

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ORACLE AMERICA, INC.,)	
)	
Plaintiff,)	
)	
VS.)	No. C 10-3561 WHA
)	
GOOGLE, INC.,)	
)	
Defendant.)	San Francisco, California
)	March 28, 2012

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

MORRISON & FOERSTER
755 Page Mill Road
Palo Alto, California 94304
BY: MICHAEL A. JACOBS, ESQUIRE
KENNETH A. KUWAYTI, ESQUIRE
MARC DAVID PETERS, ESQUIRE
ROMAN A. SWOOPES, ESQUIRE

BOIES, SCHILLER & FLEXNER
1999 Harrison Street, Suite 900
Oakland, California 94612

BY: WILLIAM FRED NORTON, ESQUIRE
STEVEN C. HOLTZMAN, ESQUIRE

ORACLE AMERICA, INC.
500 Oracle Parkway
Redwood Shores, California 94065

BY: ANDREW C. TEMKIN, CORPORATE COUNSEL

(Appearances continued on next page)

Reported By: *Katherine Powell Sullivan, CSR #5812, RPR, CRR*
Official Reporter - U.S. District Court

APPEARANCES (CONTINUED):

For Defendant:

KEKER & VAN NEST
633 Battery Street
San Francisco, California 94111-1809

**BY: ROBERT ADDY VAN NEST, ESQUIRE
DANIEL PURCELL, ESQUIRE
MICHAEL S. KWUN, ESQUIRE
CHRISTA MARTINE ANDERSON, ESQUIRE**

KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036-4003

BY: SCOTT T. WEINGAERTNER, ESQUIRE

GOOGLE, INC.
1600 Amphitheatre Parkway
Mountain View, California 94043

BY: RENNY HWANG, LITIGATION COUNSEL

For Dr. Kearl:

FARELLA BRAUN & MARTEL LLP
235 Montgomery Street, 30th floor
San Francisco, California 94104

BY: JOHN L. COOPER, ESQUIRE

P R O C E E D I N G S

1
2 **MARCH 28, 2012**

7:33 A.M.

3
4 **THE CLERK:** Calling civil action C 10-3561, it's
5 Oracle America, Inc. versus Google, Inc.

6 Counsel, can you please state your appearances for
7 the record.

8 **MR. JACOBS:** Michael Jacobs from Morrison & Foerster
9 for Oracle. With me at counsel table, in order, is Ken Kuwayti
10 from Morrison & Foerster, Andrew Temkin from Oracle, Fred
11 Norton from Boies, Schiller, Steve Holtzman from Boies,
12 Schiller, Roman Swoopes from Morrison & Foerster, and Marc
13 Peters from Morrison & Foerster.

14 **THE COURT:** Welcome.

15 **MR. VAN NEST:** Good morning, Your Honor. Bob
16 Van Nest, Keker Van Nest, for defendant Google. I'm here today
17 with Christa Anderson, Michael Kwun, Dan Purcell from our firm,
18 and Renny Hwang from Google. Good morning.

19 **THE COURT:** Good morning.

20 **MR. COOPER:** Good morning, Your Honor. John Cooper
21 for Dr. Kearl.

22 **THE COURT:** Is Dr. Kearl here?

23 **MR. COOPER:** Dr. Kearl is not here today.

24 **THE COURT:** He didn't need to be. Thank you.

25 So our trial is definitely on for April 16th, as you

1 already know. And I wanted to bring you in to help me
2 understand better some of the arguments being made and also to
3 take up a few of the ways to streamline the trial. I am going
4 to ask you later on, but not right now, for the stipulated
5 timeline that I hope you have been able to agree on.

6 I would like to start, though, with understanding
7 better the copyright part of the case. And I want to --
8 probably the best way to do this is to let one side answer the
9 question in three sentences or less, and then the other side
10 answer it, because there's so many issues that if I wait until
11 I hear out everything you want to say on all the points then I
12 will have forgotten your answer.

13 So I want to start by asking basic fundamentals. Are
14 the 11 instances of actual copying part of the 37 API source
15 code? So let's start with Mr. Jacobs.

16 **MR. JACOBS:** In certain cases yes, Your Honor. Three
17 of the 11 files are part of the Java APIs. Specifically,
18 Google copied from java.util.Arrays.java into two Android
19 files, rangeCheck. And Google copied from
20 java.security.CodeSource.java the comments into the test file
21 that Intel contributed to Harmony.

22 And Google copied from
23 java.security.CollectionCertStoreParameters.java into the test
24 file that Intel contributed to Harmony.

25 The other eight files are part of the implementation

1 but are not part of the specification.

2 **THE COURT:** Well, I'm not talking about
3 specification. I'm talking about the source code.

4 Don't get into the specification. The specification
5 is the plain English thing that tells the user how to use it,
6 right? Correct?

7 **MR. JACOBS:** Yes, that's -- well, I wouldn't say
8 plain English, Your Honor.

9 **THE COURT:** Well, it's in English.

10 **MR. JACOBS:** Yes.

11 **THE COURT:** It's talking to the user, not the
12 computer. Right now I'm focusing on the part that talks to the
13 computer, i.e. the source code.

14 Were any of those 11 instances of copying part of the
15 37 files?

16 **MR. JACOBS:** Yes.

17 **THE COURT:** Okay. Focus on that part. How many of
18 those were there?

19 **MR. JACOBS:** Let me double-check.

20 (Pause)

21 **MR. JACOBS:** Sorry, Your Honor.

22 Those three that I -- the ones that I referenced are
23 part of the source code of the API, the implementation of the
24 API.

25 **THE COURT:** I don't want to get into the

1 specifications yet.

2 Three files, source code are part of the 37. And
3 those three you've already named, called out.

4 **MR. JACOBS:** That's correct.

5 **THE COURT:** Since you mentioned it, I need to ask
6 you, you said something about Harmony. Were they copied from
7 Harmony or were they copied -- what did you mean, Harmony?

8 **MR. JACOBS:** So, Harmony was a development effort
9 that was the source for Google of some of the files that we
10 allege were copied, and the source of some of the
11 implementations of the API -- forgive me, specifications, that
12 we claim are derivative works.

13 **THE COURT:** So were all three of these copied from
14 Harmony?

15 **MR. JACOBS:** RangeCheck was not copied from Harmony.

16 **THE COURT:** Rain what?

17 **MR. JACOBS:** RangeCheck.

18 **THE COURT:** RangeCheck. And that was copied from
19 where?

20 **MR. JACOBS:** Was -- that was copied by the Google
21 programmer implementing that code.

22 **THE COURT:** Copied from what source, though?

23 **MR. JACOBS:** From Java source code.

24 **THE COURT:** All right. And then the other two were
25 copied from Harmony?

1 **MR. JACOBS:** They were taken by Google from Harmony.
2 Harmony itself, that whoever was the implementer on the Harmony
3 side copied from Java source code.

4 **THE COURT:** All right. So while I have you here
5 again, that accounts for three of the -- three of the 11. Are
6 there any other instances of -- within the 11 where source code
7 itself was copied but not part of the 37?

8 **MR. JACOBS:** I think -- if I understand your question
9 correctly, all of them. So the other eight instances are
10 code-to-code copying, regardless -- what I don't have for you
11 right now is which of those came from Harmony and which of
12 those were copied by Google directly.

13 **THE COURT:** No, I'm not making my question clear. I
14 need to back up and let you understand why I'm asking these
15 questions.

16 I've read your briefs and the other side's briefs
17 several times. There is a -- I'm not saying it's intentional,
18 but there's a very confusing aspect where sometimes you slide
19 between specification. Sometimes -- I can tell its source
20 code, but you don't say it. Sometimes it's structure,
21 arrangement, and selection.

22 And I never quite know when the claim is for
23 structure, selection, arrangement versus direct copying of
24 source code versus copying the plain English explanation to the
25 user. That's been very frustrating for me trying to figure

1 that out.

2 So we're going to spend the time today. It may take
3 an hour. I want to understand what your claim is, and put the
4 patient, so to speak, on the operating table so we can
5 understand what the body is that we're dealing with.

6 That's what my frustration is. Now, it's just
7 because you all are experts and I am coming up to speed. You
8 all know what you're talking about and I don't. But I need to
9 understand it.

10 So you have said -- there are two things I do get:
11 11 and 37. 11 and 37. I get that part. 11 things were
12 literally copied. 37 things are APIs. I'm trying to
13 understand what the relationship is between all of these.

14 So -- and there's also the problem of source code
15 being copied versus specifications being copied. So I want to
16 understand all of that.

17 Now, with that explanation, you've told me that of
18 the 11, three of those 11 instances of copying were copying of
19 source code that goes along with three of the 37 APIs.

20 **MR. JACOBS:** Yes.

21 **THE COURT:** Okay. Now, what are the other eight,
22 then?

23 **MR. JACOBS:** The other eight are in other parts of
24 Android. They aren't in the libraries that implement the 37
25 APIs.

1 **THE COURT:** All right. Not in 37, but in Android.

2 **MR. JACOBS:** Correct.

3 **THE COURT:** And it's literal, not even one iota of a
4 change? Or are you waffling on that?

5 **MR. JACOBS:** It's literal copying, but I wouldn't say
6 "not one iota of a change" because that is --

7 **THE COURT:** How can it not be -- it doesn't have to
8 be exact to be literal?

9 **MR. JACOBS:** I don't think so, Your Honor. If you
10 line them up side by side, you might see a spacing
11 difference -- we can show you this -- but you might see a
12 letter change here or there. But the words and symbols in the
13 Java source code are copied directly into the Android source
14 code.

15 **THE COURT:** So that's 3 plus 8 equals 11.

16 All right. I want to see what the other side says
17 about that. Do I have it correctly? Do I have that part down
18 correctly?

19 **MR. KWUN:** Your Honor, Michael Kwun for Google.

20 It's very close. I think there's some slight nuances
21 that I would say slightly different than Mr. Jacobs did.

22 **THE COURT:** That's why we're here. Tell me the way
23 you see it.

24 **MR. KWUN:** Let's go through the 11 files. So the
25 first file is Arrays.java. And Arrays.java is about --

1 **THE COURT:** How do you spell that?

2 **MR. KWUN:** That's an Oracle file.

3 **THE COURT:** How do you spell that?

4 **MR. KWUN:** Capital A-r-r-a-y-s period lower case
5 j-a-v-a.

6 **THE COURT:** Okay.

7 **MR. KWUN:** Arrays.java. So that's a file in the
8 Oracle version of J2SE, Java 2 Standard Edition. And it has
9 about 3,000 lines of source code.

10 Within that 3,000 lines of source code, there is a
11 9-line method called rangeCheck, which Mr. Jacobs referenced.
12 And that's one word smashed together with a capital C, but
13 otherwise lower case.

14 **THE COURT:** Wait. Is rangeCheck --

15 **MR. KWUN:** It's part of Arrays.java.

16 **THE COURT:** Is that one of the 37?

17 **MR. KWUN:** No. Arrays.java is a file within the API
18 package called java.util. So there's -- the 37 API packages
19 that are at issue, each can include multiple files.

20 So inside one of those packages that's accused of
21 infringement -- that package being java.util -- there's a file
22 called Arrays.java.

23 And inside that Arrays.java file, which has about
24 three thousand lines of source code, there's a 9-line method
25 called rangeCheck.

1 And that is the part they accuse of copying for
2 Arrays.java. And that appears -- well, actually, I should say
3 appeared, past tense, in two Android files. So that's one of
4 the 11 files.

5 He mentioned two others where there are comments, and
6 he said those are part of the API. So --

7 **THE COURT:** Comments? Do you mean by that the
8 specifications, or do you mean --

9 **MR. KWUN:** No.

10 **THE COURT:** -- the part of it that is so-called plain
11 English to the user?

12 **MR. KWUN:** It's in the source code file, but it's not
13 actual source code. It's commentary --

14 **THE COURT:** Not compiled.

15 **MR. KWUN:** Right. So when you compile it, if you
16 remove that text, it has no effect --

17 **THE COURT:** Comments don't get compiled, do they?

18 **MR. KWUN:** They don't.

19 **THE COURT:** So it's just to help the writer of the
20 source code follow what's being done by the source code.

21 **MR. KWUN:** Correct. And those are the comments that,
22 as Mr. Jacobs noted, came from Apache Harmony, and they
23 certainly look the same as comments from Oracle files.

24 **THE COURT:** All right. So the other two that
25 Mr. Jacobs mentioned --

1 **MR. KWUN:** Those are in the java.security package,
2 one of the 37 packages accused of infringement.

3 **THE COURT:** Java.security?

4 **MR. KWUN:** Yes.

5 **THE COURT:** And that -- in that one the source code
6 itself that gets compiled is not copied, but the comments are?

7 **MR. KWUN:** Correct. There is a bit of a semantic
8 question of what you call source code.

9 **THE COURT:** I wanted to distinguish between the two.
10 Comments versus the part that gets compiled.

11 **MR. KWUN:** Correct. So these are just comments.

12 **THE COURT:** Because the part that gets compiled is
13 what instructs the computer what to do.

14 **MR. KWUN:** Absolutely.

15 **THE COURT:** The part that's in English, so to speak,
16 tells the reader what is being done.

17 **MR. KWUN:** Absolutely. So those comments never had
18 an effect on a single byte in any shipped phone because they
19 don't compile into the compiled version.

20 **THE COURT:** Let's go back to rangeCheck for a minute.

21 **MR. KWUN:** Yes, Your Honor.

22 **THE COURT:** Is that a file or is that one of the
23 APIs?

24 **MR. KWUN:** It's neither, actually, Your Honor. It's
25 a method that is used -- it's what's known as a private method

1 that is used within a public method.

2 So the APIs -- I would say that the best way to frame
3 the APIs are they're the public interface, is what we're really
4 talking about in this case. That's what's discussed in the
5 specification.

6 And the public interface for one of these routines,
7 if you look at the source code implementation, has to make use
8 of certain helper functions that are not exposed to the public.
9 They're its own private work that they do behind the scenes.
10 And one of those is called rangeCheck. It's a quick utility
11 function that --

12 **THE COURT:** What does it do?

13 **MR. KWUN:** When you are sorting an array, you pass to
14 that array the starting point and the end point in the array
15 for which you are trying to sort elements. So A and B, let's
16 call them.

17 And rangeCheck makes sure that A is less than B so --
18 because it's going to presume that it's sorting things from,
19 say, 2 to 12, instead of from 12 to 2. So if A is greater than
20 B, it's going to say, that's a problem I don't know how to
21 sort, that's backwards.

22 **THE COURT:** So it's checking to make sure that each
23 item in the sort, it falls within the range.

24 **MR. KWUN:** The possible range. So it checks whether
25 A is less than B. It checks whether A is zero or greater. If

1 A is a negative number that's going to refer to an impossible
2 element of the array.

3 And it checks to make sure that B is no greater than
4 the size of the array. So if there's 12 elements and you say
5 please sort the third to the fiftieth elements, it's going to
6 say, I don't know what you're talking about.

7 That's all rangeCheck does, which --

8 **THE COURT:** There's something like that in the public
9 domain?

10 **MR. KWUN:** That concept is certainly in the public
11 domain. I don't know that you could go out and find those
12 exact nine lines, but the basic concept of bounds checking is
13 taught in programming classes across the country.

14 **THE COURT:** So what do you say about the other eight
15 that are not in the 37, but are in Android somewhere? What do
16 you say about those instances of copying?

17 **MR. KWUN:** A couple of things there. Your Honor, you
18 talked about specifications versus source code. I'm afraid I
19 have to introduce another slight wrinkle.

20 **THE COURT:** Fine. Go ahead.

21 **MR. KWUN:** Which is, the eight Oracle files they are
22 talking about are compiled files. I mean, there was source
23 code for them originally somewhere, but there is no allegation
24 that anything was copied from source code.

25 The allegation is that the compiled version of the

1 Oracle files was decompiled using a program called a
2 decompiler, and that that was copied into the source code for
3 these eight files.

4 These eight files were given to Google by an outside
5 vendor that it used to assist with the Android development
6 process.

7 **THE COURT:** Who was that?

8 **MR. KWUN:** A company called Noser in -- I believe in
9 Russia.

10 **THE COURT:** Noser?

11 **MR. KWUN:** Yeah, N-o-s-e-r.

12 **THE COURT:** They are in Russia?

13 **MR. KWUN:** Yes.

14 **THE COURT:** That's not a good fact.

15 **MR. KWUN:** But the key fact is that, as Mr. Jacobs
16 said, they are not actually part of the implementation. They
17 are so-called -- I believe they are so-called unit tests. When
18 you finish writing a program, you can do a quit sanity check to
19 make sure when you ask it, is the morning -- is the sun up in
20 the morning it says yes.

21 **THE COURT:** So this -- these eight, are they still in
22 the program, or are these the ones that you changed?

23 **MR. KWUN:** These eight test files and the comments
24 from the other two files, those were removed from the Android
25 code base.

1 **THE COURT:** When did that happen?

2 **MR. KWUN:** In response -- I believe that happened in
3 2010. Excuse me, 2011. 2011.

4 **THE COURT:** What month in 2011?

5 **MR. KWUN:** I can get that for you, Your Honor.
6 January.

7 **THE COURT:** January 2011, all eight were removed?

8 **MR. KWUN:** All eight plus the comment file -- well,
9 the comments in the file. So that covers ten of those files in
10 January of 2011.

11 **THE COURT:** So the comments and the Java file were
12 also removed --

13 **MR. KWUN:** Yes. The files remained, but the comments
14 themselves were removed.

15 **THE COURT:** But the files, you said, were not the
16 same. It was the only thing accused, were the comments.

17 **MR. KWUN:** That's right.

18 And so -- but to address another question that Your
19 Honor had raised in your order, it is possible to -- because of
20 the way a version control system, which is how you maintain
21 various versions of the software, because of the way version
22 control software works it is possible for someone to, if they
23 try rather hard, to re-create those files from the information
24 that's available on Google's website.

25 **THE COURT:** I didn't understand what you're trying to

1 say.

2 **MR. KWUN:** Frankly, Your Honor, my understanding
3 isn't going to go too far beyond that. But when you have a --
4 when you do software development you have a system called a
5 version control system that allows you to have, for example,
6 version 1.0. And then when you do version 1.1, there's some
7 changes. Those are usually stored in what's known as a diff
8 file. It just stores the difference between the last version
9 and the new version.

10 So my understanding is that because of that, if you
11 have the current version and then you look at the differences
12 and you go backwards, you can reconstruct the previous version,
13 and you can keep doing that throughout some artifice process
14 which, you know, presumably could be automated. And you can
15 come up with previous versions.

16 So my understanding is, because of the technical
17 design of the version control system that Google is using, it
18 would be --

19 **THE COURT:** Is that something that's sold to the
20 user, or that's still just at the Google mainframe?

21 **MR. KWUN:** It's available to the public. It's not
22 sold. It's not the -- the user of a phone does not get on the
23 phone this version control software. It's for developers.

24 **THE COURT:** The phone that is sold to the user, is
25 there any possible way that that unit can get -- can now access

1 these ten files that have been removed?

2 **MR. KWUN:** These ten files are not on the phone
3 anywhere. The copied -- the portions that are at issue are not
4 anywhere on the phones.

5 **THE COURT:** How about the 11th file, rangeCheck?

6 **MR. KWUN:** RangeCheck, the two files that had
7 rangeCheck in them were extensively rewritten. And that
8 rewriting actually occurred some time ago, I believe in
9 December 2010.

10 The changes were pushed public when Google came out
11 with its most recent version of Android, which is named Ice
12 Cream Sandwich, which was several months ago.

13 So, for example, Your Honor, the phone --

14 **THE COURT:** What are you saying? Are they still --
15 is rangeCheck, in the form that was accused, still being sold
16 to the public or not?

17 **MR. KWUN:** The phones that are used in the current
18 operating system, which is version 4.0, such as this one, do
19 not have rangeCheck on them (indicating).

20 **THE COURT:** So you're representing to me that all 11
21 instances, even assuming they ever were copying, those are gone
22 now, in history, as far as the units now being sold to the
23 public?

24 **MR. KWUN:** There may be -- actually, I'm pretty sure
25 there are phones that are still using old versions of the

1 operating system.

2 The manufacturers of those phones that got those
3 operating systems from Google some time ago could still be
4 shipping phones that have rangeCheck on them.

5 The other ten files never resulted in any -- the
6 allegedly -- the portions of them at issue never resulted in
7 any change in code on the phone. So, really, all we're talking
8 about is rangeCheck. But for those older and somewhat outdated
9 phones, yes, those would still have compiled code that came
10 from rangeCheck.

11 **THE COURT:** All right. Let me ask Mr. Jacobs to
12 respond to what you just said.

13 **MR. JACOBS:** Our information is different, Your
14 Honor. We downloaded what's called -- one of the versions of
15 what's called Froyo. Maybe I can give you the spectrum here,
16 give you the vocabulary.

17 Android 2.2 is known as Froyo. Android 2.3 is known
18 as Gingerbread. And Android 4.0, the version that was just
19 being discussed, is known as Ice Cream Sandwich.

20 Within each of those there are, of course,
21 subreleases, and the like. And we downloaded what we
22 understand to be the latest release of Froyo, which is 2.2.3
23 release 2, on March 12th. And all of the copied -- 11 copied
24 code files were present in that version.

25 So, I think I should step back just a minute. There

1 is a public -- there is an Android public website. And, from
2 time to time, versions of Android that are being, as was
3 mentioned, pushed out to the handset makers or to developers,
4 or to whoever, are posted to that public website. This is not
5 a version control issue. This is a, I want to download this
6 version of the code.

7 So this latest version of 2.2, of Froyo, had all but
8 one of the 11 copied code files still in it. The one that was
9 deleted by that latest version is one that's called
10 PolicyNodeImpl.java. All compressed together.

11 So, just to be clear, when you go to the public
12 Android website, one can access the latest version of Android
13 Ice Cream Sandwich. One can access earlier versions of
14 Android, such as Froyo or Gingerbread.

15 Progressively, more and more has been deleted from
16 the public version. So if you go to the latest version, for
17 example, of what's called Gingerbread, our last information was
18 that rangeCheck was still present in it on the public website.

19 It is quite possible, more than possible, probable
20 that developers, whether in handset -- in the handset context
21 or other contexts, would be accessing earlier versions of the
22 Android.

23 Not everybody wants to implement the latest version
24 recently. So the fact that these are still available on the
25 public website means that this isn't just artifactual. These

1 are versions that are made available for developers to use.

2 Let me segue, for a minute, to give you the full
3 picture of what could be out there, and I'll give you a little
4 more detail on this.

5 Meanwhile, there are handsets in the marketplace that
6 are being iterated -- that are being reproduced, if you will,
7 they are being installed, they are being created, using these
8 earlier versions of Android.

9 If you go down to your local phone store and buy an
10 Android phone, you are not necessarily getting a phone with the
11 latest version, Ice Cream Sandwich, on it. You may well be
12 getting a version with Gingerbread and Froyo. And, of course,
13 the vendors need to supply those.

14 Google has done nothing to go out to the vendors and,
15 if you will, delete the infringing code. So if you got a phone
16 today with Froyo on it, it would still have all -- it would
17 still have rangeCheck in it.

18 **THE COURT:** Well, all right. I see your point. But
19 even I know enough to know that the concept of rangeCheck is --
20 that's like the first grade, isn't it?

21 I mean, how many ways -- if A is greater than X, then
22 alert the user or do something. If it's less than -- how can
23 that be something that is worthy of copyright protection?

24 **MR. JACOBS:** The proof here is probably in the
25 pudding, or, to be more particular, in Ice Cream Sandwich, Your

1 Honor, because in Ice Cream Sandwich, Google contends that they
2 have rewritten rangeCheck and reexpressed that functionality in
3 a way that is not copied.

4 So there is a -- I'm sorry to be using these words --
5 a range of expression in rangeCheck, as evidenced by Google's
6 own rewriting of it. And the developer himself commented on
7 striking similarity when we took his deposition and --

8 **THE COURT:** How many ways are there to do it? When
9 you're comparing a given number to the two ends of the range,
10 there's a very limited number of ways to do it.

11 Of course, they are going to be similar. Now, if
12 they are absolutely identical -- I don't know. It just
13 seems -- I'm studying this word "thin."

14 If anything was ever thin, that's thin. Because, A,
15 there is -- there's -- it's simple. And I hope this case turns
16 on a lot more than just rangeCheck.

17 **MR. JACOBS:** It most assuredly does, Your Honor.

18 **THE COURT:** All right. All right. Let me -- you
19 finish your point, then we're going to hear from the other
20 side.

21 **MR. JACOBS:** So, yes, just to complete, then, the
22 picture. So if we go all the way to Android 4.01, Ice Cream
23 Sandwich, we still see one of the files is the comments. So
24 we're on comments now. And we have a common understanding of
25 comments. I agree with the previous discussion. The comments

1 in CollectionCertStoreParametersTest.java are still present.

2 So, as I indicated, there's been a progressive
3 deletion of the copied elements. But in the latest version,
4 even in the latest version that was just posted, one of the
5 files, one of the 11 files remains.

6 And if we look at Gingerbread, it depends on what
7 release of Gingerbread. But even the latest version of
8 Gingerbread, which is 2.3.7r1, at least the latest version
9 we've looked at, has both instances of rangeCheck still in it,
10 on the public website.

11 **THE COURT:** All right. How many lines of code are
12 there in the Android system?

13 **MR. JACOBS:** So --

14 **THE COURT:** Total Android system that if I went
15 out -- let's say 2.0, I went out and bought a 2.0 Android
16 machine, what would the total number of lines be?

17 **MR. JACOBS:** I don't know. But I think we should
18 clarify the question because there's -- there's the part of
19 Android -- I think this was one of the points that Google would
20 make. There's a part of Android that actually ends up on a
21 phone, and there's the whole developer environment and tools --

22 **THE COURT:** You can distinguish any way you want.
23 Which would have the fewest number of lines of code?

24 **MR. JACOBS:** I'm guessing here, but probably what's
25 on the phone.

1 **THE COURT:** How many lines would that be?

2 **MR. JACOBS:** I don't know.

3 **THE COURT:** A million?

4 **MR. JACOBS:** I don't know, Your Honor.

5 **THE COURT:** So how many lines of code are accused
6 here out of what percentage? Sounds like it's going to be far
7 less than 1 percent.

8 **MR. JACOBS:** I would be -- I think that's probably
9 right.

10 **THE COURT:** Okay. Let me hear from the other side.
11 What do you say to the fact that even though you told me these
12 are history that, in fact, you can go on your website and still
13 get 2.0?

14 **MR. KWUN:** So, Your Honor, I actually don't know
15 which website they're talking about. They said the public
16 website. There are -- this is an open source project. The
17 source code may be available on other public websites that we
18 don't control. I don't --

19 **THE COURT:** May be or is be? Is it on the Google
20 site or not? Come on.

21 **MR. KWUN:** It's not on the Google site.

22 **THE COURT:** Mr. Jacobs -- Mr. Jacobs, is it on the
23 Google website or not? The Android website or not? Come on.

24 **MR. JACOBS:** Yes.

25 **THE COURT:** All right. Counsel is telling me in a

1 flat out yes, it is. Is he not being truthful?

2 **MR. KWUN:** I don't know exactly what he is referring
3 to, so --

4 **THE COURT:** Well, who at your company over there can
5 answer this question?

6 What's your name?

7 **MR. HWANG:** Mr. Hwang.

8 **THE COURT:** All right. Come up here.

9 What is the answer to that question? Is 2.0
10 available on the Android website?

11 **MR. HWANG:** Android version 2.0 is available via the
12 Android website. That's correct.

13 **THE COURT:** All right. That's the answer. It's
14 still there.

15 **MR. KWUN:** Your Honor, 2.0 is available. My
16 understanding is the files at issue are not. Or at least the
17 portions that are allegedly copied.

18 And I understand that Mr. Jacobs is saying something
19 that is diametrically opposed to that. We have not been told
20 exactly what they did, so it's hard for me to investigate to
21 see where the discrepancy comes from.

22 **THE COURT:** It's really amazing. Here we have how
23 many lawyers in the room, and something this important on the
24 eve of trial you don't know the answer.

25 Well, you better find out before the trial starts.

1 **MR. KWUN:** Yes, Your Honor.

2 **THE COURT:** Okay. Thank you, sir.

3 How many lines of code are on the Android cellphone?

4 **MR. KWUN:** It depends on what you count. For
5 example, if you include the comments, the number I have readily
6 at hand does include comments. It's around 10, 15 million.

7 **THE COURT:** All right. So how many lines of code are
8 accused?

9 **MR. KWUN:** Less than five one-thousandths of a
10 percent, is my recollection.

11 **THE COURT:** Less than what?

12 **MR. KWUN:** Five one-thousandths of a percent.

13 **THE COURT:** How many lines does that come down to?

14 **MR. KWUN:** There's the -- I think it's somewhere on
15 the order of a few hundred, if you include the eight files that
16 don't result in anything on the phone and you include the
17 comments.

18 If you don't --

19 **THE COURT:** You're including all 11.

20 **MR. KWUN:** Yes.

21 **THE COURT:** Even if all 11 were flagrant violations,
22 it's a few hundred lines of code versus 15 million?

23 **MR. KWUN:** Yes, Your Honor.

24 To be clear, I'm not including every line from those
25 files. I'm including the lines that are allegedly copied.

1 **THE COURT:** That's what I mean.

2 **MR. KWUN:** Yes.

3 **THE COURT:** The ones that are allegedly copied.

4 **MR. KWUN:** My recollection is it's somewhere under
5 800.

6 **THE COURT:** All right. I have a different question.
7 While you're here, you might as well answer this one.

8 How many APIs are in the Google machine?

9 **MR. KWUN:** It depends on which version you look at.
10 As of the date of the expert reports last summer, it was 168
11 API packages in Android.

12 **THE COURT:** And how many are in the Java system?

13 **MR. KWUN:** In J2SE, version 5.0, there are 166.
14 Those numbers are pretty similar. It's not because 166 are
15 ultimately in Android. It's just by happenstance that the two
16 numbers are so close.

17 **THE COURT:** I want to turn to the structure,
18 selection, and arrangement part of this. I think I need
19 Mr. Jacobs to do this.

20 I have read the *Lotus* decision. Now, I know you
21 contend it does not apply here, but the Ninth Circuit has never
22 said it does not apply. Just has never been addressed by the
23 court of appeals for our Circuit.

24 I'm not saying yet that it should apply, but it is
25 close on point. And so I wanted to understand the structure,

1 selection, and arrangement.

2 Don't take me wrong. I'm not saying yet that *Lotus*
3 should apply. I'm not saying that it should not apply. But I
4 do note this. You are -- you cite Judge Easterbrook in the
5 Seventh Circuit. You cite the Fifth Circuit. You cite every
6 circuit you want whenever it helps you. But when it comes to
7 the First Circuit, for some reason you think that they are
8 wrong. And I don't understand, yet, why.

9 I read the *Lotus* opinion. It seems a much better job
10 than I could ever do. And I -- I -- so what's so wrong about
11 the *Lotus* in the -- why -- why isn't the *Lotus* decision correct
12 on -- that at least what was involved in that case, which was
13 those macros and key strokes, not the comments, why isn't that
14 a method of operation at least as applied in the *Lotus* case?

15 And how it would apply here may or may not translate,
16 but are you saying that the First Circuit, even on the facts of
17 that case, got it wrong?

18 **MR. JACOBS:** Yes.

19 **THE COURT:** Really? Okay, explain what.

20 **MR. JACOBS:** What the First Circuit did -- and this
21 is addressed in the cases in other circuits that have rejected
22 *Lotus*.

23 **THE COURT:** What courts are those, by the way bay?

24 **MR. JACOBS:** I believe it's the *Micron* decision.

25 **THE COURT:** In which court? Wasn't that a dictum?

1 **MR. JACOBS:** It's --

2 **THE COURT:** It's a dictum.

3 **MR. JACOBS:** It's analysis, I would say, Your Honor.
4 It helps us understand what's going on in *Lotus*.

5 **THE COURT:** Is the -- you said that in the plural.
6 What other courts have done that?

7 **MR. JACOBS:** That's the explicit rejection of *Lotus*.

8 **THE COURT:** Okay. So, just one. One Circuit. And
9 it's a dictum.

10 **MR. JACOBS:** And no other circuit has adopted it.

11 **THE COURT:** No other has adopted it or rejected it.
12 Maybe this will be the opportunity for the -- well, I guess
13 this case goes to the Federal Circuit.

14 **MR. JACOBS:** Applying Ninth Circuit law.

15 **THE COURT:** Applying Ninth Circuit law. So this will
16 be, possibly, an opportunity to do that. One side or the other
17 is going to raise it.

18 So I need to understand what your argument is as to
19 why, how *Lotus* got it wrong. Because I'm telling you, when I
20 read it, it reads beautifully. Now, so do a lot of other
21 decisions. And, as I say, they are all a lot better than I
22 could do.

23 But explain to me where on the facts of that case the
24 First Circuit went wrong.

25 **MR. JACOBS:** The First Circuit went wrong in deciding

1 that the characterization of something as a method of operation
2 trumps the recognition that that thing, that element -- that
3 element, we'll use that for the moment -- is expression.

4 So what happens in *Lotus* is, the Court, depending on
5 which decision you're looking --

6 **THE COURT:** Isn't that what the statute itself says?
7 I'll get it out here. I've got the statute here somewhere.

8 The statute itself carves out method of operation and
9 says it's not copyrightable.

10 **MR. JACOBS:** That's correct. The proper reading of
11 the statute, the proper reading of copyright principles is that
12 there's a delineation between idea and expression.

13 **THE COURT:** Right.

14 **MR. JACOBS:** Between a method of operation and
15 expression. Not an overlap.

16 And what happens in *Lotus* is the court says, yes,
17 this command structure is expressive. We see that it embodies
18 the expression of the programmer or the developer. But because
19 it is a method of operation, we are going to disallow copyright
20 protection for it.

21 That is the specific analytical move that we haven't
22 seen in other decisions. And it's inconsistent with the idea
23 that computer programs are subject to copyright protection
24 insofar as they represent the expression of the programmer.

25 **THE COURT:** What is the authority that says a

1 computer program is copyrightable?

2 **MR. JACOBS:** The history here is the CONTU Commission
3 in 1976, the amendments to the Copyright Act in 1980, which
4 define computer programs as a sequence of instructions to carry
5 out results, and then the cases in the '80s that held that all
6 forms of computer software, object code, source code, operating
7 system, application program, game, all of those were
8 protectable by copyright.

9 **THE COURT:** What's the best decision I can look at on
10 that?

11 **MR. JACOBS:** Probably *Apple v. Franklin*, Your Honor.
12 That was a case about the deep level -- deep operating system
13 level code in the Apple computer.

14 **THE COURT:** Wait a minute. Apple versus who?

15 **MR. JACOBS:** Franklin. Ninth Circuit case, I
16 believe. We'll get you the cite.

17 **THE COURT:** Could you get the cite for me?

18 **MR. JACOBS:** Sure.

19 **THE COURT:** I've got *Apple v. Microsoft* here.

20 **MR. JACOBS:** No, in fact -- there's *Apple vs.*
21 *Formula*. And I believe I'm thinking of the *Formula* case, in
22 fact, Your Honor. And that's at 725 F.2d 521.

23 **THE COURT:** Do we have that? Let my law clerk run
24 into chambers.

25 Could you bring that book in. 725 F.2d. We may not

1 have it on the shelf. If so, we'll have to go somewhere else.

2 So, okay. So you're saying that *Apple vs. Franklin*
3 holds that all computer programs are copyrightable?

4 **MR. JACOBS:** Yes.

5 **THE COURT:** And that's because of a change in the
6 statute in what year?

7 **MR. JACOBS:** 1980 was the amendment.

8 **THE COURT:** 1980. And what provision of the
9 Copyright Act was amended?

10 **MR. JACOBS:** I believe it was the definitions, Your
11 Honor.

12 **THE COURT:** All right. So I have most of the Act
13 right here, so which definition should I look at?

14 **MR. JACOBS:** Computer program, I believe.

15 **THE COURT:** All right. "A computer program is a set
16 of statements or instruction to be used directly or indirectly
17 in a computer in order to bring about a certain result."

18 **MR. JACOBS:** Moreover, Section 117 was amended to
19 include the RAM copying exception. So taken together, those
20 amendments represent the Congressional implementation of the
21 CONTU Commission report, which held that -- which recommended,
22 if you will, that copyright be the vehicle for protecting
23 expression.

24 **THE COURT:** Which section gives protection now to
25 computer programs?

1 **MR. JACOBS:** The actual protection would lie in 106,
2 which is the -- you won't find the word "computer program"
3 there, I don't believe. But that is the set of exclusive
4 rights. Computer programs are understood to be literary works.
5 They are registered as such with the Copyright Office.

6 **THE COURT:** That's what I'm trying to find out, where
7 is it understood in the statutory language? So I can
8 understand how the statute is set up.

9 **MR. JACOBS:** The way the statute is set up is in
10 Section 106, the grant of exclusive rights, the understanding
11 that computer programs are copyrightable subject matter and,
12 therefore, we're going to apply traditional copyright exclusive
13 rights to the protection of computer programs. You can't
14 distribute. You can't reproduce, et cetera. Can't create
15 derivative work.

16 **THE COURT:** I don't see computer programs in 106.

17 **MR. JACOBS:** That's correct. You won't find the
18 words there.

19 **THE COURT:** Trace through the argument for me so that
20 I can understand how the statute reaches copyright programs,
21 computer programs to be copyrighted.

22 **MR. JACOBS:** You would begin in section 101.

23 **THE COURT:** 101. All right.

24 **MR. JACOBS:** And you would look to derivative -- I'm
25 sorry, to the literary work.

1 **THE COURT:** Is that a definition?

2 **MR. JACOBS:** That's a definition.

3 **THE COURT:** Literary works. Okay.

4 **MR. JACOBS:** Then you would note that the --

5 **THE COURT:** It doesn't say anything about computers
6 either.

7 **MR. JACOBS:** No, that's correct.

8 And then you would look at the definition of computer
9 program, and you would note that it is there.

10 This is the reason these cases had to be decided in
11 the '80s. Congress did not explicitly state we are -- in the
12 statute, we are embracing computer programs in literary works.
13 But that is the consistent application or understanding as
14 interpreted by courts.

15 **THE COURT:** The *Apple vs. Formula* decision, what page
16 do I look at to find -- just to cut to the bottom line where
17 the Ninth Circuit holds that computer programs are protected?

18 **MR. JACOBS:** What I would direct Your Honor to is
19 523-24, which answers a narrower, more granular question, the
20 question about operating system programs.

21 **THE COURT:** All right. So it does say what you -- or
22 close to it, anyway.

23 So, let me hear from the other side as to why *Apple*
24 *Computer vs. Formula International* is -- that's in the Ninth
25 Circuit. That does seem to say that the Copyright Act now

1 covers computer programs. So what do you say to that?

2 **MR. KWUN:** Your Honor, computer programs are
3 definitely copyrightable subject matter, which is to say they
4 can be copyrighted. In any particular instance, they might not
5 be copyrighted, but they can be copyrighted.

6 And the amendments that Mr. Jacobs referred to which
7 followed the CONTU report, before that there had been some
8 discussion about whether or not computer programs are
9 uncopyrightable under the useful article doctrine. So you
10 can't copyright the functional design of a chair, for example.
11 And then the question was, isn't this just the same? It's a
12 useful article and, therefore, uncopyrightable.

13 After the CONTU Commission report recommended that
14 computer programs should be copyrightable, Congress added the
15 definition in Section 101.

16 *Apple Computer v. Formula* is an operating system
17 case. The important thing about *Apple Computer v. Formula* is
18 that the defendant, Formula, conceded that the code, the
19 implementing code that it used, was substantially similar to
20 Apple's code. And I would refer you to pages 522 to 523.

21 So the key thing about that is that in the present
22 case what we're talking about is the interfaces, not the
23 implementing code. So --

24 **THE COURT:** I don't understand why that would matter.

25 **MR. KWUN:** It's the specifications versus all of the

1 code that implements it. In terms of implementing code, the
2 only thing you've heard of from them are those 11 files. The
3 rest of their discussion, about the selection, structure and
4 arrangement of the API elements, is unaddressed by *Apple*
5 *Computer v. Formula* because in that case they were conceding
6 copying of code throughout.

7 Another point I wanted to address is that while the
8 Copyright Act refers to programs as being copyrightable, or at
9 least copyrightable subject matter, the APIs are not the
10 programs.

11 The libraries that you write to implement the APIs
12 have computer -- even them -- I would say those are actually
13 slightly different from programs because they have subroutines
14 that can be used in programs. But the APIs themselves, the
15 specifications for the APIs, and the selection structure and
16 arrangement is not code.

17 **THE COURT:** When you use the word "specification,"
18 how are you using it?

19 **MR. KWUN:** I'll try to be more precise, Your Honor.
20 I apologize.

21 So the specifications are the written documentation
22 for the APIs themselves.

23 **THE COURT:** That's the side comments? That's the
24 plain English to the user, but it's not something that the
25 computer compiles.

1 **MR. KWUN:** Yes, Your Honor. So -- and in those
2 plain-English descriptions there is what I would call the
3 descriptions or the definitions, which in the documentation
4 appears on the right side. And then there's on the left side
5 the thing that is being described.

6 So, for example, there's a method called max, m-a-x,
7 which selects the maximum of two numbers that it's given. The
8 description will say, Select the maximum of parameters A and B,
9 or something like that. That would be on the right side.

10 Max is what I would call the API. Max -- max(a,b), I
11 suppose, would be the API. And that, that's just an idea.
12 That's the idea that is embodied in code that actually goes out
13 there and takes two parameters and figures out which of those
14 two is greater than the other.

15 And that code, that implementing code in the library
16 itself -- or, actually, in *Apple v. Formula*, in the chip
17 itself, that is what was allegedly copied in *Apple v. Formula*.

18 So Apple wasn't saying, you have written code that is
19 compatible with our operating system that implements the same
20 features as our operating system, that can run programs that
21 were designed to be used with our operating system. They were
22 saying, you copied the code that actually does that stuff.

23 So they were going one step further. And that's why
24 *Apple v.* --

25 **THE COURT:** In the *Lotus* case they didn't copy the

1 underlying code either, did they?

2 **MR. KWUN:** Exactly.

3 **THE COURT:** It was the hierarchy was copied.

4 **MR. KWUN:** Exactly, Your Honor.

5 **THE COURT:** But not the underlying code.

6 **MR. KWUN:** And the hierarchy was uncopyrightable.

7 That issue is not addressed in *Apple v. Formula*.

8 **THE COURT:** All right. But I -- fair enough. But
9 Mr. Jacobs was responding to my comment or question as to where
10 does it even say that computer programs are copyrightable, and
11 that it does appear to be that this statute made them
12 copyrightable.

13 But what you're saying is they're still subject to
14 the other exceptions in the Act.

15 **MR. KWUN:** Yes, Your Honor. Computer programs are
16 copyrightable subject matter. So if I write a computer
17 program, it's possible I can get a copyright on it.

18 If I write a computer program that is so short to
19 have -- qualify as a short phrase, that's not going to be
20 copyrightable. If I write one that is wholly unoriginal, that
21 is not going to be copyrightable.

22 **THE COURT:** Pose to both sides this question. And
23 you answer it first since you're already here.

24 Except for rangeCheck, the APIs that you have, the 37
25 APIs in Android compared to the 37 analogs in Java, have

1 different source code. True?

2 **MR. KWUN:** Yes, Your Honor.

3 **THE COURT:** Let me stop there. Agreed?

4 **MR. JACOBS:** Yes and no, Your Honor.

5 **THE COURT:** Okay. Explain that part.

6 **MR. JACOBS:** The part that closely corresponds to the
7 words and symbols that are set forth in a specification aligns
8 word for word.

9 **THE COURT:** I'm just talking -- I'm only talking
10 about the source code that gets compiled by the computer --

11 **MR. JACOBS:** Yes.

12 **THE COURT:** -- at this point.

13 So you're saying it's yes and no.

14 **MR. JACOBS:** Because there is some code that
15 literally you can line up word for word in that code, in that
16 source code, the noncomment source code, the compiled source
17 code, you can line up those words with the corresponding words
18 in what we're calling the specification.

19 **MR. KWUN:** Your Honor, I think we're actually in
20 agreement. I could take another stab at explaining that.

21 **THE COURT:** All right. Go ahead.

22 **MR. KWUN:** So in the specifications there's a method
23 called max. I referred to that. And if you were going to
24 implement that method, what that means is that a developer will
25 then be able to call the max method. And so in their

1 program -- not Oracle's, not Google's -- in this developer's
2 program they are going to write max open parentheses A comma B
3 close parentheses, to find out what is the maximum between A
4 and B.

5 To implement that method in a library or API package,
6 you write some source code. And to write that source code you
7 have to first say, what is this method that I'm implementing?

8 So you write -- there's actually a few more words I'm
9 not going to remember, but you write something max open
10 parentheses int -- for integer -- a comma int B close
11 parentheses, and then you have an open curly brace, and then
12 you have a bunch of code. And that's the code that takes the
13 number A and B and figures out which of those is bigger. And
14 in the end it returns whichever one is bigger. Then you have a
15 closing curly brace.

16 **THE COURT:** Which part is the same?

17 **MR. KWUN:** What's known as the declaration or the
18 method signature, which is the part at the top. Actually, in
19 there there might be some very, very slight differences. But
20 for present purpose we can say they are the same.

21 **THE COURT:** Let's say on -- pick one of these. It
22 would be the declaration that would be one line long?

23 **MR. KWUN:** You could -- if it's a very long
24 declaration, it could spill over on another line, but,
25 generally speaking, yes.

1 **THE COURT:** And then the source code that makes it
2 work is how many lines long?

3 **MR. KWUN:** It could be -- in some cases, it could be
4 one line long. In other cases it could be hundreds of lines
5 long.

6 I should make one clarification on the declaration.
7 There are some declarations that could have multiple lines
8 because sometimes you are defining what fields are available
9 within a class. And that might be five fields, and it might be
10 convention to have a line break between them. But the code in
11 some instances could run several pages.

12 **THE COURT:** All right. So once you get past the
13 declarations, is your source code different than the Java
14 source code?

15 **MR. KWUN:** Yes.

16 **THE COURT:** Is that part agreed to?

17 **MR. JACOBS:** Yes, Your Honor.

18 **THE COURT:** All right. So it's the declarations that
19 are the question mark?

20 **MR. KWUN:** Yeah. Those are what I would say is
21 analogous to the vocabulary that is being described by the API
22 packages.

23 When the third-party developers then go out there and
24 want to write a program, they say, I want to calculate the
25 maximum. And instead of writing a book on how to calculate the

1 maximum, they use this max, this word max(a,b).

2 **THE COURT:** *Lotus* was '95. So that was after the
3 statute was changed.

4 **MR. KWUN:** Yes, Your Honor.

5 **THE COURT:** Okay. I interrupted Mr. Jacobs. I want
6 to go back to him.

7 I understand the computer programs can be
8 copyrighted. But, still, *Lotus* was in 1995. That was well
9 after the statutory change. So they didn't make the mistake I
10 was about to make to say they weren't copyrightable. They said
11 it was a method of operation. So why isn't that still correct
12 here? No, no. Why was that -- why wasn't that correct on the
13 facts of that case?

14 **MR. JACOBS:** I think -- can I change your question
15 slightly? Which is, why in the Ninth Circuit is that not
16 correct? Because I think I can read to you from the *Johnson*
17 *Controls* case, and I think it sets the analytical framework for
18 us consistent with the way I articulated it earlier.

19 **THE COURT:** Well, does it say *Lotus* is wrong?

20 **MR. JACOBS:** No, it's before *Lotus*.

21 **THE COURT:** Well, no, I don't want you to change my
22 question. I want you to answer my question.

23 **MR. JACOBS:** Okay.

24 **THE COURT:** So what -- given *Lotus*, what was wrong
25 with the way in which the First Circuit analyzed that case on

1 the facts of that case?

2 **MR. JACOBS:** The First Circuit was wrong in having
3 Section 102(b) trump the protection for expression. Having
4 found that it was expression and not idea to begin with, or not
5 having found that it was expression, that should have ended the
6 inquiry.

7 And if I may just add a couple of sentences, that's
8 the way the Ninth Circuit lays out the test in *Johnson*
9 *Controls*.

10 **THE COURT:** Write this down. Okay. You say
11 expression versus idea, and that if it is expression it is per
12 se copyrightable. No exceptions. Or am I missing something?

13 **MR. JACOBS:** Yes.

14 **THE COURT:** Because if it's an idea it's not
15 copyrightable to begin with.

16 **MR. JACOBS:** Precisely.

17 **THE COURT:** So where do the exceptions come in?

18 **MR. JACOBS:** The exceptions come in in delineating a
19 boundary, not an overlap.

20 **THE COURT:** So you're saying that the method of
21 operation never can apply to an expression?

22 **MR. JACOBS:** I'm saying that -- yes. I think that
23 our job is to look at whether on the particular facts of each
24 case the component in question qualifies as an expression of an
25 idea, or an idea itself. And that's from *Johnson Controls*.

1 **THE COURT:** Okay. Tell me what it is in *Johnson*
2 *Controls* that helps you reach that point, and the page number.

3 **MR. JACOBS:** So I'm looking at 1175 of 886 F.2d 1173.
4 That's the cite for the case.

5 The Court says: A computer program is made up of
6 several different components, including the source and object
7 code, the structure, sequence and/or organization of the
8 program, the user interface, and the function or purpose of the
9 program. Whether a particular component of a program is
10 protected by copyright depends on whether it qualifies as an
11 expression of an idea rather than the idea itself." Citing
12 several cases. "Where an idea and expression merge are
13 inseparable. The expressions is not given copyright
14 protection." That's a different analytical thread.

15 Moving ahead in the text, source and object code --
16 "The literal components of a program are consistently held
17 protected by a copyright on the program."

18 And then here is the key language. "Whether the
19 nonliteral components of a program, including the structure,
20 sequence, and organization, and user interface are protected
21 depends on whether on the particular facts of each case the
22 component in question qualifies as an expression of an idea, or
23 an idea itself."

24 So the analytical framework that's established there
25 is bucketizing, if you will. We have to decide whether the

1 material in question represents the expression of the
2 programmer.

3 Now, there is -- it's possible to draw factual
4 distinctions between *Lotus* in this case. Your direct question
5 to me was whether *Lotus* was correctly decided, in that the
6 move -- we believe that the move the *Lotus* case made in having
7 the method of operation characterization trump the expression
8 characterization was incorrect.

9 **THE COURT:** Okay. Let's -- let me let the other side
10 respond to what you just said.

11 **MR. KWUN:** So, Your Honor, *Johnson Controls* doesn't
12 really answer anything. All it tells us is that there is
13 something called an idea and there is something called
14 expression. We already know that. That's in Section 102(b).

15 And "idea," which appears in a lot of these cases, I
16 would suggest, is actually a shorthand for all of the concepts
17 that appear in Section 102(b). So that's idea, process,
18 system, method of operation.

19 The point that Mr. Jacobs raised is that he says that
20 in *Lotus* they said two things. They said that the menu
21 structure had some creative expression in it, and they said it
22 was a method of operation.

23 I think that if you ask some scholars, they might say
24 that those are inconsistent statements.

25 But the question -- I don't think you can then jump

1 to the conclusion that, ah, they were wrong; it's not a method
2 of operation. The question is, were they wrong that it was
3 creative expression?

4 **THE COURT:** Whether who was wrong?

5 **MR. KWUN:** Whether the *Lotus* court, the First
6 Circuit.

7 So the point that they made was that in the *Lotus*
8 macros you refer to the menu that a command is in by its first
9 letter, and then the particular command again by its first
10 letter. And so you have these throughout your macros, and
11 that's how the macro knows what to do. Tells the computer what
12 to do.

13 And their point was, well, you could have put these
14 commands in a different menu structure. You could have had
15 different names for these commands. And that qualifies as
16 creative expression.

17 But the problem is, as soon as they made this part of
18 their macro language, whatever creative expression might once
19 have been there became part of the method of operation. You
20 cannot perform those macros without those letters.

21 And so Mr. Jacobs glossed over what he called a
22 separate analytical line of thought in *Johnson Controls*, which
23 is merger. And what the merger doctrine says is that when
24 creative expression merges into the underlying idea it's not
25 protectable.

1 So in *Lotus*, perhaps the court should have either
2 said this is not creative expression --

3 **THE COURT:** The merger sentence, again?

4 **MR. KWUN:** The merger doctrine says that when the
5 creative expression in a work merges into the underlying idea,
6 it is not protected by copyright.

7 So in the *Lotus* case, it perhaps would have been
8 useful for the Court to have an additional line. It could have
9 either said, To the extent that there is creative expression in
10 the menu hierarchy, it is merged into the methods that the
11 menus represent for macros and, therefore, it's unprotected.

12 Or they could have said, While this might appear to
13 be creative expression, because of its functional role in this
14 method of operation it is actually not expression.

15 Either of those analyses would address the so-called
16 flaw that Mr. Jacobs pointed out, tries to point out in the
17 *Lotus* case.

18 I also want to raise one other point, which is the
19 one case that they have mentioned as actually repudiating *Lotus*
20 was *Mitel*.

21 In the *Mitel* case, I would agree, it's dicta. And
22 the reason I would say that is because, ultimately, the Court
23 there just found another doctrine to conclude that the material
24 at issue was not protected. And they said it was not protected
25 under *scenes a faire*, which is yet another doctrine that we've

1 advanced as a reason why APIs are not protected here.

2 **THE COURT:** Nonetheless, even if it was dictum, it
3 does criticize the *Lotus* decision. True?

4 **MR. KWUN:** It does criticize the *Lotus* decision.

5 And I would submit there are about five or ten
6 different ways that you can defeat Oracle's claim in this case.
7 And I would suggest that using 102(b) is the one that is most
8 consistent with Ninth Circuit law. But any of those outcomes
9 would lead to the same result.

10 And I would like to point to the *Sega v. Genesis*
11 (sic) case, which is a fair use case in the Ninth Circuit. And
12 it was about the Sega Genesis video game system and reverse
13 engineering that was done by a developer to figure out how to
14 write programs that they could then sell on cartridges for the
15 Sega Genesis system, without having to pay licensing fees to
16 Sega that provided what were effectively the specifications for
17 the interfaces for the Sega system.

18 So when Genesis (sic) did that, they copied Sega's
19 code wholesale. And they did that internally to figure out how
20 this stuff works. And then they wrote their own programs on
21 the cartridges that did not use the copied code.

22 And the question before the Court was, was that
23 intermediate copying was that a fair use? But the important
24 question that they addressed before that was -- they concluded
25 it was. They said it was a fair use.

1 And the reason they said it was a fair use is they
2 said, gaining access to those functional requirements for
3 compatibility, you can copy code in order to do that.

4 And when they said that, they said that functional
5 requirements for compatibility are unprotected. And they cited
6 Section 102(b).

7 And here, what we are talking about are functional
8 requirements for compatibility with these API packages. If
9 Google wanted Android developers to be able to write programs
10 that used these Java words, the words that were created, the
11 vocabulary that was created by these libraries, they had to
12 implement these methods. They had to implement them in the
13 same way. And they had to have the same selection,
14 arrangement, and structure.

15 Your Honor, in *Sega v.* -- excuse me. It's *Sega v.*
16 *Accolade*. I keep saying "Genesis." That's the name of their
17 game system.

18 In *Sega v. Accolade* -- the full citation is 977 F.2d
19 1510, 1992. It's a Ninth Circuit case. And the particular
20 page where they reference 102(b) and functional requirements
21 for compatibility is 1522. And that was in our opening brief,
22 on page 6.

23 **THE COURT:** So, as I understand you, you concede
24 that, at least as to these 37 APIs, you do use the same
25 structure, selection, and arrangement?

1 **MR. KWUN:** Yes, Your Honor.

2 **THE COURT:** But you say that's okay because what?

3 **MR. KWUN:** Because those are functional requirements
4 for compatibility. Let me just give you a slightly larger
5 gloss on that.

6 When programmers learn to program in the Java
7 programming language, they learn the APIs. Those are taught in
8 any basic Java programming class. If you look at the Oracle
9 books that tell people how to use Java --

10 **THE COURT:** I understand that part.

11 **MR. KWUN:** -- they teach the APIs.

12 **THE COURT:** I understand that. It's in all the
13 books.

14 **MR. KWUN:** So if you want to be able to use this
15 language over which no copyright claim is made, you have to, at
16 a bare minimum, as a practical matter, and in many instances as
17 an absolute matter, you have to implement these APIs. And you
18 have to implement the same way because, otherwise, it would be
19 like if I sold you a car that reversed the accelerator and the
20 brake pedal. That would have, obviously, disastrous
21 consequences and would make my car very unpopular.

22 In order to have that compatibility, Google had to
23 implement the API packages using the same selection,
24 arrangement, and structure. And, for that reason, those
25 elements are functional requirements for compatibility with

1 those 37 API packages. And that is precisely what the Sega
2 case says is not protected due to Section 102(b).

3 **THE COURT:** Let me hear what Mr. Jacobs says to that
4 argument.

5 **MR. JACOBS:** Let me respond, first, about the
6 decisional law and then on the facts.

7 So if you trace the thread in the Ninth Circuit and
8 the District Courts in the Ninth Circuit, one continues to find
9 *Johnson Controls* cited as the relevant authority. And one
10 doesn't see citation to *Lotus* as the way to think about the
11 idea/expression dichotomy.

12 Perhaps one of the clearest cases is a District Court
13 case out of Arizona. It's the *Merchant Transaction Systems*
14 case. It's at 2009 U.S. District LEXIS 2563. We cited it in
15 our briefing. And it recites the same kind of delineation,
16 idea, expression, coordination, and arrangement, the nonliteral
17 elements may be protectable. That brings us to the facts,
18 because the facts here are so dramatically different from the
19 cases that Google relies on.

20 Proceeding backwards through Google counsel's
21 analysis, this case is not about compatibility. As the very
22 first question the Court asked this morning revealed, only some
23 of the packages, only some of the APIs from the Java
24 specification were implemented in Android.

25 This is a -- this was a commercial tactic. It's been

1 labeled in the computer industry "embrace and extend." The
2 idea is you capture the developer community but bring them over
3 into your set of interfaces.

4 And so in the case of Android, I think -- by the way,
5 I believe our numbers were in agreement with Google's
6 counsel -- 37 of the APIs in question are copied into Android.
7 Some more that we're not making claims about because they are
8 third-party owned or arguably third-party owned are copied into
9 Android. And then there are about, roughly, a hundred that are
10 distinct to Android.

11 So Android is not Java compatible. This was not
12 about making it possible for game cartridges written in -- as
13 against Java to run on Android game consoles. Or, more
14 particularly, this wasn't about making it possible for games
15 written for Java mobile phones to run on Android mobile phones.
16 So this compatibility is a misnomer. It's a copying for
17 commercial purpose, not for functional compatibility.

18 Then moving further through the argument, if you look
19 at each of these cases and you look and compare the facts as to
20 what was copied with what was copied here, you see a
21 dramatic -- you see a dramatic difference.

22 And Your Honor asked for some exculpation on this.
23 We've prepared some slides that walk through the kind of
24 relationships and interdependencies.

25 We have statements and admissions from Google

1 programmers, from experts that we are talking in the creation
2 of these APIs about creative expression. It's like writing
3 music.

4 So no one would say that about the particular codes
5 at issue in a remote control case or in the Sega-Accolade case.
6 Those were trivial by comparison. And so having the scale tilt
7 in favor of compatibility there didn't wreak havoc on the
8 copyright system.

9 But to say here that this elaborate creative effort
10 that went into these 37 APIs is merely idea or merely a method
11 of operation would eviscerate copyright protection for
12 important creative expression.

13 So now we're at the stage where you really need to
14 look at what we're talking about, and then make a judgment as
15 to whether it's correct to characterize these merely as idea or
16 method of operation, or, rather, as protectable selection,
17 coordination, and arrangement, structure, sequence,
18 organization, the designs, the design of the computer program.

19 That's probably the last --

20 **THE COURT:** What do you say to the Sega -- there,
21 they reverse engineered. Why isn't this like the Sega case?

22 **MR. JACOBS:** Because what was taken there was so
23 trivial. What was ultimately implemented --

24 **THE COURT:** Is that word anywhere in the Court of
25 Appeals decision?

1 **MR. JACOBS:** I don't believe --

2 **THE COURT:** The word "trivial"? I didn't see that.

3 **MR. JACOBS:** No. We would be analyzing the facts,
4 Your Honor. What we would note is that *Sega* made no claim of
5 copyright infringement in the ultimate product. *Sega's* sole
6 claim was a claim of what was called intermediate copying, that
7 *Accolade*, on the way to copying the functional element, created
8 a literal copy.

9 And the question was whether absent a claim that the
10 final product was infringing, was the intermediate copying?
11 Permissible. Really didn't get to the question we're
12 addressing here, which is the scope of copyright protection for
13 nonliteral element.

14 *Sega* has this language about functional requirements
15 for compatibility. But one can overread that language like one
16 can overread the language in many decisions.

17 **THE COURT:** How long will your slide show take?

18 **MR. JACOBS:** About 20 minutes, Your Honor.

19 **THE COURT:** Let's do that now, and then we'll take a
20 break.

21 **MR. JACOBS:** I'm going to do this -- with Your
22 Honor's permission, because we are going to get a little
23 technical, more technical than I am, I'm going to do this with
24 Mr. Peters.

25 **THE COURT:** Sure.

1 **MR. PETERS:** Good morning, Your Honor.

2 **THE COURT:** Good morning.

3 **MR. PETERS:** Marc Peters for Oracle America.

4 One of the questions I think that the Court has had
5 is, what is in an API specification?

6 **THE COURT:** Wait. Wait. I want to be very clear.
7 You cannot -- we have to use the word "specification" in at
8 least a consistent way. And the way I understand specification
9 is the plain English thing that describes to the user what the
10 API does, and is not the source code that gets compiled by the
11 computer.

12 Now, if you want to use it in a different way, you
13 can do that. But it will be hard for me to understand because
14 in reading these briefs I see a little shifting back and forth,
15 depending on what inference you want to leave with me, the use
16 of the word "specification."

17 So I want you to -- I want you to be very clear that
18 I'm going to be listening for that word. Please do not use it
19 in a way that I don't understand, unless you tell me you're
20 using it in some other way.

21 **MR. PETERS:** Okay. Your Honor's understanding is
22 correct. When I use the word "specification," I will be
23 referring to the English language document that explains the
24 software.

25 **THE COURT:** All right.

1 **MR. PETERS:** And what's in it.

2 **THE COURT:** Okay.

3 **MR. PETERS:** If I may digress, I think one of the
4 reasons for the confusion in the parties' briefings about the
5 two things is that the source code itself contains the
6 documentation of the specification. A knowledgeable programmer
7 can read the source code and divine the specification, and read
8 the specification for the code that he or she is reading. So
9 there's -- there is a blending there. But today, Your Honor, I
10 think that's just an explanation of the origin of the
11 confusion.

12 Specification, absolutely, the English language
13 document. Such as the book I'm holding, *the Java Application*
14 *Programming Interface, Volume 1 Core Packages*, this is the
15 specification for certain of the packages from 1996
16 (indicating).

17 What Mr. Jacobs has put up here is a poster that was
18 published by Sun Microsystems, entitled, "The Java Class
19 Libraries Java 2 Platform Standard Edition 5.0."

20 This was a poster that Sun sells, and it illustrates
21 about half of the packages that are available in Java SE 5.0.

22 Each one of the red headings shown on that poster is
23 the name of the package. And below it are -- is shown the
24 hierarchy showing the organization and structure and sum of the
25 interrelationships between the members of those packages, the

1 classes and the interfaces.

2 **THE COURT:** Interrelationships within the API, or API
3 to API?

4 **MR. PETERS:** This poster shows both, Your Honor.

5 **THE COURT:** I'd like for you to take some examples
6 and explain this elaborate system. Because you keep saying it
7 is elaborate. So give me an example of an API that has an
8 elaborate interrelationship with a different API.

9 **MR. PETERS:** Let me get one for you, Your Honor. I'm
10 fast forwarding through my presentation.

11 If you look on the screen, this is a blowup of what's
12 on the poster for the package called javax.net.ssl.

13 **THE COURT:** Is this one of the 37?

14 **MR. KWUN:** Page number from the binder?

15 **MR. PETERS:** Page 7.

16 **THE COURT:** Is this one of the 37?

17 **MR. PETERS:** This is one of the 37, Your Honor.

18 **THE COURT:** Great. Go ahead and make your
19 explanation.

20 **MR. PETERS:** Now, what this shows is, it shows the
21 class -- what is shown on the left, in a plain font, are the
22 classes that pertain to this package. What is shown in the
23 right, in italics, starting with "ManagerFactoryParameters,"
24 are the interfaces that relates to this package.

25 What the poster illustrates graphically is, if there

1 is a small graphic symbol after the name of a class or an
2 interface, it means that that class or interface is defined in
3 a different package, not in this package.

4 So, for example, the class EventObject, that is shown
5 in the middle left, has an icon on it that, if I recall,
6 indicates that EventObject is defined in the package java.util.
7 U-t-i-l.

8 **THE COURT:** I don't follow what line you're referring
9 to.

10 **MR. PETERS:** If you look about halfway down on the
11 left side, in the row of words under the word "Object," there
12 is a line called "EventObject." It's immediately under the
13 green highlighted line that says "X509ExtendedKeyManager."

14 **THE COURT:** Okay. What I see there is
15 "HandshakeCompletedEvent."

16 **MR. PETERS:** That is right.

17 **THE COURT:** What is that?

18 **MR. PETERS:** What this indicates is that within the
19 package javax.net.ssl there is a class called
20 HandshakeCompletedEvent. It is a subclass of the class called
21 EventObject. And the blue icon following the words
22 "EventObject" indicates that that class is defined not in this
23 package but in a different package, java.util. So --

24 **THE COURT:** How do we know that from this page?
25 Java.util?

1 **MR. PETERS:** The reason we know, if you look on
2 the -- now more broadly on the poster, you can see that some of
3 the larger packages -- I'll approach it.

4 **THE COURT:** I can't see that far.

5 **MR. PETERS:** This is the challenge of even a poster
6 to show only a portion of the complexity.

7 The icon for java.util is shown right there
8 (indicating).

9 **THE COURT:** Okay. And underneath there somewhere
10 is --

11 **MR. PETERS:** Is EventObject.

12 **THE COURT:** Is what?

13 **MR. PETERS:** Under the description of java.util,
14 under this heading is the class EventObject.

15 In the different package, javax.net.ssl, the class
16 HandshakeCompletedEvent is defined in this package, but it is a
17 subclass of the class EventObject, which is in a different
18 package.

19 So this is a relationship between packages. There is
20 something defined in this package of javax.net.ssl that depends
21 on something defined in another package.

22 **THE COURT:** Okay. That helps me understand that.

23 Now, give me another example of that.

24 **MR. PETERS:** So, another example from this class,
25 from this package, is the class SSLPermission, which is about

1 five down from EventObject.

2 And SSLPermission, which is defined in the package
3 javax.net.SSL, is a subclass of a class called BasicPermission.
4 And the red icon with the keyhole is the icon for the
5 java.security package. So the class BasicPermission is defined
6 in the java.security package.

7 So this is a relationship between a class defined in
8 this package and a class defined in another package.

9 **THE COURT:** When you say "class," what's the
10 difference between a class and an API?

11 **MR. PETERS:** A class is something that is part of the
12 API.

13 Where there can be a great deal of confusion, Your
14 Honor, is that the members of a package in the Java programming
15 language are classes and interfaces. That word, "interface,"
16 doesn't refer to the API and overall interface. It refers to a
17 particular kind of construct in the Java programming language.

18 **THE COURT:** What is a library? Is that the same
19 thing as an API?

20 **MR. PETERS:** Yes, it is. So sometimes the
21 programmers would refer to this as the javax.net.ssl library.
22 They might say it is the API. So the -- what the package is,
23 it is a collection of classes and interfaces that the package
24 designer, the library designer, has decided should go together.

25 **THE COURT:** When the programmer calls up a library,

1 is it typical that they would only call up one class within the
2 library? Or is it necessary to run every class within the
3 library?

4 **MR. PETERS:** It would end up being in between, Your
5 Honor.

6 An application programmer who is, say, writing a word
7 processing application or a game or a spreadsheet application,
8 who wants to rely on the programs that have been prewritten for
9 him or her in the library, may call upon the different aspects
10 of the library that may be helpful to him or her.

11 **THE COURT:** Well, I know.

12 Let's say there's only one feature in that library
13 that you really care about at that stage in the program. Can
14 you rifle in on just that one?

15 **MR. PETERS:** Yes, Your Honor.

16 **THE COURT:** Or are you required to run every single
17 class in the library in order to get the benefit of the one
18 thing you're interested in?

19 **MR. PETERS:** In Java, you're allowed to call upon
20 only one class at a time. If there's only one class that has
21 the program that you need, then you only need to call on the
22 one class.

23 **THE COURT:** All right. Okay. So now you've given me
24 some examples of relationships. You were referring, though,
25 to, also, relationships within a API. So give me, I guess, an

1 example of that.

2 **MR. PETERS:** Well, an example of the relationship
3 within an API is you can have, just as I've indicated to Your
4 Honor, that one class can be -- a class in one API can be a
5 subclass of a class defined in another API.

6 There are, of course -- and this is much more
7 frequent -- cases where a class in one API is a subclass of a
8 class defined in the same API.

9 So it tends to be that classes are collected in an
10 API precisely because they have a relationship to each other
11 that was defined by the API designer. And so --

12 **THE COURT:** Give me an example more concretely to
13 illustrate that.

14 **MR. PETERS:** So an illustration of that, that we just
15 saw before, is in the java.security package, defines a class
16 called "Permission." The same package, java.security, also
17 defines another class, called "BasicPermission." And the class
18 BasicPermission is defined to be a subclass of Permission.

19 So an example, another example of that, again,
20 from -- I believe this will be from the class package java.nio.
21 This is on slide 6. What you have is the class IntBuffer,
22 i-n-t-b-u-f-f-e-r. And it is defined to be a subclass of the
23 class Buffer, which is defined in the same API.

24 Now, what this means is that the class in Buffer has
25 defined for it quite a number of methods. These are programs

1 and functions that are available for application programmers to
2 use. But because ByteBuffer -- I'm sorry, I'm looking at
3 ByteBuffer rather than IntBuffer.

4 Because ByteBuffer is a subclass of the class Buffer,
5 it inherits all of the methods from the class Buffer. So
6 everything that is defined in class Buffer is available to a --
7 to a ByteBuffer.

8 And, similarly, the class ByteBuffer itself has a
9 subclass called MappedByteBuffer, which inherits everything
10 ByteBuffer can do, but also has some additional functionality
11 and programs available for it.

12 So this is an example of what happens even within a
13 package when you define --

14 **THE COURT:** All right. You said you had some
15 deposition testimony from the other side, admitting what a
16 great thing this is. Give me some examples of that.

17 **MR. PETERS:** One example of that, Your Honor, is
18 going back to, say, an example of the collections framework.
19 If I can find it here. Apologize for jumping through the
20 presentation.

21 This is an example of an illustration of how an API
22 designer faces different choices. One of the useful things or
23 a useful paradigm or a problem that people -- that programmers
24 deal with is how to deal with collections of things.

25 The slide here is slide number 8 in the presentation.

1 And what is illustrated here is the different ways in which the
2 API designers for the Java libraries, the Smalltalk libraries,
3 and the C++ libraries approach this problem.

4 So these are the ways in which the API designers for
5 these platforms handled -- basically addressed the same
6 problem. So that all of these, this organization, represents
7 the same idea, but the expression of the idea, of how to deal
8 with these problems, is different.

9 **THE COURT:** So you're not claiming a copyright on the
10 idea of an API?

11 **MR. PETERS:** That's right, Your Honor.

12 **THE COURT:** You're claiming a copyright on the
13 particular structure, selection, and organization of your --
14 how you arranged your boxes, so to speak.

15 **MR. PETERS:** Right.

16 So the idea, which is not copyrightable, the idea of
17 having programs that deal with collections is not what's
18 being -- is not what is being claimed here.

19 Rather, what is copyrightable is the particular
20 design, the way to -- the -- where the creative expression
21 comes in is how to solve that problem, what is the right way to
22 solve the problem. And, in fact, there is no one right way to
23 solve these kinds of problems. There are often many arguments
24 between programmers over these things.

25 Your Honor asked about the testimony, and where I

1 wanted to add to this here, on slide 8, is Joshua Bloch, who is
2 a Google chief Java architect, and was the former designer of
3 Java APIs while at Sun -- Mr. Bloch left Sun to join Google.

4 Mr. Bloch is one of the designers of the Java Collections
5 Framework that was illustrated there. He testified:

6 "I find it very rewarding to design great
7 APIs and have people come to me years later
8 and say, wow, you know, the Collections
9 Framework changed my life."

10 These are programmers, you know, who are dealing with
11 it. They found the Collections Framework, they found the
12 design that Mr. Bloch had created for Sun, for Oracle, to be --
13 to be elegant, to be helpful, to be understandable in ways that
14 other collections frameworks, perhaps, were not.

15 **MR. JACOBS:** Your Honor, to finish off this 20
16 minutes, if we would turn to slide 3.

17 These are the particular bits of testimony that I was
18 referring to earlier, in which we have characterizations from,
19 again, Mr. Bloch:

20 "API design is an art, not a science."

21 We have Google's own expert, who in his deposition
22 said:

23 "Just as it's hard to find people that are
24 really good at anything that's hard, whether
25 it be, you know, being an artist, a football

1 player, a concert violinist, those things are
2 hard. This is something that's hard in the
3 same way."

4 And then an independent publication:

5 "There seems to be something elusive about
6 API design that, despite years of progress,
7 we have yet to master."

8 So what we're talking about when we talk about these
9 Java APIs is something -- having decided that computer programs
10 are copyrightable, our view is that we decided that the design
11 of the programs are copyrightable. Just as we decided that
12 architectural plans are copyrightable, we decided that the
13 design of a house is copyrightable.

14 And this is the design of these libraries. What we
15 call the specification is really -- if you've seen some
16 attempts at word choices, at characterization in our briefing,
17 it's because the word "specification" doesn't, in our view,
18 fully capture what is going on here.

19 We're talking about the design of the libraries by
20 designers who are designing something that is an art, not a
21 science, and that is creative.

22 **THE COURT:** We're going to take a break in a moment.
23 When we come back, I'm going to let the other side have their
24 reply to your 20-minute thing.

25 So, go ahead and have a seat.

1 **MR. PETERS:** Thank you, Your Honor.

2 **THE COURT:** I have a few questions.

3 We're still going to go for a while. I know some of
4 you want to go back and start your cross-examination
5 preparation. I don't blame you. But I need your help here,
6 too.

7 One of these is really a question for Oracle. One is
8 a question for Google. And these cut in opposite directions.

9 I want you to know -- I don't have an answer for
10 these. I ask these questions because -- and you may possibly
11 hit a home run and convince me on one of these today, but I
12 want you to know what I'll be thinking about during the trial.

13 If you were to roll back the clock to 1995, or
14 roughly when Sun finished the first round of Java -- when was
15 that? I forgot. It's in the mid '90s, right? -- and it had
16 done all the APIs it had done, I think any ordinary person
17 looking at that body of work would have said this took a lot of
18 time, a lot of creative effort; it certainly deserves either
19 patent protection or copyright protection; and somebody else
20 should just not come along and steal it. So, that is one
21 point. A question, really, not a point.

22 On the other hand, we are not in 1995. We're in
23 2012. And along the way Oracle has dedicated to the public
24 domain, as far as this case is concerned anyway, the use of the
25 Java programming language.

1 The Court has already ruled that the use of the names
2 is not protectable. Like "square root" is not protectable.
3 The code within the APIs used by Google is not the same code.
4 The concept of an API cannot be copyrightable.

5 So, so many things that were in -- in 1995, that were
6 in Sun's possession before it revealed to the world what it had
7 done, have now been dedicated to the public domain or couldn't
8 have been copyrighted in the first place.

9 So what we are down to is a question of if you do go
10 to any of these books that teach you how to -- teach you about
11 Java, it's not just the programming language, it's the APIs,
12 the libraries, the classes.

13 And Oracle has stated many times that that is free
14 for anybody to use. So if it's free for -- at least the
15 programming language. But is that too fine a distinction?

16 I still am unclear on if it's true, as Mr. Jacobs
17 says, that computer programming languages can be copyrighted,
18 and that is copyrightable under the *Formula International*
19 decision, there must have been some point in time when Sun
20 dedicated it to the public domain and allowed people to use it.

21 By what mechanism did that occur? And, if so --
22 surely it did occur -- why didn't the APIs go right along with
23 that permission?

24 I want you to know, on the Oracle side, I have never
25 gotten a satisfactory answer from you. Yes, perhaps you could

1 have glommed on to a copyright on everything way back then, but
2 along the way you dedicated to the public domain the use of
3 Java. Now you say only the Java programming language. But I
4 would like to see the document by which it says programming
5 language only but not the APIs.

6 So to kind of put a point on it, if we were in 1995,
7 every lawyer would look at this and say there's got to be some
8 way for this to be protected. It was a very creative effort
9 with a lot of interrelationships and millions of dollars of
10 work. And there must be some way to protect it, either under
11 the patent law or the copyright law.

12 So that's -- I see that point. I also see the other
13 point, which is, how come we're in a situation where Oracle has
14 allowed this to be used by the public, and then in some manner
15 there was a dedication to the public for that use. Why didn't
16 that same dedication pick up the APIs? I would like to see the
17 document that draws that distinction.

18 So with that, we're going to take a 15-minute break.
19 And we will probably go at least another hour, and maybe longer
20 than that. So I have several things I want to cover with you.
21 And we're -- you're helping me a lot here. This is a very
22 useful discussion.

23 The reason I need to understand this is because I
24 think under the law I have to decide protectability. Agreed?

25 **MR. VAN NEST:** Agreed.

1 **THE COURT:** So I have to tell the jury what part of
2 this is protectable.

3 We also haven't talked about the plain English parts
4 because you're accused over there of having plagiarized the
5 manual. So I would like to understand that claim, too.

6 I would like to say one other thing. I know that the
7 press, at least one newspaper, keeps saying that I don't want
8 you to try your case.

9 That is not true. I am looking forward to this case
10 being tried. And I don't want you to think that I am unwilling
11 or somehow unhappy about this case going to trial.

12 My view is that if you want your day in court, you're
13 going to get a fair trial. And I think this is a most
14 interesting problem, and we're going to put our heads together
15 and solve it somehow.

16 So I don't want you thinking that. But in this
17 regard I do need to say one thing that's a practical thing.
18 And that is, if you are going to settle your case you must do
19 so by Friday at noon before the trial starts.

20 Because, otherwise, a large number of people will be
21 driving from all over this district on Monday morning, to be
22 here, and they disrupt their entire lives in order to come
23 here.

24 And because of the size of the case -- and, in fact,
25 we're going to have -- there will be a fairly large venire.

1 And it's a shame to have to bring them out only to have you
2 announce you settled the case on the courthouse steps. I want
3 to protect the jury in the venire. That just should not occur.

4 You've had two years, almost, to settle -- 18
5 months -- to resolve this case. So if you're going to do it,
6 please do it by the Friday at noon, before the case starts, so
7 you don't put those people at risk and disrupt their lives.

8 That's my only comment there.

9 I want to go back and say, if you want to try the
10 case, I am looking forward to it. I think it's going to be an
11 interesting case. One side will lose. One side will win.
12 Somebody may go away gnashing their teeth in unhappiness. But
13 that's the way it is when you -- you know, this is the World
14 Series of IP cases. And only one winner comes out of the World
15 Series.

16 So that's okay with me. I think that's why we have
17 the U.S. District Court, is to provide as fair a trial as
18 humanly is possible. And we're going to do that come
19 April 16th -- no extensions -- 7:30.

20 By the way, how is it working out in Texas?

21 **MR. VAN NEST:** Still working on it, Your Honor. I'll
22 be here on the 16th, though.

23 **THE COURT:** I understand that progress is being made
24 there to relieve pressure on you.

25 **MR. VAN NEST:** Any little bit of help would be good.

1 **THE COURT:** Well, I am confident that come April 16th
2 you will be here. So that's good.

3 All right. We have more to do this morning, and I
4 would like to give you a chance to think about those questions
5 I posed, and then we're going to come back and pick right up
6 there. So, 15 minutes. Thank you.

7 (Recess taken from 9:19 to 9:32 a.m.)

8 **THE COURT:** Mr. Jacobs, you can go first.

9 **MR. JACOBS:** I would like to answer Your Honor's
10 question.

11 **THE COURT:** Okay.

12 **MR. JACOBS:** And I'd like to establish some
13 categories, first of all.

14 **THE COURT:** All right.

15 **MR. JACOBS:** One category is the distinction between
16 an application programmer who is, as Your Honor's question
17 asked, making particularized calls to functions that are
18 described in the API.

19 That application program is writing a program relying
20 on the services that are provided by the libraries. That
21 application program is not providing the libraries. That's
22 just a basic technical distinction.

23 **THE COURT:** Say that again. I'm not following your
24 distinction.

25 **MR. JACOBS:** Maybe I could show you -- so -- can I go

1 over this?

2 **THE COURT:** Yes.

3 **MR. JACOBS:** So this is the *Java Application*
4 *Programming Interface* volume that we showed Your Honor earlier.

5 **THE COURT:** Who wrote that?

6 **MR. JACOBS:** This is by James Gosling, Frank Yellin,
7 and the Java team.

8 **THE COURT:** Okay.

9 **MR. JACOBS:** And at the introduction to the book what
10 is explained is:

11 "These books are reference manuals for Java
12 application and applet programmers. To make
13 full use of them you should be familiar with
14 the programming language and its core
15 concepts."

16 So what this book is designed for is programmers who
17 are writing Java applications.

18 There are millions and millions of those programmers
19 and of those Java applications. As a technical matter, what
20 they do is invoke in a particularized basis the services that
21 are available from the Java platform from the libraries and
22 from the runtime environment.

23 If one wants to answer -- so that's that category.
24 The second category is the category of actually providing the
25 libraries. And here there are not millions, thousands,

1 hundreds, even tens.

2 Our beef is with Google because what Android did is
3 provide the libraries that implement the application
4 programming interface that conform -- for which the API is the
5 design.

6 So what -- if we take the thread of the discussion
7 that we were on before, about the relationship between the
8 library source code and the APIs, one will see the selection,
9 arrangement, coordination, structure, sequence, and
10 organization of the APIs reflected in those libraries. They
11 will line up with the specification. It is those libraries
12 that are derived from the specification.

13 So the distinction, again, is between application
14 programmers that use the services of the libraries with the
15 platform and providing the libraries for the platform. That's
16 a technical point to begin with.

17 Now, there's a business point. The business point is
18 that the whole point of making Java information available in
19 something like this document, like this book, is to explain to
20 application programmers how to use this programming environment
21 to take advantage of the write once/run anywhere capabilities
22 of the system.

23 That's not something that a vendor would want to
24 restrict. That's something a vendor would want to encourage.
25 That's precisely the reason that Google adopted the 37 APIs and

1 the libraries that implement them, because they wanted to take
2 advantage of Sun's investment in all of those application
3 programmers.

4 By contrast, Sun licenses the runtime environment,
5 the environment that provides the services that the application
6 programs call, invoke, rely on. And that's Sun's business. It
7 licenses the Java ME runtime environment. It's a complex
8 licensing model designed to get at each market in the best
9 possible way.

10 But that is the license and revenue model. The
11 license and revenue model isn't directly about licensing
12 application programmers. The application programmers are what
13 make the underlying platform useful. Encouraging application
14 programmers as a business matter is important to the utility of
15 the usefulness to the business success of the underlying
16 platform.

17 So that's the business distinction.

18 **THE COURT:** Let me stop you on that.

19 Is this true or not, that anybody can go online and
20 download the virtual machine, Java virtual machine and
21 programming language and all the APIs? No? I guess as part of
22 the runtime environment. Is that true or not?

23 **MR. JACOBS:** The runtime environment part, that is
24 correct. That is something that as a business -- the strategy
25 was to enable people like us, on our desktop PCs, to download

1 the runtime environment for our actual PCs.

2 What is licensed to vendors is a more complete set of
3 code, yes.

4 **THE COURT:** But, wait. Just the runtime environment
5 would have the APIs; no or yes?

6 **MR. JACOBS:** It would -- yes, it would include a
7 runtime version of the libraries.

8 **THE COURT:** And would it also include the virtual
9 machine?

10 **MR. JACOBS:** It would include the virtual machine.

11 **THE COURT:** And I assume, also, the programming
12 language?

13 **MR. JACOBS:** Probably wouldn't include a compiler for
14 the programming language. So --

15 **THE COURT:** But the virtual machine would take care
16 of that, wouldn't it, and convert whatever -- you could program
17 in it, and the virtual machine would translate it to whatever
18 the language is that the computer used.

19 **MR. JACOBS:** Not quite. The way it would work is
20 that a distribution of an application program to your computer
21 would be in byte code already. And then the virtual machine
22 would execute the byte code.

23 The programmer that programmed that application would
24 write in source language, run it through a Java compiler to
25 create a byte code distribution.

1 **THE COURT:** So what license does somebody of the type
2 that we just described have to sign or agree to in order to use
3 the -- to get that runtime environment off of the Internet?

4 **MR. JACOBS:** So if it's an end user like you or me,
5 we click through the click through agreement, which tells us
6 what we can do with that runtime environment on our machine,
7 which is install it on the machine and use it on the machine.
8 Probably not reverse engineer it, et cetera.

9 **THE COURT:** Says "no reverse engineering"?

10 **MR. JACOBS:** I actually am not -- I haven't looked at
11 that license recently.

12 Google makes no argument based on that runtime
13 environment license. That's not where they're going with their
14 defense here. That is a distributional fact, if you will, that
15 Sun -- like Adobe with PDF Reader.

16 **THE COURT:** I promise you, there are going to be
17 people on the jury who when they understand that you have no
18 claim to the Java programming language, that's going to be the
19 end of the line for them. They're going to say, how can you
20 claim the APIs then?

21 And while what you have just described to me may make
22 sense to you, I don't understand it. And I tried hard. So,
23 I'm going to let the other side give me their ten minutes on
24 this. But you need to come up with something that is more
25 clear-cut or the jury will never get it.

1 **MR. JACOBS:** So let me just give you one more
2 important point on the licensing aspect of this.

3 So I showed you the documentation and what it says to
4 application programmers. Here's what it says to someone who
5 wants to create a derivative work from the manual:

6 "Sun hereby grants you a fully paid
7 non-exclusive, nontransferable, perpetual
8 worldwide limited license without the right
9 to sublicense under Sun's intellectual rights
10 that are essential to practice this
11 specification. This license allows and is
12 limited to the creation and distribution of
13 clean room implementations of the
14 specification that are complete
15 implementations of the specification that
16 pass all test suites relating to this
17 situation that are available from Sun, do not
18 derive from Sun source code or binary
19 materials, and do not include Sun binary
20 materials without an appropriate and separate
21 license from Sun."

22 So for someone who wanted to create libraries that
23 were built to these specifications, there is a license regime.
24 And that is the license regime that Google refused to enter
25 into for its own business reasons.

1 **THE COURT:** What does this language say that --
2 translate that for me, how that would apply here.

3 **MR. JACOBS:** The way that would apply here is that
4 had Google sought to develop a clean room implementation of the
5 Java Application Programming Interface specification, they
6 would have had to pass -- they would have had to do it in its
7 entirety, to protect the compatibility of the Java environment.
8 No what's called supersetting or subsetting. You can't do it
9 partially or extended.

10 **THE COURT:** They say they did use a clean room. I
11 know you disagree with that, but what if the jury believes they
12 did do a clean room?

13 **MR. JACOBS:** They don't claim that they did it
14 completely. They only did 37. Then the rest were their own
15 design.

16 And this requires completeness in order to protect
17 compatibility. This requires completeness.

18 **THE COURT:** It's really the completeness point that
19 is your main point.

20 **MR. JACOBS:** That is one of the points. The second
21 point is that you have to pass all the test suites.

22 The way the Java business is set up, there's a
23 license to what are called the TCKs, the test kits for
24 compatibility, and the -- in order to get that license, you
25 have to comply with those license restrictions. And Google

1 hasn't ever taken that license at all, of course.

2 Again, that's all about protecting the underlying
3 intellectual property properly and about protecting
4 compatibility.

5 **THE COURT:** Before you have a seat, I have a
6 different question.

7 Can you get a copyright on a programming language as
8 opposed to a computer program, but on the language itself?
9 What is the answer to that?

10 **MR. JACOBS:** I think the answer is it's undecided in
11 any authoritative court decision.

12 If one invented a language, one could probably obtain
13 copyright protection for that invented language. One would
14 have assembled words and symbols and their syntax and
15 semantics. Probably one could obtain copyright protection on
16 an invented language.

17 If I can take Your Honor's question back where you
18 started before the break, what happened here is that Google
19 implemented the APIs in libraries, whether their own work, the
20 Noser work, the Apache work, without a license.

21 When it comes to the programming language, that's
22 supported, if you will, or implemented in a compiler, not in
23 these libraries.

24 And the compiler, the way Android works is that
25 Android developers, the developer community is directed to the

1 Sun website and told to download a Java compiler.

2 So we just don't have to visit, in this case, the
3 protectability of the programming language, as such. And
4 that's why we make no claim about the protectability of the
5 programming language.

6 And, of course, just as anyone could write a new
7 novel in the English language, even if the English language was
8 an invented language and protectable, the Java language is free
9 for application programmers, free for them to use.

10 **THE COURT:** All right. Let's hear from the other
11 side.

12 Oracle has had the floor for 30 minutes or so, so
13 I'll give you an opportunity to respond to any and all of the
14 above.

15 **MR. KWUN:** Okay. Let me first hand up a couple of
16 binders that -- one for you and one for your clerk. It will
17 also be on the screen.

18 Before we even get to the -- that presentation, I
19 wanted to start right where Mr. Jacobs left off, which is, I
20 actually don't think there's even a nonauthoritative opinion on
21 whether an invented language is copyrightable.

22 However, it will probably be no surprise to you that
23 I disagree with him on whether it would be copyrightable. I
24 think, just from first principles, a language cannot be
25 copyrighted, --

1 **THE COURT:** Why is that?

2 **MR. KWUN:** -- invented or not.

3 And I would point you to the basic principles behind
4 copyright law. It is there not just to protect expression, but
5 to promote expression.

6 And if you look at the words and short phrases
7 doctrine, which we've already looked at and Your Honor has
8 looked at, the reason we have the words and short phrases
9 doctrine is because if you allowed someone to claim copyright
10 over words or short phrases it effectively would allow them
11 copyright over a portion of a language. It would allow them
12 copyright over anyone who wanted to express themselves using
13 those words or short phrases.

14 Copyright on an invented language is the same thing
15 but much more severe. It would allow them to control anyone's
16 ability to express themselves in that language. Invented or
17 not, that is simply not allowed.

18 And the statutory basis for that would be 17 U.S.C.
19 102(b). That is a system -- the language is a system that
20 allows one to express themselves.

21 **THE COURT:** So you're saying a medium cannot be
22 copyrighted. Only the expression can be copyrighted.

23 **MR. KWUN:** Yes, Your Honor.

24 The fact that you use the language to create
25 expression -- and we just heard that, that developers can write

1 programs in these languages to express themselves. And that,
2 of course, can be copyrighted. That, I think, actually points
3 to the fact that the system they're using to create that
4 expression, their works, should not be copyrightable.

5 But I do not think there is any authoritative or
6 nonauthoritative case law on that. Matter of fact, I believe
7 there is actually only one case that even discusses it
8 tangentially. And all that it says is that one of the parties
9 had cited no authority, one way or the other, on whether or not
10 language was copyrightable. However, like I said, from first
11 principles, I think they are not.

12 **THE COURT:** So continue on with your --

13 **MR. KWUN:** Yes, Your Honor.

14 So we've heard that in 1995 Java was released. I
15 just want to remind the Court -- and this is from our summary
16 judgment motion that we filed sometime back -- that the CTO of
17 Sun in 1994, just one year before Java was announced -- that
18 was Eric Schmidt -- told Congress that interface specifications
19 are not protectable under copyright.

20 If you are looking --

21 **MR. JACOBS:** Your Honor, I just need to interrupt
22 with an objection that you've ruled on this in your in limine
23 motions.

24 **MR. KWUN:** Your Honor, we understand we can't present
25 this to the jury. I'm not seeking to present it to the jury.

1 I'm merely trying to get some background here to answer the
2 question that the Court had.

3 **THE COURT:** All right. Go ahead. Go ahead.

4 **MR. KWUN:** You asked whether or not there are any
5 statements that explained how one could reserve the APIs. I
6 would say this statement is exactly the opposite. It says,
7 "APIs are not copyrightable." That was sworn testimony to
8 Congress from the chief technical officer of Sun, one year
9 before Java was announced.

10 So the second thing I would point Your Honor to is
11 the brief that we filed yesterday on the field of use
12 restriction issue.

13 And you heard Mr. Jacobs talk about the licensing
14 regime that he said is in place for people who want to
15 implement APIs. And one of the requirements he said you had to
16 meet is that you have to pass all of the testing suites to show
17 compatibility. Those are called TCKs, technology compatibility
18 kits.

19 And what Mr. Schwartz said at his deposition -- and
20 he was CEO from 1996 to -- from 2006 to 2010, the relevant time
21 period, he said that, Anybody who wanted to create their own
22 runtime, whether it was Apache Harmony or GNU Classpath, was
23 free to do so; they just couldn't call it Java.

24 Now, crucially, Apache never signed a TCK license.
25 They tried to obtain the TCK license; refused to accept the

1 conditions that Sun wanted to place on that license; never
2 agreed to it.

3 So Apache did not pass the TCK suite. So when
4 Mr. Jacobs tells you that in order to create an implementation
5 you were required to pass these TCKs, what you have heard from
6 Sun's CEO, from his deposition testimony, is that no matter
7 what that document says, that actually was not the policy at
8 Sun.

9 Anyone, Apache Harmony, GNU Classpath, they both
10 created freely available implementations. Neither of them met
11 these conditions for API implementations. Both of them were
12 freely and openly distributing these.

13 There were commercial implementations that used the
14 Apache Harmony implementation of the APIs. There was no
15 lawsuit by Sun. There was no effort by Sun to stop this from
16 happening.

17 **THE COURT:** Did Sun know about it?

18 **MR. KWUN:** Yes, Your Honor.

19 **THE COURT:** Was it a publicly -- I mean, was it
20 publicly known that Sun was allowing -- was affirmatively
21 allowing this to happen, or is it just that they were busy on
22 something else and didn't get around to it?

23 **MR. KWUN:** Mr. Schwartz testified that he was
24 completely aware of what the Apache Harmony was, how it was
25 distributed, what it did. And what he said is that anyone who

1 wanted to co-create their own runtime, whether it was Apache
2 Harmony, or GNU Classpath, was free to do so. They just could
3 not call it Java.

4 As far as he was concerned, the issue was one of
5 branding.

6 **THE COURT:** You call it Java --

7 **MR. KWUN:** We say that we use the Java programming
8 language. We do not use the brand name Java.

9 What Mr. Schwartz was referring to is, he said that
10 Apache wanted to call their product, instead of Apache Harmony,
11 Apache Harmony Java. So they wanted in the name of the product
12 to have the word "Java."

13 **THE COURT:** Was Mr. Schwartz's testimony clear that
14 he was referring only to the trademark part of it, like Java is
15 a trademark? How did he word his answer?

16 **MR. KWUN:** Your Honor, let me see. I have some
17 testimony here which has been designated confidential by
18 Oracle.

19 **MR. JACOBS:** We hereby dedesignate what we see in
20 your slide.

21 **THE COURT:** Go ahead.

22 **MR. KWUN:** Not in the slide. I'm talking about in
23 our brief.

24 **MR. JACOBS:** Same thing.

25 **MR. KWUN:** So, Mr. Schwartz said that he was

1 generally familiar with how the Harmony product worked. And
2 was asked:

3 "And based on your understanding, as long as
4 users did not call their products Java they
5 were free to use the source code that Apache
6 Harmony made available?

7 **"ANSWER:** Yes."

8 That's on pages 1 to 2 of our brief. He also said:
9 "It's a free world. If they called it Java,
10 we would be involved. If they didn't call it
11 Java, they could call it a Linux phone. They
12 could call it a free phone or an open phone.
13 That's up to them."

14 He doesn't actually say --

15 **THE COURT:** Did Sun have a trademark on the use of
16 the word Java?

17 **MR. KWUN:** Pardon me?

18 **THE COURT:** Was there a trademark registered on Java?

19 **MR. KWUN:** I believe there is a trademark
20 registration. There is, however, no trademark infringement
21 count in this case.

22 **THE COURT:** I understand that part.

23 Okay. Continue, please.

24 **MR. KWUN:** And even if there were a trademark
25 infringement count, we would be entitled to use the term "Java"

1 in its nominative sense to describe what Java means, as opposed
2 to using it to brand a product.

3 So I think that there are statements from their CTO
4 in 1994, and their CEO, at all times that are relevant to this
5 lawsuit saying that, actually, these APIs are free and open for
6 people to use.

7 So if I could turn to, in our presentation, if you
8 want to look at it in the hard copy, it's tab 6.

9 But if you could turn to slide 26 please, Nate.

10 I wanted to answer Your Honor's question about what
11 APIs are required for the Java programming language.

12 And in the order you said, both as a theoretical
13 matter as well as in a practical matter. I'm going to start
14 off by what are actually required.

15 This is a description of Java API libraries. This
16 comes from Oracle's website. They are describing java.lang as
17 one of the 37 accused API packages.

18 And what they say is that java.lang provides classes
19 that are fundamental to the design of the Java programming
20 language. That's pretty clear. That is absolutely required.

21 Next slide, please, Nate.

22 This is the book you've seen from Oracle's counsel in
23 today's presentation. It is labeled as being from the source,
24 published by the Java team, and describes -- it's Volume 1 of
25 the book that described the application programming interface.

1 Next slide, please.

2 This is the back cover, from the back cover of that
3 book. It says:

4 "Volume I, Core Packages" -- that's the book
5 that you've seen -- "describes the libraries
6 that are the foundation of the Java language.
7 These libraries include java.lang, java.io,
8 java.util, and java.net. These are
9 general-purpose libraries fundamental to
10 every Java program."

11 So that's four of the 37 packages at issue in this
12 case. I also want to point out that there are three other
13 java.lang packages that have been accused, that start with:
14 Java.lang, java.lang.annotation, .ref, and .reflect.

15 There are five more java.util packages: .jar, et
16 cetera. There are several more.

17 And there are two that are javax.net, very closely
18 related to the java.net package discussed here.

19 Then there's something called java.nio. Nio, the "n"
20 in that stands for new, the "io" stands for input/output. So
21 the nio routines are very closely related to the java.io.

22 If you add those in, you're now talking about 15 of
23 the 37 packages at issue in this case.

24 And then there's the practical question. And we have
25 discussed that before. Java programmers expect to be able to

1 use the APIs when they program. Indeed, Oracle's expert said
2 as much.

3 So, also, if we could turn to -- this is tab --

4 **THE COURT:** What do you say to the -- okay. I want
5 to go back to the thing with the testimony.

6 **MR. KWUN:** Yes, Your Honor.

7 **THE COURT:** What do you say to the contracts and the
8 licenses? Mr. Jacobs says that there were clear-cut --
9 clear-cut things that put you on notice that you could not use
10 those APIs, even if you called it something else. Even if you
11 wanted to make an intermediate or derivative work, you couldn't
12 do it without permission from Sun. So, yes, somebody testifies
13 years later that's not true, but that comes later.

14 Are you at trial going to concede that, yes, that's
15 what the document said, but we just didn't believe it? What's
16 the story there?

17 **MR. KWUN:** A few things, Your Honor.

18 First of all, in May 2007 -- so contemporaneous with
19 these facts -- Mr. Schwartz said that, "There is no reason that
20 Apache cannot ship Harmony today." He said that knowing full
21 well that there had been no TCK license signed.

22 So the conditions that were mentioned by Mr. Jacobs
23 had not been met.

24 **THE COURT:** Where did he say that?

25 **MR. KWUN:** He said that in a -- that was quoted in an

1 article that is trial exhibit 2341, and that Mr. Schwartz
2 verified at deposition that he had said at the time. And he
3 confirmed that that was accurate.

4 **THE COURT:** All right. Now, help me on this point.
5 What is Oracle going to say as to why that does not apply to
6 Google? Or do they have no answer?

7 As an officer of the Court you must know what they
8 are going to say, so tell me what they are going to say, and
9 then tell me what your response to that is.

10 **MR. KWUN:** Your Honor, I think they are going to
11 point to the license agreement and say, well, I don't know what
12 Mr. Schwartz was saying; he must have meant something else.

13 Frankly, I don't know what they are going to say
14 precisely. But, there is this contemporaneous document, May
15 2007, that was --

16 **THE COURT:** Was that in the public domain?

17 **MR. KWUN:** That was -- he did not say it was in the
18 public domain. What he said is that Apache could release
19 Harmony right at that moment and -- that's what he said in the
20 document.

21 **THE COURT:** Was his statement in the public domain?
22 Was it a publicly-available statement?

23 **MR. KWUN:** Yes, Your Honor.

24 **THE COURT:** Where was it published?

25 **MR. KWUN:** It was -- I'd have to look at the

1 document. I don't have it immediately --

2 **THE COURT:** Is somebody from Google going to testify
3 they saw that and relied on it?

4 **MR. KWUN:** Your Honor, I'd have to go back to our
5 witness outlines to be certain about that.

6 **THE COURT:** All right.

7 **MR. KWUN:** Regardless, I think that it shows what
8 Sun's actual policy was. And Sun's actual policy is that these
9 were freely available.

10 I would also just point to you the fact that it was
11 well-known in the industry that Apache Harmony and GNU
12 Classpath had not entered into TCK license agreements, and that
13 they were freely made available.

14 There was wide participation in the Apache Harmony
15 project by commercial entities. The two major contributors in
16 the early days were IBM and Intel. This was well-known to
17 everyone in the industry, including members of the Java
18 community.

19 **THE COURT:** All right. Let's say you didn't have any
20 of those statements, and Harmony never existed, and all you had
21 was the license agreements.

22 Would you agree that those license agreements, if
23 they were controlling, would have required Google to get a
24 license to do what it did?

25 **MR. KWUN:** No, Your Honor. And I have two points on

1 that.

2 First of all, they can try to impose by license
3 whatever they want. If they don't actually have rights they
4 are giving you that they -- and a right to exclude, it doesn't
5 matter. The APIs are not copyrightable --

6 (Simultaneous colloquy between the Court and
7 Counsel.)

8 **THE COURT:** -- copyrightability.

9 **MR. KWUN:** That's right.

10 **THE COURT:** I understand that point. What's your
11 next point?

12 **MR. KWUN:** Second point is, if you look in the Java
13 language specification, they have a similar license in there
14 that says that you can implement the license but you have to
15 implement all of the APIs.

16 So when they told -- as you know, the language is
17 free and available for everyone to use. They have told
18 everyone that when you implement the language you should
19 implement the APIs. So to the extent that one --

20 **THE COURT:** You didn't do that. You only implemented
21 some of the APIs.

22 **MR. KWUN:** Yes, Your Honor. But to the extent that
23 they are trying to draw a distinction between the APIs and the
24 language, the fact that they require people to implement the
25 APIs shows there is no distinction.

1 **THE COURT:** But the contract said if you -- correct
2 me if I'm wrong. Didn't the contract say that if you are going
3 to use our product, Java, you've got to use it all and not
4 dilute it? What was that word?

5 **MR. KWUN:** Subset.

6 **THE COURT:** No, there's a word.

7 **MR. KWUN:** Fragment.

8 **THE COURT:** It starts with D. Degenerate or --
9 Fragment. That if you -- you can use our language all day long
10 for free, including the APIs, but you cannot fragment. That's
11 what I'm looking for.

12 Do you agree that that's in the language --

13 **MR. KWUN:** Not in those words, but their license
14 agreement does say that you shall not superset or subset.

15 **THE COURT:** Well, then, that's what you did.

16 **MR. KWUN:** Your Honor, yes, we created a subset.
17 And, yes, we had additional -- we had additional libraries.

18 **THE COURT:** If the license agreement is the
19 controlling document -- that's a big if -- but if it were the
20 controlling thing, then you would be in violation of that
21 agreement.

22 **MR. KWUN:** If we had entered into that license
23 agreement, there would have been an issue. We never entered
24 into that license agreement.

25 **THE COURT:** So then you just stole their product. I

1 mean, if you didn't have -- assuming it's copyrightable, how
2 did you -- how do you get around the license agreement other
3 than Harmony?

4 I understand your Harmony Apache point. But,
5 otherwise, if you're stuck with the agreement you don't have a
6 defense.

7 **MR. KWUN:** If the APIs are copyrightable our -- we
8 have two principal defenses. One would be the equitable
9 defenses. We've already discussed those. The other would be
10 fair use.

11 And on fair use, I would point the Court at the *Sega*
12 *v. Accolade* case and the *Sony v. Connectix* case. Both of
13 those --

14 **THE COURT:** Okay. Possibly those apply. I'm not
15 saying yes to that. Tell me if I've got it right. I'm trying
16 to understand the shape of this trial so it will help me when
17 we get to the trial.

18 Oracle will put on lots of evidence about
19 Mr. Gosling, that he's brilliant, he invented this whole thing,
20 it was renowned, it got accolades from every corner of the
21 earth. Wrote a book. Everyone uses it. It's the end all and
22 be all.

23 And that Google being a -- not Google but Oracle
24 being the good citizen that it is, has dedicated -- not
25 dedicated it fully, but has made it available but on

1 conditions. And the conditions are pretty reasonable, in order
2 to promote consistency.

3 And that Google came along, negotiated for a license,
4 didn't want to pay a hundred million dollars, went off and just
5 violated the license, because they didn't get one.

6 You come back and say, A, it's not protectable in the
7 first place. All right. I understand that argument, though I
8 don't know what the answer is. I think this is a hard
9 question.

10 Number two, you say, well, they didn't really mean
11 it. When they said that you had to have a license, they were
12 talking Janus-like and they were -- that's what they said on
13 paper, but what they were saying publicly is that Harmony
14 Apache could do it, and that meant the rest of the world could
15 do it and, therefore, we never had -- that was all waived or
16 there's an estoppel.

17 And then your final point is that even if there is --
18 those two fail, and it was protectable, there was fair use.

19 Now, maybe you have other arguments, too, but have I
20 more or less summarized it right?

21 **MR. KWUN:** Those are definitely the high points.

22 **THE COURT:** All right.

23 **MR. KWUN:** So, Your Honor, on this notion, you before
24 our break drew a distinction between what might be true in
25 1995, when Java was first released, and what might be true

1 today.

2 **THE COURT:** Right, uh-huh.

3 **MR. KWUN:** So as to what might be true in 1995, it's
4 a couple of points I want to raise.

5 First of all, there is a case that I'm going to cite,
6 *ATC Distribution Group vs. Whatever It Takes Transmissions and*
7 *Parts*. It's 402 F.3d 700 (6th Cir. 2005).

8 And the point that the ATC court made is that
9 creativity does not equate to copyrightable. And what they
10 said is, "Original and creative ideas are not copyrightable."
11 I have this as a quote with an ellipsis in there. I don't have
12 the full quote before me. "Original and creative ideas are not
13 copyrightable."

14 So the point is that under the Copyright Act, what is
15 copyrightable is creative expression. And, of course, given
16 the idea, the idea/expression dichotomy, even if you have
17 creative ideas, even if they are very creative, even if they
18 required a lot of thought, ideas are still not copyrightable.

19 Second of all, you had asked --

20 **THE COURT:** But let me test you on that for a moment.
21 That's true. An idea is not copyrightable. But here you saw
22 the diagram earlier. C++ has got one API structure. The other
23 language had another structure. And then along comes Java and
24 has its more elegant structure.

25 And the idea of an API is just an idea. But when it

1 comes down to concrete -- what's the word -- hierarchy or
2 concrete outline, the Java people came up with an elegant
3 solution, and they then expressed that elegant solution in
4 words the computer could understand; and, therefore, that ought
5 to be copyrightable. That's the argument.

6 So why don't -- what's your answer to that?

7 **MR. KWUN:** Your Honor, having two different ways of
8 organizing something doesn't mean those are expression. Just
9 means those are two different ideas.

10 I will submit that if you look at the cases and if
11 you just think about it yourself, the break between idea and
12 expression is a difficult one to determine. And it's -- it's
13 hard to make bright line distinctions.

14 However, I think that the functional nature of the
15 structure and organization of the APIs here and how that is
16 necessary for programmers to use that structure and
17 organization to express themselves in the Java programming
18 language weighs in favor of this being on the idea side of that
19 dichotomy.

20 If we could turn to slide 33, please. I wanted to
21 talk a little bit about these interdependencies which you heard
22 about before the break.

23 This is a modified version of a page from the Oracle
24 specifications. And what has been removed are the
25 descriptions. This really is what we are talking about when

1 Oracle talks about the structure, selection, and arrangement of
2 its API elements.

3 We have removed all of the text, and you're left with
4 something that, frankly, looks a lot like the blank forms that
5 were at issue in *Baker v. Selden*.

6 And if we could turn to the next slide. This, slide
7 34, this is taken from their expert's report in opposition to
8 our expert's copyright report. And this illustrates the class
9 hierarchy for the java.net package. And this illustrates some
10 of the same concepts that you saw Mr. Peters discussing.

11 And if you look -- you'll see that most of the
12 java.net classes that are listed in here are subclasses of this
13 first one that's listed, Java.lang.Object.

14 So java.lang.Object is the most fundamental class in
15 the Java language. All other classes are either subclasses of
16 java.lang.Object, or sub subclasses, and so on. Everything
17 derives from java.lang.Object. It's the only class that
18 doesn't have a parent class.

19 But most of these you see come from java.lang.Object.
20 Some of the classes, you'll see, are subclasses of other
21 java.net classes. So you see java.net.SecureCacheResponse is a
22 subclass of CacheResponse. And that's simply because it's a
23 more specialized version of the CacheResponse class.

24 Now, this notion of cross package relationships,
25 which we've heard discussed a little bit, you can see in the

1 second column, if you look towards the bottom,
2 java.net.URLConnection. No, no. Excuse me. URL Class Loader.

3 **THE COURT:** I don't see that one. Where is that?

4 **MR. KWUN:** Well, let's go with java.net. -- well,
5 that's a good question. We'll move on to the next point.

6 We'll move on to java.net.URI. So java.net.URI -- that's in
7 the right column.

8 **THE COURT:** Yes.

9 **MR. KWUN:** So URI is a Uniform Resource Identifier.
10 And it's very similar to what everybody knows as a URL when you
11 are going to websites. So -- conceptually, anyway.

12 So you can see in parentheses it says, "Implement
13 java.lang.Comparable." So java.lang.Comparable is one of these
14 interfaces that you've heard Mr. Peters talking about where,
15 again, I want to caution the Court, interface there is a
16 special construct in the Java programming language, and it's
17 not the interface in API application programming interface.

18 So the java.net.URI is a subclass of
19 java.lang.Object. So you could call Object its parent. So
20 when it says that it implements java.lang.Comparable, that
21 means it also inherits certain characteristics from
22 java.lang.Comparable. So, in a sense, you could say this it
23 has two parents; whereas, some of these classes only have one.

24 But what does this really mean, the fact that it has
25 this interface java.lang.Comparable? Java.lang.Comparable is

1 an interface that provides a method that allows you to compare
2 two things. So if you have two URIs, two Uniform Resource
3 Identifiers, you might want to know whether they are equal to
4 each other or whether one of them is less than the other.

5 Now, frankly, I don't actually know what that means
6 for it to be less than another. But I do know that if it
7 implements Comparable, this interface, it's required to provide
8 an ordering relationship.

9 So all that it means when it says that it has -- that
10 it implements java.lang.Comparable is that when you have a URI,
11 you can ask it whether it is smaller, larger, or equal to
12 another URI.

13 So if you want, you can call that interdependency. I
14 would just say that's another functional characteristic of the
15 language, of the word that's being defined there.

16 So I just wanted to give a little more of an
17 explanation of what these interdependencies really are. These
18 are all just different ways to organize the functional aspects
19 of the vocabulary that is defined in the APIs.

20 The other thing I wanted to discuss, the next thing I
21 wanted to discuss is it -- Nate, if we could have slide 14.

22 You had suggested that in 1995, surely, they should
23 have had some protection for this language. Even assuming
24 that's the case, you had also asked in one of the orders that
25 you issued before the hearing was whether or not APIs can be

1 patentable, and particularly whether the selection,
2 arrangement, and structure of APIs can be patentable.

3 And the answer for any given claimed invention is
4 going to depend on that particular claimed invention. There's
5 going to be, you know, *Bilski* questions. There's going to be
6 other questions.

7 But what we have here -- I'm going to show you two
8 patents, one issued to Sun and one issued to Oracle, that
9 certainly do claim aspects of the selection, structure, and
10 arrangement of APIs.

11 So this first one is the '093 Patent issued to Sun.

12 If we could get the next slide please, Nate.

13 Here's Claim 1. Sun claims a class structure in an
14 object based system, the class structure being arranged to
15 provide application programming interfaces that has a first set
16 of classes that are arranged in a certain, defined manner. It
17 has a second set of classes that are arranged in a certain
18 manner, and a third set of classes that are arranged in a
19 certain manner.

20 If we could actually go back to the previous slide.

21 The diagram you see at the bottom of the cover page
22 of the patent here, what it shows is the first set is what it
23 calls the core APIs. The second set in Claim 1 are the client
24 APIs, which include all of the core APIs and then have a few
25 additional ones. And then the third set is the server APIs,

1 which include all of the four APIs and all of the client APIs,
2 and have some additional APIs.

3 So they're claiming a particular way of structuring a
4 set of APIs in a client server system on an object oriented --
5 for an object oriented programming system.

6 If we can turn to slide 16.

7 **THE COURT:** Is this one of the patents asserted in
8 this case?

9 **MR. KWUN:** It is not. They've asserted no patents
10 against Google based on selection, arrangement, and structure.

11 **THE COURT:** Is the phrase "structure, arrangement,
12 selection," is that in the specification to this patent, '093?

13 **MR. KWUN:** Your Honor, I would trust that it is, but
14 I can't tell you for certain.

15 **THE COURT:** I don't see that language in the claim.
16 I see the word "structure."

17 **MR. KWUN:** Oh, the structure, selection, and
18 arrangement? We have "structure" and we have "arranged" here.
19 I don't know that we have "selection."

20 **THE COURT:** I see "arranged." I see "structure."
21 All right.

22 **MR. KWUN:** Yeah. The second patent -- slide 16,
23 please -- is the '855 Patent assigned to Oracle. Oracle
24 International Corporation in particular.

25 If we could turn to the next slide, which has Claim

1 1. They claim:

2 "A method for integrating an application with
3 a collaboration server, said method
4 comprising: providing an application
5 programming interface that includes a
6 hierarchy of schemas sharing inheritance
7 relationships ..."

8 Now, you've heard today about how classes inherit
9 characteristics from the other classes in the Java programming
10 language. This would seem very similar. Schemas would seem
11 very similar to what we've been discussing as interfaces.

12 "... wherein, the personal messaging schema
13 abstracts functionality of the collaboration
14 server as a set of item classes and container
15 classes that contain said item classes."

16 That would seem to be an arrangement of a selection
17 of classes.

18 "... providing, in said API, a plurality of
19 providers that implement hierarchy of
20 schemas" ... and "receiving a selection of at
21 least one of said providers for the
22 application after the application has been
23 compiled," and so on.

24 Neither of these patents are asserted in this case.
25 But the point simply is that Sun and Oracle certainly believe

1 that one can patent aspects of the selection, arrangement, and
2 structure of APIs.

3 **THE COURT:** All right. Thank you.

4 **MR. KWUN:** I wanted to turn now to another question
5 that the Court had had -- slide 19, please -- which was the
6 description. And you said we're also accused of infringement
7 of the description.

8 So what you have before you here, this is a
9 demonstrative of the only description comparison that their
10 expert actually has in the text of his expert report.

11 And this is the documentation. The description is
12 provided by J2SE 5.0 and Android for the getPrivate method for
13 the KeyPair class.

14 And you can see the two definitions that are provided
15 there, the two descriptions that are provided there. And I
16 would submit that they don't look much alike.

17 This was the choice that Dr. Mitchell made. As the
18 only example to give, he decided this was the example --

19 **THE COURT:** They are not limited to what's in the
20 expert report, are they? I mean, the expert is, but the direct
21 case, case-in-chief, can just put in the document. Right?

22 **MR. KWUN:** Yes, Your Honor. I would --

23 **THE COURT:** If they do that are we going to find
24 other examples where the wording is the same?

25 **MR. KWUN:** You are going to find some examples where

1 the wording is certainly more similar than that. And I would
2 submit that that's not terribly surprising, and that if you
3 compare it to a dictionary you're going to -- word for word,
4 you're going to find a number of definitions that sound
5 somewhat similar.

6 I would like to go through some of the exhibits that
7 Dr. Mitchell attached to his report. They are somewhat lengthy
8 and our time is limited.

9 **THE COURT:** This is on the specification, the plain
10 English part that describes to the user how the -- what the API
11 does.

12 **MR. KWUN:** Yes, Your Honor.

13 **THE COURT:** That's what I want -- you say Android
14 documentation. All right. So stick -- thank you for moving to
15 that. I wanted to come to that.

16 So go ahead and tell me what the story there is on
17 how close the language is.

18 **MR. KWUN:** So these are the exhibits that
19 Dr. Mitchell attached to his report. It's just the first page
20 from each of those exhibits.

21 But Your Honor obviously will see more than this.
22 But for today's purposes, if you look at the interface
23 descriptions in the -- for the java.lang package, they are
24 provided here -- again, at a mere glance you can see they don't
25 look the same at all.

1 If you turn to the next slide, 21, which is the first
2 page of copyright Exhibit C to Dr. Mitchell's report, interface
3 summary for java.io, if you look at the descriptions, you know,
4 they look pretty different to me.

5 **THE COURT:** Well, is this the way they are now on all
6 of the -- 2.0, 3.0, or is this just for the most recent
7 version?

8 **MR. KWUN:** These are the ones -- this compares the
9 standard edition 5.0 from Oracle.

10 And I actually -- I would have to look in the report
11 to see which ones Dr. Mitchell chose to compare them to. These
12 are a fairly recent, I would assume, version of the Android
13 descriptions. But, nonetheless, these are the ones that he
14 chose to attach to his report.

15 So this is copyright Exhibit C. Turn to slide 22.
16 Copyright Exhibit D. Again, they look remarkably different.

17 If you turn to copyright Exhibit E, slide 23,
18 KeyPair, this is the class where we were discussing the sole
19 example that he actually provided in his report.

20 Here, if you look at the class overview, they look
21 nothing alike.

22 If you look at the constructor summary down below,
23 constructs a KeyPair from the PublicKey and PrivateKey;
24 constructs a new instance of KeyPair with a public key and the
25 corresponding private key.

1 I will give you -- those sound a little bit more
2 similar, but, still, given that they're describing the same
3 thing and that they're both written by technical writers, I
4 would say that the descriptions are not terribly similar.

5 And if you turn to slide 24, of copyright Exhibit F,
6 the class runtime, and you look at the class description,
7 again, nothing alike.

8 Down below, if you look at the method summaries, for
9 addShutdownHook and availableProcessors, these actually look a
10 fair bit alike. But the concepts being expressed are very
11 simple and within the constraints of technical writing. I,
12 again, would submit that's not very surprising.

13 **THE COURT:** One of our earlier hearings, I have a
14 distinct memory of a side by side like this that the other side
15 had presented. And it looked identical, one item after
16 another. Almost word for word.

17 This doesn't look identical. What am I thinking of?

18 **MR. KWUN:** Your Honor, what I remember, what may be
19 what you're thinking of, was a slide that showed that the
20 interface listing for an Android class was identical to the
21 interface listing for the equivalent class in J2SE. So they
22 pulled out --

23 **THE COURT:** What is an interface listing?

24 **MR. KWUN:** Well, Your Honor, if you could turn to
25 slide 22, for example.

1 **THE COURT:** Okay.

2 **MR. KWUN:** They have something that -- I don't know
3 that it was this one, but they had something that pulled out
4 and zoomed in on the left column, and showed that the left
5 column was the same.

6 What that shows is that the -- that the selection,
7 arrangement, and structure of the elements of the API are the
8 same. And we would agree.

9 I'm not sure if that's what the Court was
10 remembering, but that's what comes to mind to me.

11 **THE COURT:** It was not just single words. It was
12 sentences.

13 I don't want to take your time on my bad memory.
14 What else do you have to say?

15 **MR. KWUN:** So, Your Honor, the only other thing I
16 want to point out is just that if you look at the cases that
17 they cite -- which I assume are the cases they believe are the
18 best cases -- in many of those cases, those out-of-circuit
19 cases, even if the Court does not follow, for example, *Lotus*,
20 the Court, nonetheless, either concludes that the material is
21 not copyrightable, as was the case in *Mitel*, or the Court
22 concludes that the material has almost no protection.

23 So, for example, they cited *Engineering Dynamics v.*
24 *Structural Software* in their most recent brief. A Fifth
25 Circuit case I think you mentioned earlier in the hearing.

1 And if you look at page 1348 in that opinion, the
2 Fifth Circuit said, "To the extent that" -- excuse me. Let me
3 back up.

4 "The same cautious approach to protection is
5 appropriate for computer user interfaces. To
6 the extent that they are highly functional
7 or, like the output formats in this case, to
8 the extent that they contain highly
9 standardized technical information they may
10 lie very near the line of
11 uncopyrightability."

12 And it refers to the relatively narrow scope of
13 property -- excuse me, of copyright protection in instances
14 like this.

15 So even the cases of theirs, that suggest things
16 might be copyrightable would grant, at best, thin copyright
17 protection to something like this, which is going to be
18 relevant both in terms of determining substantial similarity
19 and for purposes of the fair use factors.

20 **THE COURT:** Let the other side have a brief response,
21 and then we'll turn to some other subjects.

22 **MR. JACOBS:** The first thing I would like to address
23 is Mr. Schwartz and the quote from Mr. Schwartz. And we'll put
24 the entire passage from the identified exhibit on the screen.

25 Toward the bottom of the screen, Your Honor:

1 "Jonathan Schwartz, CEO at Sun, said in a
2 press conference, 'There's no reason that
3 Apache cannot ship Harmony today ... We're
4 very focused on the GPL community.'"

5 And then the articles goes on:

6 "That is technically true, but Apache
7 officials said that to do so with the TCK
8 restrictions in place would actually go
9 against the Apache software license.

10 Meanwhile, Rich Green, Sun's executive vice
11 president of software, said the TCK issues
12 were being worked out."

13 So this is entirely consistent with our description
14 of a license regime that applies to these APIs. The Apache
15 dispute was a dispute, and it was resolved. It was resolved,
16 fortunately, not with litigation. It was resolved because the
17 vendors in question, including IBM, have now joined Oracle in
18 the OpenJDK project as the vehicle for a GPL-based
19 implementation.

20 **THE COURT:** What's the evidence going to show as to
21 whether Apache Harmony signed the agreement, the restriction?

22 **MR. JACOBS:** They never signed it because the dispute
23 was about the TCK restriction that Sun was going to impose.
24 The Apache folks did not like that restriction and so they
25 didn't sign the license.

1 **THE COURT:** Did they then go ahead with their -- did
2 that stop them dead in their tracks, or what did Apache Harmony
3 then do?

4 **MR. JACOBS:** But for Android, Apache Harmony is
5 not -- by and large, not a very significant factor in the Java
6 marketplace.

7 Android took the libraries from Apache and made it
8 into their alternative implementation. But Apache Harmony is
9 now pretty much a dead project.

10 So as to what -- you asked an important follow-up
11 question, which was: Did Google rely on any statements of
12 Jonathan Schwartz?

13 This is an e-mail from Andy Rubin from 2006. He was
14 asked about alternative implementations of Java. And he says
15 back in his e-mail:

16 "Ha. Wish them luck. Java.lang APIs are
17 copyrighted. And Sun gets to say who they
18 license the TCK to, and forces you to take
19 the shared part which taints any clean room
20 implementation. I don't see how you can open
21 Java without Sun, since they own the brand
22 and IP."

23 And if you'll recall the license at the front of the
24 manual I read earlier, it's under all applicable intellectual
25 property rights.

1 Just a minute Your Honor.

2 And then in 2008, when the Apache dispute is raging,
3 an internal e-mail at Google from a fellow named Bob Lee to
4 Eric Schmidt:

5 "Sun puts field of use restrictions in the
6 Java SE TCK license, which prohibit Java SE
7 implementations from running on anything but
8 a desktop or a server. These restrictions
9 prevent Apache Harmony from independently
10 implementing Java SE, not to mention
11 Android."

12 Though that's water under the bridge, at this point.
13 And Schmidt, of course, who had been at Sun says, I'm not
14 surprised by Sun's position.

15 So the evidence, we believe, will be quite strong
16 that whatever Mr. Schwartz may say now about his understanding
17 of how the intellectual property restrictions apply to Apache
18 Harmony or to the -- or to a hypothetical project or to
19 Android, that Google well knew at the time exactly what it was
20 doing and how Apache Harmony was not a permitted vehicle for
21 implementing the libraries in Android.

22 That's all I have, Your Honor.

23 **THE COURT:** All right. Let's turn to a different
24 subject, and that's more the nuts and bolts of how we will try
25 the case.

1 Before I do that, I would like to give each side
2 until -- what is today?

3 **MR. VAN NEST:** Wednesday.

4 **THE COURT:** Until Friday, if you can do this. I'll
5 give you more time if you really need it. But it would benefit
6 me to have it sooner, let's say by 4:00 p.m. on Friday.

7 I like the concept of High Noon and Gary Cooper.

8 (Laughter)

9 **THE COURT:** And you can all imagine that you're Gary
10 Cooper. I like that concept.

11 But being so close, we'll go to 4:00 p.m. on Friday
12 to put in a 10-page brief on anything and everything you wanted
13 to comment on that came up today.

14 You can see what's on my mind. And I want to put
15 a -- give you this little caveat. The more that you are candid
16 with me, the more I will believe what you have to say. Not
17 that I'm not going to check it. I'm going to try to check
18 everything.

19 But in an area that's this hard to follow, every now
20 and then the light goes off when some lawyer writes a good
21 brief that happens to concede something and then says, even
22 though we concede that, here's why we win anyway. And a light
23 goes off that hadn't gone off before.

24 And I urge you to keep in mind that I'm not up to
25 speed like you all are, and I think the more you can be candid

1 with me the better off I will be. Maybe you will be, too. But
2 that's just a word to the wise.

3 I want to give you ten pages to bring to my attention
4 anything that you -- anything and everything that we've gone
5 into today would be fair game. All right. So simultaneously
6 4:00 p.m. on Friday.

7 Brand-new topic. Did you do the stipulated timeline?

8 **MR. JACOBS:** We're, I would say, a third to half of
9 the way down the path on stipulated timeline, Your Honor. I
10 think we are making progress. I think we could do a better job
11 if we had more time, on the stipulated timeline.

12 **THE COURT:** I will give you more time.

13 Let me explain to you the way it's used. One thing
14 I've learned in this job -- and I work hard at it -- is that I
15 see the entire trial in kind of a stereo way.

16 One of the tracks that I view the trial on is, how is
17 the jury absorbing the information? I don't go in there and
18 ask them, of course. I don't do that. But I try see the trial
19 from the viewpoint of the jury.

20 Not only as -- you heard me say earlier how much I
21 empathize with the jurors who have to drive from all over the
22 district, but I also see it from the point of view: Are the
23 lawyers presenting it in a way that the jury will grasp what's
24 going on, and what are the ways in which we can assist the jury
25 to comprehend the evidence?

1 You've already heard me say -- and you've done this,
2 I think -- those color coded charts will be a godsend for the
3 jury.

4 You've done that already, right?

5 **MR. JACOBS:** Yes, Your Honor.

6 **THE COURT:** My hat is off to you.

7 The other thing that is very useful to the jury is to
8 have a chart that's not much bigger than the one up there,
9 maybe twice as big, but can be seen from where the jury box is
10 easily, that has the main, key dates.

11 I'll make some up here. Like a timeline. And it
12 says Java released 1995. Or Google releases Android 2008. And
13 the specific date, if need be.

14 There will be, probably, eight to 12 dates that are
15 all you need. Not all you need, but that will be the framework
16 around which the jury will integrate the rest of the evidence.

17 So, for example, when a witness is on the stand
18 testifying about some meeting that occurred in January 2009,
19 the jury can glance up at that timeline and see the place in
20 the overall story where that episode fits in.

21 It is a godsend for them to be able to do that. It
22 helps them comprehend the evidence. Otherwise, they are trying
23 to remember, What was the date of that? And then they get
24 confused on some point and they actually place that meeting at
25 a different point in time.

1 Now, if what you want is confusion because you're
2 afraid you're going to lose the case if the jury understands it
3 then, of course, you don't want any of this. You want to be
4 smokescreen city.

5 But I don't think you lawyers -- I think you lawyers
6 genuinely believe that you should win. Each side. That's the
7 way you think. And maybe -- you know, who knows. One of you
8 is not going to win, but we don't know who it is yet. But if
9 you believe that the facts and the law are on your side, you
10 ought to want this.

11 What is that noise that I hear?

12 **MR. KWUN:** That was me. I'm sorry, Your Honor.

13 **THE COURT:** Okay. So I urge you to do this simple
14 timeline. It's nonargumentative. It should never have
15 something like, in an employment case, employee terminated
16 fraudulently on such and such date, or, employer lied about
17 this. No. We don't put argument in there. It's simply the
18 facts. And only the key facts.

19 Now, I will tell -- in fact, you ought -- we're going
20 to reduce it to an 8 by 10. We'll give it to the jury so they
21 can make their own notes on it, so they can fill in. We will
22 never see what they fill in. But I promise you, this is a very
23 useful tool for jury comprehension. And the other is the
24 color-coded charts.

25 All right. So try to do this within about a week.

1 By April 9th. More like 10 days.

2 Now, in addition, of course, you can have your own
3 timelines that you can show in argument and opening statement,
4 that will go beyond the -- you may want to give the jury more
5 detail. Of course, you can do that. But the one I'm talking
6 about is a stipulated one that would be available to the jury
7 at all times, to help them understand the framework of the
8 case.

9 All right. Now we go to a problem that I don't think
10 will come up here but let's make sure of that. Here's the way
11 I do stipulations. If you have ten stipulations or a hundred
12 stipulations, you've actually got to read it into the trial
13 record, and then it becomes part of the record.

14 And I will constantly tell the jury that not one word
15 you ever say as a lawyer is evidence. And you'll hear that
16 speech many times because I've learned that the lawyers will --
17 especially in your questioning, you will try to insinuate
18 things that are not even in the record, and expect that the
19 jury believes that and base a decision on it.

20 I tell them repeatedly not one word that you lawyers
21 say is evidence. It's what the witnesses say under oath that's
22 the evidence, plus the documents.

23 But a stipulation, I will tell them, is completely
24 different. That is evidence. So you will get to read that to
25 the jury and so forth. Be sure you do that the way that I

1 wanted you to do that.

2 But, now I want to address a point that I fear could
3 come up in this case that is beyond that because of the large
4 record here.

5 I have a fear that one side or the other at the end
6 of the case or halfway through the case is going to say,
7 "Judge, they've already conceded that in the papers." And it's
8 not testified to. There's no stipulation on it. And you're
9 asking me to go back and find, out of the hundreds of documents
10 filed, something -- something that you think has been taken out
11 of the case by agreement or by just a concession in a brief.

12 No. That doesn't work that way. If you want
13 something like that to be instructed to the jury or for me --
14 for me on the issues I've got to decide, you ought to make a
15 motion that it be deemed accepted, for purposes of the trial,
16 that this is true.

17 Because I cannot be in the position halfway through
18 the trial or at the end of the trial with you saying we -- we
19 relied on some statement in a brief three months ago. And when
20 I go back and look at it, it maybe hedged, it -- it may not be
21 quite as clear as you think it is.

22 A lot of money turns on this trial, and I'm going to
23 be pretty -- I'm going to make you do it the right way.

24 So, now, of course, anything that is said when the
25 trial is underway, at least for the issues that I've got to

1 decide, if you admit something to me during the trial you're
2 going to be bound by it. I'm going to hold you to it. Or if
3 you admitted something to me in the past, I will hold you to
4 it. But you as the lawyer may not be able to hold the other
5 side to it.

6 There is a difference between you and me on this. If
7 I think something has been taken out of the case, for
8 example -- I'm not going to give you any examples -- then I
9 might not even on my own motion let you put it back into the
10 case. But that's me doing it.

11 If you as the lawyer want to keep the other side from
12 doing it, you better bring that motion to have it deemed
13 admitted for purposes of the trial.

14 So I just see it coming. I want to head it off and
15 give you fair warning that you ought to think through, if there
16 are three or four things you think are critical that have been
17 taken out of the case by admission, you best tee that up and
18 have that briefed quickly, in fact.

19 All right. When we get to the phase two -- I want to
20 go back to the phase one. I had asked you to come up with a
21 video that we could play to the jury. It won't come out of
22 anybody's time. It will be free time for you. But it will
23 help the jury. And a tutorial on whatever you think they need
24 to see.

25 Are you going to be able to do that, or is this a

1 hopeless task?

2 **MR. JACOBS:** The latter, Your Honor.

3 **THE COURT:** Hopeless.

4 **MR. JACOBS:** We've consulted with each other and
5 we've spent a fair amount of time trying to imagine on our side
6 how we could do this in a way that would be acceptable to both
7 sides.

8 **THE COURT:** That's fine. But it's going to come out
9 of your time then. When you're educating the jury with your
10 own witnesses, then it just comes out of your time.

11 **MR. JACOBS:** Understood. Thank you, Your Honor.

12 **THE COURT:** But don't appeal --

13 **MR. JACOBS:** Sorry.

14 **THE COURT:** On appeal, I want it to be clear to both
15 sides I was willing to give you free time to do this. I think
16 it's a reasonable request, and I'm surprised that you lawyers
17 can't take advantage of that. All right.

18 The FJC video, when we get to phase two, I'm going to
19 show that. That's -- I assume no one has an objection to it.
20 We don't even need to get into it until phase two.

21 You know what I'm talking about?

22 **MR. VAN NEST:** We do, Your Honor.

23 **THE COURT:** Any objection to that?

24 **MR. JACOBS:** No, Your Honor.

25 **MR. VAN NEST:** No.

1 **THE COURT:** All right. That won't come out of
2 anybody's time.

3 Okay. I made a very small adjustment to the jury
4 trial guidelines. I hope you make sure you're reading the
5 current version so that you don't get caught up on that.

6 I want to say, sometimes we judges get criticized
7 because we each have somewhat different ways of doing things,
8 and the lawyers wish everyone was -- came out of a cookie
9 cutter. And I just want to explain to you why that is an
10 unreasonable expectation on your part. I know this.

11 Every one of you have tried cases before this. And
12 the first thing you do when you sit down with the judge is to
13 say, Judge, how do you like to do X? How do you like to do Y?
14 Right? You've done that many times.

15 Well, knowing that you're going to ask that question
16 I've just laid it out for you in writing. So, now, don't have
17 heartburn over the fact that the judge is answering your
18 question in advance.

19 I'm still happy to answer any other questions you
20 have. But if you don't have some guidelines the trial will
21 become a mess with a lot of finger pointing. This reduces the
22 finger pointing and helps it go more smoothly.

23 At 7:30 we will convene. The jury gets here at 7:45
24 every day. We will start by 8 o'clock. Please do not have in
25 mind that we will have long-winded motions in limine in that

1 time period. This will be trial. Things will go quickly.

2 There will be motions in limine, but they may be two
3 or three done in the 30-minute period. And then, you know, if
4 a lot of money turns on some ruling, that's the way trials are.

5 We start at 7:30. By 8 o'clock we have rulings. The
6 jury comes in; we continue with the evidence.

7 Now, I urge you, if you see an important point coming
8 up, that you not wait until the night before. You ought to see
9 it coming and say, Judge, in three or four days we're going to
10 have this problem. It's a big, important issue, we want to put
11 a brief in on it sooner.

12 I'm totally open to that. I encourage it. So there
13 we are.

14 Now, the last big trial that I had, which was a
15 criminal case, but we would get motions in limine at 1:30 a.m.
16 My law clerk was here. Not that I made her be here. She
17 wanted to be here. But I'm not going to go through that again.

18 So I'm going to have another rule, and that is that
19 you get out of here at 1:00 o'clock each day. You have notices
20 to give to the other side. You must be timely.

21 If there's something that must be brought to my
22 attention so that we can rule on it, by 8:00 p.m. that day you
23 should file your motion. And by 10:00 p.m. the other side
24 should respond.

25 So that way my law clerk -- he's going to be here

1 late anyway; and he already knows this; he's over this
2 smiling -- but he can at least get it ready for me when I come
3 in here at 5:00 a.m. in order to get ready for the trial day.

4 And we'll do our best. Every day there will be some
5 issues, and that's just the way trials are. I'm okay with
6 that. But you need to realize that we don't -- we can't do
7 five or six motions a day. It's more like one or two.

8 And, you know, it's a wonderful day when I show up
9 and you say, We're ready to go, we have no issues. That's what
10 I really want to hear. But I don't expect that except on rare
11 occasion.

12 So when we get to the trial, the law and motion side
13 recedes a bit, and the excellent trial advocacy of you lawyers
14 begins to shine. The poor judge recedes into the background,
15 and it's you and the jury and the witness.

16 It's the magic triangle that goes between that
17 lecturn -- which I will let you push down to the end so you
18 will be close to the witness and the jury. The witness and the
19 jury, that magic triangle. And I have nothing to do with it
20 except rule on objections.

21 And your witness may be pummeled on
22 cross-examination. Great. That's what trials are for. You
23 just cream the witness on cross-examination. I am looking
24 forward to seeing many of those examples.

25 And if you try to save your client, too bad. It will

1 not work. I'm going to let that witness be beaten up as bad as
2 possible.

3 This is not a deposition. This is the U.S. District
4 Court. And we are going to let you good advocates -- and
5 you're both excellent -- just go to town on these witnesses.

6 Now, that brings me to this rule. In New York -- I
7 think we discussed this, didn't we, the rule of while on
8 cross-examination you cannot talk with your client -- you
9 cannot talk with the witness, whether it's your client or not,
10 while they are on cross-examination.

11 Did we go over that?

12 **MR. VAN NEST:** We did.

13 **THE COURT:** That's the rule. So if your client is in
14 the middle of being creamed and there's a break, you just have
15 to say -- you know, give them your best smile, but you cannot
16 try to rehabilitate them in the break.

17 The Court has the ability to control the -- the
18 communications with any witness while they're on the stand
19 under cross or, for that matter, under direct.

20 But I don't care about the direct. It's the cross
21 that I care about because I think it -- the ability to do a
22 good cross-examination on a witness sometimes turns on whether
23 or not they are being rehabilitated in the hallway.

24 I had some more things I wanted to bring up with you.
25 Oh, one was the reallocation of time. I read your brief and I

1 very much appreciate it. I think at least one hour now can be
2 taken from phase two into phase one.

3 So right now I'm just going to say one hour. And so
4 we'll move -- the phase one can be 17. To my mind, now that
5 we're down to just two patents, that part will be more
6 straightforward. And the part that is going to be a little
7 harder is phase one.

8 So I'm going to -- but you don't have to use your
9 time there. You can bank it and use it later. But I will
10 allow you to move -- so we'll readjust the time to move one
11 hour from phase two to phase one.

12 **MR. JACOBS:** I'm sorry. Could you restate, Your
13 Honor? I think I heard two different things. The phase one is
14 lengthened by an hour?

15 **THE COURT:** Yes.

16 **MR. JACOBS:** And phase two is shortened by an hour?

17 **THE COURT:** It is. But if you wind up having extra
18 time in phase one, I've already said you can carry it forward
19 and use it in phase two anyway.

20 **MR. JACOBS:** Thank you.

21 **THE COURT:** Okay. Well, this may be our last
22 opportunity to meet before 7:30.

23 Very quickly, after 7:30 we'll do a few housekeeping
24 things. But probably by 8:00 a.m. we will have this room full
25 of the venire. And we will be getting right down to jury

1 selection and possibly opening statements that very day. So I
2 want to give you this chance to bring up any other issues that
3 you want to raise with me.

4 How about on the plaintiff's side, any issues?

5 **MR. JACOBS:** Something that may sound a little
6 detailed has been -- I've been ruminating on, in light of Your
7 Honor's instruction on impeachment.

8 So, as I understand it, if a witness departs from
9 prior testimony --

10 **THE COURT:** Come up here so the court reporter can
11 hear you.

12 **MR. JACOBS:** Thank you.

13 If a witness departs from prior testimony, the
14 protocol is to address Your Honor, say -- you'll have the
15 deposition transcript -- "Your Honor, I would like to play the
16 video clip of lines so and so to so and so."

17 Your Honor would look at the transcript, see if it's
18 impeaching prior testimony, and then that is the end of it.
19 The jury hears the contrary testimony.

20 As I understand your direction on this, one is not to
21 engage in a dialogue with the witness about: Were you under
22 oath? Did you understand that you were -- that the testimony
23 you were giving then could be used in court? Et cetera.

24 So that's the predicate to the question I'm going to
25 ask. So do I have an understanding so far?

1 **THE COURT:** It's 99 percent correct. All right. So
2 go ahead. Give me your question.

3 **MR. JACOBS:** So the question is this. Impeachment
4 leaves a factual question on the record. Is it permissible
5 under Your Honor's trial guidelines to go back to the witness
6 and ask the witness to -- a question that would conform the
7 actual testimony on the record of that witness to the prior
8 testimony?

9 **THE COURT:** For the cross-examiner to do that or for
10 the proponent of the witness?

11 **MR. JACOBS:** The cross-examiner.

12 **THE COURT:** I'm sorry, give me a more -- I don't
13 understand what you're saying.

14 **MR. JACOBS:** Sure.

15 **THE COURT:** Why would the cross-examiner want to
16 rehabilitate the witness?

17 **MR. JACOBS:** The cross-examiner would not. The
18 cross-examiner would want the witness to conform his testimony
19 to the prior admission.

20 **THE COURT:** Prior admission by that same witness.

21 **MR. JACOBS:** Exactly. So the witness testified in
22 his deposition the light was red. On the stand the witness
23 testifies the light is green. Your Honor, I would like to show
24 the videotaped testimony of this witness at his deposition,
25 page 34, lines 10 through 15. We play the videotape.

1 So the witness's testimony on the stand has now been
2 impeached by the deposition. Now I would like to ask the
3 witness, because it's important to me that what was said at the
4 deposition be on the record as a correction --

5 **THE COURT:** Oh, I see your point.

6 Okay. The answer is, yes, you can do that. I'll
7 give you a scenario that I approve of, and then give you an
8 example to the contrary, that I don't approve of, and explain
9 why.

10 Let's say that at the deposition they said the light
11 was red. They come in here at trial and say, I believe the
12 light was green.

13 Then you get to cross-examine. And if you lawyers
14 don't abuse it, I would let you start off by saying,
15 Mr. Witness, you said that the light was red. Do you remember
16 that? The witness says, Yes. That's so the jury will follow
17 what you're doing. I'll come back to why that can be abused in
18 a minute.

19 But then you say, Your Honor, I would like to read
20 from page X and Y. And you read from the deposition:

21 **"QUESTION:** What color was the light?

22 **"ANSWER:** The light was red."

23 All right. Then you may ask the following question:

24 "Mr. Witness, will you stand by the testimony

25 that I just read from your deposition?"

1 "Stand by," that's the key phrase.

2 And then the witness will say, usually, yes, because
3 they will be embarrassed to say anything else. But if they
4 say, "No, I don't agree with that anymore," then they are free
5 to do that.

6 All right. The reason I am -- I don't like it when a
7 lawyer says, "I want to refer you to your testimony a few
8 minutes ago where you said the light was red" -- I'm sorry,
9 "was green."

10 The lawyers sometimes take liberties, put words in
11 the mouth of the witness that they actually didn't say. And
12 that's also why I don't like for you to say, "Isn't it true in
13 your deposition you said the light was red?" Because if you
14 actually go back and read it, they didn't say that. They say
15 something like, "Somebody told me the light was red." And the
16 witness cannot remember what they said in 300 pages of
17 deposition. So it's just best to read it.

18 So I -- you certainly have my permission to say,
19 "Will you stand by the testimony I just read from your
20 deposition?"

21 Now, if you're going to play it, a video of it, you
22 can say, "Will you stand by the testimony we just saw from your
23 deposition?" Saw and heard, I guess. You can rephrase it.

24 Remember that for purposes of appeal it becomes a bit
25 of a mess because the court reporter does not take down what is

1 played on a video. The court reporter only takes down the
2 spoken word in the courtroom. So you have to then put in a
3 clerk's exhibit that is a CD of what you played. You must keep
4 exact track of that so that it won't be a problem later. That
5 then becomes a bit of a mess for the Court of Appeals because
6 they don't have the impeaching material right there in the
7 reporter's transcript.

8 So, does that answer the question?

9 **MR. JACOBS:** Yes.

10 **THE COURT:** Good. Now, that's the use of
11 depositions.

12 Now I want to say one other thing about what
13 constitutes impeachment. Sometimes lawyers think that anything
14 that generally contradicts the general themes of the other side
15 is impeachment for any witness associated with the other side.
16 No. That's not true. And I won't allow that.

17 So if you are trying -- let's say the first witness
18 on the stand is somebody who testified to subject X, and you
19 want to get up there and -- to start making your points about
20 the different other things. You can't start asking him
21 questions like, Did you know that so and so testified to X?
22 Just to start publishing to the jury your -- no.

23 Impeachment almost always has to be a direct
24 contradiction with something they previously said in a
25 deposition, a letter, e-mail, something like that.

1 I won't say that I would never allow -- here's a good
2 example, would be kind of like impeachment, like the videotape
3 of somebody who claims to be disabled when, in fact, the
4 insurance company shows that they are lugging heavy grocery
5 bags up four flights of stairs or out playing tennis.

6 But even there, there's a way to set it up. "Isn't
7 it true that you lugged four bags of groceries up the stairs?"
8 "No, I never did that." Then you play the video that shows
9 they did. It's not a prior statement, but I would allow that.

10 But if you're not going to have a prior statement,
11 there's got to be something close to the video example to be,
12 quote, impeachment.

13 One last thing I need to say on the question. For a
14 party witness you don't even need -- it can be read for any
15 purpose. It does not have to be only for impeachment.

16 And when you say that you want to read something, I
17 will pause only briefly to let the other side object. And I
18 mean two to three seconds. Because if I give you more than
19 that, it will destroy the effect for the jury. Meaning the
20 delay. They will forget what they are waiting for.

21 So if you are on the defending side you need to be
22 Johnny on the spot and have it read -- I mean read it quickly
23 and not say things like, What page was that? What line number
24 was that? No. You say, Page 69, line 1 through 10. I'm going
25 to pause. Proceed. If I don't hear an objection. So you've

1 got to be very quick on this. Otherwise, the person doing the
2 impeachment loses the impact of that contradiction.

3 I did try a few cases. I've seen hundreds of cases.
4 I've seen more than a thousand witness examinations in this
5 job. I think I've seen every trick. And -- "trick," I don't
6 mean it in a bad -- what's the word I mean? Strategy, tactic.
7 And so you don't need more than a couple of seconds. Maybe,
8 occasionally, I'll give you more than that. But you've got to
9 be ready to state your objection.

10 And if it's a party -- party testimony, it's almost
11 always going to be overruled. So you -- okay. Can I give you
12 one last word on leading, leading a witness? This comes up all
13 the time.

14 In my book, it's okay to lead a witness. Both sides
15 can lead all day long. It actually helps. Except in one very
16 important case. If it's a witness affiliated with you and it's
17 something important, you may not lead.

18 But, for example, the USA attorney, when they call
19 witnesses to the stand, they lead them right up to the
20 important meeting. They'll say, On June 27th, did you have a
21 meeting with so and so? Yes. Was so and so present? Yes.
22 What was said? And then they stop leading and go to what was
23 said by whom.

24 And that way they stop leading and they just do it
25 automatically. They are trained to do that. In most cases

1 they do a great job. I know you will, too.

2 It's okay with me if you lead to help put the jury in
3 the proper frame of mind. But as soon as you get to something
4 that's controverted, you should not lead, and you should stop
5 on your own and not wait and see how much you can get away
6 with. Otherwise, it's okay to lead, and the other side -- the
7 side that's not affiliated with the witness can lead all day
8 long. It helps get at the truth. So that's the leading thing.

9 And then the other thing that comes up, even with the
10 best of trial lawyers, is the double negative question. You
11 know what I mean by that? And it will go like this:

12 "You didn't give notice, correct?"

13 **"ANSWER:** No."

14 What does that mean? Does that mean, yes, it's
15 correct I did not give notice, or, no, it's not correct? It's
16 impossible to know.

17 Maybe from the inflection you could tell, but on a
18 cold record it won't be. And I promise you even from the
19 inflection it's rare that you can.

20 In my view, the proper form of that question is, if
21 you've got to be leading on it, is, "You didn't give notice,
22 did you?" And if they say "no" it cures that problem.

23 It's your record. I will remind you of this because
24 I know it will happen. It's happened in hundreds of trials
25 now. And you just won't be able to help yourself.

1 But I urge you to think about whether you're -- you
2 know when you're using the negative in the question it
3 sometimes -- if you say a negative followed by "correct" that's
4 the formula and recipe for disaster.

5 And I bring this to your attention because I've seen
6 excellent lawyers just can't help themselves. They like the
7 word "correct." But you should -- when "correct" is connected
8 with a negative, it leads to this problem.

9 Okay. Those are some of the -- I'm going to bring
10 this to a close unless you've got more to bring up with me.

11 Yes, Mr. Van Nest.

12 **MR. VAN NEST:** Could I have an opportunity, Your
13 Honor, briefly --

14 **THE COURT:** Of course, yes.

15 **MR. VAN NEST:** -- on some mechanical witness issues?

16 **THE COURT:** Fine.

17 **MR. VAN NEST:** So we can advise our witnesses.

18 **THE COURT:** Yes.

19 **MR. VAN NEST:** I'm assuming under your rules that
20 within a phase -- let's take the copyright phase -- if Oracle
21 calls one of the Google employees adversely, we would be able
22 to put all of their testimony into the record while they're
23 here.

24 **THE COURT:** No, not if there's an objection. It
25 would depend on a case-by-case thing.

1 And so if they don't object -- let's say they do
2 object, and you say, It's only going to take five minutes, can
3 we please do it? I would say yes. If it's going to be 40
4 minutes the answer is probably going to be no, because it's
5 interrupting the other side's case.

6 **MR. VAN NEST:** So if an adverse witness is called,
7 Your Honor's general rule would be the scope of the cross would
8 be limited to the scope of the direct, and you can't go into
9 new areas?

10 **THE COURT:** No, no. If you -- it comes up all the
11 time. And sometimes -- here's many ways to work this out.
12 Let's say you do it strictly by the book. The answer would be
13 then you tell me how long is it going to be. If it's five
14 minutes and very short, and it's going to save that witness a
15 second trip, by all means we'll do it.

16 But then if you say to me, well, I just want to bring
17 this up now, but we're going to call him back anyway, then
18 you're just using it for argument.

19 So, I need to know, is he coming back? And if it's
20 going to be 40 minutes and interrupt the plaintiff's flow of
21 the case, no, we don't do that because the plaintiff has a
22 right not to have their case interrupted at that point.

23 So the other thing is, usually, the lawyers will work
24 this out. And I've only had one or two of these cases where I
25 have to decide. That's the practical trial answer.

1 When they can't agree, then I do it case by case to
2 see. And sometimes I go ahead and let them do it to save the
3 witness a second appearances. And sometimes I don't do it
4 because it's too much of an interruption of the other side's
5 case.

6 **MR. VAN NEST:** Fair enough. I'm happy to have that
7 guidance.

8 **THE COURT:** All right.

9 **MR. VAN NEST:** The other key question is, your rules
10 require that when giving the other side notice of a witness to
11 be called, you give notice of the exhibits that you're going to
12 use with the witness.

13 I assume that would apply whether you're calling your
14 own witness on direct or whether you're calling an adverse
15 witness.

16 In other words, those rules on giving notice of
17 exhibits ahead of time, as your rules contemplate, would apply
18 if I'm calling Mr. Ellison, for example, as an adverse witness
19 and I give them notice, I've got to give them the exhibits I'm
20 going to use with Mr. Ellison, even though, essentially, I'm
21 cross-examining him. That's how I understand the rules.

22 **THE COURT:** If it's solely for impeachment then you
23 don't have to give notice. But, remember, if you -- if he
24 gives you an answer -- if you want it to go in as a
25 case-in-chief document, you should give notice.

1 If you want to be coy and hold it back for
2 impeachment only, the document will probably not go into
3 evidence. But you can read from it, from the impeaching part.

4 **MR. VAN NEST:** Fair enough.

5 **THE COURT:** But it has to be impeachment. It can't
6 be one of these sideswipes where -- and if he were to admit the
7 point, you would not get the document in because there wouldn't
8 be any basis to impeach.

9 **MR. VAN NEST:** Understood. Understood.

10 **THE COURT:** I hope it's clear. I hope I said in my
11 guidelines that impeachment documents do not have to be
12 disclosed. But the penalty for that is, even if you do it
13 right, you may lose the chance to get a good document in in
14 your case-in-chief.

15 **MR. VAN NEST:** You did. I just wanted to be sure
16 that the disclosure rules outside of impeachment apply whether
17 you're calling someone that's a direct witness that's your own
18 party or an adverse witness. And they do.

19 **THE COURT:** They do.

20 **MR. VAN NEST:** They do. Understood.

21 Both sides have listed a large number of will call
22 witnesses for the copyright phase. And I'm wondering if Your
23 Honor would entertain some deadlines prior to trial, next week,
24 in which each side exchanges a good faith will call list.

25 I'm thinking about middle of next week --

1 **THE COURT:** I've had this problem in other trials,
2 and I will give you the solution I came up with in the big
3 criminal case where exactly this problem came up.

4 Let's say we pick the number 12, and you have a --
5 the person who is putting on the witnesses, it will be the
6 plaintiff at some point. But we'll turn to you at some point
7 and you'll be putting on your case, and you have a rolling list
8 of 12 witnesses.

9 You cannot call anyone to the stand unless they have
10 been on that list for 72 hours -- I think it was 37 hours, is
11 what we came up with. Don't ask me how we got that. There is
12 a reason for it. But it works from like 5 o'clock until, you
13 know, a day and a half later. And that was a list that you
14 updated every day, and you would have 12 people on there.

15 So then the other side would know they've got to
16 prepare for 12 different crosses. But they know for sure it's
17 not going to be somebody else. It won't be number 13, who
18 comes out of left field.

19 Now, it doesn't have to be 12. It could be -- in a
20 criminal case where you have a lot of short witnesses, you
21 needed that much flexibility. In a case like this, maybe the
22 answer is six, that you -- if that is a problem, I'll tell you,
23 I am going to enforce a rule like that.

24 You cannot have 25 people or 20 people listed as the
25 people you're going to call and just force the other side to do

1 a lot of busywork. And I will put my foot down on that one and
2 just say -- and then you'll be deemed to have rested if you
3 have nobody on your list that you can call.

4 **MR. VAN NEST:** Let us work together, and with that
5 guidance I think we will be able to work it out.

6 **THE COURT:** You let me know.

7 **MR. VAN NEST:** We will.

8 **THE COURT:** I think this rule worked pretty well in
9 that other case. I think it would work okay here. And you
10 lawyers could agree on what the magic number is. So I won't
11 order that yet, but I think you two should just agree on some
12 procedure like that to sort this out.

13 **MR. VAN NEST:** Thank you. We'll try to do that.

14 Last issue, Your Honor, is -- pertains to the
15 copyright phase. And that is, in light of what we all know are
16 somewhat complex rules affecting the copyright case, would Your
17 Honor entertain a slightly more elaborate set of
18 preinstructions?

19 I'm not intending that you would preinstruct on the
20 entire set of copyright liability.

21 **THE COURT:** Sure. I would be happy to look at what
22 you have to say. I'm all in favor of giving as much guidance
23 as I can to the jury, without saying something that I regret.
24 Because that could happen.

25 And so if you want to submit some short

1 three-or-four-page proposal -- I'm going to say something, but
2 I would make it general at first. And then when we instruct
3 the jury, it would be detailed at the end of the evidence.

4 But I'm in favor of what you're proposing. It's just
5 that I don't want to -- I don't want to regret that I said
6 something about the copyright law that turns out to be wrong.

7 **MR. VAN NEST:** We'll keep that in mind, of course,
8 Your Honor.

9 **THE COURT:** So both sides can be happy to receive
10 those proposals.

11 **MR. VAN NEST:** We'll do it. That's all I have, Your
12 Honor. Thank you.

13 **THE COURT:** Mr. Cooper, please come forward. You had
14 a question.

15 **MR. COOPER:** Yes, I do, Your Honor. On behalf of
16 Dr. Kearl, I have -- I'm in a rather unique situation. I have
17 a couple of questions.

18 One is, as you know, we have delivered Dr. Kearl's
19 report to you in chambers. We have not filed it because it
20 contains confidential information.

21 Last night, I delivered a copy -- a draft copy of his
22 deposition. His deposition was taken Monday. The rule -- Your
23 Honor's order of September 9th provides that after you have
24 received the report and the deposition, you may direct
25 questions to Dr. Kearl.

1 I've raised this with counsel for the party. And I
2 wanted to inquire as to --

3 **THE COURT:** Have both sides now deposed him?

4 **MR. COOPER:** He has been fully deposed. And they
5 have until April 2nd to file challenges.

6 **THE COURT:** So the question to me is what?

7 **MR. COOPER:** The question to you is, your order of
8 September 9th provides that you have an opportunity to ask him
9 questions based upon his report and his deposition.

10 And my question was when you would intend to do that,
11 if you're going to do it, and would it be in advance of the
12 opportunity for counsel to file their challenges to Dr. Kearl?

13 **THE COURT:** Very good question. I'll have to think
14 about it and try to get out an answer today. I just don't want
15 to -- I don't know.

16 **MR. COOPER:** Okay.

17 **THE COURT:** Can I raise one with you? When we
18 present Dr. Kearl, you're going to do the examination.

19 **MR. COOPER:** I will do the direct examination, yes.
20 And one of the questions -- another question I had for the
21 Court is, will there be a time limitation on the amount of time
22 that Dr. Kearl can testify both direct and cross?

23 **THE COURT:** It will be in addition to -- it won't
24 come out on -- the direct won't come out of anybody. The cross
25 might come out of somebody's time, but the direct is going to

1 be in addition to.

2 **MR. COOPER:** Okay.

3 **THE COURT:** And I don't know. When we get closer,
4 I'd be in a better position to tell you. But if the -- if the
5 two other experts, say, each take an hour on direct then,
6 certainly, he should get at least an hour on direct.

7 So my thinking is that at least an hour and maybe
8 more would be in order for the direct examination. Could be as
9 much as two hours. Somewhere in that range.

10 **MR. COOPER:** Okay. And my final question or comment
11 is that the -- Your Honor's order of September 9th leaves open
12 how Dr. Kearl will be presented to the jury. I've raised this
13 with counsel for the parties. And this is still an open
14 question. I'm not sure we're going to resolve it this morning,
15 but how he will be identified to the jury has not been
16 resolved.

17 **THE COURT:** What do you all propose?

18 **MR. COOPER:** I am indifferent. I believe that what
19 has happened in other cases is that he is just identified to
20 the jury as an independent expert, and then counsel for the
21 parties are instructed that they cannot question deeper than
22 that.

23 **THE COURT:** Well, the jury would have to understand
24 that he has not been retained by either side.

25 **MR. COOPER:** Right.

1 **THE COURT:** It might come out that he's being paid,
2 and paid by both sides. But I think -- I'd like to get the
3 input of the lawyers on what you wanted me to say on this, and
4 what he should say.

5 **MR. COOPER:** I'm indifferent.

6 **MR. VAN NEST:** Your Honor, I think something very
7 short. He's an independent expert who is not retained by the
8 parties, but he's been appointed by the Court. Just that much.

9 **THE COURT:** What does Mr. Jacobs say?

10 **MR. JACOBS:** I think we would like to consider and
11 report back to you on that, Your Honor.

12 **THE COURT:** Okay. Can you do that by Friday at
13 4:00 p.m.?

14 **MR. JACOBS:** Sure.

15 **THE COURT:** All right.

16 **MR. COOPER:** That's all I have. Thank you.

17 **THE COURT:** Those are great questions.

18 **MR. NORTON:** Your Honor, I have one further question.

19 **THE COURT:** Sure.

20 **MR. NORTON:** Brad Norton.

21 With respect to Dr. Kearl, under Rule 706, the
22 court-appointed expert can be called by any party. And so if a
23 party were to call Dr. Kearl and examine him directly, would
24 the party's time limits apply, or would that be treated as
25 separate time?

1 **THE COURT:** If you call him, it's definitely going to
2 come out of your time. That's for sure.

3 But I didn't realize that anyone could call him. If
4 that's true -- is that true? Is that what the rule says,
5 anybody can call him?

6 **MR. NORTON:** Under Rule 706, either party may call
7 the expert appointed under Rule 706, yes, Your Honor.

8 **THE COURT:** Even if I'm going to have him called
9 anyhow? Or is that just an instance where if the judge -- I'm
10 going to have to look into that.

11 But to answer your question, if it's true that you
12 can do that at your own discretion then, of course, it's going
13 to come out of your time.

14 **MR. NORTON:** Understood. Thank you, Your Honor.

15 **MR. COOPER:** My only question in response to that,
16 Your Honor, would be whether Mr. Norton intends to call
17 Dr. Kearl before Dr. Kearl is put on in direct examination by
18 me, or after that.

19 **THE COURT:** Well, what's the answer to that,
20 Mr. Norton?

21 **MR. NORTON:** I confess that is a decision we have not
22 yet made. And if Mr. Cooper is going to -- is certainly going
23 to examine Dr. Kearl, then we'll have to decide whether, with
24 the amount of time that we have at that stage of the case, how
25 we best use it. It may not make sense for us to use our time

1 to do an examination that Mr. Cooper can do quite well. We
2 also need to think about what our jury presentation looks like.

3 **THE COURT:** My own thought was that since he does a
4 critique of both sides, that it would be best for him to show
5 up after the two experts have testified, and that he would be
6 like number three in order. That's the way I've been thinking
7 about it, but I'm open to other suggestions.

8 **MR. COOPER:** That's what we had anticipated. And I
9 anticipate that my direct examination of Dr. Kearl will be to
10 extract whatever his opinions are and then whatever his
11 comments are, whether they are criticisms or comments as to the
12 other experts, which I had anticipated would come after the
13 other experts had testified.

14 **THE COURT:** That's the way I've been thinking about
15 it, too. But I won't say -- I've got to look at this question
16 of whether or not someone can jump the gun and bring the --
17 that person in, the 706 expert in, in addition to -- would this
18 be in addition to your own expert?

19 **MR. NORTON:** Yes, Your Honor.

20 Under Rule 706, a court-appointed expert may be
21 called by any party. And we would be entitled to call that
22 expert in addition to Professor Cockburn.

23 **THE COURT:** You may be right. I'm not going to say
24 you're right yet because that scenario is coming up new. Let's
25 see.

1 It says: The witness may be called to testify by the
2 Court or any party. Further, the witness shall be subject to
3 cross-examination by each party, including a party calling the
4 witness.

5 The way I would read this is that this would be
6 subject to the Court's normal ability to control the sequence
7 and order of proof, and that since -- I think what this means
8 by "or any party" is contemplating a situation where the
9 Court -- the witness is otherwise not going to appear. But we
10 know he is going to appear and that Mr. Cooper is going to do
11 the examination.

12 And so without the benefit of any research, I would
13 say that you may not call him in your case on account of the
14 fact that he's going to be called by Mr. Cooper after both
15 experts have testified, and that his testimony will make a lot
16 more sense after both of the other experts who he's critiquing
17 have come to the jury and said their peace.

18 So this sounds like a gimmick, Mr. Norton, a gimmick
19 to seize control of the stage and prevent him from having his
20 say.

21 Now, if you come up with some authority that says I'm
22 wrong on this, I will be open to hearing it. But we're not
23 going to do that. We're going to -- you put on your expert,
24 Cockburn, and then Van Nest's expert comes, and then
25 Mr. Cooper's expert comes.

