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SOFTWARE AND COPYRIGHT LAWS

By Todd C. Barsumian

The drop in technology stocks has left some software companies looking elsewhere for revenue. One potential source of revenue for these companies can be found in software piracy, or copyright, actions against users of illegal copies of their software. The Investor's Business Daily ("IBD") reported on May 22, 2001 that piracy increased in 2000 for the first time since 1995 and that 37% of computer programs used by businesses worldwide are illegal copies. The IBD reported that software firms' losses have been calculated at 11.75 billion dollars. The IBD also reported that 159 piracy settlements totaled 6.2 million dollars but concluded that "[a]ttempts to prevent illegal copies usually fail and frustrate consumers".

What might this mean for your business? First, there is likely to be an increase in the civil pursuit of users of pirated software, especially businesses with "deep pockets." Second, as the National Law Journal recently reported, "there is a trend toward criminalizing intellectual property misappropriation."

With these two possibilities in mind, what should your business do to protect itself against increased scrutiny? First, businesses should seek a basic understanding of copyright laws. Second, businesses should take affirmative action to prevent piracy of company software in and outside the workplace.

Copyright Law and Damages

In basic terms, copyright law is a federal law which protects "original works of authorship fixed in any tangible medium of expression" that can be perceived, reproduced or communicated, whether directly or with the aid of a machine or device. A copyright does not protect ideas, processes, systems, methods of operation, concepts, principles or discoveries, though patent law may provide protection.

Computer programs are specifically defined under the copyright act as a "[s]et of arrangements or instructions to be used directly in a computer in order to bring about a certain result." In general, computer programs fall under the category of "literary works." The straightforward software piracy case usually involves determining how many programs were pilfered and how much compensation the software company is entitled to for the illegal use.

First, a software plaintiff will want to establish how many copies of a program were copyrighted. If suit is filed, this will be accomplished through conducting discovery which will include written requests for information as well as depositions of employees and officers who may have knowledge of the piracy. After determining how many illegal copies were made, the software plaintiff will consider the available remedies.

Available remedies under federal copyright law include an award of either the software owner's actual damages plus additional profits of the infringement or statutory fees. Actual damages will be comprised of the price of the software if it had been purchased plus any related fees. In proving profits, the plaintiff need only show the infringer's gross revenue. It is the infringer's burden to prove deductible expenses and profit related to factors other than the software. For some software-driven businesses, such an award could be crippling.

In the alternative to an award of profits, a plaintiff can be awarded statutory damages against infringers—who knew or should have known of the infringement—of not less than \$750 or more than \$30,000 per product as determined by the court. However, if the infringement is proven to be willful, the award may be increased to a sum of not more than \$150,000 per product. As potentially expensive as an award of statutory damages or profits could be, courts have discretion to award attorney fees and have done so in Indiana in *Martin v. City of Indianapolis* (a fee of \$131,252 was awarded to a prevailing plaintiff).

More important for businesses wishing to minimize the possibility of such damages is that they prove they were unaware of the infringement. By proving innocent infringement, a business can limit statutory damages to not less than \$200 (as opposed to \$750) per product. An innocent infringer is also less likely to have attorney fees assessed against it, as such an award is discretionary.

Criminal Prosecution

Under federal law, willful copyright infringement is a felony where the infringer has illegally copied at least 10 copies of a copyrighted work having a retail value of more than \$2,500. As discussed below, to minimize the chance of civil suit, criminal prosecution and to limit damages, a business should adopt a comprehensive copyright policy and be proactive in protecting company software from piracy.

Adopting a Copyright Policy

To prevent the possibility of facing an infringement suit, businesses should be proactive in protecting the software they purchase from piracy. Nearly all software comes with a license that puts the user on notice that the software should not be copied except under limited circumstances. Use of the software constitutes agreement to the terms of the license. Failure to scrupulously follow the license can lead to an infringement suit. However, not all infringements will be readily apparent to management, as employees may copy software unbeknownst to their supervisors. To avail itself of the innocent infringer exception, and thus limit potential damages, a business should place a copyright policy in their policy manual and, better yet, post a copyright policy in a conspicuous location and/or circulate a memo to computer users.

If you have any questions about copyright law or need assistance with the implementation of a copyright policy, contact one of KDDK's intellectual property attorneys: G. Michael Schopmeyer, Kent A. Brasseale II, Todd C. Barsumian or Monica E. Edwards.

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