Copyright

Copyright – What is it?

Copyright is often considered to be the main type of intellectual property right in relation to software.

Copyright is an unregistered right and protects the expression of ideas not the ideas themselves. This means that the underlying ideas and principles of a computer programme cannot be protected which includes:

- the concept / functionality for a computer program; or
- its programming language.

Copyright – What does it protect in relation to software?

When considering copyright in relation to "software" one needs to be clear about what we mean by "software".

Unfortunately there is no one singular definition of what "software" is. Generally speaking, when one refers to "software" we are talking about "computer programs" which in turn is primarily seen as the source code for the program.

Section 1 of the Model Provisions on the Protection of Computer Software defines a computer program as a *"… set of instructions capable, when incorporated in a machine readable medium, of causing a machine having information processing capabilities to indicate, perform or achieve a particular function, task or result."*

However, many see the concept of "software" as encapsulating much more than simply just the code and includes all of the other elements that make up software, such as screen displays and graphics.

Multiple copyright works may therefore subsist in software. When analysing software, it is important to be clear about which aspect you are looking at.

Relevant copyright works which may apply therefore include:

1. literary works e.g. source code and object code; on-screen text; and design documents (such as flow charts, graphs and functional or technical specifications would be protected as preparatory design material for a computer program);
2. compilations (other than a database);
3. databases;

4. artistic works e.g. screen displays or other visible elements; and
5. musical works.

Generally speaking, for a copyright work to subsist it must be original (i.e. not copied) and represent the author's own intellectual creation.

Software invariably does not stand still and is frequently updated as modifications are required. In each case, where a program is revised to a substantial degree, the new version will also be protected as a copyright work.

Copyright infringement

Copyright – How do you prove ''copying''?

Copyright entitles the holder to a number of exclusive acts including the right to copy. Therefore, if a person (who is not the copyright holder) makes a copy of a copyright work without permission, he/she runs the risk of copyright infringement.

However, for a claim for copyright infringement to be successfully raised, two key issues need to be addressed:

1. Was there actual copying?

Where a work is notably similar to a copyright work and the alleged infringer had access, there will be presumption that it was copied and it will be for the alleged infringer to dispel such a presumption.

To assist with establishing that copying has taken place people often use ''sleepers'' in the copyright work which are deliberate mistakes e.g. redundant code within a line of source code. Therefore if these turn up in the alleged infringing work it is compelling evidence that actual copying has taken place.

Unfortunately, if one cannot prove that copying has taken place then a claim for copyright infringement will fail.

It is conceivable for a person to come up with a work independently of another which is very similar and/or exactly the same as a copyright work. Where this happens the authors of each work will have their own copyright albeit in works which are almost identical.

It is therefore recommended that whenever a work is created that the author who creates it maintains some form of creation bible documenting how the work was created. This can then be used to dispel any alleged

copyright infringement claims by demonstrating independent creation.

2. If there was copying, how much was copied?

Not all of the copyright work needs to have been taken / copied and can be partial. Furthermore, it does not need to be exact and can be adaptive.

Where there has only been partial copying the key question to ask is when looking at the alleged infringing work has it taken a substantial part of the copyright work? This is assessed qualitatively not quantitatively on a case by case basis.

For more information on software disputes and copyright infringement, see our page on Copyright Infringement.

Copyleft – what is it?

Copyleft is in essence a play on words and is a concept which is synonymous with open-source software (OSS) licensing. Copyleft essentially turns copyright on its head and uses copyright in such a way to grant freedoms rather than restrictions, to make source code freely available and accessible with the right to run it, study it, adapt and improve it and to distribute it.

OSS licensing can take a number of forms but there are two broad categories:

1. **Restrictive / Reciprocal licences** – if you use the source code and distribute it onwards you must do so on the same terms as the terms under which that item of source code was originally licensed to you (even if you have added to it and/or improved upon it);
2. **Permissive licences** – if you use the source code in your solution you can subsequently licence your solution on your own terms but you may need to make clear which elements/excerpts within your solution are open source.

The main issues with OSS arise when it is combined with other source code. Therefore, understanding the terms upon which the OSS was licensed in the first place and how it has been combined with other source code is key.

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