

MAN 7-23-99

FORM PTO-1618A  
Expires 06/30/99  
OMB 0651-0027

07-27-1999

U.S. Department of Commerce  
Patent and Trademark Office  
TRADEMARK



101104078

RECORDATION FORM COVER SHEET  
TRADEMARKS ONLY

TO: The Commissioner of Patents and Trademarks: Please record the attached original document(s) or copy(ies).

Submission Type

New

Resubmission (Non-Recordation)  
Document ID #

Correction of PTO Error  
Reel #  Frame #

Corrective Document  
Reel #  Frame #

Conveyance Type

Assignment  License

Security Agreement  Nunc Pro Tunc Assignment

Merger  Effective Date  
Month Day Year

Change of Name

Other

Conveying Party

Mark if additional names of conveying parties attached

Name  Execution Date  
Month Day Year

Formerly

Individual  General Partnership  Limited Partnership  Corporation  Association

Other

Citizenship/State of Incorporation/Organization

Receiving Party

Mark if additional names of receiving parties attached

Name

DBA/AKA/TA

Composed of

Address (line 1)

Address (line 2)

Address (line 3)     
City State/Country Zip Code

Individual  General Partnership  Limited Partnership  If document to be recorded is an assignment and the receiving party is not domiciled in the United States, an appointment of a domestic representative should be attached. (Designation must be a separate document from Assignment.)

Corporation  Association

Other

Citizenship/State of Incorporation/Organization

07/26/1999 DNGUYEN 00000125 2054641

01 FC:481 40.00 DP

02 FC:482 25.00 DP

FOR OFFICE USE ONLY

Public burden reporting for this collection of information is estimated to average approximately 30 minutes per Cover Sheet to be recorded, including time for reviewing the document and gathering the data needed to complete the Cover Sheet. Send comments regarding this burden estimate to the U.S. Patent and Trademark Office, Chief Information Officer, Washington, D.C. 20231 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (0651-0027), Washington, D.C. 20503. See OMB Information Collection Budget Package 0651-0027, Patent and Trademark Assignment Practice. DO NOT SEND REQUESTS TO RECORD ASSIGNMENT DOCUMENTS TO THIS ADDRESS.

Mail documents to be recorded with required cover sheet(s) information to:  
Commissioner of Patents and Trademarks, Box Assignments, Washington, D.C. 20231

REEL: 001934 FRAME: 0147

**Domestic Representative Name and Address**

Enter for the first Receiving Party only.

Name

Address (line 1)

Address (line 2)

Address (line 3)

Address (line 4)

**Correspondent Name and Address**

Area Code and Telephone Number

Name

Address (line 1)

Address (line 2)

Address (line 3)

Address (line 4)

**Pages**

Enter the total number of pages of the attached conveyance document including any attachments.

#

**Trademark Application Number(s) or Registration Number(s)**

Mark if additional numbers attached

Enter either the Trademark Application Number or the Registration Number (DO NOT ENTER BOTH numbers for the same property).

**Trademark Application Number(s)**

**Registration Number(s)**

<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>

<input type="text" value="2054641"/>	<input type="text" value="2186975"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>

**Number of Properties**

Enter the total number of properties involved.

#

**Fee Amount**

Fee Amount for Properties Listed (37 CFR 3.41):

\$

Method of Payment:

Enclosed

Deposit Account

Deposit Account

(Enter for payment by deposit account or if additional fees can be charged to the account.)

Deposit Account Number:

#

Authorization to charge additional fees:

Yes

No

**Statement and Signature**

To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document. Charges to deposit account are authorized, as indicated herein.

Mark Hartwell

Name of Person Signing

Signature

2/19/99

Date Signed

## PATENT AND TRADEMARK SECURITY AGREEMENT

This PATENT AND TRADEMARK SECURITY AGREEMENT (this "Agreement"), dated as of June 24, 1999, is entered into between **WITNESS SYSTEMS, INC.**, a Delaware corporation ("Grantor"), which has a mailing address at 1105 Sanctuary Parkway, Suite 210, Alpharetta, GA 30004, and **GREYROCK CAPITAL, A DIVISION OF NATIONSCREDIT COMMERCIAL CORPORATION** ("GC"), which has a mailing address at 10880 Wilshire Boulevard, Suite 950, Los Angeles, CA 90024.

### RECITALS

A. Grantor and GC have entered into that certain Loan and Security Agreement (as amended from time to time, the "Loan Agreement") dated June 24, 1999 and other instruments, documents and agreements contemplated thereby or related thereto (collectively, together with the Loan Agreement, the "Loan Documents"); and

B. Grantor is the owner of certain intellectual property, identified below, in which Grantor is granting a security interest to GC.

NOW THEREFORE, in consideration of the mutual promises, covenants, conditions, representations, and warranties hereinafter set forth and for other good and valuable consideration, the parties hereto mutually agree as follows:

#### 1. DEFINITIONS AND CONSTRUCTION.

1.1 **Definitions.** The following terms, as used in this Agreement, have the following meanings:

"Code" means the California Uniform Commercial Code, as amended and supplemented from time to time, and any successor statute.

"Collateral" means all of the following, whether now owned or hereafter acquired:

(i) Each of the trademarks and rights and interest which are capable of being protected as trademarks (including trademarks, service marks, designs, logos, indicia, tradenames, corporate names, company names, business names, fictitious business names, trade styles, and other source or business identifiers, and applications pertaining thereto), which are presently, or in the future may be, owned, created,

acquired, or used (whether pursuant to a license or otherwise) by Grantor, in whole or in part, and all trademark rights with respect thereto throughout the world, including all proceeds thereof (including license royalties and proceeds of infringement suits), and rights to renew and extend such trademarks and trademark rights;

(ii) Each of the patents and patent applications which are presently, or in the future may be, owned, issued, acquired, or used (whether pursuant to a license or otherwise) by Grantor, in whole or in part, and all patent rights with respect thereto throughout the world, including all proceeds thereof (including license royalties and proceeds of infringement suits), foreign filing rights, and rights to extend such patents and patent rights;

(iii) All of Grantor's right, title and interest in and to the trademarks and trademark registrations listed on Exhibit A attached hereto, as the same may be updated hereafter from time to time;

(iv) All of Grantor's right, title, and interest, in and to the patents and patent applications listed on Exhibit B attached hereto, as the same may be updated hereafter from time to time;

(v) All of Grantor's right to register trademark claims under any state or federal trademark law or regulation of any foreign country and to apply for, renew, and extend the trademark registrations and trademark rights, the right (without obligation) to sue or bring opposition or cancellation proceedings in the name of Grantor or in the name of GC for past, present, and future infringements of the trademarks, registrations, or trademark rights and all rights (but not obligations) corresponding thereto in the United States and any foreign country;

(vi) All of Grantor's right, title, and interest in all patentable inventions, and all of Grantor's right to file applications for patent under federal patent law or regulation of any foreign country, and to request reexamination and/or reissue of the patents, the right (without obligation) to sue or bring interference proceedings in the name of Grantor or in the name of GC for past, present, and future infringements of the patents, and all rights (but not obligations) corresponding thereto in the United States and any foreign country;

(vii) the entire goodwill of or associated with the businesses now or hereafter conducted by Grantor connected with or symbolized by any of the aforementioned properties and assets;

(viii) All general intangibles relating to the foregoing and all other intangible intellectual or other similar property of the Grantor of any kind or nature, associated with or arising out of any of the aforementioned properties and assets and not otherwise described above; and

(ix) All products and proceeds of any and all of the foregoing (including, without limitation, license royalties and proceeds of infringement suits) and, to the extent not otherwise included, all payments under insurance, or any indemnity,

warranty, or guaranty payable by reason of loss or damage to or otherwise with respect to the Collateral.

“Obligations” means all obligations, liabilities, and indebtedness of Grantor to GC, whether direct, indirect, liquidated, or contingent, and whether arising under this Agreement, the Loan Agreement, any other of the Loan Documents, or otherwise, including all costs and expenses described in Section 9.7 hereof.

**1.2 Construction.** Unless the context of this Agreement clearly requires otherwise, references to the plural include the singular, references to the singular include the plural, and the term “including” is not limiting. The words “hereof,” “herein,” “hereby,” “hereunder,” and other similar terms refer to this Agreement as a whole and not to any particular provision of this Agreement. Any initially capitalized terms used but not defined herein shall have the meaning set forth in the Loan Agreement. Any reference herein to any of the Loan Documents includes any and all alterations, amendments, extensions, modifications, renewals, or supplements thereto or thereof, as applicable. Headings have been set forth herein for convenience only.

## **2. GRANT OF SECURITY INTEREST.**

To secure the complete and timely payment and performance of all Obligations, and without limiting any other security interest Grantor has granted to GC, Grantor hereby hypothecates to GC and grants, assigns, and conveys to GC a security interest in Grantor’s entire right, title, and interest in and to the Collateral.

## **3. REPRESENTATIONS, WARRANTIES AND COVENANTS.**

Grantor hereby represents, warrants, and covenants that:

**3.1 Trademarks; Patents.** A true and complete schedule setting forth all federal and state trademark registrations owned or controlled by Grantor or licensed to Grantor, together with a summary description and full information in respect of the filing or issuance thereof and expiration dates is set forth on Exhibit A; and a true and complete schedule setting forth all patent and patent applications owned or controlled by Grantor or licensed to Grantor, together with a summary description and full information in respect of the filing or issuance thereof and expiration dates is set forth on Exhibit B.

**3.2 Validity; Enforceability.** Each of the patents and trademarks is valid and enforceable, and Grantor is not presently aware of any past, present, or prospective claim by any third party that any of the patents or trademarks are invalid or unenforceable, or that the use of any patents or trademarks violates the rights of any third person, or of any basis for any such claims.

**3.3 Title.** Grantor is the sole and exclusive owner of the entire and unencumbered right, title, and interest in and to each of the patents, patent applications, trademarks, and trademark registrations, free and clear of any liens, charges, and encumbrances, including pledges, assignments, licenses, shop rights, and covenants by Grantor not to sue third persons.

**3.4 Notice.** Grantor has used and will continue to use proper statutory notice in connection with its use of each of the patents and trademarks.

**3.5 Quality.** Grantor has used and will continue to use consistent standards of high quality (which may be consistent with Grantor's past practices) in the manufacture, sale, and delivery of products and services sold or delivered under or in connection with the trademarks, including, to the extent applicable, in the operation and maintenance of its merchandising operations, and will continue to maintain the validity of the trademarks.

**3.6 Perfection of Security Interest.** Except for the filing of a financing statement with the applicable UCC filing authority in Georgia and filings with the United States Patent and Trademark Office necessary to perfect the security interests created hereunder, no authorization, approval, or other action by, and no notice to or filing with, any governmental authority or regulatory body is required either for the grant by Grantor of the security interest hereunder or for the execution, delivery, or performance of this Agreement by Grantor or for the perfection of or the exercise by GC of its rights hereunder to the Collateral in the United States.

#### **4. AFTER-ACQUIRED PATENT OR TRADEMARK RIGHTS.**

If Grantor shall obtain rights to any new trademarks, any new patentable inventions or become entitled to the benefit of any patent application or patent for any reissue, division, or continuation, of any patent, the provisions of this Agreement shall automatically apply thereto. Grantor shall give prompt notice in writing to GC with respect to any such new trademarks or patents, or renewal or extension of any trademark registration. Upon request of GC from time to time, Grantor agrees to provide GC with a report, signed by the president, chief financial officer or secretary of Grantor, in form and substance satisfactory to GC, as to any such new patent or trademark rights, which report, among other things, shall have attached thereto updated information for the Exhibits hereto. Grantor shall bear any expenses incurred in connection with future patent applications or trademark registrations. Without limiting Grantor's obligation under this Section 4, Grantor authorizes GC to modify this Agreement by amending Exhibits A or B to include any such new patent or trademark rights. Notwithstanding the foregoing, no failure to so modify this Agreement or amend Exhibits A or B shall in any way affect, invalidate or detract from GC's continuing security interest in all Collateral, whether or not listed on Exhibit A or B.

#### **5. LITIGATION AND PROCEEDINGS.**

Grantor shall commence and diligently prosecute in its own name, as the real party in interest, for its own benefit, and its own expense, such suits, administrative proceedings, or other action for infringement or other damages as are in its reasonable business judgment necessary to protect the Collateral. Grantor shall provide to GC any information with respect thereto requested by GC. GC shall provide at Grantor's expense all necessary cooperation in connection with any such suits, proceedings, or action, including, without limitation, joining as a necessary party. Following Grantor's becoming aware thereof, Grantor shall notify GC of the institution of, or any adverse determination in, any proceeding in the United States Patent and Trademark Office, or any United States, state, or foreign court regarding Grantor's claim of

ownership in any of the patents or trademarks, its right to apply for the same, or its right to keep and maintain such patent or trademark rights.

## **6. POWER OF ATTORNEY.**

Grantor hereby appoints GC as Grantor's true and lawful attorney, with full power of substitution, to do any or all of the following, in the name, place and stead of Grantor: (a) file this Agreement (or an abstract hereof) or any other document describing GC's interest in the Collateral with the United States Patent and Trademark Office; (b) execute any modification of this Agreement pursuant to Section 4 of this Agreement; (c) take any action and execute any instrument which GC may deem necessary or advisable to accomplish the purposes of this Agreement; and (d) following an Event of Default (as defined in the Loan Agreement), (i) endorse Grantor's name on all applications, documents, papers and instruments necessary for GC to use or maintain the Collateral; (ii) ask, demand, collect, sue for, recover, impound, receive, and give acquittance and receipts for money due or to become due under or in respect of any of the Collateral; (iii) file any claims or take any action or institute any proceedings that GC may deem necessary or desirable for the collection of any of the Collateral or otherwise enforce GC's rights with respect to any of the Collateral, and (iv) assign, pledge, convey, or otherwise transfer title in or dispose of the Collateral to any person.

## **7. RIGHT TO INSPECT.**

Grantor grants to GC and its employees and agents the right to visit Grantor's plants and facilities which manufacture, inspect, or store products sold under any of the patents or trademarks, and to inspect the products and quality control records relating thereto at reasonable times during regular business hours.

## **8. SPECIFIC REMEDIES.**

Upon the occurrence of any Event of Default (as defined in the Loan Agreement), GC shall have, in addition to any other rights given by law or in this Agreement, the Loan Agreement, or in any other Loan Document, all of the rights and remedies with respect to the Collateral of a secured party under the Code, including the following:

**8.1 Notification.** GC may notify licensees to make royalty payments on license agreements directly to GC;

**8.2 Sale.** GC may sell or assign the Collateral and associated goodwill at public or private sale for such amounts, and at such time or times as GC deems advisable. Any requirement of reasonable notice of any disposition of the Collateral shall be satisfied if such notice is sent to Grantor five (5) days prior to such disposition. Grantor shall be credited with the net proceeds of such sale only when they are actually received by GC, and Grantor shall continue to be liable for any deficiency remaining after the Collateral is sold or collected. If the sale is to be a public sale, GC shall also give notice of the time and place by publishing a notice one time at least five (5) days before the date of the sale in a newspaper of general circulation in the county in which the sale is to be held. To the maximum extent permitted by applicable law, GC may be the purchaser of any or all of the Collateral and associated goodwill at any public sale and shall be entitled, for the purpose of bidding and making settlement or payment of the

purchase price for all or any portion of the Collateral sold at any public sale, to use and apply all or any part of the Obligations as a credit on account of the purchase price of any collateral payable by GC at such sale.

## **9. GENERAL PROVISIONS.**

**9.1 Effectiveness.** This Agreement shall be binding and deemed effective when executed by Grantor and GC.

**9.2 Notices.** Except to the extent otherwise provided herein, all notices, demands, and requests that either party is required to give to the other shall be in writing and shall be governed by the notice provisions of the Loan Agreement.

**9.3 No Waiver.** No course of dealing between Grantor and GC, nor any failure to exercise nor any delay in exercising, on the part of GC, any right, power, or privilege under this Agreement or under the Loan Agreement or any other agreement, shall operate as a waiver. No single or partial exercise of any right, power, or privilege under this Agreement or under the Loan Agreement or any other agreement by GC shall preclude any other or further exercise of such right, power, or privilege or the exercise of any other right, power, or privilege by GC.

**9.4 Rights Are Cumulative.** All of GC's rights and remedies with respect to the Collateral whether established by this Agreement, the Loan Agreement, or any other documents or agreements, or by law shall be cumulative and may be exercised concurrently or in any order.

**9.5 Successors.** The benefits and burdens of this Agreement shall inure to the benefit of and be binding upon the respective successors and permitted assigns of the parties; provided that Grantor may not transfer any of the Collateral or any rights hereunder, without the prior written consent of GC, except as specifically permitted hereby.

**9.6 Severability.** The provisions of this Agreement are severable. If any provision of this Agreement is held invalid or unenforceable in whole or in part in any jurisdiction, then such invalidity or unenforceability shall affect only such provision, or part thereof, in such jurisdiction, and shall not in any manner affect such provision or part thereof in any other jurisdiction, or any other provision of this Agreement in any jurisdiction.

**9.7 Entire Agreement.** This Agreement is subject to modification only by a writing signed by the parties, except as provided in Section 4 of this Agreement. To the extent that any provision of this Agreement conflicts with any provision of the Loan Agreement, the provision giving GC greater rights or remedies shall govern, it being understood that the purpose of this Agreement is to add to, and not detract from, the rights granted to GC under the Loan Agreement. This Agreement, the Loan Agreement, and the documents relating thereto comprise the entire agreement of the parties with respect to the matters addressed in this Agreement.

**9.8 Fees and Expenses.** Grantor shall pay to GC on demand all costs and expenses that the GC pays or incurs in connection with the negotiation, preparation, consummation, administration, enforcement, and termination of this Agreement, including:



(a) reasonable attorneys' and paralegals' fees and disbursements of counsel to GC; (b) costs and expenses (including reasonable attorneys' and paralegals' fees and disbursements) for any amendment, supplement, waiver, consent, or subsequent closing in connection with this Agreement and the transactions contemplated hereby; (c) costs and expenses of lien and title searches; (d) taxes, fees, and other charges for filing this Agreement at the United States Patent and Trademark Office, or for filing financing statements, and continuations, and other actions to perfect, protect, and continue the security interest created hereunder; (e) sums paid or incurred to pay any amount or take any action required of Grantor under this Agreement that Grantor fails to pay or take; (f) costs and expenses of preserving and protecting the Collateral; and (g) costs and expenses (including reasonable attorneys' and paralegals' fees and disbursements) paid or incurred to enforce the security interest created hereunder, sell or otherwise realize upon the Collateral, and otherwise enforce the provisions of this Agreement, or to defend any claims made or threatened against the GC arising out of the transactions contemplated hereby (including preparations for the consultations concerning any such matters). The foregoing shall not be construed to limit any other provisions of this Agreement or the Loan Documents regarding costs and expenses to be paid by Grantor. The parties agree that reasonable attorneys' and paralegals' fees and costs incurred in enforcing any judgment are recoverable as a separate item in addition to fees and costs incurred in obtaining the judgment and that the recovery of such attorneys' and paralegals' fees and costs is intended to survive any judgment, and is not to be deemed merged into any judgment.

**9.9 Indemnity.** Grantor shall protect, defend, indemnify, and hold harmless GC and GC's assigns from all liabilities, losses, and costs (including without limitation reasonable attorneys' fees) incurred or imposed on GC relating to the matters in this Agreement.

**9.10 Governing Law.** The validity and interpretation of this Agreement and the rights and obligations of the parties shall be governed by the laws of the State of California, excluding its conflict of law rules to the extent such rules would apply the law of another jurisdiction, and the United States.

**9.11 Waiver of Right to Jury Trial.** GC and Grantor each hereby waive the right to trial by jury in any action or proceeding based upon, arising out of, or in any way relating to: (i) this Agreement; or (ii) any other present or future instrument or agreement between GC and Grantor; or (iii) any conduct, acts or omissions of GC or Grantor or any of their directors, officers, employees, agents, attorneys or any other persons affiliated with GC or Grantor; in each of the foregoing cases, whether sounding in contract or tort or otherwise.

**9.12 Further Assurances.** At GC's request, Grantor shall execute and deliver to GC any further instruments or documentation, and perform any acts, that may be reasonably necessary or appropriate to implement this Agreement, the Loan Agreement or any other agreement, and the documents relating thereto, including without limitation any instrument or documentation reasonably necessary or appropriate to create, maintain, perfect, or effectuate GC's security interests in the Collateral.

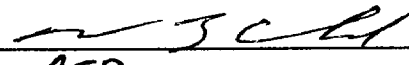
**9.13 Release.** At such time as Grantor shall completely satisfy all of the Obligations and the Loan Agreement shall be terminated, GC shall execute and deliver to

Grantor all assignments and other instruments as may be reasonably necessary or proper to terminate GC's security interest in the Collateral, subject to any disposition of the Collateral which may have been made by GC pursuant to this Agreement. For the purpose of this Agreement, the Obligations shall be deemed to continue if Grantor enters into any bankruptcy or similar proceeding at a time when any amount paid to GC could be ordered to be repaid as a preference or pursuant to a similar theory, and shall continue until it is finally determined that no such repayment can be ordered.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

Grantor:

WITNESS SYSTEMS, INC.

By:   
Title: CEO

GC:

GREYROCK CAPITAL, A  
DIVISION OF NATIONSCREDIT  
COMMERCIAL CORPORATION

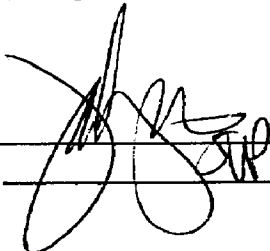
By:   
Title: LISA NAGANO

Exhibit "A"

to Patent and Trademark Security Agreement

**Witness Systems, Inc.**

**REGISTERED TRADEMARKS**

<u>Trademark</u>	<u>Registration Date</u>	<u>Registration No.</u>
"WITNESS"	April 12, 1997	#2,054,641
"RANDOM-MIZER"	September 1, 1998	#2,186,975

**PENDING TRADEMARKS**

<u>Trademark</u>	<u>Filing Date</u>	<u>Serial No.</u>
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Exhibit "B"

to Patent and Trademark Security Agreement

**Witness Systems, Inc.**

**PATENTS**

<u>Patent Description/Title</u>	<u>Issue Date</u>	<u>Patent No.</u>
METHOD AND APPARATUS FOR SIMULTANEOUS MONITORING COMPUTER USER SCREEN AND TELEPHONE ACTIVITY FROM A REMOTE LOCATION	August 4, 1998	Registration/ Application #  #5,790,798

**PATENT APPLICATIONS**

<u>Description</u>	<u>Filing Date</u>	<u>Serial No.</u>
METHOD AND APPARATUS FOR SIMULTANEOUS MONITORING COMPUTER USER SCREEN AND TELEPHONE ACTIVITY FROM A REMOTE LOCATION	Application Grant Date March 12, 1998	Application #09/041,460