

.* HIGH COURT OF DELHI: NEW DELHI

Judgment Reserved on: 15.11.2011
% Judgment Pronounced on: 18.11.2011

+ C.S.(OS) No.1142/2006

MICROSOFT CORPORATION Plaintiff
Through Mr. Shantanu Sahay, Adv. with
Ms Jaya Negi, Adv.

Versus

MR DAVID RAJU POLAMURI & ANR. Defendants
Through Defendant are *ex-parte*.

**CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH**

1. Whether the Reporters of local papers may
be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

MANMOHAN SINGH, J.

1. The plaintiffs have filed the instant suit for permanent injunction restraining infringement of copyrights, delivery up, rendition of accounts of profit and damages etc.
2. The plaintiff Microsoft Corporation is the Company organized and existing under the laws of the State of Washington,

USA, having its principal office at One Microsoft Way, Redmond, WA 98052-6399, USA. As per the plaint, the plaintiff is doing business in Delhi through its marketing subsidiary, Microsoft Corporation India Private Limited, which has its office at The Great Eastern Centre, Nehru Place, New Delhi-110019 and was set up in the year 1989 to provide marketing, promotion, anti-piracy awareness campaigns and actions and channel development support to the plaintiff /or its affiliates. The products of plaintiff No.1 are distributed in New Delhi through various authorized distributors.

3. As per the plaint, the plaintiff was set up in the year 1975 and is the biggest software publisher for personal and business computing in the world. It is engaged in the development, manufacture, licensing, and support of a range of software products for various computing devices. The plaintiffs' popular software products include the most widely used operating system software, Microsoft Windows (various versions) and application software such as Microsoft Office (various versions) and Visual Studio (various versions). The other popular software products of the plaintiff includes Microsoft Windows Server System, Microsoft Publisher, Microsoft Visio, Microsoft project and other stand alone desktop applications. Apart from computer software programmes, the plaintiffs also manufacture a large range of computer peripherals (hardware). The plaintiff has built its reputation for technological expertise in hardware by developing and launching a series of successful devices including the ergonomically designed Mouse and Keyboard for the last more than two decades.

4. It is averred in the plaint that the plaintiffs' computer programs are "works" that have been first published in the USA. These programs have been created for plaintiff by its employees. Under the US Copyright Law US Code Title 17, Section 201 (b), the copyright in a work created by an employee belongs to the employer under the 'Work made for Hire' doctrine. Both, the computer programme, and the supplementary User Instructions and Manuals are 'original literary works' as contemplated under Section 2 (o) and Section 13 (1) (a) of the Copyright Act, 1957. The plaintiff No.1 is the owner of the copyright in aforesaid works.

5. Further, it is stated by the plaintiff that as India and the USA are signatories to both the Universal Copyright Convention as well as the Berne Convention, therefore, by virtue of section 40 of the Copyright Act, 1957 read with the International Copyright Order, 1999 protection is afforded to the plaintiffs' works since they are created by authors or member countries and originate from and are first published in the said member countries. The plaintiff being the owner of the copyright in the aforesaid literary works within the meaning of the proviso to Section 17 of the Copyright Act, 1957 is entitled to all the exclusive rights flowing from such ownership as set out in Section 14 of the said Act.

6. The reproduction in any material form, including publication, performance, dissemination, translation, adaptation, the use, distribution, sale, offer for sale of any of the above material without the plaintiffs' consent, shall be deemed to be infringement of the plaintiffs' copyright as contemplated under Section 51 of the

Copyright Act, 1957. The acts of infringement are further divided into two categories namely '*primary act*' these are the acts of infringement committed by a person who reproduced the computer programs in a material form or publishes, translates or adapts the said computer program and "*secondary act*" of infringement which is committed by a person who makes for sale or hire or lets for hire or by way of trade, displays or offers for sale or hire or distributes for the purposes of trade, infringing copies of the computer program."

7. The plaintiff has been constantly protecting its copyrights and has, from time to time, prosecuted several infringing parties in India. Copies of the orders granted by this Court have been filed in the present proceedings.

8. As per the plaintiff, tis software products can be purchased by the consumers, inter alia, in one of the following ways, depending upon their personal and professional requirements and needs:

- (i) **Retail Purchase:** A consumer can acquire a Microsoft product via off-the-shelf retail purchase from an authorized reseller, which comes as individually fully-packaged boxed products.
- (ii) **With a New PC:** A consumer can acquire a Microsoft product, pre-installed on a purchased new PC.
- (iii) **Volume License:** A consumer company can acquire a Microsoft Product under a Volume Licenses from an Authorized Reseller.

9. As per the plaint, defendant No.2, M/s Teja Computers located at 47-10-3/11, Flat No.104, Medicharla Towers, Near

Diamond Park, Dwarkanagar, Vishkhapatnam-16 is a business entity engaged in marketing and selling of computer hardware including assembled desktop computers and peripherals. Defendants No.1 Mr. David Raju Polamuri appears to be the proprietor of defendant No.2.

10. The case of the plaintiff against the defendants is that in the month of February, 2006, the plaintiff received information that the defendants were infringing the plaintiffs' copyrights and other intellectual property rights by carrying on the business of unauthorized Hard Disk Loading of the plaintiffs' software programmes on to the branded computers sold by them. The said unlicensed software, naturally, were not accompanied by any original media, such as Holographic CD, original Certificates of Authenticity (COAs), User Manual/Booklet and End User License Agreements (EULA) etc.

11. In order to ascertain fact, the plaintiff sent two independent investigators to the business premises of the defendants. On 11.03.2006 the computer system as purchased from the defendants by the two independent investigators was examined by the plaintiffs' technical expert, Mr. I.P. Singh, who took printouts (screen shots) of the directory of its hard disk, in which he found the software programmes of the plaintiff as sold by the defendants, without any authorization. He opined operating system Microsoft Windows XP Professional Version 2002 and application software Microsoft Office 2000 had been loaded in the computer without any authorization. He opined that the hard disk of the said computer contained unlicensed

and/or pirated version of the plaintiffs' software.

12. Thus the plaintiff sent a legal notice dated 14.03.2006 to the defendants and called them for a settlement meeting in Vishakhapatnam on 20.03.2006. However, the defendants never attended the said meeting. Therefore, the plaintiff filed the present suit.

13. Along with the suit, the plaintiff also filed an application for interim injunction being I.A. No.6269/2006. After hearing the plaintiffs, this Court vide order dated 25.05.2006 granted *ex parte* ad-interim injunction order against the defendants thereby restraining them from copying/re-producing, hard-disk loading on the computers, selling or distributing the two programmes, MS Windows XP Professional Version 2002 and MS Office 2000 or any other programmes in which the plaintiffs have the copyright, without their authority or licence.

14. It appears from the record that as the defendants failed to file the written statement even after the four weeks time given by the court to do so therefore, on 17.01.2007 the defendants' rights to file the written statement was closed and the plaintiff was ordered to lead evidence by way of affidavit. The Defendants were proceeded *ex parte* vide order dated 15.12.2009.

15. The plaintiffs were given time to file the affidavit(s) in terms of the *ex parte* evidence. The plaintiffs in their *ex parte* evidence examined Mr. Anand Banerjee who has filed his affidavit Ex.PW1/A.

16. Thereafter, the affidavit of **PW-1**, Mr. Achhutan

Sreekumar was also filed by the plaintiff wherein he in addition has proved the following documents:

Ex.P-1- Attested & Notarized copy of the Letter of Authority issued in favour Mr. Achuthan Sreekumar by the plaintiff.

Ex.P-2- Attested & Notarized copy of the Letter of Authority issued in favour Mr. Anand Banerjee by the plaintiff.

Ex.P-3- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Windows 2000 Professional.

Ex.P-4- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office 2000 Professional.

Ex.P-5- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Word 2000.

Ex.P-6- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Windows 98.

Ex.P-7- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office 97 (Professional Edition).

Ex.P-8- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Visual Studio 6.0, Enterprise Edition.

Ex.P-9- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Visual Basic, Version 6.0 (Enterprise Edition).

Ex.P-10- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Visual C++ 6.0.

Ex.P-11- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office XP Professional.

Ex.P-12- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Windows XP Professional.

Ex.P-13- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office Professional Edition 2003.

Ex.P-14- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office Access 2007.

Ex.P-15- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office Excel 2007.

Ex.P-16- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office Groove 2007.

Ex.P-17- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office One Note.

Ex.P-18- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office Outlook 2007.

Ex.P-19- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office Power Point 2007.

Ex.P-20- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office Project Professional 2007.

Ex.P-21- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office Share Point Designer 2007.

Ex.P-22- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office Visio Professional 2007.

Ex.P-23- Court Certified Copy of Original Copyright Registration Certificate for Microsoft Office Word 2007.

Ex.P-24- Court Certified Copy of Original Copyright Registration Certificate for Windows Vista Ultimate.

17. The plaintiff filed an additional affidavit **Ex.PW2/A** dated 04.07.2007 of **PW-2** Mr. Sanjeev Sharma who is chartered accountant and in the said affidavit he has shown computation of damages to the tune of Rs.30,06,000/-.

18. I have heard the learned counsel for the plaintiffs and have also gone through the affidavit in *ex parte* evidence as well as the documents placed on the record. In their evidence, the plaintiffs have proved the facts stated in the plaint and have also exhibited the relevant documents in support of their case. The evidence filed by the plaintiffs has gone unrebutted as no cross-examination of the plaintiffs' witness was carried out. Therefore, the statements made by the plaintiffs are accepted as correct deposition.

19. Under these facts and circumstances, the plaintiffs are entitled to a decree for a permanent injunction. Hence, the suit of the plaintiffs is decreed in terms of paragraph-37(a) & (b) of the plaint. As far as the relief of damages and rendition of accounts are concerned, I am of the view that in view of the orders earlier passed in

favour of the plaintiffs, they are entitled to the punitive damages to the tune of Rs.2 lac in their favour. The plaintiffs are also entitled to the cost of the suit. Ordered accordingly.

20. Decree be drawn accordingly. The suit and the pending applications are disposed of.

MANMOHAN SINGH, J.

NOVEMBER 18, 2011