

# Microsoft Corporation vs Deepak Raval on 16 June, 2006

**Equivalent citations: MIPR2007(1)72**

**Author: A.K. Sikri**

**Bench: A.K. Sikri**

JUDGMENT

A.K. Sikri, J.

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1. The plaintiff, Microsoft Corporation, is a company organized and existing under the laws of the State of Washington, USA. It has, however, its presence all over the world. In New Delhi it has marketing subsidiary Microsoft India Pvt. Ltd. The plaintiff is a world famous for its business software such as Microsoft Windows, Microsoft Office etc. which are installed and used on millions of computers all over the world, including India. It also manufactures a large range of computer peripherals (hardware). The hardware group was established in 1982 and during this period, the plaintiff has built its reputation for technological expertise in hardware by developing and launching a series of successful devices including the ergonomically designed 'Mouse' and Keyboard. It is stated that software developed and marketed by the plaintiff is "computer programme" within the meaning of Section 2(ffc) of the Copyright Act, 1959 and included in the definition of a literary work as per Section 2(o) of the said Act. The plaintiff's computer programmes are "works" that were first published in the USA and are also registered in the USA. These programmes have been created by the employees of the plaintiff, for the plaintiff. Under the US Copyright Law, US Code Title 17, Section 201(b), the copyright in a work created by an employee belongs to the employer under the 'Work made for Hire' doctrine. Both, the computer programme, as well as the supplementary User Instructions and Manuals, are 'original literary works' as contemplated under Section 2(o) and Section 13(1)(a) of the Copyright Act, 1957. The plaintiff is the owner of the said copyright. A complete list of the software programme owned by the plaintiff is filed with the plaint. The rights of authors of member countries of the Berne and Universal Copyright Conventions are protected under Indian copyright law. India and the USA are signatories to both the Universal Copyright Convention as well as the Berne Convention. Plaintiff's works are created by authors of member countries and originate from and are first published in the said member countries. Plaintiff's works are, thus, protected in India under Section 40 of the Copyright Act, 1957 read with Page 3705 the International Copyright Order, 1999. The case of the plaintiff is that the plaintiff being the owner of the copyright in the aforesaid literary works within the meaning of Section 17 of the Copyright Act, 1957 is entitled to all exclusive rights flowing from such ownership as set out in Section 14 of the Copyright Act.

2. It is stated that the plaintiff suffers incalculable damage to its intellectual property rights and business on account of various forms of copyright piracy. A brief description of common methods of copyright infringement employed in relation to computer software are described below:

reproducing the plaintiff's software and the packaging of that software, so that purchasers are deliberately misled into believing that the product they are buying is genuine software.

reproducing or "burning" the plaintiff's software onto a blank CD, where no attempt is made to represent that the copy is genuine.

reproducing a number of the plaintiff's programme on a single CD-ROM, known as a "compilation" CD.

3. Another form of piracy that is assuming great significance in the information age is that of Internet piracy. Internet piracy occurs when software is downloaded from the Internet or distributed via the Internet without the permission of the copyright owner. Common Internet sites used for this infringing activity include online classified advertisements, Auction Houses, newsgroups, personal web sites and Bulletin Board Service (BBS) sites.

4. The plaintiff also enjoys the ownership in the trade mark 'Microsoft' which was adopted in the year 1970 and the plaintiff has used this trade mark continuously and extensively. 'Microsoft' is not only used as trade mark but also as a prominent/key and leading portion of its corporate name. This trademark is registered in India in the name of the plaintiff in classes 9 and 16 and bear the registration numbers 430449B and 430450B respectively. It is stated that the defendant No. 2 of which the defendant No. 1 is stated to be one of the Directors, is also indulging in this illegal activity of counterfeiting and piracy. It is the case of the plaintiff that in October, 2002, the plaintiff received the information that the defendants are infringing the plaintiff's copyright, trade marks and other intellectual property rights by carrying on business of unauthorised hard disk loading i.e. pre-loading various software of the plaintiff company onto hard disk of the computer that were being assembled and sold by them. The software loaded onto the machine, naturally, were not accompanied by the original Media, being the Compact Disc(s)/Floppy Disks, Certificate of Authenticity (COA), End User license Agreements (EULAs), User Instruction Manuals, Registration Cards and so on, that accompany the plaintiff's genuine software. In order to ascertain if the defendants were indeed involved in such infringing activity, an independent investigator was sent to the outlet of the defendants to place an order for a computer with defendant No. 2. Accordingly, Mr. Ravindra Pawar, the said investigator visited the premises of defendant No. 2 on 4th October 2002, and again on 23rd October, 2002 to place the order for the computer. On 23rd October, 2002 itself, the decoy investigator was given the delivery of the computer which was loaded with the unlicensed software of the plaintiff Page 3706 company. Affidavit of said Mr. Ravindra Pawar is filed along with the plaint. On 1st November 2002, a Technical Expert Mr. Sunil John, inspected the computer purchased from the defendant and took printouts of the directories of the hard disk, which clearly evidenced the fact that the following software programmes of the plaintiff were present on the computer sold by the defendants.

OPERATING SYSTEM  
Microsoft Windows 98  
Second Edition  
4.10.2222A

Registered to	:	xyz
Product ID	:	17601-OEM-0086707-33115
Computer	:	Genuine Intel x86 Family 6 Model 11 Stepping 1127.0 MB RAM Microsoft Visual Basics 6.0
Licensed to	:	xyz
Product ID	:	50021-111-1111111-44669
Microsoft Visual C++6.0 Licensed to	:	xyz
Product ID	:	50021-111-1111111-44669
Microsoft FoxPro Licensed to	:	xyz
Product ID	:	50021-111-1111111-44669
Microsoft Office 2000 (including MS Word, MSC PowerPoint, MS Outlook, MS Frontpage, MS Excel, MS Access)	:	xyz
Product ID	:	50106-005-0292143-02358

The technical expert has opined that the plaintiff's programmes contained in the hard disk of the computer are unlicensed and/or pirated versions of the plaintiff's software.

5. On a comparison of the software being sold by the defendants, and software originating from the plaintiff, it was found that the software supplied by the defendants were pirated versions of original plaintiff's computer programmes. The following were the distinguishing features found:

The software supplied by the defendants does not have the accompanying User's Manual and was not shrink wrapped;

The software supplied by the defendants does not have Software license Agreement as in the case of the Plaintiff's software;

The software supplied by the defendants does not have the order number which is always present on the software of the plaintiff.

6. The plaintiff accordingly addressed letter dated 22nd November 2002 to the defendants informing that by their action they had infringed the intellectual property rights that vest in the plaintiff. They were called upon for a settlement meeting on 27th November 2002 and were cautioned that a failure on their part to attend the meeting would leave the plaintiff with no choice but to resort to suitable legal action to protect their rights. However, the defendants Page 3707 did not pay any heed to this call of the plaintiff and, therefore, present suit is filed with the following prayers:

33 a) An order for permanent injunction restraining the defendants, officers, servants and agents and all others acting for and on their behalf from copying, manufacturing, selling, offering for sale, distributing, issuing to public, counterfeit/unlicensed version of Plaintiff software preloaded onto the Hard Disks of the computer, compact disc's or in any other manner, amounting to infringement of the Plaintiff's copyright in the said computer programs 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 copying, manufacturing, selling, offering for sale, distributing, issuing to public, counterfeit/unlicensed version of Plaintiff software preloaded onto the Hard Disks of the computer, compact disc's or in any other manner, amounting to infringement of Plaintiff's 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 copying, manufacturing, selling, offering for sale, distributing, issuing to public, counterfeit/unlicensed versions of the Plaintiff's software pre-loaded onto the Hard Disks of the computer, compact disc's, and/or any other product to which the Plaintiff's trademarks, or any deceptive variants thereof has been applied without the license of the Plaintiff amounting to passing off of the counterfeit/unlicensed software and products as genuine products of the Plaintiff;

d) An order for delivery-up to the Plaintiff, of all the counterfeit/ unlicensed copies of the Plaintiff's software, and/or articles/ software to which have been applied the Plaintiff's trademarks, or any other mark which may be identical with or deceptively similar to the Plaintiff's trademarks without license of the Plaintiff, the duplicating equipment used in the copying the software of the Plaintiff, 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 58 of the Act;

e) An order for damages be passed in favor of the Plaintiff and against the defendants;

f) An order for rendition of accounts of profits illegally earned by the defendants by reason of infringement of the Plaintiff's copyrights, 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;

g) An order for costs in these proceedings.

7. Summons were directed to be issued to the defendants vide order dated 3rd March 2003 returnable on 14th July 2003. On the same day, ex parte ad interim injunction was granted in favor of the plaintiffs restraining them from manufacturing, selling, offering for sale, distributing, issuing to public, Page 3708 counterfeit/unlicensed versions of the plaintiff's software pre-loaded onto the Hard Disks of the computer, compact disc's or any other manner amounting infringement of the plaintiff's copyright as well as trade mark and also from copying, manufacturing, selling etc. version of the plaintiff's software.

8. On service of summons on the defendant none appeared on their behalf. Vide order dated 24th March 2002 the defendants were proceeded ex parte. The plaintiff was directed to file affidavit by way of evidence. Affidavit of Mr. Nikhil Krishnamurthy, authorised representative of the plaintiff has been filed and he was examined as PW-1. He also proved various documents who were duly exhibited. Thereafter when the matter came up for hearing on 18th November 2005 request was made for leading additional evidence which was allowed. Mr. Sanjeev Sharma was accordingly examined as PW-2 on 16th February 2006.

9. PW-1 has affirmed in his affidavit various averments in the plaint note whereof is taken above. He has proved notarised copy of power of attorney in his favor given by the plaintiff company as Ex. P-1, copyright registrations as Exs. P-2 to P-6, trade mark registrations as Exs. P-7 and P-8. Affidavit of Mr. Ravindra Pawar is exhibited as Ex. P-9, affidavit of Sh. Sunil John, Technical Expert, as Ex.P-10. He has also stated that due to blatant infringing activities of the defendants, the plaintiffs have suffered enormous amount of damages under the following heads:

(a) Actual Damages- Plaintiff has suffered heavy loss of revenue due to the defendants' unauthorised loading of plaintiff's pirated software free of cost onto the computers of its consumers. By award of actual damages, the plaintiff seeks to be put in the same position as it defendants caused no loss to the plaintiff.

(b) Damages to Goodwill and Reputation- Plaintiff company and its software are indisputably No. 1 market leader in the world for software products and thus, enjoy enormous world-wide reputation and goodwill. Defendants by unauthorisedly loading free software of the plaintiff from pirated CDs, have undermined plaintiff's reputation and goodwill in the market. The infringing acts of the defendants not only weaken the market position of the plaintiff but also causes bad image before its existing and potential customers.

(c) Exemplary Damages- Under this head, damages are awarded if there is a flagrant violation by the defendants of the plaintiff's rights, to set a deterrent example for

others. Such violation can be inferred from, inter alia, nature of the infringing act, reasonable knowledge of a person skilled in the concerned trade and continuance of violation despite knowledge. Defendants' act leaves no doubt as to their international and flagrant violation of the plaintiff's intellectual property rights.

10. PW-2 is a Chartered Accountant with 18 years' experience and is working as a self-employed professional as a tax-accounting consultant. He has stated in his affidavit that he was approached by the plaintiff's attorneys to offer his advice on the computation of damages in the present case. After perusing the documents on record, the report of the investigators and other evidence Page 3709 in support of the defendants' business activities. He has taken into consideration the following facts which were put before him:

a) No accounts of the defendants are available;

b) The defendants have been in the business of selling computers since at least July 2000 and at least until when the continuing piracy activities of the defendants were confirmed on 29th April 2005 as is evident from the affidavit of the independent investigator, Mr. Viraj Gurao, which has been filed in the present proceedings. The tax invoice dated 29th April 2005, which has been filed in the present proceedings, discloses the Local Sales tax Registration No. and the Inter State Sales tax registration No. of the Defendants which are as under:

Local Sales Tax No: 411009/S/1709 w.e.f. 3/7/2000 Inter Sate Sales Tax No: 411009/C/1296 w.e.f. 3/7/2000

c) The approximate average market price of licensed Microsoft products, which were pirated and distributed illegally by the defendants by way of hard disk loading on a continuous and repeated basis, are as follows:

a. Microsoft Windows 98	Rs. 3,650/-
b. Microsoft Office 2000	Rs. 10,500/-
c. Microsoft Visual Studio 6.0	Rs. 12,600/-
d. Windows XP Professional Version	Rs. 6,200/-

11. He has assessed the loss suffered by the plaintiff in the sum of Rs. 1,28,23,200/- and on the basis thereof is contained in para 8 and 9 of the affidavit which are quoted verbatim:

8. I state that in order to arrive at the approximate sales by the Defendants of the computers loaded with the abovementioned pirated software of the Plaintiff, the following conservative and fair assumptions and estimates have been made:

(a) That the Plaintiff caught the Defendants violating their copyrights by indulging in blatant piracy of their software was in the year 2002. The court has granted the injunction against the Defendants on 3rd March 2003, which was confirmed on 24th March 2004. The Defendants repeated and continuous infringing activities were again confirmed in April 2005. Keeping the Defendant's conduct in view, it will be fair and justified to conservatively assume that the Defendants were indulging in piracy of Plaintiff's software programs on a continuous basis for the last 5 years i.e. since 2000 (the year of their inception).

(b) That the Defendants have sales of a minimum of 3 computers per week, pre-loaded with copies of unlicensed software of the Plaintiff. This translates into sales of 12 computers a month and 144 computers in a year pre-loaded with pirated copies of Plaintiff's software. This is a conservative, fair and justified estimate, considering that the Defendants are doing business in Pune, which has one of the highest student populations in the country and Defendants are habitual and compulsive infringers.

(c) That any person who purchases a computer would have been provided with the operating system to run the computer. That person would have also opted for Microsoft Office application Page 3710 software since the Defendants were willfully offering to load/install a pirated copy of the same onto the computer. The conduct of the Defendants clearly demonstrates that.

(d) However, Microsoft Visual Studio, which is a software development environment, is very popular in the student community, as it provides them with the entire range of development tools such as Visual Basic, Visual C++, Visual Sourcesafe, Visual FoxPro and Development Environment. Thus, I am assuming that conservatively at least 25% of the computers would have been preloaded with pirated copies of this software, sold by the Defendants. Therefore, atleast 36 computers in a year would have been pre-loaded with the Visual Studio software program.

9. That in the light of the above-mentioned facts and assumptions, I state that the sales turnover for an approximate 5 years is estimated to be 720 computers. I state that the potential revenue that the Defendants could have earned by distribution of licensed copies of the Plaintiff's software and keeping in view the assumptions above, is computed as follows:

Name of Software	Approx. Cost of licensed software	Computers sold by the Defendants	Approx. Revenue of the Defendants
Microsoft Windows 98	Rs. 3,650/- Per unit	576 (In 4 Years)	Rs. 21,02,400/-
Microsoft Office 2000	Rs. 10,500/- Per unit	720 (In 5 Years)	Rs. 75,60,000/-
Microsoft Visual Studio 6.0	Rs. 12,600/- Per unit	180 (In 5 Years)	Rs. 22,68,000/-
Microsoft XP Professional Version 2002	Rs. 6,200/- Per unit	144 (In 1 Year)	Rs. 8,92,800/-

12. In so far as grant of relief of injunction is concerned, it hardly poses any problem. Plaintiff has satisfactorily proved that it has copyright in its software and hardware as well as trademark right in Microsoft. Since the plaintiff has the ownership of copyright in the software and hardware products including in the computer programme as well as supplementary user instructions and manuals which are original literary works, no other person has any right to copy the said work of the plaintiff. Section 7 of the Copyright Act gives exclusive right to the plaintiff only to exploit all rights flowing from such ownership which are set out in Section 14 of the Act. Section 14, inter alia, provides:

(a) the right to reproduce the work in any material form, including storing it in any medium by electronic means

(b) to issue copies of the work.

(c) to make an adaptation or translation of the work

(d) for a computer programme, the additional right to sell or give on commercial rental, or offer for sale or commercial rental any copy of the computer programme.

(e) the right to authorise the doing of any of the aforesaid act.

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13. Under Section 51(1)(i) of the Copyright Act, copyright in a work shall be deemed to be infringed, when any person, without a license from the owner of copyright, does anything, the exclusive rights of which are granted to the owner of copyright, which are the primary acts of infringement.

14. Under Section 51(b) of the Act, copyright in a work shall be deemed to be infringed, when any person, without a license from the owner of copyright, i. makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire any infringing copies of the work, or ii. permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of copyright in the work iii. distribute either for the purpose of trade or to such an extent as to affect prejudicially the owner of copyright, any infringing copies of the work, or iv. by way of trade exhibits in public, or v. imports into India, any infringing copies of the work.

The aforesaid acts are also termed as the 'secondary acts of infringement'.

15. The plaintiff also enjoys the ownership in the trade mark 'Microsoft' which is a registered trade mark. Therefore, defendants have no right to use this trade mark and trade name that too in respect of same goods. It is not only infringement of the plaintiff's trade mark but a clear case of counterfeit or piracy. Due to fast expanding consumer base of computer products, it is a common knowledge that there is voluminous counterfeit and piracy of hardware and software of leading companies.



Since the plaintiff is the world leader in this field, it tends to be the main target of such counterfeiting and piracy. Thus, several parties are engaged in the production and sale wide range of pirated programmes and software of the plaintiff.

16. Various averments made in the plaint have gone unrebutted as the defendants have not come forward with any defense. The plaintiff has, therefore, been able to prove that the defendants have been infringing the copyright of the plaintiffs in the aforesaid works, namely, MS DOS and MS WINDOWS as there is no license granted by the plaintiff to the defendants for this purpose. By copying the trade mark 'Microsoft' there is an infringement of the plaintiff's trade mark also. Decree in terms of Sub-paras (a), (b), (c) and (d) of para 33 of the plaint is accordingly passed.

17. Coming to the question of damages, it may be stated at the outset that in the absence of the defendants, it may not be of any use to pass a decree of rendition of accounts. However, still damages can be awarded on the basis of estimation. Courts in this country have started adopting appropriate yardsticks for awarding of the damages even in the absence of the defendants.

18. Before dealing with the Indian position, let me scan through the legal position prevailing in other countries. Learned Counsel for the plaintiff has place before me plethora of international case law relating to the plaintiff itself. Various cases of such piracy and counterfeiting are filed by the plaintiff against offending parties in United States, Australia, United Kingdom and Page 3712 China. The Courts have granted compensatory damages. The position in this respect is summarized below in tabulated form:

I. UNITED STATES S. Case Title Damages Awarded (In US Damages in Rupees (Appox.) No. Dollars) 1 Microsoft Corporation v. Treble profits plus \$ 88,780 Treble profits plus Rs. 39 G.D. Systems America Inc. in Attorney fees and costs. lakhs in Attorney fees and and Anr. 872 F. Supp. 1329 costs.

2. Microsoft Corporation v. Damages of \$300,000 for Damages of Rs. 1 crore 31 Grey Computer, et al, infringement of copyright lakhs for infringement of Civ.A. No. AW 94-221 plus \$ 3,889,565.16 as copyright plus Rs. 17 crore treble profits 3 lakhs as treble profits.

## II. AUSTRALIA

1	Microsoft Corporation v. TYN Electronics Pty. Ltd. [2004] FCA 1307	Compensatory damages of \$ 386,000 plus Additional damages of \$300,000	Compensatory damages of Rs. 1 crore 32 lakhs plus Additional damages of Rs. 1 crore 3 lakhs.
2.	Microsoft Corporation v. Glostar Pty Limited [2003] FSR 210	Damages of \$295,750	Damages of Rs.1 crore
3.	Microsoft Corporation v. Goodview Electronics Pty. Ltd. [2000] FCA 1852	Damages of \$ 653,818.55 plus additional damages of \$500,000	Damages of Rs.2 crore 25 lakhs plus additional damages of Rs.1 crore 72 lakhs
4	Autodesk Australia Pty Limited and Anr. v.	Compensatory damages of \$ 25,000 plus additional	Compensatory damages of Rs. 8 lakhs 61 thousand

Cheung (1990) 17 IPR 69	damages of \$ 35,000	plus additional damages of Rs. 12 lakhs
III. UNITED KINGDOM		
1 Microsoft Corporation v. Electro-Wide Limited and Anr. [1997] FSR 580 Page 3713	Court suggested an award of additional damages.	Court suggested an award of additional damage
2. Microsoft Corporation v. Plato Technology Limited [1999] FSR 834	Microsoft entitled to an account of profits to the extent of 5000 Pounds	Microsoft entitled to an account of profits to the extent of Rs.4 lakhs
IV. HONG KONG		
1 Microsoft Corporation v. Able System Development Ltd. HCA 17892/1998	Compensatory damages of \$ 32,575,064 and additional damages of \$ 3,257,506	Compensatory damages of Rs. 18 crore 29 lakhs and additional damages of Rs. crore 82 lakhs
V. CHINA		
1 Autodesk Inc. v. Beijing Longfa Construction & Decoration Co. Ltd.	Compensation of RMB 1.49 million	Compensation of Rs. 78 lakhs

19. Reading of the judgments in the aforesaid cases would manifest that the the courts have frowned upon the conduct of the defendants "willfully calculated to exploit the advantage of an established mark" and held that in such circumstances, the plaintiff would be entitled to compensation. It was also found that the defendants were enough business savvy to engage in a successful, albeit illegal business venture. Even assuming, arguendo, that they had no knowledge of Microsoft licensing products, knowledge is not an element of copyright infringement. The Courts came heavily upon the defendants where it was found that irrefutable evidence give rise to an influence of the defendants' intentional, knowing and willful infringement.

20. In U.S., the Courts applying the aforesaid yardsticks and the provisions of Lanham Act in US, which permits the Court to award Treble profits in cases of willful infringement, have imposed the maximum penalty authorised by the statute. In Microsoft Corporation v. G.D. Systems America Inc. (supra), US \$ 3 lacs in damages for infringement of copyright were awarded. In addition, the Court also awarded damages for trademark infringement under the Lanham Act holding that "willful blindness" could be a basis for award of Treble profits and unhesitatingly the Court trebled the Microsoft's lost profits by issuing an order awarding US \$ ,3889,565.16.

21. The Australian Courts, on the other hand, found that the appropriate approach to measure the compensatory damages in this case would be "license free approach", which had the attraction of precision. In a case where the Page 3714 Court may infer that, presented with a choice between paying license fee and not using the work, the infringer would have paid the license fee, the approach is also a logical one. Ex hypothesi, the copyright owner has been deprived of a license fee. On this basis in

Microsoft Corporation v. TYN Electronics Pty. Ltd. (supra) compensatory damages to the tune of \$ 386,000 were awarded. The Court, however, in addition to compensating the plaintiff for the loss of license fee also awarded additional damages in view of the conduct of infringing parties in committing willful and intentional violation of the plaintiff's copyright and trade mark. The flagrancy of the infringement is treated as an important but not an essential factor. The Court observed that the defendant's conduct had been such that it was undeniable that they would have been acutely aware of the implications of their conduct and concluded that the Court was satisfied by the flagrancy of the defendant's conduct, the benefit that must have been accrued to them (given the commercial context in which the infringements occurred), and the need to deter such a conduct in future. For this purpose substantial additional damages were warranted and \$ 3 lacs were awarded in favor of Microsoft on this account as well.

22. Likewise, in Microsoft Corporation v. Glostar Pty Limited (supra), the Australian Court, having regard to the provisions of Section 116(4) of the Copyright Act, which provides that where an infringement of copyright is established, the Court may award additional damages if it is satisfied that it is proper to do so, took into consideration the following factors:

- a) flagrancy of the infringement;
- b) any benefit shown to have accrued to the defendant by using of the infringement;  
and
- c) all other relevant factors.

23. The English Courts have adopted the same approach and in Microsoft Corporation v. Plato Technology Ltd. (supra) the Court opined that the crucial distinction in such a case is between the honest and the dishonest trader. What essentially distinguishes the two is the trader's degree of knowledge of infringement. It would be apt to quote the relevant portion from this judgment:

I should say at the outset that in principle and in the absence of authority to the contrary I would have thought the narrower sort of relief would be more appropriate in this type of case. The crucial distinction in this sort of case is, it seems to me, between the honest and the dishonest trader. What essentially distinguishes the two is the trader's degree of knowledge of the infringement. Mr. Tappin forcefully submitted to me that knowledge that the facts complained of were an infringement is irrelevant both to a claim for infringement of trade mark and (save for so called secondary infringement) breach of copyright. This I entirely accept. Indeed so does the defendant by its acceptance that it is liable for damages or an account of profits in respect of all 45 copies of Windows 95 which it accepts for the purposes of this application can be taken to be counterfeit even though it was unaware of that fact when it dealt with them. But that does not, it seems to me, in any way go to the

question of what further relief to grant to a plaintiff going beyond a mere inquiry as to damages or an account of profits limited to the specific acts of infringement established at the date of the hearing. The trader who deals in products Page 3715 knowing that they are counterfeit or recklessly indifferent as to whether or not they are, is a dishonest trader. As such the Court can normally assume the likelihood that (a) he has in the past been extensively dealing in counterfeit copies of the plaintiff's products and (b) unless restrained by a far reaching injunction he will continue to do so in the future. In such a case relief in the very wide terms sought by Microsoft in this action may, and in most case would, be appropriate. In the case, however, of an honest trader, that is to say of a person, such as the defendant in the present case, who has supplied counterfeit copies of the plaintiff's products, neither knowing that they are counterfeit nor being recklessly indifferent as to whether or not they are counterfeit, the Court can, it seems to me make no such assumptions. In those circumstances the relief which should properly be granted against him ought, so it seems to me, in principle to be very much narrower.

24. Coming to the legal position in India, a positive trend has started. Here also as Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of the defendant's exact figures of sales by the defendants under the infringing copyright and/or trade mark, exact damages are not available.

25. Time Incorporated v. Lokesh Srivastava 2005 (30) PTC 3 was also a case where the defendants chose to remain ex parte. While refusing to grant damages on the ground that nothing was proved on record as to how these damages were calculated, the Court still granted punitive and exemplary damages of Rs. 5 lacs. It would be apposite to reproduce discussion on this aspect contained in paras 6 to 8 of the judgment:

6. The plaintiff has claimed a decree of Rs. 12.5 lacs on account of damages suffered by the plaintiff or an order of rendition of accounts of the profits illegally earned by the defendants by use of the impugned trade mark. In view of the fact that the defendants have not chosen to turn up and face these proceedings, this Court is of the considered view that an order of rendition of accounts is fully warranted and called for. Damages in the sum of Rs. 12.5 lacs as claimed cannot be awarded on account of the fact that the plaintiff has not succeeded in proving on record as to how and on what basis these damages have been calculated. Damages of Rs. 5 lacs are claimed on account of loss of reputation of the plaintiff. These can be awarded inasmuch as the readers who might have read the defendants' TIME ASIA SANSKARAN, must have formed a very poor opinion about the plaintiff's Magazine and as such, the reputation and goodwill of the plaintiff has suffered.

7. Coming to the claim of Rs. 5 lacs as punitive and exemplary damages for the flagrant infringement of the plaintiff's trade mark, this Court is of the considered view that a distinction has to be drawn between compensatory damages and punitive damages. The award of compensatory damages to a plaintiff is aimed at

compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities. Whenever an action has criminal propensity also the punitive damages are clearly called for so that the tendency to violate the laws Page 3716 and infringe the rights of others with a view to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case in hand itself, it is not only the plaintiff, who has suffered on account of the infringement of its trade mark and Magazine design but a large number of readers of the defendants' Magazine 'TIME ASIA SANSKARAN' also have suffered by purchasing the defendants' Magazines under an impression that the same are from the reputed publishing house of the plaintiff company.

8. This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trade marks, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. In Mathias v. Accor Economy Lodging Inc. 347 F.3d 672 (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away. This Court feels that this approach is necessitated further for the reason that it is very difficult for a plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions since they know that the same are objectionable and unlawful. In the present case, the claim of punitive damages is of Rs. 5 lacs only which can be safely awarded. Had it been higher even, this Court would not have hesitated in awarding the same. This Court is of the view that the punitive damages should be really punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement.

26. In Hero Honda Motors Ltd. v. Shree Assuramji Scooters 2006 (32) PTC 117 (Delhi), the Court granted punitive damages of Rs. 5 lacs after taking note of its earlier judgment in Time Incorporated (supra) as is clear from the following passages:

18: I am in agreement with the aforesaid submission of learned Counsel for the plaintiff that damages in such cases must be awarded and a defendant, who chooses to stay away from the proceedings of the Court, should not be permitted to enjoy the benefits of evasion of court proceedings. Any view to the contrary would result in a situation where Page 3717 the defendant who appears in Court and submits its account books would be liable for damages, while a party which chooses to stay away from court proceedings would escape the liability on account failure of the availability of account books. A party who chooses to not participate in court proceedings and stay away must, thus, suffer the consequences of damages as stated and set out by the plaintiff. Of course, this would not imply that the plaintiff would be entitled to any figure quoted by it which may be astronomical. The figure of Rs. 5 lacs as damages can hardly be said to be astronomical keeping in mind the nature of deception alleged by the plaintiff which not only causes direct loss to the plaintiff, but also affects the reputation of the plaintiff by selling sub-standard goods in the market where the public may be deceived in buying the goods thinking the same to be that of the plaintiff. There is a larger public purpose involved to discourage such parties from indulging in such acts of deception and, thus, even if the same has a punitive element, it must be granted. R.C. Chopra, J. has very succinctly set out in Time Incorporated's case (supra) that punitive damages are founded on the philosophy of corrective justice. That was the case where the publishers of Time Magazine had come to Court and one of the factors which weighed while awarding punitive damages was that the readers had been sufferers of the infringement of the mark of the plaintiff. The only difference is that in the present case it is the consumer of the products of the plaintiff, who have suffered as a consequence of the infringement of the mark and logo of the plaintiff by the defendant.

19: The second aspect emphasized in Times Incorporated's case (supra) has also material bearing as the object is to relieve the pressure on over-loaded system of criminal justice by providing civil alternative to criminal prosecution of minor crimes. The defendant could have been prosecuted for such counterfeiting, but the plaintiff has considered appropriate to confine the relief to civil proceedings.

20: Learned Counsel for the plaintiff also rightly points out that instead of plaintiff utilising its energy for expansion of its business and sale of its products, the resources have to be spread over a number of such litigations to bring to book the offending traders in the market. In such a case, both compensatory and punitive damages ought to be granted apart from the costs incurred by the plaintiff in such litigation.

27. Following the aforesaid dicta, in the case of Aktiebolaget Volvo and Ors. v. A.K. Bhuvra and Ors. CS (OS) No. 808/2005 decided on May 5, 2006, I also awarded punitive damages of Rs. 5 lacs in that case. It also becomes manifest that the Courts in India have treaded the same path and applied the same principles as applied by the US, UK and Australian Courts in awarding the damages and have recognised that compensatory as well as punitive damages are to be awarded. The justification for award of compensatory damages is to make up for the loss suffered by the plaintiff and the

rationale behind granting punitive damages is to deter a wrong doer and the like-minded from indulging in such unlawful activities. This is more so when an action has criminal propensity. Thus, while awarding punitive damages Courts have taken into consideration the conduct of the defendants which has "willfully calculated to exploit the advantage of an established mark" (expression used by US Page 3718 Courts), which may also be termed as "flagrancy of the defendant's conduct" (test adopted by Australian Courts). The English Courts have, adopting the same nature of test, have used the test of "dishonest trader", who deals in products knowing that they are counterfeit or "recklessly indifferent" as to whether or not they are.

28. In the present case, defendant No. 1 is a private limited company. Therefore, it can be presumed that it is doing the business in an organized manner. Further, the defendant, in spite of notice, have failed to respond. That shows willful, intentional and flagrant violation by the defendant of the plaintiff's copyright in MS DOS, MS WINDOWS and trade mark in 'Microsoft'. It can be inferred, there being no contest, that the defendants acted with dishonest intentions and are not the honest traders or "recklessly indifferent" as to whether or not the goods they are selling are counterfeit.

29. The plaintiff has produced PW-2, who is a Chartered Accountant who has given calculation of estimated damages on the basis of license fee the plaintiff could have earned on the distribution of licensed copies of the plaintiff's software as the defendants had taken license from the plaintiff to sell the said software. Damages are quantified in three categories viz., Actual damages, damage to goodwill and reputation and Exemplary damages. Though on this basis total damages are worked out to Rs. 1,28,23,200/-. However, in the suit damages claimed are Rs. 5 lacs. Therefore, I have no option but to limit the claim of the plaintiff to Rs. 5 lacs. Decree of damages in the sum of Rs. 5 lacs is hereby passed. The plaintiff shall also be entitled to costs.

30. Decree be drawn accordingly.