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Legal Topics to Consider when Establishing your IT Startup

You are seriously considering taking the step and establishing your IT startup in Switzerland. Good choice! While you are certainly focused on important non-legal topics such as finalizing your business plan, conducting a market analysis and looking for funding, you are well advised to spend some time on legal topics as well.

You will find various sources of information online that help guide you through the many decisions to take triggering legal effects. This article is meant to supplement those online guides and addresses some topics that are of specific importance to startups active in the IT business, especially if you are developing software or software products.

PROTECT YOUR PRODUCT AS FROM DAY ONE

In contrast to the US and other countries, in Switzerland software is usually not protected by patent law, but mainly as a copyright under the Federal Copyright Act (SCA). The term "software" – which generally covers the computer program, the developments and the user documentation – is not precisely defined by Swiss law. Computer programs are considered as work under the SCA and are therefore protected by a copyright, but this does only apply to the source code and the object code of the software, not to the ideas behind it. The SCA does therefore not prohibit your competitor from building a new software product based on your idea

without infringing the copyright of your software.

Copyright protection comes automatically without the need for filing or registering anything – you do not even have to use a © or similar to maintain protection. It particularly gives you the exclusive right to use your computer program. In very limited cases, it is possible to obtain a patent for an IT related product that entails enhanced protection, but comes along with downsides such as public access to the sensitive information.

Protect your product using contractual protection and applying practical measures.

Given that ideas behind the computer program are not protected, experience shows that the biggest risk for a developer of a software product is having a (former) employee or development partner using parts of the source code to develop a product with similar – often enhanced – functionalities to get a competitive advantage and save costs. In some cases, Swiss law offers remedies to defend against such

behaviour. But to significantly increase the effectiveness and efficiency of enforcement measures, it is worth providing for contractual protection in contracts with "sensitive" counterparties. Such protections have become standard and can usually be swiftly implemented without raising eyebrows and – often most important – without the need for a costly back-and-forth. They regularly prove to be worth the time and paper, especially if investors start looking at the business and are expecting to see such contractual protection in the context of their due diligence. Better be prepared.

While having legal remedies in case of a violation of your rights is nice, it is even more important to minimize the risk of violations as much as possible. This can be done by implementing practical measures to protect your product, in particular, its source code. Among the most effective measures are the following:

– restrict access to your code to a low number of employees and development partners on a strict "need to know" basis;

– have each individual with access to the code sign a strict confidentiality undertaking providing for a penalty in case of breach (this can be a one-pager, but still a powerful tool if drafted properly);

– have development partners and employees with access to sensitive

information sign non-compete undertakings (prohibiting them to use their knowledge to compete against your business for a certain period of time after termination of the cooperation);

– use standard language in agreements with development partners and employees involved in the development of your product to

ensure that your business – and not the individuals or partners involved in the development – will be the legal owner of any rights created as a result of the development efforts;

– to the extent (online) registers and databases are available, do the searches;

– thoroughly document "sensitive" development efforts to evidence the measures you take to avoid infringement.

Take measures to minimize the risk of infringement disputes that may significantly diminish the value of your business.

– technically protect your source code or content from unauthorized access (in Switzerland, digital rights management systems as such are protected, which in turn allows you to protect your product technically).

The implementation of such measures takes some time and efforts. If properly done, the effects they trigger – and the impact they may have on professional investors at a later stage of the venture – are often worth it.

AVOID INFRINGEMENTS OF THE RIGHTS OF OTHERS

Developing a product that infringes rights of others is no sustainable business model. It is very difficult to obtain financing from professional sources while an infringement dispute is pending. The fact alone that a material infringement claim is threatened and you are not in a position to easily establish that it is unsubstantiated may significantly diminish the value of your business.

The following measures can help you minimize the risk of an infringement:

– be mindful of the legal topics when doing your market and competitor analysis;

– be mindful of beginners mistakes such as decompiling and copying large portions of a competitor's source code;

LET'S FACE IT: LEGAL PROTECTION IS NICE, BUT NOT SUFFICIENT

Legal tools allow you to enhance protection of your computer program, but they provide no guarantee for the success of your idea or against the success of your competitors. As you probably know better than us, especially in the IT business it is crucial to be fast and visible, to develop a brand that is truly unique, and to create a network of followers and – hopefully – fans. We cannot ensure commercial success, but we are in a position to give you a head start on the legal front. §

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