



Stark Copyright Lesson for Software Companies in Recent First Circuit Decision

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Software companies, and companies that develop proprietary software for internal use, should pay attention to the stark and fundamental lessons in the recent First Circuit decision in *Airframe Systems, Inc. v. L-3 Communications Corp.*, No. 10-2001 (1st Cir. September 14, 2011).

The Lessons

Lesson One

Register the copyrights in *both the original* version and *all modified* versions of your software.

Lesson Two

Keep archival copies of *each* version. The plaintiff Airframe did not take these steps, and it lost its copyright infringement case as a result.

The Basic Facts

Airframe registered the original software code, then licensed defendant L-3 to use that code. Over time, as its clients changed or upgraded their computer operating systems, Airframe routinely modified its software to work on these new platforms. But it did not register the code for the modified versions. When L-3 upgraded its computer system, it somehow obtained a newer, non-registered version of the code and used that as the basis to modify its licensed code to be compatible with the new computer system. Airframe found out and sued.

L-3 filed a motion for summary judgment, arguing there was no evidence of infringement. Airframe submitted an affidavit showing how similar L-3's software was with a modified but unregistered version of the copyrighted software. The court did not explain why Airframe failed to compare the infringing code to the original, registered code. Perhaps it did not have a copy; perhaps it neglected the distinction between the original, registered version and the modified, unregistered version. In any event, the trial court thought this was a fatal error. Airframe appealed to the First Circuit Court of Appeals.

First Circuit: Airframe Did Not Prove Copying of the Registered Version

The First Circuit affirmed dismissal of Airframe's suit. It first noted that copyright holders can sue only if they have registered the copyright in the infringed work. It then explained that to prove



infringement, a plaintiff has to prove *both* “factual copying” of the registered work and “substantial similarity.” While Airframe’s sole affidavit noted significant similarities between a later modified, unregistered version of the software and L-3’s software, the First Circuit ruled that Airframe never proved the content of its *registered* software (*i.e.*, the original version), so Airframe could not, as a matter of law, establish “factual copying” of the registered work. It did not matter that L-3’s software was substantially similar to a modified, unregistered version, because that did not prove substantially similarity to, or factual copying of, the original, registered version.

Register and Keep Archival Copies of All Versions of Software Source Code

The lessons here are simple, but they are easy to overlook in the frantic pace of everyday business. It is not enough to register the copyright in original source code for a software product. When it is modified, the modified versions should be registered as well. The Copyright Office’s website contains all the information and forms needed to register software copyrights. [Click here](#) to view information on registering computer programs. [Click here](#) to view the form for registering computer programs. Once registered, software development companies should retain copies of all prior versions in archives for possible use in enforcement proceedings against future infringers.

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