

Patent Strategy and Control in the Early History of Software: The Story of IBM

By Gerardo Con Diaz

By the 1970s, International Business Machines (IBM) had become one of the most vocal opponents of software patents in the United States. The firm repeatedly argued that computer programs are nothing but texts, and that they therefore fall within the exclusive purview of copyright law. To contemporary legal scholars, such staunch opposition from a major computing firm may appear to be a historical anomaly, but no one in the computing industry at the time was surprised by IBM's position. In this talk, I argue that IBM became this industry's first and most powerful opponent of software patenting because its efforts to comply with the country's antitrust law had weakened its control over its own patent portfolio. This is a new and unpublished argument I am developing for my first book, a history of software patenting in the United States under contract with Yale University Press.

The talk uses IBM's opposition to software patenting as a case study on the historical relationships among patent licensing and control, antitrust law, and market power. It follows the firm's managers and lawyers from the mid-1950s until the mid-1970s, as they crafted and launched long-term legal strategies. In 1956, IBM signed a consent decree in order to avoid antitrust prosecution from the United States Department of Justice. The decree ordered IBM to license its patents to nearly anyone who asked, and it allowed potential licensors to turn to a federal court if IBM failed to set reasonable fees. However, starting in the mid-1960s, small software firms across the country started to entertain the idea of patenting and selling their computer programs for the first time in history. In this context, IBM's lawyers and managers agreed that software patenting could wreak havoc on their firms' market power.

Biography

By Gerardo Con Diaz

Gerardo Con Diaz is an Assistant Professor of Science and Technology Studies at the University of California, Davis and an Affiliated Fellow at Yale Law School's Information Society Project. His first book, a history of software patenting in the United States, is under contract with Yale University Press. Con Diaz received a Ph.D. in History (History of Science and Medicine) from Yale University in 2016. His work on the history of software intellectual property has won competitive fellowships and prizes from the Society for the History of Technology, the Institute of Electrical and Electronics Engineers, the Charles Babbage Institute, and the Smithsonian National Museum of American History.

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APPOINTMENTS AND AFFILIATIONS

University of California, Davis Assistant Professor, Science and Technology Studies (June 2016-)

Yale Law School Affiliated Fellow, Information Society Project (June 2016-)

EDUCATION

Yale University Ph.D., History (History of Science and Medicine), 2016 M.A., M.Phil., History (History of Science and Medicine), 2014

University of Cambridge, Trinity College M.Phil., History and Philosophy of Science, 2009

Harvard University B.A., magna cum laude, Mathematics, 2008

PUBLICATIONS

(SINGLE-AUTHORED) *Books Intangible Inventions: A History of Software Patenting in the United States (to be published by Yale*

University Press in spring 2019)

Peer Reviewed Articles “The Text in the Machine: American Copyright Law and the Many Natures of Computer

Programs, 1974-1978,” *Technology & Culture* 57:4 (October 2016): 753-779. Winner of the Society for the History of Technology’s Levinson prize.

“Contested Ontologies of Software: The Story of Gottschalk v. Benson, 1963-1972,” *IEEE Annals of the History of Computing*, 38:1 (January-March 2016): 23-33.

“Embodied Software: Patents and the History of Software Development, 1946-1970,” *IEEE Annals of the History of Computing* 37:3 (July-September 2015): 8-19.

Other “Antitrust at CBI: Engaging with the Archival Holdings on US v. IBM,” *Newsletter of the Charles Babbage Institute, Spring 2015.*

“Think Piece: Ownership and the History of American Computing,” *IEEE Annals of the History of Computing* 34:2 (April-June 2012): 86-88.

(In preparation) “The Intangibility of Computation: Halliburton v. Walker and the Making of Process Patents in the United States,” for submission to *Isis*.

FELLOWSHIPS AND PRIZES

John Addison Porter Prize, Yale University, university-wide prize for best-written work in any field of general human interest

Brooke Hindle Postdoctoral Fellowship in the History of Technology, Society for the History of

Technology (SHOT)

Samuel Eleazar and Rose Tartakow Levinson Prize, Society for the History of Technology
(SHOT), prize for the best first article by a new scholar

Adelle and Erwin Tomash Fellowship in the History of Information Technology, Charles Babbage

Institute, University of Minnesota

IEEE Life Members' Fellowship in the History of Electrical and Computing Technology, IEEE History

Center, Institute of Electrical and Electronics Engineers

Lemelson Center Fellowship, Smithsonian National Museum of American History

Rovensky Fellowship in Business and Economic History (prize awarded, funds declined), Business

History Conference

John Morton Blum Fellowship for Graduate Research in American History and Culture (declined),

Graduate School of Arts and Sciences, Yale University

PROFESSIONAL ACTIVITIES AND SERVICE (SELECTED) Editorial Boards Member of the Editorial Board, IEEE Annals of the History of Computing (August 2016- present) Book Reviews Editor, IEEE Annals of the History of Computing (October 2016-present) Contributing Editor, Technology's Stories (2015-present)

Peer Reviewer IEEE Annals of the History of Computing Information & Culture

Special Interest Group in Computers, Information, and Society (SIGCIS) Member of the 2016 Annual Meeting Program Committee (2015-2016) Communications Officer (2015-present)

Professional Memberships Society for the History of Technology History of Science Society Society for the Social Studies of Science Law and Society Association Business History Conference