

IP Hotline

July 29, 2005

PIRATED SOFTWARE, NOT CHEAP ANYMORE

In a landmark judgment, the Delhi High Court has awarded damages to the tune of Rs. 1,795,000/- (approximately USD 44886) against defendants for copyright infringement in the matter of Microsoft Corporation v Yogesh Papat. The suit was filed in the year 2003 and was finally heard in early 2005.

BRIEF FACTS OF THE CASE

In this matter Microsoft (Plaintiff) alleged that the defendant was loading the software of Plaintiff, without its licence or permission, on the hard disk of computers being sold by them and in this manner were causing financial loss to the Plaintiff. The defendants were in the business of selling assembled computers. In the absence of appearance by the defendant the case was heard ex-parte.

EVIDENCE

An employee of Microsoft purchased a computer from the defendant and the hard disk was subjected to examination by a technical expert. This examination revealed loading of pirated Microsoft software into the hard disk of the computer sold by the defendants. Plaintiff produced its evidence through affidavits, which went unchallenged since the defendant did not enter its appearance before court.

Summary of Reliefs Sought against Defendants:

- (a) Permanent injunction restraining defendants from infringing Plaintiff's copyright;
- (b) Permanent injunction restraining defendants from infringing Plaintiff's registered trademark;
- (c) Permanent injunction restraining defendants from passing off of counterfeit/unlicensed software and products as genuine products of the Plaintiffs;
- (d) Delivery up of infringing material;
- (e) Rendition of accounts of profits illegally earned by the defendants.

ORDERS GRANTED

Under the Copyright Act, 1957 and Trademarks Act, 1999, in case of infringement the civil remedies available to the plaintiff are injunction, delivery-up and damages or rendition of accounts of profits.

In the present matter the court issued decree in terms of prayers (a) to (d) above i.e. injunctive relief and order for delivery up and decree for damages. Court observed that 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.

To compute the damages claimed by Plaintiff the Court took into consideration that the defendant was carrying on his business for the past four years commencing from April 1, 1996. The court assumed that the defendant sold approximately 100 computers a year at the cost of Rs 27,050 and arrived at estimate net revenue loss of Rs 61.6 lakh for Plaintiff after deducting dealers' profit of Rs 2.40 lakh. On the basis of the annual returns of the plaintiff, average profit having been worked out over the last 4 years, damages for loss of profit of Rs. 19.75 lacs was awarded to Plaintiff. The Court justified the assumptions considered for computing financial losses as the defendant chose to remain ex-parte .

EXECUTION

If the defendant fails to pay up the damages as per the order of the court, Microsoft can initiate execution proceedings against the defendants.

PUNITIVE DAMAGES

In another case, Time Incorporated v. Lokesh Srivastava and Anr., the Delhi High Court has awarded punitive damages against the infringers of trademark and copyright of Time Incorporated. The court has distinguished between compensatory and punitive damages and has recognized the need for grant of punitive damages in matters relating to infringement of intellectual property.

The judgments in both cases mentioned above were passed *ex parte* and the infringement suits were filed by companies, which were well known and had tremendous reputation among its customers.

Till recently Indian courts have been slow and conservative in granting damages in intellectual property matters. It remains to be seen as to whether the courts adopt the same approach as in the above cases in fully contested matters. The amount of damages would depend upon facts of each case including the nature of IP infringed, reputation of the plaintiff, availability of evidence and nature of infringement. The approach of the courts

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demonstrated in these cases is a ray of hope for the IP holders.

- **Gowree Gokhale & Vikram K Raj**

Source: 1. Microsoft Corporation v. Mr. Yogesh Papat, MANU/DE/0331/2005
2. Time Incorporated v. Lokesh Srivastava, MANU/DE/0104/2005

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Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business

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