Lowndes

Should You Register Your Firmware and Software Copyrights?

Article
Lowndes
02.17.2026

Consider a cautionary tale from 2011, as reported by the Department of Justice: a Chinese wind turbine manufacturer, Sinovel, stole proprietary software from AMSC, a U.S. company that had developed technology to regulate the flow of electricity from wind turbines to electrical grids. At the time of the theft, AMSC had a contract to sell over $800 million in related products and services to Sinovel. Instead of following through with the purchase, Sinovel stole the wind turbine technology, causing a loss of nearly 700 AMSC jobs. After an 11-day trial in Madison, Wisconsin, Sinovel was convicted of conspiracy to commit trade secret theft, theft of trade secrets, and wire fraud.

The full case details are available on the Department of Justice website. The case illustrates why protecting software and firmware is critical for any business.

This brings us to a question we frequently hear: *Should we register our copyright in software and firmware with the U.S. Copyright Office?*

In most cases, the answer is yes. Here's why.

I. Copyright Protection Exists Automatically, but Registration Provides Critical Legal Benefits

Under the Copyright Act of 1976, copyright protection attaches automatically to original works of authorship, including computer programs and firmware, at the moment they are fixed in a tangible medium of expression. Your software is protected by copyright as soon as you write and save it. No registration, publication, or other formality is required.

However, automatic copyright protection and *enforceable* copyright protection are two different things. While registration is not required for copyright to exist, it is essential for effective enforcement.

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Registration provides three critical benefits:

- **Registration is a condition precedent to filing suit.** Federal registration is generally a prerequisite to filing a copyright infringement lawsuit in federal court. Without registration, you cannot access the federal courts to enforce your rights.

- **Statutory damages and attorney's fees.** Under 17 U.S.C. § 412, these remedies are available only if the work was registered before the infringement commenced, or within three months after the first publication of the work. This timing requirement is strictly enforced.

  - If registration occurs after infringement has begun (and outside the three-month window), the copyright owner is limited to proving actual damages and the infringer's profits. In software cases, this often requires expensive forensic analysis and expert testimony. By contrast, statutory damages may range from $750 to $30,000 per work infringed, or up to $150,000 per work for willful infringement, providing meaningful deterrence and compensation without the need for proof of actual harm.

- **Evidentiary presumption.** Registration made within five years of first publication constitutes prima facie evidence of the validity of the copyright and of the facts stated in the certificate. This presumption can be valuable in litigation, shifting the burden to the defendant to rebut validity.

II. The Copyright Office Provides Special Deposit Options to Protect Trade Secrets

Many software developers are concerned that registration may expose proprietary code to public disclosure. The Copyright Office has established regulations specifically to address this concern, permitting alternative deposit arrangements for computer programs that contain trade secret material.

The general rule requires deposit of the first and last 25 pages of source code. However, 37 C.F.R. § 202.20(c)(2)(vii) provides several alternative deposit options for programs containing trade secrets:

- **Option 1:** Deposit the first and last 25 pages of source code with portions with trade secret portions redacted. The redacted portions must be proportionately less than the material remaining, and the deposit must contain an appreciable amount of original code.

- **Option 2:** Deposit of the first and last 10 pages of source code with no redactions. This minimizes the amount of code disclosed while still providing sufficient material for the Copyright Office to evaluate the claim.

- **Option 3:** Deposit of the first and last 25 pages of object code together with any 10 or more consecutive pages of source code with no redactions. Object code (the machine-readable compiled version) is not readily human-readable, providing an additional layer of protection.

- **Option 4:** For programs consisting of 50 pages or fewer of source code, deposit the entire source code with trade secret portions redacted.

The Copyright Office does not publish or publicly distribute the deposited code. Deposits may be available for inspection in limited circumstances, such as pursuant to a court order in litigation.

III. Practical Recommendations

Based on our experience working with companies across various industries, we typically recommend the following approach:

- **Register early.** The ideal time to register is within three months of publication or before any anticipated infringement. Given the difficulty of predicting when infringement may occur, early registration is the most prudent course.

- **Select the appropriate deposition option.** For most software, the redacted 25-page option or the limited 10-page option provides an appropriate balance. For particularly sensitive code, the object code plus limited source code option offers additional protection.
- **Include proper copyright notices.** Copyright notices should appear in the source code itself, in any startup or splash screens, and ideally in the runtime interface.
- **Consider trade secret protection holistically.** Copyright registration is one component of intellectual property protection. Trade secrets should be protected through comprehensive measures, including employee agreements, vendor contracts, and security protocols.

Example: The Departing Employee

A common scenario involves an employee who takes proprietary code when leaving the company, either to join a competitor or to start a competing venture. While the employee may be subject to non-compete and non-disclosure obligations, copyright registration can provide significant strategic advantages.

Copyright infringement is often easier to prove than trade secret misappropriation or breach of contract. Rather than demonstrating that the employee breached confidentiality obligations or misappropriated trade secrets, you need only show they copied your registered work. Additionally, if registration was timely, statutory damages and attorney's fees are available. The prospect of these remedies could provide the additional pressure needed to resolve the case quickly.

IV. The Takeaway

The benefits of copyright registration substantially outweigh the risks of limited disclosure. The special deposit procedures are specifically designed to accommodate the legitimate trade secret concerns of software developers, and the Copyright Office has a long history of administering these procedures in a manner that balances public access interests against the protection of confidential information.

The legal benefits of registration—including the ability to sue for infringement, eligibility for statutory damages and attorney's fees, and evidentiary presumptions of validity—provide critical tools for protecting and enforcing intellectual property rights.

That said, every situation is unique. There may be specific circumstances where registration is not advisable, and your overall trade secret protection strategy should be carefully evaluated proceeding. We recommend consulting with qualified IP counsel to determine the best approach for your particular situation.

If you questions about copyright registration for your software or firmware, or if you would like to discuss your intellectual property protection strategy, please contact Stephen Thomas at Stephen.Thomas@lowndes-law.com or Alyson Kendust at Alyson.Kendust@lowndes-law.com.