

* **HIGH COURT OF DELHI: NEW DELHI**

+ **C.S.(OS) No.805/2008**

% Judgment Reserved on: 24.10.2011
Judgment Pronounced on: 31.10.2011

MICROSOFT CORPORATION & ANR Plaintiffs
Through Mr. Pravin Anand, Adv. with
Ms. Jaya Negi, Adv.

Versus

M/S G-NET TECHNOLOGIES & ORS Defendants
Through Defendants already *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 above-mentioned suit for permanent injunction restraining infringement of copyrights, delivery up, rendition of accounts of profit and damages etc.

2. As per the plaint, plaintiff No.1, Microsoft Corporation is the Company organized and existing under the laws of the State of

Washington, USA. Plaintiff No.2, Microsoft Corporation India Private Limited is the wholly owned marketing subsidiary of plaintiff No.1, having its office at Eros Corporate Towers, 5th Floor, Nehru Place, New Delhi-110019 and is an entity incorporated and registered under the Indian Companies Act, 1956. Plaintiff No.2 was set up in the year 1989 to provide marketing, promotion, anti-piracy awareness campaigns and actions and channel development support to plaintiff No.1 and/or its affiliates. Additionally, the products of plaintiff No.1 are distributed in New Delhi through various authorized distributors.

3. The case of the plaintiffs is that plaintiff No.1 was set up in the year 1975 and is the biggest software publisher for personal and business computing in the world. It engages 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).

4. Apart from computer software, the plaintiffs also manufacture a large range of computer peripherals (hardware). The Plaintiffs have established their 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.

5. It is stated in the plaint that the plaintiffs' computer programs are "works" that have been first published in the USA. These programs have been created by employees of plaintiff No.1, for plaintiff No.1. 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 for Hire' doctrine. Both, the computer programme, as well as 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.

6. As India and the USA are signatories to both the Universal Copyright Convention as well as the Berne Convention, protection is afforded to the plaintiff No.1's works since they are created by authors or member countries and originate from and are first published in the said member countries. This is by virtue of section 40 of the Copyright Act, 1957 read with the International Copyright Order, 1999.

7. The plaintiff No.1 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.

8. 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, would amount to infringement of the plaintiffs' copyright as contemplated under Section 51 of the Copyright Act, 1957. These acts of infringement are further divided into two categories namely:

“a ‘*primary act*’ 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 a *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.”

9. The plaintiffs have been constantly protecting their copyrights and have, from time to time, prosecuted several infringing parties in India. Copies of the orders granted by this Court have been filed.

10. As per the plaintiffs, their 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:

- (a) **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.

(b) **With a New PC**: A consumer can acquire a Microsoft product, pre-installed on a purchased new PC.

(c) **Volume License**: A consumer company can acquire a Microsoft Product under a Volume Licenses from an Authorized Reseller.

11. As per the plaint, defendant No.1, M/s G-Net Technologies located at 19, Ground Floor, Shanthi Road, Shanthi Nagar, Bangalore is a business entity engaged in marketing and selling of computer hardware including branded computers and peripherals. Defendants No.2 & 3 appear to be the partners of the said defendant No.1-firm.

12. The plaintiffs' case against the defendants is that in the month of April, 2008, the plaintiffs 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 to their customers. The said unlicensed software, naturally, were not accompanied by any original media, such as Original Software Installation CDs, Certificates of Authenticity (COAs), End User License Agreements (EULA), User Instruction Manuals etc. that always accompany the sale of every genuine software of the plaintiffs. On 22.04.2008 the laptop computer system as purchased from the defendants was examined by the plaintiffs' technical expert, Mr. Gurjot Singh, who undertook a detailed

technical examination of the said laptop computer system and opined that the software programmes of the plaintiffs which were loaded onto the hard drive of the laptop computer system as purchased from the defendants were unlicensed and pirated versions of the plaintiffs' software programmes.

13. Along with the suit, the plaintiffs also filed an application for interim injunction being I.A. No.5298/2008 as well as an application for appointment of a Local Commissioner being I.A. No.5299/2008. This Court vide order dated 02.05.2008 granted *ex parte* ad-interim injunction order against the defendants thereby restraining them from marketing any unlicensed version of the plaintiffs' software, and also Mr. Bipin Kalappa, Advocate was appointed as a Local Commissioner to visit the premises of the defendants and to inspect the computer systems, compact disks or other storage media, with the help of one technical expert. In compliance with the said order, the Local Commissioner filed his report, the relevant portion of which as mentioned in para No.5 of the same, reads as under:-

“5. Thereafter, Mr. Rajesh Dhomne, Technical Expert conducted a detailed examination of the laptop and the CDs seized by me. The technical examination of the said laptop computer system revealed that it was loaded with Microsoft Windows XP Professional 2002 software, and Microsoft Office 2003 had been partially loaded onto the hard drive of the said laptop computer system. The technical expert then noted down the serial number of the laptop system as seized by me and inspected by him and also noted down the product IDs of the software programmes as found to be loaded on the said laptop

computer system. The said Audit sheet was then signed by the technical expert who had prepared the same and the same was then handed over to me. I then counter-signed the audit sheet. The signed original audit sheet is annexed herewith as **Annexure “B”**. The sale invoice against which the Laptop was sold is annexed herewith as **Annexure “C”**. I had also prepared a rough on the spot proceedings report recording the said proceedings and at the end of the commission, I took the signatures of Mr. Jay Bhardwaj and Mr. Amit Upadhyay on the same. Mr. Shailesh Kumar (defendant No.1) refused to sign the same inspite of my repeatedly explaining him the mandate of the order dated 2nd May, 2008 passed by the Hon’ble High Court. The said on the spot proceedings report in original is annexed herewith as **Annexure “D”**.”

14. Defendants were duly served but no one appeared on their behalf to contest the present suit. The defendants were proceeded *ex parte* vide order dated 11.09.2009.

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 PW-1 Mr. Achuthan Sreekumar who has filed his affidavit Ex.PW1/A and proved the following documents:-

Ex.P1 & Ex.P2	Notarized copy of the Letter of Authority and Power of Attorney issued in his favour by the plaintiffs.
Ex.P3 & Ex.P4	Notarized copy of the Power of Attorney and Letter of Authority executed by the plaintiffs in favour of Mr. Anand Banerjee.
Ex.P5 to Ex.P15	Court certified copies of the Original Copyright Registration Certificates for the software programmes, such as Microsoft Windows 2000 etc.

16. 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, in fact, 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 statement made by the plaintiffs is accepted as correct deposition. Under these facts and circumstances, the plaintiffs are entitled to a decree for permanent injunction. Hence, the suit of the plaintiffs is decreed in terms of paragraph-38(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 damages to the tune of Rs.2 lac in their favour. The plaintiffs are also entitled to the cost of the suit. Ordered accordingly. Decree be drawn accordingly. The suit and the pending applications are disposed of.

MANMOHAN SINGH, J.

OCTOBER 31, 2011
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