

FINAL TRANSCRIPT

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****ACC - Hidden Cancer in Unmonitored Computer Code -- Defensive and Offensive Tactics Regarding Software Copyright And Trade Secret Protection**

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PRESENTATION

Eric L. Abbott - *Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation*

Hi, this is Eric Abbott. I'm the moderator for this presentation today called Potential Cancer of Computer Code. This presentation is being recorded and after 3:00 o'clock today, Eastern Time, it'll be available on the ACC webcast page. So if you missed something you can listen to it again.

My email address if you have questions during the presentation is eric.abbott@pgicorp.net. That's P-G-I-C-O-R-P.net. This presentation is done in conjunction with the Litigation Committee with ACCA and we have a conference call on the fourth Tuesday of every month at 4:00 P.M. Eastern. And that's where we talk about different webcasts that we're going to do and our programs for the Annual Meeting.

This is a topic that is extremely complicated and would take days to fully cover, but basically today what we're looking to do through Greg and Craig, through their help, is to give the in-house counsel enough information so they could perform just a quick diagnosis of this problem and be able to talk intelligently to their patient, or client, for that matter. And know when to refer these issues to a specialist in these areas like Greg and Craig.

The first thing that I'm going to discuss is basically how does a computer work and what does it do. Computer's basically take input, information, and then perform calculations or do other things to that input, and produce an output. Hence the term "garbage in, garbage out," which is I guess the mantra for computer programming. To do this work computers need instructions. Now the instructions come from a computer program written by a computer programmer in what's called a programming language. Something like Fortran from the old days or Pascal from the old days and there's a few newer ones out there. And then the computer takes this program which is--and throws it through something called a compiler which then puts it in the ones and zeroes that the computer uses and off it goes.

Now one thing that is important in terms of computer code is that these programs work in modules and modules are basically little subsets of these computer programs that perform specific tests. Now, how's that important for us for an in-house counsel type, is that a lot of time we all work in different industries. I work in the gaming industry, so we all hire engineers and other technical folks from our competitors at one point or another. And all of us in different industries make similar things that do perform similar tasks. As such some of the computer programs used to do those things are the same or could be the same, or could be similar.

So what happens if you're working in a company and you have a low-level programmer who just goes ahead and takes a program from their old company, to get it done quickly, and just goes ahead and throws it in your program? Well, that could present a problem. Now if you do see a situation like that then you probably would need to contact one of the gentlemen whose helping me with this webcast right now, either Greg or Craig and their firms; Kutak Rock and Gibson, Dunn & Crutcher, which have been so nice to sponsor this webcast.

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The other term that you need to understand is the term protocol. What a protocol is is a specification that from which a program is written. Now a protocol is basically, tells you the inputs and outputs to allow two different devices to communicate with each other. Now how is this important? Well in a lot of industries there are companies -- let's take a slot machine for instance.

And we make slot machines and there's the big company out there that makes the bill validator which is the thing where you put your twenty-dollar bill to go into the slot machine. Well that bill validator has to talk to the slot machine. Now we don't make bill validators. So what we would have to do is get a protocol from the bill validator company on how to talk to their bill validator and then go ahead and write a program to talk to it.

Now the problem is that if you take a protocol and write a computer program from it, the copyright law can possibly, and again we're dealing with a grey area, can possibly treat that act similar to taking a copyrighted book and translating it into French from English. Which would make it a derivative work. And again, you may have a copyright problem in that situation.

Right now what I'm going to do is go ahead and introduce our speakers who are going to use these basic definitions that I've talked about and kind of plug it into the two main areas of law here. Craig is going to talk about trade secrets. And Craig does IT protection programs to help companies avoid trade-secret problems and other IT problems.

Greg on the other hand is the general IT litigator, registered patent attorney. Has litigated source-code issues, dealing with property rights. And right now has a case in front of the U.S. Supreme Court. And I'm going to go ahead and turn it over to Greg right now. And their bios are on the website so if you want to take a closer look at their qualifications. And then once Greg and Craig are done we're going to have a question and answer period.

We're going to have a question-and-answer period and you can go ahead and email me some questions and I'll see if I can get them answered for you.

Greg, let's talk about some source code.

J. Gregory Whitehair - *Gibson, Dunn & Crutcher LLP - Counsel*

Eric, thank you so much for the introduction. And for those on the active website right now you'll find, just below the bios, is a link to an outline that we're going to use today. It's fairly high-level, as both Craig and I have thrown in a number of pages there and I'll be going along page-by-page, in that regard, in the little time that I have today.

Thank you for that introduction. And my focus today is to, as Eric said; help you see the kinds of places and times when you may actually have an issue that isn't natural. We're not assuming, in this webcast, that we're dealing with people who day in and day out are building source code, and it's the core of their business they probably know these doctrines as well or better than we do. What we're looking to are people that don't necessarily think that they have source code issues in they're business and explain to them, I'm confident that you do. You will, and do now, have source-code problems in your business. They may never bite you, but if they do it will be useful to have a heads up.

Let me just go over, quickly, the general methods of IT protection, everybody's familiar with, patent, trademark, copyright, and trade secret. Craig will be handling trade secret. I'll be talking about copyright. There's nothing here of real note about trademark. There is a prospect in some circumstances to get a patent on source code. If your people are creating for instance special method applets, protocols that are not otherwise known to the industry you may chose not to pursue those as trade secrets, but rather try to get them registered as a patentable matter. We're not going to really talk about that today although that is an option. And of course the explosion of business methods patents over the last five to seven years is a huge development and probably a worthy topic for a future seminar for ACCA.

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On the issue of copyright protection most of the situations around source-code protection are going to be in either copyright or trade secret. A copyright of course requires an original and creative expression in a fixed, tangible medium. It has to be something you can look to and find it can't just be out in the air. The statutes have found at 17.U.S.C. starting at 101, and 102 (A) is this definition. I'm on the first or second page of my outline.

You cannot copyright ideas, just pure procedures, systems, or methods of operations. Those are statutorily prohibited and essentially you're driven over either to patent or no protection at all. We're talking here about things like the content on your websites, the hyperlinks that you create the software support material. Both from that service as well as all of the day-to-day activities.

As Eric talked about the gaming machines and the protocols between them, there is communication source code from the slot machine to the bill validator, from the slot machine to the back office. From the main computer bank to the central office of the gaming machine company if they are running, for instance, a national progressive slot, every one of those communication links is going to include some kind of directional source code. Every time there is directional source code, protocol source code, there is a serious concern about whether that is proprietary material, protectable material, and frankly, whose is it. You may think it's yours, you may well be wrong.

How do you go about protecting it? Let's say you've got a programmer, they have an applet idea you're not going to go to patent, you do want to keep it protected. You don't want your competitors or even your own customers to be using this in a way that essentially rips it off from you. So you have to take some steps in order to preserve that copyright.

In the United States today, now that we've subscribed to the key copyright treaties and conventions around the world, essentially you don't-- I, let me put it this way, you get a copyright the minute you put down a new and original idea in a fixed medium. You automatically have a copyright. What you don't automatically have is all of the canopy of protections that you really want to have.

Again, my hypothetical is that you are purposefully trying to create, valuable, proprietary copyright material so that you can use it, preserve it and keep it from use by your competitors or sell it in the open market.

Registration in the United States is a critical event and I want to talk briefly about it so that you can keep it in mind when one of your client members comes to you and says, "I think I've got something, what do I do now?" To get the maximum benefits under U.S. Copyright Law, and to ensure that you have the right to be in Federal Court, bringing the maximum claims against any infringers you need to register and deposit your copyright within three months of its creation. If you wait longer than that an infringer who pops up in the meantime basically doesn't get hit with all of the same and all of the big remedies that are available under the statute.

Under the statute if you've timely registered you can bring the suit in Federal Court, you can bring an injunction which we may come back to later in the seminar, you can get statutory damages which can run in the tens of thousands of dollars per event, per violation. And you have a good shot at getting your attorney's fees. Not automatic, but it is only available if you have a timely registration.

Let me suggest to you, if you find any of this of interest, as you think you're going down the road to a copyright. Rather than necessarily calling an outside law firm right away, I encourage all of my clients to make a first run at the Copyright Office's website. It is probably the most user-friendly website I've dealt with in the United States government and just in terms of it's Q&A, in terms of it's FAQ page, and it also is not quite so careful about issues like whether their giving you legal advice. As you know, so many sites say, well, we really can't tell you how things work.

The Library of Congress through its Copyright Office website goes right to the nut of it. And that is www.copyright.gov And I encourage you to go to that site anytime you have just a first-level question about copyright in the United States.

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Let me talk about the actual registration act. We tend not to get involved in that because of the expense of our time versus the very, very small time and expense that the client can often get into. If you're just trying to register for instance the 30 visual pages on your website or a hyperlink document, a white page, a white paper that you've created and you want out there, but you want protected. You can print that off, you can send it in to the Copyright Office with a two-page form found on the Internet at that website I just mentioned and \$30 and you have your registration. You'll receive back in the mail a proof of that registration.

It is so simple that it's a little frustrating sometimes to see how few times our clients actually go through the steps to get the thing protected and then get frustrated later when they have a limited number of rights in Federal Court because of their delay in registration. The one place where we do get involved in registration, classically, is source code. If you turn to the loc.gov site and go to Circular 61, there's an extensive single-spaced discussion of how you put source code in while still protecting the core of it.

Obviously it's not helpful to you to give up the trade secrets, if you will, of the body and guts of your source code. The Copyright Office is aware of that, but they'll typically ask you to do, it's a lengthy program, is give them the first ten pages of code and the last ten, and then you stripe the centers.

And by striping you'll see Circular 61 talks about how you essentially block the ability to see all of the code so that others can't essentially rip off your material. But I encourage you if you have any issues like that certainly feel free to call me, to contact me, but I will tell you Circular 61 is a great resource.

Let me talk about the ownership rules in the United States which is really where I got most involved in my litigation work in copyrights over the last five years in particular. A number of clients have come to me because there has been a very tangled web of who created what and what the extent of those rights were when did derivative works get created, etcetera. In the United States, as in most of the countries in the world, the individual who creates the copyright owns it. This is in contrast to some other kinds of property rights that go automatically to the employer.

Now, I'm going to talk about some work-for-hire issues. So, if I'm just in my basement and I'm not working for anybody and I put something down on a piece of paper and I write, you know, a new Hemingway knock off, I will get the original copyright in my personal name. If on the other hand I am at my office and I decide to create a new document that I think is going to be used by lawyers worldwide, I have an employer and that employer automatically will be deemed to have the copyright on the material I create in my workplace. This is a kind of work-for-hire.

The other kind of work-for-hire that most people are familiar with really comes from a written agreement, typically for contractors, programmers, consultants and others. Where you have specifically said "consultant, I am paying you money for you to create original work that I think are going to be copyrightable". But, "you agree to give me all of the copyright, legal rights that you might otherwise get if we didn't have this written agreement. This is a critical document and the document that many employers and many companies fail to pay close attention to. I really urge you to be on top of the work-for-hire paragraph in any of your vendor contracts. Any time that you're commissioning a work or otherwise hiring somebody to do what you wish.

Again, it's automatic if they are your employee, but even then you may want to have a special agreement in case they're doing things on their own time and you would prefer, as the employer, to capture all of that. If they're for instance amateur programmer, but their day job is programming you may be frustrated if they decide, well I wasn't really doing it for work I did it off my home computer and at home. But gosh, you're right I used a lot of the tools from the office and the various materials I learned about while I was at work. That's one case that I've worked on, very frustrating.

Now, people who jointly create. And jointly owned creates some of the most difficult copyright litigation available. Because an entire group that's considered to be joint contributors actually controls the copyright and you need essential unanimity to go forward with derivative work, sales and others. The group has to share the income equally and this is in sharp contrast to patent law. Where each inventor may act independently and keep all of the royalties that they generate.

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Now of course every one of the arrangements that I'm describing can be modified by contract and we urge people to do that. I'm telling you what the default state is if you're not paying attention. And in some sense why we call this "the hidden cancer of source code." A source code gets created, no written agreements are in place the programmer thinks he owns it, the employee who did it at home thinks he owns it. The people who were on the outside of the deal who contributed some small piece to it, that you don't even think was creative, she or he may now think they now jointly own it and control it. Written agreements are critical.

The exception are--people know these phrases but they often don't know the depth of the doctrines, fair use, which we could make an entire seminar. Is one of those doctrines that everybody think they understand, but mostly what people think of in lay people's language is if I think it's fair to use it, that's fair use.

Obviously it's a much more technical term and typically is limited non-proprietary uses, typically limited to--even with non-profit use it's not supposed to generate any kind of income. There's a variety of other criteria for fair use and this is set forth in the Copyright Statute and you'll find in the Annotation Section is the Fair Use section, that fills a USCA.

So it's an extremely complicated doctrine and one that people tend to rely on too much. Most of you are probably familiar with the litigation back in the 80's where Texaco and a couple of other companies got sued because they were making photocopies of circulating magazines, ultimately making multiple copies and sending them to people instead of buying multiple versions of the original magazine. And ultimately ended up paying six figures in those days, to settle those cases.

And so while it's typically okay to use for instance one archived photocopy of an article you've read it's not typically okay to make further copies. And this of course is in spades in source code which is so easily digitally copied and distributed.

I want to spend a minute talking about open source. Open source ends up being in almost every source code case I work on an issue that has to be tackled. It may not be an issue, but in every case I've worked on it's been an issue because many, many simple tools, side tools, things not in the center of the code, not in the center of the computer protocol are coming from the outside. They appear to be dedicated to the public, open use, the programmer doesn't even think twice about attaching two or three connector tools for instance. It may well be in those--in many cases that that tool was created under open-source licensing. Open-source licensing, and you can just Google open source license and you'll get a raft of material.

Open-source licensing is a movement among a number of people that originated, I believe in Berkley, and it spread and is very active I know in Finland and Sweden as well. It's a movement that suggests that source codes should never be proprietarily protected. That it is an open resource to all people and that they should have to dedicate all code improvements to the greater good. Their open-source license says, if you put open-source into your protocol you must then make available the derivative work that involves the source code, open source, and make it available to the public without charge or with a very limited charge.

And the license is onerous and there has not been a lot of open litigation about it, but I can assure you that it will be more litigious and litigated in time. And I believe that open source is probably the most surprising, counterintuitive and insidious cancer in source code that you may see.

On dedication to public it's something you can readily do, IBM has done it for instance on a number of items that they've chosen not to support with market money, but they don't want other people getting proprietary value from it.

So they will publish material and make it clear that it's dedicated to the public so that no one can claim proprietary use. And if you then input that into your own program that portion is not proprietary, but its combination with another creative edition could then become copyrighted.

And that's another doctrine derivative work that's really worth looking at. Essentially a derivative work is some variation; it may be from medium-to-medium. Stage for instance, the screen, version one to version two in source code, 3.0 to 4.0. Perhaps a

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complete migration of the core protocol into a new program. The subsequent program, if it has included in it, original works, is now its own copyrighted item.

And this is very important because the person who added the original work to the derivative work is now the controlling copyright holder. Just because they got permission to use the original work doesn't mean that the permission giver retained the copyright in the next derivative work.

And this was the core fight I had in the most recent litigation here in Denver that I worked on in which a Swedish parent company gave permission to its American subsidiary to make derivative source code in a new version of a very secret encrypted program that was used for the national defense of several countries.

When the American's added their material they created, under American law, an original copyright in the American subsidiary that did not go back to the Swedish parent. And when the company split there was a huge fight over who ended up with what. What was implicit, what was explicit? U.S. statute on copyright assignment requires a written assignment on every circumstance.

And if there's not a written assignment the copyright is not to pass. There was no such assignment here. It passed to the Swedish parent and no written agreement. And so we litigated, at great expense, to try to figure out how to handle that situation. And a solution would have been available in a two-paragraph agreement. And no such agreement was in existence.

And the other problem--go ahead

Eric L. Abbott - *Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation*

Yes, I just want to--I'm sorry Greg, we've got to probably switch over to Craig now.

J. Gregory Whitehair - *Gibson, Dunn & Crutcher LLP - Counsel*

Okay. Let me just take one comment and then a reference to a website and I'll be done. The other issues that come up are, that I've just raised, are unknown contributors, inserted material from outside, and I already mentioned inter-companies. Independent programmers, outside applets, all of these can create a web, a spider web.

Eric also asked me to make some reference to international copyright issues; I'm not personally actively involved in that because I tend to do U.S. litigation. But I went on and found a--and I'll give a plug to a competitor because they did a remarkably fine job in compiling international copyright protocols. The Fenwick & Wetch [ph] firm, its www.softwareprotection.com. It has a really useful compilation if you find yourself overseas. Let me refer you to that.

And with that, thank you Eric for the time.

Eric L. Abbott - *Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation*

Okay Craig is going to talk a little bit about trade secrets right now, the other part of this little IT group of stuff we've got here. What are you going to tell us Craig?

Craig N. Johnson - *Kutak Rock, LLP - Partner*

Okay, well thank you Eric and thank you Greg. As Eric indicated earlier on I'm a partner with Kutak Rock here in Denver, and I emphasize commercial and intellectual property litigation. After spending a number of years in litigating matters, seeing how

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things fall apart I'm now finding myself spending more and more time on the other end of deals trying to advise people on how to avoid the pitfalls before they come up. And one of the most important areas in that regard is in the area of trade secrets.

Let me just contrast secret trades against the copyrighter/patent type of statutory intellectual property protection. A trade secret is a type of information that is confidential, that has value because it's secret, and it's something that you take reasonable steps to protect. There is a lot of information out there in the business world that companies don't want their competitors to have. However, not all of that information rises to the level of a trade secret.

A trade secret is that type of secret information that's essential. It's a core part of your business, and it gives you a competitive edge because you have the know-how and your competitors don't. So not every business memorandum, not every piece of financial information may constitute a trade secret. It's that those fundamental issues, which may be very important.

Now where this comes into play with respect to software is oftentimes you will have within your organization people who are developing specific protocols, specific programs for the type of business that you're doing. This is information that's not distributed outside your organization, and it helps your business run more smoothly and more efficiently as opposed to your competitors. If you have key employees who are involved in that process, and are taking that knowledge and know-how on the road with them when they go to a competitor, you run the risk of losing that core element of your business, and that's what the law of trade secrets is generally intended to protect.

In contrast to a situation where you're dealing with software that you're intending to sell, software that you're intending to distribute publicly, you may want to consider getting copyright protection as Greg has suggested. But for those types of things that you don't intend to disclose and you don't intend to let outside your organization that's where you want to be cognizant of the potential for trademark, I'm sorry, for trade secrets protection.

It's different from a copyright. It's different from a patent in that there's nothing that you file. There's nothing that you disclose to the government. There's no filing fee that's associated with it. A trade secret is protected by statute because it needs the three elements that I talked about. It's secret. It has value because it is secret, and it's something that you take efforts to maintain the secrecy of.

Unlike a patent or a copyright which is valid for a certain defined period of time, a trade secret is something that is protected in perpetuity as long as you are maintaining the secrecy of it, and you're not allowing it to be disclosed. There are reasons why you might want to consider having something as a trade secret versus a patent for certain types of technology that may be time limited in their value, and they're not going to be effective for more than a few years, you may want to do a public filing. You might want to do a copyright if you can and that's typically in the situation where you would disclose it to the public. But if it's something that you're never going to disclose, and it's something that you believe will be valuable for as long as you can keep it away from your competitors you don't want to have a disclose, and you want to maintain the trade secrecy aspect of it.

Some important things to consider when you're talking about trade secrecy is it's kind of a two-way street. Under the Uniform Trade Secrets Act which has been adopted in 47 states and the District of Columbia, the last time I checked, the statutory protection for trade secrets protect not only people from walking out the door with your trade secrets.

They also protect against people coming into your business who may have trade secrets from a competitor. In that situation which I generally call 'infection' somebody who has been working at a competitor or another business who may have had access to or had a role in developing confidential and trade secret information comes to you and then they may incorporate that information with or without your knowledge into what they're doing for your business.

Once that happens you may be finding yourself liable, both for damages and for injunctive release if the other party with the trade secrets finds out that you have now taken that information and incorporated it into your business. So it's something you have to be vary of, not just protecting your own trade secret, but making sure that people aren't bringing somebody else's trade secrets into your organization.

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As I indicated the Trade Secrets Act will permit a successful party to obtain not only an injunction against the use of those trade secrets. In certain cases you may obtain an injunction to prevent somebody from leaving and using those trade secrets. In one case, for example, a certain high-level employee who had access to marketing plans, strategic plans, pricing and other information was precluded from taking a similar position with a competitor because it was found that it was inevitable that he would use his former employer's trade secrets for the benefit of his new employer. So you can get an injunction not only to stop the use but also to stop somebody from going into a position where it's inevitable that they would use your trade secrets.

You may also obtain damages if somebody is using your trade secrets or you may be found liable for damages if you're somebody else's trade secret. Usually the measure of damages is the benefit that you got from the trade secrets, and one way that that's determined is by looking at what was the head start. Trade secrets, unlike a patent or copyright where it protects that technology from any duplicative use, even if they independently generate it, a trade secret can be reverse engineered. Somebody can look at your final product and then work backwards to find out how you got there. And that's perfectly legitimate. Trade secret protection doesn't preclude somebody from doing that.

Likewise somebody can independently generate the same information. If by happenstance two people came up with the same protocols or the same source code for a program that you're using there's nothing in the law of trade secrets that prevents that. So where you have a situation of somebody walking down the street with your trade secret what a court with oftentimes do to determine what your damages are is to say, well what was the head start that your competitor got as a result of the use of those trade secrets. How much time and effort were they able to save or what benefit did they get from that trade secret? And oftentimes given the time that it takes to develop something through generations and generations you can find that the amount of damages from the loss of trade secrets can be very expensive.

In addition to the potential for civil liability many states have adopted criminal statutes that impose fines as well as imprisonment in certain cases for people who willfully misappropriate trade secrets. Colorado, for example, has such a trade secret statute. Other states have adopted industrial espionage-type statutes which provide similar prohibitions and penalties. So it's a very serious issue. Trade secrets can be very expensive to litigate. There can be heavy damages and significant injunctive relief and you also have to be cognitive to the fact that there are potential criminal remedies.

Well let's talk just a little bit about what are the risk factors. What are the potential causes of loss, and let me focus first on what are the potential areas where you may lose your own trade secrets. Most often the loss of trade secrets is not a result of technology even though that's where businesses spend a lot of their time trying to protect their assets. They implement firewalls and computerized technology to prevent people from accessing their record. When really the biggest cause of loss is people, and so when you're assessing what are your potential risk factors you have to look at where are people with information potentially going to take that information and use it against you or for a competitor.

One of the most frequent sources of loss of trade secrets is unauthorized distribution within an organization where you haven't done a good job to control access to trade secret information, people who don't have a need to know it may have access to it, and they may take that information without your knowing it.

Equally significant and perhaps more significant in the day and age where cost cutting has forced a lot of companies to outsource, and to hire independent contractors and freelancers is the lack of control over those independent contractors. We have many contracts that say you're going to be providing a certain type of service for a certain number of hours etc. but it does not specify that the information that's created is considered a trade secret or that information that the independent contractor may be provided is part of your trade secret. So it's essential that you have control over independent contractors to make sure that these essentially strangers to your organization don't at the end of their contract walk out with your trade secrets.

Oftentimes you'll find a loss of trade secrets through lost computers. I've seen many cases where people have left laptops behind when they were working off-site and as a result they were losing access to information, or to have insufficient protection against unauthorized access to computers. Hacking is something that gets all the headlines, but frankly hacking is probably one of the lesser risks because it's a concerted effort to obtain the information and there's fewer people that are interested in going after

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trade secrets through hacking than there are people who just through the ordinary course of their business are walking out the doors not knowing what they have.

In order to protect against the loss of your own trade secrets there's a number of things that you can do. Many of these things are basically commonsensical. It's not a matter of high tech. One of the first and most important things that you can do is assess is what are your trade secrets. What information do you have in your organization that's essential, and that you need to protect? When you've identified that information you'll want to mark it as such. Put confidential legends on it, and go back and periodically review it.

If over the course of years you don't go back and do a review, it can become an onerous task to keep track of everything that you've designated as a trade secret. Some things may be time-sensitive and may lose their value over time. So in order to keep it a more manageable body of trade secrets you'll want to review it and delete the types of things from your list as trade secrets that are no longer valuable so you have room and keep your arms around those things which are important.

Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

Hey, well that's great Craig. And what I'd like to do now is kind of throw a hypothetical out there, and deal with a hypothetical, very simple problem and have you guys take a look at it from both the trade secret and copyright perspective, kind of a similar problem that we may face in-house. And I'm going to stay away from gaming devices here and we'll talk about fax machines, okay?

Company A leases fax machines. Employee Z works at Company A. Company A president says, "I want this new fax machine done in 2 months." The VP electuary (ph) says, "We can't do it in two months." He says, "Well get it done." So it winds its way down to Employee Z and he's got the choice of going out and partying in Las Vegas for the weekend or taking a module from his prior employment with Company B regarding inputting phone numbers into the fax machine. And if he doesn't take that module he misses out on the weekend. So he goes ahead and takes this module, this computer program module that he had written at his prior employment, Company B, and throws it in the hundred or so other modules, and comes up with this computer code for the fax machine to make it work.

Now the other thing that they're looking to do with this fax machine is to talk to a computer made by Company C. Now in order to talk to that computer we need Company C's protocol for communication for their computer. So the same Employee Z goes ahead and kind of ignores the legal department and just signs a NDA, a non-disclosure agreement, with Company C, doesn't get a license and gets the protocol. And goes ahead and takes that protocol, which is a specification, and writes a computer program to talk to Company C's computer.

And that computer program is thrown in with all the other modules and all the other little bits of computer code on this chip in the fax machine. And now a couple of years roll by and Employee Z has left the company and so forth, and you guys are in the legal department, and you get a letter from Company B that says, "Hey, you guys stole my module." And Company C says, "By the way, you know, I own your computer program in your fax machine." And it goes to the legal department.

Now first I'm going to start with Greg, and say, Greg, as in-house counsel, and mind you a lot of us, especially in small legal departments like myself act as emergency room physicians. We get the patient in, stabilize them, and ship them off to somebody who's an expert like yourself. How do we figure out who owns the code and the fax machine? I mean what should we do?

And then the second question is, it's kind of a follow up, is how do I advise my general counsel to say, "Hey from a business perspective what happens if we lose in court? I mean can the court just go ahead and take the U.S. Marshals and rip my fax machines out of all my customers' locations?" Because they're now leased. They're not being sold.

So Greg, why don't you help us with that, and then I've got a question for Craig on the trade secret aspects of this.

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J. Gregory Whitehair - *Gibson, Dunn & Crutcher LLP - Counsel*

Eric thanks for sending me back to law school. I enjoyed it then too. I guess the first order of business; I'm just tending to be really practical about this stuff. What do you do first? What you do first is to get as much possible information as you can, but I'll assume that you've done that. You're an excellent marshaller of your resources, and you know these facts, and you figure out where Employee Z got it. What they did with it that Employee Z with regard to the Company B material had indeed created it over there and brought it. And that Z also screwed up the way he got the codes from C, Company C.

Here's where I think this shakes out and what I think is going to happen, and probably not good for our Company A. First of all, technically Employee Z owned the copyright of Company B. Right? He created it.

Now the presumption is since he was employee that the Company B owns it. Maybe he was a contractor, maybe he wasn't. That's something I'd try to find out. Perhaps he ended up having the rights to it. But a date later whether he then transferred them to you, but at a minimum they're not in B. On the assumption he was a full employee and did it in his scope that's Company B's source code. They are going to be able to control it wherever it is. You cannot trade derivative works. You couldn't do versions from it, and you're supposed to extricate it from the code.

How do you do that? A million lines of code, 400,000 lines from this applet, or 20,000 lines from this applet. The courts say, "That's not my problem. Give it over." And until the Company B is satisfied that all of the second [ph] material has been eradicated, you've got to basically stop use and sale. And this is, of course, the death penalty to your company. That's why the royalty licensing negotiations are so dreadful because you have no leverage. Plan B for you is to find an alternative to plug into source code. It's not going to happen quickly.

As far as the Company C piece, this is frustrating where there's ambiguity. Company C said, "Oh sure. Go ahead and make stuff to connect up to our piece." But they may either have an invoice or something else that suggests, "But when you do we're going to keep that protocol too."

Again if you're not paying close enough attention to the paperwork at the time of that contract you could be in some trouble. I personally think that they won't be able to control the rights, but they may well be able to block your further use of the materials because you improperly, without a license, downloaded them to create your connection. And again, what do you do if you lose in court? Same problem, how do you get it out of the machine and eradicate the proprietary protected material, and still make your machine go out the door, not this weekend, you're in a lot of trouble.

Eric L. Abbott - *Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation*

Well I remember some from law school where they told me, they said, "If it ain't in writing, it didn't happen." So I guess kind of what you're telling me is the key here is that you need to get a written license to use whatever it is, whether it's protocol, module and to kind of spell it out in writing who owns the resultant computer program that you write from the computer--from the protocol and when you attach that program to your million lines of code for the other stuff that your device does that you make sure you own that. Is that kind of what you're telling me?

J. Gregory Whitehair - *Gibson, Dunn & Crutcher LLP - Counsel*

That is in fact one of my, in a prior life I was a re-licensing negotiator for a Baby Bell and whenever they had one of these contracts we ended up spending way too much time, very frustrating to try to sort these things out ahead of time, but I can tell you it was one one-hundredth of the cost of litigating it when there's nothing there. Because the default state are not helpful to the company who ends up proprietary material inside their machines.

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Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

Okay, well I guess from your litigation background you can, kind of from seeing all the problems, you can kind of help people like myself just kind of come up with a program so that we educate our lower-level employees that have to get something done right away, and that his or her manager knows the problems that can happen about stealing these things. Is that something you--?

J. Gregory Whitehair - Gibson, Dunn & Crutcher LLP - Counsel

Yes, absolutely. And I think the very secret side of it too from Craig's standpoint also requires a useful vigilance.

Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

Let's talk to Craig. Let's talk to Craig for a second and I think you mentioned something about how trade secrets are a matter of state law. Was that right? Was that what you said?

Craig N. Johnson - Kutak Rock, LLP - Partner

Generally a matter of state law, right (inaudible).

Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

Okay, well there's something that I'm aware of called Uniform Trade Secret Act which I think is, was about that. Was it 47 states? Something like that?

Craig N. Johnson - Kutak Rock, LLP - Partner

Yes, 47 or 48 states, right.

Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

Right and we got it here in Nevada. Let's take this question on the Uniform Trade Secret Act because that will cover most of the folks here on the call. Craig, as in-house counsel, what do I do to figure out if this module was a trade secret, and if it was misappropriated under the Uniform Trade Secret Act. And maybe you want to give kind of a quick blurb and explain what misappropriated means and what kind of facts do you need to look for. Do you see what I mean?

Craig N. Johnson - Kutak Rock, LLP - Partner

Okay, sure. Well when you gave the hypothetical the thing that got my attention right away was when you said the employee decided that it would be quicker and easier for him to just take the module that he got from a former employer. So that immediately raises a red flag. Anytime you're taking information from a former employer and using it for the benefit of a new employer you've got the potential for a trade secret issue.

If you're evaluating as in-house counsel whether or not you've got a trade secret issue, you need to first get your arms around is there a trade secret to begin with? You need to find out from that employee how did they get access to that information? Was there a non-disclosure agreement in place? Was that module something that was subject to any type of secrecy program?

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What were his obligations at his former employer when he took that information, when he access to it and when he took that information?

If it looks like this was a piece of information that the former employer treated as secret and took efforts to protect then the next question is, is there an actual misappropriation? Misappropriation under the Trade Secrets Act is generally defined as anybody who receives information or uses or discloses information that they obtained under circumstances where they knew or reasonably should have known they had a duty to maintain it secret, its secrecy, then you've got a trade secret issue. That's how basically misappropriation is defined. If you did something you know you have an obligation to maintain in secrecy and you use it or disclose it, that's where the misappropriation occurs.

Eric L. Abbott - *Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation*

Now let me ask you a question. Let's say this document had the word 'confidential' marked on it, which a lot of companies do with stuff they want to try and keep internally, keep secret. Does that tell you something in regard to misappropriation?

Craig N. Johnson - *Kutak Rock, LLP - Partner*

It certainly tells you that the former employer considered it to be confidential. But like I said before, not all confidential information rises to the level of trade secrecy. So you may see that and you may go pale when you see that your employee has taken what was marked as a confidential document and used it for your business. But that's not the end of the game there. You may still have defenses if in fact it was not treated as a trade secret. If the other employer did not use it as a-- or did not treat it reasonably as one would expect a trade secret to be treated. Any previous disclosure of that information may have destroyed the secrecy aspect of it. And if there is a disclosure there is no trade secret.

So you may have a number of defenses that would still be available to you. Let me take one step back in time though, and a way that you can protect against an over-zealous employee, really there's two things that you need to do. One in the interview process is ask any prospective employee, especially ones that are coming over from competitors or people that have a similar business, what access to trade secrets did they have, without having them tell you the trade secrets obviously. Did they have confidentiality agreements in place? And what did they understand their role to be? Through the interview process you can find out if somebody is at a risk of infecting your business with trade secrets of another.

And then when that person is hired you can avoid a lot of problems by training those employees in understanding: what is a trade secret; what are their obligations with respect to your trade secrets; and what are their obligations with respect to a former employer's trade secrets. If that employee had been properly screened through the interview process, and properly trained as an employee, he may have decided it was probably better to skip the trip to Las Vegas and to write his own code.

Eric L. Abbott - *Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation*

You've put together programs like this for companies?

Craig N. Johnson - *Kutak Rock, LLP - Partner*

Yes, absolutely. And, you know, there's really no one-size-fits-all type of program that you can put in place to protect against trade secrecy. A lot depends on the specific nature of your business. What you consider to be your trade secret? Different types of information are protected in different ways. The standard under the Trade Secrets Act is that you have to take reasonable steps. So they're not going to require in order to define the trade secrecy extraordinary measures. It's got to be something that's reasonable given the value of the information, what are the available resources etcetera.

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Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

Now let me kind of, let me kind of take a second here and kind get into a -- and again just for the audience out there, my email is eric.abbott (e-r-i-c dot a-b-b-o-t-t)@pgicorp.net if you have any questions for our panel here.

You're talking about trade secrecy and secret. Now obviously if you, you know, when you register a copyright if you copyrighted this protocol, this information and didn't black out portions -- I think Greg talking something about that. I mean you can go on that great website that Greg was talking about look to see if it's perhaps copyrighted in which case it wouldn't be secret, right?

Craig N. Johnson - Kutak Rock, LLP - Partner

Right.

Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

And then you'd do some further research from there to figure out whether they blacked out stuff.

Craig N. Johnson - Kutak Rock, LLP - Partner

Typically what you get is, is there's a trade off. One is you can have a trade secret for as long as you can make it secret, but you run the risk of somebody else developing it independently. If you take the step of getting a patent or appropriate a copyright for your material, you're making a public disclosure of parts of it, and you're getting in exchange for that public disclosure the exclusive right to that intellectual properties for a given period of time prescribed by statute. And you get protection against somebody independently developing it.

Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

Now a lot of times we get--a lot of times companies put their manuals and various things on their websites so wouldn't one step in this process as in-house counsel is something you can do quickly that is just go on the other company's website and see if they maybe published it? I mean that's a possibility as well, right?

Craig N. Johnson - Kutak Rock, LLP - Partner

Absolutely. And I think on one thing, Eric, on the--

Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

Go ahead.

Craig N. Johnson - Kutak Rock, LLP - Partner

-- (inaudible) side it's really frustrating to practitioners and I don't think there's a short solution, but it is very difficult to find indexed copyrighted materials at the Library Congress or in the Copyright office. There are some things and they're getting better but the idea that some of the popular advertising suggests is every movie ever made all on one site. We're just not seeing that and the ability to search is very difficult. So this is a thorny problem to try to figure out if something is under copyright versus a trade secret.

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Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

So the problem is you may not find out until you're in litigation and get the actual copyright filing from the other company?

Craig N. Johnson - Kutak Rock, LLP - Partner

Exactly.

Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

Wow. And of course you've probably spent \$0.5 million by that point. Let's see, I think we've only got about 8 minutes here. Why don't--I've I've got another question here from the audience. What are some good--good books? I know Greg and Craig kind of gave some websites as some places to get information. What are some good books that are out there that an attorney could, on a long plane ride or something, could educate themselves on these topics of copyrights and things like that without necessarily reading the United States code or reading state law and trade secrets and things like that? Greg, why don't you--are there any good books out there that you can think of?

J. Gregory Whitehair - Gibson, Dunn & Crutcher LLP - Counsel

Well, you know, it's interesting. You know you get so close to the picture that you end up using these big ten volume sets. Obviously the 'black letter' treatise in copyright is Nimmer, and a lot of that material is readily available on site, the subscriptions. But I actually have, and I don't have the book right in front of me, but it's--they essentially call it Trade Secrets, Copyright, Patents and Trademarks (specifically: Protecting Trade Secrets, Patents, Copyrights, and Trademarks).

And it is a publication, it's one volume. I think it may have grown to two, but what I loved about it and Wiley puts it out, the Wiley Group, what I love about it is it will give you in three to five pages it will give you a nifty overview. You just really put your toes in the water. And I think it's--I still keep it on my shelf even though I have these larger sets. But when I just want a quick hit on the doctrines that we've talked about today, it's one of my favorite books.

Eric L. Abbott - Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation

And Craig do you--what are you, are there any books out there that you're aware on trade secrets in general or something that a practitioner could go look at?

Craig N. Johnson - Kutak Rock, LLP - Partner

There is one book. It's kind of an excellent overview type of treatise. It's published by, I believe it's Aspen Publishing, and it's a handbook of intellectual claims and remedies, Aspen Publishers - Handbook of Intellectual Property Claims and Remedies. And it will walk through in fairly, in a brief and concise fashion the differences between patent, trademark, trade secrets, copyright, and other intellectual property rights.

And that's kind of a good starting point. It doesn't drill down to the level that some of the other ten volume treatises will, but it does give you a pretty good manageable overview in my experience. There's also a couple of publications that are specific. The ABA has put out a couple of publications on just an overview of intellectual property claims and remedies one of which--I can't recall the title off the top of my head, but you can find it on the ABA website. Just about 150 pages and it goes through in even more of a summary fashion some of those claims and remedies.

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Eric L. Abbott - *Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation*

I, one thing I've found and I know from Nevada's trade secrets statute it's sometimes states will tack little sections on to the Uniform Acts and they may not exactly be uniform. Is that something that--something that, I've kind of noticed but I mean would you say it's good practice to maybe look at the actual trade secrets statute? Let's say company, you know, these different companies that we talked about in our hypothetical and different states, I mean, they'll actually read it, you know. What you do you think about that Craig or am I, I'd be wrong?

Craig N. Johnson - *Kutak Rock, LLP - Partner*

The Uniform Trade Secrets Act is a very short Act, and it doesn't have very many provisions. You can get it; download it in a couple of pages off of most states' statutory websites. So I think it's definitely good to review in your home state what the Trade Secret Act is. Most states are pretty similar. There are some nuances more in the remedies section than in the definitions of: what is a trade secret and what constitutes a misappropriation. So there are some variations but I think becoming familiar with the statute in [inaudible] can be a real help.

Eric L. Abbott - *Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation*

Okay. But what about, with--Craig, what have you found out with jurisdictional issues. I mean, let me just throw this out there, I mean let's say, you know, one of the companies, I believe its Company B is in another state. You know, are you subject to jurisdiction in their state if you don't do business there?

Craig N. Johnson - *Kutak Rock, LLP - Partner*

Well you can under--and this is kind of outside the intellectual property realm, but you would have to look to the general jurisdictional statutes. And under most states long-arm jurisdiction statutes this--somebody is doing business in a state or purposefully availing themselves of the business of another state. They may be liable in another state, aside from their home state.

Eric L. Abbott - *Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation*

Well I've got a question here from the audience. The question is what attributes of a website should in-house counsel look for in determining whether a website is copyrightable and should it be more than just the interesting display of database content?

Craig N. Johnson - *Kutak Rock, LLP - Partner*

That's a really good question because I think most companies don't think very hard about trying to protect the look and feel of their websites. They have their general trademark work etc.; they hope that that's enough. But you often are putting yourself way out on a limb on the website. It turns out that anything creative is copyrighted.

In--there's a big litigation about whether compiling reverse phone numbers was creative. And ultimately a court decided, no, that wasn't creative it was just a compilation of data, but if they had put any kind of headers in it, if they had put any kind of logos around it. If they had put a color on it there would have been a creative addition to the material, that portion at least would have been protected.

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So my own take is any time you've got copywriters and by that--write, copywriters, putting material on your website is almost by definition creative. It's almost by definition something you don't want to see on a foreign website for instance by a competitor, grab it.

All you have to do is down load the pages, staple them together, \$30--the pages off of the Internet--pages off the Internet put it in this afternoon, three months after you've created it no one else can take that exact material, or anything confusingly close to that material that looks like they stole it from you.

Eric L. Abbott - *Mikohn Gaming Corporation - Associate General Counsel, Director of Litigation*

Well I'd like to, we're almost out of time here. I'd like to thank Greg, Craig, their law firms, Kutak Rock, and Gibson, Dunn & Crutcher for sponsoring this webcast. I think it's been great. The webcast has been recorded and will be available for replay after 3:00 Eastern time today, and is accessible for one year after this presentation.

I'd also like thank the Litigation Committee for allowing me to put this webcast on and our conference calls are the fourth Tuesday of every month at 4:00 Eastern. And I'd like to thank you guys and that concludes the webcast.

Craig N. Johnson - *Kutak Rock, LLP - Partner*

Thank you Eric.

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