

Volume 25

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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
)	May 17, 2012

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

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(Appearances continued on next page)

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PROCEEDINGS

P R O C E E D I N G S

1
2 **MAY 17, 2012**

12:32 p.m.

3
4 (The following proceedings were held in open court,
5 outside the presence of the jury.)

6 **THE CLERK:** Court is back in session. Case 10-3561,
7 Oracle versus Google.

8 **THE COURT:** Counsel, tell me when you're ready to
9 discuss the note from the jury. We'll just pause until you're
10 ready.

11 (Brief pause.)

12 **MR. VAN NEST:** I think we're ready your Honor to
13 discuss it.

14 **THE COURT:** How about Oracle? Is Oracle ready?

15 **MR. JACOBS:** Yes, your Honor.

16 **THE COURT:** So the note says -- from the foreperson
17 says:

18 "We are attempting to determine the scope of
19 meaning of the term "simulating execution of
20 the bytecodes..." in Patent '520. Is the
21 existence of an example of the Android code
22 not functioning ("punting") when formatted in
23 a normal simulated execution setting
24 permitted to be taken as evidence that
25 Android's array initialization diverges from

1 the patented array initialization?"

2 All right. What are the views of counsel?

3 **MR. JACOBS:** First, an observation and then two
4 points.

5 The observation is that there appears to be some
6 confusion in the question with the inserted language "when
7 formatted in a normal simulated execution setting." Because
8 I think the example that they are referring to with respect to
9 "punting" was Dr. Parr's testimony in which he asserted a null
10 pointer in the test and, therefore, it was not formatted in a
11 normal simulated execution setting. It was an artificial
12 creation. That's the observation.

13 Two points.

14 Number one, the example went to proving that -- or
15 the example that -- the experiment that Dr. Parr did went to
16 proving that stack -- the stack was not used in Android. That
17 is legally irrelevant as there is no requirement in the claims
18 that the stack be used. There is in other claims such a
19 requirement, but there is no requirement in the asserted
20 claims.

21 And, secondly, the specification does speak to how
22 the simulating execution function works when a bytecode other
23 than those that are listed as stack array initialization
24 bytecodes is encountered, and it's not inconsistent with -- in
25 fact, it's consistent with simulating an array.

1 So in Column 5, Line 44:
2 "Any bytecodes other than those listed above
3 are not recognized. The appearance of other
4 bytecodes beyond those described above
5 indicates that the clinit method performs
6 functionality in addition to statically
7 initializing an array. In this case the
8 clinit cannot be optimized. If a bytecode is
9 not recognized, the preloader considers it
10 unsuitable for optimization (or play
11 execution) and processing continues to Step
12 316."

13 So the specification is clear that if something is
14 dropped in that is not a bytecode that the clinit method would
15 ordinarily emit, then there is an exception taken and something
16 else happens. That's consistent with what happened in the
17 experiment, not inconsistent with the requirement to simulate
18 execution of an array in the asserted claims.

19 **MR. VAN NEST:** I'm not sure why we would get into all
20 that, your Honor. I think the simple answer to the question is
21 "Yes, you should give it the weight you think it deserves."

22 I mean, the answer is clearly "Yes." They are asking
23 if the existence of an example of the code not functioning,
24 i.e. punting, is permitted to be taken as evidence that
25 Android's array initialization diverges from the patented array

1 initialization.

2 That's certainly what Dr. Parr testified. He said
3 the fact that you have punting in the parseNewarray suggests
4 that it's pattern matching, not simulated execution.

5 So, I mean, I think the simple answer -- we're not
6 going to get into telling them what it means or what it should
7 mean, but they can certainly take it into account and give it
8 the weight they think it deserves. I think that's the only --
9 the only proper answer to the question. Fairly straightforward
10 I think.

11 **THE COURT:** The question is asking not a legal
12 question. It's not asking about the meaning of the
13 instructions. It's asking about how to evaluate the evidence
14 concerning how Android works.

15 Specifically, they want to know if the existence of
16 this example can be taken as evidence that the Android array
17 initialization diverges from the patented array initialization.
18 That's a fact question. That's not a legal question.

19 They are asking us to tell them how to weigh the
20 evidence. That's not a proper thing to do at this stage. It's
21 not asking about the law.

22 Now, if you two would like to -- if you both agree.
23 I'll only on do it if you both agree. We bring the jury out
24 here and you each get a five-minute argument in front of the
25 jury, supplemental argument on this point to try to answer

1 their question based on the evidence in the record. I would
2 let you do that, as long as you both stipulate it's okay.

3 But that's really what they are asking for here, is
4 some kind of supplemental argument. And that's not the --
5 that's not the proper role of this kind of a question.

6 So my inclination would be to -- well, before I tell
7 you what my inclination on exactly how to answer this, which is
8 going to be a non-answer, it would be to ask you if you want to
9 do a five-minute explanation to the jury on this point. Each
10 side gets five minutes. I'm not ordering that. If you both
11 said, "Great, we'll do it," then, fine, I think that might help
12 the jury on this point; but if you don't agree, then we're not
13 going to do it.

14 (Discussion held off the record
15 amongst counsel.)

16 **MR. JACOBS:** Your Honor, I think we can shortcut
17 this. We would prefer that the Court give the guidance the
18 Court was intending to give and not do a five-minute argument
19 on the fly.

20 **MR. VAN NEST:** Your Honor, if you're going to -- if
21 we're not going to have a supplemental argument, I would at
22 least -- I understand your Honor's point, but I think we at
23 least want to let them know that, you know, they should take
24 all the evidence into account.

25 We don't want to suggest that anything is out of

1 bounds, in other words. What they are asking is are they
2 permanent permitted to take something as evidence.

3 **THE COURT:** That's not what they are asking. You're
4 putting a spin on it. They are asking whether or not they are
5 permitted to be taken as evidence that Android's array
6 initialization diverges from the patented array.

7 If I were to say "yes" to that, then they would take
8 that to mean, well, then the judge is telling us rule for
9 Google. There is no way I'm going to do that.

10 **MR. VAN NEST:** Fair enough.

11 **THE COURT:** I'm going to say:

12 "Your question is one that goes to the weight
13 of the evidence and how to evaluate it. That
14 is for you to have decide and not for the
15 Court to give you further guidance on."

16 That's what I'm going to say. Does anyone want to
17 object to the form of that?

18 **MR. VAN NEST:** No.

19 **MR. JACOBS:** Not to the form, your Honor.

20 **THE COURT:** What is your objection?

21 **MR. JACOBS:** Substantive.

22 **THE COURT:** What is it?

23 **MR. JACOBS:** That it is legally irrelevant, this
24 evidence.

25 **THE COURT:** Well, it's too bad. That's in the

1 record. It's in the record. You didn't object to it. You
2 don't get in evidentiary objections at this point.

3 **MR. JACOBS:** I understand, your Honor, but I think
4 we're reading the question as a whole. They are starting out
5 with:

6 "We're attempting to determine the scope of
7 the meaning of the term..."

8 And they have given us an evidentiary question. I
9 guess I should further note that the claim, Claim 1, for
10 example, says:

11 "Compiling source code in the experiment is
12 not the output of a compiler."

13 So that's -- as a legal matter, that's why this
14 experiment is irrelevant.

15 **THE COURT:** Well, you don't want to do the
16 five-minute supplemental argument to explain all of that. You
17 just want to lard the record with some objection for the Court
18 of Appeals. I'm sorry, I don't buy that.

19 **MR. VAN NEST:** Would you mind reading it again?

20 **THE COURT:** Yes. I'll say:

21 "Your question goes to the weight of the
22 evidence and how to evaluate it. That is for
23 you to decide and not for the Court to give
24 you further guidance on at this point."

25 **MR. VAN NEST:** That's fine, your Honor. We don't

1 have any objection to that.

2 **THE COURT:** Let's bring back the jury and I will
3 instruct them. All right?

4 While we're waiting, at 2:00 I have a civil calendar.
5 If we get a note, I will interrupt that to deal with this case.
6 So we'll have a number of hearings. You're free to stay or
7 not, as you wish, but if a note comes out, we will pause the
8 civil calendar, bring you all back and deal with the note from
9 the jury before. So your case, in other words, gets priority
10 is what I'm trying to say.

11 **MR. VAN NEST:** How long does your calendar normally
12 run, your Honor?

13 **THE COURT:** It will go to 2:00 to 3:00 and at 3:00
14 are the CMC's.

15 (Jury enters courtroom at 12:47 p.m.)

16 **THE COURT:** Okay. Thank you.

17 **THE CLERK:** Please be seated.

18 **THE COURT:** All right. We got your note. Thank you
19 for your note. I will read it so you have it in context. This
20 is from the foreperson, 12:25.

21 "We are attempting to determine the scope of
22 the meaning of the term "simulating execution
23 of the bytcodes" in Patent '520. Is the
24 existence of an example of the Android code
25 not functioning ("punting") when formatted in

1 a normal simulated execution setting
2 permitted to be taken as evidence that
3 Android's array initialization diverges from
4 patented array initialization."

5 That was your question.

6 Now, I need to say that there are things I can give
7 you further guidance on, such as if you were to ask a question
8 specific to one of my instructions. Then usually -- I can't
9 say always, but usually I would try to answer the question that
10 is tied in to my instructions.

11 This question, though, is asking.

12 "Is the existence of an example of the
13 Android code not functioning when formatted
14 in a normal simulated execution setting
15 permitted to be taken place as evidence that
16 Android's array initialization diverges from
17 the patented array initialization."

18 Now, I have previously told you what was evidence in
19 the case and what's not evidence in the case, and you have
20 instructions on all of that. I'm not going to repeat that.
21 You have -- I've already told what you is evidence in the case
22 and what you can consider.

23 Here is my answer to the question as you have framed
24 it.

25 Your question is one that goes to the weight of the

1 evidence and how to evaluate it. That is for you to decide and
2 not for the Court to give you further guidance at this point in
3 time.

4 So I'm sorry, but that is the best answer I can give
5 you with respect to the way you have framed the question.

6 Please go back to the jury room and continue your
7 deliberations.

8 **THE CLERK:** Please rise.

9 (Jury exits courtroom at 12:50 p.m.)

10 **THE CLERK:** Please be seated.

11 **THE COURT:** While I have you here is there anything
12 else?

13 **MR. VAN NEST:** No, your Honor.

14 **MR. JACOBS:** No, your Honor.

15 Actually, timing on the JMOL oppositions. I think
16 they are currently due at 5:00 p.m.

17 **THE COURT:** Good.

18 (Laughter.)

19 **MR. JACOBS:** If that suits you, I think we can make
20 that deadline. If it didn't matter to the Court and we had a
21 couple more hours to polish, I think that would result --

22 **THE COURT:** I will give you -- I will extend it even
23 more. How much time do you really need?

24 **MR. JACOBS:** I think -- this evening, 9:00,
25 10:00 p.m.

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1 **THE COURT:** How about midnight?

2 **MR. JACOBS:** Fine, your Honor.

3 **THE COURT:** Midnight, okay.

4 **MR. VAN NEST:** Thank you, your Honor.

5 **THE COURT:** Okay. Stand by.

6 (Whereupon there was a recess in the proceedings
7 from 12:52 p.m. until 1:53 p.m.)

8 **THE COURT:** Okay. We're on the record. We have
9 another note. It says:

10 "We request transcript of a portion of
11 Dr. Mitchell's testimony be read to us. The
12 testimony concerns the topic of pattern
13 matching versus simulated execution and
14 occurred late on May 9 and again early on
15 May 10."

16 So I think you should be able to isolate the relevant
17 parts and agree on them and then we can bring the jury in and
18 read those parts.

19 Let me hear from you if you agree that you can try
20 and do that. Let me know when that's done and I will interrupt
21 the law and motion calendar to bring the jury out and we will
22 do that.

23 **MR. VAN NEST:** We will try to do that, your Honor.
24 That's what you want to know?

25 **THE COURT:** That's what I want to know. Do you think

1 on both sides we will be able to do that?

2 **MR. JACOBS:** Yes, your Honor.

3 **THE COURT:** Here is what I suggest. Why don't I send
4 in -- how long do you think it's going to take you to get that
5 done?

6 **MR. JACOBS:** Probably 10 minutes.

7 **MR. VAN NEST:** I would think it may take a little
8 longer. I would think we would need 20 to 25 minute maybe, to
9 be safe.

10 Do you want to give us a time to come back in?

11 **THE COURT:** Why don't you come back at 2:20 and let
12 me know if you've reached -- now, you need to have an exact
13 agreement. And then, of course, the court reporter is the one
14 who is going to read it.

15 So can we go off the record now and I will get
16 started with my law and motion calendar a little early so
17 somebody is here on those cases.

18 (Whereupon there was a recess in the proceedings
19 from 1:55 until 2:09 p.m.)

20 **THE COURT:** All right. We're going to go ahead. The
21 court reporter will take this down.

22 It's in Oracle America versus Google. Note from
23 Jennifer Michaels says:

24 "I'm sick. Can I get a sick day without
25 being discharged? Sorry."

1 **MR. VAN NEST:** Bob Van Nest for Google.

2 Your Honor, we conferred briefly, and we think it
3 would be appropriate to dismiss the jury for the day in hopes
4 that Ms. Michaels will feel better in the morning and be able
5 to resume deliberations. They have been deliberating now for
6 several hours; 10, 12 hours.

7 **THE COURT:** Well, that's possibly one interpretation
8 of this, but I think she means tomorrow.

9 **MR. VAN NEST:** I don't know what she means, but I
10 think even if she meant tomorrow, that would be appropriate.

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

12 **MR. VAN NEST:** Because they have already invested 12,
13 14 hours of deliberations with her.

14 **THE COURT:** Yes, but I believe they can reach a
15 verdict by tomorrow. And you don't need to have 11. We only
16 need six, and that's -- we don't have any guarantee she'll be
17 well by Monday.

18 **MR. VAN NEST:** Shouldn't we at least find out what
19 she wants? You may be right. Maybe she just wants the rest of
20 the day off. I'm not sure from the note.

21 **THE COURT:** That's a good point. Do you agree?

22 **MR. JACOBS:** Yes, your Honor.

23 **THE COURT:** All right. Let's bring in Ms. Michaels.
24 (Juror Michals enters the courtroom.)

25 **THE COURT:** Please be seated.

1 Ms. Michals, thank you for your note. I'm sorry to
2 hear that you're sick. You said:

3 "Can I get a sick day without being
4 discharged."

5 Do you mean today? You want to leave just for today
6 and be back here today?

7 **JUROR MICHALS:** I just need -- I feel like if I had
8 Friday, then I could get over this cold enough where I'm not
9 contaminating anybody.

10 **THE COURT:** What do you have?

11 **JUROR MICHALS:** I think it's a cold.

12 **THE COURT:** When did you come down with this?

13 **JUROR:** This morning or last night. This morning I
14 woke up with it.

15 **THE COURT:** I don't know the answer to whether it's
16 a -- it's a question of whether or not you should be discharged
17 or not. And I'm not saying "yes" or "no" to that.

18 But you're not actually asking to be discharged?

19 **JUROR MICHALS:** No, no.

20 **THE COURT:** You're not asking -- so I might wind up
21 just saying, if you -- well, I need to ask you this.

22 Are you able to do your job? In other words, are you
23 in a mental enough fit shape to think and deliberate?

24 **JUROR MICHALS:** I believe so. I just didn't want to
25 get everyone else sick because you asked about that at the very

1 beginning.

2 But I am coughing, sneezing and I have a cold. And I
3 want to take a nap and go to sleep. I'm tired.

4 **THE COURT:** What are the odds if we took the rest of
5 the day off and came back in the morning, you might have --

6 **JUROR MICHALS:** That will help.

7 **THE COURT:** You might bounce back overnight.

8 **JUROR MICHALS:** It's a cold. It's a virus. It's got
9 to run its course. It will help.

10 **THE COURT:** You're a nurse, right?

11 **JUROR MICHALS:** Yeah.

12 **THE COURT:** You know about these things.

13 **JUROR MICHALS:** Yeah.

14 **THE COURT:** What are the odds?

15 (Laughter.)

16 **JUROR MICHALS:** I do kids.

17 **THE COURT:** I would say that right now the odds
18 aren't good, but maybe tomorrow. You know yourself better than
19 we do.

20 **JUROR MICHALS:** I think if I had a day of rest and
21 the weekend, I think I would be excellent.

22 **THE COURT:** Of course, but that means --

23 **JUROR MICHALS:** The whole world has to stop.

24 **THE COURT:** That means we give up on the chance to
25 get a verdict by this week, and that involves 10 other people.

1 So I have to take that into account.

2 I don't want you to speak for them or for anyone
3 else. I'm just telling you what the general issue is there.

4 But if this was a matter of -- you think they are
5 good odds you would feel better enough to push on and soldier
6 on tomorrow, then I'm much more sympathetic to that idea. If
7 you're telling me you need all the way to Monday, I'm not
8 saying no. I would want to talk it over with the lawyers.

9 But I really am trying to find out what it is that
10 you think, what the options here are.

11 **JUROR MICHALS:** I think the afternoon of napping
12 would help immensely. I'm not going to say I'm going to be
13 better, but I could power on through, because I would like to
14 have a verdict.

15 **THE COURT:** Any questions that the lawyers have?

16 **MR. JACOBS:** No, your Honor.

17 **MR. VAN NEST:** No, your Honor.

18 **THE COURT:** All right. Why don't you go back in the
19 jury room. I have an idea, and I'm going to run it by the
20 lawyers.

21 (Juror Michals exits the courtroom.)

22 **THE COURT:** She doesn't sound good.

23 Here is what I suggest we do. We bring in the jury,
24 take the rest of the day off, hope she's better in the morning.

25 But if she's not feeling up to it, we tell her it's

1 okay to call in and say she's too sick to go forward and we
2 discharge her tomorrow morning. That's what I recommend.

3 **MR. VAN NEST:** I think that will work, your Honor.

4 **MR. JACOBS:** Agreed, your Honor.

5 **MR. VAN NEST:** See how she feels tomorrow.

6 **THE COURT:** So if she is good enough to go forward
7 tomorrow, great. If she's not, we discharge her to go forward
8 with the other 10.

9 Agreed?

10 **MR. VAN NEST:** Agreed.

11 **MR. JACOBS:** Agreed.

12 (Jury enters the courtroom at 2:28 p.m.)

13 **THE COURT:** Okay. Welcome back and have a seat,
14 please.

15 So by now you know that Ms. Michals is not feeling
16 too good. She has been hanging out at the hospital too much
17 and picked up somebody's cold, which we're sorry for.

18 Here is what we're going to do. It's sort of a
19 complicated plan. We're going to let you take the rest of the
20 day off so that Ms. Michals can go home and get some rest.
21 We're going to hope, keep our fingers crossed, that she feels
22 up to going forward tomorrow. If she does not, very high
23 likelihood we will discharge her and you 10 would go forward
24 without her. Okay?

25 On the other hand, if she's able to make it, great.

1 Then we just go forward as normal.

2 So the 10 of you, all of you should try to be here
3 and continue, continue on tomorrow. Please be here. We are
4 going to go forward tomorrow no matter what. The only question
5 is whether or not Ms. Michals is up to it.

6 This is one of those situations where there is a
7 possible inconvenience to the 10 of you if we took tomorrow
8 off, because then we would be giving up the opportunity to
9 possibly finish this verdict this week. Although if we don't
10 finish it this week, that's fine. We would continue into next
11 week anyway, but, you know, that is a possibility. And I think
12 it would be an inconvenience to the 10 of you to just take
13 tomorrow off. So that's my judgment as to the best way to
14 handle this.

15 Now, two things. Ms. Michals, we do hope you will be
16 well enough to participate because you made a big investment in
17 this case. We want to see you finish it all the way to the
18 end.

19 If you are just unable to do that, please call us in
20 time tomorrow so that we will know. You should call Dawn. I
21 think you have her phone number. So that will be the way that
22 we would go. And if we get that message that you just can't
23 make it in, then we will give you the word that you will be
24 discharged on account of sickness and then we will go forward
25 with the other 10 of you.

1 Now, we -- now, as for the other 10 of you, all of
2 you really, all of you really, once you leave here today please
3 don't deliberate any more. Just go home. Get a fresh start in
4 the morning. And no more deliberating or speculating or
5 whatever. And that's the best I think we can do to get our way
6 through this.

7 So any questions about that plan?

8 (All jurors respond negatively.)

9 **THE COURT:** Anything the lawyers want me to add or
10 subtract?

11 **MR. JACOBS:** No, your Honor.

12 **MR. VAN NEST:** I don't believe so, your Honor.

13 **THE COURT:** We're going to use this extra time to
14 find those passages you wanted us to read back to you. It
15 takes some time. The lawyers have been working on it, but
16 we're not there yet. It's not as easy as just punching it up
17 on the button. It usually takes anywhere from 30 minutes to an
18 hour, and we just haven't finished it yet.

19 So this little shorter day will give us the
20 opportunity, maybe first thing in the morning to be ready to
21 read that back to you as you have requested.

22 All right? So we can now let you go. Please
23 remember all the my admonitions.

24 Ms. Michals, we are keeping our fingers crossed. So
25 all of rest of you wash your lands like crazy. I don't want

PROCEEDINGS

1 you to come down with something, okay?

2 (Laughter.)

3 **THE COURT:** Have a good day. Thank you.

4 (Jury exits the courtroom at 2:32 p.m.)

5 **THE COURT:** Okay, be seated.

6 So you lawyers please help me out and try to figure
7 out what -- what readbacks we will read back tomorrow.

8 **MR. VAN NEST:** We're working on that, your Honor.

9 **THE COURT:** See you in the morning.

10 (Whereupon at 2:23 p.m. further proceedings
11 in the above-entitled cause were adjourned
12 pending jury verdict.)

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CERTIFICATE OF REPORTER

I, DEBRA L. PAS, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 10-3561 WHA, ORACLE AMERICA, INC. vs GOOGLE, INC. were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Thursday, May 17, 2012