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Special Case Note Follow-Up: Part I--Borland and the Blizzard of 1996

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CASE NOTES

SPECIAL CASE NOTE FOLLOW-UP*: *Lotus Development Corp. v. Borland International, Inc.*, 116 S. Ct. 804 (1996)

Part One: Borland and the Blizzard of '96**

Howard C. Anawalt†

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I. THE SNOW

Early Monday, January 8, 1996, my wife and I stepped out into the dazzling sight of Washington, D.C., blanketed in snow. For the previous thirty hours the city had been swept by a blizzard of proportions unseen since 1922. The news reported all offices in the capital closed – except for in custody arraignments in the D.C. District Court. We had planned to hear Supreme Court arguments in *Lotus Development Corporation v. Borland International, Inc.* that day, but we were confident that we would be looking for something else to do.¹ The quickest way to see whether the Court would be in session was to check with some of the counsel staying in a neighboring hotel.

* See generally, Jason A. Whong and Andrew T.S. Lee, *Lotus v. Borland: Defining the Limits of Software Copyright Protection*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 207.

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1. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 116 S. Ct. 804 (1996).

As we walked into the coffee shop, I saw Michael Barclay, one of the Borland attorneys. I asked him in jest, "are you going to court today?" He replied that indeed he was: "the case is on." "You're pulling my leg!" "No, here's the clerk's number. You can check it yourself. We have to be there at 8:30 for a briefing." He bolted down the rest of his muffin and was gone.

Cabs were hopeless, but the Metro was convenient. We soon set out. The Metro was way behind time, and we managed to get off at the wrong stop. We set out through huge drifts of snow, beating our own path part of the way. We reached the base of Capitol Hill (the Supreme Court is just behind the Capitol) and continued trudging up the hill. A lonely four-wheel drive sport van drove past us through the snow. When we saw a second one, we instinctively stuck out our thumbs. The vehicle stopped, and Senator Dole gave us a ride to the Court. We arrived with time to spare and proceeded to hear arguments in the *Borland* case.

II. THE CASE

Briefly, *Borland* presents a situation where one software developer, Borland, copied wholesale the command hierarchy of a competitor's popular spreadsheet program, Lotus 1-2-3. Borland did this copying so that its product could easily be used by people who were familiar with Lotus 1-2-3. Most of us use computers, and from that experience, we realize that we make an investment of time when we buy a new program and start to use it. This is because getting a program to do the things we want requires us to use commands built into the software.

Learning new commands can be wearisome at the very least. So far in this article I have used commands for centering and aligning text with the left margin, making bold text, changing size of text, setting the line spacing, creating italics and footnotes. Even with the simplest interface, one wants to minimize the need to learn to do the same functions with new commands.

Often the user will create specialized shortcut commands of his own. These are called "macros." A macro consists of a sequence of commands needed to accomplish a task. The macros reduce the effort called for in using programs, especially for repetitive tasks.

When Borland decided to compete with the Lotus 1-2-3 spreadsheet, it faced the following reality: Lotus 1-2-3 was very popular. Many users invested a considerable amount of time creating macros so that they could make their work easier. If Borland created a superior program, it would benefit users and gain an opportunity for a profita-

ble share of the spreadsheet market. Borland would have to do its own work in creating the program, as copyright laws fully protect the code already authored by Lotus. So, the company designed and wrote its own spreadsheet program. But there was a catch, users were already familiar with Lotus 1-2-3 commands. Furthermore, those who had created macros would be extremely reluctant to shift to any new program that would force them to abandon their hard work put into making macros. To meet this objection, Borland had to create a copy of the Lotus 1-2-3 command hierarchy within its program. Otherwise, users could not use their macros created for Lotus 1-2-3.²

After a lengthy trial, the Federal District Court found that Borland had infringed Lotus' copyright by duplicating the command hierarchy.³ Borland appealed to the First Circuit, which ruled that while indeed there had been copying, what had been copied constituted a "method of operation" which can not be copyrighted because of the limitations imposed by 17 U.S.C. § 102(b).⁴ The Supreme Court promptly granted certiorari, including briefing on an expedited schedule. The stage was set for what promised to be one of the most influential decisions ever on software copyright. In order to understand the significance of the case, we next examine the problem of copyright in the context of software.

III. SOFTWARE COPYRIGHT

For close to two decades the legislatures and courts have tussled with the problem of how to handle claims of ownership or control of computer programs. Both copyright and patent law have been used with varying degrees of practical success to protect the valuable work product of software innovators. Trade secret has always been available as a means of protecting new software developments, provided true secrecy is maintained. Contracts also provide formidable means of protecting software developments. Our focus here, however, is on software copyrights, with a brief comparison with the treatment of software under patent law.

Starting in the early 1980s, copyright moved with great speed to become a reliable means of protecting authorship of software. The

2. "Because the set of instructions used by the macro is a subset of Lotus' commands, the Borland platform had to translate those instructions from macros by means of a file that exactly replicated the Lotus 1-2-3 command structure's syntax and semantics." Brief for the American Committee for Interoperable Systems (ACIS) at 17, *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 116 S. Ct. 804 (1996).

3. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 799 F.Supp. 203, 223 (D. Mass. 1992).

4. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 815 (1st Cir. 1995).

copyright march began with video game cases.⁵ It then moved swiftly to allow copyright ownership of operating systems, that is, those programs that function as the central nervous systems of personal computers and workstations.⁶

A high watermark for copyright protection was reached in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, a Third Circuit case, that sanctioned copyright ownership of the basic structure and file organization of a dental office management program.⁷ The import of the case was that one could now claim ownership of the building blocks or basic processes for handling matters by way of computer programming. The first writer of a program structure would secure copyright ownership, so long as a competitor could set forth his or her code (express it) in a different structure or organization.⁸

In 1991, the *Whelan* case approach was successfully challenged by the Second Circuit in *Computer Associates International, Inc. v. Altai, Inc.*⁹ The *Altai* case squarely rejected *Whelan* because it allowed one to own far too much. Programmers necessarily operate within a practical environment that constrains them to do things efficiently, which may entail using a basic organization that they may have seen some other fellow use.¹⁰ A sound copyright approach would require that a variety of external or objective aspects be denied copyright protection. Thus, the courts should filter out structural elements dictated by considerations of efficiency and the like.¹¹ The in-

5. See *Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982).

6. See *Apple Computer, Inc. v. Formula Int'l Inc.*, 725 F.2d 521 (9th Cir. 1984); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984). The protection has extended to such matters as microcode and interfaces between the human user and the computer running the programs, as well. See, e.g., *NEC Corp. v. Intel Corp.*, 10 U.S.P.Q.2d 1177 (N.D. Cal. 1989).

7. *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

8. 797 F.2d at 1236 n.28.

9. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992).

10. Copyright violation consists primarily of copying another's work. If a programmer has had access to another's work, then one can easily infer that if that same programmer's work is "substantially similar" to the first work, then there has been copying, hence a violation. Independent creation does not violate copyright. E.g., *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir. 1986), *cert. denied*, 476 U.S. 1159 (1986).

11. The court in *Altai* adopted Professor Nimmer's three-step approach to determining what expression is copyrightable. The first filter separates out those expressions where there is only one way to express the idea. The expression and the idea are inseparable and "merge," denying any copyright protection to the expression. The second filter separates out those expressions which are dictated by factors external to the expression itself. These expressions would be those required given the particular idea sought to be expressed, commonly referred to as scenes a faire. The third filter sifts out those expressions which are included in the public domain. For all expressions separated out through the filtration process copyright is no bar to copying that expression. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706-11 (2d Cir. 1992).

fluence of *Altai* spread rapidly and is now followed in a number of other circuits.¹² While copyright law follows the interpretation of each circuit, one can nevertheless observe that the *Altai* approach or some variant predominates in the United States today.

At issue in these cases was the *scope* of copyright protection. It is generally accepted that copyright extends to computer programs,¹³ yet a bedeviling question lies at the heart of cases such as *Whelan* and *Altai*: How far does copyright protection extend? The debate continues and promises to extend long into the future.

While the Supreme Court had not ventured into the fray prior to *Borland*,¹⁴ it has warned in recent years that copyright control should not extend too broadly in the face of public interests in access to and use of expressed thought. In *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,¹⁵ the Court rejected a claim of copyright ownership of the organization and contents of white pages in a telephone book on constitutional grounds. However, in *Campbell v. Acuff-Rose Music, Inc.*,¹⁶ the Court affirmed the existence of a broad privilege to parody or transform copyrighted works under the statutory rubric of fair use.

The *Altai* line of cases, together with the Supreme Court's general copyright rulings has signaled a relative retrenchment in the scope of copyright software protection.

Let us briefly consider the protection accorded software programs by patent law. At first, patent law appeared to be sharply curtailed as a viable means of protecting computer software.¹⁷ However, *Gottschalk* did not flatly reject software patents. Several later Supreme Court decisions actually stated that so long as a computerized process either controlled a physical operation or changed a state of matter, then patents could be obtained for software processes, if the statutory requirements of novelty, utility, and nonobviousness were

12. See, e.g., *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995) (related issue of protection of graphical interfaces); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823 (10th Cir. 1993); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

13. As stated in the ACIS brief, the notion that copyright protects computer programs, including nonliteral elements of their expression "is non-controversial and has been readily accepted by other courts." Brief for the American Committee for Interoperable Systems (ACIS) at 17, *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 116 S. Ct. 804 (No. 94-2003).

14. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 116 S. Ct. 804 (1996).

15. *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991).

16. *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct. 1164 (1994). The fair use privilege is set forth in 17 U.S.C. § 107 (1988 & supp. 1993).

17. *Gottschalk v. Benson*, 409 U.S. 63 (1972).

satisfied.¹⁸ A raft of Court of Claims and Patent Appeals, then Federal Circuit cases confirmed the strong viability of software patents.¹⁹

A quick summary of the trends on software protection yields the following observation. Copyright protection remains important and ubiquitous, but its scope has begun to recede toward boundaries which comport more with the traditional nature of copyright. After all copyright grants an enormous time of ownership for rather elusive products of the mind, namely, particular *expressions* of ideas.

Patent software protection, on the other hand, has burgeoned in recent years to allow registration of virtually any software invention that in any way changes states of matter, governs processes, or sifts such physical phenomena as signals.²⁰ Patent law specifically provides for ownership of new "processes" for a statutory period of twenty years.²¹ Applications for software patents have increased enormously, and general acceptance of the applications by the Patent Office appears to be growing.²²

IV. A QUIET STATUTE

From the outset, the Copyright Act has sought to balance a privilege to control one's creative and expressive output against the public's right of access to the underlying ideas.²³ In order to assure public access to ideas and unpatented utilitarian processes, Congress included § 102(b) as part of the basic provisions of the 1976 Copyright Act. The section is sweeping in its exclusion of matters that consist of pure idea or primarily utilitarian function. It states:

In *no case* does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, *regardless of the form* in which it is described, explained, illustrated, *or embodied* in the work.²⁴

18. 35 U.S.C. §§ 101, 103 (1988). See *Diamond v. Diehr*, 450 U.S. 175 (1981); *Parker v. Flook*, 437 U.S. 584 (1978). See also *Dann v. Johnston*, 425 U.S. 219 (1976).

19. The best single case for reference on this progression and the current contours is *Arhythmia Research Technology, Inc. v. Corazonix Corp.*, 958 F.2d 1053 (Fed. Cir. 1992).

20. See *id.*; *In re Alappat*, 33 F.3d 1526 (Fed.Cir. 1994).

21. 5 U.S.C. § 154. The Copyright Act equally clearly rejects copyright of processes. 17 U.S.C. § 102(b) (1988).

22. Request for Comments on Proposed Examination Guidelines for Computer-Implemented Inventions, 60 Fed. Reg. 28,778 (1995).

23. The discussion refers to the current Copyright Act, which was enacted in 1976. The same effort has been present in the prior statutes, such as the 1909 Copyright Act. See Brief Amicus Curiae of Copyright Law Professors, *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 116 S. Ct. 804 (1996) (No. 94-2003).

24. 17 U.S.C. § 102(b) (emphasis added).

Since its inception the 102(b) exclusion has played a relatively minor role in computer software litigation. This is particularly surprising since these works, while "literary" in form or expression, are fundamentally functional. Software programs are employed to accomplish a specific task,²⁵ not for their "expression."

In 1995, however, § 102(b) took center stage in the First Circuit which allowed Borland to incorporate a copy of the entire command hierarchy from Lotus' 1-2-3 spreadsheet program in its competing Quattro Pro program without violating Lotus' copyright. An exact copy was permitted, because the Circuit Court reasoned that it constituted a "method of operation," which is excluded from copyright protection under § 102(b).²⁶

V. THE ARGUMENT

Supreme Court oral arguments are extremely important. While the cases before the court have already been fully briefed, the argument offers the chance for counsel to engage the Court in a fast moving dialogue about the issues. The Court often engages in the arguments which flow like a conversation, albeit one constrained by the authority of the Justices and the confines of the client's interests at issue.

Mr. Henry B. Gutman, counsel for Lotus, began by emphasizing that the First Circuit had gone too far in its ruling. He urged that since the trial court had made no explicit finding that expressive choices had been completely absorbed into the basic idea structure of the menu, the case must be reversed.²⁷ Mr. Gary Reebak, counsel for Borland, attempted to steer the argument toward what would be equitable under the Copyright Act.

As important as oral arguments can be, it is nearly impossible to draw firm conclusions from what one hears during the course of them. This is because the arguments are an inquiry, that is, an opportunity for the Justices to explore. For instance, were I a judge, I would want to know counsel's response to hard questions, especially if I had a preliminary view on how I believed the case should be decided. One

25. See the brief discussion of software as process versus software as expression in *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 839-40 (Fed. Cir. 1992).

26. *Lotus v. Borland*, 49 F.3d 807, 815-16.

27. Mr. Gutman actually argued this point in terms of art that have developed under copyright law. If particular expression of something coincides so fully with the underlying concept embodied in the expression, then the two can be said to have "merged," and is not protectable. See, e.g., *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967); *CCC Information Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2nd Cir. 1994), *cert. denied*, 116 S. Ct. 72 (1995).

way to test an initial inclination would be to ask a pointed question that seemed to be "loaded" with a point of view that is quite contrary to my actual leanings. Such a question would permit me to see how counsel reasons the response, exposing the strengths or weaknesses of a view that is quite different from my present thinking. After all, I would want to act on the case in a thoughtful and well informed manner.²⁸

With that caveat in mind, I did note the following themes in the argument.

A. *Expression*

A cornerstone concept in a copyright case is whether the work at hand contains expressive matter that ought to be protected. In the *Borland* case, Justice O'Connor noted that Borland had copied the entire 469 words that constituted the menu hierarchy. Her questions and observations along this line seemed to indicate that the answer must be in some sense "yes," some of the hierarchy is expressive. If that is the case, then Lotus should win, according to an analysis based on the notion that all original expression can be protected under copyright.

Justice Ginsburg pursued the same theme. She wondered aloud if this case were not too sweeping. Had there ever been a case where an entire range of works had been excluded from copyright protection, without regard to the fact that they may contain expressive aspects? Her line of questioning raises different possibilities concerning the interpretation of § 102. Section 102(b) can be understood in at least one of the following ways: (1) Section 102(b) constitutes an aid to finding whether something is "expressive." To the extent a menu hierarchy is a method, it is likely not to be an expressive feature; or (2) Section 102(b) creates an affirmative bar to copyright. Even if a portion of a menu is "expressive," if that same aspect amounts to a function or method, it is excluded from copyright.²⁹

28. Journalists will often assure us that Justice X is going a certain direction because she asked such and such a question or employed a certain tone when asking it. Sometimes that is so. Sometimes it is not. Often the journalist's interpretation of "where the Justice is coming from" falls very wide of the mark. In addition, the observer will be necessarily limited in perceptions and recollection. I took no notes during the argument, I am not sure whether note taking is permitted in the bar section of the court. In any case, I did not want to be distracted from the overall ambience of the argument.

29. The two different approaches resemble the way in which a typical tort case is viewed. The plaintiff must prove his or her case. While the defendant may undermine the case in chief, he or she may also present affirmative defenses. The first version makes § 102(b) part of the case in chief. The second makes it an affirmative defense.

Justice Breyer offered an analogy to the menu hierarchy.³⁰ The analogy was that someone designed a very good organization for a department store: women's wear on the first floor, men's on the second, children's on the third, etc. The organization then has formal wear in one section, business suits in another, right on down to shirts, sweaters, etc. He wanted to know whether one could copyright such an organization, including the labels, "women's," "shirts," etc. He pressed both counsel with this line of questions. He seemed to lean toward finding such matters, including the Lotus menu hierarchy, excluded from copyright.

Very early in Mr. Gutman's argument, Justice Souter asked whether this was an "analysis" or a "choice" case.³¹ Mr. Gutman responded without hesitation – he stated that it was an analysis case. He then continued with his theme that the First Circuit made a critical mistake by ruling as a matter of law against Lotus where the trial court had made no explicit finding that the expressive elements of the menu had "merged" with and therefore become inseparable from the idea. If this is the case, then the Circuit Court failed to leave the crucial factual question to the trial court.

B. *Macros, Judge Boudin, and Policy*

Another main feature of the argument was whether a policy choice exists. The concurring opinion of Judge Boudin came up quite a number of times in this context, as he had indicated that an inappropriate creation of a monopoly would result, if control of the macros were allowed.³² One response to this line of inquiry would be to emphasize that Congress has firmly identified the controlling policy in § 102(b). The Act has struck this balance in favor of users, by forbidding ownership of methods.

The question of the meaning of § 102(b) as a policy limit (also as a firm rule) was made rather concrete in a colloquy by Judge Boudin that focused on the development and use of macros. If it is true that

30. He also stated, in a light hearted way, that "no one likes" the analogy. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 1996 WL 12827, at 15 (U.S. Oral.Arg., Jan. 8, 1996).

31. I believe Justice Souter used the word "choice" A colleague thought that was the word, as well. In any case, "analysis" and "choice" reflect the sense of his comparison. I thought that was one of the most trenchant questions asked during the argument, yet I am not certain what Justice Souter was probing with it. He may have meant that an analytical case would be one which simply asks whether the lower court followed the correct application of the statute, as in its handling of the problem of "merger" of idea and expression. By "choice," he may have been asking if the case is one in which choice among either policies or major premises would determine the outcome. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 1996 WL 12827, at 6 (U.S. Oral.Arg., Jan. 8, 1996).

32. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 821 (1st Cir. 1995).

the original developer, in this case Lotus, can in effect control the use of shortcuts developed and "expressed" by the user, then the basic policy of ownership only of one's own expression will be violated.

VI. LULL IN THE STORM

The decision in *Borland* came as swiftly as the Blizzard of '96. Eight days after the oral argument, the Court issued a one sentence *per curiam* opinion: "The judgment of the United States Court of Appeals for the First Circuit is affirmed by an equally divided Court."³³ The speed of the decision took close watchers of this case by complete surprise.

The ruling brings finality to the specific case, absent the rare possibility of a grant of a rehearing.³⁴ However, the Supreme Court decision itself has no effect as precedent.³⁵ Thus, the decision falls far short of being "definitive" regarding the effect of 17 U.S.C. § 102(b) as a limitation on the scope of copyright. The First Circuit will be guided by both the holding and the general understanding conveyed by the Court of Appeals decision.³⁶

However, the disposition creates doubt over the relative force of some basic copyright premises – whether developer or public access claims ought to prevail with regard to highly functional elements of a computer application. Four Justices voted to affirm, but four were of some other opinion, to reverse, or perhaps remand.

Thus, the decision represents a lull in the storm that gathers around the Supreme Court concerning the scope of copyright protection of software. The clouds of controversy now hover outside Washington, in various District and Circuit Court cases. More parties with adequate financial resources will be inclined to seek review of their computer copyright claims. Their counsel will be emboldened by the close division within the Court.

There are matters which remain relatively certain, however, despite the lack of a definitive ruling in this case. First of all, § 102(b)

33. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 116 S. Ct. 804 (1996). The order further notes: "Justice Stevens took no part in the consideration or decision of this case."

34. Lotus would have to petition within 25 days. The Stern and Gressman treatise noted only two rehearings granted in the 1991 and 1992 terms. R. STERN ET AL., *SUPREME COURT PRACTICE* 610, 620 (7th ed. 1993).

35. *See Neil v. Biggers*, 409 U.S. 188 (1972).

36. Other circuits would not be bound by the First Circuit's ruling, absent a pronouncement by the Supreme Court. While there is no *Borland* Supreme Court decision to interpret, the proceedings before the Court may be helpful to attorneys in future cases. Stern and Gressman suggest: "Indeed, it would seem appropriate to look at anything in the earlier record, briefs, or argument that may reasonably be regarded as throwing light on what the summary affirmance means." STERN ET AL., *supra* note 34, at 219.

remains a strong and definite limitation on the scope of copyright computer claims. Computer programs behave, function, and while our law has been designed to protect the literary expression of that functionality, it has also created the strong line of resistance embodied in § 102(b).

When pressed by a judge as to whether public policy favors copyright control or public access to necessary command functions, the strongest response is that Congress has already struck the balance and decided the governing policy by its implementation of § 102(b). Functionality which is nearly pure, that is not embellished by some element of creative choice falls outside copyright protection. To be sure, the line between expression and unadorned functionality is not bright. But the Copyright Act insists that judges draw the line, and that they draw it with vigor in order to assure that the public will enjoy the "Progress of Science and the useful Arts" as Congress intended.³⁷

Carol Kunze and I are publishing our amicus brief that accompanies this essay because we are confident that it properly emphasizes the thrust and practical importance of § 102(b).³⁸ Section 102(b) presents an integrated set of concepts that exclude ideas and primarily functional works. Copyright does not extend to those aspects of a computer interface which constitute the command function.

The *Borland* case has come and gone, but §102(b) should certainly move to a more prominent role in copyright treatment of com-

37. U.S. CONST. art. I, § 8, cl. 8.

38. I had been working with and advising on the basis of § 102(b) for years. Many students in my classes had worked through its implications, and that activity accelerated after the Circuit Court decision was announced. I joined in the "Copyright Professor's Amicus Brief" written principally by Pamela Samuelson in the First Circuit. After all these years, I truly wanted to submit a very short brief to the highest court that focused sharply on the meaning and impact of § 102(b). Over the years I have had the benefit of working with many fine copyright scholars, including the following who also provided critique and reassurance on our Amicus brief: Mr. Daniel B. Curtis, Professor Pamela Samuelson, Professor Paul Goldstein, and Professor Dennis Karjala. Also, I believe that intellectual property claims are always subject to very strong public policy claims of access. These are based on norms of freedom of competition and free flow of information. Title 17 § 102(b) appears to be an example of congressional recognition of access type rights.

I was also asked: "What if Lotus had won?" If that had been the case, § 102(b) and its attendant policies would still be on the books, but depending on the nature of the Supreme Court's discussion, a cloud might have been placed over the efficacy of the provision. However, the most likely Supreme Court decision, other than affirmance, would have taken some form of clear recognition of the force of § 102(b) coupled with a remand to the lower courts.

puter programs.³⁹ The “quiet statute” will speak clearly, though not shrilly, in software litigation and planning.

39. Recently the Eleventh Circuit utilized § 102(b) to reverse and remand requiring more adequate jury instructions on matters that may be beyond copyright protection. The Court noted that a variety of bases, including § 102(b) definitely limit certain functional aspects of software: “Whether the protection is unavailable because these (external factors such as compatibility requirements) render the expression unoriginal, or nonexpressive per 17 U.S.C. § 102(b), or whether these factors compel a finding of fair use, copyright estoppel, or misuse, the result is to deny copyright protection to portions of the computer program.” *Bateman v. Mnemonics, Inc.*, 1995 U.S. App. LEXIS 36363 (11th Cir., Dec. 22, 1995).