

The Disappearing Computer

By Albert S. Frank, LL.B.

Some day a lawyer may walk into your office or home with a Court Order and walk out with your computer.

This can actually happen. I know because I have done it myself.

Our client was a company that had branch offices various Ontario towns. The company president came to us one day to say that almost all of the employees in one of the branches had suddenly resigned at the same time and had set up business in competition with his company. I worked intensely for a week, preparing various court papers including a lengthy sworn affidavit from the company president and an affidavit from one of the two remaining employees at the branch.

Seven days after the company president had brought this matter to our attention, I appeared before a Judge of the Supreme Court, with no notice to the departing employees, to raise with the Judge various complaints, including an apparent conspiracy amongst the employees to set up a competing business and, for that purpose, to take with them various customer files and customer lists. The Judge was of the view that, if the facts stated in the sworn affidavits

were correct, the conduct of the departing employees was "brazen", and more like a political coup than standard business practice.

In order to preserve the evidence of the possible wrongdoing of the departing employees and to preserve the property of our client company, including their files and client lists, the Judge gave a very strong Order. The Order did various things, including:

- giving the company broad powers to search the employees' homes and places of business,

- temporarily closing down the departing employees' competing business,

- restraining the departing employees from using any information obtained by them while they were employed by our client company, and

- restraining the departing employees from soliciting business from any of the customers of their former employer.

The most unusual aspect of the Order, though, was that it resulted in my taking away their computer.

A few days after the Order was obtained, the

company president and I arrived, unannounced, at one of the branches set up by the departing employees. We went through every drawer and cabinet, removing all company property, and also anything that seemed to be derived from company property or information. That included, for example, business forms that seemed to be based on the forms of our client company.

Before we left, I inspected a portable computer. I booted up the computer and examined the contents of the hard drive. It had letters and memos prepared for promotional purposes before the employees had made their departure, and even customer information. I therefore decided to take the portable computer away with me. The departing employees were distinctly unhappy to be losing their computer.

I was able to take the computer, however, because the Court Order included the following wording:

to remove, for detention and preservation, all documents, including magnetic tapes and discs that were wholly or partly reproduced or derived from any documents or things - including originals - located, or which were located, in the Plaintiff's offices.

That computer stayed in my office for several weeks, until the dispute was resolved by an

agreement between the departing employees and their former employer, our client company.

Losing a computer without warning could potentially happen to any computer freelancer. Nor are backups really helpful, since any properly worded Order would also allow for the backups to be seized at the same time as the computer is seized.

You can reduce the danger, however, by giving thought to the two main reasons why a Court might make such an Order:

- your hard drive contains, or might contain, evidence of wrongdoing; and

- your hard drive contains, or might contain, information that is somebody else's property.

Problems could arise, for example, from a failure to make it plain who owns the programming code that you write for a customer. Presumably once a job is finished you would have no further interest in any of the customer's data and it would be no hardship for you to erase it. You would, however, probably want to keep your code for possible reuse or alteration for other jobs. So it would be a good idea, in any letter or contract prepared concerning your jobs, to make it plain that you are entitled to do so.

One possible arrangement would be that, after the completion of the job and the

receipt of full payment, the customer would have unlimited rights to use or alter your code, without further payment, but that you otherwise retain full rights in the code, including the right to use it, alter it, or sell it.

You might also get into trouble if you are using unauthorized copies of commercial software. Nothing would prevent the software manufacturer from obtaining an Order seizing your computer and any backup discs if the manufacturer knows that you are likely using unauthorized copies of the software and the manufacturer decides that the issue is worth the expense and bother. You may feel that, even if you do have the occasional unauthorized copy, you are unlikely to be bothered. But you should also consider that if your computer is seized it could have a devastating effect on your business.

You do not want your computer to be The Disappearing Computer.

#

The above article originally appeared in the May 23-July 3, 1994 issue of The Computer Freelancer.

#

Research has NOT been done to see if this article is still good law. Also, this is general

information that might not apply to your particular situation.

#

Albert S. Frank is a business and trial lawyer with over 30 years of experience.

Phone: 416 929 7202

Email: afrank@FrankLaw.ca

Web: www.FrankLaw.ca

Copyright © Albert S. Frank