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Sue Mota

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COMPUTER ASSOCIATES v. ALTAI - FRENCH COMPUTER SOFTWARE COPYRIGHT ACTION NOT BARRED BY U.S. DECISION

by Sue Mota [*]

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INTRODUCTION

{1} In 1988, Computer Associates International, Incorporated (Computer Associates) commenced action claiming copyright infringement and trade secret misappropriation against Altai, Incorporated (Altai). [1] Computer Associates alleged that Altai directly copied portions of Computer Associates ADAPTER computer program into Altai's OSCAR 3.4 computer program, albeit unknowingly according to Altai, when Altai hired a Computer Associates programmer. When Altai discovered this, Altai attempted to use no infringing material in the OSCAR 3.5 version. [2] Computer Associates also claimed that Altai's OSCAR 3.5 infringed on Computer Associates' copyrights. The Court of Appeals for the Second Circuit held that there was no copyright infringement in OSCAR 3.5, [3] and used the now well-known three-prong abstraction filtration-comparison test [4] in reaching this conclusion.

{2} Computer Associates in 1990 also filed an action in France's Commercial Court, charging Altai with infringing Computer Associates' French copyright. [5] The French Commercial Court in 1995 held that the Second Circuit's decision was not dispositive of the issue under the doctrine of *res judicata* because the U.S. and French laws on copyright are similar but not identical, but held that Altai did not infringe on Computer Associate's copyright. [6] Similarly, in September, 1997 the Second Circuit held that the issues of *res judicata* and collateral estoppel are inapplicable, [7] thus allowing the French appeal to proceed.

{3} This article will review the *Computer Associates v. Altai* litigation in the United States and France, including the subsequent wide-spread adoption of the three-prong test, and will analyze the issue of *res*

judicata in international computer software copyright litigation. Finally, this author will make recommendations and predictions concerning the issue.

COMPUTER ASSOCIATES v. ALTAI

{4} James Williams and Claude Arney, III were friends and co-workers, even before both went to work for Computer Associates. Williams was employed with Computer Associates from 1977 to 1980, when he went to work for a predecessor of Altai; in 1988 Williams became the president of Altai. Arney worked for Computer Associates as a programmer from 1978 through 1983, when Williams approached him to work for Altai. When Arney came to Altai, Arney brought copies of the source from versions of Computer Associates' ADAPTER computer program, [8] and copied approximately 30% of Altai's OSCAR 3.4 source code from ADAPTER's source code, [9] which was the beginning of the problems between Computer Associates and Altai.

{5} When Computer Associates learned in 1988 that Altai copied ADAPTER, it filed suit, claiming copyright infringement and misappropriation of trade secrets. [10] When Altai received the complaint, it learned for the first time that 30% of the OSCAR 3.4 code came from ADAPTER. [11] Arney admitted that he copied some of ADAPTER's code, and, upon advice of counsel, Altai attempted a complete revision of OSCAR which included no code from ADAPTER. [12] In 1989, the new version, OSCAR 3.5, was sent to all OSCAR 3.4 customers as a free upgrade.

{6} In the copyright infringement action, Computer Associates had to prove ownership of a valid copyright [13] in the computer software program, [14] and copying by Altai. [15] Altai does not dispute that Computer Associates owns a valid copyright in SCHEDULER, which includes ADAPTER. [16] The second element of an infringement action, copying, can either be shown by direct evidence of copying, such as with the OSCAR 3.4 program, or access and substantial similarity, [17] which had to be shown concerning OSCAR 3.5. The district court assumed that Altai did had access, but found that Altai's programmers in good faith used reasonable means to rewrite OSCAR. [18] Concerning substantial similarity, [19] the district court stated that many tests used for determining substantial similarity are inadequate for computer programs. The district court also criticized the "simplistic test" for similarity of computer programs set forth by the Third Circuit in *Whelan Associates v. Jaslow Dental Laboratory*. [20] *Whelan's* broad test stated that the purpose or function of the work would be the idea, and everything not necessary to that purpose or function would be part of the expression, and therefore protectable by copyright. [21] Professor Nimmer has criticized this test, as it assumes that there is only one idea, and that everything else is expression. [22] Nimmer suggests instead Learned Hand's "abstractions test," [23] which, as applied to computer software programs, would progress in order of increasing generality from object code, to source code, to parameter lists, [24] to services required, to general outline. [25]

{7} Applying this abstractions test, the district court concluded that OSCAR 3.5 was not substantially similar to ADAPTER and therefore did not infringe. [26] Concerning code, the court's expert found that virtually no lines of code in OSCAR 3.5 were identical to ADAPTER. The expert found, concerning parameter lists, or the information set to and received from a subroutine, that he could not make a determination based upon the evidence, thus Computer Associates failed to meet its burden of showing substantial similarity. The list of services is of little importance, and the organizational chart was simple and obvious to anyone exposed to the operation of the program. [27] Thus, Altai's "clean-up" effort in OSCAR 3.5 resulted in a program not substantially similar to the ADAPTER program, [28] and consequentially, since there was no infringement, there were no damages awarded concerning OSCAR

{8} Since Altai admitted infringement concerning OSCAR 3.4, damages had to be assessed for the five years the program was on the market. Computer Associates was entitled to actual damages and profits during this time. [29] Computer Associates' expert set a damage figure at nearly \$14 million, while Altai's expert estimated damages to be \$115,000. [30] The court disagreed with both, and found neither analysis to be helpful. One problem is that OSCAR and ADAPTER were not sold independently and many customers were unaware of their presence in the resident computer programs. There was further no evidence that Computer Associates lost a single sale as a result of OSCAR 3.4 being in Altai's programs. The court used the approach of allocating a proportion of the profit, in this case one-third, on a sale to the presence of the infringing OSCAR 3.4, thus making a just and reasonable inference as to the amount of damages. The district court in 1991 thus found profits and damages to be \$364,444, plus interest, but with no punitive damages or attorneys fees or costs allocated. [31]

{9} In January, 1990, approximately two months before the trial in the district court, Computer Associates in France, with the non-profit L'Agence pour la Protection des Programmes, a private professional society representing the interests of authors and copyright owners of computer programs, secured on an *ex parte* order from the President of the Tribunal de Grande Instance (the Tribunal) authorizing seizure of computer programs and business records from the offices of Altai's French distributor, la Societe FASTER. Five object code tapes of Altai software containing OSCAR 3.5 code and FASTER's business records were seized. This order enjoined FASTER from distributing or marketing the allegedly infringing products. In February 1990, Computer Associates and L'Agence filed an action in the Tribunal de Commerce (the Commercial Court) in Bobigny, France, alleging that Altai imported and FASTER distributed OSCAR 3.5 in violation of computer Associates' French copyright. [32] The district court in 1991 denied Computer Associates' motion to modify a confidentiality order in place, as Computer Associates wanted to use these confidential materials in the French action. [33] After the district court's decision, Altai informed the Commercial Court of the district court's ruling that OSCAR 3.5 did not infringe, and of the appeal to the Court of Appeals for the Second Circuit; the trial was postponed in France until 1992. [34]

{10} In the U.S., both parties appealed to the Second Circuit; Altai abandoned its appeal, however. In this case of first impression, the Court of Appeals for the Second Circuit affirmed on the copyright infringement claim. [35] The court performed a slightly different analysis in reaching this conclusion, however, and adopted the now well-known three-prong-test: abstraction-filtration-comparison. [36]

{11} The Second Circuit stated that the line between an unprotected idea and protectable expression is difficult to draw, [37] and the starting point is *Baker v. Selden*, [38] which held that copyright protection is not granted to processes, or aspects of a work that are incident to the idea, system, or process. The Second Circuit stated that the district court wisely declined to follow the Third Circuit's decision in *Whelan*, [39] as *Whelan* "relies too heavily on metaphysical distinctions and does not place enough emphasis on practical considerations." [40] The Second Circuit developed the three prong test, the first prong of which was used by the district court; this three-prong test does not break new ground, and other circuits were invited to modify the test. [41]

{12} The first test, abstraction, was originally used for literary works such as novels and plays, but is adaptable to computer programs. [42] The court would break down the allegedly infringed computer program into its structural parts. This differs from the district court's approach, which filtered out noncopyrightable aspects of the allegedly infringing program. In a manner resembling reverse engineering, a court should dissect the allegedly copied program's structure, beginning with the code and

ending with the program's function, and isolate each level of abstraction, or essentially retrace the steps taken during the program's creation in reverse order. [43]

{13} Second, Professor Nimmer and the Second Circuit suggest a successive filtering method to separate expression from non-protectable material, [44] such as public domain material, [45] material required by factors external to the program itself, [46] or elements dictated by efficiency. [47] Finally, after filtering, any core of protectable expression is examined to see if the defendant copied it. [48] When conducting this analysis, the Second Circuit in 1992 affirmed that there was no substantial similarity, and thus no copyright infringement. [49]

{14} In 1992, in France, Altai requested a stay of the French proceeding while Altai's request for an *exequatur*, which would allow the judgment from the district court to be introduced in the Commercial Court, was pending. The stay was granted in 1992; the *exequatur* was issued by the Tribunal in 1993. [50] In 1994, Computer Associates moved to resume the French proceedings, and trial began in the Commercial Court. [51] The Commercial Court in 1995 held that Altai's Oscar 3.5 did not violate Computer Associate's rights under French Copyright law. [52] The Court of Commerce rejected Altai's claim that the Second Circuit's decision was *res judicata*, since the parties were not identical; further, U.S. and French law on copyright protection for computer programs are similar, but not identical. The similarities between the two programs, according to the French court, were dictated by the manner in which the job flow is handled in a computer center. The source codes were different, and the architecture and organization have similarities dictated by constraining logic, and the interfaces were not subject to protection. Therefore, OSCAR 3.5 does not infringe on ADAPTER. [53] The Commercial Court awarded Altai 100,000 francs in damages from the seizure of Foster's inventory of Altai products. Computer Associates has appealed this decision to the Paris Court of Appeals. [54] The appeal is pending.

{15} In 1995, when Altai learned of Computer Associates' French appeal, Altai requested that the U.S. district court enjoin Computer Associates from pursuing the French appeal. In 1996, the district court denied this request, holding that the French action was not barred by *res judicata* or collateral estoppel, and that Altai did not satisfy the threshold requirements for foreign antisuit injunction. [55] on the merits precludes the parties or their privies from relitigating issues that were or could have been raised in that action, [56] but *res judicata* does not apply when the initial forum did not have the power to award the full measure of relief sought in the later litigation. [57] *Res judicata*, however, cannot be used to bar claims that did not exist at the time of the first claim. [58] *Res judicata*, thus, does not apply in *Altai* for several reasons, according to the district court. First, the U.S. court could have declined to exercise subject matter jurisdiction as copyright laws generally do not have extraterritorial jurisdiction, [59] and thus Computer Associates may not have been permitted to raise the French infringement in the U.S. [60] Second, the U.S. court may not have been able to exercise personal jurisdiction over FASTER and FASTER may not have been in privity with a party in the U.S. action, Altai. [61] Even without these jurisdictional barriers, however, the district court still would not have barred the French suit under *res judicata*, as *res judicata* requires the preclusion to be limited to the transaction at issue in the first transaction, and in *Altai*, the acts are different, the parties are different, and the copyright laws are different. [62] Thus, *res judicata* does not bar the second action, according to the district court.

{17} Collateral estoppel bars a party from relitigating an identical issue of fact or law that was litigated and decided in a prior proceeding, if the party had a full and fair opportunity to litigate the issue and the decision of the issue was necessary to support a valid and final judgment on the merits. [63] The district court held that since the two legal standards are not the same, the French action is also not barred by

collateral estoppel. [64]

{18} A federal court may enjoin foreign suits involving persons subject to its jurisdiction, [65] but international comity requires that this remedy be used sparingly and granted only with care and great restraint, only after other means of redressing the injury have been explored. [66] The Second Circuit has two threshold requirements for a foreign antisuit injunction: first, whether the parties to both suits are the same; and second, whether resolution of the case before the enjoining court would be dispositive of the action to be enjoined. [67] Concerning the first requirement, the French action includes parties not present in the U.S., and concerning the second requirement, the French action involves issues that could not have been raised in the U.S. Thus, the foreign antisuit injunction also fails, and the French action was not barred by the district court. [68]

{19} On appeal to the Court of Appeals for the Second Circuit, a unanimous panel affirmed the district court's denial of Altai's motion to enjoin Computer Associate's French action. [69] The court reviewed the district court's application of the principles of *res judicata* and collateral estoppel *de novo*, but accepted all factual findings that were not clearly erroneous. [70]

{20} Claim preclusion, under *res judicata*, bars the subsequent litigation of any claims arising from the transaction or series of transactions which was the subject of the prior suit. [71] Altai failed to show that the conduct that is the subject of the French action occurred prior to the U.S. action, [72] and the district court could not have exercised personal jurisdiction over FASTER. [73]

{21} The district court was also affirmed on the issue of collateral estoppel, as the issues must be identical in the two courts. Issues are not identical when the legal rules are significantly different. [74] While Altai argued that U.S. and French copyright law are not significantly different, as both protect expression and not ideas, the Second Circuit stated:

{22} Such a superficial comparison begs key questions: What constitutes expression or ideas in the context of computer software, to what extent may expression be copied with impunity when it is necessary to the communication of the idea, how much expression is not original with the plaintiff or is in the public domain? Altai's argument is far from sufficient to show that the two copyright standards in France and the United States are "identical" as required for application of collateral estoppel. [75]

{23} Therefore, the district court was also affirmed on the issue of collateral estoppel.

{24} Finally on the issue of foreign antisuit injunction, the Second Circuit did not even decide whether the threshold requirements were applicable, [76] as the requested injunction was not necessary to protect U.S. jurisdiction or the integrity of U.S. judgment, as the French action would not affect a decision rendered by a U.S. court. Therefore, in the interests of comity, this argument also failed, and the district court was affirmed. [77]

CONCLUSION

{25} The Second Circuit in 1992 used the three-prong abstraction-filtration-comparison test and concluded that Altai's OSCAR 3.5 did not infringe Computer Associate's copyright. [78] The Second Circuit stated that the contours of copyright protection for non-literal program structure are not completely clear, but as future cases were decided, the contours would become better defined. [79] This is, in fact, what has happened in the U.S., and the Second Circuit's test has been used frequently for determining substantial similarity of computer software programs. For example, in 1996 in *Mitek Holdings, Incorporated v. Arce Engineering Company, Incorporated*, the Court of Appeals for the

Eleventh Circuit, in a case of first impression on the copyright ability of nonliteral elements of a computer program, affirmed the district court's finding of no infringement. [80] The district court applied the abstraction-filtration-comparison test to determine whether two wood truss layout programs were substantially similar. [81] The district court found, and the court of appeals affirmed, that the elements of the plaintiffs' program that were allegedly copied were not protectable, thus the copyright infringement claims were dismissed. [82] The Eleventh Circuit Court of Appeals in 1995 reversed a district court's judgment in a copyright infringement action upon finding that the trial judge erred in limiting the filtration step of the three-prong test to instances of nonliteral copying only. [83] The court reversed and remanded for a new trial.

{26} The Court of Appeals for the Fifth Circuit in 1994 in *Engineering Dynamics, Incorporated v. Structural Software, Incorporated* also endorsed the three-prong test in determining substantial similarity of structural engineering software. [84] The Court of Appeals for the Tenth Circuit in 1993 in *Gates Rubber Company v. Bando Chemical Industries, Limited* also adopted and elaborated upon the abstraction-filtration-comparison test for literal elements of a computer program. [85] In *Atari Games Corporation v. Nintendo of America, Incorporated*, the Federal Circuit in 1992 also endorsed the analysis of *Computer Associates v. Altai* in finding infringement when an unauthorized copy of object code was obtained from the Copyright Office. [86]

{27} The First Circuit in *Lotus Development Corporation v. Borland International, Incorporated*, however, found the test to be of little help, as *Borland* dealt with deliberate literal copying of Lotus's menu command hierarchy instead of nonliteral copying of computer code as in *Altai*. [87] In *Apple Computer, Incorporated v. Microsoft Corporation*, the Ninth Circuit affirmed the district court, which held that there was no copyright infringement of Apple's graphical user interface. [88] The virtual identity standard, not substantial similarity, was used in *Apple* as the range of protectable expression was narrow and Apple licensed the user interface to Microsoft, but *Altai* was cited by the district court. [89] Thus, in the U.S., the three-prong test has received much recognition. [90] *Altai* does concede that the three-prong test has not yet been discussed in French decisions, other than in the context of *Computer Associates'* French claims. [91]

{28} Concerning the *res judicata* issue, both the French court [92] and the U.S. courts [93] held that the action in question was not barred by the foreign action. This author agrees with the courts' conclusions, since the laws and the parties were different in the cases. These precedents may lead to more litigation, but to hold otherwise would allow parties to litigate in a favorable forum and use this to bar litigation elsewhere.

{29} *Altai* found this multiple litigation in different forums to be "vexatious." [94] In the U.S., the lawsuit was brought by *Computer Associates* on the eve of *Altai's* planned merger with a competitor of *Computer Associates*, and the merger was canceled. [95] In France, *Faster* was *Altai's* most successful foreign distribution, accounting for approximately 47% of *Altai's* total foreign revenue; according to *Altai*, the French seizure essentially put *Faster* out of business and, at the time of *Faster's* liquidation, *Faster* owed *Altai* \$258,000. [96] While this seems unfair, for issues of international comity, the courts correctly, in this author's opinion, allowed the cases to proceed.

{30} The whole unfortunate incident for *Altai* was precipitated, albeit unknowingly, when a former *Computer Associate* employee brought more than know-how to his position at *Altai*. Software firms must be very careful to not use copyrighted material. *Computer Associates* asserts that *Altai* should have recognized that *ARNEY* might use confidential material, and *Williams* should have inquired into *Arney's* activities or confidential obligation, and should have instructed *Arney* not to use competitive

information. [97] Even though Altai only paid \$344,00 for copyright infringement of OSCAR 3.4, and nothing for infringement of OSCAR 3.5 or the trade secret claim, in both the U.S. and France, the expense of litigation has been very high for both firms.

ENDNOTES

[*] Professor, Department of Legal Studies and International Business, Bowling Green State University, J.D., University of Toledo College of Law, *cum laude*, Order of the Coif; M.A. and B.A., Bowling Green State University.

[1] *Computer Associates Int'l. v. Altai, Inc.*, 775 F.Supp. 544, 549 (E.D.N.Y. 1991) (Altai I). *See infra* notes 8-31 and accompanying text.

[2] *Id.* at 554.

[3] *Computer Associates Int'l. v. Altai, Inc.*, 982 F.2d 693, 694 (2d Cir. 1992) (Altai II). *See infra* notes 35-39 and accompanying text.

[4] *Id.* at 706-11. *See infra* notes 41-49 and accompanying text.

[5] *Computer Associates v. Altai, Inc.*, 126 F.3d 365 (2d Cir. 1997) (Altai VII). *See infra* notes 69-77 and accompanying text.

[6] *Computer Associates Int'l. v. S.A.R.L. Faster*, No. 519/95 (Tribunal de Commerce Bobigny, January 20, 1995). *See infra* notes 52-55 and accompanying text.

[7] Altai VII at 365.

[8] Altai I at 553. Computer Associates' ADAPTER program is an operating system compatibility component which connects CA-SCHEDULER, a job scheduling program for IBM mainframe computers, with three different operating systems used on IBM mainframe computers. As such, ADAPTER is not a separate product, but without ADAPTER, Computer Associates would have had to market three separate versions of CA-SCHEDULER for each of the three IBM mainframe operating systems, and using programs that can run on different operating systems can save the customer time and money. Computer Associates began work on the ADAPTER program in 1979 for use with the Computer Associate DYNAM line. Computer Associates included a copyright notice on ADAPTER, but did not register ADAPTER with the copyright office. Computer Associates began development of CA-SCHEDULER in 1981, and first installed CA-SCHEDULER for a customer in 1982. All versions of CA-SCHEDULER included a version of ADAPTER. Altai I at 552.

[9] Altai I at 552. OSCAR is Altai's operating system compatibility component, first developed in 1989 by Arney for use in Altai's ZEKE program, a main competitor with CA-SCHEDULER, and later on Altai's ZACK and ZEBB program from 1985-1988. Williams had developed ZEKE for one operating system in 1982, and discussed with Arney different approaches for making ZEKE work on other operating systems. Arney suggested a common system interface, and began work on OSCAR. Arney knew that using ADAPTER's source code in OSCAR was contrary to agreements he had signed. *Id.* at 553.

[10] Altai I at 554. When Computer Associates discovered this, it registered for the first time a copyright on CA-SCHEDULER versions 2.1 and 7.0 as derivative works. Altai did not dispute the

misappropriation of trade secrets claim, but argued that the Copyright Act preempted the trade secret claim. The district court agreed, and eliminated the trade secret issue. Altai I at 566-67.

Computer Associates originally filed the case in the United States District Court for the District of New Jersey. The parties stipulated the case's transfer to the District Court for the Eastern District for New York. There was a six day trial. Altai II at 700.

[11] Altai I at 554. Williams, of course, was aware of CA-SCHEDULER, but did not know SCHEDULER included ADAPTER. Although Williams was also aware of ADAPTER, he never saw the code. Further, no one at Altai, other than Arney, knew that the ADAPTER code was used in OSCAR.

[12] Altai I at 554. The original ADAPTER code was locked up and Altai's eight programmers were forbidden to sell to Arney during this process.

[13] 17 U.S.C. § 102(a) (1984) states:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or indirectly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

The list of works is intended to be illustrative and not limitative; the eight categories do not necessarily exhaust the scope of original works of authorship.

[14] 17 U.S.C. § 101 (1994) defines "computer program" as "a set of instructions to be used directly or indirectly in a computer to bring about a certain result." A computer program is copyrightable as a literary work if it meets the statutory requirements of the Copyright Act.

Under 17 U.S.C. § 101 (1994) "literary works" are "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied."

The term "literary work" does not connote any criterion of literary merit or qualitative value. It includes computer databases and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves. H.R. Rep. No. 94-1476, 94th Cong., 2 Sess. 54 (1976). Computer programs are a new expressive form considered copyrightable from the outset without the need for new legislation. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 51 (1976).

[15] *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.* 558 F.2d 1090, 1092 (2d Cir. 1978).

[16] Altai did argue, however, that Computer Associates could not maintain a copyright infringement action based upon ADAPTER's code. Since registration is a precondition of a copyright infringement suit under 17 U.S.C. § 411(a), Altai argued that ADAPTER was only a derivative work under 17 U.S.C. § 103(b). The district court, however, disagreed, and stated that Altai's argument would be persuasive if there was evidence that ADAPTER was placed in the public domain, or if someone other than Computer Associates owned ADAPTER; there is no evidence of this. Thus, according to the district court and its expert, Dr. Davis, there was a copyright in the ADAPTER code even though it wasn't separately registered. Altai I at 556. Nonetheless, Computer Associates obtained supplemental certificates of copyright registration from the Copyright Office while the trial was pending, without informing the court or Altai, and attempted to introduce them as evidence on the last day of trial. Even though the court had ruled that Computer Associates could maintain the copyright action based upon the original registration for SCHEDULER, the court allowed the supplemental certificates of registration to be admitted as evidence. Altai I at 557.

[17] *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986).

[18] Altai I at 558. Altai states that it took ten corrective steps when OSCAR 3.5 was rewritten: Altai sought advice of counsel; the extent of copying was determined; council's advice was again sought on how to eliminate the copied code and Arney was not involved in the rewrite in any fashion; OSCAR 3.4's code was removed from Altai's system and Altai's other employees were isolated; new parameter lists were prepared without looking at OSCAR 3.4's code; specification and assignment sheets were prepared for the rewrite, giving Altai's other programmers the descriptions of their specific jobs with the new parameters list; OSCAR 3.5 was tested (the rewrite and testing took approximately 1,000 person hours; ZEKE and ZACK were modified to delete OSCAR 3.4 and insert OSCAR 3.5; OSCAR 3.5 was shipped free to all existing customers. Altai, Inc's. Memorandum on Remand to Address Trade Secrets Liability at 28-40, 832 F.Supp. 50 (E.D.N.Y. 1993), No. 89-0811.

Computer Associates states that the operating system interface should have been rebuilt from scratch, without consulting Arney and with outside programmers. Computer Associates Int'l., Inc's. Supplemental Memorandum Regarding Trade Secret Issues, 832 F.Supp. 50 (E.D.N.Y. 1993), No. 89-0811.

The Court's expert Dr. Davis recognized the effort was done in good faith, but acknowledged it could have been cleaner. Altai's Memorandum on Remand at 42.

Mr. Wallan, the expert appointed by the Commercial Court in France, *see infra* notes 51-54 and accompanying text, also stated that Altai did not respect the rules acknowledged by professional requiring a "clean room" approach.

[19] The substantial similarity inquiry, in most cases, is the heart of a copyright infringement case, whereby the court must decide whether the similarities are more than generalized ideas, as the Copyright

Act protects only expression of ideas, and not the ideas. 17 U.S.C. § 102 (b), *Baker v. Selden*, 101 U.S. 99 (1879), *Lotus Development Corp. v. Paperback Software Int'l.*, 740 F.Supp. 37, 42 (D. Mass. 1990).

[20] 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). *See*, Lynda J. Zadra-Symes, *Computer Associates v. Altai: The Retreat from Whelan v. Jaslow*, 14 EUR. INTELL. PROP. REV. 327 (1992); Brad Wright, *Changing the Standard for Computer Software*

Copyright Infringement: Computer Associates International v. Altai, 14 GEO. MASON U. L. REV. 663 (1992).

[21] *Whelan Assoc. v. Jaslow Dental Laboratory*, 797 F.2d 1222, 1236 (3d Cir. 1986). According to *Whelan*, the structure, sequence and organization of a corporate program were protected by copyright. *Id.* at 1238-40.

[22] D. NIMMER ON COPYRIGHT 13.03 [F] (1991). The district court's expert, Dr. Davis, also criticizes *Whelan* for failing to distinguish between static and dynamic versions of a program. *Altai I* at 560.

[23] *Nichols v. Universal Pictures*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

[24] Parameter lists are collections and arrangements of the data that is exchanged between modules of a program. The court's expert Dr. Davis stated that is difficult to create parameter lists, often taking months.

[25] *Altai I* at 560.

[26] *Id.* at 561-62.

[27] *Id.* at 562. The court's expert, Dr. Davis, quantified the importance of these factors. In this case, the code was the most important, but had no similarity at all, since the code was rewritten. Concerning the parameters list and macros, *Computer Associates* failed to carry its burden, but even in the light most favorable to *Computer Associates*, only a few were similar; the rest were in the public domain or dictated by the functional demands of the program. The least important were the list of services and the organization chart.

[28] *Id.*

[29] 17 U.S.C. § 504(b) (1994) states:

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

[30] *Altai I* at 568.

[31] *Id.* at 572-73. Court costs and attorney's fees are allowed under 17 U.S.C. § 505(1994) which states:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs. The fees of the expert were split, and no injunction was granted as OSCAR 3.4 was abandoned.

[32] *Altai VII* at 2. The Commercial Court is a court of limited jurisdiction over civil disputes between parties with commercial status or for acts that are exclusively commercial in nature. *Altai VI* at 50, note 4. The members of the Commercial Court are businessmen, and under French law, court action must be initiated within five days of the seizure *See infra* note 55. The Tribunal is a court of general civil jurisdiction which may issue a seizure order when requested by parties with civil status, such as the L'Agence, but not when requested by commercial parties, such as Computer Associates. The members of the Tribunal are professional jurists. Brief for *Altai* at note 2, *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, Sept. 25, 1997 (2d Cir. 1997) (No. 96-7875). Computer Associates' computer programs were accorded copyright protection under French copyright law due to the Universal Copyright Convention and the Berne Convention. *Altai VI* at 50, note 5, *see infra* note 55.

[33] *Altai I* at 573.

[34] *Altai VII* at 366-68.

[35] *Altai II* at 697. The circuit court, however, vacated the ruling on the preemption of the trade secret claim by the Copyright Act, and remanded the case to the district court on the trade secret issue.

[36] *See generally*, A. O. Martyniuk, Note, *Abstraction-Filtration-Comparison Analysis and the Narrowing Scope of Copyright Protection for Computer Programs*, 63 U. CIN L. REV. 1333 (1995); T.M.P. Tu, *Three Step Test for Substantial Similarity, Involving Abstraction, Filtration, and Comparison, Should Be Applied in Determining Whether Computer Software Copyright Has Been Infringed -- Computer Assoc's. Int'l., Inc. v. Altai, Inc.*, 25 SETON HALL L. REV. 412 (1994); Jon S. Wilkens *Protecting Computer Programs as Compilations Under Computer Associates v. Altai*, 104 YALE L.J. 435 (1994); Morgan Chur and A. Brunel, *Post-Altai Computer Copyright and Trade Secret Decision*, 11 COMPUTER LAW I (1994); James Gambrell, G. Hamilton, and J.C. Hood, *Whelan and Altai: Protecting Software by Abusing "Idea" and "Expression,"* 11 COMPUTER LAW. 9 (1994); Stephen H. Eland, Note, *The Abstraction-Filtration Test: Determining Non-Literal Copyright Protection for Software*, 39 VILL. L. REV. 663 (1994); Chris Byrne, A.L. Clapes, and J.M. Daniels, *Some Perspectives on the "Controversy" Over the Computer Associates Test for Copyright Infringement*, 9 COMPUTER LAW 11 (1993); Note, *Copyright Infringement - Redefining the Scope of Protection Copyright Affords the Non-Literal Elements of a Computer Program*, 66 TEMP. L. REV. 273 (1993); Note, *Computer Associates v. Altai and Apple v. Microsoft: Two Steps Back from Whelan*, 9 SANTA CLARA COMPUTER AND HIGH TECH. L.J. 379 (1993); Walter A. Effross, *Assaying Computer Associates v. Altai: How Will the "Golden Nugget Test Pan Out?*, 19 RUTGERS COMPUTER & TECH. L.J. 1 (1993); Note, *Copyright Law - Scope of Protection of Non-Literal Elements of Computer Programs - Second Circuit Applies an "Abstraction-Filtration-Comparison" Test*, 106 HARV. L. REV. 510 (1992); John H. Butler, *Pragmatism in Software Copyright: Computer Associates v. Altai*, 6 HARV. J. LAW & TECH 183 (1992); David Bender, *Computer Associates v. Altai: Rationality Prevails*, 9 COMPUTER LAW 1 (1992); Anthony L. Clapes, *Revenge of the Luddites: A Closer Look at Computer Associates v. Altai*, 9 COMPUTER LAW. 11 (1992); Note, *The 1976 Copyright Act's Preemptive Effect on State Trade Secret Law: Lessons Drawn from Computer Associates v. Altai*, 12 J.L. & TECH. 113 (1992); Note, *The Scope of Copyright Protection for Non-Literal Design Elements of Computer Software: Computer Associates International Inc. v. Altai*,

Inc., 37 ST. LOUIS U.L.J. 207 (1992); Gary M. Rinck, *The Maturing US Law on Copyright Protection for Computer Programs: Computer Associates v. Altai and Other Recent Case Developments*, 14 EUR. INTELL. PROP. REV. 351 (1992).

For more on the notoriety of the three-prong test, *see infra* notes 80-90 and accompanying text.

[37] *Altai II* at 704. The Copyright Act states that copyright protection for an original work of authorship does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery. 17 U.S.C. § 102(b) (1994). The court quoted Learned Hand's decision in *Nichols v. Universal Pictures*, 45 F.2d 119, 121 (2d Cir. 1930), stating "[n]obody has ever been able to fix that boundary, and nobody ever can."

[38] 101 U.S. 99 (1879) *Selden* sought copyright protection for a work entitled "Seldon's Condensed Ledger, or Bookkeeping Simplified." This book contained bookkeeping forms designed to use in connection with the system explained in the work. The Supreme Court ruled for the defendant, holding that there can be no infringement if the only similarity is of ideas and not of expression of ideas. The original doctrine of *Baker v. Selden* is that where the use of the "art" or the idea, which a copyrighted work explains or embodies, necessarily requires a copying of the work itself, then such copying is not an infringement. If the copying occurs, however, not in using the art but rather in explaining it, then the copying is an infringement. MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT section 2.18 [B] (1985). It is apparent that 17 U.S.C. section 102(b), *see supra* note 37, codifies a substantial part of the holding and dictum of *Baker v. Selden*. MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT section 2.18 [D] (1985).

[39] 797 F.2d 1222 (3d Cir. 1986). *See supra* notes 21-22 and accompanying text.

[40] *Altai II* at 706.

[41] *Id.*

[42] *See supra* notes 24-25 and accompanying text.

[43] *Altai II* at 707.

[44] *Id.*

[45] Public domain information is free and cannot be appropriated by an author, even if it is included in a copyrighted work. *Altai II* at 710.

[46] *Altai II* at 709-10. Professor Nimmer states that in many instances it is virtually impossible to write a program to perform particular functions without employing standard techniques, and thus the programmer is constrained by these external factors, which should not be protected. The Fifth Circuit considered this in *Plains Cotton Coop. Ass'n. of Lubbock, Texas v. Goodpasture Computer Serv. Inc.*, 807 F.2d 1256, 1262 (5th Cir. 1987) *cert. denied* 479 U.S. 1031 (1987), but stated that many of the similarities between the programs were dictated by externalities of the cotton market.

[47] *Baker v. Selden*, 101 U.S. 99 (1879) has developed into the doctrine of merger, which states that where there is essentially only one way to express an idea, the expression is merged with the idea, and that expression is not protected by copyright.

[48] Altai II at 710-11.

[49] Altai II at 697.

[50] Altai VII at 367. In 1993 in the U.S., on remand, the district court held that Computer Associates' trade secret claim was dismissed on the basis of the running of the statute of limitations. *Computer Associates Int'l., Inc. v. Altai, Inc.*, 832 F.Supp. 50 (E.D.N.Y. 1993) (Altai III). The district court in Altai I stated that, had the trade secret claim not been preempted, it would have been decided under Texas law. Altai I at 566. The Second Circuit agreed with this choice of law analysis. Altai II at 718. Many states have adopted the Uniform Trade Secrets Act, which sets a three-year statute of limitations, but Texas has adopted the Restatement's view on trade secrets, which treats the claim as a tort. Altai III at 52. Since Computer Associates filed the trade secret claim over two years after the cause of action occurred, although within two years of Computer Associates' discovery of the wrong, under Texas law, the claim should be dismissed. Altai III at 54.

[51] Altai VII at 368. In 1994 in the U.S., the Court of Appeals for the Second Circuit ordered that the following two questions of law be certified to the Supreme Court of Texas: (1) Does the discovery rule exception to § 16.003(a) apply to claims for misappropriation of trade secrets? (2) If not, would the application to such claims of the two-year limitations period provided by § 16.03(a) contravene the "open courts" provision of article I, § 13 of the Texas Constitution? *Computer Associates Int'l., Inc. v. Altai, Inc.*, 22 F.3d 32, 37 (2d Cir. 1994) (Altai IV).

[52] Altai VII at 368. In the U.S. in 1995, the Second Circuit affirmed that the trade secret misappropriation claim was properly dismissed under the Texas statute of limitations. *Computer Associates Int'l., Inc. v. Altai*, 61 F.3d 6 (2d Cir. 1995) (Altai V). The Supreme Court of Texas answered both certified questions in the negative. *Id.* at 7, *see supra* note 51. The Texas Supreme Court in 1996 denied on rehearing on the ruling that the trade secret misappropriation claim was time-barred. *Computer Assoc Int'l., Inc. v. Altai, Inc.*, No. 94-0433 (Tex. March 14, 1996).

[53] *Computer Associates Int'l. v. S.A.R.L. FASTER*, No. 519/95 (Tribunal de Commerce Bobigny, Jan. 20, 1995), as excerpted in 21 COMPUTER LAW REPORTER 257 (1995).

[54] Altai VII at 368. In 1994, in the U.S. district court, Altai requested an injunction to keep Computer Associates from litigating in France. After the 1995 decision in Altai's favor in France, Computer Associates withdrew this request. *Id.* This request was reactivated when Altai learned of Computer Associates' French appeal. *See infra* note 55 and accompanying text.

The French Court of Appeals is an intermediate appellate court that has jurisdiction to hear all appeals from any court within its geographic territory. Its members are professional jurists. The court conducts a *de novo* review of factual and legal issues. If a decision of the Court of Appeals is overturned on appeal to the Cour de Cassation, which takes appeals for error of law, on remand the Court of Appeals may retry questions of fact and law as it sees fit. Brief for Altai at note 11, *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, Sept. 25, 1997 (2d Cir. 1997) (No. 96-7875).

[55] *Computer Associates Int'l., Inc. v. Altai, Inc.*, 950 F.Supp. 48, 49, 51 (E.D.N.Y. 1996) (Altai VI).

[56] Altai VI at 51, *citing* *Burgos v. Hopkins*, 14 F.3d 787, 789 (2d Cir. 1994), *quoting* *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

[57] Altai VI at 51, *citing* *Burgos v. Hopkins*, 17 F.3d 787, 790 (2d Cir. 1994), *quoting* *Davidson v.*

Capuano, 792 F.2d 275, 278 (2d Cir. 1986).

[58] Altai VI at 51, *citing* Prime Management Co. v. Steinegger, 904 F.2d 811, 186 (2d Cir. 1990), *quoting* Lawlor v. Nat'l Screen Serv. Comp., 349 U.S. 322, 328 (1955).

[59] Altai VI at 51, *citing* Update Art, Inc. v. Modiin Publishing, Ltd., 843 F.2d 67, 73 (2d Cir. 1988). Altai attempted to rely on an exception to this rule, which would allow a U.S. court to exercise jurisdiction over copyright infringement occurring outside the U.S. if the defendant can show an infringing act in the U.S. which led to further infringement abroad. This was not shown by Altai. Altai VI at 52.

[60] Altai VI at 52.

[61] *Id.* For two parties to be in privity, the interests must be virtually identical, which is not the case.

[62] Altai VI at 53.

[63] Altai VI at 53, *citing* Metromedia Co. v. Fugazy, 983 F.2d 350, 365 (2d Cir. 1992), *cert. denied*, 508 U.S. 952 (1993).

[64] Altai VI at 53. France created statutory protection for copyright in 1957; in 1985, computer software was specifically designated to be within the scope of French copyright. Computer Associates state that the Universal Copyright Convention and Berne Convention give the authority to enforce the French copyright law, as these conventions provide a foreign work national treatment in all signatory countries where copyright protection is available. Memorandum in support of Altai Inc's motion to enjoin Computer Associates International, Inc. 950 F.Supp. 48 (E.D.N.Y. 1996) (No. 89-0811).

[65] *Id.*, *citing* China Trade and Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987); U.S. v. Davis, 767 F.2d 1025, 1038 (2d Cir. 1985).

[66] Altai VI at 53, *citing* China Trade, 837 F.2d at 35-36; Davis, 767 F.2d at 1038.

[67] Altai VI at 54, *citing* China Trade, 837 F.2d at 35-36. If both threshold requirements are met, the court should then examine the following five factors: (1) frustration of a policy in the enjoining forum; (2) the foreign action would be vexatious; (3) a threat to the issuing court's in rem or quasi in rem jurisdiction; (4) the proceedings in the other forum prejudice other equitable considerations; or (5) adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment. Since the threshold requirements were not met, the factors did not need to be examined. Altai VI at 54.

[68] Altai VI at 54.

[69] Altai VII at 365.

[70] Altai VII at 368-69, *citing* Valley Disposal, Inc. v. Central Vt. Solid Waste Management Dist, 31 F.3d 89, 93 (2d Cir. 1994); Manning v. City of Auburn, 953 F.2d 1355, 1358 (11th Cir. 1992); Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626 (5th Cir. 1996).

[71] Altai VII at 369, *citing* Nevada v. United States, 463 U.S. 110, 129-30 (1983); Federated Dep't. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86-90 (2d Cir. 1997); SEC v. First Jersey Sec., Inc. 101 F.3d 1450, 1463 (2d Cir. 1996); Restatement 2d

of Judgments Section 24(b) and cmt.a (1982).

[72] Altai argues that Computer Associates could have amended its U.S. complaint to include the French action, but the U.S. court stated that Altai [SIC-Computer Associates] was under no obligation to amend its U.S. complaint. Altai VII at 370.

[73] The exercise of jurisdiction would be proper if the defendant had sufficient contacts to satisfy both the state long arm statute and the Due Process Clause of the Fourteenth Amendment. Altai VII at 370, *citing* Chaiken VV Publ'g. Corp., No. 95-9301, 1997 WL 703511, at *6 (2d Cir. July 21, 1997) Altai failed to show that the federal district court would have jurisdiction over FASTER under New York's long arm statute, as there is no evidence in the record that FASTER either transacts business in New York or derives substantial revenue from the state. Even if there was personal jurisdiction, the Due Process Clause requires minimum contacts with the state, and Altai failed to show minimum, or any, contacts, of FASTER in New York. Altai VII at 370.

[74] Altai VII at 371, *citing* 18 CHARLES A. WRIGHT, et. al., 18 FEDERAL PRACTICE AND PROCEDURE see 4417 at 165 (2d ed. 1981).

[75] Altai VII at 371.

[76] *See supra* note 67.

[77] Altai VII at 372. Computer Associates, in its brief, also raised a public policy argument which was not addressed by the court. Computer Associates argued that if Altai's position would be adopted, this would undermine the goals of the Berne Convention, such as national treatment. Brief for Computer Associates at 42, Computer Assoc. Int'l., Inc. v. Altai, Inc., Sept. 25 1997 (2d Cir 1997) (No. 96-7875).

[78] Altai II. *See supra* notes 35-39 and accompanying text.

[79] Altai II at 712.

[80] 89 F.3d 1548 (11th Cir. 1996). *See*, Sue Mota, *Mitek Holdings, Inc. v. Arce Engineering Co. - The Eleventh Circuit Finds No Copyright Infringement of Computer User Interface*, MICH. TECH. & TELECOMM. L. REV. (publication pending).

[81] 864 F.Supp. 1568 (S.D. Fla. 1994). In an interesting difference from Altai, Sotolongo, the programmer in Mitek, also went to work for a competitor to develop a similar software program, but did not take any code, but rather developed the new program completely independently.

[82] Mitek, 89F. 3d at 1548.

[83] Bateman v. Mnemonics, Inc., 79 F.3d 1532 (11th Cir. 1996).

[84] 26 F. 3d 1335, 1342-43 (5th Cir. 1994). The court endorsed the abstraction-infiltration-comparison analysis as elucidated by the Tenth Circuit in Gates Rubber Co. v. Bando Chemical Industries, Ltd., *infra* note 85, and stated that this analytic approach may need to be varied to accommodate each cases' facts, *citing* Altai II at 706, *see supra* note 79.

[85] 9 F.3d 823 (10th Cir. 1993). In the abstraction stage, the computer program was broken down into six levels of declining abstraction: the main purpose; the program structure or architecture, the modules; the algorithms and data structure; the source code; and the object code. This abstraction into six levels

was proposed in John W. L. Ogilvie, *Defining Computer Program Parts Under Learned Hand's Abstractions Test in Software Copyright Infringement Cases*, 91 MICH. L. REV. 526, 570 (1992). The Tenth Circuit concluded that the district court had not conducted an adequate filtration analysis and remanded on this issue.

[86] 975 F.2d 832 (Fed. Cir. 1992).

[87] 49 F. 3d 807 (1st Cir. 1995). The U.S. Supreme Court upheld the First Circuit's decision without a written decision when it tied four to four with one Justice recusing himself. 64 U.S.L.W. 4059 (U.S. January 16, 1996) (No. 94-2003). See, Sue Mota, *Lotus v. Borland: Menu Command Hierarchy of Computer Program is Uncopyrightable*, 18 COMM. & L. 59 (1996); J. A. Whong, A.T.S. Lee, *Discussions of Lotus v. Borland: Defining the Limits of Software Copyright Protection*, 12 SANTA CLARA COMPUTER & HIGH TECH. L. J. 207 (1996); Glynn S. Lunney, Jr., *Lotus v. Borland: Copyright and Computer Programs*, 70 TULANE L. REV. 2397 (1996); Pamela T. Church, R. S. Katy, *New Case Complicates Proof of Infringement by Program Execution*, 13 COMPUTER LAW. 10 (1996); David R. Owen, Note, *Interfaces and Interoperability in Lotus v. Borland: A Market-Oriented Approach to the Fair Use Doctrine*, 64 FORDHAM L. REV. 2381 (1996); Jonathan Band, *Interoperability After Lotus v. Borland: The Ball is in the Lower Courts Again*, 13 COMPUTER LAW. 11 (1996); William F. Porter, *Breaking the Silence of a Divided Court: An Analysis of the First Circuit's Decision in Lotus v. Borland*, 36 IDEA: J.L. & TECH. 273 (1996); Linda Skon, Note, *Copyright Protection of Computer User Interfaces: "Creative Ferment" in the Courts*, 27 ARIZ. STATE L. J. 1063 (1995); Paul I Kravetz, *"Idea/Expression Dichotomy" and "Method of Operation": Determining Copyright Protection for Computer Programs*, 8 DE PAUL BUS. L. J. 75 (1995); D.M. Carleton, Note, *Lotus Develop. Corp. v. Borland Int'l: Determining Software Copyright is Not as Easy as 1-2-3*, 56 U. PITT. L. REV. 919 (1995); B.E. Kile, *Lotus v. Borland: Copyright Protection of Computer Software in a State of Transition*, 53 COPYRIGHT WORLD 16 (1995); M. Schwartz, *Copyright Protection is "Not on the Menu" in Lotus v. Borland*, 17 EUR. INTELL. PROP. REV. (1995).

[88] Apple Computer, Inc. v. Microsoft Corp. 35 F.3d 1435 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1176 (1995). See, Sue Mota, *Apple Computer v. Microsoft: The Ninth Circuit Finds No Copyright Infringement of Apple's Graphical User Interface*, 23 W. ST. U.L. REV. 39 (1995); Rodger R. Cole, Note, *Substantial Similarity in the Ninth Circuit: A "Virtually Identical" "Look and Feel"?* 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 417 (1995); David L. Hayes, *Apple v. Microsoft Under a Microscope*, 11 COMPUTER LAW. 1 (1994).

[89] Apple Computer, Inc. v. Microsoft, Corp., 821 F. Supp. 616, 623 (N.D. Cal. 1993).

[90] District courts have also cited Computer Associates v. Altai's analysis. For example, the district court for the southern district of New York cited the three-prong test when granting a partial summary judgment on finding some individual elements of two computer programs not substantially similar. Harbor Software, Inc. v. Applied Systems, Inc., 1997 WL 187350 (S.D.N.Y., Sept. 9, 1996). The test was also used by a different judge of the same court to find that nonliteral elements of a software program were not protectable because they were dictated by efficiency or limited alternatives. Productivity Software Int'l., Inc. v. Healthcare Technologies, Inc., 1995 WL 437526 (S.D.N.Y., July 24, 1995).

[91] Brief for Altai at 39, Computer Assoc. Int'l., Inc. v. Altai, Inc., Sept. 25, 1997 (2d Cir. 1997) (No. 96-7875). The United Kingdom, citing *Computer Associates v. Altai*, analyzed the non-literal elements of a computer program as a compilation in John Richardson Computers Ltd. v. Flanders. See, Mark

Sherwood-Edwards, *The Marginalisation of Computer Associates v. Altai in the U.K.* - John Richardson Computer Ltd. v. Flanders, 19 COMPUTER L. REP. 544 (1993). The court stated that there is "nothing in any English decision which conflicts with the general approach adopted in the *Computer Associates* case, but nonetheless analyzed using the compilation approach. The British High Court in 1994, however, rejected this approach. This court did "not find the route of going via U.S. case law particularly helpful," and concluded that the defendant programmer had copied a substantial part of the copyrighted work. *Ibcos Computers Ltd. v. Barclays Mercantile*, Nos. CH 1989 I 2198, CH 1994 I 215, CH 1993 I 6327 (High Ct. Ch. Div. Feb. 24, 1994).

[92] See *supra* notes 52-53 and accompanying text.

[93] *Altai VI* and *Altai VII*, see *supra* notes 55-77 and accompanying text.

[94] Brief for *Altai* at 43, *Computer Assoc. Int'l., Inc. v. Altai, Inc.*, Sept. 25, 1997 (2d Cir. 1997) (No. 96-7875).

[95] *Altai, Inc.'s. Memorandum on Remand to Address Trade Secret Liability* at 47-48, 832 F.Supp. 50 (E.D.N.Y. 1995), No. 89-0811.

[96] Brief for *Altai* at 7, 9, *Computer Assoc. Int'l. Inc. v. Altai, Inc.*, Sept. 25, 1997 (2d Cir. 1997) (No. 96-7875). After the raid, *Faster* had to post a bond guarantee of \$1 million to resume doing business; they could not, and went into liquidation. *Id.* at note 7.

[97] *Computer Assoc. Int'l., Inc.'s. Supplemental Memorandum Regarding Trade Secret Issues* at 7-8, 832 F.Supp. 50 (E.D.N.Y. 1993), No. 89-0811.

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