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Sent Via Email: ACoston@FTC.GOV

Alain Sheer
Council for the Federal Trade Commission
Federal Trade Commission
600 Pennsylvania Avenue, N.W.,
Washington, D.C. 20580

RE: IN THE MATTER OF GUIDANCE SOFTWARE, INC. FILE NO. 062 3057

Dear Alain Sheer,

BACKGROUND

I have been a professional programmer, software developer and computer hardware inventor for over twenty years. Since 1993, I developed hundreds of software programs for the freight and logistics industry. I own the copyrights to all these works and they are my intellectual property.

In the spring of 2003, Fleming Companies, Inc. ("Fleming") an adjudicated willful infringer of my intellectual property hired Guidance Software, Inc. ("Guidance") to make digital images of their computer systems which contained illegal derivatives my intellectual property, then purportedly remove my intellectual property from those same computer systems by "scrubbing" the computers and finally make "after" images of those computer systems to prove that my intellectual property had been removed. In July of 2003, Michael Gurzi of Guidance in an Affidavit filed with the United States Bankruptcy Court in Delaware claims to have removed my intellectual property from Fleming computer systems. Guidance then transported copies of my intellectual property across state lines to their facility in Pasadena.

Guidance performed this imaging work without a court order. In fact, the work appears to have violated a Federal district court "non-destruct" order, a "non-destruct" order associated with a formal SEC investigation of the adjudicated infringer, and the Bankruptcy Code's automatic stay.

Mr. Gurzi's Affidavit with the United States Bankruptcy Court in Delaware has been admitted to have been false. Guidance did not remove my intellectual property from the adjudicated infringer's computer systems. Additionally, Guidance continues to retain copies of my intellectual property on their computers systems in Pasadena against my wishes and without my permission as the owner of my intellectual property. My concern is that Guidance has exposed my intellectual property to additional unauthorized copying that occurred when the alleged break in that is the subject of the proposed Consent Decree. In addition, because this alleged computer forensic "profession" is unregulated and based on rulings of the District Court totally immune from liability for copyright infringement. I

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believe that the FTC must exercise greater oversight in regard to this alleged "profession" to protect not only the small independent developer from acts of piracy but every company that attempts to compete globally, from having their works copied without authority then exposed to "break ins" that may simply be a cover for more unauthorized copying.

COMMENT #1

In the FTC's Complaint, paragraph 4 states:

> ***"Respondent also operates a separate computer network that does not connect to the corporate network or the internet and is used only by its Professional Services Division."***

What facts support the idea that Guidance maintains one or more computer networks that do not connect to the internet or the Guidance corporate network? Has the FTC sent their own technical investigator to determine if this a true statement or not? Guidance has already shown that its statements cannot be trusted and that anything it claims must be verified independently. If the FTC has not verified this statement, I object to the Consent Decree and the FTC should proceed with its case against Guidance.

In my opinion, such a comment does not even belong in either the Complaint nor does it belong in any derivative Consent Decree. In today's networking environment, the only thing that separates computer network systems is a thin wire or wireless link and the system's administrator nod of approval to grant sharing privileges between networks. This Complaint and Consent Decree deals with a corporation's culture, technical abilities and determination to protect information and data entrusted to them by the public and in particular, their consumers and customers both willing and unwilling. Any Consent Decree should cover all aspects of Guidance's operations with respect to confidential customer and consumer information, both willing and unwilling, no matter where it is housed, networks, laptops, backups, file cabinets etc. My works are just as vulnerable on this alleged separate network as the personal identifiable information that is the basis for the Consent Decree and should be afforded no less protection.

COMMENT #2

The proposed Consent Decree states on page 3 of 7, in paragraph I:

> ***"IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the online advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent maintains and protects the privacy, confidentiality, security, or integrity of any personal information collected from or about consumers."***

I believe that I and similarly situated developers and intellectual property owners, including but not limited to Microsoft Corporation, have become unwilling consumers of Guidance's services by default rather than by choice. When Guidance chooses to don its forensics investigation hat sans portfolio or court order, it collects personal information from and about consumers along with their intellectual property. Currently, Guidance remains in possession of my intellectual property along with others such as Microsoft Corporation without permission or license. As Guidance is the repository of information that is not theirs and they have been shown as not competent in protecting that information, I believe that any Consent Decree should include property and personal information collected from unwitting consumers such as myself and Microsoft Corporation.

As long as Guidance remains the custodian of property that is not theirs, whether personal information or intellectual property, the Consent Decree should require that they report the integrity of their safekeeping efforts to the owners of that property for the duration and terms as described in the Consent Decree. If the Consent Decree does not provide for such reporting, third party inspection and verification of those Guidance security reports then I object to the Consent Decree and the FTC should proceed with their case against Guidance.

CONCLUSION

For the reasons mentioned above, I object to the Consent Decree as it is currently written. Who knows what information or data was actually taken from Guidance between September and December of 2005. Maybe nothing was taken from the Guidance systems or maybe everything was taken including all my personal, intellectual property.

I would like the Federal Trade Commission to make any Consent Decree and follow-up auditing apply to all consumer related information at Guidance no matter where it is housed. The FTC needs to verify any facts stated in the Consent Decree, especially as it pertains to technical issues regarding networks and where Guidance stores other people's property and private information. Additionally, I would like a formal determination as to whether or not developers such as Microsoft Corporation and myself, who without knowledge or consent, unwittingly became customers of Guidance, will be afforded the same protections promised by the proposed Consent Decree as those afforded to those who knowingly and voluntarily became customers of Guidance. In that regard the definition of what constitutes a "customer" as it applies to the proposed Consent Decree must be made clear. To the extent that small individual developers do not constitute members of the class of Guidance customers, then I respectfully believe that the FTC must take immediate action to regulate this alleged profession to prevent this profession being used to facilitate computer software piracy.

Sincerely,

Wayne Berry