

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

2008 MAR 12 P 4 57

CLERK, US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY

XPEL TECHNOLOGIES CORP. §
Plaintiff §

v. §

Civil Action No. SA08-CA0175-XR

AMERICAN FILTER FILM §
DISTRIBUTORS, FILM & VINYL §
DESIGNS LLC, BRETT WASSELL §
as owner and in his individual §
capacity, and LARRY WASSELL, as §
owner and in his individual capacity. §
Defendants. §

PLAINTIFF'S MOTION FOR EXPEDITED COMPUTER FORENSIC IMAGING

Plaintiff XPEL Technologies Corp. (hereinafter "XPEL") files this Motion for Expedited Computer Forensic Imaging, and respectfully shows the Court as follows:

I. INTRODUCTION

1. This Motion for Expedited Computer Forensic Imaging is brought for the purposes of preserving evidence. Almost all of the complained-of conduct alleged in the Complaint occurred on and is recorded on computers, servers, and/or other electronic storage devices in Defendants' possession, custody, or control. Given the amount of time that has elapsed since Defendants' conduct and XPEL's discovery of the activity, much of the relevant evidence may now only reside as metadata, deleted files, or file fragments on the computers, servers, or other electronic storage devices. Simple day-to-day activity on the computers, servers, and/or other electronic storage devices could alter or entirely eliminate the metadata, deleted files, or file fragments. Consequently, this Motion seeks to preserve evidence that could quickly become irretrievable, whether intentionally or inadvertently.

2. Defendants will not be prejudiced by the relief requested by this Motion. In fact, the relief sought by this Motion will benefit Defendants with the assurance that the imaged information will be preserved, serving as a defense to claims of spoliation after the entry of a signed Order on this Motion. In addition, mirror imaging of computer(s) may take place after business hours and depending on its size, server(s) on the weekend, causing practically no disruption to the Defendants' business.

THE LAWSUIT

3. Plaintiff, XPEL, creates designs for automotive paint and headlamp protection and window film products for different models of automobiles ("Kit Designs" or "XPEL's Products"). Some of these Kit Designs are delivered electronically via XPEL's web-based proprietary software and accessed by the end users' computer hardware. XPEL's business is described at its principal web site located at www.xpel.com. (Declaration of Ryan Pape ("Pape Declaration"), **Exhibit 1**).

4. Defendants are American Filter Film Distributors ("AFF"), Film & Vinyl Designs, LLC ("Film & Vinyl"), Brett Wassell, and Larry Wassell (collectively referred to as "Defendants").

5. XPEL filed its Original Complaint on March 4, 2008, against Defendants, alleging breach of contract, violation of the Digital Millennium Copyright Act, copyright infringement, violation of the Lanham Act, tortious interference with contracts, fraud, misrepresentation, and conspiracy as its causes of action, among others. The allegations are more fully set forth in Plaintiff's Original Complaint, attached hereto, as **Exhibit 2** as if fully incorporated herein, with the Complaint's exhibits attached to the Pape Declaration.

THE EVIDENCE

6. Access to XPEL's proprietary computer database of its Kit Designs is protected by XPEL's EULA, which contractually limits use of and computer access to XPEL's software and electronic copies of its Kit Designs. XPEL's business model is based upon charging for use of and computer access to XPEL's Kit Designs and restricting use and computer access to XPEL's Kit Designs via XPEL's EULA Agreements. (Pape Declaration, **Exhibit 1**).

7. Defendant AFF provides window film products and installation tools to professional window film dealers, automotive dealerships, and others who sell and install window film. AFF's website address is www.americanfilterfilm.com. The first page of the website and a relevant page from the website regarding automotive products is attached as **Exhibit 3A**. Film & Vinyl sells window film and paint protection pattern cutting packages, hardware for cutting window film and paint protection patterns such as plotters (sometimes known as "cutters"), plotter supplies, and patterns for window film and paint protection products. Film & Vinyl's website address is www.filmvinyl designs.com. The first page of the website and a relevant page from the website with an overview of "Film Designs" is attached as **Exhibit 3B**.

8. Beginning on or about November 1, 2002, AFF and/or Film & Vinyl have intermittently used XPEL's services to provide XPEL Kit Designs to AFF and/or Film & Vinyl's dealers and customers. On or about November 1, 2002 and on multiple occasions thereafter through August 31, 2005 and September 7, 2006 and on multiple occasions thereafter until October 19, 2007, Defendants accepted the then-current versions of XPEL's EULA (hereinafter "Agreement(s)") via a click-through mechanism on XPEL's internet site. XPEL's EULA sets forth the rights, duties and obligations of the parties to the EULA. (Pape Declaration, **Exhibit 1**).

9. XPEL's EULA attached as **Exhibit 1A**, was used by XPEL from December 9, 2004 through September 11, 2006. XPEL's EULA attached as **Exhibit 1B** was used by XPEL from September 11, 2006 until February 1, 2007. XPEL's EULA attached as **Exhibit 1C** has been used by XPEL since February 11, 2007. Defendants entered into a letter agreement ("Letter Agreement") with XPEL dated August 28, 2006, attached as **Exhibit 1D**.

10. AFF and/or Film & Vinyl uses software which they call "Film Designs." Film Designs software is a program based on CyberCut, a graphics design program for cutting vinyl, urethane, or window tint film. Defendants' Film Designs software includes a database capable of storing automotive, headlight, and window protection patterns. (Declaration of John Stephen Wood ("Wood Declaration"), **Exhibit 4**).

11. From about 2002 or 2003 to 2007, software resided on one or more of AFF's computers that could copy an XPEL Kit Design ("Capture Software"). This software was represented by an icon entitled "Capture" on one or more of AFF's or Film & Vinyl's computers. To "capture" a pattern as used by Defendants, means to make an electronic copy of the pattern. Further, as used by Defendants, to "capture" means that the electronic copy of the pattern is retained after the pattern is sent to a plotter or cutter. (Wood Declaration, **Exhibit 4**).

12. In early 2004, Brett Wassell instructed one or more AFF employees to "capture"—in other words, copy—one or more XPEL Kit Designs or paint protection patterns. AFF or Film & Vinyl employees and/or Brett Wassell routinely activated the "capture" software, launched XPEL's software to locate an XPEL Kit Design or pattern, and copied the XPEL Kit Designs pattern. The copy of the XPEL Kit Designs pattern was saved on an AFF or Film & Vinyl computer. The copied XPEL Kit Design or pattern could be opened in Film Designs software without using XPEL's software. (Wood Declaration, **Exhibit 4**).

13. Brett Wassell and AFF or Film & Vinyl employees modified or “cleaned up” XPEL’s Kit Designs or patterns. “Cleaning up” involves making patterns longer or shorter and cropping corners. It may also include smoothing the edges and taking out imperfections. “Cleaning up” is a term used by Brett Wassell (Wood Declaration, **Exhibit 4**).

14. Defendants have not informed XPEL that AFF or Film & Vinyl captured, copied, or modified XPEL’s patterns. Defendants did not request XPEL’s permission to capture, copy, or modify XPEL’s Kit Designs or patterns. Concerning Defendants’ capturing, copying, and modifying XPEL’s Kit Designs or patterns, Brett Wassell told AFF or Film & Vinyl’s employees that “what happens here, stays here,” or words to that effect. (Wood Declaration, **Exhibit 4**).

15. At one time, or currently, XPEL Kit Designs were saved on an AFF or Film & Vinyl network in a folder called “FD1.” On one or more occasions, XPEL Kit Designs were saved with an .fda extension that allowed them to be opened in the Film Designs software program. At one time or currently, XPEL’s Kit Designs were saved into an area in an AFF or Film & Vinyl computer called “Patterns.” (Wood Declaration, **Exhibit 4**).

16. When AFF or Film & Vinyl began capturing XPEL Kit Designs, at least some copies of XPEL Kit Designs or patterns were not saved into the Film Designs database. Larry Wassell had instructed that the copies of XPEL Kit Designs were not to be put into the Film Designs database because doing so would violate an agreement AFF and/or Film & Vinyl had with a vendor CPFilms (“CPFilms Agreement”). CPFilms provides paint protection patterns via software called Precision Cut. When this agreement appeared to be in jeopardy, Larry Wassell instructed that XPEL’s patterns were to be placed in the Film Designs database. (Wood Declaration, **Exhibit 4**).

17. AFF and/or Film & Vinyl employees and/or Brett Wassell copied XPEL's Kit Designs on a black Windows '98 computer. This Windows '98 computer was affixed with an emblem stating "Tiger Direct." The Windows '98 computer was attached to a plotter or cutter in the AFF and/or Film & Vinyl classroom. In addition, AFF and/or Film & Vinyl employees and/or Brett Wassell copied XPEL's Kit Designs on Brett Wassell's laptop computer. (Wood Declaration, **Exhibit 4**). Brett Wassell's laptop computer had or has the name "BRETTSTOSHIBA." Further, AFF and/or Film & Vinyl employees and/or Brett Wassell copied XPEL's Kit Designs on one or more computers bearing the names "CLASSROOM," "XPEL," "XPEL98," "OEMCOMPUTER," and/or "SYSTEMAX." (Pape Declaration, **Exhibit 1**).

18. In at least one instance, AFF or Film & Vinyl saved copies or derivatives of copies of XPEL Kit Designs or patterns for Honda automobiles onto a disk. AFF or Film & Vinyl took the disk to the Frank Kent Honda dealership, where an AFF or Film & Vinyl employee loaded the Kit Designs or patterns on the Honda dealership's computer. AFF and/or Film & Vinyl may have provided copies or derivatives of copies of XPEL Kit Designs to additional car dealerships for sale or for free. (Wood Declaration, **Exhibit 4**).

19. Upon information and belief, Defendants have engaged are engaging in ongoing tortious activity, the damages of which are incalculable but increasing. The nature of the tortious activity involves the ongoing use of, modification of, and deletion of digital data belonging to XPEL and data and metadata evidencing Defendants' unlawful conduct as described below. XPEL therefore requests expedited computer forensic imaging as set out below.

20. XPEL anticipates seeking a preliminary injunction pursuant to the Agreements between Defendants and XPEL ordering Defendants to cease all activity that breaches the

contracts, infringes XPEL's copyright rights, and that constitutes tortious activity. Before proceeding, however, and to avoid the necessity of conducting discovery at a hearing for preliminary injunction, XPEL respectfully requests the Court order limited discovery.

21. Accordingly, it is essential that this Court order expedited computer forensic imaging to preserve the digital data and metadata before any additional deletions can occur, whether inadvertent or intentional by making a mirror image of Defendants' Computer(s), Server(s), and any other electronic storage devices at Defendants' place of business at 1385 Westpark Way, Euless, Texas, including but not limited to Brett Wassell's laptop, said mirror images to be held in the possession of the Forensic Examiner.

22. To ensure the qualifications of the Forensic Examiner, the Forensic Examiner must be a Certified Forensic Examiner, with a Private Investigators' License. XPEL proposes DigitalWorks, as set out below, as the Forensic Examiner, which meets these criteria and is in the proximity of Defendants' place of business. Upon information and belief, DigitalWorks has successfully provided services as a Forensic Examiner in cases for attorneys, but not the Lead Attorneys in this matter, at both Jackson Walker L.L.P. and Strasburger & Price, LLC, the law firms representing the parties in this matter.

23. Specifically, XPEL requests that this Court order the following procedure be followed ("Protocol") and expedited forensic imaging take place as set out below:

I. Protocol

This Agreed Protocol is divided into three phases. For all phases, the following shall apply:

- A. The undersigned hereby agree to the following Protocol related to computer forensics analysis to be performed by a Forensic Examiner. Except where specifically set out below, the Forensic Examiner's costs shall be borne by the Plaintiff.

- B. Computer forensic analysis will be performed by DigitalWorks, located at 13333 N. Central Expy., Ste. 201, Dallas, Texas 75243 (the "Forensic Examiner").
- C. Defendants' Computers, identified below, shall be made available to the Forensic Examiner for inspection no later than two days from the date of this Order.
- D. All Forensic Examiners utilized for this Protocol must agree in writing to be bound by the terms of this Protocol prior to the commencement of their services.
- E. The Forensic Examiner shall not conduct any searches or run any reports that are not expressly permitted by the Protocol or provide any information to the parties that is not expressly covered by the Protocol or a later court order.
- F. The Date Range of all searches will be limited to November 1, 2002 to the date of the conclusion of forensic imaging by the Forensic Examiner.

II. Expedited Forensic Imaging

A. Within two days of this signed Order or the agreed-upon date and time, Defendants' Computer(s), Server(s), and any other electronic storage devices at Defendants' place of business at 1385 Westpark Way, Euless, Texas, including but not limited to Brett Wassell's laptop, which may be located at a different location, shall be made available to the Forensic Examiner to make mirror images of those devices as set out below:

Phase 1 - Forensic Imaging:

- a. Imaging of the Computer(s), Server(s), any other electronic storage devices in Defendants' possession, custody, or control, and Brett Wassell's laptop shall be created using EnCase or a similar hardware or software tool that creates a forensically sound, bit-for-bit, mirror image of the original hard drives. A bit-stream mirror image copy of the media item(s) will be captured and will include all file slack and unallocated space.
- b. Upon information and belief, Defendants' Computers may include, but are not limited to, computers named CLASSROOM, BRETTSTOSHIBA, XPEL, XPEL98, OEMCOMPUTER, and SYSTEMAX. Upon information and belief, Defendants possess one Server. This Order does not limit imaging to one server if Defendants possess or have custody or control of additional servers, each of which shall be imaged pursuant to this Order.
- c. All images and copies of images shall be authenticated by generating an MD5 hash value verification for comparison to the original hard drive.

- d. The forensic images shall be copied and retained by the Forensic Examiner until such time the court or both parties request the destruction of the forensic image files.

Phase 2 - Forensic Analysis:

- a. For each computer imaged, the Forensic Examiner will generate a standard set of reports in the form of electronic Excel spreadsheets or Access databases, showing all allocated/unallocated files and folders on each media image (an "all files" listing), and will distribute this to all parties. The "all files" listing will be produced by the Forensic Examiner within five days of imaging each media item unless processing difficulties occur at which time all parties will be advised immediately of the problems and anticipated resolution date. Any additional reports requested by any party shall be borne by the Requesting Party.
- b. Both parties may request from the Forensic Examiner certain reports from its forensic analysis, including, but not limited to, system registry information, deletion history information, internet browsing history, web-based email activity, system events, lnk files, recycle bin entries, and USB, USB2, Firewire, and/or Bluetooth storage devices. Such searches shall be limited by the Date Range. The cost of reports requested by Defendants shall be borne by Defendants.
- c. Any party may request that the Forensic Examiner extract metadata, deleted files and/or file fragments at the Requesting Party's expense, subject to the agreement of the producing party. Consent by the producing party to extract such data will not be unreasonably withheld.

Phase 3 - Production:

- a. Forensic Examiner will maintain all mirrored images. Working copies may be requested by Defendants, and the cost of such working copies will be borne by the Defendants.
- b. All parties may review the "all_files" spreadsheet and reports as run per the Protocol outlined in Phase II.
- c. The examination and production as described herein is not all inclusive and thus, any party may make additional requests for analysis and production (e.g., hash set comparisons to find file matches, unallocated space file carving, or patterns of evidence elimination), which is subject to the consent of the producing party, such consent not to be unreasonably withheld.

ARGUMENT AND AUTHORITY

24. The captured XPEL Kit Designs and the designs modified by Defendants should exist as electronic files on Defendants' computers and/or server(s), if they have not yet been deleted. The history of capturing those Kit Designs, and altering them, should exist as metadata on the Defendants' computers and/or server(s). In addition, Internet usage, specifically access to XPEL's proprietary software via the Internet, will be saved as metadata. This information, however, if deleted and if existing as metadata, "can be changed, overwritten, or obliterated by normal everyday use." MICHAEL R. ARKFELD, *ELECTRONIC DISCOVERY AND EVIDENCE* 1-6 (Law Partner Publishing, LLC 2004). "The simple acts of booting up a computer, opening a file, adding new data onto a hard disk or running a routine maintenance program on a network can alter or destroy existing data without the user's knowledge." *Id.*

25. However, deleted data and metadata can be recovered if done so expeditiously.

It is a myth that deleting a computer file...will cause it to be destroyed. When a computer user pushes the delete key to destroy a document, one is not deleting the document data, but instead merely removing the pointer or computer address of the document. The data remains, until it is overwritten by new data. Depending on its usage, this could take minutes or years.

Id. at 1-7. Metadata is "hidden data" or "embedded data" regarding who generated, opened, or changed a document, although routine activities, as described above, can alter the data if not preserved expeditiously. *Id.* at 1-6.

26. Federal courts have the inherent power to manage their dockets to achieve orderly and expeditious disposition of cases. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991). The Federal Rules of Civil Procedure give the Court the discretion to modify the discovery process. FED. R. CIV. P. 26(d); 34(b). Courts should grant narrowly tailored, expedited discovery when the request is reasonable or good cause is shown. *Ellsworth Assocs. Inc. v.*

United States, 917 F. Supp. 841, 844-45 (D. D.C. 1996). Here, the most pertinent evidence will exist in electronic form on Defendants' computers and server(s), likely in the form of deleted data, fragmented files, and metadata. This Motion is narrowly tailored, and seeks only to expedite computer forensic imaging to preserve evidence that most likely is routinely destroyed during the everyday activities of conducting business on Defendants' computers and server(s).

27. The Court should expedite the computer forensic imaging requested in this Motion because it is in the best interest of all the parties. *See Optic-Elec. Corp. v. United States*, 683 F. Supp. 269, 271 (D.D.C. 1987). This requested relief in this Motion benefits the Defendants with the assurance that the imaged information is preserved, and will reside in the hands of the neutral Forensic Examiner subject only to further orders of this Court. XPEL is prepared to agree to the mirror imaging of Defendants' Computers and Server(s) to take place after business hours and depending on its size, the server(s) may be imaged on the weekend, causing practically no disruption to Defendants' business. Conversely, XPEL will suffer actual harm and prejudice if the Motion is not granted by the loss of forensic evidence.

II. CONCLUSION

28. For all of the foregoing reasons, XPEL respectfully requests that this Court order expedited computer forensic imaging. Further, XPEL prays for all other relief to which it may show itself to be justly entitled.

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

Counsel for Plaintiff has attempted to confer with counsel for Defendants regarding the merits of the foregoing Motion, but no agreement could be reached. It is therefore presented to the Court for determination. The parties have reached preliminary agreement as to a Protective Order but a proposed Order had not yet been executed at the time of filing of this Motion.

Karen Monsen
Karen Monsen

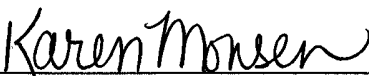
CERTIFICATE OF SERVICE

This is to certify that on this 12th day of March, 2008, a true and correct copy of the foregoing was served by email and certified mail, return receipt requested upon:

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