

SOFTWARE FREEDOM LAW CENTER, INC.
Daniel B. Ravicher (DR1498)
Aaron Williamson (AW1337)
Michael A. Spiegel (MS2309)
1995 Broadway, 17th Floor
New York, NY 10023-5882
Tel.: 212-580-0800
Fax.: 212-580-0898

Attorneys for Plaintiffs *Software Freedom
Conservancy, Inc.* and *Erik Andersen*

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

-----	X
SOFTWARE FREEDOM CONSERVANCY, INC. and	:
ERIK ANDERSEN,	:
	:
Plaintiffs,	:
-against-	:
	:
BEST BUY CO., INC., SAMSUNG ELECTRONICS	:
AMERICA, INC., WESTINGHOUSE DIGITAL	:
ELECTRONICS, LLC, JVC AMERICAS	:
CORPORATION, WESTERN DIGITAL	:
TECHNOLOGIES, INC., ROBERT BOSCH LLC,	:
PHOEBE MICRO, INC., HUMAX USA INC.,	:
COMTREND CORPORATION, DOBBS-STANFORD	:
CORPORATION, VERSA TECHNOLOGY INC.,	:
ZYXEL COMMUNICATIONS INC., ASTAK INC.,	:
and GCI TECHNOLOGIES CORPORATION,	:
	:
Defendants.	:
-----	X

PLEASE TAKE NOTICE that upon the accompanying Memorandum of Law in Support

of Plaintiffs' Motion for Default Judgment, or in the Alternative, Summary Judgment; Plaintiffs' Rule 56.1 Statement of Material Facts; the Declaration of Erik Andersen, dated June 1, 2010, and Exhibits 1-2 annexed thereto; the Declaration of Bradley M. Kuhn, dated June 3, 2010, and Exhibits 1-3 annexed thereto; the Declaration of Daniel B. Ravicher, dated June 3, 2010, and Exhibits 1-4 annexed thereto; and on all the prior proceedings and matters of record in this case, plaintiffs Software Freedom Conservancy, Inc. and Erik Andersen will move the court before the Honorable Shira A. Scheindlin, United States District Court Judge, at the United States Courthouse, 500 Pearl Street, New York, New York, at a date and time to be determined by the Court, for an order granting default judgment, or in the alternative, summary judgment in favor of the Plaintiffs against Defendant Westinghouse Digital Electronics, LLC pursuant to Federal Rules of Civil Procedure 37 and 56. Upon entry of judgment, Plaintiffs will also seek the entry of an award of (i) permanent injunctive relief, (ii) damages, (iii) reasonable attorneys' fees and costs, and (iv) any such further relief as the court may deem just and proper.

PLEASE TAKE NOTICE that pursuant to the schedule set by the court at the May 20th pre-trial conference in this matter, any opposing papers or answering memoranda are to be served by June 17, 2010.

Dated: June 3, 2010
New York, New York

Respectfully submitted,
SOFTWARE FREEDOM LAW CENTER, INC.

By: s/ Daniel B. Ravicher
Daniel B. Ravicher (DR1498)
Aaron Williamson (AW1337)
Michael A. Spiegel (MS2309)
1995 Broadway, 17th Floor
New York, NY 10023-5882
Tel.: 212-580-0800
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COMTREND CORPORATION, DOBBS-STANFORD	:
CORPORATION, VERSA TECHNOLOGY INC.,	:
ZYXEL COMMUNICATIONS INC., ASTAK INC.,	:
and GCI TECHNOLOGIES CORPORATION,	:
	:
Defendants.	:
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Plaintiffs Software Freedom Conservancy, Inc. and Erik Andersen (“Plaintiffs”) respectfully submit this Memorandum of Law in support of their motion for default judgment, or in the alternative, summary judgment against defendant Westinghouse Digital Electronics, LLC (“Westinghouse”).

INTRODUCTION

Plaintiffs filed this action against fourteen commercial electronics distributors for copyright infringement because they each copied and distributed Plaintiffs' copyrighted software without Plaintiffs' permission and continued to do so even after receiving direct notice from Plaintiffs of its unlawful activity. In their Complaint, Plaintiffs respectfully requested judgment against each defendant and relief in the form of (i) an injunction restraining defendants from any further infringement of Plaintiffs' copyrights, (ii) an award of damages, (iii) an accounting and disgorgement of each defendant's profits from its unlawful activities, (iv) a reimbursement of Plaintiffs' litigation expenses, and (v) any such further relief as the court may deem proper.

Since answering Plaintiffs' Complaint and making initial disclosures, Westinghouse has not participated in this matter and its counsel has said it does not expect Westinghouse to participate. Thus, with leave of the court granted during the May 20 pre-motion conference held in this matter, Plaintiffs respectfully move for default judgment against Westinghouse under Rule 37. In the alternative, Plaintiffs move for summary judgment against Westinghouse based on the Statement of Material Facts (“SMF”)¹ and declarations submitted herewith that show there is no genuine issue as to any material fact regarding Westinghouse's infringement of Plaintiffs'

¹ The Statement of Material Facts (“SMF”) filed pursuant to Local Rule 56.1 contains a complete list of all of the material facts. As required by the Rule, each paragraph in the SMF includes a supporting citation to one or more declaration or other document filed herewith.

copyrights. Upon judgment being granted in their favor, Plaintiffs also respectfully request an award of all appropriate remedies, including an injunction, damages, and attorneys' fees and costs.

**WESTINGHOUSE HAS CEASED TO PARTICIPATE,
MAKING DEFAULT JUDGMENT UNDER RULE 37 APPROPRIATE**

On March 8, 2010, Westinghouse served its Answer and Initial Disclosures, but since then has not participated in this matter. Westinghouse did not make initial discovery requests by March 22, the deadline specified in the court's Scheduling Order. D. Ravicher ¶ 4;² SMF ¶ 19. Westinghouse has not responded to Plaintiffs' initial discovery request, which was made on March 22, and the response to which was due April 21. D. Ravicher ¶ 5; SMF ¶ 20. When Plaintiffs attempted to confer with Westinghouse regarding its failure to respond to Plaintiffs' initial discovery request, Westinghouse's counsel replied that Westinghouse had executed a general assignment for the benefit of creditors in California and was unlikely to continue to appear in this matter. D. Ravicher ¶ 6; SMF ¶ 21. Westinghouse's counsel declined to confer about discovery, potential settlement, or anything else involving this matter. Since, Westinghouse's counsel asked Plaintiffs' consent to withdraw from representing Westinghouse in this matter. D. Ravicher ¶ 10; SMF ¶ 25.

On May 3, 2010, Plaintiffs requested a pre-motion conference in contemplation of motions to compel discovery for summary judgment. D. Ravicher ¶ 7; SMF ¶ 22. Plaintiffs served Westinghouse with a copy of that letter; Westinghouse did not reply. *Id.* Westinghouse

² The designation "D. [Name]" refers to the declaration of the identified individual attached to Plaintiffs' Motion for Summary Judgment.

also failed to appear at the pre-motion conference held on May 20, 2010. D. Ravicher, ¶ 9; SMF ¶ 24. Thus, despite making initial appearances at the beginning of this matter, Westinghouse has failed to participate in this action for several months.

Federal Rule of Civil Procedure 37 authorizes a court to enter severe sanctions against a party if the circumstances justify doing so. *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979) (“in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where ... they are clearly warranted.”). A district court has wide discretion in imposing such sanctions. *Daval Steel Products, Div. of Francosteel Corp. v. M/V Fakredine*, 951 F.2d 1357, 1365 (2d Cir. 1991). To determine whether a default judgment is warranted, “courts have considered the following factors: (a) willfulness or bad faith on the part of the noncompliant party; (b) the history, if any, of noncompliance; (c) the effectiveness of lesser sanctions; (d) whether the noncompliant party had been warned about the possibility of sanctions; (e) the client's complicity; and (f) prejudice to the moving party.” *American Cash Card v. AT&T Corp.*, 184 F.R.D. 521, 524 (S.D.N.Y. 1999), *aff'd* 210 F.3d 354 (2d Cir. 2000) (citing Jodi Golinsky, *The Second Circuit's Imposition of Litigation-Ending Sanctions for Failures to Comply with Discovery Orders*, 62 Brook. L. Rev. 585, 596-97 (1996)).

Here, Westinghouse's failure to participate cannot be attributed to mere negligence, but is by its own admissions intentional and calculated. Furthermore, Westinghouse has repeatedly failed to fulfill its discovery obligations, suggesting that it will similarly ignore lesser sanctions: Westinghouse did not begin discovery as required by the Scheduling Order, or respond to

Plaintiffs' discovery request, or confer about such discovery request, or respond to Plaintiffs' letter requesting a pre-motion conference, or attend the pre-motion conference. Westinghouse has notice that the court considers default judgment appropriate, because Plaintiffs served it with a copy of the transcript of the pre-motion conference on May 24, 2010. D. Ravicher ¶ 9; SMF ¶ 24. And having willfully abandoned its defense, Westinghouse cannot expect a less-severe sanction. Finally, as a private individual and a non-profit organization with limited resources, Plaintiffs would be severely prejudiced by having to pursue an unresponsive defendant while attempting to litigate or settle with the nine other remaining defendants in this case. Thus, the *American Cash Card* factors all favor default judgment against Westinghouse.

SUMMARY JUDGMENT IS ALSO APPROPRIATE

Summary judgment shall be granted if “there is no genuine issue as to any material fact and [] the movant is entitled to judgment as a matter of law.” Fed. R. Civ. Pro. 56(c). “[F]acts must be viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’ dispute as to those facts.” *Scott v. Harris*, 550 U.S. 372, 380 (2007). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted).

A copyright infringement claim comprises two elements: (i) ownership of a valid copyright; and, (ii) unauthorized copying, modifying, or distributing of the copyrighted work by another. 17 U.S.C. § 501(a); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

There is no genuine issue of fact that Plaintiffs' own a valid copyright in BusyBox and that Westinghouse has made unauthorized copies and distributions of BusyBox. Thus, Plaintiffs are entitled to summary judgment on their claim of copyright infringement against Westinghouse.

Plaintiffs Own Valid Copyrights in BusyBox

Plaintiff Erik Andersen is a computer programmer. D. Andersen ¶¶ 1-2; SMF ¶¶ 1-2. Beginning in 1999, he wrote software and contributed it to an open source software program known as BusyBox.³ D. Andersen ¶ 3; SMF ¶ 3. Although he allows others to use the code he contributed to BusyBox under certain terms and conditions, Mr. Andersen retains ownership over the copyrights in those contributions. D. Andersen ¶¶ 3, 5; SMF ¶¶ 3, 5. In October 2008, he registered his copyright in the code he contributed to BusyBox version 0.60.3, which was first published in April 2002. D. Andersen ¶ 4; SMF ¶ 4.

The evidentiary weight to be accorded copyright registrations is set forth in 17 U.S.C. § 410(c), which states:

In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

Although Mr. Andersen's copyright was registered more than five years after first publication, in the absence of any evidence to the contrary, Plaintiffs are still entitled to a presumption of validity. *Yurman Design, Inc. v. Golden Treasure Imps., Inc.*, 275 F. Supp. 2D 506, 515-16

³ 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 is used in countless products sold by many manufacturers all over the world. D. Kuhn ¶ 4; SMF ¶ 8.

(S.D.N.Y. 2003). Thus, there is no genuine dispute regarding the issue of whether Mr. Andersen holds valid copyright in his contributions to BusyBox.

Westinghouse Has Copied and Redistributed BusyBox Without Plaintiffs' Permission

In 2009, Plaintiffs investigated whether Westinghouse was distributing copies of BusyBox in its High Definition Television (“HDTV”) products. D. Kuhn ¶¶ 5-6; SMF ¶¶ 9-10. Plaintiffs discovered BusyBox within software provided by Westinghouse via its website for use in one of its HDTV products.⁴ D. Kuhn ¶¶ 7, 10; SMF ¶¶ 11, 14. Thus, there is no genuine dispute that Westinghouse has distributed copies of BusyBox both (i) within its HDTV's and (ii) also via its website as part of software intended for those HDTV's. These copies and distributions of BusyBox were made without Plaintiffs' permission and continue unabated today. D. Andersen ¶ 5; D. Kuhn ¶ 7; SMF ¶¶ 5, 11.

Plaintiffs note that Westinghouse could have had Mr. Andersen's permission to make these distributions if it complied with the *GNU General Public License, Version 2* (“GPLv2”) under which Mr. Andersen licenses his copyrighted contributions to BusyBox. D. Andersen ¶ 5; SMF ¶ 5. However, GPLv2 § 6 prohibits licensees who distribute BusyBox from imposing additional restrictions on recipients of BusyBox. Westinghouse violated this prohibition when it distributed BusyBox under its own “Non-Exclusive Copyright License” that imposed restrictions

⁴ The version of BusyBox distributed by Westinghouse is believed to be version v0.60.2. D. Kuhn ¶ 10; SMF ¶ 14. While Mr. Andersen owns copyright in portions of that version of BusyBox as well, the copyright registration here was for the next subsequent version of BusyBox, v0.60.3. D. Andersen ¶ 4; SMF ¶ 4. However, since Mr. Andersen “is the owner of the copyright of both the derivative and pre-existing work, the registration certificate relating to the derivative work in this circumstance will suffice to permit it to maintain an action for infringement based on defendants' infringement of the pre-existing work.” *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3D 739, 747 (2d Cir. 1998). Thus, the registration for v0.60.3 constitutes registration for v0.60.2 as well.

on recipients beyond those contained in GPLv2.⁵ D. Kuhn ¶ 9; SMF ¶ 13. Further, Westinghouse failed to comply with the requirement in GPLv2 § 3 to provide recipients of BusyBox with either a copy of the complete and corresponding source code thereto or an offer for such source. D. Kuhn ¶ 11; SMF ¶ 15. Under GPLv2 § 4, Westinghouse's violation of GPLv2's terms and conditions terminated any right Westinghouse had to copy, modify or redistribute BusyBox. Therefore, Westinghouse's subsequent copying and distributing of BusyBox was and is without permission.

UPON ENTRY OF JUDGMENT,
PLAINTIFFS SEEK ALL APPROPRIATE REMEDIES

Where a plaintiff has established copyright infringement, it is proper for a court to award (i) permanent injunctive relief, (ii) damages, (iii) reasonable attorneys' fees and costs, and (iv) any such further relief as the Court may deem just and proper. 17 U.S.C. §§ 502-505. As such, Plaintiffs respectfully request that, upon entry of default judgment, or in the alternative, summary judgment against Westinghouse, the court award the following relief:

Permanent Injunction: Under 17 U.S.C. § 502(a), a court may grant an injunction “on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” “[P]ermanent injunctions are generally granted where liability has been established and there is a threat of continuing infringement.” *Pearson Educ., Inc. v. Jun Liao*, 2008 U.S. Dist. LEXIS 39222, at *14-15 (S.D.N.Y. 2008). Since Westinghouse continues to infringe Mr. Andersen's

⁵ For example, The GPLv2 does not restrict what uses may be made of the software, but Section 3 of the Westinghouse License restricts permitted use of the software to “personal, non-commercial purposes only.” Therefore, this is an additional restriction placed on recipients of BusyBox from Westinghouse.

copyright to this day, Plaintiffs respectfully request that the court permanently enjoin Westinghouse from any further copying, distribution or use of BusyBox.

Damages: Under 17 U.S.C. § 504(a), “an infringer of copyright is liable for either (1) the copyright owner's actual damages and any additional profits of the infringer ...; or (2) statutory damages.” A plaintiff may pursue a determination of both forms of damages before having to elect between the two. 17 U.S.C. § 504(c)(1). Thus, Plaintiffs respectfully request that the court determine the amount of statutory damages to which Plaintiffs would be entitled if so elected.

Under 17 U.S.C. § 504(c)(2), if a defendant's infringement was willful, a court may award statutory damages up to \$150,000. A finding of willful infringement is appropriate if the infringer was “actually aware of the infringing activity,” *Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir 2005), and it is appropriate for a court to find willfulness and award maximum statutory damages on summary judgment, especially against a defendant that has “failed to take [the] litigation seriously.” *U2 Home Entertainment v. Lai Ying Music & Video Trading, Inc.*, 2005 U.S. Dist. LEXIS 9853, *26 (S.D.N.Y. 2005).

Here, Westinghouse had actual knowledge of its infringement of Plaintiffs' copyright as of at least September 2009, when counsel for Plaintiffs wrote a letter to Westinghouse on September 2, 2009, notifying it of the infringement and in-house counsel for Westinghouse responded by email with the subject “Your attached letter of September 2, 2009”. D. Ravicher ¶¶ 2–3 (copies of the September 2, 2009, letter sent by Plaintiffs to Westinghouse and the September 15, 2009, email sent by Westinghouse's Senior Counsel to Plaintiffs attached thereto as Exhibits 1 and 2, respectively); SMF ¶¶ 17–18. Thus, the infringement committed by Westinghouse since at least

September 15, 2009, was willful and an award of enhanced statutory damages is appropriate. Moreover, the maximum award of statutory damages of \$150,000 is warranted by Westinghouse's refusal to participate in the litigation, which demonstrates that it is no longer "tak[ing the] litigation seriously." *U2 Home*, 2005 U.S. Dist. LEXIS 9853, *26.

Costs and Attorneys' Fees: Under 17 U.S.C. § 505, a court may grant to prevailing copyright holders "the recovery of full costs" and "the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." It is appropriate to award attorneys' fees on summary judgment of copyright infringement, especially if the infringement was willful and the defendant has "refused to participate in the discovery process." *U2 Home*, 2005 U.S. Dist. LEXIS 9853, *29–30. Plaintiffs will identify their costs and reasonable attorney's fees for pursuing this action against Westinghouse and respectfully request that the court order Westinghouse to pay to Plaintiffs those costs and fees, since Westinghouse's infringement was willful and Westinghouse has "refused to participate in the discovery process." *Id.*

Other Proper Relief: Delivery of All Infringing Articles to Plaintiffs: Under 17 U.S.C. § 503(b), "[a]s part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies ... found to have been made or used in violation of the copyright owner's exclusive rights." Such "reasonable disposition" can include issuing an order permitting plaintiffs to seize infringing articles and donate those infringing articles to charity. *Universal City Studios v. Ahmed*, 1994 U.S. Dist. LEXIS 6251, *14 (E.D.P.A. 1994). Rather than order the destruction of infringing articles in Westinghouse's possession, Plaintiffs respectfully request that the court order Westinghouse to deliver all articles containing BusyBox to Plaintiffs

for reasonable disposition. Plaintiffs will donate all such articles to charity.

CONCLUSION

For the above reasons, Plaintiffs respectfully ask that the motion in support of default judgment, or in the alternative, summary judgment against defendant Westinghouse be granted and that all appropriate remedies be awarded therefor.

Dated: June 3, 2010
New York, New York

Respectfully submitted,
SOFTWARE FREEDOM LAW CENTER, INC.

By: s/ Daniel B. Ravicher
Daniel B. Ravicher (DR1498)
Aaron Williamson (AW1337)
Michael A. Spiegel (MS2309)
1995 Broadway, 17th Floor
New York, NY 10023-5882
Tel.: 212-580-0800
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**UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF NEW YORK**

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ERIK ANDERSEN,	:	ECF CASE
	:	
Plaintiffs,	:	09-CV-10155 (SAS)
-against-	:	
	:	
BEST BUY CO., INC., SAMSUNG ELECTRONICS	:	PLAINTIFFS' RULE 56.1
AMERICA, INC., WESTINGHOUSE DIGITAL	:	STATEMENT OF MATERIAL
ELECTRONICS, LLC, JVC AMERICAS	:	FACTS
CORPORATION, WESTERN DIGITAL	:	
TECHNOLOGIES, INC., ROBERT BOSCH LLC,	:	
PHOEBE MICRO, INC., HUMAX USA INC.,	:	
COMTREND CORPORATION, DOBBS-STANFORD	:	
CORPORATION, VERSA TECHNOLOGY INC.,	:	
ZYXEL COMMUNICATIONS INC., ASTAK INC.,	:	
and GCI TECHNOLOGIES CORPORATION,	:	
	:	
Defendants.	:	
-----	X	

Pursuant to Local Rule 56.1, plaintiffs submit the following statement of material facts.

PLAINTIFFS

1. Plaintiff Mr Erik Andersen is a private individual with a residence in Springville, Utah. D. Andersen¹ ¶ 1.

2. Mr. Andersen is a computer programmer and has for many years written and distributed computer software in a professional capacity. D. Andersen ¶ 2.

3. Beginning in about November 1999, Mr. Andersen wrote software for inclusion in a open source computer program known as BusyBox. Mr. Andersen allowed his contributions to be included in the BusyBox project, but retained all ownership of the the copyrights therein. Over the years, the BusyBox project came to include many of Mr. Andersen's contributions. D. Andersen ¶ 3.

4. Mr. Andersen registered his copyright in the new and revised computer source code written by him that was included in BusyBox version 0.60.3, which was first published on April 27, 2002. D. Andersen ¶ 4 (annexed thereto as Exhibit 1 is a true copy of “BusyBox, v.0.60.3.”, Copyright Reg. No. TX0006869051 (10/2/2008)).

5. Mr. Andersen allows his contributions to the BusyBox project to be copied, modified and redistributed by others under certain terms. Specifically, he licenses the copyright in his contributions under the terms of a well known open source software license called the “GNU General Public License, Version 2” (“GPLv2”). Mr. Andersen does not allow his contributions to be copied, modified or distributed under any other terms. D. Andersen ¶ 5 (annexed thereto as Exhibit 2 is a true copy of GPLv2).

1 The designation “D. ____” refers to the declaration of the identified individual attached to Plaintiffs’ Motion for Default, or in the Alternative, Summary Judgment.

6. Plaintiff The Software Freedom Conservancy, Inc. (“Conservancy”) acts as a fiscal sponsor for many open source and Free Software projects. By joining the Conservancy, projects obtain the benefits of a formal legal structure while keeping themselves focused on software development. These benefits include, most notably, the ability to collect earmarked project donations and protection from personal liability for the developers of the project. The Conservancy also holds assets for its member projects and manages them on behalf of and at the direction of the project. The Conservancy is a tax-exempt 501(c)(3) organization, so member projects can receive tax-deductible donations to the extent allowed by law. D. Kuhn ¶ 3.

7. Bradley M. Kuhn is the President of the Conservancy. He is also the Technology Director of the Software Freedom Law Center, which is counsel to plaintiffs in this matter. D. Kuhn ¶ 1. Mr. Kuhn holds a B.S. and M.S. in Computer Science, and has been a software developer and open source and Free Software advocate since the early 1990's. He has extensive experience investigating the use of open source and Free Software by third parties. D. Kuhn ¶ 2.

8. The BusyBox open source software program is a member project of the Conservancy. 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 is used in countless products sold by many manufacturers all over the world. D. Kuhn ¶ 4.

9. In addition to being the fiscal sponsor of its member projects, the Conservancy serves as copyright enforcement agent for some owners of copyrights in the member projects. The Conservancy acts as copyright enforcement agent for Mr. Erik Andersen, the owner of

copyright in significant portions of BusyBox. In this capacity, the Conservancy identifies users of open source software that may not be doing so in compliance with the applicable license terms. The Conservancy, with the assistance of legal counsel, then addresses those issues to help third parties ensure they are making appropriate use of open source software. D. Kuhn ¶ 5.

DEFENDANT WESTINGHOUSE

10. Software that is intended to be installed into an electronic device is frequently referred to as “firmware.” In connection with Mr. Kuhn's work in open source and Free Software license monitoring, at some point in 2009 he conducted an investigation to determine whether Westinghouse was distributing the BusyBox program as part of the firmware for its High Definition Television (“HDTV”) products. D. Kuhn ¶ 6.

11. As part of Mr. Kuhn's investigation, he downloaded a copy of the firmware for Westinghouse's TX-52F480S HDTV product by visiting the Westinghouse firmware download webpage at <http://www.westinghousedigital.com/firmware.aspx>. From that webpage, he downloaded the file located at http://207.38.27.164/firmware/SW/SusanII_v1.6.3.rar, which was identified as the firmware for Westinghouse's TX-52F480S HDTV product. D. Kuhn ¶ 7 (attached thereto as Exhibit 1 is a screenshot of Westinghouse webpage indicating Model Number TX-52F480S). That file was still available for download from Westinghouse's website as of June 3, 2010.

12. The ARIN WHOIS database (<http://ws.arin.net/whois>) identifies Westinghouse as the owner of the IP address 207.38.27.164 from which I downloaded the file. D. Kuhn ¶ 8.

13. Before Mr. Kuhn downloaded the file, he was prompted to agree to a

Westinghouse Digital Electronics, LLC Non-Exclusive Copyright License. D. Kuhn ¶ 9 (attached thereto as Exhibit 3 is the *Westinghouse Digital Electronics, LLC Non-Exclusive Copyright License*).

14. Mr. Kuhn analyzed the firmware file and discovered that BusyBox was indeed present therein. In particular, he opened the RAR archive file, which contained a file called “safe-kernel.img1”. Byte location 2601216 of that “safe-kernel.img1” file was a compressed ramdisk (a virtual filesystem). Inside that ramdisk, Mr. Kuhn found a binary version of BusyBox. Searching that binary version showed strings of characters that are unique to BusyBox, including the specific version number, identified as v0.60.2. D. Kuhn ¶ 10.

15. When Mr. Kuhn downloaded the Westinghouse firmware that contained BusyBox, there was no corresponding source code or offer for corresponding source code for BusyBox provided therewith. D. Kuhn ¶ 11.

THE LAWSUIT

16. Daniel B. Ravicher is a member of the bar of this court and the Legal Director of the Software Freedom Law Center (“SFLC”), counsel in this action to all plaintiffs. He is also a member of the Board of Directors for Plaintiff Conservancy. D. Ravicher ¶ 1.

17. On September 2, 2009, Mr. Ravicher sent a letter to Westinghouse's CEO Richard Houg regarding copyright infringement of the BusyBox software by its HDTV products. D. Ravicher ¶ 2 (attached thereto as Exhibit 1 is a true copy of Mr. Ravicher's September 2, 2009, letter).

18. On September 15, 2009, Mr. Ravicher received an email from Westinghouse's

Senior Counsel, Arthur Moore, with the subject “Your attached letter of September 2, 2009” regarding his letter. D. Ravicher ¶ 3 (attached thereto as Exhibit 2 is a true copy of the September 15, 2009, email).

19. As of June 3, 2010, Westinghouse has not made any initial discovery requests of Plaintiffs. The court's scheduling order in this matter required initial discovery requests to be made by March 22. D. Ravicher ¶ 4.

20. On March 22, 2010, Mr. Ravicher served on counsel for Westinghouse Plaintiffs' First Request for the Production of Documents. As of June 3, 2010, Westinghouse has not responded thereto, despite the fact that a response was due by April 21, 2010. D. Ravicher ¶ 5.

21. On April 27, 2010, Mr. Ravicher contacted counsel for Westinghouse, Jay Campbell, Esq. of the firm Renner, Otto, Boisselle & Sklar, LLP, regarding Westinghouse's overdue response to Plaintiffs' discovery request. Mr. Campbell told Mr. Ravicher that Westinghouse had undergone an assignment for the benefit of creditors under California state law and was unlikely to continue defending itself in this action. D. Ravicher ¶ 6.

22. On May 3, 2010, Mr. Ravicher wrote a letter to Chambers with a copy served on Westinghouse requesting a pre-motion conference in contemplation of a motion to compel discovery and a motion for summary judgment. Westinghouse never responded thereto. D. Ravicher ¶ 7.

23. On May 8, 2010, Mr. Ravicher received a letter dated April 28, 2010 from Michael L. Joncich of Credit Management Association regarding Westinghouse's assignment for the benefit of creditors. D. Ravicher ¶ 8 (attached thereto as Exhibit 3 is a true copy of the May 8,

2010, letter).

24. On Thursday, May 20, the court held a pre-motion conference in response to Mr. Ravicher's letter of May 3. At the conference, the court granted Plaintiffs permission to file a motion for default judgment, or in the alternative, summary judgment against Westinghouse. No counsel for Westinghouse appeared at the conference. D. Ravicher ¶ 9 (attached thereto as Exhibit 4 is a true copy of the transcript of the May 20, 2010, pre-motion conference). Mr. Ravicher served a copy of the transcript of the May 20 pre-motion conference on counsel for Westinghouse on May 24, 2010. *Id.*

25. On Monday May 24, 2010, Mr. Campbell called Mr. Ravicher and said that Westinghouse's counsel of record in this matter – Kyle B. Fleming of the law firm Renner, Otto, Boisselle & Sklar LLP and Sarah B. Yousuf of the law firm Kane Kessler, P.C. – intended to file a motion to withdraw as counsel in this case. On May 26, Mr. Campbell's associate, Betsy Batts, confirmed by email the intention of Mr. Fleming and Ms. Yousuf to do so. D. Ravicher ¶ 10.

Dated: June 3, 2010

New York, New York

Respectfully submitted,
SOFTWARE FREEDOM LAW CENTER, INC.

By: s/ Daniel B. Ravicher

Daniel B. Ravicher (DR1498)

Aaron Williamson (AW1337)

Michael A. Spiegel (MS2309)

1995 Broadway, 17th Floor

New York, NY 10023-5882

Tel.: 212-580-0800

Fax.: 212-580-0898

Attorneys for Plaintiffs *Software Freedom
Conservancy, Inc. and Erik Andersen*

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

-----	X	
SOFTWARE FREEDOM CONSERVANCY, INC. and	:	
ERIK ANDERSEN,	:	
	:	ECF CASE
Plaintiffs,	:	
-against-	:	09-CV-10155 (SAS)
	:	
BEST BUY CO., INC., SAMSUNG ELECTRONICS	:	
AMERICA, INC., WESTINGHOUSE DIGITAL	:	
ELECTRONICS, LLC, JVC AMERICAS	:	DECLARATION OF
CORPORATION, WESTERN DIGITAL	:	ERIK ANDERSEN
TECHNOLOGIES, INC., ROBERT BOSCH LLC,	:	
PHOEBE MICRO, INC., HUMAX USA INC.,	:	
COMTREND CORPORATION, DOBBS-STANFORD	:	
CORPORATION, VERSA TECHNOLOGY INC.,	:	
ZYXEL COMMUNICATIONS INC., ASTAK INC.,	:	
and GCI TECHNOLOGIES CORPORATION,	:	
	:	
Defendants.	:	
-----	X	

I, Erik Andersen, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am a named plaintiff in this action and reside in Springville, Utah. I offer this declaration in support of plaintiffs' motion for default judgment, or in the alternative, summary judgment against defendant Westinghouse Digital Electronics, LLC ("Westinghouse").
2. I am a computer programmer and have for many years written and distributed computer software in a professional capacity.
3. Beginning in about November 1999, I wrote software for inclusion in a open

source computer program known as BusyBox. I allowed my contributions to be included in the BusyBox project, but retained all ownership of the the copyrights therein. Over the years, the BusyBox project came to include many of my contributions.

4. I registered my copyright in the new and revised computer source code written by me that was included in BusyBox version 0.60.3, which was first published on April 27, 2002. Annexed hereto as Exhibit 1 is a true copy of "BusyBox, v.0.60.3.", Copyright Reg. No. TX0006869051 (10/2/2008).
5. I allow my contributions to the BusyBox project to be copied, modified and redistributed by others under certain terms. Specifically, I license the copyright in my contributions under the terms of a well known open source software license called the "GNU General Public License, Version 2" ("GPLv2"). Annexed hereto as Exhibit 2 is a true copy of GPLv2. I do not allow my contributions to be copied, modified or distributed under any other terms.

I declare under penalty of perjury that the forgoing is true and correct.



Erik Andersen

Executed on June 01, 2010

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

Registration Number:

TX 6-869-051

Effective date of registration:

October 2, 2008

Title

Title of Work: BusyBox, v.0.60.3

Completion/ Publication

Year of Completion: 2002

Date of 1st Publication: April 27, 2002

Author

Author: Erik Andersen

Author Created: New and revised computer source code by Erik Andersen

Work made for hire: No

Citizen of: United States

Domiciled in: United States

Year Born: 1971

Anonymous: No

Pseudonymous: No

Copyright claimant

Copyright Claimant: Erik Andersen

352 North 525 East, Springville, Utah, 84663

Limitation of copyright claim

Material excluded from this claim: Previous version of the program and computer program code from other sources

New material included in claim: New and revised computer source code by Erik Andersen

Certification

Name: Erik Andersen

Date: September 18, 2007

Correspondence: Yes

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Version 2, June 1991

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Finally, any free program is threatened constantly by software patents. We wish to avoid the danger that redistributors of a free program will individually obtain patent licenses, in effect making the program proprietary. To prevent this, we have made it clear that any patent must be licensed for everyone's free use or not licensed at all.

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Thus, it is not the intent of this section to claim rights or contest your rights to work written entirely by you; rather, the intent is to exercise the right to control the distribution of derivative or collective works based on the Program.

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- c) Accompany it with the information you received as to the offer to distribute corresponding source code. (This alternative is allowed only for noncommercial distribution and only if you received the program in object code or executable form with such an offer, in accord with Subsection b above.)

The source code for a work means the preferred form of the work for making modifications to it. For an executable work, complete source code means all the source code for all modules it contains, plus any associated interface definition files, plus the scripts used to control compilation and installation of the executable. However, as a special exception, the source code distributed need not include anything that is normally distributed (in either source or binary form) with the major components (compiler, kernel, and so on) of the operating system on which the executable runs, unless that component itself accompanies the executable.

If distribution of executable or object code is made by offering access to copy from a designated place, then offering equivalent access to copy the source code from the same place counts as distribution of the source code, even though third parties are not compelled to copy the source along with the object code.

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If any portion of this section is held invalid or unenforceable under any particular circumstance, the balance of the section is intended to apply and the section as a whole is intended to apply in other circumstances.

It is not the purpose of this section to induce you to infringe any patents or other property right claims or to contest validity of any such claims; this section has the sole purpose of protecting the integrity of the free software distribution system, which is implemented by public license practices. Many people have made

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If you develop a new program, and you want it to be of the greatest possible use to the public, the best way to achieve this is to make it free software which everyone can redistribute and change under these terms.

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```
<one line to give the program's name and a brief idea of what it does.>  
Copyright (C) <year> <name of author>
```

```
This program is free software; you can redistribute it and/or modify  
it under the terms of the GNU General Public License as published by  
the Free Software Foundation; either version 2 of the License, or  
(at your option) any later version.
```

```
This program is distributed in the hope that it will be useful,  
but WITHOUT ANY WARRANTY; without even the implied warranty of  
MERCHANTABILITY or FITNESS FOR A PARTICULAR PURPOSE. See the  
GNU General Public License for more details.
```

```
You should have received a copy of the GNU General Public License along  
with this program; if not, write to the Free Software Foundation, Inc.,  
51 Franklin Street, Fifth Floor, Boston, MA 02110-1301 USA.
```

Also add information on how to contact you by electronic and paper mail.

If the program is interactive, make it output a short notice like this when it starts in an interactive mode:

```
Gnomovision version 69, Copyright (C) year name of author  
Gnomovision comes with ABSOLUTELY NO WARRANTY; for details type `show w'.  
This is free software, and you are welcome to redistribute it  
under certain conditions; type `show c' for details.
```

The hypothetical commands `show w' and `show c' should show the appropriate parts of the General Public License. Of course, the commands you use may be called something other than `show w' and `show c'; they could even be mouse-clicks or menu items--whatever suits your program.

You should also get your employer (if you work as a programmer) or your school, if any, to sign a "copyright disclaimer" for the program, if necessary. Here is a sample; alter the names:

```
Yoyodyne, Inc., hereby disclaims all copyright interest in the program
```

`Gnomovision' (which makes passes at compilers) written by James Hacker.

<signature of Ty Coon>, 1 April 1989
Ty Coon, President of Vice

This General Public License does not permit incorporating your program into proprietary programs. If your program is a subroutine library, you may consider it more useful to permit linking proprietary applications with the library. If this is what you want to do, use the GNU Lesser General Public License instead of this License.

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

-----	X	
SOFTWARE FREEDOM CONSERVANCY, INC. and	:	
ERIK ANDERSEN,	:	
	:	ECF CASE
Plaintiffs,	:	
-against-	:	09-CV-10155 (SAS)
	:	
BEST BUY CO., INC., SAMSUNG ELECTRONICS	:	
AMERICA, INC., WESTINGHOUSE DIGITAL	:	
ELECTRONICS, LLC, JVC AMERICAS	:	DECLARATION OF
CORPORATION, WESTERN DIGITAL	:	DANIEL B. RAVICHER
TECHNOLOGIES, INC., ROBERT BOSCH LLC,	:	
PHOEBE MICRO, INC., HUMAX USA INC.,	:	
COMTREND CORPORATION, DOBBS-STANFORD	:	
CORPORATION, VERSA TECHNOLOGY INC.,	:	
ZYXEL COMMUNICATIONS INC., ASTAK INC., and	:	
GCI TECHNOLOGIES CORPORATION,	:	
	:	
Defendants.	:	
-----	X	

I, Daniel B. Ravicher, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am a member of the bar of this court and the Legal Director of the Software Freedom Law Center (“SFLC”), counsel in this action to all plaintiffs. I am also a member of the Board of Directors for the Software Freedom Conservancy, a named plaintiff in this case. I offer this declaration in support of the foregoing plaintiffs' motion for default judgment, or in the alternative, summary judgment against defendant Westinghouse Digital Electronics, LLC (“Westinghouse”).

2. Attached hereto as Exhibit 1 is a true copy of a letter I sent to Westinghouse's

CEO Richard Houg on September 2, 2009 regarding copyright infringement of the BusyBox software by their TX-52F480S LCD HDTV product.

3. Attached hereto as Exhibit 2 is a true copy of an e-mail I received from Westinghouse's Senior Counsel, Arthur Moore, on September 15, 2009, with the subject "Your attached letter of September 2, 2009" regarding my letter.

4. As of the date of this declaration, Westinghouse has not made any initial discovery requests of the plaintiffs. The court's scheduling order in this matter required initial discovery requests to be made by March 22.

5. On March 22, 2010, I served on counsel for Westinghouse Plaintiffs' First Request for the Production of Documents. As of the date of this declaration, Westinghouse has not responded thereto, despite the fact that a response was due by April 21, 2010.

6. On April 27, 2010, I contacted counsel for Westinghouse, Jay Campbell, Esq. of the firm Renner, Otto, Boisselle & Sklar, LLP, regarding Westinghouse's overdue response to Plaintiffs' discovery request. Mr. Campbell told me that Westinghouse had undergone an assignment for the benefit of creditors under California state law and was unlikely to continue defending itself in this action.

7. On May 3, 2010, I wrote a letter to Chambers with a copy served on Westinghouse requesting a pre-motion conference in contemplation of a motion to compel discovery and a motion for summary judgment. Westinghouse never responded thereto.

8. On May 8, 2010, I received a letter dated April 28, 2010 from Michael L. Joncich of Credit Management Association regarding Westinghouse's assignment for the benefit of

creditors. A copy of that letter is attached hereto as Exhibit 3.

9. On Thursday, May 20, 2010, the court held a pre-motion conference in response to my letter of May 3. A transcript of that conference is attached hereto as Exhibit 4. At the conference, the court granted Plaintiffs permission to file a motion for default judgment, or in the alternative, summary judgment against Westinghouse. No counsel for Westinghouse appeared at the conference. As directed by the court, I served a copy of the transcript on counsel of record for Westinghouse on May 24, 2010.

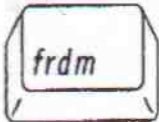
10. On Monday, May 24, 2010, Mr. Campbell called me and said that Westinghouse's counsel of record in this matter – Kyle B. Fleming of Renner, Otto, Boisselle & Sklar LLP and Sarah B. Yousuf of Kane Kessler, P.C. – intended to file a motion to withdraw as counsel in this case. On May 26, Mr. Campbell's associate, Betsy Batts, confirmed by email their intention to do so.

I declare under penalty of perjury that the foregoing is true and correct.



Daniel B. Ravicher

Executed on June 3, 2010
New York, New York



**Software Freedom
Law Center**

DANIEL B. RAVICHER
Legal Director
+1-212-461-1902 direct
ravicher@softwarefreedom.org

1995 Broadway, 17th Floor
New York, NY 10023-5882

tel +1-212-580-0800
fax +1-212-580-0898

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www.softwarefreedom.org

September 2, 2009

BY FEDERAL EXPRESS AND FACSIMILE

Richard Houg
Chief Executive Officer
Westinghouse Digital Electronics
12150 Mora Drive
Santa Fe Springs, CA 96070
Fax: +1-562-236-9898

Re: Copyright Infringement by Westinghouse's TX-52F480S

Dear Mr. Houg:

The Software Freedom Law Center represents Erik Andersen with respect to copyright matters. Mr. Andersen is the owner of rights in and to certain software programs, including BusyBox™ ("Program"), which is distributed on the web at <http://www.busybox.net/>. Westinghouse Digital Electronics's TX-52F480S product ("Infringing Product") appears to include a copy or derivative work of the Program. Further, the firmware download for this Infringing Product available on Westinghouse's website ("Infringing Software") also appears to include a copy or derivative work of the Program.¹ If true, Westinghouse is infringing Mr. Andersen's copyrights by distributing copies or derivative works of the Program without Mr. Andersen's permission.

The only way Westinghouse could have had Mr. Andersen's permission to distribute copies or derivative works of the Program would have been for Westinghouse to comply with the terms of the GNU General Public License ("GPL") under which Mr. Andersen grants licenses to the Program.² However, Westinghouse failed to comply with the terms of Section 3 of the GPL by failing to provide either the complete corresponding source code or a written offer for such source code along with the Program when it was distributed to third parties as part of the Infringing Product and Infringing Software.

The source code distribution requirements may seem like a minor issue to some, but in actuality they are perhaps the most important requirements placed on licensees under the GPL. Access to source code is what the GPL is all about and failure to abide by the terms with respect

1 See http://207.38.27.164/firmware/SW/SusanII_v1.6.3.rar.

2 See <http://www.busybox.net/about.html>.


thereto is indeed a violation of the GPL. This interpretation is not just according to Mr. Andersen and the Free Software Foundation, who is the author and interpreter for the past 15+ years of the GPL, but also according to the numerous companies, lawyers and judges that have independently interpreted and applied the GPL. We have found that some people misinterpret the importance of various sections of the GPL because they incorrectly believe that arduousness is a proxy for materiality. This is inaccurate because those provisions of the GPL which are the most material, are not necessarily the ones that are the most onerous. Further, without the source code requirements, the GPL fails to achieve its sole purpose.

Under Section 4 of the GPL, the violation by Westinghouse instantly terminated any and all rights to the Program that Westinghouse may have had under the GPL. Therefore, Westinghouse has no rights under the GPL to the Program unless and until they are reinstated by the copyright holders. Any copying, modification or distribution of the Program after the initial violation was and is without Mr. Andersen's permission and constitutes willful copyright infringement.

Fortunately for Westinghouse, Mr. Andersen is generally not like for-profit software companies that would most likely seek substantial damages for past infringement or exorbitant royalties for future distribution of the Program. Instead, Mr. Andersen prefers to assume that the cause of any GPL violation issues are benign and, as such, is willing to forgive the past infringement and reinstate Westinghouse's rights to the Program under the GPL so long as Westinghouse acts quickly to come into compliance with the GPL and remedy the harm caused by the past violation of the license.

As such, Mr. Andersen looks forward to receiving an immediate and substantively favorable response to this letter from Westinghouse. Without a manifestation of Westinghouse's commitment to resolving this matter directly with Mr. Andersen, he will be forced to conclude that resort to other, more public, venues is necessary to preserve and protect his rights in the Program.

Sincerely,



Daniel B. Ravicher

|

Subject: Your attached letter of September 2, 2009
From: "Moore, Arthur" <amoore@wde.com>
Date: Tue, 15 Sep 2009 11:40:32 -0700
To: <ravicher@softwarefreedom.org>
CC: <loni.kupchanko@tridentmicro.com>

Daniel B. Ravincher
Legal Director
Software Freedom Law Center

Dear Mr. Ravincher:

I am in house counsel for Westinghouse Digital Electronics (WDE) and I am responding to your attached letter to Richard Houn, Chief Executive Officer of WDE. I have shared your letter with Ms. Loni Kupchanko, in house counsel for the company that supplies the video processor electronics for the TX-52F480S product in question. Ms. Kupchanko has handled a prior issue involving the GPL relating to Trident's firmware for the same model television. Here is her contact information.

Loni Kupchanko
Assistant General Counsel
Trident Microsystems, Inc
Office: (408) 764-8917
loni.kupchanko@tridentmicro.com

I will be your contact at Westinghouse and I will call you for a background discussion of Westinghouse's TX-52F480S product (but not the merits of this claim).

Arthur Moore
Senior Counsel
Westinghouse Digital Electronics
12150 Mora Drive
Santa Fe Springs, CA 90670
p: 562-236-9800 x. 148
f: 562-236-9896
m: 626-826-9984
www.wde.com

This email may contain confidential information which is legally privileged. The inform:

SoftwareFreedomLawCenter-09-02-2009.pdf	Content-Description: SoftwareFree Content-Type: application/o Content-Encoding: base64
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April 28, 2010

In the matter of:

WESTINGHOUSE DIGITAL ELECTRONICS, LLC
n/k/a **Mora Electronics, LLC**
500 North State College Boulevard, Suite 1300
Orange, California 92868

BULLETIN NO. 1
34323

PROOF OF CLAIM ENCLOSED

TO THE CREDITORS:

Please be advised that Westinghouse Digital Electronics, LLC, a California limited liability company, now known as Mora Electronics, LLC (the "Company"), executed a General Assignment for the benefit of its creditors in favor of Credit Management Association ("Assignee") on April 2, 2010 (the "General Assignment"). This action was taken by the officers and managing members of the Company, based upon the advice of legal counsel and exhaustion of working capital whereby the business was unable to fund its operations.

A general assignment is a common law means of concluding the affairs of an insolvent debtor as an alternative to the Chapter 7 bankruptcy procedure. Experience has demonstrated that the recovery for assets is usually much greater in an assignment, and administrative expenses tend to be lower when compared to the average bankruptcy liquidation.

Subsequent to taking the General Assignment, the Assignee sold to Golden Star Electronics, LLC, a Delaware limited liability company n/k/a Westinghouse Digital, LLC (the "Buyer") certain of the assets remaining from operation of the Company's business for \$500,000 in cash, plus an agreement to pay to the Assignee \$1.5 million in royalties from future product sales, plus the assumption of certain obligations totaling approximately \$18 million. In connection with the sale of the assets to Buyer, the Assignee received a third-party opinion, obtained by the Company, indicating that the outstanding creditors of the Company would receive more than they would receive from a piecemeal liquidation of the Company.

SEE REVERSE SIDE

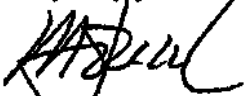
Credit Management Association
40 East Verdugo Avenue
Burbank, California 91502
Telephone: 800-541-2622 / Fax: 818-972-5301
www.CreditManagementAssociation.org

You will find enclosed a Statement of Condition prepared by the Assignee that was generated from the books and records of the Company.¹ This Statement of Condition represents the financial condition of the Company on the date of the General Assignment.

Creditors will also find enclosed a Proof of Claim form to file their claim with this office. Creditors should be aware that pursuant to California law², **the last date to return your Proof of Claim form to this office is September 27, 2010**. You must return the Proof of Claim by that date in order to ensure your participation in any distribution of funds generated to unsecured creditors from the liquidation of the Company.

A further report on the status of the Assignee's liquidation of assets will follow in approximately 180 days. You will be advised if any significant developments occur in the interim.

Very truly yours,



Michael L. Joncich
Manager, Adjustment Bureau
Telephone: (818) 972-5315
Email: mjoncich@creditservices.org

Enclosures: Statement of Condition
Form Proof of Claim

¹ In preparing the Statement of Condition, CMA has relied upon the books and records of the company and representations of management. CMA has not conducted an audit of such books and records.

² California Code of Civil Procedure §1802

**STATEMENT OF CONDITION
AS OF APRIL 2, 2010**

ASSETS

Cash in bank		87,842	
Accounts receivable	3,656,652		
Less allowance for doubtful accounts (A/R past due 90+, disputes, refunds, replacements, accrued sales programs)	<u>(3,656,652)</u>		
Total accounts receivable		-	
Inventory (forced liquidation value)			
Inventory-finished goods	246,596		
Inventory-RMA	105,758		
Inventory-refurbished-A	64,787		
Inventory-refurbished-B	236,259		
Inventory-refurbished-C	39,568		
Inventory-refurbished-D	6,941		
Inventory-Adtek	147,002		
Inventory-parts	<u>124,556</u>		
Total Inventory		971,467	
Notes and Intercompany Receivables			
Akamal	57,335		
WD - Japan	316,242		
Royalties - Japan	67,467		
Investment in subsidiary - WDT	63,837		
Investment in subsidiaries - WDC & WDJ	<u>38,000</u>		
		542,881	
I.P. Goodwill		Unknown	
Physical assets - estimated liquidation value			
Furniture, fixtures & equipment		<u>10,500</u>	
TOTAL ASSETS			1,612,690

LIABILITIES

Secured claim		-	
Priority claims			
Unpaid final payroll	118,159		
payroll taxes	7,431		
Unpaid vacation	69,488		
Sales tax	21,029		
eWaste tax	<u>90,392</u>		
		306,499	
General unsecured claims			
Accounts payable	26,571,497		
Customers with credit balance	3,094,307		
Accrued expenses	1,734,510		
Unpaid vacation	208,465		
Accrued Interest	37,190		
Commissions due	166,722		
Warranties	281,539		
Tooling cost	<u>1,512,628</u>		
		33,606,858	
Royalties payable		7,962,457	
Notes payable			
Note payable - officer loan		<u>500,000</u>	
TOTAL LIABILITIES			42,375,814

PROOF OF CLAIM

Case No. 34323

To: CMA Business Credit Services
PO Box 7740
Burbank, California 91510-7740

Re: Westinghouse Digital Electronics, LLC,
n/k/a Mora Electronics, LLC

The undersigned is a creditor of the above subject debtor(s) and I/we hereby file my/our claim below as follows:

As evidence of my/our claim, an itemized statement of my/our account and/or a copy of a promissory note is hereto attached.

THE AMOUNT OF MY/OUR CLAIM IS \$ _____

Dated: _____

COMPANY (or INDIVIDUAL) NAME _____

BY _____ TITLE _____

ADDRESS _____

CITY, STATE, ZIP _____

PHONE NO. _____ FAX# _____

EMAIL _____

NOTE: Interest is applicable only to the date of April 2, 2010, and then only in the event a written agreement exists between you and the debtor providing for payment of interest.

PLEASE COMPLETE THIS FORM, ATTACH AN ITEMIZED STATEMENT OF YOUR ACCOUNT THEREON, AND RETURN AT ONCE BUT NO LATER THAN September 27, 2010 TO:

ADJUSTMENT BUREAU
Attn: Patricia Garcia
CMA Business Credit Services
PO Box 7740, Burbank, California 91510-7740

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x

SOFTWARE FREEDOM CONSERVANCY,
INC.,

Plaintiff,

v.

09 CV 10155

BEST BUY CO., INC. et al,

Defendant.

-----x

New York, N.Y.
May 20, 2010
11:30 A.M.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

DANIEL B. RAVICHER
AARON KYLE WILLIAMSON
MICHAEL ANDREW SPIEGEL
Attorneys for Plaintiff

ALANNA FRISBY
PHILIPPE ALAIN ZIMMERMAN
Attorneys for Defendant

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1 (In open court)

2 THE COURT: My chambers somehow failed to record this
3 conference, so we endorsed a letter dated May 3 from
4 Mr. Ravicher, the plaintiff's attorney, that there would be a
5 conference on 11:00 a.m. May 20th, but then nobody put it on
6 our calendar. So we just totally missed it.

7 I have no letter response to the plaintiff's letter
8 from defense counsel. And yet they are here today. And I'll
9 know your names in just a minute.

10 MR. RAVICHER: We seek just to make our motion against
11 one of the defendants --

12 THE COURT: Good morning, everyone.

13 We failed to calendar this, but I have the plaintiff's
14 letter of May 3. I know exactly what the plaintiff is seeking.
15 I read the letter, so no point in your repeating that at all,
16 Mr. Ravicher. The question is, what's the defense answer to
17 all of this. And plaintiff says, you have not provided the
18 discovery, it is an obvious case of infringement, they are
19 going to move for summary judgement, finding a judgement of
20 infringement seeking remedies. But if you can't oppose the
21 motion under Rule 11, then you can't. There is no need for a
22 motion if you can't oppose it in good faith. What are you
23 going to say? They say it's a clear-cut case of infringement,
24 they own the copyright, you are producing these Busy Boxes, you
25 know you shouldn't be, it's just a matter of damages, isn't it?

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1 And what discovery have you not made?

2 MR. ZIMMERMAN: Your Honor, the defendants who are
3 present here are not the subject of the proposed motion.

4 THE COURT: Well, then, that's that.

5 So, what's there to say? Why don't you do this by
6 default?

7 MR. RAVICHER: Well, your Honor, the defendant filed
8 an answer, but then since filing the answer, they have not done
9 anything else.

10 THE COURT: Exactly. So they failed to respond to
11 discovery requests.

12 MR. RAVICHER: Right.

13 THE COURT: So you have sanctions under Rule 37.

14 MR. RAVICHER: Well, that was one of the motions to
15 compel, but we believe we have enough evidence already in our
16 own possession to make our case.

17 THE COURT: Right. But you can also move for default
18 judgement for the failure to produce any discovery, you know,
19 failure to respond to any discovery requests. You do it on
20 both grounds. Do it in the alternative.

21 MR. RAVICHER: Okay.

22 THE COURT: Okay, but do it quickly. You're
23 absolutely right. I mean they are not defending, so I know
24 they answered, but they are not here. They received your
25 letter and they are not here.

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1 Who is the counsel who is not here?

2 MR. RAVICHER: Westinghouse counsel, your Honor, was
3 Kyle Fleming of --

4 THE COURT: Kyle Fleming.

5 MR. RAVICHER: -- Renner Otto, a firm --

6 THE COURT: Of, what's the name?

7 MR. RAVICHER: Law firm's name is Renner Otto, of
8 Cleveland, Ohio. And their local counsel was Sarah, with an H,
9 Yousuf of the firm, Kane Kessler.

10 THE COURT: Uh-huh.

11 MR. RAVICHER: I had a conversation with Mr. Fleming
12 in order to attempt to confer about their failure to produce
13 discovery. And he said that Westinghouse has undergone some
14 California State equivalent to bankruptcy.

15 THE COURT: That's what I figured. Okay. Just make
16 your motion at the earliest possible time.

17 When do you want to make it?

18 MR. RAVICHER: Well, I could -- I could make it today,
19 on oral testimony, or I can make it by papers within two weeks.

20 THE COURT: I wish I could say yes to the oral motion,
21 but I don't think we can do it. They have to. Summary
22 judgement, they have to have the notice. Last ditch effort to
23 respond. So you'll have to make it in writing, since it is
24 dispositive.

25 Okay, so that's -- we'll make it two weeks from today?

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1 MR. RAVICHER: Two weeks, yes.

2 THE COURT: Today being May 20. We'll expect the
3 motion June 3.

4 MR. RAVICHER: Can I also make a motion, under 25C, to
5 join the new owners in interests, successors in interest?

6 THE COURT: Well, yeah, but then we're really going to
7 have give them some time to respond. In other words, the other
8 parties have been here all along. If you add a new party --

9 MR. RAVICHER: Right. So I'll move first for
10 judgement, and after judgement is entered, then make 25C
11 motion.

12 THE COURT: Yeah. So what I was going to say, is
13 since Westinghouse has been here all along, two weeks to
14 respond is enough. You're going to make this -- but this can't
15 go on. So June 3 is the motion date, response is due June 17.
16 I would ask you to order this transcript -- it will be short.
17 And send it to both Mr. Fleming's firm and Mrs. Yousuf's firm,
18 so they see the dates I have set right away.

19 June -- what did I say, 17th for response. If you get
20 a response, which I doubt, then your reply is due Monday,
21 June 28th.

22 Okay?

23 MR. RAVICHER: Yes, your Honor.

24 THE COURT: That will be fully submitted. I urge you
25 to do it on both grounding. You should win as a matter of law,

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1 anyway. And that -- after failure to participate.

2 Okay, with respect to the other defendant who is here,
3 I'm sorry I didn't realize that. JVC Americas is Ms. Frisby's
4 client. And Versa Technology is Mr. Zimmerman's client, right?

5 MR. ZIMMERMAN: Yes, your Honor.

6 THE COURT: So what are we doing with these two?

7 MR. RAVICHER: We are in discovery with them, your
8 Honor.

9 THE COURT: I mean is it -- is there anything for me
10 to do?

11 MR. ZIMMERMAN: No.

12 THE COURT: Oh, okay. So you sort of just came to
13 come, okay. Sorry you had to wait all of that time.

14 MR. RAVICHER: Thank you, your Honor.

15 THE COURT: Do you have anything to raise, either of
16 you?

17 MR. ZIMMERMAN: No, your Honor.

18 THE COURT: Sorry for the delay.

19 (Adjourned)

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

-----	X	
SOFTWARE FREEDOM CONSERVANCY, INC. and	:	
ERIK ANDERSEN,	:	
	:	ECF CASE
Plaintiffs,	:	
-against-	:	09-CV-10155 (SAS)
	:	
BEST BUY CO., INC., SAMSUNG ELECTRONICS	:	
AMERICA, INC., WESTINGHOUSE DIGITAL	:	
ELECTRONICS, LLC, JVC AMERICAS	:	DECLARATION OF
CORPORATION, WESTERN DIGITAL	:	BRADLEY M. KUHN
TECHNOLOGIES, INC., ROBERT BOSCH LLC,	:	
PHOEBE MICRO, INC., HUMAX USA INC.,	:	
COMTREND CORPORATION, DOBBS-STANFORD	:	
CORPORATION, VERSA TECHNOLOGY INC.,	:	
ZYXEL COMMUNICATIONS INC., ASTAK INC.,	:	
and GCI TECHNOLOGIES CORPORATION,	:	
	:	
Defendants.	:	
-----	X	

I, Bradley M. Kuhn, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am President of the Software Freedom Conservancy (“Conservancy”), one of the plaintiffs in this action. I am also the Technology Director of the Software Freedom Law Center, which is counsel to plaintiffs in this matter. I offer this declaration in support of plaintiffs' motion for default judgment, or in the alternative, summary judgment against defendant Westinghouse Digital Electronics, LLC (“Westinghouse”).

2. I hold a B.S. and M.S. in Computer Science, and have been a software developer and

open source and Free Software advocate since the early 1990's. I have extensive experience investigating the use of open source and Free Software by third parties.

3. The Conservancy acts as a fiscal sponsor for many open source and Free Software projects. By joining the Conservancy, projects obtain the benefits of a formal legal structure while keeping themselves focused on software development. These benefits include, most notably, the ability to collect earmarked project donations and protection from personal liability for the developers of the project. Another benefit of joining the Conservancy is that projects can use it to hold assets, which are managed by the Conservancy on behalf of and at the direction of the project. The Conservancy is a tax-exempt 501(c)(3) organization, so member projects can receive tax-deductible donations to the extent allowed by law.

4. The BusyBox open source software program is a member project of the Conservancy. 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 is used in countless products sold by many manufacturers all over the world.

5. In addition to being the fiscal sponsor of its member projects, the Conservancy also serves as copyright enforcement agent for some owners of copyrights in the member projects. The Conservancy acts as copyright enforcement agent for Mr. Erik Andersen, the owner of copyright in significant portions of BusyBox. In this capacity, the Conservancy identifies users of open source software that may not be doing so in compliance with the applicable license terms. The Conservancy, with the assistance of legal counsel, then addresses those issues to help

third parties ensure they are making appropriate use of open source software.

6. Software that is intended to be installed into an electronic device is frequently referred to as “firmware.” In connection with my work in open source and Free Software license monitoring, at some point in 2009, I conducted an investigation to determine whether Westinghouse was distributing the BusyBox program as part of the firmware for its TX-52F480S LCD HDTV product.

7. As part of my investigation, I downloaded a copy of the firmware for the TX-52F480S product by visiting the Westinghouse firmware download webpage at <http://www.westinghousedigital.com/firmware.aspx>. From that webpage, I downloaded the file located at http://207.38.27.164/firmware/SW/SusanII_v1.6.3.rar, which was identified as the firmware for the TX-52F480S product. See attached Exhibit 1 (screenshot of Westinghouse webpage indicating Model Number TX-52F480S). I note that the file is still available for download from the Westinghouse website as of today.

8. The ARIN WHOIS database (<http://ws.arin.net/whois>) identifies Westinghouse as the owner of the IP address 207.38.27.164 from which I downloaded the file. See attached Exhibit 2.

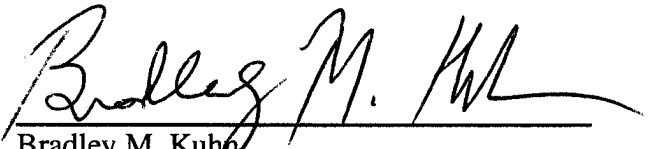
9. Before I downloaded the file, I was prompted to agree to a Westinghouse Digital Electronics, LLC Non-Exclusive Copyright License. See attached Exhibit 3.

10. I analyzed the firmware file and discovered that BusyBox was indeed present therein. In particular, I opened the RAR archive file, which contained a file called “safe-kernel.img1”. Byte location 2601216 of that “safe-kernel.img1” file was a compressed ramdisk (a virtual filesystem). Inside that ramdisk, I found a binary version of BusyBox. Searching that binary

version showed strings of characters that are unique to BusyBox, including the specific version number, identified as v0.60.2.

11. When I downloaded the Westinghouse firmware that contained BusyBox, there was no corresponding source code or offer for corresponding source code for BusyBox provided therewith.

I declare under penalty of perjury that the forgoing is true and correct.


Bradley M. Kuhn

Executed on June 3, 2010
New York, New York



Home Products Dealers Support Customer Service News Commercial Partners

Site Map Search GO

V-CHIP UPDATES

The V-Chip update is not needed to operate your TV - the only purpose of the update is to allow the TV to use a new ratings system if one is developed.

Legal Disclaimer

WESTINGHOUSE DIGITAL ELECTRONICS LLC
Non-Exclusive Copyright License
Westinghouse Digital Electronics LLC ("Westinghouse") is the owner of certain firmware update software and related intellectual property rights relating to the

I agree.

Next >>

If you wish to determine whether your TV is enabled with the capability to update the content ratings system, please click here

V-Chip Information Notification

Enter your Serial Number:

Where to find your numbers.

Enter your Model Number:

Enter your Part Number:

[Privacy](#) • [Trademarks & Terms of Use](#) • [Contact Us](#)

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Did the information on this page help you?

ARIN WHOIS Database Search

Search ARIN WHOIS for: [207.38.27.164](#)

Intelenet Communications NETWORK-207-38-0-0 (**NET-207-38-0-0-1**)

207.38.0.0 - 207.38.47.255

Westinghouse Digital Electronics ICI-WESTINGHOUSE-1 (**NET-207-38-27-160-1**)

207.38.27.160 - 207.38.27.175

ARIN WHOIS database, last updated 2010-05-25 20:00

Enter ? for additional hints on searching ARIN's WHOIS database.

#

ARIN WHOIS data and services are subject to the Terms of Use

available at https://www.arin.net/whois_tou.html

Non-Exclusive Copyright License

Westinghouse Digital Electronics LLC ("Westinghouse") is the owner of certain firmware update software and related intellectual property rights relating to the specified model of Westinghouse LCD television ("Update"). In consideration of your agreement to be bound by the terms and conditions of this Agreement and upon your affirmative acknowledgement of this license agreement by checking the box below, Westinghouse grants you a non-exclusive, non-transferable copyright license ("Agreement"), and will provide you access to the Update for your specified LCD television, to be downloaded to a Windows compatible USB flash drive. This Agreement is subject to the following terms and conditions:

1. Pursuant to this License Agreement, you are authorized to download, install, and use the Update on your Westinghouse LCD television. The Update is only compatible with the specified television and may cause serious damage if uploaded to the incorrect model Westinghouse television.
2. The Update contains proprietary information and data of Westinghouse and its licensors. This Agreement does not constitute the sale of the Update or any copy of the Update. All intellectual property rights in the Update software shall remain the exclusive property of Westinghouse and/or its licensors.
3. You may download and install the Update for personal, non-commercial purposes only. You are not authorized to copy any aspect of the Update, either in whole or in part, for any other personal or commercial use. You are prohibited from modifying, altering, or otherwise manipulating the Update or its source code.
4. This is a single user license. You may not sell, lease, loan, or otherwise distribute this Update to any third person. You may not sublicense or transfer this Update to a third party. This Agreement will terminate automatically if you breach any of its terms or if you uninstall, delete, and destroy the Update and all copies.
5. You agree to read and strictly follow the Update installation instructions provided on the Westinghouse website for your specific model LCD television. You acknowledge that failure to follow the installation instructions can result in serious damage to your LCD television. You agree that Westinghouse shall not be responsible for any damage to or diminished performance of your Westinghouse LCD television set that may result from your: (i) failure to properly follow the Update installation instructions, (ii) use of incompatible data transfer devices, or (iii) use of an incompatible computer operating system. Damage to your LCD television set caused by such misuse shall be your sole responsibility.
6. THE UPDATE IS PROVIDED TO YOU FREE OF CHARGE, "AS IS" WITH ALL ITS FAULTS. YOUR USE OF THE UPDATE IS AT YOUR SOLE RISK. WESTINGHOUSE HEREBY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THE UPDATE, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT. WESTINGHOUSE DOES NOT WARRANT THAT THE UPDATE WILL MEET YOUR SPECIFIC REQUIREMENTS OR THAT THE QUALITY OF THE UPDATE WILL MEET YOUR EXPECTATIONS. WESTINGHOUSE IS UNDER NO OBLIGATION TO SUPPORT THE UPDATES, OR TO PROVIDE FURTHER UPDATES OR ERROR CORRECTION. SOME STATES DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU, AND YOU MAY HAVE OTHER RIGHTS, WHICH VARY FROM STATE TO STATE.
7. IN NO EVENT WILL WESTINGHOUSE BE LIABLE TO YOU OR TO ANY THIRD PARTY FOR ANY DIRECT, SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE AGREEMENT OR THE USE, INABILITY TO USE, OPERATION, OR PERFORMANCE OF THE UPDATE, WHETHER SUCH LIABILITY ARISES FROM ANY CLAIM BASED UPON CONTRACT, WARRANTY, TORT, PRODUCTS LIABILITY OR OTHERWISE, AND WHETHER OR NOT WESTINGHOUSE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.
8. This Agreement will be governed by the laws of the State of California, without regard to its choice of law rules.
9. The parties hereby consent to the exclusive jurisdiction of, and venue in, any federal or state court of competent jurisdiction located in the County of Los Angeles, California for the purpose of adjudicating any matter arising from or in connection with this Agreement. Each party hereby waives its right to a jury trial of any claim or cause of action arising out of, directly or indirectly, this Agreement, and/or the use of the Westinghouse website or its contents.
10. All provisions of this Agreement are independent of each other. If any provision herein shall be held illegal, invalid, or unenforceable, in whole or in part, such provision shall be modified to the minimum extent necessary to make it legal, valid and enforceable, and the legality, validity and enforceability of all other provisions of this Agreement shall not be affected thereby.
11. This Agreement represents the complete and exclusive agreement between you and Westinghouse

relating to the Update. You acknowledge that you have not relied on any other representation not specifically included in this Agreement. You represent that you are of legal age and have the legal capacity to enter into this Agreement.