

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ARTIFEX SOFTWARE, INC.,
Plaintiff,
v.
HANCOM, INC.,
Defendant.

Case No.16-cv-06982-JSC

**ORDER RE: DEFENDANT’S MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

Re: Dkt. No. 44

Plaintiff Artifex Software, Inc. brings breach of contract and copyright infringement claims against Defendant Hancom, Inc. arising out of Hancom’s alleged breach of an open source software agreement. Hancom’s motion for partial summary judgment on Plaintiff’s breach of contract claim is now pending before the Court.¹ (Dkt. No. 44.) Having considered the parties’ briefs and having had the benefit of oral argument on August 17, 2017, the Court DENIES Defendant’s motion. Defendant has not established as a matter of law that it is entitled to judgment in its favor as to the relief available to Plaintiff on the breach of contract claim.

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¹ Both parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 11 & 19.)

1 **BACKGROUND**

2 **A. Factual Background**

3 Plaintiff develops and licenses software products that interpret files written in a page
4 description language such as Adobe Systems Incorporated's Portable Document Format ("PDF")
5 files. (Dkt. No. 1 ¶¶ 13-14.) The product at issue in this suit, Ghostscript, interprets files written
6 in PDF for display on a computer screen or for printing. (*Id.* ¶ 15; Dkt. No. 45-1, Jones Decl. at ¶
7 4.) Plaintiff is the exclusive licensor of Ghostscript and uses a dual licensing model. (Dkt. No.
8 45-1 at ¶ 4, 6.) Licensees can enter into a commercial license agreeing to pay Artifex a certain
9 royalty fee, or they can license Ghostscript under a free open source license. (*Id.*) Prior to 2013,
10 Plaintiff's open source license was under the GNU General Public License ("GPL"). (*Id.* at ¶ 8.)
11 Since 2013, Plaintiff has used the GNU Affero General Public License. (*Id.* at ¶ 7.)

12 Section 9 of the GPL states:

13 You are not required to accept this License in order to receive or run
14 a copy of the Program. Ancillary propagation of a covered work
15 occurring solely as a consequence of using peer-to-peer
16 transmission to receive a copy likewise does not require acceptance.
17 However, nothing other than this License grants you permission to
18 propagate or modify any covered work. These actions infringe
19 copyright if you do not accept this License. Therefore, by modifying
20 or propagating a covered work, you indicate your acceptance of this
21 License to do so.

22 (Complaint ¶ 21; Dkt. No. 1-1 (Ex. 1) at 10.²) Section 6 of the GPL requires licensors to
23 distribute or offer to provide copies of source code for all software in the product that is covered
24 by the license. (Dkt. No. 1-1 at 6-7.)

25 Defendant is a South Korean software company that owns and develops Hangul, a word
26 processing software used primarily in South Korea and the United States as an alternative to
27 Microsoft Word, as well as Hancm Office, a suite of software programs which include Hangul, a
28 spreadsheet software, and a presentation software. (Dkt. No. 44-3, Yang Decl. at ¶¶ 2, 19.)
Defendant first sold software using Ghostscript on or about March 20, 2008 and continuously sold

² Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 such software until approximately August 25, 2016, when Hancom contends Ghostscript was
2 permanently removed from Hangul and Hancom Office. (*Id.* at ¶ 4.) Defendant never discussed
3 or entered into a commercial license with Plaintiff. (*Id.*) Instead, Defendant’s website stated that
4 it licensed Ghostscript under the GPL. (Dkt. No. 45-1 at ¶¶ 14-15; Dkt. No. 45-3.³) Defendant,
5 however, never distributed or offered to provide the source code for its Hangul or Hancom Office
6 software during the time these software programs used Ghostscript. (Dkt. No. 45-1 at ¶ 5.)

7 On May 24, 2016, Miles Jones, President of Artifex, received an email from a South
8 Korean sales partner indicating that Hancom’s use of Ghostscript in its Hangul and Hancom
9 Office software might not comply with the GPL. (Dkt. No. 45-1 at ¶ 12.) Plaintiff performed its
10 own investigation and determined that Defendant’s use of Ghostscript did not comply with the
11 GPL. (*Id.* at ¶ 17.) Plaintiff wrote Defendant on June 15, 2016 to inform it of its breach of the
12 GPL and sought to resolve Hancom’s breach informally. (*Id.*) After these discussions failed,
13 Plaintiff filed this lawsuit. (*Id.* at ¶ 18.)

14 **B. Procedural Background**

15 Artifex alleges two claims for relief: (1) breach of contract, and (2) copyright infringement.
16 Artifex seeks permanent injunctive relief enjoining Defendant from further use of any products
17 using Ghostscript, enjoining Defendant from directly or indirectly infringing Artifex’s copyright
18 in Ghostscript, and requiring Defendant to distribute to each licensee of Hangul and Hancom
19 Office the complete source code for the products in accordance with the GPL. (Dkt. No. 1 at pp.
20 11-12.) Plaintiff also seeks compensatory, consequential, statutory, and exemplary damages, as
21 well as attorney’s fees and costs.⁴ (*Id.*)

22
23 ³ Exhibit 2 to the Jones Declaration (Dkt. No. 45-3) is a screenshot of Hancom’s website from
24 May 25, 2016 which Mr. Jones attests “roughly translates to ‘Hancom Office NEO uses
25 ghostscript (<http://pages.cs.wisc.edu/~ghost>) of Artifex Software and complies with GPL 3.0
(GNU General Public License).” (Dkt. No. 45-1 at ¶ 15.) Hancom does not dispute the accuracy
26 of this translation.

27 ⁴ Specifically, the Complaint seeks “to recover from Hancom the damages Artifex has sustained,
28 including consequential damages, for Artifex’s costs in enforcing the GNU GPL. The amounts
cannot be determined at this time. Artifex is also entitled to recover as restitution from Hancom
any unjust enrichment, including any gains, profits, and advantages that Hancom has obtained as a
result of its breach of the GNU GPL. The amount of such unjust enrichment cannot be determined
at this time but exceeds \$75,000 based on the reasonable royalty rates under which Artifex
commercially licenses Ghostscript.” (Complaint ¶ 36.)

1 Defendant responded to the complaint by filing a Rule 12(b)(6) motion to dismiss which
 2 the Court denied. (Dkt. No. 32.) At the Initial Case Management Conference, Defendant sought
 3 leave to file an early partial motion for summary judgment on the breach of contract claim, which
 4 the Court granted. (Dkt. No. 40.) That motion is now under submission. (Dkt. Nos. 44, 45, 49.)

5 DISCUSSION

6 Defendant's motion for summary judgment is two-fold. First, Defendant insists that the
 7 monetary relief Plaintiff seeks for its breach of contract claim is improper because, in essence,
 8 Plaintiff cannot recover more for breach of the GPL contract than it would for performance, and
 9 since the license was free, there are no damages to be had. Second, Defendant maintains that even
 10 if damages are available, they cut off on March 10, 2008, the first day Hancom released its product
 11 without complying with the open source requirements.

12 A. Whether Monetary Relief is Available for Plaintiff's Breach of Contract Claim

13 There are three options for a party seeking to use Ghostscript: (1) obtain a commercial
 14 license, (2) use Ghostscript under the GPL without modifying or distributing it, or (3) modify or
 15 distribute Ghostscript under the GPL and make the resulting product open source. It is undisputed
 16 that Defendant neither obtained a commercial license for its use of Ghostscript nor made its
 17 products using Ghostscript open source. Plaintiff seeks damages to make it whole for this alleged
 18 breach of the GPL.⁵ According to Plaintiff, one way to value this breach is through looking at
 19 what it would have recovered if Defendant had instead obtained a commercial license to use
 20 Ghostscript. Defendant objects to any such valuation contending that it would impermissibly
 21 rewrite the terms of the parties' contract and violate California Civil Code Section 3358's
 22 provision that "no person can recover a greater amount in damages for the breach of an obligation,
 23 than he could have gained by the full performance thereof on both sides." Not so.

24 First, there is a difference between using the alternative commercial license as a way of
 25 valuing Defendant's breach of the GPL and imposing the terms of the commercial license on
 26 Defendant. Defendant's argument that they are equivocal is unpersuasive. Defendant is correct
 27

28 ⁵ Defendant concedes that for purposes of this motion that it did in fact breach the GPL.

1 that the Court cannot impose the terms of the commercial license on Hancorn, but the jury can use
2 the value of the commercial license as a basis for any damages determination. Defendant's
3 reliance on *Jill Stuart (Asia) LLC v. Sanei Int'l Co.*, No. 12-3699 KBF, 2013 WL 3203893, at *5
4 (S.D.N.Y. June 17, 2013), is misplaced. In *Jill Stuart*, the court rejected the plaintiff's theory of
5 "contractual copyright infringement" noting that it appeared to be an attempt to make an end-run
6 around the court's prior dismissal of plaintiff's copyright claims. The court noted that under New
7 York law "[u]se of a royalty theory of recovery is generally limited to situations where the parties
8 have had a ... licensing relationship that facilitates computation of the reasonable royalty." *Id.*
9 (internal citation and quotation marks omitted). Because there was no evidence of a similar
10 license upon which damages could have been based, a reasonable royalty was not a proper
11 approximation of damages. *Id.* at *5. The same is not true here. The commercial license is
12 arguably a "similar" license. Further, the *Jill Stuart* decision was based on New York law and at
13 least one California court, applying New York law, has disagreed with its rationale. *See Fox*
14 *Broad. Co. v. Dish Network LLC*, 160 F. Supp. 3d 1139, 1180 (C.D. Cal. 2015) (noting that *Jill*
15 *Stuart* is not controlling authority and holding that "[b]ecause no controlling law holds that
16 reasonable royalties are not available as a remedy for a breach-of-contract claim, this Court
17 concludes that reasonable royalties are potentially available under New York law as a remedy for
18 the contract breach claims.").

19 Under California law, a reasonable royalty may be used to measure damages for breach of
20 contract. *See Grail Semiconductor, Inc. v. Mitsubishi Elec. & Elecs. USA, Inc.*, 225 Cal. App. 4th
21 786, 795-96 (2014) (concluding that the trial court did not error in finding that the amount the
22 breaching party would have paid to license the technology could be used to measure the damages
23 resulting from breach of a non-disclosure agreement (NDA)). Defendant's insistence that the
24 NDA cases are inapposite is unpersuasive. In *Grail*, the breaching party entered into the NDA to
25 gain access to otherwise confidential information. *See id.* at 790-91. Likewise, here, Defendant
26 obtained access to Ghostscript through entering into the GPL. Under both the NDA and the GPL,
27 the proprietary information or software is provided for free, but limits are placed on the use of this
28 information. *Compare id.* at 790 ("Mitsubishi [is] to keep in strict confidence and trust and not

1 use, disclose or make available to others, including any of its affiliates or third parties any
2 ‘Proprietary Information’ and ‘Company Documents and Materials’[] without the prior written
3 consent of [Grail]”) with Dkt. No. 1-1 at 9 (“You may not propagate or modify a covered work
4 except as expressly provided under this License. Any attempt otherwise to propagate or modify it
5 is void, and will automatically terminate your rights under this License.”). In *Grail*, the proper
6 measure of damages for Mitsubishi’s breach of the NDA “was the amount Mitsubishi would have
7 paid [] for a lump-sum, fully paid license to use the confidential information.” *Grail*, 225 Cal.
8 App. 4th at 795; see also *Celeritas Techs., Ltd. v. Rockwell Int’l Corp.*, 150 F.3d 1354, 1359 (Fed.
9 Cir. 1998) (“After [plaintiff] disclosed its proprietary technology to [defendant], [defendant] was
10 faced with two legitimate choices: it could have used the technology and entered into a licensing
11 agreement with [plaintiff] or it could have refrained from using the technology. It chose instead to
12 use the technology without compensating [plaintiff]. To compensate [plaintiff] for the breach, the
13 jury properly determined the license fee [defendant] would have paid had it not breached the
14 agreement.”).

15 At oral argument Defendant maintained that the royalties available under the commercial
16 license cannot be used to calculate damages for Hancom’s breach, but Defendant could point to no
17 case—other than the non-binding New York law *Jill Stuart* case—which supports this argument.
18 Under these circumstances, Defendant has failed to establish as a matter of law that the value of
19 the commercial license cannot be used as a measure of damages here.

20 Second, to the extent Plaintiff seeks unjust enrichment or disgorgement as a measure for
21 damages, this too is proper under California law. See *Rutherford Holdings, LLC v. Plaza Del Rey*,
22 223 Cal. App. 4th 221, 231 (2014) (“Unjust enrichment is not a cause of action, however, or even
23 a remedy, but rather a general principle, underlying various legal doctrines and remedies. It is
24 synonymous with restitution.”) (internal citation and quotation marks omitted). Defendant’s
25 argument to the contrary again misses the mark—conflating the viability of separate claims for
26 restitution and breach of contract with restitution as a way to measure damages. Defendant also
27 errs in arguing that disgorgement is unavailable because Plaintiff was not entitled to anything
28 under the license as it was a free license. The license was not free in the sense that there was no

1 consideration owed under the agreement. As the Federal Circuit has observed:

2 The lack of money changing hands in open source licensing should
3 not be presumed to mean that there is no economic consideration,
4 however. There are substantial benefits, including economic
5 benefits, to the creation and distribution of copyrighted works under
6 public licenses that range far beyond traditional license royalties.
7 For example, program creators may generate market share for their
8 programs by providing certain components free of charge. Similarly,
9 a programmer or company may increase its national or international
10 reputation by incubating open source projects. Improvement to a
11 product can come rapidly and free of charge from an expert not even
12 known to the copyright holder.

13 *Jacobsen v. Katzer*, 535 F.3d 1373, 1379 (Fed. Cir. 2008). Defendant conceded as much at oral
14 argument noting that there may have been a loss of notoriety or leads as a result of Defendant's
15 failure to make its products using Ghostscript open source.

16 Defendant's reliance on *Oracle Corp. v. SAP AG*, 734 F. Supp. 2d 956 (N.D. Cal. 2010),
17 for the proposition that disgorgement is unavailable for breach of a free license under California
18 law is misplaced. In *Oracle*, the court held that the plaintiff could not state a claim for unjust
19 enrichment in the amount of the full replacement value of the property (software) because
20 "plaintiffs retained their right to use, distribute, license, and profit from the software and support
21 materials at issue [and under these circumstances, i]t would not be equitable, logical, or legally
22 permissible to award plaintiffs the full replacement value of property that they never lost or gave
23 away." *Id.* at 970. Here, Plaintiff is not seeking the full replacement value of the software; rather,
24 it seeks to measure restitution or disgorgement by looking to what royalties Defendant would have
25 paid or to Defendant's profits from the use of Ghostscript. Thus, *Oracle* is simply inapposite. In
26 any event, as the *Oracle* court noted: "'Under the law of restitution, an individual may be required
27 to make restitution if he is unjustly enriched at the expense of another[;]' '[a] person is enriched if
28 he receives a benefit at another's expense.'" *Id.* at 969 (quoting *Ghirardo v. Antonioli*, 14 Cal.4th
39, 51 (1996)). Plaintiff gave away its Ghostscript program in consideration for the user making
its software open source, which Defendant does not dispute it did not do. The record supports a
finding that Defendant received a benefit (the use of Ghostscript) at Plaintiff's expense by
depriving Plaintiff of the value of having Defendant's software open source.

Unjust enrichment is available "where [defendant] obtained a benefit they might not have

1 obtained otherwise” and the plaintiff “not only did [] not get the benefit of the bargain of the
2 confidentiality agreement, but [defendant] misused [plaintiff’s] information for its own profit.”
3 *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 F. App’x 665, 669 (9th Cir. 2010). Thus,
4 “under California law, a defendant’s unjust enrichment can satisfy the ‘damages’ element of a
5 breach of contract claim, such that disgorgement is a proper remedy.” *Id.* Defendant correctly
6 notes that *Foster* also states that “[u]nder California law, disgorgement of improperly obtained
7 profits can be an appropriate remedy for breach of a contract protecting trade secrets and
8 proprietary confidential information.” *Id.* at 668–69 (citing *Ajaxo Inc. v. E*Trade Group, Inc.*,
9 135 Cal.App.4th 21, 37 Cal.Rptr.3d 221, 247–49 (2005)). But this does not foreclose unjust
10 enrichment as a remedy in circumstances such as the one present here where a party obtained a
11 benefit they would not have otherwise obtained and profited from that benefit without providing a
12 corresponding benefit to the other party. Defendant has thus failed to establish as a matter of law
13 that unjust enrichment or disgorgement are not available as a measure of Plaintiff’s damages.

14 In sum, Defendant has not established as a matter of law that Plaintiff is not entitled to the
15 monetary damages it seeks for its breach of contract claim. The motion for summary judgment on
16 this basis is therefore denied.

17 **B. Termination of Defendant’s License**

18 Defendant’s second basis for summary judgment—that its license terminated on March 10,
19 2008 when it first released a product containing Ghostscript without complying with the open
20 source requirements—is equally problematic. Defendant insists that to the extent that any
21 monetary relief is available on Plaintiff’s breach of contract claim, it is circumscribed by language
22 in the GPL which states that a licensee “may not propagate or modify a covered work except as
23 expressly provided under the License” and that any attempt to otherwise do so “will automatically
24 terminate your rights under this License.” (Dkt. No. 1-1 at 9.) Plaintiff counters that termination
25 of the licensee’s rights through failure to comply with the open source requirements is not the
26 same as termination of the license itself, and instead, only terminates the licensee’s rights to
27 continue to propagate or modify Ghostscript.

28 As an initial matter, the language of the GPL suggests that Defendant’s obligations

1 persisted beyond termination of its rights to propagate software using Ghostscript. Under Section
2 6, a licensee can either convey the source code with the physical product or convey an offer to
3 provide the source code which will be “valid for at least three years.” (Dkt. No. 1-1 at 7.) Further,
4 because the source code or offer of the source code is required each time a “covered work” is
5 conveyed, each time Defendant distributed a product using Ghostscript there was arguably an
6 ensuing obligation to provide or offer to provide the source code.⁶ (*Id.*) Finally, Section 8
7 provides for reinstatement of the license until notice of termination by the copyright holder if
8 certain conditions are met. (*Id.* at 10.) Plaintiff maintains that Defendant’s construction—that the
9 GPL terminated as a matter of law the first moment it released the product without the source
10 code—would render these contract provisions meaningless violating the requirement that “[t]he
11 whole of a contract is to be taken together, so as to give effect to every part, if reasonably
12 practicable, each clause helping to interpret the other.” Cal. Civ. Code § 1641; *see also City of*
13 *Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 473 (1998), as
14 modified on denial of reh’g (Jan. 6, 1999) (“[a]ny contract must be construed as a whole, with the
15 various individual provisions interpreted together so as to give effect to all, if reasonably possible
16 or practicable.”). Plaintiff thus reasons that Defendant’s breach of the license continued until
17 Plaintiff elected to terminate the license and communicated the termination to Defendant; that is,
18 until June 15, 2016.

19 Defendant nonetheless insists that the GPL automatically terminated the first time
20 Defendant distributed a product using Ghostscript without making it open source and because it
21 has not since offered the source code, the license was not reinstated. However, Defendant’s
22 reliance on *Natural Alternatives, LLC v. JM Farms*, 2016 U.S. Dist. LEXIS 135565 (E.D. Ky.
23 Sept. 30, 2016), and *Susteen, Inc. v. Sourcnext Corp.*, 266 F. App’x 690, 691 (9th Cir. 2008), for
24 the proposition that a contract with an automatic termination provision cuts off recovery for
25 subsequent breaches is misplaced. In *Natural Alternatives*, the parties’ agreement included an
26 automatic termination clause if the licensee was notified of a breach and failed to cure the breach

27 _____
28 ⁶ A “covered work” means either the unmodified Program or a work based on the Program. (Dkt.
No. 101 at 4.)

1 within a three-day notice and cure provision. *See Natural Alternatives*, 2016 U.S. Dist. LEXIS
 2 135565, *3-4. Because the licensor had sent the licensee such a letter and the breach was not
 3 corrected, the unambiguous automatic termination provision terminated the licensing agreement.
 4 *See id.* at *5-6. Not so here. There is no evidence in the record regarding when Plaintiff notified
 5 Defendant that it was terminating the agreement. Although Plaintiff’s opposition brief states that
 6 it did so on June 15, 2016, the Declaration of Miles Jones, President of Artifex Software, Inc.,
 7 states that after Artifex first learned of Hancor’s breach of the GPL on May 24, 2016, Artifex
 8 sent a letter to Hancor “on June 15, 2016, informing Hancor of its breach of the GNU GPL and
 9 seeking to resolve Hancor’s breach informally.” (Dkt. No. 45-1 at ¶¶ 12, 17.) Further, unlike the
 10 language of the *Natural Alternative’s* agreement which stated that “[t]he term of this Agreement
 11 and of the Patent License and the Trademark License . . . shall end [upon certain conditions,]” the
 12 agreement here does not end on the licensee’s breach; rather the licensee’s *rights* automatically
 13 terminate. *Compare Natural Alternatives*, 2016 U.S. Dist. LEXIS 135565, at *3 with Dkt. No. 1-1
 14 at 9-10.

15 *Susteen*, which addressed post-termination royalty payments under California law and
 16 held that “if a licensor elects to terminate a license agreement upon the licensee’s breach, the
 17 obligation to pay future royalties ceases as well,” is similarly inapposite. *Susteen*, 266 F. App’x at
 18 691.⁷ The *Susteen* court noted that the defendant’s breach did not render the plaintiff unable to
 19 receive the benefits of the bargain and that the plaintiff could have continued to perform under the
 20 agreement and received the minimum royalty payments, but instead plaintiff elected to terminate
 21 the agreement all together. *Id.* Having done so, plaintiff was not entitled to any post-termination
 22 royalty payments. Again, not so here. In addition, there is a dispute regarding when Artifex—the
 23 licensor—terminated the agreement.

24 Even if this were not the case, the undeveloped factual record would foreclose summary
 25

26 ⁷ The other cases upon which Defendant relies are similarly unpersuasive. *See Schinzing v. Mid-*
 27 *States Stainless, Inc.*, 415 F.3d 807, 810 (8th Cir. 2005) (undisputed that licensor terminated the
 28 licensing agreement); *In re Arthur Treacher’s Franchisee Litig.*, 689 F.2d 1137, 1140 (3d Cir.
 1982) (undisputed franchisor terminated contract).

1 judgment on this issue. Defendant’s discovery responses state that it downloaded and used two
2 different versions of Ghostscript. (Dkt. No. 45-7 at 7.) It used Ghostscript Version 8.6 in a
3 product beginning on or about March 10, 2008 and it used a portion of Ghostscript Version 8.71 in
4 a software product beginning on or about April 22, 2011. (*Id.*) Defendant does not dispute that it
5 downloaded and used a second version of the product three years after it contends Plaintiff’s
6 damages are cut-off here. Instead, Defendant maintains that this is irrelevant because under
7 Section 9 of the GNU GPL the licensee is “not required to accept this License in order to receive
8 or run a copy of [Ghostscript].”⁸ (Dkt. No. 49 at 16 n.6 (quoting Dkt. No. 1-1 at 10).) It is unclear
9 if Defendant’s argument is that it did not modify or change Ghostscript, but merely used it, and as
10 such no source code distributions rights inured. Hancom’s Chief Technology Officer, Wangsung
11 Yang’s declaration is vague on this point: “Hancom first sold software that used Ghostscript on or
12 about March 10, 2008 and continuously sold such software that used Ghostscript until
13 approximately August 25, 2016.” (Dkt. No. 44-3 at ¶ 4.) Plaintiff, for its part, maintains that
14 Hancom’s second download of Ghostscript means it again entered into a GPL on April 22, 2011,
15 and at a minimum, that Hancom thereafter breached this license when it distributed software using
16 Ghostscript without the source code or offer of source code. Given the ambiguities in the record
17 on this issue, Defendant has not established as a matter of law that damages, if any, for Plaintiff’s
18 breach of contract claim cut off on March 10, 2008.

19 CONCLUSION

20 For the reasons stated above, Defendant’s motion for partial summary judgment is
21 DENIED.

22 The stay on discovery is lifted.

23 The parties shall file a joint letter by September 25, 2017 regarding whether they would
24 like a referral to a magistrate judge for a settlement conference, and if so, whether there is a
25

26 ⁸ At oral argument, Defendant framed its argument differently, instead maintaining that its
27 download and use of Ghostscript under any subsequent version of the GPL was derivative of its
28 use under the first version and thus no new rights or obligations were created with subsequent
downloads. The Court declines to address this new argument improperly raised for the first time
at oral argument.

1 particular magistrate judge to whom the parties would like to be referred.

2 This Order disposes of Docket No. 44.

3 **IT IS SO ORDERED.**

4 Dated: September 12, 2017

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6 JACQUELINE SCOTT CORLEY
7 United States Magistrate Judge
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United States District Court
Northern District of California