

## **SOFTWARE OWNERSHIP AND PROTECTION IN AN ECONOMIC DOWN TURN**

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We are frequently asked by clients to help them resolve disputes between software developers and their clients about performance of software delivered and ownership of that software. Invariably, disputes arise or are exacerbated because the parties did not have in place a carefully prepared and sufficiently detailed contract regarding development and ownership of the software. Clients often assume that since they paid development costs, they will own the intellectual property rights in all of the software delivered and that the developer will not be able to use the software it developed with another customer, especially a competitor. Without a clear contract dealing with these issues, both client assumptions are most likely wrong. Further, clients often assume that they can use the software as they see fit, including providing it to a third party say in the course of a business sale. Again, unless clearly addressed in a contract, this assumption is probably wrong.

One of our contacts at APPS Global Pty Ltd recently sent us an email referring to a report which suggested that 20% of UK software companies could disappear due to the current economic down turn.

Over the past 15 years or so, businesses have significantly increased their use of software specifically written for them. Naturally, business operations become reliant upon the continued operation of that software and its updating.

Understandably, clients tend to focus on the development and implementation phases of a software project but quite frequently, do not give a great deal of consideration to the consequences for their businesses if the software cannot be efficiently maintained or enhanced later.

In general terms, software escrow involves a software developer depositing a copy of software source code (the building blocks of the software) with an independent third party. The escrow agreement provides that the source code can be released to the client in limited circumstances to enable the software to be maintained or enhanced in future. Typically, release to the client would occur in circumstances where the software developer had gone out of business or was otherwise unable to maintain or enhance the software in the future. Ideally, escrow agreements should provide that new versions of the source code are deposited with the escrow agent from time to time.

A factor to consider and which is often overlooked in escrow arrangements is to have independent verification that what is deposited with the escrow agent is the source code that will actually be required by the client.

Hopefully, our economy will not take a toll on software development businesses. However, now rather than later, would be a good time to consider whether you need to clarify who owns the software your business is dependant upon and whether you should and do have in place suitable risk management procedures regarding that software.

Please contact me if you would like further information or assistance

If you would like further information about document management policies and how they may be relevant to you or your business, please contact Brett Cowell .

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