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The Legality of Free and Open Source Software Licences: The Case of Jacobsen v. Katzer

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Cover Page Footnote

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The Legality of Free and Open Source Software Licences: The Case of *Jacobsen v. Katzer* •

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Abstract:

In August 2008 one of, if not the most, influential Intellectual Property courts in the USA known as the Court of Appeals for Federal Circuit upheld the validity of a free and open source software licence known as the Artistic Licence.

The case is significant because up until this point there has been little judicial discussion of the legal operation of this new type of copyright licensing that is sweeping across the world fuelled by the ubiquity of the Internet.

The decision in Robert Jacobsen v. Matthew Katzer and Kamind Associates, Inc. 2008 U.S. App. LEXIS 17161 (Fed. Cir. 2008) issued on 13 August 2008 provides a unique and welcomed insight into the legal operation of free and open source software licences and by analogy Creative Commons styled open content licences. This article analyses the judgment and provides commentary on its reasoning.

A. INTRODUCTION

In the last ten years "open source" has become a paradigm for thinking about innovation. While its origin can be found in the everyday activity of sharing knowledge in order to learn how to accomplish things, the application of these ideas in the area of technology and innovation have in recent times been most clearly associated with Richard Stallman and the Free Software Foundation. Stallman after a frustrating experience trying to fix a printer in his lab launched what is known as the free and open source software movement. The idea is that if

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we share and distribute the human readable software code (source code) and not just the machine readable code (binary code) then we will be able to understand how the software works more quickly and thereby take the necessary action. To achieve this goal Stallman employed the long established legal notion of copyright (and its more recent application to computer software code) along with a copyright licence or permission that promoted sharing and openness of source code but on the condition that improvements be shared on further distribution. As the default rule in copyright law is that you need permission to use material in a way that comes within their exclusive rights of the copyright owner (e.g. reproduction and communication to the public) the permission to use – the licence – was combined with conditions on use that required a commitment to further developing openness. "If you use my source code and improve upon it and then distribute it you should share your source code with the person you are distributing the software to – in essence the community." This licence known as the GNU General Public Licence (GPL) is said to be a copyleft licence as it licences copyright not to restrict its use but in a way that promotes and further expands openness and reuse. To some this amounts to turning copyright on its head in the name of community of action and thus the name copyleft.(1)

Many other licences emerged along with the GNU GPL. The Berkeley Software Distribution (BSD) licence allows the source code distributed under it to be reused in any way so long as there is a notice attributing copyright ownership, the BSD disclaimer is included and there is no attempt to suggest endorsement of the derivative work by the organisation or individual who developed the original code without their written permission.(2) This is a more permissive and less restrictive licence than the GNU GPL.

(1) On the notion of free and open source software (FOSS), see : R. Dixon, *Open Source Software Law* (2004); R. Van Wendel (ed), *Protecting the Virtual Commons* (2002); R. M. Stallman and J. Gay, *Free Software, Free Society: Selected Essays of Richard M. Stallman* (2002) <http://www.gnu.org/philosophy/fsfs/rms-essays.pdf>; L. Rosen, *Software Freedom and Intellectual Property Law* (2004) <http://www.rosenlaw.com/oslbook.htm>; B. Fitzgerald and G. Bassett (eds.), *Legal Issues Relating to Free and Open Source Software*, (2002) <http://www.law.qut.edu.au/files/open_source_book.pdf>; B. Fitzgerald and N. Suzor, (2005) 'Legal Issues for the Use of Free and Open Source Software in Government'. *Melbourne University Law Review* 29 (2): 412-447 <http://www.law.qut.edu.au/staff/lsstaff/fitzgerald2.jsp>

(2) Nelson, "Open Source Initiative OSI – The BSD License – Licensing" *Open Source* (31 October 2006), online: www.opensource.org/licenses/bsd-license.php.

From the examples found in software development, organisations like Creative Commons developed licences to promote the notion of free culture or open content. They once again used the legal institution of copyright combined with copyright licences to condition reuse that would promote openness and access. Creative Commons licences allow content to be licensed to the world on the provision that Attribution (BY) is given and with the additional yet optional conditions of Non Commercial Use (NC), Share Alike (SA), and No Derivatives (ND). (3)

Today there are numerous software and content products that are licensed through free and open copyright licences – much of it underpinning and implemented in the open and distributed world of the Internet. The word "free" in this context means not "free as in beer" but "free as in speech" or "freedom to access and reuse" .(4)

In August 2008 one of, if not the most, influential IP courts in the US known as the Court of Appeals for Federal Circuit upheld the validity of a free and open source software licence known as the Artistic Licence.(5) The case is significant because up until this point there has been little judicial discussion(6) of the legal operation of this new type of copyright licensing that is sweeping across the world fuelled by the ubiquity of the Internet. The decision in *Robert Jacobsen v. Matthew Katzer and Kamind Associates, Inc.*(7) issued on 13 August 2008 has changed all of that and will be necessary reading for anyone in the law, technology and innovation sectors.

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(3) "Creative Commons (CC) is a non-profit organization devoted to expanding the range of creative works available for others to build upon legally and to share", Creative Commons FAQ <http://wiki.creativecommons.org/FAQ>.

(4) The Free Software Definition <http://www.gnu.org/philosophy/free-sw.html>; Sam Williams, *Free as in Freedom, Richard Stallman's Crusade for Free Software*, (2002) <http://oreilly.com/openbook/freedom/>

(5) Version 1.0 and Version 2.0 of the Artistic Licence are certified as "open source" by the Open Source Initiative <http://www.opensource.org/licenses/alphabetical>. According to the Free Software Foundation Version 1.0 of the Artistic Licence is not regarded as a free software licence as it "is too vague": <http://www.fsf.org/licensing/licenses/index_html#ArtisticLicense> JMRI, below note 10,appears to be licensed under the Artistic Licence Version 1.0.

(6) See the German decision in '*Harald Welte vs. Sitecom Deutschland GmbH*', <http://www.groklaw.net/article.php?story=20040725150736471>

(7) *Jacobsen v. Katzer* 2008 U.S. App. LEXIS 17161 (Fed. Cir. Aug. 13, 2008). [Jacobsen].

B. BACKGROUND TO DISPUTE

In March 2006, Jacobsen, a physics professor at the University of California, Berkeley, filed a lawsuit against Katzer and his company, Kamind Associates Inc[8] (trading as 'Kam' Industries), claiming that Kam was distributing a commercial software program that incorporated their software code,[9] which Jacobsen had developed and licensed through a free and open source software licence.[10] Jacobsen accused Kam, which "developed commercial software products for the model train industry and hobbyists … [of] copying certain materials from Jacobsen's website and incorporating them into one of Kam's software packages without following the terms of the Artistic License" .[11] To this end he brought an

(8) Katzer was CEO and Chairman of the Board of Directors of Kamind Associates Inc. See *Jacobsen v. Katzer* 2007-1 Trade Cas. (CCH) P 75, 589 at 1. "In the district court, Jacobsen's operative complaint against Katzer/Kamind included not only his claim for copyright infringement, but also claims seeking a declaratory judgment that a patent issued to Katzer [was] not infringed by Jacobsen and [was] invalid". Ibid at 5. [Jacobsen 1].

(9) John Markoff, 'Ruling is a Victory for Supporters of Free Software', *New York Times* <http://www.nytimes.com/2008/08/14/technology/14commons.html> at 3 September 2008.

(10) *Jacobsen*, above note 7 at 1376:
Jacobsen managed an open source software group called Java Model Railroad Interface (JMRI) that had developed an application called DecoderPro, which allowed model railroad enthusiasts to use their computers to program the decoder chips that control model trains. DecoderPro files were available for download and use by the public free of charge from an open source incubator website called SourceForge; Jacobsen maintained the JMRI site on SourceForge. The downloadable files contained copyright notices and refer the user to a COPYING file, which clearly sets forth the terms of the Artistic License. Katzer/Kamind offered a competing software product, Decoder Commander, which was also used to program decoder chips. During development of Decoder Commander, one of Katzer/Kams predecessors or employees is alleged to have downloaded the decoder definition files from DecoderPro and used portions of these files as part of the Decoder Commander software. The Decoder Commander software files that used DecoderPro definition files did not comply with the terms of the Artistic License. Specifically, the Decoder Commander software did not include (1) the authors names, (2) JMRI copyright notices, (3) references to the COPYING file, (4) an identification of SourceForge or JMRI as the original source of the definition files, and (5) a description of how the files or computer code had been changed from the original source code. The Decoder Commander software also changed various computer file names of DecoderPro files without providing a reference to the original JMRI files or information on where to get the Standard Version."

(11) *Ibid*. at 1375.
The Artistic License grants users the right to copy, modify, and distribute the software: provided that [the user] insert a prominent notice in each changed file stating how and when [the user] changed that file, and provided that [the user] do at least ONE of the following:

action for copyright infringement and sought a preliminary injunction. At first instance the District Court in denying the preliminary injunction explained:

> "The plaintiff claimed that by modifying the software the defendant had exceeded the scope of the license and therefore infringed the copyright. Here, however, the JMRI Project license provides that a user may copy the files verbatim or may otherwise modify the material in any way, including as part of a larger, possibly commercial software distribution. The license explicitly gives the users of the material, any member of the public, the right to use and distribute the [material] in a more-or-less customary fashion, plus the right to make reasonable accommodations. The scope of the nonexclusive license is, therefore, intentionally broad. The condition that the user insert a prominent notice of attribution does not limit the scope of the license. Rather, Defendants' alleged violation of the conditions of the license may have constituted a breach of the nonexclusive license, but does not create liability for copyright infringement where it would not otherwise exist".(12)

The District Court held that while Jacobsen might have an action for breach of contract (the non exclusive licence) there was no action for copyright infringement based on a breach of the terms of the Artistic License. Further they explained that while establishing a likelihood of success on the merits of a copyright infringement claim would create a presumption of irreparable harm and thereby support a preliminary injunction there was no similar presumption that was created by the law for a breach of contract.

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a) place [the user's] modifications in the Public Domain or otherwise make them Freely Available, such as by posting said modifications to Usenet or an equivalent medium, or placing the modifications on a major archive site such as ftp.uu.net, or by allowing the Copyright Holder to include [the user's] modifications in the Standard Version of the Package.
b) use the modified Package only within [the user's] corporation or organization.
c) rename any non-standard executables so the names do not conflict with the standard executables, which must also be provided, and provide a separate manual page for each nonstandard executable that clearly documents how it differs from the Standard Version, or
d) make other distribution arrangements with the Copyright Holder. *Ibid.* at 1380

(12) *Jacobsen v. Katzer* 2007 U.S. Dist. LEXIS 63568 (N.D. Cal. Aug. 17, 2007) at 19. [*Jacobsen No. 2*].

C. THE APPEALS COURT

Jacobsen appealed this decision arguing, he did have an action for copyright infringement.

1) Nature of the Licensing Model

The Appeals Court commenced its analysis by examining the nature and scope of this new form of "public" licensing:

> "Public licenses, often referred to as open source licenses, are used by artists, authors, educators, software developers, and scientists who wish to create collaborative projects and to dedicate certain works to the public. Several types of public licenses have been designed to provide creators of copyrighted materials a means to protect and control their copyrights. Creative Commons, one of the amici curiae, provides free copyright licenses to allow parties to dedicate their works to the public or to license certain uses of their works while keeping some rights reserved.[13]"

The Appeals Court also acknowledged the important role these licences are playing in a wide range of endeavours:

> Open source licensing has become a widely used method of creative collaboration that serves to advance the arts and sciences in a manner and at a pace that few could have imagined just a few decades ago. For example, the Massachusetts Institute of Technology (MIT) uses a Creative Commons public license for an OpenCourseWare project that licenses all 1800 MIT courses. Other public licenses support the GNU/Linux operating system, the Perl programming language, the Apache web server programs, the Firefox web browser, and a collaborative web-based encyclopedia called Wikipedia. Creative Commons notes that, by some estimates, there are close to 100,000,000 works licensed under various Creative Commons licenses. The Wikimedia Foundation, another of the amici curiae, estimates that the Wikipedia website has more than 75,000 active contributors working on some 9,000,000 articles in more than 250 languages.[14]

Further the Appeals Court explained the rationale and operation of open source software projects:

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(13) *Jacobsen*, supra note 7 at 1378.

(14) *Ibid*.

> "Open Source software projects invite computer programmers from around the world to view software code and make changes and improvements to it. Through such collaboration, software programs can often be written and debugged faster and at lower cost than if the copyright holder were required to do all of the work independently. In exchange and in consideration for this collaborative work, the copyright holder permits users to copy, modify and distribute the software code subject to conditions that serve to protect downstream users and to keep the code accessible. By requiring that users copy and restate the license and attribution information, a copyright holder can ensure that recipients of the redistributed computer code know the identity of the owner as well as the scope of the license granted by the original owner. The Artistic License in this case also requires that changes to the computer code be tracked so that downstream users know what part of the computer code is the original code created by the copyright holder and what part has been newly added or altered by another collaborator".(15)

Importantly the Appeals Court also highlighted the benefits of the open source methodology:

> "Traditionally, copyright owners sold their copyrighted material in exchange for money. The lack of money changing hands in open source licensing should not be presumed to mean that there is no economic consideration, however. There are substantial benefits, including economic benefits, to the creation and distribution of copyrighted works under public licenses that range far beyond traditional license royalties. For example, program creators may generate market share for their programs by providing certain components free of charge. Similarly, a programmer or company may increase its national or international reputation by incubating open source projects. Improvement to a product can come rapidly and free of charge from an expert not even known to the copyright holder. The Eleventh Circuit has recognized the economic motives inherent in public licenses, even where profit is not immediate. See *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1200 (11th Cir. 2001) (Program creator derived value from the distribution [under a public license] because he was able to improve his Software based on suggestions sent by end-users. . . . It is logical that as the Software improved, more end-users used his Software,

(15) *Ibid.* at 1378-79.

thereby increasing [the programmers] recognition in his profession and the likelihood that the Software would be improved even further)." (16)

2) The Arguments

Jacobsen's claim to be the copyright owner was not challenged nor was the fact that software code was copied. Rather Kam argued that there was no infringement because they had a licence. The Appeals Court explained that:

> "[t]he heart of the argument on appeal concerns whether the terms of the Artistic License are conditions of, or merely covenants to, the copyright license." A series of US cases has held that where "a copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement and can sue only for breach of contract(17) ... [i]f, however, a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement.(18)" Therefore if the terms of the Artistic Licence were "both covenants and conditions, they …[could] .. serve to limit the scope of the license and .. [be] .. governed by copyright law … [whereas] … [i]f they are merely covenants, by contrast, they are governed by contract law.(19)" The District Court had not expressly resolved this issue simply acting as though the limitations in the Artistic License were contractual covenants rather than conditions of the copyright license".(20)

The Appeals Court summarised argument on this issue as follows:

> "Jacobsen argues that the terms of the Artistic License define the scope of the license and that any use outside of these restrictions is copyright infringement. Katzer/Kamind argues that these terms do not limit the scope of the license and are merely covenants providing contractual terms for the use of the materials, and that his violation of them is neither compensable in damages nor subject to injunctive relief. Katzer/Kamind's argument is premised upon the assumption that Jacobsen's copyright gave him no economic rights because he made his computer code available to the public at no charge. From this assumption, Katzer/Kamind argues that

(16) *Ibid.* at 1379.

(17) *Sun Microsystems, Inc., v. Microsoft Corp.* 188 F.3d 1115, 1121 (9th Cir. 1999) [Sun Microsystems]; *Graham v. James* 144 F.3d 229, 236 (2d Cir. 1998) [Graham].

(18) See *S.O.S., Inc. v. Payday, Inc.* 886 F.2d 1081, 1087 (9th Cir.1989).

(19) See *Graham* 144 F.3d at 236-37; *Sun Microsystems* 188 F.3d at 1121.

(20) *Jacobsen, above note 7 at 1380.*

> copyright law does not recognize a cause of action for non-economic rights, relying on *Gilliam v. ABC*, 538 F.2d 14, 20-21 (2d Cir. 1976) (American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal rights of authors".(21)

3) The Artistic Licence

To resolve the issue the Appeals Court said it was necessary to consider the actual terms of the Artistic Licence. It noted that the "Artistic License states on its face that the document creates conditions" whereby it says: "The intent of this document is to state the *conditions* under which a Package may be copied." The Court went on to say that "[t]he Artistic License also uses the traditional language of conditions by noting that the rights to copy, modify, and distribute are granted 'provided that' the conditions are met" and that under California contract law, 'provided that' typically denotes a condition.(22)

> The Appeals Court further explained that "[t]he conditions set forth in the Artistic License are vital to enable the copyright holder to retain the ability to benefit from the work of downstream users" (23). They added that by requiring downstream developers who modify and distribute the code to provide notice of the original source files the copyright owner puts in place a mechanism for letting downstream users know about the collaborative project based at Source Forge and allows them to join in.

In disposing of the case the Appeals Court reasoned:

> "The District Court interpreted the Artistic License to permit a user to modify the material in any way and did not find that any of the provided that limitations in the Artistic License served to limit this grant. The District Court's interpretation of the conditions of the Artistic License does not credit the explicit restrictions in the license that govern a downloader's

(21) *Ibid.* at 1381-81.

(22) Ibid at. 1381
See e.g., Diepenbrock *v. Luiz* 159 Cal. 716 (1911) (interpreting a real property lease reciting that when the property was sold, this lease shall cease and be at an end, *provided that* the party of the first part shall then pay [certain compensation] to the party of the second part; considering the appellants interesting and ingenious argument for interpreting this language as creating a mere covenant rather than a condition; and holding that this argument cannot change the fact that, attributing the usual and ordinary signification to the language of the parties, *a condition* is found in the provision in question) (emphases added).

(23) *Ibid.*

right to modify and distribute the copyrighted work. The copyright holder here expressly stated the terms upon which the right to modify and distribute the material depended and invited direct contact if a downloader wished to negotiate other terms. These restrictions were both clear and necessary to accomplish the objectives of the open source licensing collaboration, including economic benefit. Moreover, the District Court did not address the other restrictions of the license, such as the requirement that all modification from the original be clearly shown with a new name and a separate page for any such modification that shows how it differs from the original. Copyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material. As the Second Circuit explained in *Gilliam v. ABC*, 538 F.2d 14, 21 (2d Cir. 1976), the unauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright. 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. ….

The Court went on to explain:

In this case, a user who downloads the JMRI copyrighted materials is authorized to make modifications and to distribute the materials provided that the user follows the restrictive terms of the Artistic License. A copyright holder can grant the right to make certain modifications, yet retain his right to prevent other modifications. Indeed, such a goal is exactly the purpose of adding conditions to a license grant. The Artistic License, like many other common copyright licenses, requires that any copies that are distributed contain the copyright notices and the COPYING file. …

Finally it noted:

It is outside the scope of the Artistic License to modify and distribute the copyrighted materials without copyright notices and a tracking of modifications from the original computer files. If a downloader does not assent to these conditions stated in the COPYING file, he is instructed to make other arrangements with the Copyright Holder. Katzer/Kamind did not make any such other arrangements. The clear language of the Artistic

> License creates conditions to protect the economic rights at issue in the granting of a public license. These conditions govern the rights to modify and distribute the computer programs and files included in the downloadable software package. The attribution and modification transparency requirements directly serve to drive traffic to the open source incubation page and to inform downstream users of the project, which is a significant economic goal of the copyright holder that the law will enforce. Through this controlled spread of information, the copyright holder gains creative collaborators to the open source project; by requiring that changes made by downstream users be visible to the copyright holder and others, the copyright holder learns about the uses for his software and gains others knowledge that can be used to advance future software releases."[(24)]

In summary the Appeals Court held the form and the purpose of the terms of the Artistic Licence established that they were conditions and not merely contractual covenants. The consequence of this was that if those licence conditions were not satisfied there would be a likelihood of copyright infringement and a preliminary injunction would lie.

However in this case the evidence presented at the trial level was not sufficient for the Appeals Court to finally determine the issue. While it moved to overturn the decision of the District Court it sent the matter back to the District Court to determine on a factual basis whether *Jacobsen* could produce evidence to support the grant of a preliminary injunction.

4. Commentary

This a landmark decision because it confirms that free and open source software copyright licences and by analogy open content licences that are similar in style to the Artistic Licence are:

1) copyright licences

2) which impose licence conditions which if not satisfied can found an action in and the grant of remedies for copyright infringement, and

3) legally enforceable[(25)]

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(24) *Ibid.*

(25) See also *Curry v. Audax*, Rechtbank Amsterdam, Docket No. 334492 / KG 06-176 SR, 3/9/06 <http://mirrors.creativecommons.org/judgements/Curry-Audax-English.pdf> ; M. Garlick, 'Creative Commons Licenses Enforced in Dutch Courts' <http://creativecommons.org/weblog/entry/5823> ; Veni Markovski, 'Creative Commons License Recognized in Bulgarian Court' <http://blog.veni.com/?p=494> ; Thomas Margnoi,

This, in turn, provides individuals, businesses, universities and governments that use these types of licenses to distribute and acquire code and content with a greater degree of confidence in their legality.

However the decision does not clearly settle the debate as to whether these licences are also contracts although there is much in the judgment to suggest this is the case.(26) It has been argued in the past that the GPL is not capable of being a contract in common law countries as there is no consideration.(27)

Some have argued that the decision should be treated with caution as the holding that a copyright licence with conditions is lawful could be used in negative way to restrict liberty and freedom. (28) One is driven to ask whether this is a dispute with the legal effect of this legal tool or more the legal or legislative environment in which it sits. Others might argue that a copyright licence should be limited as to the conditions that can attach to it. Furthermore others have suggested that while the decision will have impact in common law jurisdictions it may not be received in the same way in civil law jurisdictions where it is argued the licence will be treated as though were it a contract.((29))

'English translation of Spanish CC decision' <http://mirrors.creativecommons.org/wp-content/uploads/2007/02/luis-cc-spanish-decision-final.pdf> at 4 September 2008.

(26) Consider the following statements: "In exchange and in consideration for this collaborative work, the copyright holder permits users to copy, modify and distribute the software code subject to conditions that serve to protect downstream users and to keep the code accessible": at 4 "The lack of money changing hands in open source licensing should not be presumed to mean that there is no economic consideration, however": *Jacobsen*, *ibid* at 4 "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 licence restrictions might well be rendered meaningless absent the ability to enforce through injunctive relief": *Jacobsen*, *ibid. at 1382.*

(27) Fitzgerald, and Suzor, above note 1 at 436-438. For further discussions of the reasons, why enforcement of public licenses under copyright law is desirable see:
Amicus Brief 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. in Robert Jacobsen v. Matthew Katzer and Kamind Associates, Inc (doing business as Kam Industries), online: http://jmri.sourceforge.net/k/docket/cafc-pi-1/ccc_brf.pdf at 15-17.

(28) Lawrence Lessig Blog, "Huge and Important News – Free Licenses Upheld" <http://www.lessig.org/blog/2008/08/huge_and_important_news_free_l.html>

(29) *Ibid.*

On the other hand the decision is significant in that it acknowledges the economic and social value of the "open source" paradigm of innovation and cultural exchange, commenting that:

> "Open source licensing has become a widely used method of creative collaboration that serves to advance the arts and sciences in a manner and at a pace that few could have imagined just a few decades ago". (30)

And that:

> "There are substantial benefits, including economic benefits, to the creation and distribution of copyrighted works under public licenses that range far beyond traditional license royalties." (31)

D.CONCLUSION

For people such as us who are dealing with open content licences on a daily basis, the decision in *Jacbsen* provides a judicial confirmation and assurance of such public licences, which can be used to further educate the broader community and act as a catalyst for changing entrenched attitudes towards copyright management practices. In terms of legal practitioners, the judgment provides guidance on the way in which public licences can be drafted and how they work in practice. Ultimately the decision gives a legal imprimatur to the notion of open innovation and how law might play a role in such a process.

The decision is a good antidote to the normal Fear Uncertainty and Doubt (FUD) that is thrown at open licensing models and their adopters to obfuscate their usefulness.

Here we have one of the most well recognised IP courts in the world providing a very positive approach to the legal operation and effectiveness of public licences. While each country in the world will no doubt interpret this decision according to the local legal environment there is little doubt it will be very useful in helping more people understand the benefits of open code and open content.

(30) *Jacobsen, above note 7 at 1378*

(31) *Ibid.* at 1379.

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7. *Jacobsen v. Katzer* 2008 U.S. App. LEXIS 17161 (Fed. Cir. Aug. 13, 2008)

ملخص
قانونية تراخيص البرمجيات الحرة والمفتوحه
قضية جاكبسن ضد كاتزر

في أغسطس ٢٠٠٨، اعترفت واحده من أهم محاكم الملكية الفكرية فى الولايات المتحدة الأمريكية، إن لم تكن أهمها، بقانونية تراخيص البرمجيات الحرة والمفتوحة والتي تعرف بالرخصة الفنية.

تعتبر هذه القضية مهمة وذلك لأن حتى وقت قريب، لم تتطرق المحاكم في الولايات المتحدة الأمريكية لهذا النوع الجديد من تراخيص حقوق المؤلف والتي ازداد انتشارها في مختلف أنحاء العالم بسبب ازدياد مستخدمي الانترنت، واستخدام هذه الرخص على نحو غير مسبوق.

يقدم قرار المحكمة في قضيه روبرت جاكبسن ضد شركة ماثيو كاتزر وكامند ومشاركوه، (٢٠٠٨، الولايات المتحدة، استئناف، ليكسس ١٧١٦١) (الدائرة الفدرالية ٢٠٠٨)، والذي صدر تحديداً بتاريخ ١٣ أغسطس ٢٠٠٨ رؤية جديدة بخصوص قانونية تراخيص البرمجيات الحرة والمفتوحة وقياساً عليها تراخيص المشاع الإبداعي. تحلل هذه المقالة الحكم وتعقب على منطوقه.