

2008-1001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT JACOBSEN,
Plaintiff-Appellant,

v.

MATTHEW KATZER and
KAMIND ASSOCIATES, INC. (doing business as KAM Industries),
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA IN CV-06-01905,
JUDGE JEFFREY S. WHITE

REPLY TO DEFENDANT'S-APPELLEES' KATZER AND KAMIND
ASSOCIATES'S RESPONSE TO MOTION FOR LEAVE FOR *AMICI CURIAE*
CREATIVE COMMONS CORPORATION, THE LINUX FOUNDATION, THE
OPEN SOURCE INITIATIVE, SOFTWARE FREEDOM LAW CENTER, YET
ANOTHER SOCIETY, DBA THE PERL FOUNDATION, AND WIKIMEDIA
FOUNDATION, INC. TO PARTICIPATE IN ORAL ARGUMENT

Anthony T. Falzone (Counsel of Record)
Christopher K. Ridder (Of Counsel)
STANFORD LAW SCHOOL
CENTER FOR INTERNET & SOCIETY
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 724-0517
falzone@stanford.edu

April 18, 2008

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JACOBSEN v. KATZER et al.

No. 2008-1001

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Amici Curiae certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Creative Commons Corporation, The Linux Foundation, The Open Source Initiative, Software Freedom Law Center, Yet Another Society, dba The Perl Foundation, and Wikimedia Foundation, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

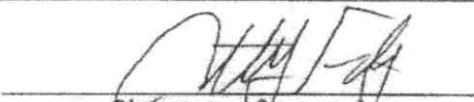
4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Anthony T. Falzone and Christopher K. Ridder, Stanford Center for Internet & Society

2/1/08

Date


Signature of counsel

Anthony T. Falzone
Printed name of counsel

**REPLY TO DEFENDANTS-APPELLEES' KATZER AND KAMIND
ASSOCIATES, INC.'S RESPONSE TO *AMICI CURIAE*'S MOTION FOR
LEAVE TO PARTICIPATE IN ORAL ARGUMENT**

Defendants-Appellees Katzer and KAMIND Associates, Inc. ("Katzer") filed a Response to *Amici Curiae*'s Motion for Leave to Participate in Oral Argument on April 9, 2006. Plaintiff-Appellant Jacobsen consents to Amici's motion and on April 16, 2008 filed a Response in support of it.

Katzer argues that Amici should not be granted leave to participate in the oral argument scheduled for May 7, 2008 because Amici's arguments will be prejudicial to Katzer and duplicative of Jacobsen's arguments. Amici submit that their arguments will not be duplicative or prejudicial to Katzer, but rather helpful to the Court.

Although there may be some overlap in the issues Amici and Jacobsen will discuss, Amici's brief discusses numerous law and policy considerations that were not the focus of Jacobsen's brief. At oral argument Amici will offer specialized knowledge and a valuable perspective to the Court that goes beyond what the parties are able to provide. *See also*, Jacobsen's Response to Defendants-Appellees' Katzer and KAMIND Accosiates, Inc.'s Response to Amici Curiae Creative Commons Corporation et al's Motion for Leave to Participate in Oral Argument ("Jacobsen Response") at 2 (noting that the Court's decision may raise "implications that the parties are unaware of, but that Amici can address.").

In contrast to the parties, who are justifiably interested in a particular result for their clients, Amici are interested in ensuring that the Court is fully informed about the potential impact of its ruling on public licensing – a critical engine of innovation that is being leveraged by millions of users, including some of the largest corporations in America. Public licensing uses copyright law in a way that is less restrictive than traditional licensing regimes, but that nevertheless depends upon the ability of copyright licensors to rely on the protections promised by the copyright system. Amici have deep experience in the realm of public licensing and are prepared to discuss at oral argument the broad range of policy considerations that bear on this case; considerations that the parties will likely not have an opportunity to address given their unique interests and the limited amount of time available at oral argument.

Katzer also argues that Amici should not be granted leave to participate in oral argument because of certain language in the Advisory Committee Notes to Fed. R. App. Proc. 29(g) (1998 Amendments). Contrary to Katzer’s suggestion, these notes state that the language of Rule 29(g) was modified to *remove* language providing that an amicus should be granted permission to participate in oral argument “only for extraordinary reasons.” Although the rule recognizes that “it is not unusual for a court to permit an amicus to argue when a party is willing to share its argument time with the amicus,” in this case sharing argument time would

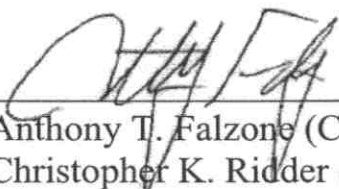
not be practical because each side has been allotted only 15 minutes for argument. This is a complex case that turns on the application of novel copyright law issues to a complex set of facts regarding the copying of open source computer software. Although the Advisory Committee Notes say that the Committee does not intend to suggest that “in other instances” an amicus should be permitted to argue absent extraordinary circumstances, the notes are not clear regarding which particular “other instances” that observation is meant to apply to. In any event, Rule 29(g) provides simply that an amicus party may participate with the Court’s permission, recognizing that the Court’s enjoys broad discretion in this matter.

Even if extraordinary circumstances were required for Amici to participate at oral argument without sharing time with Jacobsen, those circumstances are present here because the limited time available for argument would not permit Jacobsen to argue his case if it were shortened further. In addition, if given fewer than 15 minutes, Amici would not be able to properly present the issues that will assist the Court in making a determination. Finally, if present at oral argument, Amici would be available to address issues of concern to the Court beyond what the parties are able to provide, with a particular eye towards the public policies at stake and the potential impact of the Court’s ruling on a broad array of industry participants.

If the Court finds that an adjustment of time is warranted in order to accommodate Amici's participation at oral argument, Amici believe that the proposal advanced by Jacobsen is reasonable. Under Jacobsen's proposal, Amici would have 15 minutes to argue, Jacobsen would have 20 minutes to argue, and Katzer would have 20-25 minutes to argue. *See* Jacobsen Response at 3. However, Amici believe that regardless of whether the argument time is adjusted, no undue prejudice to Katzer will result from Amici's participation. To the contrary, the Court will benefit from Amici's special knowledge and from its unique legal and policy perspectives.

Wherefore Amici respectfully move that the Court grant leave for *Amici Curiae* to participate in the oral argument scheduled for May 7, 2008.

Respectfully submitted,



Anthony T. Falzone (Counsel of Record)
Christopher K. Ridder (Of Counsel)
STANFORD LAW SCHOOL
CENTER FOR INTERNET & SOCIETY
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 724-0517
falzone@stanford.edu

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Counsel for Amici Curiae

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(doing business as KAM Industries),
Defendants-Appellees.

-----)
**DECLARATION OF AUTHORITY PURSUANT TO 28 U.S.C. § 1746 AND
FEDERAL CIRCUIT RULE 47.3(d)**

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am an employee of Counsel Press. Counsel Press was retained by Attorneys for *Amici Curiae* to print the attached documents.

The attached Reply to Motion for Leave has been submitted to Counsel Press, by the above attorneys, electronically and/or has been reprinted to comply with the Court's rules. Because of time constraints and the distance between counsel of record and Counsel Press, counsel is unavailable to provide an original signature, in ink, to be bound in the documents. I have signed, or resigned the documents for Mr. Anthony T. Falzone, pursuant to 28 U.S.C. §1746 and Federal Circuit Rule 47.3(d), with actual authority on behalf of those attorneys appearing for the party.

April 18, 2008



John C. Kruesi, Jr.

CERTIFICATE OF SERVICE

UNITED STATES COURT OF APPEALS
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ROBERT JACOBSEN,
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MATTHEW KATZER and
KAMIND ASSOCIATES, INC.
(doing business as KAM Industries),
Defendants-Appellees.

-----)
I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by STANFORD LAW SCHOOL, CENTER FOR INTERNET AND SOCIETY, Attorneys for Amici Curiae.

On the 18th day of April 2008, I served the within **Reply to Defendant's-Appellees' Katzer and Kamind Associates's Response to Motion for Leave for Amici Curiae Creative Commons Corporation, The Linux Foundation, The Open Source Initiative, Software Freedom Law Center, Yet Another Society, dba The Perl Foundation, and Wikimedia Foundation, Inc. to Participate in Oral Argument** in the above captioned matter upon:

VICTORIA K. HALL
LAW OFFICE OF VICTORIA K. HALL
3 Bethesda Metro Suite 700
Bethesda, MD 20814
(301) 280-5925

R. SCOTT JERGER
FIELD JERGER LLP
510 SW Alder St. Suite 910
Portland, OR 97205
(503) 228-9115

via Federal Express, overnight delivery by placing two true copies for each in properly addressed wrappers, and placing them in an official depository maintained by Federal Express

Unless otherwise noted, 4 copies have been filed with the court on the same date via Hand Delivery.

April 18, 2008

