

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 Case No. 06-CV-1905, Judge Jeffrey S. White.

Jacobsen's Post-Argument Citation of Supplemental Authorities

Per Federal Rules of Appellate Procedure 28(j) and Federal Circuit Rule 28(i), Jacobsen submits this citation of supplemental authorities. He cites Mazer v. Stein, 347 U.S. 201, 219 (1954) and Specht v. Netscape Communications Corp., 306 F.3d 17, 22-24, 33-35 (2d Cir. 2002).

Mazer supports Jacobsen's point at oral argument that copyright law promotes expression by protecting Jacobsen's non-traditional economic gain. "The economic philosophy behind the clause empowering Congress to grant ... copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors...." 347 U.S. at 219 (emphasis added). The personal

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economic gain that open source developers get is free assistance from other developers and a license to use and distribute the other developers' improvements, which result in better software, available more quickly and at lower cost, for the open source developers, as well as the public, who is an intended third party beneficiary. This personal gain is similar to the economic value received in bartering, although it is difficult to value. Thus, the restrictions in the license—whether limits on license scope or conditions—protect a form of economic gain to the copyright holder, albeit a non-traditional economic gain.

Specht is relevant to Jacobsen's argument in his Principal Brief at 28-30 and his Reply Brief at 3-4. Specht holds that clicking a "download" button does not necessarily bind the user to a contract. In Specht, the plaintiffs successfully used this argument to prevent Netscape from compelling the mandatory arbitration required in its SmartDownload plug-in license. See 306 F.3d at 35. No license terms were visible when a user clicked the "download" button. Id. at 22-24. Here, Jacobsen has chosen not to limit downloads to only those who accept a license. Anyone can download a copy of JMRI software by clicking a "Download" button. A373; A378. No license terms are shown. Id. Thus, he has specifically avoided forming bilateral contracts, with their condition/covenant distinctions. Any

contract that forms must be unilateral—only after the user performs all required terms, which act like conditions precedent.

Respectfully submitted,

DATED: May 9, 2008

By *Victoria K. Hall*
Victoria K. Hall
LAW OFFICE OF VICTORIA K. HALL
3 Bethesda Metro Suite 700
Bethesda MD 20814

Telephone: 301-280-5925

Facsimile: 240-536-9142

ATTORNEY FOR PLAINTIFF-APPELLANT

JACOBSEN v KATZER, 2008-1001

PROOF OF SERVICE

I hereby certify that on May 9, 2008, I sent the attached Jacobsen's Post-Argument Citation of Supplemental Authorities, by first class mail postage prepaid, to:


R. Scott Jerger
Field Jerger LLP
610 SW Alder St. Suite 910
Portland OR 97205

Attorney for Defendants-Appellees Matthew Katzer and KAMIND
Associates, Inc.

Anthony T. Falzone
Stanford Law School
Center for Internet & Society
Crown Quadrangle
559 Nathan Abbott Way
Stanford CA 94305-8610

Attorney for Amici Creative Commons Corp. et al.

DATED: May 9, 2008

By 

Victoria K. Hall
LAW OFFICE OF VICTORIA K. HALL
3 Bethesda Metro Suite 700
Bethesda MD 20814

Telephone: 301-280-5925
Facsimile: 240-536-9142

ATTORNEY FOR PLAINTIFF-APPELLANT