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A pinch for piracy - punitive penalty is the court's way

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The Delhi High Court has once again granted punitive damages in a copyright infringement case . The suit was instituted by Adobe Systems Inc. ("Plaintiff No. 1") and Microsoft Corporation ("Plaintiff No. 2"), (collectively referred to as "Plaintiffs"), against Mr. P Bhoominathan ("Defendant"). The Court, in the instant case reiterated the established principles of granting punitive damages and held that punitive damages can be awarded in infringement cases to deter a wrong doer from indulging in such unlawful activities.

Factual matrix of the case

Both the Plaintiffs are well known US companies engaged in the business of inter alia, manufacturing computer software. The Plaintiffs became aware of the Defendant's infringing activities in April 2003 through BSA/NASSCOM anti piracy hotline and took immediate steps to investigate the matter. As the claims of the Plaintiffs against the Defendant were essentially the same, the Plaintiffs, subsequent to the confirmation of such infringement, jointly filed a suit against the Defendant alleging that their 'computer programme' have been infringed because of the use of pirated/unlicensed software programmes on the computer system of the Defendant for their day to day business activities. Since both India and the USA are signatories to the Universal Copyright Convention and the Berne Convention conventions , the Plaintiffs works are entitled to protection under the Indian Copyright law.

The Plaintiffs prayed for permanent injunction for restraining the Defendant from (i) infringing their copyrights and trademarks: (ii) for passing off, (iii) delivery up of infringing material, (iv) rendition of accounts and damages.

The suit along with the interim application was listed before this court for the first time on December 2, 2003 where an ex parte ad interim order restraining the Defendant from using the pirated/unlicensed software of the Plaintiffs was passed. The Court also directed the appointment of Local Commissioner for visiting the premises of the Defendant, to conduct inventory of, and seize the infringing software. The Local Commissioner submitted his report in January 2004 from which it was revealed that the 18 hard drives seized from the premises of the Defendant contained software infringing the right of Plaintiff No.2. However, no software infringing the rights of Plaintiff No. 1 was found.

The Defendant failed to appear in the next hearing which took place in March 2004 and time was granted to the Plaintiffs to lead evidence. Ultimately the matter proceeded ex-parte as the counsel representing the Defendant withdrew their appearance and the Defendant did not make appearance either itself or through another advocate. The Defendant also failed in filing the written statement.

The Court's view The Court noted that the claims of the Plaintiffs have neither been contested by the Defendant nor any objection to the report of the Local Commissioner been filed. Thus, taking into consideration the material available on record, the Court held the Defendant guilty of counterfeiting the products of the Plaintiffs and a decree of permanent injunction was granted in favour of both Plaintiffs. The Court expressed the view that counterfeiting and use of duplicate software by the Defendant not only violates the legal rights of the Plaintiffs and cause financial damages, but causes deception to the public as well. Concern was also expressed by the court for the huge losses of revenue which the government suffers as such counterfeiters neither

maintain any account books nor pay any taxes. The Court emphasized that even when a case is instituted against such wrong doers, they fail to appear in the court and do not raise defenses after interim orders are passed and seizure of goods are made. The aspect of damages is thus of prime importance in such kind of matters and the non-grant of damages is likely to encourage such wrong doers.

Dealing with the concept of damages, the Court opined that though India has followed the traditional concept of awarding compensatory damages to remedy the losses, tort litigation in India has evolved and the recent trend in India has indeed shown an inclination towards the American approach of granting punitive damages. The Court, in the instant case, while examining the Indian cases dealing with the grant of punitive damages relied heavily on the Time Incorporated case, from which started the trend of awarding punitive damages in IP cases in India. Such damages are awarded in the discretion of the court and aim at causing a deterrent effect in the society.

In the instant case, the Plaintiffs, in their evidence filed by way of an affidavit, submitted that the Defendant have deprived them of a potential revenue of INR 32, 15,500/- and claimed damages to the tune of INR 20 lakhs. The Court did not deal with this prayer. Instead, it concluded that since the amount claimed amount by the Plaintiff No. 2 was based on the Plaintiff's own assessment of their estimated loss, an amount of INR 5 lakhs as compensatory damages to Plaintiff No. 2 and INR 5 lakhs as punitive/exemplary damages for loss of reputation and goodwill could reasonably be awarded in the instant case. The Plaintiffs were also entitled to costs.

ConclusionAn interesting observation that comes to light from this judgement is that the Court granted an injunction in favour of Plaintiff No. 1, even though the pirated/counterfeiting software of Plaintiff No 1 (i.e Adobe Systems Inc.) was not found at the Defendant's premises. Here, it may be worthwhile to consider Order 8 Rule 5 (2) of Code of Civil Procedure, 1908, by virtue of which courts have the power to pronounce a judgment on the basis of the facts contained in the plaint, if the defendant has not filed a pleading. However, it is a settled principle that the plaintiff is required to make out a prima facie case in its favour.

In light of the above, it likely that the Court would have taken into consideration the fact that the Plaintiffs received information regarding the infringement of their software through BSA/ NASSCOM anti piracy hotline, the outcome of the investigations conducted by the Plaintiffs prior to the filing of the suit and the evidence which may have been produced by Adobe to prove its case. Also, as the Court seems to have adopted a strict approach of punishing the wrong doers, it is possible that since the Defendant chose to remain absent at the hearing and the pleadings went un rebutted, it was deemed that the Defendant have admitted the claims of the Plaintiff No. 1.

Thus, it appears that the Court being convinced of the fact that there is an infringement or a threat of infringement to Plaintiff No. 1's software, in the interest of justice, awarded injunction in favour of both the Plaintiffs. However, in view of the fact that infringing software of Plaintiff No. 2 was recovered from the premises of the Defendant, damages were awarded to Plaintiff No. 2 only.

The inclination of Indian courts to protect the rights of intellectual property owners seems evident from the judgement in the instant case where the importance of granting punitive damages in addition to nominal and compensatory damages in infringement related cases was highlighted. The adoption of such stern measures, in addition to the Supreme Court's recent direction to dispose IP cases in four months leaves one optimistic that a fair and equitable approach will be adopted by the Indian courts in future as well. After all keeping the counterfeiters at bay does seem like the court's way.

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1. Adobe Systems, Inc and Anr. v Mr. P.Bhoominathan and Anr. , 2009 (39) PTC 658 (Del).
2. Order 1, Rule 1, Code of Civil Procedure, 1908 permits the joining of two or more persons as plaintiffs in one suit if the right to relief alleged to exist in each plaintiff arises from the same act or transaction.
3. Computer Programme falls within the meaning of Section 2(ffc) of the Copyright Act, 1957 and is also included in the definition of a literary work as per Section 2(o) of the Copyright Act, 1957.
4. The rights and interests of the copyright holders are protected in the signatory countries by virtue of these conventions.
5. Time Incorporated v. Lokesh Srivastava, 2005 (30) PTC 3 (Del).
6. Bajaj Auto Limited v. TVS Motor Company Limited, Civil Appeal No. 6309 of 2009 arising out of S.L.P.(C) No. 13933 of 2009.