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## Questions and Answers--Copyright Column

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# LEGAL ISSUES



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## Cases of Note — Copyright in Open Source Code



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**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 tacked 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 ... from page 70

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

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**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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**ANSWER:** (1) Images found on the Internet are copyrighted but may be accompanied by a license. There certainly are some public domain images, images under a Creative Commons license or others in which the creator of the image offers under a free license to use. Many other images are copyrighted and generally require permission to use. It is unclear from the question how the library-produced materials are used, and this makes a difference. If the materials are generally made available to the public, then permission to use copyrighted images is required. If the library-produced materials are for in-house use, such as for an in-service training program, then their use may be fair use. To determine if an image is protected by copyright, various sites (such as Flickr) include that information.

(2) Materials produced by other libraries are copyrighted, but receiving permission to reproduce, download and use them should be easy. Most libraries are delighted to share materials, and a simple email request will surely result in permission to use.

**QUESTION: Does fair use apply outside of the United States?**

**ANSWER:** Fair use is a U.S. construct, although British commonwealth countries have “fair dealing” which is very similar. There is some movement on the international scene to include fair use in the revisions of some countries’ copyright laws. It is too early to predict the outcome of these copyright reform proposals around the world, however.

If the question is directed at infringement of foreign works that occurs in this country, fair use does apply. Because of international treaties, someone in the United States who copies a portion of a work copyrighted in a foreign country applies U.S. law to determine whether the reproduction is infringement or not. The law of the U.S. would consider fair use to determine whether the reproduction of the foreign work is infringement that is excused as a fair use.

**QUESTION: Now that Elsevier has purchased SSRN, there is considerable concern in the academic community that the posting of social science papers on SSRN will change. (1) Is there any indication what Elsevier will do? (2) Will there be nonprofit alternatives to SSRN?**

**ANSWER:** (1) Elsevier says that there will not be substantial change to SSRN and that it will remain open source. Press releases from Elsevier state that this purchase along with Mendeley, which it also owns, will actually strengthen SSRN. SSRN is a scholarly repository for social science research and has been an extremely valuable platform for publicly available open access scholarship. Mendeley is a free reference manager and scholarly collaborative network. Elsevier claims that together they will provide greater access to a



growing user-generated content base. Further, the combination will permit the development of new informational and analytic tools to increase engagement with researchers. Elsevier says that will improve the SSRN interface that it will continue to have free submission and downloads, and will remain unchanged in the short term. Elsevier also pledges to reach out to community members for ideas on how the platform can be improved.

(2) When the announcement was made, users expressed concern about what would happen to the papers already on SSRN and whether Elsevier would begin to charge very high fees for access and downloading. There have been calls from the academic community for an alternative similar to ArXiv but for the social sciences. Others pointed out that the papers on SSRN have no economic value. SSRN has been very important in academia for measuring the impact of research, however, and that is highly valuable, and now a for-profit company will own this data. Among other groups, the Authors Alliance is concerned about the effects of this purchase because Elsevier has traditionally created obstacles to open scholarship.

An alternative has already been proposed by a group of sociologists and librarians in partnership with the Center for Open Science. They will develop an open access archive for social science research to be called SocArXiv. (See <https://osf.io/ny5qf/> for the announcement). The papers posted will be an open access platform for the social sciences. The mission is to serve researchers and readers and not to make money; further, the intention is to provide data and code along with the papers. The first part of the project will be a preprint service to allow fast uploading and open access for readers with links to the latest version of a paper. The Website for the archive has already been created at <http://SocArXiv.org>.

**QUESTION: A visiting Chinese professor arrived on campus with a DVD which she asked the library to duplicate so she could use it in class. She does not want her original to be damaged. Is this permitted?**

**ANSWER:** Under section 108(c) of the Copyright Act, the section that permits library reproduction of lost, damaged, stolen, obsolete or deteriorating material, the work must be in the library collection. Not only is this a personal copy of a teacher, but the exceptions contained in section 108 are not available for audiovisual works (see, section 108(i)). So, reproduction by the library is not allowed under section 108. But is it a fair use to reproduce the DVD?

It is not a traditional fair use. The purpose and character of the use is to play the DVD in a classroom (which is permitted under section 110(1)), but the original can perform that function. The purpose of the reproduction here is to prevent damage to the teacher’s originally acquired DVD, not a traditional fair use. The nature of the copyrighted work is a video, which does not weigh strongly in either direction. The amount and substantiality of the portion copied favors the copyright owner since the entire work is reproduced as opposed to a portion of a work. The market effect is

loss of a sale of the DVD. Thus, traditional fair use likely would not permit reproduction of the DVD either.

**QUESTION: (1) How does copyright law apply to duplicating something for archival purposes? (2) Does a dark archive differ from an archival collection where materials are viewed?**

**ANSWER:** (1) The phrase “for archival purposes” is somewhat unclear in this question relating to copyright. However, one section of the Copyright Act permits libraries to reproduce materials for in order to preserve them, section 108(b), but it is limited to unpublished works. Libraries and archives are permitted to reproduce unpublished works for preservation or to deposit for research in another library or archive. One can argue that section 108(c) allows preservation even though it does not contain the work “preservation” but it does covers published works and allows libraries to reproduce deteriorating works in their collections. Much of the material in archival collections is fragile and deteriorating. So, copying materials to preserve them is permitted.

(2) Under both of these subsections, the intention is for the materials to be available to the public. On the other hand, a dark archive is one in which access is either very limited or non-existent. According to the California Digital Library Glossary, a dark archive is “An archive that is inaccessible to the public. It is typically used for the preservation of content that is accessible elsewhere.” A dim archive is defined as “An archive that is inaccessible to the public, but that can easily be made accessible if required. It’s typically used for the preservation of content that is accessible anywhere.” See <http://www.cdlib.org/inside/diglib/glossary/?field=institution&query=C-DL&action=search>.

Certainly, a dark archive of published works is of less concern to copyright owners than is one made available to the public. Copyright law does not differentiate, however. The Section 108 Study Group did make recommendations concerning a preservation only exception for which there would be no public access but which would carry the ability to make copies to fulfill subsections 108(b) and (c) purposes. See Section 108 Report, <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>, at page 70.

**QUESTION: When patrons donate genealogical research materials to a public library for the vertical file how does copyright apply?**

**ANSWER:** Donated published materials may be added to library collections just as if they were purchased. The fact that the materials are donated for the vertical file is immaterial, but it may help to define the format of the materials. Although the question does not make it clear, it is assumed that the donated genealogical research materials are photocopied or printed from the Internet. It is possible that they were printed from licensed sources, and the license likely covered only the individual doing the research. The recipient library should do additional verification of the source of the materials and their copyright status before adding them to the collection, even the in the vertical file. 🌿