

## Microsoft Beats Licensee's Attempt To Nix Copyright Suit

By Kurt Orzeck

*Law360, Los Angeles (February 14, 2014, 4:21 PM ET)* -- A federal judge in Georgia refused Friday to dismiss Microsoft Corp.'s copyright infringement suit accusing licensee Ebix Inc. of making unauthorized copies of programs and attempting to stymie Microsoft's efforts to investigate, ruling that the plaintiff had sufficiently alleged its copyright claim.

Rejecting the defendant's motions to dismiss for failure to state a claim and lack of subject matter jurisdiction, U.S. District Judge Charles A. Pannell Jr. said Microsoft could move forward with its allegation that its Atlanta-based customer — which designs computer applications for insurance companies — wasn't honoring the terms of their contract in January 2012.

Ebix argued that Microsoft hadn't adequately stated a claim for copyright infringement because the parts of the license agreement it allegedly breached are covenants, or promises, to pay for licensed use of Microsoft's products after the fact — not conditions of a contract. The plaintiff countered that the provisions at issue described the procedures by which Ebix could make and use copies of Microsoft's copyrighted software, thus it could sue for damages.

Judge Pannell said that, while he is inclined to agree with Ebix that the provisions should be read as covenants, the court has to accept the allegations in the first amended complaint as true at this stage in the proceeding.

"Microsoft has sufficiently pled allegations of copyright infringement that survive regardless of the court's reading of the license agreement terms at issue," Friday's order said.

Under its March 2010 licensing agreement with Microsoft, Ebix received a volume discount for licensing software for 250 or more computers and was provided with master copies of Microsoft products, the plaintiff claimed.

Ebix agreed to a "pay as you go" system under which it had the right to make unlimited copies of the programs, provided it regularly reported how many copies it ran off and paid to license each one, according to Microsoft.

The defendant was expected to submit license orders on a monthly basis for every copy of a Microsoft product that had been made that month and was required to pay for those copies, the plaintiff claimed. The agreement allowed Microsoft to audit Ebix to ensure it was holding up its end of the bargain.

After Microsoft grew suspicious that Ebix wasn't abiding by the agreement, it allegedly told Ebix in January 2012 to complete a self-audit by March of that year.

Ebix missed that deadline and several more, and when Microsoft hired Ernst & Young LLP to audit the company, Ebix admitted it had been using unlicensed copies of Microsoft's Exchange suite for years, as well as other Microsoft products for which it had no licenses, but offered to buy them if Microsoft called off the outside audit, according to the plaintiff.

But Ebix remained uncooperative, and no audit has been performed to date, court filings said.

Ebix claimed that, when read along with the licensing agreement's compliance verification section, which allows Ebix to "cure" any noncompliance revealed in an audit, the provisions at issue are clearly a covenant.

The defendant argued that, if Microsoft could sue for copyright infringement before Ebix had the chance to cure any noncompliance within 30 days of the audit, the curative part of the agreement would be meaningless.

Since Ebix has the opportunity to address any failures, the provisions can't be a condition of performance under the contract but are intended as a covenant to perform in the future.

But because a compliance verification section in the licensing agreement doesn't require Microsoft to perform an audit, Ebix couldn't sufficiently argue that the provisions at issue are covenants and not conditions, according to Judge Pannell.

Attorneys for both parties didn't immediately respond to requests for comment Friday.

Microsoft is represented by Clara J. Shin of Covington & Burling LLP, by Noah C. Graubart of Fish & Richardson PC and by in-house counsel Mary Jo Schrade.

Ebix is represented by Jason D. Rosenberg, Kathryn W. Bina and Uly S. Gunn of Alston & Bird LLP.

The case is Microsoft Corp. et al. v. Ebix Inc., case number 1:13-cv-01655, in the U.S. District Court for the Northern District of Georgia, Atlanta Division.

--Additional reporting by Dan Prochilo. Editing by Rebecca Flanagan.

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