

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

Reserved on: 25.11.2022

Date of decision: 14.12.2022

+ **CS(COMM) 1049/2016 & I.A.7150/2010**

MICROSOFT CORPORATION & ANR Plaintiffs

Through: Mr.Bharat S. Kumar, Adv.

versus

RUPESH WAIDANDE & ANR Defendants

Through: Ms.Ajune Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present Suit has been filed by the plaintiffs praying for a decree of permanent injunction against the defendants restraining them from directly or indirectly reproducing/storing/installing and/or using pirated/unlicensed software programmes of the plaintiff no.1, thereby infringing the copyright in the plaintiffs' computer programmes/software titles. The plaintiffs further pray for delivery up, rendition of accounts, damages as also costs of the Suit.

FACTUAL BACKGROUND

Case of the plaintiffs:

i) Software

2. The plaintiff no.1 was set up in the year 1975 under the laws of the State of Washington, United States of America (in short, 'USA')

and is a global software publisher for personal and business computing. The software products of the plaintiff no. 1 include operating systems for servers, personal computers (in short, 'PC') and intelligent devices; server applications for distributed computing environments, information worker productivity applications and software development tools.

3. The plaintiff no.2 is the Indian subsidiary of the plaintiff no. 1, set up in the year 1989. The plaintiff no.2 provides marketing, promotion, anti-piracy awareness campaigns and actions, and channel development support to the plaintiff no.1 or/and its affiliates in India.
4. The plaintiff no.1's popular software products include the '*Microsoft Windows Operating Systems*' (various versions) as also application software such as '*Microsoft Office*' and development tools like '*Visual Studio*' and '*Visual C++*'. The '*Microsoft Windows*' family of the plaintiff no. 1 includes software tools like *Windows 1.0*, *Windows 95*, *Windows 98*, *Windows Me*, *Windows 2000*, *Window XP Home* and *Windows XP Professional*, among others.
5. The '*Microsoft Office*' family includes versions like *Office 97*, *Office 2000*, *Office XP*, *Office 2003*, *Office 2007*, *Office 2010* and the product line includes *Microsoft Access*, *Microsoft Excel*, *FrontPage*, *Microsoft Word*, *PowerPoint*, *Microsoft Project*, *Publisher* and *Outlook* to name a few. These software are today installed and used on millions of computers all over the world,

including in India. The products of the plaintiff no.1 are distributed in New Delhi through various authorized distributors.

ii) End User Agreement

6. The computer programs of the plaintiff no.1 are always licensed in a 'soft' version of the 'End-User License Agreement', 'Registration Card' and other relevant 'User Manuals', all contained in the Original CD-ROM carrying the actual software. The licenses of the latest versions of the plaintiff no.1's computer programs are either bought off the shelf or a licensed copy of the software is supplied as Original Equipment Manufacturers (in short, 'OEMs') along with a PC, however, in both the circumstances the software requires activation.
7. The entire process of software registration can be completed via Internet or by speaking with a customer service representative of the plaintiff no.1. A unique Product Key or Installation ID is required for each installation. During the process of installation, the user is required to fill in the Installation ID or a unique Product Key number in order to finalize the installation and to activate the software. To ensure the end user's privacy, the plaintiffs use a one-way mathematical algorithm to create the hardware hash used by Product Activation to create the Installation ID. This ID is unique to the particular PC on which the software is loaded.

iii) Copyright of the plaintiffs in the Software and End User Agreement

8. Under the provisions of the Copyright Act, 1957 (in short, 'the Act'), the software programmes developed and marketed by the plaintiff no. 1 (and the plaintiff no.2 in India) would fall within the definition of '*computer programmes*' under Section 2(ffc) and are also included in the definition of a '*literary work*' under Section 2(o) of the Act. The plaintiff no. 1's computer programmes are '*works*' that were first published and are also registered in the USA.
9. It is further asserted by the plaintiffs that the Supplementary User Instructions and Manuals supplied along with the software also fall within the ambit of '*original literary works*' as contemplated under Section 2(o) read with Section 13(1)(a) of the Act.
10. The plaintiffs assert that as the computer software created as also the final version of the End-User Agreement and Manuals being '*work for hire*' created by employees of the plaintiff no. 1, the plaintiff no. 1 would be the first owner of the copyright vested in the aforementioned works under Section 17(c) 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, is therefore entitled to all the exclusive rights flowing from such ownership as set out in Section 14(b) of the Act.
11. It is further stated in the Plaint that on account of both the USA and India being member-countries of the Berne Convention, Universal Copyright Conventions and the World Trade Organization (in short, 'WTO'), the rights of authors in the USA would be equally

protected under the aegis of Section 40 of the Act read with the International Copyright Order, 1999.

iv) Nature of infringing activity by the defendants

12. The plaintiffs assert that they suffer incalculable damages to their intellectual property rights on account of various instances of copyright infringement of their software programmes. The plaintiff describes such methods of infringement in paragraph 13 of the Plaint, reproduced hereinbelow:

“...i. Reproducing the Plaintiffs' softwares and the packaging of softwares, so that purchasers are deliberately misled into believing that the product they are buying is genuine software.

ii. Reproducing or "burning" the Plaintiff's softwares onto a blank CD, where no attempt is made to represent that the copy is genuine.

iii. Reproducing a number of the Plaintiffs' programs on a single CD-ROM, known as a "compilation" CD.”

13. It is the case of the plaintiffs that the defendant no. 1, in the present case, is the IT head of the defendant no.2-company (entity engaged in the business of providing document and printing related to BPO services) and carries out its business activities from its registered office located in Mumbai, as well as from other offices.
14. It is the case of the plaintiffs that in the month of April 2010, the plaintiffs came to know from its market sources that the defendants were illegally using their software programmes in which the copyright of the plaintiff no.1 vests- including *Microsoft Windows*,

Microsoft Office and Windows Server belonging to the plaintiff no. 1, for commercial purposes at its offices.

15. The plaintiffs subsequently conducted enquiries through their channel network to determine the number of licenses that have been purchased by the defendants. This process of enquiry culminated in the plaintiffs conducting a search within its database to determine the details of the software licenses with respect to the plaintiffs' software titles held by the defendants at its offices. The said search conducted by the plaintiffs revealed that the defendants had purchased the following software from the plaintiffs:

- "a. 8 Upgrade licenses of Microsoft Office;*
- b. 4 license of Visual Studio NET Professional;*
- c. 1 license of SQL Server Standard;*
- d. 2 licenses of Windows Server with CALs*
- e. 5 Windows licenses*
- f. 26 Windows upgrade Licenses."*

16. Subsequently, the plaintiffs deputed an Investigator to conduct enquiries about the defendants' use of the plaintiff no.1's software programmes. From the telephonic conversations between the Investigator and the defendant no.1, the plaintiffs learnt that the defendants have about 130 (One Hundred Thirty) computer systems at their registered office located in Mumbai and most of the said installations have the plaintiffs' software programmes installed in it; the licenses held by which do not match with their

usage and indicate that the defendants are indulging in the unlicensed use of plaintiff no.1's software programmes.

17. Thereafter, the plaintiffs sent repeated requests to the defendants for the defendants to conduct a Software Management Assessment (in short, 'SAM') Review Program to comprehensively evaluate the extent of the piracy of the plaintiffs' software by the defendants. However, despite repeated follow ups made by the plaintiffs, the defendants chose not to respond to the said requests.

COURT PROCEEDINGS IN THE MATTER

18. Vide order of this Court dated 24.05.2010, an *ad-interim ex-parte* order of injunction was granted in favour of the plaintiffs and against the defendants, restraining the defendants from infringing the plaintiffs' software program. A Local Commissioner was also appointed by the Court to investigate the extent of alleged infringement.
19. The learned Local Commissioner submitted his report dated 04.06.2010.
20. This Court subsequently referred the parties to the Delhi High Court Mediation and Conciliation Centre (in short, 'Mediation Centre') vide order dated 27.05.2011 to settle their *inter se* disputes, however, the parties failed to arrive at an amicable settlement.

21. On account of failure to arrive at an amicable settlement, this Court vide order dated 21.11.2013, framed the following issues:

“i) Whether the defendant has infringed the copyright of the plaintiffs in software programs such as SQL Server, Microsoft Office, Microsoft Windows Operating System and their various versions, etc.? OPP

ii) Whether the plaintiff is entitled to a decree of permanent injunction as prayed for in the plaint? OPP

iii) Whether the plaintiffs are entitled to a claim of damages of Rs.20,00,200/- or of any other lesser amount? OPP

iv) Whether the plaintiffs are entitled to any other relief as prayed for in the plaint? OPP”

22. As none was appearing for the defendants, vide order of this Court dated 28.08.2018, the defendants were proceeded *ex-parte*.

EVIDENCE OF THE PLAINTIFF:

23. Mr. Vishal Ahuja, the constituted attorney of the plaintiffs in the present suit, who also filed the affidavit of admission/denial of the defendants' documents, was examined as **PW-1** in the present suit. He filed his evidence by way of affidavit(s)-**Ex PW1/A** and **Ex. PW1/B**.

SUBMISSIONS ON BEHALF OF THE LEARNED COUNSELS FOR THE PLAINTIFFS

24. The learned counsel for the plaintiffs submits that the unauthorised installation and use of the plaintiffs' software on the computer

systems of the defendants amounts to an unauthorized reproduction of the plaintiff no. 1's copyrighted software and consequently, has resulted in infringement of the plaintiff no. 1's copyright under Section 51 of the Act.

25. It is further stated that the defendants have a total of 130 installations of the plaintiffs' software programmes at their registered office but only hold approximately 46 (forty-six) *bona fide* licenses for the said software programmes. The learned counsel for the plaintiffs further submits that this form of corporate piracy is the most damaging form of software piracy affecting the plaintiffs.

ANALYSIS AND FINDINGS

26. I have considered the submissions made by the learned counsel for the plaintiffs. My issue wise findings are as under:

i) Issue No.(i)

27. Mr. Vishal Ahuja- PW1 has filed as **Exh. PW1/3** Copyright Registration Certificates in respect of few software titles owned by the Plaintiffs. Plaintiff No. 1 has, therefore, been able to prove that it is the owner of the copyright in the computer programs and the Supplementary User Instructions and Manuals, and are entitled to the exclusive rights flowing from such ownership as set out in Section 14 of the Copyright Act, 1957.
28. The witness has produced the End User License Agreement (EULA) of the plaintiff Companies as **Exh. PW1/4**, which it claims is

accompanied with all genuine licensed software of the plaintiff no. 1.

29. The assertion of the witness that on a search within the plaintiffs database- 'Microsoft Sales', it was found that the number of licenses held by the defendants was much lower than the actual usage, has gone uncontested by the defendants.
30. Moreover, the learned Local Commissioner in his report dated 04.06.2010 has found infringement on part of the defendants. The report of the Local Commissioner (**Exh. PW 1/5**) has remained unchallenged by the defendants. The report also found blatant attempts on part of the defendants to destroy evidence of their infringement.
31. The defendants have failed to show proof of genuine use of the plaintiffs' software programmes for all the installations that were in use at their organizations.
32. Therefore, from the evidence led, it is evident that the defendants have infringed upon the copyright of the plaintiffs in their software programmes.
33. Issue No.(i) is held in favour of the plaintiffs and against the defendants.

ii) Issue No.(ii)

34. In view of the finding of this Court on Issue No.1, it is established that the defendants were engaged in infringing the software

programmes of the plaintiffs and, therefore, the plaintiffs have made out a case of permanent injunction against the defendants.

35. The Issue No.(ii) is decided in favour of the plaintiffs and against the defendants.

iii) Issue No.(iii)

36. The plaintiff has relied upon the Local Commissioner Report (**Exh. PW1/5**) and the Price Lists (**Exh. PW1/6**), to arrive out at a claim of Rs. 27,34,785/- as damages. In support, the plaintiff has filed the affidavit dated 03.08.2015 of Mr. Vishal Ahuja (**PW1**) as **Ex. PW1/B**. As the Issue No. 1 has been decided in favour of the plaintiffs, the plaintiffs are held entitled to the damages of Rs. 20,00,200/- against the defendants, as claimed in prayer made in paragraph 30(IV) of the plaint.

37. The issue no. (iii) is decided in favour of the plaintiffs and against the defendants in the above terms.

iii) Issue No.(iv)

38. In view of the above findings, the plaintiffs are also held entitled to the relief of delivery up of all the impugned products, being unlicensed/pirated software confiscated by the learned Local Commissioner, and as claimed by the plaintiff in prayer made in paragraph 30(II) of the plaint.

39. The plaintiffs are also held entitled to recover costs of the Suit from the defendants.

40. Issue no. (iv) is decided as above.

RELIEF

41. Accordingly, a decree of permanent injunction in terms of the prayer mentioned in paragraph 30 (I) of the Plaint is passed in favour of the plaintiffs and against the defendants.

42. A decree of delivery up, in terms of paragraph 30 (II) of the Plaint is passed in favour of the plaintiffs and against the defendants. This would result in the seized goods released to the defendants on *superdari*, to be handed over to the plaintiffs for destruction and the needful shall be done within a period of four weeks from today.

43. Damages of Rs. 20,00,000/- are granted in favour of the plaintiffs and against the defendants. The plaintiffs are also entitled to receive the costs of the present proceedings.

44. Since damages have been awarded to the plaintiffs in the present suit, the prayer for rendition of accounts in paragraph 30 (III) of the Plaint is rejected.

45. Let a decree-sheet be drawn accordingly.

NAVIN CHAWLA, J.

DECEMBER 14, 2022/DJ/AB