IP Law
Nov. 4, 2024, 5:05 AM EST

Google, Apple Drive 'Black Box' IP Policing with App Store Rules

By *Jorja Siemons* and *Aruni Soni*

Deep Dive

- App stores sued by developers over ‘improper’ removals
- Suits illuminate ‘shadow IP enforcement regime,’ lawyers say

Apple Inc. and Google LLC app stores have drawn the ire of small app developers who accuse the tech giants of harming their businesses through opaque IP rules and takedown procedures, combined with their sweeping market power.

The App Store and Google Play allow companies to submit complaints of intellectual property violations, after which the platforms can remove apps at their sole discretion, with little recourse for the accused developers. Because of their market dominance, the plaintiffs say, removal from those stores could effectively put their companies out of business.

These private dispute resolution systems lock app store participants into “a shadow IP enforcement regime” in which platform operators handle complaints through “their own internal notice and takedown architectures” when similar disputes would otherwise proceed through federal courts, said University of New Hampshire law professor Peter Karol. That leaves small developers’ access to consumers at the mercy of tech behemoths.

Last month, Musi Inc. sued Apple over the “unjustifiable removal” of its music-streaming app following an infringement complaint by YouTube’s legal team over the app’s interface. In August, Sarafan Mobile Ltd. sued Google and Meta Platforms Inc. over what it said was an improper takedown of its “Reely” app after Meta’s Instagram complained about infringement of its Reels logo.

Both lawsuits in the US District Court for the Northern District of California allege the defendants breached their own agreements with app developers by removing the apps without sufficient evidence of infringement.

“We need to move to a system that has more checks and balances on what these large corporations do,” said Evgeny Krasnov, a Buzko Krasnov partner representing Sarafan.

'Wild West'

Google uses automated models to help it detect violations of its Developer Distribution Agreement and has "trained operators and analysts" handle cases that require "nuanced determination," according to its enforcement policy. If a developer believes an app was unfairly removed, it can appeal the decision via an online form.

Apple has a similar takedown and appeal system.

Both Sarafan and Musi received emails from the app stores notifying them of IP complaints against them, their suits said. They said they were told to contact the complaining parties—Meta and YouTube—but received no response when they tried to get in touch with them. Sarafan's Reely app was removed within two weeks of the initial complaint, and Apple removed Musi's app after a month and a half.

Google rejected Sarafan's appeal on the day it was submitted, with no explanation, Sarafan's complaint said.

Apple and Google didn't return requests for comment for this story.

Notice-and-takedown mechanisms are commonplace online. The 1998 Digital Millennium Copyright Act created a formal system giving online service providers safe harbor from infringement claims for their users' activity if they cooperate with takedown requests that would otherwise swamp federal courts.

But that law also created public safety valves that aren't present in private takedown systems that cover all kinds of IP. For example, a DMCA provision puts those who knowingly misrepresent a copyright infringement claim that leads to a takedown on the hook for damages and attorneys' fees.

Private takedown systems like Apple's and Google's have the trappings of the DMCA architecture but are the "Wild West" outside the context of copyright, Karol said.

"They've sort of taken that system and replicated it for every branch of IP without having the actual statutory framework to tell them to do that," he said.

While a DMCA dispute can ultimately wind up in court, private IP enforcement beyond copyright doesn't have that public accessibility, attorneys said.

"In a court proceeding, you can see here's a complaint with the allegations, and then we have the defendant respond, and then we have a judge come out with an opinion saying, 'Is the mark valid? Is the mark infringed?'" said Lisa Ramsey, law professor at University of San Diego. Google and Apple's systems, meanwhile, are "a black box."

That can be troubling when an accused infringer feels they're not getting due process, Ramsey said.

Ultimately, Sarafan and Musi are left bringing contractual disputes to pursue recourse against Google and Apple.

"We're in a world of the parties have come contracted into a private enforcement scheme where the platforms make judgment calls about interpreting terms of the private contracts that they mostly designed," said Peter DiCola, law professor at Northwestern University. "It's an enormous amount of power for the platforms and it makes sense that occasionally it would boil up into a dispute where someone felt that it wasn't fair."

'Outsized Impact'

The US Justice Department and more than a dozen state attorneys general accused Apple in March of engaging in anticompetitive activity, using "shapeshifting rules" in its App Store guidelines and developer agreements to "throttle competitive alternatives."

Google, too, continues to jostle with an antitrust crackdown in California federal court in its battle with Epic Games Inc., recently scoring a temporary pause on an order that would have forced it to overhaul its app marketplace.

Sarafan and Musi don't allege antitrust claims in their suits—but Sarafan does argue Google possesses an "outsized impact on the lives of independent developers." Sarafan included antitrust claims in a separate suit against Apple filed in May; Apple's motion to dismiss is pending.

"When such large entities fail to exercise due care in their business dealings, their power to destroy is absolute," Sarafan said.

It makes sense that Sarafan's and Musi's lawsuits are grounded in contractual claims, George Mason University antitrust and IP professor John Yun said. But beyond the question of whether the developer agreements were enforced reasonably, there's a broader question of whether these app stores behave as gatekeepers.

Krasnov, Sarafan's lawyer, said the issue of market power is "certainly an undercurrent" in the lawsuit.

"As the world gets more virtual, and everything moves online and into your phone and the apps," he said, "the importance of these issues grows proportionally."

The cases are Sarafan Mobile Limited v. Google LLC, N.D. Cal., No. 5:24-cv-06038; and Musi Inc. v. Apple Inc., N.D. Cal., No. 5:24-cv-06920.

To contact the reporters on this story: Jorja Siemons in Washington at jsiemons@bloombergindustry.com; Aruni Soni in Washington at asoni@ic.bloombergindustry.com

To contact the editors responsible for this story: Adam M. Taylor at ataylor@bloombergindustry.com; James Arkin at jarkin@bloombergindustry.com