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Insights

Landlord Liability for Tenant's Counterfeit Sales

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Should landlords care what business their tenants are operating? The obvious general answer of "yes" now has a more detailed and important caveat. If your client is retailing goods, you as a landlord may be liable if those goods are counterfeit. Thanks to some new developing case law which intersects intellectual property and real estate, landlords cannot willingly turn a blind eye to a tenant selling counterfeit products.

Before too much lease review hysteria sets in, courts are not asking landlords to do a ten-point inspection of a tenant's product sales to ensure there are no counterfeits being sold from a leased premises. However, in a recent case out of New York, Omega v. 375 Canal Street, a jury awarded the high-end watch retailer, Omega, with $1.1 million in damages against a landlord that was found to have contributed to trademark infringement with its willful blindness to its tenants' sales of counterfeit Omega watches. In a similar case out of Georgia that was upheld by the appellate court, Luxottica Group, S.P.A. v. Airport Mini Mall, a mini-mall owner was hit with a $1.9 million damages verdict for a type of indirect trademark infringement stemming from its subtenant's sale of fake designer glasses.

There is, however, a silver lining-- in both of those cases, the property at issue had been raided by police multiple times and the brand owners sent letters putting the landlords on notice of the illegal activity. The takeaway for landlords? Once you are put on notice of illegal activity on your leased property, you have a duty to take action. And for online landlords that think a court can't reach your virtual domain, think again. The same rules apply to virtual landlords providing forums for sales on which infringing activity occurs when they knowingly ignore it. As addressed in the Tiffany (NJ) Inc. v. eBay Inc. case out of New York City, and affirmed by the appellate court, eBay was not liable for the infringing acts of an on-line seller because it had established procedures for removing sellers of counterfeit merchandise and promptly took action when notified of such illicit activity.

For all landlords, the good news is that (as usual) you are not powerless. Here are a few general issues that should be covered in leases: (1) make sure your lease has language about illegal activity, and indemnification, insurance, and access rights relating to a reasonable suspicion of illegal

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activities; (2) have procedures in place to deal with tenants selling counterfeits on your property; and (3) take prompt action when you are notified of any such illicit activity. So for all landlords, you better remain vigilant, because while the products sold may be fake, the million dollar verdicts are very real.

If you have any questions, please contact Tara Tedrow, Jon Gibbs or the Lowndes attorney of your choice.