Against the Grain

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Cases of Note--Copyright in Open Source Code

Bruce Strauch
The Citadel, strauchb@citadel.edu

Bryan M. Carson
Western Kentucky University, bryan.m.carson@gmail.com

Jack Montgomery
Western Kentucky University, jack.montgomery@wku.edu

LEGAL ISSUES

Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>
Bryan M. Carson, J.D., M.I.L.S. (Western Kentucky University) <bryan.carson@wku.edu>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

Cases of Note — Copyright in Open Source Code

Column Editor: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

ROBERT JACOBSON V. MATTHEW KATZER AND KAMIND ASSOCIATES, INC. (DBA KAM INDUSTRIES). UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 535 F.3d 1373; 2008 U.S. App. LEXIS 17161.

Robert Jacobson owns copyright to model railroading computer programming code which he makes available for public download free of charge via the Artistic License, an "open source" or public license.

Kamind Associates do software for the model train industry and its fanatic hobbyists. **Jacobson** says **Kamind** copied part of his software and tucked it into a **Kamind** package contrary to the terms of the Artistic License. **Jacobson** sued.

The District Court held against **Jacobson,** denying his motion for a preliminary injunction. It said the nonexclusive open source Artistic License did not create liability for copyright infringement due to it being "intentionally broad."

"The license provides that a user may copy the files verbatim or may otherwise modify the material in any way, including as part of a larger, possibly commercial software distribution." ***Jacobson v. Katzer,*** 2007 U.S. dist. LEXIS 63568.

Well, that seems pretty straightforward. But it got vacated and remanded. What are we missing?

The Appeal

As it turns out, **Jacobson** doesn't really own the software. He manages an open source group which is the collective work of many railroad enthusiasts. You can download it from a Website if you agree to the terms of the Artistic License.

I guess they own it as a group.

Kamind did violate the license by not including the authors' names and **Java Model Railroad Interface (JMRI)** as the original source. Likewise, **Kamind** did not describe how it changed the original source code.

Kamind says they've stopped violating the terms, but **Jacobson** said they could always start up again. So he wanted a preliminary injunction.

The District Court held **Jacobson** only had a cause of action for breach of contract and since there is no irreparable harm in a breach, he couldn't have an injunction.

You know about that requirement. If it can't be repaired because it's irreparable, I have to stop you from doing it right now.

So What is This Open Source Thing?

Open source licenses are used when artists, authors, educators, software developers want to collaborate and thus dedicate their work to the public. It is quite widely and successfully used.

Creative Commons provides free copyright licenses if you want to give your work to the masses or license for some uses and retain for others. There are over 100,000,000 Creative Commons licenses out there. The **Massachusetts Institute of Technology** uses Creative Commons to license all 1,800 **MIT** courses.

And then there's **Wikimedia Foundation** with 75,000 active contributor gnomes who have churned out 9,000,000 articles in 250 languages.

By inviting computer programmers around the globe to make improvements, you can write and debug far faster than if the copyright holder did it all. By requiring a restatement of the license and other information, that holder ensures that any user knows his identity and the scope of the license. And the downstream user can see what has been added or altered.

Even without the immediate changing of hands of money, there are potential big economic benefits. Free of charge will certainly get you immediate market share. The product is improved by contributions of many, and it helps you build your international reputation.

Kamind admitted it copied, modified and distributed parts of **Jacobson's** code. Thus a prima facie case of copyright infringement.

Kamind says, but we had a license which gave us the right to copy, modify and distribute.

A "copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement" and must sue for breach of contract. ***Sun Microsystems, Inc. v. Microsoft Corp.,*** 188 F.3d 1115, 1121 (9th Cir. 1999).

That's a general rule though. And you can see what they're saying. Yes, I let you do it, so I can't sue you for copyright violation because you did it.

But if the license is limited in scope and a **Kamind** acts outside, you get a copyright infringement. *See* ***S.O.S., Inc. v. Payday, Inc.*** 886 F.2d 1081, 1087 (9th Cir. 1989); Nimmer on Copyright, § 1015[A](1999).

[U]nauthorized editing is an infringement of copyright like any other use outside a license. ***Gilliam v. ABC,*** 538 F.2d 14, 21 (2d Cir. 1976).

The Artistic License required that any distribution contain copyright notices and tracking of modifications. Driving traffic to the open source incubation page and informing other users of the project is an economic goal of the copyright owner that is enforceable by law.

Industry Consolidation Part 2 ...
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simple bloody-mindedness, there'll be fewer content innovators who include libraries in their thinking and dreaming.

And then the mega-content-conglomerates, who think and dream only in green, will turn their acquisitive appetites elsewhere — perhaps toward each other. This is the path that leads to monoculture, and stasis, and Disco.

Alright, I made up that part about Disco — but let it serve to strike a cautionary note about the dangers of a static, corporate-driven monoculture!

Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>

QUESTION: (1) A public library staff regularly copies and pastes images for use in library-produced materials. The images are found on the Internet. Is this infringement? (2) The library has also downloaded fliers and pamphlets produced by other libraries for use of their patrons. Does this infringe copyright?

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