COMPUTER SOFTWARE: A New Proposal for Intellectual Property Protection*

PROFESSOR ROBERT H. RINES** AND RICHARD H. BRADFORD,
PAUL R. BURKE, MARK C. NELLIGAN, ROBERT A. PARKS,
SCOTT L. PATASHNICK AND JAMES W. ROSE***

Intellectual property literature is replete with articles, essays, manuscripts and reports, explaining why Copyright is not appropriate for protecting computer software. "Copyright is inadequate." "The courts are mixing up ideas and expression." "'Look and feel' should not apply to software." Yet, for the past dozen years, the number of software developers relying on copyright protection has dramatically increased and attracted the attention of Congress when computer software was added to the Copyright Statutes. Even the Copyright Office has been stirred into conducting public hearings on how best to protect computer screen displays.

A small group of Franklin Pierce Law Center students, under the direction of President Robert H. Rines, has been evaluating the dilemma of copyright and software protection through a series of classes and lectures conducted over the past eighteen months. A preliminary result of their work was presented at the third annual Software Conference sponsored jointly by Franklin Pierce Law Center and Massachusetts Institute of Technology on January 19, 1988. What follows is a working draft of the proposed solution presented at that conference.

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**Professor of Law and President of Franklin Pierce Law Center.

It is not the purpose of this paper to restate the shortcomings of existing copyright protection as described in infinite detail by hundreds of articles published during the last decade. We would, however, like briefly to describe several existing alternatives to copyright protection which are available to the software developer.

Trademark
This form of protection provides the registrant broad powers of injunctive relief from those who use the ‘brand name’ without permission. However, it only protects against infringers marketing products under the same or a similar name. Trademark protection, however, will not stop the competitor who copies proprietary software and then markets it under a different label. ‘Copying’ of this type is very profitable because there is little investment necessary for the infringer beyond the cost of a computer, blank disks, and one legitimate copy of the program to be duplicated. Even if one were to seize and destroy the copier’s inventory, it could easily be in business again almost immediately.

Trade Secret
This form of protection may initially frustrate a potential infringer. However, given enough time and resources, a determined infringer will ultimately prevail. Once the code has been ‘broken’, the trade secret will no longer be secret and the infringer will legimitely be able to begin duplicating the owner’s software. As in the case of trademarks, this type of ‘copying’ is very profitable because there is no capital investment beyond the cost of a computer, blank disks and a copy of the decoded program.

Shrink-Wrap Licenses
This form of protection requires the registrant to assert copyright rights after which the software product as unilaterally licensed by means of a conspicuous written disclosure printed upon a sealed envelope containing the software. While popular for most mass-produced computer programs, shrink-wrap licensing had been judicially untested until very recently when the Louisiana Supreme Court refused to enforce one in *Vault Corp. v. Quaid Software Ltd.*, 655 F.Supp. 750 (E.D. La. 1987). If this trend finds wider acceptance in other circuits shrink-wrap warnings will offer no protective value.

Patent
Patent law provides the most effective protection against ‘copying’. However, patent protection is difficult to obtain for several reasons. The high standards of novelty and unobviousness must be overcome. Also the cost of obtaining and enforcing a patent can be prohibitive. It costs approximately $4000-$6000 to prosecute a patent, and legal fees for patent litigation can easily run into six figures; an amount that could devastate the typical start-up software house. Patents do, however, offer the strongest form of protection since the idea and not merely the expression is protected. Furthermore, patent law requires only an enabling disclosure. Therefore, full disclosure of the code is not necessary.

The Chosen Method Of Software Protection is Copyright

In sheer numbers alone, the overwhelming choice for protecting computer software has been copyright. It is our opinion that copyright law as developed in *Apple Computer v. Franklin*, 545 F.Supp. 812 (E.D. Pa.)
1982) (copyright was first extended to protect source and object code), *Whelan Associates v. Jaslow Laboratories*, 797 F.2d 1222 (3rd Cir. 1986), cert. den. 107 S.Ct. 877 (1987) (copyright was extended to protect the substantial similarity of the “structure, sequence, and organization” of a software program), and *Digital Communications Associates v. Softklone*, 659 F.Supp. 449 (N.D. Ga. 1987) (copyright was extended to protect computer screens which do not contain graphics or artwork), is generally evolving in the right direction. Dozens of law review articles have prophesied the impact of these landmark cases.

It is our opinion that copyright, given additional time to meet the needs of the market, will eventually provide substantive protection for software. While copyright does provide some protection for computer software, it cannot provide the complete protection developers would like. Thus our courts have engaged in attempts to stretch the copyright statutes, established to protect artistic works, to expand copyright protection to include the utilitarian aspects of computer software. Courts wrestling with the problems of stretching the Copyright Act to include software “ideas” have created a number of orphan decisions.

The existing Copyright Act expressly excludes protection for an original “idea, procedure, process, system, method of operation, concept, principle, or discovery . . .” (Copyright Act of 1976, 17 U.S.C. Section 102). This clearly raises the salient issue of enforceability when a computer program’s expression merges with the idea. As illustrated in the landmark case of *Baker v. Selden*, 101 U.S. 99 (1880), copyright registration does not necessarily provide complete protection for the registered work. Partial protection is particularly confusing in works wherein the idea and expression merge.

It is our observation that all computer software includes an element of idea. Since “idea” is an element expressly denied protection by the Copyright Act, our premise raises a rhetorical question: *Is it better to protect computer software under copyright law and seek to raise the standards (which expressly excludes the protection of ideas), or, to protect computer software under patent law and seek to lower the standards (to accommodate the generally lower level of novelty present in computer software)?*

Regardless of which choice is made, an associated and equally important issue involves the relationship of protection and enforcement. Court decisions are often delayed until a point in time so far removed from when a complaint was filed that one or both parties are adversely prejudiced. The small developer must settle, risk bankruptcy, or bear the costs of unrestrained infringement for years until trial. Even if the prejudiced party later wins, the associated costs with the delay may produce an empty victory.
What Kind of Protection
Do Software Developers Want

Simply stated, software developers want a system of protection that is: (1) fast, (2) inexpensive, (3) provides substantive protection against copying, and (4) is enforceable within a reasonable time period. Software developers only want the opportunity to exploit their own creations; to start a business, create jobs, and make money; without being forced to compete with a late comer who copies their innovative and proprietary information.

INSTRUCTION PROTECTION
A New Statutory Form of Intellectual Property Protection for Computer Software

Instruction Protection (INP) describes a new category of intellectual property for computer instructions which protects both the ideas and expressions found in a particular work. To achieve the requisite protection necessary for computer software, we are proposing that Congressional Legislation be enacted to enhance the limited protection currently provided by the Copyright Act. Today's economic contribution of software will be jeopardized unless action is taken to protect the intellectual property lying in a region between copyright law and patent law which is currently void of adequate substantive and procedural protection. The proposed INP Act requests that:

(1) Congress withdraw computer software and other instructional based intellectual property from protection under the existing copyright. (However, Copyright protection would not be deprived simply because a literary or artistic work appears on a screen. Patent protection would also be available for programs which met the necessary levels of novelty and unobviousness). We are proposing that an INP statute be adopted to provide software (instruction) protection.

(2) Under the authority provided in Article I of the United States Constitution, we are also proposing an efficient and expedient method to resolve disputes anticipated under the INP statute. We suggest a three member Article I judicial INP Tribunal. The INP Tribunal will be representative of the legal profession (government), education, and industry. The INP Tribunal will replace the burdensome delays associated with current jurisprudence with an efficient judiciary, expert in the software arts. We are proposing a new kind of court in which the judges are selected by their respective professional associations (one each nominated by the bar, teachers associations, and professional programmers association). We are proposing the INP Tribunal be appointed for a limited term rather than for life.

Instruction Protection (INP)
Registration

The INP Act will have an easy and inexpensive registration system, similar to the existing copyright system. INP registration will com-
prise: (1) a formal application by the developer, (2) a full deposit of the program, (3) a statement describing in detail the developer's contribution to the art, (4) a sealed record deposited as evidence of reduction to practice, (5) an oath or declaration identifying the author or authors, and (6) a nominal registration fee.

A significant distinction between copyright and INP registration will be the required descriptor, specifying the developer's innovation. The INP Act will provide the registrant the opportunity to describe or claim, via descriptors, his contribution to the public as opposed to what has merely been taken from the public domain. A descriptor, similar in some ways to a patent claim, will require the software developer to specifically identify or claim his improvements to the art and to define specifically what he is seeking to protect.

The registrant will have an affirmative duty to identify the subject matter which he seeks to protect. As illustrated by recent software decisions expanding the limits of the Copyright Act, the courts have afforded software further protection but have been forced to engage in subjective analyses to do so. Descriptors will objectively define the subject matter for which protection has been sought and the developer will be held to that description.

The INP Act will limit a descriptor to be claimed by only one registrant. Descriptor claiming will therefore require some system to establish a priority in which INP registrations are filed. We are suggesting a first to file system. First to file will further distinguish INP from copyright by eliminating the copyright concept of independent creation and replacing it with the patent concept (not in U.S. patent practice) of first to file.

**Information Protection (INP)**

**Deposit Requirements**

Another distinguishing element between INP and copyright will be the required deposit of a sealed record by the registrant. The record submitted shall provide evidence of the developer's actual reduction of his descriptors to practice, including pertinent dates and any references thought relevant by the developer. The sealed record will be used in resolving disputes arising within a statutorily defined primary protection period. The sealed record will also provide the principal evidence to be weighed by the trier of fact. Imposition of the sealed deposit also contemplates elimination, or at least significant reductions in discovery proceedings in the event of litigation. The complete application of all INP registrations will be available for public review with the exception of the sealed deposit.
Information Protection (INP)

No Examination

The INP Act will require no examination to effect registration. Registration will operate routinely with the registering authority only verifying that the necessary items have been included with an application. Qualifying applications will then receive an INP registration number with an effective filing date. In the event of ensuing litigation the INP registration number will establish the filing priority of the disputing parties. The INP Act will in no way restrict a developer's application for INP registration. INP registration, like copyright, will be automatic unless the application is missing items.

Instruction Protection (INP)

Weekly INP Gazette

A weekly publication similar to the Official Gazette is also suggested to distribute descriptive information about computer software filed during the preceding week. Published information might include the developer's name and address, developer assignments, the INP registration number, and an explanation of the innovative aspects of the computer software including the developer's claimed descriptors. We are proposing that all INP applications be available for public review except the sealed deposit.

Instruction Protection (INP)

Enforcement

The protection of intellectual property is only as effective as the enforcement it provides. The enforcement envisioned to power the INP Act will lie primarily in the efficiency and jurisprudence provided by the INP Tribunal. The absence of an examination and interference proceedings is intentional. Unlike protections provided under patent law, registration under the INP Act will only grant access to the INP Tribunal rather than confirm an absolute right to exclude others.

The INP Tribunal will have original jurisdiction in judging and enforcing protection for valid computer software registrants under the INP Act. The Act will define penalties for infringement. Protection will be enforceable during the statutorily imposed primary protection period. We are suggesting the primary protection period be set to five (5) years of exclusive protection from the date of registration. At the end of the primary enforcement period, a secondary period of non-exclusive protection will commence. The INP Act will protect software during the secondary protection period by forcing infringers to obtain compulsory licenses. We are suggesting the secondary protection period of com-
pulsory licensing period be set to twenty (20) years from the date primary protection expires. The combination of the primary and secondary protection periods will provide a developer twenty-five (25) years of software protection. In the event of a dispute during this period, the INP Tribunal will determine whether the registered software descriptors are valid and whether the registrant was the first to file. Findings for the registrant will result in strict enforcement with equitable penalties. Assuming the INP holder has a valid registration, an action for infringement will be easily initiated by filing a complaint with the INP Tribunal. Under the INP Act, jurisdiction and procedural rules of the INP Tribunal will attach when the registrant registers its computer software for protection. In seeking protection under the INP Act, a registrant automatically consents to the INP Tribunal’s exclusive jurisdiction and procedural rules. The federal subject matter jurisdiction created by the INP Act will additionally include all disputes involving unregistered defendants.

We are convinced of the complete "due process" Constitutionality of such Article I dispute resolution and rule making.

Information Protection (INP)

Dispute Resolution

The INP Act calls for an unprecedented coalition of government, industry and academia to cooperatively review and resolve legal disputes. The three member INP Tribunal will equally represent each of these interests. Each representative shall be a person of competent technical knowledge with a background in software technology and who shall be appointed for a temporary period of service.

The representatives will be nominated and screened by their peers to ensure their individual qualifications and to avoid conflicts of interest. Tenure on a INP Tribunal panel will be similar to jury duty, but hopefully will be perceived as much more. Appointments may be considered an honor by the representatives and their companies or organizations. It is expected that partisan involvement, especially by the private sector, will additionally foster feelings of greater effectiveness and impact in making the system work and promote a self policing attitude found in many professional organizations. The appointment periods will be relatively short and will be staggered to provide overlapping participation, to facilitate administrative and procedural efficiency, and to promote consistent adjudication. We propose two types of judicial proceedings.
Information Protection (INP)

Tribunal Proceedings

Procedurally, INP Tribunal proceedings will be kept brief. Discovery will be limited since the members of the INP Tribunal will be technically familiar with the art. Very liberal rules of evidence will apply and discovery will be both accelerated and effectively reduced by the evidentiary weight placed upon the deposits made during registration. A statutorily set time limit on the length of a trial will also encourage and promote efficiency by forcing the litigants to immediately focus on the critical issues. Additionally, the combined experience of the Tribunal will discourage frivolous complaints. The INP Tribunal will be required to issue a short opinion within a prescribed period of time.

Appeals from an INP decision will be heard by the Court of Appeals for the Federal Circuit. Statutory rules will require appeals to be timely filed and will limit the scope of review to the arbitrary and capricious standards set forth in 5 U.S.C. Section 706(2)(a) (1966) of the Administrative Procedure Act.

Information Protection (INP)

Mediation Proceedings

Mediation will be the primary form of dispute resolution targeted by the INP Act. The Act will be structured to highly favor mediation because it is generally faster and less expensive. The Act will interpret registration to indicate the registrant’s consent to mediation and only in situations involving an unregistered defendant will a choice be offered between the INP Mediation Board and the INP Tribunal. Such defendants will be encouraged to choose mediation since the INP Tribunal rules will allow the assessing of attorney fees and costs against the losing party.

The INP Mediation Board’s composition will parallel that of the INP Tribunal: three representatives from government, industry and education. However, the focus of the INP Mediation Board will be to promote compromise and employ broad equitable principles. Selection of the INP Mediation alternative will require advance agreement by both parties that the decision of the INP Mediation Board will be binding and final. The INP Mediation Board will deliver a timely, final decision at the close of the proceedings. There will be no appeals from INP Mediation decisions.

The goals of either the INP Mediation Board or the INP Tribunal will be to provide timely, efficient, consistent, and equitable resolutions to disputes involving INP registered intellectual properties. To oversee the daily operations and administration of this program it is suggested that
INP operations be placed within the Patent and Trademark Office, possibly under the Commissioner acting as Assistant Secretary of Commerce. INP registration and filings, Tribunal and Mediation Board nominations and appointments, scheduling of adjudication hearings, and day to day operations could then be headquartered at the Patent and Trademark Office in Washington, D.C.

Information Protection (INP)

Substantive Components

A significant element of the INP Act is the substantive protection it will extend to intellectual property within the scope of the Act. The copying limitations of the Copyright Act considered in many recent cases has proven the need for protection beyond the literal writing. Computer software is susceptible to the four (4) major types of inequitable infringement:

1. Literal copying (regardless of the method of fixation and including all forms of expression including but not limited to language, source code, and object code);
2. Copying of the file layouts, program structure, organization and sequence of instructions;
3. Copying of unique user interfaces or display screens generated by the software; and
4. Copying of unobvious software ideas embodying novelty and contributing to the art.

Only by extending protection to all four of these inter-related and integral regions of computer software may the investment of time and money to develop the software product be secured. To permit such protection the INP Act must rely heavily upon the descriptors submitted by the registrant, which describe or claim the unique elements of the software program. The purpose of the descriptor is to outline in what specific ways a feature is believed to be an innovative and creative contribution to the software art as distinguished from that which exists in the public domain.

To effectuate the substantive protection proffered by the INP Act, a descriptor must disclose and describe not only the software environment but also include specific details with definitive references to the source code, the compiler used, the function of the code, and its utility to the user. When an application is released, the existence of a feature worthy of protection will depend upon its novelty in the market and its utility to the end user. The descriptor must also disclose and exclude any symbols or algorithms in the public domain. By describing the form and function of different attributes of the user interface, the novelty and
unobviousness of the software as a whole will emerge. For example, a
user could develop a protectible novelty interest by:

- Combining predefined icons and commands as exemplified by innovative
data entry schemes such as those incorporating a computer 'mouse'; or,
- Creating a new method of manipulating information contained within files
as developed by Apple® Computer with their recently introduced Hyper-
Card™ software product. (Apple is a registered trademark of Apple Com-
puter, Inc.; HyperCard is a trademark of Apple Computer, Inc.).

The substantive protection of INP will vary, of course, depending upon
the contribution to the art as fixed by the descriptors. While an in-
novative and revolutionary new software product will be extended
substantive protection in all four of the regions cited, "look alike" prod-
ucts providing similar solutions and incorporating significant amounts
of public domain techniques will usually qualify for less substantive
protection. Another "ordinary" word processing program might be an ex-
ample of a program which would be extended lesser substantive protec-
tion under the INP Act. Such a contribution to the art might only merit:

(1) Literal copying protection (regardless of the method of fixation and in-
cluding all forms of expression including but not limited to language,
source code, and object code).

While the substantive protection available under the INP Act will be
largely dependent upon what the descriptors claim, in no event will pro-
tection be less than the minimum protection currently afforded com-
puter software under the existing Copyright Act.

### Instruction Protection (INP)

#### Resolving Descriptor Disputes

The INP Mediation Board (or INP Tribunal) will have the task of
resolving whether the defendant has wrongfully invaded the registrant’s
descriptor. The imposed test should be similar to the patent claim in-
fringement standard. The more innovative the computer program, the
wider the breadth of the descriptor’s protection. The two adjudicating
principles driving the decision making process will be:

(1) equity; and
(2) rewarding innovation.

The INP Mediation Board (or INP Tribunal) will have jurisdiction over
the parties to impose a fair solution. Foremost considerations will in-
clude the good or bad faith of the parties, market conditions, economics,
and product demand. The INP Mediation Board or INP Tribunal’s
equitable powers of relief will include the latitude to reward both parties
in instances which support findings that both parties have unique con-
tributions. It is believed that decisions made under the INP Act will
reflect the practical, real business world solutions needed to completely protect the investments necessary and encourage software research and development. To clarify our proposal, consider the following examples of equity in action under the INP Act:

- If a developer independently creates software identical to a previously registered work, then the subsequent developer would retain some rights to market the software. If the parties cannot resolve this alone, the INP Mediation Board (or INP Tribunal) may impose a license or cross license; or the market might be divided geographically or by objectively defined buying groups.
- If a second developer's software is an improvement over the first, then perhaps a cross license may be imposed.
- If a second developer demonstrates bad faith, then exclusion from the market might be in order.
- The INP Mediation Board will have the authority to individually assess software for the purpose of determining the extent of the exclusive rights afforded.

Secondary considerations will evaluate and seek to discourage unauthorized copying of computer software and related user interfaces or screen displays. Protection from copying is necessary over and above the innovative idea articulated by the registrant’s descriptors for several reasons. The most fundamental reason is that literal copying protection will prevent a second developer interested in entering a market from ‘borrowing’ large portions of code from another developer, then making some functional changes or improvements to the code, and ultimately applying for their own INP descriptor protection. Consider the following example:

- Company A develops and markets a new, innovative software package. Company B, who would like to quickly enter this new market purchases a copy of the program for the purpose of reverse engineering it. With descriptor protection only, Company B would be free to copy 80% of Company A’s code while adding new and perhaps better features in the remaining 20%. Assuming Company B’s changes are sufficient, B’s final product could then enjoy INP protection by drafting the descriptors defining his improvements around the descriptors protecting Company A’s software. Furthermore, by leaving 80% of the code intact, Company B can quickly get its product to market with substantial savings in development costs.

We believe this scenario is unfair to Company A and illustrates why it is necessary to create a second level of protection for innovative software. In forging an equitable remedy between two parties, the INP Mediation Board (or INP Tribunal) should be extremely sensitive to the copying of instructional code. Direct copying of innovative software will be heavily considered and sanctioned when formulating equitable remedies between aggrieved parties.
The INP Act further recognizes inherent characteristics of computer software which renders it different than other considerations in existing copyright law. Distinguishing these differences as they apply to the protection of software is necessary to equitably and consistently apply the INP law:

- **Access:** Under the INP Act proving access will not be a necessary requirement because the descriptor will extend protection beyond literal copying. However, proving access is always useful evidence in proving that copying has taken place.
- **Idea/Expression Dichotomy:** We believe that every computer software program deserving of INP protection can be written in several different ways, and therefore, the INP Mediation Board (or INP Tribunal) will not be required to address this controversial and time consuming issue. Protection will be defined by the registrant’s descriptors.
- **Utility:** Computer software is inherently utilitarian. Recent copyright decisions have expressly ignored this fact and the fact that the Copyright Act absolutely excludes utilitarian works from protection. The INP Act will extend protection to the utilitarian aspects of software.

The INP Mediation Board (and INP Tribunal) shall adopt the software tests and standards which have been developed to date. Copyright tests based upon the similarity of expression are useful and should be incorporated in principle by the INP Act. Two specific examples would be (1) inquiries into the literal similarity of the programs, and (2) whether the respective pieces of software are substantially similar. The literal similarity inquiry is a traditional approach to copyright. Evidence of access and similarity of the infringing work as written must be shown. Given the interests to be protected in software this test is not always adequate; often software infringers will go to great lengths to disguise their product for the purpose of leading one to believe no copying has taken place. While borrowing these copyright principles, a more applicable analysis is the substantially similar test which has also been developing in copyright cases. The INP Mediation Board and INP Tribunal should adopt these basic standards of review and consider utilizing the following criteria suggested in the Duncan Davidson article, *Whelan Decision: Missing the Middle Ground*, 5 Computer Law Reporter 340 (1986):

- **Variable and field names:** The names of variables, labels, and their annotations and marginal comments usually have no intrinsic value to the program but are stylistic choices of the programmer. Too much similarity is often evidence of direct copying.
- **Sequence of statements:** Too much similarity in the content of statements, their order, and location in the program indicates copying.
- **Non-optimal implementation of algorithms:** The original program may not utilize the fastest way of executing every algorithm. Often a slight change can vastly improve performance. If a subsequent program con-
New Proposals for Software Protection

- sistently uses the same inefficient algorithms, it is useful evidence of copying.
- Use of non-public domain algorithms: There are many public domain algorithms that may be used for a specific task. For example, sort routines used to organize data. When a distinctive algorithm belonging to another appears in a second programmer’s software, it may evidence that copying has taken place.
- Sequence and structure of subroutines: The expression of a program includes the manner in which intrinsic subroutines are strung together. An inference of copying arises when the order of subroutines is similar and the similarity is either not dictated by performance or program externalities. The structure of programs can vary greatly. A large subroutine may be broken down into several selections. The size, selection and composition of subroutines are often discretionary. Again an inference of copying can be made when an accused infringer’s subroutines resemble the original programmer’s.
- Internal data structures: The manner in which data is stored in records, files, table, fields, the keys chosen for data base access, the size of the data, the names of the data fields, and items are also discretionary choices. In some cases the similarity is necessary to achieve compatibility with external data or because structure is dictated by function, however, in many other instances the same discretionary choices are made for no apparent independent, functional reason. Such instances infer copying.

Even when there is no literal copying, an infringing similarity may be found when a second developer makes too many identical discretionary choices. Under these circumstances an inference is made that the expression was copied and thereby would constitute an infringement as under copyright.

Information Protection (INP)
Screen Displays and User Interfaces

Screen displays are a distinct entity that are not subject to the same infringement criteria as their underlying code. While a given program can produce only a single version of a screen display, the converse is not true; the Softklone court observed that a single screen display may be created by any number of different and unique sequences of computer code. The INP Mediation Board and INP Tribunal shall adopt basic standards and criteria which delineate these inherent differences. Additionally, the courts must also clearly distinguish the protectible and unprotectible aspects of screen display. As held in Baker, forms are not protectible, while the information presented is.

Recent Copyright decisions have recognized the need and economic importance of screens as user interface tools. Projections as to the importance of this mode of interfacing from software professionals (developers, hardware companies, etc.) indicate a probable meteoric rise in the importance of software as time passes. The impact of further utilization of video output by computer programming is yet to be deter-
mained. We believe that existing legal systems do not provide adequate protection for software and that these conditions will worsen with the rapid advance of technology.

Conclusion

The philosophy of encouraging our citizens to contribute to the useful arts has never been utilized more than it is today. The volume of computer software is geometrically expanding as electronics pervades nearly every corner of our society. However, our government’s promise of exclusivity in return for innovation is empty without substantive protection and timely enforcement. The existing copyright system is promising more protection than it is able to deliver. Clearly a $100 software package for a desktop computer is dwarfed by our national trillion dollar budget. However it is at this low and misleadingly “unimportant” level where infringement is proliferating. Software, because of the generally low costs associated with duplication, is particularly vulnerable since the combination of both incomplete protection and untimely delays in enforcement make the risks for the infringer almost non-existent.

An opportunity exists to change the prophesy of inadequacy our copyright system and judiciary have created. A prophesy seemingly unaffected by economic consequences and insulated from international activities.

Justice for the developers of computer programs, apparently unlike today’s courts, cannot continue to operate in a vacuum without regard to time. The economic and international impact of our legal system no longer impacts only the individual parties who show up in court; our nation as a whole is equally being crippled.

The ability of our burgeoning software industry is being strained to compete in the world marketplace. Our Instruction Protection (INP) proposal is offered as a potential solution for your consideration. We welcome your comments and criticism: Franklin Pierce Law Center, INP Proposal, 2 White Street, Concord, New Hampshire 03301, U.S.A.

Epilogue: Robert H. Rines — The thrust of the deliberations hereinvolved has been twofold.

First, to answer the question as to whether the mechanisms of existing legal concepts and procedures for the protection and utilization of intellectual property are satisfactorily suited to the subject matter of information and to the techniques for its presentation and its utilization both in the late twentieth century public interest and in the clearly indicted futuristic and expanding technology and its nuances, so close at hand.
Having swiftly answered this question in the negative, the second question underlying this presentation applies not just to intellectual property in information, but also generally to all subject matters that have become enmeshed in the Procrustean-bedded "legal" octopus, and continually subjected to its blinding, inky emissions. Must American jurisprudence and practice modernize chiefly by "Band-aid" patchwork on a sacred, immovable superstructure? Or can new approaches be Constitutionally evolved, skirting the disastrous image and consequences of equating "due process" with the right to never-ending litigation, the seemingly inviolate "win-lose" tradition, and with almost total reliance on the pitifully choked, often incompetent, and sometimes fake funnel of courts that we replicate ad nauseum in their own image?

I think the answer to the second question is also "NO"!

And so, risking the ire of the sacred priests making up the hierarchy and "lower-archy" (begging to coin a word), and treading irreverently on forbidden ground, we offer initial inventive, though undoubtedly imperfect, ideas for consideration and for critiquing, modifying and rejecting, that may, however, constitute a beginning, at least, of a new era in America.

An era concerned no longer with perpetuating custom for custom's sake; nor with "make-work" business for lawyers, including entropically expanding minutia and nonsense and ever-growing "high-school" tasks; nor with pretexts of legal techniques not even accurate to the first decimal place, but that arrogantly are played with "refinements" dealing with the tenth decimal place; nor with the litigious and unsophisticated "win-lose" climate that stifles us all and that we simply can no longer economically afford; nor with the man-made fiat that "due process" in the Constitution means prompt trials for criminals, but means non-prompt trials for civil litigation (try to square that with the crocodile-tear concern for the intentions of the framers of the Constitution).

And not to perpetuate a legal system and profession that refuses to admit (except to its own brothers and sisters) that it has failed, and continues to fail to serve today's society (if it ever really did in the past), and is far out-of-tune in every area of human endeavor, and certainly with the needs of a modern and technologically expanding society — and so pitifully far behind man's progress and sophistication in so many other disciplines.

Rather, our proposition deals with a new spirit, admitting of some historical respect for the past, but with no respect for any god-like image imposed on a docile (but fortunately awakening) American public
to the effect that we, the people, have no choice but to be stifled in the progress we want to make by the omni-wise, all powerful, last-word and priestly admonitions: "You can't do it; it's against the 'law'".

Or that, "We must wait to see what the courts say," as the prime way society learns what it can and cannot do — even if it takes years. "Common law" evolution in our current type of court systems has its strong points. But its almost exclusive and painfully slow and exorbitantly costly use as the principal and almost universal technique for developing authoritative guidelines, is just no longer acceptable; and it is rapidly destroying our economy and our society.

How long, Oh Cataline!****

****Subject matter more fully treated in a forthcoming book, tentatively entitled "ENOUGH!!".