

# Joseph Ellin's Commentary on "Who Can Change Proprietary Source Code"

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Who Can Change Proprietary Source Code

## I

This is a debate over who owns a software system, the company or the designer. Horace says the system is 'really' the property of the company, but Derek, the designer, claims to possess certain property rights in it. My contribution to the ensuing discussion would be to say: "Gentlemen. Questions of property are determined by law, not philosophy. It is true that some philosophers, such as Locke and Nozick, think there's such a thing as property apart from law; but this opinion is untenable, as no rational criteria can be provided by which 'natural' property can be determined. (For instance, Locke says that I own anything with which I 'mix my labor'; but what is that? If I build a fence around a forest, does that mean I own the entire forest? Or only the land under the fence? Or the fence itself and nothing else? And if I own the fence, do you have a right to climb over the fence to get into the forest?) Whether the system is or is not the property of the previous employer depends on what the law says. It's not a moral question whether Derek or his prior employer have legal control over the work Derek did there. This may or may not depend on any agreement Derek signed, or didn't sign. So Derek should consult his, or the company's, lawyer and determine what his rights are.

Derek's arguments are feeble rationalizations for his desire to fiddle with the software he invented. He'd be more honest to say, 'Look, if I had signed my rights away, my hands would be tied. But I never did, and the previous company didn't seem to care. So now I'm free as a bird to do what I want with this system. That's my understanding of my legal rights, and I intend to exercise them fully. If I'm wrong, they can sue me.'"



As the case develops, things go farther than intended and now Derek's new employer not only wants him to make greater use of the software system than he initially thought would be right, but claim to own it themselves. Derek has gotten himself into a moral pickle and he wants someone to rescue him from it. He signed an agreement with his new company that his work belongs to them. He then revised the work he did for the first company, half-thinking that he really shouldn't; and now he regrets that the new company claims that the whole thing is theirs! It's really to late for him to conclude that the old company is being treated badly, since he's the one who made it happen. The only remedy here is for the first company to sue the new employer and have the court determine the legal property rights.



Should Horace, Derek's friend, tell the old company that Derek is using the software? Why not? There are no secrets involved in this, unless Horace is under a pledge of confidentiality, which wasn't stated. The smaller company needs to know that their systems are at risk unless they secure legal title to them; it's surprising that they have never been told this before by their lawyers! (Maybe they need new lawyers).