Brief

* Intro
* Go through each slide

Cases:

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

Copyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material. . . . Copyright licenses are designed to support the right to exclude; money damages [\*1382] 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.

1. Philpot - Creative Commons Attribution 2.0 litigation
   1. Copyright Infringement (CC)
   2. Copyright Management Information

* Philpot v. Planck, LLC, Docket No. 1:17-cv-04513 (S.D.N.Y. Jun 15, 2017) et al
* Philpot v. Entravision Communications Corporation, Docket No. 4:18-cv-07255 (N.D. Cal. Nov. 20, 2018)
* Philpot v. Hubbard Radio Phoenix LLC, Docket No. 2:18-cv-03084 (D. Ariz. Oct 01, 2018)
* Philpot v. New Orleans Tourism Marketing Corporation, Docket No. 2:18-cv-09087 (E.D. La Oct 1, 2018)
* About 34 cases filed since January 2018

1. Drauglis v. Kappa Map Grp., LLC, 128 F. Supp. 3d 46, 2015 ILRC 2503 (D.D.C. 2015)

P alleged D did not offer the map available for free as required by the CC BY-SA 2.0 license

Photo was used on the Cover of a Atlas

Atlas was not a derivative work

Cover was not a derivative work (not *enough* alteration of the photo)

For these reasons, the Court finds that defendant did not create a derivative work when it incorporated the Photograph into the cover of the Atlas, and that therefore, the ShareAlike requirement does not apply to the Atlas. So defendant is entitled to summary judgment on this aspect of plaintiff's copyright infringement claim.

Notice Requirements

To satisfy section 4(a), then, defendant could have printed the Atlas with either the License's URL or its URN, as both are subclasses of the URI required by the License.

. . .

Creative Commons has unique names for each of its six licenses, and the particular type of license at issue in this case is specifically designated and easily located online by the phrase "CC BY-SA 2.0."

. . .

Therefore, the Court finds that defendant's reference to the name of the License on the back cover of the Atlas was sufficient to satisfy the section 4(a) notice requirement, and defendant is entitled to summary judgment on this issue.

1. Dominant Author/Mastermind
   1. Blizzard/DoTA cases
2. Ameriprise
   1. Court ruled GPL Sec. 0 is a patent license in effect

XimpleWare’s complaint asserts claims for (1) direct infringement of the ‘852, ‘459 and ‘657 patents under 35 U.S.C. § 271(a) against all defendants; 25 (2) inducement under 35 U.S.C. § 271(b) against Versata and its corporate parents Aurea and Trilogy;26 and (3) declaratory relief that the asserted patents are valid and enforceable.

ORDER GRANTING-IN-PART DEFENDANTS’ MOTIONS TO DISMISS (Re: Docket Nos. 25, 33, 38, 39), XimpleWare, Inc. v. Versata Software, Inc. et al, Docket No. 5:13-cv-05161 (N.D. Cal. Nov 5, 2013) Page 5

Because an express license is a defense to patent infringement, XimpleWare’s direct infringement claims against Versata’s customers turn on whether the customers’ distribution is licensed under the GPL. The reason is that the GPL provides that even if the original licensee – here, one of the Versata entities – breaches its license for whatever reason, third-party customers of that original license retain the right to use XimpleWare’s software so long as the customer does not itself breach the license by “distributing” XimpleWare’s software without satisfying an attendant conditions.[48] Because XimpleWare has plainly alleged that the customers did not satisfy these attendant conditions, the only real issue to resolve is whether XimpleWare has sufficiently alleged that its software was “distributed” by the customers when they shared the software with their independent contractors, franchisees, and producers.

[48]: See Docket No. 18-1, Ex. 1 at ¶ 0 (“Activities other than copying, distribution and modification are not covered by this License; they are outside its scope. The act of running the Program is not restricted, and the output from the Program is covered only if its contents constitute a work based on the Program (independent of having been made by running the Program). Whether that is true depends on what the Program does.”); see also id. at ¶¶ 1-2, 4.

ORDER GRANTING-IN-PART DEFENDANTS’ MOTIONS TO DISMISS (Re: Docket Nos. 25, 33, 38, 39), XimpleWare, Inc. v. Versata Software, Inc. et al, Docket No. 5:13-cv-05161 (N.D. Cal. Nov 5, 2013) Page 9 - 10

The customers marshal two primary arguments against such a conclusion. First, the customers argue that any independent contractor or the like working for the customers has no need for the software because the software is designed to calculate the commissions owed by the customers on various financial transactions. In short, there is no need in the field to use what is back office software. Second, the complaint does not allege Versata’s customers shared the software with independent contractors who then themselves copied, distributed or used it, and sharing the software with independent contractors working with the customers alone does not constitute distribution. Put another way, this is effectively internal distribution, and internal distribution is not enough to breach the GPL.

ORDER GRANTING-IN-PART DEFENDANTS’ MOTIONS TO DISMISS (Re: Docket Nos. 25, 33, 38, 39), XimpleWare, Inc. v. Versata Software, Inc. et al, Docket No. 5:13-cv-05161 (N.D. Cal. Nov 5, 2013)

1. Artifex Software, Inc. v. Hancom, Inc., No. 16-cv-06982-JSC, 2017 BL 136537 (N.D. Cal. Apr. 25, 2017)

Defendant contends that Plaintiff's reliance on the unsigned GNU GPL fails to plausibly demonstrate mutual assent, that is, the existence of a contract. Not so. The GNU GPL, which is attached to the complaint, provides that the Ghostscript user agrees to its terms if the user does not obtain a commercial license. Plaintiff alleges that Defendant used Ghostscript, did not obtain a commercial license, and represented publicly that its use of Ghostscript was licensed under the GNL GPU. These allegations sufficiently plead the existence of a contract. *See, e.g., MedioStream, Inc. v. Microsoft Corp.*, [**749 F. Supp. 2d 507**](https://www.bloomberglaw.com/product/blic/bc/W1siRG9jdW1lbnQiLCIvcHJvZHVjdC9ibGljL2RvY3VtZW50L1gxNU1LNVNMRzAwME4iXV0--1d823775eb07629acf75abd61adc44345403e8dd/document/X1EF7CO003?jcsearch=749%20F.%20Supp.%202d%20507&summary=yes#jcite) ,[**519**](https://www.bloomberglaw.com/product/blic/bc/W1siRG9jdW1lbnQiLCIvcHJvZHVjdC9ibGljL2RvY3VtZW50L1gxNU1LNVNMRzAwME4iXV0--1d823775eb07629acf75abd61adc44345403e8dd/document/X1EF7CO003?jcsearch=519&summary=yes#jcite) (E.D. Tex. 2010) (concluding that the software owner had adequately pled a claim for breach of a shrink-wrap license).

Accordingly, Defendant's motion to dismiss Plaintiff's breach of contract claim is denied. Plaintiff has adequately pled the claim and Defendant has not proved at this stage that the claim is preempted by the Copyright Act.

1. GhostScript
   1. How many people have they sued?
2. Google v Oracle
   1. Just because everyone else is doing it, why should courts care
3. GREAT MINDS, v. FEDEX OFFICE AND PRINT SERVICES, INC., Case 17-808, Document 40-1, 07/05/2017,

In the proposed brief, Creative Commons seeks to aid the Court’s consideration of this appeal in two ways: first, by walking through the mechanics of how this widely-used license works; and second, by discussing relevant public policy concerns—a topic raised by Great Minds ostensibly as a consideration weighing in favor of a reversal—that can only be fairly and fully addressed by CC. With respect to the first issue, Creative Commons’ experience and intimate familiarity with the license it drafted in consultation with legal experts and creators around the world affords a unique, if not definitive, perspective on the operation of the license and its terms. With respect to the second issue, Great Minds itself asks that public policy be a factor in the Court’s interpretation of the license. See Opening Br. 31-34. Assuming the Court finds such considerations relevant, Creative Commons seeks to share its own perspective on the public policy issues at stake, given CC’s unequaled experience with the license, its purpose, and the diverse licensors and licensees who use it.

<https://creativecommons.org/wp-content/uploads/2016/08/Great-Minds-Amicus-Brief-and-Motion-for-Leave-to-File.pdf>

GREAT MINDS, v. FEDEX OFFICE AND PRINT SERVICES, INC., Case 17-808, Document 74, 08/23/2017,

IT IS HEREBY ORDERED that Creative Commons Corporation’s motion for leave to file an amicus curiae brief is DENIED

https://creativecommons.org/wp-content/uploads/2016/08/2017-08-23-Motion.pdf

1. Hellwig v. VMWare
   1. Too much too soon?
2. Baker v. Seldin
   1. Copyrightability of methods of operation
3. RoyaltyStat, LLC v. IntangibleSpring, Corp., No. 8:15-cv-3940-PX (D. Md. Oct. 25, 2018)
   1. What is a “work” - Copyright Office declining to register only a subset of records in a database and court failing to find this was enforceable unit - goes to what a contributor can or cannot register if they want to sue
4. Bowers v. Baystate Techs., Inc., 320 F.3d 1317 (Fed. Cir. 2003)
   1. Copyright Act does not preempt contract restrictions that prevent lawful use of software (e.g., reverse engineering). Add to it that sometimes court ignore contract formation issues, e.g., enforcing a hyperlinked “terms of service” in the footer of a webpage (Karen Copenhaver said that FOSS lawyers filed an amicus brief, but I can’t guess which side they were on - I got the impression she thought the decision was a good one)

Summary - High Level Discussions:

* Is there a litigation strategy we should be doing? Should the free software community be actively suing so that we have some control over the way licenses are interpreted?

Lead in slide Great Minds?

* Why doesn't Artifex get crap for suing on Ghostscript?
  + [Artifex Software, Inc. v. Palm, Inc., No. 5:09-cv-05679 (N.D. Cal.)](https://www.businesswire.com/news/home/20091203006412/en/Artifex-Software-Files-Copyright-Infringement-Lawsuit-Palm) (Dec 2, 2009)
  + Artifex Software, Inc. v. Hancom, Inc., No. 3:16-cv-06982 (N.D. Cal.)
  + Artifex Software, Inc. v. Conduit Ltd., No. 3:18-cv-00971 (N.D. Cal.) (Feb 14, 2018) - MuPDF GPL/AGPL Contract and Copyright Claim MUPDF being incorporated into Mobile Apps
  + Artifex Software, Inc. v. First Nat. Title Ins. Co., No. 4:18-cv-00503 (N.D. Cal.) ( Jan 23, 2018) - MuPDF GPL/AGPL Contract and Copyright Claim MUPDF being incorporated into Mobile Apps
* How do you register the copyright in fragmented ownership?

Lead in slide RoyaltyStat v. Intangible Spring

But see Oracle v. Google (dicta that each module was a work)

* How far does “industry practice” really go?

Lead in slide Oracle v. Google

First off, principle is for contract interpretation, not an excuse to infringement because “all the cool kids do it this way”

In Oracle v. Google it was argued as part of fair use (Google acted in good faith because it was only doing what everyone else did) but it didn’t save the day

* Copyright Act does not preempt contract restrictions that prevent lawful use of software (e.g., reverse engineering). Add to it that sometimes court ignore contract formation issues, e.g., enforcing a hyperlinked “terms of service” in the footer of a webpage

Lead in slide Bower v. Baystate

* Was Hellig v. VMware a strategically a good move?
* Was it a good idea for FSF to argue against Google v Oracle being accepted by the Supreme Court?
* Should copyleft folks support (present tense! Petition for Certiorari filed) Oracle in Google v Oracle, since Oracle’s theory theory strengthens copyleft licenses (but does it screws Wine, Homebrew - obviously can’t mention projects by name though)?

Lead in slide Oracle v. Google

* What can we do to make sure that licenses are applied correctly?
* If courts are going to determine that copyleft licenses are a mix of contract and licenses, what impact does that have on remedies? Do we want that outcome? (I don’t see the issue here, where’s the harm in two theories for recovery?)
* To what extent can a company control the distribution or exact copies containing trademarks?
* Community Enforcement Principles

Format