

Reselling Used Apps?

In a recent decision, the Court of Justice of the European Union (CJEU) held that the resale of used software generally cannot be excluded in licence terms. The judgment, which aimed at the resale of used business software, may also affect the app market.

Smartphone and tablet users are used to all these little helpers easing their lives. Whether used to update the family photo album, to escape “real life” by playing some fun computer games or to read and revise documents for work, apps have become an integral part of our “smart” world.

What if a user does not want to use an app anymore?

Once purchased, apps usually cannot be returned for a refund. However, one could consider selling it to someone who would be happy to use it for a reduced price. Given the usually low purchase prices of apps, this might not be a realistic scenario.

But what about platform switchers? If someone intends to give up his iPad and switch to an Android- or Windows-based tablet, he might indeed be interested in receiving at least some money for selling the comprehensive collection of apps purchased over the years. This brings up various questions about the legal admissibility and technical feasibility of such used-app sales.

Recent CJEU case

While it was long unclear whether licence terms could forbid the resale of used software, the CJEU recently (case C-128/11, *UsedSoft v Oracle*) provided guidance on whether and under what conditions the resale of used software licences could be prevented by the rightholders of the software copyright. The CJEU held that the principle of exhaustion of rights (*Erschöpfung*) is also generally applicable to purchased downloaded software. Article 4 (2) of the Computer Program Directive stipulates, “The first sale in the Community of a copy of a programme by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof”.

Exhaustion of rights thus principally means that the developer/seller of software (or any other copyright protected work) cannot have any further influence on the “fate” of one specific copy of the software once it has been sold to an end-user. Previously (at least according to the Austrian approach) the principle of exhaustion was only applicable to physical copies of the software (*Werkstücke*), such as a DVD with a copy of the software on it.

But the CJEU overturned this precedent and ruled that it does not depend on whether the software is sold on a DVD or is made available for download on the internet. Therefore, the software developer/seller cannot prevent the software users from selling the purchased software to a third party (of course, the user would have to delete all copies of the software from his devices and not use the software further).

An exception is that this does not apply to parts of volume-licences. For example, one could not buy a volume-licence for 100 clients, use only 50 and resell the other 50 as “used software”. Only the whole volume licence (ie, all 100 client licences) could be sold. The same exception applies for parts of software packages.

Following this CJEU decision, terms in software licence agreements prohibiting the



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resale of used licences are generally inapplicable. This decision, however, only limits the developer's/seller's copyright so that he cannot legally prohibit sales of used software. So it is not clear whether the developers/sellers must enable or facilitate such used software sales (ie, providing the technical infrastructure to allow such sales; this is particularly relevant in "closed environments" like Apple iOS).

Conclusion

Clarification of this question will certainly lead to further cases before the CJEU. Therefore, the CJEU decision may also have an impact on the app market (even on "closed environments"). App developers, technically and legally, should consider whether their apps and licence terms are fit for a possible used sale by one user to another. App store operators may want to reconsider their licence terms and provide technical solutions for used-app sales. Users should consider the option of selling used apps when switching platforms and check whether the sale would be technically feasible.