

General Counsel



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Copyright Infringement

I began last quarter's column with a brief discussion about the recording industry's lawsuit against an Arizona man for "ripping" legally purchased CDs to his hard drive and subsequently making the digital files available via a "shared folder." The suit is just one in a long series of litigation recently brought by the industry in an effort to curb the widespread copyright infringement that has plagued the commercial recording industry for a number of years.

Although the recent spate of record industry litigation has garnered much attention, the industry's standard enforcement practices are far more ubiquitous and decidedly low-key: threats and warnings promising financial and criminal penalties for unlawful duplication or performance. While this sort of warning was once limited to the familiar "FBI Warning" that appears at the beginning of most commercial videos, it seems like today anyone who claims a copyright interest in something accompanies their copyright

claim with threats of significant monetary penalties and decades in prison for infringement.

Just the other day I ran across a professional photographer's web site that threatened a \$2,500 "fine" for any "unauthorized use" of his images. Of course, there are several ways one might use copyrighted work that are not expressly authorized by the copyright owner, but are, nevertheless, lawful. Indeed, the fair use provisions of the Copyright Act allow certain, limited use of copyrighted material without prior permission of the owner. Similarly, the TEACH Act allows public performance or display of copyrighted material under certain circumstances. (Both are discussed in earlier columns). Moreover, private parties, copyright owners or otherwise, lack the necessary legal authority to unilaterally assess "fines" against alleged wrongdoers; the assessment of such monetary damages must be made by a court of competent jurisdiction.

So, what are the consequences of infringing upon someone's copyright? Or, from a copyright owner's perspective: what are the remedies available from an infringer? As usual, the answer lies in the Copyright Act.

A quick word of caution: this column, as with most of my writing, relies wholly on U.S. law. International laws vary widely with respect to infringement remedies, so be aware that your home country's laws may differ significantly. No matter what country you live in, it's important to talk to a qualified attorney for guidance on copyright issues, or any other legal matters.

Criminal versus Civil Liability

As an initial matter, it is important to note that the Copyright Act provides for both civil and criminal penalties for copyright infringement. Criminal infringement occurs, generally, when one willfully infringes a copyright "for purposes of commercial advantage or private financial gain" or when one makes or distributes unlawful copies of copyrighted works with a retail value of more than \$1,000.

Sentences can include prison terms of up to 10 years and fines of \$1 million, but the Federal Sentencing Guidelines give judges some leeway in crafting an appropriate sentence, particularly if an offender does not have a prior criminal record. For example, a man was recently sentenced by a judge in the Eastern District of Virginia to six months of home confinement (commonly referred to colloquially as "house arrest") for ripping unreleased CDs (made available only to radio stations and DJs) and uploading the content to various Internet servers for global distribution.

In addition to incarceration and fines, criminal copyright convictions also typically re-



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sult in the forfeiture of the infringing items, which are destroyed, and any revenues generated as a result of the infringement.

Like all federal criminal charges, criminal infringement actions are brought by the U.S. Attorney of a particular jurisdiction; they cannot be brought by individuals, though such charges generally start with a complaint or tip from a copyright owner. Criminal infringement charges are typically directed at widespread, commercial conduct, like the selling of bootlegged recordings or videos.

Civil Remedies

Far more common than criminal charges are civil lawsuits brought by one private party against another, seeking money damages and injunctive relief against the alleged infringer. As a general rule, a copyright owner who prevails on an infringement claim is entitled to receive the actual losses attributable to the infringement along with any profits generated by the infringer that aren't included in the "actual losses" calculation.

In cases where a copyright has been registered with the Copyright Office prior to the

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alleged infringement or within three months of publication, a copyright owner may elect to receive "statutory damages" which are defined by the Copyright Act and have no relation to the actual damages or lost profits attributable to the infringement.

A statutory damage award can range from \$750 to \$30,000, or, if the copyright owner is able to show that the infringement was willful, up to \$150,000. The commercial recording and movie industries quote this latter number frequently as an absolute penalty for copyright infringement. Conspicuously omitted from their threats, however, is the statutory language that immediately follows the willful infringement provision, providing for a reduction in statutory damages (to no less than \$200) if the defendant can demonstrate that it was unaware that its acts constituted infringement.

So, to sum up the relatively complex copyright damages landscape: as a general rule a copyright owner can recover the actual losses attributable to an infringement of his or her work. If the work is properly registered, a copyright owner can recover between \$200 and \$150,000, depending on the relevant circumstances of the infringement.

In addition to money damages, the court can award the winner with litigation costs and attorney's fees, to be paid by the oppo-

nent. The court can also enjoin (stop) the infringer from continuing to engage in the infringing acts, and order the destruction of any infringing articles that may still exist.

Liquidated Damages

Recall that earlier I mentioned that private parties do not have the right or lawful ability to unilaterally assess "fines" against others. There is one small caveat that is worth mentioning, as it has the potential to appear in the context of content license agreements.

Parties to an agreement may, in some circumstances, stipulate the consequences of breach ahead of time. These provisions, typically called "liquidated damages clauses," are common in contracts where the actual damages incurred by a breach may be difficult or costly to calculate. A typical cell phone contract, for example, often provides for an "early termination" fee, a set fee that the service provider charges in the event a subscriber cancels the contract before the end of its defined term (usually one or two years).

One could conceive of a copyright license, such as a performance license for a planetarium show, that might include a liquidated damages clause in the event that the licensee exceeds the scope of license (consider a licensor includes a liquidated damages clause in its show license that provides for a \$50 charge ev-

ery time an image from the show is used outside the context of the full show presentation).

The point of this protracted explanation is to illustrate that although a copyright owner cannot unilaterally "fine" an alleged infringer, two contracting parties, through their agreement, can provide for liquidated damages that has the ultimate effect of a fine. But the catch is that the parties have agreed to the arrangement in a contract. Absent such an agreement, a copyright owner making an infringement claim must seek redress through the courts.

A Brief Digression: Cell Phone Jamming

On an unrelated, but very relevant note, there has been a fair amount of Dome-L traffic lately regarding the use of cell phone "jammers" that prevent the reception of cell phone signals in certain areas. While the technology is not particularly new, it had, until recently, been limited to government and military use, typically as a method to prevent remote detonation of explosive devices. Apparently a number of governments have legalized jamming equipment for use by private parties, such as movie theaters, restaurants, libraries, and other places where patrons may value an environment free from interruption.

Although the jamming devices are available through a variety of online sources, in the United States, their use remains illegal. A 2005 public notice issued by the Federal Communications Commission explains that intentional interference with licensed radio communications, such as cell phone transmissions, is a violation of the Commission's regulations and applicable federal statutes.

Passive jamming - that is, constructing a facility in such a way that prevents or hinders cellular transmissions - may be a lawful alternative to using affirmative jamming technology. Indeed, many commercial buildings already enjoy (or, depending on your perspective, are plagued by) this "feature," as the concrete and steel construction often inhibits cellular reception. ☆

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