

## Can a software license restrict my ability to use software?

by Lawrence Rosen

Most software licenses are based on copyright law. The owner of a copyright in computer software has the exclusive rights to do and to authorize, among other things, the reproduction of the copyrighted work in copies. No third party can make a copy of software without obtaining the permission of the copyright owner.

The word "copy" has a specific definition in the Copyright Act: Copies are "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

That definition creates a unique problem for software. The simple loading of a computer program into memory has been held to involve the creation of a *copy*, one of the exclusive rights of the copyright owner. So the mere act of running a program, and thus making a copy of the software in memory, can only be done with permission – unless we can point to another section of the copyright law that expressly authorizes the making of copies to *use* software.

Congress resolved that problem in the Copyright Act of 1976 to allow software to be *used* when it added, in section 117, a limitation on the exclusive rights of copyright owners. Notwithstanding the other provisions of the law, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy of that program provided that such a new copy "is created as an essential step in the utilization of the computer program or in conjunction with a machine and that it is used in no other manner."

To the extent that software that you license is protected by copyright, section 117 of the Copyright Act provides that you are free to copy the software into memory for execution, and thus to *use* it in the normal fashion for which it is designed.

Be careful though. Proprietary software licenses can contain other restrictions on use. Those restrictions do not stem from the copyright law, but they are imposed in a contract (e.g., the license agreement) between you and the software provider.

Free and open source software licenses do not impose such abhorrent contractual limitations on *use*. When you use software made available under licenses approved by the Free Software Foundation (FSF) or Open Source Initiative (OSI), you can be confident that you can *use* the software freely, just as the Copyright Act provides.

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