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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ROBERT JACOBSEN,

Plaintiff,

v.

MATTHEW KATZER, et al.,

Defendants.

) No. C06-1905-JSW

) **EXPERT REPORT OF BRUCE PERENS**

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I am Bruce Perens. I am one of the founders of the Open Source movement in software. I am the composer of the generally-accepted rules for Open Source software licensing, which are called the *Open Source Definition*, and which may be found at <http://opensource.org/docs/osd> .

I am not charging for my time in preparing this report. I agreed to produce it because I am concerned for the plight of Robert Jacobsen, and for the broader effect that this case might have on the global community of Open Source developers.

My full bio may be found at <http://perens.com/about/bio/> , but I'll list some achievements you might find relevant.

I represented Open Source at the United Nations Summit on the Information Society, at the request of the United Nations Development Program. I am an advisor to corporations and governments worldwide on issues of Open Source policy and strategy.

I am the creator of the *Busybox* Open Source software. It is included in millions of consumer devices, including SONY TV sets and many brands of internet routers, wireless access points, mobile telephones, and many other products.

I am a visiting lecturer at *Agder University* in Southern Norway several times each year, under a grant from the Norwegian Government. I recently taught a summer-school session “Open Source, Open Science” to doctoral and post-doctoral students there.

Before my involvement in Open Source, I was a senior operating systems programmer at Pixar Animation Studios, and worked on software tools for the creation of feature films. I am credited in the films *Toy Story II*, and *A Bug's Life*.

## Report

**Jacobsen did not choose to dedicate his work to the public domain, even though that option was clearly available to him.**

The effect of a dedication to the public domain, and the process for making such a dedication, have been common knowledge among software developers for at least three decades. A software developer who wishes to make such a dedication would generally attach the statement “This work is dedicated to the public domain” to his work.

Programmers like Jacobsen admire work that is both concise and effective. No license is as simple as that one-sentence dedication to the public domain, which should make it desirable to programmers. But programmers also understand that a dedication to the public domain is a complete abdication of any right or interest regarding the program. Thus, the various Open Source licenses are used much more frequently than a dedication to the public domain.

**Jacobsen chose to retain some control over his work. One element of this control was enforcement of his right to attribution.**

The preamble to the Artistic License 1.0, and the name of the license itself, explain that the rationale of the license is to retain for the author some *artistic control*. Part of the intent of the license is to enforce

certain *moral rights of authorship*. Even though the United States lacks a body of moral rights law like France's *droit d'auteur*, it is possible to enforce some of those rights through copyright law.

Probably the most crucial moral right of an author is the right to attribution as the creator of a work. And this is a universally-accepted right: attribution, or a copyright statement incorporating attribution, accompany the vast majority of copyrightable works.

The name and rationale of the Artistic License point out that programmers are like artists in the emotional fulfillment that they gain from their work. A programmer likes to have his software used and appreciated by users, just as a painter is fulfilled when his work is viewed appreciatively.

### **Attribution has a special status for Open Source developers.**

Part of the fulfillment for Open Source developers is that they aren't anonymous. A programmer who creates a work of proprietary software for hire often cedes his right of attribution to his employer. In contrast, the identity of an Open Source developer is published. This increases the “artistic” emotional gratification that he derives from the public appreciation of his work.

But attribution isn't just for gratification. It's also for trust. When the company or person behind a program is known, civil or criminal action can be imposed if that program does *deliberate* harm. If software is lacking attribution, nobody can trust it. Thus, authors like Jacobsen are expected, and themselves expect, to have their names prominently displayed upon their work. And the reputation of the author becomes important, because it is the source of trust in the software.

And so the author's own name is often known to users of Open Source software, even when those users aren't programmers, and Open Source programmers acquire significant *public* reputations. Some of them have even become celebrities: Linus Torvalds, creator of Linux, is generally acknowledged to be the most famous Finn, outshining Finnish actors and sports figures. I was paid for the use of my name as the brand – and credibility - of a technical book series (*Bruce Perens' Open Source Series*, a line of 24 titles published by Prentice Hall PTR). Similarly, Jacobsen is admired as one of the leading lights in digitally-controlled model railroading, a hobby with a large and increasing number of devotees.

Jacobsen is not only valued by his users, but by the worldwide community of experts who produce software that works with his or who directly collaborate with him – mostly, in this case, as a hobby activity. These experts become familiar with him, his code, and his conduct. They work for many companies and schools, and they can thus become important to Jacobsen's future career.

Open Source can carry reputation even farther: everybody with an internet connection has access to Jacobsen's source code online, and to archives of his online communication related to the project. Thus, a potential employer can accurately assess if Jacobsen is a good programmer or a great one, and whether he's a good team worker or a liability. This is information that is rarely available by querying a previous employer – Open Source provides a way to assess a programmer's competence that simply wasn't available before.

And so, Open Source developers often tangibly gain from their public reputation. For many of them it leads to employment, including payment to produce Open Source software during their working hours. My reputation as an Open Source developer and proponent has driven my consulting business, my past employment with companies such as HP, my expert witness practice, and my acceptance as a college teacher and researcher.

**Outsiders might easily discount the importance of attribution to an Open Source developer, but are responsible to provide it in compliance with their licenses.**

Thus, attribution is immensely important to Open Source developers, because their association with a program or product leads to “artistic” emotional gratification, to the development of their reputation and credibility, works as an advertisement for their competence, and tangible benefits can be derived from this. But anyone unfamiliar with the effect of attribution upon these developers could be expected to discount its importance, and the damage that occurs when it is withheld.

Jacobsen valued the reputation that he gained from his Open Source: that he chose the Artistic License rather than a dedication to the public domain indicates his intent to offer the privilege to use, modify, and redistribute his work *only* to parties that complied with all terms of his license, including the terms that require attribution of Jacobsen through the reproduction of his copyright statement. To parties that do not choose to comply with his license, Jacobsen offers nothing.

By Katzer's admission, Jacobsen was stripped of his attribution when his work was copied into Katzer's product. Jacobsen was further deprived of his attribution when Katzer claimed authorship of the result. Katzer treated Jacobsen's work as if it was that of an employee who was paid to create a work for hire.

Open Source software is used successfully in many commercial products today. Katzer could have created a proprietary derivative work of Jacobsen's JMRI in full compliance with Jacobsen's license without significant hardship, or he could have approached Jacobsen to negotiate a commercial license to Jacobsen's work. Were that the case, and had Katzer not caused Jacobsen hardship by pursuing him for patent royalties, etc., Jacobsen would most likely have proudly pointed out his work's presence in Katzer's product on the JMRI web site.

It was Jacobsen's right and expectation to be compensated for his work through emotional gratification, augmentation of his reputation, advertisement of his competence, and potential tangible benefits derived from these things, all arising from the attribution required by the Artistic License. Katzer denied all of this to Jacobsen. Instead of gratification Jacobsen had hardship and distress through Katzer's actions to collect from Jacobsen royalties for the use of Katzer's now-disclaimed patent, and through other actions of Katzer which are already in the record.

**A poorly-informed finding in this case could result in widespread de-motivation of Open Source developers, and a loss to the public.**

Although as I have discussed there is some benefit for Open Source developers, the production of Open Source is also a public benefit activity. The general public receives a huge collection of effective software that it can use, redistribute, and modify without fee, under very liberal terms including those of the Artistic License with which this case is concerned.

There have already been significant effects on science, education, and industry from the availability of Open Source software, as is shown by the fact that most individuals already know what “Linux” and “Firefox” are. It is notable that those who can not otherwise afford such powerful software turn to Open Source for a hand up from poverty and disenfranchisement. I have keynoted conferences on Open Source development in South America and elsewhere, and have directly experienced the involvement of Open Source software in bringing the messages and products of the disenfranchised to the connected world via the internet, and in providing the computational and communications infrastructure of third-

world nations as well as our own. Its quality and zero cost are a compelling motivation for a range of users from the most poorly-funded of individuals to multinational corporations.

I am concerned that a precedent, set by this case, allowing the removal of attribution of Open Source developers could result in widespread demotivation of those developers, causing them to halt or reduce their release of software under Open Source licenses, and reducing the benefit to the public from their work.

Because developers do not ask for any direct monetary compensation when they convey their work under an Open Source license, the non-monetary and indirect compensation that they expect is of increased importance. If they are denied that compensation, the Open Source developers have as much motivation to continue work as a painter whose works are regularly stolen and then exhibited as the creation of another artist.

Jacobsen has already suffered such demotivation. A hobby project that he shared with others under a license with the most liberal of terms was turned into years of hardship, something he'll never forget. He works on in the hope that he'll be granted relief from further abuse, and that the global community of Open Source developers will be protected from actions like Katzer's.

I have also suffered such demotivation, as creator of the busybox software, perhaps the most widely infringed Open Source program after the Linux kernel. However, the enforcements brought by later developers on that project have made the point, worldwide, that Open Source licenses must be complied with. These include case *07-CV-8205 in the United States District Court for the Southern District of New York*, *Andersen and Landley v. Monsoon Multimedia, Inc.*, and additional cases brought in that court against Xterasys (case 07-CV-10456), High-Gain Antennas (case 07-CV-10455), Verizon Communications (case number unknown), Bell Microproducts (case 08-CV-5270) and Super Micro Computer (case 08-CV-5269). There have also been cases brought in Germany and elsewhere by various developers. My data regarding these cases is incomplete, but I am informed that all of them settled out of court with terms requiring compliance with the Open Source license. My interest, rather than those of later developers, was not addressed in these cases as I was not party to them, and some infringements continue.

A notable developer who was demotivated is Rick Brewster, creator of Paint.net, a popular electronic illustration program. Mr. Brewster gave me permission to quote his message, which is attached to this report.

While Brewster was able to continue to distribute his program as Open Source while implementing technical measures to frustrate the sort of extremely inept infringer he portrays above, it's clear that such conduct frustrated him, and if allowed to continue, would have demotivated him from creating his program.

In closing, the issue of attribution for Open Source developers is of greater importance than I believe the court may have realized. I am pleased to have been allowed to explain that issue. I hope I've conveyed the importance of a finding for Jacobsen, and the importance of this case to Open Source developers worldwide.

I am required to report the cases in which I have reported or testified for the past 4 years. The last such case was more than 4 years ago.

In producing this report, I have been influenced by previous documents on this case disclosed through the JMRI web site and Groklaw.net, and by the not-for-publication document 284 of this case, “ORDER GRANTING MOTION TO DISMISS FOR MOOTNESS; DENYING IN PART AND GRANTING IN PART MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; DENYING MOTION TO STRIKE; AND DENYING MOTION FOR PRELIMINARY INJUNCTION”.

Other documents have been emailed to me which I have not yet reviewed. Of course I am also relying on my experience and whatever inputs have produced that experience.

I am required to list my publications over the past decade. One recent publication discusses the Federal Circuit finding in Jacobsen v. Katzer:

<http://itmanagement.earthweb.com/osrc/article.php/3775446/Bruce-Perens-A-Big-Change-for-Open-Source.htm>

I have also participated in discussion of Jacobsen v. Katzer at some of the web sites listed below, and in person at public conferences including the Open Source Business Conference.

My broad participation in public discourse on the internet makes it impossible to provide an exhaustive list of my publications and I do not maintain such a list. The “google.com” search engine lists some 160,000 references to my name, some of which may lead to my online speech, and approximately 10,000 are listed on “blogsearch.google.com”. Amazon.com lists about 150 books referring to me, some of which may include my speech. Web sites that I have contributed to include datamation.com, perens.com, technocrat.net, slashdot.org, groklaw.net, debian.org, lists.debian.org, lwn.net, but this is not an exhaustive list. There are also videos of my speeches at youtube.com and other sites. Some articles I have written are:

- <http://itmanagement.earthweb.com/osrc/article.php/3801396/Bruce-Perens-Combining-GPL-and-Proprietary-Software.htm>
- <http://itmanagement.earthweb.com/osrc/article.php/3809221/Bruce-Perens-Is-Open-Source-Capitalist-or-Communist.htm>
- <http://itmanagement.earthweb.com/osrc/article.php/3778376/Bruce-Perens-A-Vertical-Market-Seeks-Open-Standards.htm>
- <http://itmanagement.earthweb.com/osrc/article.php/3812891/Bruce-Perens-Microsoft-and-TomTom-Settle-Justice-and-Linux-Lose.htm>
- <http://oreilly.com/catalog/opensources/book/perens.html>

Respectfully Submitted  
***Bruce Perens***

A handwritten signature in cursive script, appearing to read "Bruce Perens", is displayed on a light blue rectangular background.

***20-October-2009***

ATTACHMENT ONE

from

<http://blog.getpaint.net/2007/12/04/freeware-authors-beware-of-%E2%80%9Cbackspaceware%E2%80%9D/>

### *Freeware Authors: Beware of “Backspaceware”*

*Paint.NET’s license is very generous, and I even release the source code. All free of charge. Unfortunately it gets taken advantage of every once in awhile by scum who are trying to profit from the work of others. I like to call this backspaceware\*. They download the source code for something, load it up in to Visual Studio (or whatever), hit the backspace key over the software’s name and credits, type in a new name and author, and re-release it. They send it to all the download mirror sites, and don’t always do a good job covering up their tracks.*

*There is currently an individual who is doing this with Paint.NET. I won’t mention them by name or link to them in order to avoid pumping up their PageRank. Basically what they’ve done is downloaded the Paint.NET v3.10 source code, renamed it and changed the credits, removed the license and copyright notice (which violates the Paint.NET license, btw), plagiarized a bunch of content from the Paint.NET website, and bundled half the plugins from the Paint.NET forum without any of the authors’ permission.*

*That last one really pisses me off. It’s not enough to take advantage of my generosity, he has to backstab the altruistic community as well. “My paint program supports all sorts of cool effects and file formats!!!” Yeah jerk, because you ripped off the work of 50 people by blatantly violating United States copyright law. What’s even more entertaining is that this is the third time this guy has done this! He’s also been known to do this with all sorts of other freeware applications that are nice enough to release the source code. Oh, and did I mention when you install this guy’s backspaceware that it uninstalls Paint.NET? It also tries to use the same installation directory, %PROGRAMFILES%\Paint.NET. (Don’t worry I used a virtual PC) He didn’t even remove the LICENSE.TXT files from the plugins he stole, which correctly cite themselves as Paint.NET plugins.*

*Real innovative work there, bub. I hope he puts this on his resume and someone asks him about it during an interview – that would be an entertaining conversation to watch.*

*Manager: “So you ripped off Paint.NET and a bunch of plugins, and re-released it with your name on it?”*

*Him: “Yup!”*

*Manager: “Cool! Welcome to your new job at Clown Burger. Make sure to ask customers if they want fries with that.”*

*Him: “I get free lunch right?”*

*I went and searched through my Inbox for his name because I wanted to find the e-mails I sent him the last two times he did this. What I also found was that awhile ago I actually gave this scumface technical support when he was having trouble installing Paint.NET! It’s so nice that he’s turned around and dumped on my face to show his appreciation.*

*To combat this and a few other similar instances that have happened over the years, I believe I will change the way that I release the source code for Paint.NET. As a stopgap before the v3.20 release, the version 3.10 source code is no longer*

*available, starting immediately, while I finalize on this decision. It just feels like it's a disaster waiting to happen with the way I've been releasing it so far.*

*Here are the changes I'm thinking of:*

- 1. I will no longer be releasing the source code for the installer.*
- 2. I will no longer be releasing the source code for PaintDotNet.Resources.dll, which has the code for loading resources as well as all the graphics (icons, logo, etc.)*
- 3. I will no longer be releasing the text and graphic resources in the source code distribution (RESX files, icons, logos). This includes the translations to non-English languages.*
- 4. I am still contemplating how much of PaintDotNet.exe I want to release. Especially parts such as the updater and core parts of the main UI that I've spent a lot of creative energy on.*

*The goal is to dramatically increase the amount of work required to release a backspaceware version of Paint.NET. The first one clearly does this. The 2<sup>nd</sup> and 3<sup>rd</sup> make it much harder to change names, credits, and logos. The 4<sup>th</sup> one makes it much more difficult to rip off the UI or "shell" of Paint.NET.*

*Plugin authors often need something to debug with, and I still want to ensure that people can study the source code for educational or honestly innovative purposes. These consumers of the source code don't need access to the resource files: you can just use the PaintDotNet.Resources.dll and PaintDotNet.Strings.3.resources that ship with the regular download. However, by making it more difficult to commit a "backspace violation", I am hoping to put an end to this and other lazy copycat schmucks.*

*A lot of software implements copy protection to save profits, but I've never really believed in the stuff. It's unfortunate that I have to investigate these measures in order to help protect myself and others from lazy ripoff jerks.*

*\* Someone else suggested "thief-ware", but I think that implies at least a little planning and cunning. I believe that "backspace"-ware correctly infers the level of simple laziness and lack of any real skill.*

[End of quotation]

**CERTIFICATE OF SERVICE**

I hereby certify that on October 20, 2009, and pursuant to agreement of counsel, I e-mailed this document to Defendants counsel, R. Scott Jerger.

By \_\_\_\_\_/s/  
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