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[63] This can be seen merely by looking at the section entitled "Why Current Copyright Protection for Computer Programs is Problematic," where the current state of copyright infringement is described—the inconsistencies between circuits in the application of the "substantially similar" test for indirect infringement.

[64] Not only the United States, but the entire world.

[65] Such a suggestion seems most reasonably to promote consistent application of the laws, especially in today's Internet based society, where computer programs can be sent to all fifty states with the simple click of a mouse.

[66] That is, the regional circuit courts have *no* jurisdiction.

[67] *I.e.*, on a civil action arising under any Act of Congress relating to patents, plant variety protection, copyright and trademark laws. 28 U.S.C. § 1338 states:

> Patents, plant variety protection, copyrights, mask works, designs, trademarks, and unfair competition
>
> (a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.
>
> (b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.
>
> (c) Subsections (a) and (b) apply to exclusive rights in mask works under chapter 9 of title 17, and to exclusive rights in designs under chapter 13 of title 17, to the same extent as such subsections apply to copyrights.

[68] Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 809 (1988).

[69] *See* Aerojet-General v. Machine Tool Works, Oerlikon-Buehrle, Ltd., 895 F.2d 736 (Fed. Cir. 1990) (*en banc*). For a more complete explanation, see ROBERT L. HARMON, PATENTS AND THE FEDERAL CIRCUIT, 785-88 (4th ed. 1998).

[70] I do concede that the number of cases presented to the Federal Circuit would likely increase, but the substance of these cases would largely remain the same.

[71] The application of the doctrine of equivalents will be explained in detail in the following section.

[72] That is, the issue of determining infringement of a computer program under the doctrine of equivalents.

[73] While the doctrine of equivalents is a judicially created test for non-literal patent infringement, I believe it can provide the added protection computer programs call for.

[74] *See* HARMON, *supra* note 69, at 17. The doctrine of equivalents is described in detail in *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605 (1950).

[75] "Infringe" is defined in 35 U.S.C. § 271(a): "whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent."

[76] HARMON, *supra* note 69, at 16.

[77] *Id.* at 17.

[78] *Id.*

[79] Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605.

[80] It is, of course, non-literal infringement, but infringement nonetheless.

[81] Penwalt Corp. v. Durand-Wayland, Inc., 833 F.2d 931 (Fed. Cir. 1987).

[82] HARMON, *supra* note 69, at 276-77. *See also* Hilton Davis Chem. Co. v. Warner-Jenkinson Co., 62 F.3d 1512 (Fed. Cir. 1994) (*en banc*), *rev'd.* 520 U.S. 17 (1997). The Federal Circuit's decision in *Hilton Davis* was reversed by the Supreme Court; however, the Court left specific language of the tests—whether function-way-result or insubstantial differences—up to the Federal Circuit.

[83] Such a change did not really alter things much, as the substantiality of the differences between the two devices could be determined by application of the function-way-result test.

[84] Dolly, Inc. v. Spalding & Evenflo Co., 16 F.3d 394 (Fed. Cir. 1994). *See also* Upjohn Co. v. MOVA Pharm. Corp., 225 F.3d 1306 (Fed. Cir. 2000).

[85] Insituform Tech., Inc. v. Cat Contr., Inc., 156 F.3d 1199 (Fed. Cir. 1998).

[86] As identified by Professor Nimmer.

[87] Pamela Samuelson et. al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2315 (1994).

[88] In fact, sometimes advances can be made so quickly, that once a person goes through the long patent application process, the program could be obsolete; however, then competitors who did not know the product was being patented would have to pay incredible damages, as they are likely to use any technology that is available. One would think that after a single judgment for millions of dollars, a company would be much less eager to jump into the market for fear that it would unknowingly use a program already patented by somebody else.

[89] Samuelson et al., *supra* note 87, at 2314. Samuelson specifically explains that the law should only intervene when necessary to avoid market failure. *Id.*

[90] Of course, I risk incurring the wrath of the Federal Circuit by seeming as though I wish to increase its case load; however, I will illustrate why the court should not be too concerned.

[91] I thought the doctrine of equivalents would be the best test for computer program copyright infringement first, and then the concept of giving the Federal Circuit jurisdiction seemed to make the transition even smoother. So, if you will, part three came before part two.