



When Microsoft Comes a Rappin'

By: Jim Astrachan

Wasn't it Bill Gates who quipped, "What's good for Microsoft is good for the country?" If not, he might as well for its software is more a part of our lives than ever were the cars and trucks of General Motors. Unlike General Motors, Microsoft is hell bent on not losing market share to innovators or imitators. Especially those imitators who do so through illegal means such as counterfeiting Microsoft's software products.

The benign, outward appearance of Microsoft has been trashed for all times by the government's antitrust case and Bill's testimony, but if further evidence of Microsoft's strength and determination to crush those who incur its ire is needed, consider its virtual army of investigators, lawyers and paralegals who roam the retail countryside seeking out and punishing those persons declared by them to sell counterfeit Microsoft software.

And woe be he who fails to cry "enough" upon receipt of Microsoft's proverbial knock on the door in the form of a letter stating that Microsoft has determined that the letter's recipient has engaged in heinous acts of copyright and trademark infringement through the sale of counterfeit software in boxes, and bearing labels, adorned with its trademarks and trade dress.

Microsoft's crosshairs traverse the entire supply chain, from the occasional retailer who sells few products to the back-alley, or foreign, manufacturer who creates thousands of knock-offs, often with its country's taciturn approval. Unable to pursue these manufacturers, protected as they are within their foreign borders, Microsoft turns to those within the jurisdiction of the United States courts.

Microsoft's letter will demand an accounting of the number of Microsoft products sold and the sales price. Microsoft often already knows the identity of all persons up and down the supply chain. It assumes that all sales are of counterfeit products and a demand for payment will soon arrive to those who provide sales information. In exchange for this payment sum, Microsoft will provide a release from liability for

transactions occurring during a narrow slice of time, sometimes as short as a month, being the timeframe in which its investigators brought product.

Demand, or request, for evidence that the software sold was truly counterfeit is generally unwelcomed as is the attempt to negotiate a payment. There is little choice: Succumb to the demand or do not. The latter course will, in short course, result in a nasty suit for trademark and copyright infringement in which Microsoft will seek statutory damages of \$150,000 per copyrighted work infringed, treating bundled works as separate works for this purpose, attorneys' fees and treble trademark damages. Suit is an ugly mess that most defendants will try to settle, but will learn that now the cost of settlement far exceeds the cost of Microsoft's earlier demand. There is a lesson, here, to be taught.

Recently, Microsoft got its way in a U.S. district court in Utah where it was granted summary judgement and awarded statutory damages of \$990,000 and attorneys' fees, despite the protestations of the defendant that the evidence produced by Microsoft did not support summary judgement. Lucky for the defendant the appellate court agreed, and in its decision are some very important lessons for any business that finds itself at the business end of Microsoft's sharpened stick.

The complaint was Microsoft garden variety. The type used over and over again, containing allegations of copyright and trademark infringement. Demanding huge sums of money.

In reversing the trial court, the Court of Appeals held that defendant MBC had submitted sufficient evidence to counter whether it sold counterfeit software, how many units its sold and whether it acted intentionally, if it had sold counterfeit software.

The first issue of material fact raised by MBC was whether or not Bantech, MBC's supplier, had obtained all software sold to MBC in Singapore, as invoices in Bantech's records show that it made purchases of software in the United States as well as in Singapore. This also brought into question the number of alleged counterfeit software units sold by MBC.

Second, because MBC's operations manager testified he personally inspected each software unit received to assure authenticity, there was an issue of material fact whether any of the units sold by MBC were counterfeit. This testimony was critical. Bolstering this was the fact that no counterfeit units were found during a search of MBC's offices. And, the court noted, even if there was evidence that Bantech had shipped counterfeit units to MBC, there was no evidence that these units had been resold by MBC.

Third, while there were counterfeit units of software in possession of Mr. Software, MBC's retail customer, there was no evidence that MBC was the source of

those units. Nor does receipt of counterfeit units equate to sale of counterfeit units. While Microsoft may have had the basis for so concluding, that was not enough for summary judgement. And without establishing actual sales, there was no basis for an award of statutory damages and attorneys' fees.

But there is a moral to this story, and that is that it is very likely that the monetary demand made by Microsoft before it filed suit was far less than what MBC paid in legal fees to defend against summary judgement and pursue its appeal. And worse, MBC still faces the specter of trial and an award of damages against it. True, a prevailing defendant can recover attorneys' fees, but the odds favor that Microsoft will prove some copyright infringement.

Like it or not, Microsoft has all the money, the will and directive to win. It is a formidable foe. Worse yet, Bill's dad is Microsoft's lawyer. And we all know what that means.

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