Ask a Lawyer Archive

Unauthorized Use Of Confidential Information

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Q. My partner and I developed a software product and filed a copyright registration on the software. We showed our software product to another company that indicated interest in purchasing our product. This company did not purchase the product, but instead copied our information and developed their own product based on our information. We did not sign a nondisclosure agreement with this company. What are our rights? If we sue, do we have much of a chance of winning? How expensive would it be to take a case like this to court?

-- *Kathleen*

A.

This situation unfortunately arises rather frequently in the high tech industry. As you have learned the hard way, it is always a good idea to have a nondisclosure agreement in place before you share proprietary or confidential information with a third party.

Having said this, I see a lot of really bad nondisclosure agreements come across my desk, and others which are reasonable but simply not understood by my client. If you have signed a bad nondisclosure agreement that does not protect your rights or if you just do not understand the terms of the agreement you sign and disclose confidential information without following the requirements of the agreement, then the effect is often the same as just not having an agreement in place at all.

Why is a nondisclosure agreement important? Well, besides protecting against the unauthorized use of confidential information, a good agreement can also prohibit the unauthorized use of proprietary information, trade secrets, and know-how, as well as product samples and demos. It can also prohibit such actions as reverse engineering of a sample product, which most likely took place in this case.

While clearly a nondisclosure agreement would have been a good idea in your situation, the facts of your case suggest that you may also have an action for copyright infringement against this company, provided that the company actually infringed your copyrighted work when it developed its own product.

My advice would be to consult with an intellectual property attorney in your jurisdiction who practices in the area of copyright litigation to discuss with him or her the specific facts of your case. Though it is not clear from the facts you have provided above, you may have other causes of action against the company as well, which a copyright litigator would be able to advise you on after talking to you in person.

As for the cost of taking a case like this to trial, assuming you have a good case against the company, this is hard to predict. Litigation is rarely a cheap solution, and it often costs a great deal it terms of time as well as money. If you can find an attorney who will take the case on contingency, you would pay the attorney out of the proceeds of the award. However, given the risks to an attorney of taking a contingency case, attorneys are often reluctant to take such cases unless they anticipate a large damage award, which will at least compensate them for the hours they put into the case. Given this fact, you will most likely need to pay the attorney on an hourly basis for his or her time and the attorney will most likely expect an up-front retainer. You may be able to recover some of these expenses as part of your award if you win the case.

My advice would be to consult with an attorney first on the merits of your case against this company and then ask him or her about the costs of taking a case like this to trial, and any other options he or she might suggest. You might then get a second or third opinion from several other copyright litigators in your jurisdiction and ask them for the same advice.

After you are armed with the facts, you will be in a good position to make an informed decision on how best to proceed.

-- *Kristie Prinz*
