



# InfoAboutInfo<sup>SM</sup>

B R I E F I N G 

## TrendAlert: *Lowry's Reports v. Legg Mason* – The \$20 Million Copyright Wake-Up Call

### **In This Briefing**

<i>Lowry's Reports v. Legg Mason: A Cautionary Tale</i> .....	2
Compliance Imperatives for Content Buying Organizations.....	5
Enforcement Imperatives for Content Vendors.....	10
In Outsell's Opinion: There's Plenty of Room for Common Sense in Rights Matters.....	13



Volume 7 • April 9, 2004





## **Lowry's Reports v. Legg Mason: A Cautionary Tale**

### **Bottom Line**

***Lowry's Reports v. Legg Mason* is a recent federal court decision with implications for both content vendors and buyers. The jury's \$19.7 million damage award is a wake-up call for both sides to review their practices.**

This Briefing looks at *Lowry's Reports v. Legg Mason*, an important recent court decision in the field of copyright law, and analyzes its implications for copyright compliance activities and processes. The facts in the case took place in a corporate setting, but the implications are similar for academic and government buy-side organizations.

Copyright infringement is just one of the fronts in a broader battleground loosely referred to as "corporate compliance." The field includes reporting and archiving requirements imposed by the new Sarbanes-Oxley Act, The Health Insurance Portability and Accountability Act of 1996 (HIPAA), and software licenses, as well as any number of other requirements imposed by legislation and the courts.

The common denominator of this new generation of requirements is that they are information-intensive, and that complying with them increasingly involves organizations calling on their content deployment professionals' expertise. Copyright compliance is just one of the fields, but it is one in which libraries and information centers have always been closely aligned.

The broader context here also includes the recent actions by the Recording Industry Association of America (RIAA) to enforce its rights with respect to music recordings by suing individual users for unauthorized downloading and exchange of digital music over the Internet. The RIAA actions have contributed to a widespread awareness of the dangers of copyright infringement, and that awareness has spread to users and management in the corporate world.

As one of our clients put it, copyright compliance is not exactly front-burner stuff compared to Sarbanes-Oxley and other compliance fields that are getting more attention. However, the size of the judgment in this *Legg Mason* case should cause many organizations to reexamine their compliance practices. With a relatively small investment in process review and compliance measures, buy-side companies can acquire reasonable levels of protection against infringement suits of this sort.

This Briefing focuses on the corporate environment, but many of the lessons are relevant for the academic and government content markets as well. Specifically, the doctrine of "fair use" has wider application in the government and academic markets, but the kind of systematic infringement in this case is out of bounds no matter where it occurs.

## The \$20 Million Wake-Up Call

On October 3, 2003, a Federal District Court in Maryland announced a sensational \$19.7 million jury verdict against financial services firm Legg Mason for copyright infringement. On February 11, 2004, the judge denied a motion for a new trial and upheld the jury's damages award. The case, brought by financial industry newsletter publisher Lowry's Reports, Inc., is still under appeal, but the size of the award and the facts of this specific case should serve as a wake-up call for content buyers and vendors.

In simplified form, here are the facts behind the decision:

- **The newsletter.** Lowry's Reports publishes daily and weekly editions of a newsletter called "Lowry's New York Stock Exchange Market Trend Analysis." Lowry's analytical niche is its analysis of overall market direction. Legg Mason, Inc., through its brokerage firm Legg Mason Wood Walker, Inc., purchased a single-user \$700 annual subscription.
- **The terms.** Lowry's sells only single-user subscriptions to the newsletter. Its subscriber agreements explicitly prohibit unauthorized copying or dissemination of the newsletter.
- **The infringement.** Legg Mason's troubles begin when it subscribed to the Lowry's newsletter. The publication was delivered each week to an employee in Legg Mason's research department. From 1994 to 1999, the research department regularly copied and faxed the newsletters to branch offices, where they were further copied and redistributed. Starting in 1999, an electronic version of the newsletter was posted on Legg Mason's Intranet, where it was available to all employees. The company did have a policy against unauthorized distribution of copyrighted works, but it was ignored.
- **The whistleblowers.** In 2000, one current and one former Legg Mason broker made separate calls to Lowry's, informing it of the redistribution that was occurring within Legg Mason.
- **The warnings.** A few months after being alerted to the infringement, Lowry's issued a memorandum to all subscribers, including Legg Mason, reminding them of the restrictions on redistribution. In July 2001, Lowry's president Paul Desmond spoke with the recipient of the single copy of the newsletter at Legg Mason, who confirmed that copies were being posted on the Intranet. Lowry's then sent a "cease-and-desist" letter to Legg Mason, demanding that it stop unauthorized redistribution of the newsletter.
- **Continued infringement.** Even after the warnings were issued and Legg Mason removed the newsletter from the company Intranet, copies of the reports continued to be regularly circulated to multiple members of the research department through July 2002.

- **The verdict.** Lowry’s sued Legg Mason in federal court for copyright infringement. Federal copyright law allows owners of registered copyrights like Lowry’s to opt for “statutory damages” in cases where actual damages are difficult to calculate. In cases like this one, where the court found that the infringement was “willful,” a plaintiff can recover up to \$150,000 per infringement. The jury awarded Lowry’s \$50,000 in statutory damages for each act of infringement before the “cease-and-desist” letter, and \$100,000 for each infringement after it. The court also awarded breach of contract damages of \$825,270, for a total of \$19,725,270.

## **The Powerful Lessons of *Legg Mason***

The main lessons of the *Legg Mason* decision can be summed up as follows:

- The most serious and potentially damaging liability for copyright infringement is systematic, repeated infringement over time.
- Internal copyright policies alone do not shield organizations from liability for infringement carried out by their employees.
- Truth will out: If an organization is systematically infringing, the word is likely to leak out, as it did at the hands of Legg Mason’s whistleblowers.
- Cease-and-desist orders are an important tool for content vendors, and content buyers ignore them at their peril.
- Published works have copyright protection without formal registration, but registration provides potentially valuable additional rights in infringement enforcement actions.
- Publishers should offer enterprise pricing that gives buyers a reasonable means to redistribute content widely without breaching contract or infringing on copyrights.

The field of copyright compliance is, of course, bigger than just the *Legg Mason* decision. This case provides an excellent illustration, however, of just how badly things can go for an infringer. The remainder of this Briefing focuses on the broader trends and practices we see in the industry, based on our ongoing dialogue with buyers and sellers of content.



# Compliance Imperatives for Content Buying Organizations



## Bottom Line

The *Legg Mason* case has a number of concrete lessons for the content buyer: **Don't rely on "fair use"; obtain appropriate licenses from a rights-licensing organization such as CCC; review the ownership and funding of such agreements within your organization; understand the terms and conditions in your content contracts; put a copyright compliance policy in place and regularly reinforce it with employees; take the lead in compliance education; and be alert for systematic and ongoing infringement.**

In the wake of the *Legg Mason* case, and amid the heightened awareness of copyright protection issues raised by the RIAA's enforcement actions against music downloaders, now is a good time for organizations to review their copyright compliance policies. In our ongoing dialogue with clients and industry leaders, we have developed a checklist of compliance imperatives against which content deploying functions can evaluate the adequacy of their copyright compliance measures.

In general, our assessment is that content buying organizations want to "do the right thing," and content deployment functions are filled by people who are aware of copyright law and eager to comply with its requirements. They are also looking for practical and friction-free means of compliance.

It is also clear that compliance is higher in the consciousness of industries whose products are intellectual property, such as the software industry or management consulting. These industries increasingly spend a lot of time and energy protecting their rights in their own work products, and are consequently more likely to have well-developed compliance programs of their own.

## Don't Rely on a "Fair Use" Defense, Particularly in the Corporate Setting

Fair use is a doctrine that establishes the conditions under which copying is not an infringement. The landmark copyright case of *The American Geophysical Union v. Texaco Corporation*, decided a decade ago, defines, for better or worse, the fair use defense to copyright infringement in for-profit corporations. The subtleties of fair use law are complex and beyond the scope of this Briefing. It's sufficient to note that since the *Texaco* decision, the doctrine of fair use is severely restricted in the corporate setting. The doctrine certainly does not cover the sort of infringement occurring within *Legg Mason*.

Accordingly, content buyers need to look to other means to ensure that their copying practices are in compliance with copyright law. For most, that means turning to what seems to be the only licensing game in town – Copyright Clearance Center (CCC).

## **Obtain Appropriate Licenses from CCC or Other Rights-granting Organization**

For many organizations, the cornerstone of their copyright compliance practice is an enterprise license from CCC. CCC aggregates rights from about 10,000 publishers and 1.75 million works into a single license. Organizations purchase licenses that cover copying of covered works within the organization. The basic license covers photocopies of print works; additional license amendments are available to cover digital copies, and for multinational coverage. In the corporate environment, fees for the licenses are based on a formula reflecting the licensee's industry and the number of employees in certain information-intensive categories of professional workers. The basic license is available for corporate or government organizations, not academic.

CCC enterprise licenses come in two flavors: Annual Authorizations Service (AAS) for companies with over 750 employees and all law firms, and the Photocopy Authorizations License (PAL) for companies with fewer than 750 employees.

It's just as important to know what's not covered by the CCC license, however:

- Copying and redistribution outside the organization.
- Systematic copying that serves as a substitute for subscribing to a journal.
- Electronic copying and redistribution of digital works, unless the CCC's digital agreement is also in place. That agreement does not cover as wide a spectrum of publications as the basic license, so caution is advised in noting whether frequently used publications are covered.
- Non-U.S.-based employees are not covered, unless a multinational agreement is in place.
- Despite the relative comprehensiveness of the CCC license, there are publications it does not cover. Licensees need to be aware of the exceptions, particularly with regard to publications specific to their industry or key functions.

Content deployment professionals should also provide their internal customers with a process for obtaining permissions and licenses outside the scope of the CCC agreement. That process can include a number of alternative paths:

- Direct contact with a publisher's permissions service.
- Use of CCC's transactional licensing services.
- Point-of-content licensing systems offered at publishers' Web sites by CCC, RSiCopyright, and others.

Finally, there are organizations that go without a license from the CCC. Those organizations must be extra vigilant in providing clear policies and compliance review, but it is possible to rely on transactional services and other means to obtain necessary permissions. These organizations can also expect considerable pressure from CCC and publishers to get on board, and the CCC's methodology and pricing are not without critics. For most large organizations, and despite its limitations, the CCC license has become the *de facto* basis of compliance efforts with the most comprehensive coverage available.

## **Review Ownership and Funding of the CCC Agreement**

Because all kinds of compliance issues have caught the eye of upper management in recent years, Outsell believes this is a good time for organizations to review the “ownership” of copyright compliance processes. We see the following typical situations in larger organizations:

- The CCC license is paid for out of a library or information center budget, and copyright compliance is largely the domain of information professionals.
- The CCC license is paid for out of an R&D budget, in cases where the information function is part of that same budget.
- The CCC license is paid for by corporate counsel but administered by the information center.
- The CCC license is paid for and administered by an information center, but corporate counsel is involved in negotiating the license and advising the information center on compliance matters.

Given the higher overall visibility of compliance risks in recent months, Outsell believes this is an excellent opportunity for content deployment professionals to “manage up” and discuss their copyright compliance efforts with upper management including the CFO, corporate counsel, or risk management (if such a unit exists). A growing interest in centralizing compliance oversight may lead the company to take on the CCC license funding; at the very least, such action will raise the visibility of the information unit as a key player in the compliance field.

## **Know Your Content License Terms and Conditions**

Contracts trump copyright law. It is critical that content buyers understand that the content license agreements they sign may contain terms that are more (or less) restrictive than what copyright law otherwise allows. An annual review of contracts is part of any portfolio management process; the review should not be limited to pricing issues alone, but also should identify any areas of potential liability where user practices are not consistent with access and redistribution terms of the licenses.

See our Briefing, *Information Content Management Best Practices: Information Services Portfolio Management* (Volume 7, February 20, 2004) for a review of portfolio management practices.

Another word of caution here: promises made by salespeople in the heat of negotiations are not part of your agreement unless they are in writing. Everything is negotiable, and salespeople are often asked whether exceptions to the express policy in a contract are allowed. If there is agreement on a certain exception, get it written into the contract.

## **Put a Copyright Compliance Policy and Process In Place – But Don't Stop There**

Legg Mason did have a copyright policy in place; that policy was ignored by the employees involved in the infringement of Lowry's copyrights. Simply having the policy is not enough; the court ruled that the company could be held vicariously liable for the acts of its employees if it had the right and ability to supervise and end the infringement.

A written copyright compliance policy is central to a comprehensive compliance approach. The policy should be easy to find (on an Intranet or other easily accessible network location and in company handbooks), and should be part of the organization's new-hire training as well as ongoing training of existing employees. Many organizations regularly distribute reminders of the terms of the policy – over their Intranets, via e-mail, or even as pop-up notices in software applications.

CCC provides model compliance policy templates at its Web site: [www.copyright.com](http://www.copyright.com). The templates can be adapted to include company-specific policies and contact points.

## **Take the Lead on Compliance Education**

Many content deployers regularly conduct compliance education for their organizations' business units. Often that education is supported by and conducted jointly with other interested functions, such as corporate counsel, finance, corporate communications, risk management, etc.

As with any educational effort, this can be an opportunity to market information services by learning about users' practices and concerns, identifying needs for various kinds of information products, and spreading the word about information resources that employees might not be aware of. Educational programs should emphasize making compliance easy, rather than policing and punishing non-compliance.

A good copyright compliance policy doesn't just tell people what *not* to do; it should provide employees with the information and processes they need to do the right thing. One global company in the computer industry has created a separate internal "copyright portal" that contains the corporate policy plus these additional items:

- Basic information about copyright and the company's CCC license.
- Contact information for people in the various units involved in compliance (the library, legal).
- An FAQ approach ("How do I...?") that provides answers and solutions for people with typical compliance questions.
- General information about copyright via links to other sites on the open Web.

This is a good example of a practical approach to copyright compliance policy; the policy becomes not just a paragraph in the company handbook, but a living, breathing guide to the correct procedure in common situations, including specific contact information for people who can help address the nontypical situations.

### **Be on the Alert for Systematic and Ongoing Infringements**

Many content deployment functions do not have the time or resources to "police" their organizations' level of copyright compliance. One of the lessons of the *Legg Mason* decision, however, is the potentially huge liability from systematic and continuous infringement. That kind of infringement is often relatively easy to spot; anyone within the Legg Mason firm could have identified copyrighted information distributed on the Intranet, and two people eventually did blow the whistle on the practice.

Content deployment professionals, more than any other function in an organization, have the content skills and knowledge to be able to spot systematic and widespread infringement, or to at least raise the right questions about certain uses of external content. Regular review of the content of company Web sites and Intranets is a cost-effective form of risk management.

Above all, don't let the existence of a CCC license or any other contract lull the organization into a state of complacency regarding copyright matters. Licenses rarely provide "anything goes" rights; it is critical to know their boundaries and to watch for obvious examples of infringement.



## Enforcement Imperatives for Content Vendors

### Bottom Line

The lessons of *Legg Mason* for content vendors include: maintain open relationships and good contracts with customers; use technology to monitor usage and identify potential infringement patterns; register copyrights; clearly identify and demand an end to infringement; and save litigation as a last resort for serious cases of infringement.

The *Legg Mason* case deals with a specific set of facts and a specific kind of information product, but it does have lessons for most commercial content providers that are worthy of attention.

### The Best Copyright Protection is a Good Contract and a Good Relationship

Lowry's is probably not complaining about its \$19.7 million judgment in the *Legg Mason* case, but the situation certainly did not need to go this far. The fact is that the infringement went on for years, and Lowry's was leaving money on the table throughout the infringement period, as Legg Mason consumed more than it paid for. Lowry's did many of the right things: it registered its copyrights, it clearly marked its content as copyrighted, it sent notices to all customers reminding them of restrictions on redistribution, and it sent a cease-and-desist order when confronted with blatant infringement. Still, it clearly lacked a good relationship with this customer – otherwise it would have spotted the level and duration of infringement at an earlier stage.

Lowry's also failed to offer a pricing scheme that would have allowed Legg Mason to redistribute the content as it wished at a reasonable cost. An individual-subscription-only model is a relic of the print age, and actually hinders the ability of customers to legitimately use a product in ways they likely see as natural and normal.

A universal theme Outsell hears in our dialogue with both content vendors and buyers is that they share agreement with and respect for copyright rules. Most buyers understand copyright law and that their vendors have to make a living, which would be undermined by excessive infringement. Buyers also know that end users sometimes willfully or innocently infringe copyrights and license terms, and they accept a role in putting those users back in compliance. Content vendors, for their part, acknowledge that their customers want to “do the right thing.” Publishers and content vendors do not want to get into the business of suing their customers over rights matters – it's not good for their core business.

The bottom line here is that rights protection in the corporate environment is most often a matter of pragmatic good relations between vendor and customer. This means vendors will know enough about their customers' operations to spot potential trouble; buyers will be eager to come clean and remedy infringements if they know the vendor will be flexible and helpful in preventing future problems; and both will benefit from clear, straightforward contracts and license terms.

## **Use Technology to Track Usage and “Right-size” Contracts for Electronic Products**

Vendors of electronic products have an advantage that Lowry's Reports did not have – they can track access and usage. While usage tracking will not allow them to identify “downstream” copyright infringement by users who copy and redistribute content after it is delivered through an electronic product, it does allow them to closely monitor basic compliance with their terms.

For example, a vendor of an electronic company information database issues single-user passwords. By monitoring the usage of those passwords, it can identify any usage that appears to be inconsistent with a single worker's usage level – for example, if the same password is being shared by an entire department. Smart vendors have standard procedures for dealing with these sharing violations, and will look at them as an opportunity for communication with customers. In the best-case scenario, those discussions yield more specific information about the true user base. For enterprise license agreements, that information is extremely useful in negotiating appropriate contract pricing.

## **Register Your Copyrights**

Perhaps the most important lesson of *Legg Mason* for publishers and rightsholders is the importance of registering copyrights with the U.S. Copyright Office. Lowry's Reports' registration of its newsletter copyrights allowed it to take advantage of the statutory damages provisions of copyright law (17 U.S.C. 504).

A work does not need to be registered to obtain copyright protection, but damages in copyright cases are notoriously difficult to calculate. Section 504 takes away that uncertainty by establishing ranges of damage amounts to be awarded by the court, but that section applies only to registered copyrights. A special section, which was invoked in the *Legg Mason* case, allows for damages of up to \$150,000 *per infringement* if the court finds the infringement to be willful.

Lowry's decision to take the simple step of registering its copyrights was worth millions of dollars. Without the statutory damages provisions of the copyright act, the court would have had to calculate actual damages. One measure of those damages would be the price Legg Mason would have had to pay for a single subscription for each and every one of its brokers during the infringement, which would still have been far below the \$19.7 million statutory damages amount.

## **Clear and Consistent in Identifying and Halting Infringement**

Lowry's first received evidence of infringement from two whistle-blowing brokers in 2000. A short time later, it issued a letter to all customers reminding them of the restrictions on redistribution of the newsletter. Finally, when confronted with a direct admission of the infringement by an employee of Legg Mason, Lowry's issued a formal "cease-and-desist" letter insisting that Legg Mason immediately stop the infringing activity.

In the course of a normal vendor-customer relationship, those kinds of responses and warnings should be sufficient to halt the infringement without destroying the relationship. If, as in this case, the customer continues the infringement – well, that's the stuff of multimillion-dollar jury verdicts.

Vendors should have ready a plan for a successive escalation of communications, reminders and warnings that move the conflict along to a resolution in a timely way. These communications serve two purposes: They give the infringing party reasonable time to correct the infringement, and they clearly establish for the record that the infringement is not occurring with the vendor's consent.

## **Litigation Is a Last Resort – But Keep Options Open**

Vendors report a significant increase in concern about copyright and license compliance among their customers, and in the vast majority of situations, conflicts over unauthorized redistribution of copyrighted works can be resolved through sound customer relations practices and good communication on both sides.

The *Legg Mason* verdict has caught the attention of the publishing world, however. Many publishers know or suspect that their content is being redistributed on Intranets or through other means, and they are prudently taking some of the steps outlined in this section to ensure that they protect their interests. This is a case where speaking softly but carrying a \$19.7 million stick is good practice. Vendors should take every measure to ensure that they will prevail in case of litigation, but avoid brandishing the stick while trying to quietly work out differences with their customers.



## In Outsell's Opinion: There's Plenty of Room for Common Sense in Rights Matters

### Bottom Line

**Copyright law and practice is full of myths, misunderstandings, and extreme viewpoints. Savvy content buyers and vendors understand that questions about content licenses and copyrights are best solved through good relationships and common-sense approaches. Reasonable buyers do not encourage or hide large-scale infringement; reasonable vendors do not sue over every incidental copy made or e-mail forwarded. Following the guidelines and practices identified in this Briefing will protect the interests of both parties.**

Discussions of copyright law tend to be characterized by overly theoretical discussion about how the Internet and digital media have or should have changed the rules. Extreme views make for good headlines. The “information wants to be free” crowd, including groups such as the Electronic Frontier Foundation, Public Knowledge, and the Stanford Law School Center for Internet and Society, argue that copyright law has become entirely too restrictive, and they regularly call for the elimination of many copyright restrictions. The music industry goes after 12-year-olds and widows with huge lawsuits in order to strike fear in the hearts of music downloaders. Digital rights management (DRM) advocates envision an Orwellian world in which every tidbit of digital information can be locked down and/or traced back to its original source. Some professionals spend undue time on debating whether a single incidental copy is fair use, at the same time that systematic infringements go on all around.

Most publishers and information providers, however, operate in a different reality where those extremes don't sound appealing. Particularly in the business-to-business (B2B) publishing world, transactions are, for the most part, conducted between parties who respect each other's rights. End users might be a little fuzzy on what is and is not allowed, but their behaviors can be influenced by their organizations, or content licenses can be crafted in such a way that their behaviors fall within the appropriate license.

The *Legg Mason* case is the cautionary tale, to be held up as the bad example for years to come. That exception simply proves the rule, however, that by following the compliance imperatives outlined in this Briefing, both buyers and sellers of content can have their needs met and their rights preserved in an atmosphere of mutual respect, all while avoiding costly judgments.



**David Curle**  
*Director and Industry Analyst*  
*Outsell, Inc.*  
[dcurle@outsellinc.com](mailto:dcurle@outsellinc.com)

### **Outsell Background**

Founded in 1994, Outsell is the only research and advisory firm that focuses exclusively on the IC Industry. Delivering high-quality, fact-based research, analysis, and advice, Outsell helps world-class content vendors, Global 2000 companies, government agencies, and leading educational institutions increase their understanding of content users and end-markets, assess content quality and effectiveness, benchmark content deployment operations, hire and retain executives, and develop more successful internal and commercial content products and services.

Outsell, Inc.'s information, analysis, opinion, and reports (the "Information") are based on qualitative and/or quantitative research methods and its staff's extensive professional expertise in the industry. Outsell, Inc. has used its best efforts and judgment in the compilation and presentation of the Information and believes the Information is accurate as of the date furnished, but the industry and the Information are subject to rapid change. Except as aforesaid, Outsell, Inc. makes no other representations or warranties, express or implied, concerning or relating to the Information.

Visit us at our headquarters at 330 Primrose Road,  
Suite 510, Burlingame, CA 94010, phone 650-342-6060,  
fax 650-342-7135, or come by our Web site, [www.outsellinc.com](http://www.outsellinc.com)

*Info.AboutInfo<sup>SM</sup> is a service mark of Outsell, Inc.*  
*Printed in the U.S.A.*

