

# INTELLECTUAL PROPERTY (IP)

## WHAT ARE MY RIGHTS AT WORK?

### **Copyright in any artistic work (which does include programming in all forms) arises automatically when the work is created. There is no formal procedure.**

It encompasses the right to copy, publish, sell, license or adapt the work in question. This is distinct from patents for inventions or innovations which are approved by IP Australia.

This is a short resource designed to help you understand what rights you have when it comes to copyright at work.

### **DISCLAIMER**

Hopefully this guide will help you recognise or even avoid circumstances where your rights at work are infringed.

However, the information here is general only. Every case has its own specifics and you should obtain specific legal advice from a legal professional if you think your rights have been infringed!

### **RIGHTS UNDER YOUR EMPLOYMENT CONTRACT**

The first thing is to always look to the terms of your contract in detail, it should explicitly outline how copyright in the work you do for your employer is assigned.

In the absence of any explicit terms, the *Copyright Act 1968* s35(3) states that any commercial rights in a work created in the

course of your employment belong to your employer, even if your contract does not explicitly state as such.

What can be important to consider is your own “side” or “private” work.

If your employer has game jams; free after hours use of the office; provisions for working from home; or otherwise allows you to use your work equipment for non-work purposes then it is possible anything you make could be snapped up and become the copyright of your employer instead of yourself.

In the marginal case, so long as the clear majority of work you do on a side project is outside of work (i.e. on your personal, not work PC) and outside of what your employer directs you to create then you should be in the clear.

### **WHAT IF I'M AN INDEPENDENT CONTRACTOR?**

In this case the statute is reversed. Independent contractors are presumed to retain the copyright in all the work you do for the company in question unless the contract says otherwise.

In larger projects you can expect clauses that assign all copyright to the company as routine, but for smaller firms keep in mind this is open to negotiation should you wish to retain some degree of copyright in your work.



### **There are circumstances where your employer can claim copyright on your personal work that you might not expect:**

#### **GAME JAMS**

If your employer has game jams at work the results belong to them unless you've got it in writing that it's your copyright.

#### **WORKING FROM HOME**

This can blur the line between what time is “outside of work” giving your employer claims to copyright, take practical steps to separate work and side projects such as having a personal and work PC.

*Example: In Redrock Holdings v Hinkley (2001) an employer successfully gained the copyright over a software tool their dev had made before joining the company, because he had continued to improve it and use it at work. The employee was left only with the copyright in the pre-employment revision of the software and would be in breach of copyright if he copied his own improvements.*

## REVERSE ENGINEERING

In copyright law it's important to understand that copyright protects the "expression, not the idea itself". Therefore it is not infringement to copy a function, so long as you don't reproduce the code itself.

If you have actually seen the source code and then reproduced something the same or similar from memory with slight tweaks then this would typically be infringement, if it is not exactly the same it would be an infringement as an unauthorized adaptation of an original work.

Say you are reverse engineering, how can you avoid liability?

The best practice is to adopt a "clean room" design. Do not let anyone on the team be tainted by exposure to the source code or

any other documentation from the original.

If your team reproduces the original functions without seeing any hint of the original, Australian courts should rule no infringement.

However you must be careful in considering whether your engineered code would be an exact copy of something in the original without even seeing it.

One relevant example in the case law is a scenario where an engineer infringed by deducing the exact data in a compression table and then used it for themselves. In cases where you've deduced the original exactly, you'll need to come up with an original alternative.

It is important to note that simply translating or rewriting any program or part thereof

into another programming language, is strictly considered an adaptation of the original and is thus an infringement.

Lastly, be careful with any program you have purchased, licensed or have a development agreement over. The terms will very likely have a section that prohibits reverse engineering which means you could be sued by the other party under breach of contract or breach of confidence.

### Citations:

- *Autodesk Inc v Dyason* ("AutoCAD case") (1992) 173 CLR 330
- *CA, Inc. v ISI Pty Limited* [2012] FCA 35
- *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 202 CLR 1

## MORAL RIGHTS: RIGHTS THAT CANNOT BE SOLD OR TRANSFERRED

The following rights can only be deferred by **your direct consent** and are otherwise inherent to your work on any project:

**Right of Attribution:** (s193-195AB Copyright Act 1968) You have a right to be credited for any original work you've done for your employer. This right arises at the time your employer chooses to make the project you worked on available to the public in any form. You have the right to be credited in any reasonable way you nominate, identifying in any way you wish. Your employer therefore must have credits somewhere in all publicly available copies of the project and must identify you with a reasonable amount of prominence. The right of attribution is a crucial legal right in maintaining your portfolio of prior work.

**Right Against False Attribution:** (s195AC-195AH Copyright Act 1968) Conversely you have the right to demand your removal from the credits or force a stop to any other representation by any person that implies or states that you worked on something that you did not. This may not seem important, but it applies when a project you worked on has been modded by someone else or if work you have done has since been altered by someone else in any substantial way.

**Right to the Integrity of Authorship:** (s195AI-AL Copyright Act 1968) You have a right for your artistic works not to be subject to

"derogatory treatment", at law this is defined as doing anything to/with the work that would be prejudicial to your honour or reputation. This is to say that while you are alive you have the right not to have your work treated in a way that would have you turning in your grave. This right can be held jointly by all authors of a project. Keep in mind this right only applies in a context where the alteration or whatever has been done to the work would reflect badly on you personally in the eyes of others, it can be understood as a protection against defamation by proxy. This right is rarely invoked.

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