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 28, 2010
RED HAT, INC. and)
NOVELL, INC.)
)
Defendants) 8:00 A.M.

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

APPEARANCES:
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MR. ARTHUR A. GASEY
MR. PAUL C. GIBBONS
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(Proceedings recorded by mechanical stenography, transcript produced on CAT system.)

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10 * * * * * *
11 P R O C E E D I N G S
12 THE COURT: Mr. Krevitt or Mr. Gasey, what
13 do we have this morning?
14 MR. KREVITT: We have a couple issues. I
15 don't know if the Plaintiffs have any issues.
16 Mr. Reiter wanted to address an issue with
17 respect to the damages issues about which Your Honor
18 conducted some proceedings yesterday.
19 THE COURT: I did.
20 Yes, Mr. Reiter.
21 MR. REITER: Thank you, Your Honor. With
22 respect to the Apple license, Your Honor -- oh,
23 Mr. Vickrey is not here.
24 MR. GASEY: He is en route, Your Honor.
25 THE COURT: Let's do something else. We

1 can come back to that when Mr. Vickrey is here.
2 MR. KREVITT: Another issue is the timing
3 of the trial, the allocation of time between the
4 parties. As Your Honor knows, when we met in Washington
5 for the pretrial conference, we set this trial for four
6 days, Monday through Thursday, and I think ambitiously
7 chopped up the time and how much time we were going to
8 use during the day.
9 We have also on the defense side planned
10 for a four-day trial to end on Thursday and, as a
11 consequence, made judgments along the way, how long to
12 cross-examine witnesses, for example. And we just --
13 given that the time has gotten less in terms of actual
14 talk time, I want to make sure that that is going to be
15 fairly allocated over the four-day period for the
16 parties.
17 And so I want to just discuss that with
18 Your Honor and figure out a way to make sure the parties
19 in that four-day period will have the same amount of
20 time.
21 THE COURT: Well, I think Mr. Gasey is
22 winding up today.
23 MR. GASEY: That's right, Your Honor.
24 THE COURT: Last witness.
25 MR. GASEY: Right. I think your clerk has

1 kept an accurate running clock by our count, so they've
2 got roughly, I think, ten hours.
3 MR. KREVITT: That's just it, Your Honor.
4 The point I'm making is a slightly different one, which
5 is -- and I'm not in any way suggesting the Plaintiffs
6 want to short us any time. It's that when Your Honor
7 said 12 hours, 12.5 hours, whatever it was, we were
8 assuming that we would get more done each day. And in
9 the two days we've had, I think Your Honor's count
10 yesterday was six and change and two and change, so if
11 you add that up, roughly nine hours.
12 So there's been nine hours. The parties
13 had 12.5 each; that's 25. That would leave 16 hours.
14 We're not going to get that done in the next two days.
15 That's what I'm talking about. It requires some
16 reallocation of the total for each party.
17 MR. GASEY: Your Honor, I think we've got
18 to keep in mind that most of Monday morning was not
19 involved with running anybody's time. Your know, the
20 clock is what it is. Your Honor told the jury they
21 might have to be here for a full week. If it ends up
22 ending on Friday, it ends up ending on Friday.
23 I still don't think it will because I
24 don't think we're going to come anywhere near our time
25 limit. And I haven't the foggiest what the Defendants

1 are going to do, but even under those circumstances, I
2 still think we're going to get done Thursday, tomorrow.
3 MR. KREVITT: I know we're talking about
4 the time limits. I don't want to get repetitive, but
5 the time limits that were set can't apply in a four-day
6 trial anymore; that's the point I'm trying to make. So
7 when Mr. Gasey talks about the 12.5-hour time limit,
8 that can't work anymore in a four-day trial because we
9 haven't used up the time in that way that we were
10 talking about using it in Washington. There has been
11 less time.
12 And so if, for example, Mr. Gasey were to
13 use 12.5 hours in this four-day period, when you just
14 add up the time, it's just simple math. We're going to
15 end up with far fewer than 12.5 hours for us. We're
16 going to wind up with several hours less. That's the
17 point I'm raising, Your Honor, is that if we look at it
18 as a four-day trial -- nobody is suggesting anyone
19 was responsible for voir dire going long, but it did.
20 And so we just have less time to use, and it just needs
21 to be allocated evenly. That's the only point I'm
22 raising.
23 THE COURT: We'll keep an eye on it. I
24 don't expect we're going to come out to the minute even.
25 MR. KREVITT: I'm not expecting that.

1 THE COURT: I do expect each party will
2 get their opportunity to make their points.
3 Are we still waiting for Mr. Vickrey?
4 MR. GASEY: Yes, Your Honor.
5 Unless you folks have anything else you
6 wanted to bring up. Since we've got the time and I
7 wanted to make use of it, hopefully in a fair fashion, I
8 wanted to bring up -- we did -- the Defendants were kind
9 enough to go ahead and let us come over late last night
10 and look at the two computers that I understand they're
11 going to go ahead and rely upon later on presumably
12 through Dr. Wilson and his analysis.
13 We looked at these computers, like I say,
14 for the first time last night. I think we have a couple
15 of issues with allowing the judge to go ahead and see it
16 because of the prejudicial effect of that.
17 Specifically, we're talking about a system -- I don't
18 know if you remember personal computers back in the
19 '80s. Mine was an old Apple too. There wasn't any
20 actual disk drive in the computer. You had to go ahead
21 and insert a system disk in order to go ahead and make
22 it work.
23 And what they've got is they've got two
24 different computers, one by Amiga and one by Apple. And
25 in both cases, the disks that they are intending to run

1 off of their computers are these handwritten,
2 hand-marked disks that say things like Workspace 1 and
3 Workspace 2. That's not the title of any actual system
4 disks I know of. They're going to be running a
5 demonstration that goes ahead and creates something
6 years after the fact.
7 I understand that they do have, albeit for
8 a different version, an actual system disk of an Amiga
9 computer and of some workbench-type feature. My only
10 request is if the Defendants are going to go ahead and
11 offer some physical piece of prior art, that it should
12 be based on something for which they can actually prove
13 is what was in public use or what was offered for sale
14 before the critical day.
15 MR. LYON: This is purely an evidentiary
16 issue. We intend to authenticate using for one -- let
17 me step back.
18 The computers themselves are not being
19 offered as evidence. It's the software we're relying
20 on. The computers are there purely to be able to
21 demonstrate because they won't run on modern computers.
22 The software, we are going to authenticate
23 through Dr. Wilson's personal experience with the
24 software. He has extensive experience teaching people
25 how to actually use Macintosh software, how to write it,

1 all of that. He'll authenticate it that way.
2 With respect to the Amiga, he'll
3 authenticate through the distinctive features of the
4 software. All of the issues he can go through and
5 provide testimony to show this is the software from that
6 time period.
7 So it's all a matter of authentication.
8 If Mr. Gasey believes that we haven't authenticated
9 after the time we've put in the testimony, he can object
10 to using it as evidence but it's purely an evidentiary
11 issue.
12 MR. GASEY: The problem is by the time
13 we'll be able to challenge, the bell will have already
14 rung in front of the jury. My point is simply if the
15 claims -- for instance, Claim 8 of the '521 patent talks
16 about a memory, in other words, a disk. Show us the
17 disk. Don't show us something he wrote on after the
18 fact.
19 By the way, my understanding is that these
20 materials were not something in Dr. Wilson's personal
21 possession. In the case of one of the computers, I
22 understand it was purchased off eBay. EBay wasn't
23 around in the mid '80s. There's another source needed
24 to authenticate.
25 The software from an Amiga seems like it

1 was taken from some collection. If they're going to
2 authenticate it, it should have come through the fact
3 witness the person in custody of the software.
4 MR. LYON: We gave them the software six
5 months ago. They could have done all the testing if
6 they thought it wasn't right. Second point, again, the
7 computers are not the exhibits. The computers are there
8 to be able to display what the software does. It
9 doesn't really matter. It's a computer to show it.
10 You're not trying to say that's the old computer from
11 that time, although frankly it is.
12 And then finally, the issue is that all of
13 this, if they really want to challenge whether or not
14 it's doing what it's supposedly doing, that's
15 cross-examination material.
16 THE COURT: When will all of this come up?
17 MR. LYON: Sometime tomorrow morning
18 maybe.
19 THE COURT: Can you have it in tonight?
20 MR. LYON: Have what in? I'm sorry.
21 THE COURT: All this material in tonight.
22 MR. LYON: Yes, sure, we can try to do
23 that.
24 THE COURT: Why don't we, after this
25 evening. I'll take a quick look just to assure that

1 there's not any great prejudice occurring. It does
2 strike me as largely an authentication issue, and if
3 they have someone who can testify...
4 MR. GASEY: That's our point is that it's
5 not our burden to authenticate it. It's theirs.
6 THE COURT: It is. It is, but if you feel
7 there is a prejudice issue, I'll take a quick look this
8 evening before we do our jury instructions.
9 MR. LYON: That sounds fine, Your Honor.
10 MR. GASEY: Thank you, Your Honor.
11 THE COURT: Mr. Vickrey, we were waiting
12 for you, but Mr. Reiter has the floor, I think.
13 MR. REITER: Yes, Your Honor. Last night
14 when we were talking about the Apple agreement and when
15 Mr. Vickrey was cross-examining -- or performing his
16 direct examination of Mr. Gemini, I was reviewing some
17 of the transcript last night of Mr. Gemini.
18 I can hand you up a very short one-page
19 part of the transcript. And what I'm concerned about
20 was with line 6 through 18. Mr. Vickrey asked
21 Mr. Gemini, what does the agreement actually say it's
22 doing. It's a settlement of litigation. That was filed
23 when? It's a settlement of litigation that was filed
24 April 18, 2007, in the Eastern District of Texas,
25 settled June 8, 2007.

1 Are you aware -- this is where I
2 became very concerned. Are you aware of any way TLC and
3 IPI could recover damages for actions prior to when they
4 first gave Apple notice of the patents? No, I'm not
5 aware of that. Mr. Vickrey asked, so this license
6 couldn't cover seven years? No.
7 As a matter of law, Mr. Vickrey was wrong,
8 and Mr. Vickrey, I believe, given that his firm
9 represented IPI in that case, either forgot or
10 understood that he was wrong, and we need a curative
11 instruction.
12 There are method claims and apparatus
13 claims in these patents. Under the recent Crown Packing
14 case, which is off of the Hanson case, it's very clear
15 that when only method claims are asserted, 287(a) does
16 not apply. In the Apple case -- and I have a copy of
17 the complaint to hand up to the Court, IPI asserted
18 against Apple only a method claim.
19 If you look at the second page, Your
20 Honor, Paragraph 8, Apple has infringed and is now
21 directly infringing at least Claim 21 of the '412
22 patent. That is a method claim.
23 So for Mr. Vickrey to ask Mr. Gemini, is
24 there no way that that license could go back seven years
25 and they can collect damages for seven years is wrong as

1 a matter of law. I cannot correct that with Mr. Gemini.
2 We need a curative instruction from the Court on the
3 law.
4 THE COURT: Mr. Vickrey?
5 MR. VICKREY: Your Honor, the prior
6 licenses did not require any marking. So it was my
7 understanding that there had to be notice to Apple.
8 THE COURT: If there's -- Mr. Reiter has a
9 point, doesn't he, that marking isn't the issue once you
10 have a method claim? That's the old Hanson ski slope
11 case.
12 MR. GASEY: Your Honor, if I might on that
13 in Hanson ski slope, all of the claims of the subject
14 matter met the claims. In this case the Plaintiffs had
15 asserted method claims in the complaint, but there are
16 also additional system claims on the subject matter of
17 infringement.
18 THE COURT: System claims are a bit
19 ambiguous.
20 MR. REITER: Not the Apple case. In the
21 Apple case --
22 THE COURT: We're talking about this case
23 that was settled in --
24 MR. REITER: That's why they asserted only
25 the method claim so they could go back six years.

1 MR. GASEY: With respect to those claims,
2 there wasn't any claim that Apple was a direct user of
3 those method claims. The direct claims of infringement,
4 what Apple does, they make product. The users of
5 Apple's products are direct infringers in method claims.
6 The system claims are the claims of what Apple actually
7 does.
8 THE COURT: But if you're suing on a
9 method claim, you don't have to worry about marking,
10 what becomes the limitation -- time limitation on
11 damages, statute of limitations, right.
12 MR. GASEY: Except, Your Honor, with
13 respect to the method claims, what Apple was practicing
14 they were inducing their customers to use their claims.
15 Those are the facts. With respect to those claims of
16 course with infringement of a method under 271(b), there
17 has to be notice. There was notice given but not six
18 years before.
19 MR. REITER: Apple has infringed and now
20 directly infringed. Apple, I'm sure, used Apple
21 computers and always used Apple computers. They could
22 go back six years the same thing they're doing in this
23 case, that you can. About my clients' use, they were
24 intending to go back six years. That's why they
25 asserted the method claim against Apple for at least

1 Apple's use of the method.
2 For them to get up and Mr. Gemini say
3 there is no way the Apple agreement could cover seven
4 years is wrong, and it's wrong as a matter of law.
5 MR. VICKREY: Your Honor, you may recall
6 during opening, they made a big deal --
7 THE COURT: I saw it. I know the issue.
8 MR. VICKREY: This would cover all of
9 Apple's sales for seven years, but as Mr. Gasey pointed
10 out, they would need to indirect -- this is indirect
11 infringement because their customers have to load this,
12 use it put it on a display. And to the extent that
13 they're selling an entire system, the Article of
14 Commerce patent was the '521 patent which would require
15 marking. So this claim to attach to their sales would
16 require -- because it's indirect infringement, would
17 require notice.
18 MR. REITER: Your Honor, they did not --
19 THE COURT: Is there anything on the '521
20 patent here?
21 MR. REITER: No, only the '412.
22 MR. VICKREY: Precisely.
23 MR. REITER: The only claim asserted as
24 the method claim.
25 THE COURT: This is the complaint in the

1 case against Apple.
2 MR. REITER: Crown Packing and Hanson say
3 even if there are mixed methods and apparatus in the
4 patent if only the method claims are asserted, 287(a)
5 does not apply. The evidence is only a method claim is
6 being asserted.
7 MR. GASEY: Then, Your Honor, the
8 Defendants are getting caught in a bit of an
9 inconsistency. As I'm sure you're aware, they made a
10 big deal Red Hat doesn't use, doesn't manufacture
11 displays, displays are not part of what they do. That's
12 a part of their big noninfringement claim.
13 Look at Claim 21, method comprising a
14 system that includes, first element, a display. That's
15 a structure. That's a thing. It's not -- that's not a
16 method of making a display, it's a display.
17 MR. REITER: My point, Your Honor, is they
18 represented to the jury the point of law that is
19 incorrect.
20 THE COURT: I'm reading this over, and
21 what Mr. Gemini testified is are you aware of any way.
22 Now, I don't think Mr. Gemini is holding himself out as
23 a lawyer here. He's -- to the extent he's testified to
24 this awareness, I think you'll have an opportunity to
25 point out that is he aware of the points you're making,

1 and you can make your points then in a way of correcting
2 his understanding, may even help you with the jury if
3 you're able to show that in a convincing manner.
4 I think that's the way to handle it. I
5 don't think I -- my jury instructions will make very
6 clear what the period of infringement is for this case.
7 I don't think I need to correct his misunderstanding, if
8 he has one. And the witnesses are always going to have
9 misunderstandings, and that's why we have
10 cross-examination to point those out.
11 MR. GASEY: Thank you, Your Honor.
12 MR. KREVITT: Your Honor, may I?
13 THE COURT: You may.
14 MR. KREVITT: One point very briefly. I
15 don't want to belabor the point. There is a difference
16 here. I want to note it quickly. Here's the
17 difference, if you give me one second.
18 THE COURT: I'm happy to.
19 MR. KREVITT: Mr. Reiter will do an
20 effective job on cross-examination, and let's say he has
21 created in the jury's mind a question. The jury has a
22 question. Can you go back six years? Can you not go
23 back six years? The jury doesn't know. Mr. Reiter has
24 done his job. That's not good enough. It's a question
25 of law. You can go back six years for a method claim.

1 We now have a situation where the jury has a question on
2 the question of law.
3 THE COURT: If you think I need to address
4 this in my instructions, we'll talk about it.
5 MR. KREVITT: Thank you, Your Honor.
6 THE COURT: This is a pretty minor point.
7 MR. KREVITT: It's essential to this
8 license.
9 THE COURT: I understand that, and if it
10 becomes something I need to address in my instructions,
11 I will.
12 MR. GASEY: Quickly before the jury comes
13 in, I just thought I'd point out, this may affect how we
14 handle things that the AV system is down in terms of
15 putting up slides and such.
16 COURT ROOM DEPUTY: Our system is having a
17 problem. We'd like to keep it down for 10 minutes.
18 That would be 8:30. We're letting it rest. Then we'll
19 turn it back on and see if it works correctly.
20 MR. GASEY: I'm glad to see it's not just
21 the lawyers that are tired.
22 THE COURT: Thanks. Of course we can let
23 that happen. When we start in a minute or two,
24 Mr. Gemini will take the stand. The Court will
25 acknowledge that he interrupted Mr. Gemini yesterday and

1 will request Mr. Gemini to please return to perhaps a
2 few minutes before where he was testifying and continue
3 so that the jury will have context.
4 MR. GASEY: Thank you, Your Honor.
5 THE COURT: So we'll be back in a minute
6 or two.
7 (Recess.)
8 (Jury in.)
9 THE COURT: I see lots of nice warm
10 sweaters this morning. Please be seated.
11 Mr. Vickrey, if I recall, the Court
12 interrupted Mr. Gemini and would like to ask if you
13 could perhaps recover the context a little bit and allow
14 Mr. Gemini to continue with his testimony for the ladies
15 and gentlemen of the jury.
16 MR. VICKREY: Certainly, Your Honor.
17 THE COURT: Thank you.
18 JOSEPH GEMINI, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN
19 DIRECT EXAMINATION CONTINUED
20 BY MR. VICKREY:
21 Q. Mr. Gemini, right before we broke yesterday,
22 you were in the process of giving your opinion as to the
23 form of the license that you assume should apply or you
24 believe should apply here?
25 Based on your analysis, should the

1 damages in this case be based on a running royalty or a
2 lump sum paid up license?
3 A. In my opinion, it would be a running royalty.
4 Q. And why again is that, sir?
5 A. Well, as I said, I believe at this point we
6 have the benefit of hindsight. We have an understanding
7 of how products were sold. We have an understanding of
8 how the products were distributed. And as I said,
9 there's no actual sales of the products, so at this
10 point, the running royalty would be sufficient.
11 Q. Does the fact that the -- that there were --
12 prior licenses that apply to running royalty play into
13 your analysis?
14 A. Yes, there were prior licenses that were also
15 based on a running royalty at that time.
16 Q. And were those prior licenses before or after
17 the date of the hypothetical negotiation?
18 A. Before.
19 Q. You mentioned hindsight. Does the fact that
20 the patents already expired and we know the
21 distribution, does that play any role?
22 A. Yes, because we know exactly the number of
23 distributions we could apply a royalty rate to.
24 Q. And you said that there are two kinds of
25 royalty agreements per unit?

1 A. There would be a per-unit royalty rate or, as I
2 said yesterday, a percentage of revenue royalty rate.
3 Q. And which of those structures is appropriate
4 here?
5 A. In this situation, I believe a per-unit royalty
6 rate based on the fact that the Defendants distribute
7 the software for free.
8 Q. And based on your analysis of the license
9 agreements, do you have an opinion as to an appropriate
10 per-unit price for a license based on a running royalty?
11 A. Yes.
12 Q. What's that, sir?
13 A. Well, based on my consideration of everything
14 we looked at yesterday, the importance of the virtual
15 desktops for the users, as described yesterday, and some
16 of the information we looked at, the license agreements
17 that we've seen, the Central Point agreement, the
18 Hewlett-Packard agreement, the royalty rates in those
19 agreements were 25 cents on the Central Point, 99 cents
20 effectively on the Hewlett-Packard. I determined the
21 mid-point of that range would be reasonable or 62 cents
22 per unit.
23 Q. And did you ascertain Red Hat's unit value for
24 the distribution of the infringing software for the
25 damages period?

A. Yes.
Q. How did you do that, sir?
A. Well, I used two sources of information. I wasn't provided with information specifically from Red Hat, but I used two sources of information that was acquired from the internet on Red Hat's distributions of the software.
Q. And kindly turn to PX283. Tell me what this exhibit is.
A. This is a -- information from the Fedora project website that provides for what they call unique IP address downloads of the Fedora product of Red Hat.
Q. And what did that -- those statistics attempt to estimate for Fedora?
A. The number of installations of Fedora for a specific period for a specific Fedora product.
Q. Which Fedora product?
A. In this document, there's Fedora 7, 8, 9, 10, 11, 12.
Q. And kindly turn to PX269. What's that?
A. This is a news report quoting some person from Red Hat describing the number of installations of their products for specific periods.
Q. And Mr. Frields, a Red Hat executive, was even interviewed for this article, correct?

A. Yes.
Q. Now, based on the data you reviewed, did you derive an estimate of software recipients during the appropriate damage period?
A. Yes, I did.
Q. Let me show you a page from PX35. Tell me what these numbers represent. First of all, does this represent your work?
A. Yes.
Q. And what have you done here?
A. Well, I've tried to -- what I've done is I've taken the data -- the two reports I've just looked at, the Fedora and Red Hat distribution information I looked at, and I tried to -- what I did was I had to determine the amount or the number of installations during the damages period, which was different than what was shown on the documents.
Q. So you've actually adjusted these numbers to account for the fact that the period at issue is 14 months?
A. Correct. The period of damages is from the time of October of 2007 through the patent expiration in December of 2008. So it's essentially 14 months. And the data -- if you look at the top portion of this exhibit, the total number of Fedora licenses as of the

end of November was 9.1 million. That covered approximately 19 months. So we were only -- the Plaintiffs are only entitled to damages for 14 of that 19 months.
So I took the 9.1 million times that ratio of 14 months versus 19 months to come up with total Fedora distributions during that period of damages, which is the 6.7 million.
Q. Okay. And then you've added the -- a percentage of the RHEL licenses?
A. Correct. The data on the RHEL covered 47 months that I looked at. And so I multiplied -- there was only 14 months of damages within the 47 months of distribution. So again, I multiplied by roughly 30 percent to come up with the RHEL licenses during the damages period of 570,000. So then I added Fedora to RHEL to come up with a total of 7.275 million distributions during the period of damages.
Q. Mr. Gemini, is that number aggressive or conservative?
A. I believe it's conservative.
Q. Why do you say, sir?
A. Well, Red Hat has indicated in some of its data that there's certain tracking issues related to the data in terms of in some instances there may be overcounting

of distributions. In some instances, there may be undercounting of distributions. And they've indicated the undercounting is more significant than the overcounting, if that's clear. We can probably go through it a little more.
Q. Kindly go back to PX283. First of all, who's talking here. Who's saying this?
A. This is the Fedora website.
Q. Okay. And is this the explanation of the methodology that you're talking about?
A. Yes.
Q. Let's go through them one by one. The first states users who have dynamic IP addresses likely will be counted multiple times, which inflates the number of users. Do you see that?
A. Yes.
Q. What's an IP address?
A. It's generally an address for a computer.
Q. Okay. And then the second point is users who are behind NAT or corporate proxies will not be counted at all. What's NAT?
A. It's my understanding it's network address transmission.
Q. So what's -- give me an explanation for what's going on in No. 2.

A. Well, my understanding of No. 2 is that what will happen is a company will have a specific network address where they download the software to that address. And then they'll -- I guess I used the term sprinkle or fan it out to other users within their corporations. So one IP address may cover -- I don't know what the number would be -- but a number of individuals users that aren't being accounted for in that number, according to Red Hat.

Q. Let's look at how they summarized it. The anecdotal evidence that we receive -- well, you tell us, Mr. Gemini.

A. If you read there, it says, the anecdotal evidence that we received from different groups, companies, and organizations suggests that Group 2 is significantly larger than Group 1, which means that they're undercounting No. 2 there. The corporate proxies are more significant than their overcounting, which would tell me the numbers are at least more conservative.

Q. Okay. Now, have you sought to adjust the 7.25 million number for U.S. use?

A. Yes.

Q. How have you adjusted that number?

A. Well, I considered, first of all, during the

period of damages what the U.S. portion of Red Hat's revenues were.

Q. Turn to PX297, please. Tell me what this is.

A. This is a press release on Red Hat's third quarter of 2008 profits, financial results.

Q. And what did this document tell you?

A. It indicates that for a period during 2008, 45 percent of their sales came from outside the U.S., which would indicate to me that 55 percent came from within the U.S.

Q. Now, tell me why -- so what number did you use to adjust your 7.25 million to account for U.S.?

A. I used -- I used a -- excuse me one second.

I used the 55 percent number to adjust -- I used the 55 percent number to adjust my -- adjust the sales or the distribution number to account for U.S. only sales or distributions.

Q. Why did you make that adjustment using a percentage of U.S. revenue as opposed to, for example, location of IP addresses?

A. Well, as we just discussed, the IP addresses may include, as we said, one IP address that might cover, you know, hundreds of corporate -- a big corporate user, and I understand that many of Red Hat's clients are U.S. companies.

Q. And conversely, wasn't -- what was the other issue about overcounting?

A. The overcounting was the dynamic IP address change.

Q. Which results in what?

A. Again, an overcounting of the units.

MR. HILL: Your Honor, I apologize for interrupting, but if I can be of assistance.

THE WITNESS: I have water here.

MR. HILL: Okay. Thank you.

Q. (By Mr. Vickrey) I'm going to show you PX321, Schedule 1. Tell me what this is.

A. This is a calculation of reasonable royalty related to Red Hat, and what it simply does is it takes the unit information we were discussing where I calculated the total number of units for Red Hat, 7.275 million.

I took the U.S. portion of that revenue to account only for the U.S. portion of those units to come up with a total Red Hat accused units subject to damages of roughly 4 million units. Then I applied the royalty rate of 62 cents to those units to come up with a reasonable royalty related to Red Hat of $2,480,913.

Q. Mr. Gemini, is that number aggressive or conservative?

A. Again, it's conservative for a number of reasons. One is, again, the units may be understated based on what we've indicated, and the royalty rates that I considered and the royalty license that I considered covered worldwide use as opposed to U.S. use.

Q. And we looked at four license agreements, correct?

A. Yes.

Q. Were all of those worldwide?

A. Yes.

Q. And yet you've applied not a worldwide license but just U.S. only, correct?

A. That's correct.

Q. Now, does this number take into account any adjustment for litigation risk?

A. No.

Q. According to Red Hat's damage expert, Dr. Putnam, should the reasonable royalty be adjusted for that risk?

A. He indicated that the reasonable royalty should be adjusted for litigation risk.

Q. And what percentage risk factor did he use?

A. He used what was considered a probability of win risk rate of 58 percent for a patent owner, which would equate to multiplying a damage number or

1 reasonable royalty number by 1.72 times. It's basically
2 the inverse of the 58 percent.
3 Q. And is the percentage he used conservative or
4 aggressive, the 58 percent?
5 A. It's -- well, it's -- I don't know how to
6 answer that. It's based on a different time frame in
7 terms of the litigation risk.
8 Q. And you mentioned an AIPLA study?
9 MR. VICKREY: Kindly put up Exhibit 317.
10 Q. (By Mr. Vickrey) The study that you were
11 talking about before?
12 A. Yes.
13 Q. And -- this is more -- is this more recent or
14 earlier than the information that Dr. Putnam relied on?
15 A. It's more recent.
16 Q. And according to this study, what would be the
17 adjustment for litigation risk?
18 A. It would be a 25 percent adjustment. It would
19 be a four times adjustment because the probability
20 before summary judgment is only 25 percent, which means
21 any royalty negotiated was discounted by 75 percent.
22 Q. Okay.
23 A. So essentially it's four times --
24 Q. All right.
25 A. -- the number.

1 MR. VICKREY: So going back to 321,
2 schedule 1, kindly. 321, Schedule 1.
3 Q. (By Mr. Vickrey) So just to be clear, the
4 number that you've opined is the reasonable royalty
5 doesn't take into account any adjustment or factor of
6 litigation risk, correct?
7 A. No.
8 Q. Turning to Novell, has Novell produced any
9 documents showing how many copies of the infringing
10 software have been used or distributed?
11 A. No.
12 Q. Nonetheless, did you attempt to find such data?
13 A. Yes.
14 Q. What did you find?
15 A. I found data from an openSUSE website that
16 indicated, again, the number of downloads or
17 distributions of the product.
18 Q. Is that PX290?
19 A. Yes.
20 Q. And based on your analysis of this document,
21 how many users did you estimate for the damage period?
22 A. Based on this document for the Novell openSUSE
23 10.3 for the products at issue starting with 10 --
24 version 10.3, is approximately 12.8 million
25 distributions.

1 Q. And did that document give any rough estimate
2 of U.S. use?
3 A. Yes. It gave an estimate of U.S. use.
4 Q. Of what?
5 A. I think it was approximately 14 percent was
6 related to U.S.
7 Q. And did you use that number?
8 A. Yes.
9 Q. What did you come up with?
10 A. Well, I applied the 14 percent to 12.8 million
11 distributions to come up with approximately 1.8 million
12 U.S. Novell distributions.
13 Q. And is that number aggressive or conservative?
14 A. Again, this data is based on similar data that
15 we saw for Fedora, a similar type of information. They
16 call it YUM data, similar procedure. So it appears to
17 be conservative based on the same analysis from Red Hat.
18 Q. And did you obtain any information on their
19 enterprise, the Sled distributions?
20 A. No, I wasn't able to find any information on
21 their Sled distributions.
22 Q. And so does the 1.8 million number even account
23 for any Sled distributions?
24 A. No, it does not.
25 Q. And if we took into account Sled distributions,

1 would the number be higher or lower?
2 A. It would be higher.
3 Q. We just don't know how much higher?
4 A. That's correct.
5 MR. VICKREY: Kindly show us 295.
6 Q. (By Mr. Vickrey) What is this calculation,
7 Mr. Gemini?
8 A. This is a calculation of the royalty related to
9 Novell based upon the openSUSE units without any Sled
10 units. The total units subject to damages is what I
11 indicated before, approximately 1.8 million, 1,795,186,
12 and a royalty rate of 62 cents gives you a reasonable
13 royalty for Novell of $1,113,015.
14 Q. Mr. Gemini, Is this number conservative or
15 aggressive?
16 A. Again, based on what I talked about with Red
17 Hat and everything I believe, it's conservative, it's
18 reasonable.
19 Q. Now, again, even though the four licenses that
20 you looked at were worldwide, have you used worldwide?
21 A. No, I have not.
22 Q. Have you adjusted this number for litigation
23 risk at all?
24 A. No.
25 Q. And have you seen any information indicating

1 that Novell has entered into per-unit royalty licenses?
2 A. Yes, I have.
3 Q. Now, assuming that the -- assuming that the
4 Apple license applied to this so-called Leopard product
5 in 2008 sales and that only, are your numbers consistent
6 with the Apple license?
7 A. I believe they are.
8 MR. VICKREY: Your Honor, may I approach?
9 THE COURT: You may.
10 MR. REITER: Your Honor, I have an
11 objection here. This was not discussed -- this is
12 another item that was not discussed in Mr. Gemini's or
13 any of Mr. Gemini's reports. He did not do an analysis
14 of the per unit, which it appears that he's about to do
15 of the Apple license.
16 MR. VICKREY: Your Honor, I used this with
17 Dr. Putnam during his deposition last week, which in
18 part, Mr. Gemini discussed in his supplemental report a
19 few hours later. I mean, he discussed the Putnam
20 deposition.
21 I would agree that none of his reports
22 talk about Apple. This is just a reality check for the
23 benefit of the jury and the Court that we're not saying
24 that the Apple license should apply. We're saying that
25 it's in line with --

1 MR. REITER: It's nice that Mr. Vickrey is
2 giving a speech to the jury, but the fact of the matter
3 is that this is not part of Mr. Gemini's analysis. It
4 wasn't in his report. It was used with Dr. Putnam, but
5 Mr. Gemini did not include it even after Dr. Putnam's
6 report.
7 THE COURT: Let's hear what Mr. Gemini has
8 to say about this, and you can inquire about it further,
9 Mr. Reiter.
10 Q. (By Mr. Vickrey) Look at -- if you look at the
11 page of the unit sales for Mac in 2008, what are we
12 seeing here?
13 A. 9.7 million -- I'm sorry. The American number
14 is 3.9 million units.
15 Q. Okay. And the number of units -- is the
16 number -- are the numbers that you have opined for Red
17 Hat and Novell consistent with the Apple license
18 adjusted for litigation risk?
19 A. It appears to be, yes.
20 MR. VICKREY: That's all I have.
21 THE COURT: Mr. Reiter, would you care to
22 inquire?
23 MR. REITER: Yes, Your Honor.
24 COURT ROOM DEPUTY: It's been switched.
25 CROSS-EXAMINATION (CONTINUED)

1 BY MR. REITER:
2 Q. Good morning, Mr. Gemini.
3 A. Good morning.
4 Q. I have a few things I want to start with and
5 make sure that as we have our discussion this morning,
6 you and I are on the same page and that the jury
7 understands what we're talking about so that everybody's
8 clear about running royalty and hypothetical
9 negotiations and dates -- or rates and bases.
10 A. Okay.
11 Q. So the first thing I want to make sure I
12 understand is, you're here to give an opinion about
13 damages, right?
14 A. That's correct.
15 Q. And you're being paid or your firm is being
16 paid $385 an hour for you to give that opinion, right?
17 A. Well, my firm is being compensated for my work
18 in this case, yes.
19 Q. At $385 an hour?
20 A. That's my rate, yes.
21 Q. Okay. And you're not giving an opinion on
22 infringement, are you?
23 A. No, I'm not.
24 Q. You're not a technical expert; you don't know
25 if the products infringe or don't infringe, do you?

1 A. That's correct. That's an assumption as a
2 damage expert that you make, that the patents are valid
3 and infringed.
4 Q. And you didn't do any checking; you didn't talk
5 to Dr. Zimmerman about whether there was infringement or
6 not, did you?
7 A. No.
8 Q. Now, you've submitted four reports or opinions
9 in this case; is that right?
10 A. Well, there's four reports --
11 Q. Four reports.
12 A. -- that lay out my opinions, yes.
13 Q. Right. And as part of this analysis that we've
14 been talking about, a hypothetical negotiation, there's
15 some factors that you're supposed to consider, right?
16 Some factors from a case called Georgia-Pacific; is that
17 right?
18 A. Yes.
19 Q. About 15 of them?
20 A. Yes.
21 Q. And your first report contains an analysis of
22 those 15 factors; is that right?
23 A. Yes.
24 Q. And you used those factors to kind of appraise
25 what the technology and what the patents might be worth,

1 right?
2 A. Well, you use the factors to help you determine
3 what a reasonable royalty is in patent litigation.
4 Q. Right. And your first report talked about a
5 different type of analysis than you presented this
6 morning; isn't that right?
7 A. It was different, yes.
8 Q. Yeah. You used revenues of the Defendants Red
9 Hat and Novell, and you applied a percentage rate to
10 that; is that right?
11 A. Yes, I did.
12 Q. Okay. And to come up with that rate, you used
13 those Georgia-Pacific Factors, right?
14 A. I considered the factors as part of my
15 analysis, yes.
16 Q. And you used that same or at least parts of
17 that same analysis in Georgia-Pacific from your first
18 report for your second and third reports and fourth
19 reports; is that right?
20 A. I would say consideration of the factors has
21 been part of my entire analysis.
22 Q. No. My question was, the analysis that you
23 formed in your first report, you used that analysis in
24 your second, third, and fourth reports; isn't that
25 right?

1 A. I'm not sure I understand.
2 Q. Well, we talked about this at your deposition a
3 week and a half ago. I asked you, when we went through
4 your first report, if your analysis with respect to
5 certain of the factors, for example, Factor 9, whether
6 that analysis in your first report was still the same,
7 and you said yes.
8 A. I think I agreed that my analysis of the
9 factors was continuous, and my first report was part of
10 that analysis.
11 Q. And that analysis in the first report was
12 focused on a different theory of damages than what you
13 presented?
14 A. It was a different methodology in terms of how
15 the royalty was applied.
16 Q. That methodology was stricken by the Court,
17 wasn't it?
18 A. Well, the Court determined that --
19 Q. It wasn't reliable?
20 A. -- I should use a different methodology, yes,
21 which is what I did.
22 Q. And that opinion, that methodology you can't --
23 was no good?
24 A. Well, I didn't present it. It was something
25 the Court had concerns with, and they asked me to

1 reconsider what I did, and I did.
2 Q. But still using the same analysis or much of
3 the same analysis in your first report, the one that was
4 stricken, you're still carrying over to the second and
5 third and fourth reports?
6 A. Well, there's many similar factors that didn't
7 change.
8 Q. So that's a yes, you're still using several of
9 the same --
10 A. Some of the factors, yes.
11 Q. Thank you.
12 THE COURT: Could I speak to Mr. Vickrey
13 and Mr. Reiter for a quick second over here?
14 (Bench conference.)
15 THE COURT: I don't want the Court to be
16 invoked as impugning any witness. We all know the Court
17 made certain rulings. Those are appropriate, but I want
18 you to be very careful to not suggest that the Court has
19 discredited this witness or any other witness.
20 MR. REITER: I understand, Your Honor, but
21 he's still relying on analysis from his first report and
22 his second and third report. In his second and third
23 reports, he says he's using analysis from the first
24 report. And if that analysis was erroneous and the
25 Court found it unacceptable -- if he's still using that

1 analysis and the Court has found that it's
2 inappropriate, then I think the jury has a right to hear
3 that.
4 THE COURT: Well, we've been back through
5 that, and I spent a lot of time and have made it clear
6 that he can testify as he has. So I'm just giving you a
7 heads-up --
8 MR. REITER: I'll move on.
9 THE COURT: -- that we would -- the
10 Court's not going to be used to discredit a witness
11 here.
12 MR. REITER: I understand. I'll move on.
13 MR. VICKREY: Some of his analysis, in
14 fact, didn't change at all.
15 MR. REITER: He could have submitted --
16 THE COURT: I think I've made my point.
17 Thank you.
18 (Bench conference concluded.)
19 THE COURT: We lawyers get paid to make
20 legal points to each other. Please disregard our little
21 discussions here on the side. And Mr. Reiter and
22 Mr. Vickrey will pay attention to make sure we do
23 everything correctly.
24 Mr. Reiter, you were inquiring.
25 MR. REITER: Thank you, Your Honor.

Q. (By Mr. Reiter) So, again, just to make sure we're all talking about the same thing, you're saying that the appropriate type of a reasonable royalty in this case is a running royalty; is that right?
A. Yes.
Q. And there's different ways that you could structure an agreement. That's basically one way to structure an agreement. There's another way of lump sum, right?
A. That's correct.
Q. Lump sum is kind of all -- you pay one price and get all you can eat, right?
A. Essentially, yes.
Q. And the running royalty is -- kind of pay as you go?
A. Yeah. The running royalty more or less matches -- kind of eliminates risk. You match a sale with a rate, and there's no uncertainty as to what's going to happen in the future.
Q. But just so I'm clear, a running royalty is -- have you ever been to the State Fair of Texas?
A. I'm sorry?
Q. The State Fair of Texas?
A. No, I'm sorry, I have not.
Q. Do they have a state fair in Illinois?

A. I believe they do, but I don't know that I've been to it.
Q. At the State Fair here, they charge you for every ride that you go on, so you buy tickets and every ride costs a certain number of tickets. And that's kind of like a running royalty; you pay as you go, right?
A. I don't know if it's the same as a running royalty, but you pay as you use their service.
Q. And do you know how many tickets you need to buy for each of the rides you're going to go on?
A. I assume.
Q. And here out in Arlington, they have Six Flags and you can pay -- I don't know what it is. My son just went a few weeks ago. I think $20 to get in; you get all the rides you want.
That's like a lump sum, isn't it?
A. In the context of a reasonable royalty?
Q. Well, it's like a lump sum.
A. Well, it's a one-time payment.
Q. Right.
A. I mean, it's one time and you can go on as many rides as you can.
Q. Right. And that's what a lump sum is. You make a one-time payment, and that's like what SGI did. We'll talk about that in a few minutes.

They paid a lump-sum payment and they could make as many products as they wanted to, right?
A. That's what SGI did, yes.
Q. Now, when you have a running royalty like we're talking about, there's two components to that. There's a rate and a base; is that right?
A. Yes.
Q. And the rate is the price of the ticket, right?
A. Yes, essentially.
Q. Okay. And the base is how many rides you're going to go on?
A. The base, in this case, is how many distributions there were.
Q. Right. And it's very important, when you do a running royalty calculation, that you have an accurate counting of the base; isn't that right? You need to be able to count what you're paying?
A. Yes. I mean, you have an understanding of what the base is. You have an agreement. You understand what the base is, and you determine a royalty based on that base.
Q. But you need to be able to count each unit that goes into the base. The base is the total, the number of rides. If I'm going to do six rides at the State Fair, that would be my royalty base, right?

A. Yeah, you need to know -- you need to have an understanding of how that base is going to be determined. So you have an understanding of here's how we're going to determine the base and here's how we're going to pay a royalty on it.
Q. Okay. And if you can't figure out the base, then in that hypothetical negotiation, the parties are not going to agree to a running royalty, is it? If they can't count what they're paying for it?
A. Well, they have to have some understanding of what's going to happen. Subject to a license agreement, you have to have an understanding of what you expect in the future, so...
Q. Sure. But you could do it as a lump sum, too. You could say --
A. Right. But you still have to have an understanding of what that base essentially would be. You have to understand that -- I mean, there has to be an understanding of what's going to happen going forward in order to have a lump sum. You have to have some idea of what that base would potentially be.
Q. Well, when I go to Six Flags, I pay $20 to get in the gate. It doesn't matter if I ride 1 ride or if I ride 25 rides.
A. Well, I don't think I'd equate going into Six

1 Flags as similar to a hypothetical negotiation for a
2 royalty.
3 Q. Well, it's type of a lump sum. We talked about
4 that. And I can go and ride as many rides as I want,
5 right?
6 A. I don't think it should be characterized as a
7 lump-sum license agreement. It's a payment to go in and
8 do rides. I think this is a little more -- this is a
9 little different than going into Six Flags.
10 Q. Well, I agree with that. This is serious.
11 We're talking very serious money, and we're trying to
12 get to an accurate estimation or an accurate appraisal
13 of what this technology is worth.
14 A. And I think the most accurate appraisal of that
15 is to determine how many units were distributed and
16 apply a royalty rate.
17 Q. Right. If you can count the number of units.
18 A. I think -- I think beyond that -- beyond that,
19 you're going through some -- I guess not knowing what
20 the future is going to be when you enter into a lump
21 sum. Now we know; we're sitting here; we know the total
22 base.
23 Q. Well, Mr. Gemini, you'll agree with me that
24 when you do a running royalty calculation, you need to
25 be able to count the number of units; is that right?

1 A. I would agree that you need to --
2 Q. That's a yes or no question.
3 A. You need to have an understanding of what those
4 units are and how to determine them.
5 Q. You need be able to count them?
6 A. Yes. And that's what I've done.
7 Q. Okay. I just want to make sure we're all
8 understanding that you need to be able to count with
9 precision. And I think you said accurately, when
10 Mr. Vickrey was talking, the number of units; is that
11 right?
12 A. I said -- what do you mean accurately I said?
13 I don't recall what you're talking about.
14 Q. Mr. Vickrey was asking you some questions, and
15 I think you said you need to know exactly the number of
16 units. I wrote it down in my notes. Know exactly the
17 number of units, the way you said it.
18 And that's very important in a running
19 royalty, right? Because I don't want to pay for units
20 that I'm not selling, if I'm the licensee, right?
21 A. Correct.
22 Q. And the licensor doesn't want to take the risk
23 of not getting paid for units that might be out there,
24 right?
25 A. Right, which is why in this case, we know the

1 number of units, and there's no uncertainty as to what
2 the royalty is based on units.
3 Q. Okay. We'll talk about the number of units in
4 a moment, Mr. Gemini. I'm just talking about getting a
5 foundation of how we go about this analysis. And I
6 think we have an agreement now that it's very important
7 to know the number of units precisely.
8 A. Well, you need to know the number of units.
9 Q. Okay. Thank you.
10 And then you also need to be able to
11 calculate the rate, what do those units cost, right?
12 A. Right.
13 Q. Okay. Now, let's talk about the number of
14 units and how you got to that analysis. I know you did
15 that this morning with Mr. Vickrey.
16 But before we get to the royalty base for
17 this case, I just want to make sure that we all
18 understand -- and I think you mentioned it -- the
19 Defendants here, Red Hat and Novell, they give their
20 software away for free, right? They don't charge
21 anything for their software?
22 A. They distribute for free, yes.
23 Q. Well, people can get on; their servers can find
24 it and copy it. I can give it to my wife. It's all out
25 there for free, right?

1 A. That's correct.
2 Q. And it doesn't matter to them if there are --
3 to their bottom line, to their revenue numbers. It
4 doesn't matter to them if there is a hundred people
5 using Fedora or a million people using Fedora. They're
6 not going to get a dime more based upon that hundred or
7 million users, are they?
8 A. No. I think the more -- as you've seen, the
9 more people who use their products, the more they're
10 going to sell other services, such as subscriptions,
11 such as tech support, such as training.
12 And Fedora's a key for them to develop
13 their products.
14 Q. Okay. But Fedora doesn't have any subscription
15 revenues. Fedora doesn't have any service revenues.
16 There's no services, no revenue at all associated with
17 Fedora, is there?
18 A. They don't -- they don't provide services for
19 Fedora.
20 Q. Right. And there's no revenue associated with
21 Fedora?
22 A. Well, the revenue from what they've realized
23 when they distribute their RHEL products.
24 Q. From the RHEL products?
25 A. Right.

1 Q. Not from Fedora?
2 A. Right.
3 Q. Now, I think when you were talking with
4 Mr. Vickrey, you focused your analysis on products that
5 are just in the United States, right? We're just
6 talking about Red Hat and Novell products in the United
7 States, right?
8 A. I determined the royalty base, the units.
9 Q. In the United States?
10 A. U.S. only.
11 Q. Right.
12 A. I attempted to do that.
13 Q. Right. And we're focusing on units for a
14 14-month period, from October of 2007 to December of
15 2008; is that right?
16 A. That's correct.
17 Q. Okay. Now let's start with Red Hat. Now, with
18 respect to Red Hat, there are two products. There's the
19 Fedora and then the RHEL, the Red Hat Enterprise Linux,
20 right?
21 A. That's correct.
22 Q. Okay. And with respect to its products, you're
23 aware that Red Hat does not manage its business based on
24 the number of units that are out there, right?
25 A. I've seen indications that they said something

1 to the SEC regarding how they managed, but I don't know
2 how that's relevant to what I'm doing here.
3 Q. Well, Red Hat doesn't count units, does it? It
4 told the SEC that it doesn't count units.
5 A. I don't think that's true.
6 Q. Okay.
7 MR. REITER: Can we put up PX903, please?
8 Q. (By Mr. Reiter) We looked at this at your
9 deposition, didn't we, Mr. Gemini? This is a letter to
10 the SEC from Red Hat?
11 A. Yes.
12 MR. VICKREY: Just to note, we were not
13 given notice that they were going to use any exhibits
14 with Mr. Gemini.
15 MR. REITER: We had an agreement that we
16 can -- we need only identify exhibits that we're going
17 to seek to admit through a witness, not exhibits for
18 impeachment.
19 Mr. Gemini just said he didn't think --
20 THE COURT: You may proceed.
21 MR. REITER: Okay. Thank you.
22 Q. (By Mr. Reiter) So we talked about this
23 document at your deposition, didn't we, Mr. Gemini?
24 A. Yes.
25 Q. And we went through -- and this is a response

1 by Red Hat to the SEC. And this first note is actually
2 a note from the SEC in the letter, right?
3 A. Yes.
4 Q. And the SEC is telling Red Hat: We note that
5 there's a significant increase in revenue. And it goes
6 on to say in the second sentence: It would appear that
7 the number of subscriptions sold, renewed, and expired
8 in a given period may be meaningful to measures of your
9 performance.
10 And then it goes on to say: Please
11 describe to us the extent to which you use these
12 metrics -- and those metrics are the number of
13 subscriptions -- as a key indicator in managing your
14 business.
15 Do you remember we had that discussion?
16 A. Yes.
17 Q. Okay.
18 MR. REITER: And if we could go to the
19 second page of this, and if we could blow up the
20 response.
21 Q. (By Mr. Reiter) And this is where Red Hat
22 responds to the SEC's question. This is the United
23 States government asking the SEC about something very
24 important; isn't that right?
25 A. I'm not exactly sure what the context of this

1 is.
2 Q. Okay. And the response from Red Hat in the
3 first sentence of the response: Management does not
4 currently use or track the number of subscriptions, for
5 example, new, renewed, and expired, in managing its
6 business. Due to changes in the company's business,
7 including an increase in the complexity of business over
8 time, management does not consider these metrics -- and
9 that's counting the number of units -- to be meaningful
10 measures of performance. And then it gives some
11 explanations.
12 In the second bullet, Red Hat says: Red
13 Hat currently does not track subscription metrics with
14 precision.
15 So Red Hat is telling the government that
16 it doesn't track these numbers; it doesn't use these
17 numbers, right?
18 A. Well, it's telling the government it doesn't
19 track them for management purposes.
20 Q. Right. It's not tracking --
21 A. We've seen information that they track the
22 numbers. I've shown it to you.
23 Q. For managing its business, Mr. Gemini.
24 Red Hat has represented to the Securities
25 & Exchange Commission that it does not track these

numbers, and that those numbers are not important to its business; is that right?
A. Well, that's what they're saying.
Q. Thank you.
A. But it doesn't mean they don't track -- they don't track the numbers.
Q. It says they don't track the numbers to manage their business.
A. That's what it says.
Q. Thank you.
Now, to get to the numbers that you used. You used, I think, the article in which Red Hat employee, Mr. Frields, was quoted?
A. Yes.
MR. REITER: Put up PX269.
Q. (By Mr. Reiter) Is this the article that you were referring to?
A. Yes.
Q. And if we look at, I guess, the third paragraph, Mr. Frields is quoted as saying: The total number of users has always been an incredibly difficult number to measure, doesn't he?
A. Yes.
MR. REITER: And if we go to the last page of the document -- I'm sorry -- scroll back.

Q. (By Mr. Reiter) Right in the middle: There really is no way of tracking users that well, except through methods that are somewhat more intrusive, and we're not willing to do that, right?
A. Yes. And I think they've indicated that they believe the numbers are understated, which is what I pointed out.
Q. Well, what they're saying here is that they don't know exactly how many users there are.
A. Yeah. I think they believe they're understated.
Q. But they don't know how many users there are, do they? They don't manage their business based on the number of users, and they don't know, do they?
A. They have an idea.
Q. They may have an idea.
A. They have a tracking -- they have tracking, and it's understated, that idea.
Q. They may have a general idea, but they don't know with precision?
A. That's correct.
Q. Okay. They don't know exactly the number of units?
A. Yeah. They believe they're understated.
Q. They don't know exactly, do they? That's a yes

or no question.
A. Right. At least I'm not aware of any information that indicates whether they know or not. They haven't provided that.
Q. Well, everything that you've seen, including the letter to the SEC says they don't know exactly and they don't use these numbers to manage their business.
A. No. I think the SEC said they don't track it to manage their business. It doesn't say they don't track it.
Q. It said --
A. It just says they don't track it to manage their business.
Q. Mr. Gemini, I can put that document back on from the SEC, and it says: We do not -- Red Hat currently does not track subscription metrics with precision. They don't know exactly how many units.
A. Right.
Q. And you said to Mr. Vickrey that knowing exactly the number of units is important; that Red Hat knows exactly the number of units, and, in fact, they don't.
A. Well, they understate them. That's what I've said.
Q. They don't know?

A. They have an idea. It's understated.
Q. Now, you went through the math with Mr. Vickrey. You used the Frields article, and it had something like 9.1 million unique IP addresses, right?
A. Yes.
Q. And that's not users, right? That's IP addresses?
A. That's -- my understanding is that's downloads, yes.
Q. Well, it's not downloads. It's the number of -- well, let me back up.
You understand that all of our computers, when we get on the internet, have a kind of address, right?
A. Yes.
Q. And that we each have a unique address, just like we all have a unique address at our home, right?
A. Yes.
Q. And what Red Hat does and what Novell does is when somebody visits their website, they kind of click and count, okay, that's a new IP address that has visited our website; is that right?
A. I believe so. I'm not positive of that.
Q. You're not really sure of the whole methodology that's being discussed here?

A. Well, in terms of what your question is, I'm not positive of it, but I have an idea. I have an idea based on what they said in their data as to the units.
Q. They said in their data they track IP addresses. They didn't say downloads, right?
A. Well, I'd have to look at the document again.
Q. Well, we can put up PX269 again.
And if we look at -- let's see -- the paragraph -- sorry. Just bear with me here. If we look at the paragraph that we looked at before, the total number of users has always been difficult, right at the top.
And it's talking about if you total up the unique IPs. It's not talking about users. Then it goes on to say it adds up to about 9.5 million boxes. But it's talking about IP addresses, right?
A. Well, it says -- it says at the time of this article, they have 9.5 million boxes right now. And then if you go to the next page, it says: Linux distributions could exceed 13 million users.
Q. But that's going on in the future. We're not talking about the time of the 14 months that we're looking at, right?
A. It says 9.5 million boxes.
Q. Right. But it's also doing that by

extrapolating based on unique IP addresses, right?
A. That's what the data indicates.
Q. Okay. And what we were talking about is IP addresses are when a computer, like you or me, visits a Red Hat website, they kind of do a click and say, okay, that's a unique IP address, and I'm going to count that as one, right?
A. That's what it appears to be.
Q. And it doesn't mean that anything really happened. It's just I visited it; it's a unique IP address; and then I'm going to move on, right?
A. I'm not sure what you mean not really happening. My understanding is this indicates how many unique IP addresses and how many boxes are at Fedora right now.
Q. They're correlating the IP addresses to the boxes, but what they're really counting are the IP addresses?
A. Well, they've indicated what the users are. There's 9.5 million boxes with Fedora.
Q. They've indicated that the unique IP addresses may represent 9.5 million boxes.
A. It's my understanding of the document, it indicates it's 9.5 million boxes. They expect 13 million users.

Q. And they also said --
A. I reviewed another document that indicated that it's understated.
Q. They also said they don't count these numbers; it's incredibly difficult to calculate, right?
A. Yes, they have.
Q. Now, what you did is you took the 9.1 million for that period and you took 14/19ths, is that right, to try and get to the 14 months?
A. Of damage period.
Q. Of damage period.
And you came up with something like 6.7 million unique IP addresses?
A. Fedora units.
Q. Fedora.
And then for RHEL, you also used that article where a Red Hat employee was talking about some numbers, and you extrapolated out to get to about 570,000?
A. That's correct.
Q. Okay. And you added those two numbers together, and you got about 7.2, 7.3 million?
A. Correct.
Q. Okay. And you tried to account for just what was in the United States, right?

A. Yes.
Q. And the way you did that is by taking revenue that Red Hat generates through its subscriptions, through its services and consulting, and determined how much of that is in the United States; is that right?
A. Yes.
Q. Now, I think we talked about this a moment ago, but for Fedora, there's no revenue associated with it. There's no subscriptions; there's no consulting; they generate nothing from that, right?
A. Well, they use Fedora to develop their products and to increase their sales base.
Q. But they don't generate any revenue?
A. That's correct.
Q. Okay. So you're taking revenue numbers from other products and extrapolating a percentage to determine how much of Fedora is in the United States.
Did I understand that correctly?
A. Well, that was the best -- to me, the best information that would be available at this time to determine those number of units. The sales -- the sales revenues represent to me, to some extent, where the users are.
Q. Where the users are, but that sales revenue is not for Fedora.

1 A. That's correct. Well, it includes, you know,
2 their products company-wide.
3 Q. We talked about this, Mr. Gemini, as I've said
4 a couple times. Fedora doesn't generate any revenue.
5 A. That's correct.
6 Q. Okay. So you're taking that revenue
7 information and extrapolating that to Fedora that
8 doesn't generate any revenue just to kind of come up
9 with an idea of what might be in the United States?
10 A. Yes. I was trying to determine the United
11 States units.
12 Q. Now, I thought I also heard you say that
13 there -- I think Mr. Vickrey asked you why not just use
14 the IP addresses that are identified in the United
15 States, and you said, well, it's not really reliable
16 information, because it may be undercounted or
17 overcounted; is that right?
18 A. Yes.
19 Q. But nonetheless, you're going to use the IP
20 addresses for the total number, right? So you're using
21 the IP addresses for one hand, the total number, but you
22 don't want to look at the specific number of IP
23 addresses that are identified for the United States, do
24 you?
25 A. Again, based on my understanding that I believe

1 they understate.
2 Q. Because it's not reliable information?
3 A. Yes.
4 Q. Now, with respect to Novell, you went through
5 that analysis, and Novell, you said, you found on their
6 website some information about their unique IP
7 addresses; is that right?
8 A. Yes.
9 Q. And you added all of those up?
10 A. Yes.
11 Q. And Novell, though, had some information you
12 said about what was in the United States, about 14
13 percent?
14 A. They had something that indicated what was
15 actually used in the United States. It said use. The
16 document said use, so I considered that.
17 Q. The document talked about unique IP addresses,
18 didn't it?
19 A. I believe the document indicated that it talked
20 about use, the percentage of use in the United States.
21 Q. Well, why don't we put up --
22 MR. REITER: I think it's PX290.
23 Q. (By Mr. Reiter) And if we look at Page 7 of 11,
24 and the text right there says: The tables so far are
25 purely based on IPs visiting the download server. As

1 many users use DSL connections with changing IPs,
2 guessing the number of users from numbers of IPs is
3 basically impossible.
4 Isn't that what it says?
5 A. Yes, but this is -- earlier, it talks about how
6 this is similar to the Fedora yum data that they used.
7 Q. Yeah, it does say that, but it also is telling
8 you right here that this information really isn't that
9 good. It's basically impossible.
10 And it even goes on to say that they
11 started updating the way they're going to do it using a
12 random cookie to the server. And if you look at the
13 information, the cookie numbers are much less.
14 They just really don't know how many users
15 they have, do they?
16 A. I don't know if Novell knows. They haven't
17 provided that information. I'm getting information
18 based on what I've gathered from the internet, and I'm
19 trying to provide the best information I can to
20 determine the reasonable royalty.
21 Q. And the reason that you don't know, or that
22 Novell doesn't know, is because it doesn't keep track,
23 just like Red Hat; isn't that right?
24 A. Well, I thought I saw testimony yesterday about
25 keeping track.

1 Q. You saw testimony yesterday about keeping track
2 of IP addresses, which is what we're looking at today,
3 what the Frields article talked about.
4 A. Again, I recall testimony, I believe, regarding
5 keeping track.
6 Q. Now, nonetheless, even though these numbers are
7 a guess and are purely based on IP addresses, you went
8 ahead and used the Novell specific numbers, the total
9 and the 13.8, 14 percent just in the United States,
10 right?
11 A. Correct.
12 Q. And you felt that was reliable enough to
13 proceed with your analysis?
14 A. It was the best information I had to proceed
15 with my analysis.
16 Q. Now, it's true, isn't it, that as your analysis
17 in this case has evolved, Red Hat has provided you with
18 exactly the type of information that you used with
19 Novell?
20 A. Well, I know that Red Hat provided a document,
21 but I don't know what it is.
22 Q. Well, you said that you read Dr. Putnam's
23 supplemental report, right?
24 A. Yes.
25 Q. And you read his deposition, right?

A. Correct.
Q. And Dr. Putnam explains that Red Hat provided the same type of information that Novell has provided that identifies the number, the specific number of IP addresses in the United States, right?
A. Again, it was a one-page document with no explanation on it. I'm not sure to what extent Mr. Putnam knows what it is.
Q. Well, you read Dr. Putnam's report, right?
A. Yes.
Q. And Dr. Putnam explained that in reality it wasn't 6 million or 5 million or 4 million units in the United States. It was 1.5 million unique IP addresses Red Hat counted in the United States, right?
A. Well, that was the downloads.
Q. That was unique IP addresses?
A. Correct.
Q. Because they don't count downloads. They count unique IP addresses?
A. Right.
Q. And so Red Hat provided you with the 1.5 million unique IP addresses in the United States, and you didn't use that number?
A. Well, again, as I said, I didn't understand what the document was. There's no explanation of it at

all.
Q. You understand --
A. I understood the data that was on the website and what they provided, and I had an understanding of that, so...
Q. Okay. But Red Hat provided a document with 1.5 million, but you nonetheless used your extrapolations to get up to around 3.5 or 4 million, right?
A. I believe that's reasonable, yes.
Q. Okay. Now, with respect to the base, still counting the numbers, you're aware that Red Hat and Novell both sell or provide subscriptions to servers, right? That's primarily what RHEL is for, Red Hat Enterprise Linux, that's for server products?
A. Yes.
Q. And that's not -- a server is not like the computers we see in our offices or at home. Servers are these large computer farms that companies like FedEx and banks use to process data, right?
A. Well, there's different types of servers.
Q. Okay. You understand that there's evidence that the servers don't have displays associated with it, right?
A. For discussions, servers may not have displays. I don't think it's absolute.

Q. Well, you understood that the claims in this case require that a display be associated with each system that's using the invention, right?
A. I'm not exactly sure.
Q. You understand a display is an important component, right?
A. It's a component, right.
Q. And did you do any analysis to try to determine what percentage of the Red Hat or the Novell users actually had a display associated with these server installations?
A. Well, the Novell, I didn't calculate anything on the servers.
Q. Well, they used -- openSUSE can be used for servers as well, right?
A. Well, I wasn't aware of any -- any indication of what the server numbers were for openSUSE, but I have no information at this point as to the number of servers that use a display.
Q. So you didn't take into account or you didn't try and figure out the number of units that didn't have a display associated with it, did you?
A. No, I did not.
Q. Now, you also, I think in your third report, tried to provide some explanation of how many people are

using the workspace switching feature, didn't you? You looked at a survey from Novell?
A. I considered a survey at that time, yes.
MR. REITER: And if we could put up PX295, Page 9, please.
Q. (By Mr. Reiter) And this is your -- one of your reports, right?
A. Yes.
Q. Your third report, I think?
A. That's correct.
Q. And this is not a great copy and I apologize for that, but I think in your report, you focused on the last element of the survey to virtualize a desktop or a system; is that right?
A. Yes.
Q. And you use that to try and identify what percentage of people might actually be using the workspace switching feature; is that right?
A. Well, I indicated that there was -- it may be related to that, but it was -- at least in my deposition, I indicated that that was vague. It wasn't exactly clear as to what this related to.
Q. But you don't know, because there's something different between workspace virtualization, which is working remotely, and a virtual desktop; isn't that

1 right?
2 A. Correct. And as I said, I believe it was
3 unclear, so I didn't use that in my testimony.
4 Q. Right. It was unclear, but you put it in your
5 report anyway?
6 A. Yes.
7 Q. Okay. And even though you put that in your
8 report and you implied that maybe 38 percent of the
9 people that have the product might be interested in the
10 virtual desktops, you didn't discount your base at all
11 to take into account that perhaps only 38 percent of the
12 users actually use this, do you?
13 A. No. The royalty rate is -- that I've
14 determined based on my analysis -- that's implicit.
15 It's based on use.
16 Q. Well, I'm talking about the base. You said
17 rate.
18 A. The reason I didn't discount the base is
19 because the royalty rate that I've calculated is based
20 on what the expected use is. Those license agreements
21 that we looked at are based on what the expected use is.
22 Q. I'm talking about the people that actually use
23 the system, that actually have it installed.
24 Here you were trying to say that it's
25 important, because 38 percent of the people that were

1 responding to the survey found this feature, even if it
2 was associated with virtual desktops with the invention,
3 important. And you didn't discount your royalty base to
4 account for that, did you?
5 A. No. As I said, I didn't think it was
6 necessary.
7 Q. Okay. Now, one last thing on the base.
8 You understand that there are two packages
9 associated with the Defendants' offerings. There's a
10 GNOME package, G-N-O-M-E, and then a KDE package, right?
11 A. Yes.
12 Q. And you didn't -- and you understand that KDE
13 is not a part of this case, right?
14 A. I'm not exactly sure.
15 Q. Okay. But you didn't try and segregate out of
16 your base the KDE versus GNOME numbers, did you?
17 A. No, I did not.
18 Q. You kept them; you just lumped them altogether?
19 A. That's correct.
20 Q. Now, I'd like to turn, Mr. Gemini, to the rate.
21 We've talked about the base. Now I'd like to turn to
22 the rate.
23 And as I understand your opinion this
24 morning, you're saying that the per-unit royalty would
25 be 62 cents a unit; is that right?

1 A. That's correct.
2 Q. Okay. And you're saying that in the
3 hypothetical negotiation, Red Hat and Novell would have
4 agreed to pay 62 cents per unit to use the Plaintiffs'
5 patents; is that right?
6 A. I believe that's reasonable.
7 Q. Okay. And they would do that even though they
8 don't run their business based on counting units; they
9 don't manage their business based on counting units, and
10 they don't generate revenues specifically from the
11 units.
12 That's -- that's your -- your opinion,
13 right?
14 A. Well, I believe it's reasonable. I believe it
15 compensates for the infringement. It's based on my
16 understanding of everything I've considered.
17 Q. Okay. Now, there's four licenses that are part
18 of your analysis, right?
19 A. Yes.
20 Q. We have the Central Point license?
21 A. That's correct.
22 Q. And the Hewlett-Packard license?
23 A. Yes.
24 Q. The Silicon Graphics license?
25 A. Yes.

1 Q. And the Apple license?
2 A. Correct.
3 Q. Okay. And your rate was the mid-point of what
4 you considered to be -- the rate that you presented this
5 morning, 62 cents, was the mid-point of what you
6 concluded to be the rate between the Central Point
7 license and the Hewlett-Packard license; is that right?
8 A. It was in the middle of that range, yes.
9 Q. Right. And Central Point -- well, why don't we
10 start with the Central Point agreement.
11 And the Central Point agreement had, as
12 the licensed product --
13 MR. REITER: And if we could put up DX768,
14 please, Section 1.1.
15 Q. (By Mr. Reiter) Central Point obtained a
16 license to what's called the Central Point PC Tools for
17 Windows; is that right?
18 A. That's correct.
19 Q. And that was an add-on product to Windows,
20 right?
21 A. That's my understanding.
22 Q. It wasn't an operating system?
23 A. Correct.
24 Q. It was an add-on like an add-on to a car. It's
25 not the actual operating system?

A. That's correct.
Q. And if we go to the license grant -- I think Mr. Vickrey talked about that -- in Section 2.0, this is for a worldwide license?
A. That's correct.
Q. And Central Point can sell this anyplace in the world?
A. That's right.
Q. And if we go to Section 3.0, Central Point was to pay 25 cents per unit copy of the Central Point PC Tools; is that right? The licensed product?
A. That's correct.
Q. Now, let's turn to the HP license. One more point on that before we do that.
You haven't seen any evidence or any information that Xerox ever received any royalties from Central Point, have you?
A. No. I wasn't provided with any information from Xerox on that.
Q. Thank you.
Now, you understand that in the purchase agreement that the Plaintiffs have with Xerox, that Xerox was required to assist in any litigation. Were you aware of that?
A. I don't recall that.

Q. That Xerox was required to provide information if the Plaintiffs --
A. I don't recall seeing that.
Q. Okay. Did you ask to get any information from Xerox? Did you ask the lawyers if --
A. I asked if there was any information available.
Q. Did you ask if they would call Xerox or tried to get ahold of Xerox?
A. No, I did not.
Q. But you don't know of any payments made by Central Point under this license as an agreement?
A. No. I know this is what they agreed to under the negotiations.
Q. Right. But you don't know that they actually paid anything?
A. No, I don't.
Q. Now, let's turn to the HP license, DX770.
Now, in this case, the licensed product was a product called Dashboard, right?
A. Correct.
Q. And that product, again, is an add-on to the operating system. It's not an operating system?
A. That's correct.
Q. And it was a worldwide license, Section 2.0?
A. Right.

Q. They could sell anyplace in the world?
A. That's correct.
Q. Now, I think to get to your 99-cent rate in the HP license, you said that HP sold the product for $99, the Dashboard product for $99?
A. Yes.
Q. Now, the terms of the payment are not just a 1-percent royalty, are they?
A. In the HP agreement?
Q. In the HP agreement.
A. That's correct.
Q. Okay. In fact, HP paid $110,000 upfront, right, as a lump sum?
A. That's correct.
Q. And that lump sum focused on or compensated Xerox for all of the past sales that HP made of the Dashboard product, right?
A. Correct.
Q. And it also allowed for HP, or whomever the licensee was, to sell another $10 million before any additional payments had to be paid, right?
A. I'm sorry. I don't understand.
In other words, the 110 allows that?
Q. Yeah. For $110,000, HP got coverage for all of the stuff it sold before, and then for another $10

million going forward. And this is Section 3.1.
A. Well, there are two separate sections. There's 110 for past sales, and then going forward is a different agreement, a running royalty. So, to me, they're two distinctly different aspects of a license agreement.
Q. Well, no.
Going forward for the first $10 million of sales in the Dashboard product, after the effective date, there was no additional payments due, right?
A. Correct.
Q. So for $110,000, HP was able to get all of its past sales covered and then another $10 million of future sales covered, right?
A. Well, I guess what I'm having trouble with is the 110 is specifically for past. So it doesn't --
Q. So are you saying that day one, after the license was executed, HP, or whoever the licensee was, had to start paying 1 percent on the next product made?
A. No, I'm not saying that. I'm saying there's two components. There's a paid-up and then there's running royalty, and the running royalty is based on the first $10 million being --
Q. The running royalty is based on the first $10 million?

A. The first $10 million not having any royalty rate applied.
Q. So the 110,000 covered that $10 million, right?
A. Well, you're using the term covered. I'm just saying that the agreement doesn't say that this 110,000 is going to cover the first 10 million. It says it covers the past.
I'm trying not to characterize the agreement as being that the 110 is covering the 10 million.
Q. HP didn't have to pay anything additional for the next $10 million in sales, did it?
A. That's correct.
Q. And after that $10 million in sales, then that 1-percent royalty kicked in, right?
A. Correct.
Q. And you have no evidence, do you, that that $10 million was ever satisfied, that they ever made 10 million in sales?
A. Yes. I'm not aware -- I haven't provided -- I'm not aware if they have.
Q. You didn't ask or you didn't have anybody ask Xerox if that happened, did you?
A. Well, I had asked if there was information from Xerox, and I wasn't provided with anything.

Q. You don't know?
A. I don't know.
Q. And nevertheless, though, you're saying that that -- you go straight to that 1-percent royalty to get to that 99 cents, right?
A. Well, that's what I considered. I believe that's reasonable based on my analysis of the license, based on my understanding of the agreement at the time, not having information on the sales. It's probably the high end of the royalty analysis.
Q. Well, your understanding of the agreement at the time comes from reading the agreement, right?
A. Yes.
Q. And the agreement says in Exhibit B that on the day HP executes the license, it's going to transfer that license and give it to Borland, right?
A. Correct.
Q. Another company unrelated to HP?
A. Right.
Q. The day it executed the license, HP essentially no longer had the license, right?
A. I believe so.
Q. So everything that HP did after it executed the license is kind of irrelevant, right?
A. What do you mean?

Q. Well, you're saying that the 1-percent royalty applies to a 99-dollar product that HP sold, right?
A. Well, that was the price at the time of the negotiation.
Q. At the time of the negotiation, but that 1-percent royalty, we said, didn't kick in until sometime later, until $10 million had been sold?
A. That's correct.
Q. And you didn't do any analysis, did you, to determine really what happened in the future, what the price of the product turned out to be?
A. I hadn't found anything about what the sales were, whether they ever reached the 10 million. What I said was, I think the 1 percent is kind of the high end of the range of the royalty.
Q. Based on $99 that HP sold the product?
A. Right.
Q. Okay. Now, did you look to see what Borland did?
A. Well, I understand that Borland sold it for less.
Q. Yeah.
A. At least there's indication that they sold it for less. Again, I was trying to provide a range of royalty.

Q. Borland was then -- on the day that it was executed, the license was executed, Borland was the licensee. Borland had the obligations, right?
A. That's my understanding.
Q. And Borland, immediately upon acquiring the business and getting the license, it dropped the price of the product, the Dashboard product.
A. I don't know for sure.
Q. Did you look at Dr. Putnam's report?
A. Yes.
Q. Did you look at the information that Dr. Putnam provided?
A. Yes.
MR. REITER: And let's put up DX928. If we could blow this up. It's a terrible copy. I apologize.
Q. (By Mr. Reiter) So it says HP quits the consumer software business, right?
A. I don't believe I've seen this.
Q. This was part of Dr. Putnam's report. You said you looked at that.
A. I looked at his report.
Q. You didn't look at his exhibits?
A. I didn't see this. I wasn't provided with any of those exhibits.

1 Q. Okay. Well, we provided -- you did see his
2 report, though?
3 A. Yes.
4 Q. Okay. And it says that HP quits the consumer
5 software, departs arena following sale of Dashboard to
6 Borland.
7 Dashboard is the product we're concerned
8 about, right?
9 A. Yes.
10 Q. And if we look at the last paragraph of the
11 first column, it says: Borland plans to lower the price
12 of Dashboard.
13 Do you see that?
14 A. Yes.
15 Q. It said HP did sell it, said it sold about
16 125,000 copies of the 99-dollar Dashboard. But Borland,
17 as it was going to go forward, it was going to lower the
18 price.
19 A. Yes.
20 Q. If we could look at --
21 A. As I said, I haven't seen this.
22 Q. Okay. You didn't look for any additional
23 information to see what Borland did with the product,
24 did you?
25 A. No. I was basing it on my understanding of the

1 $99 at the time of the hypothetical negotiation -- or at
2 the time of their negotiation.
3 Q. At the time of -- but you didn't look to see
4 really what happened to determine what the price of the
5 product was, and if a 1-percent royalty was to be
6 applied, what that value would be, did you?
7 A. Well, yeah. I considered it based on the $99.
8 My understanding of the $99.
9 Q. But, Mr. Gemini, we already talked about this.
10 The 99 or the 1-percent royalty doesn't
11 kick in until $10 million of revenue is generated,
12 right?
13 A. That's correct. I was looking at the upper
14 bound of a royalty analysis.
15 Q. Well, but it actually could have been higher.
16 They could have sold it for $200.
17 A. Right.
18 Q. But in reality, they sold it for less?
19 A. Right. There's no certainty as to what
20 happened in this case.
21 MR. REITER: If we could put up DX920,
22 please.
23 And if you'll bear with me, I'll get this
24 to the right part. A lot of documents.
25 Now, if we go to the third paragraph,

1 please.
2 Q. (By Mr. Reiter) We can see the Dashboard for
3 Windows was selling for 49.95, right?
4 A. Yes. Again, I haven't seen this document.
5 Q. So this was another document that Dr. Putnam
6 referred to in his report, and you did say you had that
7 report?
8 A. Yes.
9 MR. REITER: And if we go to DX921,
10 please -- let's see. Is that what we're on? 921.
11 Q. (By Mr. Reiter) And we look at the first
12 paragraph, it says that for a limited time, customers
13 can purchase a special upgrade to dBASE for Windows for
14 $129, and receive dBASE for Windows Easy Start Pack,
15 including Dashboard for free.
16 So, in fact, Borland was even giving this
17 product away, wasn't it?
18 A. Well, it was part of a package they were
19 selling for 129, $130.
20 Q. Well, you buy the package and then you can get
21 the Dashboard part for free, right? That's what it
22 says?
23 A. That's what it looks like.
24 Q. You didn't take any of this into account in
25 coming up with the 99 cents?

1 A. I considered what Mr. Putnam did. As I said, I
2 was determining -- trying to determine a range of
3 royalty based on what I understood to be the price of
4 the product at the time of the negotiation.
5 Q. My question was, Mr. Gemini, you didn't take
6 any of this information into account, this Borland
7 information, when determining what you thought the upper
8 bound of the royalty should be?
9 A. As I said, I have not seen these documents.
10 Q. You didn't take any of this information into
11 account? You have not done anything related to Borland
12 in your analysis?
13 A. What I said is I considered Dr. Putnam's
14 report.
15 MR. REITER: Can we put up --
16 Q. (By Mr. Reiter) Just so we're clear, the
17 Borland acquisition and what Borland did with the
18 product did not factor into your analysis, did it?
19 That's a yes or no question.
20 A. I would say simply that it's based on what HP
21 was selling its product. That's what I considered.
22 Q. It did not take into account what Borland did
23 after it acquired the license and the product?
24 A. I would say at this time that's correct.
25 Q. Now, let's talk about the Central Point

1 agreement again for a second. I think when Mr. Vickrey
2 was asking you some questions, you said that you didn't
3 take into account the litigation risk at all, did you,
4 in coming up with your royalty rate?
5 A. That's correct.
6 MR. REITER: If we can put up the second
7 report, please, Mr. Gemini's second report, and turn to
8 Page 6, the top of the page.
9 Q. (By Mr. Reiter) Now, this is where you kind of
10 explain in your report how you got to 62 cents, right?
11 A. Yes.
12 Q. You say: In my opinion -- starting with the
13 first full sentence on the page -- consistent with my
14 Georgia-Pacific analysis in my first report in
15 determining the effect of such factors on the reasonable
16 royalty, the reasonable royalty rate using the
17 information, would be the mid-point, 62 cents.
18 A. Correct.
19 Q. This royalty rate of 62 cents is based on the
20 Central Point software agreement which clearly is a
21 settlement of litigation. In considering these royalty
22 rates, in my opinion, a range of 62 cents to 99 cents
23 per unit is most reasonable when considering that
24 Central Point Software royalty rate of 25 cents per unit
25 was clearly done in compromise of litigation, and thus

1 the reasons stated above is entitled to less weight than
2 the HP agreement.
3 So, in fact, you did take into account the
4 litigation risks, didn't you?
5 A. Well, when I said I didn't take into account
6 the litigation risk, I meant that I didn't adjust it up
7 as Dr. Putnam did. I didn't increase the 25 cents.
8 Q. But you did. You increased it to 62 cents.
9 A. I considered both, the high end and the low end
10 of the reasonable royalty range without adjusting the
11 low end up, based on the litigation risk.
12 Q. Well, you -- you in your reports --
13 A. Essentially, you could take the 25 cents, and
14 if you applied Dr. Putnam's percentage, the rate would
15 go from 25 to 43 cents. So that range would be upped.
16 I didn't do that. That's what I said when
17 I didn't consider the litigation risk.
18 Q. Well --
19 A. I didn't adjust the rate of Central Point up --
20 Q. Then why didn't you say that --
21 A. -- to bring my range -- my low-bound range --
22 you understand? To bring my lower end of the range --
23 Q. No, I don't. Because what I see here, and I
24 think what we talked about in your deposition, is that
25 given the litigation risks, which is exactly what it

1 said here -- in compromise of litigation -- you thought
2 the Central Point license was entitled to less weight in
3 the HP, and you adjusted the rate up.
4 Why wouldn't the rate then be 25 cents?
5 Why isn't that an applicable rate?
6 A. Because it doesn't account for litigation risk.
7 Q. Oh, so you are taking into account the
8 litigation risk?
9 A. I'm not sure I follow what you're --
10 Q. You told me that you didn't take into account
11 the litigation risk, and yet --
12 A. In determining -- I guess I should be clear.
13 In determining the 25 cents, the litigation risk would
14 increase that rate to -- at a minimum 43 cents and maybe
15 higher.
16 Q. In doing your analysis, Mr. Gemini, you did
17 consider that the Central Point license was in
18 settlement of litigation, did you not?
19 A. Yes. And at the time I did that, I wasn't
20 sure -- I think there was some question as to whether it
21 would be admitted, at least I understood, in this case,
22 because it was settlement of litigation.
23 Q. So you took that into account?
24 A. Yes.
25 Q. Now, part of the litigation risk -- and I think

1 you explained this to --
2 THE COURT: Mr. Reiter, will you be
3 looking for a break point here at some point?
4 MR. REITER: This is fine, Your Honor.
5 THE COURT: Should we take a break now?
6 Let's take our morning break.
7 (Recess.)
8 (Jury in.)
9 THE COURT: Please be seated.
10 Just so you know I did propose a trip to
11 Six Flags to test those royalty theories, but the
12 attorneys didn't think it was a good idea.
13 All right. Mr. Reiter, excuse me for a
14 moment of levity there. Please go ahead.
15 MR. REITER: Thank you, Your Honor.
16 Q. (By Mr. Reiter) Mr. Gemini, I think we were
17 talking about the Central Point agreement and whether or
18 not you took into account litigation risks and so forth.
19 Do you recall that?
20 A. Yes.
21 Q. Okay. Now, in Central Point -- before I get to
22 that, the litigation risk analysis has to do with the
23 fact that in a hypothetical negotiation, the patents are
24 assumed valid and infringed, right?
25 A. Correct.

Q. Okay. And there's -- what you were talking about from the literature and to account for that litigation risk was that in settlement agreements sometimes parties discount what they pay because there hasn't been a judgment when the patent is, in fact, infringed; isn't that right?

A. Right. There's been no -- the patents haven't been proved to be valid and infringed.

Q. And in the Central Point case, the infringer there, Central Point, admitted that it infringed, didn't it?

A. Well, there was an order indicating they were agreeing to that.

Q. There was -- Mr. Gemini, there was an order in which they agreed to have the judge sign.

MR. REITER: And if we could put up the last page of the Central Point agreement, please. Well, actually could we go to the previous page.

Q. (By Mr. Reiter) This is a stipulated consent judgment and order as part of the agreement, isn't it?

A. Yes.

Q. And if we could go to the next page, Paragraph 5, it says -- and this is something that was to be signed by the judge -- Central Point has infringed the patents.

Doesn't it say that?

A. It says that, but that doesn't mean --

Q. That's what it says.

A. -- it was proven and.

Q. Mr. Gemini, it was a simple -- it was a simple question, Mr. Gemini. I know you want to talk.

THE COURT: We can't both talk. Listen carefully to the question and just answer the question. If you need to explain, that will come later when Mr. Vickrey comes back.

Mr. Reiter.

Q. (By Mr. Reiter) The judgment in that case was that Central Point infringed the claims of the patent, is that not right? That's what it says up there.

A. I don't know what -- if that's right.

Q. That's what the document says?

A. I don't even know if that's a signed order.

Q. Did you go back and check?

A. I haven't seen a signed order.

Q. Because I went back and checked on PACER, and I found there was a signed order. I don't have it with me, but there was a signed order.

A. Okay.

Q. So Central Point was determined by a consent judgment to have infringed the patents, right?

A. I'm not sure that that's the case.

Q. You're not a lawyer?

A. I'm not sure that that's --

Q. You're not a lawyer?

THE COURT: Mr. Gemini, you have to just answer the questions that are asked.

THE WITNESS: I'm sorry.

THE COURT: So just listen carefully.

Mr. Reiter.

MR. REITER: Thank you.

Q. (By Mr. Reiter) Mr. Gemini, in Paragraph 5, the consent judgment says, Central Point has infringed the claims of the '412 and '687 patent?

A. That's what it says.

Q. And Central Point agreed to pay 25 cents because it infringed; isn't that right? That's what the agreement says; isn't that right?

A. I don't know if that's --

Q. That's what the agreement says?

A. The agreement says that they agreed --

Q. Thank you.

A. -- to pay 25 cents.

Q. Thank you, Mr. Gemini.

Now, you talked about the Janake article with Mr. Vickrey -- I think that's PX317 -- and how

different assessments or how that might be valuable in determining what the litigation risk discount might be; is that right?

A. Yes.

Q. Okay. And if we could turn to page 6 of Exhibit 317, and if we look at the middle paragraph, it says -- sorry, I lost my place here. The top paragraph.

The analysis the author explains, we deliberately omitted -- about four lines down, five lines down -- what might be considered the most important variable in this analysis, legal strength of the parties' respective positions, and in order to look at other factors apart from any subjective perceptions of the factual and legal merits of the parties' positions.

So this study omitted what even the author said was the most important variable in the analysis; isn't that right?

A. Well, the author does cite limitations.

Q. The author cites limitations in this paper?

A. Yes.

Q. Thank you.

Now, let's turn to an agreement that Xerox had with Microsoft. You're aware of that, right?

A. Yes.

1 Q. And we know that -- I think it's been said that
2 Microsoft in its operating system in Windows doesn't
3 include the workspace switching feature; isn't that
4 right?
5 A. That's my understanding.
6 Q. And Microsoft, I guess -- strike that.
7 You said a moment ago you agreed with me
8 that Microsoft does have a license or did have a license
9 with Xerox that would have covered these patents, right?
10 A. I'm not positive of that. I know there's an
11 agreement, but I don't recall what it covered.
12 Q. In fact, you talked about the Microsoft license
13 in one of your reports, didn't you?
14 A. Yeah, I believe it covered the patents.
15 Q. Okay, okay. And Microsoft could have gone
16 ahead and added this feature to its product if it wanted
17 to for free, couldn't it have? Didn't have to pay any
18 more money to Xerox or anybody else, right?
19 A. I'm not exactly sure. I imagine.
20 Q. You didn't study the Microsoft-Xerox license?
21 A. I don't know what Microsoft could have done. I
22 haven't studied it.
23 Q. You haven't studied it? So Microsoft, though,
24 was licensed, and it could have put this feature in,
25 right?

1 A. I really don't know.
2 Q. You don't know? We do know that Microsoft
3 doesn't provide the feature?
4 A. That's correct.
5 Q. But we also talked about at your deposition
6 that if somebody wanted to have this feature on its
7 windows product, it could do so for free, right?
8 A. Well, there's downloads that people can add on.
9 There's downloads that are free, and there's downloads
10 that cost money. There's like 17 different download
11 versions.
12 Q. 17 different downloads, two of which cost a
13 little bit of money and 15 of which are free, right?
14 A. That's my understanding.
15 Q. The one from Microsoft is free? If I wanted to
16 add it to Windows, I could go to the Microsoft website
17 and it's free, right?
18 A. I'm not sure.
19 Q. You don't know? You didn't look?
20 A. I didn't see specifically the Microsoft one.
21 Q. Okay. Well, actually you do know that the
22 Microsoft one is free, though, right?
23 A. I believe it is.
24 Q. Okay. And in fact, that was one of the
25 exhibits, I think Exhibit 278, PX278 on the second page.

1 A. Yes.
2 Q. And it talks about -- if we scroll down -- that
3 you can add it. It's a free download from Microsoft's
4 Power Tools Collection. Do you see that?
5 A. Yes.
6 Q. So Microsoft doesn't include it in its product,
7 but if you want it, it will give it to you, no extra
8 cost?
9 A. It has a download for free.
10 Q. Okay. Thank you.
11 Now, if we could put up the Microsoft
12 license, DX778, and look at Section 1.10. It has a
13 provision for open-source products, doesn't it?
14 A. Yes.
15 Q. And it has a provision for Linux and GNOME that
16 we've talked about. Do you see that?
17 A. Yes.
18 Q. So at the time that Microsoft and Xerox signed
19 this agreement, Xerox was aware of Linux and GNOME,
20 wasn't it?
21 A. Assuming -- I assume.
22 Q. I mean, this is a license agreement that Xerox
23 signed, right? You said you looked at it.
24 A. I assume they were aware of it.
25 Q. Well, they put it in the agreement, right?

1 A. Yes.
2 Q. Now, let's talk a little bit about the SGI and
3 the Apple agreements. Now, in SGI, that was a lump-sum
4 agreement, right?
5 A. Yes.
6 MR. REITER: And if we could put up DX773
7 and the license grant.
8 Q. (By Mr. Reiter) It's a worldwide license,
9 right?
10 A. Yes.
11 Q. And this agreement requires SGI to pay $95,000,
12 and it can use the patented technology as much as it
13 wanted, right?
14 A. That's correct.
15 Q. No limitations?
16 A. That's correct.
17 Q. And you didn't take -- you thought this
18 agreement really wasn't pertinent, right?
19 A. Yes, I explained why.
20 Q. So you didn't really take this into account.
21 It was an add-on product to an operating system, right?
22 A. Right. And I think I explained my opinion.
23 Q. You didn't know the intent of the parties; is
24 that right?
25 A. There was no information on intent. There was

1 an indication that --
2 Q. You didn't know the intent of the parties?
3 A. That's correct.
4 Q. And if we could go to Section 6.5 of the
5 agreement. Now, 6.5 of the agreement explains that this
6 document constitutes the entire understanding and
7 agreement between the parties. Do you see that? Did
8 you take that into account, that they have recorded
9 exactly what they meant to understand, and that was for
10 $95,000, you can do as much as you want, ride as many
11 rides as you want?
12 A. Yeah, that's what they said. What I was
13 talking --
14 Q. But you didn't take that into account?
15 A. Take what into account?
16 Q. You dismissed the SGI license because you --
17 A. I considered it, and I explained why I didn't
18 believe it was as relevant as the other licenses.
19 Q. $95,000 is clear payment, and you dismissed it
20 because you didn't have the information behind the
21 scenes?
22 A. Partly, yes.
23 Q. And the agreement, though, says all of that
24 doesn't count, what you need to look at, what the
25 parties need to look at, is this document because it

1 constitutes the entire understanding and agreement
2 between the parties?
3 A. It constitutes what they understand the
4 agreement to include.
5 Q. Right. Which was --
6 A. It doesn't have any indication as to what Xerox
7 expected, what SGI expected as to sales --
8 Q. But what Xerox --
9 A. -- as to revenues, as to use, so that's what I
10 was considering when I was talking about I had no
11 understanding as to what was expected at the time.
12 Q. What Xerox and SGI expected was SGI would pay
13 Xerox $95,000, and SGI could use the invention as much
14 as it wanted. That's what they understood, right?
15 A. That's correct.
16 Q. Now, let's talk about the Apple agreement.
17 Now, Apple paid 1.25 million dollars; is that right?
18 A. That's correct.
19 Q. And it executed the agreement in 2007; is that
20 right?
21 A. Right.
22 MR. REITER: So if we could put up the
23 Apple agreement, DX740.
24 Q. (By Mr. Reiter) And the Apple agreement
25 provided that the licensed product in Section 1.1 was

1 any product, service, device, system, hardware,
2 software, or anything else that was offered by Apple; is
3 that right?
4 A. Yes.
5 Q. Basically every product that Apple has, sold,
6 or offered, was covered by this license?
7 A. That's correct.
8 Q. And in the agreement, Section 2.3, Apple
9 received a release of any past infringement. If we look
10 at the middle of the paragraph, that says, the parties
11 on behalf of themselves and their successors at the
12 beginning of the paragraph hereby releases and acquits
13 and forever discharges. And you can read all the
14 language through, and it talks about any compensation
15 for known or unknown acts related to infringement of the
16 licensor patents that happened prior to the effective
17 date.
18 Do you see that?
19 A. Yes.
20 Q. So Apple received a release, a license for all
21 of the infringement that it may have done prior to the
22 effective date; isn't that right?
23 A. That's what it indicates, yes.
24 Q. Now, I think you said to Mr. Vickrey that you
25 were unaware of any way that the Apple agreement could

1 cover seven years. I think there was another year going
2 forward on the patents and then perhaps six years going
3 back; isn't that what you testified to?
4 A. That's what I said. I wasn't aware of the way
5 in which they could go back six years.
6 Q. You've testified in a lot of cases as a damages
7 expert, haven't you?
8 A. Yes.
9 Q. And in several of those cases, I'm sure you've
10 asked for damages that go back six years?
11 A. Yes.
12 Q. You're aware that the patent law allows one to
13 seek damages six years prior to filing a lawsuit?
14 A. Yes. There are certain situations where you
15 can do that.
16 Q. And you've testified in cases where you've
17 sought damages going back six years, haven't you?
18 A. Yes.
19 Q. And in this case, in the Apple case, did you
20 take a look at the complaint in that case?
21 A. Yes, I did.
22 Q. And in that case, Apple was accused of
23 infringing at least one claim, right?
24 A. I believe so, yes.
25 Q. Claim 21 of the '412 patent; isn't that right?

A. I don't recall specifically, but they were accused of infringement of the claims.
Q. Well, I can put it up --
A. Well, I would -- I said I don't recall specifically what claim it was they were asserting, but I know they were asserting a claim.
Q. There was a claim identified?
A. Right.
Q. And you're aware that in patent cases if a method claim is asserted that one can go back six years in a case. Aren't you aware of that under the law?
A. I know there's different issues raised for different reasons in terms of --
Q. Well, you've testified as a damages expert in many cases, and here you said -- you said to this jury and you said to this court that you were aware of no way that this agreement could cover seven years of activity; isn't that what you testified to?
A. I was not aware of a way.
Q. Okay. And in fact, there is a way, isn't there?
A. Well, there are ways that --
Q. There is a way, isn't there?
A. -- their patent owners can claim damages beyond -- or six years prior.

Q. If Apple was accused infringement for just a method claim -- and it was -- then they could go back six years prior to the filing of the lawsuit; isn't that right?
A. I don't know if that's totally absolute. I'm just saying there might be circumstances where you can't. I just don't know.
Q. So what you testified to the jury about seven years, you just don't know that to be true?
A. I wasn't aware of a way.
Q. You don't know that to be true, do you?
A. I said I wasn't aware of a way.
Q. Mr. Gemini, what you're suggesting is that you can't, and my point is that there are ways that one can go back beyond the filing of a lawsuit; isn't that true?
A. I agree with you. Can I qualify that?
Q. I don't have another question for you.
A. Okay. Sorry.
Q. Now, you've talked about that this agreement would be a lump sum -- or a running royalty agreement, right?
A. Yes.
Q. Now, you're aware that when the Plaintiffs notified Red Hat and Novell of a -- of the patents, they sent a letter the day before they sued them, right?

A. Yes.
Q. And in that letter, they said that they would do a lump-sum payment, right?
A. They would consider it, yes.
Q. In fact, they said -- if we put up DX738, under Settlement Proposal, it says that IPI and TLC propose a settlement that will fully release -- this was a letter to Novell -- Novell from liability under the patents through expiration and also grant a covenant not to sue and a paid-up license for a single lump-sum payment.
They were not looking for a running royalty, were they?
A. Well, normally --
Q. They were not looking for a running royalty, weren't they, sir?
A. They don't indicate that.
Q. There was no mention of a running royalty?
A. Not in that, no.
Q. Thank you.
Now, just a few more questions. You put up or you discussed with Mr. Vickrey some articles, the Mozilla article and the Ubuntu articles; is that right?
A. Yes.
Q. Now, you didn't find any articles that were published by Red Hat or Novell about this workspace

switching feature, did you?
A. I was not able to find anything on that.
Q. You didn't find anything, did you?
A. Correct.
Q. In fact, if we put up PX279, for example, this is one of the documents I think you talked to Mr. Vickrey about?
A. Yes.
Q. And there's nothing about Red Hat or Novell in this, is there?
A. That's correct. It relates to Ubuntu's Linux.
Q. And Ubuntu is not a party to this lawsuit?
A. That's correct.
Q. And Ubuntu, in fact, is a competitor of Novell and Red Hat; isn't that right?
A. That's correct.
Q. Now, in the documents and the information that you looked at, what you focused on was simply the workspace switching feature; is that right?
A. Yes.
Q. And you were in the courtroom when Dr. Zimmerman was deposed -- or was questioned; is that right?
A. Yes.
Q. And were you here when I asked Dr. Henderson,

1 the inventor, questions; were you here for his
2 examination?
3 A. Yes.
4 Q. And you understand that the invention is more
5 complicated, more -- there's more parts to it than just
6 having workspace switching; isn't that right?
7 A. Well, I understand those claims, and there's
8 more --
9 Q. But it's more than just workspace switching;
10 isn't that right?
11 A. Well, I was focusing on my understanding of the
12 feature of the accused products as it relates to the
13 products at issue.
14 Q. But you heard the testimony that it's more than
15 just workspace switching; isn't that right?
16 A. I can't characterize that. I just know.
17 Q. You don't know --
18 A. There's different --
19 Q. I'm sorry, Mr. Gemini.
20 A. -- claims involved with infringement.
21 Q. Mr. Gemini, it was a simple question. There's
22 more -- you heard the testimony there's more to these
23 claims than just workspace switching; isn't that
24 correct?
25 A. I don't recall the testimony specifically to be

1 able to say that.
2 MR. REITER: Thank you. I pass the
3 witness, Your Honor.
4 THE COURT: All right. Mr. Vickrey.
5 MR. VICKREY: Thank you, Your Honor.
6 REDIRECT EXAMINATION
7 BY MR. VICKREY:
8 Q. Mr. Gemini, I want to talk about Six Flags for
9 a minute, because the Defendants' lawyers are suggesting
10 that that would be a good example of a situation where
11 somebody could figure out a lump sum paid-up royalty.
12 You walk in, you say, I want to pay $20 because I want
13 to ride on all the rides. Remember that, sir?
14 A. Yes.
15 Q. Well, going -- in that situation, as I'm
16 walking into Six Flags, I know, don't I, approximately
17 how long I'm going to be there, how many rides I want to
18 go on, right?
19 A. Yes.
20 Q. So I'm going to take that into account before I
21 shell out 20 bucks for the unlimited pass?
22 A. Yes.
23 Q. And conversely, if I know that I've got to take
24 my mother to a Mother's Day lunch at noon, I know I can
25 only be there for an hour, maybe I won't do the

1 unlimited all-day pass, right?
2 A. That's correct.
3 Q. Now, take an example of somebody who snuck in,
4 they jumped the fence, and they're caught on tape. And
5 they're caught riding 17 rides that day. Security
6 catches them, and they bring them before the folks at
7 Six Flags before they call the police and say, what
8 should this fellow pay. You know in hindsight what
9 they've done, right?
10 A. That's correct.
11 Q. You can calculate because you're past that
12 time; you don't have to speculate, right?
13 A. That's correct.
14 Q. And if I'm walking into Six Flags trying to
15 figure out whether I pay for the whole day or per ride,
16 paying the whole day, that's going to cap my risk of
17 paying too much, right?
18 A. Yes.
19 Q. But that's -- by capping the risk of paying too
20 much, you're doing it ahead of time, right?
21 A. Yes.
22 Q. HP, the HP license, that included 110,000
23 payment up front?
24 A. Yes.
25 Q. What does that number translate into for sales

1 of a $99 product for a 1 percent royalty?
2 A. 110,000 divided by 99?
3 Q. Right.
4 A. You're asking me if it's $110,000 and there's
5 $99 per unit, how many units is that?
6 Q. Well, yeah, what would that translate into to
7 get under net sales for a 1 percent royalty?
8 A. It would be about $10 million.
9 Q. All right. Now, you used a 99 cent per unit as
10 a high end of a reasonable royalty range?
11 A. Yes.
12 Q. And did Dr. Putnam, the Defendants' damage
13 expert, originally agree with you?
14 A. Yes.
15 MR. VICKREY: Kindly, put up Slide 21.
16 Q. (By Mr. Vickrey) Here's where they said, what
17 was the observed royalty. He tried to extrapolate,
18 that's what you did too. What did he say it was?
19 A. 99 cents.
20 Q. And then he changed his mind, right? He
21 changed his mind?
22 A. Yes.
23 Q. Does your damage calculation accommodate
24 reasonable differences of opinion as to what the
25 high-end royalty rate would be?

1 A. Yes.
2 Q. In what ways?
3 A. Well, the royalty agreements we've looked at,
4 as I've said, are worldwide. And when you -- what I'm
5 applying the royalty rate to is U.S. sales. Think of it
6 as, as you determine a royalty rate, if you're going to
7 have a royalty rate based on worldwide sales, your
8 royalty base is going to be larger, okay, so you might
9 discount your royalty a little bit because you have a
10 larger base.
11 Well, I'm applying a royalty rate that's
12 based on a worldwide base to a U.S. base, so at least in
13 that sense, I believe the royalty is reasonable. I have
14 also, as I said, not considered the risk of litigation
15 discount.
16 Q. And let's talk about Central Point for a second
17 because there was a suggestion that a party's settlement
18 in agreeing to a settlement, they said, okay, we agree
19 that we infringe and we agree that the patent is valid,
20 somehow accommodated or adjusted for litigation risk.
21 Remember that testimony, sir?
22 A. Yes.
23 Q. The studies that you've seen, would that have
24 any impact on the appropriate litigation risk
25 adjustment, the fact that the parties and not the Court

1 are making some -- stating something about, we agree
2 that the patent's infringed and invalid?
3 A. I'm not -- can you re-ask that? I'm not sure
4 I --
5 Q. Just the studies that you've looked at. For
6 example, the most recent AIPLA study --
7 A. Yes.
8 Q. -- what does that focus on in terms of the
9 litigation risk?
10 A. Well, it focuses on litigation risk, you know,
11 based on summary judgment, based on trial.
12 MR. VICKREY: Kindly, 317.
13 Q. (By Mr. Vickrey) And if we take a look at some
14 of the things that -- if we could focus on the
15 highlighted -- what do they say about summary judgment?
16 A. Whereas accused infringers more often win by
17 summary judgment. What that means is it's much more
18 common for a patent owner to lose based on summary
19 judgment prior to trial.
20 Q. And summary judgment is a proceeding that
21 occurs prior to trial, correct?
22 A. That's correct.
23 Q. And so the fact that -- in Central Point was
24 there ever any ruling on claim construction, summary
25 judgment, trial or anything like that?

1 A. Not that I'm aware of.
2 Q. And to your knowledge, did the mere fact that
3 the parties put in a settlement agreement that we agree
4 that the patent is valid and infringed, have any impact
5 on, for example, these Defendants?
6 A. No, I think generally those types of statements
7 were common in settlements.
8 Q. We talked a little bit about use. Were you
9 here -- you were in the courtroom yesterday for the
10 reading of some of the depositions. Remember that?
11 A. Yes.
12 Q. And it kind of droned on a long time, and I
13 apologize for that because I know it was kind of boring,
14 and I almost fell asleep. But during the reading of the
15 deposition of the Steinman deposition, the following
16 testimony came in from a Novell executive, and this was
17 at page 44:
18 Question: So downloads is something that
19 Novell tracks, correct?
20 Answer: Correct.
21 You've seen testimony like that, sir?
22 A. Yes, I believe I refer to that in my testimony.
23 Q. But did Novell or Red Hat ever produce their
24 own internal download numbers in this case?
25 A. Not that I'm aware.

1 Q. You had to go out and find it on the internet,
2 correct?
3 A. Yes.
4 Q. And speaking of the internet sources that you
5 used, I want to go back to the one --
6 MR. VICKREY: 283, please, slide 36,
7 second page.
8 Q. (By Mr. Vickrey) I want to focus on the
9 methodology and what it tells us. They're saying it's
10 not simply downloads; it's the IP addresses that reach
11 our update server. It's reasonable to equate new IP
12 addresses checking in with a new installation.
13 Those aren't your words; it's their words,
14 right?
15 A. Correct.
16 Q. But let's focus on these two glitches in the
17 methodology. What does this tell you about the --
18 whether the aggregate number is conservative, in other
19 words, undercounted?
20 A. Well, as I indicated, they've stated that it's
21 significantly understated essentially based on Item 2
22 where they have trouble tracking corporate users.
23 Q. So the aggregate number of users is
24 conservative, but what does this tell you about the
25 reliability of relying on the location of the IP

1 addresses?
2 A. Well, it talks about how the IP addresses
3 equate with the new installation of Fedora.
4 Q. But what does this -- No. 1, what does this
5 tell you about the reliability of relying on where --
6 just IP -- the -- where an IP address -- where IP
7 addresses reside in terms of measuring use?
8 A. I'm sorry; I misunderstood your question. In
9 other words, what we talked about earlier where there
10 might be IP addresses that are used to fan out to a
11 bunch of other IP addresses.
12 Q. And conversely, where we know they're actual IP
13 addresses, what does No. 1 tell you?
14 A. They might be counted multiple times.
15 Q. The Microsoft license --
16 MR. VICKREY: Do you happen to have DX778?
17 Specifically, the top of page 6.
18 Q. (By Mr. Vickrey) That license specifically
19 excluded -- or you tell me. Did that license exclude or
20 include open-source products?
21 A. Well, it indicates it excludes open-source
22 products.
23 Q. And do you recall the amount of money that
24 Microsoft paid in that license?
25 A. I want to say around 50 million, $50 million.

1 MR. VICKREY: That's all I have, sir.
2 RECROSS-EXAMINATION
3 BY MR. REITER:
4 Q. The Microsoft license covered every patent that
5 Xerox had, didn't it?
6 A. I believe so.
7 Q. You talked about Dr. Putnam and his analysis.
8 I think that was put up by Mr. Vickrey right at the
9 beginning of your redirect. Do you recall that?
10 A. Yes.
11 Q. Dr. Putnam was responding to your first report,
12 was he not?
13 A. Yes.
14 Q. And that report dealt with, I think we talked
15 about, an entirely different type of analysis, right,
16 revenue by percentage?
17 A. It was a different analysis.
18 Q. Right. And we're talking an entirely different
19 analysis today, right? Isn't that right, you changed
20 your analysis?
21 A. It's per unit, yes.
22 Q. Now, On the HP license --
23 MR. REITER: If we could put that up,
24 please.
25 Q. (By Mr. Reiter) You have the HP license I think

1 in your binder?
2 A. I don't remember what exhibit it was. You can
3 go ahead on the screen, if you want.
4 Q. Simple question, Mr. Gemini. Can you point to
5 me any place in the HP license where it says that the
6 royalty for the patents is 99 cents?
7 A. It doesn't say that.
8 Q. Now, Central Point -- Mr. Vickrey talked about
9 that a little bit just a second ago -- and in that
10 case -- and I think we established it, Central Point
11 admitted that it infringed, right?
12 A. The consent judgment order did indicate --
13 Q. And the judge signed that and said, you're an
14 infringer?
15 A. I haven't seen the signed copy, but you
16 indicated it was signed.
17 Q. Now, last point on the IP addresses. You are
18 using the IP addresses, the total number of IP
19 addresses. You're saying that's a reliable number,
20 right?
21 A. Yes.
22 Q. But you're saying the breakdown of the IP
23 addresses, where the numbers come from, that's not
24 reliable; is that right? I think that's what you just
25 told Mr. Vickrey.

1 A. I believe so.
2 Q. Okay. So you're saying that to get to the
3 total, if you have U.S. plus foreign plus -- well, I
4 guess that would be it, U.S. plus foreign, that when you
5 take those two parts individually, they're not reliable,
6 but when you add them together, they are reliable;
7 that's your testimony?
8 A. Well, what I'm indicating from that information
9 is that they're understated. I'm trying --
10 Q. No, I don't think that's what you said. We
11 were talking about geography, and you said that it
12 wasn't reliable to take the IP addresses and use that
13 information to determine where they come from; is that
14 right?
15 A. Correct, because of the information on where
16 the IP addresses may be.
17 Q. But it's okay to take the constituent parts,
18 the numbers from the U.S. plus the numbers from outside
19 the U.S., that total, and rely on that total number; is
20 that right?
21 A. I relied on the total number.
22 Q. On the total number. Even though the subparts,
23 the parts that get you to the total, are not reliable?
24 A. Well, they're understated.
25 Q. Well, then the whole number is not reliable,

1 right; you can't not use one part and then use the whole
2 part and say it's not reliable?
3 A. I didn't say it's not reliable. I said it's
4 understated, and I think I indicated what my --
5 Q. No, we're talking about geography. We're not
6 talking about the total numbers. We're talking about --
7 you're saying that the numbers counting where the IP
8 address is, that number is not reliable; is that right?
9 A. That's correct.
10 Q. But when you add that number, whatever it is,
11 plus what's outside the United States to get the total,
12 that number is reliable?
13 A. Based on my understanding of the documents, in
14 terms of calculating a damage amount.
15 Q. But with Novell, with Novell, sir, they
16 separated out, they told you the percentage that was in
17 the United States and what was outside the United
18 States, right?
19 A. It had a percentage of use in the United
20 States.
21 Q. And you used that number; you relied on that?
22 A. It was a lower number than Novell's worldwide
23 sale percentage.
24 Q. But you used the geographic information that
25 Novell provided?

1 A. Yes.
2 Q. And we talked about this. Dr. Putnam
3 provided -- Red Hat provided to you a specific
4 identification of the geography for the Red Hat numbers,
5 didn't it?
6 A. As I said, I don't know what that document
7 indicated.
8 Q. You didn't use that document, did you?
9 A. That's correct.
10 MR. REITER: Thank you, Your Honor.
11 THE COURT: Mr. Reiter?
12 MR. VICKREY: Nothing further, Your Honor.
13 MR. KREVITT: Your Honor, I'd like to
14 renew the objection that I raised at the outset. In the
15 presence of the jury, I won't explain further. But I
16 think the testimony of Mr. Gemini confirmed the concern
17 that I had, and I want to renew my objection.
18 THE COURT: The objection -- the Court
19 overruled the objection and allowed Mr. Gemini to
20 testify.
21 MR. GASEY: Thank you, Your Honor.
22 MR. VICKREY: Your Honor --
23 MR. GASEY: Your Honor, the Plaintiffs
24 rest.
25 THE COURT: That's what I was waiting for.

1 MR. VICKREY: Subject to the admission of
2 the exhibits.
3 MR. GASEY: We'll do the exhibits at the
4 end of the day.
5 THE COURT: We all understand how that
6 happens, yes.
7 Who am I looking to?
8 MR. REITER: Your Honor, if we can do --
9 (Bench conference.)
10 MR. HILL: Mr. Reiter and I in past trials
11 have stipulated at this point that both sides agree that
12 any Rule 50 motions were timely made, preserved. To
13 make maximum use of the jury's time, we go on into the
14 Defendants's case.
15 MR. REITER: We'll make a motion at the
16 break.
17 THE COURT: Good idea. And it's on the
18 record that we all understand the motion.
19 MR. REITER: Everything is preserved.
20 THE COURT: It's deemed made, and we'll
21 actually make it later.
22 MR. REITER: On all issues?
23 THE COURT: On all issues.
24 You know, I have to say sometimes the
25 attorneys actually help. The lawyers help us a little

1 bit. They move things along quicker.
2 MR. KREVITT: Would you like the
3 Defendants to proceed at this time, Your Honor?
4 THE COURT: I would indeed.
5 (Witness sworn.)
6 THE COURT: Let's take one second to stand
7 up and stretch a minute.
8 (Pause in the proceedings.)
9 THE COURT: Let's proceed.
10 MR. KREVITT: May I address the jury to
11 explain?
12 THE COURT: Yes, you may.
13 MR. KREVITT: Ladies and Gentlemen,
14 Michael Tiemann will be our first witness on behalf of
15 the Defendants. The Plaintiffs have rested. It's our
16 turn.
17 Mr. Tiemann is the Vice President of Open
18 Source Affairs at Red Hat, senior executive. He's been
19 here all week, as you've seen. He's also the corporate
20 representative and will be testifying about the business
21 of Red Hat, their products, open source generally, and
22 also some of the issues about which you all just heard
23 regarding usage of the products, downloads, abilities to
24 count, those kinds of issues.
25 Thank you, Your Honor.

1 THE COURT: You may proceed.
2 MR. KREVITT: Ready?
3 THE WITNESS: I am.
4 MICHAEL TIEMANN, DEFENDANTS' WITNESS, PREVIOUSLY SWORN
5 DIRECT EXAMINATION
6 BY MR. KREVITT:
7 Q. Can you state your name for the record, please.
8 A. I'm Michael Tiemann.
9 Q. And where are you currently employed?
10 A. I'm currently employed at Red Hat,
11 Incorporated.
12 Q. And what is your position, Mr. Tiemann?
13 A. My position is Vice President of Open Source
14 Affairs.
15 Q. I was afraid you were going to contradict me,
16 and we were going to have a problem right at the outset.
17 What do you do in that position?
18 A. In that position, I travel around the world and
19 I talk with executives from the public and private
20 sectors about open source technology, strategy, and
21 policy.
22 Q. Where is Red Hat located?
23 A. Red Hat's corporate headquarters are in
24 Raleigh, North Carolina, on the campus of North Carolina
25 State University, but we have offices worldwide.

1 Q. Why is Red Hat located on the campus of a
2 college?
3 A. Well, there's a lot of great students, a lot of
4 the young minds, a lot of new ideas. And the interplay
5 between business and education, I think, benefits both
6 of us.
7 Q. How long have you been at Red Hat?
8 A. Since January of 2000, a little over ten years.
9 Q. How long has Red Hat been in business; do you
10 know?
11 A. Red Hat has been in business since 1993.
12 Q. How many employees does Red Hat have?
13 A. We have about 3,200 employees worldwide.
14 Q. Is Red Hat a growing company?
15 A. Yes, we are growing. In the last fiscal year,
16 we added, I think, over 600 jobs during one of the worst
17 economic times I can remember.
18 Q. And when you started working at Red Hat, right
19 before that, what had you been doing?
20 A. I was working at a company called Cygnus
21 Solutions.
22 Q. What was Cygnus?
23 A. Cygnus was a company which I founded in 1989,
24 and we actually provided commercial support for open
25 source software.

1 Q. You founded the company, Cygnus?
2 A. I did found the company in 1989. It was
3 actually the world's first company to provide commercial
4 support for open-source software.
5 Q. How old were you in 1989?
6 A. I was 25 years old.
7 Q. And you said you were the first company in the
8 world to provide support for open source; is that right?
9 A. That's correct. It was a very new idea at the
10 time.
11 Q. Was it considered a widely accepted idea at the
12 time?
13 A. A lot of people told me I was crazy, and I
14 sometimes thought so myself, but over the years, I
15 believed that this was the right thing to do. And I
16 think history has proved that that was a great model for
17 promoting technology and software.
18 Q. Tell us a little bit more about that for a
19 moment, if you would, Mr. Tiemann. Explain to the jury
20 why it is that in 1989, when everyone else in the world
21 thinks you're nuts, you think it's a good idea to be in
22 the open-source space?
23 A. Well, it's based on experiences that I had
24 working on open-source software. I first encountered
25 open source in 1987 working at microelectronics in

1 Austin, Texas.
2 Q. Go on.
3 A. And that company was actually a group of
4 companies that got together to try to develop new models
5 of innovation as a way of creating new technologies.
6 And, in fact, Congress passed a law to help them
7 establish those new models of innovation, and that's
8 where I worked in 1987.
9 Q. Why did Congress pass a law encouraging
10 companies to work together to develop new innovations?
11 A. Well, in 1984, we were also having economic
12 difficulties. The U.S. was falling behind competitively
13 with the Japanese and other semiconductor manufacturers,
14 and it was believed at the time that some of the U.S.
15 laws were making it difficult for American companies to
16 successfully compete in the global marketplace.
17 And MCC got what they wanted, which was
18 the ability for companies to collaborate on research and
19 development and try and develop new ideas and bring them
20 to market.
21 Q. What do you mean falling behind?
22 A. Well, where do I begin?
23 The Japanese manufacturing in the 1970s
24 and '80s took a lot of our manufacturing jobs away.
25 They were also doing that to us in semiconductors. In

1984, the Japanese had passed American ability to make competitive DRAM chips, which is vital to both the computer industry and also our national security interests.

Q. So am I correct, then, that the law that Congress passed was designed to help the United States companies work together to face that competitive threat?

A. That is correct.

Q. And is that the area in which you participated?

A. Right. I was working at a project which was to develop some new technologies, and in that project, we needed to use very special software which was only developed by small companies. They charged millions of dollars for that technology.

And it also took -- when you made a contract with such a company, they couldn't deliver the software right away. They had to adapt it to the new machines, and that would take years. It was at that time, when I downloaded some software from the internet, and started making changes.

And within two weeks time, I had done the job that would have cost millions of dollars to do, and it saved our company a lot of money, and it accelerated our schedule. And that experience and many, many others like it taught me that this concept of downloading

software, making improvements, sharing it with others, and receiving the benefits of other people's contribution was like a business model ready to be exploited. And I think that's actually what happened.

Q. And that was open-source software?

A. That was. The license on that software that I downloaded said you are free to remodify and redistribute this software with only one restriction. You cannot stop other people from doing the same thing.

Q. And when you say the same thing, what do you mean by that?

A. That they could also read, modify, and redistribute the software. It was kind of a golden rule. You can -- if you treat others the way you've been treated, then you have all the rights that other people have.

Q. So if you're working on open-source software -- and let's take you, a smart kid of 20-something.

A. 23 at that time.

Q. Okay. I'm feeling worse and worse by the minute thinking what I was doing at 23.

But when you were 23 and you came up with a great idea and a new terrific idea, if you used open-source software, part of this golden rule is you couldn't protect that?

A. Well, part of the golden rule was you couldn't stop other people from benefiting the same way that you benefited.

So I wouldn't characterize it as protection. I would just say that there's -- there's a line that just popped into my head that I can't get out.

Q. Okay.

A. But it's a line from Matthew, which says: Freely you are given, so freely you should share.

Q. So that's the concept you're saying that when given open-source software, whatever improvements you make, those also are shared freely?

A. That is correct.

Q. So we've been talking a lot about open source. It's talking about -- I think you've given some sense of it, but maybe let's just put some boundaries about it.

What does open source mean to you? Because throughout this trial, that's a term the jury has heard an awful lot about.

A. Right. So I'll back up to the beginning.

Software, as I think you've all been told, are the programs that control how a computer operates. And the way a program comes into existence is that a programmer writes text in something that we call source code.

And what open source refers to is the kind of source code that permits people -- not just the person who wrote the code, but permits other people to access the code, read it, modify it, and distribute it. So open source plus software is what we call open-source software.

Q. So I think when we met I had some trouble quite catching that.

Did you prepare a demonstrative that helped explain that?

A. Yes, I did.

If we could see what an example of actual computer open source code looks like.

MR. KREVITT: Can we put that up?

A. I brought an example here. It's a computer game.

Q. (By Mr. Krevitt) Simple example, right?

A. It is a simple example. And what this computer does, it challenges the user to guess a number. And it gives the user as many guesses as the user wants. And when the user finally guesses the number, it tells the user how many guesses it took.

And obviously, the objective is to guess the number in the smallest number of trials.

And so what this source code does is it

1 plays this game. I will say that I actually started
2 programming when I was 11, and a program like this in a
3 language called Basic is one of the very first programs
4 I ever encountered. And when I did this programming, I
5 would have fun with the game for about ten minutes, then
6 I wanted to change it.
7 And so if we can change to the next slide,
8 what you see is that that says, let's guess the number
9 from 1 to 1,000. That's the kind of change that a
10 programmer would make.
11 And in the world of open source, anybody
12 can change the game any way they want. And that is what
13 begins this participation in open source.
14 Q. So source code -- because I can read this --
15 A. You almost can. It's a human-legible -- it's
16 intended to be understood, yes.
17 Q. Is there some kind of computer code that is not
18 human-readable?
19 A. Well, there are two different kinds. But
20 there's binary code, which is what the actual computer
21 executes.
22 But proprietary software, typically, is
23 hidden from view. It's developed by programmers inside
24 a company and they don't share the source code. They
25 only have the product which is after it's been

1 translated into actual computer code.
2 Q. Okay. So let's take that in parts to make sure
3 that that's clear.
4 First, this is source code (indicates)?
5 A. That is correct.
6 Q. So source code is human-readable. I mean,
7 someone that doesn't read source code can't sit down and
8 read it like a novel, but it's human-readable?
9 A. That is the goal.
10 Q. And so when we've been talking in this trial
11 about source code, because I've been sitting through for
12 a long time -- I just want to make sure we're all clear
13 that that's source code.
14 A. That is source code.
15 Q. Okay. And so -- and I think you said it's like
16 a recipe, and that's because this tells a programmer --
17 A. Right. Going back to what is the function of
18 software, the goal of the software is to basically give
19 instruction to the computer what the computer should be
20 doing. And it is like a recipe. A recipe will tell you
21 here are the ingredients; here are the ways that you
22 combine these ingredients to get something.
23 And depending on how much flour, how much
24 sugar, or how much egg you put in, you might get a cake
25 or you might get a cookie or you might get a biscuit.

1 And so a computer software program is
2 saying take this data, combine it these ways, and out
3 comes your result. So that is how software is like a
4 recipe for a computer.
5 And open source is like a recipe that you
6 can share with your friends, and they can say, you know,
7 I know how to make this better. Let's use butter
8 instead of oil, and now we have a new kind of biscuit.
9 Q. And an analogy that was used earlier -- I don't
10 remember by whom -- what we all think of when we think
11 of something secretive is the formula to Coke.
12 And so is the idea that we can all drink a
13 Coke and enjoy a Coke and we can buy a Coke, but we
14 don't know how a Coke is made.
15 A. No, no. And that's the example of proprietary
16 software. People who write proprietary software will
17 often say you don't need to see the source; you don't
18 need this; all you need is the product.
19 But those of us in the open-source
20 community believe that we can make a better product
21 every day by always having the freedom to make
22 improvements and get ideas from our neighbors or share
23 ideas with our neighbors.
24 Q. So just continuing, and I know it's very, very
25 simplified, but just with the Coke analogy, just to make

1 sure we're all on the same page with the nomenclature,
2 the proprietary company is like Coca-Cola that has a
3 product you can buy, but you don't know the recipe; you
4 can't reproduce it; and you can't take it -- take apart
5 the various ingredients and add a little bit more of
6 this or a little bit more of that and come up with a
7 better Coke?
8 A. Right. We call those proprietary software
9 companies. Microsoft Windows is an example of a
10 proprietary software company. They don't give you
11 permission to look at the source.
12 Q. I want to hear that. For me, it's helpful if I
13 make sure I can do the other side of the coin.
14 And so in open source, not only do you
15 sell the Coke, but you also distribute with it the
16 recipe to Coke?
17 A. That is right.
18 Q. And so everyone around the world now with the
19 recipe to Coke can suggest improvements and make better
20 and some will be good, some will be not good?
21 A. Absolutely. And so what we believe is that the
22 value of the software is being able to use it. And
23 sometimes in order to use it, you have to modify it.
24 And instead of making one single company the limiting
25 factor of who will get what they want and who will not

1 get what they want, anybody who can make a change can
2 get what they want. And that's a big value to a lot of
3 people.
4 Q. Okay. So to close the loop, you said there's
5 proprietary software and there's open-source software?
6 A. Yes.
7 Q. Okay. And so just very quickly, what are the
8 differences, then, outside the Coke world, in the
9 software world between proprietary software and
10 open-source software?
11 You can start with whichever one you want.
12 A. Right. So I want to try and talk about the two
13 main differences. There are two ways of seeing the
14 difference for each one.
15 Q. Okay.
16 A. One way of seeing it is, you know, as a user,
17 when you acquire open-source software, either by
18 downloading it or by having it come as a product, you
19 get the freedoms to read it, modify it, redistribute it.
20 And that's what open source looks like to a user.
21 It looks like a car you can go and buy
22 which comes with a service manual, and you have the
23 freedom to take it apart in your garage, if you want to.
24 And in the case of proprietary software,
25 what you see is a product, which is defined by a single

1 company and they decided what features it has. They
2 decide what -- they decide when to ship new versions.
3 And they also decide when to take it out of production
4 and force you to buy a new version.
5 So from the user perspective, that's the
6 difference. But there's another difference.
7 Q. And what is that difference?
8 A. And that difference is from the developer's
9 perspective, a developer who -- in the case of
10 proprietary software, it's typically developed by a
11 small number of people working in secret on the program.
12 And they -- the total number of people who are working
13 on that is necessarily limited by the total number of
14 people within that company.
15 By contrast, in the world of open source,
16 the entire world, or at least all those who are
17 connected to the internet, can potentially be
18 developers. And that was one of the things that really
19 sparked my imagination about open source.
20 I've been teased by my counsel about being
21 a smart kid, but in 1987, I knew immediately I was not
22 the smartest kid in the whole world. And so one of the
23 exciting things about open source was I always had a
24 chance to work with people smarter than me. And when I
25 talk with open-source developers, every single one of

1 them has the experience that there is somebody smarter
2 than them teaching them something.
3 So we have a motto in the world of open
4 source, which is nobody is as smart as everybody.
5 That's been my experience, and that's been the
6 experience of all the people I've worked with in open
7 source.
8 Q. Thank you, Mr. Tiemann?
9 So now let's talk about Red Hat's
10 products, because we've heard a lot of testimony about
11 Red Hat's open-source products, and now let's be real
12 clear about what those products are.
13 So tell me, sir, what are Red Hat's
14 products?
15 A. Our principal product is Red Hat Enterprise
16 Linux, and it comes in two main varieties.
17 Q. If we could just slow down just for a minute.
18 A. I'm sorry, yes.
19 Q. Because I want to make sure that we hear what
20 you said.
21 A. Okay.
22 Q. It was Red Hat Enterprise Linux?
23 A. Yes.
24 Q. You went through that quickly, and that's a
25 term that I'm not sure the jury's heard. They've heard

1 RHEL a lot, but I'm not sure --
2 A. I understand.
3 Q. So the name of the product is?
4 A. Red Hat Enterprise Linux. And it's often
5 abbreviated RHEL, and it's often pronounced, to the
6 consternation of our brand people, rel.
7 Q. So let's walk through the letters.
8 A. Yes.
9 Q. The R and the H are Red Hat?
10 A. Right.
11 Q. Okay. And the E?
12 A. The E stands for Enterprise, and in our
13 industry, the term enterprise really refers to large
14 companies who have complex business operations and are
15 typically using computers as a way of managing those
16 complex business operations.
17 Q. How -- oh, I'm sorry.
18 A. I was just going to say that it's common to
19 hear people talk about enterprise software as being the
20 kind of software that such large companies use. And we
21 distinguish our product by naming it Red Hat Enterprise
22 Linux to tell the world we are providing solutions to
23 large companies with complex business operations.
24 Q. Well, I want to come back to that in a second
25 and why that matters, but we only got up to E.

A. Yes.
Q. So what --
A. And then L, L stands for Linux. And Linux, both, names an operating system the way that Windows names a Microsoft product, Microsoft Windows. But Linux also names a distribution that contains thousands of software packages.

You could think of a software package as being an application or an add-on. And so with the Red Hat Enterprise Linux distribution, there is not just an operating system. There's also a web browser. There's an e-mail client. There are web servers and other packages, thousands of packages.

Q. Sir, let's talk -- turn now -- you were describing what -- why it matters that Red Hat Enterprise Linux product is an enterprise product.
A. That's right.
Q. By the way, you're familiar with Novell's products?
A. Yes.
Q. And do they have an E in their products, also?
A. Yes, they do.
Q. Is that's the same E, enterprise?
A. That's the same E, because we're competing for the same customer.

Q. And those customers are generally what?
A. Large companies who need massive amounts of computer power to run complex business operations.
Q. So drill down on that, if you would, for me, sir, a little bit more.

What do you mean when you say they're big companies with massive amounts -- how do they use your software? In what context do they use your software?

A. The context that they're typically using the software is running computer servers, which are special kinds of computers that have been designed to store and process large amounts of information.

Servers can be hooked together to make them more and more powerful, and, typically, when you start hooking together these servers, they start to take up a lot of space since you need large rooms to hold them. Because of the massive amount of power that they draw, those rooms have to be specially air-conditioned. They need special amounts of power. And so we call those warehouses for computers, server farms or data centers.

Q. And I think you prepared a demonstrative --
A. I did, yes. There's a picture --
Q. -- maybe we could see that just gives a --
A. -- that gives you an example of a data center.

This data center is in Texas. It's Dell Hardware. And I believe it's running in Houston. It's the largest private hosting service in the country.

Q. Now, a couple quick questions about servers, and you can use this demonstrative or not as appropriate.
A. Sure.
Q. First, do servers use displays?
A. Well, let me show you, actually, because we have a laser pointer here. Let me sort of show you the boundaries of where a server is.

Do you see these -- you can see a bunch of repeated horizontal lines that look like it's a bunch of items all stacked up and all the same. So you see a red wire and a blue wire and then another red wire and a blue wire.

Each one of those elements that looks the same probably is the same. It's a server, and you can see that they're packed tightly together, and there's absolutely no room for a display.

A display would simply use up space and heat, and people typically don't even go into a server room, except to replace a bad computer. And so these servers are in racks; these racks are in rows; these rows are in data centers.

Q. And how big is a data center? What are we talking about?
A. Data centers can get quite large. The New York Stock Exchange, for example, is now building a data center that is seven football fields in size.
Q. It would be seven football fields of this?
A. That's right.
Q. And that's just for the New York Stock Exchange?
A. That's just for the New York Stock Exchange.

I personally visited a customer data center that's 16 acres of air-conditioned space. And I understand that the largest data center in the country is in Chicago, and it's almost 30 acres.

Q. Is the New York Stock Exchange a customer of Red Hat's?
A. Yes, they are.
Q. I wanted to make sure your client got that plug.

And how -- well, why don't we talk about the New York Stock Exchange. How do they use your software?

A. Well, as you can imagine, the New York Stock Exchange is processing billions of transactions a day, and it's very important that their computer systems do

1 not crash.
2 And so the New York Stock Exchange relies
3 on our operating systems to provide secure, reliable
4 function for their enterprise applications, and that is
5 the -- basically, the service that we provide is the
6 assurance and the technical support that keeps those
7 systems running and keeps the New York Stock Exchange
8 trading stocks every day.
9 Q. By the way, if -- I know you testified that
10 typically servers wouldn't have a display; is that
11 right?
12 A. Yes.
13 Q. If a server did have a display, would it -- and
14 the servers were running your software, would the
15 display be running your software?
16 A. Well, if the server -- if the server did have a
17 display, you know, these servers are personal computers.
18 They just have strange properties. They're extra strong
19 and extra beefy and extra powerful.
20 But some of these you might be able to put
21 in the cards necessary for there to be a display, in
22 which case that one server could have a display.
23 Q. My question -- I must not have asked a good
24 question. I am sorry.
25 I'm just simply asking that if we know --

1 we've been talking about Microsoft.
2 A. Yeah.
3 Q. Is it possible to have a server running Red Hat
4 Enterprise Linux software and it be hooked up to a
5 display that's running Microsoft Windows?
6 A. That's -- I would not characterize it that way.
7 There are customers who are using Microsoft Windows as a
8 kind of administrative -- like a gate agent at an
9 airport. Somebody might want to schedule the
10 installation of a software, or they may want to change
11 the location of an application, just like a gate agent
12 needs to change the gate of a flight or, you know, get
13 luggage to the right place.
14 The Windows computer can communicate with
15 the server, but I would not consider that that Microsoft
16 Windows computer functioned as a display for the server.
17 It would just be like -- it's no different in that case
18 as a user who is buying a book from Amazon. And the
19 instructions you give on your computer at home is not
20 what I would consider to be a display for the Amazon
21 servers that are sitting in Portland, Oregon.
22 Q. But -- and that makes sense to me. But even if
23 it were considered a display for the server, are you
24 saying that it still could be running software that is
25 not Red Hat software?

1 A. Oh, absolutely. As I said before, there are a
2 lot of people who are using Microsoft software because
3 some of the administrative applications only run on
4 Microsoft.
5 And so you need to have a Microsoft PC to
6 control these powerful servers, even though you have a
7 lot more faith in our system than Microsoft for running
8 your servers.
9 Q. So the New York Stock Exchange, that was a
10 customer that you mentioned?
11 A. That's one.
12 Q. Any other customers?
13 A. We have many others. Saber Holdings, for
14 example, manages tickets and flight schedules for a lot
15 of different airlines, including American Airlines.
16 They're a customer. I've seen their server farm; it's
17 big.
18 We have customers like Orbitz and -- let's
19 see -- priceline.com. We have customers like
20 amazon.com, Ticket Master, VeriSign that secures
21 internet transactions. We have a lot of enterprise
22 customers all around the world.
23 Q. Are these customers using the Red Hat
24 Enterprise Linux server product?
25 A. That's the fundamental relationship. The

1 business we do with these customers, the main value that
2 they're paying for is reliable, secure operation of
3 their servers running our operating systems, and the
4 associated stuff that comes with those operating
5 systems.
6 Q. So you've said a few times that in the
7 overwhelming majority -- I don't remember your exact
8 words --
9 A. Yeah.
10 Q. -- your customers use your software on servers.
11 A. Yeah.
12 Q. Can you put a finer point on that? Is it a
13 percent?
14 A. I can tell you -- first of all, I can't tell
15 you exactly how many machines we support as servers
16 versus desktop. But from a revenue perspective, 90
17 percent of our revenue is based on the server
18 relationship; 10 percent of our revenue is based on
19 people who are using a desktop configuration.
20 Q. So revenue -- you just mentioned revenue, but I
21 also heard you say that all of your products are free;
22 is that right? Or did I hear somebody else say that?
23 Have you not said that yet?
24 A. I've heard that a lot.
25 The source code to all of our products is

1 free, and you can download it from the internet whether
2 you are a customer or not a customer. That is open
3 source.
4 Q. So let me just make sure that I understand
5 that.
6 Are there any products that -- of any of
7 the Red Hat Enterprise Linux products that are at issue
8 in this case, any ever, that Red Hat charges a dime for?
9 A. There's no source code that we charge money
10 for. We sell subscriptions. The only thing we charge
11 money for is subscriptions.
12 Q. So -- and we'll get to subscriptions.
13 A. Actually -- I'm sorry -- we do charge money for
14 training and consulting, but as to the software, which I
15 think was the meat of your question.
16 When it comes to how do we make money on
17 software.
18 Q. That's my question.
19 A. It's subscriptions.
20 Q. Okay. So before we get to subscriptions, I
21 want to make sure what we don't do, and then we'll talk
22 about what we do do.
23 A. Okay.
24 Q. So as to the software that you provide that's
25 accused of infringement in this case --

1 A. Right.
2 Q. -- does Red Hat ever charge a dime?
3 A. No.
4 Q. Okay. Now, subscriptions. Let's talk about
5 that.
6 What are subscriptions and --
7 A. Sure. So a subscription is basically an
8 agreement that for a period of time, a customer will pay
9 Red Hat for services that include unlimited technical
10 support, bug fixes, security updates, new versions of
11 our technology. And in addition to subscriptions,
12 customers can pay for training and consulting.
13 Q. Now, maybe this isn't necessary, but we talked
14 about what servers are.
15 What is a desktop as you are using that
16 term?
17 A. Well, as I use that term, a desktop is the kind
18 of computer you would have at your home, or it's got a
19 display; it's typically something you would have on a
20 desk.
21 Q. Judge Rader is --
22 A. There's a perfect example.
23 Q. -- assisting your testimony?
24 A. Yes. I bet it doesn't run our operating
25 system.

1 Q. One day.
2 A. One day we'll get there.
3 Q. And so when you said revenues and 90 percent of
4 your revenues are attributable to servers, 10 percent to
5 desktops, you mean revenues from the subscriptions?
6 A. That's correct. Server subscriptions versus
7 desktop subscriptions.
8 Q. So with all of the available software in the
9 open-source world, you have a limited amount in your
10 products; is that right?
11 A. That's correct.
12 Q. And how do you go from -- how does Red Hat go
13 about determining from all the various open source out
14 there what it's going to be in its products, the Red Hat
15 Enterprise Linux products?
16 A. So the world of open source, since I started
17 it, has really grown to a really, really large
18 community. It is estimated that there are millions of
19 open-source developers around the world, more
20 open-source developers than any single company employs.
21 There are hundreds of thousands of packages, and any one
22 of those could represent some valuable function that a
23 customer might want in the future.
24 We have something called the Fedora
25 Project, which is a way of bringing together ideas from

1 that larger community with the participation of the
2 community. And then in that experimental lab
3 environment seeing, you know, what ideas work and what
4 ideas don't work.
5 Q. So let's take that in steps. You just said
6 that laboratory environment.
7 A. Yeah.
8 Q. So explain what the Fedora Project is a little
9 bit more specifically and how it functions as a
10 laboratory project for your products.
11 A. Right. So after we launched the Red Hat
12 Enterprise Linux product line, we -- we realized that we
13 needed to have more visibility in what was happening in
14 the open-source community than just what our small
15 company could do.
16 So Red Hat sponsored a project called the
17 Fedora Project, which invited members of the community
18 to work with us as equals and to build a distribution
19 that included experimental technologies and features.
20 Q. And how do you then go from the Fedora Project
21 to your products?
22 A. Right. So some of these experimental features
23 blow up in the lab. We don't put those in our
24 commercial products. Some of those experimental
25 features are really, really great, but they need more

1 work.
2 So we let the open-source community
3 continue to refine them, and we contribute our own best
4 ideas to those projects. But once a technology in that
5 experimental environment proves itself to be a suitable
6 candidate, then we will nominate that for a future
7 version of our product.
8 And Red Hat alone will do the kind of
9 engineering needed to give us the confidence, if this
10 technology is running at the New York Stock Exchange,
11 that we're not going to be the reason that it goes down.
12 THE COURT: Let's take a five-minute
13 break.
14 MR. KREVITT: Certainly.
15 THE COURT: Just five minutes. You can
16 leave.
17 (Recess.)
18 (Jury in.)
19 THE COURT: Mr. Krevitt, you were
20 inquiring.
21 MR. KREVITT: Thank you, Your Honor.
22 Q. (By Mr. Krevitt) So before the break, we were
23 talking about Fedora, and we were talking about how you
24 go from all of the ideas out there, some good, some
25 crazy, and how you wind up with the ideas in your

1 product; is that right?
2 A. Yes, that's correct.
3 Q. Okay.
4 A. I remember.
5 Q. Okay. Good. So just a few more questions
6 on -- on that.
7 How does that process -- let's do it this
8 way maybe. Let's start -- we can either start at the
9 high or at the low, so why don't we start at the
10 product.
11 How many software packages are in Red Hat
12 Enterprise Linux, different software packages?
13 A. We certify and ship about 2900 packages.
14 Q. So less than 3,000?
15 A. Just less than 3,000.
16 Q. Okay. Why don't we call it 2900.
17 A. Give or take.
18 Q. All right. And how many are -- software
19 packages are there, roughly, out there in the open
20 source available?
21 A. It's unknown, but it's hundreds of thousands of
22 possible packages.
23 Q. Okay. So you have hundreds of thousands of
24 possible packages, and you need to wind up with 2900 in
25 your product?

1 A. That's correct.
2 Q. And is that where the Fedora Project comes in?
3 A. Exactly.
4 Q. So taking -- because you know this so well, I
5 want to make sure the jury understands this clearly, and
6 so things that maybe you just take for granted, the jury
7 and I don't. So take it slowly.
8 How do you go from hundreds of thousands
9 of potential software packages, some great ideas, some
10 less great, to the 2900 software packages you wind up
11 with in your products? Take that in baby steps.
12 A. So in baby steps, the first thing we want to
13 do, to know it's going to be suitable in our product, we
14 want to have something which is like a Linux
15 distribution.
16 So the Fedora Project creates something
17 that is a Linux distribution. It's just aimed at a
18 different group of people than our commercial product.
19 So, number one, it starts like a Linux distribution --
20 or it is a Linux distribution.
21 Q. Okay. But just, again, so we're clear, the Red
22 Hat Enterprise Linux products are your products?
23 A. That's correct.
24 Q. Okay. Is Fedora a product?
25 A. No, it's a project.

1 Q. Okay. And we'll get into that distinction, I
2 think, but just as you're explaining it, I want to make
3 sure we understand the difference between your products
4 and the mechanism to get to your products.
5 A. Okay.
6 Q. So you start with the hundreds of thousands of
7 possible ideas.
8 A. Right. You start -- there's a big universe out
9 there, and there are a whole bunch of smart people who
10 think this is a good idea or that's a bad idea,
11 etcetera. And we invite these people to join with us to
12 assess that universe of possibilities. And so we invite
13 the whole world, but not the whole World shows up.
14 About a few thousand people show up and they say we want
15 to help raise this bar.
16 Q. Okay. And -- and what -- what happens next?
17 So you have the few thousand or how many thousands?
18 A. So what happens is that these people nominate
19 the software projects that they think are a good idea to
20 put in -- onto the proving ground.
21 So if the software does not belong on the
22 proving ground, possibly because it doesn't have an
23 open-source license so it cannot be used with our
24 product or possibly because it's so remotely different
25 from what we're trying to do that it could never

1 possibly be in step, we reject obvious misfits.
2 And these people bring to us a set of
3 technologies or a set of candidates that look like a
4 good idea to sort of bring it all together, and it's a
5 little bit like the minor leagues where you bring in a
6 bunch of people who you think might be good players in
7 the future, and you put them on a team and see how they
8 play.
9 Q. It's a little like the minor leagues in
10 baseball?
11 A. Any minor league.
12 Q. Okay. And is -- because that -- I think about
13 it that way sometimes --
14 A. Yeah.
15 Q. -- I just want to make sure that's what you're
16 explaining to the jury.
17 A. Right.
18 Q. So explain what you mean by that, that it's
19 like a training ground.
20 A. Yes. So, basically, you don't want to put a
21 new technology on the floor of the New York Stock
22 Exchange or in some server at the bottom of the Pentagon
23 and say -- you know, something you're not familiar with,
24 so you need to get familiar with it.
25 So Fedora is an opportunity to sort of see

1 how it works, see that it works well with a whole bunch
2 of other things, and know that there's a lot of people
3 who understand the function of that software and that it
4 can be relied on.
5 Q. So you take the Fedora product -- the
6 project -- excuse me -- takes those candidates and it
7 puts them together?
8 A. It puts them together in something we call a
9 Fedora distribution, and we make a new distribution
10 every six months. So we throw away old distributions
11 and say, well, that was interesting information from the
12 past, but we're only focused on right now.
13 Q. And then you distribute the Fedora
14 distribution?
15 A. Yeah. We make it available to anybody so that
16 we're not the only ones.
17 Q. How does that process take us -- how does that
18 distributing the candidates take us from there to our
19 product?
20 A. Right. So what happens is, lots of people all
21 over the world take this Fedora Project distribution,
22 and they use it in strange ways. And those different
23 ways tell us, is it suitable for putting it onto a Navy
24 destroyer?
25 Is it suitable for putting it into a

1 server farm in the desert?
2 Is it suitable for, you know, calculating
3 how to fix the financial crisis?
4 We get back all this feedback, and the
5 things, which get highly rated by that process, inform
6 our marketing guys and our engineers we ought to look at
7 taking this best software and graduating it to RHEL.
8 Q. So based on the way the software functions or
9 operates or is reacted to in the Fedora Project, you
10 make judgments about what to put in your products?
11 A. That's right. That's right.
12 And it's like picking from a bunch of
13 maybe promising athletes which ones are going to be
14 long-term franchise players on the team. Because our
15 enterprise customers, once you -- once you put an
16 application into production in some remote data center
17 that could be buried underground, you don't want to be
18 constantly going out to that remote location and trying
19 to figure out what's wrong.
20 So you need reliability, and that comes
21 from familiarity, stress-testing, lots of different
22 eyeballs making sure it's right.
23 Q. So just using your sports analogy and I'll keep
24 the sports analogies limited, I promise.
25 A. I understand.

1 Q. But is it like you want to field the baseball
2 team, and so you go into a training camp with 20
3 pitchers and 10 catchers and 30 outfielders, do the
4 training camp, see who works well together?
5 A. Exactly.
6 Q. And then field your team?
7 A. That's right. If you've got a great first-base
8 player who cannot play with the second-base player, you
9 don't want them together on your professional team.
10 Q. And then the professional team is your product?
11 A. That's right.
12 Q. Now, I have to follow up with a couple things
13 you said just now, because they always remind me of
14 things that I think will be interesting to the jury, so
15 let's pick through a couple.
16 You said Navy destroyer. Is Red Hat
17 software used on a Navy destroyer?
18 A. It's used on Navy ships. It's also used on --
19 it's -- both on ships and onshore for the Navy.
20 Q. Can you give an example of a ship in the Navy
21 that uses Red Hat software?
22 A. One is the USS Nimitz. It's a nuclear aircraft
23 carrier. We're very, very proud to be on that ship.
24 Q. And that uses Red Hat software?
25 A. Yes, it does.

1 Q. On the deck?
2 A. Yes, it does.
3 Q. And then you also said the bottom of the
4 Pentagon; you'd want to make sure that the software
5 that's at the bottom of the Pentagon, I wrote down, is
6 reliable.
7 Does the Department of Defense use
8 open-source software?
9 A. The Department of Defense not only uses
10 open-source software, but they have increasingly
11 understood the method of open-source production leads to
12 more reliable systems. And they are actively
13 encouraging all branches of service to consider
14 open-source software when making acquisition decisions.
15 Q. In fact, I showed a demonstrative.
16 MR. KREVITT: Why don't we pull up the
17 demonstrative from the Department of Defense from
18 October of last year, I think.
19 Q. (By Mr. Krevitt) And I'll ask you, sir, if
20 you've seen this document before.
21 A. I have seen this document. I think I saw it
22 the day it came out. It made me incredibly proud.
23 Q. Yes, I can imagine.
24 And if you can just read the first
25 sentence.

1 A. Okay. To -- the first sentence reads: To
2 effectively achieve its missions, the Department of
3 Defense must develop and update its software-based
4 capabilities faster than ever, to anticipate new threats
5 and respond to continuously changing requirements.
6 Q. And then it continues?
7 A. The use of open-source software (OSS) can
8 provide advantages in this regard.
9 Q. And the Department of Defense is not the only
10 branch of the federal government that uses open-source
11 software; is that right?
12 A. No, no.
13 Q. How about the Department of --
14 A. In fact, the executive branch, the White House
15 uses open-source software to run their website to
16 communicate with the American public.
17 Q. How about the Justice Department? Now that
18 we're in their courtroom, how about the Justice
19 Department?
20 A. There are parts of the U.S. court system that
21 use our servers for collecting and storing and accessing
22 data for proceedings.
23 Q. So let's look at the White House document so
24 the jury can see that again. You can read as much as
25 you'd like. We highlight those two sentences.

1 Why don't you focus on those, but I hope
2 that's big enough for the jury to see.
3 A. I'll read them. The first sentence says: This
4 code is available for anyone to review, use, or modify.
5 We are excited to see how developers across the world
6 put our work to good use in their own applications.
7 Next sentence: By releasing some of our
8 code, we get the benefit of more people reviewing and
9 improving it.
10 Q. Does the -- and this came out April 21, which I
11 think was --
12 A. That was last week.
13 Q. A week ago yesterday.
14 Does the White House, the U.S. White
15 House, accurately describe open source, in your view?
16 A. They do a fantastic job. I couldn't have
17 taught it better myself.
18 Q. And you said that it made you proud when you
19 saw the Department of Defense press release to the Joint
20 Chiefs of Staff, the secretaries to the military
21 branches, but you said that made you proud; is that
22 right?
23 A. Actually, a lot of what Red Hat does makes me
24 proud, because this idea that started out really as an
25 oddball idea has connected with what I feel are some of

1 the greatest values and privileges of being an American:
2 The freedom to start a business, to make a living doing
3 what you love, and then, most importantly, helping other
4 people do what they want to do, whether it's what the
5 DOD does, which is protecting America, or what the White
6 House does, which is serving America.
7 So that's all I can say. It's great.
8 Q. And it made you proud when you sold the White
9 House -- did you feel like maybe you finally made it?
10 A. I'm getting there.
11 Q. The idea is not so crazy? Well, maybe the
12 inclusion by the White House doesn't necessarily prove
13 it's not crazy.
14 A. There are many, many cases in the years I've
15 been involved with it that have made me incredibly proud
16 of what's happened and how it's gone.
17 Q. So back to Fedora, just to finish on that.
18 How much does Red Hat charge for those
19 distributions of the R&D project, Fedora?
20 A. Red Hat charges nothing for Fedora. As an R&D
21 project, it's just made available to the world to
22 download, participate, improve.
23 Q. How much does Red Hat charge for subscriptions
24 to Fedora?
25 A. We don't sell any subscriptions at all. We

1 don't consider Fedora suitable for commercial use.
2 Q. Why is that?
3 A. It's R&D project. Some may blow up in the lab,
4 and some projects, you know, may be wonderful. But we
5 can't stand behind Fedora as a product. We stand with
6 Fedora developers to experiment and discover what's
7 possible.
8 Q. So there's not a dime in any form, fashion at
9 all that Red Hat makes from Fedora?
10 A. No. It's not its purpose. Fedora is about
11 generating ideas.
12 Q. Does everyone who downloads Fedora download the
13 same version of it?
14 A. There are many versions of Fedora, and they
15 could be different by their version number. They could
16 be different by what kind of processor architecture you
17 install them on.
18 Anybody is free to make custom versions of
19 Fedora as well. And they are named, you know, for
20 whatever universe they're supposed to go into. In Latin
21 America, people make Fedora in Portuguese.
22 Q. And if I download Fedora and my partner,
23 Mr. Reiter, downloads Fedora, are we necessarily,
24 though, going to have the same packages? His may be in
25 Portuguese, but are we going to have the same packages?

1 A. If you go to the same server and you ask for
2 the same software, then you'll get a bucket of bits that
3 contains the same thing. But a download is totally
4 different than an installation.
5 Q. How so?
6 A. Well, when you take that software to install it
7 on your computer, you get asked a series of questions.
8 One of those questions is English or Portuguese. One of
9 those questions is what kind of keyboard do you have.
10 One of those questions is do you want GNOME or KDE or no
11 desktop at all.
12 And so there's a variety of installation
13 parameters. Once you finally say go, then it may
14 install all of the packages, or it may install very few
15 of the packages. It depends on what you ask for.
16 Q. So let me follow up on just the example you
17 gave, because you gave an example and that way we can
18 contextualize for the jury.
19 You said you can choose to download KDE.
20 You could choose to download GNOME, or you could choose
21 to have no desktop at all.
22 Did I get that right?
23 A. I explained that it's at install time.
24 Q. At install time.
25 A. So when you say I'm ready to install, it says,

1 great, what would you like to install? Here's a bunch
2 of things you can do.
3 It's like ordering food at a restaurant.
4 You don't buy everything on the menu. You get what you
5 want for dinner.
6 Q. When you -- when you go to -- to take the
7 restaurant analogy, I'm laughing, because I joke with
8 Mr. Vincent that he does order everything on the menu.
9 So I want it to be clear that that's why I looked over
10 at him.
11 When you -- when you -- just to take the
12 restaurant analogy, is downloading Fedora like walking
13 into the restaurant?
14 A. Right. It's walking into the restaurant and
15 getting a big menu in front of you with a lot of
16 choices.
17 Q. I see. And then one of the choices is desktop
18 environment?
19 A. Yes.
20 Q. And you say you could choose none or KDE or
21 GNOME?
22 A. Right.
23 Q. So it's sort of appetizers.
24 A. Right.
25 Q. You could either have one or not, or you can

1 make a choice?
2 A. Right. And when you do that -- in fact, one of
3 the questions that it asks you is, would you like to do
4 this install on a graphical user interface, because you
5 have a fancy display; or would you like to do it in
6 text, because you like the old green screen and you're
7 never going to change.
8 Q. I want to change our focus for just a minute
9 now and talk about counting of Red Hat products.
10 Do you remember Mr. Vickrey asked
11 Mr. Gemini a series of questions on that?
12 A. I did hear that.
13 Q. And Mr. Reiter asked Mr. Gemini a series of
14 questions?
15 A. I did hear that.
16 Q. And then Mr. Vickrey asked another series, and
17 there was a lot of testimony about whether you can count
18 and what you can count and -- do you remember that?
19 A. I heard all of it.
20 Q. I want to ask you a series of questions about
21 that.
22 First, how did you feel as you were
23 sitting there as an executive at Red Hat, who knows what
24 can be counted and what cannot be counted, listening to
25 Mr. Gemini testify regarding Red Hat in that regard?

A. I felt very uncomfortable about what he was saying, because it didn't sound at all right. But I also felt confident that having an opportunity to speak in court, it would be possible for the jury to understand the facts.
Q. Good. I'd like to do that now.
How many people use Red Hat's RHEL and Fedora software?
A. We don't count users of either RHEL or Fedora, so we don't know.
Q. This might be a little bit more intrusive, and I want to hear everything you have to say. I want the jury to hear everything you have to say.
There are certain things that Mr. Gemini said, though, and I want to make sure we address them directly.
A. Okay.
Q. So I may ask questions that are -- that would be good to just have a simple answer, and then you can explain the answer, but I don't want there to be any confusion on those points.
A. Got it.
Q. Okay. Thank you.
So let's take RHEL first. Does Red Hat count the number of RHEL users?

A. No.
Q. Ever?
A. No.
Q. Does Red Hat count the number of Fedora users?
A. No.
Q. Ever?
A. No.
Q. Does Red Hat have any information at all regarding the number of users of the Fedora Project?
A. No.
Q. Does Red Hat have any information at all regarding the number of users of the RHEL products?
A. No.
Q. Okay. Now, was there anything you wanted to say, because I know I told you how I wanted to do it. Then I have a series of questions, but I felt maybe I was cutting you off.
A. No.
Q. Because we did not -- did we talk about Mr. Gemini's testimony?
A. We did.
Q. And did I tell you what to say in response to Mr. Gemini's testimony?
A. No.
Q. Did I tell you how to answer the questions at

all?
A. You told me to speak the truth.
Q. Okay. Can Red Hat determine the number of users of Fedora?
A. I don't believe so.
Q. Okay. Is that information that Red Hat has, the number of users of Fedora?
A. It is not information that Red Hat has.
Q. Did you hear Mr. Gemini tell the jury that Red Hat does know the number of users of Fedora?
A. I did hear that.
Q. Did you hear Mr. Gemini tell the jury that Red Hat knows the number of users of the RHEL products?
A. I did hear that.
Q. Were either of those answers accurate?
A. No. They were wrong.
Q. So let's get into that a little bit.
Why can't Red Hat determine the number of users of Fedora?
A. To determine the number of users, we would have to collect information about users, which we don't do.
Q. Let's be clear. What does that mean, we, Red Hat, do not collect information about users?
A. We don't collect information -- we don't collect any personal identifying information. You know,

we're not part of the U.S. Census. We do not collect any user information when people download Fedora.
Q. So I download Fedora today, let's say. Do I have to tell Red Hat who I am?
A. No, you do not.
Q. Do I have to give any information about myself?
A. No.
Q. If I download 20 copies, do I have to say?
A. No.
Q. If I give 20 copies to my friends, do I have to say?
A. No.
Q. If I download one copy and don't use it, do I have to say?
A. No.
Q. If I download 30 copies and don't use any of them, do I have to say?
A. No.
Q. No information at all, just to be clear, on number of users of the Fedora Project?
A. That is correct.
Q. And just so the jury is clear, are you saying that Red Hat doesn't keep track of that information, or are you saying Red Hat can't keep track of that information?

1 A. It's both. We cannot and we do not.
2 Q. So let's look at what -- and talk about for the
3 jury then, how did Mr. Gemini suggest that maybe you can
4 keep track of users?
5 And what he talked about was IP addresses.
6 Do you remember that?
7 A. I do remember that.
8 Q. Okay. And he said that there were millions of
9 IP addresses.
10 A. Yes, he did.
11 Q. And then from the IP addresses, these millions
12 of IP addresses, he told the jury that there are
13 millions of users.
14 Do you remember that?
15 A. I do remember that.
16 Q. And, in fact, he said there may be many, many
17 more than the millions you saw, because the numbers may
18 be understated.
19 A. I heard that.
20 Q. Okay. Any of that right?
21 A. No.
22 Q. Okay. So let's talk about IP addresses.
23 What are IP addresses?
24 A. An IP address is a number that your computer
25 has to have to basically get onto the internet. And

1 sometimes that -- for most people who connect to the
2 internet like I do from my home, that IP address is
3 dynamically allocated.
4 Q. Does Judge Rader's computer have an IP address,
5 assuming that he has internet access?
6 A. If he's on the internet, he does. If he's not
7 on the internet, he probably won't have.
8 Q. And when Judge Rader may go on vacation to
9 California with the same computer, does it have the same
10 IP address?
11 A. It will most likely have a different IP
12 address.
13 Q. If Judge Rader went down the road to Tyler and
14 got on the internet there --
15 A. Right.
16 Q. -- would he have the same IP address with his
17 computer?
18 A. He might have a different IP address every hour
19 depending on how the internet service provider hands out
20 these IP addresses.
21 Q. So the same guy --
22 MR. KREVITT: No offense, Your Honor.
23 Q. (By Mr. Krevitt) -- with the same computer, you
24 just testified has many, many IP addresses?
25 A. That is correct.

1 Q. Okay. So if Judge Rader's computer has many IP
2 addresses and we add up all those many IP addresses and
3 we get a number and that number is more than one, does
4 that number tell us how many users there are?
5 A. Not at all.
6 Q. So if the IP addresses don't tell you the
7 number of users, why does Red Hat keep track of them at
8 all?
9 A. We keep track of them in part so that we know
10 where in the world Fedora is being used.
11 Q. So explain that. You keep track of the IP
12 addresses so you get geographic information.
13 Is that what you mean by where in the
14 world?
15 A. That's one of the reasons for keeping track of
16 that, yes.
17 Q. Explain that to me.
18 A. So an IP address does not tell you anything
19 about the user or the computer itself. The IP address,
20 however, does tell you the geographic location. And
21 this is very important for companies that do internet
22 commerce, because, for example, if you use a credit card
23 to buy something, if your credit card billing address
24 says that you live in Marshall, Texas, but the IP
25 address says it's coming from Nigeria, you know, the

1 company processing the credit card transaction may say I
2 don't believe that this is a legitimate transaction.
3 So the IP address is something that can be
4 relied on to provide information about where in the
5 world that computer is setting.
6 Q. So at any given time, a computer connected to
7 the internet has an IP address?
8 A. That is correct.
9 Q. And when the user -- excuse me -- the computer
10 moves around to different locations and connects to the
11 internet, that same computer owned by the same person
12 has a different IP address?
13 A. Yes.
14 Q. Okay. So as often as one moves around, that's
15 how often the same person has an IP -- different IP
16 address?
17 A. They may have even more IP addresses, because
18 they may be getting refreshed every hour.
19 Q. So let's talk about that. First, I wanted to
20 make sure I understood what you were saying when you
21 travel. And, again, when I say I want to make sure at
22 least my question is clear for the jury. I don't mean
23 travel from here to Asia. I mean travel from here to
24 Longview, you'll have a different IP address.
25 A. That's correct.

Q. Okay. And then you said a moment ago that, in fact, there's other reasons why the same guy with the same computer will have many IP addresses.
A. That's correct.
Q. So can you explain that to the jury, please?
A. Yeah. There's something called a dynamic IP address. And a dynamic IP address is simply -- is one way that internet service providers basically allocate IP addresses to people who are using the system.
And one of the reasons that they have these dynamic IP addresses is, if some computer has gone off the internet, they want to know that nobody is using this slot anymore, so let's kick it off. So a dynamic IP address is given to a computer which can then put the new one in, and it can basically say I'm still here, you know, keep my connection alive.
Q. So the same computer in the same place --
A. That's right.
Q. -- will continually get new IP addresses?
A. In fact, I believe I've had that experience here in Marshall, Texas, where I have a virtual private network for talking back to my company so I can do my business. And about every hour the connection gets dropped because the IP address changes and I have to type in a new code to say let me back in.

Q. Sitting in the exact same place, your computer on the exact same table?
A. Yes.
Q. IP address is changing all the time?
A. Yes.
Q. You're the same user?
A. I am.
Q. Now, you said that IP addresses tell you information about geographic location.
A. That is correct.
Q. And is that because when you're in Marshall, Texas, although you're getting many IP addresses, each one indicates where you are?
A. That's correct.
Q. How does that work?
A. I don't know the specific technical details of exactly how that works, but an analogy is that there's a lot of different license plates in Texas, but they're all Texas plates. There's a lot of different license plates in North Carolina, but they're all Carolina plates.
So when you're in Texas, you get Texas IP addresses. When you're in North Carolina, you get North Carolina IP addresses.
Q. And how certain is that information? Is it a

rough guess that maybe my IP address will say I'm in Texas, but I'm really in Maine?
A. So I have looked into this, and on a country-by-country basis, that number is certain enough to do financial transactions, you know, day in and day out, hundreds of millions of financial transactions with certainty.
Q. Let me make sure I understand, because, again, I want to unpack your answer for the jury a little bit.
A. Okay.
Q. I asked you if the IP address can determine with certainty the geographic location.
A. Yes.
Q. And I think you said that at least on a country-by-country basis, it can with certainty; is that correct?
A. Yes; that is correct.
Q. And just so we're clear, when you say certainty, are you talking 88 percent, 95 percent? What are we talking about?
A. I'm talking about that's how the internet was designed to work. It's designed around -- the IP stands for internet protocol. And so when you want to put a system onto the internet, there's another -- there's an organization called ICANN. The Internet -- I think it's

the Internet Committee for Address, Names, and Numbers.
And ICANN is basically like the agency that hands out these license plates. ICANN is the one that tells the ISPs, here are the IP addresses you can give to your customers. And those ranges are set based on country.
And so the U.S. has been given a certain range of IP addresses. And even in the news today, people are worried about we're going to run out of IP addresses.
Q. That's sort of like when a community gets really crowded and they have to come up with a new area code for the community?
A. Exactly, right.
Q. But you know when you hear that area code exactly where it is?
A. That's right. So we've got that exact situation. The U.S. has a range, and we can keep adding new area codes until we run out of area codes.
And then what do we do? But that day hasn't come. Today, those numbers tell you which country they belong to. Just like a country code, an area code, and a phone number tells you where that telephone is located.
Q. And so just to tie the loop for the jury, you

1 can tell with certainty where an IP address comes from
2 on a country-by-country basis; is that right?
3 A. It's -- it's as certain as anything I know.
4 Q. And as certain --
5 A. Yes, yes.
6 Q. -- as day will follow night?
7 A. Day will follow night.
8 Q. And so you can tell -- putting aside whether IP
9 addresses tell you the number of users or they don't
10 tell you the number of users, whatever IP addresses tell
11 you, we know that of all the IP addresses, we can tell
12 with absolute certainty which ones are from the United
13 States?
14 A. That is correct.
15 Q. Okay. So now, Mr. Tiemann, have you ever done
16 an analysis to determine where certain IP addresses are
17 from in connection with the Fedora Project?
18 A. In fact, I have.
19 Q. Okay. What analysis did you do?
20 A. I did an analysis of the geographic locations
21 for every IP address of machines connecting to the
22 Fedora servers during the period of October 2007 to
23 December of 2008.
24 Q. Okay. So let's -- let me make sure the jury
25 understands that.

1 First, you said you looked at all the IP
2 addresses that hit Red Hat?
3 A. That hit Fedora.
4 Q. Hit Fedora. Excuse me.
5 A. Hit the Fedora Project.
6 Q. Right. Because that's what Mr. Gemini talked
7 about. All of the IP addresses that hit the Fedora
8 Project for the time period October 2007 to December
9 2008; is that right?
10 A. That's the full months. We didn't go halfway
11 into either month. It's the full time.
12 Q. Okay. So all of October of '07 to the end of
13 December 2008?
14 A. That is correct.
15 Q. And you -- you pulled all of those IP addresses
16 and looked at them?
17 A. Actually, I asked a person at Red Hat to write
18 a script to pull all those IP addresses and count them
19 according to whether they were inside the U.S. or not
20 inside the U.S.
21 Q. Let me ask you to clarify one thing, and that
22 is script.
23 A. I'm sorry.
24 Q. My gut tells me that's a computer term?
25 A. Yes. Back to a program. I asked that a

1 program be written which would collect all of this
2 information and sort and count how many things were --
3 how many IP addresses, how many unique IP addresses came
4 from the U.S. versus not from the U. S.
5 I reviewed that script; I understood that
6 script; and I supervised that script being run on the
7 Fedora servers in order to produce a report to summarize
8 the unique IP addresses that hit Fedora from the U.S.
9 versus the unique IP addresses that came from outside
10 the U.S.
11 Would you -- okay.
12 Q. Why don't we just put them up and make sure
13 that we're all on the same page for the jury.
14 A. Let's do that.
15 Q. I think the first one we should look at is
16 DX904.
17 MR. KREVITT: And that's not going to be
18 very clear for the jury.
19 Q. (By Mr. Krevitt) Just tell us what it is.
20 A. If we could just -- let's just go down to --
21 let's look at this first line here just to show you.
22 This is a monthly total. 10 is the month
23 of October. 2007 is the year. And what we've done is
24 we collect all the unique IP addresses into a file. And
25 it's -- the number on the left is the total number

1 inside the U.S., and the number on the right is the
2 number outside the U.S.
3 So for that particular month, we see
4 162,000 unique IP addresses inside the U.S. and outside,
5 654,000.
6 Q. So why don't we keep that up, and maybe, again,
7 it's just easy for the jury and for others using an
8 example.
9 A. Okay.
10 Q. So the 162,000 number is unique IP addresses
11 that hits Fedora in October '07?
12 A. That's correct.
13 Q. And the 654,000 is the number of unique IP
14 addresses that hit Fedora in October of '07?
15 A. From outside the U.S.
16 Q. From outside?
17 A. That's correct.
18 Q. And so if you were to add those two --
19 A. If you were to add those two, every single,
20 unique IP address would be counted.
21 Q. So leaving that up, let's just talk about what
22 we know and what we don't know, okay?
23 A. Yeah.
24 Q. I'm going to ask a question. You don't have
25 to -- so here's my question: Can we tell how many users

of Fedora there were from this number?
A. No, we cannot.
Q. Is that possible?
A. I know of no way to do it.
Q. Could it be more than that number for the number of users? Could it conceivably be more?
A. It could conceivably be more.
Q. Could it be fewer?
A. It could be fewer.
Q. Could it be way fewer?
A. It could be way fewer.
Q. And it could be much more?
A. It could be much more.
Q. Okay. So we don't know that. We don't know that. We don't know the number of users. We've gotten that established.
Okay. Then can we tell the number of unique IP addresses with certainty? Not saying whether those are users or not?
A. Yes. We can know the number of unique IP addresses, because that is what the script counts.
Q. So those numbers are not guesses or estimates or speculation. Those are actual, precise numbers of unique IP addresses?
A. Yes. In fact, I'm so confident of our

methodology that I published some source code.
Q. Well, we'll come back to that.
And then the final thing I want to ask you is, so you said that we know for sure that if you add that up, that's the total number of unique IP addresses?
A. That's right.
Q. If you were to add those two numbers up, you'd wind up --
A. An exact number.
Q. -- with 8 and change?
A. An exact number.
Q. An exact number. Okay. Good.
Now, you have them broken down, obviously. To the left is unique IP addresses from the United States?
A. That's correct.
Q. And to the right is unique IP addresses outside the United States?
A. Yes.
Q. Do we know whether that breakdown is accurate?
A. Yes.
Q. Do we know that with certainty?
A. Yes.
Q. And that is the breakdown?
A. That is the breakdown for the month of October

2007.
Q. And let me just show quickly DX912, then we'll do 913, then 914.
MR. KREVITT: Actually -- I'm sorry -- why don't we go back. I'm sorry. And why don't we pull up the last line.
This. I should have done that. I apologize.
Q. (By Mr. Krevitt) So, Mr. Tiemann, will you just tell us what that is? I think the jury understands how we got to these things, but what is that that's now on the screen?
A. So what that is, is that is the sum total of all of the unique IP addresses during the period from the beginning of October 2007 to the end of December 2008, distinguished on the left by those unique IP addresses that originated in the United States. And the number on the right is the number of unique IP addresses for that period coming from outside the United States.
Q. So if you add these two numbers up, you would have the total number of unique IP addresses that hit Fedora during the 14-month period October '07 to December '08?
A. That's correct. If you add those two numbers, it rounds up to 9.8 million total.

Q. Which was about what Mr. Gemini was talking about for total number of IP addresses?
A. Which is probably no surprise there.
Q. Right. So we know that with certainty, those totals?
A. Yes.
Q. And then this is the number of unique IP addresses that hit Fedora during the damages period in this case from the United States?
A. That is correct. Approximately 1.5 million unique IP addresses hit Fedora from inside the United States.
Q. And we know that with certainty?
A. Right. We know the whole number. I gave you a human approximation, but we know with certainty it was 1,537,441.
Q. Number of unique IP addresses that hit Fedora during the damages period in this case?
A. Right.
Q. Now, that number may not reflect the number of actual users?
A. That is correct.
Q. The number of actual users might be lower?
A. It might be lower; it might be higher; it might be much lower; it might be much higher.

1 Q. Okay. And did you determine, just as a
2 percent, what -- what the total number of unique IP
3 addresses in the United States constituted of the total
4 number of unique IP addresses?
5 A. Yes, I did.
6 Q. What is that percent?
7 A. The math says that if you take 1.5 million out
8 of a total of 9.8 million, the number adds up to a
9 little bit less than 16 percent in the U.S. versus the
10 whole world.
11 Q. So just as a matter of math then, am I correct,
12 that we know with certainty --
13 A. Right.
14 Q. -- that the number of unique IP addresses from
15 the United States during the damages period was just
16 less than 16 percent?
17 A. That is correct.
18 Q. Does that number surprise you? I mean, would
19 you have expected it to be higher than 16, lower than
20 16?
21 A. It actually doesn't surprise me at all, because
22 if you look at the total number of people in the world
23 that can access the internet, it's almost 2 billion
24 people.
25 And if you look at the total number of

1 people in the United States who have an internet
2 connection, it's another number that's escaped my mind.
3 But when you do the math, approximately 14 percent of
4 all the internet users in the world are based in the
5 U.S.
6 So it's no surprise to me at all that
7 if -- there's 14 percent of all internet users are from
8 the U.S., it's no surprise at all that approximately
9 15-some percent of Fedora users are in the U.S. and the
10 numbers bear that out.
11 Q. Thank you. Let's do the documents I had asked
12 for.
13 THE COURT: Mr. Krevitt, do you want to
14 check the clock at any point?
15 MR. KREVITT: I'm at the jury and the
16 Court's preference. I don't -- maybe it makes sense to
17 stop now.
18 THE COURT: Okay. You know best.
19 Let's take our hour break.
20 MR. KREVITT: Thank you.
21 (Lunch recess.)
22
23
24
25

1 CERTIFICATION
2
3
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.
8
9
10
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