

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 COMPUWARE CORPORATION,

5 Plaintiff,

6 v

7 INTERNATIONAL BUSINESS
8 MACHINES CORPORATION,

9 Defendant.

Case No. 02-CV-70906
U.S. Magistrate Judge
Wallace Capel, Jr.
Flint, Michigan
September 1, 2004
10:02 a.m.

10 Ordered By:

DAVID ETTINGER, ESQ.

11 MOTION HEARING

12 APPEARANCES:

13 For the Plaintiff:

DANIEL JOHNSON, JR. ESQ.
Fenwick & West
2 Palo Alto Square
Suite 800
Palo Alto, CA 94306
650-494-0600

16 For the Defendant:

THOMAS RAFFERTY, ESQ.
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
212-474-1784

19 Court Recorder:

James Peltier

22 Proceedings recorded by electronic sound recording, transcript
23 produced by transcription service.

1 (Court in Session)

2 THE COURT: Compuware versus IBM.

3 MR. JOHNSON: Yes, Your Honor. Daniel Johnson, Jr.
4 on behalf of Compuware.

5 THE COURT: Is every motion I get from you guys
6 labeled emergency?

7 MR. JOHNSON: You know, Your Honor, that's a good
8 point.

9 THE COURT: It just seems to be, you know.

10 MR. JOHNSON: You know, I've got to tell you, it
11 feels like it.

12 THE COURT: Yeah, it does feel like it. All right.
13 I've read through all the stuff, all these filings. The
14 initial thing I want to know is this. Who discovered this
15 information? Because --

16 MR. RAFFERTY: I'm sorry?

17 THE COURT: Who discovered this information because
18 the initial thing that I was told is that the information
19 didn't exist and then in their response I was reading that
20 this facility had been closed for three years.

21 MR. RAFFERTY: Yes, Your Honor. Tom Rafferty on
22 behalf of IBM. The information, Your Honor, the program at
23 issue, there are two programs in the case, but the one at
24 issue is file manager.

25 File manager was developed in the Perth, Australia

1 facility of IBM. For the beginning period of its development,
2 they were using remotely a system, a mainframe system in an
3 IBM facility in Sydney, Australia. And years before the
4 lawsuit was filed, all of that material was moved back to a
5 system in Perth and the system, the computer itself in Sydney
6 was brought down, it was taken apart, it was no longer used.
7 When we --

8 THE COURT: But that was just a server, right?

9 MR. RAFFERTY: Well, no, it was a -- it was a 3090
10 mainframe. It was acting as a server for the people in Perth
11 who were accessing it remotely and I mean Perth is as far from
12 Sydney as San Francisco is from New York.

13 THE COURT: My point is, is it's all electronics,
14 counsel. It doesn't matter in terms of distance. My point
15 is, is the information wasn't -- wasn't being stored on that
16 facility, was it?

17 MR. RAFFERTY: No, it was not -- it was not being
18 stored. But everything in -- in the year 2000, everything
19 came back to Perth. And at that point --

20 THE COURT: Including the -- the alpha or the beta
21 copies of this original file manager?

22 MR. RAFFERTY: Well, the beta copy would never have
23 been in Sydney, it was the source code that was in Sydney,
24 Your Honor.

25 THE COURT: All right.

1 MR. RAFFERTY: I want to make sure that we're clear
2 on that. So what happened was when the -- when the product
3 was actually released in December of 2000, what they did was
4 roll up all the source code and create a new version from
5 which to work forward.

6 And for this product they did not think that they had
7 kept, specifically kept --

8 THE COURT: Who didn't think?

9 MR. RAFFERTY: The developers in Perth, Mr. Turner
10 principally who was the manager of the program at the time.
11 They did keep that information for the other program and we
12 produced that and we produced all the source code and all of
13 the revision control data for file manager from Version 1
14 going forward.

15 What we could not find was a copy of the pre-version 1
16 source code and revision control information, separate and
17 apart from what continued to exist. And this is a lot like
18 writing a book. You start writing and you don't --

19 THE COURT: Yeah, but usually you keep all those
20 copies there because you're working from them, counsel. So
21 where -- why was it separated from the others, or was it
22 separated from the others?

23 MR. RAFFERTY: Because when they get ready to
24 release the product, they take everything that's current and
25 create that because that becomes Version 1. So what happened,

1 Your Honor, is we could not find any pre-version 1 source
2 code --

3 THE COURT: My point is, is why not? Where -- why
4 did it just happen to come about on this occasion? You found
5 the other -- you found the other pre copies, correct?

6 MR. RAFFERTY: We found the other pre, absolutely.
7 But --

8 THE COURT: This one wasn't stored in the same
9 place?

10 MR. RAFFERTY: It wasn't stored in the same place.
11 There were two separate programs, two related but separate
12 development projects. Mr. Turner at one point was managing
13 both and at a point in time went off to one and left the other
14 two on Mr. Sutherland.

15 What we found this summer in Sydney was not on a
16 computer, it was a backup tape from that computer that no
17 longer exists there. And we went through because as I
18 understand 26(e), I've got to keep looking to make sure that
19 I've done what I can do to produce what's relevant and what's
20 responsive. And they had been pressing us.

21 They took a 30(b)(6), they've asked lots of questions
22 about what happened to this code over time. And they got the
23 explanation that it was no longer necessary after Version 1
24 and no one took any steps intentionally to preserve it. So as
25 far as we could tell it no longer existed.

1 When we found these backup tapes in Sydney, we restored
2 them, we loaded them up, we looked through them and we found
3 it. As soon as we found it, Your Honor, I called them. I
4 didn't wait to send them a letter or hoping he was out of the
5 office, I called them and I said, I've got this stuff, it's
6 being copied, I'm hoping it's going to get out the door
7 tonight to you. You tell me what we need to do within reason
8 to assist you in getting through this.

9 And that's what we did. Now they didn't wait very long
10 to file this motion. And in the interim after we got their
11 motion, we then went and got our experts to start looking at
12 what we had in fact produced.

13 And it turns out not surprisingly because these are
14 continuations, it's what became Version 1, and we produced the
15 Version 1 material to them. Basically 91% of what we've given
16 them in this new production for the source code is already in
17 the source code that they've had for a very long period of
18 time.

19 And let me just take a minute. File manager was
20 developed from a IBM program that was created in the 1970's
21 called Ditto. Ditto was the base that they used to create
22 file manager.

23 In 2003, we produced to Compuware the source code for
24 Ditto. And we in the last week or two, starting on the 18th
25 of August, we compared the Ditto source code that they've had

1 for basically a year now to what we produced in terms of the
2 pre-version 1 file manager source code, 83% of it is exactly
3 the same.

4 So what they've got is launched through the Ditto code
5 that they've already had for a year. Now they could have done
6 that too but they haven't. But interestingly enough in the
7 declaration from --

8 THE COURT: They could have done what?

9 MR. RAFFERTY: They could have before they brought
10 this emergency motion, had taken a look to see whether they in
11 fact had something that was brand new and all over the lot or
12 whether it was largely duplicative of what they had already
13 gotten produced to them. They didn't do that.

14 But interestingly enough, Ms. Frederickson, their expert
15 in her declaration which they attached to the motion, she said
16 when she was listing the work that she would do to review this
17 material that we had produced, the first thing she said she
18 would do is exactly what we did. She'd compare the source
19 code in an automated program to Ditto.

20 THE COURT: And what amount of time did she estimate
21 that that would take?

22 MR. RAFFERTY: Well, she didn't break -- she had a
23 whole series of work that she would do. She estimated that it
24 would take somewhere between 2,200 and 3,500 hours. But that,
25 I think, Your Honor, was on the mistaken impression that all

1 of this was new.

2 They've already done this for Ditto. We've looked at
3 Ditto. Ditto -- 83% of what we've just given them is just
4 Ditto, same names, same modules, everything is the same
5 because Ditto was the base from which the file manager
6 developers began to work on this.

7 Now, Your Honor, I don't have any question that they've
8 got some work to do on this. You know, I said to Mr. Johnson
9 in our phone call and in my letter, that you tell me what you
10 need to do and within reason I'll cooperate. I'm not going to
11 stand here and say, if I had found this material a year ago,
12 I'd have produced it a year ago, Your Honor.

13 I've never personally been sanctioned for a discovery
14 misconduct and I've certainly never been -- been accused of
15 discovery misconduct in a circumstance in which I found the
16 material and immediately turned it over to the other side.

17 THE COURT: Who was responsible for searching for
18 this material originally, counsel?

19 MR. RAFFERTY: Well, Your Honor, I was. I'm the
20 lawyer --

21 THE COURT: No, no, I'm not talking about you.
22 You're ultimately responsible, sure. You're ultimately
23 responsible. My point is, is that the -- the -- at this
24 facility is a backup tape.

25 MR. RAFFERTY: Well, Your Honor, the reason -- the

1 backup tape was in a closet. It's just a series of tapes.
2 And the system itself had not been -- had been gone for two
3 years. The system that --

4 THE COURT: The system itself is just the hardware,
5 counsel. The backup tape itself, who was responsible for
6 looking for the backup tapes and all that?

7 MR. RAFFERTY: We asked the programmers, Mr. Turner
8 and the people working for him in Perth to find the source
9 code, to find the revision control materials.

10 THE COURT: Were they the ones originally
11 responsible for the development of this project?

12 MR. RAFFERTY: Absolutely, Your Honor.

13 THE COURT: So they would have been the ones to keep
14 the backups?

15 MR. RAFFERTY: Right. But they had -- they -- their
16 position, Your Honor --

17 THE COURT: And didn't one of them testify that this
18 material no longer existed?

19 MR. RAFFERTY: He did because when it came back to
20 Perth, they didn't keep it in Perth. And they were unaware
21 that someone had made a backup of -- and it wasn't just a
22 backup of this material, Your Honor, it was a backup of
23 everything that was on the system in Sydney at that point in
24 time. There had been --

25 THE COURT: So they made a backup of the entire --

1 everything that was on the system?

2 MR. RAFFERTY: Right. And when we -- we didn't know
3 that that backup tape existed. And this -- during the last
4 year I have been pressing and Mr. Turner put in his affidavit
5 that the lawyers had repeatedly asked, are you sure, are you
6 certain that we have looked everywhere possible. Can you tell
7 me that there's no place else that we can look and we went out
8 and went the extra yard.

9 They went to Sydney, they talked to people in Sydney,
10 they said well, there may be some backup tapes here and the
11 answer to that then from our end was, if there are backup
12 tapes, let's make sure we load them up, see what's on them.
13 Because if there's anything there that we should have
14 produced, we're going to produce it. And that's just what we
15 did.

16 THE COURT: All right. Counsel, what's your
17 response?

18 MR. JOHNSON: Your Honor, let me answer the
19 question, did -- answer -- first, Mr. Turner had the
20 responsibility from the outset of this case because he was on
21 the ground in Perth along with their lawyers to do what
22 happens in every case involving electronic media. They were
23 under directive from you to locate all tapes, all backups.

24 And they were under a directive because we explicitly
25 asked for beta code. When we asked for it in July when I came

1 here for the first time and you ordered them to produce it,
2 the definition of file manager included beta code.

3 Now what did you get? You got a declaration from Mr.
4 Turner, that's after he told us they don't exist, never
5 happened, everything was erased. And he said, why, I had no
6 idea they might be in Sydney.

7 Now pause and consider that for a moment. They did the
8 development in Perth using the mainframe in Sydney. If I
9 walked in here and told you that my client had a mainframe in
10 Detroit and another mainframe in Flint and he -- he checked in
11 Detroit, but he didn't check in Flint, you would tell me I did
12 not discharge my duty. I had an obligation to search
13 everywhere, every place that was reasonable.

14 Now against the background that they did the work on the
15 mainframe in Sydney to come in here and tell you, we didn't
16 think to look in Sydney defies logic and reason. But there's
17 another reason why this conduct is outrageous.

18 Mr. Turner did a search a year and a half after he had
19 been ordered by you to do so. And you know what he wrote? He
20 wrote just his name and beta and said I didn't find anything.
21 Well, guess what? When he added the initials F.M. for file
22 manager he found exactly what he was looking for.

23 It is beyond belief that a man with some 20 plus years of
24 experience in the programming business as they bragged to me
25 when I was in Australia, could stand before you and say, I

1 never thought to add the word file manager. And that's
2 exactly what his declaration says.

3 But worse than that he was under an explicit order to do
4 so and more than that, the order said he had to search his
5 files, even if he had done a cursory search and said Rod
6 Turner, all files for the relevant time period had done an
7 investigation or had his lawyers do the investigation, he
8 would have found it. He said, well, if it's not this name it
9 doesn't exist, so therefore I don't have to look.

10 And why did they look? It wasn't for any -- any reason
11 that -- that they felt like they had some moral obligation. I
12 kept screaming, I do not believe that IBM would destroy the
13 original material that was directly relevant to their
14 development history and here's why. He just gave you the IBM
15 mumbo jumbo about 91% the same.

16 We went in for the preliminary injunction. They told us
17 that Ditto was 90% of their Version 1. After the preliminary
18 injunction which they touted to the Judge, well, it's all
19 Ditto, turned out it was 22%, 22%. And they said there is no
20 source code in -- in the new product. Well, we've got
21 testimony that shows source code all over the place.

22 Now why am I here? I'm here because discovery in this
23 case closed in April. All of my expert reports were finished,
24 all of the experts had been deposed. And then I get a call
25 from Mr. Rafferty, I happen to like Mr. Rafferty, and he says,

1 and oh, by the way, all of the stuff you brought all those
2 motions over and we swore up and down didn't exist, it exists.
3 And I pointed out to Mr. Rafferty, well, that means now I've
4 got to re-take 10, 15 depositions. I now have to have my
5 experts redo everything they've done.

6 And here's why, Your Honor. Because at the preliminary
7 injunction hearing, they said we didn't rely on the
8 ex-Compuware people. They didn't give us any information.

9 We had e-mail that said, Mr. Hilner began reviewing the
10 beta product in March of 2000. And in July and August of 2000
11 they pulled the product from the anticipated delivery and
12 re-worked it. And that re-work ended up with a new product
13 being delivered in December.

14 And I said, I am at a huge disadvantage. I have no idea
15 what you did from March or from the beginning until your first
16 version came out. And they said, well, it doesn't matter
17 because we don't have it because it didn't exist. Well, it
18 does matter and here's why. Because their claim about the
19 Ditto code is false. Because Mr. Turner, the person with the
20 most knowledge, not some flunky, the guy who ran the program,
21 the person with the most knowledge, he swore to me in
22 deposition, he swore in declaration it didn't exist.

23 And they changed their tune when they realized that they
24 were going to stand in front of that jury and I was going to
25 tell that jury what happened to the beta code, what happened

1 to the original source code. They said, well, you know, it's
2 93%. Well, guess how this works.

3 First of all, it's not 93%. I had my people do a line
4 analysis, a third of it is new at a minimum. We can't do the
5 analysis because they write it in proprietary code. So it
6 takes hours and hours and hours for my people to do the work.

7 And then they said, well, that doesn't matter, it's all
8 the same. It's not the same. It would be different if I was
9 standing in front of you in July 2000 and they produced it in
10 -- in November 2000. I had plenty of time to do discovery.

11 But they have been selling their products, cutting our
12 market for months and years. And now on the eve of trial they
13 come in here and say, oh, we got some new stuff to analyze.
14 It should have been produced right at the beginning. And they
15 don't even offer a plausible explanation.

16 For Mr. Turner to file a declaration that says I added
17 the word F.M., the initials F.M. to a search, F.M. stands for
18 file manager and I was able to find it, does --

19 THE COURT: Let me ask you something.

20 MR. JOHNSON: Yes, sir.

21 THE COURT: Where did he enter that search into?
22 Where did that search take place?

23 MR. JOHNSON: In Perth, Australia. In Perth,
24 Australia. And the game they told me was, the -- the beta
25 system was in Boulder, Colorado. And I said, how could it be

1 that you have a beta system in Boulder, Colorado and you did
2 the work in Perth? And they said, with the typical IBM
3 aplomb, that's what we did.

4 And when I said, I cannot believe you didn't keep the
5 beta since you showed it to the ex-Compuware people. Well,
6 counsel, that's the way it is. And now they stand in front of
7 you and say, no harm, no foul.

8 What we've got here is a situation where IBM thinks that
9 Compuware and Dan Johnson fell off a turnip truck and whatever
10 they say we have to believe. In any other situation nobody
11 would believe that farcical's tale, nobody. I do not believe
12 that Mr. Rafferty was told the truth, but I also do not
13 believe that Mr. Turner is telling the truth.

14 If it didn't exist six months ago, how could it now
15 exist? A backup tape in this industry is so commonplace it is
16 ludicrous for someone to say, well, they kept the backup tape
17 in a closet. That makes no sense technologically.

18 What we have here is a situation in which we've been
19 disadvantaged, we couldn't get the information. We have
20 spent, and when I say millions of dollars, we spend millions
21 of dollars, thousands and thousands of hours because the very
22 piece of code which we would have been able to trace, you
23 start it here, you went here, and the critical issue in the
24 case is, when you started getting input from ex-Compuware
25 people, what did they provide.

1 To be able to trace that genealogy required that we had
2 the original code. When we didn't get it, I had to hire
3 another expert to go through an elaborate process to figure
4 out given the rate of lines of codes they did, how much of it
5 was original, how much of it was standard, and moreover, could
6 it be done in the time length they said. If I had had that
7 code I wouldn't have needed that.

8 Now I understand I'm asking for a severe sanction. But
9 the law in the 6th Circuit is, under circumstances such as
10 this where I clearly have been prejudiced, and more
11 importantly, where they have not come forward with a plausible
12 explanation. You asked the right question, who was
13 responsible. You asked the right question, where was it. The
14 person responsible? In Perth. What was his responsibility?
15 To monitor the entire progress. What was his responsibility?
16 To handle the discovery.

17 Now if it is the case that counsel delegated this
18 authority to the folks on the ground in Australia, we cited
19 you case law that says you can't do that. That the law is if
20 you're the outside counsel, somebody had to check.

21 If he is prepared to say, or more importantly if IBM is
22 prepared to say that they just heard about a backup tape last
23 week, then you ought to join the turnip truck parade, Your
24 Honor, because that's exactly what they're telling us. No,
25 there is no excuse for this.

1 I'm supposed to go to trial November 8th in Detroit. I
2 have worked and prepared to do just that. And now I cannot go
3 to trial, I cannot go to trial and they will continue selling
4 their product gleefully and walk out of here and say, you
5 know, I added F.M. and that's all that matter.

6 I got one other point and I'll sit and I promise. They
7 told you it wasn't in the order. The first order defined --
8 defined file manager is including the beta and all source
9 code. In their papers that's what they told you.

10 Then they said, we waived. The order they claim we
11 waived simply said, you produce X, you told us it doesn't
12 exist, it reserved the right to come back later and ask for
13 additional documents to the extent they existed. And yet
14 their defense to you was not, we apologize. It was not, we
15 made a mistake, Mr. Turner somehow was not competent. What
16 did they tell you? Compuware lied to you. Compuware
17 distorted the facts.

18 You can read the order that you signed and Judge Steeh
19 signed. It said all source code. It said all beta code. No,
20 I'm not here because I've got some -- some litigation
21 advantage. I'm here because this story does not wash.

22 Mr. Turner was not truthful. And if he said he did a
23 search, then the search he did was so incompetent as to be
24 gross negligence. And under the standard in the 6th Circuit,
25 negligence is enough, gross negligence is more than enough.

1 And if adding those two letters doesn't make it gross
2 negligence, I don't know what does.

3 THE COURT: Let me ask you something, counsel. How
4 much time would your experts need to do this in to be
5 re-deposed -- re-deposed?

6 MR. JOHNSON: Well, I talked to my experts. They
7 told me the best -- the best estimate they could give me was
8 2,500 to 3,000 hours of additional analysis. And the reason
9 is because they have to go through and interpret all of the
10 new code and the map module by module what in fact happened.

11 THE COURT: I'm asking you how long do you think you
12 would be able to if -- if discovery was reopen to?

13 MR. JOHNSON: I would say, Your Honor, we're looking
14 at a minimum of seven to ten months. And I've got to take
15 more discovery. I've got to -- now that -- oh, by the way,
16 the version control, the reason version control was so
17 important and why we kept asking for it, is version control
18 would show you who developed what module and how long it would
19 take.

20 So when they told me we were able to come up with a
21 product that my people say should have taken you five years
22 and 12 months. I would then be able to go back and depose the
23 very people I didn't know existed. And I have to and want to
24 do that. And I want to do it in Australia with them on the
25 ground where maybe more documents will show up now that they

1 know that backup tapes exist. This is a major major major
2 undertaking, Your Honor.

3 THE COURT: All right. I'll be out in a few
4 minutes.

5 (Court in Recess at 10:25 a.m.; Resume at 10:32 a.m.)

6 THE COURT: All right, counsel, this is what I'm
7 going to do. Trial date is set in October at this point in
8 time.

9 MR. JOHNSON: November 8th, Your Honor.

10 THE COURT: November. I talked to Judge Steeh about
11 those dates and he wants this trial to go by January. I'm
12 going to give you additional discovery time until then --
13 until the end of December.

14 The costs for those re-depositions and for the expert to
15 re-analyze that code is going to be born by IBM. I'm not
16 willing -- Mr. Rafferty, I believe -- I have no reason to
17 believe that you would lie to this Court.

18 I do think though, Mr. Turner clearly dropped the ball.
19 I do think it's negligence, gross negligence probably. I
20 think the sanction is pretty severe since -- would be rather
21 severe that's being asked for though under the circumstances
22 if there's other remedies that I can fashion in this case for
23 them to be able to prepare and that's what I'm doing in this
24 case.

25 Let me tell you though, IBM better do -- if there's any

1 other materials out there, I'm not going to be in this type of
2 mood next time. Because there's no reason at this late of a
3 date for Mr. Turner not to have found that material. And for
4 him to say that it didn't exist, I find somewhat outrageous.
5 I'm bothered by that, very bothered by that.

6 IBM is going to pay the cost for this motion. They're
7 going to pay the cost for the re-depositions of those experts
8 and for the cost of the analysis on it. All right?

9 MR. RAFFERTY: I understand, Your Honor. I believe
10 that this is the material you were looking for and there's
11 nothing else.

12 THE COURT: Well, let's just make sure.

13 MR. RAFFERTY: No, no, but I do -- I want to hear
14 from him now --

15 THE COURT: All right. Okay. And I'm going to give
16 you until the -- I want that discovery completed by the end of
17 December. You're going to have to push. If you need to get
18 another expert to look at that, then do it, but I'm not going
19 to extend that. All right?

20 MR. JOHNSON: All right, Your Honor.

21 THE COURT: All right. I want an order prepared.
22 Thank you.

23 MR. RAFFERTY: Thank you, Your Honor.

24 MR. JOHNSON: Thank you, Your Honor.

25 THE COURT: Thank you.

(Court Adjourned at 10:35 a.m.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Deborah L. Kremlick
Deborah L. Kremlick, CER-4872

Date: 9-3-04