

April 15, 2005

**VIA Federal Express**

Business Owner  
Successful Company  
123 Main Street  
Anytown, USA 10101

***Privileged and Confidential  
Settlement Negotiations***

Re: SIIA v. Successful Company

Dear Mr. Owner:

Your offer to settle this matter for \$5,000.00 is rejected. SIIA and the participants in the SIIA piracy program whose copyrights you infringed consider this an extremely serious case of software piracy.

Under the Copyright Act the admission of a plaintiff's copyright registration certificates create a presumption of the copyright's validity (*William Elecs., Inc. v. Arctic Int'l, Inc.*, 685 F. 2d 870 (3d Cir. 1982), and evidence of defendant's access to substantially similar software raises an inference of copying. Nimmer on Copyrights, §13.02[B]; *Granite Music Corp. v. United Artists Corp.*, 582 F.2d 718 (9th Cir. 1976) ("If a plaintiff offers proof that defendant has 'access' to his work and that the two works are substantially similar, then a presumption of copying by the defendant arises."). *Also see*, Nimmer on Copyrights, §12.11; *Original Appalachian Artworks, Inc., v. Toy Loft, Inc.*, 684 F.2d 821 (11th Cir. 1982); and *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059 (9th Cir. 1981) (citing Nimmer on Copyrights); *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984); *see also*, Nimmer on Copyrights §4:12:11).

Plaintiffs will have made out a *prima facie* case of copyright infringement at this point and the burden of proof will shift to Successful Company (SC) to prove either the invalidity of the SIIA-member copyrights or to negate the probability of copying by evidence of independent creation or common source. *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 829 F. Supp. 1314, 1318 (M.D. Fla. 1993). Once a *prima facie* case of copying has been made, it is clearly erroneous for a court to find no infringement, absent countervailing evidence of the defendant's independent creation or other evidence showing a license from the plaintiff (*Dakin & Co. v. Charles Offset Co.*, 441 F. Supp. 434 (S.D.N.Y. 1977)).

SIIA will be entitled to statutory damages against SC and you for the unlicensed software reflected by the audit. Under Section 504 of the Copyright Act, 17 U.S.C. § 504, SIIA may elect to recover monetary damages measured either by actual damages plus any of SC's profits attributable to the infringement, or statutory damages for willful infringement up to \$150,000 per violation. Copyright infringement is willful when it is done with knowledge that it is in violation of the publisher's copyright, which "knowledge may be actual or constructive" or with "reckless disregard" for the copyright owner's rights. *Id.*; *Lipton v. Nature Co.*, 71 F.3d 464, 472 (2d Cir. 1995); *Central Point Software, Inc. v. Global Software & Accessories Inc.*, 880 F. Supp. 957, 967 (E.D.N.Y. 1995); *RCA/Ariola International, Inc. v. Thomas & Grayson Co.*, 845 F.2d 773, 779 (8th Cir. 1988).

The statutory damages analysis requires consideration of the expenses saved and profits reaped by SC in connection with the infringement, the revenues lost as a result of SC's conduct, and the infringers' state of mind – whether willful, knowing, or merely innocent. *Schmidt v. Holy Cross Cemetery Inc.*, 840 F. Supp 829, 835 (D. Kan. 1993); *Dive N' Surf Inc. v. Anselowitz*, 834 F. Supp. 379, 383 (M.D. Fla. 1993); and *N.A.S. Import Corp v. Chenseon Enterprises, Inc.*, 968 F.2d 250, 252, 23 USPQ2d 1387, 1388 (2d Cir. 1992). *See, Lowryss Reports v. Legg Mason Inc.*, 271 F. Supp. 737 (D. Md., July 10, 2003), where the court entered a \$19.6 million judgment based on defendant's infringement of plaintiff's copyrighted newsletter that had a \$700 annual subscription price.

Wholly apart from the issue of willfulness, SC and you will also be liable pursuant to Section 504(b) of the Act for disgorgement of all profits derived by SC from such unlicensed use of the unlicensed software within the three-year statute of limitations upon proof that at least a portion of SC's profits are attributable to the unlicensed use of Plaintiff's software. *See generally, Rainer v. Wayne State University*, 26 F. Supp. 2d 963, 972 (E.D. Mich. 1998); and *Estate of Vane v. The Fair, Inc.*, 849 F.2d 186 (5th Cir. 1988) (defendant has the burden of proving that some or all of its gross revenue did *not* result from its infringement of plaintiff's copyrighted work.)

Further, SIIA will seek a permanent injunction under Section 502 and an award of attorneys' fees and costs under Section 505 of the Act. Attorneys' fees, alone, are likely to be a multiple of Plaintiff's present demand if it becomes necessary to try this case to verdict. Finally, the law also provides under Section 503(b) of the Act for the court to "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...."

You will be personally liable for the statutory damages, disgorged profits and attorneys fees discussed above because, as a part-owner of SC, and the officer in charge of SC's operations, you had "the right and ability to supervise the infringing activity and also had a financial interest in such activities." *White Metal Casting Corp. v. Cornell Metal Specialties Corp.*, 353 F. Supp. 1170, 1175 (E.D.N.Y. 1972) quoting *Gershwin*

*Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

The Copyright Act is a strict liability statute. No knowledge of infringement is required in establishing liability, and employers and officers are routinely held liable under the Act for their employees infringing activities regardless of their lack of knowledge. *Smith v. Little Brown and Company*, 245 F. Supp. 451 (1965); See also, Nimmer on Copyrights § 12.04[A][3][d].

The rampant software piracy in this country is a national disgrace. A recent survey showed that over \$12 billion of software is stolen annually and that 36% of the software used by U.S. businesses is unlicensed. As you have probably read in the press, the software industry is fighting back. While SIIA would prefer to settle this dispute without the cost, work, time, and publicity of litigation, SC's \$5,000 offer ignores the reality that it will cost SC more than SIIA's demand to defend this suit, not to mention statutory damages up to \$150,000 per violation, disgorgement of SC's profits for the past three years, and payment of SIIA's attorney's fees. SIIA's settlement demand expires at 5:00 p.m. on April 25, 2005.

Very truly yours,

N. Forcement Attorney