

How to ensure software is protected

Rights in software can be very valuable, so you need to ensure you protect yours properly. This means making sure you have the right to use, commercialise and take action against anyone who tries to use or copy it without your permission, as well as taking some practical steps to keep it safe.

1. Make sure you own the IP

Who owns the IP rights in software is often a hot topic of negotiation between customers and software developers as this will determine who can use and commercially exploit the software. Key points:

- a number of different IP rights may exist from patents to trade secrets, but the most common and potentially most valuable will usually be copyright;
- IP created by an employee during the course of their employment will automatically belong to the employer, not the employee, but it is still important that your employment contracts are explicit about how and when IP ownership arises;
- the position for consultants is the opposite to that of employees. Unless the contract states otherwise, if the consultant/developer creates the IP, then they will own it. So it is even more critical to ensure the consultancy or software development agreement clearly states that any IP created by the consultant/developer will be automatically assigned (transferred) from the consultant/developer to the client;
- collaborations will need particular consideration as the position on ownership may not be clear;
- using open-source software or other third party software can complicate your ownership rights, so check the terms of any licence for these;
- if you won't automatically own the IP, and can't get an assignment (transfer) of the rights to you, then make sure you have a licence allowing you to use the software in the way that you need to for as long as you need to; and
- a well-drafted development agreement is essential.

2. Use a Confidentiality Agreement

Before you share any information relating to your software, or allow any person access to it (and that includes your employees as well as business partners or potential business partners) make sure they have signed a binding confidentiality agreement (Non-disclosure Agreement/NDA). This should:

- define as clearly but broadly as possible the protected information/materials;
- restrict who can access the information and who they in turn can share it with;
- limit the purposes for which they can use the information; and

- require the recipient to keep the information secure.

3. Register your rights

Some intellectual property rights are automatically protected once they arise (like copyright), other rights like patents and trade marks need to be registered. Consider your software carefully as more than one type of protection may be needed. If you do get your rights registered, make sure you keep these renewed.

4. Licences

If you want to make money from your software you will usually look to licence it to third parties, and receive royalties. Make sure your licences are all up to date, valid and enforceable and contain all the necessary terms to protect your rights.

5. Enforce your rights

- take action to stop anyone infringing your rights as soon as you become aware. This might be as simple as a letter, or require formal legal action, but if you don't act reasonably quickly then this might prejudice your rights to act later. Take legal advice as soon as you have any concerns;
- make sure when you licence your software that you include the right to conduct regular audits of your licensees to ensure they are complying with the licence terms, and that you carry these out;

6. Consider escrow for the source code

As source code is essentially the key to understanding and operating the software, it is important to make sure access to it is restricted. However, customers often require access in order to be able to fix problems and ensure they can continue using the software if the supplier becomes insolvent.

One solution is to place the source code in escrow with a suitable independent third party for safe keeping, with an escrow agreement signed by all parties allowing access only in very specific circumstances.

Need further information?

Read:

- our infographic on [confidentiality agreements](#)
- for more detailed guidance on IP rights:
 - [Copyright](#);
 - [Patents](#);
 - [Design rights](#); and
 - [Trade Marks](#).
- for more on software licences, including for open source software, see [here](#)
- for more information on the [development process see here](#) and on engaging developers see [here](#)
- about escrow [here](#)