1   The Honorable Thomas S. Zilly

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7   UNITED STATES DISTRICT COURT
                WESTERN DISTRICT OF WASHINGTON
                         AT SEATTLE
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10   TIM and PENNY PATERSON, husband and   Case No. 2:05-CV-01719-TSZ
     wife and the marital community thereof,

11   Plaintiffs,

12   vs.

13   LITTLE, BROWN AND COMPANY, a   PLAINTIFFS' RESPONSE TO
     Massachusetts state corporation, TIME   DEFENDANTS' MOTION FOR
14   WARNER BOOK GROUP, a Delaware state   SUMMARY JUDGMENT
     corporation, HAROLD EVANS
15   ASSOCIATES LLC, a New York state   NOTED FOR MOTION APRIL 20,
     limited liability company, HAROLD EVANS, 2007
16   and DAVID LEFER,

17   Defendants.

18

19   COME NOW Plaintiffs Tim and Penny Paterson ("Paterson" or "Plaintiff"), by and

20   through their attorneys, D. Michael Tomkins and Dietrich Biemiller, and respectfully request

21   that Defendants' Motion for Summary Judgment be denied.

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23   PLAINTIFFS' RESPONSE TO
     DEFENDANTS' MOTION FOR   LAW OFFICES OF
     SUMMARY JUDGMENT - 1   D. Michael Tomkins, P.S.
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I.   DISPUTED FACTS

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In June of 1978, Plaintiff Tim Paterson ("Plaintiff") began working as a computer

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engineer at Seattle Computer Products (SCP), which conducted its business out of Tukwila,

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Washington.

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While employed at SCP, Plaintiff began designing an 8086 CPU card for S-100

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microcomputers. After its first prototypes worked in May 1979, SCP contacted Microsoft to

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obtain 16-bit software for its new computer. Plaintiff packed up the prototype he designed and

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went to Microsoft with the intent of getting the Stand-Alone Disk BASIC to run on it.

10

By November 1979, SCP began shipping its 8086 computer system with the Microsoft

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Stand-Alone Disk BASIC as the only software to run on it. However, this software was only

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useful to a specific group of computer users and was not set up to serve the real needs of

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commercial users. SCP then set out to find a software base for its machine that would make it

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more useful for the public. SCP needed a general-purpose operating system.

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Tim Paterson made a proposal to the owner of SCP. That proposal was for SCP to take

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the initiative and write its own operating system. Paterson, who graduated with a bachelors

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degree in Computer Science, proposed a two-phase software development project: first, to

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create a quick and dirty operating system to fill the immediate need for SCP's 8086 computer;

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and, second, to create a much more refined operating system that would be made available in

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both single-user and multi-user version. SCP entrusted Paterson with the task of creating the

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proposed operating system, which later became known as DOS (Disk Operating System).

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1   Plaintiff's primary objective in the design of DOS was to make it easy as possible for

2   software developers to write applications for it. To achieve this, Plaintiff sought to make the

3   Application Program Interface (API) compatible with CP/M. CP/M's compatibility with the

4   API was key to enabling automated translation of 8-bit programs into 16-bit programs. As it

5   was, CP/M could not be run on 16 bit chips. Also, it was hoped that the familiarity of the

6   CP/M-style API would make it easier for developers to learn to write programs for DOS. The

7   API, however, was not the same as the underlying code. It was simply a veneer, a set of

8   labels, which initiated the processes of the underlying code.

9   The secondary objective in the design of DOS was to make it fast and efficient, so it

10 was written entirely in 8086 assembly language. Plaintiff was particularly concerned about the

11 way files were organized on disk. Plaintiff felt that the format used by CP/M was a significant

12 bottleneck so he turned to the Microsoft Stand-Alone Disk BASIC and used a File Allocation

13 Table.

14   Between April and July of 1980, Plaintiff was able to spend about half of his time

15 working on 86-DOS. It began shipping with the 8086 computer system in August of 1980.

16   SCP approached Microsoft with a proposal to adapt its software to run under DOS.

17 Microsoft came back with a different proposal, which included Microsoft marketing DOS for

18 SCP. However, in July of 1981, Microsoft offered to buy DOS from SCP and subsequently

19 did.

20   On or about 2004, Defendants Little Brown and Time Warner published and

21 distributed a book written by Defendant Harold Evans ("Defendant, or Evans"). This book,

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1 entitled "They Made America" ("book"), contains a section on Gary Kildall. In that section of

2 the book, Defendant Evans asserted that Mr. Kildall was the "inventor" of DOS. This is false.

3 It is known in the computer world and the public in general that DOS was invented by Plaintiff

4 Tim Paterson.

5   The book makes other false claims: either directly, or by insinuating the existence of

6 non-disclosed facts. Evans claimed that Mr. Paterson's work:

7   • was "a rip off;"

8   • that "The CP/M machine code was taken apart, using CP/M's own DDT [its debugger],

9   to determine the internal workings of CP/M in order to make a clone of CP/M

10   operation;"

11   • that Paterson took "a ride" on Kildall's system;

12   • that Mr. Paterson appropriated the "look and feel" of a competing operating system and

13   its utilities;

14   • that Mr. Paterson copied most of the top part of Kildall's operating system (the Int 21

15   commands that allowed the operating system to interact with the application program);

16   • that the Int 21 commands were the heart of Kildall's system;

17   • was a copy of Kildall's work, and was stolen from him; and

18   • that Kildall could have prevailed in a suit against Paterson, but refrained from doing so

19   because he was a gentleman.

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II.   ARGUMENT AND AUTHORITY

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A. Summary Judgment Standard

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Summary judgment is appropriate where no issues of material fact exist, and only

4 questions of law remain to be determined. *State Farm Insurance v. Emerson*, 102 Wn.2d 477,

5 687 P.2d 1139 (1984). Before granting a motion for summary judgment, the Court must

6 consider all facts submitted and make all reasonable inferences from the facts in a light most

7 favorable to the non-moving party. See, *Hanz v. State*, 105 Wn.2d 302, 311, 714 P.2d 1176

8 (1986).

9

Here, all disputed facts must be construed in favor of Mr. Paterson.

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B. Mr. Paterson is a private individual, not a public figure.

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In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974),

13 the U.S. Supreme Court established the rule for determining the breach of the duty of care that

14 the plaintiff must demonstrate in order to recover damages from a defendant for the

15 publication of a libelous falsehood. If the complainant is a public figure or a public official,

16 they must prove that the statement was made with knowledge of its falsity or with a reckless

17 disregard of the statement's falsity. If the complainant is a private individual, then each state

18 may determine the standard to be applied provided that the applicable standard is no less than

19 negligence. In Washington, the standard for a private individual is negligence. *Taskett v.*

20 *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81, 85 (1976); *Caruso v. Local Union No.*

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1   *690 of Intern. Broth. Of Teamsters, Chauffers, Warehousemen and Helpers of America,* 100

2   Wash. 2d 343, 670 P.2d 240, 245 (1983).

3   Whether or not a party is a public figure is a question of law which must be decided by

4   the court. *Wolston v. Reader's Digest Ass'n, Inc.*, 578 F.2d 427, 429 (D.C. Cir. 1978), rev'd,

5   443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979) (rev'd on other grounds with Supreme

6   Court finding that plaintiff was not a public figure); *Greenberg v CBS Inc.*, 69 A.D.2d 693,

7   703, 419 N.Y.S.2d 988, 993 (2d Dep't 1979).

8   Furthermore, "[t]he burden of proof with respect to the status of the plaintiff is on the

9   media defendant." *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551 (4th Cir. 1994).

10   Defendant Evans has not met this burden.

11   **1.   Mr. Paterson is not a "general purpose" public figure.**

12   A general purpose public figure is defined as:

13   [A] person whose name is immediately recognized by a large percentage of the
          relevant population, whose activities are followed by that group with interest, and
14   whose opinions or conduct by virtue of theses facts, can reasonably be expected to be
          known and considered by that group in the course of their own individual decision-
15   making.

16   *Harris v. Tomczak,* 94 F.R.D. 687, 700-01 (E.D. Cal. 1982)

17   A "general purpose" public figure is much less common than a "limited purpose"

18   public figure.

19   It has been noted that "a general public figure is a well-known 'celebrity,' his name a

20   'household word.'" *Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d 1287, 1294 (D.C.

21   Cir. 1980). This test is to be strictly construed. As the Court in *Gertz* held, "[a]bsent clear

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1   evidence of general fame or notoriety in the community, and pervasive involvement in the

2   affairs of society, a public personality should not be deemed a public personality for all aspects

3   of his life." *Gertz,* at 352.   Courts have uniformly held that the class of people who are

4   general purpose public figures is limited. (*Waldbaum,* 627 F.2d at 1292, "the general public

5   figure is a rare creature;" *Wolston,* 443 U.S. at 165, "class of general purpose public figures

6   are a 'small group of individuals'")

7   Here, Evans has not asserted that Mr. Paterson is a general public figure- at most, he

8   states, while presenting no real evidence thereof, that Mr. Paterson has thrust himself into a

9   public controversy, claiming that this makes him a "limited purpose" public figure.

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11   **2.   Mr. Paterson is not a "limited purpose" public figure.**

12   Evans claims that Mr. Paterson has, through his actions, thrust himself into a long-

13   standing controversy concerning the paternity of DOS. However, this controversy, however

14   long standing, was between Kildall and Bill Gates. Further, it did not affect any large swaths

15   of the population, and was at interest only to a relatively small group of computer aficionados,

16   until the publication of Mr. Evans' book.

17   A limited purpose public figure is defined as "an individual [who] voluntarily injects

18   himself or is drawn into a particular public controversy and thereby becomes a public figure

19   for a limited range of issues." *Gertz*, at 351.   The Supreme Court focused not just on the

20   question of whether there was a public controversy, but on the nature and extent of a person's

21   public involvement in it.

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1   The test for determining whether a person is a limited purpose public figure

2   incorporates several factors.

3   A defendant must show that the plaintiff has: (1) successfully invited public attention

4   to his views in an effort to influence others prior to the incident that is the subject of litigation;

5   (2) voluntarily injected himself into a public controversy related to the subject of the litigation;

6   (3) assumed a position of prominence in the public controversy; and (4) maintained regular

7   and continued access to the media. *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 136-

8   37 (2d Cir. 1984).

9   At most, Evans can point to a couple of articles in trade journals that refer to Mr.

10   Paterson's role in the development of DOS; and one letter to the editor where Mr. Paterson

11   takes issue with Kildall's characterization of his work as derivative. This fails to rise to the

12   level of becoming a "public controversy," and to the extent that it is, can hardly be called a

13   successful invitation of public attention to it.   Mr. Paterson likewise cannot have assumed a

14   position of prominence in this "public" controversy; that office rests with Mr. Gates. Nor can

15   they show regular and continued access to the media.

16   As Mr. Evans has failed in his burden to establish that Mr. Paterson is anything other

17   than a private individual, all Mr. Paterson need show is that Mr. Evans acted negligently in

18   publishing his false, defamatory comments. This, he can do.

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C. Evans' statements are false, and constitute libel per-se.

1. The Statements are libelous per-se.

"A publication which tends to expose a living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse, or to injury him in his business or occupation, is libelous per se." *Purvis v. Bremer's, Inc.* 54 Wash.2d 743, 344 P.2d 705 (1959), RCW 9.58.010.

Mr. Evans accused Mr. Paterson of "copying" Killdall's code verbatim, "taking a ride" on Kildall's work, of "ripping off" that work, which he equated in his deposition with outright thievery. *See Exhibit A, excerpts of Deposition of Harold Evans.*

"In determining whether a publication can be defamatory, it must be construed in sense in which it would ordinarily be understood by its readers." *Purvis*, at 751, citing *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P.2d 847 (1933). Here, the defamatory nature of the statements is absolutely clear. Evans accused Paterson of stealing Kildall's ideas. Any ordinary reader of the defamatory statements would hate Paterson, ridicule him, hold him in contempt and distrust- both in his business dealings and otherwise.

Evans further reports in numerous instances that Kildall could have sued over these actions, and would have prevailed, but chose not to do so because he was too nice, and too much a gentleman. This presents the innuendo that Kildall's potential suit had merit.

Publication of these accusations in Evans' book can only be considered as exposing Mr. Paterson to hatred, contempt, ridicule and obloquy. Anyone who would consider doing business with Mr. Paterson currently would be faced with these accusations, and would be

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1   given pause about Mr. Paterson's honesty and fair dealing. Are the products Mr. Paterson

2   selling now his own, or did he "rip off" those ideas too? It is abundantly obvious that these

3   comments deprive Mr. Paterson of the benefit of public confidence, and injure him in his

4   business and occupation.

5   **2.   The statements are false.**

6   But are the statements made by Evans true? They are not.

7   **a.   Int-21 was not the heart of Kildall's innovation.**

8   First, Evans describes Kildall's Int-21 API (Application Program Interface) calls, "the

9   heart of his innovation," and Paterson's use of them copying, cloning, ripping off, stealing

10 from, Kildall. However, as clearly described by Professor Lee A. Hollaar, an expert witness in

11 this case, **Mr. Killdall did not have an Int-21 mechanism in his CP/M software**. *See*

12 *Declaration of Professor Lee A. Hollaar.* He utilized a "CALL 5" mechanism to perform that

13 function. The use of the "Int-21" instruction occurred in 86-DOS before CP/M, or any other

14 Digital Research operating system. If anything, it could just as easily be claimed that when it

15 first appeared in Kildall's CP/M-86, written after 86-DOS, it was because Kildall had

16 "reworked" and "adopted" it from Paterson's work. *Id.*

17   Computer operating system "calls," which provide functions for application programs,

18 were not an innovation pioneered by Kildall. In fact, Kildall's CP/M "borrowed extensively"

19 from Digital Equipment Corporation's DEC PDP-10 system. *Declaration of Hollaar, p. 10.*

20 The use of an interrupt or subroutine call to a specified location was common to the operating

21 systems that Kildall used before and during his development of CP/M. *Id.* Likewise, the

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"DDT" debugger program used by Kildall was based on a DEC-supplied program by the same name.

The use of a colon following a device name is also taken directly from the PDP-10 operating system, like many of the device names in CP/M. *Id, at 11. (See also Exhibit B, History of CP/M, Online Software Museum, "CP/M was developed on Intel's 8080 Emulator under DEC's TOPS-10 operating system, so naturally many parts of CP/M were inspired by it, including the eight character filenames with a three-character extension…")*

Not only is Int-21 *not* the heart of Kildall's system; his system did not have Int-21 in it in the first place. Mr. Paterson was the first one to use them, at Intel's recommendation. Evans' assertion that Paterson "stole" them from Kildall is clearly false.

b.   Paterson did not copy verbatim vast swaths of Kildall's code.

The gravest of Evans' defamatory statements about Mr. Paterson was that Paterson somehow took Kildall's software code and copied it bodily. Evans takes this accusation, made by Kildall, and adopts it as true. Evans relies upon no real evidence of this, but merely reports from other sources and from Kildall's memoirs.

Mr. Paterson denies this, and claims that he wrote DOS. Professor Hollaar, his expert witness, who incidentally was the expert witness in *Caldera Inc. V. Microsoft Corp.*, a case relied upon heavily by Mr. Evans, concurs: Paterson wrote DOS, without resorting to CP/M's code. *See Declarations of Paterson and Hollaar.*   This alone should be sufficient admissible evidence to defeat Evans' Summary Judgment motion.

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1   Evans, in his attempt to show that his accusations of thievery are true, points to

2   statements made by Mr. Paterson that he utilized certain labels in his own code to promote

3   translation compatibility. This is presented as some kind of admission that he stole the code.

4   This is patently false.

5   API calls, even if they were a part of Kildall's CP/M, were simply commands that

6   instructed the operating system to perform certain tasks. The code for the tasks themselves,

7   were completely different. *Declaration of Hollaar, Declaration of Paterson.* "Calls" are

8   merely labels, a veneer, placed on top of the code, that trigger actions for the actual code to

9   perform. The code these calls triggered was completely different. Evans confuses use of these

10   labels as use of the underlying function and code. *See Declaration of Paterson.*

11   Translation compatibility, a goal that Mr. Paterson admits to having, was required in

12   order to allow programmers to translate their 8 bit programs into 16 bit programs that would

13   operate on the operating system. Mr. Paterson could just as easily labeled the actions as

14   something else, but he would have run the risk that programmers, unwilling to start from

15   scratch with another set of labels, would not adapt their programs to the operating system.

16   Evans has used the analogy of someone needing a car, but since the owner wouldn't

17   sell it, the person was forced to take it. This analogy is not instructive. It implies not only that

18   an entire car was taken, but that it was stolen.

19   A better analogy, described by Mr. Paterson in his Declaration, is this: someone in the

20   very early days of automobiles wanted to design a better car. Existing cars had brakes, which

21   consisted of a pedal that when depressed would force a stick into the ground. The designer

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1 also had to use the concept of stopping a car, and to use the label "brake," but thought it would

2 be better to cause pads to adhere to discs attached to the wheels. The label was the same, the

3 pedal being depressed was the same, but the mechanism by which the function was

4 accomplished was completely different. Same label, same trigger, but totally and

5 fundamentally different mechanics.

6   Likewise, Paterson did sit down with a list of the "labels" that CP/M used, and decided

7 to use similar labels to trigger portions of his code, written by him exclusively. Saying that

8 these "labels" constituted stealing would be like saying disc was like stealing the operation of

9 a dragging stick, or stealing the concept of cars having to be stopped.

10   Those who design cars today put the gas pedal on the right and the brakes on the left.

11 They don't have to do this: they could just as easily put the brake pedal on the right and the

12 gas on the left; but doing it the other way is expected by the public and to do otherwise would

13 not only be unsafe, but go against convention.

14   Likewise, Mr. Paterson wanted to allow programmers the flexibility of translating their

15 old CP/M programs to run on his new operating system, and *had* to use the labels to allow the

16 software to effectively conduct a translation to run on the newer, 16 bit chips. This hardly

17 amounts to stealing (See c., below).

18   Most tellingly of all, Evans also knew that Kildall, in response to widespread copying

19 of his software in the late 1970's, had hidden a copyright message in his source code. *See*

20 *Exhibit C, excerpts of Research Notes of David Lefer, relied upon by Evans to draft "They*

21 *Made America," at p. 27.*

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1   Kildall wrote that the copyright message was cleverly hidden, and "you had to be a

2 very sophisticated programmer to remove that message. Not only that, if it was removed,

3 CP/M would not run because the operating system checked to see if the message was there

4 before starting, using an encryption scheme that worked quite well." *Id.*

5   Thus, Paterson *could not* have copied CP/M bodily, or the copyright message would

6 have popped up. Since 86-DOS operated with no copyright message, it could not have been

7 copied by Mr. Paterson as Kildall and Evans claimed. This was known by Evans, but

8 disregarded.

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10   c.   **Kildall could not have sued Paterson, even if he wasn't such a
                      gentleman.**

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12   While not specifically pled as a false statement, the allegation made by Evans that

13 Kildall could have sued Paterson under a "look and feel" theory but chose not to do so until

14 after the statute of limitations ran because he was a "gentleman" is also demonstrably false.

15 Evans included these ideas in his chapter in order to lionize Kildall, and demonize Paterson.

16   Evans's insinuation that Kildall had a valid claim that would have prevailed is flawed

17 for several reasons. First, he had no right to sue Paterson, Gates, or anyone else in connection

18 with the development of DOS. He had voluntarily waived the right to sue in his agreement

19 with IBM. *See Exhibit D, Contract with IBM*. Evans had this unambiguous contract in his

20 possession, and could have seen that Kildall's assertions to the contrary were provably wrong.

21   Evans further claimed that Kildall could have prevailed in a suit because "[t]he

22 copyright law of 1976 was not amended until 1981, specifically to cover the look and feel of

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1 software." However, *there was no amendment* to the United States copyright statutes in 1981.

2 *See Declaration of Hollaar, p. 4 at 17-19.* Nor were there any concurrent amendments that

3 dealt specifically with "look and feel," and there are *still* none. *Id.*

4 Even if Kildall had brought a claim against Paterson, he could not have prevailed. In

5 the landmark case *Synercon Technology v. University Computing*, 462 F.Supp 1003 (1978),

6 which also deal with input formats, the courts had already found that where only about 21

7 percent of the material in plaintiff's copyrighted computer program user's manual was based on

8 prior material, and where the remaining 79 percent was entirely original, plaintiff had

9 contributed something "recognizably its own" to prior treatments of the same subject, and its

10 copyright was not invalid merely because some parts of the whole were not independently

11 conceived. That court also used an automotive analogy- the familiar "H" pattern of an

12 automobile stick shift.

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21 The familiar "figure-H" pattern of an automobile stick is chosen arbitrarily by an auto manufacturer. Several different patterns may be imagined, some more convenient for the driver or easier to manufacture than others, but all representing possible configurations. The pattern chosen is arbitrary, but once chosen, it is the only pattern which will work in a particular model. The pattern (analogous to the computer "format") may be expressed in several different ways: by a prose description in a driver's manual, through a diagram, photograph, or driver training film, or otherwise. Each of these expressions may presumably be protected through copyright. But the copyright protects copying of the particular expressions of the pattern, and does not prohibit another manufacturer from marketing a car using the same pattern. Use of the same pattern might be socially desirable, as it would reduce the retraining of drivers. Likewise, the second manufacturer is free to use its own prose descriptions, photographs, diagrams, or the like, so long as these materials take the form of original expressions of the copied idea (however similar they may be to the first manufacturer's materials) rather than copies of the expressions themselves. Admittedly, there are many more possible choices of computer formats, and the decision among them more arbitrary, but this does not detract from the force of the analogy.

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Synercon, at 1013. See also *Declaration of Hollaar, at p. 8.*

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3   Based on *Synercon* and established copyright law, Paterson would have prevailed in a

4   suit if Kildall had brought an action against him. His use of similar call labels is directly

5   analogous to using an "H" pattern in a stick shift- socially desirable to facilitate ease of

6   programmers.

7   Later cases have further upheld and clarified the holding in *Synercon*. In *Computer

8   Associates Intern. Inc. v. Altai, Inc.*, 982 F.2d 693 (1992), the Second Circuit Court of

9   Appeals adopted the *scenes a faire* doctrine to apply to computer programs. They found that

10 it was not a violation of copyright if the following applies:

11   a programmer's freedom of design choice is often circumscribed by extrinsic
        considerations such as (1) the mechanical specifications of the computer on which a
        particular program is intended to run; (2) compatibility requirements of other programs
12   with which a program is designed to operate in conjunction; (3) computer
        manufacturers' design standards; (4) demands of the industry being serviced; and (5)
13   widely accepted programming practices within the computer industry.

14 *Altai,* at 709-710

15   Here, Paterson's use of a specific set of call labels were the product of compatibility

16 requirements of other programs (the translator would not have worked if the codes were not

17 referenced the same way), and by the demands of the industry being serviced (programmers

18 wanted the same call labels so that their programs, using widely accepted programming

19 practices, could be translated to a 16 bits and run on DOS).

20   Finally, if Kildall claimed that he had an actionable claim on a "look and feel" theory,

21 why would he need that theory at all? "Look and feel" claims are based upon the presumption

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1 that the underlying code is different, but the end result appears the same as the original

2 program. *See Exhibit C, pp. 56-59, the GEM suit.* If Paterson had bodily lifted code to the

3 extent that Kildall claimed, why not just sue him directly for outright copyright infringement?

4

5   **3. Evans' statements are not "opinion."**

6   After his attempt to portray his statements as true, Evans turns to an equally

7 unsuccessful attempt at portraying other of his statements as non-actionable opinion. Evans

8 attempts, citing the Washington Division 2 Court of Appeals in *Schmalenberg v. Tacoma*

9 *News, Inc.*, 87 Wn.App 579 (1997), to define "opinion" as "a statement that does not express

10 or imply proveable facts." This vastly simplifies and mischaracterizes the law.

11   Prior to *Schmalenberg*, the Supreme Court of Washington adopted a three-part test to

12 determine whether a statement is opinion or not.

13   To determine whether a statement should be nonactionable [opinion], a court should
           consider at least (1) the medium and context in which the statement was published, (2)
14   the audience to whom it was published, and (3) whether the statement implies
           undisclosed facts.
15
16   *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986).

17   The Washington Supreme Court first described the principle of the medium and

18 context of the examined statement. It reasoned that statements made in certain contexts, such

19 as editorial pages or political debates, were more likely to include opinions than contexts that

20 one would more normally expect facts. *Dunlap*, at 539. Here, the statements that accused

21 Paterson of moral turpitude, thievery, and ripping off were made explicitly as facts, in a

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1   scholarly, historical documentary book. One expects statements of truth in history books, not

2   the opinions found in an editorial page, unless easily and specifically identified as opinon.

3   Next the Supreme Court looked at the nature of the audience. In public debates, they

4   reasoned, the audience is prepared for mischaracterizations and exaggerations, and would be

5   likely to view representations with awareness of a subjective bias by the speaker. *Id.* Here,

6   the audience expected impartial, fair reporting. The book was presented as a definitive

7   history. The "history" Evans reported was Paterson was a thief, and benefited from his theft.

8   The third factor, which the Court characterized as perhaps the most crucial, was

9   whether the statement implied undisclosed facts that supported it. *Id.* That is exactly the case

10   here. Evans claimed that Paterson took Kildall's code and copied it; made it into a "slapdash

11   clone;" was a knockoff; was a "ripoff," that he "took a ride" on Kildall's system; that some

12   undisclosed person had done an analysis of the code and found it to be almost identical. All of

13   these imply undisclosed facts: that Paterson had access to Kildall's code; that he copied that

14   code; and someone caught him doing it. All of these are false, and all the statements are made

15   by Evans by implying that they are based on facts. The facts, alleged by Evans, are found by

16   referring to the commentaries of others, or by mischaracterizing and taking out of context the

17   statements made by Paterson.

18   Nobody has taken the code of 86-DOS and compared it to the code of CP/M. Kildall

19   has purported to do so, and has even produced, attached to his memoirs as "Appendix B," "A

20   Comparison of CP/M and MS-DOS." *See Exhibit E, marked as "Confidential."*

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1   This comparison lists three pages of "the first 26 API function calls" that Kildall

2   claims were "taken by Paterson directly into MS-DOS." The first page is CP/M, the second is

3   CP/M-86, and the third is MS-DOS. A quick comparison of the three pages shows remarkably

4   similarity between CP/M and CP/M-86, not surprising because Kildall wrote them both.

5   There are some similarities between CP/M and MS-DOS, as found on the third page, but only

6   those that constituted the "labels." Kildall's accusations imply proveable facts, that the code

7   underlying the "labels" was copied, and he goes so far as to express that concept, but Kildall

8   fails utterly to provide any such proof, and Evans has presented no other proof from any other

9   source- only echoes of other unsupported accusations.

10   Evans' statements, adopting Kildall's as true, were made in the venue of a factual

11   history to a worldwide audience, and clearly imply facts. In no way can any of these libelous

12   per-se statements be construed as opinion.

13   Evans goes on to claim that his statements constituted opinion because they were

14   shared by others. His reliance on this as exculpating him is misguided. Under Washington

15   law, a person who republishes defamatory statements made by another does not escape

16   liability for the defamation, even if the republisher is careful to ascribe the statements to the

17   original speaker. *Auvil v. CBS 60 Minutes*, 800 F.Supp 928, 931, (E.Dist.Wash 1992), citing

18   *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 178, 736 P.2d 249 (1987). Evans cannot hide

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1   behind quoting other sources for his defamatory statements, and neither can he claim them to

2   be opinion just because others might claim them to be.[1]

3

4   **4. Paterson need not detail special damages to survive summary judgment.**

5   Evans argues that because his statements do not constitute libel per-se, and Paterson

6   has not specifically pled libel per-se, that Paterson must allege and prove special damages.

7   Washington, however, is a notice pleading state. *Bryant v. Joseph Tree, Inc.*, 119

8   Wn.2d 210, 222, 829 P.2d 1099 (1992). The civil rules, then, require only a short, plain

9   statement of the claim showing that the plaintiff is entitled to relief. *Id.* The notice pleading

10 rule anticipates that the parties will, through discovery, have the opportunity to learn in more

11 detail the nature of the complaint being made. *Id.* Finding that the claim is not pled, therefore,

12 is appropriate "only if the complaint alleges no facts that would justify recovery." *Wright v.*

13 *Jeckle,*, 104 Wn.App 478, 481, 16 P.3d 1268, *review denied,* 144 Wn2d 1011 (2001). So, a

14 court must accept not only Mr. Paterson's allegations but any reasonable inferences that may

15 be derived from those allegations as true. *Id.*

16   Paterson's complaint alleges the elements of libel per-se, and he argues that this court

17 find that the statements made by Mr. Evans are indeed libelous per-se.

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20 [1] See also: *Flowers v. Carville*, 310 F.3d 1118 (Nev. 2002); "…each repetition of a defamatory statement by a
    new person constitutes a new publication, rendering the repeater liable for that new publication…The law deems

21 the repeater to 'adopt as his own' the defamatory statement," every repetition of a defamatory statement is a
    publication in itself, even though the repeater states the source or resorts to the customary newspaper evasion "it

22 is alleged." The speaker cannot immunize a statement that implies false acts simply by couching it as opinion
    based on those facts.

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1   In Washington, however, courts have employed two different meanings for "libel per-

2   se." "The words may mean either (1) that the statement is libelous on its face, or (2) that it is

3   actionable without proof of special damage in certain situations." *Demopolis v. Peoples Nat.*

4   *Bank of Washington*, 59 Wn.App 105, 796 P.2d 426 (1990), citing *Caruso v. Local 690, Int'l*

5   *Bhd. Of Teamsters*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983). In Washington, a libelous per-

6   se statement is actionable without proof of special damages only if the defendant acted with

7   actual malice. *Caruso*, 100 Wn.2d at 354, basing its ruling on *Gertz v. Robert Welch, Inc.*

8   The Demopolis court noted, however, that the scope of *Gertz* was limited in *Dun &*

9   *Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755-63, 105 S.Ct. 2939, 86

10   L.Ec.2d 593 (1985), which held that damages could be presumed without a finding of actual

11   malice when the matters were purely of a private concern.

12   The Demopolis court further held that it was a question of fact whether a defendant

13   acted in actual malice, and therefore it was reversible error to dismiss a case for lack of proof

14   of special damages at the summary judgment level.

15   Reading *Demopolis* with the case at bar, then, if Paterson is found to be a private

16   individual instead of a public figure, special damages need not ever be described. If Paterson

17   is a public or limited public figure, he does need to prove special damages unless he can show

18   that Evans acted with actual malice, but if he can show actual malice, special damages still

19   need not be proven. Finally, even if Paterson is unable to establish actual malice at this time,

20   the Court is prohibited from awarding Evans summary judgment on this issue, as actual malice

21   is a question of fact for a jury.

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23   PLAINTIFFS' RESPONSE TO
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1   Paterson can, however, show that Evans acted with actual malice.

2

3   **D. Evans' statements were made with knowledge of, or reckless disregard of, the
     truth.**

4

5   If Paterson is found to be a public figure or a "limited public figure," in order for him to

6   eventually prevail at trial he must prove that Evans acted with "actual malice." He need not

7   prove this to survive summary judgment, however. *Demopolis,* at 117.[2]

8   The concept of malice in a defamation claim is far different than the concept of malice

9   for other torts. "The phrase 'actual malice' is unfortunately confusing in that it has nothing to

10   do with bad motive or ill will." *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S.

11   657, 667, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

12   A statement is made with "actual malice" when it is made with knowledge that it was

13   false or with reckless disregard of whether it was false or not." *New York Times Co. v.*

14   *Sullivan*, 376 U.S. 254, 278-80, 84 S.Ct. 710, 725-726, 11 L.Ed.2d 686 (1964).

15   In Washington, to establish actual malice, "the plaintiff must prove that the defendant

16   either knew the expression was false or recklessly disregarded obvious warning signs that it

17   contained falsities." *Harris v. City of Seattle*, 315 F.Supp.2d 1105 (2004), citing *Flowers v.*

18   *Carville*, 310 F.3d 1118 (Nev. 2002)*., Hoppe v. Hearst Corp.*, 53 Wn.App. 668, 676, 770 P.2d

19   203 (1989).[3] Reckless disregard "is not measured by whether a reasonably prudent man

20   _____

21   [2] See also *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), "The finder of fact
     must determine whether the publication was indeed made in good faith."

22   [3] RCW 9.58.020 describes when malice is to be presumed: "Every publication having the tendency or effect
     mentioned in RCW 9.58.010 shall be deemed malicious unless justified or excused. Such publication is justified

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1   would have published, or would have investigated before publishing.   There must be

2   sufficient evidence to permit the conclusion that the defendant in fact entertained serious

3   doubts as to the truth of [the] publication." *Id,* quoting *St. Amant v. Thompson*, 390 U.S. 727,

4   731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

5   "Reckless disregard" cannot be encompassed in one single, finite, infallible definition.

6   *St. Amant,* at 730-731. "Inevitably, its outer limits will be marked out through case-by-case

7   adjudication." *Id.*

8   What evidence constitutes a sufficient showing of a knowledge of falsity or a reckless

9   disregard of warnings that the statements were false is a fact specific determination, which

10 must be determined upon a review of the totality of the evidence. One of the most thorough

11 reviews of the sufficiency of an evidentiary showing is found in *Harte-Hank Communications,*

12 *Inc. v. Connaughton,* 491 U.S. 657, 667, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

13   There, the Supreme Court, in its review of the totality of the evidence, found actual

14 malice because the defendant had consciously avoided discovering the truth. The facts that the

15 Court found were supportive of this conclusion were that the plaintiff had denied the charges,

16 there were others who supported the plaintiff's position, certain claims that the defendant

17 made in support of his actions were inconsistent, there were concerns about the veracity of the

18 declarant, the defendant had failed to review tapes made of an interview of the plaintiff even

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21 whenever the matter charged as libelous charges the commission of a crime, is a true and fair statement, and was
    published with good motives and for justifiable ends. It is excused when honestly made in belief of its truth and
    fairness and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any
22 person in respect of public affairs, made after a fair and impartial investigation.

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1   though they were available, and the fact that the defendant had failed to interview a key

2   witness. *Harte-Hanks,* at 691-692.

3   Evans likewise either knew the falsity of the statements he made, or consciously

4   avoided discovering the truth. Evidence of this is legion.

- Daniel Kelves, a Professor of History at Yale University, reviewed the chapter prior to publication at Mr. Evans' request. In his comments, he warned Mr. Evans: "The revision of the standard story about the origins of Microsoft's MS-DOS and how IBM screwed Kildall and CP/M is absolutely convincing. I think you should excerpt that and publish it independently in a place that will get a lot of attention. I wonder, though, if it would be worth trying to interview somebody from IBM about their side of the story, and try to find out why they wanted to favor MS-DOS and discriminate against CP/M. Otherwise, I'd suggest one caution. Beyond the MS-DOS/CP/M story, you credit Kildall with a lot of vision, for having been the first to conceive this and the first to conceive that. I have no specific knowledge with which to contradict any or all of those claims, but I do know that the history of technological innovation isn't usually so neat and single-fathered. I'd suggest hedging the claims somehow by, for example, attributing them to other authorities. Kildall was no doubt a key visionary but not likely to have been alone." *See Exhibit F.*

- Evans writes how Kildall was shocked and betrayed at the pricing that IBM set for CP/M: $240.00, instead of the $60.00 for PC-DOS. However, it was Kildall who set his own pricing. In materials produced by Evans, he included a "Digital Research News, First Quarter 1982." In that publication, Digital Research included an order form for CP/M-86, which priced their own product at $250.00. *See Exhibit G.*

- Evans drafted his chapter using notes made by his researcher, David Lefer. Lefer informed Evans that Kildall "borrowed from the TOPS operating system on the DEC PDP-10 he was using to create CP/M. Other influences found their way into CP/M code as well." Evans makes no mention of this, instead calling Kildall the sole creator of CP/M. *See Exhibit C, p. 14.*

- Lefer further cautions Evans: "In writing about this, Kildall clearly wants to imply that Gates used this copyrighted material when he built DOS for IBM, but this has not been proven. We have to be careful about implying Gates knew he was consciously stealing Kildall's work. We don't know, although Kildall believes he did. Evans ignores this caution as well. *Id, p. 24.*

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- Lefer calls Kildall's manuscript "largely, but not completely reliable." *Id, p. 32.*

- Lefer calls into question Kildall's ability to sue. He quotes Gerry Davis, who was Digital Research's attorney at the time, as saying "Be careful with that section that says I'm at fault for not suing. If it were ever published, I could sue, because I have a set of documents that demonstrate I did not tell him that at all." Evans continued to claim that Kildall could have sued. *Id, p. 34.*

- Lefer also calls into doubt the allegations that Paterson copied the first twenty six function calls directly and identically. He informs Evans, "I've looked at the list of MS-DOS functions and CP/M functions. Some are blatant copies, some slight alterations. I see only 21 that really resembled each other, though." He then provided these alleged "eerie similarities," which upon review, are nothing alike. Evans ran with Kildall's description, in spite of this. *Id, pp. 38-39.*

- Lefer quotes Tom Rolander, of Digital Research, as describing "important differences" between CP/M and DOS. He described many differences, and even stated that "QDOS [was] actually better in some ways." Lefer described these improvements. Evans was silent on these issues in his chapter. *Id, p. 40.*

- Lefer described one "excuse" as to why the two operating systems were similar was that there was a limited number of ways to construct an operating system using the same Intel chip. There were strict constraints imposed by the microprocessor chip, allowing only so many ways one could write it. Evans chose to ignore this explanation. *Id, p. 41.*

- Lefer repeated Kildall's contention that CP/M and 86-DOS were 60-70% the same code. He informed Evans that he didn't understand it, and suggested that Evans "ask Wharton about it." Evans did not, and chose simply to take Kildall's contention as gospel without verification by facts. *Id, p. 41.*

- Lefer warned Evans that "Kildall's feelings may have been poisoned over the years" regarding the decision not to sue. *Id, p. 45.*

- Lefer refers to the story about Kildall being invited to a CD-ROM conference by a Microsoft employee after Gates heard that Kildall was planning one. Kildall accuses Gates of being manipulative, an opportunistic person. Lefer then cautions Evans by writing: "One has to wonder whether Kildall really felt so abused at the time, or whether this is the bitterness of an advanced alcoholic speaking a decade later." This questioning of Kildall's motives and veracity is ignored. *Id, p. 55.*

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- Kildall is accused of appropriating the "look and feel" of a competitor's Graphical User Interface, and lawsuits are threatened by Apple. Kildall cleverly used this "stolen" product, GEM, to be a big seller in Europe. This entire series of events, unflattering to Kildall, was left out of Evans' chapter. *Id, p. 56-59.*

4

5

- Kildall released a product in 1987, called DR-DOS. Lefer writes, "Kildall must have loved the irony that he was now selling a clone of MS-DOS." *Id, p. 62*

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- Lefer quotes Tom Rolander as saying "The more the fortune and influence of Bill Gates grew, the more he [Kildall] became obsessed. Day and night, the film of that day played in his head. It wasn't even a question of money. What really hurt him was the myth. Gary felt that no one accorded any importance to what he had accomplished." Lefer continues, "In the early and mid 90s Gates was everywhere. Every time Kildall opened a magazine, he found Gates picture and articles hailing him as the founder of the PC revolution. It ate at him." *Id, p. 74.*

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- Lefer refers to an incident at the University of Washington Computer Science Department asking Gates to deliver a lecture instead of Kildall. "Kildall complained, but his old thesis advisor said his opposition to Gates' speaking sounded like 'sour grapes.' K writes, 'Well, that's exactly what it was, of that there's no doubt whatsoever." He continues: "Kildall grew embittered. He blamed Gerry Davis for not suing…Kildall resented Gates, not for becoming richer, but for taking credit Kildall felt was rightly his." *Id, p. 75.*

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- Evans had a copy of Kildall's memoirs, to which was attached "Appendix B, A comparison of CP/M and MS-DOS. Kildall provides three charts, which purport to show the similarities of his system to DOS. A review of the charts clearly shows no similarities beyond what were intended, and necessary for translation compatibility. *See Exhibit E, marked as Confidential.* Had he talked to Paterson, he would have seen another chart, which shows how clearly different the two systems were. *See Exhibit appended to Declaration of Tim Paterson.*

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- Appendix D consists of "Excerpts from the DRI and IBM Contract." A review of this document, in Evans' possession, clearly shows that DRI had waived any right to sue. In spite of the clear wording, protecting not only IBM but Microsoft and SCP, Evans reported that Kildall could have sued, and would have prevailed in such suit. *See Exhibit D, emphasis added, marked as Confidential.*

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1   • Evans admits that in spite of having the opportunity to do so, he never
      attempted to interview Tim Paterson. He stated that Paterson had said
2   everything he wanted to say on the issue on the public record. *See Exhibit A,*
      Excerpts from Deposition of Harold Evans, pp. 19-20, 52.
3

4   Most telling of all is this failure of Evans to pick up the telephone and interview Tim

5   Paterson. RCW 9.58.020 requires a "fair and impartial investigation" in order to make a

6   libelous statement excusable. If not excusable, it constitutes malice.

7   While failure to investigate, by itself, will not support a finding of constitutional

8   malice, it can be considered as a factor. Once doubt exists, the publisher must act reasonably

9   in dispelling it. *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 901 (9th Cir. 1992).

10   Courts have also found constitutional malice to exist where the means of investigating the

11   facts are easy, yet unexplored. *Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d

12   466, 477, 605 N.Y.S.2d 218, 626 N.E.2d 34 (1993). Malice has also been found where a

13   publisher adhered to a preconceived story in spite of evidence garnered that indicated the

14   falsity of the story. *Gertz v. Robert Welch Inc.*, 680 F.2d 527, 539 (7th Cir. 1982)(on remand

15   from Supreme Court, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), cert. den. 459 U.S.

16   1226, 103 S.Ct.1233, 75 L.Ed.2d 467 (1983).   It would certainly appear that Evans chose to

17   back Kildall's version of the story, in spite of glaring facts that showed otherwise.

18   Another important factor in play here in determining whether the defendant had a

19   "reckless disregard for truth," is just how trustworthy the source is- in this case, Gary Kildall.

20   If the defendant in fact entertained serious doubts as to the proof of his publication, such

21   subjective awareness of probable falsity may be found if there are obvious reasons to doubt

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1   veracity of an informant or accuracy of his reports. *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct.

2   1635, 60 L.Ed.2d 115 (1968).

3   Here, Evans was clearly warned that Kildall borrowed freely from other programs to

4   produce CP/M, yet claimed complete authorship; warned that Kildall was not completely

5   accurate; warned that Kildall was a bitter man, an alcoholic, who had an axe to grind; warned

6   that Kildall admitted that he had "sour grapes;" and was warned that fact after fact that Kildall

7   claimed to be true were demonstrably false. None of these warnings were heeded, and Evans

8   published the version of the story that accused Paterson of thievery.

9   All of this obviates that Evans acted with "actual malice," which at the very least

10   presents an issue of fact for a jury. Evans cannot prevail on summary judgment on these

11   grounds.

12

13   **E. Paterson's False Light Invasion of Privacy claim is recognized in Washington.**

14   Evans cites *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 473-74, 722 P.2d 1295

15   (1986) to stand for the proposition that Washington has not adopted the false light tort theory.

16   This is an erroneous reading of that case. The issue there was not whether the claim was

17   recognized in Washington, but what the statute of limitations for the claim was. The

18   Washington Supreme Court held that the statue of limitations for false light claims was two

19   years.

20   While the court did note that several states had refused to recognize the false light tort

21   altogether, Washington certainly has not done this.

22

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1   In fact, counsel for Evans was also the counsel of record for another false light claim

2   recently, before this very Court, and curiously never brought up any issue about the existence

3   of the false light tort. *Harris v. City of Seattle*, 315 F.Supp 1105 (W.D.Wash, 2004). The

4   false light claim is alive and well in Washington, as counsel for Evans knows, and has elected

5   to not instruct this Court.

6   **III.   CONCLUSION**

7   Plaintiff has easily defeated Defendant's large burden in order to, in good faith, allege

8   that there are no facts in dispute. In the case at bar, the disputed facts are numerous, and the

9   law turns heavily on these disputed facts.

10   What is not disputed is that Evans has said that Plaintiff copied CP/M; which word

11   "copied" within the context of the chapter, and clearly understood to a reasonable audience,

12   means "steal" and "theft;" and then supported this with hideous allegation with no facts. Tim

13   Paterson is the only person, let alone litigant, who can absolutely say with 100% certainty

14   what he did and how he did it. The book was written over five years, and if Evans and his

15   research staff, which had hundreds of thousands of dollars at their disposal in order to get it

16   right, could easily have done a "source code autopsy" on Paterson's DOS product, and

17   determine once and for all what, if anything, was misappropriated. There is no record of this

18   "autopsy" having been done, despite Evans' remarkable access to the Kildall family and

19   numerous other sources.

20   All Evans would have had to do to avoid crossing the line into actionable libel was

21   heed the warnings of his researchers; pick up the phone and interview Paterson; use language

22

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1   that was not per-se libelous; and attempt to report with balance the debate that continues to

2   rage amongst a tiny group of specially trained and interested computer historians that continue

3   to ask the question "who built the computer?"

4

5

6   Respectfully submitted this 20th day of April, 2007

7

8   /S/

9   _____

10   D. Michael Tomkins, WSBA # 4979
                           Attorney for Plaintiffs

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12

13   /S/

14   _____
                           Dietrich Biemiller, WSBA # 32171
                           Attorney for Plaintiffs

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