

## Recent First Circuit Decision Provides Important Lessons on Copyright Diligence

Software companies, and those companies that develop proprietary software for their internal use, should carefully note lessons coming out of the recent U.S. Court of Appeals for the First Circuit decision in *Airframe Systems, Inc. v. L-3 Communications Corp.*, No. 10-2001 (1st Cir. September 14, 2011):

### Best Practice Lessons

#### First Lesson

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

#### Second Lesson

Maintain complete copies of each version of software, in both source and object code.

Because the plaintiff, Airframe Systems, failed to take these steps, it lost its copyright infringement case at the district court level and on appeal.

### The Facts

Airframe registered the copyright in its original software code, and then licensed it to defendant L-3 to use. Over the next several years, as customers upgraded their operating systems, Airframe routinely revised its software to work on these new platforms. However, it never registered the copyright to that revised code.

At some point, L-3 upgraded its computer system and somehow obtained a copy of one of the newer (and non-registered) versions of the Airframe code. L-3 then used that newer copy as the basis by which to modify its copy of Airframe's licensed (and registered) code to run on its new computer system. Airframe discovered this activity and sued.

L-3 ultimately filed a motion for summary judgment, arguing there was no evidence of infringement. Airframe responded with an affidavit showing the similarities between L-3's software and a revised, but unregistered, version of its software. The court never explained why Airframe failed to compare the infringing code to the original (registered) code. As a result of this omission, the trial court ruled this to be a fatal error and granted summary judgment in L-3's favor. Airframe then appealed to the First Circuit.

## First Circuit: Airframe Failed To Prove Copying of the Registered Version

In affirming the trial court's decision, the First Circuit held that copyright owners can sue only if they have registered the underlying copyright in the infringed work. The court also held that, to prove infringement, a plaintiff has to establish "factual copying" of the registered work and "substantial similarity." Because Airframe's sole affidavit noted significant similarities between L-3's software and an unregistered version of the Airframe software, the Court held that Airframe never proved the content of its *registered* software, so that Airframe could not, as a matter of law, establish the requisite "factual copying" of the registered work. Thus, any similarities between L-3's software and the unregistered version were immaterial and did not advance Airframe's claim, leaving it open to dismissal.

## 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 context of everyday business activities. First, it is not enough to register the copyright in source code for the original version of a software product. Second, when it is modified, the modified versions should be registered as well — at the time the modifications are finalized.

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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