

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 103/2008

MICROSOFT CORPORATION AND ANR. Plaintiffs

Through: Mr. Nischal Anand, Advocate

versus

MR. SANJAY LANGAR AND ANR. Defendants

Through: Defendants are *ex parte*.

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

J U D G M E N T

: REVA KHETRAPAL, J.

1. The Plaintiffs have filed the present suit for permanent injunction *inter alia* seeking to restrain the Defendants from committing the acts amounting to infringement of Plaintiffs' copyright in its various software programs.

2. The Plaintiff No.1, Microsoft Corporation is a company organized and existing under the laws of USA and the Plaintiff No. 2, Microsoft Corporation India Pvt. Ltd. is the wholly owned marketing subsidiary of the Plaintiff No.1, set up in the year 1989 to provide marketing, promotion, anti piracy awareness campaigns and actions and channel development support to the Plaintiff No.1. The Plaintiff No.1, which was set up in the year 1975, 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 popular software products of the Plaintiffs 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).

3. It is averred in the plaint that the software developed and marketed by the Plaintiffs is a “computer program” within the meaning of Section 2 (ffc) of the Copyright Act, 1957 [hereinafter referred to as the ‘Act’] and is included in the definition of literary work as per Section 2 (o) of the Act. The Plaintiff No.1 being the owner of the copyright in the aforesaid literary works within the meaning of Section 17 of the Act, claims entitlement to all the exclusive rights following from such ownership as set out in Section 14 of the Act.

4. The software products of the Plaintiffs can be purchased by the consumers *inter alia* in one of the following ways – (a) retail purchase, i.e., a Microsoft product purchased via off-the-shelf retail purchase from an authorised reseller which comes as an individually fully packaged boxed product; (b) with a new PC, i.e., a Microsoft product pre-installed on a new PC purchased; and (c) volume license, i.e., Microsoft products acquired by a Company under volume licenses from an authorised reseller. Each of the said mode of purchase contains a different set of unique and distinct anti-piracy features and usually, all the genuine software products of the

Plaintiffs comprise of Certificate of Authenticity, End-User License Agreement, Hologram Media (CD) and Documentation, which help identify a genuine software product with pirated or counterfeit products.

5. The copyright in the Plaintiffs' software products, it is stated, are infringed *inter alia* in one of the following ways – (a) **End-User Piracy**, i.e., when a Company or an educational institution uses unlicensed software or software in excess of the license or without license at all, which means pirated software; (b) **Counterfeiting**, i.e., when the pirates make exact duplicate CDs of the original software along with holograms, trademarks, packaging, instruction manual and Certificate of Authenticity and sell them to the customer as original at a price higher than a channel pirate; (c) **Channel Piracy**, i.e., when the pirate is a retailer, who sells software copied on re-writable CD ROMs to the consumers in the market at a fraction of the price of the original software; and (d) **Internet Piracy**, i.e., when infringers sell or distribute unlicensed software on the internet. Apart from the aforesaid methods of piracy, there is one other method, which is the most damaging form of piracy i.e. piracy by way of **Hard-Disk Loading**. In Hard-Disk Loading, it is stated, a computer dealer or seller usually loads/installs an unlicensed copy of Plaintiffs' software on to the Hard Drives (HDD) on the computers which are purchased by the customers. The computer dealer in such circumstances does not charge any price for the Plaintiffs' software or may occasionally charge a meagre sum for software installation, thus, making the

computer purchase very attractive for the customers. The customers may or may not be aware that the software copy loaded on to their computer is an illegal copy, making them liable for copyright infringement. Infringing copies of softwares by way of Hard-Disk Loading are not accompanied by Certificate of Authenticity (COA) labels, Holographic CDs, User Manuals, Booklets and genuine End-User License Agreement.

6. Plaintiffs allege that the cause of action for filing the present suit arose when in the month of October, 2007, the Plaintiffs received information that the Defendants were infringing their copyright and other intellectual property rights by carrying on the business of unauthorized Hard-Disk Loading of the Plaintiffs' software on to the computers sold by them to their customers. The Defendant No.1 is the proprietor of M/s. AGM Sales Corporation, the Defendant No.2 herein and engaged in the business of marketing and selling computer hardware including branded computers and peripherals. It is alleged that an independent investigator, namely, Mr. Jatin Batra, was deputed by the Plaintiffs to place an order for the purchase of a computer with the Defendants. The said investigator purchased a laptop computer system pre-loaded with Microsoft Windows XP and Microsoft Office, etc. from the Defendants for ₹30,500/- for which a retail invoice bearing No.5/10/2007-DC-7960, dated 5th October, 2007, was handed over to the said investigator. The laptop computer system so purchased was couriered by the investigator to the Plaintiffs and the same was inspected by the Plaintiffs technical

expert, Mr. I.P.Singh, who took printouts of the directory of its hard disk. The said printouts reveal that the following software programs of the Plaintiffs were installed on the laptop computer system sold by the Defendants:-

- **Operating System:**

Microsoft Windows XP Professional Version 2002

Registered to: Lenovo

Registration No.55274-644-0867167-23592.

- **Application Software:**

Microsoft Office 2003

(Word, PowerPoint, Outlook, Excel, Access, Infopath, Publisher)

Licensed to: Lenovo

Product ID: 73931-640-1953575-57485.

7. The aforesaid software programs, it is alleged, were not accompanied by any Original Certificates of Authenticity (COA), Holographic Software Installation CDs, User Instruction Manuals/Booklets and genuine copy of the End User License Agreement (EULA). The Plaintiffs, on 13.10.2007, addressed a legal notice to the Defendants informing them about their infringing activities, which notice was never replied to by the Defendants. Left with no other option, the Plaintiffs filed the present suit for permanent injunction.

8. Summons of the suit were issued to the Defendants, but inspite of service the Defendants did not care to appear and were proceeded *ex parte* on 17.07.2009. The Plaintiffs filed their *ex parte* evidence

by way of affidavit of PW1 - Mr. Achuthan Sreekumar, Constituted Attorney of the Plaintiff Nos. 1 and 2, who in his affidavit (Exhibit PW1/A) reiterated the contents of the plaint and proved the following documents:

- Copies of Letter of Authority and Power of Attorney executed by the Plaintiffs in favour of PW1 as Exhibits P1 and P2.
- Copies of Letter of Authority and Power of Attorney executed by the Plaintiffs in favour of Mr. Anand Banerjee, who was the Constituted Attorney of the Plaintiffs at the time of filing of the suit as Exhibits P3 and P4.
- Court certified copies of the Original Copyright Registration Certificates for the software programs Microsoft Windows 2000 Professional, Microsoft Office 2000 Professional, Microsoft Word 2000, Microsoft Windows 98, Microsoft Office 97 (Professional Edition), Microsoft Visual Studio 6.0, Microsoft Visual Basic Version 6.0, Microsoft Visual C++ Version 6.0, Microsoft Office XP Professional, Microsoft Windows XP Professional and Microsoft Office Professional Edition 2003 as Exhibits P5 to P15.

9. I have heard the learned counsel for the Plaintiffs and scrutinized the record. I am of the considered opinion that the Plaintiffs have in fact proved the facts averred in the plaint. The oral

as well as documentary evidence of the Plaintiffs is unrebutted. There is also on record the affidavit of the investigator, namely, Mr. Jatin Batra along with a visiting card of the Defendants and the retail invoice issued by the Defendants which is dated 05.10.2007 for the computer system purchased by the said investigator. The affidavit of the technical expert of the Plaintiffs, namely, Mr. I.P.Singh, who examined the infringing software on the Laptop along with the printouts of directory of hard disk and photographs of the Laptop containing the infringing software also stand proved on record. From the said evidence on record, which is unchallenged by the Defendants, I am satisfied that the Defendants are involved in acts of infringement of Plaintiffs' copyright, causing loss and damage to the Plaintiffs. The Plaintiffs are accordingly held entitled to a decree of permanent injunction, as prayed for and resultantly, the suit of the Plaintiffs is decreed in favour of the Plaintiffs and against the Defendants in terms of para 37(a) of the plaint.

10. So far as the relief of damages is concerned, this Court has time and again awarded punitive damages in cases dealing with infringement of trademark and copyright in order to deter those who undermine the law and has also held that the Defendant who chooses to absent himself from the proceedings must suffer the consequences. Reference may usefully be made to the decisions of this Court in *Time Incorporated vs Lokesh Srivastava & Anr 2005 (30) PTC 3 (Del)* and *Proctor & Gamble Company vs Joy Creators 2011 (45)*

PTC 541 (Del). In the case of ***Time Incorporated (supra)***, this Court laid down as follows:

“The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to this but suffer on account of the breach.”

11. Similarly in ***Proctor & Gamble Company (supra)***, this Court, relying upon its earlier judgments in ***Time Incorporated (supra)***, ***Hero Honda Motors Ltd. Vs. Shree Assuramji Scooters***, 2006 (32) PTC 117 (Del) and ***Microsoft Corporation Vs. Deepak Rawal*** MIPR 2007 (1) 72, made the following apposite observations:

“Also, the Court needs to take note of the fact that a lot of energy and resources are spent in litigating against those who infringe the trademark and copyright of others and try to encash upon the goodwill and reputation of other brands by passing off their goods and/or services as those of that well known brand. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, use the well reputed trademark of another person, so as to encash on the goodwill and reputation which that mark enjoys in the market, with impunity and then avoid payment of damages by remaining absent from the Court, thereby depriving the Plaintiff an opportunity to

establish actual profit earned by him from use of the infringing mark, which can be computed only on the basis of its accounts books. This would, therefore, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bonafide defence to make and therefore come forward to contest the suit and place their case before the Court.”

12. In view of the aforesaid, damages in the sum of ₹ 5 lacs along with the cost of the suit are also awarded in favour of the Plaintiffs and against the Defendants.

13. CS(OS) 103/2008 stands disposed of accordingly.

**REVA KHETRAPAL
(JUDGE)**

February 05, 2013