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Erik Andersen and Rob Landley

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

\_\_\_\_\_x  
ERIK ANDERSEN, an individual,  
and ROB LANDLEY, an individual,  
  
Civil Action No. CV \_\_\_\_\_  
  
Plaintiffs,  
  
-against-  
  
XTERASYS CORPORATION  
  
Defendant.  
  
\_\_\_\_\_x

**COMPLAINT**

This is an action by Erik Andersen, an individual, and Rob Landley, an individual, (“Plaintiffs”) by and through their attorneys, the Software Freedom Law Center, Inc., to recover damages arising from infringement of their copyrights by Xterasys Corporation (“Defendant”) and to enjoin Defendant’s future infringement. Specifically, Defendant distributed and continues to distribute Plaintiffs’ copyrighted BusyBox software without Plaintiffs’ permission and despite the fact that Plaintiffs notified Defendant of its unlawful activity. Since Defendant has infringed Plaintiffs’ copyrights, and since that infringement is ongoing, Plaintiffs seek damages and injunctive relief.

## **THE PARTIES**

1. Erik Andersen is a private individual with a residence in Springville, Utah. Rob Landley is a private individual with a residence in Austin, Texas. Erik Andersen and Rob Landley (“Plaintiffs”) develop, market, distribute and license computer software in a professional capacity.

2. Upon information and belief, Xterasys Corporation, (“Defendant”) is a California corporation with its principal place of business at 1311 John Reed Court in City of Industry, California. Upon information and belief, Defendant is engaged in the business of advertising, marketing and distributing computer hardware and software. Upon information and belief, Defendant regularly transacts substantial business in this district, including at least through its website where it distributes its software products.

## **JURISDICTION AND VENUE**

3. This Court has subject matter jurisdiction over Plaintiffs’ claims for copyright infringement pursuant to 17 U.S.C. §501 and 28 U.S.C. §§1331 and 1338(a).

4. This Court has personal jurisdiction over Defendant pursuant to Rule 4(K)(1)(a) of the Federal Rules of Civil Procedure and §§301 and 302 of the New York Civil Practice Law and Rules because, upon information and belief, Defendant has conducted and continues to conduct substantial business in the State of New York. This business includes owning and operating a website at [www.xterasys.com](http://www.xterasys.com) for the purposes of directly marketing and supporting various electronic devices to people in New York state, including residents of New York state.

5. Venue in this district is proper under 28 U.S.C. §§1391 and 1400 because a substantial part of the events giving rise to the claims asserted herein arise in this district, and Defendants, upon information and belief, are and at all times were doing business in this district.

## FACTUAL BACKGROUND

6. Plaintiffs are authors and developers of the BusyBox computer program, and the owners of copyrights in that computer program. BusyBox is a single computer program that comprises a set of computing tools and optimizes them for computers with limited resources, such as cell phones, PDAs and other small, specialized electronic devices. BusyBox is extremely customizable, fast and flexible, and, upon information and belief, is used in countless products sold by more than 100 manufacturers all over the world, including IBM, Nokia, Hewlett-Packard, and Siemens.

7. Plaintiffs have distributed BusyBox since on or about November 4, 1999. They distribute BusyBox in source code form, the human-readable form of a computer program that a programmer must have in order to make changes to the program. Plaintiffs distribute BusyBox under a license entitled the “GNU General Public License, Version 2” (“the License”). A copy of the License is attached to this Complaint as Exhibit A.

8. Under the License, Plaintiffs grant certain permissions to other parties to copy, modify and redistribute BusyBox so long as those parties satisfy certain conditions. In particular, Section 2(b) of the License, addressing each licensee, states:

You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License.

Thus, if a licensee redistributes a version of BusyBox, it may do so only under the terms of the License.

9. The License permits a licensee to distribute BusyBox, or works based on BusyBox, in object code or executable form, on the condition that the licensee gives recipients access to the source code corresponding to what they distribute. The object code or executable form of a

computer program is the form that can actually be run on a computer, but which is not intelligible to the human reader and thus is not practicably modifiable. Section 3 of the License states:

You may copy and distribute the Program (or a work based on it, under Section 2) in object code or executable form under the terms of Sections 1 and 2 above provided that you also do one of the following:

- a) Accompany it with the complete corresponding machine-readable source code, which must be distributed under the terms of Sections 1 and 2 above on a medium customarily used for software interchange; or,
- b) Accompany it with a written offer, valid for at least three years, to give any third party, for a charge no more than your cost of physically performing source distribution, a complete machine-readable copy of the corresponding source code, to be distributed under the terms of Sections 1 and 2 above on a medium customarily used for software interchange . . . .

10. Plaintiffs have at no time granted any permission to any party to copy, modify or distribute BusyBox under any terms other than those of the License.

11. Upon information and belief, Defendant makes and sells various electronic devices and hardware (the “Infringing Products”) that contain embedded executable software (the “Firmware”). Defendant also provides the Firmware itself for download via its website, at <http://www.xterasys.com/support/drivers.htm>.

12. Upon information and belief, Defendant’s Firmware contains BusyBox, or a modified version of BusyBox that is substantially similar to BusyBox, in object code or executable form. Distribution of the Firmware, either as part of the Infringing Products or by itself, thus inherently includes distribution of BusyBox and, as such, Defendant is required to have Plaintiffs’ permission to make that distribution. The only such permission available for BusyBox is the contingent one granted under the License.

13. Upon information and belief, Defendant offers copies of the Firmware on its website, but does not offer any source code corresponding to the Firmware. Upon information and belief, since at least January 20, 2005, Defendant has distributed to the public copies of the Firmware in its Infringing Products and via its website without providing source code to BusyBox. Defendant's Infringing Products include Defendant's BM-200, WAP257, XA-2611B, MH350, XR-2408GU, XR-3106, XR-4106, and WR-254 products.

14. Section 4 of the License states:

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Therefore, under the License, any party that redistributes BusyBox in a manner that does not comply with the terms of the License immediately and automatically loses all rights granted under it. As such, any rights Defendant may have had under the License to redistribute BusyBox were automatically terminated the instant that Defendant made non-compliant distribution of the Infringing Products or Firmware. Since that time, Defendant has had no right to distribute BusyBox, or a modified version of BusyBox, under any circumstances or conditions.

15. Upon information and belief, on July 25, 2006, Defendants were notified by third parties of Plaintiffs' copyright in BusyBox and of Defendant's infringement thereof. This notification was provided via electronic mail. The notification included instructions for downloading the firmware file for Defendants' WR-254 product (the "WR-254") and testing it for the presence of BusyBox.

16. On May 23, 2007, through their counsel, Plaintiffs notified Defendant of its unlawful conduct based upon its failure to comply with the License.

17. On May 23, 2007, Defendant's employee or agent, Steve Yang, responded to Plaintiffs'

counsel via electronic mail asking for more specific information on the infringement. Plaintiffs' counsel responded, providing instructions for confirming the presence of BusyBox in the WR-254. Defendants stated that they would cease online distribution of the Firmware for the WR-254 pending an investigation by Defendant.

18. On May 24, 2007, Plaintiffs' counsel responded to Mr. Yang via electronic mail, reminding him that the infringement would still be ongoing if Xterasys continued to distribute the Firmware as part of the WR-254 product. Plaintiffs' counsel also asked to be informed of the progress of Defendant's investigation.

19. Since May 24, 2007, Defendant has not contacted Plaintiffs' counsel. Upon information and belief, Defendant continues to distribute to the public copies of the Firmware in its Infringing Products without providing source code for BusyBox. Upon information and belief, Defendant continues to distribute to the public copies of the Firmware (with the exception of the WR-254 firmware) via its website without providing source code for BusyBox.

## **COUNT I**

### **COPYRIGHT INFRINGEMENT**

20. Plaintiffs reallege and restate paragraphs 1 through 19 as if more fully set forth herein.

21. Plaintiffs are, and at all relevant times have been, the copyright owners under United States copyright law in the software program known as BusyBox.

22. Defendant's distribution of its Infringing Products and Firmware without approval or authorization by Plaintiffs infringes Plaintiffs' exclusive copyrights in BusyBox pursuant to 17 U.S.C. §501.

23. Plaintiffs are entitled to recover from Defendant the amount of their actual damages incurred as a result of the infringement, in such amount as is shown by appropriate evidence upon

the trial of this case. 17 U.S.C. §504.

24. Plaintiffs are also entitled to injunctive relief pursuant to 17 U.S.C. §502 and to an order impounding any and all infringing materials pursuant to 17 U.S.C. §503. Plaintiffs have no adequate remedy at law for Defendant's wrongful conduct because, among other things, (a) Plaintiffs' copyrights are unique and valuable property whose market value is impossible to assess, (b) Defendant's infringement harms Plaintiffs such that Plaintiffs could not be made whole by any monetary award, and (c) Defendant's wrongful conduct, and the resulting damage to Plaintiffs, is continuing.

25. Plaintiffs are also entitled to recover their attorneys' fees and costs of suit. 17 U.S.C. §505.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request judgment against the Defendant as follows:

(1) That the Court issue injunctive relief against Defendant, and that Defendant, its directors, principals, officers, agents, representatives, servants, employees, attorneys, successors and assigns, and all others in active concert or participation with Defendant, be enjoined and restrained from copying, modifying, distributing or making any other infringing use of Plaintiffs' software.

(2) That the Court order Defendant to pay Plaintiffs' actual and consequential damages incurred, in an amount to be determined at trial;

(3) That the Court order Defendant to account for and disgorge to Plaintiffs all profits derived by Defendant from its unlawful acts;

(4) That the Court order Defendant to pay Plaintiffs' litigation expenses, including reasonable attorney's fees and costs of this action; and

(5) That the Court grant Plaintiffs any such further relief as the Court may deem just and proper.



Dated: New York, New York  
November 19, 2007

Respectfully submitted,

SOFTWARE FREEDOM LAW CENTER, INC.

By: \_\_\_\_\_

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Attorneys for Plaintiffs

Erik Andersen and Rob Landley

**EXHIBIT A**

# The GNU General Public License

Version 2, June 1991

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