

TABLE OF CONTENTS

FACTUAL BACKGROUND.....	3
I. Plaintiff Opower Pioneered the Field of Home Energy Usage Reporting By Creating User-Friendly Reports that Highlight Neighbor Comparisons	3
A. Opower Recognized a Market Opportunity for Easily Readable Home Energy Reports.....	3
B. Opower Spent Months Refining the Appearance of Its Report in Order to Deliver Key Comparison Data to Readers in the Most Impactful Way	4
C. Opower Customizes its Flagship Home Energy Report for Each Utility and Continues to Invest in Promoting and Developing its Reports.....	5
D. Opower’s Home Energy Reports Immediately Became a Major Commercial and Environmental Success.....	5
II. E2.0 Copied Opower and is Infringing its Copyrighted Home Energy Reports.....	7
A. E2.0 is Sending out Infringing Reports as Part of WMECO’s Western Mass Saves Program	7
B. E2.0’s Accused Report is Strikingly Similar to Opower’s Report.....	8
C. E2.0 Actually Viewed Opower’s Home Energy Reports	10
D. E2.0 Had Many Options for Alternative Energy Usage Reports	11
E. E2.0’s Use of Infringing Reports Directly Harms Opower	11
F. Opower Took Immediate Action to Stop E2.0’s Infringement.....	12
ARGUMENT.....	13
I. Opower is Likely to Succeed on the Merits of its Copyright Infringement Claim.....	13

A.	Opower’s Copyright Registrations are Presumed Valid.....	13
B.	E2.0 Copied Original Elements of Opower’s Home Energy Reports	14
i.	E2.0 Actually Copied Opower’s Reports.....	14
ii.	E2.0’s Energy Savings Report is Substantially Similar to Opower’s Copyrighted Home Energy Reports	16
II.	The Irreparable Harm, Balance of Hardship and Public Interest Factors Favor Granting an Injunction	18
	CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

Accusoft Corp. v. Mattel, Inc., 117 F. Supp 2d. 99 (D.Mass. 2000)..... 18

Buc Int’l Corp. v. Int’l Yacht Council Ltd., 489 F.3d 1129 (11th Cir. 2007) 17

C.B. Fleet Co., Inc. v. Unico Holdings, Inc., 510 F. Supp. 2d 1078
(S.D. Fla. 2007)..... 16

Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600
(1st Cir. 1988)..... 16, 18

Coquico, Inc. v. Rodríguez-Miranda, 562 F.3d 62 (1st Cir. 2009)..... 13

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 126 S.Ct. 1837 (2006)..... 18

Epic Metals Corp. v. Condec, Inc., 867 F. Supp. 1009 (M.D. Fla. 1994) 17

Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 111 S.Ct. 1282 (1991) 17

Flag Fables, Inc. v. Jean Ann’s Country Flags and Crafts, Inc., 730 F. Supp. 1165
(D. Mass. 1989)..... 19

Flomerics Ltd. v. Fluid Dynamics, Int’l, Inc., 880 F. Supp. 60 (D. Mass. 1995)..... 14

Playboy Enters. v. Starware Publishing Corp., 900 F.Supp. 433 (S.D. Fla.1995)..... 15

Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo., Inc., 768 F.2d 145
(7th Cir. 1985)..... 17, 18

Segrets, Inc. v. Gillman Knitwear Co., Inc., 207 F.3d 56 (1st Cir. 2000) 14

Situation Mgmt. Sys. v. ASP Consulting Group, 560 F.3d 53 (1st Cir. 2009) 16

T-Peg. Inc. v. Vermont Timber Works, Inc., 459 F.3d 97 (1st Cir. 2006)..... 14, 16

Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167 (7th Cir. 1997)..... 14

Voice of the Arab World, Inc. v. MDTV Medical News Now, Inc., 645 F. 3d 26
(1st Cir. 2011) 18

Statutes

17 U.S.C. § 101.....	17
17 U.S.C. § 103.....	17
17 U.S.C. § 410.....	13
17 U.S.C. § 410(c)	14
17 U.S.C. § 501(a)	13

INTRODUCTION

This copyright infringement case concerns two direct competitors in the clean energy industry. Over the past four years, Plaintiff Opower, Inc. (“Opower”) all but created the now exploding field of reader-friendly home energy usage reporting. It is best known for its flagship Home Energy Reports—paper reports directly mailed to residents. The reports (which are prepared in close cooperation with regional utility companies, and for which Opower has obtained multiple copyright registrations), clearly and cleanly digest for a given resident his or her energy usage. The reports then compare the resident’s usage to that of similarly-situated neighbors, and suggest personalized actions to reduce consumption.

Within seconds of reviewing the Opower report, a homeowner learns whether he is generally being energy efficient—as compared, say, to a neighbor that also has a large home—or is behind the curve. Human nature being what it is, this evaluation often leads to profound changes in energy usage behavior, as it is only natural to want to keep up with the Joneses. Earlier this year, Opower surpassed the \$50 million mark in total energy savings achieved, and has achieved almost exactly 500,000,000 Kilowatt hours saved. President Obama personally visited Opower, holding the company out as a model of success in the clean energy industry.

Defendant Efficiency 2.0 (“E2.0”) saw Opower’s success and copied Opower’s flagship and copyrighted Home Energy Reports, as shown below. Opower has just learned that E2.0 is using these nearly identical knock-off energy reports as part of a large and pivotal pilot program in Western Massachusetts. E2.0’s bodily appropriation of Opower’s carefully selected and arranged copyrighted works is prohibited under copyright law. Accordingly, Opower seeks an immediate preliminary injunction preventing further infringement of its reports by E2.0.

OPower's Copyrighted Home Energy Report

E2.0's Infringing Energy Savings Report¹



Home energy report

Account number: 5255621430
Report period: 09/05/09 - 10/08/09

We are pleased to provide this personalized report to you as part of a pilot program. The purpose of the report is to:

Provide information This report is an educational tool to help you understand your home's natural gas use in the context of other homes.

Track progress We will help you learn about how your home's usage changes over time and where you likely have opportunities to save.

Share energy efficiency tips On the back of the report, we provide ideas for saving energy and money.

Find more: www.nationalgridus.com/energyreports

ROCKY YEE
1911 FT MYER DR STE 702
ARLINGTON VA 22209-1605

Last Winter Neighbor Comparison

Your usage last winter: Dec '08 - Mar '09



* Therms: Standard unit of measuring heat energy

HOW YOU'RE DOING:

GREAT 😊

GOOD 😊

MORE THAN AVERAGE

WHO ARE YOUR "NEIGHBORS"?

ALL NEIGHBORS

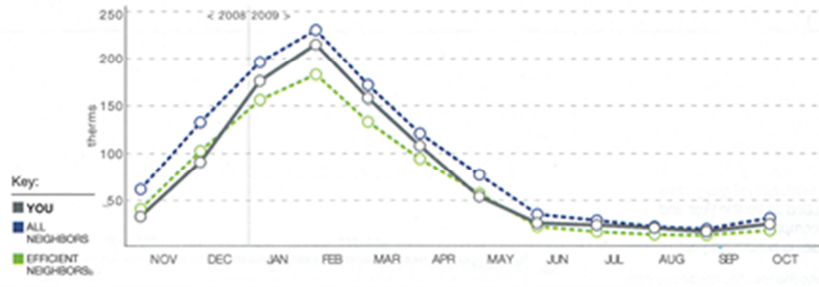
Approximately 100 occupied nearby homes that are similar in size to yours (avg 1,573 sq ft) and have gas heat

EFFICIENT NEIGHBORS

The most efficient 20 percent from the "All Neighbors" group

Last 12 Months Neighbor Comparison

You used 11% MORE natural gas than your efficient neighbors.



Track your progress and find ways to save at www.nationalgridus.com/energyreports

NOR-20091014-3-NOR-NEA-10_A-1-4-2009



Western Massachusetts Electric

A Northeast Utilities Company

ENERGY SAVINGS REPORT

Report Period: 2/1/11 - 5/1/11

Sample A. Sample
123 Any Street
Anytown, USA 12345-6789



0001

Your Energy Savings Report helps you understand your home's energy use and shows you how to save money on your electric bill.

Sign up with your account number to learn more! www.WesternMassSaves.com

WMECO account number: 9999999999

How Your Energy Use Compares to Your Neighbors

This graph shows average monthly electric use from February through April



HOW YOU'RE DOING:

- GREAT
- GOOD**
- ROOM TO IMPROVE

WHO ARE YOUR NEIGHBORS?

Neighbors

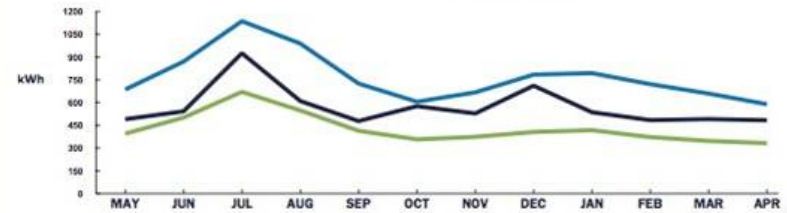
Nearby homes of about the same size as yours that have both electricity and natural gas service.

Efficient Neighbors

The most efficient 20% from the "Neighbors" group.

Neighbor Comparison - Last 12 Months

You used 25% LESS energy than your neighbors. This costs you about \$343 LESS per year.



Complete the recommendations on the other side to improve for the next report in July.

You can stop receiving these mailings by calling (877) 793-0382 and entering your account number: 9999999999. All savings recommendations are estimates. A-001 8879 V01 999999 151652 702

¹ See Exh. 3 for the complete two-sided Opower report. As detailed below, the E2.0 report (Exh. 1) is taken from a presentation given by E2.0's customer, which does not show the second side. Rodgers Decl. ¶ 6-7; Exh. 16 at p. 5. All referenced exhibits may be found in the Appendix of Exhibits filed herewith.

FACTUAL BACKGROUND

I. Plaintiff Opower Pioneered the Field of Home Energy Usage Reporting By Creating User-Friendly Reports that Highlight Neighbor Comparisons

A. Opower Recognized a Market Opportunity for Easily Readable Home Energy Reports

Opower, originally called Positive Energy, was founded in 2007 with the goal of finding a practical method to engage residential energy users in a way that would cause them to reduce their home energy consumption on a large scale. Declaration of Daniel Yates (hereinafter “Yates Decl.”) at ¶ 4. Opower soon saw what others in the energy industry did not. Namely, mailing out standard monthly utility bills would never change energy consumption behavior because the average utility customer could not understand the raw data as presented in the bill. *Id.* ¶ 4.

With the guidance of its Chief Scientist, renowned social psychologist Dr. Robert Cialdini of Arizona State University, Opower recognized that energy users would benefit from two specific innovations. Yates Decl. ¶ 5. First, they needed be given access to analogous data reflecting usage by their neighbors in order to understand their consumption in context—and not just any neighbors, but specifically those with like homes (i.e., square footage, heat type, etc.). Second, and critical to this copyright case, users needed a more accessible, intuitive and expressive report which would permit them to readily digest their own energy use, and effortlessly perform the just-mentioned comparison. Yates Decl. ¶ 5.²

² Opower also recognized that utilities, which were in many cases operating in regulatory environments mandating reductions in consumption, were equally desirous of a way to better engage their customers. Yates Decl. ¶ 6.

B. Opower Spent Months Refining the Appearance of Its Report in Order to Deliver Key Comparison Data to Readers in the Most Impactful Way

After months of drafting, Opower completed the first model of its report in October 2007. Yates Decl. ¶ 7 and Exh. 6 (showing first prototype report). Opower prepared the report for use by the Sacramento Municipal Utility District (“SMUD”), its first utility customer. Although that draft design contained in substance all of the neighbor information that Opower had selected for comparison, its arrangement did not yet allow the consumer to process the data in a quick, orderly way. Accordingly, Opower continued to refine the way in which it presented its selection of information to users. *Id.* ¶ 7.

By November 2007, with the help of a professional outside design firm called Smart Design, it had redesigned the SMUD report to provide more open space and allow for easier digestion of key data. *Id.* at 8 and Exh. 7 (showing second prototype report completed in November 2007). Opower, for instance, raised the prominence of the easy-read efficiency rating box (“Good,” “Great,” etc.), increased the size and importance of the eye-catching Neighborhood Comparison bar graph, moved the user-friendly “12 Month Comparison” line graph up to the first page, and dropped less immediate metrics to page two. *Id.* A user would immediately be told how she was doing relative to her neighbors, without being overwhelmed by details.

Opower continued to revise the design of its report over the next three months until finally, in January 2008, it settled upon a final report. Yates Decl. ¶ 9; Exh. 2 (showing first registered report). In this final version, which Opower registered with the Copyright Office in September 2009 (Reg. No. VA 1-692-228), Opower settled on the final look and messaging of its presentation (“**WHO ARE YOUR NEIGHBORS**”, “**HOW YOU’RE DOING**,” etc.), and signature bolding of key terms (“**YOU**”, “**__ % MORE**”, etc.). *Id.*

C. Opower Customizes its Flagship Home Energy Report for Each Utility and Continues to Invest in Promoting and Developing its Reports

As with SMUD, Opower's customers are generally utilities, such as National Grid and NSTAR right here in Massachusetts. It contracts with the utilities to send out reports directly to the utilities' customers, using data provided by the utilities in addition to data it collects on its own. Yates Decl. ¶ 10.³ Opower customizes its Home Energy Report for each utility with which it contracts. Yates Decl. ¶ 10. For example, its reports for National Grid and Connecticut Light & Power ("CLP") show the respective color schemes and trademarks of those utilities. *Id.*; Exhs. 3, 4. Opower registered those particular two later derivative reports with the Copyright Office as Copyright Reg. Nos. TX 7-435-604 and TX 7-435-609, respectively. Yates Decl. ¶ 11; Exhs. 3, 4.⁴

Opower spends approximately \$600,000 per year advertising and promoting its reports in the United States, through channels such as online and print advertisements, conference sponsorships, webinars, its website, and direct mail campaigns. Yates Decl. ¶ 12. Opower continues to develop and seek improvements for its reports, and currently has a team of twelve full-time employees dedicated to just that task. Yates Decl. ¶ 12.

D. Opower's Home Energy Reports Immediately Became a Major Commercial and Environmental Success

Opower's hypothesis proved correct. By clearly communicating to consumers how their energy use compares to that of their neighbors, Opower demonstrably improved energy efficiency among participants. Almost three years into a study of the Opower/SMUD pilot program, Navigant Consulting has found that the average high consumption households achieve 2.89 % savings, with low consumption households saving 1.70 %. Yates Decl. ¶ 13; Exh. 8.

³ Opower crunches this data with its own proprietary software. That software is not currently at issue in this litigation.

⁴ Opower contractually retains all copyrights in the reports. Yates Decl. ¶ 10.

Opower calculates that as of the filing of this brief it has saved about 500,000,000 kilowatt hours of energy, abated close to 740,000,000 lbs of carbon dioxide, and saved consumers close to \$60 million on their energy bills. Yates Decl. ¶ 14.

Opower's reports have been a commercial success as well. Opower sends out Home Energy Reports on behalf of 60 utility companies across the country, including eight of the ten largest, reaching about 2.9 million households. Yates Decl. ¶ 15. Close to half a million customers in Massachusetts alone receive the reports. *Id.* It has printed and sent out over 19 million reports to date nationwide, without any confidentiality restrictions on them. *Id.*

Opower's success has been recognized by mainstream media, environmental groups, and even the nation's political leaders. President Obama, for example, personally visited and held a press conference at Opower's offices in March 2010 to acknowledge the company's success. In his speech he stated:

The work you do here . . . is making homes more energy efficient, it's saving people money, it's generating jobs and it's putting America on the path to a clean energy future...And so this is a model of what we want to be seeing all across the country.

Yates Decl. ¶ 16; Exh. 9.⁵ In January, 2009, the New York Times carried a front page, above-the-fold, article spotlighting Opower (then Positive Energy) and the success of its Home Energy Reports.⁶ See Leslie Kaufman, *Utilities Turn Their Customers Green, With Envy*, N.Y. Times, January 30, 2009, at A1. (attached in electronic edition format at Exh. 10).⁷

⁵ A complete video of President Obama's speech is available at: www.whitehouse.gov/the-press-office/remarks-president-clean-energy-jobs.

⁶ The article ran alongside a large image showing a detail of a Home Energy Report, including the Last Month Neighbor Comparison graph. Yates Decl. ¶ 17; Exh 10.

⁷ The Wall Street Journal recently ranked Opower as a Top 10 Clean-Tech Company, noting that Opower is "hot" because it "leverages data to deliver customized messages . . . about how to boost energy efficiency[.]" Ramsdell Decl. ¶ 4; Exh. 11. Opower similarly made the 2011 Global CleanTech 100 list for its specialization in "customer communications and engagement." Ramsdell Decl. ¶ 3; Exh. 12. CNN noted last December that Opower's "interesting reports" are "packed with information" that is "snappily presented." Ramsdell Decl. ¶ 5; Exh. 13.

II. E2.0 Copied Opower and is Infringing its Copyrighted Home Energy Reports

A. E2.0 is Sending out Infringing Reports as Part of WMECO's Western Mass Saves Program

Founded in late 2008, after Opower's initial rise to prominence, E2.0's business model mirrors that of Opower. It, too, contracts with utilities to provide energy reporting services to the utilities' consumer, and sends out paper comparison reports (which it calls Energy Savings Reports) as part of that service. Declaration of Steven W. Ramsdell ("Ramsdell Decl.") ¶ 6; Exh. 14 (printout of E2.0 website showing "Energy Savings Reports" page).⁸

Recently, E2.0 released a new model of its Energy Savings Report shown at the outset of this brief and in the Appendix at Exh. 1 (the "Accused Report"). It did so on behalf of its utility customer Western Massachusetts Electric Company ("WMECO"). In particular, WMECO and E2.0 commenced an energy savings pilot program known as "Western Mass Saves" in November 2010. Declaration of Justin Rodgers ("Rodgers Decl.") ¶ 5; Exh. 16 ("Western Mass Saves" Presentation) at p. 5. The program has a number of components, including the delivery of periodic, paper energy usage comparison reports to select WMECO customers in Western Massachusetts. *Id.* at pp. 3-5, 20.⁹ Although the report shows the WMECO logo, E2.0 administers the program. Ramsdell Decl. ¶ 10; Exh. 20.

WMECO representatives have been promoting the Western Mass Saves program—especially the energy comparison reports—nationally to other utilities. Indeed, Opower first learned of E2.0's infringement on September 29, 2011 when one of its employees attended a public conference call presentation given by WMECO to a group of public utilities from the

⁸ According to one article, as of June 30, 2011, Efficiency 2.0 was sending out paper reports to more than 300,000 people. Ramsdell Decl. ¶ 7; Exh. 15 (GreentechMedia article).

⁹ At this stage in the proceedings, Opower does not have precise knowledge as to when E2.0 commenced its infringement. The Accused Report may have been sent out with the start of the Western Mass Saves program in November 2010, or it may have been introduced mid-way through the program. In any event, for purposes of this motion, Opower believes that infringement began on or after November 2010, and the Accused Report was created some time in Fall 2010 at the earliest.

Pacific Northwest United States. Rodgers Decl. ¶ 3-6; Exh. 16. That presentation showcased the Accused Report extensively. Exh. 16 at pp. 5, 6 and 20.

B. E2.0's Accused Report is Strikingly Similar to Opower's Report

As shown in the Appendix to this brief, and page two above, E2.0's Accused Report (Exh. 1) looks just like Opower's copyrighted Home Energy Reports (Exhs. 2-4). Even after repeated viewings, it is hard not to confuse the report from Opower with the copy from E2.0. Comparing the front page of Opower's registered National Grid report with E2.0's WMECO report, the similarities include but are not limited to the following:

- Overall Layout and Blocking. Both reports have a three part structure. Introductory information at the top (title, report period, etc.) is left justified from a starting position more than half way across the page. Two and only two comparison graphs take up, respectively, the following two thirds of the page. In the middle third, set off with a light grey border, a bar graph on the left is juxtaposed against an easy-read "How You're Doing" three-option check box on the right. A "Who Are Your Neighbors" explanation is spaced along the bottom of the middle portion, set off by a nearly page-length, faint grey separation line. In the bottom third, a "Last 12 Months" comparison line graph runs all the way across the page, with a call-out box offering a per cent comparison to one's neighbors in the upper right corner of the bottom portion.
- Use of Open Space. Both reports rely on a minimalist approach, with most of the printed area consisting of open, white space and the absence of any information at all.
- Use of Language. E2.0 copied substantial amounts of original language created by Opower for its reports, including the phrases: "How You're Doing," "Neighbor Comparison", "Who

Are Your Neighbors”, “You used ____ % [More/Less] . . . than your . . . neighbors”, and “Efficient Neighbors[:] The most efficient 20% from the ‘[All] Neighbors’ group.”

- Use of Font, Bolding and Accents. The fonts used in the two reports appear identical. Similarly, E2.0 has placed in bold almost all the same terms as Opower and the two reports have parallel points of emphasis, such as the distinctive use of all capital letters for the MORE/LESS term in the lower right call-out box.
- Color. E2.0’s report uses color in a nearly identical way to Opower’s report. Both use the green (efficient neighbors), blue (all neighbors) and grey (you) motif in the same place—the bar and line graphs. This flash of color in a very particular and limited place focuses the attention of the reader on the comparisons, and breathes life into them.¹⁰
- Selection and Presentation of Specific Graphs and Information. E2.0 chose to copy Opower’s selection and arrangement of exactly two particular “neighbor” comparisons out of a virtually unlimited number of potential options. Namely, in both cases, graph one uses a bar graph to compare a home owner’s total energy use (“You”) over a multi-month period against (1) neighbors with similar homes and heating systems to yours and (2) those neighbors in clause one that are particularly efficient in their energy consumption. That section then gives an opinion as to that person’s performance by checking one of three boxes. Graph two, directly below the former and on the same page, offers a line graph tracking your energy usage over the entire past year, month by month, against those same categories of neighbors. From this graph, you can track how your variation from your neighbors might depend on the time of year (perhaps, for example, you have an inefficient heater which shows bigger inefficiencies in the winter).

¹⁰ The colors used in a given report generally track those preferred by the relevant utility, and Opower does not claim rights to those colors in the abstract. Nevertheless, it was Opower’s insight to use those colors in a very particular way to attract attention to precise places on the report.

C. E2.0 Actually Viewed Opower's Home Energy Reports

From its beginnings, E2.0 was well aware of Opower and its copyrighted Home Energy Reports. Vice President of E2.0 Andy Frank wrote an article in June 2009, still hyperlinked on E2.0's webpage, in which he showed an intimate knowledge of Opower (then Positive Energy), its Home Energy Reports, and studies showing their effectiveness:

Direct mail is another traditional marketing channel with which utilities are very familiar. Mailers can deliver messages and information directly to the home and customers can be segmented by energy usage, demographics and psychographics. The company Positive Energy, for example, tells households how their energy use compares to similar homes in their area, with smiley faces providing an easy visual cue. Savings are then measured by comparing households that receive the mailer with a control group that does not receive anything.

Ramsdell Decl. ¶ 8; Exh 17, Andy Frank, *Residential Energy Efficiency, This is How We Do It (Part 2)*, June 9, 2009 (emphasis added).

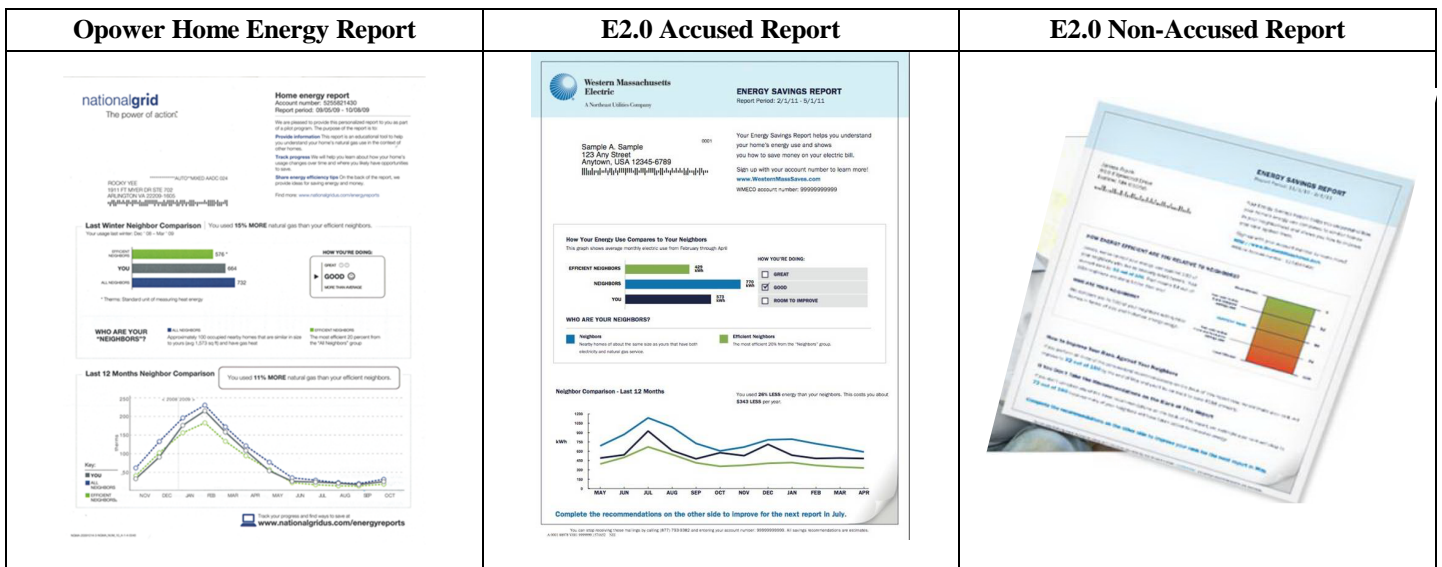
E2.0's founder, Tom Scaramellino, has also kept a particularly close eye on Opower over the years, and directly viewed Opower's Home Energy Reports. On November 17, 2008, at a conference in Sacramento, California, Mr. Scaramellino personally attended a presentation given by Opower's President & Founder Alex Laskey. Declaration of Alex Laskey, ("Laskey Decl.") ¶¶ 3-5. As part of that presentation, Mr. Laskey displayed detailed slides showing views of Opower's then-current Home Energy Reports. *Id.* ¶ 4; Exh. 18 (showing excerpts of slides from presentation). Mr. Laskey and Mr. Scaramellino later conversed at the conference. *Id.* ¶ 5-7. In addition, in May 2010, Opower sent out a press release promoting the launch of Opower 3.0, its new web portal. Mr. Scaramellino immediately sent Opower's CEO Daniel Yates an email acknowledging the new launch. Yates Decl. ¶ 19; Exh 19.

Opower's reports are everywhere, and easy to find. A version of Opower's Home Energy Report has appeared on Opower's website at least since October 1, 2009. Yates Decl. ¶ 18. In June 2010, the same time period that Mr. Scaramellino was monitoring Opower's press releases,

Opower released a new version of its website, www.opower.com, which included a particularly high resolution version of Opower’s Home Energy Report. Yates Decl. ¶ 18.

D. E2.0 Had Many Options for Alternative Energy Usage Reports

E2.0 had many other options for its Energy Savings Reports. In fact, E2.0 has apparently used alternative reports that look different from Opower’s. For instance, an alternative report, which is not accused in this case, is shown right on E2.0’s website (the “Non-Accused Report”). Exh. 14. Just below is a thumbnail-type comparison of an Opower Home Energy report to the Accused Report and the Non-Accused Report from E2.0’s website.



E. E2.0’s Use of Infringing Reports Directly Harms Opower

E2.0 and Opower directly compete with each other to attain energy reporting business from utility companies. Yates Decl. ¶ 20. One of Opower’s customers—Northeast Utilities—is the parent company to E2.0’s customer WMECO as well as Opower’s customer CLP. Exh. 21 (screenshot from Northeast Utilities page). Yates Decl. ¶ 21. E2.0 is offering these customers a knock-off substitute to Opower’s signature report. Any sale it makes is one less for Opower.

But this is not the most significant way in which Opower is being harmed. E2.0, like Opower, heavily promotes any successes from such programs. *See, e.g.*, Ramsdell Decl. ¶ 11; Exh. 22 (promoting “verified results” of 1.5%-2.5% savings for Energy Savings Reports on E2.0 website); Exh. 16 at pp. 20, 24 (Western Mass Saves presentation claiming .51 % conversion rate and .98% kWh savings for mailers). To the extent these purported results have incorporated or will incorporate data from studies using infringing reports, they are highly misleading and irreparably prejudicial to Opower. What appear to be positive results attributable to E2.0, are in reality positive results attributable to Opower. Utilities heavily value and rely on these results. Among other things, many state regulators or the utilities themselves mandate verifiable proof of lowered consumption in order to meet key efficiency benchmarks—a major selling point for energy reporting companies. Yates Decl. ¶ 22. Verified results are thus essential to securing utility accounts and developing goodwill in the energy reporting field. The misleading use of infringing reports to verify results is potentially devastating to Opower. *Id.*

F. Opower Took Immediate Action to Stop E2.0’s Infringement

Due to the obvious threat of harm it faced, Opower immediately set about to prepare this lawsuit against E2.0 upon learning of the infringement on September 29, 2011. It filed expedited requests to register two additional copyright registrations that it asserts in this case. Those registrations have effective dates of October 26, 2011, and were received by Opower’s counsel on November 2, 2011 Exhs. 3-4; Ramsdell Decl. ¶ 12. Opower immediately brought this suit just over a week after it received the later registrations.

ARGUMENT

With this motion Opower seeks a preliminary injunction, pursuant to 17 U.S.C. §§ 501(a) and 502(a),¹¹ preventing E2.0 from further infringing Opower's exclusive rights in its copyrighted reports. In copyright infringement cases, district courts in the First Circuit determine the propriety of preliminary injunctive relief according to four factors: (i) the likelihood that the movant will succeed on the merits; (ii) the possibility that, without an injunction, the movant will suffer irreparable harm; (iii) the balance of relevant hardships as between the parties; and (iv) the effect of the court's ruling on the public interest. *Coquico, Inc. v. Rodríguez-Miranda*, 562 F.3d 62, 66 (1st Cir. 2009). The first factor weighs heaviest in copyright cases as resolution of the other three “often turns on the plaintiff's likelihood of success.” *Id.*

I. Opower is Likely to Succeed on the Merits of its Copyright Infringement Claim

To prevail on its copyright infringement claim, Opower must show ownership of a valid copyright and copying of original elements of the work by E2.0. *Coquico*, 562 F.3d at 66. Opower readily meets both aspects of that test.

A. Opower's Copyright Registrations are Presumed Valid

Opower owns and asserts three copyright registrations covering its Home Energy Reports in this case, namely U.S. Copyright Reg. Nos. VA 1-692-228, TX 7-435-604, and 7-435-609. *See* Exhs. 2-4 (showing copies of registrations). All three registrations were made within five years of first publication (the earliest publication occurred in 2008). In each case, that is, the Copyright Office examined the application and made a determination that the works met the requirements for copyright protection. 17 U.S.C. § 410. Accordingly, all three copyrights are

¹¹ Opower currently moves for relief only under its copyright infringement claim. It does so without prejudice to its right to later seek injunctive relief for its unfair competition and state law claims.

presumed valid in this judicial proceeding. 17 U.S.C. § 410(c); *Flomerics Ltd. v. Fluid Dynamics, Int'l, Inc.*, 880 F. Supp. 60, 62 (D. Mass. 1995) (Gorton, J.). This satisfies the first prong of the infringement test. *Id.*

B. E2.0 Copied Original Elements of Opower's Home Energy Reports

The second prong of the infringement analysis itself bifurcates into two inquiries. Opower must show that: (a) E2.0 actually copied the work as a factual matter, and (b) its copying was extensive enough to render the infringing and copyrighted works “substantially similar.” *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 108 (1st Cir. 2006).

i. E2.0 Actually Copied Opower's Reports

Actual copying may be proven either through direct or circumstantial evidence. *T-Peg*, 459 F.3d at 111. In the absence of direct evidence, Opower may indirectly establish copying by providing evidence that (1) E2.0 enjoyed access to the copyrighted work and had opportunity to copy it, and (2) “probative similarity” exists between the two works. *Id.*; *Coquico*, 562 F.3d at 66-67. Where similarities between the accused and accusing works are particularly striking, that may by itself be a basis for inferring copying, without any proof of access. *Segrets, Inc. v. Gillman Knitwear Co., Inc.*, 207 F.3d 56, 62 (1st Cir. 2000) (no genuine issue of material fact as to actual copying where patterns were “strikingly similar”); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1169-71 (7th Cir. 1997) (Where “two works are so similar as to make it highly probable that the later one is a copy of the earlier one, the issue of access need not be addressed separately, since if the later work was a copy its creator must have had access to the original.”).

Direct evidence is rare in copyright cases, *T-Peg*, 459 F.3d at 111, and no discovery has taken place in this case to date. Nevertheless, there is direct evidence here of the fact that E2.0's executives actually viewed Opower's reports prior to creating the Accused Report. As shown

above, Vice President of E2.0, Andy Frank, wrote an article in May 2009 in which he highlighted specific details of Opower's reports (such as the use of smiley faces) that would only be known to someone who had seen them. Exh. 17. Similarly, E2.0's CEO Tom Scaramellino personally attended an early Opower presentation in which the SMUD Home Energy Report was displayed and discussed in detail. Laskey Decl. ¶ 3-5; Exh. 18.

The circumstantial evidence also strongly favors a finding of actual copying. To begin with, E2.0 clearly had access and an opportunity to copy Opower's works. Almost 19 million Home Energy Reports have been sent out to date. Such mass publication is clear evidence of access. *Playboy Enters. v. Starware Publishing Corp.*, 900 F.Supp. 433, 437 (S.D. Fla.1995) (wide distribution of Playboy magazine evidence of access). A version of Opower's reports, moreover, has consistently been on its website since at least October 1, 2009. Yates Decl. ¶ 18. The New York Times ran a front page story in January 2009 showing a detail of the reports, and describing them. Exh. 10. E2.0's principals sent emails and wrote articles showing that they monitor Opower closely. Exhs. 19 and 17. E2.0's customer WMECO is a sister company of Opower's customer CLP, from which it would have had easy access even to drafts of Opower's registered CLP Home Energy Report. Exh. 21. Finally, the reports themselves are strikingly similar such that it would be nearly unbelievable to think that whoever created the E2.0 report had not first seen the Opower Home Energy Report.

As to probative similarity, here the works are not just somewhat similar, but almost identical in all key respects. *Coquico*, 562 F.3d at 67 (affirming finding of probative similarity where toys were "nearly identical in many material respects"). To be sure, E2.0 made some very superficial changes to vary its report from that of Opower (e.g., replacing "All Neighbors" with "Neighbors", "Last 12 Months Neighbor Comparison" with "Neighbor Comparison- Last

Twelve Months”, and a dotted line graph with a solid line graph). The existence of such “minor differences,” however, “may itself suggest copying.” *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 608 (1st Cir. 1988) (“superficial changes may be viewed as an attempt to disguise an intentional appropriation”) (internal citations and punctuation omitted).

ii. E2.0’s Energy Savings Report is Substantially Similar to Opower’s Copyrighted Home Energy Reports

Substantial similarity, the second step of the inquiry, is measured by the “ordinary observer” test. *T-Peg*, 459 F.3d at 112. Under that test, two works will be said to be substantially similar if “a reasonable, ordinary observer, upon examination of the two works, would conclude that the defendant unlawfully appropriated the plaintiff’s protectable expression.” *Id.* (internal punctuation omitted). Put another way, the allegedly infringing work will be deemed substantially similar to the allegedly infringed work “if an ordinary observer would be disposed to overlook any disparities in the works.” *Coquico*, 562 F.3d at 67. While the substantial similarity comparison focuses on the “aspects of a plaintiff’s work [that] are protectable under copyright laws[,]” a court must nevertheless be “careful not to over-dissect the plaintiff’s work, causing it to ignore the plaintiff’s protectable expression.” *Situation Mgmt. Sys. v. ASP Consulting Group*, 560 F.3d 53, 59 (1st Cir. 2009).

In this case, any ordinary, reasonable person holding the totality of the front page of the two reports side by side would be sure to overlook the trivial disparities, and focus on the substantial similarity of the respective works. They are for all intents and purposes the same—direct substitutes. Moreover, the key creative elements of Opower’s reports that E2.0 copied (the original overall design and layout, creative and inventive language, use of open space, color scheme, font, bolding and accents) are all protectable under copyright law. *See, e.g., C.B. Fleet Co., Inc. v. Unico Holdings, Inc.*, 510 F. Supp. 2d 1078, 1082 (S.D. Fla. 2007) (issuing

preliminary injunction to prevent copying of, among other things, a competitor's: "color scheme, format, display, choice of words to emphasize, [and] the distinguishing colors and/or fonts used to emphasize certain points . . ."); *Situation Mgmt. Sys.*, 560 F.3d. at 61 (reversible error for district court to have excluded large portions of plaintiff's works based upon its misapplication of the originality requirement; the work's "text, flowcharts, and illustrations . . . certainly demonstrate the requisite minimal degree of creativity"); *Flomerics*, 880 F. Supp. at 62 (infringement of technical reference manual found in verbatim copying of phrases).

In addition to these immediately original elements, however, Opower's copyright protection also extends to its "compilation" of graphs and factual information under 17 U.S.C. § 103: i.e., its thoughtful selection of what comparisons to present to the reader, and its arrangement of that information in a uniquely expressive way. *Situation Mgmt. Sys.*, 560 F.3d at 62 ("the original selection and arrangement of non-copyrightable elements is itself copyrightable").¹² In *Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo., Inc.*, for instance, the plaintiff created land plat maps. 768 F.2d 145, 147 (7th Cir. 1985). To create its maps, plaintiff overlaid key demographic data, which it assembled from public sources, onto line-drawn maps that it traced from publically available aerial photographs. It sold these plat maps to clients such as farm equipment sales agents who wanted to quickly learn information about potential customers. *Id.* In affirming a ruling that copyrightable elements were infringed, the Court stated:

The contribution of a collection of facts lies in their presentation The collector may change the form of information and so make it more accessible, or he may change the organization and so make the data more understandable. . . . In each case the copyright

¹² See also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350-51, 111 S.Ct. 1282 (1991); 17 U.S.C. §§ 101 (definition of "compilation"); *T-Peg*, 459 F.3d at 114 (reversible error for court to ignore similarities in overall "arrangement" of elements in architectural work); *Buc Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1144-45 (11th Cir. 2007) (sufficient basis for jury to find originality in selection, order and arrangement of yacht sales listings); *Epic Metals Corp. v. Condec, Inc.*, 867 F. Supp. 1009, 1013 (M.D. Fla. 1994) (finding substantial similarity in view of evidence of "substantial copying of charts and tables").

depend[s] on the fact that the compiler made a contribution- a new arrangement or presentation of facts Teasing pictures from the debris left by conveyancers is a substantial change in the form of information. The result is copyrightable[.]

Id. at 149. The same is true here, only Opower is “teasing pictures from the debris” left by utility companies and energy users. Opower’s choice of which particular comparisons to reveal (selection), and where and how to place them for maximum impact (arrangement), is infused with Opower’s original, creative expression. It is thus protectable as a compilation. E2.0 took, wholesale, this protected selection and arrangement of information.

As shown by E2.0’s alternative design on its website, moreover, none of these choices were required to create a comparison-driven energy usage report. Exh. 14. E2.0 had a limitless range of other expressive presentations to choose from. This availability of alternatives strongly favors a finding that E2.0 copied protectable expression. *Buc Int’l.*, 489 F.3d at 1144.

II. The Irreparable Harm, Balance of Hardship and Public Interest Factors Favor Granting an Injunction

The longstanding rule in the First Circuit has been that because injury normally can be presumed, the plaintiff in a copyright case is entitled to a preliminary injunction even without a detailed showing of irreparable harm if the plaintiff demonstrates probable success on the merits. *See Concrete Mach. Co.*, 843 F. 2d at 611-12; *Flomerics*, 880 F. Supp. at 61-62 (citing same); *Accusoft Corp. v. Mattel, Inc.*, 117 F. Supp 2d. 99, 102 (D. Mass. 2000) (Gorton, J.). Under this presumption, Opower would clearly be entitled to an injunction without any further findings.¹³

Apart from a legal presumption, if E2.0’s infringement is not immediately enjoined, Opower will be irreparably harmed in a number of ways not redressable by monetary damages

¹³ The continuing vitality of such a presumption has been called into question by other circuits in the wake of the Supreme Court’s decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 126 S.Ct. 1837 (2006). Recently, the First Circuit expressly declined to rule on whether an analogous presumption in trademark cases was undercut by *eBay*. *Voice of the Arab World, Inc. v. MDTV Medical News Now, Inc.*, 645 F. 3d 26, 34-35 (1st Cir. 2011). Under *Voice of the Arab World*, the presumption articulated in *Concrete Machinery* appears to remain the law of the First Circuit, so long as it is applied consistently with “traditional equitable principals.” *Id.* at 34. As detailed here, traditional equitable principals support an injunction in this case.

alone. The primary threat to Opower in this case is not the pecuniary value of lost accounts, such as the lost WMECO account (though that threat is real and difficult to quantify in its own right). Rather, it is the inchoate harm to Opower's stellar reputation for being the go-to source for uniquely impactful and readable home energy comparison reports. That reputation is Opower's most important asset. It spent years and millions of dollars refining its signature reports, and achieved a very strong market position and positive reputation in doing so.

It is impossible to quantify the harm to its reputation that would result if E2.0 is able to continue marketing a knock-off of that very same report over the roughly two years until trial. *See Concrete Mach.*, 843 F. 2d at 611 (noting that irreparable harm is highly likely in copyright cases, because "Any ultimate success in a lawsuit could have little effect on public perception of who the true creator was."); *Flag Fables, Inc. v. Jean Ann's Country Flags and Crafts, Inc.*, 730 F. Supp. 1165, 1174 (D. Mass. 1989) (Freedman, J.) ("The potential damage to the plaintiff's reputation for excellence is just the kind of irreparable harm which a motion for preliminary injunction is intended to address."). This is particularly true here because it is a small industry, with any reputational gains to E2.0 translating into immediate harm to its rival, Opower. One report is a direct substitute for the other.

In this case, the reputation effect is magnified because of the importance the industry places on pilot studies and verifiable results. E2.0 and WMECO are beating the publicity drum with respect to their Western Mass Saves program. Exhs. 22 and 16 at pp. 20, 24. Any such successes for E2.0, however, will be misleading as they are predicated on use of an infringing report. Moreover, as shown above, energy usage reporting companies need to be able to produce verified savings results to satisfy utility regulators and mandates. If E2.0 is permitted to complete its study using infringing reports, it will surely attempt to rely on that data for years

going forward – for example by supplying the data to its utility customers so that the utilities can submit it to state regulators as evidence of lowered energy consumption. This would have an exponentially harmful impact on Opower that could not be measured in monetary damages.¹⁴

Any harm to E2.0 from an injunction is, moreover, far lower in comparison to the harm Opower would experience if an injunction is not entered. E2.0, after all, could simply replace its current reports with a non-infringing report such as the one it has already created. Exh. 20.¹⁵

Finally, it is the clear public policy of the Copyright Act to reward companies like Opower for their creative efforts and talents in developing new ways to perceive and express information. Opower revolutionized the clean energy industry by creating energy usage reports that energy consumers actually read and respond to. The President of the United States held Opower out as a socially responsible and financially successful archetype for others to follow. The Copyright Act was put in place to assure game-changing companies like Opower that second-comers will not be able to simply copy their creations. “It is virtually axiomatic that 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 the protected work.” *Id.* at 612 (internal punctuation omitted).

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff Opower’s Motion for Preliminary Injunction and grant the relief described in the proposed order filed herewith.

¹⁴ As the field of energy usage reporting is brand new, it is subject to sea-changes at any time. This uncertainty regarding a copyright’s commercial lifespan is another well-recognized reason for granting preliminary relief pending trial. *Concrete Mach.*, 843 F. 2d at 611 (copyright preliminary injunctions are particularly appropriate because “[u]nlike most property rights, the value of this interest is often fleeting”); *Flag Fables*, 730 F. Supp. at 1174-75.

¹⁵ In any event, the law in this circuit is clear that an infringer cannot claim to be harmed by the fact of having to cease its infringement. *Concrete Mach.*, 843 F.2d. at 612 (“Advantages built upon a deliberately plagiarized make-up do not seem to us to give the borrower any standing to complain that his vested interests will be disturbed.”) (internal quotations omitted).

Dated: November 14, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above document is being filed contemporaneously with Complaint in this action, and a true and correct copy of the above document will be served by hand upon Efficiency 2.0 along with service of the Complaint on November 15, 2011.

/s/ Peter J. Karol/
Peter J. Karol

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