

FOR PUBLICATION

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

GREAT MINDS, a non-profit
organization,
Plaintiff-Appellant,

v.

OFFICE DEPOT, INC., a
Delaware corporation,
Defendant-Appellee.

No. 18-55331

D.C. No.
2:17-cv-07435-JFW-E

OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted November 8, 2019
Pasadena, California

Filed December 27, 2019

Before: Jerome Farris and M. Margaret McKeown, Circuit
Judges, and Virginia M. Kendall,* District Judge.

Opinion by Judge Farris

*The Honorable Virginia M. Kendall, United States District Judge for
the Northern District of Illinois, sitting by designation

SUMMARY**

Copyright

The panel affirmed the district court's dismissal for failure to state a claim of a copyright infringement brought by Great Minds, publisher of math curriculum Eureka Math.

The panel held that defendant Office Depot, Inc., did not become a licensee of a Creative Commons license, and become bound by its terms, or otherwise infringe Great Minds' copyright by making copies of Eureka Math materials for a profit on behalf of school and school district licensees. There was no dispute that the school and school districts licensees' copying of Great Minds' material was permitted under the license. There also was no dispute that, if Office Depot were itself a licensee, commercial copying of Great Minds' material would fall outside the scope of the license and infringe Great Minds' copyright. The panel held that, under California law, the school and school district licensees' exercise of their rights under the license through the services provided by Office Depot did not result in Office Depot becoming a licensee. The panel further held that the district court did not abuse its discretion in denying leave to amend the complaint.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Christopher J. Sprigman (argued), Simpson Thatcher & Bartlett LLP, New York, New York; Jeffrey E. Ostrow, Simpson Thatcher & Bartlett LLP, Palo Alto, California; Rhett O. Millsaps, II, Law Office of Rhett O. Millsaps II, New York, New York; for Plaintiff-Appellant.

Jennifer A. Golinveaux (argued), Winston & Strawn LLP, San Francisco, California; Diana Hughes Leiden, Winston & Strawn LLP, Los Angeles, California; for Defendant-Appellee.

Andrew M. Gass (argued) and Elizabeth H. Yandell, Latham & Watkins LLP, San Francisco, California; Diane M. Peters, Creative Commons Corp., Mountain View, California; for Amicus Curiae Creative Commons Corporation.

OPINION

FARRIS, Circuit Judge:

Plaintiff-Appellant Great Minds, publisher of math curriculum Eureka Math, appeals from the January 18, 2018 dismissal under Fed. R. Civ. P. 12(b)(6) of its copyright infringement claim against Office Depot, Inc. in the United States District Court for the Central District of California (Walter, J.). We AFFIRM. Office Depot did not itself become a licensee of the “Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International Public License” (and become bound by its terms) or otherwise infringe Great Minds’ copyright by making copies of Eureka

Math materials for a profit on behalf of school and school district licensees.

BACKGROUND

Great Minds is an education-based non-profit organization. It created and copyrighted a math curriculum called “Eureka Math” for grades PreK-12, which it publishes and sells commercially in print form nationwide. It also releases digital files of Eureka Math online for free download to any member of the public under a limited public copyright license template produced by Creative Commons.¹ Under the License, “[e]very recipient of [Eureka Math] automatically receives an offer from [Great Minds] to exercise the Licensed Rights.” License § 2(a)(5)(A).

The License grants “the individual or entity exercising the Licensed Rights” a “worldwide, royalty-free, non-sublicensable, non-exclusive, irrevocable license to . . . reproduce and Share [Eureka Math], in whole or in part, for NonCommercial purposes only” License §§ 1(n), 2(a)(1). The License defines “Share” to mean, in pertinent part, “to provide material to the public by any means or process that requires permission under the Licensed Rights, such as reproduction, public display, public performance, distribution, dissemination, communication, or importation,” License § 1(l). “NonCommercial” means, in pertinent

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part, “not primarily intended for or directed towards commercial advantage or monetary compensation.” License § 1(k).

But § 2(b)(3) of the License reserves Great Minds’ right to collect royalties for *commercial* uses of Eureka Math:

To the extent possible, the Licensor waives any right to collect royalties from [the licensee] for the exercise of [these NonCommercial] Licensed 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 [Eureka Math] is used other than for NonCommercial purposes.

If any individual or entity exercising the licensed rights “fail[s] to comply with [the License], [their] rights under [the License] terminate automatically.” License § 6(a). Great Minds claims that this applies equally to every individual or entity that possesses Eureka Math materials, including all “downstream recipients.”

Office Depot provides copy services on request and behalf of public schools and school districts. It charges a fee for those services, and at times it makes copies of Eureka Math materials for the schools’ use. It does not sell those copies to the public in Office Depot stores. Great Minds claims, and Office Depot does not dispute, that Office Depot employs field representatives to advertise its copying services to schools and school districts that use Eureka Math. In 2015,

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