From: "Steve Hill" <shill@scmlaw.com>
To: <dbradford@novell.com>, <JFLUNDBERG.ORM-CORP.OREM@...
Date: Wed, Jul 29, 1998 2:00 PM
Subject: Re: Fwd: Caldera v. Microsoft

Judge Boyce ruled that Novell's financial interest is an insufficient interest to allow it to intervene, and that Caldera does not have standing to protect Novell's work product. Accordingly, he granted Microsoft's motion to compel the work product documents. I am faxing you a copy of Judge Boyce's memorandum decision.

Novell has the right to appeal this ruling to Judge Benson. Surprisingly, there are no real bright line decisions on point. As Boyce states in his opinion, in every case where a party is allowed to intervene, it had a current interest in the work product as a party litigant, as opposed to holding a financial interest in the outcome as does Novell. But there is no holding to the effect that such an interest is a prerequisite to intervention.

Our view is that the claim of work product, by itself, is a sufficient interest to permit intervention. Thereafter, the court must balance Novell's continuing interest in its work product against Microsoft's legitimate show of need, if any.

We do not want this issue to hold up the case and therefore have proposed the following to Microsoft: We will produce the documents pending appeal provided that Microsoft agrees to return the documents and make no use of them should Novell prevail on appeal. All such documents will be stamped CONFIDENTIAL so that they would have to be filed under seal.

Do you agree with this approach?

Finally, in light of the court's ruling, your deposition will have to be postponed.

As to the press, I would suggest the following statement:

Novell is reviewing Judge Boyce's written decision and is considering an appeal to Judge Benson.

On the brighter side, the press is all over Judge Boyce's ruling that Microsoft must produce source code to Caldera. Bryan Sparks told me he has received over 40 calls from the press this morning on this issue.

The stories of the past two weeks make clear that as trial approaches we will see increasing press coverage of everything that happens in the case. As unfortunate as the story of two weeks ago was, the protective order imposes no restriction on reference to confidential discovery material in court. Susman made the argument he had to make, and it turns out that a reporter was in the room. There have previously been plenty of references to Microsoft confidential material during various hearings where no reporter was present. To put this in perspective, come trial time, unless the courtroom is cleared of press (which is inconceivable to me), all manner of Microsoft confidential information is going to be reported on nationally on a daily basis, much of it extremely damaging to the Microsoft myth.

I hope this is helpful. Please let me know if you have questions. I will be on Scout camp tomorrow and Friday and probably out of phone range, but will get back to you as soon as I can.

Regards,

Steve

>>> "david bradford" <dbradford@novell.com> 07/29 7:56 AM >>>
Sounds like we lost in court yesterday on our motion to maintain the privilege. If I know anything about the

law, sounds like the judge was flat out wrong---particularly since we DO have a very real financial interest in the case.

HOW SHOULD WE RESPOND NOW TO PRESS INQUIRIES?