EXHIBIT 20

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

* * *

CALDERA, Plaintiff, v. MICROSOFT, Defendant.	)	Case #2:96-CV-645B

BEFORE THE HONORABLE RONALD N. BOYCE

July 16, 1998

Reported by Michelle Mallonee, CSR, RPR

ALPHA COURT REPORTING
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File No. 071698M

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v.
MICROSOFT,
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Thursday, July 16, 1998; Salt Lake City, Utah
2:20 p.m.
* * *

THE COURT: All right, 96-CV-645B, Caldera versus Microsoft. I think that the things that we need to address are, first, the petition for intervention, motion to intervene by Novell, and then with regard to how that is resolved, then the question of whether there is any kind of issue left on the work product privilege. If Novell is allowed to intervene, then we need to focus on the work product privilege. If Novell is not allowed to intervene, I don't think Caldera has a basis on which to assert the work product privilege and that forecloses it. All right.

MR. JARDINE: Do you want to have Novell go first, I assume, your Honor?

MR. SUSMAN: Your Honor, Steve Susman. I've been asked to speak by Novell's counsel.

THE COURT: I think we get down to a preliminary issue, and that is the question of what interest Novell has to have in protecting its work product privilege, that is, if it once had a work product privilege is that enough to give it standing to intervene, or must it have a particularized need to intervene to protect itself from disclosure of the information in other contexts, other litigation contexts or other important contexts that warrants the protection of the

privilege.

MR. SUSMAN: Yes, your Honor. I would argue that Novell has an interest that it needs to intervene and protect because, as you already acknowledged, Caldera cannot protect it, and its interest is based on two things, your Honor, number one is financial interest. Microsoft acknowledges that Novell has a substantial financial stake in the outcome of this lawsuit. Under the licensing agreement executed between Caldera and Novell --

THE COURT: Let me ask you a question there. A substantial interest in the outcome of the lawsuit, but not a substantial and immediate financial interest in the material that is claimed to be subject to the protection of the work product privilege. That is, if we look at the AT&T case, the DC Circuit's position, after you get through some of the generally flowery language, appeared to be that the disclosure of that information would have an immediate adverse effect, possibly in other litigation and other immediate transactions.

Here, as I understand the relationship between Novell and Caldera, the financial interest is because of their obligations to each other, not anything extrinsic to that relationship.

MR. SUSMAN: I believe, I believe that's incorrect, your Honor. I believe in the ATT case, the lawsuit that

same economic scenario -- would you say under those circumstances Novell lost its work product claim? I would suggest no court in the world would hold that.

Does it somehow change it if instead of having a 20/80 percent partnership, we have what's essentially an overriding royalty?

THE COURT: I think it makes a very big difference because Novell does not share the risks of the litigation as they unfold. Novell becomes the recipient of the benefit, or the indirect injury that occurs is that the litigation prospects don't come out as Novell would wish them to, but they are not involved in the litigation, they are not participating, they are sharing the risk like a grubstake.

MR. SUSMAN: But not exactly, your Honor. I mean the truth of the matter is --

THE COURT: It's like a gold miner in Alaska. He's up there with his butt on the line with a polar bear after him, but the guy that financed him in Seattle is sitting down with a cigar in a warm motel.

MR. SUSMAN: I don't think there's any secret in that the lawyers who are representing Caldera in this lawsuit are doing so on a contingency basis. That's no secret. Novell has been hauled into this Court before you on as many occasions as we have. They are involved in this lawsuit. They are the subject of subpoenas. Their people are being

deposed as frequently as Caldera's people are being deposed, so to say that they are not bearing the expense of the lawsuit almost equal to Caldera, I won't say it's totally the same, Caldera does have the responsibility to retain and pay for the expert witnesses, but it is not a big difference, and the point I am saying, no case, your analysis, in the first place there is not a single case I've ever seen that supports it. They don't cite one.

THE COURT: Well, let me tell you --

MR. SUSMAN: But I think --

THE COURT: You make a claim in your brief of standing as just saying well, if Novell has a work product privilege claim, this confers standing. That's about the breath of what you assert in your opening brief, and then Microsoft comes back and said whoa, wait a minute, that's too broad a claim. There has to be a showing of a more particularized injury from the disclosure, and now you are coming back and saying this is our injury. Our injury is that we have a financial interest in the outcome of the litigation because of our contract with Caldera. Is that a fair assessment?

MR. SUSMAN: Because of our financial interest in the outcome of the lawsuit, and because the disclosure of materials prepared by our attorneys to evaluate and possibly pursue this very same claim that Caldera is now pursuing on

our behalf, the disclosure of those materials to the opponent in this lawsuit, which Caldera is suing in part on our behalf will hurt us.

THE COURT: It will hurt you in your economic recovery, your economic interest. For example, let me take your situation. Suppose, for example, you sold everything out to Caldera and walked away without any percentage return in this lawsuit, but just a payout of the assets. Now, if that occurred, I think you would be hard pressed to say there was a work product privilege that still existed, unless you could show some specific injury, economic injury to you in the context of whatever litigation would be involved. Now, the difference is that in this instance what you have done is kept the right to receive the proceeds of Caldera's cause of action, a portion of it.

MR. SUSMAN: Right. I agree in the example you gave, the economic injury gets attenuated, it's more remote. It's clear no one denies it's clear economic injury. What we are trying to do, what is it in any lawsuit? Supposed Novell versus -- why wouldn't you allow -- every litigant has an economic interest. That's the only reason they wouldn't want, Caldera wouldn't want its work product disclosed to Microsoft because of economic interest. What we're talking about, what interest are we trying to protect here?

THE COURT: A pure cash interest. You are not

going to be in the position, or shouldn't be in the position of making the strategic and tactical decisions on the case.

MR. SUSMAN: The interest is --

THE COURT: That's what the work product privilege is designed to protect is the judgment associated with making the litigation tactical decisions, the attorney's thought processes and things of that nature.

MR. SUSMAN: Yes sir, but the work product protection outlives the particular lawsuit.

THE COURT: Yes, it does.

MR. SUSMAN: I mean --

THE COURT: But it's diluted after that particular lawsuit is gone, and then you have to come up with some other specific particularized justification for its perpetuation.

MR. SUSMAN: I don't believe so.

THE COURT: I think you do, otherwise you could simply make the claim you made in your initial brief that you have not pressed now, and you have been pressing the economic relationship, the residual economic relationship that you have. You are not going to claim that work product should apply to you simply because at some time in the stage of Novell's activity it could have claimed a work product privilege and therefore that privilege sort of exists out there like an ever-living vampire.

MR. SUSMAN: I think I am, your Honor. I think the

protects its own interest authorizing me to speak on its own behalf, they have their counsel obviously here in the courtroom, I think this is a case where the Court should sustain the claim of privilege.

Now, I can address other things in their motion if you wish, but this is the main thing.

THE COURT: No, I want to hear the factors relative to standing and resolve that independent, and the intervention motion, independent of anything else. I don't want to do this, but I think what we're going to end up doing is hearing the other side's argument on intervention, and I'm going to take that under advisement because I want to go back and do a little more work on that, and then depending on how I rule, you'll get a ruling on that. We'll have either a subsequent hearing on the application and the privilege, or that will end it.

MR. SUSMAN: And frankly, your Honor, I mean I would say this. I don't think our brief, or for that matter their brief, was directed to the issues you raise, and I think we can both, if that's what's concerning you, whether, I mean you have articulated the concern economic interest is not enough to allow Novell to intervene. They have to have something more than economic interest, and is the kind of interest they have in this lawsuit sufficient under the work product? Those are issues that we didn't address in our

brief and they didn't address, and I don't think it would be, if you are concerned about that –

THE COURT: That's what I'm going to look at –

MR. SUSMAN: I think if you would allow us both five days to –

THE COURT: – the range of things and that, because I think that's fairly important. The work product privilege is kind of like neutrino. It's extremely hard. Nobody can really identify where it is at any given time, and it's extremely difficult to get a handle on to hold it within appropriate boundaries, and what I'm suggesting is what are those things that in this very intriguing question ought to be the parameters of its continued assertion. That's what I'm interested in.

MR. SUSMAN: Well unless, if that's your –

THE COURT: I'd like to hear from the other side. I think I have your argument clearly in mind, but I will give you that if that's what you want.

MR. SUSMAN: I would like an opportunity to look at the cases. I can do it in 48 hours.

THE COURT: Time is not that critical, what is important is the quality of the presentation

MR. SUSMAN: I read all the cases cited by them and us, and I don't see – this is an issue that doesn't jump out of these cases, so I've obviously got to look somewhere other

than the cases I cite and they cite for the answer to the question you pose, if there is an answer.

THE COURT: All right. Thank you.

MR. SUSMAN: Thank you.

THE COURT: All right, Mr. Jardine?

MR. JARDINE: I'm going to try to stay away from physics, your Honor. I don't know if I can describe a neutrino, but I think I'll try to talk about Rule 24, which is the one you said is at issue here.

THE COURT: You don't have any question that if they have a sufficient interest in the work product privilege that Rule 24 would afford them the opportunity for intervention to protect that interest because nobody else is going to protect it.

MR. JARDINE: That's correct. I think it's correct to say that nobody else can protect it, but then the question is whether the interest they are asserting is sufficient to satisfy the Rule 24 analysis.

THE COURT: That's right, and their assertion in their brief was it's our work product privilege, they've now added to that in their argument and in their reply brief. In their argument they have now said well, we are going to be affected by the outcome of this because the amount of money that we're entitled to under our sales agreement could be either enhanced or diminished by the effect of this

litigation.

MR. JARDINE: I understand that argument has been made today. I've only gotten one brief from them, and I don't think they made that argument in their brief, but our reply brief which addresses their joint memorandum I think addresses the argument they make, and I think this argument about this residual financial interest is new, not made in the papers, but I'm glad to address it.

THE COURT: Not made in their papers, no, but it's something I got out of your brief.

MR. JARDINE: Well, if we raised it, it doesn't come to mind, but in any event I'll address it.

THE COURT: I think you raised the substance of it there, at least I, I don't think I dreamt this.

MR. JARDINE: I try not to help my worthy adversaries with any arguments, so if it got in there it was inadvertently.

THE COURT: Not quite maybe in the same form.

MR. JARDINE: In our view, the kind of interest which Rule 24 protects and is recognized in the cases is an interest different than the interest asserted here.

THE COURT: Traditionally it is, but certainly you would agree that the law in this circuit, and somewhat uniformly, is that a legitimate claim of work product is the basis to request intervention.

MR. JARDINE: That's correct, but I think the cases in this circuit and elsewhere frame that interest in terms of a legal interest. The legal interest of a participant of the litigation process in some other case or some other context, like being the subject of a grand jury investigation –

THE COURT: That indeed is the context in which it came up, and that's the question. I wonder is an economic interest in the very litigation at hand sufficient to at least allow the intervention to protect that interest, and we go to the question of, this has been characterized by Counsel for Novell, Caldera as being essentially akin to a royalty, and we've talked about certain aspects of subrogation. It's really sort of a, it's not a royalty because a royalty is a more carved-out, identifiable, participatory right. This in a sense is an accounting interest, isn't it?

MR. JARDINE: I think it is an accounting interest, and I think Mr. Susman when he said to the Court, and this is my understanding of the license agreement, is they get a percentage of revenues, and this is one source of revenues, so it's really remote. In that sense I think the royalty situation you discussed, at least in my experience, doesn't quite fit because each of those licenses varies on its terms, but the licensor usually retains some interest, some obligations, so I think you really have to look at this case, and I think if you remember the facts, Mr. Susman says they

came on the scene. The truth is Novell left the scene, it sold the business, it transferred the documents, and it retained this residual accounting interest, and I think the distinction you were discussing with him was the distinction we see. The work product doctrine, as I understand it, is focused on the way in which people participate in the litigation process, and that's a legal –

THE COURT: Let me ask you, because Counsel made a very strong claim that the purposes of the work product privilege, or work product privilege are still extended here, that is the interest that Novell had originally and any work product privilege that might have developed because they were thinking of bringing the same kind of case against Microsoft, still has legitimacy, even though they no longer have the assets of the company and have alienated the claim for relief, because they still have an interest in protecting the various thought processes and documents and things of their counsel in order to maximize, and this is the only conclusion I think you can draw, to maximize the economic interest that they might benefit from if the litigation is favorable to them.

MR. JARDINE: I heard Mr. Susman make that argument, and I think there are two problems with it. Number one, the language with which he tries to articulate or defend that proposition is the language of the attorney-client

privilege, the confidentiality language. In most cases you get both privileges overlying in a single document. If you peel off the attorney-client privilege, a lot of those arguments I think go, and you are stuck with trying to analyze it in the terms of the attorney work product which has different purposes.

Secondly, Novell had it available to it prior to the transfer options that would have protected this information. They chose to sell it, transfer it, and one other undisputed fact, besides the fact the business was sold, was that Novell has not told this Court it had any existing or potential litigation for Microsoft or others for which any of this would be relevant, so if you look at the AT&T case, for instance, the Court found there was a 24(a)(2) interest, and that interest was the existing related litigation, so if you look at the cases, as I understand it, that the point they make breaks down because they have to import into it the language of the attorney-client confidentiality.

THE COURT: Well, let me see if your argument holds up in this sense: Indeed, there were continued litigation interests I think in AT&T and in the one Tenth Circuit case. However, should those cases be read as saying that you have to have that kind of interest, a litigation interest, I don't think there is anything per se in those cases that say that

in order to keep the work product privilege you have to have a continuing litigation interest. You have to have an interest is what I'm saying, and now I'm asking does it have to be a litigation interest? Can it be an economic interest? Can it be some other interest that is reasonable to protect?

MR. JARDINE: Well, the cases define the interest they are recognizing for Rule 24 purposes as litigation-related interests. They don't go through discussions of what they exclude, so I don't know if any of those cases –

THE COURT: Litigation related, certainly there is a certain relationship that exists where Novell is interested in this litigation.

MR. JARDINE: Well, they are interested, I suppose, if there are five shareholders of Caldera, it's a closely held corporation, all of them are interested in it, it's not the kind of interest –

THE COURT: Except their interest is adequately protected, but Novell, having something that Caldera does not, has to request protection of its own interest. What I'm wondering, what I want to know is it your position that the interest that Novell has is simply not within the work product privilege continuation, right?

MR. JARDINE: That is our position. Our position is that the cases don't recognize anything like that kind of

a remote economic interest as a way to tie into the work product privilege, and I agree having sold the business, left the scene, not having any claim of any related litigation or any way in which the disclosure of those documents can come back to hurt it as opposed to this remote economic interest.

THE COURT: Have you got any line of authority that defines the kind or dimension of interest that must be demonstrated in order to claim the continuation?

MR. JARDINE: Can I consult with the chief researcher on this? I think the answer is nothing more than you can glean from the cases that grant intervention to protect the attorney work product privilege, all of which are litigation related. I think what I've said is you look at the cases that are in this area, Rule 24 intervention to protect work product.

THE COURT: Let me take you a step further now. Would it not be advantageous to have some kind of identifiable expression of the kind of interest that the courts ought to recognize as either a tolerance or a containment of the work product privilege?

MR. JARDINE: Beneficial to the system of jurisprudence?

THE COURT: Yes.

MR. JARDINE: I agree with you, this is not a particularly clear area of the law, but you know, I guess my

interest is more in this case.

THE COURT: What interest would you say would best serve the continuation of that work product interest where you no longer have what might be said to be a primary interest in that privilege but it's related to some other activity?

MR. JARDINE: In my view, if I understand the purposes of the work product protection, I'm not sure it's a privilege, it's more a protection.

THE COURT: It's, whatever the mis-termination of it, it's got that growth attached to it.

MR. JARDINE: That it's to protect the lawyer's work in the context of litigation, and if somebody sells the business, leaves the field, even if they retain a residual economic right, and if they have no risk of being involved in litigation, that, to me, could be gleaned from the cases and ought to draw the line.

THE COURT: So you say the privilege ought not to maintain if there were no longer any kind of threat of litigation?

MR. JARDINE: I don't want to decouple it from the fact that Novell sold the business and transferred the documents. I think in the context of this case I'd say yes.

THE COURT: And think it's obvious that that's to your advantage to separate Novell from Caldera for that

purpose. There's no question about that. What I'm trying to get is to see if you can draw a line for me relative to the identifiable interest that should cause a court to say we ought to continue to recognize the work product claim, or beyond this point we ought not to go because there is no utility any longer because it's unrelated to the reasons for which the privilege was established.

MR. JARDINE: I will do my best, and it will be close to what I've done. I would say to the Court the point I made earlier is what makes this unique is so often the work product protection is coupled with the attorney-client privilege. You don't analyze it with the one peeled off. Now taking that away for whatever reason, there are reasons in our case that there is no attorney-client privilege associated with that material, therefore you are not protecting confidentiality, you are protecting the thought processes of the lawyers and their interaction with fact witnesses and that sort of thing.

THE COURT: I don't want you to slide off to the merits that exist here. What I want you to do is to focus on what interest ought to at least satisfy the right to claim that the privilege still exists, and therefore standing to assert it, regardless of how the ultimate outcome might be treated.

MR. JARDINE: It's easier for me to say where the

line draws where they don't have the interest than where they do. I think they don't have the interest where the business and the claims and everything else have been transferred, and that party, the transferor no longer has any risk as a participant in the litigation process on the claims being analyzed, and to me it's pretty easy to say.

THE COURT: The key word there is risk. Do you want risk in the sense of liability, or risk in the sense of some type of denigration of their status such as economic loss?

MR. JARDINE: I think the causes tie it closely enough to related litigation that I mean the kinds of risk a participant in litigation has.

THE COURT: Let me ask you, taking the cases that have been presented on both sides, is there anything in those cases where the courts have focused on what interest there is in maintaining the privilege other than that which was asserted by the party seeking standing as how they could be harmed if the privilege were not respected?

MR. JARDINE: The only cases I know are the cases in which the harm flows from the party seeking to intervene being in related litigation or the subject of grand jury proceedings, and it's defined in that way in part because it's the intersection of Rule 24 and 26. Work product is, by definition, is in anticipation of litigation so it's --

THE COURT: It's your contention there has to be some form of litigation interest, and that an economic interest by way of a dilution of what one might otherwise receive is an insufficient basis upon which to say there is justification for maintaining privilege?

MR. JARDINE: I think that's correct. The analogy I think of is somebody who sells a piece of ground and they may have, they keep a security interest in the ground, and they may have had analyses with respect to legal issues over the ground, and once that goes it's not litigation related, so I think that's our position, your Honor, because Rule 26 talks about the work product privilege being in anticipation of litigation, and therefore that's the environment in which this is evaluated.

THE COURT: All right.

MR. JARDINE: Thank you.

MR. SUSMAN: Ten minutes, your Honor, has allowed me to do a little healthy research. Let me begin with the ATT case. The Court says on the subject of intervention, "MCI has certainly alleged an interest in the protection of its work product since it claims to have created the data base documents in anticipation of its litigation against AT&T in the Northern District of Illinois, and this interest will be impaired if the data base documents are not protected from AT&T's discovery request." I've look at the opinion, there

discussion, and that was that it can shift and change in dimension depending on the interest involved, and that is not necessarily what the DC Circuit said.

MR. SUSMAN: Tenth Circuit in this Frontier case says that the circuit courts says, "One of the circuits, the third, has suggested that the doctrine should only apply to closely related subsequent litigation, although it has expressly declined to so hold. At least two additional circuits, the fourth and the eighth, extended privilege to all subsequent litigation related or not," and they cite –

THE COURT: By the same party.

MR. SUSMAN: No, sir, I don't believe so.

THE COURT: I think so. I think if you look at those cases that's exactly what they are.

MR. SUSMAN: Okay, you may be right.

Finally at least three circuits they say extend, recognize the work product extent to subsequent litigation but declined to decide, and then they say we don't have to choose here because it's closely related:

THE COURT: That was certainly helpful.

MR. SUSMAN: Well.

THE COURT: Let me put the same –

MR. SUSMAN: If we are a party –

THE COURT: Let put the same question to you that I put to –

is no mention of continuing litigation concern.

Then the DC Circuit says at the end of this discussion. It says, "The second case cited to us by AT&T to deny intervention is Donaldson versus United States. Donaldson versus United States denied intervention on the grounds that no privilege was available to the party seeking to intervene. In the present case by congress, MCI has asserted a claim of privilege which is plausible on its face, and must be accepted by us for the purpose of determining the intervention issue." I would say, your Honor, that you would not listen to us for an hour-and-a-half if Novell was not asserting a claim which was plausible on its face.

I think the first thing I urge the Court to do is allow the intervention. Once you allow the intervention, then I think we go to, I know you are dealing with the question, well, why am I going to intervene, but they don't have a privilege anymore. That's going to be your next immediate ruling.

THE COURT: The concern that I have is that all right, you have a plausible claim on its face, maybe in the sense that there was an original formulation of that privilege, but the question is whether the interest that now exists is sufficient to say that that privilege ought to be maintained. That is what the work product privilege is. We go back to what we were talking about very early on in this

MR. SUSMAN: If I am a party in this litigation then you've answered that question, right?

THE COURT: Yeah. We're dealing now with the question that I put to Mr. Jardine and I put to you, and that is I asked him what particular interest ought to exist to keep the privilege going, he said related litigation interest, and what I'm asking you is for you to give me a line of what interest you think is sufficient to justify standing to claim the privilege.

MR. SUSMAN: Yes, sir. It is the, quote, "Integrity of the adversary process that must be safeguarded in spite of the desirability of the free interchange of information before trial. The overriding concern is that the lawyer's morale be protected as he perform his professional functions in planning litigation and preparing his case. The work product is the embodiment of a policy that a lawyer doing work in preparation for a case for trial should not be hampered by the knowledge he may be called upon at any time to hand over the result of his work to an opponent. The concern of the court for the integrity of the practicing bar which made crystal clear in the transient concurrence of Judge Jackson in Hickman when he stated that the primary effect of the practice advocated here would be on the legal profession itself, and the real purpose and the probably effect of the practice ordered by the district court would be