

Guidelines for appointment of local commissioner in software infringement and piracy cases

An order for appointment of a local commissioner to visit the premises of a defendant is very crucial to the remedies claimed in a suit for copyright infringement of software by a plaintiff. The job of a local commissioner in such cases is to ensure that all the incriminating evidence pointing towards copyright infringement and piracy is not only collected but also preserved for the eventual trial of the case. Being intangible objects and highly susceptible to swift deletion and destruction, the visit by a local commissioner to confiscate such evidence is indispensable to such actions. However, refusal by the court to grant such an order is a nightmare for copyright litigators in India since such a refusal could seriously impair the claims in such actions. The plaintiff/ appellant in the instant case of *Autodesk Inc v. AVT Shankardass*, therefore, made a request before a Division Bench of the High Court of Delhi to lay down some important guidelines for appointment of local commissioners in such cases so as to end the existing contradictory views on the same. After considering the issues in depth, the Division Bench has laid down the following guidelines:

- The object of appointment of a local commissioner in software piracy matters is not so much for collection of evidence but for preservation and protection of infringing and incriminating evidence. In the absence of appointment of a local commissioner, such evidence that can be collected only from the premises of the defendant could be lost, removed or destroyed.
- Request for appointment of a local commissioner in such cases is intended to subserve the ends of justice as it is imperative to have an element of surprise so that the actual position is not altered.
- The test of reasonable and credible information regarding the existence of pirated software should not be subjected to strict proof at the initial stage itself. Rather it has to be tested on the touchstone of pragmatism and the natural and normal course of conduct and practice in trade.
- Since any attempt by a plaintiff to obtain any admission by employing decoy customers and gaining access to the defendant's premises has the potential of alerting the defendant and causing a possible disappearance of the evidence, courts must not insist on such visits as a precondition. Further, any reports by private investigators engaged by the plaintiff need not be disregarded on partisan grounds and should be analysed objectively.
- In cases where there is no definite and cogent information regarding existence of pirated software, or where court has an element of doubt, it may consider asking the plaintiff to deposit costs in the court so that in

case the pirated software or incriminating evidence is not found, the defendant could be suitably compensated.