

Copyright in software

The New Zealand Copyright Act 1994 offers express protection against copying of computer programs. Although computer programs were not expressly mentioned in the Copyright Act 1962, case law had established that (a) copyright exists in program source code as a literary work and (b) copyright exists in machine code by virtue of the machine code being a translation of source code.

The aspects of programs which are protected is not entirely clear—"program" is not defined. In addition to program code it is possible both "look" and "feel" may be protected, as may be database design and software architecture.

Most countries provide copyright for software and all signatories to the 1994 World Trade Agreement must do so. None of these countries require copyright to be registered.

Under one of two international conventions to which most countries are signatories, countries confer the benefit of their national law on overseas copyright owners or on the owners of copyright works first published in overseas countries. A computer program written in New Zealand will attract in the United States copyright which will be enforceable in the US against infringers.

Obtaining copyright

Unlike patents, it is not necessary to apply to register a work for copyright. Copyright exists automatically from the time the program is written as an unpublished work and as a published work after the program has been released. The application of a copyright notice such as "© A J Park 2007" is advisable for evidentiary and deterrent reasons, but is not mandatory.

Copyright registration in the United States may be desirable for commercial reasons and is a precondition to sue for infringement in that country.

Infringement

Copyright in a computer program will be infringed by unauthorised (1) copying, (2) conversion into another code or language, (3) storage in any medium, and (4) decompilation¹.

It is not necessary to copy the whole of a program to infringe. Copying of a substantial part (which might be a single subroutine) is sufficient. The mere running of a program will probably amount to infringement in some countries since copying and storage takes place as the code is read from disk into memory for execution.

Originality

Computer programs must be original to attract copyright. However, the level of originality is not high and "original" simply means that skill and labour has been expended and that the program is written without copying.

Term

As for all literary works, the term of copyright in a computer program is the life of the author plus 50 years in most countries. There is no specific recognition that the commercial life of software is much shorter than that of books for example. The term of copyright for a computer-generated work is 50 calendar years from the year it was made.

¹ But not in some countries if the decompilation is for error correction or for the writing interoperable software.

Enforcement

Copyright infringement is primarily a civil wrong and therefore copyright owners must enforce their copyright themselves.

Enforcement is usually done through a High Court proceeding. Our firm is experienced in the specialist field of software copyright litigation and instigated the first software copyright case to go to trial in 1987.

It is also a criminal offence to make or deal in infringing copies with knowledge that they are infringements. The maximum penalty is \$5000 for each infringing copy and/or three months imprisonment.

Importation & parallel importation

Importation of unauthorised (pirated) copies is an infringement of copyright. The importation into New Zealand of genuine software without the consent of the copyright owner no longer constitutes a breach of copyright following the Copyright Act Amendment 1998.

Border control

Under the Copyright Act, "pirated copies" of copyright works can be detained by New Zealand Customs. Unless the copyright owner starts a proceeding in the court within 10 days (extendible), Customs will release the detained copies. Similar procedures exist in the United States and other countries.