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HONG KONG | BEIJING

NEWSLETTER

issue 18 . 2017

IP UPDATE



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App Store: The Battlefield for Rights and Responsibilities in China

We have entered the age where we all grew dependent on our mobile phones. No doubt, the mobile phone apps market, being an integral part to the use of mobile phones, becomes one of the most profitable and fast-growing markets in the world, and the issue of protecting one's intellectual property rights in this market becomes the growing concern for all intellectual property right owners. This article serves as an introduction of how an app developer may protect his intellectual property rights in the app market in China.

APP DEVELOPER'S RIGHTS IN CHINA

Copyright Protection

From the perspective of app markets, copyright comes to protect the rights owners in two different angles. On one hand, the content displayed and/or used in the app may be protected under copyright – e.g. the art works and graphics used in the app, the literature and articles published through the app, etc. On the other hand, the programming language of the app may also be protected.

Regarding the programming language, it should be noted that copyright does not protect the ideas and concepts of the app. This is to say, if an infringer re-write the app by another programming language, this may not constitute copyright infringement. Further, it is always difficult to prove that the infringer did copy the programming language and hence constituted copyright infringement. Expert analysis in this regard may be required. Also, addition of distinctive yet useless feature in the programming language, and/or even

addition of bugs and errors that may not affect the performance of the program, may be helpful in establishing direct copyright should the same feature be identified in the infringer's program.

Recordal of app copyright may also be considered as it serves as prima facie evidence of the ownership of copyrights. It also facilitates enforcement actions and corporate app developers may enjoy tax benefits.

Software patents

In order to have a more comprehensive protection of the rights over the app, the app developer may consider registration of the app as a software patent with State Intellectual Property Office. Of course, the app has to satisfy technicality requirements set out in both Chinese Patent Law and Guidelines for Patent Examination of SIPO. However, this may

not be a satisfactory route as extensive time would be required to go through the substantial examination process, and may itself be incompatible with the fast-changing and relatively short lifespan app market.

APP STORES IN CHINA AND ENFORCEMENT

Cooperating with the app stores to enforce your intellectual property rights remain the most cost efficient way to combat app related infringement, as app stores remain the most common and popular ways for app developers to distribute their products to end-users. Each app store may have its own procedures and policies in handling intellectual property rights infringement complaints, and we set out below some of the more popular app stores in China:-

Apple App Store

Content creator may report infringement to Apple and Apple will put the complainant to direct contact with the alleged infringer. If the case is still unsettled after negotiations between the complainant and the alleged infringer, the case will be referred to the Apple Store Legal team.

Baidu App Store

IP infringement complaint can be made via email to the designated address. Complainants should include in the email the name of the copyrighted app and proof of your rights over the app. If documentation evidence is not available, the complainant developer may provide screenshots of User Interface ("UI") design and part of the program code with the complainant identity documents to support your claim. Of course, information of the infringing app, including the URL to the app and screenshots of UI design of such app should be provided to facilitate the process of the complaint.

Xiaomi App Store

IP infringement complaints can be made via email to the designated address. Xiaomi will redirect the complaint to the alleged infringer. The alleged infringer may submit a counter statement. If the dispute is not settled, Xiaomi will then suggest the complainant to proceed to legal actions against the infringer by applying for injunction, suing or lodging administrative complaints.

Google Play

If you are aware of intellectual property infringement, you may lodge a Legal Removal Request to Google. You will have to first identify and describe the copyrighted work, URL address of an example of an authorized use of the work (e.g. official / authorized downloading site of the app) and the location of the alleged infringing material. After receiving the above information, Google will then process your complaint and respond by removing or disabling access to material claimed to be the subject of infringing activity and/or terminating subscribers. The owner of the allegedly infringing app will be notified by Google and the alleged infringer can make a counter notification defending his/her own app. The infringing content may be removed from the platform after investigation. Google also from time to time publish the infringement notices to the public.

Liability of App Store

While the app stores in most of the cases are not the primary infringer, they facilitate the distribution of the infringing app and hence may still have liability in facilitating the infringement. Accordingly, most app stores have in place a notice-and-takedown mechanism to mitigate the risk of being held liable for facilitating the infringement. While in most of the cases, the existence of an appropriate takedown mechanism may avoid liability, we see examples of Chinese court cases where the court seems to have placed a higher burden on the app stores to scrutinize apps before allowing their publication.

In one recent case, the court finds that an app store is liable for infringement in allowing the infringing app to be distributed on its platform. It seems that the court considers that given the nature of the infringing app in question (being an app allowing user to view works of different authors), the app store should have knowledge on the potential infringement of the app, and the failure of the app store to enquire and satisfy itself that the infringer has the right to distribute the works concerned would therefore constitute infringement.

It is clear that app stores may under certain circumstances be also liable for distribution of infringing apps. However, the extent of burden and liability vary depending on the actual circumstances of the case. In appropriate circumstances, app developers may also consider taking actions against the app stores for the purpose of enforcement.