Nos. 16-16832, 16-16905

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; ORACLE INTERNATIONAL CORPORATION, a California corporation,

Plaintiffs-Appellees,

v.

RIMINI STREET, INC., a Nevada corporation; SETH RAVIN, an individual,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Nevada,
No. 2:10-cv-0106-LRH-VCF

ANSWERING BRIEF FOR APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellees Oracle USA, Inc., Oracle America, Inc., and Oracle International Corporation, by and through their counsel of record, hereby certify that publicly-held Oracle Corporation is the ultimate parent company of Oracle USA, Inc., Oracle America Inc., and Oracle International Corporation. Oracle Corporation wholly owns, through one or more of its privately-held wholly-owned subsidiaries, Oracle USA, Inc., Oracle America, Inc. and Oracle International Corporation. No other publicly held corporation owns 10% or more of the stock in Oracle USA, Inc., Oracle America, Inc., or Oracle International Corporation.

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INTRODUCTION

Appellants' opening brief is remarkably divorced from the facts revealed by the six years of litigation underlying this appeal. Notwithstanding the rose-colored narrative they seek to spin, the evidence in this case proved that Appellants made *thousands* of copies of Oracle's copyrighted materials in ways that plainly violate the terms of the very licenses they claim authorized their serial copying. Appellants then went to great lengths to hide their illegal conduct, including destroying their enormous library of unauthorized copies and lying under oath. Those tactics prolonged this litigation, but they did not prevent judge or jury from seeing Appellants' actions for what they were: unauthorized taking and copying of Oracle's copyrighted materials on a massive scale.

Even now, however, Appellants continue to obfuscate. They proceed as if they were found liable for making some copies on behalf of customers who purchased licenses to use the software, when they were actually found liable for amassing an entire library of Oracle's copyrighted works and indiscriminately using those copies to support multiple customers in plain violation of the license terms. They proceed as if they were found liable for simply accessing Oracle's websites, when they were actually found liable for using unauthorized "scraper" tools—which they *admittedly* knew were prohibited—to download files from those sites at a scale so gargantuan that it crashed one of Oracle's systems and exceeded

all other users' activity on that system combined. And they proceed as if they have been enjoined from servicing Oracle's software, when they have actually been enjoined from engaging in further infringement and computer abuse.

Appellants' continued efforts to obscure the true nature of their conduct and the proceedings below succeed only in confirming that both judge and jury got it right. Appellants are serial copyright infringers who were correctly held liable for their violations of federal and state law, correctly enjoined from continuing their misconduct, and correctly ordered to pay the bulk of the attorneys' fees and costs that Oracle was forced to incur as a result of their litigation tactics and years of lies. This Court should affirm.

STATEMENT OF JURISDICTION

Oracle agrees with Appellants' statement of jurisdiction.

STATEMENT OF THE CASE AND THE FACTS

A. Oracle's Enterprise Software Business

Oracle[1] develops and licenses copyrighted enterprise software programs that help organizations efficiently perform critical business functions. This case concerns four separate lines of Oracle software. Three of those lines, branded under the umbrellas of PeopleSoft, Siebel, and JD Edwards, are application

[1] Except where indicated, all references to "Oracle" refer collectively to Appellees Oracle USA, Inc., Oracle America, Inc. ("Oracle America"), and Oracle International Corporation ("Oracle International").

programs that handle tasks such as running payroll and managing human resources and customer relations.[2] These applications all run on Oracle's Relational Database Management Software ("Database"), the fourth copyrighted software line at issue. AER58-59, 90-91.

As is typical in the industry, Oracle does not sell ownership rights to its enterprise software. Customers purchase licenses that enable them to use specific programs, while Oracle retains all intellectual property rights in its works. AER59, 90-91. Though their specific terms may vary, the written license agreements for each program generally contain similar provisions.

For instance, a typical license limits use of the software to uses that support the particular licensee's internal operations:

- PeopleSoft: "PeopleSoft grants Licensee a perpetual, non-exclusive, non-transferable license to use the licensed Software, solely for Licensee's internal data processing operations at its facilities." AER1177.

- Siebel: "Siebel hereby grants to Customer [various enumerated] nontransferable, nonexclusive, worldwide, perpetual irrevocable rights and licenses that may be exercised solely in connection with Customer's own internal business operations." AER1163.

[2] Oracle acquired PeopleSoft USA, Inc., including the PeopleSoft and JD Edwards copyrighted materials at issue here, in December 2004, and acquired Siebel Systems, including the Siebel copyrighted materials at issue, in January 2006. Oracle International is the owner and/or exclusive licensee of the copyright registrations-in-suit for each of the relevant software programs. AER415-16.

- JD Edwards: "J.D. Edwards grants to Customer a non-exclusive, non-transferable, limited license to use the Software and Documentation on the Customer System(s) for Customer's internal business operations." AER1172.[3]

The licenses also authorize the licensee to make only a limited number of copies, and only for limited purposes:

- PeopleSoft: "Licensee may … make a reasonable number of copies of the Software, solely for (i) use in accordance with the terms set forth herein …; (ii) archive or emergency backup purposes; and/or (iii) disaster recovery testing purposes," and "may make a reasonable number of copies of Documentation and the Software which shall be limited to Production Use solely for Licensee's internal use." AER1177.

- Siebel: "Customer" may "reproduce, exactly as provided by Siebel, a reasonable number of copies of the Programs and the Ancillary Programs solely for archive or emergency back-up purposes or disaster recovery and related testing." AER1163.

- JD Edwards: "Customer" may "copy" the software "to the extent necessary for Customer's archival needs and to support the Users." AER1172.

And the licenses further restrict which rights the licensee may transfer to third parties, and how those third parties may use the licensed material:

- PeopleSoft: "Licensee may provide access to and use of the Software only to those third parties that: (i) provide services to Licensee concerning Licensee's use of the Software; (ii) have a need to use and

[3] All citations to PeopleSoft licenses are to the license belonging to Appellants' customer City of Flint; for Siebel, it is the license belonging to Novell; and for JD Edwards, it is the license belonging to Giant Cement. The relevant terms of those licenses are representative of PeopleSoft, Siebel, and JD Edwards licenses generally. ORE150-53, 434-35.

access the Software; and (iii) have agreed to substantially similar non-disclosure obligations imposed by Licensee as those contained herein." AER1180.

- Siebel: Customer may "have third parties … install, integrate, and otherwise implement the Programs and Ancillary Programs," but all third-party use must be "solely in connection with Customer's own internal business operations." AER1163.

- JD Edwards: "For any access to the Software other than by an employee of Customer, … all provided access shall be restricted to screen access for the functions required." AER1172.

These (and other, similar) provisions establish three overarching principles: (1) the software may be used only to support the specific licensee's internal operations; (2) only a limited number of copies may be made; and (3) third-party rights to access, copy, or use the software are more narrowly circumscribed than the licensee's.

Database, the platform on which those applications run, is available for download, free of charge, from the Oracle Technology Network website ("OTN") for certain limited purposes. To obtain a free copy of Database from OTN, one must agree to the terms of the Developer License, which provides in relevant part:

- The software "may be installed on one computer only, and used by one person in the operating environment identified by us. You may make one copy of the program for backup purposes."

- Oracle "grant[s] you a nonexclusive, nontransferable limited license to use [the software] only for the purpose of developing, testing, prototyping and demonstrating your application, and not for any other purposes."

- "You may not … use [the software] for your own internal data processing or for any commercial or production purposes, or use [it] for any purpose except the development of a single prototype of your application."

AER1208. In short, under the Developer License, only one production copy and one backup copy may be made, and those copies may be used solely to develop a new application.[4]

Oracle's relationships with its customers do not end the day they purchase a license for Oracle enterprise software. To ensure that its products remain current, operational, and secure from ever-changing threats, Oracle is constantly developing updates and other enhancements. These support materials are vital for the thousands of businesses, governments, and non-profits that rely on Oracle software to meet their day-to-day organizational needs. Software for managing payroll and accounting, for instance, would lose much of its utility if it were not kept up-to-date with changes to applicable regulations and tax laws. Customers thus frequently enter into separate maintenance contracts with Oracle that entitle them to access these separate, copyrighted support materials for an annual fee. These contracts also entitle customers to obtain entirely new versions of the licensed products, thus permitting customers to benefit from Oracle's annual

[4] Oracle also licenses Database to its customers through Oracle License and Service Agreements ("OLSAs"), but the undisputed evidence showed that Rimini obtained its copies of Database *solely* from OTN, not through any customer's license. AER69-70; *see infra* pp.12-13.

research and development efforts, and further safeguarding them from the security risks inherent in using older versions. AER59, 91.

Oracle makes these support materials available to its customers online. Customers with valid maintenance contracts may access Oracle's support websites using their unique log-in credentials and download the specific materials for which they have contracted. AER424, 1239-47. As with the base software programs, customers must agree to use these materials only for their own business operations. AER1033-34. To control access to its servers, Oracle requires customers to agree not to take the materials from the online portal in a way that could be harmful to Oracle's systems or other customers. Specifically, customers must agree that:

> [Y]ou will not access or use [the website] in any manner that could damage, disable, overburden, impair, or otherwise result in unauthorized access to or interference with, the proper functioning of any Oracle accounts, computer systems, or networks. For example, you may not use any software routines commonly known as robots, spiders, scrapers, or other automated means, to access [the website] or any Oracle accounts, systems, or networks.

AER1033.

B. Appellants' Business Model

Unlike Oracle, which spends billions of dollars on research and development and employs more than 30,000 software engineers who write new programs as well as patches, fixes, and updates for Oracle's existing software offerings, Rimini Street, Inc., ("Rimini") does not develop or license its own enterprise software.

Instead, Rimini competes with Oracle to provide support services to customers who use Oracle's copyrighted enterprise software. AER16, 34-35, 91.

Rimini was founded in 2005 by Seth Ravin. ORE103-04, 364.[5] Before starting Rimini, Ravin was president of TomorrowNow, Inc. ORE376, 382-85. Like Rimini, TomorrowNow provided support services to licensees of Oracle software, and did so at prices well below what Oracle charged. AER1507-08; ORE382-85, 421. But that discount came at Oracle's expense, in the form of systematic violations of Oracle's intellectual property rights. Indeed, the company that acquired TomorrowNow in 2005 shut it down in 2008 after concluding that TomorrowNow's business model of using its customers' log-in credentials to access and copy Oracle's software updates was unlawful, and later stipulated to both civil and criminal liability based on TomorrowNow's activities when Ravin was at the helm.[6]

Unfortunately, just like TomorrowNow, "Rimini's business model was built entirely on its infringement of Oracle's copyrighted software and its improper access and downloading of data from Oracle's website and computer systems."

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[5] "ORE" refers to the record excerpts submitted along with this brief.

[6] *See Oracle USA, Inc. v. SAP AG*, No. 07-CV-1658 (N.D. Cal.), Dkt.911 ¶¶15-16; FBI Press Release, *TomorrowNow, Inc., Sentenced on Computer Intrusion and Copyright Infringement Charges* (Sept. 14, 2011), *available at* http://bit.ly/2kVbc0j. Ravin was held in contempt in the *SAP* litigation for refusing to answer questions about what happened at TomorrowNow under his watch. ORE398-402.

AER17; *see* ORE421 (Ravin: "[W]e did not change our business model."). When he left TomorrowNow to start Rimini, Ravin assured the market that his new company could offer the same services as his old one at the same bargain-basement prices. AER1508, 1515. But Rimini lacked TomorrowNow's stockpile of illegally obtained copyrighted material, and also lacked a single customer with access to the materials on Oracle's support websites. To get around that problem, Appellants paid one of Ravin's childhood friends—possibly more than a million dollars—to become a Siebel "customer" just so they could access the Siebel site. ORE253, 374-77, 447-48, 514.[7]

Appellants then embarked on a mission to create a "library" of Oracle software that Rimini could use to service its customers. To that end, Appellants used the fake customer's log-in credentials to download materials that they subsequently copied to support actual customers. ORE374, 447-48. And after discovering that Oracle did "not 'check' the [downloader's] info entered against any license agreement" on certain of its sites, Appellants simply falsely represented on those sites that they possessed licenses to access them. ORE369. They then "helped themselves to the buffet," downloading massive amounts of copyrighted material without paying a nickel for it, and setting up automated tools that could

[7] While this fictitious "customer" never actually used the Siebel software, it nonetheless featured prominently in Rimini marketing materials, praising Rimini for helping the company extend the life of the (never-used) software. ORE377-78.

download the website's entire contents. AER474-45; ORE248-52, 368-69. Appellants then moved on to downloading material from PeopleSoft's Customer Connection website—before Rimini had a single PeopleSoft customer. ORE134, 379, 487-88. And once Rimini did have customers, Appellants used those customers' credentials to obtain dozens of copies of Oracle software installation media by falsely claiming that *Rimini's* address was the customer's "secondary offsite backup location." AER78.

These ill-gotten materials formed the backbone of Rimini's business. Appellants collected the copied and downloaded materials into a central "library," and used that library to create environments—copies of the software that Appellants "modified to develop and test software updates"—for particular customers without regard to which customer's license was used to obtain the underlying software. AER94. Appellants then engaged in even *more* unlicensed copying, "cloning" (or copying) initial environments built for one customer (which they hosted on their own servers, in contravention of the license terms) for several other customers. ORE254-57, 356-60, 373, 447-48, 454, 483, 492-93. Appellants had hundreds of environments on their servers, each one containing hundreds if not *thousands* of exact copies of Oracle software. ORE269, 514.

Appellants' unauthorized copying by no means stopped with their initial stockpiling of Oracle's copyrighted materials. Just as Oracle continued (lawfully

and at great expense) to develop new software versions, patches, and fixes, Rimini continued (unlawfully and without paying a nickel) to download Oracle's copyrighted materials. For instance, despite being fully aware that using automated downloading tools on Oracle's support websites was forbidden even to licensees (which Rimini itself, of course, was not), Ravin directed Rimini employees to use such prohibited tools to download millions of protected files. AER38, 238; ORE133, 384-92, 412-14. That downloading became so intense that it crashed an Oracle system, prompting Oracle to block Rimini's IP address. AER38. After Oracle sent a cease and desist letter, Appellants realized that Oracle was "onto us for massive download volumes." AER239-40. Yet rather than desist, they doubled down, using multiple virtual machines to download the remaining files as quickly as possible and allowing employees to use prohibited tools from their residential internet connections to avoid detection. ORE263; AER976-77, 998-99, 1155-56.

There was nothing ambiguous about the nature of Appellants' activity; even their own lawyer told Ravin, "You have to admit this looks pretty bad." AER474. Nor was there anything ambiguous about the reason for all this unauthorized copying: It enabled Appellants to "mak[e] a crap load of money from" selling services built around Oracle's intellectual property. AER68-69. Appellants *could have* respected the terms of the licenses and *could have* complied with Oracle's

terms of use. But that would have taken a lot of money and a lot of time, and thus would have prevented Rimini from offering its services at the cut-rate prices on which its business depended. In short, as the district court ultimately found, "Rimini's business model was built entirely on its infringement of Oracle's copyrighted software and its improper access and downloading of data from Oracle's website and computer systems, and Rimini would not have achieved its current market share and business growth without these infringing and illegal actions." AER17.

C. Pre-Trial and Trial Proceedings

In 2010, Oracle sued Appellants for copyright infringement of its PeopleSoft, Siebel, JD Edwards, and Database software, as well as for violations of computer abuse laws and other related claims. ORE1-42. Appellants responded by admitting that they had copied at least some of Oracle's copyrighted software, but claiming that all of their copying was authorized by licensing agreements between Oracle and Rimini's customers. ORE73-74. Appellants also claimed that, to the extent those licenses did *not* authorize their copying, the licenses constituted copyright misuse. ORE55-57.

The district court dismissed Appellants' copyright misuse counterclaim at the outset. AER1556-58. Then, at the close of discovery, the court concluded that Appellants' authorization defense failed as a matter of law as to Database, both

because Appellants copied far more than "the single copy authorized by the Developer License" and because they did not make copies to "create or develop a separate software application within the meaning of the Developer License." AER66. The court also rejected Appellants' attempt to justify that copying by pointing to licenses under which Rimini's *customers* were authorized to copy Database (which contained different terms), finding those licenses irrelevant "because Rimini did not obtain its copies of Oracle Database from clients who had [a license] for Oracle Database." AER69-70.

As to PeopleSoft, JD Edwards, and Siebel, it was clear that the PeopleSoft licenses prohibited copying Oracle's material onto Rimini's own systems (as opposed to a system under the licensee's control), thereby defeating any authorization defense as a matter of law. AER90-109. But the district court concluded that Rimini's copying *could* be permissible under the Siebel and JD Edwards licenses, but only if Rimini made solely archival or backup copies for the licensee. AER109-13. Rimini fended off summary judgment by claiming (falsely, it turned out) that it complied with that restriction. AER109-11. Accordingly, the core liability issue for trial was whether Appellants made copies only for the licensee's own backup or archival use in the manner contemplated by the licenses.

While Appellants' brief reads as if that issue was never in serious dispute, Appellants actually went to great lengths to prevent Oracle (and the district court)

from discovering the true nature of their business. First, despite having admittedly been on notice of potential litigation, Rimini "affirmatively and irretrievably deleted" its massive library of intermingled copies of Oracle software and support materials—a library that was "approximately a couple times the size of … all of the books in the Library of Congress." ORE446. That spoliation—which Appellants initially tried to cover up, ORE51, 267-68, 349-50 (claiming that no such library ever existed)—made it impossible to identify the source of the thousands of copies of the software that were used to make the myriad development environments Rimini built. ORE136, 146-47.

Appellants also adamantly denied engaging in any cross-use for years, only to reverse course at trial and admit the truth. Ravin initially testified about cross-use in a deposition in the *TomorrowNow* litigation, which went forward only after Ravin was held in contempt of court for resisting discovery. *See supra* n.6. At that deposition, Ravin testified that Rimini never cross-used Oracle's software. ORE398-402. Ravin repeated that denial in his deposition in this case, stating emphatically that "[n]ever in the entire history of Rimini" did "it ever occur[] that one customer's software environment ha[d] been used to develop a fix or update that was ultimately delivered to a different customer." ORE627; *see* ORE413-14. Rimini's Rule 30(b)(6) designee likewise testified that "all the development" at Rimini "is done for a particular customer in that customer's environment using that

customer's files." ORE507. Rimini made the same representations to the district court, insisting that "each client is assigned a separate data 'silo' where Oracle Software and Support Materials for only that client are maintained." ORE73-74.

Those were all lies. Notwithstanding Appellants' destruction of the massive software library, Oracle painstakingly proved that Rimini regularly used one customer's "development environments … to develop and test software updates for … *other Rimini customers*." AER100 (emphasis added). When confronted with that wealth of evidence at trial, Ravin blithely admitted that Rimini engaged in cross-use "all the time," and that his earlier deposition testimony categorically denying as much was false. AER1225; *see* ORE410-16; AER421, 426, 435. A Rimini witness similarly testified that the materials in the library Rimini destroyed were not organized by customer, which meant that Rimini had no way of knowing to whom any of the software actually belonged. ORE354, 452-54, 459.

Given the overwhelming evidence—and Appellants' own belated admissions directly contradicting earlier testimony—Oracle prevailed at trial on all 93 of its copyright claims against Rimini. AER447-54. Oracle likewise prevailed against both Rimini and Ravin on its two state-law computer abuse claims. AER457-60; *see* Cal. Penal Code §502(c)(2), (3); Nev. Rev. Stat. §205.4765(1), (3). To remedy Rimini's massive copyright infringement, the jury awarded Oracle the fair market value of a hypothetical license, which it measured at $35,600,000. AER451. And

although the jury found Rimini's infringement "innocent" rather than "willful," it assigned the maximum amount of statutory damages ($30,000) for each count of infringement, totaling $2,790,000. AER454.[8] To remedy Appellants' unauthorized taking of Oracle's material in violation of the computer abuse statutes, the jury awarded $14,400,000 in lost profits ($8,800,000 to Oracle America and $5,600,000 to Oracle International), plus $27,000 to Oracle America for costs attributable to investigating Appellants' conduct. AER46-50, 457-60.

D. Post-Trial Proceedings

Appellants filed a renewed motion for judgment as a matter of law, AER273-310, which the district court denied, ORE205-07.[9] The court awarded Oracle $28,502,246.40 in attorneys' fees, applying a 20% across-the-board discount; $4,950,566.70 in taxable costs and $12,774,550.26 in non-taxable costs, reducing most of the latter by 25%; and $22,491,636.16 in prejudgment interest on the copyright award and $5,279,060.12 in prejudgment interest on the state-law awards. AER4, 24-33.

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[8] Oracle elected to recover the jury's measure of actual, rather than statutory, damages. *See* 17 U.S.C. §504(b)-(c).

[9] The court also entered judgment for Oracle on its claim under California's Unfair Competition Law ("UCL"), Cal. Bus & Prof. Code §17200 *et seq.*, which the parties agreed is derivative of the violation of California's computer access law. AER14.

The court entered a permanent injunction prohibiting Rimini from, *inter alia*:

- "reproduc[ing], prepar[ing] derivative works from, or distribut[ing] PeopleSoft, JD Edwards, or Siebel software or documentation unless solely in connection with work for a specific customer that has affirmed in writing that the customer holds a valid, written license agreement for the particular PeopleSoft, JD Edwards, or Siebel software and documentation authorizing Rimini's specific conduct";

- "reproduc[ing], prepar[ing] derivative works from, or distribut[ing] Oracle Database software"; and

- "copy[ing] or access[ing]" JD Edwards or Siebel "source code."

AER6-8. The court further enjoined both Rimini and Ravin from, *inter alia*:

- "distribut[ing] materials downloaded from any Oracle website to more than one person or entity";

- "access[ing] any Oracle website using any entity's credentials for the benefit of any entity other than the entity to which the credentials were issued"; and

- "access[ing] (including download[ing] from) any Oracle website in any manner that could damage, disable, overburden, impair, or otherwise result in unauthorized access to or interference with, the proper functioning of any Oracle accounts, systems, or networks, including but not limited to access by or use of any automated or computerized method simulating manual downloading."

AER8-9.

Immediately after the injunction issued, Rimini published a press release stating that the injunction "will simply prohibit the previous conduct by Rimini" already found to be infringing, and that since Rimini "had ceased said conduct by

July 2014, there is no expected impact on any current or future service offering, or on Rimini['s] current or future ability to service any of its clients." ORE579-81. Rimini issued another press release the following month assuring that "[t]he injunction does not prohibit Rimini['s] ongoing or future provision of support for [PeopleSoft, JD Edwards, Siebel, and Database]," but merely "constrains" how Rimini provides that support. ORE582-84.

Notwithstanding those assurances, Appellants sought to stay the injunction pending appeal, claiming it would cause them irreparable harm. ORE223-42. The district court denied that motion, ORE243-47, but this Court granted a stay, ORE585-86. This consolidated appeal followed.

SUMMARY OF ARGUMENT

Appellants identify no basis to disturb the jury verdict or judgments below. Rimini first challenges its liability for copyright infringement, insisting that all of its copying was authorized by the license agreements between its customers and Oracle. That argument rests on a complete distortion of both Rimini's conduct and the licenses. Rimini did not just make some copies on behalf of its customers; it amassed an enormous library of Oracle's copyrighted materials on its own systems, which it then used to provide support services to its various customers indiscriminately, without regard to whose license was used to access and copy the material. Indeed, some of Rimini's copies were not made pursuant to any license

at all, but rather were made by falsely representing that Rimini itself had a license, or by paying someone to become an Oracle customer. Rimini does not and cannot identify anything in the licenses that authorizes any of that conduct; in fact, their plain terms squarely prohibit it.

Rimini is thus forced to argue that the licenses violate the copyright misuse doctrine. But Rimini did not come close to proving that the licenses raise any of the concerns that animate that demanding affirmative defense. The licenses do not prohibit Oracle's customers from using third parties to support their Oracle software; nor do they prohibit customers from purchasing software from someone else. Instead, they simply prohibit third parties from building their businesses on the backs of unauthorized copies of Oracle's copyrighted materials—an eminently permissible (and eminently reasonable) exercise of Oracle's exclusive rights under the Copyright Act.

Appellants fare no better with their challenges to the jury's computer abuse verdicts. While they complain at length about the scope of the federal Computer Fraud and Abuse Act, they seem to have forgotten that they were found liable for violating *state* computer abuse statutes, not that distinct federal law. And as this Court has already held (repeatedly), those state statutes do not raise constitutional concerns, as they prohibit unauthorized *taking and using* of digital data, not embellishing on a dating website or sharing a password with a family member.

Contra App.Br.30. Nor can Appellants identify any flaw in the jury's computer abuse damages award, as the state statutes plainly permit lost profits, and the amount awarded by the jury was well within its discretion.

Appellants fault the district court for awarding injunctive relief, fees, and costs, but the court acted comfortably within its own broad discretion in doing so. Such relief is hardly surprising in a case where the defendants *concededly* destroyed critical evidence and lied under oath for years to try to avoid liability. Appellants are thus left arguing that the district court's discretion was somehow constrained by the jury's finding that Rimini's infringement was "innocent." But contrary to their contentions, there is no bar to injunctions against "innocent" infringers. Moreover, the district court enjoined Rimini not because the court disagreed with the jury's innocence finding (which was not an obstacle to an injunction), but because Rimini's pervasive infringement inflicted the kind of irreparable injury on Oracle that warrants injunctive relief. The court was right to do so, and did not abuse its discretion on that or on any other score. The judgment below should be affirmed.

STANDARDS OF REVIEW

The denial of a motion for judgment as a matter of law is reviewed de novo, "view[ing] the evidence in the light most favorable to the nonmoving party … and draw[ing] all reasonable inferences in his favor." *Barnard v. Theobald*, 721 F.3d

1069, 1075 (9th Cir. 2013). The decision to grant a permanent injunction is reviewed for abuse of discretion, as is the injunction's scope; the underlying factual findings are reviewed for clear error. *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1030 (9th Cir. 2013). Attorneys' fees, costs, and prejudgment interest awards are reviewed for abuse of discretion. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1180 (9th Cir. 2013); *Oak Harbor Freight Lines, Inc. v. Sears Roebuck, & Co.*, 513 F.3d 949, 954 (9th Cir. 2008). Under that standard, this Court must defer to findings of fact and applications of law unless they are "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

ARGUMENT

I. Rimini Infringed Each Of The Copyrights At Issue.

The evidence in this case overwhelmingly established that Rimini built an entire business around serial copying of Oracle's copyrighted material. Rimini copied (at least) 381 PeopleSoft environments, 87 Siebel environments, and 10 JD Edwards environments onto its own systems. ORE355; *see also* ORE270-83, 356-39, 370-74, 379, 408, 442. And those were just the environments. Each environment contained copies of hundreds *if not thousands* of Oracle's copyrighted files. ORE269, 514. Moreover, by Ravin's own admission, Rimini engaged in cross-use "all the time." AER1225. In other words, Rimini routinely copied files

under the auspices of one customer's license (or, sometimes, under no license at all) to use them for other customers.

While Rimini vigorously contested those facts in the proceedings below, all of that is no longer in serious dispute. Nor could it be, given the record Oracle painstakingly developed and the jury's findings. Nonetheless, Rimini continues to insist that it did not engage in any copyright infringement, either because its massive copying and cross-use were authorized by its customers' licenses or because the restrictions in those licenses constitute copyright misuse. Rimini is wrong on both scores.

A. The Licenses Do Not Authorize Rimini's Conduct.

"The existence of a license creates an affirmative defense to a claim of copyright infringement" on which the defendant bears the burden of proof. *Corbello v. DeVito*, 777 F.3d 1058, 1066 (9th Cir. 2015). Rimini "does not have its own software license from Oracle for any of the identified Enterprise Software programs copied on its systems," AER97, and it failed to identify *any* provision in *any* of its customers' licenses that excused its infringement. Rimini attempts to obscure that reality by selectively quoting from the licenses and ignoring the true nature and scale of its copying. The Court should reject that effort to rewrite the record.

1. Rimini does not raise any viable challenge to its liability for infringement of Oracle's Database Software.

Rimini does not challenge the basis on which it was held liable for infringing Oracle's copyrighted Database software—*i.e.*, that its copying violated the Developer License. AER69-70. Instead, to the extent Rimini challenges the Database judgment, it does so only on the ground that its copying was authorized by *its customers'* Oracle License and Service Agreements ("OLSAs"). *See* App.Br.17-20. While that argument fails on its own terms, *see* AER69-73, it faces the insuperable obstacle that the district court found as a matter of fact that "Rimini did not obtain its copies of Oracle Database from clients who had an OLSA." AER69-70. Rimini does not challenge that finding on appeal and instead just ignores it—presumably because "[i]t is undisputed that Rimini obtained its copies of Oracle Database only by downloading these copies from the OTN." AER70. Accordingly, the judgment as to Database must be affirmed. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("arguments not raised by a party in its opening brief are deemed waived").

2. Rimini's infringement of PeopleSoft, JD Edwards, and Siebel was flatly inconsistent with the governing licenses.

While Rimini does challenge its liability for infringing Oracle's copyrights in PeopleSoft, JD Edwards, and Siebel materials, those arguments fail, as Rimini's

copying plainly was not authorized by its customers' licenses. Rimini's contrary arguments mischaracterize both the licenses and its own conduct.

At the outset, Rimini conveniently ignores the fact that it copied materials not licensed to *any* customer. For instance, Rimini copied an entire library's worth of files from PeopleSoft's Customer Connection website in 2006, *before it had a single customer with a valid PeopleSoft license*. ORE134, 379, 487-88. But even setting that aside, Rimini fails to recognize that the question in this case is not (as Rimini would have it) whether the licenses authorize *any* third-party copying or use. It is whether they authorize *Rimini's* copying and use, as it was proven at trial. *See Barnard*, 721 F.3d at 1075 (reviewing court must "view the evidence in the light most favorable to the nonmoving party … and draw all reasonable inferences in his favor"). In other words, the question is whether the licenses authorize massive, serial copying under one customer's license to create environments used to support a whole host of other customers. As the district court correctly found, they do not.[10]

While Rimini blithely asserts that the licenses authorize some degree of copying, *see* App.Br.19, Rimini cannot escape the reality that the licenses authorize

[10] Rimini contends (at 21) that the court "acted prematurely in construing the licenses," but there is nothing "premature" about interpreting contract provisions at summary judgment after extensive briefing and discovery. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1079 (9th Cir. 2010).

copying only under specific and narrow conditions. For example, they authorize only "a reasonable number of copies," and they expressly require copies to be made only for "archive or emergency backup purposes" or "disaster recovery testing purposes" in the event the production copy is destroyed or lost.[11] Moreover, any copies not kept "at [the licensee's] facilities" must be stored on a backup server "under the sole control of Licensee." AER1177 (PeopleSoft §§1.1-1.2(a)).[12] And the licenses expressly confine third parties to making copies "for Licensee's internal use," and "in accordance with the terms set forth herein," which limit all use to supporting "Licensee's internal data processing operations at its facilities." AER1177 (PeopleSoft §§1.1-1.3).[13]

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[11] *See* AER1177 (PeopleSoft §1.2(b)) (permitting "a reasonable number of copies of the Software" for "archive or emergency backup purposes; and/or … disaster recovery testing purposes"); AER1163 (Siebel §2.1(iv)) (permitting "a reasonable number of copies of the Programs and the Ancillary Programs solely for archive or emergency back-up purposes or disaster recovery and related testing"); AER1172 (JD Edwards art. II, §7(iii)) (permitting third parties to "copy the Documentation or Software" solely "to the extent necessary for Customer's archival needs and to support the User").

[12] *See also* AER1163 (Siebel §§1.5, 2.1(i)) (Customer may use the Programs only on specifically "Designated System(s)"—which are defined to mean "Customer's User and Server System(s) [as] designated on the Order Form(s)"—"or on a backup system if the Designated System(s) is inoperative"); AER1172 (JD Edwards art. I & art. II, §1) (Customer's right "to use the Software and Documentation" expressly limited to uses on "the Customer System(s)").

[13] *See also* AER1163 (Siebel §2.1) (Customer's right to "use," "reproduce," and "have third parties … install, integrate, and otherwise implement the" software all restricted to uses "in connection with Customer's own internal business operations"); AER1172 (JD Edwards art. II, §7) ("Customer shall not, or cause

Rimini's serial copying violated each of those restrictions. Rimini copied hundreds if not thousands of Oracle's copyrighted files, and copied them onto Rimini's own systems. ORE269-83, 355-39, 370, 373-74, 379, 408, 432. Rimini then used those files to build dozens of "general development environments" that it used to support *all* of its customers, not just the internal operations of the particular customer whose license it used to obtain them. *See, e.g.*, ORE514 (Rimini "used *all* of the software, PeopleSoft software, Oracle Database software, Siebel software, [and JD Edwards] software … in connection with [its] work for customers"). Indeed, Rimini concededly engaged in cross-use—including amassing a massive library of Oracle software not organized by customer, and cloning environments from one customer to another, *see supra* pp.13-15—"all the time." AER1225. That plainly does not qualify as copying for archival or backup purposes—let alone copying "at [the licensee's] facilities," AER1177. *See* AER100 (archival or backup copy is "inherently an unmodified copy of the software for use in the event that the production copy … is corrupted [or lost]"); AER1338 ("if you're doing something" with a copy of software, "it's no longer a backup").

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anyone else to … copy the Documentation or Software except to the extent necessary for Customer's archival needs and to support the Users.").

Rimini's contrary arguments are defeated by the plain terms of the licenses. According to Rimini, the restriction that copies may be used only to support the "Licensee's internal data processing operations," AER1177, means nothing more than "that the licensee cannot use the software to compete with Oracle's sales of software." App.Br.20. That reading is impossible to square with the actual language of the licenses, which pointedly limits copying and use to supporting the "*Licensee*." Rimini's contention (at 21-22) that its *own systems* satisfy the "at [the licensee's] facilities" condition, AER1177, is equally implausible. If facilities under the control of a third party qualified as the *licensee's* facilities, then there would have been no need for the licenses to state expressly (as they do) that, under certain limited circumstances, the software may be used "at a third-party site … *under the sole control of Licensee*." AER1177 (emphasis added); *see also Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 212 (3d Cir. 2002) (rejecting claim that license limited to "Customer's data center" allowed support from third party's facilities).

In short, Rimini copied Oracle's software and support materials for *Rimini's* use (not the licensee's), onto *Rimini's* servers (not the licensee's), to develop products *Rimini* could sell for *Rimini's* financial gain. Rimini cannot identify a single provision of a single license that authorizes even one of those actions, let alone all of them. Its strained efforts to squeeze its massive copying into the

license restrictions would render a copyright owner's core right to limit reproduction of its works meaningless. *See S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 (9th Cir. 1989) (copyright "license[s] must be construed in accordance with the purposes underlying federal copyright law").

B. The Licenses Do Not Violate the Copyright Misuse Doctrine.

Rimini alternatively contends that, if its customers' licenses do *not* authorize its conduct (and they plainly do not), then those licenses must be unlawful. That argument rests on a fundamental misunderstanding of copyright misuse doctrine.

"Copyright misuse is a judicially crafted affirmative defense to copyright infringement." *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1157 (9th Cir. 2011). The defense, which is grounded in antitrust concerns, "forbids a copyright holder from 'secur[ing] an exclusive right or limited monopoly not granted by the Copyright Office.'" *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001). This Court has found copyright misuse only once, where the American Medical Association ("AMA") gave a federal agency a royalty-free license "to use, copy, publish and distribute" its copyrighted medical-procedure-identification system on the condition that the agency agree not to use any competitor's system. *Practice Mgmt. Info. Co. v. AMA*, 121 F.3d 516, 517-18 (9th Cir. 1997). That was misuse, this Court has explained, "because the AMA was not entitled to use the

license agreement to prevent the use of all competitor's products." *Apple*, 658 F.3d at 1158.

This case is a far cry from *AMA*. Nothing in Oracle's licenses prohibits Oracle's customers from using other products, or from using third parties to service Oracle's products. Third parties remain free to offer their own software and their own support services for Oracle's software—so long as they do so in ways that respect the licenses' restrictions, such as by accessing software licensed to their customers on the customer's own system and using that access to support only that customer. *See supra* pp.3-6. Thus, far from attempting to secure any monopoly over the software or software servicing industries, Oracle's licenses "simply attempt[] to control the use of [Oracle's] own software—an area that is the focus of the copyright." *Apple, Inc. v. Psystar Corp.*, 673 F. Supp. 2d 931, 940 (N.D. Cal. 2009) (emphasis omitted).

The Courts of Appeals have recognized repeatedly that copyright owners may "refuse[] to license a copyrighted work or … do[] so only on terms the copyright owner finds acceptable" without engaging in misuse. *A&M Records*, 239 F.3d at 1027; *see also Dun & Bradstreet*, 307 F.3d at 221 (finding record "simply devoid of any evidence of misuse" where software licensing agreements "specifically allow[ed] for third party maintenance provided the third party signs non-disclosure agreements … and complies with other conditions contained

therein"); *Veeck v. S. Bldg. Code Cong. Int'l Inc.*, 241 F.3d 398, 409 (5th Cir. 2001) (rejecting misuse argument where copyright holder did not "mandate[] the exclusive use of its codes or any of its other services"). And courts have rejected copyright misuse defenses even as to far more restrictive licenses than those here.

For example, in *Apple*, this Court held that the license accompanying Apple's popular operating system did not amount to misuse even though it authorized licensees to run the software *only* on Apple computers. 658 F.3d at 1154-55. That provision concededly made it difficult for the defendant (who produced and sold "non-Apple-labeled" computers) to compete, but it was not misuse because it "did not prevent others from developing their own computer or operating systems." *Id.* at 1155; *see also Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 203-06 (3d Cir. 2003); *Serv. & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 690 (4th Cir. 1992); *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1408-09 (9th Cir. 1986).

The same is true here. While the licenses limit copying and use of Oracle's copyrighted software, they plainly do not preclude third parties from developing competing software or providing competing support services. *See supra* pp.4-6. They just require third parties to do so in ways that do not disregard Oracle's exclusive rights under copyright law. Nothing in the copyright misuse doctrine

prohibits Oracle from exercising its exclusive right to restrict reproduction of its own copyrighted works.

II. There Is No Basis To Disturb The Computer Abuse Verdicts.

A. Rimini and Ravin Plainly Violated Both State Statutes.

Appellants complain at length about the jury's computer abuse verdicts, but both their ire and the cases they cite are trained on the wrong target. *All* of those cases deal with the federal Computer Fraud and Abuse Act ("CFAA"), a statute that is no longer at issue in this case. While Appellants misstate the CFAA's requirements and mischaracterize the cases interpreting it, the more fundamental problem with their argument is that the jury was asked only whether Appellants violated the California Comprehensive Computer Data Access and Fraud Act ("CDAFA") and the Nevada Computer Crimes Law ("NCCL"). AER575-86. The record amply supports the jury's finding that Appellants violated those distinct state statutes, and this Court's precedent squarely forecloses Appellants' attempts to call their constitutionality into question.

The CDAFA makes it "a public offense" to "take[], cop[y], or make[] use of any data from a computer, computer system, or computer network" "without permission." Cal. Penal Code §502(c)(2); *see also id.* §502(c)(3). As this Court has held, the "plain language" of that law prohibits "logging into a database with a valid password and subsequently taking, copying, or using the information in the

database improperly." *United States v. Christensen*, 828 F.3d 763, 789 (9th Cir. 2015). Like the California law, Nevada's statute prohibits using or taking data without permission. *See* Nev. Rev. Stat. §205.4765(1), (3) (unlawful to "knowingly, willfully and without authorization … Use[] … Take[] … [or] Obtain[] … data" from a "computer, system or network"). Echoing *Christensen*, Nevada courts have held that the NCCL prohibits taking and using information from a digital server in a prohibited manner, even if the defendant has authorization to access the information. *See, e.g.*, *Paradise Healthcare Servs. v. Delgado*, 2015 WL 9875393, at *5 (Nev. Dist. Ct. Dec. 29, 2015). Accordingly, whatever the limits of federal law, both California and Nevada law plainly prohibit unauthorized *using or taking*, even when some degree of *access* was authorized.

Appellants clearly violated those state statutes. Since February 2007, Oracle's support websites have prohibited "any software routines commonly known as robots, spiders, scrapers, or any other automated means, to access [the websites], or any other Oracle accounts, systems or networks." ORE306-07; AER1145-47. Despite being fully aware of that prohibition and what it meant by no later than mid-2007, Ravin instructed Rimini employees to use "scraper" programs to download millions of files from Oracle's systems in late 2008 and early 2009. AER38; ORE389-91, 421-24. Appellants' automated smash-and-grab exceeded the total activity of all other users on one system *combined* over the

relevant period. AER43. And they continued using scrapers to take Oracle's data even after learning that they had crashed Oracle servers and that Oracle had blocked their IP address as a result. Indeed, once they realized Oracle was "onto us," ORE587; AER239-40, they responded not by desisting, but by using multiple virtual machines to download Oracle's files as quickly as possible, and even using automated download tools from residential internet connections to avoid detection. ORE263; AER239-41, 976-77, 998-99, 1155-56.

Appellants do not seriously dispute that they took and used Oracle's copyrighted software in violation of the relevant terms of use. Instead, they insist that they cannot be held liable for doing so because the state statutes cannot be violated unless the user lacked *any* authorization to access the website at all. *See* App.Br.24-26. That is precisely the argument this Court rejected in *Christensen*, concluding that the CDAFA (unlike the federal CFAA) "does not require *unauthorized* access." 828 F.3d at 789; *see also Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1069 (9th Cir. 2016) (same). Liability instead turns on whether the plaintiff proved "unauthorized *taking or use of information*." *Christensen*, 828 F.3d at 789 (emphasis added). The same is true of the Nevada law. *See* Nev. Rev. Stat. §205.4765(1); *Paradise Healthcare*, 2015 WL 9875393, at *5. Appellants' contrary argument (at 24-26) is completely unmoored from the text of the state statutes which, unlike the federal CFAA, do not require

unauthorized access. Moreover, their argument would defeat a core purpose of the statutes, as it would allow even the most egregious identity theft so long as the perpetrator had authorization to access the information he stole (as was the case in *Christensen*).

Appellants alternatively contend that if the state statutes do reach their conduct, then they must be unconstitutional. But whatever constitutional concerns might arise with a statute that criminalizes "routine[] transgress[ions]" of a website's terms of use, *United States v. Nosal*, 676 F.3d 854, 861 (9th Cir. 2012) (en banc), that is simply not what the state statutes do. The "focus" of the state statutes (and Appellants' misconduct) "is on unauthorized *taking or use of information*," *Christensen*, 828 F.3d at 789 (emphasis added), not merely on violation of a website's terms of use. Nothing in the First Amendment or any other constitutional provision privileges massive unauthorized taking and use of proprietary software. *See, e.g.*, *Video Pipeline*, 342 F.3d at 203-06; *L.A. News Serv. v. Tullo*, 973 F.2d 791, 796 (9th Cir. 1992); *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 113 (2d Cir. 2010) ("[T]he First Amendment … is, of course, not a license to … infringe copyrights."). That is precisely why courts have found that prohibitions on unauthorized taking and use raise "no serious constitutional doubts." *Craigslist Inc. v. 3taps Inc.*, 964 F. Supp. 2d 1178, 1185 (N.D. Cal. 2013);

see also, e.g., *People v. Hawkins*, 121 Cal. Rptr. 2d 627, 637 (Cal. App. 2002) (CDAFA is "sufficiently clear to avoid constitutional problems").

In all events, there was nothing "routine" about Appellants' transgressions, which involved using prohibited tools to download and copy material so frequently and voluminously as to crash one of Oracle's systems. Appellants continued their massive unauthorized downloading years after learning of the prohibition, and even ramped up their efforts after discovering that Oracle was "onto" them, including by trying to evade Oracle's security measures. The jury thus had little trouble finding—as they were instructed at Appellants' insistence—that Appellants *subjectively believed* their conduct "exceed[ed]" any "authorized access" they may have been granted. AER577-78, 584-85. In fact, Ravin himself admitted that Appellants knew what they were doing was unauthorized, and conceded that his contrary deposition testimony was false. ORE412-14.

Accordingly, Appellants' purported concern that unknowing computer users might run afoul of a website's terms of use and become subject to liability is entirely misplaced here. Even assuming *arguendo* that there may be cases that present that concern, this is certainly not one of them, as Appellants' knowing and willful taking and using of data without authorization "is in the heartland" of the statutes' intended reach. *Salman v. United States*, 137 S. Ct. 420, 429 (2016); *see also, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) ("scienter requirements

alleviate vagueness concerns"); *Facebook*, 844 F.3d at 1069 (holding that "concerns about overreaching or an absence of culpable intent simply do not apply" where user had direct and express notice that its activities were not authorized).[14]

B. The Damage Award Was Fully Justified.

Appellants challenge the jury's decision to award $14,400,000 in lost profits—$8,800,000 for Oracle America, $5,600,000 for Oracle International—for the computer abuse violations. AER46-50, 457-60. According to Appellants, neither state statute authorizes *any* recovery of lost profits, so the jury should have confined its award to the $27,000 Oracle America spent investigating Appellants' conduct. The plain text of both state statutes refutes that contention.[15]

Under California law, compensatory damages generally include lost profits. *See Elec. Funds Sols. v. Murphy*, 36 Cal. Rptr. 3d 663, 675 (Cal. App. 2005). The

[14] Since Appellants' challenges to the CDAFA verdict fail, so do their challenges to the judgment on Oracle's derivative UCL claim. *See supra* n.9.

[15] Appellants also argue that Oracle International lacked statutory standing to recover any damages, App.Br.32-33, but they waived that argument by failing to raise it in their Rule 50(a) motion. AER41 & n.8; *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003). In all events, they are wrong. Oracle International "owns the copyrights" in the files Appellants took from Oracle's servers, AER821-22; ORE487-88, and it lost millions of dollars as a result, AER457-60, 839. That readily suffices to establish standing. *See* Cal. Penal Code §502(e)(1) ("the owner or lessee of … data who suffers damage or loss by reason of a violation … may bring a civil action"); Nev. Rev. Stat. §205.511(1) ("Any victim of a crime described in [the NCCL] may bring a civil action to recover … [d]amages for any response costs, loss or injury suffered as a result of the crime.").

CDAFA is no exception. The statute defines compensatory damages to "include any expenditure reasonably and necessarily incurred" in verifying damage to the victim's digital property. Cal. Penal Code §502(e)(1). "The statutory definition of a thing as 'including' certain things does not necessarily place thereon a meaning limited to the inclusions." *People v. W. Air Lines*, 268 P.2d 723, 733 (Cal. 1954). To the contrary, "[t]he word 'includes' is ordinarily a word of enlargement, not limitation." *Patton v. Sherwood*, 61 Cal. Rptr. 3d 289, 294 (Cal. App. 2007). That is plainly the case with the CDAFA. In addition to authorizing recovery of "compensatory damages," Section 502(e)(1) allows victims to obtain "injunctive relief or other equitable relief," as well as "*any other civil remedy available*." §502(e)(1) (emphasis added). The obvious intent of that provision is to *enlarge* victims' possible modes of recovery, not restrict them.

The NCCL likewise allows "damages for any response costs, loss or injury suffered as a result of the crime." Nev. Rev. Stat. §205.511. By definition, lost profits are losses "suffered as a result of" the relevant violation. *See, e.g.*, *PR Diamond Prods., Inc. v. Desert Diamond Indus., LLC*, 2014 WL 6885677, at *7 (Nev. Dist. Ct. Mar. 7, 2014). Appellants claim that only "damages that result *directly* from the unauthorized access" are recoverable, App.Br.36, but the word "directly" appears nowhere in the statute, and this Court has no license to amend Nevada law. Regardless, the jury had ample evidence from which to find that

Appellants' unauthorized automated downloading directly caused Oracle to lose profits. To convince customers to switch to and stay with Rimini, Appellants needed a full library of Oracle software and support materials. ORE261-66, 356-60, 373, 447-48, 454, 492-93. And to offer services at cut-rate prices, they needed to obtain those materials for free. That is why Ravin directed employees to grab Oracle's copyrighted files at all costs, even going so far as to use cloak-and-dagger measures to evade Oracle's attempts to block Rimini's unlawful activity. ORE261-66, 314-48, 389-91, 423-24, 439-40.

Appellants continue to insist that their illegal actions did not "cause" Oracle to lose customers, App.Br.36, but that was a factual dispute for the jury to resolve, and there was more than sufficient evidence for it to reject Appellants' theory. As the district court concluded, "Rimini's business model was built entirely on its infringement of Oracle's copyrighted software and its improper access and downloading of data from Oracle's website and computer systems, and Rimini would not have achieved its current market share and business growth without these infringing and illegal actions." AER17. Even Appellants admitted that their automated downloading was critical to signing and keeping customers. ORE261-66; AER1157-58. The jury was certainly entitled to agree.

III. Appellants' Challenges To The Permanent Injunction Are Meritless.

Appellants alternatively contend that even if they violated the Copyright Act and the state statutes, the district court erred by enjoining them from doing so again in the future. Those arguments are meritless, as both the injunction and the findings underlying it were well within the district court's broad discretion.

A. The District Court Did Not Abuse Its Discretion in Finding Injunctive Relief Warranted.

The Copyright Act empowers courts to enter permanent injunctions "on such terms as [they] may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. §502(a). "The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Enjoining Appellants from continuing their infringement and computer abuse was eminently reasonable—and far from an abuse of discretion.

1. The *eBay* factors uniformly support the court's decision to grant injunctive relief.

A plaintiff seeking a permanent injunction must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent

injunction." *Id.* The district court did not come close to abusing its discretion in finding those factors satisfied here.

Irreparable Injury. Rimini first makes the extraordinary argument that its infringement did not "cause" Oracle any harm, period. App.Br.39-40. Both the district court and the jury found otherwise. As the court explained, Rimini's "infringement enabled it to rapidly build its business and gain market share … by offering cut-rate prices on its support services for Oracle software." AER16-17. "In fact," the court found, "Rimini's business model was built entirely on its infringement of Oracle's copyrighted software and its improper access and downloading of data from Oracle's website and computer systems, and Rimini would not have achieved its current market share and business growth without these infringing and illegal actions." AER17. As Oracle's CEO testified, and as expert testimony corroborated, Rimini's cut-rate prices broke "the bonds and the trust that we have with our customers" and made customers "wonder[] whether we've treated them fairly." AER430; *see also* AER323, 493-94, 674. Those competitive injuries are classic examples of irreparable harm. *See Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1345 (Fed. Cir. 2013); *Celsis in Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012); *Apple*, 658 F.3d at 1154.

Inadequacy of Money Damages. Given "the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use*" the plaintiff's protected works, *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring), courts have long recognized that a damages award does not obviate the need for a permanent injunction in infringement cases. *See, e.g.*, *Apple*, 658 F.3d at 1154; *Runge v. Lee*, 441 F.2d 579, 580 (9th Cir. 1971). That is no less true of the "hypothetical license" used to measure damages here. AER560. Such awards make parties whole for the amount they would have charged the infringer *in the past* for a license to engage in the infringement that has already occurred. *See* AER22, 450-51. But they do not account for the reality that Oracle would not have licensed Rimini on the terms to which it helped itself. Nor do hypothetical royalties for *past* infringement compensate for the prospect of *future* infringement. *See Wakefield v. Olenicoff*, 2015 WL 1460152, at *9 (C.D. Cal. Mar. 30, 2015).

Moreover, both Congress and the courts have long recognized that copyright infringement is inherently difficult to quantify and prove. *See, e.g.*, *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935); *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545 (9th Cir. 1989). That underscores the propriety of awarding injunctive relief where (as here) all other factors are satisfied, as "[d]ifficulty in estimating monetary damages is evidence that remedies at law are

inadequate." *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 862 (Fed. Cir. 2010), *aff'd*, 564 U.S. 91 (2011).

Appellants fault the district court for identifying "lost market share" as one of the many intangible injuries Oracle suffered, AER17, insisting that the jury found "that Oracle suffered zero lost profits." App.Br.42. In fact, the jury simply chose to award a hypothetical license in lieu of lost profits on the copyright claims, AER450; the jury then went on to award Oracle more than $14 million in lost profits on the computer fraud claims, AER457-60. Accordingly, even accepting the notion that the jury "found" that the copyright violations did not cause Oracle to lose any market share, the district court—which was considering *all* of "the losses suffered because of the defendants," AER17, not just those attributable solely to the infringement—did not contradict the jury's findings in the slightest by including the intangible injury of lost market share on that list.

Balance of Hardships. Any hardship an infringer suffers in complying with the law is far outweighed by the harm to the copyright owner in having to suffer the infringer's continuing trespass of his rights. *See Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011). That is particularly true where, as here, the defendant has no legitimate purpose for continuing its unlawful conduct, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1220 (C.D. Cal. 2007), and has routinely represented

that it is no longer engaged in that conduct, *see, e.g.*, AER18-19, 348.[16] If those representations are true, then any hardship associated with compliance should be *de minimis*. If they are not—as was the case with Appellants' representations that they had no software library and never engaged in cross-use—then any harm Oracle stands to suffer vastly outweighs Rimini's interest in avoiding an injunction.

Public Interest. "Inadequate protections for copyright owners can threaten the very store of knowledge to be accessed." *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 287 (2d Cir. 2012). Protection of copyrights is thus "a vindication of the public interest," *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 909 (8th Cir. 2012), and an injunction such as the one here "serves the purpose of enriching the general public through access to creative works" yet to be produced, *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016). While "the public benefits from lower prices resulting from free market competition," *Canon, Inc. v. GCC Int'l Ltd.*, 263 F. App'x 57, 62 (Fed. Cir. 2008), Appellants have repeatedly

[16] In addition to assuring the court that its infringement has ceased, Rimini has issued several press releases assuring the public that the injunction "will simply prohibit the previous conduct by Rimini … that was found by the Jury and Court to be infringing," that "[t]he injunction does not prohibit Rimini['s] ongoing or future provision of support for [PeopleSoft, JD Edwards, Siebel, and Database]," and that "since Rimini … had ceased said conduct by July 2014, there is no expected impact on any current or future service offering, or on Rimini['s] current or future ability to service any of its clients." ORE579-84.

represented that their current business model is *not* based on the prior conduct, so the injunction should be no hindrance to the public interest in competition.[17]

Finally, Appellants make a half-hearted argument that the district court abused its discretion by granting an injunction on Oracle's CDAFA claims, asserting that "[t]he court did not even discuss three of the four *eBay* prongs … with respect to the state-law injunction." App.Br.48. In fact, the court considered the copyright and state-law violations together, and found the *eBay* factors satisfied with respect to "defendants' conduct" as a whole. AER18-19. And rightly so, as much of Appellants' business, and the harms Appellants caused Oracle, depended on the unauthorized downloading that formed the basis for the computer abuse verdicts. Appellants do not and cannot explain how enjoining them from engaging in the same conduct—conduct that the jury found was knowing, willful, and without authorization, AER457-59, 575-85, and which Appellants went to great lengths to conceal, *see supra*—would pose any hardship or be contrary to the public interest.

2. The copyright injunction is entirely consistent with the jury's "innocent infringement" finding.

According to Rimini, the district court could not exercise its statutory discretion to grant an injunction on the copyright claims because the jury found its

[17] Nor do Appellants' flawed overbreadth arguments identify any public harm. *See infra* III.B.

infringement "innocent." That argument finds no support in the Copyright Act, which empowers courts to enter "final injunctions on such terms as [they] may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. §502(a). That language plainly does not confine injunctive relief to cases of "willful" infringement. Notably, Congress *did* condition some statutory remedies on the character of the infringement. *See, e.g.*, *id.* §504(c)(2). Congress knew how to make remedies contingent on willfulness, and it did not do so in Section 502(a).

Unsurprisingly, then, courts routinely enter injunctions against innocent infringers. *See, e.g.*, *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 36 (2d Cir. 1990) (affirming a finding of "innocent infringement," an award of statutory damages, *and* the issuance of "a permanent injunction … to deter future infringements"); *De Acosta v. Brown*, 146 F.2d 408, 410 (2d Cir. 1944) (affirming an injunction as "clearly correct" against a defendant whose infringement was "innocent"); *Broadcast Music, Inc. v. Coco's Dev. Corp.*, 1981 WL 1364, at *2 (N.D.N.Y. 1981) (issuing a permanent injunction where the defendant "was not aware nor had he reason to believe that his acts constituted an infringement of copyright"); *see also De Acosta*, 146 F.2d at 414 (Hand, J., dissenting on other grounds) (an innocent infringer "may of course be enjoined"); *Wales Indus. Inc. v. Hasbro Bradley, Inc.*, 612 F. Supp. 510, 520 (S.D.N.Y. 1985) ("even an innocent infringer may be enjoined from engaging in infringing activity"); *Jackson v. MPI*

Home Video, 694 F. Supp. 483, 492-93 (N.D. Ill. 1988) (issuing a preliminary injunction against a likely innocent infringer who "evince[d] an attitude of callous disregard toward Jackson's copyright"). Appellants may quibble about the similarity of these examples, but they have identified *zero* cases embracing their position that innocent infringement may not be enjoined.

As the above-cited (and other) decisions reflect, whether infringement was knowing, willful, or otherwise is certainly a relevant consideration, but it is hardly dispositive. *See MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 520 (9th Cir. 1993) (affirming a permanent injunction because the "threat of a violation" was clear, even though plaintiff made "no showing" of any actual violation of copyright law). What matters most is whether an injunction will "prevent future violations" of the law. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). The district court acted well within its discretion in finding that an injunction would do so here.

After all, "Rimini's business model was built entirely on its infringement of Oracle's copyrighted software and its improper access and downloading of data from Oracle's website and computer systems." AER17. Even if the infringement component of that conduct was innocent, the court had ample latitude to conclude that someone who infringed on a massive scale and whose business model is *dependent* on infringement is at least as likely to reoffend as someone whose

infringement was isolated but willful. *Cf. Metro-Goldwyn-Mayer.*, 518 F. Supp. 2d at 1208-24 (enjoining defendant whose "business model depended upon massive infringement"); H.R. Rep. No. 94-1476, at 163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5779 (Section 504(c)(2) "protect[s] against unwarranted liability in cases of occasional or isolated innocent infringement"). Indeed, Congress itself has recognized that some innocent infringement is more damaging than some willful infringement by authorizing statutory damages for as much as $30,000 for innocent infringement and as little as $750 for willful infringement. *See* 17 U.S.C. §504(c).

Moreover, regardless of whether the *infringement* was innocent, Appellants' pervasive "litigation misconduct," *Kirtsaeng*, 136 S. Ct. at 1989, certainly was not. Appellants destroyed relevant evidence and lied about their business practices for years. Suffice to say, it was well within the court's discretion to find that this pattern of misconduct suggested a willingness to continue violating the law.

Appellants alternatively contend that the court's *reasons* for entering the copyright injunction contradict the jury's "innocent infringement" finding, and therefore violate the Reexamination Clause of the Seventh Amendment. That argument rests on a misunderstanding of the law and a mischaracterization of the court's opinion. The Seventh Amendment comes into play only when a finding *necessary* to support equitable relief has been made by the jury. *See Teutscher v.*

Woodson, 835 F.3d 936, 951 (9th Cir. 2016). That alone dispels Appellants' Reexamination Clause argument because neither "callous disregard" nor non-innocence is a necessary finding for injunctive relief. *See* 17 U.S.C. §502(a). The Reexamination Clause thus was not even implicated, let alone violated, in this case.

In any event, the district court did not rest the injunction on any finding regarding Rimini's *mens rea*. The court's observation that "the evidence … established Rimini's callous disregard for Oracle's copyrights and computer systems" came in a discussion not of *Rimini's* mental state, but of *Oracle's* irreparable injury. AER16. In particular, the "callous disregard" language is found in the section of the opinion labeled "Irreparable Injury"; it follows the court's elucidation of the irreparable injury requirement; and it is followed by detailed discussion of how Rimini's *conduct* was uniquely damaging to Oracle's business, as it allowed Rimini to "gain market share against Oracle … by offering cut-rate prices," and to "land[] clients for its services by telling customers that Oracle's services were overpriced." AER17.

The relevant discussion and findings thus are addressed to a question (whether the nature of Rimini's infringement caused Oracle irreparable harm) entirely separate from the question the jury was asked in reaching its innocent infringement finding (whether Rimini knew its conduct violated the licenses). And

nothing in the jury's findings precluded the court from taking into account the extremely damaging *effects* of Rimini's infringement, innocent or not. Indeed, the jury itself recognized that Rimini's infringement was particularly harmful, as the jury selected the maximum statutory damages for innocent infringement ($30,000) for all 93 infringement counts. AER454; 17 U.S.C. §504(c)(1). Moreover, the conduct the court was addressing in its irreparable injury section was not even limited to Rimini's copyright infringement, but also included Appellants' violation of the computer abuse laws, which the jury found *willful*. AER457-59, 575-85. The injunction is thus entirely consistent with the jury's findings and the Seventh Amendment.

B. The Injunction Is Neither Overbroad Nor Vague.

Finally, Appellants' contention that the injunction is overbroad or vague is meritless. Appellants identify only a single example of this so-called overbreadth: the copyright injunction's purported prohibition on "access." Once again, Appellants' arguments are divorced from the facts. The copyright injunction uses the term "access" only twice: Rimini may not "copy or access" the source code for (1) JD Edwards- or (2) Siebel-branded software. AER7-8. Those proscriptions are fully consistent with the terms of the applicable licenses, which expressly restrict third-party access to source code. The JD Edwards license does so by restricting third parties to "screen access" of the software, which, as Oracle explained at trial,

does not include access to source code. AER1172. Similarly, the Siebel license does not allow third parties "[to] access the software's source code to carry out development and testing of software updates." AER111; *see* AER1161-71. The injunction thus prohibits the same thing as the licenses themselves.

Appellants' claim (at 47) that "the injunction forbids certain conduct that would bring about a 'benefit,' and the 'use' of Oracle software 'to support' licensees" suffers from the same flaw: The injunction is far more specific than Appellants' selective quotation suggests. It prohibits Rimini from, *inter alia*, "us[ing] a specific licensee's … software or documentation other than to support the specific licensee's own internal data processing operations," and from "us[ing] a specific licensee's … environment to develop or test software updates or modifications for the benefit of any other licensee." AER6-8. The injunction thus does not "enjoin human thought or ingenuity," App.Br.47, but rather enjoins the cross-use that underlies the infringement finding. *See supra* pp.14-15, 24-28.

As for the CDAFA injunction, Appellants do not even try to identify any provision that supports their overbreadth claim; they just generically assert that the injunction is insufficiently "tethered to the California statute." App.Br.48. In fact, the injunction prohibits the same things as the statute: unauthorized taking and using of information from Oracle's websites. *See* AER8-9; *supra* pp.31-32. Appellants complain that the injunction prohibits such conduct even if they may

not be entirely without authorization to "access" those sites, App.Br.48, but that argument fails for the same reason as their attempt to avoid state-law liability: The "unauthorized taking or use of information" violates the CDAFA regardless of whether some degree of *access* was authorized. *Christensen*, 828 F.3d at 789.

IV. Appellants' Challenges To The Post-Trial Awards Are Meritless.

A. The Decision to Award Attorneys' Fees Was Not An Abuse of Discretion.

The Copyright Act authorizes the "award [of] a reasonable attorney's fee to the prevailing party." 17 U.S.C. §505. In deciding whether to award fees, courts must consider the degree of success obtained, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983), "the objective reasonableness of the losing party's position," *Kirtsaeng*, 136 S. Ct. at 1983, and "'considerations of compensation and deterrence,'" *id.* at 1985. Those considerations amply support the court's exercise of discretion to award fees here.

Degree of Oracle's Success. Oracle did not just win—it won repeatedly and significantly. Oracle persuaded the court to dismiss Rimini's copyright misuse counterclaim at the outset, AER1551-59, won summary judgment on the remaining counterclaims at the close of discovery, AER58-89, and obtained a jury verdict on *every single one* of its copyright claims, AER448-49. Oracle went 93-for-93 on its copyright claims, AER454, and as the district court emphasized, this "was a copyright infringement case first and foremost," AER25. Oracle also prevailed on

both computer fraud claims it submitted to the jury, proving that Appellants had "willfully" taken Oracle's material in violation of those laws. AER457-59, 575-85. Those victories led to a $50 million damages award and a permanent injunction. AER5-9, 450-60. Under any reasonable interpretation of the facts, Oracle achieved a substantial victory.[18]

Unreasonableness of Rimini's Positions. Rimini put forward countless objectively unreasonable arguments over the course of the litigation. For instance, Rimini denied for years that it had engaged in *any* cross-use, only to admit at trial that cross-use occurred "all the time." *See supra* pp.14-15. Similarly, Rimini fended off summary judgment on certain claims by arguing that it did not use those environments for development, only to admit at trial that Rimini "used *all* of the software" for testing and development. *See supra* p.13. An argument cannot be objectively reasonable if it is objectively—and knowingly—false. *See Moore v. Bryant*, 348 F.3d 238, 242 (7th Cir. 2003); *IO Grp., Inc. v. Jordan*, 2010 WL 2231793, at *2-3 (N.D. Cal. June 1, 2010) (awarding fees in copyright case in light of "inherent contradictions in Defendant's factual statements").

Deterrence. Rimini claims an attorneys' fees award would not achieve deterrence in this case because its infringement was found innocent. App.Br.50.

[18] Appellants claim that the verdict was less favorable than their Rule 68 offers, App.Br.51, but those offers proposed payment over several years *without* interest and did not include meaningful injunctive relief. *See* AER31 n.6.

But "Section 505 does not condition an award of fees on the showing of a willful infringement or frivolous suit," *Casella v. Morris*, 820 F.2d 362, 366 (11th Cir. 1987), and courts may award fees "to deter repeated instances of copyright infringement … even if the losing position was reasonable in a particular case." *Kirtsaeng*, 136 S. Ct. at 1989. Moreover, again, even accepting that Rimini's *infringement* was innocent, its "litigation misconduct," *id.*, was not. Rimini ignored its preservation obligations, intentionally destroyed key evidence, and denied *any* cross-use all the way until trial, needlessly prolonging the litigation and increasing its already-considerable cost. *See supra* pp.13-15. The district court manifestly did not abuse its discretion in concluding that an award of attorneys' fees would help deter such misconduct by future litigants (including Appellants).

B. The Amount of Fees Awarded Was Reasonable.

The statutes at issue all allow for "reasonable attorney's fees." *See* 17 U.S.C. §505; Cal. Penal Code §502(e)(2); Nev. Rev. Stat. §205.511(c). The district court arrived at its fee award using the presumptively reasonable lodestar method, "multipl[ying] the number of hours the 'prevailing party reasonably expended on the litigation by a reasonable hourly rate.'" *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006). The court then reduced the lodestar by 20% to reflect its finding that Oracle's billing records contained a small number of improper block-

billing entries. AER30-31. That award was well within the court's broad discretion.

Appellants complain that the lodestar calculation was based on "rates far exceeding those in Las Vegas," where the case was brought. App.Br.54. As the district court rightly found, however, this was not a local case in any meaningful sense. AER445 (the court had "never seen a case this complex that involved this many issues before a jury"). Indeed, one need only peruse the list of *Appellants' own attorneys*, who hail from prominent, national law firms and work out of San Francisco, Kansas City, Houston, Los Angeles, and Washington, D.C., to confirm the court's assessment. AER30; *see also* ORE573. In a complex case such as this, "the proper scope of comparison" is not determined by where the case happens to have been filed, but rather by what "'lawyers of reasonably comparable skill, experience, and reputation' … engaged in 'equally complex Federal litigation'" charge for their services. *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010). Counsel's rates were well within the norm for that relevant community; Appellants do not argue otherwise.

Nor did the court err in awarding the fee as a lump sum. Apportionment of attorneys' fees among claims is not mandatory. *See El-Hakem v. BJY Inc.*, 415 F.3d 1068, 1075-76 (9th Cir. 2005). In complex cases like this one, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it

difficult to divide the hours expended on a claim-by-claim basis." *Hensley*, 461 U.S. at 435. That is particularly true where, as here, each claim arose from a "common core of facts." *Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003). It was well within the court's discretion to determine that since this "was a copyright infringement case first and foremost," AER25, the extensive effort it took to obtain a 100% success rate on those claims (not to mention victory on both state law claims) justified a substantial award.

Finally, the district court did not abuse its discretion by holding Ravin liable for the fees award under the CDAFA and NCCL. Appellants claim that the court should have "segregate[d] fees" between the copyright claims and the state law claims because Ravin was held liable only for the latter. App.Br.56-57. But whether to segregate fees claim-by-claim was a question for the district court, and the court acted well within its broad discretion in declining Appellants' request to do so. Moreover, Appellants *paid the award in full* without raising that objection, *see* AER119-20, rendering any error waived and harmless. *See, e.g.*, *Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210, 1219 (9th Cir. 2003) (declining to consider challenge to fee award where losing party failed to raise objection in district court).

C. The Costs Award Was Not An Abuse of Discretion.

Appellants also challenge the district court's decision to award non-taxable costs. But as they concede (at 55), their argument that non-taxable costs are not recoverable under the Copyright Act is squarely foreclosed by this Court's precedent. *See Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 885 (9th Cir. 2005). Contrary to their contentions, *Twentieth Century Fox* has not been "abrogated" by *Marx v. General Revenue Corp.*, 133 S. Ct. 1166 (2013). *Marx* simply reiterates that a prevailing party is entitled to its full costs unless a federal statute "limits" the courts' "discretion" to award them. *Id.* at 1172. As this Court has already concluded, the Copyright Act emphatically does not. On the contrary, it provides that "the court *in its discretion* may allow the recovery of *full costs*." 17 U.S.C. §505 (emphasis added). The award of $12,774,550.26 in non-taxable costs—roughly 30% less than Oracle sought, *see* AER20-22—was thus well within the court's discretion. *See Twentieth Century Fox*, 429 F.3d at 885.[19]

D. The Prejudgment Interest Award Was Not An Abuse of Discretion.

Finally, the district court did not abuse its discretion in awarding prejudgment interest. The starting point for measuring prejudgment interest in

[19] The court did err, however, in calculating Oracle's *taxable* costs, as it inadvertently included $1,467,564.65 in non-taxable costs in the taxable cost award. ORE209-10. Accordingly, Oracle does not object to a limited remand to correct that mistake.

copyright cases is the post-judgment rate established by 28 U.S.C. §1961(a), which is the weekly average of the one-year constant maturity Treasury yield. *See Frank Music*, 886 F.2d at 1552-53. But since "[a]n award of pre-judgment interest at below market rates does not fully compensate the prevailing party and, in addition, tends to … give[] an economic benefit to the debtor," courts retain discretion to depart from Section 1961 where equity warrants. *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 836-37 (9th Cir. 2012) (en banc); *see also, e.g.*, *Blankenship v. Liberty Life Assurance Co. of Boston*, 486 F.3d 620, 628 (9th Cir. 2007) (upholding prejudgment interest rate of 10.01%); *United States v. Pend Oreille Cty. Pub. Util. Dist. No. 1*, 135 F.3d 602, 613 (9th Cir. 1998) (upholding prejudgment interest at 90% of prime rate). Oracle asked the court to exercise that discretion and apply the prime rate (8.25%) instead of the Treasury rate (0.61%). ORE160-63. The court instead used the Treasury rate as of the date infringement began. AER23. That decision, which left Oracle with substantially less than it sought, was not an abuse of discretion.

The jury's damages award reflected the amount Oracle would have received had it licensed its software to Rimini back when Rimini first began infringing Oracle's copyrights. An award based on the anemic Treasury rate as of the judgment date thus would not have "compensate[d Oracle] fully … for the misappropriated value of its property." *Polar Bear Prods., Inc. v. Timex Corp.*, 384

F.3d 700, 718 (9th Cir. 2004). Over the six years between when the infringement began and the jury's verdict, Oracle suffered not just the violation of its rights, but delay in receiving payment for the hypothetical license. And much of that delay was due to Rimini's own misconduct, which included both spoliation and perjury. *See supra* pp.13-15. Had Oracle recouped its damages at any point along the way, it would have received a far greater return than under the recession-driven Treasury rate that prevailed as of judgment. Forcing the court to ignore those facts would leave Oracle holding the bill for Rimini's infringement, and would violate the principle that prejudgment interest awards should deter "would-be infringers" and "discourage needless delay." *Polar Bear*, 384 F.3d at 708, 718.

In a last-gasp effort, Rimini contends that even though prejudgment interest may be available "from the date of infringement" in *patent* cases, *Frank Music*, 886 F.2d at 1551, the same cannot possibly be true of copyright cases. App.Br.58. Rimini does not and cannot explain why that would be so. Prejudgment interest serves to make plaintiffs whole, to ensure that the defendant does not obtain a windfall, and to deter other bad actors from engaging in similar conduct. *See Polar Bear*, 384 F.3d at 718. Although Section 1961 provides a useful starting point, it is just that; what matters most is that the award "respon[d] to considerations of fairness" in the case at hand. *Bd. of Comm'rs of Jackson Cty. v. United States*, 308 U.S. 343, 352 (1939) ("[I]nterest is not recovered according to a

rigid theory of compensation for money withheld, but is given in response to considerations of fairness."). Those "considerations of fairness"—which here include egregious litigation misconduct that significantly extended the litigation, as well as macroeconomic changes in the interim that caused interest rates to fall off a cliff—overwhelmingly support the decision below.

Nor is there any error in the court's award of prejudgment interest under the NCCL. That decision was fully consistent with Nevada law, *see* Nev. Rev. Stat. §17.130(2); *Torres v. Goodyear Tire & Rubber Co.*, 317 P.3d 828, 830-31 (Nev. 2014), and Appellants do not argue otherwise. They instead contend that such interest was unavailable under the election-of-remedies doctrine because Oracle obtained an injunction for the computer abuse violations under California law, which does not allow recovery of prejudgment interest. App.Br.61. But nothing prevents prevailing plaintiffs from obtaining separate remedies for separate legal wrongs—particularly where, as here, those awards do not remedy the same thing.

"Election of remedies is 'the legal version of the idea that a plaintiff may not have his cake and eat it too.'" *Hickson Corp. v. Norfolk S. Ry. Co.*, 260 F.3d 559, 566-67 (6th Cir. 2001) (quoting D. Dobbs, *Remedies* §1.5 at 14 (1973)). "The doctrine is remedial in nature and does no more than prevent double recovery." *Id.* at 567; *accord United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 416 (6th Cir. 2002); *Gens v. Resolution Trust Corp.*, 112 F.3d 569, 573

(1st Cir. 1997). Oracle obtained no double recovery. "The sole function of an action for injunction is to forestall future violations." *United States v. Or. State Med. Soc.*, 343 U.S. 326, 333 (1952). Prejudgment interest, by contrast, compensates plaintiffs for *past* injuries. *See West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987). Indeed, "awards of prejudgment interest on future damages are not available." *Verdin v. C & B Boat Co.*, 860 F.2d 150, 158 (5th Cir. 1988). The election-of-remedies doctrine thus posed no barrier to the court's award.

CONCLUSION

For the foregoing reasons, this Court should affirm, with the limited exception of remanding to amend the costs order.

Respectfully submitted,

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February 21, 2017

STATEMENT OF RELATED CASES

Pursuant to Federal Rules of Appellate Procedure 28-2.6, Appellees Oracle USA, Inc., Oracle America, Inc., and Oracle International Corporation, by and through their counsel of record, hereby certify that the two consolidated matters pending in this appeal (Case Nos. 16-16832 & 16-16905) are the only related cases pending before this Court.

Dated: February 21, 2017

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,963 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

Dated: February 21, 2017

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement