1978

Case Digest, 1 Computer L.J. 573 (1978)

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Recommended Citation

CASE DIGEST

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The materials in this section are intended to provide a concise overview of the case decisions relating to computers rendered during the year 1978. Each case is summarized in a separate digest entry. Each entry contains the following information:
- case name
- case citation
- subsequent history (if any)
- summary of salient facts
- legal analysis and holding of the court (or agency)

The digest entries are organized topically as follows:

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CASE DIGEST

2. System Design

2.2 Protecting Proprietary Interests

C78-1 *In re* Freeman, 573 F.2d 1237, 197 U.S.P.Q. 464, 6 CLSR 809
       (C.C.P.A. 1978).

The application, entitled "Computer Typesetting," was for a system for typesetting alphanumeric information, using a computer-based control system in conjunction with a phototypesetter of conventional design.

The patent examiner cited *In re Christensen*[1] in rejecting the claims, as their only novelty resided in the algorithm and the attendant software. The Board of Appeals ("Board") found *Christensen* inapposite, since Freeman's invention involved more than the mere practice of an algorithm on data considered to be old and well known. The Board, however, entered a new rejection, based upon *Gottschalk v. Benson*.[2] The Board reasoned that the novelty of the invention resided in the computer program, and that a patent on Freeman's invention would, in effect, be a patent on the algorithm itself.

The Court of Customs and Patent Appeals ("C.C.P.A.") reversed the Board, ruling that the claims indirectly recited an algorithm (*i.e.*, there was no reference to a particular program), and that neither the apparatus claims nor the method claims pre-empted

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1. 478 F.2d 1392, 178 U.S.P.Q. 35, 4 CLSR 66 (C.C.P.A. 1973).
2. 409 U.S. 63, 175 U.S.P.Q. 673, 3 CLSR 256 (1972).

a mathematical algorithm. The C.C.P.A. found that the Board had improperly rejected the claims.

C78-2 *In re* Johnson, 589 F.2d 1070, 200 U.S.P.Q. 199 (C.C.P.A. 1978).

The inventions involved methods for removing undesired noise from seismic data. It is quite common for seismic data to be recorded in digital form and for computers to be used in the processing of that data. The examiner rejected all of the claims as nonstatutory subject matter under 35 U.S.C. § 101,[3] and some of the claims under § 102.[4] The Board of Appeals, acting before the Supreme Court decision in *Parker v. Flook*,[5] affirmed the rejection of all of the claims under § 101, relying on *Gottschalk v. Benson*[6] and *In re Christensen*[7] for the proposition that a patent cannot be granted for any "subject matter which is algorithmic in character."[8]

The Court of Customs and Patent Appeals applied the precedents of *Benson* and *Flook* to the claimed invention. Focusing ini-

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3. Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.
35 U.S.C. § 101 (1976).
    4. A person shall be entitled to a patent unless—
        (a)   the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
        (b)   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 in the United States, or
        (c)   he has abandoned the invention, or
        (d)   the invention was first patented or caused to be patented by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application filed more than twelve months before the filing of the application in the United States, or
        (e)   the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or
        (f)   he did not himself invent the subject matter sought to be patented, or
        (g)   before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.
35 U.S.C. § 102 (1976).
    5. — U.S. —, 198 U.S.P.Q. 193 (1978).
    6. 409 U.S. 63, 175 U.S.P.Q. 673, 3 CLSR 256 (1972).
    7. 478 F.2d 1392, 178 U.S.P.Q. 35, 4 CLSR 66 (C.C.P.A. 1973).
    8. 589 F.2d at 1075, 200 U.S.P.Q. at 205.

tially on *Flook*, the Court found two important factual distinctions. First, the applicant did not allege any novel mathematical procedures and did not seek a patent on a mathematical formula. Second, the computations required in performing Johnson's processes produced a noiseless seismic trace on a record medium, not merely a mathematical value as in *Flook*.

Testing the claims under *Benson*'s "nutshell" holding, the C.C.P.A. analyzed the claims to determine whether or not they merely recited a mathematical formula or a method of calculation. Applying the two-step test of *In re Freeman*,[9] the court found all of the claims to be statutory subject matter and therefore patentable.

In response to the Government's claim that the *Benson* and *Flook* decisions stand for the proposition that all computer programs are unpatentable, the court said:

> Very simply, our decision today recognizes that modern technology has fostered a class of inventions which are most accurately described as computer-implemented processes. Such processes are encompassed within 35 U.S.C. § 101 under the same principle as other machine-implemented processes, subject to judically determined exceptions, inter alia, mathematical formulas, methods of calculations and mere ideas.[10]

C78-3   Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264 (9th Cir. 1978).

Modern Controls, Inc. is a relatively small company specializing in developing equipment used with computers. Andreadakis, who had a Ph.D. in physics, was employed by Modern Controls from January 27, 1976, until May 27, 1977. While at Modern Controls, Andreadakis helped develop a commercially marketable, flat panel, gas discharge display device used to display information from a computer.

Prior to working for Modern Controls, Andreadakis worked for Control Data Corporation for five years. During three of those years, he assisted in developing a flat panel, gas discharge display device which had the best commercial prospect of all similar devices being tested by Control Data. Another employee of Control Data, a member of the board of directors of Modern Controls, had approached Andreadakis and others, and asked them if they would be interested in working for Modern Controls to develop the same device. Andreadakis and another member of the Control Data team expressed an interest and, shortly thereafter, Andreadakis left Control Data for Modern Controls.

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9.   573 F.2d 1237, 197 U.S.P.Q. 464 (C.C.P.A. 1978).
10.   589 F.2d at 1081-82 n.12, 200 U.S.P.Q. at 210 n.12.

On the first day of his employment at Modern Controls, Andreadakis was requested to sign an employee confidentiality agreement. He initially refused to do so, but did sign it some nine weeks later at the insistence of Modern Controls. By the terms of the agreement, Andreadakis agreed to assign to Modern Controls his rights to any inventions developed during his employment and to refrain from disclosing any confidential information obtained while so employed. He also agreed to refrain from working for a competitor of Modern Controls for a two-year period following termination of his employment. Modern Controls agreed to pay Andreadakis his base salary for two years after his termination if he quit and was unable to find comparable work because of this covenant.

In February or March of 1977, Andreadakis wrote to several companies seeking employment. He received an offer from Burroughs Corporation and began work there on June 6, 1977. Burroughs was also developing a flat panel, gas discharge display device similar to the one that he had helped to develop at Modern Controls. Andreadakis was immediately assigned to the division of Burroughs developing that device.

In his letter of resignation from Modern Controls dated May 13, 1977, Andreadakis represented that he was leaving the area of research in which he had been involved and was considering a teaching position in the east. Modern Controls became aware of Andreadakis' employment at Burroughs only by accident and, shortly thereafter, brought this action to enforce the covenant not to compete.

The district court denied Modern Controls' motion for a preliminary injunction on the ground that it had not shown a substantial probability of success at trial because the court believed the covenant not to compete to be unenforceable since (1) the covenant lacked consideration, as it was not ancillary to the initial employment agreement and was not supported by independent consideration, (2) since Modern Controls had not proved that trade secrets existed with respect to the device, and (3) because the employee confidentiality agreement containing the covenant was broader in scope than reasonably necessary to protect any legitimate need of Modern Controls. The district court also denied relief to Modern Controls since it had failed to show irreparable harm and had not established that Andreadakis had disclosed or would disclose to Burroughs any trade secrets or confidential business information gained at Modern Controls.

The court of appeals reversed and remanded the case for further proceedings. It reasoned that the covenant not to compete was not ancillary to the initial employment agreement and was sup-

ported by independent consideration. It also found that Modern Controls sufficiently established that Andreadakis had access to confidential business information and it was likely that Modern Controls would suffer irreparable injury if a preliminary injunction was denied.

C78-4   Parker v. Flook, — U.S. —, 198 U.S.P.Q. 193, 6 CLSR 833 (1978).

The application, entitled "Method for Updating Alarm Systems," involved a method of updating alarm limits during catalytic conversion processes. The method consisted of three steps: an initial step, which measured the present value of the process variable (*e.g.*, the temperature); an intermediate step, which used an algorithm to calculate an updated alarm limit value; and a final step, which adjusted the alarm limit to the updated value. The difference between conventional methods of changing alarm limits and that described in Flook's application was in the intermediate step—a mathematical algorithm.

The patent examiner rejected the claims as being addressed to nonstatutory subject matter, since the only novel part of the invention was the algorithm used to adjust the alarm value. The Board of Appeals sustained the examiner's rejection. The Court of Customs and Patent Appeals reversed,[11] reasoning, *inter alia*, that since the mere solution of the algorithm would not constitute infringement of the claims, a patent on the method would not pre-empt the formula used. The C.C.P.A. narrowly interpreted *In re Christensen*[12] as limited to situations where there were no steps other than those required for the solution of the algorithm. The C.C.P.A. concluded that because there was some post-solution activity (*i.e.*, the use of the algorithm to obtain a given result), the claims involved patentable subject matter.

The United States Supreme Court reversed the C.C.P.A.'s decision, holding that the identification of a limited category of useful, though conventional, post-solution applications of the formula or algorithm does not make the method eligible for patent protection under 35 U.S.C. § 101.[13] The Court, citing *O'Reilly v. Morse*,[14] reasoned that Flook's formula was within the prior art and thus not patentable, since the chemical processes involved in catalytic conversion are well known, as are the monitoring of process variables, the use of alarm limits to trigger alarms, the notion that alarm

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11. *In re* Flook, 559 F.2d 21, 195 U.S.P.Q. 9, 6 CLSR 426 (C.C.P.A. 1977).
12. 478 F.2d 1392, 178 U.S.P.Q. 35, 4 CLSR 66 (C.C.P.A. 1973).
13. *See* note 3 *supra*.
14. 56 U.S. (15 How.) 61 (1853).

limit values must be recomputed and readjusted, and the use of computers for automatic process monitoring.

C78-5   *In re* Sarker, 575 F.2d 870, 197 U.S.P.Q. 788 (C.C.P.A. 1978).

The claimed invention involved a technique for computer "modeling" of a river so that design requirements of riparian constructions could be accurately predicted.

The Board of Appeals made an adverse decision on the application. In filing his appeal with the Court of Customs and Patent Appeals, appellant also filed a motion to seal the record and to hear oral argument *in camera*, so that the material disclosed in the patent application could be retained as a trade secret in the event of an adverse decision.

The C.C.P.A. granted the motion. The court reasoned that in an *ex parte* patent appeal, where the motion coincided with the filing of a certified transcript, a balancing test must be used. This test balances the interests of the trade secret owner/patent applicant, the court and the public, together with other relevant factors.

The factors which lead the court to grant the appellant's motion were:

(1)   The substance of the patent application in issue had remained confidential by virtue of the operation of 35 U.S.C. § 122;

(2)   The filing of the motion *coincided* with the filing of the certified transcript in the court such that the latter was never available to the public;

(3)   The motion and supporting memoranda convincingly demonstrate (a) that the application in issue contains material susceptible of retention as a trade secret, (b) that such material has, in fact, been so retained, (c) that appellant has filed no foreign patent applications, and (d) that the subject matter has not become generally available through the activities of others;

(4)   The merits of appellant's claims of entitlement to patent protection involve unsettled questions of law which are of current concern and the resolution of which is in the public interest;

(5)   All less restrictive mechanisms for bringing the dispute before this court while still protecting the alleged trade secrets, e.g., a stipulated statement of facts, an abbreviated record, etc., have been explored and proven impractical; and

(6)   The extraordinary action of the court in protecting the substance of the pending application will not be rendered nugatory by the issuance of a patent *regardless* of the holding since there are no allowed claims based on the alleged trade secret pending in Sarker's application.[15]

The court's opinion from the *in camera* proceeding is reported in *In*

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15.   575 F.2d at 872, 197 U.S.P.Q. at 790.

re Sarker.[16]

C78-6 *In re* Sarkar, 588 F.2d, 1330, 200 U.S.P.Q. 132 (C.C.P.A. 1978).

The application, entitled "Methods of Open Channel Analysis and Control," involved a technique for mathematically modeling an open channel, *e.g.*, a natural stream or artificial waterway. Sarkar claimed that his method of constructing a mathematical model was capable of accurately providing the flow parameters of a river over a period of time. The model's ability to account for additional complexities was claimed to be the principal advance over more idealized models in the prior art.

The Board of Appeals rejected all claims solely because it considered them not directed to a "process" within the meaning of 35 U.S.C. § 101.[17] There were two distinct rationales for the Board's § 101 rejection. The first involved the interpretation and significance of a step in the claim which included the act of "measuring."[18] The second involved the significance of "post-solution activity" steps.

For the claim involving the act of "measuring," Sarkar sought to meet the examiner's rejection based upon *Gottschalk v. Benson*,[19] as interpreted in *In re Christensen*,[20] by arguing that the measuring step was a novel, nonobvious physical step. The Board rejected this argument, stating that the step was within the art.

For the claims involving "post-solution activity," the Board concluded that:

> [w]hile it is true that the final step in each of these claims makes reference to the mathematical result achieved by performing the prior recited steps, we consider the connection to be so tenuous that the several steps recited in each claim when considered as a whole do not constitute a proper method under the statute.[21]

The C.C.P.A. affirmed, holding that Sarkar's claims were nonstatutory material, since they recited a mathematical "algorithm."

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16. 588 F.2d 1330, 200 U.S.P.Q. 132 (C.C.P.A. 1978). *See* Case C78-6 *infra.*

17. *See* note 3 *supra.*

18. This claims read:

1. A method of constructing a mathematical model of at least a portion of an open channel segmented into at least one reach and in which there is spatially varied unsteady flow and including the existence of at least one gravity wave during a given period of time comprising:

    (a) measuring the cross-sectional dimensions of the channel at a specifically chosen, predetermined number of locations usable for schematizing said dimensions into a rectangularized cross-section for each regularly spaced but arbitrarily chosen distance Δx along the length of the channel irrespective of the chosen value of the interval of time Δt; * * *.

558 F.2d at 133, 200 U.S.P.Q. at 135.

19. 409 U.S. 63, 175 U.S.P.Q. 673, 3 CLSR 256 (1972).

20. 478 F.2d 1392, 178 U.S.P.Q. 35, 4 CLSR 66 (C.C.P.A. 1973).

21. 588 F.2d at 1332, 200 U.S.P.Q. at 136.

"[M]athematical equations expressed in algebraic form, and a technique for solving them are recited in each claim."[22]

C78-7   Synercom Technology, Inc. v. Universal Computing Company, 199 U.S.P.Q. 537 (N.D. Tex. 1978).

Synercom Technology, Inc. ("Synercom") brought an action against University Computing Company ("UCC") and Engineering Dynamics, Inc. ("EDI") for copyright infringement. Synercom is an engineering consulting firm specializing in computerized structural analysis. UCC is a computer company that charges users for computer time, remitting part of its charges to the software owner as a royalty for the use of the program. EDI is an engineering firm competing with Synercom.

Synercom claimed that UCC and EDI infringed its copyrights on the instruction manuals and input formats used with a computer program designed to solve engineering problems in structural analysis.

Synercom had developed a computer program for structural analysis called STRAN. This program was one of the more competitive of the several hundred structural analysis programs available. The STRAN program and the various versions of the instruction manuals were protected by copyright.

EDI developed a structural analysis program, SACS II, to compete with STRAN. EDI knew that for SACS II to be successful in the marketplace, it must be wholly compatible with STRAN; i.e., receive its data input and allow STRAN users to switch to SACS II with a minimum of training and without loss of data accumulated in scores of key-punched cards, called data decks. EDI had obtained a copy of a user's brochure for STRAN and incorporated details of STRAN's input cards and instructions in their SACS II programming manual.

By the time EDI entered the market with SACS II, the relationship between Synercom and UCC had deteriorated and UCC had sought out EDI, anticipating that Synercom would not renew their contract. A new triad was thus born, consisting of UCC, with SACS II being sold by EDI. The SACS II instruction manual distributed by EDI contained exact images of some of the input cards and instructions of STRAN, thereby enabling a customer to use the STRAN input format.

The district court ruled that Synercom's copyright registrations

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22. *Id.* at 1334, 200 U.S.P.Q. at 138. The mathematical expressions of Sarkar's claims were not disclosed in the court's opinion per Sarkar's request. *See* Case C78-5 *supra.*

were valid for the three editions of the instruction manual. Though the court found that the manuals were infringed by UCC and EDI, the formats were found not copyrightable and thus not infringed, because EDI appropriated Synercom's ideas, not the "expressions" of the format. The court reasoned that although it would be "infringement to translate a computer program from, for example, FORTRAN to ALGOL, as it is to translate a novel or play from English to French", the "preparation of a computer program in *any* language from a general description of the problem to be solved . . . is very dissimilar to the translation of a literary work, or to the translation of a program from one language to another."[23] The court thus found that EDI's preparation of a FORTRAN preprocessor program from the descriptions contained in the Synercom manuals did not constitute infringement.

C78-8 Telemed Corporation v. Tel-Med, Inc., 588 F.2d 213, 200 U.S.P.Q. 427 (7th Cir. 1978).

Telemed Corporation brought this action against Tel-Med, Inc. and the Chicago Medical Society for trademark infringement, service mark infringement, and service mark and trademark dilution.

Telemed Corporation uses the word "TELEMED" in connection with a service to hospitals and private physicians involving the computer-analysis of electro-cardiograms by telephone. Telemed Corporation has a service mark for the word "TELEMED" appearing as an "optical font," in a computer recognition style of print or logo.

Tel-Med, Inc. uses the word "TEL-MED" to identify its health care information service, consisting of recorded messages on specific health subjects made available to the public by telephone. Tel-Med, Inc. has a service mark for the word "TEL-MED." Tel-Med, Inc. has never used an "optical font" as its logo.

The district court held for the defendants, finding that the defendants' use of the term "TEL-MED" did not constitute infringement of either the service mark or trademark, and that Telemed Corporation's claim for injunctive relief based on dilution was equally without merit.

The court of appeals affirmed the district court's opinion, reiterating that the attempted demonstration of confusion consisted only of a showing by the plaintiff of "occasional superficial confusion" and most of that was "superficial, trivial, and attributable to the error in the listing of the defendant's program in the Chicago telephone directory and not because of any palming off or unfair

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23. 199 U.S.P.Q. at 546.

competition on the defendant's part."[24]

C78-9 *In re* Toma, 575 F.2d 872, 197 U.S.P.Q. 853, 6 CLSR 824
        (C.C.P.A. 1978).

The patent application, entitled "Method Using a Programmed
Digital Computer System for Translation Between Natural Lan-
guages," involved a method of operating a digital computer to trans-
late from a source natural language, *e.g.*, Russian, to a target natural
language, *e.g.*, English. The method involves three phases: the dic-
tionary look-up phase established the target language meaning of
each word in the source text; the syntactical analysis phase identi-
fied syntactical information from the inflection of the word and the
position of the word within the source text; and the synthesis phase
used the meaning and syntactical information of all of the words of
a sentence in the source text to form a sentence in the target lan-
guage. The application further disclosed that from the time the
source text is converted to machine-readable input data to the time
the machine-readable output data is converted to human-readable,
translation text, the process proceeds totally under the control of a
computer program. During the process, the computer carries out a
series of unthinking, abstract mathematical operations on the ab-
stract values of the text stored in the computer memory.

The Board of Appeals sustained the examiner's rejection of cer-
tain claims on the ground that they were directed to nonstatutory
subject matter.[25] The Board's decision was based on its reading of
Gottschalk v. Benson,[26] and an earlier interpretation of *Gottschalk v.
Benson* appearing in *In re Christensen*.[27]

The Court of Customs and Patent Appeals rejected the Board's
analysis, holding that, in light of *In re Chatfield*,[28] even when the
only novel aspect of an invention is an algorithm, it is not proper to
decide the question of statutory subject matter by focusing on less
than all of the claimed invention. The C.C.P.A. further held that in
determining whether an invention is statutory subject matter, the
term "algorithm" will be utilized to refer specifically to a procedure
for solving a given type of mathematical problem.

Base thereon, the C.C.P.A. ruled that the claims to a method of
operating a computer to translate languages could not be rejected as
pre-empting an algorithm, because translation between natural lan-

24. 588 F.2d at 220, 200 U.S.P.Q. at 434.
25. 35 U.S.C. § 101 (1976). *See* note 3 *supra*.
26. 409 U.S. 63, 175 U.S.P.Q. 673, 3 CSLR 256 (1972).
27. 478 F.2d 1392, 178 U.S.P.Q. 35, 4 CSLR 66 (C.C.P.A. 1973).
28. 545 F.2d 152, 191 U.S.P.Q. 730, 6 CLSR 52 (C.C.P.A. 1976), *cert. denied*, 434 U.S.
875, 6 CLSR 466 (1977).

guages does not involve any direct or indirect recitation of an "algorithm" or of a procedure for solving a mathematical problem *per se*. The C.C.P.A. reversed the Board's decision, ruling that the claimed invention was statutory subject matter within the technological arts.

3. System Procurement

3.1 Purchase Agreements

C78-10 Burroughs Corporation v. Chesapeake Petroleum & Supply Company, 282 Md. 406, 384 A.2d 734, 6 CLSR 782 (Md. 1978).

Chesapeake Petroleum & Supply Company ("Chesapeake") purchased a computer and computer programs from Burroughs Corporation. The back of the sales contract contained fourteen paragraphs. One of the paragraphs waived all of the purchaser's rights to damages under the contract, while another disclaimed all warranties, express or implied. The computer programs were included as an addendum and incorporated into the computer sales contract on the same date.

Chesapeake financed a portion of the purchase price through a third company, Weston Leasing Company ("Weston"). By the terms of the lease agreement dated October 1971, Weston paid the cash balance due to Burroughs, and Chesapeake agreed to lease the equipment from Weston for a period of sixty months.

Burroughs was to deliver the computer, fully-programmed, to Chesapeake by September 1, 1971. Chesapeake did not receive any equipment until mid-October, and the computer did not perform all of the functions specified in the contract. From October 1971 to the spring of 1974, Chesapeake was only able to use the computer to perform simple debit and credit postings. Burroughs attempted, unsuccessfully, to correct the other, defective programs.

During the spring of 1974, Chesapeake stopped using the Burroughs computer and bought another computer, which performed satisfactorily. Chesapeake then filed suit against Burroughs. In counts 1 and 2 of the complaint, Chesapeake alleged that Burroughs had breached the contract and its warranty under the contract. Chesapeake claimed that, in signing the contract, it had relied on prior oral representations made by agents of Burroughs, and on information in Burroughs' sales literature, to the effect that the computer and software would fulfill Chesapeake's needs. Chesapeake also asserted that Burroughs failed to provide equipment and programs adequate to perform the functions listed in the addendum to the contract. In count 3, Chesapeake alleged negligence by Burroughs in designing, programming, and installing the equipment.

Chesapeake amended the initial complaint by adding a fourth count for fraudulent misrepresentations by Burroughs as to the capabilities of the equipment. Chesapeake requested $200,000 in damages on each count.

The trial court awarded Chesapeake $30,000 in damages, consisting of (1) the cost of the computer less its salvage value, (2) the cost of an expert consultant, (3) the value of the useless equipment, and (4) miscellaneous labor expenses. On counts 1 and 2, the court found that Burroughs had breached the contract because the equipment sold to Chesapeake did not perform as represented.

The trial court further held that none of the conditions printed on the reverse side of the sales contract were part of the particular agreement since the first page of the contract stated that the "[t]erms and conditions on reverse side are part of this security agreement." The trial court found that there was no security agreement since Chesapeake financed the purchase through Weston and not Burroughs. Therefore, the court concluded that the waiver of damages[29] and disclaimer of warranties clauses printed on the reverse side of the agreement were not part of the contract. The trial court dismissed count 3 because it found no duty or obligation independent of the contract flowing from Burroughs to Chesapeake and directed a verdict for Burroughs on count 4.

The appellate court affirmed the trial court's decision, holding, *inter alia*, that the printed provisions on the reverse side of the sales contract were not operative since the language on the front of the contract indicated that those provisions were applicable only if the document was a security agreement and that Chesapeake had no financing arrangement with Burroughs. The court further held that parol evidence[30] of oral warranties was admissible to explain

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29. The court also held that it would be unconscionable under the Maryland Commercial Code, Section 2-302 to enforce the waiver provision.

30. [T]he parol evidence rule excludes only evidence of the language used by the parties in making the contract other than that which is furnished by the instrument itself. The rule is also stated to exclude the colloquium or oral negotiations, leading to the very contract, which the parties consummated by reducing it to writing.

The parol evidence rule is founded upon the principle that when the parties have discussed and agreed upon their obligations to each other and reduced those terms to writing, the writing, if clear and unambiguous, furnishes better and more definite evidence of what was undertaken by each party than the memory of man, and applies to exclude extrinsic utterances when it is sought to use those utterances for the purpose for which the writing was made, such writing superseding them as the legal act. The instrument itself is regarded as the best evidence of what the parties intended, and the writing still remains the best evidence of the understanding of the parties, even though, through a defect of form or by reason of some positive provision of law, it cannot have the effect intended for it. No other language is

ambiguities in the construction of provisions of the contract, and that the trial court's finding that Burroughs did not supply the goods as promised and warranted under the contract was *not* clearly erroneous.

C78-11 Huntington Beach Union High School District v. Continental Information Systems Corporation, 452 F. Supp. 538 (C.D. Cal. 1978).

Huntington Beach Union High School District ("School District") invited bids for the purchase of data processing equipment, including an IBM System 370/145 computer system. Continental Information Systems Corporation ("CIS") submitted a bid of $352,915.34. CIS was awarded the contract and was timely notified of this action. By the terms of the contract, CIS was to deliver, install, and have completely operational a 370/145 system by July 31, 1977. Both prior to and after the award of the contract, agents of CIS represented to the School District that CIS had the ability to meet its bid obligations and would deliver the computer system within the three-month period set forth in the bid specifications.

During the next three months, a third party advised the School District that the computer serial number set forth in CIS' bid was not available and that the computer serial number set forth in CIS' revised bid was not in CIS' possession.

On July 20, 1977, CIS informed the School District that it would not meet its bid obligation. Following notification of non-performance, the School District attempted to award the contract to the second lowest bidder, but was informed that that bid would no longer be honored.

On August 4, 1977, the School District rebid the system and awarded the bid to the lowest responsible bidder for $412,340.00. Because of CIS' failure to perform and the necessary delay from rebidding, the School District did not obtain delivery of a 370/145 computer system until October 1977.

The School District brought an action for breach of contract against CIS and its agents involved in the bidding. The district court found that only CIS, and not its agents, could be held liable for damages. The court ruled that the School District was entitled to recover (1) the costs which it had incurred in the purchase of periph-

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admissible to show what the parties meant or intended, for the reason that each has made the instrument the agreed test of his meaning and intention. The rule rests upon a rational foundation of experience and policy and is essential to the certainty and stability of written obligations. It is designed to permit a party to a written contract to protect himself against perjury, infirmity of memory, or the death of a witness.

3 AM. JUR. 2D *Evidence* § 1016, at 151-52 (1967).

eral equipment in anticipation of delivery of the computer and (2) the costs incurred in hiring an additional programmer and reprogramming software for use on the existing equipment.

In entering a judgment of $12,403.06 plus 7% interest in general damages and $9,782.10 plus interest in incidental and consequential damages, the court stated that plaintiff had proven no malice which would support an award of punitive damages and that there was no proof of fraud or negligent misrepresentation on the part of any defendant.

The court did not award all of the damages claimed by plaintiff because it found that the School District should have foreseen the problems with CIS and declared the contract breached at a time when it could have reawarded the contract to the second lowest bidder,[31] rather than waiting until the time for performance had expired and then having to call for new bids.

3.3 Commercial Law

C78-12   Nixdorf Computer, Inc. v. Jet Forwarding, Inc., 579 F.2d 1175 (9th Cir. 1978).

Nixdorf Computer, Inc. ("Nixdorf"), an Illinois Corporation, entered into two installment sales contracts for a computer system with Jet Forwarding, Inc. ("Jet"). The contracts were to be performed in California and both parties agreed that California law was to be applied.

Approximately two weeks after the computer system was shipped to Jet, a Jet employee telephoned Nixdorf to explain that Jet was in financial difficulty and could not pay the balance of the purchase price still due. He advised Nixdorf to repossess the computer system for Nixdorf's own protection. Shortly thereafter, with Jet's consent, agents of Nixdorf repossessed the equipment. Nixdorf subsequently returned the hardware to its inventory of new equipment, without making any effort to separately identify it. At least some of it was ultimately sold to other customers. After repossessing the equipment, Nixdorf made no effort to notify Jet of any subsequent resale.

Nixdorf brought this action against Jet for damages. Nixdorf contended that it was entitled to damages for nonacceptance or repudiation in accordance with California Commercial Code section 2708,[32] which provides that the measure of damages is the difference

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31. By the terms of the Invitation to Bid, the bids did not expire until July 12, 1977.

32. California Commercial Code, Section 2708 provides:

   (1)   Subject to subdivision (2) and to the provisions of this division with

between the market price at the time of tender and the unpaid contract price or, in the alternative, the loss of profits to the seller, whichever is greater.

Jet, on the other hand, contended that it had accepted the goods and taken possession of them and that the repossession by Nixdorf was a realization upon a security interest reserved in the goods under the terms of the contract.[33] Jet further contended that Nixdorf was limited to the remedy of a security interest holder under California Commercial Code section 9504.

The district court entered a judgement for Jet, together with an award of $5,000 in attorney's fees as the prevailing party. The court of appeals affirmed, holding that the purchase agreement provided by Nixdorf reserved a security interest in the goods sold and the repossession of the goods after Jet had accepted and taken possession of them was a realization upon that security interest. The court held, however, that by failing to give Jet notice of resale, Nixdorf was barred from recovering any deficiency under California law.[34]

respect to proof of market price (Section 2723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this division (Section 2710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subdivision (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this division (Section 2710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

33. Two of the paragraphs on the reverse side of the installment sales contract provided, *inter alia*:

2. Purchaser hereby grants to the Seller a security interest and title shall remain with seller on the equipment. . . . This security interest shall not terminate until all sums due under this Agreement are fully paid. . . .

7. If Purchaser shall fail to make payment when due, Purchaser agrees to return equipment to Seller and Seller may without notice or demand and without legal process enter the premises and take possession of said property, retaining as liquidated damages all payments made thereon. . . .

34. California Commercial Code, Section 9504 provides, *inter alia*:

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . . . The proceeds of disposition shall be applied in the order following to

(a) The reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) The satisfaction of indebtedness secured by the security interest under which the disposition is made; . . .

(2) If the security interest secures an indebtedness, the secured party must

3.5 Negligence and Fraud

C78-13 Shivers v. Sweda International, Inc., 146 Ga. App. 758, 247
S.E.2d 576 (1978).

Shivers, a certified public accountant, brought suit against
Sweda International, Inc. ("Sweda"), claiming that he was fraudu-
lently induced into purchasing a computer by an agent of Sweda.
Shivers claimed that the agent promised (1) he would procure an oil
company as a client of Shivers' accounting service, (2) the re-
quested software would be available for the computer by a particu-
lar time following purchase, and (3) installation and operation of the
computer would be "simple and easy." Sweda filed a motion for
summary judgment, which was granted. Shivers appealed.

The Georgia Court of Appeals upheld the lower court, stating
that the facts showed conclusively that Shivers' claim of fraud was
without merit. The court reasoned that, even if the agent's promises
to Shivers had been made with knowledge that they would not be
fulfilled, Shivers could not recover for fraud where he relied on the
statements without exercising ordinary diligence to discovery the
truth. The court further reasoned that the allegedly false represen-
tations of the agent—that the software would be available by a par-
ticular time and that installation and operation of the computer
would be "simple and easy"—were merely unfulfilled predictions or
erroneous conjectures, not actionable in the presence of an indica-
tion that they were made with the intent not to perform them or
with present knowledge that they would not be fulfilled.

C78-14 Triangle Underwriters, Inc. v. Honeywell, Inc., 457 F. Supp.
765 (E.D.N.Y. 1978).

Honeywell develops and sells computer systems. In January
1970, Honeywell's New York office approached Triangle Underwrit-
ers to sell or lease to it Honeywell's new H-110 computer system to
replace the IBM 360/20 computer then used by Triangle. The H-110

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account to the debtor for any surplus, and, unless otherwise agreed, the
debtor is liable for any deficiency.
(3) A sale or lease of collateral may be as a unit or in parcels, at wholesale
or retail and at any time and place and on any terms, provided the secured
party acts in good faith and in a commercially reasonable manner. Unless
collateral is perishable or threatens to decline speedily in value or is of a type
customarily sold on a recognized market, the secured party must give to the
debtor, . . . a notice in writing of the time and place of any public sale or of
the time on or after which any private sale or other intended disposition is to
be made.
This section has been construed in California to preclude the security holder from
any recovery of a deficiency when the holder fails to notify the debtor in writing of a
resale. Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 1009, 104 Cal. Rptr. 315, 321
(1972).

system is a package consisting of both computer hardware and software. On March 19, 1970, Honeywell submitted a written proposal to Triangle for the H-110 system. The written proposal set forth an implementation plan, reciting the steps to be taken to make the system fully operational within 105 days of approval of the proposal.

In early December 1970, Honeywell advised Triangle that the system was fully operational. On December 5, 1970, Triangle elected to purchase the computer system and entered into a sales agreement with Honeywell Information Systems, Inc. ("H.I.S."), a separately incorporated division of Honeywell. The system was installed in January 1971, at which time Triangle discontinued use of its IBM system.

Triangle contended that from the time the system was installed in January 1970 it failed to function effectively, and that various supplied programs had numerous errors in them and did not function as Honeywell had represented. Triangle further contended that Honeywell did not "run a proper parallel system during the change-over period."[35]

After the installation, Honeywell personnel attempted to correct the deficiencies in the programs. They made some modifications in the programs and worked on them at Triangle's premises until sometime in 1972.

Triangle brought this action against Honeywell and H.I.S. on August 14, 1975, for damages for loss of its business as a going concern, loss of profits, and expenses and special damages arising from the purchase of the computer system. Triangle's complaint contained nine counts alleging, in various forms, negligent or fraudulent inducement to enter into the contract, breach of a contemporaneous oral agreement to prepare custom application software, breach of express and implied warranties, negligence and fraud.

Since jurisdiction was based on diversity of citizenship, the forum's (New York) substantive state laws were applied, including the applicable statutes of limitation. Honeywell's affirmative defenses urged, *inter alia*, that the claims were all barred by the Uniform Commercial Code, section 2-725(1), which provides, in pertinent part, that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." This section, applies to "transactions in goods,"[36] and states that a "cause of action accrues when the breach occurs."[37]

Triangle moved for an order striking both affirmative defenses

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35. 457 F. Supp. at 767.

36. U.C.C. § 2-102(1962).

37. U.C.C. § 2-725(2)(1962.)

raising the statute of limitations, on the ground that the system did not consist solely of "goods" within the meaning of the Uniform Commercial Code, but was predominantly "services." In such a case, a six-year statute of limitations would apply.[38] Honeywell and H.I.S. then cross-moved for summary judgment.

The district court concluded that the computer system did not consist primarily of "services." The court reasoned that the agreement with Honeywell "did not contemplate that it [Honeywell] would run a data processing service for Triangle but rather that Honeywell would develop a completed system and deliver it 'turnkey' to Triangle to operate."[39] Since the agreement between the parties was that Honeywell and H.I.S. would deliver a complete computer system on a specific date, breach of contract for sale of the system occurred when they delivered a defective system. In dismissing the complaint, the court ruled that the counts alleging breach of contract and the counts alleging negligence were barred by a four-year and three-year statute of limitations, respectively.

4. Government Regulations of the Computer Industry

4.6 Federal Antitrust and Trade Regulation Laws

C78-15 ILC Peripherals Leasing Corporation v. IBM Corporation, 448 F. Supp. 228 (N.D. Cal. 1978).

Plaintiffs brought an antitrust action against IBM, alleging that IBM's practice of selling its Madrid disk drive unit and head/disk assembly for a single price constituted an illegal tying arrangement. After reviewing the history of disk drive technology, Judge Conti found (1) that the function of the aggregation of drive and assembly was "to provide users with a very large storage capacity that is permanently on line"; (2) that the integration of disk and assembly resulted in cost savings apart from merely reduced sales expenses and the like of any tie-in; and (3) that the drive and assembly are normally sold and used as a unit—even by *plaintiffs*. The court granted IBM a directed verdict.

5. Tort Law

5.2 Negligent Use of Computers

C78-16 Annbar Associates v. American Express Company, 565 S.W.2d 701 (Mo. Ct. App. 1978).

Annbar Associates, a partnership owning the Muehlebach Hotel in Kansas City, was a member of a computerized reservations sys-

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38. CIV. PRAC. § 213(2)(1962).
39. 457 F. Supp. at 769.

tem for hotels ("Space Bank"), operated by the American Express Company. In mid-1973, the hotel experienced a serious "cash crunch" and was unable to pay the bill for the computerized reservation services. The Muehlebach Hotel was therefore placed "off-line" and was ineligible to receive reservations from the Space Bank. During this time, the responses from the Space Bank computer read "NOT AVAILABLE," and the reservation agents were directed to tell prospective hotel clients: "I'm sorry that hotel is not available."

Annbar sued American Express for damages for the injurious falsehood arising out of the alleged misrepresentation to potential hotel customers that the hotel could not accommodate them, when in fact it could. The trial court entered a judgment for Annbar for actual and punitive damages.

The court of appeals reversed and remanded, finding, *inter alia*, that though Annbar's failure to pay the bill for American Express' services may have given rise to a right to cancel the hotel's membership in the computerized reservation service, it did not give American Express the right to provide false information calculated to discourage future transactions between the hotel and its prospective clients. The court held, however, that absent evidence of a spite motive on the part of the reservation agents or evidence of purposeful harm to Annbar, Annbar could recover only if the reservation agents knew that the "NOT AVAILABLE" response on the computer was false, or if the reservation agents acted in "reckless disregard" of the truth or falsity of the "NOT AVAILABLE" response.

5.4 Other

C78-17 Cyborg Systems, Inc. v. Management Science America, Inc., 77 Civ. 2645 (N.D. Ill., filed January 30, 1978), *reprinted in* 1978-1 Trade Cases ¶ 61,927 (1978).

The four-count complaint was filed by Cyborg Systems, an Illinois corporation, charging Management Science America, Inc. ("MSA") and others with the common law torts of slander and intentional interference with prospective economic advantage and with violations of section 2 of the Sherman Act. The gravamen of all four counts was MSA's publication and republication of statements attacking Cyborg's integrity and accusing it of having stolen the computer software payroll system that MSA markets. MSA responded to Cyborg's complaint with a motion to dismiss, or, alternatively, to stay. This motion contested personal jurisdiction and venue and argued that three of the counts failed to state claims upon which relief could be granted.

The district court ruled that there had been the necessary mini-

mum contacts to satisfy the Illinois long-arm statute and due process, because the long-arm statute has been interpreted to include extra-territorial acts which had injurious consequences within Illinois. The court further found that venue was proper because (1) Cyborg contended that the antitrust claims arose in the district, (2) MSA did not state that they would be inconvenienced by litigation in the district, and (3) the injury was suffered by an Illinois corporation, i.e., the claim "arose" in Illinois.

The three claims that were challenged involved various torts and allegations of monopolization and attempts to monopolize in violation of section 2 of the Sherman Act. The court ruled that the tort allegations were sufficient to state a cause of action. The antitrust claims were based on the allegations of defamation and bad faith litigation initiated in a related trade secret case. These claims also charged that MSA occupied a monopoly position in the relevant market—licensing and servicing over fifty per cent of the computer software systems in the United States. The court ruled that the Noerr-Pennington doctrine[40] did not protect MSA from the antitrust charges, since the case could come within the "sham litigation" exception of the doctrine,[41] even though it was the sole case that had been filed. The court further ruled that a stay of the antitrust suit was not appropriate, even though a judicial determination that the trade secrets covering the computerized payroll system had been obtained unlawfully would undermine the antitrust charges.

7. Criminal Law

7.1 Theft of Computer Time or Services

C78-18   United States v. Sampson, 6 CLSR 879 (N.D. Cal. 1978).

Sampson, a former employee of the Institute for Advanced Computation, Inc. ("IAC"), a NASA contractor, and Miller, an employee of IAC, obtained unauthorized use of a United States government computer without the intent to reimburse the government for such use. Sampson used one of his home telephones to gain access to the computer, using the code name "Captain Libra." A NASA investigator discovered from computer printouts that a person using the name "Captain Libra" had used the computer. The investigator then confronted Sampson and Miller with the printouts, whereupon both admitted that these printouts reflected portions of their unauthorized use of the computer. Based upon Sampson's statement

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40. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

41. The rule that an antitrust action may rely on an act of "sham litigation" has been well-established since the Supreme Court's decision in California Motor Trans. Co. v. Trucking Unltd., 404 U.S. 508 (1972).

that he used the computer for an average of six hours per week for thirty-two weeks, a value of $1,924.00 was calculated for the commercial cost of Sampson's computer utilization.

Both Sampson and Miller were indicted for violations of 18 U.S.C. § 641.[42] Defendants moved to dismiss the indictment on the ground that it failed to state a criminal offense, arguing that computer time and computer storage capacity were not "property" within the meaning of the statute.

The district court denied the motions, holding that the consumption of computer time and the use of computer storage capacity were inseparable from the physical identity of the computer itself. The court found the indictment legally sufficient, because the computer time and the use of its storage capacities were "things of value."

7.2 Theft of Information

C78-19 United States v. Seidlitz, 589 F.2d 152 (4th Cir. 1978).

Optimum Systems, Inc. ("OSI"), a computer service company, was under contract to install, maintain, and operate a computer facility at Rockville, Maryland, for use by the Federal Energy Administration ("FEA"). Under the contract, persons working for FEA in various parts of the country could use keyboards at communications terminals in their offices to send instructions over telephone circuits to the computers in Rockville; the computers' responses would be returned over telephone circuits and displayed on the sender's CRT (cathode-ray tube) terminal.

Seidlitz helped to prepare the software installed at the Rockville facility and was responsible for the security of the central computer system. After approximately six months as Deputy Project Director of OSI, Seidlitz resigned his job and returned to work at his own computer firm in Alexandria, Virginia.

Approximately six months later, a computer specialist employed by FEA, and temporarily assigned to the OSI facility, detected an unauthorized intruder who had gained access to the computer system. It was determined that the intruder had gained access by tele-

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42. Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—shall be fined not more than $10,000 or imprisoned not more than ten years, or both; * * *.

18 U.S.C. § 641 (1948).

phone from outside the OSI facility. The telephone company was then requested to trace the call. The telephone company manually traced[43] the call to Seidlitz' Alexandria office, but would not divulge the results of the trace except in response to a subpoena.

The following day, OSI activated a special feature of its computer system, known as the "Milten Spy Function," which automatically records any requests made of the computer by an intruder and any computer responses to such requests. The telephone company was again asked to trace the call when it was suspected that the unauthorized person was using the computer. This trace lead once again to Seidlitz' Alexandria office, though OSI was not so informed.

OSI then advised the FBI of the intrusions and, at the FBI's suggestion, the telephone company conducted two additional manual traces when alerted by OSI. Both of these calls were terminated, however, before the traces had progressed beyond the telephone company's office in Lanham, Maryland, which served 10,000 subscribers. The telephone company then installed "originating accounting identification equipment" in the Lanham office.[44] Shortly thereafter, two calls were made to the OSI computer and were traced to Seidlitz' Lanham residence. The FBI then searched (with a warrant) Seidlitz' Alexandria office, seizing, *inter alia*, a copy of the user's guide to the OSI system and some 40 rolls of computer paper on which OSI source code was printed. Seidlitz' Lanham residence was also searched (with a warrant), where the officers found a portable communications terminal which contained a teleprinter for receiving written messages from the computer, as well as a notebook containing access codes previously assigned to authorized users of the OSI computers.

The indictment against Seidlitz charged him with transmitting two telephone calls in interstate commerce as part of a scheme to defraud OSI of property consisting of information from the computer system.[45]

Seidlitz filed a motion to suppress the evidence seized from his office and residence, claiming that the searches had been invalidated by the use of illegal electronic surveillance to obtain the infor-

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43. A manual trace is accomplished without listening in on the line or breaking into the conversation. It entails a physical tracing of the telephone circuitry backward through the various switching points from the equipment which received the call.

44. This new equipment can automatically and quickly ascertain, without intercepting the contents of any communication, the telephone number of any of the 10,000 area telephones from which any subsequent calls to the OSI computers originated.

45. A motion for acquittal on a third count of interstate transportation of stolen property was granted during the course of the trial.

mation contained in the affidavits supporting the warrants. The district court rejected this motion ruling, *inter alia*, that the information obtained by use of the "Milten Spy Function" was not covered under Section 605 of the Communications Act of 1934[46] and that neither Title III of the Omnibus Crime Control and Safe Streets Act of 1968[47] nor the fourth amendment were violated,[48] since the information was obtained with the consent of a party to the defendant's telephonic communications. The court further ruled that neither Title III nor the fourth amendment were violated during the tracing of the telephone calls, since the number of the telephone from which the calls were placed was determined by a process which did not entail the interception of the *contents* of the communications.

Over defense objections, much of the challenged evidence was admitted at trial, and the telephone traces, as well as the operation of the "Milten Spy Function," were described to the jury. In the face of this evidence, Seidlitz conceded that he had retrieved the information from the computers, but claimed to have acted only out of concern for the security of the OSI system and stated that he intended to present the printouts to OSI officials to prove to them that their security was inadequate. Seidlitz also claimed that the software system that he retrieved—WYLBUR—was not a trade secret or other property interest of OSI sufficient to qualify as "property" within the meaning of the wire fraud statute.[49] Seidlitz was convicted of two counts of fraud by wire.

On appeal, Seidlitz renewed his "illegal surveillance" claims and further argued that the evidence before the jury was insufficient to establish either his fraudulent intent or that the WYLBUR system constituted "property." The court of appeals affirmed, holding that (1) the use of manual telephone tracers and the "Milten Spy Function" did not constitute an invalid electronic surveillance; and (2)

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46. 47 U.S.C. § 605 (1968).

47. 18 U.S.C. §§ 2510 *et seq.* (1968).

48. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV.

49. The federal wire fraud statute, 18 U.S.C. § 1343 (1956), provides that:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

there was sufficient evidence from which the jury could have found that the WYLBUR system was "property," and that Seidlitz possessed fraudulent intent in obtaining the WYLBUR system without authorization.

8. Constitutional Law

8.4 Search and Seizure

C78-20   Frazier v. State of Florida, 362 So. 2d 169 (Fla. Ct. App. 1978).

Frazer and friends were observed by a deputy in an area where there had been disturbances a few nights earlier. The deputy asked for identification and each person showed him his driver's license. They were requested to step from their vehicles and asked their reason for being in the area. The deputy was informed that they were there to meet some friends; however, there were no other persons or vehicles in the area. The deputy then checked each person through the police computer for outstanding warrants. The computer's answer was in the negative. The deputy, however, was not satisfied and, upon frisking Frazer, felt what he believed to be a weapon. On removing the object from Frazer's pants, he discovered what appeared to be marijuana. The deputy then read Frazer his *Miranda* rights whereupon he noticed another bulge in Frazer's pants and removed it. This also appeared to be marijuana. Frazer was then arrested.

Frazer was convicted of possession of more than five grams of cannabis. The district court of appeal reversed, holding that the deputy had no reason to believe that the defendant or the others, prior to the pat-down, would be carrying weapons and that the pat-down of the defendant was therefore not justified and the marijuana inadmissible.

8.5 Due Process

C78-21   Napp v. Dieffenderfer, 364 So. 2d 534 (Fla. Ct. App. 1978).

Napp was a candidate in an election for councilman in Miami Beach. Following the election, he filed a complaint challenging the election. Napp sought, *inter alia*, that the court "(e)nter a declaratory judgment determining and adjudicating the legal status and validity of the new computer-punch card election system."[50] Napp's grounds for seeking such relief were *inter alia*:

> 1) that the system of voting by punch cards is unconstitutional,
> [and] 2) that the election system of disqualifying double-punched
> cards violates the due process under the Florida and United States

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50. 364 So. 2d at 535.

Constitutions. . . .[51]

The trial court dismissed the complaint, holding that the grounds alleged did not support the relief sought. The court's rationale was that Napp failed to allege that the irregularities complained of, if corrected, would have caused a different result in the election. The District Court of Appeal affirmed the trial court's ruling.

9. Evidence

9.1 Admissibility of Computer Output

C78-22 United States v. Cepeda Penes, 577 F.2d 754 (1st Cir. 1978).

Defendant, Orlando Cepeda Penes, and another person were charged with possession of marijuana with intent to distribute. Cepeda was also charged with importing marijuana.

During the trial, the Government sought to rebut Cepeda's denial that he had made admissions during the arrest. One of the admissions Cepeda denied on direct examination was that he had told the arresting agents that he had committed the crime because he owed back taxes in Puerto Rico. On cross-examination, Cepeda testified that he had filed his returns and had paid all back taxes. The Government then called to the stand an employee of the Tax Bureau who testified that a computer search revealed that Cepeda had not filed returns from 1972-1975. A "negative certification"[52] was issued on the basis of this search, and admitted into evidence. Cepeda's counsel objected to this evidence because no notice had been given and because it was hearsay, since no cross-examination of the contributors to the computerized information could be undertaken. The evidence was nonetheless admitted. Both defendants were convicted.

On appeal, Cepeda claimed, as error, *inter alia*, the admission of the "negative certification" issued on the basis of a computer search and the line of questioning relating to it. The court of appeals affirmed the lower court ruling that the "negative certification" was properly admitted into evidence under Fed.R.Evid., Rule 403.[53] The court reasoned that the purpose of introducing the evidence was not merely to affect Cepeda's credibility, but to resuscitate the govern-

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51. *Id.*
52. FED. R. CIV. P. 44(b).
53. Rule 403, FED. R. EVID., provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ment's evidence that Cepeda had admitted the crime and his motive in committing it.

The court reasoned that, as in *United States v. Dioguardi*,[54] the computerized data used to determine tax filings was not complicated, and any prejudice due to lack of notice was minimal. The court rejected the notion, based upon *United States v. Ruffin*,[55] that the use of the "negative certification," based on a computerized public record constituted "indirect hearsay," and should have been excluded under Fed.R.Evid., Rule 803(8)(B) & (C).[56] The court reasoned that the limitation in Rules 803(8)(B) & (C) against the admissibility of public records against a criminal defendant was not contained in Fed.R.Evid., Rule 803(10),[57] which permits a "negative certification" to be offered into evidence. The evidence was thus admissible under Rule 803(10).

C78-23   United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978).

Ruffin was convicted on several counts of federal income tax evasion for filing false and fraudulent personal and corporate income tax returns. On appeal, Ruffin urged, *inter alia*, that the district court erred in admitting into evidence an IRS computer printout, which allegedly contained a coded notation that Ruffin had, at some indefinite time in the past, contacted the IRS and stated to some unidentified IRS official that his business, Rugore Associates, was not required to file a corporate income tax return for 1972. Dur-

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54.   428 F.2d 1033, 1038 (2d Cir.), *cert. denied*, 400 U.S. 825 (1970).

55.   575 F.2d 346 (2d Cir. 1978). *See* Case C78-23 *infra*.

56.   FED. R. EVID., Rule 802(8)(B) & (C) provide:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
* * *

(8)   Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

57.   FED. R. EVID., Rule 803(10) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(10)   Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

ing the trial, Ruffin objected to the introduction of the printout only on the basis of irrelevancy. On appeal, Ruffin claimed as a ground for error that the proffered evidence was hearsay. Though Ruffin did not assert this "specific ground of objection" at trial, the appellate court stated that the IRS computer printout could not fit within any of the hearsay exceptions, and was therefore inadmissible against Ruffin in a criminal proceeding. The court found, however, that under the circumstances, the admission of the printout was "harmless" error because the printout was introduced solely to show that a corporate tax return for Rugore Associates had not been filed, and Ruffin was not convicted of failing to file such a return.

C78-24   Hamilton Music, Inc. v. York, 565 S.W.2d 838 (Mo. 1978).

Hamilton Music, Inc. ("Hamilton") filed a three count suit arising from a franchise agreement for a retail music store and related business dealings between the parties.

The trial court ruled in favor of defendant York. Hamilton appealed. Among the claims of error on appeal was the trial court's refusal to admit into evidence a "business record" offered by Hamilton under Missouri law.[58] A Hamilton employee testified that it was a computer print-out prepared by Westinghouse Credit Corporation, a stranger to the litigation, rather than by Hamilton, and that this printout had been retained in Hamilton's files as part of its business records.

The court of appeals affirmed the trial court holding that the computer print-out failed to qualify for admission into evidence as a business record because no particularities or even generalities were offered as to the time, mode and manner of its preparation by its "custodian or other qualified witness."

10.   Procedure and Discovery

C78-25   Equal Employment Opportunity Commission v. Carter Carburetor, Division of ACF Industries, Inc., 577 F.2d 43 (8th Cir. 1978).

The Equal Employment Opportunity Commission ("EEOC") brought this action against Carter Carburetor, a Division of ACF Industries, Inc. ("Carter"), and several labor unions, alleging that the

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58.   A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

MO. REV. STAT. § 490.680 (1969).

defendants had discriminated on the basis of race with regard to hiring, promotion, apprenticeship training, job classifications, and discharge of certain employees.

This action was plagued with discovery problems. One of EEOC's two sets of interrogatories addressed to Carter sought detailed information about Carter's computer equipment, including locations of the computers, programming information, and computer capabilities. Carter objected to these interrogatories as irrelevant, burdensome, oppressive and requesting confidential and privileged trade secrets. The district court denied EEOC's motion to compel answers to these interrogatories. EEOC then revised the interrogatories, narrowing their scope to information about the equipment used for the input, storage or retrieval of personnel information, and the maintenance of these computer files. Carter again objected to these interrogatories as being irrelevant and as requesting privileged information. The district court also denied EEOC's motion to compel answers as to these interrogatories. The court of appeals did not rule on the propriety of these interrogatories, but merely mentioned them as being one of the discovery problems in the case.

C78-26   Oppenheimer Fund, Inc. v. Sanders, — U.S. —, 6 CLSR 848 (1978).

Sanders and others brought a class action under Fed.R.Civ.P., Rule 23(b)(3), on behalf of themselves and a class of purchasers against the Oppenheimer Fund, Inc. ("Fund"), the corporation managing its investment portfolio, and a brokerage firm. The complaint alleged, *inter alia*, that the defendants, other than the Fund, had violated federal securities laws by issuing or causing to be issued misleading prospectuses and annual reports about the Fund. Recovery was requested in the amount by which Fund shares had been overvalued.

Plaintiffs sought to require the Fund's transfer agent to compile a list of names and addresses of all members of the class, so that notice could be sent as required by Fed. R. Civ. P., Rule 23(c)(2).[59] The proposed class, consisting of all persons who had acquired shares during a particular time span, numbered approximately 121,000 persons of whom approximately 103,000 still held shares.

Deposition testimony of the transfer agents' employees indicated that compilation of the requested list would entail manual

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59. In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.
FED. R. CIV. P. 23(c)(2).

sorting of a great many records, keypunching 150,000 to 300,000 computer cards, and creating several new computer programs. The cost of this compilation was estimated at $16,000.

In light of this information (and the possibility of plaintiffs' responsibility for the cost, based upon the decision of the court of appeals in *Eisen v. Carlisle & Jacquelin*[60]), plaintiff moved to redefine the class to include only those persons who purchased shares during the time span and still held those shares. The district court agreed with the defendants' objection that this would arbitrarily exclude 18,000 former Fund shareholders. The Court also rejected plaintiff's proposal that notice be included in a regular fund mailing, since it would also reach 68,000 shareholders who were not class members, with possible ill effects on the Fund. The district court did hold, however, that the cost of compiling the list of class members was the responsibility of the defendants.

A divided panel of the court of appeals reversed the order of the district court insofar as it required the defendants to bear the cost of the compilation, holding that the identification of class members is an integral step in notifying them, and that this responsibility was to be borne by the plaintiff. On rehearing *en banc*, however, the court of appeals reversed the panel, holding that plaintiffs could obtain the names through the federal discovery rules, and that the district court had not abused its discretion under Fed.R.Civ.P., Rule 26(c),[61]

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60. 479 F.2d 1005 (2d Cir. 1973).

61. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion.

FED. R. CIV. P. 26(c).

which protects parties from "undue burden and expense" in complying with discovery requests.

On certiorari, the United States Supreme Court reversed and remanded, holding, *inter alia*, that it was Fed.R.Civ.P., Rule 23(d),[62] and not Rule 26(b)(1),[63] that empowered the district court to direct the defendants to help representative plaintiffs compile a list of class members. The Court also held that the district court had acted within its authority under Rule 23(d) in requiring the defendants to assist in the identification of class members, since the only means of identification was by reference to the records kept by the transfer agent, and the defendants apparently had control of those records.

The Supreme Court found, however, that the district court had abused its discretion by requiring the defendants to bear the expense of the transfer agent's compilation. The Court reasoned that when the burden of extracting information from a defendant's computerized records is substantially the same for either party, the plaintiffs should bear the expense of programming, since it is the plaintiffs who seek to maintain the suit as a class action. When there is significant cost in extracting the information from the defendant's computerized records, the proper test is whether the cost

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62. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.
FED. R. CIV. P. 23(d).

63. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
FED. R. CIV. P. 26(b)(1).

is "substantial," not whether it is modest in relation to a party's ability to pay. The Court found the estimated $16,000 cost "substantial" and ruled for the defendants, stating that ". . . we do not think a defendant should be penalized for not maintaining his records in the form most convenient to some potential future litigants whose identity and perceived needs could not have been anticipated."[64]

C78-27 United States v. Fensterwald, Misc. Action No. 75-231 (D.C. Cir., filed February 21, 1978), *reprinted in* 1978-1 U.S. Tax Cases ¶ 9245 (1978).

This case involves efforts by the Internal Revenue Service ("I.R.S.") to subpoena defendant Fensterwald's partnership documents and records of 1973 for an audit, and the efforts of Fensterwald to quash the summons and extend discovery.

On February 19, 1976, the district court ordered enforcement of an I.R.S. summons and denied Fensterwald's original motion to quash. Fensterwald appealed on the grounds that his activities in the public sector, including employment with several Congressional investigative committees, had removed him from the status of an ordinary taxpayer, and that he was entitled to establish that the I.R.S. had acted in bad faith. The court of appeals remanded the case for "limited discovery as to how [defendant's] name came to be selected for this special audit,"[65] since no discovery of that nature had been allowed by the district court. The court ordered that Fensterwald be allowed to engage in "discovery procedures deemed appropriate by the District Court. . . ."[66]

On remand, the district court allowed Fensterwald to serve interrogatories. Fensterwald filed one set of ten interrogatories. The first five questions requested explanatory information regarding the Taxpayer Compliance Measurement Program and the way in which the computers in this program select names, such as defendant's, for audit. The second set of five questions addressed the issue of whether the I.R.S. had engaged in any harassment of Fensterwald, and requested that the I.R.S. identify all files that it maintained on Fensterwald and to list those persons involved in preparing the interrogatory answers.

The I.R.S. answered Fensterwald's ten interrogatories. There was no dispute as to the sufficiency of the I.R.S.'s answers to the first set of questions, relating to the Taxpayer Compliance Measurement Program and the way in which the computers in this program

64. — U.S. —, 6 CSLR at 862.
65. 553 F.2d 231, 232 (D.C. Cir. 1977).
66. *Id.* at 233.

selected names for audit. Fensterwald, however, contended that the answers to the second group were insufficient. The district court rejected Fensterwald's argument, denied his motion to quash the summons, and granted the I.R.S.'s renewed motion to enforce the subpoena.

C78-28 Management Science, Inc. v. Wilson Manufacturing Company, 451 F. Supp. 963 (E.D. Wis. 1978).

Wilson Manufacturing Company, a Texas corporation, contracted with Management Science, Inc. ("MSI"), a Wisconsin corporation, for the preparation of certain computer programs. MSI brought an action against Wilson in Wisconsin to recover damages under the contract.

Wilson moved for dismissal on the grounds that the court lacked jurisdiction, and that it was not subject to service under the Wisconsin long-arm statute. Wilson claims that the contract was executed in Texas, that it had no place of business in Wisconsin, and that its contacts with Wisconsin were limited to: (1) two Wilson employees trained at a 3-day "User's Conference" in Wisconsin in September 1975, and (2) the payments required under the contract being mailed from Texas to Wisconsin.

MSI, however, claimed that the court had jurisdiction since the computer programs were developed in Wisconsin and Wilson purposefully availed itself of the privileges and protections of Wisconsin law when it "intentionally entered into a contract which it knew would cause certain consequences in Wisconsin. . . ."[67] The district court ruled for Wilson, reasoning that Wilson's contacts with Wisconsin were too isolated to permit the exercise of jurisdiction under Wisconsin law.

12. Labor Law

C78-29 *In re* Boston Police Patrolmen's Ass'n., 6 CLSR 869 (Mass. 1978).

The Boston Police Patrolmen's Association ("Association") filed a petition for clarification with the Massachusetts Labor Relations Commission ("Commission"). The petition alleged that the Association had in its possession certain computer generated overtime lists prepared for the Boston Police Department, which indicated that some patrolmen were either assigned to the Special Investigations Unit ("SIU")[68] of the Boston Police Department or had performed

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67. 451 F. Supp. at 964.

68. The Special Investigations Unit of the Boston Police Department is an internal, anti-corruption unit which was organized for the purpose of investigating allegations of police misconduct. In a prior case, the Commission excluded SIU employees

overtime services for that unit. The petition requested that the Commission investigate the employment status of these patrolmen and determine whether they were employed by SIU or performing services for SIU.

The Commission determined that a routine computer print-out was issued which listed the month's overtime hours of police officers assigned to various units in the Police Commissioner's office. This two page print-out contained the names of some patrolmen who were assigned to the Planning Research Division. Solely because of a computer programming error, both pages of this print-out were labeled "Prepared for Special Investigation Unit," when they should have been labeled "Prepared for Commissioner's Office." The error was noted and corrected approximately two months later. No further notice was taken of the computer error until the Association came into possession of photocopies of the mistakenly labeled computer print-outs a year later. At this time, the patrolmen on the list were subjected to some harassment. Consequently, the petition for clarification was filed.

The Commission found that the heading, "Prepared for Special Investigation Unit" affixed to the computer print-out was erroneous and the result of a programming error. The Commission further found that the listed patrolmen should not be excluded from the collective bargaining unit of the Association, since all testimony demonstrated that the print-out was in error, the patrolmen were not assigned to the SIU, and they were neither managerial nor confidential employees of the Police Department.

13. Computer Use in the Legal Profession

13.1 Computer-Assisted Legal Research

C78-30 Equal Employment Opportunity Commission v. Eastex, Inc., 16 F.E.P. Cases 1062 (E.D. Tex. 1976), *vacated and remanded*, 16 F.E.P. Cases 1063 (5th Cir. 1978).

The Equal Employment Opportunity Commission ("EEOC") filed a motion to compel compliance with and to modify a consent decree and application by Eastex for attorneys' fees and costs. The court denied EEOC's motion and awarded Eastex its attorneys' fees and costs, including computer-assisted legal research expenses in using the LEXIS system.

On appeal, the award of attorneys' fees and costs was vacated and remanded, since the district court did not indicate the legal test

from the collective bargaining unit represented by the Association, since they spend substantially all of their time investigating other police officers, and their investigations might result in discipline or prosecution of those police officers.

it had applied in awarding attorneys' fees to Eastex and the district court's order did not contain sufficient facts to resolve the legal contention of either party on appeal.

C78-31 Husky Oil Company v. Department of Energy, 447 F. Supp. 339 (D.C. Wyo. 1978).

The Department of Energy ("DOE") issued a final administrative order denying Husky Oil Company's ("Husky") application for an adjustment in the standard of exception from the crude oil entitlement program under 10 C.F.R. § 211.67. Husky sought injunctive relief from the DOE order. Cross motions for summary judgment were filed.

In the heat of argument during the trial, DOE's counsel "broadly hinted that the Temporary Emergency Court of Appeals ("TECA") would eventually find for DOE."[69] The court stated that:

> We are not unaware that 84 percent of the cases decided by TECA (as shown by Tenth Circuit LEXIS information) have held for the government. But that does not give DOE a bureaucratic license to ignore the mandate of Congress, the department's own rules and regulations and the evidence of this case.[70]

The court issued the injunction, granting Husky's motion for a summary judgment and denying DOE's motion for a summary judgment.

16. Taxation

C78-32 Honeywell Information Systems, Inc. v. Maricopa County, 118 Ariz. 171, 575 P.2d 801 (Ariz. App. 1978).

Honeywell Information Systems, Inc. contended that the Maricopa County Assessor overvalued thirty-nine items of computer equipment for 1973 taxes by including intangibles such as computer programs, classroom instruction and support engineering services in the overall valuation. Honeywell paid the taxes under protest and appealed the assessment to the State Board of Property Tax Appeals ("Board"). The Board upheld the valuation fixed by the Assessor. On appeal to the Superior Court, the court affirmed the Board's ruling.

The court of appeals reversed and remanded, holding that Honeywell, which had one "bundled" price for its hardware and software, was knowingly and systematically discriminated against by the Assessor in the valuation of Honeywell's computer equipment, since other computer companies, who had "unbundled" prices, were not assessed for their software. The court further held

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69. 447 F. Supp. at 349.
70. *Id.*

that computer software is intangible property and, as such, should be excluded in determining the value of tangible computer equipment. The court concluded that a valuation by taxing authorities based on a bundled catalog list price is excessive when it includes software, and that in arriving at a determination of the fair market value of computer equipment, discounts from the catalog price must be considered.

C78-33 Oates v. County of Sacramento, 78 Cal. App. 3d 745, 143 Cal. Rptr. 337 (1978).

Oates owned real property leased to the county superintendent of schools for administrative purposes. A portion of the space was used by the superintendent to store educational tapes and to house a print shop and computer data processing center. Some of the educational tapes and some of the computer time were rented out to private schools. Oates sued for the refund of taxes paid on building space leased to the superintendent, arguing that under the California Constitution,[71] the property was exempt from property taxation.

The trial court ruled against Oates on the ground that the property was *not* exclusively used for the purpose found in the exemption, but its use was only incidental to the public school system. The court of appeal reversed and remanded for apportionment proceedings, holding that the term "exclusively" includes incidental as well as primary uses; such incidental use, however, must be directly connected with, essential to, and in furtherance of the primary use. The court further held that the extent of the nonpublic use of the computer was *de minimis* because it serviced school districts in Northern California, the State Department of Education, and the Chancellor's Office of the Community Colleges and because private users paid for only three percent of the computer time.

C78-34 Straughn v. Thompson, 354 So. 2d 948 (Fla. Ct. App. 1978).

Thompson's 1974 tax bill contained a "computer error," which omitted a zero from the stated assessed value of the improvements on Thompson's property. After Thompson's payment of the 1974 tax, the error was discovered and additional taxes were back-assessed.

The trial court held invalid the tax assessor's correction of the computer error in the property tax bill and his back assessment of additional taxes. The court of appeal reversed, ruling that the action of the tax assessor was valid.

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71. CAL. CONST. art. XIII, § 3(d) provides, *inter alia*:

The following are exempt from property taxation:

 * * *

 (d) Property . . . used exclusively for public schools. . . .