Ignorance Is Not Bliss: Corporate Liability For Employee Downloading Activities.

Recent headlines reflect an astonishing trend—individuals sued by the Recording Industry for sharing music files downloaded from the Internet. While the lawsuits have focused on individual users, the new target appears to be corporate America.

The focus shifted in February 2003, when the Recording Industry Association of America (“RIAA”), along with the Motion Picture Association of America mailed “A Corporate Policy Guide to Copyright Use and Security on the Internet” (“Copyright Guide”) to the top Fortune 1000 firms. The guide was designed to “explain the problem of copyright theft in the corporate and office environment, what can be done about it, and how [an employer] can implement policies to minimize the risk to [its] organization.” Copyright Guide at 1. In March 2003, the RIAA also sent letters to 300 companies claiming that it had evidence that the company’s employees were illegally sharing music files.

Corporate entities have begun to feel the wrath of the RIAA. For example, in April 2002, the RIAA announced a $1 million settlement of its copyright infringement dispute against Integrated Information Systems, Inc. ("IIS") based on employee downloading of music files onto company computers. With copyright infringement occurring in the corporate workplace, employers have been, and will continue to be held responsible for their employees’ acts of infringement.

Employers should take heed of relevant intellectual property laws. Copyright infringement is a strict liability offense; a company’s knowledge of its employees’ conduct plays no part in avoiding liability, only its damages. Ignorance is not bliss; an employer may be found liable for statutory damages ranging from $200.00 to $150,000.00 per infringed work (i.e. damages for each song, movie, or other copyrighted work downloaded or shared) with no knowledge of the infringing conduct. In order to protect itself against potential liability, a company should be proactive, and institute prophylactic measures to minimize its exposure.


3. This case may appear more egregious than the average company as here, Integrated Information Systems Inc., set up a dedicated server on its network for music file sharing by employees.

4. The Copyright Act provides that:
   i. The copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just.

   ii. In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200. 17 USC § 504(c).
I. THEORIES OF EMPLOYER COPYRIGHT LIABILITY

A potential suit against an employer for the conduct of its employee will likely assert liability for contributory or vicarious copyright infringement.5

A. Vicarious Infringement

An employer may be found liable for vicarious copyright infringement if the employer has the right and ability to supervise the employee’s conduct, fails to do so, and has a direct financial interest in the employee’s activities.

In Lowry's Reports, Inc. v. Legg Mason, Inc., two financial services companies were held vicariously liable for copyright infringement as a result of the acts of their employee. 271 F. Supp. 2d 737 (D. Md. 2003). There, an employee distributed and shared newsletters containing Lowry’s Reports (copyrighted daily stock market analysis) by posting copies on Legg Mason’s Intranet and by e-mailing copies of the newsletter to other employees. Holding the companies liable, the court found that the companies had the right and ability to supervise the employee, but failed to do so. The court rejected defendant’s position that its lack of knowledge obviated liability. Id., 271 F. Supp. 2d at 746.

In fact, the court held that adoption of an express company policy prohibiting the unauthorized copying of copyrighted material would not prevent liability. “The law of copyright liability takes no cognizance of a defendant’s knowledge of intent . . . The fact that employees infringed copyrights in contravention of policy or order bears not on Legg Mason’s liability, but rather on the amount of statutory and punitive damages and the award of attorneys’ fees.” In other words, the only way for an employer to absolve itself from liability is to stop the infringement altogether.

B. Contributory Infringement

An employer may be found liable for contributory copyright infringement for merely providing a Web site and services to its employees.

In Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc., the court found that operators of an electronic bulletin board service (“BBS”) were liable for contributory copyright infringement based on subscribers’ infringing conduct. 982 F. Supp. 503 (N.D. Ohio 1997). There, some of the BBS operator’s 6,000 subscribers uploaded and downloaded files containing plaintiff’s copyrighted works. The court held that the operators “induced, caused, and materially contributed” to any infringing activity that took place on their BBS. The Court found that the BBS had constructive knowledge that infringement activity was likely to be occurring on their network. Ibid.

II. METHODS TO LIMIT EMPLOYEE COPYRIGHT INFRINGEMENT OVER THE INTERNET

A. Corporate Policies and Education

Knowledge is power. An efficient method to avoid exposure for an employee’s online misconduct is to adopt and enforce an Internet Acceptable Use Policy (“Policy”). The Policy should demand that users of the company’s services respect online copyrights.6 The company must adopt procedures to monitor and strictly enforce the Policy. As discussed above, adoption of a Policy alone will not remove the company from potential liability. An employer must make sure that all employees read the Policy, and give periodic reminders to employees to ensure their familiarity with the Policy.

5. It should be noted that any employer liability will only attach if the employee is liable for direct copyright infringement. It should also be noted that an employer may have defenses against any contributory/vicarious liability claims asserted against it, including fair use. Companies should contact counsel for legal advice to discuss its options in defending any such suits.

6. While outside of the focus of this article, to avoid employee right to privacy claims, employers should include language in the policy to notify employees that their Internet activity may be monitored.
In addition, a company should educate its employees regarding Copyright law. A responsible company will inform its employees that downloading or sharing copyrighted works (including music files, movies, or games) could constitute copyright infringement. The company should also inform the employee that if there is an action based upon copyright infringement, both the company and the employee can be held liable for damages.

B. Monitor

Companies may use Internet monitoring software programs to monitor and report on employee Internet usage and downloading from the Internet. To prevent employees from visiting those inappropriate sites, employers can establish firewalls and install Internet filtering software.

Companies may also create Internet compliance officers to monitor Internet abuses. At a minimum, companies should implement internal procedures to effect a prompt and fair investigation of an employee’s misuse of the Internet.

C. Act

As soon as an employer becomes aware of an employee’s infringing activity it should delete whatever files the employee has downloaded. Moreover, a company should take steps to reprimand an employee who engages in infringing conduct, including termination.

III. Conclusion

An employer may not plead ignorance to avoid liability for the acts of its employees. In order to limit its exposure, a company must implement some form of Internet Use policy, combined with an internal enforcement mechanism.

Limiting employees' internet access prevents draining or slowing company resources for non-work related activities, increases employee productivity, reduces the risk of computer viruses, and increases the server's bandwidth. Finally, through regulating the content of employee downloads, an employer may limit its exposure for harassment claims.