

Recent Developments in Computer Law

By DAVID R. SYROWIK

Brooks & Kushman P.C.

Southfield, Michigan

UPCOMING EVENTS

Proprietary Rights Committee Meeting

March 19, 1998 at 5:00 p.m.

Offices of Brooks & Kushman
Southfield, MI.

Current project: Preparation of a standard form of software license that includes software patent licensing considerations.

Council Meeting

March 25, 1998 at 4:30 p.m.

State Bar of Michigan Building
Lansing, MI

ICLE Computer Contracts Seminar

April 24, 1998 at 9:00 a.m.

Ann Arbor, MI

Spring Networking Lunch

May 27, 1998 at noon

Ritz Carlton Hotel
Dearborn, MI

Council Meeting to follow lunch

Tentative Council Meeting (TBD)

June 1998

State Bar Annual Meeting

September 16, 1998

Lansing, MI

Program Topic: Year 2000 Software Issues

Emerging Technology Committee

Meetings Ongoing

Those persons interested in participating in the Committee discussions should contact Mitch Goodkin, the Committee chair, by e-mail

(mitch@mail.tmo.umich.edu). The current topic being discussed involves "Information Age to the Automation Age."

U.S. Court of Appeals

Patent

As reported at 54 BNA's PTCJ 211, the Court of Appeals for the Federal Circuit granted the petition of the U.S. Patent and Trademark Office for rehearing *en banc* in *In re Zurko* (No. 96-1258) on July 2. The order granting the petition directs the parties to file additional briefs addressing the question of whether the Federal Circuit should review fact findings of the PTO under the Administrative Procedure Act standard review, (*i.e.*, "Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law") instead of the presently applied "clearly erroneous" standard. In its panel opinion (42 U.S.P.Q.2d 1476), the Federal Circuit reversed the decision of the Board of Patent Appeals and Interferences upholding a patent examiner's obvious rejection of an application relating to a method for improving security in a computer system.

As reported at 54 BNA's PTCJ 230, the Court of Appeals for the Federal Circuit on July 11, 1997 allowed a CD-ROM brief for the first time in an appeal from a decision by the Patent and Trademark Office. The July 11 order follows an April ruling in another case that struck such a filing based on the lack of consent by the court and the adverse party and on prejudice to the adverse party. In this case, the court found insufficient prejudice to the PTO in its inability to prepare its own CD-

ROM counterpart brief, noting that the PTO admitted having the equipment to view the CD-ROM brief. *In re Berg*.

Copyright

As reported at 54 BNA's PTCJ 478, on September 25, 1997 the Court of Appeals for the Second Circuit held that neither the doctrine of *res judicata* nor collateral estoppel justifies enjoining a plaintiff that has lost a suit for copyright infringement of its computer program in a U.S. court from pursuing an infringement action in a French court. *Computer Associates International, Inc. v Altai, Inc.*

As reported at 43 U.S.P.Q.2d 1385, on July 9, 1997, the Court of Appeals for the Second Circuit held that copyright infringement of software structure requires a comparison of the alleged structural similarities between the programs, even if all of the structural elements of the copyright owner's program are individually unprotectable. The court criticized the district court for failing to complete the comparison step of the abstraction-filtration-comparison test, explaining that, under the Supreme

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From the Chair

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Computer Law
Section Web Site

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Edward F. Langs
Writing Award



MEMO FROM THE CHAIR

By Michael S. Khoury

Welcome to 1998! There are a lot of developments that the Section has been spearheading in the last couple of years, and you will start to see the further results of those efforts this year. First, our Section home page is finally up, and is reachable through the home page of the State Bar of Michigan. The URL for our site (bookmark this) is <<http://www.michbar.org/sbm/sections/complaw.htm>> This newsletter is (or should) be on the page, as well as some prior publications, a listing of upcoming events, a directory of the section leadership and other information. Hopefully, by the time you get this newsletter, the suggestion box will be activated, and your suggestions for improving the home page are encouraged as a means of communication among members of the Section.

You will see in this newsletter a listing of the upcoming events for the Section. While it is usually the officers, council and committee chairs who attend council meetings, our meetings are open to all members of the Section, and you are welcome to attend. If you can't attend, however, you will be able to find minutes of recent council meetings on the home page, which should give you a good summary of what is happening in the Section. The focus for this year's officers and council has been the quality of service and value being delivered to members of the Section, ways of encouraging participation, and providing educational opportunities in this developing area of law to members. The latter is often achieved at the committee level, and those of you who have participated in the Proprietary Rights Committee meetings know that they are always interesting and useful. The Emerging Technologies Committee conducts virtually all of its business by e-mail, which is a low cost means of participating.

You will want to mark your calendar for two special events. On May 27, 1998, we will hold our annual spring lunch program, which will focus this year on special issues impacting computer law and the health care industry, as well as the maintenance of confidentiality for electronic communications and transactions. Held at the Ritz Carlton Hotel in Dearborn, this is always a fun event. On September 16, 1998, during the State Bar Annual Meeting, we will be doing something a little different. Our meeting and program will be held in the afternoon, instead of the morning, in order to enable many of our Section members to participate in the activities of other Sections (and only coincidentally conclude at the

time of the various alumni receptions). An exciting program is planned on Year 2000 issues, and we hope to see many people there.

All of the members of the Section Council encourage and welcome your comments about the quality and value of Section activities, your ideas for improving those activities as well as the future of the Section itself. These will be some of the discussions to take place at our March council meeting, and we certainly encourage your participation at any time, so send any of us an e-mail!

Welcome To Our Home!



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Continued from page 1

Court's *Feist* decision, a compilation of unprotectable elements is copyrightable even though its constituent elements are not. *Softel, Inc. v Dragon Medical and Scientific Communications, Inc.*

As reported at 43 U.S.P.Q.2d 1065, on June 10, 1997, the Court of Appeals for the Eleventh Circuit in a divided *en banc* decision held that an infringement plaintiff did not exercise creativity or judgment in "selecting" principle communities served by cable systems listed in its cable directory, and such "selection" is not original with plaintiff. *Warren Publishing, Inc. v Microdos Data Corp.*

As reported at 54 BNA's PTCJ 302, West Group and Oasis Publishing Co. on July 24, 1997 announced a settlement agreement that allows Oasis to continue using West's pagination system in its CD-ROM legal reporters. The agreement was reached four months after oral arguments in the Eighth Circuit where a decision upholding West's copyright claim to its page numbering was being appealed. The agreement provides for Oasis to take a copyright license on "slightly better terms" than contained in a recent antitrust consent decree, and for West to pay Oasis's litigation fees. *Oasis Publishing Co. v West Publishing Co.*

As reported at 54 BNA's PTCJ 475, on September 22, 1997 the Court of Appeals for the Tenth Circuit held that four-digit command codes used by technicians to program long distance telephone "call controllers" are uncopyrightable because they were chosen arbitrarily and are largely sequential, thus lacking the originality required for copyrightable expression under 102(a) of the Copyright Act. The court found other elements of the code unprotectable *scenes a faire* because they were dictated by external functionality and compatibility requirements of the computer and telecommunications

industries. *Mitel, Inc. v Iqtel, Inc.*

As reported at 54 BNA's PTCJ 484, on September 23, 1997 the Court of Appeals for the Ninth Circuit held that the availability of quantifiable monetary damages is not a reason to deny injunctive relief in a copyright infringement action. Plaintiff and defendant are competitors in the business of "place and route" software, which is used to design computer chips. Cadence sued Avant! for copyright infringement and misappropriation of trade secrets claiming that Avant! incorporated Cadence's trade secret computer source code into Avant!'s ArcCell software products. Cadence alleged that several of its former employees took the code when they left Cadence to work for Avant! *Cadence Design Systems, Inc. v Avant! Corp.*

Pensions and Benefits

As reported in the July 25, 1997 issue of the *WALL STREET JOURNAL*, the Court of Appeals for the Ninth Circuit, in an *en banc* decision, ruled that Microsoft Corp. improperly excluded certain employees from lucrative benefit plans by wrongly classifying them as temporary or contract workers. The ruling by the divided 11-judge panel generally upholds a ruling last fall by a three-judge panel of the same court (*i.e.* 97 F.3d 1187). It could cost Microsoft many millions of dollars. Beyond that, it could have significant implications for employers across the country, who have increasingly turned to contract employees to better manage global employment demands and to cut costs. Generally, temps or contract employees can be excluded from participating in health-benefit, stock-purchase and pension plans. *Vicaino v Microsoft*, 94-35770.

Tax

As reported at 66 U.S. Law Week 1044 (July 15, 1997), the Court of Appeals for the Eighth Circuit ruled that

proprietary tax preparation software licensed to the clients of a Big Six accounting firm is subject to the summons power of the Internal Revenue Service in the course of a tax investigation. *U.S. v Norwest Corp.*

Trademarks—Personal Jurisdiction

As reported at 54 BNA's PTCJ 420, the U.S. Court of Appeals for the Second Circuit held on September 10, 1997 that a New York district court lacked personal jurisdiction over a Missouri defendant charged with infringing the "Blue Note" trademark in its Web Site because the Missouri defendant's acts did not take place in New York. *Bensusan Restaurant Corp. v King.*

Evidence

As reported in 66 U.S. Law Week 1211, the Tenth Circuit held that a creditor can't rely on a computerized financial record to show that a debt was obtained by fraud and should therefore be declared non-dischargeable in bankruptcy. The court adheres strictly to the Bankruptcy Code section allowing an exception to discharge only if the creditor can show that in extending credit it relied on "a statement in writing." *Bellco First Federal Credit Union v Kaspar (In re Kaspar).*

U.S. District Courts

Patent

As reported at 43 U.S.P.Q.2d 1843, the U.S. District Court for the Northern District of California held on July 18, 1997 that defendants who had a subjective belief that their product did not infringe plaintiff's patent for a computer controlled display system (RE 32,632) could not be held liable for inducing infringement. There was no evidence that they should have known that their product would lead to infringement. *Apple Computer, Inc. v Articulate Systems, Inc.*



As reported in the September 18, 1997 issue of the *DETROIT FREE PRESS*, Hilgraeve Corp. of Monroe, Michigan sued Symantec Corp. and McAfee Associates in U.S. District Court for the Eastern District of Michigan in Detroit for infringing its software Patent No. 5,319,776 entitled "In Transit Detection of Computer Virus With Safeguard". The patent covers a method for searching out viruses in data typically downloaded from the Internet and preventing the viruses from contaminating personal computers. The Abstract of the patent states: "Data is tested in transit between a source medium and a destination medium, such as between two computers communicating over a telecommunications link or network. Each character of the incoming data stream is tested using a finite state machine which is capable of testing against multiple search strings representing the signatures of multiple known computer viruses. When a virus is detected the incoming data is prevented from remaining on the destination storage medium. Both hardware and software implementations are envisioned."

As reported in the October 7, 1997 issue of the *Wall Street Journal*, Digital is discussing the licensing to Intel of its Alpha microchip technology and manufacturing capacity in exchange for more than \$1.5 billion in cash and long-term chip-buying discounts. Any accord would settle a Digital lawsuit in which the computer maker accused Intel of infringing on its patents. *Digital Equipment Corp. v Intel Corp.*

Copyright

As reported at 44 U.S.P.Q.2d 1211, the U.S. District Court for the Southern District of New York sanctioned plaintiff under Fed. R. Civ. P. 16 for failing, despite repeated requests, to provide adequate definition of its allegedly infringed software. *Fonar Corp. v Magnetic Resonance Plus, Inc.*

As reported at 43 U.S.P.Q.2d 1589, the District Court for the Eastern District of Virginia held on June 10, 1997 that 17 USC § 117 of the Copyright Act, permitting necessary copying and adapting of computer software, applies to licensed telephone switching software where the licensee is "the owner of a copy." The issue for applying Section 117 is not whether the transaction with the licensor involved a license to use the program, but whether it created ownership rights in the copy, according to the court. In this case, the court found that the transaction - consisting of a single payment to the licensor and an unlimited period for the buyer to assert the right of possession - was a sale making the licensee an owner of the copy. *DSC Communications v Pulse Communications, Inc.*

As reported at 54 BNA's PTCJ 342, the District Court for the Southern District of New York held on August 13, 1997 that the revision right held by creators of a collective work under 17 USC § 201(c) includes the right to republish the collective work in electronic media, including on-line and CD-ROM products. The court summarily dismissed copyright infringement claims by a group of freelance writers who insisted that the publishers were authorized to use their articles in print products only. The electronic works are a revision of the collective work to the extent that the arrangement is lost, according to the court, but they do not create a new collective work because the original selection is preserved. *Tasini v New York Times.*

As reported at 43 U.S.P.Q.2d 1062, the District Court for the Eastern District of Pennsylvania ruled on May 27, 1997 that an action alleging infringement by computer programs that were not developed with government's consent or authorization need not be dismissed on ground that the Court of Federal Claims

has exclusive jurisdiction over the action under 28 USC § 1498(b). *Freiman v Seel.*

Trademarks

As reported at 54 BNA's PTCJ 419, the U.S. District Court for the Northern District of California on September 8, 1997 held that "invisible" references to "PLAYBOY" and *PLAYBOY* magazine imbedded in an "adult" web site can be enjoined as trademark infringement. The defendant used such "meta tags" which are hidden from the user's view but are read by Internet search engines to generate search results. *Playboy Enterprises, Inc. v Calvin Designer Label.*

As reported at 43 U.S.P.Q.2d 1312, the District Court for the District of Oregon held on June 2, 1997 that a preliminary injunction will issue prohibiting defendants from using "Super Producer" mark for real estate software, even though the term "producer" is generic, and plaintiff's "Top Producer" mark is correspondingly weak. *Top Producer Systems, Inc. v Software Sciences Ltd.*

As reported at 43 U.S.P.Q.2d 1036, the District Court for the Central District of California held on February 14, 1997 that the term "Mountain" is an arbitrary mark for computer data storage products, and is likely to be confused with defendants' "MountainGate" trade name for similar products. *National Customer Engineering, Inc. v Lockheed Martin Corp.*

As reported at 43 U.S.P.Q.2d 1056, the District Court for the Central District of California held on March 19, 1997 that registrants of "Skunk Works" Internet domain names are not necessary parties to an infringement suit brought by the owner of "Skunk Works" mark against the exclusive registrar of domain names. *Lockheed Martin Corp. v Network Solutions, Inc.*

As reported at 43 U.S.P.Q.2d 1356, the District Court for the Northern Dis-



trict of Georgia held on June 20, 1997 that a Georgia statute that criminalizes Internet trademark uses that imply authorization and Internet uses of false identities (*i.e.*, pseudonyms) is invalid for violating the First Amendment. The court granted a preliminary injunction to block enforcement of the statute, finding that it lacks a compelling state interest, that it is unconstitutionally overbroad, and that it is unconstitutionally vague. The court pointed out that the statute fails to define key terms such as "falsely identify," "use," and "falsely imply." *American Civil Liberties Union of Georgia v Miller*.

Criminal Law

As reported at 66 U.S. Law Week, p. 1030, the District Court for the Southern District of New York held on June 20, 1997 that the state's Internet indecency statute was unconstitutionally attempting to export its regulatory scheme to conduct occurring entirely outside its borders. The court said that Internet communications constitute "commerce" within the meaning of the Constitution. The court said "[T]he Internet represents an instrument of interstate commerce, albeit an innovative one; the novelty of the technology should not obscure the fact that regulation of the Internet impels the traditional Commerce Clause considerations." The court concludes that the law imposes burdens on interstate commerce that exceed any local benefits. *American Library Ass'n v Pataki*.

As reported at 66 U.S. Law Week, p. 1125 (August 21, 1997), the District Court for the Northern District of California held that the 1996 Child Pornography Prevention Act's ban on computer-generated images that appear to be children engaging in sexually explicit conduct does not violate the First Amendment. *Freedom of Speech Coalition v Reno*.

Unfair Competition

As reported in the October 8, 1997 issue of the *F*, Sun has filed suit against Microsoft in the U.S. District Court for the Northern District of California alleging that Microsoft is trying to disrupt an attempt by Sun and its partners to make Sun's Java software language a platform that could compete with Microsoft's dominant Windows operating systems. Microsoft signed a licensing agreement with Sun last year to use Java. Sun executives claim the agreement requires Microsoft to remain in compliance with new compatibility tests as they are developed by Sun. Microsoft's newly released software for browsing the World Wide Web failed the tests. Sun is seeking a court order forcing Microsoft to offer Sun's Java version, or alternatively an injunction to prevent Microsoft from using a "Java Compatible" logo on its new Internet Explorer Web browser. Sun's complaint also charges Microsoft with trademark infringement, false advertising, breach of contract, unfair competition, and "interference with prospective economic advantage." *Sun Microsystems, Inc. v Microsoft Corp.*

Antitrust

As reported in the October 21, 1997 issue of the *WALL STREET JOURNAL*, the Justice Department filed suit in U.S. District Court in Washington against Microsoft because Microsoft bundles or ties its Internet browser, Internet Explorer, with its Windows 95 operating system.

Personal Jurisdiction

As reported at 66 U.S. Law Week 1211, a federal district court in New Jersey says it lacks general personal jurisdiction over a non-resident defendant whose only contact with the forum is an Internet site it uses to advertise. *Weber v Jolly Hotels*.

As reported at 66 U.S. Law Week 1212, a federal district court in Virginia exercises personal jurisdiction under the state long-arm statute over a non-resident business that posts press releases on an Internet site. *Telco Communications, Inc. v An Apple A Day, Inc.*

U.S. Patent and Trademark Office

Trademarks

As reported at 43 U.S.P.Q.2d 1304, the Trademark Trial and Appeal Board ruled on June 18, 1997 that "Fact sheet brochures" submitted as specimens with application for registration of mark "PB.web," for computer software and instruction manuals, are unacceptable as evidence of actual trademark use. *In re MediaShare Corp.*

Copyright Office

As reported at 54 BNA's PTCJ 361, a Copyright Office report released August 21, 1997 stated that investigations into the need for legislation to expand database protection must take into account constitutional concerns stemming from the Copyright Clause and the First Amendment. The report on the legal protection for databases, requested by Sen. Orrin Hatch (R-Utah), presents an overview of domestic and international laws on the issue, describes current database industry practices, and discusses issues raised during a series of meetings held between the Copyright Office and interested parties.

Commerce Department

As reported at 54 BNA's PTCJ 195, 204, domain names on the Internet are the subject of a request for public comment issued July 2, 1997 by the Commerce Department. The notice points out that requests for domain names increased to as many as 70,000 per month in 1996, and that a smooth transition is



essential for the 1998 expiration of the registration agreement with Network Solutions, Inc. The notice not only sets out trademark questions, but also questions on organizational framework, new TLDs, and policies for registries.

The White House

As reported at 54 BNA's PTCJ 194, an Internet report, entitled "A Framework for Global Electronic Commerce," was unveiled July 1, 1997 by President Clinton and Vice President Gore. The report suggests policies to facilitate the world-wide growth of commerce on the Internet, stating that Internet development should not be burdened with undue government restrictions. The intellectual property goals recited in the report include ratification of copyright treaties, promotion of patent protection under TRIPs, and improved resolution of trademark conflicts.

State Law

Consumer Protection

As reported at 66 U.S. Law Week 1045 (July 15, 1997), a New York state court held that state consumer protection statutes are enforceable in state courts against businesses that engage in false advertising and other deceptive activities over the Internet. Injunctive relief was obtained against an Internet scam artist accused of bilking resident and non-resident consumers. *New York v Lipsitz (NY SupCt NYCty)*.

Computer Fraud

Effective April 1, 1997, the State of Michigan changed two of its computer fraud statutes:

Section 4 of 96 PA 326, MCL 752.794; MSA 28.529(4) and Sections 5a and 5b of 96 PA 326, MCL 752.795(a and b); MSA 28.529(5)(a) and (b); MSA 28.529(5)(a) and (b).

MCL 752.794 "Access to Computers with Intent to Defraud" now reads:

"A person shall not intentionally access or cause access to be made to a computer program, computer, computer system, or computer network to devise or execute a scheme or artifice with the intent to defraud or to obtain money, property, or a service by a false or fraudulent pretense, representation, or promise."

Prior to the 1996 Amendment which changed the statute, the statute read:

"A person shall not, for the purpose of devising or executing a scheme or artifice with intent to defraud or for the purpose of obtaining money, property, or a service by means of a false or fraudulent pretense, representation, or promise with intent to gain access to or cause access to be made to a computer, computer system, or computer network."

MCL 752.795 "Unauthorized access to computers; unauthorized insertion of instructions or programs" now reads:

A person shall not intentionally and without authorization or by exceeding valid authorization, do any of the following:

- (a) Access or cause access to be made to a computer program, computer, computer system, or computer network to acquire alter, damage, delete, or destroy property or otherwise use the service of a computer program, computer, computer system, or computer network.
- (b) Insert or attach or knowingly create the opportunity for an unknowing and unwanted insertion or attachment of a set of instructions or a computer program into a computer program, computer, computer system, or computer network, that is intended to acquire, alter, damage, delete, disrupt, or destroy property or otherwise use the services of a computer program, computer, computer system, or computer network. This subdi-

vision does not prohibit conduct protected under section 5 of article I of the state constitution of 1963 or under the first amendment of the Constitution of the United States.

Prior to the 1996 Amendment which changed the statute, the statute read:

"A person shall not intentionally and without authorization, gain access to, alter, damage, or destroy a computer, computer system, or computer network, or gain access to, alter, damage, or destroy a computer software program or data contained in a computer, computer system, or computer network."

The 1996 Amendment also changed the definition of a number of words including "access", "computer", "computer network", "computer program", and "computer system" at MCL 752.792 "Definitions" as follows:

- (1) "Access" means to instruct, communicate with, store data in, retrieve or intercept data from, or otherwise use the resources of a computer program, computer, computer system, or computer network.
- (2) "Computer" means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network.
- (3) "Computer network" means the interconnection of hardware or wireless communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.



(4) "Computer program" means a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network.

(5) "Computer system" means a set of related, connected or unconnected, computer equipment, devices, software, or hardware.

Prior to the 1996 Amendment, the above words were defined as follows:

- (1) 'Access' means to approach, instruct, communicate with, store data in, retrieve data from, or otherwise use the resources of, a computer, computer system, or computer network.
- (2) 'Computer' means an electronic device which performs logical, arithmetic, and memory functions by the manipulations of electronic or magnetic impulses, and includes input, output, processing, storage, software, or communication facilities which are connected or related to a device in a system or network.
- (3) 'Computer network' means the interconnection of communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.
- (4) 'Computer program' means a series of instructions or statements, in a form acceptable to a computer, which permits the functioning of a computer system in a manner designed to provide appropriate products from the computer system.

(5) 'Computer system' means a set of related, connected or

unconnected, computer equipment, devices, and software.

If you have an article you would like considered for publication, send a copy to:

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Statement of Editorial Policy

The aim and purpose of the Michigan Computer Law Section of the State Bar of Michigan is to provide information relative to the field of computer law, and other information that the section believes to be of professional interest to the section members.

Unless otherwise stated, the views and opinions expressed in the Michigan Computer Lawyer are not necessarily those of the Computer Law Section, or the State Bar of Michigan.

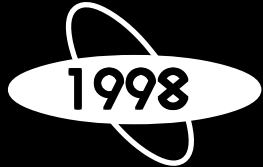
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1. The award will be given to the student article which, in the opinion of the judges, makes the most original and significant contribution to the knowledge and understanding of current computer law issues.
2. Only one prize of \$500.00 will be awarded.
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4. Entries must include the submitter's name(s), current address, current telephone number and college or university attended.
5. Entries must be typed, double-spaced and submitted on letter-size (8.5 by 11 inch) plain, white, bond paper (no onion skin). Entries must contain proper citations, including foot notes at the end of the entry.
6. All rights to entries shall become the property of the State Bar of Michigan. The Computer Law Section reserves the right to make editorial changes.
7. Entries must be postmarked by June 30, 1998.
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