International Program Protection

Copyright protection appears available in many countries; country-by-country survey results are reported

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Copyright protection is preferably combined with trade secret protection for international license agreements. In countries where the issue has been litigated, copyright protection appears to be available for computer programs in most of the major industrial countries of the world. In this regard, we corresponded with knowledgeable patent attorneys or LES members in all of the countries where there are LES chapters, and negative responses were only received from Spain and Italy and in an initial response from Australia. This initial negative response from Australis was reversed when an intermediate Australian Court of Appeals reversed the lower court decision.

However, despite the virtual unanimity in according copyright protection to computer programs, where the issue has been litigated, rapid increase in the use of computers and computer programs has generated much ferment and study throughout the world. New laws have been proposed in many countries. Practices for handling copyrights on computer programs have been and are being modified. Now that the basic issue of the copyrightability of computer programs is established in many countries, courts will have to examine the breadth of coverage that will be given, presumably adapting existing principles of copyright law to the computer program area.

The situation will now be examined based on the work of various groups active in the field and on a country-by-country basis.

WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

WIPO has been very active in this field and has been very cooperative in supplying background information on its work. It has published its "Model Provisions on the Protection of Computer Software," Geneva 1978. These model provisions call for a duration of protection for 20 years from first commercial use, but not more than 25 years from creation. The Model Law does not call for the deposit of copies of the program, and it would not preempt other forms of protection.

It is interesting to note that most proposals for new statutes call for shorter periods of protection than the very long-term protection afforded by current copyright laws. Accordingly, to the extent that the present copyright laws are providing adequate protection, it might be expected that proposed statutes would not be supported by the computer industry.

WIPO was also very helpful in providing background articles and materials on the protection of computer programs in various countries. These materials include "Legal Protection of Computer Programs in the Federal Republic of Germany," by J. Betten, Industrial Property, November 1983, page 310; "The Legal Protection of Computer Programs in Australia," by A. Liberman, Industrial Property, November 1983, page 320; and a report on the WIPO meeting of a Committee of Experts on the Legal Protection of Computer Software, Geneva, June 13 to 17, 1983.

Consideration will now be given to the situation in individual countries.

The United States

Unlike many other countries, the United States Copyright Law, in accordance with 17 USC 117, which was enacted in December 1980, includes language which specifically includes computer programs. The U.S.A. also differs from most other countries in the requirement for a deposit of the copyright program in order to obtain a copyright registration, which is necessary in order to obtain damages for copyright infringment, to bring suit, and other benefits under the U.S. copyright laws.

The U.S. Copyright Office prefers that deposits be in the form of source code instead of the object code (normally in computer language). Object code will, however, be registered, but under the U.S. Copyright Office "Rule of Doubt," based "Solely on the (Copyright) Office's inability to properly examine the work," in accordance with informational material promulgated by the U.S. Copyright Office. In the event the copyright registrant supplies the first and last 25 pages of object code print-out, and any 10 consecutive pages of source code, registration is not considered "doubtful."

The U.S. Copyright Office also permits registration with selected Trade Secret or Confidential information blocked out of the deposited program. The first and last 25 pages are normally requested. Special relief relative to deposits may be requested "in special cases and to avoid unnecessary hardship."

Background information and citations on U.S. Law are included in an earlier *Les Nouvelles* article, "Protecting Computer Programs," by Alan C. Rose, Vol. XVI, No. 4, Dec. 1981, pp 309-314.

Other interesting recent U.S. developments include the following:

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1. Decisions of the Third and the Ninth U.S. Circuit Courts of Appeals holding that operating systems programs (which primarily manage the computer system) are copyrightable, as well as application programs which interact with the user; see *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 219 USPQ 113; and *Apple Computer, Inc. v. Formula International, Inc.*, 221 USPQ 762.

Tying Violation

2. It was held to be an antitrust tying violation to refuse to license a copyrighted computer program to persons who do not also purchase a CPU, *Digidyne Corp. v. Data General Corp.*, June 7, 1984, CA-9, 28 PTC J292.

3. Inputting mileage data from copyrighted published distance guides into a computer data base constitutes copyright infringement, *Rand McNally & Co. v. Fleet Management Systems, Inc.*, District Court for No. Dist. Ill., July 25, 1984, 28 PTCJ 524.

4. In several related proceedings Apple Computer, Inc. was finally able to stop the importation of ROM-less computers, with the key copyrighted Read Only Memory (ROM) program chip omitted from the counterfeit Apples. Customs initially held that they could not prohibit imports under 17 USC 602 because there was no actual copyright infringement, but in a parallel U.S. International Trade Commission action (In re Certain Personal Computers and Components thereof, ITC No. 337-TA-140, 1984) an exclusionary order was issued under 19 USC 1337, based on contributory copyright infringement.

5. In another case involving Apple, two men were indicted on criminal copyright charges late in September of this year in the San Francisco, California, area, as reported in the *Los Angeles Times* of October 3, 1984. The possibility of serving jail time for copyright violations may deter some of the extensive copyright violations that have been taking place in the computer program field in the past few years.

6. Legislation is pending to give short-term protection (10 years) to the configuration of computer chips. However, because of a conflict between bills having a similar purpose in the Senate and the House of Representatives, it is not clear whether any legislation will be enacted in the near future.

Italy, Spain

Our attorney correspondents in Italy and Spain express severe reservations as to whether the copyright laws in their countries would cover computer programs. Accordingly, they make a strong recommendation that trade secret obligations be included in any license agreements involving their countries. Italy does have a Copyright Office, however, and it appears possible that computer programs may be subject to registration in the Italian Copyright Office if they are printed in book or booklet form.

Australia

In Australia, the case of *Apple Computer Inc. v. Computer Edge Pty. Ltd.* has been percolating through the judicial system. In the initial decision, it was held that computer programs were not protected by the copyright law that was supposedly limited to "either information or instruction or pleasure in the form of literary enjoyment."This lower court decision was reversed by an intermediate court of appeals, but the case is now on appeal to the Australian court of last resort. In addition, we have been informed that legislation has now been enacted in Australia providing statutory protection for computer programs.

Canada

In a newsletter from Ridout and Maybee, of Toronto, Canada, two Canadian decisions are noted in which it is assumed by the tribunals that copyright protection applies to computer programs, see *Apple v. Computermat*, and *Spacefile v. Smart Computing* (no citations given).

Japan

Our Japanese correspondents have indicated that copyright protection was held to be applicable to computer programs in a landmark case involving the Space Invaders II game, *Taito Corp. v. I.M.G. Enterprises Corp.*, Tokyo District Court, Dec. 6, 1982, Case No. (Wa) 10867/1979. Apparently, consideration is also being given to special legislation in this area.

England

Our correspondent in England indicates that copyright protection is applicable to computer programs.

CONCLUSION

Copyright protection is applicable to computer programs in most jurisdictions. However, because of the ease of transmission and copying of computer programs, it is strongly recommended that trade secret protection also be invoked by the inclusion of strict confidentiality provisions, whenever possible. This will of course be essential for those countries where copyright protection may not be available for computer programs, and will be desirable in all jurisdictions.