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 PLAINTIFF-APPELLANT

Rhett O. Millsaps, II
LAW OFFICE OF RHETT O. MILLSAPS II
745 Fifth Avenue, Suite 500
New York, New York 10151
646-535-1137

and

Eric M. Lieberman
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
61 Broadway, 18th Floor
New York, New York 10006
212-254-1111

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 3

A. Great Minds' *Eureka Math* Curriculum. 4

B. The NonCommercial Public License. 5

C. FedEx's Willful Infringement of Great Minds' Copyrights. 7

D. The District Court's Dismissal of the Complaint. 7

SUMMARY OF ARGUMENT 9

STANDARD OF REVIEW 11

ARGUMENT 11

I. THIS CIRCUIT'S CASE LAW AND THE UNAMBIGUOUS LANGUAGE OF THE LICENSE REQUIRE REVERSAL OF THE DISTRICT COURT'S DISMISSAL OF GREAT MINDS' COMPLAINT 11

A. FedEx's Own Volitional Conduct Makes It Directly Liable for Infringement Here. 14

B. FedEx's Conduct Constitutes Commercial Activity that Exceeds the Scope of the Unambiguous Terms of the Public License. 17

C. The Public License Does Not Allow NonCommercial Users to Delegate the Right to Make Commercial Reproductions.......... 21

D. The Cases Relied on by the District Court, While Factually Inapposite, Legally Support Great Minds' Position.......... 25

II. PUBLIC POLICY GROUNDS ALSO WARRANT REVERSAL OF THE DISTRICT COURT'S DISMISSAL OF GREAT MINDS' COMPLAINT.......... 31

CONCLUSION.......... 34

CERTIFICATE OF COMPLIANCE.......... 36

TABLE OF AUTHORITIES

Page(s)

Cases

Automation by Design, Inc. v. Raybestos Prods. Co.,
463 F.3d 749 (7th Cir. 2006) 26, 27

Basic Books v. Kinko's Graphics Corp.,
758 F. Supp. 1522 (S.D.N.Y. 1991) 19

Bourne v. Walt Disney Co.,
68 F.3d 621 (2d Cir. 1995), *cert. denied*, 517 U.S. 1240 (1996) 12, 18

Capitol Records, LLC v. ReDigi Inc.,
934 F. Supp. 2d 640 (S.D.N.Y. 2013) 14, 15

Cartoon Network LP, LLLP v. CSC Holdings, Inc.,
536 F.3d 121 (2d Cir. 2008) 15, 16

Cohen v. U.S.,
98 Fed. Cl. 156 (Fed. Cl. 2011) 17

Compliance Source, Inc. v. GreenPoint Mortg. Funding, Inc,
624 F.3d 252 (5th Cir. 2010) 29, 30

EL Education, Inc. v. Public Consulting Group, Inc.,
15-CV-9060 (DAB), 2016 WL 5816994
(S.D.N.Y. Sept. 23, 2016) .... *passim*

Estate of Hevia v. Portrio Corp.,
602 F.3d 34 (1st Cir. 2010) 22, 26

Galli v. Metz,
973 F.2d 145 (2d Cir. 1992) 34

Gilliam v. Am. Broad. Cos.,
538 F.2d 14 (2d Cir. 1976) 17, 18, 21, 22

Great Minds v. FedEx Office and Print Services, Inc.,
16-CV-1462 (DRH)(ARL), 2017 WL 744574
(E.D.N.Y. Feb. 24, 2017) 3

Harper & Row Publishers, Inc. v. Nation Enterprises,
471 U.S. 539 (1985) 14

Hogan Sys., Inc. v. Cybresource Int'l, Inc.,
158 F.3d 319 (5th Cir. 1998).. 23, 28, 29

Jacobsen v. Katzer,
535 F.3d 1373 (Fed. Cir. 2008).. 21

John Wiley & Sons, Inc. v. DRK Photo,
998 F. Supp. 2d 262 (S.D.N.Y. 2014).. 18

Leutwyler v. Royal Hashemite Court of Jordan,
184 F. Supp. 2d 303 (S.D.N.Y. 2001).. 12, 13

Levitin v. Sony Music Entertainment,
101 F. Supp. 3d 376 (S.D.N.Y. 2015).. 13

Mahan v. Roc Nation, LLC,
No. 14 Civ. 5075(LGS), 2015 WL 4388885
(S.D.N.Y. July 17, 2015) 33

Marconi Wireless Telegraph Co. of Am. v. Simon,
227 F. 906 (S.D.N.Y. 1915), *aff'd*, 231F. 1021 (2d Cir. 1916),
rev'd on other grounds, 246 U.S. 46 (1918).................................... 25, 26

Matthew Bender & Co. v. W. Pub. Co.,
240 F.3d 116 (2d Cir. 2001).. 33

Mitek Holdings, Inc. v. Arce Eng'g Co.,
198 F.3d 840 (11th Cir. 1999).. 33

Perfect 10, Inc. v. Giganews, Inc.,
847 F.3d 657 (9th Cir. 2017).. 15

Playboy Enterprises International Inc. v. Mediatakeout.com LLC,
15 Civ. 7053 (PAE), 2016 WL 1023321
(S.D.N.Y. March 8, 2016).. 12

Princeton Univ. Press v. Mich. Document Servs.
99 F.3d 1381 (6th Cir. 1996)... 16, 20

Religious Tech. Ctr. v. Netcom On-Line Commc'n Serv., Inc.,
907 F. Supp. 1361 (N.D.Ca. 1995) 15

S.O.S., Inc. v. Payday, Inc.,
886 F.2d 1081 (9th Cir. 1989).. 17, 18

Scholz Design, Inc. v. Sard Custom Homes, LLC,
691 F.3d 182 (2d Cir. 2012)... 11

Spinelli v. Nat'l Football League,
96 F. Supp. 3d 81 (S.D.N.Y. 2015).. 12

Steve Altman Photography v. U.S.,
18 Cl. Ct. 267 (Cl. Ct. 1989) 18

Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.,
996 F.2d 1366 (2d Cir. 1993).. 14

Viacom Int'l Inc. v. Fanzine Int'l Inc.,
No. 98-CV-7448, 2000 WL 1854903 (S.D.N.Y. July 12, 2000) 18

Womack+Hampton Architects, LLC v. Metric Holdings Ltd. P'ship,
102 Fed. App'x 374 (5th Cir. 2004)... 28

WPIX, Inc. v. ivi, Inc.,
691 F.3d 275 (2d Cir. 2012)... 12

Statutes

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Rules

Fed. R. App. P. 4(a)(1) 1

Other Authorities

Black's Law Dictionary 19

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, as this is a civil action arising under the copyright laws of the United States. The court entered a final judgment on March 21, 2017 dismissing plaintiff-appellant Great Minds' complaint alleging infringement of its copyrights by defendant-appellee FedEx Office and Print Services, Inc. ("FedEx"). A95.[1] Great Minds filed a timely notice of appeal on March 22, 2017, in accordance with Fed. R. App. P. 4(a)(1). A96. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Appellant Great Minds is a 501(c)(3) non-profit organization and has created and copyrighted, *inter alia*, a comprehensive math curriculum, *Eureka Math*, for grades PreK-12 ("Eureka Math") that it publishes and sells nationwide. Great Minds relies on revenues from sales and commercial licensing of Eureka Math to fund its day-to-day operations as well as improvement of its existing curricula and creation of new curricula. Eureka Math is used by tens of thousands of educators across the country. Great Minds also makes digital files of Eureka Math available to the public for free download under a written "Creative Commons Attribution – Non Commercial – Share Alike 4.0 International Public License" (the "Public

[1] Citations herein to the Appendix are denoted by "A" followed by the cited page number(s) and additional pinpoint cites where appropriate.

License”). Any member of the public may download, reproduce, and distribute Eureka Math pursuant to the terms of the Public License, which is made available to all on the same terms without the need to negotiate. The scope of the Public License, however, is expressly limited to *noncommercial* uses.

Appellee FedEx has ignored the express noncommercial limitation of the Public License, and its employees have reproduced Eureka Math for FedEx’s profit in its commercial stores, at the request of others who have downloaded Eureka Math pursuant to the Public License. Great Minds sued FedEx for copyright infringement. The district court dismissed the lawsuit holding that FedEx’s acts were covered by the Public License.

The questions presented are:

1. Whether the plain language of the Public License, which expressly authorizes members of the public to download and reproduce licensed educational materials “for NonCommercial purposes only” and further provides that “[i]n all other cases the Licensor expressly reserves any right to collect such royalties, including when the Licensed Material is used other than for NonCommercial purposes,” unambiguously prohibits commercial copy shops, in this case FedEx, from reproducing materials published under the license, for profit, at the request of and upon commercial payment by third parties.

2. In the alternative, whether the language of the Public License is ambiguous with regard to this question, making the district court's resolution of the issue on a motion to dismiss improper.

STATEMENT OF THE CASE

This appeal arises from the district court's dismissal of Great Minds' complaint against FedEx alleging infringement of Great Minds' copyrights in certain materials that FedEx commercially reproduced without authorization by Great Minds. A95. Great Minds filed its complaint against FedEx on March 24, 2016 in the United States District Court for the Eastern District of New York, seeking injunctive relief and damages, after Great Minds learned that FedEx was commercially reproducing Great Minds' Eureka Math materials in or around Suffolk County, New York and elsewhere without authorization from Great Minds. *See* A7-34. FedEx moved to dismiss the complaint, and the district court granted FedEx's motion to dismiss and filed an opinion and order of dismissal, *Great Minds v. FedEx Office and Print Services, Inc.*, 16-CV-1462 (DRH)(ARL), 2017 WL 744574 (E.D.N.Y. Feb. 24, 2017), reprinted at A83-94. This appeal followed.

STATEMENT OF FACTS

Great Minds is a Washington, D.C. based non-profit 501(c)(3) organization that seeks to ensure that all students, regardless of their circumstances, receive a content-rich education in the full range of the liberal arts and sciences, including

English, mathematics, history, the arts, science, and foreign languages. A9 ¶ 8. Great Minds works with teachers and scholars to create instructional materials, conduct research, and promote policies that support a comprehensive and high-quality education in America's public schools. *Id.*

A. Great Minds' *Eureka Math* Curriculum.

Great Minds has created, *inter alia*, a comprehensive math curriculum, *Eureka Math*, for grades PreK-12 ("Eureka Math") that is used by tens of thousands of educators across the country and is officially recommended for use by the states of New York and Tennessee. A9 ¶ 9. Great Minds owns federal copyright registrations in Eureka Math. A9 ¶ 10, A19-29.

Great Minds publishes and sells printed book versions of Eureka Math and relies substantially on the revenues from those sales to update and improve Eureka Math, develop new curricula, and otherwise fund its non-profit educational mission. A9 ¶ 11, A10 ¶ 14-15. Great Minds also has entered royalty-bearing licenses with third parties that wish to engage in reproduction of Eureka Math for their own commercial gain, and Great Minds likewise relies on those license revenues to improve Eureka Math, fund the creation of new curricula, and support its other non-profit, educational activities. A10 ¶ 15.

Additionally, Great Minds makes digital files of Eureka Math available to the public for free download under a written "Creative Commons Attribution –

Non Commercial – Share Alike 4.0 International Public License" (the "Public License"). A9 ¶ 12, A30-34. Any member of the public may download, reproduce, and distribute Eureka Math, and creative derivative works based on Eureka Math, pursuant to the terms of the Public License, which is not negotiated with individual users but instead made available to all on the same terms. A31 § 2(a)(5). The scope of the Public License, however, is expressly limited to *non-commercial* uses – any and all for-profit uses, *made by anyone*, are expressly forbidden. A31 §§ 2(a)(1), 2(b)(3). Great Minds' public licensing of Eureka Math under the Public License thus advances its mission and benefits the public by striking a balance that allows teachers, students, and school districts to freely share and use the Eureka Math materials for their non-commercial, educational benefit, while reserving Great Minds' rights to collect royalties for commercial reproduction of Eureka Math to fund its curriculum development and other operations. A9 ¶ 11-12, A10 ¶ 14-15.

B. The NonCommercial Public License.

The Public License describes the licensed rights in relevant part as follows: "Licensor hereby grants You a worldwide, royalty-free, non-sublicensable, non-exclusive, irrevocable license to exercise the Licensed Rights in the Licensed Material to reproduce and Share the Licensed Material, in whole or in part, **for NonCommercial purposes only**." A31 § 2(a)(1)(A) (emphasis added). "You" is defined as "the individual or entity exercising the Licensed Rights." A30 § 1(n).

The Public License further states, "Every recipient of the Licensed Material automatically receives an offer from the Licensor to exercise the Licensed Rights under the terms and conditions of this Public License." A31 § 2(a)(5)(A). The Public License also makes clear that if a recipient of the licensed material "fail[s] to comply with this Public License, then [the recipient's] rights under this Public License terminate automatically." A33 § 6(a).

The Public License defines NonCommercial as "not primarily intended for or directed towards commercial advantage or monetary compensation. For purposes of this Public License, the exchange of Licensed Materials for other material subject to Copyright or Similar Rights by digital file-sharing or similar means is NonCommercial provided there is no payment of monetary compensation in connection with the exchange." A30 § 1(k).

The Public License expressly reserves Great Minds' rights to collect royalties from commercial reproduction of Eureka Math under additional limiting language that reads as follows:

> To the extent possible, the Licensor waives any right to collect royalties from You for the exercise of the Licensed [i.e., noncommercial] Rights, whether directly or through a collecting society under any voluntary or waivable statutory or compulsory licensing scheme. **In all other cases the Licensor expressly reserves any right to collect such royalties, including when the Licensed Material is used other than for NonCommercial purposes**.

A31 § 2(b)(3) (emphasis added).

C. FedEx's Willful Infringement of Great Minds' Copyrights.

FedEx has ignored the express noncommercial limitation of the Public License, and its employees have reproduced Eureka Math for FedEx's profit in its commercial stores, without authorization from Great Minds, in at least New York and Michigan in 2016 and 2015, respectively. A11 ¶¶ 16, 19. Unlike other commercial printers, FedEx refused Great Minds' demand that it cease commercially reproducing Eureka Math or obtain a royalty-bearing license from Great Minds for the right to do so. A11 ¶¶ 17-18, 20-21. Great Minds accordingly filed a complaint in the district court on March 24, 2016 alleging violation of Great Minds' copyright rights based on FedEx's unauthorized commercial reproduction of Eureka Math. A7-34.

D. The District Court's Dismissal of the Complaint.

On February 24, 2017, without hearing oral argument, the district court issued a Memorandum and Order dismissing Great Minds' complaint. A83-94.

In so doing, the district court ignored this Circuit's precedent establishing that direct liability for a reproduction or distribution of a copyrighted work is placed on the party whose exercise of volition is responsible for the reproduction or distribution. In this case the party exercising volition, and therefore directly responsible for the production and distribution of unauthorized commercial copies

of Eureka Math, was FedEx – the entity whose employees actually produced the copies.

The district court also wholly ignored the express terms of the Public License, which states that "[e]very recipient of the Licensed Material automatically receives an offer from the Licensor to exercise the Licensed Rights under the terms and conditions of this Public License," A31 § 2(a)(5)(A), and that if a recipient of the licensed material "fail[s] to comply with this Public License, then [the recipient's] rights under this Public License terminate automatically." A33 § 6(a). In wholly disregarding these express terms of the Public License and this Circuit's precedent regarding volitional conduct, the district court ruled that "the entities exercising the 'Licensed Rights' are the school districts, not FedEx," A92, even though Great Minds has alleged that it is FedEx and its employees who are making the unauthorized commercial copies of Eureka Math. A11 ¶¶ 16, 19, 21, 23-24.

Additionally, the district court ruled that "the unambiguous terms of the License grant the licensee, i.e., the person exercising the rights provided under the License, the right 'to reproduce and Share the Licensed Material, in whole or in part, for NonCommercial purposes only' but does not in any manner limit the means by which a licensee may reproduce the materials." A93. As discussed in detail below, the district court improperly embraced a narrow interpretation of the limiting language in the Public License that favors FedEx and based its decision

entirely on a handful of inapposite cases that held that the holder of a private copyright license may – in the absence of specific limiting language – delegate its licensed rights to third parties.

SUMMARY OF ARGUMENT

This appeal arises from FedEx's and the district court's disregard for this Circuit's established precedent regarding volitional conduct and the unambiguous terms of the Public License, both of which establish that FedEx's unauthorized commercial reproduction of Eureka Math is an infringement of Great Minds' copyrights.

First, the district court erred by ruling that FedEx's customers, and not FedEx, are the entities exercising rights under the Public License when FedEx employees reproduce and distribute copies of Eureka Math at the customers' request solely for FedEx's commercial gain. This Circuit has made clear that a commercial copy shop's reproduction of copyrighted materials for its own profit is volitional conduct separate and distinct from its customers' use of those materials, and thus FedEx is directly liable for infringement of Great Minds' copyrights. The Public License itself restates this principle; the Public License's language provides that *every* recipient of materials under the Public License must abide by the terms and conditions of that license – including its strict noncommercial use limitation – and that if a recipient of materials under the Public License fails to do so, then the

licensed rights automatically terminate, which means that the use by the party is infringing.

Second, the district court erred by failing to recognize that FedEx's reproduction of Eureka Math materials plainly is a proscribed commercial use under the Public License's unambiguous terms, relevant case law, and common understanding of the meaning of "commercial."

Third, the district court based its ruling on factually inapposite cases that, when correctly understood and applied to the facts of this case, actually support Great Minds' position. None of the cases relied on by the district court involved a public license, like the Public License at issue here; rather, those cases involved private licenses that contained no relevant limitations, in contrast to the Public License's express noncommercial limitation. Nonetheless, all of the cases cited by the district court support Great Minds' position here that a written license restriction must be strictly enforced.

Finally, the district court failed to understand the public policy issues that weigh heavily in favor of Great Minds in this case. Great Minds relies on revenues from sales of Eureka Math, as well as commercial licensing of those materials, to fund improvements to the curriculum as well as the creation of new curricula and other aspects of its non-profit, educational mission. If the Public License were to be construed to permit commercial copy shops to reproduce Eureka Math for profit

without paying Great Minds a royalty, and thus to unfairly commercially compete with Great Minds, Great Minds would choose not to make its materials available under the Public License for free, *noncommercial* use by the public. Thus, affirming the district court's ruling in favor of FedEx would run contrary to the interests of the Copyright Act – specifically, the interest in maximizing the public's exposure to valuable works.

For these reasons, this Circuit's precedent and the unambiguous terms of the Public License require not only reversal of the judgment of dismissal, but ultimately judgment in favor of Great Minds on the face of the Public License.

STANDARD OF REVIEW

This Court "review[s] a district court's grant of a motion to dismiss *de novo*, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Scholz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182, 185 (2d Cir. 2012).

ARGUMENT

I. THIS CIRCUIT'S CASE LAW AND THE UNAMBIGUOUS LANGUAGE OF THE LICENSE REQUIRE REVERSAL OF THE DISTRICT COURT'S DISMISSAL OF GREAT MINDS' COMPLAINT

Where a plaintiff owns valid copyrights in materials that a defendant has reproduced without authorization from the copyright holder, as is the case here, the "burden of proof…falls on defendant[] to demonstrate that [it has] an affirmative

statutory defense to copyright infringement." *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278 (2d Cir. 2012) (citing *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995), *cert. denied*, 517 U.S. 1240 (1996) (noting possession of license by accused infringer is affirmative defense and burden falls on licensee to prove license's existence)). Dismissal "on the basis of a license is proper when 'a contract underlying the suit clearly and unambiguously demonstrates the existence of the defendant's license to exploit the plaintiff's copyrights and where plaintiff has not shown any limitation on that license.'" *Playboy Enterprises International Inc. v. Mediatakeout.com LLC*, 15 Civ. 7053 (PAE), 2016 WL 1023321, *2-3 (S.D.N.Y. March 8, 2016) (citing *Spinelli v. Nat'l Football League*, 96 F. Supp. 3d 81, 121 (S.D.N.Y. 2015)) (emphasis added).

Courts generally apply principles of contract law in the construction of copyright licenses. *See Bourne*, 68 F.3d at 628-29; *EL Education, Inc. v. Public Consulting Group, Inc.*, 15-CV-9060 (DAB), 2016 WL 5816994, *3 (S.D.N.Y. Sept. 23, 2016); *Leutwyler v. Royal Hashemite Court of Jordan*, 184 F. Supp. 2d 303, 306 (S.D.N.Y. 2001). Where "the language of the contract is unambiguous and conveys a definite meaning, then the interpretation of the contract is a question of law for the court." *Bourne*, 68 F.3d at 629 (internal quotation marks and citation omitted).

"Alternatively, where the language used is susceptible to differing interpretations, each of which may be said to be as reasonable as another, then the interpretation of the contract becomes a question of fact for the jury." *Id*. (internal quotation marks and citation omitted). *See also Levitin v. Sony Music Entertainment*, 101 F. Supp. 3d 376, 387-88 (S.D.N.Y. 2015) (denying motion to dismiss copyright claims where defendants' "reading of the [licenses was] but one possible reading of the[] agreements," and "Plaintiffs [had] suggested, and the Court [found] reasonable, alternative interpretations of the[] contracts"); *Leutwyler*, 184 F. Supp. 2d at 306-307 (denying motion to dismiss copyright claims where plaintiff argued that readings of the license at issue other than that urged by defendants were "possible, and were actually intended"); *EL Education*, 2016 WL 5816994 at *6 (ruling that "the Court need only find [plaintiff's] interpretation sustainable on the face of the contract" and denying motion to dismiss copyright claims "[b]ecause the Court indeed [found plaintiff's] interpretation [of the license] reasonable").

Accordingly, while Great Minds contends that the limiting language in the Public License is unambiguous in its favor, this Court should reverse dismissal of Great Minds' complaint if Great Minds' interpretation of the Public License is a reasonable alternative to FedEx's interpretation improperly embraced by the district court.

A. FedEx's Own Volitional Conduct Makes It Directly Liable for Infringement Here.

The district court based its ruling dismissing Great Minds' complaint on its reasoning that, "[a]s the school districts are the entities exercising the rights granted by the License, it is irrelevant that FedEx may have benefitted by having been hired by them to act, viz. make copies, in their stead." A92. In so ruling, the district court wholly overlooked the law of this Circuit regarding volitional conduct, or causation, under which FedEx's alleged conduct constitutes direct infringement of Great Minds' copyrights in this case, as well as the unambiguous language of the Public License regarding downstream users that places liability on FedEx for exceeding the clear scope of the Public License.

To "state a claim for copyright infringement, a plaintiff must establish that it owns a valid copyright in the work at issue and that the defendant violated one of the exclusive rights the plaintiff holds in the work." *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 648 (S.D.N.Y. 2013) (citing *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993)). These exclusive rights include the rights of reproduction and distribution. *See id*. at 651; *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 548 (1985) ("verbatim copying of excerpts of the manuscript's original form of expression would constitute infringement…").

"When there is a dispute as to the author of an allegedly infringing instance of reproduction, [*Religious Tech. Ctr. v. Netcom On-Line Commc'n Serv., Inc.*, 907 F. Supp. 1361 (N.D.Ca. 1995)] and its progeny direct [the Court's] attention to the volitional conduct that causes the copy to be made." *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008). *See also ReDigi*, 934 F. Supp. 2d at 656; *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666-67 (9th Cir. 2017) (reaffirming the importance of the volitional-conduct analysis and surveying consistent cases, including *Cartoon Network*). In "determining who actually 'makes' a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct." *Cartoon Network*, 536 F.3d at 131.

The district court ignored this precedent, under which FedEx, not its educational customers, is the party volitionally responsible for making the copies of Eureka Math. It is FedEx's conduct that directly infringes Great Minds' exclusive rights of reproduction and distribution – infringement that occurs each time an employee in one of FedEx's retail stores reproduces or distributes the Eureka Math materials for FedEx's profit without authorization from Great Minds. Specifically, FedEx makes the copies after a school district issues "a request to a

human [FedEx] employee, who then volitionally operates the copying system to make the copy…" *Cartoon Network*, 536 F.3d at 131; *see* A11-12 ¶¶ 16-21. This is precisely the kind of conduct that this Circuit has held to satisfy the volitional requirement for direct infringement. *See id*. at 131-32 (distinguishing the acts in that case, which this Circuit held not to be directly infringing, from the commercial copy-shop's volitional, directly infringing conduct, like FedEx's here, in *Princeton Univ. Press v. Mich. Document Servs.* 99 F.3d 1381 (6th Cir. 1996) (discussed in section I(B), *infra*)). As a consequence, *FedEx's* copying is the conduct that must be assessed under the Public License.

Moreover, the district court's analysis ignores the public nature of the Public License and its unambiguous terms, under which FedEx is not shielded from liability for its commercial use simply because its customers ultimately make a permissible noncommercial use of the Eureka Math materials. The License is not a private license to schools, but rather is a public license that offers permission to reproduce and distribute Eureka Math, and to produce derivative works based on Eureka Math, to every person in the world on the same terms and conditions. To wit, the Public License expressly provides regarding all "[d]ownstream recipients": "*Every recipient* of the Licensed Material automatically receives an offer from the Licensor to exercise the Licensed Rights under the terms and conditions of the Public License." A31 § 2(a)(5)(A) (emphasis added). The Public License further

makes clear that if a recipient of the licensed material "fail[s] to comply with this Public License, then [the recipient's] rights under this Public License terminate automatically." A33 § 6(a).

In sum, the unambiguous terms of the Public License provide that FedEx, as a downstream recipient of the Eureka Math materials, must abide by the terms and conditions of the Public License, or the rights under the Public License "terminate automatically." *Id*. The Public License gives FedEx no right to make commercial reproductions of the Eureka Math materials for its own profit, and thus the district court's grant of dismissal should be reversed.

B. FedEx's Conduct Constitutes Commercial Activity that Exceeds the Scope of the Unambiguous Terms of the Public License.

A copyright "license must be construed in accordance with the purposes underlying federal copyright law," and "[c]hief among these purposes is the protection of the author's rights." *S.O.S., Inc. v. Payday, Inc*., 886 F.2d 1081, 1088 (9th Cir. 1989). "Whether intended to allow greater economic exploitation of the work…or to ensure that the copyright proprietor retains a veto power over revisions desired for the derivative work, the ability of the copyright holder to control his work remains paramount in our copyright law." *Gilliam v. Am. Broad. Cos*., 538 F.2d 14, 21 (2d Cir. 1976).

Accordingly, "[i]n construing the terms of [a] license," a "court must give precedence to narrow, specific language over broad, general language." *Cohen v.*

U.S., 98 Fed. Cl. 156, 165 (Fed. Cl. 2011) (internal quotation marks omitted) (quoting *Steve Altman Photography v. U.S.*, 18 Cl. Ct. 267, 281 (Cl. Ct. 1989)). *See also Bourne*, 68 F.3d at 629 ("In order to analyze Bourne's contention that Disney has no right to produce videocassettes utilizing the Compositions, <u>we first must look to the specific language of the grants</u>. If the production of home videocassettes clearly falls outside the scope of the grants, then Disney's use of the Compositions was unauthorized as a matter of law…") (emphasis added). Indeed, "copyright licenses are assumed to prohibit any use not authorized." *Viacom Int'l Inc. v. Fanzine Int'l Inc.*, No. 98-CV-7448, 2000 WL 1854903, at *5 (S.D.N.Y. July 12, 2000) (quoting *S.O.S.*, 886 F.2d at 1088); *cf. Gilliam*, 538 F.2d at 21 (a licensee's authorized conduct is that which is "specifically empowered" by the terms of the license).

There can be no reasonable dispute in this case that FedEx's use of the Eureka Math materials is commercial, and thus exceeds the scope of the Public License, which grants rights only for noncommercial use, and infringes Great Minds' copyrights. *See* A31; *John Wiley & Sons, Inc. v. DRK Photo*, 998 F. Supp. 2d 262, 287 (S.D.N.Y. 2014) ("It is black-letter law that a claim for copyright infringement lies when a party's use of copyrighted material exceeds the scope of its license") (internal quotation marks and citations omitted).

While the Public License itself does not directly prescribe what constitutes a "commercial" use, the Public License defines "NonCommercial" as "not primarily intended for or directed towards commercial advantage or monetary compensation." A30 § 1(k). The Public License goes on to clarify, "For purposes of this Public License, the exchange of Licensed Materials for other material subject to Copyright or Similar Rights by digital file-sharing or similar means is NonCommercial provided there is no payment of monetary compensation in connection with the exchange." *Id.* (emphasis added). And the Public License expressly provides that in "all…cases [aside from NonCommercial use] the Licensor expressly reserves any right to collect such royalties, including when the Licensed Material is used other than for NonCommercial purposes." A31 § 2(b)(3).

Thus, under the unambiguous terms of the Public License as well as relevant case law, FedEx's reproduction of Eureka Math in exchange for monetary compensation and solely for its own profit is a commercial activity distinct from its customers' noncommercial use of Eureka Math, and thus FedEx's commercial reproduction exceeds the expressly limited scope of the License.[2] *See Basic Books v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1531 (S.D.N.Y. 1991) ("The use of the Kinko's packets, in the hands of the students, was no doubt educational.

[2] Black's Law Dictionary defines "commercial" as follows: "Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. Generic term for most all aspects of buying and selling."

However, the use in the hands of Kinko's employees is commercial.") *See also* section I(A), *supra*, regarding FedEx's volitional conduct.

The Sixth Circuit's reasoning in *Princeton Univ. Press v. Mich. Document Servs.*, holding that the challenged use (*i.e.*, reproduction of course packs by a commercial shop) was commercial in nature and distinct from the customers' noncommercial use, also applies squarely to FedEx's conduct in this case:

> It is true that the use to which the materials are put by the students who purchase the coursepacks is noncommercial in nature. But the use of the materials by the students is not the use that the publishers are challenging. What the publishers are challenging is the duplication of copyrighted materials for sale by a for-profit corporation that has decided to maximize its profits—and give itself a competitive edge over other copyshops—by declining to pay the royalties requested by the holders of the copyrights.

99 F.3d 1381, 1386 (6th Cir. 1996). The same reasoning applies here, where FedEx, "a for-profit corporation…has decided to maximize its profits—and give itself a competitive edge over other copyshops [and Great Minds, the copyright owner itself]—by declining to pay the royalties requested by" Great Minds for commercial reproductions of the Eureka Math materials made by FedEx. *Id*. This is precisely the sort of commercial use for which Great Minds has expressly reserved the right to collect royalties under the License. *See* A31 §§ 2(a)(1)(A), 2(b)(3).

Accordingly, the district court is incorrect in its ruling that there "is no claim" here that "FedEx has copied the Materials…for its own purposes." A90.

Great Minds' entire claim here, as alleged in its complaint, is based on the fact that FedEx has reproduced, and intends to continue reproducing, the Eureka Math materials solely for its own profit. *See* A12 ¶ 23. This is a direct violation of Great Minds' right, as the creator and copyright owner of Eureka Math, to "control [its] work" – by granting the public a free right to noncommercial use while simultaneously reserving its right to collect royalties for commercial reproduction – "to allow [its own] greater economic exploitation of the work…" *Gilliam*, 538 F.2d at 21. *Cf. Jacobsen v. Katzer*, 535 F.3d 1373, 1381-82 (Fed. Cir. 2008) (holding, "Copyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material" and "A copyright holder can grant the right to make certain modifications, yet retain his right to prevent other modifications").

C. The Public License Does Not Allow NonCommercial Users to Delegate the Right to Make Commercial Reproductions.

In addition to the district court's failure to distinguish between the volitional conduct of noncommercial end users and the volitional conduct of FedEx in making commercial reproductions of Eureka Math, the district court's ruling that the "the License does not limit a licensee's ability to use third parties in exercising the rights granted by the License," A91 – *i.e.*, that schools may delegate their noncommercial rights under the Public License to commercial copy-shops like FedEx – defies both the unambiguous, limiting terms and conditions of the Public

License and controlling and persuasive case law regarding the interpretation of copyright licenses (including the cases cited by the district court in its opinion).

First, as discussed in section I(A), *supra*, the Public License is not an unlimited, private license issued to specific schools or school districts, who in turn may delegate their unlimited rights to third parties; to the contrary, it is a limited public license that grants any member of the public – including FedEx – the right to make only *noncommercial* use or reproductions of Eureka Math. Indeed, the Public License explicitly addresses "[d]ownstream recipients" of the licensed materials and makes clear that "*[e]very recipient* of the Licensed Material automatically receives an offer from the Licensor to exercise the Licensed Rights under the terms and conditions of the Public License." A31 § 2(a)(5)(A) (emphasis added). The Public License further states that if a recipient of the licensed material "fail[s] to comply with this Public License, then [the recipient's] rights under this Public License terminate automatically." A33 § 6(a). Accordingly, by the plain and unambiguous terms of the Public License, FedEx – a downstream recipient of the Eureka Math materials – must abide by the noncommercial limitation of the Public License, and the licensed rights "terminate automatically" upon FedEx's "fail[ure] to comply with" the noncommercial limitation of the Public License. *Id*.

Second, since schools themselves do not have the right under the Public License to make commercial use or reproductions of Eureka Math, they cannot

grant or delegate such a right to FedEx. *See Gilliam*, 538 F.2d at 21 ("a grantor may not convey greater rights than it owns"); *Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 44 (1st Cir. 2010) (holding "[t]hat control was, of course, limited by the scope of the license" and thus "the relevant question reduces to whether [the licensee's delegate], acting for the license holder, observed those limits.") (emphasis added); *cf. Hogan Sys., Inc. v. Cybresource Int'l, Inc.*, 158 F.3d 319, 324 (5th Cir. 1998) ("what [the licensee] may do itself under the License, [the licensee] may use a contractor to do") (emphasis added).

A recent district court case is particularly instructive here. In *EL Education*, defendant Public Consulting Group, Inc. ("PCG) "was awarded a contract by the New York State Education Department ('NYSED') to develop a statewide English Language Arts & Literacy ('ELA') curriculum for Grades 6-12." 2016 WL 5816994 at *1. PCG subcontracted with plaintiff EL Education, Inc. ("EL") – a New York non-profit organization "that works with schools, school districts and states to improve K-12 education" – to create the ELA curriculum. *Id*. Under a written agreement, EL assigned to PCG its ownership and intellectual property rights in the ELA materials it created, but the agreement in turn conveyed to EL "a nonexclusive, perpetual, irrevocable, royalty-free license to copy, disseminate, create or have created by third parties, derivatives, sublicense, and use in any way such materials or works." *Id*.

A dispute arose between the parties when EL, in addition to posting the ELA materials for free digital download on its website, also began selling printed versions of the materials. *Id.* at 1-2. EL sued for a judgment declaring that the broad language of the license there unambiguously permitted its commercial activity, specifically arguing, *inter alia*, that the use of the word "disseminate" was synonymous with "distribute" and "that the words 'use in any way' in the license 'reasonably must be construed to include the right to print and commercially distribute…'" *Id*. at *4. PCG counterclaimed for breach of a prior settlement agreement and copyright infringement, arguing that the license "unambiguously preclude[d] EL from selling or reprinting the curriculum because, *inter alia*, if the parties had intended to grant a sales right, they would have included one explicitly in the license." *Id*. at *5.

EL moved to dismiss PCG's counterclaim for copyright infringement based on the broad language used in the license (permitting, *e.g.*, "use in any way"), but the court denied the motion, ruling that "PCG's interpretation [was] sufficiently reasonable" that, "in light of relevant principles of law [requiring copyright licenses to be construed narrowly and assumed to prohibit any use not expressly authorized],…PCG's claims must survive dismissal." *Id*.

In contrast to the license in *EL Education*, the language in the Public License here (a) unambiguously prohibits commercial use and reproduction, (b) expressly

reserves Great Minds' right to control and collect royalties for commercial uses and reproduction, and (c) permits only noncommercial use and reproduction, thereby requiring not only reversal of the judgment of dismissal, but ultimately judgment in favor of Great Minds on the face of the Public License. *See* A31-33. At the very least, the Court should reverse the district court's dismissal of Great Minds' complaint, as the Public License here certainly is no less ambiguous than the language in the license in *EL Education*. The license at issue in *EL Education* contained no similar express limiting language, and yet the district court there denied the defendant's motion to dismiss because commercial reproduction had not been affirmatively authorized with sufficient clarity.

D. The Cases Relied on by the District Court, While Factually Inapposite, Legally Support Great Minds' Position.

The cases relied upon by the district court are inapposite on the facts, but nonetheless support Great Minds' legal position that a license restriction, such as the express noncommercial limitation in the Public License here, must be strictly enforced. The district court cited cases that concerned private, unrestricted licenses that did not contain limitations like those in the Public License here. The courts in those cases ruled that delegation was permissible because there was no limiting language in the licenses that might prohibit such delegation. Illustrative of the cases that the district court relied upon is *Marconi Wireless Telegraph Co. of Am. v. Simon*, 227 F. 906, 910 (S.D.N.Y. 1915), *aff'd*, 231F. 1021 (2d Cir. 1916), *rev'd*

on other grounds, 246 U.S. 46 (1918), which involved a private, not a public, license. The court in that case ruled that "[a] licensee [*sic*] 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 employes [*sic*]" (emphasis added). Unlike in *Marconi Wireless*, in this case there is specific language in the Public License that limits *all* users to noncommercial uses. Thus, as applied to this case, *Marconi Wireless* actually supports Great Minds' position.

In *Estate of Hevia*, the central issue was who controlled an implied private license, for which there was no relevant restriction of rights in the license – again in contrast to the situation here. 602 F.3d 34. And again, as applied to the Public License in this case, *Estate of Hevia* actually supports Great Minds' position. Indeed, the First Circuit made clear that a court will look carefully at and enforce the specific terms and limitations of the scope of a license: "…control was, of course, limited by the scope of the license. So viewed, the relevant question reduces to whether [the licensee's delegate], acting for the license holder, observed those limits." 602 F.3d at 44 (emphasis added). Here, the Public License clearly is restricted to noncommercial use only, specifically reserves Great Minds' right to collect royalties for all commercial uses, and FedEx has not "observed those limits." *Id.*; A31 §§ 2(a)(1)(A), 2(b)(3).

Automation by Design, Inc. v. Raybestos Prods. Co., which also involved a private, not a public, license, likewise demonstrates the importance that courts place on respecting specific limiting terms in a license. 463 F.3d 749 (7th Cir. 2006). In *Raybestos*, the owner of copyright in certain machine drawings brought an action against a licensee and its contractor for copyright infringement in connection with the transfer by the licensee of the drawings to its contractor for the purpose of building a machine based on the drawings. While the court ultimately concluded that there was no copyright infringement, it did so based on a careful analysis of the terms of the written private license. The court there held that "once ABD admitted that Raybestos could duplicate parts of the equipment for maintenance and repair, this fight was over. For there is nothing in the contract language that would distinguish between copying and making derivative works for one or more parts, from copying the machine as a whole." 463 F.3d at 758 (emphasis added). The court further emphasized the lack of limiting language in the license that would have supported the licensor's claim:

> The dissent argues that the right of duplication was limited to the "project" which the dissent claims was only the "first machine." Post at 762. From this the dissent concludes that "Raybestos's implied right of distribution should not extend beyond making spare and replacements parts for the first machine because ABD has not admitted such a right of distribution." Id. (emphasis ours). But this leap in logic works only if we grant ABD's request to interpret the contract to add such limiting language—that is if we accept ABD's contention that the contract implies something that it does not say.

Id. (emphasis added).

Unlike in *Raybestos*, the case at hand requires no "leap in logic." *Id*. The Public License here contains limiting language that draws an express distinction between permitted noncommercial use and unauthorized commercial use. *See* section I(B), *supra*. FedEx – and every other person or entity in the world – is permitted to make noncommercial use of Eureka Math, but specifically barred by the Public License from making unauthorized commercial uses or reproductions. As discussed above in sections I(A)-I(C), FedEx is responsible for the copying in this case, as the copies are the product of FedEx's own volitional conduct. And FedEx's use of Eureka Math for its own profit is both distinct from its customers' noncommercial use and incontrovertibly commercial. In short, FedEx's use is therefore not authorized under the unambiguous terms of the Public License, and thus FedEx has committed copyright infringement.

Finally, the district court's own parenthetical summary of *Womack+Hampton Architects, LLC v. Metric Holdings Ltd. P'ship*, 102 Fed. App'x 374, 382-83 (5th Cit. 2004), shows why that case is inapposite for the same reason here: "licensee's hiring of others not a transfer of the rights contained in the [private] copyright license as <u>the use at issue was consistent with the license</u> and not an impermissible transfer"). A91 (emphasis added). Here, for all the reasons discussed above, FedEx's commercial reproduction of Eureka Math clearly is not

consistent with the specific, plain language and purpose of the Public License. *Cf. Hogan Sys.,* 158 F.3d at 324 ("what [the licensee] may do itself under the License, [the licensee] may use a contractor to do") (emphasis added).

The Fifth Circuit's decision in *Compliance Source, Inc. v. GreenPoint Mortg. Funding, Inc.*, which distinguished *Hogan Sys*., is more instructive in this case, even though it too is factually inapposite in that it involved a non-public license. 624 F.3d 252 (5th Cir. 2010). In *Compliance Source*, the licensors (database software developers) brought suit against a licensee for breach of a private license agreement because the licensee gave database input access to the licensee's attorneys in violation of the written license agreement; the defendant there argued that it simply had delegated its rights under the license to its agent-attorneys. The Fifth Circuit reversed summary judgment and held for the licensors, closely analyzing the language of the license to conclude that the licensee indeed had breached the license. In so doing, the court held that a court cannot "look past the actual language of a licensing agreement and absolve a licensee who grants third-party access merely because that access is on behalf of, or inures to the benefit of, the licensee." *Id*. at 259. The *Compliance Source* court explained that the agreement in that case:

> …contain[ed] no provision that generally permit[ed] GreenPoint to grant third-party access, whether or not such access would be on behalf of or for the benefit of GreenPoint, and GreenPoint ha[d] not pointed to any provision that g[ave] it that right. In fact, the agreement

> [did] exactly the opposite; it provide[d] that it [did] not grant to GreenPoint any right to "copy, make, use, have made, sell, support, or sub-license" the licensed technology except as specifically provided. In addition, the agreement expressly prohibit[ed] transfer or sublicense of the technology; withh[eld] from GreenPoint any ownership or proprietary interest in the technology; and restrict[ed] GreenPoint's ability to reproduce or alter the technology, use the technology in competition with Plaintiffs, assign its duties under the agreement to a third party, or confer any right under the agreement upon a third party.

Id. at 260.

The Fifth Circuit's analysis in *Compliance Source* is relevant to this case insofar as the Public License at issue here clearly "withholds rights not expressly given," *id*., – *i.e.*, all rights other than those for noncommercial use – and specifically reserves to Great Minds the right to collect royalties when the Eureka Math materials are reproduced for commercial purposes. *See* A31 §§ 2(a)(1)(A), 2(b)(3). Moreover, the Public License here does not give noncommercial users any right to delegate their noncommercial use rights for commercial purposes, such as FedEx's reproduction for its own profit; to the contrary, the Public License expressly provides that all "[d]ownstream recipients" must abide by its terms and conditions, and that the Public License "terminate[s] automatically" if a recipient of the license materials fails to do so. A31 § 2(a)(5)(A), A33 § 6(a).

For these reasons, the district court's ruling that FedEx's commercial reproduction of Eureka Math is permissible because FedEx is simply acting as a delegate of its noncommercial customers under the Public License should be

rejected, and the Court should reverse the district court's improper dismissal of Great Minds' complaint.

II. PUBLIC POLICY GROUNDS ALSO WARRANT REVERSAL OF THE DISTRICT COURT'S DISMISSAL OF GREAT MINDS' COMPLAINT

The district court stated in a footnote in its ruling:

> The Court notes parenthetically that prohibiting a school district from using a commercial copy service to duplicate the materials would be antithetical to GM's avowed purpose in subjecting the Materials to the License, to wit, to "benefit[] the public by allowing teachers, students, and school districts to freely share, reproduce, and use the Materials for their non-commercial, educational benefit." Compl. ¶ 12.

A92 n. 4. Respectfully, this statement illustrates the district court's fundamental misunderstanding of the operations of organizations like Great Minds and the public policy concerns at issue here that weigh in favor of protecting Great Minds' authority to forbid commercial uses – an authority that Great Minds has specifically reserved pursuant to the terms of the Public License. *See* A31 §§ 2(a)(1)(A), 2(b)(3).

FedEx has taken, and the district court embraced, the audacious position that FedEx should have the right to profit by commercially reproducing Great Minds' Eureka Math materials without paying Great Minds a royalty simply because Great Minds has made Eureka Math available publicly for free noncommercial use under the Public License. But Great Minds would not make Eureka Math or its other curricula materials available publicly for free noncommercial use under the Public

License if in doing so Great Minds gave up its expressly reserved right to charge a royalty for commercial use, including commercial reproduction, of those materials. A10 ¶ 15. In short, Great Minds is entirely happy to have schools and school districts themselves download, share, use, and reproduce Eureka Math. Those copies are noncommercial. Great Minds has not, however, given permission to major for-profit corporations like FedEx to act as commercial publishers and make a profit copying Eureka Math. This clearly is a commercial use that is not permitted under the Public License, and construing the Public License to allow it would destroy Great Minds' expressly reserved right to collect royalties for commercial reproduction and use. *See* A31 § 2(b)(3).

If school districts do not wish to make their own copies of Eureka Math, then they can come to Great Minds for pre-printed copies, which Great Minds provides for a reasonable price, or they can go to another commercial copier that has been licensed by Great Minds. *See* A9 ¶ 11, A10 ¶ 15. This is the balance between wide public noncommercial access and reserved commercial rights that Great Minds implemented when it licensed Eureka Math to the public under the noncommercial Public License. This arrangement permits the widest possible dissemination to the public of Eureka Math, free of charge, while also providing to Great Minds the resources it needs to continue to serve the public as an independent, self-sustaining non-profit – one that can respond nimbly to the needs

of teachers and not spend precious time and resources pleading for grant funding from charitable or corporate foundations.

Indeed, Great Minds relies on revenues from sales of Eureka Math, including royalties from commercial reproduction of Eureka Math materials by third parties, *inter alia*, to improve its existing curriculum and develop new curriculum. *See* A9 ¶ 11, A10 ¶¶ 14-15. Affirming the district court's ruling in favor of FedEx thus 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 revenues to create such materials in the first place and otherwise to support their public, non-profit missions. *See* A10 ¶ 15.

Accordingly, affirming the district court's ruling in favor of FedEx would run contrary to the "'interests of the Copyright Act' –specifically…'to maximize the public exposure to valuable works.'" *Mahan v. Roc Nation*, LLC, No. 14 Civ. 5075(LGS), 2015 WL 4388885, *2 (S.D.N.Y. July 17, 2015) (quoting *Mitek Holdings, Inc. v. Arce Eng'g Co*., 198 F.3d 840, 842-43 (11th Cir. 1999) (quoted with approval in *Matthew Bender & Co. v. W. Pub. Co*., 240 F.3d 116, 122 (2d Cir. 2001)).

In sum, for all the reasons set forth above, and particularly in light of the public policy harm that would result from this Court's adoption of FedEx's position, the Court should reject the district court's and FedEx's interpretation of the Public License that ignores the specific, express limitations that prohibit FedEx's unauthorized commercial reproduction and distribution of Eureka Math. *See*, *e.g.*, *Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992) ("an interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless...is not preferred and will be avoided if possible. Rather, an interpretation that gives a reasonable and effective meaning to all terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect") (citations and quotations omitted).

CONCLUSION

For the forgoing reasons, Great Minds respectfully requests that the judgment below be reversed, and that this case be remanded to the district court for further proceedings on the merits of its claims.

Dated: New York, New York
May 23, 2017

Respectfully submitted:

LAW OFFICE OF RHETT O. MILLSAPS II

/s/ Rhett O. Millsaps II

Rhett O. Millsaps II
745 Fifth Avenue, Suite 500
New York, NY 10151
Tel: (646) 535-1137
Fax: (646) 355-2816
Email: rhett@rhettmillsaps.com

RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.

/s/ *Eric M. Lieberman*

Eric M. Lieberman
61 Broadway, Suite 1800
New York, NY 10006
Tel: (212) 254-1111
Fax: (212) 674-4614
Email: elieberman@rbskl.com

Attorneys for Plaintiff-Appellant Great Minds

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,948 words (based on the Microsoft Word word-count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14 point Times New Roman.

DATED: May 23, 2017

/s/ *Rhett O. Millsaps II*
Rhett O. Millsaps II
LAW OFFICE OF RHETT O. MILLSAPS II
745 Fifth Avenue, Suite 500
New York, NY 10151
Telephone: (646) 535-1137
rhett@rhettmillsaps.com

Attorney for Plaintiff-Appellant