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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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

Case No.16-cv-06982-JSC

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

Re: Dkt. No. 44

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

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

1 **BACKGROUND**

2 **A. Factual Background**

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

12 Section 9 of the GPL states:

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

19 (Complaint ¶ 21; Dkt. No. 1-1 (Ex. 1) at 10.<sup>2</sup>) Section 6 of the GPL requires licensors to  
20 distribute or offer to provide copies of source code for all software in the product that is covered  
21 by the license. (Dkt. No. 1-1 at 6-7.)

22 Defendant is a South Korean software company that owns and develops Hangul, a word  
23 processing software used primarily in South Korea and the United States as an alternative to  
24 Microsoft Word, as well as Hancm Office, a suite of software programs which include Hangul, a  
25 spreadsheet software, and a presentation software. (Dkt. No. 44-3, Yang Decl. at ¶¶ 2, 19.)  
26 Defendant first sold software using Ghostscript on or about March 20, 2008 and continuously sold  
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28 <sup>2</sup> Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the  
ECF-generated page numbers at the top of the documents.

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

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

14 **B. Procedural Background**

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

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

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

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

5 **DISCUSSION**

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

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

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

24 First, there is a difference between using the alternative commercial license as a way of  
25 valuing Defendant's breach of the GPL and imposing the terms of the commercial license on  
26 Defendant. Defendant's argument that they are equivocal is unpersuasive. Defendant is correct  
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<sup>5</sup> Defendant concedes that for purposes of this motion that it did in fact breach the GPL.

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

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

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

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

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

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

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

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

16          Defendant’s reliance on *Oracle Corp. v. SAP AG*, 734 F. Supp. 2d 956 (N.D. Cal. 2010),  
17          for the proposition that disgorgement is unavailable for breach of a free license under California  
18          law is misplaced. In *Oracle*, the court held that the plaintiff could not state a claim for unjust  
19          enrichment in the amount of the full replacement value of the property (software) because  
20          “plaintiffs retained their right to use, distribute, license, and profit from the software and support  
21          materials at issue [and under these circumstances, i]t would not be equitable, logical, or legally  
22          permissible to award plaintiffs the full replacement value of property that they never lost or gave  
23          away.” *Id.* at 970. Here, Plaintiff is not seeking the full replacement value of the software; rather,  
24          it seeks to measure restitution or disgorgement by looking to what royalties Defendant would have  
25          paid or to Defendant’s profits from the use of Ghostscript. Thus, *Oracle* is simply inapposite. In  
26          any event, as the *Oracle* court noted: “‘Under the law of restitution, an individual may be required  
27          to make restitution if he is unjustly enriched at the expense of another[;]’ [a] person is enriched if  
28          he receives a benefit at another’s expense.” *Id.* at 969 (quoting *Ghirardo v. Antonioli*, 14 Cal.4th  
29          39, 51 (1996)). Plaintiff gave away its Ghostscript program in consideration for the user making  
30          its software open source, which Defendant does not dispute it did not do. The record supports a  
31          finding that Defendant received a benefit (the use of Ghostscript) at Plaintiff’s expense by  
32          depriving Plaintiff of the value of having Defendant’s software open source.

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

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

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

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

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

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



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

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

27 \_\_\_\_\_  
28 <sup>6</sup> A “covered work” means either the unmodified Program or a work based on the Program. (Dkt.  
No. 101 at 4.)

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

15 *Susteen*, which addressed post-termination royalty payments under California law and  
 16 held that “if a licensor elects to terminate a license agreement upon the licensee’s breach, the  
 17 obligation to pay future royalties ceases as well,” is similarly inapposite. *Susteen*, 266 F. App’x at  
 18 691.<sup>7</sup> The *Susteen* court noted that the defendant’s breach did not render the plaintiff unable to  
 19 receive the benefits of the bargain and that the plaintiff could have continued to perform under the  
 20 agreement and received the minimum royalty payments, but instead plaintiff elected to terminate  
 21 the agreement all together. *Id.* Having done so, plaintiff was not entitled to any post-termination  
 22 royalty payments. Again, not so here. In addition, there is a dispute regarding when Artifex—the  
 23 licensor—terminated the agreement.

24 Even if this were not the case, the undeveloped factual record would foreclose summary  
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26 <sup>7</sup> The other cases upon which Defendant relies are similarly unpersuasive. *See Schinzing v. Mid-*  
 27 *States Stainless, Inc.*, 415 F.3d 807, 810 (8th Cir. 2005) (undisputed that licensor terminated the  
 28 licensing agreement); *In re Arthur Treacher’s Franchisee Litig.*, 689 F.2d 1137, 1140 (3d Cir.  
 1982) (undisputed franchisor terminated contract).

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

### 19 CONCLUSION

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

22 The stay on discovery is lifted.

23 The parties shall file a joint letter by September 25, 2017 regarding whether they would  
24 like a referral to a magistrate judge for a settlement conference, and if so, whether there is a  
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26 <sup>8</sup> At oral argument, Defendant framed its argument differently, instead maintaining that its  
27 download and use of Ghostscript under any subsequent version of the GPL was derivative of its  
28 use under the first version and thus no new rights or obligations were created with subsequent  
downloads. The Court declines to address this new argument improperly raised for the first time  
at oral argument.

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

This Order disposes of Docket No. 44.

**IT IS SO ORDERED.**

Dated: September 12, 2017

  
JACQUELINE SCOTT CORLEY  
United States Magistrate Judge