

PINHEIRO NETO LAW FIRM

To the Honorable Judge of Law from the Criminal Court of the District of Barueri, State of Sao Paulo.

MICROSOFT INFORMATICA LTDA, a company duly incorporated and existing according to the laws of Brazil, with its headquarters at the City of Sao Paulo, at Avenida das Nacoes Unidas 12901, Torre Norte, 27<sup>th</sup> floor, enrolled under the taxpayer's list under number 60.316.817/0001-03, by means of its legal representative (Document number 01) and undersigned lawyers, respectfully files before this court and against SERGIO AMADEU DA SILVEIRA, Brazilian citizen, President of the National Institute of Information Technology (ITI), with headquarters at SCN Quadra 04 Bloco B Pétala D, room 1102, Edificio Centro Empresarial Varig, CEP 70710-500, Brasilia, DF, the following

DEMAND FOR EXPLANATION

on the grounds of Article 25 of the Federal Statute 5,250 of February 1967 - "The Press Law", for the reasons and motives explained below:

I- On the exclusive jurisdiction of this Honorable Court to Receive, Process and Decide the Present Demand for Explanation

1. Under the express provisions of article 42 of the Press Law, which is mandatory, the jurisdiction to receive, process and decide the Demand for Explanation is that of the place where the newspaper or periodical, in this case, the place where the magazine Carta Capital, was printed. Said magazine published the article which the Plaintiff deems as incriminated. See below:

Article 42 – “The place of the violation, for determining Territorial Jurisdiction, will be that where the newspaper or the periodical was printed, and that of the place where the studio of the permitted or conceded radio station is located, as well as the main place of business of the news agency.

Sole Paragraph – Press Crimes are subject to the provisions of article 85 of the Criminal Procedure Code.

2. The precedents of our Courts are uncontroversial in ratifying the provisions of the Especial Law, according to the following decisions listed in the law reviews: JUTACRIM 68/181; 67/225; 78/412; RT 555/343; 559/379; 556/315; 578/361; 656/269; 603/365 etc.

3. According to the administrative information of the abovementioned magazine, it is printed at Avenida Marcos Penteados Ulhoa Rodrigues, 700, Santana de Parnaíba/SP, Plural Editora e

Grafica, in the district of Barueri.

4. For this reason, this Court must process and decide the present Demand for Explanation.

## II - On the Facts

5. On March 17, 2004, the Magazine Carta Capital published under the title "The Penguin Advances" a journalistic article about the growing of private companies which would start to adopt free software, and about the intention of the federal government to launch an advertising campaign in favor of this type of software.

6. In this journalistic article, Mr. Sergio Amadeu, Defendant herein, in the exercise of his public duties of President of the National Institute of Information Technology (ITI), aiming at disseminating free software among Ministries, State owned companies and governmental bodies, made aggressive declarations lacking any kind of technical foundation about the use of the software developed by Microsoft, Plaintiff herein.

## III. On the References and Comments made to the Plaintiff company by the Defendant, from which one can infer Defamation

7. With purposes still to be clarified, the Defendant, at the condition of President of ITI, gave an interview to the magazine Carta Capital, in which he makes reference and imputations of offensive nature to the Plaintiff, using phrases and expressions from which defamation is inferred, under the terms of the article 21 of Statute 5.250/67, as follows:

"In defending free software, Mr. Amadeu does not abstain from criticizing Microsoft, accusing the company of a "drug-dealer practice" for offering the operational system Windows to some governments and city administration for digital inclusion programs. "This is a trojan horse, a form of securing critical mass to continue constraining the country".

"To Amadeu, this will be a decisive year to win the "strategy of fear, uncertainty and doubt", as he classifies the business model of Microsoft." (bold characters added by the Plaintiff)

8. As demonstrated below, these declarations made by Mr. President of the ITI, beyond being absurd and criminal, extrapolate prohibitions and violate duties inherent to the public office the Defendant exercises.

9. Moreover, because of the fact that these declarations configure defamation, all the prerequisites required by article 25 of Statute 5250/67 are fulfilled for the filing of the present Demand for Explanation.

## IV. On the Law

10. The offensive expressions launched by the Defendant at the interview violate the rule of Article 12 of the Press Law, which leads to the application of the aforementioned especial statute whenever there is an excess in freedom of speech and freedom of thought, by means of the dissemination of information.

11. The speech declared in the context of the interview granted by the Defendant, "drug dealer practice" offends the most crucial foundations of the rules typifying the felony of defamation, provided at article 21 of the Federal Statute 5250/67.

12. Defamation is configured by the imputation to someone of fact offensive to its reputation. Brazilian law and the legal scholars accept quite uncontroversially that a legal entity can be the victim of the defamation felony, considering that its reputation is part of its objective honor and image, qualities cultivated by the entity and recognized by society.

13. In this direction, Julio Fabrini Mirabet, in its Manual of Criminal Law, Atlas Press, 16<sup>th</sup> issue, pages 161 and 162, lectures that:

“Regarding the Press Law, our Courts have decided about the admissibility of the defamation crime being the victim as legal entity”

14. The precedents of our Courts ratify the understanding of the legal doctrine, according to the following decisions transcribed below:

“There is no doubt that, under the Press Law, the legal entity is also a “person”, able to suffer a crime against its honor, being controversial only the “compatibility of which criminal type applies (calumny, defamation, criminal offense)”. (STF – RHC – Rel. Rafael Mayer – RT 561/414)

“Press Law – crime against honor – Legal Entity – Defamation and Criminal Offense – the legal entity can be the victim of crimes against honor. Despite that this attribute is a quality of natural persons, one cannot deny to the legal entities a moral asset which encompasses its good name, respectability and trust. If these assets are disturbed, the inevitable consequences are untrustworthiness, ruin, and bankruptcy” (TACRIM – SP – AC 367.767 – Rel. Gilberto Gama)

“Crime against honor – legal entity – victim – Possibility – Legal entities can be the victim of a crime against honor, except for the crime of calumny – since a legal entity cannot commit a crime – because its reputation and trustworthiness are able to be disturbed, with consequences to its economic life” (TACRIM – SP – AC 428.169 – Rel Silvio Rico)

15. Therefore, since the possibility of a legal entity to be a victim of crimes against its honor

has been demonstrated, especially regarding defamation, the legal entity has the faculty of exercising its rights provided in article 25 of Law 5.250/67 (“Press Law”) and its paragraphs:

“Article 25 – If from references, quotations or phrases, one can infer calumny, defamation or criminal offense, whoever is offended can judicially notify the agent. The agent shall have 48 (forty eight) to explain himself or herself.

1<sup>st</sup> Paragraph – If within this term the notified agent does not explain himself or herself, or, according to the discretion of the Judge, the explanation is not satisfactory, the agent must be liable for the offense.

2<sup>nd</sup> Paragraph – At the notifying party request, the Judge can determine that the explanations provided be published or transmitted, under the terms of article 29 and the following articles”

16. The aforementioned infringing speech demands immediate judicial intervention. However, the journalistic article did not follow a standard of questions and answers when inserting the opinions of the Defendant.

17. Therefore, the Plaintiff demands that the Defendant answers the list of questions below, under the terms of article 25 of the Press Law, and at the end, the Plaintiff demands this honorable judge to analyze the value of the answers, if they ever come to be provided. In case of retraction, the Plaintiff claims for the application of the Second Paragraph of the aforementioned Article 25, which provides that the retractions must be published in the same section of the magazine Carta Capital, where the offensive article was initially published, charging all the costs to the Defendant.

#### List of Question

1- Has the Defendant spoken about free software to the Carta Capital Magazine in the article published at issue number 282 as of March 17, 2004?

2- Has the Defendant referred to the attitude of the Plaintiff Microsoft as "drug dealer practice"?

3- What does it mean to the Defendant "drug dealer practice"?

4- How does the Defendant interprets the expression "drug dealer practice"?

5- What does the expression proffered by the Defendant "strategy of fear, uncertainty, and doubt" referred in the article mean?

6- Is there any logical connection and/or intention from the Defendant in tipifying the behavior of the Plaintiff as "drug dealer practice" with the subsequent expression made in the interview of "fear strategy"?

Terms under which,  
Claims for Judicial Provision.

Sao Paulo, June 7, 2004

Beatriz M.A. Camargo Kestener  
OAB/SP 112.221

Mario Panseri Ferreira  
OAB/SP 159.530