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What Your Employees Download Can Cost You Protecting Against Copyright Infringement

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Liability for copyright infringement can be a very costly matter. The scary part for businesses is that liability for copyright infringement can arise very easily and often without the knowledge or participation of management. Something as simple as an employee downloading a report through an expired subscription it had access through by way of its former employer, copying a photograph from the Internet for use on a company website, or printing and distributing copies of an article to other employees can give rise to liability for copyright infringement. We have recently been contacted by several clients who have received demand letters claiming infringement based on one or more of these employee actions. Especially prevalent in the financial services industry, many times the employer is unaware that its employees are continuing to access financial databases and proprietary information made available to him/her by their former employer.

The reason that liability for copyright infringement can attach so easily to an employer is two-fold. First, individuals who copy or distribute a copyrightable work can be subject to strict liability for their violation of the owner's rights.[1] Even in cases where the individual was unaware that work was subject to copyright protection or that his or her actions violated the rights of the owner, the law still imposes liability. See 17 U.S.C.A. §§ 501-04. Second, once it has been established that the individual has violated one of the owner's exclusive rights in the work, all that is required to establish the vicarious liability of the employer is to prove that there was some benefit to the employer. A "benefit to the employer" can be as simple as an employee creating copies of a research report and distributing them to other employees in the company; using a protected photograph or image on the employer's website; or posting text, videos, or images copied from another entity's website onto the employer's social media page. These seemingly innocuous activities can result in huge losses for the employer.

Statutory damages for copyright infringement can be substantial. The highest statutory damage awards are reserved for cases of "willful" infringement, but even "innocent" infringement can lead to thousands of dollars in damages, and the bar for proving willful infringement is surprisingly low. If the owner of the work has provided proper notice (in most cases simply applying the © symbol to the work along with the owner's name and date of creation is enough), then the defense of "innocent" infringement cannot be raised, and damages can be bumped up into the higher "willful" range. Statutory damages for even "innocent" infringement can range from "not less than $750 or more than $30,000 as the court considers just." Statutory damages for "willful" infringement can be as high as $150,000 per infringing act, plus attorney's fees and costs. 17 U.S.C.A. § 504(c).

The “per infringing act” standard acts as a multiplier, rapidly inflating the potential losses. For example, if an employee downloads an artist’s photograph and saves a copy on the company’s computer, that is a single infringement of the artist’s right to reproduce the work. If the employee emails the photo to her co-workers, that is a separate violation of the artists’ exclusive right of distribution. If the employee uploads the photo to the company’s website, it is another violation of the artist’s right of distribution. And if the employee prints out a flyer with the photo and hands it out, these would be still further, separate violations of the right to reproduce and distribute the image. When attorney’s fees and costs of litigation are included, the amount of money that the employer could be liable for, even in this simple example, can be significant. And if the employee in this example makes his or her behavior a regular practice, the potential liability can be staggering.

So what can the employer do? Unfortunately, there is no foolproof way to avoid liability for an employee’s infringing acts. There are, however, steps that an employer can take to minimize the impact should such an issue arise. First, it is important to have a clear policy in place, and in writing, regarding how to avoid copyright infringement. This should be included in your company’s general IP Policies and Procedures, and also included in an employee handbook. Second, it is important to train your employees on how to avoid copyright infringement in the workplace. Third, your company should monitor what your employees download onto company computers and spot check sources that are used in internal reports, on company websites, advertisements, social media, etc. Finally, most general business insurance policies offer coverage for copyright infringement (among other types of IP liability or damage), often under the umbrella of “advertising injury.” The cost and limits of coverage vary greatly from policy to policy and is something that should be discussed with your insurance carrier.

Cullen and Dykman has experience working with companies to develop policies and procedures to avoid copyright infringement, and to respond to claims of infringement. If you have any questions regarding policies, procedures, and training with regard to copyright infringement please feel free to contact Karen I. Levin at 516-296-9155 or via email at klevin@cullenanddykman.com, or Jennifer A. McLaughlin at 516-357-3713 or via email at jmclaughlin@cullenanddykman.com, or Ariel Ronneburger at 516-296-9182 or via email at aronneburger@cullenanddykman.com.