

Federal Court



Cour fédérale

**Date: 20090917**

**Docket: T-1928-04**

**Citation: 2009 FC 849**

**Ottawa, Ontario, September 17, 2009**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**MICROSOFT CORPORATION**

**Plaintiff**

**and**

**1276916 ONTARIO LTD., SAMIR MOHAMED JISRI,  
AFI KHAN and ASH MATAR**

**Defendants**

**AMENDED REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Plaintiff, Microsoft Corporation (“Microsoft”) commenced the underlying action for copyright infringement against the Defendants. Microsoft is the owner of the copyright in the various computer programs in question. The action relates to a business operated by the Defendants

under the name “Smart Buy” which has been selling and distributing unlicensed copies of Microsoft computer programs installed in the computer systems it sells.

[2] Microsoft now brings a motion for default judgment against 1276916 Ontario Ltd. and Samir Mohamed Jisri. Mr. Jirsi is the sole director and shareholder of 1276916 Ontario Ltd. Microsoft has discontinued against the other Defendants, Afi Khan and Ash Matar.

[3] Initially, 1276916 Ontario Ltd. and Samir Mohamed Jisri (“Smart Buy”) were represented by counsel and defended the action. Smart Buy frequently missed court imposed deadlines, necessitating the Plaintiff to follow-up with counsel and the Court. Smart Buy misled Microsoft about whether it was still in business. It persisted in infringing activities after the litigation was commenced. It generally delayed the conduct of this action. Eventually, Smart Buy’s counsel withdrew from the action because counsel could not contact and obtain instructions from its client. Smart Buy’s Statement of Defence was struck out by Order of Prothonotary Aalto dated February 2, 2009 for failure to comply with court orders and participate in the action.

[4] Microsoft now applies for default judgment against 1276916 Ontario Ltd and Samir Mohamed Jisri, the directing mind of 1276916 Ontario Ltd., seeking as relief:

- a. statutory damages of \$120,000
- b. punitive damages of at least \$50,000;
- c. a permanent injunction; and,

d. solicitor client costs.

### **FACTS**

[5] Microsoft has registered copyright in Canada for the eight software programs in issue in this action. Those programs are:

- Microsoft Office Access 2003
- Microsoft Office Excel 2003
- Microsoft Office PowerPoint 2003
- Microsoft Office Professional Edition 2003
- Microsoft Office Publisher 2003
- Microsoft Office Word 2003
- Microsoft Windows XP Professional

[6] When a business sells a computer system with licensed Microsoft software installed on the computer, the complete software package should include, among other things, the appropriate: (a) CD-ROM(s); (b) a Certificate of Authenticity (COA) label; and (c) in the case of Microsoft Windows XP Professional, a manual.

### **Smart Buy**

[7] The business of Smart Buy includes the sale of computers and related products. 1276916 Ontario Ltd. remains an active Ontario corporation; however, the Smart Buy store at 755 Queensway East, Unit 101, Mississauga, Ontario no longer in business.

### Copyright Violations

[8] Microsoft maintains a database of reports relating to software piracy. Members of the public can report instances of suspected piracy to Microsoft with the assurance their identity will remain secret. Prior to the commencement of the lawsuit against Smart Buy, Microsoft received ten piracy reports regarding Smart Buy. The reports described a range of activities, including installing unlicensed copies of Microsoft software onto new computers and either not providing the customer with CD-ROM(s) or providing burned CD-Rs of the Microsoft software installed. Customers were also asked to sign a document indicating any “illegal” software installed on the computer was theirs.

### September, 2003 Offer to Sell

[9] On September 19, 2003, an investigator visited Smart Buy. Smart Buy’s store manager offered to sell a computer system with copies of Microsoft Windows XP Professional and Microsoft Office XP Professional pre-installed on the computer at no cost, with “back-up” copies of the software in question rather than the original CD-ROMs. It appears Smart Buy offered to install unlicensed copies of Microsoft software, specifically Microsoft Windows XP and Microsoft Office XP Professional, onto the hard drive of the computer being offered for sale.

### Cease and Desist Letter

[10] As a result, a cease and desist letter from Microsoft’s outside counsel dated October 22, 2003 was sent to Smart Buy. After sending the cease and desist letter to Smart Buy, Microsoft

continued to receive piracy reports relating to Smart Buy. Microsoft then sent a warning letter dated March 8, 2004 to Smart Buy.

#### July, 2004 Sale of a Computer with Unauthorized Microsoft Programs

[11] The specific allegations that underlie the Statement of Claim relate to events that took place in July, 2004. A Microsoft investigator visited Smart Buy on July 16, 2004, and dealt with an individual who identified himself as “Afi Khan”. The investigator requested a quote for a new clone computer. The investigator indicated he wanted Windows XP and Microsoft Office. Afi Khan told the investigator that the programs would be loaded on the computer but that no CDs or Certificates of Authenticity (COAs) would be included. The investigator provided a \$100 deposit to purchase the computer system and returned on July 21, 2004 to pick it up.

[12] When the investigator returned to pick up the computer, the investigator dealt with a person named “Ash Matar”. The investigator asked Ash Matar if the investigator could see the computer running before paying the balance of the computer. Ash Matar hooked the computer up and demonstrated Windows XP had been installed. The investigator noted Microsoft Office had not been installed and told Ash Matar this program was to have been installed on the computer. Ash Matar proceeded to manually install the program on the computer. The computer system sold by Smart Buy contained unauthorized copies of the following Microsoft computer programs copied onto the hard drive: Microsoft Office Access 2003; Microsoft Office Excel 2003; Microsoft Office PowerPoint 2003; Microsoft Office Professional Edition 2003,

Microsoft Office Publisher 2003; Microsoft Office Word 2003 and Microsoft Windows XP Professional.

History of this Action

[13] Microsoft commenced this action on October 29, 2004. Service was accepted on behalf of 1276916 Ontario Ltd. and Samir Mohamed Jisri on November 4, 2004 and the Defendants subsequently filed a brief Statement of Defence.

[14] Microsoft continued to receive piracy reports relating to Smart Buy after the lawsuit was commenced. In January, 2006, where Smart Buy sold a customer computer systems with copies of Microsoft Windows XP and Microsoft Office installed on the computers, the customer did not receive CD-ROMs or Certificate of Authenticity labels for the software. In addition, the invoice that Smart Buy provided to the customer for the sale of the computers was stamped “No Software was installed or sold with this system/invoice. The client holds full responsibility for any illegal software installed or copied.”

[15] Pursuant to the Order of Madam Prothonotary Milczynski dated January 31, 2006 (the “January 31<sup>st</sup>, 2006 Order”), a schedule was set for the steps in the proceeding.

[16] A direction to attend was served by counsel for Microsoft requiring a representative of 1276916 Ontario Ltd. and Samir Mohamed Jisri to attend on examination for discovery on February 24, 2006. Two days before the scheduled day for discovery, on February 22, 2006,

Smart Buy's counsel contacted Plaintiff's counsel and stated their clients informed them that Smart Buy was no longer in business.

[17] On February 23, 2006, an investigator visited Smart Buy to confirm if Smart Buy was still in business and investigate Smart Buy for possible copyright infringement. Smart Buy was still in business. Smart Buy offered to sell the investigator a computer with unlicensed copies of Microsoft software installed on it notwithstanding Microsoft's lawsuit against the company.

[18] The examination for discovery of Samir Mohamed Jisri on his own behalf and as a representative of 1276916 Ontario Ltd. took place on February 24, 2006. Despite the service of various Directions to Attend by Microsoft's counsel and requests for the production of specific documents, the Defendant arrived empty handed.

[19] Mr. Jisri described his role and involvement with 1276916 Ontario Ltd., Mr. Jisri confirmed he was the owner and CEO of the company and the driving force behind the incorporation of 1276916 Ontario Ltd. His responsibilities include purchasing, marketing, advertising, international relations, computer sales and dealing with customers. Among other things, Mr. Jisri signed the lease on behalf of the company, signs company cheques and deals with the company's banking. Mr. Jisri also testified that Smart Buy's business was "more of a family business", that his brother and his cousin were involved in the business in sales and watching the store.

[20] Notwithstanding that undertakings given at the examination for discovery of Mr. Jisri and the January 31<sup>st</sup>, 2006 Order imposed a deadline of April 30, 2006 for the answers to undertakings, Smart Buy failed to meet the court imposed deadline.

[21] Microsoft's counsel therefore wrote to counsel for Smart Buy by letter dated November 22, 2007 requesting dates in January and February, 2008 when it would be convenient for defendants' counsel and his client to attend the pre-trial conference. Smart Buy's counsel responded to the request for available pre-trial dates by letter dated November 23, 2007. That letter stated in part:

Please be advised that I have just been notified that Smart Buy Canada is no longer in business. Unfortunately, I have tried to contact my client, but I understand he is out of the jurisdiction and I have no instructions with respect to this matter.

[22] Microsoft investigated Smart Buy's claim that it was no longer in business. These inquiries revealed not only that Smart Buy was still in business, but that Smart Buy's pattern of infringing behaviour continued.

[23] In December, 2007, an investigator visited Smart Buy and the investigator asked an individual identified as "Alex" for a quote for a new custom built computer system. The investigator told Alex he was interested in the \$300 computer. The investigator asked Alex if the operating system was included in the price. Alex told the investigator that Microsoft Windows XP Home was \$49.99 extra and Microsoft Windows XP Professional was \$69.99 extra. The



investigator gave Alex a \$60.00 deposit and Alex indicated that it would take 2-3 days to assemble the computer and provided the investigator with an invoice. The investigator returned to Smart Buy on December 6, 2007 to pick up the computer system. A technician hooked up the computer and demonstrated that Windows XP Professional and Microsoft Word had been installed.

[24] The computer system sold by Smart Buy contained unauthorized copies of the following Microsoft computer programs copied onto the hard drive: Microsoft Office Access 2003; Microsoft Office Excel 2003; Microsoft Office PowerPoint 2003; Microsoft Office Professional Edition 2003, Microsoft Office Publisher 2003; Microsoft Office Word 2003 and Microsoft Windows XP Professional.

[25] On January 18, 2008, Microsoft informed Smart Buy's counsel that his client was still in business and that Smart Buy's pattern of infringing behaviour continued. In the same letter, Microsoft again requested dates in January, February or March, 2008 for Smart Buy and its counsel to attend on a pre-trial conference. No response was received from Smart Buy's counsel to the January 18, 2008 letter. As a result, a further follow up letter was sent by counsel for Microsoft to counsel for Smart Buy. Again, no response was received from Smart Buy's counsel.

[26] In the context of discussions on a completely unrelated matter, Smart Buy's counsel indicated that he had received no response from his client and that he may bring a motion to get

off the record. Ultimately, by notice of motion dated April 24, 2008, Smart Buy's counsel, brought a motion to be removed as solicitor of record which such motion was heard on June 16, 2008.

[27] By Order of Prothonotary Kevin R. Aalto dated June 16, 2008 (the "June 16<sup>th</sup>, 2008 Order"), Klaiman Edmonds was removed as the solicitor of record for Smart Buy. The June 16<sup>th</sup>, 2008 Order also stated:

2. Klaiman, Edmonds shall send a copy of this Order by regular mail to the Defendants, 1276919 [sic – 1276916] Ontario Ltd. and Samir Mohamed Jisri, at the following addressees:

755 Queensway, Unit 101  
Mississauga, Ontario  
L4Y 4C5

and

1119 Shadeland Drive,  
Mississauga, Ont.  
L5C 1P2

3. Klaiman, Edmonds shall also e-mail a copy of this Order to the Defendants, 1276919 [sic – 1276916] Ontario Ltd. and Samir Mohamed Jisri, at [sjisri@cct.ca](mailto:sjisri@cct.ca)
4. The Defendant, 1276916 Ontario Ltd., shall appoint solicitors to represent it in this proceeding on or before July 15, 2008 failing which it shall bring a motion that it be granted leave to be represented by one of its Shareholders, Directors or Officers.
4. The Defendants, 1276916 Ontario Ltd. and Samir Mohamed Jisri, shall provide to the Court on or before July 15, 2008 current active phone numbers where these Defendants can be reached so that a case conference can be convened to set a schedule for next steps in this proceeding.

[28] Copies of the June 16<sup>th</sup>, 2008 Order were served on 1276916 Ontario Ltd. and Samir Mohamed Jisri. 1276916 Ontario Ltd. did not appoint a solicitor to represent it, nor did it seek leave to be represented by one of its shareholders, officers or directors.

[29] Ultimately the Statement of Defence was struck out by Order of Prothonotary Aalto dated February 2, 2009, for a failure to comply with court orders and participate in this action. By Order of Prothonotary Kevin R. Aalto dated February 2, 2009 (the “February 2, 2009 Order”) the Court ordered as follows:

**THIS COURT ORDERS** that:

1. The statement of defence of the Defendants 1276916 Ontario Ltd. and Samir Mohamed Jisri dated November 18, 2004 is hereby struck out for the failure of 1276916 Ontario Ltd. and Samir Mohamed Jisri to comply with the Order of Prothonotary Kevin Aalto dated June 16, 2008, which such order required the Defendants, 1276916 Ontario Ltd. to appoint solicitors to represent it in this proceeding on or before July 15, 2008, failing which is [sic – it] was to bring a motion to be granted leave to be represented by one of its shareholders, directors or officers and which such Order required the Defendants 1276916 Ontario Ltd. and Samir Mohamed Jisri to provide to the Court on or before July 15, 2008 current active phone numbers at which these Defendants could be reached so that a case conference could be convened to set a schedule for next steps.
2. Plaintiff’s counsel, Osler, Hoskin & Harcourt LLP (“Osler”) shall send a copy of this Order by regular mail to the Defendants, 1276916 Ontario Ltd. and Samir Mohamed Jisri, at the following addresses:

755 Queensway, Unit 101  
Mississauga, Ontario  
L4Y 4C5

and

1119 Shadeland Drive  
Mississauga, Ontario  
L5C 1P2

3. Osler shall also e-mail a copy of this Order to the Defendants, 1276916 Ontario Ltd. and Samir Mohamed Jisri, at [sjisri@cct.ca](mailto:sjisri@cct.ca).
4. 1276916 Ontario Ltd. and Samir Mohamed Jisri shall have 30 days from service of this Order to provide their contact details to the Court, and, to the extent that 1276916 Ontario Ltd. and Samir Mohamed Jisri wish to participate in this action, to file a statement of defence, failing which Microsoft may move for default judgment.

[29] Copies of the February 2<sup>nd</sup>, 2009 Order, together with a cover letter dated February 3, 2009, were served by regular mail and by e-mail to the addresses as specified in the February 2<sup>nd</sup> Order.

[30] Pursuant to paragraph 4 of the February 2<sup>nd</sup>, 2009 Order, 1276916 Ontario Ltd. and Samir Mohamed Jisri had 30 days from service of the February 2<sup>nd</sup>, 2008 Order “to provide their contact details to the Court, and, to the extent that 1276916 Ontario Ltd. and Samir Mohamed Jisri wish to participate in this action, to file a Statement of Defence, failing which Microsoft may move for default judgment.” 1276916 Ontario Ltd. and Samir Mohamed Jisri have failed to provide their contact details to the Court. Moreover, neither 1276916 Ontario Ltd. nor Samir Mohamed Jisri has filed a Statement of Defence since the February 2, 2009 Order.

#### **APPLICABLE RULES**

[31] The applicable rule is Rule 210 of the *Federal Court Rules*, which provides as follows:

210. (1) **Motion for default judgment** - Where a Defendant fails to serve and file a statement of defence within the time set out in rule 204 or any other time fixed by an order of the Court, the plaintiff may bring a motion for judgment against the Defendant on the statement of claim.

(2) **Motion in writing** - Subject to section 25 of the *Crown Liability and Proceedings Act*, a motion under subsection (1) may be brought *ex parte* and in accordance with rule 369.

(3) **Affidavit evidence** - A motion under subsection (1) shall be supported by affidavit evidence.

(4) **Disposition of motion** - On a motion under subsection (1), the Court may

- (a) grant judgment;
- (b) dismiss the action; or
- (c) order that the action proceed to trial and that the plaintiff prove its case in such a manner as the Court may direct.

## CASE LAW

[32] The approach to be taken on a motion for default judgment and the applicable test was summarized by Snider J. in *Louis Vuitton Malletier S.A. v. Yang* as follows:

[4] On a motion for default judgment, where no Statement of Defence has been filed, every allegation in the Statement of Claim must be treated as denied. A plaintiff must first establish that the defendant was served with the Statement of Claim and has not filed a defence within the deadline specified in Rule 204 of the *Federal Courts Rules*, SOR/98-106. Evidence must be led that enables the Court to find, on a balance of probabilities, that infringement has occurred within the meaning of the relevant statute. . .

*Louis Vuitton Malletier S.A. v. Yang*, 2007 FC 1197, at para 4

[33] The decision in *Louis Vuitton Malletier S.A. v. Yang* sets out the issues on a motion for default judgment on copyright infringement as follows:

- (a) has the defendant been served with the statement of claim;

- (b) has the defendant not filed a statement of defence within the deadline specified in Rule 204;
- (c) has the plaintiff established ownership of the copyrights in question;
- (d) has the plaintiff established infringement of those rights by the defendant; and
- (e) the relief to be granted.

*Louis Vuitton Malletier S.A. v. Yang, supra*, at paras 4, 7 to 16

[34] The first four issues are factual in nature. The evidence above establishes these facts in this case.

## **RELIEF SOUGHT**

[35] Microsoft seeks the following relief: (a) statutory damages of \$15,000 for each of the 8 works infringed for a total of \$120,000; (b) punitive damages of at least \$50,000; (c) a permanent injunction; and, (d) solicitor client costs.

### *Statutory Damages – Copyright Infringement*

[36] With respect to the claim for copyright infringement, Microsoft has elected statutory damages. The applicable provision of the *Copyright Act* R.S. 1985, c. C-42 is section 38.1, which provide as follows:

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all infringements involved in the proceedings, *with respect to any one work* or other subject-matter, for which any one infringer is liable

individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just.

...

(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

(a) the good faith or bad faith of the defendant;

(b) the conduct of the parties before and during the proceedings; and

(c) the need to deter other infringements of the copyright in question.

...

(7) An election under subsection (1) does not affect any right that the copyright owner may have to exemplary or punitive damages.

[37] A number of cases have now considered section 38.1 and granted statutory damages.

There are three decisions that are noteworthy for present purposes. The first is the decision of Harrington J. in *Microsoft v. 9038-3746 Quebec Inc.*, 2006 FC 1509, Harrington J. awarded the maximum permitted statutory damages of \$20,000 per work for each of the 25 computer programs that had been infringed for a total of \$500,000 in statutory damages, as well as punitive damages.

[38] The second decision is the subsequent decision of Snider J. in *Louis Vuitton Malletier S.A. v. Yang*, 2007 FC 1179. Snider J., after reviewing the applicable factors, awarded the maximum statutory damages of \$20,000 for each of the two works infringed.

[39] The third decision is my decision in *Microsoft Corporation v. PC Village Co. Ltd.*, 2009 FC 401. It also involved a motion for default judgment. The underlying infringement in the action also related to the sale of computers with unauthorized copies of Microsoft computer programs. After reviewing the applicable factors I awarded statutory damages of \$10,000 each per work infringed for a total of \$150,000.

[40] The first and second factors enumerated in section 38.1(5), are bad faith and conduct before and during the proceedings. An important consideration in relation to both factors is the continuation of the infringing activity after receipt of notice. Another consideration is whether or not the infringing conduct is an isolated incident. I find Smart Buy's conduct clearly demonstrated bad faith. Smart Buy continued its infringing activities not only after warnings but also after the action commenced in Court. Further, Smart Buy sought to mislead the Plaintiff by advising it was no longer in business when it was, all while its infringing activities persisted.

[41] With respect to the third factor, deterrence, the following comments in *Louis Vuitton Malletier S.A. v. Yang*, supra are appropriate.

[25] Next, I turn to the need to deter others. ... Another aspect of deterrence that is relevant is the behaviour of the Defendants. The award in this case should attempt to deter conduct where orders of the Court and other legal remedies are blatantly ignored. In my view, a high award is necessary to deter future infringement and, secondarily, to deter open disrespect for Canada's copyright protection laws.

[42] I conclude the amount of statutory damages must reflect not only the Defendants' bad faith and their disregard for the rights of the Plaintiff. In light of Smart Buy's ongoing



infringement of Microsoft's copyrights despite having received notice of its infringing activities, including through the commencement of this lawsuit, there is a need to deter further infringing activity by Smart Buy. In my view, the amount for statutory copyright damages must be sufficiently high to serve a salutary message and deter future infringements.

[43] Further, software piracy is a significant problem affecting Microsoft. In addition, it not only adversely impacts Microsoft, but other computer retailers competing with Smart Buy. A business like Smart Buy that distributes unlicensed software with its computer systems has a competitive price advantage over businesses that distribute licensed software. This behaviour should be specifically discouraged.

[44] Smart Buy's bad faith and its conduct before and during proceedings are closely related. I find Smart Buy acted in bad faith and its conduct before and during the proceedings justifies a statutory award consistent with the amount in *Microsoft Corporation v. PC Village Co. Ltd.* I would award \$10,000 for each of the eight software works infringed.

#### *Punitive and Exemplary Damages*

[45] Subsection 38.1(7) of the *Copyright Act* provides for the awarding of punitive and exemplary damages in addition to statutory damages.

[46] Recent copyright infringement cases have attracted significant punitive damage awards, in circumstances similar to the present case. Specifically:

- a) In *Microsoft v. 9038-3746 Quebec Inc.*, supra the trial judge, Harrington J., awarded a total of \$200,000 in punitive damages, \$100,000 against the individual defendant and \$100,000 against the corporate defendants.
- b) In *Louis Vuitton Malletier S.A. v. Yang*, supra Snider J., awarded \$100,000 in punitive damages on a motion for default judgment, in addition to the maximum statutory damages award.
- c) In *Louis Vuitton Malletier S.A. v. 486353, B.C. Ltd.*, supra a decision of the British Columbia Supreme Court, the motions judge awarded a total of \$300,000 in punitive damages comprised \$200,000 against the individual that was the principal of the enterprise in question and \$100,000 against the remainder of the defendants.
- d) In *Microsoft v. PC Village Co. Ltd.* I awarded a total of \$50,000 in punitive damages against all of the defendants jointly and severally.

[47] In these cases, the Court referred to the factors enumerated by Binnie J. in *Whiten v. Pilot Insurance Co.* 2002 SCC 18. The law in this regard is summarized by Boyd J. in *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, who in addition to considering the *Whiten* case, also considered the decisions in *Microsoft v. 9038-3746 Quebec Inc.* and *Louis Vuitton Malletier S.A. v. Yang*. After reviewing some of the general principles, Boyd J. stated:

[86] Punitive and exemplary damages have been awarded in cases of trademark and copyright infringement, where, for example, the conduct of the defendants was “outrageous” or “highly reprehensible”, or where the defendant’s actions constituted a callous disregard for the rights of the plaintiff or for injunctions granted by the Court. Similarly, in determining whether punitive and exemplary damages ought to be awarded, the Court will consider whether the defendant has little regard for the legal process, thus requiring the plaintiff to expend additional time and money in enforcing its rights (*Microsoft* at paras. 118 to 120; *Yang* at para. 48-49; *Pro Arts, Inc. v. Campus Crafts Holdings Ltd.* (1980), 50 C.P.R. (2d) 230 at 250-252 (Ont. H.C.J.); *2703203 Manitoba Inc. v. Parks*, 2006 NSSC 6, 47 C.P.R. (4th) 276 at paras. 37-40; *Society of Composers*,

*Authors and Music Publishers of Canada v. 728859 Alberta Ltd.* (2000), 6 C.P.R. (4th) 354 at paras. 19-24 (F.C. T.D. Proth.).

[48] An additional consideration in this case is Smart Buy's attempt to shift liability to the customer. The Defendant asked customers to sign a document indicating that any "illegal" software installed on the computer was the responsibility of the customer when it was Smart Buy's agents that installed the software in question.

[49] Accordingly, I award punitive damages of \$50,000.

#### *Personal Liability*

[50] Personal liability for the infringing activities of the corporation will be imposed where the individual authorizes, directs or participates in activities knowing they are likely to constitute infringement or that reflect an indifference to the risk of it. *Microsoft v. 9038-3746 Quebec Inc.*, supra, at paras 91, 92 and 98 and *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, supra, paras 45 to 48.

[51] In result, the Defendant Jisri is also liable for the infringing activities of the Defendant 1276916 Ontario Ltd.

#### *Permanent Injunction*

[52] Microsoft submits that a permanent injunction should be granted. It argues a wide injunction provided for in section 39.1 of the *Copyright Act* is appropriate. However, the

evidence indicates the Defendants' infringing actions related to specific popular software programs and operating systems. The Defendants' infringing activities involved what could be described as illegal installation of the Plaintiff's computer operating systems and basic software programs rather than infringement across a broader range including business or entertainment computer programs. Without more, I consider the injunction should be restricted to previous, current and future variations of the Microsoft software programs and operating systems identified by Microsoft's investigator.

## **COSTS**

[53] Clearly, Microsoft is entitled to costs. Microsoft submits costs should be awarded in a fixed, substantial, amount. This action against a single business with somewhat limited court proceedings would be more properly assessed in the usual manner.

[54] Given the conduct of the Defendants in delaying and deserting the proceedings, I will grant costs on a solicitor client basis.

## **CONCLUSION**

[55] In summary, the defendants infringed Microsoft's copyrights. Accordingly, I conclude that in light of the Smart Buy's conduct, it would be appropriate to grant relief as follows:

(a) an award of statutory damages in the amount of \$80,000;

(b) an award of punitive damages of at least \$50,000;

(c) a permanent injunction in respect of the software programs listed in Schedule A; and,

(d) costs on a solicitor and client basis.

## JUDGMENT

[1] **THIS COURT DECLARES** that the Plaintiff, Microsoft Corporation, is the owner of the copyrights in various computer programs which are literary works, namely those listed in Schedule “A” (the “Microsoft Programs”) and that the copyrights have been infringed by the Defendants 1276916 Ontario Ltd. and Samir Mohamed Jisri contrary to sections 3 and 27 of the *Copyright Act*.

[2] **THIS COURT ORDERS** that the Defendants 1276916 Ontario Ltd. and Samir Mohamed Jisri, the servants, employees or agents of these Defendants, the officers and directors of 1276916 Ontario Ltd., and any person, corporation or entity acting under the instructions of the foregoing and anyone aware of this Judgment are hereby permanently enjoined and restrained from directly or indirectly:

- a) infringing Microsoft’s copyrights in the Microsoft Programs as set out in subparagraph b) below, including, without limitation, from:
  - i) producing or reproducing, or causing to be produced or reproduced, all or a substantial part of the Microsoft Programs in any material form including, without limitation, installing or causing to be installed unlicensed copies of the Microsoft Programs on computers;

- ii) selling, distributing, exposing for sale, or offering for sale copies of any of the Microsoft Programs and/or related documentation which infringe Microsoft's copyrights;
  - iii) possessing for the purposes of selling, distributing, exposing for sale or offering for sale copies of any of the Microsoft Programs and/or the related documentation which infringe Microsoft's copyrights;
  - iv) importing into Canada copies of any of the Microsoft Programs which infringe Microsoft's copyrights;
  - v) selling, distributing, exposing for sale, or offering for sale copies of any of the Microsoft Programs in any manner which is contrary to limitations and/or license terms appearing on or accompanying the Microsoft Programs; and
  - vi) ordering, abetting, authorizing or assisting others to do any of the foregoing; and
- b) infringing in any manner whatsoever, including by means of the activities described above, the copyright in the works in respect of which Microsoft owns copyright, including:
- i) the copyright in the computer programs identified in Schedule "A" including all previous, current and future variants of the computer programs.

[3] **THIS COURT ORDERS** that the Defendants 1276916 Ontario Ltd. and Samir Mohamed Jisri shall pay forthwith to the Plaintiff the amount of \$80,000 payable jointly and severally as statutory damages pursuant to section 38.1 of the *Copyright Act*.

[4] **THIS COURT ORDERS** that the Defendants 1276916 Ontario Ltd. and Samir Mohamed Jisri shall pay forthwith to the Plaintiff the amount of \$50,000 payable jointly and severally as punitive and exemplary damages.

[5] **THIS COURT ORDERS** that the Defendants 1276916 Ontario Ltd. and Samir Mohamed Jisri shall pay post-judgment interest on the amount awarded in paragraph 3 of this Judgment to the Plaintiff at a rate of 2% calculated from the date of Judgment.

[6] **THIS COURT ORDERS** that the Defendants 1276916 Ontario Ltd. and Samir Mohamed Jisri shall pay forthwith to the Plaintiff its solicitor and client costs of these proceedings inclusive of all costs and disbursements payable jointly and severally.

“Leonard S. Mandamin”

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Judge



## **SCHEDULE “A”**

### **List of Microsoft Programs and Copyright Registration Numbers**

1. Getting Results with Microsoft Access 97, Registration No. 461565
2. Getting Results with Microsoft Excel 97, Registration No. 461569
3. Getting Results with Microsoft Office 97, Registration No. 461564
4. Getting Results with Microsoft Outlook 97, Registration No. 461568
5. Getting Results with Microsoft PowerPoint 97, Registration No. 461567
6. Getting Results with Microsoft Word 97, Registration No. 461566
7. Guide D'Utilisation De Microsoft Word, Registration No. 384656
8. Introducing Microsoft Windows 95, Registration No. 453836
9. Manuel De Reference De Microsoft Excel, Registration No. 384659
10. Microsoft Access, Version 2.0, Registration No. 441809
11. Microsoft Access for Windows 95, Registration No. 450102
12. Microsoft Access 97, Registration No. 461574
13. Microsoft Access 97 (French Edition), Registration No. 488267
14. Microsoft Access 2000, Registration No. 480075
15. Microsoft Access 2000, Registration No. 1004098 [French Version]
16. Microsoft Access Version 2002, Registration No. 494603
17. Microsoft Excel For The Apple MacIntosh Version 1.5, Registration No. 384624
18. Microsoft Excel For Windows Version 2.1, Registration No. 384622
19. Microsoft Excel Getting The Most From Your Hardware With Microsoft Excel Version 2.10, Registration No. 384623
20. Microsoft Excel For Windows Version 3.00, Registration No. 417086
21. Microsoft Excel For Windows Version 4.0, Registration No. 428708

22. Microsoft Excel for Windows Version 5.0, Registration No. 438734
23. Microsoft Excel for Windows 95, Registration No. 450103
24. Microsoft Excel 97, Registration No. 461578
25. Microsoft Excel 97 (French Edition), Registration No. 488265
26. Microsoft Excel 2000, Registration No. 480076
27. Microsoft Excel 2000, Registration No. 1004101 [French Version]
28. Microsoft Excel Version 2002, Registration No. 494604
29. Microsoft Excel User's Guide, Registration No. 384625
30. Microsoft Office 95 (Professional Edition), Registration No. 448204
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Mandamin, J.

**DATED:** September 17, 2009

**APPEARANCES:**

John C. Cotter  
Tara James

FOR THE PLAINTIFF

No One Appearing

FOR THE DEFENDANTS

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FOR THE PLAINTIFF

N/A

FOR THE DEFENDANTS