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NETBULA, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NETBULA, LLC, a Delaware limited liability
company,

Plaintiff,

vs.

BINDVIEW DEVELOPMENT
CORPORATION, a Texas Corporation,
SYMANTEC CORPORATION, a Delaware
Corporation, ERIC J. PULASKI, an individual,
and DOES 1-10, inclusive,

Defendants.

Case No.: C-06-0711-MJJ

**PLAINTIFF NETBULA, LLC'S
OPPOSITION TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT AND CROSS-
MOTION FOR SUMMARY JUDGMENT OR
SUMMARY ADJUDICATION AS TO THE
COPYRIGHT CLAIM**

Date: August 21, 2007

Time: 9:30 AM

Dept: Courtroom 11

Judge: The Honorable Martin J. Jenkins

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Plaintiff opposes Defendants' motion for summary judgment as to the copyright claim. Pursuant to FRCP Rule 56(c) and Civil Local Rule 56-1, Plaintiff files this cross-motion¹ for summary judgment on the copyright claim or summary adjudication on Defendants' affirmative defenses.

INTRODUCTION

Established facts point to one legal conclusion: Defendants BindView Development Corporation ("BindView"), Symantec Corporation ("Symantec") and Eric J. Pulaski ("Pulaski") are liable for copyright infringement. Plaintiff holds a valid copyright in its Netbula RPC software. Defendant BindView violated Plaintiff's copyright by: (1) creating derivative work based on the Netbula RPC Software Development Kit ("SDK"); (2) distributing the developer version of Netbula RPC runtime library (the "pwrpc32.dll" file) to hundreds of companies and organizations; and (3) putting the infringing HackerShield/bv-CIS products on the internet for unrestricted download. Defendants BindView and Symantec (4) modified the Netbula RPC SDK files in their possession and (5) altered the identifying information of the Netbula SDK files to conceal infringement in the bv-CIS 8.10, 8.10SP1 and "Symantec Control Compliance Suite" software. Defendants' acts were done without any authorization by the copyright holder and violated Plaintiff's exclusive rights protected by the copyright law. Defendants BindView and Symantec cannot provide any valid defenses to their actions and must be held liable for copyright infringement. Defendant Pulaski was the president and CEO of Defendant BindView. He knew about the infringement no later than September 2005, at which time he owned approximately 20% of BindView. Pulaski is vicariously and contributorily liable for copyright infringement.

Defendants' motion for summary judgment is based on the theory that because Netect LTD ("Netect") listed "Netbula" as "licensed software" in its disclosure letter, because Netbula cannot show Netect agreed to Netbula's licensing restrictions, and because BindView was a Texas company when it acquired Netect, that BindView somehow owns unrestricted rights to Netbula software through "operation of law". Defendants claim that because Symantec created a Texas

¹ FRCP Rule 56(c) states that a motion for summary judgment shall be served at least 10 days before hearing date.

1 shell company to acquire BindView, Symantec was able to benefit as well, and that it too owns
 2 unrestricted rights to Netbula software – including the recently discovered alterations of
 3 Netbula’s code under the supervision of Symantec employees such as Don Closser and Shantanu
 4 Ghosh². If Symantec won this argument, Symantec would be able to claim ownership of a
 5 portion of Microsoft too, as Netect listed “Netbula” along with “Microsoft” in its disclosure
 6 letter³.

7 Under federal law, “copyright licenses are assumed to prohibit any use not authorized.” *S.O.S.,*
 8 *Inc. v. Payday*, 886 F.2d 1081, 1888 (9th Cir. 1989). A non-exclusive copyright license operates
 9 as an affirmative defense to copyright infringement. But, “Defendant bears the burden of
 10 proving . . . affirmative defenses.” *A & M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896, 912
 11 (N.D.App. 2000). Defendants failed to prove they were authorized to copy, create derivative
 12 works from, modify or distribute Plaintiff’s software.

13 The copy of Netbula software Defendants distributed was labeled “Netect LTD. Dev License,
 14 Non-distributable.” Netect had no right to distribute the developer version of Netbula software.
 15 Defendants’ claim that they did not understand or consent to Netbula’s licensing terms is not a
 16 valid defense against a copyright infringement claim. Defendants proved one thing: the
 17 pwrpc32.dll they distributed had been only licensed to one Netect LTD developer.

18 Under federal law, even that one developer license was not transferable. “Federal copyright
 19 law provides a bright line prohibition against transfer of copyright license rights.” *SQL Solutions,*
 20 *Inc. v. Oracle Corp.*, No. C-91-1079 MHP, 1991 U.S. Dist. LEXIS 21097, at *12 (N.D. Cal.
 21 Dec. 18, 1991). Defendants primarily relied on a Texas state case which drew analogy from real
 22 estate leases. However, “State law is preempted by federal law in question of copyright law or
 23 policy.” *Id.*

26 ² Don Closser and Shantanu Ghosh are in charge of the development of “Symantec Control Compliance Suite 8.5”,
 27 the successor to BindView bv-Control. Both resigned from BindView in January 2006 and became employees of
 28 Symantec.

³ Netbula was listed in the Netect disclosure letter as “licensed software” along with Microsoft VC++, MS Internet
 Explorer, SUN Java and others. Netect also listed other third party items such as Compiler (GNU), Winzip and
 “Data Base” as owned software.

As Plaintiff will show, Defendants misconstrued the relevant law and their license defense is entirely invalid. Plaintiff will present evidence which will prove copyright infringement by Defendants. Accordingly, Plaintiff requests the Court to deny Defendants' motion for summary judgment and find Defendants liable for copyright infringement.

In the following, Plaintiff will reference specific documents, deposition transcripts, expert reports, supporting declarations and other documents. Documents produced by Defendants are labeled with prefix "BV" (such as BV00001). Plaintiff's documents are labeled with prefix "NB" (such as NB-0001). A reference such as "NB123,125" indicates the starting bates number (123) and the particular page (125) where the information is found. Such referenced documents are attached as exhibits to the declaration of Vonnah M. Brillet and declaration of Don Yue. The statement of facts contains information obtained from recent discovery.

STATEMENT OF FACTS

1. Background of Netbula RPC software business

Netbula, LLC was formed in July 1996 to market its first product called PowerRPC, which is intended to enable software companies to develop applications based on Remote Procedure Call ("RPC") technology. RPC allows a program on a local computer to execute a command on a remote computer over a network.

A Netbula RPC product purchaser must buy one developer license (an "SDK" license) for each computer programmer who will use Netbula Software Development Kit ("SDK")⁴ to develop RPC applications. The pwrpc32.dll file contains the essential code for RPC functionality and is a necessary component for a program based on RPC technology. The "pwrpc32.dll" file in the SDK is for development purposes only. Netbula's licensing terms prohibits the distribution of the developer version of "pwrpc32.dll". A Netbula product purchaser must buy a separate license for the right to copy the distributable version of "pwrpc32.dll" file. The distributable version of the pwrpc32.dll is different from the developer version. The license for the right to copy the pwrpc32.dll to a single computer is also called a "runtime license" – a standard term used in the software industry. Each SDK license and runtime license is only granted for a single computer

⁴ The SDK includes "powerrpc.h", "rpcgen.exe", "pwrpc32.lib", "pwrpc32.dll" and other files.

1 and might only be granted for use in specific operating system environment, such as Windows
2 NT.

3 The 1998-1999 version of Netbula's standard license agreement⁵ (Yue Depo, Exhibit 82)
4 contained a section for the SDK license:

5 NETBULA ONC RPC SDK AND POWERRPC SDK PRODUCT LICENSE

6 The SOFTWARE PRODUCT is protected by copyright laws and
international copyright treaties, as well as other intellectual
7 property laws and treaties.

8 1. LICENSE

9 One software license gives one user (the license user) the right to use
the software. Under Windows NT and 95 platforms, this user can only use
the software from one computer.

10 The license is not transferable.

11 2. COPYRIGHT

12 You must treat the software as other copyrighted material.

13 YOU MAY NOT COPY AND REDISTRIBUTE ANY PART OF THE SOFTWARE.

14 The software (runtime dlls, supporting programs) of the SDK
contains CODE that identify themselves as for development only and
not for distribution/deployment. TO DISTRIBUTE THESE SOFTWARE COMPONENTS
TO ANY MACHINE OUTSIDE OF YOUR DEVELOPMENT ENVIRONMENT, YOU MUST PURCHASE
A DISTRIBUTION LICENSE FROM NETBULA.

15 The agreement also had a distribution license section:

16 NETBULA ONC RPC AND POWERRPC DISTRIBUTION LICENSE

17 The distribution license give you the right to distribute Netbula RPC supporting
18 programs (such as pmavsvc.exe) and components (such as pwrpc32.dll
runtime library) to a limited number of machines along with your product.

19 1. Limited distribution

20 The total number of machines to which the Netbula RPC supporting programs and
components are distributed is limited. This limit is specified at the
time of purchasing the distribution license. Netbula may request you to
count the number of machines which have the supporting software installed.
21 You must agree to provide the count when requested.

22
23 Netbula sold its products on its web site with a fill-in web form. In some cases, customers
24 printed out and filled out the web form, then faxed the form back to Netbula. Such completed
25 web forms were produced in discovery. A fax dated February 10, 2000 included the following
26 "Expla[i]nation of license terms",
27
28

⁵ Throughout the history of Netbula, it only executed a few signed license agreements with its customers.

Explanation of license terms

One development license is for one developer to use Netbula RPC (PowerRPC or ONC RPC)

to develop client/server applications on one machine running one operating system (each UNIX flavor is a different OS).

A Netbula ONC RPC limited application distribution license is for

- installing applications developed using Netbula RPC tools and supporting infrastructure (DLLs, portmapper, etc)
- for one operating system
- on up to 1,000 (one thousand) machines for any number of users

Netbula may request you to conduct an audit to account the number of runtimes that have been installed.

ONC RPC runtime licenses can also be purchased at smaller paks.

License terms portion of NB4827-4829⁶, a filled out order form fax to Netbula⁷

A fax (NB4820, 4822) dated October 22, 1999 had the following pricing table:

Product (part#)	Platform (enter)	Unit price	Qunantity	Amount
* Netbula ONC RPC SDK for WIN32 development license (ORW32SDK)	Windows NT/95	\$525	x 1	= 525
Netbula ONC RPC Windows NT/95 limited application distribution license (ORW32DIS)	Windows NT/95	\$5995	x 0	= 0
* ONC RPC Windows NT/95 runtime license small pak	NT/95/98	20 machines: \$1000	x 1	= 1000

Above: Web order form. Netbula sold licenses in blocks of different sizes. Netbula's sales documents refer the 1000-pak license as a "Limited Distribution License" and 100-copy or 20-copy licenses as small-pak licenses.

When Netbula licenses its RPC SDK or runtime library to a customer, it creates a copy specific to that customer by embedding the customer's name and license type into the software files, making the copy unique to that customer. Netbula does this for the purpose of recording the license information of the customer and protecting Netbula's copyright. In case of

⁶ The Bates number on Netbula's documents had seven digits numbered sequentially from NB—0000001. In this case, the Bates number is NB-0004827. To simplify, the leading zeros are omitted.

⁷ The same faxed page is listed as exhibit 26 of Yue deposition, but defendants clipped out the dates on that exhibit.

1 unauthorized copying, Netbula could trace the origin back to the customer by simply looking at
2 the copied files.

3 The copy of pwrpc32.dll file in BindView's bv-CIS product contains the following text:

4 "Netect LTD. Dev License, Non-distributable" (Yue Depo., Exhibit 76, NB954)

5 **2. BindView's access to Netbula RPC software**

6 BindView was founded by Eric J. Pulaski in May 1990. BindView's first year revenue was
7 about \$40,000 (Pulaski Depo., pp.7-8). In 1998, BindView became a publicly traded company. A
8 July 20, 1998 SEC filing indicates that Eric J. Pulaski owned 36.5% of BindView stock⁸ in 1998.

9 Netect Ltd. was incorporated in July 1996 under the laws of Israel (BindView SEC filing,
10 NB1421, 1438). In July 1998, Netect Inc purchased "one user development license" for Netbula
11 ONC RPC SDK and one limited distribution license (NB760). Unknown to Netbula, Netect
12 developed a software product called HackerShield and put it on the Netect web site for download.
13 The HackerShield product was Netect's only product.

14 According to a BindView May 7, 1999 SEC filing (NB1421, 1433), in 1996, Netect's
15 revenue was \$12,000; in 1998, Netect's annual revenue reached \$31,000. Netect had at least 35
16 employees (BV60704). Although Netect's revenue per employee was less than \$100 per month
17 on average, BindView became interested in Netect because BindView needed a product like
18 HackerShield to compete in the security software marketplace. BindView and Netect started
19 acquisition talks in late 1998, culminating in BindView's acquisition of Netect in March 1999.
20 Jeff Margolis, a senior vice president at BindView, led the financial and legal aspects of the
21 Netect acquisition (Margolis Depo., p.45). Eric Pulaski and his brother, David Pulaski, actively
22 participated in the acquisition process. BindView paid \$30 million to buy Netect. Based on
23 BindView document titled "HackerShield Product Launch Project plan", Netect had a
24 spreadsheet with 2000 names of parties who have downloaded HackerShield (BV46576, 46581).

25 In January 1999, Netect provided a disclosure letter (BV51930-51947) to BindView pursuant
26 to their acquisition agreement. Jeff Margolis, who led the "financial and legal aspects" of Netect
27

28 _____
⁸ <http://www.sec.gov/Archives/edgar/data/1061646/0000950129-98-003080.txt> page 54

1 acquisition, had the following exchange in his deposition about the disclosure letter (Jeff
2 Margolis Depo, pp.51-54)

3 Q. Would you please read that section, 4.21.2(a).

4 A. Okay. Licenses?

5 Q. Yes.

6 A. "Sun - License for Java. SSL - License for Communications
7 Infrastructure. Eric Young – License for Encryption SSL. Microsoft -
8 License for MS Internet Explorer. Microsoft - License for Compiler. (VC++).
9 Sun - License for Java. PGP - License for PGP. Nico Mak - License for Win
10 Zip. Netbula - License for Netbula. Chart FX - License for Charting
11 mechanism and Hacker Shield."

12 ...

13 Q. And this list also included an item for the Microsoft license for Compiler
14 VC++. Is that right?

15 A. Yes.

16 ...

17 Q. Did BindView assure that it had a license for the Microsoft VC++
18 Compiler for each BindView developer in 1999?

19 A. I do not know.

20 **3. BindView's use and distribution of Netbula RPC SDK**

21 After BindView acquired Netect, it closed Netect's offices and dismissed Netect's employees
22 after an initial transition period (Pulaski Depo., pp.57-60). BindView developed HackerShield
23 2.0 and later renamed HackerShield to "bv-Control for Internet Security" ("bv-CIS"). Part of bv-
24 CIS development was later moved to BindView India Pvt. Ltd⁹. in Pune, India.

25 From the installable copies of Hacker Shield and bv-CIS from March 2000 to September
26 2005, BindView developed multiple new program modules based on Netbula RPC (Yue Decl,
27 July 31, 2007). In BindView HackerShield 2.0, two program modules depended on Netbula's
28 pwrpc32.dll. In bv-CIS 8.10, which was released in September 2005, a total of five BindView

⁹ BindView India Pvt. Ltd. was owned 99% by Entevo Corporation and 1% by BindView Development Corp. See BV677, 678 . The same document listed Netect LTD as an inactive subsidiary.

modules relied on Netbula's pwrpc32.dll. Key functions of bv-CIS, such as the "SANS Priority One" security checks, depended on Netbula's RPC technology.

From the source code files and BindView's project scheduling documents, about 16 BindView programmers did work using Netbula RPC.

BindView sold HackerShield/bv-CIS to over 600 companies and organizations – many of them very large organizations with tens of thousands of employees. Based on the expert report of Gregory T. Kovacs, BindView issued over 15 million licenses for the bv-CIS product and earned over \$50 million in gross revenue. BindView also used bv-CIS as a promotional tool to sell other products, discounting bv-CIS – often offering it for free, while selling others at a price. BindView put HackerShield/bv-CIS on the internet for unrestricted download. BindView gave away copies of HackerShield at security conferences. BindView granted unlimited licenses to at least 54 customers. The "pwrpc32.dll" file BindView distributed was a developer version of the software, which is explicitly prohibited by Netbula's licensing terms from distribution.

4. Symantec and BindView's pact on the Netbula issue

From December 2002 to early 2003, Symantec evaluated BindView products for potential acquisition (Pulaski Depo. p.64, see also, BindView SEC filing on November 8, 2005). In the spring of 2005, Pulaski met John Thompson, CEO of Symantec, who expressed Symantec's renewed interest in acquiring BindView.

On September 1, 2005, Symantec "kicked off" due diligence on BindView. The due diligence was conducted by Symantec and supplemented by Fenwick & West LLP (SYM349, 355). Symantec identified Netbula PwRPC as a third party software BindView used but with unresolved intellectual property rights issues (Pulaski Dep., pp.70-72). Jeff Margolis reported regularly to Pulaski on the progress on the Netbula issue.

On September 26, 2005, BindView issued a press release touting version 8.1 of the bv-Control for Internet Security product (NB2129-2130).

On September 28, 2005, David Gayler, a BindView programmer, sent an email to Netbula with a subject "need to purchase ASAP" (NB960), without specifying a product name. The next day, Don Yue ("Yue") of Netbula telephoned Mr. Gayler. When Mr. Gayler asked about Netbula's licensing terms for PowerRPC, Yue asked Mr. Gayler whether BindView had used

1 Netbula's PowerRPC. According to Yue, Mr. Gayler said a few words then avoided answering
 2 the questions (Yue Depo., pp 564-567). Subsequently, Yue sent emails to Mr. Gayler attempting
 3 to confirm with him that BindView did use PowerRPC, but Mr. Gayler did not respond to any of
 4 these inquiries.

5 On October 2, 2005, Symantec and BindView signed a merger agreement. That same day
 6 (Toedt Dep. p.70), Symantec and BindView signed a disclosure letter (BV677). BindView's then
 7 general counsel, D.C. Toedt ("Toedt"), conducted background checks on Netbula, and
 8 communicated with Fenwick & West LLP and Symantec. Schedule 3.13 of the unpublished
 9 disclosure letter is titled "No Default" (BV677, 691), specifically addressing the Netbula issue. It
 10 states that the Netbula "PwRPC" license was not transferred to BindView, but BindView
 11 believed that Netbula would agree to an assignment of the license.

12 On October 3, 2005, Yue saw a news story about the Symantec-BindView merger and
 13 emailed David Gayler again. Thirty minutes later, Mr. Gayler forwarded Yue's email to Don
 14 Closser, BindView vice president of Research and Development, asking Mr. Closser to "handle
 15 it." Mr. Closser then emailed Shantanu Ghosh, BindView's vice president in India (BV48176).
 16 No one in BindView responded to Yue's inquiries.

17 **5. Netbula's discovery of BindView's copying of Netbula RPC software**

18 Not getting any response from BindView, on October 10, 2005, Yue sent a letter (NB963) to
 19 Pulaski, asking BindView to provide a royalty report with the following information: (1) date of
 20 deployment; (2) platform type; (3) Netbula RPC runtime usage type; and (4) the number of
 21 machines onto which Netbula RPC runtime component was copied.

22 After Pulaski received the October 10, 2005 letter by Yue, Jeff Margolis, Senior VP of
 23 BindView, telephoned Yue. Yue asked Mr. Margolis which BindView products were using
 24 Netbula RPC, Mr. Margolis stated that he did not know. Yue then sent another letter (NB964) to
 25 Pulaski on October 13, 2005. In this letter, Yue expressed concerns on "[w]hether a sale was
 26 made for multiple or even unlimited licenses." Yue made it clear that "Netbula RPC license are
 27 counted by the number of machines". Yue asked BindView to provide additional information for
 28 verification purposes.

After BindView received the October 13, 2005 letter Yue sent to Pulaski, Mr. Margolis telephoned Yue again and informed Yue that BindView would provide a report before the October 29, 2005 deadline set by Netbula. On October 18, 2005, Yue sent Mr. Margolis another email (NB965-966). Yue stated that he presumed that the relevant BindView product was bv-Control.

On October 17, 2005, BindView filed a preliminary proxy statement (NB2225-2352) with the SEC¹⁰. On page 44 of this SEC filing, defendant Symantec was listed as BindView's largest shareholder and owned 19.9% of BindView; defendant Pulaski was the second largest shareholder and owned 18.6% of BindView. Because Pulaski and others had previously assigned their voting rights to Symantec, Symantec controlled at least 41.3% of the voting rights for the Symantec-BindView merger¹¹ on or before October 17, 2005.

On October 21, 2005, Mr. Margolis emailed Shantanu Ghosh (BindView VP in India), asking how soon "PwRPC" could be replaced. The email was copied to Don Closser and Ed Pierce (BindView's then CFO). Shantanu Ghosh responded saying they needed about two weeks (BV48319).

On October 25, 2005, Mr. Margolis telephoned Yue. While on the telephone, Mr. Margolis sent Mr. Yue an email and asked Yue to check it immediately. The email included a table, which listed the "Units" from 1999 to 2005(1H); the line for "July 1998 Purchase" was "1,000"; the line for "Net" was 681 (NB967-968). See image below.

	2005 (1H)	2004	2003	2,002	2001	2000	1999
Units	70	240	145	123	107	437	559
Total 1999 - 2005 (1H)	1,881						
July 1998 Purchase	1,000						
Net	881						

¹⁰ <http://www.sec.gov/Archives/edgar/data/1061646/000095012905009874/h29311pmprem14a.htm>

¹¹ On October 5, 2005, BindView filed SEC form DEFA14A (<http://www.sec.gov/Archives/edgar/data/1061646/000095012905009665/0000950129-05-009665-index.htm>), attached were the Symantec-BindView merger agreement and three voting agreements signed by Pulaski and two other BindView officers. Pulaski et al each "irrevocably appoints Arthur F. Courville and Gegory E. Myers of Symantec Corporation" to vote and exercise all voting rights for the merger.

1 Yue asked Mr. Margolis whether BindView sold “site licenses”. Mr. Margolis denied that
2 BindView sold any site licenses¹² and stated that the 1681 unit count was accurate.

3 Review of BindView’s SEC filings revealed that BindView sold millions of licenses for the
4 bv-Control product. On the same day, Yue sent an email to Mr. Margolis, asking BindView to
5 provide the information requested in the two letters sent to Pulaski (NB969-971). Yue made it
6 clear that a lawsuit would be filed in federal court unless Netbula received the requested
7 information by October 29, 2005. Yue further indicated that Symantec should be notified about
8 the situation, since it was acquiring BindView’s intellectual property.

9 On the morning of October 26, 2005, Mr. Margolis sought to meet with other high level
10 BindView executives to discuss the Netbula issue (Email, BV46637).

11 On the afternoon of October 26, 2005, D.C. Toedt sent an email to Yue (NB972-975), written
12 in numbered paragraphs. In paragraph 5, Mr. Toedt stated: “Even erring much on the side of
13 generosity, our rough estimate is that Netbula’s monetary recovery would amount, to about
14 \$24,000.” In paragraph 6, Mr. Toedt wrote: “Please confirm which way Netbula wants to
15 proceed with this matter – as a litigation matter, or on a business basis as described above.” In
16 paragraph 7, Mr. Toedt wrote: “we hope you were not hinting that Netbula might try to tortiously
17 interfere with the merger agreement.”

18 Netbula then began to prepare to sue BindView at the earliest possible date. In late October
19 2005, a draft complaint against BindView was prepared (Yue Depo, pp. 627-628). Netbula also
20 communicated with other lawyers, including a Texas law firm.

21 On November 2, 2005, Yue sent another letter to Pulaski via FedEx. A copy of this letter
22 was also sent to John Thompson. Yue stated that Netbula had discovered that BindView’s
23 October 25, 2005 report was untrue and that BindView had issued site licenses. The letter
24 requested BindView and Symantec to preserve documents.

25 On November 3, 2005, BindView filed its quarterly report with the SEC, in which bv-CIS
26 8.10 was listed as BindView’s quarterly highlight (NB603, 605).

27
28 ¹² In his deposition, when asked on whether BindView sold site licenses, Mr. Margolis responded: “A. Okay. I’m
sure they did. I mean, BindView issued site licenses to people but -- to customers, but I don’t have any knowledge
of any specific ones.” (Margolis Depo., pp.37-38)

6. BindView's Infringement after November 2, 2005

On November 7, 2005, defendant Eric J. Pulaski telephoned Don Yue at Netbula. Pulaski testified that Mr. Margolis had reached an impasse on the Netbula issue, and he wanted to resolve it himself as the CEO of BindView (Pulaski Dep., p.72). Unknown to Yue, D.C. Toedt was with Pulaski and was taking notes¹³ of the telephone conversation. The conversation between Yue and Pulaski lasted about 45 minutes (from 3:45pm to 4:30pm). Toedt's notes were one and one-half pages (Toedt Deposition, Exhibit 8). According to Toedt's notes, (1) Pulaski told Yue: "We want to reach a reasonable solution – pay the full amount we owed you"; (2) On the issue of site licenses: Yue made two proposals, one is to count the number of computers, Pulaski disagreed; then Yue proposed to count the number of administrators¹⁴, Pulaski agreed: "We'll check on site licenses - work out some kind of average # of admins" (Toedt's notes); (3) on pricing: Toedt's notes read "99- \$50 for runtime license", "prepay – different price"; (4) on downloads: Yue insisted that they must be reported and counted for royalties, Pulaski contended that BindView did not have the records, but BindView would see what they could do with downloads; (5) On the NDA: Yue explained that an NDA was not necessary, Pulaski agreed.

Yue's deposition testimony included more details and additional information about the conversation, which are relevant to the contract and fraud claims.

Unaware of the fact that D.C. Toedt listened to the Pulaski-Yue telephone conference, on November 7, 2005, Yue sent an email to Neil Smith and D.C. Toedt (NB982-3). In this email, Yue described certain issues raised in the conference call, and also mentioned two approaches to resolve the dispute. Yue testified the purpose of that email was to get a confirmation of the oral agreement he made with Pulaski (Yue Dep., pp.642-643).

On the next day, November 8, 2005, BindView filed a definitive proxy statement with the

¹³ The notes taken by D.C Toedt were not produced by Defendants until July 2, 2007 at Pulaski's deposition that same day. Mr. Yue's earlier deposition testimony regarding the November 7, 2005 telephone conversation matched extremely well with the notes taken by Toedt, yet provided far more detail and additional information, such as discussion on interest rate, agreement on pricing and litigation. Both Pulaski and Toedt stated in their deposition that they did not remember the details well. Toedt stated in his deposition that his notes were not meant to be a transcript of the conversation. He acknowledged that he did not record everything discussed.

¹⁴ In Yue's deposition, he gave detailed description of the conversation, and he testified that he proposed to count the number of administrators and number of technical support persons.

1 SEC. At the beginning of the SEC filing were two letters signed by Pulaski and Toedt,
2 respectively. In the main body of the proxy statement, BindView warranted the absence of
3 “material adverse effect” and “[BindViews’s] ownership of, and right to use, the intellectual
4 property used in [BindView’s] business, including the absence of any violation, infringement or
5 misappropriation of the intellectual property of others”. According to the merger agreement
6 attached to the proxy statement, Symantec may terminate the agreement if BindView
7 intentionally breached any of its representations, warranties or covenants or any of BindView’s
8 representations and warranties becomes untrue. In that event, BindView would be required to
9 pay Symantec \$8 million. BindView’s total amount of cash was about \$30 million.

10 On November 10, 2005, BindView issued a press release touting a security update for the bv-
11 CIS product (NB2513).

12 On November 11, 2005, Toedt replied to Yue’s November 7, 2005 email, stating that (1)
13 BindView compiled a list of downloads; and (2) BindView was pulling together site license
14 information. Toedt indicated that BindView would provide a report the next week (NB982).

15 On November 17, 2005, Symantec issued a press release¹⁵ stating that the waiting period for
16 regulatory approval for the Symantec-BindView merger expired. The Symantec press release
17 invited readers to read BindView’s November 8, 2005 definitive proxy statement and other
18 documents filed with the SEC.

19 On November 21, 2005, D.C. Toedt emailed (NB999-1000) Yue a summary (NB1144) of
20 HackerShield/bv-CIS licenses granted by BindView and supporting details (NB1052-76). The
21 report indicated 54 site licenses were issued, with 1627 non-site licenses. The email also attached
22 a list of downloads (NB1085-1143) from December 2000 to August 2005.

23 That same day, Yue responded to D.C. Toedt’s email and thanked Toedt and Pulaski for the
24 report (NB1007-1009). According to this email, Yue and Pulaski arranged to have a conference
25 call at 2:00pm, central time on November 23, 2005.

26 On November 23, 2005, at 10:50am Pacific time (NB3663, 3666, phone bill), in preparation
27 for the conference call with Pulaski, Yue telephoned a royalty consultant and consulted him on
28

¹⁵ http://www.symantec.com/about/news/release/article.jsp?prid=20051117_02

1 the interest rate issue. The consultant billed Netbula \$81.25 for this service (NB3672).

2 On November 23, 2005, at 12:19pm Pacific time, Yue telephoned Pulaski. Yue was put on
3 hold for several minutes (Yue Depo., p.605). Unknown to Yue, D.C. Toedt later entered
4 Pulaski's room and listened to the conference call without announcing his presence. Toedt took
5 notes for the November 23, 2005 conference call. The telephone call lasted 55 minutes (Phone
6 bill, NB5235, 5236). Toedt's notes for the call were only one page (Toedt Depo., Exhibit 9).

7 Based on D.C. Toedt's notes, Yue's testimony and Pulaski's testimony, Pulaski told Yue that
8 there was a \$50,000 limit imposed by the Symantec-BindView merger agreement. Both Yue and
9 Pulaski testified that Pulaski told Yue to "take the money and run". Yue testified that Pulaski
10 told him that Netbula would have to fight Symantec for years without getting a dime. Pulaski
11 testified that his hands were tied and he had a suspicion that Symantec wouldn't even pay
12 \$50,000 (Pulaski Depo, p.32:1-10). In Pulaski's deposition, he admitted that under a site license,
13 a customer can make unlimited number of copies (Pulaski Depo., p.29).

14 After the telephone call, on November 23, 2005, Yue emailed a summary (NB1014-15) of
15 the conversation to Pulaski, Toedt and Neil Smith. Toedt responded to Yue's email on the same
16 day without disclosing that he listened to the conversation. Yue replied back to Toedt: "We said
17 we were to sue BindView quite some time ago as we concluded that BindView infringed
18 willfully and acted in bad-faith. We halted the proceedings because Mr. Pulaski called and
19 promised cooperation." (NB1016)

20 On November 28, 2005, responding to Pulaski's email on November 25, 2005 (NB1020),
21 Yue sent an email (NB1029-35) reviewing the agreement Pulaski and Yue made in the
22 November 7, 2005 conversation and Netbula's position.

23 According to Yue's deposition testimony and declarations, because he knew that making
24 knowingly false statements in SEC filing carries significant penalty, he believed that Defendants
25 would make their representations in the SEC filings true by performing their part of the
26 November 7, 2005 agreement. When asked about SEC release 51283, also known as the Titan
27 Report, D.C. Toedt answered: "I've heard the name. That's about – but I don't really know
28 anything about it." (Toedt Dep., p.12). Pulaski admitted that he had been advised on SEC
guidelines (Pulaski Depo., p.14-15).

1 According to a November 22, 2005 BindView email (BV48367), BindView developers were
 2 unable to replace Netbula software and suggested the removal the functionalities dependent on
 3 Netbula. The project manager of the bv-CIS product sent an email on November 29, 2005, noting
 4 that changes for fixing the “pwrpc” issue would be released within a few weeks (BV48385,
 5 48387).

6 On December 6, 2005, another BindView developer sent an email (BV48391) to other
 7 BindView developers, analyzing Netbula RPC library usage in bv-CIS. In this email, the
 8 developer included some Netbula source code. In a subsequent email, the developer estimated
 9 that the time to replace Netbula RPC would be four (4) weeks for two developers and one QA.

10 On December 7, 2005, Don Closser sent an email (BV48335) to Shantanu Ghosh asking
 11 about a meeting with “Eric”. Shantanu responded that he has forwarded details of Netbula
 12 application programming interface and they may need help from someone who knows RPC.

13 On December 8, 2005, the bv-CIS manager emailed other BindView executives, stating that
 14 they needed five (5) more weeks to fix six (6) security checks that used Netbula code (BV48399).

15 On December 12, 2005, Don Closser sent an email to Arshad Matin and Shantanu Ghosh
 16 about an R&D meeting, one of the items listed was about Netbula replacement. (BV48336-7)

17 On December 12, 2005, Shantanu Ghosh sent an email to Don Closser, Eric Pulaski and D.C
 18 Toedt about replacing Netbula in bv-CIS (BV48401), responding to a status inquiry sent by Don
 19 Closser. Ghosh stated they are expecting to have the RPC work done by one of Closser’s
 20 developers who has the requisite knowledge.

21 **7. Netbula’s discovery of Defendants’ fraud**

22 In January 2006, Don Yue noticed that Symantec completed its acquisition of BindView and
 23 BindView was delisted from the stock market. Yue then read the Symantec-BindView merger
 24 agreement filed with SEC in October 2005 again, and found that the \$50,000 settlement limit
 25 was in that document which was signed by Pulaski.

26 **8. Symantec’s continuing infringement of Netbula’s copyright**

27 On January 6, 2006, Symantec announced the completion of its merger with BindView. On
 28 the same day, BindView employees, including Don Closser and Shantanu Ghosh, resigned from
 BindView. Within days, they became Symantec employees. See BV1025-1090.

1 On February 8, 2006, Don Closser (then a Symantec employee) sent an email to Shantanu
2 Ghosh, asking whether BindView had Netbula source code (BV48339).

3 According to Netbula's expert report by Rod Morison, in version 8.5 of bv-CIS, which is
4 named "Symantec Control Compliance Suite", defendants made changes to Netbula's source
5 code files and disguised them as being from other sources.

6 ARGUMENT

7 A. LEGAL STANDARD FOR SUMMARY JUDGMENT

8 Summary judgment is appropriate only when "there is no genuine issue as to any material
9 fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c);
10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the moving party does not bear the
11 burden of proof on the issue at trial, it may discharge its burden of showing that no genuine issue
12 of material fact remains by demonstrating that "there is an absence of evidence to support the
13 nonmoving party's case." *Id.* at 325. Where the moving party will have the burden of proof on an
14 issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other
15 than for the moving party. See *id.* Once the moving party meets this initial burden, the non-
16 moving party must go beyond the pleadings and by its own evidence "set forth specific facts
17 showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-moving party must
18 "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan*
19 *v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). If the non- moving party fails to make this showing,
20 the moving party is entitled to judgment as a matter of law. See *Celotex*, 477 U.S. at 323.

21 B. BURDEN IN COPYRIGHT INFRINGEMENT CLAIMS

22 To establish a claim of copyright infringement, a plaintiff must demonstrate (1) ownership of
23 a valid copyright and (2) "copying" of protectable expression by the defendant. *Baxter v. MCA,*
24 *Inc.*, 812 F.2d 421, 423 (9th Cir.), cert. denied, 484 U.S. 954, 108 S. Ct. 346, 98 L. Ed. 2d 372
25 (1987). The term "copying" is "shorthand for the infringing of any of the copyright owner's five
26 exclusive rights." *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 n.3 (9th Cir. 1989). These
27 rights include the right to reproduce the copyrighted work, the right to prepare derivative works,
28 the right to distribute copies to the public, and the right to publicly display the work. 17 U.S.C.
§§ 106(1)-(3) & (5).

Defendants can assert affirmative defenses, including license, lack of originality and invalid copyright registration, but they have the burden of proof. "Defendant bears the burden of proving . . . affirmative defenses." *A & M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896, 912 (N.D.App. 08/10/2000).

"Lack of knowledge of the copyright infringement is neither an element of the plaintiff's case nor a defense to infringement." *Microsoft Corporation v. Compusource Distributors, Inc.*, 115 F.Supp.2d 800 (E.D.Mich. 2000). See also, *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 829 (8th Cir. 1992) (a defendant's liability for copyright infringement is absolute regardless of intent or state of mind).

C. PLAINTIFF HAS A VALID COPYRIGHT IN ITS POWERRPC SOFTWARE

In order to meet the burden of showing ownership of a valid copyright, the plaintiff must show that the work is original and that the applicable statutory formalities were followed. See *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1541 (11th Cir.1996).

Netbula's PowerRPC is highly sophisticated software. The "pwrpc32.dll" alone is translated from over 100 pages of source code. For copyright protection, a work only requires a "modicum of creativity". The "powerrpc.h" file (which defendants altered) consists of two pages of Netbula source code. That file alone can demonstrate the originality in the PowerRPC software. The object code in pwrpc32.dll is also copyrighted. Plaintiff deposited 50 pages of source code per copyright office guidelines, paid the registration fee and obtained a valid copyright certificate (Registration TX 6-211-063, attached to the complaint). Thus, Plaintiff owns a valid copyright.

D. DEFENDANTS COPIED NETBULA'S PowerRPC SDK SOFTWARE

As shown in the Statement of Facts, Defendant BindView (1) created derivative work based on Netbula RPC Software Development Kit ("SDK") by multiple programmers; (2) distributed the developer version of Netbula RPC runtime library (the "pwrpc32.dll" file) to hundreds of companies and organizations along with multiple versions of HackerShield and bv-Control for Internet Security ("bv-CIS"); (3) put the infringing HackerShield/bv-CIS products on the internet for unrestricted download. Defendant BindView and Symantec (4) modified the Netbula RPC SDK files in their possession and (5) altered the identifying information of the Netbula SDK files

1 to conceal infringement in the bv-CIS 8.10, 8.10SP1 and “Symantec Control Compliance Suite”
2 software.

3 E. DEFENDANTS HAVE NO VALID LICENSE DEFENSE

4 COPYRIGHT AND LICENSE DEFENSE

5 1. Defendants Have the Burden to Prove a License Defense

6 “The existence of a nonexclusive license, if granted to the defendant in an infringement
7 action, operates as an affirmative defense to a claim of infringement.” See *Danielson, Inc. v.*
8 *Winchester-Conant Properties, Inc.*, 186 F.Supp.2d 1 (D.Mass. 02/27/2002). See also, *Apple*
9 *Computer, Inc. v. Microsoft Corp.*, 709 F. Supp. 925 (N.D.Cal. 03/20/1989).

10 However, “Defendant bears the burden of proving . . . affirmative defenses.” *A & M Records,*
11 *Inc. v. Napster, Inc.*, 114 F.Supp.2d 896, 912 (N.D.App. 2000). Moreover, “Copyright licenses
12 are assumed to prohibit any use not authorized.” *S.O.S., Inc. v. Payday*, 886 F.2d 1081, 1888 (9th
13 Cir. 1989). “[A] plaintiff only needs to show that the defendant has used her property; the burden
14 of proving that the use was authorized falls squarely on the defendant.” *Chamberlain Group, Inc.*
15 *v. Skylink Technologies, Inc.*, 381 F.3d 1178, 72 U.S.P.Q.2d 1225 (Fed. Cir. 08/31/2004). Thus, a
16 defendant must demonstrate that it was expressly granted the right for any particular use.

17 In *S.O.S.*, a software designer that had granted a payroll company a license to use its
18 copyrighted software alleged that the licensee had infringed its copyright by modifying the
19 program. The district court granted Payday’s motion for summary judgment on the ground that
20 Payday had a license to use the payroll programs and California law required that the contract be
21 construed against *S.O.S.*, “placing the burden on *S.O.S.* explicitly to restrict Payday from making
22 modifications. Absent such a restriction in the contract, the district court held, Payday acquired
23 the unrestricted right to adopt and utilize the program.” *Id.*

24 The Ninth Circuit reversed. In so doing, the Court held:

25 The license must be construed in accordance with the purposes underlying
26 federal copyright law. *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851,
27 854 (9th Cir. 1988); Harris, 734 F.2d at 1334. Chief among these purposes
28 is the protection of the author’s rights. *Cohen*, 845 F.2d at 854. ***We rely on state law to provide the canons of contractual construction, but only to the extent such rules do not interfere with federal copyright law or policy.*** See *Fantastic Fakes, Inc. v. Pickwick Int’l, Inc.*, 661 F.2d 479, 482-83 (5th Cir. 1981) (state law rules of contract construction not preempted

1 by federal law; however, application of state law to supply implied terms
2 in copyright license would raise preemption question).

3 *S.O.S., Inc. v. Payday*, 886 F.2d 1081, 1888 (9th Cir. 1989) (emphasis added)

4 The S.O.S. decision made it clear that unless a use of a copyrighted work is expressly
5 granted by a copyright license, such use is prohibited.

6 **2. Transfer of Copyright Licenses is Prohibited Unless Expressly Authorized**

7 It is well established in patent and copyright law that a patent or copyright licensee may
8 not sub-license his licensed intellectual property rights without express permission from the
9 licensor. See *Gardner v. Nike, Inc.*, 279 F.3d 774 (9th Cir. 2002); *Everex Systems v. Cadtrak*
10 *Corp.*, 89 F.3d 673, 679 (9th Cir. 1996). "Federal copyright law provides a bright line
11 prohibition against transfer of copyright license rights." *SQL Solutions, Inc. v. Oracle Corp.*, No.
12 C-91-1079 MHP, 1991 U.S. Dist. LEXIS 21097, at *12 (N.D. Cal. Dec. 18, 1991).

13 "It has long been held by federal courts that agreements granting patent licenses are
14 personal and not assignable unless expressly made so." *PPG Industries, Inc. v. Guardian*
15 *Industries, Corp.*, 597 F.2d 1090, 1093 (6th Cir. 1979). In *Harris v. Emus Records Corp.*, 734
16 F.2d 1329 (9th Cir. 05/29/1984), the Court reasoned:

17 Where precedent in copyright cases is lacking, it is appropriate to look for
18 guidance to patent law "because of the historic kinship between patent law
19 and copyright law." *Sony Corp. of America v. Universal City Studios*, 464
20 U.S. 417, 104 S. Ct. 774, 787, 78 L. Ed. 2d 574 (1984) (footnote omitted).
21 A patent license has been characterized as "a naked license to make and
22 sell the patented improvement as a part of its business, which right, if it
23 existed, was a mere personal one, and not transferable, and was
24 extinguished with the dissolution of the corporation." (citations omitted)

25 Such an interpretation of a license accords with the policies underlying
26 enactment of the Copyright Act.

27 *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1333 (9th Cir. 05/29/1984)

28 **3. Merger or Acquisition Results in Transfer of Intellectual Property Licenses**

In *SQL Solutions, Inc. v. Oracle Corp.*, a case decided in the Northern District of
California, Oracle Corp. ("Oracle") granted D&N Systems Inc. ("D&N"), a Massachusetts
company, a perpetual license to use and modify certain Oracle software and create derivative

works in 1987. In 1990, D&N merged with SybaseSub, Inc., a shell corporation set up by Sybase, Inc. (“Sybase”) to perform a reverse triangular merger with D&N. The surviving corporation, D&N, took a new name: SQL Solutions, Inc. (“SQL”). SQL became a wholly owned subsidiary of Sybase. Oracle moved to terminate the license with SQL. SQL sued for declaratory relief and injunctive relief against Oracle for breach of software license.

SQL contended that (1) a mere change of name from D&N to SQL Solutions did not affect any rights under a contract, and (2) only a change of stock ownership was involved when it transformed into SQL and no assignment or transfer of rights had occurred.

The SQL court held that SQL’s reliance on several California cases which allowed assignment was misplaced, as those cases involve real estate leases, not intellectual property. Citing *Koppers Coal & Transportation Co. v. United States*, 107 F.2d 706, 708 (3rd Cir. 1939) and *PPG Industries, Inc. v. Guardian Industries Corp.*, 597 F.2d at 1096, the court concluded that “a transfer of rights is no less a transfer because it occurs by operation of law in a merger.” *SQL Solutions* at *11. The SQL court further concluded that “[t]he court need not decide whether Oracle has been impacted adversely because it finds that federal copyright law is applicable to the transfer of the copyright license right which occurred in this case. State law is preempted by federal law in question of copyright law or policy.” *Id* at *12.

A more recent case involves software licenses during corporate mergers. *Cincom Systems, Inc. v. Novelis Corp.*, No. 1:05cv152 (S.D.Ohio 01/12/2007), 2007 U.S. Dist. LEXIS 2721; Copy. L. Rep. (CCH) P29,311. In that case, defendant continued to use the same software on the same computers originally licensed, but it was merged into another corporation. The Cincom defendant relied primarily on *TXO Production Co. v. M.D. Mark, Inc.*, 999 S.W.2d 137 (Ct. App. Tex. 1999) in arguing that no transfer of the software licenses had occurred. The Cincom court agrees that the question of whether transfer occurred is a matter of state law. “However, the Court must apply Ohio law on this issue *in a manner that does not conflict with federal copyright law and policy.*” *Cincom* at *7-8 (emphasis added). The Cincom court noted that “*TXO Production Co. v. M.D. Mark, Inc.* can be distinguished on this ground as it does not involve intellectual property rights.” *Id* at *19.

DEFENDENTS CANNOT PROVE THEIR LICENSE DEFENSE

1 **1. Defendants misconstrued the burden of proof on the license defense**

2 Defendants cites *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121-22 (9th
3 Cir. 1999) for their license defense. However, “copyright licenses are assumed to prohibit any
4 use not authorized.” *S.O.S., Inc. v. Payday*, 886 F.2d 1081, 1888 (9th Cir. 1989). As Plaintiff
5 shown above, defendants have the burden of proving the terms of the license grants.

6 In *Sun Microsystems, Inc. v. Microsoft Corp.*, the copyright holder, Sun Microsystems,
7 Inc. “(Sun”) granted Microsoft copyright licenses to use its source code for the Java technology
8 to create derivative work and distribute the resulting Java technology. Microsoft modified Sun’s
9 source code and created its own version of Java. Sun sued for copyright infringement. The
10 district court granted preliminary injunction, the Ninth Circuit vacated the preliminary injunction
11 order and remanded. The district court made a full analysis of the Sun-Microsoft agreement in
12 *Sun Microsystems, Inc. v. Microsoft Corp.*, 81 F.Supp.2d 1026 (N.D.App. 2000).

13 Under the Sun-Microsoft Technology License and Distribution Agreement (“TLDA”),
14 Sun granted to Microsoft a development license “under the Intellectual Property Rights of SUN
15 to make, access, use, copy, view, display, modify, adapt, and create Derivative Works of the
16 Technology in Source Code form for the purposes of developing, compiling to binary form and
17 supporting Products.” TLDA § 2.1(a). Sun also granted Microsoft a distribution license to
18 “make, use, import, reproduce, license, rent, lease, offer to sell, sell or otherwise distribute to end
19 users as part of a Product or an upgrade to a Product, the Technology and Derivative Works
20 thereof in binary form.” TLDA § 2.2(a)(iii).

21 In TLDA §2.6, the agreement placed a compatibility requirement on Microsoft’s
22 implementation of Java technology. In analyzing the TLDA, the district noted that “[t]he
23 language and structure of the TLDA suggest that the compatibility obligations are separate
24 covenants and not conditions of, or restrictions on, the license grants. The license grants in
25 sections 2.1 (‘Source Code and Development License to Technology’) and 2.2 (‘Distribution
26 License to Technology’) allow Microsoft to distribute the Technology and Derivative Works of
27 the Technology as part of a Product but say nothing about the license grants being subject to,
28 conditional on, or limited by compliance with the compatibility obligations set forth in Section
2.6 (‘Compatibility’).” *Id.* (footnotes omitted).

Basically, the compatibility requirement (Section 2.6) in the TLDA was outside of the copyright license grants (Sections 2.1(a) and 2.2(a)) and was never mentioned in the copyright license grants. Thus, in that case, Microsoft was able to prove its license affirmative defense against copyright claims – it had the right to make modifications under the copyright license.

Sun Microsystems, Inc. v. Microsoft Corp. is distinguishable from the instant case in that Microsoft proved that it had valid copyright licenses to create derivative work, to modify the source code and distribute the resulting products. In the instant case, Defendants BindView and Symantec fail to meet their burden to show they had the right to create derivative works using Netbula RPC SDK and distribute the resulting products and pwrpc32.dll. Their attempt to shift the burden to Plaintiff to prove the exact terms of license and their acceptance of the license restrictions is entirely misguided.

2. Netect already violated and would have continued to violate the original license grant

The evidence in the case proved the existence of the following licenses from the HackerShield and bv-CIS products and source code produced by BindView and Symantec:

(1) The Netbula RPC SDK BindView and Symantec used had the following license grant:

“Netect LTD. One user ONC RPC Dev License.” (Yue Depo., Exhibit 75)

(2) The Netbula pwrpc32.dll module BindView distributed with the HackerShield and bv-

CIS products had the following license grant: “Netect LTD. Dev License, Non-distributable” (Yue Depo., Exhibit 76, NB954)

Netect had violated the above licenses before it was acquired by BindView. From the source code produced by defendants, it is evident that multiple Netect programmers had used Netbula RPC SDK in developing the original HackerShield software, in violation of the license grant. (Brillet Decl, Exhibit E). Netect also violated the limited distribution clause of Netbula’s standard licensing terms by putting the HackerShield program on the web for unrestricted download. (NB1490-1496, an February 9, 1999 email from jpr5@netect.com to BUGTRAQ@netscape.org). Based on BindView document titled “HackerShield Product Launch Project plan”, Netect had a spreadsheet with 2000 names for whom have downloaded HackerShield (BV46576, 46581).

Assuming Netect had not been acquired by anyone but continued to develop and distribute

1 newer versions of HackerShield, it would have violated the license grant by developing
2 HackerShield for Windows 2000 and later versions of the Windows operating system. Netbula's
3 licenses always restricted the Netbula RPC license to the Windows versions available at the time
4 of license grant. Netect purchased the licenses in 1998, Windows 2000 and XP did not exist then.
5 The Netect license was only granted for Windows 95 and Windows NT.

6 In *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 04/27/1988), in 1969,
7 Cohen granted a license for Paramount to use certain musical compositions in film and on
8 television. Years later, the VCR was developed. Paramount made videocassette tapes of the film.
9 Cohen sued for copyright infringement. The district court granted summary judgment against
10 Cohen. The Ninth Circuit reversed. Noting that "the license must be construed in accordance
11 with the purpose underlying federal copyright law", the court held "that the license did not give
12 Paramount the right to use the composition in connection with videocassette production." *Id.*

13 Defendants, based on a page they found on web.archive.org, claim that Netect may have
14 obtained an unrestricted license. The following is the deposition transcript of Don Yue on that
15 web page:

16
17 Q And we just looked at two web pages that said that you don't charge
18 royalties for products distributed -- strike that. We just looked at web pages
19 that said you don't charge royalties for products developed with your software
20 development tool, right?

21 A I don't -- I don't -- I didn't authenticate this web page. As I -- I see it's
22 from Web.Archive.org, so I cannot admit what is written here, you know.
23 This is from a web -- another website, and anybody can do a website.

24 Q Okay.

25 A And also, "Best of all, we don't charge" -- you know, that -- reading --
26 reading from this paragraph, right, "Best of all, we don't charge runtime
27 royalties for software development using our development products, we only
28 charge one -- a one-time fee for a limited distribution license," my
understanding, this can be interpreted in various ways. From the latter part of
the sentence, it says one-time fee. That means the -- the earlier part
referenced to a recurring fee, because in a lot of cases companies charge an
annual fee. You buy a license and then you pay -- pay year after year, you
know, expires after one year. So this says "one-time." That means you
purchase and then it's perpetual, you don't have to pay again for the same
license.

Q Okay.

Yue Deposition, pp.246-249.

Defendants cannot hope to defeat the evidence that Netect itself violated the license based on speculation on a web page they found on web.archive.org.

3. The licenses granted to Netect were not transferable

“Federal copyright law provides a bright line prohibition against transfer of copyright license rights.” *SQL Solutions, Inc. v. Oracle Corp.*, No. C-91-1079 MHP, 1991 U.S. Dist. LEXIS 21097, at *12 (N.D. Cal. Dec. 18, 1991).

Netbula licensing terms explicitly prohibited the transfers of licenses.

4. Defendant BindView and Symantec could not legally obtained any license from Netect

As we have shown above, the merger of a company with another company causes the transfer of **intellectual property** from the merging company into the merged company. Even the Texas state court in *TXO Production Co. v. M.D. Mark, Inc.* distinguished that case from intellectual property cases by noting that “[t]he PPG opinion also was based upon strong public policy against the implied assignment of patent licenses” and that the plaintiff in that case had failed to show that seismic data was a trade secret akin to patent rights. 999 S.W.2d at 142 n. 4.

Therefore, even in the hypothetical situation in which BindView kept the one Netect programmer who had a licensed copy of Netbula RPC SDK and only that programmer used Netbula RPC in development of HackerShield/bv-CIS, it still would have been an unlawful transfer of the one user copyright license from Netect to BindView. Similarly, BindView had no right to distribute any pwrpc32.dll file, let alone the developer version licensed to Netect.

For the same reason, Symantec’s reverse triangular merger with BindView created an unlawful transfer of copyright licenses, even assuming that BindView had any license¹⁶.

F. DEFENDANTS CANNOT PROVE ANY OTHER AFFIRMATIVE DEFENSES

Defendants asserted other affirmative defenses such as lack of originality, invalidity of copyright and unclean hands in their answer. Defendants cannot prove any of these affirmative

¹⁶ The *SQL* case was a reverse triangular merger case, and the court explicitly rejected the “operation of law” theory on copyright license transfers.

defenses. For instance, Defendants' own email messages and actions indicate they were unable to replace Netbula RPC due to lack of the required skills. After this lawsuit was filed, Defendants kept telling the Court they used the drop-in replacement for Netbula. In fact, Defendants just altered the Netbula code in their possession and disguised it as from someone else. Defendants cannot raise any genuine issue of fact for trial as to the copyright claim.

G. DEFENDANTS ARE LIABLE FOR COPYRIGHT INFRINGEMENT

Plaintiff has met its burden of proving copyright infringement by showing that it has a valid copyright and Defendants copied the protected elements. Pulaski owned 18.6% of BindView. As CEO of BindView, he had the right and ability to stop the infringement, but failed to do so. Instead, he authorized the transfer the infringing bv-CIS software to Symantec. Defendants' infringement after September 2005 was done with knowledge of the infringing nature of their activities and is thus willful.

Defendants' license defense is entirely misguided. They cannot meet the burden of proving any of their affirmative defenses. Accordingly, Defendants must be found liable for infringement of Plaintiff's copyright.

CONCLUSION

Plaintiff proved that Defendants are liable for copyright infringement. Plaintiff has shown that Defendants had no valid license defense to the copyright infringement claim, and Defendants presented no other valid affirmative defenses. Plaintiff respectfully requests the Court to deny Defendants' motion for summary judgment as to the copyright claim. Plaintiff respectfully requests the Court to grant Plaintiff's cross-motion for summary judgment and find Defendants liable for willful copyright infringement. In the alternative, Plaintiff respectfully requests the Court to grant Plaintiff's cross-motion for summary adjudication and dismiss Defendants' license, lack of originality, unclean hands and invalidity of copyright registration affirmative defenses.

Dated: July 31, 2007

LAW OFFICES OF VONNAH M. BRILLET

By: _____/S/_____

Vonnah M. Brillet

Attorneys for Plaintiff NETBULA, LLC

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