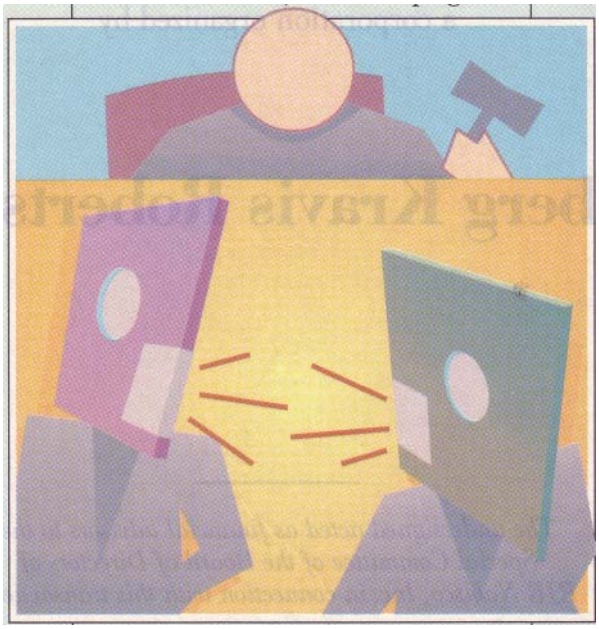
Commentary/by Keith Hammonds

DON'T BURY SOFTWARE'S PROMISE IN A LEGAL BOG

Suppose you invented a better clock. No one would question your legal right to protect the mechanism that runs it from imitation. But what about the face: the arrangement of 12 numerals and the clockwise movement of the hands? Should you be able to protect that? Surely not—that's too far-fetched.

Or is it?

That's what the courts will decide starting late this year. The products at issue are computer programs, not clocks, but the question is the same: To what extent can a software company legally protect a program's appearance, design, and functionality—its "look and feel"? The question is so crucial that any answer is controversial. But a cursory look at the history of the computer business provides a conclusion: The marketplace, not the courts, should decide whose "look and feel" is deserving.



MUDDY ARENA. The issue has been brought to a head by three companies. In Boston, Lotus Development Corp. has charged two small rivals with copying the look of its 1-2-3 spreadsheet. In California, Ashton-Tate Inc. is suing to stop a competitor from using its computer language in a new database package. And Apple Computer Inc. hopes to reserve for itself pictorial symbols used to operate its personal computers.

The cases will set precedents in what has become a muddy legal arena. Traditional copyright law, which protects creative expression of ideas but not the ideas themselves, doesn't perfectly apply to software, whose characteristics are both creative and functional. Increasingly, in fact, software publishers are applying for patents. But they can't patent everything. So they're also trying to expand copyright law.

The trick is to move the law in a direction that benefits everyone. But it's doubtful whether exceedingly broad protections will do that. From the start, software has been a derivative product. Programmers improve on what has been done before. "That's the way

we learned to do things," says Daniel S. Bricklin, a veteran programmer. "We stand on the shoulders of other giants."

In 1979, Bricklin himself invented VisiCalc, the first spreadsheet for personal computers. Three years later, Lotus founder Mitchell D. Kapor borrowed the concept and turned it into 1-2-3, soon making VisiCalc obsolete. That, says Bricklin, is the one best argument against broad copyright protection for software: It would leave little room for the next Lotus to emerge.

Certainly, Lotus and other innovators are entitled to protection of their creative efforts. Copyright law clearly makes it illegal to copy the code that makes up 1-2-3 or Ashton-Tate's dBase IV. And courts are concluding that exact duplication of a program's appearance on the screen is a crime. But should the law protect features that just make a program easier to use?

Not if the goal is to promote better software and the international competitiveness of the companies that buy it. The software business is hurtling forward at an astounding rate: Programs are getting bigger, more powerful, and more complex by orders of magnitude every few years. To keep up, innovators need the building blocks that, after a decade, most PC buyers take for granted: pop-up menus, for example. Or use of the Fl key to call up helpful instructions.

SHELTERED LIFE? If Lotus and Apple win their suits, even these simple devices will be protected from duplication. That would create a "consumer-hostile issue in an industry that can ill afford it," observes C. David Seuss, CEO and president of Spinnaker Software Corp.

It could also ensure that a few big companies control the direction of the industry. This is happening anyway, to a degree: Large companies are the ones with the research resources to tackle bigger programs and the marketing clout to sell them. Do they need another big advantage?

Mark Eppley, president of Traveling Software, doesn't think so. His motto is "innovate, don't litigate." While that's a self-serving position for any entrepreneur to take, it's also a principle that companies such as Apple and Lotus followed as startups. That alone should persuade the courts to prevent these companies from closing the door on others now.

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