

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

AMC TECHNOLOGY, L.L.C.,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SAP AG,	:	
SAP AMERICA, INC., and	:	
SAP LABS, L.L.C.,	:	
Defendants.	:	05-CV-4708

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

November 3, 2005

Plaintiff AMC Technology, L.L.C. (“AMC”), a software company, brought this action against its former licensee, SAP AG and its subsidiaries, SAP America, Inc., and SAP Labs.¹ It its complaint, AMC alleged counts of direct, contributory, and vicarious copyright infringement, breach of contract, and misappropriation of trade secrets. With respect to copyright infringement, AMC alleged that: (1) the SAP application called “mySAP CRM 5.0,” soon to be released to the public, contained copyrighted AMC code that SAP was not authorized to copy; and (2) SAP was about to distribute detailed instructions to its customers that would allow them to copy the AMC Multi-Channel Management Suite (“MCMS”) code for use with mySAP CRM 5.0..

Together with its complaint, AMC filed a motion for a preliminary injunction based on the direct, contributory, and vicarious copyright infringement claims to enjoin SAP from: (1)

¹ This opinion will refer to the three SAP entities collectively as “SAP” except where more specificity is needed.

including AMC code in its product; and (2) instructing, describing, or purporting to authorize the copying of AMC code by users of mySAP CRM 5.0 and any future versions of the SAP software.

At a hearing on the motion for preliminary injunction, AMC stated that it was satisfied AMC code would not be included in mySAP CRM 5.0, so it would dismiss the direct infringement claim. The remaining issue is whether AMC is entitled to a preliminary injunction on its contributory or vicarious copyright infringement claims. The court will grant the preliminary injunction because AMC has a reasonable likelihood of success on the merits of its contributory copyright infringement claim, will otherwise suffer irreparable harm, and the harm to AMC outweighs the harm to SAP by granting the injunction. Therefore, the action is in the public interest. An appropriate Order follows.

I. FACTUAL BACKGROUND

A. The Parties and Their Products

AMC Technology, L.L.C., is a software company based in Virginia. SAP AG is a German software company and the parent corporation of SAP America and SAP Labs. SAP develops, markets and sells business software.

The SAP product at issue is “mySAP CRM.” “CRM” stands for “customer relationship management.” Companies use mySAP CRM to rationalize and improve various aspects of their communications with customers. SAP states that a company’s employees can use mySAP CRM to place customers’ orders for the company’s products; report service problems with the products; plan and execute marketing campaigns, including telemarketing programs; and generate reports about sales volumes and other data.

One element of mySAP CRM is the “CRM Interaction Center,” used by call center agents to manage and track their interactions with customers by retrieving information about the customers, taking purchase orders and other information and transmitting it to other departments within the company, and so on.

AMC makes and sells a product called “Multi-Channel Management Suite” or “MCMS.” MCMS adds to programs such as mySAP CRM the ability to handle email and web chat interactions with customers in addition to telephone calls. AMC MCMS connects directly to the communication channel servers (e.g., telephone switches and email servers) and is able to check agent availability, queue and route all incoming customer phone calls, emails, and web chat communications, and allow an agent to respond to all customers from the same computer, regardless of the channel used.

The AMC MCMS software has several components. One part of the software is installed on the user’s computer and provides user interface. Declaration of Johnnie Wilkenschildt, Development Manager of mySAP CRM Interaction Center, in Support of SAP’s Opposition to Motion for Preliminary Injunction (“Wilkenschildt Decl.”) ¶ 12. A second part is installed on a server rather than the user’s own computer and allows a particular agent to receive phone calls and messages or stops calls and messages from going to that agent. Id. The third part of the AMC MCMS software—“connectors”—allows it to interact with a company’s telephone switch or email or web chat server. Id. Each different connector is designed to work with a particular manufacturer’s switch or server. Declaration of Wolfgang Bauer, Product Management Specialist, SAP AG, in Support of SAP’s Opposition to Motion for Preliminary Injunction (“Bauer Decl.”) ¶ 4; Wilkenschildt Decl. ¶ 9. Different organizations using mySAP CRM and

AMC MCMS require different connectors, depending on the organization's intended use (e.g., for telephone, email, web chat, or a combination) and other variables, such as the organization's provider of telephone switchboard services and email server software. Bauer Decl. ¶ 4.

B. The Agreement Between the Parties

Until 2001, SAP offered only telephone communication management capability with mySAP CRM. On September 1, 2001, wishing to expand the capabilities of the CRM Interaction Center to include email and web chat, SAP entered into a licensing agreement with AMC (the "OEM Agreement") for AMC's MCMS software.

The OEM Agreement gave SAP the right to sublicense certain parts of AMC MCMS "as a product embedded into SAP software." OEM Agreement § 3.2. A subsequent amendment also gave SAP the right to license other parts of the MCMS code, namely, the "connectors," as "a complementary product to SAP's software." OEM Agreement, Amendment 1, §§ I-II.

AMC MCMS is only one component of a complex software package; not every user of mySAP CRM immediately (or ever) makes use of AMC MCMS. The payment terms of the OEM Agreement reflected this. Under the contract, SAP paid AMC only for "productive users." OEM Agreement, Attachment A, ¶ 2.1. In order for a user to become "productive," the user had to activate the AMC software by registering his license with AMC and obtaining an activation key from AMC (or from SAP during the one-year period between March 1, 2003 and February 29, 2004). Declaration of Georg Schröder, Vice President, Corporate Third Party Licensing, SAP AG, in Opposition to the Motion for Preliminary Injunction ("Schröder Decl.") ¶ 4. (Additionally, the relevant connectors had to be installed on the user's server. Bauer Decl. ¶ 4.) The agreement provided for SAP to pay AMC an annual license fee of one million dollars to

cover 10,000 “productive users,” and \$100 for each user beyond that number. OEM Agreement, Attachment A, ¶ 2.1. AMC was to report to SAP periodically the number of registrations so SAP would know how many “productive users” existed. Id.; Schröder Decl. ¶ 4. During the one-year period that SAP handled registration, SAP gave customers wishing to become “productive users” of AMC MCMS a “Master License Key” it had received from AMC. Schröder Decl. ¶ 5. SAP paid AMC \$500,000 for the use of the Master Key. Id. ¶ 6. Both the individual registration keys provided from September 2001 to March 2003 and from March 2004 to the present and the master key provided between March 1, 2003 and February 29, 2004 were for licenses with “no expiration”. Bauer Decl. ¶ 7-9; Schröder Decl. ¶ 7.

The OEM Agreement also contains a series of provisions addressing the relationship between the parties after termination of any part of the agreement.

§ 11.3 Termination of this Agreement shall not affect any of the individual sublicense agreements between End Users and SAP. Except for cases of termination for cause by Licensor, SAP remains entitled to make copies of the Software Products to the extent required in order to fulfill all contracts with End Users and/or Applicable Entities concluded in the ordinary course of business prior to the date on which the termination becomes effective.²

§ 11.4 Upon the expiration of this Agreement or any termination, SAP shall be deemed to be granted a non-exclusive, perpetual license to use, modify, distribute and sublicense the Software Products with the then current version of SAP Software,

² On the official copy of the OEM Agreement, both this section number and the next one are inserted by hand in the margin and followed by a question mark. The parties have adopted this numbering and so has the court.

as it exists at the time of such expiration or termination and not with future versions on the same basis as is said [sic] forth in Section 3 hereof, and SAP shall pay a royalty fee to Licensor of \$100 per Productive User up to the maximum Software Product Fee of USD \$4,000.000. . . .

In December 2003, AMC and SAP terminated the sublicensing portion of the OEM Agreement, effective March 1, 2004, and enacted Amendment No. 7 to the OEM Agreement:

2. Term and Termination

- c) Section 11 of the Original Agreement shall apply concerning the termination for the Software Products MCMS described in Attachment A.
- d) In addition the parties agree that for each End User licensing MCMS as part of the SAP Software (which shall include only CRM 4.0 for purposes of Section 11 of the Original Agreement) after February 29, 2004, [AMC] shall report to SAP [various identifying information for new “productive users”]. . . .

The portion of the OEM Agreement regarding SAP’s right to license the connectors (Amendment 1 to the OEM Agreement) remained in force.

C. The Dispute

When SAP planned the release of the next version of its software, mySAP CRM 5.0, SAP considered how to ease the transition for mySAP CRM customers using AMC MCMS as their multi-channel management software. SAP had provided its mySAP CRM customers with different multi-channel management options, one of which was its own program, “Web-based IC” or “Web Client.” Testimony of A. Uliano, President and Chief Technology Officer of AMC,

10/11/2005, Transcript of October 11, 2005 Hearing (“Hr. Tr.”) at 35-36. “Web-based IC in mySAP CRM version 4.0 contained features that provide the same or similar functionality to MCMS.” SAP’s Complaint for Declaratory Relief in Case No. 05-04595, E.D. Pa., 8/30/2005, ¶ 12. Nonetheless, SAP wished to enable those customers who had already licensed MCMS with an earlier version of mySAP CRM to keep using MCMS.

SAP instructed its developers that it would no longer issue MCMS with any new version of mySAP CRM, but that licensees of MCMS for use with earlier versions of mySAP CRM had the right to continue using it with any new version. Wilkenschildt Decl. ¶ 22. During the spring and early summer 2005, its developers worked to remove all MCMS code from mySAP CRM 5.0 and drafted a set of instructions that would allow existing customers upgrading to mySAP CRM 5.0 to copy into the new version the AMC MCMS code they had received with an earlier version of mySAP CRM. See “Component Upgrade Guide,” Pl’s Exh. 16; Wilkenschildt Decl. ¶¶ 23, 27-29. In this way, customers who had used the AMC MCMS as their multi-channel management software within earlier versions of mySAP CRM would be able to use it with mySAP CRM 5.0. Wilkenschildt Decl ¶ 34.

On May 12, 2005, an AMC developer, Aimee Stinson, contacted an SAP developer, Satit Nuchitsiripattara, to ask when the process of ensuring compatibility of MCMS with the new mySAP CRM would take place. Def’s Exh. 54. Nuchitsiripattara informed Stinson that mySAP CRM 5.0 would not include MCMS, but he would appreciate her assistance in ensuring that the instructions he was preparing for mySAP CRM 5.0 customers to use previously obtained MCMS code would work as planned. Wilkenschildt Decl. ¶ 32; Def.’s Exh. 54. Stinson replied that she had “confirmed with Tony” (Anthony Uliano, AMC’s CEO) that mySAP CRM would not

include MCMS; she added that she would be “happy to review the upgrade procedure.” Id. This is how Uliano learned of SAP’s plans to instruct its customers on migrating AMC’s MCMS software from mySAP CRM 4.0 to mySAP 5.0. Uliano Testimony, Hr. Tr. 43-44. On June 24, 2005, Wilkenschildt asked Nuchitsiripattara to send a draft of the “Component Upgrade Guide” to Stinson for her feedback. Wilkenschildt Decl. ¶ 36. Uliano then reviewed the draft. Uliano Testimony, Hr. Tr. at 48.

On June 29, 2005 Uliano expressed his concern to SAP that the planned Component Upgrade Guide was a sign it was “finding ways to circumvent” the OEM Agreement. Def.’s Exh. 54. On July 7, 2005, Uliano wrote more explicitly to SAP officials that:

AMC does not agree with SAP’s action to instruct customers, partners, and SAP employees on how to copy AMC source code from CRM 4.0 to CRM 5.0. The right to use our software in CRM 5.0 is strictly prohibited in our last Amendment (number 7). . . . It is very important for SAP to prevent these instructions from being released until such time that SAP has secured the rights to license our software for customers using CRM 5.0.

Def.’s Exh. 54.

On August 30, 2005, SAP AG filed an action in this court for a declaratory judgment that SAP could issue instructions allowing existing users of mySAP CRM 3.0, 3.1 or 4.0 to migrate the AMC software from earlier mySAP CRM versions into mySAP CRM 5.0. A week later it voluntarily dismissed the action.

On August 31, 2005, AMC filed a complaint and the motion for a preliminary injunction

presently before the court.³ The issue before the court at this time is whether a preliminary injunction should issue on the basis of AMC's contributory and vicarious copyright infringement claims.

MySAP CRM 5.0 is scheduled to be released on a limited basis at the end of October 2005. Wilkenschildt Decl. ¶ 6. Its full release is scheduled for the end of the second quarter of 2006. Uliano Testimony, 10/11/2005 Hr. Tr. 17:13-15.

II. DISCUSSION

The decision to grant or refuse a preliminary injunction is within the discretion of the district court. Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983). To obtain a preliminary injunction for copyright infringement, the plaintiff must show: "(1) that it is reasonably likely to succeed on the merits of its copyright infringement claim and (2) a likelihood that it will suffer irreparable harm if the injunction is denied. Other issues to consider if relevant are (3) the likelihood of irreparable harm to the non-moving party and (4) the public interest." Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 196 (3d Cir. 2003) (internal citations omitted). Additionally, in deciding whether to grant or deny a preliminary injunction, the district court should also consider the possibility of harm to other interested persons. Anderson v. Davila, 125 F.3d 148, 159 (3d Cir. 1997). "[O]ne of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable,

³ This court has jurisdiction over the action under 28 U.S.C. § 1331 and jurisdiction over SAP through the venue clause of the OEM Agreement (§ 17.5). At the hearing, counsel for SAP specifically stated that SAP AG submitted to the jurisdiction of the court and had no objection to it. Hr. Tr. 116:11-117.8.

noncontested status of the parties." Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 197 (3d Cir.1990).

A. Reasonable probability of success on the merits

Copyright law protects "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102. It is settled law that software can be copyrighted and the copyright can be infringed. Apple Computer, 714 F.2d at 1247-49. Subject to certain enumerated exceptions within the Copyright Act, copyright owners have the exclusive right to: (1) reproduce the copyrighted work; (2) prepare derivative works; and (3) distribute copies. 17 U.S.C. § 106. To prove copyright infringement pursuant to 17 U.S.C. § 501, the plaintiff must demonstrate two elements: (1) ownership of a copyright and (2) copying by the defendant. Dam Things From Denmark v. Russ Berrie & Co., 290 F.3d 548, 561 (3d Cir. 2002). "One infringes contributorily by intentionally inducing or encouraging direct infringement." Metro-Goldwyn Mayer Studios Inc. v. Grokster, 125 S. Ct. 2764, 2776 (2005) (internal citations omitted). See also Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 160 (3d Cir. 1984) (contributory infringement occurs when, "with knowledge of the infringing activity, [the defendant] induces, causes or materially contributes to the infringing activity of another.") One infringes vicariously "by profiting from direct infringement while declining to exercise a right to stop or limit it." Metro-Goldwyn Mayer, 125 S. Ct. at 2776. Providing users with instructions enabling them to copy AMC code would constitute inducement to copyright infringement. "Evidence of active steps taken to encourage direct infringement, such as . . . instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe . . ." Id. at 2779.

SAP does not dispute that AMC MCMS is protected by copyright⁴ or that SAP's distribution of the Component Upgrade Guide constitutes contributory copyright infringement if the recipients of the guide, current users of mySAP CRM 3.0, 3.1, or 4.0, do not otherwise have the right to copy AMC's MCMS software. Because there is no question that the distribution of the Component Upgrade Guide induces SAP's customers to copy AMC's MCMS code, there is no need to analyze AMC's vicarious infringement theory.

Whatever rights SAP's licensees may have, they are valid with respect to AMC's MCMS software only to the extent that they do not exceed SAP's rights, i.e., that they are "in compliance with" the OEM Agreement.⁵ See OEM Agreement § 5.2. A defendant in a contributory copyright infringement case cannot use as a defense its own grant of a sublicense exceeding the scope of its license. The issue before the court is whether SAP could grant its licensees the right to copy MCMS from an earlier version of mySAP CRM to mySAP CRM 5.0.

The OEM Agreement clearly does not allow users of earlier versions of mySAP CRM to copy AMC's MCMS code and use it with mySAP CRM 5.0. SAP contends that the OEM Agreement only bars it from issuing sublicenses of MCMS to new users acquiring licences to mySAP CRM 5.0 as their first mySAP CRM product, but customers who have already purchased a license for an earlier version of mySAP CRM have the right to continue to use their "no

⁴ AMC has submitted a Certificate of Registration for its MCMS Software. Pl.'s Exh. 17. Registration certificates constitute "prima facie evidence of the originality of the work and the facts stated in the certificates." 17 U.S.C. § 410.

⁵ Section 5.2 of the OEM reads: "SAP shall enter into legally enforceable, written, license agreements with each of its customers . . . containing the terms and conditions under which the Software Products are sublicensed in compliance with this Agreement" (emphasis added).

expiration” AMC MCMS sublicenses, even if the MCMS software is operating with an newer version of mySAP CRM. SAP claims the users are authorized to use the software under perpetual licences, so assisting them to do so cannot be unlawful, because there cannot be contributory infringement in the absence of direct infringement by a third party.

The disagreement between the parties can be reduced to two major issues: 1) the scope of SAP’s sublicensing rights during the term of validity of the OEM Agreement (Section 3.2); and 2) SAP’s rights after the termination of the contract (Section 11.4). The OEM Agreement is governed by Pennsylvania contract law. See OEM Agreement, § 17.5.

(i) Scope of SAP’s Sublicensing Rights

Section 3.2 of the OEM Agreement reads:

Licensor hereby grants to SAP the non-exclusive right to make copies of the master media copies of the Software Products and sublicense and distribute them to End Users . . . as a product embedded into SAP Software. Such sublicenses shall be granted by SAP in the same license agreement by which SAP licenses SAP Software to End Users.

The parties disagree on the meaning of the word “embedded,” not defined in the contract. AMC argues it means “encapsulated in” or “hosted in” a larger program, and that this limits SAP’s use and distribution rights by mandating that mySAP CRM and MCMS must be distributed together if at all.⁶ SAP argues it is not a limitation on its sublicensing rights, and

⁶ Q What is embedding?
A Well, embedding in a software sense is when—is when you have a larger program that has a separate program encapsulated in it. So you have a larger program that hosts a smaller program. And in this case, the [SAP] interaction center as a program hosted our MCMS as a program. . . .

simply means “licensed together with.”⁷ Despite the parties’ apparent disagreement, the word “embedded” is not ambiguous. See Bohler-Uddeholm America Inc. v. Ellwood Group, Inc., 247 F.3d 79, 94-95 (3d Cir. 2001) (under Pennsylvania contract law, “(1) mere disagreement between the parties over the meaning of a term is insufficient to establish that term as ambiguous; (2) each party’s proffered interpretation must be reasonable, in that there must be evidence in the contract to support the interpretation beyond the party’s mere claim of ambiguity; and (3) the proffered interpretation cannot contradict the common understanding of the disputed term or phrase when there is another term that the parties could easily have used to convey this contradictory meaning.”) According to Webster’s Third International Dictionary (1993), “to embed” is “to enclose closely in or as if in a matrix . . . ; to surround closely.” The Microsoft Computer Dictionary defines “embedded” as “[i]n software, pertaining to code or a command that is built into its carrier.” Microsoft Press, Microsoft Computer Dictionary (4th Ed. 1999). There is no evidence either in common use or in the contract to support SAP’s interpretation.⁸ The contract

THE COURT: It comes with it?

THE WITNESS: It comes with it, yes, your Honor.

Testimony of A. Uliano, Hr. Tr. 58:16-22.

⁷ Q. You mention embedded software. What does embedded software mean?

A. Embedded software, first of all, means that we are licensing an SAP product towards a customer, and this includes third-party software as part of the SAP product licenses. So the customer is not licensing the third-party product on its own, stand alone.

. . . .

Q. Does the upgrade procedure change that?

A The embedding, itself, is not changed.

Testimony of G. Schröder, Tr. 129:25-130:6, 130:9-10.

Later, Mr. Schröder testified that “embedded” means that “it can only be used together.” See Hr. Tr. 176, 181-82.

⁸ No general or technical dictionary consulted by the court supports SAP’s understanding of “embedding” as “licensing together,” although the particular context of software “embedded”

contains evidence contrary to SAP's position: the very next sentence of Section 3.2 goes on to specify, as an additional requirement, that the sublicenses to AMC's software must be "granted by SAP in the same license agreement by which SAP licenses SAP Software to End Users." OEM Agreement, § 3.2.

(ii) SAP's Rights After Termination

Section 11.4 of the OEM Agreement provides:

Upon the expiration of this agreement or any termination, SAP shall be deemed to be granted a non-exclusive, perpetual license to use, modify, distribute and sublicense the Software Products with the then current version of SAP Software, as it exists at the time of such expiration or termination and not with future versions on the same basis as is said [sic] forth in Section 3 thereof [and pay AMC specified royalty fees for such distribution].

(emphasis added).

This section clearly states SAP has no rights with respect to MCMS past the version of mySAP CRM current at the termination of the licensing agreement (which Appendix 7 to the OEM Agreement identifies as mySAP CRM 4.0). SAP argues that Section 11.4 simply requires it to remove the MCMS code from future versions of mySAP CRM, but does not affect those customers who licensed MCMS with older versions; it contends those customers can continue using the MCMS code with any future versions. To understand the contract otherwise, SAP

in other software is not specifically mentioned in any of the other sources consulted. See Webster's New World Computer Dictionary (10th Ed. 2004); Douglas A. Downing et al., Dictionary of Computer and Internet Terms (8th Ed. 2003), Sybil P. Parker ed. in chief, McGraw-Hill Concise Encyclopedia of Science and Technology (4th Ed. 1998).

argues, would be to place before these customers the choice of foregoing the right to mySAP CRM upgrades or having to expend considerable time and money to install an alternative multi-channel management system and then train their workers in its use.

Under Pennsylvania contract law, when a contract is unambiguous, “the focus of contract interpretation is on the terms of the agreement as manifestly expressed rather than, perhaps, as silently intended.” Amoco Oil Co. v. Snyder, 478 A.2d 795, 798 (Pa. 1984). See also Morningstar v. Hallett, 858 A.2d 125, 129 (Pa. Super. 2004) (“[t]he paramount goal of contractual interpretation is to give effect to the intent to the parties. In determining the intent of the parties to a written agreement, the court looks to what they have clearly expressed, for the law does not assume that the language of the contract was chosen carelessly.”) “Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.” 401 Fourth St., Inc. v. Investors Ins. Group, 879 A.2d 166, 171 (Pa. 2005).

What is expressed in Section 11.4 is that SAP’s right to “use” as well as “distribute” MCMS is limited and does not extend to any versions of mySAP CRM subsequent to 4.0; any sublicense to an end user must also be so limited. SAP attempts to call the provision’s plain meaning into doubt by arguing that it would create internal contradiction and ambiguity within the contract and that SAP interpretation is supported both by the commercial circumstances surrounding the deal and the parties’ subsequent course of conduct, but its arguments are not persuasive.

SAP argues that Sections 3.2 and 11.4 could not limit SAP’s rights in the manner asserted by AMC, because such limitation would make other clauses nonsensical. SAP points to

Section 11.3 of the OEM Agreement, which provides that “[t]ermination of this Agreement shall not affect any of the individual sublicense agreements between End Users and SAP” and claims termination would necessarily impair either the right to upgrade or the right to use MCMS in perpetuity, both granted in SAP’s standard licensing agreement (“Standard End User Licensing Agreement” or “Standard EULA”). In addition, Appendix 1 of the OEM Agreement, allowing SAP to license AMC connectors, is still in effect (see OEM Agreement, Appendix 1), and AMC is bound under Section 4.5 of the OEM Agreement to “ensure that all Software Products are and continue during the entire term of this Agreement always fully compatible to SAP Software including new versions or releases thereof” (emphasis added).⁹ Sections 11.6 and 11.7 provide that AMC must cooperate with SAP in servicing the embedded MCMS code for three years after termination and then take over the service.

There is no contradiction between the plain language of Section 11.4 and the provisions cited by SAP. Denying the users the right to use MCMS with any mySAP CRM version subsequent to 4.0 does not necessarily result in a violation of Section 11.3: to the extent that the sublicense agreements SAP has entered into are “in compliance with [the OEM Agreement],” as mandated by Section 5.2, they are unaffected. The standard End User License Agreements (“EULAs”) that SAP uses in the United States do not grant the right to upgrades in the main (and only mandatory) portion of the EULA; that right is contracted for and paid for separately. Even the rights granted in the EULA are qualified, so that no right actually granted in the EULA would

⁹ Mr. Schröder testified that additional software would be needed to use the AMC connectors with any program other than AMC MCMS, including SAP’s mySAP CRM Interaction Center Web Client. See Hr. Tr. 146:4-15, 147:7-149:18.

be significantly affected.¹⁰ SAP's argument that AMC is obliged to make to make its connectors compatible with SAP software would lead to the absurd result that AMC must provide new as well as existing users of mySAP CRM with MCMS, so the connectors continue to work. The evidence in the record does not support SAP's contention that AMC's post-termination service obligations under Sections 11.6 and 11.7 would be meaningless if present MCMS users could not use it with mySAP CRM 5.0. Users do not immediately switch over to new versions of mySAP CRM; there may still be users of mySAP CRM 4.0 with MCMS more than three years from now.¹¹

As the contract is not ambiguous with respect to SAP's post-termination rights, there is no need to turn to extrinsic evidence of the alleged commercial background of the agreement or the parties' course of conduct to divine the intentions of one of the parties. See Amoco Oil Co. v. Snyder, 478 A.2d at 798 ("the focus of contract interpretation is on the terms of the agreement as manifestly expressed rather than, perhaps, as silently intended."); Regscan v. Con-Way Transp. Serv., 875 A.2d 332, 337 (Pa. Super. 2005) ("When the language of a written contract is clear and unequivocal, its meaning must be determined by its contents alone. Only if the words

¹⁰ See, e.g., Declaration of Charles F. Tisa, Vice-President, Contracts, SAP America, in Support of SAP's Opposition to Motion for Preliminary Injunction ("Tisa Decl."), Exh. A ("Standard EULA"), § 7.1 (warranting "that the Software will substantially conform to the functional specifications contained in the Documentation for six months following delivery").

SAP has not submitted any documents or declarations relating to its agreements with customers outside the United States; to the extent that the discussion involves the terms of the contract between SAP and its customers, it will be based on the "Standard EULA" licensing mySAP CRM to United States Customers.

¹¹ Mr. Schröder testified that **customers are not obligated to accept upgrades, although a very high percentage of them do.** Schröder Testimony, Hr. Tr. 128:12-16. SAP limits support for any given version five years after its release and terminates it eight years after its release. Hr. Tr. 125:23-126:9. Some customers may still use mySAP CRM 3.0. Hr. Tr. 141:21-22.

used are ambiguous may a court examine the surrounding circumstances to ascertain the intent of the parties.”) (internal citations omitted).

Even if there were a need to turn to extrinsic evidence, it would support AMC’s position. SAP contends that the commercial realities make it clear that SAP would not have entered into the agreement as AMC understands it; because of the cost of installation and training for customers and the long development cycles of software, it would have made no commercial sense for SAP to agree that installed customers would have to stop using MCMS after a certain point. See Schröder Decl. ¶ 8-10; Tisa Decl. ¶ 8. However, it would have made little sense for AMC to agree to the limitless use of its software with mySAP CRM upgrades without further payment, since AMC alleges SAP installed users are the only “proven market” for MCMS. Affidavit of Anthony X. Uliano, President and Chief Technology Officer, AMC Technology (“Uliano Decl.”) ¶ 13.

SAP also argues that the parties’ course of conduct shows AMC understood SAP’s existing licensees could use MCMS with any version of mySAP CRM, since AMC itself described the master activation key it provided SAP between March 2003 and February 2004 as having “no expiration date.” AMC’s grant of licenses with “no expiration” is qualified by the termination clauses of the OEM Agreement. The licenses are perpetual so long as MCMS is used “in compliance with the OEM Agreement,” (OEM Agreement, Section 5.2), i.e., “embedded” with the version of mySAP CRM current at termination or earlier versions.

Evidence of prior negotiations supports AMC’s position. Section 11.4 was the result of bargaining by AMC and modified the following version of the same section, submitted by SAP as part of its form OEM agreement: “Upon the expiration of this Agreement or any termination

SAP shall be deemed to be granted a non-exclusive, perpetual and fully paid license to use, modify, distribute and sublicense the Software Products as it exists [sic] at the time of such expiration or termination on the same basis as is said [sic] forth in Section 3 hereof, and SAP shall have no further obligation to make license fee payments to Licensor hereunder.” Pl.’s Exh. 17 § 11.4. AMC obtained two major changes by negotiation: the right to be paid for any copies of its software licensed after the termination of the agreement, and a limitation of SAP’s rights to the “then current” version of SAP’s product.¹²

AMC has shown that it has a reasonable likelihood to succeed on the merits. SAP’s licensees do not have the right to copy MCMS to use with mySAP CRM 5.0 because they could not have received from SAP a right SAP did not have, and SAP’s instructing them to do so by providing the Component Upgrade Guide would constitute contributory copyright infringement. The OEM Agreement plainly and unambiguously limits SAP’s rights both during the term of the contract and after its termination. SAP can distribute AMC MCMS only as a product “embedded” into SAP software. What SAP is proposing to do is to allow its customers to “dis-

¹² In its answer to the complaint, SAP also pleaded a series of affirmative defenses, all of which have been considered although none of which was specifically addressed in oral argument. SAP believes that AMC should be estopped from renegeing on its commitment to SAP that it could grant “perpetual” licenses to AMC’s software. Of course, the interpretation of the extent of that commitment is tightly bound up with the interpretation of the OEM Agreement. Since the agreement limited SAP’s licensing rights to the last current version at the termination of the contract, AMC’s grant of licenses with “no expiration date” does not contradict with its position in this litigation. SAP also raises a defense of laches. To prevail, SAP must prove inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Gruca v. United States Steel Corp., 495 F.2d 1252, 1258 (3d Cir. 1974). Mr. Uliano first learned of SAP’s plans to distribute a Component Upgrade Guide in May 2005; during the summer he notified SAP that he believed such distribution constituted an infringement of AMC’s copyright, and AMC brought this lawsuit on August 31, 2005. Three months between discovering the proposed violation and filing a complaint does not constitute inexcusable delay, especially when SAP was given prompt notice of ACM’s position.

embed” AMC from earlier versions of mySAP CRM so they can use it with mySAP CRM 5.0. This is a right that SAP never had and could not have granted its customers. Section 11.4 clearly spells out that SAP never had—and could not grant—the right to use MCMS with any version subsequent to the one current at the time of termination of the licensing part of the OEM Agreement.¹³ AMC is likely to succeed in showing that SAP’s customers have no right to use MCMS with mySAP CRM 5.0 and that SAP is liable for contributory copyright infringement by inducing them to do so.

B. Irreparable harm to AMC

The court must consider whether the movant will suffer irreparable harm in the absence of preliminary relief preserving the status quo until the merits of the case can be tried. Irreparable harm is an injury that "cannot be redressed by a legal or equitable remedy following a trial." Instant Air Freight Co. v. C.F. Air Freight, 882 F.2d 797, 801 (3d Cir.1989). An irreparable injury is one that "is not remote or speculative, but actual and imminent and for which monetary damages cannot adequately compensate." FMC Corp. v. Control Solutions, Inc., 369 F. Supp. 2d 539, 573 (E.D. Pa. 2005).

A showing of a prima facie case of copyright infringement, or reasonable likelihood of success on the merits, raises a presumption of irreparable harm. Apple Computer, 714 F.2d at 1254. The presumption may be relaxed when the alleged infringement is of “material peripheral

¹³ SAP concedes that it could not ship a version of mySAP CRM 5.0 with MCMS to any customers, including customers already using MCMS (see Winkenschildt Decl. ¶ 22; Schröder’s Testimony, Hr. Tr. 121:17-20), yet SAP’s description of the upgrade procedure makes it difficult to appreciate the difference. According to SAP, the procedure consists of “first of all, sav[ing] the MCMS code], then send[ing] that procedure to upgrade [mySAP CRM] where we are deleting [MCMS], and then fill it in back what’s required.” Schröder Testimony, Hr. Tr. 136: 20-23.

to the [copyright holder's] business," in which case the Third Circuit requires "a stronger showing of irreparable harm as the [copyright holder's] likelihood of success on the merits wanes." Marco v. Accent Publ'g Co., 969 F.2d 1547, 1553 (3d Cir.1992); see also Apple Computer, 714 F.2d at 1254 (no stronger showing needed where the copyrighted material is "central to the essence of plaintiff's operations.") MCMS is clearly central to AMC's operations. AMC counts eleven full-time employees and its revenues in the last few years have been around two million dollars. Uliano Testimony, Hr. Tr. 29-30. At least half of that amount can be traced to SAP's licensing of MCMS. See OEM Agreement, Attachment A, § 2.1 (providing for a yearly upfront licensing fee of one million dollars). AMC claims the SAP installed base is "the entire proven market for MCMS." Uliano Decl. ¶ 13.¹⁴ A stronger showing of irreparable harm is not needed here.

SAP's attempt to rebut the presumption of irreparable harm fails. SAP argues that even if AMC is correct in its interpretation of the OEM Agreement, its losses can easily be quantified at trial by multiplying the per-user licensing fee that AMC charged SAP under the OEM Agreement by the number of users that have taken advantage of SAP's instructions to transfer the AMC MCMS code to mySAP CRM 5.0. It is not possible to know how many users are presently using MCMS (since no records were kept during the year that MCMS registration and activation was accomplished through a "master key"), see Uliano Testimony, Hr. Tr. 74:17-25, or how many of the users will actually follow the instructions and copy the AMC MCMS code into mySAP CRM 5.0. Id. at 104:2-10.

SAP argues that it would be possible to calculate the number of users who have activated

¹⁴ These allegations are sufficiently strong to support a finding of irreparable harm even in the absence of the presumption.

AMC MCMS simply by ascertaining users who have purchased MCMS connectors from SAP, see Tisa Decl. ¶ 18, but: (a) SAP has not shown that it possesses accurate lists of connector licensees outside the United States¹⁵; (b) it appears that organizations license connectors, see Tisa Supplemental Decl ¶¶ 2-4, while royalties for the main part of the MCMS software are paid at the rate of \$100 per individual user; the correlation between the one and the other is not clear (compare standard letter explaining connector installation, Exh. A to Bauer Decl., to OEM Agreement, Attachment A, § 2.1); and (c) SAP has conceded that if AMC wins at trial, this method would at most enable the decision-maker to determine the maximum number of users who might have upgraded and copied MCMS (because MCMS needs a connector to work), see Schäder Testimony, Hr. Tr. 144:22-145:11. SAP has not explained how it would find the individual users who would copy the AMC MCMS software.

Because there is no reliable way to calculate AMC's damages, AMC has shown that it will suffer irreparable harm if an injunction does not issue.

C. Irreparable Harm to SAP

SAP argues that a preliminary injunction would harm it by placing it in breach of its own licensing agreement with its customers and in violation of its customers' expectations, subjecting it to legal and commercial consequences. These potential troubles do not outweigh the presumed harm to AMC.

SAP argues that the requested injunction would expose it to litigation because it would make it impossible for SAP to fulfill its contractual obligations to its existing customers: if it

¹⁵ SAP's list currently includes fifteen U.S.-based organizations. Id.; Supplemental Declaration of Charles F. Tisa in Support of SAP's Opposition to Motion for Preliminary Injunction ("Tisa Supplemental Decl.") ¶¶ 2-4.

keeps its promise by delivering the upgraded mySAP CRM 5.0 to its customers, it will deprive them of the opportunity to “Use” the AMC MCMS software embedded in the version the customer originally licensed. See Tisa Decl. ¶ 13 and Exh. A thereto (“Standard EULA”), § 1.9.¹⁶ SAP also argues that it would face commercial consequences: both the initial licensing and installation of mySAP CRM and the subsequent upgrades require a substantial investment of time and money, and its customers would be upset to find that the upgraded version actually deprived them of a feature they had been using. See Schröder Testimony, Tr. 152:22-153:6.

Whatever problems may arise for SAP from disgruntled customers will be limited. It is not clear that discontinuing the use of MCMS would place SAP in violation of its contract with its customers or that SAP would be subject to legal action even if it were in violation. SAP customers license a functionality, not MCMS specifically. See Schröder Testimony, Hr. Tr. 171-172. This functionality could be provided by a piece of software other than MCMS; it can be provided by SAP’s own Web Client software. Uliano testimony, Tr. 35-39; SAP’s Compl. for Declaratory Relief in Case No. 05-04595, E.D. Pa., 8/30/2005, ¶ 12.¹⁷ SAP frequently “retires”

¹⁶ SAP has not provided examples of the EULAs it uses outside the United States. From SAP’s submissions it appears that eleven U.S.-based companies and government entities have both purchased AMC connectors (and thus are likely to be users of the MCMS software) and have paid maintenance dues. Tisa Decl. ¶ 35; Tisa Supplemental Decl. ¶¶ 2-4. SAP also argues that it might be subject to “a multiplicity of suits” in different jurisdictions and that this risk constitutes irreparable damage. The possibility of actions in multiple jurisdictions is not a consideration at this stage.

¹⁷ Admissions by attorneys are admissible against their clients, where the attorney acted within the scope of his authority. Fed. R. Evid. 801(d)(2)(D); Mangual v. Prudential Lines, Inc., 53 F.R.D. 301, 301 (E.D. Pa. 1971). See also First Bank of Marietta v. Hogge, 161 F.3d 506, 510 (8th Cir.1998) (“Although these statements from First Bank’s abandoned state court pleadings do not constitute binding judicial admissions, these statements are admissible evidence that can be weighed like any other admission against interest of First Bank.”)

functionalities of its software and replaces them with other functionalities. Uliano Testimony, Hr. Tr. 71. Even if denying some customers the opportunity to participate in the limited rollout of mySAP CRM 5.0 could somehow be construed as a breach of contract on SAP's part, SAP's Standard EULA (used in the United States) severely limits its customers' ability to take legal action against SAP. SAP America's Standard EULA provides that at SAP's option, it can cure negligence or breach by bringing "the performance of the Software into substantial compliance with the functional specifications." Standard EULA § 9.1.

Difficulties that SAP brought upon itself by sublicenses with its customers exceeding its license cannot outweigh the presumed harm to AMC from the violation of its copyright. See Opticians Ass'n of America v. Indep. Opticians of America, 920 F.2d 187, 192 (3d Cir. 1990) (defendant was not harmed when it openly, intentionally, and illegally appropriated the plaintiff's trademark); Apple Computer, 714 F.2d at 755 (if a knowing copyright infringer were permitted to plead as irreparable harm damages directly arising from its infringement, it "would be permitted to build its business around its infringement, a result we cannot condone").

Scheduled for the end of October 2005 is a limited release of the new version of mySAP CRM, targeted to what a "very, very small number" of customers; the general release is contemplated for the end of June 2006, by which time a decision on the merits can be reached. See Schröder Testimony, Hr. Tr. 163:17-164:3. There is no evidence that any customers have been promised an upgrade by any particular date.

Finally, SAP could avoid any harm by paying for its right to distribute MCMS, as it has done in the past.

SAP has not convincingly demonstrated that it will be subjected to greater harm if the

requested injunction is granted than AMC will suffer if it is not.

Harm to Third Parties

SAP argues that in deciding whether to grant a preliminary injunction, the court should also take into account the harm it could cause to SAP's customers. In some cases, the Third Circuit has considered the potential harm to other interested persons in evaluating the balance of hardships. See Anderson v. Davila, 125 F.3d 148, 159 (3d Cir. 1997); see also Apple Computer, 714 F.2d at 1246 (noting without comment that district court below had considered "the improbability of harm to other interested persons").

Even such potential harm does not favor SAP. The only customers that could possibly be harmed by an order enjoining SAP from distributing its Component Upgrade Guide would be those who currently use mySAP CRM 3.0, 3.1, or 4.0 with AMC MCMS who are scheduled to participate in the limited release of mySAP CRM 5.0 with the intention of continuing to use MCMS with mySAP CRM 5.0. Commercial and practical realities may make it advisable for companies to upgrade their business software regularly, see Schröder Testimony, Hr. Tr. 122-23, 127-28, but there is no evidence it is urgent for any of SAP's customers to do so; the court has no reason to believe that SAP customers would suffer great harm since the majority of SAP customers appear to be willing to wait at least until the general release date, and none of the users of mySAP CRM 4.0 will lose their right to support from SAP until 2008. See Schröder Testimony, Hr. Tr. 125:23-127:9. Any harm to SAP customers is further mitigated by two factors: being deprived of MCMS does not mean losing multi-channel functionality altogether, since mySAP CRM has provided other options for that functionality at least since the 4.0 version; and any SAP customer who is unwilling to relinquish MCMS can acquire a license

directly from AMC.

D. Public interest

The public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in a protected work. Apple Computer, 714 F.2d at 755. This principle applies here.

III. CONCLUSION

Plaintiff's motion for a preliminary injunction will be granted because AMC has shown a reasonable likelihood of success on the merits of its contributory copyright infringement claim and likelihood of irreparable harm if the injunction does not issue; the potential harm to SAP and interested third parties does not outweigh the harm to AMC if the injunction does not issue. The public interest favors an injunction protecting copyright.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

AMC TECHNOLOGY, L.L.C.,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SAP AG,	:	
SAP AMERICA, INC., and	:	
SAP LABS, L.L.C.,	:	
Defendants.	:	05-CV-4708

ORDER OF PRELIMINARY INJUNCTION

AND NOW, this 3rd day of November, 2005, upon consideration of AMC Technology, L.L.C. (“AMC”)’s Motion for Preliminary Injunction and SAP AG, SAP America, and SAP Labs (“SAP”)’s Opposition to Motion for Preliminary Injunction, and following an evidentiary hearing on October 11, 2005, it appearing that:

1. This court has jurisdiction over the subject matter and the parties;
2. Venue lies in the Eastern District of Pennsylvania;
3. SAP intends to distribute a “Component Upgrade Guide” teaching customers how to copy AMC’s copyrighted software program, “AMC MCMS,” from earlier versions of “mySAP CRM”;
4. AMC has not authorized this copying;
5. AMC has shown a reasonable likelihood of success on the merits of its contributory copyright infringement claim against SAP and likelihood of irreparable harm if SAP is not enjoined from distributing the “Component Upgrade Guide” or otherwise disseminating instructions for copying AMC’s MCMS software; SAP has not shown irreparable harm to itself or interested third parties; and the public interest favors an injunction protecting a copyrighted work;

IT IS ORDERED THAT :

1. Plaintiff AMC Technology, L.L.C.’s motion for preliminary injunction (Paper # 3) is **GRANTED**.
2. Defendants, SAP AG, SAP America, Inc., and SAP Labs, LLC, their employees, agents, and assigns, are preliminarily enjoined from describing or purporting to authorize the copying, migration, or incorporation of AMC MCMS code embedded in mySAP CRM 3.0, 3.1, or 4.0 into any version of mySAP CRM released after mySAP CRM 4.0 unless specifically authorized or

licensed to do so by AMC; defendants are also ordered to retrieve any copy of the Component Upgrade Guide or equivalent information already distributed and inform the recipients that the copying, migration, or incorporation of ACM MCMS into mySAP CRM5.0 has not been authorized by AMC;

3. This injunction will be effective upon AMC's filing a bond in the amount of \$750,000.

/s/ Norma L. Shapiro

S.J.