Safe harbor?

Do mobile application developers have "safe harbor" against copyright infringement? Sergey Medvedev, Gorodissky & Partners, considers a recent ruling of the Russian IP Court.

There has been an explosive growth of mobile technology over the last few years. Personal tablets and smart phones are mobile devices that people all over the world use in order to communicate faster and access media content to be entertained. Mobile applications, which are generally installed as software, enable mobile devices to operate by allowing the public to access, use, generate and share different pieces of data as well as media, including movies, music and books. Mobile applications can be freely distributed or sold to customers through various online store platforms (for example, App Store, iTunes, iBooks, Google Play, Amazon App Store) that promote their brand identity.

Although e-stores tend to have strict policies, terms of use and regulations in place to offer copyright-cleared and legitimate media content, there are still some cases when non-authorized products penetrate into their online platforms for subsequent downloading by customers. While customers (users) may not even realize that certain media content has been legalized, and, therefore, continue using the "pirated" mobile applications on their mobile devices, valid copyright holders usually have greater concern about any unauthorized exploitation of their intellectual property rights. As a result, copyright holders are usually seeking to file copyright infringement claims against online store platforms and mobile application developers that are involved in unlawful usage, storage and distribution of media products.

The service provider argument

Practically, the chances to prevail in a copyright infringement action against an e-store are often very low, as almost every such online platform has registered itself as a "service provider" (for instance, with the US Copyright Office within the meaning of the Digital Millennium Copyright Act (DMCA 17 USC 512)), and possesses a perfect statutory immunity from liability by operation of the applicable law. However, a copyright holder can receive a favorable court decision against a mobile application developer if it is able to prove valid copyright ownership and unauthorized copyright usage by the latter.

But, what if the mobile application developer claims to be acting as a "service provider" by giving third party users an option to generate and upload certain media content into the mobile application? Can such mobile application developer, which is actually behaving similarly to what is called an Internet Service Provider (ISP), be eventually shielded from the liability for copyright infringement?

Testing the argument

This question has been recently tested under Russian court practice. In its judgment delivered on January 30, 2014 *(case ref: A40-12522/2013),* the Russian IP Court refused to grant a defense to the mobile application developer and found the company of the respondent liable for copyright infringement. The court awarded monetary compensation (equivalent to the US concept of "statutory damages") to DROFA LLC (the plaintiff), which was able to demonstrate the exclusive rights vested in the copyrighted books under the relevant license agreements and was able to prove the unauthorized usage of the copyrights by the mobile application developer.

The Russian IP Court held that the defendant, Nintegra, Ltd., failed to submit any evidence confirming

Résumé

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the uploading by third party users of the infringing materials (copyrighted books) into its mobile application called "LMS School. School Diary", which was available for downloading on iPad and iPhone mobile devices. The court ruled that the defendant was indeed offering a "finished software product" (in other words a ready-to-use mobile application) to its customers and rejected the defendant's arguments regarding the specific liability exceptions to copyright infringement claims according to the earlier precedential opinion of the Russian Supreme Commercial Court No. 6672/11 dated November 1, 2011 *(case ref: A40-75669/08-110-609)*.

The Russian IP Court also did not consider the concept of the so-called "information intermediary", which has been recently introduced in Article 1253(1) of the Russian Civil Code, and did not take into account the statutory-defined situations when such "information intermediary" might be released from the liability for intellectual property infringement by virtue of the law. Basically, the defendant pleaded that it did not upload any media-content into the mobile application, did not control the activities of third party users and immediately removed the infringing materials (copyrighted books) from the mobile application upon receipt of the cease and desist letter from the plaintiff before the civil action had been brought with the competent court.

Indeed, the defendant wanted to step into the shoes of the "service provider" in this case, arguing that the "service provider" should not be liable for copyright infringement if it had not initiated the transmission of information, had not selected the recipient of information, had not affected the integrity of information, and had undertaken preventive measures to cease the unauthorized use of intellectual property subject matter. However, the Russian IP Court stated that the above would apply only to hosting and social media providers as well as torrent resources, as had been mentioned in the referenced decision of the Russian Supreme Commercial Court; hence suggesting that mobile application developers would stay beyond the terms of the referenced liability immunity. Nevertheless, it might still be presumed that a different outcome would be possible if the defendant was able to show clear evidence that the mobile application at issue was another software platform on which third party users were uploading the target media-content.

The first judgment

This case is the first judgment ever issued in Russia regarding the liability of a mobile application developer for intellectual property infringement, where the respondent was trying to apply the "analogy" tool and compare its commercial activities with the regular operations of an ISP. The judgment itself represents an illustration of what may be done (evidenced) in theory and in practice in order for the mobile application developer to try to seek a "safe harbor" against the copyright infringement.

Given the significance of this case, as well as the circumstances surrounding the same, it is quite likely that mobile application developers will use the main holdings of the Russian IP Court in future analogous or similar disputes on the precedential basis. And, it is interesting to see, of course, how the court practice in this regard will be trended and fixed to eventually give an unequivocal answer to the question of the present article.