THE SOFTWARE LEGAL BOOK

Paul S. Hoffman

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About the author. . .

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A	Employee Confidentiality Agreement
B	Disclosure Agreement with Consultant (covering handling and return of confidential information)
C	Consulting Agreement (provisions covering confidential information, competitive activity and ownership of work product)
D	Uniform Commercial Code § 2-313, 314, 315, 316 and § 2-719
E	Consumer License Agreements
F	Permanent License Agreement (and Equipment Sales Agreement)
G	Software Maintenance Agreement
H	Extended Software Support Agreement
I	Copyright Form TX
J	Selected Portions of the Copyright Law and Regulations
K	Uniform Trade Secrets Act (substantive portions)
L	A Software Distributorship/Marketing Form
M	Inter-related Distributorship Agreements, including foreign [Western Electric UNIX 7th Edition]

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I. A SOFTWARE PRIMER FOR LAWYERS AND MANAGERS

Introduction

This section of the book is intended to provide the non-computer person with a basic introduction to the software area. These 'primer' materials introduce some commonly used jargon and emphasize some characteristic aspects of software, programmers and programming that affect contract formation and fulfillment.

INTRODUCTION

This book is written for people who buy, sell, use and develop software and their lawyers. It is hoped that this book may serve as a useful checklist or reference in connection with licensing proprietary software and other software-related contracts. The book is not intended to be a substitute for legal advice with respect to your particular contracting situation and problems. If this book results in better contracts and less litigation, it will have accomplished its primary purpose.

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Croton-on-Hudson, N.Y.

PART I

A SOFTWARE PRIMER FOR LAWYERS AND MANAGERS

A. Programs and Programming

A computer program is a series of steps or instructions that cause a computer to perform some useful function. The writing of programs is perhaps more of an art than a science. And even when a program is nominally 'completed', some amount of future program maintenance will be required. (See the section on software maintenance, I.D below).

1. Development of a Program

Program development typically includes the following steps:

- definition of the requirements of the program - kinds of input and expected output (these requirements are developed either by the user or by the user in conjunction with the vendor)
- preparation of a program flowchart showing the relationship of the various inputs, processes and outputs. (An outside vendor will do this in consultation with the user)
- writing of the actual program
- testing and debugging of the program
- preparation of user operating instructions for the program
- completion of documentation of the program to allow for easy maintenance
- maintenance of the program by either user or vendor

2. Causes of Delay

It is clear from the above description that the vendor does not (and indeed can not) control the entire process. The user plays a substantial role in defining the requirements - and often in redefining the requirements as work proceeds.

Programs generally take longer to write and debug than originally anticipated. It is not unusual to find a program requiring three times as much time to complete as originally estimated. Some particular factors that can blow a time schedule skyhigh include the following:

- the user changes the requirements after work has commenced
- computer hardware is not available for testing when needed
- more computer memory or faster machines are required then originally estimated
- the programmer's services are needed, from time to time, to fix earlier programs or to work on other projects
- the programmer gets sick or leaves the firm or develops a bad relationship with the user
- the amount of work required to prepare the program was underestimated

Any of the above can cause serious delay in providing a debugged operating program. The most common cause is the last one - that of simply underestimating the amount of time necessary to prepare and debug the program.

3. The Difference Between a Program and a Package

Although no two particular instances are exactly alike, a general rule of thumb might be that a well-documented package costs about three times as much to prepare as a program to accomplish the same purpose. The additional expense (and time) involved in developing a package is largely caused by the greater amount and higher quality of the documentation and the building in of some degree of flexibility to allow the program to be used by different customers. For example, the original program customer required reports in a particular format but the packaged program allows a choice of several formats.

B. Source and Object - What Do They Mean?

1. In General

Today it is rare to have programmers write programs in the actual codes which cause the computer to perform. Over a period of years a number of programming 'languages' have been developed - and programs are usually written in these languages. These languages include FORTRAN (a scientific programming language), COBOL (a business-oriented language), and APL (which stands for "A Programming Language"!), to name but a few. There are so many different programming languages available that it would require many pages in this book just to list the more significant ones with a one-line description of each.

A program written in a programming language (such as COBOL) is written in English-like 'source' code. A computer uses the source code program to prepare its own machine language operating instructions - called the 'object' program. The object code program consists of the machine language instructions that actually cause the computer to do useful work. One source code instruction may be exploded by the computer into a number of object code instructions.

One characteristic of source code is that it has usually been garnished with descriptive 'comments'.

Comments embedded in a source program are notes made by the programmer when writing the program on functions of particular parts of the program or describing kinds of data. These comments are of substantial help to the programmer both in debugging the program and in making future changes or modifications to the program.

Object code is extremely difficult to work with in terms of making changes or alterations to programs. Changes are usually made to source code which is then used to produce fresh object code.

2. Copying and Modification Aspects

When a software vendor distributes object code it is with the knowledge that it is possible for the user to copy it but not possible, as a practical matter, for the user to modify or disguise it. Proof of unauthorized copies can be as simple as comparing two object programs to show that they are identical.

On the other hand, source code can be easily modified. When source is released by the vendor, problems in detecting and proving unauthorized use become more difficult. An ingenious programmer with access to source can discover the methods used in the program and use those methods to prepare a competitive product. It is also possible for a programmer to modify source code in an attempt to disguise the origins of the modified program.

3. Maintenance Aspects

Another definitional aspect of source versus object lies in the handling of future software maintenance. If only object code is furnished to the customer, the customer must rely upon the vendor for maintenance. If source code is furnished to the customer the customer has, at least theoretically, the ability to maintain the software himself.

C. Documentation - What Does It Mean?

Documentation includes written records of how a program was constructed, what the program does and how to use it. The term 'documentation' is often used in a broad sense to include the following:

User Documentation

- Written instructions for input operators as to how to key input data.
- Written instructions guiding the computer operator in how to load and run the program and how to handle exceptions (e.g. when the program rejects data as being in the wrong format, etc.).

System/Program Documentation

- Functional or 'system' flowcharts showing in outline form how the system works.
- Program flowcharts that outline each program (and which probably served to guide the programmer in writing the program).
- Listing of the 'source' code.

Packaged software usually comes with either good 'how to operate' documentation or a respectable level of instruction for operators, input people and the like. In any event, adequacy or inadequacy of operating documentation is quickly apparent to the user. Not so readily apparent is the quality of the documentation relating to the internal workings of the program - the

documentation 'road map' needed by the programmer when correcting problems and in making changes (or improvements) to the program.

In general, there is great gap between the desired standard of documentation for systems and programs and the level of documentation actually achieved. It is common for programmers to defer the bulk of the desired (or required) documentation until the particular program is debugged and operating. At that time, the programmer may complete documentation of the program - or that programmer may be assigned to writing another program leaving completion of the documentation on the first program to some future time!

The industry standard for good documentation is considerably higher than actual practice. Software vendors can (and do) get into trouble by promising a level of documentation that they do not, in fact, achieve.

D. Software Maintenance

1. In General

In the discussion of programming above, it was assumed that once a program is written to perform a certain task it will continue to perform that same task in that same way - in other words, it will be consistent. Even if there is a mistake built into the program it will make the same mistake consistently! In the real world, however, the environment in which the program exists is not perfectly consistent. Some of the things that may affect how a program continues to operate include:

- A new keyboard operator may discover a new way to make an error.
- The hardware environment may change through the addition of different kinds of terminals or other peripherals.
- The software environment may change - for example, the hardware manufacturer may correct or improve the operating system software.
- The user requirements may change - for example, new business activities may require minor or major changes in the program.
- The philosophical environment may change to require greater use of communications.
- The size of files may increase over time and cause 'latent' bugs to become active.

'Software maintenance' is usually taken to include not only fixing bugs but also making minor changes or

improvements to the programs and, to some extent, the supplying of enhancements or new program features.

2. Bugs

From the viewpoint of the software user the most basic maintenance operation is that of bug fixing. While bug fixing is most important during the developmental or early operational stages of a particular chunk of software, bugs continue to crop up from time to time over a period of many years in software of any complexity. Human ingenuity in uncovering latent bugs in future years seems to be almost unlimited! New bugs are discovered in programs that have been regarded as highly stable over a period of years. Of course, with the passage of time, the finding of new bugs becomes less frequent - and usually less serious.

It should also be noted that program maintenance in and of itself may be the source of new bugs. It is possible (even common) to fix one problem and, by so doing, create another. Some computer users, who are either cynical or sophisticated depending on your point of view, quote the old adage "If it works - don't fix it!"

These software users do not ignore the importance of program maintenance, they just inhibit the amount of changing going on as a means of obtaining greater program stability.

The ability to fix bugs that pop up in a program requires:

- programming skill;
- some knowledge of what the program is suppose to be doing;
- a knowledge of what the effects of the bug are;
- the 'source' code for the program and
- either adequate documentation of the program (see the comments on Documentation above) or a knowledge of the 'folklore' of the program by having been involved in its original creation and subsequent changes.

Often it is possible to find a way to work around a bug. For example, if the problem only appears when two different kinds of operator activity are going on at the same time, it may be possible to avoid the bug by making sure (administratively) that those two activities are not performed concurrently.

It should be noted that a good computer operation includes the administrative effort to make sure that bugs are documented as fully as possible. There are few things that can cause more frustration all the way around than a bug that refuses to reappear for the software maintenance people!

3. Improvements and Enhancements

Improvements and enhancements may be generally thought of as things which either improve or extend the

capabilities of the program. Obviously, a program may be garnished with enhancing functions to the point where only a small part of the overall program is in the original state. For this reason, most software vendors are unwilling to give a blanket commitment to furnish future enhancements but rather insist on retaining control over what improvements or enhancements are 'given free' to the customer as part of a software warranty or in connection with a maintenance contract.

4. Patches and New Versions

It is fairly typical for a software vendor to send out frequent 'new versions' of the program to customers during the first year or so of the program's life. With any luck, the vendor has made as thorough a check as possible that the new version works the same as the old version.

Each new version will include fixes of some known bugs and may include some improvements in the manner of operation based upon customer feedback. During the early years of a program, bugs may be fixed temporarily by means of a 'patch' which may be keyed into the program (without understanding it) by the local installation personnel each time the program is loaded. The next 'new version' from the vendor will incorporate these

patches so that they no longer need to be keyed in or entered individually when the program is loaded.

A sophisticated user when first trying a new version will make sure that:

- the old program is retained intact until the new version has thoroughly proved itself (i.e. that the fixing of old bugs has not created new bugs) and
- the basic data files (if any) associated with use of the program are retained with enough backup that, if and when the new version explodes, it will be possible to at least catch up to date using the old program.

At the risk of being somewhat redundant, it is not unknown for a vendor-supplied patch or new version to cause worse problems than the problems supposedly corrected!

On balance, it is usually better for the software user to stay up to date with each new software version (while exercising appropriate caution). Even though there may be occasional painful experiences when a new version causes problems it is usually better to take those problems as they arise rather than to end up with an obsolete working program that is different from everybody else's and that nobody remembers how to fix or improve.

5. Software Maintenance

Software maintenance charges are usually calculated

out, by the vendor, to have some relationship to the purchase or license cost of the software. If the software is leased, maintenance may be included in the lease charges. Many software vendors simply do not know how to charge for software maintenance and therefore apply some arbitrary rule of thumb - e.g. 1% of the (one-time) software license fee as a monthly maintenance charge for a $100,000 chunk of software would be $1,000.

Although many software vendors still use maintenance pricing based on a percentage of the permanent license fee, there is a healthy trend toward pricing maintenance services on a more rational basis. Maintenance pricing should depend on the requirements of the particular chunk (or sub-chunk) of software and the level of support needed by the customer.

Suppose the vendor sells a permanent license to the user, the license covering the following:

1. A basic, stable, well-documented package.
2. An enhancement module (for which this is the first customer).
3. A third party program sub-licensed by the vendor.

Even without assigning numbers to the above, it is clear that a percentage of the license fee doesn't relate well to maintenance. What does provide a rational basis for software maintenance pricing is a combination of:

- projected actual maintenance requirements;
- contract language that both establishes and limits the vendors maintenance responsibility; and
- treatment for other expenses such as travel and communications.

From the software user's point of view, almost any maintenance cost may appear reasonable compared to the cost of doing his own maintenance of sophisticated packaged software. Probably the most significant point in connection with software maintenance is not the amount of the charge but rather competence and responsiveness of the vendor and being able to get a good understanding of just what kind of services will be furnished by the vendor.

Whether you are a computer user or lawyer to a computer user, the whole maintenance contracting picture assumes a different complexion if the software is going to be of the 'you bet your company' kind. Computers are used in many sensitive applications, even in substantial companies, where a software failure can practically shut a company down.

II. PROTECTING THE PROPRIETARY INTEREST IN SOFTWARE

You have a particular program or a set of programs that you regard as proprietary. Your investment in these programs may be large (or small) and may have been made intentionally (or unintentionally). In any event, the programs represent an asset and, by making them available to more than one user you may be able to make more money and able to provide (or use) a more polished 'product' than could have been prepared for any single user.

As with any valuable asset, you are concerned about security. Even if the software is embedded in a turnkey system or a piece of dedicated equipment, it represents an asset with value. If someone gives your software away or steals it you may merely lose a sale - or you may lose a significant portion of your business.

Modifications and enhancements to proprietary software present their own proprietary rights problems. And there are grey areas in determining just who has the right to license others to use software.

PART II

PROTECTING THE PROPRIETARY INTEREST IN SOFTWARE

A. Choosing a Protection Route - In General

There is no single answer on the best way to protect software - software is here used in the broad sense to include documentation, operator manuals and other user-oriented materials. Copyright is the best course for user-oriented materials (such as operator manuals) even though the computer programs are usually better protected through the trade secret route. Inexpensive, widely-distributed software is not a good candidate for trade secret protection - despite the disadvantages of copyright protection for software, copyright may be the only available protection.

1. Trade Secret Protection

Trade secret routes for protecting the software include:

- o using the software only at a (secure) installation which you control - that is, operate as a service bureau;
- o selling term or permanent license agreements with contract provisions binding the licensee to protect the software as 'trade secret' information; and
- o same as directly above but with additional mechanical restrictions - such as furnishing only object code to licensees.

Assuming that you do not wish to stay merely in a service bureau kind of business but want to license others to run the software on their own systems you must choose between a public kind of protection (patent or copyright) or a private kind of protection (trade secret). In actual practice, the choice is between trade secret and copyright

for most software. Trade secret can be used to protect ideas, methods and techniques. Copyright does not protect ideas, methods and techniques. As a result, trade secret protection is better if it is available.

2. Copyright Protection

Computer programs are copyrightable - any doubts should have been laid to rest by the December, 1980 amendments to the copyright law. A definition of a "computer program" was added to Section 101 and Section 117 was revised to limit exclusive rights in computer programs (both sections are quoted in Appendix J).

The question for the software proprietor is not whether to use copyright protection but is rather the question of how much copyright protection to use! As is pointed out in the following section (Part II, B), some elements of software documentation, such as user guides, should be protected by copyright. The question of whether to rely upon copyright for protection of the actual source or object programs is another matter.

Copyright protects the particular expression only. Use of the copyright mechanism for software protection places the information (including ideas, methods and techniques) in the public domain - free for anyone to use!

3. Patent Protection

Patent protection may be available for software that meets patentability standards (including novelty). Recent Supreme Court decisions do not say that computer prograns

are patentable - they merely say that the presence or absence of a computer program should not affect whether or not an invention is patentable. In other words, the presence or absence of computer programs should be ignored when looking at patentability.

There are a number of reasons why patent is not a very good way to protect most software:

- obtaining a patent is an expensive, uncertain and time-consuming process that typically takes two years
- a patent destroys trade secret protection on the disclosed information - and the patent disclosure must usually be quite complete
- patents are not the final absolute grant that most laymen believe them to be - in fact, more than half the infringement cases find the patent to be either invalid or uninfringed
- all litigation is expensive - but patent litigation has been referred to as "the sport of kings"

As a practical matter, patent protection will continue to be worth considering for protection of computerized equipment or machinery or for protecting other 'dedicated' types of application.

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B. Copyright

The Copyright Act of 1976 became effective January 1, 1978. The new law made a number of significant changes - including a dramatic change in just how statutory copyright is obtained. In addition, the new law eliminated "common law" copyright, simplified the copyright procedure and became more forgiving in terms of being able to cure 'mistakes' in publication without a copyright notice.

Copyright Office Form TX is the appropriate form to file for copyright registration for computer programs and for operating user manuals and advertising copy. (A copy of Form TX is included as Appendix I in this book.) Copies of Form TX are supplied free of charge and may be requested by writing to : Copyright Office, Library of Congress, Washington, D.C. 20559.

Under the new copyright law which went into effect January 1, 1978, statutory copyright is achieved as soon as a 'writing' is fixed in tangible form. As soon as you lift your pencil from the coding sheet you have a statutory copyright - even though you register your actual copyright later. This was a dramatic change - for under the old law statutory copyright was achieved by publishing with the copyright notice.

Although copyright registration is not required (or even possible!) at the time of achieving statutory copyright, it is still necessary to place a copyright notice on published works to protect the copyright. The new law

makes it easier to cure accidental publication without the copyright - but intentional publication without the copyright notice probably ends copyright protection of the published matter.

1. Publication and the Copyright Notice

Section 101 of the Copyright Act defines publication as follows:

> "'Publication' is the distribution of copies *** of a work to the public by sale or other transfer of ownership, or by rental, lease or lending. The offering to distribute copies *** to a group of persons for purposes of further distribution *** constitutes publication." [*** indicates omission of text for easy reading - the full text of this definition appears in Appendix J]

A fair reading of this definition seems to say that licensing of computer programs is publication in the copyright sense. Licensing with intentional omission of the copyright notice probably prevents any later claim of copyright protection but does not have any effect on civil and criminal enforcement of trade secret protection.

2. What a Program Copyright Protects

It bears repeating that the copyright law protects only against copying - not against use or disclosure of the ideas, methods and techniques revealed by the particular copyrighted expression. Someone may study the ideas, methods and techniques used in your source program and then develop the same program from scratch - and the use and sale of the new program will not be a copyright infringement of your program even though chunks of code (or even all the code) is the same as your program.

Catching an infringer is a matter of proof. Normal elements of proof include showing that the infringer had access to your copyrighted code and that copying actually took place. Proof is easy if the copying was of copyrighted object code and the infringer cannot produce the corresponding source code. Proof of unauthorized copying of copyrighted source code is more difficult.

To prove copying of source code, in addition to showing that portions of the code are the same it will be helpful if, say, your code took twelve months to write while the infringer came up with the 'same' code in only two months! And it can be very helpful to proof if the code was 'salted' (see II, E below) and the infringer neglected to remove the salt.

Source code infringement is a much more difficult thing to prove than infringment of a more conventional literary work (such as this book). There are a nearly infinite number of ways to express thoughts in the English language - so it is fairly unlikely that someone will independently come up with near identical chunks of English language text to express the same thoughts. Source languages, however, tend to be highly constrained and not very flexible. There are a limited number of ways to express a particular 'thought' in source language. Even 'comments' in source tend to be constrained. In a limited number of characters, how many ways can you express a comment such as "Gross Wages Year to Date?" The

net effect is that proof of source code copyright infringement can be difficult where an infringer has gone to some pains to conceal copying.

It is possible to restrict the amount of use of a copyrighted program. For example, use of an authorized copy may be restricted by agreement to a single CPU at a single site, etc.

Since a December, 1980 amendment to the law, the making of back-up copies of copyrighted computer programs has been expressly authorized and is not an infringement. [see § 117 in Appendix J] The same amendment authorizes the transfer of the backup copies with transfer of the 'owned' copy.

3. The Risk in Using Both Copyright and Trade Secret on the Same Program or Document

At the time of this writing (in early 1982) the court decisions are split as to whether it is possible to claim trade secret protection on material bearing a copyright notice. Trade secret protection relies on secrecy - whereas the copyright registration process makes the deposited copyrighted material available for public inspection. [see Code § 705 in Appendix J] It seems pretty clear that actual copyright registration washes out trade secret protection at least to the extent that the 'trade secret' is disclosed in the copyright deposit materials. It is not clear whether merely licensing with the copyright notice (without actually registering the

copyright) serves as an election to rely on the public protection of copyright.

At a recent seminar on contracts, Ray Mantle (partner of copyright expert Roger Milgrim) suggested use of a legend on trade secret-protected programs along the following lines:

> "This program is protected by the copyright law as an unpublished work, 198_"

Such a self-serving declaration has no legal effect - but it doesn't hurt the proprietor's position and it may dissuade some potential copiers from copying.

Deposit copies of programs 'published' in machine readable form need only consist of the first 25 and last 25 pages of the program listing. [see Regulations § 202.20 in Appendix J] At first blush, this might appear to make it possible to pad the front and rear of a program, keeping the middle out of the 'public' hands of the Copyright Office. The partial deposit itself raises several problems:

- the Copyright Office routinely certifies a copy of the deposited material for litigation so that the copyright owner can prove infringement - a deposit missing a middle may become a phantom copyright
- a sophisticated 'system' may consist of ten to several hundred modular (and sometimes optional) programs many of which are able to be used in different systems - a deposit of the front and rear of each program may amount to complete disclosure of the system while a deposit of only the front and rear of the overall 'system' will produce a gigantic phantom copyright

- when source code is furnished to licensees in both hard copy listing and machinable form the partial deposit regulations do not appear to apply - two complete copies appear to be required for copyright deposit purposes [see Copyright Office Regulations on Deposit §202.20 in Appendix J in the rear of this book]

The net effect is that a complete deposit is the best route to follow if, in fact, you want to be able to rely on copyright protection.

4. Copyright of Source, Object or Both?

Nobody knows the relationship of source and object in the copyright sense. The concept of compilers (and, at least theoretically, reverse compilers) is foreign to the copyright law. It clearly does not seem directly analogous to a translator translating, say, a book from English to German! (Under the copyright law, the right to publish the German translation is reserved to the original author of the English book.)

At the time of this writing (early 1982), the Copyright Office requests source code listings (rather than object listings) as the best representation of authorship. The Copyright Office will accept object code listings for deposit under their 'rule of doubt' upon receiving written assurance from the applicant that the object code contains 'copyrightable authorship'. The Copyright Office position in being reluctant to accept object code is an unfortunate position for the software industry.

From the software industry standpoint, it would be desirable to be able to protect the source code as a trade secret while protecting the object code by copyright. Mechanically, object code can be well protected by the copyright mechanism - as a practical matter, object code cannot be modified but can only be used in the form of a copy, making proof of infringement pretty straightforward.

It is likely to be some time before the software copyright area becomes stable. In the meantime there are three alternate strategies for protection of the actual programs:

- o The Trade Secret Strategy - use trade secret to protect both source and object
- o The Copyright Strategy - use copyright to protect both source and object
- o The Hybrid Strategy - use trade secret to protect source and copyright to protect object (object-only being released to licensees)

Regardless of the choice of strategy, the copyright mechanism should be used on some non-code elements that can not qualify for trade secret protection.

5. New Emphasis on Prompt Registration

If copyright protection is to be relied upon for protection of any part of the software (whether programs or manuals) it is a good idea to register your copyright promptly. Under the old law (prior to January 1, 1978) a work could be registered with the Copyright Office at any time during the first 28 years after creation. It was

merely necessary to register the copyright before suing an infringer.

The new copyright law (effective January 1, 1978) encourages prompt registration. Statutory damages and attorney's fees are not available for infringements commencing before registration of the copyright. The one exception to this rule is that the new law allows a 90 day grace period after the first publication - if registration is made within the grace period, statutory damages and attorney's fees are available for infringements before registration.

In addition, if registration is not made within the first five years the copyright registration certificate will not be accepted in court as prima facie evidence of ownership of the work. The net effect is that the new law strongly encourages copyright owners to register within the first five years.

Registration of copyright is necessary prior to suing an infringer. If the registration certificate is already in hand, you can get into court immediately. The normal registration process takes a matter of months although the Copyright Office will try to turn it around more quickly where the purpose is to file a lawsuit.

It should be noted that even when actual copyright registration occurs after an infringement, the owner may still sue for injunctive relief, impounding and destruction of infringing copies and for actual damages.

For infringements occuring after registration (whether registration is early or late), the copyright owner has the option of electing statutory damages. Statutory damages require less in the way of proof than actual damages. Statutory damages range from a minimum of $250 to a maximum of $5,000 - with the maximum being $50,000 in cases of willful infringement.

6. Some Software Elements Should be Registered

Some information furnished to licensees (and prospective licensees) should be copyrighted. If it is the kind of thing that is casually shown or given to prospective customers without having them sign a confidential disclosure agreement, copyright is appropriate. Some training material and operator manuals are likely to fall into this category. A good rule of thumb is that if it is the kind of thing that will be shown to people without a written agreement on confidentiality, copyright is the appropriate route.

7. Summary

It is possible to copyright programs. Copyright is the cheapest kind of protection for programs - but it is considerably less effective than the trade secret route for source code.

Copyright protects only the 'expression' against actual copying. It does not protect against taking of ideas or concepts or even coming up with identical chunks of program steps from scratch. Use of a copyrighted

program is not an infringement unless the use involves the making of an unauthorized copy. At the present time there is little case law under the new Copyright Act. The copyright law now provides that copying a copyrighted program for back-up purposes is not an infringement if the copier is an authorized holder of one copy.

There is a logical problem in placing a copyright notice on a program while trying to retain trade secret strings. Even though copyright registration may be obtained on a program as either an 'unpublished' or 'published' work, both require a deposit copy and the deposited copy is available for public inspection in the Copyright Office. If the owner of a program tries to wear both belt and suspenders (belt being use of the copyright notice, suspenders being trade secret protection) the owner may run into the danger of having a court decide that the programs are protected by copyright only, trade secret only - or neither!

C. Trade Secret Protection

1. In General

In general, a trade secret is information not known in the marketplace, that has value (due to its not being known) and that is treated by you and your customers as a trade secret. The rough definition of a trade secret is like the definition of a duck. If it looks like a duck, waddles like a duck and quacks like a duck, proving that it is a duck is likely to be pretty straightforward. A trade secret is a trade secret if it looks, feels and is treated like a trade secret. As a general rule, computer software will qualify for trade secret protection if it:

- o is not known in the marketplace;
- o has value due to its not being known; and
- o is treated as a secret.

Trade secret law is state law - whether based on specific state statutes or on case law (the latter often referred to as the 'common law'). About half of the fifty states (including all the major commercial states) have some statutory provisions concerning property rights in trade secrets.

In 1979, a Uniform Trade Secrets Act was proposed for adoption by all states. The Uniform Act is intended to codify the basic principles of common law trade secret protection. Even though, as of this writing, few states had yet adopted the Uniform Act, there is little doubt

that the Act will be influential as a statement of the common law. (The substantive text of the Act is reproduced in Appendix K in the back of this book)

The thrust of this book is toward contracting to stay out of trouble - it is not intended to provide in depth analysis of cases and precedents. Lawyers coming in regular contact with the trade secret area should have Roger Milgrim's excellent treatise Trade Secrets (two compression bound looseleaf volumes, updated annually) published by Matthew Bender & Company. Another lawbook set of possible interest is Trade Secrets and Know-How Throughout the World, Aaron N. Wise (five looseleaf volumes) published by Clark Boardman Company Ltd.

2. When Trade Secret Protection is Inappropriate

There is no magic number of how many people may know a trade secret before it stops being a secret. As a practical matter, at some point (such as with broadly distributed consumer level software), reasonable efforts to maintain secrecy become difficult or impossible. Reasonable efforts to maintain secrecy under the particular circumstances are more important than the actual maintenance of secrecy.

Trade secret protection is not available for publicly known or disclosed information. Trade secret protection should not be tried where the particular information is:

- to be shown to others (e.g. prospective customers) without having them sign a confidential disclosure agreement; or
- is known to the trade.

It is not unknown for software vendors to leave confidentially stamped manuals or training materials exposed to casual viewing at trade shows! If it is necessary for marketing to show the information without a signed agreement, use the copyright mechanism to protect the actual documents.

3. Trade Secret Protection at Home

Trade secret protection begins at home. With regard to your own employees, trade secret protection is not just limited to software - it may include such things as the names and locations of present and prospective customers. It is not uncommon to find a new competitor springing from a departing employee! To establish and preserve trade secret protection, your own people should adhere to some simple rules:

- Don't leave trade secret information lying on desk tops where it might be seen by any casual passerby.
- Make sure that visitors are either escorted or, better yet, have a signed agreement to respect the confidentiality of your information.
- Make sure that you have signed confidentiality agreements with all employees. (A fairly typical confidentiality agreement is included as Appendix A)

- Make sure that you have signed confidentiality agreements with all free-lance programmers or outside consultants. (See Appendixes B and C for typical provisions)

- Don't leave trade secret information exposed to view at trade shows - and do not show it to prospective licensees unless there is a signed confidentiality agreement.

- Put periodic reminders on the bulletin board (or in notes to employees) about the need to protect trade secret information belonging to your firm.

- Set up a 'trade secret' termination process for departing employees, making sure that: (1) company materials are returned from home; (2) the employee is reminded of his or her signed confidentiality agreement and (3) if an employee is going with a competitor, alert the competitor to the existence of the employee agreement

If it becomes necessary to sue someone for unauthorized possession or use of your trade secret information, you will be blown out of the water if it can be shown that you yourself did not treat the information as trade secret information. As a matter of practice, breaches of confidentiality by a licensee do not have nearly the damaging impact of breaches by your own firm.

4. Trade Secret Protection by Customers

Proprietary rights and trade secret license provisions are covered in some detail later in this book [see Part IV, I on contractual protection of proprietary rights]. The general rules of thumb are:

- Restrictions should be reasonable in the light of good data processing operating procedures - e.g. back-up, including off-site back-up, should be permitted.

- Restrictions should be meant - restrictions violated with your knowledge (implying consent) could mean forfeiting the future right to enforce the restriction
- You should be able to know where your trade secrets are located
- Don't provide for draconian penalties against the customer if the trade secret gets out of the customer's shop - rather provide for co-operative enforcement (see the discussion below)

Some trade secret license agreements include penalties against the licensee if the information gets out of their shop into the marketplace. This is almost exactly wrong. The most likely route for a competitor to get your trade secrets is through a departing employee of yours or of your licensee. In order to track down and punish the wrongdoing former employee of the licensee, the co-operation of the licensee is near-essential. You want to be informed early on about the departing licensee employee becoming a potential competitive threat - and the licensee is not encouraged to be co-operative if co-operation involves self infliction of a penalty!

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D. Furnishing Object Code Only

1. In General

As noted earlier in this book, object code is nearly impossible to modify (at least intentionally!). When a software vendor furnishes only object code to a customer - this does several different things for the vendor:

- It helps in proving unauthorized use. A straight comparison may prove the basic case in either copyright or trade secret.
- There is little chance of difference between code maintained by the vendor and code used by the customer. The source code customer may make changes and forget to tell the vendor about the changes - but the object code customer simply won't dink about with the software at all.

The customer getting only object code must rely upon the vendor for software maintenance. With many sophisticated software systems, reliance upon the vendor is the only practicable route. In many cases, the customer has neither the desire nor the ability to maintain specialized software.

If the software will be very important to the customer, the customer may (and probably should) insist upon being able to get a copy of the source code if something disastrous should happen to the vendor (e.g. bankruptcy). Vendors generally do not quibble with that kind of a request because none believes that he can or will ever go belly-up! The principal trouble in this area is the use of source code escrow as a mechanism.

2. Source Escrow Agreements

The primary feature of an escrow agreement is that a 'stake holder' holds something of value and releases it to a particular person on the happening of a specific event. Probably the most common form of escrow encountered is that where an individual buys a home and the down payment is kept "in escrow" by the seller's attorney either until the contract of sale becomes unconditional or the transfer of title actually takes place. In that instance, the 'stake' is well known and identified - i.e. the down payment.

The use of escrow arrangements with software source code is much more complex. The software 'stake' is not well defined. The escrow agent or stake holder will not warrant that the source code in escrow will assemble into the object code being run by the customer at any particular point in time.

A source code escrow agreement may provide the customer with a false sense of security on the one hand and the vendor with near-automatic breach of the contract on the other hand. In order to understand why this is so it is necessary to understand:

- o the nature of software maintenance;
- o how the escrow mechanism works; and
- o how a software vendor is likely to fail.

As indicated in an earlier section in this book, software maintenance is usually best done by the individual(s) that wrote the original code. Remember that

basic documentation includes the programmer's notes (typically 'comments' embedded in source code) that are intended to stimulate the programmer's memory when the time comes to fix bugs or make modifications. The quality level of documentation in the industry ranges from poor to fair. The individuals who wrote and are working with the code are not only likely to be competent in the area and familiar with the code and existing documentation, but also are likely to know the 'folklore' of the program.

In theory, each time that the vendor modifies the source code, an updated copy of the source code (usually on magnetic tape or disk) is deposited in the hands of the escrow agent. The escrow agent may be able to tell when something is received from the vendor but is not able to tell what the something is! If the vendor goes bust, the escrow agent is required to release the source code (or a copy) to the customer.

A failing software vendor is more likely to fail over a period of time than to suffer sudden instantaneous collapse. A likely scenario for failure begins with the vendor underestimating time and cost on custom software commitments to third parties. To fulfill the commitment on these losing contracts, the vendor goes into a firefighting mode, assigning more people and requiring long hours of the people assigned. Over a period of time, the vendor develops cash flow problems, loses some key technical personnel and becomes an administrative disaster area.

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A vendor in a firefighting mode defers non-critical problems and administrative chores. Updating source in escrow is a purely administrative chore - not a fire. As a result, if the vendor eventually collapses, the source released from escrow is unlikely to assemble into the object code that the customer is actually running.

Even a non-failing, highly competent software vendor is likely to be in technical breach from time-to-time if the contract calls for constantly updated 'escrow'. Source escrow agreements work best with software that is almost unchanging and vendors that do not get in financial trouble!

3. Assurance of Future Maintenance

Customers want assurance that the code will continue to be maintained no matter what. At least in theory, access to source code will mean that the customer will be able to maintain the code or will be able to hire someone else to provide future maintenance of the code. The emphasis is probably on the 'someone else' as most customers only want to use the code and are not anxious to maintain it themselves.

Many customers are simply not in a a position to attract and retain highly specialized programmers - and that may be what is required for the particular software. Even if a customer is able to maintain the code, such maintenance usually means that the customer will be paying the full cost of maintenance rather than sharing the cost with others having the same standard software chunks! In addition, the

customer will have to pay the full license cost for any third party furnished software tools (e.g. a "C" compiler license) that are necessary to maintain the software.

The best assurance as to continued future availability of competent outside maintenance lies in the ability of competent outsiders to make a respectable profit from maintaining the software. Thus the best assurance of future maintenance is that the maintenance <u>is</u> a business. If it is a business, even if the software vendor fails, a portion of the vendor (or some of the vendor's people) are likely to continue the maintenance.

One red flag to the customer is vendor pricing of maintenance services on a flat annual percentage of the license fee. (See the discussion of maintenance pricing starting at Part I, D-5) The dollar amount for maintenance derived from a percentage formula <u>may</u> produce a profitable business - but on the other hand it may indicate a vendor emphasizing 'right now' license fees rather than paying appropriate attention to building profitable long-term customer service.

If the software is going to be of substantial importance to the customer there are several alternative contract approaches to access to source code for future maintenance:

- Require source code as a condition for dealing with the vendor
- The same as above but with actual compiling of the source code (by vendor or you) at your

site to provide assurance of identity of source and object

- Provide that if certain events occur that you will be able to get a copy of the relevant source code from the person "in control" of the vendor for the reasonable cost of making the copy [for one such contract clause, see "Right to Source Program" at Appendix F-5]

The first two provide the greatest assurance if it may be possible for you to actually maintain the software. If it is unlikely that you would actually want to maintain the software, the third alternative makes sure that you will be looking at the right place to keep track of the people that are best able to continue to provide maintenance - whether through continuation of the vendor/debtor or on another basis.

E. Proprietary Notices and Coding to Protect Proprietary Rights

1. Copyright Notice

If copyright is relied upon to protect the actual program it is desirable in the case of an unpublished work and necessary in the case of a published work to include a copyright notice. In a source language program, near the front of the program, the copyright notice should be inserted so that any source listing will provide the copyright notice on the first page of the listing. In the case of programs in modules, each separate module should include the copyright notice. Good practice for computer programs is to use the form of notice "Copyright © John Jones 1978." The use of both © and the word "Copyright" is not required - either is effective.

Effective in late 1981, the Copyright Office adopted regulations covering placement notice on machine-readable copies. According to the regulation [§202.10(g) reproduced at Appendix J-6,7], any of the following is acceptable:

- A notice embodied in the copies in machine-readable form in such a manner that on visually perceptible printouts it appears either with or near the title, or at the end of the work;
- A notice that is displayed at the user's terminal at sign-on;
- A notice that is continuously on terminal display; or
- A legible notice reproduced durably, so as to withstand normal use, on a gummed or other label securely affixed to the copies or to a box, reel, cartridge, cassette, or other container used as a permanent receptacle for the copies.

It is better to over-notice than to under-notice.

The year to be used is usually either the year of first publication or the year of actual registration, whichever is earlier. Determining the appropriate year of 'publication' is not always a clear-cut matter.

For published works in hard copy, the best form of notice is "© John Jones 1978." The addition of the word copyright (prior to the ©) for programs makes sure that the meaning of the notice is clear if printed on a line printer not having the © symbol (or not having it in the appropriate location).

2. Trade Secret Proprietary Notices

Where trade secret protection is relied upon for the programs, it is good practice to place proprietary notices near the front of each program or module. Such a proprietary notice might appear (when printed or displayed) along the following lines:

> "This program is proprietary to Softco, Inc. and may be used only as authorized in a license agreement controlling such use."

The use of proprietary notices will put a licensee's employees on notice that they are dealing with proprietary software. [See also the 'unpublished work' notice at Part II, B-5]

3. Salting the Code

It is good practice to include command strings in source code that do not, in fact, perform any useful function. Intentional inclusion of such command sequences

(or the use of constants with no real function) may simplify proof of unauthorized use. Salting the program in this manner can make proving the case against a thief very straightforward. Although someone could independently develop the same set of commands to perform a function, it is highly unlikely that they would coincidentally put in the same useless commands or unneeded constants!

To carry the salting process one step further, each licensed user can be given an unique identifier unobtrusively embedded in the source and object code. Even though this takes some extra effort, it will give the vendor a good shot at back-tracking an unauthorized copy to its place of origin. Perhaps more important, user knowledge that the user's copy is coded to the user will tend to encourage honesty.

4. Use of Disabling Code

Some sophisticated vendors have considered (and some have actually tried) the use of a metered or dated self-clobbering function in the program. The basic idea is that if the customer pays his bills, the meter is eliminated or reset or the date is changed - otherwise at the pre-set amount of use or the passing of a specific date the software self-destructs! If the customer pays his bills, the vendor patches the software to permit continued operation.

This is a high legal exposure technique that should be used only if the customer is fully informed in advance of just what will happen under what circumstances. The advance notice will permit the customer to limit reliance on the software.

In one instance involving disabling code, the licensee had a dispute with the vendor. The disabling code (unknown to the licensee) caused the previously stable program to die. The program had run reliably for about two months. The licensee, assuming erroneously that it was a hardware failure, called in the hardware maintenance people who spent several days replacing parts and trying to 'fix' the system. One of the software vendor's people stopped by and the system started to work again! Although the licensee did not pursue legal action against the vendor - if the licensee had done so the prospective damages would have been substantial - not only the cost of unneeded hardware maintenance but damage to the licensee's business, etc. The 'surprise' element would probably knock out the standard contract limitations on damages.

5. Enabling Code and Hardware Locks

Enabling code is just another face of disabling code - but applied affirmatively. The user receives software not capable of genuine productive use until the 'key' is furnished by the vendor. The key may be released upon receiving back the money or the signed agreement or both.

Some software vendors have tried using hardware locks keyed to a particular identified processor. Many processors do in fact have an internal ability to identify themselves by serial number to a program. This type of hardware lock has little merit except in the case of dedicated hardware (e.g. a dedicated word processing system). If the hardware breaks down on a dedicated system, the user is able to use any other similarly dedicated system with the same level of software. Unfortunately, the user of software on a general purpose processor is left without the ability to backup the hardware.

A fairly recent development is the addition of portable hardware/software locks. The hardware portion of the lock (typically a plug-in solid state module) plugs into a socket on the computer. One such device, for example, plugs into the game paddle socket on an Atari. Others connect to a communications port on the computer, plugging into an RS232C connector. Hardware locks, as they exist today, have two levels. One is the level in which each authorized user of the program is given a copy of the program (which may be copied) and a copy of the hardware module (which is impossible for the home enthusiast to copy). Even though the program may be copied it is not usable unless the user has one of the hardware modules.

The second level of use of hardware locks is where a single module is used to control use of a number of different programs. Each program may be opened up to live

use by the user upon receipt of a special program key for the particular hardware lock module. Each hardware lock is coded to the particular user so that even if a user is able to obtain bootleg copies of other programs from the same vendor, those programs will not run in conjunction with the user's hardware lock until the software vendor sends the particular key to the user for the user's particular lock.

F. Ownership of Modifications and Enhancements

1. In General

Software is rarely static. Most software tends to change over time. The changes include not only the fixing of problems but the addition of enhancements or modification to run under a different operating systems or on a different computer.

After a period of time, the software in actual use may bear little resemblance to the original software. The current software may be much more valuable than the original software. Ownership problems are less likely to arise if some thought is given to ownership at the beginning of the process.

2. The Impact of Copyright Law Changes

The dust has not yet settled from the impact of the new copyright law. Under the pre-1978 law, copyright was achieved by publication with the copyright notice. Under the new law the achievement of statutory copyright occurs as soon as the copyrightable matter is fixed in tangible form. If you are making notes while reading this, you have achieved a statutory copyright in those notes as they become visible (and copyrightable) on the paper. At that point in time you have a statutory copyright and it matters not the least bit whether you ever publish your notes or even show them to someone else!

If a programmer is writing a program, copyright is achieved in the program as soon as any copyrightable portion

(which could be even a few lines of code) is placed upon the coding sheets. Since the new copyright law became effective, someone immediately has an ownership interest in that code granted by the United States Government. The question is, who owns the copyright?

The copyright is normally owned by the author. The most pertinent exception to author ownership is the 'work made for hire' exception defined in copyright law §101 (reproduced at Appendix J-3) which in part reads as follows:

> "a work prepared by an employee within the scope of his or her employment..."

There is no question but that the company owns the software in the case of a programmer working on company time and employed as a genuine 'employee'. In that example, no written agreement is necessary. Suppose however, that the employee does some work at home using a terminal connected to the company's computer?

An outside free-lance programmer is almost invariably considered an independent contractor so that the employer does not need to withhold taxes, pay unemployment taxes, etc. But the outside programmer may still be an 'employee' in the copyright sense. If there is a written agreement between company and free-lance covering ownership of copyright, that agreement will normally control and settle the ownership issue.

The word 'employee' used in the copyright law is interpreted in the agency law sense. That means that an employee is one working under the direction and control of

the employer. The deduction of withholding or even a contract stating that the person is an independent contractor does not control the definition of 'employee'. When free-lance programmers or outside software houses are used, the 'direction and control' aspect is the significant factor.

3. Company and Employee Generally

The trend in recent years has been toward broadening individual rights. This has been reflected in moving toward employee-company patent-invention agreements that are much less restrictive than they used to be. It is now generally recognized that employees do have a right to a life (and even productive work!) outside the company environment. An employment agreement which reaches for too much for the employer may be struck down in its entirety. As a result, employment agreements in use today covering ownership of inventions, patents, and copyrights tend to be limited to company ownership of things directly related to the company's business. A good employment agreement results in the company owning software written by the programmer at home if the software is in the company's business area.

Neither management nor non-managerial employees tend to be well informed of the company's exposure through the expansion of employee rights, copyright law changes, increasing use of communications and changes in work habits.

a. The Programmer-Employee. The programmer - employee writing programs on the job is usually working

within the scope of employment as an employee in fact. The company owns the software developed in this fashion even if there is no employee agreement covering ownership.

There is a tendency today for many programmers (particularly the more dedicated ones) to have terminals at home which are used to access the company computer so that the employee can work productively at home. In this instance, without an employee agreement, the situation begins to get a little grey. It may depend on precisely what software the employee is working on at home. For example, the case is stronger for company ownership if the program being worked on is part of the company's accounts receivable program - but weaker if the program being worked on is a utility routine susceptible to use outside the company. The fact that a company computer has been used is not determinative.

A written employee agreement has always been desirable but now is becoming a necessity. In addition to covering ownership, the agreement can also provide some protection for the company for confidential information generally. Data processing personnel are often exposed to company information that the company does not want freely available on the market place.

b. The Manager-Employee. The manager's job description may not speak to programming - but more and more managers are, in fact, doing programming. I would hazard a guess that probably half of all managers will be doing some

programming (in the large sense) within the next few years. The problem arises in the fact that programs written by the manager are not usually within the scope of the manager's employment. The manager may own the program despite the fact that company time and company resources were used in developing the programs. The definition is that it must be by an employee and within the scope of employment. The trend should be toward having managerial level employees (even in areas such as word processing, not typically thought of as a data processing area) sign confidentiality and ownership agreements. The general philosophy is that if the company pays for it, the company should own it - a rational conclusion that always works out only with an employee agreement.

4. The Company and Third Parties

Many companies are making extensive use of free-lance programmers and outside software houses. Many of these arrangements are made in the form of a written contract covering confidentiality and ownership of the resultant work product. The written agreement with an individual usually specifies that the individual is not an employee.

Unfortunately, many companies do employ free-lancers or third party software houses without the benefit of a written agreement clearly addressing the question of ownership of the work product. It then comes as a rude shock to the company to find out that software that they payed for may not, in fact, belong to the company.

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Where there is no written agreement covering ownership, ownership swings upon whether the third party was working as an employee (agency sense - under the direction and control of the employer) within the scope of employment. This automatically raises problems with the more competent free-lancers and software houses. Many company data processing managers want to use an outsider to whom they can explain the problem in general terms and have the software house or free-lance come back with the solution. This is precisely the situation where the third party is <u>not</u> an employee under the direction and control of the company - and as a result, the third party is likely to own the software.

G. Who Has The Right To License?

1. Some General Background

Not so many years ago, the software situation was fairly straightforward in terms of ownership. Much software was provided bundled with hardware as a sort of 'premium' at no extra charge to the customer. Computer companies did not care too much about who was using the software because it meant that their machines would be used.

In recent years software has been made more transportable (able to be used on different machines), reflected in commercial availability of a wide variety of software in a relative handful of common languages such as RPG, PL1 and COBOL. It makes good sense not to reinvent the wheel more than necessary - so much software today springs from some software already developed by someone else.

If the software developed by someone else was copyrighted, there is no problem in using the ideas and techniques expressed in the copyrighted program (although it is a copyright violation to 'copy' the program).

2. Trade Secret is Forever

More and more frequently, however, the software from someone else was licensed under trade secret provisions protecting not only the actual code but the ideas, concepts and techniques embodied in the program. A frequent question is, "how much modification do you need to do to a program before you are free of the license restrictions?" The

answer to the question is that you are never free of the license restrictions.

The use of trade secret protection poses its own problems for the licensee. It is common for a company to take a license to trade secret protected software and then invest substantial sums of money in improving and expanding the software - often investing much more than the original software proprietor. At some point in time the data processing manager of the licensee realizes that the software in its present stage of development is a salable commodity. The problem is that no license can be granted without the consent of the original licensor - and this is true even if the licensee has developed ninety percent of the current code.

The data processing manager has two potential avenues at least theoretically available. These are:

- to secure the consent of the original licensor; or
- to redevelop the portion of the software originally licensed in such a manner that it no longer includes any 'trade secrets' of the original licensor.

Neither of the two avenues appears very attractive. The original software vendor may demand terms that are close to armed robbery and the mere fact of having originally licensed some portion of the software casts a doubt on the ability of the licensee to develop similar software without using trade secrets of the original licensor.

3. Some Protective Provisions for the Licensee

It is trite but true that an ounce of prevention is worth a pound of cure. It is highly desirable that a customer-company, at the time of originally becoming a licensee of software, lay the groundwork for some degree of future flexibility. How much flexibility is desirable depends upon the type of software and the use to be made. And just how much problem 'prevention' can be obtained depends on the relative bargaining positions at the time. Some provisions that might be appropriate (and bargained for) are the following:

- o the Licensor gets no rights in software developed by the company (Licensee) even if such software is embedded in the licensed software or functionally equivalent to the licensed software.
- o the software developed under this agreement shall be jointly owned without accounting [either party can do with it what they will without accounting to the other party]
- o if the company desires to license others to use the software, the company may do so upon payment to Licensor of the then commercial license fee for the software but not in excess of $_____ per site license or $_____ per customer wide license. The company agrees that any such licenses shall include reasonable provisions for protection of the proprietary nature of the software.
- o all restrictions on company use and sublicensing shall terminate on the later of five years from the effective date of this Agreement or two years from last Licensor-furnished maintenance.

4. Licensee Analysis Of Future Proprietary Problems.

Much commercially available software is distributed widely on standard terms. If you take a license to such

software and then develop a program using the licensed software as an external module, there are unlikely to be future problems. If you want to sell your own software to someone else, all they need to do is to obtain a license to the required external software.

A situation that can (and does) give rise to problems is where you use an outside software vendor on a development project which includes use of some core software proprietary to the outside software house.

In this situation the customer may develop (and pay for) the vast bulk of the code. If the agreement with the outside software house includes a license agreement authorizing customer use (use only) of the code proprietary to the software house, the customer may be tied up forever. This result is unconscionable if, in fact, the proprietary contribution of the software vendor turns out to be relatively small. One way around this problem is provide for a time cap on proprietary restrictions (say, five years). Another way around the problem could be something in the nature of a stated license fee if at any future time the customer should want to authorize others to use the software.

III. THE SOFTWARE CONTRACTING ENVIRONMENT

Every software contract has at least two parties - and sometimes more. The software vendor may be new, may be old, may be large, may be small, may be well financed and well organized or poorly financed and poorly organized. The buyer of software may be sophisticated and staffed with competent software professionals - or may be naive and relying, of necessity, upon the vendor for expertise. The software 'product' may be solid and well-defined - or it may be developmental and poorly defined. With software of any degree of sophistication, no two contracting situations are exactly alike!

This section of the book takes a look at software as a product and also considers some of the factors that the parties should take into account in software contracts.

PART III

THE SOFTWARE CONTRACTING ENVIRONMENT

A. Categorizing Software - How Defined Is It?

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A. Categorizing Software - How Defined is It?

The following subsections on standard software, customized and custom software, and bundled software have an important function from both the software vendor's point of view and the software user's point of view. Determining the degree of definition of the software to be furnished by a vendor and bought by a purchaser is basic to being able to lay out the contract details. If a vendor purports to be furnishing standard software while in fact delivering largely custom software, both vendor and purchaser have a problem! The following discussion may be useful.

1. Standard Software

'Standard software' is software exactly like software already in use. For example, if two users have exactly the same utility sort program - that is standard software.

One distinctive aspect of standard software is that a fault which affects one user is likely to affect other users. As a result, if a fault appears and is fixed for one user, all users end up getting that fault fixed whether or not they were troubled by it. Each patch or new version for one user becomes a patch or new version for other users.

One advantage of standard software is that prospective users are able to see the software in operation at existing user sites. This ability to get something that

is exactly like existing software simplifies definitional problems for both vendor and prospective user.

The most important aspect of standard software is that it is stable and is normally well defined in terms of documentation and known capabilities and limitations.

a. Maintenance Implications

Standard software is easy to maintain only to the extent that it remains standard. If the vendor furnishes source code to a customer and the customer makes modifications to the source code, the software no longer is readily maintainable by the vendor. It is a good idea for the vendor to limit his maintenance responsibility to maintaining only unmodified software (see Section E. 7 for some language).

b. Marketability Through Distributors and OEMs

Standard software, because of its high degree of definition, can be and often is marketed through distributors or OEMs. When marketed through knowledgeable distributors or OEMs, the warranties filtering down to the end user are usually pretty weak - the distributor or OEM will pass on less in the way of warranties than he receives from the proprietor but will not pass on more!

2. Customized Software

'Customized software' is standard software that has had modifications made to it to fit the particular

customer. For example, standard software may produce a family of financial reports for the customer but the customer wants some reports in a different format and wants some new data accumulated and reported. Existing programs are modified to permit the new report format and data accumulation.

a. Customer-Variable Data

Although the introduction of customer unique data into a standard program is often thought of as customization, in fact, it is more in the line of installation support than customization of the standard program. Good vendor practice is to make sure that the customer can readily install new versions of the standard software without having to reinstall customer variable information.

b. Maintenance Implications

Programs that have been modified to fit the particular customer become unique to the customer (at least to the first customer!). Good vendor practice is to make the modifications in such a way that they either become incorporated in a new version of the standard software (in which event the customized element disappears) or become a custom program which is separate and distinct for maintenance purposes. Either course will minimize maintenance effort on the part of the vendor. Of course, customized software disappears - we are left either with standard software or with standard software plus custom software.

3. Custom Software

'Custom software' is defined as software unique to a particular customer. Of course, what was custom software for the first customer may become standard software upon subsequent sales. The sale of custom software may be intimately related with the sale of some standard software - or it may stand entirely separate and apart.

A contract programmer provides custom software. Similarly, a vendor preparing a special data conversion program (to operate with the vendor's standard software), is preparing custom software.

The distinctive aspect of custom software is that it neither exists nor is fully defined at the beginning. As a result, operating documentation and program documentation is available only after the custom program(s) have been completed. Typically, the better custom software is defined in the beginning, the less chance of vendor-customer disputes.

4. Bundled Hardware and Software

Bundled hardware and software occurs when a hardware manufacturer also furnishes software to the customer as part of the same transaction or when an OEM furnishes both hardware and software to the customer. The so-called turnkey system vendor typically provides bundled hardware and software.

The degree of bundling is variable. An OEM for Digital Equipment Corporation may be providing standard commercial hardware in conjunction with a part-standard, part-custom software system. The transaction may be structured so that the hardware transaction is only partially connected to the software transaction - in other words, partial bundling. From the vendor's viewpoint the best situation is to have as much contract separation as possible between the hardware transaction and the software transaction so that a software squabble will not cause the hardware to kick back to the OEM vendor. (A combined Equipment/Software agreement appears in Appendix F)

B. Deliverables - Packaging the Product

Although software is an intangible with a strong service element, it is usually sold as 'deliverables' plus promises and restrictions or conditions. An adequate definition of just what is being sold, even for a single vendor, will vary from product-to-product.

Defining the software product requires a good deal of effort and thought. Unfortunately, there aren't any shortcuts.

The concept of 'deliverables' is a useful one in designing software agreements. Laying out just what the vendor is promising to deliver lets both parties know where they stand.

One deliverable is clearly the standard program or programs. It (or they) have a name and a description (other than the marketing description). Use the name and refer to the description.

If the customer is going to install the software himself, it is a good idea to define the media and format. A list of prerequisite elements of software or hardware should be either in the system description or laid out separately.

If on-site training of the customer's operating personnel is included, the training will require the cooperation of the customer. This kind of installation

support becomes a deliverable if defined - e.g.:

> "one day of senior systems analyst support on site, scheduled by agreement between vendor and customer."

Similarly, if training is to be furnished to customer employees (such as input operators, etc.), it is also a good idea to define that training and cast it in the form of being a 'deliverable'. For example,

> "three contiguous days of on-site instruction by a vendor instructor, scheduled by agreement between vendor and customer"

makes that training a deliverable and is far preferable to a promise stating "vendor will train customer's input/output operators."

If training materials, operator manuals and the like are to be provided to the customer - use their names and quantities to make them deliverables.

Still another deliverable can be installation support for conversion. This support becomes a deliverable if defined in terms of a limited commitment, e.g.:

> "Four days of analyst support on-site to aid customer in conversion of customer files, scheduling to be by agreement between customer and vendor prior to software installation."

C. Pricing the Software Product

1. In General

Pricing the software product is inextricably entangled in the functional/legal definition of the software product and follow-on services. At one extreme, an "As-Is" license can be clear cut with no mandatory follow-on obligation for support and no warranties for satisfactory operation. However, most software sales do have some initial warranty obligations and follow-on service requirements. The software pricing area is in a state of flux.

This section considers some factors that go into pricing software from the vendor's standpoint.

2. Some Basic Pricing Considerations

In an "As-Is" sale of a permanent license, the cost of producing the standard software product (duplicating a tape in the documentation) is likely to be trivial compared to the price of a permanent license. For most software sales, however, the determination of a price in a rational manner may only be done in conjunction with a detailed definition of the complete software product. It is helpful to think of most software sales as having a fixed price portion and a variable price portion.

- The fixed price portion is limited to deliverables.

- The variable price portion consists of elements that may vary from customer to customer - travel and living expenses, telephone charges, additional installation support, preparation of specific programs and/or documentation, etc.

In addition to pricing deliverables, take a very careful look at the warranties included in the software license. No matter how carefully drafted the deliverables are in a software agreement, a loose warranty may still put the vendor in a position where he may have promised happiness (a variable concept!) for a fixed price.

3. The Two-Step Approach to Pricing Poorly Defined Software

A pricing tool that may sometimes be helpful is that of quoting a fixed price for the packaged specified 'deliverables' plus an additional fixed price to produce both a specification and price quote on special or custom programs. This two-step approach to poorly defined software can substantially reduce the risk for both vendor and customer.

4. The Use of a 'Click' Pricing Element

One traditional problem in software licenses is that license fees and maintenance charges are usually independent of the amount of use of the software by customers. As a pricing matter, higher use usually means higher value to the customer while lower use means lower value to the customer - and the vendor price is based on some assumption

as to the amount of use by his typical customer. Restrictions to a single CPU may furnish a rough quantitative limit on the amount of use - but that limit tends to increase with each new generation of hardware thereafter and is not a very satisfactory long run kind of limitation.

Some vendors are switching to a direct 'click' usage charge for software that lends itself to a transaction count, number of output pages or some other objective measure. The use of a charge based on such 'clicks' may permit the software vendor to offer a lower permanent license fee or lower base term monthly charge while providing some protection against a very large amount of use for the minimum license fee.

The user may be able to better justify a software purchase if usage charges bear some relationship to his use (and savings). Where the user achieves full use of the software product only over a period of time, the click charges are lower in the early part of the license.

5. Maintenance Pricing

The most common problem in maintenance pricing is that of under pricing the maintenance services. Pricing on the basis of one percent per month (or some other percentage formula related to the permanent license fee) usually has no relationship to reality. In some cases it will be too high - and in some too low.

Factors that enter into the pricing of maintenance services include the following:

- Standard Software. The amount of support needed for genuinely standard (multi-customer) portions of the software. (Important also is whether the updating of standard portions is accomplished on a generalized multi-customer basis or whether changes must be made individually to each customer's version).

- Customized/Custom Software. The amount of customized software or vendor-developed software unique to the particular customer. One possibility is to support unique software only on a time and materials basis.

- Enhancements. Will there be no-charge enhancements - and what will the effect be on maintenance effort required?

- Training. Any continuing training obligations?

- Variable Expenses. How will variable expenses (telephone, travel, etc.) be handled?

- Administrative Effort. What level of administrative effort will be required to monitor each customer to ensure software maintainability by the vendor?

- Price Breakdown by Program. Can prices be broken into program-by-program charge basis? (See Appendix H).

- Price Breakdown by Level of Service Required. Can price be broken into optional service levels? (See Appendix H).

- Click Pricing. Is click pricing usable and appropriate as a term license element of maintenance prices?

D. Software Buyer Product Definition Considerations

Any software buyer should do a rough product definition for proposed software purchases. The buyer with no internal maintenance capability is in quite a different position than the buyer with a sophisticated systems and programming staff capable of maintaining the purchased software. The performance of self analysis by the buyer is a vital (and unfortunately often overlooked) step. The following checklist questions may be helpful in defining the wanted software 'product'.

1. Maintenance Considerations

- Do we now have (or will we have) the ability to maintain the software? If so, who will own improvements which we may make?
- If we are relying on the vendor for maintenance, what kind of response time is necessary if we have a problem?
- How much continuing support will we need other than bug-fixing?
- Is there any likelihood that we will want to change hardware or operating systems in the foreseeable future - and what kind of assurances from the software vendor are needed in this regard?
- Will we need continued training of our personnel (particularly new personnel) over a period of time?

2. Conversion

- If conversion is required, what support will be required from the vendor and over what period of time?

- Is it possible that programming changes may be required due to information discovered during the conversion process?

3. Acceptance Testing

- Are we willing to take the vendor's say-so as being adequate?
- Should we insist on acceptance of the software being an all-at-once thing or are there some chunks or features which we will take later?
- If there are to be later-delivered portions, are they essential portions, the lack of which would have caused us to look elsewhere for the software?

4. The Environment

- Will the software be at a site with multiple computers capable of running the software - and will we want to do so?
- Is the computer site likely to change?
- Is it possible that we may move to decentralized computing and would that affect the use of the software?

5. Proprietary Rights

- What security can we, in fact, offer the vendor for his proprietary software?
- Are there present or future ownership interests that we could (should) have?

6. Role of the Software

- How hard would it be to convert to alternate software - what happens, worst case, if the software dies and the vendor has dissolved?
- Might we want to offer a 'service' based on the software to affiliated or non-affiliated companies - are we permitted to do so?

E. Income Tax Considerations for the Software Buyer

1. In General

One of the most frequent questions encountered on the part of software buyers is whether or not the Investment Tax Credit can be used in conjunction with buying software. The general answer to this question is 'no' - although there are some cases in which the Investment Tax Credit may be successfully claimed for the purchase of bundled software. (See the ITC section below).

For general income tax purposes, the taxpayer is required to be consistent in either writing off software expenses as incurred or amortizing those expenses over a period of years. Unless a particular software purchase is setting the buyer's tax accounting policy, the amortize/expense decision has already been made.

2. Maintenance Fees and Term License Fees

Maintenance fees and term license fees are normally expensed by the user as they are incurred. A front end payment (e.g. for installation charges or a front end license payment) may be either expensed as incurred or written off over the term of the agreement so long as the user-taxpayer is consistent.

3. Permanent License Fees

The general rule on computer software costs is that those costs may be deducted currently or they may be amor-

tized over a period of five years (less, if shown as appropriate). Software expenses must be consistently treated in the same way by the company.

If software is bundled with hardware and the price is not shown separately for the software, the total amount must be amortized over the life of the hardware.

4. The Investment Tax Credit

The Investment Tax Credit (ITC) is available only in connection with Section 38 property - Section 38 property is defined as being solely tangible property. Even though software may be considered as 'goods' in some cases for purposes of the Uniform Commercial Code, the Internal Revenue Service does not consider software as being 'tangible'. Although the tax water continues to be tested by some software purchasers, the general rule is that software does not qualify for investment tax credit in that it is not tangible.

The exception to the rule is where the software and hardware are bundled together for a single price. For example, assume the purchase of a sophisticated word processing system which includes software without the software being separately priced. If other requirements for the ITC are met, the ITC may be claimed for the entire cost of the word processing system even though it is clear that the software element makes up some unstated part of that price.

From the software vendor's standpoint, an attempt to bundle normally unbundled software and hardware into a single price can create some sticky problems in developing a payment schedule and in drafting provisions splitting out software and maintenance.

IV. THE SOFTWARE CONTRACT

This section of the book considers how a contract is formed - in particular, some general contract principals and clauses are considered as well as specialized aspects of software contracts. Problems can arise if the vendor and customer do not understand the contracting offer/acceptance mechanism and the function of an integration clause in a contract.

Software warranties are, of necessity, quite different from the warranties given with hardware - this section includes Uniform Commercial Code provisions that may be applicable, some specific warranties that should not be made (or at least, should be made only with great caution) and some warranties that provide some safety for the vendor while giving reasonable comfort to the customer.

Other specific contract areas that are considered include installation/acceptance, excusable delays, the patent and copyright clause, contractual protection of proprietary rights, and fundamental format design for a software agreement.

PART IV

THE SOFTWARE CONTRACT

PART IV

THE SOFTWARE CONTRACT (Cont'd)

A. The Contract Offer/Acceptance Mechanism

1. In General

Sometimes a contract is presented by one party and accepted, as it stands, by the other party. Where one party has enough bargaining strength, that party's contract may be presented on a "take it or leave it" basis.

More often, contracts are the product of negotiation between the parties. A typical sequence might go something along the following lines:

- offer by the vendor
- counteroffer by the customer
- counteroffer by the vendor
- acceptance by both customer and vendor by signing an agreement

It should be noted that contracts do not always have to be in written form. Oral contracts can be as valid and binding as written ones. For example:

- vendor "I'll let you use the software for $500"
- customer "I'll take that deal."

Oral contracts are not usually a good idea in the business context in that proof of the contract may be difficult - and there are certain situations in which an oral contract is not valid even if proved.

In the first example above (offer, counteroffer, etc.) the contract that was formed was based upon the

last offer before acceptance of the agreement by both parties.

Acceptance of a contract may sometimes be based on actions by the parties that show there is, in fact, a contract - even though a written document has not been signed. Whether or not any or all of the vendor's form contract provisions will apply in that situation is open to question. It is clear that a written, signed contract provides the best protection for both customer and vendor.

Sometimes two quite different contracts are signed by both parties covering the same transaction. That situation is covered in the next subsection.

2. Customer Purchase Order v. Vendor License Agreement

Many companies require that all purchases (including those of software licenses) be made on the company's standard purchase order form, which must be signed by the vendor. The terms and conditions printed on the purchase order form have no relationship to the licensing of software. Read those terms and conditions carefully.

In a situation where the customer and the vendor each sign two agreements (purchase order and license agreement) and the terms of those agreements conflict, a court is likely to view the contract as being a composite of the two documents after knocking out all terms in conflict.

The rationale is that where terms conflict there was no genuine agreement between the parties. As a practical matter, the vendor must get rid of serious conflicts between the two forms.

Customers are not consistent in willingness to modify their own purchase order form. Some companies negotiate willingly over crossing out part or all of the terms and conditions on the purchase order form. With other companies, authority to modify the form exists at such a high level in the organization that, as a practical matter, the purchase order form stays inviolate! Some possible approaches include the following:

- negotiate specific terms out of the purchase order
- place on the front of the purchase order a statement that "the terms and conditions on the back of this purchase order to not apply"
- place either on the front of the purchase order or as an amendment to the license agreement a statement along the following lines: "in the event of any conflict between the terms and conditions of this purchase order and the terms and conditions of the license agreement, the terms and conditions of the license agreement shall control"

In every case where a purchase order is to be signed by the vendor, the purchase order should refer to the specific separate license agreement covering the software.

B. The Integration Clause

1. In General

Any well written form contract for a computer system or software will include what lawyers call an "integration clause." The clause usually goes along the following lines:

> "The Licensee agrees that this Agreement is the complete and exclusive statement of the agreement between the parties, which supersedes all proposals or prior agreements, oral or written, and all other communications between the parties relating to the subject matter of this Agreement."

In addition, a good form contract will require that it be signed on behalf of the vendor at the vendor's home office. This latter provision helps ensure that the law of the vendor's home state will be applied to the contract (as recited in the contract). But perhaps the most important benefit of home office signature for many companies is the assurance that management and legal get a look at the contract before it is signed. Despite the physical presence of an integration clause in a contract, there are pitfalls - and there are steps that management may take to avoid them.

2. Preventing Incorporation of Sales Documents by Reference

The most common pitfall is that of including a sales document (e.g. a proposal) in the contract (see also the

section on warranties). Unfortunately, it is not necessary to attach the proposal to the contract to include it - the proposal may be included by a simple reference - for example by writing in somewhere above the signature line:

"Per proposal dated March 1, 198-."

Even if the proposal had some kind of an up-front disclaimer stating that the proposal is not a contract, that disclaimer gets washed out by the contract reference to the proposal. Now it <u>is</u> part of the contract. And you may have promised happiness for a fixed price!

There are positive steps that can be taken:

1. Let the marketing and sales personnel know that such references in the form contract will not be accepted by the home office without approval at the highest level. Period. Let the salesmen have the burden of pulling any particular elements out of the proposal that might properly be included (in management's view) as part of the contract.

2. When a contract is received by the home office for signature and it includes a reference to <u>any</u> outside document, it should be accompanied by a copy of this document. Even standard price lists should be attached so an old price list does not get out by accident.

3. Make sure that <u>any</u> changes to the form contract are reviewed with your lawyer (preferably with a computer

lawyer). Changes that appear innocuous to management may cause unexpected legal effects!

4. Make sure that the paper shuffling process proceeds rapidly enough so that a customer-modified contract does not get accepted through performance on your part. You can accept a contract by act as well as by signature!

3. Industry Practice, Course of Dealing and Consultant Posture

There are some other circumstances where a court might allow outside information to affect an otherwise unmodified form contract with an integration clause. The following situations might permit the customer to bring in information outside the four corners of the contract document itself. Note that the word used is 'might' - not definitely will. These situations are:

- industry practice differs from your practice - and the contract is silent on the particular point
- you have had a course of dealing with the customer extending over a period of time (usually more than a year) and you have established your own practices between you - and again the contract is silent on the particular point
- you have come on strong to the customer in a 'consultant' posture as being both expert in your field and knowledgeable about his operation - and the customer is unsophisticated in the computer sense.

The presence of any one of the three situations noted above should raise a caution flag. When in doubt check with your computer-lawyer as to the possible effect in the particular situation.

C. Warranties and the Uniform Commercial Code

1. In General

All software is sold or licensed with warranties and remedies of one kind or another. If the contract is, in the eyes of the court, too restrictive in terms of disclaiming warranties and limiting remedies, a court may supply warranties and remedies from the relevant provisions of the Uniform Commercial Code (UCC). Packaged software and software included as part of a system sale tends to be treated as 'goods' under the UCC.

Warranties are probably the most tender area for software contracts and license agreements. The best insurance against future litigation (or the future ability of a customer to hold your feet to the fire) is through careful control of just what warranties are given to the customer.

The best point to start in order to understand warranties in the legal sense is by taking a look at the Uniform Commercial Code provisions.

2. The Uniform Commercial Code Warranties

In §2-313, the UCC says (freely paraphrased) that an express warranty is created by:

- any affirmation of fact or promise made by the seller to the buyer or
- any description of the goods

Note that the fact, promise or description must be part of the written contract if that contract is intended to be the complete statement of the bargain between the parties.

UCC §2-314 says that there is an implied warranty that the goods are merchantable. Merchantable goods are defined as:

- being able to pass without objection in the trade
- being fit for the ordinary purposes for which such goods are used.

UCC §2-315 covers the implied warranty of fitness for a particular purpose. The particular provision, a brief one, is quoted here in its entirety:

> "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgement to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

Most software vendors do not want to give that kind of warranty! Fortunately, it is possible to design appropriate warranties for a software contracting situation and to exclude the UCC warranties. It is not, however, possible to exclude all warranties except in the case of a straight "As-Is" sale.

[Note that the relevant portions of the above UCC Sections appear in full at Appendix D].

D. Software Warranties that Should Not be Made

1. Freedom from Bugs or Coding Errors

Some software licenses include a warranty along the following lines:

> "Softco warrants the licensed software to be free of program coding errors when installed."

This kind of a warranty should not be made in that form for several reasons:

a. Software of any sophistication is rarely bug-free even after years of use. What the customer wants is software that is stable and performs satisfactorily. When a bug is discovered it may be necessary to fix the bug for a stable effective operation - or it may be possible to avoid the bug through operating procedures with little or no impact on the software stability and effectiveness from the customer's viewpoint.

b. Trivial bugs can be unreasonably expensive to fix.

Sometimes a minor bug or coding error (from the customer's point of view) may require an inordinate amount of programming effort on the part of the vendor to fix. For example, suppose that a particular sequence of terminal operator actions causes the program to fail, and the failure is traced to inadequate storage allocation to permit that sequence. It might be possible to cure the problem by rewriting the operator's instructional guide rather than restructuring and reworking several programs to permit larger storage.

c. The Vendor's Problem Can Be Permanent.

Software maintenance contracts tend to provide, for a fee, the same warranties that were provided in the original license agreement. As a result, a customer may have a permanent ability to hold the vendor's feet to the fire over bugs or coding errors that have no practical effect upon the customer's operation of the software.

Note that there are forms of the "freedom from bugs" warranty that can be given. Those affirmative warranties are discussed in Part IV, E.

2. Freedom from Defects in Material and Workmanship

Software should not be warranted as if it was hardware. Probably the clearest example of a software warranty that should NOT be made is the following:

> "Vendor warrants that the software will be free from defects in material and workmanship."

Such a warranty may be appropriate for hardware contracts. Unfortunately, warranties framed along that line are still seen in some contracts which include software. In particular, a warranty of that nature has been used for bundled systems (hardware and software) and in contracts for computer controlled machinery. Such a warranty is simply inappropriate for software. Software of any degree of sophistication - or software including any 'customized' elements - probably does not satisfy the warranty.

3. Warranting the Proposal

Another warranty that should not be given (or at least should not be given without careful soul searching) is the express warranty that comes about by incorporating a sales document, such as salesman correspondence or a sales-oriented proposal, as part of the contract. (In this connection see the section on the "Integration Clause"). Sales documents, such as proposals, tend to promise happiness to the customer. If such a document is included in the software contract by a simple reference above the signature line in the contract, you may have promised to deliver 'happiness' rather than delivering defined software or a standard package.

4. Exact Conformance to Specification

A warranty that should be given with caution is the following:

> "Vendor warrants that the software will conform with the attached specification."

A warranty of exact conformance with the specification can be reasonable if the software actually does conform exactly to the specification. The specification may be a neatly refined accurate specification for an existing package. On the other hand, the specification may include a not so well defined statement of a new feature or modification.

Most software contracts covering packages have warranty provisions intended to cover standard software.

The package itself may be fairly well defined in specifications. The problem arises when that contract is used to cover multiple chunks of software in varying stages of definition:

- a fully defined basic standard software package;
- a partially defined but not yet built enhancement to the standard package; and
- some customized software for the particular customer - which may be defined functionally if at all.

Now the problem becomes apparent. Unless additional contract language is considered (usually by way of an amendment) the warranty of conformance to specifications now covers all three of the above listed software elements.

5. Vendor Performance Without Customer Cooperation

Many, perhaps most, software contracts require cooperation from the customer for the vendor to perform in a timely fashion. The need for customer cooperation should be placed in the contract - or the customer may be able to give the vendor a very uncomfortable time. Some, but by no means all, of the areas in which customer cooperation may be required are:

- timely installation of hardware meeting the requirements of the software
- machine access for program development, testing and/or debugging

- help in tracking down bugs (e.g. furnishing dumps, furnishing problem reports on the vendor's form, etc.)
- prompt installation of patches and new versions so that the customer is running on the software that the vendor thinks he is!
- access to key customer personnel for system definition
- timely response to vendor questions
- preventing inaccurate customer-furnished information (or making changes at the customer's expense).

There are no simple cure-alls for the potential problems listed above. Of course not all the problems have applicability to any individual software contract. The problems are, however, most likely with software contracts that include substantial development or installation efforts by the vendor.

There is no single answer from the vendor's viewpoint. Some tools that can be used by the vendor include the following:

- include customer warranties in the contract (e.g. customer sign-off on system description)
- include a disclaimer (e.g. "we are not responsible unless things are as we think they are")
- include a contract statement that this is a joint effort between vendor and customer and that the cooperation of both parties will be required
- do not permit customer-requested changes without a written 'authorization' track record.

The best contract is one which makes an accurate description of the responsibilities and risks of both parties. The above checklists of possible problems and tools may be helpful.

E. Making Affirmative Software Warranties/Remedies

The previous section talked about software warranties that should not be made. This section discusses how to make warranties and limit remedies. Remember that:

- A software warranty is usually a promise that the software matches a description or performs in a certain way.
- A remedy is what the customer gets if the software does not comply with the warranty.

1. Use Scaled Warranties/Remedies Where Appropriate

Probably the most common fault in software contracts is the providing of a single warranty for all the software covered by the contract without spelling out exceptions. Using a single warranty is fine where only a single type of software is covered by the contract - for example, a stable fully-defined package. But inclusion of both such a stable package and either custom/customized software or third party software under the same warranty is an invitation to trouble. The particular problems that a single warranty may introduce include:

- inadvertent bundling of all software into a unit - thus postponing acceptance of any software element and extending the warranty period
- the furnishing of a warranty on any third party software elements stronger than that received by the vendor from the third party software source
- providing the customer an ability to get out of the deal if any software element fails to meet the warranty.

This section of the book will consider the structuring of levels of warranty and the types of warranty that can be made at each level.

2. Consider Definition by Remedy

Software warranties are often defined in a reverse way by specifying the remedy or level of service. For example, Type I software might be defined as receiving prompt response to service requests and on line access via communications for bug-fixing by the vendor. Type I software, in this example, would receive the highest level of warranty and of service. The lowest level of warranty, say Type III, might be defined as receiving an "as-is" warranty with a promise to provide, during the warranty period, any new releases or changes made generally available to the vendor's customers or received by the vendor from a third party (if the third party was the original source of the software).

In scaled warranties, each chunk of software is assigned a warranty level (e.g. "Level I"). The software form contract then includes a description of each level of warranty/remedy, enabling the customer to quickly ascertain what kind of warranty and support he will be receiving for each chunk of software. For one illustration of scaled warranties, see the form Maintenance Agreement in Appendix H.

3. Standard Software

Standard software has been defined as software that is stable, well-defined and in active use at multiple locations. In general, the customer has the ability to see standard software in action (whether or not the customer chooses to exercise that ability). Standard software should have a description which can be warranted to be fairly accurate. Any description of the software, whether short or long, should be looked at carefully to make sure that it represents a statement of current standard software without including glossy over-broad marketing statements or elements that are, in fact, developmental in nature.

A standard software warranty may run along the following lines:

> "The software furnished under this Agreement is warranted to conform to Softco's [specifications for] [description of] such software in Exhibit B."

The square brackets indicate an alternate form of statement. The exhibit itself may include a reference to a particular Softco document.

Where a warranty period is used a remedy provision may run along the following lines:

> "For a period of ninety days following acceptance, Softco will design, code, checkout, document and deliver promptly any amendments or alterations to the Software that may be required to correct errors present at the time of acceptance

of the software and which significantly affect performance in accordance with the specifications. This warranty is contingent upon Customer advising Softco in writing of such errors, in accordance with Softco's prescribed reporting procedures, within ninety (90) days from acceptance as defined herein."

In the example above, the phrase "and which significantly affect performance" effectively excludes fixing of trivial failures to conform to specifications.

There is no great magic about any particular set of words used for warranties or remedies (providing that the UCC provisions are kept in mind) - but it is very important to match the warranties/remedies to the software actually being provided.

4. Customized Software

Customized software has been defined as standard software that has been modified to fit the particular customer's requirements. The 'customization' may be done entirely by the vendor - but more often it is a cooperative effort between vendor and customer. Although the standard software portion qualifies for the standard software warranty, the customized elements are usually not solely within the vendor's control. The key is not to warrant the customized elements beyond the point that the customization is exclusively in the vendor's control.

One way to handle customized elements is to perform the work on a time and materials basis. This is an appropriate route where the amount of effort required is unknown at the time of contracting. Of course, working on a time and materials basis largely avoids warranty/remedy problems.

If a fixed price is quoted for the customization, one or more of the following tools might be helpful:

- invest the time to fully define the customization to reduce the risk
- have the customer affirmatively promise people cooperation and access to resources
- define the customization effort in terms of the amount of time (programmer days) to be devoted on a 'best efforts' basis
- take the risk by doing the customization prior to contract if the changes may be usable by multiple customers.

5. Custom Software

Whereas customized software involves some modification to standard software, custom software implies the creation of a new program or set of programs from scratch. By definition, custom software is developmental in nature. The warranties and remedies that are furnished with custom software depend almost completely upon the degree of definition at the time of contract. And, even given the best contract, custom software involves cooperation between vendor and customer and some degree of administra-

tive effort on the part of both to track the changes that almost inevitably crop up during the course of development. If the custom software is well-defined, it is possible to use a warranty/remedy along the lines of the standard software warranty/remedy outlined above. In addition, the vendor should consider including either in the form contract or as special contract provisions applicable to the custom software, some of the following provisions:

- a requirement that changes ordered by the customer will be billed on a time and materials basis
- a force majeure clause that excuses delays beyond the 'reasonable control' of the vendor (see Section IV G in this book)
- if documentation is promised, it should be promised on an 'as available' basis unless the level of documentation to be provided is fully understood by both parties
- spell out areas where customer cooperation is required (e.g. machine availability, access to people, etc.)
- state that after installation or acceptance, corrections or modifications will be made on a time and materials basis.

Note that most of the above provisions take custom software out of the normal warranty/remedy provisions of the form contract. Every case is likely to be a little different - and the net effect is that custom software usually requires custom contract provisions.

6. Bundled Hardware and Software

A hardware type of warranty may be given where, from the customer's viewpoint, he is buying a piece of hardware having certain characteristics (even though those characteristics are present by virtue of software). In general, however, hardware and software warranties should be split even where the contract is for delivery of a bundled system. Treating hardware differently from software works to the advantage of both vendor and customer in that it lays out warranties and remedies in a more realistic fashion. Hardware may have a 'repair or replace' warranty - but software should not have that kind of warranty.

The bundled system vendor should bear in mind that should he fail to deliver what has been promised, the buyer may be able to reject both hardware and software - and this is probably true even though the bulk of a bundled system has been installed and is operating for a customer. An 'off-the-shelf' bundled system stands on a different footing than a system with custom elements. In the case of an 'off-the-shelf' system the definition will usually be pretty well worked up - and both buyer and seller understand what is being bought and sold. Where a bundled system transaction has some software elements that are to be delivered later than

the basic system (or hardware elements unique to the particular customer), there can be serious problems. In this regard, see Section V. A (The Bundled System Contract) in this book.

7. Limiting Responsibility for Customer Modifications

About the only thing that can be said about customer modifications is that the vendor can not be responsible for them! This lack of responsibility should be set out in the contract. Such a disclaimer of responsibility may run along the following lines:

> "Customer shall inform Softco in writing of any modifications made to the software. Softco shall not be responsible for maintaining Customer-modified portions of the software. Corrections for difficulties or defects traceable to Customer errors or system changes will be billed at Softco's standard time and materials rate."

F. Installation and Acceptance

1. In General

Establishing just when software is installed and accepted is important when those dates serve as trigger events for payment or the beginning of a warranty period. Although a hardware customer is usually willing to accept the hardware vendor's say-so on when equipment is installed (installation equalling acceptance in this instance), the same customer is not so charitable toward the software vendor.

The mass distribution software vendor may avoid installation/acceptance problems by merely promising to refund the money if the software is returned within, say, thirty days. In that instance, the vendor has no responsibility for actual installation and the software is sold on an "as-is" basis. If not returned, it is accepted.

In software sales with a somewhat greater degree of sophistication, the contract might provide for a payment schedule along the following lines:

- twenty percent on contract
- thirty percent on installation
- forty percent on acceptance and
- ten percent thirty days after acceptance.

The date of acceptance becomes extremely important due to the fact that not only does payment hinge on

acceptance but, until acceptance occurs, the vendor may be on the hook for free maintenance service.

2. Installation

Installation of the software (like hardware) tends to be when the vendor says it is installed. Where an installation date is used in the contract as a trigger for payment, it is important to provide a promise by the customer to have the necessary hardware in place by a certain date. On that date, providing the software is ready for installation, installation may be deemed to have occurred even if the hardware is not available.

3. Acceptance

Acceptance is a much more difficult date to define. From the vendor's viewpoint, he would like to have the software accepted when he says it works - but few customers will go along with that! The customer, given his druthers, would like to live with the software in actual operation prior to formal acceptance.

The establishment of just how to determine when acceptance occurs should be up front at the time of the contract. If the software is standard software, the vendor should have developed an acceptance test analogous to the tests run on newly installed hardware by the hardware vendor. At the time of contract, the customer

may examine and agree to that acceptance test. For standard software the contract provision might be as follows:

> "The Softco Products will be deemed accepted when they have successfully satisfied the acceptance criteria in accordance with procedures defined in the Softco Acceptance Test or as established by Softco prior to testing. Acceptance will be performed utilizing the actual hardware system to be used with the software system."

The general requirement in defining acceptance from both customer and vendor viewpoints is the development of the description or specifications to the point where both parties agree that the software is adequately defined. Acceptance tests to be jointly developed by vendor and customer can present serious problems unless such joint definition is done in advance of the contract. Unless the test is layed out up front, the customer may have the ability to defeat the entire contract merely by not agreeing to any particular test.

In a situation where the hardware installation may be delayed for any reason, it may become important to provide for acceptance testing on alternate (but similarly configured) hardware at an alternate site.

There have been situations in the marketplace where a customer has used software in a productive sense for a long period of time without 'accepting' the software. If a customer is able to postpone acceptance it increases

the financial leverage of the customer over the vendor by withholding the acceptance payment and also provides for a longer period for bugs to show up while the software is under 'free' maintenance. A provision that can help a great deal in this situation is as follows:

> "Productive use by the customer shall constitute acceptance."

Making productive use equal to acceptance does not eliminate the potential problem - but at least it makes the bargain a little fairer by triggering acceptance at such time as the customer decides to put the software (as it then stands) into productive operation.

Acceptance problems may also arise where the software is not to be delivered all at once but rather over a period of time. Unless it is clearly understood by both parties that there will be no acceptance until all the software is accepted, the contract should spell out just what is understood regarding acceptance of individual parts of the software. The problem often arises in one of the following situations:

- a custom program, not needed for immediate operation, is scheduled for later delivery
- a software enhancement (now in development) is promised to this particular customer.

In both of those situations there are three questions to be answered with respect to the later delivered software:

(1) How is the acceptance payment to be handled?

(2) When will the warranty period begin? and

(3) Is the later delivered software an essential part of the deal from the customer's viewpoint or only an optional part of the deal?

For one example involving later delivered software see Section V. A (The Bundled System Contract) in this book.

Providing a good description of the software is easy when the software is a stable well-defined package.

Where some of the software is well-defined while some is not - a good intermediate solution is to provide for vendor-only acceptance tests of the well-defined package while jointly devised acceptance procedures should be developed for the less well-defined portion. If a jointly developed acceptance test is to be developed after contract, it is desirable to have a distinct time limitation on the customer-furnished portions of an acceptance test.

A classic problem develops when the customer keeps changing the ground rules of what is wanted. When you don't know what you want, it is hard to tell when it is finished!

4. Dealing with Custom Software

Some tools and techniques for dealing with customized or custom software include the following:

- Use a paid system study approach (for a fixed price) to jointly develop with the customer the specifications for the chunk of software. Based on those specifications, the vendor can quote a fixed price with a higher degree of confidence.

- Use a "best efforts" commitment - agree to deliver the chunk of software by an "estimated" date on a best-efforts basis.

- Use taut administration by maintaining tight management control over software development - no customer-requested changes unless approved by vendor management.

- Spell out "optional" - if the portion of software is a separable (optional) element from the customer's viewpoint, make sure the contract indicates that. Use of a "best-efforts" commitment to develop the software will make it less likely that the customer can back out and recover earlier payments for a basic package based on failure of the vendor to provide happiness in the additional chunk of software.

- Live use equals acceptance - regardless of acceptance testing, it is a good idea to provide that productive use of the software by the customer will constitute acceptance.

- Time/automatic acceptance - where acceptance testing with customer participation is used, sometimes it is helpful to put in a time limit (e.g. "acceptance 30 days after installation unless reported faults or defects exist") and to require the customer to provide a written description on a vendor form of system faults or defects. A succeeding period of time (perhaps another 30 days) may be tacked to the period to enable clearing up of faults determined during the initial period.

G. Excusable Delays (Force Majeure)

We live in a somewhat uncertain age. Airplanes may be grounded by weather, key employees may leave and promises of others may be broken. Although not appropriate for every contract, many contracts have (or should have) a clause which provides some excuse when things happen that are outside of that party's reasonable control. The clause, often called a "Force Majeure" clause goes along the following lines:

> "Softco shall not be responsible for any delays caused by Acts of God or any other cause beyond Softco's reasonable control."

Although many force majeure clauses are extremely detailed listing such thing as strikes, riots and acts of war, yet the fundamental principle is that a party should not be responsible for things beyond his reasonable control.

A force majeure or excusable delay clause is often a good idea from both the customer's point of view and the vendor's point of view. The customer may be delayed in getting the required hardware due to a manufacturer foul-up and the software vendor may lose that key employee - the only one capable of writing the custom program in one week flat!

Although most vendor contracts have a one-way force majeure clause operating to their benefit, there is no

reason why such a provision should not be made two-way if a customer wishes.

An excusable delays clause may become absolutely essential from the vendor's viewpoint if specific flat deadlines are given in the contract to give the contract a "time is of the essence" flavor.

H. The Patent and Copyright Clause

The patent and copyright clause in a contract is intended to assure the customer of some protection in the event that it turns out that the software was not the vendor's to sell. For many types of software and many customers, the need for such a clause is not very great. However, with a cautious customer or one that is going to place a great deal of business reliance upon the software, there will be insistance upon a patent and copyright clause.

A patent and copyright clause may look something like this:

> "Softco warrants that the use of the software furnished under this Agreement shall not infringe any United States patent, copyright, trade secret or other proprietary right covering such product. Softco agrees, at its own expense, to defend, or at its option to settle, any claim, suit or proceeding brought against Customer on the issue of infringement of any United States patent, copyright, trade secret or other proprietary right with respect to the software furnished by Softco to Customer under this Agreement. In the event that any Softco software should be determined to be subject to the proprietary rights of a third party, Softco agrees, at its option, to: (1) procure for Customer the right to continue using such software; or (2) replace or modify such software to make it noninfringing; or (3) remove such software or portion thereof and refund to Customer a proportionate share of the license fee."

Patent and copyright clauses come in many forms - some running several pages long. Most vendors (and customers) prefer patent and copyright clauses short enough to give the reader a chance of understanding them. Unfortunately, the language tends to be reminiscent of the Internal Revenue Code! It is important to read the patent

and copyright clause - notice subprovision (3) in the example!

Where one party proposes a patent and copyright clause, it is important for the other party to determine how that clause may affect his future rights and obligations. Particular points to look for include:

- o if some software is found infringing, what options does the vendor have?
- o who pays whose legal expenses - or does each party pay his own legal expenses?
- o does a mere threat by someone trigger this paragraph or does it take an actual court decision?

Be careful with patent and copyright clauses to make sure that one party is not warranting ownership of something which is, in fact, owned by someone else. For example, if the software contract includes a manufacturer's operating system to be furnished by the software vendor, it should be made clear somewhere in the contract that that operating system does not belong to the vendor - and therefore is not covered by the patent and copyright clause.

I. Contractual Protection of Proprietary Rights

1. In General

The software proprietor should include enough contract requirements to protect the trade secret nature of his software - while not indulging in 'overkill' by making those restrictions so onerous that, in fact, they will be waived by general agreement between the software proprietor and the software purchaser. To maintain trade secret protection, the customer must be required to treat the software as a trade secret which happens to be in his hands for use. As a result, the customer is normally required by contract to observe rudimentary security procedures. At least portions of the contract restrictions on customer actions are for psychological impact - the customer must be convinced that the owner is serious about the proprietary nature of the software and the need to maintain trade secret protection.

Restrictions should be reasonable enough that the customer will be able to live with them in actual operation. It hurts the vendor as much as the customer (and perhaps more than the customer) if the restrictions are so onerous that the customer cannot live up to them.

- The customer may be hurt by over-strong restrictions that put him in technical breach of the contract from day one.

- The vendor is hurt because he is likely to know of the breaches and, by ignoring them, to waive the particular contract restrictions. A court might take such a waiver as an indication that there is really no trade secret there!

The following subsections consider some of the restrictions that may reasonably be placed on the customer. (For examples of one level of restrictions see Appendix F pages 3-6)

2. Customer Admission That the Software is Proprietary to the Vendor

The contract should provide an acknowledgment by the customer that the software is proprietary and the property of the software owner. Such a statement may run along the following lines:

> "Customer recognizes that the computer programs, system documentation manuals and other materials supplied by Softco to Customer are subject to the proprietary rights of Softco."

The contract should go a little further and have an affirmative statement by the customer that the programs, documentation and all information supplied in machine readable form comprise trade secrets of the vendor. Some customers find this a little extreme - but are readily willing to admit that the vendor 'represents' that such is the case.

The contract should also point out that some of the materials furnished by the vendor are protected by the copyright law. This will help make it clear that the customer understands that copying is forbidden except as specifically permitted under the contract.

3. Ownership of Specific Materials

Even though the customer acknowledges that the vendor owns the software (as an intangible) the contract should spell out what, if anything, the customer does own. The contract may provide (as a deliverable) that the customer may 'own' authorized copies of copyrighted materials, but does not have any ownership interest in anything else furnished by the vendor.

4. Use Restrictions

Use restrictions imposed by the vendor are, in fact, a part of the product description. In arriving at just what kinds of uses will be permitted, the vendor indirectly defines his marketplace. Particular use restrictions may include some or all of the following:

- A limitation to use by the named customer.
- Use limited to a named location.
- Use to support only terminals operated by the customer.
- Use on a single central processing unit.
- Use on one central processing unit at a time at a site having several suitably configured systems.

Still another kind of limitation relates to just who is named as the customer. If the customer is a subsidiary of a larger company, future sales of the same software may or may not be made to other subsidiaries of the parent company depending on how the 'customer' is identified in the contract. Precise identification of 'customer' is an

important matter for both vendor and customer. The customer must think through what the future may hold in terms of corporate reorganizations, possible acquisitions, etc. Centralization to decentralization of computing facilities (and back again) seems to be a routine long-term cycle in many large companies. How both vendor and customer look at a particular contract may depend upon which phase of that cycle the particular customer happens to be in!

The prudent customer may well insist on the ability to assign the contract to a parent or subsidiary company as a basic protective measure. The software vendor may not object to parent-subsidiary assignability if he is content with the rough-cut kind of use limitation that comes through allowing use on a single central processor. Of course, the vendor counting solely on a single CPU restriction may well be in trouble down the road when, at least theoretically, a single powerful communicating CPU could serve the entire worldwide need for a particular program!

5. Prohibition Against Competition

The vendor will usually want to make sure that the customer does not turn around and start competing with him by selling competitive software or services. Depending on the needs of the customer and the relative

negotiating power of the vendor, one or more of the following restrictions may be used:

- The customer agrees not to sell similar software to the licensed software while the particular license agreement is in effect.
- The customer agrees not to sell the use of the program as a service or service bureau.

A customer may well wish to sell services based on the licensed software - the vendor may or may not object to that. A provision in the form contract prohibiting the sale of service bureau services based on the software will, at the very least, make sure that the service bureau aspect comes out in negotiations. Again, at some future time, a single CPU might be capable of satisfying the complete demand for the service.

6. Restrictions on Backup and Copying

Backup restrictions must recognize the fact that a reasonable amount of backup is a necessary thing. Few vendors will want to physically verify the location of every backup copy every time such a copy is made. There are several ways in which backup may be handled in the contract while still preserving trade secret protection. All of the following routes permit backup with certain restrictions:

- The customer agrees to treat the software as he does his own most valuable software.

- The customer identifies each off-site location at which the software will be kept.
- The customer describes his backup procedures with locations.

Where backup locations and procedures are specified in the contract in detail, it is necessary to require the customer to notify the vendor of any change in procedures or locations - a potential administrative problem for both vendor and customer. Sometimes a customer may have inherently poor security (e.g. some university computing centers) in which case the vendor may have second thoughts about licensing the particular customer at all! At the other extreme, some customers already deal with materials so sensitive that they have structured levels of security with the highest level being subject to government top secret security procedures. In that case, the vendor may discuss with the customer what level of security, within the customer's classifications, is appropriate for use as a reference level for treatment of the vendor's software.

7. A Blanket Prohibition Against Reverse Engineering Where Only Object Code is Furnished

There are computer programs available that attempt to reconstruct source code from object code. As a practical matter, it should be understood that any attempt to recreate source from object will create source missing the elemental documentation such as comment cards, normally forming a part of the source code. Although such source-reconstruction programs have had limited success to date (and are unlikely

to work very well in the foreseeable future), it is a good idea to include a representation by the customer that he will not attempt to create the source programs by reverse engineering. In the absence of a specific reverse engineering provision, there is no bar for a customer holding object code to attempt to develop the source code on his own.

8. Customer Cooperation in Tracking Down Unauthorized Use

Many license agreements spell out punishment for the customer if his authorized copy of the software is in turn copied for unauthorized use by others. The most likely means of this happening are through theft by an employee (or former employee) of the customer. What the vendor really needs is the cooperation of the customer - in particular:

- the customer should agree to notify the vendor immediately if he learns of the unauthorized use or possession of the software and
- the customer should cooperate with the vendor in tracking down and punishing unauthorized users.

It does the vendor no good to create a contract climate which makes the customer silent and uncooperative in pursuing suspected unauthorized use or possession of the software. The customer may reasonably insist on being held harmless from expenses in providing this

cooperation - at least if the unauthorized use or possession was not due to the negligence of the customer.

9. Transfer of License Rights

The degree to which the license may be assignable is important to both customer and vendor. Most form license agreements tend to be set up in the most restrictive mold. The customer must think forward to see what the future might hold for his business and form of business organization - and compare that thinking to the non-assignability provisions. The vendor, of course is concerned about how his marketplace is carved up today and how future transfer of license rights from the customer might affect his then-marketplace. Some vendors start from a position that the license should not be assignable and then back up to a position that:

> "customer may not assign this Agreement without the advance written consent of Softco. Such consent shall not be unreasonably withheld."

The one iron-clad rule is that no customer assignment should be permitted without advance written notice to the vendor. Permitting customer assignment without notice could destroy trade secret protection.

J. Designing a Form Software Agreement

The vendor does most of his thinking up front in the design of form agreements. The form makes sure that the vendor springs from a solid base in negotiating any individual agreement. This section takes a look at format elements in designing a basic contract form.

A form agreement should look like a form and, if at all possible, should be typeset. The basic psychology is simple - if it looks like a form (and particularly if it is printed) it must be the one that everyone signs.

Good form agreements do much more than provide a sound base for negotiations. Even with software costing into the six figures, some customers will sign off on the form as it stands if it is reasonably drawn. One of the most important aspects of using a standard form is that software license administration becomes a matter of knowing what exceptions apply to each licensee - without painstaking examination of a mass of individually typed contracts.

In designing a form agreement the following rules of thumb may be helpful:

- The basic form agreement should have space on the front page to identify the particular software being licensed but should not be 'tailored' to any particular chunk of software.
- An attached schedule or exhibit should be used to list 'deliverables'. (This would include the number of copies of manuals,

amount and location of training included in the price, etc.)

- An attached schedule or exhibit should be used to describe (in rough fashion) the licensed software and version (unless described in an identified separate document).

- An attached schedule or exhibit should be used for a current price list for other services (such as instructor time charges, fees for class attendance, etc.).

- An attached schedule or exhibit should be used for any installation schedule. If appropriate, make sure that it has a 'best efforts' footnote.

- An attached schedule or exhibit should be used for the particular price/payment schedule for the software.

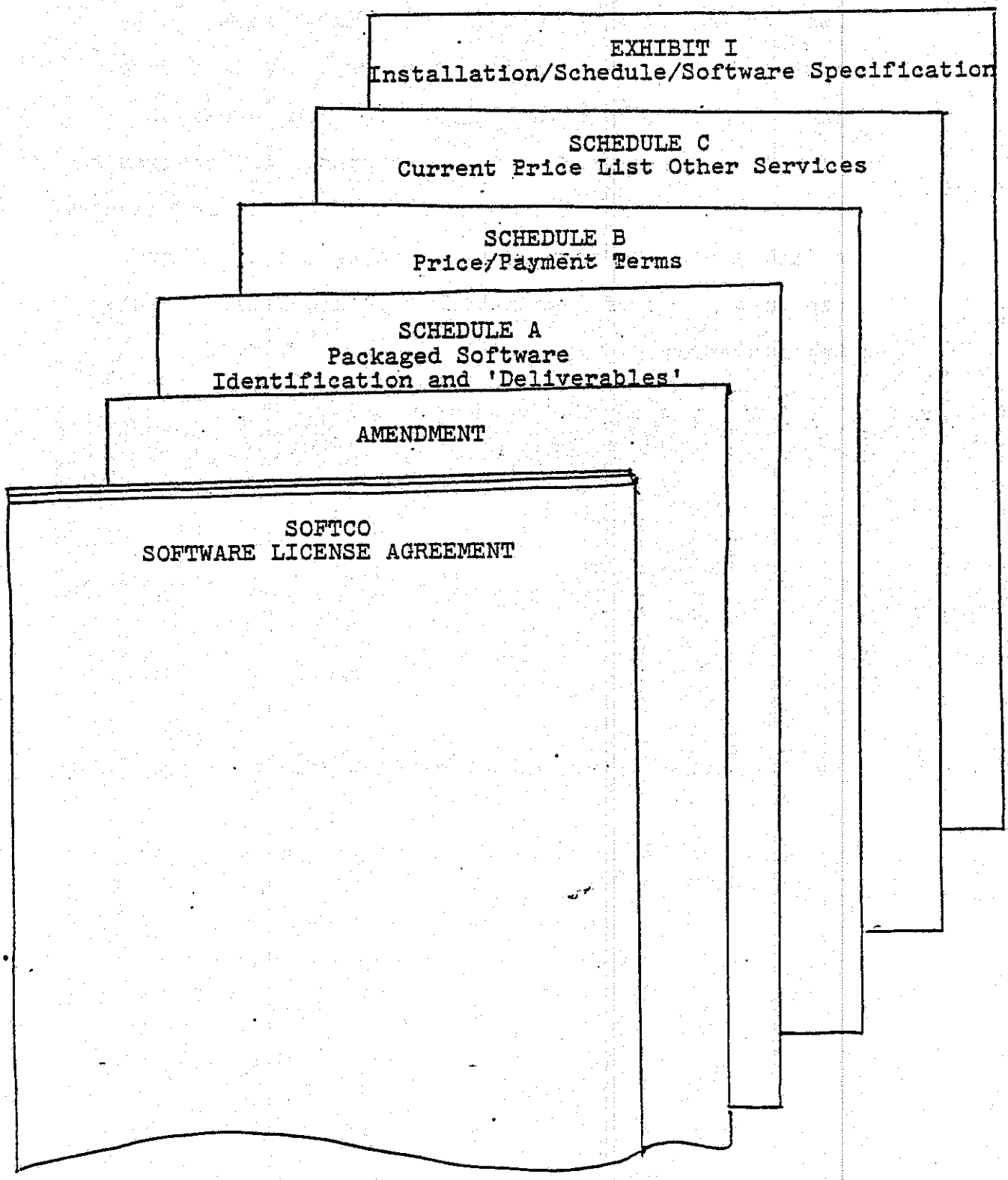
EXHIBIT I
Installation/Schedule/Software Specification
SCHEDULE C
Current Price List Other Services
SCHEDULE B
Price/Payment Terms
SCHEDULE A
Packaged Software
Identification and 'Deliverables'
AMENDMENT
SOFTCO
SOFTWARE LICENSE AGREEMENT

The above (as shown in the drawing) may seem to lead to an unwieldy document with many pages - but most pages will be standard text or a standard form. The basic principle is to have the form agreement itself be the same for every customer. Any changes to the form are highlighted in an amendment or an addendum. A little bit of forethought in designing the format can save a lot of negotiating time and later administrative effort.

V. HANDLING SOME SPECIAL CONTRACT SITUATIONS

This section considers some special contracting situations that should be recognized as being 'different' and which do require special handling. The first subsection presents a hypothetical case study of a bundled system contract including timing considerations for both hardware and software. The example portrays a fairly common kind of "system" sale situation.

Except in the case of truly standard software furnished on an "As-Is" basis or with very limited support obligations no two software deals are likely to be exactly identical. It is one thing for the vendor to prepare good basic form agreements but quite another to recognize the differences in any particular contracting situation and handling those differences contractually. All too often a software contract, as executed, does not read on the actual situation.

Arbitration is considered as a possible tool for use by both vendor and customer. Most vendors and customers have not been involved in arbitration - this subsection explains how arbitration works so that it may be considered for use in contracts or as an after-the-fact tool for resolving disputes.

Part V - Introduction

PART V

HANDLING SOME SPECIAL CONTRACT SITUATIONS

A. The Bundled System Contract

When a contract involves bundled hardware and software - the vendor commits to furnish a 'system'. From the user's viewpoint this makes a lot of sense in that he wants to buy a working system rather than an assemblage of parts. Although a standard form contract is helpful, systems of any degree of sophistication tend to require a good deal of contract tailoring so that the final contract is fair to both parties and speaks to the deal actually made. Situations can and do become quite complex in the contracting sense. For example, suppose we have the following 'systems' situation:

1. Software vendor to supply CPU and some peripherals to customer as a hardware OEM. Orders by the system vendor to the hardware manufacturer are subject to cancellation penalties if cancelled within two months of expected shipping data.

a. CPU shipment estimate - two months after receipt of order by manufacturer;

b. Tape drives - off the shelf; and

c. Disk drives (a new model) shipment estimated but not guaranteed six months after receipt of order by manufacturer. (Customer can operate on a tape system on an interim basis).

2. Software vendor to supply software including the following:

(a) A basic package, "X", already installed and running in a number of other locations;

(b) An "X" enhancement, now in Beta test phase (highly desirable but not required for customer's operation) and

(c) Two 'custom' programs to be prepared for the particular customer: (1) partially designed program "A" which is necessary for any productive operation on the part of the customer; and (2) program "B" which is desirable from the customer's viewpoint for long range operation but which is only defined in rough concept at contract time.

There are two possible worst contract cases. In the first 'worst' case a sloppy contract permits the customer to withhold out-of-proportion amounts of money (and to defer paying for maintenance) until the last element is in and the last bug cleared up. In the second 'worst' case, custom program B is never delivered for any one or more of a number of possible reasons and the customer backs out of the deal suing for all the Uniform Commercial Code remedies including not only return of all money paid but incidental costs incurred plus consequential damages.

A good contract for the above system will make a fair allocation of risk between the customer and the system vendor.

Some possible contract provisions (but by no means the only possible provisions) include the following:

Hardware:

(1) A Force Majeure clause including excuse of the system vendor for delays due to causes beyond its reasonable control - including delays on the part of its suppliers.

(2) Hardware warranties to start on shipment of each unit from manufacturer (match with manufacturer warranties in OEM agreement).

(3) A save harmless from cancellation penalties clause for the system vendor's benefit if customer should cancel for any reason or if customer should change hardware configuration.

(4) State prices separately for each hardware unit if possible.

Software:

(1) State prices separately for the basic "X" package, program A; the "X" enhancement and program B.

(2) Provide for acceptance of the basic "X" package and program A independently of the "X" enhancement and program B.

(3) Provide that software will be accepted on bringing it up on the tape system prior to delivery

of the disk drives, in the alternative, bringing it up on a non-customer equivalent system.

(4) Provide that "X" enhancement, currently in preparation, will be delivered and installed when available. (A current 'estimate' of delivery date may be included.)

(5) If a price has been quoted on program B, state that it is an estimate based on preliminary information supplied by the customer. Alternate approaches to program B include quoting a price for preparing a specification for program B so that a program price may be quoted.

B. Handling Required or Optional Third Party Software

1. The Hardware Manufacturer's Operating System

You may be in the position intentionally (or unintentionally) of selling third party software to run with (or as part of) your package. This situation may arise when you serve as the hardware OEM and you have modified the manufacturer's operating system to make your software package operate more efficiently. Depending upon your contracts with the hardware manufacturer (typically an OEM agreement or OEM agreement and software license), you should make sure the following factors are considered.

2. Ownership of the Operating System

Who owns the operating system? If the version of the operating system that has been integrated with the package was originally released by the hardware manufacturer before 1978 without copyright or trade secret strings, there is probably no problem. It is worthwhile making sure of a 'paper trail' to be able to prove that the operating system is in the public domain if the need should ever arise.

3. New Operating System Versions

Might there be (at some time in the future) a need to update your integrated software version to be compatible with a more recent release of the original manufacturer-

supplied operating system? If there is any such possibility, the license agreement with the end-user should cover who pays any freshly required hardware manufacturer license fees.

The most typical situation is where your package runs under a particular standard operating system version supplied directly by the manufacturer. In this instance the operating system license is normally purchased by the end-user direct from the manufacturer. You should include in the license agreement (see the section on format of license agreements) a description of the particular operating system and version that your package runs under. In this instance the manufacturer may come out with new versions of his operating system which you may not want to (or may not be able to) have your package run under. Careful wording in the license agreement is necessary.

4. Other Third Party Software

It is becoming more and more common for a software vendor to function, in part, as a software integrator. For example, suppose you supply an accounting package but you use a third party supplied 'sort' program integrated with your own software package. Depending upon the degree of integration with your own software, one of the following examples may read on your situation:

Example 1. The third party software is fully integrated and you assume any maintenance responsibility. In this case, the customer may not even realize that there is third party software present in the system - and, indeed, it makes little difference to him. You pay any required license fee directly to the third party under a separate agreement.

In the case of fully integrated third party software it is only necessary to make sure that you have the right to license and that the contractual statement of proprietary rights reads on the actual situation. Language might read as follows:

> "Vendor represents that he owns or is authorized to license the software."

Example 2. Your software operates with a separate third party program, required by the customer, but which you have neither the ability nor the inclination to maintain. Typically, such third party software is highly stable, widely used in the marketplace and has little need for maintenance. The license for the third party software may be by you (a sub-license, in effect) or may run directly from the third party to the customer even though you furnish the code to the customer.

With such external required software on which maintenance will not be furnished by you, the safest course is to clearly label such software in the contract as being furnished by a third party "AS-IS." It is sometimes helpful to include in the contract a phrase such as follows:

> "Although Software Vendor does not maintain third party software, so long as Customer is under Software Vendor maintenance for Vendor's base software, Vendor agrees to furnish Customer with appropriate corrections or updates to third party software as they may be received by Vendor from the third party supplier."

C. Granting Price Options for Software

A fairly common situation is where a customer wants to license a software package but does not know whether or not he will want another related package from the same vendor at some time in the future. The customer wants to license the basic package now but with an option to license the other package at a fixed price sometime in the future. If the vendor is willing to grant such an option it is worthwhile considering the following points:

- limit the period within which the option may be exercised by the customer.
- specify just what software is optioned - in general, it is better to identify the optioned software with the vendor's program name and version (e.g. ACCOUNT A-1234, release 4) number rather than to merely identify it by a generic or functional name (e.g. "Accounting Package").
- if a generic functional name is used - make sure the language of the option does not allow any future separately priced software to be read into the optioned software for the option price.
- state the complete cost - express the option price as a dollar amount plus "then-current installation and training charges." This is particularly important in inflationary times.
- state the terms of payment on option exercise - one possibility is to state: "this option may be exercised by the payment to Vendor of the price plus then-current installation and training charges."

When granting an option for software, bear in mind that you are freezing in written form the conditions

for a future event. During the life of the option many things may change - people costs, marketing approach, package designations or repackaging of the packaged product line. All of these potential problems can be reduced by using a short (six or twelve month) option period. As the option period lengthens, greater care must be taken in precise option wording.

D. Distributing Software Through Third Parties

1. In General

A license between proprietor and end-user involves only two parties - and is usually a straightforward licensing transaction. If, however, a third party (e.g. a distributor) is brought into the picture the situation becomes much more complex. No two transactions are likely to be identical. As between proprietor and distributor, some of the major factors that differ from deal to deal include the following:

- Development work anticipated by proprietor or distributor or both.
- The anticipated life cycle of the software.
- The warranties furnished to the distributor by the proprietor (e.g. warranties in the operating capabilities sense as to whether the software meets certain specifications - or is furnished in "AS-IS" condition).
- Whether the software is to be licensed to the end-user in a plain vanilla form or whether it will be customized to each end-user.
- Who assumes ongoing maintenance responsibilities.
- The royalty question and the question of what revenues royalties apply to.
- Whether the proprietor will be signing any kind of direct contracts with the end-user or will be wholly or partially invisible from the end-user's point of view.
- Rights reserved by the proprietor (e.g. rights existing users or rights of self-use of the software).
- The degree of trust between proprietor and distributor - particularly with regard to checking reporting honesty in royalties.

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- Any future grant back to proprietor of use-rights in distributor-developed improvements.

It will be seen from the above list that few proprietor-distributor agreements fit into any consistent mold.

The industry position of the parties may be quite a bit different also. For example, the proprietor may be a user that has developed software and would like to make some money from it but wants no ongoing responsibilities. At the other extreme, the proprietor may be a professional software package house that intends to be continually involved with (and in control of) ongoing development and maintenance. The balance of this Section looks at some of the particular areas that may be of concern in the proprietor-distributor contract.

Appendix L in this book is a form distributorship agreement that may be helpful in some situations. That particular form is reasonably well adapted to transfer of exclusive rights to distribute software while retaining use-rights or rights for existing customers.

A set of interrelated distributorship agreements is included as Appendix M. The latter Appendix includes agreements that have been used by one company to authorize distribution of an operating system, including some consideration of foreign distribution. The first page of Appendix M has a description of the somewhat voluminous contract documents reproduced.

2. Deliverables

As with individual end-user license agreements, it is good practice to cast as many things in deliverable form as possible. Of necessity, the deliverables from proprietor to distributor will be somewhat different than the deliverables to an end-user. Typically, distributors are more likely to receive (or require) source code than end-users (more about this under the Maintenance sub-section below). Deliverables are also more likely to include copies of training materials at the trainer level and may include some assurance of availability of sales or technical-sales support for some period of time.

2. The Royalty Base

Ongoing royalties are usually related to the revenues received by the distributor for end-user licenses to the software. This is not always a clearcut thing to measure.

Where the agreement is for an exclusive distributorship, the distributor will normally need control over substantially all marketing and pricing aspects. Thus the distributor needs some degree of flexibility to decide to, say, bundle in two days of on-site installation support for a single license fee. The distributor also needs some flexibility in order to put a price tag on additional licenses to the same customer or for broadening the scope permitted to a single customer or, perhaps, to permit limited further sub-licensing of the software (e.g. a distributor's distributor). Assuring fair royalty returns

to the proprietor while retaining flexibility for the distributor can be a complex undertaking.

Some general rules of thumb may be helpful:

- Royalties should not be applied to end-user payments for out-of-pocket distributor costs.
- Where the proprietor is not responsible for ongoing development or maintenance, it is usually a good idea to have a royalty cap in either total dollars or time (e.g. royalty payments to a maximum dollar amount but no royalties after, say, five years).
- Royalties should be payable as "non-recoverable" payments are received by the distributor.
- Royalties should usually not be payable on software elements that are separately sold but not originally furnished by the proprietor.

For one approach to contract royalty provisions, see Appendix L.

3. Handling Reserved Rights

Almost invariably, the software proprietor contracting with a distributor wants to (or absolutely must) retain certain rights for themselves or on behalf of previously authorized end-users. Retained or existing rights should be identified in the contract - even though they are not always susceptible to being spelled out in full detail at the time of contract.

Where retained rights include current authorized users, a list of users and the degree of license scope should be included in the contract. Some thought should be given to the question of what happens if an existing user

(pre-distributorship arrangement) later wants an additional or expanded license.

4. Insuring Honesty in Reporting

A proprietor has a justifiable concern in making sure that royalties due are actually paid. On the other hand, the software distributor does not want the proprietor's people to be able to casually rummage through the records of the distributor. A good intermediate meeting ground, for both the proprietor and distributor, is the following type of provision:

> "Proprietor shall have the right, by independent auditor and at proprietor's expense, to audit the appropriate records of distributor as to compliance with the royalty provisions of this agreement."

A provision along the lines of that expressed above provides a reasonable balance in the records-auditing area. The proprietor has a genuine ability to check the performance of the vendor - but is unlikely to do so unless there is some reasonable ground to suspect that the distributor is not living up to his obligations.

5. Development Commitments

It often occurs in distributorship arrangement that one or another of the parties is willing to undertake a certain amount of development. The development may be of actual improvements to the programs or preparation or improvement of the accompanying user-oriented materials. The general rule of thumb is that if development promises are not carried out, some change in royalty rates or relative rights is likely to be a more appropriate remedy than trying to

cancel or undo the whole distributorship licensing transaction.

Development commitments of the 'best efforts' variety amount to a mere statement of intent on the part of the party promising the work. If development elements are a significant portion of the deal and failure to provide them cannot be compensated for by adjustment of royalty rates or adjustment of rights, it is necessary to define the required developments with the same degree of care as in any software development contract. As a matter of practice, 'best efforts' commitments tend to be more common in this area than in ordinary software development contracts. The rationale is that the proprietor and distributor have parallel interests in the money to be made or lost through development efforts.

6. Cross Licensing of Improvements

The software proprietor may want to have the right to use any distributor-developed improvements or enhancements. The prospect of future improved software at low cost or no cost may be a very attractive prospect to the proprietor not actively engaged in the software business. Distributors tend to be willing to grant back a right to use improvements developed by the distributor, at least for some period of time. Such grant backs are usually in the form of a limited right to use the distributor-owned improvements. If the contract is such that the proprietor has the ability to terminate the distributorship arrangement (e.g. if minimum

royalty payments are not made, etc.) the distributor does not want the proprietor to be able to sell the improved software.

7. Maintenance Commitments and Fees

If the distributor is going to maintain the software, the contracting situation is fairly straightforward as usually no royalties will be payable on maintenance charges. On the other hand, if the proprietor is expected to maintain the software, the question arises as to what happens if the proprietor does not maintain the software - or fails to maintain it adequately.

From the distributor's viewpoint, even if the proprietor is going to maintain the software, it is a good idea for the distributor to have at least the theoretical capability of maintaining the software himself. The distributor must have source code to be able to directly fulfill the distributor's direct maintenance commitments to end-users.

A fairly straightforward way to handle maintenance fee splitting is to make some effort to define what is required in the way of ongoing maintenance from the proprietor. If that standard of performance is not maintained then some penalty is assessed against the proprietor (e.g. no future maintenance payments or a reduction in base royalty rates).

Figuring out how to define a default in maintenance performance is exceptionally difficult. Maintenance and warranty contract clauses from end-user licenses do not fit

very well in distributor agreements. Two techniques that put a time-element into 'default' without really defining the term are:

- o provide for maintenance payments to the proprietor to be made over the period covered (rather than as such payments are received by the distributor); and
- o to provide, that maintenance payments end after written notice to the proprietor of specific default in providing maintenance, such default remaining uncorrected thirty days after the notice.

8. Termination Provisions

Mechanical termination of a hardware agreement is fairly straightforward - the user has the ability to simply ship the hardware back. Termination of software agreements is more complex. At any given point in time, the distributor may have any or all of the following commitments to end-users:

- o Ongoing maintenance contracts
- o Moral commitments to furnish the software, not yet reduced to a written agreement
- o Existing granted options for additional licenses or expanded scope
- o Custom software development commitments for use in conjunction with the software
- o Sub-distributorship agreements

As a result of the possible kinds of commitments made by the distributor above, termination of a distributorship agreement is usually a 'soft' termination rather than a 'hard' termination. It is good practice to permit the distributor to fulfill existing good faith commitments. As

a result, it is usually not feasible to have a termination of a distributorship agreement which requires the distributor to immediately return source code and other materials furnished by the proprietor! Another 'soft' feature is the need to provide that revenues payable to the distributor after termination are still, as appropriate, subject to royalties.

9. Warranties

The proprietor may provide the same sort of warranties to a distributor as the proprietor might to an end-user. If the proprietor is not engaged in the software business on a regular basis, software may be provided to the distributor in "AS-IS" condition. Such software is essentially unwarranted as to performance.

If the proprietor does warrant the software to meet a description or specification, all the comments in Part IV on warranties are appropriate.

One warranty important to any distributor is the software proprietor's warranty of ownership or right to license. This provision is often carefully negotiated in distributorship agreements. The distributor is going to be in the position of having to warrant the right to license the end-user and normally wants to be well covered on assurances from the proprietor.

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E. Third Party Leasing and Software

Third party leasing of software is an industry distinguished by its absence! In order to understand why there is little or no third party software leasing it is necessary to understand a little bit about the nature of software licenses on the one hand and the nature of third party leasing transactions on the other hand.

1. The Hardware Leasing Transaction

A leasing company is basically a financing company with little interest in the objects that they lease beyond some threshold considerations. In general, the leasing company is only interested in transactions where the object of the lease (the hardware) is a standard industry item with a genuine resale market. If the user's credit is good and the hardware satisfies the criteria of being both standard and resaleable, the leasing company will buy the hardware (typically brand new) and lease it to the user.

The leasing company insists on absolutely clear title to the hardware. Invariably the leasing company will insist upon being completely insulated from any customer complaints about the quality or usefullness of the hardware!

Lease charges are usually closely related to the cost of money at any particular time and the leasing company views themselves as being primarily in a financial business - not a computer business. The leases may be

'true' leases where only rental is paid by the user but more commonly are full payout leases where the user may obtain title to the hardware at the end of the lease period for a relatively modest payment.

If the lessee (the actual hardware user) has complaints about the performance and promises made by the hardware vendor, his only recourse is against the hardware or system vendor - the lessee must still continue to pay the leasing company! If the customer or user does not make the required payments to the leasing company the leasing company still owns the hardware and is able to take it away and rent it or sell it to someone else. With a standard computer system this is indeed a possible course of action for the leasing company. The same thing occurs at the end of a lease if a customer does not purchase the equipment - the leasing company will look for a purchaser or new lessee.

2. Software as a Lease Object

Software presents real problems for a third party leasing company. First of all there is nothing really solid or tangible to hold on to - the original license payment purchases only a limited right to use the software. In addition, the software may have had customizing done to it so that it will not be readily transferable to some other user without a good deal of further customization. Still another factor is that a subsequent user

of the software will probably require that customization plus installation and support be supplied by the original software vendor. All of these factors make third party software leasing a very difficult thing for leasing companies to swallow.

Many customers or users of software do not understand the difficulties in a third party lease of software. As a rule of thumb, software vendors should lay out to their prospective customers that software is, as a practical matter, simply not third party leaseable. Such a vendor position can save a good deal of wheel spinning.

Even if a leasing company is willing to advance the money for a software license, the software vendor still has some concerns. Unless the leasing company has actually signed the license agreement, a bill of sale signed by the software vendor to the leasing company, although nominally for financing purposes, may in fact give the leasing company ownership rights in the software rather than ownership of a highly restrictive license to use the software.

Even if a leasing company is willing to sign a license agreement - that license agreement must be specifically worked over to protect the proprietary rights of the software vendor. The mere fact that the licensee is a third party leasing company (with no intent whatsoever to operate the software themselves) will tend to knock out license provisions relating to named site and use restrictions.

3. Bank Collateral and Software

Many of the comments in the section on third party leasing apply also to the use of software as collateral by banks. Banks are sometimes willing to accept odd collateral for a loan. Again, the basic principle is that if the debtor fails to pay, the bank may foreclose on the collateral and sell it at a public (or sometimes private) sale. With normal collateral, a properly conducted such sale forecloses any other claim of ownership in the collateral.

Even if a bank is willing to accept software as collateral, it is a risky business for the software vendor. The inference before a court would be that the collateral constitutes something worthwhile on the open market. The software vendor will have a difficult time sustaining proprietary restrictions before a court if the software vendor acted in such a way as to convince the bank that the software was, in fact, saleable on the open market.

F. Licenses to the Government

In licensing software to the government, or any government entity, the contract boiler plate will be bulky to the point of discouraging reading. It is vital that the contract be looked through very carefully to make sure that the particular sale will neither place your software in the public domain nor license all governmental uses by all agencies, branches and contractors. It is possible to license software to the government for single CPU/single site use or for use limited to a specific agency - but the government-furnished legal boiler plate will not read that way!

G. Arbitration

Suing in court is expensive, consumes substantial amounts of management time and can (and often does) take place over a multi-year period. In some circumstances arbitration can come to as fair a result while being cheaper, quicker and less demanding of the time of your key personnel. Some potential advantages and costs of arbitration are discussed below.

1. Some Advantages

One major advantage of arbitration is that much less management time may be required. Management people involved tend to be key people - people that can least be spared to cope with protracted litigation. Although solid preparation for an arbitration hearing is vital - the preparation tends to be concentrated and the dispute resolved within a few months.

Another advantage of arbitration is that the arbitration clause in a contract may specify the location of the arbitration tribunal. If your base is, say, New York, you may wish to specify that any arbitration will be conducted there. Although all contracts (whether or not there is an arbitration clause) tend to say what state's law will be applied, you can not specify the location of a court for a lawsuit.

Still another advantage is the chance of getting an arbitrator having some knowledge of computers. The Commercial Panel has two hundred data processing experts on its list of arbitrators.

2. Costs

Arbitration is substantially less expensive than suing in court. Of course there are costs associated with arbitration. In addition to legal fees the American Arbitration Association (AAA) charges administrative fees for handling arbitrations. Fees are assessed on a sliding schedule. Some representative AAA fees for varying amounts in controversy are as follows:

Amount at issue	AAA Fee
$10,000	$300
$100,000	$1,350
$1,000,000	$3,850

AAA Commercial Panel arbitrators normally are not paid unless more than two days of hearing are required. Most commercial arbitrations run two hearing days or less. In cases which will require either substantial amounts of arbitrator time or special expertise on part of the arbitrator, the parties may agree to compensate the arbitrator from the beginning.

3. How It Works

Arbitration is fast. The average commercial arbitration is completed with two days or less of hearings and a front-to-end time of three months from demand for arbitration through the arbitrator's award.

Arbitration does not permit the extensive discovery procedures available in the courts. If arbitration permitted the exhaustive discovery process permitted under the Federal Rules, it would do away with its ability to speedily resolve disputes! An arbitrator (whether a lawyer or not) does have the power to subpoena documents - and the parties have ample opportunity to submit their own documentary evidence as well as their own oral testimony. The parties also have the ability to cross-examine the other side's witnesses.

In an arbitration the rules of evidence tend to be applied less formally than they are in court. An arbitrator might say, for example, "we'll let it in for what it's worth." This can sometimes be an advantage.

4. When to Consider Arbitration

An arbitration clause is not a substitute for a good contract. The arbitrator's function includes interpretation of the contract - not rewriting it!

Arbitration is not appropriate when applied to the proprietary restrictions in a software license agreement.

Note that an arbitration clause may specify what matters or what parts of a contract are subject to arbitration. Thus, in a software contract, the arbitration clause may specify that disputes over proprietary restrictions shall not be arbitrated.

Software development contracts and system contracts (including hardware and software development) can be appropriate for arbitration. To a small system vendor, the ability to specify local arbitration rather than having to file a lawsuit one thousand miles away could be worth quite a lot.

When one of the parties to a contract is substantially bigger and more powerful than the other, the strong party has the ability to stonewall, keeping litigation in the courts going indefinitely (and expensively). The weaker party might want an arbitration clause to avoid protracted litigation. Arbitration is fast - you will have either a settlement or a decision within a matter of months.

5. The Arbitration Clause

Most arbitration is based on an 'arbitration clause' in the contract - even though arbitration may be used by agreement among the parties to a dispute without a specific contract provision. The standard arbitration clause of the American Arbitration Association is as follows:

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgement upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof."

The standard arbitration clause is not a good clause for the software vendor unless proprietary license restrictions are excluded. In addition, for inclusion in a form software license, the vendor may wish to require that any arbitration be conducted at a location convenient to him. Of course, the software buyer may have the negotiating clout to insist on arbitration at a location convenient to him! An arbitration clause excluding proprietary provisions and specifying a location is as follows:

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, except as stated below, shall be settled by arbitration in the City of Philadelphia in accordance with the Rules of the American Arbitration Association, and judgement upon the reward rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.
>
> "The provisions of Section IV (Proprietary Restrictions) of this contract and disputes arising therefrom shall not be arbitratable."

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APPENDICES

SOFTCO, INC.
NON-DISCLOSURE AGREEMENT

I understand that, in its business, Softco has developed and uses commercially valuable technical and nontechnical information and, to guard the legitimate interest of Softco, it is necessary for Softco to protect certain of the information as confidential and a trade secret or by patent.

I recognize that the computer programs, system documentation, manuals and other materials developed by Softco are subject to the proprietary rights of Softco, that Softco regards this information as exceptionably valuable trade secrets of Softco and that its use and disclosure must be carefully and continuously controlled. I further recognize that although some of Softco's customers are well known to the trade, that other customers and prospective customers are not so known and that Softco views the names and identities of these customers and prospective customers, as well as the content of sales proposals, as being confidential information and Softco's trade secrets.

I also recognize that special hardware and product hardware and their related software development by Softco are subject to Softco's proprietary rights and that Softco may treat those developments, whether hardware or associated software, as either trade secret or patentable material.

I understand that information mentioned above is vital to the success of Softco's business, and that I through my employment, may become acquainted with that information, and may contribute to that information through inventions, discoveries, improvements or in some other manner.

Therefore, in consideration of my employment or continued employment by Softco, and in consideration of the mutual promises in this Agreement, it is agreed as follows:

1. Except as may be required by my employment by Softco, I will not, without Softco's prior written consent, disclose or use at any time either during or subsequent to my employment by Softco, any secret or confidential information of Softco of which I become informed during my employment, whether or not I develop it.

2. I will not directly or indirectly, during the course of my employment and forever thereafter upon termination of my employment

for any reason whatsoever, solicit the trade or patronage of any of the customers or prospective customers of Softco, with respect to any of the services, products, trade secrets or other matters of Softco discussed in this Agreement.

3. I will promptly disclose to Softco any and all inventions, discoveries and improvements conceived or made by me during the period of employment and related to the business or activities of Softco. I will assign and hereby agree to sign all my interests therein to Softco or its nominee. Whenever I am requested to do so by Softco, I will execute any and all applications, assignments or other instruments which Softco shall deem necessary to apply for and attain Letters Patent of the United States or any foreign country or to protect otherwise Softco's interests therein. These obligations shall continue beyond the termination of my employment with respect to inventions, discoveries and improvements conceived or made by me during the period of employment, and shall be binding upon my assigns, executors, administrators and other legal representatives.

4. I understand that by this agreement Softco agrees in the event that, subsequent to my employment by Softco, my assistance is needed in regards to securing, defending or enforcing any patent which I am an inventor or co-inventor, that Softco will pay reasonable compensation for my time at a rate to be agreed but not higher than the last salary rate paid me by Softco during my employment.

5. Upon termination of my employment by Softco for any reason, I will promptly deliver to Softco all correspondence, drawings, blue prints, manuals, letters, notes, notebooks, reports, flow-charts, programs, proposals, or any other documents concerning Softco's customers, or products or processes used by Softco.

6. I understand that this Agreement shall be effective when signed by both Softco and me and that the terms of this agreement shall remain in full force and effect both during the continuation of my employment by Softco and after the termination of employment for any reason.

Employee_____(Seal)

Date_____

SOFTCO, INC.

By_____

Title_____

Date_____

DISCLOSURE AGREEMENT

Softco, Inc. ("Softco") of Croton-on-Hudson, New York, and ("Contractor") hereby agree as follows:

1. To further the business relationship between Softco and Contractor, it is necessary and desirable that Softco disclose to Contractor confidential information (hereinafter referred to as "Softco Information") concerning any or all of the following: current, future, or proposed products

2. Contractor shall not communicate Softco Information to any third party and shall use its best efforts to prevent inadvertent disclosure of Softco Information to any third party.

3. Contractor shall neither use Softco Information nor circulate it within its own organization except to the extent necessary for:

(a) negotiations, discussions and consultations with personnel or authorized representatives of Softco;

(b) supplying Softco with goods or services at its order;

(c) preparing bids, estimates and proposals for submission to Softco; and

(d) any purpose Softco may hereafter authorize in writing.

The obligations of Paragraph 2 and 3 hereof shall terminate with respect to any particular portion of the Softco Information:

(i) it was in the public domain at the time of Softco's communication thereof to Contractor;

(ii) it entered the public domain through no fault of Contractor subsequent to the time of Softco's communication thereof to Contractor;

(iii) it was in Contractor's possession free of any obligation of confidence at the time of Softco's communication thereof to Contractor;

(iv) it was rightfully communicated to Contractor free of any obligation of confidence subsequent to the time of Softco's communication thereof to Contractor; or

(v) it was developed by employees or agents of Contractor independently of and without reference to any Softco Information or other information that Softco has disclosed in confidence to any third party;

or

(b) when it is communicated by Softco to a third party free of any obligation of confidence;

or

(c) in any event, seven years after Softco's communication thereof to Contractor.

5. All materials, including, without limitation, documents, drawings, models, apparatus, sketches, designs, flow-

charts and listings furnished to Contractor by Softco and which are designated in writing to be the property of Softco and shall be returned to Softco promptly at its request with all copies made thereof.

6. Communications from Contractor to personnel and authorzied representatives of Softco shall not be in violation of the proprietary rights of any third party and shall be made without any obligation of confidence.

7. This Agreement shall govern all communications between Softco and Contractor during the period from date of Agreement to the date on which either party receives from the other written notice that subsequent communications shall not be so governed.

8. This Agreement shall be construed in accordance with the laws of New York.

_____
Contractor

By _____

Title _____

Date _____

Softco, Inc.

By _____

Title _____

Date _____

Consultant Agreement - provisions covering trade secrets, competitive activity and ownership of work product

. . . . . .

7. CONFIDENTIAL INFORMATION

Consultant acknowledges that in the course of performing assignments for Client, Consultant will be exposed to confidential and trade secret information of Client and may be exposed to information confidential to customers of Client. Consultant agrees to treat all such information as confidential and to take all reasonable precautions against disclosure of such information to third parties during and after the term of this Agreement. At termination of this Agreement, Consultant will promptly return to Client all copies of Client furnished information and all Consultant-prepared information prepared for or in connection with work for Client.

8. COMPETITIVE ACTIVITY

Consultant agrees that he will not, during the term of this Agreement and for a period of one year thereafter, engage in any competitive activity except with Client's written consent.

9. OWNERSHIP OF WORK PRODUCT

Consultant agrees that, with respect to Consultant's work, any developments made by Consultant or under Consultant's direction in connection with Client assignment shall be the sole and complete property of Client and that any and all patents and copyrights shall belong to Client.

. . . . . .

Section 2-313. Express Warranties by Affirmation, Promise, Description, Sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

***

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Section 2-314. Implied Warranty: Merchantability: Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

***

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description

***

(c) are fit for the ordinary purposes for which such goods are used; and

***

(3) Unless excluded or modified (Section 2-316), other implied warranties may arise from course of dealing or usage of trade.

Section 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Section 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understading calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

Section 2-719. Contractual Modification or Limitation of Remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

CUSTOMER SOFTWARE SUBLICENSE GRANT
FOR DIGITAL EQUIPMENT CORPORATION®
(DEC®) SOFTWARE PURCHASERS

(Check all boxes which apply; sign and return to HEATH COMPANY. Another Sublicense Grant form should be returned with future orders for additional SOFTWARE products.)

[ ] HT-11 Operating System [ ] HT-11-1 FORTRAN

Write in the blank below your CPU make, model and serial number. (If CPU is purchased with this order, HEATH will fill in the blank.)

CPU_____
(Fill in blank)

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HEATH COMPANY

By_____[Pre-signed, Printed signature]

ACCEPTED AND AGREED:
CUSTOMER'S SIGNATURE_____
DATE

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FOR SID/ZSID, MAC AND DESPOOL PURCHASERS ONLY: The serial number of your Digital Research CP/M System must be supplied in advance. HEATH or VEC will supply the information if SID, MAC and/or DESPOOL are purchased on the same order with a DIGITAL SESEARCH Operating System.

CP/M SERIAL NUMBER_____

HEATH COMPANY
By_____ [Pre-signed, printed signature]_____

ACCEPTED AND AGREED:
CUSTOMER'S SIGNATURE_____
DATE

SOFTCO, INC.
SOFTWARE LICENSE/EQUIPMENT SALES AGREEMENT

Agreement Number _____

The Customer agrees to purchase and Softco, Inc. (Softco), by its acceptance of this agreement, agrees to sell, in accordance with the following terms and conditions, the hardware listed below and more fully described in the attached Exhibits. In addition, Softco agrees to grant to Customer and Customer agrees to accept from Softco, in accordance with the following terms and conditions, a permanent non-exclusive single-site license for use of software proprietary to Softco listed below and more fully described in the attached Exhibits.

I. SOFTCO SUPPLIED PRODUCTS

A. Software

Software Designation	License Fee	Approximate Installation Date

B. Hardware

Model Designation	Equipment Price FOB Plant	Approximate Installation Date

C. PAYMENT TERMS. Payment shall be made in accordance with Schedule A. All payments shall be made in U.S. Dollars within ten days of the date of the invoice. If partial deliveries are authorized, each shipment shall be invoiced and paid for when due without regard to other scheduled deliveries. Softco reserves the right to add an interest charge not exceeding 1 1/2% per month, or fraction thereof, for failure to make a payment within 30 days of the invoice date.

D. TITLE, RISK OF LOSS AND SECURITY INTEREST. Ownership of the hardware and risk of loss or damage shall pass to the Customer upon delivery F.O.B. shipping point by Softco; however, the

Customer does hereby give to Softco a security interest in the hardware as security for the performance by the Customer of all its payment obligations hereunder, together with the right, without liability, to repossess the hardware, with or without notice, in the event of default of any of such obligations.

E. TAXES. Prices and fees are exclusive of all federal, state, municipal, or other government, excise, sales, use, occupational, or like taxes now in force or enacted in the future and, therefore, prices are subject to an increase equal in amount to any tax Softco may be required to collect or pay upon the sale or delivery of items purchased or licensed. If a certificate of exemption or similar document or proceeding is to be made in order to exempt the sale from sales or use tax liability, the Customer will obtain and pursue such certificate, document or proceeding.

F. DELIVERY. Delivery will be made F.O.B. shipping point. The time of delivery is the time when the items to be delivered are ready for pickup by the carrier. Items held or stored for the Customer shall be at the risk and expense of the Customer. Softco will ship Collect which indicates freight invoices go directly to Customer for payment of shipping charges.

G. DELAYS. Softco shall not be liable for any damages or penalty for delay in delivery or for failure to give notice of delay when such delay is due to factors beyond Softco's reasonable control, including, but not limited to, delays in transportation and delay in delivery by Softco's vendors.

II. CUSTOMER RESPONSIBILITIES

The customer agrees to obtain and install the following equipment on, or prior to, the dates specified below.

Equipment	Installation Date

Customer shall be responsible for timely site preparation including, but not limited to, adequate electrical power for computer operation. Customer shall be responsible for equipment cabling except as specifically set forth to be provided by Softco.

III. PROPRIETARY RIGHTS OF SOFTCO IN THE SOFTWARE

A. The Nature of these Rights, and Title

Customer recognizes that the computer programs, system documentation manuals and other materials supplied by Softco to Customer are subject to the proprietary rights of Softco. Customer agrees with Softco that the programs, documentation and all information or data supplied by Softco in machine-readable form are trade secrets of Softco, are protected by civil and criminal law, and by the law of copyright, are very valuable to Softco, and that their use and disclosure must be carefully and continuously controlled. Customer further understands that operator manuals, training aids and other written materials are subject to the Copyright Act of the United States.

(1) Title: Softco retains title to the programs, documentation, information or data furnished by Softco in machine-readable form, and training materials. Softco does not retain title to operator manuals and other material bearing the Softco copyright notice, but these items shall not be copied except as herein provided.

Customer shall keep each and every item to which Softco retains title free and clear of all claims, liens and encumbrances except those of Softco, and any act of Customer, voluntary or involuntary, purporting to create a claim, lien or encumbrance on such an item shall be void.

B. Restrictions on Customer's Use

The computer programs and other items supplied by Softco hereunder are for the sole use of Customer at the named location, supporting only terminals operated by Customer.

(1) Competitive Uses: Customer agrees that while this License is in effect or while it has custody or possession of any property of Softco, it will not directly or indirectly lease, license, sell, offer or negotiate to lease, license or sell, or otherwise negotiate or contract for any software similar to that supplied under this license, but this clause shall not be construed to prohibit Customer from acquiring for its own use software from third parties.

(2) Copies: Customer agrees that while this License is in effect, or while it has custody or possession of any property of Softco, it will not (a) copy or duplicate, or permit anyone else to copy or duplicate, any physical or magnetic version

of the computer programs, documentation or information furnished by Softco in machine-readable form, (b) create or attempt to create, or permit others to create or attempt to create, by reverse engineering or otherwise, the source programs or any part thereof from the object program or from other information made available under this License or otherwise, (whether oral, written, tangible or intangible). Customer may copy for its own use and at its own expense operator manuals, training materials, and other terminal-user-oriented materials, but shall advise Softco of the number of copies made and their distribution.

(3) Use Restrictions: The computer programs licensed hereunder shall be used only on a single central processing unit or mainframe (referred to as the CPU) and its associated peripheral units at the same site. Customer shall advise Softco in advance of the manufacturer and the serial number of the CPU and its site location. Use of a program shall consist either of copying any portion of the program from storage units or media into the CPU, or the Processing of data with the program, or both. All programs, documentation, and materials in machine-readable form supplied under this license shall be kept in a secure place, under access and use restrictions satisfactory to Softco, and not less strict than those applied to Customer's most valuable and sensitive programs. The programs licensed hereunder may be temporarily transferred to another CPU while the specified CPU is undergoing repairs, but Customer shall notify Softco of such transfer if it is for a period of more than 72 hours.

(4) Multi-Processor and Multiple Processor Use: If the computer programs licensed hereunder are used at a site having, in addition to the designated CPU, a second suitably configured central processing unit Customer shall advise Softco in advance of the manufacturer and the serial number of such second unit. Customer may use the computer programs licensed hereunder on such second unit subject to the following conditions: (i) authorization under this paragraph to use the programs on a second unit shall not operate to extend any warranty whatsoever; (ii) the second unit shall be physically present at the same site as the CPU; (iii) Customer shall not permit the computer programs licensed hereunder to be transmitted over any off-site communications lines for any purpose; and (iv) the programs may be active on only one of the CPU's at any given time.

(5) Backup Files: Customer shall furnish Softco a written description of site file backup procedures insofar as those procedures may involve backup of the computer programs licensed hereunder. The written backup procedures description shall include for each file backup copy of any of the programs licensed hereunder, media type and, for off site backup, where

kept. Softco shall promptly approve or disapprove backup procedures. Approval shall not be unreasonably withheld. Copies of the licensed programs made under Softco-approved Customer backup procedures shall not be deemed to be copies under III.B.(2) above.

(6) Unauthorized Acts: Customer agrees to notify Softco immediately of the unauthorized possession, use, or knowledge of any item supplied under this license and of other information made available to Customer under this Agreement, by any person or organization not authorized by this Agreement to have such possession, use or knowledge. Customer will promptly furnish full details of such possession, use or knowledge to Softco, will assist in preventing the recurrence of such possession, use or knowledge, and will cooperate with Softco in any litigation against third parties deemed necessary by Softco to protect its proprietary rights. Customer's compliance with this subparagraph shall not be construed in any way as a waiver of Softco's right to recover damages or obtain other relief against Customer for its negligent or intentional harm to Softco's proprietary rights, or for breach of contractual rights.

(7) Inspection: To assist Softco in the protection of its proprietary rights, Customer shall permit representatives of Softco to inspect at all reasonable times any location at which items supplied are being used or kept.

C. Transfer of License Rights

The Customer's rights to use the programs, documentation, manuals and other materials supplied by Softco hereunder shall not be assigned, licensed, or transferred to a successor, affiliate or any other person, firm, corporation or organization, voluntarily, by operation of law, or in any other manner without the prior written consent of Softco.

D. Right to Source Program

If Softco, whether directly or through a successor or affiliate shall cease to be in the software business, or if Softco should be declared bankrupt or insolvent by a court of competent jurisdiction, Customer shall have the right to obtain, for its own and sole use only, a single copy of the then current version of the source program of the object programs supplied under this Agreement, and single copy of the documentation associated therewith, upon payment to the person in control of the source program the reasonable cost of making each copy. Each source program supplied to Customer under this paragraph shall be subject to each and every restriction on use set forth in this Agreement, and Customer acknowledges that the source programs and their associated documentation are extraordinarily valuable

proprietary property of Softco and will be guarded against unauthorized use or disclosure with great care.

E. Remedies

If Customer attempts to use, copy, license, or convey the items supplied by Softco hereunder, in a manner contrary to the terms of this Agreement or in competition with Softco or in derogation of Softco's proprietary rights, whether these rights are explicitly herein stated, determined by law, or otherwise, Softco shall have, in addition to any other remedies available to it, the right to injunctive relief enjoining such action, the Customer hereby acknowledging that other remedies are inadequate.

F. Binding Effect and Definitions

The Customer agrees that this agreement binds the named Customer and each of its employees, agents, representatives and persons associated with it. This agreement further binds each affiliated and subsidiary firm, corporation, or other organization and any person, firm, corporation or other organization with which the Customer may enter a joint venture or other cooperative enterprise.

The term employee means an individual on whose behalf the Customer withholds income taxes or makes contributions under the Federal Insurance Contributions Act or similar statutes in other nations.

The term Customer means only the following corporations or organizations.

IV. ACCEPTANCE

Acceptance of the Softco Products will be performed at the Softco or Customer site.

The Softco Products will be deemed accepted when they have successfully satisfied the acceptance criteria in accordance with procedures defined in the Softco's Acceptance Test or as established by Softco prior to testing. Acceptance will be performed utilizing the actual hardware system to be used with the software system, including the hardware products supplied by Softco. Use of the system in production shall constitute acceptance.

Softco has the option to specify alternate equipment at an alternate site if Customer fails to fulfill responsibilities specified in Paragraph II, unless a mutually agreed upon alternate Installation Date has been determined subsequent to this agreement.

V. WARRANTY

A. Software

For ninety (90) days following acceptance, Softco will design, code, checkout, document and deliver promptly any amendments or alterations to the software that may be required to correct errors present at the time of acceptance of the system and which significantly affect performance in accordance with the specifications. This warranty is contingent upon Customer advising Softco in writing of such errors, in accordance with Softco's prescribed reporting procedures, within ninety (90) days from acceptance as defined herein.

Following the warranty period Customer may continue to receive Softco's software maintenance by Customers' execution of Softco's then standard maintenance agreement and payment of Softco's then-current charge for such maintenance.

Customer shall inform Softco in writing of any modifications made to the software. Softco shall not be responsible for maintaining Customer-modified portions of the software. Corrections for difficulties or defects traceable to Customer errors or system changes will be billed at standard Softco's time and materials rates.

B. Hardware

(1) All Softco supplied equipment is warranteed against defects in workmanship and materials, under normal use and service for a period of ninety (90) days from the date of delivery.

(2) The above warranty is contingent upon proper use in the application for which the hardware was intended and is not applicable to hardware which has been modified without Softco's approval, or which has been subjected to unusual physical or electrical stress, or on which the original identification marks have been removed or altered. This warranty will not apply if adjustment, repair, or parts replacement is required because of accident, neglect, misuse, failure of electrical power, air conditioning, humidity control, transportation, or causes other than ordinary use.

C. No Other Warranties

Except for the express warranties stated in A and B above, Softco disclaims all warranties with regard to the Softco products sold hereunder including all implied warranties of merchantability and fitness and all obligations or liabilities on the part of Softco for damages, including but not limited to, consequential damages arising out of or in connection with the use or performance of the system.

VI. GENERAL

This agreement is not assignable without the prior written consent of Softco. Any attempt by Customer to assign any of the rights, duties or obligations of this Agreement without such consent is void.

This Agreement can only be modified by a written agreement duly signed by persons authorized to sign agreements on behalf of Customer and of Softco, and variance from the terms and conditions of this Agreement in any order or other written notification from the Customer will be of no effect.

If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

No action, regardless of form arising out of this Agreement may be brought by either party more than two years after the cause of action has arisen, or, in the case of non-payment, more than two years from the date of the last payment.

This Agreement will be governed by the laws of the State of New York.

The Customer acknowledges that he has read this Agreement, understands it, and agrees to be bound by its terms and conditions. Further the Customer agrees that it is the complete and exclusive statement of the agreement between the parties, which supersedes all proposals or prior agreements, oral or written, and all other communications between the parties relating to the subject matter of this agreement.

Customer _____	Accepted by Softco, Inc.
By _____	By _____
Title _____	Title _____
Date _____	Date _____

SCHEDULE A

Payment Schedule

Payments to Softco are due as previously noted and in accordance with the following schedule:

SOFTWARE

		Amount
A.	20% Advance Deposit with Agreement	$_____
B.	60% Delivery payment (due on delivery, F.O.B. shipping point)	$_____
C.	20% Acceptance payment (due on completion of acceptance criteria)	$_____
100%	total	$_____

HARDWARE

		Amount
A.	20% Advance Deposit with Agreement	$_____
B.	80% Delivery payment (due on delivery, F.O.B. shipping point)	$_____
	total	$_____

Softco

Software Maintenance Agreement

Maintenance Agreement No._____

relating to
Permanent License Agreement No. _____

Name and Address of Customer:

TERM

The term of this agreement shall commence on
and shall continue for one year, after which it may be terminated by either party on having provided 60 days prior written notice to the other party.

FEE

Maintenance Fee shall be $ payable monthly, in advance.

CHANGES IN TERMS, CONDITIONS AND FEES

Softco may change its Software maintenance fees, terms and conditions upon 90 days written notice to Customer but no such change shall be effective prior to the end of the initial one year term.

TAXES AND DUTIES

There shall be added to maintenance fees and other charges to this agreement amounts equal to any tariff, duties and/or sales or use tax, or any tax in lieu thereof imposed by any government or governmental agency with respect to the services rendered by Softco under this agreement.

COVERAGE

The Software covered is that Software designated in the Permanent License Agreement, and as updated with improvements

or modifications furnished Customer under Softco Software Warranty. During the term of this Agreement Softco will supply Customer with any improvements or modifications to the Software which are not charged for as options.

During the term of this Agreement, Softco will correct or replace Software and/or provide services necessary to remedy any programming error which is attributed to Softco and which significantly affects use of the Software. Such correction, replacement or services will be promptly accomplished after Customer has identified and notified Softco of any such error in accordance with Softco's reporting procedures.

Customer agrees to provide Softco with dumps, as requested, and with sufficient support and test time on Customer's computer system to duplicate the problem, certify that the problem is indeed with the Softco's Software, and to certify that the problem has indeed been fixed.

Customer shall inform Softco in writing of any modifications made by Customer to the Software. Softco shall not be responsible for maintaining Customer modified portions of the Software or for maintaining portions of the Software affected by Customer modified portions of the Software.

Corrections for difficulties or defects traceable to Customer errors or system changes will be billed at standard Softco's time and material rates.

Any corrections or alterations to or new versions of the Software that Softco may deliver to Customer under this Agreement shall be limited to one copy of such Software and documentation delivered to the Customer.

TELE-MAINTENANCE HOT-LINE

Customer agrees to install and maintain for the duration of this Agreement, a modem and associated dial-up telephone line. Customer will pay for installation, maintenance and use of said equipment and associated telephone line use charges. Softco shall use this modem and telephone line in connection with error correction. Such access by Softco shall be subject to prior approval of Customer in each case and such access will be solely for the purpose authorized by Customer in the individual case.

TRAVEL EXPENSES

Customer shall reimburse Softco for any out of pocket expenses incurred at Customer's request, including travel to and from

the Customer site, lodging, meals, telephone, and shipping, as may be necessary in connection with duties performed under this Agreement by Softco.

PROPRIETARY RIGHTS

Any changes, additions, and enhancements in the form of new or partial programs or documentation as may be provided under this Agreement shall remain the proprietary property of Softco. The Permanent License Agreement specified above will include under its proprietary restrictions any such additional programming and documentation provided under this agreement.

TERMINATION

In the event of termination of the Permanent License Agreement, specified above, through default by Customer, all maintenance fees or charges payable for the entire term of this Agreement shall without notice or demand by Softco immediately become due and payable and Softco's obligations under this Software Maintenance Agreement shall immediately end.

Softco may terminate this Agreement in the event of default by Customer. Default by the Customer includes Customer's failure to pay the monthly maintenance fee within 30 days notice that the same is thirty days or more delinquent.

GENERAL

This Agreement shall be binding when accepted by Softco at 160 West Street, Croton-on-Hudson, New York and will be governed by the laws of the State of New York.

The terms and conditions stated herein supercede all prior agreements between parties relating to the subject matter of this Agreement. This Agreement may be changed or modified only in writing.

Customer _____	Softco, Inc.
By _____	By _____
Title _____	Title _____
Date _____	Date _____

SOFTCO
ESP SOFTWARE SUPPORT AGREEMENT

ESP Agreement No. _____ relating to License Agreement No. _____

Name and address of Licensee:

INITIAL TERM

The initial term of this Agreement shall commence on _____ and shall continue for one year, after which it may be terminated by either party on having provided 90 days prior written notice to the other party. If the date of commencement shall fall on other than the first day of a month, the inital term shall be deemed to include the twelve full months next following the date of commencement.

ESP CHARGES AND BILLING

Charges for ESP support services shall be in accordance with the schedule for such services; a copy of the current schedule is attached to this Agreement as Schedule I. Billing shall be monthly in advance, except for any initial partial month, which shall be included in the billing for the first full month under this agreement. Payments not received by Softco within 30 days of the date of invoice shall be subject to a late charge of 1.5 percent per month and shall not qualify for ESP credit accumulation.

LEVELS OF SUPPORT - General

Developmental (DEV) support is for customers whose special requirements necessitate modifications and extensions to the basic software modules so that the modules become unique to the customer or to a few customers. DEV support is top priority support with Softco installation of new versions and accumulation of ESP credits.

Standard (STD) support is for customers with standard unmodified, unextended software modules. STD support is also top priority support including Softco installation of new versions and accumulation of ESP credits.

Minimal (MIN) support is for customers requiring minimum support for standard unmodified unextended software modules.

CHANGES IN TERMS, CONDITIONS, AND FEES

Softco may change the ESP software support fees, terms, and conditions on 90 days written notice to customer but no such change shall be effective prior to the end of the initial one-year term. Customer may, by 30 days written notice to Softco, terminate this contract on the effective date of any such change. In the absence of such notice of termination, the change shall be deemed accepted by the customer.

Certain ESP customers may accumulate ESP credits (described below) for use in the purchase of Softco's products and services. Softco reserves the right at any time or from time to time, by written notice to customer to: (1) add, remove, or change products and services for which ESP credits may be used; and (2) change the maximum percentage by which the price for any product or service may be reduced through use of ESP credits. A schedule of current products and services eligible for partial purchase with ESP credits is attached to this Agreement as Schedule II.

TAXES AND DUTIES

There shall be added to the charges under this Agreement amounts equal to any tariff, duties and/or sales or use tax or any tax in lieu thereof imposed by any government or governmental agency with respect to the services rendered by Softco under this Agreement.

COVERAGE

Particular software covered under this Agreement and applicable level of coverage will be as indicated on riders to this Agreement. Each such rider will reference this Agreement by number.

During the term of this Agreement, Softco will correct or replace software and/or provide services necessary to remedy any programming error, which is attributed to Softco, and which significantly affects use of the software. Such correction, replacement, or services will be accomplished after customer has identified and notified Softco of any such error in accordance with Softco's reporting procedures. The manner and timing of Softco support is further qualified in accordance with the level of service purchased by the customer as outlined below in this section.

Customer agrees to provide Softco with memory dumps, as requested, and with sufficient support and test time on customer's computer system to duplicate the problem, certify that the problem is with the Softco's software, and to certify that the problem has been fixed.

Customer shall inform Softco in writing of any modifications made by customer to the software. Softco shall not be responsible for maintaining customer modified portions of the software or for maintaining portions of the software affected by customer modified portions of the software.

Corrections for difficulties or defects traceable to customer errors or system changes will be billed at standard Softco time and material rates.

ALL ESP CUSTOMERS (DEV, STD, AND MIN)

All ESP customers will receive:

1. New system releases, as they are released by Softco.
2. System discrepancy reports published periodically, listing all known "bugs" and their status.
3. No-charge registration of one attendee at each periodic system tutorial. These tutorials will cover introduction or refresher courses on the Series 6300 as offered by Softco in Croton-on-Hudson.

ESP - DEV SERVICE

DEV support includes the following:

1. Normal under-two-hour telephone response to urgent customer situations. Support is provided through Softco-supplied 1200 baud modems permitting problem files or programs to be examined, modified, or replaced (via transmission) directly by Softco's Croton-on-Hudson based support group.
2. Softco installation and verification of new system releases through Auto-Update(TM). Use of Auto-Update(TM) services will be scheduled by Softco in cooperation with customer.
3. Accumulation of ESP credits at the rate of 50 percent of the basic monthly charge for ESP-DEV support services. ESP credits may be accumulated by customer for up to twelve (12) months after which the most recent twelve (12) months charges producing ESP credit will be used; i.e., first credits earned are first credits used. Monthly invoices issued will show ESP credits earned and present ESP credit balance. ESP credits shall accrue as payments are received

by Softco. While customer is under ESP-DEV support, ESP credits may be used to reduce the charges for eligible Softco products and services as detailed in Schedule II. No more than 50% of any qualifying invoice item may be paid by ESP credits.

ESP - STD SERVICE

STD support includes the following:

1. Normal under two-hour telephone response to urgent customer situations. Support is provided through Softco-supplied 1200 baud modems permitting problem files or programs to be examined, modified, or replaced (via transmission) directly by Softco's Croton-on-Hudson based support group.
2. Softco installation and verification of new system releases through data communications. Use will be scheduled by Softco in cooperation with customer.
3. Accumulation of ESP credits at the rate of 35 percent of the basic monthly charges for ESP-STD support services. ESP credits may be accumulated by customer for up to twelve (12) months after which the most recent twelve (12) months charges producing ESP credit will be used; i.e., first credits earned are first credits used. Monthly invoices issued will show ESP credits earned and present ESP credit balance. ESP credits shall accrue as payments are received by Softco. While customer is under ESP-STD support, ESP credits may be used to reduce the charges for eligible Softco products and services as detailed in Schedule II. No more than 50% of any qualifying invoice item may be paid by ESP credits.

ESP - MIN SERVICE

MIN support includes the following:

1. After problem diagnosis by customer and furnishing to Softco of appropriate documentation of the problem, Softco will analyze and mail a response (normal less than thirty (30) day response).
2. New system releases will be furnished by Softco on tape for customer installation. Any Softco support required for installation will be billed at Softco standard time and material rates.

Any corrections or alterations to or new versions of the software that Softco may deliver to customer under this Agreement shall be limited to one copy of such software and documentation delivered to the customer.

COMMUNICATIONS RESPONSIBILITY AND COSTS

Customers of DEV and STD support: Customer agrees to install and maintain for the duration of this agreement, the Softco-supplied 1200 baud modem and associated customer-supplied dial-up telephone line. Customer will pay associated telephone equipment and line use charges. Softco shall use this modem and telephone line in connection with error correction and updating. Such access by Softco shall be subject to prior approval of customer in each case and such access will be solely for the purpose authorized by customer in the individual case.

MIN Customers: Customers with MIN level support only are not required to install communications equipment.

TRAVEL AND TELEPHONE EXPENSES

Customer shall reimburse Softco for any out-of-pocket expenses incurred at customer's request, including travel to and from the customer site, lodging, meals, telephone, and shipping as may be necessary in connection with duties performed under this Agreement by Softco.

PROPRIETARY RIGHTS

Any changes, additions, and enhancements in the form of new or partial programs or documentation as may be provided under this Agreement shall remain the proprietary property of Softco. The License Agreement specified above will include under its proprietary restrictions any such additional programming and documentation provided under this Agreement.

TERMINATION

In the event of termination of the License Agreement specified above, through default by customer, all maintenance fees or charges payable for the entire term of this Agreement shall without notice or demand by Softco immediately become due and payable, and Softco's obligations under this Software Support Agreement shall immediately end.

Softco may terminate this Agreement in the event of default by customer. Default by the customer includes customer's failure to pay the monthly maintenance fee within (thirty) 30 days notice that the same is thirty days or more delinquent.

GENERAL

This Agreement shall be binding when accepted by Softco at 160 Cleveland Drive, Croton-on-Hudson, New York and will be governed by the laws of the State of New York.

In the event that customer desires to increase or decrease the support level of any software module or modules, Softco reserves the right to determine, in its sole discretion, whether or not the module or modules qualify for the proposed support level. If Softco determines that the modules, as in the customer's hands, do not qualify for the level requested by the customer, Softco will inform the customer of the reasons for the lack of qualification.

Customer agrees to promptly install new system releases and understands that failure to promptly install new system releases shall release Softco from its support obligation until such time as the new release is installed.

The terms and conditions stated herein supercede all prior Agreements between parties relating to the subject matter of this Agreement. This Agreement may be changed or modified only in writing.

Customer	Accepted by Softco, Inc.
By_____	By_____
Title_____	Title_____
Date_____	Date_____

SCHEDULE I

EXTENDED SUPPORT PLAN (ESP) MONTHLY RATE CHART

	Software Groups	Support Level STD	DEV	MIN
(1)	Base System	350	600	200
	[define]			
(2)	Application	750	1,200	450
	[Other optional standard programs as a group - define]			
(3)	Interactive	300	450	150
	[Another optional group of programs - define]			
*(4)	General	200	N/A	200
	[Third party supported software]			

NOTE:

(1) The "Base System" must be included as base support whatever support level is selected.

(2) Support must remain within a support level category.

(3) Whether or not a particular program or module as it exists in a customer's system is eligible for a particular level of support will be determined by Softco in Softco's sole discretion.

*(4) General group support available on an 'as available' basis with updates and new versions passed along as released.

SCHEDULE II

ESP CREDIT USE

The following Softco products and services may be purchased from Softco at a price reduced by ESP credits:

		Maximum ESP Credit Use as a Percent of Price*
1.	New features and enhancements compatible with customer's licensed software (applicable to base price only and not to installation charges, if any)	50%
2.	Registration for Softco educational courses and seminars in Croton-on-Hudson	50%
3.	Consulting support (time charges only) for special problems or tasks	50%
4.	Installation support (time charges only) and error correction of errors due to customer errors or system changes	50%

*ESP credits may not be used to reduce shipping, travel, installation, telephone charges, taxes or any other out-of-pocket charge. ESP credits may not offset more than 50% of any qualifying invoice item.

Rider_____ ESP Agreement No._____

Software Group	Support Level	Effective Date	Monthly Rate	ESP Credit
(1) Base System Group [define]				
(2) Spplication Group [define]				
(3) Interactive Group [define]				
(4) General Group [define]				

Accepted by:

Softco, Inc.
160 Cleveland Drive
Croton-on-Hudson, N.Y. 10520

by_____

Title_____

Date_____

Accepted by:

Customer_____

by_____

Title_____

Date_____

FORM TX

UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
WASHINGTON, D.C. 20559

APPLICATION FOR COPYRIGHT REGISTRATION

for a Nondramatic Literary Work

HOW TO APPLY FOR COPYRIGHT REGISTRATION:

- ***First:*** Read the information on this page to make sure Form TX is the correct application for your work.
- ***Second:*** Open out the form by pulling this page to the left. Read through the detailed instructions before starting to complete the form.
- ***Third:*** Complete spaces 1-4 of the application, then turn the entire form over and, after reading the instructions for spaces 5-11, complete the rest of your application. Use typewriter or print in dark ink. Be sure to sign the form at space 10.
- ***Fourth:*** Detach your completed application from these instructions and send it with the necessary deposit of the work (see below) to: Register of Copyrights, Library of Congress, Washington, D.C. 20559. Unless you have a Deposit Account in the Copyright Office, your application and deposit must be accompanied by a check or money order for $10, payable to: *Register of Copyrights.*

WHEN TO USE FORM TX: Form TX is the appropriate application to use for copyright registration covering nondramatic literary works, whether published or unpublished.

WHAT IS A "NONDRAMATIC LITERARY WORK"? The category of "nondramatic literary works" (Class TX) is very broad. Except for dramatic works and certain kinds of audiovisual works, Class TX includes all types of works written in words (or other verbal or numerical symbols). A few of the many examples of "nondramatic literary works" include fiction, nonfiction, poetry, periodicals, textbooks, reference works, directories, catalogs, advertising copy, and compilations of information.

DEPOSIT TO ACCOMPANY APPLICATION: An application for copyright registration must be accompanied by a deposit representing the entire work for which registration is to be made. The following are the general deposit requirements as set forth in the statute:

Unpublished work: Deposit one complete copy (or phonorecord).

Published work: Deposit two complete copies (or phonorecords) of the best edition.

Work first published outside the United States: Deposit one complete copy (or phonorecord) of the first foreign edition.

Contribution to a collective work: Deposit one complete copy (or phonorecord) of the best edition of the collective work.

These general deposit requirements may vary in particular situations. For further information about copyright deposit, write to the Copyright Office.

THE COPYRIGHT NOTICE: For published works, the law provides that a copyright notice in a specified form "shall be placed on all publicly distributed copies from which the work can be visually perceived." Use of the copyright notice is the responsibility of the copyright owner and does not require advance permission from the Copyright Office. The required form of the notice for copies generally consists of three elements: (1) the symbol "©", or the word "Copyright", or the abbreviation "Copr."; (2) the year of first publication; and (3) the name of the owner of copyright. For example: "© 1978 Constance Porter". The notice is to be affixed to the copies "in such manner and location as to give reasonable notice of the claim of copyright." Unlike the law in effect before 1978, the new copyright statute provides procedures for correcting errors in the copyright notice, and even for curing the omission of the notice. However, a failure to comply with the notice requirements may still result in the loss of some copyright protection and, unless corrected within five years, in the complete loss of copyright. For further information about the copyright notice and the procedures for correcting errors or omissions, write to the Copyright Office.

DURATION OF COPYRIGHT: For works that were created after the effective date of the new statute (January 1, 1978), the basic copyright term will be the life of the author and fifty years after the author's death. For works made for hire, and for certain anonymous and pseudonymous works, the duration of copyright will be 75 years from publication or 100 years from creation, whichever is shorter. These same terms of copyright will generally apply to works that had been created before 1978 but had not been published or copyrighted before that date. For further information about the duration of copyright, including the terms of copyrights already in existence before 1978, write for Circular R15a.

HOW TO FILL OUT FORM TX

Specific Instructions for Spaces 1-4

- The line-by-line instructions on this page are keyed to the spaces on the first page of Form TX, printed opposite.
- Please read through these instructions before you start filling out your application, and refer to the specific instructions for each space as you go along.

SPACE 1: TITLE

• ***Title of this Work:*** Every work submitted for copyright registration must be given a title that is capable of identifying that particular work. If the copies or phonorecords of the work bear a title (or an identifying phrase that could serve as a title), transcribe its wording completely and exactly on the application. Remember that indexing of the registration and future identification of the work will depend on the information you give here.

• ***Periodical or Serial Issue:*** Periodicals and other serials are publications issued at intervals under a general title, such as newspapers, magazines, journals, newsletters, and annuals. If the work being registered is an entire issue of a periodical or serial, give the over-all title of the periodical or serial in the space headed "Title of this Work," and add the specific information about the issue in the spaces provided. If the work being registered is a contribution to a periodical or serial issue, follow the instructions for "Publication as a Contribution."

• ***Previous or Alternative Titles:*** Complete this space if there are any additional titles for the work under which someone searching for the registration might be likely to look, or under which a document pertaining to the work might be recorded.

• ***Publication as a Contribution:*** If the work being registered has been published as a contribution to a periodical, serial, or collection, give the title of the contribution in the space headed "Title of this Work." Then, in the line headed "Publication as a Contribution," give information about the larger work in which the contribution appeared.

SPACE 2: AUTHORS

• ***General Instructions:*** First decide, after reading these instructions, who are the "authors" of this work for copyright purposes. Then, unless the work is a "collective work" (see below), give the requested information about every "author" who contributed any appreciable amount of copyrightable matter to this version of the work. If you need further space, use the attached Continuation Sheet and, if necessary, request additional Continuation Sheets (Form TX/CON).

• ***Who is the "Author"?*** Unless the work was "made for hire," the individual who actually created the work is its "author." In the case of a work made for hire, the statute provides that "the employer or other person for whom the work was prepared is considered the author."

• ***What is a "Work Made for Hire"?*** A "work made for hire" is defined as: (1) "a work prepared by an employee within the scope of his or her employment"; or (2) "a work specially ordered or commissioned" for certain uses specified in the statute, but only if there is a written agreement to consider it a "work made for hire."

• ***Collective Work:*** In the case of a collective work, such as a periodical issue, anthology, collection of essays, or encyclopedia, it is sufficient to give information about the author of the collective work as a whole.

• ***Author's Identity Not Revealed:*** If an author's contribution is "anonymous" or "pseudonymous," it is not necessary to give the name and dates for that author. However, the citizenship or domicile of the author **must** be given in all cases, and information about the nature of that author's contribution to the work should be included.

• ***Name of Author:*** The fullest form of the author's name should be given. If you have checked "Yes" to indicate that the work was "made for hire," give the full legal name of the employer (or other person for whom the work was prepared). You may also include the name of the employee (for example, "Elster Publishing Co., employer for hire of John Ferguson"). If the work is "anonymous" you may: (1) leave the line blank, or (2) state "Anonymous" in the line, or (3) reveal the author's identity. If the work is "pseudonymous" you may (1) leave the line blank, or (2) give the pseudonym and identify it as such (for example: "Huntley Haverstock, pseudonym"), or (3) reveal the author's name, making clear which is the real name and which is the pseudonym (for example, "Judith Barton, whose pseudonym is Madeleine Elster").

• ***Dates of Birth and Death:*** If the author is dead, the statute requires that the year of death be included in the application unless the work is anonymous or pseudonymous. The author's birth date is optional, but is useful as a form of identification. Leave this space blank if the author's contribution was a "work made for hire."

• ***"Anonymous" or "Pseudonymous" Work:*** An author's contribution to a work is "anonymous" if that author is not identified on the c ies or phonorecords of the work. An author's contribution to a work is "ps udonymous" if that author is identified on the copies or phonorecords under a fictitious name.

• ***Author's Nationality or Domicile:*** Give the country of which the author is a citizen, or the country in which the author is domiciled. The statute requires that either nationality or domicile be given in all cases.

• ***Nature of Authorship:*** After the words "Author of" give a brief general statement of the nature of this particular author's contribution to the work. Examples: "Entire text"; "Co-author of entire text"; "Chapters 11-14"; "Editorial revisions"; "Compilation and English translation"; "Illustrations."

SPACE 3: CREATION AND PUBLICATION

• ***General Instructions:*** Do not confuse "creation" with "publication." Every application for copyright registration must state "the year in which creation of the work was completed." Give the date and nation of first publication only if the work has been published.

• ***Creation:*** Under the statute, a work is "created" when it is fixed in a copy or phonorecord for the first time. Where a work has been prepared over a period of time, the part of the work existing in fixed form on a particular date constitutes the created work on that date. The date you give here should be the year in which the author completed the particular version for which registration is now being sought, even if other versions exist or if further changes or additions are planned.

• ***Publication:*** The statute defines "publication" as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending"; a work is also "published" if there has been an "offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display." Give the full date (month, day, year) when, and the country where, publication first occurred. If first publication took place simultaneously in the United States and other countries, it is sufficient to state "U.S.A."

SPACE 4: CLAIMANT(S)

• ***Name(s) and Address(es) of Copyright Claimant(s):*** Give the name(s) and address(es) of the copyright claimant(s) in this work. The statute provides that copyright in a work belongs initially to the author of the work (including, in the case of a work made for hire, the employer or other person for whom the work was prepared). The copyright claimant is either the author of the work or a person or organization that has obtained ownership of the copyright initially belonging to the author.

• ***Transfer:*** The statute provides that, if the copyright claimant is not the author, the application for registration must contain "a brief statement of how the claimant obtained ownership of the copyright." If any copyright claimant named in space 4 is not an author named in space 2, give a brief, general statement summarizing the means by which that claimant obtained ownership of the copyright.

PRIVACY ACT ADVISORY STATEMENT
Required by the Privacy Act of 1974 (Public Law 93-579)

AUTHORITY FOR REQUESTING THIS INFORMATION:
- Title 17, U.S.C., Secs. 409 and 410

FURNISHING THE REQUESTED INFORMATION IS:
- Voluntary

BUT IF THE INFORMATION IS NOT FURNISHED:
- It may be necessary to delay or refuse registration
- You may not be entitled to certain relief, remedies, and benefits provided in chapters 4 and 5 of title 17, U.S.C.

PRINCIPAL USES OF REQUESTED INFORMATION:
- Establishment and maintenance of a public record
- Examination of the application for compliance with legal requirements

OTHER ROUTINE USES:
- Public inspection and copying
- Preparation of public indexes
- Preparation of public catalogs of copyright registrations
- Preparation of search reports upon request

NOTE:
- No other advisory statement will be given you in connection with this application
- Please retain this statement and refer to it if we communicate with you regarding this application

INSTRUCTIONS FOR FILLING OUT SPACES 5-11 OF FORM TX

SPACE 5: PREVIOUS REGISTRATION

• ***General Instructions:*** The questions in space 5 are intended to find out whether an earlier registration has been made for this work and, if so, whether there is any basis for a new registration. As a general rule, only one basic copyright registration can be made for the same version of a particular work.

• ***Same Version:*** If this version is substantially the same as the work covered by a previous registration, a second registration is not generally possible unless: (1) the work has been registered in unpublished form and a second registration is now being sought to cover the first published edition, or (2) someone other than the author is identified as copyright claimant in the earlier registration, and the author is now seeking registration in his or her own name. If either of these two exceptions apply, check the appropriate box and give the earlier registration number and date. Otherwise, do not submit Form TX; instead, write the Copyright Office for information about supplementary registration or recordation of transfers of copyright ownership.

• ***Changed Version:*** If the work has been changed, and you are now seeking registration to cover the additions or revisions, check the third box in space 5, give the earlier registration number and date, and complete both parts of space 6.

• ***Previous Registration Number and Date:*** If more than one previous registration has been made for the work, give the number and date of the latest registration.

SPACE 6: COMPILATION OR DERIVATIVE WORK

• ***General Instructions:*** Complete both parts of space 6 if this work is a "compilation," or "derivative work," or both, and if it incorporates one or more earlier works that have already been published or registered for copyright, or that have fallen into the public domain. A "compilation" is defined as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." A "derivative work" is "a work based on one or more preexisting works." Examples of derivative works include translations, fictionalizations, arrangements, abridgments, condensations, or "any other form in which a work may be recast, transformed, or adapted." Derivative works also include works "consisting of editorial revisions, annotations, elaborations, or other modifications" if these changes, as a whole, represent an original work of authorship.

• ***Preexisting Material:*** If the work is a compilation, give a brief, general statement describing the nature of the material that has been compiled. Example: "Compilation of all published 1917 speeches of Woodrow Wilson." In the case of a derivative work, identify the preexisting work that has been recast, transformed, or adapted. Example: "Russian version of Goncharov's 'Oblomov'."

• ***Material Added to this Work:*** The statute requires a "brief, general statement of the additional material covered by the copyright claim being registered." This statement should describe all of the material in this particular version of the work that: (1) represents an original work of authorship; and (2) has not fallen into the public domain; and (3) has not been previously published; and (4) has not been previously registered for copyright in unpublished form. Examples: "Foreword, selection, arrangement, editing, critical annotations"; "Revisions throughout; chapters 11-17 entirely new".

SPACE 7: MANUFACTURING PROVISIONS

• ***General Instructions:*** The copyright statute currently provides, as a general rule, and with a number of exceptions, that the copies of a published work "consisting preponderantly of nondramatic literary material that is in the English language" be manufactured in the United States or Canada in order to be lawfully imported and publicly distributed in the United States. At the present time, applications for copyright registration covering published works that consist mainly of nondramatic text matter in English *must*, in most cases, identify those who performed certain processes in manufacturing the copies, together with the places where those processes were performed. *Please note:* The information must be given even if the copies were manufactured outside the United States or Canada; registration will be made regardless of the places of manufacture identified in space 7. In general, the processes covered by this provision are: (1) typesetting and plate-making (where a typographic process preceded the actual printing); (2) the making of plates by a lithographic or photoengraving process (where this was a final or intermediate step before printing); and (3) the final printing and binding processes (in all cases). Leave space 7 blank if your work is unpublished or is not in English.

• ***Import Statement:*** As an exception to the manufacturing provisions, the statute prescribes that, where manufacture has taken place outside the United States or Canada, a maximum of 2000 copies of the foreign edition can be imported into the United States without affecting the copyright owner's rights. For this purpose, the Copyright Office will issue an import statement upon request and payment of a fee of $3 at the time of registration or at any later time. For further information about import statements, ask for Form IS.

SPACE 8: REPRODUCTION FOR USE OF BLIND OR PHYSICALLY-HANDICAPPED PERSONS

• ***General Instructions:*** One of the major programs of the Library of Congress is to provide Braille editions and special recordings of works for the exclusive use of the blind and physically handicapped. In an effort to simplify and speed up the copyright licensing procedures that are a necessary part of this program, section 710 of the copyright statute provides for the establishment of a voluntary licensing system to be tied in with copyright registration. Under this system, the owner of copyright in a nondramatic literary work has the option, at the time of registration on Form TX, to grant to the Library of Congress a license to reproduce and distribute Braille editions and "talking books" or "talking magazines" of the work being registered. The Copyright Office regulations provide that, under the license, the reproduction and distribution must be solely for the use of persons who are certified by competent authority as unable to read normal printed material as a result of physical limitations. The license is nonexclusive, and may be terminated upon 90 days notice. For further information, write for Circular R63.

• ***How to Grant the License:*** The license is entirely voluntary. If you wish to grant it, check one of the three boxes in space 8. Your check in one of these boxes, together with your signature in space 10, will mean that the Library of Congress can proceed to reproduce and distribute under the license without further paperwork.

SPACES 9, 10, 11: FEE, CORRESPONDENCE, CERTIFICATION, RETURN ADDRESS

• ***Deposit Account and Mailing Instructions (Space 9):*** If you maintain a Deposit Account in the Copyright Office, identify it in space 9. Otherwise you will need to send the registration fee of $10 with your application. The space headed "Correspondence" should contain the name and address of the person to be consulted if correspondence about this application becomes necessary.

• ***Certification (Space 10):*** The application is not acceptable unless it bears the handwritten signature of the author or other copyright claimant, or of the owner of exclusive right(s), or of the duly authorized agent of such author, claimant, or owner.

• ***Address for Return of Certificate (Space 11):*** The address box must be completed legibly, since the certificate will be returned in a window envelope.

FORM TX

UNITED STATES COPYRIGHT OFFICE

REGISTRATION NUMBER

TX TXU

EFFECTIVE DATE OF REGISTRATION

....
(Month) (Day) (Year)

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE CONTINUATION SHEET (FORM TX/CON)

1 Title

TITLE OF THIS WORK:

PREVIOUS OR ALTERNATIVE TITLES:

If a periodical or serial give: Vol. ..... No. ..... Issue Date .....

PUBLICATION AS A CONTRIBUTION: (If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared.)

Title of Collective Work: ..... Vol. ..... No. ..... Date ..... Pages .....

2 Author(s)

IMPORTANT: Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). If any part of this work was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates blank.

1

NAME OF AUTHOR:

Was this author's contribution to the work a "work made for hire"? Yes..... No.....

DATES OF BIRTH AND DEATH:

Born ..... (Year) Died ..... (Year)

AUTHOR'S NATIONALITY OR DOMICILE:

Citizen of ..... (Name of Country) } or { Domiciled in ..... (Name of Country)

AUTHOR OF: (Briefly describe nature of this author's contribution)

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK:

Anonymous? Yes..... No.....
Pseudonymous? Yes..... No.....

If the answer to either of these questions is "Yes," see detailed instructions attached.

2

NAME OF AUTHOR:

Was this author's contribution to the work a "work made for hire"? Yes..... No.....

DATES OF BIRTH AND DEATH:

Born ..... (Year) Died ..... (Year)

AUTHOR'S NATIONALITY OR DOMICILE:

Citizen of ..... (Name of Country) } or { Domiciled in ..... (Name of Country)

AUTHOR OF: (Briefly describe nature of this author's contribution)

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK:

Anonymous? Yes..... No.....
Pseudonymous? Yes..... No.....

If the answer to either of these questions is "Yes," see detailed instructions attached.

3

NAME OF AUTHOR:

Was this author's contribution to the work a "work made for hire"? Yes..... No.....

DATES OF BIRTH AND DEATH:

Born ..... (Year) Died ..... (Year)

AUTHOR'S NATIONALITY OR DOMICILE:

Citizen of ..... (Name of Country) } or { Domiciled in ..... (Name of Country)

AUTHOR OF: (Briefly describe nature of this author's contribution)

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK:

Anonymous? Yes..... No.....
Pseudonymous? Yes..... No.....

If the answer to either of these questions is "Yes," see detailed instructions attached.

3 Creation and Publication

YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED:

Year. .....

(This information must be given in all cases.)

DATE AND NATION OF FIRST PUBLICATION:

Date. ..... (Month) (Day) (Year)

Nation ..... (Name of Country)

(Complete this block ONLY if this work has been published.)

4 Claimant(s)

NAME(S) AND ADDRESS(ES) OF COPYRIGHT CLAIMANT(S):

TRANSFER: (If the copyright claimant(s) named here in space 4 are different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright.)

- *Complete all applicable spaces (numbers 5-11) on the reverse side of this page*
- *Follow detailed instructions attached* • *Sign the form at line 10*

DO NOT WRITE HERE

Page 1 of ..... pages

Appendix I-4

	EXAMINED BY:..... CHECKED BY:.....	APPLICATION RECEIVED:
	CORRESPONDENCE: ☐ Yes	DEPOSIT RECEIVED:
	DEPOSIT ACCOUNT FUNDS USED: ☐	REMITTANCE NUMBER AND DATE:

FOR COPYRIGHT OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED ADDITIONAL SPACE, USE CONTINUATION SHEET (FORM TX/CON)

PREVIOUS REGISTRATION:

- Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office? Yes..... No.....
- If your answer is "Yes," why is another registration being sought? (Check appropriate box)
  - ☐ This is the first published edition of a work previously registered in unpublished form.
  - ☐ This is the first application submitted by this author as copyright claimant.
  - ☐ This is a changed version of the work, as shown by line 6 of this application.
- If your answer is "Yes," give: Previous Registration Number..... Year of Registration.....

5 Previous Registration

COMPILATION OR DERIVATIVE WORK: (See instructions)

PREEXISTING MATERIAL: (Identify any preexisting work or works that this work is based on or incorporates.)

.....

.....

MATERIAL ADDED TO THIS WORK: (Give a brief, general statement of the material that has been added to this work and in which copyright is claimed.)

.....

.....

6 Compilation or Derivative Work

MANUFACTURERS AND LOCATIONS: (If this is a published work consisting preponderantly of nondramatic literary material in English, the law may require that the copies be manufactured in the United States or Canada for full protection. If so, the names of the manufacturers who performed certain processes, and the places where these processes were performed must be given. See instructions for details.)

NAMES OF MANUFACTURERS	PLACES OF MANUFACTURE
.....	.....
.....	.....
.....	.....

7 Manufacturing

REPRODUCTION FOR USE OF BLIND OR PHYSICALLY-HANDICAPPED PERSONS: (See instructions)

- Signature of this form at space 10, and a check in one of the boxes here in space 8, constitutes a non-exclusive grant of permission to the Library of Congress to reproduce and distribute solely for the blind and physically handicapped and under the conditions and limitations prescribed by the regulations of the Copyright Office: (1) copies of the work identified in space 1 of this application in Braille (or similar tactile symbols); or (2) phonorecords embodying a fixation of a reading of that work; or (3) both.

a ☐ Copies and phonorecords b ☐ Copies Only c ☐ Phonorecords Only

8 Licenses For Handicapped

DEPOSIT ACCOUNT: (If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.)

Name:.....

Account Number:.....

CORRESPONDENCE: (Give name and address to which correspondence about this application should be sent.)

Name:.....

Address:..... (Apt.)

..... (City) (State) (ZIP)

9 Fee and Correspondence

CERTIFICATION: * I, the undersigned, hereby certify that I am the: (Check one)

☐ author ☐ other copyright claimant ☐ owner of exclusive right(s) ☐ authorized agent of:.....
(Name of author or other copyright claimant, or owner of exclusive right(s))

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Handwritten signature: (X).....

Typed or printed name..... Date.....

10 Certification (Application must be signed)

.....
(Name)

.....
(Number, Street and Apartment Number)

.....
(City) (State) (ZIP code)

MAIL CERTIFICATE TO

(Certificate will be mailed in window envelope)

11 Address For Return of Certificate

* 17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1978 - 261 -022/16

April 1978 - 500,000

CONTINUATION SHEET FOR FORM TX

FORM TX/CON

UNITED STATES COPYRIGHT OFFICE

- If at all possible, try to fit the information called for into the spaces provided on Form TX.
- If you do not have space enough for all of the information you need to give on Form TX, use this continuation sheet and submit it with Form TX.
- If you submit this continuation sheet, leave it attached to Form TX. Or, if it becomes detached, clip (do not tape or staple) and fold the two together before submitting them.
- **PART A** of this sheet is intended to identify the basic application. **PART B** is a continuation of Space 2. **PART C** is for the continuation of Spaces 1, 4, 6, or 7. The other spaces on Form TX call for specific items of information, and should not need continuation.

REGISTRATION NUMBER

TX TXU

EFFECTIVE DATE OF REGISTRATION

.... (Month) .... (Day) .... (Year)

CONTINUATION SHEET RECEIVED

Page ______ of ______ pages

DO NOT WRITE ABOVE THIS LINE: FOR COPYRIGHT OFFICE USE ONLY

A — Identification of Application

IDENTIFICATION OF CONTINUATION SHEET: This sheet is a continuation of the application for copyright registration on Form TX, submitted for the following work:

- TITLE: (Give the title as given under the heading "Title of this Work" in Space 1 of Form TX.)

....

- NAME(S) AND ADDRESS(ES) OF COPYRIGHT CLAIMANT(S): (Give the name and address of at least one copyright claimant as given in Space 4 of Form TX.)

....

B — Continuation of Space 2

☐ **NAME OF AUTHOR:**

Was this author's contribution to the work a "work made for hire"? Yes..... No.....

DATES OF BIRTH AND DEATH: Born.......... (Year) Died.......... (Year)

AUTHOR'S NATIONALITY OR DOMICILE: Citizen of.......................... (Name of Country) or Domiciled in.......................... (Name of Country)

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK: Anonymous? Yes...... No...... Pseudonymous? Yes...... No......

If the answer to either of these questions is "Yes," see detailed instructions attached.

AUTHOR OF: (Briefly describe nature of this author's contribution)

☐ **NAME OF AUTHOR:**

Was this author's contribution to the work a "work made for hire"? Yes..... No.....

DATES OF BIRTH AND DEATH: Born.......... (Year) Died.......... (Year)

AUTHOR'S NATIONALITY OR DOMICILE: Citizen of.......................... (Name of Country) or Domiciled in.......................... (Name of Country)

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK: Anonymous? Yes...... No...... Pseudonymous? Yes...... No......

If the answer to either of these questions is "Yes," see detailed instructions attached.

AUTHOR OF: (Briefly describe nature of this author's contribution)

☐ **NAME OF AUTHOR:**

Was this author's contribution to the work a "work made for hire"? Yes..... No.....

DATES OF BIRTH AND DEATH: Born.......... (Year) Died.......... (Year)

AUTHOR'S NATIONALITY OR DOMICILE: Citizen of.......................... (Name of Country) or Domiciled in.......................... (Name of Country)

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK: Anonymous? Yes...... No...... Pseudonymous? Yes...... No......

If the answer to either of these questions is "Yes," see detailed instructions attached.

AUTHOR OF: (Briefly describe nature of this author's contribution)

C — Continuation of Other Spaces

CONTINUATION OF (Check which): ☐ Space 1 ☐ Space 4 ☐ Space 6 ☐ Space 7

SELECTED PORTIONS OF THE COPYRIGHT LAW AND REGULATIONS

The copyright law is Title 17 of the United States Code. Some provisionss of the Code and Regulations pertinent to software are included in this Appendix as follows:

* *

APPENDIX INDEX

* *

§ 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

* * * *

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner," with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

A "device," "machine," or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

* * * *

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.

* * * *

A "work made for hire" is:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, . . . as a translation, as a supplementary work, as a compilation, . . ., if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, . . . appendixes, and indexes, . . .

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result [amended by the Act of December 12, 1980, Pub. L. No. 96-517].

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

* * * *

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

* * * *

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 [relating to "fair use"] through 108 [relating to reproduction by libraries and archives], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

* * * *

§ 117. Limitation on exclusive rights: Computer programs

Notwithstanding the provisions of § 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner [¶ 117 as amended by the Act of December 12, 1980, Pub. L. 96-517].

* * * *

§ 705. Copyright Office records: Preparation, maintenance, public inspection, and searching

(a) The Register of Copyrights shall provide and keep in the Copyright Office records of all deposits, registrations, recordations, and other actions taken under this title, and shall prepare indexes of all such records.

(b) Such records and indexes, as well as the articles deposited in connection with completed copyright registrations and retained under the control of the Copyright Office, shall be open to public inspection.

* * * *

§ 202.10 Methods of affixation and positions of the copyright notice on various types of works

(a) General.

(1) This section specifies examples of methods of affixation and positions of the copyrights notice on various types of works that will satisfy the notice requirement of section 401(c) of title 17 of the United States Code, as amended by Pub. L. 94-553. A notice considered "acceptable" under this regulation shall be considered to satisfy the requirement of that section that it be "affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright." As provided by that section, the examples specified in this regulation shall not be considered exhaustive of methods of affixation and positions giving reasonable notice of the claim of copyright.

(2) The provisions of this section are applicable to copies publicly distributed on or after December 1, 1981. This section does not establish any rules concerning the form of the notice or the legal sufficiency of particular notices, except with respect to methods of affixation and positions of notice. The adequacy or legal sufficiency of a copyright notice is determined by the law in effect at the time of first publication of the work.

* * * *

(f) Contributions to Collective Works

For a separate contribution to a collective work to be considered to "bear its own notice of copyright," as provided by 17 U.S.C. 404, a notice reproduced on the copies in any of the following positions is acceptable:

(1) Where the separate contribution is reproduced on a single page, a notice is acceptable if it appears:

(i) Under the title of the contribution on that page;

(ii) Adjacent to the contribution; or

(iii) on the same page if, through format, wording, or both, the application of the notice to the particular contribution is made clear;

(2) Where the separate contribution is reproduced on more than one page of the collective work, a notice is acceptable if it appears:

(i) Under a title appearing at or near the beginning of the contribution;

(ii) on the first page of the main body of the contribution;

(iii) immediately following the end of the contribution; or

(iv) on any of the pages where the contribution appears, if:

(A) The contribution is reproduced on no more than twenty pages of the collective work;

(B) the notice is reproduced prominently and is set apart from other matter on the page where it appears; and

(C) through format, wording, or both, the application of the notice to the particular contribution is made clear;

* * * *

(4) As an alternative to placing the notice on one of the pages where a separate contribution itself appears, the contribution is considered to "bear its own notice" if the notice appears clearly in juxtaposition with a separate listing of the contribution by title, or if the contribution is untitled, by a description reasonably identifying the contribution:

(i) on the page bearing the copyright notice for the collective work as a whole, if any; or

(ii) in a clearly identified and readily-accessible table of contents or listing of acknowledgements appearing near the front or back of the collective work as a whole.

(g) Works Reproduced in Machine-Readable Copies.

For works reproduced in machine-readable copies (such as magnetic tapes or disks, punched cards, or the like, from which the work cannot ordinarily be visually perceived except with the aid of a machine or device, each of the following constitute examples of acceptable methods of affixation and position of notice:

(1) A notice embodied [sic] in the copies in machine-readable form in such a manner that on visually perceptible printouts it appears either with or near the title, or at the end of the work;

(2) A notice that is displayed at the user's terminal at sign-on;

(3) A notice that is continuously on terminal display; or

(4) A legible notice reproduced durably, so as to withstand normal use, on a gummed or other label securely affixed to the copies or to a box, reel, cartridge, cassette, or other container used as a permanent receptacle for the copies.

* *

§ 202.20 Deposit of copies and phonorecords for copyright registration

* * * *

(c) Nature of required deposit.

(1) Subject to the provisions of paragraph (c)(2) of this section, the deposit required to accompany an application for registration of claim to copyright under section 408 of title 17 shall consist of:

(i) In the case of unpublished works, one complete copy or phonorecord.

(ii) On the case of works first published in the United States before January 1, 1978, two complete copies or phonorecords of the work as first published.

(iii) In the case of works first published in the United States on or after January 1, 1978, two complete copies or phonorecords of the best edition.

(iv) In the case of works first published outside of the United States, whenever published, one complete copy or phonorecord of the work as first published. For the purposes of this section, any works simultaneously first published within and outside of the United States shall be considered to be first published in the United States.

(2) In the case of certain works, the special provisions set forth in this clause shall apply. In any case where this clause specifies that one copy or phonorecord may be submitted, that copy or phonorecord shall represent the best edition, or the work as first published, as set forth in paragraph (c)(1) of this section.

* * * *

(vii) Machine-readable works. In cases where an unpublished literary work is fixed, or a published literary work is published only in the form of machine-readable copies (such as magnetic tape or disks, punched cards, or the like) from which the work cannot ordinarily be perceived except

with the aid of a machine or device,[1] the deposit shall consist of:

(A) For published or unpublished computer programs, one copy of identifying portions of the program, reproduced in a form visually perceptible without the aid of a machine or device, either on paper or in microform. For these purposes, "identifying portions" shall mean either the first and last twenty-five pages or equivalent units of the program if reproduced on paper, or at least the first and last twenty-five pages or equivalent units of the program if reproduced in microform, together with the page or equivalent unit containing the copyright notice, if any.

(B) For published and unpublished automated data bases, compilations, statistical compendia, and other literary works so fixed or published, one copy of identifying portions of the work, reproduced in a form visually perceptible without the aid of a machine or device, either on paper or in microform. For these purposes: (1) "identifying portions" shall mean either the first and last twenty-five pages or equivalent units of the work if reproduced on paper or at least the first and last twenty-five pages or equivalent units of work if reproduced on microform, or, in the case of automated data bases comprising separate and distinct data files, representative portions of each separate data file consisting of either 50 complete data records from each file or the entire file, whichever is less; and (2) "data file" and "file" mean a group of data records pertaining to a common subject matter, regardless of the physical size of the records or the number of data items included in them. (In the case of revised versions of such data bases, the portions deposited must contain representative data records which have been added or modified.) In any case where the deposit comprises representative portions of each separate file of an automated data base as indicated above, it shall be accompanied by a typed or printed descriptive statement containing: The title of the data base; the name and address of the copyright claimant; the name and content of each separate file within the data base; including the subject matter involved; the origin(s) of the data and the approximate number of individual records within the file; and a description of the exact contents of any machine-readable copyright notice employed in or with the work and the manner and frequency with which it is

---

[1] Works published in a form requiring the use of a machine or device for purposes of optical enlargement (such as film, filmstrips, slide films, and works published in any variety of microform), and works published in visually perceptible form but used in connection with optical scanning devices, are not within this category.

displayed (e.g., at user's terminal only at sign-on, or continuously on terminal display, or on printouts, etc.). If a visually-perceptible copyright notice is placed on any copies of the work (such as magnetic tape reels) or their container, a sample of such notice must also accompany the statement.

* * * *

UNIFORM TRADE SECRETS ACT
[substantive portions]

Section 1. Definitions

As used in this Act, unless the context requires otherwise:

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;

(2) "Misappropriation" means:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(I) derived from or through a person who had utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) "Person" means a natural person, corporation, business trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Trade secret" means information, including a formula,

pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means to, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Section 2. Injunctive Relief

(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(b) If the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

Section 3. Damages

(a) In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment cause by misappropriation that is not taken into account in computing damages for actual loss.

(b) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a).

Section 4. Attorney's Fees

If (i) a claim of misappropriation is made in bad faith, (ii) a motion to terminate an injunction is made or resisted in bad faith, or (iii) willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.

Section 5. Preservation of Secrecy

In an action under this Act, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

Section 6. Statute of Limitations

An action for misappropriation must be brought within 3 years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

[Omitted portions cover procedure and enactment]

[a software distributorship/marketing form]

LICENSE AGREEMENT

between:

("LICENSOR") and
Softco, Inc., Inc. ("Softco"), Croton-on-Hudson, New York 10520.

LICENSOR hereby grants to Softco and Softco hereby accepts from LICENSOR, in accordance with the following terms and conditions, an exclusive license to market and sublicense computer software now developed and to be developed by LICENSOR (described in Schedule A and referred to hereinafter as the "Software"). Additional computer software may be included in this Agreement from time to time by additional schedules as agreed in writing by LICENSOR and Softco. Softco agrees to use its best efforts to market the Software so as to promote and encourage the royalty payments by Softco to LICENSOR.

1. Effective Date and Term

The effective date of this Agreement is _____. The term of this Agreement is permanent unless terminated in accordance with the provisions of Paragraph 4 below.

2. Scope of License

LICENSOR grants to Softco the exclusive right to market, use, license, sub-license and otherwise commercialize the Software subject only to royalty payment provisions and to certain retained rights of LICENSOR or rights of use previously granted by LICENSOR to third parties, all of which retained or previously granted rights are described in Schedule E attached. Softco shall have the right to set prices and control other aspects of marketing including the scope of sublicense rights granted, consistent with the terms and conditions of this Agreement. LICENSOR's name and connection with the Software may be publicized by Softco. During the term of this Agreement, LICENSOR agrees that it will not license, sub-license and/or otherwise commercialize the Software or knowingly participate in the commercialization of any software similar to or competitive with the Software. Other than as expressly stated in this paragraph, nothing in this Agreement shall prevent LICENSOR from acquiring any software for its own use or from the marketing of its own present or future software not connected with the Software.

3. License Fees and Payment

From the effective date of this Agreement, Softco will pay LICENSOR royalties on license fees for the Software as specified in Schedule D, payable as non-recoverable payments are received by Softco.

A. Royalty Exclusions. No royalty shall be payable on the following:

(1) Separately stated installation or maintenance charges.

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(2) Separately stated software elements not included in the Software as listed in Schedule A.

(3) Separately stated reimbursement of expenses.

(4) Separately stated consulting fees.

(5) Separately stated fees for custom programming or customization of the Software.

(6) Elements of (1) through (5) when bundled into a license fee but only to the extent that such elements are reasonable in amount and do not exceed, in the aggregate, ___% of the particular license fee.

B. Payment. Payment shall be made to LICENSOR quarterly.

C. Maximum Royalties and Limitation of Time. The license granted to Softco by LICENSOR shall continue permanently without further payment to LICENSOR by Softco on the earlier of the following:

(1) The cumulative payment of $_____ by Softco to LICENSOR in total royalty payments.

(2) Five years after the effective date of this agreement, but any royalties accrued but unpaid with respect to payments received by Softco prior to the end of the five years shall be paid to LICENSOR.

4. Termination of the Agreement

Either party may terminate this Agreement in the event of material breach by the other party, such breach remaining uncorrected sixty days after written notice of the breach to the breaching party.

In the event of termination by Softco under this Section 4, Softco may treat the license granted hereby as a permanent non-exclusive license with no further royalty obligations to LICENSOR.

Provisions of this Agreement affecting the proprietary nature of the Software including trade secret and copyright protection shall survive any termination of this Agreement.

The parties agree that no termination of this Agreement by LICENSOR shall affect the ability of Softco to fulfill its obligations under any commitment made by Softco in good faith and in accordance with this Agreement prior to the effective date of such termination including, but not limited to, retention of source code to provide ongoing maintenance. Termination due to a breach by Softco shall not relieve Softco of the obligation to pay any amounts due LICENSOR with respect to pre-termination commitments from Softco's customers even though such amounts may be paid to Softco after termination.

5. Right to Audit Records

LICENSOR shall have the right, upon reasonable notice, by independent auditor and at LICENSOR's expense, to audit Softco's records as they affect amounts payable to LICENSOR under this license.

6. Termination of Exclusivity

If Softco shall fail to meet the minimum royalty payments specified in Schedule D, LICENSOR may give 60 days written notice to Softco of intent to terminate the exclusive nature of this License Agreement. If Softco makes the required minimum payments within the 60 day period, this license shall continue in full force and effect as an exclusive license, otherwise this license shall be converted to a non-exclusive license.

7. Taxes

Softco will hold LICENSOR harmless from any sales, excise or use tax or taxes in lieu thereof (except taxes based upon income earned by LICENSOR pursuant to this Agreement) which may be imposed by any governmental authority upon use or sub-licensing by Softco of the Software, or on this Agreement.

8. Use of a Trade Name

Softco may use a trade name to describe the Software or its functions, such trade name being proprietary to Softco.

9. Improvements, Modifications and Maintenance

LICENSOR agrees to make the improvements or modifications described in Schedule B.

LICENSOR agrees to fulfill the operational warranty and maintenance obligations specified in Schedule C.

Modifications or improvements in the Software furnished Softco by LICENSOR shall remain the property of LICENSOR but such modifications or improvements shall be included in the Software.

Modifications or improvements in the Software made by Softco or third parties shall be proprietary to Softco or the third parties and LICENSOR shall have no rights therein.

10. Proprietary Rights and Indemnity

Except as otherwise herein provided, LICENSOR retains title to the computer programs, documentation, information or data furnished by LICENSOR to Softco in source or object form.

Both parties acknowledge that the Software and any modifications, enhancements or improvements to the Software are trade secret information. Both parties agree to exercise care and control with respect to these trade secrets and Softco agrees to require its sublicensees to exercise such care and control.

LICENSOR agrees to defend and save harmless Softco against any action against Softco or Softco's sublicensees on account of violation of any third party patent, copyright or trade secret rights occurring due to use or licensing of the Software as supplied by LICENSOR. Softco shall have the right, at its own expense, to participate in the defense of any such action against Softco or Softco's sublicensees.

11. Sub-Licenses

Sub-licenses granted by Softco shall include reasonable restrictions in conformity with this Agreement to protect the proprietary nature of the licensed software.

12. Warranties

Except as otherwise expressly provided herein and in the attached schedules, LICENSOR disclaims all warranties with regard to the Software licensed hereunder including all implied warranties of merchantability and fitness and all obligations or liabilities on the part of LICENSOR for damages in excess of license fees paid, including but not limited to consequential damages arising out of or in connection with the use or performance of the system.

LICENSOR warrants that it is the sole owner of the Software and is able to enter this Agreement.

13. Assignment

This Agreement is not assignable by either party without the prior written consent of the other party. This clause shall not be construed to prohibit Softco from executing usage agreements with its customers or from granting sub-licenses or otherwise distributing the software directly or indirectly within the Scope of the license granted by this Agreement.

14. General

Captions in this Agreement are for convenience only and are not intended to have any legal effect.

This Agreement can only be modified by a written agreement duly signed by persons authorized to sign agreements on behalf of LICENSOR and Softco.

If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, except as stated below, shall be settled by arbitration in the City of White Plains, New York in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

No action, regardless of form arising out of this Agreement may be brought by either party more than two years after the cause of action has arisen, or, in the case of non-payment, more than two years from the date of the last payment.

This Agreement shall be governed by the laws of the State of Connecticut.

The parties agree that this is the complete and exclusive statement of the agreement between the parties, which supersedes all proposals or prior agreements, oral or written, and all other communications between the parties relating to the subject matter of this Agreement.

Softco, Inc.		LICENSOR:	
BY	_____	BY	_____
TITLE	_____	TITLE	_____
DATE	_____	DATE	_____

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SCHEDULE A
SOFTWARE DESCRIPTION

[on separate sheet]

SCHEDULE B
DEVELOPMENT WORK/SCHEDULE

[on separate sheet]

SCHEDULE C
OPERATING AND MAINTENANCE OBLIGATION

[on separate sheet]

SCHEDULE D
ROYALTIES AND MINIMUM PAYMENTS

[on separate sheet]

SCHEDULE E
EXISTING RIGHTS

[on separate sheet]

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Note: This Appendix contains interrelated form license agreements used by Western Electric to license distributors of UNIX* Time-Sharing System, Seventh Edition. Although lengthy, the interrelated agreements are useful to show not only how several agreements may be meshed for use with a distributor but also handling single/multiple CPU and foreign distributors.

The interrelated forms were in use as of December 1, 1981. Included are:

- o software agreement used generally for UNIX Systems and other software packages (starts on page M-2). Alternate pages are also included as follows:
  - (a) Page 3, Alt. (a) - used when there are multiple initially CPUs. [at M-4]
  - (b) Page 3, Alt. (b) - used with foreign licensee. [at M-6]
  - (c) Page 3, Alt. (c) - used with foreign licensee when there are multiple initially designated CPUs. [at M-7]
  - (d) Page 7, Alt. - used with licensee domiciled in United Kingdom. [at M-12]
- o supplemental agreement, UNIX Seventh Edition only (starts on page M-14), including form customer agreement (page M-25) and form distributor agreement (page M-26).

---

* UNIX is a trademark of Bell Laboratories.

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SOFTWARE AGREEMENT

Effective as of
WESTERN ELECTRIC COMPANY, INCORPORATED, a New York corporation ("WESTERN"), having an office at 222 Broadway, New York, New York 10038, and

("LICENSEE"), having an office at

agree as follows:

ARTICLE I

DEFINITIONS

1.01 Terms in this agreement (other than names of parties and Article headings) which are in capital letters shall have the meanings specified in the Definitions Appendix.

ARTICLE II

GRANTS OF RIGHTS TO USE LICENSED SOFTWARE

2.01 WESTERN, at the request of LICENSEE, grants to LICENSEE, for itself and its SUBSIDIARIES, a personal, nontransferable and nonexclusive right to use the LICENSED SOFTWARE, solely for its own or its SUBSIDIARIES' internal business purposes and solely on DESIGNATED CPUs.

No right is granted for the use of the LICENSED SOFTWARE on or in connection with the operation of any CPU other than a DESIGNATED CPU; provided, however, that the right to use the LICENSED SOFTWARE granted hereunder shall extend to the temporary use of the LICENSED SOFTWARE on a single back-up or substitute CPU during any time when a DESIGNATED CPU is inoperative due to malfunction or the performance of hardware repair, maintenance or other hardware modifications.

LICENSEE may at any time notify WESTERN in writing of its designation by location, type and serial number of replacing or additional CPUs upon which the LICENSED SOFTWARE is to be used and CPUs to be replaced. Such notice shall be effective as an amendment to this agreement adding such replacing or additional CPUs and deleting such replaced CPUs as DESIGNATED CPUs upon agreement thereto in writing by WESTERN and, in the case of additional CPUs, receipt by WESTERN of the payment specified in Section 3.02.

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No right is granted for the use of the LICENSED SOFTWARE directly for any third person, or for any use by any third person of the LICENSED SOFTWARE.

2.02 Subject to receipt by WESTERN of the payment specified in Section 3.01, within a reasonable time after such receipt, WESTERN shall furnish to LICENSEE the LICENSED SOFTWARE in the form identified in the Schedule attached hereto and made a part hereof.

2.03 (a) LICENSEE hereby assures WESTERN that it and its SUBSIDIARIES do not intend to and will not knowingly, without the prior written consent of the Office of Export Administration of the U.S. Department of Commerce, Washington, D.C. 20230, transmit directly or indirectly:

(i) the LICENSED SOFTWARE; or

(ii) any immediate product (including processes and services) produced directly by the use of the LICENSED SOFTWARE; or

(iii) any commodity produced by such immediate product if the immediate product of the LICENSED SOFTWARE is a plant capable of producing a commodity or is a major component of such plant;

to Afghanistan or to any Group P, Q, W, Y or Z country specified in Supplement No. 1 to Section 370 of the Export Administration Regulations issued by the U.S. Department of Commerce. LICENSEE agrees to promptly inform WESTERN in writing of any such written consent issued by the Office of Export Administration.

(b) LICENSEE agrees that neither it nor its SUBSIDIARIES will, without the prior written consent of WESTERN, transmit, directly or indirectly, the LICENSED SOFTWARE to any country outside of

(c) LICENSEE agrees that its and its SUBSIDIARIES' obligations under this Section 2.03 shall survive and continue after any termination of rights under this agreement.

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(Multiple CPUs)
Software-Corp.-020173-090180-3, Alt.(a)

ARTICLE III

FEES AND REPORTS

3.01 LICENSEE shall, within sixty (60) days after execution hereof by both parties, pay to WESTERN, for the rights granted hereunder, the sum of U.S. dollars ($), representing U.S. dollars ($) for a first DESIGNATED CPU and U.S. dollars ($) each for ( ) additional DESIGNATED CPU(s).

3.02 Upon each written agreement by WESTERN under Section 2.01 to LICENSEE'S designation of one or more additional DESIGNATED CPUs upon which the LICENSED SOFTWARE is to be used, LICENSEE shall pay to WESTERN the sum of U.S. dollars ($) for each such additional DESIGNATED CPU.

3.03 Payments to WESTERN shall be made in United States dollars to WESTERN'S Treasury Organization at 222 Broadway, New York, New York 10038, or at such changed address as WESTERN shall have specified by written notice.

3.04 On WESTERN'S request, but not more frequently than annually, LICENSEE shall furnish to WESTERN a statement, certified by an authorized representative of LICENSEE, that the use of the LICENSED SOFTWARE by LICENSEE and its SUBSIDIARIES has been reviewed and that the LICENSED SOFTWARE is being used solely on DESIGNATED CPUs (or temporarily on a back-up or substitute CPU in place of any inoperative DESIGNATED CPU) pursuant to the provisions of this agreement.

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ARTICLE III

FEES AND REPORTS

3.01 LICENSEE shall, within sixty (60) days after execution hereof by both parties, pay to WESTERN, for the rights granted hereunder, the sum of U.S. dollars ($) for a first DESIGNATED CPU.

3.02 Upon each written agreement by WESTERN under Section 2.01 to LICENSEE'S designation of one or more additional DESIGNATED CPUs upon which the LICENSED SOFTWARE is to be used, LICENSEE shall pay to WESTERN the sum of U.S. dollars ($) for each such additional DESIGNATED CPU.

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3.04 On WESTERN'S request, but not more frequently than annually, LICENSEE shall furnish to WESTERN a statement, certified by an authorized representative of LICENSEE, that the use of the LICENSED SOFTWARE by LICENSEE and its SUBSIDIARIES has been reviewed and that the LICENSED SOFTWARE is being used solely on DESIGNATED CPUs (or temporarily on a back-up or substitute CPU in place of any inoperative DESIGNATED CPU) pursuant to the provisions of this agreement.

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ARTICLE III

FEES AND REPORTS

3.01 LICENSEE shall, within sixty (60) days after execution hereof by both parties, pay to WESTERN, for the rights granted hereunder, the sum of U.S. dollars ($) for a first DESIGNATED CPU.

3.02 Upon each written agreement by WESTERN under Section 2.01 to LICENSEE'S designation of one or more additional DESIGNATED CPUs upon which the LICENSED SOFTWARE is to be used, LICENSEE shall pay to WESTERN the sum of U.S. dollars ($) for each such additional DESIGNATED CPU.

3.03 Payments to WESTERN shall be made in United States dollars to WESTERN'S Treasury Organization at 222 Broadway, New York, New York 10038, United States of America, or at such changed address as WESTERN shall have specified by written notice.

3.04 On WESTERN'S request, but not more frequently than annually, LICENSEE shall furnish to WESTERN a statement, certified by an authorized representative of LICENSEE, that the use of the LICENSED SOFTWARE by LICENSEE and its SUBSIDIARIES has been reviewed and that the LICENSED SOFTWARE is being used solely on DESIGNATED CPUs (or temporarily on a back-up or substitute CPU in place of any inoperative DESIGNATED CPU) pursuant to the provisions of this agreement.

3.05 LICENSEE shall bear all taxes, however designated, imposed as a result of the existence or operation of this agreement, including, but not limited to, any tax upon, with respect to or measured by, any payment or receipt of payment hereunder, any registration tax, any tax imposed with respect to the granting or transfer of rights or considerations hereunder, and any tax which LICENSEE is required to withhold or deduct from payments to WESTERN, except (i) any such tax imposed upon WESTERN by any governmental entity in the United States, and (ii) any such tax imposed upon WESTERN in the country in which the aforesaid office of LICENSEE is located if such tax is allowable as a credit against United States income taxes of WESTERN. To assist WESTERN in obtaining such credit, LICENSEE shall furnish WESTERN with such evidence as may be required by United States taxing authorities to establish that any such tax has been paid.

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ARTICLE III

FEES AND REPORTS

3.01 LICENSEE shall, within sixty (60) days after execution hereof by both parties, pay to WESTERN, for the rights granted hereunder, the sum of U.S. dollars ($), representing U.S. dollars ($) for a first DESIGNATED CPU and U.S. dollars ($) each for ( ) additional DESIGNATED CPU(s).

3.02 Upon each written agreement by WESTERN under Section 2.01 to LICENSEE'S designation of one or more additional DESIGNATED CPUs upon which the LICENSED SOFTWARE is to be used, LICENSEE shall pay to WESTERN the sum of U.S. dollars ($) for each such additional DESIGNATED CPU.

3.03 Payments to WESTERN shall be made in United States dollars to WESTERN'S Treasury Organization at 222 Broadway, New York, New York 10038, United States of America, or at such changed address as WESTERN shall have specified by written notice.

3.04 On WESTERN'S request, but not more frequently than annually, LICENSEE shall furnish to WESTERN a statement, certified by an authorized representative of LICENSEE, that the use of the LICENSED SOFTWARE by LICENSEE and its SUBSIDIARIES has been reviewed and that the LICENSED SOFTWARE is being used solely on DESIGNATED CPUs (or temporarily on a back-up or substitute CPU in place of any inoperative DESIGNATED CPU) pursuant to the provisions of this agreement.

3.05 LICENSEE shall bear all taxes, however designated, imposed as a result of the existence or operation of this agreement, including, but not limited to, any tax upon, with respect to or measured by, any payment or receipt of payment hereunder, any registration tax, any tax imposed with respect to the granting or transfer of rights or considerations hereunder, and any tax which LICENSEE is required to withhold or deduct from payments to WESTERN, except (i) any such tax imposed upon WESTERN by any governmental entity in the United States, and (ii) any such tax imposed upon WESTERN in the country in which the aforesaid office of LICENSEE is located if such tax is allowable as a credit against United States income taxes of WESTERN. To assist WESTERN in obtaining such credit, LICENSEE shall furnish WESTERN with such evidence as may be required by United States taxing authorities to establish that any such tax has been paid.

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ARTICLE IV

TERMINATION

4.01 If LICENSEE or any of its SUBSIDIARIES shall fail to fulfill one or more of its obligations under this agreement, WESTERN may, upon its election and in addition to any other remedies that it may have, at any time terminate all the rights granted by it hereunder by not less than two (2) months' written notice to LICENSEE specifying any such breach, unless within the period of such notice all breaches specified therein shall have been remedied; upon such termination WESTERN shall not have any obligation to refund any monies paid it pursuant to Sections 3.01 and 3.02 and LICENSEE shall within thirty (30) days deliver to WESTERN all documentation containing the LICENSED SOFTWARE, and shall render unusable all LICENSED SOFTWARE placed in any storage apparatus.

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ARTICLE V

MISCELLANEOUS PROVISIONS

5.01 Nothing contained herein shall be construed as conferring by implication, estoppel or otherwise any license or right under any patent or trademark, whether or not the exercise of any right herein granted necessarily employs an invention of any existing or later issued patent.

5.02 This agreement shall prevail notwithstanding any conflicting terms or legends which may appear in the LICENSED SOFTWARE.

5.03 WESTERN and its ASSOCIATED COMPANIES make no representations or warranties, expressly or impliedly. By way of example but not of limitation, WESTERN and its ASSOCIATED COMPANIES make no representations or warranties of merchantability or fitness for any particular purpose, or that the use of the LICENSED SOFTWARE will not infringe any patent, copyright or trademark. WESTERN and its ASSOCIATED COMPANIES shall not be held to any liability with respect to any claim by LICENSEE, its SUBSIDIARIES, or a third party on account of, or arising from, the use of such LICENSED SOFTWARE.

5.04 LICENSEE agrees that neither LICENSEE nor its SUBSIDIARIES will, without WESTERN'S express written permission, (i) use in advertising, publicity, or otherwise any trade name, trademark, trade device, service mark, symbol or any other identification or any abbreviation, contraction or simulation thereof owned or used by WESTERN or any of its ASSOCIATED COMPANIES, or (ii) represent, directly or indirectly, that any product or service of LICENSEE or its SUBSIDIARIES is a product or service of WESTERN or any of its ASSOCIATED COMPANIES, or is made in accordance with or utilizes any information or documentation of WESTERN or any of its ASSOCIATED COMPANIES.

5.05 Neither the execution of this agreement nor anything in it or in the LICENSED SOFTWARE shall be construed as (i) an obligation upon WESTERN or any of its ASSOCIATED COMPANIES to furnish any person, including LICENSEE and its SUBSIDIARIES, any assistance of any kind whatsoever, or any information or documentation other than the LICENSED SOFTWARE; or (ii) providing or implying any arrangement or understanding that WESTERN or any of its ASSOCIATED COMPANIES will make any purchase or lease.

5.06 LICENSEE agrees that it and its SUBSIDIARIES shall hold the LICENSED SOFTWARE in confidence for WESTERN and its ASSOCIATED COMPANIES. LICENSEE further agrees that it and its SUBSIDIARIES shall not make any disclosure of the LICENSED SOFTWARE (including methods or concepts utilized therein) to anyone, except to employees of LICENSEE and its SUBSIDIARIES to whom such disclosure is necessary to the use for which rights are granted hereunder. LICENSEE and its SUBSIDIARIES shall appropriately notify each employee to whom any such disclosure is made that such disclosure is made in confidence and shall be kept in confidence by him.

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5.07 The obligations of LICENSEE, its SUBSIDIARIES and their respective employees under Section 5.06 shall survive and continue after any termination of rights under this agreement or cessation of a SUBSIDIARY'S status as a SUBSIDIARY; however, such obligations shall not extend to any information relating to the LICENSED SOFTWARE which is now available to the general public or which later becomes available to the general public by acts not attributable to LICENSEE, its SUBSIDIARIES or their respective employees.

5.08 LICENSEE agrees that it and its SUBSIDIARIES will not use the LICENSED SOFTWARE except as authorized herein, that it and its SUBSIDIARIES will not make or have made, or permit to be made, any copies of the LICENSED SOFTWARE, except those copies which are necessary to the use, by LICENSEE and its SUBSIDIARIES, for which rights are granted hereunder, that each such necessary copy shall contain the same proprietary notices or legends which appear on the LICENSED SOFTWARE, and that no rights are granted under this agreement expressly or impliedly with respect to any copyrights except as provided for in this Section 5.08.

5.09 Neither this agreement nor any rights hereunder, in whole or in part, shall be assignable or otherwise transferable.

5.10 Nothing in this agreement grants to LICENSEE or to its SUBSIDIARIES the right to sell, lease or otherwise transfer or dispose of the LICENSED SOFTWARE in whole or in part.

5.11 Any notice or request hereunder shall be deemed to be sufficiently given to the addressee and any delivery hereunder deemed made when sent by registered mail addressed to LICENSEE at its office above specified or addressed to WESTERN at P.O. Box 25000, Greensboro, North Carolina 27420 (to the attention of its Patent Licensing Organization), or at such changed address as the addressee shall have specified by written notice.

5.12 This agreement sets forth the entire agreement and understanding between the parties as to the subject matter hereof and merges all prior discussions between them, and neither of the parties shall be bound by any conditions, definitions, warranties, understandings or representations with respect to such subject matter other than as expressly provided herein, or in any prior existing written agreement between the parties, or as duly set forth on or subsequent to the effective date hereof in writing and signed by a proper and duly authorized representative of the party to be bound thereby.

5.13 If LICENSEE is not a corporation, all references to LICENSEE'S SUBSIDIARIES shall be deemed deleted.

5.14 The construction and performance of this agreement shall be governed by the law of the State of New York.

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IN WITNESS WHEREOF, each of the parties has caused this agreement to be executed in duplicate originals by its duly authorized representatives on the respective dates entered below.

WESTERN ELECTRIC COMPANY, INCORPORATED

By.....

Date .....

Attest:

[SEAL]

.....
Secretary

.....

By.....

Title.....

Date .....

Attest:

[SEAL]

.....
Secretary

SPECIMEN COPY

IN WITNESS WHEREOF, each of the parties has caused this agreement to be executed in duplicate originals by its duly authorized representatives on the respective dates entered below.

WESTERN ELECTRIC COMPANY, INCORPORATED

By .....

Attest:

[SEAL]

.....
Secretary

.....
Date

The Common Seal of

was hereunto affixed
in the presence of:

.....
Directors

[SEAL]

.....

.....Secretary

.....Date

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DEFINITIONS APPENDIX

ASSOCIATED COMPANIES of WESTERN means SUBSIDIARIES of WESTERN, companies presently having WESTERN as a SUBSIDIARY and SUBSIDIARIES of such companies other than WESTERN and its SUBSIDIARIES. The term also means and includes Cincinnati Bell Inc., an Ohio corporation, and The Southern New England Telephone Company, a Connecticut corporation, and their SUBSIDIARIES.

CPU means central processing unit.

COMPUTER PROGRAM means any instruction or plurality of instructions for controlling the operation of a CPU.

DESIGNATED CPU means a CPU designated below by location, type and serial number, as well as any CPU designated pursuant to Section 2.01:

SUBSIDIARY means a company the majority of whose stock entitled to vote for election of directors is now or hereafter controlled by the parent company either directly or indirectly, but any such company shall be deemed to be a SUBSIDIARY only so long as such control exists.

LICENSED SOFTWARE means the COMPUTER PROGRAMS and the documentation, or any portions thereof, generally identified below and specifically listed in the attached Schedule:

SPECIMEN COPY

SUPPLEMENTAL AGREEMENT

(CUSTOMER SOFTWARE, SPECIFIED NUMBER OF USERS)

between

WESTERN ELECTRIC COMPANY, INCORPORATED

and

Effective as of

SPECIMEN COPY

SUPPLEMENTAL AGREEMENT

(CUSTOMER SOFTWARE, SPECIFIED NUMBER OF USERS)

Effective as of ,
WESTERN ELECTRIC COMPANY, INCORPORATED, a New York corporation ("WESTERN"), having an office at 222 Broadway, New York, New York 10038, and

("LICENSEE"), having an office at

agree as follows:

ARTICLE I

MAIN AGREEMENT

1.01 This agreement is supplemental to, and modifies as of the effective date hereof, a software agreement ("the Main Agreement") between the parties hereto, effective as of relating to

ARTICLE II

DEFINITIONS

2.01 Terms in this Supplemental Agreement (other than names of parties and Article headings) which are in capital letters shall have the meanings specified in the Main Agreement or in the Definitions Appendix of this Supplemental Agreement.

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* UNIX is a trademark of Bell Laboratories.

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ARTICLE III

GRANT OF RIGHT TO ENTER INTO CUSTOMER CPU AGREEMENTS AND DISTRIBUTOR AGREEMENTS AND TO USE CUSTOMER SOFTWARE

3.01 Notwithstanding any provisions to the contrary in the Main Agreement, WESTERN, at the request of LICENSEE, grants to LICENSEE, for itself and its SUBSIDIARIES, personal, nontransferable and nonexclusive rights: (i) to grant solely to customers thereof solely by CUSTOMER CPU AGREEMENTS personal, nontransferable and nonexclusive rights to use CUSTOMER SOFTWARE solely on CUSTOMER CPUs, and to furnish, either directly or pursuant to Section 3.01(iv) through distributors, CUSTOMER SOFTWARE to such customers pursuant to such CUSTOMER CPU AGREEMENTS after the effective date thereof; (ii) to use CUSTOMER SOFTWARE on CORPORATE CPUs solely for its own or its SUBSIDIARIES' internal business purposes; (iii) to use CUSTOMER SOFTWARE solely for testing purposes on CPUs that are to become CUSTOMER CPUs; and (iv) pursuant to DISTRIBUTOR AGREEMENTS to furnish CUSTOMER SOFTWARE MASTERS to its or its SUBSIDIARIES' distributors and to grant to such distributors personal, nontransferable and nonexclusive rights to make copies of CUSTOMER SOFTWARE MASTERS configured for use on CUSTOMER CPUs, to use such copies solely for testing such CUSTOMER CPUs, and to furnish such copies as CUSTOMER SOFTWARE to LICENSEE'S or its SUBSIDIARIES' customers after CUSTOMER CPU AGREEMENTS have been executed by LICENSEE or any of its SUBSIDIARIES and such customers.

3.02 (a) LICENSEE hereby assures WESTERN (or confirms any prior assurance to WESTERN) that it and its SUBSIDIARIES do not intend to and will not knowingly, without the prior written consent of the Office of Export Administration of the U.S. Department of Commerce, Washington, D.C. 20230, transmit directly or indirectly:

(i) the LICENSED SOFTWARE; or

(ii) any immediate product (including processes and services) produced directly by the use of the LICENSED SOFTWARE; or

(iii) any commodity produced by such immediate product if the immediate product of the LICENSED SOFTWARE is a plant capable of producing a commodity or is a major component of such plant;

to Afghanistan or to any Group P, Q, W, Y or Z country specified in Supplement No. 1 to Section 370 of the Export Administration Regulations issued by the U.S. Department of Commerce. LICENSEE agrees to promptly inform WESTERN in writing of any such written consent issued by the Office of Export Administration.

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DEFINITIONS APPENDIX

CORPORATE CPU means any CPU on which the CUSTOMER SOFTWARE is used by LICENSEE or any of its SUBSIDIARIES and which is inherently restricted by hardware constraints to service no more than a specified number of USERS.

CUSTOMER CPU means any CPU designated in or pursuant to any CUSTOMER CPU AGREEMENT and inherently restricted by hardware constraints to service no more than a specified number of USERS.

CUSTOMER CPU AGREEMENT means an agreement between LICENSEE or any of its SUBSIDIARIES and a customer thereof relating to the use of CUSTOMER SOFTWARE on a CUSTOMER CPU, for which agreement WESTERN has given its written approval to LICENSEE prior to execution thereof.

CUSTOMER SOFTWARE means any COMPUTER PROGRAM in machine language (object code) directly executable by a CPU and capable of supporting no more than the specified number of USERS for such CPU, which COMPUTER PROGRAM is part of or derived from the portion of the LICENSED SOFTWARE comprising the UNIX* Time-Sharing System, Seventh Edition. The term also means any table, constant, macroinstruction or other information that is used or interpreted by any such COMPUTER PROGRAM, and the source-code files listed in the attached schedule.

CUSTOMER SOFTWARE MASTER means a form of CUSTOMER SOFTWARE from which can be generated copies of CUSTOMER SOFTWARE configured for specific CUSTOMER CPUs.

DISTRIBUTOR AGREEMENT means an agreement between LICENSEE or any of its SUBSIDIARIES and a distributor therefor relating to the distribution and use of CUSTOMER SOFTWARE to LICENSEE'S or its SUBSIDIARIES' customers, for which agreement WESTERN has given its written approval to LICENSEE prior to execution thereof.

USER means (i) a terminal for entry, display and/or printing of information or (ii) a data link to a subordinate CPU, such terminals or data links being serviced on a time-sharing basis by a CUSTOMER CPU or CORPORATE CPU under control of the CUSTOMER SOFTWARE.

* UNIX is a trademark of Bell Laboratories.

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IN WITNESS WHEREOF, each of the parties has caused this Supplemental Agreement to be executed in duplicate originals by its duly authorized representatives on the respective dates entered below.

WESTERN ELECTRIC COMPANY, INCORPORATED

By .....
Director of Patent Licensing

Date .....

Attest:

[SEAL]

.....
Secretary

.....

By .....

Title .....

Date .....

Attest:

[SEAL]

.....
Secretary

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COUNTRY APPENDIX

Abu Dhabi
Algeria
Argentina
Australia
Austria
Bahrain
Bahamas
Belgium
Bolivia
Botswana
Brazil
Canada
Chile
Colombia
Costa Rica
Cyprus
Denmark
Dominican Republic
East Africa
Ecuador
Egypt
El Salvador
Federal Republic of Germany
Finland
France
French Guiana
Guatemala
Greece
Guyana
Hong Kong
Honduras
Iceland
India
Indonesia
Iraq
Ireland (Eire)
Israel
Italy
Ivory Coast
Japan
Jordan
Kuwait
Lebanon
Luxembourg
Malaysia
Mexico
Morocco
Nicaragua
Netherlands
New Zealand
Nigeria
Norway
Oman
Pakistan
Panama
Paraguay
Peru
Philippines
Portugal
Republic of China (Taiwan)
Republic of Korea
Saudi Arabia
Singapore
Spain
Sri Lanka
Sudan
Surinam
Sweden
Switzerland
Syria
Trinidad
Thailand
Tunisia
Turkey
United Kingdom
United States
Uruguay
Venezuela
Yemen
Yugoslavia
Zambia



Any comments or suggestions you may have on correcting, improving or extending this book will be appreciated.

Return this form to:

Paul S. Hoffman, Esq. (914) 271-5191
P.O. Box 40
Croton-on-Hudson, N.Y. 10520

Comments or suggestions:

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.....

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From_____

Address:

CARNEGIE PRESS INC.