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## SOFTWARE TAXATION IN OHIO

by

ROBERT W. MCGEE\*

For more than a decade after the first software tax case was decided, computer software was uniformly classified as intangible for the purpose of sales, use, and personal property taxes, and therefore exempt from taxation.<sup>1</sup> Then, in 1983, the decisions began to go in the other direction, classifying software as tangible and therefore subject to taxation.<sup>2</sup> Ohio courts have played an early and continuing role in the debate over software taxation. This article provides a brief overview of software taxation in general, summarizes the role Ohio courts have played, and compares and contrasts the Ohio position on software taxation with that of other courts.

### TANGIBILITY

While the main thrust of this paper is on the evolution and development of software taxation in Ohio, it is best to begin with a brief overview of software taxation in general. The next few paragraphs are devoted to that end. The primary issue in software tax cases is tangibility. If software is viewed as tangible it is often subject to state sales, use, and property taxes; if classified as intangible, it is often exempt from tax. Several lines of legal reasoning have been used to justify classifying software as intangible and therefore exempt from tax.

Some courts have applied the "knowledge" rationale. This rationale states that what is significant for taxation purposes is that computer software is intangible knowledge contained on a tangible medium (e.g., a card, tape, or disk).<sup>3</sup> In other words, once the information on the tangible medium is transferred to the

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<sup>1</sup> The first case to address directly the software tangibility issue was *D.C. v. Universal Computer Assocs.*, 465 F.2d 615 (D.C. Cir. 1972). Some other early cases that held software to be intangible for the purpose of sales, use, or property taxes are *County of Sacramento v. Assessment Appeals Bd.*, 108 Cal. Rptr. 434 (Cal. Ct. App. 1973); *Greyhound Computer Corp. v. State Dep't of Assessments & Taxation*, 320 A.2d 52 (Md. App. 1974); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976) *Ala. v. Central Computer Servs.*, 349 So.2d 1160 (Ala. 1977); *First Nat'l Bank of Fort Worth v. Bullock*, 584 S.W.2d 548 (Tex. Ct. App. 1979); *First Nat'l Bank of Springfield v. Department of Revenue*, 421 N.E.2d 175 (Ill. 1981); *James v. TRES Computer Sys.*, 642 S.W.2d 347 (Mo. 1982). A number of cases involving data processing service bureaus also touch on the tangibility of computer software. Some of the most frequently cited cases are: *Accountants Computer Servs. v. Kosydar*, *Central Data Sys. v. Kosydar*, and *Andrew Jergens Co. v. Kosydar*, all consolidated at 298 N.E.2d 519 (Ohio 1973); *Citizens Fin. Corp. v. Kosydar*, 331 N.E.2d 435 (Ohio 1975); *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166 (Tex. 1977); *Miami Citizens Nat'l Bank & Trust Co. v. Lindley*, 364 N.E.2d 25 (Ohio 1977).

<sup>2</sup> See *Comptroller of the Treasury v. Equitable Trust Co.*, 464 A.2d 248 (Md. App. 1983); *Chittenden Trust Co. v. King*, 465 A.2d 1100 (Vt. 1983); *Citizens & S. Sys. v. S.C. Tax Comm'n*, 311 S.E.2d 717 (S.C. 1984).

<sup>3</sup> See *Universal Computer Assocs.*, 465 F.2d 615 (D.C. Cir. 1972); *Commerce Union Bank*, 538 S.W.2d 405 (Tenn. 1976).

computer, all that remains is the intangible knowledge.<sup>4</sup> The tangible medium is "merely incidental to the purchase [or use] of the intangible knowledge and information stored on the tapes."<sup>5</sup>

The "essence of the transaction" test is an expansion of the knowledge rationale outlined above.<sup>6</sup> Following the knowledge rationale, this test holds that where the transaction is in essence the purchase of an intangible, such as a custom or canned program, the transaction is exempt from taxation.<sup>7</sup>

The "relative value" test has also been applied to software tax cases.<sup>8</sup> This test recognizes software creation as a process involving both tangible and intangible elements. Most of the value of a software product is attributable to its intellectual content; the tangible medium used to store and transfer this knowledge--the card, tape, or disk--is an incidental cost. A program selling for \$50,000 might be stored on tapes or disks costing under fifty dollars, which indicates that the purchaser of the program is actually buying knowledge rather than a physical product.

A number of courts have applied the "mode of transmission" test.<sup>9</sup> This test has a few variations, but basically stands for the proposition that where the knowledge can be conveyed from the seller to the buyer without the use of a physical medium, the transaction involves the sale of intangible property. This transfer can occur, at least in theory, by having the seller's programmer give verbal instructions to the buyer's computer operator. A more practical approach is to transfer the program from the seller's computer to the buyer's computer directly, over telephone lines.<sup>10</sup> Using this mode of transmission can save \$30,000 if the sale of a \$500,000 program involves a six percent state sales tax.<sup>11</sup>

The analogy of software programs to films and phonograph records has also been made.<sup>12</sup> Although films and records have much in common with computer

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<sup>4</sup> *Universal Computer Assocs.*, 465 F.2d at 618.

<sup>5</sup> *Commerce Union Bank*, 538 S.W.2d at 408.

<sup>6</sup> See *First Nat'l Bank of Fort Worth v. Bullock*, 584 S.W.2d 548 (Tex. Ct. App. 1979).

<sup>7</sup> *Id.* at 550.

<sup>8</sup> See *Universal Computer Assocs.*, 465 F.2d at 619; *Commerce Union Bank*, 538 S.W.2d at 408.

<sup>9</sup> See *Universal Computer Assocs.*, 465 F.2d 615 (D.C. Cir. 1972); *Ala. v. Central Computer Servs.*, 349 So.2d 1160 (Ala. 1977); *Commerce Union Bank*, 538 S.W.2d 405 (Tenn. 1976); *First Nat'l Bank of Fort Worth v. Bullock*, 584 S.W.2d 548 (Tex. Ct. App. 1979).

<sup>10</sup> Some corporations use this mode of transmission to avoid paying sales tax.

<sup>11</sup> Whether an otherwise taxable event becomes nontaxable by use of this mode of transmission depends on state law.

<sup>12</sup> See *Central Computer Servs.*, 349 So.2d 1160 (Ala. 1977); *First Nat'l Bank of Springfield v. Department of Revenue*, 421 N.E.2d 175 (Ill. 1981); *Comptroller of the Treasury v. Equitable Trust Co.*, 464 A.2d 248 (Md. App. 1983); *Greyhound Computer Corp. v. State Dep't of Assessments & Taxation*, 320 A.2d 52 (Md. App. 1974); *James v. TRES Computer Servs.*, 642 S.W.2d 347 (Mo. 1982); *Commerce Union Bank*, 538 S.W.2d 405 (Tenn. 1976); *Chittenden Trust Co. v. King*, 465 A.2d 1100 (Vt. 1983). For cases involving the tangibility of films and records for the purpose of sales, use, and property taxes, see *D.C. v. Norwood Studios*, 336 F.2d 746 (D.C. Cir. 1964); *Boswell v. Paramount Television Sales*, 282 So.2d 892

software, several distinctions can be made. Like computer software, most of the value of a film or record is attributable to the intellectual and artistic content rather than to the celluloid, plastic, or paper upon which the content is recorded.<sup>13</sup> Buyers of records and films do not consider themselves to be purchasers of celluloid or plastic. However, a critical distinction exists between a film and computer software in that the celluloid upon which the movie is recorded is "a crucial artistic element of the motion picture; without film there could be no movie."<sup>14</sup>

Another difference between a film and software is that the medium upon which the computer program is recorded can be returned to the seller or destroyed after the program has run through the computer. Movie film, on the other hand, has continuing value after the movie has been shown; it can be used again and again.<sup>15</sup>

Software also differs from films, records, and books in that the latter three items can be used immediately upon purchase, whereas software must first be translated into a language that a computer can understand.<sup>16</sup> Furthermore, the latter three items are immediately perceptible to the senses, whereas software, in essence, is not. A further distinction is that the software sales or licensing agreement often includes periodic updating by the seller. Films, records, and books are not updated after sale.<sup>17</sup>

Courts have also wrestled with the issue of whether the sale of computer software constitutes the sale of a product or a personal service. This issue frequently is raised in service bureau cases,<sup>18</sup> although analogies to the Uniform

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(Ala. 1973); *Simplicity Pattern Co. v. State Bd. of Equalization*, 101 Cal. App.3d 184, *superseded by* 615 P.2d 555 (Cal. 1980); *Michael Todd Co. v. County of Los Angeles*, 371 P.2d 340 (Cal. 1962); *J. A. Burgess Co. v. Ames*, 194 N.E. 565 (Ill. 1935); *Saenger Realty Corp. v. Grosjean*, 193 So. 710 (La. 1940), *appeal dismissed*, 310 U.S. 613 (1940); *University Microfilms v. Scio Township*, 257 N.W.2d 265 (Mich. Ct. App. 1977), *appeal denied*, 402 Mich. 880 (1978); *United Artists Corp. v. Taylor*, 7 N.E.2d 254 (N.Y. 1937); *Recording Devices Co. v. Porterfield*, 283 N.E.2d 626 (Ohio 1972); *Recording Devices v. Bowers*, 190 N.E.2d 258 (Ohio 1963); *Crescent Amusement Co. v. Carson*, 213 S.W.2d 27 (Tenn. 1948).

<sup>13</sup> Films, records, and books are generally treated as tangible property for sales tax purposes.

<sup>14</sup> See Karl K. Heinzman, *Computer Software: Should It Be Treated as Tangible Property for ad valorem Tax?* 37 J. Tax'n 184, 185 (1972); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 407-08 (Tenn. 1976); John W. Bryant & Lance R. Mather, *Property Taxation of Computer Software*, 18 N.Y.L. FORUM 59, 74 (1972); Matthew A. Case, *Sales and Use Tax of Computer Software--Is Software Tangible Personal Property?*, 27 WAYNE L. REV. 1503, 1516 (1981). This distinction is becoming less clear-cut with advances in technology.

<sup>15</sup> See *D.C. v. Universal Computer Assocs.*, 465 F.2d 615 (D.C. Cir. 1972); *Commerce Union Bank*, 538 S.W.2d 405 (Tenn. 1976).

<sup>16</sup> See *Ala. v. Central Computer Servs.*, 349 So.2d 1160, 1162 (Ala. 1977); *Commerce Union Bank*, 538 S.W.2d 405, 408 (Tenn. 1976). In *University Microfilms v. Scio Township*, 257 N.W.2d 265 (Mich. Ct. App. 1977), *appeal denied*, 402 Mich. 880 (1978), the court distinguished software from master microfilm negatives, noting that "[t]he value of plaintiff's master negatives is in the printed word itself." 257 N.W.2d at 267.

<sup>17</sup> See *Bryant & Mather*, *supra* note 14, at 74. This distinction does not apply, however, to the many programs that are not updated after sale.

<sup>18</sup> See *Intellidata v. State Bd. of Equalization*, 188 Cal. Rptr. 850 (Cal. Ct. App. 1983); *Credit Bureau of Miami County, Inc. v. Collins*, 364 N.E.2d 27 (Ohio 1977); *Miami Citizens Nat'l Bank & Trust Co. v. Lindley*, 364 N.E.2d 25 (Ohio 1977); *Citizens Fin. Corp. v. Kosydar*, 331 N.E.2d 435 (Ohio 1975);

Commercial Code<sup>19</sup> and the sale of information<sup>20</sup> have also been made. In general, if software is viewed as being a product or a good, it is tangible property subject to sales, use, and property taxation.<sup>21</sup> If viewed as a service, however, software is considered intangible and not subject to these taxes.<sup>22</sup>

Canned programs are more likely to be viewed as products than are custom programs that involve personal services. Because software often involves elements of both sales and services, courts have developed several tests to aid in making this distinction. One test is whether the transfer of property is a mere convenience in achieving the primary purpose of the transaction.<sup>23</sup> Another test is whether the value of the materials is small compared to the value of the services.<sup>24</sup> A third test is whether the item transferred has value only to the purchaser, as is the case when one acquires a custom program, or whether the item can be sold to the general public, as is the case with canned programs.<sup>25</sup>

No services are performed with canned programs; they are sold as is and are available to the general public. They are conveyed to the purchaser using a tangible medium, and there is no question that the transfer of the tangible property is more than merely incidental to the transaction. In contrast, custom programs are different for particular customers and are of no value to the general public. The value of the tangible medium is small in comparison with the value of the services required to write the custom program.

#### THE OHIO CASES

Ohio courts have addressed a number of issues related to software taxation including the taxation of stock exchange data, credit information, and data processing service bureaus.

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Accountants Computer Servs. v. Kosydar, 298 N.E.2d 519 (Ohio 1973); Bullock v. Statistical Tabulating Corp., 549 S.W.2d 166 (Tex. 1977).

<sup>19</sup> The Uniform Commercial Code distinguishes the sale of goods from the sale of services. See Note, *Computer Services as Goods Under the U.C.C.*, 77 MICH. L. REV. 1149 (1979).

<sup>20</sup> The sale of mailing lists or stock exchange information is the most frequently cited case for software tax cases.

<sup>21</sup> See Robert D. Crockett, *Software Taxation: A Critical Reevaluation of the Notion of Intangibility*, 1980 B.Y.U.L. REV. 859, 867-68.

<sup>22</sup> *Id.*

<sup>23</sup> Howitt v. Street & Smith Publications, 12 N.E.2d 435 (N.Y. 1938); Bigsby v. Johnson, 99 P.2d 268 (Cal. 1940), *rev'd on other grounds*, 118 P.2d 289 (Cal. 1941).

<sup>24</sup> D.C. v. Universal Computer Assocs., 465 F.2d 615 (D.C. Cir. 1972); Mahon v. Nudelman, 36 N.E.2d 550 (Ill. 1941); Community Telecasting Serv. v. Johnson, 220 A.2d 500 (Me. 1966); Berry-Kofron Dental Lab. Co. v. Smith, 137 S.W.2d 452 (Mo. 1940); Commerce Union Bank v. Tidwell, 538 S.W.2d 405 (Tenn. 1976).

<sup>25</sup> United Aircraft Corp. v. O'Connor, 107 A.2d 398 (Conn. 1954); Bucyrus-Erie Co. v. Lorenz, 186 N.E.2d 250 (Ill. 1962); University Microfilms v. Scio Township, 257 N.W.2d 265 (Mich. Ct. App. 1977), *appeal denied*, 402 Mich. 880 (1978).

*Bunker-Ramo Corp. v. Porterfield* involved the sale of stock exchange data.<sup>26</sup> In that case, Bunker-Ramo provided stock brokers and security dealers with electronically transmitted stock exchange information for a fee. As part of the agreement, Bunker-Ramo installed tangible personal property on the customers' premises to enable them to receive the transmissions, at a cost varying between \$6,000 and \$17,000. Approximately 110 Bunker-Ramo employees were engaged in customer servicing as well as reception, editing, transformation, and preparation of raw data that eventually would be transmitted to subscribers. Bunker-Ramo employees also made frequent visits to the subscribers' premises to correct errors.<sup>27</sup>

Bunker-Ramo argued that the transmission of this data constituted a personal service and therefore was not subject to the Ohio sales tax.<sup>28</sup> The Commissioner countered that such transmissions constituted the sale of tangible personal property subject to sales tax.<sup>29</sup> The Ohio Supreme Court held for the Commissioner, stating that Bunker-Ramo's transactions were correctly characterized as sales because they involved the transfer of possession of and licenses to use tangible personal property.

An examination of the record indicates that the activity which the appellee performs is a completely mechanized service transaction. It is not a personal service transaction in the sense that there are no people engaged in serving directly the subscribers of appellee. This service is rendered automatically by computers, communication lines and reception and display instruments.<sup>30</sup>

The court found it significant that a relatively small number of people were authorized to oversee, maintain, and service the devices on the subscriber's premises. Thus, while some of the services rendered were tailored to meet the needs of specific subscribers, the small proportion of employees assigned to this task indicated that an insignificant amount of personal service was involved.

In *Credit Bureau of Miami County v. Collins*, the taxpayer provided credit information to customers both orally and in written form.<sup>31</sup> The court held that, in cases where information was transferred in written form, the tangible property conveyed was an inconsequential element in the transaction, and the true object of

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<sup>26</sup> *Bunker-Ramo Corp. v. Porterfield*, 257 N.E.2d 365 (Ohio 1970). For other cases involving the sale of stock exchange data, see *Dun & Bradstreet, Inc. v. City of New York*, 11 N.E.2d 728 (N.Y. 1937); *Quotron Sys. v. Comptroller of the Treasury*, 411 A.2d 439 (Md. App. 1980).

<sup>27</sup> *Bunker-Ramo*, 257 N.E.2d at 367-77.

<sup>28</sup> *Id.* at 368.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Credit Bureau of Miami County, Inc. v. Collins*, 364 N.E.2d 27 (Ohio 1977).

the transaction was not the acquisition of the taxpayer's property, but rather the services the taxpayer provided.<sup>32</sup>

Ohio courts have decided several cases involving data processing service bureaus. Ohio is one of the leading states on this subject. Data processing service bureaus perform functions that are not always easy to classify as falling neatly and exclusively into either the product or service category. In one of three consolidated cases, *Accountants Computer Services v. Kosydar*,<sup>33</sup> the Ohio Supreme Court quoted an earlier Arizona case which set forth the following possibilities regarding mixed sales of services and property:

- (1)The service is the main item sold and the property sold is incidental thereto and not separately charged (not a taxable sale as a sale of services).
- (2)The service and property sold can be readily separated (one tax exempt and the other taxable).
- (3)The service sold is incidental to the property and not separately charged (taxable in gross).<sup>34</sup>

*Accountants Computer Services* received raw data from customers in the form of paper punch tapes or adding machine tapes upon which the customers' debits and credits were recorded. The information was then processed by machine and furnished to individual clients with printouts that were used by the customer to draft financial statements. Data was sorted, classified, and rearranged by *Accountants Computer Services'* machine. The court held that this process resulted in the sale of a product rather than a service and, as such, was subject to the Ohio sales tax.<sup>35</sup>

The court, recognizing that the category into which a vendor falls is a question of fact to be determined in light of all the evidence, stated that:

*When there is a fixed and ascertainable relationship between the value of the article and the value of the service rendered in connection therewith so that both may be separately stated, then the vendor is engaged in both selling at retail and furnishing services and is subject to the tax as to one and tax exempt as to the other. Where the property*

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<sup>32</sup> *Id.* at 30. The holding in this case is based on the reasoning set forth in *Accountants Computer Servs. v. Kosydar*, 298 N.E.2d 519 (Ohio 1973).

<sup>33</sup> 298 N.E.2d 519 (Ohio 1973). *Central Data Sys. v. Kosydar* and *Andrew Jergens Co. v. Kosydar* involved similar issues to those in *Accountants Computer Servs.* These three cases were consolidated and tried simultaneously.

<sup>34</sup> *Accountants Computer Servs.*, 298 N.E.2d at 526 (quoting *Goodyear Aircraft Corp. v. Ariz. State Tax Comm'n*, 402 P.2d 423 (Ariz. Ct. App. 1965), *overruled by Ariz. State Tax Comm'n v. Southwest Kenworth*, 561 P.2d 757 (Ariz. Ct. App.), *cert. denied*, 434 U.S. 834 (1977)).

<sup>35</sup> *Id.* at 527-28.

*and the service are distinct and each is a consequential element capable of ready separation, it cannot be said one is an inconsequential element within the exemption provided by the statute.<sup>36</sup>*

In the second of the consolidated cases, *Central Data Systems v. Kosydar*, Central Data provided clients with data processing, key punching, systems design and programming, and contract consulting. The court determined that what was being sold was a service rather than a product.<sup>37</sup> *Central Data* can be distinguished from *Accountants Computer Services*. In *Central Data*, it was the analysis and thinking skills of Central Data employees which were being sold; the data processing machinery and related printouts were merely used by Central Data personnel to assist themselves in rendering their personal services. Because personal service was the main item contracted for and the resulting printed matter constituted an inconsequential element for which no separate charge was made, the sale of the tangible personal property was not subject to taxation.

In *Andrew Jergens Co.*, the third of the consolidated cases, the company contracted with A.C. Nielsen Company, a market research organization. Nielsen was to compile, analyze, and interpret statistical data, and to assist management in making marketing decisions based on the data provided. As an integral part of the service furnished, Nielsen assigned account executives to Jergens' account whose duty it was to analyze, interpret, and present to Jergens' management the information developed by Nielsen.

*Jergens* represents an even clearer example of a transaction involving the sale of a service rather than a product. The A.C. Nielsen Company was hired to gather, analyze, and interpret data, and to assist the Jergens management in making marketing decisions. It was clearly the personal service of Nielsen and its staff that was contracted for; the tangible personal property that was transferred for communication purposes was an inconsequential element without separate charge. The court held that the entire transaction was exempt from Ohio sales tax, without making any allocation for the portion of the consideration that was attributable to personal services.

The rationale for not separating the inconsequential amount attributable to personal services from the amount attributable to tangible personal property is that: (1) nearly all transactions are, of necessity, mixed transactions involving at least a slight degree of personal service, and (2) where this degree of personal service is of insignificant consequence, both the practical problem of attributing to such service a percentage of the entire consideration paid and the insignificant effect it

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<sup>36</sup> *Id.* at 526 (quoting *Rice v. Evatt*, 59 N.E.2d 927 (Ohio 1945)).

<sup>37</sup> *Id.* at 528.

would have on the amount paid in taxes, make such a distinction unreasonable and unnecessary.<sup>38</sup>

Two years later the Ohio Supreme Court was once again called upon to decide a computer service bureau case. In *Citizens Financial Corp. v. Kosydar*,<sup>39</sup> Citizens provided both off-line and on-line services to the thrift industry. In the off-line method, the tellers at the savings and loan manually record the daily deposits and withdrawals. The recorded transactions are delivered daily to the taxpayer, where a computer changes the information into computer readable media. The taxpayer then delivers to the customer a hard copy printout which provides the customer with an accounting journal of daily transactions, thus updating the individual account records. A fee is charged, based on the number of such accounts each customer maintains in the computer.<sup>40</sup> The on-line method consists of the tellers' use of terminals, which are located at the tellers' windows. Passbooks are placed in the terminals and by depressing appropriate keys, the transaction is transmitted via telephone lines to the taxpayer's computers. Then the computers make the programmed calculation, printing the transaction on both the customer's passbook and upon a printout at the terminal. Subsequently, the taxpayer delivers a hard copy journal of the transactions to the customer. A fee is charged in the same manner as in the off-line methods.<sup>41</sup>

The court held both the on-line and off-line transactions to be taxable and not within the personal service exemption. The true object of the transaction was held to be the property produced, i.e., the hard copy printouts, rather than a service.<sup>42</sup>

The dissent stated that the personal service exception must be seriously distorted before it can be construed to impose a tax upon a service transaction. The dissent also noted that similar transactions would be exempt from the sales tax had they occurred in Connecticut, Louisiana, New York, Texas, Virginia, Washington, or Wisconsin.<sup>43</sup>

In *Bullock v. Statistical Tabulating Corp.*,<sup>44</sup> a non-Ohio case, customers brought in business records and invoices, which Statistical then translated into a

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<sup>38</sup> *Id.* at 525.

<sup>39</sup> 331 N.E.2d 435 (Ohio 1975). For an in depth analysis of this case, see Michael J. Bayer, *Citizens Financial Corporation v. Kosydar: Data Processing and the Ohio Sales Tax Service Exemption*, 6 CAP. U.L. REV. 663 (1977).

<sup>40</sup> *Citizens Fin. Corp.*, 331 N.E.2d at 436.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 436-37.

<sup>43</sup> *Id.* at 438-39.

<sup>44</sup> 549 S.W.2d 166 (Tex. 1977). See also *Janesville Data Ctr., Inc. v. Wis. Dep't of Revenue*, 267 N.W.2d 656 (Wis. 1978). In *Janesville Data*, an almost identical fact pattern produced the same result as in *Statistical Tabulating*. *Contra* *Intellidata v. State Bd. of Equalization*, 188 Cal. Rptr. 850 (Cal. Ct. App. 1983). The California view is that the entire transaction may be treated as tangible even though virtually all of the value is attributed to an intangible element such as intellectual content. This view was used in *Simplicity Pattern Co. v. State Bd. of Equalization*, 615 P.2d 555 (Cal. 1980) (master audio-visual

computer readable code and transferred onto cards that could be read by the customer's computer. Once read, the cards had no further use. There was no separate charge to the customers for the cards. The Texas court used the same test it had used in an earlier case, stating that if the object or the essence of the sale is not tangible personal property but intangible property, then the transaction is not taxable under any definition of sale.<sup>45</sup>

In another Ohio case, *Miami Citizens National Bank & Trust Co. v. Lindley*,<sup>46</sup> a bank performed data processing for other banks and furnished its customers with a series of reports to be used in making informed decisions for future operations. The sales tax was assessed only on charges for computer printouts and not for programming time. The court found the entire transaction to be taxable, as the true object of the transactions was the receipt of the printed form that contained the computer organized data.<sup>47</sup>

Ohio courts have decided a few cases dealing directly with computer software. In *Compuserve v. Lindley*, the Ohio Court of Appeals found software to be intangible, and not subject to sales, use, or property taxation.<sup>48</sup> Although the software was stored on tangible tapes and, as operational software, was indispensable to the operation of the computer, the true purpose of the software purchase was to obtain intangible information, and the purchase of the tapes was merely incidental to the purchase of intangible information. In effect, the court held that Ohio was attempting to tax personal service transactions, which were exempt from taxation because of their intangible nature. It also specifically disagreed with the holdings in *Chittenden*, *Equitable*, *Citizens and Southern Systems*, and *Hasbro* because these cases improperly held that the real purpose of the transaction was to obtain the medium upon which the software was stored (tape, etc.) rather than the information itself.<sup>49</sup>

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negatives); *Albers v. State Bd. of Equalization*, 47 Cal. Rptr. 69 (Cal. Ct. App. 1965), cert. denied, 383 U.S. 960 (1966) (draftsman drawings); *People v. Grazer*, 291 P.2d 957 (Cal. Ct. App. 1956) (radiologist's x-ray films).

<sup>45</sup> *Statistical Tabulating*, 549 S.W.2d at 168-69 (citing *Williams & Lee Scouting Serv. v. Calvert*, 452 S.W.2d 789 (Tex. Ct. App. 1970)). In *Williams & Lee Scouting*, the court found that the object of the transaction for the plaintiff's subscribing customers was the scouting service provided by the plaintiff. Current statistical data on oil and gas well production was continuously gathered in the field by Williams and Lee employees. The data was compiled and mailed to subscribing customers in regular reports duplicated by offset printing at the plaintiff's office. The Comptroller attempted to tax the whole transaction because a tangible item, the printed report, changed hands. For a similar case involving credit report information, see *Credit Bureau of Miami County, Inc. v. Collins*, 364 N.E.2d 27 (Ohio 1977).

<sup>46</sup> 364 N.E.2d 27 (Ohio 1977).

<sup>47</sup> *Id.* at 27. For a similar fact situation with a similar result, see *Statistical Tabulating Corp. v. Lindley*, 445 N.E.2d 1104 (Ohio 1983). See also *Aedes Assocs. v. Lindley*, No. 83-0969C, 1986 WL 941 (Ohio Ct. App. Jan. 22, 1986).

<sup>48</sup> 535 N.E.2d 360 (Ohio Ct. App. 1987).

<sup>49</sup> See *Comptroller of the Treasury v. Equitable Trust Co.*, 464 A.2d 248 (Md. 1983); *Chittenden Trust Co. v. King*, 465 A.2d 1100 (Vt. 1983); *Citizens & S. Sys. v. S.C. Tax Comm'n*, 311 S.E.2d 717 (S.C. 1984); *Hasbro Indus. v. Norberg*, 487 A.2d 124 (R.I. 1985). For other Ohio cases dealing with the "true object of the transaction," see *Financial Computer Servs. v. Lindley*, 436 N.E.2d 1025 (Ohio 1982); *Citizens Fin. Corp. v. Kosydar*, 331 N.E.2d 435 (Ohio 1975). Other courts in Maine and Michigan have recently held

But in another Ohio case, the court found the purchase of software to be taxable on the ground that the tangible tapes were the true object of the transaction.<sup>50</sup> And where the true object of the transaction was a computer printout rather than a software program, the sale was held to be the sale of tangible personal property and therefore subject to the sales tax.<sup>51</sup>

From a review of the cases, it is apparent that Ohio courts have played a leading role in formulating the majority positions on issues relating to the sales, use, and property taxation of computer software.

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software to be intangible and not subject to taxation. *See* *Measurex Sys. v. State Tax Assessor*, 490 A.2d 1192 (Me. 1985); *Maccabees Mut. Life Ins. Co. v. State Dep't of Treasury*, 332 N.W.2d 561 (Mich. Ct. App. 1983). Kansas treats applications software as intangible and operational software as tangible. *See In re Protest of Strayer*, 716 P.2d 588 (Kan. 1986); *Re Appeal of AT&T Technologies* 749 P.2d 1033 (Kan. 1988). This distinction in treatment is due to the differing natures of the two types of software. Operational software is needed to make the hardware work, and so has some attributes of hardware, which is tangible. Application software, on the other hand, is not needed to make the hardware work. Thus it appears that the weight of authority, while no longer unanimous, is still weighted heavily in favor of classifying software as intangible.

<sup>50</sup> *Ohio Farmers Ins. Co. v. Lindley* (July 15, 1981), Ohio B.T.A. No. 79-B-43, unreported.

<sup>51</sup> *Statistical Tabulating*, 445 N.E.2d 1104 (Ohio 1983).