Do Attorneys Follow Their Own Copyright Advice?

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Copyright law does not apply just to teenagers downloading music, but to lawyers as well. Lawyers are good at giving advice, but do we take it gracefully and heed it well when it comes to compliance with copyright law? The starting point in understanding copyright obligations is knowing that copying of copyrighted works is generally infringement unless the copyist has either the right to do so (e.g., a license), a valid fair use defense or a specific legal exemption. What follows is a guide to good – and bad – copyright practice inside the law firm as highlighted by a few common situations.

SENDING E-MAILS OR PHOTOCOPIES OF ARTICLES TO CLIENTS

You find an interesting article that your clients might really want to read. They might think better of you because you’re on top of new developments, too. Is it legal to forward them copies? First, copyright law doesn’t provide a definite number as to how many copies one can make and distribute before the “fair use” defense crumbles and one is legally required to obtain permission. In other words, there is no bright line stating that making four copies is legal and five is not. Note that word, “defense”: fair use is a defense and not an absolute right, so law firms wishing to avoid embarrassment and liability over a potential violation might stop thinking about defenses right here and always obtain permission (more about that later).

Regarding the fair use defense in this example, the copying and distribution of the article will almost certainly be viewed as commercial in nature, even though in this situation the lawyer is not charging a fee. (Of course, we might be underestimating the lawyer here.) Further, there is some potential harmful effect or loss on the copyright owner by the unauthorized activity. Both of these facts will generally work against finding of a fair use defense. What to do? There are two practical choices. One choice is to approach the copyright owner for permission. Most publishers maintain rights and permissions departments that license rights. A second alternative is to obtain a kind of blanket license from the Copyright Clearance Center. The CCC provides photocopying and digital use licenses for copying from its large repertory of publications. Many large law firms are already CCC licensees for exactly this kind of purpose.

COPYING A BOOK FOR LITIGATION

Assuming the number of copies made is small and limited to the number necessary for litigation, this copying is likely to be within a fair use defense. It would seem logical that the defense will be stronger when the book is out of print and not available at Amazon.com. Why would such a small matter create any realistic chance of litigation for copyright infringement? The answer might be that in a pitched battle over other larger issues, the copying could give the parties just one more thing to litigate over. For example, in Religious Technology
Center v. Wollersheim, (9th Cir. 1992) the parties argued over whether copies of allegedly stolen documents made for the purpose of preparing an expert witness for a state tort litigation were infringing.

COPYRIGHT IN LEGISLATION
States and municipalities often adopt into law copyrighted texts, such as building codes. Some copyright owners have challenged the subsequent reprinting of these laws by third parties. In Veeck v. Southern Building Code Congress International, Inc. (5th Cir. 2002), the plaintiff filed a declaratory judgment seeking a ruling that he did not violate the Copyright Act when he cut and pasted defendant’s copyrighted building codes on his website. Two North Texas municipalities had passed the codes into law prior to plaintiff’s publication. The court sided with the plaintiff reasoning that there is only one way to express “the law,” and that it is therefore an uncopyrightable fact. Given that the plaintiff republished the law in the precise form in which the municipalities adopted it, the court ruled that he did not infringe defendant’s copyrights.

DOWNLOADING MUSIC AND MOVIES IN THE OFFICE
Unauthorized downloading of copyrighted musical compositions to a personal computer is generally infringing. Could a law firm employer be held vicariously liable for such infringement if one of its employees commits it while at work? The answer to this question is generally, “No.” In order to be held vicariously liable for an employee’s copyright violations, an employer must have the right and ability to control the employee’s infringing behavior, and must have an obvious and direct financial interest in the exploitation of the copyrighted materials. Assuming that the employee is illegally downloading music files for personal use and enjoyment (keeping the downloading secret and not using the music for any business purpose), it would seem that an infringement claim brought against his employer would not meet the second prong of this vicarious liability standard. If, on the other hand, the employee is using the downloaded music for a business purpose (such as entertaining clients) the law firm could be liable even if it had not expressly approved the use. All that being said, law firms are well-advised to have policies prohibiting unauthorized downloading.

PICTURES AND MUSIC IN POWERPOINT SLIDES
How many tedious legal presentations would benefit by the inclusion of professional-grade images and music? The Internet has obviously provided users with a vast, tempting free library of lively digital images that can be downloaded and redistributed internationally with ease. Unfortunately, one should assume that most of these freely-accessible images on the Internet are copyrighted. Placement of a © copyright notice on the image (or any other work) is not a precondition to protecting a copyrighted work. In other words, copy at one’s own risk. Further, the unauthorized public performance of music may violate additional rights of the copyright owners in the songs. So, yet again licensing is the best way to go for the careful lawyer.

Looking to the future – for everyone (law firms, too) who wants to re-use copyrighted works – there’s a growing demand for systems that provide easy, fair-priced images and other content at central sources. Although the advice contained in this article may seem obvious, even bothersome, in most situations where law firms want to use copyrighted works, they should do the right thing and get the rights.

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