LETTER TO THE EDITOR

Editor, Jurimetrics:

Duncan Davidson's article[1] was a much-needed survey of the current state of legal protection for software. For the most part, I agree wholeheartedly with Mr. Davidson's analysis. I was especially pleased to read that, unlike some commentators, Mr. Davidson agrees that the plain language and intent of the 1980 Software Copyright Act and the accompanying CONTU Report protects software regardless of the medium in which it is stored. I sincerely hope that Mr. Davidson has settled the issue; far too much effort has been wasted on attempts to prove that programs stored in ROMS are not protected from pirates.

Despite my overall approval, however, I must take issue with several points made by Mr. Davidson:

1. On page 341, Mr. Davidson states that "The written code (source or object) is prepared in machine-readable 'binary' form, the form the computer uses." Unless he is speaking of the result of the compilation or assembly process, Mr. Davidson is mistaken; code is "prepared in" nonbinary programming languages.

2. In discussing the argument that the "binary form" of a program is unintelligible to human beings, Mr. Davidson distinguishes binary code from music and film. According to Mr. Davidson, film, music, and "all forms of artistic expression . . . have in common a fundamental purpose to communicate to human beings." *Id.*, at p. 365. This distinction is unconvincing, however, since even the binary form of a non-interactive program—an operating system program, for instance—interacts with the computer's hardware to make the computer communicate with human beings. Although indirectly, even the binary form of a program communicates. Moreover, even music recorded on a cassette tape or a book stored on

[1]Davidson, *Protecting Computer Software: A Comprehensive Analysis*, 23 JURIMETRICS 337 (1983).

microfilm needs a machine to make it intelligible, and no one would suggest that these types of works are not protected.

3. On page 367, in his discussion of the idea/expression dichotomy in copyright law, Mr. Davidson states the following:

> The expression of a book does not consist of the precise language in the book, but consists of the specific interrelation of plot, character, theme, and other elements of the story. Similarly, the expression in software does not consist of the exact written source code, but the specific logic and design of the program.

This is not quite accurate; it tells only half the tale. According to Professor Nimmer, there are two types of copyright infringement, each of which involves the theft of a different aspect of what is protected by copyright. First there is infringement based on "comprehensive nonliteral similarity," i.e., infringement of what Mr. Davidson asserts is protected by copyright, the "specific logic and design of the work." But there is also what Nimmer terms "fragmented literal similarity"—the taking of even small verbatim excerpts from a work—which is also prohibited by the copyright laws. 3 M. Nimmer, *Nimmer on Copyright*, § 13.03[A][1]; *see College Entrance Book Co. v. Amsco Book Co.*, 119 F. 2d 874 (2d Cir. 1941) (defendant's taking of only 15 percent of plaintiff's work constitutes infringement, despite dissimilarities between plaintiff's and defendant's works); *Robertson v. Batten, Barton, Durstine, & Osborn, Inc.*, 146 F. Supp. 795 (S.D. Cal. 1956) (copying only two bars from plaintiff's songs, despite dissimilarities between songs, constitutes infringement); *see also Higgins v. Baker*, 309 F. Supp. 635, 637 (S.D.N.Y. 1970) (denying defendant's motion for summary judgment, since although "only .8 percent of [plaintiff's] works were copied, this does not conclusively establish the insubstantiality of the copying").

Notwithstanding these minor and perhaps insignificant quibbles, let me reiterate my appreciation for Mr. Davidson's article. It was a much-needed and comprehensive dose of common sense.

ROBERT P. MERGES
Law and Technology Association
Yale Law School
401-A Yale Station
New Haven, CT 06520