

# LOCKE FOR THE MASSES: PROPERTY RIGHTS AND THE PRODUCTS OF COLLECTIVE CREATIVITY

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## I. INTRODUCTION

A concurring opinion in a First Circuit copyright case<sup>1</sup> from the 1990s caught my attention when it came out, and I have been rolling its ideas around in my mind ever since. In the case, the court denied copyright protection to the menu command structure of the Lotus 1-2-3 spreadsheet program.<sup>2</sup> The majority's holding was straightforward, and came right out of statutory law.<sup>3</sup> But the concurrence by Judge Boudin was different. In it he talked of the importance of maintaining a commons, but his logic stressed that much of the value of Lotus' menus was created by the efforts of those who used the 1-2-3 program:

Requests for the protection of computer menus present [a] concern with fencing off access to the commons in an acute form. A new menu may be a creative work, but over time its importance may come to reside more in the investment that has been made by *users* in learning the menu and in building their own mini-programs—macros—in reliance upon the menu.

....

A different approach [to resolving this case] would be to say that Borland's use is privileged because, in the context already described, it is not seeking to appropriate the advances made by Lotus' menu; rather, having provided an arguably more attractive menu of its own,

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1. *Lotus Dev. v. Borland Int'l*, 49 F.3d 807 (1st Cir. 1995) (Boudin, J., concurring).

2. *Id.* at 819.

3. *Id.* at 819-20 (finding that "expression that is part of a 'method of operation' cannot be copyrighted").