



Copyright infringement

In practice, the most important form of legal protection for software is copyright.

Copyright is an unregistered right, enshrined in statute, which exists automatically upon the creation of a particular 'work' (for example, literary or musical) and prevents the unauthorised copying of that work. It's important to note that copyright protects the representation of an idea, not the idea itself.

In the context of software, copyright primarily protects the source and object codes, as well as the "preparatory design material for a computer program" (comprising any flow charts, graphs and functional or technical specifications).

Copyright protection may also extend to: screen displays and other visible elements that appear when the program is running (design icons, for example); on-screen text; music created by the computer program; and the Graphical User Interface. For more information about copyright and other intellectual property rights in software, please see the [IP in Software section of the Software Hub](#).

When does copyright infringement occur?

Copyright may be infringed when a third party, without the authority of the copyright owner:

1. Makes unauthorised copies of the software;
2. Issues unauthorised copies of the software to the public;
3. Adapts the software or does any of the above in relation to an adaptation. This can include making an altered version of the software, translating and converting between computer languages or codes, and translating object code into source code (decompiling); and
4. Loads and runs a computer program without authority.

The above is a non-exhaustive list of potential copyright infringements which relate to software, the most common of which is making unauthorised copies of the software. For a claim for copyright infringement to be successfully raised, two key issues need to be addressed: (i) Was there actual copying?; and (ii) If there was copying, how much was copied?

(i) 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 produce 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.

(ii) 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.

How can a copyright owner enforce their rights?

A copyright owner may enforce their rights by:

- Applying for a court order for the seizure, delivery-up or destruction of infringing software;
- Seeking an interim injunction to prevent the infringer from further infringing actions;
- Issuing a claim for damages for the loss suffered (the court also has discretion to award additional damages to the copyright owner if there has been flagrant copying); and
- Criminal sanctions (including imprisonment).

Practical First Steps

If you suspect a third party is infringing the copyright in your software, as a very first step, before even lawyers are approached, it is important to capture and preserve evidence of any apparent infringement.

Without evidence, there is no claim.

Unless you've been involved in litigation before, capturing evidence at the outset might not be something that immediately comes to mind as being a critical first step. However if the opportunity to capture important evidence is missed, a claim may be fatally harmed.

Capture Early

Seeking legal advice at an early stage is always recommended as we can help you structure your communications more advantageously to shape a robust dispute resolution strategy, but don't let this delay you from gathering evidence. At any moment critical evidence may be removed, edited or deleted, particularly if the other side is aware of a dispute.

An example: Copied Software Code

If you discover that someone has copied your software without your permission, infringing your intellectual property (IP) rights, the initial instinct may be to contact the offender and make a claim. However, if you make contact with the infringer before capturing and keeping a copy of any evidence of infringement, you give them an opportunity to edit or hide it. It may then be difficult or impossible to pursue a claim without access to evidence of infringement. The original evidence could be lost and with it the opportunity to apply for an injunction to stop further use of the software and a claim to the infringing party's profits.

Therefore, before any contact is made with the infringer, it is recommended that the infringing software (including any code if possible) is captured and preserved as dated screenshots.

Capturing and Preserving Evidence

Screenshots are good evidence of software infringement.

When taking a screen shot try to include the date and time information as it appears on the main page of your computer's operating system (Google should help you find the answer how to do this depending on your particular device if you're unsure). It is also useful to make a contemporaneous note (recording the date and time) of the circumstances under which you discovered the infringing material and how you have stored it in isolation to preserve its integrity. It is important not to use the evidential copy of the material as your "working copy" for further analysis / investigation. We may need to provide the original material to an expert for forensic analysis at a future point in time and it is important not to undermine the validity of that material as a result of poor handling / storage.

You may also wish to email the screenshots and your commentary to your lawyer/accountant to 'date stamp' and preserve the evidence.

A quick and easy low tech method of capturing the material can be to take a photograph of the screen.

Evidence can make or break a claim (whether or not it goes to court). It also plays a key role in both the assessment of damages and the ability to secure other remedies from the Court, such as final injunctions, which may be critical to stopping further harm.

If you take the time to capture and preserve evidence then you will make your lawyer's job a lot easier.

In more complex situations (for example if the material is located on the hard disk of a PC or laptop or on a server), it is important to seek expert help and advice from forensic specialists from the outset to ensure that the integrity of the evidence is preserved.

For further information please contact [Kathryn Rogers](#) on +44(0)1892 506 147 or at kathryn.rogers@crippspg.co.uk.