DESTINATION COURT OF ARBITRATION

HERE TRANSPORT)

v.) Case No. 3279-2

UPTIME CARE)

DECISION

The parties in this matter have appeared and presented their evidence in open court. The court now enters these findings of fact and conclusions of law and awards judgment as follows.

FINDINGS OF FACT

The following facts are established by the record:

A written Consulting Contract negotiated between Here Transport and Uptime Care included the following provisions:

1. Beginning January 1, 3277 and continuing for a period of 5 years (until December 31, 3281):
    A. Uptime Care grants Here Transport a nonexclusive license to use the Uptime Dispatch software to facilitate maintenance for up to 6 FTL vessels serving Destination and for up to 50 surface transportation vehicles operated on Destination.
    B. Here Transport shall pay a quarterly royalty (due on the first day of the quarter) equal to the greater of:
        1. $10,000 per FTL vessel serving Destination, plus
        $1,000 per surface transportation vehicle operated on Destination.

        or

        2. A minimum of $65,000.
2. Uptime Care shall
    A. Consult with Here Transport part time (8 hours/week for up to the first four weeks of the quarter beginning January 1, 3277), without additional charge, on possible modifications to the Uptime Dispatch Software, as directed by the manager of Here Transport, to support (1) additional reporting requirements requested by Here Transport or (2) additional maintenance cost saving technologies requested by Here Transport, provided Here Transport acquires and pays for all necessary third party licenses or additional Uptime Care licenses for the additional maintenance cost saving technologies.
    B. Provide and install, without additional charge, any hardware or software required onboard any vessel or vehicle within the scope of this license in order to operate the Uptime Dispatch Software.
3. This license is for Software as a Service (SAAS). Uptime Care shall provide, without additional charge, hardware (servers and memory) and security sufficient to support

the response time, data security, and report and data availability requirements set forth in Exhibit A attached.

4. The Uptime Dispatch Software shall provide the functionality required to conform with the specifications set forth in Exhibit B attached and any mutually agreed modification under Par. 2(A) above.

The requirements in Exhibit A and the specifications in Exhibit B are not at issue and were not made a part of the record.

Uptime Care provided the consulting services as required under paragraph 2(A). Here Transport objects that the modifications to add functionality to the Uptime Dispatch Software were made with open source software modules. Here Transport was not required to acquire or pay for any third party software licenses or additional Uptime Care licenses for the modifications.

Uptime Care provided the onboard hardware in conformity with paragraph 2(B) and the SAAS access, reporting, and data protection in conformity with Paragraph 3 and Exhibit A.

The Uptime Dispatch Software, as modified, provided the functionality required under paragraph 4. Here Transport only objects that the required functionality under paragraph 2(A) was provided using software modules made with open source software.

The application to register a copyright for the Uptime Dispatch Software identifies two employees, Al Jobs and Wilson Gates, as the authors of a work for hire. No copyright registration is sought for the modules using open source software. Here Transport does not dispute the fact the identified individuals were the authors and were employed by Uptime Care for purposes of the work for hire doctrine.

Here Transport has used the Uptime Dispatch Software on:

5 FTL vessels serving Destination at $10,000 per FTL vessel = $50,000, plus

40 surface transportation vehicles at $1,000 each = $40,000.

The total quarterly royalty was $90,000. In the future, this number may change in conformity with the contract terms establishing the agreed royalty.

Here Transport filed a complaint seeking declaratory judgment that it does not have to pay Uptime Care the agreed royalty for a software license. Here Transport claimed use of open source software breached the license. The consultant, Uptime Care filed an answer and counterclaim, together with an application for copyright registration for the Uptime Dispatch software. Both parties sought declaratory judgment regarding ownership of the software and payment of the license royalty.

JURISDICTION

Personal Jurisdiction. Uptime Care employees provided software and consulting services Here Transport used to provide transportation services to and on Destination. The parties agreed to jurisdiction and venue on Destination regarding this dispute. Moreover, specific personal jurisdiction is proper. Both parties:

(1) . . . purposefully avail[ed] [themselves] of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claim . . . arise[s] out of or relates to the [parties'] forum-related activities; and

(3) the exercise of jurisdiction comports with fair play and substantial justice, i.e., it [is] reasonable.

EX Corp. v. Travelers et al., Destination Case No. 3276-1A, *quoting Schwarzenegger v. Fred Martin Superstore*, 374 F.3d 797, 802 (9th Cir. 2004) (*citing Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir.1987)).

Subject-matter Jurisdiction. The Uniform Declaratory Judgment Act establishes discretionary judicial authority, in a case involving an actual justiciable controversy, to declare the rights of parties with adverse legal interests. 6A Moore, Federal Practice ¶¶57.01-32 (2d ed. 1979). The Destination Court of Arbitration has discretion to enter declaratory judgment, in appropriate cases, determining the contractual rights of citizens of Destination. *See* ***AI Edison v. South Mine*****,** Destination Case No. 3279-1.

CONCLUSIONS OF LAW

Analysis

The Uptime Dispatch Software is a work for hire and the copyright is owned by Uptime Care whether it was authored by a human or an AI or jointly by both. Uptime Care is entitled to copyright registration. The Uptime Dispatch Software copyright does not include the open source modules.

The Consulting Agreement permitted use of open source software to modify the Uptime Dispatch Software. The preexisting Uptime Dispatch Software is not a derivative work of the open source modules. The preexisting Uptime Dispatch Software is not subject to the limitations of open source licensing.

Payment of the agreed royalty to Uptime Care is a license covenant enforceable under contract law. Uptime Care is entitled to specific performance of the royalty provision in the Consulting Agreement.

I. The Declaratory Judgment Claim

The issue presented by Uptime Care is whether the Uptime Dispatch Software is entitled to copyright registration.

The issue presented by Here Transport is whether the Consulting Agreement precluded Uptime Care from using open source software modules to provide additional functionality for the Uptime Dispatch Software.

A. Copyright Ownership of the Uptime Dispatch Software

1. Uptime Care Owns the Uptime Dispatch Software as a Work For Hire

Ownership of property on Destination, including intellectual property, is a matter of Destination law. Destination has no copyright statutes. Neither EX Corp., the owner of the Charter for Destination, nor the Governor and Administration of Destination is a party to any treaties regarding copyrights or other intellectual property. Copyrights are treated as personal property for purposes of taxation and inheritance.

To the extent not in conflict with Destination law and public policy, Destination copyright law is guided by the U.S. Copyright Act as it existed in 2025. A copyright is owned initially by the author of the work, 17 U.S.C. § 201(a), or, in the case of a work for hire, by the author's employer. 17 U.S.C. §§ 201(b), 101 (definition of a "work made for hire"). When the author is an independent contractor, if the work is not commissioned as a "work for hire", and no contractual duty to assign is created, then the author, not the person paying for the work owns the copyright. *Community for Creative Non-Violence v Reid*, 490 U.S. 730, 737, 109 S. Ct. 2166 (1989).

The application to register a copyright for the Uptime Dispatch Software identifies two employees, Al Jobs and Wilson Gates, as the authors of a work for hire. Here Transport does not dispute the fact the identified individuals were the authors and were employed by Uptime Care for purposes of the work for hire doctrine. The Uptime Dispatch Software is owned by the authors' employer, Uptime Care, as a work for hire. Any transfer of all the copyright owner's rights must be written. 17 U.S.C. §§ 201(d), 204(a).

2. **The Open Source Modifications Do Not Affect Ownership of the Preexisting Work**

A derivative work is "a work based upon one or more preexisting works. 17 U.S.C. § 101 (definition of a "derivative work"). The derivative work is distinct from the preexisting work.

> *The copyright in a* compilation or *derivative work* extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work *is independent of, and does not affect* or enlarge the scope, duration, *ownership, or subsistence of, any copyright protection in the preexisting material*.

Id., § 103(b) (emphasis added).

The modifications to the preexisting Uptime Dispatch Software do not affect ownership of the preexisting material. Uptime Care does not claim ownership of the open source modifications. Uptime Care still owns the preexisting Uptime Dispatch Software.

3. **Uptime Care is Entitled to Register the Copyright in the Uptime Dispatch Software**

As previously formally announced in **PSA 79/ONE**, under Destination law and public policy, differences from U.S. copyright law include:

> Copyright registration is permissive and not a condition of copyright protection. *Cf.* 17 U.S.C. § 408(a); *Moberg v. 33T LLC*, 666 F. Supp. 2d 415 (D. Del. 2009) (Berne Convention protects foreign works in the U.S. without registration); *Pepe (U.K.) Ltd. v. Ocean View Factory Outlet Corp.,* 770 F. Supp. 754 (D. Puerto Rico 1991) (same). The Destination Court

of Arbitration only requires an application for copyright registration to be filed with the Complaint. The Court can order registration in the judgment. The Court Clerk will maintain a record of registered copyrights.

All authors receive the same duration of copyright protection as works for hire: 95 years from first publication or 120 years from creation, whichever expires first.

An application for copyright registration was filed with the Complaint. Uptime Care is entitled to registration for the Uptime Dispatch Software.

B. The Open Source License for Modifications Does Not Violate the Consulting Agreement

1. The Open Source License

Copyright law gives an author the exclusive right to copy, distribute, display, perform or create derivatives of an original work of authorship. 17 U.S.C. § 106. The author can also authorize others to exercise the author's rights. *Id*. This authorization usually takes the form of a license—a contract. Under a license, the user pays a royalty for the authorized use, and the author agrees not to sue the user for infringement based on the authorized use.

> Thus, an infringement claim "fails if the challenged use of the work falls within the scope of a valid license." *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1110 (9th Cir. 2019).

Oracle Am., Inc. v. Hewlett Packard Enter., 971 F.3d 1042, 1051 (9th Cir. 2020)

A licensee is ordinarily limited to the rights expressly granted in the license; additional rights are not ordinarily implied. *E.g., Cohen v. Paramount Pictures Corp*., 845 F.2d 851, 853 (9th Cir. 1988). A license is not a sale and does not create a right to transfer or copy the author's work without additional authorization. *Vernor v. Autodesk, Inc*., 621 F.3d 1102 (9th Cir. 2010).

Copyleft is a type of license under which the author contracts with every licensee seeking to use the work (usually software) on a nonexclusive basis. The license grants the licensee the right to exercise the author's rights in the work, including creating derivative works, without paying a royalty. In return, every licensee agrees to make the work, including any derivative work, available to others on the same terms.

When applied to computer software, a copyleft type of license is usually called open source. The open source software is available for free, on the condition it must remain available for free, even if modified.

The goal of both the creator and the user of open source software is to make basic software modules that perform a required function or task freely available, and to thereby avoid the need to independently write new software when efficient code already exists to perform the required function or task.

Uptime Care provided open source modules consistent with the open source software license.

2. The Open Source Modifications Did Not Violate the Consulting Agreement

Uptime Care provided open source modules consistent with the contract obligations to the end user, Here Transport. Uptime Care provided 'the functionality required to conform with the specification set forth in Exhibit B attached and any mutually agreed modification." Consulting Contract Par. 4.

Here Transport "acquired and paid for all necessary third party licenses or additional Uptime Care licenses for the additional maintenance cost saving technologies." *Id.*, Par. 2 (A). No payments were due under the open source license, and no royalty was charged to Here Transport for the open source software. As required by the open source license, the Consulting Contract permitted Uptime Care to grant Here Transport a "nonexclusive" license. *Id.*, Par. 1(A).

Nothing precluded Uptime Care from using open source software modules to provide additional functionality. The Consulting Agreement permitted use of open source software to modify the Uptime Dispatch Software.

It is hereby ordered, adjudged, and decreed by this Court, under the authority of the Charter for Destination and the Governor's Administration, awarding Declaratory Judgment as follows:

> Here Transport has not identified any breach of the open source license or the Consulting Agreement.
>
> Uptime Care complied with the open source license by adding open source modules to the Uptime Dispatch Software. Uptime Care did not charge Here Transport for the open source modules.
>
> The Consulting Agreement did not preclude using open source software to provide consulting services and resulting software modifications. No provision of the Consulting Agreement required, expressly or by implication, delivery of custom software to modify the Uptime Dispatch Software.
>
> The Uptime Dispatch Software is a work for hire. It does not matter whether it was authored by a human or an AI or jointly by both. The preexisting Uptime Dispatch Software is not a derivative work of the open source modules.
>
> The Uptime Dispatch Software is copyrightable as an original work of authorship, and the copyright is owned by Uptime Care. The Consulting Agreement did not transfer or purport to transfer ownership of the copyright in the Uptime Dispatch Software to Here Transport.
>
> Uptime Care is entitled to copyright registration for the Uptime Dispatch Software. The copyright in the Uptime Dispatch Software does not include the open source modules.

The Clerk is directed to register the copyright in the Uptime Dispatch Software, excluding the open source modules.

II. The Breach of Contract Claim

The required elements of a contract and a claim for breach of contract are set forth in **EX CORP. v. TRAVELERS et al.,** Destination Case No. 3276-1.

To be enforceable, a contract requires "an offer, an acceptance, consideration, and sufficient specification of terms so that the obligations involved can be ascertained." *Savoca Masonry Co. v. Homes & Son Constr. Co.*, 112 Ariz. 392, 394, 542 P.2d 817, 819 (1975). In addition, an enforceable contract must be between competent parties, Restatement (Second) of Contracts § 12, and not against public policy. *Id.* § 178 (contracts unenforceable on public policy grounds).

The Consulting Agreement, including the copyright license in Par. 1(A), is an enforceable contract. The written contract terms reflect an offer and acceptance between competent parties supported by consideration. The terms are sufficiently definite. Public policy supports enforcement of the license according to its terms to protect the mutually agreed rights of both parties.

A breach of contract claim requires:

> A contract (see above)
>
> A material breach, and
>
> Damages resulting directly from the breach.

Graham v. Asbury, 112 Ariz. 184, 185, 540 P.2d 656 (1975); *Clark v. Compania Ganadera de Cananea, S.A.*, 95 Ariz. 90, 94, 387 P.2d 235, 238 (1963); *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170 ¶30, 83 P.3d 1103, 1111 (App. 2004).

Copyright rights and contract rights are so intertwined in licenses that courts eventually had to resolve when to apply which law.

> We refer to contractual terms that limit a license's scope as "conditions," the breach of which constitute copyright infringement. *Id.* at 1120. We refer to all other license terms as "covenants," the breach of which is actionable only under contract law. *Id.*

MDY Industries v. Blizzard Entertainment Inc., 629 F.3d 928, 939 (9th Cir. 2010), *citing Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1120 (9th Cir. 1999).

Payment of the agreed royalty is a license covenant enforceable under contract law. Copyright infringement need not be proven. 3 M. Nimmer D. Nimmer, Nimmer on Copyright § 10.15[A], at 10-112-13 (1989) (failure to pay royalties under license agreement gives rise to breach of contract or rescission action).

There is no ambiguity in the royalty provision. Here Transport owes a royalty to Uptime Care in return for Uptime Care's nonexclusive license of the Uptime Dispatch Software to Here Transport.

The Consulting Agreement has a 5 year term and can only be terminated earlier if there is a material breach. Uptime Care has not breached the Consulting Agreement; consequently, Here Transport is liable for the quarterly royalty payments of at least $65,000 (currently $90,000). Uptime Care is entitled to specific performance of the royalty provision in the Consulting Agreement. *The Power P.E.O., Inc. v. Employees Insurance of Wausau*, 201 Ariz. 559, 563, 38 P.3d 1224, 1228 (App. 2002).

It is hereby ordered, adjudged, and decreed awarding judgment for Uptime Care for quarterly royalties of $90,000, subject to future adjustments as provided in the Consulting Agreement.

III. Claims Outside the Scope of This Decision

Copyright Infringement: The Declaratory Judgment above establishes copyright ownership. "A licensee infringes the owner's copyright if its use exceeds the scope of its license" *S.O.S., Inc.*, 886 F.2d at 1087. The license granted to Here Transport bars a copyright suit unless Here Transport breached the license. Here Transport did not breach any license condition in Consulting Agreement Par. 1(A) limiting the scope of the license. As noted above "payment of the agreed royalty is a license covenant enforceable under contract law."

Here Transport received the output of the Uptime Dispatch Software, not the software itself nor software ownership. Here Transport has no claim for copyright infringement.

Preemption: Copyright law preempts state law protection for rights equivalent to the exclusive rights of a copyright owner. 17 U.S.C. § 301. To avoid preemption, the non-copyright claim asserted must require an extra element (more than copying). 1 M. Nimmer and D. Nimmer, Copyright § 1.01[B][1](a) (1996).

Contract claims require the "extra elements" of mutual assent and consideration. Thus, contract terms can supplement copyright protection or provide even more protection than copyright law. For example:

> Contract covenants can protect blank forms that lack original expression required to qualify for copyright protection. *Utopia Provider Systems, Inc. v. Pro-Med Clinical Systems*, 536 F.3d 1313 (11th Cir. 2010) ("Parties may enter a license agreement to avoid the cost of having to litigate the validity of a copyright, and this bargain between the parties should be honored.").
>
> An implied in fact contract conditioning use of an unsolicited script on payment does not require proof of copying of original expression protected by copyright. *Benay v. Warner Bros. Entertainment*, 697 F.3d 620 (9th Cir. 2010) (producer obligated to pay for disclosure of an idea he would be legally free to use, but he would in fact be unable to use, without the disclosure giving rise to the implied in fact contract). *Accord Montz v. Pilgrim Films & Tel., Inc.*, 649 F.3d 975, 990 (9th Cir. 2011) (*en banc*); *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967-68 (9th Cir. 2004).
>
> A software license can restrict the use of the software to process third party data. *National Car Rental System, Inc. v. Computer Associates Int'l, Inc.*, 999 F.2d 426, 433 (8th Cir.), *cert. denied*, 510 U.S. 861 (1993).
>
> Shrinkwrap license terms can protect a CD ROM database by limiting use or disclosure. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

The shrinkwrap agreement (accepted by removing the plastic cover on the box containing the physical—CD ROM—copy of the software) was later replaced by online technologies.

> There are two types of contracts formed online: "clickwrap" and "browsewrap" agreements. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–76 (9th Cir. 2014). In a clickwrap agreement, users must select a check box or radio button to indicate that they agree to the website's terms and conditions. *Id.* In contrast, browsewrap agreements do "not require the user to manifest assent to the terms and conditions expressly. A party instead gives his assent simply by using the website." *Id.* at 1176.

Small Justice LLC v. Xcentric Ventures LLC, 873 F.3d 313, 319 n.4 (1st Cir. 2017). Courts have consistently held [a browsewrap] agreement to be unenforceable, as individuals do not have inquiry notice. *Keebaugh v. Warner Bros. Entertainment Inc.*, 100 F.4th 1005, 1014 (9th 2024) (*citing Nguyen*, 763 F.3d at 1178-79). Clickwrap agreements, however, are "routinely" enforced. *Id*. (*quoting Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022)).

Two additional forms of online agreements emerged as technology advanced.

> The agreement with the strongest notice is the scrollwrap agreement, where the user must scroll through all the Terms of Service before they can click the mandatory "I agree" box.

Keebaugh, 100 F.4th at 1014. Finally, a sign-in wrap agreement displays a sign in page which declares "By tapping 'Play,' I agree to the Terms of Service." The terms of service are available, but the user is not required to scroll though the terms. *Id*.

> [A]n enforceable online agreement based on inquiry notice may be found only if: "(1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms."

Id. (*quoting Berman*, at 856). When downloading a smartphone app, the context of the transaction connotes continuing access governed by terms of service. *Id*., at 1019. In this context conspicuous terms of use are enforceable. *Id*., at 1020. *Accord Chabolla v. ClassPass Inc*., 129 F.4th 1147 (9th Cir. 2025).

A royalty provision which does not refer to copyrighted software (avoiding any implied requirement for a copyright) may be enforceable even in the absence of copyright ownership. *See* **AI Edison v. South Mine (Case No. 3279–1) (Contract Claim Outside the Scope of This Decision)** (royalty may be enforced by contract in the absence of patent protection).

Copyright licenses must be carefully drafted. For example, some cases have suggested a copyright license with no termination date or termination provision can only be terminated after 35 years (under 17 U.S.C. § 203) unless there is a material breach or mutual consent. *Accusoft Corp. v. Palo*, 923 F. Supp. 290 (D. Mass. 1996), *aff'd*, *Accusoft Corp. v. Palo*, 237 F.3d 31 (1st Cir. 2001). The lack of a termination provision can prevent either party from exploiting the copyrighted work.

> Accusoft ... [is] enjoined from reproducing those codes in the Library which belong to Palo and from preparing derivative works based upon such codes, and ... [Palo is] enjoined from distributing the Library in violation of Accusoft's exclusive right to distribute. ...

923 F. Supp. 290 (D. Mass. 1996) (both parties were effectively “put out of business”). See *Palo v. Accusoft Corp.,* 2002 U.S. Dist. Lexis 22703 (D. Mass. Nov. 18, 2002) (after 6 years there was still no resolution of the dispute).

The Clerk is ordered to enter judgment and register the copyright in the Uptime Dispatch Software in accordance with this Decision.

/s/ AI Judge