

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
MAGISTRATE JUDGE ELIZABETH D. LAPORTE

ORACLE CORPORATION, a Delaware ) Case No. C07-1658  
Corporation; ORACLE, USA, INC., ) PJH (EDL)  
a Colorado corporation; and )  
ORACLE INTERNATIONAL )  
CORPORATION, a California )  
corporation, )

CERTIFIED COPY

Plaintiffs, )

vs. )

FURTHER DISCOVERY  
CONFERENCE

SAP AG, a German corporation; )  
SAP AMERICA, INC., a Delaware )  
corporation; TOMORROWNOW, INC., )  
a Texas corporation; and DOES )  
1-50, Inclusive, )

Defendants. )

February 13, 2009

TRANSCRIPT OF AUDIO RECORDING

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1 information. So we're part way through the looking glass  
 2 with that alone.  
 3 JUDGE LEGGE: I saw that.  
 4 MR. McDONELL: Obviously TomorrowNow is a  
 5 third-party support provider for Oracle products, and it  
 6 is accused of the things it is accused of in the  
 7 complaint.  
 8 The relevance for coming to understand the  
 9 nature, scope and extent of this third-party support  
 10 market has many dimensions to it, all of which are quite  
 11 significant.  
 12 First of all -- and I'll take these in no  
 13 particular order. Oracle would very much like to leap to  
 14 the conclusion that because a customer -- an Oracle  
 15 support customer became a TomorrowNow customer -- that  
 16 that proves Oracle's damages. They lost that customer  
 17 because, and only because, TomorrowNow allegedly infringed  
 18 their copyrights.  
 19 That's not necessarily so. There is this market  
 20 of other third-party support providers. If a customer  
 21 that chose to leave Oracle because they were dissatisfied  
 22 with Oracle -- of which there's no doubt there are such  
 23 customers -- elected to go to TomorrowNow, but had  
 24 TomorrowNow not been there -- that same customer could  
 25 have, and would have, gone to Rimini Street, or any of

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1 these other support providers.  
 2 That prevents a defense to causation of damages,  
 3 and there's case law smack on point, that in the context  
 4 of copyright infringement, causation of the damage is an  
 5 element.  
 6 So we are looking at a black box right now. We  
 7 know nothing from Oracle about the nature and scope of its  
 8 other third-party support vendors. We know from public  
 9 sources --  
 10 JUDGE LEGGE: But isn't your causation issue  
 11 determined by examining what happened to the actual  
 12 clients? Not what Oracle's relation might be with other  
 13 third-party providers.  
 14 MR. McDONELL: It doesn't necessarily have to be  
 15 Oracle's relationship with those third-party providers,  
 16 but what those third-party providers are; what they can  
 17 do; how they do it.  
 18 JUDGE LEGGE: That is going to ask why the client  
 19 migrated to another platform.  
 20 MR. McDONELL: That's exactly right, I think.  
 21 My point here, Your Honor -- and I'll give you a  
 22 case cite here in a moment -- is if a customer became  
 23 dissatisfied with Oracle; made the decision that they are  
 24 leaving Oracle come what may; elected to go to  
 25 TomorrowNow -- but had TomorrowNow not been there, they

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1 certainly would have gone to another third-party support  
 2 provider -- that presents a causation-of-damages defense.  
 3 JUDGE LEGGE: It does.  
 4 MR. McDONELL: We need to know what there is to  
 5 know about these other third-party --  
 6 JUDGE LEGGE: The question is why the customer  
 7 might migrate to a different platform. How is that  
 8 answered by what you find out about Oracle's relationship  
 9 with other third-party providers?  
 10 MR. McDONELL: Because we need to find out if  
 11 these other third-party support providers were providing  
 12 similar types of services in the nature of what  
 13 TomorrowNow is doing. Because it helps make the case that  
 14 they could have, and would have, gone to those other  
 15 support providers to get the same kind of service.  
 16 Otherwise, we would be faced with this argument  
 17 from Oracle, I'm quite sure, when we try to argue that  
 18 customers would have gone somewhere else, they would say,  
 19 "Oh, no, that's speculation; you don't know what might  
 20 have been provided."  
 21 JUDGE LEGGE: If you are going to make the  
 22 argument, or the defense or -- I guess causation as a  
 23 whole is their problem, but still, you want to raise lack  
 24 of causation -- aren't you going to have to go to the  
 25 individual clients and say, "Why did you do this; why did

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1 you leave?" But that's where the evidence is going to be.  
 2 MR. McDONELL: Part of the evidence. But don't  
 3 we also need to know, Your Honor, what the third-party  
 4 support market had available for that customer? That's  
 5 the other side of the same coin.  
 6 One side of that coin is customer's desire to  
 7 leave Oracle. The other side of the coin is what were the  
 8 options available to that customer. Right now we're  
 9 looking at a black box. We need the information that  
 10 there were other opportunities for these customers to go  
 11 get the type of support that was available from  
 12 TomorrowNow.  
 13 And just so I get this on the record -- and I can  
 14 provide a copy shortly after the hearing to one and all --  
 15 in Data General Corp. v. Groom and System Support  
 16 Corporation, 36 F 3rd, 1147, First Circuit Court of  
 17 Appeal, 1994 -- similar situation. And it was, in fact, a  
 18 company and a support provider.  
 19 The company who stood in Oracle's shoes claimed  
 20 that the support provider was providing support to  
 21 customers using copyrighted material. The support  
 22 provider offered in defense that, "Well, we did use some  
 23 copyrighted material, but we could have done the same  
 24 support without infringing, and therefore you still,  
 25 inevitably, would have lost that customer."

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CERTIFICATION

I, GEORGE SCHUMER, a Certified Shorthand Reporter in the State of California, hereby certify that said proceedings were taken at the time and place therein stated; that said proceedings were reported by me and thereafter prepared under my direction into typewriting, by computer; and that the foregoing is a full, complete and true record of said proceedings.

DATED: February 21, 2008.



GEORGE SCHUMER, CSR No. 3326