

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 07-80296 CIV-HURLEY/VITUNAC

MICROSOFT CORPORATION,
a Washington corporation,

Plaintiff,

v.

BIG BOY DISTRIBUTION LLC, a Florida
limited liability company; STEVEN
BLACKBURN; EDUCATIONAL SOLUTIONS
AND TECHNOLOGICAL DEVELOPMENT
INC., d/b/a EDUCATIONAL SOLUTIONS and
EDSOL, a Jordanian company; and MAHMOUD
SHADID,

Defendants.

**MICROSOFT CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO LIABILITY AGAINST BIG BOY DISTRIBUTION AND STEVEN
BLACKBURN AND MEMORANDUM IN SUPPORT**

Plaintiff Microsoft Corporation (“Microsoft”) files this Motion for Partial Summary Judgment against Defendants Big Boy Distribution LLC (“Big Boy”) and Steven Blackburn (“Mr. Blackburn”) (collectively, the “Big Boy Defendants”) and supporting Memorandum of Law. Pursuant to Fed. R. Civ. P. 56, Microsoft seeks summary judgment as to the Big Boy Defendants’ liability on Microsoft’s claims for copyright infringement, 17 U.S.C. § 501, and unauthorized importation of copyrighted works, 17 U.S.C. § 602(a). The motion is made on the

grounds that there is no controversy as to any material fact necessary to prove the Big Boy Defendants' liability for copyright infringement of Microsoft's copyrights and unauthorized importation of Microsoft's copyrighted works. This Motion is based on the Memorandum in Support incorporated herein, the declarations of Tamara Johnson, Evelyn Blackwell, Miles Hawkes, and Jeremy Roller, including the declaration and deposition transcript of Mr. Blackburn, upon the pleadings and documents on file with the Court, and upon such other matters as to which the Court must and may take judicial notice.

MEMORANDUM OF LAW

I. INTRODUCTION

The Big Boy Defendants, acting in concert with others both known and unknown, have illegally obtained from abroad, imported to the United States, and distributed in the United States large quantities of Microsoft software intended for a special program designed to aid schools in developing countries. The Big Boy Defendants' importation to the United States of Microsoft software manufactured and licensed for distribution abroad violates the Copyright Act. *See* 17 U.S.C. § 602(a). Additionally, the Big Boy Defendants' distribution of this special software intended only for qualified educational users violates Microsoft's exclusive right of distribution under the Copyright Act. *See* 17 U.S.C. §§ 106(3), 501(a). The Big Boy Defendants have engaged in this illegal conduct despite a permanent injunction entered by the United States District Court for the District of Utah specifically enjoining Mr. Blackburn from infringing upon Microsoft's copyrights.

By this motion Microsoft seeks a finding of liability on its two claims for unauthorized importation of a copyrighted work and copyright infringement. Determination of the damages to which Microsoft is entitled from the Big Boy Defendants due to their violation of the Copyright Act is an issue that will remain for trial.

II. FACTS¹

A. Microsoft Student Media Software.

Microsoft offers Student Media software through special academic licensing programs at prices roughly equivalent to Microsoft's manufacturing and transportation costs, which amounts to a discount in excess of 90% off the regular retail price. SF ¶ 2. The academic licensing programs were created to provide low cost software to qualified educational institutions for use by their students, faculty, and staff. SF ¶ 2. Microsoft distributes Student Media software at a steep discount to provide students in the United States, in developing nations, and worldwide low cost access to the latest software technology and information in furtherance of their students' educational development. SF ¶ 2.

Pursuant to the terms of Microsoft's licensing agreements and policies, Microsoft Student Media is subject to significant restrictions regarding use and distribution. The Student Media program is intended only for qualified educational users and the license agreements under which such software media is distributed restrict the distribution of such media to those qualified educational users. SF ¶ 2. Additionally, in the United States Student Media may be distributed only by Authorized Education Resellers ("AERs"), who are permitted to distribute Student Media only to qualified educational users. SF ¶ 3. Academic institutions and students are prohibited from redistributing Student Media because the programs through which Student Media is distributed are designed to provide low cost software to qualified educational users, and not the general public. SF ¶ 3. Microsoft Student Media is marked with the following copyright warning:

All use subject to volume license agreement. Do not make illegal copies of this disc. **Not for retail or OEM Distribution. Not for resale.**

SF ¶ 4 (emphasis in original).

¹ In accordance with Local Rule 7.5, Microsoft has contemporaneously filed and served herewith a Statement of Material Facts ("SF"). In the interest of brevity, in this Memorandum of Law Microsoft refers to the paragraph within the SF that contains the fact asserted and its citation in the record. Such paragraphs are cited as "SF ¶ ___."

As part of Microsoft's international licensing and distribution programs, Microsoft also imposes geographic restrictions on the distribution of Microsoft products, including Student Media software. SF ¶ 5. For example, Student Media distributed to Europe, the Middle East, or Africa, would not be licensed for distribution or use in North America. SF ¶ 5.

B. The Big Boy Defendants' Importation and Distribution of Microsoft Student Media Software.

Mr. Blackburn is an owner and operator of Big Boy. SF ¶ 1. The Big Boy Defendants sell computer software developed and manufactured by companies such as Microsoft. SF ¶ 1.

Mr. Blackburn testified that the Big Boy Defendants were a party to a three-way arrangement for importing Microsoft Student Media Software into the United States from Jordan. SF ¶ 6. The Big Boy Defendants imported approximately 5,000 units of Microsoft Windows XP Professional Student Media software and 5,000 units of Microsoft Office 2003 Professional Student Media software from Defendant Mahmoud Shadid of Amman, Jordan. SF ¶ 6. Microsoft has valid copyrights in that software. SF ¶ 6. The Big Boy Defendants arranged for the importation of this software on behalf of a third party, eDirectSoftware ("eDirect"), a Canadian company, and eDirect's principal, Jesse Willms. SF ¶ 6.

The Big Boy Defendants also purchased a significant quantity of Microsoft Student Media software from eDirect and redistributed approximately 9,000 units of that Student Media to resellers and online retailers. SF ¶ 7. A large portion of that software was obtained by eDirect from Jordan. SF ¶ 7.

The Microsoft software the Big Boy Defendants brought into the United States on behalf of eDirect included 4,800 units of Microsoft Office 2003 Professional Student Media software marked with the following work order numbers: WO1131821, WO1131822, WO1145385, WO1145386, and WO1145387. SF ¶ 10. Additionally, the 4,951 units of Microsoft Windows XP Professional Student Media software were marked with the following work order numbers: WO1131824, WO1145368, WO1145369, WO1145374, WO1145377, and WO1145379. SF ¶ 10. The Microsoft Student Media software the Big Boy Defendants purchased from eDirect

was similarly marked with work order numbers. That software included 2,003 units of Microsoft Office 2003 Professional Student Media software marked with the following work order numbers: WO1131821, WO1145387, WO1145385, and WO1131822. SF ¶ 12.

Additionally, 1,620 units of Microsoft Windows XP Professional Student Media software marked with the following work order number: WO1131824. SF ¶ 12.

The Microsoft software marked with the above listed work order numbers was manufactured in Ireland by a company called Sonopress and assembled in Ireland by a company called Moduslink. SF ¶ 13. The software was not licensed for distribution in the United States. SF ¶ 13. Furthermore, the software marked with the above listed work order numbers initially was distributed to defendant Educational Solutions (“EdSol”) or Farah Trading and Contracting Company (“Farah”), both of which are in Jordan. SF ¶ 13. Microsoft was never paid by EdSol, Farah, or any other party for that Student Media software. SF ¶ 13. Like other licensees of Microsoft Student Media software licensed for exclusive use and distribution abroad, EdSol and Farah are not authorized by Microsoft to import to the United States Microsoft software licensed for distribution outside the United States. SF ¶ 13. Similarly, the Big Boy Defendants are not AERs or otherwise authorized to distribute Microsoft Student Media software and are not authorized by Microsoft to import to the United States Microsoft software licensed for distribution outside the United States. SF ¶ 14.

C. Microsoft’s Prior Litigation Against Mr. Blackburn.

This is not the first lawsuit between Microsoft and Mr. Blackburn. In an action entitled *Microsoft Corporation v. MBC Enterprises, L.C.*, Civil No. 2:00-CV-217 PGC (D. Utah), Mr. Blackburn was sued by Microsoft for, *inter alia*, copyright infringement. On March 14, 2006, the Honorable Paul G. Cassell, United States District Court Judge for the District of Utah, entered a permanent injunction against Mr. Blackburn and another individual and entity. SF ¶ 8. The injunction permanently enjoins and restrains Mr. Blackburn from any infringing use or distribution of Microsoft software programs or components protected by any Microsoft

trademark, service mark, or copyright. SF ¶ 8. The injunction further directs Mr. Blackburn to refrain from:

Engaging in any . . . activity constituting an infringement of any of Microsoft's trademarks, service mark, and/or copyrights, or of Microsoft's rights in, or right to use or to exploit these trademarks, service mark, and/or copyrights

SF ¶ 8.

III. ARGUMENT

A. Fed. R. Civ. P. 56 Standard.

The standard for granting summary judgment is well known. Summary judgment is appropriate where, as here, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Cases such as this one, where there is no real dispute that the Big Boy Defendants engaged in infringing activity, are particularly well suited for summary judgment. *See, e.g., Microsoft Corp. v. Sellers*, 411 F. Supp. 2d 913, 918 (E.D. Tenn. 2006); *Microsoft Corp. v. Logical Choice Computers*, 2001 WL 58950 at *8 (N.D. Ill. June 22, 2001); *Microsoft Corp. v. Compusource Distrib., Inc.*, 115 F. Supp. 2d 800, 805-06 (E.D. Mich. 2000); *Microsoft Corp. v. Grey Computer*, 910 F. Supp. 1077, 1084 (D. Md. 1995).

B. Microsoft Is Entitled To Judgment As A Matter Of Law.

The Copyright Act grants the copyright owner several exclusive rights, including the exclusive right of distribution. *See* 17 U.S.C. § 106(3). Additionally, the Copyright Act provides that it is an unlawful infringement of a copyright owner's rights to import into the United States copyrighted works acquired abroad without the copyright owner's authority. *See* 17 U.S.C. § 602(a).

To establish its claim for copyright infringement, Microsoft need only show (1) that it owns valid copyrights in the works at issue, and (2) that the Big Boy Defendants encroached upon Microsoft's exclusive rights under the Copyright Act. *See* 17 U.S.C. § 501; *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Entertainment Research*

Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1217 (9th Cir. 1997). The Big Boy Defendants' knowledge or intent is irrelevant to their liability for copyright infringement. See 17 U.S.C. § 501(a); *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198-99, 51 S. Ct. 410, 412, 75 L.Ed. 971 (1931); *Microsoft Corp. v. Grey Computer*, 910 F. Supp. 1077, 1083 (D. Md. 1995).²

1. Infringing Importation Of Copyrighted Works.

The Big Boy Defendants' importation to the United States of Microsoft software manufactured and licensed for distribution abroad violates the Copyright Act. See 17 U.S.C. § 602(a) ("Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501."). The software the Big Boy Defendants imported was manufactured by a third party in Ireland and licensed for use by students in Africa, Europe, or the Middle East and *not* for students in other parts of the world, including North America. SF ¶¶ 9-13.

Importation to the United States of this software, which is manufactured and licensed for exclusive use abroad, plainly violates 17 U.S.C. § 602(a). If the Big Boy Defendants attempt to assert a first sale defense (which they cannot because the Microsoft software at issue here is licensed and not sold, see SF ¶¶ 2-4, 13), that defense will not shield their importation to the United States of Microsoft Student Media from abroad. The first sale defense simply does not apply to copyrighted works manufactured abroad, intended for distribution abroad, and imported into the United States without the copyright owner's authorization, even if the

² A court may, however, consider a party's state of mind in determining whether to enhance statutory damages or to award attorney's fees. See 17 U.S.C. § 504(c)(2). At trial, Microsoft will offer significant evidence that statutory damages, should Microsoft elect them, should be enhanced and that Microsoft is entitled to attorney's fees. This evidence includes, but is not limited to, the fact that Mr. Blackburn was subject to a permanent injunction enjoining him from engaging activities that infringe upon Microsoft's copyrights, was aware of the licensing restrictions on this software and, according to an email attached to Mr. Blackburn's declaration, had been advised of a plan to remove work order numbers from the Microsoft software in an effort to avoid legal action. SF ¶¶ 6-8.

copyrighted works were “sold.” See *Swatch S.A. v. New City, Inc.*, 454 F. Supp. 2d 1245, 1253-55 (S.D. Fla. 2006); *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 481-82 (9th Cir. 1994); *BMG Music v. Perez*, 952 F.2d 318, 319 (9th Cir. 1991); *Columbia Broadcasting System, Inc. v. Scorpio Music Distribs., Inc.*, 569 F. Supp. 47, 49-50 (E.D. Pa. 1983), *aff’d without opinion*, 738 F.2d 424 (3d Cir. 1984).

Quality King Distribs., Inc. v. L’anza Research Int’l, Inc., 523 U.S. 135 (1998), does not stand against this authority. That case, in which the Court held that the first sale defense did apply, involved the importation of copyrighted works that originally had been manufactured *in the United States*. See *Quality King*, 523 U.S. at 154 (Ginsburg, J., concurring) (“This case involves a ‘round trip’ journey, travel of the copies in question from the United States to places abroad, then back again. I join the Court’s opinion recognizing that we do not today resolve cases in which the allegedly infringing imports were manufactured abroad.”).

Indeed, a leading commentator has recognized that *Scorpio*, cited above, “probably represented the best construction” of the Copyright Act with respect to 17 U.S.C. § 602(a) and the first sale defense, and therefore the Copyright Act “should still be interpreted to bar the importation of gray market goods that have been manufactured abroad.” 2 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 8.12[B][6] (2006); see also *Swatch*, 454 F. Supp. at 1254 (recognizing that under *Quality King*, first sale doctrine applies only to copies first sold in the United States, not those manufactured and first sold abroad).

Nimmer is not the only authority to have reached this conclusion. Federal courts, including the U.S. District Court for the Southern District of Florida, have determined that post-*Quality King* the First Sale Defense remains inapplicable to copyrighted works manufactured and sold abroad. In *Swatch S.A. v. New City, Inc.*, 454 F. Supp. 2d 1245 (S.D. Fla. 2006), Swatch sued New City, an unauthorized importer of copyrighted Swatch watches, for violation of 17 U.S.C. § 602(a). Just as Microsoft anticipates the Big Boy Defendants will assert here, New City argued that the First Sale Defense barred Swatch’s unauthorized importation claim. The Honorable Paul C. Huck found that New City’s argument was based on a misreading of

Quality King:

§ 109(a) [the First Sale Defense] only protects resales of works “lawfully made under this title,” which means copyrighted works legally made and sold in the United States. . . . Thus, in *Quality King*, § 109(a) protected the unauthorized importation of copyrighted goods imported because the goods were made and first sold in the United States. Had the goods not been manufactured domestically, § 109(a) would not have applied.

Swatch, 454 F. Supp. 2d at 1254 (citation omitted). Because the Swatch watches were manufactured and first sold abroad, the court found that New City’s importation of those watches violated Swatch’s right to prevent their importation under Section 602(a) of the Copyright Act. *Id.* at 1254-55; *see also UMG Recordings, Inc. v. Norwalk Distribs., Inc.*, 2003 WL 22722410, at *3-*4 (C.D. Cal. 2003) (rejecting First Sale Defense to 17 U.S.C. § 602(a) claim for works manufactured abroad). In short, “[t]he first sale doctrine in 17 U.S.C. § 109(a) does not . . . provide a defense to infringement under 17 U.S.C. § 602(a) for goods manufactured abroad.” *BMG Music v. Perez*, 952 F.2d 318, 319 (9th Cir. 1991).

Finally, although relevant only to determination of damages (not liability, as a single infringement is sufficient to establish liability, *see Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832, 840-41 (9th Cir. 1992)), it is worth noting that the Big Boy Defendants’ liability for unauthorized importation of a copyrighted work arises not only from that software the Big Boy Defendants’ imported from Jordan on behalf of eDirect, but also that software the Big Boy Defendants’ purchased from eDirect. Even if the Big Boy Defendants acquired the imported Student Media software from eDirect in the United States, they are liable under 17 U.S.C. § 602(a). *See Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 482 (9th Cir. 1994) (“[T]he purchaser of illegally imported copies has no more authority to distribute copies than does the original importer.”).

Based upon undisputed facts, Microsoft is entitled to summary judgment on its infringing importation of copyrighted works claim.

2. Copyright Infringement.

Further, the Big Boy Defendants' distribution of Microsoft Student Media software to other than qualified educational users violates Microsoft's exclusive right of distribution under the Copyright Act. *See* 17 U.S.C. §§ 106(3), 501(a). Mr. Blackburn testified that the Big Boy Defendants redistributed approximately 9,000 units of Microsoft Student Media software to resellers and online retailers. SF ¶ 7. This software was plainly marked as not for resale. SF ¶¶ 4, 7. None of the Big Boy Defendants' customers were educational institutions or users. SF ¶ 7. The Big Boy Defendants distributed this special Student Media software without authorization from Microsoft, and without qualifying end users consistent with the academic volume licensing programs under which Student Media is distributed. SF ¶¶ 7, 14. The Big Boy Defendants simply do not have the right to sell Microsoft software because they cannot obtain rights beyond those granted in the license:

“[E]ven an unwitting purchaser who buys a copy in the secondary market can be held liable for infringement if the copy was not the subject of a first sale by the copyright holder.” *See American Int'l Pictures, Inc. v. Foreman*, 576 F.2d 661, 664 (5th Cir. 1978). “Thus unless title to the copy passes through a first sale by the copyright holder, subsequent sales do not confer good title.” *Id.*

Novell, Inc. v. Unicom Sales, Inc., 2004 WL 1839117, at *13 (N.D. Cal. 2004); *see also Microsoft Corp. v. Harmony Comps. & Elecs.*, 846 F. Supp. 208, 212 (E.D.N.Y. 1994) (same).

Again, a first sale defense to Microsoft's copyright infringement claim here will fail because the Microsoft software at issue is distributed by license, not sale. SF ¶¶ 2-4, 13; *see also Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1089 (N.D. Cal. 2000) (first sale defense applies only when there has been “an actual sale”); *Wall Data Inc. v. L.A. County Sheriff's Dep't*, 447 F.2d 769, 785 n.9 (9th Cir. 2006) (“[T]he first sale doctrine rarely applies in the software world because software is rarely ‘sold.’”).³ Indeed, Microsoft was *never paid* for the software at issue here. SF ¶ 13.

³ Even without this evidence that Microsoft's software is licensed and not sold, the Big Boy Defendants would bear the burden of proving an “actual sale” and other requirements of that defense. *Microsoft Corp. v. Harmony Computers & Elecs., Inc.*, 846 F. Supp. 208, 212 (E.D.N.Y. 1994); *MapInfo Corp. v. Spatial Re-Engineering Consultants*, 2004 WL 26350, at *3 (N.D.N.Y. 2004); *see also Novell, Inc. v. Unicom Sales, Inc.*, 2004 WL 1839117, at *8 (N.D. Cal. 2004) (“Because the defendant ‘clearly has the particular knowledge of how possession

C. Blackburn Is Individually Liable For Copyright Infringement.

An individual who participates in copyright infringement is personally liable for such infringement. *See, e.g., Playboy Enters., Inc. v. Starware Publ'g Corp.*, 900 F. Supp. 438, 441-42 (S.D. Fla. 1995). Additionally, “it is well settled that ‘one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing activity of another, may be held liable as a ‘contributory’ [copyright] infringer.’” *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 160 (3d Cir. 1984). An individual is liable for contributory copyright infringement even if he does not have actual knowledge of the infringing activity, but should have had reason to know of the infringing conduct. *Cable/Home Comm. Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845-46 (11th Cir. 1990). Further, an individual may be vicariously liable for copyright infringement if he or she had the right and ability to supervise the infringing activity and also had a direct financial interest in such activities. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996). An individual can be held vicariously liable even if he was ignorant of the infringement or if he was an absentee owner with no involvement in the company’s day-to-day operations. *Southern Bell Tel. and Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 811 (11th Cir. 1985); *All Nations Music v. Christian Family Network, Inc.*, 989 F. Supp. 863, 869-70 (W.D. Mich. 1997).

Mr. Blackburn is directly liable for unauthorized importation of a copyrighted work and for copyright infringement arising from his distribution of Student Media software. Mr. Blackburn repeatedly testified that he personally participated in the importation of the Microsoft Student Media software from Jordan on eDirect’s behalf. SF ¶ 6. Additionally, Mr. Blackburn testified that he personally distributed Microsoft Student Media software to non-educational resellers and online retailers. SF ¶ 7 (“I try to service my customers for what their needs are. So I do not put burdens on them for taking more product for less – I try to give people what they

of the particular copy was acquired,’ the defendant has the burden of proving the applicability of the first sale doctrine.”) (quoting 17 U.S.C. § 109, Historical Note).

ask for.”).

Even if Mr. Blackburn were not directly liable (which he is), he is at least contributorily and vicariously liable. Mr. Blackburn, as owner of Big Boy Distribution, had a direct financial interest in Big Boy’s importation and distribution of Microsoft Student Media software. SF ¶ 1. Not only did Mr. Blackburn have the ability to supervise the infringing activity, he directly undertook that infringing activity, including purchasing Microsoft Student Media software from eDirect, distributing that software to retailers and online resellers, and arranging importation into the United States of Microsoft Student Media software from Jordan. SF ¶¶ 6-7. Indeed, Mr. Blackburn’s supplier of the Student Media software sent an email to Mr. Blackburn and eDirect discussing a plan to remove Microsoft work order numbers and bar codes from the Student Media software in an effort to avoid legal action by Microsoft. SF ¶ 6.

Based upon his direct participation in the infringing activity, Mr. Blackburn is liable for copyright infringement. At a minimum, based upon his ability to supervise and control the infringing activities and his direct financial interest in the activities, Mr. Blackburn is contributorily and vicariously liable.

D. Microsoft Is Entitled To A Permanent Injunction.

“When a copyright plaintiff has established a threat of continuing infringement, he is entitled to an injunction.” *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994); *Superhype Publishing, Inc. v. Vasilou*, 838 F. Supp. 1220, 1226 (S.D. Ohio 1993). “Generally, it would appear to be an abuse of discretion to deny a permanent injunction where liability has been established and there is a threat of continuing infringement.” *Walt Disney Co. v. Powell*, 897 F.2d 565, 567-68 (D.C. Cir. 1990) (quoting 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.06[B] (1989)).

Here, the undisputed evidence shows that the Big Boy Defendants continued dealing in infringing Microsoft software despite plain warnings on the software that their distribution of it violated Microsoft’s rights. SF ¶¶ 4, 6-7. Indeed, Mr. Blackburn knew of and discussed these licensing restrictions with other participants in the importation scheme. SF ¶ 6. Mr. Blackburn

even received an email from his supplier that discussed a plan to remove markings from the software in an attempt to avoid legal action. SF ¶ 6. Further, because the Big Boy Defendants' infringement of Microsoft's rights is beyond dispute, Microsoft is justified in inferring a threat of future harm. *See, e.g., Walt Disney Co.*, 897 F.2d at 567-68 (defendant argued that he voluntarily ceased infringement, but trial court was justified in finding that defendant's reformation resulted from risk of legal exposure and it was not unlikely that defendant would attempt to infringe plaintiff's copyrights in the future).

A permanent injunction prohibiting further infringement will protect Microsoft's intellectual property rights without causing Defendants any harm. *Columbia Pictures Indus., Inc. v. T & F Enters. Inc.*, 68 F. Supp. 2d 833, 841 (E.D. Mich. 1999). "[G]iven the magnitude of defendants' infringing activities [of selling pirated items] and the relative ease with which such infringement can be perpetrated," it is appropriate to infer a substantial threat of ongoing harm exists, and to grant a permanent injunction. *Columbia Pictures*, 68 F. Supp. 2d at 841. Accordingly, Microsoft asks the Court to enter the accompanying proposed permanent injunction to prevent any future violation of Microsoft's copyrights.

IV. CONCLUSION

For all of the foregoing reasons, this Court should enter partial summary judgment finding the Big Boy Defendants liable for (a) unlawful importation of Windows XP Professional, Microsoft Office 2003 Professional, and the programs that are part of the Office 2003 Professional suite: Microsoft Access 2003, Microsoft Excel 2003, Microsoft Outlook 2003, Microsoft PowerPoint 2003, Microsoft Word 2003, and Microsoft Office Publisher 2003, and (b) violation of Microsoft's exclusive right of distribution for those same copyrighted works. The Court should also permanently enjoin the Big Boy Defendants from any future infringement of Microsoft's copyrights. A proposed order is attached hereto as Exhibit "A."

DATED this 7th day of January, 2008.

s/Gustavo A. Bravo
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of January, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record identified on the below service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Gustavo A. Bravo

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SERVICE LIST

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