

United States District Court
Northern District of California
Before The Honorable Jeffrey S. White

Robert Jacobsen,)
)
Plaintiff,)
)
vs.)
)
Matthew Katzer,)
)
Defendant.)
_____)

No. C06-1905 JSW

San Francisco, California
Friday, December 4, 2009

Reporter's Transcript Of Proceedings

Appearances:

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**Reported By: Sahar McVickar, RPR, CSR No. 12963
Official Reporter, U.S. District Court
For the Northern District of California**

(Computerized Transcription By Eclipse)

1 Friday, December 4, 2009

9:00 a.m.

2 P R O C E E D I N G S

3 **THE CLERK:** Calling case No. C-06-1905,
4 Robert Jacobsen versus Matthew Katzer. PghCounsel, please
5 state your appearances for the record.

6 **MR. MCGOWAN:** Good morning, Your Honor.
7 David McGowan for plaintiff.

8 **THE COURT:** Good morning.

9 **MR. JERGER:** Good morning, Your Honor.
10 Scott Jerger representing Matthew Katzer &
11 Associates, Inc.

12 **THE COURT:** Good morning.

13 I assume counsel has received the Court's tentative
14 ruling and the questions?

15 **MR. MCGOWAN:** Yes, Your Honor.

16 **MR. JERGER:** Yes, Your Honor.

17 **THE COURT:** All right.

18 And, please, if you haven't argued here, or even if
19 you have, just to remind you, that the purpose of this hearing
20 is not to give the parties an opportunity to generally argue
21 their papers, because I've read everything in the papers and
22 the authorities, and I'm quite familiar with this case. So
23 those are the questions that the Court has in an attempt to
24 resolve -- resolve the motions after having read them. So I
25 would appreciate if you would stick to the questions.

1 And so, for example, when I ask a question about
2 where in the record, I'm really talking about citations and to
3 the record as opposed to characterizations or a 4th of July
4 speech about, you know, the strength of your case. So please
5 speak to the -- quell your evocative origins and stick to the
6 questions, please.

7 So I'll start with the first question. It was -- I
8 was just thinking about this first question, and I'm going to
9 put all of these questions to the defendants in the first
10 instance and then give the plaintiffs an -- plaintiff an
11 opportunity to respond because, for example, the plaintiff, in
12 opposition to the defendant's motion, said that
13 copyrightability is a question of fact, plaintiffs --
14 defendants seem to argue it's a question of law, so the
15 question is, is it really a question of fact or law?

16 And even if it is a question of fact, are there
17 really any disputes of fact with respect to originality and/or
18 copyrightability? Because let's litigate the issues that need
19 to be litigated and not deal with those things that the Court
20 can decide as a matter of law. So that's sort of the backdrop.

21 So I'll start with Mr. Jerger: What is your answer
22 to Question No. 1?

23 **MR. JERGER:** Sure. Thank you, Your Honor.

24 Well, we agree that it's a mixed issue of fact and
25 law. You would look to the law to determine what that standard

1 is for originality, and then you would look to the record to
2 determine whether or not plaintiffs have met that standard.

3 In this specific case, what we are arguing is that
4 plaintiff's burden, as the one asserting a copyright
5 infringement claim, is to show that they meet all the elements
6 of that claim, and one of those elements is originality.

7 Defendants, in their moving papers, showed that
8 there are no issues of fact as to originality, that the
9 plaintiff's work isn't original in that it doesn't meet the
10 minimum level of creativity or that it didn't originate from
11 plaintiff. And we believe that plaintiff's response doesn't
12 create an issue of fact to that, and they don't show anything
13 in the record that would demonstrate that.

14 **THE COURT:** Let me interrupt you for one second,
15 just to reframe what I think the answer is and then let you go
16 on.

17 So you're saying the question of copyrightability
18 is -- and/or originality -- is a mixed question of law and
19 fact. Your position is, there is no question of disputed fact,
20 and applying the law to the undisputed facts, you win on that
21 issue. Is that essentially your --

22 **MR. JERGER:** Yes.

23 **THE COURT:** -- argument?

24 Okay, go on.

25 **MR. JERGER:** And I think the key here is that,

1 obviously, you are very familiar with this case; we've been
2 struggling with this moving target of what exactly it is they
3 are claiming a copyright to. Because this isn't a simple or
4 even a typical copyright infringement case, where, for example,
5 I take somebody's work, and I go and I publish it. At that
6 point, it's -- and that's the typical case. And it's fairly
7 clear the copying wasn't authorized, nor was the distribution
8 authorized.

9 This case has a twist which was never really
10 addressed by the plaintiff until their opposition papers which
11 we discussed in detail in our moving papers, which is that the
12 copying and the downloading of the files, that's always been
13 authorized by license. So the literal file that was copied is
14 not what you look to to determine copyright infringement.
15 Because, of course, that file, it's very large, hundreds of
16 pages, is there copyrightable original information in there?
17 Absolutely. But that's not -- that was permitted under the
18 license to be downloaded by defendants. And they concede in
19 their opposition --

20 **THE COURT:** But are you conflating -- I'm not sure
21 if that's the case, but are you conflating copyrightability and
22 infringement? Because you kind of change; you say -- you were
23 first discussing there is no dispute -- well, you believe,
24 there is no dispute of fact, and that as a matter of law the
25 intellectual property here is not copyrightable, and then you

1 were talking about, well, merely downloading does not
2 constitute infringement. Are those different questions?

3 **MR. JERGER:** I think the question to focus on is
4 what is the -- what is the work that defendants are being
5 accused of infringing? And that work is what was distributed
6 by defendants, because that's the act which would lead to
7 infringement. So and what we're saying is when you look at the
8 files that defendants distributed with their product, Decoder
9 Commander, we don't believe that there is any vestigial
10 residual work in there that meets that minimum level of
11 copyrightability.

12 And we demonstrate that by choosing some of the --
13 the terms -- you know, they refer to it as code, which is kind
14 of an interesting term because these are text files like a --

15 **THE COURT:** They're XML files.

16 **MR. JERGER:** Right, exactly.

17 And we look through the XML files, and they look
18 very -- very different. And trying to figure out what in
19 defendant's XML file originates from plaintiff's files and is
20 copyrightable is not an easy task, and we don't believe that
21 the record reflects any dispute on that.

22 You know, for example, in their moving papers, they
23 make a big deal that -- about the -- the text and the "code,"
24 if you will, that creates the user interface for their
25 interface for their software product; well, again, that's

1 looking at the file that was downloaded, the original file.

2 Defendant's product is a -- has a completely
3 different interface, and none of that program or interface
4 information is included in defendant's file, so it's just wrong
5 to say that that information could lead to infringement.

6 **THE COURT:** All right.

7 Counsel?

8 **MR. MCGOWAN:** Um, in answer to the first question,
9 Your Honor, it's a factual issue. You can turn any issue into
10 a mixed question of fact and law just by saying there is a
11 legal standard that pertains.

12 The question under copyright law is, does the work
13 come from the plaintiff or does it come from somewhere else?

14 **THE COURT:** Well, before you get to that, this is
15 what you stated in your opposition to the defendant's motion in
16 the second paragraph I think on the first substantive page of
17 your motion, you said it's a question of fact, and you cite
18 some cases.

19 The next question is, is there a dispute of fact
20 here, materially?

21 **MR. MCGOWAN:** And my answer to that is, no. There
22 are three levels of protectable expression in the files that
23 defendant admits to having distributed. And let me go through
24 the selection and arrangement, which is the second half of the
25 Court's first question, and that is one level.

1 The question is, under the **Fise** (*phonetic*) case and
2 basic copyright law, does the selection and arrangement come
3 from the JMRI developers or does it come from somewhere else?
4 We argue three things on that point. The first is that we've
5 got registration, which is undisputed. Under the **Dream Games**
6 case, that shifts the burden to defendant to negate the
7 presumption of originality.

8 The second -- and that's undisputed, that's conceded
9 in their papers. The second point is to say what's in dispute
10 and what's not in dispute. Defendants have argued repeatedly
11 that in the files they distributed, there is some content that
12 originates elsewhere than JMR. We do not dispute that, that's
13 the case in every compilation ever made. The **Key Publications**
14 case from the Second Circuit, which we cite repeatedly,
15 stresses that point. That's basic as to how compilation
16 copyrights work.

17 So the fact to take their moving papers in variable
18 one in the QSI Electric file, you can find in numbers and words
19 that come from the National Model Railroad Association is true,
20 there's no dispute. It's also irrelevant to the question of
21 whether it was arranged and selected in a manner original to
22 Howard Penny, who is the developer who wrote that file. So
23 that doesn't create a dispute, the fact that there's something
24 in there.

25 The other point that defendants' have stressed is

1 that there are some data that originate with the manufacturers.
2 QSI, which is the basis of the counter-claim, has been
3 mentioned; we don't disagree with that, either. There is some
4 data that originates with the manufacturer. Obviously, we have
5 arguments on the counter-claim. Neither of those points
6 entails anything whatever about the selection and arrangement
7 of those preexisting data.

8 So what defendants have done, in essence, is provide
9 the Court a snippet of one variable in 1 out of 102 files and
10 say, look at this, this expression comes from the National
11 Model Railroad Association; ergo, all 102 files, which we admit
12 we copied and distributed under our claim of right for our
13 account are unprotected. Nothing, no case, supports that kind
14 of generalization.

15 To draw an analogy to the Yellow Pages case, the
16 Key Publications case, it is the equivalent of saying that JMRI
17 developed a Chinese business Yellow Pages for San Francisco,
18 and defendants open it up and say, well, here is Hunan
19 Restaurant on Sansome Street; they don't own the Hunan
20 Restaurant, they don't own the name Sansome Street; therefore,
21 the entire directory is uncopyrightable. They are totally
22 different concepts. And one does not remotely begin to prove
23 the other.

24 So just at the level of have the defendants met the
25 burden established by the Dream Games case, I think the answer

1 is no. There is certainly no factual dispute because we don't
2 disagree that this is preexisting data.

3 Now as to the evidence on selection and arrangement,
4 because we are not just relying on the presumption, they
5 present a file, QSI Electric in their moving papers, we didn't
6 pick it, it's their best shot. They go through and they say,
7 here is one variable, and then they go through and they say,
8 here is another variable, a variable 53. The evidence in the
9 record is that there are 42 variables in that one file, they
10 picked one.

11 The file as a whole omits several variables that the
12 NMRA calls out, which is a choice to select some but not all of
13 the preexisting content. Professor Jacobson, in his
14 declaration in Docket 345, paragraphs 7 and 8, Docket 368,
15 paragraphs 7 to 32 and 41 to 42, explain why those variables
16 were omitted.

17 Howard Penny, in his declaration, which is Docket
18 370, explains why, and the reason is they all have to do with
19 speed, the speed of a locomotive, slowing up -- speeding up,
20 slowing down.

21 When he put those files together and created the
22 template that runs through them that we should adopt or he
23 should adopt, the view of what he thinks model railroaders
24 have, their layouts, and he thinks model railroaders think of
25 speed in an integrated fashion, so rather than one at a time,

1 cookie cutter, cutting and pasting -- or anyone else's, he
2 chose to not select some of those variables and deal with them
3 differently in the main JMRI program in a table.

4 That omission reflects judgment about how
5 railroaders deal with their layouts. That judgment is
6 protectable, both under the Key Publications case, which sets
7 our baseline for judgment. The baseline for judgment in
8 Judge Winters' opinion in Key Publications is the example of
9 person who did the Yellow Pages directory, not including
10 businesses they thought would not last very long, all right?
11 If that qualifies, a judgment about how do model railroaders
12 subjectively perceive the behavior of their layouts, I think my
13 definition does.

14 That point, the fact that we've got a selection and
15 it originates with a choice by JMRI, is sufficient, I think, to
16 answer the question of originality, which is where does this
17 choice come from? They do not contend that choice came from
18 the National Model Railroad Association. There is no evidence
19 whatever about the other 40 variables in that file. They say
20 nothing about it. They say nothing about the other 101 files.

21 So if you ask, what's the state of the record as to
22 where this selection arrangement came from, there is no dispute
23 that it came from Professor Jacobson and Howard Penny. The
24 reason it exists is both Professor Jacobson's subjective
25 judgment and, to address the interface point my friend

1 Mr. Jerger raised, because the decoder definition files that
2 JMRI created were designed to work with the rest of the JMRI
3 program. They looked up to the interface and down to the chip.
4 The declaration of Jack Schall at Docket 346 goes into that
5 point in detail.

6 We don't disagree about the interface being at issue
7 in terms of infringement. The reason we raised the interface
8 was to explain that choices are original to JMRI, because when
9 JMRI programmers were writing the files, they were looking up
10 at the JMRI program. And you see the speed tables up there,
11 and that implies the omission of variables, which is
12 protectable selection.

13 You can see an echo of this choice in defendant's
14 own documents. I'll refer the Court to Docket 380, Exhibit C.
15 There is a two-page document, an e-mail from Mr. Katzer to the
16 developer he hired to do this, Robert Bouwens.

17 On page KAM 649, Mr. Katzer is describing how he
18 understands their program works. And he says, "we grab the
19 JMRI data" -- doesn't say raw data, doesn't say manufacturer
20 data, says, "we grab the JMRI data and place it into our own
21 format, which goes to the questions Mr. Jerger raised about why
22 do they look different. They grabbed it, they translated it,
23 send data in their format.

24 Mr. Bouwens' response explaining what exactly they
25 did -- and in his response, which is KAM 648, his point 3 says,

1 in substance, we had a hard time grabbing the speed functions,
2 there seem to be a lot missing. It's an echo of the choice
3 that's protectable.

4 So I don't think there is a dispute as to the
5 selection. We don't disagree that this is preexisting
6 material. They have put nothing into the record as to the
7 judgments exercised in selecting those files even those
8 variables -- I'm sorry, even with respect to the single file
9 they discuss.

10 I think there is an enormous failure of proof with
11 respect to the work, which is the 102 files as a whole, because
12 I don't think you can take one variable from one file and say,
13 I've now proved all 102 that I copied, distributed and sold
14 from my own account.

15 **THE COURT:** Who has the burden of proof, though?

16 **MR. MCGOWAN:** They do. The registration under the
17 Dream Games case creates a presumption of all elements of
18 copyrightability.

19 The Swersky (*phonetic*) case which we cite is very
20 clear that originality is a defense under the Ninth Circuit
21 precedent for years. Defendants -- I bear the burden on my
22 license; defense, they bear the burden on their originality
23 defense. And they have conceded the point, that is not an
24 issue.

25 **THE COURT:** A chance to briefly reply?

1 **MR. JERGER:** Sure. And we disagree with that and
2 believe that the burden obviously shifted. And both parties
3 filed motions for summary judgment in our moving papers having
4 no idea what they are claiming copyright to. We take examples
5 from the QSI Electric file, which is the file that they
6 identified as their best evidence. And it's always been a file
7 that's been attached to Mr. Jacobson's declaration for the past
8 three years as evidence of copyright infringement.

9 We show that there is nothing in that comparing the
10 two QSI Electric files, nothing that resides in Mr. Katzer's
11 file that could lead to infringement; I think that's enough to
12 shift the presumption from the registration back to them to
13 show what elements are copyrightable.

14 And this gets back to do you look at the literal
15 file that was copied for the selection arrangement or do you
16 look at the distributed file? Again, if the burden is shifted
17 back to them, do they have selection and arrangement in
18 their -- in their files? Absolutely, of course. But does that
19 selection and arrangement survive into Mr. Katzer's file? That
20 copyrightable intellectual property that went into the
21 selection arrangement, does it survive? And we don't think so.

22 For example, and I think this is a good analogy,
23 let's say there is, you know, there is 50 states, let's say
24 they create a list of their ten favorite states, okay? We
25 admit, we copied their list of ten favorite states, and that is

1 copyrightable, that process of creating the ten favorite
2 states.

3 But what we are -- our output, our position is,
4 isn't their list of ten favorites states, it's a new list of
5 ten favorite states. And once -- if the copying is not the act
6 that leads to infringement, then you have to ask yourself, does
7 that selection and arrangement that originated with plaintiff's
8 file survive in the defendant's file? And we are saying that
9 burden is shifted. At the very least, there is an issue of
10 fact on it. And we believe that summary judgment should be
11 granted.

12 **THE COURT:** So wait, you are basically saying you
13 admit that what you copied was copyrightable, but you are
14 essentially saying but there was no infringement of that
15 copyright because what you distributed was not the same thing
16 that you downloaded, and what you distributed was not
17 copyrightable?

18 **MR. JERGER:** Right. And there was a license for
19 the -- the original copying. And both parties agree that that
20 wasn't an act that led to infringement because that was within
21 the scope of artistic license.

22 **THE COURT:** Okay, so what do you have to say about
23 that? What evidence in the record with respect to the fact
24 that that which the defendants distributed was, in fact
25 copyrightable?

1 **MR. MCGOWAN:** Um-hmm. They -- three points.

2 The first is, as Mr. Jerger just agreed, the subset
3 of decoders, the 102 files, that is, in and of itself, a
4 selection, they copied that. Exhibit A to Professor Jacobson's
5 reply declaration, which is Docket 379, gives you a table. You
6 look at the subset, it's all there. Nobody disagrees with
7 that. They've never argued that that selection, in and of
8 itself, was uncopyrightable. That is one level.

9 The second question that I want to mention, because
10 I don't think this has been brought up and I don't want it to
11 get lost, is that we have put in evidence in Professor
12 Jacobson's declaration, Docket 368, at paragraphs 22 to 32, of
13 250 unique descriptions written by JMRI developers that run
14 through all the files that do not originate with the NMRA or
15 anyone else, they originate with the developers.

16 And that is the short phrases argument they make,
17 which is a little bit different from the selection and
18 arrangement argument. That is in evidence running all through
19 the files. There is literally no evidence on anything other
20 than two variables in that one file.

21 So Mr. Jerger's position, just so I think we are all
22 clear, is that I put in one variable, and I put in a little bit
23 about another variable, and I have rebutted the presumption
24 with respect to 101 other files, all of which were
25 independently noticed and copyrighted, which together form the

1 work that we are focusing on in this motion. I think at a
2 subsequent time, we may count the individual files, but we
3 don't need to worry about that today.

4 There is no precedent that indicates that that is
5 acceptable. The Apple Computer case we cite, the CCC
6 Information case we cite both say you cannot, in assessing
7 originality, disaggregate the work. Every copyrighted work
8 ever published can be reduced into unprotectable elements.

9 J.K. Rowling did not write the English language, she
10 didn't create the syntax, she has rights. The decomposition is
11 a fundamental error on these arguments.

12 With respect to the translation point, what you have
13 heard, I believe, is characterization and argument. If you
14 take a look at the document that I just referenced, we grab the
15 JMRI data, we translate it. That's Mr. Katzer's words.

16 Mr. Bouwens, writing back saying, yeah, we do that,
17 and we're having a hard time getting these speed tables, that
18 is the only evidence in the record from their side, and we are
19 introducing it, as to what they were distributing. And what
20 they are distributing are the files, and they are having a hard
21 time grabbing the ones because they can't -- I guess they
22 expect to see just cut-and-paste-it stuff, and it's not
23 cut-and-paste-it stuff.

24 Howard Penny's declaration, 370, and his deposition
25 testimony are completely unrefuted. There is nothing contrary

1 to them. There is argument that says we didn't reproduce this,
2 but the evidence is, I omitted these files, I made these
3 choices. You look at version 304 of their product, the files
4 aren't there. You see their developers saying, I'm having a
5 hard time grabbing the files to distribute them. That's the
6 evidence. There is nothing that contradicts that.

7 **THE COURT:** All right.

8 **MR. MCGOWAN:** I fundamentally don't understand, I
9 suppose, when you've got this notion we are grabbing, we are
10 translating, we are distributing, that somehow we are not
11 actually doing that.

12 **THE COURT:** Let's move on.

13 **MR. JERGER:** A couple of quick points, Your Honor?

14 **THE COURT:** Yeah.

15 **MR. JERGER:** First, I would just urge you to look at
16 the cases that Mr. McGowan mentions regarding the
17 disaggregating the work and how that's improper, if you look at
18 those cases, those are all cases where the actual copying would
19 lead to infringement. Again, this is a twist, where the
20 copying doesn't lead to infringement, so those cases aren't
21 exactly on point. And that theory that deconstruction
22 disaggregation is improper doesn't make sense in this context.

23 Two, there is evidence in the record refuting --

24 **THE COURT:** But isn't there undisputed evidence
25 indicating that the plaintiffs and the other members of the

1 JMRI group invested a sufficient amount of creativity in the
2 selection, ordering and arrangement of the data collected in
3 the data files that is in Mr. Penny's declaration? And can't
4 the Court find on this record that the selections and choices
5 about the arrangement reflect the minimal amount of creativity
6 required to satisfy what we all agree is the low threshold for
7 demonstrating originality?

8 **MR. JERGER:** I agree it's a low threshold, but I
9 absolutely don't believe that there is no genuine issue of
10 material fact on that point.

11 **THE COURT:** I thought before you said there wasn't
12 an issue of fact.

13 **MR. JERGER:** Well, for purposes of -- I mean, I
14 think what Mr. McGowan is saying, they are moving for summary
15 judgment on their copyright infringement claim; they are saying
16 there is no issue of fact, our work is original, and we want
17 summary judgment on the copyright infringement claim. I'm
18 responding to that and saying, well, at the very least there is
19 an issue of fact on that.

20 **THE COURT:** I would like to move on to the next
21 question because I think I have what I need on this, at least
22 the information to noodle over here.

23 Let's go to Question No. 2, which relates to the
24 damages. Is there, in fact, a disputed fact regarding the
25 damages if the Court does consider the expert reports?

1 **MR. JERGER:** Well, if I could parse that sentence a
2 little bit and address the expert reports?

3 **THE COURT:** I understand that it wasn't sworn
4 originally, and then there was a declaration filed late, and
5 that's -- you know, that's something that the Court will have
6 to --

7 **MR. JERGER:** Sure.

8 **THE COURT:** -- consider. So I don't want to get
9 into that. That's presented in the record, and I have to
10 decide what I'm going to do on that. But assume that I do
11 consider those expert reports.

12 **MR. JERGER:** Sure. But even if they were sworn, our
13 position is under -- and they are fine for expert reports. For
14 the purpose of Rule 26, they can rely on hearsay and
15 inadmissible evidence, but for the purposes of Rule 56, summary
16 judgment, they need to contain facts that would be admissible
17 as evidence under Rule 56(e). And those expert reports, if you
18 look at them, absolutely don't serve that purpose.

19 Mr. Einhorn, for example, determines that a
20 programmer's rate is \$100 an hour by reviewing web sites, which
21 web sites I have no idea. Mr. Perens' report contains a cut
22 and paste of 2- or 300 pages of a blog he read. Those aren't
23 admissible facts. They are fine for an expert report to rely
24 on to create an opinion, but they don't create a genuine issue
25 of material fact. So that's all I wanted to say on that.

1 Regarding your question, is there a disputed fact
2 regarding the damages allegedly sustained by plaintiff? Even
3 if this court considers the expert reports, there I would say
4 no, there is not. And if you look at the cases we cite in our
5 brief, we go through the correct test to determine damages in
6 the Ninth Circuit. Those expert reports use an acquisition
7 cost test, which I don't believe is the correct measure of
8 damages in the Ninth Circuit.

9 I think if you look at the cases, it's very clear:
10 The correct test is more, you know, what you call it, what --
11 the case -- it's kind of an imputed license test, and it's what
12 a willing buyer would have been reasonably required to pay a
13 willing seller back at the time of the infringement. You
14 create a hypothetical situation, rewind the tape, what would
15 have happened?

16 Our position is, as a matter of law under that test,
17 which is the applicable test in the Ninth Circuit, a willing
18 buyer would not have reasonably paid a willing seller anything
19 for a product that's offered for free on the Internet, it
20 wouldn't have happened. And that is the fair market value of
21 the product. And that is the beginning and the end point to
22 determine actual damages under the Copyright Act.

23 I just want to step back and say a couple of things
24 here. The damage issues, under the Copyright Act, would be
25 composed of three things: Statutory damages, attorney's

1 fees -- those aren't damages but would be some fees allowed,
2 and compensatory damages, which are the actual damages
3 suffered, the fair market value of the products, and
4 disgorgement of products, if any, from defendant's
5 infringement. These expert reports -- and plaintiff, they are
6 only contesting the actual damages. So and they have conceded
7 that they are not entitled to statutory damages or attorney's
8 fees. And we have moved -- and as you recall, that's been the
9 motion -- the subject of two motions to dismiss already.

10 We would like summary judgment on those issues, that
11 plaintiff is not entitled to statutory damages or attorney's
12 fees, and additionally, that plaintiff is not entitled to
13 disgorgement of profits, since defendants haven't made any
14 profits. And that is one of the components of actual damages.
15 They are not contesting that. They have put nothing in the
16 record to show that defendants made a profit, that there is
17 anything to disgorge.

18 So what that leaves is actual damages, and we
19 believe that we are entitled to summary judgment on the other
20 three issues. As to actual damages, we also believe we are
21 entitled to summary judgment because there is no issue of
22 material fact. Under the test that the Ninth Circuit uses,
23 what a reasonable buyer -- what a willing buyer would have been
24 reasonably required to pay a willing seller at the time of the
25 infringement, there is absolutely no damages. And defendants

1 are entitled to judgment as a matter of law on that.

2 **THE COURT:** Before I hear from the defendants -- the
3 plaintiffs on this, what -- please respond to the second part
4 of Question No. 2 regarding the --

5 **MR. JERGER:** Absolutely.

6 **THE COURT:** -- Federal Circuit decision.

7 **MR. JERGER:** Absolutely. And that's -- that
8 question, I believe, addresses irreparable harm as opposed to
9 compensatory damages. As I mentioned, the Copyright Act allows
10 compensable monetary damages for actual damage to the fair
11 market value disgorgement of defendant's products.

12 The Federal Circuit decision, Mr. Penny's testimony
13 and Mr. Jacobson's testimony, by their own admission are only
14 addressing irreparable harm, which by its definition is not
15 compensatory. They say those declarations are being put into
16 evidence to show irreparable harm for purposes of a permanent
17 injunction, not for purposes of copyright damages, for purposes
18 of permanent injunctive relief at the end of the case.

19 They cite reduced developer involvement, confusion
20 in the marketplace -- these are their declarations -- confusion
21 in the marketplace and reputational injury: We've conceded
22 that there is now a factual dispute as to irreparable harm.

23 As you recall, we've been to the Federal Circuit
24 twice now on injunctive relief, and they have never put
25 anything into the record until this most recent opposition

1 brief, any admissible evidence into the record that they have
2 suffered any irreparable harm. Now they have with
3 Mr. Jacobson's depo -- declaration attached to his opposition
4 brief. So we are conceding that there is an issue of fact as
5 to irreparable harm, but none of that evidence, the Federal
6 Circuit's opinion or the two declarations, none of it, and
7 plaintiff concedes this in their papers at II in the
8 opposition, page II in the introduction, none of that evidence
9 addresses monetary damages, and therefore, it is not relevant
10 to the issue of actual damages under the Copyright Act, but,
11 rather, irreparable harm for purposes of permanent injunctive
12 relief.

13 **THE COURT:** Counsel?

14 **MR. MCGOWAN:** I can address the timeliness issue
15 briefly, if the Court would like. The Einhorn and Perens
16 affidavits are affidavits in opposition to defendant's motion,
17 and under Rule 56(c) and the Local Rules could have been filed
18 yesterday and been timely.

19 **THE COURT:** I think that's a -- may be an ambiguity
20 or glitch in the law that needs to be addressed by the Supreme
21 Court and Congress because that is something that is
22 continuously irksome to district judges.

23 **MR. MCGOWAN:** We -- we apologize to the Court.

24 I don't believe there is a genuine issue regarding
25 the authenticity of these reports. They were served timely,

1 nobody disagrees about that.

2 **THE COURT:** I would like to get into the question
3 because I have enough to make a ruling on that issue.

4 **MR. MCGOWAN:** Thank you.

5 I think that there is plainly an issue of fact. I
6 will represent to the Court that the defendants' expert report,
7 which I received a couple of hours before the reply brief, does
8 not say damages are zero. The brief says that, the brief has
9 no evidence that says that.

10 Sworn testimony in the record on damages, Docket
11 348, Exhibit E, Mr. Penny testifies as to the time that he put
12 in to writing these files as an attachment to the Einhorn
13 affidavit, as a sworn declaration from Professor Jacobson
14 putting in over 400 hours of time.

15 In order to believe that damages are zero, the Court
16 would need to accept the proposition that that time was quite
17 literally worthless, which seems to me strongly
18 counterintuitive. After all, the defendants thought it was
19 worthwhile to copy and sell on their own account.

20 The question is how much, not whether there is harm.
21 As to how much, we have our view. Mr. Jerger says, I don't
22 think it was a good methodology to survey web sites, and I
23 don't know how strong that is. He's got no methodology of his
24 own. As to whether it generates an issue of fact, the answer
25 to that, unequivocally, I think is, yes.

1 I want to address one point before I go to the
2 Perens question, if I can, or the irreparable harm question,
3 the second part of the Court's question.

4 In their moving papers, the defendants argue there
5 is no genuine issue because they got no value of use because
6 they made no money; that is wrong. The Syd and Marty Krofft
7 case we cite explicitly says that under 504(b) of the Copyright
8 Act, those are alternative measures. There is no evidence --
9 well set that aside.

10 In their reply papers they drop that argument, and
11 they said there is no value of use because you can download
12 these files for free. I want to note a very strong exception
13 to that argument that has been made several times to this Court
14 before and what led to the first appeal in this case.

15 The code is released under a license. He downloaded
16 it without charge. Defendants did not adhere to the license
17 terms; they are infringers, they breached the terms.

18 You cannot extrapolate from a price for somebody who
19 adheres to a license to a price for somebody who strips out the
20 author's information, rebundles the code, and sells it for
21 their own account. They are fundamentally different things.

22 There is no way in the world any commercial entity
23 would operate on that principle. It is fundamentally
24 illogical, in my view, and I don't understand why the argument
25 keeps coming up.

1 With respect to the Federal Circuit, it is my view
2 that damage is damage, and there is a question of can I remedy
3 it through one means or another. There is no question in my
4 mind that the Federal Circuit, when it wrote its opinion, had a
5 conception that certain types of harms were intrinsic to the
6 type of facts that were presented to it. I think that what
7 we've done is provide to the Court record evidence that those
8 facts exist in this case.

9 Some of those facts, I will argue at an appropriate
10 time, I believe cannot be remedied through money. It does not
11 mean they are not harms, does not mean they are not damages, it
12 means that they are extremely difficult to estimate, and
13 equitable relief is the better way to go.

14 Some elements I think do lend themselves to at least
15 the type of notion of quantification you do in the value of use
16 analysis. So to me, to my way of thinking, defendants have
17 moved for summary judgment saying there is no remedy, dismiss
18 this claim, there is no remedy.

19 They have conceded there is an issue, at least on
20 the equitable side. We've got dueling expert reports, and not
21 even their own expert agrees with their own brief. I can't see
22 a way in which we can get to the notion that there is no
23 factual issue on damages on this record.

24 **THE COURT:** Let me ask: What about the --
25 Mr. Jerger's position about I guess the plaintiff is conceding

1 that he is not entitled to statutory damages or attorney's
2 fees, correct?

3 **MR. MCGOWAN:** Yeah. Just to make that clear, I
4 agree with Mr. Jerger, I don't -- it's a little bit awkward in
5 terms of the motion. One of the things I want to do is try and
6 narrow this case down and streamline it, so I don't know that
7 that means you grant the motion which is directed to the whole
8 cause of action.

9 I agree with Mr. Jerger, it's not a statutory fees
10 case. I agree with Mr. Jerger on the copyright side, setting
11 aside cybersquatting, setting aside DMCA. It's not a statutory
12 damages case, not a statutory fees case, I agree with that. I
13 agree that our theory is a value of use theory, not a
14 disgorgement of profits theory.

15 So I think we can, going forward, take those as
16 given. I don't think that maps on the granting that motion
17 because the motion goes to the cause of action, not to the
18 specific elements.

19 **THE COURT:** And the --

20 **MR. MCGOWAN:** It's the Court's discretion,
21 obviously.

22 **THE COURT:** The reality is, the plaintiff would be
23 judicially estopped from asserting a position to the contrary
24 going forward.

25 **MR. MCGOWAN:** Yes. You are not going to hear that

1 again.

2 **THE COURT:** All right, so that's out of the case as
3 far as the Court's concerned. Whether or not it has to grant
4 summary judgment adjudication on that point is more of a
5 housekeeping issue, so I don't need to address that. It's
6 agreed.

7 Anything more you want to say on this point of
8 damages?

9 **MR. JERGER:** On the point of actual damages, I think
10 it really comes down to a review of the case law to determine
11 whether or not this value of use theory vis-à-vis acquisition
12 cost is an appropriate measure of damages.

13 **THE COURT:** What about the out-of-pocket for the
14 value, the imputed value of Professor Jacobson's time?

15 **MR. JERGER:** Again, I mean, I think this -- this
16 value of use theory comes from Richard -- Richard Posner, a
17 case called Deltak Associates. It has a pretty sordid history.
18 It finds its way into a sentence in the Polar Bear case, where
19 the Court is just quoting directly from Dell Tech, or
20 potentially a case quoting Dell Tech, I don't remember.

21 But I think it's very much -- and in the end of that
22 Polar Bear case, they don't even use the acquisition cost
23 theory, so I think, as a matter of law, this Court is able to
24 determine whether or not that theory is a viable theory in this
25 circuit.

1 **THE COURT:** All right.

2 **MR. MCGOWAN:** May I say one very brief thing?

3 **THE COURT:** Yes.

4 **MR. MCGOWAN:** The Day Tech (sic) case, which is in
5 our papers, is elaborating the Ninth Circuit's opinion in Syd
6 and Marty Krofft at pages 360 and 361 of Day Tech (sic).
7 Judge Cudahy not Judge Posner, says the value of use theory is
8 the flip side of what that Ninth Circuit was talking about in
9 Syd and Marty Krofft -- not the flip side, they are the same
10 thing. It's different phraseology. Fair market value of the
11 use is a way of determining value of use. They are not
12 different economically. They are not different theories. And
13 I just want to note that because I think that what was just
14 said is just not a --

15 **THE COURT:** All right, well, I will review those
16 cases.

17 Let's move on to Question No. 3. Mr. Jerger, I'll
18 start with you. Again, record cites for dispute of fact
19 regarding the communication of the scope of -- the scope of
20 permission to the plaintiff.

21 **MR. JERGER:** Absolutely.

22 Well, we agree that there is no record cite where
23 Mr. Severson from QSI discusses the scope of permission, but we
24 think that -- that that's not dispositive on the issue, as the
25 plaintiff suggests, but, rather, if you review the record, it's

1 clear through the course of dealings of QSI and plaintiff that
2 there was an implied license to incorporate, at least. And we
3 concede that incorporate -- it can vary -- variable numbers.

4 But the issue is, what is the scope of that license?
5 Clearly, it's not unlimited in scope. And that is a fact issue
6 to be determined. It isn't something that on this record you
7 can determine. There is no genuine issue of material fact
8 because it's the custom and practice of the community is what
9 determines the scope of that license.

10 **THE COURT:** All right, but --

11 **MR. JERGER:** And the course of dealing between the
12 parties.

13 **THE COURT:** I'm sorry.

14 But on the narrow point, you agree that there is no
15 dispute of fact regarding the communication to plaintiff of the
16 scope of QSI's permission?

17 **MR. JERGER:** Right. Whether we agree that QSI never
18 communicated the scope to plaintiff.

19 **THE COURT:** But are you saying the Court is focused
20 on the wrong issue for -- in deciding this issue as a matter of
21 law, correct?

22 **MR. JERGER:** Correct, because the issue is, there
23 clearly is an implied license, or there was at some point. Now
24 it's been revoked at some point, either -- you know, when that
25 happened it's hard to say, but the scope of the implied license

1 is a question of fact to be determined through the course of
2 dealings, and the parties, the custom and the usages in the
3 industry.

4 I mean, clearly, they had a right to do something.
5 Whether that right is to just look at the QSI manual as a user
6 manual, a reference manual, I think it was more than that. But
7 where does it end? I mean, clearly, they didn't have the right
8 to assert ownership, which is what they were doing at the
9 beginning of this case. So somewhere that license is limited
10 in scope, and it's an issue of fact where that is.

11 **THE COURT:** All right.

12 **MR. MCGOWAN:** I --

13 **THE COURT:** I assume you agree that there is no
14 issue of material fact on the conveyance of the scope of the
15 permission?

16 **MR. MCGOWAN:** They did not convey any limitation.

17 **THE COURT:** All right.

18 What about the issue that counsel is now focusing
19 on?

20 **MR. MCGOWAN:** They did not argue in their papers
21 what I take to be a usage of trade argument. There is no
22 evidence of a usage of trade. There is, of course, a
23 performance evidence, so maybe I should back up and get the
24 taxonomy properly.

25 The Photo case in the Ninth Circuit says that when

1 you have a nonexclusive license, it's interpreted under general
2 contract principles. We have established the license, they
3 have conceded the license, now it's a question of scope.

4 This, by the way, is not an implied license theory,
5 this is an express license theory based on Mr. Severson's very
6 candid testimony that he gave permission and instructed his
7 employees to facilitate it.

8 I would draw the Court's attention to the course of
9 performance, particularly Docket 348, Exhibit L, Bates labels
10 MM 2 through 6, indicate that QSI conveyed to Mike Mosher and
11 Howard Penny -- this is the Mosher document -- information
12 authorized by Mr. Severson for use in creating the files that
13 included variable descriptions.

14 If you look at the Bates pages I just mentioned and
15 you compare them to, I believe, page 9 of the defendant's
16 opposition, that is the same class. They are essentially the
17 same variable descriptions. So the course of performance is
18 consistent with the explicit permission.

19 Under the SOS Payday case, it becomes a burden on
20 the defendant, once the license is established, to show the
21 limitation. Now, under general contract principles, course of
22 performance will trump usage of trade. I can -- this has not
23 been argued in the papers, so I haven't put it in our papers.
24 I can give the Court authority for that, I teach contract law:
25 Under the UCC it's very simple: Course of performance is what

1 these particular people did with respect to this particular
2 agreement. That trumps some sort of bruting omnipresence in
3 the sky about what people think is normally out there.

4 The position Mr. Jerger is advocating I think is a
5 very radical one, which is that a rights holder can tell
6 someone, go ahead, use our stuff, they are complements,
7 complementary products, chip and software, have private
8 reservations, never express them, have a course of performance
9 that unequivocally indicates a scope that includes both the
10 numbers and the descriptions, and then stand up and say without
11 any evidence in the record, well, there is a usage of trade-out
12 there, and therefore, there is a fact issue.

13 If that's the law, nobody is ever going to be able
14 to rely on these types of grants, these types of grants, these
15 types of permissions, which are not -- I mean, it's a very
16 destructive thing to do.

17 When Mr. Severson was asked point blank at his
18 deposition, do you want these guys to stop, he said he didn't
19 care. The reason he doesn't care is because these are
20 complementary products. What JMRI is doing is good for them.
21 He is unhappy, understandably so, because he has been told that
22 Mr. Jacobson claims to own his material. That statement is not
23 true.

24 **THE COURT:** All right.

25 You want to respond? Are you being radical here?

1 **MR. JERGER:** I don't think I'm being radical. I
2 think any implied license, which I believe this is, has --
3 somewhere, it becomes limited. I mean clearly, if there is an
4 implied license, it means there is nothing in writing, and the
5 copyright owner doesn't intend to turn over a hundred percent
6 of their intellectual property.

7 And I disagree with what Mr. McGowan is saying: At
8 the beginning of this case, and even through today,
9 Mr. Jacobson's declaration asserts -- I would say asserts
10 ownership in the feature description of the QSI manual. It
11 says the JMRI author chose a plus sign when it wrote -- when he
12 or she wrote directional headlights and directional taillights.
13 That comes directly from the QSI manual.

14 The beginning of this case, as you recall, was very
15 much about the information from the QSI manual that ended up in
16 Mr. Katzer's product. So I just don't think that that is fair,
17 to say that they have never asserted rights in the QSI
18 materials.

19 And back to the license issue: Really, Mr. Severson
20 is clear in his deposition, he talks about it on pages 9 and 10
21 of Document 345, that he never -- in his mind, what he thought
22 was that he was going to give the QSI manual to JMRI, and they
23 were going to use the CV numbers to create their products. He
24 testified, I don't think I care what JMRI does with this,
25 because I don't think he thinks in regard to that question a

1 vested business interest.

2 What he did say in that deposition was, no, I never
3 thought that that meant that they would take those feature
4 descriptors and put that in their product, I never thought
5 that. He said, if they were going to do that, I thought they
6 would have come to me and asked for a license, or some sort of
7 something in writing.

8 **THE COURT:** All right.

9 Anything further?

10 **MR. MCGOWAN:** No, Your Honor.

11 **THE COURT:** All right.

12 For those of you who have been before me, you know
13 that I put Question 4 in there extremely advisedly, especially
14 in light of the Court's vacuum theory that you have heard, that
15 nature and lawyers hate a vacuum, in the sense that lawyers
16 will always file something or argue something when given an
17 opportunity. But I put that in there in case there is
18 something you feel -- without going over what we have talked
19 about that needs to be said to flesh out what you said. So
20 I'll give you a chance.

21 **MR. JERGER:** And this is Question 4?

22 **THE COURT:** Yes.

23 **MR. JERGER:** Really, under this topic, I just want
24 to discuss the pre-trial time line, a little bit of logistics.

25 **THE COURT:** All right.

1 **MR. JERGER:** And that moving from the trial date,
2 which has been set by this Court as March 22nd, I worked
3 backwards from that using this Court's guideline, which sets
4 the pre-trial conference at March 1st. And I concluded that on
5 February 12th, 2010, a lot of things needed to get done.

6 On February 1st, motions in limine needed to be
7 filed. And Mr. McGowan and I have been discussing, exchanging
8 witness lists, jurisdictions, voir dire instructions, these
9 sorts of things, either on January 22nd or 29th. I'm feeling
10 like that's a lot of stuff packed into the first two months of
11 next year. And I'm wondering if there is some way that we
12 could either push the trial date back a month or at least push
13 the February 12th submission back a little further?

14 **THE COURT:** Let me hear from Mr. McGowan.

15 **MR. MCGOWAN:** We like the March 22nd trial date. If
16 we were to push the trial date back a month, that would
17 complicate Professor Jacobson's life substantially and be tough
18 for me, too. We are on academic calendars.

19 I don't want to jam Mr. Jerger, and I understand
20 what he is saying, but the trial date is a problem. It's
21 certainly up to the Court whether you would be happy receiving
22 papers shorter than the normal time before the pre-trial
23 conference, I don't mind pushing that back, but moving the
24 trial back a month is a problem.

25 Moving it back two or three months I think is a long

1 time. And I think one of the things that we would hope to do
2 today is narrow the issues so that Mr. Jerger and I can focus
3 on what is important. And I know we are going to visit,
4 presumably, Judge Laporte again. I think trial dates can
5 concentrate people.

6 **THE COURT:** Well, I think I'm not disregarding what
7 you are saying, Mr. Jerger, and what Mr. McGowan is saying.
8 And one way or the other, even given reducing this to the
9 lowest common denominator with what the parties agree to in the
10 arguments and the papers, the complexion of the case is going
11 to change, probably change toward -- not toward expanding, but
12 toward narrowing. So I will take under advisement what you
13 said, look at the schedule.

14 Obviously, I want to consider the arguments made
15 today and reconsider what is in the papers and responses to the
16 Court's questions, and come -- what comes out the other end of
17 that is the Court's order.

18 I will consider what is appropriate, both for
19 counsel's schedule, the age of the case, and the, you know, the
20 needs of the Court in terms of its managing its schedule and
21 not necessarily in this order, the possibility of settling the
22 case. Because with the complexion changing one way or the
23 other, we have a new, if you will, kid on the block, not that
24 Mr. McGowan is a kid, but a new lawyer on the case with a
25 different perspective, perhaps, one way or the other.

1 So I'm hoping the case will now move on a very
2 different tact. Either it will settle, or we can move to an
3 expedited trial.

4 Mr. McGowan is correct that this case will go back
5 to a settlement conference, if at no other time, certainly
6 after pre-trial, when everybody knows where they are and they
7 have reflected on the Court's rulings on jury instructions and
8 in limine motions. So I will take it under advisement.

9 I can't, because I don't know what the case is going
10 to look like, but I will certainly look at the calendar with
11 due regard to everybody's schedule so that I can do something
12 rational.

13 What I won't do, I will tell you, I will not reduce
14 the time that the Court has to consider the papers because the
15 Court's standing order was created advisedly based upon what
16 this Court needs to adequately prepare for trial.

17 Yes, Mr. Jerger?

18 **MR. JERGER:** Just for point of information, when I
19 created my time line, I was assuming we would be going back to
20 a settlement conference, and we are looking forward to that and
21 happy to do it.

22 The other thing that you might not be aware of is
23 that I'll be heading to the Federal Circuit on January 1st to
24 argue the case against Ms. Hall. And I know Mr. McGowan
25 doesn't have anything to do with that, so I'm one person, and

1 I'm going to be in a bunch of places at once.

2 **THE COURT:** That's also, I guess, an
3 elephant-in-the-room kind of an issue, because, you know, there
4 is infinite possibilities, but if the Federal Circuit, you
5 know, affirms where we are right now subject to the Court's
6 order on these motions -- if the Federal Circuit reverses, then
7 that's -- and we are back into patent land, then it seems to
8 the Court that it may be the case -- that all bets are off. I
9 don't know, but that is just an extra variable.

10 **MR. MCGOWAN:** I don't --
11 Go ahead, Scott.

12 **MR. JERGER:** I was just going to say, I think the
13 issue with the Federal Circuit is going to be harm and
14 copyright. And I think the motion to dismiss the patent
15 claims, they did not appeal that. And I'll let Mr. McGowan
16 address that. There will be an appeal at the end of the case.

17 **MR. MCGOWAN:** That's correct.

18 **THE COURT:** Okay.

19 So the disposition -- other than your need to
20 prepare to argue and there is only one of you, you are saying
21 that the -- the decision, given what's at issue before the
22 Federal Circuit now, should not impact the trial of this case.

23 **MR. JERGER:** That's correct, Your Honor.

24 **THE COURT:** All right, very well. I'll take all
25 that into account. I understand the plaintiff's concern with

1 regard to timing. And I need to look at the contours of the
2 case, as you do.

3 And I may very well, just based upon, you know, my
4 custom and habit in these matters, is call upon counsel to meet
5 and confer upon receipt of the Court's order and saying, okay,
6 you know, what did I just do in terms of the schedule? What do
7 you all propose that is rational? Because it may scale down
8 very much your motions, your jury instructions.

9 So I think, in fairness, we all ought to put our
10 heads together and see where we are and give you folks a chance
11 to give me a proposal, and then I can weigh in on that, all
12 right?

13 **MR. MCGOWAN:** May I address your point?

14 **THE COURT:** Which one?

15 **MR. MCGOWAN:** Additional comments.

16 **THE COURT:** Yes.

17 **MR. MCGOWAN:** Ms. Hall asked me to mention that she
18 is ill and unable to be here, and she sends her regrets.

19 This case has been around for a long time, we know
20 that. It's got a pretty full docket, and we understand that.
21 I think one of the reasons for that is that from our side there
22 are a couple of principles at issue that we consider pretty
23 fundamental. You don't take other people's trademarks, you
24 don't take their code, strip their names off, and sell it.

25 If we can get the principles nailed down, as a

1 matter of liability, then it becomes a case about numbers. I
2 think numbers are a common language, it's much easier to talk
3 about, much easier to sit down and reason through and see if
4 you can come to a resolution than we have fundamental problems
5 over principles. And that is really what we are trying to do.

6 And I agree entirely with what the Court said, when
7 we get the order, we can hopefully do that and put it on a
8 footing where Mr. Jerger and I can sit down with just ourselves
9 or with Judge Laporte and make something sensible happen.

10 **THE COURT:** You don't have to respond, I know your
11 client's position on that as well. And it's going to have no
12 impact on this Court other than on the realization that we all
13 have, that the complexion of the case is changing.

14 I think the delays and all, by the statement of the
15 Federal Circuit itself, as well as some commentators, this case
16 has been, as some would say, sui generis, making new law. And
17 it's a very complicated issue. So we'll all muddle through, do
18 justice. And I'll probably ask -- invite you to meet and
19 confer and to give the Court a proposal as to the first day in
20 the rest of the life of this case after the order comes out,
21 all right?

22 Thanks, gentlemen. Very well briefed and argued.

23 **MR. JERGER:** Thank you, Your Honor.

24 **MR. MCGOWAN:** Thank you.

25 **THE COURT:** Thank you, gentlemen.

(Proceedings adjourned at 10:02 a.m.)

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CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Sahar McVickar

Sahar McVickar, RPR, CSR No. 12963

Monday, December 7, 2009