

2009-1352

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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ROBERT JACOBSEN,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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Appeal from the United States District Court for the  
Northern District of California in case No. 06-CV-1905,  
Judge Jeffrey S. White

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**BRIEF OF *AMICUS CURIAE* SOFTWARE FREEDOM LAW CENTER  
IN SUPPORT OF APPELLANT**

June 15, 2009

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## CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* certifies the following:

1. The full name of every party or amicus represented by me is: Software Freedom Law Center, 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: Not Applicable.
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. 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:

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## TABLE OF CONTENTS

CERTIFICATE OF INTEREST .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF INTEREST <i>OF AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	4
I.    DEVELOPERS USE FOSS LICENSES TO PROMOTE FREEDOM .....	4
II.   LICENSE VIOLATION HARMS COMMUNITIES OF DEVELOPERS....	6
III.  LICENSE VIOLATION INJURES THE RELATIONSHIP BETWEEN FOSS DEVELOPERS AND THEIR USERS.....	8
IV.  LICENSE VIOLATION HARMS THE PUBLIC INTEREST.....	10
V.   THE HARM CAUSED TO FOSS DEVELOPERS BY COPYRIGHT INFRINGEMENT FROM LICENSE VIOLATION MEETS <i>WINTER'S</i> REQUIREMENT OF IRREPARABLE INJURY.....	12

CONCLUSION .....14

CERTIFICATE OF COMPLIANCE .....15

CERTIFICATE OF SERVICE .....16

## TABLE OF AUTHORITIES

### **Cases**

<u>Am. Hosp. Ass'n v. Harris</u> , 625 F.2d 1328, 1331 (7 <sup>th</sup> Cir. 1980).....	13
<u>Jacobsen v. Katzer</u> , 535 F.3d 1373, 1381–82 (Fed. Cir. 2008).....	14
<u>Wedel v. United States</u> , 2 F.2d 462, 463 (9th Cir. 1924).....	12
<u>Wildmon v. Berwick Universal Pictures</u> , 983 F.2d 21, 24 (5 <sup>th</sup> Cir. 1992).....	9, 13
<u>Winter v. Natural Res. Def. Council, Inc.</u> , 129 S.Ct. 365, 374 (2008).....	12

### **Other Materials**

The Free Software Foundation, GNU General Public License v2.0 (1991).....	4
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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is filed on behalf of the Software Freedom Law Center (“SFLC”).\* SFLC is a not-for-profit legal services organization that provides legal representation and other law-related services to protect and advance Free and Open Source Software (FOSS), defined as software distributed under terms that give recipients freedom to copy, modify and redistribute the software. SFLC provides pro bono legal services to non-profit and individual FOSS developers, all of whom distribute software under FOSS licenses. SFLC also helps the general public better understand the legal aspects of FOSS.

FOSS is a valuable public good, and copyright law should preserve the incentives, interest, and choices of FOSS developers. Because these incentives are primarily dependent upon mutual respect for and enforcement of the communal norms defined in FOSS licenses, damages are typically an insufficient remedy for infringement of FOSS copyrights. The availability of injunctive relief is necessary to enforce those norms as they are embodied in FOSS copyright licenses. The district court's reasoning in this case threatens to broadly foreclose injunctive relief

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\* *Amicus* has filed a contemporaneous motion seeking leave to file this brief. No part of this brief was authored by counsel for any party and no party, person, or organization contributed to this brief besides *amicus* and its counsel.

to FOSS developers, stripping them of effective remedy and dampening their motivation to contribute to the common good. Thus, SFLC submits this brief to express support of Plaintiff-Appellant's position and the reasoning of this Court in the prior appeal.

This brief is submitted with the consent of the Plaintiff-Appellant. Consent of Defendant-Appellee was requested, but no response was received.

## **SUMMARY OF ARGUMENT**

The goal of Free and Open Source Software (FOSS) communities is to create and distribute software exclusively under terms that perpetuate freedom. When software written by these communities is distributed without regard for those terms, the product is turned directly against the developers' purpose—rather than spreading free software, the violator abuses the efforts of FOSS developers, spreading non-free software and depriving other users of the rights the developers intended them to have. This directly and immediately harms the developers, and also undermines the community's unifying values, working a harm as diffuse and complex as the relationships that compose the community. These harms cannot be adequately quantified or compensated, and thus the traditional equitable view is that they must be prevented. The injured developers require and deserve injunctive relief because money damages alone cannot redress the injury caused by the infringement of their copyrights.

## **ARGUMENT**

### **I. DEVELOPERS USE FOSS LICENSES TO PROMOTE FREEDOM**

Developers apply FOSS licenses to their software to grant others the freedom to use, copy, modify and redistribute the software for no cost. In return, they require those who take advantage of their generous terms to perpetuate that freedom when they do so. In many FOSS licenses this purpose is explicit; the most popular license says that it “is intended to guarantee your freedom to share and change free software—to make sure the software is free for all its users.” The Free Software Foundation, GNU General Public License v2.0 (1991), at <http://www.gnu.org/licenses/gpl-2.0.html> [hereinafer GPL].

These freedoms are not sentimental or abstract. They allow downstream developers to build atop FOSS instead of starting from scratch (a process that is often a cost-prohibitive barrier to entry), and they give users real, immediate power. With access to source code and the right to modify it, those downstream developers and users can make the software more useful, remake it into something wholly new, or even turn it into a competing product. For example, there are dozens of successful operating systems built on top of Linux, the operating system "kernel" included in GNU/Linux products sold by companies such as Red Hat,

Novell, and Nokia, as well as non-commercial operating system distributions such as Debian and Ubuntu. Because these rights that FOSS developers share so freely are ones that competitive entities regard as valuable property, proprietary software publishers do not offer them to end users at any price.<sup>1</sup> In commercial software contracts, they command substantial royalties. FOSS developers, however, typically forgo royalties and instead take their compensation in the spread of freedom.

The positive freedoms granted in FOSS licenses are protected by corresponding restrictions which preserve the same freedoms for the developers and all users. For example, GPL licensees must: (i) grant to others the same rights they received; (ii) include a copy of the license when they distribute the software; (iii) make recipients aware of their rights; and (iv) license programs derived from the original program under similarly free terms. These requirements ensure that the work of all contributors remains free; preserving that freedom and sharing it with others is the only consideration demanded of licensees for exercise of all these rights in the software.

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<sup>1</sup> “Proprietary” here means the opposite of “free and open source.”

FOSS licenses (and the freedoms they grant) are devised to be passed among people—developers and users alike—without limit, allowing all recipients to redistribute the software and many to add value. Cutting off this progression by distributing under non-free license terms curtails the freedom not just of the initial recipients but of the unknown number of others who will never receive the software from them or have the opportunity to build upon the enhanced software. In turn, the initial developers never realize the benefit of those lost contributions.

Those who violate the conditions of FOSS licenses appropriate all the value of the software, but deny its authors the sole object of their efforts, the freedom embodied in and protected by the FOSS license. This misappropriation destroys the very purpose for which the developers write the software. In this way, every violation harms the developers directly and immediately. In the proprietary software licensing context, the harm done by an infringer is the loss of license revenue to the copyright holder. In the FOSS context, the infringer harms every present and future possessor or developer of every copy of the software.

## **II. LICENSE VIOLATION HARMS COMMUNITIES OF DEVELOPERS**

Unlicensed and non-free distribution of FOSS harms the developers not only by directly subverting their efforts, but also by damaging the mechanism of

cooperation by which they produce software. FOSS developers work within communities in which almost all work is strictly voluntary, i.e., not financially compensated. If developers' work is exploited, their choice to participate in the community is reduced to a prisoner's dilemma: anyone can defect from the common terms, receiving the benefit of others' cooperation and also punishing it as described above. Over time, the community will be deprived of contributions, as developers are discouraged from contributing by repeated exploitation. This harm cannot be compensated by money damages, as no amount of money can reconstitute a community.

Other developers in the affected community suffer in several different ways. First, they lose the software enhancements the contributions would add. As a result, they cannot build upon the missing contributions or have their own contributions improved by others. The software suffers, as do the developers and users who depend on its quality and continued improvement.

Second, the community's collaborative spirit suffers because it depends upon mutual trust, which the violation undermines. FOSS is produced by mass collaboration, often among people who have never met face to face, heard each other's voices, or even seen pictures of one another. It is difficult to build and

maintain trust when the terms for cooperation can be flouted without reprisal. FOSS licenses enforce a minimal set of common values and goals, and allow strangers to collaborate without fear that their FOSS contributions will simply be hidden, packaged and sold without their consent.

These harms to the developers' interest in productive, trustworthy development communities are impossible to quantify; their manifestations are as varied as the motivations of individual members and the relationships between them. Therefore, money damages are incapable of compensating for them, and injunctive relief is necessary and appropriate.

### **III. LICENSE VIOLATION INJURES THE RELATIONSHIP BETWEEN FOSS DEVELOPERS AND THEIR USERS**

FOSS copyright licenses are not just dry recitations of grants and conditions—they are themselves advocacy and outreach efforts, and they define the relationships between participants in a community. By giving people freedom, developers make a potent argument about the value of that freedom, and they invite users to join them in extending that freedom to others by making more FOSS. FOSS licensees do not only submit to the legal boundaries of the license, they also by implication adopt its political and non-economic principles.

A license violation destroys the invitation. It converts free software into merely software; participants in a community into merely end users. Because every user is a potential volunteer, interrupting the connection between projects and users deprives the projects of their most valuable resource, people's time and attention. Over time, renewing this resource is the difference between the projects that are successful and those that are defunct.

Projects cannot buy volunteers, goodwill, or word-of-mouth, which is why they secure user freedoms through license conditions rather than contractual covenants. Copyright doctrine recognizes that money damages are often insufficient in infringement cases, and favors injunctive relief when the resulting harm is noneconomic. See Wildmon v. Berwick Universal Pictures, 983 F.2d 21, 24 (5<sup>th</sup> Cir. 1992). To FOSS developers, the cost of violations far exceeds any financial price.

Because money is rarely a means and never an end in FOSS communities, money damages can never repair the harm done when a community's message to potential new developers and FOSS adherents is lost as a result of a license violation. This unrealized potential for growth cannot be estimated, much less measured in dollars. For these reasons, injunctive relief is the only way to protect

FOSS developers when their copyright licenses are violated.

#### **IV. LICENSE VIOLATION HARMS THE PUBLIC INTEREST**

FOSS development provides enormous benefit to the public. For the average user, it provides an alternative to the royalty-based, unmodifiable, proprietary software that is the only other option in the marketplace. Already, a freely modifiable and free-of-cost FOSS program is available to perform any task commonly required by home and enterprise computer users. They can share these programs freely, enabling them to collaborate without concern for incompatibility. And they can access the development process and work with others to improve the quality and functionality of the software.

Businesses that use FOSS also have greater choice in selecting a software service provider. Many companies—including Canonical, Red Hat, and Oracle—package GNU/Linux operating system distributions for enterprise users, but those users are not bound to their initial suppliers for support. Because an enterprise user, like all users, has the right to receive the source code to the FOSS running its systems, it can turn elsewhere or to itself for support if its vendor proves unsatisfactory.

Contrary to a popular myth, FOSS developers don't just produce low-cost clones of proprietary software. FOSS is qualitatively different in that it favors open standards and data portability where proprietary vendors often choose lock-in. FOSS programs rarely come with the restrictive end user license agreements that are standard parts of almost every proprietary software package. Dispensing with collecting money also allows FOSS communities to avoid the need to control the flow of software and data, which means FOSS software always seeks to facilitate novel facilities, even in the absence of an ability to tax them.

Consumer electronics manufacturers use FOSS to develop products and bring them to market more quickly.<sup>2</sup> The routers and modems in our homes and the cellphones in our pockets all benefit from enhanced features at a reduced price because they are built on FOSS. By eliminating software development and licensing costs, more companies can competitively produce software-embedded appliances. This makes markets more competitive and new technology available to a broader range of consumers.

FOSS lowers barriers to entry for businesses by reducing software and hardware costs. This is especially significant in developing economies, where the

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<sup>2</sup> FOSS is found pervasively in products sold by Cisco, Palm, Google, Nokia, and countless other companies.

cost of proprietary software licenses is often prohibitive. By providing world-class software at zero cost, the FOSS community levels the playing field between fledgling businesses and large, established market leaders.

Given the broad range of individuals, businesses, and entire industries that benefit from FOSS, it is impossible to quantify the ultimate harm caused when infringement dismantles the chain of FOSS development. Because developers are motivated to contribute to FOSS by their belief in freedom, the loss of their contributions is irrecoverable: the work they do, on the terms they offer, is not available elsewhere at any price. The law of public nuisance has long recognized that a swift injunction is the only effective remedy for such harm to the public interest. See *Wedel v. United States*, 2 F.2d 462, 463 (9th Cir. 1924).

#### **V. THE HARM CAUSED TO FOSS DEVELOPERS BY COPYRIGHT INFRINGEMENT FROM LICENSE VIOLATION MEETS *WINTER'S* REQUIREMENT OF IRREPARABLE INJURY**

The Supreme Court set out the standard for a preliminary injunction in *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 374 (2008):

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

As detailed above, FOSS license violations cause two immediate harms: they deprive the developer of the rights reserved in the license, and they sever the developer's legal relationship with other licensees who never become aware of their rights. These harms are not merely likely, but certain, because they are effected at the instant the violation occurs. They are irreparable because they are noneconomic and so damages cannot compensate for them. See Wildmon v. Berwick Universal Pictures, 983 F.2d 21 24(5th Cir. 1992). Nor can damages remedy the erosion of the development community. Moreover, though this harm too begins immediately, it is compounded by time so that its ultimate scope is uncertain at the outset. Therefore, the community's resulting loss "cannot [be] remed[ied] following a final determination on the merits," Am. Hosp. Ass'n v. Harris, 625 F.2d 1328, 1331 (7<sup>th</sup> Cir. 1980), and is irreparable for that reason as well.

Because all of these harms are inevitable consequences of the copyright infringement resulting from FOSS license violations, developers always suffer irreparable harm when their software is distributed in contravention of the license terms. Because this harm is also damaging to the public's interest in the availability of FOSS, an injunction is also in the public interest.

## CONCLUSION

For these reasons we agree with this Court's prior statement in this case:

Copyright licenses are designed to support the right to exclude; money damages alone do not support or enforce that right. The choice to exact consideration in the form of compliance with the open source requirements of disclosure and explanation of changes, rather than as a dollar-denominated fee, is entitled to no less legal recognition. Indeed, because a calculation of damages is inherently speculative, these types of license restrictions might well be rendered meaningless absent the ability to enforce through injunctive relief.

Jacobsen v. Katzer, 535 F.3d 1373, 1381–82 (Fed. Cir. 2008).

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I do hereby certify pursuant to Federal Rule of Appellate Procedure 32(a)(7) (B) that the foregoing Brief of *Amicus Curiae* conforms to Federal Rule of Appellate Procedure 32(a)(5), 32(a)(6), and 32(a)(7).

I further certify that according to the word count of the word processing system used to prepare this brief, OpenOffice.org Writer 2.4.1, the relevant portion of this brief contains 2,501 words, is double-spaced (except for headings) and appears in 14-point proportional Times New Roman font.

June 15, 2009

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I, Daniel B. Ravicher, hereby certify that I caused 12 copies, including original, of the foregoing:

**Brief of *Amicus Curiae* Software Freedom Law Center  
in Support of Plaintiff-Appellant**

to be sent for hand filing on the 15th Day of June, 2009 to:

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I further certify that two copies of the foregoing Brief of Amicus Curiae were served on the 15th Day of June, 2009, by Federal Express on the following counsel of record:

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