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SUPERIOR COURT OF THE STATE OF CALIFORNIA.  
FOR THE COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER - DEPARTMENT C33

SOFTWARE FREEDOM CONSERVANCY, )  
INC., A NEW YORK NONPROFIT )  
CORPORATION, )  
PLAINTIFF, )

VS. ) NO. 30-2021-01226723

VIZIO, INC., A CALIFORNIA )  
CORPORATION; AND DOES 1 )  
THROUGH 50, INCLUSIVE, )  
DEFENDANTS. )

----- )

THE HONORABLE SANDY N. LEAL, JUDGE PRESIDING  
REPORTER'S TRANSCRIPT OF PROCEEDINGS  
THURSDAY, OCTOBER 5, 2023

(APPEARANCES ON THE FOLLOWING PAGE)

REPORTED BY: STACIE SKOTARCZYK, CSR NO. 7211  
OFFICIAL COURT REPORTER PRO TEMPORE

1 APPEARANCES OF COUNSEL:

2 FOR PLAINTIFF SOFTWARE FREEDOM CONSERVANCY:

3 SHADES OF GRAY LAW GROUP, PC

4 BY: NAOMI JANE GRAY

DONALD A. THOMPSON

NGRAY@SHADESOFGRAY.LAW

5  
6 AND

VAKILI & LEUS, LLP

7 BY: SA'ID VAKILI (REMOTE)

DAVID N. SCHULTZ (REMOTE)

8 VAKILI@VAKILI.COM

9  
10 FOR DEFENDANT VIZIO, INC.:

QUINN EMANUEL URQUHART & SULLIVAN, LLP

11 BY: MICHAEL E. WILLIAMS

MICHAELWILLIAMS@QUINNEMANUEL.COM

12 ALSO PRESENT:

13 DENVER GINGERICH (REMOTE)

14 BRANDI HAMER (REMOTE)

15 KAREN SANDLER (REMOTE)

16 PERRY SMITH (REMOTE)

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1 SANTA ANA, CALIFORNIA - THURSDAY, OCTOBER 5, 2023

2 MORNING SESSION

3 --000--

4 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN  
5 COURT:)

6 THE COURT: WE'RE ON THE RECORD IN THE MATTER  
7 OF SOFTWARE FREEDOM CONSERVANCY VERSUS VIZIO.

8 MS. GRAY: GOOD MORNING, YOUR HONOR. JANE GRAY  
9 FROM SHADES OF GRAY LAW GROUP FOR THE PLAINTIFF, SOFTWARE  
10 FREEDOM CONSERVANCY.

11 THE COURT: GOOD MORNING.

12 MADAM COURT REPORTER, ARE YOU REPORTING THESE  
13 PROCEEDINGS?

14 THE COURT REPORTER: YES.

15 THE COURT: OKAY. MS. GRAY, SO A LITTLE LOUDER  
16 NEXT TIME.

17 AND I BELIEVE THERE ARE ALSO PARTIES ONLINE.

18 MR. THOMPSON: GOOD MORNING, YOUR HONOR.  
19 DONALD THOMPSON FOR PLAINTIFF SOFTWARE FREEDOM  
20 CONSERVANCY, AND I'M HERE WITH MISS GRAY.

21 MR. VAKILI: GOOD MORNING, YOUR HONOR.  
22 SA'ID VAKILI, ALSO FOR PLAINTIFF SOFTWARE FREEDOM  
23 CONSERVANCY, INC. I WILL NOT BE ARGUING, BUT I'M HERE  
24 AS AN OBSERVER.

25 THE COURT: THANK YOU.

26 MR. SCHULTZ: GOOD MORNING, YOUR HONOR.

1 DAVID SCHULTZ, ALSO OF VAKILI & LEUS. ONCE AGAIN, I'M  
2 ALSO JUST OBSERVING.

3 THE COURT: AND IF YOU CAN TURN ON YOUR CAMERA,  
4 PLEASE.

5 MR. SCHULTZ: I THOUGHT I DID.

6 THE COURT: I THINK YOU MIGHT HAVE A -- THERE  
7 YOU ARE.

8 MR. SCHULTZ: OKAY. I SEE MYSELF. SO ALL  
9 RIGHT.

10 MR. WILLIAMS: YOUR HONOR, MICHAEL WILLIAMS OF  
11 QUINN EMANUEL FOR DEFENDANT VIZIO.

12 THE COURT: WHO IS MR. SMITH?

13 THE CLERK: HE'S NOT AFFILIATED WITH ANY  
14 PARTIES, YOUR HONOR.

15 MR. SMITH: JUST AN OBSERVER, YOUR HONOR.

16 THE COURT: GREAT. IF YOU COULD KEEP YOUR  
17 CAMERA ON, THEN.

18 AND I THINK WE HAVE ADDITIONAL PARTIES.

19 MS. SANDLER: YES, I'M KAREN SANDLER, JUST  
20 OBSERVING AS WELL.

21 THE COURT: GOOD MORNING.

22 WHO IS DENVER GINGERICH?

23 MS. GRAY: HE'S ALSO WITH SOFTWARE FREEDOM  
24 CONSERVANCY, YOUR HONOR.

25 THE COURT: SIR, IF YOU COULD TURN ON YOUR  
26 CAMERA, PLEASE.

1 MR. GINGERICH: IT'S ON, YOUR HONOR.

2 THE COURT: ALL RIGHT. AND I HAVE JUST THE  
3 COURT ATTENDANT, AND THEN A COURT ATTORNEY ON AS WELL.  
4 OKAY. ALL RIGHT.

5 SO I CAN GO AHEAD AND HEAR ARGUMENT FROM YOU  
6 ALL. I DID NOT ISSUE A TENTATIVE, SO I'M HAPPY TO HEAR  
7 FROM YOU BOTH.

8 MS. GRAY: EXCELLENT, YOUR HONOR. I'M GOING TO  
9 BE ARGUING ON THE PREEMPTION MOTION TODAY, AND MY  
10 COLLEAGUE, MR. THOMPSON, WILL BE ARGUING ON THE  
11 THIRD-PARTY BENEFICIARY ISSUE.

12 THE COURT: OKAY.

13 MS. GRAY: I WOULD ASK, SO THAT WE CAN USE THE  
14 COURT'S TIME EFFICIENTLY AND HELP THE COURT REACH A  
15 DECISION, ARE THERE ANY PARTICULAR AREAS THAT YOU WISH US  
16 TO FOCUS ON, OR PARTICULAR QUESTIONS THAT YOU HAVE THAT  
17 YOU WISH US TO ADDRESS?

18 THE COURT: THE PREEMPTION AND THE THIRD-PARTY  
19 BENEFICIARY.

20 MS. GRAY: EXCELLENT. THEN THAT'S WHAT I'M HERE  
21 TO DO.

22 ONE OTHER HOUSEKEEPING MATTER BEFORE WE GET  
23 STARTED HERE, YOUR HONOR. DOES THE COURT WANT TO  
24 ENTERTAIN ADDITIONAL ARGUMENT ON THE OBJECTIONS THAT ARE  
25 BEFORE THE COURT?

26 THE COURT: NO, I DON'T.

1 MS. GRAY: OKAY. EXCELLENT.

2 CAN I JUST CONFIRM THAT WHEN THE COURT ISSUES  
3 ITS RULING, WE'LL GET A RULING ON THE OBJECTIONS AS WELL?

4 THE COURT: YOU'LL GET A RULING.

5 MS. GRAY: THANK YOU SO MUCH, YOUR HONOR.

6 MR. WILLIAMS: YOUR HONOR, SINCE IT'S VIZIO'S  
7 MOTION, WOULD YOU LIKE ME TO BEGIN?

8 THE COURT: YES.

9 MR. WILLIAMS: THANK YOU.

10 YOUR HONOR, WITH REGARD TO, FIRST OF ALL, AS A  
11 PRELIMINARY MATTER, THE DISTRICT COURT RULING THAT  
12 REMANDED THE CASE TO STATE COURT HAS ABSOLUTELY NO  
13 BEARING ON THE PREEMPTION ISSUE. IT CITED NUMEROUS  
14 CALIFORNIA COURT OF APPEAL CASES THAT MAKE THAT CLEAR.

15 THE JURISDICTIONAL QUESTION THAT THE FEDERAL  
16 COURT DECIDED IS DIFFERENT FROM, AND NOT BINDING ON THE  
17 QUESTION OF WHETHER A STATE LAW PREEMPTION DEFENSE WILL  
18 SUCCEED. THERE ARE NUMEROUS CASES, WHICH WE CITED, IN  
19 WHICH THE DISTRICT COURT REMANDED, FINDING NO COMPLETE  
20 JURISDICTION FOR PURPOSES OF FEDERAL JURISDICTION, BUT  
21 THE STATE COURT OF APPEAL AFFIRMED FINDINGS OF PREEMPTION  
22 AS A DEFENSE. SO TO PUT THAT PART OUT OF THE WAY,  
23 BECAUSE THAT IS A FOCUS OF PLAINTIFF'S ARGUMENTS IN THEIR  
24 PAPERS.

25 WITH REGARD TO THE PREEMPTION ISSUE, IT TURNS ON  
26 WHETHER THE RIGHTS THAT SOFTWARE FREEDOM CONSERVANCY IS

1        ASSERTING ARE EQUIVALENT TO THE EXCLUSIVE RIGHTS UNDER  
2        THE COPYRIGHT ACT. I DON'T BELIEVE THE PARTIES REALLY  
3        DISPUTE THE STANDARD THAT THE COURT SHOULD APPLY. THE  
4        QUESTION BECOMES MORE, HOW DOES IT GET APPLIED HERE. AND  
5        AS THE COURT HAS MADE CLEAR, THE KABEHIE CASE, WHICH IS  
6        THE CALIFORNIA COURT OF APPEAL, YOU HAVE TO LOOK AT THE  
7        PARTICULAR PROMISE THAT'S ALLEGED TO HAVE BEEN BREACHED,  
8        AS WELL AS THE PARTICULAR RIGHT THAT'S ALLEGED TO HAVE  
9        BEEN VIOLATED. AND YOU DO THAT ANALYSIS WITH REGARD TO  
10       DETERMINING WHETHER A BREACH OF CONTRACT CLAIM IS  
11       PREEMPTED BY THE COPYRIGHT ACT.

12                AND AS THE COURT MADE CLEAR, THERE MUST BE AN  
13        EXTRA ELEMENT TO THE BREACH OF CONTRACT CLAIM THAT  
14        TRANSFORMS THE CLAIM INTO SOMETHING QUALITATIVELY  
15        DIFFERENT THAN A COPYRIGHT INFRINGEMENT. IF THERE ISN'T  
16        THAT EXTRA ELEMENT THAT ACTUALLY CHANGES THE NATURE OF  
17        THE CLAIM, THEN THE CLAIM IS PREEMPTED. THAT'S THE WHOLE  
18        POINT OF FEDERAL PREEMPTION.

19                SO IF THE SAME CONDUCT UNDERLYING SFC'S STATE  
20        LAW BREACH OF CONTRACT CLAIM WOULD GIVE RISE TO A CLAIM  
21        FOR COPYRIGHT INFRINGEMENT, PREEMPTION CONTROLS AND THE  
22        STATE LAW CLAIM IS PREEMPTED.

23                I WANT TO FOCUS THREE MAIN POINTS CONFIRMING  
24        PREEMPTION HERE. FIRST, THE SOURCE CODE PROVISION OF THE  
25        GENERAL PUBLIC LICENSE VERSION 2, THE GPL'S AT ISSUE  
26        HERE, THAT IS AN EXERCISE OF THE COPYRIGHT HOLDER'S

1 EXCLUSIVE RIGHT TO DISTRIBUTE THEIR COPYRIGHTED WORK.  
2 THAT'S THE FIRST ARGUMENT I WANT TO FOCUS ON.

3 THE SECOND ONE IS THAT THE SOURCE CODE PROVISION  
4 IS A CONDITION TO THE LICENSE, AND UNDER BINDING LAW THAT  
5 CONDITION TERMINATES THE LICENSE, AND GIVES RISE TO A  
6 CLAIM FOR COPYRIGHT INFRINGEMENT. AND IF YOU HAVE A  
7 CLAIM FOR COPYRIGHT INFRINGEMENT, YOU CAN'T HAVE A  
8 COMPETING STATE LAW CLAIM BASED ON THE SAME CONDUCT.

9 AND THE THIRD POINT I WANT TO FOCUS ON IS THAT  
10 THERE IS NO EXTRA ELEMENT TO SOFTWARE FREEDOM  
11 CONSERVANCY'S BREACH OF CONTRACT CLAIM THAT WOULD  
12 TRANSFORM IT AWAY FROM SOMETHING BEYOND A COPYRIGHT  
13 CLAIM.

14 SO FIRST, THE SOURCE CODE IS TIED TO THE  
15 EXCLUSIVE RIGHT OF DISTRIBUTION. SO THE COPYRIGHT ACT  
16 GRANTS A COPYRIGHT HOLDER CERTAIN EXCLUSIVE RIGHTS, AND  
17 THOSE ARE CODIFIED IN 17 USC 106. AND THEY INCLUDE, AT  
18 LEAST AS PERTINENT TO THIS CASE, THE RIGHT TO DO AND TO  
19 AUTHORIZE THE COPYING, MODIFICATION, AND DISTRIBUTION OF  
20 THE COPYRIGHTED WORK.

21 THAT MEANS THAT THE COPYRIGHT HOLDER HAS THE  
22 EXCLUSIVE RIGHT DO DETERMINE IF AND HOW THAT COPYRIGHTED  
23 WORK CAN BE COPIED, HOW IT CAN BE MODIFIED, AND HOW IT  
24 COULD BE DISTRIBUTED. AND IN THE JACOBSEN VERSUS KATZER  
25 CASE, WHICH IS A FEDERAL CIRCUIT CASE WHICH WE CITE  
26 APPLYING CALIFORNIA, LAW, IS INSTRUCTIVE ON THIS MATTER.



1           AND IT EXPLAINS, "COPYRIGHT HOLDERS WHO ENGAGE  
2       IN OPEN-SOURCE LICENSING HAVE THE RIGHT TO CONTROL THE  
3       MODIFICATION AND DISTRIBUTION OF THEIR COPYRIGHTED  
4       MATERIALS."

5           AND WHAT SFC IS SEEKING TO DO HERE IS TO  
6       CONTROL -- IS TO ENFORCE LANGUAGE IN THE GPL'S THAT  
7       GOVERN THE COPYRIGHT HOLDER'S EXCLUSIVE RIGHT TO CONTROL  
8       THE DISTRIBUTION OF THEIR PRODUCT, OF THEIR SOFTWARE.

9           HOW DO WE KNOW THAT? WELL, THE GPL'S ON THEIR  
10      FACE STATE THAT THE LICENSE ONLY COVERS THE RIGHT TO  
11      COPY, DISTRIBUTE, AND MODIFY THE SOURCE CODE. THOSE ARE  
12      THREE EXCLUSIVE RIGHTS UNDER THE COPYRIGHT ACT. I DON'T  
13      THINK ANYONE IS GOING TO DISPUTE THAT.

14          SO BY NECESSITY, SEEKING TO ENFORCE THE GPL'S IS  
15      SEEKING TO ENFORCE ONE OF THOSE EXCLUSIVE RIGHTS UNDER  
16      THE COPYRIGHT ACT.

17          BUT MORE SPECIFICALLY, THE GPL'S SAY THAT THE  
18      LICENSEE CAN DISTRIBUTE THE SOFTWARE, PROVIDED THAT THEY  
19      ALSO PROVIDE THE SOURCE CODE FOR THE SOFTWARE, OR A  
20      WRITTEN OFFER THAT SOMEONE CAN REQUEST THE SOURCE CODE.

21          THAT IS AN EXERCISE OF THE COPYRIGHT HOLDER'S  
22      RIGHT TO CONTROL THE DISTRIBUTION OF THEIR SOFTWARE. THE  
23      COPYRIGHT HOLDER IS TELLING PEOPLE, I'M GOING TO PERMIT  
24      YOU TO DISTRIBUTE MY SOFTWARE ON THE CONDITION THAT YOU  
25      ALSO INCLUDE WITH IT THE SOURCE CODE TO THE MODIFICATIONS  
26      OR THE CHANGES YOU HAVE MADE.

1            THAT IS AN EXERCISE OF THE EXCLUSIVE RIGHT TO  
2 CONTROL THE DISTRIBUTION OF THE SOFTWARE. IF THE LICENSE  
3 SAID -- AND PEOPLE MAY BE FAMILIAR WITH THIS IN A  
4 SOFTWARE LICENSE. YOU BUY A SOFTWARE PRODUCT. IF THE  
5 LICENSE SAID, YOU ARE PROHIBITED FROM DISTRIBUTING COPIES  
6 OF THIS LICENSE, OR IF IT SAID, YOU ARE ONLY ALLOWED TO  
7 DISTRIBUTE UP TO FIVE COPIES OF THIS LICENSE TO MEMBERS  
8 OF YOUR HOUSEHOLD, I DON'T THINK ANYONE COULD CREDIBLY  
9 DISPUTE THAT THAT CONDITION IS AN EXERCISE OF THE  
10 COPYRIGHT HOLDER'S EXCLUSIVE RIGHT TO CONTROL THE  
11 DISTRIBUTION OF THEIR COPYRIGHTED WORK.

12            HERE, THE GPL'S ARE NO DIFFERENT. THEY SAY, YOU  
13 HAVE THE PERMISSION TO DISTRIBUTE THIS COPYRIGHTED  
14 SOFTWARE, SO LONG AS OR PROVIDED THAT YOU INCLUDE THE  
15 SOURCE CODE THAT GOES ALONG WITH IT.

16            SO THAT POINT MAKES CLEAR THAT THIS IS AN  
17 EXERCISE OF THE COPYRIGHT HOLDER'S EXCLUSIVE RIGHT. IT'S  
18 EQUIVALENT TO EXCLUSIVE RIGHTS, AND PREEMPTION APPLIES.

19            IN ADDITION, THE AUTHOR OF THE COPYRIGHT LICENSE  
20 AT ISSUE, THE GPL'S, AN ENTITY CALLED THE FREE SOFTWARE  
21 FOUNDATION, THEY REITERATE THIS POINT. THEY HAVE PUT OUT  
22 THERE ON THEIR WEBSITE WHERE THE GPL'S ARE LOCATED, THERE  
23 ARE FREQUENTLY ASKED QUESTIONS THAT SAY, WHO HAS THE  
24 POWER TO ENFORCE THE GPL'S? AND THEY TELL THE WORLD THAT  
25 BECAUSE THESE ARE COPYRIGHT LICENSES, THE COPYRIGHT  
26 HOLDER MUST BE THE ONE TO ENFORCE THESE TERMS.

1 ALL THAT DOES IS REITERATE THAT THIS IS  
2 ENFORCING -- THE WAY IT WAS DRAFTED, IT'S ENFORCING  
3 EXCLUSIVE RIGHTS UNDER THE COPYRIGHT ACT.

4 THE SECOND ARGUMENT, THAT THE SOURCE CODE  
5 PROVISION IS A CONDITION OF THE LICENSE, AND AGAIN, YOUR  
6 HONOR, THE JACOBSEN V. KATZER CASE, WHICH WAS A UNANIMOUS  
7 DECISION FROM THE FEDERAL CIRCUIT, LAYS OUT, AND IT  
8 DOESN'T -- IT'S A VERY APPLICABLE CASE HERE, BECAUSE IT  
9 WAS INTERPRETING AND ADDRESSING A SIMILAR OPEN SOURCE  
10 LICENSE THAT WE HAVE HERE.

11 IN THAT CASE, IT WAS AN OPEN SOURCE SOFTWARE  
12 LICENSE THAT SAID, YOU HAVE PERMISSION, USER, TO COPY,  
13 MODIFY, OR DISTRIBUTE THE SOFTWARE, PROVIDED THAT YOU  
14 TELL PEOPLE WHAT MODIFICATIONS YOU MADE, AND WHEN, AND  
15 YOU MAKE THOSE MODIFICATIONS PUBLICLY AVAILABLE ON A  
16 WEBSITE OR SOME OTHER FORM THAT THE WORLD CAN HAVE ACCESS  
17 TO THE MODIFICATIONS YOU MADE. VERY MUCH ON PAR WITH  
18 WHAT THE GPL'S HERE INVOLVE IN TERMS OF OFFERING OR  
19 PROVIDING THE SOURCE CODE.

20 AND IN THAT CASE, THE COURT ANALYZED WHETHER  
21 THIS WAS A CONDITION OF THE LICENSE. BECAUSE IF IT'S A  
22 CONDITION OF THE LICENSE, AND SOMEONE VIOLATES THAT  
23 CONDITION OR BREACHES THAT CONDITION, IT TERMINATES THE  
24 LICENSE, AND IT RESULTS IN A CLAIM FOR COPYRIGHT  
25 INFRINGEMENT.

26 AND THE COURT THERE EXPLAINED THAT THE TERMS AT

1 ISSUE WERE CLEARLY A CONDITION OF THE LICENSE, BECAUSE IT  
2 NOTED ON ITS FACE THAT IT CREATED CONDITIONS FOR THE  
3 COPYING, MODIFICATION, AND DISTRIBUTION OF THE SOFTWARE.  
4 IT USED TRADITIONAL LANGUAGE OF A CONDITION UNDER  
5 CALIFORNIA LAW, BECAUSE IT WAS APPLYING CALIFORNIA LAW.  
6 THE "PROVIDED THAT" LANGUAGE; THAT YOU CAN DO THIS,  
7 PROVIDED THAT YOU ALSO DO X.

8 AND THAT THESE CONDITIONS ALLOWED THE COPYRIGHT  
9 HOLDER TO RETAIN THE BENEFIT OF DOWNSTREAM USERS WHO ARE  
10 MODIFYING THEIR WORK.

11 THOSE SAME PRINCIPLES APPLY HERE. THE GPL'S SAY  
12 ON THEIR FACE, THESE CAN PROVIDE TERMS AND CONDITIONS FOR  
13 THE COPYING, MODIFICATION, AND DISTRIBUTION. THEY USE  
14 LANGUAGE THAT UNDER CALIFORNIA LAW CONNOTES A CONDITION  
15 THAT PROVIDED THAT LANGUAGE, AND THEY ALLOW THE COPYRIGHT  
16 HOLDER TO RETAIN THE ABILITY TO BENEFIT FROM DOWNSTREAM  
17 USERS WHO WANT TO MAKE MODIFICATIONS TO THE OPEN SOURCE  
18 SOFTWARE.

19 SO BECAUSE IT IS A CONDITION OF THE LICENSE, AND  
20 THE GPL'S ALSO STATE CLEARLY, "YOU ARE PROHIBITED FROM  
21 COPYING, MODIFYING OR DISTRIBUTING THIS OPEN SOURCE  
22 SOFTWARE EXCEPT AS PROVIDED HEREIN," OR LANGUAGE TO THAT  
23 EFFECT. AND ANY ATTEMPT TO DO OTHERWISE IS VOID, AND  
24 AUTOMATICALLY TERMINATES THE LICENSE.

25 SO AGAIN, IF YOU DON'T FOLLOW THE TERMS OF THE  
26 GPL LICENSE, YOUR LICENSE IS TERMINATED, AND THAT GIVES

1 RISE TO A CLAIM FOR COPYRIGHT INFRINGEMENT. AGAIN, WHY  
2 IS THAT IMPORTANT? BECAUSE IF YOU HAVE A CLAIM FOR  
3 COPYRIGHT INFRINGEMENT, YOU CAN'T BRING A BREACH OF  
4 CONTRACT CLAIM FOR THE SAME CONDUCT.

5 AND THAT BRINGS ME TO THE THIRD POINT, WHICH IS  
6 THE EXTRA ELEMENT TEST.

7 AND ONCE AGAIN, KABEHIE MAKES CLEAR, THE EXTRA  
8 ELEMENT MUST BE ONE THAT QUALITATIVELY TRANSFORMS A CLAIM  
9 FROM A COPYRIGHT CLAIM. AND THE MERE BREACH OF A PROMISE  
10 INHERENT IN EVERY CONTRACT DOES NOT CONSTITUTE THE  
11 REQUISITE EXTRA ELEMENT, UNLESS IT CREATES A RIGHT  
12 QUALITATIVELY DIFFERENT THAN COPYRIGHT.

13 AND THE COURT GAVE EXAMPLES IN THAT CASE AND  
14 SAID, THE EXTRA ELEMENT COULD THE RIGHT TO PAYMENT OR THE  
15 RIGHT TO ROYALTIES OR SOME OTHER INDEPENDENT COVENANT  
16 THAT IS UNRELATED TO THE EXCLUSIVE RIGHTS UNDER THE  
17 COPYRIGHT.

18 BUT THE COURT ALSO SAID, IF THE PROMISE IS JUST  
19 AGREEING TO DO THAT WHICH YOU ARE ALREADY PROHIBITED FROM  
20 DOING UNDER THE COPYRIGHT LAWS, OR REQUIRED TO DO UNDER  
21 THE COPYRIGHT LAWS, THERE IS NO EXTRA ELEMENT.

22 AND THAT'S EXACTLY WHAT WE HAVE HERE. THE  
23 LANGUAGE IN THE GPL'S THAT SFC IS FOCUSED ON IS THE  
24 LANGUAGE THAT REQUIRES A USER TO DISTRIBUTE THE SOURCE  
25 CODE IF THEY WANT TO DISTRIBUTE SOFTWARE COVERED BY THAT  
26 LICENSE. IT IS PART AND PARCEL OF THE EXCLUSIVE RIGHTS.

1 THERE IS NO EXTRA ELEMENT. AND WE KNOW THAT ALSO BECAUSE  
2 SFC HAS PUBLICLY STATED, BOTH TO VIZIO BEFORE LITIGATION,  
3 AND PUBLICLY IN MANUALS AND COMPLIANCE GUIDES THAT THEY  
4 HAVE WRITTEN BEFORE THIS LAWSUIT, THAT MAKE CLEAR THAT  
5 VIOLATION OF THE SOURCE CODE PROVISION CONSTITUTES  
6 COPYRIGHT INFRINGEMENT, AND THE COPYRIGHT HOLDER IS THE  
7 ONLY PERSON WHO CAN ENFORCE THAT.

8 THAT CONFIRMS, THEY ARE NOT SEEKING ANY EXTRA  
9 ELEMENT HERE. IT'S THE EXACT SAME ALLEGED BREACH. THE  
10 FAILURE TO -- THE ALLEGED FAILURE TO PROVIDE THE SOURCE  
11 CODE WITH THE SOFTWARE.

12 SO WE CONTEND THAT THERE IS NO EXTRA ELEMENT.  
13 THE RIGHTS THEY ARE ASSERTING ARE EQUIVALENT TO THE  
14 EXCLUSIVE RIGHTS UNDER THE COPYRIGHT ACT, AND PREEMPTION  
15 APPLIES.

16 I WANT TO TURN TO THE THIRD-PARTY BENEFICIARY,  
17 YOUR HONOR.

18 THE MOTION FOR SUMMARY JUDGMENT FOCUSES ON THE  
19 THIRD PRONG OF THE THIRD-PARTY BENEFICIARY TEST. AND THE  
20 CALIFORNIA SUPREME COURT, IN THE GOONEWARDENE CASE, LAID  
21 OUT THE ELEMENTS. BUT THERE, THE QUESTION IS WHETHER  
22 PERMITTING A THIRD PARTY TO BRING A BREACH OF CONTRACT  
23 CLAIM IS CONSISTENT WITH THE OBJECTIVES OF THE CONTRACT,  
24 AND THE REASONABLE EXPECTATIONS OF THE CONTRACTING  
25 PARTIES.

26 SO, AND THE COURT CAN CONSIDER THE LANGUAGE OF

1 THE LICENSE ITSELF EXTRINSIC EVIDENCE OF OBJECTIVE  
2 MATTERS, THE CIRCUMSTANCES UNDER WHICH THE PARTIES  
3 ENTERED INTO THE CONTRACT, ET CETERA. AND SO THE COURT  
4 BREAKS THAT PRONG INTO TWO ELEMENTS; WHETHER THIRD-PARTY  
5 ENFORCEMENT IS CONSISTENT WITH THE CONTRACTING PARTY'S  
6 PERFORMANCE OBJECTIVES, AND WHETHER THIRD-PARTY  
7 ENFORCEMENT IS CONSISTENT WITH THE REASONABLE  
8 EXPECTATIONS OF THE CONTRACTING PARTIES.

9 AND THE CITY OF OAKLAND CASE THAT WE CITE IN OUR  
10 BRIEFING MAKES CLEAR THAT ANY DOUBTS RELATED TO THE  
11 EXISTENCE OF THIRD-PARTY BENEFICIARY STATUS MUST BE  
12 RESOLVED AGAINST IT. SO THE PRESUMPTION IS AGAINST  
13 THIRD-PARTY BENEFICIARY STATUS.

14 AS TO THE OBJECTIVES OF THE CONTRACT, AGAIN,  
15 WE'RE DEALING WITH A COPYRIGHT LICENSE. AND A COPYRIGHT  
16 LICENSE CAN ONLY BE ENFORCED BY THE COPYRIGHT HOLDER.  
17 AND WE CITE CASES TO THAT EFFECT. AND THE AUTHOR OF THIS  
18 LICENSE HAS REITERATED THAT FACT, AND SO HAS SFC, THAT  
19 THE COPYRIGHT HOLDER IS THE ONLY ENTITY THAT CAN ENFORCE  
20 THE GPL'S.

21 THE OBJECTIVE OF THE LICENSE IS TO CREATE THESE  
22 CONDITIONS UNDER WHICH THE COPYRIGHT HOLDER CAN CONTROL  
23 THE MANNER OF DISTRIBUTION OF THEIR SOFTWARE. SO WE  
24 BELIEVE, UNDER THE OBJECTIVE PURPOSES, NO THIRD-PARTY  
25 ENFORCEMENT IS PERMITTED.

26 AND THEN WE ALSO CONTEND, YOUR HONOR, THAT THIS

1 THIRD-PARTY ENFORCEMENT IS NOT CONSISTENT WITH THE  
2 REASONABLE EXPECTATIONS OF THE PARTIES. AN ENTITY THAT'S  
3 ENTERING INTO A COPYRIGHT LICENSE TO OBTAIN SOFTWARE  
4 COVERED BY A LICENSE IS NOT GOING TO EXPECT THAT THEY CAN  
5 POTENTIALLY BE SUED BY LITERALLY MILLIONS OF PEOPLE,  
6 WITHOUT LIMITATION, ESPECIALLY WHEN THE AUTHOR OF THAT  
7 LICENSE MAKES CLEAR THAT THE ONLY PEOPLE THAT CAN ENFORCE  
8 IT IS THE COPYRIGHT HOLDER.

9 BASED ON THE OBJECTIVE FACTS, NO LICENSEE IS  
10 REASONABLY GOING TO EXPECT THAT THEY COULD BE SUED BY  
11 ANYONE, NOR IS THERE ANY NEED TO, BECAUSE AS THE COURTS  
12 HAVE NOTED, IF YOU HAVE THE ACTUAL PARTIES TO THE  
13 AGREEMENT WHO CAN ENFORCE IT AND DO ENFORCE IT, THAT CUTS  
14 AGAINST THIRD-PARTY ENFORCEMENT.

15 WE HAVE SEEN COPYRIGHT HOLDERS FILE SUIT, WE  
16 HAVE EVEN SEEN SOFTWARE FREEDOM CONSERVANCY FILE SUIT  
17 JOINED WITH COPYRIGHT HOLDERS TO ENFORCE THE TERMS UNDER  
18 COPYRIGHT LAW. THERE IS NO THIRD-PARTY BENEFICIARY  
19 EXPECTATION HERE.

20 AND THE IDEA OF THAT, AGAIN, THE EXPLOSION OF  
21 POTENTIAL LITIGATION AND THE LITIGATION COSTS THAT WOULD  
22 COME WITH IT, WHICH IS SOMETHING THE SUPREME COURT SAID  
23 THE COURT CAN CONSIDER IN THE GOONEWARDENE CASE, FURTHER  
24 DEMONSTRATE THAT THERE IS NO EXPECTATION OF THIRD-PARTY  
25 ENFORCEMENT.

26 I KNOW I'VE SAID A LOT, YOUR HONOR, AND YOU HAVE



1 HAD A LONG DAY. IF THERE IS ANY QUESTIONS, I'M HAPPY TO  
2 ANSWER THEM.

3 THE COURT: GOING BACK TO, I KNOW I SAID I  
4 DIDN'T WANT TO HEAR ABOUT THE OBJECTIONS, BUT LET'S SEE.

5 I GUESS AS TO, MR. WILLIAMS, YOUR DECLARATION,  
6 THE OBJECTIONS, IF YOU WANT TO ADDRESS OBJECTIONS 26, 42?

7 MR. WILLIAMS: THESE ARE TO MY DECLARATION? THE  
8 OBJECTIONS?

9 THE COURT: YES.

10 MR. WILLIAMS: OKAY. WHICH NUMBERS, YOUR HONOR?

11 THE COURT: NUMBER 26.

12 MR. WILLIAMS: OKAY.

13 THE COURT: 42.

14 MR. WILLIAMS: SO WITH REGARD TO OBJECTION 26,  
15 WHICH IS REFERENCING EXHIBIT 10, IS THE QUESTION, YOUR  
16 HONOR, WITH REGARD TO THE SETTLEMENT NEGOTIATIONS POINT,  
17 OR IS THERE A PARTICULAR ISSUE YOU WANT ME TO FOCUS ON?

18 THE COURT: I DON'T HAVE -- WHAT IS OBJECTION  
19 NUMBER 26?

20 MR. WILLIAMS: IT SAYS, "LACK OF PERSONAL  
21 KNOWLEDGE, STATEMENTS IN NEGOTIATION OF SETTLEMENT," AND  
22 THEN, "THIS EVIDENCE IS FURTHER OBJECTED TO ON THE  
23 GROUNDS THAT IT'S IRRELEVANT, AND DOES NOT TEND TO PROVE  
24 THE EXISTENCE OF ANY FACT."

25 THE COURT: AND THAT'S FOR EXHIBIT 10, CORRECT?

26 MR. WILLIAMS: CORRECT.

1 THE COURT: OKAY. SO IF YOU JUST WANT TO  
2 ADDRESS THAT.

3 MR. WILLIAMS: SURE.

4 THE COURT: THOSE OBJECTIONS.

5 MR. WILLIAMS: SURE. SO EXHIBIT 10, WHICH WAS  
6 INCLUDED, IS A LETTER THAT WAS SENT FROM SFC'S DIRECTOR  
7 OF COMPLIANCE, DENVER GINGERICH, TO IN-HOUSE COUNSEL AT  
8 VIZIO, WHICH WAS ENTITLED "COPYRIGHT INFRINGEMENT." IT  
9 WAS ESSENTIALLY A CEASE-AND-DESIST LETTER THAT WAS SENT  
10 TO MY CLIENT, THAT WE WERE PROVIDED COPIES OF WHEN WE  
11 WERE RETAINED.

12 WITH REGARD TO THE SUBJECT MATTER OF IT, IT IS  
13 LACK OF PERSONAL KNOWLEDGE. IT'S UNCLEAR IF THE QUESTION  
14 IS -- WHAT THAT'S REALLY DIRECTED TO IS WHETHER I HAVE  
15 KNOWLEDGE OF IT BEING TRUE AND CORRECT, IT'S A -- I DON'T  
16 THINK THERE IS ANY DISPUTE THAT THEY SENT THIS LETTER TO  
17 MY CLIENT. I WAS PROVIDED WITH IT IN CONNECTION WITH OUR  
18 RETENTION HERE. SO I DON'T THINK THAT'S REALLY AN ISSUE.

19 IN REGARD -- THEY RAISE A QUESTION ABOUT WHETHER  
20 THESE ARE STATEMENTS IN NEGOTIATION OF SETTLEMENT. THIS  
21 IS A TRUE CEASE-AND-DESIST LETTER THAT WAS SENT TO OUR  
22 CLIENT. THERE WAS NO INDICATION ON IT THAT IT WAS A  
23 SETTLEMENT NEGOTIATION. AND IN FURTHER COMMUNICATION,  
24 WHICH I BELIEVE WE INCLUDED WITH OUR REPLY, SFC MADE THE  
25 POINT THAT ALL OF THESE COMMUNICATIONS MAY BE ULTIMATELY  
26 PUBLICLY DISCLOSED AT SOME POINT.

1           SO THIS WAS NOT PART OF ANY SETTLEMENT  
2           NEGOTIATION, PARTICULARLY THIS LETTER.

3           AND RELEVANT, I THINK IT'S VERY CLEAR AND  
4           RELEVANT TO THE POINT THAT I MADE EARLIER, THAT, ONE, THE  
5           REASONABLE EXPECTATIONS OF THE PARTIES, AND THAT THERE IS  
6           NO EXTRA ELEMENT HERE. SFC'S POSITION IS VIZIO'S ALLEGED  
7           FAILURE TO PROVIDE THE SOURCE CODE CONSTITUTES COPYRIGHT  
8           INFRINGEMENT.

9           IF THAT'S THE CASE, AND THEN THEY ARE NOT  
10          RELYING ON ANY EXTRA ELEMENT, THAT'S WHAT THEY ARE  
11          ALLEGING HERE, AND THAT'S WHAT LOCKS THEM INTO THE  
12          PREEMPTION ANALYSIS.

13          YOU MENTIONED --

14          THE COURT:    AND THEN 42.

15          MR. WILLIAMS:  -- 42, WHICH APPEARS TO BE  
16          EXHIBIT 5.  THAT IS ANOTHER LETTER FROM MR. GINGERICH TO  
17          VIZIO'S GENERAL COUNSEL, DATED AUGUST 7, 2018, WITH THE  
18          TITLE "COPYRIGHT INFRINGEMENT BY," AND IT IDENTIFIES  
19          CERTAIN TELEVISION MODEL NUMBERS.  AND AGAIN, FOR THE  
20          SAME REASONS I INDICATED, THAT WOULD BE IRRELEVANT, AND  
21          NOT COVERED BY ANY SETTLEMENT COMMUNICATIONS.

22          THE COURT:    OKAY.  AND 44, OBJECTION NUMBER 44.

23          MR. WILLIAMS:  SURE.  44 IS TO EXHIBIT 8, SO  
24          THIS IS THE FREQUENTLY ASKED QUESTIONS ABOUT THE GNU  
25          LICENSES, WHICH WAS PRINTED FROM THE FREE SOFTWARE -- THE  
26          WEBSITE THAT ACTUALLY MAINTAINS, THE WWW.GNU.ORG, THIS IS

1 WHERE PEOPLE COULD ACTUALLY DOWNLOAD AND OBTAIN COPIES OF  
2 THE GPL'S THAT ARE AT ISSUE HERE. IT WAS AUTHORED BY THE  
3 FREE SOFTWARE FOUNDATION, WHICH IS THE ENTITY THAT  
4 CREATED THE GPL'S, THAT DRAFTED THEM. AND WE HAVE CITED  
5 IT FOR THE QUESTION OF WHO HAS THE POWER TO ENFORCE THE  
6 GPL'S, WHICH IS ONE OF THE FREQUENTLY ASKED QUESTIONS.  
7 AND THAT'S AT PAGE 68 OF THE COMPENDIUM OF EXHIBITS.

8 AND WHAT THAT GOES TO IS IT'S NOT ONLY  
9 REITERATING THE POINTS THAT WE MADE, BUT FURTHER  
10 ESTABLISHING THE REASONABLE EXPECTATIONS OF THE PARTIES,  
11 AND THE CIRCUMSTANCES SURROUNDING THE -- WHEN PARTIES  
12 ENTER INTO THIS LICENSE, WHEN THE ENTITY THAT CREATED IT  
13 IS TELLING THE WORLD, THIS IS A COPYRIGHT LICENSE, THE  
14 ONLY PEOPLE WHO CAN ENFORCE IT ARE THE COPYRIGHT HOLDERS,  
15 SO IF YOU SEE A VIOLATION, LET THEM KNOW.

16 SO IT GOES, IT'S PARTICULARLY RELEVANT TO THE  
17 THIRD-PARTY BENEFICIARY IN THE REASONABLE EXPECTATIONS OF  
18 THE PARTIES DISCUSSION.

19 THE COURT: OKAY. I HAVE FIVE MORE I WANTED TO  
20 ADDRESS. OBJECTION NUMBER 45.

21 MR. WILLIAMS: SO THAT IS EXHIBIT 9, WHICH IS A  
22 PRINTOUT, AGAIN FROM THE WWW.GNU.ORG WEBSITE, DISCUSSING  
23 VIOLATIONS OF THE GPL'S HERE AT ISSUE. FOR THE SAME  
24 REASONS, IT'S RELEVANT, BECAUSE AGAIN, THIS IS THE  
25 CREATOR OF THAT LICENSE TELLING THE WORLD WHAT TO DO IF  
26 YOU SEE A VIOLATION, AND THAT ONLY THE COPYRIGHT HOLDER

1 HAS THE POWER TO ENFORCE THE GPL'S. AND THIS IS ALSO  
2 SOMETHING THAT SFC HAS PUBLICLY STATED MULTIPLE TIMES  
3 PRIOR TO THIS LITIGATION, AS WELL. SO AGAIN, IT GOES TO  
4 THE REASONABLE EXPECTATIONS OF THE PARTIES.

5 THE COURT: OKAY. AND OBJECTION NUMBER 46.

6 MR. WILLIAMS: 46, EXHIBIT 10, AGAIN, THIS IS  
7 COMMUNICATIONS BETWEEN SFC AND VIZIO PRE-LITIGATION. THE  
8 SUBJECT IS COPYRIGHT INFRINGEMENT REGARDING THESE CERTAIN  
9 MODELS. AND AGAIN, THESE ARE PARTY ADMISSIONS BY SFC  
10 THAT THE SAME CONDUCT THEY HAVE ALLEGED IN THIS LAWSUIT,  
11 THEY ARE CONTENDING CONSTITUTE COPYRIGHT INFRINGEMENT.

12 THE COURT: OBJECTION NUMBER 49.

13 MR. WILLIAMS: 49 IS EXHIBIT 16. SO THIS IS A  
14 PRINTOUT FROM THE FREE SOFTWARE FOUNDATION, FSF.ORG,  
15 WHICH IS THE ENTITY THAT DRAFTED THE GPL'S. IT'S A  
16 STATEMENT BY THE EXECUTIVE DIRECTOR AT THE TIME FOR THE  
17 FSF.

18 AND AS WE EXPLAINED WITH REGARD TO OUR RESPONSE,  
19 PART OF IT WAS, THE OBJECTION WAS IMPROPER OPINION. AND  
20 AS WE INDICATED, THIS IS FROM THE ENTITY THAT DRAFTED THE  
21 GPL'S, AND THAT THEY'RE QUALIFIED TO EXPLAIN THE PURPOSE  
22 AND INTENTS BEHIND THE COPYRIGHT LICENSE.

23 WITH REGARD TO THE HEARSAY OBJECTION, AGAIN, WE  
24 ARE NOT OFFERING IT FOR THE TRUTH, BUT RATHER INTENT OR  
25 STATE OF MIND, AND THEY GO TO THE REASONABLE EXPECTATIONS  
26 OF THE PARTIES.

1           AND THEN THERE IS AN AUTHENTICATION, BUT AGAIN,  
2 WE HAVE PROVIDED THESE ALL THROUGH, SORT OF, PAGE VAULT,  
3 WHICH IDENTIFIES THE INFORMATION ON THE COVER SHEET OF  
4 WHERE IT WAS PROVIDED FROM. I DON'T KNOW THAT SFC IS  
5 CHALLENGING THE LEGITIMACY OF IT, AS OPPOSED TO THE  
6 SUBSTANCE OF THE STATEMENT.

7           THE COURT: AND OBJECTION NUMBER 56.

8           MR. WILLIAMS: 56 IS TO EXHIBIT 23.

9           SO THIS IS A PRINTOUT FROM COPYLEFT.ORG. AND IN  
10 PARTICULAR, WE HAD HIGHLIGHTED LANGUAGE THAT SAYS,  
11 COPYRIGHT LAW -- LET'S SEE. IT STATES, "THEREFORE,  
12 COPYRIGHT HOLDERS OR THEIR AGENTS ARE ULTIMATELY THE SOLE  
13 AUTHORITIES TO ENFORCE COPYLEFT AND PROTECT THE RIGHTS OF  
14 USERS. ACTIONS FOR COPYRIGHT INFRINGEMENT ARE THE  
15 ULTIMATE LEGAL MECHANISM FOR ENFORCEMENT."

16           AND THIS PARTICULAR STATEMENT, AGAIN, GOES TO  
17 REASONABLE EXPECTATIONS OF THE PARTIES. AND I NEED TO  
18 CONFIRM THAT, I THINK IT WAS ALSO PREPARED BY SFC  
19 REPRESENTATIVES, SO THEY'RE PARTY ADMISSIONS.

20           THE COURT: ALL RIGHT. THOSE ARE THE ONES I  
21 WANTED TO ADDRESS. OKAY.

22           ALL RIGHT. I'LL HEAR FROM MISS GRAY. ARE YOU  
23 GOING FIRST, OR IS MR. THOMPSON?

24           MS. GRAY: I WILL BE GOING FIRST ON THE SUBJECT  
25 OF PREEMPTION, YOUR HONOR.

26           THE COURT: OKAY.

1 MS. GRAY: YOUR HONOR, IN THIS CASE, VIZIO  
2 ENTERED INTO A CONTRACT THAT ALLOWED IT THE FREEDOM TO  
3 INCORPORATE SOFTWARE DEVELOPED BY OTHERS INTO VIZIO'S  
4 SMART TVS, IN EXCHANGE ONLY FOR A PROMISE THAT IT PROVIDE  
5 COPIES OF THAT SOFTWARE TO CONSUMERS WHO BOUGHT THE TVS.

6 VIZIO NOW ARGUES THAT IT CAN BREACH THIS  
7 CONTRACT WITH IMPUNITY, BECAUSE ANY CLAIM FOR BREACH  
8 WOULD BE PREEMPTED BY COPYRIGHT LAW, AND BECAUSE THE  
9 PARTIES WHO ARE HARMED BY THE BREACH LACK STANDING TO  
10 ENFORCE THEIR RIGHTS.

11 THAT IS NOT AND CANNOT BE THE LAW. THREE  
12 DIFFERENT COURTS HAVE AGREED WITH CONSERVANCY'S POSITION  
13 UNDER IDENTICAL OR VIRTUALLY IDENTICAL FACTS. IN FACT,  
14 THE ONLY COURTS THAT WE KNOW OF TO ADDRESS THE SPECIFIC  
15 GPL PROVISION AT ISSUE HERE HAVE AGREED WITH OUR  
16 POSITION, AND HAVE SPECIFICALLY REJECTED THE POSITION  
17 THAT VIZIO WOULD HAVE THIS COURT ADOPT TODAY, INCLUDING  
18 THE FEDERAL DISTRICT COURT ON THE REMAND ORDER IN THIS  
19 CASE, WHICH IS HIGHLY PERSUASIVE.

20 NOW, VIZIO SAYS THIS SHOULD BE A COPYRIGHT  
21 INFRINGEMENT CLAIM, NOT A CONTRACT CLAIM. AND THEY HAVE  
22 POINTED OUT THAT THE COPYRIGHT ACT PREEMPTS STATE LAW  
23 CLAIMS THAT ASSERT RIGHTS THAT ARE EQUIVALENT TO  
24 COPYRIGHT. CALIFORNIA COURTS LOOK AT WHETHER A CLAIM HAS  
25 THIS EXTRA ELEMENT, RIGHT, THAT IS QUALITATIVELY  
26 DIFFERENT FROM THE ELEMENTS OF A COPYRIGHT CLAIM.

1           IN A BREACH OF CONTRACT CASE, THAT EXTRA ELEMENT  
2 HAS TO BE A CONTRACTUAL PROMISE CREATING A RIGHT THAT  
3 DOES NOT EXIST UNDER FEDERAL COPYRIGHT LAW.

4           AND I WANT TO ADD A LITTLE, A LITTLE ADDITIONAL  
5 INFORMATION, AND A LITTLE SHADING ON MR. WILLIAMS'S  
6 DESCRIPTION OF THE RIGHTS PROTECTED BY THE COPYRIGHT ACT,  
7 SO WE'RE REALLY CLEAR ON WHAT A COPYRIGHT CLAIM IS,  
8 VERSUS WHAT THE KIND OF BREACH OF CONTRACT CLAIM INVOLVED  
9 HERE IS.

10           COPYRIGHT ACT SECTION 106 RESERVES SIX RIGHTS OF  
11 A COPYRIGHT OWNER. REPRODUCTION. THAT'S MAKING COPIES,  
12 RIGHT? ADAPTATION, WHICH THE STATUTE REFERS TO AS MAKING  
13 A DERIVATIVE WORK, TAKING ONE WORK AND PUTTING IT INTO  
14 ANOTHER FORM. LIKE YOU TAKE THE SPIDERMAN COMIC BOOK AND  
15 MAKE A MOVIE OUT OF IT, RIGHT? THAT'S A DERIVATIVE WORK.  
16 REPRODUCTION, ADAPTATION, DISTRIBUTION, PUBLIC  
17 PERFORMANCE, PUBLIC DISPLAY OF THE WORK. AND LASTLY,  
18 PUBLIC PERFORMANCE OF A SOUND RECORDING BY DIGITAL AUDIO  
19 TRANSMISSION.

20           THOSE ARE THE SIX RIGHTS THAT ARE RESERVED TO  
21 THE COPYRIGHT OWNER. ONLY THE COPYRIGHT OWNER CAN ENGAGE  
22 IN THESE ACTS.

23           YOUR HONOR, I WOULD LIKE TO REFER TO COPYRIGHT.  
24 I DO A LOT OF PUBLIC SPEAKING ON COPYRIGHT, AND I  
25 GENERALLY REFER TO COPYRIGHT AS THE HAMMER TIME RULE.  
26 REMEMBER THAT SONG FROM THE '90'S? HAMMER, MC HAMMER,



1 "CAN'T TOUCH THIS"? COPYRIGHT IS THE "CAN'T TOUCH THIS"  
2 RULE, BECAUSE IT ALLOWS THE COPYRIGHT OWNER TO TELL THE  
3 REST OF THE WORLD, YOU CAN'T TOUCH THIS. IT IS AN  
4 EXCLUSIONARY RULE. EVERYONE ELSE IS EXCLUDED FROM  
5 ENGAGING IN THOSE ACTS, REPRODUCTION, ET CETERA, UNLESS  
6 THEY HAVE PERMISSION FROM THE COPYRIGHT OWNER.

7 AND THE COPYRIGHT ACT PREEMPTS CLAIMS THAT STEM  
8 FROM THOSE ACTS, THOSE SIX ACTS, AND THOSE SIX ACTS  
9 ALONE, REGARDLESS OF HOW THEY'RE CHARACTERIZED.

10 NOW, WHAT THE COPYRIGHT ACT DOESN'T DO, AND YOU  
11 WILL HAVE HEARD THAT THIS WAS NOT IN THE LIST OF SIX  
12 THINGS THAT I JUST RATTLED OFF. IT DOESN'T EMPOWER THE  
13 COPYRIGHT OWNER TO REQUIRE A THIRD PARTY TO ENGAGE IN ANY  
14 AFFIRMATIVE ACTS.

15 FOR EXAMPLE, THE COPYRIGHT ACT DOESN'T EMPOWER  
16 MC HAMMER TO FORCE ME TO GIVE THE COURT A COPY OF "CAN'T  
17 TOUCH THIS," BECAUSE I REFERRED TO IT IN THIS PROCEEDING,  
18 RIGHT?

19 IF A COPYRIGHT OWNER WANTS TO REQUIRE A THIRD  
20 PARTY TO DO AN AFFIRMATIVE ACT WITH A COPYRIGHTED WORK,  
21 THAT RIGHT HAS TO COME FROM SOMEWHERE OTHER THAN THE  
22 COPYRIGHT ACT. AND HERE, THAT'S THE CONTRACT, THE GPL.  
23 BUT THERE ARE TWO GENERAL PUBLIC LICENSES INVOLVED HERE,  
24 BUT I'M GOING TO REFER TO THEM COLLECTIVELY AS THE GPL,  
25 BECAUSE THEY'VE GOT ESSENTIALLY THE SAME LANGUAGE IN  
26 THEM.

1 SO THE RIGHT TO SOURCE CODE HERE, THE  
2 DISTRIBUTION RIGHT THAT WE ARE TALKING ABOUT, IS GRANTED  
3 BY THE GPL, AND NOT BY THE COPYRIGHT ACT. NOW, COPYRIGHT  
4 PREEMPTION OF CLAIMS IS VERY WELL ILLUSTRATED IN THE  
5 KABEHIE CASE, WHICH INVOLVED A CONTRACT FOR THE PURCHASE  
6 OF EXCLUSIVE RIGHTS TO MUSIC COMPOSITIONS. AND THERE WE  
7 ARE TALKING ABOUT, ESSENTIALLY, LIKE, SHEET MUSIC TO  
8 SONGS.

9 AND THERE WERE A NUMBER OF DIFFERENT COPYRIGHT  
10 AND CONTRACT CLAIMS INVOLVED THERE, AND THE COURT  
11 CONDUCTED A FACT-SPECIFIC ANALYSIS OF THE PARTICULAR  
12 PROMISES ALLEGED TO HAVE BEEN BREACHED, AND THE  
13 PARTICULAR RIGHTS ALLEGED TO HAVE BEEN VIOLATED. AND  
14 THIS INVOLVED THE SALE OF THE SELLER, OF THE COPYRIGHT  
15 OWNER, OF THESE RIGHTS IN THESE COMPOSITIONS TO A BUYER.

16 AND AFTER THE SALE OCCURRED, THE SELLER  
17 CONTINUED TO COPY AND DISTRIBUTE THE COMPOSITIONS AT  
18 ISSUE, EVEN THOUGH THEY HAD ALREADY PURPORTEDLY SOLD THEM  
19 TO SOMEONE ELSE.

20 AND THAT WAS A COPYRIGHT CLAIM, RIGHT? BECAUSE  
21 REMEMBER, REPRODUCTION AND DISTRIBUTION ARE RIGHTS  
22 PROTECTED BY THE COPYRIGHT ACT. SO THAT WAS SIMPLY THE  
23 REPRODUCTION AND DISTRIBUTION RIGHTS PROTECTED BY  
24 COPYRIGHT LAW. THAT WAS A COPYRIGHT CLAIM, AND WAS  
25 PREEMPTED. NO BREACH OF CONTRACT CLAIM FOR THE  
26 REPRODUCTION AND DISTRIBUTION OF THOSE COMPOSITIONS.

1 BY CONTRAST, THERE WAS ANOTHER ISSUE IN DISPUTE  
2 IN THAT CASE, AND THAT WAS, THE SELLER WAS REQUIRED,  
3 UNDER THE TERMS OF THE SALE CONTRACT, TO DELIVER A COPY  
4 OF WHAT WE CALL THE MASTER RECORDING. THAT'S THE  
5 ORIGINAL RECORDING OF THE SONG, RIGHT? DELIVER A COPY OF  
6 THE MASTER RECORDING TO THE BUYER. AND THEY DIDN'T DO  
7 THAT. BUT THAT'S NOT SOMETHING THAT YOU FIND IN THE  
8 COPYRIGHT ACT. THAT'S NOT A RIGHT IN THE COPYRIGHT ACT.  
9 THAT WAS A RIGHT THAT WAS GRANTED TO THE BUYER IN THE  
10 CONTRACT.

11 AND SO THAT CLAIM WAS, INVOLVED AN EXTRA  
12 ELEMENT, AND WAS QUALITATIVELY DIFFERENT FROM A COPYRIGHT  
13 INFRINGEMENT CLAIM. SO THAT CLAIM WAS NOT PREEMPTED.

14 AND SO THE KABEHIE COURT LISTED A WHOLE BUNCH OF  
15 EXAMPLES OF THE TYPES OF CLAIMS THAT ARE PREEMPTED. AND  
16 IF YOU LOOK AT THEM, YOU'LL SEE THEY ALL GO BACK TO THAT  
17 LIST OF SIX THINGS THAT I MENTIONED AT THE OUTSET.  
18 VIOLATION OF EXCLUSIVE EXHIBITION RIGHTS. THAT'S  
19 DISTRIBUTION AND DISPLAY.

20 THE RELEASE OF PROTECTED IMAGES TO THE PUBLIC.  
21 THAT'S REPRODUCTION AND DISTRIBUTION.

22 COPYING OF A SCRIPT, THAT'S REPRODUCTION. THESE  
23 ALL IMPLICATE SECTION 106 RIGHTS.

24 THE EXAMPLES THAT COURT GAVE OF WHAT CONTRACT  
25 CLAIMS THAT ARE NOT PREEMPTED: FAILURE TO PAY ROYALTIES,  
26 RIGHT? A PAYMENT REQUIRED BY A CONTRACT. AN

1 UNAUTHORIZED DISCLOSURE OF CONFIDENTIAL INFORMATION  
2 PROTECTED BY A CONTRACT. AND SO ON AND SO FORTH.

3 THERE ARE A NUMBER OF GREAT EXAMPLES IN THAT  
4 CASE. BUT THE COPYRIGHT ACT DOESN'T GRANT COPYRIGHT  
5 OWNERS THESE RIGHTS; CONTRACTS DO.

6 NOW, I WANT TO TALK A LITTLE BIT ABOUT THE  
7 COURTS THAT HAVE ADDRESSED PREEMPTION IN THIS CONTEXT,  
8 BECAUSE WE HAVE A COUPLE OF VERY ON-POINT CASES WHERE  
9 COURTS HAVE ADDRESSED PREEMPTION ISSUES, SPECIFICALLY  
10 APPLYING TO THE GPL AND THE DISTRIBUTION OF SOURCE CODES,  
11 WHICH IS EXACTLY WHAT WE HAVE HERE.

12 AND ONE IS THE VERSATA CASE, WHICH IS CITED IN  
13 OUR BRIEF, WHERE THE PLAINTIFF INCORPORATED A  
14 GPL-GOVERNED PROGRAM INTO ITS OWN SOFTWARE, SUED A  
15 LICENSEE OF ITS SOFTWARE FOR BREACH OF A BROADER MASTER  
16 LICENSE AGREEMENT, AND THE LICENSEE COUNTERCLAIMED FOR  
17 BREACH OF THE GPL'S SOURCE CODE PROVISION, EVEN THOUGH  
18 THE LICENSEE WASN'T A PARTY TO THAT CONTRACT.

19 AND THE COURT SAID THE SOURCE CODE PROVISION WAS  
20 AN ADDITIONAL OBLIGATION IN THAT CONTRACT. IT WAS AN  
21 AFFIRMATIVE PROMISE TO MAKE, FOR THE LICENSEE TO MAKE ITS  
22 OWN SOFTWARE OPEN SOURCE, BECAUSE IT USED OPEN SOURCE  
23 MATERIAL IN ITS SOFTWARE.

24 THE GPL SOURCE CODE PROVISION CREATES WHAT THAT  
25 COURT VERY APTLY TERMED, ESSENTIALLY, OPPOSITE RIGHTS  
26 FROM THOSE CREATED BY COPYRIGHT, AND THIS GOES BACK TO

1 THE, YOU KNOW, THE EXCLUSIONARY RULE. AND COPYRIGHT  
2 ALLOWS YOU TO EXCLUDE, BUT DOESN'T GIVE THE COPYRIGHT  
3 OWNER THE POWER TO FORCE SOMEBODY ELSE TO DISTRIBUTE  
4 SOMETHING. THAT COMES FROM THE CONTRACT.

5 SO THE COURT SAID THE VIRAL COMPONENT REQUIRING  
6 THE FURTHER DISTRIBUTION OF THE GPL IS SEPARATE AND  
7 DISTINCT FROM COPYRIGHT OBLIGATIONS, AND AGREED WITH THE  
8 CONSERVANCY'S POSITION IN THIS CASE.

9 THE OTHER CASE IS ARTIFEX VERSUS HANCOM, A  
10 NORTHERN DISTRICT OF CALIFORNIA CASE IN WHICH THE  
11 DEFENDANT INCORPORATED GPL SOFTWARE INTO A LARGER  
12 PROGRAM, FAILED TO DISTRIBUTE ITS SOFTWARE WITH THE  
13 SOURCE CODE. AND THE COURT HELD THAT THE FAILURE TO  
14 DISCLOSE THAT SOURCE CODE WAS THE REQUIRED EXTRA ELEMENT,  
15 IN ADDITION TO REPRODUCTION OR DISTRIBUTION, SUFFICIENT  
16 TO BRING THE CLAIM OUT OF THE COPYRIGHT ACT, AND TO  
17 CREATE A NONPREEMPTIVE CONTRACT CLAIM.

18 THE COURT FOLLOWED THE VERSATA COURT, REJECTED  
19 JACOBSEN VERSUS KATZER, WHICH VIZIO RELIES ON. AND  
20 WHAT'S PARTICULARLY APT AND APPLICABLE ABOUT THIS CASE IS  
21 IT REALLY HIGHLIGHTS THE DISTINCTION BETWEEN THE  
22 COPYRIGHT AND THE CONTRACT CLAIMS. BECAUSE IN THAT CASE,  
23 THE PLAINTIFF ALSO BROUGHT, IN ADDITION TO THAT BREACH OF  
24 CONTRACT CLAIM FOR FAILURE TO DISTRIBUTE THE SOURCE CODE,  
25 ALSO BROUGHT A COPYRIGHT INFRINGEMENT CLAIM, BECAUSE THE  
26 BREACH OF THE LICENSE EFFECTIVELY TERMINATED THE LICENSE.

1 SO AS A COPYRIGHT OWNER, THE PLAINTIFF SUED FOR COPYRIGHT  
2 INFRINGEMENT TO STOP THE DEFENDANT FROM CONTINUING TO  
3 DISTRIBUTE THE SOFTWARE, AND FOR BREACH OF THE SOURCE  
4 CODE PROVISION FOR THEIR FAILURE TO DISTRIBUTE THE SOURCE  
5 CODE, AS REQUIRED UNDER THE GPL. THESE TWO CLAIMS CAN,  
6 AND DO, ARISE FROM THE SAME CONDUCT. AND THAT WAS  
7 RECOGNIZED BY THE ARTIFEX COURT.

8 AND THE FEDERAL DISTRICT COURT, ON THE REMAND  
9 ORDER, ALSO FOUND THESE CASES PERSUASIVE, AND RELIED ON  
10 THEM IN FINDING THAT REMAND WAS APPROPRIATE HERE, BECAUSE  
11 THERE IS NO PREEMPTION.

12 I WANT TO TALK FOR A MINUTE ABOUT THE JACOBSEN,  
13 THE FEDERAL CIRCUIT OPINION IN JACOBSEN, WHICH  
14 MR. WILLIAMS TALKED ABOUT ALSO. THAT, SIGNIFICANTLY, WAS  
15 NOT A PREEMPTION CASE. AND THERE IS A BIG DIFFERENCE  
16 BETWEEN THAT CASE AND THIS CASE FACTUALLY IN THAT THE  
17 PLAINTIFF IN THAT CASE WAS A COPYRIGHT OWNER, LIKE THE  
18 PLAINTIFF IN THE ARTIFEX CASE, RIGHT? PLAINTIFF WAS A  
19 COPYRIGHT OWNER, AND BROUGHT A CLAIM FOR COPYRIGHT  
20 INFRINGEMENT, SEEKING A PRELIMINARY INJUNCTION TO STOP  
21 THE DEFENDANT FROM CONTINUING TO EXPLOIT THE SOFTWARE AT  
22 ISSUE.

23 THAT WAS AN OPEN SOURCE LICENSE CALLED THE  
24 ARTISTIC LICENSE, WHICH REQUIRED THE LICENSEE, WHEN  
25 MODIFYING THE SOFTWARE, TO INCLUDE COPYRIGHT NOTICES AND  
26 TRACK CHANGES WHEN DISTRIBUTING THE SOFTWARE.

1 THE TRIAL COURT HAD SAID, ON A MOTION FOR  
2 PRELIMINARY INJUNCTION, THAT YOU HAVE A CLAIM FOR BREACH  
3 OF CONTRACT, THE PLAINTIFF APPEALED, AND THE FEDERAL  
4 CIRCUIT HELD THAT THE PLAINTIFF HAD MADE OUT A PRIMA  
5 FACIE CASE FOR COPYRIGHT INFRINGEMENT.

6 AND THAT WAS THE CONTEXT WITHIN WHICH THAT COURT  
7 EVALUATED WHETHER THE USE BY THE DEFENDANTS WAS OUTSIDE  
8 THE SCOPE OF THE LICENSE. THE QUESTION WAS WHETHER THERE  
9 WAS A LIKELIHOOD OF SUCCESS ON THE MERITS OF COPYRIGHT  
10 INFRINGEMENT VERSUS A CONTRACTUAL DEFENSE. IT WAS NOT A  
11 PREEMPTION DECISION. THE NATURE OF THAT CLAIM SOUNDED,  
12 IN COPYRIGHT, UNLIKE THE NATURE OF THE CLAIM HERE.

13 BEFORE I CONCLUDE, I WANT TO TALK A LITTLE BIT  
14 ABOUT THIS ISSUE OF WHEN SOMETHING IS A CONDITION VERSUS  
15 WHEN SOMETHING IS A COVENANT. BECAUSE HONESTLY, YOUR  
16 HONOR, THAT JUST DOESN'T EVEN MATTER HERE. IT DOESN'T  
17 MATTER WHETHER THESE PROVISIONS ARE CONDITIONS OR  
18 COVENANTS, BECAUSE FOR ONE THING, THIS IS FOR TWO  
19 REASONS.

20 THE FIRST IS THAT UNDER CALIFORNIA LAW, A  
21 CONTRACTUAL PROVISION CAN BE BOTH A CONDITION AND A  
22 COVENANT. THAT'S VERY CLEAR. AND WHERE A CONDITION IS  
23 WITHIN THE CONTROL OF THE LICENSEE, IT IS TREATED AS A  
24 COVENANT THAT THEY PROMISE TO FULFILL. AND WE CITE SOME  
25 LANGUAGE FROM, YOU KNOW, BLACK LETTER LAW, FROM  
26 WILLISTON, WHICH MAKES THAT POINT VERY NICELY.

1           {WHEN THE OCCURRENCE OF THE CONDITION IS LARGELY  
2 OR EXCLUSIVELY WITHIN THE CONTROL OF ONE PARTY, SO THAT  
3 THE OTHER PARTY IS SIGNIFICANTLY OR TOTALLY DEPENDENT ON  
4 THE CONTROLLING PARTY, THE EXPRESS LANGUAGE OF CONDITION  
5 WILL TYPICALLY GIVE RISE TO AN IMPLIED PROMISE OF ONE  
6 SORT OR ANOTHER." THAT'S WILLISTON, SECTION 3815, WHICH  
7 IS CITED IN OUR OPPOSITION BRIEF.

8           SO A PROVISION CAN BE BOTH A CONDITION AND A  
9 COVENANT AT THE SAME TIME. AND IMPORTANTLY, EVEN IF THIS  
10 WERE A CONDITION, THAT'S NOT THE END OF THE QUESTION.  
11 AND THIS IS THE SECOND REASON WHY IT DOESN'T MATTER  
12 WHETHER THIS IS A CONDITION OR A COVENANT. IT'S BECAUSE  
13 SLAPPING THE LABEL OF A CONDITION ON SOMETHING ISN'T THE  
14 END OF THE INQUIRY. AND THE ARGUMENT IS A LITTLE  
15 REDUCTIVE TO SAY THAT IF IT'S A CONDITION, IT'S  
16 AUTOMATICALLY COPYRIGHT INFRINGEMENT, BECAUSE THE CASE  
17 LAW SHOWS, INCLUDING THE CASE LAW CITED BY VIZIO IN THIS  
18 CASE, SAYS THAT YOU HAVE TO, IN ORDER FOR THERE TO BE A  
19 COPYRIGHT CLAIM, THE COPYING HAS TO BE GROUNDED, OR THE  
20 CLAIM HAS TO BE, THE BREACHED PROVISION HAS TO BE A  
21 CONDITION, AND THAT CONDITION AND THE COMPLAINT MUST BE  
22 GROUNDED IN AN EXCLUSIVE RIGHT OF COPYRIGHT. THAT'S  
23 GOING BACK TO THE BIG SIX THAT I CITED AT THE BEGINNING;  
24 REPRODUCTION, DISTRIBUTION, ET CETERA, RIGHT?

25           SO OTHERWISE, AND, YOU KNOW, IN THE MDY CASE,  
26 THE NINTH CIRCUIT TALKED ABOUT THIS, THEY WERE



1 INTERPRETING A CONTRACT UNDER DELAWARE LAW, NOT  
2 CALIFORNIA LAW, SO IT'S A LITTLE DIFFERENT FROM OUR CASE.  
3 THE CONTRACT INTERPRETATION ISSUES THERE ARE DIFFERENT  
4 FROM IN OUR CASE. BUT THEY BASICALLY, THEY SAID THAT IF  
5 THEY WERE TO RULE ANY DIFFERENTLY AROUND THIS ISSUE OF  
6 WHETHER SOMETHING IS A COPYRIGHT INFRINGEMENT CLAIM OR A  
7 CONTRACT CLAIM, ANY COPYRIGHT OWNER COULD DESIGNATE ANY  
8 DISFAVORED CONDUCT DURING THE USE OF SOFTWARE AS  
9 COPYRIGHT INFRINGEMENT BY PURPORTING TO CONDITION THE  
10 LICENSE ON IT, ON THE PLAINTIFF -- ON THE PARTY NOT DOING  
11 IT. AND IN THAT CASE, IT WAS AN ONLINE GAME THAT PARTIES  
12 WERE PLAYING, AND THE CONDUCT AT ISSUE WAS THE USE OF A  
13 BOT TO ALLOW USERS TO PLAY THE GAME, RIGHT, TO ADVANCE IN  
14 THE GAME MORE QUICKLY. AND THAT WAS PROHIBITED BY THE  
15 TERMS OF USE OF THE GAME.

16 AND IN THE LITIGATION, THE DISPUTE WAS WHETHER  
17 OR NOT THE BREACH OF THAT PROVISION OF THE TERMS OF USE  
18 GAVE RISE TO A COPYRIGHT CLAIM OR A CONTRACT CLAIM. AND  
19 THE COURT CONCLUDED IT GAVE RISE TO A CONTRACT CLAIM,  
20 BECAUSE USING THE BOT TO PLAY THE GAME, VIOLATING THE  
21 PROVISION THAT SAYS YOU CAN'T USE A BOT TO PLAY THIS  
22 GAME, DOESN'T IMPLICATE ANY OF THE BIG SIX. IT'S NOT  
23 REPRODUCTION, IT'S NOT DISTRIBUTION, IT'S NOT, ET CETERA,  
24 ET CETERA, ANY OF THOSE THINGS.

25 SO TO SIMPLY SAY, WELL, IT'S A CONDITION, AND  
26 THERE IS LANGUAGE OF CONDITION IN THIS AGREEMENT, ISN'T

1 THE END OF THE STORY. BECAUSE IT CAN BE A CONDITION AND  
2 A COVENANT, AND BECAUSE THE ACTUAL ACT THAT IS COMPLAINED  
3 OF HERE ISN'T ONE OF THE BIG SIX.

4 THE COMPLAINT HERE IS THAT IS THAT VIZIO  
5 INCORPORATED THIS SOFTWARE INTO ITS TV'S, AND FAILED TO  
6 DISTRIBUTE THE SOURCE CODE DOWNSTREAM TO BUYERS OF THE  
7 TV'S. IT IS THE FAILURE OF THE DISTRIBUTION, IT IS THE  
8 FAILURE TO PROVIDE A COPY OF THE SOURCE CODE THAT IS THE  
9 CLAIM HERE, NOT THE REPRODUCTION OF THE SOFTWARE ITSELF.

10 AND THAT IS A RIGHT THAT'S GRANTED UNDER THE  
11 CONTRACT AND NOT UNDER THE COPYRIGHT ACT. AND THAT IS  
12 WHY THERE IS NO PREEMPTION HERE.

13 IF YOUR HONOR HAS ANY QUESTIONS NOW, I WOULD BE  
14 HAPPY TO ADDRESS THEM. OTHERWISE, I'LL TURN IT OVER TO  
15 MR. THOMPSON TO TALK ABOUT --

16 THE COURT: OKAY.

17 MS. GRAY: -- THE THIRD-PARTY BENEFICIARY  
18 ISSUES.

19 THE COURT: I DON'T HAVE ANY QUESTIONS, BUT I'M  
20 AT 12:20. I'M SORRY; CAN YOU COME BACK AT 1:30?

21 MS. GRAY: ABSOLUTELY.

22 MR. WILLIAMS: SURE.

23 (LUNCH RECESS.)

24

25

26

1 SANTA ANA, CALIFORNIA - THURSDAY, OCTOBER 5, 2023

2 AFTERNOON SESSION

3 --000--

4 THE COURT: WE'RE BACK ON THE SOFTWARE FREEDOM  
5 CONSERVANCY CASE.

6 IS IT MR. THOMAS?

7 MR. THOMPSON: THOMPSON.

8 THE COURT: GO AHEAD.

9 MR. THOMPSON: GOOD AFTERNOON, YOUR HONOR.

10 VIZIO DOES NOT DISPUTE THAT THE RECIPIENTS OF LICENSED  
11 SOFTWARE HAVE A RIGHT TO SOURCE CODE UNDER THE GPL'S, AND  
12 YET VIZIO ARGUES THAT AS A MATTER OF LAW THOSE RECIPIENTS  
13 OF LICENSED SOFTWARE MAY NOT ENFORCE THE RIGHT THAT WE  
14 INDISPUTABLY ENJOY, BECAUSE SOMEHOW IT WOULD BE  
15 INCONSISTENT WITH THE OBJECTIVES OF THE CONTRACT AND THE  
16 REASONABLE EXPECTATIONS OF THE CONTRACTING PARTIES.

17 NOTHING COULD BE FURTHER FROM THE TRUTH. THE  
18 REQUIREMENT THAT THIRD-PARTY ENFORCEMENT BE CONSISTENT  
19 WITH THE OBJECTIVES OF THE CONTRACT COMES FROM  
20 PROFESSOR EISENBERG, AND THE SUPREME COURT GAVE HIM  
21 CREDIT FOR THAT TEST IN THE GOONEWARDENE CASE.

22 IN THE SAME LAW REVIEW ARTICLE WHERE PROFESSOR  
23 EISENBERG ANNOUNCED THAT TEST, HE ALSO WROTE, "WHEN THE  
24 PURPOSE OF THE PROMISEE IS TO CONFER A RIGHT ON THE  
25 BENEFICIARY, ENFORCEMENT IS APPROPRIATE." THAT'S AT  
26 PAGE 1374 OF HIS LAW REVIEW ARTICLE.

1           IN THE PRIOR PAGE, PAGE 1373, HE WROTE, "THIS IS  
2 A WELL-ESTABLISHED CATEGORY OF THIRD PARTIES WHO CAN  
3 ENFORCE CONTRACTS."

4           NOW, WE CITED A SIMILAR STATEMENT IN OUR BRIEF  
5 AT PAGE 1391, "ALLOWING DONEE BENEFICIARIES TO ENFORCE  
6 CONTRACTS UNDER WHICH THEY WILL BENEFIT IS A NECESSARY OR  
7 IMPORTANT MEANS OF EFFECTUATING THE PERFORMANCE  
8 OBJECTIVES OF THE PARTIES TO THE CONTRACT."

9           SO HERE, WE HAVE A STATEMENT BY THE PERSON WHO  
10 CAME UP WITH THE TEST, WHO IS CREDITED BY THE SUPREME  
11 COURT AS HAVING DONE SO, WHO IS SPEAKING TO THE PRECISE  
12 ISSUE IN THIS CASE, AND WHO IS SAYING, WHEN THE PURPOSE  
13 OF THE CONTRACT IS TO CONFER A RIGHT ON THE THIRD PARTY,  
14 ENFORCEMENT IS APPROPRIATE. NOW, THAT SHOULD RESOLVE THE  
15 ISSUE.

16           NOW, IT ALSO BEARS EMPHASIZING THAT THE PURPOSE  
17 OF THIS CONTRACT IS TO PROMOTE THE DEVELOPMENT OF FREE  
18 AND OPEN SOURCE SOFTWARE. AND FREE SHARING OF SOURCE  
19 CODE IS ESSENTIAL TO THAT PURPOSE AND OBJECTIVE, BECAUSE  
20 THE SOURCE CODE IS NEEDED TO MODIFY AND CONTINUE THE  
21 DEVELOPMENT OF THE SOFTWARE.

22           THE REQUIREMENT THAT THIRD-PARTY ENFORCEMENT BE  
23 CONSISTENT WITH THE REASONABLE EXPECTATIONS OF THE  
24 CONTRACTING PARTIES REFLECTS THE TEACHING OF PRIOR  
25 CALIFORNIA DECISIONS. THAT IS ALSO A QUOTE FROM THE  
26 GOONEWARDENE CASE. AND VIZIO HAS CITED NO SUCH PRIOR

1 CALIFORNIA DECISIONS IN SUPPORT OF ITS POSITION THAT --  
2 IN SUPPORT OF ITS POSITION IN THIS CASE.

3 RATHER, IT HAS CITED A SERIES OF INAPPOSITE  
4 SUBSEQUENT CALIFORNIA DECISIONS UNDER WHICH THE THIRD  
5 PARTY DID NOT HAVE ANY RIGHT UNDER THE CONTRACT IT WAS  
6 SEEKING TO ENFORCE.

7 IN THE WEXLER CASE, FOR EXAMPLE, THE DAUGHTER  
8 HAD NO RIGHT UNDER THE INSURANCE CONTRACT SHE WAS SEEKING  
9 TO ENFORCE, BECAUSE THEY ONLY COVERED NAMED INSURED AND  
10 SHE WAS NOT A NAMED INSURED.

11 IN THE CITY OF OAKLAND, THE OAKLAND RAIDERS  
12 CASE, THE CITY OF OAKLAND HAD NO RIGHT UNDER THE NFL  
13 RELOCATION POLICY, BECAUSE THAT POLICY LEFT UNFETTERED  
14 DISCRETION TO THE NFL TEAM MEMBERS. THAT'S AN EXACT  
15 QUOTE FROM THE CASE. THEY HAD UNFETTERED DISCRETION TO  
16 DECIDE ON TEAM RELOCATIONS.

17 SO OF COURSE, THE CITY COULD NOT INTERFERE WITH  
18 THEIR UNFETTERED DISCRETION BY DEMANDING A CERTAIN  
19 OUTCOME UNDER THE RELOCATION POLICY.

20 THIS CASE IS DIAMETRICALLY OPPOSED. VIZIO HAS  
21 NO DISCRETION ABOUT WHETHER TO SHARE SOURCE CODE. THE  
22 CONTRACT CLEARLY REQUIRES IT, AND THE CONTRACT CLEARLY  
23 CONFERS A RIGHT ON THE RECIPIENTS OF LICENSED SOFTWARE TO  
24 DEMAND THE SOURCE CODE.

25 SO THAT'S, THESE ARE THE TWO, THE TWO PRONGS OF  
26 THE THIRD PART OF THE TEST. THE FIRST PART AND THE

1 SECOND PART ARE NOT IN DISPUTE, AND THE TWO PRONGS OF THE  
2 THIRD PART ARE EASILY RESOLVED BY THE FACT THAT  
3 RECIPIENTS OF LICENSED SOFTWARE HAVE A RIGHT TO THE  
4 SOURCE CODE, AND THERE IS NO CALIFORNIA DECISION THAT  
5 WOULD DENY THEM THAT RIGHT.

6 NOW, WHEN A PARTY HAS A RIGHT, IT IS ONLY  
7 REASONABLE TO EXPECT THAT IT SHOULD ALSO HAVE A REMEDY,  
8 AND A MEANS OF ENFORCING THAT RIGHT. BECAUSE A RIGHT  
9 WITHOUT A REMEDY AND A RIGHT WITHOUT A MEANS OF  
10 ENFORCEMENT IS NOT A RIGHT AT ALL. IT'S WORTHLESS,  
11 FRANKLY.

12 AND VIZIO IS TAKING THE POSITION THAT  
13 ENFORCEMENT BY COPYRIGHT HOLDERS OUGHT TO BE SUFFICIENT,  
14 BUT COPYRIGHT IS A DIFFERENT RIGHT. COPYRIGHT HOLDERS  
15 ARE DIFFERENT PLAINTIFFS. WE ARE NOT ASSERTING COPYRIGHT  
16 IN THIS CASE. WHAT WE ARE ASSERTING IS OUR RIGHT TO  
17 SOURCE CODE, WHICH EXISTS UNDER THE TERMS OF THE  
18 CONTRACT.

19 NOW, THERE ARE ADDITIONAL REASONS ADDRESSED IN  
20 OUR BRIEF WHY ENFORCEMENT BY COPYRIGHT HOLDERS IS NOT  
21 SUFFICIENT. THEY MAY NOT KNOW OF THE BREACH. THEY MAY  
22 NOT BE MOTIVATED, WILL NOT BE MOTIVATED TO ENFORCE THE  
23 BREACH. AND IMPORTANTLY, THEY, IT IS NOT AT ALL CLEAR  
24 HOW THEY COULD SHOW ELIGIBILITY FOR SPECIFIC PERFORMANCE  
25 FOR INJUNCTIVE RELIEF. SPECIFICALLY, HOW WOULD THEY SHOW  
26 IRREPARABLE HARM?

1           THEY ARE FREELY ALLOWING OTHERS TO USE THE  
2           COPYRIGHT UNDER THE TERMS OF THE CONTRACT. ONE PARTY  
3           CONTINUES TO USE THE COPYRIGHT, BUT NOT IN COMPLIANCE  
4           WITH THE TERMS OF THE CONTRACT, AND THE COPYRIGHT HOLDER  
5           SUES FOR INJUNCTIVE RELIEF. HOW DO THEY SHOW IRREPARABLE  
6           HARM?

7           WELL, IN THIS CASE THE PARTY THAT IS HARMED IS  
8           THE PARTY DEMANDING THE SOURCE CODE, DENIED THE RIGHT TO  
9           SOURCE CODE. AND WE NEED THE SOURCE CODE TO MODIFY THE  
10          SOFTWARE. THAT IS OUR IRREPARABLE HARM.

11          SO THIS IS A CLEAR FORM OF HARM THAT EXISTS IN  
12          THIS CASE, AND IT'S NOT CLEAR HOW A COPYRIGHT HOLDER  
13          COULD SHOW THAT HARM, EVEN IF THEY OTHERWISE WERE  
14          INTERESTED AND MOTIVATED IN ENFORCING A BREACH, AND ALSO  
15          ABLE TO DO SO.

16          NOW, IT ALSO BEARS MENTION THAT THE GPL'S  
17          SPECIFICALLY STATE THAT THE PARTIES ARE NOT RESPONSIBLE  
18          FOR ENFORCING COMPLIANCE BY OTHERS. IT'S IN SECTION SIX  
19          OF THE GPL. AND SO IF WE WERE TO ASK A COPYRIGHT HOLDER  
20          TO ENFORCE, THEY COULD EASILY SAY NO. IT'S ENTIRELY AT  
21          THEIR DISCRETION, AND THEY COULD POINT TO THE CONTRACT  
22          AND SAY, WE DON'T HAVE TO ENFORCE UNDER THE TERMS OF THIS  
23          CONTRACT.

24          AND WHAT KIND OF RIGHT IS THAT, IF WE HAVE TO  
25          PLEAD FOR SOMEONE ELSE TO ENFORCE THEIR RIGHTS, AND IF  
26          THEY CAN SIMPLY REFUSE TO DO IT? THAT'S NOT A RIGHT AT

1 ALL.

2 AND YET, THE PREAMBLE OF THE GPL'S IS VERY  
3 CLEAR, THAT RECIPIENTS OF LICENSED SOFTWARE HAVE A RIGHT  
4 TO THE SOURCE CODE, WHICH IS ESSENTIAL TO FREE AND OPEN  
5 SOURCE SOFTWARE DEVELOPMENT.

6 NOW, VIZIO HAS ALSO TAKEN THE POSITION THAT IF  
7 YOU RULE IN OUR FAVOR IN THIS CASE, IT WILL LEAD TO A  
8 PROLIFERATION OF LITIGATION. AND THAT IS SIMPLY NOT TRUE  
9 FOR ANY NUMBER OF REASONS. NOW, IT IS NO COINCIDENCE  
10 THAT THE PLAINTIFF IN THIS CASE IS A NONPROFIT. WHAT  
11 WE'RE SEEKING IS SOURCE CODE. THERE IS NO FINANCIAL  
12 INCENTIVE HERE, APART FROM OUR DESIRE TO VINDICATE THE  
13 GPL'S AND THE RIGHT TO SOURCE CODE UNDER THE GPL'S. AND  
14 IF YOU RULE IN OUR FAVOR, VIZIO HAS TOLD YOU THERE WOULD  
15 BE A PARADE OF HORRIBLES.

16 WELL, IT SIMPLY IS FANCIFUL THINKING, BECAUSE  
17 THERE IS NO FINANCIAL INCENTIVE. IT'S EXPENSIVE TO FILE  
18 LITIGATION, TO SEE IT THROUGH. IT'S COSTLY, IT'S  
19 BURDENSOME. AND HERE THERE IS NO FINANCIAL INCENTIVE.  
20 THERE IS SIMPLY A DEMAND THAT VIZIO ABIDE BY THEIR  
21 OBLIGATIONS UNDER THE CONTRACT, WHICH THEY AGREED TO, AND  
22 WHICH ARE NECESSARY FOR THE DEVELOPMENT OF FREE AND OPEN  
23 SOURCE SOFTWARE.

24 NOW, THE RECOGNITION OF A LEGAL RIGHT ALWAYS  
25 INVOLVES SOME RISK OF LITIGATION, BUT THAT'S A PRICE WE  
26 PAY TO LIVE IN A SOCIETY OF LAWS. HERE, THE RISK OF



1 LITIGATION IS VERY LOW, AND IT CERTAINLY DOES NOT JUSTIFY  
2 DENIAL, OUTRIGHT DENIAL OF A RIGHT THAT CLEARLY EXISTS  
3 UNDER THE PLAIN TERMS OF THE CONTRACT.

4 NOW, VIZIO HAS ALSO TAKEN THE POSITION THAT  
5 CONSERVANCY ADMITTED THAT THIRD-PARTY ENFORCEMENT IS NOT  
6 POSSIBLE, AND THE FREE SOFTWARE FOUNDATION IS THE PRIMARY  
7 INTERPRETER AND ULTIMATE AUTHORITY ON THE GPL'S.

8 NOW, THOSE ARE INACCURATE AND IRRELEVANT LEGAL  
9 CONCLUSIONS BY NON-ATTORNEYS. THEY IMPROPERLY INVADE THE  
10 PROVINCE OF THE COURT, AND FRANKLY, THEY ARE WRONG. THE  
11 COURT IS THE PRIMARY INTERPRETER AND ULTIMATE AUTHORITY  
12 ON THE MEANING OF THE CONTRACTS IN THIS CASE. CERTAINLY,  
13 NO ONE ELSE IS, AND IT'S UP TO THE COURT TO DECIDE, WHAT  
14 DO THE CONTRACTS MEAN. AND THE CONTRACTS ON THEIR FACE  
15 CONFER A RIGHT TO SOURCE CODE. THAT RIGHT DEMANDS A  
16 REMEDY, AND IT DEMANDS A MEANS OF ENFORCEMENT.

17 NOW, ALSO, THESE STATEMENTS ARE IRRELEVANT TO  
18 THE MUTUAL INTENTION OF THE PARTIES AT THE TIME OF  
19 CONTRACTING. THESE FAQs, FOR EXAMPLE, ON THE FSF  
20 WEBSITE, THEY WERE DOWNLOADED IN 2023. THERE IS NO  
21 EVIDENCE THAT THEY WERE PUBLISHED ANY EARLIER THAN THAT.

22 ON VIZIO'S MOTION FOR SUMMARY JUDGMENT, ALL  
23 INFERENCES ARE DRAWN IN FAVOR OF THE OPPOSING PARTY; IN  
24 THIS CASE, CONSERVANCY. SO WE CAN'T ASSUME THAT ANYONE  
25 SAW THOSE FAQs ANY EARLIER THAN 2023.

26 MOREOVER, IT'S A VERY LONG LIST OF FAQs ON THE

1 WEBSITE. THIS IS NOT IN THE CONTRACT. THIS IS ON A  
2 WEBSITE. AND IT'S, AGAIN, RATHER FANCIFUL TO IMAGINE  
3 THAT EVERY PARTY TO THE GPL'S IS GOING TO THIS WEBSITE,  
4 LOOKING AT A LIST OF 200-PLUS FAQs, AND FIXATING ON THE  
5 ONE THAT CONCERNS ENFORCEMENT, MEANS OF ENFORCEMENT, IN  
6 THE EVENT OF A BREACH.

7 IT'S PARTICULARLY FANCIFUL SINCE THE SUPREME  
8 COURT HAS WRITTEN IN GOONEWARDENE THAT PARTIES, AT THE  
9 TIME OF FORMING A CONTRACT, ARE NOT THINKING ABOUT, OR DO  
10 NOT TYPICALLY FIXATE ON WHAT HAPPENS IN THE EVENT OF A  
11 BREACH. RATHER, THEY ARE FIXATED ON THEIR RIGHTS AND  
12 OBLIGATIONS UNDER THE TERMS OF THE CONTRACT ITSELF. IN  
13 THIS CASE, THE RIGHT TO SOURCE CODE, WHICH APPEARS ON THE  
14 FACE OF THE CONTRACT, AND NOT ON A WEBSITE.

15 NOW, IT ALSO DOESN'T MATTER WHETHER FSF INTENDED  
16 THIRD-PARTY ENFORCEMENT. WHAT MATTERS IS THAT THE  
17 CONTRACTS CREATE A RIGHT TO SOURCE CODE. AGAIN, THE  
18 GOONEWARDENE CASE IS EXPLICIT. "OUR CASES HAVE NOT  
19 REQUIRED A SHOWING THAT THE CONTRACTING PARTIES ACTUALLY  
20 CONSIDERED THE THIRD-PARTY ENFORCEMENT QUESTION AS A  
21 PREREQUISITE TO THE APPLICABILITY OF A THIRD-PARTY  
22 BENEFICIARY DOCTRINE: THAT'S A QUOTE FROM GOONEWARDENE,  
23 PAGE 830.

24 AND PROFESSOR EISENBERG AGAIN HAS WRITTEN: WHEN  
25 THE PURPOSE OF THE PROMISEE IS TO CONFER A RIGHT ON THE  
26 BENEFICIARY, ENFORCEMENT IS APPROPRIATE." THAT'S

1 PAGE 1374 OF HIS LAW REVIEW ARTICLE.

2 SO THE CONTRACTS CONFER A RIGHT ON THE  
3 BENEFICIARY. THEY ARE SILENT ON THE QUESTION OF  
4 ENFORCEMENT. SO THIRD-PARTY BENEFICIARIES, RECIPIENTS OF  
5 LICENSED SOFTWARE, CAN ENFORCE THEIR RIGHT UNDER THE  
6 CONTRACT.

7 NOW, I ALSO WANT TO ADDRESS THE ADMISSIBILITY OF  
8 THESE FSF STATEMENTS. FIRST OF ALL, THEY ARE LEGAL  
9 CONCLUSIONS, CLEARLY LEGAL CONCLUSIONS, BY NON-ATTORNEYS,  
10 AND INADMISSIBLE ON THAT BASIS. ADDITIONALLY, THEY ARE  
11 HEARSAY. FSF IS NOT A PARTY TO THIS CASE. THERE IS NO  
12 EXCEPTION TO HEARSAY. THESE ARE NOT STATEMENTS OF  
13 INTENT. STATEMENTS OF INTENT CAN BE ADMISSIBLE UNDER THE  
14 HEARSAY EXCEPTION WHEN THEY RELATE TO FUTURE CONDUCT,  
15 CONDUCT TO BE CONDUCTED IN THE FUTURE.

16 THEY DO NOT, STATEMENTS OF INTENT ARE NOT  
17 OTHERWISE ADMISSIBLE WHEN THEY RELATE TO PRIOR CONDUCT.  
18 IN PARTICULAR, STATEMENTS OF BELIEF ARE NOT ADMISSIBLE.  
19 MEMORY OR BELIEF. AND THAT'S IN EVIDENCE CODE  
20 SECTION 1250.

21 SO WHAT WE HAVE HERE ARE STATEMENTS OF BELIEF,  
22 LEGAL CONCLUSIONS IN PARTICULAR, AND THEY ARE  
23 INADMISSIBLE AS LEGAL CONCLUSIONS. THEY ARE ALSO  
24 INADMISSIBLE AS HEARSAY.

25 AND IT'S ALSO WORTH EMPHASIZING THAT THEY ARE  
26 SIMPLY WRONG. THESE FAQs DON'T PURPORT TO SPEAK TO

1 CALIFORNIA LAW. AND HERE, WE HAVE A CALIFORNIA SUPREME  
2 COURT WHO HAS ANNOUNCED THE APPLICABLE STANDARD, CITING  
3 PROFESSOR EISENBERG, SPEAKING TO THE PRECISE FACTS AT  
4 ISSUE IN THIS CASE, AND THAT IS THE LAW THAT THE COURT  
5 SHOULD FOLLOW, NOT A MISSTATEMENT OF LAW ON AN  
6 INADMISSIBLE WEBSITE.

7 EVEN IF THESE STATEMENTS ARE ADMITTED, THEY ARE  
8 ENTITLED TO NO WEIGHT FOR THAT REASON, BECAUSE THEY ARE  
9 WRONG, BECAUSE THEY ARE BY NON-ATTORNEYS, AND BECAUSE  
10 THERE IS NO REASON TO BELIEVE THAT THE PARTIES ACTUALLY  
11 SAW THEM. AS PART OF THE THOUSANDTHS OF PARTIES WHO  
12 ACCEPT THE GPL'S, THEY ARE PRESUMED TO READ THE TERMS OF  
13 THE CONTRACT, AND NOT COMMENTARY ON, BURIED ON A WEBSITE,  
14 PRESUMABLY PUBLISHED IN 2023, AND NOT DEMONSTRABLY  
15 PUBLISHED ANY EARLIER THAN THAT.

16 NOW, THERE IS NO INDICATION THAT FREE SOFTWARE  
17 FOUNDATION CONSIDERED THE QUESTION OF THIRD-PARTY  
18 ENFORCEMENT AT THE TIME THAT IT PROMULGATED THIS  
19 CONTRACT, BUT IT DIDN'T HAVE TO. IT INCLUDED A RIGHT TO  
20 SOURCE CODES IN THE TERMS OF THE CONTRACT. AND THAT IS  
21 THE RIGHT THAT WE'RE HERE SEEKING TO VINDICATE.

22 IT ALSO WARRANTS MENTION THAT THE PLAIN TERMS OF  
23 THE CONTRACT PRECLUDE MODIFICATION. IT CANNOT BE  
24 MODIFIED BY FREE SOFTWARE FOUNDATION OR ANYONE ELSE. AND  
25 THESE FAQs ON THEIR WEBSITE CANNOT MODIFY THE TERMS OF  
26 THE CONTRACT, AND DON'T PURPORT TO MODIFY THE TERMS OF

1 THE CONTRACT. AND SO THE CONTRACT SHOULD BE CONSTRUED  
2 ACCORDING TO ITS PLAIN TERMS, WHICH EXIST ON THE FACE OF  
3 THE AGREEMENT, IN THE PREAMBLE IN PARTICULAR, AND WHICH  
4 CONFER THIS RIGHT TO SOURCE CODE ON RECIPIENTS OF THIRD  
5 PARTIES -- ON RECIPIENTS OF LICENSED SOFTWARE, RATHER.

6 AND THE MOST SALIENT TERMS FROM THE PREAMBLE  
7 READ AS FOLLOWS: IF YOU DISTRIBUTE COPIES OF A PROGRAM,  
8 GPL LICENSED PROGRAM, WHETHER GRATIS OR FOR A FEE, YOU  
9 MUST GIVE THE RECIPIENTS ALL THE RIGHTS THAT YOU HAVE.  
10 YOU MUST MAKE SURE THAT THEY, TOO, RECEIVE, OR CAN GET,  
11 THE SOURCE CODE.

12 THAT IS WHY WE'RE HERE TODAY, YOUR HONOR. WE  
13 ARE SEEKING THE SOURCE CODE THAT WE'RE ENTITLED TO UNDER  
14 THE TERMS OF THE CONTRACT.

15 AND WITH THAT, I WILL CONCLUDE, UNLESS THE COURT  
16 WANTS TO HEAR ADDITIONAL ARGUMENT ON EVIDENTIARY  
17 OBJECTIONS.

18 THE COURT: NO, THANK YOU.

19 MR. WILLIAMS: YOUR HONOR, VERY BRIEFLY. I KNOW  
20 THE COURT HAS INDULGED US IN OUR ARGUMENT. UNLESS THE  
21 COURT HAS QUESTIONS, I DON'T INTEND TO RESPOND TO THE  
22 THIRD-PARTY BENEFICIARY ISSUES. I BELIEVE THOSE HAVE  
23 BEEN BRIEFED IN OUR PAPERS.

24 I DO WANT TO BRIEFLY ADDRESS SOME OF THE  
25 PREEMPTION ISSUES.

26 THE -- LOOKING AT THE ACTUAL SOURCE CODE

1 PROVISION, WHICH IS SECTION THREE, THE LANGUAGE SAYS, YOU  
2 MAY COPY AND DISTRIBUTE THE PROGRAM, PROVIDED THAT YOU  
3 ALSO DO ONE OF THE FOLLOWING. ACCOMPANY IT WITH THE  
4 COMPLETE CORRESPONDING MACHINE READABLE SOURCE CODE. AND  
5 I LEFT OUT SOME OF THE ANCILLARY WORDS, BUT THAT -- YOU  
6 MAY COPY AND DISTRIBUTE, PROVIDED THAT YOU PROVIDE THE  
7 SOURCE CODE. COPYING AND DISTRIBUTION ARE EXCLUSIVE  
8 RIGHTS UNDER THE COPYRIGHT ACT. I DON'T THINK COUNSEL  
9 DISPUTED THAT.

10 THIS IS A CONDITION THAT THE AUTHOR OF THE GPL  
11 HAS PLACED, OR THE COPYRIGHT HOLDER HAS PLACED ON THEIR  
12 DISTRIBUTION.

13 NOW, SFC HAS TAKEN THE POSITION IN THIS LAWSUIT  
14 THAT THE OBLIGATION TO PROVIDE SOURCE CODE HAS NOTHING TO  
15 DO WITH THE RIGHT OF DISTRIBUTION UNDER THE COPYRIGHT  
16 ACT. PUTTING ASIDE THE PLAIN LANGUAGE, WHICH SHOWS TO  
17 THE CONTRARY, THEY HAVE NOT ADDRESSED THE ELEPHANT IN THE  
18 ROOM. WHY HAS SFC FILED LAWSUITS, SENT DEMAND LETTERS  
19 SAYING THAT THIS IS COPYRIGHT INFRINGEMENT BY DOING THE  
20 EXACT SAME THING THEY ARE ALLEGING HERE, NOT PROVIDING  
21 THE SOURCE CODE?

22 THEY ARE NOW SAYING, WE DIDN'T MEAN THAT. THEY  
23 SENT LETTERS. THEY FILED LAWSUITS SAYING, YOUR FAILURE  
24 TO DO THIS CONSTITUTES COPYRIGHT INFRINGEMENT BECAUSE IT  
25 VIOLATES THE EXCLUSIVE RIGHT OF DISTRIBUTION. AND THEY  
26 DON'T EVEN TRY TO EXPLAIN THAT.

1 MORE IMPORTANTLY, IT IS CLEAR THAT THEY ARE  
2 TRYING TO ELIMINATE THE PREEMPTION DEFENSE ENTIRELY. WE  
3 SUBMITTED, IN CONNECTION WITH A REPLY BRIEF, A DOCUMENT  
4 THAT WASN'T FILED -- PROVIDED TO US UNTIL AFTER WE FILED  
5 OUR SUMMARY JUDGMENT MOTION. IT WAS FILED CONDITIONALLY  
6 UNDER SEAL, BECAUSE THEY HAD DESIGNATED IT AS  
7 CONFIDENTIAL UNDER THE PROTECTIVE ORDER, ALTHOUGH I DON'T  
8 BELIEVE ANY MOTION TO SEAL HAS BEEN FILED BY SFC, BUT  
9 IT'S EXHIBIT 1 TO THE DAN POSNER DECLARATION IN  
10 CONNECTION WITH OUR REPLY BRIEF.

11 AND WITHOUT GETTING INTO THE DETAILS, BECAUSE IT  
12 WAS CONDITIONALLY FILED UNDER SEAL, THE COURT'S REVIEW OF  
13 THAT DOCUMENT WILL MAKE CLEAR THAT THEY ARE CONTINUING TO  
14 TAKE THE POSITION THAT THEY SHOULD GET TO CHOOSE WHETHER  
15 THEY BRING A COPYRIGHT INFRINGEMENT CLAIM OR A  
16 THIRD-PARTY BENEFICIARY CLAIM BASED ON THE EXACT SAME  
17 CONDUCT. THAT IS EXACTLY WHAT PREEMPTION IS MEANT TO  
18 PREVENT.

19 YOU CANNOT BRING A STATE LAW CLAIM FOR THE SAME  
20 CONDUCT THAT SUPPORTS A COPYRIGHT INFRINGEMENT CLAIM.  
21 THAT'S THE FUNDAMENTAL PRINCIPLE OF PREEMPTION. AND SO  
22 THAT DEMONSTRATES THAT THIS IS -- THEIR POSITION IS  
23 DISINGENUOUS. THEY ARE TRYING TO TAKE ADVANTAGE OF BOTH  
24 OPPORTUNITIES. THEY ARE PRETENDING THEY HAVE NEVER  
25 ACCUSED PEOPLE OF COPYRIGHT INFRINGEMENT, OR SENT DEMAND  
26 LETTERS FOR COPYRIGHT INFRINGEMENT, WHICH CONFIRMED THAT

1 THERE IS NO EXTRA ELEMENT HERE. AND THAT'S WHY WE  
2 BELIEVE THEIR POSITION HAS NO MERIT. WELL, AMONG THE  
3 OTHER REASONS, THE PLAIN LANGUAGE OF THE TEXT.

4 NOW, SFC TALKED ABOUT THIS, COPYRIGHT IS THE  
5 RIGHT TO EXCLUDE. WELL, THE COPYRIGHT STATUTE SAYS THE  
6 COPYRIGHT HOLDER HAS EXCLUSIVE RIGHTS TO DO OR TO  
7 AUTHORIZE THE FOLLOWING BIG SIX, AS MISS GRAY REFERRED  
8 TO. AND OF COURSE, THAT INCLUDES THE RIGHT TO COPY AND  
9 THE RIGHT TO DISTRIBUTE.

10 EVERY LICENSE AGREEMENT IS AN EXERCISE OF A  
11 COPYRIGHT HOLDERS'S AUTHORIZATION TO ALLOW OTHERS TO  
12 COPY, DISTRIBUTE, MODIFY, SUBJECT TO THE CONDITIONS THEY  
13 PUT IN THERE. HERE, THE COPYRIGHT HOLDER PUT IN THE  
14 CONDITIONS THAT SAYS, YOU MAY COPY AND DISTRIBUTE IT, SO  
15 LONG YOU ALSO PROVIDE THE SOURCE CODE. NO DIFFERENT THAN  
16 THE CASE IN JACOBSEN V. KATZER, WHICH WE REFERRED TO.  
17 AND EVEN IN THAT CASE THE FEDERAL CIRCUIT SAID,  
18 "COPYRIGHT LICENSES ARE DESIGNED TO SUPPORT THE RIGHT TO  
19 EXCLUDE. MONEY DAMAGES ALONE DO NOT SUPPORT OR ENFORCE  
20 THAT RIGHT. THE CHOICE TO EXACT CONSIDERATION IN THE  
21 FORM OF COMPLIANCE WITH THE OPEN SOURCE REQUIREMENTS OF  
22 DISCLOSURE AND EXPLANATION OF CHANGES, RATHER THAN AS A  
23 DOLLAR DENOMINATED FEE, IS ENTITLED TO NO LESS LEGAL  
24 RECOGNITION."

25 IN OTHER WORDS, THE FEDERAL CIRCUIT IS SAYING  
26 THE OPEN SOURCE COPYRIGHT HOLDER IS ENTITLED TO CONDITION



1 THEIR USE OF THEIR SOFTWARE ON THESE DISCLOSURE  
2 REQUIREMENTS, WHICH ARE IDENTICAL, IN SUBSTANCE, TO WHAT  
3 WE HAVE HERE.

4 AND COUNSEL SAID JACOBSEN WASN'T ABOUT  
5 PREEMPTION. WELL, THE FEDERAL CIRCUIT REVERSED THE ENTRY  
6 OF A PRELIMINARY INJUNCTION AND REMANDED IT TO THE  
7 DISTRICT COURT. AND IN JACOBSEN 2, WHICH WE CITE IN OUR  
8 CASE, THE NORTHERN DISTRICT OF CALIFORNIA SPECIFICALLY  
9 FOUND THAT THE BREACH OF CONTRACT CLAIM WAS PREEMPTED  
10 UNDER THE COPYRIGHT ACT.

11 SO FINALLY, I JUST WANT TO TOUCH ON THE CASES  
12 THEY MENTIONED. VERSATA, IT'S AN UNPUBLISHED DECISION  
13 FROM THE WESTERN DISTRICT OF TEXAS. AND IT SPECIFICALLY  
14 DID NOT ADDRESS THIRD-PARTY BENEFICIARY. THE COURT NOTES  
15 THAT AT THE END OF THE OPINION.

16 THE ARTIFEX CASE, WHICH IS UNPUBLISHED OUT OF  
17 THE NORTHERN DISTRICT, FIRST OF ALL, INVOLVED GPL VERSION  
18 ONE, NOT VERSION TWO. AND THE COURT NOTED THERE THAT THE  
19 DEFENDANT IN THAT CASE OFFERED NO EXPLANATION FOR WHY THE  
20 SOURCE CODE REQUIREMENT WAS NOT AN EXTRA ELEMENT. THERE  
21 WAS NO ARGUMENT ON IT. THAT'S CONTRARY TO WHAT WE HAVE  
22 HERE.

23 FINALLY, THE NORTHERN DISTRICT RELIED, INSTEAD,  
24 NOT ON THAT ISSUE, BUT ON THE FACT THAT THERE WAS AN  
25 EXTRATERRITORIAL ISSUE INVOLVING THE BREACH OF THE  
26 COPYRIGHT ACT. SO IN THE DECISION THE COURT SAYS, BY THE

1 WAY, THE NINTH CIRCUIT HAS HELD THAT THERE IS NO  
2 EXTRATERRITORIAL EFFECT WITH REGARD TO THE COPYRIGHT ACT,  
3 SO THE COURT BASED ITS RULING ON THAT ISSUE, WHICH WE  
4 DON'T HAVE HERE.

5 JACOBSEN, A PUBLISHED UNANIMOUS DECISION FROM  
6 THE FEDERAL CIRCUIT, APPLIED CALIFORNIA LAW TO A VERY  
7 COMPARABLE OPEN SOURCE LICENSE AGREEMENT THAT WE HAVE  
8 HERE. WE WOULD SUBMIT THAT CARRIES A SIGNIFICANT AMOUNT  
9 OF PRECEDENTIAL AUTHORITY, AND IS PERSUASIVE.

10 AND UNLESS THE COURT HAS ANY QUESTIONS, I WANT  
11 TO THANK YOU FOR THE TIME THAT YOU SPENT WITH US HERE  
12 TODAY.

13 THE COURT: NO QUESTIONS. THANK YOU.

14 ANYTHING ELSE?

15 MS. GRAY: YES, YOUR HONOR. IF I MAY JUST  
16 BRIEFLY, I WOULD LIKE TO RESPOND TO SOME OF THE COMMENTS  
17 THAT MR. WILLIAMS JUST MADE.

18 SO MR. WILLIAMS SAID, FIRST OF ALL, YOU KNOW, HE  
19 CITED THE SOURCE CODE PROVISION IN THE GPL THAT SAYS, YOU  
20 MAY COPY AND DISTRIBUTE PROVIDED THAT YOU DO THESE  
21 FOLLOWING THINGS, INCLUDING PROVIDE THE SOURCE CODE.

22 AND HE SAYS THAT'S THE COPYING AND DISTRIBUTION  
23 RIGHT UNDER THE COPYRIGHT ACT, AND IT IS A CONDITION THAT  
24 THE OWNER HAS PLACED IN DISTRIBUTION.

25 WELL, I JUST, I WANT TO TALK ABOUT THIS IDEA OF  
26 WHERE THIS RIGHT TO THE SOURCE CODE PROVISION COMES FROM.

1 LET'S SAY THERE WAS NO CONTRACT IN PLACE HERE AT ALL.  
2 RIGHT? NO LICENSE AGREEMENT AT ALL. THE COPYRIGHT ACT  
3 DOESN'T GIVE THE COPYRIGHT OWNERS OF THE SOURCE CODE AT  
4 ISSUE HERE THE RIGHT TO REQUIRE ANYONE TO DISTRIBUTE THAT  
5 SOURCE CODE. IT'S NOT A RIGHT THAT'S IN THERE, IT'S NOT  
6 ONE OF THE BIG SIX. THEREFORE, THAT RIGHT IS NOT ONE OF  
7 THE ONES THAT IS PROTECTED BY COPYRIGHT.

8 THE ONLY WAY YOU GET TO MAKE THAT REQUIREMENT,  
9 THE ONLY WAY A COPYRIGHT OWNER GETS TO REQUIRE A THIRD  
10 PARTY TO MAKE THAT KIND OF A DISTRIBUTION IS THROUGH A  
11 CONTRACT. IT'S A CONTRACT RIGHT.

12 SO LET ME GIVE YOU AN EXAMPLE HERE. WELL,  
13 BEFORE I DO THAT, LET ME SAY THIS: MR. WILLIAMS SAYS THE  
14 CONSERVANCY TAKES THE POSITION THAT WE GET TO CHOOSE  
15 WHETHER TO BRING A COPYRIGHT CLAIM OR A CONTRACT CLAIM.  
16 AND HE SAYS THIS IS THE ELEPHANT IN THE ROOM.

17 SO HERE'S, OKAY, ELEPHANT, I'M ADDRESSING THE  
18 ELEPHANT, WHEREVER THE ELEPHANT IS, I'M ADDRESSING IT  
19 NOW, RIGHT? THE ELEPHANT IN THE ROOM, WHETHER WE GET TO  
20 CHOOSE TO BRING A CONTRACT CLAIM OR A COPYRIGHT CLAIM.  
21 WELL, FIRST OF ALL, WE DO. THAT'S RECOGNIZED BY THE  
22 FEDERAL COURT --

23 THE COURT REPORTER: I'M SORRY --

24 MS. GRAY: I'LL TRY TO SLOW DOWN.

25 THE FEDERAL COURT RECOGNIZED, IN THE REMAND  
26 ORDER, THAT A PLAINTIFF IS THE MASTER OF ITS COMPLAINT,

1 AND THEY GET TO CHOOSE WHAT CLAIMS THEY BRING. AND SO  
2 THE FACT THAT CONSERVANCY MAY HAVE BROUGHT OTHER CLAIMS  
3 IN OTHER CASES, OR ASSERTED OTHER CLAIMS IN  
4 CORRESPONDENCE AT VARIOUS POINTS IN TIME, DOESN'T MEAN  
5 THAT AT THE MOMENT THAT THEY CHOOSE TO FILE THE COMPLAINT  
6 IN THIS ACTION, THEY DON'T GET TO DECIDE, YOU KNOW WHAT?  
7 NOW WE ARE PUTTING PEN TO PAPER, AND THIS IS THE CLAIM,  
8 THIS IS THE CLAIM THAT WE'RE GOING TO BRING. WE'RE GOING  
9 TO BRING A BREACH OF CONTRACT ACTION.

10 AND THAT'S NOT JUST RECOGNIZED BY THE COURT IN  
11 THE REMAND ORDER. IT'S ALSO RECOGNIZED IN THE ARTIFEX  
12 WHERE THERE WAS A COPYRIGHT INFRINGEMENT CLAIM AND A  
13 COPYRIGHT CLAIM, WHICH THE COURT ADDRESSED IN ITS  
14 OPINION.

15 NOW, MR. WILLIAMS SAYS THAT THIS IDEA OF NOT  
16 BEING -- OF CHOOSING BETWEEN WHETHER TO BRING A COPYRIGHT  
17 CLAIM OR A CONTRACT CLAIM, HE SAID, AND I PUT QUOTES  
18 AROUND THIS IN MY NOTES, "THAT IS WHAT PREEMPTION IS  
19 MEANT TO PREVENT."

20 NO, NO. THAT IS NOT WHAT PREEMPTION IS MEANT TO  
21 PREVENT. PREEMPTION EXISTS BECAUSE CONGRESS DECIDED THAT  
22 IT WANTED COPYRIGHT TO BE A BODY OF FEDERAL LAW; RIGHT?  
23 AND SO FOR THE REASONS THAT CONGRESS DECIDES WHEN IT  
24 WANTS TO OCCUPY THE FIELD, RIGHT, TO HAVE UNIFORMITY OF  
25 DECISIONS, ET CETERA, ET CETERA, THEY DECIDED, WE'RE  
26 GOING TO OCCUPY THE FIELD ON COPYRIGHT LAW, AND WE ARE

1 GOING TO SAY THAT STATE LAW CLAIMS THAT A CERTAIN GROUP  
2 OF RIGHTS ARE GOING TO BE PREEMPTED.

3 THAT'S WHAT PREEMPTION IS MEANT TO PREVENT.  
4 IT'S NOT, IT'S TO RESERVE COPYRIGHT CLAIMS TO BE DECIDED  
5 UNDER FEDERAL LAW, NOT TO SAY THAT IF YOU HAVE TWO  
6 DIFFERENT CLAIMS THAT YOU COULD LEGITIMATELY CHOOSE FROM,  
7 YOU CAN'T CHOOSE BOTH OF THOSE CLAIMS.

8 NOW, HERE'S WHERE I WANT TO GIVE YOU AN EXAMPLE,  
9 OKAY? LET'S SAY DON AND I ENTER INTO A CONTRACT THAT  
10 ALLOWS HIM TO MAKE 10 COPIES OF A PHOTOGRAPH THAT I OWN.  
11 DON MAKES 11 COPIES. I HAVE AN INFRINGEMENT CLAIM  
12 AGAINST DON THAT'S BASED ON THE MAKING OF THAT 11TH COPY.  
13 THAT 11TH COPY IS AN INFRINGEMENT, BECAUSE IT'S NOT  
14 SOMETHING I AUTHORIZED HIM TO DO.

15 I DON'T HAVE A BREACH OF CONTRACT CLAIM AGAINST  
16 DON FOR THAT 11TH COPY, BECAUSE IT'S PREEMPTED BY THE  
17 COPYRIGHT ACT. BECAUSE THE MAKING OF THE COPY, THE  
18 REPRODUCTION, IS THE ACT THAT GIVES RISE TO THE CLAIM.  
19 OKAY?

20 NOW LET'S CHANGE THE EXAMPLE A LITTLE BIT.  
21 LET'S SAY I ENTER INTO A CONTRACT WITH DON, AND IT SAYS  
22 DON CAN MAKE 10 COPIES OF THE PHOTOGRAPH THAT I OWN ON  
23 THE CONDITION THAT HE PAYS ME \$100. DON MAKES THE 10  
24 COPIES, BUT HE STIFFS ME AND HE DOESN'T PAY ME THE  
25 HUNDRED BUCKS, RIGHT? I HAVE A BREACH OF CONTRACT CLAIM  
26 AGAINST DON, BECAUSE THE COPYRIGHT ACT DOESN'T SAY

1 ANYTHING ABOUT PAYMENT. IT SAYS I GET TO MAKE COPIES,  
2 AND I GET TO AUTHORIZE PEOPLE TO MAKE COPIES, BUT IT  
3 DOESN'T SAY THAT I HAVE TO GET MONEY FROM THEM OR THAT  
4 THEY HAVE TO PAY ME FOR IT, RIGHT? I COULD AUTHORIZE HIM  
5 TO DO IT FOR FREE.

6 SO THAT'S THE RIGHT. THE PAYMENT RIGHT IS THE  
7 ONE THAT COMES FROM THE CONTRACT. I HAVE A BREACH OF  
8 CONTRACT CLAIM AGAINST HIM FOR THAT.

9 NOW, LET'S SAY, THIRD EXAMPLE, THE CONTRACT  
10 SAYS, YOU CAN MAKE 10 COPIES OF A PHOTOGRAPH THAT I OWN  
11 ON THE CONDITION THAT YOU PAY ME \$100. DON MAKES 11  
12 COPIES, AND HE STIFFS ME, AND HE DOESN'T PAY ME THE  
13 HUNDRED BUCKS. I HAVE A COPYRIGHT INFRINGEMENT CLAIM  
14 AGAINST DON BASED ON COPY NUMBER 11; HE HAS MADE AN  
15 UNAUTHORIZED REPRODUCTION. AND I HAVE A BREACH OF  
16 CONTRACT CLAIM FOR HIS FAILURE TO PAY ME THE HUNDRED  
17 DOLLARS.

18 I CAN ASSERT EITHER OF THOSE CLAIMS, NEITHER OF  
19 THOSE CLAIMS, OR BOTH OF THOSE CLAIMS. IT IS ENTIRELY UP  
20 TO ME WHAT I DECIDE TO BRING AND HOW I DECIDE TO ENFORCE  
21 THE DISTINCT RIGHTS THAT I HAVE UNDER THE COPYRIGHT ACT  
22 AND UNDER THE CONTRACT.

23 SO HERE, WE BROUGHT A BREACH OF CONTRACT CLAIM  
24 BECAUSE WE'RE ENFORCING A CONTRACT RIGHT, AS YOU'VE HEARD  
25 THROUGHOUT THE ARGUMENT HERE.

26 I WANT TO TOUCH VERY BRIEFLY ON THE JACOBSEN

1 CASE, WHICH MR. WILLIAMS MENTIONED, BECAUSE HE MENTIONED  
2 THE FACT THAT ON REMAND, YOU KNOW, LIKE AT THE FEDERAL  
3 CIRCUIT LEVEL, RIGHT, I SAID IT WASN'T A PREEMPTION CASE,  
4 WHICH IT WAS NOT. THE FEDERAL CIRCUIT DID NOT ADDRESS  
5 PREEMPTION.

6 ON REMAND THEY DID, THE DISTRICT COURT DID  
7 ADDRESS PREEMPTION OF A SEPARATE CLAIM, RIGHT? THERE  
8 WERE TWO CLAIMS BROUGHT IN THAT CASE. THERE WAS A  
9 COPYRIGHT INFRINGEMENT CLAIM THAT WAS BROUGHT THAT WAS  
10 THE SUBJECT OF THE FEDERAL CIRCUIT OPINION, AND ON  
11 REMAND, THE LANGUAGE THAT MR. WILLIAMS QUOTED WAS  
12 ADDRESSING A SEPARATE CLAIM FOR BREACH OF CONTRACT THAT  
13 WAS BASED ON MISAPPROPRIATION OF THE SOFTWARE AT ISSUE, A  
14 BREACH OF CONTRACT CLAIM FOR MISAPPROPRIATION OF A  
15 SOFTWARE. THAT'S COPYING. IT'S ONE OF THE BIG SIX.

16 AND THE DISTRICT COURT SAID THAT'S PREEMPTED,  
17 BECAUSE IT'S THE EXACT SAME RIGHTS THAT ARE PROTECTED BY  
18 THE COPYRIGHT ACT. SO THE DISTRICT COURT APPROPRIATELY  
19 FOUND THAT CLAIM TO BE PREEMPTED.

20 SO IN SUMMARY, YOUR HONOR, THERE IS NO  
21 PREEMPTION HERE, BECAUSE THE CLAIM AT ISSUE HERE, WHICH  
22 IS TO VINDICATE THE SOURCE CODE PROVISION TO REQUIRE  
23 DOWNSTREAM LICENSEES OF THIS SOFTWARE TO DISTRIBUTE  
24 COPIES OF THE SOURCE CODE, IS NOT FOUND IN THE COPYRIGHT  
25 ACT.

26 MR. WILLIAMS -- OR I'M SORRY, VIZIO SEEKS TO

1 TURN THE COPYRIGHT ACT ON ITS HEAD AND SAY THAT BECAUSE A  
2 COPYRIGHT OWNER CAN AUTHORIZE THE DISTRIBUTION OF ITS OWN  
3 WORK, IT CAN ALSO FORCE THIRD PARTIES TO DISTRIBUTE ITS  
4 OWN WORK, AND THAT'S THE SAME RIGHT.

5 IT'S NOT. THEY ARE DISTINCT, AND THERE IS NO  
6 PREEMPTION HERE. AND I WOULD BE HAPPY TO ANSWER ANY  
7 QUESTIONS YOU MAY HAVE ON THIS SUBJECT.

8 THE COURT: I HAVE NO ADDITIONAL QUESTIONS.

9 MS. GRAY: THANK YOU, YOUR HONOR.

10 MR. WILLIAMS: MAY I HAVE ONE MINUTE AS THE  
11 MOVING PARTY?

12 THE COURT: YOU MAY.

13 MR. WILLIAMS: ON THE MASTER COMPLAINT, IT'S  
14 CONTRARY TO CALIFORNIA LAW. WE CITE THE CALIFORNIA  
15 SUPREME COURT CASE OF DETOMASO AND THE CIVIC PARTNERS  
16 VERSUS YOUSSEFI CASE. THE ISSUE ISN'T WHAT YOU ALLEGE,  
17 IT'S THE SUBSTANCE OF YOUR CLAIM.

18 SECOND, WITH REGARD TO THE EXAMPLE, IF THERE WAS  
19 NO CONTRACT HERE, NO GPL, WELL, IF THERE WAS NO CONTRACT  
20 AND A PARTY DISTRIBUTED SOMEONE ELSE'S COPYRIGHTED  
21 SOFTWARE, THEY WOULD BE LIABLE FOR COPYRIGHT  
22 INFRINGEMENT.

23 THE ISSUE HERE IS THERE IS A LICENSE AGREEMENT  
24 THAT GIVES YOU THE RIGHT TO DISTRIBUTE SOFTWARE, SUBJECT  
25 TO CERTAIN CONDITIONS.

26 ON PREEMPTION, PREEMPTION IS MEANT TO PREVENT



1 STATE LAW FROM UNDERMINING THE FEDERAL STATUTORY SCHEME.  
2 UNDER FEDERAL COPYRIGHT LAW, ONLY THE COPYRIGHT HOLDER  
3 CAN SUE TO ENFORCE COPYRIGHTS.

4 SFC IS TRYING TO DO EXACTLY WHAT PREEMPTION IS  
5 MEANT TO PREVENT. THEY ARE TRYING TO NOW ADD SOME  
6 ADDITIONAL RIGHTS UNDER A STATE CONTRACT CLAIM TO ENFORCE  
7 THE SAME RIGHTS UNDER COPYRIGHT. THAT IS WHAT PREEMPTION  
8 IS MEANT TO PREVENT.

9 FINALLY, THE EXAMPLE MISS GRAY GAVE, I HAVE NO  
10 QUALMS WITH THE FACT THAT IF HER COLLEAGUE STIFFED HER ON  
11 THE MONEY, AND ALSO MADE AN 11TH COPY, THAT THERE WOULD  
12 BE TWO SEPARATE CLAIMS; ONE FOR BREACH OF CONTRACT, AND  
13 ONE FOR COPYRIGHT INFRINGEMENT. WE EVEN ACKNOWLEDGE THAT  
14 IN A FOOTNOTE IN OUR BRIEF.

15 BUT WHAT CANNOT HAPPEN, AND I DON'T THINK  
16 MISS GRAY ARGUED THIS, IS THAT SHE COULD DECIDE TO SUE  
17 HER COLLEAGUE, DON, FOR BREACH OF CONTRACT BASED UPON HIS  
18 MAKING THE 11TH UNAUTHORIZED COPY. THAT IS COPYRIGHT  
19 INFRINGEMENT. SHE CANNOT ELECT TO SUE FOR THAT SAME  
20 CONDUCT UNDER BREACH OF CONTRACT. IT'S EITHER A BREACH  
21 OF CONTRACT BECAUSE IT DOESN'T INVOLVE EXCLUSIVE RIGHTS  
22 UNDER THE COPYRIGHT ACT, OR IT'S COPYRIGHT INFRINGEMENT,  
23 BECAUSE IT DOES INVOLVE EXCLUSIVE RIGHTS.

24 HERE, THEIR ASSERTION IS THAT WHAT THEY ARE  
25 SEEKING TO ENFORCE INVOLVES AN EXCLUSIVE RIGHT TO COPY  
26 AND DISTRIBUTE. THAT IS A COPYRIGHT CLAIM.

1           THANK YOU FOR YOUR PATIENCE, YOUR HONOR.

2           MS. GRAY: JUST ONE LAST THING, YOUR HONOR, I  
3           KNOW YOU HAVE BEEN SO PATIENT. I JUST WANT TO SAY IN THE  
4           HYPOTHETICAL I GAVE, I'M NOT SUING DON FOR MAKING THE  
5           11TH COPY. I'M SUING HIM FOR STIFFING ME, AND THE  
6           STIFFING ME PART IS EQUIVALENT, IN THIS SITUATION, TO THE  
7           FAILURE TO DISTRIBUTE THE SOURCE CODE. IT'S THAT ADDED  
8           REQUIREMENT UNDER THE CONTRACT.

9           WE'RE NOT SEEKING A PRELIMINARY INJUNCTION HERE.  
10          WE'RE NOT SEEKING TO STOP VIZIO FROM INCLUDING THE  
11          SOFTWARE IN ITS TV'S. THAT'S A COPYRIGHT REMEDY, RIGHT?  
12          TO SAY YOU'RE INFRINGING AND I WANT YOU TO STOP, THAT'S A  
13          COPYRIGHT CLAIM.

14          THAT'S NOT WHAT WE ARE ASKING FOR HERE. WE'RE  
15          SAYING, YOU OWE US THIS CODE. YOU'VE STIFFED US ON THIS  
16          CODE, AND WE WANT YOU TO GIVE IT TO US.

17          THANK YOU.

18          THE COURT: THANK YOU. THANK YOU ALL.

19          MR. WILLIAMS: THANK YOU FOR YOUR PATIENCE AND  
20          YOUR TIME.

21          THE COURT: THANK YOU ALL.

22          MR. WILLIAMS: THANK YOU, YOUR HONOR.

23                        (END OF PROCEEDINGS.)

24

25

26

1 STATE OF CALIFORNIA )  
 ) SS.  
2 COUNTY OF ORANGE )  
3

4 REPORTER'S CERTIFICATE

5  
6  
7 I, STACIE SKOTARCZYK, CSR NO. 7211, COURT  
8 REPORTER, DO HEREBY CERTIFY THAT THE WITHIN AND  
9 FOREGOING REPORTER'S TRANSCRIPT IS A FULL, TRUE AND  
10 CORRECT TRANSCRIPTION OF MY SHORTHAND NOTES THEREOF, AND  
11 A FULL, TRUE AND CORRECT STATEMENT OF THE PROCEEDINGS  
12 HAD IN SAID CAUSE.

13 DATED AT FULLERTON, CALIFORNIA, THIS 7TH DAY OF  
14 OCTOBER, 2023.

15   
16

17 STACIE SKOTARCZYK, CSR NO. 7211  
18 COURT REPORTER  
19  
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26

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