ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

COPPERHEAD LIMITED

Plaintiff
(Defendant to the Counterclaim)

and

DANIEL MICAY

Defendant
(Plaintiff by Counterclaim)

STATEMENT OF DEFENCE AND COUNTERCLAIM

1.   Unless explicitly admitted herein, the defendant, Daniel Micay ("**Micay**"), denies the allegations contained in each paragraph of the Statement of Claim and puts the plaintiff to the strict proof thereof.

Overview

2.   "Open source" software development is the process through which source code is released publicly, and the public is encouraged to study, test, improve upon, and modify that code. Open source projects rely on communities of interested contributors, each of whom provides their code under the permissive, open source copyright license used by the project in question. The resulting software is often better and more secure as a result of this transparency and collaborative effort. Open source development is a critical feature of much modern software, especially in the realm of computer security.

3.   The plaintiff seeks to misappropriate the copyrights associated with an open source software project started by Micay. The code authored by Micay and the other contributors was created long before the plaintiff was incorporated. On the plaintiff's own pleadings, no written assignment of any copyrights has ever taken place.

4.   The plaintiff's suit evinces a fundamental misunderstanding of copyright law, the principles of open source software development, and the factual record.   Micay respectfully requests that the plaintiff's suit be dismissed, with costs.

Parties and Players

5.   Micay is a 28-year-old computer programmer. He manages the open source software project that produces GrapheneOS, a security-hardened version, or "fork", of the Android mobile operating system. He owns 50% of the common shares of the plaintiff, Copperhead Limited ("**Copperhead**").

6.   James Donaldson ("**Donaldson**") owns the remaining 50% of the common shares of Copperhead. At the relevant times, Donaldson performed business development and marketing functions for Copperhead, and served as Copperhead's sole director.

7.   The plaintiff Copperhead Limited ("**Copperhead**") is an Ontario corporation established in November 2015 to sponsor and sell support services related to Micay's open source Android security work, described further below. To Micay's knowledge, during his involvement with the company, Copperhead's only full-time employee was Donaldson, who holds himself out as the company's Chief Executive Officer.

Micay's Initial Involvement in Open Source Android Security

8.   Android is the world's most popular mobile operating system. It is used in billions of devices around the world, including smartphones, tablets, watches, cameras, etc. Android is formally known as the Android Open Source Project ("**AOSP**").

9.   Google is the chief promoter and marketer of Android. This includes maintaining and releasing canonical iterations, or "releases", of Android that incorporate improvements from the broader developer community. Where a contributor writes code that is incorporated into a canonical release, Google often pays a "bounty" to both recognize the contribution and to encourage similar efforts.

10.   Some users seek privacy and security features that are not offered in canonical Android releases, either because they have not yet been developed or require compromises unlikely to be made in a mainstream operating system. As canonical releases of Android occur on a relatively fixed monthly schedule with a month of internal testing for security fixes, some users also desire more frequent security updates to address emerging security threats.

11.   Micay began working on security hardening for the open source Linux operating system in 2012. Android incorporates the core elements, commonly referred to as the "kernel", of Linux, and Micay shifted his focus to creating security-hardened versions of Android in 2014. By early/mid 2015, Micay had personally authored a substantial body of computer code that forms the basis of a security-hardened version of Android ("**Code A**"), which he maintained and published on the GitHub platform.

12. GitHub is the most commonly used website for publishing open source computer code, collecting contributions from the developer community, prioritizing development pathways, and issuing stable releases of the software. Coordination between project contributors takes place primarily on GitHub, IRC/Matrix chat rooms and via messages over the Signal messaging app. These are also used to engage with the community, along with social media like Twitter and Reddit. The Code A developer community used these platforms, which were managed by Micay.

13. While Micay is the primary author and copyright owner of Code A, other members of the open source community have contributed code to the project as well, and the work of other open source projects has been incorporated into Code A in accordance with the terms of the relevant licenses under which Micay published Code A on GitHub. All individual contributors to Code A provided their contributions under licenses approved by the Open Source Initiative ("**OSI**"), and which allowed both commercial and non-commercial use of Code A.

14. Micay managed the development of Code A in his personal capacity, using his personal email address. In many cases, his improvements to the underlying Android system influenced or were explicitly adopted by the AOSP, resulting in the payment of bounties from Google to Micay. This has been Micay's primary source of income since 2014, along with donations from the community to support his open source work.

Formation of Copperhead

15. In late 2014, Donaldson and another individual, Dan McGrady ("**McGrady**") contacted Micay about forming a company around Micay's open source work. While

Code A was available for anybody to use and improve upon, Donaldson wanted to sell support services around it, as well as telephone handsets with Code A pre-loaded on the devices. McGrady and Donaldson proposed calling the company Copperhead, and suggested that Micay market Code A as CopperheadOS.

16.   This model of "sponsorship" of open source projects is common. The corporate sponsor contributes resources to a project—i.e. promotion, money, staff time, etc.—but monetizes their involvement through offering ancillary services.

17.   Micay agreed to this arrangement on the explicit understanding and agreement of Donaldson and McGrady that Micay would continue to manage all aspects of the Code A open source project. Micay agreed to market Code A as CopperheadOS on the following conditions:

(a)   Micay would continue to make all development decisions for the open source project;

(b)   Micay would continue to make all licensing decisions for the open source project;

(c)   Micay would continue to control his copyrights regarding Code A, including any subsequent contributions that formed part of CopperheadOS ("**Code B**");

(d)   Micay would continue to control the social media and publishing accounts regarding the open source project, including GitHub, Twitter, and Reddit; and

(e)   Micay would continue to control all donations made to support development of Code A/CopperheadOS.

18.   McGrady stepped away before Copperhead was incorporated in November 2015.

19.   Upon incorporation, Donaldson appointed himself Copperhead's Chief Executive Officer and sole director. Micay has never served as a director of Copperhead. He and Donaldson are co-equal 50% shareholders. Micay and Donaldson paid $500 each for their shares in Copperhead.

Operation of Copperhead

20.   After the formation of Copperhead in November 2015, Micay and Donaldson proceeded on largely parallel tracks, which suited their respective strengths and challenges.

21.   Donaldson attempted to make good on his plan to sell services and support surrounding CopperheadOS. As he is not technically proficient, Donaldson often relied on Micay for help in preparing pitch materials and implementing service obligations. Donaldson succeeded in convincing several companies to sign service and support contracts with Copperhead.

22.   Micay is a talented programmer. However, he suffers from acute social anxiety and depression. He conducts his work in physical isolation, but with online collaborators. Micay has only seen Donaldson in person fewer than 10 times since the formation of Copperhead in 2015.

23.   From and after the formation of Copperhead, Micay continued to expand community support for the open source CopperheadOS project, growing its Twitter following (@CopperheadOS) and collecting donations for the continued support of his open source work.

24.   Micay continued to make regular improvements to Code A through Code B. Micay continued to maintain the GitHub repository of code using his personal email address, and all copyright/licensing notices remained in his name personally. Donaldson/Copperhead were aware of this at all times.

25.   Where Code B was of broader utility to the Android community, Micay continued to submit those improvements to AOSP in exchange for bounties, as well as other similar programs. Micay did this at all times under his own name, declaring that he was the copyright author and owner for the relevant portions of Code B, with the full knowledge and support of Donaldson/Copperhead.

26.   The AOSP bounty system remained Micay's primary source of income. Contrary to Copperhead's statement of claim, Micay was never employed by Copperhead. While Donaldson occasionally held Micay out as Copperhead's "Chief Technology Officer", Micay never signed an employment agreement with Copperhead or accepted a common law offer of employment, was never paid a regular salary, and never agreed to serve as a fiduciary of Copperhead. Donaldson's description of Micay as "Chief Technology Officer" was puffery, as Copperhead actually had no regular employees other than Donaldson and it could not afford to pay Micay a salary in any event.

27.   While Copperhead provided monies to Micay from time to time, they never approached a salary of $60,000 per year. Donaldson sometimes unilaterally and retroactively categorized these payments as shareholder loans in order to avoid or defer the payment of taxes, despite Micay's objection to that characterization. Copperhead only began characterizing these monies as employment income after Micay and Donaldson parted ways, as described further below.

Breakdown of Copperhead

28.   While CopperheadOS continued to garner significant attention in the security world under Micay's management, Donaldson's stewardship of Copperhead's business faltered. He failed to raise capital, and struggled to perform the engagements that he did secure.

29.   Donaldson began to focus on the idea of changing the nature of CopperheadOS from an open source project to "closed source" software. In his view, this would allow Copperhead to sell licenses to CopperheadOS, since support contracts were not lucrative enough for Donaldson's liking.

30.   Micay consistently rejected these proposals. Donaldson's plan had two fundamental flaws. First, Code A and Code B had already been licensed to the public under open source licenses. There was no way to "claw back" the licenses under which they had already been released and were being used in the wider world. Moreover, Micay had no interest in writing proprietary software, or software for hire.

31.   Second, Donaldson's proposal was fundamentally inconsistent with the collaborative, community-based work that had allowed CopperheadOS (comprising Code

A and Code B) to develop in the first place. Micay worked hundred-hour weeks on CopperheadOS because he believes in open source software development and was able to make a living through contributions to AOSP. Copperhead had no capacity to develop CopperheadOS as a proprietary, in-house software project.

32.   Despite these problems, to placate Donaldson, Micay temporarily adopted a "source available" license for his future work on CopperheadOS in September 2016. This license did not apply to Code A and Code B, or any contributions to that code from third parties. It applied only to the code released under that "source available" license ("**Code C**").

33.   In 2018, matters between Micay and Donaldson came to a head over Donaldson's desire to pursue business deals with criminal organizations, and his attempts to compromise the security of CopperheadOS, including by proposing license enforcement and remote updating systems that would allow third-parties to have access to users' phones. As part of this process, Donaldson began to demand that Micay provide Donaldson with the "signing keys"—i.e. the credentials required to verify the authenticity of releases of CopperheadOS (the "**Keys**"). Donaldson advised that, in order to secure certain new business, potential customers required access to the Keys.

34.   The Keys had been in continuous use by Micay, in his personal capacity, since before the incorporation of Copperhead. However, more importantly, any party with the Keys could mark malicious software as "authentic", and thereby infiltrate devices using CopperheadOS.

35.   Micay was unwilling to participate in that kind of security breach. Since Donaldson had control over certain infrastructure for the open source project, he would be able to incorporate (or hire others to incorporate) the privacy-damaging features described above for all future releases of CopperheadOS. Micay therefore deleted the Keys permanently and severed ties with Copperhead and Donaldson.

36.   Micay has since carried on his open source work as GrapheneOS, which is released under an open source license. GrapheneOS uses elements of both Code A and Code B, but not Code C.

37.   Donaldson/Copperhead have responded by engaging in a sustained campaign of threatening contributors to GrapheneOS, slurring Micay in the technical press, and falsely claiming copyright over Code A and Code B. Donaldson has caused Twitter to seize the open source project's Twitter account (@CopperheadOS). Donaldson has seized approximately $100,000 in donations made to support the open source project. When informed of this, many of the donors were livid.

38.   Today, Copperhead remains a shell company that does no meaningful work on any Android-hardening software. By relying on miscellaneous contractors, Donaldson/Copperhead have continued to issue "releases" of CopperheadOS. However, these releases largely amount to repackaging the work of others.

39.   With respect to the copyright claims advanced by Copperhead, to be clear:

    (a)   Micay never assigned any copyrights, including to Code A and Code B, to Copperhead or anybody else, in writing or otherwise;

(b)   Micay never acquiesced or otherwise agreed to creating works for hire for Copperhead;

(c)   Micay was never a fiduciary of Copperhead. He was and is a shareholder. He was never a director. While Donaldson unilaterally assigned Micay a title that included "officer", no employment agreement was ever presented, negotiated, or signed;

(d)   Micay specifically denies that any equitable transfer has taken place with respect to his copyright interests in Code A and Code B; and

(e)   Micay retains all right, title, and interest in the copyrights related to Code A and Code B.

40.   Despite this, on June 22, 2018, Copperhead falsely entered copyright registration 1150787, over the source code in CopperheadOS, in the Canadian Intellectual Property Office. Micay learned of this false registration upon being served with the Statement of Claim in this action.

41.   Micay asks that this action be dismissed with costs.

COUNTERCLAIM

42.   The Plaintiff by Counterclaim, Daniel Micay (the "Plaintiff by Counterclaim"),
claims:

(a)   the sum of $50,000, comprising the donations to the CopperheadOS open
source project that were misappropriated by Copperhead;

(b)   a declaration that Micay is the author and copyright holder of Code A and
Code B;

(c)   a permanent injunction barring Copperhead from using any of Code A or
Code B;

(d)   pre-judgment interest in accordance with section 128 of the *Courts of
Justice Act*, R.S.O. 1990, c. C.43, as amended;

(e)   post-judgment interest in accordance with section 129 of the *Courts of
Justice Act*;

(f)   the costs of this proceeding, plus all applicable taxes; and,

(g)   such further and other relief as to this Honourable Court may seem just.

43.   The Plaintiff by Counterclaim repeats and relies upon the allegations in the
Statement of Defence in support of the Counterclaim.

October 1, 2020

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