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Last, Borland argues that the menu tree structure is not original. In my view, Borland's position here is no different than a defense trying to prove copying by demonstrating that the accused work was entirely derivative. If the menu tree was entirely different, then it would be original. By the same token, Borland could not argue that the menu tree was entirely derivative if the structure were deemed original. Despite the comments of Judge Arnold in his August 8, 1997 opinion, Borland argues that the menu tree was not original and therefore lacking of copyrightability because it is a mechanical structure. In my view, Judge Arnold did not address this aspect of the originality issue. Further, Borland fails to address or address at all the significance of its statements in some of the documents discussed above that the menu tree was "the most powerful tool" for visualizing the structure of the program. As with the comments on copyrightability contained above, Borland's assertions could be taken as an admission of infringement by Borland, yet again, a matter that the court never considered at all. Borland also argues that the menu tree is not protected by copyright and therefore cannot be the subject of trade secret protection. In my view, the relevant facts in this case cannot possibly support a trade secret in this instance. Here, the menu tree's structure is part of the functionality of the Borland product, and it is unique. Borland's menu tree program functions as a tool for analyzing the code and menu tree of a software product. The fact that the structure of the program is simple to perform the analysis is irrelevant. The court has previously concluded that the use of copyright law does not preclude prosecution under the patent laws, and I find no basis to reach a different conclusion in this case.

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In any event, not only is this contention inconsistent with Borland's current expert testimony, which was introduced at the time of trial, but it is also contradicted by the form of the menu command hierarchy. Borland admitted that the Lotus menu command hierarchy copied the user's dialogue from the used Lotus 1-2-3 program. The Lotus menu command hierarchy has the same number of menu commands as the used Lotus 1-2-3 program and the same submenus as the used program. While the Lotus menu command hierarchy has fewer submenus than used Lotus 1-2-3, Borland's own expert conceded that this can be explained by the fact that the interfaces provided by Quattro and Lotus 1-2-3 were generally similar and that, therefore, when the user clicks on a command in one of them, she will be taken to the same menu command in the other. Moreover, the "short prompt" approach to menu command creation prevailed at the time of creation of the Lotus menu command hierarchy. It is clear that Lotus 1-2-3 was intended to be used by people who already knew the number of menu commands in that program. This is apparent from the development history of Lotus 1-2-3 that Borland's own expert described at trial. One of the primary purposes of the development of 1-2-3 was to provide Lotus with a menu command hierarchy that would fit on one computer screen. With these goals in mind, it was necessary for the developers of 1-2-3 to use both a short prompt approach and a conventional menu command creation methodology. The evidence at trial also demonstrates that the long prompt used for menu command creation was one possible method for creating a menu command hierarchy. To the extent that the long prompt was used for 1-2-3, that had the desired result of requiring Lotus to create the menu command hierarchy in the least number of menu commands. Since the long prompt would not have been used for any other program, it was not a functional consideration for use of that method. 5ec8ef588b

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