

License Allows Copying Whether Done in House or at FedEx

(March 28, 2018) Great Minds and FedEx Office and Print Services, Inc. don't think alike, especially when it comes to copying Great Minds documents.

The non-profit organization designs educational materials, releasing them to the public without charge subject to a Creative Commons license. As long as the user did not charge for the materials, Great Minds did not charge a fee.

In 2015 and early 2016, Great Minds discovered that some FedEx stores in Michigan and New York made copies of their materials at the request of certain school districts. FedEx charged the school districts for the copies. Great Minds sued FedEx for copyright infringement claiming it was due a license fee because FedEx was paid to make the copies, thus violating the license that the materials could only be distributed for free. The trial court dismissed the case.

The Second Circuit found that the license did not specifically address whether a user could have a third party make copies for allowable educational purposes. "That silence does not produce any ambiguity, however," the appellate court wrote. "Applying well-established agency principles, we conclude that licensees may use third-party assistance in exercising their rights under non-exclusive copyright licenses unless the license clearly states otherwise."

The opinion noted the license does allow a user "to 'reproduce and share' the Materials for non-commercial purposes." Great Minds conceded that the school districts could reproduce the materials. However, argued that when FedEx was paid for the copying, it engaged in a commercial purpose for which Great Minds was entitled to receive a license fee. The appellate court rejected the argument. "The License text provides no basis for distinguishing between a school that directs its employees to make copies on the school's machines and a school that achieves an identical result by enlisting a temporary independent contractor—or a commercial duplication service."

The appellate court agreed with the trial court that Great Minds "failed to state a plausible claim of copyright infringement against FedEx."

Great Minds v FedEx Office and Print Services, Inc., Second Cir. No. 17-808-cv, filed March 21, 2018.

Balough Law Offices, LLC, is a Chicago-based law firm that focuses on cyberspace, intellectual property, and business law. Our homepage is balough.com.