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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91122524
Party	Defendant Wayne R. Gray
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Date	04/12/2011
Attachments	MOT FOR PROTECTIVE ORD.pdf ( 2 pages )(15128 bytes ) PROPOSED PROTECTIVE ORDER.pdf ( 8 pages )(25878 bytes )

**UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

X/OPEN COMPANY LIMITED,

Opposer,

Opposition No.: 91122524

vs.

Application Serial No.: 75/680,034

WAYNE R. GRAY,

Mark: INUX

Applicant.

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**MOTION AND COMBINED BRIEF FOR PROTECTIVE ORDER**

COMES NOW applicant Wayne R. Gray, by and through his undersigned counsel, and moves for entry of a protective order on the following grounds.

As mentioned in Applicant's Motion to Resume and Reset filed recently in this matter, there are confidential documents in existence (but not yet in evidence in this opposition) which have a very significant impact with respect to ownership of the UNIX trademark, upon which Opposer bases its opposition. Two of those documents are known as the September 1996 Confirmation Agreement (unredacted), and the May 10, 1994 Novell-X/Open Agreement (untitled). Applicant has received said Confirmation Agreement in discovery in this matter, but it has not yet been entered into evidence due to the lack of a suitable protective order. The May 10, 1994 agreement has been requested in discovery from Opposer, but has not yet been furnished. It is believed that other important documents of a confidential nature also exist which have not yet been furnished in response to Applicant's discovery requests.

The undersigned counsel for Applicant has contacted counsel for Opposer regarding this motion, but Opposer's counsel declines to respond at this time on procedural grounds, in view of the fact that the matter is currently stayed.

WHEREFORE Applicant respectfully requests that the Board enter a suitable protective order in this matter; a proposed form of an order is attached hereto for convenience.

Dated: April 12, 2011

Respectfully submitted,

/David L. Partlow/  
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Counsel for Applicant

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by regular U. S. mail to Mark Sommers, Esquire, at Finnegan, Henderson, Farabow, Garrett, & Dunner, L.L.P., 901 New York Ave., N.W., Washington, D.C. 20001-4413, this 12<sup>th</sup> day of April, 2011.

/David L. Partlow/

## PROPOSED PROTECTIVE ORDER

In view of the fact that at least one of the parties in this Opposition desires to introduce into evidence what might be considered confidential information by either of the parties, the following Protective Order is hereby entered.

**I. Definitions.** For the purposes of this Protective Order:

A. The term “person” means and includes, without limitation, individuals, firms, associations, partnerships, and corporations.

B. The term “third party” means any person other than Opposer and Applicant.

**II. Scope.** This Protective Order will apply to all information produced in discovery in this action, including without limitation, testimony from depositions upon oral examination or upon written questions, answers to interrogatories, documents and things produced, and answers to requests for admission.

**III. Confidential Information.** “Confidential Information” is any information that reflects any non-public, confidential business information, including without limitation trade secrets. Documents that a party in good faith reasonably believes contain “Confidential Information” will be stamped CONFIDENTIAL INFORMATION” or with a substantially similar designation. Except as required in the conduct of proceedings in this action, “Confidential Information” will not be disclosed to any person other than:

1. Individuals from each of the parties hereto provided that such individuals agreed to and sign the Secrecy Agreement attached hereto as Attachment A;

2. Experts or consultants for a party engaged in the preparation and prosecution of a party's claims or defenses in this action, provided that such experts or consultants agree to and sign the Secrecy Agreement attached hereto as Attachment A;
3. Outside counsel for a party, including any attorney working at outside counsel's law firm;
4. The Board, mediators, arbitrators, and other alternative dispute resolution professionals; and
5. Secretarial and clerical personnel of the above persons, including court reporters, videographers, and outside vendors of such persons, who are working under the supervision of such persons and are informed of this Protective Order and orally agreed to its provisions.

"Confidential Information" will be used only for the purpose of preparing and conducting this litigation, including any alternative dispute resolution related to this litigation, and will not be used by or on behalf of any party or person to whom it is disclosed for any other purpose whatsoever, including but not limited to any business, commercial, competitive, financial, informational, personal, or other purpose, or in connection with other litigation in any form, including any administrative form. In particular, no "Confidential Information," including the existence of such information, may be disclosed, disseminated, or revealed to or discussed with any third party, in full or summary form, in general or specific terms, or directly or indirectly, including without limitation: customers, licensees, retailers, wholesalers, distributors, and members of the parties; trade, industry, professional, or personal contacts of any kind; reporters and other personnel from the print or electronic media, including members of the trade press and

the legal press; websites to which content of any type can be added; electronic or printed publications of any type; secretarial and clerical personnel of persons permitted access to “Confidential Information,” unless they are informed of this Protective Order and orally agreed to its provisions; and outside experts or consultants, or prospective experts or consultants, unless they agreed to and signed the Secrecy Agreement attached hereto as Attachment A, whether retained or not.

**IV. Deposition Testimony; Transcript or Recording of Deposition.** After receiving a transcript or recording of the deposition, the party for which the deponent testified will have 10 days to designate portions of the transcript or recording as “Confidential Information” and provide all other parties with such designations in writing. Such designations will be made on the deposition transcript or a separate document referring to the relevant pages and lines of the transcript or the relevant times of the recordings. Any media containing a recording of a deposition or portion of deposition containing “Confidential Information” will be labeled CONFIDENTIAL INFORMATION. All parties will treat the transcript or recording as “Confidential Information” for 10 days from the date when the party for which the deponent testified received the transcript or recording, or until written designations are received, whichever occurs first. The parties may modify these procedures, including with regard to the deadline for providing designations, by mutual agreement without further order of the Board.

**IV. Documents Filed with the Board.** Any party that wishes to file any documents with the Board designated as or containing “Confidential Information” or any pleadings, motions, or other papers reproducing, paraphrasing, or discussing such information (or

any portion of any documents designated or containing “Confidential Information” or any pleadings, motions, or other papers reproducing, paraphrasing, or discussing such information) will file such documents under seal, in written form, not electronically. The party will also file the documents or portions of documents electronically in redacted form for the public record.

**VI. Objections to Designations.** Any party has the right to object to the designation of any information as “Confidential Information.” However, before moving the Board to change any confidentiality designation, the parties will make a good faith effort to resolve any dispute over such designation. The parties are not obligated to challenge the propriety of any confidentiality designation. Failure to do so will not preclude a subsequent challenge to the propriety of any such designation. Further, compliance with the terms of this Protective Order will not operate as an admission that any particular document or information is or is not confidential. Nor does the entry of this Protective Order waive any rights the parties may have to object on any grounds to the use of any “Confidential Information” at any hearing, in any paper, or at the trial of this action.

**VII. Disclosure to Additional Persons.** In the event that a party desires to provide access to information identified as “Confidential Information” to any person or category of persons not included in Section III of this Protective Order, it shall notify the producing party no less than 10 days in advance of such access in writing and, if the producing party objects, the party desiring to make disclosure will move the Board for an order that such person or category of persons may be given access to such information. In the event that the motion is granted, such person or category or persons may have access to such information, provided that such person or persons agree in writing before

such access is given to be bound by the terms of this Protective Order by signing the Secrecy Agreement attached as Attachment A hereto, and such other terms as the Board may impose. The parties will make a good-faith effort to resolve any disputes over access to any type of confidential information before moving the Board to obtain access.

In the event that a party takes the deposition of a witness from a third party, the party taking the deposition may show documents containing “Confidential Information” to the witness, provided that the witness agrees to be bound by the terms of this Protective Order by signing the Secrecy Agreement attached as Attachment A hereto.

**VIII. Disclosure Pursuant to Subpoena or Other Process.** Nothing in this Protective Order will prevent any party who has received “Confidential Information” pursuant to this order from producing such information in response to a lawful subpoena or other compulsory process, provided that:

A. Before providing any “Confidential Information” in response to the subpoena or compulsory process, the party receiving a subpoena or compulsory process will, as soon as reasonably practical, give notice of the subpoena or process to the producing party by telephone or email or facsimile, and will furnish the producing party with a copy of the subpoena or compulsory process so as to afford the producing party a reasonable opportunity to seek a protective order;

B. Upon receipt of the notice of the receipt of a subpoena or other compulsory process, the producing party, within a reasonable time, but no later than the return date for the subpoena or compulsory process, will advise the other parties whether it intends to file a motion for a protective order prohibiting the production of the “Confidential Information.”

C. If application for a protective order is made in the appropriate forum before the return date, the party receiving the subpoena or process will not produce such “Confidential Information” prior to receiving the responsive order from the appropriate forum or the consent of the producing party.

**IX. Inadvertent Disclosure to Third Parties.** In the event that a party discovers that it has inadvertently disclosed any “Confidential Information,” or any documents or information (written or oral) subject to the attorney-client privilege, attorney work-product immunity, or any other privilege or immunity, to any third party, such disclosure will not be deemed to automatically waive any claim that the information is confidential or subject to the attorney-client privilege, the attorney work-product immunity, or any other applicable privilege or immunity. Nor will such disclosure automatically result in a waiver of or otherwise limit the right of the parties to enforce the provisions of this order. Whether, or to the extent that, a waiver has occurred will be governed by the relevant case law.

**X. Inadvertence Disclosure to Parties.** In the event that a party discovers that it has inadvertently disclosed any “Confidential Information,” or any information subject to the attorney-client privilege, attorney work-product immunity, or any other privilege or immunity, to any party:

A. The disclosing party will immediately notify the receiving party in writing and describe the specific information that was disclosed by production number or otherwise;

B. The receiving party will return the identified information to the disclosing party within five (5) business days; and

C. The disclosing party will properly designate the “Confidential Information” and will send the information to the receiving party within five (5) business days and/or the disclosing party will produce a privilege log place identifying the information subject to the attorney-client privilege, attorney work-product immunity, or any other privilege or immunity within five (5) business days.

Inadvertent disclosure of any “Confidential Information,” or any information subject to the attorney-client privilege, the attorney work-product immunity, or any other privilege or immunity, to any person or in any manner not permitted by this Protective Order will not be deemed to automatically waive any claim that the information is confidential or subject to the attorney-client privilege, the attorney work-product immunity, or any other applicable privilege or immunity. Nor will such disclosure automatically result in a waiver of or otherwise limit the right of parties to enforce the provisions of this order. Nor will anything in this section limit the right of a party to challenge a claim of confidentiality, attorney-client privilege, attorney work-product immunity, or any other privilege or immunity as to any inadvertently produced information. Whether, and to the extent that, a waiver has occurred will be governed by the relevant case law.

**XI. Survival of Obligations.** The obligations of this Protective Order will survive the termination of this action and the parties agree that either party may seek to enforce the provisions of this Protective Order in any appropriate forum.

**XII. Return or Destruction of Information.** No later than thirty (30) days after the conclusion of this case, counsel for each party shall return all documents that have been marked “Confidential Information” to the person from whom they were obtained.

Alternatively, the parties may destroy such documents and provide sworn confirmation of such destruction to the person from whom they were obtained no later than thirty (30) days after the conclusion of this case.