Copyright Infringement Implications for Mergers & Acquisitions

By Keli Johnson Swan

During a merger, divestiture or acquisition, the surviving entities may have a struggle with resulting ownership of software assets. Many companies include transfer language in their transaction documents to identify potential software and hardware assets to be transferred. Provisions in transaction documents may not definitively determine the ownership of the software assets in future license reviews. Copyright infringement reviews and claims related to software could potentially cost a larger company hundreds of thousands of dollars, so it is important to be aware of the possible implications.

There are two main concerns regarding the retention of another company's computers and servers:

1) Liability for Non-Compliant Software:

Once a purchasing company acquires the hardware assets of another business, it becomes liable for any non-compliant software installations. There are a number of ways in which software may be out of compliance, including, but not limited to, exceeding the number of licensed copies, acquiring the incorrect license for the version installed, using software outside the authorized geographic region, or otherwise failing to adhere to the terms of the software license agreement.

It is critical for the purchasing company to audit the network of the target company and assess its software compliance prior to completion of the acquisition. It is equally prudent to calculate any potential outstanding copyright infringement liability as part of the acquisition or merger process.

2) License Restrictions For Transfer:

If a diligent audit and assessment of the company's network reflects no potential copyright infringement and that the software assets are fully licensed, the purchasing company may still face hurdles to properly transferring ownership of the assets.

Many software publishers include a provision barring the transfer of a software license in the license agreement. Others allow the transfer, subject to written consent from the software publisher. This final step is key to ensuring the assets acquired during the transaction are properly licensed. In the event of a software audit, the purchasing company will be required to prove ownership of the software installed on all of its computers and servers. Therefore, it is important that the transfer of ownership is documented with the software publisher for recordkeeping.

Alternatively, some purchasing companies choose to avoid the time and expense of a full audit of the newly acquired assets, and reformat the hardware assets, and add newly purchased software to the formatted computers.

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About the author Keli Johnson Swan:

As an associate attorney at Scott & Scott, LLP, Keli is primarily focused on software licensing and copyright infringement matters. She advises clients in a variety of industries to ensure compliance with software licenses and develop strategies for maximizing the value of software licenses.

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