

Appeal No. 2018-2214

IN THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CURVER LUXEMBOURG, SARL

Plaintiff-Appellant,

V.

HOME EXPRESSIONS INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY, CASE NO. 2:17-cv-4079

**REPLY OF OPEN SOURCE HARDWARE ASSOCIATION TO
PLAINTIFF-APPELLANT'S OPPOSITION TO MOTION FOR
LEAVE TO FILE BRIEF OF *AMICUS CURIAE***

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December 10, 2018

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Pursuant to Federal Rule of Appellate Procedure 27, Federal Circuit Rule 27, and this Court’s order of November 28, 2018, the Open Source Hardware Association (“OSHWA”) respectfully submits this reply to Curver Luxembourg, SARL’s (“Curver”) opposition to OSHWA’s motion for leave to file a brief *amicus curiae*.¹ In its opposition, Curver has apparently misconstrued OSHWA’s mission, its purpose in preparing an *amicus* brief in this case, the open-source hardware community and its interest in this case, and the arguments in OSHWA’s proposed brief. As detailed in its motion for leave to file and further in this reply, OSHWA’s proposed brief offers a distinctive perspective and information beyond what the parties provide, and would assist this Court as it considers this case. Accordingly, OSHWA respectfully requests that the Court grant its motion for leave to file its proposed *amicus* brief.

OSHWA is a non-profit organization that supports and advocates for the open-source hardware community. It is not a trade association and its interest in this case is not “marketing,” whether “political” or otherwise. *See*

¹ Curver formulated and refers to its filing as a “brief” rather than a response in opposition to a motion. Opp’n at 1, 11. OSHWA believes that, under Fed. R. App. Proc. 27(a)(3) and Fed. Cir. R. 27(b), a response in opposition would be the correct filing to respond to OSHWA’s motion for leave to file. Accordingly, OSHWA has formulated this filing as a reply to a response in opposition. OSHWA will promptly reformulate this reply as necessary if the Court requests.

Opp'n. at 1-2. OSHWA wishes only to preserve a balanced, clear scope of design patent protection, and to assist this Court in understanding the potential effects that the disposition of this case could have on open-source hardware designers and on design innovators more generally.

Curver's opposition misconstrues OSHWA's overall mission as "cut[ting] to the heart of exclusivity provided to inventors[.]" *Id.* at 2. This is incorrect, and in any case, irrelevant. OSHWA supports the licensing of hardware designs according to open-source principles. As Curver recognizes in its aside regarding *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008), open-source licensing is not a rejection of intellectual property. *See* Opp'n at 4 n.2. To the contrary, open-source licenses routinely rely on intellectual property rights to enforce open innovation models. Were open-source hardware designers to use design patents to undergird open-source hardware licenses, OSHWA would support them.²

In any event, OSHWA's support for or critique of the patent system is irrelevant to its interest in this case. All design innovators—whether they seek patents or not—work within the patent system and have an interest in a

² *See, e.g.*, OSHWA's Proposed Br. at 9-10 (noting that "to the extent that [open-source hardware designers] use design patents to require downstream users to maintain a design's openness, open-source hardware designers must be able to understand how far that requirement can extend.").

well-balanced, clear scope of design patent protection. Because open-source hardware designers often combine ornamental and functional elements, the scope of design patents is directly relevant to their work. As OSHWA already explained in its motion for leave to file, “while many creators of open-source hardware do not seek patent protection for their creations, an understandable scope of design patent protection is nonetheless essential to their ability to innovate lawfully and to collaborate with other innovators.” Mot. for Leave to File at 2.

OSHWA’s proposed brief does the following: it introduces the open-source hardware community and OSHWA; it explains, from an industrial design perspective, how the scope of design patent protection can affect design practice and design innovation; it explains the importance of clearly scoped design patent protection for the open-source hardware community and design innovators generally; and it examines the potential implications of this case for this community. Taking all of this, and the underlying law, into account, the proposed brief asserts that design patent scope is properly tied to the article of manufacture disclosed in the patent, and that the District Court’s decision should be affirmed. Accordingly, although the proposed brief supports affirmance as provided in Fed. R. App. Proc. 29(a)(4), it does

so for reasons well beyond the parties' narrow interests, and provides new information and a perspective quite different from that of the parties.

Curver's opposition ignores much of OSHWA's proposed brief and mischaracterizes the rest. It largely ignores one of OSHWA's primary arguments: that the application of a design to a specific article of manufacture is itself an innovative act that is both fundamental to industrial design and at the heart of the purpose of design patent protection. *See* Proposed Br. at 11. It mischaracterizes OSHWA's explanation of the open-source community's interests, and the potential effects of this case on that community, as "marketing." Opp'n. at 1–2. It ignores cases and other authorities offered solely by OSHWA, and portrays as mere repetition the unsurprising fact that OSHWA—writing about the same case as the parties—uses some of the same precedent as the parties. This characterization of OSHWA's brief is not accurate.

The remainder of Curver's opposition is devoted to arguing against the merits of OSHWA's proposed brief and introducing new arguments to the case. OSHWA disagrees with many of these arguments. However, they are not appropriately raised in a response in opposition to a motion for leave to file, so OSHWA does not address them here.

Contrary to the opposition's depiction, OSHWA's proposed brief provides this Court with an explanation of how a community of design innovators' interests could be affected by the decision in this case. OSHWA's proposed brief provides a distinctive perspective, and specific information and arguments "that can assist the court beyond what the parties can provide." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F. 3d 542, 545 (7th Cir. 2003) (Posner, C.J., in chambers).

OSHWA therefore respectfully requests that this Court grant leave to file OSHWA's proposed brief *amicus curiae*.

Respectfully Submitted,

December 10, 2018

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 27(a)(7) and 47.4, counsel for *Amicus*

Curiae Open Source Hardware Association certifies that:

1. The full names of every party or *amicus* represented in the case by me are:
The Open Source Hardware Association

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:
None

3. All parent corporations and any publicly held companies that own 10 percent or more of stock of any party or *amicus curiae* represented by me are:
N/A

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or are expected to appear in this Court are:
Erik Stallman and Jennifer M. Urban, Samuelson Law, Technology & Public Policy Clinic, University of California, Berkeley School of Law

5. Title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:
None

December 10, 2018

Signed: /s/ Erik Stallman
Erik Stallman

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CERTIFICATE OF COMPLIANCE

As counsel for *Amicus Curiae* Open Source Hardware Association, I hereby certify that the reply contained herein complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 and 14-point Times New Roman font.

I further certify that the body of this reply complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 983 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

December 10, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2018, I caused the foregoing Reply of Open Source Hardware Association to Plaintiff-Appellant's Opposition to Motion for Leave to File Brief of *Amicus Curiae* to be electronically filed with the Court using the CM/ECF System, which will serve e-mail notice of such filing on the following attorneys:

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