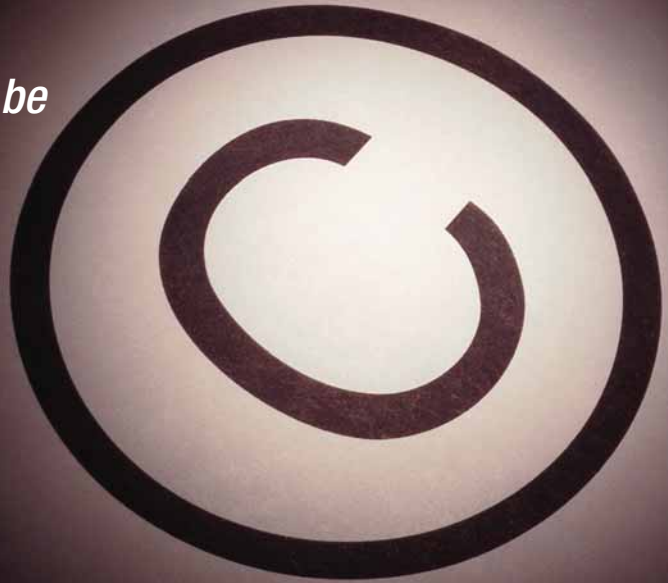


Seller Beware

Under copyright law, you may be liable even though you didn't even know you were involved in the sale of infringing artwork

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We've all heard the adage "Buyer beware." But when it comes to copyright law, it's "Seller beware." Anyone who manufactures or sells a product that infringes a copyright is liable. And not knowing that the product is infringing is not a defense. When you venture into the world of copyright, you must know that you are entering the twilight zone where corporate liability structures are irrelevant, indemnity clauses are useless, and sellers—not buyers—are at risk. Sound like a scary place? Let us explain.

The U.S. Copyright Act grants copyright owners exclusive rights to the use of their work. These rights include the right to copy the work, to make derivative works (a work based on a preexisting work, such as an art reproduction, a book translation, a movie version of a story, putting an image on a licensed product, an electronic version, etc.) along with the right to distribute the work and the right of public display. Infringement occurs when someone violates one of a copyright owner's exclusive rights. And "someone" means everyone in the stream of commerce flowing from the violation of a copyright owner's rights.

The individuals in the stream of commerce who are liable for infringement fall into one or more of three categories: 1) direct infringers, 2) contributory infringers, and 3) vicarious infringers. Direct infringers are the most common. A direct infringer copies a work or violates one of the other exclusive rights of a copyright owner himself—that is, makes the copies, distributes the infringing work, or publicly displays the unauthorized copy. Knowledge of the

infringement is not required. This is a strict liability offense. So being "innocent" will not relieve a violator of liability (although it may affect the amount of statutory damages).

Contributory infringers provide the means for someone else to infringe. For example, a store selling blank CDs and loaning CDs with copyrighted music for burning is a contributory infringer. While the store is not copying the music itself, it is providing the means for others to copy.

Vicarious infringers, the last category of infringers, have the authority to supervise a direct infringer and have a financial stake in the infringing activity. However, they need not have knowledge that the infringing activity has occurred. Where vicarious infringement occurs, a copyright owner may sue the direct infringer, the business entity he works for, and even the authority individuals of the company (shareholders and directors). Holding authoritative individuals liable is similar to piercing the corporate veil used in agency and tort law where, despite the measures taken in the structure of an entity to limit individual liability, individuals are still susceptible to personal liability.

Suppose an artist approaches a company, and the company agrees to produce posters of the artist's work. The company then sends the artist's work out for reproduction and sells copies to its customers. As it turns out, the artist copied someone else's work. The artist is a direct infringer. He copied another artist's work, a violation of the true artist's exclusive right to copy his work. And despite merely carrying on business as usual, the company is a contributory and direct infringer. By hiring a reproduction company to reproduce the work, it has provided the means for some-

one else to infringe by copying the work. Further, by selling copies of the work, it has directly violated the true artist's right to distribute the work. The reproduction company is liable for creating the infringements. If the customer is a retailer that sells the work, the retailer is liable for violating the distribution right. Or if the customer is a hotel, it may be liable for violating the copyright owner's right of public display.

Knowledge by any of the entities of the infringing status of the work is irrelevant; everyone is liable to the copyright owner. A copyright owner may sue any and everyone in any of these categories for the infringement of his work. This is called "joint and several" liability. Not only are liability structures of a business entity irrelevant, but individuals who are actively involved in the infringing conduct might also be liable individually in addition to any corporate liability. Companies are liable for the actions of their employees. So claiming it was a rogue employee or independent contractor won't deflect liability.

A copyright owner can go after everyone or just a select subset of infringers. For example, say an infringement originated in China and the rest of the players are in the U.S. The copyright owner can just go after the "innocent" U.S.-based defendants and not have to waste time in a futile action against someone in China.

Who the copyright owner goes after is a strategic decision that varies in each case. Sometimes it is the deep pocket large retailer or maybe the distributor—with the promise of not telling their customers that they have been selling infringing goods in exchange for an appropriate settlement.

Depending on the circumstances of the infringement, a copyright owner may be entitled to as much as \$150,000 per infringement (each infringed-upon image) and attorney fees or disgorgement of all the various defendants' profits. For example, if five images were infringed upon, then the upside of the exposure for statutory damages would be \$750,000 plus attorney fees (they can be lower at the court's discretion down to \$750 per infringement). Statutory damages and attorney fees are available to the one who filed a copyright registration on the infringed-upon artwork prior to the commencement of the infringing conduct. You can file for registration afterwards in order to file suit (it's a prerequisite), but then you get no attorney fees or statutory damages, just actual damages.

Actual damages are the loss to the copyright owner or the profits of everyone who infringed. The owner's loss would probably be the lost royalty or lost sales. The formula for these profits is a bit complicated and depends on several factors. In most cases, there are indemnification obligations so the downstream merchants can look upstream to their suppliers. What happens is that the retailer will look to the distributor (they can go to China and look to the manufacturer if they wish). Say the distributor made \$12,000 and the retailer \$30,000 in profit. The distributor will normally get stuck with paying the whole \$42,000 to

the copyright owner (no discounts for "not knowing").

How can you prevent your company from being caught up in a chain of infringement? The best way is to know with whom you are dealing. Sourcing from established artists, their publishers, or agents will give you a degree of comfort. Having good indemnification clauses in your contract will help. Ask questions as to who created it, when, where, do they have a copyright registration? If any suspicions arise avoid the product or supplier. Caveat: If you source in China, it is only a matter of when and not if you will buy infringing goods and then you will have no recourse (try suing a Chinese company in China).

In the end, the only individual not liable for infringement in a transaction is the ultimate retail buyer (unless the buyer sells the infringing work). Thus, copyright law turns the age-old adage of "Buyer beware" on its head. When it comes to copyright law, it's "Seller beware!" ■

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