

EXHIBIT A

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-01658-PJH (EDL)

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

Defendants.

_____ /

*** HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY ***

DEPOSITION OF STEPHEN GRAY

VOLUME I

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June 8, 2010

Reported by:
Natalie Y. Botelho
CSR No. 9897

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09:49:03 3 Do you have any detailed understanding of
09:49:04 4 what "protected expression" means in terms of the
09:49:06 5 copyright act?

09:49:11 6 A. I have served as a copyright -- an
09:49:14 7 expert -- a technical expert in a copyright matter
09:49:17 8 in the past, and the term "protected expression"
09:49:20 9 arose in that matter.

09:49:22 10 Q. Okay. So I'm not asking --

09:49:23 11 A. So I have some understanding, I think.

09:49:25 12 Q. As you sit here today, do you have a
09:49:27 13 detailed understanding of what "protected
09:49:28 14 expression" means?

09:49:31 15 MR. FUCHS: Objection; form.

09:49:32 16 THE WITNESS: Well, again, you're asking
09:49:33 17 me the general -- that's what I heard before in the
09:49:37 18 first question that I wasn't sure about. There's a
09:49:39 19 general question there, and so in the matter --
09:49:44 20 matters in which I've served as a technical expert
09:49:48 21 where copyright was part of the -- or was an issue,
09:49:53 22 was the issue, I have developed some expertise
09:49:56 23 understanding the technical aspects of copyright,
09:49:58 24 and it -- the term "protected expression" arose
09:50:05 25 certainly in both of those -- as a matter of fact,

09:50:06 1 I'm sure -- matters. And so to that extent, I have
09:50:09 2 some experience and expertise in that area.

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10:00:21 5 Q. Would you hold yourself out as an expert
10:00:23 6 in determining whether COBOL contains protected
10:00:26 7 expression under the Copyright Act?
10:00:34 8 A. I would -- I would -- I think I would hold
10:00:39 9 myself out as someone who could perform analysis of
10:00:42 10 a body of COBOL code and could serve as a technical
10:00:45 11 expert in a matter like this to make a
10:00:50 12 determination, I suppose, of whether or not there
10:00:54 13 was protected expression in a body of code. Again,
10:00:59 14 it would -- I'm not saying that that is -- includes
10:01:05 15 a definition that I arrive at independent of some
10:01:09 16 legal guidance by the attorneys involved, but I
10:01:12 17 would be -- I think I would be capable or qualified
10:01:14 18 to serve as a technical expert witness in a matter
10:01:18 19 where the questions at hand had to do with providing
10:01:24 20 expertise in COBOL, or identifying protected
10:01:27 21 expression in a body of COBOL source code.

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10:04:19 4 Q. I'm asking -- you said, "I think
10:04:20 5 authorship is an issue with respect to -- can be an
10:04:22 6 issue with respect to protected expression." I'm
10:04:25 7 asking, when? What is the basis for that statement?
10:04:31 8 A. I think it comes down to whether or not --
10:04:35 9 my understanding -- again, this is as a layperson.
10:04:38 10 I'm not -- not as a layperson. As a person who has
10:04:42 11 a technical background and has served as a technical
10:04:47 12 expert in copyright matters in the past, I'm just
10:04:49 13 giving you my understanding, not as an attorney. I
10:04:52 14 don't want to -- I don't want to step over the line
10:04:53 15 and try to sound like I'm trying to be an attorney.
10:04:57 16 Having said that, I think that authorship
10:05:00 17 issues do arise in copyright matters. Is that what
10:05:04 18 we're talking about? I may have lost the question.

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11:14:49 18 MR. POLITO: Q. You referred earlier to
11:14:51 19 two matters in which you had performed analysis for
11:14:56 20 copyright cases. Are those two matters on this
11:14:58 21 list?
11:15:01 22 A. No. One of them is.
11:15:04 23 Q. Which one?
11:15:09 24 A. MathWorks v. COMSOL.
11:15:12 25 Q. That is a 2008 case, according to your

11:15:15 1 Appendix 2?

11:15:16 2 A. That's correct.

11:15:16 3 Q. Okay. And what was the subject matter of

11:15:28 4 your expert report in MathWorks versus COMSOL,

11:15:31 5 generally speaking?

11:15:39 6 A. The -- there were two matters in the

11:15:43 7 MathWorks v. COMSOL, so let me -- I think so -- and

11:15:49 8 I wrote two expert reports. Oh, but, you know, one

11:15:53 9 of the expert reports was not -- okay. I'm with

11:15:56 10 you. I was just sorting it out. I think the

11:15:59 11 copyright case in that matter, my expert report was

11:16:05 12 an analysis of COMSOL's software and MathWorks'

11:16:12 13 software and a comparison between them to identify

11:16:20 14 the use of MathWorks' software in the -- in COMSOL's

11:16:28 15 software.

11:16:33 16 Q. By whom were you retained? By which

11:16:36 17 party?

11:16:36 18 A. I was retained by MathWorks.

11:16:39 19 Q. What was the programming language or

11:16:41 20 languages?

11:16:44 21 A. It was a programming language which was

11:16:47 22 proprietary to MathWorks. The -- it was called M.

11:16:55 23 It's just -- it's --

11:16:56 24 Q. M like the letter?

11:16:57 25 A. Uh-huh. It's a proprietary language to

11:17:00 1 MathWorks. Some C programming language. And when I
11:17:09 2 say "C," I mean variants of C. Could have been C++.
11:17:14 3 Some of the modules might have been C++. And Java.
11:17:19 4 Q. Was it -- do you recall whether the C
11:17:21 5 involved object-oriented code or not?
11:17:27 6 A. My recollection is that some of the --
11:17:30 7 certainly some of the modules that I analyzed were
11:17:33 8 object-oriented. I don't recollect whether or not
11:17:37 9 the modules at issue were object-oriented or not.
11:17:44 10 Q. Did you analyze M and C and Java in that
11:17:48 11 matter?
11:17:51 12 A. Oh, yeah. The two -- the parties'
11:17:56 13 software was written in a variety of languages, M,
11:17:58 14 C, and Java.
11:18:01 15 Q. And you analyzed code in all three of
11:18:03 16 those languages?
11:18:04 17 A. Yes.

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11:21:57 18 Q. And how did you go about determining
11:22:02 19 whether there was protected expression that was
11:22:06 20 copied between the MathWorks and the COMSOL products
11:22:11 21 in that matter?
11:22:16 22 A. Generally by abstracting -- creating
11:22:22 23 various abstractions of the soft -- of both bodies
11:22:25 24 of the software, then comparing -- then, you know,
11:22:31 25 removing not -- unprotected expression from those

11:22:36 1 bodies that -- and then comparing the residue and
11:22:40 2 making a determination as to whether or not the
11:22:42 3 copying had occurred.

11:22:43 4 Q. Did you use software that was purchased
11:22:48 5 from a third party to do that filtration?

11:22:52 6 A. I did not.

11:22:53 7 Q. Did you write it yourself?

11:22:54 8 A. I analyzed it myself.

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11:33:24 24 Q. Other than the -- are you familiar with
11:33:26 25 the term "abstraction filtration comparison"?

11:33:30 1 A. I am familiar with the term.

11:33:30 2 Q. Is that an accurate description of what

11:33:33 3 we've just been discussing regarding your work in

11:33:35 4 MathWorks versus COMSOL?

11:33:38 5 A. Yes.

11:33:38 6 MR. FUCHS: Objection; form.

11:33:39 7 THE WITNESS: Sorry.

11:33:52 8 MR. POLITO: Q. I'll read it again. Is

11:33:58 9 abstraction filtration comparison an accurate

11:34:02 10 description of what we've just been discussing

11:34:03 11 regarding your work in MathWorks against COMSOL?

11:34:07 12 A. Yes, it is.

11:34:08 13 MR. FUCHS: Objection; form.

11:34:09 14 MR. POLITO: Q. And what does

11:34:09 15 "abstraction filtration comparison" mean to you,

11:34:12 16 Mr. Gray?

11:34:14 17 A. A process by which a technical expert like

11:34:20 18 myself can use to identify the common elements of

11:34:29 19 bodies of software, filtering out those things for

11:34:33 20 which comparison is not required.

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11:50:35 19 Q. And so in that -- in the list of cases
11:50:39 20 that you've participated in where copyright was the
11:50:42 21 central issue, is it correct that there are two
11:50:43 22 cases in your history as an expert, one being the
11:50:46 23 MathWorks case, and one being the second case?
11:50:49 24 A. That's -- I think that's -- yeah, I think
11:50:50 25 that's correct.

11:50:51 1 Q. What's the other case? And you said it's
11:50:52 2 not in Appendix 2. Is it in your CV in Appendix 1?
11:50:56 3 A. I think --
11:50:57 4 MR. FUCHS: Objection; compound.
11:50:58 5 THE WITNESS: I think -- I think that the
11:50:59 6 other case is in my CV, on Page 10.
11:51:10 7 MR. POLITO: Q. I'm getting there.
11:51:11 8 A. Page 10 of my CV.
11:51:13 9 Q. And what's the matter?
11:51:14 10 A. In 1984, O'Melveny & Myers, IBM v. NCR,
11:51:20 11 NCR Comten.
11:51:22 12 Q. And which -- for which party did you
11:51:23 13 perform analysis in that matter?
11:51:26 14 A. IBM.
11:51:32 15 Q. And what was the nature of your expert
11:51:35 16 report? Did you submit an expert report in that
11:51:39 17 matter?
11:51:41 18 A. So I think -- the answer to your question,
11:51:45 19 I think, is no, I did not submit an expert report,
11:51:51 20 which is why it's not on the prior testimony and
11:51:54 21 depositions, because I didn't -- and I don't
11:51:55 22 recollect that I was deposed in that case. That's
11:51:58 23 fuzzy. 1984 was a while back. But I did submit a
11:52:05 24 report, but I don't recollect that it in that matter
11:52:10 25 at that time rose to the level of an expert report

11:52:13 1 that -- right, so I submitted a report. I may have
11:52:16 2 just been a consulting as opposed to a testifying
11:52:19 3 expert in that matter. I'm just -- it's a little
11:52:22 4 fuzzy.

11:52:23 5 Q. Sure. What was the nature of your
11:52:24 6 engagement in that matter, as far as what was the
11:52:29 7 subject matter of your engagement?

11:52:31 8 A. The subject matter was whether or not NCR
11:52:34 9 Comten had used IBM software in a product.

11:52:41 10 Q. What was the set of programming languages
11:52:43 11 involved?

11:52:50 12 A. In both instances it was an assembler
11:52:53 13 language which was peculiar to the device that each
11:52:57 14 of the companies had manufactured. I think the
11:53:04 15 assembler language, it wasn't -- sorry. It was an
11:53:08 16 assembler language that was peculiar -- that had
11:53:10 17 been written for the hardware under which these were
11:53:13 18 both operating.

11:53:14 19 Q. Do you remember the name of the device?

11:53:15 20 A. Sure.

11:53:16 21 Q. What was it?

11:53:16 22 A. Well, there -- the IBM device was a -- the
11:53:21 23 number, model number, whatever, was 3705. That was
11:53:25 24 the hardware platform. And the software was a
11:53:29 25 software program called NCP. NCP stands for Network

11:53:34 1 Control Program. The NCR Comten device was, I
11:53:40 2 think, the Comten -- I think it was the Comten 10.
11:53:46 3 You'd think with a marketing department, they could
11:53:49 4 come up with something cleverer than that, but it
11:53:52 5 was the Comten 10. And the language was -- I forget
11:53:56 6 what the software was actually named. SSP maybe.
11:54:00 7 Software Support Program, I think, was what it was
11:54:02 8 called for the Comten device. I had -- that's --
11:54:05 9 I'm 50/50 confident about that. But it was written
11:54:08 10 in an assembler language which was written
11:54:13 11 specifically for that Comten device.

11:54:16 12 Q. Sure.

11:54:16 13 A. Or that Comten hardware family.

11:54:18 14 Q. Were you directed to look for protected
11:54:21 15 expression in copied material in that matter?

11:54:25 16 A. Well, those were -- it was a little
11:54:30 17 different environment then, so the assignment that I
11:54:34 18 was given was to compare at a side-by-side level the
11:54:38 19 software which had been written for the IBM 3705 NCP
11:54:45 20 program and the Comten SSP program. I'm just going
11:54:48 21 to use SSP, knowing that it might not be exactly the
11:54:52 22 right language, but I think it was something like
11:54:53 23 that. So comparing the IBM NCP program to the
11:54:59 24 Comten SSP program on a side-by-side basis.

11:55:04 25 I guess probably before that was to do a

11:55:07 1 function-to-function comparison, then do a code
11:55:10 2 comparison, and then to produce -- that was the
11:55:15 3 comparison that I did on the code. It wasn't
11:55:17 4 necessarily -- it wasn't necessarily to identify
11:55:24 5 protected expression so much as to identify areas
11:55:31 6 where there were similarities.

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11:56:32 5 Q. But you did not perform abstraction
11:56:35 6 filtration comparison in that matter?
11:56:38 7 MR. FUCHS: Objection; form.
11:56:44 8 THE WITNESS: That's an interesting
11:56:45 9 question. It's -- I never thought about that. So I
11:56:59 10 don't recollect it having been called abstraction
11:57:02 11 filtration comparison. I think it might even have
11:57:04 12 been before the time that abstraction filtration
11:57:07 13 comparison case that we referred to. But the
11:57:10 14 reality is it probably was kind of an abstraction
11:57:11 15 filtration comparison process, really is what
11:57:17 16 happened. So, you know, it wasn't a formal one. It
11:57:18 17 wasn't identified as such, but in a sense, it may
11:57:22 18 have been kind of an abstraction filtration
11:57:24 19 comparison process.
11:57:26 20 MR. POLITO: Q. Sure. And how did you
11:57:28 21 know, then, what to exclude if we sort of analogize
11:57:32 22 it to what we would now call abstraction filtration
11:57:35 23 comparison?
11:57:35 24 A. So just -- I think that the attorneys
11:57:42 25 working with IBM informed me that there were certain

11:57:48 1 aspects of the Comten software that I didn't need to
11:57:53 2 pay attention to or didn't need to worry about,
11:57:56 3 except in a very narrow sense I needed to worry
11:57:59 4 about it, but at some level not have to worry about
11:58:02 5 it too much. I know that's not a very clear answer.
11:58:05 6 But there were some aspects of it not to worry
11:58:07 7 about, except in a narrow sense and then other
11:58:09 8 aspects to pay more attention to.

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12:06:43	22	Q.	Other than the two matters that we've just
12:06:45	23		discussed, have you ever in your capacity as an
12:06:48	24		expert performed analysis regarding copyright
12:06:53	25		infringement?

12:07:03 1 A. Let me just quickly go through. I mean,
12:07:05 2 it's --
12:07:06 3 Q. Sure.
12:07:07 4 A. It will take a couple minutes.
12:07:08 5 (Pause.)
12:07:23 6 THE WITNESS: So I think what you've asked
12:07:24 7 me to do is identify -- well, so, yeah, let me ask,
12:07:28 8 did you ask me to identify matters in which I was
12:07:33 9 asked to do some copyright infringement even if it
12:07:35 10 was not necessarily the central theme? Is that what
12:07:39 11 you're asking me?
12:07:40 12 MR. POLITO: Q. To clarify, I'm not
12:07:41 13 asking whether you were instructed to infringe
12:07:44 14 someone else's copyright. I'm asking whether you
12:07:46 15 were instructed to determine whether there was
12:07:47 16 copyright infringement or performance of the
12:07:49 17 functionality in that matter.
12:07:52 18 A. Well, let me give you an example and see
12:07:54 19 if this is responsive to what it is you're asking.
12:07:55 20 In the matter on the top of Page 6, the first matter
12:08:00 21 is -- the attorneys are Cooley Godward, and the
12:08:04 22 question is Leader v. Facebook.
12:08:08 23 Q. I see it, yes.
12:08:09 24 A. Now, without disclosing too much about
12:08:13 25 that case, because it's an active case, the --

12:08:14 1 Leader has obviously accused Facebook of some patent
12:08:20 2 infringement, and an issue has arisen with respect
12:08:24 3 to copyright as well. And so I have been asked -- I
12:08:30 4 was asked to look at -- I was asked to deal with
12:08:36 5 some copyright issues with respect to a copyright
12:08:40 6 issue that has arisen not necessarily as the central
12:08:43 7 theme, but as the -- as another theme that has
12:08:46 8 arisen, I guess is the best way to say it. So is
12:08:49 9 that what you're asking me; are there any other
12:08:50 10 matters like that?
12:08:52 11 Q. Yes.
12:08:52 12 A. Okay.

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12:09:06 24 A. So the Cooley Godward matter, I think some
12:09:09 25 copyright issues have arisen. CNET v. Etilize --

12:09:20 1 that's in the middle of the page on Page 6 --
12:09:22 2 copyright issues arose.
12:09:24 3 Q. Okay. Before we move any further, since
12:09:26 4 there might be a couple of these, can you tell me
12:09:28 5 whether you actually performed any -- excuse me --
12:09:32 6 either abstraction filtration comparison or code
12:09:35 7 analysis as part of the copyright issues that you
12:09:38 8 helped to address?
12:09:40 9 A. Sure.
12:09:40 10 Q. And I don't know if you're comfortable
12:09:42 11 saying that in the Facebook case, but....
12:09:45 12 A. Well, in the Facebook case, we did not get
12:09:49 13 to code, so these are -- this is a -- it's not code.
12:09:55 14 Q. Great.
12:09:56 15 A. I'll leave it that.
12:09:57 16 Q. Yeah.
12:09:58 17 A. In the Etilize -- the CNET v. Etilize
12:10:02 18 case, there was code analysis.
12:10:04 19 Q. Related to the copyright issue?
12:10:06 20 A. Related to an issue of copyright.
12:10:08 21 Q. Can you explain what your distinction is
12:10:09 22 between copyright issue and an issue of copyright?
12:10:12 23 A. So during -- I'm trying to make a --
12:10:21 24 determine what can I say here. So what I -- I think
12:10:22 25 what I -- I think I can say that. So what happened

12:10:24 1 is, during the patent -- I was hired -- I was
12:10:28 2 retained by CNET as their expert in -- for
12:10:35 3 invalidity and for infringement, or for validity and
12:10:40 4 infringement.

12:10:41 5 Q. Sure. Patent infringement.

12:10:43 6 A. Patent infringement, correct. And what
12:10:44 7 had -- what was discovered is that Etilize -- that
12:10:52 8 CNET ended up discovering that Etilize might have
12:11:00 9 copied a database schema and used it as their own.
12:11:06 10 So the question arose whether that -- whether to
12:11:11 11 pursue a copyright issue there or whether it was a
12:11:14 12 trade secret issue or what had happened. So
12:11:16 13 copyright arose in that matter.

12:11:19 14 It is a -- it is a trade secret issue that
12:11:25 15 has -- I think is being -- I think is being tried
12:11:28 16 here soon. It's not on my list because I have too
12:11:31 17 much other things to do, and I'm not going to be an
12:11:33 18 expert in that -- in the -- or not going to testify
12:11:36 19 at that trade secret case, but it's being tried
12:11:40 20 soon. So copyright arose, turned out to be a trade
12:11:44 21 secret issue as opposed to copyright, but -- so it
12:11:47 22 arose there.

12:11:48 23 Q. Did you have any engagement in analysis
12:11:49 24 related to the question of whether to pursue a
12:11:51 25 copyright issue in that case? And I'm asking a yes

12:11:54 1 or no question, if you don't mind.

12:11:56 2 A. So ask it again.

12:11:57 3 Q. Sure. Were you involved in the analysis

12:11:59 4 of determining whether to pursue a copyright

12:12:02 5 infringement claim in the CNET case?

12:12:06 6 A. I would not consider my activity to have

12:12:10 7 been -- the activity that I performed was not to

12:12:14 8 make a determination as to whether or not to use --

12:12:18 9 to do a copyright or a trade secret case, no. The

12:12:21 10 work that I did might have been involved in some of

12:12:23 11 that, but I wasn't personally involved in it. I

12:12:27 12 wasn't --

12:12:28 13 Q. Okay. Thank you.

12:12:29 14 A. Mm-hmm.

12:12:30 15 Q. Are any of the other cases in this CV that

12:12:34 16 we're reviewing cases in which there was a copyright

12:12:36 17 issue arose, and then when we identify those, we'll

12:12:44 18 talk about the details.

12:12:58 19 And I'm sorry to interrupt you. Before we

12:13:00 20 move on, are you -- are you personally involved in

12:13:03 21 any of the copyright-related activity in the

12:13:04 22 Facebook matter?

12:13:09 23 A. No, I don't -- no, I'm not.

12:13:11 24 Q. Thank you.

12:13:12 25 A. I don't know where it stands, but I'm not

12:13:14 1 doing anything. I'm not active; let's put it that
12:13:16 2 way.
12:13:17 3 Q. Thank you.

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12:15:28 20 Q. So the Facebook issue in 2009 that's an
12:15:31 21 active matter, the CNET issue in 2008 as to which
12:15:36 22 there are active matters, but you're not
12:15:38 23 participating?
12:15:40 24 A. That's correct. I think it became -- like
12:15:41 25 I say, I think it became a theft of trade secrets or

12:15:47 1 a -- yeah, something like that.

12:15:48 2 Q. Right. And then the MathWorks and the IBM

12:15:51 3 case, yes?

12:15:55 4 A. That seems to me to be right, yes.

12:15:57 5 Q. And in only the two matters that we

12:15:58 6 discussed at length, MathWorks and IBM, did you

12:16:01 7 perform any analysis relating to copyright; is that

12:16:03 8 correct?

12:16:06 9 A. Well, I don't think that's right.

12:16:09 10 Q. Okay.

12:16:09 11 A. I mean -- no, I don't think that's right.

12:16:14 12 Q. Okay. How -- which other matters on

12:16:15 13 those -- of those four did you perform analysis

12:16:17 14 related to copyright?

12:16:18 15 A. Well, I think I've performed analysis

12:16:21 16 related to copyright. I didn't perform -- copyright

12:16:23 17 was not the central issue, but there would -- but

12:16:26 18 copyright issues arose, and so I did some -- perform

12:16:28 19 some analysis related to copyright, potential

12:16:31 20 copyright assertions or accusations and so on. So I

12:16:34 21 did do some analysis, but I mean --

12:16:38 22 Q. So in the CNET case, did you perform any

12:16:41 23 code comparison?

12:16:44 24 A. Yes.

12:16:45 25 Q. Did you perform any abstraction filtration

12:16:47 1 comparison?

12:17:01 2 A. I believe -- I believe that I performed
12:17:08 3 abstraction and comparison. The question is did we
12:17:11 4 ever get to the point of -- did we ever get to the
12:17:14 5 filtration piece in there, and I guess I'd have to
12:17:16 6 say that to the extent that I did, it was trivial or
12:17:21 7 not very serious. It wasn't a full -- let me say it
12:17:25 8 differently. I never performed a full abstraction
12:17:27 9 filtration comparison effort in the CNET v. Utilize
12:17:34 10 matter with respect to copyright issues that arose
12:17:37 11 during the litigation of this patent infringement.

12:17:39 12 Q. And is it -- did you say that in the CNET
12:17:43 13 issue, it was only a database schema that was at
12:17:46 14 issue, as far as the copyright goes?

12:17:50 15 A. Well, it was database related, not nec --
12:17:53 16 not exclusively the schema. Database related. I
12:17:58 17 think what they -- I think what I said was that they
12:18:01 18 discovered the lifting of a schema, but that led to
12:18:04 19 a whole bunch of other stuff that they didn't think
12:18:07 20 was at issue, and that's why -- that's how it
12:18:09 21 started. But yeah, there was a lot of
12:18:10 22 database-related issues.

12:18:11 23 Q. So did you perform analysis as to the
12:18:14 24 schema itself?

12:18:15 25 A. Yes.

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14:36:42 7 Q. Mr. Gray, are you an expert in software
14:36:43 8 licensing?
14:36:51 9 A. I wouldn't -- you know, I don't have --
14:36:55 10 the experience -- let me say it differently. The
14:36:57 11 experience that I have had with software licensing
14:36:59 12 has been to some extent in the negotiation of
14:37:02 13 licenses, to some extent in the definition of
14:37:05 14 licensed content, in some -- to some extent in
14:37:10 15 trying to make sure that groups that were working
14:37:12 16 for me or that I was working with were abiding by
14:37:15 17 licenses and so on. So I've had experience with
14:37:17 18 licenses, but I don't think that I -- that that
14:37:21 19 qualifies me as a -- I don't think that that
14:37:25 20 expertise rises to the level of being able to opine
14:37:30 21 on licensing matters per se. I don't think so.

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14:52:02 10 Q. Are there any other areas in which you
14:52:03 11 would hold yourself out as an expert that we haven't
14:52:06 12 discussed?
14:52:07 13 MR. FUCHS: Objection; form.
14:52:12 14 THE WITNESS: Well, I have fairly broad
14:52:17 15 range of expertise in the software -- is this just a
14:52:20 16 general question, just generally?
14:52:22 17 MR. POLITO: Q. (Nods head.)
14:52:24 18 A. I have quite a bit of expertise in 35
14:52:27 19 years of -- or so, maybe a little more -- of effort
14:52:31 20 in the software development industry. So there's a
14:52:34 21 number of areas where I'm -- where my experience can
14:52:37 22 be brought to bear in analyzing the reports and
14:52:41 23 helping interpret it for a jury. So I think there
14:52:45 24 are a number of areas where my expertise would be
14:52:47 25 applied.

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14:57:55 16 MR. POLITO: Q. Would you agree that your
14:57:56 17 experience relates more to the design of software
14:57:59 18 than to the development of software?

14:58:06 19 MR. FUCHS: Objection; form.

14:58:09 20 THE WITNESS: Well, so you really are
14:58:11 21 asking -- I think what you're asking -- the way you
14:58:15 22 asked that question leads me to ask you, then, what
14:58:17 23 you mean by "development." I don't know how to -- I
14:58:20 24 wouldn't have teased that out.

14:58:21 25 MR. POLITO: Q. Let's hypothesize that

14:58:23 1 there's a development practice by which someone
14:58:25 2 creates a functional specification and perhaps a
14:58:27 3 technical specification, then someone else
14:58:31 4 implements the technical and/or functional
14:58:33 5 specifications. Would you agree that your
14:58:35 6 experience is more in the matter of developing
14:58:38 7 functional and technical specifications rather than
14:58:40 8 in the matter of implementing technical and
14:58:43 9 functional specifications?

14:58:45 10 MR. FUCHS: Objection; form, compound,
14:58:47 11 incomplete hypothetical.

14:58:50 12 THE WITNESS: So using your definition of
14:58:52 13 "implementation," which I -- does that include tests
14:58:57 14 as well, or is it ended -- or does test in there --

14:59:01 15 MR. POLITO: Q. Let's keep tests
14:59:02 16 separately for a minute.

14:59:03 17 A. Okay. So you're really talking about
14:59:04 18 program --

14:59:05 19 MR. FUCHS: Objection.

14:59:07 20 THE WITNESS: Sorry. Go ahead, Josh.

14:59:08 21 MR. FUCHS: Same objection.

14:59:09 22 THE WITNESS: I think you're talking about
14:59:09 23 programming. When you say "implementation," you're
14:59:11 24 really talking about programming?

14:59:12 25 MR. POLITO: Q. Sure.

14:59:13 1 A. Okay. All right. So my latter experience
14:59:15 2 over the last few years has more to do with
14:59:21 3 analyzing source code and designing systems and
14:59:25 4 software than it does with programming, over the
14:59:29 5 last -- over the last few years.
14:59:32 6 Q. And "last few years," are we talking ten
14:59:35 7 years?
14:59:37 8 A. I think certainly since I have been
14:59:40 9 involved -- I'd say since -- at least since the mid
14:59:47 10 '90's. So what's that; 15 years? Goodness.
14:59:51 11 Fifteen years, jeez. Yeah.

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15:29:14 23 Q. Did you analyze the Titan source code,
15:29:15 24 Mr. Gray?
15:29:17 25 A. I remember looking at some Titan source

15:29:22 1 code.

15:29:23 2 Q. Did you analyze it?

15:29:26 3 A. In -- when you say an -- the term "analyze
15:29:30 4 the source code" could mean a, you know, pretty
15:29:32 5 broad range of things. What did you mean when you
15:29:34 6 say did I analyze the source code?

15:29:36 7 Q. Did you, for instance, try to determine
15:29:37 8 how it worked?

15:29:40 9 A. There were certain parts of it that I
15:29:41 10 tried to determine how it worked. There were some
15:29:45 11 aspects of the Titan source code that I looked at to
15:29:48 12 determine how it worked. I don't -- I don't know if
15:29:52 13 that's completely responsive, but -- so yes, I
15:29:55 14 determined how some parts of it worked.

15:29:57 15 Q. Did you perform your analysis -- I'm
15:29:59 16 sorry. Were you finished?

15:30:00 17 A. I was going to say I looked at it to
15:30:02 18 determine how some parts of it worked. I was just
15:30:05 19 trying to be complete.

15:30:06 20 Q. Did you perform analysis independent of
15:30:07 21 the analysis performed by Mr. Funck and his
15:30:09 22 associates?

15:30:12 23 A. Yes, I did.

15:30:13 24 Q. And are -- is that analysis reflected
15:30:17 25 anywhere in your report?

15:30:17 1 (Pause.)

15:31:26 2 THE WITNESS: I don't -- I'm trying to
15:31:28 3 recollect if I made any reference to it. I don't
15:31:31 4 see that I have cited to it, to my analysis of the
15:31:37 5 Tit -- of any aspects of the Titan source code. I
15:31:44 6 don't know that I've cited to any body of Titan
15:31:48 7 source code. I can't remember. So while I remember
15:32:34 8 looking at some Titan source code, I must not have
15:32:41 9 relied on it.

15:32:42 10 MR. POLITO: Q. So your conclusion in
15:32:44 11 9.5.3, you're relying on a single log file to arrive
15:32:48 12 at that conclusion?

15:32:52 13 A. I've cited to the one log file, and I
15:32:56 14 believe that's what I'm relying on for the
15:32:58 15 conclusion that is contained in Section 9.5.3.

15:33:02 16 Q. And you're not relying on any source code?

15:33:15 17 A. I don't cite to it, so I must not have
15:33:17 18 relied on it. I mean, it must be that the log file
15:33:20 19 is all I relied on for the conclusion that I drew
15:33:23 20 here.

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15:37:44 15 Q. That's fine. How did you decide whether a
15:37:45 16 document should be on this list or not?
15:37:52 17 A. I think it's -- the qualification is
15:37:54 18 whether I considered it or relied on it in the
15:37:58 19 development of my report, with probably a bias
15:38:02 20 towards over-inclusion. By that I mean with a bias
15:38:07 21 towards -- if there was a document that I may or may
15:38:10 22 not have considered very carefully or that was
15:38:13 23 cumulative to some other document that was on there,
15:38:15 24 I think it -- the list should reflect -- have a bias
15:38:19 25 towards over-inclusion, meaning that it should

15:38:22 1 reflect documents, even though there may be some
15:38:24 2 cumulative aspect of -- or -- but I don't -- and --
15:38:30 3 no, that's -- that's sufficient.

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15:56:34 1 Q. So would you agree that there's no way for
15:56:35 2 anyone to determine which of the Exhibits 1 through
15:56:38 3 1,880 you actually considered in creating your
15:56:43 4 report?

15:56:43 5 MR. FUCHS: Objection; form.

15:56:46 6 THE WITNESS: I don't know that -- I don't
15:56:47 7 know of a way other than to -- I mean, these are
15:56:53 8 exhibits to depositions. The depositions refer to
15:56:57 9 the plaintiffs' exhibits, and I've read -- there's a
15:57:01 10 lot of depositions that I've read, and so one way to
15:57:03 11 get a better feel for it would be based upon the
15:57:06 12 depositions that I've read, which point to the
15:57:09 13 plaintiffs' exhibits, which would give some
15:57:11 14 indication of which of the files I had opened or
15:57:16 15 read or not, and so on. That would be a better
15:57:19 16 way -- that might be a way to approximate it. But
15:57:23 17 even at that, I don't think it's going to be
15:57:25 18 conclusive, but it would be a way of getting closer
15:57:27 19 to understanding that.

15:57:29 20 MR. POLITO: Q. Did you consider every
15:57:31 21 deposition that you list in your Appendix 3?

15:57:40 22 A. I read some or all of -- I said -- read
15:57:47 23 some or all of each of these depositions, yes.

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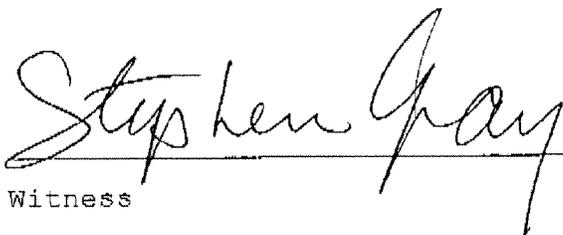
15:58:53 19 MR. POLITO: Q. And is there any way to
15:58:54 20 tell which exhibits you relied upon as opposed to
15:58:57 21 considered?
15:59:02 22 A. Probably, I think, that it would be -- it
15:59:05 23 would be true -- at least it's my intent -- to have
15:59:08 24 identified exhibits relied upon actually in the body
15:59:12 25 of the report, would be my intent.

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16:14:54 14 Q. Does your report contain or refer to all
16:14:57 15 data and other information that you considered in
16:14:59 16 forming your opinions in your report?
16:15:03 17 MR. FUCHS: Objection; form.
16:15:10 18 THE WITNESS: Well, of course I have
16:15:12 19 relied on my own experience and background in
16:15:16 20 addition to the information that is in the report in
16:15:20 21 the forming of my opinions which are contained
16:15:23 22 within the report. But other than that, I believe
16:15:26 23 and intend that the report contains the information
16:15:29 24 that I have relied on.

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1 I declare under penalty of perjury, under
2 the laws of the United States, that the foregoing is
3 true and correct. Subscribed at
4 SOLANA BEACH _____, California, this
5 16th day of JULY _____ 2010.

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7
8 
9 _____
10 Witness

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