THE CHANGING ENVIRONMENT OF SOFTWARE COPYRIGHT: THE CASE OF APPLE COMPUTER V. MICROSOFT CORP.

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This article addresses the current status of intellectual property protection for computer software, which consists of legislation and court decisions in the arenas of copyright, patent, and trade secret. The court decisions that set the precedent for the existing legal environment are surveyed and the pending case of Apple Computer v. Microsoft and Hewlett-Packard is discussed in detail. What will emerge from this case is a new definition of what constitutes copyright infringement of computer software. The potential effect of this new definition upon software developers and vendors will be explored.

"Apple wins first round in software-copyright case" was the highlight of the Law Section of The Wall Street Journal on March 20, 1989 (Schmitt, 1989). Richard Sherlund, vice president of investment research at Goldman Sachs & Co. stated, “I think the whole industry is stunned by this announcement.” In Big Board trading, Hewlett-Packard slipped $2, Apple fell slightly, and Microsoft fell $4.75.

What was the nature of Judge William Schwarzer’s decision and why was it so unexpected that it upset an entire industry? How did the legal and social environment that fostered the decision develop? What is the long-term impact of this decision on corporations, software developers, and consumers? These are the questions we can hope to answer by analyzing the history and progression of software copyright decisions, and the latest chapter in this saga, the case of Apple v. Microsoft.

Introduction
How does the law provide for the protection of intellectual property, such as software, and why are computer programs often copyrightable but not patentable? There are three principal categories of intellectual property protection: patent, copyright, and trade secret (Lieberman &
A patent provides a 17-year monopoly over the use of a work; an invention is the property of its owner and cannot be produced and sold by anyone else. To qualify, an invention must be novel, nonobvious, and useful. Patentable items include processes, manufactures, machines, and improvements. Unpatentable items, which are specifically excluded, encompass printed matter other than designs, naturally occurring substances, methods of doing business, ideas, scientific principles, and mental processes. The social consequences of patenting these sorts of items, thus preventing their free and widespread use, would certainly be negative. Even when a patent is granted and use of an invention restrained, the patent-holder is required to fully disclose the particularities of his invention in the interests of the long-term benefit to society.

Copyright offers a more limited protection for a period equal to the author’s life plus 50 years, or in the case of work done for hire, for 75 years. Copyright, unlike patent, does not protect an idea, merely an expression of an idea. This allows two items of software to have a far greater similarity than, say, two patentable devices. The software items could be used in nearly an identical fashion to accomplish the very same purpose. The attempt to discriminate idea from expression, and thus the copyrightable from the uncopyrightable, has been the basis for much legal hairsplitting and will be discussed in greater detail with regard to specific cases. For a work to be copyrightable, it must be original and tangible. Copyright grants the owner the exclusive right to reproduce and distribute the work, and to prepare derivative forms of the work, rather than a right to exclusive use ("Copyright," 1983, p. 1733).

The third form of intellectual property protection, trade secret, has less applicability to the software arena. A trade secret is “information, including a formula, pattern, compilation, program, device, method, technique, or process that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy” (Current, 1988, p. 91). So by definition, a trade secret is only valuable as long as it is kept secret, and it is virtually impossible to keep software “secret” (Lieberman & Seidel, 1988, p. 719).

**Early Computer Litigation**

The roots of copyright dispute and the struggle to determine what is copyrightable date back to 1907 and the case of White-Smith Music Publishing Co. v. Apollo Co. The issue in this case was whether copyright protection extended to a player piano roll. In this instance, the Supreme Court held that a piano roll was not a copy of a musical composition because it was in a form that could not readily be perceived (Lieberman & Seidel, 1988, p. 728). Since that time, copyright protectability has been extended and expanded to include works in any tangible forms of expression from which they can be communicated either directly or with the aid of a machine. The Copyright Act of 1976 specified that the following types of works were eligible for copyright protection: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion picture and other audiovisual works; and sound recordings ("Current," 1988, p. 23). Computer programs belong in the category of literary works (Clapes, Lynch, & Steinberg, 1987, p. 1524). In 1980, Congress defined 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 result” ("Copyright", 1983, p. 1726). It has been argued that a computer program, because of its abstract nature, can be categorized as an idea and is not patentable.

During the 1970s, the Patent Office did not grant software patents. Software was considered equivalent to mathematical equations,