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Not a Legg to stand on

It is now commonplace for the bulk of workplace-related information to be disseminated in electronic format. This applies both to information sourced internally and to external information provided by a third party. With respect to the latter, it is usual practice for a company to subscribe to an electronic publication which is then forwarded to a limited group of named individuals - who, in turn, bounce on copies to other colleagues or even friends outside the company, thereby widening the circle of readership.

On the face of it, such practices do not seem problematic, especially since it all seems remarkably similar to passing round a hard copy publication. A recent US case, however, has overturned these assumptions and suggests that forwarding subscriber-based online publications might cost companies a great deal of money. To be precise, on 3 October 2003, a Federal Jury in Baltimore levied a $19.7 million fine against financial services firm, Legg Mason for illegally distributing a copyrighted online financial investment newsletter, *Lowrys New York Stock Exchange Market Trend Analysis* (the ‘Reports’), to its employees.

History

Lowrys publishes the Reports in both daily and weekly editions. The Reports provide original and proprietary technical analysis of the stock market, indicating the relative strength of the market as a whole, and indicating the best times for investment, as opposed to recommending specific investments. The Reports are particularly known for the three ‘Lowrys numbers’, figures representing:

- buying power;
- selling pressure: and
- short-term buying power,

which measure the current flow of money in and out of the market.

Lowrys sends out its daily alerters via fax or e-mail within three hours of the markets closing each day and is so protective of the information that it has never offered group or corporate subscriptions, only limited subscription to individuals.

For over a decade, Legg Mason subscribed to a single copy of the Reports. Since 1994, that copy had been sent via fax, and then via e-mail, to Linda Olszewski of Legg Mason’s research department. Each morning before the New York stock market opened, Legg Mason’s director of Research, Richard Cripps, held a ‘morning call’ to all its US brokers which included informing all those on the call of the day’s ‘numbers’.

From 1994 until July 1999, the research department regularly faxed copies of the complete Reports to branch offices, where the Reports were copied and distributed further. From July 1999, Legg Mason began posting the Reports on the firm’s intranet and circulating copies to every member of the research team, including Cripps.

Between June and December 2000, Lowrys received telephone calls from one current and one ex-employee of Legg Mason informing it that Legg Mason was posting the Reports on its intranet ‘for all the brokers to see and use’. This allegation was then re-iterated in a letter by the ex-Legg Mason employee.

In July 2001, Lowrys telephoned Olszewski, who admitted that the Reports were being posted on the Legg Mason intranet, but agreed to remove them after Lowrys followed up the call with a ‘cease and desist’ letter. Although it removed the Reports from the intranet, however, Legg Mason continued to distribute the report electronically within the research department.

Denying liability for the infringing acts of its employees, Legg Mason stressed that the copying contravened express company policy which was to observe copyright in order to 'avoid violating applicable regulatory and firm standards as well as copyright laws'. It was the view of the court that Legg Mason had an obvious and direct financial interest in the copying, and that unless it could offer an affirmative defence, it would be liable for the infringing behaviour of its employees.

In its evidence for summary judgment in July, Legg Mason offered up three such defences:

- equitable estoppel;
- fair use; and
- implied licence.

Equitable estoppel

The court said that to establish an estoppel defence, Legg Mason needed to show that:

- Lowrys knew or should have known that Legg Mason was infringing its copyrights;
- Lowrys, through misrepresentation or concealment, induced Legg Mason reasonably to believe that Lowrys did not intend to enforce its rights;
- Legg Mason was ignorant of the true facts; and
- Legg Mason relied to its detriment on Lowrys' misleading conduct.

Legg Mason highlighted the fact that it took Lowrys a whole year after first hearing of the infringement in June 2000 before it took action in July 2001 - suggesting that it was reasonable to conclude during that time that Lowrys did not intend to enforce its rights. The court, however, disagreed, pointing out that each and every issue of the Reports stated the copyright requirements clearly and that Legg Mason had never contacted Lowrys to ask if any other usage would be permitted. The defence of estoppel therefore failed.

Fair use

Citing limited re-distribution within the research department, Legg Mason claimed fair use. To help establish whether a particular use is fair, the Copyright Act offers four factors. One should consider:

- the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for, or value of, the copyrighted work (17 U.S.C. § 107).

The court found that the use of a copyrighted work for a commercial purpose runs counter to the fair use defence, particularly when Legg Mason had an obvious and direct financial interest in widespread copying, both for its own business need, and by depriving Lowrys of the subscription cost associated with an additional six or more copies. The court therefore found that the copying did not constitute fair use.

Implied licence

On the issue of implied licence, Legg Mason argued that it had an implied licence to reproduce copyrighted material. To back up this claim, it argued that on a number of occasions Lowrys had sent a copy of the Report directly to another member of their research staff when the copy for Olszewski had not arrived. The court found, however, this could in no way be used to demonstrate that Lowrys could have known about, or accepted, the re-distribution of multiple copies throughout the research department. As a result, the defence of implied licence also failed

Damages

Both parties sought partial summary judgment on various issues relating to damages. Legg Mason argued that Lowrys could not recover its profits nor enhanced statutory damages for willful infringement. Legg Mason also denied distributing infringing copies outside of the company and argued that any profit reaped from infringing the copyright of the Reports was indirect.

Lowrys pointed out that Legg Mason trumpeted the fact that as a company, it only had one product - 'advice' (financial advice). With this in mind, Lowrys argued, the use of material from the Reports would not only enhance the value of Legg Mason's one product, but also produce concrete profits. However, the court found it 'utterly implausible' that *all* of Legg Mason's profits resulted from its use of the Reports, and therefore decided that Lowrys' claim for Legg Mason's profits must fail.

Legg Mason's attempt to limit the statutory damages to $200 per infringing work due to innocent infringement also failed, as the copyright notice was clearly present on each and every copy of the Reports. Therefore, the court decided that Legg Mason could not remit Lowrys' damages below $750 per infringing work.

The Copyright Act permits the court to increase statutory damages to a maximum of $150,000 per infringing work if the copyright owner can prove the infringement was committed 'willfully'. The court decided to leave this issue to trial as mutual denials and apparent lapses of memory on behalf of Legg Mason staff, especially when it came to recalling whose idea it was to put the Reports on the intranet, made it hard to determine the facts outside of a full trial setting.

The jury in the trial decided that Legg Mason had indeed 'willfully' violated Lowrys' copyrights and awarded the publisher $50,000 for each violation between July 1999 and July 2001; and a further $100,000 for each violation after that date (when it received the cease and desist letter). The jury also awarded Lowrys more than $800,000 in contract damages for the lost revenue for subscriptions.

Not unsurprisngly, Legg Mason has called the jury's decision 'grossly excessive' and most commentators expect the company to appeal the amount of damages. Appeal or not, the decision sets a strong precedent for publishers - especially smaller niche publishers - and should serve as a wake up call for companies and businesses that knowingly turn a blind eye to similar practices within their own organisations.

How could this happen?

For many people, the problem in accepting this case lies in the inevitable comparison with print products. If a company buys a copy of a print journal for a library, anyone can come along and read that copy without the risk of being sued. However, if the library receives that same publication in electronic format - in e-mail or PDF - and it is bounced on to different readers, the possibility of lawsuits enter the arena.

The fact of the matter is, however, that passing on a copy of an e-publication means that the copy takes on multiple form: the reader bounces it on while retaining his own copy. Passing on a print copy though means that the original is no longer in the reader's possession - which is a very different proposition to an e-publication, and neatly illustrates the distinction between print and online.

It is for this reason that publishers usually take the practical step of licensing their electronic content so that it is distributed to a limited amount of people or a whole firm. Interestingly - and significantly - in this case, Lowrys did not offer firm-wide licences, only individual ones. It is usual for the publisher to state that no part of its publication may be copied, stored, transmitted, or - and perhaps most important in the Legg Mason case - forwarded, in any form without prior written permission from the publishers. Other statements specify exactly what kind of punishment the publishers would seek in the case of a subscriber forwarding their electronic content without permission - often the cost of a redistribution licence or equivalent subscription cost for a specified number of users.

Could it happen in the UK?

In the UK, copyright infringement is a tort for which redress is available in the civil courts. Usually an infringer is ordered to pay damages. As in the Legg Mason case, an employer would be liable for the infringement of its employees, regardless of how much information that employer circulated expressly forbidding any illegal copying.

While no major individual cases have been brought by UK publishers, the Newspaper Licencing Agency (NLA) has, in the past, issued proceedings on behalf of its members. The NLA acts as a one-stop shop for individuals and companies wishing to obtain a licence to permit copying, for internal management use, from all of the UK's national newspapers and many regional press. Usually infringers will settle before the need for legal action (amusingly, all three of the UK's main Political parties are among those who have settled in the past) but the NLA will take action if parties refuse to settle. In its most well known case - which it lost - *NLA v Marks & Spencer* - the NLA tried to show that Marks & Spencer's recopying of a press cutting supplied by a clipping service amounted to infringement of the newspapers 'typographical arrangement'.

Marks & Spencer took a press cutting service, which copied items of interest from the UK's national newspapers. It then made additional copies of some of these cuttings to circulate to its staff. While the clipping service had an NLA licence allowing the copying, Marks & Spencer did not.

Although Marks & Spencer prevailed in this case - with the courts deciding that the 'typographical arrangement' lay in the whole paper not in individual articles - fear of a second action, founded on copyright with respect to individual articles, prompted the company to acquire a NLA licence for its copying.

So the Legg Mason case should act as a wake up call to us all. It can happen here, and bodies such as the Copyright Licencing Agency, and its compliance arm, Copywatch, are looking for whistleblowers to alert them to just these types of infringements. Their website proclaims:

> 'Some big businesses have told us they don't make illegal copies ... do you know different?'

And for those tempted to blow the whistle, Copywatch is offering the temptation of rewards of up to £20,000. This, in itself, should be enough to make companies large and small take note, as it only takes one disgruntled ex-employee to get the ball rolling, and there is always at least one of those in every firm.

Further information

Summary judgment opinion:
http://www.mdd.uscourts.gov/Opinions152/Opinions/Lowrys_op0703.pdf

Copyright Act: http://www.copyright.gov/title17/92chap5.html

Copywatch: http://www.copywatch.org/

NLA: http://www.nla.co.uk/

NLA v Marks & Spencer [2001] UKHL 38, 12 July 2001; [2001] ALL ER (D) 140 (Jul)