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***VENDORS NOW SEEKING SIZEABLE DAMAGES FOR
UNLICENSED USE OF SOFTWARE***

During the past eighteen months, we have seen a serious increase in activity by various software vendors to enforce their rights to prevent unauthorized copying of software programs. These vendors have been taking action against those who are using unlicensed or unauthorized copies of software, resulting in very stiff penalties. We urge you to consider taking the appropriate actions discussed below to minimize or eliminate any risk.

The United States' Copyright Act provides copyright owners with the right to bring a civil action to enjoin the infringing activity, and to recover either statutory damages or actual damages and profits of the infringer. Statutory damages range from \$750 to \$30,000 for each work infringed. In cases where willfulness can be shown, statutory damages may be increased to \$150,000 for each work infringed. A successful copyright owner may also be awarded costs and attorney's fees.

While clients understand the need to be properly licensed, internal controls are often inadequate to prevent unintentional violations of copyright law. Often times licensed software is not removed from older computers as employees migrate to newer machines. In other instances, mistakes are made as to whether new software purchases constitute new licenses or mere upgrades which typically serve only to replace the license for the upgraded program. We have also found that employees sometimes load their own copy of a program on a company's computers, or that the company's imaging practices contribute to installing unauthorized copies of software. Regardless of cause, it is not uncommon to find that the number of software installations exceed the number of licenses.

Under U.S. Copyright Law, the copyright owner has, among other rights, the exclusive right to distribute and reproduce copies of a particular work. The absence of intent to make unlawful copies has no bearing on the threshold issue of infringement. Nor is it a defense to assert that the unauthorized copy is not actually "used" by an employee. As such, poor internal controls, attempts to shift responsibility for the problem to a particular individual, or other "explanations" may not provide cover should you be on the receiving end of a claim of infringement.

In order to combat what is perceived as a widespread problem, many vendors have banded together to educate businesses, in a rather painful manner, about copyright law. One such group is the Business Software Alliance (BSA), an organization that represents the interests

of vendors such as Autodesk, Apple, Adobe, Microsoft, and other well-known companies. BSA often acts on “tips” from within a particular company usually furnished by disgruntled current or former employees. BSA then acts upon this lead by sending a notice of alleged infringement, warning against spoliation of evidence, and insisting upon a full audit of all installed software. Except in the case of blatant software piracy, the BSA seeks to resolve matters amicably. However, this often means payment of substantial sums for past infringing activities. BSA uses a settlement methodology based on the MSRP of the unlicensed programs, meaning that infringement of certain trade specific software can ramp up the cost of settlement significantly.

This past February, BSA offered an amnesty program for businesses located in several cities, including Boston. This program was advertised both in print media and on radio. Now that the amnesty period has expired, we expect to see increased focus on enforcement in and around the Boston area. As the old saying goes, “an ounce of prevention is worth a pound of cure.” ***Accordingly, we are advising our clients to examine their licensing status to confirm they hold all requisite network and PC licenses for software installed on company computers. To the extent of any shortfall, clients should purchase new licenses, or where appropriate, consider going to a network model allowing a designated number of concurrent users. Clients should use this examination process as an opportunity to identify the factors that contributed to the problem in the first place and adopt strict internal policies to assure compliance going forward.***

We are aware of several companies that have recently received notices from BSA. We prefer to be in a position of assisting a client with a response that evidences compliance rather than conducting negotiations to settle what might be a very sizeable monetary exposure.

Should you have any questions, please feel free to contact us.

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