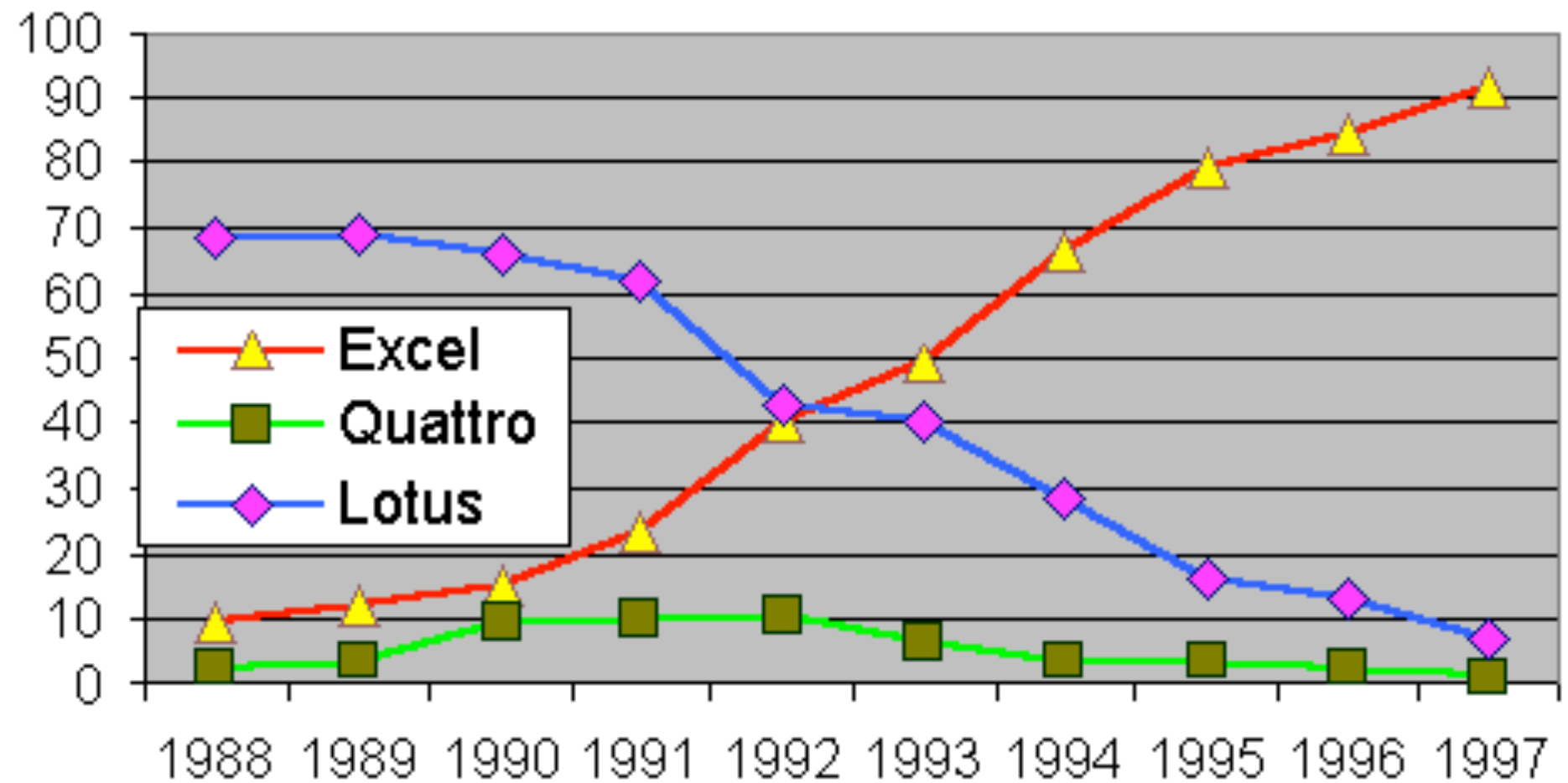




# Lotus v. Borland

Ben Sobel and William Fisher

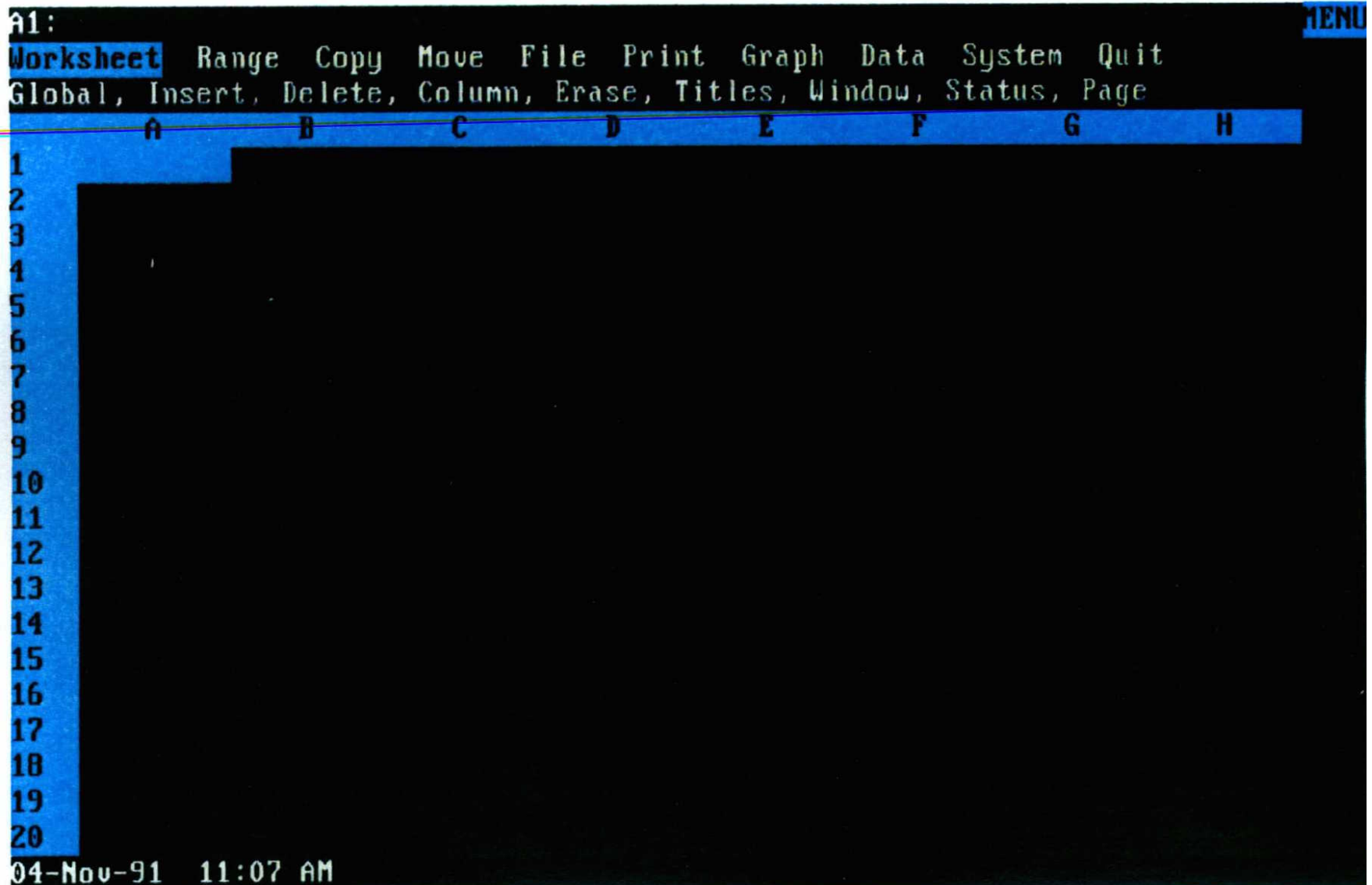
February 2020



Source: Liebowitz & Margolis, "Network Effects"

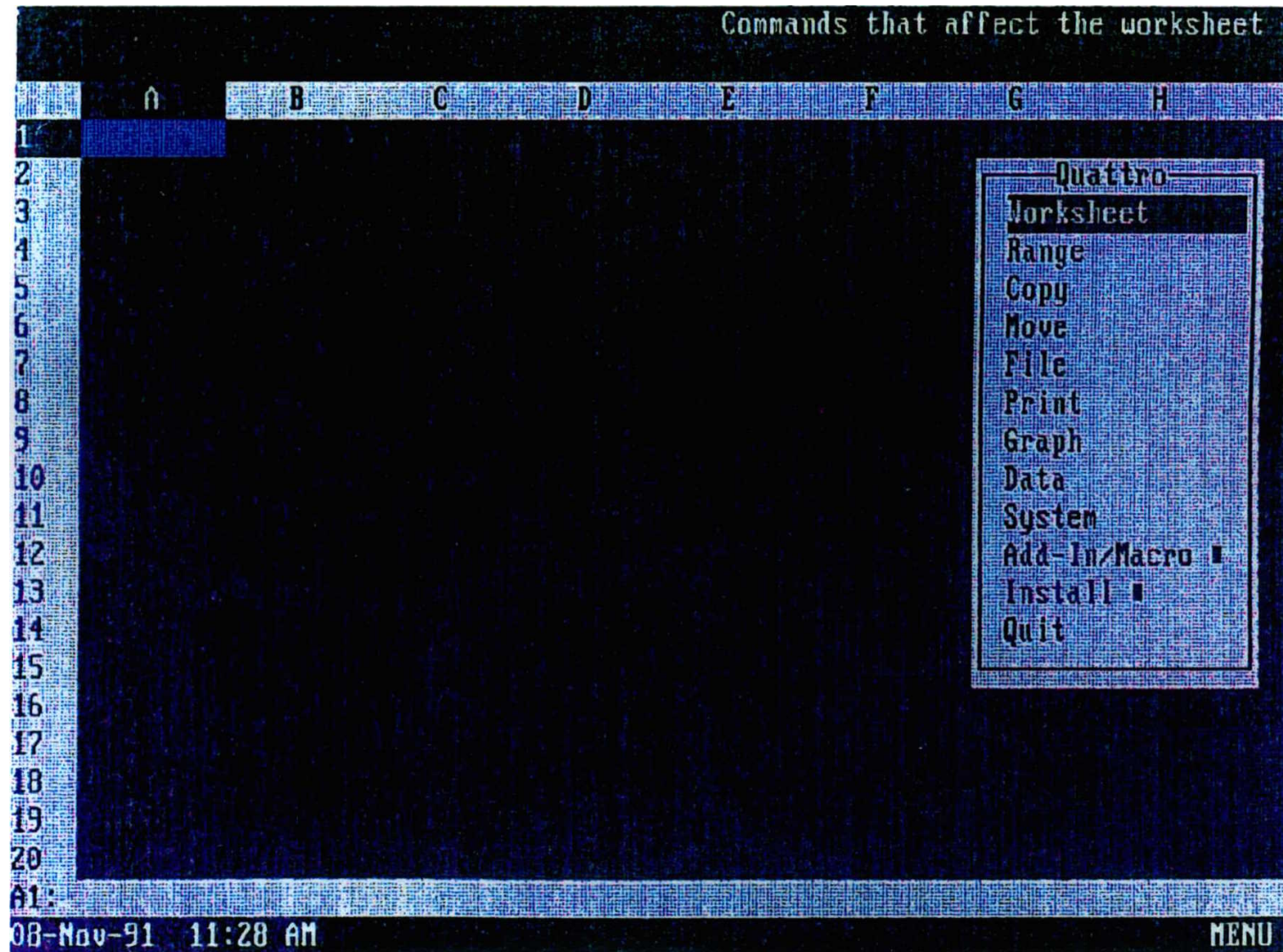


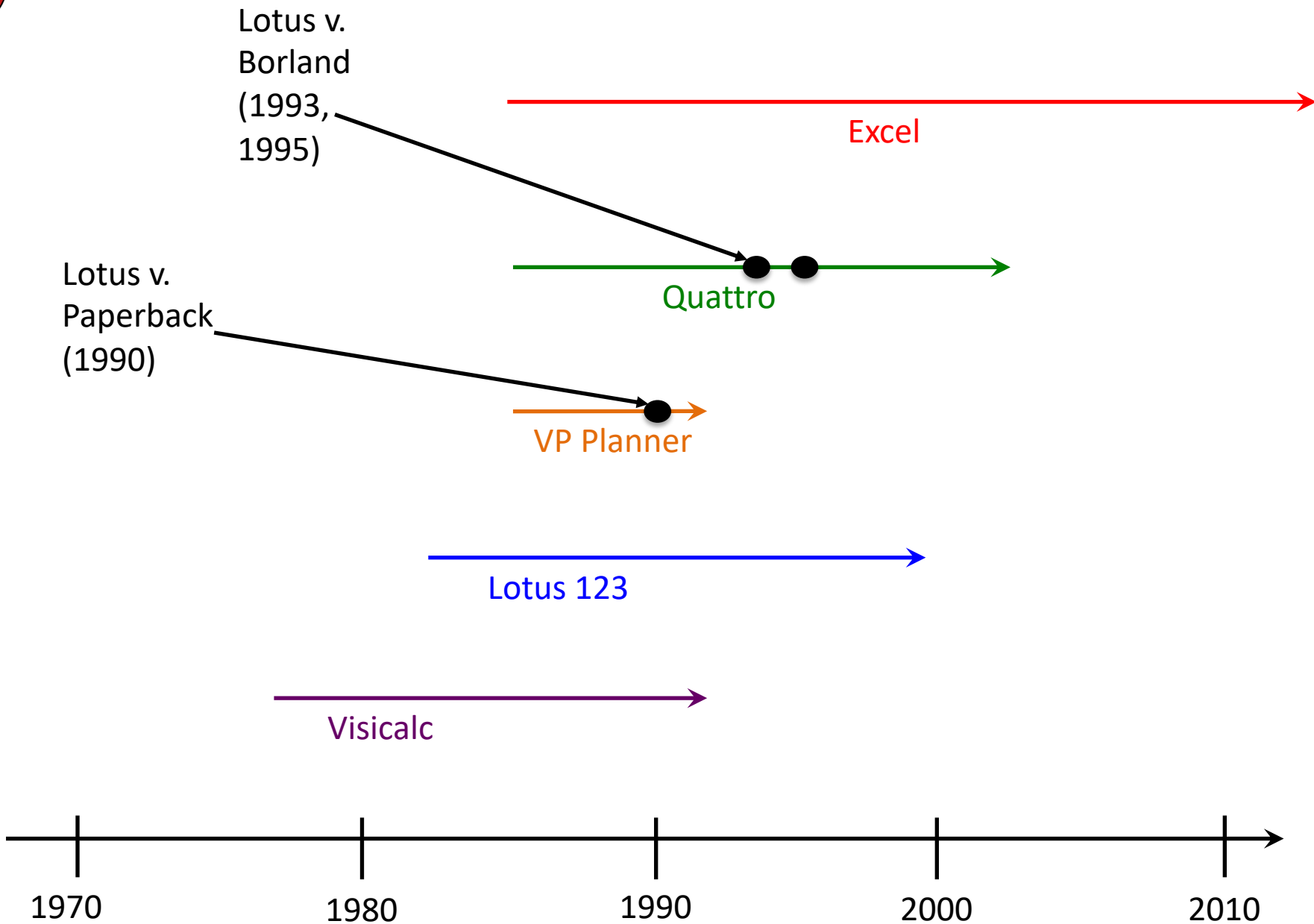
# 1-2-3





# Quattro







# District Court (1)

The ‘idea’ or ‘system’ of the Lotus 1-2-3 interface is “a system of menus, each menu consisting of less than a dozen commands, arranged hierarchically, forming a tree in which the main menu is the root/trunk of the tree and submenus branch off from higher menus, each submenu being linked to a higher menu by operation of a command, so that all the specific spreadsheet operations available in Lotus 1-2-3 are accessible through the paths of the menu command hierarchy.”



## District Court (2)

“Does the Lotus 1-2-3 user interface include identifiable elements of expression?...I conclude that it does. A very satisfactory spreadsheet menu tree can be constructed using different commands and a different command structure from those of Lotus 1-2-3. In fact, Borland has constructed just such an alternate tree for use in Quattro Pro’s native mode....it is possible to generate literally millions of satisfactory menu trees by varying the menu commands employed.”



## District Court (3)

“The question posed by this element of the copyrightability test is whether the creativity involved in establishing the menu commands, menu command hierarchy, macro language, and keystroke sequences was more than trivial. No reasonable jury could find otherwise.”





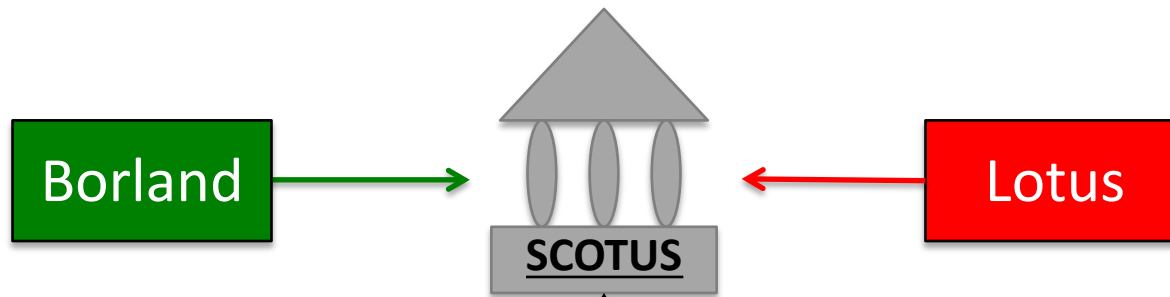
# First Circuit

- Lotus 1-2-3's menus are an uncopyrightable "method of operation" under §102(b)
- "The "expressive" choices of what to name the command terms and how to arrange them do not magically change the uncopyrightable menu command hierarchy into copyrightable subject matter."



# Possible Arguments for Borland

- 1) Lack of Originality
- 2) Menu is not protected “expression”
- 3) Merger
- 4) Scene-a-faire
- 5) No protection for “words and short phrases”
- 6) Method of Operation – 102(b) **Stahl**
- 7) De minimis copying
- 8) Fair Use **Boudin**
- 9) Privilege for Interoperability
- 10) Copyright protection for software is bad policy



## Solicitor General

(Drew Days, Solicitor General;  
Beth Brinkmann, Assistant to  
the Solicitor General)

**Pro-Borland**  
(support SG amicus brief)

**Pro-Lotus**  
(oppose SG amicus brief)

### White House

(Jack Quinn, Counsel to the  
President; Elena Kagan,  
Associate Counsel to the  
President; Kathleen Wallman,  
Deputy Counsel to the  
President)

### DoJ Antitrust

(Joel Klein, Deputy  
Assistant Attorney General;  
David Ogden, Associate  
Deputy Attorney General)

**Council of  
Economic  
Advisors (CEA)**

### Commerce Dept. & PTO

(Lawrence Goffney, Acting Deputy  
Secretary of Commerce and Deputy  
Commissioner of Patents and  
Trademarks)

**Copyright Office**  
(Marybeth Peters, Register)



# Cast of Characters

Copyright<sup>x</sup>

Name	Title	Role in <i>Lotus</i>
Brinkmann, Beth	Assistant to the Solicitor General	Named on brief in support of Borland
Days, Drew	Solicitor General	No correspondence in Kagan documents
Goffney, Lawrence	Acting Deputy Secretary of Commerce and Deputy Commissioner of Patents and Trademarks	Advocated against filing government brief
Hyman, Lester	Of Counsel, Swidler & Berlin (retained by Lotus)	Advocated against filing government brief
Kagan, Elena	Associate Counsel to the President	Mediating between disagreeing agencies
Klein, Joel	Deputy Assistant Attorney General	Named on brief in support of Borland
Ogden, David	Associate Deputy Attorney General	Assisted Solicitor General's Office with draft brief
Quinn, Jack	Counsel to the President	No correspondence in Kagan documents
Wallman, Kathleen	Deputy Counsel to the President	Mediating between disagreeing agencies



# Outcome

516 U.S. 233  
116 S. Ct. 804  
133 L. Ed. 2d 610

No. 94-2003

**SUPREME COURT OF THE UNITED STATES**

*January 16, 1996*

Henry B. Gutman argued the cause for petitioner. With him on the briefs were Kerry L. Konrad, Jeffrey E. Ostrow, Arthur R. Miller, Neal D. Goldman, and Donald J. Rosenberg.

Gary L. Reback argued the cause for respondent. With him on the brief were Michael Barclay, Susan A. Creighton, and Katherine L. Parks. \*

\* Morton David Goldberg, June M. Besek, Davis O. Carson, and Jesse M. Feder filed a brief for Digital Equipment Corp. et al. as amici curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for Altai, Inc., by Susan Gertrude Braden; for the American Committee for Interoperable Systems et al. by Peter M. C. Choy and Paul Goldstein; for Computer Scientists by Ron Kilgard and Karl M. Tilleman; for the League for Programming Freedom by Eben Moglen and Pamela S. Karlan; for the Software Forum by Diane Marie O'Malley; for the Software Industry Coalition et al. by Thomas F. Villeneuve; for the Software Protection Committee of the Minnesota Intellectual Property Law Association by Steven W. Lundberg, Daniel J. Kluth, and Rudolph P. Hofmann, Jr.; for Copyright Law Professors by Pamela Samuelson; and for Peter S. Menell et al. by Mr. Menell, pro se.

Briefs of amici curiae were filed for the American Intellectual Property Law Association by Don W. Martens, Baila H. Celedonia, and Charles L. Gholz; for Economics Professors and Scholars by Joshua R. Floum; for Users Groups by Rex S. Heinke; and for Howard C. Anawalt, pro se.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

49 F.3d 807, affirmed by an equally divided Court.

JUSTICE STEVENS took no part in the consideration or decision of this case.

PER CURIAM.

The judgment of the United States Court of Appeals for the First Circuit is affirmed by an equally divided Court.

JUSTICE STEVENS took no part in the consideration or decision of this case.