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6 UNITED STATES DISTRICT COURT
7
8 EASTERN DISTRICT OF CALIFORNIA

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10 MICROSOFT CORPORATION, a) 1:06-cv-01745-AWI-SMS
Washington corporation,)
11 Plaintiff,) FINDINGS AND RECOMMENDATION RE:
v.) PLAINTIFF'S APPLICATION FOR
12) DEFAULT JUDGMENT AND PERMANENT
MATTHEW EVANS, an individual,) INJUNCTION (DOC. 11)
13)
Defendant.)
14)
15)

16 Plaintiff is proceeding with a civil action in this Court.
17 The matter has been referred to the Magistrate Judge pursuant to
18 28 U.S.C. § 636(b) and Local Rule 72-302(c)(19). Pending before
19 the Court is Plaintiff's motion for default judgment for
20 statutory damages, attorney's fees and costs, and a permanent
21 injunction, which was filed on August 20, 2007, with a supporting
22 memorandum and declaration of Katherine M. Dugdale, and was
23 served on Defendant Matthew Evans by mail at the address listed
24 on the proof of service of summons.

25 The motion came on regularly for hearing on October 12,
26 2007, at 9:30 a.m. in Courtroom 7 before the Honorable Sandra M.
27 Snyder, United States Magistrate Judge. Katherine M. Dugdale
28 appeared telephonically on behalf of Plaintiff; Defendant Matthew

1 Evans appeared on his own behalf, and his father was also
2 present. The Court had received and reviewed all the papers. The
3 Court had a colloquy with Defendant Evans; however, the Court
4 informed Defendant that pursuant to Local Rule 78-230(c), because
5 Defendant had not filed opposition, Defendant would not be
6 allowed to be heard in opposition to the motion.¹ After argument
7 by Plaintiff, the matter was submitted to the Court.

8 I. Entitlement to Default Judgment

9 A court has the discretion to enter a default judgment
10 against one who is not an infant, incompetent, or member of the
11 armed services where the claim is for an amount that is not
12 certain on the face of the claim and where 1) the defendant has
13 been served with the claim; 2) the defendant's default has been
14 entered for failure to appear; 3) if the defendant has appeared
15 in the action, the defendant has been served with written notice
16 of the application for judgment at least three days before the
17 hearing on the application; and 4) the court has undertaken any
18 necessary and proper investigation or hearing in order to enter
19 judgment or carry it into effect. Fed. R. Civ. P. 55(b); Alan
20 Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392 (9th
21 Cir. 1988). Factors that may be considered by courts in
22 exercising discretion as to the entry or setting aside of a
23 default judgment include the nature and extent of the delay,
24 Draper v. Coombs, 792 F.2d 915, 924-925 (9th Cir. 1986); the
25 possibility of prejudice to the plaintiff, Eitel v. McCool, 782

26
27 ¹ Although there was some discussion of Defendant's unsuccessful efforts to find counsel and his confusion
28 with respect to court papers, Defendant had not and has not moved to set aside his default; thus, these matters were
not before the Court at the hearing. The Court informed Defendant that it would proceed to file findings and
recommendations, and thereafter there would be a period within which to file objections.

1 F.2d 1470, 1471-72 (9th Cir.1986); the merits of plaintiff's
2 substantive claim, id.; the sufficiency of the allegations in the
3 complaint to support judgment, Alan Neuman Productions, Inc., 862
4 F.2d at 1392; the amount in controversy, Eitel v. McCool, 782
5 F.2d at 1471-1472; the possibility of a dispute concerning
6 material facts, id.; whether the default was due to excusable
7 neglect, id.; and the strong policy underlying the Federal Rules
8 of Civil Procedure that favors decisions on the merits, id.

9 A default judgment generally bars the defaulting party from
10 disputing the facts alleged in the complaint, but the defaulting
11 party may argue that the facts as alleged do not state a claim.
12 Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392.
13 Thus, well pleaded factual allegations, except as to damages, are
14 taken as true; however, necessary facts not contained in the
15 pleadings, and claims which are legally insufficient, are not
16 established by default. Cripps v. Life Ins. Co. of North America,
17 980 F.2d 1261, 1267 (9th Cir. 1992); TeleVideo Systems, Inc. v.
18 Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987).

19 A. Service, Default

20 The proof of service filed on December 14, 2006, establishes
21 that service of the summons, complaint, and related documents on
22 Defendant was effected on December 4, 2006, by personal delivery
23 of the documents upon Defendant Matthew Evans at an address
24 located in Riverbank, California.

25 This service complies with Fed. R. Civ. P. 4(e)(2).

26 The Court notes that the docket does not reflect that
27 Defendant ever responded to the complaint, and the declaration of
28 Jennifer N. Chiarelli in support of the request for entry of

1 default filed on January 26, 2007, establishes that Defendant did
2 not plead in response to the complaint or otherwise defend
3 against the complaint. (Decl. at 2.) At the hearing, counsel for
4 Defendant represented to the Court that Defendant had called
5 Plaintiff's counsel's firm after the time to answer had passed,
6 but Dugdale did not speak with Defendant personally.

7 The docket reflects that Defendant's default was entered on
8 February 1, 2007.

9 B. Notice

10 A defaulting party is entitled to written notice of the
11 application for default judgment unless the party has not
12 appeared in the action. Fed. R. Civ. P. 55(b)(2). An appearance
13 for the purpose of Rule 55 need not be a formal one and may
14 consist even of informal contacts made by the defaulting party
15 where the defaulting party demonstrates a clear purpose to defend
16 the suit. In re Roxford Foods v. Ford, 12 F.3d 875, 879-81 (9th
17 Cir. 1993).

18 Here, there is no information regarding the extent of any
19 contacts by Defendant with the Plaintiff or Plaintiff's counsel
20 in the declaration submitted in support of the motion. However,
21 the proofs of service attached to the application reveal that the
22 moving papers were served by mail on Defendant on August 20,
23 2007, at the address at which service of the summons and
24 complaint was effected and which Defendant confirmed at the
25 hearing on the motion was his address. Thus, regardless of
26 Defendant's status with respect to appearance, it appears that
27 Defendant has received notice of the application for default
28 judgment.

1 C. Liability

2 Because claims that are legally insufficient are not
3 established by a party's default, a court in considering an
4 application for default judgment must determine whether the
5 claims upon which a plaintiff seeks a default judgment are
6 legally sufficient. It is the party's burden to demonstrate to
7 the Court that under the pertinent law, the Plaintiff's claims,
8 as alleged, are legally sufficient.

9 Plaintiff asserts that the facts alleged in the complaint
10 establish claims of copyright infringement, trademark
11 infringement, violation of the Lanham Act by false designation of
12 the origin of the software, and unfair competition.

13 1. Copyright Claim

14 An infringer of copyright is liable for actual damages and
15 any additional profits of the infringer attributable to the
16 infringement. 17 U.S.C. § 504(a). An infringer is anyone who
17 violates any of the exclusive rights of the copyright owner as
18 provided by sections 106 through 118. 17 U.S.C. § 501(a).
19 Copyright protection subsists in original works of authorship,
20 including pictorial and graphic works. 17 U.S.C. § 102. The owner
21 of a copyright has the exclusive rights to perform or authorize
22 the reproduction of the copyrighted work in copies, prepare
23 derivative works based on the copyrighted work, distribute
24 copies to the public by sale or other transfer of ownership, and
25 display the copyrighted work publicly. 17 U.S.C. § 106.

26 Thus, to prevail on a claim for infringement of copyright
27 under 17 U.S.C. § 501, Plaintiffs must establish that Defendant
28 violated an exclusive right of the copyright owner as provided in

1 17 U.S.C. §§ 106, 501(a). Elektra Entertainment Group Inc. v.
2 Crawford, 226 F.R.D. 388, 392-93 (C.D.Cal. 2005). This means that
3 to establish a prima facie case of direct infringement,
4 Plaintiffs must show 1) ownership of the allegedly infringed
5 material, and 2) the infringer's violation of at least one
6 exclusive right granted to copyright holders under 17 U.S.C. §
7 106. Marder v. Lopez, 450 F.3d 445, 453 (9th Cir. 2006).

8 Here, Plaintiff alleged that it develops, markets,
9 distributes, and licenses computer software programs, including
10 Microsoft Windows XP Professional (Windows XP Pro), an operating
11 system for which it holds a valid copyright, duly registered with
12 the United States Copyright Office. (Cmplt. pp. 2-3.) Defendant
13 advertised, marketed, and distributed computer software,
14 including software bearing Microsoft's registered copyrights; in
15 or about February 2006, Defendant distributed counterfeit Windows
16 XP Pro software components to a customer. Thereafter, Plaintiff
17 notified Defendant by letter that the distribution infringed
18 Plaintiff's property rights and further demanded cessation of the
19 infringing conduct, but in October 2006, Defendant distributed to
20 an investigator counterfeit Windows XP Pro software components.

21 Thus, the complaint adequately stated a claim for
22 infringement of copyright. See, Microsoft Corp. v. Sellers, 411
23 F.Supp.2d 913, 918-19 (E.D.Tenn 2006) (unauthorized dealing in
24 infringing copies of copyrighted software Windows XP Pro and
25 Windows 2000 Pro constituted copyright infringement).

26 2. Trademark Claim

27 As to the claim regarding infringement of a federally
28 registered trademark, 15 U.S.C. § 1114(a) provides that a person

1 is liable in a civil action by a registrant of a registered mark
2 for various remedies if the person, without the consent of the
3 registrant, uses in commerce any reproduction, counterfeit, copy,
4 or colorable imitation of a registered mark in connection with
5 the sale, offering for sale, distribution, or advertising of any
6 goods or services on or in connection with which such use is
7 likely to cause confusion, or to cause mistake, or to deceive. It
8 has been held that in order to prevail on such a claim, the
9 Plaintiff must establish a protected interest in the thing
10 infringed as well as a likelihood of consumer confusion;
11 registration is prima facie evidence of a protected interest, and
12 establishing that a substantial segment of consumers and
13 potential consumers have mentally associated the mark and a
14 single source of the product is also sufficient. Levi Strauss &
15 Co. v. Blue Bell, Inc., 778 F.2d 1352, 1354-55 (9th Cir. 1985).

16 Plaintiff alleges that it had duly and properly registered
17 specified trademarks and a service mark in the United States
18 Patent and Trademark Office on the principal register, including
19 for Microsoft Windows. (Cmplt. p. 3.) Further, Defendant
20 advertised, marketed, and distributed computer software,
21 including software imitating software bearing Microsoft's
22 registered trademarks, logos, and service mark; in or about
23 February 2006, Defendant distributed counterfeit Windows XP Pro
24 software components to a customer. Thereafter, Plaintiff notified
25 Defendant by letter that the distribution infringed Plaintiff's
26 property rights and further demanded cessation of the infringing
27 conduct, but in October 2006, Defendant distributed to an
28 investigator counterfeit Windows XP Pro software components. (Id.

1 p. 4.)

2 It was also alleged that Defendant's conduct constituted
3 infringement of Plaintiff's federally registered trademarks and
4 service mark in violation of the Lanham Trademark Act, including
5 but not limited to 15 U.S.C. § 1114(1). The trademarks and
6 service mark were the means by which Plaintiff's software was
7 distinguished from the software or products of others in the same
8 or related fields; because of Plaintiff's long, continuous, and
9 exclusive use of the marks, they have come to mean and are
10 understood by customers, end users, and the public to signify
11 software or service of Plaintiff, and the infringing materials
12 that Defendant has and is continuing to use, offer, and
13 distribute are likely to cause confusion, mistake, or deception
14 as to source, origin, or authenticity. (Cmplt. p. 6.) Defendant's
15 conduct was undertaken with the purpose of misleading, deceiving,
16 or confusing customers and the public as to the origin and
17 authenticity of the infringing materials, and of trading upon
18 Plaintiff's goodwill and business reputation. (Id. p. 7.)

19 Plaintiff has thus adequately alleged a claim for trademark
20 infringement under the Lanham Act. See Microsoft Corp. v.
21 Sellers, 411 F.Supp.2d 913, 918-19 (E.D.Tenn. 2006) (dealing in
22 commerce by unauthorized distribution of registered Microsoft
23 software constituted, under circumstances in which consumers were
24 sure to be confused, constituted a violation of the Lanham Act).

25 3. False Designation of Origin, etc.

26 As to Plaintiff's claim of false designation of origin and
27 unfair competition, 15 U.S.C. § 1125(a) provides:

28 (a) Civil action

1 (1) Any person who, on or in connection with any goods
2 or services, or any container for goods, uses in
3 commerce any word, term, name, symbol, or device, or
4 any combination thereof, or any false designation of
origin, false or misleading description of fact, or
false or misleading representation of fact, which--

5 (A) is likely to cause confusion, or to cause
6 mistake, or to deceive as to the affiliation,
7 connection, or association of such person with another
8 person, or as to the origin, sponsorship, or approval
9 of his or her goods, services, or commercial activities
by another person, or

10 (B) in commercial advertising or promotion,
11 misrepresents the nature, characteristics, qualities,
or geographic origin of his or her or another person's
goods, services, or commercial activities,

shall be liable in a civil action by any person who
believes that he or she is or is likely to be damaged
by such act.

12 The statute covers misrepresentation of the origin of production
13 as well as geographic origin. Dastar Corp. v. Twentieth Century
14 Fox Film Corp., 539 U.S. 23, 29 (2003). It requires determination
15 of whether or not the public is likely to be deceived or confused
16 by the similarity of the marks. Century 21 Real Estate Corp. v.
17 Sandlin, 846 F.2d 1175, 1178 (9th Cir. 1988)

18 Plaintiff alleged that the long, continuous, and exclusive
19 use of the trademarks and service mark, which distinguished
20 Plaintiff's product from the software of others in the same or
21 related fields, as well as distinctive displays, logos, icons,
22 graphic images, and packaging (all collectively referred to
23 "Microsoft visual designs") had caused them to come to mean and
24 to be understood by customers, end users, and the public to
25 signify software or services of Plaintiff; however, Defendant had
26 used Plaintiff's name, marks, visual designs, and packaging that
27 was virtually indistinguishable from Microsoft visual designs in
28 connection with its goods and services, with the wilful purpose

1 of misleading, deceiving, or confusing customers and the public
2 as to the origin and authenticity of the goods and services
3 offered, marketed, or distributed in connection with Plaintiff's
4 marks, name, and imitation visual designs, and of trading upon
5 Plaintiff's goodwill and business reputation. Such conduct
6 constituted false designation of origin, false description, and
7 false representation that the imitation visual images originated
8 from or were authorized by Plaintiff, in violation of the Lanham
9 Trademark Act, 15 U.S.C. § 1125(a). (Cmplt. p. 8.)

10 Plaintiff alleged the necessary facts concerning the
11 Defendant's conduct and the likelihood of confusion. Distribution
12 of unauthorized and infringing copies of Microsoft software
13 constitutes a violation of § 1125(a) of the Lanham Act by falsely
14 designating the origin of the software distributed. Microsoft
15 Corp. v. Sellers, 411 F.Supp.2d 913, 919 (E.D.Tenn. 2006). Thus,
16 Plaintiff has stated a claim for false designation of origin and
17 unfair competition.

18 4. California Common Law Unfair Competition

19 Common law claims of unfair competition and actions pursuant
20 to Cal. Bus. & Prof. Code § 17200 (defining unfair competition as
21 including unlawful, unfair, or fraudulent business acts or
22 practices) are "substantially congruent" to claims made under the
23 Lanham Act. Cleary v. News Corp., 30 F.3d 1255, 1262-63 (9th Cir.
24 1994). The Court further notes that it is established in
25 California that if goods or services are known to the public by a
26 name, design, or physical appearance, any imitation which has the
27 effect of deceiving buyers regarding the origin of the goods or
28 services may be actionable as unfair competition. See 13 Witkin,

1 Summary of California Law (10th Ed. 2005) at § 98.

2 Accordingly, Plaintiff has stated a pendant state claim for
3 common law unfair competition.

4 In summary, Plaintiff has alleged sufficient facts to
5 establish Defendant's liability to Plaintiff on the four claims
6 addressed above.

7 D. Damages

8 Plaintiff seeks for copyright and trademark infringement
9 only statutory damages, arguing that they are appropriate because
10 Defendant's default has in effect precluded discovery by
11 Plaintiff as to the full extent of Defendant's infringement and
12 the amount of actual damages Plaintiff suffered based on
13 Defendant's profits.

14 The general allegations with respect to damage include
15 allegations on information and belief that the Defendant's
16 conduct was not isolated, but rather was the result of
17 Defendant's continuing involvement in advertising, marketing,
18 installing, and/or distributing the materials, including
19 reproductions, copies, or colorable imitations of the Microsoft
20 copyrighted software and/or the Microsoft trademarks, logos, and
21 service mark. (Id. p. 4.) Further, it was alleged that Defendant
22 continued to commit acts of copyright and trademark infringement
23 and was wilfully blind and acted in reckless disregard of
24 Microsoft's registered copyrights and marks. (Id. pp. 4, 7.)
25 Defendant's conduct resulted in damage to Plaintiff. (Id. p. 5.)

26 1. Copyright

27 Title 17 U.S.C. § 504 provides in pertinent part:

28 (a) **In General.** Except as otherwise provided by

1 this title, an infringer of copyright is liable
2 for either--

3 (1) the copyright owner's actual damages
4 and any additional profits of the infringer,
5 as provided by subsection (b); or

6 (2) statutory damages, as provided by
7 subsection (c).

8

9 (c) Statutory Damages.--

10 (1) Except as provided by clause (2) of this
11 subsection, the copyright owner may elect, at
12 any time before final judgment is rendered,
13 to recover, instead of actual damages and
14 profits, an award of statutory damages for
15 all infringements involved in the action,
16 with respect to any one work, for which any
17 one infringer is liable individually, or for
18 which any two or more infringers are liable
19 jointly and severally, in a sum of not less
20 than \$750 or more than \$30,000 as the court
21 considers just. For the purposes of this
22 subsection, all the parts of a compilation or
23 derivative work constitute one work.

24 (2) In a case where the copyright owner
25 sustains the burden of proving, and the court
26 finds, that infringement was committed
27 willfully, the court in its discretion may
28 increase the award of statutory damages to a
sum of not more than \$150,000. In a case
where the infringer sustains the burden of
proving, and the court finds, that such
infringer was not aware and had no reason to
believe that his or her acts constituted an
infringement of copyright, the court in its
discretion may reduce the award of statutory
damages to a sum of not less than \$200. The
court shall remit statutory damages in any
case where an infringer believed and had
reasonable grounds for believing that his or
her use of the copyrighted work was a fair
use under section 107, if the infringer was:
(i) an employee or agent of a nonprofit
educational institution, library, or archives
acting within the scope of his or her
employment who, or such institution, library,
or archives itself, which infringed by
reproducing the work in copies or
phonorecords; or (ii) a public broadcasting
entity which or a person who, as a regular
part of the nonprofit activities of a public

1 broadcasting entity (as defined in subsection (g)
2 of section 118) infringed by performing a published
3 nondramatic literary work or by reproducing a
 transmission program embodying a performance of
 such a work. (Emphasis added.)

4 A district court has wide discretion in determining the amount of
5 statutory damages to be awarded and should consider what is just
6 in the particular case in light of the nature of the copyright,
7 the circumstances of the infringement, and other relevant
8 circumstances. Los Angeles News Service v. Reuters Television
9 International, Ltd., 149 F.3d 987, 996 (9th Cir. 1998). The
10 statutory damages serve both compensatory and punitive purposes,
11 so in order to effectuate the statutory policy of discouraging
12 infringement, recovery of them is permitted even absent evidence
13 of the actual damages suffered by the plaintiff or of the profits
14 reaped by the defendant. Id.

15 Plaintiff asserts that Defendant's conduct was wilful, but
16 Plaintiff does not seek enhanced damages for wilful infringement;
17 rather, because Defendant's conduct was wilful, Plaintiff seeks
18 the maximum amount of statutory damages for non-wilful
19 infringement of the copyright, which is \$30,000.00.

20 The copyright concerned a software program, which is a type
21 of work that is exponentially more expensive to produce than a
22 single song, for example. See, Peer International Corp. v. Pausa
23 Records, Inc., 909 F.2d 1332, 1337 (9th Cir. 1990) (considering
24 the compulsory nature of the licenses in question). The actual
25 number of infringements is not known; only two specific
26 distributions (February 2006 and once after October 2006) are
27 noted in the complaint, although it was alleged that Defendant
28 was in the business of selling copyrighted works and continued to

1 infringe the copyright. (Cmplt. pp. 2, 4.)

2 Considering all the circumstances, the Court exercises its
3 discretion to determine the appropriate amount of statutory
4 damages and concludes that an award of statutory damages in the
5 amount of \$10,000.00 is just under all the circumstances.

6 2. Trademark Infringement

7 Plaintiff seeks statutory damages under the Lanham Act in
8 the amount of \$100,000.00 for each of the three trademarks in
9 issue (see Cmplt. p. 3).

10 Title 15 U.S.C. § 1117(c)(1) provides:

11 In a case involving the use of a counterfeit mark
12 (as defined in section 1116(d) of this title) in
13 connection with the sale, offering for sale, or
14 distribution of goods or services, the plaintiff may
15 elect, at any time before final judgment is rendered by
16 the trial court, to recover, instead of actual damages
17 and profits under subsection (a) of this section, an
18 award of statutory damages for any such use in
19 connection with the sale, offering for sale, or
20 distribution of goods or services in the amount of-

21 (1) not less than \$500 or more than \$100,000 per
22 counterfeit mark per type of goods or services sold,
23 offered for sale, or distributed, as the court
24 considers just; or

25 (2) if the court finds that the use of the
26 counterfeit mark was willful, not more than \$1,000,000
27 per counterfeit mark per type of goods or services
28 sold, offered for sale, or distributed, as the court
considers just. (Emphasis added.)

21 Plaintiff thus seeks the maximum amount of damages,
22 \$100,000.00, per mark of the three marks alleged to have been
23 infringed upon; Plaintiff explains that of the four trademark
24 registrations in issue (two for Microsoft, one for Windows, and
25 one for Colored Flag Design), the Microsoft mark is listed in two
26 different classifications of goods, but Plaintiff only seeks
27 damages per counterfeit mark, or for three registrations. (Mot.
28 p. 7 n. 1.)

1 Reference to § 1116(d)(1)(B) shows that a counterfeit mark
2 is defined in pertinent part as follows:

3 As used in this subsection the term "counterfeit
4 mark" means-

5 (i) a counterfeit of a mark that is registered on
6 the principal register in the United States Patent and
7 Trademark Office for such goods or services sold,
8 offered for sale, or distributed and that is in use,
9 whether or not the person against whom relief is sought
10 knew such mark was so registered....

11 Thus, it appears that statutory damages are appropriate with
12 respect to the three marks, which are alleged to have been
13 infringed by Defendant's conduct.

14 The statute provides little guidance for determining the
15 amount of statutory damages. However, courts have analogized to
16 the body of case law interpreting a similar provision in the
17 Copyright Act. Phillip Morris USA, Inc. v. Castworld Products,
18 Inc., 219 F.R.D. 494, 501 (C.D.Cal. 2003) (citing Sara Lee Corp.
19 v. Bags of New York, Inc., 36 F.Supp.2d 161, 166 (S.D.N.Y.
20 1999)). This involves consideration not only of compensation for
21 the injured plaintiff, but also deterrence of future
22 infringement. Id. This is consistent with established
23 understanding in the Ninth Circuit of the policies underlying
24 trademark protection, namely, to protect consumers from being
25 misled as to the enterprise from which the goods or services
26 emanate or with which they are associated, to prevent impairment
27 of the value of the enterprise that owns the trademark, and to
28 achieve these ends in a manner consistent with the objectives of
free competition. See Intel Corp. v. Terabyte International,
Inc., 6 F.3d 614, 618 (9th Cir. 1993.) Copyright factors include
the defendant's profits and saved expenses, the plaintiff's lost

1 revenues, and the defendant's state of mind. Louis Vuitton
2 Malletier and Oakley, Inc. v. Weit, 211 F.Supp.2d 567, 584
3 (E.D.Pa 2002).

4 Here, profits, expenses, and lost revenues are matters only
5 of speculation. Plaintiff has not given the Court even the most
6 basic information regarding its loss, such as the price or value
7 of the goods or services subject to the violations. The precise
8 scope of Defendant's business is not clear. All that the
9 allegations of the complaint indicate is that the Defendant used
10 multiple counterfeit marks in once instance in February 2006 and
11 in another after October 2006; further, he continued to infringe
12 upon the marks at the time of the filing of the complaint
13 (December 2006). It appears that Defendant did so wilfully,
14 intentionally, and with a purpose unjustly to benefit from the
15 efforts of Plaintiff in promoting and selling goods and/or
16 services. Specific evidence of wilfulness includes the failure to
17 respond to requests to cease and desist contained in a letter
18 dated July 31, 2006, which was alleged to be notification to
19 Defendant of the wrongfulness of his conduct, and a failure to
20 respond to the complaint and the motion for default judgment, of
21 which it is established that Defendant had notice. The Court
22 notes that § 1111 provides that no damages shall be recovered
23 against an infringer of a registered mark unless the defendant
24 had actual notice of the registration.

25 Under the circumstances, the Court concludes that because
26 there is some evidence that the use of the confusing mark was
27 wilful and repeated, even in the absence of evidence of the
28 extent of Plaintiff's loss or the Defendant's profits, it is

1 appropriate to award damages for the purpose of deterrence. It is
2 alleged that Defendant was in the business of advertising,
3 marketing, and distributing computer software and components, and
4 continued to do so at the time of the filing of the complaint.
5 (Cmplt. pp. 2, 4.) Because it was alleged that the incidents were
6 not isolated and were continuing, a significant interest in
7 deterrence is presented. There is no detailed evidence regarding
8 the nature or quality of the respective services offered by
9 Plaintiff and Defendant; nevertheless, because of the likelihood
10 of confusion established by Defendant's default, the
11 circumstances necessarily demonstrate an interest in the
12 protection of the public.

13 Plaintiff seeks \$100,000.00 for each of the three trademarks
14 at issue under § 1117(c)(1). This is not a case in which the
15 defendant has been shown to have engaged in the promotion and
16 sale of multiple counterfeit goods over the internet for an
17 extended period of time, imported millions of infringing
18 products, or unjustly gained huge amounts of profits. It may thus
19 be distinguished from some of the reported cases in which
20 extremely large awards have been made, such as Louis Vuitton
21 (\$1,500,000 for eight marks, use of multiple domain names on the
22 internet, and egregious conduct of extensive sales of many types
23 of goods for a long period of time); Petmed Express, Inc. v.
24 Medpets.Com, Inc., 336 F.Supp.2d 1213, 1221 (S.D.Fla 2004)
25 (\$400,000 for each infringing mark used on the internet plus
26 \$50,000 for each infringing domain name, based on wilfulness and
27 the presumptively high scope of internet sales); and Playboy
28 Enter., Inc. v. AsiaFocus Int'l, Inc., 1998 WL 724000 (E.D.Va

1 1998) (\$1,000,000 for wilful infringement of two counterfeit
2 domain names, and \$500,000 for each category of merchandise,
3 where there was extensive use of multiple sites for sale of
4 Playboy merchandise as well as viewing of photographic images,
5 use of registered trademarks within the named sites and in e-mail
6 addresses, and active encouragement of other web sites to
7 distribute the infringing material); see also Philip Morris USA
8 Inc. v. Castworld Products, Inc., 219 F.R.D. 494, 501-02 (C.D.
9 2003) (award of \$2,000,000 for wilful infringement of two famous
10 Marlboro trademarks by sale of 8,000,000 imported counterfeit
11 cigarettes of inferior quality with a street value of millions of
12 dollars). Given that the only probative evidence available to the
13 Court in the present case demonstrates wilful conduct of
14 relatively short duration and of uncertain extent or effect, the
15 Court exercises its discretion and concludes that pursuant to 15
16 U.S.C. § 1117(c)(1), an award of \$100,000.00 in damages is
17 appropriate.

18 The Court notes that a successful plaintiff is entitled to
19 recover both actual damages under the Lanham Act and statutory
20 damages under the Copyright Act. Nintendo of America, Inc. v.
21 Dragon Pacific Intern., 40 F.3d 1007, 1010-11 (9th Cir. 1994),
22 cert. denied, 515 U.S. 1107 (1995). The court in Nintendo
23 reasoned that a separate award of statutory damages under both
24 the Copyright Act and the Lanham Act was appropriate when a
25 single act has violated both statutes because two separate wrongs
26 have been committed. However, the court distinguished a case in
27 which recovery of actual damages under both statutes was held to
28 be an impermissible double recovery. Id. at 1011 n. 1.

1 The Court has not found any definitive authority in the
2 Ninth Circuit, although the Court takes judicial notice of orders²
3 submitted in cases before district courts in the Central and
4 Eastern Districts of California, in which awards of statutory
5 damages under both statutes were made, and which Plaintiff
6 submitted after hearing.

7 It is established in this circuit that an award of actual
8 damages under the Lanham Act and statutory damages under the
9 Copyright Act is permissible because multiple wrongs have been
10 committed. Nintendo of America, Inc., 40 F.3d at 1011. Further,
11 the Court finds that there is no double recovery in awards of
12 statutory damages under both statutes because distinct injuries
13 to different interests have been suffered by the Plaintiff. See,
14 Microsoft Corp. v. Tierra Computer, Inc., 184 F.Supp.2d 1329,
15 1331 (N.D.GA 2001) (noting cases in which awards of statutory
16 damages were made under both acts). Further, statutory damages
17 serve not only as a substitute for compensation, but also as a
18 penalty and a deterrent to future violations. Id. It is clear
19 that in this case actual damages are difficult or impossible to
20 calculate, and this is largely due to Defendant's own conduct and
21 inaction. Considering all these factors, and exercising its
22 considerable discretion, the Court concludes that an award of
23 statutory damages for trademark and copyright infringement does
24 not violate the rule against double recoveries.

25 /////

27 ² The two orders are in Microsoft v. Image & Business Solutions, Inc., et al., 2007 WL 2874440 (C.D.Cal.
28 2007) and Microsoft v. Hargadon Computer, Inc. et al., Eastern District of California Case No. CIV S-03-1486
LKK/GGH.

1 E. Injunctive Relief

2 Plaintiff seeks injunctive relief against future copyright
3 and trademark infringement.

4 1. Injunction against Trademark Infringement

5 Title 15 § 1116(a) provides:

6 The several courts vested with jurisdiction of
7 civil actions arising under this chapter shall have
8 power to grant injunctions, according to the principles
9 of equity and upon such terms as the court may deem
10 reasonable, to prevent the violation of any right of
11 the registrant of a mark registered in the Patent and
12 Trademark Office or to prevent a violation under
13 subsection (a), (c), or (d) of section 1125 of this
14 title. Any such injunction may include a provision
15 directing the defendant to file with the court and
16 serve on the plaintiff within thirty days after the
17 service on the defendant of such injunction, or such
18 extended period as the court may direct, a report in
writing under oath setting forth in detail the manner
and form in which the defendant has complied with the
injunction. Any such injunction granted upon hearing,
after notice to the defendant, by any district court of
the United States, may be served on the parties against
whom such injunction is granted anywhere in the United
States where they may be found, and shall be operative
and may be enforced by proceedings to punish for
contempt, or otherwise, by the court by which such
injunction was granted, or by any other United States
district court in whose jurisdiction the defendant may
be found.

19 It is appropriate to award injunctive relief in connection
20 with a default judgment pursuant to the Lanham Act. Philip Morris
21 USA Inc. v. Castworld Products, Inc., 219 F.R.D. 494, 502
22 (C.D.Cal. 2003) (finding permanent injunctive relief appropriate
23 because the claims otherwise warranted an injunction, the
24 defendant had chosen to ignore the lawsuit, and failure to grant
25 the injunction would needlessly expose the plaintiff to the risk
26 of continuing irreparable harm); Pepsico, Inc. v. California
27 Security Cans, 238 F.Supp.2d 1172, 1177-78 (C.D. 2002) (granting
28 an injunction barring use of a trademark on counterfeit products

1 where it was consistent with the relief requested in the
2 complaint, and it was not absolutely clear that the wrongful
3 behavior had ceased and would not begin again).

4 An injunction is an equitable remedy appropriate where there
5 is irreparable injury and inadequacy of legal remedies; the Court
6 will balance the competing claims and consider the potential
7 injury and convenience to each party of granting or withholding
8 the injunctive relief, as well as consider the public interest.
9 Weinberger v. Romero-Barcelo, 456 U.S. 305, 312-13 (1982).

10 The Lanham Act gives courts the "power to grant injunctions,
11 according to the principles of equity and upon such terms as the
12 court may deem reasonable, to prevent the violation" of a
13 registrant's rights. 15 U.S.C. § 1116(a). A plaintiff is not
14 automatically entitled to an injunction simply because it proved
15 its affirmative claims; the grant of injunctive relief is not a
16 ministerial act flowing as a matter of course. Pyrodyne Corp. v.
17 Pyrotronics Corp., 847 F.2d 1398, 1402 (9th Cir. 1988). However,
18 the owner of a registered mark is generally entitled to
19 injunctive relief because there is no adequate remedy at law for
20 the injury caused by a defendant's continuing infringement. See
21 Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1180-81
22 (9th Cir. 1988); Lone Star Steakhouse & Saloon v. Alpha of Va.,
23 Inc., 43 F.3d 922, 939 (4th Cir. 1995). Demonstrating a
24 likelihood of confusion is generally sufficient in trademark
25 infringement or unfair competition cases to permit a presumption
26 that the plaintiff will suffer irreparable harm. Vision Sports,
27 Inc. v. Melville Corp., 888 F.2d 609, 612 n. 3 (9th Cir. 1989).
28 Denying injunctive relief would force Plaintiff to endure

1 continuing infringement and to bring successive suits for money
2 damages. Further, there is a strong interest in protecting
3 consumers. In cases where the infringing use is for a similar
4 service, broad injunctions are especially appropriate. Century 21
5 Real Estate Corp. v. Sandlin, 846 F.2d at 1180-81.

6 The Court finds that, as alleged in the complaint,
7 Defendant's wrongful conduct included the advertising, marketing,
8 installing, and/or distribution of "infringing materials,"
9 specifically, reproductions, copies, or colorable imitations of
10 the Microsoft copyrighted software and/or the Microsoft
11 trademarks, logos, and service mark described in the complaint.
12 (Cmpt. p. 4.) The Court further finds that, as Plaintiff alleged
13 in the complaint, Plaintiff's trademarks and service mark are
14 unique and valuable property which have no readily determinable
15 market value; Defendant's infringement caused harm to Plaintiff
16 that could not be remedied by a monetary award; Defendant's
17 wrongful conduct and damage resulting therefrom are continuing;
18 and if Defendant's wrongful conduct is allowed to continue, the
19 public is likely to become further confused, mistaken, or
20 deceived as to the source, origin, or authenticity of the
21 infringing materials. (Cmplt p. 7.)

22 The Court finds that Plaintiff has established that it is
23 the owner of four registered trademarks, one including a service
24 mark: "MICROSOFT," Trademark and Service Mark Registration No.
25 1,200,236, for computer programs and computer programming
26 services; "MICROSOFT," Trademark Registration No. 1,256,083, for
27 computer hardware and software manuals, newsletters, and computer
28 documentation; "WINDOWS," Trademark Registration No. 1,872,264

1 for computer programs and manuals sold as a unit; and COLORED
2 FLAG DESIGN, Trademark Registration No. 2,744,843, for computer
3 software. Defendant engaged in trademark infringement of these
4 brands and continues to do so. Defendant's infringement was
5 wilful.

6 The Court finds that Plaintiff is entitled to permanent
7 injunctive relief against future infringement of its marks by
8 Defendant because Plaintiff has established a likelihood of
9 confusion if Defendant continues to use Plaintiff's mark, has
10 shown that irreparable harm will result absent such relief, and
11 finally has shown that a permanent injunction will serve the
12 public interest. Further, the Court finds that with respect to
13 the relative hardships imposed by an injunction, the balance tips
14 in favor of issuance. Plaintiff is only seeking to enjoin illegal
15 activity. The injunction will not adversely affect any of
16 Defendant's legitimate business operations, nor will it suffer
17 any cognizable hardship as a result of its issuance. Conversely,
18 Plaintiff will suffer harm in the form of disfavor from customers
19 if Defendant's activities continue. The Court further finds that
20 injunctive relief would serve the public interest because the
21 pertinent law protects not only the private interests of the
22 trademark owner, but also the public's interest in not being
23 confused by the infringing products. The Court finds that an
24 injunction would deter future infringement.

25 2. Injunction against Copyright Infringement

26 Plaintiff also seeks injunctive relief against further
27 copyright infringement by Defendant.

28 Title 17 U.S.C. § 502 states:

1 (a) Any court having jurisdiction of a civil
2 action arising under this title may, subject to the
3 provisions of section 1498 of title 28, grant temporary
4 and final injunctions on such terms as it may deem
5 reasonable to prevent or restrain infringement of a
6 copyright.

7 (b) Any such injunction may be served anywhere in
8 the United States on the person enjoined; it shall be
9 operative throughout the United States and shall be
10 enforceable, by proceedings in contempt or otherwise,
11 by any United States court having jurisdiction of that
12 person. The clerk of the court granting the injunction
13 shall, when requested by any other court in which
14 enforcement of the injunction is sought, transmit
15 promptly to the other court a certified copy of all the
16 papers in the case on file in such clerk's office
17 (emphasis added).

18 As a general rule, absent a great public injury, a permanent
19 injunction will be granted when liability has been established
20 and there is a threat of a continuing violations. Cadence Design
21 Systems, Inc. v. Avant! Corp., 125 F.3d 824, 829 (9th Cir. 1997);
22 MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 520 (9th
23 Cir. 1993) (issuing an injunction against further infringement of
24 protected software rights where the plaintiff demonstrated that
25 the defendant had computers in its loaner inventory with the
26 protected software on it).

27 Generally a party seeking a preliminary injunction must show
28 either a likelihood of success on the merits and the possibility
of irreparable injury, or that serious questions going to the
merits were raised and the balance of hardships tips sharply in
its favor; however, because in a copyright infringement claim a
showing of a reasonable likelihood of success on the merits
raises a presumption of irreparable harm, a plaintiff need only
show a likelihood of success on the merits to obtain a
preliminary injunction. Micro Star v. Formgen, Inc., 154 F.3d

1 1107, 1109 (9th Cir. 1998).

2 Here, Plaintiff seeks a permanent injunction. Plaintiff has
3 already shown actual success on the merits because the complaint
4 states a claim for infringement, and Defendant has defaulted;
5 further, Plaintiffs have alleged that unless restrained,
6 Defendant will continue to cause irreparable injury for which
7 there is no full monetary compensation. This is sufficient for a
8 permanent injunction. Sony Music Entertainment, Inc. v. Global
9 Arts Productions, 45 F.Supp.2d 1345, 1347 (S.D.Fla. 1999). An
10 injunction against further infringement and even infringement of
11 future works is permitted, and it is appropriate to grant an
12 injunction on an application for default judgment. Princeton
13 University Press v. Michigan Document Services, Inc., 99 F.3d
14 1381, 1392-93 (6th Cir. 1996) (noting that an injunction of works
15 copyrighted in the future is supported by the weight of
16 authority); Elektra Entertainment Group Inc. v. Crawford, 226
17 F.RD. 388, 393-94 (C.D.Cal. 2005) (granting a final injunction on
18 default judgment to enjoin defendant from directly or indirectly
19 infringing plaintiffs' rights under federal or state law in
20 copyrighted recordings, whether then in existence or later
21 created, where requested terms of injunction were the same as
22 those prayed for in complaint, proposed injunctive relief was
23 appropriate, the plaintiffs sent two letters to defendant before
24 plaintiffs sought entry of default which warned of default
25 judgment, defendant failed to respond to serious claims brought
26 against him despite receiving adequate notice, and failure to
27 grant injunction would have resulted in plaintiffs' continued
28 exposure to harm with no method of recourse).

1 Here, the Court finds that, as Plaintiffs alleged in the
2 complaint, Defendant infringed Plaintiff's valid copyright held
3 in Windows XP Pro (including user's reference manuals, user's
4 guides, and screen displays), duly and properly registered with
5 the United States Copyright Office, Registration Certificate TX
6 5-407-055. (Cmplt. p. 3.) Further, Defendant engaged in wrongful
7 conduct, including advertising, marketing, installing, and/or
8 distribution of infringing materials, specifically reproductions,
9 copies, or colorable imitations of the Microsoft copyrighted
10 software and/or the Microsoft trademarks, logos, and service mark
11 described in the Complaint, and that Defendant wilfully continued
12 to commit acts of copyright and trademark infringement against
13 Plaintiff. (Cmplt. pp. 3-4.) Further, as previously noted, it is
14 alleged that Plaintiffs have no adequate remedy at law. (Cmplt.
15 pp. 5-6.)

16 The Court finds that Defendant's lack of intent to comply
17 with the copyright restrictions is demonstrated by the
18 Defendant's failure to reply to the letter that Plaintiffs sent
19 to the Defendant which notified Defendant that his conduct
20 infringed Plaintiff's intellectual property rights and demanded
21 cessation of the conduct, and by Defendant's further failure to
22 respond to serious claims brought against him despite receiving
23 adequate notice. It appears that the failure to grant the
24 requested injunction would result in Plaintiff's continued
25 exposure to harm with no method of recourse. There does not
26 appear to be any public injury that would result from issuance of
27 the injunction. Accordingly, the Court concludes that injunctive
28 relief is appropriate.

1 However, the injunctive relief sought is too broad.
2 Generally an injunction must be narrowly tailored to remedy only
3 the specific harms shown by the plaintiffs rather than to enjoin
4 all possible breaches of the law; injunctive relief concerning a
5 copyright will be limited to works that infringe on the
6 Plaintiffs' copyright. Iconix, Inc. v. Tokuda, 457 F.Supp.2d 969,
7 998-1002 (N.D.Cal.2006) (preliminary injunction in copyright
8 case). Further, it is established that every order granting an
9 injunction shall set forth the reasons for its issuance; shall be
10 specific in its terms; shall describe in reasonable detail, and
11 not by reference to the complaint or other document, the act or
12 acts sought to be restrained; and is binding only upon the
13 parties to the action, their officers, agents, servants,
14 employees, and attorneys, and upon those persons in active
15 concert or participation with them who receive actual notice of
16 the order by personal service or otherwise. Fed. R. Civ. P.
17 65(d). Even without objections by a party, a court has an
18 independent duty to assure that an injunction is specific in its
19 terms and describes in reasonable detail the acts sought to be
20 restrained. See, EFS Marketing, Inc. v Russ Berrie & Co., 76 F.3d
21 487, 493-94 (2nd Cir. 1996); 4 Nimmer on Copyright, § 14.06(C)
22 (2006).

23 Here, the permanent injunction proposed by Plaintiff (Doc.
24 15) would enjoin infringement with respect to not only the
25 computer software programs that are the subject of the copyright
26 and trademark protection, but also things that are packaged and
27 distributed with the protected programs, such as unspecified
28 proprietary components, end user license agreements (EULA's), and

1 certificates of authenticity (COA's) (Prop. Inj. pp. 1-2), which
2 pursuant to the complaint are additional to the copyrighted
3 Windows XP Pro operating system, user's reference manuals, user's
4 guides, and screen displays (Cmplt. pp. 1-2), and further appear
5 not to be included in the matters described as the things for
6 which there are registered trademarks, namely, computer programs
7 and programming services; computer hardware and software manuals,
8 newsletters, and computer documentation; computer programs and
9 manuals sold as a unit; and computer software (Cmplt. p. 3).

10 Likewise, the proposed injunction would cover infringement
11 of any other works now or hereafter protected by any of
12 Plaintiff's trademarks or copyrights (Prop. Inj. p. 2). It would
13 also cover the use of names, logos, or "other variations
14 thereof," terminology which is not sufficiently specific. These
15 aspects of the injunction would be unclear and also would exceed
16 the scope of the infringement.

17 Accordingly, these aspects should be eliminated from the
18 injunctive relief sought.

19 The Court should order Defendant Matthew Evans, and his
20 agents, servants, employees, representatives, successors and
21 assigns, and all those persons or entities acting in concert or
22 participation with him, to be permanently enjoined and restrained
23 from

24 1) imitating, copying, or making any other infringing use or
25 infringing distribution of the Microsoft Windows XP Professional
26 (Windows XP Pro) software package and operating system, including
27 reference manuals, user's guides, and screen displays, protected
28 by Microsoft's copyright number TX 5-407-055; and

1 2) imitating, copying, or making any other infringing use or
2 infringing distribution of the matters covered by registered
3 trademarks and service mark, including the following:

4 "MICROSOFT," Trademark and Service Mark Registration No.
5 1,200,236, for computer programs and computer programming
6 services; "MICROSOFT," Trademark Registration No. 1,256,083, for
7 computer hardware and software manuals, newsletters, and computer
8 documentation, including reference, user, instructional, and
9 general utilities manuals and data sheets for computer hardware
10 and software users; "WINDOWS," Trademark Registration No.
11 1,872,264, for computer programs and manuals sold as a unit; and
12 COLORED FLAG DESIGN, Trademark Registration No. 2,744,843, for
13 computer software; user manuals therefor sold as a unit
14 therewith; computers; computer hardware; computer application
15 programs; computer peripherals; computer mice and pointing
16 devices; DVD players; digital cellular phones; blank smart cards;
17 communication servers and computer application and operating
18 system programs for use therewith; video game machines and
19 operating system software for use therewith and in playing
20 electronic games; computer keyboards; computer and video game
21 joysticks; and video game interactive control floor pads; and

22 3) manufacturing, assembling, producing, distributing,
23 offering for distribution, circulating, selling, offering for
24 sale, advertising, importing, promoting, or displaying any item
25 or thing included in the matters listed in paragraph (2) above
26 and bearing any simulation, reproduction, counterfeit, copy, or
27 colorable imitation of any of Microsoft's registered trademarks
28 or service mark listed in paragraph (2) above; and

1 4) using any simulation, reproduction, counterfeit, copy, or
2 colorable imitation of any thing covered by Microsoft's
3 registered trademarks or service mark listed in paragraph (2)
4 above, in connection with the manufacture, distribution, offering
5 for distribution, sale, offering for sale, advertisement,
6 promotion, or display of any software, component, end user
7 license agreement, certificate of authenticity, or other item or
8 thing not authorized or licensed by Microsoft; and

9 5) using any false designation of origin or false
10 description which can or is likely to lead the trade or public or
11 individuals erroneously to believe that any software, component,
12 end user license agreement, certificate of authenticity, or other
13 item or thing has been manufactured, produced, distributed,
14 offered for distribution, advertised, promoted, displayed,
15 licensed, sponsored, approved, or authorized by or for Microsoft,
16 when such is not true in fact; and

17 6) using the names or logos of any of Microsoft's copyright
18 and/or trademark-protected software programs in any of
19 Defendant's trade or corporate names; and

20 7) engaging in any other activity constituting an
21 infringement of any of Microsoft's trademarks, service mark
22 and/or copyrights, or of Microsoft's rights in, or right to use
23 or to exploit these trademarks, service mark, and/or copyrights,
24 or constituting any dilution of Microsoft's name, reputation, or
25 goodwill; and

26 8) assisting, aiding, or abetting any other person or
27 business entity in engaging in or performing any of the
28 activities referred to in paragraphs numbered one through eight

1 above.

2 F. Attorney's Fees

3 Plaintiff seeks an award of attorney's fees pursuant to both
4 17 U.S.C. § 505 and 15 U.S.C. § 1117(a).

5 With respect to the copyright claim, 17 U.S.C. § 505 states:

6 In any civil action under this title, the court
7 in its discretion may allow the recovery of full
8 costs by or against any party other than the
9 United States or an officer thereof. Except as
otherwise provided by this title, the court may
also award a reasonable attorney's fee to the
prevailing party as part of the costs.

10 Under this provision, attorney's fees are to be awarded to
11 prevailing parties in the court's discretion after consideration
12 various factors, including but not limited to frivolousness,
13 motivation, objective unreasonableness (both as to legal and
14 factual components of the case), culpability, the degree of
15 success obtained, the strength of the case relative to the costs
16 of the litigation, the pecuniary circumstances of the parties,
17 and the need in the particular circumstances of the case to
18 advance considerations of compensation and deterrence; the award
19 should further the underlying purposes of the Copyright Act.
20 Fogerty v. Fantasy, Inc., 510 U.S. 517, 535 n. 19 (1994);
21 Fantasy, Inc. v. Fogerty, 94 F.3d 553, 557-60 (9th Cir. 1996). The
22 objectives of the Copyright Act include discouraging infringement
23 and increasing public exposure to a creative work. Fantasy, Inc.
24 v. Fogerty, 94 F.3d at p. 559. A court has the discretion to
25 award interest on the fees. See, Fantasy, Inc. v. Fogerty, 94
26 F.3d at p. 561.

27 Here, an award of attorney's fees would further the
28 deterrent and compensatory purposes of the act and would reward

1 successful handling of the litigation.

2 With respect to the trademark claim, 15 U.S.C. § 1117(a)
3 concerns violations of any right of a registrant of a mark or a
4 violation under § 1125(a) that have been established in a civil
5 action. It states in pertinent part, "The court in exceptional
6 cases may award reasonable attorney fees to the prevailing
7 party." Exceptional cases includes cases in which trademark
8 infringement is malicious, fraudulent, deliberate, or wilful.
9 Lindy Pen Co. v. Bic Pen Corp., 982 F.2d 1400, 1409 (9th Cir.
10 1993); Philip Morris USA Inc. v. Castworld Products, Inc., 219
11 F.R.D. 494, 502 (C.D.Cal.2003).

12 To determine a reasonable attorney fee award under §
13 1117(a), courts employ the lodestar method. See, Earthquake Sound
14 Corp. v. Bumper Industries, 352 F.3d 1210, 1219 (9th Cir. 2003).

15 Case law construing what a reasonable fee is applies
16 uniformly to all federal fee-shifting statutes. City of
17 Burlington v. Dague, 505 U.S. 557, 561 (1992). "The most useful
18 starting point for determining the amount of a reasonable fee is
19 the number of hours reasonably expended on the litigation
20 multiplied by a reasonable hourly rate." Hensley v. Eckerhart,
21 461 U.S. 424, 433 (1983). This figure, the "lodestar," is
22 presumed to be the reasonable fee contemplated by the statute.
23 City of Riverside v. Rivera, 477 U.S. 560, 568 (1986). Factors to
24 consider in the initial lodestar calculation are the novelty and
25 complexity of the issues, the special skill and experience of
26 counsel, the quality of the representation, the results obtained,
27 and the superior performance of counsel. Blum v. Stenson, 465
28 U.S. 886, 898-900 (1984). As to the reasonable hourly rate, a

1 district court should be guided by the rate prevailing in the
2 community for similar work performed by attorneys of comparable
3 skill, experience, and reputation. Blum v. Stenson, 465 U.S. 886,
4 895 n. 11 (1984). Either current or historical rates prevailing
5 rates may be used; use of current rates or an appropriate
6 adjustment for delay in payment may be reasonable. Missouri v.
7 Jenkins, 491 U.S. 274, 283-84 (1989). Local Rule 54-293 also sets
8 forth the procedure to be followed, the matters to be shown by an
9 applicant, and the criteria to be followed in making awards.

10 Here, the violations were deliberate and wilful. Thus, the
11 Court determines that the case is exceptional, and an award of
12 attorney's fees would be appropriate.

13 The declaration of Katherine M. Dugdale establishes that she
14 is a partner in her Santa Monica firm and an attorney with
15 primary responsibility for this case; she has handled matters of
16 this type for nine years and has been an attorney for fourteen
17 years; she and Jennifer N. Chiarelli, a 2000 law school graduate,
18 have worked on the case; Dugdale's time was billed at a rate of
19 \$387 per hour, and Chiarelli's at \$301.50 per hour; based on
20 Dugdale's experience and familiarity with rates charged by Los
21 Angeles attorneys with similar experience and expertise, the fees
22 incurred are reasonable and appropriate.

23 For preparation and review of the complaint and accompanying
24 documents and service, 7.4 hours were expended, for a sum of
25 \$2,769.75; for preparation and review of request for entry of
26 default, 2.1 hours were expended, for a sum of \$633.15.

27 Considering the reasonable hourly rate and number of hours
28 expended, and further considering the skill of the attorneys, the

1 issues, and the quality of the representation and results
2 obtained, the Court concludes that the amount sought, \$3,402.90,
3 is reasonable.

4 With respect to costs, Plaintiff withdrew its request for
5 costs at the hearing on this motion.

6 F. Status of Defendant

7 The declaration of Dugdale establishes that Defendant is not
8 an infant, incompetent, or a person protected by the
9 Servicemembers Civil Relief Act of 1940, 50 App. U.S.C. §§ 501,
10 521.

11 G. Discretionary Factors

12 Here, it does not clearly appear that there is any risk of
13 mistake or excusable neglect on the part of anyone with a
14 potential interest in the subject matter of the instant action.
15 Further, given the state of the pleadings, there is no apparent
16 likelihood of a dispute as to a material fact essential to the
17 Plaintiffs' case. Defendant's delay has been long-standing, and
18 there is no cognizable showing of excuse on the part of
19 Defendant. There does not appear to be any reason why the general
20 policy in favor of a decision on the merits would warrant
21 refusing to enter the requested default judgment.

22 Accordingly, the Court finds that Plaintiff has shown
23 entitlement to a default judgment.

24 G. Defendant's Address for Service of this Order

25 At the hearing, Defendant Matthew Evans represented to the
26 Court that his address is 5900 Chancellor Way, Riverbank,
27 California 95367. His telephone numbers are (209) 481-9230 (cell)
28 and (209) 863-8201 (land line).

1 II. Recommendation

2 Accordingly, it IS RECOMMENDED that

3 1) Plaintiff's motion for default judgment BE GRANTED; and

4 2) The Clerk BE DIRECTED to enter judgment in favor of
5 Plaintiff Microsoft Corporation and against Defendant Matthew
6 Evans in the amount of \$110,000.00 in statutory damages and
7 \$3,402.90 in attorney's fees; and

8 3) The Clerk BE DIRECTED to enter a judgment in favor of
9 Plaintiff Microsoft Corporation and against Defendant Matthew
10 Evans that enjoins Defendant Matthew Evans his agents, servants,
11 employees, representatives, successors and assigns, and all those
12 persons or entities acting in concert or participation with him,
13 to be permanently enjoined and restrained from

14 a) imitating, copying, or making any other infringing
15 use or infringing distribution of the Microsoft Windows XP
16 Professional (Windows XP Pro) software package and operating
17 system, including reference manuals, user's guides, and screen
18 displays, protected by Microsoft's copyright number TX 5-407-055;
19 and

20 b) imitating, copying, or making any other infringing
21 use or infringing distribution of the matters covered by
22 registered trademarks and service mark, including the following:
23 "MICROSOFT," Trademark and Service Mark Registration No.
24 1,200,236, for computer programs and computer programming
25 services; "MICROSOFT," Trademark Registration No. 1,256,083, for
26 computer hardware and software manuals, newsletters, and computer
27 documentation, including reference, user, instructional, and
28 general utilities manuals and data sheets for computer hardware

1 and software users; "WINDOWS," Trademark Registration No.
2 1,872,264, for computer programs and manuals sold as a unit; and
3 COLORED FLAG DESIGN, Trademark Registration No. 2,744,843, for
4 computer software; user manuals therefor sold as a unit
5 therewith; computers; computer hardware; computer application
6 programs; computer peripherals; computer mice and pointing
7 devices; DVD players; digital cellular phones; blank smart cards;
8 communication servers and computer application and operating
9 system programs for use therewith; video game machines and
10 operating system software for use therewith and in playing
11 electronic games; computer keyboards; computer and video game
12 joysticks; and video game interactive control floor pads; and

13 c) manufacturing, assembling, producing, distributing,
14 offering for distribution, circulating, selling, offering for
15 sale, advertising, importing, promoting, or displaying any item
16 or thing included in the matters listed in paragraph (b) above
17 and bearing any simulation, reproduction, counterfeit, copy, or
18 colorable imitation of any of Microsoft's registered trademarks
19 or service mark listed in paragraph (b) above; and

20 d) using any simulation, reproduction, counterfeit,
21 copy, or colorable imitation of any thing covered by Microsoft's
22 registered trademarks or service mark listed in paragraph (b)
23 above, in connection with the manufacture, distribution, offering
24 for distribution, sale, offering for sale, advertisement,
25 promotion, or display of any software, component, end user
26 license agreement, certificate of authenticity, or other item or
27 thing not authorized or licensed by Microsoft; and

28 e) using any false designation of origin or false

1 description which can or is likely to lead the trade or public or
2 individuals erroneously to believe that any software, component,
3 end user license agreement, certificate of authenticity, or other
4 item or thing has been manufactured, produced, distributed,
5 offered for distribution, advertised, promoted, displayed,
6 licensed, sponsored, approved, or authorized by or for Microsoft,
7 when such is not true in fact; and

8 f) using the names or logos of any of Microsoft's
9 copyright and/or trademark-protected software programs in any of
10 Defendant's trade or corporate names; and

11 g) engaging in any other activity constituting an
12 infringement of any of Microsoft's trademarks, service mark
13 and/or copyrights, or of Microsoft's rights in, or right to use
14 or to exploit these trademarks, service mark, and/or copyrights,
15 or constituting any dilution of Microsoft's name, reputation, or
16 goodwill; and

17 h) assisting, aiding, or abetting any other person or
18 business entity in engaging in or performing any of the
19 activities referred to in paragraphs numbered one through eight
20 above; and

21 4) The Clerk of the Court IS DIRECTED to serve a copy of
22 this order by mail on Defendant Matthew Evans at 5900 Chancellor
23 Way, Riverbank, California 95367.

24 This report and recommendation is submitted to the United
25 States District Court Judge assigned to the case, pursuant to the
26 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 72-304 of the
27 Local Rules of Practice for the United States District Court,
28 Eastern District of California. Within thirty (30) days after

1 being served with a copy, any party may file written objections
2 with the Court and serve a copy on all parties. Such a document
3 should be captioned "Objections to Magistrate Judge's Findings
4 and Recommendations." Replies to the objections shall be served
5 and filed within ten (10) court days (plus three days if served
6 by mail) after service of the objections. The Court will then
7 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
8 (b) (1) (C). The parties are advised that failure to file
9 objections within the specified time may waive the right to
10 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
11 1153 (9th Cir. 1991).

12
13 IT IS SO ORDERED.

14 Dated: October 16, 2007

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE