

MAR28MICROSOFT-FINDINGS.txt

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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3 No. 1:06-mc-10061-MLW
4

5 In re
6 Application of
7 MICROSOFT CORPORATION,
8 Appellant

9 vs.

10 NOVELL, INC.,
11 Respondent

12 *****

13 For Hearing Before:
14 Chief Judge Mark L. Wolf

15 Excerpt transcript: Judge's Findings

16
17 United States District Court
18 District of Massachusetts (Boston.)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Tuesday, March 28, 2006

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
One Courthouse Way, Room 5200, Boston, MA 02210
(617) 737-0370

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1 P R O C E E D I N G S

2 (Excerpt begins.)

3 THE COURT: AS I said before we took the break, as
4 this matter has some urgency and I'm emersed in it, I will give
5 you my tentative or qualified decision orally. which is, as I
6 understand it from experience in the English tradition of --
7 and I hope that the level of detail, among other things, will
8 indicate that this is not a decision that has been reached
9 casually.

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10 As I said before the break, my tentative decision,
11 subject to possible reconsideration and revision after
12 receiving any supplementation, is to order Novell, Inc. to
13 produce documents in its possession, custody and control which
14 are relevant to the existing statement of objections concerning
15 interoperability, which will be the subject of the March 30,
16 2006 hearing. I've been educated to understand today, however,
17 that it's not essential that Microsoft receive those documents
18 prior to the March 30 hearing. And therefore, because the
19 nature of the relevant issue has changed and this matter has
20 proceeded on an expedited basis, I think it's most appropriate
21 to give the foreign tribunal an opportunity to address the
22 present issue.

23 The documents that will need to be produced promptly, if
24 my views do not change, may be redacted to remove any
25 privileged information. I am providing the parties an

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1 opportunity to supplement the submissions concerning
2 receptivity of the foreign tribunal to the discovery subject to
3 the more narrow request that I'm inclined to grant. The DG
4 Comp.'s March 10, 2006 submission primarily addresses the
5 impropriety of ordering discovery that is relevant to an issue
6 as to which no statement of objections has yet been filed.

7 The current request, which I'm tentatively granting, is
8 for information that is relevant to the existing statement of
9 objections concerning interoperability. That discovery does
10 not, as I understand it, implicate the objections emphasized by
11 the DG Comp. in the March 10, 2006 submission.

12 Any additional submissions shall be made by April 6,
13 2006. Novell shall begin now to assemble the documents that
14 will have to be produced. If my tentative views become my

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15 final views, Novell should make appropriate redactions and
16 prepare a privilege log so that the documents can be provided
17 on April 10, 2006 or thereafter, if I do not revise my views.

18 The reasons for this decision are as follows. This case
19 arises out of the European Commission's investigation of
20 Microsoft's allegedly anticompetitive activities. The European
21 Commission has issued an initial decision against Microsoft
22 holding that it violated the European community law when it did
23 not share interoperability information with its competitors.
24 Microsoft claims that in reaching its decision, the Commission
25 relied on communications with Microsoft's competitors, one of

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1 which is Novell, Inc.

2 To mount its defense, Microsoft believes it needs
3 documents that constitute or memorialize those communications.
4 Thus, Microsoft initially brought an ex parte 28 United States
5 Code Section 1782 application asking this Court to endorse
6 Microsoft's subpoena to Novell to produce such documents and,
7 indeed, documents that were relevant to issues in addition to
8 interoperability. This Court granted that motion, but
9 specifically authorized Novell to file a motion to quash. It
10 also ordered the parties to meet to try to resolve any
11 disputes. After the parties conferred and were unable to
12 resolve their disputes, Novell did file a motion to quash
13 arguing that Microsoft's Section 1782 application should be
14 denied completely or alternatively should at least be limited
15 to documents relevant to the interoperability issue.

16 I have conducted today, March 28, 2006, a hearing for
17 almost two hours, which has sharpened my understanding of the
18 issues.

19 Generally speaking, with regard to 28 United States Code

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20 Section 1782, this Court has the authority to order discovery
21 in connection with a proceeding before a foreign tribunal if it
22 determines that the request is made by an interested party for
23 material to be used in proceedings in a foreign tribunal and if
24 the party from whom the request is made resides in the district
25 in which the Court sits. The Supreme Court so instructed in

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1 Intel Corporation v. Advanced Micro Devices, Inc., 542 U.S.
2 241, a 2004 decision.

3 As Intel also teaches, if the Court determines that it
4 has the authority to grant the Section 1782 application, it
5 must decide whether to exercise its discretion to do so. The
6 exercise of that discretion should be guided by four factors.
7 (1) whether the entity from whom discovery is requested is a
8 party in the foreign proceeding. (2) the nature of the foreign
9 proceeding and tribunal and the receptivity of the foreign
10 tribunal to the request for discovery. (3) whether granting
11 the discovery request is compatible with the purpose of the
12 statute to provide assistance to foreign tribunals and, in
13 return, receive assistance from foreign nations at a later
14 time. And (4) whether the discovery request is intrusive and
15 unduly burdensome.

16 The pertinent facts up to the time of the Section 1782
17 request were essentially not in dispute. On March 24, 2004 the
18 European Commission, or "the Commission," decided that
19 Microsoft infringed Article 82 of the EC Treaty and Article 54
20 of the EEA agreement, both of which relate to the abuse of a
21 dominant market position, by refusing to disclose certain
22 interoperability information to vendors of work group server
23 operating systems' products. You may refer to that as the 2004
24 decision. Microsoft has appealed this decision in the Court of

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25 First Instance, or CFI, and has scheduled a five-day hearing on

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1 that appeal in April of 2006.

2 On November 10, 2005, the Commission decided that
3 Microsoft had not complied with the 2004 decision by failing to
4 provide adequate interoperability information to prospective
5 licensees. That is sometimes referred to by the parties as the
6 Article 24(1) decision. To reach its decision, the Commission
7 relied on two reports from the OTR group, an outside consulting
8 firm retained by the Commission as independent experts as well
9 as comments from Microsoft's competitors, including Novell.
10 The Commission instructed Microsoft to comply with its decision
11 by December 15th, 2005 or face a daily fine of 2 million
12 Euros.

13 On December 21, 2005, the Commission issued a statement
14 of objections, or "SO," charging that Microsoft had not
15 complied with the Article 24(1) decision. The statement of
16 objections was based on two reports by a monitoring trustee,
17 who was appointed by the Commission to measure Microsoft's
18 compliance with two OTR reports relied upon in the Article
19 24(1) decision and comments received from Microsoft's
20 competitors, including Novell. When appointed, the monitoring
21 trustee was instructed to establish procedural safeguards to
22 protect Microsoft's due process rights and ensure transparent
23 communications between the trustee and others.

24 The trustee was also directed to establish a procedure
25 for third parties to lodge complaints concerning Microsoft's

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1 compliance with the 2004 decision. The trustee was told to
2 send a copy of these complaints to the Commission so that they
3 would be included or could be included in the Commission file

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4 and to deliver a nonconfidential version of any complaint to
5 Microsoft. Microsoft asserts that the trustee did not fully
6 comply with this order.

7 The statement of objections was accompanied by a list of
8 documents in the Commission's file which Microsoft had a right,
9 under EU regulations, to examine. This file included a
10 correspondence between Microsoft and the Commission, the
11 reports from OTR and the monitoring trustee, and formal
12 requests for information sent by the Commission to Novell, Sun
13 Microsystems, IBM and Oracle and each company's response.
14 However, the index did not include any other communications
15 with Novell or any other company, nor did the Commission say it
16 was withholding such documents.

17 On December 24, 2005, Microsoft wrote to the Commission
18 Hearing Officer that the file index wasn't complete. On
19 January 13th, 2006, the Hearing Officer instructed the
20 Commission to provide a list of documents the Commission had
21 withheld. On January 20, 2006, the Commission provided a list
22 showing that it had withheld, as confidential, more than 40
23 documents of correspondence between the Commission and
24 Microsoft's competitors, including Novell.

25 On January 30, 2006, Microsoft asked the Hearing Officer

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1 for access to the Commission's correspondence with Novell, Sun,
2 Oracle and IBM. On February 8, 2006, the Hearing Officer
3 directed the Commission to provide copies of its communications
4 with third parties, including Novell. Initially, the
5 Commission had not provided these documents claiming they were
6 confidential, but the Hearing Officer ruled that the
7 confidentiality had been waived. The Hearing Officer also
8 stated that the correspondence OTR and the monitoring trustee

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9 have had with third parties must be produced by the Commission
10 only if such a document was in the Commission's file. The
11 Commission complied with the Hearing Officer's directive on
12 February 13, 2006. There was a scheduled hearing before the
13 Commission on March 30, 2006 concerning the statement of
14 objections.

15 Microsoft's initial subpoena to Novell was quite broad.
16 It has, however, since narrowed its request. More
17 specifically, the subpoena, as described today, is deemed to be
18 for documents that constitute communications between Novell,
19 the Commission, the Trustee, OTR, or any other third party
20 known or believed by Novell to have been retained by the
21 Commission relating to inoperability information, as defined in
22 the 2004 decision, and is for documents that memorialize any
23 such oral communications relating to inoperability
24 information.

25 Microsoft is not now seeking documents that are relevant

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1 only to issues not in the current statement of objections, such
2 as the possible failure to comply with Articles 5A or 5C of the
3 2004 decision, the Article 24(1) decision, generally.

4 Microsoft has also abandoned its request for a prompt
5 deposition of Novell. Microsoft has made other Section 1782
6 requests to competitors that are pending in District Courts in
7 which those competitors reside.

8 AS I understand it, when the European Commission
9 investigates a competition complaint, it does so through the
10 Director or General for Competition, or DG Comp, of the
11 European Commission. The DG Comp is part of the Commission --
12 is the part of the Commission that is charged with
13 investigating complaints of anticompetitive activity. During

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14 its investigation, the DG Comp reviews many documents. The
15 Commission file consists of all the documents that have been
16 obtained by the DG Comp during the investigation that it deems
17 were relevant to the investigation. The defendants in the
18 proceedings before the Commission gain access to this file once
19 the Commission has filed a statement of objections, with the
20 exception of internal documents, business secrets and other
21 confidential information.

22 The Commission is allowed to exclude from the file
23 evidence which has no relation to the allegations of fact and
24 law in the statement of objections. If the defendant believes
25 that the Commission's services have erroneously withheld

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1 documents, it may make a request for a decision of the Hearing
2 officer who is responsible for guarding the defendant's rights
3 in the Commission proceedings. The decision of the Hearing
4 officer can be reviewed by the Court of First Instance, the
5 CFI.

6 28 United States Code, Section 1782A, states, in
7 pertinent part, that the District Court in which a person
8 resides may order him to produce a document for use in a
9 proceeding in a foreign or international tribunal. The Supreme
10 Court has recently addressed 28 United States Code Section 1782
11 as it relates to the European Commission in the Intel case.

12 It is undisputed that Microsoft is an interested party.
13 It is a party to the Commission proceeding. It is also
14 undisputed that Novell resides in the District of
15 Massachusetts. Therefore, this Court is authorized, but not
16 required, to order the requested discovery. Any discovery
17 order is subject to any applicable privilege including, but not
18 limited to, the attorney/client privilege and the work/product

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19 privilege.

20 I explained earlier the four factors the Supreme Court
21 described in the Intel case to be considered in deciding a
22 section 1782 request. The first, as I said, is whether the
23 entity from whom discovery is requested is a party in the
24 foreign proceeding. Novell is a participant or party in the
25 Commission proceeding. If Novell has relevant documents that

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1 are not in the DG Comp's file or OTR file, the Commission
2 cannot order Novell to produce those documents.

3 For example, there may be nonprivileged Novell documents
4 memorializing oral communications that are not reflected in the
5 Commission's file. As I said in the course of the argument,
6 hypothetically, such internal memoranda of oral communications
7 could be material to the credibility of the DG Comp's
8 contentions and the merits of them.

9 To take an extreme and hypothetical example to
10 illustrate this point, without suggesting any impropriety in
11 this case, if a competitor of Microsoft had paid a bribe to the
12 DG Comp to influence the DG Comp to aggressively assert that
13 Microsoft was not in compliance with the order, that memorandum
14 would contain relevant, and I would think, material information
15 not likely to be in the Commission's files. In addition, there
16 would be information that the Commission could not get access
17 to through its own processes because Novell is not a party or
18 participant in the Commission proceedings.

19 The second factor to be considered is the nature of the
20 foreign proceeding and tribunal and the receptivity of the
21 foreign tribunal to the requested discovery. Documents and
22 information that were relevant to the existing statement of
23 objections concerning interoperability information could

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24 potentially be helpful to the foreign tribunal. Evidence
25 regarding the extent, if any, to which the monitoring trustee

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1 or OTR were influenced by Novell, which arguably is a
2 competitor of Microsoft, has a bias could be meaningful to the
3 Commission in deciding the merits of the statement of
4 objections.

5 The March 10, 2006 DG Comp submission opposing the then
6 existing request for documents emphasizes in Paragraphs 25, 26
7 and 27 the impropriety of ordering the disclosure of documents
8 which are not relevant to an issued statement of objections.
9 That submission does not directly address the issue, as it has
10 been narrowed and presented, of whether even the DG Comp
11 imposes the disclosure of documents that are relevant to the
12 existing statement of objections concerning interoperability
13 information. Moreover, I note that the DG Comp's views are not
14 necessarily the views of the European Commission.

15 In Intel, 542 U.S. at 254, the Supreme Court wrote that
16 the DG Competition's overriding responsibility was to conduct
17 investigations into alleged violations of the European union's
18 competition prescription. In essence, the Supreme Court has
19 described the DG Comp as a prosecutor rather than as a neutral
20 judicial officer.

21 While Novell analogizes this case to Intel and to other
22 cases, the Schmitz and In re Winkler, I find that those
23 analogies are not apt. In both Schmitz and Winkler, the German
24 government opposed the request.

25 In Schmitz, the German government was concerned that

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1 granting the discovery request would undermine the ongoing

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2 German investigation. In In re Winkler, the German government
3 was concerned that granting the discovery request would
4 undermine the final decision by a German court. In those two
5 cases, the foreign government authoritatively articulated very
6 significant sovereignty concerns.

7 In Intel, the discovery request was made by a
8 complainant who was not a party to the European action with the
9 ultimate goal of helping the Commission. And it was the
10 Commission itself, I believe, that authoritatively expressed
11 its desire that the discovery request not be granted. Thus
12 far, at least, unlike Intel, the Commission, as opposed to the
13 prosecuting arm of the operation of DG Comp, has not expressed
14 a view.

15 I have considered the fact that Microsoft can and indeed
16 has asked the Hearing Officer for documents. Indeed, the
17 Hearing Officer has already ordered the disclosure of some
18 documents that were not originally produced. However, as I
19 noted earlier, the Hearing Officer and the Commission have no
20 power to order Novell to disclose relevant documents in its
21 file because Novell was not a party to the Commission
22 proceedings. Therefore, ordering the disclosure of Novell
23 documents would not circumvent Commission procedures because
24 the Commission has no procedures for obtaining documents that
25 are exclusively in the possession or control of Novell.

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1 With regard to the third statutory -- I'm sorry, the
2 third Intel factor, I find that ordering the narrowly-tailored
3 discovery would not be unduly intrusive or burdensome. Novell
4 has explained today that it has very few documents that are
5 relevant to the interoperability information issue.

6 Finally, with regard to effectuating the purposes of

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7 Section 1782, I find that, on the present record, ordering
8 Novell to produce documents relevant to the interoperability
9 issue would assist the foreign tribunal by making accessible to
10 Microsoft and potentially to the Commission relevant
11 information that it cannot -- the Commission cannot compel the
12 production of the Novell documents.

13 So for those reasons, unless I revise my view based on
14 information that I receive next week, I will require Novell to
15 produce the documents. I do want to -- I will write a short
16 order that memorializes the conclusion of this, but doesn't
17 describe the reasons. I would like to reiterate what I said
18 before the break, however. I am not presuming to order the
19 European Commission to do anything. What I am doing is
20 offering an opportunity for the Commission, the DG Comp, the
21 Hearing Officer or anybody else who might feel qualified to
22 address authoritatively, or arguably authoritatively, the
23 position of the European Commission on the revised narrower
24 request, an opportunity to do so. But it's entirely up to the
25 Commission and anybody who might seek to act on its behalf to

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1 decide whether to provide something that will supplement the
2 record.

3 Is there a question?

4 MR. FEEHERRY: I hope a helpful suggestion to your
5 Honor. Because we need to respond to a subpoena, what I would
6 suggest to the Court is that you would annex or attach to your
7 order the modified subpoena as served, as delivered to Novell,
8 which we understand would be further modified to delete
9 references to Articles 5A or 5C of the 2004 decision, the
10 Article 24(1) decision, that that language there would be
11 stricken. So the reference would be to the SO or -- in

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12 Requests 1 through 4, it relates specifically to
13 interoperability or interoperability information.

14 THE COURT: Well, I guess I'd say the following.
15 (1) I may order you to confer, but essentially a subpoena is a
16 court order. And if I give you an order, that's what you would
17 be responding to. I would be happy if you could reach some
18 agreement, but actually I think I issued an order that's more
19 narrow than the subpoena, as it's written, because -- but in
20 any event, you've heard my order. You're going to have the
21 transcript. I'd be quite pleased if you agree on a subpoena
22 that implements my decision.

23 MR. FEEHERRY: If I can test your patience, your
24 Honor? As the issue really has to do with the obvious
25 communications with trustee or communications with the

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1 Commission, I think your order is absolutely clear. As to a
2 communication with some third party, the subpoena was narrowed
3 to indicate any documents which summarize any communication
4 between Novell and any third party known or believed by you to
5 have been retained by the Commission with respect to the
6 subject matter of the request. And that's the language that
7 we -- at least would be comfortable with being able to hand
8 back to Novell to ask "Are there any such documents?" We're
9 simply working with the language of the modified subpoena.

10 MR. BRUCE: You're not changing it?

11 MR. FEEHERRY: We're not changing that. The only
12 place we would change would be to delete reference to the
13 decision, the Article 24(1) proceeding, so that we are down to
14 the issue of the SO and interoperability.

15 MR. BRUCE: On that, your Honor, we would like to
16 meet and confer because we need to study -- we know what you're

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17 driving at and I think we're not going to have a problem coming
18 to closure, but --

19 THE COURT: Fine. You should file that by noon
20 tomorrow. And just to point something out. That's fine,
21 because you've studied this language, but I think if you look
22 at the transcript, I talk about documents that contain or
23 constitute communications or summarize oral communications.
24 It's actually narrower, but this is fine. Use this subpoena.
25 I think as you just described it, it sounded to me consistent

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1 with what I intend.

2 AS I say, I'm very busy on other things, so you don't
3 want to come back to me with any disputes. You really don't.
4 Okay?

5 MR. BRUCE: No, and I'm almost sure we won't. The
6 noon tomorrow may be difficult because we have to consult with
7 people in Brussels, for example.

8 THE COURT: No, you don't have to consult with
9 anybody in Brussels. I've issued an order.

10 MR. BRUCE: No, no, no, I'm sorry, your Honor. I'm
11 talking about the way that he wants to revise the subpoena.
12 That's what I meant.

13 THE COURT: I mean --

14 MR. FEEHERRY: If your Honor would give us an extra
15 day to accommodate --

16 THE COURT: Well, I thought you wanted it attached
17 to my order?

18 MR. FEEHERRY: Oh, no, I'm not asking for that.

19 THE COURT: Fine. You've got until noon on Friday
20 to file it with me. Actually, tomorrow is wednesday. You'll
21 have until noon on Thursday.

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MR. BRUCE: Thank you.

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MR. FEEHERRY: One last question, your Honor. I

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understand your order is not yet final from your standpoint,

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and hence I will be asked the question about appealability. As

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your Honor understands --

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THE COURT: It's not appealable.

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MR. FEEHERRY: And we assume that it won't become

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appealable, I guess, until -- well --

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THE COURT: My understanding, subject to being

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educated otherwise by the Court of Appeals is, that I haven't

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decided this matter, therefore it's not appealable. I've told

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you what I would do on the present record, however, the record

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is not complete. When I get any submissions that are made next

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week, I will consider them and I will either write that I've

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considered them, they don't cause me to alter my views,

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therefore Novell shall produce, or I will write that I've

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considered them, they do cause me to revise my views for the

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following reasons, and therefore the motion to quash is

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allowed. And I would assume that it would be after that that

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the disappointed party would be authorized to appeal. However,

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I'm not permitted to give legal advice and I don't have to

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study when things are ripe for appeal because I just decide

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them and then they're gone.

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MR. FEEHERRY: Your Honor, and the reason, of

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course, is we're assuming you will then issue something final

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on or after the 6th, when you will receive these materials,

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because the traditional process by which this issue could be

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appealed by either party -- although I suppose if it's an order

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to produce, it would require a motion for a stay in the first

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1 instance before your Honor, and you have written in this area.

2 THE COURT: Canterbury Liquors probably most
3 thoughtfully, but that's a long time ago.

4 MR. FEEHERRY: You slightly modified the
5 reasonableness of success on the merits on appeal, I think, in
6 that decision, arguing persuasively that perhaps the District
7 Court might not be the first one to rule on that.

8 In any event, that's the reason for my request. So that
9 if a party wished to take an appeal, depending on what happens
10 next week, one of the things that would happen in this court
11 before the 10th would be some sort of a motion for a stay.
12 Thank you, your Honor.

13 THE COURT: That's fine. And if we get to that
14 point, I think it will be important that you each tell me what
15 you think about the last date on which Microsoft could
16 supplement the record. Obviously if the documents are
17 produced, there's a form of irreparable harm to Novell. On the
18 other hand, if delay would mean that Microsoft couldn't get the
19 documents in the record, that may weigh against the stay. But
20 you told me it was very few documents and if it's only what the
21 Commission already has, then what's the fuss?

22 Is there anything further in this matter for today? All
23 right. Thank you very much. The Court is in recess.

24 (Ends 1:40 p.m.)
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1 C E R T I F I C A T E
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5 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do
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6 hereby certify that the foregoing record is a true and accurate
7 transcription of my stenographic notes, before
8 Chief Judge Mark L. Wolf, on Tuesday, March 28, 2006, to the
9 best of my skill and ability.

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16 _____
RICHARD H. ROMANOW

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