To "Send" or Not to "Send"? – The $150,000 Question

By Scott A. Fredricks

That "send" button could get you into a lot of trouble when it comes to electronic newsletters or articles found on Internet websites. Contrary to popular opinion, most of the content that arrives in your e-mail inbox does not belong to you. Thanks to sophisticated tracking software and big financial judgments, sharing that interesting article with your friends or colleagues could prove to be a very expensive mistake.

United States copyright laws generally grant ownership – and thus distribution rights – to the creator of the content, and not the person who receives it. Therefore, you must pay attention to the restrictions owners place on your use of their content. For example, many online newspapers allow visitors to print one paper copy of an article for their personal use, but prohibit further copying or redistribution via e-mail. Similarly, electronic newsletters distributed via e-mail often allow the recipient to also print or forward one copy of the newsletter as long as you immediately delete the original electronic copy. Of course, such contractual limits on copying or redistribution are often forgotten, overlooked, or completely ignored. Who would ever know if one of these things was forwarded anyway, right? Today, the owners probably do know if and when you forward their content.

In 2003, a jury ruled that financial services firm Legg Mason, Inc. had to pay the publisher of a daily financial newsletter a whopping $20 million for copyright infringement because the firm had faxed, e-mailed, and posted 240 copies of the newsletter onto its intranet. Because the federal Copyright Act allows an author to recover up to $150,000 per willful infringement, such a large award can mount up fairly quickly.

In Legg Mason's case, the publisher was tipped off to the copying by a disgruntled former employee. However, software developers have created tracking software that allows publishers to monitor compliance with subscription agreements. For example, tracking software that is easily attached to e-mail or electronic documents can notify a publisher if the e-mail or document is forwarded to anyone other than the intended recipient. Some of the more sophisticated software will even identify the IP address of the computer viewing the protected document and report how long the document was viewed, which pages of the document were viewed, and whether any pages were printed.

Armed with this data, a publisher is in a powerful position to extract a large payment from a company whose employee violates the terms of a subscription agreement. Of course, this is great news if you own the content. The very technology that makes your content easier to copy/infringe can now be used to catch scofflaws that violate your subscription agreements or terms of use. And the law can make it worth your while to pursue infringers.

A company on the receiving end, however, could stand to lose big if its employees are forwarding copyrighted material that was originally contained in, or attached to, an email. Companies should audit their subscriptions and educate their employees to make sure they comply with the limits of those subscriptions. Otherwise, pressing that "send" button could become the most expensive second they've ever spent.

Scott Fredricks is a partner in the Intellectual Property Practice Group at Cantey Hanger LLP. This article first appeared in the October 11-16, 2010 issue of The Fort Worth Business Press and is reprinted with permission.

SCOTT A. FREDRICKS, PARTNER
CANTEY HANGER LLP | 600 West 6th Street, Suite 300 | Fort Worth, Texas 76102
MAIN 817-877-2800 | DIRECT 817-877-2873 | FAX 817-877-2807 | EMAIL sfredricks@canteyhanger.com