

Computer Programs: Infringement of Copyright.

UNITED KINGDOM

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Introduction

Computer programs can be protected by a variety of intellectual property rights (IPRs). Copyright is often the most appropriate IPR. This article outlines some aspects of copyright law as it applies to computer programs in the UK. However, in some circumstances other law and IPRs may apply, such as the law of contract, confidentiality, trade marks and patents.

For example, it is common for a software house to keep its source code secret. If such code is unlawfully disclosed by an employee to an unauthorized person (typically a competitor) then this may be both a breach of confidence and a breach of the contract of employment.

A software pirate may infringe the legitimate proprietor's trade mark by, say, reproducing it on CD packaging.

Changes to UK Patent Office practice and European legislation are under way to ensure that computer programs which are capable of providing a "technical contribution" can benefit from patent protection in Europe. Thousands of patents have been issued in Europe covering software-related inventions. It is interesting to note that the majority of these are held by non-European companies. The stage is set for patents (and utility models) to become increasingly important for protecting software in Europe.

UK Copyright Law

Copyright is a property right. Essentially, its function is to protect the creative efforts of the author. Copyright subsists in an original literary work, including a computer program, preparatory design material for a computer program, a database and a table or compilation other than a database. However, there is no copyright unless and until the work is recorded.

The work must be "original" in the sense that it is not copied. It need not be novel. The relevant UK statute, the Copyright, Designs and Patents Act 1988, does not define "original". The EU approach (in Directive 91/250/EEC on the legal protection of computer programs) is that a computer program is original if it is the author's own intellectual creation. Likewise, a database is original if, and only if, by reason of the selection or arrangement of its contents it constitutes the author's own intellectual

creation. The work must not be trivial – the author must have expended some skill, labour, judgement, knowledge (or even taste) in creating it.

The author of a work is the first owner of any copyright in it. In the software industry many programmers work as independent contractors. It is not unusual for disputes to arise as to ownership of copyright. Contracts must be clearly worded to avoid such problems. In contrast, if an employee produces a copyright work in the course of their employment, the employer is the first owner of the copyright, subject to any agreement to the contrary.

The duration of copyright depends on the exact nature of the work and how it was created. For a literary work such as a computer program, the basic rule is that copyright protection expires after 70 years from the end of the calendar year in which the author dies. For most software, it might as well last forever!

Protecting Program Structure

Copyright protects source code, object code “micro code” (e.g. software in ROM chips, i.e. “firmware”). Copyright can protect individual programs, suites of programs (as compilations) and data/record structures (as compilations and/or databases).

To help understand this it is worth looking at some UK High Court decisions. In the 1994 case of *Ibcos Computers*, the court decided that a *compilation* of programs may be a copyright work in itself where the putting together of the whole package involves considerable skill and labour. It said: “‘Consideration is not restricted to the text of the code’ ... most literary copyright works involve both literal matter (the exact words of a novel or computer program) and varying levels of abstraction (plot, more or less detailed of a novel, general structure of a computer program).”

This recently received support from another High Court judge, Pumfrey J. in a case decided in April 1999, *CFI v. Tradition*, where the judge said: “It seems to be generally accepted that the ‘architecture’ of a computer program is capable of protection if a substantial part of the programmer’s skill, labour and judgement went into it. In this context, ‘architecture’ is a vague and ambiguous term. It may be used to refer to the overall structure of the system at a very high level of abstraction... The term ‘architecture’ may also be used to describe... ‘program structure’ ”.

A traditional concept is that copyright protects the expression of an idea but not the idea itself. This concept has been highly developed by US courts. The approach of the UK court to this in the context of computer programs has been varied. In the 1992 case of *John Richardson Computers*, it was thought that it would be right to adopt a similar approach in England. A few years later, in *Ibcos*, the concept’s usefulness was doubted, in that it would lead to complications so far as UK law is concerned and risk over citation of US authorities, which are based on different statutes. The view was that UK copyright cannot prevent the copying of a mere general idea but can protect the copying of a detailed idea.

Around the same time as the *Ibcos* judgement, the 1994 Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS agreement) was being made. Under TRIPS, member states have to ensure that certain minimum standards for IPRs are implemented into their national laws. Article 9(2) states that “Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.” Given that the UK is a party to TRIPS, there is a good chance that in future the idea/expression concept will be considered again by the UK courts.

As mentioned above, preparatory design material for a computer program can also be protected by copyright. During the creation of a working program, designers may produce flow charts, specifications, tables, program listings, screen display, menu layouts and the like. This will be preparatory design material and can be protected.

Infringement of Copyright

The most relevant infringing activities to computer programs involve “copying”, “adapting” and publicly distributing the work. In each case the activity can be in relation to the whole of the work or a substantial part of it.

Copying means reproducing the work in any material form and includes storing the work in any medium by electronic means.

CFI v. Tradition confirmed the test for a claim in copyright laid out in *Ibcos*:

- (i) What are the work or works in which the plaintiff claims copyright?
- (ii) Is each such work original?
- (iii) Was there copying from that work?
- (iv) If there was copying, has a substantial part of that work been reproduced?

The inter-relationship of the originality of the work copied can be important. Whether a part is substantial must be decided by its quality rather than its quantity. Substantiality is to be judged in the light of the skill and labour in design and coding which went into the piece of code which is alleged to be copied. It is not determined by whether the system would work without the code, nor by the amount of use the system makes of the code.

Adapting means making an arrangement or altered version of the computer program/database or a translation of it. Here translating means converting the program into or out of a computer language or code or into a different computer language or code or into a different computer language or code.

Distributing includes rental or lending the work to the public.

A number of acts are permitted by statute in relation to copyright works. Making a back-up copy of a computer program, decompiling it in certain circumstances and lawfully adapting it (including correcting errors in it) will not infringe. There are also a number of

fair dealing exceptions to infringement, such as use for research or private study and reporting current events.

Future Challenges for Copyright

With increasing “globalization” of commerce, jurisdictional issues will have greater importance. Not all countries have well-developed judicial systems which are used to dealing with IPRs. Generally, IPRs are territorial and normally the UK courts will not entertain disputes relating to foreign IPRs. However, where at least one defendant is domiciled in the UK, the claimant is entitled to sue in the English courts for copyright infringements occurring in any EU or EFTA state (as the Court of Appeal held in the 1999 case of *Pearce v. Ove Arup Partnership.*).

The pace of technological development poses many legal challenges. For instance, current copyright legislation caters for relatively straightforward matters on the Internet, such as the unauthorized reproduction of a literary work on a website: unsurprisingly, courts in France (*Queneau v. L(Christian)*, 1997) and Scotland (*Shetland Times v. Wills* (1997)) have indicated that this can amount to copyright infringement.

In May 1999, the European Commission presented an amended proposal for a Directive to harmonise certain aspects of copyright and related rights in the information society. It aims to establish a level playing field for copyright protection in the information society and would cover, for example, digital delivery systems for music and films. In particular, it addresses the legal protection of technological anti-copying measures. However, it does not affect the legal protection of computer programs or databases. This is interesting in view of the fact that they can be easily transmitted via the Internet. Whether there will be a need for similar legislation in relation to computer programs and databases remains to be seen.