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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BIAA, LLC, a Utah Limited Liability Company,
d.b.a. BRASHER'S IDAHO AUTO AUCTION,

Plaintiff,

vs.

SOFTWARE & INFORMATION INDUSTRY
ASSOCIATION; ADOBE SYSTEMS
INCORPORATED, a Delaware corporation;
COREL, INC., a Delaware corporation; McAfee,
INC., a Delaware corporation; SYMANTEC
CORPORATION, a Delaware corporation;
IDAHO AUTO AUCTION, INC., an Idaho
corporation; ADP, Inc., a Delaware corporation;
and ROBERT WILLIAM GILLESPIE, an
individual;

Defendants.

Case No.

**COMPLAINT FOR
DECLARATORY JUDGMENT OF
NON-INFRINGEMENT AND
JUDICIAL FINDING OF
DAMAGES**

Plaintiff BIAA, LLC, d.b.a. Brasher's Idaho Auto Auction, hereby files its complaint for declaratory judgment of non-infringement and judicial finding of damages, and for indemnification against Defendants Gillespie and Idaho Auto Auction, Inc.

PARTIES

1. Plaintiff BIAA, LLC, d.b.a. Brasher's Idaho Auto Auction ("Brasher's") is a Utah limited liability company having a principle place of business at Boise, Idaho.

2. Defendant Adobe Systems Incorporated ("Adobe") is a Delaware corporation having its principal place of business at San Jose, California.

3. Defendant Corel Corporation ("Corel") is a Delaware corporation having its principal place of business at Mountain View, California.

4. Defendant McAfee, Incorporated ("McAfee") is a Delaware corporation having its principal place of business at Santa Clara, California.

5. Defendant Symantec Corporation ("Symantec") is a Delaware corporation having its principal place of business at Mountain View, California.

6. Defendant Idaho Auto Auction, Inc. ("Idaho Auto Auction"), on information and belief, is an Idaho corporation having its principal place of business in Boise, Idaho.

7. Defendant Robert William Gillespie ("Gillespie") is an individual who, on information and belief, resides in the state of Idaho.

8. Defendant Software & Information Industry Association ("SIIA") is an association with headquarters in Washington, D.C. that provides intellectual property protection to several hundred software and information companies (including Defendants Adobe, McAfee

and Symantec). On information and belief, SIIA was acting as the agent of Adobe, McAfee and Symantec in the actions alleged herein.

9. Defendant ADP, Inc. ("ADP") is a Delaware corporation having its principle place of business in Roseland, New Jersey and provided software which is alleged to infringe the rights of SIIA's members.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this claim pursuant to the Copyright Act, 17 U.S.C. §101 et seq., 28 U.S.C. §§1331 and 1338(a), and the Declaratory Judgment Act, 28 U.S.C. §2201.

11. This Court has personal jurisdiction over SIIA because SIIA, on information and belief, conducts business within the state of Idaho and within this district.

12. This Court has personal jurisdiction over Adobe, Corel, McAfee, and Symantec because each conducts business within the state of Idaho and within this district.

13. This Court has personal jurisdiction over Idaho Auto Auction, Inc., because, on information and belief, Idaho Auto Auction has conducted business within the state of Idaho and within this district, including some of the acts alleged herein.

14. This Court has personal jurisdiction over Gillespie because, on information and belief, Gillespie resides within the state of Idaho and the acts alleged herein to have been committed by Gillespie occurred in Idaho.

15. This Court has personal jurisdiction over ADP because, on information and belief, ADP provided software to Brasher's and/or Idaho Auto Auction, which SIIA now claims to infringe the copyrights of its members.

16. Venue is proper in this district under 28 U.S.C. §§1391(b) and 1391(c).

17. An actual case or controversy has arisen between the parties. SIIA has asserted claims of copyright infringement and has threatened litigation against Brasher's for the alleged infringement of software sold by Adobe, Corel, McAfee and Symantec. These statements threaten injury to Brasher's and thus, SIIA has created a case or controversy between SIIA and its members, on the one hand, and Brasher's on the other hand.

FACTUAL ALLEGATIONS

18. On May 1, 2007, Brasher's purchased the assets of Idaho Auto Auction.

19. Included in the purchase were a number of computers which were being used by Idaho Auto Auction.

20. In approximately 2008, Robert William Gillespie ("Gillespie"), a former IT administrator of Brasher's, installed two non-licensed copies of Adobe Acrobat Pro onto two computers owned by Brasher's. Gillespie also loaded a copy of Adobe Creative Suite 3 onto another computer at Brasher's.

21. Gillespie's actions were in violation of Brasher's policies and Gillespie was subsequently terminated from Brasher's.

22. On information and belief, after Gillespie was terminated, he informed SIIA that Brasher's had pirated software on their computers.

23. SIIA contacted Brasher's in May of 2010, requesting to run an audit of all software on Brasher's computers based on the communications of an unidentified third party who claimed that Brasher's had illegal copies of software on its machines. Despite repeated requests, SIIA has failed to identify the person who made the claim about Brasher's.

24. Believing it had nothing to hide, Brasher's complied with the request and the audit.

25. SIIA claimed to have found, in addition to the two copies of Adobe Acrobat Pro, one copy of Adobe Creative Suite, one copy of Corel Animation Shop, one copy of McAfee SpamKiller, and three copies of Symantec ProComm. Brasher's independently searched for this software on its computers, but was unable to locate some of the software and believed that it had proper licenses for the others.

26. On information and belief, SIIA's auditing program searched the registry of Brasher's computers, displaying software that was once on the machine but that was no longer present.

27. With the exception of the Adobe programs, Brasher's never installed any of the allegedly infringing software. Rather, it is apparent that the software was loaded onto the machines prior to their acquisition from Defendant Idaho Auto Auction.

28. On information and belief, Idaho Auto Auction installed and removed at least some of the allegedly infringing software previous to Brasher's acquiring the used computers.

29. On information and belief, ADP provided software used by Idaho Auto Action and/or Brasher's which included some of the allegedly infringing software.

30. Brasher's had no knowledge that the computers contained allegedly infringing software when it acquired the computers.

31. After receiving the results of the software Audit, SIIA repeatedly made demands for payment several times the total retail price of the software and far in excess of any damages suffered by SIIA's members.

32. Despite its lack of bad faith or knowledge regarding the allegedly infringing software, Brasher's repeatedly offered to settle with SIIA for well-above the full retail price of the allegedly infringing software. For example, Brasher's offered to settle with SIIA for \$12,500.00 despite the fact that the retail price of the software allegedly infringed is less than half that amount. Moreover, Brasher's has provided evidence that it had licenses for some of the allegedly infringing software.

33. The retail price of the two copies of Adobe Acrobat Pro is \$898.00. Adobe's profits on the program would be considerably less.

34. The retail price of Creative Suite 3 is less than \$2,000.00, although SIIA has demanded payment for each component which it values at less than \$3,550.00. Adobe's profits on the program would be considerably less.

35. The retail price of market value of the additional software that was ostensibly on the computer registries when Brasher's acquired the computers is approximately \$1,000.00

36. Brasher's has repeatedly offered SIIA amounts well above the retail price of the software, including an offer of \$12,500.00 to settle the matter. Despite the fact that the settlement proposals have been more than twice the retail price of the allegedly infringed software, and even though Brasher's had no idea that the software was on the machines, SIIA continues to reject settlement offers and demand excessive settlement amounts despite the lack of intent on the part of Brasher's.

CLAIMS FOR RELIEF

CLAIM ONE: DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF COPYRIGHTS

37. Brasher's repeats and incorporates as though fully set forth herein each and every allegation in paragraphs 1 through 36 above.

38. An actual, present and justiciable controversy has arisen between Brasher's and SIIA regarding the infringement of software found on the registry of Brasher's computers.

39. Brasher's seeks declaratory judgment from this Court that it is not liable for copyright infringement for the software found on its computer registries which it did not install or for which it has a license or sublicense. Brasher's did not install much of the software, and had no knowledge of the existence of the software on the computers until threatened by SIIA.

40. In the alternative, Brasher's seeks a judgment from this Court that it is liable for no more than the lesser of statutory damages or retail price of the software found on its computers.

41. Further, Brasher seeks declaratory judgment that, to the extent there was any infringement, Brasher's was an innocent infringer.

CLAIM TWO: JUDICIAL DETERMINATION OF DAMAGES

42. Brasher's repeats and incorporates as though fully set forth herein each and every allegation in paragraphs 1 through 41 above.

43. An actual, present and justiciable controversy has arisen between Brasher's and SIIA regarding the proper damages for copyright infringement of the two copies of Adobe Acrobat Pro and Adobe Creative Suite 3 which were installed on Brasher's computers in violation of company policy.

44. In light of SIIA's refusal to accept reasonable settlement offers, Brasher's requests the Court to determine damages for any infringements.

CLAIM THREE: APPORTIONMENT OF LIABILITY

45. Brasher's repeats and incorporates as though fully set forth herein each and every allegation in paragraphs 1 through 44 above.

46. An actual, present and justiciable controversy has arisen between Brasher's and Idaho Auto Auction, Gillespie and ADP as to who should be liable for any infringement of copyrights by software found on the registry of Brasher's computers.

47. Brasher's therefore requests that the Court apportion liability between Brasher's, Idaho Auto Action, Gillespie and ADP.

CLAIM FOUR: INDEMNIFICATION/CONTRIBUTION

48. Brasher's repeats and incorporates as though fully set forth herein each and every allegation in paragraphs 1 through 47 above.

49. An actual, present and justiciable controversy has arisen between Brasher's and SIIA regarding the infringement of software found on the registry of Brasher's computers.

50. To the extent that the Court determines any of the software found on the registry of Brasher's computers which Brasher's did not install is infringing, Brasher's makes a claim for indemnification and/or contribution from Idaho Auto Auction, from whom Brasher's acquired the computers, for the entire amount of the damages or an amount the Court determines is fair.

51. To the extent that the Court determines the copies of Adobe programs were infringing, Brasher's seeks a judicial determination of indemnification and/or contribution in the full amount of damages, or an amount the Court determines is fair, from defendant Gillespie, who personally installed the copies of Adobe programs on Brasher's computers without Brasher's knowledge or consent.

52. To the extent any software which is found to be infringing which was provided by ADP, Brasher's seeks a judicial determination of indemnification and/or contribution in the full amount of damages, or an amount the Court determines is fair, against defendant ADP.

PRAYER FOR RELIEF

WHEREFORE, Brasher's respectfully requests that the Court:

A. Enter judgment of non-infringement as to copies of software allegedly found on Brasher's computers;

B. Determine the proper damages for any act of infringement committed by Brasher's;

C. Apportion liability for any acts of infringement between Brasher's, Idaho Auto Auction, Gillespie and ADP.

D. Order contribution from Idaho Auto Auction, Gillespie and ADP for any damages awarded to SIIA or its members.

E. Any other relief which the Court deems fair and just.

DATED this 7th day of July, 2011.

EBERLE, BERLIN, KADING, TURNBOW
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By



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