

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF TEXAS  
 MARSHALL DIVISION  
 IP INNOVATION, L.L.C. )  
 and TECHNOLOGY LICENSING )  
 CORP., )  
 )  
 Plaintiffs )  
 ) Civil Docket No.  
 VS. ) 2:07-CV-447-RRR  
 ) April 27, 2010  
 RED HAT, INC. and )  
 NOVELL, INC. )  
 )  
 Defendants ) 1:05 P.M.

TRANSCRIPT OF JURY TRIAL  
 BEFORE THE HONORABLE RANDALL R. RADER  
 UNITED STATES CIRCUIT JUDGE

APPEARANCES:  
 FOR THE PLAINTIFF: MR. JOSEPH A. CULIG  
 MR. ARTHUR A. GASEY  
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(Proceedings recorded by mechanical stenography,  
 transcript produced on CAT system.)

1 THE COURT: All right. Mr. Gibbons --  
 2 MR. GIBBONS: Thank you, Your Honor.  
 3 THE COURT: -- you may proceed.  
 4 MR. GIBBONS: Let's go back to that last  
 5 slide.  
 6 MYRON ZIMMERMAN, Ph.D., PLAINTIFFS' WITNESS, PREVIOUSLY  
 7 SWORN  
 8 DIRECT EXAMINATION (CONTINUED)  
 9 BY MR. GIBBONS:  
 10 Q. So before we took our lunch break,  
 11 Dr. Zimmerman, we were talking about the final element  
 12 here of Claim 1 of the '183 patent, and I believe you  
 13 described the function of the Defendants' product with  
 14 respect to that element, correct?  
 15 A. Yes, I did.  
 16 Q. And in your opinion, does Defendants' product  
 17 contain this element of Claim 1 of the '183 patent?  
 18 A. I do.  
 19 Q. And based on your analysis of the Defendants'  
 20 products and their source code, is it your opinion that  
 21 those using the Defendants' products infringe Claim 1 of  
 22 the '183 patent?  
 23 A. I do.  
 24 Q. Now, sir, what we're talking about here is what  
 25 a single human being is doing, correct?

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 16 \* \* \* \* \*

PROCEEDINGS

17 MR. GASEY: It just occurred to me, Your  
 18 Honor, during the pretrial conference they mentioned  
 19 that Tuesday night might be the night that we'd be going  
 20 through jury instructions, and I talked with Defendants'  
 21 counsel. We don't really care.  
 22 They indicated they might prefer doing it  
 23 Wednesday night, and I just wanted to see what Your  
 24 Honor's plans were with respect to that.  
 25 THE COURT: Let's do Wednesday; is that  
 all right?  
 MR. GASEY: That's fine. I just wanted to  
 make it clear in advance.  
 THE COURT: Wednesday it is.  
 (Jury in.)

1 A. Yes.  
 2 Q. So that would be a single person with a single  
 3 log-in session with multiple workspaces, correct?  
 4 A. That is correct.  
 5 Q. Or a single person with perhaps two log-in  
 6 sessions, correct?  
 7 MR. LYON: Your Honor, again, he's  
 8 testifying. For counsel I'd ask that he reask the  
 9 questions.  
 10 THE COURT: You can do that.  
 11 MR. GIBBONS: Sure. I can.  
 12 Q. (By Mr. Gibbons) Dr. Zimmerman, what are we  
 13 talking about with what a single human being is doing?  
 14 A. There's two ways it could be used. One would  
 15 be a single human being logging in once and switching  
 16 between workspaces. An alternative way would be for a  
 17 single human being to log in twice and switch between  
 18 log-in sessions.  
 19 Q. And that single human being would have two  
 20 separate names for those two log-in stations?  
 21 A. That is correct.  
 22 Q. That would be home or office, correct?  
 23 A. It could be whatever names they chose to use.  
 24 Q. User 1 or User 2?  
 25 A. Correct.

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1 Q. And is it true, then, just to summarize, that  
2 would be one single person?  
3 A. That would be one human being.  
4 Q. Okay. So do Red Hat and Novell sell displays?  
5 A. Do they sell displays?  
6 Q. Yes, sir.  
7 A. They do not sell physical displays.  
8 Q. Okay. So what was your analysis with respect  
9 to?  
10 A. The analysis was that the systems that the Red  
11 Hat and Novell software run on do use a display, a  
12 physical display, that would be provided as part of the  
13 computer system. That includes the processor, disk  
14 drives, and the display.  
15 Q. From your testimony, you've looked at their  
16 websites and their user names, correct?  
17 A. That is correct. And they all -- they cite  
18 there the kind of hardware requirements needed for their  
19 software.  
20 Q. You're familiar with the different parts of a  
21 patent, correct?  
22 A. Yes, I am.  
23 Q. We've just gone through in great detail here  
24 the four claims, correct?  
25 A. That is correct.

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1 Q. Now, is it your opinion that all four of these  
2 claims, Claims 1 and 21 of the '412 the patent, Claim 8  
3 of the '521 patent, and Claim 1 of the '183 patent are  
4 all infringed by the Defendants' products as set forth  
5 through your testimony here today?  
6 A. Yes, it is.  
7 Q. Now, beyond the claims, there are other parts  
8 of the patent, correct?  
9 A. There are.  
10 Q. Okay. And did your review of Dr. Henderson's  
11 patents include those other parts of the patent?  
12 A. Those were reviewed as well.  
13 MR. GIBBONS: Take a look at the next  
14 slide, please.  
15 Q. (By Mr. Gibbons) What do we see here, sir?  
16 A. Here we see a list of the U.S. patents that  
17 were referenced by this patent.  
18 Q. And as the Court instructed the jury yesterday,  
19 that can be often referred to as prior art, correct?  
20 A. That's correct.  
21 Q. And that's your understanding?  
22 A. It is.  
23 Q. What's your understanding as to how these  
24 patents are treated by the Patent Office during the  
25 examination of these patents-in-suit?

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1 A. These patents were reviewed by the Patent  
2 Examiner as part of consideration of issuing this patent  
3 here.  
4 Q. And beyond patents that are cited here on the  
5 patents-in-suit, we have what's referred to as other  
6 publications, correct?  
7 A. That is correct.  
8 Q. And would these also be prior art?  
9 A. These would also be reviewed by the Examiner as  
10 prior art.  
11 Q. And so that's what it means when you have other  
12 publications listed, correct?  
13 A. That is correct.  
14 Q. Now, if we take a look at the first of those,  
15 we see a reference that's entitled Chan, P.P., Learning  
16 Considerations in User Interface Design: The Room  
17 Model.  
18 Do you see that, sir?  
19 A. I do.  
20 Q. What does that mean to you here on the face of  
21 the patent?  
22 A. It means that the Patent Examiner was aware of  
23 this publication at the time the patent was issued.  
24 Q. Did you review this document, the Chan  
25 document, sir?

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1 A. I did.  
2 Q. And this document was considered by the Patent  
3 Office, correct?  
4 A. It was.  
5 Q. What elements is the Chan reference missing  
6 from the inventions that are claimed in the  
7 patents-in-suit?  
8 A. The Chan publication was missing the claims  
9 elements of multiple workspaces with windows inside  
10 those workspaces and did not provide a mechanism for  
11 switching between those workspaces to use the different  
12 display objects within those workspaces.  
13 Q. So the Chan reference is missing elements,  
14 correct?  
15 A. It is.  
16 Q. In addition to being reviewed by the Patent  
17 Office, correct?  
18 A. It was.  
19 Q. Now, we see another reference here. It refers  
20 to the X Window System.  
21 Do you see that?  
22 A. I do.  
23 Q. This is also on the patent, correct?  
24 A. It is.  
25 Q. What elements is X Windows -- well, start at

1 the beginning.  
 2 You're familiar with X Windows?  
 3 A. I am.  
 4 Q. How is X Windows different from what's claimed  
 5 here in the patents-in-suit?  
 6 A. X Windows, at that time, was not providing  
 7 multiple desktop workspaces or providing an icon to  
 8 switch between those multiple workspaces. I don't  
 9 believe there was any -- I think those are the key  
 10 missing elements.  
 11 Q. Well, are there others?  
 12 A. I didn't -- I don't believe there was any  
 13 discussion in that article anyway about -- I believe  
 14 that's -- I'm just going to stop there.  
 15 Q. Okay. Well, how many workspaces did X Windows  
 16 have?  
 17 A. It had one, just the desktop, one single  
 18 desktop.  
 19 Q. Did it have the ability to switch to another  
 20 workspace?  
 21 A. No, it did not.  
 22 Q. Take a look at another reference here. This is  
 23 from the actual specification itself, Plaintiffs'  
 24 Exhibit 1, in evidence.  
 25 And what do we see here, sir?

1 application at a time, and so that the user -- prior to  
 2 that, they could only have one real live active  
 3 application.  
 4 And this allowed for them to have more  
 5 than one application, and provided a way to switch  
 6 between applications, but it was not the same thing as  
 7 switching between desktops.  
 8 Q. What is an add-on, sir?  
 9 A. An add-on was a capability that was -- software  
 10 that was sold after the Macintosh was purchased so the  
 11 user could purchase and download and use that add-on  
 12 separate from when they purchased the computer itself.  
 13 Q. So was this part of the original Macintosh  
 14 product?  
 15 A. No, it was not.  
 16 Q. Did it add multiple workspaces to the original  
 17 Macintosh workspace environment?  
 18 A. No, it did not.  
 19 Q. What would be your opinion if someone were to  
 20 try to equate a window with a workspace?  
 21 A. They're not the same.  
 22 Q. How about an application of the workspace?  
 23 A. They're not the same. An application in a  
 24 window go together, but they're not the same as a  
 25 desktop with all the icons and windows within a desktop.

1 A. We see that this document is discussing the  
 2 features in the Macintosh user interface in the MacWrite  
 3 manual and the MacPaint manual which were published by  
 4 Apple Computer.  
 5 Q. How many workspaces did the Macintosh user  
 6 interface have?  
 7 A. It had one desktop workspace.  
 8 Q. Did it have the ability to switch to another  
 9 workspace?  
 10 A. No, it did not.  
 11 Q. And, again, so we're clear, windows are not  
 12 workspaces, correct?  
 13 A. That's right.  
 14 Q. Applications are not workspaces?  
 15 A. That is correct.  
 16 Q. And let's take a look at another reference.  
 17 This is from Plaintiffs' Exhibit 2 in evidence, which is  
 18 the '521 patent.  
 19 What do we see here, sir?  
 20 A. We see a reference to the Macintosh Switcher  
 21 Construction Kit.  
 22 Q. And what was the Macintosh Switcher  
 23 Construction Kit?  
 24 A. That was a software add-on capability that  
 25 allowed the Macintosh computer to run more than one

1 Q. Someone with that opinion would be incorrect?  
 2 A. That is correct.  
 3 Q. Another reference cited during the prosecution  
 4 of these patents we see here.  
 5 A. Yes. We see --  
 6 Q. The Star product or system by Xerox, correct?  
 7 A. That is correct.  
 8 Q. What was the Xerox Star?  
 9 A. Xerox Star was a computer system manufactured  
 10 by Xerox. It had a desktop display, and inside of  
 11 there, there were multiple windows. And they sold that  
 12 into the marketplace.  
 13 The windows in this system were somewhat  
 14 different than we're familiar with today. The windows  
 15 were tiled; that is, they were next to each other. They  
 16 didn't overlap.  
 17 Q. So you could see all the windows together?  
 18 A. That's correct. They were next to each other  
 19 as opposed to being overlapped or stacking the way we're  
 20 familiar with today.  
 21 Q. And if we take a look actually in the  
 22 specification of the '412 patent, what does the  
 23 specification of the patent say about the Xerox Star?  
 24 A. It's noted that Xerox Star provides a single  
 25 workspace.

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1 Q. Do you agree with that?  
2 A. I do.  
3 Q. Are there any other elements that the Xerox  
4 Star is missing as relates to the patents-in-suit?  
5 A. It did not provide a switching icon to switch  
6 between multiple workspaces and did not have display  
7 objects that were crossing those multiple workspaces.  
8 Q. Let's take a look at another reference cited  
9 during the prosecution. This is to Viewpoint, another  
10 Xerox system.  
11 Are you familiar with Viewpoint?  
12 A. Yes, I am.  
13 Q. What is Viewpoint?  
14 A. Viewpoint was a successor -- it is a next  
15 generation version of the Star. And in this one, it was  
16 a bit more -- some changes to the graphical user  
17 interface.  
18 And here we see in this product  
19 overlapping windows and a little bit more of what we see  
20 as a modern desktop environment.  
21 Q. What was missing?  
22 A. It was still missing multiple workspaces. It  
23 provided single desktop workspace, again, with multiple  
24 windows. The windows behaved slightly differently than  
25 they did in the Star, but, again, it was a single

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1 desktop workspace and no switching icon to move between  
2 workspaces.  
3 Q. Now, Dr. Zimmerman, you analyzed the report  
4 offered by the Defendants on validity, correct?  
5 A. That is correct.  
6 Q. And in that report, the Defendants claim that  
7 each of the references they rely upon somehow  
8 invalidates Dr. Henderson's patents, correct?  
9 A. That is correct.  
10 Q. Now, as we have discussed, many of those  
11 references have been cited during the prosecution of  
12 these patents, correct?  
13 A. That is correct.  
14 Q. Okay. Have you seen any references offered by  
15 the Defendants which invalidate the claims of  
16 Dr. Henderson's patents which are being asserted here  
17 today?  
18 A. No, I have not.  
19 Q. Now, Dr. Zimmerman, we had some testimony from  
20 you earlier about your observations of others seen using  
21 the Defendants' products.  
22 Do you recall that?  
23 A. I do.  
24 Q. And I believe you also testified that you've  
25 read the depositions of the Defendants' witnesses in

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1 which they've testified that they have seen others using  
2 the products, correct?  
3 A. That is correct.  
4 Q. And, in fact, some of those witnesses have  
5 testified, and you've read that they themselves have  
6 used the products, correct?  
7 A. That is correct.  
8 Q. Which products were those?  
9 A. Those were the Red Hat Enterprise Linux and  
10 Fedora products.  
11 Q. You also heard some witness testimony from the  
12 Novell side, too, correct?  
13 A. That is correct.  
14 Q. Which products were those?  
15 A. Those were the openSUSE products.  
16 Q. Okay. And with respect to testimony from the  
17 Defendants' witnesses, what did they testify that they  
18 used?  
19 A. Excuse me again?  
20 Q. With respect to testimony that you reviewed  
21 from the Defendants' witnesses on the Novell side, what  
22 products did they testify that they used?  
23 A. They used -- from the Novell side?  
24 Q. Yes, sir.  
25 A. They were using the SUSE products.

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1 Q. As well as the openSUSE?  
2 A. As well as the openSUSE.  
3 Q. And you yourself had testified you have seen  
4 users running the Defendants' products, correct?  
5 A. Yes. The Red Hat product, yes.  
6 Q. You saw folks using the Red Hat products?  
7 A. Yes, I have.  
8 Q. Do you recall when you saw these uses?  
9 A. I saw them in various timeframes in 2009, 2008,  
10 2007.  
11 Q. And where did you observe these uses?  
12 A. I was doing some work with a company in 2009  
13 named RIGO; 2008, it was a company called Progress  
14 Software; and 2007, it would have been a company called  
15 MindReader.  
16 Q. Let's turn, if we could, to Plaintiffs' 197.  
17 And we looked at this document earlier in your  
18 testimony, correct?  
19 A. Yes.  
20 Q. This is the Novell document, correct?  
21 A. Yes.  
22 Q. What does it say at No. 5 about switching  
23 between desktops?  
24 A. It notes: To switch between desktops, click  
25 the desired desktop in the page or in the panel.

1 Q. And what's Novell instructing its users to do  
 2 here?  
 3 A. They are instructing their users that -- how to  
 4 use the multiple desktops. And the mechanism to do that  
 5 is to click on the switching icon that we talked about  
 6 earlier.  
 7 The term pager here is the same thing as  
 8 the switching icon we talked about earlier.  
 9 Q. And earlier you testified you looked at some of  
 10 Defendants' websites, correct?  
 11 A. That is correct.  
 12 Q. And, again, why did you do that?  
 13 A. As part of my getting familiar with the  
 14 products and understanding how to install and use them,  
 15 and I looked at various guides they provided on helping  
 16 their users understand how to use the products.  
 17 MR. GIBBONS: And if we can turn to  
 18 Plaintiffs' 266, please.  
 19 A copy for the court.  
 20 Q. (By Mr. Gibbons) What do you see here, sir?  
 21 A. We see a page from the Fedora, tour of the  
 22 desktop providing an introduction to new users about how  
 23 the desktop operates and what they can do with it.  
 24 Q. So this is Red Hat?  
 25 A. This is Red Hat Fedora.

1 A. Yes. That is the -- an image copy of what we  
 2 saw earlier today, which is the four panels associated  
 3 with the switching icon. Here they name it the  
 4 workspace switcher.  
 5 And it reads down below: Workspace  
 6 switcher represents the workspace -- I can barely read  
 7 it there.  
 8 Q. Look at your monitor.  
 9 A. Okay.  
 10 Q. It's right there, sir.  
 11 A. Thank you.  
 12 Shows the applications running on each  
 13 other. Clicking on one of the squares moves you to that  
 14 desktop.  
 15 Q. And that's what the instruction in this user  
 16 guide is referring to with respect to the darkened  
 17 panel, correct?  
 18 A. The darkened panel means that's the current  
 19 workspace the user is seeing on their screen. Then they  
 20 can click on any of the other three workspaces to see  
 21 that workspace.  
 22 Q. And you've also testified that as part of  
 23 formulating your opinion in this case, you read and  
 24 reviewed deposition testimony from certain of the  
 25 Defendants' witnesses, correct?

1 Q. And they're the ones who put this up on their  
 2 website?  
 3 A. That is correct.  
 4 This is technically on the Fedora website,  
 5 and when I was searching, I started at the Red Hat  
 6 website looking for introduction to manuals. And that  
 7 link from the Red Hat website took me to the Fedora  
 8 website where I saw this.  
 9 Q. And, again, what does this show?  
 10 A. This here is showing -- describing to the  
 11 reader that workspace switchers situated on the far  
 12 right that -- it states also that workspaces have long  
 13 been a feature of the Unix and Linux desktops  
 14 environments.  
 15 Each workspace provides a separate desktop  
 16 where applications can be organized. The workspace  
 17 switcher allows you to switch from one workspace to  
 18 another. Each workspace has separate desktop areas with  
 19 a matching windowless panel. However, the manual panel  
 20 and background image is the same in all desktops.  
 21 MR. GIBBONS: If we can take a look at  
 22 Plaintiffs' Exhibit 227.  
 23 Q. (By Mr. Gibbons) This is Red Hat Enterprise  
 24 Linux Step-by-Step Guide. If we look at this page,  
 25 which is RH6131, these are the four panels, correct?

1 A. Yes, I did.  
 2 Q. Did you review deposition testimony from Red  
 3 Hat's Matthias Clasen?  
 4 A. Yes, I did.  
 5 Q. Do you recall who he was?  
 6 A. I believe he was the Red Hat technical  
 7 representative for this case.  
 8 Q. Let's take a look at some of Mr. Clasen's  
 9 testimony right there. And this begins at Page 28 of  
 10 his testimony taken on September 17, 2009.  
 11 Question -- first, do you recall seeing  
 12 this testimony, sir?  
 13 A. I do.  
 14 Q. And what's Mr. Clasen talking about here?  
 15 A. He's talking about his job responsibility at  
 16 Red Hat, and he states here that he is -- I'm  
 17 characterizing -- he's the package maintainer for the  
 18 products that were mentioned earlier, which were the  
 19 Fedora 7, 8, and 9 products. And he keeps an eye out  
 20 for bugs.  
 21 And if they are serious, he reports them  
 22 in Bugzilla, which is a bug-reporting system. It's his  
 23 responsibility to keep an eye on those, and if they are  
 24 serious, put bug fixes which get released in the form of  
 25 an update package.

1 Q. Take a look at the next page, which is Page 29  
2 of this deposition.

3 A. Again, he continues to discuss the -- that for  
4 each bug, he keeps a log -- this is inside of  
5 Bugzilla -- he keeps a log like a list of all the bugs  
6 and the back and forth dialog with a package maintainer  
7 to collect enough information so that the right  
8 information are sent to the people who might be  
9 interested.

10 So he concludes in broad terms speaking  
11 that he is the support of the released Red Hat  
12 Enterprise Linux products.

13 Q. In your opinion, what's Mr. Clasen's task with  
14 respect to his support of the released RHEL products as  
15 well as the Fedora 7, 8, and 9?

16 A. Well, he is interacting with users of the  
17 product that are logging bugs and letting them know to  
18 make sure he gets enough information from them about  
19 what's wrong and working to make sure those issues get  
20 prioritized and fixed.

21 Q. Is it fair to say he's supporting those users?

22 A. It is.

23 Q. Okay. And one last question. I'm not sure if  
24 it came out clear in your testimony.

25 You're not opining that the Defendants

1 infringed because they make displays, correct?

2 A. That is correct.

3 Q. You're testifying they use displays and others  
4 use the software, correct?

5 A. Correct.

6 Q. Okay. Thank you for your time.

7 MR. GIBBONS: I have nothing further on  
8 direct examination.

9 THE COURT: Mr. Lyon, you may proceed.

10 CROSS EXAMINATION

11 BY MR. LYON:

12 Q. Good afternoon, Dr. Zimmerman. How are you?

13 A. Good.

14 Q. I have a few questions, not very much. I don't  
15 think it will take very long. I wanted to talk a little  
16 bit about some of the slides we just saw on the Novell  
17 and Red Hat literature that you were talking about.

18 Now, it's true -- you understand that  
19 inducement of infringement requires that there be some  
20 teaching by the Defendants to get others to use the  
21 products in an infringing way, correct?

22 A. Correct.

23 Q. And you also understand that that means it's  
24 all the elements that have to be taught, correct?

25 A. Yes.

1 Q. It's not -- and every claim limitation we saw  
2 has to be part of the teaching in order for there to be  
3 inducement, correct?

4 A. I believe if everything about -- in the claims  
5 element are part of how the --

6 Q. Do you understand that that's the standard for  
7 inducement, Doctor? Yes or no?

8 A. Yes.

9 Q. So now you would agree with me that the patent  
10 does not claim virtual workspaces in any form, right?  
11 It's not just the right to the virtual workspaces,  
12 correct?

13 A. Yes.

14 Q. And it's not just directed to switching between  
15 virtual workspaces, right?

16 A. Yes.

17 Q. It's, in fact, directed to a very specific  
18 implementation of switching between virtual workspaces  
19 that are configured in particular ways, right?

20 A. Yes.

21 Q. They have to be display objects that are common  
22 between the two workspaces, correct?

23 A. Yes.

24 Q. All right. So now if we could turn to -- let's  
25 start with Plaintiffs' Exhibit 197, please. Yes. And

1 page 5.

2 And we were looking at this using virtual  
3 desktops, I believe, during your direct testimony; is  
4 that correct, Doctor?

5 A. Yes.

6 MR. LYON: Can we blow that up a little  
7 bit? Thank you.

8 Q. (By Mr. Lyon) Now, actually just -- and  
9 looking up to this, there is nothing in this section at  
10 all that talks about adding in common display objects,  
11 correct? It's just taking a couple workspaces and  
12 creating a couple workspaces, right?

13 A. The default desktop includes icons that will be  
14 shared across it.

15 Q. That's not my question. I'm asking you, does  
16 this have anything at all about doing anything with  
17 adding in common display objects?

18 A. This does not describe the desktop --

19 Q. All it talks about is setting up different  
20 workspaces and switching between them, right?

21 A. That's right.

22 Q. Okay. Now, if we look at Plaintiffs' Exhibit  
23 266, please.

24 MR. LYON: And if we can blow up -- let's  
25 see. A little farther down, please.

1 Q. (By Mr. Lyon) And so the part that we are  
2 focusing in on here was the clicking on the show desktop  
3 button -- windows. You can use the combination key to  
4 switch between open windows, correct? Is that the part  
5 we were focusing on during your direct?

6 A. No. That was not what we were talking about.  
7 This is switching between open windows, not between open  
8 desktops.

9 Q. I see. Where are we on this one? Hang on.  
10 Maybe I got confused.

11 I'm sorry. It's down below. Sorry. My  
12 apologies; I didn't have the document in front of me.

13 So the workspace switcher is what we're  
14 talking about. Each workspace provides a separate  
15 desktop where applications can be organized. That's the  
16 language around that in the paragraph that we're  
17 focusing on, correct?

18 A. Yes.

19 Q. So that, again, talks about setting up multiple  
20 workspaces, correct, and switching between them?

21 A. Yes.

22 Q. It doesn't talk about setting up any kind of  
23 common display objects in those workspaces, correct?

24 A. Correct.

25 Q. And if we look at Plaintiffs' Exhibit PX227 at

1 page 22. There we go.

2 MR. LYON: Blow up that paragraph down  
3 there that begins, the workspace switcher.

4 Q. (By Mr. Lyon) Again, that's talking about  
5 switching between virtual workspaces, correct?

6 A. Yes, it is.

7 Q. Nothing about setting up any kind of common  
8 display objects that would be available on those  
9 workspaces, correct?

10 A. That is correct.

11 Q. Now, the claims all require a first and a  
12 second display object, don't they?

13 A. They do.

14 Q. That's two display objects, correct?

15 A. Yes.

16 Q. And if you don't have two display objects,  
17 you'd agree with me that you can't infringe the claims  
18 then?

19 A. That's correct.

20 Q. Now, is the -- and the other thing about  
21 infringement -- I think you mentioned this in your  
22 direct. Every single claim limitation has to be present  
23 for there to be infringement of any of the claims,  
24 correct?

25 A. That's correct.

1 Q. That chart that you put up there with all those  
2 check marks going down, down, down, if I erase any one  
3 of those check marks, infringement is gone, right?

4 A. That's correct.

5 Q. Now, the Court defined in this case a display  
6 to mean a device that's attached to a computer in order  
7 to present images, which is essentially just a monitor,  
8 right; that's what we've been talking about?

9 A. Yes.

10 Q. And it's true that the Defendants don't produce  
11 displays, correct?

12 A. Right.

13 Q. And you would agree with me that all the claims  
14 require that the products be used in an infringing  
15 manner in order to actually have infringement in the  
16 case, correct?

17 A. Yes.

18 Q. So if there isn't a display, if the jury would  
19 find that there are situations where there aren't  
20 displays in the case, that wouldn't be an infringing  
21 use, correct?

22 A. If there's no display anywhere, in the system  
23 that would be correct.

24 Q. And if there are no display objects that are  
25 being used on a display, that also would be a situation

1 where there's no infringing use, correct?

2 A. You mean a blank display, nothing on it?

3 Q. No. I'm just saying a display that doesn't  
4 have actual display objects on it that's in use.

5 A. So no display objects?

6 Q. No display objects.

7 A. Yes.

8 Q. And you would agree with me that a command-line  
9 interface is a situation where you don't have display  
10 objects, right?

11 A. That is correct.

12 Q. And a command-line interface is something where  
13 all you're seeing is text characters scrolling across  
14 the screen, right?

15 A. Nongraphical user interface, command-line  
16 interface.

17 Q. Correct. Kind of like the old IBM PCs  
18 basically, right?

19 A. Yes.

20 Q. Now, I'd like to talk a little bit about one of  
21 the claim limitations that's -- in all of the claims,  
22 there is this limitation perceptible is the same tool;  
23 do you recall that?

24 A. Yes.

25 Q. And that's saying that the two display objects,

1 that it's important that they -- the user perceive them  
 2 to be the same tool in both workspaces, correct?  
 3 A. That is correct.  
 4 Q. And it's your opinion that the skill level of  
 5 the user impacts that, right?  
 6 A. The skill level -- if -- the skill level is --  
 7 might be necessary -- come into consideration if the  
 8 display object looks somewhat different. The question  
 9 is whether they perceive it as the same or not; that  
 10 might depend on the user.  
 11 Q. And so say I'm a person trying not to infringe  
 12 the patent. I want to change my display objects so they  
 13 don't look the same in the two different workspaces. I  
 14 don't have any way of knowing that without doing some  
 15 kind of study, do I?  
 16 A. If the intention is to make them be perceived  
 17 as the same tool, then I think you'd be infringing. If  
 18 they are not the same tool and don't look like the same  
 19 tool, then you're not infringing.  
 20 Q. It depends on the user's perception in that  
 21 case; that's your opinion, correct, Doctor?  
 22 A. In the case of where it is not the same display  
 23 object but it looks similar, there's certainly a gray  
 24 area in what looking similar would be considered.  
 25 Q. And in order to find that line between

1 desktop area.  
 2 Q. Would that be an icon in two different  
 3 locations, sir?  
 4 A. Yes, it is.  
 5 Q. Now, you were asked questions about instruction  
 6 being necessary to induce; is that correct, sir?  
 7 A. Yes, I was.  
 8 Q. And did we not run through some examples of  
 9 user guides in your prior direct testimony, sir?  
 10 A. We did.  
 11 Q. Are you aware of the Defendants providing  
 12 instruction to their users?  
 13 A. Yes.  
 14 MR. GIBBONS: Can you pull up Plaintiffs'  
 15 92, please.  
 16 Q. (By Mr. Gibbons) This is a Novell document,  
 17 correct, Dr. Zimmerman?  
 18 A. That is correct.  
 19 Q. And what's the title of it?  
 20 A. Competitive Comparison Flyer.  
 21 Q. And below that?  
 22 A. SUSE, Linux Enterprise Server, including  
 23 Support and Training.  
 24 Q. What does this indicate to you, sir?  
 25 A. This indicates that the -- Novell is providing

1 infringing and noninfringing, at that point, I'd have to  
 2 go out and do some kind of usability study; that's your  
 3 opinion, isn't it, Doctor?  
 4 A. In those extreme cases, yes.  
 5 Q. And you've done none of those usability studies  
 6 for this case to find out how far the claims go?  
 7 A. I did not.  
 8 Q. Okay.  
 9 MR. LYON: I think I have no further  
 10 questions. Thank you.  
 11 THE COURT: Thank you, Mr. Lyon.  
 12 Mr. Gibbons, do you have anything to  
 13 follow up on?  
 14 MR. GIBBONS: Briefly.  
 15 REDIRECT EXAMINATION  
 16 BY MR. GIBBONS:  
 17 Q. Can a trash icon be a display object?  
 18 A. Yes, it is.  
 19 MR. GIBBONS: Would you put up the first  
 20 page of Plaintiffs' Exhibit 266, please, and zoom in on  
 21 the bottom right here, please. Right here.  
 22 Q. (By Mr. Gibbons) Dr. Zimmerman, can you read  
 23 that bottom line for us, please.  
 24 A. The trash icon on the right end of the window  
 25 list panel works the same as the trash icon in the

1 technical support and training for the SUSE Linux  
 2 Enterprise server.  
 3 Q. And that's training on how to use their  
 4 product, correct?  
 5 A. That is correct.  
 6 Q. And Red Hat provides similar training, correct?  
 7 A. That is correct.  
 8 Q. Have you heard of a Red Hat Academy?  
 9 A. I have.  
 10 Q. Are you aware of Red Hat selling courses?  
 11 A. I am.  
 12 Q. And we saw Mr. Clasen's testimony about support  
 13 as well, correct?  
 14 A. Yes. He works for Red Hat and was providing  
 15 support function for Red Hat.  
 16 Q. One final question. You saw we had some boxes  
 17 over there they were checking off as we went through the  
 18 various elements of the claims, correct?  
 19 A. Yes.  
 20 Q. And Mr. Lyon asked you about erasing one of  
 21 those boxes, correct?  
 22 A. That is correct.  
 23 Q. If you erase one for one product, does it mean  
 24 that the other products that were up there don't  
 25 infringe?

1 A. No, it does not.  
 2 MR. GIBBONS: That's all I have, sir.  
 3 MR. LYON: Just a couple more questions,  
 4 Your Honor.  
 5 RECCROSS-EXAMINATION  
 6 BY MR. LYON:  
 7 Q. The training that we just looked at, that was  
 8 just a general blurb on the fact that Red Hat provides  
 9 training, correct -- or in that case, actually, Novell,  
 10 correct?  
 11 A. Yes, that was Novell providing training.  
 12 Q. No evidence in that at all, though, that it  
 13 provides training for this particular feature, right?  
 14 A. It provides training generally for their  
 15 product.  
 16 Q. Generally. Nothing is specific to this  
 17 particular feature, right?  
 18 A. Not to my knowledge.  
 19 Q. Okay. And then also you mentioned the trash  
 20 icon. Is it your opinion that the trash icon on the  
 21 desktop of the accused products is a display object for  
 22 purposes of this -- of these patents?  
 23 A. Yes.  
 24 Q. And then is it also your opinion then if we  
 25 have two workspaces that have two trash icons on them,

1 your opinion; is that right?  
 2 A. The display object itself is the -- is the  
 3 application window that that application is running in,  
 4 yes. And the user would understand by looking at that  
 5 display object in either workspace that they are working  
 6 with the calendaring application.  
 7 MR. LYON: I have no further questions.  
 8 MR. GIBBONS: Briefly.  
 9 Slide 119, please.  
 10 REDIRECT EXAMINATION  
 11 BY MR. GIBBONS:  
 12 Q. Is this the example you're talking about,  
 13 Dr. Zimmerman?  
 14 A. Yes, it is. What we have in Workspace 1 is the  
 15 calendaring application is open, and you can see that it  
 16 is positioned in the upper left-hand corner of Workspace  
 17 1. And when the user switches over to Workspace 2,  
 18 which is on the right-hand side here, you can see that  
 19 that calendaring application is now positioned in the  
 20 lower right-hand corner of the screen.  
 21 MR. GIBBONS: Thank you, Your Honor. I  
 22 have nothing further.  
 23 MR. LYON: Nothing further, Your Honor.  
 24 THE COURT: You may step down.  
 25 Mr. Gasey?

1 that that's how -- that's your evidence of how these  
 2 patents are infringed by the products?  
 3 A. That is one example of a shared display object  
 4 across two workspaces.  
 5 Q. So if it's shown that that's not true, that  
 6 would be -- that would be noninfringement?  
 7 A. There are a number of examples of shared  
 8 display objects. That's one example, a very simple  
 9 example.  
 10 Q. Where are the other examples -- what are the  
 11 examples?  
 12 A. The other example is where we have an  
 13 application. I gave an example earlier in my testimony  
 14 about a calendaring application. In that case, what the  
 15 user sees in one desktop is the calendaring application  
 16 and, you know, what they've scheduled for the day.  
 17 And then they could have -- on the second  
 18 workspace, they could have the calendaring application  
 19 opened also, and it could be located in a different  
 20 place. It could be sized differently, but it's showing  
 21 the same calendar and content as the first.  
 22 Q. So in your opinion, as long as the tools that  
 23 are being used are the same, that's the same -- those  
 24 would be infringing -- let me rephrase that.  
 25 The underlying application is the tool in

1 MR. GASEY: Yes, Your Honor. At this  
 2 point, there's some deposition testimony that we'd like  
 3 to read into the record. Specifically instead of some  
 4 live witnesses, there are some individuals that we need  
 5 to read in their testimony, some of whom won't be  
 6 appearing here live. And so in lieu of that, we're  
 7 reading in their testimony.  
 8 And we're also -- we have to add on some  
 9 testimony that the Defendants have requested be read  
 10 into the record, so it's going to be one continuous  
 11 reading by Mr. Gibbons supplying the part of the  
 12 questions and Mr. Culig supplying the part of the  
 13 answers.  
 14 We will be brief, Your Honor.  
 15 MR. GIBBONS: Could you call Mr. Culig  
 16 into the witness box to sit because that way it's a  
 17 little bit easier.  
 18 THE COURT: Who is the answerer, and who  
 19 is the questioner?  
 20 MR. GIBBONS: I'm going to be the  
 21 questioner, Your Honor. My colleague, Mr. Culig, will  
 22 do the answerer.  
 23 THE COURT: And you'll clarify who  
 24 Mr. Culig represents, right?  
 25 MR. GIBBONS: Mr. Culig is an attorney in

1 my law firm.  
 2 THE COURT: Yes, but he's going to be  
 3 reading someone else's words.  
 4 MR. GIBBONS: He sure will, and we'll do  
 5 that as each witness changes, Your Honor.  
 6 THE COURT: Thank you.  
 7 MR. GIBBONS: I misunderstood.  
 8 Ladies and gentlemen, as my colleague  
 9 stated, we're going to be reading some deposition  
 10 testimony that was taken earlier in this case during the  
 11 fact discovery period.  
 12 These are witnesses that we are putting on  
 13 in our case in chief. The first one we're going to read  
 14 from is an employee of Red Hat named Matthias Clasen who  
 15 was designated by Red Hat as its corporate designee on  
 16 some technical issues.  
 17 (Deposition excerpt read.)  
 18 QUESTION: Mr. Clasen, is it?  
 19 ANSWER: Yes.  
 20 QUESTION: What is your title with Red  
 21 Hat?  
 22 ANSWER: I believe my official title is  
 23 principal software engineer. I start out as senior  
 24 software engineer.  
 25 QUESTION: And when did you start out

1 QUESTION: And Fedora 9 would have been  
 2 released in spring of 2008, Fedora 8 in fall of 2007?  
 3 ANSWER: Correct.  
 4 QUESTION: So for fall of 2007 for Fedora  
 5 8?  
 6 ANSWER: Uh-huh.  
 7 QUESTION: And then Fedora 7 would have  
 8 been released in spring of 2007?  
 9 ANSWER: From the calculations we did.  
 10 QUESTION: When you say Red Hat packages  
 11 material that includes material done by the open-source  
 12 community, what does that entail?  
 13 ANSWER: Packaging details, taking the  
 14 released version of a product. Usually it comes in the  
 15 form of a tarball. That's t-a-r-ball, which is a  
 16 colloquial name for a compressed archive. And we take  
 17 those and package them in the form of an RPM, which is  
 18 the package format that is used for Fedora as well.  
 19 QUESTION: And you understand that you're  
 20 here today testifying as Red Hat for certain topics,  
 21 right?  
 22 ANSWER: Yes.  
 23 QUESTION: Because Red Hat isn't an actual  
 24 person; it's a corporation, and it needs representatives  
 25 to go ahead and speak on its behalf on certain topics?

1 approximately as a senior software engineer?  
 2 ANSWER: In April of 2004.  
 3 QUESTION: Generally what are your duties  
 4 as a principal software engineer?  
 5 ANSWER: My current responsibility is that  
 6 I'm a team lead for part of the Desktop Team.  
 7 QUESTION: What is the Desktop Team?  
 8 ANSWER: Desktop Team is the group of  
 9 inside Red Hat engineering, which is responsible for  
 10 maintaining and developing all of the components that  
 11 belong to the Desktop.  
 12 QUESTION: When you say Desktop, what do  
 13 you mean?  
 14 ANSWER: The components that comprise the  
 15 part of the operating system you usually consider the  
 16 Desktop, everything you see on the screen, the graphical  
 17 applications.  
 18 QUESTION: Is it your responsibility with  
 19 respect to the Desktop group limited to a particular  
 20 product or group of products within Red Hat?  
 21 ANSWER: We are responsible for both  
 22 Fedora and all the RHEL versions that are supported.  
 23 QUESTION: So Fedora 10 would have been  
 24 spring -- or sorry, fall of 2008?  
 25 ANSWER: Right.

1 ANSWER: Correct.  
 2 QUESTION: And specifically looking at  
 3 your list, you've been designated as the designee  
 4 starting with Topics 11, 12, and 13; do you see those  
 5 topics?  
 6 ANSWER: I see those topics. I'm not  
 7 exactly aware of those numbers I've been designated.  
 8 QUESTION: Well, I'll represent to you  
 9 that you have been designated for six topics, 11 through  
 10 13, 26, and 33, 34. Take a look at those topics and see  
 11 if that matches your understanding of the subject  
 12 matters in which you've been designated.  
 13 What topics do you understand looking at  
 14 Exhibit 9 that you're responsible as testifying on  
 15 behalf of Red Hat for?  
 16 ANSWER: I found myself nominated to  
 17 testify on Topic 11, 12, 13, 26, 33, and 34.  
 18 QUESTION: And you're willing to testify  
 19 on behalf of Red Hat and bind Red Hat by virtue of your  
 20 testimony; is that fair?  
 21 ANSWER: I'm willing to testify to the  
 22 best of my knowledge.  
 23 QUESTION: Switching over to RHEL 4 and 5,  
 24 when approximately was RHEL 4 released?  
 25 ANSWER: RHEL 4 was released approximately

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1 in early February of 2005.  
2 QUESTION: And over what period of time  
3 has Red Hat supported RHEL 4?  
4 ANSWER: Ever since.  
5 QUESTION: It supports it currently?  
6 ANSWER: Yes.  
7 QUESTION: With respect to RHEL 5, when  
8 approximately was that released?  
9 ANSWER: RHEL 5 was released in 2007. I'm  
10 not exactly sure about the month.  
11 QUESTION: Do you know the season?  
12 ANSWER: I'm not sure.  
13 QUESTION: In the spring and fall releases  
14 with different versions of Fedora -- let's stick with 7  
15 through 9 since that's what's involved in the lawsuit --  
16 what, if any, was your role with respect to supporting  
17 those releases after the release date?  
18 ANSWER: As a package maintainer for the  
19 aforementioned packages, it is my responsibility to keep  
20 an eye on the bugs of the product. If they are serious,  
21 they get reported in Bugzilla, which is a bug-reporting  
22 collection tool.  
23 As a package maintainer, it's my  
24 responsibility to keep an eye on those, and if they are  
25 serious, put bug fixes which get released in the form of

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1 update packages.  
2 QUESTION: You mentioned Bugzilla in your  
3 earlier answer; what is Bugzilla?  
4 ANSWER: Bugzilla is a bug-reporting tool  
5 that provides web interface where users of software can  
6 report problems to any individual packages or  
7 components.  
8 QUESTION: And there is an ongoing log  
9 kept of the various threats of the bugs that are  
10 reported; is that correct?  
11 ANSWER: Yes. For each bug, there's  
12 essentially, as I said, a logbook of comments and the  
13 various back-and-forth between the package maintainer  
14 who is trying to collect enough information to find out  
15 what's wrong and the bug reporters who are the people  
16 who might be interested.  
17 QUESTION: By the way, does in the process  
18 of releasing -- by the way, just so I can avoid having  
19 to jump back and forth between RHEL and Fedora, if I  
20 refer to the relevant product, you understand that I'm  
21 referring to RHEL 4 and 5 and Fedora 7, 8 and 9?  
22 ANSWER: I do.  
23 QUESTION: Do you ever use Fedora 7, 8,  
24 and 9?  
25 ANSWER: No.

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1 QUESTION: Well, what version?  
2 ANSWER: Well, back up. I had them  
3 installed at the time they were developed. I generally  
4 have the version that is being developed installed.  
5 QUESTION: Do you test the GUI.  
6 ANSWER: That is part of the testing, yes.  
7 QUESTION: What generally is the nature of  
8 the testing of the GUI that goes on?  
9 ANSWER: The first step in testing if the  
10 graphical user interface is functional would be just  
11 start the computer and check is the graphical user  
12 interface in front of you.  
13 QUESTION: When you say in front of you,  
14 do you mean on the screen?  
15 ANSWER: Yes.  
16 QUESTION: I mean, what other tests, if  
17 any, other than just making sure that a picture and  
18 image pops up on the display screen?  
19 ANSWER: Well, next would be to test the  
20 individual applications for first start-up successfully.  
21 QUESTION: That would include a task bar,  
22 right?  
23 ANSWER: That would include a task bar.  
24 QUESTION: If someone was going to use  
25 Fedora, do they need to have a processor and a memory in

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1 order to make it work?  
2 ANSWER: If they want to use it as a  
3 computer, they need a functional computer, yes.  
4 QUESTION: That would include a processor  
5 and a memory?  
6 ANSWER: Yes.  
7 QUESTION: Have you ever seen Fedora used  
8 for by any of its -- any Red Hat customers for other  
9 than operating a computer?  
10 ANSWER: No.  
11 QUESTION: Do you know why Fedora --  
12 excuse me, why Red Hat would include in the Fedora  
13 installation guide a list of keyboard layouts that are  
14 supported by Fedora?  
15 ANSWER: I don't actually see that list  
16 here.  
17 QUESTION: You're right. It doesn't  
18 include the list. But if you look, it says, 5.2  
19 keyboard configuration. It says --  
20 MR. GIBBONS: Get PX41 at page 4.  
21 QUESTION: It says the installation  
22 program displays a list of the keyboard layouts  
23 supported by Fedora.  
24 ANSWER: Yes, I see that.  
25 QUESTION: Do you know why Fedora would

1 provide -- or Red Hat would provide such a list?  
 2 ANSWER: It is essential to pick -- it's  
 3 important to pick a matching keyboard layout to the  
 4 actual physical layout of your keyboard to be able to  
 5 use the keyboard effectively. So if you don't have --  
 6 if the layout of your keyboard is not supported, you're  
 7 going to be in trouble using Fedora for that keyboard.  
 8 QUESTION: You've just been handed a  
 9 six-page document that's entitled, Workspace.C. Can you  
 10 take a look at it and tell me if you've ever seen this  
 11 listing of code before?  
 12 MR. GIBBONS: That's PX42.  
 13 ANSWER: Yes, I've seen that.  
 14 QUESTION: What is it?  
 15 ANSWER: It's a source file that's part of  
 16 Libwnck.  
 17 QUESTION: Is Libwnck found in each of the  
 18 versions of the accused products?  
 19 ANSWER: Different versions of Libwnck are  
 20 found in each of those products.  
 21 QUESTION: To your knowledge, is  
 22 Workspace.C a component in Libwnck found in each of the  
 23 accused products?  
 24 ANSWER: To my knowledge, it is a part  
 25 each of those, yes.

1 MR. GIBBONS: Plaintiffs' 43.  
 2 QUESTION: Is workspace-switcher.c a  
 3 module which to your knowledge is in each of the accused  
 4 products?  
 5 ANSWER: I cannot say for sure which  
 6 versions of the source file correspond to components in  
 7 each of the RHEL products.  
 8 QUESTION: Do you know whether workspace  
 9 switcher whether or not is in any of the accused  
 10 products?  
 11 ANSWER: Yes, I believe it is.  
 12 QUESTION: Which ones do you believe it is  
 13 in?  
 14 ANSWER: I know for sure that it's in all  
 15 of the accused products.  
 16 QUESTION: What is a workspace switcher?  
 17 ANSWER: I would say the most concrete  
 18 answer I can give you is workspace switcher is like the  
 19 object that is defined in the course code.  
 20 QUESTION: It --  
 21 MR. KREVITT: I'm sorry to interrupt. I  
 22 just want to make sure you're also reading the  
 23 counter-designations because it seemed from our  
 24 read-along that counter-designations weren't being read,  
 25 and the understanding was that it would be all of the

1 QUESTION: Do you have an understanding of  
 2 how the term, workspace, is used?  
 3 ANSWER: Generally speaking, my  
 4 understanding of a workspace is that it is a collection  
 5 of top-level windows that can be shown on a screen at  
 6 the same time.  
 7 QUESTION: How does a workspace differ  
 8 from a desktop, if at all?  
 9 ANSWER: That is a hard to answer  
 10 question, I have to say, because people actually use  
 11 these terms interchangeably at times, so the terminology  
 12 is not entirely clear.  
 13 QUESTION: Okay. Do you consider the  
 14 terms to be interchangeable?  
 15 ANSWER: It depends on the circumstance.  
 16 I would say desktop is used as a shorthand reference to  
 17 desktop environment, which would mean as a whole. In  
 18 another context, desktop might very well be used as a  
 19 synonym for workspace. So I would say it depends on the  
 20 context.  
 21 QUESTION: Mr. Clasen, I would like to  
 22 hand you what has been marked as Exhibit 12. This is a  
 23 module that is entitled, Workspace -- excuse me,  
 24 workspace-switcher.c, right?  
 25 ANSWER: I see that.

1 deposition testimony read.  
 2 MR. CULIG: We only received counter  
 3 designations for Mr. Agarwal.  
 4 THE COURT: Would you hold on just a  
 5 second. We'll handle this.  
 6 MR. KREVITT: I'm not sure what role he  
 7 was in --  
 8 THE COURT: He was not in any role.  
 9 MR. GASEY: We received counter  
 10 designations -- it's my understanding that we received  
 11 counter-designations from Mr. Agarwal.  
 12 THE COURT: Do you have a copy,  
 13 Mr. Reiter?  
 14 MR. KREVITT: These may have been the  
 15 designations that arrived at 2:00 this morning, Your  
 16 Honor, which gives you some sense of why we didn't  
 17 provide counter-designations yesterday. We didn't have  
 18 these designations, but I just want to bring that to the  
 19 Court's attention. We're obviously going to need an  
 20 opportunity to have counter-designations read also.  
 21 MR. GASEY: We sent these last night. I  
 22 have in my possession from 11 o'clock last night.  
 23 THE COURT: All we need is to make sure --  
 24 MR. GASEY: Sure.  
 25 THE COURT: Is there some way that you can

1 put your finger on what Mr. Gibbons needs to be reading?  
 2 MR. KREVITT: I'm sorry. Mr. Reiter just  
 3 explained we provided counter-designations months ago.  
 4 What was provided yesterday was just the testimony they  
 5 intended to read in. The counter-designations have been  
 6 provided and were provided in a timely manner long ago,  
 7 Your Honor.  
 8 THE COURT: Well, do we have those easily  
 9 accessible so they can all be read at the same time for  
 10 the jury?  
 11 MR. GIBBONS: I don't know that we have  
 12 those in a format that would allow them to be read right  
 13 now. Your Honor, we exchanged designations as part of  
 14 the pretrial proceedings. And then yesterday --  
 15 THE COURT: Mr. Gibbons, how long is it  
 16 going to take to get the full transcript of what's  
 17 supposed to be read?  
 18 MR. KREVITT: I'm sorry, Your Honor?  
 19 THE COURT: How long -- can you place in  
 20 front of Mr. Gibbons a transcript right now of what  
 21 should be read?  
 22 MR. KREVITT: I imagine we can, Your  
 23 Honor. I can't lay my hands on it at this very moment.  
 24 THE COURT: I'm trying to decide whether  
 25 to let my jury take a break while you decide figure out

1 ANSWER: The first step in testing the  
 2 graphical user interface is functional would be just  
 3 start the computer and check is the graphical user  
 4 interface in front of you.  
 5 QUESTION: When you say, in front of you,  
 6 you mean on the screen?  
 7 ANSWER: Yeah.  
 8 QUESTION: And what other tests, if any,  
 9 other than just making sure that a picture and image  
 10 pops up on the display screen?  
 11 ANSWER: Next would be to test the  
 12 individual applications for first start-up successfully.  
 13 It would include testing the functionality in general of  
 14 everything you see on the screen.  
 15 QUESTION: That would include a task bar,  
 16 right?  
 17 ANSWER: That would include a task bar.  
 18 QUESTION: Do you understand in the course  
 19 of your work at Red Hat what people understand when they  
 20 talk about task bar?  
 21 ANSWER: Yes.  
 22 QUESTION: What is that?  
 23 ANSWER: It's usual -- that usually refers  
 24 to a part of the -- like our desktop configuration. You  
 25 have two so-called panels, a top panel and a bottom

1 where we're at.  
 2 MR. KREVITT: I apologize, Your Honor. We  
 3 weren't aware that they weren't being read.  
 4 THE COURT: That's fine.  
 5 MR. GIBBONS: Why don't we take a break,  
 6 Your Honor?  
 7 THE COURT: We don't need to point  
 8 fingers.  
 9 Let's take a break. Just a procedural  
 10 matter. We'll take a 15-minute break, and you come on  
 11 back, and we'll have everything ready for you.  
 12 (Jury out.)  
 13 (Jury in.)  
 14 THE COURT: Please be seated.  
 15 Attorneys do bill by the hour, but that's  
 16 not the reason this took so long.  
 17 Please proceed, Mr. Gibbons.  
 18 MR. GIBBONS: Your Honor, we're going to  
 19 pick up the Clasen deposition on Page 35 to incorporate  
 20 some of the additions.  
 21 (Deposition excerpt read.)  
 22 QUESTION: Did you test the GUI?  
 23 ANSWER: That is part of the testing, yes.  
 24 QUESTION: What generally is the nature of  
 25 the testing of the GUI that goes on?

1 panel, which are two gray bars at the top and at the  
 2 bottom of the screen, and they contain various user  
 3 interface elements. And one element that you usually  
 4 find on the default configuration on the bottom panel is  
 5 referred to as a task bar.  
 6 QUESTION: If someone is going to use  
 7 Fedora, do they need to have a processor and a memory to  
 8 make it work?  
 9 ANSWER: It depends on how they want to  
 10 use Fedora, yes.  
 11 QUESTION: If they don't want to use it to  
 12 hold a coffee cup, they actually have to have it operate  
 13 because they need a processor and memory?  
 14 ANSWER: If they want to use it as a  
 15 computer, they need a functional computer, yes.  
 16 QUESTION: That would be a processor and a  
 17 memory?  
 18 ANSWER: Yes.  
 19 QUESTION: Have you ever seen Fedora used  
 20 by any of its -- any Red Hat customers for other than  
 21 operating a computer?  
 22 ANSWER: No.  
 23 QUESTION: Do you know why Fedora --  
 24 excuse me, why Red Hat would include in the Fedora  
 25 installation guide a list of keyboard layouts that are

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1 supported by Fedora.  
2 ANSWER: I don't actually see that list  
3 here.  
4 MR. GIBBONS: Go to PX41.  
5 QUESTION: You're right. It doesn't  
6 include the list. If you look, it says 5.2 keyboard  
7 configuration. It says, the installation program  
8 displays a list of the keyboard layouts supported by  
9 Fedora.  
10 ANSWER: Yes, I see that.  
11 QUESTION: Do you know why Fedora would  
12 provide or Red Hat would provide such a list?  
13 ANSWER: It's important to pick a matching  
14 keyboard layout to the actual physical layout of your  
15 keyboard to be able to use the keyboard effectively. So  
16 if you don't have -- if the layout of your keyboard is  
17 not supported, you're going to be in trouble using  
18 Fedora for that keyboard.  
19 QUESTION: You've just been handed a  
20 six-page document that's entitled, Workspace.C. Take a  
21 look at it and tell me if you've ever seen this listing  
22 of code before.  
23 ANSWER: Yes, I've seen that.  
24 QUESTION: What is it?  
25 ANSWER: It's a source file that's part of

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1 Libwnck.  
2 QUESTION: Is Libwnck found in each of the  
3 versions of the accused products?  
4 ANSWER: Different versions of Libwnck are  
5 found in each of those products.  
6 QUESTION: To your knowledge, is  
7 Workspace.C a component in Libwnck found in each of the  
8 accused products?  
9 ANSWER: To my knowledge, it is a part of  
10 each of those, yes.  
11 QUESTION: Let's just talk in general  
12 terms. Do you have an understanding of how the term,  
13 workspace, is used?  
14 ANSWER: Generally speaking, my  
15 understanding of a workspace is that it is a collection  
16 of top-level windows that can be shown on the screen at  
17 the same time.  
18 QUESTION: How does a workspace differ  
19 from a desktop, if at all?  
20 ANSWER: That is hard to answer the  
21 question, I have to say, because people actually use  
22 these terms interchangeably at times, so the terminology  
23 is not entirely clear.  
24 QUESTION: Okay. Do you consider the  
25 terms to be interchangeable?

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1 ANSWER: It depends on the circumstance.  
2 I would say desktop is used as a shorthand reference to  
3 desktop environment, which would mean as a whole. In  
4 another context, desktop might be very well be used as a  
5 synonym for workspace. So I would say it depends on the  
6 context.  
7 QUESTION: Mr. Clasen, I would like to  
8 hand you what has been marked as Exhibit 12. This is a  
9 module that is entitled, workspace -- excuse me --  
10 workspace-switcher.c, right?  
11 ANSWER: I see that.  
12 QUESTION: Is workspace-switcher.c a  
13 module which to your knowledge is in each of the accused  
14 products?  
15 ANSWER: I cannot say for sure which  
16 version of the source filed and corresponding components  
17 is in each of the RHEL products.  
18 QUESTION: Do you know whether workspace  
19 switcher -- whether or not it is in any of the accused  
20 products?  
21 ANSWER: Yes, I believe it is.  
22 QUESTION: Which ones do you believe it is  
23 in?  
24 ANSWER: I know for sure that it's in all  
25 of the accused products.

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1 QUESTION: What is a workspace switcher?  
2 ANSWER: I would say the most concrete  
3 answer I can give you is workspace switcher is like the  
4 object that is defined in a source code.  
5 QUESTION: What does it do?  
6 ANSWER: It provides functionality to -- I  
7 need to check what actually it is.  
8 QUESTION: By the way, for the record,  
9 this module is 16 pages, right, as printed?  
10 ANSWER: Yeah. It looks like it is.  
11 QUESTION: Have you seen it before?  
12 ANSWER: I have seen it. I would say the  
13 workspace switcher object provides functionality to  
14 manage one or more workspaces.  
15 QUESTION: What does the switching refer  
16 to in workspace switcher?  
17 ANSWER: Switching refers to -- when I  
18 earlier defined what a workspace is, I said it is a work  
19 group of top-level windows at a given time. And  
20 switching refers to that workspace that is shown on the  
21 workspace would be referred to as the current workspace.  
22 Switching refers to switching to a current workspace.  
23 MR. GIBBONS: Let's go to PX41.  
24 QUESTION: Let's take a look back at  
25 Exhibit 10, the claim chart, and specifically, let's

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1 look at an example here. Let's go to page 14, if we  
2 could. What do you understand the screen on page 14 to  
3 show?  
4 ANSWER: It's another screen shot of  
5 Fedora Desktop.  
6 QUESTION: Can you see on I think what you  
7 referred to earlier as the bottom panel as a series of  
8 four boxes next to the little trash can icon?  
9 ANSWER: I see that.  
10 QUESTION: What are those boxes?  
11 ANSWER: This series of four boxes is --  
12 the term we use for that is the pager.  
13 QUESTION: The pager?  
14 ANSWER: The pager, yes. That's what we  
15 use.  
16 QUESTION: What is the pager?  
17 ANSWER: I mean, clarify, what is.  
18 QUESTION: When you say if, for instance,  
19 I'm assuming that the box that is included reflects the  
20 current screen shown on this page; is that correct?  
21 ANSWER: That is correct.  
22 QUESTION: If one were to click on any one  
23 of the three beige boxes, what would happen?  
24 ANSWER: I guess it depends on what's on  
25 the other workspace. What is generally going to happen

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1 is that a different workspace is going to become the  
2 current workspace.  
3 QUESTION: So for instance, if I had a  
4 word processor icon on this page and I clicked it and it  
5 was open on this workspace, if I switched to one of  
6 those beige boxes, that word processor icon -- or excuse  
7 me, that word processor window wouldn't be open in the  
8 other workspace?  
9 ANSWER: Yes. In general, the answer is  
10 yes.  
11 QUESTION: If I had a word processor on  
12 this workspace and I switched to another workspace, it  
13 would also show the same or what would appear to me to  
14 be the same word processor icon?  
15 ANSWER: I think I said that already. The  
16 set of icons as shown on one workspace is the same  
17 that's going to be shown on the other workspace. So  
18 it's going to be the same.  
19 QUESTION: If you were using it, if you  
20 were a user, and you clicked -- let's say you had word  
21 processor and calculator icons, if you clicked and  
22 switched from one workspace to the other, you would  
23 perceive those as being the same icons, right?  
24 ANSWER: Yes.  
25 QUESTION: What is the software that

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1 enables a user to switch from one workspace to another  
2 by clicking on those different boxes?  
3 ANSWER: So we're talking about what  
4 happens when you click on one of those gray boxes down  
5 there?  
6 QUESTION: Right. I think we talked about  
7 it earlier. When you click on one of those gray boxes,  
8 a different workspace comes up, right?  
9 ANSWER: That's what we said.  
10 QUESTION: What is the software that  
11 enables that to occur?  
12 ANSWER: Are you asking me what names of  
13 individual components are?  
14 QUESTION: Right.  
15 ANSWER: Okay. I guess there's three  
16 components at least. The first one would be what I  
17 referred to earlier as the pager, which is the applet  
18 that actually displays those gray and blue boxes on the  
19 panel as part of the bottom panel. And the pager, I  
20 believe, is part of the GNOME panel package, and it is  
21 an instance of what I referred to earlier as applets,  
22 which are little self-standing applications that run and  
23 show something inside.  
24 QUESTION: Got it. So a pager is one of  
25 the -- I think you mentioned there are three. What are

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1 the other two?  
2 ANSWER: So the pager is using the  
3 earlier -- the Libwnck Library that we discussed  
4 earlier.  
5 QUESTION: Is there a specific module in  
6 Libwnck that's involved in the switching?  
7 ANSWER: I couldn't say exactly. It  
8 depends on what you mean by module as well, I guess. If  
9 you're talking about individual source files or objects,  
10 I couldn't name the source files.  
11 QUESTION: And then so pager, Libwnck, and  
12 what's the third one?  
13 ANSWER: The third component would be the  
14 window manager, which in this case I cannot say for sure  
15 because there's nothing which really indicates which  
16 windows manager is running.  
17 THE COURT: Please suspend for a second.  
18 When we finish with this reading, Mr. Gasey and  
19 Mr. Reiter or Krevitt or somebody, I'd like each of you  
20 to take about three minutes and tell the jury why we  
21 went through this from your perspective.  
22 MR. GASEY: Sure.  
23 THE COURT: So you'll each have a chance  
24 to explain what you think this reading has informed my  
25 jury about, but let's finish the reading, and then we'll

1 each have a couple minutes to explain.  
 2 Excuse me, Mr. Gibbons, you may proceed.  
 3 MR. GIBBONS: Thank you, Your Honor.  
 4 QUESTION: On page 101, how, if at all,  
 5 would you expect the functionality of the workspace file  
 6 to differ among the accused products?  
 7 ANSWER: I don't expect any.  
 8 QUESTION: Same question with respect to  
 9 the workspace switcher file, which I believe is Exhibit  
 10 12. How, if at all, would you expect the workspace  
 11 switcher file to differ from the accused products?  
 12 ANSWER: Do you know which of the relevant  
 13 versions we're looking at?  
 14 QUESTION: I'm not sure, offhand.  
 15 ANSWER: I would expect you would find  
 16 different versions of the source code file in each of  
 17 the different relevant products, and I don't think the  
 18 function would be different.  
 19 QUESTION: With respect to the switching  
 20 functions that we've been discussing, do you know  
 21 whether or not there's any difference in functionality  
 22 relative to the versions of Libwnck that are provided in  
 23 the relevant products?  
 24 ANSWER: The switching here we talk about,  
 25 the clicking on the pager, and switching to a different

1 deposition.  
 2 THE COURT: If you have a question, you  
 3 can write it down.  
 4 MR. GIBBONS: And Justin Steinman is an  
 5 employee of Novell and was a corporate designee that was  
 6 deposed during fact discovery in this case. And that  
 7 deposition was September 23rd, 2009.  
 8 (Deposition excerpt read.)  
 9 QUESTION: Would you please state your  
 10 name for the record.  
 11 ANSWER: Justin Steinman.  
 12 QUESTION: And you understand that you are  
 13 a designee for Novell here for today's deposition?  
 14 ANSWER: Yes, I do.  
 15 QUESTION: What's your position with  
 16 Novell?  
 17 ANSWER: I'm Vice-President of Solution  
 18 and Product Marketing.  
 19 QUESTION: How long have you held that  
 20 position?  
 21 ANSWER: A little over a year.  
 22 QUESTION: And how long have you been with  
 23 the company?  
 24 ANSWER: Since June of 2004.  
 25 QUESTION: Have you been deposed before?

1 workspace as we discussed earlier?  
 2 QUESTION: Correct.  
 3 ANSWER: I believe that function has not  
 4 changed.  
 5 MR. GIBBONS: That's it.  
 6 THE COURT: Is that the whole -- that's  
 7 all?  
 8 MR. GIBBONS: That's the Clasen  
 9 deposition.  
 10 THE COURT: All right.  
 11 MR. HILL: Do you want us to do that in  
 12 regard to each deposition or finish the depositions and  
 13 then do it for the collection?  
 14 THE COURT: Let's do all of it, unless  
 15 it's -- can you do all of them with one summary?  
 16 MR. GASEY: I think we can do all with one  
 17 summary.  
 18 THE COURT: We're going to, Ladies and  
 19 Gentlemen, handle --  
 20 Mr. Gibbons, how many? Four?  
 21 MR. GIBBONS: Yes, Your Honor.  
 22 THE COURT: Four readings like this, and  
 23 then we'll have counsel explain to us a little bit more  
 24 the significance of what we've heard.  
 25 MR. GIBBONS: Let's go to the Steinman

1 ANSWER: No.  
 2 QUESTION: Prior to your current position,  
 3 what was your title with Novell?  
 4 ANSWER: Director of Product Marketing for  
 5 Linux and Open Platform Solutions.  
 6 QUESTION: How long were you in that  
 7 position with Novell?  
 8 ANSWER: Roughly two years.  
 9 QUESTION: How did your job  
 10 responsibilities change with your promotion to  
 11 vice-president?  
 12 ANSWER: I inherited responsibility for  
 13 all of Novell's product lines. Previously, I was  
 14 responsible only for Linux.  
 15 THE COURT: Can you suspend? Is that in a  
 16 form that could be posted for them to read along?  
 17 MR. GIBBONS: I don't think it is, Your  
 18 Honor.  
 19 THE COURT: All right.  
 20 MR. GIBBONS: And I apologize.  
 21 QUESTION: When you were the Director of  
 22 Product Marketing for Linux, which products were you in  
 23 charge of?  
 24 ANSWER: I was responsible for the SUSE  
 25 Linux Enterprise product line.

<p style="text-align: right;">Page 65</p> <p>1 QUESTION: And that would be desktop and 2 server? 3 ANSWER: Yes. 4 QUESTION: And you still have 5 responsibility for those two products in your new 6 position as well, correct? 7 ANSWER: Correct. 8 QUESTION: And you have an understanding 9 of what products are at issue in this case? 10 ANSWER: Yes. 11 QUESTION: And what are those products? 12 ANSWER: SUSE Linux Enterprise Server, 13 Version 10, SUSE Linux Enterprise Desktop, Version 10, 14 OpenSUSE 10.2, 10.3, and I believe 11.0. 15 QUESTION: Do you know how or why you were 16 selected for specific topics in this case? 17 ANSWER: I believe because I 18 am vice-president of product marketing. 19 QUESTION: But prior to yesterday, nobody 20 conferred or consulted with you about specific topics, 21 did they? 22 ANSWER: No. 23 QUESTION: So you just showed up in your 24 preparation session and you were told, here's what you 25 were going to be deposed on?</p>	<p style="text-align: right;">Page 67</p> <p>1 ANSWER: Correct. 2 QUESTION: It sponsors the initiative, 3 correct? 4 ANSWER: Novell contributes the funding 5 betterdesktop.org. We had not the sole provider. 6 QUESTION: Here's Exhibit 2. It's a 7 document bearing Bates Nos. NV1158 through 1204, 8 entitled, Enterprise Linux Desktops, and it bears the 9 date of 22 December, 2008. Have you seen this document 10 before? 11 ANSWER: Yes. 12 QUESTION: This is something you reviewed 13 yesterday? 14 ANSWER: Yes. 15 QUESTION: What is this document? 16 ANSWER: This is an internal confidential 17 positioning document that explains to the Novell 18 marketing team how to talk about the benefits of the 19 Linux Desktop. 20 QUESTION: The second paragraph down, it 21 says, based on 1500 hours of usability video during the 22 design phase of the product SUSE Enterprise Desktop 23 provides an unparalleled user experience through an 24 easy-to-use graphical interface, integrated search 25 capabilities in an intuitive menu design.</p>
<p style="text-align: right;">Page 66</p> <p>1 ANSWER: Correct. 2 QUESTION: You're familiar with the 3 betterdesktop.org initiative? 4 ANSWER: Yes. 5 QUESTION: And it's true that about 1500 6 hours of videotape was recorded showing interaction with 7 desktops? 8 ANSWER: Yes. 9 QUESTION: And that was using Novell's 10 products? 11 ANSWER: Not all 1500 hours were done 12 using Novell products. 13 QUESTION: But some were, right? 14 ANSWER: Some of those hours were, yes. 15 QUESTION: Did you review those 16 videotapes? 17 ANSWER: I spent cursory time looking at 18 the betterdesktop.org on the website. 19 QUESTION: That's a Novell initiative, 20 right? 21 ANSWER: It is a community initiative. 22 Novell is a participant in the community initiative. 23 QUESTION: But Novell used 24 betterdesktop.org as part of its research and design for 25 the Linux desktop, right?</p>	<p style="text-align: right;">Page 68</p> <p>1 Do you see that? 2 ANSWER: Yes, I do. 3 QUESTION: This 1500 hours that Novell is 4 touting as a usability video, that's the initiative we 5 were discussing, right, the betterdesktop.org? 6 ANSWER: Yes, betterdesktop.org. 7 QUESTION: And that's the 1500 hours of 8 video on page 1194, correct? 9 ANSWER: Correct. 10 QUESTION: And you testified that you 11 reviewed some of this video, correct? 12 ANSWER: Some of which video? 13 QUESTION: The 1500 hours of 14 betterdesktop.org video. 15 ANSWER: Yes. I watched 10 or 15 minutes 16 of betterdesktop.org. 17 QUESTION: And you have seen the users 18 being videotaped using Novell's Linux Enterprise 19 Desktop, correct? 20 ANSWER: I'm trying to think back. It's 21 been three years since I've watched the videos. I 22 believe I saw users using a variety of desktop products 23 in the betterdesktop.org. 24 QUESTION: Including Novell's Linux 25 Enterprise Desktop, correct?</p>

<p style="text-align: right;">Page 69</p> <p>1 ANSWER: Including Novell's Enterprise 2 Linux Desktop. 3 QUESTION: Do you know if Novell has given 4 users of its products more ways to move between 5 desktops? 6 ANSWER: Could you define, more? 7 QUESTION: You're aware that in Novell's 8 products users can move between desktops, correct? 9 ANSWER: Could you define a desktop? 10 QUESTION: What is your definition of, 11 desktop? 12 ANSWER: My definition of a desktop is a 13 single screen that a user interacts with when he or she 14 is typing. 15 QUESTION: You're aware that the SUSE 16 product allows a user to switch by clicking on an icon 17 between one screen and another? 18 ANSWER: Yes. 19 QUESTION: You're aware that that is one 20 of the features of the SUSE Linux Enterprise product, 21 correct? 22 ANSWER: From a marketing perspective, you 23 can classify that as a basic feature of the product. 24 QUESTION: This is Exhibit 3. It is a 25 document entitled, openSUSE 11.0 KDE Quick Start, Nos</p>	<p style="text-align: right;">Page 71</p> <p>1 to Exhibit 3. Here it does detail how the openSUSE 11 2 works, correct? 3 ANSWER: Yes, this document does detail 4 how openSUSE 11.0 works. 5 MR. GIBBONS: PX90. 6 QUESTION: Here's Exhibit 5. It is a 7 document entitled, SUSE Linux Enterprise Desktop GNOME 8 User Guide, and it bears a date of May 8, 2008. We 9 printed this off the Novell website. 10 I'd like you to turn, if you would, to the 11 last page that we have in this exhibit. It says, 12 workspace switcher; do you see that? 13 ANSWER: Yes, I do. 14 QUESTION: Are you familiar with the 15 workspace switcher in GNOME? 16 ANSWER: I've never seen that term before. 17 I'm reading the description. 18 QUESTION: You testified earlier that you 19 have seen products use the SUSE Linux Enterprise product 20 at trade shows, right? 21 ANSWER: Correct. 22 QUESTION: Obviously, these are trade 23 shows you attended? 24 ANSWER: Correct. 25 QUESTION: And you were presenting at?</p>
<p style="text-align: right;">Page 70</p> <p>1 NV7655 though 7658. Have you seen this document before, 2 sir? 3 ANSWER: Actually, I have not. 4 QUESTION: This is not something that you 5 reviewed in preparation for today's deposition when you 6 reviewed documents yesterday, correct? 7 ANSWER: This is the first time in my life 8 I've ever seen this document. 9 QUESTION: Take a look at page 2 of the 10 document, which is page 7656. If you look in the second 11 paragraph, in the top -- in the left-hand column, it 12 says, Pager Desktop Previewer. Do you see that? 13 ANSWER: Yes. 14 QUESTION: Between the quick launcher and 15 the task bar, find a miniature preview that shows your 16 virtual desktops. OpenSUSE allows you to organize your 17 programs and tasks on several desktops, which minimizes 18 the number of windows to arrange on the screen. To 19 switch between desktops, click one of the symbols in the 20 pager. 21 Do you see that? 22 ANSWER: I do. 23 QUESTION: That's how you would switch 24 between desktops in SUSE Enterprise Linux Desktop or 25 server products, correct? But regardless, we'll go back</p>	<p style="text-align: right;">Page 72</p> <p>1 ANSWER: Not always. Sometimes I just 2 attended. 3 QUESTION: Were those uses by these 4 prospects of the Novell products at a Novell booth? 5 ANSWER: Usually. Not always. 6 QUESTION: How would Novell -- if the 7 prospect has a Novell booth and is accessing Novell 8 products, is it done over some sort of a computer that 9 Novell provided at the booth? 10 ANSWER: Yes. 11 QUESTION: The prospects use the desktops 12 products or access it using a mouse? 13 ANSWER: Correct, and a keyboard. 14 QUESTION: One or the other? 15 ANSWER: Or both, yeah. It's standard 16 desktop interface. 17 QUESTION: When you use the Novell product 18 and you're clicking from desktop to desktop with your 19 mouse, do you click on the icons? 20 ANSWER: I actually use the keyboard, 21 personally. 22 QUESTION: You're clicking on icons, 23 right? 24 ANSWER: Sometimes I click on icons, yes. 25 QUESTION: The summary that we have in</p>

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1 Exhibit 5 of workspace, that's accurate, correct? In  
2 your own experience as a user of the product, that's  
3 accurate, correct?  
4 ANSWER: Yes. As a user, I would say that  
5 is accurate.  
6 QUESTION: Does Novell also track who  
7 downloads its SUSE software?  
8 ANSWER: We do, but the quality of data  
9 around downloads is pretty poor.  
10 QUESTION: What do you mean by pretty  
11 poor?  
12 ANSWER: Because it is free, you can  
13 download it and say your name is Mickey Mouse, and you  
14 can e-mail me at Disney World.  
15 QUESTION: Mickey Mouse isn't actually  
16 using?  
17 ANSWER: No, he is not.  
18 QUESTION: That is for the identification  
19 or the accuracy of who is downloading. You track  
20 downloads, don't you?  
21 ANSWER: Correct.  
22 QUESTION: Here is Exhibit 6. This is a  
23 document bearing a date of 7 July of 2009, and it is  
24 entitled, SUSE 11 Takes off Faster Than 10.  
25 Have you seen this document or any version

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1 of this document before?  
2 ANSWER: Yes. I have seen this online.  
3 QUESTION: This is a recordation of an  
4 interview that you provided back in July of this year,  
5 correct?  
6 ANSWER: This is an article that Timothy  
7 Prickett Morgan wrote for The Register. I was  
8 interviewed as one source for the article.  
9 QUESTION: You'll see that in the third  
10 paragraph down, it says, according to Justin Steinman,  
11 director of marketing for Linux and Open Platform  
12 Solutions at Novell, the downloads for SUSE Linux 11,  
13 which Novell apparently shortens to Code 11 internally  
14 when it talks about it, were 10 percent higher in May  
15 than they were for SUSE Linux 10 in the year ago.  
16 Do see that?  
17 ANSWER: I do see that.  
18 QUESTION: So downloads are something that  
19 Novell tracks, correct?  
20 ANSWER: Correct.  
21 QUESTION: Where would you have gotten the  
22 information to have the knowledge that the downloads for  
23 SUSE 11 were 10 percent higher than those for SUSE Linux  
24 10 a year ago?  
25 ANSWER: From our field marketing team.

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1 QUESTION: You'll see if you turn to the  
2 next page what looks to be the fourth full paragraph  
3 from the top beginning with, in its most recent quarter.  
4 Do you see that?  
5 ANSWER: Yes, I do see that paragraph.  
6 QUESTION: It talks about Linux  
7 maintenance and subscription sales; do you see that?  
8 ANSWER: Yes, I see that.  
9 QUESTION: That's another metric that  
10 Novell tracks in addition to the number of downloads for  
11 its software, correct?  
12 ANSWER: Correct. Novell reports  
13 maintenance and subscription sales as part of our  
14 quarterly filings with the SCC.  
15 MR. GIBBONS: PX92.  
16 QUESTION: This is Exhibit 7. It is  
17 numbered NV1549 through 1552. It is entitled, SUSE  
18 Linux Enterprise Server Including Technical Support and  
19 Training.  
20 Have you seen this document before today?  
21 ANSWER: Yes.  
22 QUESTION: Did you review this when you  
23 were preparing with your lawyers yesterday?  
24 ANSWER: Yes.  
25 QUESTION: Is this something put out by

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1 your marketing group?  
2 ANSWER: Yes.  
3 QUESTION: What is it, Exhibit 7?  
4 ANSWER: It is a Competitive Comparison  
5 Flyer that explains to the customers the difference  
6 between the technical support and training between SUSE  
7 Linux Enterprise Server and Red Hat Enterprise Linux.  
8 QUESTION: That's what we see at page  
9 1550?  
10 ANSWER: Correct. That is what we see on  
11 page 1550.  
12 QUESTION: That sets forth some of the  
13 pricing for Novell's -- what did you call them?  
14 Subscriptions?  
15 ANSWER: Subscriptions.  
16 QUESTION: It sets forth some of the  
17 pricing for a Novell subscription?  
18 ANSWER: It shows a list price for  
19 subscriptions.  
20 QUESTION: What do you mean by list price?  
21 ANSWER: The price we quote to customers  
22 before discount.  
23 QUESTION: Looking at page 1550, it says  
24 for one year of support, the standard price is \$799,  
25 correct?

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1 ANSWER: That is the standard price for  
 2 one year of support for SUSE Linux Enterprise Server.  
 3 QUESTION: For priority, the price goes up  
 4 to \$1,499, correct?  
 5 ANSWER: For one year or priority support  
 6 for SUSE Linux Enterprise Server, the price is 1,499.  
 7 QUESTION: Is that per server?  
 8 ANSWER: Yes, these prices are per server.  
 9 QUESTION: There are hardware  
 10 manufacturers that sell products that are preconfigured  
 11 with SUSE, correct?  
 12 ANSWER: I think the term you are looking  
 13 for would be preloaded with SUSE.  
 14 QUESTION: Preloaded?  
 15 ANSWER: Where the software is installed  
 16 at the factory and ships with the device. Is that what  
 17 you're asking?  
 18 QUESTION: Yes.  
 19 ANSWER: Yes, we have partnerships where  
 20 the software is preinstalled at the factory and ships on  
 21 the device.  
 22 MR. GIBBONS: PX88.  
 23 QUESTION: Take a look at page 1191 of  
 24 Exhibit 2. It should be in front of you. It should be  
 25 page 7 of the document.

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1 ANSWER: I see it.  
 2 QUESTION: If you look at the bottom  
 3 paragraph, about halfway down, there's a sentence  
 4 beginning, our hardware partners such as HP, Dell,  
 5 Lenovo, Wyse, Micro-Star International also help to  
 6 ensure that adoption is painless through a wide range of  
 7 devices preloaded with Enterprise Linux Desktops.  
 8 Do you see that?  
 9 ANSWER: I do see that.  
 10 QUESTION: In those instances that someone  
 11 goes out and they buy, say, a Lenovo laptop and it comes  
 12 preloaded with SUSE, how does Novell generate a revenue?  
 13 ANSWER: So this laptop would be preloaded  
 14 with SUSE Linux Enterprise Desktop, and the hardware  
 15 manufacturer pays a fee to the Novell for the  
 16 subscription for the first year of the support and  
 17 updates. And then the end customer would renew the  
 18 subscription if they wanted to.  
 19 MR. GIBBONS: PX95.  
 20 QUESTION: This is Exhibit 10. This is a  
 21 September 3rd, 2008, article entitled, The Var Guide,  
 22 V-A-R Guide. Novell Desktop Linux paves way to Lenovo  
 23 server.  
 24 Have you seen this before, sir?  
 25 ANSWER: Yes, I have.

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1 QUESTION: The very top of the article, it  
 2 says, Novell is losing money in the desktop Linux  
 3 market, but those desktop deals are driving big wins in  
 4 the server arena, according to senior VP in marketing,  
 5 Chief Officer John Dragoon.  
 6 Is that accurate?  
 7 ANSWER: That is what the statement says.  
 8 QUESTION: Do you have any reason to  
 9 dispute that?  
 10 ANSWER: I believe this article is stating  
 11 that we established a relationship with Lenovo around  
 12 preloaded Linux desktops, and then when they decided to  
 13 get into the server business, they already had a Linux  
 14 partner. So we were able to ask them if they wanted to  
 15 preload Linux on their server line.  
 16 QUESTION: The preloading of the Linux  
 17 Enterprise Desktop software onto Lenovo products led to  
 18 what we see here in this article, which is the  
 19 preloading of the Linux Enterprise Service software onto  
 20 Lenovo servers, correct?  
 21 ANSWER: The preloading of SUSE Linux  
 22 Enterprise Desktops on Lenovo desktops gave us the  
 23 relationship to open a conversation around preloading  
 24 Linux onto the Lenovo server line. It was not directly  
 25 correlated.

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1 QUESTION: Well, you never wrote the Var  
 2 guy to let him know he was incorrect in this article,  
 3 did you?  
 4 ANSWER: No.  
 5 QUESTION: Do you read the VAR guy every  
 6 day?  
 7 ANSWER: More days than not. He's a  
 8 blogger. He doesn't post every day, but more days than  
 9 not, I do. I generally do not respond to blogs. No  
 10 good ever comes from that.  
 11 QUESTION: You can issue accurate  
 12 information, correct?  
 13 ANSWER: I can do a lot of things.  
 14 QUESTION: In this case, you had no reason  
 15 to dispute what this blogger is saying, correct?  
 16 ANSWER: I think you and I have discussed  
 17 how my interpretations of this article are different  
 18 than your interpretation of this article.  
 19 MR. GIBBONS: PX180.  
 20 QUESTION: This is Exhibit 11, a document  
 21 bearing the Nos. NV2392 through 2421. On the cover  
 22 page, it has both Lenovo and Novell company names. Have  
 23 you seen this document, Exhibit 11, before today, sir?  
 24 ANSWER: Yes, I have.  
 25 QUESTION: Take a look at page 2410, if

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1 you would. What do we see here in this shot?  
2 ANSWER: What you see here is the cube  
3 effect of SUSE Linux Enterprise Desktop, which is  
4 powered with a technology called XGL, which is an  
5 open-source community technology that enables users to  
6 have multiple desktop displays.  
7 QUESTION: That's along the lines of what  
8 we discussed earlier in terms of having the ability in  
9 SUSE to go from one desktop to another, correct? This  
10 is one version of that?  
11 ANSWER: I'm not a technologist, so I  
12 wouldn't presume to talk about how that is working. I  
13 would tell you when we talk about the ability to have  
14 multiple workspaces, from a marketing perspective, this  
15 is what we are talking about.  
16 QUESTION: From a user's perspective, I  
17 can have one workspace which would be the one on the  
18 left that appears that says, desktop effects, or another  
19 one that appears to be on the right side of the cube as  
20 another workspace. That's what I would see as the user?  
21 ANSWER: Yes, that's what you would see as  
22 the user.  
23 QUESTION: Have you ever used the cube  
24 effect yourself?  
25 ANSWER: Yes, I have.

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1 QUESTION: One user could just flip to  
2 whatever one they wanted to work on much like you talked  
3 about earlier, correct?  
4 ANSWER: Yes.  
5 QUESTION: Do you know when these photos  
6 were taken?  
7 ANSWER: I have no idea.  
8 QUESTION: Do you know who took them?  
9 ANSWER: No idea.  
10 QUESTION: Do you know what Novell  
11 personnel were involved with the San Diego Unified  
12 School District in its use of SUSE?  
13 ANSWER: I don't know.  
14 QUESTION: Do you know what version of  
15 SUSE Linux Enterprise Desktop the cube effect first  
16 appeared in?  
17 ANSWER: It first appeared in SUSE Linux  
18 Enterprise Desktop 10.  
19 QUESTION: Take a look at Exhibit 5 again,  
20 please, if you would. Exhibit 5 is for the SUSE Linux  
21 Enterprise Desktop 10, correct?  
22 ANSWER: Exhibit 5 is for SUSE Linux  
23 Enterprise Desktop 10 SP2.  
24 MR. GIBBONS: PX90.  
25 QUESTION: This document is dated May 8,

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1 of '08. Is it fair to say SP2 was already out there,  
2 correct?  
3 ANSWER: These documents are actually  
4 released within one to two weeks of a service pack being  
5 released. It would be safe to say that SP2 came out no  
6 earlier than April 24th of 2008.  
7 QUESTION: Take a look at Exhibit 11, if  
8 you would, at page 2410. That's the cube view that you  
9 have used, correct?  
10 ANSWER: Yes. This have the cube I've  
11 used.  
12 MR. GIBBONS: Exhibit 180.  
13 QUESTION: With the cube, how do you  
14 switch from workspace to work space?  
15 ANSWER: When I've used the cube as an  
16 individual user, I switched one of two ways,  
17 control-alt, right arrow slash left arrow. Left arrow  
18 takes you left, and right arrow takes you to the right,  
19 or I've done control plus alt, and you click on the cube  
20 itself on the screen and move your arrow and the cube  
21 turns.  
22 QUESTION: Do you use your mouse to click  
23 on the cube then?  
24 ANSWER: On the entire --  
25 QUESTION: On the screen itself?

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1 ANSWER: On the workspace itself.  
2 QUESTION: And manipulate the cube that  
3 way?  
4 ANSWER: Yes.  
5 QUESTION: And how about, is the cube the  
6 only way you have used the workspace switcher?  
7 ANSWER: Yes. Those are the only two ways  
8 I have done it.  
9 MR. GIBBONS: PX98.  
10 QUESTION: This is Exhibit 14, which is  
11 numbered NV1633 through 1634. It is entitled, Novell  
12 Linux Indemnification Program.  
13 Have you seen this document before today?  
14 ANSWER: Yes, have I.  
15 QUESTION: Did you review this when you  
16 were preparing yesterday?  
17 ANSWER: Yes.  
18 QUESTION: Why does Novell feel the need  
19 to tell its customers that they are being indemnified?  
20 ANSWER: Novell offers this program to its  
21 customers because of what we affectionately call the  
22 FUD, fear, uncertainty, and doubt in the marketplace  
23 around Linux spread by Microsoft.  
24 QUESTION: Why do you feel the need to  
25 tell your customers that they are being indemnified?

1 ANSWER: Because Microsoft continues to  
 2 tell our customers that Linux is not safe to use, and  
 3 our customers ask us repeatedly whether to believe  
 4 Microsoft or not.  
 5 QUESTION: Is this something that Novell  
 6 shares with all of its customers?  
 7 ANSWER: Yes.  
 8 MR. GIBBONS: And that's the conclusion of  
 9 Steinman.  
 10 THE COURT: Is that the second one?  
 11 MR. GIBBONS: Yes, it is, Your Honor.  
 12 Next we're going to read from the  
 13 deposition of Markus Rex, who was a Novell corporate  
 14 designee, and his deposition was taken on October 8,  
 15 2009.  
 16 (Deposition excerpt read.)  
 17 QUESTION: Can you please state your name  
 18 for the record.  
 19 ANSWER: Markus Rex.  
 20 QUESTION: You understand that you are a  
 21 corporate designee today on behalf of Novell, correct?  
 22 ANSWER: Yes.  
 23 QUESTION: Okay. And what's your title  
 24 with Novell?  
 25 ANSWER: I'm a Senior Vice President and

1 I'm not 100 percent sure.  
 2 QUESTION: So you produced no documents  
 3 for this case; is that correct?  
 4 ANSWER: That is correct.  
 5 QUESTION: And you haven't done any  
 6 investigation as to what other documents or any other  
 7 witnesses produced in this case, correct?  
 8 ANSWER: That is correct.  
 9 QUESTION: Okay. And you haven't asked  
 10 anybody?  
 11 ANSWER: No.  
 12 QUESTION: And nobody told you to ask  
 13 anybody, correct?  
 14 ANSWER: Nobody told me to ask anybody.  
 15 QUESTION: If you'll take a look at  
 16 Agarwal 6 --  
 17 MR. GIBBONS: PX40.  
 18 QUESTION: -- what do we see in Agarwal 6?  
 19 ANSWER: That looks like an invoice  
 20 report.  
 21 QUESTION: And what do you mean by invoice  
 22 report?  
 23 ANSWER: The report in which we have  
 24 invoices by period by product.  
 25 QUESTION: Okay. And now, it doesn't show

1 General Manager for the Open Platform Business Solutions  
 2 Group.  
 3 QUESTION: Okay. And how long have you  
 4 been in that position?  
 5 ANSWER: Since December last year.  
 6 QUESTION: Since December 2008?  
 7 ANSWER: Yes.  
 8 QUESTION: Okay. And prior to that --  
 9 let's start over.  
 10 How long have you been with Novell?  
 11 ANSWER: Since January of 2004 when I came  
 12 here on acquisition.  
 13 QUESTION: And what was acquired?  
 14 ANSWER: SUSE Linux.  
 15 QUESTION: And that's SUSE Linux?  
 16 ANSWER: Yes.  
 17 QUESTION: Now, you're aware of what --  
 18 and are you aware what Novell products are accused of  
 19 infringement in this case?  
 20 ANSWER: Yes.  
 21 QUESTION: And what products are those?  
 22 ANSWER: The SUSE Linux Enterprise  
 23 Server 10, SUSE Linux Enterprise Desktop 10, and then  
 24 two levels of either two or three openSUSE products,  
 25 Version 11, Version 10.3, and I think Version 10.2, but

1 units in terms of numbers or licenses or numbers of  
 2 subscriptions sold, does it?  
 3 ANSWER: No.  
 4 QUESTION: And does this report in Exhibit  
 5 6 here include revenue for consulting or training  
 6 services?  
 7 ANSWER: No. It's only product revenue.  
 8 QUESTION: Okay.  
 9 ANSWER: Product invoicing.  
 10 QUESTION: And by product invoicing, you  
 11 mean subscriptions, correct?  
 12 ANSWER: That is correct.  
 13 QUESTION: Go back to Agarwal 6, if you  
 14 would, for a moment. The first page, Page 795,  
 15 Column A, Row 6 says openSUSE 11.X, correct?  
 16 ANSWER: Yes.  
 17 QUESTION: Was 2008 the first time  
 18 openSUSE was made available?  
 19 ANSWER: Yes.  
 20 QUESTION: If you look over on Column D,  
 21 we see some revenue?  
 22 ANSWER: Yes.  
 23 QUESTION: How is the revenue generated  
 24 for openSUSE if it's an open-source product that's given  
 25 away?

1 ANSWER: It is sold as a box. You buy a  
 2 physical box, which contains CDs, a printed manual, and  
 3 you pay for that box with the contents.  
 4 QUESTION: That's even for openSUSE?  
 5 ANSWER: That is correct.  
 6 QUESTION: And now you're telling me that  
 7 if I wanted to use openSUSE, I would buy a box which  
 8 contained the CDs and other packaging and other  
 9 instructions; is that correct?  
 10 ANSWER: That is correct. You can  
 11 download the product for free. If you want to get the  
 12 convenience of having it put on a CD or DVD, get a  
 13 printed manual, then you pay us some money for that.  
 14 QUESTION: And that's true with respect to  
 15 the SUSE Linux Desktop and Server version as well,  
 16 correct?  
 17 ANSWER: That is not correct. They are  
 18 sold as subscriptions.  
 19 QUESTION: Okay. So if I wanted a  
 20 subscription, I get the whole package as well at the  
 21 same time; is that right?  
 22 ANSWER: You can elect to, but not -- it's  
 23 not -- the subscription does not necessarily contain the  
 24 whole packaging and manuals and everything. It contains  
 25 it in electronic form, not in printed form.

1 kept?  
 2 ANSWER: I'm thinking. It is kept in the  
 3 ERP system that we have, and it is kept in our -- in our  
 4 subscription what is -- what is it called -- it's called  
 5 in the Novell -- it's kept in the Novell Customer Center  
 6 or the back-end database at the Novel Customer Center.  
 7 QUESTION: Two locations at Novell,  
 8 correct?  
 9 ANSWER: To my knowledge, yes.  
 10 QUESTION: And if you wanted to, you could  
 11 run a report from either the ERP system or the Novell  
 12 Customer Center back-end database to determine how many  
 13 registration codes have been generated from Novell for  
 14 these products, correct?  
 15 ANSWER: That is correct.  
 16 QUESTION: But you know how many units  
 17 were sold?  
 18 ANSWER: We would know how many were sold.  
 19 QUESTION: Now, prior to 2007 and maybe  
 20 2008, Novell kept track of the registration codes it had  
 21 sold, correct?  
 22 ANSWER: We used a different -- a slightly  
 23 different system, which was where we had like a -- where  
 24 we gave out generic codes that were multiple-use codes,  
 25 and we found them -- we found it very hard to keep track

1 QUESTION: Okay. And where, if anywhere  
 2 in this Agarwal Exhibit 6, does it tell us how many  
 3 licenses were sold or given away for that matter?  
 4 ANSWER: I do not see it anywhere.  
 5 QUESTION: Well, with respect to the  
 6 revenues that we see here in Agarwal Exhibit 6, Novell  
 7 must have some idea of how many units they've given away  
 8 if it knows how much revenue it has generated, correct?  
 9 ANSWER: Yes, that is correct.  
 10 When we get a customer subscription, the  
 11 customer then pays us some money, which is what we  
 12 record and what we know. We do not know whether the  
 13 customer actually ever activates that subscription, so  
 14 we do not know whether it's used. We just know what was  
 15 given out.  
 16 QUESTION: And paid for, correct?  
 17 ANSWER: And paid for.  
 18 QUESTION: If you wanted to find out what  
 19 that number is for any given Novell SUSE or openSUSE  
 20 product, where would you go?  
 21 ANSWER: We would look at the number of  
 22 registration codes that were created.  
 23 QUESTION: Okay.  
 24 ANSWER: They have a key tied to a unit.  
 25 QUESTION: And where is that information

1 of.  
 2 We had like a generic code that was used  
 3 by so -- and so many customers and we didn't get any  
 4 indications as to the unit count, which is why we  
 5 changed to the new system with unique registration  
 6 codes.  
 7 QUESTION: And do you know how much Novell  
 8 paid when it acquired SUSE Linux?  
 9 ANSWER: I think it was \$220 million.  
 10 QUESTION: Okay. Well, that product was  
 11 open-source, right?  
 12 ANSWER: That is correct.  
 13 QUESTION: And these companies, HP,  
 14 Fujitsu, Siemens, and Dell, were companies that Novell  
 15 was trying to get to preload the SUSE operating system  
 16 onto their computers, correct?  
 17 ANSWER: The desktop, right.  
 18 QUESTION: And there's a lot of value to  
 19 Novell to have the operating system preloaded onto these  
 20 hardware suppliers' computers, correct?  
 21 ANSWER: It is very helpful to us, yes.  
 22 QUESTION: And then along with the sale of  
 23 a laptop or desktop that has the preloaded SUSE Linux  
 24 desktop on it, Novell generates subscription revenues,  
 25 correct?

<p style="text-align: right;">Page 93</p> <p>1 ANSWER: That is correct to a certain  2 extent. Those are very short subscriptions.  3 QUESTION: And the hope is that the  4 purchaser or the user will then --  5 ANSWER: Renew the subscription to a  6 long-term one.  7 QUESTION: And that happens frequently,  8 correct?  9 ANSWER: What happens frequently?  10 QUESTION: That the person who purchases  11 the preloaded version of SUSE with a short subscription  12 renews the subscription?  13 ANSWER: Unfortunately not.  14 QUESTION: No? They go without the --  15 without the support?  16 ANSWER: Yes.  17 QUESTION: Okay. And what do you base  18 that on?  19 ANSWER: Just we know the number of units  20 that went out.  21 QUESTION: Okay.  22 ANSWER: We get reports from those  23 hardware vendors, and then we see the number of people  24 that actually renew their subscriptions.  25 QUESTION: Okay.</p>	<p style="text-align: right;">Page 95</p> <p>1 using the keyboard or the mouse, correct?  2 ANSWER: I do. I -- yes -- I think you do  3 this with -- you can do this with both. I only use the  4 keyboard.  5 QUESTION: Okay. So you do like control  6 alt or --  7 ANSWER: Something there.  8 QUESTION: Okay. You don't even know  9 where the key is, but you know you can hit a key?  10 ANSWER: I personally do not use this.  11 QUESTION: Here's Rex Exhibit 3.  12 MR. GIBBONS: PX54.  13 QUESTION: It is a multi-page document  14 with the title Xgl on SUSE 10.1 for GNOME and KDE with  15 NVidia Graphics Cards. Do you see that at the top?  16 ANSWER: Yes.  17 QUESTION: Have you seen this before?  18 ANSWER: Not that exact same document, no.  19 QUESTION: Have you seen similar ones?  20 ANSWER: I probably saw some documents  21 written about that topic.  22 QUESTION: It's dated April 19th of 2006.  23 Do you see that?  24 ANSWER: Yes.  25 QUESTION: This is a document that bears a</p>
<p style="text-align: right;">Page 94</p> <p>1 ANSWER: There's a significant mismatch.  2 QUESTION: And do you have any idea on the  3 percentage of folks who are left to renew their  4 subscription versus those that don't?  5 ANSWER: I would say probably single-digit  6 renewals -- renewal rate.  7 QUESTION: Okay.  8 ANSWER: So less than 10.  9 QUESTION: Okay. That's just for the  10 desktop version, though, correct?  11 ANSWER: Yes. We do not preload the  12 server version.  13 QUESTION: Take a look, if you would, at  14 Page 2410. Do you see that?  15 ANSWER: Yes.  16 QUESTION: Now that shows a 3D desktop,  17 correct?  18 ANSWER: Yes.  19 QUESTION: Or a cube?  20 ANSWER: Yes.  21 QUESTION: Okay. When you're using the  22 cube, you can switch from one workspace, which is, say,  23 one face of the cube to another, correct?  24 ANSWER: Well, yes.  25 QUESTION: And you can do that either</p>	<p style="text-align: right;">Page 96</p> <p>1 Novell letterhead at the top, correct?  2 ANSWER: Correct.  3 QUESTION: That's kept on Novell's  4 website?  5 ANSWER: That is -- it says so in the  6 title.  7 QUESTION: Page 12. Right.  8 ANSWER: I assume so, that is.  9 QUESTION: Take a look at the second to  10 last page.  11 ANSWER: Yes.  12 QUESTION: It's entitled Xgl Shortcuts?  13 ANSWER: Yes.  14 QUESTION: Take a look halfway down this  15 page. You'll see a reference to the cube. Do you see  16 that?  17 ANSWER: Yes.  18 QUESTION: And that tells you how you can  19 manipulate the cube?  20 ANSWER: Yes.  21 QUESTION: You can rotate it to the next  22 desktop using control alt and a directional arrow.  23 ANSWER: Yes.  24 QUESTION: And you can also manipulate it  25 by using the mouse?</p>

<p style="text-align: right;">Page 97</p> <p>1 ANSWER: I can see that.</p> <p>2 QUESTION: Okay. And you can also</p> <p>3 manually rotate it by dragging the mouse, if you look at</p> <p>4 the fourth one down.</p> <p>5 ANSWER: Yes.</p> <p>6 QUESTION: Okay. And you have used this,</p> <p>7 the cube?</p> <p>8 ANSWER: As I said, to play around with</p> <p>9 it, yes.</p> <p>10 QUESTION: Okay. And you've seen others</p> <p>11 use it?</p> <p>12 ANSWER: Yes.</p> <p>13 QUESTION: Let's go back to Exhibit 11,</p> <p>14 Page 180.</p> <p>15 ANSWER: Sorry.</p> <p>16 QUESTION: Now, when have you used the</p> <p>17 cube?</p> <p>18 ANSWER: About when it came out.</p> <p>19 QUESTION: Okay. When was that?</p> <p>20 ANSWER: Oh, 2006. Sometimes in 2006.</p> <p>21 QUESTION: And when have you seen others</p> <p>22 use it?</p> <p>23 ANSWER: A lot back then.</p> <p>24 QUESTION: Yes.</p> <p>25 ANSWER: It's not a big productivity game;</p>	<p style="text-align: right;">Page 99</p> <p>1 MR. GIBBONS: This one is to PSA Peugeot</p> <p>2 Citroen?</p> <p>3 ANSWER: That is correct.</p> <p>4 QUESTION: And it lists issues, solutions,</p> <p>5 and results. Do you see that?</p> <p>6 ANSWER: Yes.</p> <p>7 QUESTION: And under solution, Novell's</p> <p>8 solution is SUSE Linux Enterprise Desktop and SUSE</p> <p>9 Enterprise Server. Do you see that?</p> <p>10 ANSWER: Yes.</p> <p>11 QUESTION: And one of the results listed</p> <p>12 under this results column is Xgl 3D desktop effects</p> <p>13 keeps employee motivation high. Do you see that?</p> <p>14 ANSWER: Yes.</p> <p>15 QUESTION: And that's referring to the</p> <p>16 cube, correct?</p> <p>17 ANSWER: That is correct, to the cube.</p> <p>18 QUESTION: Here is Steinman 3.</p> <p>19 MR. GIBBONS: PX197.</p> <p>20 QUESTION: And this is numbered NV7655</p> <p>21 through 7668. Have you seen this document before, sir?</p> <p>22 ANSWER: Yes.</p> <p>23 QUESTION: And you reviewed this in</p> <p>24 preparation for today?</p> <p>25 ANSWER: Yes.</p>
<p style="text-align: right;">Page 98</p> <p>1 that is, an eye-candy tool. It's not a big productivity</p> <p>2 game, so people play around with it, then it sort of</p> <p>3 tapers off.</p> <p>4 QUESTION: Okay.</p> <p>5 ANSWER: From my observations.</p> <p>6 QUESTION: Because there are other ways to</p> <p>7 switch desktop workspaces, correct?</p> <p>8 ANSWER: Yes.</p> <p>9 QUESTION: And what are those?</p> <p>10 ANSWER: You can use a pager like mine</p> <p>11 where you have the workspaces listed at the bottom.</p> <p>12 Just click on them, click on Workspace 2, Workspace 3,</p> <p>13 and Workspace 4. This is not -- you can switch users,</p> <p>14 yes, but this is not necessarily switching workspaces.</p> <p>15 QUESTION: You can use it using the cube</p> <p>16 by just clicking on icons to switch from one workspace</p> <p>17 to the other, correct?</p> <p>18 ANSWER: Yes.</p> <p>19 QUESTION: Let's take a look on Page</p> <p>20 NV2416, a couple of pages down from where you were.</p> <p>21 ANSWER: Yes.</p> <p>22 QUESTION: And this seems to be a key</p> <p>23 study that was presented as part of this Lenovo</p> <p>24 presentation, correct?</p> <p>25 ANSWER: Correct.</p>	<p style="text-align: right;">Page 100</p> <p>1 QUESTION: Take a look at Page 7659, and</p> <p>2 on the left-hand column you'll see it says Using Virtual</p> <p>3 Desktops. Do you see that?</p> <p>4 ANSWER: Yes.</p> <p>5 QUESTION: Back on Page 7659, the</p> <p>6 paragraph that's under the title Using Virtual Desktops,</p> <p>7 the last sentence reads: You might, for example, use</p> <p>8 one desktop for e-mailing and calendaring and another</p> <p>9 for word processing or graphics applications.</p> <p>10 Do you see that?</p> <p>11 ANSWER: Yes.</p> <p>12 QUESTION: Why does Novell suggest to use</p> <p>13 one desktop for e-mailing and another for word</p> <p>14 processing?</p> <p>15 ANSWER: I do not know why Novell suggests</p> <p>16 that. It is something that is used in computers for a</p> <p>17 long while that you sort of have like a cleaned-up</p> <p>18 desktop, so to speak. You use one part of the desktop</p> <p>19 for doing this and the other part for doing that,</p> <p>20 similar to what you would do on a physical desk.</p> <p>21 QUESTION: Okay.</p> <p>22 ANSWER: Where you sort of have the one</p> <p>23 side doing this, and then you have your stacks doing the</p> <p>24 other thing on the other side. Some people like to do</p> <p>25 that; other people don't.</p>

<p style="text-align: right;">Page 101</p> <p>1 QUESTION: But you've seen other people do 2 that? 3 ANSWER: Yes. 4 QUESTION: And that's at Novell? 5 ANSWER: Yes. 6 QUESTION: Using the Novell products? 7 ANSWER: Yes. 8 QUESTION: How about Novell customers? 9 ANSWER: I don't actually stand behind 10 them and watch them, but there's a certain population of 11 computer users that likes to do this. I would assume 12 that this is the same for Novell customers as it is for 13 Novell employees and for people who do this as a hobby. 14 QUESTION: Steinman 5. 15 MR. GIBBONS: PX90. 16 QUESTION: And it is a multi-page document 17 dated May 8 of 2005 that's entitled SUSE Linux 18 Enterprise Desktop 10 SP2 GNOME User Guide. If you take 19 a look at that last page. 20 ANSWER: Okay. 21 QUESTION: Do you see workspace switcher? 22 ANSWER: Yes. 23 QUESTION: Does this refresh your 24 recollection of what that means? 25 ANSWER: It describes the same concept</p>	<p style="text-align: right;">Page 103</p> <p>1 QUESTION: Okay. 2 ANSWER: That is the same functionality 3 that I referred previously to as pager. 4 QUESTION: Okay. All right. 5 ANSWER: Just so we're clear on 6 terminology. 7 QUESTION: Sure. It seems Novell uses a 8 few different terms -- 9 ANSWER: Yes. 10 QUESTION: -- almost interchangeably 11 depending upon who it is; is that correct? 12 ANSWER: That is correct. 13 MR. GIBBONS: PX55. 14 QUESTION: In Exhibit Rex 5 is a 15 multi-page document, SUSE Linux Enterprise Desktop 10 16 dated June 2006. Have you seen this document before? 17 ANSWER: No. 18 QUESTION: Do you know what a reviewer's 19 guide is? 20 ANSWER: Yes. 21 QUESTION: What is that? 22 ANSWER: It is something that we give to 23 people, so I've not seen this. I know that it exists as 24 part of a list of documents that was produced for SUSE 25 Enterprise 10.</p>
<p style="text-align: right;">Page 102</p> <p>1 that I would probably call virtual desktops or several 2 desktops. 3 QUESTION: Okay. 4 ANSWER: I do not use this workspace 5 switcher. 6 QUESTION: Okay. 7 ANSWER: This is the -- there are lots of 8 different ways how you could call this functionality of 9 having more than one desktop area inside your computer. 10 QUESTION: Yes. 11 ANSWER: And it probably depends on 12 what -- like the first time was when you got used to 13 that concept, what you called it. 14 QUESTION: Okay. 15 ANSWER: So I call it a virtual desktop. 16 So somebody else might call it workspace switchers. 17 QUESTION: It seems to be, at least with 18 respect to Steinman 5, which is a SUSE document or a 19 Novell document, that there is an applet called 20 workspace switcher, correct? 21 ANSWER: I -- yes. 22 QUESTION: Okay. 23 ANSWER: As you see in the same paragraph, 24 it says virtual desktop, so that's probably why I 25 wouldn't know that.</p>	<p style="text-align: right;">Page 104</p> <p>1 QUESTION: So when the release came out in 2 2006, this was one of the documents that was brought 3 out? 4 ANSWER: This was one of the documents 5 that was brought out, yes. 6 QUESTION: Okay. 7 ANSWER: And it gives the person who is 8 supposed to write a review, like a journalist or analyst 9 or somebody, gives him hints to where we want him to 10 look. 11 QUESTION: Okay. So this is the way to 12 direct that review to the features that you wish to 13 highlight, correct? 14 ANSWER: Yes. Correct. 15 QUESTION: And if you take a look at 16 Page 11 of this document, Rex Exhibit 5, you'll see one 17 of those features is the 3D workspace. 18 ANSWER: Yes. 19 QUESTION: And it also provides the 20 reviewer with instructions on how to manipulate the cube 21 in the 3D workspace? 22 ANSWER: That is correct. 23 I would like to point something out. The 24 one thing that is probably missing in this reviewer's 25 guide document here is the comment that we have on that</p>

<p style="text-align: right;">Page 105</p> <p>1 document.</p> <p>2 QUESTION: You're looking at Rex</p> <p>3 Exhibit 3?</p> <p>4 ANSWER: Rex 3 as brought right up here on</p> <p>5 this attention. At the time this product came out,</p> <p>6 there were like four computers that this feature worked</p> <p>7 on.</p> <p>8 QUESTION: Four brands?</p> <p>9 ANSWER: No, four machines, four machine</p> <p>10 types.</p> <p>11 QUESTION: Okay.</p> <p>12 ANSWER: And so while we said, hey, like</p> <p>13 that really is good, it was not something that was</p> <p>14 really used by a lot of people, because it was not</p> <p>15 enabled by a default. So if you installed the product,</p> <p>16 that feature was not available to you. You had to go</p> <p>17 through very explicit steps that verified that your</p> <p>18 computer will not break when you enabled this feature,</p> <p>19 so...</p> <p>20 QUESTION: This was back in 2006 at the</p> <p>21 time of release?</p> <p>22 ANSWER: That was back in 2006.</p> <p>23 QUESTION: Okay.</p> <p>24 ANSWER: And that was true throughout the</p> <p>25 whole license service of the SUSE Linux Enterprise 10</p>	<p style="text-align: right;">Page 107</p> <p>1 QUESTION: And what version of SUSE</p> <p>2 Enterprise Desktop was out in 2008?</p> <p>3 ANSWER: 10.</p> <p>4 QUESTION: 10?</p> <p>5 ANSWER: And Service Pack 2.</p> <p>6 QUESTION: Service Pack 2, SP2?</p> <p>7 ANSWER: Yes.</p> <p>8 QUESTION: If you look on the first page</p> <p>9 of Rex Exhibit 6 --</p> <p>10 MR. GIBBONS: PX198.</p> <p>11 QUESTION: -- about midway down, we see a</p> <p>12 reference to SP2, correct?</p> <p>13 ANSWER: Correct.</p> <p>14 QUESTION: Take a look at Page 8782.</p> <p>15 ANSWER: Yes.</p> <p>16 QUESTION: It talks about an intuitive</p> <p>17 user interface.</p> <p>18 ANSWER: Yes.</p> <p>19 QUESTION: And mentions 1500 hours of</p> <p>20 usability video during that design phase of the project.</p> <p>21 ANSWER: Uh-huh. Yes.</p> <p>22 QUESTION: Were you involved in the design</p> <p>23 phase of that project?</p> <p>24 ANSWER: No. I was videoed.</p> <p>25 QUESTION: You were videoed?</p>
<p style="text-align: right;">Page 106</p> <p>1 product line.</p> <p>2 QUESTION: Okay. Take a look. Here is</p> <p>3 Rex 6.</p> <p>4 MR. GIBBONS: PX198.</p> <p>5 QUESTION: And it is Bates-numbered NV8781</p> <p>6 through 8785. Do you see that?</p> <p>7 ANSWER: Yes.</p> <p>8 QUESTION: And it bears the title SUSE</p> <p>9 Linux Enterprise Desktop: Tech Specs, Linux Technical</p> <p>10 Specifications. Do you see that?</p> <p>11 ANSWER: Yes.</p> <p>12 QUESTION: Have you seen that document</p> <p>13 before?</p> <p>14 ANSWER: No, not in that form, I should</p> <p>15 say.</p> <p>16 QUESTION: You've seen it in other forms?</p> <p>17 ANSWER: I saw the raw input that was then</p> <p>18 nicely formatted and put on that page.</p> <p>19 QUESTION: Okay. And you'll see, if you</p> <p>20 turn to the back page, Page 8785, you see there's a</p> <p>21 copyright symbol, the date 2008?</p> <p>22 ANSWER: Yes.</p> <p>23 QUESTION: So this document was put out</p> <p>24 about 2008, correct?</p> <p>25 ANSWER: I would say so, yes.</p>	<p style="text-align: right;">Page 108</p> <p>1 ANSWER: I was videoed. I was not --</p> <p>2 QUESTION: So you were one of the</p> <p>3 subjects?</p> <p>4 ANSWER: I was one of the subjects, yes.</p> <p>5 QUESTION: Okay. And that's on -- that</p> <p>6 video was shown on Novell's Better Desktop website; is</p> <p>7 that correct?</p> <p>8 ANSWER: I think they didn't show me.</p> <p>9 QUESTION: You don't think you -- you</p> <p>10 didn't make the cut?</p> <p>11 ANSWER: I don't think I made the cut.</p> <p>12 QUESTION: Is that because you were not</p> <p>13 able to manipulate the desktop adequately?</p> <p>14 ANSWER: Well, they determined I had a</p> <p>15 nontypical user's pattern, I assume. Otherwise, they</p> <p>16 would have shown it. I'm not using any of those virtual</p> <p>17 things. I have one desktop, clutter everything on one</p> <p>18 desktop, so I wasn't helpful for determining how you</p> <p>19 could use virtual desktops most efficiently.</p> <p>20 QUESTION: Okay. You're familiar with the</p> <p>21 website betterdesktop.org, though, correct?</p> <p>22 ANSWER: Yes.</p> <p>23 QUESTION: And that's part of the openSUSE</p> <p>24 project?</p> <p>25 ANSWER: It's part of Novell. I'm not</p>

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1 sure whether it's officially part of the openSUSE  
2 project or how we did it. I think we did  
3 betterdesktop.org initially, that predates openSUSE --  
4 the openSUSE products.  
5 QUESTION: Okay.  
6 ANSWER: So I'm not sure whether this  
7 wrapped it in there or not.  
8 QUESTION: Again, what exhibit is that?  
9 MR. GIBBONS: PX42.  
10 ANSWER: It's Exhibit 11, Clasen 11. It  
11 appears to me that this is code that describes the  
12 functionality that I referred earlier to as virtual  
13 desktops.  
14 QUESTION: Okay.  
15 ANSWER: And subsequently, Clasen 12 would  
16 be then the code that is used to sort of switch those --  
17 switch between those workspaces with a pager applet,  
18 what I call pager.  
19 QUESTION: Okay. So as near as you can  
20 tell, all three of the source code modules are found  
21 within Novell SUSE products?  
22 ANSWER: That is really difficult to tell  
23 as there's no version number tied to it. So I don't  
24 know whether it's a workspace-switcher.c, which is in  
25 Exhibit 12, and a version that was exactly that version

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1 that was shipped -- similar functionality was shipped.  
2 QUESTION: Okay. And as you sit here  
3 looking at these three pieces of code, you can't tell  
4 right now if this exact code was used in the SUSE  
5 products, correct?  
6 ANSWER: That is correct.  
7 QUESTION: But you believe similar --  
8 similar code is used?  
9 ANSWER: Yes.  
10 QUESTION: What are Novell's policies and  
11 practices with regard to licensing United States patents  
12 or intellectual property?  
13 ANSWER: So if we -- let me refer to my  
14 earlier example of the MPEG LA patents and --  
15 QUESTION: That's the license you just  
16 entered into?  
17 ANSWER: It was a license we just entered  
18 into. So we know that there's a licensed technology.  
19 We see if there is any way how we can -- we see whether  
20 there's a strong business need that we need to use that  
21 licensing technology or not.  
22 We determine that there is a need. We  
23 have our legal department enter open discussions with  
24 the respective -- what would you call -- a company that  
25 represents those technologies and patents, and then if

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1 we join in after it was determined that there is a way  
2 how we can license that, we join in from a business  
3 perspective and see whether there was -- if the cost is  
4 worth the benefit for us.  
5 Sometimes it's possible to use a  
6 technology, but the cost is just not worth it. So then  
7 we don't offer that feature as part of our product.  
8 QUESTION: Now, with respect to the  
9 features that are being accused of infringement in this  
10 case, you've not taken those out of the SUSE products,  
11 right?  
12 ANSWER: That is correct.  
13 QUESTION: You continued to use it,  
14 correct?  
15 ANSWER: That is correct.  
16 (End of deposition excerpt.)  
17 MR. GIBBONS: That's the conclusion of  
18 that transcript, Your Honor.  
19 THE COURT: Do we have one to go,  
20 Mr. Gibbons?  
21 MR. GIBBONS: We do have one to go, Your  
22 Honor, and that's a short one. This is September 23rd,  
23 2009 of Nitin Agarwal, who was a Novel corporate  
24 witness.  
25 (Deposition excerpt read.)

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1 QUESTION: Can you please state your full  
2 name for the record.  
3 ANSWER: Nitin Agarwal.  
4 QUESTION: Mr. Agarwal, are you the  
5 Comptroller of Novell?  
6 ANSWER: Comptroller within Novell, one of  
7 the comptrollers.  
8 QUESTION: Within which unit?  
9 ANSWER: Open Platform Solutions.  
10 QUESTION: From a lay perspective, what  
11 generally do you understand the topics to be that you're  
12 here to testify today on behalf of Novell?  
13 ANSWER: Well, I did go through one of the  
14 documents, and the way I understand it, you had some  
15 questions regarding some revenues of some specific  
16 products and profitability and expenses and questions  
17 like that.  
18 QUESTION: Kathy just handed you what's  
19 marked as Agarwal Exhibit 1. Can you take a look at  
20 that and tell me if that is a document that you may have  
21 looked at in preparation for your deposition today.  
22 If it will help, I think -- I think the  
23 first topic you will see your name on is Topic 5 at the  
24 end of the response.  
25 ANSWER: Okay. Yep, I see Topic No. 5.

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1 QUESTION: For the record, what does that  
 2 topic state?  
 3 ANSWER: The total unit and dollar volume  
 4 of sales made since 2001 and projected to be made for  
 5 2009, '10, and '11 by Novell, including sales made by  
 6 sublicensees where applicable, and profits, gross and  
 7 net, realized or projected to be realized for 2009,  
 8 2010, and 2011 by Novell for the relevant products.  
 9 QUESTION: Kathy has handed you what has  
 10 been marked, respectively, as Agarwal 4 and 5. The OEM4  
 11 is labeled NV848.  
 12 MR. GIBBONS: PX38.  
 13 QUESTION: Can you take a look at it and  
 14 tell me if you've ever seen that document before?  
 15 ANSWER: Yep. That's our press release --  
 16 one of our press release schedules.  
 17 QUESTION: Take a look at Agarwal  
 18 Exhibit 5. You don't have to review the whole thing  
 19 here, because it's fairly bulky. It is 131 pages. It's  
 20 Bates-labeled NV664 through 794. This is Novell's 10-K,  
 21 right?  
 22 ANSWER: Yes.  
 23 QUESTION: What I'd like you to take a  
 24 look at is -- let's go to Page 37. You'll see there  
 25 is a -- it is Page NV702.

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1 Do you see that there's a total net  
 2 revenue figure for 2007 of -- this is in thousands --  
 3 932,499?  
 4 ANSWER: Yes.  
 5 QUESTION: That matches up or appears to  
 6 match up with, if you look back at Agarwal 4, the total  
 7 net revenue figures for 2007 at the bottom of the  
 8 column, the second to the left, right?  
 9 ANSWER: Yes.  
 10 QUESTION: If we flip forward to the notes  
 11 to consolidated financial statements, Page 116, NV781 --  
 12 ANSWER: Okay.  
 13 QUESTION: -- again, you see the same 932  
 14 million 499 net revenue total, right?  
 15 ANSWER: Yes.  
 16 QUESTION: That net revenue figure is  
 17 comprised as a result of adding together the four, I  
 18 think you called them groups or segments?  
 19 ANSWER: Yes.  
 20 QUESTION: In Agarwal Exhibit 4, there was  
 21 similarly a sum of four different groups or segments,  
 22 right?  
 23 ANSWER: Yes.  
 24 QUESTION: My question to you is, how come  
 25 the segment figures in Agarwal 4 differ from Page NV781?

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1 ANSWER: Yeah, it is different because  
 2 Exhibit 4 -- yeah, Exhibit 4, that just talks about  
 3 product revenues. So the 94 does not include revenue  
 4 for services, which is not split out by segment.  
 5 If you look at the Exhibit 4 right down at  
 6 the bottom, you will see one single line for services.  
 7 QUESTION: How is it attributed then  
 8 across -- is there a formula for attributing that  
 9 192,038 in order to reach the segment figures of Agarwal  
 10 Exhibit 5, or is there some direct correlation based  
 11 upon purchase orders?  
 12 How does a -- what determines how the 192  
 13 million 38 is split up amongst the various segments in  
 14 order to reach the figures of Agarwal Exhibit 5?  
 15 ANSWER: There's a formula, yeah.  
 16 QUESTION: Do you know what the parameters  
 17 are that go into the attribution for the formula? In  
 18 other words, what are the factors that determine how it  
 19 gets split up?  
 20 ANSWER: There are multiple things, but  
 21 invoicing is one of those, how much you sell. How much  
 22 products you sell is one of the factors that goes into  
 23 determining how to split the services revenue.  
 24 QUESTION: In other words, if the pure  
 25 sales figures of the products is higher, that will weigh

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1 more heavily in favor of that segment getting a larger  
 2 percentage of the service number attributed to it?  
 3 ANSWER: Yes. There's that possibility,  
 4 yes.  
 5 QUESTION: We are definitely keeping this  
 6 confidential. Have you ever seen the -- they're  
 7 sometimes called the Xgl feature of the cube?  
 8 ANSWER: Yes, I've seen that in our  
 9 demonstrations.  
 10 QUESTION: Do you know using that as an  
 11 example, has the Open Platform Solutions have ever tried  
 12 to place a value in terms of how much added value that  
 13 provides for products in which it is used?  
 14 ANSWER: No.  
 15 QUESTION: Are there any other  
 16 technologies that you are aware of that Novell attempts  
 17 to quantify as being valuable or not in determining what  
 18 brings value to the sale of its products?  
 19 ANSWER: No, not at a feature level.  
 20 QUESTION: Is the Open Platform Solutions  
 21 Group -- excuse me -- Business Unit, are they, to your  
 22 knowledge, the licensors or licensees to any technology?  
 23 ANSWER: Yeah. We have OEM agreements  
 24 with some technology providers.  
 25 QUESTION: Are the licenses that are part

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1 of any OEM agreements, do those get counted against your  
2 business units P&L for a year?  
3 ANSWER: What do you mean?  
4 QUESTION: In other words, is it counted  
5 as a cost for your business unit?  
6 ANSWER: Yes.  
7 QUESTION: So it's not done at a corporate  
8 level; it's charged to your unit?  
9 ANSWER: Yes.  
10 QUESTION: Can you think of how many such  
11 license agreements there are?  
12 ANSWER: Six, seven.  
13 QUESTION: Are any of those licenses  
14 technology-related?  
15 ANSWER: Yes.  
16 QUESTION: I mean, by -- what I mean by  
17 technology is not just simply you pay X dollars for a  
18 part. You're actually licensing the right to use the  
19 technology?  
20 ANSWER: Correct.  
21 QUESTION: Are these licenses which are  
22 done on a running-royalty basis?  
23 ANSWER: Yes.  
24 QUESTION: Can you name for me any  
25 running-royalty licenses that Open Platform Solutions

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1 licenses?  
2 ANSWER: We use Media Codecs and we pay  
3 royalty for using those codecs.  
4 QUESTION: Who do you license that from?  
5 ANSWER: It is V-I-A, VIA Technologies.  
6 QUESTION: A Japanese company, right?  
7 ANSWER: I think so.  
8 QUESTION: Do you know what the royalty  
9 rate is for that license?  
10 ANSWER: Oh, boy. I don't remember off  
11 the top. It is a per-unit royalty with a cap. I don't  
12 remember the actual per-unit royalty percentage.  
13 QUESTION: Do you know what product or  
14 products the licensed Media Codecs are used in?  
15 ANSWER: In the desktop products.  
16 QUESTION: If we are talking about gross  
17 profits as opposed to contribution margins, what would  
18 the range of gross profits be for the products-in-suit?  
19 ANSWER: We don't calculate gross profits  
20 at a product level.  
21 QUESTION: Do you calculate gross profits  
22 as a unit?  
23 ANSWER: At a business unit level?  
24 QUESTION: Yes.  
25 ANSWER: Yes.

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1 QUESTION: What is a range of gross  
2 profits for the Open Platform Solutions Business Unit?  
3 ANSWER: It is in the 78-percent range.  
4 (End of deposition excerpt.)  
5 MR. GIBBONS: That's it, Your Honor.  
6 THE COURT: Thank you.  
7 Mr. Hill, three minutes.  
8 MR. HILL: Thank you, Your Honor.  
9 MR. CUGIL: Your Honor, may I step down?  
10 THE COURT: Yes, you may.  
11 You may proceed.  
12 MR. HILL: Thank you, Your Honor.  
13 Ladies and Gentlemen, let me explain first  
14 why we were reading those depositions to you, before I  
15 tell you the summary of what it is that we believe that  
16 we were showing by reading those depositions to you.  
17 In lawsuits, sometimes you have to take a  
18 witness' testimony by deposition, because that  
19 witness -- you want to preserve their testimony, and it  
20 may be that you can't require them to show up at trial.  
21 If a witness doesn't live within a certain area of the  
22 courthouse, you can't make them come show up here.  
23 These witnesses were all employees of the  
24 Defendants, and so we, as the Plaintiff, can't control  
25 them. And so if they don't live within a certain area

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1 of the courthouse, we can't make them show up live in  
2 court and testify in the courtroom.  
3 MR. KREVITT: Your Honor, if I may?  
4 THE COURT: Mr. Hill, the Court could make  
5 them come. The Court elected not to.  
6 You may proceed.  
7 MR. KREVITT: Also, they will be here, two  
8 of them.  
9 THE COURT: We don't need that  
10 explanation. You have now two minutes to explain in  
11 summary portion what this was all about.  
12 MR. HILL: I sure will, Your Honor. Thank  
13 you.  
14 Folks, what this was, was a statement from  
15 the Defendants themselves regarding certain things that  
16 Dr. Zimmerman relied upon in his testimony to you about  
17 how these products infringe.  
18 These were the comments and then portions  
19 of the code and portions of the user manuals that were  
20 the source documents for some of Dr. Zimmerman's  
21 testimony to you about how these products infringe our  
22 patents.  
23 And, again, these were statements from --  
24 admissions from Red Hat and Novell's own employees.  
25 To go through them briefly, you first had

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1 Matthias Clasen. He was Red Hat's principal software  
2 engineer. He testified to the infringing workspace  
3 switching function that Dr. Zimmerman described. They  
4 described it on the screen, and he admitted that he  
5 personally uses that functionality.  
6 You then had Mr. Steinman, who was the  
7 Novell Director of Marketing, and he explained how  
8 Novell's products performed our patented technology. He  
9 admitted that Novell trains its customers, and they  
10 showed you the product training materials. Trains their  
11 customers in how to use the infringing workspace  
12 switcher functionality on their computers.  
13 You then heard from Mr. Markus Rex. He's  
14 the Novell Senior Vice President of Open Platform. And  
15 he discussed the tens of millions of dollars that Novell  
16 makes by giving away the software that contains our  
17 inventions.  
18 And he described how they make that money  
19 by giving away the software and then selling  
20 subscription services on the backs of that technology.  
21 He also showed how they teach their  
22 customers the specific steps that are required to use  
23 this functionality, use the task switcher. It's in  
24 their explanation, in their manuals, their teaching to  
25 their customers.

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1 Finally, he also showed that they know the  
2 number of units. They know the number of downloads or  
3 the number of units of this software that they  
4 distribute, and they track that information. That's  
5 going to be important in the damages portion of the case  
6 and.  
7 THE COURT: Thank you, Mr. Hill.  
8 MR. HILL: Thank you, Your Honor.  
9 THE COURT: Mr. Lyon, you have three  
10 minutes.  
11 MR. LYON: Thank you, Your Honor.  
12 Ladies and Gentlemen of the Jury, the  
13 witnesses, I submit, did not say what Mr. Hill just said  
14 they said. I think the issue really is that these are  
15 deposition testimony that came in. We put in some  
16 testimony not really because we thought it was important  
17 to do so here, but just for completeness of the record.  
18 Two of the witnesses will be showing up  
19 tomorrow, and Mr. Rex and Mr. Steinman will both be here  
20 to testify, so we'll put in our evidence that way  
21 generally.  
22 But let's take them just briefly as to  
23 each witness.  
24 Matthias Clasen was a Red Hat software  
25 engineer. He testified about code, and you saw him

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1 identify a lot of code, most of which you didn't see  
2 Dr. Zimmerman refer to at all or explain how that  
3 relates to the products or how it relates to the claims.  
4 Mr. Steinman, who is a Novell marketing  
5 person, spoke a little bit about training as Mr. Hill  
6 said. But, again, it was just training programs in  
7 general. We heard nothing about how we supposedly teach  
8 this accused feature.  
9 And I think a lot of it is what you  
10 heard -- all in all, we heard a lot about workspace  
11 switching and the fact that we have virtual workspaces  
12 but not about going the extra mile that the patents  
13 require, because it's not just about virtual workspace  
14 switching. We've had Dr. Henderson and others already  
15 talk about this.  
16 So this really -- ultimately, we think  
17 that it added something to the record to show that we  
18 have engineers and we have software and, surprisingly,  
19 we have code that goes into our software. But beyond  
20 that, we don't believe it added much to what you've  
21 already heard today.  
22 THE COURT: Mr. Lyon.  
23 Mr. Gasey, it's your case.  
24 MR. GASEY: Yes, Your Honor. Next we'd  
25 like to call our damages expert, Mr. Joseph Gemini.

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1 THE COURT: This would be a good time for  
2 the jury to take a break, and I'm going to suggest one.  
3 15 minutes; it may be more.  
4 We're not going yet.  
5 (Jury out.)  
6 THE COURT: Would you swear  
7 Mr. Gemini and have him take the stand.  
8 COURT ROOM DEPUTY: Yes, sir.  
9 THE COURT: We may have the unusual  
10 occasion of swearing you again, Mr. Gemini, so the jury  
11 sees, but we'd like to have you under oath now.  
12 (Witness sworn)  
13 THE COURT: Mr. Vickrey, I may need to ask  
14 you to help me here.  
15 MR. VICKREY: Certainly.  
16 THE COURT: You --  
17 MR. VICKREY: Can I give you an outline of  
18 the actual opinion testimony; would that help?  
19 THE COURT: Let me just tell you a little  
20 bit -- that will help, but let me tell you exactly of  
21 course what the Court's concerns are. The Court is  
22 obligated to follow the law of the federal circuit.  
23 And the Court has observed in the Lucent  
24 case and the ResQNet case that the federal circuit is  
25 very concerned about obtaining reliable economic

1 evidence that really links the damages calculation to  
2 the scope of the claimed invention. That becomes very  
3 difficult in a situation like this where the claimed  
4 invention is one feature of a very complex and intricate  
5 software system. It's a single feature in a system that  
6 has thousands of features. And we can argue about  
7 whether it's a significant feature or not, but our task  
8 has not defined its significance but its value.

9 Now, could you outline for me how you and  
10 Mr. Gemini are going to inform the jury about -- in  
11 economic terms now, it would make me extremely happy if  
12 I saw demand curves up there on that screen. I say that  
13 over and over again; I never see them, although I'm told  
14 that an economist can do a regression analysis and  
15 obtain that kind of information.

16 I'm beginning to make it clear that I want  
17 economic evidence, but then the other factor of that is  
18 I need you to show me how that's going to be tied to the  
19 scope of the claimed invention. And so talk -- just  
20 make it very clear, talk about units sold means nothing  
21 because that unit that's sold has thousands of features,  
22 all but one of which is not claimed. So you're going to  
23 have to help me narrow the damages to the scope of the  
24 claimed invention.

25 MR. VICKREY: Certainly.

1 THE COURT: Can you show me how you've  
2 done that, Mr. Vickrey?

3 MR. VICKREY: Certainly, Your Honor. We  
4 would start out by addressing what Mr. Gemini found in  
5 terms of evidence of use or importance. It's going to  
6 be largely anecdotal, but then we turned to --

7 THE COURT: That's going to be of very  
8 minimal value. I will allow that to come in, but --

9 MR. VICKREY: Your Honor --

10 THE COURT: But if it goes too long, I'm  
11 going to start saying when do we get to the evidence.

12 MR. VICKREY: Certainly, Your Honor.

13 THE COURT: And this is an instance where  
14 the Court may be more involved than it has been up to  
15 now.

16 MR. VICKREY: Your Honor, the principal  
17 evidence of value will be -- Mr. Gemini will address  
18 four licenses of these patents-in-suit.

19 THE COURT: Very good. I like that.

20 MR. VICKREY: And he will address their  
21 economic terms.

22 THE COURT: Good.

23 MR. VICKREY: Their applicability.

24 THE COURT: These are two of the actual  
25 claimed inventions, right?

1 MR. VICKREY: Correct, Your Honor.

2 THE COURT: Just so I can check my memory,  
3 what are the four?

4 MR. VICKREY: There's a Central Point  
5 license.

6 THE COURT: Yes, I remember that.

7 MR. VICKREY: There's an HP license.

8 THE COURT: Yes.

9 MR. VICKREY: There's an SGI license.

10 THE COURT: Yes.

11 MR. VICKREY: And there's the Apple  
12 license.

13 THE COURT: And there's the Apple license.  
14 I had them in my mind. Thank you.

15 MR. VICKREY: And Mr. Gemini will also  
16 address his view on the applicability of a running  
17 versus a lump-sum royalty and the pros and cons and why  
18 one would apply over the other here.

19 And he will attach -- based on the license  
20 rates, the royalty rates in the licenses, he will give  
21 his opinion based on the actual license agreements, what  
22 the royalty rate should be as applied to the volumes at  
23 issue, the same volume, for example, for Red Hat that he  
24 identified in his supplemental report, which I believe  
25 Your Honor withstood a motion to strike, and the basis

1 for his calculation as to what that volume is.

2 THE COURT: So if I understand you,  
3 Mr. Gemini will be testifying about the -- let's do this  
4 a better way.

5 Mr. Gemini, you will be testifying about  
6 the four licenses, right?

7 THE WITNESS: Yes.

8 THE COURT: And you will specify then the  
9 amounts of each of those licenses, the time periods, and  
10 the volume of usage they covered.

11 THE WITNESS: The licenses?

12 THE COURT: Yes.

13 THE WITNESS: Yes.

14 THE COURT: And how will you relate that  
15 to the Red Hat and Novell usage?

16 THE WITNESS: Well, I've analyzed the  
17 licenses to try to equate a royalty rate that would be  
18 applicable to the units of Red Hat and Novell during the  
19 period of the accused infringement.

20 THE COURT: And how long is that period?

21 THE WITNESS: The damages period is from  
22 October of '07 to the notice date through December of  
23 '08, 14 months essentially.

24 THE COURT: 14 months. So how do you --  
25 you're going to take what you compute to be the license

1 rate on those four existing licenses and apply it to  
2 this period of usage by Red Hat and Novell; is that it?

3 THE WITNESS: Yes.

4 THE COURT: And how do you compute?  
5 There's four different licenses. They have different  
6 rates. The Central Point, what's the value of the  
7 Central Point.

8 THE WITNESS: 25 cents per copy  
9 distributed.

10 THE COURT: 25 cents per copy distributed;  
11 you'll be able to show that?

12 THE WITNESS: Yes.

13 THE COURT: And then how do you know the  
14 amount of usage by Red Hat and Novell of the claimed  
15 invention?

16 THE WITNESS: Well, I don't think we  
17 have -- as we said, we have anecdotal evidence as to the  
18 value of the invention of these products. We don't have  
19 anything that indicates the total number of units that  
20 were used, but I was also going to opine that the  
21 licenses that I've analyzed are not based on -- or the  
22 royalty rate is not based on -- in other words, the  
23 agreement doesn't say it's 25 cents per copy based on  
24 everybody that uses it. It's based on 25 cents per  
25 copy.

1 Mr. Vickrey, that there is no evidence for the accused  
2 products of any use or demand or value.

3 And the Court asked when Mr. Gemini took  
4 the stand for reliable economic evidence that ties the  
5 damages to the scope of the invention and the use of the  
6 invention. There is no such evidence. We're talking  
7 about third parties and different products.

8 The other thing that we don't have is  
9 these licenses are for the most part products that are  
10 add-on products, not for buyer operating systems. So  
11 the Central Point license at 25 cents a unit, it was for  
12 an add-on product to Microsoft's Windows, and that was  
13 the 25 cents. So there's no economic data that  
14 apportions out that 25 cents as it might apply to an  
15 entire operating system.

16 The only license -- the only license that  
17 applies to an entire operating system is the SGI  
18 license. That might be applicable. That was not a  
19 running royalty license. That was \$95,000.

20 The last thing I'm going to -- well, two  
21 more things. As to the HP license -- I'm sure you'll  
22 hear about that -- the evidence he's going to present, I  
23 believe, if he sticks with his expert reports is that  
24 license shows a 99 cent royalty per unit. The evidence  
25 is -- Mr. Gemini told me this in his deposition, there

1 And it's implied, I believe, in that  
2 license that they've considered the use when they've  
3 negotiated that royalty. They've also considered the  
4 scope of the -- what it covers worldwide versus U.S., so  
5 to that extent, those licenses consider that issue.

6 THE COURT: Okay. Well, let's dive in and  
7 see how this goes. Mr. Reiter, I see you're on your  
8 feet.

9 MR. REITER: I am, Your Honor. I  
10 understand I'm going to have an opportunity to  
11 cross-examine.

12 THE COURT: You certainly are.

13 So far, it seems that Mr. Gemini is making  
14 an effort to stick to licenses of the claimed invention,  
15 which is the sort of methodology that I think Lucent and  
16 ResQNet would have approved.

17 MR. REITER: I understand that, Your  
18 Honor. The problems that I want to point out as we  
19 begin -- and I don't know if you're going to have  
20 Mr. Vickrey talk a little bit with Mr. Gemini before the  
21 jury comes in to see if you're satisfied such that it's  
22 okay for the jury to hear this, or you're just going to  
23 have the jury come in. But I wanted to point out in  
24 advance that there are a number of flaws. One is -- and  
25 I think Mr. Gemini has already pointed this out, as has

1 is no evidence that 99 cents was ever applied to that  
2 license. That license, in fact, required a \$110,000  
3 lump-sum payment that allowed for all past sales by HP,  
4 the day that license was signed, HP divested itself of  
5 its consumer software division, gave that product to  
6 Borland Software, who then started selling the product.

7 And the evidence is that the product was  
8 not sold for \$99 dollars, not \$75, but it went down to  
9 \$49 to \$39 and was even given away for free. So  
10 Mr. Gemini is going to be telling the jury that 99 cents  
11 applies to the HP license, and there is no evidence, and  
12 I think that's prejudicial.

13 Finally, that 1 percent per copy royalty  
14 in the HP license didn't kick in until \$10 million of  
15 additional product was sold by whoever was the licensee.  
16 Mr. Gemini told me in his deposition he has no evidence  
17 of that. There's no evidence that the 1 percent royalty  
18 applied. So we have no reliable evidence that these  
19 licenses, as he's applying them, would apply here, and  
20 finally, on the issue of numbers, what we are talking  
21 about are unique IP addresses.

22 We're not talking about downloads. We're  
23 not talking about actual copies. We're talking about  
24 anecdotal evidence that Red Hat and Novell used to  
25 measure trends to see what's going on. But they have

1 told as much to the SEC in comments that they don't  
2 track numbers. They give these products away for free,  
3 and because they give them away for free they don't care  
4 how many copies are out there. It makes no effect on  
5 their bottom line if there are 10 copies or 100 copies.

6 I wanted to make those points.

7 THE COURT: The Grateful Dead. Just a  
8 second. Do you know what I'm saying? I see one nodding  
9 head. I bet he's the only one in the room who, like me,  
10 knows what I'm saying. The Grateful Dead was a band  
11 from the '60s and '70s, the only band from the '60s and  
12 '70s who allowed everyone to tape every single one of  
13 their shows and did not make revenue on their music at  
14 all but on the peripherals.

15 I think you're the Grateful Dead. We  
16 shouldn't laugh at that because of the music model of  
17 today. The Grateful Dead was 30 years ahead of their  
18 time.

19 The Rolling Stones now realize that they  
20 make very little money by selling records, even in their  
21 current form as CD disks. You make money on the touring  
22 and the peripherals and T-shirts and whatever else they  
23 sell.

24 So the Grateful Dead was the music  
25 equivalent of the open-source software movement. So it

1 wasn't a completely off-the-wall comment.

2 But Mr. Vickrey, I want to give you a  
3 chance to respond to what Mr. Reiter said.

4 MR. VICKREY: Certainly, Your Honor.

5 We have evidence of number of units, and  
6 we will show that the numbers are actually conservative  
7 by the words of Red Hat's own executives, and we'll  
8 explain why that is. Their expert disagrees with  
9 Mr. Gemini's view of certain licenses.

10 Mr. Gemini disagrees with their expert's  
11 view of certain licenses, but what we will address are  
12 the terms in black and white; what we know about the  
13 application, was it worldwide, etcetera; what we know  
14 about any sales; the circumstances, for example, of the  
15 Apple license, things like that. And what we've heard  
16 is a closing argument about their view of evidence which  
17 Your Honor hasn't heard yet.

18 THE COURT: That's fair enough,  
19 Mr. Vickrey.

20 Mr. -- am I speaking to Mr. Krevitt or Mr.  
21 Reiter?

22 MR. REITER: I think at the pretrial we  
23 all had a problem, including myself, staying quiet when  
24 we're not on the podium. But the point is with respect  
25 to the numbers, Mr. Gemini with respect to Novell took

1 some numbers that were published on unique IP addresses,  
2 not downloads. And those numbers are specific. They  
3 are the number of unique IP addresses. For whatever  
4 they mean, those are the numbers, and they identify  
5 about 15, 15.5 percent being in the United States.

6 Red Hat has produced those same numbers.  
7 In fact, Mr. Tiemann prepared those numbers, and those  
8 numbers show 1.5 million essentially unique IP addresses  
9 have hit the Red Hat server during the relevant time.

10 Mr. Gemini is ignoring that evidence. He  
11 is taking information from an article that does quote a  
12 Red Hat employee. He's extrapolating from that article  
13 to a 14-month period as best he can, and then he's  
14 taking revenue numbers, worldwide revenue numbers, when  
15 these products don't generate revenue, their services  
16 do.

17 But he's trying to say for that -- for the  
18 U.S., I'm going to say what percentage of the revenue in  
19 the United States. And that's not reliable, and it's  
20 prejudicial under 403 to let the jury hear that because  
21 it's just wrong, and he knows it's wrong because  
22 Dr. Putnam testified in his deposition about it, they  
23 have the numbers, and they've used the numbers very  
24 well.

25 THE COURT: How do we deal with the

1 Grateful Dead problem? Remember, Grateful Dead is not  
2 making money on the music. They're making money on the  
3 peripherals, and that's, I think, what Mr. Reiter is  
4 telling me. He's a little more artful in his way of  
5 presenting it. But so how do we make that jump?

6 MR. VICKREY: Your Honor, the money that  
7 they make from this business model is a relevant factor  
8 under Georgia-Pacific, and -- but once again --

9 THE COURT: Well, maybe I'm missing the  
10 point. Let's stick with the Grateful Dead. We're  
11 talking about one song of their 5,000, and that's what  
12 we're talking about here. And they don't make money on  
13 the music; they make money on the peripherals. Now, how  
14 do we say what the value of the one song is?

15 It's relevant, and I think it's relevant  
16 here. The Grateful Dead never made the Top Ten. Maybe  
17 Tricking did, but almost none of their songs made the  
18 Top Ten anywhere, and so it isn't like we're talking  
19 about yesterday or one of the grand songs of the '60s.  
20 We're talking about one song. How do we get from that  
21 to -- when we're valuing it in the peripherals?

22 MR. VICKREY: Well, Your Honor, because  
23 it's been valued in the past, and in terms of the  
24 business model, no question about it, this is how they  
25 make money. They make money by -- through this

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1 software, giving away this software. And their entire  
2 business model is built around the success of that.  
3 And how do we know what this is valued,  
4 what this incremental piece is valued? Well, I submit,  
5 Your Honor, our damages model is acceptable under the  
6 federal circuit's view of the current state of the  
7 damages law.  
8 The details that he's arguing are  
9 questions of fact. For example, what Mr. Tiemann did --  
10 we haven't heard from Mr. Tiemann. We got this strange  
11 schedule from them. We questioned their damages expert  
12 about it last week.  
13 Mr. Gemini is going to address that. He's  
14 going to address their evidence, and they can attack it.  
15 Their expert can attack it, and we'll have that  
16 argument. But the methodology is sound. We are  
17 extrapolating a per-unit royalty, and we've heard -- we  
18 just heard testimony that -- from one of their  
19 executives that, yes, we have engaged in per-unit  
20 royalties in the past even though we say it's hard for  
21 us to track and that sort of thing. There is a basis in  
22 the record for what we're trying to do.  
23 THE COURT: Okay. Thank you, Mr. Vickrey.  
24 Thank you, Mr. Reiter.  
25 And thank you, Mr. Gemini, for being

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1 patient here with us.  
2 We'll allow this to go forward. You know  
3 my concerns.  
4 MR. VICKREY: I certainly do, Your Honor,  
5 and I will respect them.  
6 THE COURT: I will listen carefully and --  
7 why don't we take five minutes here so that everyone can  
8 be fresh, and then we'll start over with the jury.  
9 MR. GASEY: Are you going to swear  
10 Mr. Gemini for the --  
11 THE COURT: I think we will swear you  
12 again, Mr. Gemini, if that's all right. The jury likes  
13 to see that and know that they can trust you.  
14 MR. GASEY: Do you mind if we take those  
15 binders out of there too?  
16 THE COURT: Yes, please do.  
17 Five minutes.  
18 (Recess.)  
19 (Jury in.)  
20 THE COURT: Please be seated.  
21 Ladies and Gentlemen, we did try and warm  
22 the courtroom a little, but I think my suggestion is to  
23 bring a sweater tomorrow. That may be the best way to  
24 regulate temperature.  
25 Mr. Gasey.

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1 MR. GASEY: Yes, Your Honor. My partner,  
2 Paul Vickrey, will be taking the next witness,  
3 Mr. Gemini, the Plaintiffs' damages expert.  
4 THE COURT: Mr. Vickrey.  
5 COURT ROOM DEPUTY: Raise your right hand,  
6 please.  
7 (Witness sworn.)  
8 MR. VICKREY: Your Honor, may I approach  
9 with the exhibit book?  
10 THE COURT: Yes, you may.  
11 MR. VICKREY: Thank you.  
12 THE WITNESS: Thank you.  
13 MR. VICKREY: I have one for the Court as  
14 well.  
15 THE COURT: Thank you.  
16 MR. VICKREY: Certainly.  
17 JOSEPH GEMINI, PLAINTIFFS' WITNESS, SWORN  
18 DIRECT EXAMINATION  
19 BY MR. VICKREY:  
20 Q. Kindly state your name.  
21 A. Joseph Gemini.  
22 Q. Mr. Gemini, are you appearing here today as the  
23 Plaintiffs' damage expert?  
24 A. Yes, I am.  
25 Q. Let me ask you a few questions about your

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1 background.  
2 What undergraduate degree do you have?  
3 A. I have a B.A. from Western Illinois University.  
4 Q. Are you a certified public accountant?  
5 A. Yes, I am.  
6 Q. Do you have any graduate degrees?  
7 A. Yes. I have a master's in business  
8 administration from DePaul University with a major in  
9 finance.  
10 Q. When did you obtain your CPA certification?  
11 A. In 1987.  
12 Q. How do you get to be a certified public  
13 accountant?  
14 A. Well, first you have to graduate with an  
15 accounting degree, then you have to take a four-part  
16 exam where you have to pass all four parts before you  
17 can become a certified public accountant.  
18 Q. Are you employed?  
19 A. Yes, I am.  
20 Q. By whom?  
21 A. My firm name is Duggan, Kenning & Gemini, LLC.  
22 We're located in Chicago, Illinois.  
23 Q. And what does the accounting firm of Duggan,  
24 Kenning & Gemini do?  
25 A. Well, we do a number of things. We're -- we're

1 essentially an accounting firm that does personal tax  
 2 returns, business tax returns, personal financial  
 3 planning, financial statement preparation for small  
 4 businesses.  
 5 And then we also do what I'm doing here  
 6 today, consulting on issues of damages or technology or  
 7 licensing.  
 8 Q. Have you done any valuations of intellectual  
 9 property?  
 10 A. Yes, I have.  
 11 Q. How many times?  
 12 A. I don't know offhand.  
 13 Q. Okay. You've mentioned consulting. What kind  
 14 of consulting work have you done?  
 15 A. Well, I've consulted in the area of licensing.  
 16 I've consulted in the area of disputes such as this,  
 17 litigation disputes.  
 18 Q. Have you been qualified to testify in court as  
 19 an expert in valuation and computation of damages?  
 20 A. Yes.  
 21 Q. Kindly identify examples of the courts.  
 22 A. I've been qualified in a number of courts,  
 23 including federal courts in Massachusetts, Illinois,  
 24 Washington State, California, Virginia, Iowa, a number  
 25 of times.

1 A. I would say approximately 75 to 100 times. I'm  
 2 not exactly sure. It's been around 20 years I've been  
 3 in this area of the business.  
 4 Q. What kinds of intellectual property cases have  
 5 you worked on?  
 6 A. I've worked on cases such as today, patent  
 7 infringement cases. I've worked on something called  
 8 trade secrets. It's like the formula for Coca-Cola is a  
 9 trade secret. I've worked on trademark damages, breach  
 10 of contract damages, those types of damage cases.  
 11 Q. Are you a member of any professional  
 12 associations or organizations?  
 13 A. Yes. I'm a member of the American Institute of  
 14 Certified Public Accountants and the Illinois Certified  
 15 Public Accounting Society.  
 16 Q. Have you lectured at any professional  
 17 associations and seminars about patent damage  
 18 calculations?  
 19 A. Yes.  
 20 MR. VICKREY: Your Honor, we offer  
 21 Mr. Gemini as a qualified expert under Federal Rule of  
 22 Evidence 702.  
 23 MR. REITER: No objection, Your Honor.  
 24 THE COURT: You may proceed.  
 25 Q. (By Mr. Vickrey) Kindly tell us, Mr. Gemini,

1 Q. How many trials have you been qualified to  
 2 testify at trial as an expert in the computation of  
 3 damages?  
 4 A. I would say approximately 20 times.  
 5 Q. Have you testified in any case in which my law  
 6 firm's clients have been involved?  
 7 A. Yes.  
 8 Q. How many?  
 9 A. I would say about a dozen.  
 10 Q. So you've worked with my firm before?  
 11 A. Yes.  
 12 Q. You've worked with me before?  
 13 A. Yes.  
 14 Q. Have you testified or worked in any cases for  
 15 parties represented by other lawyers?  
 16 A. Yes.  
 17 Q. Approximately how many times?  
 18 A. Well, testimony, you know, maybe another eight  
 19 to ten times. And then I've worked on a number of  
 20 situations where I didn't testify. We never got to  
 21 trial or whatever. Probably about 15 to 20 law firms.  
 22 Q. Have you also consulted in the area of damage  
 23 calculations in lawsuits without actually testifying?  
 24 A. Yes.  
 25 Q. Approximately how many times?

1 what you were asked to do in this case.  
 2 A. I was asked to determine damages in this case  
 3 due to the Plaintiffs, based on the determination of  
 4 infringement against the Defendants.  
 5 Q. And what have you done to prepare to give  
 6 testimony in the case?  
 7 A. I've considered a significant amount of  
 8 information, including financial records produced by  
 9 both parties, deposition testimony, publicly available  
 10 information on websites that talk about -- you know,  
 11 you've seen virtual workspaces and products related to  
 12 virtual workspaces.  
 13 I've considered court orders, other cases  
 14 related to damages, opinions. I've considered the  
 15 expert opinion reports of the Defendants' expert in his  
 16 deposition. I would say generally that's the type of  
 17 information I've considered.  
 18 Q. Have you looked at the license agreements for  
 19 the patents-in-suit?  
 20 A. Yes, I have.  
 21 Q. Are these the kinds of documents that you would  
 22 study in your day-to-day work in calculating damages?  
 23 A. Yes.  
 24 Q. What forms of damage do you understand a patent  
 25 owner should obtain when its patent has been infringed

1 in a case such as this?  
 2 A. Normally, in a case like this, a patent owner  
 3 is entitled to what they call a reasonable royalty.  
 4 Q. What's a reasonable royalty?  
 5 A. A reasonable royalty is the minimum amount of  
 6 damages that a patent owner is entitled to in a patent  
 7 infringement case.  
 8 Q. What is it? Is it payment or --  
 9 A. Yes. It's an amount that the --  
 10 hypothetically, there's a hypothetical negotiation that  
 11 occurs where the plaintiff and defendant determine the  
 12 amount of the royalty, payment for the use of the  
 13 invention.  
 14 Q. Are there any assumptions in this negotiation?  
 15 A. Yes. You assume under this -- what they call  
 16 hypothetical negotiation where it occurs back in time,  
 17 you go back in time when the infringement began and  
 18 determine a reasonable royalty based upon a hypothetical  
 19 negotiation. And you assume that the patent has already  
 20 been determined to be valid and infringed.  
 21 Q. What's your understanding of when the  
 22 infringement occurred -- began in this case?  
 23 A. My understanding is in 2005.  
 24 Q. What did you consider in determining a  
 25 reasonable royalty in this case?

1 Q. And what did you do to analyze the use or value  
 2 of the invention?  
 3 A. Well, I -- first of all, I considered that this  
 4 is -- you've seen virtual desktop, virtual workspaces.  
 5 That's the feature of the patent that relates to the  
 6 products in suit -- or the products that Defendants have  
 7 sold or distributed.  
 8 And I've considered that those products  
 9 have a number of features. So I tried to determine to  
 10 what extent the features that are accused; that is, the  
 11 virtual desktops have been used or how they've been  
 12 perceived in the marketplace.  
 13 Q. Mr. Gemini, did you find any evidence which  
 14 allowed you to calculate the actual degree or actual use  
 15 of the patented feature?  
 16 A. Not to a degree of actual calculation as to  
 17 use.  
 18 Q. Did you find any studies or surveys that showed  
 19 the degree of actual use of the feature?  
 20 A. No studies or surveys, no.  
 21 Q. Did you find evidence that the patented feature  
 22 is actually used by the Defendants and their customers?  
 23 A. Yes.  
 24 Q. What was that evidence?  
 25 A. Well, you saw the testimony of Mr. Markus

1 A. Well, I considered, like I said, the licensing,  
 2 the licensing practices, the -- there's also a number of  
 3 factors I've considered, what's called the  
 4 Georgia-Pacific Factors. It's a case from some years  
 5 ago that kind of laid out a number of factors that you  
 6 would consider in determining a reasonable royalty.  
 7 Q. What do the Georgia-Pacific Factors attempt to  
 8 measure, Mr. Gemini?  
 9 A. Well, you consider the factors and you see how  
 10 they would affect the reasonable royalty negotiation,  
 11 determine how each factor may affect each party on  
 12 negotiation.  
 13 Q. Generally, what do the Georgia-Pacific Factors  
 14 involve, if you can kind of group them?  
 15 A. They generally relate to considering licensing  
 16 of the patents-in-suit, for one; the extent of use, the  
 17 extent of use of the patents by the infringer, the  
 18 advantages of the invention, commercial success, how the  
 19 use of the patent has affected other products of the  
 20 infringer. Those are generally the types of things you  
 21 consider.  
 22 Q. And what did you do to analyze -- I think you  
 23 told us that use is one of the categories of factors in  
 24 Georgia-Pacific?  
 25 A. Yes.

1 (sic). He described how he had seen people at his  
 2 company use it. He's seen others or his customers use  
 3 the technology. He was not able to quantify to the  
 4 extent of what that use was, but he did indicate that it  
 5 was used.  
 6 Q. What about on the Red Hat side?  
 7 A. Well, I've seen information from Red Hat  
 8 indicating how they select features for their products,  
 9 the stringent criteria they go through to select those  
 10 features and put this feature into their products.  
 11 Q. Kindly turn to PX312. Tell me what this is.  
 12 A. This is -- I'm sorry. Did you ask what this  
 13 is?  
 14 Q. Yes, please.  
 15 A. This is an article from Red Hat Magazine  
 16 regarding Fedora Project and Red Hat Enterprise Linux.  
 17 Q. I believe it's on the second page, but we  
 18 flashed a quote up on the screen. This is addressing  
 19 the selection criteria as to what actually goes into the  
 20 Enterprise product?  
 21 A. Yes. It says it must meet stringent selection  
 22 criteria and address a demonstrated issue encountered by  
 23 customers. They must be more than just theoretical or  
 24 corner-cases, which implies to me that it must be  
 25 something customers are in need of.

1 Q. To your knowledge, Mr. Gemini, did Red Hat  
 2 implement the virtual workspace feature into the  
 3 Enterprise Linux product as well?  
 4 A. Yes.  
 5 Q. What else did you do to assess the relative  
 6 importance of the patented feature?  
 7 A. Well, I considered industry observers' comments  
 8 regarding the feature, users' comments regarding the  
 9 feature.  
 10 Q. Let me show you PX285. Tell me what this is.  
 11 A. This is an article from MozillaQuest, which was  
 12 an online computer magazine, and it describes the  
 13 features that we've been talking about, the virtual  
 14 desktops.  
 15 Q. And what did this industry publication have to  
 16 say about virtual desktops?  
 17 A. Well, first, in the first top box, it  
 18 indicates: If there were no other reason to switch from  
 19 Microsoft Windows to GNU-Linux, the Linux Virtual  
 20 Desktop would be more than reason enough to make the  
 21 switch.  
 22 And down below, it describes virtual  
 23 desktops and the advantage of it, and it indicates that  
 24 Linux Virtual Desktops feature is tremendously useful  
 25 and handy.

1 Q. So, Mr. Gemini, why is this relevant, if  
 2 they're talking about Ubuntu?  
 3 A. Well, it's talking specifically about the  
 4 virtual desktop feature as it relates to Linux.  
 5 Q. How do they rate this feature?  
 6 A. They indicate that perhaps -- you can see by  
 7 the highlighted area there: Perhaps the greatest single  
 8 productivity-boosting feature in Linux is the ability to  
 9 open several virtual desktops at one time. This allows  
 10 you to create separate work environments for various  
 11 simultaneous tasks.  
 12 Again, it's, to me, evidence of how the  
 13 feature is perceived in the marketplace.  
 14 Q. Kindly turn to PX286. Tell me what this is.  
 15 A. This is a blog from a system administrator,  
 16 again, regarding Linux.  
 17 Q. And what was the subject matter of this  
 18 particular issue?  
 19 A. It indicates at the top there, you can see:  
 20 Are multiple desktops really useful?  
 21 Q. And what did he conclude?  
 22 A. Well, he describes -- as you can see from the  
 23 first highlight there, one of the biggest differences  
 24 between the Windows world and the Linux world is the  
 25 Windows world only has one desktop while the Linux world

1 Q. Kindly turn to PX278. Tell me what this is.  
 2 A. This is an article from PC World, which is a  
 3 recognized computer magazine, and it describes -- at the  
 4 top, you'll see the 20 features Windows ought to have  
 5 and how to get them, and one of the -- the first feature  
 6 listed there is virtual workspaces.  
 7 Q. And did the -- did PC World go on to describe  
 8 what was meant by virtual workspaces?  
 9 A. Yes.  
 10 Q. Is this the description?  
 11 A. Yes. It indicates virtual -- as you can see  
 12 there, virtual workspaces indicates in a typical Linux  
 13 installation four workspaces automatically spring into  
 14 existence at boot time. So this is describing the  
 15 virtual workspaces and how it's implemented into the  
 16 Linux products.  
 17 Q. Kindly turn to PX279.  
 18 A. Okay.  
 19 Q. Tell me what this is.  
 20 A. This is an article from CNET News that  
 21 discusses a product called Ubuntu of Linux, which is  
 22 another form -- there's a number of distributors of  
 23 Linux: Red Hat, Novell, and Ubuntu is also a  
 24 distributor of Linux open-source software, free  
 25 software.

1 can have several.  
 2 He also indicates at the bottom, are all  
 3 those desktops really useful? He says: I think they  
 4 are, and I guess a lot of other people do, too. And he  
 5 indicates that they don't come standard with Windows;  
 6 you have to somehow get them separate.  
 7 Q. All right. Does PX287 include comments to this  
 8 issue from actual users?  
 9 A. Yes, it does.  
 10 Q. Let's look at a few of these comments. One of  
 11 the commentators references what? The top one?  
 12 A. Well, the top one, you can see there it says:  
 13 I've gotten very comfortable with multiple desktops in  
 14 Sled 10.  
 15 Q. What's Sled 10?  
 16 A. Sled 10 is an Novell -- accused Novell product.  
 17 Q. Do the other commentators also address their  
 18 views of this feature?  
 19 A. Yes. You can see other comments. I have down  
 20 the middle one: I have 15 virtual desktops, 5 currently  
 21 in use, some dual monitors, the second one.  
 22 Then the third one is: I've always had  
 23 virtual desktops on my computers. I use one desktop for  
 24 each major task that I am working on.  
 25 And it talks about how -- on a few

1 occasions when I have used Windows or Macs, I have found  
2 the lack of virtual desktops to be an annoying  
3 deficiency.

4 Q. Kindly, the last one of these, Mr. Gemini, turn  
5 to PX265. Tell me what this is.

6 A. This is a -- what they call a forum, a Ubuntu  
7 forum. We talked about what Ubuntu is. The question  
8 they were asking is: Do you use virtual workspace  
9 switcher?

10 Q. And were the responses to this questionnaire  
11 confined to Ubuntu products?

12 A. No. It included Ubuntu, but you can see the  
13 second one, by Cheese Sandwich, indicates: I formerly  
14 used Solaris here at work, now I use Red Hat with GNOME,  
15 and I've used workspace switching on both. I find  
16 workspace switching absolutely essential, as I'm often  
17 juggling several tasks.

18 Q. Now, what did you conclude from your review of  
19 the industry and user assessments of this feature?

20 A. Well, as a feature of the accused products,  
21 it's obvious from this information that it's an  
22 important feature to users. Industry observers have  
23 indicated that it's something that's desirable to the  
24 users of these products.

25 Q. Now, I believe you stated that sales of other

1 I often say, specifically by selling free software.

2 Q. Look at this second statement that we have  
3 highlighted here: We are less than 20 percent of the  
4 total contributions to the Linux kernel.

5 What is that, the Linux kernel?

6 A. Well, my understanding is the kernel is like  
7 the core on which they build -- everybody adds to keep  
8 building up the Linux product.

9 Q. Based on your review of the record, Mr. Gemini,  
10 where are the software components of Fedora and RHEL  
11 coming from?

12 A. Others -- others, people other than Red Hat in  
13 general.

14 Q. Have you seen any evidence suggesting that Red  
15 Hat or Novell independently developed the virtual  
16 desktops feature?

17 A. No, I have not.

18 Q. I want to turn to licensing, because I think  
19 you told us that that's one of the things that you would  
20 look to in trying to determine a reasonable royalty; is  
21 that true?

22 A. Yes.

23 Q. First of all, what is a license?

24 A. Well, a license, generally somebody may have a  
25 technology, a patent, and somebody may want to use that

1 products were -- sales of other products sold in  
2 conjunction with the patented product is one of the  
3 things you look to in the Georgia-Pacific Factors.

4 A. That's correct.

5 Q. And did you analyze that factor in this case?

6 A. Yes, I did.

7 Q. Well, what did you find, sir?

8 A. Well, as you've seen, Novell and Red Hat give  
9 away free software to -- they make money by giving away  
10 free software. So I've considered that, that many of  
11 these products are given away. And as a result, people  
12 use these products and they buy services, subscription  
13 services, tech support services, training.

14 All that type of services from Novell and  
15 Red Hat are a result of the distribution of these  
16 products.

17 Q. Now, have you reviewed the Defendants' own  
18 statement about how they make money off this open source  
19 business model?

20 A. Yes. I reviewed a statement from their CEO,  
21 their chief executive officer.

22 Q. Kindly look at PX276. Is this the statement  
23 that you're talking about?

24 A. Yes. The first statement there, as you can see  
25 from -- in that exhibit, it says: Red Hat makes money,

1 patent. So they enter into an agreement. They call it  
2 a license.

3 Generally, a license lays out terms of the  
4 agreement. It could be length, how long the license is.  
5 It normally includes some sort of compensation. You've  
6 seen, I believe, licenses before, but it can include  
7 some sort of payment. It could be a running royalty  
8 payment. It could be a one payment, one-time lump sum  
9 payment. So that's generally what a license is.

10 Q. Now, what role do licenses play in a  
11 determination of a reasonable royalty in a case such as  
12 this?

13 A. Well, in a case such as this where you have  
14 situations such as this case where the actual patents  
15 that are in suit, the three patents-in-suit, have been  
16 licensed, you consider those as part of your reasonable  
17 royalty analysis.

18 Q. Now, are there previous licenses of the  
19 patents-in-suit?

20 A. Yes.

21 Q. How many?

22 A. There's four that I've seen.

23 Q. Did you analyze those licenses?

24 A. Yes, I did.

25 Q. Let's look at them one by one in chronological

1 order. Start with PX247.  
 2 Tell me what this is.  
 3 A. One second. I got the wrong...  
 4 Q. 247?  
 5 A. Yes, I'm sorry.  
 6 This is a license agreement between Xerox  
 7 Corporation and Central Point Software, Inc., entered  
 8 into in 1994.  
 9 Q. Were you here for the opening statements?  
 10 A. Yes.  
 11 Q. Was this license -- were the financial terms of  
 12 this license for zero money?  
 13 A. No. There was a royalty rate included in the  
 14 agreement.  
 15 Q. What was the royalty rate?  
 16 A. The royalty rate -- as you can see on the  
 17 screen there, the licensee agreed to pay Xerox a sum of  
 18 25 cents per-unit copy of the licensed product made,  
 19 used, leased, licensed, sold, distributed by licensee  
 20 for sales prior to the date of the agreement and for all  
 21 sales or distributions of licensed product after the  
 22 date of agreement.  
 23 So, essentially, 25 cents pre and post the  
 24 agreement for anything that was sold or distributed.  
 25 Q. What was that product?

1 agreement; you determine that you're going to pay a  
 2 royalty based on whatever it may be, based on a  
 3 distribution of a software product, based on sales  
 4 revenue.  
 5 And the running royalty could be a  
 6 per-unit royalty where you take like a dollar for every  
 7 unit sold or distributed, or it could be a percentage of  
 8 revenue. So it might be 1 percent of each sales price  
 9 of the product.  
 10 Now, a lump-sum royalty is one payment at  
 11 the time you enter into the agreement, and it covers  
 12 whatever term that you may decide it covers. It could  
 13 be the life of the patents, just one payment, one  
 14 lump-sum payment.  
 15 Q. What was the geographic scope of this license?  
 16 A. This license covered worldwide sales, which  
 17 generally meant that wherever any sale occurred, they  
 18 would pay a royalty on it, or any distribution occurred,  
 19 they would pay a royalty on it, whether it be a U.S.  
 20 sale, a non-U.S. sale.  
 21 Q. But these are U.S. patents being licensed,  
 22 correct?  
 23 A. Yes.  
 24 Q. And if you would kindly look at the first page  
 25 of the license again.

1 A. It was a product called Central Point PC Tools.  
 2 Q. Kindly look at DX926. Tell me what this is.  
 3 A. This is a description of what was included in  
 4 the Central Point PC Tools product. And you can see,  
 5 there's a number of features in there. There's a lot of  
 6 different things that were part of that product that was  
 7 being licensed.  
 8 You remember, the license relates to the  
 9 technology at issue or the virtual desktop. So, again,  
 10 this was one piece. And I think you can see at the  
 11 bottom there -- it's not highlighted -- but it talks  
 12 about virtual desktops at the bottom.  
 13 So this is one piece of that license, and  
 14 Xerox and Central Point agreed to 25 cents per  
 15 distributed copy of this -- based on this license.  
 16 Q. Now, was this a running royalty or a paid-up  
 17 lump sum?  
 18 A. This is a running -- do you want me to  
 19 explain --  
 20 Q. Tell us what it is first.  
 21 A. It's a running royalty.  
 22 Q. What's the difference between a running royalty  
 23 and a lump sum?  
 24 A. Well, a running royalty is exactly what it  
 25 sounds like. It continues on. You enter into an

1 Can you tell if this was in settlement of  
 2 a lawsuit that was filed earlier in the same year? I'm  
 3 afraid we don't have it on the screen, but --  
 4 A. I'm sorry. What was the question again?  
 5 Q. Can you tell by looking at the first page  
 6 whether this is a settlement of an actual lawsuit that  
 7 was filed earlier in the year, that same year?  
 8 A. Yes, it was a settlement of a lawsuit. The  
 9 agreement was dated in June of 1994, and it was a  
 10 settlement of a lawsuit filed in the same year.  
 11 Q. Are you aware of any court rulings that had  
 12 occurred affecting infringement or validity prior to  
 13 this execution of this license?  
 14 A. No, I'm not aware of any royalties.  
 15 Q. Kindly turn to PX50. Tell us what this.  
 16 A. I don't think I have it in here. I'll just  
 17 read it off the screen.  
 18 Q. Okay.  
 19 A. This is an agreement -- this is another license  
 20 agreement, and it's between Xerox Corporation and  
 21 Hewlett-Packard Company entered into in 1994.  
 22 Q. And do you find any evidence that there was  
 23 ever a lawsuit filed or threatened?  
 24 A. I did not find any evidence of that.  
 25 Q. So this was not a settlement of litigation?

1 A. I don't believe so.  
 2 Q. You were here for the openings again?  
 3 A. Yes.  
 4 Q. And you heard that the only financial term was  
 5 that this was for \$110,000?  
 6 A. That's what I heard, yes.  
 7 Q. What are the actual economic terms stated in  
 8 the agreement, Mr. Gemini?  
 9 A. Well, the agreement calls for a payment of  
 10 \$110,000, but it also calls for a running royalty based  
 11 on 1 percent of net revenues. So this is a combination  
 12 of a one-time payment and a running royalty agreement.  
 13 Q. What was the actual licensed product?  
 14 A. It was a Hewlett-Packard product called  
 15 Dashboard, which is another type of utility product  
 16 similar to Central Point Tools, an add-on product.  
 17 Q. And what was Dashboard selling for at the time  
 18 of this negotiation?  
 19 A. Prior to the negotiation, my understanding is  
 20 it was selling for \$99 per unit.  
 21 Q. What was the geographic scope of this license?  
 22 A. This, again, was a worldwide license, which,  
 23 again, covers sales no matter where they occur.  
 24 Q. Did you make any effort to translate this  
 25 license into a per-unit royalty?

1 document is.  
 2 A. One second.  
 3 This is a license agreement between Xerox  
 4 Corporation and Silicon Graphics, Inc.  
 5 Q. What are the economic terms of this license?  
 6 A. This was a license for paid-up royalty of  
 7 \$95,000 at the time of the agreement.  
 8 Q. What was the geographic scope of the SGI  
 9 license?  
 10 A. This covered worldwide again.  
 11 Q. Now, have you seen any evidence as to the  
 12 number of actual or projected sales of any SGI product  
 13 with the patented feature from that timeframe?  
 14 A. No, I've seen nothing that indicates how many  
 15 products are sold, how many dollars were sold, any of  
 16 that information.  
 17 Q. Or what was projected?  
 18 A. Nothing as to what was projected, no.  
 19 Q. Have you seen any evidence showing how SGI  
 20 viewed the patented feature at the time of the  
 21 negotiation?  
 22 A. Yes.  
 23 Q. What have you seen?  
 24 A. Well, I've seen an indication that they were  
 25 somewhat lukewarm on the feature. They had indicated

1 A. Yes. If you consider that the price of the  
 2 product prior to the agreement was \$99 and the royalty  
 3 rate was 1 percent, then the effective royalty rate per  
 4 unit would be 1 percent times \$99, or 99 cents per unit.  
 5 Q. Now, are you the only person in this case who  
 6 determined that the HP license translated into a 99-cent  
 7 per-unit royalty?  
 8 A. No.  
 9 Q. Who else did that?  
 10 A. Well, Dr. Putnam had done that in his first  
 11 report. Dr. Putnam is the expert for Defendants.  
 12 Q. I'll show you a Schedule 10 from Dr. Putnam's  
 13 damage report. And here, if you'll look at B, there's  
 14 some information about the Hewlett-Packard license?  
 15 A. Yes.  
 16 Q. And what does Dr. Putnam state is the, quote,  
 17 observed royalty, close quote?  
 18 A. 99 cents per unit.  
 19 Q. Now, is the HP license a running royalty, a  
 20 lump-sum -- or a lump-sum paid-up royalty?  
 21 A. Well, it has a component of payment for the  
 22 past, and it also has a running portion of it.  
 23 Q. So it's both?  
 24 A. Right.  
 25 Q. Kindly look at DX733. Tell me what this

1 that they were willing to take the feature out as  
 2 opposed to entering into a license.  
 3 Q. I better show you PX292. Tell me what this is.  
 4 A. This is a statement or a release -- product  
 5 release notes by SGI, and it indicates that SGI was --  
 6 if you see the highlighted area -- talking about the  
 7 Xerox Corporation has recently asserted restrictive  
 8 software patents, and that the features are programmed  
 9 to automatically turn off on May 15, 1995, unless the  
 10 system has been provided with a license code that will  
 11 enable the features to continue.  
 12 So, essentially, they're saying unless  
 13 they can reach an agreement with Xerox, they're just  
 14 going to shut the thing off, which indicates to me it  
 15 wasn't that important to them.  
 16 Q. And this was an announcement to the public, its  
 17 own customers?  
 18 A. Yes.  
 19 Q. Now, I'm going to turn you to PX52. Kindly  
 20 tell me what this is.  
 21 A. This is the settlement license agreement you've  
 22 heard about between Apple Inc., and IP Innovation, LLC  
 23 and Technology Licensing Corporation.  
 24 Q. What's the date?  
 25 A. June of 2007.

1 Q. And does the license agreement cover the same  
2 three patents-in-suit?

3 A. Yes, it does.

4 Q. And who are the licensing parties to this  
5 agreement?

6 A. It would be Apple, Apple Inc., and the  
7 Plaintiffs, IP Innovation, LLC and Technology Licensing  
8 Corporation.

9 Q. What were the economic terms of the Apple  
10 license?

11 A. This was a lump-sum payment of \$1.25 million.

12 Q. Now, what's your understanding as to where this  
13 feature fit into the Apple product? Was it the entire  
14 Apple product or some minor subset?

15 A. No. This is similar in terms of features.  
16 Apple's products, Apple's operating systems has numerous  
17 features, also. So this was Apple paying for this one  
18 feature as it relates to its products, which is the  
19 features that are also in that product.

20 Q. At the time of this license, was Apple's  
21 primary business the sale of software?

22 A. No. They sell computers; they sell iPods.  
23 They sell a number of things.

24 Q. Did Red Hat or Novell even consider Apple a  
25 major competitor?

1 A. No, they did not.

2 Q. How do you know that?

3 A. I've seen information in their annual reports  
4 indicating who their major competitors were.

5 Q. I'm going to show you PX100. Tell me what this  
6 is.

7 A. This is a Form 10-K or an annual report. It's  
8 for Red Hat, February 29th, 2008. This is a public  
9 filing that Red Hat prepares as a public company.  
10 That's their financial statement as of the end of that  
11 year, which is February 29, 2008.

12 Q. And I'm going to move you to Page 5,  
13 Mr. Gemini. On that page, does Red Hat identify to the  
14 government and the public what its competitors are?

15 A. Yes. It indicates that competition is from  
16 well-established proprietary software industry  
17 participants. And it lists there -- and you can see  
18 Apple is not one of those competitors.

19 Q. Did you hear in the opening statement that this  
20 license was for seven years?

21 A. Yes, I did.

22 Q. Does the license say that? Can you find that  
23 language anywhere in the license?

24 A. I could not, no.

25 Q. What does the agreement actually say?

1 A. I'm sorry?

2 Q. What does the agreement actually say it's  
3 doing?

4 A. Oh, it's a settlement of litigation.

5 Q. That was filed when?

6 A. It's a settlement of litigation that was filed  
7 on April 18th, 2007 in the Eastern District of Texas.  
8 This was settled on June 8th, 2007.

9 Q. Are you aware of any way TLC and IPI could  
10 recover damages for actions prior to when they first  
11 gave Apple notice of the patents?

12 A. No, I'm not aware of that.

13 Q. So this license couldn't cover seven years?

14 A. No.

15 Q. And, again, at this point when is the -- when  
16 are the patents going to expire?

17 A. These patents expired -- actually have expired.  
18 They expired on, I believe, December 9th or 8th of 2008.  
19 So they're essentially going to expire, you know, a year  
20 and a half from the date of this agreement, this Apple  
21 agreement.

22 Q. And have you seen or heard any evidence showing  
23 that Apple is prepared to sell its products without the  
24 infringing feature?

25 A. Yes, I have.

1 Q. What's the geographic scope of the Apple  
2 license?

3 A. Again, this is a worldwide license. It covers  
4 sales throughout the world.

5 Q. By the way, each of the four licenses we looked  
6 at were for U.S. patents?

7 A. Yes.

8 Q. Do you have any understanding as to why all of  
9 the licenses are worldwide?

10 A. Well, my experience -- my understanding is when  
11 you have patents such as these where it involves using  
12 and selling and distributing software throughout the  
13 world, it becomes difficult to determine where -- when  
14 you have mixed use, U.S., foreign, it's difficult to  
15 determine where that's occurring.

16 So many companies enter into worldwide  
17 licenses to hopefully resolve any future disputes that  
18 may occur and make it easier to administer. So,  
19 generally, that's what my understanding is.

20 Q. So what are the advantages of structuring these  
21 licenses as worldwide even if some of the foreign  
22 activity wouldn't actually infringe the U.S. patent?

23 A. Generally, I think it said administration.

24 Q. Does the royalty reflect -- royalty rate  
25 reflect the parties' recognition that a portion of the

1 sales wouldn't actually infringe the U.S. patent laws?  
2 THE COURT: Would you withhold for a  
3 second.

4 Mr. Reiter?

5 MR. REITER: Your Honor, this was not in  
6 any of Mr. Gemini's reports, an analysis of how a  
7 worldwide license would affect royalties. Not at all.  
8 I move to strike the question.

9 MR. VICKREY: It actually was in the  
10 report last week, just hours after your expert's  
11 deposition.

12 MR. REITER: Respectfully, I disagree.  
13 Let me be specific.

14 THE COURT: Show me the expert report.  
15 Excuse me, folks.

16 MR. VICKREY: 321, Your Honor.

17 THE COURT: And will you tell me where in  
18 this I find some explanation of the worldwide versus  
19 domestic issue?

20 MR. VICKREY: Paragraph 2, Your Honor,  
21 first sentence. Paragraph 2, Subset 2.

22 MR. REITER: Your Honor, if I might  
23 respond?

24 THE COURT: Yes, Mr. Reiter.

25 MR. REITER: There's nothing in here that

1 heard summary judgment; you've heard claim construction.  
2 I believe.

3 It was entered into before any of that  
4 occurred. So -- so there's certain risk involved in  
5 litigation based on certain stages of the case, and this  
6 was entered into in at least, from what I can see, the  
7 earliest portion of the case.

8 Q. Have you reviewed any studies which have sought  
9 to quantify the litigation risk encountered in patent  
10 infringement cases?

11 A. Yes.

12 Q. Give me an example.

13 A. Well, there was a study done by an organization  
14 called AIPLA that indicated that when a patent owner has  
15 not gotten through summary judgment, they have a much  
16 greater chance of losing a case. Once they get through  
17 summary judgment and go to trial, they have a much  
18 greater chance of winning a case.

19 So what that tells me is at the time of  
20 this negotiation, TLC had a much less -- much worse  
21 chance of winning the case, which means they would  
22 discount their royalty a little more at that time.

23 Q. Mr. Gemini, in your opinion of the four  
24 licenses, which is the least informative in terms of  
25 calculating a reasonable royalty?

1 reflects Mr. Gemini's analysis of the Apple agreement or  
2 how the royalty rate might have been affected based on  
3 the fact that the Apple agreement is for -- what this is  
4 talking about is Mr. Gemini's analysis with respect to  
5 Red Hat and how Red Hat's revenues affect the total  
6 number of units.

7 So there's nothing that has to do with  
8 what we were talking about right now.

9 THE COURT: Mr. Vickrey?

10 MR. VICKREY: Your Honor, it's a fact all  
11 of these licenses are worldwide. And they're worldwide  
12 for a reason. I think Mr. Gemini pointed out one of the  
13 reasons -- which is consistent with his reports -- it's  
14 tough to track. And -- and it's -- it's relevant to an  
15 analysis of the license of these very patents-in-suit.

16 MR. REITER: If it was relevant, he should  
17 have put it in his report. He's had four.

18 THE COURT: Yes, I sustain the objection.  
19 Let's go on.

20 Q. (By Mr. Vickrey) Have you expressed any  
21 concerns, Mr. Gemini, about the use of the Apple license  
22 as a model for the reasonable royalty here?

23 A. I had, yes.

24 Q. What are those concerns?

25 A. Well, this agreement was entered into -- you've

1 A. In my opinion, it would be the SGI agreement.

2 Q. Why do you say that, sir?

3 A. Well, as I indicated, we have absolutely no  
4 information as to sales, as to expectation of sales.  
5 Generally, lump-sum payments are based on some sort of  
6 expectation.

7 There's indications that they were  
8 lukewarm; they were ready to take it out of their  
9 product. They were willing to just not use it, which  
10 tells me it wasn't important to them at the time.

11 So I would say that would be the least  
12 relevant to my analysis.

13 Q. Was there any evidence that HP and Central  
14 Point were willing to walk away from virtual desktops?

15 A. Not that I have seen.

16 Q. What about the Defendants, Red Hat and Novell,  
17 have you seen any evidence that once they learned of  
18 this patent claim, they stopped providing virtual  
19 desktops?

20 A. No, I've not seen any evidence of that.

21 Q. What did they do instead?

22 A. My understanding is that they considered (sic)  
23 to sell products with virtual desktops, and they -- they  
24 continued to sell it.

25 Q. Mr. Gemini, based on your analysis, should the

1 damages in this case be based on a running royalty or  
 2 paid-up lump sum?  
 3 A. In my opinion, a running royalty would be most  
 4 appropriate.  
 5 Q. Why is that?  
 6 A. Well, we have licenses that were entered into  
 7 at the time with the hypothetical based on a running  
 8 royalty. We have information -- and we'll go through  
 9 that -- as to how many units were distributed by Red  
 10 Hat, by Novell.  
 11 We know -- we don't have to guess at what  
 12 they would have expected. We know what's happened; that  
 13 the patent has expired. We know exactly what the  
 14 universe of units are.  
 15 Q. Any other reasons why you believe that a  
 16 running royalty is appropriate?  
 17 A. I would say generally those are the reasons I  
 18 would consider.  
 19 Q. You mentioned already knowing what the units  
 20 are, and yet you're talking about a hypothetical  
 21 negotiation.  
 22 Does hindsight ever play a role in what an  
 23 expert such as yourself is supposed to look at in coming  
 24 up with a damage figure?  
 25 A. Yes. You can consider information subsequent

1 per-unit price for a license based on a running royalty?  
 2 A. Yes.  
 3 Q. What is that, sir?  
 4 A. Well, based on everything I've considered,  
 5 including the extent of use information, how the  
 6 invention is perceived, the agreements which indicate  
 7 that Central Point had a royalty rate of 25 cents per  
 8 unit. HP had an effective royalty rate of 99 cents per  
 9 unit.  
 10 I considered that the mid-point of that  
 11 rank, in my opinion, is reasonable. Considers all the  
 12 factors --  
 13 THE COURT: Let's take a recess here, if  
 14 we could. In fact, we'll let the jury go for the day,  
 15 and we'll return tomorrow at 8:30. And we'll get to  
 16 hear more from Mr. Gemini. And I appreciate your  
 17 service today.  
 18 (Jury out.)  
 19 THE COURT: Thank you. I'd like us to  
 20 continue a little further, if we could today.  
 21 Mr. Gemini, would you take me back --  
 22 could you and I look at the Central Point license?  
 23 THE WITNESS: The Central Point one?  
 24 THE COURT: Yes.  
 25 THE WITNESS: Which one?

1 to the data hypothetical.  
 2 Q. What do they call that, sir?  
 3 A. I've heard it called -- they call it the book  
 4 of wisdom. In hindsight, you can see what had occurred.  
 5 Q. In this case today, there's -- the patents are  
 6 expired, correct?  
 7 A. That's correct. They expired in December of  
 8 2008.  
 9 Q. And we have an idea as to what happened during  
 10 the infringement period, correct?  
 11 A. That's correct.  
 12 Q. And I believe you said that there are two kinds  
 13 of running royalty agreements.  
 14 A. There's generally two types of running royalty  
 15 agreements. There's a per-unit royalty, as I explained,  
 16 or a percentage of revenue royalty on a running basis.  
 17 Q. Which of those structures is appropriate here?  
 18 A. In my opinion, the per-unit, because, as you've  
 19 seen, the Defendants distribute software for free. So  
 20 there's indication -- there's nothing to apply the  
 21 revenue to. You have a per-unit royalty to compensate  
 22 the Plaintiffs for the infringement based on each copy  
 23 that was distributed by the Defendants.  
 24 Q. Now, based on your analysis of the license  
 25 agreements, do you have an opinion as to the appropriate

1 THE COURT: That's the one for 25 cents  
 2 per shot. That's the one that's on DX926.  
 3 THE WITNESS: I'm sorry. The agreement  
 4 or --  
 5 THE COURT: Well, I'm looking at what the  
 6 license agreement was to the Central Point software; is  
 7 that correct?  
 8 THE WITNESS: Yes.  
 9 THE COURT: All of the Central Point  
 10 software as a whole?  
 11 THE WITNESS: Central Point PC Tools for  
 12 Windows.  
 13 THE COURT: Yes. That's what I thought I  
 14 perceived. And there's a list of the utilities included  
 15 in that, isn't there, in DX926?  
 16 THE WITNESS: Yes.  
 17 THE COURT: And I see something like 14 or  
 18 15 little boxes, the last of which is the desktop  
 19 feature that is part of this lawsuit; is that correct?  
 20 THE WITNESS: That's what it looks like to  
 21 me.  
 22 THE COURT: Now, that means that the  
 23 license on the Central Point software was a small --  
 24 only a small fraction of that can be attributed to the  
 25 claimed invention.

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1 Is that your perception?  
2 THE WITNESS: Only a small fraction of  
3 what?  
4 THE COURT: Well, the license covers the  
5 whole Central Point software, all of these 14 features  
6 in DX926, only -- I'm not sure it's 14.  
7 Let me count. (Counting.) 15. I missed  
8 by one.  
9 So there are 15 features here that are  
10 part of that software, only one of which is the claimed  
11 invention; is that correct?  
12 THE WITNESS: That's what it appears to  
13 be, yes.  
14 THE COURT: Yes. And so did you make any  
15 effort in your analysis to factor out of the 25-percent  
16 royalty the part attributable to the other 14 features?  
17 THE WITNESS: I'm not sure I understand.  
18 THE COURT: Well, it's not a difficult  
19 question.  
20 THE WITNESS: It's 25 cents.  
21 THE COURT: There are 15 features, only  
22 one of which is the claimed invention. I'm not going to  
23 let you tell my jury that they paid 25 cents per unit  
24 for the claimed invention. They didn't. They paid 25  
25 cents per unit for 15 features, only one of which was

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1 the claimed invention.  
2 And you were about to give them a  
3 number -- that's why I stopped you -- that was based on  
4 a failure to take into account the scope of the claimed  
5 invention.  
6 THE WITNESS: Well, the 25 cents, as far  
7 as I understand it, is based on distributing a product  
8 that includes the patents.  
9 THE COURT: That includes it, yes, as  
10 one --  
11 THE WITNESS: Right.  
12 THE COURT: I'm not sure -- see, because I  
13 haven't had an analysis, I don't even know if this is  
14 the largest of the 15 features or the smallest. I do  
15 know it's listed last of the 15, tending to suggest that  
16 it may not even have been as significant as the other  
17 14.  
18 But it's clear that no one paid 25 cents  
19 per unit just for the claimed invention. They paid that  
20 for a much larger piece of software, and I think the  
21 same is true of the 99-cent per-unit license, in which  
22 case you've got to factor out those parts which are not  
23 the claimed invention and give me and my jury a number  
24 which can be more identified as the value of the claimed  
25 invention, not a larger piece of software that includes

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1 the claimed invention.  
2 Mr. Vickrey, you're welcome to comment on  
3 this as well.  
4 MR. VICKREY: I think that there could be  
5 a misunderstanding here. First of all, it's not 15  
6 features; it's many other features. And even in the  
7 last point, the last point doesn't even include -- it's  
8 not confined to the patented invention.  
9 Nonetheless, the sellers of PC Tools are  
10 saying the value of your incremental add-on is 25 cents  
11 a unit. We have all this other stuff and we're selling  
12 it, but we have valued your -- they're not claiming we  
13 have a patent that the license -- the licensee is not  
14 claiming we patented any other feature here.  
15 They apply the value of 25 --  
16 THE COURT: Show me exactly what is  
17 licensed.  
18 MR. VICKREY: The patents.  
19 THE COURT: The patents and the patents  
20 alone?  
21 MR. VICKREY: Yes.  
22 THE COURT: Well, that's what I need to  
23 see. Show me.  
24 MR. VICKREY: Let's go back to the license  
25 agreement.

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1 MR. GASEY: 247, Your Honor.  
2 THE COURT: What is it?  
3 MR. GASEY: 247, I believe it is, Your  
4 Honor.  
5 THE COURT: 247.  
6 Per-unit copy of the licensed product.  
7 What's the licensed product?  
8 MR. VICKREY: PC Tools, Your Honor.  
9 THE COURT: PC Tools is what?  
10 MR. VICKREY: Is the product that had the  
11 features we just looked at.  
12 THE COURT: The 15 features?  
13 MR. VICKREY: Actually more.  
14 THE COURT: So they're licensing at 25  
15 cents per unit the 15 features, not the claimed  
16 invention. Am I wrong?  
17 MR. VICKREY: I think you are.  
18 THE COURT: Help me out.  
19 THE WITNESS: Well, Paragraph 1 talks  
20 about the invention rights.  
21 MR. VICKREY: They're only licensing  
22 what's covered by the patents, Your Honor. And what  
23 they've done is they've allocated 25 cents to the  
24 patented feature. This is per-unit.  
25 So it's actually more than 15 features;

1 it's many more. But one of them is covered by the  
2 patent, and the licensee says, in this negotiation, it's  
3 settling this lawsuit; I've agreed to pay you 25  
4 percent -- 25 cents for that portion of this product  
5 which your patents cover. Nothing more.

6 We don't claim that these patents cover  
7 all those features.

8 THE COURT: The licensed product is the  
9 whole --

10 MR. VICKREY: Precisely.

11 THE COURT: -- Tools for Windows?

12 MR. VICKREY: Right. And the licensee  
13 agreed and the licensor allocated the value of this  
14 invention to be 25 cents a unit.

15 THE COURT: Is that your understanding,  
16 Mr. Reiter?

17 MR. REITER: This is what I was trying to  
18 say before, Your Honor, and I think I agree with you, is  
19 that there are many, many features. And, in fact, on  
20 the line that you were identifying, there are many  
21 features, including the virtual desktops.

22 One of the points, additionally, it's not  
23 just virtual desktops with common display objects. We  
24 know that virtual desktops was in the prior art, so we  
25 don't even know that this covers an infringing product.

1 But I agree with Your Honor, that there  
2 are many features. This was for the entire value of  
3 that product, and as a result of that, and as I said I  
4 wasn't articulate before, this 25 cents per unit is  
5 inflated with respect to here particularly.

6 THE COURT: I'm looking, Mr. Vickrey and  
7 Mr. Gasey, at this agreement, and it defines invention  
8 rights and it defines licensed product.

9 The 25 cents is for what?

10 MR. VICKREY: The 25 cents is for --

11 THE COURT: The licensed product?

12 MR. VICKREY: Precisely.

13 THE COURT: The whole -- all 15 features,  
14 am I not --

15 MR. VICKREY: No, Your Honor.

16 THE COURT: Am I reading it wrong?

17 MR. VICKREY: You are, respectively, Your  
18 Honor.

19 THE COURT: The licensed product shall  
20 mean PC Tools. Invention rights shall mean the patents.

21 MR. VICKREY: Precisely, Your Honor. The  
22 invention rights identify two patents. And in the  
23 grant, Xerox grants the licensee the right to sell that  
24 product using these patents.

25 We don't claim that -- there was never any

1 claim that these patents covered any other feature other  
2 than what is covered by these patents. And the parties  
3 negotiated that even though this product has many, many,  
4 many features, we are going to value the patent rights  
5 vis-a-vis this product at 25 cents per unit.

6 MR. GASEY: By the way, Your Honor, the  
7 invention rights called up in 1.0, which are the sole  
8 grant under our Section 2.0, are solely for patents that  
9 are the '412 family. The '687 is another member of that  
10 family.

11 THE COURT: Sure. Fine. The invention  
12 rights isn't the issue. It's the scope of the 25 cents,  
13 which is per unit of the product, the product being much  
14 larger than the licensed invention rights.

15 MR. VICKREY: Right. But they've agreed  
16 to pay Xerox the value of what their patent covers and  
17 only that in this negotiation. It's not -- they're not  
18 claiming some larger portion of the product.

19 The parties sat down and said here's what  
20 I think -- here's what this negotiation of this  
21 settlement of this lawsuit is going to entail. We give  
22 you 25 cents a unit; you give us a license of these  
23 patents. And they go off and sell their product.

24 MR. REITER: With all due respect to  
25 Mr. Vickrey, there's no evidence of anything of what the

1 parties intended or what they discussed.

2 MR. VICKREY: We have the license  
3 agreement here.

4 MR. REITER: I agree we have a license  
5 agreement, which is all that we have. But Mr. Vickrey  
6 was talking about the parties sat down and they  
7 discussed certain things. We know what they've  
8 memorialized.

9 And they memorialized a license that  
10 covers the entire product and allows the entire product  
11 to be sold.

12 THE COURT: But it's settlement of  
13 litigation, isn't it, Mr. Reiter, which -- and the  
14 litigation was just on the patents, right?

15 MR. REITER: It was on the patents, and  
16 there was a consent judgment where the patentee  
17 consented to infringement.

18 THE COURT: Okay.

19 MR. REITER: So you asked about settlement  
20 of litigation. I thought you were going some place  
21 else.

22 THE COURT: I understand how that factors  
23 in.

24 MR. REITER: But on the point that we're  
25 on, Your Honor, there's no evidence of what the parties'

1 intent was here. Mr. Gemini was talking about that with  
2 respect to the SGI license, and now Mr. Vickrey is  
3 saying that he didn't have anything. Now Mr. Vickrey is  
4 trying to bring in what the intent of the parties are  
5 with extrinsic evidence, and there is no such extrinsic  
6 evidence.

7 THE COURT: Okay. Well, let's go to the  
8 next one. Let's look at the -- you take your pick.

9 MR. VICKREY: HP.

10 THE COURT: Take me through the HP  
11 license. What exactly is licensed and for how much?

12 MR. VICKREY: Your Honor, the HP license  
13 is 50.

14 THE COURT: I have it.

15 MR. VICKREY: This is the license relating  
16 to the Dashboard product, Your Honor. The licensed  
17 product is the Dashboard product.

18 THE COURT: I'm seeing the -- okay. Tell  
19 me what the Dashboard product is.

20 MR. VICKREY: Your Honor, that was a  
21 product that was sold, the evidence shows at the time of  
22 the license agreement, for \$99.

23 THE COURT: And it included.

24 MR. VICKREY: It included a virtual  
25 desktop aspect to it.

1 was a down payment, plus a running royalty of 1 percent  
2 MR. REITER: Your Honor, it was \$110,000  
3 for all past sales, and \$110 -- that \$110,000 included  
4 another \$10 million of sales. It's in the license.

5 THE COURT: Just a second. Complete  
6 satisfaction of any claims assertable which may have  
7 been accrued prior the effective date.

8 Yes, you're correct on that.

9 MR. REITER: And to go on, it says: And  
10 then for an additional 10 million dollars' worth of  
11 sales.

12 And there is no evidence -- and Mr. Gemini  
13 told me in the deposition he has no evidence that that  
14 \$10 million was ever satisfied, that this 1-percent  
15 royalty was ever implemented.

16 And, in fact, as I mentioned before the  
17 jury came in, the evidence is that on the day -- and you  
18 can look to the very last page of the agreement,  
19 Exhibit B. It shows that the assignment was assigned to  
20 Borland on the day that it was executed.

21 Borland bought this business unit, and it  
22 lowered the price immediately.

23 THE COURT: So in other words, you had to  
24 get the 10 million in sales, then the 1 cent kicked in?

25 MR. REITER: 1 percent kicked in. That's

1 THE COURT: And what else? Was there any  
2 other feature other than the claimed invention?

3 MR. VICKREY: Oh, yes. Many features,  
4 but, Your Honor, that's precisely the point, that in  
5 that, other things went along in these products. This  
6 was not the only thing. This was not -- this was not a  
7 one-piece deal.

8 But nonetheless, the parties negotiated,  
9 came up with a royalty rate. Once -- in one case, it  
10 was 25 cents per unit. In the other situation, it was 1  
11 percent -- some money down and 1 percent on a product  
12 that was then selling for \$99.

13 MR. REITER: Your Honor --

14 THE COURT: The lump-sum payment part of  
15 it as well?

16 MR. VICKREY: Yes.

17 THE COURT: A lump-sum payment of  
18 \$110,000, right?

19 MR. VICKREY: Correct, Your Honor.

20 THE COURT: Why that?

21 MR. VICKREY: Why that?

22 THE COURT: Yes. If the payment for the  
23 invention was 1 cent, why the \$110,000?

24 MR. VICKREY: It was -- as Mr. Gemini  
25 testified, it was a combination. It was a lump sum; it

1 exactly right. And there's no evidence that that \$10  
2 million was ever satisfied.

3 THE COURT: So we don't know if that was  
4 paid at all?

5 MR. REITER: No. No. In fact --

6 THE COURT: Does my jury know that?

7 MR. REITER: No.

8 THE COURT: Did you take that into  
9 consideration, Mr. Gemini?

10 THE WITNESS: Well, I considered what they  
11 entered into at the time they negotiated it. I'm not  
12 aware to what extent any of the sales were made.  
13 There's no information on that.

14 THE COURT: How do you know the value of  
15 this invention, if you don't know what was paid for it?

16 THE WITNESS: Well, that's what they  
17 agreed to. That's what Xerox and HP agreed to.

18 THE COURT: And they could very well  
19 accept this 10-million-dollar figure knowing it never  
20 would be reached. Did anyone check into that?

21 MR. REITER: Your Honor, they had in their  
22 assignment agreement a provision with Xerox that Xerox  
23 was supposed to assist in this case or any cases. They,  
24 to my knowledge, never asked Xerox. If they did and got  
25 information, it was never produced to us.

1 In fact, these agreements were produced to  
2 us because we subpoenaed Xerox.

3 THE COURT: So this is going to be your  
4 99-cent --

5 MR. VICKREY: Your Honor, we aren't the  
6 only one who ascribed a value of 99 cents. It was in  
7 Dr. Putnam's original report as well.

8 THE COURT: Dr. Putnam's original report  
9 didn't make it to court, did it?

10 MR. REITER: No. That's his original  
11 report.

12 THE COURT: That's Mr. Gemini's original  
13 report.

14 MR. REITER: Dr. Putnam's original report,  
15 Your Honor, responded to Mr. Gemini's original report  
16 based on revenue. And what Dr. Putnam was trying to do  
17 was take the entire value, because Mr. Gemini, as Your  
18 Honor knows, didn't -- he violated the entire market  
19 value rule.

20 And what Dr. Putnam was trying to do was  
21 take the value of the operating system plus the add-on  
22 plus the services and ascribe some kind of percentage  
23 royalty to do an apples-to-apples comparison.

24 THE COURT: I'm still having trouble --  
25 I'm -- I'm having trouble seeing the value of this

1 discount it.

2 MR. VICKREY: Your Honor, he didn't  
3 inflate it. He discounted it.

4 MR. REITER: Your Honor, he did inflate  
5 it, because Mr. Vickrey knows that after HP sold the  
6 business to Borland, Borland dropped the price. The  
7 99-dollar price, particularly given the \$10 million of  
8 additional sales that was allowed before the 1 percent  
9 kicks in, the 99-dollar price is irrelevant.

10 THE COURT: Did you consider that,  
11 Mr. Gemini?

12 THE WITNESS: The 99-dollar price?

13 THE COURT: That it was dropped.

14 THE WITNESS: I considered what they  
15 entered into at the time of the negotiation, what Xerox  
16 and HP's mindset was at the time, which was \$99.

17 MR. REITER: At the time they sold the  
18 business to Borland, and that's very clear from the  
19 agreement.

20 MR. VICKREY: Your Honor, this dropping of  
21 the price --

22 THE COURT: I need an effort to really  
23 find the value of this product, not an effort to build a  
24 fancy legal case to mislead a jury. And I'm not seeing  
25 it at this point.

1 license to us.

2 Mr. Vickrey?

3 MR. VICKREY: Well, Your Honor --

4 THE COURT: We don't know if they even  
5 reached, ever, the point of paying 1 cent out of the  
6 product sales, do we?

7 MR. VICKREY: Your Honor, we don't have  
8 that sales information. What we do know is at some  
9 point, there was an estimate in the record of 125,000 in  
10 sales by HP.

11 And, Your Honor, this is just one data  
12 point. We're looking for evidence of licensed  
13 negotiations prior the hypothetical negotiation. And we  
14 have three. And two of them have a running royalty  
15 component.

16 And we're given this business model.  
17 We're somewhat at a loss to take percentage of net  
18 sales, because there are no net sales of this particular  
19 product at issue in this lawsuit. So what is evidence  
20 of how other people value this technology back then, and  
21 on a per-unit basis, Central Point and then also to some  
22 extent, at HP.

23 THE COURT: I don't see an effort to  
24 discount this for the lack of the reliability of the  
25 evidence. I see an effort to inflate it, not to

1 MR. VICKREY: And Your Honor has also  
2 heard about discount for litigation risk.

3 THE COURT: I certainly have.

4 MR. VICKREY: And all of this is  
5 discounted. There's been no -- there have been no  
6 rulings. There have been no summary judgments, no claim  
7 construction as opposed to what scholars agree is a much  
8 different number having gone through trial, because the  
9 patentee, Plaintiff patent holder, is looking at  
10 settling before all those things happen in the  
11 litigation. He's looking at a deeply discounted number.

12 So if you're looking at Central Point, if  
13 you're looking at HP, even if you're looking at Apple,  
14 none of those things had happened. So those numbers are  
15 depressed because of the litigation discount. And I  
16 think even their expert would agree with me. He's  
17 written on the subject.

18 MR. REITER: Your Honor, Mr. Gemini just  
19 testified with respect to HP that he saw no threat of  
20 litigation, and there was no litigation that appeared to  
21 be pertinent. And so that discount that Mr. Vickrey is  
22 talking about is irrelevant.

23 THE COURT: Well, there's litigation  
24 involved all the way through here, wasn't there?

25 MR. REITER: Not with HP. No, there was

1 no evidence. That's what Mr. Gemini just testified to.  
2 He saw no evidence that there was any threat of  
3 litigation there.

4 With respect to Central Point, yes, there  
5 was a lawsuit filed. As I pointed out a moment ago,  
6 there was a consent judgment, a consent judgment, not  
7 just a contract provision that said they stipulated to  
8 infringement; a judgment by the Court that Central Point  
9 infringed.

10 So that takes us back to exactly the way  
11 the hypothetical negotiation would be where infringement  
12 is presumed.

13 THE COURT: Let's go on to the other two  
14 licenses. What's the Silicon Graphics license?

15 MR. VICKREY: It's a 95,000-dollar lump  
16 sum.

17 THE COURT: Lump-sum payment?

18 MR. VICKREY: Correct, Your Honor.

19 THE COURT: For what?

20 MR. VICKREY: For a feature that SGI was  
21 prepared to yank out of its product.

22 THE COURT: Is it the claim feature?

23 MR. VICKREY: Yes.

24 MR. REITER: In the SGI license, Your  
25 Honor, it was -- the licensed product was an overall

1 MR. VICKREY: Well, Your Honor, I  
2 respectfully disagree, because two different licensees,  
3 there was --

4 THE COURT: Things have different value.  
5 We're trying to find the absolute value that this  
6 deserves in our system, the Red Hat system, the Novell  
7 system and what they would have agreed to, if they had  
8 agreed before there was infringement. That's what we're  
9 trying to do here.

10 MR. VICKREY: Yes, but at the same time,  
11 we can't disregard what actually happened. And they  
12 made absolutely no effort to take out what their expert  
13 says is a trivial feature.

14 THE COURT: Okay. I have your point.  
15 Apple, the license, talk to me about it.

16 MR. VICKREY: Okay. The timeframe,  
17 obviously, is similar to ours. I mean, it's almost spot  
18 on.

19 The period of -- covered by the patent  
20 before it expired, the damage period is very close. The  
21 parties are the same.

22 Where we would differ on the precise  
23 applicability would be it doesn't take into account the  
24 fact that the settlement was discounted due to the risk  
25 of litigation. And that is different.

1 operating system very similar to this case. An overall  
2 operating system with a feature that is alleged. We  
3 don't have any evidence of exactly what it did, but it's  
4 alleged to be the claim feature.

5 SGI paid a lump sum of \$95,000 to have  
6 that feature in its overall operating system, worldwide  
7 license for the life of the patents.

8 THE COURT: Why isn't that closer to what  
9 we're doing here, Mr. Vickrey?

10 MR. VICKREY: Because there are three  
11 reasons. There's absolutely no evidence of demand or  
12 sales of that product. At the time, the other party to  
13 the license agreement did not see this feature as  
14 even -- it wasn't valuable to them. They offered to  
15 take it out as opposed to our situation where there's  
16 never been any effort to take it out.

17 Several of these -- two of these license  
18 situations, Apple and SGI, involve situations where  
19 the --

20 THE COURT: The fact that they're willing  
21 to take it out reflects on the value of the invention.  
22 It discounts the value of the invention. It doesn't  
23 buttress your case at all. I think that's backwards.

24 MR. REITER: They were willing to pay  
25 \$95,000 to keep it in. That was it.

1 And I think we'll hear from Defendants'  
2 expert and from other treatises that that number is  
3 different than the number that should result if the  
4 patents actually litigated and found valid and  
5 infringed, because the studies show that --

6 THE COURT: What's the federal circuit law  
7 on that?

8 MR. VICKREY: Federal circuit law on that,  
9 we don't -- it's still an evolving scenario. The  
10 article, the AIPLA study was actually peer-reviewed by  
11 Judge Moore, then Professor Moore, and it updated the  
12 study that she performed in 2000.

13 And the authors of the study recognized  
14 and concluded that if you factor in summary judgment, a  
15 settlement prior to summary judgment, be it in  
16 litigation or just -- not even in litigation, the  
17 parties take into account that the Defendant's going to  
18 see greater likelihood of succeeding on summary  
19 judgment. But if the Plaintiff gets through that, then  
20 the discount factor is something like 58 percent.

21 But overall, it's about 25 percent,  
22 starting before summary judgment, claim construction,  
23 everything else. And that's what we have in Apple. And  
24 that was Mr. Gemini's concern about the apples-to-apples  
25 of the Apple settlement agreement.

1 MR. REITER: No pun intended.

2 THE COURT: Mr. Reiter?

3 MR. REITER: Yes, Your Honor.

4 The Apple agreement, the way Mr. Vickrey  
5 described it, is not exactly right. The Apple agreement  
6 covered all Apple products. Apple makes an operating  
7 system.

8 We heard from Mr. -- or from, I think,  
9 Mr. Cooper about Leopard and Tiger and so forth. Apple  
10 puts that into its machines, into Macintosh, into other  
11 machines.

12 Apple, under these claims, because they  
13 have a display, is a direct infringement. We are not.  
14 We only provide a component. Because Apple is a direct  
15 infringer, they could go back six years. I think Your  
16 Honor knows the law. They could go back six years.

17 In fact, the Apple agreement talks about a  
18 release, and, in fact, releases all prior acts of  
19 infringement that happened prior to the effective date.

20 So when Mr. Vickrey is saying it's  
21 pertinent as far as the temporal component, 14 months to  
22 whatever this is, that's not right. This is for seven  
23 years.

24 It's also on the overall product -- on the  
25 overall product, not just the operating system, and it

1 percentages being up in the 50-percent range. And it  
2 all is just some data to try and quantify something that  
3 really can't be quantified.

4 MR. VICKREY: Your Honor, just briefly on  
5 that.

6 We couldn't go back six years, because  
7 there was a marking issue. We couldn't. There was  
8 strictly a notice issue. But -- if Your Honor would  
9 like, we have the Janake article as an exhibit. We can  
10 allow the Court to take a look at that.

11 THE COURT: It's been a while since I've  
12 seen it. Do you have that, and the Moore?

13 MR. VICKREY: We definitely have the  
14 Janake.

15 THE COURT: Let me tell you what --  
16 Mr. Gasey, I promise to give you time.

17 MR. GASEY: I just wanted to point out a  
18 specific exhibit, DX773 is the Silicon Graphics  
19 agreement. It has no marking provision. That's one of  
20 the reasons we can't go back six years.

21 MR. REITER: But they're a non-practicing  
22 entity, so I don't know that they have a marking  
23 requirement.

24 MR. GASEY: Silicon Graphics?

25 MR. REITER: There's no evidence they make

1 covers Apple's entire product line, and Apple's entire  
2 revenue is magnitudes higher than what the Defendants  
3 have here.

4 THE COURT: But they're settling  
5 litigation on this patent, right?

6 MR. REITER: They are settling litigation  
7 on this patent. I do agree with that. It was a loss  
8 of --

9 THE COURT: Mr. Gasey?

10 Did you have something else, Mr. Reiter,  
11 you wanted to tell me?

12 MR. REITER: Yeah, I wanted to respond to  
13 what Mr. Vickrey said about the Janake article. The  
14 Janake article is as good as it is. What Professor  
15 Janake says in the article is that he omits the most  
16 important information from his study, and that is the  
17 relative strengths of the parties' positions.

18 He ignores that, because he can't assess  
19 that. He also says that it's not meant to be a  
20 representation of really what litigation is. And then  
21 as Mr. Vickrey said, when you talk about trial, the  
22 percentages go substantially higher.

23 So the Janake article does provide some  
24 information, but there are many other articles like the  
25 Moore article and the Teece article that talk about the

1 a --

2 MR. GASEY: Product shipped, that triggers  
3 the '387 patent.

4 THE COURT: Let's take about 10 or 15  
5 minutes and let me consult with my brighter minds here.  
6 And I'll be back.

7 MR. REITER: Your Honor, did you get the  
8 Teece article?

9 THE COURT: I do have it. I have Paul  
10 Janake's article.

11 MR. REITER: Do you want the Teece article  
12 as well?

13 THE COURT: Yeah, sure.

14 Mr. Gemini, am I correct, you're going to  
15 suggest a running royalty somewhere between 25 and 99?

16 THE WITNESS: That was my --

17 THE COURT: That's what I thought. Thank  
18 you.

19 Give me 10 or 15 minutes. Is that all  
20 right?

21 MR. VICKREY: Certainly.

22 THE COURT: Thank you. I'll be right

23 back.

24 (Recess.)

25 THE COURT: Is Mr. Gemini present.

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1 MR. GASEY: Now, he is.  
 2 THE COURT: That's okay. You can stay  
 3 there.  
 4 I looked at all the documents again, and  
 5 I'm going to allow the testimony to go forward. There  
 6 can be plenty of other opportunity for Mr. Reiter to  
 7 make many of his points on cross-examination.  
 8 Mr. Gemini can make his point, and I would only say to  
 9 Mr. Reiter that I'll need the same amount of time with  
 10 Mr. Putnam.  
 11 MR. REITER: We're happy to provide that  
 12 obviously, Your Honor.  
 13 THE COURT: I think -- what's he saying,  
 14 \$100,000 paid up lump sum? That's probably off.  
 15 MR. REITER: Well, actually --  
 16 THE COURT: I'm jumping a bit to  
 17 conclusions here, but I find that as questionable as  
 18 anything. So I want some time with him as well.  
 19 MR. VICKREY: Thank you, Your Honor.  
 20 THE COURT: And -- any further questions  
 21 about what we'll do then tomorrow?  
 22 MR. REITER: No, Your Honor. I just would  
 23 like to pose -- I guess it's an objection under Rule  
 24 403.  
 25 THE COURT: You have every right to.

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1 MR. REITER: I think to have Mr. Gemini  
 2 continue to present evidence to this jury that is wrong  
 3 and inflated is prejudicial and is not something we  
 4 can't undo. I will, of course, cross-examine him to the  
 5 best of my ability, but the jury has heard evidence and  
 6 will continue to hear evidence about things that just  
 7 aren't true.  
 8 THE COURT: This Court just spent about an  
 9 hour trying to assure itself that it was making the  
 10 right ruling on that precise point, Mr. Reiter. And  
 11 I've come to the conclusion that there is no prejudice  
 12 here.  
 13 MR. REITER: I understand, Your Honor.  
 14 THE COURT: I find that the licenses,  
 15 while having some ambiguities and some limitations, are  
 16 focused on the claimed invention. That seems consistent  
 17 with federal circuit law. I think Mr. Vickrey has  
 18 properly and carefully characterized federal circuit law  
 19 on the pending litigation point and its effect on  
 20 royalties.  
 21 And so Mr. Vickrey will be allowed to  
 22 continue his examination of Mr. Gemini, and you will  
 23 have every opportunity on cross-examination to revisit  
 24 many of the points that we've discussed for an hour here  
 25 this evening out of the jury's presence so that we can

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1 all be confident we're getting the right value on this  
 2 venture.  
 3 This is difficult business, as we all  
 4 know, and I've appreciated each of your efforts to work  
 5 with the Court on finding the right amount and the right  
 6 way to testify here.  
 7 Anything further -- oh, yes, we have work  
 8 to do this evening now that we've finished that point.  
 9 Mr. Reiter, your objection, however, is  
 10 preserved, and you'll have every chance to follow that  
 11 up at any point you'd like to.  
 12 MR. REITER: Thank you, Your Honor.  
 13 MR. GASEY: I was wondering, Your Honor,  
 14 if we might establish what the order of the witnesses is  
 15 going to be after --  
 16 THE COURT: That's always part of our day.  
 17 We'll need to hear where we're going next. Why don't we  
 18 do the --  
 19 MR. GASEY: Exhibits first?  
 20 THE COURT: We can have Ms. Dickman and  
 21 Mr. Stewart come forward and do their work for us.  
 22 MS. DICKMAN: Hello, Your Honor.  
 23 Today Plaintiffs offered the following  
 24 exhibits to be admitted: PX1, PX2, PX3, PX4, PX5,  
 25 PX6 --

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1 THE COURT: Move slow enough that  
 2 Mr. Stewart can keep up.  
 3 MS. DICKMAN: Okay. PX10, PX32A, which  
 4 was Mr. Zimmerman's resume only, PX32B, which was the  
 5 list of materials he reviewed only, PX38, PX39, PX40, PX  
 6 41.  
 7 MR. STEWART: I believe we have an  
 8 objection for PX 41.  
 9 THE COURT: All right. We'll come back to  
 10 that one. Please note what that is, and what should  
 11 happen, Mr. Stewart, is you run me down PX41 so I can  
 12 see what the objection will be when it happens.  
 13 MS. DICKMAN: PX42, PX43, PX44, PX50,  
 14 PX52, PX54, PX55, PX69, PX88, PX90, PX91.  
 15 MR. STEWART: I believe we have an  
 16 objection for that.  
 17 THE COURT: 91 and 41 so far.  
 18 MS. DICKMAN: PX92, PX95.  
 19 MR. STEWART: Another objection for PX95.  
 20 THE COURT: All right.  
 21 MS. DICKMAN: PX98, PX100, PX180, PX197,  
 22 PX --  
 23 MR. STEWART: We have an objection for 197  
 24 as well.  
 25 THE COURT: 197. Okay. We've got four so

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1 far.  
2 MS. DICKMAN: PX198, PX208, PX227, PX247,  
3 PX265.  
4 MR. STEWART: Objection for 265.  
5 THE COURT: 265.  
6 MS. DICKMAN: PX266, PX276, PX278.  
7 MR. STEWART: Objection for 278.  
8 MS. DICKMAN: PX279.  
9 MR. STEWART: Objection for 279.  
10 MS. DICKMAN: PX285.  
11 MR. STEWART: Another objection.  
12 MS. DICKMAN: PX286.  
13 MR. STEWART: Another objection.  
14 MS. DICKMAN: PX292.  
15 MR. STEWART: Another objection.  
16 MS. DICKMAN: PX312.  
17 Then we also used Defendants' Exhibits  
18 DX773, Defendants' Exhibit DX808, Defendants' Exhibit  
19 DX927.  
20 THE COURT: All right. Ten documents.  
21 What are the objections, Mr. Stewart.  
22 MR. STEWART: That's correct.  
23 THE COURT: If we need to, we can get the  
24 attorneys involved on these objections here.  
25 MR. STEWART: We actually also entered a

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1 couple of exhibits on the Cooper cross.  
2 THE COURT: Oh, okay.  
3 Ms. Dickman, are you aware of these?  
4 MS. DICKMAN: Yes.  
5 MR. STEWART: It's DX738 and DX727.  
6 THE COURT: All right, good.  
7 MS. DICKMAN: I need to see if our  
8 attorneys...  
9 THE COURT: Okay.  
10 MR. REITER: With respect to PX265, 278,  
11 279, 285, 286 and 292, we object on hearsay grounds.  
12 These are articles or websites, blogs. They're out of  
13 court statements. Mr. Gemini was testifying about them.  
14 I have no problem under Rule 703 about him testifying  
15 about them, but they don't come into evidence.  
16 THE COURT: I think I remember these  
17 documents, yes.  
18 Mr. Vickrey, will you respond to that.  
19 MR. VICKREY: Your Honor, if I can get the  
20 numbers. I think two of them actually involve  
21 statements by Red Hat executives to the press.  
22 MR. REITER: I tried to exclude those. I  
23 did not include, for example, the CEO paper or  
24 the article.  
25 MR. VICKREY: And I think Mr. Reiter is

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1 correct inasmuch as Mr. Gemini is entitled to rely on  
2 them for his opinion, can rely on them, but in terms of  
3 independently admissible, I would agree with Mr. Reiter  
4 THE COURT: All right. Then I agree that  
5 we will strike as hearsay 265, 278, 279, 285, 286, and  
6 292. They are available for his commentary but not  
7 admissible as part of the record.  
8 MR. GASEY: Your Honor, I wasn't sure, so  
9 I just thought I'd bring it up. Do I need to reiterate  
10 my offer of proof with respect to exhibits that were  
11 related to the KDE Your Honor addressed this morning?  
12 There were about four or so exhibits that were called  
13 out of Dr. Zimmerman's presentation as a result of  
14 that --  
15 THE COURT: Yes, I think you'll want to  
16 proffer those, and I will --  
17 MR. GASEY: Okay.  
18 THE COURT: -- and I will strike them by  
19 virtue of my ruling this morning, and then we will have  
20 formally preserved all your rights with respect to  
21 those.  
22 MR. REITER: And if I might indulge the  
23 Court's patience just a little bit more. Mr. Lyon is  
24 the one that has the knowledge of which ones they are,  
25 and he's not here. So if we could just deal with that

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1 first thing in the morning, Your Honor, and I apologize  
2 for that.  
3 THE COURT: Okay. Well, we dealt with --  
4 so we just had one, two, three, four things to deal  
5 with.  
6 MR. GASEY: I'm sorry, Your Honor.  
7 THE COURT: Yes, go ahead.  
8 MR. GASEY: One of the exhibits that I  
9 identified -- I think it's PX197 -- is -- it's  
10 actually a -- it's a Novell document. It's the actual  
11 KDE document that was cited in Dr. Zimmerman's report.  
12 We're not admitting it for purposes of advancing a KDE  
13 theory, but it is a Novell document nonetheless and  
14 should be admissible.  
15 THE COURT: It's the one we had the  
16 virtual desktop --  
17 MR. GASEY: That's right, Your Honor.  
18 THE COURT: -- excerpt from?  
19 MR. GASEY: Yes, Your Honor.  
20 THE COURT: It seems that would be part of  
21 the record, Mr. Reiter.  
22 MR. REITER: Well, this is a KDE Quick  
23 Start.  
24 THE COURT: It is. I remember he referred  
25 to it, and to get the context on what he referred to

1 this document would be appropriate, if you agree.  
 2 MR. REITER: That's fine as long as we  
 3 understand KDE is not.  
 4 THE COURT: I ruled on that. 197 then is  
 5 admitted into evidence. So we really only have 41, 91,  
 6 and 95 remaining.  
 7 MR. GASEY: 91, Your Honor, actually was  
 8 one of the ones Mr. Vickrey was referring to. It's an  
 9 interview with Mr. Steinman.  
 10 MR. REITER: Well, actually, I do have an  
 11 objection because there's no quotes in here. It's just  
 12 paraphrasing Mr. Steinman. Mr. Steinman will be a  
 13 witness. If they want to try and authenticate his  
 14 statements, they can try to do that to get it in that  
 15 way. But this is just a website article that says  
 16 things that, according to Justin Steinman --  
 17 THE COURT: Can you show it to Mr. Vickrey  
 18 so he can see it as well?  
 19 Mr. Vickrey, that sounds reasonable if  
 20 he's going to be here.  
 21 MR. VICKREY: That does sound reasonable,  
 22 Your Honor. That's fine.  
 23 THE COURT: You can show him the article  
 24 and asks if he recognizes the statements.  
 25 MR. VICKREY: Certainly.

1 MR. REITER: Right, but --  
 2 MR. GIBBONS: That's the same with 91 and  
 3 95.  
 4 MR. GASEY: We can deal with those in  
 5 Steinman's testimony.  
 6 MR. REITER: This is not a document that  
 7 Mr. Clasen created. This is the claim charts for the  
 8 Plaintiff, and they put it in front of Mr. Clasen to ask  
 9 him questions about it. I don't see how that makes it  
 10 admissible. They're not his statements. This would  
 11 come in with Dr. Zimmerman.  
 12 THE COURT: Mr. Gasey?  
 13 MR. GASEY: We'll withdraw that.  
 14 THE COURT: 41 is therefore not admitted  
 15 at this time, and we've dealt with all of our documents  
 16 for this evening.  
 17 MR. REITER: With one caveat of Mr. Lyon  
 18 coming back on the KDE documents to make sure.  
 19 THE COURT: Well, I've already ruled on  
 20 those. The only thing we're going to do is allow  
 21 Mr. Gasey to proffer them so that I can officially  
 22 refuse to accept them for the record so that he has a  
 23 full record of what I've done.  
 24 MR. REITER: I understand, Your Honor.  
 25 THE COURT: Okay.

1 THE COURT: That was 91. 91 is not  
 2 admitted at this point although you may admit it later.  
 3 MR. REITER: PX95, also, we object to on  
 4 hearsay grounds. This looks like it's just a blog from  
 5 the VAR guy. I don't know who he is.  
 6 That's something we can revisit with  
 7 Mr. Steinman as well because --  
 8 THE COURT: Let's do that. 95 is not  
 9 admitted at the moment. That leaves us only one, 41;  
 10 can you deal with that now?  
 11 MR. REITER: This, I think, is Mr. Lyon's.  
 12 It's one of the claim charts, and I'm not sure where we  
 13 came out on that. It's the 183 Claim Chart.  
 14 MR. GASEY: That was something I believe  
 15 we addressed in the deposition of Mr. Clasen.  
 16 MR. GIBBONS: That went in the reading  
 17 deposition, Your Honor.  
 18 THE COURT: Is it in already, Mr. Reiter?  
 19 MR. REITER: Is it in already?  
 20 MR. VICKREY: It was addressed in the  
 21 deposition.  
 22 MR. REITER: I think it was an exhibit in  
 23 the deposition.  
 24 MR. GASEY: It was represented as Clasen's  
 25 deposition was being read in.

1 MR. VICKREY: Thank you, Your Honor.  
 2 THE COURT: Now, what else do I need to  
 3 deal with this evening?  
 4 MR. GASEY: Two things. One, Your Honor,  
 5 is --  
 6 THE COURT: Where are we going next?  
 7 MR. GASEY: Right, and a possible  
 8 defense-related issue of this computer that I kind of --  
 9 THE COURT: That's a good point.  
 10 So I presume this is your last witness,  
 11 Mr. Gasey and Mr. Vickrey?  
 12 MR. VICKREY: Yes, Your Honor.  
 13 MR. GASEY: That's correct.  
 14 THE COURT: And so you'll close your case  
 15 sometime tomorrow morning?  
 16 MR. VICKREY: Correct, Your Honor.  
 17 THE COURT: Then where do we go,  
 18 Mr. Reiter?  
 19 MR. REITER: We go with the Rule 50  
 20 motion.  
 21 THE COURT: That, I would expect, but  
 22 where do we go beyond that?  
 23 MR. REITER: And then we'll start  
 24 presenting our case, obviously, Your Honor.  
 25 THE COURT: Yes.

1 MR. REITER: And we will send this to them  
2 at 8 o'clock this evening per our agreement.

3 But I believe our first sets of  
4 witnesses -- don't hold me to this -- will be  
5 Mr.4 Tiemann and Mr. Riveros and Mr. Rex and Mr.  
6 Steinman. Beyond that, I don't know.

7 THE COURT: Does that give you the -- kind  
8 of the notice you need, and it will all be official at 8  
9 o'clock?

10 MR. GASEY: That's great, Your Honor.

11 THE COURT: Now let's deal with the --  
12 will any of those witnesses present prior art?

13 MR. REITER: No. Those are all corporate  
14 witnesses.

15 THE COURT: Those are corporate witnesses.  
16 So the presentation of prior art would happen the  
17 following day, if at all?

18 MR. REITER: We may be able to get through  
19 all of those witness. That's what I need to go back and  
20 check and then start with some of our experts.

21 THE COURT: It might happen tomorrow then?

22 MR. REITER: It might if things move  
23 faster than they have.

24 THE COURT: Are you going to bring in --

25 MR. REITER: We are planning on bringing

1 THE COURT: Is there some way, Mr. Reiter,  
2 that you can give -- would it be Mr. Zimmerman -- some  
3 access to this between now and then so Mr. Gasey can  
4 have some sense of comfort that what's happening here is  
5 authentic.

6 MR. REITER: Yes, absolutely, Your Honor,  
7 just to make a few comments to what Mr. Gasey said and  
8 not to take away Mr. Lyon's thunder tomorrow morning.

9 But we have provided the software. We're  
10 not seeking to admit these machines. They are simply  
11 going to run the software and demonstrate what the  
12 software can do. We have put them on notice through  
13 Dr. Wilson's expert report that he, in fact -- he ran  
14 the machines. We showed various screen shots of the  
15 machines being run. They have been on notice of this.

16 THE COURT: But would you now at my  
17 request please give --

18 MR. GASEY: I believe it would be  
19 Dr. Zimmerman.

20 THE COURT: Would you give Dr. Zimmerman  
21 access to these so that he can --

22 MR. GASEY: Play with them.

23 THE COURT: Yes, exactly, provide whatever  
24 assurance that authentic software is being run in an  
25 authentic manner so that the Court has full confidence

1 those in. Again, that's Mr. Lyon's bailiwick. He will  
2 be here in the morning.

3 THE COURT: Okay. Well, Mr. Gasey, can we  
4 deal with this in the morning?

5 MR. GASEY: I suppose so, Your Honor.

6 THE COURT: Talk to me a minute now so I  
7 can think about it.

8 MR. GASEY: Our big concern is twofold,  
9 Your Honor. This is something which should have been  
10 produced as one of the prior art references to be relied  
11 upon under local patent rule 3-3 and 3-4.

12 I understand the Defendants have produced  
13 software as part of their production, and if they want  
14 to rely on just the software, that's fine. They've gone  
15 ahead and played under the rules.

16 My concern is that we're dealing with a  
17 machine for which we have no authenticity or guarantee  
18 of the circumstances under which it was purchased, how  
19 it was maintained, what the changes, if any, have been  
20 in the software since then. We are talking about  
21 25-year-old architecture.

22 And what's more, we're dealing with, as I  
23 understand it, ex parte testing showing different screen  
24 shots for which we were never notified, and we were  
25 never allowed to participate in testing and inspecting.

1 in what you're presenting.

2 MR. REITER: Absolutely, Your Honor.

3 THE COURT: Will that suffice, Mr. Gasey?

4 MR. GASEY: I want to see what we're  
5 looking at, but that would be a step in the right  
6 direction.

7 THE COURT: Well, that should happen then  
8 if you could put that in motion to happen this evening.  
9 I hate to keep people up late, but it sounds like  
10 Dr. Zimmerman has a late night.

11 Anything else?

12 MR. VICKREY: Nothing else.

13 MR. REITER: Nothing from our end.

14 THE COURT: I did allow the Defendants'  
15 Exhibits. There were two --

16 MR. GASEY: We had no objection.

17 THE COURT: And there was no objection.  
18 Those are both admitted.

19 MR. GASEY: Right.

20 THE COURT: Thank you for clearing that.  
21 My total time at this moment is Plaintiffs have used six  
22 hours and 14 minutes. Defendants have used two hours  
23 and 31 minutes.

24 MR. VICKREY: Thank you, Your Honor.

25 MR. REITER: Thank you.

1 MR. GASEY: Thank you, Your Honor.  
2 THE COURT: That's where we're at. Let's  
3 meet at 8 o'clock to see if we have any needs.  
4 (Court adjourned.)  
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1 CERTIFICATION.  
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4 I HEREBY CERTIFY that the foregoing is a  
5 true and correct transcript from the stenographic notes  
6 of the proceedings in the above-entitled matter to the  
7 best of my ability.  
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11 \_\_\_\_\_  
12 DONNA COLLINS, CSR  
13 Deputy Official Court Reporter  
14 State of Texas No. 1086  
15 Expiration Date: 12/31/10

\_\_\_\_\_  
Date

16 \_\_\_\_\_  
17 GLENDA FULLER, CSR  
18 Deputy Official Court Reporter  
19 State of Texas No. 1042  
20 Expiration Date: 12/31/10  
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Date