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Process : **0028553-98.2014.8.08.0024**
Complaint : **201401071498**
Situation : **Current**
Action : **Public Class Action**
Nature : **Civil**
Date of Prosecuting: **18/08/2014**
District: **VITÓRIA - 5th LOWER CIVIL COURT**

Distribuição

Date : **18/08/2014 12:01**
Motive : **Distribution by draw**

Parties of the Process

Plaintiff

PUBLIC ATTORNEY'S OFFICE OF THE STATE OF ESPIRITO SANTO
0000000/ES - PUBLIC

Defendant

APPLE COMPUTER BRASIL LTDA
GOOGLE BRASIL INTERNET LTDA
MICROSOFT INFORMATICA LTDA

Judge: PAULO CESAR DE CARVALHO

Decision

STATE OF ESPÍRITO SANTO
JUDICIARY BRANCH
DISTRICT OF THE CAPITAL
5th CIVIL DISTRICT OF VITÓRIA
Records n. 0028553-98.2014.8.08.0024
Plaintiff: MINISTÉRIO PÚBLICO DO ESTADO DO ESPÍRITO SANTO
Defendant: APPLE COMPUTER BRASIL LTDA and OTHERS.

DECISION

This is about a PUBLIC CLASS ACTION proposed in face of APPLE COMPUTER BRASIL LTDA, GOOGLE BRASIL INTERNET LTDA and MICROSOFT INFORMATICA LTDA in which the PUBLIC ATTORNEY'S OFFICE intends the condemnation of the defendants in obligation to make consistent the "removal of the application named SECRET (by part of the first two defendants) and the similar application CRYPTIC (by part of the third defendant) of its official stores, as well as to be determined to them to remotely remove the same applications of the users who have already installed them in their respective smartphones".

It is an urgent advance protection request, with basis on the article 12 of the Public Class Action Law -- Law 7.347/85 and article 84 of the Consumer Defense Code -- Law 8.078/90, affirming that due to the referred applications many people are being victims of constraints and unlawful acts against the honor without being able to defend themselves, given the anonymity of the posts, since the application SECRET “allows users to tell secrets of their own or of friends anonymously through the app for their Facebook contacts”, considering that the developers have already affirmed that “it is impossible to identify who told the secret, since there is no data or user photo” and guarantee that “the maximum information disclosed is that the message was published by a friend or a friend of a friend in the app”.

This is the report. I decide.

In terms of article 5, item IV, of the Federal Constitution, “the expression of thought is free, and anonymity is forbidden”. However, item X, of the same provision, guarantees that “the privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured”.

According to DANIEL SARMENTO, among the reasons of moral and pragmatic order that justify the protection of the freedom of expression, there is the essential guarantee to the free development of personality and human dignity, established that the possibility of each individual to interact with their akin, to express their own ideas and feelings and to listen to those exposed by others, is vital to the existential fulfilling. We cannot forget, yet, that “the fulfillment of democracy has as a premise the public open, plural and dynamic space, where there is the free confrontation of ideas, which is only possible upon the guarantee of freedom of expression”.

However, the freedom of expression does not constitute an absolute right, being innumerable the hypothesis in which its exercise enter in conflict with other fundamental rights or collective legal goods constitutionally protected, which will be equated upon a pondering of interests, in a way to guarantee the right to honor, privacy, equality and human dignity and, even, protection of the child and the adolescent, since there isn't any restriction to the usage of these apps pointed at the initial complaint.

To make such rights compatible with the freedom of expression, without previous censoring, the Constitution adopted the model of freedom with responsibility, preventing anonymity. Therefore, the prohibition of anonymity allows the responsabilization for any eventual offense to the referred rights to personality, also constitutionally protected. In this sense, the lesson of DANIEL SARMENTO, in important collective work:

The model of freedom of expression laid out by the 1988 Constitution is the one of freedom with responsibility. In other words, the freedom of manifestation is consecrated with great wideness, but, on the other hand, it is established that those who act in an abusive manner in the exercise of their rights, and with that cause damages to third parties, can be liable for their actions. The prohibition of anonymity is aimed precisely at enabling this possibility of responsabilization, through the identification of the author of each manifestation. Furthermore, the knowledge of the author's identity can be important so that its receivers can make a value judgement about the expressed content. The prohibition of anonymity does not exclude, however, the secrecy of sources, provisioned in article 5, item XIV, of the Constitution that aims to protect the professional exercise of journalists, in a way to promote the access of citizenship to relevant information, that, without this guarantee, could not reach the public. SARMENTO, Daniel. Comment to the article 5, IV. CANOTILHO, J. J. Gomes; MENDES, Gilmar F.; SARLET, Ingo W.; Streck, Lenio L. (Coords.). Comments to the Brazilian Constitution. São Paulo: Saraiva/Almedina, 2013.

Enlightened by the exposed, we can conclude that the damage potential of the SECRET application and its similar CRYPTIC is striking, since they not only allow but also encourage the sharing of phrases and photos without the identification of who posted them, having the possibility, yet, to highlight the “most liked” secrets, increasing the eventual harm.

Notwithstanding the information technology technicians affirming that the use of the world wide web always leaves “traces”, allowing the identification of the user, in the case of the applications, the published messages do not show their origin, with the following warning on the app’s homepage:

You will be completely anonymous, and we will never post anything on Facebook.

We can ascertain, for, even in judicial cognizance, that the use of the application disrespects the final part of article 5, IV, of the Federal Constitution (seal to anonymity), as well as precludes, or at least makes it extremely hard, the possibility of obtaining a compensation for material or moral damage derived from an eventual violation to the right to privacy, honor and image of people (article 5, X, FC).

It is relevant, yet, for the injunction grant, to take into consideration that there wasn’t any payment by the users of the referred applications, since they are distributed for free.

Before the exposed, strong on the rules of article 12 of the 7.347/85 Law alongside article 84 of the Consumer Defense Code, I GRANT THE PRELIMINARY INJUNCTION REQUEST, determining to the first two defendants (APPLE COMPUTER BRASIL LTDA and GOOGLE BRASIL INTERNET LTDA) the removal of the application named “SECRET” and to the third (MICROSOFT INFORMÁTICA LTDA) of the similar application named “CRYPTIC” of its official stores, also determining, to remotely remove the applications of the users who have already installed them in their respective smartphones, in the limit of ten days, under penalty of daily fines which I establish on R\$20.000,00 (twenty-thousand reais) for non compliance with any of the requested.

To be summoned.

Vitória, August 19th 2014.

Paulo César de Carvalho

Law Judge

Provision

Before the exposed, strong on the rules of article 12 of the 7.347/85 Law alongside article 84 of the Consumer Defense Code, I GRANT THE PRELIMINARY INJUNCTION REQUEST, determining to the first two defendants (APPLE COMPUTER BRASIL LTDA and GOOGLE BRASIL INTERNET LTDA) the removal of the application named “SECRET” and to the third (MICROSOFT INFORMÁTICA LTDA) of the similar application named “CRYPTIC” of its official stores, also determining, to remotely remove the applications of the users who have already installed them in their respective smartphones, in the limit of ten days, under penalty of daily fines which I establish on R\$20.000,00 (twenty-thousand reais) for non compliance with any of the requested. To be summoned.