

SOFTWARE PIRATES IN INDIA BEWARE

Recently, the Delhi High Court awarded damages of approximately Rs. 2,000,000 (US\$46500) to Microsoft Corporation (“Microsoft”) in a software piracy case, which is one of the highest damages award in such cases in India. In addition to awarding the damages, the court granted a permanent injunction against one, Mr. Yogesh Popat and others (the “Defendants”), from carrying out any infringement/passing off activities of Microsoft products, copyrights or trademarks. The court also passed an order against the Defendants to deliver all pirated copies of Microsoft’s software, including the equipment used to make infringing copies of the software, as well as other infringing materials in the Defendants’ possession.

The facts of the case are as follows. The Defendants were engaged in the business of assembly and sale of computers since 1996 and were selling computers loaded with pirated versions of Microsoft software. Microsoft placed a trap order with the Defendants through a Microsoft employee, and the Defendants sold to this employee a computer preloaded with Microsoft's pirated software, viz., visual studio 6.0, MS Windows 98 and MS Office 2000. Thereafter, Microsoft filed a suit against the Defendants *inter alia* for an order of permanent injunction and damages on the ground that the Defendants did not have any license or permission from Microsoft to copy or sell its software. However, the Defendants did not enter appearance in the case and were declared *ex parte*. Microsoft led evidence by way of affidavits from its employee who purchased the computer and a technical expert who examined the computer’s hard disk.

Under Indian law, a copyright holder is entitled to the remedies of injunction, damages and account of profits against an infringer. A sub-inspector of police, who is convinced of the infringement or possible infringement of the copyright, can seize all copies of the work and materials used to make the infringing copies, without warrant, and produce them before a magistrate.

If a person knowingly and for gain, or in the course of trade or business, infringes or abets in the infringement of the copyright in any work or other right conferred by Indian copyright law, he is liable to be imprisoned for a term between six months to three years and to pay a fine between Rs. 50,000 (US\$1037) and Rs. 200,000 (US\$4150). Where an offender uses an infringing copy of a computer program on a computer, he is liable to be punished with imprisonment from seven days up to a maximum of three years and a fine between Rs. 50,000 (US\$1037)

and Rs. 200,000 (US\$4150). If the offender in the above cases proves that the infringement was not for gain or in the course of trade or business, the court may not impose imprisonment but can impose a fine up to Rs. 50,000 (US\$1037).

Further, if a person knowingly makes or possesses plates to make infringing copies, or publishes a sound recording or video film without the required particulars, he can be fined and imprisoned for a period up to two years.

The court concluded that the Defendants were pirating Microsoft's software and loading it on computer hard disks, thereby, infringing Microsoft's copyright. And, this merited a damages award of approximately Rs. 2,000,000 (US\$46500). Additionally, in awarding damages, the court observed that it would be futile to direct the Defendants to render accounts because the Defendants were carrying on the business surreptitiously. This is a new approach adopted by Indian courts, instead of the usual practice of issuing directions to render accounts, which is generally ineffective, as the infringers do not maintain proper accounts.

In conclusion, this is a landmark case under Indian copyright law, not just for the high damages award, but also for the fact that the court decided the case in a very short time, based on evidence adduced by way of affidavits. This will herald a new era in the speed with litigation is conducted in the Indian judicial system.

In case you have any questions with regard to the foregoing or any other issues of Indian IP or technology law, please contact Mr. Anoop Narayanan at anoop@majmudarindia.com