

No. 18-55331

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**GREAT MINDS,**

*Plaintiff-Appellant,*

v.

**OFFICE DEPOT, INC.**

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Central District of California  
No. 2:17-cv-07435-JFW-E  
Hon. John F. Walter

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**MOTION OF CREATIVE COMMONS CORPORATION FOR LEAVE TO  
FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND  
AFFIRMANCE OF THE DISTRICT COURT**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A),  
Creative Commons Corporation states that it does not have a parent corporation,  
and no publicly held corporation owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 29(a)(3), Creative Commons Corporation respectfully requests leave of this Court to file the attached brief as *amicus curiae* in support of Defendant-Appellee Office Depot, Inc. Creative Commons endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief. *See* Circuit Rule 29-3. Office Depot consented, and Great Minds did not.

### **IDENTITY AND INTEREST OF MOVANTS**

Creative Commons is a 501(c)(3) nonprofit organization that operates globally to enable the sharing and reuse of creative works around the world. In pursuit of that mission, Creative Commons makes available and maintains a suite of standard, “off-the-shelf” copyright licenses that signal and convey *ex ante* the permissions authors wish to grant for uses of their works that copyright law prohibits by default. This lawsuit turns on the interpretation of one of those licenses: the Creative Commons Attribution–NonCommercial–ShareAlike 4.0 International Public License (known to the world as “CC BY-NC-SA 4.0,” and referenced in the parties’ briefing as the “Public License” or the “Creative Commons Public License”).

When an author such as Great Minds shares a work using the license, anyone may legally use, copy, and distribute the licensed material for “NonCommercial” purposes, a term defined in the license, on the conditions that they attribute Great

Minds and share derivative works under the same terms. This particular license in its current and prior versions has been applied to more than 150 million creative works all over the world. Those works have in turn been reused, under the terms of the license, by multitudes more. The judicial interpretation of the license at issue here is thus a matter of significant interest for Creative Commons, its author and steward.

### **ARGUMENT**

The amicus brief Creative Commons seeks to file will assist the Court in its consideration of matters relevant to the disposition of this case. *See* Fed. R. App. P. 29(a)(3)(B). First, Creative Commons is, of course, intimately familiar with the text and structure of its own license, and so offers a particularly well-informed perspective on how the various pieces work together. Second, Great Minds' opening brief makes a number of arguments concerning the purpose of Creative Commons licenses and the predicted effects of an adverse ruling. It is important for the Court to know that Creative Commons disagrees with Great Minds' perspective on these topics. In Creative Commons' view, an affirmance rather than a reversal would best serve the purpose of the Creative Commons license on which this appeal turns; and a reversal not an affirmance would adversely affect the broader community of Creative Commons license users.

**I. THE PROPOSED BRIEF WOULD HELP THE COURT BY EXPLAINING HOW THE AUTHOR AND STEWARD OF THE LICENSE UNDERSTANDS ITS TEXT AND STRUCTURE TO OPERATE IN THE CIRCUMSTANCE PRESENTED**

The first portion of the proposed brief addresses how the text and structure of the Creative Commons license that is the subject of this appeal should be interpreted in the circumstance presented. On these issues—*i.e.*, the mechanics of the license, looking only at the text within the four corners of the document—Creative Commons offers a uniquely well-informed perspective that can aid the Court. Creative Commons has spent more than 15 years developing and honing its licenses. Working with many of the leading copyright scholars in the world, Creative Commons has carefully crafted the various pieces to work together in specific ways, triggering application of the license’s restrictions in particular circumstances but not others. Great Minds misinterprets the plain text and structure of the license in several important respects, including but not limited to the critical question of when, precisely, it limits the conduct of people seeking to reuse licensed works. An amicus brief from the author and steward of the license is relevant and helpful purely to correct those errors. *Cf.* Op. Br. at 32-33 (characterizing a Creative Commons amicus brief in a prior case as helpful to Great Minds’ position here); *id.* at 56 (invoking a Creative Commons study in support of Great Minds’ position here); Proposed Brief of *Amicus Curiae* Creative Commons at 11 n.3, 14 n.7 (responding to these arguments, as the author of both cited works).

## **II. CREATIVE COMMONS DISAGREES WITH AND SEEKS TO RESPOND TO GREAT MINDS' CHARACTERIZATIONS OF THE PURPOSE OF THE LICENSE AND THE PREDICTED EFFECTS OF AN AFFIRMANCE**

Throughout the opening brief, Great Minds warns of various ways in which an affirmance would “lead[] directly to absurd results that undermine the purpose and function of the [Creative Commons] License” at issue, *see* Op. Br. at 37, and otherwise negatively “affect all who use the [Creative Commons] License in reliance on the commonly understood meaning of its plain terms,” *see id.* at 6. Creative Commons, the author and steward of the license, disagrees. The second part of the proposed brief thus articulates why, contrary to Great Minds’ contentions, an affirmance would—in Creative Commons’ view—be entirely consistent with the purpose and function of the Creative Commons license at issue. The proposed brief then goes on to explain that it is a reversal not an affirmance which would—in Creative Commons’ view—have potentially negative implications for the broader community that has come to use and rely on all of Creative Commons’ “NonCommercial” license offerings.

## **III. GREAT MINDS IS WRONG TO CONTEND THAT CREATIVE COMMONS HAS NO RELEVANT PERSPECTIVE TO OFFER IN AN APPEAL SPECIFICALLY ABOUT THE MEANING OF CREATIVE COMMONS' OWN LICENSE**

In correspondence regarding whether Great Minds would consent to the filing of the amicus brief at issue here, Great Minds asserted that nothing Creative

Commons has to say can be useful to the Court because this appeal arises from a dismissal on the pleadings—which in turn means that only the plain language of the license can properly be relevant to the Court’s interpretation. And the parties, the argument went, are perfectly capable of saying everything that there is to be said about the plain language.<sup>1</sup>

We note in response that that position—that only the text of the document matters—squarely contradicts what Great Minds urged in its merits brief to the Second Circuit in *Great Minds v. FedEx Office & Print Services, Inc.*, 886 F.3d 91 (2d Cir. 2018). *See id.*, Case No. 17-808, ECF No. 29 at 31-34 (argument section of opening brief entitled “PUBLIC POLICY GROUNDS ALSO WARRANT REVERSAL OF THE DISTRICT COURT’S DISMISSAL OF GREAT MINDS’ COMPLAINT”). For the reasons discussed above, it also contradicts arguments that Great Minds is presently making to this Court. *See* Op. Br. at 38 (describing Great Minds’ understanding of the implications of the Second Circuit’s decision in a related scenario, and arguing that “[t]his result would be directly inimical to the purpose of the [Creative Commons] License”). To the extent that it is appropriate for Great Minds to contend that reversal is warranted because an affirmance would yield results “directly inimical to the purpose of” Creative Commons’ license, it is

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<sup>1</sup> We invite Great Minds to file the full correspondence as an attachment to its opposition to this Motion for Leave.

manifestly appropriate for the Court to hear that Creative Commons—which has views about the purpose of its own licenses—disagrees. Conversely, to the extent the Court chooses to focus solely on the plain text and structure of the license, to the exclusion of other considerations, we respectfully suggest that Creative Commons’ perspective on those issues alone may be useful for the Court to hear.

We expect Great Minds to point out in opposition that the Second Circuit denied Creative Commons’ request to file an amicus brief in the *FedEx Office* case. *See Great Minds v. FedEx Office & Print Services, Inc.*, Case No. 17-808, ECF No. 74 (2d Cir. 2017). Its *pro forma* one-sentence order offered no explanation for that result. Regardless, under the circumstances presented here, we hope this Court finds Creative Commons’ proposed contribution helpful, and agrees that granting this motion for leave to file is warranted.

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August 20, 2018

Respectfully submitted,

s/ Andrew M. Gass

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### **CERTIFICATE OF SERVICE**

I hereby certify that on August 20, 2018, I electronically filed the forgoing Motion of Creative Commons Corporation For Leave To File Brief As *Amicus Curiae* In Support Of The Appellee And Affirmance Of The District Court with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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