

A practical guide to copyright in computer software

1. Introduction

1.1 Under UK law, determining who owns and is free to make use of the copyright in a computer program is not always a simple task. It is necessary first to determine who created the program, and under what circumstances. This may be used to establish ownership, and it will then be necessary to determine if any conditions have been placed on the use of the code.

2. Employees and commissioned works

2.1 If the program is written wholly by an employee then the copyright in the code will belong to the employer¹. Otherwise, one must look to the circumstances in which the author created the work.

2.2 If the code is commissioned from someone other than an employee, absent an agreement to the contrary the copyright in the code will belong to the author (or the employer of that author). Therefore, in such circumstances it is advisable to obtain a specific assignment of the ownership of the copyright as a part of the commission. Terms and Conditions often do not cover this.

2.3 Further, it is worth noting that paying for the work involved in writing the code does not, of itself, serve to transfer ownership of the copyright – though it will give rise to an implied licence to the purchaser to use the code for the purposes supplied. However, this licence would not for example extend to allowing the purchaser to sell the code as a program to others. Any implied term will only be the minimum required. Since a licence to use the code, without transferring ownership, will allow use of the code, no presumption will exist that ownership has been transferred².

3. Complications: Teams, Open Source

3.1 This position is further complicated in that nowadays it is increasing uncommon

¹ section 11(2) Copyright, Designs & Patents Act 1989

² [2009] EWHC 2602 Infection Control Enterprises Limited v Virrage Enterprises Limited

to find a program written wholly from scratch, or by a single individual. Often, the code will be developed by a team, which may or may not include contracted consultants. Hence, it will be vital to ensure that the contracts retaining any such consultants include terms assigning the copyrights to the consulted business.

3.2 Additionally, code is often reused from freely available sources – such as sourceforge, Google Code, and Codeplex among others as open source code. This code is made available for re-use often at no cost. Under pressure of deadlines the temptation to use such code may be hard to resist. Also, in many current development environments such use is encouraged since code for a specific task has already been written and in the case of an active and sizeable open source community will be in use with many skilled coders having examined the code for potential problems.

3.3 Nevertheless, a potential problem for certain business models is that open source code is supplied under specific licence terms that control what use may legally be made of the re-used code. These licences vary in terms from those that permit re-use of the licensed code with little or no restriction (eg attribution licences such as the BSD licence³) through to those that require, in certain circumstances, that all code forming a part of the larger program must be made available on similar terms if the licensed code is taken (share and share alike licences such as the GPL⁴). The terms of these licences will often cover amendments to the re-used code, not just code that incorporates the re-used code wholesale, such that the licence terms are not evaded by amending the re-used code.

3.4 In some cases it is acceptable to incorporate a licensed code library provided the library itself is not modified⁵. If the library is modified, the larger program – not just the modified library may become subject to the licence terms of the reused code.

³ [BSD Licence](#)

⁴ [GPLv3](#)

⁵ [LGPLv3](#)

3.5 In most cases the requirement to release code to third parties does not become triggered unless the product is distributed outside of the development company. Accordingly code developed “in house” for “in house” use will not normally invoke these clauses and nor will code contracted from a third party for use “in house”. However, code developed for use by customers of an organisation will often invoke the requirement to share.

3.6 One problem could be that while a program has been created by an employee such that the employer believes they “own” the copyright, the employer may nevertheless find themselves, once the code has been marketed and the presence of licensed code discovered, under an obligation to share the code free of charge to all who ask for it. Broadly this is what happened to Cisco following its purchase of Linksys (for approx \$500m) in 2003. The Linksys routers were found post-completion to incorporate as key elements code subject to the GPL. As a result Cisco were and are required to make the source code for the routers available at no cost.

3.7 Another problem may arise where the code itself is original but works together with licensed code such that on compilation or execution of the program the licensed terms come into play. As noted, these problems however do not typically exist while the code is being developed for internal use, but when a decision is made to market the program outside of the company careful consideration and analysis of the code will be needed to determine any potentially adverse commercial consequences of distributing the code. Clearly the fact matrix governing a particular situation will be key to understanding the situation and managing any potential risk. HLBBshaw can assist in this.

3.8 There are commercial organisations⁶ that will analyse software to detect the fingerprints of licensed code to determine any risk associated with distribution of a particular codebase. Some businesses when contracting software development will require as a condition of the contract that code bearing specific licences (or kinds of licence) is expressly forbidden

⁶ For example [Black Duck](#), [Palamida](#)

from being used in the final delivered product and will require such fingerprinting before final payment for the commercial product. It is also becoming common when acquiring a software business for the commercial products to be put through such a test as part of the due diligence process to avoid a situation similar to that befalling Cisco noted above.

4. Practice Tips/Advice

1. Understand where your code originates
2. Have a policy regarding the use of open source code in development projects
3. Ensure where appropriate that ownership of the copyright in developed code passes to the company
4. Enforce the open source policy by fingerprinting where appropriate prior to marketing of code

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