Copyright—Using Unlicensed Proprietary Software to Create a New Software Product

Case No. 08-11

Facts:

Engineer A is a software systems engineer hired by NewSoft, a start-up company, to help in the development of a new software product. Engineer A soon learns that the plans for the proposed new product will be based upon proprietary software for which NewSoft does not have a license. Engineer A assumes that this is some sort of mistake and speaks to the company president about the matter. Engineer A is assured by the company president that the situation will be rectified. But several months pass, and no licenses have been secured for the proprietary software. Repeated efforts by Engineer A to get the NewSoft leadership to address this issue have failed. Engineer A is uncertain as to what steps she should take next.

Question:

What are Engineer A's ethical obligations under the circumstances?

References:

Section I.6.	-	*NSPE Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.*
Section II.1.d.	-	*NSPE Code of Ethics:*	*Engineers shall not permit the use of their name or associate in business ventures with any person or firm that they believe is engaged in fraudulent or dishonest enterprise.*
Section II.4.	-	*NSPE Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section III.9.	-	*NSPE Code of Ethics:*	*Engineers shall give credit for engineering work to those to whom credit is due, and will recognize the proprietary interests of others.*
Section III.9.c.	-	*NSPE Code of Ethics:*	*Engineers, before undertaking work for others in connection with which the engineer may make improvements, plans, designs, inventions, or other records that may justify copyrights or patents, should enter into a positive agreement regarding ownership*

Discussion:

The use and protection of intellectual property is an area of growing importance within the practice of engineering. Patent, trade secret, copyright, and other legal protections are a fundamental part of a reasonable approach in addressing intellectual property issues within the field of engineering and business. Often intellectual property issues raise difficult and complicated ethical considerations.

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The NSPE Board of Ethical Review has had an opportunity to review a case with a somewhat similar, although distinguishable, set of facts in BER Case No. 97-12. Interestingly, two years after having decided the original case, the Board revisited and reconsidered the case in BER Case No. 99-13. In BER Case No. 97-12, Engineer A was employed by SPQ Engineering, an engineering firm in private practice involved in the design of bridges and other structures. As part of its services, SPQ Engineering used a CAD software design product under a licensing agreement with a vendor. Although under the terms of the licensing agreement, SPQ Engineering was not permitted to use the software at more than one workstation without paying a higher licensing fee, SPQ Engineering ignored the restriction and used the software at a number of employee workstations. Engineer A became aware of the practice and called a "hotline" publicized in a technical publication and reported his employer's activities. In deciding that it was not ethical for Engineer A to report his employer's apparent violation of the licensing agreement on the "hotline" without first discussing his concerns with his employer, the Board concluded that the facts and circumstance were not of a character that involved any danger—direct or indirect—to the public health and safety. Instead, the facts and circumstances related to matters of a legal nature and did not relate to engineering judgment or expertise. The Board noted that the NSPE Code Section II.4. placed a basic obligation on engineers to be faithful agents and trustees in professional matters with their employers. It was the Board's opinion that Engineer A's actions in reporting his employer's apparent violation was directly in conflict with the NSPE Code of Ethics. The Board was troubled that Engineer A did not consider other less adversarial and surreptitious alternatives. For example, said the Board, "Engineer A could have first discussed this matter with his employer, pointing out the possible damages that the violation posed to SPQ Engineering and suggesting that SPQ Engineering confer with its legal counsel before continuing its current actions." Instead, Engineer A took a course of action that could have caused significant damage to SPQ Engineering and ultimately to Engineer A himself. Said the Board, "One is inclined to wonder about the motivation for Engineer A's actions without his first exploring other less adversarial and surreptitious alternatives, in view of the lack of any direct danger to the public health and safety. While, in the context of the facts of this case, we cannot conclude that this provision compels Engineer A to ignore an apparent violation of the law and the NSPE Code (See NSPE Code Section III.9.), by the same token, Engineer A could have easily exercised far greater judgment and professional discretion before taking action."

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Two years later in BER Case No. 99-13, the Board reconsidered its ruling in BER Case No. 97-12. Among the causes for review included comments expressed by others who had concluded that the opinion could be read to suggest that engineers may ethically tolerate unlawful actions by their employers or their clients. Others noted that BER Case No. 97-12 suggested that an engineer who brings unlawful actions to the appropriate authorities would be acting unethically. Additional comments noted that the opinion did not recognize the possibility of retribution by the employer against the engineer and also that the opinion did not condemn or criticize the employer for its improper actions and bad conduct. While the then-present members of the NSPE Board of Ethical Review did not construe BER Case No. 97-12 to indicate those conclusions, the Board sought to clarify its intent in rendering its opinion under the facts. The Board noted its intent was to recognize the right and the obligation of an engineer to report such violations as appropriate. At the same time, the Board continued to maintain that as a professional, an engineer should always exercise judgment and discretion when confronting a situation such as the one presented under the facts. Depending upon all of the facts and circumstances, an engineer should take reasonable steps to exhaust all appropriate alternatives before taking an extreme action, such as reporting an employer or a client for their actions, particularly where such actions do not appear to result in physical harm or danger to the public health or safety. At the same time, the Board declared that engineering managers who knowingly act in an unlawful manner or who take retaliatory actions against another engineer who brings such matters to their attention are ignoring the basic principles contained in the NSPE Code of Ethics and are unethical.

This brings the Board to the present case. As noted earlier, while the facts in the present case are somewhat similar to the earlier cases discussed, there is one fundamentally important difference. In the present case, Engineer A is being asked to personally, directly, and knowingly participate in an infringement of intellectual property rights as part of the performance of his core services (designing new software based upon the proprietary software for which there was no license) on behalf of NewSoft. While BER Case Nos. 97-12 and 99-13 also clearly involved a violation of intellectual property rights, under the facts in those cases, it is clear that the engineer who expressed ethical and other concerns was far more remotely involved in the questionable ethical activities. The Board's position in these two cases suggest that the engineer had an obligation to exhaust all internal remedies before resorting to other alternatives. The Board believes the opinions in BER Case Nos. 97-12 and 99-13 are correct and well grounded, but that the facts in the present case raise an additional question: Should an engineer take a different course of action when the engineer is personally or potentially involved in an ethical violation?

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It is the Board's view that when an individual's professional reputation and ethical standing is put directly at risk as a result of the actions of an employer or client through no fault of the engineer, the engineer has a right to act more assertively than when the obligations an engineer may have when the engineer observes an ethical violation on the part of an employer or client. This, of course, assumes that the facts and circumstances do not involve a danger to the public health and safety.

In the present case, unlike the facts in BER Case Nos. 97-12 and 99-13, Engineer A's professional reputation and ethical standing are put directly at risk as a result of the actions of an employer or client. A reasonable recourse for Engineer A would be to insist that the matter be immediately resolved—(1) the company must take immediate steps to obtain the necessary license, permission, or other legal clearance in order to proceed with the work or (2) the company must obtain a legal opinion from competent legal counsel demonstrating that the actions being taken by NewSoft do not amount to a copyright infringement or some other intellectual property violation. If NewSoft fails to follow the course of action in either (1) or (2), Engineer A may either resign from NewSoft and/or report NewSoft's actions to the appropriate authorities.

Conclusion:

It would be ethical for Engineer A to insist that the matter be immediately resolved—(1) the company must take immediate steps to obtain the necessary license, permission, or other legal clearance in order to proceed with the work or (2) the company must obtain a legal opinion from competent legal counsel demonstrating that the actions being taken by NewSoft do not amount to a copyright infringement. If NewSoft fails to follow the course of action in either (1) or (2), Engineer A may either resign from NewSoft and/or report NewSoft's actions to the appropriate authorities.

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Each opinion is intended as guidance to individual practicing engineers, students, and the public. In regard to the question of application of the NSPE Code to engineering organizations (e.g., corporations, partnerships, sole proprietorships, government agencies, and university engineering departments), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services, which must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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