

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ORACLE CORPORATION, a)
Delaware corporation,)
ORACLE USA, INC., a)
Colorado corporation, and)
ORACLE INTERNATIONAL)
CORPORATION, a California)
corporation,)
)
Plaintiffs,)
)
vs.) No. 07-CV-1658 (PJH)
)
SAP AG, a German)
corporation, SAP AMERICA,)
INC., a Delaware)
corporation, TOMORROWNOW,)
INC., a Texas corporation,)
and DOES 1-50, inclusive,)
)
Defendants.)
_____)

VIDEOTAPED DEPOSITION OF
KEVIN MANDIA

VOLUME 1; PAGES 1 - 290

THURSDAY, MAY 20, 2010

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

REPORTED BY: HOLLY THUMAN, CSR No. 6834, RMR, CRR

(1-427382)

09:20:33 1 Q. Okay. Were copyright violations at issue
09:20:42 2 in the Dayton case?

09:20:45 3 A. Not that I recall.

09:20:47 4 Q. Were copyright violations at issue in the
09:20:49 5 McDanel case?

09:20:52 6 A. No, they were not.

09:20:53 7 Q. Were copyright issues -- violations at
09:20:55 8 issue in the Grant case?

09:20:58 9 A. Copyright issues were not at issue in the
09:21:00 10 Grant case.

09:21:01 11 Q. Were copyright issues at issue -- or let
09:21:05 12 me rephrase that.

09:21:07 13 Were copyright violations at issue in the
09:21:10 14 work and testimony you provided before the World
09:21:17 15 Bank tribunal?

09:21:18 16 A. I do not believe copyright issues were
09:21:20 17 part of the matter I testified in.

09:21:22 18 Q. Okay.

09:21:23 19 A. In front of the World Bank.

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Q. Okay. And it's fair to say, based on what

09:24:33 1 you've described, that your declaration covered in
09:24:35 2 the Lockheed versus Boeing matter, that that sworn
09:24:38 3 testimony you provided in Lockheed versus Boeing
09:24:41 4 did not address any copyright violations. Correct?
09:24:45 5 A. Yes. It did not address any copyright
09:24:47 6 violations.

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09:25:51 25 Q. Did any of the matters which you worked on

09:25:58 1 when you were in the Air Force Office of Special
09:25:59 2 Investigations involve any allegations of copyright
09:26:04 3 violations?
09:26:05 4 A. I don't recall any matters that I've
09:26:07 5 worked on when I was in the Air Force office of
09:26:10 6 special investigations that involved copyright
09:26:11 7 matters.

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14:36:44 2 Q. Okay. You're not a lawyer. Right?

14:36:46 3 A. I am not a lawyer.

14:36:47 4 Q. You do not have any specialized legal
14:36:50 5 training in copyright law, do you?

14:36:51 6 A. I do not have specialized training in
14:36:54 7 copyright law.

14:36:55 8 Q. You do not hold yourself out to be a
14:36:57 9 copyright expert, do you?

14:36:59 10 A. I do not hold myself out to be a copyright
14:37:01 11 expert.

14:37:03 12 Q. Before this matter, have you ever
14:37:05 13 undertaken any source code comparison to determine
14:37:08 14 if an alleged copyright violation took place?

14:37:17 15 A. Pausing, because I felt like there was two
14:37:20 16 questions there.

14:37:22 17 Q. Well, it's intended to be combined.

14:37:25 18 A. Okay.

14:37:25 19 Q. You've already testified you've done
14:37:27 20 source code comparison.

14:37:28 21 A. Right.

14:37:28 22 Q. My question is, have you ever done source
14:37:30 23 code comparison to determine if an alleged
14:37:33 24 copyright violation took place?

14:37:35 25 A. Not to the best of my knowledge.

14:37:40 1 Q. Have you ever analyzed source code to
14:37:41 2 determine if it includes protected expression for
14:37:44 3 the purpose of a copyright analysis?

14:37:47 4 A. I have not analyzed source code to
14:37:50 5 determine if it contains protected expression in
14:37:53 6 regards to copyright analysis.

14:37:55 7 Q. Have you ever analyzed source code to
14:37:57 8 determine whether any alleged copied portion of
14:38:01 9 that source code was only de minimus for the
14:38:03 10 purpose of copyright analysis?

14:38:07 11 A. I have not -- you said the word
14:38:10 12 "de minimus" to me. That's another legal term.
14:38:14 13 I have not done what you just asked.

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14:39:13 7 Q. Are you familiar with an analysis or test
14:39:16 8 known as the abstract filtration comparison test?
14:39:21 9 A. I am not familiar with that test.
14:39:26 10 Q. To your knowledge, are -- any of the
14:39:27 11 individuals at Mandiant who assisted you in
14:39:32 12 preparation of your report have any expertise in
14:39:40 13 doing the source code comparison to determine if an
14:39:43 14 alleged copyright violation took place?
14:39:45 15 A. I am unaware -- first, we weren't tasked
14:39:48 16 to do what you're insinuating here, that we were
14:39:52 17 tasked to do a protected expression analysis in
14:39:55 18 this case. We're in fact not tasked at Mandiant to
14:39:59 19 do so.
14:39:59 20 But in answer to your question, since we
14:40:01 21 weren't tasked, I'm unaware if any of my employees
14:40:05 22 have done something like this in their past or not.
14:40:19 23 Q. Are you aware of whether any Mandiant
14:40:21 24 employee has ever analyzed source code to determine
14:40:24 25 if it includes protected expression for the

14:40:27 1 purposes of a copyright analysis?

14:40:31 2 MR. LEWIS: Objection. Asked and
14:40:32 3 answered.

14:40:35 4 THE WITNESS: I am not aware. Had we been
14:40:38 5 tasked to do something like that, I would have
14:40:40 6 become aware. But in this case, I am not aware of
14:40:43 7 Mandiant employees and whether they do or do not
14:40:45 8 have the expertise in this area. Specifically in
14:40:49 9 de minimus protected expression, I believe is what
14:40:52 10 we're describing.

14:40:54 11 MR. COWAN: Q. That question was related
14:40:55 12 only to protected expression.

14:40:57 13 A. Okay.

14:40:57 14 Q. And your answer is the same. You're not
14:40:59 15 aware?

14:41:00 16 A. I am not aware.

14:41:01 17 Q. The next question is, are you aware of
14:41:02 18 whether any Mandiant employee has ever analyzed
14:41:05 19 source code to determine whether any of the alleged
14:41:06 20 copied portion of that source code was only
14:41:09 21 de minimus for the purposes of copyright analysis?

14:41:13 22 A. Again, based on -- we weren't tasked to do
14:41:15 23 that. I didn't poll the expertise in that area
14:41:20 24 amongst Mandiant, so I am not aware if someone is
14:41:23 25 or is not, has experience in regards to de minimus

14:41:29 1 analyses.

14:41:30 2 Q. Are you aware of whether any Mandiant
14:41:32 3 employee has ever done any analysis to determine if
14:41:35 4 computer source code is a derivative work for the
14:41:39 5 purposes of copyright analysis?

14:41:41 6 A. Again, because I made an assumption on
14:41:44 7 derivative work and did not need to poll my
14:41:46 8 employees as to their expertise in that area, I
14:41:48 9 don't know what level of expertise we have in that
14:41:51 10 area.

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14:43:33 11 Have you ever offered any expert opinions
14:43:36 12 regarding software licenses?
14:43:40 13 A. I have not offered any expert opinions.
14:43:42 14 And I regard expert -- I think you're using the
14:43:46 15 legal term, in a court, or testimony -- I have not
14:43:48 16 offered any testimony that I am aware of in that
14:43:51 17 regard.
14:43:52 18 Q. Okay. And you don't hold yourself out to
14:43:54 19 be an expert in software licenses and the
14:43:57 20 interpretation of software licenses, do you?
14:43:59 21 A. I do not hold myself out as an expert in
14:44:01 22 the interpretation of software licenses.

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14:53:13 20 Q. Okay. Have you ever written any code for
14:53:15 21 the Siebel programs?
14:53:17 22 A. I have not written any code for Siebel.
14:53:30 23 Q. You have never written any PeopleSoft code
14:53:32 24 either, have you?
14:53:34 25 A. I have not written any code for

14:53:36 1 PeopleSoft.

14:53:37 2 Q. Have you ever written any code for

14:53:40 3 JD Edwards?

14:53:40 4 A. I have not written any code for

14:53:42 5 JD Edwards.

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15:41:00 2 Q. Okay. Did you review any software license
15:41:18 3 for any purpose in formulating the opinions and
15:41:20 4 conclusions that are contained in your report?

15:41:25 5 A. I did not. I think when you state
15:41:29 6 license, you mean the actual software license
15:41:31 7 document?

15:41:32 8 Q. Correct.

15:41:32 9 A. Okay. I did not review any specific
15:41:37 10 documents that I would call software license
15:41:40 11 documents.

15:41:45 12 I want to be clear. I did receive
15:41:47 13 information that was called licensing information.

15:41:53 14 Q. Right. But you didn't review, to your
15:41:55 15 knowledge, any of the actual software licenses
15:41:58 16 themselves. Correct?

15:41:59 17 A. It was not part of my task to look at
15:42:01 18 licensing information.

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15:44:53 18 Q. But you didn't read the actual terms of
15:44:55 19 use of Oracle's websites. Right?
15:44:57 20 A. No. That's what I was stating, to be
15:45:00 21 clear. I did also read the terms of use, in
15:45:04 22 regards to just reading them to understand them.
15:45:07 23 Q. But you have no conclusions or opinions
15:45:09 24 regarding the applicability of the terms of use of
15:45:14 25 any Oracle website, as far as your conclusions and

15:45:19 1 opinions are concerned. Right?

15:45:20 2 MR. LEWIS: Objection. Vague.

15:45:27 3 THE WITNESS: I used a "terms of use"
15:45:29 4 assumption in order to have a legal interpretation
15:45:33 5 of the terms of use.

15:45:35 6 MR. COWAN: Q. But you were given that
15:45:36 7 assumption; you didn't make that yourself. Right?

15:45:38 8 A. I was given that assumption. I did not
15:45:41 9 make that assumption myself.

15:45:42 10 Q. And you have no independent opinion from
15:45:49 11 an expert standpoint regarding the validity of the
15:45:52 12 assumption. You simply have accepted the
15:45:54 13 assumption for the purposes of your conclusions and
15:45:57 14 analysis. Correct?

15:45:58 15 A. I accepted and applied the assumption.

15:46:00 16 Q. Correct? But you have -- other than
15:46:06 17 accepting and applying the assumption that was
15:46:08 18 given to you, you have no independent opinion from
15:46:10 19 an expert standpoint regarding the validity of that
15:46:14 20 assumption. Right?

15:46:15 21 MR. LEWIS: Objection. Vague.

15:46:21 22 THE WITNESS: That is correct.

15:46:25 23 You did say the word "expert" in there.

15:46:28 24 Correct?

15:46:30 25 MR. COWAN: Q. I did.

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15:47:47 22 MR. COWAN: Q. Where did you get the
15:47:48 23 assumptions that are contained in paragraph 35
15:47:51 24 through 47 of your report?
15:47:55 25 A. I was asked to make these assumptions by

15:48:00 1 counsel.

15:48:11 2 Q. And you did no independent analysis to
15:48:15 3 test any of these assumptions. Correct?

15:48:16 4 MR. LEWIS: Objection. Vague and
15:48:18 5 compound.

15:48:20 6 THE WITNESS: What do you mean by
15:48:21 7 independent analysis?

15:48:22 8 MR. COWAN: Q. You took the assumptions
15:48:23 9 as stated without doing any independent analysis to
15:48:26 10 determine whether the assumptions are in fact true.

15:48:29 11 MR. LEWIS: Same objections.

15:48:32 12 THE WITNESS: I did take the assumptions
15:48:33 13 as stated. And just to be clear, I understood how
15:48:38 14 to apply them by doing some additional work. So I
15:48:41 15 fully understand the assumptions, and I did do some
15:48:45 16 analysis to the extent so I knew exactly how to
15:48:48 17 apply them.

15:48:50 18 MR. COWAN: Q. But you didn't do any
15:48:51 19 analysis to formulate the assumptions. They were
15:48:54 20 given to you. Right?

15:48:58 21 A. That is correct. I am not the one who
15:49:00 22 formulated these assumptions.

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16:19:27 9 MR. COWAN: Q. Okay. What about 55?

16:19:37 10 A. 55 is a definition I devised with the

16:19:44 11 collaboration of other individuals, meaning I

16:19:46 12 didn't make it in a vacuum. That I may have typed

16:19:50 13 every word. This might be every exact word I

16:19:52 14 chose, but over the course of a year or more, we

16:19:56 15 all decided cross-use means this.

16:19:59 16 Q. Okay. And when you say we all and other

16:20:01 17 individuals, you're referring to folks at Mandiant,

16:20:04 18 yourself, and Oracle's counsel. Correct?

16:20:06 19 A. That is correct.

16:20:07 20 Q. Okay. What about 56?

16:20:22 21 A. This may be authored by me with knowledge

16:20:26 22 I learned from others, and it may be a definition

16:20:30 23 that I collaborated with somebody else on.

16:20:33 24 Q. Including counsel?

16:20:35 25 A. Including Mandiant employees and counsel.

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16:26:17 11 MR. COWAN: Q. Particularly where it
16:26:18 12 involved some legal interpretation as to whether
16:26:22 13 some activity was proper or not, you had to have
16:26:25 14 counsel's input. Correct?
16:26:28 15 MR. LEWIS: Objection. Vague.
16:26:29 16 THE WITNESS: Do you have any specifics in
16:26:30 17 mind?
16:26:31 18 MR. COWAN: Q. Yeah. Paragraphs 54
16:26:33 19 through 56.
16:26:37 20 MR. LEWIS: Objection. Compound.
16:26:38 21 MR. COWAN: Q. And you've already
16:26:39 22 testified that counsel input into all of those.
16:26:41 23 Right?
16:26:44 24 A. I believe so.
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16:27:15 12 Q. How do you define the word
16:27:16 13 "contamination"?
16:27:18 14 A. For us, it meets that improper activity
16:27:20 15 assumption.
16:27:21 16 Q. And that's my whole point.
16:27:23 17 When you're trying to discern whether
16:27:24 18 something's improper in this case, you have to rely
16:27:27 19 on counsel's input to tell you that. Right?
16:27:29 20 MR. LEWIS: Objection. Argumentative,
16:27:30 21 vague, and compound.
16:27:31 22 THE WITNESS: For the most part in this
16:27:32 23 case, when I use the word "improper," it is me
16:27:35 24 applying the improper activity -- yes, the improper
16:27:38 25 activity assumption.

16:27:40 1 MR. COWAN: Q. Which you were provided by
16:27:42 2 counsel.

16:27:43 3 MR. LEWIS: Objection. Misstates the
16:27:45 4 record.

16:27:45 5 THE WITNESS: Yes, I was. I should say, I
16:27:47 6 was asked to make the assumption.

16:27:51 7 MR. COWAN: Q. That was provided to you
16:27:52 8 by counsel?

16:27:53 9 A. That is correct.

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17:56:56 24 THE WITNESS: In regards to the results
17:56:57 25 that I used in my report, I relied on Mr. Levy's

17:57:01 1 expertise.

17:57:06 2 MR. COWAN: Q. And thus didn't -- you
17:57:07 3 didn't do anything to verify the information he
17:57:09 4 provided back to you. Correct?

17:57:13 5 MR. LEWIS: Objection. Vague.

17:57:17 6 THE WITNESS: There could be -- there
17:57:20 7 could have been communications between Mandiant
17:57:25 8 folks and Levy's folks on numerous occasions to
17:57:29 9 understand which measures were skewing or not
17:57:32 10 skewing things. But to the best of my
17:57:36 11 recollection, I relied on Mr. Levy's ranges for
17:57:40 12 improper use of environments, and I relied on his
17:57:45 13 expertise to generate those percentages.

17:57:48 14 MR. COWAN: Q. Without doing any further
17:57:50 15 analysis yourself with respect to his findings?

17:57:53 16 MR. LEWIS: Objection. Mischaracterizes
17:57:53 17 the testimony.

17:57:57 18 THE WITNESS: Can you repeat that
17:57:58 19 question, please?

17:57:59 20 MR. COWAN: Q. You didn't do any further
17:58:00 21 analysis yourself with respect to his findings.
17:58:04 22 Right?

17:58:04 23 MR. LEWIS: Same objection.

17:58:06 24 THE WITNESS: I'm unsure. I know in
17:58:09 25 regards to the final numbers I got from Mr. Levy, I

17:58:14 1 relied on his expertise when reporting those
17:58:17 2 numbers.

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18:20:33 1 another call in potentially January of 2010.

18:20:39 2 Q. Okay. This may be the last question of
18:20:41 3 the day, because Ted's going to shut me down if
18:20:45 4 it's not.

18:20:47 5 What was the subject matter that you
18:20:49 6 recall discussing with Ms. Ishiguro? What's her
18:20:52 7 area of specialty?

18:21:04 8 A. The best I can recollect, we discussed
18:21:06 9 with her PeopleSoft schema, PeopleSoft databases.

18:21:17 10 MR. COWAN: I think that's all we have for
18:21:19 11 today. We'll continue your deposition tomorrow
18:21:22 12 morning, as per the agreement of the parties.

18:21:26 13 THE VIDEO OPERATOR: Going off the record,
18:21:26 14 the time now is 6:21. This also is the conclusion
18:21:31 15 of Tape 5.

18:21:32 16 (Time noted, 6:21 p.m.)

18:21:39 17 ---o0o---

18:21:39 18 I declare under penalty of perjury that
18:21:39 19 the foregoing is true and correct. Subscribed at

18:21:39 20 EXTON, PA, ~~California~~, this 6 day of
18:21:39 21 JULY 2010.

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KEVIN MANDIA

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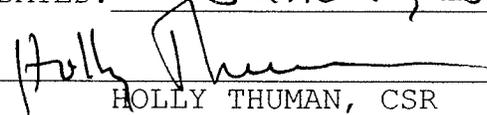
CERTIFICATE OF REPORTER

I, HOLLY THUMAN, a Certified Shorthand Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein state, and that the testimony of said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;

That before completion of the deposition review of the transcript was [] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition, nor in any way interested in the event of this cause, and that I am not related to any of the parties thereto.

DATED: June 3, 2010

HOLLY THUMAN, CSR