

defendant's mere desire to achieve compatibility is a defense to copyright infringement.  
*Apple v. Franklin*, 714 F.2d at 1253.

## 2. Nonliteral Elements of Expression, Including User Interfaces, Are Protected by Copyright

The software copyright cases have also established that nonliteral elements of expression in computer programs are protected under the same principles that protect nonliteral elements of expression in other literary works — and, indeed, in all copyrighted works. The Third Circuit established this basic principle in the context of software in *Whelan Assocs., Inc. v. Jaslow Dental Laboratory, Inc.*: “copyright protection of computer programs may extend beyond the programs’ literal code to their structure, sequence, and organization . . . .” 797 F.2d 1222, 1248 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

The two other principal Court of Appeals cases that have addressed the issue at length are in accord with *Whelan* on this point. As the Second Circuit stated in *Computer Associates Int’l, Inc. v. Altai, Inc.*, “if the non-literal structures of literary works are protected by copyright; and if computer programs are literary works, as we are told by the legislature; then the non-literal structures of computer programs are protected by copyright.” 982 F.2d 693, 702 (2d Cir. 1992). This is nothing more than the application of general copyright principles. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir 1930), *cert. denied*, 282 U.S. 902 (1931).

Recently, in *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, the Tenth Circuit stated that "*Whelan* is premised upon traditional principles of copyright law, and its conclusion that the structure of a program may be protectable is sound." 9 F.3d 823, 840 (10th Cir. 1993). See also *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.*, 886 F.2d 1173, 1177 (9th Cir. 1989) (holding that nonliteral elements of computer programs "including the structure, sequence and organization and user interface . . . may be protected by copyright where they constitute expression rather than ideas"); *Lotus Development Corp. v. Paperback Software Int'l*, 740 F. Supp. 37 (D. Mass. 1990); Nimmer Declaration at ¶¶ 16, 25, 28 ("CONTU had no views, and made no recommendations which would negate the availability of copyright protection for the detailed design, structure and flow of a program under the copyright principles that make copyright protection available, in appropriate circumstances, for the structure and flow of a novel, a play or a motion picture."); Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer Generated Works: Is Anything New Since CONTU?*, 106 Harv. L. Rev. 977, 1032-34 (1993) (the author was a member of CONTU who served on its software subcommittee) ("Miller"). Cf. *Plains Cotton Cooperative Assoc. v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256 (5th Cir.), cert. denied, 484 U.S. 821 (1987) (court, declining to "embrace" *Whelan*, finds nonliteral elements in plaintiff's program to have been dictated by "externalities of the cotton market," and thus not protectible); *Synercom Technology, Inc. v. University Computing Co.*, 462 F. Supp 1003 (N.D. Tex. 1978) (nonliteral structure of "input formats" not protectible).

**C. To Apply Special Rules to Computer Programs Would Be Contrary to Congressional Intent and the Case Law**