

17-808-CV

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GREAT MINDS,

Plaintiff-Appellant

v.

FEDEX OFFICE AND PRINT SERVICES, INC.,

Defendant-Appellee

*On Appeal from the United States District Court
for the Eastern District of New York (Central Islip)*

BRIEF FOR DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Federal Rule of Appellate Procedure 28(a)(1), the undersigned counsel for Appellant FedEx Office and Print Services, Inc. hereby certifies that FedEx Office and Print Services, Inc. is a wholly-owned subsidiary of FedEx Corporation. FedEx Corporation is a publicly trade corporation under the symbol “FDX.”

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RESPONSE TO ISSUES PRESENTED

1. Did the District Court correctly grant FedEx Office's motion to dismiss, where the law allows a licensee to enlist the assistance of a third party to assist in its exercise of license rights, and the language of the license agreement does not otherwise prohibit third parties from doing so?

I. STATEMENT OF THE CASE

This case arises from the reproduction by Appellee FedEx Office and Print Services, Inc. (“FedEx Office”) of educational materials produced by Appellant Great Minds and used by school districts (the “Licensed Materials”). Complaint (Dkt. No. 1) ¶ 9 [Appendix A9]. Great Minds makes the Licensed Materials available to those school districts for free, and authorizes their reproduction, provided that the Licensed Materials are used by those school districts for educational or other non-commercial purposes. Compl. ¶ 12 [A10]. Great Minds claims that the school districts using the Licensed Materials (“Licensee School Districts”) may not hire FedEx Office to make reproductions of the Licensed Materials on their behalf.

Great Minds does not deny that it licenses the reproduction of the Licensed Materials. The license at issue is the ubiquitous “Creative Commons Attribution-Non Commercial- Share Alike 4.0 International Public License,” authored by third-party Creative Commons (the “License”). *See* Compl. Ex. B [A30-A34].

The License twice grants the right to reproduce the Licensed Materials. First, the License allows Licensee School Districts to “reproduce and Share the Licensed Material, in whole or in part, for NonCommercial purposes.” License § 2(a)(1)(A) [A31] (emphasis added); Compl. ¶ 12 [A10]. A right of reproduction is again granted by the License’s definition of “Share,” which includes

“reproduction” of the Licensed Materials. License § 1(l) [A31]. This makes sense, of course, because the Licensed Materials must be reproduced and distributed by teachers to students in order to have any value.

The License does not limit its grant of the reproduction right to the Licensee School Districts, by, for example, requiring that copying be made personally by the Licensee School Districts. *See generally*, License [A30-A34]. The License similarly does not prohibit the Licensee School Districts from delegating portions of licensed activities, such as reproduction, to others. *See generally*, License [A30-A34]. Instead, the License is limited only by the restriction that the Licensee School Districts’ use of the Licensed Materials must be “NonCommercial.” License § 2(a)(1)(A) [A31]; Compl. ¶ 12 [A10]. The Licensee School Districts’ educational use indisputably meets the License’s “NonCommercial” requirement. *See* Compl. ¶ 12 [A10].

Notably, it is each individual Licensee School District using the Licensed Materials, not FedEx Office, that is a party to the License. *See* Compl. ¶ 12 [A10]. Although Great Minds alleges that it “makes the [Licensed] Materials available ... under [the License],” it does not explain how the License is offered to, or how it can be found by, prospective licensees. *See* Compl. ¶ 12 [A10]. Great Minds does not allege that FedEx Office is a party to the License. *See generally*, Complaint [A7-A14]. Nor does Great Minds allege that FedEx Office was even *aware* of the

License's terms, much less that it took any affirmative action to *assent* to the License's terms.

Instead, Great Minds alleges only that FedEx Office assists Licensee School Districts, at the Licensee School Districts' request, in reproducing the Licensed Materials to enable the use of those materials by school districts under the License. Compl. ¶¶ 12, 14 [A10-A11]. Great Minds does not allege that the Licensed Materials are used by the Licensee School Districts for anything but educational purposes, or that the Licensee School Districts' use of the Licensed Materials is not "NonCommercial." To the contrary, the Complaint admits that the Licensed Materials are used for the Licensee School Districts' "non-commercial, educational benefit" and that the Licensee School Districts may "freely share, reproduce, and use the [Licensed] Materials" in pursuit of that purpose. Compl. ¶ 12 [A10].

Despite acknowledging that (1) the Licensee School Districts are acting within their rights under the License, and (2) FedEx Office's activities are carried out "at the request of" those Licensee School Districts, Great Minds accuses FedEx Office of "willful and blatant infringement" of its copyrights. Compl. ¶¶ 1, 12, 14 [A7, A10-A11]. In support, Great Minds identifies two instances where it claims that FedEx Office reproduced the Licensed Materials *at the request of a Licensee School District*. See Compl. ¶¶ 16, 19 [A11]. Great Minds claims that this reproduction constituted infringement because the License requires that

“commercial print shops, like FedEx [Office], negotiate a license and pay a royalty to Great Minds if they wish to reproduce the [Licensed] Materials for commercial purposes – *i.e.* for their own profit – at the request of their customers.” Compl. ¶ 14 [A11].

The District Court granted FedEx Office’s Motion to Dismiss on February 24, 2017, because “FedEx [Office’s] copying of the [Licensed] Materials is permitted by unambiguous terms of the License” Memorandum & Order, Dkt. No. 26 (Feb. 24, 2017) at 8 [A90]. Great Minds was granted leave to amend. *Id.* at 12 n.5 [A94]. Great Minds chose not to do so and this appeal followed. *See* Docket [A1-A6]; Notice of Appeal, Dkt. No. 27 (March 21, 2017) [A96].

II. SUMMARY OF THE ARGUMENT

This case results from Great Minds’ improper attempt both to stretch the Copyright Act and to misapply the License it grants for free to anyone who asks. The Complaint rests upon the mistaken premise that the school districts that Great Minds explicitly licenses to reproduce its materials for educational use may not enlist FedEx Office to make those reproductions on their behalf.

The District Court rightfully rejected this tortured logic and granted FedEx Office’s motion to dismiss. *See* Memorandum & Order, Dkt. No. 26 [A83-A94]; Judgment [A95]. The District Court’s conclusion was clear and correct: “[t]he unambiguous terms of the License permit FedEx [Office] to copy the Materials on

behalf of a school district exercising rights under the License and charge that district for that copying at a rate more than FedEx [Office's] cost, in the absence of any claim that the school district is using the Materials for other than a 'non-Commercial purpose.'" Memorandum & Order, Dkt. No. 26 at 11 [A93]. That ruling should be affirmed.

"When ... there is no indication that a license-granting copyright owner has restricted the licensee's ability to use third parties in implementing the license, the license is generally construed to allow such delegation." *Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 44-45 (1st Cir. 2010); *see also Marconi Wireless Telegraph Co. of Am. v. Simon*, 227 F. 906 (S.D.N.Y. 1915) ("A licensee to make and use is not (in the absence of specific language in his license) limited to making with his own hands, in his own shop, or by his own employe[e]s. He may employ, procure, or contract with as many persons as he chooses to supply him with that which he may lawfully use, provided such conduct does not change his relation to the licensor."), *aff'd* 231 F. 1021 (2d Cir. 1916), *re'vd on other grounds* 246 U.S. 46 (1918). The District Court was correct to conclude that the License contained no such restriction on third party use. Memorandum & Order, Dkt. No. 26 at 9-11 [A91-A93].

The District Court was similarly correct to conclude that FedEx Office was not a party to the License and that it was the Licensee School Districts' use, not

FedEx Office's use, that must be (and is) "non-Commercial." Memorandum & Order, Dkt. No. 26 at 9-10 [A91-A92]. And the District Court was correct that the "fair use" cases cited by Great Minds are inapposite. Memorandum & Order, Dkt. No. 26 at 10 [A92]. This Court should affirm the District Court's order granting the motion to dismiss.

III. ARGUMENTS AND AUTHORITIES

A. Legal Standard

1. Standard of review

To survive dismissal, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This requires that "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 556).

"[T]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements do not suffice." *Iqbal*, 556 U.S. at 678. Thus, although "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. Therefore, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions and 'courts are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555).

2. License interpretation

“It is well established that use of a copyrighted work within the scope of a valid license is non-infringing as a matter of law.” *Spinelli v. NFL*, 96 F. Supp. 3d 81, 128 (S.D.N.Y. 2015) (citing *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998)); see also *Womack + Hampton Architects, LLC v. Metric Holdings Ltd.*, 102 Fed. App’x 374, 382 (5th Cir. 2004) (affirming finding that third party’s actions were within scope of license: “[u]se consistent with a license is a defense to an infringement claim”). Accordingly, “[d]ismissal of a claim for copyright infringement is proper where a contract underlying the suit clearly and unambiguously demonstrates the existence of defendant’s license to exploit the plaintiff’s copyrights and where plaintiff has not shown any limitation on that license.” *Ariel (UK) Limited v. Reuters Grp. PLC*, No. 05 CIV 9646 (JFK), 2006 U.S. Dist. LEXIS 79319, at *5 (S.D.N.Y. Oct. 31, 2006).

“Where the scope of a copyright license is in question, ‘the copyright owner bears the burden of proving that the defendant’s copying was unauthorized.’” *Chapman v. New York State Div.*, No. 1:04-CV-867, 2011 U.S. Dist. LEXIS 78026, at *14 (S.D.N.Y. July 18, 2011) (quoting *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995)). Great Minds therefore bears the burden to demonstrate that FedEx Office’s reproduction on behalf of and at the request of the Licensee School Districts was not authorized by the License. See *Spinelli*, 96 F.

Supp. 3d at 130-31 (granting motion to dismiss copyright infringement claims, including claim against sub-licensees, because alleged infringement was within the scope of licenses); *Jinjit, Ltd. v. Jovani Fashion, Ltd.*, No. 14-CV-2585 (DAB), 2016 U.S. Dist. LEXIS 44863, at *27-30 (S.D.N.Y. March 30, 2016) (granting motion to dismiss copyright infringement claim because of valid license).

B. The District Court Was Correct to Conclude that FedEx Office Is Authorized to Assist the Licensee School Districts in Exercising Their Licensed Rights

There are many defenses to a claim for copyright infringement. These include, *inter alia*, (a) a direct license between the copyright owner and the alleged infringer, (b) fair use, (c) statutory licenses, (d) non-volitional actions on the part of the alleged infringer, and (e) authorization of the alleged infringement derived through a license to which the alleged infringer is not a party. Each of these is independently sufficient to defeat a claim for infringement. A defendant is free to decide which defense or defenses it wishes to assert.

At this stage, FedEx Office asserts only the latter of these defenses—its actions are authorized as a result of the License to which it is not a party because it renders assistance to Licensee School Districts in exercising their rights under the License.¹ Great Minds' arguments focus primarily on the other defenses and

¹ For the avoidance of doubt, FedEx Office expressly reserves all rights to assert any and all other defenses at the appropriate time in the event the District Court's ruling is reversed and this case is remanded for further proceedings. FedEx Office

largely ignore the defense FedEx Office has actually asserted in its motion to dismiss. Great Minds' arguments fail to address squarely the arguments asserted and the District Court's ruling.

1. A licensee may enlist third parties to assist it in exercising licensed rights

The District Court correctly concluded that the law allows the Licensee School Districts to hire FedEx Office to make copies on their behalf. Memorandum & Order, Dkt. No. 26 at 8-9 [A90-A91]. On this, the law is clear: “[w]hen ... there is no indication that a license-granting copyright owner has restricted the licensee’s ability to use third parties in implementing the license, the license is generally construed to allow such delegation.” *Estate of Hevia*, 602 F.3d at 44-45 (rejecting infringement claim based on third-party’s use because activities were delegated by licensee). As a result, the “enlistment of third parties does not transmogrify a non-infringing use into an infringing use.” *Id.* at 44; *see also, e.g., Hogan Sys. v. Cybresource Int’l, Inc.*, 158 F.3d 319, 324 (5th Cir. 1998) (rejecting infringement claim because third party’s activities were in support of licensee: “what Norwest could itself do under the License, Norwest may use a contractor to do”); *Womack + Hampton*, 102 Fed. App’x at 382.

does not address those other defenses here, however, because they were not asserted in the Motion to Dismiss and thus are not currently at issue.

This principle is aptly demonstrated by the Seventh Circuit’s opinion in *Raybestos*, where the court held that once a licensee “secured the rights to duplicate the [copyrighted] designs ... it could hire another party ... if [Licensee] lacked the tools or skills to do so itself.” *Automation by Design, Inc. v. Raybestos Prods. Co.*, 463 F.3d 749, 757 (7th Cir. 2006). In *Raybestos*, a machine designer licensed design plans for the construction of a machine to a manufacturer. *Id.* at 751-52. After Licensee hired a sub-contractor to build the machine based on the licensed plans, Licensor sued both for copyright infringement. *Id.* at 756-57.

The Seventh Circuit concluded there was no infringement. *Id.* at 758. The court first explained that it was irrelevant whether Contractor was legally an agent or independent contractor of Licensee—the key factor was that “[Licensee] hired [Contractor] to act for or in place of itself, as a representative.” *Id.* at 757. In other words, “[Licensee] simply hired [Contractor] to act in [Licensee’s] stead- using the design to create a machine that it likely did not have the capacity to create on its own.” *Id.*

In so ruling, the court analogized to a licensee taking a licensed product to Kinko’s (FedEx Office’s corporate predecessor) for reproduction. As the court explained:

To see that [Licensee] had the right to use the designs in this manner **we need only look to a more clear-cut example**. Take, for instance, [Licensee’s] right to duplicate the designs. All parties agree that this language

clearly allowed [Licensee] to make photocopies of the designs. If, however, [Licensee] lacked the capacity to photocopy the designs on sight (*sic*) (if, for example, the designs were to (*sic*) large for an ordinary paper copier or needed to be reproduced in color), **[Licensee] could certainly take the designs to a Kinko's photocopy shop to have them copied.** Similarly, if it lacked the capacity to manufacture parts on its own, **it had the right to hire another to do so in its stead.** It is true, as the dissent points out, that [Contractor] benefitted from having the designs. It benefitted in part, however, in the same way that Kinko's might benefit from being awarded a photo-copy job.

Id. at 757 (emphases added).

The hypothetical “clear cut example” put forth by the Seventh Circuit to justify its result is no longer hypothetical. *Id.* at 757. This case presents the identical situation—right down to the enlisting by the Licensee School Districts of Kinko's (as FedEx Office was previously known) to make the copies they could not make on their own.

Great Minds' claims should fare no better than those of the licensor in *Raybestos*. Great Minds' own allegations make clear that (1) FedEx Office performs the requested services “at the request of” Licensee School Districts (Compl. ¶¶ 12, 14 [A9-A10]); and (2) the Licensee School Districts' use of the Licensed Materials, including reproduction, are within the scope of the License (Compl. ¶ 12 [A9]). Just as the licensee in *Raybestos* was entitled to hire the contractor to help it carry out licensed tasks, so too are the Licensee School

Districts entitled to hire FedEx Office to reproduce the Licensed Materials on their behalf.

2. The “have made” doctrine similarly confirms that the License allows delegation

The rule applied in *Raybestos* and *Estate of Hevia* is consistent with and analogous to the doctrine of “have made” rights in patent licensing law. “The have made cases stand for the proposition that by exercising their rights to have licensed products made, licensees can shield the unlicensed manufacturer *who makes the products for them* and subsequently *sells the products to them* from infringement liability by *impliedly licensing* the otherwise infringing actions.” *Asetek Holdings, Inc. v. CoolIT Sys.*, No. C-12-4498 EMC, 2013 U.S. Dist. LEXIS 147829, at *14-*15 (N.D. Cal. Oct. 11, 2013) (quoting *Intel Corp. v. Broadcom Corp.*, 173 F. Supp. 2d 201, 232 (D. Del. 2001)) (emphasis in original). “This notion is derived from the rule that ‘the right to make, use, and sell a product inherently includes the right to have it made by a third party, absent a clear indication of intent to the contrary.’” *Freescale Semiconductor, Inc. v. ChipMOS Techs.*, No. 5:09-CV-03689-EJD, 2013 U.S. Dist. LEXIS 10517, at *9 (N.D. Cal. Jan. 25, 2013) (quoting *Corebrace LLC v. Star Seismic, LLC*, 566 F.3d 1069, 1072-73 (Fed. Cir. 2009)) (emphasis added).

Corebrace is instructive. There, the Federal Circuit applied this rule to affirm a grant of a motion to dismiss in favor of an alleged infringer who made

products at the request of a licensee. 566 F.3d 1069. In so doing, the court held that a licensee did not exceed the license when it “contract[ed] with third parties to have the licensed products made for its own use.” *Id.* at 1075. It rejected arguments that (a) a reservation of rights, (b) the fact that the license was not sublicensable, and (c) the fact that the license was non-exclusive indicated an intent to prohibit the use of third parties. *Id.* at 1074-75. The court thus concluded unambiguously that the accused third party was protected by its customer’s license because “[a] grant of a right to ‘make, use, and sell’ a product, without more, inherently includes a right to have a third party make the product.” *Id.* at 1074.

This reasoning regarding the ability to “make, use, and sell” a product applies equally to the right to “reproduce and Share the Licensed Material” granted by the License. License § 2(a)(1)(A) [A31]; Compl. ¶ 12 [A9]. And just like the licensor in *Corebrace*, Great Minds’ reservation of rights argument cannot insert into the License a nonexistent prohibition. *See* Sec. III.B.3, *infra*. This Court, like the Federal Circuit in *Corebrace*, should therefore affirm the District Court’s order granting the Motion to Dismiss.

3. The License does not prevent the Licensee School Districts from enlisting the assistance of third parties like FedEx Office

The District Court was also correct to conclude that “the License does not limit a licensee’s ability to use third parties in exercising the rights granted by the License.” Memorandum & Order, Dkt. No. 26 at 9 [A91]. Indeed, the District

Court correctly pointed out that Great Minds “concedes as much when it conceded that it would be permissible for FedEx [Office] to copy the materials if it did so at cost.” Memorandum & Order, Dkt. No. 26 at 9 [A91]. In other words, if the License had the ban on third party use that Great Minds now urges, Great Minds’ own hypothetical of “copying at cost” would still violate that prohibition.

“Copyright licenses are generally construed according to neutral principles of contract interpretation.” *Wu v. Pearson Educ., Inc.*, No. 10 CIV 6537 (KBF), 2013 U.S. Dist. LEXIS 5289, at *11 (S.D.N.Y. Jan. 11, 2013). Because Great Minds filed a lawsuit in New York based on alleged infringement in New York, New York has the “greatest interest” in the litigation and New York contract law applies. *See, e.g., Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 590 n.7 (S.D.N.Y. 2001) (“The Second Circuit Court of Appeals has ‘discerned no significant difference between the applicable federal and New York choice-of-law rules. The federal common law choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the litigation.’”) (quoting *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 350 (2d Cir. 1992)). “In New York, a written contract is to be interpreted so as to give effect to the intention of the parties as expressed in the contract’s language.” *Random House*, 150 F. Supp. 2d at 1663.

a. The License terms contain no express prohibition on the assistance of third parties

Great Minds' attempt to distinguish *Raybestos* and the other cases authorizing FedEx Office's reproduction is unpersuasive. Great Minds argues that "those cases demonstrate[] the importance that courts place on respecting specific limiting terms in a license." Great Minds' Appellant's Brief ("GM Brief") at 27. While that may be true, the License at issue here does not contain the restriction Great Minds seeks.

If Great Minds intended to limit the Licensee School Districts' right to enlist others to assist in reproduction, it should have done so in the License. "The licensor who argues that there should be an exception or deviation from the meaning reasonably conveyed by the language of a license loses, because he or she 'should bear the burden of negotiating for language that would express the limitation or deviation.'" *Spinelli*, 96 F. Supp. 3d at 122 (quoting *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 487 (2d Cir. 1998)).

The terms of the License are unambiguous and reflect no intent by Great Minds to prevent delegation. As a result, Great Minds must be held to those unambiguous terms and the general rule allowing delegation of licensed activities should apply. *See Hogan*, 158 F.3d at 323 (concluding that if licensor wanted to prevent delegation of rights under license, "it should state this intent"); *Spinelli*, 96

F. Supp. 3d at 122 (stating that if plaintiffs wanted to vary the default rule allowing sublicenses, “such a term should have been negotiated and included explicitly”).

Great Minds’ reliance on *EL Educ., Inc. v. Pub. Consulting Grp., Inc.* is unpersuasive. No. 15-CV-9060 (DAB), 2016 U.S. Dist. LEXIS 133650 (S.D.N.Y. Sept. 23, 2016); *see* GM Brief at 23-24. That case did not address a limitation on the use of third parties in a license agreement. Instead, it addressed a claim that a licensee should be allowed to sell materials in print in addition to making them available for free on its website. *Id.* at *4. And in the end, the court did not conclude that the use at issue was prohibited, only that it could not say it was permitted as a matter of law. *Id.* at *17. Instructive here, the court also refused to read in a use restriction because “where sophisticated drafters omit a term from a contract, ‘the inescapable conclusion is that the parties intended the omission.’” *Id.* at *15 (quoting *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (N.Y. 2014)).

b. The definition of “Share” indicates an intent to authorize third party assistance

The License indicates an intent to allow delegation. The License defines “Share” as “to provide material to the public by any means or process ... such as reproduction” License § 1(l) [A30] (emphasis added). The inclusive language “any means or process” indicates an intent to allow licensees broad latitude in exercising their licensed right to reproduce and distribute the materials for non-

commercial use. *See* Memorandum & Order, Dkt. No. 26 at 9 [A91]. This includes enlisting third parties. Simply put, FedEx Office is the “means or process” the Licensee School Districts chose to exercise their contractual right to reproduction.

c. The “Reservation of Rights” does not support a third-party assistance restriction

The District Court was correct to reject Great Minds’ attempt to read in a non-existent limitation on third party assistance through the License’s reservation of rights provision. Memorandum & Order, Dkt. No. 26 at 10 [A92]. The reservation of rights states: “To the extent possible, the Licensor waives any right to collect royalties from You for the exercise of the Licensed Rights In all other cases the Licensor expressly reserves any right to collect such royalties, including when the Licensed Material is used for other than NonCommercial purposes.” License (Compl. Ex. B) § 2(b)(3) [A31].

This clause has no bearing on the ability of Licensee School Districts to delegate to third parties. Instead, it is a reservation of rights that allows Great Minds to collect damages from the licensee if the licensee itself exceeds the scope of the License by, for example, selling Licensed Materials to the public at large instead of distributing them to students. *C.f.* Memorandum & Order, Dkt. No. 26 at 10 [A92] (“Nor can the reservation of rights contained in the License be read to preclude a licensee from hiring someone to make copies of the [Licensed]

Materials so the licensee can use them for a ‘nonCommercial’ purpose ... the unambiguous import of this provision is to reserve G[reat Minds’] right to collect royalties from a licensee if the *licensee* exceeds the scope of the license by, for example, selling copies of the materials.”) (emphasis in original).

Thus, like all other terms of the License, the reservation of rights focuses on the activities of the Licensee School Districts—not on the actions of third-parties like FedEx Office. Because, as discussed more fully below, FedEx Office is not a licensee and there is no allegation that Licensee School Districts are making non-commercial use of the Licensed Materials, this term is irrelevant to this dispute. *See* Sec. III.C, *infra*.

Great Minds’ attempt to imply into the License a nonexistent limitation on third-party delegation must be rejected. Just like the failed attempt to imply such a restriction in *Raybestos*, Great Minds’ argument that Licensee School Districts may not delegate their rights to FedEx Office is a “leap of logic [that] works only if [the Court] grant[s] [Great Minds’] request to interpret the contract to add such limiting language—that is if [the Court] accept[s] [Great Minds’] contention that the contract implies something it does not say.” *Raybestos*, 463 F.3d at 758.

4. Great Minds’ fair use cases are inapposite because FedEx Office does not rely on the fair use defense

As noted above, FedEx Office *does not argue fair use* in its Motion to

Dismiss.² Nevertheless, Great Minds relies on several fair use cases to argue that “FedEx [Office’s] reproduction of Eureka Math in exchange for monetary compensation and solely for its own profit is a commercial activity distinct from its customer’s noncommercial use” GM Brief at 19 (emphasis in original); *see also* GM Brief at 19-20 (citing *Basic Books v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) and *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381 (6th Cir. 1996)).

As correctly recognized by the District Court, these cases “are distinguishable in that the customers ‘requesting’ the copying did not have a license to make the reproduction and because FedEx [Office] does not rely upon the fair use doctrine.” Memorandum & Order, Dkt. No. 26 at 10 [A92]. Because there was no license in these cases explicitly granting the customers the right to make copies, the printers could not step into the shoes of their customers and make copies on their behalf. Here, of course, the Licensee School Districts are expressly licensed to make reproductions and FedEx Office may therefore step into their shoes.

Because their customers had no license, the defendants in *Princeton* and *Basic Books* relied on the fair use defense to excuse their copying. Unlike those defendants, *FedEx Office did not rely on the fair use defense in the motion to*

² As noted above, FedEx Office expressly reserves all rights to raise this and any other defense should this case be remanded.

dismiss. This distinction is critical, because the fair use defense requires a full analysis of the use of the material under the factors in 17 U.S.C. § 107, including the intentions of the party invoking it. *See, e.g., Princeton*, 99 F. 3d at 1385.

After conducting the multi-factor fair use analysis, *Princeton* and *Basic Books* concluded that fair use rights cannot be exercised derivatively (i.e. the print shops could not exercise the fair use rights of their educational customers). In stark contrast, *Hevia*, *Raybestos*, and *Hogan* all expressly hold that rights under an express license may be exercised derivatively as FedEx Office does here. The fact that the defendants whose customers had no license in *Princeton* and *Basic Books* could not assume their customers' fair use defense has no bearing on this case where it is undisputed that the customer has a license. FedEx Office properly assisted those customers in making the reproductions that they were unable or unwilling to make on their own. *See, e.g., Hogan*, 158 F.3d at 324; *Raybestos*, 463 F.3d at 757.

5. Great Minds' "volitional actor" argument is irrelevant

Great Minds' "volitional actor" argument is similarly irrelevant to this dispute. *See* GM Brief at 14-16. At best, Great Minds' argument establishes that FedEx Office *could* be liable for direct (as opposed to contributory) infringement if the Court were to agree that FedEx Office takes the volitional act that arguably infringes and FedEx Office has no valid defenses. This has no bearing on whether

FedEx Office could assert any of the other independently sufficient defenses to infringement available to FedEx Office.

*FedEx Office's motion to dismiss (and the District Court's ruling) are not based on a claim that FedEx Office is not a "volitional actor" under the copyright law.*³ Establishing that FedEx Office is a volitional actor is therefore irrelevant. Like the non-existent "fair use" argument discussed above, Great Minds' attempt to refute an unasserted "non-volitional actor" defense has no bearing on the defense that FedEx actually asserted, namely that FedEx Office assisted the Licensee School Districts to exercise their licensed rights. The volitional actor argument provides no basis for reversal.

C. The District Court Was Correct to Conclude That FedEx Office Is Not a Licensee

The District Court correctly ruled that "the entities exercising the "Licensed Rights" are the [Licensee] [S]chool [D]istricts, not FedEx [Office]" Memorandum & Order, Dkt. No. 26 at 10 [A92]. This ruling is correct because FedEx Office is not a party to the License.

Great Minds claims that FedEx Office became a party to the License by making the reproductions requested by the Licensee School Districts at issue in this case. GM Brief at 22. It supports this argument with a citation to the

³ As noted above, FedEx Office expressly reserves all rights to raise this and any other defense should this case be remanded.

License's "downstream recipients" provision that states "every recipient of the licensed materials receives an offer from the Licensor to exercise the licensed rights". GM Brief at 22 (quoting License § 2(a)(5)(A) [A31]) (emphasis added). The fact that FedEx Office may have received an *offer* to become a licensee does not automatically render FedEx Office a licensee as Great Minds suggests. Nor does it destroy FedEx Office's right to assist Licensee School Districts in their own exercise of Licensed Rights.

1. FedEx Office did not know of or assent to the License's terms as required to make it a party to the License

"Mutual manifestation of assent' is the 'touchstone' of a binding contract." *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 388 (E.D.N.Y. 2015) (quoting *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 29 (2d Cir. 2002)) (refusing to hold users to contract when there was no evidence of knowledge of terms or any intent to be bound). "Where the terms of a contract are offered by one party to another, unequivocal acceptance of the terms by the receiving party is required." *Id.* (emphasis added). Indeed, "[a]s a general principle, at common law, an acceptance of a contract, in order to be effective, must be positive and unambiguous." *Id.* (quoting 2 WILLISTON ON CONTRACTS § 6.10 (4th ed.)) (emphasis added).

This "unequivocal acceptance" requires the purportedly accepting party to have knowledge of the terms it is accepting. *Id.* at 393-94. This is true even to defeat an allegation of acceptance by use like the one Great Minds makes here.

E.g., Hines v. Overstock.com, Inc., 380 Fed. App'x 22, 25 (2d Cir. 2010) (“Here, according to [defendant’s] submission, users of the Overstock website ‘accept’ the Terms and Conditions merely by using the website. This assertion alone does not support a finding that a binding agreement existed, however, because Overstock did not allege any facts tending to show that a user would have had actual or constructive knowledge of the Terms and Conditions.”); *see also, e.g., Hirsch v. Citibank, N.A.*, 542 Fed. App'x 35, 37 (2d Cir. 2013) (“While it is true that a party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing, an exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case no contract is formed with respect to the undisclosed terms.”).

Although Great Minds now suggests that FedEx Office is a party to the License, it did not *allege* this in its Complaint,⁴ nor does Great Minds allege that FedEx Office assented to—or even had knowledge of—the License’s terms at any time before this dispute. The best Great Minds can do is claim that it made an *offer* to FedEx Office by attaching the License to its work. GM Brief at 16, 22 (quoting License § 2(a)(5)(A) [A31] (“every recipient of the licensed materials

⁴ Even if Great Minds had alleged that FedEx Office was a party to the License, this would be entitled to no weight because it would be a legal conclusion. *See Iqbal*, 556 U.S. at 678 (“the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions ... courts ‘are not bound to accept as true a legal conclusion couched as a factual allegation’”).

receives an offer from the Licensor to exercise the licensed rights”)). An offer is not enough. The absence of any allegations of acceptance or assent to License terms by FedEx Office precludes a finding that FedEx Office is a party to the License.

Further, the mere offer by Great Minds of a license agreement to the public at large cannot make FedEx Office a party to the License. FedEx Office must take some affirmative action, beyond mere reproduction of the Licensed Materials provided to it by Licensee School Districts, to “manifest assent to such a license agreement.” *See Specht v. Netscape Commc’ns, Corp.*, 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001); *see also Estate of Hevia*, 602 F.2d at 41 (explaining that “implied licenses are found only in narrow circumstances” and that “[t]he touchstone to grant an implied license is intent. We ask whether the totality of the parties’ conduct indicates an intent to grant such permission”). Without even having any knowledge that the License *existed*, FedEx Office could not have agreed to be bound by its terms.

2. The only relevant use is that of the Licensee School Districts and there is no allegation that the Licensee School Districts are making non-commercial use

For the avoidance of doubt, FedEx Office does not assert it is authorized *directly* to reproduce the Licensed materials as a *party* to the License. Instead, FedEx Office is authorized by the License *indirectly* because it is assisting the

Licensee School Districts in exercising *their own* licensed rights. *See* Sec. III.B.1, *supra*. As a result, the District Court correctly concluded that the only use that matters is the use of the Licensee School Districts. Memorandum & Order, Dkt No. 26 at 10 [A92] (“As the school districts are the entities exercising the rights granted by the License, it is irrelevant that FedEx [Office] may have benefitted by having been hired by them to act, viz. make copies, in their stead.”).

D. The District Court Was Correct to Conclude that the License is Unambiguous based on Great Minds’ Admission

The District Court correctly determined that FedEx Office’s activities are authorized by the “unambiguous terms of the License.” Memorandum & Order, Dkt. No. 26 at 8 [A90] (emphasis added). Nevertheless, Great Minds now suggests for the first time that the License is ambiguous and requests a remand on that basis. GM Brief at 3, 25. This new argument should be rejected out of hand because it was not raised below. *See, e.g., Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 50 (2d Cir. 2015) (“It is well settled that arguments not presented to the district court are considered waived and generally will not be considered for the first time on appeal.”); *Walter E. Heller & Co. v. American Flyers Airline Corp.*, 459 F.2d 896, 902 (2d Cir. 1972) (“[a] court of appeals is not the proper forum for raising new issues ... nor is an appellant normally permitted to have the benefit of a new theory on appeal.”)

But Great Minds went beyond mere silence about ambiguity. Great Minds

has repeatedly admitted that the License is unambiguous. In response to FedEx Office's Motion to Dismiss, Great Minds claimed unequivocally "that the limiting language in the License is unambiguous in its favor" Plaintiff's Memo in Opposition to Mot. to Dismiss, Dkt. 15.2 (Aug. 24, 2016) at 5 [A57]. Moreover, Great Minds urged the District Court to entertain a motion for summary judgment before discovery had even begun because it claimed that "[s]ince the question of FedEx [Office's] liability in this case turns on the interpretation of the written license at issue ... this issue is ripe for summary judgment." Letter from Great Minds to District Court, Dkt. No. 13 (July 11, 2016) at 1 [Appellee's Supplemental Appendix ("SA") 1]. In support, Great Minds cited several cases stating that a court may grant early summary judgment when construing an unambiguous agreement. *Id.* Great Minds reiterated its position that "the plain language of the license is unambiguous in Great Minds' favor ..." a few months later when opposing a request to file an amicus brief by Creative Commons, the drafter of the License. Letter from Great Minds to District Court, Dkt. No. 24 (September 15, 2016) at 2 n.1. [SA4].

Great Minds cannot now change its position and claim ambiguity because it disagrees with the District Court's interpretation of the License Great Minds admitted repeatedly was unambiguous. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("Where a party assumes a certain position in a legal

proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him ...”) (internal quotations and citations omitted).

In any event, the record does not support a finding of ambiguity. In New York, “contract language is ambiguous if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as understood in the particular trade or business.” *Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1095 (2d Cir. 1993). “No ambiguity exists when contract language has a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself and concerning which there is no reasonable basis for a difference of opinion.” *Id.* The determination of whether a contract is ambiguous is a question of law. *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 178 (2d Cir. 2004).

This case does not turn on the interpretation of a vague term in the License. Quite the contrary, it turns on an improper attempt by Great Minds to read in language that is entirely absent. This is not ambiguity that can be resolved through extrinsic evidence; it is an attempt to rewrite the License. The License is clear on

what it includes, and what it does not include, and the Motion to Dismiss was properly granted based on its clear terms.

E. The District Court Was Correct to Reject Great Minds' Misguided Public Policy Arguments

Great Minds' sky-is-falling policy argument does not help its case. Great Minds asserts that “[a]ffirming the district court’s ruling would have a significant chilling effect on Great Minds’ (and likely others’) activities that benefit the public both by discouraging Great Minds and others like it from making their educational materials freely available for noncommercial use and by depriving them of much needed revenue to create such materials in the first place and otherwise to support their public, non-profit mission.” GM Brief at 33. Not so.

This is a false dichotomy. Great Minds could, but so far has chosen not to, switch from the Creative Commons License to a different license at any time containing the (nonexistent) restriction on third-party reproduction it seeks to read into the Creative Commons license. The License should not be interpreted in a manner that is (a) contrary to the purpose of the License; and (b) harmful to the hundreds of thousands of entities using the License solely so that Great Minds may avoid the minor inconvenience of drafting its own license. *See Hogan*, 158 F.3d at 323 (concluding that if licensor wanted to prevent delegation of rights under license, “it should state this intent”); *Spinelli*, 96 F. Supp. 3d at 122 (stating that if plaintiffs wanted to vary the default rule allowing sublicenses, “such a term should

have been negotiated and included explicitly”).

Indeed, as recognized by the District Court, the interpretation urged by FedEx Office is consistent with the purpose of the Creative Commons license to make educational and other materials widely available. *See* Memorandum & Order, Dkt. No. 26 at 10 n.4 [A92]. Great Minds’ interpretation would disrupt the well-established licensing scheme Creative Commons has put in place. This would likely cause hundreds of thousands of content creators to cease using the Creative Commons license and draft their own license, leading to a great number of works ceasing to be distributed. Such a result must be avoided.

IV. CONCLUSION

For the foregoing reasons, Appellee FedEx Office and Print Services, Inc. respectfully requests that this Court affirm in its entirety the District Court’s Order granting the motion to dismiss with prejudice and entering judgment against Great Minds and grant to FedEx Office and Print Services, Inc. any and all other relief which this Court deems just and proper.

Dated: June 27, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 27, 2017, I electronically filed a copy of the foregoing *Brief of Defendant-Appellee* with the Clerk of the Court for the United States Court of Appeals for the Second Circuit through the CM/ECF system.

I certify that lead counsel for all participants in this case are registered CM/ECF users and will receive a copy of the foregoing Brief of Defendant-Appellee through electronic delivery. Pursuant to Second Circuit Rule 25.1(h)(1), the Filing Users' registration constitutes consent to electronic service of all documents. Accordingly, I certify that on June 27, 2017, I separately served by electronic copy the Brief of Defendant-Appellee on the following:

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 7,014 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: June 27, 2017.

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