

2008-1001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT JACOBSEN,

Plaintiff-Appellant,

v.

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

Defendants-Appellees

2008 APR 17 PM 12:55
U.S. COURT OF APPEALS
FEDERAL CIRCUIT

RECEIVED

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
Citation of Supplemental Authority

Katzer and KAMIND Associates, Inc. ("Katzer and KAMIND") filed a citation of supplemental authority, citing Netbula, LLC v. Storage Technology, Corp., No. C06-07391-MJJ, 2008 WL 228036 (N.D. Cal. Jan. 18, 2008). Because the parties in Netbula had a contract, and the parties here do not, Netbula has limited relevance.

In Netbula, Plaintiff Netbula charged Defendant Storage Technology and others with infringing Netbula's copyright. Id. at *1. Netbula and Storage Technology had negotiated two contracts, licensing Netbula's software to Storage Technology under certain terms. Id. Netbula later charged Storage Technology with violating those terms. See id. Defending

against Storage Technology's summary judgment motion, Netbula argued that Storage Technology did not comply with conditions precedent, and in the alternative, acted outside the scope of the license grant. Id. at *3. The district court rejected Netbula's arguments relating to conditions precedent, stating that nothing in the license required the terms be met prior to the license grant. Id. at *7. The remaining issue before the district court was whether "the terms of the license are covenants or limitations on the scope of the license." Id. at *3. After analyzing the evidence, the district court ruled the breached terms did not limit the license scope, therefore, the terms were covenants, violation of which was breach of contract, not copyright infringement. Id. at *4-8. Other terms, which limited scope, were not violated. Id. at *5-6.

Netbula has limited relevance because Netbula and Storage Technology had a contract, whereas the parties in Jacobsen do not. If no contract exists, no contractual covenant exists, and the contract-copyright distinction in Netbula is irrelevant. Netbula's discussion of conditions precedent is irrelevant because, unlike the Netbula contract, the Artistic License specifically describes conditions under which Jacobsen grants permissions. A370.

Netbula does recognize that a would-be licensee who exceeds the scope of the license is an infringer. Katzer and KAMIND attempt to confuse the issue by stating that “giving credit” is the license’s only requirement. They do not deny they exceeded the scope of the license. Therefore, Katzer and KAMIND implicitly admit they are infringers.

As stated, Netbula has limited relevance.

Respectfully submitted,

DATED: April 17, 2008

By *Victoria K. Hall*

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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)

Robert Jacobsen 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:

Robert Gibbs Jacobsen

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:

None

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. 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:

Law Office of Victoria K. Hall

For the record, I was an intern, serving with Judge Richard Linn from June-August 2002.

4/17/08

Date

Victoria K. Hall

Signature of counsel

VICTORIA K. HALL

Printed name of counsel

Reset Fields

JACOBSEN v KATZER, 2008-1001

PROOF OF SERVICE

I hereby certify that on April 17, 2008, I sent the attached Response to Defendants-Appellees Matthew Katzer and KAMIND, Associates, Inc.'s Citation to Supplemental Authority, by first class mail postage prepaid, to:


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