BUSINESS

Case 'looks and feels' like a patent

Glossary of software terms

Case Looks and Feels Like a Patent

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Ever since Bill Gates added up enough ones and zeros to make a billion dollars, there has been a dream in the Washington State software industry that with a little bit of creativity and a lot of luck, the Microsoft story can be repeated.

A recent ruling in a major software industry case, however, is likely to provide a reality check and a wake-up call to developers in this state as well as elsewhere.

U.S. District Judge Robert Keeton ruled June 28 in Boston, that Paperback Software had violated the "look and feel" of Lotus Development Corp's 1-2-3 in Paperback's $99 spreadsheet program.

Although the ruling was aimed only at Paperback, and it is likely to be appealed, " its effect will be to chill some away from a better idea," says David Schacter, a Palo Alto, Calif., copyright attorney specializing in software cases.

The chill from the Boston decision was quickly felt in Silicon Valley as Lotus expanded its interface protection by filing suits against Borland International and The Santa Cruz Operation, both makers of competitive spreadsheet programs.

In Washington State,the effect of the decision will not be immediate. Microsoft Corp's Excel, the biggestto Lotus 1-2-3, is unlikely to feel the wrath of Lotus' legal squad because the program has a different user interface. In fact, Judge Keeton cited Excel's example in his 113-page decision as proof that an alternative interface can be a commercial success.

William H. Neukom, vice president of law and corporate affairs at Microsoft says the company was naturally appreciative of Judge Keeton's citation. However, he says, Microsoft feels that individual variations on industry standard interfaces should be measured on a "case by case basis."

Microsoft is in the midst of a "look and feel" lawsuit of its own. The action, filed by Apple Computer Inc., contends that Microsoft's Windows graphical user interface bears too much similarity with the Apple Macintosh interface. Some industry observers, however, note that Apple's interface bears even more similarity with the Xerox Star interface developed by Xerox Corp in the late 1970's. Xerox itself made a last minute attempt to invalidate Apple's claim to the Macintosh interface, shortly after Apple filed its suit. However, a San Francisco judge struck down Xerox's claim earlier this year as too little too late.

The Microsoft/Apple case was turned over to newly appointed Judge Vaughn Walker in February, after Judge William Schwarzer took a five-year leave of absence from the U.S. District Court in San Francisco to head the Federal Judicial Center in Washington, D.C.

The change in judges is likely to cause a further delay in the two-year old case. Only 10 of 189 "similarities cited by Apple in Microsoft Windows remain to be decided. Judge Schwarzer ruled last summer that the other 179 similarities were covered by a licensing agreement signed by Microsoft with Apple in 1985. Microsoft and codefendant Hewlett-Packard filed nine motions on June 13 — most of them sealed — that will be the subject of a public hearing later this summer.

The Washington State Software Commission, which was established to present

a unified political front on issues such as taxation, has not yet taken an official position on the "look and feel" question. Bob Delf, president of Interlinq Software in Kirkland and chairman of the software industry group says the Lotus decision may force at least a discussion of the issue at its forthcoming July 23 board meeting.

Delf says the group has not taken a stand on the issue in the past, because few of the 220 member companies have been faced directly with the question. "Microsoft is the only exception," he says.

Delf, himself, takes a position that copyright protection should be based on the manner in which a system interacts with the user — not on a "look and feel" of a particular interface. He says that in his own company's programs, the basic mortgage software calculates the same figures and determines the same bottom line as competitive products. What is different is the manner in which the user can achieve these results. "Paperback and Borland used both the user interface and the keystroke command interface from 1-2-3. I think that was a mistake. If they hadn't, they would not be in the position they are in," Delf says.

In his ruling, Judge Keeton says Lotus' command interface is unique, and competitors should be able to express the same thing in an unlimited number of ways. Lotus attorneys further defended their actions against Paperback Software and others by noting the company's large investment in the development of the interface. While Lotus must recoup this investment by charging a much higher price for 1-2-3, rivals have been free to copy the interface in their inexpensive versions. "We believe Judge Keeton's decision was a very well thought analysis of the copyright law," says Richard Eckel, a spokesman for Lotus Development Corp.

Others, are not convinced, saying that companies like Lotus that create an industry standard, will have the right to eliminate competition. "Judge Keeton's decision in essence gives Lotus a monopoly on spreadsheet interfaces," Schacter says.

A copyright is different from a patent, the attorney adds. A patent gives a company a monopoly on how an idea is expressed, such as in a hardware device. A copyright, gives a company or an author the right to an idea, not its method of expression. One author might lead off a book with "It was a dark and story night," for example. A second author might express the same idea "It was a typical Seattle winter's evening," without violating the copyright.

Software law is more complicated, Schacter says. The term "look and feel" is amorphous, he points out. The term has little legal meaning, except as one small part of the jury instruction during copyright trials. It's primary use has been in literary copyright cases, however, the term has become better known in software copyright suits. "Look and feel" has come to mean a very close similarity in interfaces — what the user sees and uses to execute commands in a software program. Some cases have gone beyond mere "look and feel" to contend an "eerie resemblance" exists between two applications.

There are only so many ways a user interface can be expressed, Schacter believes. The limitations are imposed by the users. A user expects to be able to move from one software package to another without having to learn a dozen different ways of calculating numbers, searching for data or performing countless other everyday tasks.

The Lotus interface, which makes use of a menu accessed by a slash key, has

become an industry standard that has been copied by a large number of software developers.

Lotus officials say they are not targeting any particular company because of market share. “If you can improve on the Lotus interface, we welcome it,” Eckel says. “What we are fighting is the copies.”

The Lotus/Paperback decision is not likely to be the final word on the issue. Whatever happens in the Microsoft/Apple Computer litigation, the issue is likely to continue to reflect the biases of regional federal courts. Sensing this probability, Borland filed suit against Lotus, hours before Lotus filed its claim against the California company. By so doing, Borland will get the case heard before a San Francisco judge, rather than taking its chances in a Boston court.

Attorney Schacter says ultimately one of these cases will reach the U.S. Supreme Court. “Only then will we see a final resolution of the question,” he notes. In the meantime, however, small developers with a big dream must take care that the program they develop is both user-friendly and lawyer-friendly