

# EXHIBIT 3

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ROBERT JACOBSEN, an individual, )  
 )  
Plaintiff, )  
 )  
vs. ) No. C-06-1905-JSW  
 )  
MATTHEW KATZER, an individual, )  
and KAMIND ASSOCIATES, INC., an )  
Oregon corporation dba KAM )  
Industries, )  
 )  
Defendants. )  
\_\_\_\_\_ )

*ORIGINAL*

DEPOSITION OF ROBERT JACOBSEN  
Taken in behalf of the Defendants

September 17, 2009  
Portland, Oregon

1 BY MR. JERGER:

2 Q. Let's look at Exhibits 1 and 2. We're going to  
3 look at 1 and 2, which are attachments to one of your  
4 declarations.

5 A. Yes.

6 Q. Which I'm sure you're familiar with. All right.  
7 I just want to understand a couple of things. So if we  
8 could put these side by side, AD and AE.

9 A. Exhibits 1 and 2? Okay.

10 Q. I think we all have seen these a bunch and know  
11 what they are, but we'll set up a little bit of background  
12 here. So what's AD?

13 A. That was addressed to me?

14 Q. Yeah.

15 A. AD appears to be a JMRI definition file.

16 Q. And this is -- is this -- who is the author of  
17 this file?

18 A. Howard Penny is listed as the author.

19 MS. HALL: Objection. Hearsay.

20 THE WITNESS: This says that Howard Penny is  
21 the author of this file.

22 BY MR. JERGER:

23 Q. What particular file is this? Does it have a  
24 name?

25 MS. HALL: Objection. Lack of foundation.

1 BY MR. JERGER:

2 Q. Go ahead and answer.

3 A. This says QSI Electric.xml file, Version 1.1.

4 BY MR. JERGER:

5 Q. Now, so is this --

6 MS. HALL: Objection. Hearsay on that basis.

7 BY MR. JERGER:

8 Q. Is this the decoder definition file for QSI  
9 Electric?

10 MS. HALL: Objection. Lack of personal  
11 knowledge.

12 MR. JERGER: Are you going to object to every  
13 question? I mean, this is going to take forever if you  
14 do.

15 THE WITNESS: This is the file that I would  
16 have called that.

17 BY MR. JERGER:

18 Q. That you would call -- I mean, this is attached  
19 to your declaration; right?

20 A. Yeah.

21 Q. I don't think -- there's no mystery to this, is  
22 there? This is the QSI Electric decoder definition file;  
23 right?

24 A. This is one of many, yes.

25 Q. One of many written by Howard Penny. I'm not

1 trying to trick you. I just want us to be on the same  
2 page here. I think all of this stuff is fairly obvious at  
3 this point.

4 So AE is the KAM file; right?

5 A. Yes.

6 Q. And it seems like we are all in agreement that  
7 the KAM template tool interacted with the QSI Electric  
8 file and produced the KAM file, which is -- is that your  
9 understanding?

10 A. I don't know how that file was produced.

11 Q. Okay. Following this lawsuit over the last  
12 three years, what is your understanding of how this was  
13 produced?

14 A. The file that I found that made this exhibit was  
15 shipped with the 304 CD.

16 Q. Okay.

17 A. That's all I know about it.

18 Q. What's the relationship in your mind between AE  
19 and AD?

20 A. Something or somebody made AE from AD.

21 Q. That's what I was getting at. So AE relates to  
22 QSI Electric as well?

23 A. Yes.

24 Q. Are these both XML files?

25 A. Yes.

1 Q. Is it fair to say they're text files?

2 A. Yes.

3 Q. So what I want to understand -- and I've really  
4 been trying to understand this for a while -- is, explain  
5 to me what copyrightable information exists in AD, which  
6 is Exhibit 1, that also exists in AE, Exhibit 2.

7 MS. HALL: Objection. Calls for a legal  
8 opinion.

9 Don't answer.

10 MR. JERGER: You're instructing him not to  
11 answer?

12 MS. HALL: Not to give a legal opinion. No.

13 MR. JERGER: Well, we have to know what  
14 you're asserting -- what you're asserting against us in  
15 each file, and to date you've never said. So you're  
16 instructing him not to tell us what you consider  
17 copyrightable information in Exhibit AE?

18 MS. HALL: I'm permitting him to answer any  
19 factual questions that you may have, but I'm not -- I'm  
20 instructing him not to offer any legal opinions.

21 BY MR. JERGER:

22 Q. Do you consider your registered copyrightable  
23 information in Exhibit AE a factual opinion or a legal  
24 opinion?

25 A. I'm not a lawyer. I can't answer that kind of

1 question. I can't -- I'm sorry. I'm not a lawyer.

2 Q. Okay. All right. Let's just make it -- so  
3 you're not going to answer questions relating to the  
4 creativity and arrangement that you consider copyrightable  
5 that is contained in Exhibit AE; is that correct?

6 MS. HALL: I'm instructing him not to answer.  
7 However, if you have factual questions -- you know, to the  
8 extent you have factual questions, I am more than happy to  
9 let him answer.

10 BY MR. JERGER:

11 Q. What in AE do you consider that is creativity  
12 and arrangement that you maintain a copyright to that was  
13 taken from Exhibit AD?

14 A. Just give me a second to parse the sentence. So  
15 what in the file that was shipped with Katzer 304 do I  
16 consider to be part of document 1?

17 MS. HALL: I'm going to object on the basis  
18 of lack of personal knowledge. This is Mr. Penny's  
19 document.

20 MR. JERGER: Well --

21 MS. HALL: If you want to ask him about --

22 MR. JERGER: -- you're the plaintiff in this  
23 lawsuit.

24 MS. HALL: If you want to ask him some  
25 questions about files that he created, that he has

1 personal knowledge of, I have no problem with that. In  
2 fact, if you want to ask him which ones he created and  
3 then printed out, we can go through those. I think that  
4 might help you get the information that you are looking  
5 for.

6 MR. JERGER: We're going to stick with this  
7 file.

8 MS. HALL: Okay.

9 BY MR. JERGER:

10 Q. Do you have an assignment from Mr. Penny to the  
11 copyright rights to this file?

12 A. Yes.

13 Q. Are you asserting that KAM and Mr. Katzer are  
14 infringing your copyright to this file?

15 A. Yes.

16 Q. What are you asserting is infringing?

17 A. The entire factual content of exhibit -- is this  
18 Exhibit 2? How do I -- what do I refer to this as?

19 Q. Exhibit 2 or Exhibit AE. Either one is fine.

20 A. Exhibit 2, the entire factual content of that  
21 was copied from content that I have a copyright to.

22 Q. Okay. Let me --

23 MR. JERGER: Hold on two seconds. You can  
24 stay on the record.

25 (Pause in the proceedings.)

1 BY MR. JERGER:

2 Q. When you say factual content, can you identify  
3 with this highlighter on that exhibit what you're  
4 referring to?

5 A. So in a definition file like this --

6 Q. Uh-huh.

7 A. Wait a second. AE. That's this one?

8 Q. Right.

9 A. So what you're asking me to do is go through and  
10 identify all of the parts that were copied from our  
11 content?

12 Q. No. Because what I'm asking is parts that were  
13 copied and that you claim a copyright to that you're  
14 asserting Matt is infringing or KAM is infringing.

15 A. I have a copyright on the entire content of the  
16 JMRI file.

17 Q. Okay.

18 A. I can't parse it any finer than that. What I  
19 can show you is what characters have been copied.

20 Q. Let's do that.

21 MS. HALL: You know, the best evidence of  
22 that actually is the tool that Mr. Katzer used to do the  
23 copying. I mean, you're asking my client to come up with  
24 a bunch of comparisons. He may very well miss some of  
25 them --

1 were related just to e-mail documents?

2 A. Yes.

3 Q. And that everything else is hard copy?

4 A. Yes.

5 Q. Okay.

6 A. There were a few NMRA website things and things  
7 like that that were electronic. Let me point out that the  
8 letters K-A-M appear in a lot of common words, and a key  
9 word search for that was difficult, but it was performed.

10 Q. Okay. I appreciate that.

11 Take a look at page -- same document, page 20.

12 That's Request for Admission 1.

13 A. Okay.

14 Q. This is sort of --

15 MS. HALL: Just let me take a look at this.

16 Okay. I'm on page 1. Yep.

17 BY MR. JERGER:

18 Q. Request for Admission 1 says, "That Defendants'  
19 alleged infringement of Plaintiff's Copyrighted Works  
20 commenced prior to June 13, 2006."

21 Okay. Your response is, "Jacobsen objects to  
22 this Request for Admission as vague with respect to the  
23 word 'commenced'.

24 "Subject to this objection, and without waiving  
25 it, Jacobsen agrees in part and denies in part. Jacobsen

1 agrees he learned of Defendants' infringement before  
2 June 13, 2006 for JMRI Version 1.7.1. He denies that  
3 infringement did not re-commence for purposes of statutory  
4 damages. He also denies that infringement commenced  
5 before June 13, 2006 for later versions of JMRI software.  
6 He denies any other part of this Request for Admission."

7 Okay. So my question is -- that answer hedges a  
8 little bit, and I need to know it now. Do you agree that  
9 defendants' alleged infringement of a version of JMRI  
10 1.7.1 commenced prior to June 13, 2006?

11 A. I agree that defendants produced a work that  
12 infringed JMRI code rights before June 13, 2006.

13 Q. You used that term "produced a work." What does  
14 that mean to you?

15 A. They may have produced other works at other  
16 times in the future.

17 Q. Do you have a date on when the first  
18 infringement -- alleged infringement you learned of  
19 occurred?

20 A. Sitting here today, no, I do not.

21 Q. But you agree that defendants' alleged  
22 infringement of at least one version of JMRI software  
23 occurred prior to June 13, 2006?

24 A. I don't see the difference between that and this  
25 sentence, but I agree with it.

1 Q. The sentence says you learned.

2 A. Yes. I learned of an infringement. That's  
3 right. Since I've learned of it, it must have happened  
4 before that date, so, yes, it did indeed start.

5 Q. So you agree with me that it happened?

6 A. That's right. The infringement of JMRI 1.7.1  
7 happened before June 13, 2006 or started before June 13,  
8 2006.

9 Q. Okay. Thanks.

10 (Discussion off the record.)

11 BY MR. JERGER:

12 Q. Admission No. 2, "That all versions, including  
13 the current version, of Plaintiff's Copyrighted Works  
14 include material from the QSI manual." And the response  
15 is, "Denied." Why did you deny that?

16 A. Not all versions include material from the QSI  
17 manual.

18 Q. Do you agree that some versions contain material  
19 from the QSI manual?

20 MS. HALL: Objection. Lack of personal  
21 knowledge or lack of foundation.

22 THE WITNESS: There are QSI decoder  
23 definitions in JMRI.

24 BY MR. JERGER:

25 Q. Right. Six; right?

1 to the way your template tool works.

2 Q. And what does the script identify?

3 A. It looks for pieces within certain KAM decoder  
4 templates and matches them to the original pieces in the  
5 JMRI decoder definition files.

6 Q. And when you say pieces, what does that mean?

7 A. Very similar to what I was doing by hand with  
8 the yellow pen this morning.

9 Q. Okay.

10 A. Here is a JMRI definition, and here's how it was  
11 copied into the KAM template. Here is the next JMRI  
12 definition, and here's how it was copied into the KAM  
13 template.

14 Q. Okay.

15 A. Over and over and over again.

16 Q. That information in 275 to 1011, is that  
17 equivalent to or broader than your copyright material?

18 A. My copyright material is the entire set of  
19 decoder definition files, and in some later copyrights the  
20 code that goes with them.

21 Q. Okay.

22 A. I stress that I have not seen defendants' source  
23 code, and I was doing this only with the shipped decoder  
24 templates. I do not know how he did this.

25 Q. How who did what?