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

+ CS(OS) 130/2008

% **Date of decision :03rd July, 2014**

MICROSOFT CORPORATION & ANR Plaintiff

Through : Mr. Ashsish Somasia, Advocate

versus

MR. RAJEEV TREHAN & ANR.

..... Defendant

Through : None

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (Oral)

1. The plaintiffs have filed the present suit for permanent injunction restraining infringement of copyrights, delivery up, rendition of accounts of profits, damages etc. Summons were issued in the suit on 23.01.2008, 29.04.2008, 10.11.2008 and 29.04.2009. On 13.08.2009 Defendant no. 2 entered appearance and fresh summons were issued to Defendant no. 1. None appeared on behalf of Defendant no. 1 despite service, hence Defendant no. 1 was proceeded ex parte on 15.01.2010 and Defendant no.2 was deleted from the array of parties as there was no necessity of impleading the proprietary concern of its business name as defendant no.2.
2. On 17.08.2010, defendant no. 1 put in appearance and filed an application under Order IX Rule 7 CPC. On 30.09.2011, defendant no. 1, Mr. Rajiv Trehan stated on oath that he is not the proprietor of Defendant no. 2 firm and had no connection whatsoever with M/S Kudrat Infotech. On 31.01.2012 counsel for Defendant no. 1 stated that Defendant no. 2 is a sole proprietary concern and Mr Karan Deep Singh is the sole proprietor.

On 07.11.2013, order dated 15.01.2010 wherein Defendant no. 2 was deleted from the array of parties and Defendant no. 1 was proceeded ex parte was recalled and fresh summons were issued to Defendant no. 2 by all modes. Despite service, none appeared on behalf of defendant no. 2 and consequently Defendant No. 2 was proceeded ex parte on 03.07.2014.

3. The Plaintiffs have filed affidavit by way of evidence of Constituted Attorney of Plaintiff No. 1 and Plaintiff No. 2 Mr Achuthan Sreekumar (PW1). Letter of Authority and Power of Attorney in favor of Mr Achuthan Sreekumar has been exhibited as **Ex. P-1** and **Ex. P-2** respectively. PW1 has deposed that at the time of filing of the present suit, Mr Anand Banerjee was the constituted attorney and that he recognizes the signature of Mr Anand Banerjee, affixed in the plaint in his capacity as the constituted attorney of plaintiffs. A notarized copy of the Power of Attorney and the letter of Authority as executed by the Plaintiff No.1 and Plaintiff No. 2 in favor of Mr Anand Banerjee have been exhibited as **Ex. P-3** and **Ex. P-4**
4. PW1 has deposed that Microsoft Corporation is a company organized and existing under the laws of the State of Washington, USA, having their principal office at One Microsoft Way, Redmond, WA 98052-6399, USA. He has further deposed that Plaintiff No.2, Microsoft Corporation India Private Limited is the wholly owned marketing subsidiary of the Plaintiff No.1 Microsoft Corporation, having their office at Eros Corporate Towers, 5th Floor, Nehru Place, New Delhi-110 019, and is an entity incorporated and registered under the Indian Companies Act, 1956. The 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 the Plaintiff No. 1 and/or its affiliates.

Additionally, the products of the Plaintiff No. 1 are distributed in New Delhi through various authorized distributors.

5. PW1 has also deposed that Plaintiff No. 1 (Microsoft) was set up in the year 1975 and is the biggest software publisher for personal and business computing in the world. The Plaintiff No. 1 engages in the development, manufacture, licensing, and support of a range of software products for various computing devices. Its software products include operating systems for servers, personal computers (PC), and intelligent devices; server applications for distributed computing environments; information worker productivity applications; and software developments tools. Plaintiff No. 1 also sells video game console (Xbox), video games and engages in online business through various Internet portals (MSN etc.). 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). These software are today installed and used on millions of computers all over the world, including India. He further deposed that the software developed and marketed by the Plaintiffs is a "computer programme" within the meaning of Section 2 (ffc) of the Copyright Act, 1957 and included in the definition of a literary work as per Section 2 (o) of the Act.
6. PW1 has also deposed that the Plaintiffs Company, apart from computer software, also manufactures a large range of computer peripherals (hardware). The Microsoft Hardware group established in 1982, has been an integral part of the Plaintiffs' growth for 26 years. During this period, the Plaintiffs have built their reputation for technological expertise in hardware by developing and launching a series of successful devices including the economically designed Mouse and Keyboard.

7. PW1 has further deposed that the Plaintiffs' computer programmes are "works" that have been first published in the USA and are also registered in the USA. These programs have been created by the employees of the Plaintiff No. 1, for the 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 made 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 said copyrights.
8. PW1 has also deposed that the rights of authors of member countries of the Berne and Universal Copyright Conventions are protected under Indian copyright law. India and the USA are signatories to both the Universal Copyright Convention as well as the Berne Convention. The Plaintiff No. 1's works are created by authors of member countries and originate from and are first published in the said member countries. The Plaintiff No. 1's works are, thus, protected in India under Section 40 of the Copyright Act, 1957 read with the International Copyright Order, 1999.
9. Mr. Achuthan Sreekumar, PW1, has further deposed that the Plaintiff No. 1 being the owner of the copyright in the aforesaid literary works within the meaning of 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 Copyright Act, *inter alia*,
 - a) the right (to **reproduce** the work in any material form, including storing it in any medium by electronic means.
 - b) to **issue copies** of the work.
 - c) to make an **adaptation** or **translation** of the work

- d) for a computer programme, the additional right to **sell** or give on **commercial rental**, or offer for sale or commercial rental any copy of the computer programme.
- e) the right to **authorise** the doing of any of the aforesaid acts.

10. He has also deposed that under Section 51 (a) (i) of the Copyright Act, copyright in a work shall be deemed to be infringed, when any person, without a license from the owner of copyright, does anything, the exclusive rights of which are granted to the owner of copyright, such as the ones enumerated in paragraph above (the *primary acts* of infringement).
11. PW1 has further deposed that under Section 51 (b) of the Act, copyright in a work shall be deemed to be infringed, when any person, without a license from the owner of copyright,
 - (i) makes for sale or hire, or sells or lets for hire, or by way of trade, displays or offers for sale or hire any infringing copies of the work; or
 - (ii) permits for profit, any place to be used for the communication of the work to the public where such communication constitutes an infringement of copyright in the work; or
 - (iii) distributes, either for the purpose of trade or to such an extent as to affect prejudicially the owner of copyright, any infringing copies of the work; or
 - (iv) by way of trade exhibits in public; or
 - (v) imports into India, any infringing copies of the work.

The aforesaid acts are also termed as *secondary acts* of infringement.

12. PW1 has also deposed that, the Plaintiffs have developed, *inter alia*, the following computer programs that are applied and are used by various business establishments and home users, and includes, among others:

- a. **Microsoft Windows 2000 Professional;**
- b. **Microsoft Office 2000 Professional;**
- c. **Microsoft Word 2000;**
- d. **Microsoft Windows 98;**
- e. **Microsoft Office 97 (Professional Edition);**
- f. **Microsoft Visual Studio 6.0, Enterprise Edition;**
- g. **Microsoft Visual Basic, Version 6.0 (Enterprise Edition);**
- h. **Microsoft Visual C++ 6.0**
- i. **Microsoft Office XP Professional**
- j. **Microsoft Windows XP Professional**
- k. **Microsoft Office Professional Edition 2003**

The 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 owned by the Plaintiffs have been exhibited as **Ex. P5, Ex. P6, Ex. P7, Ex. P8, Ex. P9, Ex. P10, Ex. P11, Ex. P12, Ex. P13, Ex. P14 and Ex. P15.**

13. PW1 has also deposed that Plaintiffs suffers incalculable damage to their intellectual property rights and business on account of various forms of copyright piracy. A brief description of common methods of copyright infringement employed in relation to computer software is described below:

- Reproducing the Plaintiffs' software and the packaging of that software, so that purchasers are deliberately misled into believing that the product they are buying is genuine software.
- Reproducing the Plaintiffs' software by loading them on the Hard Drives (HDDs) of the computer without the license with the help of pirated CDs or in excess of the software licensed purchased for a designated no. of computers.
- Reproducing or "burning" the Plaintiffs' software onto a blank CD, where no attempt is made to represent that the copy is genuine.
- Reproducing a number of the Plaintiffs' programs on a single CD-ROM, known as a "compilation" CD.

14. PW1 has further deposed that in the month of November 2007, the plaintiffs received information that the Defendants were engaged in infringing Plaintiffs' copyrights, trademarks and other intellectual property rights by carrying on the business of unauthorized Hard Disk Loading of the Plaintiffs' software on the branded computer systems sold by the Defendants 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.

15. PW1 has also deposed that in order to ascertain if the Defendants were indeed involved in such infringing activities, the plaintiffs requisitioned the services of an independent investigator, Mr Santosh Dwivedi, who purchased a computer system from the Defendants on 6th November 2007, onto which pirated/unlicensed versions of the Plaintiffs' software programs had been illegally loaded. Further on 13th November 2007, the computer system as purchased from Defendant was examined by the Plaintiff's technical expert, Mr Gurjot Singh. Detailed affidavit of the independent investigator and technical expert has been filed in the present proceedings.
16. On 13th November 2007, Plaintiff's Technical expert photographed the box and thereafter opened one said box and inspected the laptop computer system and took printouts (screenshots) of the directory of his hard disk. The printouts of the said directory clearly revealed the fact that following software programs of the plaintiff were present on the laptop, computer systems as sold by the defendants:

Operating System: Microsoft Windows XP Professional Version 2002

Registered to: Acer

Registration No.: 76487-640-8365391-23137

Application Software: Microsoft Office 2003 (Word, PowerPoint, Outlook, FrontPage, Excel, Access, Infopath, Publisher)

Licensed to: Acer JBB

Product ID: 73931-640-0000106-57403

17. The technical expert opined that the Plaintiff's programs as contained on the hard disk of the laptop computer system were unlicensed and/or pirated versions of the Plaintiff's software programs.
18. PW1 has further deposed that since computer programs are as much an outcome of concentrated human skill, labor and ingenuity as any other copyrighted work, and since they are vital components of advanced information processing technology, it is imperative that the illegal trade activities of traders like the Defendants be strictly restrained and the dangerous growth of computer software piracy be stemmed. The computer industry is a high investment industry - not only in terms of money but also in terms of the valuable time, skill and effort, which goes into the development of new and advanced computer programs and software. As such, the Plaintiffs like others engaged in this industry, banks heavily upon the copyright protection afforded to their computer software in jurisdictions in which piracy and infringement of their works takes place.
19. PW1 has also deposed that the loss and damage incurred by the Plaintiffs on account of Defendant's copying and illegally distributing copies of the Plaintiffs' computer programs run into lakhs and lakhs of Rupees. Since it is difficult to quantify the "exact" monetary extent of losses, the Plaintiffs bases their claim of damages of Rs. 20 lakhs on one or more of the following factors:
 - (i) Actual illegal profits earned by the Defendants from selling more computers loaded with pirated software programs of the Plaintiffs; and/or

(ii) Actual revenue lost by the Plaintiffs due to loss of sales of original software arising out of the illegal/infringing activities of the Defendants.

(iii) Damage to Plaintiffs' enormous reputation and goodwill in the following manner:

(a) The purchasing customers of the computers sold by the Defendants with pirated software of the Plaintiffs, will in all likelihood believe that such infringing practice of the Defendants is authorized by the Plaintiffs;

(b) If the pirated copies of the Plaintiffs software programs ever fails or get corrupted or malfunctions, the Defendant's customers, in receipt of those programs, will accuse the Plaintiffs and their software products of being of poor quality. Pirated software is more prone to virus attacks and malfunctions for obvious reasons.

20. I have heard counsel for the plaintiff and carefully perused the documents which have been placed on record along with the affidavit by way of evidence which has been filed. Court certified copies of the Original Copyright Registration Certificates for the software programs as owned by the plaintiffs have been exhibited as **Ex. P5, Ex. P6, Ex. P7, Ex. P8, Ex. P9, Ex. P10, Ex. P11, Ex. P12, Ex. P13, Ex. P14 and Ex. P15.**
21. Insofar as the grant of injunction is concerned, the issue is hardly contentious. On the basis of the documents placed on record plaintiffs have been able to establish that plaintiffs are the owner of the copyright in its computer programme within the meaning of Section 2(ffc) of the Copyright Act, 1957 and is included in the definition of literary work as per Section 2(o) of the said Act. Section 17 of the Copyright Act, 1957

gives exclusive rights to the plaintiff to exploit all rights emanating from the ownership of its copyright, as set out in Section 14 of the Copyright Act.

22. The evidence of the plaintiffs has gone unchallenged and un-rebutted. On the basis of the documents filed along with the evidence, it stands established that the defendants have violated the copyright of the plaintiffs by carrying on the business of Hard Disk Loading i.e. pre loading various software programs of the plaintiffs on to the computers sold by the defendants, causing loss and damage to the plaintiffs.
23. In view of the aforesaid, the plaintiffs are entitled to a decree of permanent injunction in terms of prayer 'a' of paragraph 38 of the plaint. The defendants are accordingly restrained from copying, selling, offering for sale, distributing, hard-disk loading, issuing to the public, counterfeit/unlicensed versions of the plaintiffs software programs in any manner which would amount to infringement of plaintiffs' copyright in its computer programs and related manuals.
24. The last aspect to be considered is the issue of damages on account of infringement of copyright of the plaintiffs and also for loss of sales and reputation.
25. The Defendants have deliberately stayed away from the present proceedings as a result of which an enquiry into the accounts of the Defendants for determination of charges cannot take place.
26. In *Microsoft Corporation v. Deepak Raval* reported at MIPR 2007 (1) 72, this Court observed that in our country the Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of Defendant, the exact figures of sale made by them under the infringing copyright and/or

trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities.

27. In *Larsen and Toubro Limited v. Chagan Bhai Patel* reported at MIPR 2009 (1) 194, this Court has observed that it would be encouraging the violators of intellectual property, if the Defendants notwithstanding having not contested the suit are not burdened with punitive damages.
28. Our discussion on punitive damages will remain incomplete without revisiting the landmark case of *Time Incorporated v. Lokesh Srivastava and Anr.* reported at 2005 (30) PTC 3 (Del). The said case can be rightfully acknowledged as a harbinger of the practice of awarding punitive damages in intellectual property rights matters in India, a trend which all Courts are zealously endorsing and following today. In the said case, while awarding punitive damages Rs. 5 lakhs in addition to compensatory damages also of Rs. 5 lakhs, R.C. Chopra, J. observed that it was about time the Courts dealing actions for infringement of trade marks, copyrights, patents, etc. should not only grant compensatory damages but also award punitive damages with a view to discourage and dishearten law-breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. Following observations of the learned single Judge in paragraph 7 of the said case, incarnating the jurisprudence underlying the practice of awarding punitive damages in India, are reproduced as under:

“7. Coming to the claim of Rs. 5 lacs as punitive and exemplary damages for the flagrant infringement of the Plaintiff's trade mark, this Court is of the considered view that a distinction has to be drawn between compensatory damages and punitive damages. The award of compensatory damages to a Plaintiff is aimed at compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrongdoer and the like minded from indulging in such unlawful activities. Whenever an action has criminal propensity also the punitive damages are clearly called for so that the tendency to violate the laws and infringe the rights of others with a view to make money is curbed. 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 law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on accounts of the breach. In the case in hand itself, it is not only the Plaintiff, who has suffered on account of the infringement of its trade mark and Magazine design but a large number of readers of the Defendants's Magazine 'TIME ASIA SANSKARAN' also have suffered by purchasing the Defendants' Magazines under an impression that the same are from the reputed publishing house of the Plaintiff company.”

(Emphasis supplied)

29. Coming back to the facts of the present case, on the basis of the evidence placed on record, it has already been established that the Defendants are pirating the software of the Plaintiff and are also loading the same on the hard disk of the computers sold by them without taking permission from the Plaintiff. However, inasmuch as the Defendants have chosen not to appear, it may not be of any use to pass a decree of rendition of accounts. The Plaintiff will nevertheless be entitled to damages in light of the judicial dicta observed in *Times Incorporated (supra)* and the other aforementioned cases.
30. For the reasons stated above, the plaintiffs have made out a case for grant of decree as prayed in the plaint. Accordingly the suit is decreed in favor

of the plaintiffs and against the defendants. Plaintiff is also entitled to damages to the tune of Rs. 5 Lacs.

31. Decree sheet be drawn up accordingly.

(G.S.SISTANI)
JUDGE

JULY 3, 2014
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