

Who is minding the store?

How to avoid common intellectual property missteps

The American legal system provides certain rights and protections for owners of intellectual property (IP). It is crucial that businesses avoid infringement of intellectual property rights.

“Businesses often inadvertently infringe the intellectual property rights of others because of inattention to internal operations, a lapse that comes with a significant price tag,” says Alexis Dillett Isztwan, member, Semanoff Ormsby Greenberg & Torchia, LLC.

Smart Business spoke with Isztwan about the risks and consequences of infringing on intellectual property as well as how to avoid missteps.

What businesses are at risk?

In any business, a multitude of infringement risks exist in daily operations. Since infringement does not require that the infringer knew its activities were infringing, businesses must bear the burden of policing their own operations.

Where are the risks?

The most common risk is the unauthorized use of images, content or music. Businesses often look to the internet or social media as a flexible marketing platform for advertising and promotional campaigns that can be launched quickly and inexpensively. The downside is that employees often equate easy access on the internet to images and music with an unfettered right to use third-party works in advertisements or on company websites.

In reality, use of third-party images, music or content requires a license from the owner and typically a fee, regardless of the significance of the use. While employees may believe the IP owner will never discover the use, many technologies exist that enable

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IP owners to cast a broad search over the internet to identify unauthorized uses of their works.

Another risk arises with the use of software in excess of permitted use under the business's license. Unless a license allows for enterprise-wide use, the business must limit its use to the numbers specifically permitted, whether those limitations are per user, per laptop or desktop, per server, or per location.

Employees often believe that a software license is carte blanche for use in the business and will copy a program to additional devices, laptops or desktops without the knowledge of the business owners. This misunderstanding of software rights puts a business at significant risk of infringement claims based on the unauthorized uses. While discovery may seem unlikely, all it takes is one disgruntled former employee to disclose the infringing uses to the software owner.

What are the consequences?

The stakes are high. Typically, once unauthorized use is detected, the IP owner will send a letter demanding payment of damages and immediate removal of the unauthorized use — the clear implication being that failure to comply will invite a lawsuit. Six-figure settlement demands are the norm with IP owners often arguing the infringer must pay three to five times

the actual damages so that the settlement amount acts as a deterrent.

Even short of litigation, damages can quickly grow. When coupled with legal fees related to negotiating a settlement, damages may have a substantial financial impact on a business even before considering the resulting operational cost of purchasing the appropriate number of software licenses or replacing the promotional piece.

How can a business avoid missteps?

First, never respond to a demand letter without consulting counsel. If the IP owner took the time to send a letter, the matter will not be resolved with a brief call. More often than not, attempts by business owners to resolve an IP matter without counsel result in increased settlement amounts or a severely compromised negotiating position.

Second, businesses should implement internal processes that minimize the risk of unauthorized use of IP. The policies should state clearly what activities are permitted and by whom, and identify the point person to be contacted for inquiries and approvals.

Third, educate and train employees on avoiding potential infringements and knowing when to ask questions and seek approvals.

Finally, appoint an internal coordinator to oversee use of third-party IP and software in the business's daily activities. ●