

Jacobsen v. Katzer – Offering Guidance on the Enforceability of Open Source Software Licenses

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Although open source software has been used by computer programmers for decades, there has been almost no litigation addressing the enforceability of open source software licenses. Recently the Software Freedom Law Center brought a number of actions on behalf of the primary program developers of BusyBox for alleged violations of version 2 of the General Public License (GPL), one of the most popular open source licenses. As of October 2008, all but one of these actions had been settled out of court, with the last one still pending. This past August a court finally set precedent in the area of public or open source licenses and result is encouraging for those who support the open source movement.

In *Jacobsen v. Katzer*, the United States Court of Appeals for the Federal Circuit exercised appellate jurisdiction to hear a case where the plaintiff brought suit alleging copyright infringement. Jacobsen, the copyright holder of a program used to run model trains, brought the action against a competitor and sought a preliminary injunction. Overruling the district court's denial of the preliminary injunction, the court upheld the enforceability of the Artistic License, a type of open source license. This license included certain features, such as requirements that downstream users attribute the original code to the authors who created it, that they identify any modified code in the derivative work, and that they agree to specific terms before downloading the program. There are the kinds of features that make open source licenses attractive to programmers. The public nature of the agreements promotes the sharing of ideas and so programs are improved and modified with greater efficiency than if the code was protected by a traditional copyright license. The court found the features of the Artistic License sufficient to constitute conditions, not merely covenants. The conditions identified boundaries which limited licensees' behavior and so the court deemed the open source license limited in scope. Consequently, licensees could violate those terms giving the copyright holder the ability to file for infringement. Thus, when the defendants violated the terms of the Artistic License, Jacobsen was entitled to bring an action for copyright infringement and not merely breach of contract.

This holding is extremely encouraging for supporters of the open source movement. While there is still a paucity of litigation surrounding these licenses, *Jacobsen* has established precedent in favor of enforcement of the unique features that renders open source licenses so attractive.

Sources:

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