

## Litigator of the Week: Geoffrey Howard of Bingham McCutchen

By David Bario

Last Tuesday, when we caught up with Bingham McCutchen's Geoffrey Howard right after his client Oracle won \$1.3 billion jury verdict against the German software company SAP, he said he was feeling "ecstatic." No surprise there: Not only did the jury fully endorse the theory of damages he and David Boies of Boies, Schiller & Flexner advanced during Oracle's three-week trial against SAP, the jury's award was the largest handed down all year, and apparently the largest-ever in a copyright case.

On Thursday, fresh from a long holiday weekend spent with family members he'd hardly seen in two months, Howard told us that the magnitude of the verdict was still sinking in. "It's a great feeling, it's great to know that the client's faith in its IP has been vindicated, and I don't think that's something that'll ever wear off," Howard said.

Howard and Bingham got involved in the case in late 2006, just weeks after Oracle discovered that an SAP subsidiary, TomorrowNow, had downloaded millions of maintenance software files from Oracle's website the year before. (Oracle brought in Boies Schiller this spring, as the damages trial approached.) After investigating the breach with Bingham's help, Oracle sued SAP for copyright infringement in March 2007, claiming that SAP knew about the theft when it acquired TomorrowNow and used the intellectual property to lure customers from Oracle.

In what turned out to be a crucial bit of discovery, Bingham uncovered documents showing that SAP anticipated litigation with Oracle when it acquired TomorrowNow in 2005, and planned to use its subsidiary as a "liability shield" to ward off infringement claims. That revelation, combined with other evidence about SAP's TomorrowNow acquisition

and its use of Oracle's IP, presumably led SAP to stipulate to contributory infringement on the eve of trial last month.

With infringement already decided, SAP lawyer Robert Mittelstaedt of Jones Day did his best to convince the jury that it should award damages based only on Oracle's lost profits, measured by the number of customers Oracle actually lost because of the infringement. Mittelstaedt told jurors that the lost profits model would result in an award in the neighborhood of \$40 million.

But jurors instead accepted the argument put forth by Howard and Boies (Howard gave Oracle's opening; Boies delivered the summation), who said that SAP owed Oracle a lump sum royalty equaling what SAP would have paid for a license in 2005, when SAP acquired TomorrowNow. Jurors later told the San Jose Mercury News that they never considered an award less than \$500 million, and talked about awarding Oracle as much as \$3 billion. (The number they arrived at, \$1.3 billion, was a bit less than the \$1.65 billion Boies requested in Oracle's closing, but pretty close.)

Howard told us that SAP's stipulation to contributory infringement may have shortened the trial, but it still allowed Oracle to offer enough contextual evidence to make a bullet-proof damages case.

"This was a once-in-a-generation case, where the facts and the law and the equities all line up in a way that every juror understands," Howard said.

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