

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

MOTION FOR LEAVE TO FILE BRIEF OF *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. IN SUPPORT OF PLAINTIFF-APPELLANT AND
URGING REVERSAL

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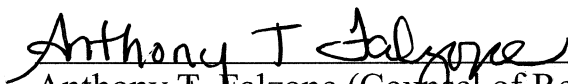
December 28, 2007

Counsel for Amici Curiae

CERTIFICATE OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1 and Federal Circuit Rule 47.4, counsel for *amici curiae* certifies the following:

1. The full names of every amicus party represented by me are: 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. There are no real parties in interest associated with the amicus parties listed.
3. There are no parent corporations or any publicly held companies that own 10 percent or more of the stock of any amicus party listed above.
4. The amicus parties did not appear in the trial Court. The names of all attorneys who will be appearing before this Court on behalf of the amicus parties are Anthony T. Falzone and Christopher K. Ridder, both of whom are employed by the Stanford Law School Center for Internet and Society.


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December 28, 2007

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Amici respectfully move the Court, pursuant to Federal Rule of Appellate Procedure 29(a), for leave to file the brief submitted herewith, as *amici curiae* in support of Plaintiff-Appellant Robert Jacobsen. Mr. Jacobsen has consented to the filing of this brief. Amici attempted to obtain consent to the filing of this brief from Matthew Katzer and KAMIND Associates, but they have refused their consent, necessitating the filing of this Motion for Leave. On December 20, 2007, and on subsequent occasions, counsel for Amici asked counsel for Katzer and KAMIND, pursuant to Federal Circuit Rule 27(a)(5), whether they would file a response to this motion. As of the time of filing, Katzer and KAMIND had not confirmed whether they will file such a response.

Amici 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. are organizations that support, facilitate, and depend upon a robust ecosystem of public licensing. *See* Brief of *Amici Curiae* at 1-5. Public licensing leverages copyright principles to create freedoms for users of copyrighted works that are not present under traditional copyright licensing regimes, while reserving to the copyright owner certain important rights, including in many cases the rights required to preserve those freedoms.

Public licenses, such as the Artistic License, the GNU General Public License (“GPL”), and the Creative Commons licenses, leverage the copyright system in unique ways that encourage innovation and creativity by inviting users to copy, modify and distribute creative works, subject to certain limitations. For example, the GPL has become central to software innovation, inspiring such ambitious projects as GNU/Linux, a computer operating system licensed under the GPL. Creative Commons licenses enable content creators and innovators to mark a wide variety of creative work with the freedoms they intend that creative work to carry. Licensors of those works can thereby easily signal that some (but not all) of the exclusive rights granted by the Copyright Act are dedicated to the public (i.e., “Some Rights Reserved.”). Literally millions of public licensors have depended upon the copyright system securing to them the property protections promised by the copyright system.

Amici's interest in this case arises from a concern regarding the District Court's ruling below, which misinterpreted both the law and the Artistic License at issue in this case. If applied generally to public licensing, the ruling that violation of the terms of the Artistic License sounds in contract, not copyright, could threaten the protections afforded by the copyright system that millions of public licensors have relied on. This is contrary to the premises and expectations that underlie public licensing: that copyright owners who grant permission for some

uses of the work, but not all, may seek redress in copyright infringement when rights not licensed are infringed. Those who choose to license their work for the purpose of innovation should not be penalized with diminished enforcement rights. Rather, they should retain the full array of remedies that other copyright licensors retain.

Amici believe that a friend-of-the-court brief will assist the Court in understanding the important issues at stake in this case, and the consequences that could flow from application of the District Court's decision. The brief principally addresses three topics. The first section describes how public licenses leverage copyright law to promote innovation, and why this leverage should be preserved. The second section discusses why copyright infringement remedies must remain an essential component of public licensing, and the risks posed by the effective forfeiture of copyright that are implied in the District Court's decision. The third section describes in detail why the District Court's ruling was erroneous. Specifically, it discusses the well-established legal principle that someone who acts outside the scope of a copyright license is liable for infringement, and why that principle applies in this case. It also discusses the proper interpretation of the Artistic License in light of the principles of federal copyright law, and describes why the license terms at issue must be interpreted as license conditions, as opposed to contractual covenants.

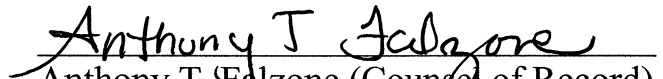
This brief meets the requirements of Federal Rule of Appellate Procedure 29. An amicus brief is appropriate at least “when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)). As the Third Circuit has noted, “[e]ven when a party is very well represented, an amicus may provide important assistance to the court.” *Neonatology Associates, P.A. v. Cmsr. Of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002).

Amici bring to the issues presented in this case a unique perspective that will assist the Court in considering the effects of the decision it must reach. Amici’s brief provides detailed information regarding the role of public licensing, its importance to innovation, and why its unique foundation in our nation’s copyright laws must be preserved. In analyzing the specific facts of this case, Amici describe not only why the district court’s ruling is erroneous, but also how if upheld it could have unintended consequences for public licensing.

Accordingly, Amici present "considerations of fact, law or policy" that are not otherwise being presented by the parties. *National Organization for Women*, 223 F.3d at 617.

Wherefore amici respectfully move that the Court grant leave to file the
Brief of *Amici Curiae* submitted herewith.

Respectfully submitted,


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December 28, 2007

Counsel for Amici Curiae

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v.

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Defendants-Appellees.

ON MOTION

[PROPOSED] ORDER

Upon consideration of the motion of 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. for leave to file an *amicus curiae* brief urging reversal, the Court finds that the proposed brief will assist in the determination of this Appeal. Accordingly, IT IS ORDERED that leave to file an *amicus curiae* brief is GRANTED.

FOR THE COURT

Date: _____

United States Court of Appeals
For the Federal Circuit

CERTIFICATE OF SERVICE

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
2008-1001**

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Plaintiff-Appellant,

v.

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

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I, *Bliss Metz*, 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.

That on the **28th day of December 2007**, I served the within **Motion for Leave to
file Brief of Amici Curiae** in the above captioned matter upon:

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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.

December 28, 2007

Bliss Metz