PC Software Workshop: Legal Issues - Contracts

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Recorded: May 6, 2004
Needham, Massachusetts

CHM Reference number: X4621.2008

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Conducted by Software History Center – Oral History Project

Abstract: Dan Bricklin and Dan Fylstra discuss VisiCalc's various contract issues, including how the original contract between Personal Software and Software Arts was done and their royalty arrangement. They discuss other types of contracts including the end-use shrinkwrap license, dealer and distributor contracts as well as developer contracts. They end by talking about the relationship with both IBM and Atari for VisiCalc.

Participants:

Name	Prior Affiliation
Oscar Schachter	ADAPSO, ACT, moderator
Dan Bricklin	Software Arts, Software Garden
Dan Fylstra	Personal Software, VisiCorp
Burton Grad	IBM, ADAPSO
Doug Jerger	ADAPSO
Luanne Johnson	Charles Babbage Foundation
John Toole	Computer History Museum
Bill Aspray	Indiana University, historian
Tim Bergin	American University, historian
Martin Campbell-Kelly	University of Warwick, historian
Jeffrey Yost	CBI University of Minnesota, historian

Oscar Schachter: We're here to talk about the use of contracts in the PC industry. For the tape, I'd like each of you to identify yourselves.

[Each participant introduced himself or herself by name]

Types of Contracts

Schachter: Some of contracts that were used in the PC world were different from those used in the mainframe world. The first one was a development contract where one company or one individual developed a piece of software but didn't have the desire or the ability to distribute it and asked another company to distribute that software; the distributor company was then paid a royalty on the resale of the software.

A second kind of contract which was very prevalent in the PC world but not in the same way in the mainframe world, was a distributor contract with distributors distributing large numbers of packaged software products but not adding any value to them. The “mainframe” world had VARS who packaged software with a microcomputer or a minicomputer and added technical value.

Bill Aspray: They added financial value too.

Schachter: Yes, that's right. The third contract, which was prevalent in both worlds, was an end user contract -- a contract between the owner or the person who had the right to license the software and the person or the company who was going to use the software. The PC world added a number of very complex issues to this third category of contract that didn't exist in the kind of face-to-face negotiations that took place between the mainframe or minicomputer supplier.

Dan Bricklin: And what else, the nondisclosure agreement [NDA]?

Oscar Schachter: The nondisclosure agreements were really important. They were standard, but there were variations for most contracts.

Bricklin: There were variations that occurred because of the beta testing we did and stuff like that.

Burt Grad: We want to focus primarily on those things that were unique and different in the PC world. NDAs were very common in the mainframe world. We always had significant interactions with our beta test clients and there were greater numbers of customers involved. If there are some of these other kinds of things that you think are good variations, let’s talk about them.

Bricklin: I was involved with some that were not unique to PCs, but they varied with different companies. Working with IBM was different from other companies; their NDA was very difficult and almost killed our deal with them. If you look at NDAs, IBM, which used the traditional type was on one end, and on the other end was the NDA used by companies like Ansa, the one that produced Paradox. Theirs was a much more friendly, to put it mildly, NDA. It included something like sign on the dotted line -- this is the dotted line.

Grad: Are there any other types of contracts? Jeff, do you know of any; or was anyone else involved here? The three that I mentioned were the major ones I thought of and we’ve added the NDA.

Jeff Yost: Another one relates to one site versus multi-site.

Martin Campbell-Kelly: I also have an interest in knowing about the number of licenses for the purpose of reverse engineering.

Schachter: That was true in the mainframe world where we licensed object code, basically, and the end user was prohibited from trying to reverse engineer the product to arrive at the source code.

Grad: One of the interesting questions we can explore as we go through this is, in most cases there was no significant use of the mainframe contracts in the PC world; the PC people invented their own rather than used contracts from the mainframe world. I believe this is true and that's one of the things I was hoping we could clarify during this discussion.

Aspray: Was that true of the minicomputer?

Schachter: The minicomputer followed the mainframe world to a large degree. But look at the first contract we talked about. It was a developer writing something and then giving somebody else the right to sell it for them. Basically in the mainframe world the developers worked for the corporation that was the eventual licensor of the product, or they worked for the company that was going to license the product. They would give the license to somebody else; the individual was not involved. However, in the PC world I think you had many more individuals writing software, then they licensed a company to distribute it.

Tim Bergin: We had that before with the FORTRAN houses that would create the FORTRAN for somebody else and things like that.

Grad: That was custom work. The company that Oscar was with, ACT, did a bunch of those custom system software programs.

Schachter: Yes and the copyright was always with the company you were working for.

Grad: So who would initiate the contract? They had one example with VisiCalc. I know there must be others here that know about it. How did it get started?

Bricklin: We know how the VisiCalc one got started because Dan [Fylstra] talked about it this morning.

Schachter: I missed that conversation.

The Initial Contract for VisiCalc

Bricklin: Okay. Dan talked about how he came from a background in publishing, and they used a publishing lawyer named Anderson, or something like that. The firm is not around anymore. And it was back and forth between our representative, Frank Conrad, from a small firm in Boston, and Personal Software. It was based on Bob [Frankston] and me wanting to craft it the way we needed it, plus the input we had from others. But when we did it, Dan tried to write it as a contract that he could use as a standard contract in the future. We didn't have word processing in those days that we could afford. So he actually typeset it and then brought it back and made a copy of the original. It was copied on one of those copiers that used a light bulb underneath it.

And that's how we literally did that. It was trying to be a standard agreement – it was written like a standard agreement – and tried to come up with as many different things we could think of, including the fact that the author may be the author of future works. We included deliverables and acceptance and all that type of stuff.

Schachter: What about the maintenance of the software?

Bricklin: Well, there wasn't maintenance as such but it had to do with fixing bugs. But remember that there was no ongoing relationship with the customer. And, actually, people made fun of the idea of new versions for years. Microsoft started doing that and I remember watching them saying, "Oh, Microsoft's making money because there's an installed base and they're making money off of their upgrades." And people laughed about that as being a major thing, and now we know that's the major thing that they care about because once you saturate the market, that's your main source of revenue. You know, in those early days, it was just: You came out with a product. They bought it. You never heard from them. In fact, you were lucky if you heard from your customer so that you could try to sell them something else in the future. You would fix bugs in new versions and you would do new versions as new hardware upgrades occurred. But one thing you wanted to do was to come up with new products. The big one was bringing out new versions for new machines. We were licensing it for the Apple and we had to be in all those different machines. This was the VisiCorp type of the personal software contract which was a model for others.

Schachter: Did VisiCorp try to lock you into anything that you did in the future?

Bricklin: Yes. Did you read the contract? The whole relationship with the company was tainted by the fact that we both had lock-ins and we had to dance around the lock-ins because we wanted to do other products that might not go through them because of our relationship. And they wanted to get other products from other people. That whole thing was similar to entertainers being locked in and vice versa. That was in the contract and the details specified when we had to look at the new version, and when we had to produce it for them, and how

royalties were calculated. There was a whole concept.

Schachter: There is a difference, though, between a new version of the same product and an entirely new product. Suppose you had developed a word processor?

Bricklin: I don't know if we had in that contract a right of first refusal. There were discussions, and I'm sure it was in other contracts. There were various rights about other products that you might produce, and whether they got the right of first refusal or not, whether you were given a right of first refusal to produce a product that they wanted when they were doing an RFQ. Those were all discussed; I had notes that we discussed those types of things with them at various points over the years.

Schachter: But clearly, if you wanted to introduce an upgraded version of a spreadsheet, they had first rights to that.

Bricklin: It depended upon how you interpreted the contract on that. There were always statements regarding “mutually agreeable” and stuff like that. As Dan said, it was an attempt at a contract. It was the first one. It was done under great time pressure because he was privately announcing it at Ben Rosen's conference in New Orleans the next morning. He had a flight a few hours later, and he signed it at about 2:00 in the morning, after months of negotiation back and forth. So there was great pressure, and we were literally cutting and pasting this stuff that was typeset, and typing on Bob’s typewriter and putting it together and then copying all of it to get the contract done. It then became a model for many contracts after that because it was so much work for others to do it on their own.

Schachter: Was that a major negotiating point: the rights that they would have to any future development?

Bricklin: If you really want to know, I’ll have to look at my notes of my discussions with my lawyers.

Schachter: Why don't you tell us what you remember as the major issues that you dealt with.

Royalty Arrangements

Bricklin: Well, there are issues about the different types of selling. In our case, it was selling it retail through distribution. This was different from the OEM agreement with the manufacturer where there were no manufacturing costs. The original agreement we had with them was cost of goods sold and there was profit. We split the profits a certain way, and that's how we came up with the royalty percentage, assuming a certain cost of the product, etcetera. It was based on the $34.95 price of the TI calculator people had at the time. So in our

negotiations with Personal Software about the original contract, a major sticking point was the royalty arrangements. We had different royalty arrangements in different situations, depending on whether it was an OEM agreement or whether it was more of a three way distribution; they were differentiated. Differences included what responsibilities we had, what were the delivery criteria, etc. Royalty advances were key because our development costs were high and we couldn't afford to produce the product with what we had. We literally mortgaged ourselves to buy a $50,000 computer to be able to develop this thing and hire people and stuff like that. So royalty advances were important, and then we had to make the royalty advances non-refundable because we couldn't get the loan on the machine without it.

Schachter: Royalty arrangements are one of those difficult things to write and to police. A royalty arrangement which says you get 5 percent of revenue is a very easy arrangement because you know what your revenue is, and then 5 percent of that is easily calculated. When you start talking about profits, you're getting into a difficult area.

Bricklin: We had the revenue figures.

Schachter: The percentage of revenue, not the percentage of profits.

Bricklin: Here's the thing. The way we came out with it was at a meeting at Joyce Chen's restaurant between Bob Frankston, Dan Fylstra and me. I worked without MSG. They worked with MSG.

We figured out what the financials would be. Dan knew the costs because he was selling Microchess. So we figured that we would charge the same amount as the TI business analyst calculator, which I think was $34.95 or something – whatever it was in those days. It was a big stretch in price because it was a business program.

Then we figured out the dollar amount of his costs, he gave us his costs. And then we figured out what percentage of that was left, his profit after marketing and other costs like that. We split that in half or two-thirds and we figured out a particular percentage of that. Then we took the cost of the TI business analyst calculator -- $34.95 or whatever -- did a ratio of that to calculate the number that we were supposed to get in dollars and ended up with 35.7 % of the revenue.

Schachter: Of the revenue?

Bricklin: Of the revenue. The revenue would be less if you went through distribution. But in the case of an OEM deal, there was no cost of goods unless there were ROMs. So it was less media cost or something like that. I think some of those were missing in the contract, but I can check. So they split it to make it easy. It was split for audit allowances. That was decided very quickly, and it was not really a major negotiating issue other than the percentage of OEM; we

argued about that for a long time, and Dan was adamant at leaving it at 15 percent, and we did. So there was some negotiation about the split, two thirds or 50 percent, and we ended up with 50 percent of the OEM. That was it. The actual calculations were not that much because it was so simple; it was based on gross receipts, less standard deductions.

I have a real copy of the contract here. Payments, okay. Publisher will pay, based on revenue received by it with respect to all sales, leases, licenses... Net sales price shall mean publishers gross selling price which his customers are paying.

The cost of business included the package for shipment less taxes and transportation costs, and credit those amounts for returns; and then, pursuant to sales lease transaction, and pursuant to which the right to sell or license the product is granted a person or entity which assumes primary responsibility for marketing the product ultimately to the customer and such transaction includes 5,000 copies or when such person is granted a license to produce more than 5,000, and net revenue shall mean this less amount of direct costs of manufacturing. It was very clear.

New Speaker: There was a provision that VisiCorp could develop products and vice versa. And the bottom line is that any contract works as long as you're friendly. No contract works if you're not.

Bricklin: But this has to do with the wording in the contract: Upon written notice to require the owner to modify the product for other personal computers other than those described in paragraph one hereof in order to prepare to deliver such things within a reasonable period of time, provided that they pay advances, sales and stuff like that as the exclusive right to marketing new versions.

Schachter: Did they have the source code of the program?

Bricklin: I don't think so. The copyright resided with the author. I don't know if we gave them source or not. We were supposed to be the developer. We were supposed to originally become a development firm.

Schachter: Do any of the historians have any questions about this kind of contract -- the author giving advice to some of the publisher contracts?

Bricklin: There was another issue though, the issue of contention. It had to do with reasonable efforts in marketing and stuff like that, what type of marketing had to be done, who was in control of the marketing, etc. There was some discussion about that. And it did have a best efforts clause or something like that.

Schachter: But there was no guarantee of?

Bricklin: But it has no guarantee of success, explicitly no guarantee of bug free even though you had to fixed bugs within a certain number of days. So those types of issues were covered. If you don't have a copy of the contract, you could get a copy of it. I don't have a clean copy here.

There were variants on it that were in the package that SPA gave out years later The variants on it were in the package – not the specific contract because this has to do just with VisiCalc.

Aspray: But you had to develop other products ultimately. How did you do that?

Bricklin: We produced many versions which we sold ourselves and we had other contracts. But I didn't negotiate those contracts. And as you said, I'd do it myself. I was a software developer after that, and I got to sign the Softsel agreement later on. So I'd gotten to do that on the other side, too.

Schachter: So you sold it through the distributors. These other products were sold through the distributors and you sold them directly; you didn't go through VisiCorp.

Bricklin: We self published. All products in those days were sold either direct to end users or through distribution of various sort, depending on which company you used.

Schachter: Let's go to the end users for a moment. How did the end user buy your follow on products?

Bricklin: They bought them through a store.

Schachter: Okay. So who sold them to the store? Could you sell directly to the store yourself?

Bricklin: That's going into distribution. You should talk to distribution about that. We sold it through distributors, and we didn't do a lot directly to stores. But there were chains, and we had reps that called on stores there. Everybody had their own setup.

Schachter: Did you have an end user contract that you used?

<u>The Shrinkwrap License</u>

Bricklin: The shrinkwrap license. The shrinkwrap license is a whole other thing. Because

there was not a transaction at the point of sale, where you could get an agreement with it, the shrinkwrap license was used. You can talk to a lot of lawyers who are from that day who worked with us on the shrinkwrap licenses, and you can see how that progressed over time. There were cases that we were following but I don't remember them specifically.

Schachter: I remember cases in Louisiana.

Bricklin: There were a lot of variations, depending on what your lawyer had heard. And we looked at each other's licenses. But different people had different agreements; they evolved over time. But it basically was a shrinkwrap that was done eventually as a license: this is licensed to you, it is not sold to you, and stuff like that.

Aspray: Which reminds me, you guys did not get together in a trade association for that shrinkwrap issue?

Bricklin: There was a lot of discussion. Eventually it moved so the lawyers talked to each other as the process became more formal and in a while it became big business. We're talking about companies like Lotus and VisiCorp, and we would go listen to them speak and all that.

Schachter: Did you make any warranties at all that your product would meet the specifications?

Bricklin: No, we felt that you had to warrant something, or else you couldn't get a deal. So we warranted the media to be free from defects.

And therefore we replaced the media with a new copy of it if you wanted. Also, some of us would warrant that it met the specifications, and if it didn’t you could return it for the purchase price. And I know that we would plan that we would never be free from defects like all complex things.

Schachter: What about copyright and trade secret infringement? Did you warrant against that?

Bricklin: I'd have to go get it. I'll tell you what VisiCalc did. Let's take the first one. This is an early one. Did they have a warrantee on the product? I don't know if they had at this point. Later on they did. We would warrantee the VisiCalc software. I don't know what the date was on this release of the program. This isn't the first because it has their name and address on it. They forgot that on the first one.

This product was sold as is. The warrantee as to the performance risk of quality is yours. However the original purchase only warrants the diskette to be free of defects in material for

90 days…if defective go to an authorized dealer…replace diskette during the first year if a defect occurs for $15.

Schachter: There is no warrantee against copyright or patent infringement?

Bricklin: Not in this one. Later on, we started. I don't think that was until we had lawsuits about that. Basically, you didn't start seeing the patent stuff until there were lawsuits about it. I'd have to go check my Software Garden warranties because that one I wrote myself working with my lawyers. The one I just read to you was the one from 1979.

Schachter: Which was very early.

Bricklin: Very early. Early on we didn't worry about the shrinkwrap agreement. We didn't know what was what because this wasn't a big business. It didn't matter, but the lawyers said we had to do this, and we did.

Doug Jerger: There was an issue about insurance.

Bricklin: Luckily, we didn't tell them that one of the first uses was open heart surgery with anesthesia calculations.

Schachter: Are there any other questions from the historians on those contracts or on any contracts?

Aspray: Looking at your other competitors at this time, were you different?

Bricklin: I believe that Dan [Fylstra] was more attuned to legal stuff than others. It depended on whether you had legal people in there or people who cared about legal stuff. He clearly did because he came from the publishing world and knew about that stuff and also because one of our advisors had a wife who was a lawyer. So we got involved in the legal issues. Others only went in when there were lawsuits and stuff. This Ansa contract was interesting because they had a really simple NDA. It was just a paragraph or two: "You won't tell about it until…. Now sign on the dotted line." They were taking that approach even though they were funded by Sevin Rosen, the big VC firm. In-house counsels existed as the companies got bigger and they started doing some of that work. But it looked like a lot of catch as catch can and the lawyers did talk. But then, the small companies just took the SPA sample contracts. I wrote my own based on what my lawyers said.

Schachter: What about in the mid-1980s. The PC companies started contracting directly with PC manufacturers to load their software on the PCs.

Bricklin: I didn't do any of those contracts, so I don't know. You'll have to ask Dan [Fylstra] about the OEM agreements that VisiCorp and others had with the manufacturers. Those took forever to negotiate because I know the negotiations between Radio Shack and them and the one we had with HP were difficult. We had negotiations with every manufacturer because they wanted their own version of VisiCalc. They all wanted a version that they could sell bundled under their own name. With some of those contracts, some also had the license to duplicate it.

IBM wanted VisiCalc, but they didn't want any other products first. VisiCorp wanted to be able to modify their new products to run on various machines, but they wanted to sell them directly because they'd make more money than by selling them through IBM. And IBM would push them for a hard deal. I don't have those contracts. Dan [Fylstra] might be able to help you, but obviously the people who negotiated them can't help you with it. And the guys on the IBM side can help you with that.

Finding Lawyers in the Early Years

New Speaker: Are there patterns that one can identify in the early PC software industry about the way that companies chose their lawyers?

Bricklin: A lot of us were small, so I guess a lot of it was through friends. You can ask Dan how he ended up with the publishing law firm he knew from his family or something. I asked another developer I knew if they could find a way to help us incorporate because we needed to incorporate. And then when we brought Julian in, he brought a friend of his who was lawyer at Charles Pittman, which is how we ended up with them.

So we ended up with the same lawyer for business and professional software who was also located in Boston, even though they were a Washington firm. And then, after a while, there was the need for specialists. I ended up with my patent lawyer because he had written a patent that I thought was a horrible patent, and therefore I had great respect for him. When I was at Slate, we needed a patent lawyer and we brought in Thompson & Thompson. They said, "We'll do this and we'll do this and we'll do this, then we'll look at it, and then we'll file for you," and things like that. We didn't have time to do that. We're doing all the work. We thought, "Why do we need you?"

And so I went to a guy that I had met at an SPA meeting. We all talked to each other at meetings like this. SPA was very important for meeting and talking with other small business owners. That's where I met Gary Hecker and he ended up being my lawyer. He was Pixar's lawyer, which was good. If he was good enough for Steve Jobs, he was good enough for me.

Schachter: There were very few lawyers who were really conversant in the law of computer

technology, certainly going into the 1970s. But by the end of the 1970s, there were some number of computer technology lawyers. There was a Computer Law Association that was formed, that's still in existence today, made up of people who are interested in computer technology. By the time the 1980s rolled around, there were a fair number of lawyers who had written contracts for mainframe companies who could transfer that knowledge and capability to the PC companies.

Bricklin: There was another thing that happened: venture capital came in. When venture capital came in, they had lawyers that they told you to use. There was Fenwick & West, a California firm, and IBM's firm in Boston, ended up doing a lot of computer contracts.

Schachter: And there was an individual in Boston who wrote some of the first books on computer contracts.

Bricklin: Yes. That was for bigger companies, I think. But one company which did a lot of venture capital work – they were Lotus' lawyer – became very big.

Schachter: Yes, but everyone was feeling their way. Clearly, with the shrinkwrap license, the issue of how you were going to get an ultimate consumer to sign a license, and how you could get it signed and returned to you when they're buying something in a retail store was very difficult. There had to be some other mechanism developed to bind them in a license because you weren't selling it to them. You were just licensing them.

Bricklin: And the dirty secret is we always held our breath. The concept of the shrinkwrap licenses was never really tested in court, although there were one or two cases.

Jerger: And if the law of practicality came into play just as it did in the mainframe world, it probably didn't matter what contract you had because if you're selling to the large companies with lots of resources, what chance did you small guys have in 1981. What's the suit you mentioned earlier?

Bricklin: There was a suit against Lotus, the one where someone had inserted something in the end of a range and it didn't work or something like that. The suit was based on that, but it was thrown out on a technicality.

Jerger: So you're saying you could get five to ten years before you really needed the agreement, and by then the lawyers started to catch up with you.

Schachter: Yes. And if you bought something for $100 or so, what are you going to sue for?

Bricklin: Yes. We noticed how the licenses changed over time as, for example, the thing

about simultaneous use. Once we started having license agreements, we would get feedback that would affect the license. We would all hear about it, and we would decide from a marketing viewpoint whether we wanted to make a change. Everyone started modifying the licenses along those lines as people learned. And we were learning from each other and the lawyers were talking to each other too.

Schachter: But when did the corporations start pushing for site licenses for the unrestricted right to make copies?

Bricklin: I don't remember. But all sorts of corporate people would ask you for all sorts of things. They would ask for it because if you could, you would write specific agreements for them. You would make special versions of the agreement for them as necessary.

Schachter: In the case of the site license, did they have to report back how many copies they made?

Bricklin: It depends. I don't know what the different agreements were at the time. I assume that everything was custom to begin with, and then you would usually start with what you had before.

Distributor Contracts

Now, let's go to distributor contracts. Softsel was already working very well when I first worked with them, in 1986 I think. What I remember is they had a standard agreement that was a horrible agreement. But if you asked them to remove certain paragraphs, they would. If you didn't ask them, they would leave them in.

And obviously that stopped over time. But the thing is that some people were clever, like in the case of Vern Rayburn when he was at Lotus. He worked a deal with Blumberg at Softsel to do an exclusive with them as a distributor. This was a new thing, apparently, and it made Softsel push like crazy. It also made Lotus 1-2-3 come out on top of the Softsel hot list. That was the marketing technique that came out of the agreements with Softsel. But there were a lot of returns if I remember correctly.

Schachter: What percentage of the ultimate sales price went to the software company?

Bricklin: I think it was somewhere between 40 and 45 percent.

Schachter: Of the sale price?

Bricklin: No, of the list price. And their wholesale price was based on different tiers, I

think. I remember I used to get in the forties, as much as 47%, and they used to complain a bit about it. I was a little high for what I should have been for my product, but it was prestigious or something. Others were getting a little less, but I think it was generally in the forties of the gross.

Jerger: You're saying that you got royalty based on 47%?

Bricklin: No, no, no. The percentage meant that for a $100 product, Softsel would pay me $43 or $46.

Schachter: For a $100 end user price?

Bricklin: Yes, end user list price. They took their 10 percent or 20 percent, and their dealer had to make their money. Softsel had cartons of product that all they had to do was pick it up and finance the float between when they got paid and we got paid.

Schachter: This was unlike what VisiCorp was doing since they were packaging the product.

Bricklin: I also sold directly to dealers, but I'd charge more with the dealers. If I remember, I think I charged $60 for a $74.95 product.

Schachter: What about your contracts with your developers? Did you have a contract in place with your programmers?

Bricklin: We had to get them to sign the rights across to us. Oh, that's the other agreement, which is the same anywhere, relating to work made for hire. We had to do that. Dan's lawyer wouldn't let him sign the agreement with us until we had an agreement that took into account what we did before we formed the company. We started with just ideas and before we started we signed all our rights to the company. So they wanted that.

As far as other people with information, [Mike] Maples was good. Vern Rayburn was good and he loves to talk about those things. He was good because he ran a computer store, the first one in L.A., I think. Vern was a publisher, a small publisher, before the days of VisiCorp. He was one of the early employees at Microsoft and he was at Lotus, and he was a venture capitalist in other companies.

Trademark Issues

Are there other issues? Oh, trademark. I remember we were at one of the conferences, maybe the West Coast Computer Faire back in 1978 or 1979, something like that. One of the manufacturers, I think it was Radio Shack, went around saying, "You have our trademark

without a circled R next to it" and they argued about attribution. And suddenly everybody was attributing everything.

This whole thing that happened made us acknowledge other people's trademarks. We were very loose about trademarks until that event occurred when somebody inserted the mark and said, "You're using our mark without saying it's ours." And we noticed that suddenly everybody was very concerned. They had to be extra careful because they were afraid somebody would slap them with some suit for having misused a trademark.

Schachter: Was VisiCalc a trademark of VisiCorp?

Bricklin: Yes, it was. It was subject to our contract that in the event that the contract was terminated, the trademark would revert to us unless it was used on other products. And so, the lawsuit involved that it wasn't supposed to be used on other products.

Schachter: They were using VisiOn and not VisiCalc.

Bricklin: Right. And it was a real mess because they had built a lot of goodwill from a trademark, and trying to extend it to other products was important to them. And for us, the goodwill from our product to us was what we cared about. So we cared about just "Calc." They cared about "Visi" and "VisiCalc" and it was a real mess.

Aspray: It's very interesting realizing that back then everyone underestimated goodwill. So you're looking at a rate of 35.7%, and you realize we underestimated the actual value. So it was 35.7% of cash, but was a minuscule percentage of the actual value…

Bricklin: The value to the company because of the ability to sell other products.

Patent Rights

Campbell-Kelly: Could you recount your experience of trying to get a patent?

Bricklin: Ah, yes. You should ask Dan about his lawyer who brought in a specialist in patents.

Campbell-Kelly: I'm asking you, not Dan Fylstra.

Bricklin: As I recall, he brought in a patent lawyer who was recommended by his law firm, and she came in and said, "Listen. Here's how it works. You can't patent software." They had been involved in a patent suit with one of their products which was a game. And so they knew

that it was possible to get patents on software. What she said was that here is the situation: there's a one in ten chance that it will get through. You have to make a machine or invent what looks like a machine that does it and do this and this and this, and it will cost you $10,000, and your chances of getting it are one in ten. So the decision was made not to do it because it was expensive. The rights were there. In the contract they were given the right to apply for patents. If she had said it would be a slam dunk, we would have applied for a patent. We would have enforced that patent, I'll tell you that.

And there wouldn't have been any Excel or Lotus 1-2-3. I don't recall what the recommendation was, but what came out of the meeting was not to proceed. And my feeling is I didn't think it was a good idea to have software patents because there are lots of researchers who do it and they could have software patents too.

New Speaker: IBM's Watson Research among other research projects had a spreadsheet product. They had a patent on an early version of a spreadsheet that they had built, a calculator kind of thing. They had a patent on some screen calculator that had memory for putting things, but it wasn't like VisiCalc. And a lot of product companies had products like VisiCalc in the labs, but they were never shipped. One of the things we said about VisiCalc wasn't that it was special, but that it had actually shipped and got real people using it. So I felt that if Watson Research was patenting everything they were doing, we're dead as a small company. So I think it's kind of good that it's hard to patent software today because it's making it possible for us to come up with ideas. But I believe the recommendation was not to patent VisiCalc; it was too expensive. It was $10,000 for the one in ten chance. That's equivalent to a $100,000 bet.

New Speaker: The key thing, though, is that the laws changed. That was 18 months later. So this was really a different world, in a sense.

Bricklin: Yes, but the law changed and it was then possible. By then, we had missed the window you have after you first show the product publicly.

Schachter: So no one knew about Marty Goetz's patent?

Bricklin: Oh, we knew there were lots of patents.

Schachter: You knew?

Bricklin: Oh, yes, we knew. As I said, this personal software company had been slapped with a lawsuit – a patent lawsuit – for pieces of software in a game. And so we knew it was possible. We had a lot of examples. She brought examples of computer software patents and showed us what it takes to patent software.

Dan, do you remember the meeting with the meeting with the lawyer about the patents? Dan Fylstra just walked in the room.

Dan Fylstra: Yes. And the opinion at the time was that a patent wasn't a viable option. We felt that there was sort of a remote chance that maybe you could file one that would work.

New Speaker: Remember, you had a patent problem with some program? Do you remember that case? That was a patent you had to deal with.

Fylstra: Yes, that's right. It was fairly easily resolved, though. It didn't stop us. I'm not even sure that we negotiated a patent license or anything. I think we just faced them down

New Speaker: One of the things I know from my patent class in those days was patents are hard to defend. Now it's hard to break, because the courts changed, too.

Schachter: Most patents that go to litigation are declared invalid. Very, very few actually stand up.

Bricklin: Well, things change when the courts change. They moved them to the patent courts, which makes things worse. A lot of things happened to make it change.

Dealers and Distribution Channels

Schachter: Dan, since you're here, why don't you talk to us about the distribution channels used and the kinds of contracts you had with the distribution channels, if you remember?

New Speaker: And any of the other contracts, too.

Fylstra: Well, that's a more complicated subject. The subject of dealer contracts is, to my mind, relatively simple because I think most manufacturers would like to have the shortest, least committed contracts they can with dealers There is a long story about how Apple dealt with its regional distributors where they did have contracts. Apple had four or five regional distributors who had built-in territories. In other words, for some region of the country and for some fairly large number – hundreds – of dealers, they were the regional distributors that Apple would go through, and they had these distributor contracts. There came a time when Apple had grown into the scale and size that the distributors were now a limiting factor. They didn't have the capital. They didn't have the marketing strength that Apple wanted in this channel. So Apple went through a process of acquiring those distributors who would sell and terminating the others. And of course, there were antitrust claims made against Apple and one of the actual successes was winning all those cases so that Apple wound up with control of its distribution.

New Speaker: Are you saying that you followed what Apple did as a model of hardware manufacturers? There was a model for signing computer distribution contracts?

Fylstra: Well, we literally had no contracts with dealers. The idea was the contract was on an invoice by invoice basis: we'll make this sale, not promising to make another one. That gave us maximum flexibility.

Bricklin: That's the same way that I sold years later.

Jerger: Can you differentiate the distributor, dealer, and OEM?

Fylstra: Yes. First of all, a distributor buys from the manufacturer and resells to the next level of a trade to dealers. And by a dealer I mean the individual computer store. Maybe it's a small individual or chain store, but their customer is then the end user.

So yes, we had had a two tier distribution system and later replaced that with a single tier. Those contracts hadn't been written properly to begin with so that it was possible for them to terminate their contracts and then when the inevitable claims came, they were able to win. They did those contracts right. I think the risk for a manufacturer is in getting committed through contracts to a channel where you want to make a change and you can't. And then, there's a whole bunch of other issues such as price maintenance issues and other things.

We used to worry a lot about antitrust. I mean, this was overkill. One thing we found at Harvard Business School was that they drilled it into us. But I found that lots of other people who had been in MBA programs from other schools didn't even think about it.

Bricklin: Lotus, of course, was worried about antitrust issues because they had lawyers who came from IBM. This continued for years; I know I was doing that, and you probably continued to do that, too, where you would sell on an invoice basis on a per order basis to a store who would then sell it to the end user. Or you would sell to a group of stores like ComputerLand which would buy a lot. Or you would have an agreement with somebody who would buy them and they would pay you, and they would take care of selling them to stores.

International Sales

Schachter: What about overseas sales? Did you do any overseas sales in Europe?

Fylstra: We had several country subsidiaries. At the peak, I think we had six domestic locations and three international subsidiaries

Schachter: And would they do direct selling, or would they sell through distributors?

Fylstra: If we had a direct subsidiary, they were our distributor and they would sell to dealers. And in other countries we had client distributors.

Bricklin: I remember that there was this one guy who I don't think was ever an authorized distributor, but he began cloning copies of VisiCalc. And we won a copyright infringement lawsuit against him. That was in Germany and that was one of the first copyright infringement cases for software that was prosecuted all the way to completion.

Then there are the two types of OEM agreements. The first was where they had the ability to manufacture a product for themselves, and the other was where the publisher would manufacturer it and sell quantities of a branded version for the manufacturer.

And then there's another related agreement which involves porting a product to different machines: You have a weird machine, and I don't have a version that's compatible. You want me to move my product to your machine. Let's make a deal where they had the right to port.

New Speaker: Well, what were the issues that you would haggle over, because you clearly did?

VisiCalc's Contract with IBM

Fylstra: It was an interesting and difficult situation. IBM really wanted VisiCalc. In fact, when they were planning to come out with the IBM PC, they talked to us and, actually, the machine went to you guys.

Bricklin: Yes.

Fylstra: We had the original. So VisiCorp negotiated the deal with IBM, and it turned out to be our most lucrative deal ever. We made more money on the IBM PC than on any other platform.

Bricklin: Which surprises people.

Fylstra: Yes. And with the story that people now know about Lotus 1-2-3, it's still very much the case.

That was actually a difficult negotiation. Some of our senior managers, including Terry Opdendyk, did the negotiation. I know that they absolutely pressed IBM as far as they could go on price, and they got the deal but they created some ill will.

New Speaker: They talked about it for years, yes.

Fylstra: What subsequently happened, based on what people from IBM told us later, was it was a very difficult negotiation; and then, once that deal was signed, you guys executed well and you kept all of your promises.

Bricklin: Yes. I remember them telling us that it was the most bug free software they had ever gotten

Fylstra: But, the NDA with them was tough to do.

Bricklin: One of the reasons was that they wanted no commingling, but we did back ups. Since part of our business was selling to multiple manufacturers, we were developing for multiple machines at once. We used shared development environments, and we were doing daily backups and sending them to Iron Mountain. It was really a mess. So we had to get a carve-out to get their lawyers to deal with the fact that we had backups and stuff like that. It was really tough. We almost lost the deal because of that.

Fylstra: We had a trip to Boca Raton where we had to negotiate everything without signing the NDA.

Bricklin: We had a meeting with them where they weren't allowed to tell us about the machine, so they would say, “Well, a good machine would have such and such. What do you think a good machine would have? We have a really good machine.”

Schachter: And would IBM retain the right to develop a competing product to VisiCalc in the future?

Fylstra: I don't think the contract excluded that. But on the other hand, IBM's attitude at that time, and you can see that from what they did with MS DOS and with VisiCalc and other products, was that they were going to get these product on a non-exclusive basis and we’re going to put them on our platform and we believe that our name and the quality of our hardware and software will make it work. They were just not being exclusive at that time with the software.

Bricklin: They didn't worry about the software. They wanted people to develop software. They encouraged their own employees to develop software for it.

New Speaker: This was a very renegade group in IBM.

Fylstra: That's right. It was very unlike IBM, and it probably did cost them in the end. It got them into the market in a major way as a major success, but then it cost them fairly quickly

because it wasn't long before Compaq and lots of other clones came along.

Schachter: Are there any other questions because we're going to have to wrap up very quickly here. Do the historians have any questions?

Working with Atari

Fylstra: I'll say one of the interesting things that happened involved the agreements that we had with manufacturers reps who worked for Atari. Atari was pretty big in video games, and they had a personal computer based on the 6502. It was one of the first ports that we did.

Instead of having a direct sales force, Atari had manufacturers rep firms all around the country and we started selling to those manufacturer reps. Atari was happy with that because they were happy to get VisiCalc at all. Well, we went on creating relationships with the rep firms, and we were selling the next version through them also and then the Commodore PET version through the same reps, and Atari started getting uncomfortable with that. It reached a point where Ray Kassar, who I think was either the CEO or the head of this main division of Atari, was telling us, "We're not going to let you do this. We're going to tell the reps to terminate it." But we were prepared for this and I met with him and waved the antitrust flag and that postponed the day of reckoning with them. It bought us time that we needed.

But we knew that this would eventually come, so we had a plan in place for when it did come. We spent a lot of time with these reps, getting to know them. And at each one of the rep firms there was at least one individual who was really excited about selling computers more than video games, and was really excited about the Apple II. And we knew who those people were. So when the time came that Kassar decided to send a letter to these reps, saying, “If you want to continue to work for Atari, you have to drop Personal Software, period, right now, 24 hours – do it.” And they all did it. We then executed our plan to hire all of those guys. Thirty days later, we had an actual sales force.

New Speaker: I think we need to go to each of these companies and see if we can get copies of their contracts to see how they evolved. It was the question about how much of these were homegrown contracts and how many became industry standards and stuff like that. It seemed like almost everything was homegrown.

New Speaker: In 1978 and 1979 this was all pretty new stuff.

New Speaker: The standard contract that came out from SPA turned out to be a very usable contract.

New Speaker: By 1990, even by probably 1985, 1986, 1987, the law firms had

developed finished contracts and you could buy them.

Bricklin: I have a question: originally, there wasn't a warrantee about infringement, and that didn't come in until about ten years ago, did it? I don't think the original warrantee on the original VisiCalc had it.

Fylstra: Yes. Our concern was merchantability issues. We had to do consumer warranties, which was something the software companies were not doing before that.

Bricklin: This actually was more than most companies did because you had a 90 day and a one year warrantee for different amounts of money; it was free at 90 days, and for $15 you got more.

Fylstra: All those things are in there because of the different state laws that govern what you can and can't disclaim and so on. So there's kind of coverage for most possible cases.

Schachter: It's now pretty much uniform; it’s uniform across the country.

Fylstra: That sort of thing actually mattered. We never encountered a litigation situation, but Lotus did. It was a pretty famous case involving a construction firm.

Bricklin: There's another issue that came up which was the issue of distributing software electronically. There was a tax issue in California. The issue had to do with reproduction rights, so that the original disk – the master disk – had to be transmitted electronically. The conclusion was basically that if there was no tangible medium, it was not subject to sales tax. By the way, for what it's worth, five or six years later in the dark times for VisiCorp, the California State Board of Equalization assessed us millions and millions of dollars on our sales.

Schachter: Okay. We thank you all for your contributions.

