



President's Message

Your ACC Membership - - a Valuable Resource In Challenging Times

These days it seems like every where you turn talk of the decline in the economy is dominating the news. Unemployment is up, companies are laying off, and many who, only a year or so ago, were riding a wave of prosperity suddenly find themselves less secure in their position or looking for new opportunities. During these times, ACC offers many valuable resources and services to its members.

If you are looking for a new position, the ACC In-House Jobline is the premier electronic employment resource for the in-house counsel community. ACC can help you find the opportunity that's right for you. With almost 1,000 job openings around the world spanning all disciplines of the law, job seekers find an unparalleled concentration of in-house positions. ACC also offers career resources to help with interviewing skills and transition for those who are new to in-house practice.

Another way ACC stands by its members is the opportunity to continue your membership at a reduced price if you lose your in-house position. Offered to existing members, ACC will waive your dues for up to one year, and offer a reduced membership rate for up to an additional two years if you are displaced but actively seeking a new in-house position. For those ACC members who are retiring, ACC offers a reduced annual membership fee.

Networking and social opportunities also abound within ACC. ACC sponsors 16 committees, each focusing on substantive legal practice areas or types of practice. Committees offer valuable networking opportunities that can help strengthen and build your practice. Joining a committee doesn't require a set commitment of time. You can participate in a variety of ways, with as little or as much time as you have available. On the social scene, our ACC Chapter sponsors two social networking events during the year where you can meet new people and share opportunities. This year will also be our Chapter's first Annual Golf and Spa event. What better way to meet new people and expand your network than through a relaxing day at a spa or a round of golf?

As a member of ACC you are a part of the world's largest organization serving the professional and business interests of attorneys who practice in the legal departments of corporations, associations and other private-sector organizations around the globe. With over 23,000 members employed by more than 10,000 organizations in 80 countries, through your ACC membership you are connected to every other ACC member and to the people and resources necessary for your personal and professional growth.

So rest secure knowing your ACC membership offers the tools and resources you need to succeed, and that ACC will stand with you where ever these challenging economic times may take us.

Ty Ulmer
Chapter President, St. Louis

Executive Compensation: Best Practices in the Private Market

By: Paul G. Klug and Rebecca L. Frigy

Paul G. Klug is a shareholder at Polsinelli Shughart PC in St. Louis, Missouri. His practice primarily focuses on general corporate law, mergers and acquisitions and tax. Rebecca L. Frigy is an associate at Polsinelli Shughart PC in St. Louis, Missouri. Her practice primarily focuses on health law and general corporate law, including fraud and abuse issues, physician employment agreements and other corporate transactions.

The economic crisis in the United States has brought executive compensation practices under fire. Private companies, in large part, are not currently subject to executive compensation regulation; however, they may not be far behind. Growing regulatory trends and powerful figures in the political spotlight have already begun to turn attention to the private market. The Troubled Asset Relief Program ("TARP"), which is the fundamental component of the Emergency Economic Stabilization Act of 2008, and the American Recovery and Reinvestment Act ("ARRA") have extended limitations on executive compensation to privately held institutions benefiting from TARP. Powerful political figures, specifically President Obama and Timothy F. Geithner, Treasury Secretary, have also expressed a desire to expand limitations on executive compensation to any recipient of government assistance. The new regulatory provisions and an increasing public dialogue on the topic should be reason enough to compel private companies to consider addressing executive pay concerns now, rather than waiting for the government's iron fist to give them no choice. In light of the TARP and ARRA legislation and the SEC's disclosure requirements of public companies, we have devised certain "best practices" that should be implemented by private companies.

1. **Don't Lose Sight of the Goal of Executive Compensation.** The goal of executive compensation is to attract and retain the best management talent. To achieve this goal, a company does not have to compensate its executives more than its competitors or other companies. Rather, executive compensation should not only provide executives with a salary to pay for living related costs, but also give executives the opportunity and power to push the envelope and challenge themselves through performance based incentives.

2. **Review and Analyze Executive Compensation Policies Regularly.** In 2006, the SEC overhauled its compensation disclosure rules. The Compensation Disclosure & Analysis ("CD&A") is the centerpiece of these disclosure rules. Under CD&A a public company must address the hows and whys of its compensation policies and decisions. The CD&A process can be used to show an emphasis on long-term value creation, executive longevity, and sensitivity to shareholder concerns.

Through a CD&A review process, companies can:

- Establish clear performance goals that are grounded in the company's business goals and strategic plans; and
- Provide information and authority to executives that leaders need to succeed, including details regarding their performance and the company's.

Questions companies should attempt to answer include:

- What are our compensation philosophy and design principles?
- What is our most important compensation objective and are we meeting that objective?

- How do we define long-term success? What amount of time is considered long-term? How will we measure long-term success? How can we best compensate long-term success?

To compensate for long-term success, a private company should offer equity awards, stock appreciation rights or phantom stock to executives. A private company should utilize tally sheets and/or Wealth Accumulation Analysis in performing its periodic review and analysis. A "tally sheet" is one sheet of paper that lists and tallies the different elements of an executive's pay package, including salary, annual and long-term incentives, retirement plans and other termination benefits, and benefits and perquisites. Wealth Accumulation Analysis is used to look at the past, present and future values generated by each element of the compensation package that an executive has earned or will earn. This analysis helps to determine the effectiveness of each pay elements in achieving the goals of the compensation package and whether an executive has been given sufficient incentives to perform.

3. **Implement Internal Pay Equity.** An internal pay equity analysis compares compensation magnitude at various levels within an organization to assess the internal fairness of compensation among executives or between the executive suite and other employees. Two reasons to implement internal pay equity are: (1) to restore internal fairness and to address growing internal division and disconnect between the top executives, the company's senior managers, and the rank and file employees; and (2) as an important benchmark to avoid excesses.

4. **Implement Transparency in Executive Compensation Policies.** Unlike their public company counterparts who are required to disclose information about executive compensation, there are no such reporting requirements for private companies. Private companies should consider disclosing the rationale and purpose for granting different types and amounts of compensation. Disclosing the compensation and performance expectations will help hold an executive accountable for reaching his individual goals and those set by the company.

5. **Consider Including Certain Policies in Executive Compensation Packages.** Adopting policies that restrict an executive's stock ownership or ability to exercise stock options shows the company's commitment to aligning management's interests with those of the stakeholders. A private company should consider adopting policies such as stock ownership guidelines and holding periods, claw-backs and golden-parachute limitations.

Stock ownership guidelines and holding periods may take the form of "Hold Through Retirement" ("HTR") requirements. In regards to claw-back policies, companies should consider putting one or several of the following elements of executive compensation "at-risk": cash incentive awards, performance shares, restricted stock/units and vested or unvested options. Under TARP, companies are required to institute claw-backs if any bonus or incentive compensation is paid to a senior executive and payment was based on errors in the company's financials or performance metrics. Companies should also consider implementing policies that limit "golden parachute" payments. Under the TARP legislation, "golden parachute" payments are restricted to three times the executive's annual compensation.

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6. Exercise Good Corporate Citizenship. Exercising good corporate citizenship means that a corporation maintains high ethical standards, decreases its negative effects on the environment, and gives back to the community. In terms of executive compensation, practicing good corporate citizenship requires that the corporation consider factors other than the magnitude of the company's profits in making executive compensation determinations. For example, the company should consider factors such as, whether the executive has been able to improve employee morale at the corporation, whether the executive has improved the corporation's public image, and what effects have the executive's actions had on the surrounding natural, social and economic environments.

Just as there is no one-size-fits all approach to compensating company executives, when it comes to applying and implementing the "best practices" discussed in this article factors specific to each individual company must be considered. Factors such as a company's size, industry and management team will help determine which "best practices" might be feasible and/or beneficial for a company. While it is understood that full implementation of the "best practices" may not be feasible for every company, we hope that these "best practices" can serve as a guide and a tool to help private companies align their compensation practices with the company's goals and to help drive the company's long-term success.

Welcome New and Renewing Members!

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Legal Services of Eastern Missouri 18th Annual Justice for All Ball

February 28, 2009

The St. Louis Chapter, along with other local organizations and companies, sponsored a table at the Legal Services of Eastern Missouri Justice for All Ball. Below are some photos from the event.



Federal Circuit Weighs in on Open Source License Copyright Protection

By: Jason Schwent, Thompson Colburn LLP

Jason Schwent's practice is centered on the litigation of intellectual property matters, licensing technology and advising clients on intellectual property protections. Mr. Schwent has experience in litigating complex patent, trademark, and copyright matters in both administrative proceedings (like interferences, reexaminations, oppositions, and cancellations) as well as in state and federal courts. He also is experienced in drafting and reviewing open source and proprietary software licenses, counseling clients regarding media licensing and technology transfer, and advising clients about maximizing the protection for their intellectual property assets. He has substantial experience representing and advising established and emerging technology companies, multi-state and multi-national manufacturing companies, as well as large fortune 500 corporations.

On August 13, 2008, the U.S. Court of Appeals for the Federal Circuit made its first foray into the world of open source software. In an anticipated decision, the Federal Circuit overruled a U.S. District Court case from the Northern District of California and held that software programmers who distribute software programs for free using an open source license can rely on copyright law and sue for monetary damages if the terms of the license are violated.

Plaintiff Robert Jacobsen, a professor of physics, model train hobbyist, and member of the Java Model Railroad Interface (JMRI), held a copyright to computer programming code used to control model trains from a user's computer. Jacobsen distributed the software for free online subject to a common open source license known as the "Artistic License." The terms of Jacobsen's license gave users the right to copy, modify, and distribute the software but required users to acknowledge when distributing the software that JMRI was the creator of the software and to note any changes made to the code if it was used for another project.

Defendants Matthew Katzer and Kamind Associates, Inc. also developed commercial software for the model railroad industry. During the development of Katzer's and Kamind's own competing model train software, a Kamind employee copied and incorporated portions of Jacobsen's software. Though Jacobsen's license allowed downloaders to use the software as they saw fit, Katzer and Kamind did not comply with the acknowledgment and notification provisions of the license.

Because Katzer and Kamind failed to comply with all of the license terms, Jacobsen brought suit in the Northern District of California for the infringement of his copyrights in the software and sought a preliminary injunction to cease Katzer's and Kamind's infringing use.

In denying Jacobsen's request for a preliminary injunction, the district court maintained that Jacobsen could not successfully sue for copyright infringement. Since Jacobsen's non-exclusive license intentionally gave all downloaders all of the rights of the copyright holder, Katzer and Kamind could not have exceeded any of the rights granted in the license. Instead, because the only infringement was of the terms of the non-exclusive license, the district court ruled that Jacobsen's only remedy was to pursue a claim for breach of license.

The Federal Circuit disagreed and instead focused its analysis on whether open source license terms (like the Artistic License's

acknowledgment and notification provisions) were conditions upon which the license were granted, or were merely covenants to the copyright license which had no effect on the rights granted to users. The Federal Circuit considered the language of the Artistic License and found that the acknowledgment and notification provisions were conditions and not covenants. The license language explicitly conditioned the grant of copyrights on the user making certain acknowledgments and giving certain notifications. The Federal Circuit held that copyright holders who engage in open source licensing, like all copyright holders, "have the right to control the modification and distribution of copyrighted material." While most copyright licensors seek the payment of money in exchange for the grant of rights, the fact that Jacobsen chose to grant his license subject to certain acknowledgment and notification provisions rather than the payment of a licensing fee was "entitled to no less legal recognition." The Federal Circuit thus held that Jacobsen was entitled to pursue claims of copyright infringement (along with any and all remedies allowed by the copyright statute) for Katzer's and Kamind's violation of the conditions of Jacobsen's license.

While more of an acknowledgment of what many in the field already understood, as a first foray into the subject of open source licensing by any appellate court, the Federal Circuit decision is, nonetheless, an important acknowledgment.

First, while only ruling on the appropriateness of the District Court's denial of a preliminary injunction, the decision was an implicit acceptance by a U.S. appellate court that open source licenses are valid agreements. While acknowledged by courts in other countries, and by some lower courts in the U.S., this acceptance, even if implicit, by a U.S. appellate court is an important recognition of the validity of open source licenses.

Second, and perhaps more importantly, by establishing that the violation of open source software license terms constitutes copyright infringement, this decision establishes that copyright remedies are now available to open source plaintiffs. Though still required to meet the registration and other provisions of the copyright statute in order to receive these remedies, with this confirmation that the full arsenal of copyright remedies are even potentially available, open source plaintiffs will be emboldened to vigorously enforce their rights. Further encouraging open source plaintiffs to pursue enforcement actions is the potential for enforcement to be paid for by defendants. The copyright statute allows in some circumstances for prevailing parties to collect their attorneys' fees and costs. While open source plaintiffs may have been reluctant in the past to pay for enforcement actions involving free software where proving actual damage may have been difficult, now that they have the potential of collecting not only statutory damages but also their attorneys' fees, plaintiffs will be more likely to enforce their open source licenses with greater frequency. Accordingly, it is absolutely critical for every company which develops, purchases, licenses, distributes or uses software which may contain open source software to educate themselves about open source software and to take the steps necessary to ensure compliance with open source licenses. Without compliance efforts, companies face the potential of significant liability at the hands of open source plaintiffs wielding copyright remedies.

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Upcoming ACC Events:

May 14, 2009

ACC and BAMSL Present:

28th Annual Corporate Counsel Institute

CLE Credit: 8.7 Hours

Location: Sheraton Westport Hotel, Lakeside Chalet

Time: 7:45 a.m. - 5:00 p.m.

Cost: ACC/BAMSL Members \$225.00; Non-Members \$275.00

Please check out the ACC website to register.

May 19, 2009

**ACC, BAMSL, LSEM and VLAA Pro Bono Committees Present:
"The Basics of Representing Small Nonprofit Organizations"**

CLE Credit: 1 Hour

Speaker: Keith Kehrer, Bryan Cave LLP

Location: Regional Arts Commission/VLAA

Time: 4:00 - 5:15 p.m.

Cost: Free

Please visit the ACC website for registration details.

May 21, 2009

**"Managing Your Workforce in a Struggling Economy...
and Successfully Juggling Employment Laws Along the Way!"**

Speakers: Rodney Harrison, Gregg Lemley, and James Paul

CLE Credit: 1.25 Hour

Sponsor: Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Location: Westborough Country Club

Time: 4 - 5:45 p.m. (cocktails and hors d'oeuvres to follow presentation)

RSVP to Logan Wright at logan@amchouston.com

You can find out more information on all of these events at: www.acc.com/chapters/stlouis

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