

1 THE COURT: Okay. Two questions. The first  
2 question, could another operating system connect to Windows 95  
3 API?

4 MR. TULCHIN: The answer to that is no, Your Honor.

5 MR. SCHMIDTLEIN: It's really not a question, I  
6 think.

7 THE COURT: I think the answer is no. So I would  
8 just write no.

9 MR. SCHMIDTLEIN: We haven't been able to consider  
10 that.

11 THE COURT: 12 -- what is the date?

12 THE CLERK: 14th.

13 MR. TULCHIN: 14th, Your Honor.

14 THE COURT: The next one is, two questions, we  
15 would like Mr. Bennett's testimony and Microsoft's dictionary  
16 also, if possible.

17 The second question makes me think that I forgot to  
18 rule on something.

19 MR. TULCHIN: It was my recollection, Your Honor,  
20 that the dictionary is not in evidence.

21 THE COURT: Yeah. But I thought that the issue was  
22 Novell wanted it in, and you were all objecting.

23 MR. SCHMIDTLEIN: No. No.

24 THE COURT: Nobody wants it in?

25 MR. SCHMIDTLEIN: No, Judge. They didn't object

1 to --

2 THE COURT: I thought they objected.

3 MR. TULCHIN: We did, as I remember, Your Honor.

4 THE COURT: In any event, I'm going to let it in.

5 MR. TULCHIN: Shouldn't we say, Your Honor, the  
6 findings of fact define middleware? That is, after all, the  
7 binding on both sides.

8 THE COURT: Let me take a look at this. Does  
9 anybody have the dictionary?

10 How about Mr. Bennett's testimony?

11 MR. TULCHIN: I'm fine with giving them  
12 Mr. Bennett's testimony. I guess they want the whole thing.

13 THE COURT: Any problem with Mr. Bennett's  
14 testimony?

15 MR. SCHMIDTLEIN: No.

16 THE COURT: Okay. We'll give it to them. The  
17 court reporter -- there were a couple bench conferences.  
18 She's got to have time to --

19 MR. JOHNSON: Take those out.

20 THE COURT: -- redact any bench conferences. Let  
21 me take a look at the dictionary. I mean, it still seems to  
22 me the dictionary definition -- be that as it may, let me take  
23 a look at it.

24 MR. TULCHIN: They really shouldn't --

25 THE COURT: I understand.

1 MR. TULCHIN: Your Honor, the dictionary definition  
2 is not the definition of middleware for purposes of this case.

3 THE COURT: Exactly.

4 MR. TULCHIN: Novell asked the Court to adopt, and  
5 the Court did adopt --

6 THE COURT: Let me take a look at it.

7 MR. TULCHIN: -- the definition from the findings.

8 MR. SCHMIDTLEIN: Obviously we disagree with  
9 Microsoft as to what the appropriate middleware definition in  
10 the case is. So we introduced it. We crossed them on it.  
11 It's allowed --

12 THE COURT: I've got to see it.

13 MR. TULCHIN: Actually, Your Honor, I think the  
14 complaint which makes no reference to the dictionary adopts  
15 the government's case definition of middleware.

16 MR. SCHMIDTLEIN: No.

17 MR. TULCHIN: If not expressly, implicitly. That's  
18 how they got past the statute of limitations, was to argue --

19 THE COURT: Let me take a look at it first.

20 MR. TULCHIN: Okay.

21 THE COURT: If anybody has it.

22 MR. SCHMIDTLEIN: We're trying to get it, Your  
23 Honor.

24 THE COURT: You can take that back and say no. And  
25 Mr. Bennett's testimony say we'll get it for them. It's going

1 to take a while --

2 THE CLERK: Okay.

3 THE COURT: -- to get it. And then we're talking  
4 about the dictionary.

5 (Time lapse.)

6 MR. SCHMIDTLEIN: Your Honor, I apologize.  
7 Apparently Mr. Goldberg doesn't have the hard drive that has  
8 all the exhibits on.

9 THE COURT: That's fine. No problem. I think  
10 they've got it here on this side. I just want to take a look  
11 at it.

12 MR. HOLLEY: Your Honor, may I bring this to you?

13 THE COURT: Sure. I hope there's a page number.

14 MR. HOLLEY: No. I'm bringing you the transcript  
15 of Professor Bennett's testimony.

16 THE COURT: Thanks.

17 MR. HOLLEY: Your Honor, I suppose we're going to  
18 by hand redact the bench conferences.

19 THE COURT: That's the issue. Actually if you all  
20 want to do that, that's fine.

21 MR. HOLLEY: I will get together with Mr. Hassid or  
22 someone, and we'll do it right now.

23 THE COURT: I think there was one or two bench  
24 conferences.

25 MR. HOLLEY: I think that's right. Okay. We'll

1 get rid of them.

2 MR. TULCHIN: Your Honor, on this other issue,  
3 Paragraph 44 of the complaint defines middleware in the same  
4 way as the government's case. It's an expressed reference to  
5 middleware as the US Court of Appeals for the District of  
6 Columbia Circuit held in affirming the District Court's  
7 findings. So I don't think the dictionary is relevant. I  
8 don't think it's in evidence.

9 THE COURT: What's that, the complaint? Let me  
10 take a look at it.

11 MR. HOLLEY: He wants to see the complaint.

12 MR. TULCHIN: Oh, the complaint, Your Honor. I'm  
13 sorry. I was just reading from Paragraph 44.

14 Also Paragraph 48, Your Honor, is relevant to this.

15 MR. JOHNSON: Your Honor, I would also say, and  
16 we'll get it for you, in their answer to the complaint, they  
17 admitted that middleware was far less than what they now  
18 claim.

19 MR. HOLLEY: Your Honor, that is absolutely false.

20 MR. JOHNSON: I will get the reference for you,  
21 Your Honor.

22 MR. HOLLEY: I would --

23 MR. JOHNSON: We have it in their answer.

24 MR. HOLLEY: I looked at it recently, and what it  
25 does is incorporate by reference the findings of fact in the

1 government case which defines the middleware in Finding 28,  
2 Finding 32, Finding 37, Finding 39 and Finding 77. They are  
3 binding in this case. That is the definition of middleware.  
4 Otherwise, this case would have been dismissed on the statute  
5 of limitations if it was not the same theory as the government  
6 case, Your Honor.

7 MR. JOHNSON: Your Honor --

8 THE COURT: It seemed like the answer.

9 MR. JOHNSON: -- the government's case obviously  
10 did not depend on the definition of middleware. It required  
11 middleware --

12 THE COURT: I'm just sitting here, I don't even  
13 know what the Microsoft definition is. I assume someone is  
14 trying to get me the definition?

15 MR. SCHMIDTLEIN: We were told it was admitted into  
16 evidence, but we'll get you it.

17 MS. NELLES: Your Honor, may I just briefly on the  
18 dictionary? Just so the record is clear, Theresa will recall  
19 this, I'm sure. The transcript indicates on Page 4959 --  
20 excuse me -- as to exhibits received into evidence, none. At  
21 the end of the day, Theresa informed me that Novell had  
22 handwritten in the dictionary onto the exhibit list. We  
23 hadn't been informed of that. I informed her we did have an  
24 objection, and to raise that with you.

25 THE COURT: Was the definition read to somebody?

1           MR. TULCHIN: Yes. On cross I think it was read to  
2 Professor Bennett, Your Honor.

3           MS. NELLIS: On cross-examination, Your Honor.

4           THE COURT: I mean, I have a recollection that's --  
5 I didn't want it in, but I let the question in. But I --

6           MR. HOLLEY: Your Honor, the only reason I didn't  
7 read Professor Bennett all the findings of fact was because I  
8 understood the Court to have ruled that this dictionary could  
9 not trump the definition of middleware that lies at the core  
10 of Novell's case. The only kind of middleware that could ever  
11 be a threat to a PC operating system is middleware that has  
12 the characteristics that Novell itself refers to in  
13 Paragraph 44 of the complaint.

14           And, of course, the reason it's in the complaint is  
15 because it's in the findings of fact issued by Judge Jackson.  
16 It is really the height of sophistry to now say that the  
17 definition that should control is some dictionary definition.

18           THE COURT: What is the dictionary definition?  
19 Just tell me.

20           MR. HOLLEY: It basically says, Your Honor, that  
21 any piece of software that sits between any other two pieces  
22 of software is middleware.

23           That is a meaningless truism. And it cannot be the  
24 definition of middleware that controls in this case, because  
25 any piece of software that exposes some APIs is no threat

1 whatsoever to Windows. It reduces the middleware theory to a  
2 joke.

3 MR. JOHNSON: Your Honor, Mr. Holley gets agitated,  
4 but the fact of the matter is his definition of middleware is  
5 a definition which destroys the applications barrier to entry.  
6 This case is not about our ability to destroy the applications  
7 barrier to entry. This case is about whether or not we  
8 contribute significantly or reasonably capable of lowering the  
9 application barrier of entry. And --

10 THE COURT: I'm pretty clear on this. I'm pretty  
11 clear. I'm not going to let it go back. I let it in. I  
12 let -- it doesn't matter. I remember now. I let the question  
13 in. I frankly don't think it is what the case is about.  
14 We've got -- I mean, you've alleged what it is in the  
15 complaint. That's what this case proceeds on. The theory  
16 isn't -- I mean, I don't even think your technical people  
17 defined it at this point.

18 MR. SCHMIDTLEIN: When we got into this dispute  
19 about whether you were going to define it in the jury  
20 instructions, I thought we had agreed that there was actually  
21 a dispute between Dr. Noll and --

22 THE COURT: There is a dispute. But I think the  
23 dictionary, that's not -- I don't think Dr. Noll takes  
24 Microsoft's dictionary definition.

25 MR. TULCHIN: No. Your Honor, Dr. Noll said, and



1 I'll get you the exact paragraph, although I don't have it  
2 available right at the moment. Dr. Noll said in his testimony  
3 that the middleware had to expose enough APIs so that he  
4 didn't adopt the -- I forget the right phrase here --  
5 full-featured Office productivity applications, but he did say  
6 middleware has to expose enough APIs so that other ISVs would  
7 be able to write applications to the middleware itself.  
8 Without that, of course, the second theory has no logical  
9 basis at all.

10 I mean, Novell clearly in the complaint adopted the  
11 government's theory. As we've said before, that's how  
12 Count One got this far since the suit was filed in 2004, and  
13 they relied on the tolling provision in the Clayton Act by  
14 saying that the claim in Count One was based on the claim in  
15 the government case.

16 So the dictionary definition is not Dr. Noll's  
17 definition. There's a dispute between Dr. Noll and Dr. Murphy  
18 as to exactly what that third prong should be. But it's  
19 clearly far, far removed from the dictionary definition that  
20 says middleware is something that runs in the middle.

21 Even Dr. Noll said, and maybe we could find the  
22 testimony if we have the transcript here, it has to expose  
23 enough APIs so that other ISVs would be writing applications.  
24 That's the whole idea of the second theory, that so middleware  
25 would have applications --

1 THE COURT: Mr. Johnson?

2 MR. JOHNSON: May I respond? Yes, Your Honor.

3 That is not what Professor Noll said. In fact, we showed --

4 THE COURT: I don't care what Professor Noll said.  
5 The whole logic of this case is, you're right, it doesn't  
6 matter to me how Microsoft defines it. The general theory is  
7 software that sits between two or more types of software and  
8 translates information between them, that's got nothing to do  
9 with your theory of the case, which is the threat to the  
10 operating system.

11 I also take you tolled limitations based on the  
12 government case. The government case, the findings of fact  
13 are binding here. Define what middleware is. And in any  
14 event, I never admitted it. I allowed a question, but that's  
15 it.

16 Okay. Thank you all.

17 MS. NELLES: Thank you, Your Honor.

18 MR. TULCHIN: Thank you, Your Honor.

19 THE COURT: Just tell them they can't have it.

20 THE CLERK: Okay. Do you want to write --

21 THE COURT: I'll write it.

22 Microsoft's dictionary, also, if possible, I will  
23 write, will be provided, not in evidence.

24 THE CLERK: Okay.

25 MR. SCHMIDTLEIN: Your Honor, one last point. The

1 other reason for using the Microsoft definition, Mr. Bennett  
2 testified that his definition, that he got his definition  
3 based upon his sort of experience and his notion.

4 THE COURT: I think if they get Bennett's testimony  
5 they actually are going to get the definition. I mean,  
6 that's -- I mean, this really is a question of evidence. I  
7 don't think I let in the definition. I really think that I  
8 allowed it to be read. So if they read through Bennett's  
9 deposition, I think that's why I let it in, because -- I  
10 didn't let it in, but that's why I allowed examination about  
11 it. Where did you come up with it --

12 MR. SCHMIDTLEIN: Right.

13 THE COURT: -- and took it into account? So I'm  
14 not saying that portion of the transcript should be excised.  
15 I mean, they can have it. But they're not going to have free  
16 standing -- and, if anything, I went too far allowing that,  
17 but it was in the context of exactly what you said. It was  
18 how did Bennett arrive at that? He took into account the  
19 definition. And then I think I allowed you to question what  
20 it is. So it's there. I just never let it in as such, and I  
21 don't think it should be in.

22 MR. SCHMIDTLEIN: Okay. Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. HOLLEY: Thank you, Judge.

25 MS. NELLES: Thank you, Your Honor.

1 (Recess.)

2 THE COURT: Somebody sure has a bug somewhere.

3 Next question. The answer I think is no.

4 MR. JOHNSON: Actually we think the answer is yes,  
5 Your Honor.

6 MR. TULCHIN: I don't know.

7 MR. JOHNSON: There was plenty of testimony that  
8 this stuff could be reverse engineered. And it's only asking  
9 if we would have the same functionality in the file open  
10 dialog on another operating system.

11 MR. TULCHIN: No, the answer is not yes, Your  
12 Honor. I don't know what the same functionality means. Same  
13 functionality as what?

14 MR. JOHNSON: Well, that's fair.

15 MR. TULCHIN: Excuse me, if I may.

16 MR. JOHNSON: I just said that's fair.

17 MR. TULCHIN: But the question, even leaving out  
18 the last clause, without breaking the law, I don't know what  
19 that means, but they have, if NameSpace extensions would not  
20 have been withdrawn, and I guess the next clause is, if  
21 PerfectFit was cross-platformed, which it never was --

22 THE COURT: That's -- go ahead.

23 MR. TULCHIN: I don't know. Then it says, would  
24 users on any operating system they choose have the same  
25 functionality in the file open dialog?

1           Of course there's the Windows file open dialog  
2           which was available to anyone on Windows. Since PerfectFit  
3           was never put on any other platform, as far as I know, I'm not  
4           sure what the meaning of this is, it seems to me that without  
5           a lot more information this question can't be answered yes or  
6           no, that an answer would need to be crafted that explains the  
7           facts and circumstances.

8           THE COURT: Well, let's say technically --  
9           Mr. Johnson, your view is that they were there, that it could  
10          have been reversed engineered, it would have then been  
11          cross-platformed to another operating system.

12          MR. JOHNSON: And let me go a little further than  
13          that, Your Honor. Obviously PerfectFit was cross-platformed.  
14          We had lots of evidence in the record that WordPerfect which  
15          contained PerfectFit was cross-platformed at the time of the  
16          events in question. It was written to UNIX base operating  
17          systems. It was written to Linux base operating systems. It  
18          was written to the Mac operating system. And there were  
19          several others, as well, many of which --

20          THE COURT: Not the new.

21          MR. JOHNSON: -- many of which were Intel -- if I  
22          may finish, Your Honor, many of which were Intel-compatible  
23          operating systems.

24          So when you're talking about PerfectFit, Your  
25          Honor, this question doesn't ask about PerfectOffice, this

1 question asks about PerfectFit. And PerfectFit was  
2 cross-platformed during the time of the events in question on  
3 many different platforms.

4 So when asked about the file open dialog, I would  
5 presume that they were asking about WordPerfect's open dialog.  
6 They're not talking there about Microsoft's common open  
7 dialog. They're talking about our file open dialog.

8 THE COURT: I see.

9 MR. JOHNSON: So we would say the answer to the  
10 question is yes. But I must say, in fairness to Mr. Tulchin,  
11 I think it is a question that has so many variables in it that  
12 it would be impossible for us to reach a meaningful agreement  
13 on how to respond to this question. I think we perhaps have  
14 an out here by the last clause by simply saying that that's a  
15 legal issue as to which you need not be concerned, and leave  
16 it at that. I would suggest doing that because we clearly  
17 would not be able to reach agreement as to how to respond to  
18 this question.

19 THE COURT: No, you're right. If you're talking  
20 about the prior version of PerfectFit -- I'm sorry. I was  
21 thinking about the new version. But --

22 MR. JOHNSON: PerfectFit is not PerfectOffice.  
23 It's PerfectFit.

24 THE COURT: You're right. You're right.

25 MR. JOHNSON: So, you know, our answer would be

1 yes. Of course Microsoft's not going to agree with that. I  
2 understand that. I don't think we ever reach --

3 THE COURT: Wait. Wait. Wait. Why don't I simply  
4 say -- I don't know what to say.

5 MR. TULCHIN: Your Honor --

6 MR. JOHNSON: I would suggest saying that's a legal  
7 conclusion, and you need not be concerned with it. I mean,  
8 they've given us that out with that last clause.

9 THE COURT: This may --

10 MR. JOHNSON: That may be the easiest way to  
11 provide an answer without getting into it.

12 MR. TULCHIN: I mean, Your Honor, I wonder -- I  
13 think Mr. Johnson's suggestion is constructive. I will say  
14 this. The new version of PerfectFit was not cross-platformed.  
15 The Court is correct about that.

16 THE COURT: Well, that's not what --

17 MR. JOHNSON: That's not what it says.

18 MR. TULCHIN: Well, that may be, Your Honor.  
19 PerfectFit itself was not a product. It was a component of  
20 PerfectOffice. But perhaps this question shouldn't be  
21 answered at all, or it should be answered with some sort of  
22 response. Our answer, I think the correct answer is no. But  
23 if the response from the Court is this is a question that  
24 can't be answered for legal reasons or, as Mr. Johnson  
25 suggested, I forget his exact phrase, but this is a legal

1 matter about which you need not be concerned, I think that's  
2 okay.

3 THE COURT: Let me try something here.

4 MR. TULCHIN: Mr. Holley points out to me, Your  
5 Honor, that perhaps the jury is concerned that it would be  
6 some sort of patent infringement, that last clause may refer  
7 to that. I don't know. The question actually as it stands  
8 really doesn't make much sense, and I think that's sort of the  
9 problem. To parse the question would require a very lengthy  
10 inquiry of the juror who wrote it, which, of course, we can't  
11 make.

12 (Time lapse.)

13 THE COURT: I don't know. This may not be  
14 satisfactory. I mean, I agree Mr. Johnson's suggestion is  
15 very constructive, but I'm not sure it goes far enough because  
16 it obviously is just, what are they asking you? So maybe this  
17 question is something like this. This question cannot be  
18 answered because, one, it calls for a legal conclusion; and,  
19 two, it is not entirely clear what the question is.

20 MR. TULCHIN: I'm okay with that, Your Honor.

21 MR. JOHNSON: Yes, Your Honor. We'll agree to  
22 that.

23 THE COURT: Yeah. Because I think that's the  
24 problem. I think that's exactly what you said. And that's  
25 why we came up with different answers to the question.



1 MR. JOHNSON: Yes. I think it's a really  
2 impossible question to answer. We can debate about it for  
3 about four days.

4 THE COURT: We can have another closing argument.  
5 Okay. Here. See if you can understand what I  
6 wrote.

7 THE CLERK: Okay. Now do you want me to type this  
8 out or --

9 THE COURT: Yeah. I want you to type it out.

10 THE CLERK: The question cannot be answered  
11 because, one, it calls for a legal conclusions; and, two, it  
12 is not entirely clear what the question asks.

13 THE COURT: Just conclusion, not conclusions.  
14 Thank you all. I'll sign that.

15 MR. HOLLEY: Thank you, Your Honor.

16 THE COURT: I hope you get five minutes' rest.

17 (Recess.)

18 THE COURT: I could be wrong. I still think  
19 they're treading water. As I understand the question, it has  
20 a clear answer, but maybe I'm wrong. That there would be  
21 different on Win95. I mean, that's the whole point.

22 Do you agree?

23 MR. JOHNSON: Your Honor, I -- actually this is  
24 another one of those questions unfortunately --

25 THE COURT: I know.

1 MR. JOHNSON: -- that it's so badly done that it's  
2 hard to say what they're asking. The open file dialog would  
3 be the same. And the last part --

4 THE COURT: But not the --

5 MR. JOHNSON: -- it would be the same on Win95.  
6 But obviously with respect to the NameSpace APIs, it would --  
7 it could be different.

8 THE COURT: As I interpret, they must be asking  
9 what they asked the first time, which is what comes up does it  
10 come down, and what comes up doesn't come down, if I'm talking  
11 about middleware. That clearly if they write -- they must be  
12 talking about a customized open file dialog because that is  
13 what would be dependent on NameSpace APIs. If they're talking  
14 about Windows open file dialog the NameSpace APIs is  
15 different. So they must be asking if what the code that was  
16 being written for Windows 95 is itself portable.

17 MR. TULCHIN: Yes.

18 THE COURT: That's how I interpret it.

19 MR. JOHNSON: Your Honor, again, I think this  
20 is -- I'm not even sure there's evidence in the record from  
21 which we lawyers could answer this. But the open file dialog  
22 would certainly be the same. The custom file open dialog  
23 would be the same. Now, whether it -- whether obviously --  
24 whether it would have the functionality which doesn't ask  
25 about, whether it would invoke different APIs, it's just

1 another question that I think really can't be answered.

2 MR. TULCHIN: Could I pose --

3 MR. JOHNSON: The open file dialog would be the  
4 same.

5 THE COURT: No. I understand your --

6 MR. TULCHIN: Let me propose an answer, because I  
7 think I agree with the Court that it's very similar if not  
8 identical to an earlier question. But here's what I would  
9 propose.

10 There are no NameSpace extension APIs on other  
11 operating systems. So WordPerfect or PerfectOffice on other  
12 operating systems could not depend on the NameSpace extension  
13 APIs. Those APIs are Microsoft technology that were available  
14 only on Windows 95.

15 MR. JOHNSON: Your Honor, we would vigorously  
16 object to that answer. Frankly the open file dialog would be  
17 the same. And the last clause is just simply -- if it would  
18 clearly -- if it was on Windows 95, and again, we don't even  
19 know, assuming that we had access to the NameSpace APIs, it's  
20 not even written as though whether or not we had access to  
21 them in this question. But it's just -- it's just  
22 unintelligible.

23 I think really what we ought to do when a question  
24 comes out that's unintelligible is tell the jury they have to  
25 decide this case based upon their collective recollection of

1 the evidence and the experts that appear in the case rather  
2 than us trying to introduce evidence which I think is not in  
3 the record.

4 MR. TULCHIN: Your Honor, I think what I said is  
5 actually fully --

6 THE COURT: Say it again.

7 MR. TULCHIN: -- in the record.

8 THE COURT: It didn't sound objectionable to me,  
9 but I'm sitting here and I'm not sitting there, and  
10 Mr. Johnson has a good perspective. So let me hear again.

11 MR. TULCHIN: I'm not sure I'll be able to use the  
12 exact words, but I'll try.

13 There are no NameSpace extension APIs available on  
14 operating systems, so WordPerfect or PerfectOffice on other  
15 operating systems could not have depended on those APIs. The  
16 NameSpace extension APIs are Microsoft technology that was  
17 available only on Windows 95.

18 And there can't be any dispute about that, Your  
19 Honor. It wasn't an option for Novell or WordPerfect or Corel  
20 later to use the NameSpace extension APIs in conjunction with  
21 some other operating system. They were, in fact, patented  
22 Microsoft technology. But patented or not, the answer would  
23 be the same. It isn't open for an ISV to take APIs in Windows  
24 and use them for their own benefit on some other operating  
25 system. I think -- I don't think there can be any dispute

1 about that. That certainly is supported by the record and is  
2 plain and simple truthful.

3 MR. JOHNSON: Your Honor, as I said before, in  
4 response to the last one, which was kind of similar, these  
5 things can be reversed engineered, and the evidence in the  
6 case is that they apparently were by some people. So again,  
7 whether that would have been lawful --

8 MR. SCHMIDTLEIN: Your Honor, I think the other  
9 question is, I think WordPerfect did have different custom  
10 file open dialogs on other platforms. It's not as if there  
11 wasn't an open file dialog on the versions of WordPerfect that  
12 operated on other operating systems. The extent to which they  
13 implemented all, some or different functionality because they  
14 would call different APIs, things like that, I think is,  
15 that's the part -- I mean, I'm not necessarily disagreeing.

16 THE COURT: Maybe I've just got too simple of an  
17 understanding of this. This obviously, this question unlike  
18 the last one obviously relates to the version of WordPerfect  
19 that was being written for Windows 95 because of the inclusion  
20 of the phrase, quote, if it depended on the NameSpace APIs.

21 Maybe I don't understand the evidence, but it seems  
22 to me to be clear that in terms of what shared code was  
23 writing it would have had to write something different. I  
24 mean, that's the bottom line. I mean, it's not like if they  
25 wrote this that if they succeeded in what they were trying to

1 do, they could have immediately ported that or used it in  
2 connection with another operating system. And that seems to  
3 me that what the question seems to be getting at, and it seems  
4 to me the evidence is crystal clear that they couldn't.

5 MR. TULCHIN: Yes, Your Honor.

6 THE COURT: And the question -- I understand the  
7 ambiguity that both Mr. Johnson and Mr. Schmidlein have  
8 alluded to, but it seems to me this question necessarily is  
9 talking about the open file dialog that was being written for  
10 Windows 95 by Mr. Harral and Mr. Glen -- what's his name?

11 MR. JOHNSON: Actually, Your Honor --

12 MR. TULCHIN: We've actually answered your question  
13 earlier, the Court answered the earlier question by saying the  
14 NameSpace extension APIs, I hope I wrote it down the way the  
15 Court dictated it, involved in this case are only on  
16 Windows 95. This looks to be sort of another version of the  
17 same question, and I think it deserves the same answer that we  
18 all agreed to earlier. The NameSpace extension APIs were not  
19 available on any other operating system. So WordPerfect or  
20 PerfectOffice, if they had been written for other platforms,  
21 could not have depended on the NameSpace extension APIs.

22 I mean, that can't be controversial.

23 MR. JOHNSON: Your Honor, I still think it is. I  
24 mean, the open file dialog would be the same on cross-platform  
25 releases of WordPerfect on all platforms. Now, clearly if it

1 depended upon the NameSpace APIs, it would be talking about  
2 running on Windows. I certainly agree with that.

3 THE COURT: You mean that the goal would have been  
4 if they had written, if they had written this code for  
5 Windows 95 and then written codes for other operating systems,  
6 the open file dialog would have looked the same?

7 MR. JOHNSON: It would be identical. Absolutely  
8 identical.

9 THE COURT: It would appear the same. That would  
10 have been their goal.

11 MR. JOHNSON: Yes. Exactly. You would not want a  
12 different version to operate differently on another operating  
13 system. You would want it to be the same. And obviously  
14 during this time period WordPerfect was, in fact, written to  
15 other operating systems and had the same functionality that it  
16 had on the Windows system.

17 MR. TULCHIN: Actually, Your Honor, Mr. Frankenberg  
18 said they never wrote for another operating system.  
19 PerfectOffice and WordPerfect were never written.

20 THE COURT: It couldn't have had the same  
21 functionality. If they had the same functionality Harral and  
22 what's his name would never have ruined all their nights  
23 trying to write that. I mean, that's Microsoft's argument.

24 MR. JOHNSON: Wait a minute.

25 MR. TULCHIN: This question asks if it depended on,

1 I'm just reading the words in the question, if it depended on  
2 the NameSpace APIs. And so the answer that I started with has  
3 to be the right answer. If Novell was writing something that  
4 depended on the NameSpace APIs, whatever they were writing  
5 could not have appeared on, been available on some other  
6 platform. That's by definition. This was Microsoft property,  
7 intellectual property, and Microsoft APIs. It's not open to  
8 the ISV to make a wholesale theft of Microsoft APIs and use  
9 them on another operating system. I mean, that much I think  
10 everybody would acknowledge.

11 So this question, Your Honor, by definition asks  
12 about potential technology that would have depended upon  
13 Mr. Nakajima's innovations, patented innovations. And under  
14 the circumstances, I think the answer has to be as I suggested  
15 it, or some very close variation.

16 MR. JOHNSON: Your Honor, a couple responses.  
17 First of all, again, Mr. Tulchin misstates the record with  
18 respect to WordPerfect. The WordPerfect we know was  
19 cross-platformed at the time the events in question.

20 MR. TULCHIN: No. No. Back in '92-93 --

21 THE COURT: Let him finish.

22 MR. JOHNSON: This does not, again doesn't refer to  
23 PerfectOffice. This is referring to WordPerfect, which, of  
24 course, was cross-platformed at the time of the events in  
25 question and was, in fact, written to cross-platform during



1 Mr. Frankenberg's term there.

2 Now --

3 MR. TULCHIN: This is --

4 MR. JOHNSON: If this question stopped with, if it  
5 depended on the NameSpace APIs, I might be able to find my way  
6 to this answer Mr. Tulchin is talking about. But then it goes  
7 on to say, or would it be different on Windows 95? Which  
8 leads to a complete ambiguity in the question in terms of what  
9 they're talking about.

10 So I think the answer, in fairness we've already  
11 told them that the NameSpace APIs are not on Windows -- are  
12 not on anything but Windows 95; right? I think we've told  
13 them that.

14 THE COURT: We told them that.

15 MR. JOHNSON: So I think we can possibly tell them  
16 that again. But I think you have to say that the custom file  
17 open dialog would be the same on cross-platform releases of  
18 WordPerfect. However --

19 MR. TULCHIN: Your Honor --

20 MR. JOHNSON: However, the NameSpace extension APIs  
21 would not be available on other platforms. I mean, I think in  
22 fairness, we have to get to guess that our file open dialog  
23 functionality would be the same on these different platforms.  
24 We would not have -- we would not want different functionality  
25 on the various platforms.

1           But I agree that we have to say, as I think we  
2 already told them frankly, that the NameSpace APIs, I think  
3 that's fair, are only on Windows. So I think you have to say  
4 both in order to fairly respond to this question.

5           MR. TULCHIN: Your Honor, if I could just point out  
6 one very important thing. If Mr. Johnson's statement is  
7 correct, that the Novell custom file open dialog could have  
8 been available on any other platform without use of the  
9 NameSpace extension APIs --

10          THE COURT: The whole case falls apart.

11          MR. TULCHIN: One might ask, well, why are we here  
12 after seven years of litigation?

13          THE COURT: And that goes back to that exhibit that  
14 it was at least referred to in somebody's cross-examination,  
15 there it is. You know, why would you need to write it new?

16          MR. TULCHIN: The basis of their claim is they  
17 couldn't do the advance file open dialog without the NameSpace  
18 extension APIs. That's the whole basis of what they were  
19 claiming.

20                 So for Mr. Johnson to say now that somehow this  
21 question should be answered in some other fashion, I think  
22 we've all agreed the NameSpace extension APIs were not  
23 available on any other platform except Windows 95. And if I  
24 understand what Mr. Johnson said a moment ago, I think he's  
25 acknowledging that the case should be dismissed with prejudice

1 without getting to the jury.

2 THE COURT: I don't think he was. But I understand  
3 your point.

4 MR. TULCHIN: Because, Your Honor, if  
5 Mr. Richardson and Mr. Harral could have written their file  
6 open dialog, the one they said was so cool and advanced and  
7 customized --

8 THE COURT: Without using the NameSpace APIs, then  
9 why are we here?

10 MR. TULCHIN: Yeah. Then why are we here? So it  
11 can't be right.

12 MR. JOHNSON: Your Honor, again, I agree that the  
13 NameSpace extension APIs were only on Windows. I mean,  
14 obviously. But to not answer the first part yes, that they  
15 would be the same on cross-platformed releases that were  
16 WordPerfect, of course, our open dialog would be the same. It  
17 would look -- it was a function --

18 THE COURT: I hear you. But as an abstract matter,  
19 and we would have to redraft the contract if we were  
20 negotiating. But it seems to me that as a matter of grammar  
21 there's a lot in-between the phrase open file dialog, but open  
22 file dialog if it depended on the NameSpace APIs, that has got  
23 to be -- the other line which adds some ambiguity, perhaps,  
24 but the only way this makes grammatic sense is if when they  
25 asked the question they're asking about the open file dialog

1 dependent on the NameSpace APIs.

2 MR. TULCHIN: Yes, Your Honor.

3 THE COURT: That's the problem. I understand what  
4 you're saying. But that's the only way to make any sense out  
5 of the question.

6 MR. TULCHIN: I agree, Your Honor. And I think the  
7 phrase "open file dialog" on the first line of this  
8 question --

9 THE COURT: It's talking about the open file dialog  
10 which would have been --

11 MR. TULCHIN: Correct.

12 THE COURT: As I said before, it seems to me pretty  
13 clear that if we're talking about if Harral and Richardson had  
14 written and succeeded in writing the code -- and again, this  
15 is -- I'm sure if the technical people were here they would  
16 fault what I'm saying. But essentially, is that easily  
17 portable, is it almost automatically transferable to another  
18 operating system?

19 MR. HOLLEY: And, Your Honor, the answer to that is  
20 obvious, because the only operating system that had a treeview  
21 that said My Computer, My Network Neighborhood, My Briefcase  
22 was Windows. So by definition it was impossible to have the  
23 same file open dialog run on UNIX or Linux or OS/2. And it --

24 THE COURT: But they did have because I think you  
25 were the one that did the cross-examine, they did have or

1 somebody did have a customized open file dialog which predated  
2 this --

3 MR. TULCHIN: Correct.

4 THE COURT: And your very point was, why don't they  
5 just use that?

6 MR. TULCHIN: Correct. That was from '93 and --

7 THE COURT: And to that -- I'm sorry, did I mess  
8 you up?

9 To that extent, Mr. Johnson was right. It would  
10 look the same, but it would be different.

11 MR. TULCHIN: Well, Your Honor --

12 THE COURT: Or if it's not different, then it would  
13 be --

14 MR. TULCHIN: The prior Novell or WordPerfect file  
15 open dialog in '93 that was shown as part of Exhibit 110, it  
16 was in that trade press article with a screen shot of it --

17 THE COURT: Was that the '94 release?

18 MR. TULCHIN: It was written for Windows. It was  
19 written for Windows 3.1.

20 THE COURT: Right.

21 MR. TULCHIN: But this question, I mean, I think we  
22 agree with the Court, this question has to be answered in some  
23 fashion similar to what we described earlier. And Mr. Holley  
24 made a very good point there, obviously, that the file open  
25 dialog couldn't be the same on other platforms, or as the

1 question asks, on a cross-platform release of WordPerfect. It  
2 couldn't be the same because, of course, none of those other  
3 platforms had all the Microsoft Windows technology on them.

4 So again, I think we're back to the same question.  
5 Mr. Johnson agrees that there are no other -- there are no  
6 NameSpace extension APIs available on any other operating  
7 system, on any other platform. So I think we should say that,  
8 and we should add that, as a result a release of WordPerfect  
9 for any other platform could not have depended upon or  
10 utilized the NameSpace extension APIs.

11 THE COURT: Okay. I think what we ought to do, and  
12 Mr. Johnson can have his exception. Go ahead.

13 MR. JOHNSON: Let me try --

14 THE COURT: Sure.

15 MR. JOHNSON: -- some sort of a compromise. I  
16 mean, the PerfectFit code on each of these cross-platform  
17 releases would not be different. But let me try this, and  
18 that is, I don't think we ought to be giving the same response  
19 we've already given to another question. I think that  
20 hopefully they're trying to ask something besides whether  
21 other operating systems had the NameSpace extensions. We've  
22 already told them that; right?

23 THE COURT: I hope so. Right now frankly, I feel  
24 like their deliberations are like a computer that is sort of  
25 in space somehow.

1 MR. JOHNSON: But let me try this. To be fair --

2 THE COURT: No. No. Give it a try.

3 MR. JOHNSON: And that is, cross-platform releases  
4 of WordPerfect would have similar open file dialogs, but such  
5 releases would not be dependent upon or use the NameSpace  
6 extension APIs. Because that's a fact.

7 MR. TULCHIN: Well, clearly it is not a fact.  
8 There's not a single piece of evidence that some other file  
9 open dialog for some other platform would look similar to the  
10 one that they were trying to write for Windows or the one that  
11 Corel released in May of '96 for Windows 95. No evidence from  
12 any witness that ever said that.

13 MR. JOHNSON: Wait a minute.

14 MR. TULCHIN: Mr. Johnson made it up. It's just  
15 not true. And, I mean, to say it would be really wrong, Your  
16 Honor.

17 MR. JOHNSON: Your Honor, that's absurd.  
18 QuickFinder, all the things that WordPerfect brought to the  
19 table would, of course, be present running on any operating  
20 system, otherwise it wouldn't be WordPerfect. We wouldn't --  
21 we wouldn't manufacture a copy of WordPerfect that differed in  
22 functionality than we had on another operating systems. That  
23 would be absurd. And all I'm saying is that we would have  
24 similar open file dialogs, but I do think we need to make  
25 clear, I certainly agree, that such releases would not be

1 dependent upon the NameSpace extension APIs.

2 If you want to say again what we've already said,  
3 which is that NameSpace extension APIs are only on Windows, I  
4 mean, you could say that again.

5 THE COURT: Okay. I understand. Let me just try  
6 something.

7 MR. JOHNSON: Okay.

8 (Time lapse.)

9 THE COURT: I'm not sure this gets us anywhere, so  
10 that may be wrong for that reason. I also am tired enough  
11 that I might have it wrong. Let me try this.

12 As I believe I have told you before, an open file  
13 dialog dependent on the NameSpace extension APIs would run  
14 only on Windows 95 and could not be run on any other platform.

15 MR. TULCHIN: That's a correct statement.

16 THE COURT: Which I think does it, and I think I've  
17 said what both of you have said without getting into the areas  
18 which cause each of you concern. Let me just say it again.

19 As I believe I have told you before, an open file  
20 dialog dependent on the NameSpace extension APIs would run  
21 only on Windows 95 and could not be run on any other platform.

22 It doesn't tell them much that I haven't told them  
23 before, but they've got to get knocked off of wherever they  
24 are.

25 MR. TULCHIN: Yes, Your Honor, it's correct. And



1 one of the things that I should point out to the Court, I know  
2 the Court will remember this, that Harral and Richardson said  
3 that they wanted to add QuickFinder to the Windows Explorer.  
4 The Court reacted at the time by saying, I see what you're  
5 doing. You're trying to marry -- this is outside the presence  
6 of the jury, trying to marry your file open dialog to Windows.

7 So by definition when Harral and Richardson said  
8 they wanted to add the Novell technology to the Windows  
9 Explorer, the statement you just read is absolutely correct.

10 THE COURT: Yeah. But let me hear from  
11 Mr. Johnson.

12 MR. JOHNSON: I really do object to the way you've  
13 done that, Your Honor, because you're essentially leaving out  
14 the fact that we would have open file dialogs on other  
15 operating systems. Certainly they would not invoke the  
16 NameSpace APIs.

17 MR. TULCHIN: Then why didn't they do it?

18 THE COURT: Go ahead.

19 MR. JOHNSON: They couldn't invoke the NameSpace  
20 APIs. And I understand that, and we've told them that before.  
21 But presumably, this question is something a bit different.  
22 And they're asking whether they would be the same on  
23 cross-platform releases. And our contention is they would  
24 essentially be the same because you don't produce a different  
25 product to operate on different operating systems.

1           Now, clearly the functionality, the functionality  
2 would be done in a different way. Presumably that operating  
3 system would have APIs that may or may not allow similar  
4 functionality to the NameSpace APIs. You know --

5           THE COURT: No. I hear you.

6           MR. JOHNSON: I don't know --

7           THE COURT: I'm a little worried. But frankly, I  
8 don't -- and I'm inclined to agree with you, that logically,  
9 you're going to have the customized open file dialogs look the  
10 same. I'm not sure that's in evidence. But more importantly,  
11 it really is -- I hear you, but I don't think that's what's  
12 being asked. I mean, that's -- to go back to the question, as  
13 I say as a matter of grammar, I think they must be talking  
14 about not open file dialogs generally, but open file dialog  
15 dependent on the NameSpace APIs. That's -- I mean, I hear  
16 you. But simply as a matter of what they're asking --

17           MR. TULCHIN: That's the question.

18           THE COURT: I think that's why I should answer it  
19 the way that I do without getting into -- if I talk about,  
20 well, other open file dialogs could be the same. But it seems  
21 to me that would confuse them more.

22           MR. JOHNSON: Well, it would be a little, I think,  
23 fairer to us because we would and did have open file dialogs  
24 on other platforms during this period on WordPerfect that had  
25 the same functionality at least with respect to WordPerfect as

1 it would have on Windows platforms.

2 MR. SCHMIDTLEIN: I think --

3 MR. JOHNSON: So to suggest that somehow this  
4 question is only asking the exact same question that we've  
5 already answered, I just think that's not fair because that  
6 suggests that we really lost the jury. And they're asking,  
7 because you're basically giving them the exact same answer  
8 we've already given them.

9 THE COURT: But maybe they didn't understand it.

10 MR. TULCHIN: Well, Your Honor --

11 MR. JOHNSON: We were pretty straight forward about  
12 it, Your Honor.

13 THE COURT: I thought we were. And I'm telling  
14 you, I'm saying, I think I've told you before, so I'm not --  
15 so I'm not suggesting -- so if they've got another question,  
16 let them move to it.

17 MR. SCHMIDTLEIN: I think --

18 MR. TULCHIN: One very important point, if I may.  
19 Mr. Johnson just obfuscated a little bit. But, Your Honor, he  
20 said during this period. If he means '92 and '93, that's  
21 correct. But in '94 and '95 WordPerfect and PerfectOffice  
22 were not written for any other platforms. Novell --

23 THE COURT: But these guys are talking about the  
24 but for world.

25 MR. TULCHIN: But they didn't do it, Your Honor.

1 If they didn't need the NameSpace extensions to write for  
2 other platforms, and we know they couldn't have used them,  
3 they would have done it. They didn't do it, Your Honor.  
4 There were no other WordPerfect or PerfectOffice releases,  
5 from the time Novell bought the company 'til the time it sold  
6 for any other platform.

7 So your answer -- the question -- sorry. The  
8 answer you proposed to give, Your Honor, is a correct answer.  
9 It may not squarely deal with each clause of this question,  
10 but it deals fairly with the question as a whole.

11 MR. SCHMIDTLEIN: Your Honor, I think the worry, at  
12 least everybody probably is reading this a little bit  
13 different, the delivery is a little bit differently, listening  
14 to the back and forth here, I understand where you are, and I  
15 understand Microsoft's point. And we obviously disagree with  
16 this back and forth over what we were writing to and what we  
17 weren't writing to.

18 The only concern I have listening to this right now  
19 is by leaving off saying what you said and nothing more. And  
20 I think what you said is right is, are they left with the  
21 misimpression -- I can't tell what they're thinking. Are they  
22 left with the misimpression that there would be no open file  
23 dialog on other versions? In other words, if we couldn't use  
24 the version that invokes the NameSpace extensions on other  
25 operating systems, which is right, are they left with the

1 impression that there would be no open file dialog whether it  
2 had similar or the same or different functionality? And so if  
3 there was a sentence that came at the end that said, however,  
4 you know, cross-platform versions of WordPerfect would have  
5 operated with an open file dialog, you know, with similar or,  
6 you know, something having to do -- something to try to  
7 capture that. That's my concern.

8 MR. JOHNSON: And, Your Honor, we could just take  
9 out the same or similar notion altogether and fairly tell them  
10 that cross-platform releases of WordPerfect would have open  
11 file dialogs.

12 MR. TULCHIN: No.

13 MR. JOHNSON: Which they would. Which it is  
14 undisputable.

15 MR. TULCHIN: There was never --

16 MR. JOHNSON: It's undisputable that cross-platform  
17 releases of WordPerfect, which were, in fact, present in the  
18 time period we were talking about, '94-95, would have open  
19 file dialogs. But such releases would not be dependent upon  
20 the NameSpace extension APIs which were only available on  
21 Windows.

22 MR. TULCHIN: That would be highly misleading, Your  
23 Honor, because Novell never released a product, WordPerfect or  
24 PerfectOffice, on any other platform. So one could  
25 hypothesize what they might look like, but there never was

1 one. And Mr. Johnson was careful in his answer to say, there  
2 were cross-platform versions available at the time. He's  
3 referring to versions that were released before Novell ever  
4 owned these products for earlier platforms. Novell never  
5 wrote WordPerfect or PerfectOffice for anything other than  
6 Windows.

7 So to say that the file open dialog on a Novell  
8 product would have looked similar or even would have existed  
9 is just misleading, unless you tell the jury that in the two  
10 years that Novell owned WordPerfect it never released any  
11 cross-platform version of WordPerfect or PerfectOffice. If we  
12 add that, at least we're not misleading them into thinking  
13 there ever was such a thing. There was not.

14 MR. HOLLEY: And Your Honor --

15 MR. TULCHIN: And that, Your Honor, is not just  
16 indisputable, but that's unanimous in the record.

17 MR. JOHNSON: Your Honor, that's simply not true.  
18 On 9-23-94, WordPerfect 5.0 on UNIX came out. On 10-6-94,  
19 WordPerfect for UNIX SCO came out. On 3-15-95, WordPerfect  
20 6.0 came out. On 3-1-95, I mean, I've got a whole list of  
21 them here.

22 MR. TULCHIN: Well, then let's look at the file  
23 open dialog because they didn't look anything like Windows.

24 MR. JOHNSON: They did come out with cross-platform  
25 versions on lots of different platforms during the time period

1 in which Novell owned these products. And not only that, Your  
2 Honor, as you correctly pointed out, we're also talking about  
3 a but for world. And, in fact, Mr. Frankenberg testified that  
4 WordPerfect Novell develops a version for Linux during the  
5 time he was with the company.

6 So it's just not correct to say that during the  
7 time Novell owned WordPerfect that it did not come out with  
8 versions of WordPerfect, and again this question is about  
9 WordPerfect, it's not about PerfectOffice, we did come out  
10 with versions of WordPerfect --

11 THE COURT: That itself is puzzling.

12 MR. JOHNSON: -- that were on lots of different  
13 operating systems.

14 MR. HOLLEY: Your Honor, the only --

15 THE COURT: Wait. Wait. Wait. I'll hear from you  
16 in a minute.

17 MR. JOHNSON: I wish we could stop doing that and  
18 saying we didn't have cross-platformed versions of WordPerfect  
19 during the relevant time period.

20 So all I'm saying is we can make very clear that  
21 those releases would not be dependent on the NameSpace  
22 extensions and that those extensions would only exist on  
23 Windows. And we don't even have to say our open file dialogs  
24 would be the same or similar, but I think we at least have to  
25 tell the jury that cross-platform releases of WordPerfect

1 would have custom open file dialogs --

2 MR. HOLLEY: Your Honor --

3 MR. JOHNSON: -- because that's a statement that  
4 cannot be disputed.

5 MR. TULCHIN: Oh, it can. There is no evidence of  
6 that in the record, Your Honor.

7 THE COURT: Let me hear from Mr. Holley.

8 MR. HOLLEY: Your Honor, the only reason that it  
9 could be conceivably of any importance to this jury about  
10 whether there are file open dialogs in other product is  
11 whether they believe that file open dialogs are a form of  
12 middleware. And since we didn't tell them what middleware  
13 means, they're struggling because they can't figure it out.

14 But the important thing is that whatever it was  
15 that Mr. Harral and Mr. Richardson were trying to write for  
16 Windows 95 they never wrote for anything else. There's zero  
17 evidence that they even tried. And the fact that there's a  
18 file open dialog, of course there is. Every software product  
19 has a file open dialog. That's silly. The only issue is  
20 whether the sheer code that Harral and Richardson were writing  
21 for Windows 95 was some sort of cross-platform middleware.  
22 Answer, no. Couldn't possibly be.

23 And the reason why is for the reason that  
24 Mr. Tulchin just said. It was married to the APIs exposed by  
25 Windows 95. There is no Windows Explorer on OS/2. There is



1 no Windows Explorer on Linux. There is no Windows Explorer on  
2 UNIX. So their testimony is that they wanted to add five  
3 things to the Windows Explorer. As a result of that, they  
4 were completely tied to Windows 95, and the PerfectFit stuff  
5 they were writing was completely tied to Windows 95.

6 This jury apparently is in there talking about  
7 whether PerfectFit technology written for Windows 95 was  
8 cross-platformed middleware. The answer to that question is  
9 absolutely not.

10 THE COURT: I'm not sure that -- you probably are  
11 right, but they could be talking about the other theory. They  
12 could be talking about franch- -- what you call the franchise  
13 theory. They could be talking about whether or not, if they  
14 could have used the Windows APIs they could have written  
15 WordPerfect to another operating system.

16 I doubt Microsoft would accept this. But let me  
17 try something, a sentence. And if you accept it, it would be  
18 great, because I think it's true.

19 Cross-platform versions of WordPerfect, if  
20 developed --

21 MR. TULCHIN: I'm sorry. I couldn't hear you.

22 THE COURT: Excuse me.

23 Cross-platform versions of WordPerfect, if  
24 developed, presumably would have had open file dialogs.

25 However, as to your specific question, as I believe I have

1 previously told you -- and then what I said before -- an open  
2 file dialog dependent on the NameSpace extension APIs would  
3 run only on Windows 95, that's the married point, and would  
4 not have run on any other platform. I think --I don't want  
5 Mr. Holley and Mr. Tulchin to argue with one another, but I do  
6 think it's pretty clear that any -- I think it's just a matter  
7 of common sense not of evidence that any -- that WordPerfect  
8 is going to have an open file dialog, which is  
9 Mr. Schmidtlein's point, and this sentence would answer that.  
10 But it wouldn't -- and it would -- but it would focus upon the  
11 marriage point, which I think is correct and which I don't  
12 really hear being objected to by Novell. It's just that they  
13 want more.

14 MR. JOHNSON: Your Honor, I think you were very  
15 close. Could you read the first part again so I can hear it?

16 THE COURT: Cross-platform versions of WordPerfect,  
17 if developed, presumably would have had open file dialogs.  
18 However, as to your specific question, and as I believe I have  
19 previously told you, an open file dialog dependent on the  
20 Namesake extension APIs would run only on Windows 95 and would  
21 not run on any other platform.

22 MR. JOHNSON: Your Honor, I only have one request  
23 or modification, and that is you take out the words "if  
24 developed" because I think in fairness --

25 THE COURT: Okay. If I use presumably. I

1 understand.

2 MR. JOHNSON: We did. But other than I think I  
3 could live with that formulation.

4 MR. TULCHIN: Well, I don't think we can, Your  
5 Honor.

6 MR. JOHNSON: Yes. And it is NameSpace extensions,  
7 Your Honor. You often say Namesake.

8 THE COURT: I mean to say NameSpace.

9 MR. JOHNSON: Okay.

10 MR. TULCHIN: I don't think we can live with it,  
11 Your Honor, for several reasons. One, there is no evidence  
12 that they ever were developed. Two, there is no evidence in  
13 the record. And it's nice for Mr. Johnson to read from a  
14 list, but at least by my recollection at this trial, none of  
15 that is in evidence at all, and that's what should govern.  
16 Secondly --

17 THE COURT: Well, let me ask you about that.  
18 Doesn't the very screen shot from --

19 MR. JOHNSON: 231. It has the whole list of all --

20 THE COURT: Doesn't that show an open file on it?

21 MR. HOLLEY: Your Honor, not the ability to add  
22 things like QuickFinder and the presentations -- if all we're  
23 talking about is exposing a search engine in an operating  
24 system, then the Court really should dismiss this case right  
25 now, because there is nothing --

1 THE COURT: That's not going to happen.

2 MR. HOLLEY: -- completely trivial about making a  
3 search system in the operating system. The only issue is  
4 whether Harral and Richardson could do what they said was  
5 critically important, and let's remember what that was. They  
6 said they wanted to add things to the Windows Explorer.  
7 That's what the NameSpace extensions do. That's all they do.  
8 And that is only possible on Windows 95. No one ever did it  
9 on any other operating system. And so the jury is trying to  
10 find out whether this really is as married to Windows 95 as it  
11 is, and we should tell them yes, and any suggestion that that  
12 technology was portable to any other platform is entirely  
13 unsupported by the evidence in this case.

14 THE COURT: Now, they don't quarrel with that.  
15 That's not what Mr. Schmidtlein -- okay. I'm going to answer  
16 it the way -- I understand what Mr. Schmidtlein is saying.  
17 I'm answering their question if we get to it. I honestly  
18 don't think that's their concern. I really think their  
19 concern is the marriage concern. So I'm going to answer it as  
20 I said before. But I understand your point. But I really do  
21 think the question is what the question is, and I think it's  
22 got -- and I should answer only that question.

23 And, Theresa, it is as I said before. As I believe  
24 I have told you before, so they know I'm not adding anything,  
25 an open file dialog dependent on the Namesake extension

1 APIs --

2 THE CLERK: NameSpace.

3 THE COURT: Did I say Namesake again?

4 THE CLERK: Yes, you did.

5 THE COURT: -- NameSpace extension APIs would run  
6 only on Windows 95 and would not run on any other platform.

7 I'm answering it that way. I understand your  
8 point. I think that is the question being asked, and I think  
9 I am telling them that I haven't said anything that I haven't  
10 told them before.

11 MR. SCHMIDTLEIN: Are you going to give the first  
12 sentence?

13 THE COURT: No; because I really don't think that's  
14 the question. If it's objected to, I really don't think I  
15 should. And I think that if they get to the point --  
16 honestly, I think they understand as a mat- -- I don't think  
17 that's the issue.

18 But I hear you. And I hear you. And if Microsoft  
19 hadn't objected. But I really think this is the question.  
20 And it's got to be -- I think they're struggling with the  
21 marriage point for whatever reason under whatever theory,  
22 middleware or possible franchise or whatever's going on, but I  
23 really do think as a matter of grammar, the way this is  
24 written they have to be asking whether an open file dialog  
25 that's dependent on NameSpace extension APIs would be the same

1 on Windows 95 and other platforms. I think that's what the  
2 question is, and I think that's what the answer ought to be.

3 So I take your point. And if we ever get to the  
4 next point, you know, I'll hear it.

5 MR. SCHMIDTLEIN: For the record our exceptions are  
6 noted for the record?

7 THE COURT: Absolutely. On all of these, you have  
8 your exception. Thank you.

9 MR. TULCHIN: Thank you, Your Honor.

10 MS. NELLES: Thank you, Your Honor.

11 MR. JOHNSON: Thank you, Your Honor.

12 THE COURT: Maybe we could just make it easier and  
13 take out the extension and just say Namesake. Again, I  
14 understand Novell objects to this. Let me read it one more  
15 time.

16 As I believe I have told you before, an open file  
17 dialog dependent on the NameSpace extension APIs would run  
18 only on Windows 95 and would not run on any other platforms.

19 And if -- and I understand the point, if we get to  
20 a point, what would the other -- what would the other  
21 application look like, and we'll cross that bridge when we get  
22 do it.

23 MS. NELLES: Thank you, Your Honor.

24 (Recess.)

25 THE COURT: Sorry for the delay. I was trying to

1 use my time productively by finding the exercise room and  
2 beginning to exercise.

3 All right. I have no idea what this is.

4 Mr. Tulchin, it's your exhibit, maybe.

5 MR. TULCHIN: Your Honor, my hunch is that they're  
6 asking for demonstrative Exhibit 311, which we used with  
7 Professor Murphy when he was here. It was a slide. It's not  
8 in evidence. That seems to be -- it's not about operating  
9 systems. It's about Office suites, which may be what their OS  
10 means.

11 THE COURT: This is not OS/2.

12 MR. TULCHIN: Professor Murphy testified about this  
13 slide beginning at Page 4759.

14 THE COURT: I think the answer is it's not -- it  
15 simply is a demonstrative and not in evidence.

16 MR. TULCHIN: That's correct, Your Honor, it is.

17 THE COURT: Okay.

18 MR. TULCHIN: If you thought it was advisable to  
19 provide the testimony about it, it begins at 4759 of the  
20 December 7th transcript.

21 THE COURT: That's not what they asked for.

22 MR. JOHNSON: Your Honor, I think this should be  
23 one of those where you just say demonstrative is not  
24 available, and your recollection controls. I mean, that's a  
25 standard answer in these kind of situations.

1 THE COURT: Okay. If you would, the defendant  
2 exhibit chart -- excuse me. Chart 311.

3 MR. SCHMIDTLEIN: Demonstrative.

4 THE COURT: -- is not in evidence but was only a  
5 demonstrative -- what do you call them? Slide?

6 MR. JOHNSON: Demonstrative slide is fine.

7 THE COURT: -- slide. Therefore, it cannot be  
8 given to you in the juryroom. Your recollection of the  
9 evidence is what must control.

10 MR. JOHNSON: Thank you, Your Honor.

11 MR. TULCHIN: Yes. Your Honor, it would certainly  
12 be appropriate for you to say if there's testimony you want to  
13 see, let us know. But obviously that's up to you.

14 MR. JOHNSON: Your Honor, I think you're beginning  
15 to invade the province of the jury.

16 THE COURT: I'm not invading the province of the  
17 jury, but I'm violating my rule of answering the question as  
18 posed.

19 MR. JOHNSON: Thank you.

20 THE CLERK: Judge, Chart 311 --

21 THE COURT: The last thing probably isn't true, so  
22 don't say that. Probably if they ask for the testimony, we  
23 could probably give it to them. I'm sorry. What did I say?  
24 Defendant's Chart 311 --

25 THE CLERK: Is not in evidence, and it is not --



1 THE COURT: Period. It was only a demonstrative  
2 slide and cannot be given to you in the juryroom.

3 MR. JOHNSON: Then you're going to finish it with  
4 your recollection.

5 THE COURT: No; because I don't think it's accurate  
6 because if they ask for the testimony, I'm not going to say  
7 anything about it.

8 MR. JOHNSON: Okay. Gotcha.

9 MR. TULCHIN: Thank you, Your Honor.

10 MR. SCHMIDTLEIN: Try to be back exercising.

11 THE COURT: I may have a different plan of which it  
12 would involve I'll do it at 8:15. But I need something in my  
13 hand, but this is not the place to say it.

14 MR. SCHMIDTLEIN: Maybe you can run the steps.

15 THE COURT: That's probably what I should do. I'm  
16 just going to get some outdoor exercise.

17 THE CLERK: Judge, can I just tell you one more  
18 time?

19 THE COURT: If you don't mind me looking.

20 THE CLERK: I don't mind at all.

21 THE COURT: Chart 311 is not in evidence. It is a  
22 demonstrative slide and cannot be given to you in the  
23 juryroom.

24 MR. JOHNSON: Thank you, Judge.

25 (Recess.)

1 STATE OF UTAH )

2 ) ss.

3 COUNTY OF SALT LAKE )

4 I, KELLY BROWN HICKEN, do hereby certify that I am  
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of  
7 the foregoing matter on December 14, 2011, and thereat  
8 reported in Stenotype all of the testimony and proceedings  
9 had, and caused said notes to be transcribed into typewriting;  
10 and the foregoing pages number from 5371 through 5419  
11 constitute a full, true and correct report of the same.

12 That I am not of kin to any of the parties and have  
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this \_\_\_\_ day of  
15 \_\_\_\_\_ 2011.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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