

Creative Commons License Doesn't Bind Commercial Printers, Ninth Circuit Rules

By Scott Graham

Winston & Strawn and Latham & Watkins have sprung Office Depot—and, potentially, millions of other users—from potential liability for reproducing material licensed via Creative Commons.

The U.S. Court of Appeals for the Ninth Circuit ruled Friday that Office Depot didn't violate an educational nonprofit's copyright by copying, for a fee, classroom materials that are freely licensed for non-commercial uses.

Nonprofit Great Minds sells its "Eureka Math" curriculum in print form and makes digital files available for download under Creative Commons' Attribution-NonCommercial-ShareAlike 4.0 International Public License. That license states that "you are free to" copy and redistribute material so long as appropriate credit is given and the use is noncommercial.

Office Depot advertises its copying services to schools

that use Eureka Math. At one time Office Depot paid royalties to Eureka Math, but it stopped doing so after a federal court in New York ruled that the Creative Commons license did not preclude teachers from hiring a third party to make copies, even if the copying service made a profit.

The Ninth Circuit adopted much of the same reasoning Friday in *Great Minds v. Office Depot*. "A licensee's hiring of a third-party copy service to reproduce licensed material strictly for the licensee's own permitted use does not turn that third party into a licensee that is bound to the license terms," Judge Jerome Farris wrote for a unanimous panel.

Creative Commons was founded in the early 2000s by IP scholars looking to create an alternative to the internet's default setting of "all rights reserved." The free, off-the-shelf licenses let authors signal

to the world that anyone is legally free to use their works so long as certain conditions are satisfied.

Simpson Thacher & Bartlett counsel Christopher Sprigman argued to the court last month that "the licensee is 'you,' which means, literally, you and me and everyone else on the planet who copies Eureka Math."

The Ninth Circuit judges pointed out at argument and in their opinion that under that reading, school teachers or staff could make copies on a school-owned copier, but couldn't pay a high school student to do the labor. Sprigman argued that Great Math wouldn't sue high school students. Its concern is that it can't compete with a national, for-profit copying company.

Latham partner Andrew Gass, representing Creative Commons as amicus curiae pro bono, told the court that

the same license covers 150 million works around the world. “So Great Minds’ generous offer not to file suit” against high school students would be “small solace” to other users who could be affected by the Ninth Circuit’s ruling, he said.

“The court shouldn’t be distracted by Creative Commons’ presence as an amicus today,” Sprigman argued. “If the court needs help from Creative Commons in interpreting the language of the license,” then the case should not have been dismissed on the pleadings, he argued.

Ultimately, the court ruled that it’s clear schools may contract for copying under the license without imposing independent liability on Office Depot.

“Great Minds’ interpretation cannot be correct,” Farris wrote. “The license itself provides no basis to distinguish between permitted copies of Eureka Math made by a licensee’s own employees (e.g., school teachers or staff) versus those made by a third-party contractor (e.g., Office Depot employees). We decline to read such a distinction into the License.”

Ninth Circuit Judge M. Margaret McKeown and U.S. District Judge Virginia Kendall, visiting from the Northern District of Illinois, concurred.

Winston & Strawn partner Jennifer Golinveaux argued the appeal for Office Depot. “This is an important copyright decision regarding the scope of the widely used Creative Commons Public License,”

Golinveaux said in a written statement. “We welcomed the opportunity to represent Office Depot in this matter, as well as the participation of Creative Commons as amicus on the appeal.”

Winston’s team also included partners Diana Hughes Leiden and Jeffrey Wilkerson, of counsel Thomas Kearney, and associates Irina Lyapis and Alyse Ritvo.

Gass worked with Latham associates Elizabeth Yandell, Kris Hanson and Ivana Dukanovic.

Scott Graham focuses on intellectual property and the U.S. Court of Appeals for the Federal Circuit. He writes ALM’s *Skilled in the Art IP* briefing. Contact him at sgraham@alm.com.