

COMPUTER LAW By Al Harrison and Stephen J. Hyland

INTRODUCTION

“Computer law,” while unsurprisingly pertaining to a diversity of matters involving or at least implicating computer technology, frequently compels attorneys to navigate beyond well-defined legal boundaries into what appears to be a chameleon-like landscape. Many recurring scenarios seem to be vanilla applications of established law to computer-related business relationships. For example, computer law may simply involve drafting an employment agreement for a computer programmer or drafting a confidentiality agreement for a software development project between potential joint adventurers. As another perhaps obvious example, computer law may involve preparing a “shrink-wrap” license¹ for use of commercial software. Similarly, computer law may simply involve securing state or federal registration for a trademark applicable to hardware or software products or may also involve prosecuting a lawsuit which raises allegations, inter alia, of copyright infringement of a suite of computer programs.

On the other hand, computer law may involve preparing a joint development agreement for custom software or a marketing and distribution agreement for shrink-wrapped software, in which use of proper terminology is important to define correctly the parties’ allocation of ownership rights, responsibilities, and liabilities. A common focus is securing registration for a copyright applicable to software or obtaining the Patent Grant from the United States Patent and Trademark Office or perhaps foreign governments, for hardware or software products. In addition, computer law frequently demands examining the scope of licensed use of software and concomitant copyright infringement and software piracy issues.

Computer law also pertains to the diverse and pervasive activities conducted electronically, including, of course, the Internet. Conducting business in Cyberspace, i.e., conducting business electronically on-line, independently of geographical boundaries and time zones, introduces a plethora of new legal considerations that necessitate an attorney having at least an awareness of fundamental computer law issues.

This article will review representative issues and developing law that populate the current computer law landscape. The goal is to provide the legal professional with an overview of computer law practice and with a general awareness and comprehension of the issues that must be analyzed prior to appropriate legal services being rendered.

PIERCING THE COMPUTER TECHNOLOGY VEIL

Computer technology is based upon the cooperation between hardware — an ensemble of machine components and peripheral devices — and software — computer programs that are written specifically to execute a panoply of business, personal, or recreational functions on computers — generally with minimal human intervention. A conventional desktop or portable computer comprises hardware components and peripherals such as: a hollow case, system (“mother”) circuit board, video circuit board and associated video display screen, hard-disk drive, diskette drives, CD-ROM drive and concomitant controllers, keyboard, pointing device or “mouse,” modem, and printer. When these various components and peripherals are integrated into a compatible and synergistic system contained within its case, and coordinated with the expectations and control of an operating system, a typical “personal computer” is produced. Before such a computer may be operated by a user, however, suitable instructions must be loaded into its memory and duly inform the computer’s brain how to use apply these instructions to the

ensemble of components and devices to produce the result expected by the user. Software comprises computer programs that provide prerequisite instructions that are loaded into a computer's memory and are executed when requested by a user. Software also includes help-screens, tutorials, and documentation manuals that enable users to understand the built-in functions and features of the underlying computer program and then to exploit them via the interface provided.

PROTECTING COMPUTER HARDWARE AND SOFTWARE

Similar to most property, computer hardware and software may be protected in several different ways. As a combination of machinery and electronic devices, the available protections for computer hardware are predictably patents and trade secrets. Software, on the other hand, may be protected not only by patents and trade secrets, but also may be protected by copyright. Furthermore, most software is used subject to a license agreement that limits users' rights, including prohibition of reverse-engineering of the underlying computer program.

PATENT PROTECTION

Patent protection originates with the U.S. Constitution, wherein Congress was authorized to grant an inventor exclusive rights to enjoy benefits of discoveries for limited times "to promote the progress of science and useful arts."² Congress enacted patent statutes under Title 35 to grant patent rights to inventors and established the Patent And Trademark Office as the federal agency to prosecute patent applications.³ The Patent And Trademark Office, in turn, has established rules and regulations for filing and prosecuting patent applications.⁴

To be patentable an invention must constitute "a new and useful process, machine, manufacture, or composition of matter."⁵ In addition, to be patentable, an invention must be sufficiently innovative to satisfy standards of novelty⁶ and "nonobviousness."⁷ Subject matter such as laws of nature, mental processes, and mathematical formulas or algorithms are excluded from patent protection.⁸ The Supreme Court has articulated that otherwise statutory subject matter, e.g., a process for molding synthetic rubber, does not magically become metamorphosed into non-statutory subject matter just because a computer or software is used.⁹ Accordingly, an apparatus or methodology that includes computerizing a mathematical algorithm and the like may be patentable subject matter provided that some kind of physical phenomenon or transformation occurs.

PATENTING COMPUTER HARDWARE

Akin to any machine or article of manufacture, if a new design for a hardware component or peripheral such as a hard disk drive controller were sufficiently innovative to satisfy the statutory requirements of novelty, utility, and nonobviousness, as determined by an examiner in the U.S. Patent and Trademark Office, then a patent is issued that grants the inventor or assignee the exclusive right to make, use, or sell the claimed invention for 20 years from the filing date of the patent application.¹⁰ A patent application initiates the patent procurement process in which rigorous examination is performed by a patent examiner who is assigned to prosecute the application based upon the subject matter of the invention. The patentability prospects and interrelated prosecution of an application are more complicated for software patent applications.

SOFTWARE PATENTS

Patent protection for software is typically sought as either a utility patent for a useful process, a machine or apparatus, or an article of manufacture or as a design patent for an ornamental design. Unlike

a utility patent for processes or systems or devices such as disk drives and read-only memory (ROM), a design patent for an article of manufacture is sought not for its utility, but for its ornamental or aesthetic appeal.¹¹ An example of an ornamental design might be novel arrangement of graphical elements intended for a series of screen displays or perhaps for a recurring set of icons. Any patent that is granted, however, must satisfy the requirement of originality: patent rights are granted only to the original inventor.

Software patent applications may be couched as an apparatus having a structure functioning on a computer platform or as a method for implementing processes or algorithms using a computer as a platform. In either approach, the software invention is disclosed as a system of components having an interrelated structure and function which accomplish synergistic results. But to obtain a grant of patent rights from the Patent and Trademark Office, the downstream practical aspects and impact of the software must be fully disclosed¹², otherwise the application will be rejected on the basis of being unpatentable subject matter. Vendors throughout the computer industry are now actively seeking comprehensive portfolios of patents to protect their proprietary interests and to afford cross-licensing opportunities.

COPYRIGHT PROTECTION

Copyright protection, similar to patent protection, derives its origin from the Constitution, wherein authors are entitled to exclusive rights to enjoy the benefits of their writings for limited times.¹³ But that is where the nexus ends: the scope of copyright protection is limited by statute, precluding protection from being extended to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."¹⁴ Thus, copyright protection is not as broad as patent protection. This narrower copyright protection for an author lasts for the author's life plus 50 years or, for anonymous or pseudonymous works or works made for hire, it lasts for 75 years from the year of first publication or 100 years from the year of creation, whichever expires first.¹⁵ Another difference between securing patent protection and securing copyright protection is that the scope of a copyrighted work of software authorship is not ascertained by the U.S. Copyright Office, the federal agency responsible for issuing copyright registrations. Generally, a copyright examiner assigned to review a pending application simply checks to assure that certain formalities have been satisfied and that the submitted work as a whole appears to be registrable.¹⁶ Instead, such scope issues are ascertained on an ad hoc basis by a judge sitting in federal court for copyright-related matters in controversy. Nevertheless, the scope of protection to be accorded copyrighted software should be dictated by the extent of the originality and creativity manifest in elements of the work as a whole, as actually registered.¹⁷ Such protection vests at the moment a creative work is created; before an infringement suit may be filed, however, registration must be sought.¹⁸

In spite of primarily performing useful functions depending from systems and methods that have heretofore been the exclusive domain of patents, it is well settled that software may receive copyright protection.¹⁹ This protection has been accorded not only to software literal elements manifest in its underlying computer program code²⁰, but also to its non-literal elements manifest in its user interface and screen layout, and associated structure, sequence, and organization.²¹ Hence, copyright has been the most widely used and effective protection for software. A suitable test, referred to as the Abstractions-Filtration-Comparison Test,²² for assessing the scope of copyright protection has been embraced throughout the federal courts of appeals.²³ This three-prong test guides a court to analyze which elements of a copyrighted work are original and manifest creative expression and, therefore, merit copyright protection.

The “abstractions” prong of the test focus on the several ideas and implementation of those ideas that characterize a typical sophisticated computer program. Each such idea that populates a level of abstraction is identified and then sent through a copyrightability filter in the next prong. This “filtration” stage determines if similarities between an accused infringing work and the copyrighted work are attributable to non-creative expression, i.e., attributable to necessary elements driven by such factors as functionality, compatibility, efficiency, routine programming practices, industry standards, or market forces; protectable elements pass through the copyrightability filter and are eligible for protection. Then, the court is directed to compare the copied and protectable elements with the copyrighted software as a whole to determine whether the two works are substantially similar. If substantial similarity is found, then copyright infringement liability attaches. If similarities arise not because of creative expression, but because of necessary elements, then these elements fail to pass through the copyrightability filter (the second prong of the 3-prong test), and copyright infringement liability should not attach.

Some courts have recently deviated from the initial rigorous abstractions stage of the three-prong test, simply using it as a guide for analyzing the merits of a particular copyright infringement claim. For example, in a lawsuit between Apple Computer and Microsoft, the Court of Appeals for the Ninth Circuit articulated that the graphical user interface in dispute incorporated several concepts, but declined to take the pains to visualize these concepts into an abstractions hierarchy as suggested by the court in the case of *Computer Associates, Inc. v. Altai Court*.²⁴ The Court of Appeals for the Fifth Circuit, in a case involving literal infringement of definitions and processes constituting a theory of leadership management, articulated that the trial court’s observation that critical core language was literally copied was sufficient to support a finding of infringement, even though a rigorous abstractions-filtration-comparison test was not conducted.²⁵

Similarly, in the *Lotus v. Borland* case, the Court of Appeals for the First Circuit declined to embrace the three-prong test, observing that it tends to obscure the issue of whether particular elements can be copyrighted at all. In particular, the First Circuit held that the command hierarchy of Lotus’ spreadsheet was not protectable by copyrightable because it was essential to the method of operation (being akin to the button-controls on a conventional VCR).²⁶ Recently the Court of Appeals for the Eleventh Circuit held that this rigorous test is applicable to a case in which literal infringement is alleged, recognizing that even for a claim of literal infringement, protectable elements must be separated from unprotectable elements, and a jury must be instructed about the implications of finding that elements were literally copied because of interoperability or compatibility requirements.²⁷

TRADE SECRET PROTECTION

Although substantial protection is available for hardware through the patent statutes and is available for software through the patent and copyright statutes, trade secret protection is another option for securing proprietary rights. Trade secret protection is immediately available and is not premised upon securing a patent grant or copyright registration from a federal government agency. “A trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [the business] an opportunity to obtain an advantage over competitors who do not know or use it.”²⁸ Misappropriation of a trade secret occurs when a trade secret is revealed by someone other than the owner through breach of confidence or contract, or other improper means.²⁹ A cause of action accrues when the trade secret is used.³⁰

Modern computer programs are commonly created by programmers writing source code in a

human-readable programming language from design specifications, then compiling the source code into object (binary) code with a special program called a compiler, and then linking related object code to create an executable computer program. The ideas that are fixed in the source code are typically based upon business and technical acumen and frequently incorporate mathematical modeling techniques including algorithms. Because source code may be copyrighted or patented, government disclosure requirements may make source code ultimately available to the public³¹. Therefore, if disclosure is to be avoided, trade secret becomes a critical means of protecting software (and perhaps hardware components). Such public disclosure of a trade secret and the ensuing loss of such proprietary rights in the trade secret obviously constitutes misappropriation and, indeed, destruction thereof³²

A prerequisite to establishing trade secret rights is that all parties must have a meeting of the minds that a confidential relationship has been established. For example, in a case in which the party claiming a trade secret, the misappropriation theory was rejected because there was no evidence that confidentiality was demanded.³³ While courts occasionally exercise visceral jurisprudence and infer a confidentiality agreement based upon the totality of circumstances and the like, an express agreement is preferable and, of course, more predictable.³⁴

Texas also provides criminal provisions for theft of trade secrets.³⁵ The “theft of trade secrets” offense, a third degree felony, is committed whenever an actor “without the owner’s effective consent, ... knowingly” steals, copies, communicates, or transmits a trade secret.³⁶ In one case involving Texas Instruments Co., Inc., a defendant was convicted for “knowingly making a copy of five separately identified computer programs that were the trade secrets of his employer.” On appeal, the Texas Court of Criminal Appeals held the computer programs were trade secrets³⁷ and that the defendant had knowingly taken them.³⁸

LICENSED USE OF SOFTWARE

Software is routinely but licensed — not sold — to users in order to avoid the “first sale doctrine,” wherein the exclusive right to distribute the software is lost upon sale of the physical media on which the software is delivered to users, i.e., diskettes, CD-ROM, and manuals.³⁹ It should be kept in mind, however that the first sale doctrine relates only to the exclusive distribution right, not to the copyright interest per se. In one of Microsoft’s myriad lawsuits against unauthorized distributors of counterfeit MS-DOS and Windows, a court held that the Section 109 (a) exception to Microsoft’s exclusive distribution right did not apply because Microsoft licenses did not sell but merely licensed tangible media along with the software contained thereon.⁴⁰

These licenses are usually are contained inside the shrink-wrapping in which the software is packaged. While hardly ever having the opportunity to negotiate the terms of these licenses, users are frequently presented with the option to return the software for a refund if the terms are unacceptable. Since users do not have the benefit of arms-length bargaining with software vendors, such shrink-wrap have been generally considered to be adhesion contracts. It appears to be common among users, while generally being cognizant of not violating software copyright, that the terms of shrink-wrap licenses are not taken seriously. The Ninth Circuit, however, routinely upholds the validity of such licenses,⁴¹ and the Seventh Circuit has recently held that such licenses are enforceable, unless the terms are objectionable under conventional contract theory.⁴²

THE INTERNET AND THE EVOLUTION OF CYBERLAW

As the Internet was evolving as an inexpensive and virtually unlimited vehicle of communication, multimedia works had already become readily available, primarily on CD-ROMs. Provided that a user had a computer with a CD-ROM drive and a sound card, the coordination of a diversity of text, sounds, video, animation, and images could be conveniently enjoyed. With the exponential explosion of users who regularly “surf” the Net and the myriad of such multi-faceted information being downloadable from the Internet, ownership issues became relevant not only to software developers and to electronic distributors, but also to the various creators of the multimedia works including artists, animators, film producers, script and song writers, musicians, performers, and even choreographers.

With such a prevalent capability to enjoy the seemingly free fruits of the Internet and perhaps similar (albeit limited) merriment from popular local electronic bulletin board systems (BBS)⁴³, the issue arises about who owns the rights to these multimedia works. While many of the creative components are in the public domain, undoubtedly some of the components are not. Accordingly, it is becoming incumbent upon multimedia software developers to inquire into ownership of audiovisual elements, sound-effects, digitized photographs, etc., to avoid infringing upon another’s rights. But how does such a software developer ascertain whether particular creative or artistic components are proprietary — requiring a license for use — or whether the components are freely available in the public domain, etc.?

Some of the implicated industries have established performing rights organizations which function as licensing agencies. The American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) agencies are well known for licensing songs and music. Such Internet projects as “Project Gutenberg” and the Online Book Initiative strive to sort out the multimedia licensing morass. The Online Book Initiative⁴⁴ provides a plethora of text and illustrations, passing royalties through to authors or corresponding to holders of electronic rights. There is still much work to be done to enable software developers and the like to expeditiously ascertain ownership and licensing issues, and, indeed, to establish whether licensing obligations will be feasible.

Another consideration is whether “fair use,” as contemplated by the copyright statutes, carves out infringement exceptions on the Internet.⁴⁵ A fair use analysis weighs the purpose and character of the use, nature of the work, amount and substantiality of the elements used, and the impact of the use upon the marketplace. Generally, commercial use forecloses a fair use defense.⁴⁶ Recent developments in the law suggest that a “copyright misuse” defense may be generally more successful than a fair use defense relevant to multimedia works.⁴⁷ By asserting a misuse affirmative defense, an accused copyright infringer alleges that a copyright owner is exceeding the scope of copyright manifest in a work of authorship.⁴⁸

The Internet has also introduced serious concerns pertaining to freedom of speech, libel, and defamation, pornography, privacy, and destruction or corruption of corporate data. Databases are being transplanted to FTP servers accessible on the Net; some of these databases are being “borrowed” from vendors claiming proprietary rights therein. As an attempt to fight back against this alleged electronic pollution, Congress passed the Communications Decency Act of 1996. This Act has now been found to be unconstitutional on First Amendment grounds in the case of *ACLU v. Attorney General Reno and the United States Department of Justice*⁴⁹ and is enjoined from being enforced.

The prevalence and utility of the commercial use of Internet domain names has delivered confusion to the Internet Network Information Center (“InterNIC”), the registrar of domain names. Formerly, domain names were assigned on a first come, first served basis; because of the spate of trademark infringement and

dilution controversies that have arisen, InterNIC has changed registration procedures. In view of the likelihood that a domain name will serve a trademark function, obtaining federal trademark registration is crucial.

SOFTWARE “TIME BOMBS” AND “DROP-DEAD” DEVICES

Software vendors occasionally program into their software a “time bomb” or “drop-dead” device that assures that a potential customer will pay prerequisite license fees before use of the software is legitimately commenced or continued. If such fees are timely paid, then these seemingly nefarious devices are not activated or are deactivated. Otherwise, the computer programs self-destruct or perhaps databases decompose. Accordingly, these disabling devices function as a “virtual repossession” of their software.

There are several ways in which software may be disabled. “Time bombs” are instructions incorporated into the computer software that either prevent the software from being executed after a specific date or which cause the software to terminate on that date. Generally, time bombs do not erase software from a hard disk, but render it unusable. These devices are activated during software installation, usually and preferably with users’ permission. Unlike time bombs, “drop dead” devices are activated when the vendor accesses the computer program in some way, for example by dialing up the system with a modem or by sending an unidentified person to a site. Since activation of a drop- dead device will most likely occur when license fees are not paid, system access is frequently without a user’s express permission, and may be performed under the guise of a system update or service call.

Predictably, these novel devices have caused damage to corporate data or have restricted access to a business’ own data. In one case, the purchaser of a computer system filed an action against the seller for breach of warranty and conversion after the seller disabled the software with a time bomb.⁵⁰ The court held that there was sufficient evidence to support a jury award of punitive damages, noting that the seller had no colorable right to lock up the computer system.”⁵¹ In another case, a federal court upheld the right of a vendor to deactivate two software installations on the basis of nonpayment; each user was warned that this abnormal termination would occur.⁵² Adequate notice is clearly a vital factor in a court determining whether use of an abnormal termination device to a party’s detriment is reasonable.

CONCLUSION

As computers continue to permeate every fabric of our society, and technology continues to develop apace, the contours of the computer law landscape will become more difficult to navigate particularly throughout Cyberspace. While false-starts, detours and reversals are predictable, it will be exciting to contribute to the discovery of the Rosetta Stone that will assist attorneys and judges properly compile a plurality of anomalously-shaped pieces that will fit the same puzzle. Making progress is usually not easy. Demonstrating that progress has been made is even more elusive. By comprehending both the problems solved and the problems created by computers and other peculiar technical tools, we can venture forth armed with computers having keyboard and mouse appendages, and, of course, with legal skill, to engage and traverse the craters and asperities of this rapidly changing landscape.

End Notes

1. Software, generally consisting of diskettes or a CD-ROM, user manual, installation guide, and related promotional materials, is generally packaged within an attractive box sealed with transparent wrap. The process by which transparent wrap is snugly affixed to this packaging is called “shrink-wrapping.” A software license is either imprinted upon an envelope containing the diskettes or CD-ROM, inserted inside the user manual, or included with the promotional materials. Since the license describing the scope and terms for authorized use of the software is contained inside the packaging, it is called a shrink-wrap license.
2. Const., Art. I, § 8, cl. 8.
3. 35 U.S.C. §§ 1-375.
4. 37 C.F.R. Part I, Rules of Practice in Patent Cases.
5. 35 U.S.C. § 101.
6. 35 U.S.C. § 102. Under § 102(a), patent protection is precluded if “the invention was known or used by others in this country, or patented or described in a printed publication in this country or a foreign country, before the invention thereof by the applicant for patent; under § 102(b), patent protection is precluded if “the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent.”
7. 35 U.S.C. § 103 (“a patent may not be obtained ... if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains”)
8. See, e.g., *In re Warmerdam*, 31 U.S.P.Q.2d 1754 (Fed. Cir. 1994)(a process that simply manipulates abstract ideas or natural phenomena is not patentable under 35 U.S.C. § 101).
9. *Diamond v. Diehr*, 450 U.S. 175, 184-185 (1981).
10. 35 U.S.C. § 154(a), implementing the General Agreement on Tariffs and Trade (GATT)/World Trade Organization treaty, i.e., the Uruguay Round Agreements Act. Prior to June 8, 1995, the term of a U.S. patent was 17 years from the issue date. Patents in force as of June 8, 1995, may have additional life, depending upon the date that underlying applications were filed.
11. 35 U.S.C. § 171.
12. See, e.g., *In re Lowry*, 32 F.3d 1579 (Fed. Cir. 1994).

13. See supra note 1.
14. 17 U.S.C. § 102(b). This section was added by amendment to incorporate well-settled law, articulated by the Supreme Court in *Baker v. Selden*, 101 U.S. 99 (1880).
15. 17 U.S.C. § 302.
16. This cursory examination focuses upon whether the boxes on the application have been properly filled, whether the appropriate fees have been paid, whether the materials deposited along with the application meet the regulations and whether such deposited materials contain proper copyright notices.
17. *Cable News Network, Inc. v. Video Monitoring Serv. of America, Inc.*, 940 F.2d 1471, 1479 (11th Cir. 1991); *Feist Publs. v. Rural Tel.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 1296; *Donald v. Zach Meyer's TV Sales & Service*, 426 F.2d 1027 (5th Cir. 1970), cert. denied, 91 S.Ct. 459 (1971).
18. 17 U.S.C. § 411.
19. 17 U.S.C. § 101 (1992) defines a computer program as a "set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result" and 17 U.S.C. § 102(a) states that "[c]opyright protection subsists ... in original works of authorship fixed in any tangible medium of expression ... from which they can be perceived, reproduced, or otherwise communicated, either directly or with aid of a machine or device." See also *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 259-260 (5th Cir. 1988). For copyright registration purposes, computer programs are considered to be nondramatic literary works. See, *The Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.3d 823, 839 (10th Cir. 1993); *Computer Assoc., Inc. v. Altai, Inc.*, 982 F.2d 693, 1249-1250 (2d Cir. 1992).
20. *CMS Software Design Sys., Inc. v. Info Designs, Inc.*, 785 F.2d 1246, 1249 (5th Cir. 1986); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983), cert. dismissed, 464 U.S. 1033 (1984).
21. Generally, R.T. Nimmer, *The Law Of Computer Technology* ¶ 1.07 (Cum. Supp. No. 1 1996).
22. See, e.g., *The Gates Rubber Co.*, 9 F.3d at 838; *Computer Assoc, Inc.* at 702-703.
23. See, e.g., *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1343-1348 (1994), opinion supplemented on denial of reh'g en banc, 46 F.3d 408 (5th Cir. 1995) (appeal prosecuted by Mr. Harrison).

24. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995).
25. *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 534 (5th Cir.), cert. denied, 115 S. Ct. 82 (1994) (appeal prosecuted by Mr. Harrison).
26. *Lotus Development Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir. 1995), aff'd without opinion, 116 S. Ct. 804 (1996).
27. *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996).
28. RESTATEMENT OF TORTS § 757 cmt. b. State courts throughout the United States, including Texas courts, have adopted this definition; see, e.g., *Luccous v. J.C. Kinley Co.*, 376 S.W.2d 336, 338 (Tex. 1964).
29. RESTATEMENT OF TORTS § 757 cmt. b.
30. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 769 (1958), cert. denied, 358 U.S. 898, 79 S. Ct. 223, 3 L.Ed.2d 148 (1958).
31. The Copyright Office requires the deposit of identifying portions of preferably source code when software registration is sought. Such deposit may be reviewed at the Library of Congress, but not photocopied by the public. The Patent and Trademark Office keeps patent applications in secret during the pendency of a patent application. Once issued, a patent is published and the public may readily obtain copies thereof.
32. See, e.g., *Precision Plating & Metal Finishing, Inc. v. Martin-Marietta Corp.*, 435 F.2d 1262, 1263 (5th Cir. 1970), cert. denied, 404 U.S. 1002 (1971).
33. See, e.g., *Smith v. Snap-On Tools Corp.*, 833 F.2d 578, 580-581 (5th Cir. 1987).
34. *Hyde Corp.*, 314 S.W.2d at 777; *Salsbury Lab., Inc. v. Merieux Lab., Inc.*, 908 F.2d 706, 710 (11th Cir. 1990).
35. Tex. Penal Code Ann. § 31.05.
36. Tex. Penal Code Ann. § 31.05(b) and (c).
37. *Leonard v. State*, 767 S.W.2d 171 (Ct.App.—Dallas 1988), aff'd, 823 S.W.2d 633 (Tex.Crim.App. 1991). Leonard's co-worker, Thomas Schalk, was also convicted in a companion trial. His conviction was upheld. *Schalk v. State*, 767 S.W.2d 441 (Ct.App.—Dallas 1988), aff'd, 823 S.W.2d 633 (Tex.Crim.App. 1991).
38. *Leonard*, 767 S.W.2d at 172.

39. 17 U.S.C §§ 106(3) (exclusive distribution right), 109(a) (first sale exception to § 106(3) right).
40. *Microsoft Corp. v. Harmony Computers & Elecs., Inc.*, 846 F. Supp. 208 (E.D.N.Y. 1994).
41. See, e.g., *Triad Systems Corp. v. Southeastern Exp. Co.*, 64 F.3d 1330 (9th Cir. 1995).
42. *ProCD v. Zeidenberg*, 908 Fed. Supp 640 (W.D. Wis. 1996) (reversing the trial court and holding that software shrink-wrap transaction is similar to a consumer obtaining a warranty card or purchasing a concert ticket).
43. An excellent local BBS exclusive to members of the legal profession is “Ye Ole Bailey” which may be reached at 713-520-9566; sysop Reginald Hirsch is family law specialist in Houston. Another superb BBS is available through the Houston League of PC Users, Inc. (“HAL-PC”), a local computer user group, which is available to members but may be browsed by the public at 713-963-4100.
44. The Online Book Initiative (“OBI”) is a cooperative effort to accumulate a myriad of materials which are arranged alphabetically by author’s name and by topic. A detailed description of this online book repository service may be obtained in the read-me located at <http://ftp.std.com/obi/readme.html>.
45. 17 U.S.C. § 107.
46. See, Campbell v Acuff Rose Music, Inc., 114 S. Ct. 1164, 1169 (1994); see also, Playboy Enterp., Inc. v. Frena, 839 F. Supp 1552 (M.D. Fla. 1993) (fair use defense rejected).
47. *DSC Communications v. DGI Technologies*, 81 F.3d 597, 601 (5th Cir. 1996) (copyright claim must not exceed the scope granted by the United States Copyright Office and must not inhibit competition), citing, Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 977 (4th Cir. 1990).
48. *DSC Communications*, 81 F.3d at 601, citing, Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 865 n. 27 (5th Cir. 1979), cert. denied, 445 U.S. 917, 100 S. Ct. 1277 (1980) (recognizing the misuse defense).
49. No. 96-1458, (4th Cir. decided July 29, 1996) (“The Internet may be fairly regarded as a never-ending world-wide conversation” Judge Stewart Dalzell).
50. *Clayton X-Ray Co. v. Prof. Sys. Corp.*, 812 S.W.2d 565 (Mo. Ct. App. 1991).
51. *Id. at 567.*
52. *American Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473 (D.C. Minn. 1991), aff’d, 967 F.2d 1208 (8th.Cir. 1992) (observing that the vendor had a legal right to deactivate the computer system for nonpayment).

