

## **HOW TO PROTECT TECHNOLOGY**

One of the most important assets for technology companies is their intellectual property and those who have knowledge of it. There are a variety of legal tools and principles that can assist employers in protecting this asset.

A first step toward protecting intellectual property (IP) is to own it. The employer will generally own all copyrightable work created by employees in the course of their employment, although the law relating to ownership of patentable inventions is less clear. It is therefore important to deal with IP ownership in the employment agreement, before the IP is created. The agreement should also cover related issues, such as disclosing existing IP to the employer, maintaining records regarding IP creation, maintaining confidentiality, etc.

Employees of technology companies have a wealth of knowledge and skills that are critical to their employers' success. Many tech companies attempt to protect this value through the use of contractual language, including non-competition and non-solicitation clauses, IP ownership clauses and confidentiality provisions.

In general, restrictive covenants in the employment area are considered to be contrary to public policy in that they restrict individual freedom and prevent competition in a free and open marketplace. However, courts have recognized that restrictive covenants may be enforceable against employees and others in appropriate circumstances. In deciding whether to enforce restrictive covenants, courts will generally consider:

- Whether the employer has a legitimate propriety interest to protect;
- The scope of the limitation, with respect to the temporal and geographical limitations; and
- The overall reasonableness of the clause and whether it restrictive activities beyond the employer's legitimate interests.

Restrictive covenants must be drafted precisely, and may encompass only those activities that must be restricted in order to protect the employer's legitimate interests. Notwithstanding the care and scrutiny that is required to craft them, there is



no question a post-employment restrictive covenant can be a very useful tool to employers. With or without one, employees generally owe their employers duties of good faith, loyalty and fidelity, which prevents them from competing against their employers or engaging in activities that are directly contrary to their employers' interest during the period of employment. A restrictive covenant can be used for a fixed period during the post-termination period to protect an employer against competition from a former employee, including by preventing the employee from engaging in competitive activities, such as soliciting away existing employees.

Another valuable tool to employers in the tech area is the inclusion in the employment contract of an IP ownership clause. The *Copyright Act* already vests copyright ownership in an employer when IP is created in the course of employment. Employment agreements often go further, and state that any IP created by the employee at any time during the period of employment will be owned by the employer. These are commonly more enforceable than restrictive covenants.

The law also imposes obligations on employees to maintain the confidentiality of their employers' confidential information, including proprietary information and client lists. This obligation applies to both the employment and post-employment periods. However, many tech companies have chosen to craft specific contractual provisions addressing confidentiality to avoid any dispute about what type of information falls within the scope of this obligation.

The above are just a few of the many ways tech companies can try and protect their most valuable assets.