



Copyright and Software Created by Federal Labs

Michael W. Carroll

American University Washington College of Law

Copyright in Government Works

Quick Overview

17 U.S.C. § 105

- ▷ “Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.”

17 U.S.C. § 101

- ▷ “A ‘work of the United States Government’ is a work prepared by an officer or employee of the United States Government as part of that person’s official duties.”

“Securing” Copyright

- ▷ Copyright law was an opt-in system until March 1, 1989.
- ▷ Works were protected by common law copyright until publication.
- ▷ If a work was published without a copyright notice, the work went into the public domain.
- ▷ To “secure” a federal copyright, the owner had to publish with a copyright notice.

“Securing” Copyright

- ▷ After the United States joined the Berne Convention, Congress fundamentally changed the law.
- ▷ From March 1, 1989 forward, copyright is automatic and subsists in any:
 - Original work of authorship
 - Fixed in a tangible medium of expression.
- ▷ Thus, copyright is “secured” at the time the work is created.

“Securing” Copyright

- ▷ Many provisions related to federally-funded copyrighted works are out of date.
- ▷ Moreover, provisions that treat “securing” copyright as a discretionary decision have become legally incoherent.

15 U.S.C. § 290(e)

- ▷ Still reads:
- ▷ “(a) Notwithstanding the limitations under section 105 of title 17, the Secretary **may secure copyright and renewal thereof** on behalf of the United States as author or proprietor in all or any part of any standard reference data which he prepares or makes available under this chapter, and may authorize the reproduction and publication thereof by others.”
- ▷ This language originated in 1968, when publication with notice and renewal were still in effect.

Copyright registration – 17 U.S.C. § 411

- ▷ Securing copyright is now automatic
- ▷ The right to enforce copyright is not
- ▷ To file a copyright infringement suit, the copyright owner of a U.S. work must first
 - apply to register their claim to copyright and
 - receive a registration or
 - a rejection from the Copyright Office.
 - *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 586 U.S. ____ (2019).

Software from Federal Labs

Quick Overview

Software economics

- ▷ Claims that copyright in software from Federal Labs would close a commercialization gap are economically questionable.
- ▷ The GAO report from 1990 is not a reliable source
 - The markets for software have changed considerably.
 - The report does not account for automatic copyrightability of derivative works made by private sector actors building on software from Federal Labs

Software economics

- ▷ The code produced by U.S. Government employees within this scope of their duties is in the public domain.
- ▷ That code is therefore a public resource.

Software economics

- ▷ If the problem is that employees lack incentives to ready their software for commercialization
 - That should be addressed through incentives tied to the scope of their duties

Software economics

- ▶ Private sector actors will obtain copyright on modifications or additions to the Labs' code.
- ▶ These entities can license these copyrights
 - Proprietary
 - Open source

Software economics

- ▷ If private sector investment in code improvements is necessary for commercialization
- ▷ The ability to engage in proprietary licensing of those improvements should provide sufficient ROI

Software economics

- ▷ If the claim is that competitors can create their own version of these improvements after the value of commercialization has been shown
- ▷ Then, the improvements are likely not that significant, or
- ▷ The first improver would have to squander their market-leading position for this to be true

Software economics

- ▷ Why is not
- ▷ A claim that private investors require transfer of exclusive rights in the federally-created code before they will invest in improving it
- ▷ Just asking for a wealth transfer from public to private hands?
- ▷ The investor apparently does not believe the value of its improvements will create sufficient ROI

Software economics

- ▷ If the claim is that copyright is needed to make federally-created code open source
- ▷ This also is questionable

Software economics

- ▶ Open source licenses
 - Permissive – grant permission to the public
 - Reach-through (copyleft) – require same license on derivative works

Software economics

- ▷ If the Federal Lab were to have copyright and adopt a permissive license
 - Others could use the code and apply different licenses to their derivatives
 - Thus, no guarantee that the improvements are also open source

Software economics

- ▶ If the Federal Lab were to have copyright and adopt a reach-through (copyleft) license
 - That would be one way to ensure that improvements would be under the same license
 - The Lab could also incorporate code that is under a reach-through license into the federal code, thus requiring that improvers comply with the reach-through license

Thank you

- ▶ Thank you to the Committee for the opportunity to participate

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