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August 19, 2009

Judge William H. Alsup
United States District Court
450 Golden Gate Avenue
San Francisco, California

Re: Apple Inc. v. Psystar Corp., Case No. CV-08-3251-WHA

Dear Judge Alsup:

Psystar has not destroyed evidence or acted in bad faith in its discovery responses. Apple has in its possession all materials in Psystar's possession and relevant to its discovery requests. The only materials not produced, because Psystar does not have copies, are (a) one previous version of the first Psystar bootloader ("psybootefi"), in which about three lines of code differ from the current version that was handed over to Apple; and (b) certain "master copies" of Psystar's hard drive images that vary in minor respects from the master copies produced to Apple.

We provide here a full explanation of each issue raised by Apple. Since Psystar acted in good faith to comply with its discovery duties, and the minor discovery violations alleged by Apple result in no discernible prejudice to Apple, the proposed relief should be rejected. Alternatively, if Apple genuinely believes that the subset of machines sold in the past, and that are affected by the discovery problems revealed, give rise to separate and different liability, then the proper course is to bifurcate the case and resolve any issues relating to that subset of machines separate from the claims arising from and relating to recent and future Psystar systems.

Psystar's recent systems have been the subject of full discovery and Apple raises no discovery issues related to these systems. Important legal issues, for Psystar as well as the computer software and hardware industries, are implicated by the design and sale of these systems. This case deserves to be resolved on the merits. While Apple would achieve its purpose of destroying a competitor and leaving the law ambiguous, a grant of relief in the form of infringement and DMCA claims resolved entirely in favor of Apple would be a gross distortion of justice.

I. Master Copies

For efficiency and consistency, Psystar creates a master hard drive image from which a copy is made to each production machine. Psystar has produced for Apple the master hard drive image ("master copy") that it used for versions 10.5.4 and 10.5.6 of the OS X operating system. Psystar acknowledges that minor changes to the 10.5.4 master copy were made during the production run, and that not every change was saved as a separate version in the course of business. The only deliberate changes made to the 10.5.4 master copy, to Psystar's knowledge, were minor updates to Psystar software such as updates to

the device driver software. (Psystar provides custom device drivers for hardware not available from Apple).

At no point did Pystar take affirmative action to either destroy or not preserve these intermediate master copies. Rather, Psystar innocently failed to initiate new measures to preserve certain of its electronic data. Previous counsel never informed Psystar of the need to implement substantial alterations in its business practices to accommodate the requirements of litigation discovery. Psystar was not timely informed, for example, that they needed to implement source code control, or to save all copies of electronic data, even files not commonly conceived as “documents”. Further, it was not part of Psystar’s normal operations to perform these steps. Now fully informed, Psystar has corrected these deficiencies. Apple has not complained that discovery related to recent versions of the Psystar systems has, in any manner, been compromised.

Apple focuses its complaints on three non-Psystar and non-Apple files allegedly discovered on Pystar machines sold in the past: dsmos.kext (“dsmos”), AppleDecrypt.kext (“AppleDecrypt”), and Netkas. Psystar acknowledges that it has previously downloaded and evaluated these binary files. It is possible that any or all of these files may have accidentally appeared on a production machine, since evaluation often occurred on the same machine used to manage the master copy for production machines. Psystar is a small business and cannot afford the equipment or personnel needed to fully isolate all of its activities to prevent these kinds of mishaps. However, none of these files (a) have ever formed a part of the Psystar system; (b) have been necessary to run a Psystar computer; or (c) currently exist in any form on Psystar production machines. Nor has Psystar ever possessed or viewed the source code to dsmos, AppleDecrypt, or Netkas.

II. Kernel Extensions

An essential component of Pystar’s product is a kernel extension that facilitates the decryption by OS X of certain binaries licensed to OS X users. Pystar has always performed this step with a kernel extension known as “OpenCojones.” In the past, Psystar has downloaded and evaluated binary versions of other kernel extensions known to function similarly. Two such kernel extensions are dsmos and AppleDecrypt. Psystar has never intentionally incorporated these external kernel extensions into its product.

Apple acknowledges that Psystar has produced the source code for OpenCojones. But they complain that their expert has found copies of dsmos and AppleDecrypt on certain Psystar machines sold in the past. As discussed earlier, Psystar acknowledges the possibility that copies of either or both of these kernel extensions may have been accidentally transferred to the hard drive image of Psystar machines sold in the past. But Psystar never deleted or failed to produce the source code for dsmos or AppleDecrypt, because Pystar has never possessed or even viewed that source code. The two kernel extensions - dsmos and AppleDecrypt - are widely available on the internet (see Exhibit A) in binary form and can be downloaded by anyone. This is how Psystar obtained its copies.

Since Apple asserts that it now has a copy of the dsmos and AppleDecrypt binaries from Psystar machines, the discovery complaint is largely moot.

III. Bootloaders

A bootloader is a computer program that starts operating systems when a user turns on a computer system. As such, the bootloader is in many respects conceptually separate from an operating system, though a distribution of an operating system may include its own bootloader.

Psystar has used two bootloaders in its product to start OS X. Originally it used a bootloader called psybootefi, derived from the open source program known as “boot132” (see e.g. <http://www.insanelymac.com/forum/index.php?showtopic=113288>). More recently, Psystar replaced psybootefi with a new bootloader, written by Psystar, called “dubl.” Apple has all copies of the source code for dubl. They also have a copy of the source code for the most recent version of psybootefi.

There is one previous version of psybootefi that has not been produced because Psystar did not have adequate source control software in place at the time the source code was modified. Sometime in 2008, Psystar fixed a bug in psybootefi related to reading data from the hard drive. Psystar failed to save a copy of the code before the bug fix. The changes amounted to about three lines of code, according to Rudy Pedraza, Psystar’s CEO. Although Psystar cannot produce the original source code file, they are willing to explain the change to satisfy any concern that Apple might have regarding the potential significance of the missing three lines of code.

“Netkas” is a bootloader available on the internet (see e.g. <http://netkas.org/?p=74>). Psystar acknowledges it has downloaded the binary form of this bootloader for evaluation, but has never used it as part of the Psystar system. Psystar was not aware that this bootloader was included on any past machines, though again acknowledges the possibility that it may have been accidentally transferred to the master hard disk image used to create production machines. At no time has Psystar possessed or viewed any source code for Netkas. Apple also apparently has a copy of this binary from a Psystar machine.

IV. Conclusion

For the foregoing reasons, Psystar respectfully requests that this Court recognize its good faith efforts to comply with discovery and the lack of discernible prejudice to Apple or its case, and to deny the relief requested by Apple.

Respectfully submitted,

/s/ K.A.D. Camara
K.A.D. Camara

/s/ David Welker
David Welker

Counsel for Psystar Corporation

Signature Attestation

Pursuant to General Order No. 45(X)(B), I hereby attest that I have obtained the concurrence in the filing of this document from all the signatories indicated by (/s/name) within this e-filed document.

August 19, 2009

By: /s/ David Welker

David Welker