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SOFTWARE COPYRIGHT INQUIRY

Briefly, copyright is a legal device which provides the owner of the work (e.g., book, manuscript, software program, artwork, technical drawings, etc.) exclusive rights over the work, such as the right to make copies, the right to distribute copies, the right to make adaptations (prepare new works based on the underlying work), as well as the right to perform and/or display the work in public. The Copyright Act specifically classifies computer software programs as “literary works” and affords them full copyright protection. Copyright not only protects all forms of computer code, but it may also extend to program design documents, user manuals, and the program’s user interface. Screen displays may also constitute an audiovisual work that is separate and distinct from the actual computer code.

Copyright automatically comes into existence the moment an author fixes his or her work in some tangible form, e.g., software code is written. If a work is created as a “work-for-hire,” ownership generally goes to the employer (or person who commissioned the work in certain instances). Otherwise, ownership remains in the author and must be expressly assigned.

Copyright protects an author’s work only if and to the extent it is *original* (i.e., not copied from another’s work). However, a work need not be entirely new to be protectable. Certain works are derived from previously existing works or are compilations of pre-existing material and become new works of authorship entitled to copyright protection. The most important limitation of copyright is that it protects only the particular form of expression, not the ideas, methods or concepts contained within it. As we previously discussed, software patents or trade secrets are the best vehicle for protecting such ideas.

In the past, all published works had to contain a copyright notice (©, name of owner, date) to be protected. Now the use of copyright notice is optional, but it is always a good idea to include copyright notice on all published works to warn potential infringers of your claim to copyright. You should place your copyright notice in a number of different places to ensure that it serves its intended purpose — to be seen and give notice of your copyright. Every component of a software package should contain the notice, including the package or box, the manual or other written documentation, the disks or other media and the appropriate computer screens.

Furthermore, registration of the work with the U.S. Copyright Office is not *required*. However, prompt registration provides a number of important advantages if it is ever necessary to go to court to enforce it. For example, registration makes your copyright a matter of public record and may provide you with the ability to collect statutory damages and attorney fees in the event of litigation.

Generally, computer software is often revised and modified. Preferably, each version of a program should be registered separately starting with the first version. A new version of a preexisting program is considered a derivative work under copyright law. Once you have registered an original version of a software program, all material contained in *that* version is

covered, regardless of how many new versions are produced. However, new material contained in the new versions is not covered without additional registrations. If the changes are minor, or merely correct routine errors, registration is probably not necessary — and will not be allowed. If, on the other hand, your changes are significant (a new release or new version), you should register the new release as a new version of the original. Note carefully that under Copyright Office rules, registering a later version of preexisting software will not constitute registration of the earlier version, and will only cover the new material added to the preexisting software. The original version and any intervening versions should also be registered for complete protection.

The deposit material required by the Copyright Office varies depending on the type of work to be registered and whether the work has been published. For software code, the Copyright Office rules usually allow you to deposit a *portion* of the work rather than the entire program. If you plan to keep your source code as a trade secret, the Copyright Office rules permit you to deposit source code with any trade secrets blocked out. For example, for programs with over 50 pages of source code, you may deposit the first and last 25 pages of code with less than 50% of the source code blocked out. If the code contains a copyright notice, you must include the page or equivalent unit that contains the notice. If the deposit material does not include the title and version number, you should add such information to identify the particular program. The Copyright Office normally retains deposits for only five years. You may, however, request a full-term retention for a fee.

Trade secret protection is usually desired for portions of the code. Therefore, the deposit materials, should the program be over 50 pages of source code, would consist of the first and last 25 pages of code with less than 50% of the source code blocked out. Blocking out code is generally accomplished by using a black permanent marker to line through specific lines of code or, in some cases, every other line or word to make the code unreadable. A clean copy of the code should also be provided to us for our files.

In the event of infringement, you will need to demonstrate copying, which generally can be established by showing access and substantial similarity to your code. The best evidence of infringement is to catch the infringer with code that is somehow instantly identifiable as being yours. This can be accomplished by burying nonfunctional and idiosyncratic symbols somewhere in the code or including intentional non-harmful errors or unnecessary codings. If these symbols or coding are present in the infringer's copy, a court will likely conclude that there was indeed copying.

It is also very important to keep meticulous records of the entire development process, from the initial stage to coding, debugging and testing. A policy for maintaining master copies of each version should also be implemented for evidential purposes. This can be useful in demonstrating that your work was original (in the event you are charged with infringement) and also to demonstrate that the software code involved in any litigation for which you are charging someone with infringement is owned by you. The kind of evidence courts typically rely on are witnessed records and Copyright Office deposits, since computer records are too easily altered to give them legal credibility. Dated, witnessed, hard copy print-outs of source and object code are likely to be the most credible form of evidence. Supplemental permanent media copies (CDs) may also prove effective in some instances.