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IP Basics: Copyright for Digital Authors

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Additional Information
This series began by Professor Field in the 1970s in print booklets continued as web pages and were last updated in 2015.

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Introduction

Copyright encourages the creative efforts of authors, artists, and others by securing the exclusive right to reproduce works and derive income from them. The fact that graphics and text appear on a computer screen or that written material is intended to control the operation of computer hardware, at least in the U.S., no longer casts doubt on its being proper copyright subject matter.

Copyright arises automatically once an original effort has been started and some aspect of it has been fixed in a tangible medium. One need not even have notice on published copies. Registration is required only if legal action is warranted (and the work originates in the U.S. -- something hereafter presumed in this discussion). However, in the U.S., giving notice and promptly registering works provide advantages with regard to remedies. Those advantages are explained below, along with basic limits to copyright protection, issues to be considered in transferring copyright interests, and the fundamental distinction between works that are and are not "for hire."

Limits to Copyright

Copyright does not give an owner the right to sell or distribute a work. For example, one person's enhancements to another's program might (or might not be) copyrightable, it would infringe without permission of the owner of copyright in the original. Also, of course, the right to sell a particular work might be affected by laws governing matters such as obscenity or the rights of privacy or publicity of any persons who might be depicted in it.

Fair Use. Even with that in mind, there are further limits to copyright. For example, partial or limited reproduction of another's work may be permitted under the doctrine of fair use. This doctrine is especially liberal where the use advances public interests such as education or scholarship and specifically permits making a backup copy of a program. Further, sellers of utility software, such as clip art or programming libraries, should permit hassle-free distribution of non-competing works created by licensed users. [Programmers should seriously consider whether to use the work of publishers who assert additional rights.] Beyond fair use, still more fundamental limits to copyright protection should be considered.

Expressions are Protected, not Facts or Ideas. The basic idea is easily illustrated: An author of an online story has protection for her words, but not for facts that she went to the trouble to collect or her basic plot. Similarly, a programmer has protection from others' duplicating a segment of code but not from their writing different code to accomplish the same end. Protection for facts as such is probably not available, and processes can be protected, if at all, only by trade secrets or patents. [For more on the last option in particular, see Seeking Cost-Effective Patents, right-hand navigation bar.] That said, caution is nevertheless warranted. Copying someone's creative presentation of facts could easily infringe. Also, merely translating from one language into another may infringe -- just as would translating a novel from French to English.

Independent Creation is Permitted. A second work, identical to an earlier copyrighted work, does not infringe, if it is, in fact, independently created. While a well-known first work of a very unique or fanciful kind may make an independent creation defense difficult to believe, the problem may be more complicated

with regard to some kinds of software. Assume that, code has been copied with slight variations from the original, and it is claimed that function dictated form.

A practical cure for the problem of showing that a work was in fact copied is to embed "identifiers" such as misspellings and useless loops or variables. The objective is to hide them so that they will show up in copies which are claimed to be, but are not, independently created. If so, the issue will no longer be the alleged copier's credibility.

Extending the Reach of Copyright

No formalities are required to obtain copyright. As mentioned above, appropriate kinds of work are protected when they are fixed in a tangible medium, whether or not they can be directly perceived by human senses.

In the U.S., it is unnecessary even to provide a copyright notice. Yet, other nations require it, and a few also require, besides the usual notice, the phrase "All rights reserved." Further, in the U.S., notice eliminates a potential defense of a copier -- innocent infringement. Thus, particularly where that text does not interfere with the aesthetic integrity of a work, copyright owners should incorporate notice into published copies of their work. If that is done, to the extent that copyright is available, it should be automatically secured in most other countries under international treaties.

In the U.S., registration is necessary for copyright owner to enjoin, or to recover actual damages suffered from, unauthorized uses of a work. Also, even better remedies, namely statutory damages up to $150,000 as well as attorney fees, can be obtained if works are promptly registered. In the case of unpublished works, registration must occur prior to the unauthorized use. Published works should be registered within three months of publication.

Deposit and Registration

Whether one registers or not, copies of most works published in the U.S. must be deposited with the U. S. Copyright Office, Washington, D.C. 20559. See Section 202.19 of Title 37 of the Code of Federal Regulations (available in many public libraries) or at the Copyright Office website. In any event, under Section 407(d) of the Act, sanctions for failure to deposit are not imposed until a publisher fails to respond to an official demand for copies.

Registration is inexpensive and often straight-forward. Simple forms, containing basic instructions, are available from the Copyright Office. Register by sending the form (TX for most computer works) with a modest fee. Registration may also require the submission of identifying material.

Works for Hire

An important U.S. copyright issue is whether a work is "for hire."

Employed Programmers. Copyright in works of regular employees are presumed to be owned by their employers. In the absence of agreement to the contrary, employers own all rights to any work created within an employee's scope of employment.

Free-Lance Programmers and Entrepreneurs. In contrast with employees, free-lance programmers and entrepreneurs are ordinarily presumed to own copyright in their work even though there is only one copy, and it is sold. However, a party commissioning a work may insist that it be "for hire" -- particularly if it contributes to a still larger work. If (1) this is in writing and (2) the work may be so classified under the definition of a "work made for hire" in Section 101 of the Copyright Statute, then both the work and any accompanying copyright are owned by the party who commissioned it.

Legal Implications of Works for Hire

Ownership. As between those who own copyright in a work "for hire" and the artist or programmer who actually created it, the latter have no more rights than if they were total strangers. Thus, substantially similar later works will infringe. Freelance software authors and artists, in particular, need to think very carefully about what they may give up in assigning copyright in commissioned works or permitting them to be regarded as for hire.

The term of copyright. Rights in works for hire span 120 years from the date of creation or 95 years from the date of publication, whichever is shorter. The term for other works (at least when the author or artist is identifiable) extends for the artist's lifetime and 70 years beyond -- or, in the case of joint works, beyond death of the last surviving author. More information.

Copyright transfers may revert. After a time (at least 35 years), rights in works not for hire may revert back to creators (or others if they are deceased) even if copyright has been unconditionally assigned. These times will surely exceed the market life of most programs, so programmers probably need not be concerned. However, the situation could be quite different for accompanying art or text. Whether a given work is "for hire" is usually a simple matter to resolve at the time of a transfer. Surviving families of some computer artists, if not programmers, may regret that more care was not taken in dealing with this issue.

Whether to Register

Free-lance programmers must decide whether to register a work before trying to find a publisher. As discussed above, registration is unnecessary to have copyright, and, in any case, carefully selecting people with whom to do business is likely to be more cost-effective than copyright litigation.

Many publishers traditionally have preferred that works not be registered prior to publication. Some reasons for this have been eliminated by statutory changes. For example, publishers need no longer worry about separate notices on each story, cartoon or other free-lance contribution.

Still, publishers' policies should be explored in advance of registering or making submissions.

Entrepreneurs, even though they reproduce and sell their own works, also need to decide whether to register. While the fee is low, and copies may not have to be deposited, expenses can mount if each item is fairly small and inexpensive.

Because prior registration is unnecessary to enjoin unauthorized use or to collect actual damages (for example, caused by lost sales), the additional remedies attached to prompt registration may not appear, on balance, to be "worth it." Yet, some multiple works can be registered as a collection, particularly if works are unpublished. If expense is a problem, this should be explored.

Selling and Licensing Rights

While assignments and licenses may be of most interest to free-lance programmers who are not dealing with a company on a take-it-or-leave-it basis, even entrepreneurs may have occasion to consider licensing others the right to reproduce a particular program.

Before transferring rights to others, several issues should be considered and resolved. Transfers of anything beyond non-exclusive licenses (permission to use) must be written.

Very Important Questions to Answer Before Making Transfers:

- If the work is commissioned, is it or can it be regarded as "for hire"?
- If not, what rights are being transferred? All or perhaps just a license to use or reproduce for limited purposes or limited markets?
- Can the publisher use the work (or parts of it) in another product line or change the method of selling it?
- Can the publisher license others to use any part of the work in the same or unrelated products? If so, on what basis must payment be made?
- To what extent is the software author restricted, for example, in being able to sell substantially similar (infringing) works?
- In a long term relationship, what happens if the publisher loses interest in the work or goes out of business? Do rights return or linger in the hands of uninterested or incompetent people? (Minimum royalty provisions may help avoid such problems -- in any case, heed the voice of sad experience!)
- How will payment be made? For example, hourly wages, a lump sum or royalties based on sales?
- If royalties are due, on what basis will they be computed? For example, per item or a percentage of gross sales? (Avoid net sales or profits; it is too easy for the purchaser or licensee to play games with expenses allocated to particular sales!)
- Does a publisher ask to be indemnified for expenses of defending third party suits? This is pretty common. However, anyone can sue anybody for anything! Even if you win a suit, expenses can be very high; are you being paid enough to accept this risk?

Avoiding Copyright Infringement

As discussed earlier, copyright gives owners the exclusive right, for example, to reproduce protected subject matter (such things as ideas and facts being excluded). Sometimes a question arises as to whether a second, similar work was copied or independently created. If the person creating a second work had access to the original work and the works are virtually identical, copying is likely to be presumed even if the chance of access is remote.

When a programmer or computer artist sells copyright in a work, however, access is obviously not an issue if the same person later executes a similar work. To avoid problems, it is important that the creator and purchaser of the copyright reach clear agreement about such matters. It is important for computer artists and authors to understand that a work does not have to be identical to infringe copyright in an earlier one. The legal test of infringement is "substantial similarity" -- which translates (roughly) into whether an ordinary observer would recognize a work as copied in whole or in part from an earlier one.

In a similar vein, artists often ask if it is OK to base a painting on, for example, a magazine photograph -- even though they appreciate that turning that photograph (or some part of it) into postcards would infringe the copyright. Such questions are not easy to answer. First, an artist is unlikely to be sued for using a relatively small element from another work -- particularly if it is not copied in detail. (One who photographs a tropical scene does not get exclusive rights to all palm trees that might vaguely resemble those depicted there.)

Still, the safest course of action (particularly if you have any doubts) is: Do not copy a work in which others have the copyright unless you have permission! Clip art and software libraries are sold to be copied -- use those, being sure to note any limitations on their use. (For example, I have a CD of clip art that can be used in printed works, but the license expressly forbids digital distribution. Thus, I cannot use that clip art to liven up my web pages! In that vein, see the brief discussion of utility software, above.)

The Need for Counsel

Programmers interested in exploring options other than copyright should also read Seeking Cost-Effective Patents before seeing counsel.

Those who are content with copyright should encounter little difficulty registering their works, but transferring legal interests is another matter altogether. Anyone concerned about any issue posed above (or other things of the kind) should seek the advice of counsel. Failing to do so is to risk being found to have sold more than you intended or to have liabilities that you never anticipated!

Even if licenses or assignments are offered on a take-it-or-leave-it basis, it pays to know what you are getting into. Lawyers cannot determine whether deals are economically advantageous or professionally satisfying. Yet, those familiar with software assignments and licenses should be able to explain the short- and long-term legal implications of various provisions so that computer artists and authors can decide for themselves whether to enter into an agreement.

Finally, of course, programmer-entrepreneurs face the problems faced by anyone in business. For example, they need to explore matters such as liability for programming errors that cause erroneous computations or loss of data.