

2008-1001

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT JACOBSEN,

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US COURT OF APPEALS
FEDERAL CIRCUIT

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.

Response to Defendants-Appellees' Katzer and KAMIND Associates, Inc.'s
Response to Amici Curiae Creative Commons Corporation et al's Motion
for Leave to Participate in Oral Argument

Katzer and KAMIND Associates, Inc. ("Katzer and KAMIND")
oppose Amici Curiae Creative Commons Corporation et al's ("Amici")
Motion for Leave to Participate in Oral Argument. Jacobsen consents.
Because this case involves a matter of first impression of potentially great
significance to Amici, the Court should grant leave for Amici to participate
in oral argument.

A Court may permit an amicus to participate in oral argument. Fed.
R. App. P. Rule 29(g). Courts in the future will look to this Court's ruling in
Jacobsen v. Katzer, and how it addressed the copyright-contract-license

distinction at issue in the appeal. Because the Court may seek guidance from the parties during oral argument on the rule to be used in the future to interpret open source licenses, Amici should be permitted to participate in oral argument. Amici have specialized knowledge in the field of open source software and enforcement of copyrights. Some Amici have drafted open source licenses, including the license at issue in this appeal. Some Amici engage in transactions involving open source software licenses. A rule which this Court adopts may have implications that the parties are unaware of, but that Amici can address. If the Court seeks guidance during oral argument on the rule the Court should adopt, Amici's knowledge of open source software licenses, and policy issues relating to those licenses, will be invaluable to the Court. For these reasons, Jacobsen supports Amici's motion. The Court should grant Amici's motion for leave to participate in oral argument.

Katzer and KAMIND contend that Amici should share Jacobsen's allotted oral argument time, unless extraordinary circumstances exist. Even if this reading of Rule 29(g) is correct, extraordinary circumstances do exist. After Jacobsen discovered that Katzer and KAMIND were using Jacobsen's code in their products, Jacobsen amended his complaint to include causes of action related to copyright. With that amendment, and the motions that

followed, the Jacobsen case evolved from a private dispute, to a matter of first impression for enforcing copyrights in open source software. Again, Amici's unique expertise in open source license will provide invaluable assistance to the Court. To deny Amici the opportunity to participate in oral argument would be to silence any input from Amici on issues raised by the Court during oral argument. Again, for these reasons, the Court should grant leave to permit Amici to participate in oral argument.

Katzer and KAMIND contend that Jacobsen and Amici's arguments are duplicative. They are not. Jacobsen focuses on whether Katzer and KAMIND have a license under any theory. Amici address similar aspects of the district court's decision, but address issues relating to public licenses in general. The Court will benefit from hearing from Amici. Katzer and KAMIND contend that they will be prejudiced if the Court grants additional time so that Amici may participate in oral argument. To the extent that Katzer and KAMIND need more time to respond to Amici's arguments, the Court should grant them an additional 5-10 minutes, and grant Jacobsen 5 minutes to respond to Katzer and KAMIND's and Amici's remarks.

For the reasons stated above, Jacobsen supports Amici's motion for leave to participate in oral argument. The Court should grant leave to permit Amici to participate in oral argument.

Respectfully submitted,

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