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Attorneys for Plaintiffs
Erik Andersen and Rob Landley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

—————————————————————x

ERIK ANDERSEN, an individual,
and ROB LANDLEY, an individual,

                Plaintiffs,

    -against-

SUPER MICRO COMPUTER, INC.
a Delaware corporation,

                Defendant.

—————————————————————x

Civil Action No. CV _____

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 Super Micro Computer, Inc. ("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, Super Micro Computer, Inc. ("Defendant") is a Delaware corporation with its principle place of business at 980 Rock Ave. San Jose, CA 95131. Upon information and belief, Defendant is engaged in the business of manufacturing, advertising, marketing and distributing computer hardware and software. Upon information and belief, Defendant contracts with third party distributors to supply goods and services within this district, including at least through online stores where they sell and distributes Defendant's hardware and software products. Upon information and belief, Defendant also distributes software, including the infringing software at issue, and provides other services to residents of this district via its website.

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 contracts with third party merchants to supply goods and services within the State of New York, and provides software and services to residents of this district via its website.

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 Defendant, upon information and belief, is and at all times was 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 communications 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 ftp://ftp.supermicro.com.

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 July 2004, 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 AOC-SIM1U+ IPMI 2.0 System Management Card.

14.   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. Section 4 of the License states:

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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.   On February 29, 2008, through their counsel, Plaintiffs notified Defendant of its unlawful conduct based upon its failure to comply with the License.

16.   On April 16, 2008, Defendant's counsel provided Plaintiffs with source code which it represented to be the complete and corresponding code for the GPL-licensed software on the Infringing Products. Plaintiffs initiated a technical review of the source code and communicated to Defendant their other demands for settlement of the matter.

17.   On April 25, 2008, through their counsel, Plaintiffs notified Defendant that the source provided did not include "scripts used to control compilation and installation of the executable,"

and therefore did not constitute "complete and corresponding source code" within the meaning of the license.

18. Defendant has not responded to Plaintiff's April 25 notice, and continues to distribute the Infringing Products and Firmware in violation of Plaintiffs' exclusive rights under the Copyright Act.

COUNT I
COPYRIGHT INFRINGEMENT

19. Plaintiffs reallege and restate paragraphs 1 through 18 as if more fully set forth herein.

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

21. 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.

22. 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.

23. 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.

24.   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
June 9, 2008

Respectfully submitted,

SOFTWARE FREEDOM LAW CENTER, INC.

By: _____

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Attorney for Plaintiffs
Erik Andersen and Rob Landley

EXHIBIT A

The GNU General Public License

Version 2, June 1991

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51 Franklin Street, Fifth Floor, Boston, MA 02110-1301, USA

Preamble

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   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; or,

   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.)

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