

No. 18-55331

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

GREAT MINDS,

Plaintiff-Appellant,

v.

OFFICE DEPOT, INC.,

Defendant-Appellee.

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

**OPPOSITION TO 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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Pursuant to Rules 27 and 29 of the Federal Rules of Appellate Procedure, plaintiff-appellant Great Minds submits this opposition to the Motion of Creative Commons Corporation for Leave to File Brief as *Amicus Curiae* in Support of Appellee and Affirmance of the District Court (the “CC Motion”).

ARGUMENT

Great Minds understands that the Court often accepts *amicus* briefs, but the Court should exercise its discretion and deny Creative Commons’ motion for leave in this instance because Creative Commons’ proposed *amicus* brief (i) cites the same cases and rehashes the same arguments found in the Response Brief of Defendant-Appellee Office Depot, Inc. (“OD Br.”) and (ii) makes factual assertions that are neither relevant nor useful to the Court in this appeal of the Rule 12(b)(6) dismissal of Great Minds’ copyright claim. *See* F. R. App. P. 29(a)(3)(B); *Kinnard v. Rogers Trucking*, 176 Fed. Appx. 829, 830, 2006 WL 1009282, *1 (9th Cir. Apr. 18, 2006) (denying motion for leave to file *amicus* brief “because the proposed briefs raise[d] the same points already raised in [the appellant’s] briefs”) (citing 9th Cir. R. 29-1, Adv. Comm. Note).

In a nutshell, the Court cannot affirm dismissal of Great Minds’ copyright claim unless the language of the Creative Commons non-commercial public license at issue (the “Public License”) is unambiguous on its face in favor of defendant-appellee Office Depot, Inc. (“Office Depot”). *See, e.g., San Diego*

Unified Port Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, No. 3:15-cv-1401-BEN-MDD, 2016 WL 3766364, at *5 (S.D. Cal. July 6, 2016) (“When . . . contract language is not ambiguous, a court can resolve a motion to dismiss”). If the Court needs to rely on any of the arguments or assertions proffered by Creative Commons in its proposed *amicus* brief, the language is not unambiguous on its face, and the Court must reverse dismissal of Great Minds’ copyright claim. *See, e.g., Duncan v. The McCaffrey Group, Inc.*, 200 Cal. App. 4th 346, 381 (Cal. Ct. App. 2011) (“Once extrinsic evidence is considered, the interpretation of the contract becomes a question of fact for the trier of fact”) (overruled on other grounds by *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.*, 55 Cal. 4th 1169 (Cal. 2013)).

I. CREATIVE COMMONS’ URGED INTERPRETATION OF THE PUBLIC LICENSE BASED ON ITS UNDERSTANDING OR EXPERIENCE CANNOT AID OFFICE DEPOT IN THIS APPEAL

It is undisputed that, in order to prevail in this appeal, Office Depot must demonstrate that the language of the Public License at issue is *unambiguous on its face* in Office Depot’s favor. *See* Great Minds Opening Br. at 25-26; OD Br. at *passim*. Great Minds need only put forward a reasonable interpretation of the Public License’s language to show that the Public License is at a minimum ambiguous, thus requiring reversal in this case. *See, e.g., San Diego Unified Port Dist.*, 2016 WL 3766364 at *5.

The first part of Creative Commons’ proposed *amicus* brief, according to Creative Commons, “would help the Court by explaining how the author and steward of the license understands its text and structure to operate in the circumstances presented.” CC Motion at 3. But if the Court needs to turn to Creative Commons’ urged interpretation of the Public License’s text and structure, whether based on Creative Commons’ intention, understanding, or experience, then the language of the Public License plainly is not unambiguous on its face in Office Depot’s favor, and the Court must reverse dismissal of Great Minds’ copyright claim. *See, e.g., Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co.*, 10 Cal. App. 3d 206, 216 (Cal. Ct. App. 1970). (“But when parol evidence is introduced in aid of the interpretation of uncertain or doubtful language in the contract, the question of the meaning (or intent of the parties) is one of fact” that “must be left to the jury”); *Byrne v. Laura*, 52 Cal. App. 4th 1054, 1065 (Cal. Ct. App. 1997) (“questions of ‘intent’ and ‘purpose’ are ordinarily questions of fact”).

Creative Commons asserts an interest as *amicus* in this case because it is the author and self-identified “steward” of the Public License. *See* CC Motion at 1-2. But Creative Commons offers arguments regarding the meaning of the language of the Public License that simply rehash Office Depot’s. Notably, Creative Commons, like Office Depot, nowhere addresses the complete absence from the Public License of any clear language permitting licensees to pay *commercial* actors

to exercise their *non-commercial* rights. There is no such language because Creative Commons did not see fit to include it in the license. It may be that Creative Commons regrets that omission now, but Creative Commons' current views regarding the plain language of the Public License are, in any event, simply irrelevant here. *See* Cal. Civ. Code § 1636 (“A contract must be so interpreted as to give effect to the mutual intention of the parties *as it existed at the time of contracting*, so far as the same is ascertainable and lawful”) (emphasis added).

In its opening brief, Great Minds showed why the exercise of non-commercial licensee rights by commercial actors is flatly inconsistent with the Public License's plain language. And neither Office Depot nor Creative Commons has offered a reading of the plain language of the Public License that forecloses Great Minds' understanding. If anything, Creative Commons' repeated attempts to file *amicus* briefs – attempts which thus far have been rebuffed (see *infra*) – make clear that dismissing Great Minds' claims on a Rule 12(b)(6) motion was, as a matter of law, improper.

It may be that Creative Commons' urged interpretation based on its intention, understanding, or experience could be relevant on remand as the case proceeds on the merits and the record is developed (if this Court holds the language of the Public License to be ambiguous). But “at this stage” – as the Eastern District of New York court ruled in denying Creative Commons leave to

file an *amicus* brief there – “the Court is limited to determining whether the License is unambiguous in [Office Depot’s] favor based on its ‘four corners,’ rendering Creative Commons’s [*sic*] familiarity and perspective irrelevant at this juncture.” *Great Minds v. FedEx Office & Print Serv., Inc.*, No. 16-CV-1462 (DRH)(ARL), 2017 WL 744574 (E.D.N.Y. Feb. 24, 2017); *see also* CC Motion at 6 (noting that the Second Circuit likewise denied Creative Commons leave to file a proposed *amicus* brief in that appeal); Cal. Civ. Code § 1638 (“The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity”); *Duncan*, 200 Cal. App. 4th at 381.

II. CREATIVE COMMONS’ FACTUAL CONTENTIONS AND VIEWS ON THE PURPOSE OR FUNCTION OF THE PUBLIC LICENSE CANNOT AID OFFICE DEPOT IN THIS APPEAL

The remainder of Creative Commons’ proposed *amicus* brief contains factual contentions regarding the purported purpose and function of the Public License from Creative Commons’ perspective, which likewise cannot aid Office Depot in this appeal; if the Court needs to consider them, it is another indication that the language of the Public License is ambiguous, which would require the Court to reverse and remand the case. *See Duncan*, 200 Cal. App. 4th at 381; *Kaufman*, 10 Cal. App. 3d at 216; *Byrne*, 52 Cal. App. 4th at 1065.

For instance, Creative Commons takes issue with *Great Minds* citing a 2009 survey regarding users’ interpretation of the meaning and operation of the Public

License's noncommercial limitation (the "Survey"), which is publicly available on Creative Commons' website, as potential evidence supporting Great Minds' interpretation of the Public License. *See* Proposed Brief of *Amicus Curiae* Creative Commons at 11 n.3. But Creative Commons' pronouncements that "neither the passages cited [by Great Minds] nor the broader investigation [of the Survey] have anything to do with the issue on appeal," and that "[i]t is of precisely zero relevance here and it is misleading for Great Minds to suggest otherwise," *id.*, are belied by the Survey itself and particularly the excerpts contained in the record.

The Survey is titled, "*Defining 'Noncommercial': A Study of How the Online Population Understands 'Noncommercial Use'*," and the Survey reports data showing, *inter alia*, that "CCFF creators say they choose to license their work for noncommercial use primarily because the NC term allows them to control the right to make money from the work (70%), and they do not want anyone else to make money or get a commercial advantage from the work (61%)," and that "More than a three-quarter majority of both [creators and users] agree[] that it is 'definitely' a commercial use if money is made from the use of a work in some way, including directly from the sale of a copy of a work." Appellant's Excerpts of Record 21, 26-27.

While the Survey does not directly address the question raised in this appeal, Great Minds contends that it contains strong evidence supporting Great Minds'

interpretation of the plain language and operation of the Public License. But it is not for this Court to determine at this juncture – on review of a Rule 12(b)(6) dismissal – the extent to which the Survey bears on Great Minds’ urged interpretation of the Public License; that question should be answered by a finder of fact only if this Court finds that both Great Minds and Office Depot both have put forward reasonable interpretations of the Public License, rendering it ambiguous and thus requiring reversal to proceed on the merits. *See Kaufman*, 10 Cal. App. 3d at 216; *Byrne*, 52 Cal. App. 4th at 1065; *Duncan*, 200 Cal. App. 4th at 381. So it is with every other factual contention proffered by Creative Commons in its proposed *amicus* brief, and thus the Court should deny Creative Commons leave to file the brief as irrelevant and undesirable at this juncture to the extent it is not duplicative of Office Depot’s response brief.

CONCLUSION

For the foregoing reasons, the Court should deny Creative Commons’ motion for leave to file its proposed *amicus* brief. If the Court exercises its discretion to accept Creative Commons’ proposed *amicus* brief, then Great Minds respectfully requests that the Court grant Great Minds leave to file a supplemental brief to respond to the factual points raised by Creative Commons that were not raised by Office Depot.

Dated: August 29, 2018

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: August 29, 2018

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