John L. King's Commentary on "Who Can Change Proprietary Source Code"

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Who Can Change Proprietary Source Code

What should Derek do now? That’s the closing question of Part II of the case. The answer is clear: he should talk to the lawyers at the current company. I say keep this case. It is pretty realistic, and reflects problems many people face. This case illustrates nicely how the issues are both ethical and legal. It does need a teaching note, however. It is helpful to divide the case into ethical and legal issues. I’m not a lawyer, and lawyers might spot more than I do here. Legal Irrespective of whatever agreement Derek had with his previous company, the system in question is theirs: Derek is tweaking with “a few minor alterations” the “innovative software system he helped design at the small computer firm.” It is confusing to parse the language of the case, but it appears this innovative software system is the “lifeblood” of the firm. It is difficult to imagine any court saying otherwise. Derek’s current company appears to have deep pockets. They could be liable for substantial damages if they adopt this software that can be shown to belong to some other firm. If the current company is sued I would think the outcome would be bad for Derek, at least. If Derek uses this for himself neither the previous company nor the current company are likely to know. If the previous company finds out they might sue Derek, but he doesn’t have deep pockets, the new company didn’t know so getting at them might be hard (especially after they fire Derek), there is ambiguity about Derek’s rights in this case since he didn’t sign anything, and the previous company probably didn’t lose any real sales. But if the new company uses this widely all that could change. Ethical Derek knows this is the previous company’s “lifeblood.”

At the least he should ensure that the current company offers the previous company the sale or license opportunity if it goes beyond him. Derek owes his current company the warning that this could be (probably is) proprietary and that. He might “get away” with using it for himself, but it would be a bad idea to use it widely in the current company without talking to the previous company. Derek can always say (as can the current company to the previous company) that Derek was just testing to

see if it worked. The current company probably buys all kinds of stuff – why not this? And the previous company would probably like the sale. Upshot Derek owes both an ethical and legal “duty of care” to both companies. Fortunately, neither duty of care excludes the other. Derek can honor both by doing the right thing: talking to the current company’s lawyers. They’ll know what to do.