Can you imagine making it through a single work day without using your computer? If you’re like most people, you answered with an emphatic “No!” Curiously, most of us are not computer programmers. Rather, we are tradesman, professionals, and business people who have become reliant upon our computers and the software programs that they contain.

With that in mind, it is odd how little attention businesses pay to the ownership of the software on their computers. If I asked you to tell me who owns your company’s service vehicles, equipment, building, or office furniture; you would know the answer without hesitation. But, who owns the software programs upon which your company so heavily relies? If you’re like most people, you’re not so sure.

Software programs are intellectual property most often protected by copyright. Copyright protection arises automatically as a matter of law; though rights should always be protected through federal registration. As a default rule, ownership of copyright automatically vests with the author (i.e., the writer, director, or programmer).

This can become tricky when working in a business environment and is often overlooked entirely. Problems arise most commonly with software developed by employees and independent contractors.

Taking up first the issue of an employee, if an employee creates a new software program to perform a vital function for your business, does the employee own the resulting software program? The California Labor Code addresses this issue within California by providing that the business owns the software created by its employee if the software is (1) related to the business’ then existing business, or (2) the result of work performed by the employee for the business. While this provision is helpful, it leaves substantial room for dispute.

Who owns software that an employee develops for a future product line of your business? Who owns software developed by an employee on his own time, but directly related to your business?

These are not questions that your business will want to answer at the time of an expensive and time consuming dispute. Instead, the best practice is to have a written agreement, including a confidentiality agreement, and implement an invention assignment policy, drafted to be consistent with California and federal law, that sets up a clear process for clarifying the ownership of software at the time that it is created.

Turning next to the issue of an independent contractor, if an independent contractor creates a new software program to perform a vital function for your business, does the independent contractor own the resulting software program? Recall that the default rule is for copyright ownership to vest automatically with the author, here the independent contractor. However, the Copyright Act creates exceptions for certain works prepared by an independent contractor for a business. Even with these exceptions, if ownership of software created by an independent contractor is not clarified by written agreement, it can lead to costly ownership disputes when your business desires to offer the software as a part of a service to customers, the independent contractor desires to market the software to a competitor, or your business desires to use the software in a manner that the independent contractor opposes.

Such costly disputes can be avoided by making clear in the written contract between your business and the independent contractor that the software it develops will be the sole and exclusive property of your business.

Failing to clarify ownership of software developed by an employee or an independent contractor may result in someone other than your business owning and controlling the software that your business relies upon. Taking simple steps to clarify ownership of the software that your business relies upon can preserve its right to use and exploit such software, and avoid costly disputes down the road.

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