

# ADVISORY

## SULLIVAN & WORCESTER INTELLECTUAL PROPERTY ADVISORY

### District Court Issues Interpretation of Open Source “Artistic License”; First U.S. Lawsuit Filed to Enforce GPL

Despite the widespread and growing use of open source software, there have been no definitive U.S. court decisions regarding the enforceability of open source software licenses. However, a pair of recent lawsuits—each involving a different open source software license—may provide some guidance for businesses considering the use of open source software. The first case, brought in a California federal court and involving a lesser-known open source license, the “Artistic License,” has resulted in a decision which places important limitations on the remedies available for breach of the license. The second case, involving Version 2 of the well-known General Public License (“GPL”), is the first U.S. lawsuit brought specifically to enforce the GPL’s terms.

The GPL and other open source software licenses are notable for their “viral” quality. Usually, such licenses provide that anyone may freely copy, distribute, and even modify the software source code covered by the license. However, they also provide that any resulting code must be released under the same license terms—that is, any resulting source code must be freely reproducible, distributable, and modifiable, even if incorporated into a commercial software distribution. Many businesses are understandably wary of such license terms, fearing that the incorporation of open source software packages may “infect” their proprietary software, requiring them to make their source code available to the public free of charge. For businesses that incorporate open source software into their proprietary products, the legal enforceability of open source licenses such as the GPL is of prime importance.

**The Artistic License Case.** A recent decision issued by a California federal court ruled on the enforceability of the open source “Artistic License,” and held that a failure to comply with certain provisions of the license did not constitute federal copyright infringement, but rather a simple breach of contract under state law. Robert Jacobsen, a developer of open source software for model railroad enthusiasts, filed suit against KAM, a company which develops commercial model railroad software. [\*Jacobsen v. Katzer\*, 3:06-cv-01905](#) (N.D. Cal., order issued August 17, 2007). Jacobsen alleged that KAM incorporated certain open source software libraries into its commercial products which he had developed and which were

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governed by the Artistic License. Under the terms of the Artistic License, KAM had the right to freely use Jacobsen's source code on the condition that it properly credited the original developers when distributing a commercial product. KAM failed to attribute the code to Jacobsen, prompting the copyright infringement claim.

In examining Jacobsen's use of the Artistic License, the court held that he had granted the public a nonexclusive license to use, copy and distribute his software—a license with an "intentionally broad" scope. The condition that KAM insert a prominent notice of attribution was not a limitation on this broad scope. In other words, a failure to comply with this condition did not expose KAM to copyright infringement, but rather to a claim under state contract law for breach of the nonexclusive license. Most significantly, Jacobsen's remedies under state contract law were limited to damages and not an injunction as is typically available to certain plaintiffs under federal copyright law.

While the Artistic License at issue in *Jacobsen* is a rarely used and relatively obscure form of open source license, the decision has the potential to influence other courts' interpretations of other open source licenses, including the ubiquitous GPL. A similar interpretation of the GPL would have far-reaching implications for users of open source software, potentially taking the "teeth" out of these licenses and reducing the risks associated with the incorporation of open source software into proprietary code.

**The GPL Case.** Just one month after the court's decision in *Jacobsen*, the Software Freedom Law Center filed a lawsuit on behalf of two open source developers, seeking to enforce the terms of the GPL against Monsoon Multimedia, an India-based developer of multimedia software and hardware devices. Monsoon had incorporated a commonly-used open source multimedia software package covered by Version 2 of the GPL and known as "BusyBox" into several of its products. Although Monsoon had publicly acknowledged that its products incorporated a modified version of the BusyBox software, the complaint alleged that Monsoon, by failing to make this modified computer source code freely available to the public, was violating the terms of the GPL. *Andersen v. Monsoon Multimedia, Inc.*, 1:07-cv-08205-JES (S.D.N.Y., complaint filed September 19, 2007).

Less than a week later, following settlement negotiations with BusyBox developers, Monsoon issued a press release indicating its intention to comply fully with the terms of the GPL. Specifically, Monsoon agreed to make the modified BusyBox source code freely available to the public on its website.

**What It Means for You.** While the *Jacobsen* case may provide some comfort to businesses who are worried about the "infectious" quality of open source licenses, the outcome of the *Monsoon* litigation demonstrates that the GPL and other open source licenses are far from becoming a dead letter. Without more court decisions interpreting the scope and enforceability of these licenses, the risks associated with open source software remain high. Before making the decision to utilize open source software, clients should seek legal advice in order to minimize potential risks.