

2008-1001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT JACOBSEN, an individual,

Plaintiff-Appellant,

vs.

MATTHEW KATZER, and KAMIND ASSOCIATES, INC., (doing business as KAM
Industries);

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA IN CASE NUMBER C06-1905-JSW,

JUDGE JEFFREY S. WHITE

RESPONSE TO JACOBSEN'S POST-ARGUMENT CITATION OF SUPPLEMENTAL
AUTHORITIES AND ADDITIONAL ARGUMENT

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Matthew Katzer and Kamind Associates, Inc.

May 14, 2008

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Robert Jacobsen v. Matthew Katzer and KAMIND Associates

No. 2008-1001

CERTIFICATE OF INTEREST

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

Appellee 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:

Matthew Katzer and Kamind Associates, 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:

N/A

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:

N/A

4. [X] 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:

Field Jerger LLP, Gorman and Miller, P.C.

5/14/08
Date

Signature of counsel
Scott Serger
Printed name of counsel

**RESPONSE TO JACOBSEN'S POST-ARGUMENT CITATION TO
SUPPLEMENTAL AUTHORITIES AND ADDITIONAL ARGUMENT**

Defendants-Appellees Matthew Katzer and Kamind Associates, Inc.

(Katzer) hereby respond to Plaintiff-Appellant Jacobsen's Citation to Supplemental Authorities, which includes substantial legal argument.

Specht is not relevant to the case at bar because Katzer admits he had actual notice of the Artistic License. *See e.g.* Brief of Appellees at 11; Joint Appendix (JA) at A121, A292. Actual knowledge of the license effectively binds Katzer to the terms of the license and Jacobsen (as the offeror) is estopped from claiming that a binding contract was not formed. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 402 (2nd Cir. 2004); *Cairo, Inc. v. Crossmedia Servs.*, 2005 U.S. Dist. LEXIS 8450 at *13 (N.D. Ca. 2005); *Southwest Airlines Co. v. BoardFirst, LLC*, 2007 U.S. Dist. LEXIS 96230 at *17 (N.D. Tex. 2007).

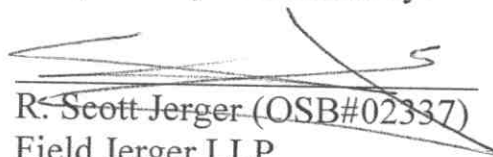
The issue, rather, is whether Katzer's actions exceeded the scope of the license grant and whether the source of Jacobsen's complaint is grounded in a right protected by the Copyright Act. *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d. 1307, 1316 (Fed. Cir. 2005). The Artistic License does not limit *how* the Decoder Definition files *themselves* can be used (*i.e.* copied, modified, or distributed). *See id.* Rather, the attribution requirement and the choice of one additional action at 3(a)-(d) and 4(a)-(d), chosen by the licensee, are

restrictions beyond the scope of the exclusive copyright rights. In the words of Jacobsen, these restrictions are “for having to give credit, and tell people where it came from and/or where to get their own copy of the software.” JA at A292.

These attribution requirements, like the covenant discussed in *Storage Tech. Corp.* above, are not related to any of the exclusive copyright rights. Therefore, these restrictions are not conditions on the copyright license grant, or a limitation on the scope of the copyright license itself. Rather they are additional, non-copyright related covenants incorporated into the copyright license grant. Therefore, they are not enforceable under federal copyright law.

Dated: May 14, 2008

Respectfully submitted by:


~~R. Scott Jerger (OSB#02337)~~

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