

[MANU/DE/0331/2005](#)

IN THE HIGH COURT OF DELHI

CS(OS) No. 103/2003

Decided On: 22.02.2005

Appellants: Microsoft Corporation
Vs.

Respondent: Mr. Yogesh Papat and Anr.Hon'ble Judges:
Pradeep Nandrajog, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Pravin Anand, Adv.

For Respondents/Defendant: Nemo

Subject: Intellectual Property Rights

Catch Words:

Claim, Compensation, Computer, Computer Programme, Computer Software, Copy, Copying, Copyright, Damage, Deceptively Similar, Duplicating Equipment, Electronic, Employee, Expert, Good, Infringement, Infringing, Infringing Copies, Intellectual Property, Licence, Mark, Name, Owner, Passing Off, Property, Proprietor, Purchaser, Register, Registered, Registration, Report, Sale, Selling, Servant, Similar, Software, Threat, Trade Mark, User, Verify, Work

Cases Referred:

Microsoft Corporation v. Electrowide Ltd. and Anr., (1997) FSR 580

Disposition:

Suit allowed

JUDGMENT

Pradeep Nandrajog, J.

1. Plaintiff is the registered proprietor of the trade mark 'MICROSOFT'. The mark is registered in class 9 and 16 vide registration No. 430449-B and 430450-B. Plaintiff claims to have created various kinds of software in which plaintiff claims a proprietary right. When the software is sold, purchaser has a licence agreement setting out the terms of permissible user of the software which is contained in a floppy. CD/floppies are handed over. Term of the licence agreement permits the use of the CD's/floppies, as per conditions.

2. It is stated in the plaint that the defendants, without a licence are loading the **software** on the hard disk of computers being sold by them and in this manner are causing financial loss to the plaintiff. It is alleged that the defendants do not have any permission from the plaintiff to copy or sell the licenced programmes as per **software** developed by the plaintiff. Following reliefs are prayed for:-

a) An order for permanent injunction restraining the defendants, their directors, officers, servants and agents and all others acting for and on their behalf from copying, selling, offering for sale, distributing, issuing to the public, counterfeit/unlicensed versions of the Plaintiffs' **software**, in any manner, amounting to **infringement** of the Plaintiffs' copyright in the said computer programs and related and related manuals;

b) An order for permanent injunction restraining the defendants, their directors, officers, servants and agents and all others acting for and on their behalf, from unauthorisedly selling, offering for sale, distributing the Plaintiff's **software** and/or any other product to which the Plaintiffs' trademark, or any deceptive variants thereof have been applied without the license of the Plaintiffs' amounting to **infringement** of Plaintiffs' registered trademarks;

c) An order for permanent injunction restraining the defendants, their directors, officers, servants and agents and all others acting for and on their behalf, from unauthorisedly selling, offering for sale, distributing the Plaintiffs' **software** and/or any other product to which the Plaintiffs' trademarks, or any deceptive variants thereof has been applied without the license of the Plaintiffs, amounting to passing off of the counterfeit/unlicensed **software** and products as genuine products of the Plaintiffs;

d) An order for delivery-up to the Plaintiffs, of all the counterfeit/unlicensed copies of the Plaintiff's **software**, and/or articles/**software** to which have been applied the Plaintiffs' trademarks, or any other mark which may be identical with or deceptively similar to the Plaintiffs trademarks without license of the Plaintiffs, the duplicating equipment used in the copying the **software** of the Plaintiffs, including computers, compact disc writers, stampers, burners, "plates" as defined in Section 2(t) of the Act, hard disks, diskettes, packaging and advertising material, labels, stationery articles and all other infringing material under Section 59 of the Act;

e) An order for rendition of accounts of profits illegally earned by the defendants by reason of **infringement** of the Plaintiff's copyright, including conversion damages which are presently indeterminate, **infringement** of trademarks as aforesaid and by passing off their goods and/or business as the goods and business of the Plaintiff, and a decree be passed against the defendants in the sum of the amount so ascertained."

3. As per the plaint, defendant No. 1 was found to be carrying on operations on behalf of defendant No. 2.

4. Defendants chose not to enter appearance after being served. Vide order dated 20.2.2004 they were proceeded ex-parte. Plaintiff has led evidence by way of affidavit.

5. Evidence by way of affidavit of Mr. Nikhil Krishnamurthi proves the following:-

(i) Ex.P.1, power of attorney issued by the plaintiff company in favour of Mr. Nikhil Krishnamurthi to institute the suit, sign and verify the pleadings.

(ii) That the plaintiff is in the field of computer programmes (**Software**), the said computer **software** includes various operating systems such as MS-DOS, Microsoft Windows and Microsoft Office.

(iii) Ex.P.2, P.3, P.4 and P.5, being the computer programmes developed by the plaintiff named (a) Microsoft Office 2000, (b) Microsoft Windows 98 Operating Systems, (c) Microsoft Visual Basic (d) Microsoft Visual C++.

(iv) Ex.P.6 and P.7 being the certificate of registration pertaining to the registration of the trade mark Microsoft in name of the plaintiff.

(v) Ex.P.8 being the affidavit of Mr. Vikas Arora, an employee of the plaintiff who purchased a computer from the defendants loaded with the pirated **software** of the plaintiff.

(vi) Ex.P.9 being the affidavit of a technical expert Mr. Sunil John who studied the hard disk of the computer purchased from the defendants by Mr. Vikas Arora and reported loading of pirated **software** of the plaintiff on the hard disk.

6. Plaintiff has also filed affidavit by way of evidence of Shri Sanjiv Sharma a Chartered Accountant. Said evidence brings on record and proves the following:-

(i) Evidenced from the bill issued by the defendants on 3.9.1992, the fact that the defendants are in business since 1.4.1996 because of the reason the bill records sales tax registration w.e.f. 1.4.1996.

(ii) From the bill of the defendants, on the sale price of a computer it is established that the sale price was Rs. 27,050/- as of 3.9.2002.

(iii) On the assumption that the defendant sell approximately 100 computers a year, which is purely assumptive, on the further assumption that keeping in view the operating systems Windows 1998, 400 computers would be load with said system, lesser sales of the other **software**, assumption would be that 200 computers and 20 computers respectively were loaded with the **software** Office 2000 STD and Visual Studio 6.0, on the cost per unit of the licenced **software** estimated loss of business to the plaintiff comes to Rs. 64 lacs.

(iv) Minus dealers profit of Rs. 2.40 lacs, net revenue loss has been worked out at Rs. 61.6 lacs.

(v) On the basis of the annual returns of the plaintiff, average profit having been worked out over the last 4 years, evidence of this witness establishes that the gross profit of the plaintiff being 32.1%, loss of profit to the plaintiff comes to Rs. 19.75 lacs.

7. Affidavit of Mr. Vikas Arora proved as Ex.P.8 by Mr. Nikhil Krishnamurthi establishes that when he approached defendant No. 1 for sale of a computer, defendant No. 1 agreed to sell a computer loaded with the following **software** of the plaintiff:-

(a) Visual Studio 6.0

(b) MS Windows 98

(c) MS Office 2000.

8. Affidavit further establishes that defendant No. 1 did not issue a formal bill/cash memo but handed over his business card in which name of defendant No. 2 was printed showing said defendant to be a dealer in computers and electronic components. The affidavit of Mr. Vikas Arora further establishes that on his instances defendant No. 1 gave a bill dated 3.9.2002 pertaining to sale of a computer. The bill does not list any **software**, **software** literature or CD being sold.

9. Annexure P.9 proved by Shri Nikhil Krishnamurthi, being the affidavit of Mr. Sunil John, a computer expert, proves that the hard disk of the computer purchased by Mr. Vikas Arora was being loaded, by the defendants with the **software** of the plaintiff.

10. Evidence on record establishes that Mr. Nikhil Krishnamurthi is competent to file and institute the suit on behalf of the plaintiff. The verification of the plaint is in order. Evidence also establishes that the plaintiff is the registered proprietor of the trade mark/name MICROSOFT and that the copyright in the computer **software** programmes:-
(a) MS Windos 98, (b) MS Office 2000 and (c) MS Visual Studio 6.0 vests in the plaintiff.

11. Evidence further establishes hard disk piracies by the defendants. It establishes that the defendants are pirating **software** of the plaintiff and are loading the same on the hard disk of the computers sold by said defendants without permission from the plaintiff.

12. Though assumptive i.e. based on the assumption of sale of 100 computers each year and on the basis of the popularity of the computer **software**, as also sold computers being loaded with the pirated **software**, loss of profit to the stands established.

13. It may be true that the financial loss is based on certain assumption, but it cannot be helped for the reason the defendant has chosen to remain ex-parte.

14. Assertion of the witnesses of the plaintiff that the plaintiff has a copyright in the pirated **software** has gone un rebutted.

15. Evidence on record establishes that the defendants are engaged in the business of assembling computers and sale to the public under the name of defendant No. 2.
16. Before a computer can function to carry out the tasks required by its owner, it has to be properly loaded with one or more operating systems. The operating system is nothing but a **software** contained in a CD. The defendants are supplying computers pre-loaded with the **software** of the plaintiff.
17. The **software** being pre-loaded in the computers sold by defendants is a **software**, copyright whereof vests in the plaintiff.
18. Unchallenged evidence of the witnesses of the plaintiff noted above which includes the sworn affidavit of an employee of the plaintiff, defendants are proved to be pirating the **software** of the plaintiff.
19. It stands established that the defendants have infringed the plaintiff's copyright by making illicit copies of the operating systems **software** by openly copying whatever operating system is currently salable. As observed in *Microsoft Corporation v. Electrowide Ltd. and Anr.* (1997) FSR 580 by Mr. Justice Ladd of the High Court of Justice, Chancery Division, this constitutes a general threat to infringe the copyright in the class of **software**.
20. Defendants are in the business of sale of computers. One can safely presume that they had knowledge that the products being sold were infringing copies.
21. Plaintiff is a world renowned computer **software** company. Plaintiff would be entitled to the wide ranging injunctions to restrain any further **infringement** of its intellectual property rights in any of its **software** at the hands of the defendants. Plaintiff would also be entitled to an order for the delivery-up forthright by the defendants. Plaintiff would also be entitled to damages for the reason that it would be futile to direct the defendants to render accounts for the reason that the defendants have been carrying on business surreptitiously.
22. Suit is accordingly decreed in terms of prayers 'A' to 'D' of the plaint, as noted in para above. Suit is further decreed by awarding the plaintiff compensation/damages against the defendants in the sum of Rs. 19.75 lacs. Damages awarded are payable by the defendants jointly and severally. Damages awarded shall carry interest @ 9% p.a. from the date of decree till date of payment.
23. Plaintiff would be entitled to costs.
24. Decree be prepared on the plaintiff making up the deficiency in court fee in respect of the damages which have been awarded.

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