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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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INSTANTCERT.COM, LLC and STEVEN  
GLOER,

Plaintiffs,

v.

ADVANCED ONLINE LEARNING, LLC  
and BRANDON PERRY,

Defendants.

Case No. 2:11-cv-1833-MMD-GWF

ORDER

(Plfs.' Motion for Preliminary Injunction –  
dtk. no. 31)

Before the Court is Plaintiffs Steven Gloer and InstantCert.com, LLC's Motion for Preliminary Injunction. (Dkt. no. 31.) For the reasons discussed below, Plaintiffs' Motion is DENIED.

**I. BACKGROUND**

InstantCert.com, LLC ("InstantCert") provides online study materials for the College-Level Examination Program ("CLEP"), Dantes, and Excelsior examinations used to earn college credit at participating universities. These materials include examination questions and answers organized by a number of different subject areas. With the assistance of its officer Steven Gloer, InstantCert created study materials for the CLEP in 2004. Gloer registered the materials with the United States Copyright Office. (Dkt. no. 31-A.) In 2005, InstantCert created study preparation materials for the Dantes examinations, and Gloer had those materials registered as well. (*Id.*)

1 InstantCert and Gloer allege that Defendants Advanced Online Learning, LLC  
2 (“AOL”) and their employee/owner, Defendant Brandon Perry, created a website in 2008  
3 at www.paceprep.com that copied all of Plaintiffs Dantes and CLEP’s materials.  
4 Plaintiffs allege that, upon learning of the infringement, they sent a cease-and-desist  
5 letter to the Defendants. The website subsequently shut down. Plaintiffs further allege  
6 that on or about February 16, 2010, Defendants created another infringing website,  
7 www.misterprep.com, where Defendants sell exact duplicates and substantially similar  
8 copies of thirty one (31) of the copyrighted materials that Plaintiffs own and sell,  
9 including the Dantes and CLEP exam preparation materials.

10 Plaintiffs filed this suit on November 16, 2011, alleging copyright infringement,  
11 unfair competition, and trade dress infringement. (Dkt. no. 1.) Plaintiffs waited until May  
12 21, 2012, to seek preliminary injunction.

## 13 **II. LEGAL STANDARD**

14 To qualify for a preliminary injunction, a plaintiff must demonstrate: (1) a likelihood  
15 of success on the merits; (2) a likelihood of irreparable harm; (3) that the balance of  
16 hardships favors the plaintiff; and (4) that the injunction is in the public interest. *Winter v.*  
17 *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs have not demonstrated the  
18 second and third requirements.

## 19 **III. DISCUSSION**

20 Plaintiffs seek a preliminary injunction on the basis of their copyright infringement  
21 claims. The Court will therefore only examine these claims.

### 22 **A. Likelihood of Success on the Merits**

23 To succeed on a copyright infringement claim, Plaintiffs must establish that (1)  
24 they are the owners of the copyright; and (2) their works have been copied by  
25 Defendants. *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004); *Sid & Marty Krofft*  
26 *Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977); see 17

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1 U.S.C. § 106.<sup>1</sup> Defendants argue that Plaintiffs cannot demonstrate a likelihood of  
2 success because Plaintiffs are not the owners of a valid copyright. Defendants do not  
3 challenge the second element of the copyright infringement claim, and thus concede for  
4 the purposes of this Motion that Plaintiffs' works have been copied.

5 A copyright certificate establishes prima facie evidence of the validity of a  
6 copyright and of the facts in the certificate. 17 U.S.C. § 410(c). The presumption of  
7 validity is rebuttable. See *Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*,  
8 122 F.3d 1211, 1217 (9th Cir. 1997); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085-  
9 86 (9th Cir. 1989); *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1321 (9th Cir. 1986); see,  
10 e.g., *North Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992);  
11 *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 908 (2d Cir. 1980). To rebut the  
12 presumption, the defendant must offer some evidence to dispute or deny the plaintiff's  
13 prima facie case of infringement. See, e.g., *North Coast*, 972 F.2d at 1033; *Folio*  
14 *Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 763 (2d Cir. 1991).

15 Here, Plaintiffs provide copyright certificates as prima facie proof of the validity of  
16 their copyrights in the materials copied by Defendants. (See Dkt. no. 31-A.) Defendants  
17 attempt to rebut that presumption by advancing three arguments: (1) Plaintiffs' materials  
18 are unoriginal and belong to other third parties; (2) Plaintiffs failed to demarcate their  
19 copyright registrations as compilations and/or derivative works; and (3) the deposit copy  
20 of one of the copyrights has been destroyed, rendering that copyright invalid. All three  
21 arguments fail.

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22  
23 <sup>1</sup>17 U.S.C. § 106 provides: "the owner of copyright under this title has exclusive  
24 rights to do and to authorize any of the following: (1) to reproduce the copyrighted work  
25 in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted  
26 work; (3) to distribute copies or phonorecords of the copyrighted work to the public by  
27 sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of  
28 literary, musical, or dramatic, and choreographic works, pantomimes, and motion  
pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the  
case of literary, musical, or dramatic, and choreographic works, pantomimes, and  
pictorial, graphic, or sculptural works, including the individual images of a motion picture  
or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of  
sound recordings, to perform the copyrighted work publicly by means of a digital audio  
transmission."

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**1. Copyright status of Plaintiffs' materials**

The only disagreement between the parties here concerns the quantity of infringement that has occurred. Accordingly, Defendants are likely either liable for infringing directly on various questions and answers copied from Plaintiffs' product, or, if those materials are unoriginal and/or copyrighted elsewhere, Defendants are at least liable for copying Plaintiffs' original composition of unoriginal or copyrighted works.

Defendants challenge the originality of Plaintiffs' materials, and argue that much, if not all, of the materials were lifted from other sources. Defendants point to questions and answers that exist in Plaintiffs' CLEP materials that are substantially similar or otherwise copied verbatim from sources whose copyrights predated Plaintiffs' date of registration. According to Defendants, a short analysis of Plaintiffs' CLEP materials using online plagiarism tracking tools revealed that answers from at least 18 of the 29 chapters are unoriginal, and that 479 test questions or answers from 18 of those chapters are lifted from other sources.<sup>2</sup> They point to several chapters consisting almost exclusively of lifted materials, including Chapters 2, 3, 27, and 28.

To the extent that Plaintiffs' materials are original, Defendants have infringed on valid copyrights. If, however, some of those materials are unoriginal to Plaintiffs, or are copyrighted elsewhere, Plaintiffs' purported copyright over those materials is invalid. See 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in *original* works of authorship fixed in any tangible medium of expression . . .") (emphasis added in parenthetical); *Feist Pub'ns. Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 347 (1991) ("The originality requirement . . . remains the touchstone of copyright protection today."). Plaintiffs do not concede that any of their materials are unoriginal, and it is not clear from the briefing what percentage of materials is contested. However, assuming at least some of the materials were composed by either Gloer or the independent

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<sup>2</sup>According to Defendant Perry's declaration, most of the copyrighted materials at issue have not been reviewed for originality. The CLEP materials contain at least 10,491 exam questions. Plaintiffs do not concede that the 479 are unoriginal to Plaintiffs' writers.

1 contracting firm hired to create the questions for Plaintiffs, Defendants have likely  
2 infringed on Plaintiffs' valid copyrights.

3 In addition, Plaintiffs are also likely to succeed on copyright infringement claims  
4 relating to the original compilations of their materials. Defendants do not challenge  
5 Plaintiffs' copyright status as original compilations. The Copyright Act protects  
6 "collective" works, *i.e.* those works "formed by the collection and assembling of  
7 preexisting materials or of data that are selected, coordinated, or arranged in such a way  
8 that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C §  
9 101. So long as Plaintiffs selected, coordinated, or arranged their various materials in  
10 unique and creative ways, Plaintiffs are entitled to protection over their compilations.<sup>3</sup>  
11 Defendants claim that the titles and subheadings that Defendants copied from Plaintiffs  
12 are the intellectual property of College Broad and Prometric, the entities that own the  
13 CLEP and Dantes tests, respectively. But Plaintiffs do not challenge Defendants'  
14 copying of the titles or subheadings — rather, Plaintiffs seek the Court's protection from  
15 the infringement of Plaintiffs' original compilations of various questions into groups. The  
16 creative act of assembling materials is copyrightable. *See Feist Pub'ns., Inc.*, 499 U.S.  
17 at 347-49. For this reason, Defendants are either liable only for infringing on Plaintiffs'  
18 thin copyright on their original composition of questions and answers, or Defendants are  
19 also liable for directly infringing on Plaintiffs' copyrights in the underlying materials.

20 **a. Failure to Demarcate as Compilation or Derivative**

21 Defendants' second argument revolves around Plaintiffs' failure to claim  
22 compilation or derivative work status on their copyright applications. Gloer left lines 6(a)  
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24 <sup>3</sup>Of course, Plaintiffs would not receive protection over the underlying copyrighted  
25 material solely because they arranged that material in a creative way. Their copyright  
26 would exist only in the *form* of the compilation, not in that which is compiled. *See* 17  
27 U.S.C. § 103(b) ("The copyright in a compilation or derivative work extends only to the  
28 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."); *Feist Pub'ns., Inc.*, 499 U.S. at 348 ("Originality remains the *sine qua non* of  
copyright; accordingly, copyright protection may extend only to those components of a  
work that are original to the author.").

1 and 6(b) on the Certificates of Registration blank. (Dkt. no. 31-A.) These lines ask a  
2 registrant to identify any preexisting work or works that the copyrighted material is based  
3 on, and to identify the material added to the original work. Defendants argue that  
4 Gloer's failure to identify these materials in the registration, coupled with the fact that the  
5 material was prepared through the assistance of an attorney, "strongly indicates" that the  
6 omission was intentional and thus renders the copyrights invalid.

7 Plaintiffs counter that Gloer was not aware that his independently contracted  
8 writers hired to compose the questions and answers used existing sources. Plaintiffs  
9 draw the Court's attention to the "Services Agreement" that operated between the  
10 Plaintiffs and the firm that provided the writers. This contract states that the work  
11 provided by the firm will be original and will not infringe upon the intellectual property  
12 rights of any third party. (Dkt. no. 37-A.)

13 "Absent intent to defraud and prejudice, inaccuracies in copyright registration do  
14 not bar actions for infringement." *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335  
15 (9th Cir. 1984). "[I]nadvertent mistakes on registration certificates do not invalidate a  
16 copyright and thus do not bar infringement actions, unless the alleged infringer has  
17 relied to its detriment on the mistake, or the claimant intended to defraud the Copyright  
18 Office by making the misstatement." *Urantia Found. v. Maaherra*, 114 F.3d 955, 963  
19 (9th Cir. 1997). Omissions may be immaterial if the work would still have been  
20 registerable. *Id.* As stated above, the burden of proving invalidity rests with the party  
21 seeking to rebut the presumption of copyright validity. *See North Coast Indus.*, 972 F.2d  
22 at 1033; *S.O.S., Inc.*, 886 F.2d at 1086.

23 Defendants have failed to demonstrate a likelihood of success on the issue of the  
24 registrations' invalidity. Defendants' burden is "very high," *Bibbero Sys., Inc. v. Colwell*  
25 *Sys., Inc.*, 731 F. Supp. 403, 404 (N.D. Cal. 1988), and they have failed to provide  
26 enough evidence for this Court to infer an intent to defraud. Whether or not other third  
27 parties hold valid copyrights over Plaintiffs' test preparation materials, it is likely that  
28 Plaintiffs at least hold a valid copyright over the compilation of those materials.

1 Therefore, Plaintiffs are likely to have some registerable materials, despite their failure to  
2 designate their works as derivative or compilations. Further, Gloer's affidavit and the  
3 agreement between InstantCert and the independent writing firm suggest that Gloer was  
4 unaware that some of their materials might be copyrighted. The Court will not infer intent  
5 to defraud the Copyright Office merely because the copyright registration was prepared  
6 by a lawyer and did not include its potential derivative or compilation status.

## 7 **2. Status of Destroyed Deposit Copy**

8 Defendants' last argument is that the deposit copy of the Dantes Exam  
9 Preparation materials has been destroyed, thereby invalidating the copyright held by  
10 Gloer.

11 This argument is unavailing. As Plaintiffs correctly point out, the Dantes copyright  
12 registration is not invalidated simply because the Copyright Office might have  
13 mishandled the submitted materials. Defendants cite to *Seiler v. Lucasfilm, Ltd.*, 808  
14 F.2d 1316, 1319 (9th Cir. 1986), a case where a claim of copyright infringement was  
15 made without producing the original work, thereby precluding a proper copyright analysis  
16 as to the question of copying and substantial similarity. Indeed, the *Seiler* court made  
17 clear to point out that the plaintiff could not demonstrate that the work was unavailable  
18 "through no fault of his own." *Id.* Here, the Copyright Office was unable to open the  
19 compact disc that contained the copyrighted materials. This may have been due either  
20 to a faulty disc provided by Plaintiffs, or to destruction or ordinary wear and tear  
21 occurring after the disc was deposited with the Copyright Office. Defendants have not  
22 met their burden of demonstrating that Plaintiffs' own actions caused the destruction of  
23 the deposit copy, and as a result have not overcome the presumption of copyright  
24 validity.

25 For the reasons set forth above, Plaintiffs' claim of copyright infringement –  
26 whether in the underlying works or as compilations – is likely to succeed on the merits.  
27 Defendants have not provided sufficient evidence to question the validity of Plaintiffs'  
28 copyrights.

1           **B.     Likelihood of Irreparable Harm**

2           The second factor a court must analyze in determining whether to issue a  
3 preliminary injunction is the likelihood of irreparable harm in the absence of temporary  
4 injunctive relief. “The basis of injunctive relief in the federal courts is irreparable harm  
5 and inadequacy of legal remedies.” *Los Angeles Memorial Coliseum Comm’n v. Nat’l*  
6 *Football League*, 634 F.2d 1197, 1202 (9th Cir.1980) (citing *Sampson v. Murray*, 415  
7 U.S. 61, 88 (1974)). “Perhaps the single most important prerequisite for the issuance of  
8 a preliminary injunction is a demonstration that if it is not granted the applicant is likely to  
9 suffer irreparable harm before a decision on the merits can be rendered . . . .” C. Wright,  
10 A. Miller & M. Kane, *Fed. Practice and Procedure* § 2948.1, p. 139 (2d ed. 1995).

11           Traditionally, courts presumed the likelihood of irreparable harm when a plaintiff  
12 demonstrated a likelihood of success on a copyright infringement claim. *Flexible Lifeline*  
13 *Sys, Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 994-95 (9th Cir. 2011). However, the  
14 Supreme Court’s decisions in *Winter* and *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S.  
15 388 (2006), have altered this presumption. The Ninth Circuit recently held in two  
16 copyright infringement actions that a “plaintiff must demonstrate a likelihood of  
17 irreparable harm as a prerequisite for injunctive relief, whether preliminary or  
18 permanent.” *Flexible Lifeline Sys., Inc.*, 654 F.3d at 998; *Perfect 10, Inc. v. Google, Inc.*,  
19 653 F.3d 976, 981 (9th Cir. 2011) (decided the same month as *Flexible Lifeline Sys.,*  
20 *Inc.*). As a result, a plaintiff must now present evidence of irreparable injury. *See*  
21 *Leatherman Tool Group, Inc. v. Coast Cutlery Co.*, 823 F. Supp. 2d 1150, 1158 (D. Or.  
22 2011). Showing monetary injuries, without more, will not justify granting a preliminary  
23 injunction. *See Lydo Enter., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th  
24 Cir.1984) (explaining that if money damages or other relief granted in the ordinary  
25 course of litigation can adequately compensate the plaintiff, irreparable injury probably  
26 will not follow the denial of a preliminary injunction); *Los Angeles Memorial Coliseum*  
27 *Comm’n*, 634 F.2d at 1202 (noting that purely monetary injuries normally are not  
28 considered irreparable).



1           While the Court finds that Plaintiffs will likely succeed on the merits of their  
2 infringement claims, the Court cannot presume the likelihood of harm but must  
3 determine whether Defendants' infringing conduct will result in irreparable injury to  
4 Plaintiffs. Granting a preliminary injunction is an extraordinary remedy. *Munaf*, 553 U.S.  
5 at 689-90. As such, "[a] showing of irreparable harm is the single most important  
6 prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v.*  
7 *Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citations  
8 omitted). Plaintiffs fail to offer evidence to satisfy this important prerequisite.

9           Plaintiffs make two arguments in support of their position that irreparable injury is  
10 imminent. First, they argue that counterfeit exam preparation materials "destroys the  
11 salability and value" of their work, and that Defendants' conduct results "in a loss of  
12 business and profits not measurable with precision." Second, Plaintiffs argue that their  
13 reputation stands to suffer by being associated with Defendants' inferior products. They  
14 allege that Defendants' infringement hurts their investment in their business goodwill and  
15 reputation, losses that are not measurable in monetary terms. Plaintiffs fail to offer any  
16 evidence of irreparable harm, but merely rely on the argument that the two types of  
17 injuries they advance have been recognized as irreparable injuries. Both of these  
18 arguments fail.

19           Plaintiffs' first argument asks the Court to grant a preliminary injunction merely  
20 because the monetary value of Defendants' conduct cannot, at this stage of the  
21 litigation, be measured with precision. However, "[t]he possibility that adequate  
22 compensatory or other corrective relief will be available at a later date, in the ordinary  
23 course of litigation, weighs heavily against a claim of irreparable harm."). *Sampson*, 415  
24 U.S. at 90. Plaintiffs have not offered any evidence that the value of their business has  
25 been impacted by Defendants' infringement. Moreover, that Defendants' conduct  
26 impacts the "salability and value" of Plaintiffs' business is only true to the extent that  
27 Defendants are receiving income that might otherwise belong to Plaintiffs. Put  
28 differently, Plaintiffs are losing only the estimated \$750 of monthly AOL revenue,

1 assuming all of AOL's services infringe. Monetary damages alone must be inadequate  
2 to compensate for the injury. *eBay Inc.*, 547 U.S. at 391 ("A plaintiff must  
3 demonstrate . . . that remedies available at law, such as monetary damages, are  
4 inadequate to compensate for that [irreparable] injury").

5 Plaintiffs' second argument also fails because Plaintiffs have not offered any  
6 evidence demonstrating irreparable injury to Plaintiffs' reputation and goodwill. Failure to  
7 make even a minimal showing of irreparable harm proves fatal to Plaintiffs' position that  
8 irreparable injury is likely. See *Goldie's Bookstore, Inc. v. Superior Court of State of*  
9 *Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (findings of loss of goodwill and customers that  
10 are speculative and not based on factual allegations do not constitute irreparable injury);  
11 see, e.g., *Aurora World, Inc. v. Ty Inc.*, 719 F. Supp. 2d 1115, 1169 (C.D. Cal. 2009) (no  
12 irreparable injury demonstrated because of failure to provide evidence of reputational  
13 harm from infringement); *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 937 n. 3 (N.D. Cal.  
14 2009) (denying request for preliminary injunction for failure to provide evidence of  
15 irreparable harm resulting from copyright infringement); *CJ Products LLC v. Snuggly*  
16 *Plushez LLC*, 809 F. Supp. 2d 127, 145 (E.D.N.Y. 2011) (finding irreparable harm where  
17 plaintiff produced evidence that infringing product created customer confusion); *Apple*  
18 *Inc. v. Psystar Corp.*, 673 F. Supp. 2d 943, 948-49 (N.D. Cal. 2009) (finding irreparable  
19 injury in part based on evidence of actual consumer confusion and harm to reputation  
20 and goodwill); see also *Stuhlberg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832,  
21 841 (9th Cir. 2001) ("*Evidence of threatened loss of prospective customers or goodwill*  
22 *certainly supports a finding of the possibility of irreparable harm.*") (emphasis added in  
23 parenthetical).

24 Plaintiffs make two general allegations in support of their reputational injury  
25 argument: they have invested heavily in their products, reputation, and goodwill; and  
26 reputational injury can constitute irreparable harm for the purposes of injunctive relief.  
27 However, "[t]he fact that alleged harm is primarily in the form of lost customers and  
28 business goodwill, which at least in theory may be compensated by damages, weighs

1 against a claim of irreparable harm.” *OG Intern., Ltd. v. Ubisoft Entm’t*, 2011 WL  
2 5079552, at \*10 (N.D. Cal. Oct. 26, 2011). Moreover, Plaintiffs have not demonstrated  
3 *how* irreparable injury would result from Defendants’ actions, and have proffered no  
4 evidence in support of their argument. See *Goldie’s Bookstore, Inc.*, 739 F.2d at 472;  
5 *Aurora World, Inc.*, 719 F. Supp. 2d at 1169. Plaintiffs failed to show how a consumer  
6 would connect Defendants’ services with InstantCert. AOL grants an ordinary consumer  
7 access to test preparation materials, but the record does not demonstrate that the  
8 consumer might confuse AOL’s materials with those of InstantCert while reading AOL’s  
9 questions and answers. Without evidence of non-monetary irreparable injury, this Court  
10 cannot upend the Ninth Circuit’s decisions in *Flexible Lifeline Sys.* and *Perfect 10* by  
11 effectively reinstating a presumption of irreparable injury.

12 For these reasons, Plaintiffs fail to demonstrate that irreparable injury will likely  
13 result without a preliminary injunction.

14 **C. Balance of Hardships**

15 An injunction may not issue unless the balance of hardships tips in favor of the  
16 moving party. *Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir.  
17 1993). “[A] court must remain free to deny a preliminary injunction, whatever be the  
18 showing of likelihood of success, when equity in the light of all the factors so requires.”  
19 *Apple, Inc. v. Samsung Electronics Co., Ltd.*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 2572037, at  
20 \*64 (N.D. Cal. July 1, 2012).

21 Here, Defendants’ argument is two-fold: that Defendant Perry will suffer a serious  
22 financial setback if a preliminary injunction issues, and that InstantCert will not be unduly  
23 harmed if forced to litigate without this preliminary remedy. An injunction would burden  
24 Perry and AOL. Failing to issue an injunction would be burdensome to InstantCert to the  
25 extent that the injury accrues during the pendency of the litigation. But as Defendants  
26 point out, only 53 individuals have subscribed for AOL’s services, and AOL is not in any

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1 position to seriously challenge InstantCert's status atop the industry.<sup>4</sup> Plaintiffs can seek  
2 monetary relief for any damages incurred as a result of Defendants' alleged continuing  
3 infringement during the pendency of this litigation. While Plaintiffs have demonstrated a  
4 likelihood of success on the merits, they cannot assume that Defendants are *in fact*  
5 infringing. The Court rejects Plaintiffs' request to collapse the first and third  
6 requirements of the preliminary injunction inquiry. For these reasons, the balance of the  
7 hardships inquiry weighs in favor of Defendants.

8 **D. Public Interest**

9 The Court concludes that the public interest is served by issuance of a preliminary  
10 injunction, as "it is virtually axiomatic that the public interest can only be served by  
11 upholding copyright protections and correspondingly, preventing the misappropriation of  
12 skills, creative energies, and resources which are invested in the protected work." *Apple*  
13 *Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3rd Cir. 1983); *Warner*  
14 *Bros. Entm't, Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1015 (C.D. Cal. 2011)  
15 (quoting *Apple Computer, Inc.*).

16 In summary, the Court holds that a preliminary injunction against Defendants is  
17 inappropriate. Plaintiffs have failed to proffer specific evidence as to the likelihood of  
18 irreparable injury it faces in the absence of such an extraordinary remedy, and have  
19 failed to demonstrate that the balance of the hardships favors granting preliminary relief.  
20 Although Plaintiffs have demonstrated a likelihood of success, whatever damage  
21 incurred by the Plaintiffs during the course of the litigation can be addressed at the  
22 remedy stage of the litigation in the event that Plaintiffs succeed on the merits.

23 ///

24 \_\_\_\_\_  
25 <sup>4</sup>Plaintiffs use these same figures to argue that AOL stands to lose *less* were an  
26 injunction to issue since it cannot be, by virtue of its small subscriber base, a very  
27 profitable entity. However, the injunction could seriously damage AOL's entire business,  
28 and the hardship to AOL would be necessarily great. This is a different situation than  
occurred in *CJ Products LLC*, where the district court qualified its balance of hardship  
finding on the fact that the accused infringing company would "not be severely impacted,  
as they have an extensive array of non-infringing products that they may continue  
selling." *CJ Products LLC*, 809 F. Supp. 2d at 146.

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**IV. CONCLUSION**

Accordingly, IT IS HEREBY ORDERED THAT Plaintiffs Steven Gloer and InstantCert.com, LLC's Motion for Preliminary Injunction (dkt. no. 31) is DENIED.

ENTERED THIS 27<sup>th</sup> day August of 2012.

  
\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE