

JACOBSEN V. KATZER: THE FEDERAL CIRCUIT WEIGHS IN ON THE ENFORCEABILITY OF FREE AND OPEN SOURCE SOFTWARE LICENSES

By Hersh R. Reddy

“Open Source” and “Free Software” are terms that elicit strong opinions from both the software industry and the legal profession. Proponents of open source attribute its openness and collaborative workflow for the creation of more robust software packages at a low overall cost to society.¹ On the other hand, some extreme opponents of open source claim that it usurps the constitutional provisions for the promotion of intellectual property by the use of “viral” licenses that forcibly open up proprietary systems.²

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1. See, e.g., ERIC STEVEN RAYMOND, *THE CATHEDRAL AND THE BAZAAR* (3d ed. 2002), <http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/>.

Many people (especially those who politically distrust free markets) would expect a culture of self-directed egoists to be fragmented, territorial, wasteful, secretive, and hostile. But this expectation is clearly falsified by (to give just one example) the stunning variety, quality, and depth of Linux documentation. It is a hallowed given that programmers *hate* documenting; how is it, then, that Linux hackers generate so much documentation? Evidently Linux’s free market in egoboo works better to produce virtuous, other-directed behavior than the massively-funded documentation shops of commercial software producers.

Id. at <http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/ar01s11.html>.

2. See Letter from Dan McBride, President & CEO, The SCO Group, Inc., Open Letter on Copyrights (Dec. 4, 2003), <http://www.sco.com/copyright/>

However, there is a group of software developers in the United States, and other parts of the world, that do not believe in the approach to copyright protection mandated by Congress. In the past 20 years, the Free Software Foundation and others in the Open Source software movement have set out to actively and intentionally undermine the U.S. and European systems of copyrights and patents. Leaders of the FSF have spent great efforts, written numerous articles and sometimes enforced the provisions of the GPL as part of a deeply held belief in the need to undermine or eliminate software patent and copyright laws.

Id.