

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 ) 1:15 P.M.

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

APPEARANCES:  
 FOR THE PLAINTIFF: MR. JOSEPH A. CULIG  
 MR. ARTHUR A. GASEY  
 MR. PAUL C. GIBBONS  
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 903/935-3868

(Proceedings recorded by mechanical stenography,  
 transcript produced on CAT system.)

1 THE COURT: Sure.  
 2 MR. KREVITT: We'll do one of those two.  
 3 THE COURT: Let's get our jury now.  
 4 MR. KREVITT: Thank you, Your Honor.  
 5 (Jury in.)  
 6 THE COURT: Please be seated. We probably  
 7 don't tell you folks enough how much we appreciate you,  
 8 so we're telling you again now.  
 9 Mr. Krevitt, you're in charge.  
 10 MR. KREVITT: Thank you, Your Honor.  
 11 Q. (By Mr. Krevitt) So, Mr. Tiemann, before the  
 12 break, we were talking about numbers of unique IP  
 13 addresses.  
 14 A. I remember.  
 15 Q. I just want to ask a few more questions about  
 16 that, and then we'll move on.  
 17 First, all the numbers we were discussing  
 18 with respect to unique IP addresses relate to Fedora; is  
 19 that correct?  
 20 A. That is correct.  
 21 Q. Do those numbers of unique IP addresses have  
 22 anything at all to do with the Red Hat Enterprise Linux  
 23 products?  
 24 A. Nothing at all. They were only unique IP  
 25 addresses of people contacting Fedora servers.

1 APPEARANCES CONTINUED:  
 2 FOR THE DEFENDANT: MR. JOSH A. KREVITT  
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 17 \* \* \* \* \*

11 P R O C E E D I N G S  
 12 MR. KREVITT: We had discussed a process  
 13 for our Rule 50 motions.  
 14 THE COURT: Yes.  
 15 MR. KREVITT: We had thought we were going  
 16 to do it at lunch. In the interest of time, we're fine.  
 17 Obviously, the thing we're most --  
 18 THE COURT: Do it at the end of the day?  
 19 MR. KREVITT: We'll do it at the end of  
 20 the day or perhaps file a written document tonight. If  
 21 Your Honor wants to hear any argument, we can do it  
 22 tomorrow morning.  
 23 MR. GASEY: Given the other things that we  
 24 have going on, Your Honor, that seems the smartest thing  
 25 to do, looking at the physicals and jury instructions.

1 Q. And, again, Fedora is the research and  
 2 development project, not one of Red Hat's products?  
 3 A. That is correct.  
 4 Q. So -- and the information -- just so we can get  
 5 ourselves back where we were -- told us exactly how many  
 6 unique IP addresses there were for Fedora and exactly  
 7 how many of those unique IP addresses were in the United  
 8 States?  
 9 A. Right. Because the IP address tells you the  
 10 location when you're on the internet. The IP address on  
 11 the internet tells you the geographic location and you  
 12 can tell by country from that IP address.  
 13 Q. And the answer to the question during the  
 14 damages period that we know with precision and certainty  
 15 is 16 percent of the IP addresses were in the United  
 16 States and all the rest, 84 percent, were outside the  
 17 United States?  
 18 A. Mathematically, we can calculate to a precision  
 19 greater than 16 percent, but that is -- the precision is  
 20 a very precise number, but it's actually a number a  
 21 little bit less than 15 -- 16 percent.  
 22 Q. A little bit less than 16 percent.  
 23 A. Yeah.  
 24 Q. Okay. So we are rounding up?  
 25 A. You are.

1 Q. The benefit of the doubt?  
 2 A. You are.  
 3 Q. Okay. And the reason we're talking about this  
 4 is because of Mr. Gemini's testimony, right?  
 5 A. I believe so.  
 6 Q. Okay. That is why we're talking about it was  
 7 that statement. The reason we're talking about it is  
 8 because of Mr. Gemini's testimony. And here's a  
 9 question: Do you recall during Mr. Gemini's testimony  
 10 he conceded that the Plaintiffs, even if they proved  
 11 infringement, even if they proved validity, the  
 12 Plaintiffs, if we ever -- if the jury every considers  
 13 damages, they would only be entitled to the use in the  
 14 United States?  
 15 A. I did hear that.  
 16 Q. And so what Mr. Gemini did is he took the total  
 17 number of IP addresses; do you remember that?  
 18 A. Yes.  
 19 Q. And he said that that total number of IP  
 20 addresses equals the total number of users?  
 21 A. I did hear that.  
 22 Q. And he said it might even understate the number  
 23 of users. The number of users might be higher?  
 24 A. I heard that, too.  
 25 Q. And that's not right because of what we

1 discussed earlier, that IP addresses don't tell you  
 2 users; is that right?  
 3 A. It's not right because it could be more, it  
 4 could be less, there is no way to tie a number of IP  
 5 addresses to a number of users.  
 6 Q. Okay. But then what Mr. Gemini did was, after  
 7 he started with the 9 million or so IP addresses, he --  
 8 he came up with a way of trying to figure out how many  
 9 of those were in the United States; do you remember  
 10 that?  
 11 A. I do.  
 12 Q. And he didn't do what you did, which is  
 13 actually count them; is that right?  
 14 A. To actually classify them as being in the  
 15 U.S. or not in the U.S., correct.  
 16 Q. But --  
 17 A. Yes.  
 18 Q. But it's not -- that's not like it is a sunny  
 19 day out and reasonable people could disagree.  
 20 A. Right.  
 21 Q. There's an answer to the question of how many  
 22 IP addresses are in the United States, correct?  
 23 A. There is an answer -- he -- he --  
 24 Q. And -- and -- and you gave the answer?  
 25 A. I gave the answer.

1 Q. Okay. And as a percent, that's the 15 and  
 2 change, 16 percent?  
 3 A. Correct.  
 4 Q. But do you -- do you remember that  
 5 Mr. Gemini, because he has to find some way to talk  
 6 about use in the United States, said that one way to do  
 7 that is to look at Red Hat's revenue, figure out how  
 8 much of that revenue is in the United States, and then  
 9 use that as the portion of the IP addresses that we'll  
 10 say are in the United States; do you remember that?  
 11 A. I do remember hearing him say that.  
 12 Q. Okay. And just because there was a lot for the  
 13 jury in that, I just want to make sure it's clear what  
 14 my question is going to be. The total number of IP  
 15 addresses is what you heard Mr. Gemini start with; is  
 16 that right?  
 17 A. Yes.  
 18 Q. And Mr. Gemini suggested that that total number  
 19 of IP addresses was the total number of users; is that  
 20 right?  
 21 MR. HILL: Your Honor, I would object to  
 22 the continual leading of the witness.  
 23 MR. KREVITT: I'll -- I'll rephrase the  
 24 question.  
 25 THE COURT: I -- I think you should.

1 MR. KREVITT: Okay. I will.  
 2 Q. (By Mr. Krevitt) Do you recall what  
 3 Mr. Gemini said the total number of IP addresses  
 4 represents?  
 5 A. Mr. Gemini said that it was a lower bound on  
 6 the number of users. He reinforced the idea that the  
 7 total number of IP addresses undercounted or  
 8 significantly undercounted the total number of users.  
 9 Q. And then do you remember Mr. Gemini was shown a  
 10 document relating to Apple's use?  
 11 A. Yes, I do.  
 12 Q. And do you remember the number of users in 2008  
 13 that document that was shown to Mr. Gemini reflected?  
 14 A. I remember that document showing the total  
 15 number of U.S. shipments of Apple products with displays  
 16 being less than 4 million units. I remember it being  
 17 3.9 million and change units.  
 18 Q. 3.9 million MacIntosh units in the United  
 19 States in 2008?  
 20 A. That's what I remember from that document.  
 21 Q. Okay. So -- and we'll come back to that. So  
 22 do you recall how Mr. Gemini used the revenue  
 23 information?  
 24 A. Yes.  
 25 Q. Okay. And the revenue information relates to

1 what products?

2 A. It relates to Red Hat's overall revenue, which  
3 is Red Hat Enterprise Linux predominantly, of which is  
4 mostly server revenue, but it also --

5 Q. Okay. And the -- and that's -- that's the  
6 revenue from the subscriptions that you discussed  
7 earlier?

8 A. Again, our total revenue also includes training  
9 and consulting, but he took a web report showing a  
10 breakdown of how much of our total revenue is in the  
11 U.S., how much our total revenue is outside the U.S.

12 Q. And do you remember what the number, the  
13 percent Mr. Gemini said was Red Hat's revenue in the  
14 United States?

15 A. I remember that number being at least 45  
16 percent.

17 Q. Do you remember it being 55 percent?

18 A. I don't remember whether that was North America  
19 or just U.S., but I do -- I do remember that number  
20 being significantly larger than 16 percent.

21 Q. And do you recall Mr. Gemini then taking the  
22 revenue numbers from the RHEL products and using those  
23 to estimate the number of IP addresses for Fedora?

24 A. For -- for estimating the prorated allocation  
25 between U.S. and the rest of the world for Fedora, yes,

1 I do remember that.

2 Q. Using the revenue from RHEL to estimate U.S.  
3 use of Fedora?

4 A. Yes.

5 Q. Now, you testified that the number of IP  
6 addresses for Fedora is roughly 16 percent?

7 A. That is correct.

8 Q. And my recollection, and Counsel will correct  
9 me if I'm wrong, but my recollection was that the  
10 revenue number that -- the percent that Mr. Gemini used  
11 for the U.S. was 55 percent, okay?

12 A. Okay.

13 Q. My question to you, sir, is: Why would the  
14 percent -- the revenue in the United States for Red  
15 Hat's products be 55 percent and -- as compared to the  
16 number of IP addresses for the Fedora project so much  
17 lower at 16 percent? Can you explain that?

18 A. Sure. Well, first of all, Red Hat's Enterprise  
19 customers are not average entities in the world, so  
20 there are many more large enterprise customers in the  
21 U.S. as a percentage of the overall world than there are  
22 people in the U.S. as a percentage of the overall world  
23 or as a percentage of internet users as a percentage of  
24 the U.S. We have a lot more big companies in the U.S.

25 Q. So how does that explain, then, why your -- for

1 your revenue where people are paying money --

2 A. Right.

3 Q. -- most of it, a lot of it would be from the  
4 United States, whereas for your Fedora project where  
5 people are paying no money at all ever it's so much  
6 lower at 16 percent?

7 A. The most logical explanation that I can think  
8 of is that the enterprise customer in the -- in the  
9 U.S., we see more large companies who have more money  
10 that want to buy enterprise software and subscriptions,  
11 and that is why we see so much more business in the U.S.  
12 on a relative basis.

13 Now, when a --

14 Q. For the -- for the -- for the RHEL product?

15 A. For RHEL, yes. So what the revenue percentage  
16 teaches is how affluent American businesses are compared  
17 to businesses around the world. It does not teach  
18 how -- whether or not any average user walking around  
19 the street would do business with Red Hat.

20 On the other hand, with Fedora having zero  
21 cost associated with it, anybody who is interested in  
22 downloading the software anywhere in the world, could be  
23 rich or poor, speak English or not, can download that  
24 software, install it on their machine.

25 And so the -- the RHEL number talks about

1 really the business of selling subscriptions and the --  
2 and the nature of America's economic strength. The  
3 Fedora numbers teach about internet averages that can be  
4 measured U.S. versus rest of the world.

5 Q. And is that what you were referring to earlier  
6 when you said internet usage generally --

7 A. Yes.

8 Q. -- in 14 percent for the United States?

9 A. Right. Right.

10 Q. Can you explain how that relates?

11 A. Sure. There's a -- there are a variety of  
12 websites that provide an estimate of the total number of  
13 internet users. And one estimate is that it's about 1.8  
14 or 1.9 billion people in the world do have the ability  
15 to get on the internet. Another 4-plus billion don't  
16 even have the ability to connect to the internet.

17 So of that total almost 2 billion people,  
18 there are about 250 million people in the U.S., not the  
19 whole population of the U.S., but about 250 million  
20 people in America can get on the internet.

21 So if you take the fraction, how many  
22 people in America, versus how many people in the world,  
23 you get a fraction which is about 14 percent, 14.4  
24 percent. So it's actually closer to 15 percent.

25 Q. You're not talking about Fedora. Internet

1 usage in the world?  
 2 A. I'm talking about internet usage in the world.  
 3 Q. 15 percent in --  
 4 A. Yes.  
 5 Q. -- the U.S.?  
 6 A. Correct.  
 7 Q. And for IP addresses for Fedora, how much was  
 8 in the U.S.?  
 9 A. For IP addresses, less than 16 percent, a  
 10 little bit more than 15 percent.  
 11 Q. Okay. Pretty close?  
 12 A. Very close, as expected.  
 13 Q. Now, Mr. Gemini was shown a document, a Red Hat  
 14 document that explained why --  
 15 MR. KREVITT: Do we have the document?  
 16 Are we able to pull that up? Oh, that was quick.  
 17 Q. (By Mr. Krevitt) Let's go to the part about  
 18 which Mr. Gemini was questioned. If you look at the  
 19 accuracy of the metrics.  
 20 A. Yes, I see that.  
 21 Q. Do you recall the testimony on this document?  
 22 A. I do.  
 23 Q. Okay. And do you recall Mr. Gemini using this  
 24 document to suggest that IP addresses might actually  
 25 understate the number of users of Fedora?

1 than is represented by this document.  
 2 Q. And what is your position relative to the  
 3 author of this document?  
 4 A. I am vice-president of Open Source Affairs at  
 5 Red Hat, and --  
 6 Q. Is that a more senior position than  
 7 Mr. Fields?  
 8 A. It is a more senior field, but it's also a  
 9 field that takes me to talking with different people who  
 10 provide me with different anecdotes than the ones that  
 11 Mr. Fields might be experienced with.  
 12 Q. A way senior position to Mr. Fields?  
 13 A. Yes.  
 14 Q. Okay. And so do you think you would be in a  
 15 better position given your experience, then, to  
 16 understand whether there's any correlation between IP  
 17 addresses and users and, if so, what that would be?  
 18 A. Well, first of all, if I can share a little bit  
 19 of my anecdotal experience.  
 20 Q. Okay.  
 21 A. The -- the -- the people that I talk with,  
 22 remember, our executives from the public and private  
 23 sector all over the world, and in that group of people,  
 24 most of the contacts that are made between the -- the  
 25 machines at those companies at Red Hat are made because

1 A. I do recall that.  
 2 Q. Do you agree with that?  
 3 A. I do not.  
 4 Q. Now, do you see that it says the anecdotal  
 5 evidence that we received from different groups,  
 6 companies, and organizations suggests that Group 2 is  
 7 significantly larger than Group 1?  
 8 A. I do see that.  
 9 Q. And Group 1 would suggest that the number of  
 10 users might actually be lower than the IP addresses,  
 11 correct?  
 12 A. Yes.  
 13 Q. And Group 2 suggests that the number of users  
 14 might be higher than the IP addresses?  
 15 A. I do see that.  
 16 Q. And so the document seems to be suggesting that  
 17 the number of users may actually be higher than the  
 18 number of IP addresses.  
 19 A. But --  
 20 Q. Do you remember Mr. Gemini saying that?  
 21 A. I do remember -- I do remember him saying that.  
 22 Q. Do you agree with that?  
 23 A. I do not agree with that.  
 24 Q. Can you explain why you disagree with that?  
 25 A. Well, I have different a anecdotal experience

1 of our commercial products. They are not bringing  
 2 Fedora onto the floor of the New York Stock Exchange.  
 3 So there are a lot of large corporate  
 4 users who -- who I have spoken with that do not use  
 5 their corporate firewalls as a gateway to attaching to  
 6 Fedora.  
 7 So in my experience, the idea that there  
 8 are a lot of companies getting Fedora software instead  
 9 of access to our commercial products is not in agreement  
 10 with this statement.  
 11 Q. Do you know why Mr. Fields would have said  
 12 this?  
 13 A. Number one, it could be his experience. Number  
 14 two, it could be that he is trying to help promote the  
 15 popularity of Fedora because promoting popularity is a  
 16 way of achieving more popularity.  
 17 Mr. Fields is successful when more people  
 18 join the Fedora project, bring more great ideas, and  
 19 help make his product better.  
 20 Q. Just turning back to a second to the revenue  
 21 question, is there any correlation at all between the  
 22 amount of revenue Red Hat makes in the United States  
 23 from its RHEL products and the number of users or usage  
 24 or anything regarding the Fedora project?  
 25 A. Absolutely not.

1 Q. Is that -- is that -- is there any correlation  
2 at all?

3 A. I can think of many different ways that there  
4 would be no correlation.

5 Q. And so would it be -- would it be reasonable if  
6 somebody wanted to understand what the usage of Fedora  
7 is in the United States, would it be reasonable to use  
8 the revenue numbers of the RHEL products to do that?

9 A. I think it would be utterly unreasonable.

10 Q. Do you, Mr. Tiemann, believe in the United  
11 States patent system?

12 A. Yes.

13 Q. Why -- why do you believe in the United States  
14 patent system?

15 A. Well, I -- I come from a family of inventors.

16 Q. What do you mean by that?

17 A. Well --

18 Q. You -- you have family members that are patent  
19 owners, is that what you mean by inventors?

20 A. Yeah. Yes, that's what I mean.

21 Q. Can you explain that?

22 A. My -- my brother has two U.S. patents. My  
23 father had 135 patents at the time of his death, and two  
24 more were issued after the time of his death. And I  
25 grew up in a household where patents were a daily

1 of his patents that won him a lot of other awards was  
2 recognized for the Nobel Prize in 2009. And those  
3 patents that he created in all fields of engineering  
4 were a marvel to me.

5 Q. So that's -- that's obviously very impressive.  
6 But how -- how did your father react -- you're not in a  
7 field that focuses on patents. I'm trying to think how  
8 to set that question up. And so how did your father, a  
9 man who had clearly been committed to and benefited --  
10 benefited from the patent system feel when he learned  
11 his son was going to be engaged in the open-source  
12 community?

13 A. Well, he gave me his blessing, and he told me  
14 he was proud. He taught me to program when I was 11.  
15 And when I chose to go into computers, he gave me  
16 encouragement.

17 When I said I was going to drop out of  
18 Stanford, you know, where he got a Ph.D., and start a  
19 company based on open-source software, he said, go get  
20 them. And about three or four years after when it was  
21 clear that that company was on the path to success, he  
22 invited me to GE to make a presentation about how our  
23 software could help GE make better products.

24 And that presentation resulted in our  
25 first contract with General Electric around 1993-1994.

1 conversation around the dinner table.

2 Q. With 135 patents, would -- would getting a  
3 patent be cause for celebration or did it just become  
4 that's what dad does at the office?

5 A. No, it was -- it was -- it was great news. We  
6 were -- we were very proud. We were very proud, and his  
7 accomplishments were amazing.

8 I remember when he got his 25th patent,  
9 they gave him a plaque, and we put a plaque in the  
10 hallway between the kitchen and the dining room. And  
11 for his 50th patent, he got some other special  
12 commemorative awards. And -- and there were not many  
13 people at General Electric that had 50 patents. He was  
14 in a really elite company.

15 And then when he got 75 patents, I think  
16 that was around the time that GE gave him the award, the  
17 Coolidge Award is what GE gives to their best inventors.  
18 Coolidge invented the X-Ray, too. And was next to  
19 Thomas Edison, People at GE thought that he was the most  
20 important inventor, though Thomas Edison is more famous

21 But my dad invented the CCD for digital  
22 imaging, he invented the CAT scanner, he invented  
23 ultrasonic imaging, he invented signal processing for  
24 the HDTV. One of his early inventions resulted in  
25 somebody else winning the Nobel Prize in 1973, and one

1 Q. That was your first contract?

2 A. With GE.

3 Q. Yes.

4 A. We -- we -- we had to eat, so we sold contracts  
5 within, you know, six months of starting the company.

6 Q. Yes.

7 MR. KREVITT: I have nothing further, Your  
8 Honor.

9 Thank you.

10 THE WITNESS: Thank you.

11 THE COURT: Mr. Hill.

12 MR. HILL: Thank you, Your Honor.

13 THE COURT: Would you care to inquire?

14 CROSS-EXAMINATION

15 BY MR. HILL:

16 Q. Mr. Tiemann, how are you today?

17 A. Very well. Thank you, Mr. Hill.

18 Q. We haven't had the chance to meet formally. So  
19 I want to introduce myself. My name is Wesley Hill. As  
20 you know, I represent the plaintiffs, IP Innovation and  
21 Technology Licensing Corporation.

22 Is this your first time in East Texas,  
23 Mr. Tiemann?

24 A. Yes, it is.

25 Q. Well, let me -- let me say as a person of the

1 area, welcome.  
 2 A. Thank you very much.  
 3 Q. Now, Mr. Tiemann, there's a number of things I  
 4 want to talk to you about today, a number of the things  
 5 that you and Mr. Krevitt covered.  
 6 But before I do that, I want to talk about  
 7 one thing that you didn't cover. You guys covered a lot  
 8 of areas, but in my listening, I didn't hear that you  
 9 said anything about whether the products you distribute  
 10 at Red Hat include the technology protected by my  
 11 clients' patents; is that right?  
 12 A. I -- that's an interesting question. My  
 13 understanding is that the technology --  
 14 Q. I'm not looking for your understanding.  
 15 A. Okay.  
 16 Q. I just want to know in the ground that you and  
 17 Mr. Krevitt covered, there was no discussion about  
 18 whether the technology in your products actually  
 19 incorporates technology covered by my clients' patents,  
 20 was there?  
 21 A. There was no such discussion.  
 22 Q. Thank you.  
 23 And I don't mean to cut you off,  
 24 Mr. Tiemann. I -- the Judge keeps us on a clock, and  
 25 I'd just ask for the -- the same courtesy that I know

1 Mr. Krevitt discussed with you. I want to talk to you  
 2 about Plaintiffs' Exhibit 269.  
 3 Plaintiffs' Exhibit 269 -- I apologize,  
 4 but it's a little hard to see. We'll get to the  
 5 beginning there where you can see it -- is an article  
 6 that was published on internetnews.com. You can see the  
 7 title of the article there, November 21, 2008. Red Hat  
 8 Fedora claims it's the leader in Linux. Do you see  
 9 that?  
 10 A. I do.  
 11 Q. And this was a reporter writing an article for  
 12 a publication. And I want to look at the first two  
 13 paragraphs. We've got them, you can see there, and then  
 14 we'll look at the third paragraph, as well. I'll give  
 15 you a chance to read that, and I'll read along with you.  
 16 Counting Linux users is no easy task since  
 17 there is typically no requirement for users to register  
 18 their installations. Yet Linux distributions do try and  
 19 count users in an attempt to quantify their user base  
 20 and relative footprint in the operating systems space?  
 21 Red Hat's Fedora Community Linux distribution has now  
 22 tallied its user base. Do you see that?  
 23 A. I do.  
 24 Q. It says that you have tallied your user base,  
 25 and then it goes on to say that it's a number that on

1 Mr. Krevitt tried to ask for from folks at times. We'll  
 2 go question and answer.  
 3 Now, first off, I want to get into one  
 4 thing that you and Mr. Krevitt covered towards the end  
 5 of your testimony, and that gets us to this issue of  
 6 whether Red Hat tracks or can even determine, if it  
 7 wants to, the number of users of its software products.  
 8 And, specifically, I want to talk to you a little more  
 9 about Mr. Fields. Who is Mr. Fields?  
 10 A. Mr. Fields is an engineer at Red Hat.  
 11 Q. His name is Paul Fields. How long has he been  
 12 with Red Hat?  
 13 A. Probably three, maybe four years.  
 14 Q. And what's -- what's his formal position?  
 15 A. We don't use formal titles very often, but I  
 16 know that he is associated with -- he's a Red Hat  
 17 representative to the Fedora project.  
 18 Q. And the Fedora project is part of Red Hat,  
 19 correct? Red Hat sponsors and runs that project?  
 20 A. It's a -- it is a Red Hat project.  
 21 Q. And Mr. Fields is an employee of the company,  
 22 the company has confidence in him?  
 23 A. That is correct.  
 24 Q. Well, I want to talk to you a little bit about  
 25 some other things. We saw the one document that

1 the surface will make it the largest installed base of  
 2 any Linux distribution, with at least 9.5 million users,  
 3 possibly as many as 10.5 million.  
 4 Now, let's look at the next paragraph  
 5 because that's where it tells us where the reporter is  
 6 getting information. The total number of users has  
 7 always been an incredibly difficult number to measure.  
 8 A. I agree.  
 9 Q. You agree with that statement, don't you?  
 10 A. I do.  
 11 Q. And that's a statement by Mr. Fields. But he  
 12 says, if you total up all of the unique IPs on Fedora 7,  
 13 8, and 9, it adds up to about 9.5 million boxes right  
 14 now?  
 15 A. I disagree with that.  
 16 Q. You disagree with that statement?  
 17 A. Yes.  
 18 Q. Let's look at the bottom of this document, the  
 19 last paragraph. And it goes on to say that this 9  
 20 million that Mr. Fields has tallied does not include  
 21 users of Red Hat Enterprise Linux. So we know the total  
 22 number of users, if you put Enterprise together,  
 23 according to Mr. Fields, with Fedora is in excess of  
 24 9.5 million dollars -- excuse me -- 9.5 million users,  
 25 don't we?

1 A. According -- according to Mr. Frields, yes.  
 2 Q. And then there's another statement here, it  
 3 says, in a recent analysis event, Red Hat executive  
 4 vice-president, Paul Cormier. Who is Paul Cormier?  
 5 A. Paul Cormier is -- is a -- one of the  
 6 co-presidents of Red Hat in charge of the engineering  
 7 and the business units. So he is responsible for the  
 8 RHEL product business, among other functions.  
 9 Q. Another employee in whom you have confidence?  
 10 A. He is a very senior executive of Red Hat.  
 11 Q. Well, he said in a presentation that the  
 12 company currently has over 2.5 million paid  
 13 subscriptions for its Red Hat Enterprise Linux offer?  
 14 A. I see that.  
 15 Q. Do you disagree with that?  
 16 A. I have no reason to disbelieve it.  
 17 Q. Let's look at the next page, the document  
 18 continues on. Top two paragraphs -- excuse me, top  
 19 three.  
 20 As a result, Frields agreed that the total  
 21 Red Hat family of Linux distributions could exceed 13  
 22 million users?  
 23 A. I disagree with that.  
 24 Q. And let's look at the paragraph here where it's  
 25 a quote from Mr. Frields. He says he's personally

1 correct us.  
 2 And in this particular case, I would go to  
 3 Paul and say, Paul, you need correction.  
 4 Q. Mr. Tiemann, why would Mr. Frields be out in  
 5 the marketplace promoting as fact the number of users of  
 6 your products if the company -- you being chief -- a  
 7 higher executive in the company than he, didn't have  
 8 confidence in the numbers? Why would you let him do  
 9 that?  
 10 A. Well, we can't control everybody, and --  
 11 Q. So you're -- you're saying Paul Frields is a  
 12 rogue employee who's out there propagating lies within  
 13 the marketplace?  
 14 A. There's a big difference between propagating  
 15 lies and company propaganda.  
 16 Q. So it's propaganda. So in the courtroom, it's  
 17 not good enough because it's propaganda, but in the  
 18 marketplace, you think that's an okay business practice?  
 19 Is that what you're saying, Mr. Tiemann?  
 20 A. It is a well-accepted practice in American  
 21 businesses to make positive strong claims about one's  
 22 position relative to competitors.  
 23 Q. Is it a well-accepted practice in American  
 24 business to put information in your filings with the  
 25 Securities and Exchange Commission that may not be

1 exceedingly distrustful about people who put out numbers  
 2 without backing up the way they found those numbers. Do  
 3 you see that?  
 4 A. I agree with that.  
 5 Q. And he says, we always document our numbers so  
 6 others can verify them if they want.  
 7 A. I agree.  
 8 Q. We're not just pulling them out of a hat.  
 9 A. Yep.  
 10 Q. Mr. Frields seems to believe in his numbers,  
 11 doesn't he?  
 12 A. I appreciate that he says that he always  
 13 documents his numbers so that others can verify them, if  
 14 they want, because in this process of documentation  
 15 where he has taken unique IP addresses on the one hand  
 16 and systems on the other, added those two numbers  
 17 together to magically create users, that is something  
 18 whose documentation allows me to say that makes no  
 19 sense.  
 20 Q. So you believe Mr. Frields -- you don't have  
 21 confidence in him?  
 22 A. I don't have any confidence in that analysis.  
 23 I've been doing open-source software for a long time,  
 24 and one of our key goals is to make all of our errors  
 25 obvious so that somebody smarter than us can come in and

1 accurate?  
 2 A. That is not a well-accepted practice. That  
 3 practice is frowned on very heavily.  
 4 Q. Of late, it seems it may be a frequent  
 5 practice, but it's not a -- it's not an accepted  
 6 practice; is that right?  
 7 A. That is absolutely correct.  
 8 Q. And let's look a little bit at the 10-K. Now,  
 9 first, let me get you to explain to the jury, if you  
 10 would, what is a 10-K filing with the Securities and  
 11 Exchange Commission?  
 12 A. A 10-K filing is a report that public companies  
 13 file with the SEC to provide all necessary information  
 14 that is required. It's kind of like a big 1040 tax form  
 15 for companies, except a little more complicated than  
 16 that.  
 17 Q. Let's talk about -- you say you don't track  
 18 users. Do you track revenue?  
 19 A. Of course, we track revenue.  
 20 Q. Okay. Let's look specifically at Plaintiffs'  
 21 Exhibit 100. And can you identify that for me?  
 22 A. That appears to be our 10-K form filed on April  
 23 19, 2008, for the fiscal year ending February 29, 2008.  
 24 Q. And I want to look specifically -- this is a  
 25 publicly-available document, is it not?

1 A. That is correct. Anybody can download it from  
2 the internet.

3 Q. And let me make sure I -- I make clear, as  
4 well. Red Hat files this because it's a publicly-traded  
5 company, right?

6 A. I -- I believe that's correct.

7 Q. And Red Hat -- but just to make sure so nobody  
8 misunderstands, a publically-traded company doesn't mean  
9 you're a charity or you're some public-good  
10 organization, right?

11 A. We do -- publicly-traded company simply means  
12 that the public can buy shares and own a percentage of  
13 Red Hat by buying those shares.

14 Q. Your stock is available on the stock exchange  
15 like --

16 A. That's --

17 Q. -- GE's stock or --

18 A. Yeah. In fact, we're available on that same  
19 exchange.

20 Q. And what that means, though, is that Red Hat is  
21 a for-profit corporation, correct?

22 A. That is correct.

23 Q. And the job of Red Hat executives, like the  
24 jobs of any executives of any for-profit corporation, is  
25 to maximize value for its shareholders, right?

1 Q. Please.

2 A. For the year ended February 29th, 2008, total  
3 revenue increased 30.6 percent or \$122.4 million to \$523  
4 million from \$400.6 million for the year ended February  
5 28th, 2007.

6 Q. And that would be the total annual revenue for  
7 your company; is that right?

8 A. Yes.

9 Q. The 523 million number?

10 A. Yes.

11 Q. And then if we look at the last sentence that  
12 begins on this page but ends on the next, that's what I  
13 want to focus on.

14 A. Yes. Okay.

15 Q. And it says, the success of our business model  
16 is influenced by the acceptance and widespread  
17 deployment of our open-source technologies. Our ability  
18 to generate subscription revenue on a per installed  
19 system basis for Red Hat Enterprise Technology and our  
20 ability to increase annual average subscription revenue  
21 per customer by providing additional value to our  
22 customers in the form of additional technology  
23 infrastructure and providing customers with additional  
24 services.

25 A. I agree with that.

1 A. Yes.

2 Q. And that's why it does what it does; is that  
3 right?

4 A. That is one of the -- that -- that is a guiding  
5 principle of how we manage our business.

6 Q. In fact, there's a fiduciary obligation to  
7 those shareholders for you to have that guiding  
8 principle, isn't there?

9 A. Thanks to the Supreme Court, yes.

10 Q. Let's look specifically at Page 39 of --

11 MR. HILL: I think it's another three  
12 pages in there. I'm sorry. I may have my numbers  
13 wrong.

14 Q. (By Mr. Hill) And we're going to look right at  
15 the bottom, the last paragraph, and I know that's hard  
16 to see. It's small print. And I'm hopeful that the  
17 jury -- the folks in the jury can see that.

18 A. I can read it.

19 Q. Can you read it? Okay.

20 And, specifically, the first sentence  
21 there, can you tell us what information that's  
22 conveying?

23 A. It is conveying information about absolute  
24 revenue and revenue growth on a year-to-year basis.  
25 Would you like me to read it?

1 Q. Is it your testimony to this jury that despite  
2 Mr. Fields' statements to the public, that despite your  
3 comments that your ability to continue the success of  
4 your business includes the ability to generate revenue  
5 subscriptions on a per installed system basis and your  
6 ability to increase on a per customer basis, that Red  
7 Hat cannot determine how many users it has of its  
8 products?

9 A. That is --

10 Q. Is that your testimony, your sworn testimony to  
11 this jury?

12 A. That -- that is my testimony.

13 Q. I apologize for taking a second, Mr. Tiemann.  
14 I took a lot of notes, and I've got to sort through  
15 them.

16 A. I'll take a drink of water.

17 Q. Thank you. I wish I had one. I think  
18 somebody's going to -- somebody is going to fix me up.

19 A. We can work together.

20 Q. They did better than me and Mr. Gibbons, we  
21 spilled it all over the floor this morning?

22 Now, I want to talk to you a little bit  
23 about open source. As I understand it the open-source  
24 community is a community; it's not -- it doesn't include  
25 all the businesses in the world. It's just one way of

1 doing business; is that right?  
 2 A. That's right. We talked about having our  
 3 community hat on which is different than our Red Hat hat  
 4 on.  
 5 Q. And we talked earlier about property rights.  
 6 We were talking about -- you were talking about patent  
 7 rights specifically?  
 8 A. Yes.  
 9 Q. Have there been -- you have patents of your  
 10 own, is that --  
 11 A. I do not.  
 12 Q. Has a company that you've ever owned or  
 13 developed had patents?  
 14 A. I believe that we were issued patents as part  
 15 of Cygnus Solutions and that those patents conveyed to  
 16 Red Hat when we were acquired. Red Hat has filed over  
 17 1,000 patent applications, and I believe so far we've  
 18 been granted 42 patents.  
 19 Q. So Red Hat has patents of its own?  
 20 A. Yes, it does.  
 21 Q. Software patents?  
 22 A. They are patents. They do not have a special  
 23 designation on the ribbon copy that says, this is a  
 24 software patent.  
 25 Q. Well, are some of the claims in some of those

1 patents performed by software?  
 2 A. To be honest, I have not reviewed those patents  
 3 in detail, so I can't say without seeing an exhibit what  
 4 exactly is covered by any claims.  
 5 Q. But the idea of the open-source community is  
 6 that if you choose to participate -- and that's key,  
 7 isn't it?  
 8 A. Yes, it is.  
 9 Q. It's a voluntary process?  
 10 A. Yes, it is.  
 11 Q. If you choose to participate, you can have  
 12 access to other things other people have contributed?  
 13 A. Yes.  
 14 Q. And in exchange, you make what you may  
 15 contribute available to everyone else?  
 16 A. That's basically right.  
 17 Q. But if you choose not to participate you still  
 18 retain all of your property rights, don't you?  
 19 A. I -- so anybody -- everybody who has property  
 20 rights maintains those property rights whether they  
 21 participate or not.  
 22 Q. So if you have private property rights and you  
 23 choose not to contribute that property --  
 24 A. Yes.  
 25 Q. -- to the open-source community --

1 A. Yep.  
 2 Q. -- it's still yours?  
 3 A. It's still yours.  
 4 Q. And the open-source community has no right to  
 5 tread on that private property, do they?  
 6 A. No right at all.  
 7 Q. So if someone develops a new idea and they  
 8 think it's a worthwhile idea, they can do one of two  
 9 things. They could go and try to get patent protection  
 10 for that idea if they think it's worthwhile and  
 11 something they want to promote and maybe make a living  
 12 from, couldn't they?  
 13 A. Yes.  
 14 Q. That's the proprietary model, typically?  
 15 A. You don't need a patent to make proprietary  
 16 software. Microsoft created huge value for themselves  
 17 before they ever had any patents at all.  
 18 Q. But if a person wants to innovate and then take  
 19 advantage of that innovation for their own  
 20 benefit --  
 21 A. Yeah.  
 22 Q. -- there's nothing wrong with that, is there?  
 23 A. There's nothing wrong with doing it with  
 24 copyright, with trade secret, trademark, patents.  
 25 Q. That's the American way, isn't it?

1 A. That is the American way.  
 2 Q. We reward innovation in this country under our  
 3 patent system by giving inventors exclusive rights to  
 4 those new and novel ideas in exchange for them  
 5 disclosing that new and novel invention to the public;  
 6 isn't that right?  
 7 A. I was with you in the very first thing you  
 8 said. We reward innovation, I completely agree with  
 9 that. That is the American way.  
 10 Q. And one of the ways that we do that under the  
 11 American patent system is that if someone has a new and  
 12 novel idea and they go to the patent office and they are  
 13 willing to disclose that idea to the patent -- or,  
 14 excuse me, to the public, they, in return, receive the  
 15 exclusive rights to that idea for a certain period of  
 16 years; isn't that right?  
 17 A. That is correct.  
 18 Q. And patents are public, aren't they?  
 19 A. The -- the documents for the patents are  
 20 public, but the patents themselves, I believe, as you  
 21 would explain, are private property.  
 22 Q. Well, exactly. They're private property, but  
 23 if you wanted to go review patents --  
 24 A. Yes.  
 25 Q. -- these patents right here --

1 A. Yes, yes.  
 2 Q. -- at the patent office --  
 3 A. That's right.  
 4 Q. -- you could go check them out like a library  
 5 and look at them?  
 6 A. Yes. Yep. My --  
 7 Q. And you can do that for any patent that's ever  
 8 been issued in this country, couldn't you?  
 9 A. Yes, in fact, you can.  
 10 Q. And the reason we make those available is we  
 11 want innovators to disclose their ideas so that others  
 12 can learn from them and hopefully progress technology?  
 13 A. That is what my dad taught me when I was eight.  
 14 Q. That's a good thing, isn't it?  
 15 A. Yes.  
 16 Q. And if a person discloses to the public their  
 17 new and novel idea and the government reviews it and  
 18 upon that review agrees it's a new and novel idea,  
 19 they'll give them patent protection; isn't that right?  
 20 A. They'll give them a patent.  
 21 Q. They'll give them a patent. And the patent  
 22 provides certain rights, and chief among those rights is  
 23 the right to exclude others from using your invention  
 24 without your permission; isn't that correct?  
 25 A. If the patent is valid, yes.

1 Q. Is a patent presumed valid when it is issued by  
 2 the patent office?  
 3 A. It is presumed valid.  
 4 Q. Let me ask you one thing about that. I notice  
 5 one thing that Mr. Krevitt had asked you at one point,  
 6 and I wanted to follow up on it.  
 7 He said that -- he mentioned at one point  
 8 toward the end there, even if the plaintiff proved  
 9 infringement and validity. Do you remember him saying  
 10 that?  
 11 A. I do.  
 12 Q. We don't have to prove validity, do we?  
 13 A. I believe that part of this trial, as I  
 14 understood the proceedings so far, is that there is an  
 15 open question of validity and that it is possible for  
 16 the defense to basically prove with a clear and  
 17 convincing case that the patent is not valid.  
 18 Q. So it's to the Defendants, it's the Defendants'  
 19 chore, not the Plaintiffs' chore?  
 20 A. That's correct.  
 21 Q. But the presumption is a patent is valid --  
 22 A. Right.  
 23 Q. -- correct?  
 24 A. It's presumed valid but it's not necessarily  
 25 valid.

1 Q. But it's presumed valid because the patent  
 2 office has reviewed it and approved it, and it's  
 3 presumed valid until someone comes forward with clear  
 4 and convincing evidence to the contrary?  
 5 A. Correct.  
 6 Q. I just wanted to make sure we didn't get mixed  
 7 up on that.  
 8 A. I'm with you.  
 9 Q. Now, let's get back to our discussion of these  
 10 patent rights versus the open-source community.  
 11 Now, I described one scenario, which is I  
 12 come up with something. I want to be -- follow the  
 13 American dream and make a success, be a success,  
 14 hopefully achieve financial success based on my work and  
 15 my property, and so I seek patent protection. And if I  
 16 get it, I can then sell my idea to those who wish to use  
 17 it, and I can profit from my innovation, correct?  
 18 A. My father taught me that you cannot patent an  
 19 idea. A patent is very, very specific about what it can  
 20 contain, and my understanding is that you sell a license  
 21 to practice the inventions disclosed.  
 22 But the idea of patenting ideas was  
 23 something which as soon as he told me about patents, he  
 24 said, you cannot patent an idea.  
 25 Q. Well, I apologize if I used loose language.

1 A. Okay.  
 2 Q. What I mean by that is you can patent a device  
 3 if you come up with a new invention?  
 4 A. Correct.  
 5 Q. You can patent the way of doing something, a  
 6 method?  
 7 A. Right.  
 8 Q. And we see claims in this case?  
 9 A. Right.  
 10 Q. Both methods and systems --  
 11 A. Right.  
 12 Q. -- for doing something?  
 13 A. Right.  
 14 Q. And then I can profit from that?  
 15 A. You can -- you can sell a license, and if you  
 16 make a profit, then that means you earned more than you  
 17 spent.  
 18 Q. And that's capitalism, isn't it?  
 19 A. That is one form of capitalism.  
 20 Q. And that is what a lot of companies choose to  
 21 do, is they choose to do their own innovation, their own  
 22 development, and then sell that innovation and  
 23 development to others who want to use it, correct?  
 24 A. A lot of them use trademarks, a lot of them use  
 25 copyrights, a lot of them use trade secrets. Coca-Cola

1 was never patented. It was a trade secret. They made a  
 2 lot of money on a secret.  
 3 Q. And it's theirs?  
 4 A. And it's theirs.  
 5 Q. It belongs to them?  
 6 A. And they own it.  
 7 Q. And let's contrast that now with the  
 8 open-source area. If someone comes up with a new idea  
 9 and they're going to participate in what you advocate,  
 10 which is the open-source community --  
 11 A. Yep.  
 12 Q. -- that means they don't take their idea and  
 13 seek protection for it and seek to profit from it by  
 14 limiting others' access. They voluntarily surrender it,  
 15 correct, to others' use?  
 16 A. That's essentially correct.  
 17 Q. And in exchange for that, they get what?  
 18 A. In exchange for that, they get the benefit of  
 19 working with people who are smarter than they are,  
 20 teaching them how to take what they thought was a good  
 21 idea and make it a better idea. They --  
 22 Q. So -- I'm sorry. I didn't mean to cut you off?  
 23 A. Okay. They -- they -- they profit from that  
 24 from gaining the reputation that being the smartest guy  
 25 in the room, you can get paid a lot of money to go from

1 room to room to room with your great ideas and the  
 2 fountain of great ideas.  
 3 Q. So even if their idea is a great idea in and of  
 4 itself, it's a wonderful idea and it could be a very  
 5 valuable and profitable idea --  
 6 A. Yes.  
 7 Q. -- if they choose --  
 8 A. Yes.  
 9 Q. -- they can turn it over to everybody else?  
 10 A. That is correct.  
 11 Q. And then everyone else can use it and work from  
 12 it, and they get, I guess, a that-a-boy pat on the back  
 13 of having helped everybody?  
 14 A. You're -- you're -- you're describing very well  
 15 the question I asked myself, could I really make a  
 16 business out of this? That was a big question. It took  
 17 me two years to get over the fear of doing business that  
 18 way.  
 19 Q. Well, in fact, you built your own business? It  
 20 was called -- would you tell me?  
 21 A. Cygnus.  
 22 Q. Cygnus. And Cygnus --  
 23 A. C-Y -- C-Y-G-N-U-S, to help the reporter.  
 24 Q. And -- thank you. And I apologize if my speech  
 25 impediment they call East Texas drawl makes it harder on

1 the court reporter.  
 2 You had your own business, Cygnus, and you  
 3 had developed a way of doing business, correct?  
 4 A. That is correct.  
 5 Q. And it was valuable?  
 6 A. It has been.  
 7 Q. And it belonged to you?  
 8 A. It belonged to me and the two other  
 9 co-founders, we were equal partners.  
 10 Q. And you and the two other co-founders didn't  
 11 choose to donate that to the public good, that way of  
 12 doing business. You decided to sell it to Red Hat; is  
 13 that right?  
 14 A. Well, we sold -- we sold the business to Red  
 15 Hat. We -- the -- the way of doing business was not  
 16 something that we could particularly sell.  
 17 Q. You sold your business to Red Hat?  
 18 A. We sold the business to Red Hat.  
 19 Q. How much did you sell your business to Red Hat  
 20 for?  
 21 A. That transaction was valued at 687 million  
 22 dollars in stock.  
 23 Q. So Red Hat obviously found what you had to  
 24 offer quite valuable?  
 25 A. They did.

1 Q. And now Red Hat makes its money by depending on  
 2 others to give it their innovation so that Red Hat can  
 3 sell services surrounding that innovation and profit  
 4 from it; is that correct?  
 5 A. We profit from it because we give as good as we  
 6 get.  
 7 Q. So you depend on others to voluntarily give you  
 8 their ideas without compensation so that you and Red Hat  
 9 can chase the profits that you're obligated to chase for  
 10 your shareholders by selling services surrounding that  
 11 contribution; isn't that right?  
 12 A. I hate to do this, but if you could reask the  
 13 question so I can focus on it because my -- my attention  
 14 span did not quite capture that.  
 15 Q. Okay.  
 16 A. I'm sorry.  
 17 Q. And I apologize.  
 18 What Red Hat does is it asks people to  
 19 voluntarily contribute their innovation to Red Hat so  
 20 that you can incorporate it into a product around which  
 21 you can then profit by selling services and support  
 22 technology, correct?  
 23 A. I would not exactly characterize it that way.  
 24 Q. Is it way off?  
 25 A. It's maybe -- it's -- it's -- it's sort of a

1 little bit the wrong side of the equation.  
 2 Q. Well, let's talk a little bit more about  
 3 software patents.  
 4 A. Okay.  
 5 Q. Software patents get in the way of Red Hat's  
 6 way of doing business, don't they?  
 7 A. They can.  
 8 Q. And the software that you distribute may, in  
 9 fact, contain other people's proprietary information,  
 10 might it?  
 11 A. It's theoretically possible.  
 12 Q. And you don't make reference -- any warranty  
 13 or -- or representation to the people that take your  
 14 free software that it might not infringe someone else's  
 15 patent rights?  
 16 A. I don't think that we warrant and indemnify  
 17 people who download the free software, that that is  
 18 true. But we practice, as best we can, the ability to  
 19 make sure that we do not infringe other people's  
 20 intellectual property.  
 21 Q. Well, I'm probably getting a little far afield  
 22 here. So let me, in the interest of time, just cut to  
 23 the chase, Mr. Tiemann.  
 24 Just because you're in the open-source  
 25 business doesn't mean that the software you distribute

1 infringement.  
 2 Q. And the fact that you give it away doesn't  
 3 change that, does it?  
 4 A. No, that has nothing to do with it.  
 5 Q. Let's talk about the private property rights in  
 6 the form of software patents.  
 7 A. All right.  
 8 Q. You've said in the past that you hate software  
 9 patents; isn't that right?  
 10 A. Probably true.  
 11 Q. I want to show you something specifically.  
 12 I'll just let you confirm for me whether it's accurate  
 13 or not. I'll just put it here on the document camera.  
 14 MR. HILL: Can you switch this on? Thank  
 15 you.  
 16 Q. (By Mr. Hill) This, Mr. Tiemann, is a  
 17 publication, news article.  
 18 MR. KREVITT: Your Honor, I hate to  
 19 interrupt Mr. Hill's examination.  
 20 We were provided no notice of this  
 21 document pursuant to the parties' agreement and to  
 22 exchange documents. The only exception is documents  
 23 used for impeachment. There's no inconsistent statement  
 24 that's been established yet.  
 25 THE COURT: I'll give Mr. Hill latitude on

1 may not practice other people's private property -- or  
 2 private innovations, that they haven't chosen to give to  
 3 that open-source community, does it?  
 4 A. If you look at all the patent lawsuits in the  
 5 country over the last 10 years, everybody has got a  
 6 problem with infringement at some point in time if they  
 7 have any significant revenues. And so to characterize  
 8 that we uniquely suffer from this problem I think is not  
 9 fair.  
 10 Q. Well, I'm not asking whether you suffer from a  
 11 problem.  
 12 A. Okay.  
 13 Q. What I'm asking is, is the open-source  
 14 community above the law?  
 15 A. Absolutely not.  
 16 Q. The same patent laws that apply to me or apply  
 17 to you apply to the open-source community and to Red  
 18 Hat?  
 19 A. That is correct, and we honor those laws.  
 20 Q. If you're distributing a product that contains  
 21 someone else's protected technology, you're an  
 22 infringer; isn't that right?  
 23 A. If we don't have a license to distribute that  
 24 technology, then that would, I believe -- I'm not a  
 25 lawyer, but I believe that that would meet a test of

1 this.  
 2 MR. KREVITT: Thank you, Your Honor.  
 3 MR. HILL: Thank you. The intent wasn't  
 4 to impeach, Your Honor.  
 5 THE COURT: Proceed, Mr. Hill. You don't  
 6 need to talk about it anymore.  
 7 Q. (By Mr. Hill) Now, can you see that okay,  
 8 Mr. Tiemann?  
 9 A. I can. It's a little low on the screen.  
 10 Q. Let me see if I can pull it up.  
 11 A. There you go. That's good.  
 12 Q. All right. This is another business  
 13 publication. This is from BNET Business Network, part  
 14 of ZDNET.  
 15 Are you familiar with those?  
 16 A. I am.  
 17 Q. And it says: Red Hat exec takes Sun to task on  
 18 open source. It's published September 24, 2004.  
 19 Do you see that?  
 20 A. Yes.  
 21 Q. It says: Top Red Hat executive has attacked  
 22 the open-source credentials of its sometime business  
 23 partner Sun Microsystems.  
 24 It goes on to talk about a web blog  
 25 posting: Thursday, Michael Tiemann -- that's you -- Red

1 Hat's Vice President of Open Source Affairs, criticized  
2 Sun for its support of software patents and its decision  
3 to keep Java a proprietary software.

4 A. I see that.

5 Q. Specifically, I want to look at the next page,  
6 and I want to look at the last sentence of this  
7 paragraph that I put the little brackets around.

8 Do you see that okay?

9 And it's a question that you posed. I'll  
10 give you time to catch up.

11 A. Is this the thing in the box?

12 Q. Yes.

13 A. Okay. I've got it.

14 Q. And it says -- the last sentence there of that  
15 paragraph: Would you put your financial muscle in  
16 lobbying credibility behind fighting software patents,  
17 something our community universally hates because it  
18 threatens our ability to innovate?

19 A. I see that.

20 Q. Software patents threaten what you perceive as  
21 your company's business model and your ability to  
22 innovate; isn't that right?

23 A. That is correct.

24 Q. Do you really think you have to be able to take  
25 other people's protected property to be able to

1 somebody like my clients, who own a patent or inventor,  
2 like Dr. Henderson that you heard from earlier, who put  
3 his blood, sweat, and tears into this invention -- do  
4 you think they should be heard to complain when a  
5 company begins distributing to millions and millions of  
6 customers their proprietary software?

7 A. They should be heard -- if you're talking about  
8 complaining in the public speech, which is what I was  
9 doing with my web posting. I was trying to get my  
10 fellow business people and Americans to understand my  
11 position and join with me and say, hey, if Congress can  
12 change the law in 1984 to allow businesses to  
13 collaborate on new innovation, maybe Congress can say  
14 it's the best thing for the Department of Defense; it's  
15 the best thing for the White House; it's the best thing  
16 for the New York Stock Exchange. Maybe America would be  
17 better off if we took this new invention, open source,  
18 and made it more legally protected.

19 So that kind of complaint, I'm sure your  
20 client already complains in various places about the  
21 burdens of being a patent holder. But in terms of legal  
22 complaint the question that I would -- you know, to me  
23 when I hear the question of legal complaint, the  
24 question is, what is the basis?

25 And the basis requires infringement, and I

1 innovate?

2 A. It has nothing to do with taking anybody's  
3 property.

4 MR. KREVITT: Your Honor, I object. The  
5 question wasn't designed --

6 THE COURT: He can -- Mr. Tiemann can  
7 continue to respond to the questions.

8 A. This is not a question of taking. This is a  
9 question of how companies are able to spend their  
10 resources in their plans to innovate.

11 And when our people have to spend years of  
12 effort trying to demonstrate that a baseless allegation  
13 is false, then that takes away from our ability to  
14 innovate, and it puts us in a courtroom and just forces  
15 us to litigate.

16 To me, that is not an efficient use of our  
17 development resources or our financial resources. And  
18 we would not have that problem if people would give to  
19 us the same promise we give to them, which is full  
20 freedom to practice our patents under open source.

21 Q. (By Mr. Hill) But what if they don't want to?

22 A. If they don't want to, I -- I will follow the  
23 law, but I will follow the law and complain.

24 Q. Well, do you also agree that it's -- there's an  
25 equal complaint to be had on the other side of that by

1 don't believe we infringe. In fact -- we don't  
2 infringe.

3 Q. I understand that's your company's contention  
4 in the lawsuit. That's why we're here.

5 A. Right.

6 Q. Because we have a difference of opinion.

7 A. Right.

8 Q. You understand that my client does have a  
9 complaint, and they're voicing that complaint in this  
10 courtroom?

11 A. And I believe in equal access to the law. And  
12 so I believe at the end of the day, it is proper for  
13 both complaints to be heard and for a ruling to be made  
14 on which complaint is the more valid.

15 Q. I want to get back to something you said just a  
16 second ago. You cited that you're complaining in the  
17 court of public --

18 A. Yes.

19 Q. -- public arena.

20 A. Well said.

21 Q. And also complaining to Congress that maybe the  
22 law should be different in certain regards; is that  
23 right?

24 A. Well, to be honest, I don't remember any  
25 specific complaints to Congress, because I don't have

1 the kind of clout that Bobby Ray Inman had when he was  
2 President of MCC.

3 Q. Well, your company has lobbied the Supreme  
4 Court of the United States as well for the abolition of  
5 software patents; isn't that right?

6 A. I would not be surprised to learn that.

7 Q. But it's because you think that the more  
8 acceptable business model is one in which we decrease  
9 the number of private rights, private personal property  
10 rights in this country, and take away people's rights in  
11 exchange for a community where rights can be just open  
12 and communally shared?

13 A. I go back to the Constitution and the specific  
14 wording that explains why we even have patents and  
15 copyrights, which is to promote progress in science and  
16 the useful arts. And I agree with that with all my  
17 heart.

18 And when I read what Thomas Jefferson said  
19 as first Commissioner of the Patent Office and upon his  
20 many reflections of the good and the bad of what evolved  
21 out of the patent system, I find myself really agreeing  
22 with that fundamentalist view that Thomas Jefferson  
23 expressed, which is that an idea should not be patented.

24 Q. And our Constitution protects people's life,  
25 liberty, and property, correct?

1 Q. Let's talk about the products you do  
2 distribute. You're not trying to tell this jury that  
3 you don't make money off the software you distribute,  
4 are you?

5 A. We have tried to tell the jury, and with your  
6 permission, I'll tell them again.

7 We sell subscriptions to Red Hat  
8 Enterprise Linux and other software. We also make money  
9 by selling training and consulting services.

10 Q. So free isn't really free?

11 A. It's just like a horse. If a horse shows up,  
12 it might be free that afternoon, but if you have to take  
13 it to the vet and you've got to feed it, sooner or later  
14 it costs a lot of money.

15 These complex software systems are just  
16 like that. You can get the software for free, but they  
17 need help every day. And that's what we sell, the  
18 ongoing help.

19 Q. In this part of the world, we understand about  
20 selling a man a horse.

21 So let me talk to you a little bit about  
22 your software. You intend to make money surrounding  
23 this software. That's why you put it out there. This  
24 software is your entree to then be able to put your  
25 for-profit products on top of it, correct?

1 A. That's right.

2 Q. And to enhance your business model, you want to  
3 see less property in this world so that you can profit  
4 off of selling services surrounding what used to be  
5 others' private property; isn't that correct?

6 A. It's a balance and a trade-off. It's a balance  
7 and a trade-off that some models work better than  
8 others; some models work better at a given time than  
9 others. And we have seen how much good can be done when  
10 people work together, and we believe that that is the  
11 best way to build technology, which is why we've chosen  
12 that as opposed to the proprietary model of what  
13 Microsoft practices or opposed to the practices of IPI.

14 We've chosen our best guess about how to  
15 make money and hire more people to do more work.

16 Q. So it's a given to your ability, taken to your  
17 need-type paradigm you're pursuing?

18 A. No. I think it's more the American way.

19 Q. Because you know who said given to your  
20 ability, taken to your need, don't you?

21 A. That was Jefferson?

22 Q. That was Karl Marx.

23 A. Oh, okay.

24 Q. Let's talk about something else.

25 A. All right.

1 A. It's a two-part process, a two-step process.  
2 We intend to sell Red Hat Enterprise Linux and to profit  
3 from the sale of Red Hat Enterprise Linux. And we  
4 refresh the ideas in that product and the capabilities,  
5 and we find new competitive ideas of what happens in the  
6 universe that Fedora helps us see.

7 Q. It's a loss leader essentially, your software?

8 A. Anything that doesn't make money, I guess, is a  
9 loss leader. We don't make any money on Fedora. It's  
10 research and development.

11 Q. Do you know what a loss leader is? Do you know  
12 what that means?

13 A. I do.

14 Q. Well, I'll tell you my understanding of it and  
15 you can see if we share the same understanding.

16 I worked for a Brookshire grocery store as  
17 a kid growing up, and we would have sales. When the  
18 sale paper came out on Tuesday, the front page would  
19 have some product on the front that they're selling way  
20 cheaper than they can really sell.

21 A. Yes.

22 Q. They might sell milk for 99 cents a gallon.

23 A. I understand that.

24 Q. And the point is to get people in the door.

25 A. Yep.

1 Q. And so you lose money on the milk, but you know  
2 you're going to make it up everywhere else.

3 A. Yep.

4 Q. That's what you do with your software products,  
5 isn't it?

6 A. Well, we don't -- we make our software sources  
7 available for free, I'll grant you that. But we don't  
8 provide, to my knowledge, you know, 99-cent versions of  
9 RHEL as a loss leader to get people to come into our  
10 store.

11 And, in fact, they don't have to come into  
12 our store. They can download the sources without ever  
13 being customers, so I think that's very different than  
14 the idea of a loss leader.

15 It's a research and development project.  
16 There's a great university in Austin, Texas, where  
17 people come to learn and you pay all that tuition and  
18 what you get out is a degree and you get knowledge,  
19 right? But is that a loss leader?

20 I don't think so. It's a totally  
21 different thing. It's about education.

22 Q. There's no question that that free software is  
23 there for a purpose and the purpose is money.

24 A. The purpose of that software is to help us  
25 refresh the product so that we can move it forward. The

1 So we might have some super wonderful  
2 thing that we want to do in our product, but we can't  
3 because some other company has a patent and we know that  
4 that patent reads on what we want to do. And so we  
5 won't do it, because we can't practice a patent that we  
6 don't have a license to.

7 But we might have a patent that's valuable  
8 to that other company. And so instead of taking money  
9 over to those people, we can say we've got a patent. Or  
10 maybe we take a patent and some money and we trade.

11 And so patents function like those  
12 property deeds in the Monopoly game. Money functions  
13 like money in the Monopoly game. Sometimes you pay  
14 money; sometimes you trade cards; and sometimes you make  
15 a deal with both money and cards.

16 But we are creating value for the company  
17 that we hope to trade with people, if that comes to it,  
18 or that we hope to use for maximizing value in other  
19 ways. It's our right just, as it's your right, to take  
20 a valid patent and assert it as we choose.

21 And one of the remarkable things that we  
22 choose to not do is assert it against the open-source  
23 community.

24 Q. Why would you hold patents instead of  
25 consistent with your open-source community simply

1 money comes from the product.

2 Q. And if you're found to be using someone else's  
3 protected property in Fedora, or RHEL as it's called,  
4 are you saying that Red Hat gets off scot free because  
5 you don't know how extensive your infringement might be,  
6 because you say you can't track the number of users?

7 A. We will obey the law and we will obey the  
8 Court.

9 Q. You understand that the patent statute  
10 guarantees a patent owner at least a reasonable royalty  
11 for infringement, don't you?

12 A. I do.

13 Q. And you're not saying if we infringe, we can't  
14 figure out how many people we give it to, so sorry?

15 A. I fully understand that what is at issue in  
16 this case are some patents and not the patent system.

17 Q. I'm going to go over one last thing.

18 You talked earlier about Red Hat having  
19 its own patents.

20 A. Yes.

21 Q. Why?

22 A. Well, many reasons. One reason is because, as  
23 we've already heard in this case, one of the valuable  
24 things that a patent gives you is the ability to  
25 practice other patents you may not have.

1 dedicating those for public use? Why are you holding  
2 back certain patents?

3 A. Well, because not everybody in the public  
4 community plays by the world as we wish it would be.  
5 And so we use them -- we use them as a shield, and we  
6 have the ability to use them in other ways, if we have  
7 cause to do so. That's part of what private property is  
8 all about.

9 Q. So you have it both ways?

10 A. We -- well, if having it both ways is how you  
11 see it, then that's how we have it.

12 Q. Let me ask you one last question or two, and I  
13 will sit down and try to save everybody's time.

14 Who is Matthias Clasen?

15 A. Matthias Clasen is a principal software  
16 engineer at Red Hat.

17 Q. And he testified by deposition in this case as  
18 a 30(b)(6) witness. Did you hear that?

19 A. I heard that testimony yesterday.

20 Q. He was speaking as a representative of the  
21 company?

22 A. Yes, he was.

23 Q. Where does he work?

24 A. He works at Red Hat.

25 Q. Is he here in Marshall this week?

1 A. Not to my knowledge.

2 Q. Where is he at?

3 A. I imagine that he is wherever he works. I  
4 don't know if he works in Boston. There's 3200  
5 employees at Red Hat, and I don't know the location of  
6 every one.

7 MR. HILL: I'll pass the witness, Your  
8 Honor.

9 Thank you, Mr. Tiemann.

10 THE COURT: Mr. Krevitt, would you care to  
11 inquire further?

12 MR. KREVITT: I do, Your Honor, just  
13 briefly.

14 RECCROSS-EXAMINATION

15 BY MR. KREVITT:

16 Q. Karl Marx. I wasn't expecting that. I wasn't  
17 expecting that.

18 THE COURT: Do you have a question,  
19 Mr. Krevitt?

20 MR. KREVITT: I do.

21 Q. (By Mr. Krevitt) Mr. Hill said that you keep  
22 some of your inventions, patents. Red Hat gets patents.

23 A. Me personally?

24 Q. No. Red Hat keeps its patents and doesn't give  
25 them to anyone, and so in that way it has it both ways.

1 It gets patents and keeps them for itself, but yet it's  
2 getting innovations from other people?

3 A. I do. It's missing one fact.

4 Q. All right. Maybe you're anticipating my  
5 question. Why don't you tell me what that fact is.

6 A. The fact is that we do grant to the open-source  
7 community the value of practicing those patents, and we  
8 don't ask for any royalty or any payment. We give free  
9 permission to them. So we treat the open-source  
10 community in a fully fair way, both ways, and --

11 Q. Just to be clear -- just to be clear --

12 A. Yes.

13 Q. -- that means every person in the world that  
14 agrees that how -- that they will participate in the  
15 open-source community and share their innovations is  
16 free at all times without permission, without contacting  
17 you to use your patents; is that right?

18 A. Essentially. I can make it more precise, if  
19 you want.

20 Q. Please.

21 A. So Red Hat has something called the patent  
22 promise, and we post it on our website, and we think  
23 it's so important when you go to our whole website and  
24 you see all the different nav bars, at the bottom of the  
25 page on every page, you can click on the patent promise

1 to see what promises we make.

2 And what we say in that patent promise is  
3 if you practice a method that we have covered by a  
4 patent and you use one of the open-source licenses that  
5 we list as an acceptable license -- because we don't  
6 want any random person to say, you know, this is an  
7 open-source license, give me your patents, right?

8 So we enumerate what are the acceptable  
9 licenses, which are all well-known and well-understood  
10 by the open-source community. And then we say, if  
11 you're doing it under one of these licenses, you can do  
12 it with no fear that Red Hat will come against you and  
13 assert a patent against you in that way.

14 That's a little more precise, I hope.

15 Q. I think it was. So there -- and I think you  
16 said Red Hat has 40 patents; is that right?

17 A. My understanding is 42 have been issued to Red  
18 Hat so far.

19 Q. And how many pending applications?

20 A. Well, I think we've filed over a thousand. I  
21 don't know precisely how many are pending.

22 Q. So ballpark, we're talking about over a  
23 thousand patents or patent applications?

24 A. That's a lot of money going to patent  
25 attorneys.

1 Q. Okay. And that's all protection that -- if  
2 those patents come out of the Patent Office, that's all  
3 protection that would be Red Hat's to use any way it  
4 wants; is that right?

5 A. Any way it wants and --

6 Q. And following up on Mr. Hill's discussion of  
7 the patent system, that means that Red Hat could, if it  
8 wanted, exclude everyone from using all of those  
9 inventions in all of those patents?

10 MR. HILL: Your Honor, I object to  
11 Counsel's leading during the redirect.

12 MR. KREVITT: I'm just following up.

13 THE COURT: I think you can pose a  
14 question that lets Mr. Tiemann answer.

15 MR. KREVITT: Sure.

16 Q. (By Mr. Krevitt) What rights would Red Hat have  
17 if it wished to, to assert those patents or patent  
18 applications when they issue out of the Patent Office?

19 A. When they issue out of the Patent Office, Red  
20 Hat has every right in the world to assert that patent  
21 against anybody who infringes the claims of the patent,  
22 and --

23 Q. So Red Hat could, if it chose to, do what IPI  
24 is doing here and sue people?

25 A. That is exactly correct.

1 Q. But Red Hat has made a commitment; is that the  
2 patent promise you were talking about?

3 A. We have made a choice and that choice is that  
4 we offer patent peace to those who put their software  
5 under a set of open-source licenses, and we reserve all  
6 of our rights that the patents provide for anybody who  
7 chooses to work in another way.

8 Q. And that's true -- is that true of everybody  
9 who contributes to open source; they all keep their  
10 patent rights, if they have any patent rights?

11 A. Yes. We don't say that you lose your patent  
12 rights by joining Red Hat. But what we do say is we can  
13 reject your software, if it's encumbered by patents that  
14 you cannot grant to the whole open-source community.

15 Q. Now, are there instances in which somebody will  
16 say to Red Hat, hey, we think you're infringing our  
17 patents? Has that happened? Or we think to use this  
18 technology, you would be infringing our patents?

19 A. There's well-known software out there which we  
20 are very cautious about, because we are convinced that  
21 in order to implement that software, we would have to  
22 practice claims from a non-expired patent.

23 Q. So are you saying you're concerned, because to  
24 incorporate that functionality in your product might  
25 mean that you fell within the scope of someone else's

1 in London, UK, and they happily include an MP3 player  
2 and they have been rapidly overtaking the popularity of  
3 our Fedora Project and other Linux distributions,  
4 because, to paraphrase an old song, I want my MP3.

5 And so we can't provide that as an  
6 open-source implementation, even though we know how to  
7 do it. It's easy to write the code; it's impossible to  
8 get the patent rights we need. So we are literally deaf  
9 and dumb as far as the computer is concerned, because we  
10 can't do audio files legally, and so we don't.

11 Q. So you could just add it and hope for the best  
12 that they wouldn't sue you, right?

13 A. That's not how we do business.

14 Q. It isn't?

15 Are you looking at taking anyone's  
16 property rights away?

17 A. No.

18 Q. That's not Red Hat's mission, to take away  
19 people's property rights?

20 A. No. Our mission is to add value to our  
21 customers and return value to our shareholders.

22 Q. Do you know, roughly, how long the feature  
23 that's accused of infringement in this case has been in  
24 the Red Hat distributions?

25 A. My understanding is that the accused feature

1 patent?

2 A. Exactly. And we avoid that.

3 Q. By avoid that, what do you mean?

4 A. That means that if we are aware or have reason  
5 to believe that a particular piece of software is  
6 covered by a patent that does not provide the rights,  
7 the necessary rights for anybody in the open-source  
8 community to practice that patent, then we will say --  
9 we will not put that into our open-source projects.

10 Q. And is that just talk, or are there examples of  
11 Red Hat having put its money where its mouth is and not  
12 put features in that might infringe someone's patents?

13 A. There's a really great example of that.  
14 There's a file format called MP3, which is used for  
15 music and media files, and the MP3 encoders and decoders  
16 are covered by software patents. And we preemptively  
17 said that we will not accept any implementation of MP3  
18 players in our Fedora Project, because we do not want to  
19 trespass across those patents. And that has really hurt  
20 the popularity of Fedora.

21 Q. What do you mean hurt? Has it put you at a  
22 competitive disadvantage?

23 A. It has. We heard earlier about another  
24 distribution who is not present in the courtroom, the  
25 Ubuntu distribution. They, as I understand, are based

1 first appeared in 1997.

2 Q. And do you know who owned -- just from having  
3 sat through this trial already, do you know who owned  
4 the patents in 1997, the patents that are at issue in  
5 this case?

6 A. It was the Xerox Corporation.

7 Q. Do you know until how long the Xerox  
8 Corporation has had those patents?

9 A. They had those patents until 2004.

10 Q. And then in 2004, the Plaintiffs were given  
11 those patents?

12 A. That is my understanding from this trial.

13 Q. At any time ever between 1997, when this  
14 feature appeared in your products, and 2004, when Xerox  
15 gave the patents to the Plaintiffs, at any time in any  
16 way did Xerox ever contact Red Hat and say, hey, we  
17 think we've got a problem with our patents?

18 A. I'm unaware of any such contact by Xerox of any  
19 person associated with Red Hat or the Fedora Project.

20 Q. And because of the open-source nature of your  
21 products, the way you do what you do -- the way you do  
22 this feature that's accused of infringement has been  
23 publicly available every second it's been out there; is  
24 that right?

25 A. That's right. We don't know how many users

1 have been exposed to that feature, but it's more than  
2 one.

3 Q. Well, I guess my point is, we know that  
4 starting in 1997, the -- there was nothing secret about  
5 it.

6 A. Nothing secret.

7 Q. Nothing that Xerox couldn't have seen --

8 A. No.

9 Q. -- in '97?

10 A. No.

11 Q. Or '98 or any year.

12 And then in 19 -- excuse me -- in 2004,  
13 the Plaintiffs in this case got the patents?

14 A. Yes.

15 Q. And in October of 2007, they sued Red Hat?

16 A. Yes.

17 THE COURT: Excuse me. I see Mr. Hill on  
18 his feet.

19 MR. HILL: Your Honor, I don't mean to  
20 drag things out, but I believe this is beyond the scope  
21 of the cross-examination. There was no licensing with  
22 Xerox or any of that chronology.

23 THE COURT: I don't remember that.

24 MR. KREVITT: Your Honor, there was  
25 extensive examination on whether or not Red Hat cares

1 about possibly infringing people's patents. In one part  
2 of the question and answer on that is when any patents  
3 are brought to their attention, they act immediately and  
4 responsibly.

5 THE COURT: You may proceed.

6 MR. KREVITT: Thank you, Your Honor.

7 Q. (By Mr. Krevitt) So you recall in 2004 that  
8 Plaintiffs are given the patents; in 2007, they go ahead  
9 and sue Red Hat?

10 A. Yes.

11 Q. And at any time before the notice letter -- and  
12 just so we're all clear, I'm referring to the letter  
13 that the Niro firm sent the day before they sued us.

14 A. October 8, 2007?

15 Q. Yes. Yes.

16 At any time before Red Hat received that  
17 notice letter in the years from 2004 to 2007, did the  
18 Plaintiffs or anyone on behalf of the Plaintiffs, the  
19 Niro firm, anyone ever bring these patents to Red Hat's  
20 attention?

21 A. Not to my knowledge at all.

22 Q. No one ever said, hey, we think you've got a  
23 problem?

24 A. Nobody.

25 Q. Okay. Now, I asked you whether the feature was

1 secret, and you said it wasn't. And we were talking  
2 about whether Xerox could have known about it.

3 Remember that?

4 A. Yes.

5 Q. In fact, do you recall seeing earlier today an  
6 exhibit during Mr. Gemini's testimony, which was a  
7 Microsoft/Xerox agreement?

8 A. I do.

9 Q. And do you recall that that agreement  
10 specifically identified Linux?

11 A. I saw it not only identifying Linux, but  
12 actually Linux as a category of a broader open-source  
13 software domain. And so it specified not only Linux,  
14 but it specified many other open-source programs,  
15 including GNOME and others.

16 Q. And it's GNOME that has the feature that's  
17 accused of infringements; is that right?

18 A. That is correct.

19 Q. So we know Xerox knew about this feature,  
20 correct?

21 A. We know that they knew about GNOME.

22 Q. We know they knew at least about GNOME. Fair  
23 enough. Good clarification.

24 I think you answered some questions as to  
25 your feelings on software patents, and nobody in the

1 courtroom was left with any ambiguity regarding those  
2 feelings.

3 Do you think that this litigation is an  
4 example of why you dislike software patents?

5 A. This -- the litigation is precisely the problem  
6 that I wrote about extensively, not just in that but in  
7 other postings.

8 And to give you an example of this, the --  
9 it was in 1995 that I had an SGI computer on my desktop,  
10 and I remember seeing the notice that was on that very  
11 screen that a particular feature, which I happened to  
12 not use, would disappear from the computer.

13 And I thought to myself, it's a software  
14 patent, and I wonder what the consequence of this  
15 software patent will be in my life. And at the time, I  
16 just thought, I'm losing a feature off the desktop. And  
17 I had no idea that that notice in 1995 in Mountainview,  
18 California, would land me in a courtroom in Marshall,  
19 Texas, 15 years later.

20 Q. What, sir, about this lawsuit -- what about  
21 this lawsuit makes you uncomfortable with some of these  
22 software patents that are out there?

23 A. The thing that makes me the most uncomfortable  
24 is that the question of infringement is something which,  
25 as a technical person and as a computer user, I can find

1 no basis for the claims that are being alleged against  
2 Red Hat, and yet here we are taking the jury's time to  
3 decide this issue.

4 And so the question -- if infringement can  
5 be such a questionable case, then that limits people's  
6 willingness to innovate, because who knows what is  
7 contained in the next 300,000 patent applications going  
8 to the Patent Office or the next 150,000 patents that  
9 are coming out.

10 How is it possible to safely talk with  
11 somebody, get an idea, implement it, and not have, 15  
12 years later, litigation come down on your head?

13 Q. Maybe that answer answers my next question.  
14 But I wanted to ask another question, which was just  
15 following up on Mr. Hill's first.

16 Mr. Hill seemed to take us for task,  
17 probably me more than you, for not raising the question  
18 of whether the technology that's accused of infringement  
19 in this case actually infringes.

20 Do you remember that?

21 A. Yes.

22 Q. Okay. Does the technology that's accused of  
23 infringement in this case infringe in your view?

24 A. Not in my view.

25 MR. KREVITT: I think that's all I have,

1 Dr. Zimmerman that testified. And this jury heard his  
2 testimony, and I think they may have a little different  
3 view of whether this is a frivolous lawsuit or not based  
4 on that testimony. But you didn't have the benefit of  
5 hearing that, did you?

6 A. I'm sorry, I did not.

7 Q. Now, you understand, don't you, Mr. Tiemann,  
8 that my clients have not joined your club, right? Your  
9 open-source community?

10 A. They have not offered to us the promise that we  
11 offer to others. We would gladly accept the promise to  
12 practice those claims of now expired patents in our  
13 products. I guess now we have no fear today, but this  
14 is about the past.

15 Q. This is about the past. They want to keep  
16 their private property theirs and not donate it to your  
17 community. And you understand that the reason they're  
18 in this courtroom is because they don't want their  
19 property freely given away by you.

20 Do you understand that?

21 A. I understand that they're in this courtroom to  
22 try to win a judgment.

23 Q. And would you agree with me that a company can  
24 make bigger margins if you don't have to develop your  
25 own technology?

1 Your Honor.

2 THE COURT: Mr. Hill, anything further?

3 MR. HILL: Yes, Your Honor, thank you.

4 RE-CROSS-EXAMINATION

5 BY MR. HILL:

6 Q. Mr. Tiemann, I want to cut to the chase to the  
7 very end of what Mr. Krevitt was asking you about.  
8 You're calling this a frivolous lawsuit, aren't you?

9 If you're going to say it, just come on  
10 out and say it.

11 A. This is a very serious lawsuit.

12 Q. You said it was baseless?

13 A. I believe our software does not infringe, and  
14 so there's no basis for damages.

15 Q. So you're calling this a frivolous lawsuit.

16 A. It's a very serious lawsuit with allegations  
17 that we owe millions of dollars. I take it very  
18 seriously.

19 Q. And you say we have no basis for our claim of  
20 infringement. Let me ask you then, I assume you were in  
21 the courtroom. You heard the testimony from  
22 Dr. Zimmerman?

23 A. I was absent during his testimony. I  
24 apologize.

25 Q. Oh, okay. Well, there was a gentleman named

1 A. I don't know that I would agree with that as a  
2 general economic principle.

3 Q. Having people give you the technology you  
4 provide rather than having to spend money on research  
5 and development to develop it all yourself certainly  
6 cuts costs, doesn't it?

7 A. It cuts some costs; it adds other costs. We  
8 have to sift through billions of lines of source code to  
9 figure out which 200 million we're going to put into the  
10 next version of Fedora. There's a lot of cost in having  
11 access to a billion lines of source code.

12 Q. I guess just like having to sort through what  
13 people donate runs up cost for the Goodwill?

14 A. It does. And I don't see the people who run  
15 Goodwill making a lot of money.

16 Q. Well, let's talk about one last thing.

17 You mentioned that my client sued you  
18 right after they sent a notice letter; isn't that right?

19 A. I don't think I was the one who made that  
20 mention.

21 Q. Well, I'll just say it as fact. We sued you  
22 right after we sent you a notice letter.

23 A. Yes.

24 Q. I want to show you something. I want to show  
25 you a copy of Plaintiffs' Exhibit 326.

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1 Can you tell us what this is?

2 A. This is a license which I helped write in 1991.

3 Q. Is this an open-source license?

4 A. Yes, it is.

5 Q. And it's a Version 2?

6 A. Yes, it is.

7 Q. And that's a valid version under which your

8 products can be distributed and people can participate

9 in the open-source community?

10 A. Yes, it is.

11 Q. And I want to look at the second to the last

12 paragraph right down here.

13 MR. HILL: Thank you.

14 Q. (By Mr. Hill) And it says: Finally, any free

15 program is threatened constantly by software patents.

16 A. I see that.

17 Q. And then the last sentence says: To prevent

18 this, we have made it clear that any patent must be

19 licensed for everyone's free use or not licensed at all.

20 A. I see that.

21 Q. Do you think my client might have sued you

22 because they knew if they signed a license with you,

23 they'd have to license everybody in the world as a

24 result through you, because you wouldn't sign a license

25 otherwise, would you?

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1 A. Do you understand the use of the word free

2 there? Do you understand that that word, free, is not

3 meant to imply free of charge, but it is meant to mean

4 free as in freedom.

5 Q. You will not take a license from a third party

6 unless that party agrees that their software can be

7 distributed into the open-source community and

8 reproduced freely after that, will you?

9 A. That is correct.

10 Q. Do you think that might give somebody reason to

11 figure it's not going to do me any good to negotiate

12 with this guy?

13 A. I think that might give somebody who has a very

14 short lifespan left on their patent and someone willing

15 to make a lump-sum payment for dismissing whatever the

16 remaining claim value is on that short term, that that

17 would look like a very attractive offer.

18 MR. HILL: I pass the witness, Your Honor.

19 Thank you.

20 THE COURT: Mr. Krevitt?

21 MR. KREVITT: I have no further questions.

22 THE COURT: Thank you. You may step down.

23 THE WITNESS: Thank you very much.

24 THE COURT: Mr. Krevitt, would you like to

25 call Mr. Reiter, so to speak?

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1 MR. KREVITT: I'll switch seats with my

2 colleague, Your Honor.

3 MR. REITER: You get me again, Your Honor,

4 or the jury gets me again.

5 Just a question, Your Honor. We're

6 approaching 3:00 o'clock. Do you want us to start the

7 next witness, or would you like to take the --

8 THE COURT: You're trying to win the

9 favor.

10 MR. REITER: It's my turn.

11 THE COURT: Okay. Let's take our break.

12 (Recess.)

13 (Jury in.)

14 THE COURT: Please be seated.

15 And, Mr. Reiter, I see you're on your

16 feet.

17 MR. REITER: Defendants would like to call

18 their next witness, Mr. Gerry Riveros.

19 COURT ROOM DEPUTY: Raise your right hand,

20 please.

21 (Witness sworn.)

22 THE COURT: You may proceed.

23 MR. REITER: Your Honor, I have notebooks.

24 GERRY RIVEROS, DEFENDANTS' WITNESS, SWORN

25 DIRECT EXAMINATION

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1 BY MR. REITER:

2 Q. Good afternoon. Would you state your name for

3 the record, please?

4 A. Yes, my name is Gerry Riveros.

5 Q. And who are you, Mr. Riveros? What do you do?

6 A. I work for Red Hat and I'm here to explain how

7 Red Hat markets Red Hat Enterprise Linux and also

8 explain how our customers use our software.

9 Q. What's your position at Red Hat?

10 A. I'm a senior product marketing manager for our

11 server product.

12 Q. Where do you work?

13 A. I work in North Carolina.

14 Q. Is that on the campus of North Carolina State?

15 A. That's correct, yeah, North Carolina State

16 University.

17 Q. You went to the University?

18 A. No, I didn't. I went to Michigan.

19 Q. Big 10 school?

20 A. Definitely.

21 Q. Where are you from originally?

22 A. I'm from the Midwest. I'm from Indiana.

23 Q. How did you get to North Carolina?

24 A. Taking the job. I've always wanted to work for

25 Red Hat. That's one of the key companies, and I got the

1 opportunity to do that.

2 Q. Okay. What -- what did you study in school?

3 A. I studied aerospace engineering.

4 Q. How long have you worked for Red Hat?

5 A. I started -- about seven years. I started in  
6 May of 2003.

7 Q. And what was your first position there? What  
8 did you start doing?

9 A. So I started -- I managed all of the marketing  
10 for our desktop product.

11 Q. You talked about desktop product. What is that  
12 in comparison to RHEL or the other products?

13 A. Certainly -- certainly. So we have two  
14 products. As you guys know, we have Red Hat Enterprise  
15 Linux, which is just a computer operating system like  
16 windows, and there's two versions of it. There's one  
17 version that's for servers and then there's another  
18 version that's for desktops. And -- but overwhelmingly,  
19 by a long, long measure, what we typically sell is just  
20 our server products.

21 Q. Now, when you say you sell your server  
22 products, what do you mean by sell?

23 A. Yeah, so the software itself is free, but what  
24 we sell are basically subscriptions which are really  
25 just support contracts.

1 Q. And how does -- how does Red Hat make its money  
2 if it's giving away the software?

3 A. So again, it's that we sell support contracts.  
4 So basically if -- if a customer has a problem, they  
5 have the ability to call us and then we'll help them to  
6 fix that problem.

7 Q. How does RHEL compare to -- well, let me ask  
8 you first, do you know what Fedora is?

9 A. Yeah, I'm familiar with Fedora -- what Fedora  
10 is, but it's not a product that I'm responsible for so I  
11 don't really keep up with it.

12 Q. Are you responsible for marketing or anything  
13 with Fedora?

14 A. No, not with Fedora. Only with Red Hat  
15 Enterprise Linux.

16 Q. Now, you said you are I think the senior  
17 product marketing manager of Red Hat?

18 A. Correct.

19 Q. Long title?

20 A. Yeah, exactly. Makes for an interesting  
21 business card.

22 Q. Yeah, I was going to say. And what do you mean  
23 by marketing? What is -- what is that?

24 A. Yeah, so what I'm responsible for is talking to  
25 our customers and understanding how they use our

1 software, so that way I can figure out what it is that  
2 we need in our software to keep our current customers  
3 happy and then also what we need to have in it such that  
4 we can attract new customers and that they want to  
5 choose to buy our product instead of our competition's.

6 Q. You guys in your marketing group, you develop  
7 messages for your customers?

8 A. Yeah, exactly. So like the things that we're  
9 responsible for is figuring out what are the features  
10 that we put into the product, how do we price, what  
11 markets do we put it in, and then what are the key  
12 messages, like what are the key features and benefits  
13 that we want to talk to our customers about to again  
14 highlight why we're better than our competition or how  
15 it's going to save them money.

16 And the way we distribute those messages  
17 is we create these marketing publications. It's  
18 basically like a brochure where we give an overview of  
19 what our -- our products are. We also create  
20 specification sheets which go into more nitty-gritty  
21 technical details about the features of our product, and  
22 then we also create white papers which tell our  
23 customers what's the best way to use our software.

24 Q. So it's more than just a slogan; you actually  
25 put together real information talking about real

1 features that really interest your customers; is that  
2 right?

3 A. Yeah, exactly. So I mean we create hundreds  
4 and hundreds of pages of marketing documents.

5 Q. And do you participate in creating those pages?

6 A. Yeah. So I personally create these documents  
7 and then I also review all the documents that my group  
8 creates before it goes out to our sales teams and our  
9 customers.

10 Q. And you -- you just mentioned your customers.  
11 Do you ever see any of your customers?

12 A. Yeah, I do. So I've -- I talk to our customers  
13 all the time. That's one of the key responsibilities of  
14 my job in that I need to understand how they use the  
15 software. So I talk to them, find out how we compare to  
16 our competition, find out what are the features that  
17 they want, what complaints do they have around our  
18 software. I also survey them, again, to get their  
19 opinion about our software, and then I use all that  
20 information to figure out how to make our software  
21 better.

22 Q. So you say you figure it out. You use it to  
23 determine how to make the software better. You actually  
24 program the software?

25 A. No, no, no, I don't. What I'm saying is that

1 my group is responsible for figuring out those  
2 particular pieces of information. So, again, like I  
3 said, we go and -- and talk with the customers or like  
4 I've personally visited their data centers and seen how  
5 they use our software to again better understand what it  
6 is that we need to give them to make sure that they stay  
7 a customer of ours.

8 Q. So you talked about how you understand what the  
9 customers do or what the customers need. How do you get  
10 an understanding of what the product actually does?

11 A. So what I do is -- is I talk to the software  
12 developers, and I talk to them so that they can explain  
13 to me what is this feature, how does it work, how does  
14 it benefit our customers, and how are they going to use  
15 it. And then they also give me demonstrations that show  
16 me how the features work and how customers are going to  
17 use those features.

18 Q. Customers ever report back to you, give you  
19 feedback, tell you anything good or bad about the  
20 product?

21 A. Yeah, all the time. So, again, one of our key  
22 responsibilities is to talk to our customers, and we get  
23 all kinds of feedback from them.

24 Q. Now, how does -- how does Red Hat distribute  
25 RHEL, Red Hat Enterprise Linux?

1 prices is that we provide three different levels of  
2 support. So at the lowest price -- our lowest priced  
3 option, which comes with the lowest level of support,  
4 it's called basic. And basically what that means is, is  
5 if you have a problem, you can contact us via the  
6 internet. You basically fill out a web form, and then  
7 we can take up to two days to get back to you and start  
8 to try to help fix your problem.

9 Q. There's also a standard subscription?

10 A. Yeah, exactly. So you pay a little bit more  
11 money, and then we're going to give you a little bit  
12 more support. So basically with standard support, that  
13 means that you can call us when you have a problem and  
14 you can call us during normal business hours and then if  
15 your computer is broken down, then we'll get back to you  
16 within one hour and start helping you to fix your  
17 problem.

18 Q. And then what about the premium subscription?

19 A. Right. So that's -- that's our highest level  
20 of support. It costs more money. And when you have  
21 premium level support, that means you get the same stuff  
22 that we give you with standard support, except instead  
23 of only having -- you know, being able to call us during  
24 normal business hours, you can call us around the clock,  
25 24 hours a day, seven days a week.

1 A. Yeah, exactly, so they -- the software itself  
2 is free. And so, again, what we sell are subscriptions  
3 which again are just nothing but support contracts.

4 MR. REITER: Okay. I want to put up DX  
5 270, please.

6 Q. (By Mr. Reiter) You have a binder in front of  
7 you, Mr. Riveros, if you need to look at it, but it will  
8 be on the screen?

9 Do you know what this document is?

10 A. Yeah, I'm familiar with this document, and it's  
11 actually one that I personally wrote.

12 Q. What is it?

13 A. It's basically a price list for all of our Red  
14 Hat Enterprise Linux products.

15 Q. Okay. And, again, by products, you're talking  
16 about the services that Red Hat provides, right?

17 A. That's correct, so all the services that we  
18 provide and which really is the support that we provide  
19 to our customers.

20 Q. Okay. And looks like on the -- the document  
21 there's three different levels, a basic, a standard, and  
22 a premium; is that right?

23 A. Yeah, exactly. Like I was saying, we provide  
24 the -- the software is free, and what we provide is  
25 support. And so the reason that you see three different

1 Q. And this is principally how Red Hat makes its  
2 money by selling these services?

3 A. Exactly. It's through these support contracts  
4 that we make our money.

5 Q. Okay. Now, you said you met with some  
6 customers; is that right?

7 A. Yes.

8 Q. Give me an example of one or two customers you  
9 met with.

10 A. Yeah, certainly. So one customer that I'm  
11 really familiar with is FedEx. So FedEx buys our server  
12 software. And the way that they use it is they put it  
13 on servers that -- that runs their website. So that's  
14 where like you and I could go and we could schedule a  
15 pickup or track our package. They also use our serve --  
16 our server software on the servers that basically track  
17 in realtime where all the packages are, where all their  
18 airplanes are, and where all their delivery trucks are.  
19 And then they also use our server software to -- on  
20 servers that store all their customers' information.

21 Q. Anybody else, any other customers you've met  
22 with?

23 A. Yeah. So another one that I'm very familiar  
24 with and one that I actually like walked through their  
25 data center and saw how they use our software is Bank of

1 America. And, again, they buy our server software, and  
2 the way that they use it is, again, it powers the  
3 servers that runs their website. They also use it on  
4 the servers that does all their check -- check  
5 processing. And they also use it on all the servers  
6 that store their customer -- customers' information and  
7 their bank balances.

8 Q. What is your understanding of why these  
9 customers like FedEx and Bank of America come to Red  
10 Hat? Why do they -- why do they buy RHEL?

11 A. Right. So they choose us because we provide  
12 the best value for their money in terms of performance  
13 and security because those are the two things that our  
14 customers really care about and that's -- they want the  
15 best performance. They want to be able to process the  
16 most transactions that they possibly can. And they also  
17 want the highest levels of security so that no one can  
18 break into their -- their servers and steal their  
19 confidential information.

20 Q. Now, you said you walked through I think -- was  
21 it Bank of America?

22 A. That's correct.

23 Q. And you saw all the servers and all the  
24 computers lined up?

25 A. That's correct.

1 Do they -- what do they look like?

2 A. Yeah, so those monitors typically you're  
3 running them one of two ways. One is where you're  
4 running them without graphics, where the screen is just  
5 a black screen, no graphics, and -- and just text.

6 Q. Just like, you know, the Apollo 11, see the old  
7 movies, like Apollo 13 with Tom Hanks?

8 A. Yeah, just like the little computers where all  
9 you see is this green screen that just has text on it.

10 And then another way that they run it  
11 is -- is they're usually just running like Microsoft  
12 Windows desktop on it.

13 MR. REITER: Let me put up DX 241, please.

14 Q. (By Mr. Reiter) Is the -- do you recognize this  
15 document, Mr. Riveros?

16 A. Yes, I do.

17 Q. How do you know this document?

18 A. This is a document that my group, the Red Hat  
19 marketing group created.

20 Q. What was the purpose of this document?

21 A. So this -- this document is a best practices  
22 document. It's to tell our customers the best way to  
23 use our software.

24 Q. And do your customers actually use your  
25 software or the RHEL software in this manner?

1 Q. And what did that look like?

2 A. So -- again, predominantly, almost -- you know,  
3 again, by a long, long measure, what customers buy from  
4 us is our server product. And the way that they use it  
5 is they use it to power a server, and then on top of  
6 that server they run their business applications. And  
7 then these servers are housed in a special room that's  
8 called a data center. So if you went and looked at a  
9 data center, all you would see is just rows and rows of  
10 hundreds and hundreds of servers and disk drives.

11 Now, what you wouldn't see is -- is  
12 monitors hooked up to each one of those.

13 Q. Wait a second. Let me interrupt you.

14 How are -- how are the people able to work  
15 with your computer if there's no monitor?

16 A. Right. So, again, the way that you run a  
17 server is you don't hook it up to a monitor. Instead,  
18 what you have is this room that has hundreds and  
19 hundreds of servers and then you have just a couple of  
20 machines, like a handful, like one or two that are  
21 called system administration terminals. And then those  
22 system administration terminals, they have a monitor and  
23 they are what people use to tell the servers what to do.  
24 And --

25 Q. How do those -- how do those monitors interact?

1 A. Yes, exactly. So, again, what they mostly buy  
2 is our server software, and the way that they use it is  
3 they install it on their servers and then on top of  
4 those servers, they run their business applications.

5 MR. REITER: Let's turn to page 3 of  
6 DX 241, please -- page 3. And if we could blow up the  
7 picture at the bottom, please.

8 Q. (By Mr. Reiter) What does that show,  
9 Mr. Riveros?

10 A. Yeah, exactly.

11 So this is a picture of a typical data  
12 center. So, again, what you're seeing is just rows and  
13 rows of servers and disk drives.

14 And, again, what you're not seeing is you  
15 don't see any monitors because, again, you don't run a  
16 server with a monitor.

17 Q. Okay. I want to switch subjects just slightly  
18 and talk about what customers ask for or don't ask for  
19 from -- from you and your marketing people.

20 MR. REITER: So to help with that  
21 discussion, let's put up DX 240, please.

22 Thank you.

23 Q. (By Mr. Reiter) Have you seen this document  
24 before, Mr. Riveros?

25 A. Yes, I have.

1 Q. What is this?  
 2 A. So this is another document that my group put  
 3 together, and it's basically an overview of our products  
 4 when we released Red Hat Enterprise Linux Version 4.  
 5 Q. Okay. And you understand Red Hat Enterprise  
 6 Linux Version 4 is one of the accused products in this  
 7 case?  
 8 A. Yes.  
 9 MR. REITER: Now, let's turn to page 9 of  
 10 Exhibit DX 240. And let's blow up the technical feature  
 11 section.  
 12 Q. (By Mr. Reiter) What does this show?  
 13 A. Again, this is a marketing document. Basically  
 14 here we're just talking more in-depth about what are the  
 15 features that we offer, why we're better than our  
 16 competition, and why they should buy our product instead  
 17 of our competition's.  
 18 MR. REITER: Okay. And let's -- let's  
 19 turn to page 13. Page 13, right, and if you could just  
 20 blow up the bottom part where it says Red Hat desktop.  
 21 Q. (By MR. Reiter) What is Red Hat desktop?  
 22 A. Again, what we -- what we produce is two  
 23 versions of Red Hat Enterprise Linux. The one that  
 24 almost everybody uses is the server edition, but we also  
 25 have a desktop edition.

1 do anything to promote our desktop product.  
 2 Q. Are you familiar with the feature that is  
 3 accused in this case, the desktop switcher feature?  
 4 Have you heard of that?  
 5 A. Yes, I have.  
 6 Q. When did you first hear about that?  
 7 A. I heard about it through this lawsuit.  
 8 Q. So you've been working for Red Hat for six,  
 9 seven years, you're in charge of marketing, and the  
 10 first time you hear about that feature is when this  
 11 lawsuit came around?  
 12 A. Yes. I don't personally -- I've never used  
 13 that feature, and I've never heard any of our customers  
 14 ask for that feature.  
 15 Q. None of your customers have ever asked for this  
 16 feature?  
 17 A. No, and, again, like I said, that's my job is  
 18 to understand how they use it and to talk to my  
 19 customers to find out what it is that they want in the  
 20 software. And one of the things that they never ask for  
 21 is for that switch -- that windows switcher feature.  
 22 Q. You guys write up anything about the switcher  
 23 feature?  
 24 A. No, we never have. In none of the marketing  
 25 materials that we have created do we talk about that

1 Q. So when you're talking about the desktop here,  
 2 that's the actual product for which you provide  
 3 services, not like the computer screen?  
 4 A. Yeah, exactly. So it's a product that you  
 5 would use to run on like your personal computer or a  
 6 laptop.  
 7 Q. How does -- you're in charge of marketing of a  
 8 server and a desktop?  
 9 A. Exactly. So the first two years of my career  
 10 was where I managed the marketing for our desktop  
 11 products, and then for the last five years I've been  
 12 managing the marketing for our server product. So I'm  
 13 very familiar with both of our products.  
 14 Q. How much money does Red Hat give you to market  
 15 the desktop products?  
 16 A. So the -- so first of all, in our sales -- if  
 17 you were to look at our sales numbers, you'll find that  
 18 over 90 percent of the money that we make from Red Hat  
 19 Enterprise Linux is for our server product. So that --  
 20 that influences how we're going to do our marketing. In  
 21 fact, a hundred percent of our marketing effort is to  
 22 promote our server version.  
 23 In fact, also a hundred percent of the  
 24 marketing dollars that we're going to spend this year  
 25 will all be used marketing our server product. We don't

1 windows switcher feature.  
 2 Q. I guess you would have heard about it if you  
 3 had wrote it up?  
 4 A. Yeah, exactly. Again, because none of our  
 5 customers are asking us for that feature and -- and it's  
 6 not a feature that we -- we want to talk about because  
 7 we don't think it would influence anybody to buy our  
 8 software versus our competitors'.  
 9 Q. Now, have you seen the feature since it was  
 10 brought to your attention?  
 11 A. Yes, I have.  
 12 Q. Okay. Now that you know what the feature is,  
 13 do you recall ever seeing customers using that feature  
 14 when you walked through their places?  
 15 A. No. Again, in all the data centers that I've  
 16 walked through, I've never seen our customers use it.  
 17 And -- to all the customers I've talked to, none of them  
 18 have -- have talked -- asked about that feature. And I  
 19 also know that the servers that we have in our data  
 20 center at Red Hat, I've never seen any of them using  
 21 that switcher feature.  
 22 MR. REITER: Let's put up DX 245. It's a  
 23 black cover document, so that's actually the document.  
 24 Q. (By Mr. Reiter) Have you seen this before,  
 25 Mr. Riveros?

1 A. Yes, I have.

2 Q. Okay. What is it?

3 A. So this is, again, an overview -- it's  
4 basically a presentation that we give to customers to  
5 explain to them what products we offer.

6 Q. Okay. Let's turn to -- this is a slide show;  
7 is that right?

8 A. That's correct.

9 MR. REITER: Okay. Let's turn to RH 1191,  
10 please.

11 Q. (By Mr. Reiter) What's this?

12 A. So, again, these are like the key features and  
13 benefits that we talk to our customers about, about why  
14 they should choose our software and not our  
15 competition's. So here are the main things that we --  
16 just a couple of them, main things we want -- points  
17 that we want to get across to our customers is that they  
18 should choose us because we provide world class  
19 performance, they should choose us because we provide  
20 military grade security, that kind of thing.

21 Q. Let me interrupt you on that -- on the security  
22 issue. I've been listening to the testimony and also  
23 kind of thinking about this as I've been working with  
24 you guys. And that is you guys are providing this  
25 software to the Department of Defense, right?

1 A. That's correct. They're one of our biggest  
2 customers.

3 Q. And you've got people all over the world that  
4 are writing -- that's writing this code, people in the  
5 Middle East and people in Asia and people in South  
6 America are writing this code, right?

7 A. That's correct. We have people from all over  
8 the world and from major companies and universities that  
9 are contributing code.

10 Q. Now, doesn't it strike one or -- or isn't the  
11 Department of Defense concerned that they've got  
12 somebody some place outside of the United States that's  
13 writing code that could control some of the most secret  
14 and important information the government has?

15 A. Yeah, I know it sounds counter intuitive, but  
16 they're -- they're not. That's one of the -- the  
17 biggest strengths about open-source software is that  
18 everybody can see the source code. So what that means  
19 is, let's say you're a bad guy and you wanted to hide in  
20 there some trap door that you could then use later to  
21 surreptitiously gain control of that server. Because  
22 there's thousands of people every day looking at that  
23 software, the -- the probability that you'd be able to  
24 hide something there and that no one would be able to  
25 discover it is -- is almost zero.

1 Q. Does that same security or that same check  
2 occur in a proprietary system like Microsoft?

3 A. No, because, again, open-source code -- like I  
4 said, there's people around the world, thousands and  
5 thousands of people who are working with the code, who  
6 are testing it, who are contributing to the code, so  
7 they're -- they're inspecting the code daily.

8 But while Microsoft and those companies,  
9 they hire people who inspect the code and the amount of  
10 people that they can hire and that they pay to do all  
11 this type of inspection is far, far less.

12 Q. Who are some of the biggest developers of open  
13 source at the corporate level, who are the biggest  
14 companies that help with this open source; do you know?

15 A. Yeah, so the top five contributors to open  
16 source -- so we're proud to say that Red Hat is the  
17 number one commercial contributor. Number two is  
18 Novell. And then there's a bunch of other really big  
19 technology companies that contribute. Like number 3 is  
20 going to be IBM. Number 4, I think, is Intel. Number  
21 5, I believe, is HP. So I mean, the largest -- you  
22 know, others are like Oracle. I mean, all the largest  
23 technology companies are now more and more contributing  
24 to open-source software.

25 MR. REITER: Let's turn to slide RH 1203,

1 please. There we are.

2 Q. (By Mr. Reiter) What's this slide,  
3 Mr. Riveros?

4 A. So this is a slide that I personally created  
5 that talks about the key benefits of our desktop  
6 product. So, again, we create two products. One's a  
7 server product; one's a desktop product. And here's the  
8 one slide that we have in this whole deck that talks  
9 about our desktop product.

10 Q. So out of all that information, all those  
11 pages, you have one slide on desktop?

12 A. Exactly. And it's because, again, all of our  
13 money comes from selling our server product. So we  
14 don't spend a lot of time talking about our desktop  
15 product.

16 Q. Now, let's turn to -- let's talk about RHEL 5.  
17 You understand that's also one of the accused products  
18 in this case?

19 A. Yes, I do.

20 MR. REITER: Let's put up DX271, please.

21 Q. (By Mr. Reiter) Do you recognize this  
22 document, Mr. Riveros?

23 A. Yes, I do. This is another marketing document  
24 that my group, the Red Hat Marketing Department created

25 Q. And does this document highlight or talk any

1 about the user interface at all?  
 2 A. Yes, it does. On page number 6 at the bottom  
 3 of the page, so if you zoom in at the bottom of the  
 4 page -- yeah, right there. It talks about our client  
 5 systems. And to us client systems means our Red Hat  
 6 desktop product.  
 7 Q. I see it says GNOME and KDE window managers.  
 8 Do you see that?  
 9 A. Yes.  
 10 Q. Are -- are both of those offered to your  
 11 customers?  
 12 A. Yeah, exactly. We like to give our -- our  
 13 customers a choice. So like here we're saying that the  
 14 key benefits of using Red Hat desktop is that you have  
 15 your choice of windows managers, you have your choice of  
 16 e-mail tools, of web browsers, that we also provide an  
 17 office -- office tool kit that gives you word  
 18 processing, creating spreadsheets, or creating  
 19 presentations.  
 20 Q. Okay. Anything in this document that talks  
 21 about this workspace switching feature that you've just  
 22 learned about?  
 23 A. No, there's nothing in this document that talks  
 24 about that feature.  
 25 Q. Okay. Let's take a look at another document --

1 accounting background. And then we create another  
 2 presentation that's for technical users to give them  
 3 more in-depth knowledge at the nitty-gritty level of all  
 4 the features that we include with our -- our Red Hat  
 5 Enterprise Linux. This one slide talks about at a real  
 6 low level, technical level about the key features that  
 7 we include with our desktop product.  
 8 Q. Who is the audience for this slide?  
 9 A. Again, this is more for like software  
 10 developers. This is for the system administrators, the  
 11 people inside of a corporation who are going to actually  
 12 implement, install, and manage the -- these desktops.  
 13 Q. I don't mean to beat a dead horse, and there's  
 14 been some horse analogies already you maybe didn't get  
 15 to hear. But anything about the desk -- the workspace  
 16 switcher in this?  
 17 A. No, there's nothing in here about the workspace  
 18 switcher.  
 19 Q. Okay. So just to kind of wrap up and make sure  
 20 that we're all on the same page, if I understood you  
 21 right, none of your customers ever asked about this  
 22 desktop switcher?  
 23 A. That's correct, I've never had a customer ask  
 24 me about that or -- or say they wanted that desktop  
 25 switcher feature.

1 MR. REITER: DX272, please.  
 2 Q. (By Mr. Reiter) What's this?  
 3 A. So this is another marketing document. This is  
 4 actually one that I personally created, and it talks  
 5 about, again, the key features and benefits that we want  
 6 our customers to know when they're trying to choose what  
 7 desktop should they buy.  
 8 Q. Anything about workspace switching?  
 9 A. No, there's nothing about the workspace  
 10 switcher in this document.  
 11 MR. REITER: Let's turn to Slide 23 -- or  
 12 page 23?  
 13 A. I think you're referring to DX246.  
 14 MR. REITER: DX246.  
 15 Q. (By Mr. Reiter) Okay. That's right. Right.  
 16 Thank you, Mr. Riveros.  
 17 A. Sure.  
 18 MR. REITER: Slide 23 of DX246. I'm  
 19 sorry. A lot of documents to keep up with. There we  
 20 go. That's what I was looking for.  
 21 Q. (By Mr. Reiter) Now, what is this?  
 22 A. So this -- this is a -- this is part of a  
 23 presentation that we give to more technical people. So  
 24 we usually create a presentation that's for people who  
 25 are making the buying decision, who have more of an

1 Q. And -- and you and your group have never  
 2 written about it?  
 3 A. No, we have not. We've never put it into our  
 4 marketing materials because we don't believe that  
 5 it's -- first of all, something that our customers  
 6 aren't asking for and we don't believe that it's a  
 7 feature that would influence a customer to buy our  
 8 software.  
 9 Q. In fact, you didn't know about it before the  
 10 lawsuit?  
 11 A. Yeah, exactly.  
 12 MR. REITER: Pass the witness, Your Honor.  
 13 Thank you, Mr. Riveros.  
 14 THE COURT: Mr. Vickrey.  
 15 CROSS-EXAMINATION  
 16 BY MR. VICKREY:  
 17 Q. Good afternoon, Mr. Riveros.  
 18 A. Good afternoon.  
 19 Q. I'm Paul Vickrey. Pleased to meet you.  
 20 A. Pleased to meet you.  
 21 Q. Mr. Riveros, did I hear you right, did you say  
 22 that you took surveys of customers?  
 23 A. Yeah, we do, but it's more informal in that  
 24 what we do is invite some customers to come together and  
 25 ask them general questions about how does our software

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1 compare against the competition, what do they like about  
2 it, how are they using it, how do they wish -- you know,  
3 how do they want to use it.  
4 Q. Isn't it a fact, sir, that Red Hat kept and  
5 archived written surveys from customers about what they  
6 liked, what they used, what they needed?  
7 A. Not that I'm aware of. Again, like I said, the  
8 way that our group usually works is we go and talk to  
9 our customers and find out what they -- what they want.  
10 Q. Well, let me read from your deposition, sir --  
11 A. Sure.  
12 Q. -- page 118, starting at line 2.  
13 QUESTION: Now, do you or anyone at Red  
14 Hat actually survey your customers as to what functions  
15 they like and which ones they use?  
16 ANSWER: One of the ways is that we  
17 collect information, people can do feature requests, and  
18 we look at all the feature requests and tally them up.  
19 So if everyone -- like there's 400 people asking for the  
20 same feature and only 10 people asking for the other  
21 feature, then we heavily consider the one that had 400  
22 people asking for it.  
23 QUESTION: And so that's the only -- the  
24 extent of any surveying that Red Hat performs?  
25 Yes.

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1 QUESTION: And is that kept in writing  
2 anywhere?  
3 ANSWER: The feature request is -- it is a  
4 system that customers can use and go and file these  
5 feature requests and that's kept and that's archived.  
6 Those discussions of where we get together and banter as  
7 to what is, there's no formal record of that.  
8 QUESTION: And with respect to the archive  
9 feature request, did you produce those?  
10 ANSWER: I did not.  
11 Did you give that testimony, sir?  
12 A. Yes, and I can explain it.  
13 Q. Again, sir, did you give that testimony?  
14 A. I did.  
15 Q. And you've come in here today and told this  
16 jury that this feature -- this accused feature in this  
17 lawsuit is so trivial, that nobody ever used it. You've  
18 never seen anybody use it, never heard of it, it's not  
19 the subject of any discussion at any customer, correct,  
20 it's trivial?  
21 A. Correct, I've never had -- I've never used it  
22 and I've never seen one of our customers use it and I've  
23 never had a customer ask me for that feature.  
24 Q. And would you agree with me, sir, that since  
25 it's never used, it's not important to anybody, that

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1 once Red Hat knew about these patent claims, they could  
2 easily eliminate them from their products without any  
3 commercial downside?  
4 A. No. Because that feature comes with GNOME and  
5 GNOME is really -- a set of packages that comes with  
6 hundreds of features. It's kind of like a CD, you know,  
7 a music CD, in that the package is like the music CD,  
8 the features that come in it are like the songs. So  
9 there may be one or two songs that you really want, but  
10 for you to get those songs, you've got to buy the whole  
11 CD even though it may contain like eight other songs you  
12 don't really care about. So this particular feature,  
13 the windows switch -- windows switcher, comes with a set  
14 of packages that are called GNOME.  
15 And in that -- the reason that we want  
16 GNOME is that we have customers who want three key  
17 features out of the hundreds that come with GNOME and  
18 those three features are the advanced plug and play,  
19 some advanced file management tools, and some advanced  
20 networking tools. And it just so happens that GNOME --  
21 like I said, it comes with hundreds of features, one of  
22 which is this window switcher and you either take the  
23 whole package like you do that music CD or don't take  
24 it. And so we wanted those three key features, so we  
25 had to take the whole GNOME package.

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1 Q. Are you telling the jury that there was no way  
2 to eliminate this feature or disable it?  
3 A. It could be done, but it's not something that  
4 we would do because first of all, it's a huge hassle.  
5 We would have to basically redo that whole GNOME  
6 thing -- that GNOME package. We would -- we would have  
7 to then do all the maintenance on it ourselves because  
8 it would now become a -- a special standalone product by  
9 itself. It would be basically the Red Hat version of  
10 that, and we don't want to spend the engineering to --  
11 to do that. What we like to do is to just take these  
12 packages that other people have created, that other  
13 people maintain, and then use those.  
14 Q. By the way, you manage the business side of the  
15 server products, correct?  
16 A. That's correct.  
17 Q. You work in server solutions, right?  
18 A. That's correct.  
19 Q. But you're familiar with Fedora?  
20 A. Again, I'm familiar with what it is. It's not  
21 what I'm responsible for, and I don't really keep up  
22 with it.  
23 Q. And you believe, do you not, in corporate  
24 policy at Red Hat that -- that Red Hat picks only those  
25 features from Fedora that it believes that its

1 enterprise customers would find useful and would  
 2 actually use them, correct?  
 3 A. Yes, that's right.  
 4 Q. And when you say enterprise customers, we're  
 5 talking about big companies?  
 6 A. That's correct.  
 7 Q. You have -- you have a lot of big company  
 8 customers in the United States, correct?  
 9 A. Yes.  
 10 Q. I want to just visit a couple of the documents  
 11 that you were shown.  
 12 MR. VICKREY: Kindly put up 271, and go to  
 13 page 6, please. Blow that up.  
 14 Q. (By Mr. Vickrey) Now, this is one of the  
 15 documents you were shown on direct examination?  
 16 A. Yes.  
 17 Q. The -- this shows that the RHEL subscription  
 18 model doesn't require client access licenses, correct?  
 19 A. Yes.  
 20 Q. You don't need to have a client access license  
 21 to have access to the software, correct?  
 22 A. You don't need a client access license to get  
 23 to any data that's stored on a server.  
 24 Q. In fact, anybody can access that RHEL software,  
 25 correct?

1 A. Anyone who -- the software itself you're  
 2 speaking about --  
 3 Q. Right.  
 4 A. -- Red Hat Enterprise? Right, anyone can  
 5 use -- we don't sell the software.  
 6 Q. Right.  
 7 A. The software is freely available. Anyone can  
 8 go get it.  
 9 MR. VICKREY: Kindly turn to the next one,  
 10 and page 5 of that. Yeah.  
 11 Q. (By Mr. Vickrey) Here we have the RHEL  
 12 software source code for RHEL is open source, freely  
 13 downloadable, correct?  
 14 A. Yes.  
 15 Q. And it's freely transferrable, correct?  
 16 A. Yes.  
 17 MR. VICKREY: Kindly move to DX240.  
 18 Q. (By Mr. Vickrey) This is another document that  
 19 you discussed on your direct examination?  
 20 A. Right.  
 21 MR. VICKREY: Kindly turn to page 21.  
 22 Q. (By Mr. Vickrey) One of the things that you  
 23 folks market is the Proxy Mode, correct, for the  
 24 software?  
 25 A. Yeah, exactly. One of our products is called

1 Red Hat Network Proxy Server.  
 2 Q. And if we -- there's a diagram as to how that  
 3 works that's right underneath the text. Do you see  
 4 that?  
 5 A. Yes.  
 6 Q. And so here we have -- we have one IP address  
 7 getting the software from Red Hat, and then it  
 8 distributes it to a number of different desktops,  
 9 correct?  
 10 A. Yes, basically instead of each server going to  
 11 our computers and downloading software updates, the  
 12 customer can elect to put a proxy server behind their  
 13 firewall and that's the only server that communicates  
 14 with our servers.  
 15 Q. For example, if -- if I'm -- if my law firm --  
 16 and I have -- my law firm has 35 lawyers and many  
 17 secretaries and maybe we have 50 people with computers.  
 18 If I do the proxy model, I'm getting one -- I reach out  
 19 to Red Hat for one installation of software and then  
 20 I -- I distribute it within my law firm, correct?  
 21 A. You're basically downloading software  
 22 updates --  
 23 Q. Okay.  
 24 A. -- and you're right. You're just using one  
 25 internet connection to download it from our servers and

1 then you can download it to the -- the servers that have  
 2 one of our support subscriptions.  
 3 Q. Now, do you have any basis for denying that  
 4 there were at least 4 million installations of Fedora or  
 5 RHEL software in the U. S. from October of 2007 to  
 6 November -- to December of 2008?  
 7 THE COURT: Can you hold for just a  
 8 second?  
 9 Mr. Reiter?  
 10 MR. REITER: There's no foundation that he  
 11 keeps tracks of numbers or that's part of his job  
 12 responsibility.  
 13 THE COURT: He's testified as to his  
 14 responsibilities. I think the jury will keep it  
 15 straight.  
 16 Go ahead, Mr. Vickrey.  
 17 Q. (By Mr. Vickrey) Yeah, sir, can -- do you have  
 18 any basis for denying that there were at least 4 million  
 19 installations of either RHEL or Fedora software in the  
 20 United States from October of 2007 to December of 2008?  
 21 A. I have no idea how many units we sell because  
 22 we don't track that number. Our accounting systems are  
 23 set up to only track money. It tracks how much our  
 24 customers owe us, how much they paid us, and we track  
 25 that because we have to provide that information --

1 we're required to provide that information to our -- our  
2 investors and to the federal government. But there's no  
3 requirement for us to track the number of units, so we  
4 just don't do that.

5 Q. Okay. Do you have any basis for denying that  
6 there were at least 4 million installations of either  
7 RHEL or Fedora software in the U. S. during those 14  
8 months?

9 A. Again, I have no idea how many units we've  
10 sold.

11 Q. Okay. But -- but just so -- the jury has heard  
12 a lot about Fedora and the IP address, but not much  
13 about RHEL. And the RHEL software is kind of -- you  
14 cherry pick Fedora features, correct?

15 A. Yeah, so we use -- there's thousands and  
16 thousands of features that come with Fedora and then we  
17 pick the ones that we think are going to provide the  
18 most value to our customers and then we use those as a  
19 foundation for creating Red Hat Enterprise Linux.

20 Q. And -- and for the RHEL model where you make  
21 money, we've seen that the proxy model comes into one  
22 location at the client and it fans out, correct?

23 A. Yes.

24 Q. And then there are other instances where people  
25 in the U. S. could just go in and -- and download it

1 you take this feature out of your product. Do you  
2 recall those from Mr. Vickrey?

3 A. Yes.

4 Q. You started working at Red Hat seven years ago,  
5 was it?

6 A. Correct. In 2003.

7 Q. And GNOME and KDE were available then, were  
8 being used?

9 A. Yeah, exactly. We've had that in our product  
10 for quite a long time.

11 Q. Anybody ever say anything to you all about this  
12 feature -- this workspace feature infringing? Ever hear  
13 anything about that?

14 A. No.

15 Q. Nobody ever said a word in all that time?

16 A. No, not until this lawsuit.

17 Q. Now, you said that GNOME is a package with a  
18 whole bunch of features, right?

19 A. Yes.

20 Q. And you all focus on what the customers want,  
21 right?

22 A. Exactly.

23 Q. But you all respond responsibly to what those  
24 customers want, right?

25 A. Yes.

1 for -- for nothing, even though they're -- they're not a  
2 customer of yours. They haven't even opted for the  
3 proxy model, correct?

4 A. Yes.

5 MR. VICKREY: And there are other -- well,  
6 that's it. That's all I have, sir.

7 THE COURT: Mr. Reiter, go ahead.

8 MR. REITER: Just a few questions.

9 THE COURT: Sure.

10 REDIRECT EXAMINATION

11 BY MR. REITER:

12 Q. Mr. Riveros, is tracking Fedora numbers part of  
13 your job?

14 A. No. Again, that's not part of my  
15 responsibility. I don't have anything to do with  
16 Fedora.

17 Q. I think you were talking about selling product.  
18 You guys don't sell the software, do you?

19 A. Yeah, again, the software is free. What we  
20 sell are support contracts.

21 Q. Is there any support contract available for  
22 Fedora?

23 A. No, there's not. Fedora's free. Anybody can  
24 download it and use it.

25 Q. Now, there were some questions about why didn't

1 Q. You're not going to do anything inappropriate,  
2 are you?

3 A. No, of course not.

4 Q. And I just want to make it clear that in those  
5 seven years you were involved in marketing and  
6 supporting these products, right?

7 A. Yes.

8 Q. And never heard anything or anybody complain  
9 about this feature being inappropriate in any way, did  
10 you?

11 A. No, never.

12 MR. REITER: No further questions, Your  
13 Honor.

14 MR. VICKREY: Nothing further, Your Honor.

15 THE COURT: You may step down.

16 Mr. Reiter?

17 MR. REITER: Now we're going to play some  
18 video deposition tape, Your Honor. But it will be a  
19 little bit better, I hope, than yesterday. Not that  
20 that was bad.

21 MR. HILL: Easy now, Your Honor. Our  
22 reading was quite good.

23 MR. REITER: What we're going to do,  
24 Ladies and Gentlemen, is play the depositions of the two  
25 other inventors that are named on these patents,

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1 Dr. Card who you heard me talk about with Dr. -- or  
2 Dr. Henderson and also Mr. Maxwell, the other named  
3 inventor.  
4 I took those depositions. They were  
5 videotaped, so we're not going to have the reading.  
6 You'll actually be able to see on the screen the  
7 inventors and listen to what they have to say. And I  
8 believe that we have the transcript that goes along with  
9 it, so you'll be able to read, listen, and watch all at  
10 the same time. It's almost as good as going to the  
11 movies.  
12 THE COURT: Let's go.  
13 MR. REITER: We're going to do Dr. Card  
14 first.  
15 THE COURT: And you'll give us a brief  
16 introduction here?  
17 MR. REITER: Yes.  
18 THE COURT: Remind us that they're -- who  
19 the inventors are, et cetera?  
20 MR. REITER: Right. This is Dr. Card, as  
21 I said, one of the named inventors. His deposition was  
22 taken at Xerox PARC where he still worked about a year  
23 ago or so. He was asking questions under oath as if he  
24 were here in the courtroom and answering.  
25 THE COURT: Okay. Proceed.

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1 (Video playing.)  
2 QUESTION: For whom do you work?  
3 ANSWER: Palo Alto Research Corporation,  
4 PARC.  
5 QUESTION: That's a subsidiary of Xerox?  
6 ANSWER: Yes.  
7 QUESTION: Did you ever work with  
8 Smalltalk, programming it?  
9 ANSWER: I tried to use a version called  
10 Fast Talk at one point, but that was a defective  
11 version, and so it wasn't practical, so I abandoned it.  
12 So very briefly.  
13 QUESTION: How long has it been since you  
14 reviewed the '412 patent?  
15 ANSWER: 20 years.  
16 QUESTION: Did you review the patent after  
17 it issued?  
18 ANSWER: No.  
19 QUESTION: Did you ever read the final  
20 claims that issued with the patents?  
21 ANSWER: I can't recall.  
22 QUESTION: What about with respect to the  
23 '183 or the '521 patents? Do you recall reading the  
24 claims that issued with those patents?  
25 ANSWER: I don't recall, because I don't

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1 think there was really any reason for me to read them.  
2 QUESTION: I'm curious. How would you  
3 characterize what it is you and your co-inventors have  
4 done?  
5 ANSWER: Multiple -- multiple workspaces  
6 that have windows in them.  
7 QUESTION: Is that it? And I don't mean  
8 that in a demeaning sort of way. Is there anything  
9 else, other attributes associated with your work that  
10 you would include in multiple workspaces with windows?  
11 ANSWER: Do you mean this in a  
12 constraining way, that -- that if it doesn't have all of  
13 these properties, it isn't something different or --  
14 QUESTION: Well, as I understand it, I  
15 mean, we talked about Xerox Star. Xerox Star had  
16 windows, right --  
17 ANSWER: That is true.  
18 QUESTION: -- as a user interface?  
19 ANSWER: That's true.  
20 QUESTION: And depending upon, I guess,  
21 how one defines a workspace, Xerox Star allowed one to  
22 have multiple windows, right?  
23 ANSWER: Well, I said multiple workspaces.  
24 QUESTION: I understand. And that's why I  
25 prefaced that depending on how one defines workspace.

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1 ANSWER: Yeah. So there was a version of  
2 Xerox Star that had multiple workspaces, I think.  
3 QUESTION: Well, and the reason I ask is  
4 because, as I understand it, even from -- and we'll get  
5 to some of the details in the patent in a moment. But  
6 some of the earlier work, like Smalltalk and like the  
7 Xerox Star, as we've already talked about, allowed a  
8 user to have multiple workspaces with windows in those  
9 workspaces, but perhaps a same window was not available  
10 between the different workspaces?  
11 ANSWER: I see what you mean.  
12 QUESTION: So that's why I was asking  
13 whether you would characterize your work as coming up  
14 with the additional step of having that or a same window  
15 appear in multiple workspaces. Do you understand the  
16 question now?  
17 ANSWER: Yeah. Well, yes, I thought that  
18 -- that was an important step in what we did, because it  
19 means you don't have to partition the set of windows  
20 precisely.  
21 QUESTION: Partition the windows precisely  
22 according to the task that one is doing?  
23 ANSWER: Right.  
24 QUESTION: Well, having multiple  
25 workspaces was something, as we already talked about,

1 that was around before you started the work that led to  
 2 these three patents; isn't that right?  
 3 ANSWER: Which -- which -- I'm not sure  
 4 which systems you are thinking of. It certainly was not  
 5 common.  
 6 QUESTION: Well, Star, for example?  
 7 ANSWER: No, but Star didn't have multiple  
 8 workspaces.  
 9 QUESTION: Star had multiple windows?  
 10 ANSWER: Had multiple windows, yes.  
 11 QUESTION: How do you distinguish between  
 12 a workspace and a window?  
 13 ANSWER: Think of it as -- sorry -- I need  
 14 to wait. Think -- think of it as having multiple  
 15 screens, virtual multiple screens.  
 16 QUESTION: If a window occupied an entire  
 17 screen, would that be a workspace?  
 18 ANSWER: Not unless you had other windows  
 19 inside that window.  
 20 QUESTION: So I was asking about the  
 21 problem of moving from one workspace to another  
 22 workspace.  
 23 ANSWER: Uh-huh.  
 24 QUESTION: I think you referred to the  
 25 issue of tool faulting. Are you familiar with what that

1 resize it and relocate it.  
 2 QUESTION: You did that with what you call  
 3 placements, right?  
 4 ANSWER: Right.  
 5 QUESTION: Okay. But there's only one  
 6 instance of that window?  
 7 ANSWER: That's right. And that's why if  
 8 you change it in one of those workspaces, it would  
 9 change in the other workspace because it was really only  
 10 one window. But the user had the illusion that it was  
 11 in both places.  
 12 QUESTION: Dr. Card, while we were on a  
 13 break, I asked the court reporter to mark as Exhibit 6 a  
 14 document that bears Bates numbers, and just so you know,  
 15 the Bates numbers are the little numbers at the lower  
 16 right-hand corner of the documents. It's what we  
 17 lawyers call the numbers. XP 1702 through XP 1860.  
 18 Do you recognize that document, Dr. Card?  
 19 ANSWER: It appears to be a conglomeration  
 20 of several copies of several documents, which come from  
 21 notebooks of mine.  
 22 QUESTION: And is this one of the  
 23 documents or collection of documents that you gave to  
 24 your lawyer in response?  
 25 ANSWER: Yes, yes.

1 means?  
 2 ANSWER: Not with the term tool faulting.  
 3 QUESTION: Not with the term tool  
 4 faulting?  
 5 ANSWER: No.  
 6 QUESTION: Well, let's maybe focus this  
 7 down to one aspect. We were talking earlier this  
 8 morning about a window that could be seen in multiple  
 9 workspaces?  
 10 ANSWER: Yes.  
 11 QUESTION: Okay. If I'm in Workspace 1,  
 12 just for ease of nomenclature, and I'm going to  
 13 Workspace 2 --  
 14 ANSWER: Yes.  
 15 QUESTION: -- and a window in Workspace 1  
 16 is also in Workspace 2 --  
 17 ANSWER: Uh-huh.  
 18 QUESTION: -- okay, is there only one  
 19 instance of that window that's used by the system?  
 20 ANSWER: The clever way we actually did it  
 21 was by having a set of commands that would -- yes,  
 22 there's only one window, and it would just be a set of  
 23 instructions that would reshape it. Would have a  
 24 different -- say you go to this -- put it in this  
 25 different location and give it this different size,

1 QUESTION: And, Dr. Card, this notebook  
 2 has a date of May 30th, 1986, to -- I can't read the  
 3 next day. Is the May 30th, 1986, is that when you  
 4 received the notebook?  
 5 ANSWER: That's probably going to be the  
 6 first date in which I put an entry in the notebook.  
 7 QUESTION: And is this the first notebook  
 8 that recorded your work relating to the Rooms Project?  
 9 ANSWER: To the best of my knowledge, if  
 10 it's the first one in the series that I gave you.  
 11 QUESTION: I assume you have notebooks  
 12 that are earlier in time than these -- or this one?  
 13 ANSWER: Right. And this is the earliest  
 14 of the records that I was able to locate. I can't say  
 15 for sure there wasn't something -- some notes missing  
 16 that were thrown away long ago or something.  
 17 QUESTION: Sure, sure. But there wasn't  
 18 an earlier notebook that you saw that might have had the  
 19 work and you said, well, I'm not going to give that one?  
 20 ANSWER: No.  
 21 THE REPORTER: No, I'm not going to?  
 22 ATTORNEY: Give that one.  
 23 THE REPORTER: Give that one?  
 24 ATTORNEY: Yes.  
 25 THE REPORTER: Thank you.

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1 ANSWER: I produced everything that I  
2 could find.  
3 QUESTION: Okay. Do you remember when you  
4 started working on the Rooms Project?  
5 ANSWER: I don't really. Other than what  
6 I can localize by the dates in the notebook.  
7 QUESTION: At PARC, in this time frame in  
8 the '80s, were you free to go off and work on whatever  
9 it is that you thought was --  
10 ANSWER: Yes.  
11 QUESTION: What about John Maxwell, did  
12 you work with him at all?  
13 ANSWER: Not directly.  
14 QUESTION: Indirectly?  
15 ANSWER: Well, it turned out he had a  
16 somewhat similar idea.  
17 QUESTION: And his work was done  
18 independent of what you and Dr. Henderson did?  
19 ANSWER: More or less, yes.  
20 QUESTION: His work was the desktops work;  
21 is that right?  
22 ANSWER: Yes.  
23 QUESTION: Did you ever look at desktops?  
24 ANSWER: I can't recall looking at it.  
25 QUESTION: Did you work with Cedar?

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1 ANSWER: No.  
2 QUESTION: So if wouldn't mind turning to  
3 page 1713 of Exhibit 6?  
4 ANSWER: Yes.  
5 QUESTION: I guess that's page 10 of your  
6 lab notebook in the upper left-hand corner?  
7 ANSWER: Yes.  
8 QUESTION: The designation on the -- right  
9 underneath the numeral 10, 86, looks likes 0511; is that  
10 right?  
11 ANSWER: It's either 05 or 06.  
12 QUESTION: Is that this date?  
13 ANSWER: Yes.  
14 QUESTION: Would that be either June --  
15 May or June 11, 1986?  
16 ANSWER: Yes. And from the date on  
17 subsequent pages, we could probably tell. Yeah, 06  
18 appears before. So that's -- that's going to be June.  
19 QUESTION: Okay. Now, right next to the  
20 date, there is a line that says plan for theory of  
21 rooms; is that right?  
22 ANSWER: Uh-huh.  
23 QUESTION: So would this be late in the  
24 project since you're using the word rooms?  
25 ANSWER: Well, I can't tell. Probably

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1 we're at least in the middle of it. I think this was  
2 around the time I was trying to figure out how this all  
3 worked.  
4 QUESTION: And then the next slide, 1758.  
5 ANSWER: Uh-huh.  
6 QUESTION: Windows are needed in more than  
7 one task?  
8 ANSWER: Yes.  
9 QUESTION: Do you know what that refers  
10 to?  
11 ANSWER: Yeah. You know, you might want  
12 the same text edit page up in more than one project at  
13 the same time.  
14 QUESTION: And this -- this being model 2  
15 on page 1758?  
16 ANSWER: Yeah.  
17 QUESTION: Uses placements to implement  
18 that need?  
19 ANSWER: Right.  
20 QUESTION: Or satisfy that need?  
21 ANSWER: That's right.  
22 QUESTION: And placements are not equal to  
23 windows?  
24 ANSWER: No. Placements takes the notion  
25 of windows and breaks it into sort of the content part

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1 that's in the window, but then there's the location and  
2 sizing part.  
3 QUESTION: Right. And the contents of the  
4 window remain constant?  
5 ANSWER: Right. There's some data  
6 structure that you're pointing to. But how you clip  
7 that in terms of how big the window is and that sort of  
8 thing where it's located on the screen.  
9 QUESTION: And that's a single data  
10 structure for a particular window?  
11 ANSWER: Well, I didn't understand what  
12 you meant by that.  
13 QUESTION: Well, you said there's a data  
14 structure for the window up there?  
15 ANSWER: Yeah, there's some content for  
16 the window in an application where it's getting the data  
17 from.  
18 QUESTION: And that content -- there's  
19 only one instance of that content?  
20 ANSWER: Yeah.  
21 QUESTION: And that content is available  
22 to that window regardless of what workspace?  
23 ANSWER: Yeah, but the placement -- you  
24 can have a placement for that window in the lower left  
25 corner of the screen or another placement for that

1 window in the upper left corner of the screen. And one  
2 room could have it one way and one room could have it  
3 the other way.

4 QUESTION: Yeah, I think I understand it.  
5 The placement just takes that same window and puts it  
6 some place?

7 ANSWER: Right. And the clever way it  
8 does that is when you move to the other room, it just  
9 essentially moves it, you know. It says, oh, here's  
10 this new location and just reshapes it and redispaces  
11 it.

12 QUESTION: We were talking about thrashing  
13 and a user trying to find what he or she was working on  
14 as the user navigates between or among workspaces,  
15 right?

16 ANSWER: Uh-huh.

17 QUESTION: And moving -- excuse me --  
18 moving the window around, did that create a problem for  
19 the user? In other words, I'm working on a text editor,  
20 it's in my left-hand corner, and then when I go to a new  
21 workspace and it's up in the right-hand corner --

22 ANSWER: No, because when you go to --  
23 change workspace, your illusion is that it's right where  
24 you left it all the time.

25 QUESTION: Before it's in the -- oh, it's

1 task focus.

2 QUESTION: Going back to the document, the  
3 Model 3, how is that different from Model 2?

4 ANSWER: Ah, there's a little subtlety.  
5 So the way we say it is -- well, I'll get to that.

6 There's some things that you want in more than one  
7 workspace at a time. There's some things you want to  
8 carry around with you, or you might want in multiple  
9 workspaces, maybe some icons, maybe a small set of  
10 windows. And so this provides what we sometimes  
11 call the control panel. This provides a set of icons  
12 that you can take with you.

13 QUESTION: Task share common subtasks. So  
14 a task is a room; is that right?

15 ANSWER: Yeah.

16 QUESTION: Okay. And you want to have --  
17 the subtask would be a particular application within a  
18 room that's available?

19 ANSWER: Yeah. Maybe -- usually they were  
20 little icons that fit below in some part of the room.  
21 And it sort of -- we discovered that when we just  
22 strictly went into other rooms, suddenly we didn't have  
23 our little tools that we wanted with us that we had  
24 accumulated so carefully in the room. So we wanted a  
25 way to share these little tool sets between rooms.

1 where I left it when I left --

2 ANSWER: In that context.

3 QUESTION: I see.

4 ANSWER: If you're working on Project X  
5 and that was in the lower left corner in Project X, you  
6 go back to Project X and it's still there, even though  
7 you've been working on Project Y that had a larger size  
8 version of that window around, and it was in the other  
9 part of the screen for that project.

10 So things actually give you the illusion  
11 that they stay in fixed places more than if you were  
12 moving them all around in order to get them out of the  
13 way of other stuff. By avoiding moving the windows  
14 around because of all of this clutter and overhead and  
15 stuff, you actually get a more stable workspace.

16 QUESTION: So you kind of look at it I  
17 guess from the human machine interaction sense at the  
18 macro level of the overall task as opposed to the  
19 individual tasks that are associated with that larger  
20 task?

21 ANSWER: That's right. And part of the  
22 issue is that this is one of the problems with the way  
23 windows are used is that it causes the workspaces to be  
24 application-focused, whereas you want them to be  
25 task-focused. And so this is a way of mapping into that

1 QUESTION: That's different than copying a  
2 window from one workspace to another, the baggage?

3 ANSWER: Yeah, because the baggage is a  
4 little place you can put stuff in. You can kind of drop  
5 them -- drag and drop them into this thing and then  
6 go -- it's a little pouch you can carry along with you  
7 as you move from one workspace -- from one room to  
8 another, as I remember it.

9 QUESTION: On page 1762 -- and this looks  
10 like it's September 30th, 1986; is that right?

11 ANSWER: Yes, I think so.

12 QUESTION: Okay. Rooms release stock room  
13 design. Does that ring any bells?

14 ANSWER: Rooms release -- the room system  
15 is -- appears to be a stock room. I have no idea what  
16 that means. Used to configure the system. Aha, Okay.

17 QUESTION: Is that kind of like a control  
18 panel?

19 ANSWER: Yeah, this is -- ah, okay, so  
20 this is -- looks to me like it's an initial design of a  
21 thing that I came to call catalogs. So the question is  
22 how -- there's some things that were sort of things that  
23 you wanted to do with these rooms. We got into  
24 decorating them with wallpaper in the background so that  
25 you could have each room have a distinct view and tell

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1 which one you were in.  
2 QUESTION: I see.  
3 ANSWER: And the idea of doing that was to  
4 have something like a catalogue, and so there's a little  
5 book catalogue you could turn the pages of it. And then  
6 you would click something in it in order to order, and  
7 the order would be fulfilled within a couple of seconds.  
8 QUESTION: So if I put striped wallpaper  
9 in a particular room, then when I went there, I would  
10 go, oh, okay, that's this case?  
11 ANSWER: Yeah.  
12 QUESTION: And the other one had pink  
13 wallpaper?  
14 ANSWER: Yeah. So we're trying to make  
15 things extremely easy for the user, and what we used as  
16 a metaphor of a -- of a Montgomery Wards catalogue,  
17 shopping.  
18 QUESTION: It wouldn't work today. Nobody  
19 would know what that was?  
20 ANSWER: That's true. I even got a  
21 Montgomery Wards catalogue and counted the number of  
22 words per entry to figure out what was the ideal length  
23 and description and used it in this.  
24 QUESTION: So you were trying to make  
25 it -- make it appear familiar to the users from an

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1 interactive point of view?  
2 ANSWER: That's right. Instead of having  
3 these abstract, abstract control panels. Then if you  
4 think of it, in shopping, you actually make a lot of  
5 technical judgments about what you want. And so if you  
6 can sort of couch it in that kind of buyer-ease selling  
7 language -- and people even like to shop catalogues.  
8 QUESTION: Dr. Card, I've had marked as  
9 Exhibit 7 an article entitled Rooms, the Use of Multiple  
10 Virtual Workspaces to Reduce Space Contention in a  
11 Window-Based Graphical User Interface. Do you have that  
12 in front of you?  
13 ANSWER: Yes.  
14 QUESTION: Are you an author on this  
15 article?  
16 ANSWER: Yes.  
17 QUESTION: So in -- in your paper, Page  
18 215, you've got a section, multiple virtual workspaces?  
19 ANSWER: Yes.  
20 QUESTION: And you refer to a few lines  
21 down, Smalltalk projects as being --  
22 ANSWER: Yes.  
23 QUESTION: -- an example of a system that  
24 had multiple virtual workspaces; is that right?  
25 ANSWER: Yes.

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1 QUESTION: You go on to say, projects are  
2 arranged hierarchically with subprojects represented in  
3 their parents as windows through which the projects can  
4 be entered. These windows are called project views or  
5 informally doors. Do you recall that aspect of  
6 Smalltalk?  
7 ANSWER: I don't since it's been so long  
8 and since I wasn't a direct Smalltalk user.  
9 QUESTION: Does that refresh your  
10 recollection that a view was a window in Smalltalk?  
11 ANSWER: It says that, but I -- I just  
12 don't remember that about Smalltalk.  
13 QUESTION: Turning to page 241 of your  
14 article, and then looking at the paragraph that has the  
15 heading Simultaneous Access to Separate Information?  
16 ANSWER: Uh-huh.  
17 QUESTION: And about five or six lines  
18 down, you refer to Cedar multiple desktops. Do you see  
19 that?  
20 ANSWER: Yes.  
21 QUESTION: Is that Mr. Maxwell's work that  
22 you're referring to?  
23 ANSWER: I believe so. I'm not sure, but  
24 I believe so.  
25 QUESTION: And I may have asked you this

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1 question, and if I did, I apologize. But did you ever  
2 work with the desktops portion of Cedar?  
3 ANSWER: No, I didn't work with Cedar.  
4 QUESTION: Dr. Card, before the lunch  
5 break, we were talking generally about rooms, and we've  
6 talked a little bit about the three patents, the '412,  
7 and the '183 and the '521, but I -- I want to ask a few  
8 more questions specifically about the patents. So if  
9 you wouldn't mind pulling out -- I think it's Exhibit 3,  
10 the '412 patent?  
11 ANSWER: Got it.  
12 QUESTION: I just have a few questions  
13 because I want to make sure that our discussion about  
14 rooms generally is also applicable to what's discussed  
15 in the patents. And what I first want to look at is --  
16 or are Figures 1A and B within the patent.  
17 And we were talking about rooms as  
18 providing multiple workspaces for a user throughout the  
19 morning. Do you recall that?  
20 ANSWER: Right. Uh-huh.  
21 QUESTION: Okay. Now, Figure 1A refers  
22 to, I believe, a workspace, and that's denoted by  
23 Numeral 10. Does that look correct to you?  
24 ANSWER: Yes.  
25 QUESTION: Okay. And within that

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1 workspace are Windows 12, 14 -- 12 and 14.  
2 ANSWER: Uh-huh.  
3 QUESTION: And then also a door icon, 16,  
4 right?  
5 ANSWER: Right.  
6 QUESTION: And then looking at Figure 1B,  
7 there's a workspace denoted by Numeral 20; is that  
8 right?  
9 ANSWER: Yes.  
10 QUESTION: And that Workspace 20 has  
11 Windows 22 and 24 as well as a door icon, 26; is that  
12 right?  
13 ANSWER: Yes.  
14 QUESTION: Now, in the -- focusing on the  
15 Windows 12 and 22 in Workspaces 10 and 20 respectively,  
16 that window is the same windows, is it not?  
17 ANSWER: Yes.  
18 QUESTION: And there's one instance of  
19 that window in memory; is that right?  
20 ANSWER: Depending on what you mean by in  
21 memory. There -- there is one data structure window  
22 part of it. So from the user's point of view, these are  
23 two different windows, But the contents of the window is  
24 the same in back of it.  
25 So if any part of -- if 12 -- the contents

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1 of 12 are altered, then the contents of 22 would be  
2 altered, as well.  
3 QUESTION: But in your system and as is  
4 depicted in the patent, Windows 12 and 22 or the window  
5 as depicted by Figures 12 and 22 and Figures 1A and B,  
6 would be only one instance in memory; is that right?  
7 ANSWER: Yes.  
8 QUESTION: Now, referring to Figure 2, and  
9 we made some mention earlier this morning about  
10 placements?  
11 ANSWER: Uh-huh.  
12 QUESTION: Does Figure 2 reflect what the  
13 placements were that we were talking about with respect  
14 to rooms?  
15 ANSWER: Yes.  
16 QUESTION: And the placements identify  
17 where those work -- I'm sorry. Strike that.  
18 The placements identify where those  
19 windows will be within a particular workspace?  
20 ANSWER: Yes. Yes.  
21 QUESTION: And there are data structures  
22 associated with each particular workspace; is that  
23 correct?  
24 ANSWER: Yes.  
25 QUESTION: When you were doing -- you or

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1 Austin were doing the invention disclosure, do you  
2 recall talking to Mr. Maxwell at all?  
3 ANSWER: I can't recall whether we did or  
4 not.  
5 QUESTION: Do you recall whether the  
6 lawyer found Mr. Maxwell's work or you found  
7 Mr. Maxwell's work or Mr. Maxwell pointed out his work  
8 to you?  
9 ATTORNEY: Objection.  
10 ANSWER: I don't recall that.  
11 QUESTION: You don't recall?  
12 ANSWER: I don't recall that.  
13 QUESTION: Did you look for prior art or  
14 earlier systems during the prosecution process to give  
15 to your patent attorney?  
16 ATTORNEY: Objection.  
17 ANSWER: Yes, whatever we knew of.  
18 QUESTION: Do you have any familiar  
19 knowledge of the Cedar system?  
20 ANSWER: Only that I have seen demos of  
21 it.  
22 QUESTION: You didn't work on the Cedar  
23 system at all?  
24 ANSWER: No.  
25 QUESTION: Do you know whether you've ever

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1 looked at the '412 patent since it issued?  
2 ANSWER: I probably have, but I don't  
3 remember when. I mean, I certainly -- I don't think  
4 I've really read it or studied it.  
5 QUESTION: You don't know if you've ever  
6 looked at all the figures, the 19 sheets of figures and  
7 the 58 columns of text in the claims, you don't know if  
8 you've ever done that?  
9 ANSWER: No.  
10 QUESTION: About how long would you say  
11 it's been since you last even looked at the '412 patent?  
12 ANSWER: Gee, I have no idea.  
13 QUESTION: Any time in the last 10 years?  
14 ANSWER: I just don't remember.  
15 (End of videoclip.)  
16 MR. REITER: That was the first inventor.  
17 I don't know if you want the summary now.  
18 THE COURT: Sure. Go ahead, give us an  
19 introduction.  
20 MR. GIBBONS: We have an objection because  
21 they left out some of the --  
22 THE COURT: Oh, did they miss something?  
23 MR. GIBBONS: Yes, they did, Your Honor.  
24 THE COURT: Uh-oh.  
25 MR. GIBBONS: Page 128, Line 25.

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1 THE COURT: Are we going to be able to  
2 pull that up easily? Good. Can you go --  
3 MR. GIBBONS: Just read it? It's five  
4 lines.  
5 MR. HILL: We'll just read it in, Your  
6 Honor, to save time.  
7 MR. VICKREY: Here, here, I'll read it  
8 with Your Honor's permission.  
9 THE COURT: Sure. Please.  
10 MR. VICKREY: QUESTION: Did you look for  
11 prior art or other systems or earlier systems during the  
12 prosecution process or give -- to give to your patent  
13 attorney?  
14 ANSWER: Yes. Whatever we knew of.  
15 QUESTION: You provided?  
16 ANSWER: Yes, our attorneys were quite  
17 adamant that we provide all the prior art, so -- so we  
18 take them seriously.  
19 That's it. That's it.  
20 MR. REITER: Apologize for that.  
21 THE COURT: Now, Mr. Reiter -- that's  
22 fine. What's next?  
23 MR. REITER: Do you want a summary of that  
24 now, Your Honor, or do you want the next inventor? This  
25 is the next inventor.

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1 THE COURT: And you're just going to tell  
2 us who this is, and we're going to move in, right?  
3 MR. REITER: Sure.  
4 THE COURT: Good.  
5 MR. REITER: Absolutely. This is  
6 Mr. Maxwell whom you've heard talked about.  
7 I should explain one thing on the video.  
8 Obviously, we're not playing the whole thing. The video  
9 -- or the deposition. That took many hours. We  
10 wouldn't do that to you-all or to anybody.  
11 And this is Mr. Maxwell, he's the other  
12 inventor, as I said. There are other voices. My voice  
13 didn't change. Lawyers for the other side were present.  
14 So I didn't want you to think I swallowed something  
15 funny.  
16 (Videoclip playing.)  
17 QUESTION: It is true that you still work  
18 for Xerox Corporation; is that right?  
19 ANSWER: I work for the Palo Alto Research  
20 Center, which is a wholly-owned subsidiary of Xerox.  
21 QUESTION: Also known as PARC, P-A-R-C?  
22 ANSWER: Correct.  
23 QUESTION: Have you worked at the Palo  
24 Alto Research Center continuously since 1981 when you  
25 graduated?

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1 ANSWER: Pretty much.  
2 QUESTION: From 1981 to '84, you were in  
3 the computer science lab working on the Cedar  
4 programming language?  
5 ANSWER: Well, January '84 is when I  
6 switched. So really '81 to '83.  
7 QUESTION: What is the Cedar programming  
8 language?  
9 ANSWER: The Cedar programming language  
10 was an experimental programming environment. It was  
11 strongly typed. It was one of the competitors for --  
12 the government was interested in developing a new  
13 programming language, and the one they eventually chose  
14 was Ada, but they had four different programming  
15 languages that they were considering, and Cedar was one  
16 of them at the time.  
17 QUESTION: Was the research associated  
18 with Cedar subsidized or funded by the government?  
19 ANSWER: No.  
20 QUESTION: Any commercial use of Cedar?  
21 ANSWER: Not as far as I know.  
22 QUESTION: Are you familiar with the  
23 system called Desk Tops?  
24 ANSWER: I implemented Desk Tops as well.  
25 QUESTION: That's different?

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1 ANSWER: That's -- that's -- that was a  
2 part of it.  
3 QUESTION: A part of the system that you  
4 were working in -- or working on in 1981 to 1983?  
5 ANSWER: Correct.  
6 QUESTION: Could there be multiple  
7 applications associated with one window?  
8 ANSWER: I -- I don't remember.  
9 QUESTION: In other words, if I opened up  
10 a window, would I maybe see a mail application and a  
11 text editing application, and I can select one of those  
12 to work on within that window?  
13 ANSWER: I don't understand the question.  
14 QUESTION: Well, I'm thinking about it  
15 perhaps in today's terms where I can open up a window,  
16 and I might see a number of icons in a window, in a  
17 Microsoft Windows environment, and I could click on one  
18 of those icons within the window and perhaps another  
19 window would open up that would allow me to work on  
20 whatever that icon represented.  
21 ANSWER: I don't remember.  
22 QUESTION: Did the windowing system that  
23 you worked on allow for different users to use the  
24 system? In other words, it could be Mr. Maxwell signs  
25 on as a user and another, Mark Reiter, signs on as a

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1 user?

2 ANSWER: I don't remember.

3 QUESTION: What did you do to prepare for

4 the deposition today?

5 ANSWER: I gathered information, and I

6 talked with my attorney.

7 QUESTION: Did you talk to anybody else?

8 ANSWER: Yes.

9 QUESTION: Who did you talk to?

10 ANSWER: I talked with some of my

11 co-workers that had worked with me when I was working on

12 the desktop system.

13 QUESTION: Who did you speak with?

14 ANSWER: Actually, I sent e-mails. So

15 that's probably better. It was Michael Plass and Dan

16 Swinehart and Russ Atkinson.

17 QUESTION: Plass, P-L-A-S-S?

18 ANSWER: S-S.

19 QUESTION: And, I'm sorry, the other two

20 names?

21 ANSWER: Russ Atkinson.

22 QUESTION: And?

23 ANSWER: Dan Swinehart.

24 QUESTION: When did you invent the

25 desktop?

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1 ANSWER: I'm not exactly sure. Sometime

2 between 1981 and January 1984.

3 QUESTION: Okay. Once you moved over to

4 the natural language group, you didn't work on it any

5 further?

6 ANSWER: No.

7 QUESTION: Was there ever a commercial

8 implementation of Desk Tops?

9 ANSWER: Not that I know of. Oh, I'm

10 sorry. So the Rooms system had commercial

11 implementations, but -- so if you think of them as

12 merging together and then having a commercial, then the

13 desktops would as well.

14 QUESTION: Do you consider Rooms and Desk

15 Tops to be the same thing?

16 ANSWER: No. I mean, they're -- let's

17 see, invented and implemented completely independent of

18 each other.

19 QUESTION: Were they -- you mentioned that

20 they may be -- or you used the words merged together.

21 Could you explain what you meant by that?

22 ANSWER: I meant for the purpose of the

23 patent.

24 QUESTION: Oh, okay. Okay. But they

25 weren't merged together in the sense of taking one idea

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1 of Desk Tops and the other idea of Rooms and trying to

2 create one product?

3 ANSWER: The ideas were so overlapping --

4 that may have happened. I don't know much about the

5 commercial implementations.

6 QUESTION: Did you work on Rooms at all?

7 ANSWER: No.

8 QUESTION: The Desk Tops program was a

9 part of the Cedar programming project?

10 ANSWER: Yes.

11 QUESTION: Do you know if Xerox has kept

12 the software that you worked on during the Cedar project

13 in the software repository?

14 ANSWER: I think that the Cedar project

15 still exists. So I assume the software is in the --

16 still in that software repository. I don't know whether

17 or not they keep all the original versions.

18 QUESTION: Did you look in the software

19 repository?

20 ANSWER: No.

21 QUESTION: Where is the software

22 repository?

23 ANSWER: I don't know.

24 QUESTION: Push a button and --

25 ANSWER: It's been 20 years. I assume

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1 it's not where it was before, and I don't remember where

2 it was before.

3 QUESTION: Do you recall the work that led

4 to the filing of these patents?

5 ANSWER: Yes.

6 QUESTION: Let's talk about that. When

7 did you begin the work that led to the filing of these

8 patents?

9 ANSWER: Do you -- do you mean when did I

10 work on the desktop system?

11 QUESTION: Well, what is it that you

12 contributed? Let's start that way. I know that's a

13 hard question, but what part of these patents did you

14 add to or did you contribute to the patent?

15 What was your technical contribution to

16 these?

17 You can answer the question best you can.

18 ANSWER: Sorry. I paused longer to see if

19 there's an objection next time.

20 I wrote the Desk Tops system.

21 QUESTION: Is Desk Tops an implementation

22 of the invention described in these patents?

23 ANSWER: I think so.

24 QUESTION: Have you reviewed these patents

25 recently?

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1 ANSWER: No.  
2 QUESTION: Getting ready for the  
3 deposition, you didn't go back and skim them or look at  
4 them?  
5 ANSWER: No.  
6 QUESTION: When was the last time you read  
7 them?  
8 ANSWER: 20 years ago.  
9 QUESTION: Did you work with  
10 Mr. Henderson or Dr. Card in developing a multiple  
11 workspace environment?  
12 ANSWER: No.  
13 QUESTION: Did you work with  
14 Mr. Henderson or Dr. Card at all?  
15 ANSWER: We talked occasionally.  
16 QUESTION: Were they involved in this  
17 Cedar project?  
18 ANSWER: No.  
19 QUESTION: If you would, please, turn  
20 to -- in the '412 patent -- and I'm -- I'm just going to  
21 for now refer to the Exhibit 3 as the '412 patent.  
22 ANSWER: Okay.  
23 QUESTION: Column 43, around Line 11 -- if  
24 you could take a look at the paragraph, and I'll just  
25 read it into the record. This is Column 43, Line 11,

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1 from the '412 patent. The invention has been  
2 implemented in two distinct systems. One is called Desk  
3 Tops, and the other as noted above is called Rooms. Is  
4 the Desk Tops that is referred to there the work that  
5 you did?  
6 ANSWER: Yes.  
7 QUESTION: And how would you define a  
8 window in the context of Desk Tops?  
9 ANSWER: A window is an area of the  
10 screen. It has its placement and its size.  
11 QUESTION: What do you mean by placement?  
12 ANSWER: Its location -- its location on  
13 the screen and its size and shape.  
14 QUESTION: If I'm working just  
15 hypothetically in Desk Tops and I'm on a particular  
16 desktop working with a text application and then I want  
17 to switch to the other desktop, would that text  
18 application or could that text application also be  
19 available in the second desktop?  
20 ANSWER: Yes.  
21 QUESTION: Would or was that application  
22 updated between Desk Tops, so if I'm working in the  
23 middle of a document on the first desktop and I switch  
24 over to the second desktop, that document is in the  
25 state it was when I left the first desktop?

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1 ANSWER: Yes.  
2 QUESTION: So in, I guess, order of  
3 development, which was first?  
4 ANSWER: The Smalltalk -- well, I don't  
5 know. I worked on the Smalltalk system first, but I  
6 don't know which came first historically.  
7 QUESTION: Did you work on Smalltalk in  
8 the 1978-80 period?  
9 ANSWER: Yes.  
10 QUESTION: Before you graduated?  
11 ANSWER: Yes.  
12 QUESTION: And what about the viewer  
13 system, when did you work on that?  
14 ANSWER: 1981 to 1983. Those three years.  
15 QUESTION: Is viewer the overall project  
16 name for what also included desktop?  
17 ANSWER: Originally, the -- the viewer  
18 system -- so we called windows viewers back then because  
19 they provided a view on some data, and the viewer system  
20 allowed for these two tiles, two columns where you had  
21 windows and icons. And then I worked on that project.  
22 I was one of the two main people who developed -- or I  
23 came in later. So I wasn't the primary person, but I  
24 worked on it. And then after I worked on it for a  
25 while, then I implemented the Desk Tops interface.

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1 QUESTION: So Desk Tops was a subcomponent  
2 of viewer?  
3 ANSWER: An adjunct.  
4 QUESTION: Adjunct.  
5 ANSWER: I don't remember whether it was  
6 officially part of the project or something that was  
7 built on top of it.  
8 QUESTION: Why -- why did you build Desk  
9 Tops?  
10 ANSWER: It was fun.  
11 QUESTION: Was there some shortcoming in  
12 viewer that inspired you to develop Desk Tops?  
13 ANSWER: I thought people might find it  
14 useful.  
15 QUESTION: What was different about Desk  
16 Tops -- or what did Desk Tops add to the viewer? Let me  
17 ask it that way.  
18 ANSWER: It allowed you to swap back and  
19 forth between different tasks.  
20 QUESTION: And you couldn't do that with  
21 viewer?  
22 ANSWER: Not easily.  
23 QUESTION: Mr. Maxwell, before we broke,  
24 we were talking about Desk Tops and going through a few  
25 passages in the '412 patent, which is Exhibit 3. I'd

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1 like to turn back to where we were looking in the '412  
2 patent, and particularly Column 43, Line -- about 27.  
3 ANSWER: Okay.  
4 QUESTION: It says, a particular viewer  
5 can be in more than one desktop, and it can have a  
6 different size and position in each desktop. Do you see  
7 that sentence?  
8 ANSWER: Yes.  
9 QUESTION: So a viewer is a window, as we  
10 understand it today; is that right?  
11 ANSWER: Yes.  
12 QUESTION: Okay. And what does this  
13 sentence refer to?  
14 ANSWER: So the notion was that you had a  
15 viewer, and the viewer represented a view on a  
16 particular application and perhaps even a particular  
17 document if it is like a text -- if the application was  
18 a text application. And that in one desktop, it might  
19 be placed in the upper left-hand corner and have this  
20 size, and when you switched to the other desktop, it  
21 might be in the lower right-hand corner and have a  
22 different size.  
23 QUESTION: And that viewer or window was  
24 the same window, just displayed in two different  
25 desktops?

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1 ANSWER: Yes.  
2 QUESTION: You don't remember how you  
3 implemented the viewer being available in multiple  
4 desktops?  
5 ANSWER: No, I don't.  
6 QUESTION: Now, was there a data structure  
7 associated with each viewer?  
8 ANSWER: I don't remember.  
9 QUESTION: If you could turn -- just so I  
10 can kind of finish up this point -- to Figures 1A and B  
11 of the patent, the '412 patent. Do you recall having  
12 seen these figures in the past, Mr. Maxwell?  
13 ANSWER: I don't.  
14 QUESTION: In desktops, that viewer, which  
15 is identified as Numeral 12 in Figure 1A and Numeral 22  
16 in Figure 1B, is the same viewer, same window?  
17 ANSWER: I don't remember the exact  
18 details of how it was implemented. I don't remember if  
19 it was the same data structure or just conceptually the  
20 same.  
21 QUESTION: What is the difference?  
22 ANSWER: I just don't remember exactly how  
23 I implemented it. I mean, certainly from the user's  
24 point of view, they were intended to be the same viewer,  
25 but I don't remember if I might have destroyed one and

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1 created another or if I modified the data structure in  
2 the process. I don't remember how I implemented.  
3 QUESTION: Again, looking at Figure 1A and  
4 Figure is B together. If a user were to make an edit in  
5 the Viewer A, B, C, D, Numeral 12, and then switch over  
6 to the desktop that's represented by Figure 1B, those  
7 edits would be displayed in the Viewer 22; is that  
8 right?  
9 ANSWER: Yes.  
10 ATTORNEY: Objection.  
11 QUESTION: So, in other words, there's a  
12 text editor associated with the viewer in Figure 1A and  
13 a text editor associated with the viewer in Figure 1B,  
14 right?  
15 ANSWER: Correct.  
16 QUESTION: In Desk Tops, would the  
17 application -- the text editor application be only in  
18 memory once or would there be one application for Figure  
19 1A and one for Figure 1B?  
20 ANSWER: I think just once.  
21 QUESTION: I believe you worked on  
22 Smalltalk, right?  
23 ANSWER: I worked on Smalltalk.  
24 Smalltalk -- there were a lot of people working on  
25 Smalltalk, and I worked on it for three months.

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1 QUESTION: Did you ever -- I may have  
2 asked you this, and if I did, I apologize, but just  
3 going back through my notes.  
4 Did you work at all on the Rooms Project?  
5 ANSWER: No.  
6 QUESTION: So you didn't participate in  
7 the drafting of any of the Rooms articles that are  
8 referenced in the patents?  
9 ANSWER: (Shakes head.)  
10 QUESTION: So I'm a little confused how  
11 this -- the '412 patent came into being. It sounds like  
12 you were working on Desk Tops back in '81 to '83, and  
13 you finished your work, and you went to the natural  
14 language group; is that right?  
15 ANSWER: Correct.  
16 QUESTION: And put aside Desk Tops and  
17 didn't dust it off again until some 20 something years  
18 later when you get a note from us, right?  
19 ANSWER: Right.  
20 QUESTION: Okay. And then Mr. Henderson  
21 and Dr. Card, working on Rooms separately; is that  
22 right?  
23 ANSWER: Correct.  
24 QUESTION: You didn't work with them at  
25 all on Rooms?

1 ANSWER: Correct.  
 2 QUESTION: Did you know about the Rooms  
 3 Project, though?  
 4 ANSWER: Yes.  
 5 QUESTION: Do you recall when you first  
 6 learned about the Rooms Project?  
 7 ANSWER: No.  
 8 QUESTION: Was it at the time you were  
 9 working on Desk Tops?  
 10 ANSWER: No.  
 11 QUESTION: Later?  
 12 ANSWER: Yes.  
 13 QUESTION: Do you remember how you learned  
 14 about the Rooms Project?  
 15 ANSWER: No.  
 16 QUESTION: So the Rooms Project is going  
 17 on, you hear about that. Did you say to somebody, hey,  
 18 that's just like what I did several years ago in Desk  
 19 Tops?  
 20 ANSWER: No.  
 21 QUESTION: How did it come to being that  
 22 you and Mr. Henderson and Dr. Card were put together on  
 23 this one patent?  
 24 ANSWER: The patent attorney, Jim Beran,  
 25 came to my office and he said, we found your name on

1 some software in this CSL system on a system called Desk  
 2 Tops. Did you write that software?  
 3 And I said, yes.  
 4 And then he said, well, we would like to  
 5 file a patent on that.  
 6 And I said, sounds good to me.  
 7 QUESTION: Did you ask for a working model  
 8 or example of Rooms and review that at the time the  
 9 patent was filed?  
 10 ATTORNEY: Objection.  
 11 ANSWER: No.  
 12 QUESTION: Do you remember any PARC forums  
 13 where Rooms was presented?  
 14 ANSWER: Yes.  
 15 QUESTION: What were those, or can you  
 16 describe those?  
 17 ANSWER: I remember one where Austin  
 18 Henderson and Stu Card presented the Rooms interface.  
 19 QUESTION: Do you recall when that was?  
 20 ANSWER: No.  
 21 QUESTION: Was that, to the best of your  
 22 recollection, before or after the patent was filed?  
 23 ANSWER: I don't remember.  
 24 QUESTION: Do you remember what your  
 25 reaction was when you saw them present the Rooms system?

1 ANSWER: That they had gotten everything I  
 2 had gotten.  
 3 QUESTION: Several years later?  
 4 ANSWER: Right. I didn't want to say  
 5 anything because it felt like boasting to say, well, I  
 6 did it three years earlier.  
 7 QUESTION: Again, I think I asked you  
 8 this, and I apologize if I did. Did you publish any  
 9 papers on Desk Tops?  
 10 ANSWER: No.  
 11 QUESTION: Did Mr. Swinehart work on Desk  
 12 Tops with you?  
 13 ANSWER: No.  
 14 QUESTION: Are you familiar with the term  
 15 tool faulting, T-O-O-L faulting?  
 16 ANSWER: Which line are you on?  
 17 QUESTION: Well, I'm not on a particular  
 18 line yet. I'm just asking whether you are familiar with  
 19 the term tool faulting.  
 20 ANSWER: I don't recognize the term.  
 21 QUESTION: Okay. I'm trying to find where  
 22 it's introduced. Ah, here we go. Line 20, the  
 23 paragraph begins, during a task switch, the user needs  
 24 fast access to the tools associated with a new task that  
 25 are not currently available and the process of accessing

1 each such tool is referred to as a tool fault during  
 2 which the user does whatever is necessary to find that  
 3 tool and make it available for use. Do you see that?  
 4 ANSWER: Yes, I do.  
 5 QUESTION: Does that refresh any  
 6 recollection of what that term tool faulting or tool  
 7 fault means?  
 8 ANSWER: It doesn't refresh a  
 9 recollection, but it sounds like a page fault.  
 10 QUESTION: Do you know what that was?  
 11 ANSWER: I don't remember.  
 12 QUESTION: Did it have to do with the  
 13 overview?  
 14 ANSWER: I don't remember.  
 15 QUESTION: And because that feature of  
 16 Rooms wasn't in Desk Tops, they decided that you  
 17 shouldn't be an inventor on the '687 patent?  
 18 ATTORNEY: Objection.  
 19 ANSWER: Are you going to tell me not to  
 20 say anything? I don't remember.  
 21 QUESTION: Do you know if Desk Tops was  
 22 implemented on all Cedar installations?  
 23 ANSWER: I think Cedar ran on a limited  
 24 number of platforms, and Desk Tops ran on all the  
 25 platforms that Cedar ran on.

1 QUESTION: It was filed according to the  
2 face of the patent in March 1987. Do you see that?  
3 ANSWER: Yes.  
4 QUESTION: A little more than some 22  
5 years ago, correct?  
6 ANSWER: Yes.  
7 QUESTION: How many times would you say  
8 you've looked at the '412 patent in the last 22 years?  
9 ANSWER: Zero.  
10 QUESTION: Have you ever read any of the  
11 claims of the '412 patent?  
12 ANSWER: Probably, before it was filed.  
13 QUESTION: But not since it's issued?  
14 ANSWER: No.  
15 QUESTION: I think you said your  
16 involvement with the prosecution of the '412 patent  
17 stopped after reading application; is that correct?  
18 ANSWER: Yes.  
19 QUESTION: You didn't write any of the  
20 text of the patent?  
21 ANSWER: No.  
22 QUESTION: Did you prepare any of the  
23 drawings?  
24 ANSWER: No, not that I remember. I may  
25 have been involved occasionally if there was an

1 action -- an office action. My patent attorney may have  
2 said, you know, showed me what he was going to do or  
3 something, but I don't remember that.  
4 (End of videoclip.)  
5 THE COURT: Mr. Reiter?  
6 MR. REITER: Your Honor, that concludes  
7 our deposition reading, I believe, for our portion of  
8 the case.  
9 THE COURT: Okay.  
10 MR. REITER: Do you want a summary as we  
11 did yesterday of the testimony?  
12 THE COURT: I think this was pretty clear.  
13 Let's go on to our next witness.  
14 MR. REITER: Okay.  
15 MR. KREVITT: You'd like to proceed  
16 without a break at this time?  
17 THE COURT: Well...  
18 MR. KREVITT: I didn't want to steal  
19 someone's thunder by actually suggesting it.  
20 THE COURT: Let's just take five minutes.  
21 A quick break would be good, and then we'll come back  
22 fresh for our witness.  
23 (Jury in.)  
24 THE COURT: Thank you. Please be seated.  
25 Mr. Krevitt, are you on your feet?

1 MR. KREVITT: I am, Your Honor. Your  
2 Honor, may I briefly address the jury --  
3 THE COURT: You may.  
4 MR. KREVITT: -- as we did with  
5 Mr. Tiemann?  
6 So now you're going to hear from Markus  
7 Rex, who is in charge of the open-source business at  
8 Novell. He has a position similar to Michael Tiemann  
9 but at Novell, the other Defendant.  
10 And as you'll hear, Novell also has  
11 proprietary businesses. He's responsible for the  
12 open-source portion of the Novell business. He'll talk  
13 about the business and some of the other issues we  
14 covered earlier today.  
15 We call Mr. Rex.  
16 DEPUTY CLERK: Raise your right hand,  
17 please.  
18 (Witness sworn.)  
19 MARKUS REX, DEFENDANTS' WITNESS, SWORN  
20 DIRECT EXAMINATION  
21 BY MR. KREVITT:  
22 Q. Good afternoon, Mr. Rex.  
23 A. Good afternoon.  
24 Q. Can you state your name for the record.  
25 A. Markus Rex.

1 Q. And where do you work?  
2 A. I work for Novell, Incorporated.  
3 Q. And where is Novell?  
4 A. Novell is based in Waltham, Massachusetts.  
5 Q. And is that just outside Boston?  
6 A. That is just outside of Boston.  
7 Q. And by now the jury is aware that you're  
8 probably not from Boston; is that right?  
9 A. No, I'm not. I was born in Germany and moved  
10 to Boston in 2005.  
11 Q. And what brought you to Boston in 2005?  
12 A. My company asked me to. I was working for  
13 Novell already at that time, and they asked -- offered  
14 me a position over in Boston, and I accepted with my  
15 family, so we moved over.  
16 Q. And you were with Novell in Germany before  
17 that?  
18 A. Yes; that is correct.  
19 Q. And moved with the family in 2005?  
20 A. That is correct.  
21 Q. How big a family do you have, sir?  
22 A. I have one daughter.  
23 Q. How old is she?  
24 A. She's 15.  
25 Q. And tell us a little bit about Novell. When

1 was Novell started?  
 2 A. Novell was founded in 1983.  
 3 Q. In Massachusetts?  
 4 A. No. In Provo, in Utah.  
 5 Q. And how many employees does Novell have?  
 6 A. Novell has around 3900 employees worldwide.  
 7 Q. Now, as I said to the jury just before you came  
 8 up, Novell is a little different than Red Hat in one  
 9 respect. Not all of Novell's business is what we've  
 10 been referring to as open source; is that right?  
 11 A. That is correct.  
 12 Q. Some of Novell's business is proprietary?  
 13 A. That is correct.  
 14 Q. And just as a percent to give the jury a sense  
 15 of how that breaks down for Novell, how big, as a  
 16 percent of the overall business, is the open-source  
 17 business at Novell?  
 18 A. So the open-source business is about 16, 1-6  
 19 percent.  
 20 Q. 16 percent of the overall?  
 21 A. 16 percent of the overall business, yes.  
 22 Q. And it's that 16 percent of the Novell business  
 23 that you're responsible for?  
 24 A. That is correct.  
 25 Q. And how many people work in your line of the

1 business?  
 2 A. So in my direct line of the business, I work  
 3 around 400 people.  
 4 Q. Of those 400, how many are engineers, software  
 5 developers?  
 6 A. Around 300.  
 7 Q. So 300 people that work in your line of the  
 8 business are devoted to developing technology and  
 9 software?  
 10 A. Yes; that is correct.  
 11 Of those 300 people that we have, we have  
 12 about 50, 60 that work on like contributing to open  
 13 source, enhancing some products that you heard mentioned  
 14 and named. And the rest is normal software engineering,  
 15 helping, supporting services, bug-fixing, all that  
 16 stuff.  
 17 Q. So we'll get into this later, but Novell  
 18 doesn't just take other people's software and put it out  
 19 there. Novell has hundreds of software engineers  
 20 devoted to developing software?  
 21 A. Most certainly we do.  
 22 Q. Okay. So tell me a little bit about Novell's  
 23 business and just one convention, because I won't get  
 24 this right every time. When I say Novell's business for  
 25 purposes of this discussion, I mean the open-source

1 business. The jury knows; you'd made it clear there's a  
 2 whole, large part of Novell's business that's not at  
 3 issue in this case.  
 4 So tell us a little bit about Novell's  
 5 open-source business.  
 6 A. So Novell's open-source business fundamentally  
 7 has about -- has two products. They are in the Linux  
 8 operating system space as we all heard over the last  
 9 couple of days.  
 10 There's a server version of that, and  
 11 there is a desktop version of that product that we make  
 12 available and -- for which we sell subscriptions.  
 13 Q. So what is a subscription in this context?  
 14 A. So a subscription -- this is a very, very  
 15 common question. I get this all the time. I like to  
 16 make an analogy to like a newspaper. That's actually  
 17 where the term comes from.  
 18 So a subscription is something where you  
 19 pay some money. So you're my customer; you pay me some  
 20 money. And in return for that money, you get a ton of  
 21 services; you get support. You can pick up the phone  
 22 and call me and I will help you out, if you don't know  
 23 what to do with the software.  
 24 You get new versions; you get updates, bug  
 25 fixes, patches. I think that's about it.

1 Q. But it's unlike a newspaper in that a newspaper  
 2 you pay a subscription and you get the physical  
 3 newspaper, and if you stop paying your subscription, you  
 4 don't get the newspaper.  
 5 Is that how Novell's business works?  
 6 A. A subscription actually works very similar. So  
 7 while you pay us, you can do all that stuff and you get  
 8 this from us. The thing that you get without you having  
 9 to do anything is the new version.  
 10 So if a new version comes out, if there's  
 11 an upgrade or an update, which you might be familiar  
 12 from your usage of computers at home, those you get.  
 13 And once you stop paying, you don't get those anymore.  
 14 Q. But to be clear, the products are free whether  
 15 you have a subscription or not?  
 16 A. Absolutely. All the products, as I said, are  
 17 available for free for download. And there's no  
 18 obligation for you to pay for them.  
 19 MR. HILL: Your Honor, there's no pending  
 20 question now, but I just ask that Counsel refrain from  
 21 the continual leading of the witness.  
 22 MR. KREVITT: Okay.  
 23 Q. (By Mr. Krevitt) So with respect to your  
 24 products, is there a charge for your products?  
 25 A. No, there is no charge for the products.

1 Q. Ever?

2 A. Nope. There is no charge for the products.  
3 You can download them for free, as I said.

4 Q. And you just testified about subscriptions.

5 A. Yes.

6 Q. And subscriptions, I think you said, are for  
7 services?

8 A. So you sign up for a subscription, and for that  
9 subscription, you get services from us. As I mentioned,  
10 support, bug fixes, upgrades, new versions, patches, and  
11 so on.

12 Q. Can somebody download the Novell product and  
13 not get a subscription?

14 A. Absolutely, yes. And many people do.

15 Q. That's not a good thing for you?

16 A. No. To be honest, I want to make money just as  
17 any other company does.

18 Q. So it's entirely available on the web  
19 regardless of a subscription. It's not tied to a  
20 subscription?

21 A. It is not at all tied to a subscription. It's  
22 freely available for download.

23 Q. And what -- just so that we can talk about the  
24 products by name, what are Novell's open-source products  
25 called?

1 German). That is German, obviously. It comes from a  
2 German company, and this means software system and  
3 development.

4 Q. So SUSE is an acronym for a German name?

5 A. It is an acronym for a German name for a  
6 company which was founded in 1992?

7 Q. And translated into English, what is it again?

8 A. Software and system development.

9 Q. We'll just call it SUSE.

10 A. I think there's a reason why we all do, yes.

11 Q. Yes, right.

12 And the -- are the SUSE Linux Enterprise  
13 Server and SUSE Linux Enterprise Desktop products  
14 open-source products?

15 A. Yes, they are.

16 Q. And were you here for Mr. Tiemann's testimony  
17 regarding open source?

18 A. Yes, I was.

19 Q. And you heard some of the back and forth  
20 regarding open source?

21 A. Yes, I did.

22 Q. And did you disagree with any of his testimony?

23 A. I would not disagree with any of his testimony.  
24 It was very eloquently put.

25 Q. Okay. So just in your words, why don't you

1 A. We have two. We have one product that is  
2 called SUSE Linux Enterprise Server and the other one is  
3 SUSE Linux Enterprise Desktop.

4 Q. SUSE, how do you spell that?

5 A. S-U-S-E.

6 Q. So it's SUSE Linux Enterprise Desktop and SUSE  
7 Linux Enterprise Server?

8 A. That is correct.

9 Q. And earlier today during some testimony, I  
10 heard -- I can't remember if it was the questioning or  
11 the answering, but someone referring to SLED and SLES?

12 A. Yes. We actually do the same thing, because  
13 this is really like a lengthy thing to say, and you get  
14 your tongue all tied up when you say all the time SUSE  
15 Linux Enterprise Server. I have a bad habit of speaking  
16 too fast.

17 So we do the same as Mr. Tiemann  
18 mentioned; we actually shorten it and we just use the  
19 first letters of the product, the individual component.  
20 So S-L-E-S is SUSE Linux Enterprise Server, or Desktop.

21 Q. SLED is Desktop?

22 A. SLED is Desktop.

23 Q. Where does SUSE come from? What does that  
24 mean?

25 A. SUSE comes from software system development (in

1 explain to the jury, and maybe given they've heard so  
2 much about it, it doesn't have to be too long, but your  
3 understanding of what open-source software is.

4 A. Okay. I'll be happy to.

5 So open-source software, as we heard,  
6 refers to a piece of software where you have free access  
7 to the source code. This is the human-readable form  
8 that we saw numerous times on the screen that you can  
9 freely download.

10 You can modify it; you can give it away;  
11 you can contribute; you can change it; you can do with  
12 it basically whatever you want; and you have complete  
13 access to it.

14 The advantages, from my perspective, of  
15 open-source software are that you can just -- you can  
16 get past it to a solution. If there's anything that you  
17 want to change or add or modify, it goes faster because  
18 you have direct access. If you are a skilled  
19 programmer, you can do your own thing, and it just --  
20 it's faster and more efficient to get to a solution that  
21 helps to solve the problem.

22 Q. And your open-source products have the word  
23 Linux in them, in the name, and the word enterprise in  
24 the name.

25 A. That is correct.

1 Q. And so let's just make sure we understand what  
2 those words mean in the context of Novell's products.

3 What does Linux mean?

4 A. So Linux means the operating system called  
5 Linux, which consists of many, many, many packages. We  
6 heard both terms earlier today. And the definition of  
7 Linux is exactly on spot as the same we have with  
8 Mr. Tiemann.

9 Q. And enterprise?

10 A. Enterprise means -- for us, it denotes the  
11 target group of that product. So that product, SUSE  
12 Linux Enterprise Desktop and SUSE Linux Enterprise  
13 Server, are targeted at companies who have some serious  
14 computational and business needs unlike, for example, a  
15 home user that would download it and play around with it  
16 at home.

17 Q. Now, you used the phrase contribute to open  
18 source.

19 A. I did.

20 Q. What do you mean? How does -- how does Novell  
21 contribute to open source? Because we heard a lot of  
22 questioning earlier about things Novell and Red Hat  
23 take.

24 How does Novell contribute to open source?

25 A. Well, as I said, I have about 60 or so people

1 components of those operating systems, which is the core  
2 that does -- the core of the operating system all the --  
3 all the other work, like work with the hardware, make  
4 sure that the other applications run, talk to the  
5 network, and do all that stuff. That is what the Linux  
6 kernel itself does. This is what I'm going to talk  
7 about.

8 Q. And the Linux kernel, then, is -- exists and  
9 anyone can contribute to it?

10 A. Yes. The Linux kernel is one of those  
11 open-source projects that exists out there that is --  
12 has lots of contributions.

13 Novell, for example, has two to three  
14 dozen people that contribute just to that single one  
15 component, because it is the core component of the  
16 operating system.

17 Q. So when you say -- again, I want to make sure  
18 that it's clear for the jury.

19 When you say contribute, what do you mean  
20 by contribute? Is that actual software engineering and  
21 new ideas and innovations?

22 A. Absolutely. Those are software engineers.

23 Q. So how does that contribution work?

24 A. Well, they implement -- somebody has an idea  
25 for a feature -- somebody has an idea for a feature.

1 working on projects. Some of those packages or projects  
2 we spoke about. And they contribute their work. So  
3 they are paid by us, and they contribute their work back  
4 towards that project and towards that open-source  
5 community.

6 And that means that all the code they  
7 write and everything is being uploaded again to the  
8 internet where the next guy, for example, Mr. Tiemann at  
9 Red Hat, can take it and download it and continue to  
10 work with it. That means contribute.

11 Q. Let's use Linux as an example to make sure it's  
12 clear for the jury.

13 First, Linux is one of many open-source  
14 packages?

15 A. The -- do you refer to the Linux kernel?

16 Q. I will if you'd like me to.

17 A. I think that makes it easier.

18 Q. Okay. Tell me if the Linux kernel is one of  
19 many open-source packages.

20 A. So just to make the distinction, this is really  
21 unfortunate, because it is the same name. Linux without  
22 anything else, just those five letters, refer to the  
23 complete operating system that we heard about for the  
24 last three days.

25 The Linux kernel is one of those

1 They implement it. And then that is added to that piece  
2 of software, and it's then uploaded again to the  
3 internet where everybody else can get it and can  
4 download it.

5 Q. And do you have engineers at Novell that are  
6 devoted to the Linux kernel and other engineers that may  
7 be devoted to some other open-source aspect?

8 A. Yes. As I said, the 60, around, people are --  
9 about half of them are devoted to the Linux kernel, and  
10 the other half are devoted to various other projects.

11 Q. Do you have a sense of all the contributions to  
12 Linux kernel there are out there from anyone, big  
13 companies to individuals, how much Novell contributes to  
14 the Linux kernel?

15 A. So we heard -- we heard it referred to  
16 yesterday, I think, that Red Hat contributes around 20  
17 percent to the Linux kernel. We contribute around 15  
18 percent to the Linux kernel.

19 There are other companies, say, IBM.  
20 They -- so Red Hat is the biggest contributor. We are  
21 the second biggest contributor. IBM is the third  
22 biggest contributor. I'm not exactly sure about the  
23 others. I think Intel is fifth; HP, I think, is sixth.  
24 I don't recall who's fourth.

25 Q. Hang on, because -- first, let me understand

1 that answer and then your answer. I want to make sure I  
 2 got the second part of your answer.  
 3 A. Sorry.  
 4 Q. That's okay.  
 5 So did you say that Novell contributes  
 6 approximately 15 percent to the Linux kernel?  
 7 A. That is correct.  
 8 Q. What does that mean? Does that mean 15 percent  
 9 of the Linux kernel was contributed by Novell?  
 10 A. It means 15 percent of the changes that are  
 11 done during one year have been done by Novell. And a  
 12 change is a bug fix, a contribution, a modification, a  
 13 whatever.  
 14 Q. And there's only one company that has made more  
 15 contributions to the Linux kernel?  
 16 A. Yes.  
 17 Q. Any idea who that is?  
 18 A. My good friends in competition, Red Hat.  
 19 Q. And they are your competitor?  
 20 A. They are most certainly our competitor.  
 21 Q. So together Red Hat and Novell, I guess, if you  
 22 add up the 20 percent and the 15 percent, are at just  
 23 over a third of all the contributions to the kernel?  
 24 A. That is absolutely correct.  
 25 Q. And you started to get into who else

1 contributes. Before we get there, I want to understand  
 2 who uses the Linux kernel.  
 3 So now we have some sense -- the jury has  
 4 some sense of the contributions you make.  
 5 MR. HILL: Objection, Your Honor, Counsel  
 6 testifying.  
 7 MR. KREVITT: I don't think that's  
 8 reasonable, Your Honor. I'm setting up the question to  
 9 make sure we understand the context.  
 10 THE COURT: Go ahead.  
 11 Q. (By Mr. Krevitt) So given that, that you've  
 12 explained the contributions that you make to the Linux  
 13 kernel, who uses the Linux kernel? Who's out there  
 14 using it?  
 15 A. There are tons of companies out there using the  
 16 Linux kernel, all kinds of -- all kinds of usages from  
 17 the very biggest to really small companies.  
 18 Q. Let me take it a different way. Do you recall  
 19 I put some customers on the board at some point --  
 20 A. Yes.  
 21 Q. -- of Red Hat and Novell?  
 22 A. Yes, you did.  
 23 Q. And I put the White House?  
 24 A. Yes, you did.  
 25 Q. And I put the Department of Defense?

1 A. Yes.  
 2 Q. Do recall that?  
 3 A. Yes.  
 4 Q. Do they use the Linux kernel?  
 5 A. Absolutely they use the Linux kernel.  
 6 Q. So all of those companies are using the Linux  
 7 kernel and all those federal agencies are using the  
 8 Linux kernel, and it's that kernel to which Red Hat and  
 9 Novell are making a third of all the changes?  
 10 A. Yes; that is correct.  
 11 Q. Now, we've talked about just now who uses the  
 12 Linux kernel.  
 13 A. Yes.  
 14 Q. Those companies, the federal agencies. And we  
 15 talked about your contribution and Red Hat's  
 16 contribution.  
 17 Who else -- I know lots of individuals --  
 18 we've talked about that -- that can contribute. But who  
 19 else contributes to the Linux kernel? Red Hat's No. 1  
 20 and you said Novell is No. 2.  
 21 Who else contributes to the Linux kernel?  
 22 A. So IBM is No. 3.  
 23 Q. I just want to write it down. IBM is the --  
 24 A. IBM is No. 3 as far as contribution is  
 25 concerned.

1 Q. Okay. Why don't we do this, just so I have it  
 2 handy, if I can. Everyone will have to forgive my  
 3 handwriting.  
 4 So No. 1 -- I don't know when the last  
 5 time these were used. We'll use a different color. No.  
 6 1 is Red Hat. No. 2 -- that's not any good -- No. 2 is  
 7 Novell; is that right?  
 8 Can you all see this?  
 9 No. 2 is Novell?  
 10 A. That is correct.  
 11 Q. Who is the third largest contributor to the  
 12 Linux kernel?  
 13 A. IBM.  
 14 Q. IBM. I know you can see it. I hope you can  
 15 read it with my handwriting.  
 16 And who is the fourth?  
 17 A. I don't recall the No. 4. I know No. 5.  
 18 Q. All right. I'll take that. Who is No. 5?  
 19 A. That is Intel.  
 20 Q. Intel?  
 21 A. Yes.  
 22 Q. And 6?  
 23 A. Is HP.  
 24 Q. HP. Why don't we stop there.  
 25 A. That is as far as I know.

1 Q. Well, that works out then.  
 2 A. That works out.  
 3 Q. All right.  
 4 MR. KREVITT: And you-all, I assume, can  
 5 see this. We're going to talk about these.  
 6 Q. (By Mr. Krevitt) So do you have a sense -- we  
 7 talked about Red Hat's contributions, 20 percent, and  
 8 Novell's 15.  
 9 Any sense of IBM's contribution to the  
 10 Linux kernel?  
 11 A. I'd say probably 12, 13 percent.  
 12 Q. Any sense of No. 4?  
 13 A. I know that Intel was barely scratching 10, so  
 14 like 9.something.  
 15 Q. All right. So we know that No. 4 is somewhere  
 16 between these two.  
 17 Okay. So these are the largest with HP to  
 18 the Linux kernel?  
 19 A. That is correct.  
 20 Q. Do you know whether these companies, IBM and  
 21 Intel and HP, like Red Hat and Novell, have engineers  
 22 that are devoted to making suggestions and improvements  
 23 to the Linux kernel?  
 24 A. Yes, we do. And I know many of them.  
 25 Q. So, yes, you do know whether they have?

1 such as Linux or Windows for that matter.  
 2 Q. So for every -- so just to make sure I  
 3 understand and the jury understands, every piece of  
 4 hardware needs software; is that right?  
 5 A. That is correct.  
 6 Q. Okay. And continue.  
 7 A. So IBM sells a lot of hardware.  
 8 MR. HILL: Your Honor --  
 9 THE COURT: Mr. Hill?  
 10 MR. HILL: I object to the relevance of  
 11 what we're getting into here. I'm not sure --  
 12 THE COURT: Can you this move along?  
 13 MR. KREVITT: Yes, we can move it along.  
 14 There was a suggestion during the cross-examination of  
 15 Mr. Tiemann with respect to open source. I wanted to  
 16 make sure the jury has a full and complete  
 17 understanding.  
 18 THE COURT: I really think my jury is well  
 19 up on what hardware and software is. Let's see if we  
 20 can get along.  
 21 Q. (By Mr. Krevitt) So continue. IBM sells a lot  
 22 of hardware.  
 23 A. IBM sells a lot of hardware. They need an  
 24 operating system to run on that hardware, so they want  
 25 to make sure that the operating system that they get on

1 A. I know they have them, and I know many of the  
 2 people.  
 3 Q. How do you know many of the people?  
 4 A. I've been in the business of Linux since 1992.  
 5 That's when I started to do Linux in open source. And  
 6 over the time when you are so long with a particular  
 7 topic, you get to know the people that are in there.  
 8 Q. So I know why Red Hat and Novell -- we talked  
 9 about their businesses.  
 10 Why does IBM, if you know, contribute to  
 11 the Linux kernel? Why does it devote the resources and  
 12 the engineers to contribute to the Linux kernel?  
 13 A. So what -- what IBM does is IBM sells hardware.  
 14 Q. And just so the jury is clear, when you say  
 15 hardware -- we've talked a lot about software. What's  
 16 hardware?  
 17 A. Oh, the physical computer, the thing you can  
 18 touch, and that -- IBM sells the hardware. And every  
 19 computer hardware that you need -- that you buy needs a  
 20 piece of operating system to run on top of it.  
 21 Q. Every piece of -- let's break that down.  
 22 A. Every computer needs an operating system that  
 23 runs on it.  
 24 Q. And the operating system is the software?  
 25 A. The operating system is a piece of software

1 that hardware is -- has the best performance, supports  
 2 all the features of the hardware, and simply generates  
 3 for the customer, who buys in the end the complete  
 4 computer with the operating system, provides the most  
 5 value. That's why IBM does it.  
 6 Q. So does the hardware that IBM sells run the  
 7 Linux kernel?  
 8 A. Absolutely, yes.  
 9 Q. And is that why they made contributions to  
 10 Linux kernel?  
 11 A. That is why they make the contributions.  
 12 Q. And is that true of Intel as well?  
 13 A. Intel makes components for those computers but  
 14 for exactly the same reason.  
 15 Q. HP?  
 16 A. HP sells computers, same reason.  
 17 Q. So why don't you tell the jury, please, just a  
 18 couple examples of the customers of Novell's open-source  
 19 products, the SUSE Linux Enterprise products.  
 20 A. Certainly. One example that comes to mind  
 21 being here in Texas is NASA down in Houston, Texas.  
 22 NASA --  
 23 Q. And can you -- I'm sorry. I was just going to  
 24 ask you to give a brief explanation how NASA uses  
 25 Novell's software.

1 A. Of course. So what NASA does, we all remember,  
2 unfortunately, the Columbia tragedy where the shuttle on  
3 reentry to Earth blew up because of the heat shield was  
4 faulty and seven astronauts died.

5 Afterwards, NASA had to re-engineer the  
6 shuttle. They didn't have a lot of space shuttles left,  
7 so they couldn't send up people and try it out. So what  
8 they decided, they built a huge supercomputer that runs  
9 our software where they do some simulations on, lots of  
10 simulations to ensure that when they send up the next  
11 shuttle with the next seven astronauts on it, that it  
12 returns back to Earth safely.

13 And through using that super-cluster --  
14 they actually called it the Columbia cluster as an honor  
15 to the tragedy there, that through that work they  
16 actually managed to get in space one year sooner than  
17 they had originally projected, and it saved them about a  
18 million work hours using that simulation software.

19 Another project that is actually -- while  
20 we're on NASA, I just really like this a lot, being  
21 stranded --

22 MR. HILL: Objection, Your Honor. This is  
23 non-responsive.

24 THE WITNESS: I'm sorry.

25 Q. (By Mr. Krevitt) Can you give me another

1 I think it's about -- I think it's about  
2 four times the size of this room, whatever that means in  
3 square feet.

4 Q. And all of those computers are devoted to that  
5 task?

6 A. They're all devoted to that task. That is the  
7 single thing they do.

8 Q. Running your software?

9 A. Running our software.

10 Q. How about government agencies? Just to  
11 complete it, we talked earlier about that with  
12 Mr. Tiemann.

13 Do government agencies use Novell  
14 software?

15 A. Well, one example I can give is the New York  
16 subway system, the largest one in this United States.  
17 They have -- after the attacks on -- the terror attacks  
18 on September 11th, they decided they wanted to make  
19 sure the subway continued to work. They wanted to make  
20 sure that it continues to work.

21 So they decentralized their control  
22 functions and put out many backup data centers all over  
23 the city so that there was no single point of failure.  
24 They use our software for those data centers.

25 Q. That's current, the data centers are using your

1 example of how NASA uses your software, please?

2 A. I certainly can. Another example is NASA gets  
3 lots of satellite data and stuff. They built another  
4 cluster where they also use our software where they  
5 simulate and calculate the impacts of natural  
6 catastrophes, such as a volcano or an earthquake or  
7 something like that on the Earth's ecosystem.

8 So they simulated what climate changes  
9 would come out of the Iceland volcanic eruption two  
10 weeks ago and stuff like that.

11 Q. And they do that using your software?

12 A. They do that using our software.

13 Q. And just to give us a sense of scale, let's  
14 take either of those examples. How many servers are  
15 running your software involved in doing those  
16 calculations, either the calculations to determine  
17 simulations for the heat shield or calculations for the  
18 ecosystem?

19 A. So the Columbia cluster is about 15,000, one  
20 five thousand servers for that.

21 Q. 15,000 servers. How big -- how big a space  
22 would that take up?

23 A. I can tell you in square meters. I'm not so  
24 firm on acres and the American measurements. Square  
25 feet I could maybe try.

1 software now?

2 A. Yes, that is currently in use.

3 Q. Do those data centers run the Linux kernel?

4 A. Yes.

5 Q. That's the same Linux kernel to which all of  
6 these companies contribute in the way we discussed?

7 A. Yes, that is correct.

8 Q. Now, you mentioned earlier your server products  
9 and your desktop products.

10 Do you recall that?

11 A. I do.

12 Q. Do you have a sense as to how much of the  
13 open-source business at Novell is from servers and how  
14 much of the open-source business of Novell is from  
15 desktops?

16 A. About 90 percent of the business is server and  
17 10 percent is desktop.

18 Q. Why is that? Why is it -- Mr. Tiemann said the  
19 same thing. Obviously you can only testify for Novell,  
20 but why is -- why is the overwhelming majority of your  
21 business servers?

22 A. Well, I mean, Microsoft has a very predominant  
23 marketshare on the desktop. They have about  
24 90-something percent marketshare on the desktop. It's  
25 just a very small niche left over for us.

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1           Whereas on the server side, the combined  
 2 Linux marketshare is quite significant, so this is where  
 3 just the majority of the Linux installations are being  
 4 used in data centers and servers.  
 5       Q. And just to follow up, when you say Linux  
 6 marketshare, you don't mean Novell's products  
 7 necessarily?  
 8       A. No. I mean Linux overall.  
 9       Q. All the companies out there that are using  
 10 Linux on the servers?  
 11       A. That is correct.  
 12       Q. Now, were you here and did you have an  
 13 opportunity to see the picture that Mr. Tiemann put up  
 14 of servers?  
 15       A. Yes.  
 16       Q. And is that -- when you think of a server, is  
 17 it the same thing?  
 18       A. That is about what I think of as a server.  
 19       Q. Those were Red Hat servers. In other words,  
 20 those were servers that could run your software or Red  
 21 Hat's software?  
 22       A. Absolutely. They all look similar.  
 23       Q. Can you tell looking at this server whether it  
 24 runs Red Hat's or Novell's?  
 25       A. No. No stickers on it.

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1       Q. And do -- let's talk quickly about displays.  
 2 Do servers use displays in your experience?  
 3       A. Servers generally don't use displays.  
 4       Q. Why is that? Why wouldn't you have a display  
 5 with a server?  
 6       A. So what a server does is a server takes all  
 7 kinds of data and processes it and stores it and does  
 8 things with it. And the data entry happens at different  
 9 points.  
 10           So, for example, when I fly back to Boston  
 11 later this week or on the weekend, I hope, then I go  
 12 talk to the gate agent for American Airlines and they  
 13 type in their thing. And this is a terminal just like  
 14 we have here or the Judge told us earlier.  
 15           And this device doesn't do anything. It  
 16 just transmits the data to the server. And on the  
 17 server, there's a big database that looks up my record,  
 18 and they tell us, okay, you have Seat 5K or 5F or  
 19 whatever, and then you -- I get my boarding pass.  
 20           This is all happens -- the server happens  
 21 all in the back end. The front end has nothing to do  
 22 with it. It's different locations. It can be thousands  
 23 of miles away. And it's just not connected anywhere.  
 24       Q. Let's take your example of the airline. You go  
 25 up to the counter, you said. An agent is typing into

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1 the desktop there with a display, and then it's  
 2 interacting with a server somewhere.  
 3           Assuming that the server is running Novell  
 4 software, the server with which that agent is ultimately  
 5 connected somehow; that information is being accessed or  
 6 to which information is being sent, can you tell  
 7 anything from that fact, from the fact that the servers  
 8 are running Novell software, whether the display that  
 9 the agent is using would be operating with Novell  
 10 software?  
 11       A. It is totally independent, has nothing to do  
 12 with each other.  
 13       Q. So even if the display is interacting with the  
 14 server running your software, it doesn't tell you what  
 15 the display's software is?  
 16       A. No. There was really a good example earlier  
 17 about Amazon. When you buy a book with Amazon, it's  
 18 totally irrelevant what you see on your screen. You can  
 19 use a Mac; you can use Windows; you can use even Linux,  
 20 if you want. Amazon still runs Linux, as we learned  
 21 earlier, on the back end.  
 22           MR. KREVITT: By the way, Your Honor,  
 23 whenever is a good time for the Court, I'll go as long  
 24 or as short as Your Honor wants. But I noticed the  
 25 time.

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1           THE COURT: We should hit pretty close to  
 2 5:30, so you have about four or five minutes.  
 3           MR. KREVITT: Okay. Let's use it then.  
 4       Q. (By Mr. Krevitt) You heard earlier talk about  
 5 research and development project that Red Hat has.  
 6           Do you recall that?  
 7       A. Yes, I do.  
 8       Q. Fedora?  
 9       A. Yes, I do.  
 10       Q. And does Novell have a research and development  
 11 project?  
 12       A. Novell has a similar project called openSUSE.  
 13       Q. And does -- and that's just open with SUSE?  
 14       A. Yeah, openSUSE, eight letters.  
 15       Q. And does Novell charge for that product?  
 16       A. No, we don't.  
 17       Q. Any money?  
 18       A. No, we don't, not currently.  
 19       Q. And does Novell charge subscriptions, sell  
 20 subscriptions for that?  
 21       A. There's no subscriptions available for that  
 22 product.  
 23       Q. You said currently there. I caught the  
 24 currently.  
 25           Was there a time when Novell charged

1 something for openSUSE?

2 A. So openSUSE was always available for free  
3 download. It is our research product so we didn't do  
4 any selling for it or subscriptions or anything, but  
5 what we did was as a convenience for our customers, that  
6 we made it available on a CD and we sent the CD out for  
7 shipping and handling costs.

8 You could call us up and say I'd like this  
9 on a CD, or you could print the book so you don't have  
10 to read it on screen, and we would ship it.

11 Q. Did you say the software was always free for  
12 download?

13 A. The software was always free for download. It  
14 was literally just --

15 Q. This is just if somebody wanted a disk?

16 A. You could download it if you wanted it, which  
17 far more people did than the ones that actually called  
18 us up.

19 Q. So that's why you said currently, because you  
20 used to charge some shipping and handling for the disk?

21 A. Yes. And we discontinued that. There just  
22 wasn't enough demand for that, so we stopped.

23 Q. So you no longer charge?

24 A. We no longer charge. We no longer make it  
25 available even for shipping and handling. It's only for

1 free download. You go to a server on the internet and  
2 download it; that's it.

3 Q. So the desk isn't available, so you don't have  
4 to charge the shipping and handling?

5 A. Exactly.

6 Q. I see.

7 Okay. So aside from that -- and we  
8 understand that that existed, the shipping and handling.  
9 Aside from that, does Novell now or has Novell ever  
10 charged for openSUSE?

11 A. No, we did not.

12 Q. And I think I asked you and I apologize, but  
13 any subscriptions?

14 A. No subscriptions for openSUSE.

15 Q. Any revenue at all?

16 A. Besides what I mentioned, nothing else.

17 Q. Is openSUSE -- does it cost Novell money? Does  
18 it -- do you invest money in openSUSE?

19 A. Oh, most certainly. I have engineers on my  
20 staff that get a paycheck every half month or every  
21 month and they most -- it most certainly is costing  
22 money to create that project, yes.

23 Q. How many engineers are devoted to openSUSE?

24 A. I would say probably around 80, 70, 80.

25 Q. And they're devoted full-time to openSUSE, the

1 70 to 80?

2 A. They work on projects and packages related to  
3 openSUSE.

4 Q. And are there other expenses associated with  
5 openSUSE?

6 A. Well, you need some service; you need some  
7 network; you need some hardware, as I said. You have  
8 whatever, some internal tools that you need, you need to  
9 manage those servers, so there are typical kind of  
10 business expenses you would have in a software company.

11 MR. KREVITT: I saw you leaning forward,  
12 Your Honor.

13 THE COURT: It's your time, but we've  
14 about reached the time my jury gets to go home.

15 MR. KREVITT: Well, I'm not going to keep  
16 them from going home, Your Honor.

17 THE COURT: We'll see you tomorrow morning  
18 at 8:30.

19 (Jury out.)

20 THE COURT: All right. We've got work to  
21 do. Let's do our business of the day first, get rid of  
22 the exhibits.

23 MS. DICKMAN: Plaintiffs would like to  
24 offer the following exhibits to be admitted: PX1,  
25 PX35 --

1 THE COURT: Slow down so that Mr. Stewart  
2 can tell me if he has problems at any point.

3 MS. DICKMAN: All right. PX1, PX35,  
4 PX149, PX156, PX100, PX269, PX283, PX290, PX295, PX297.

5 MR. STEWART: We have an objection with  
6 297.

7 THE COURT: Okay.

8 MS. DICKMAN: PX316, PX317.

9 MR. STEWART: And we have an objection  
10 with 317.

11 THE COURT: Okay.

12 MS. DICKMAN: PX321, only Schedule 1, so  
13 it would be 321-A; and PX321-B, which would be  
14 Schedule 2; PX326, the non-numbered article offered by  
15 Mr. Hill, titled Red Hat Exec Takes Sun to Task on Open  
16 Source, which we would number PX327.

17 MR. STEWART: Did we have an objection  
18 with that? We hadn't seen it before.

19 MR. REITER: I'm sorry?

20 MR. STEWART: Is that an article we didn't  
21 see?

22 MR. GASEY: That was only used for  
23 impeachment.

24 MR. HILL: Okay. It's not substantive  
25 evidence.

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1 THE COURT: Don't need that one?  
 2 MS. DICKMAN: No.  
 3 THE COURT: Make sure the record shows  
 4 which one you are not offering.  
 5 MR. HILL: It's not in the record by  
 6 number, Your Honor. It was the article I used for  
 7 impeachment purposes with the witness.  
 8 MS. DICKMAN: And then Defendants' Exhibit  
 9 778, Defendants' Exhibit 809, Defendant's Exhibit 271,  
 10 and Defendants' Exhibit 240.  
 11 THE COURT: Okay. What's the story on 297  
 12 and 317?  
 13 MR. REITER: The same thing as we talked  
 14 about yesterday, Your Honor, hearsay; they're articles.  
 15 I think this is still one that Mr. Steinman has  
 16 referenced, and he will testify tomorrow. We thought  
 17 we'd have him on today.  
 18 Just defer putting that in?  
 19 MR. VICKREY: That's fine.  
 20 THE COURT: You can authenticate that  
 21 tomorrow.  
 22 MR. VICKREY: That's fine.  
 23 THE COURT: Just hold it up and ask him if  
 24 he recognizes it, and then we're fine, right?  
 25 So 297 and 317 are not admitted at this

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1 time. And, Mr. Stewart, you need to give me your list.  
 2 MR. STEWART: The Defendants offer DX240,  
 3 DX241, DX245, DX246.  
 4 MS. DICKMAN: When were these offered?  
 5 Okay. Sorry.  
 6 MR. STEWART: Okay.  
 7 THE COURT: Are you guys back together?  
 8 MS. DICKMAN: Can you start one more time?  
 9 MR. STEWART: DX240, DX241, DX245, DX246,  
 10 DX270, DX271, DX272, DX809.  
 11 MS. DICKMAN: What was that one?  
 12 MR. STEWART: I'm sorry. I take that  
 13 back. DX904.  
 14 MS. DICKMAN: We object to that one.  
 15 THE COURT: 904?  
 16 MS. DICKMAN: Yes.  
 17 MR. STEWART: DX975.  
 18 MS. DICKMAN: We object to that one as  
 19 well.  
 20 MR. STEWART: And DX976.  
 21 MS. DICKMAN: Which we also object to.  
 22 THE COURT: Is that all, Mr. Stewart?  
 23 MR. STEWART: Yeah.  
 24 THE COURT: Can we talk about 904, 975,  
 25 976?

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1 MR. GASEY: Sure, Your Honor.  
 2 THE COURT: Tell me the problem.  
 3 MR. GASEY: Hearsay as to all three.  
 4 With respect to 904, that is the software  
 5 listing that Mr. Tiemann testified that somebody else  
 6 created pursuant to what somebody else wrote as a  
 7 program. It wasn't created as a business document by  
 8 Red Hat in the normal course of business. It's an  
 9 out-of-court statement.  
 10 MR. REITER: That's not true. He  
 11 authenticated it, Your Honor. He said that he looked  
 12 over the software, verified the software, and it was  
 13 done according to his instructions.  
 14 THE COURT: Was this the accounting  
 15 software that counted how many of this and that?  
 16 MR. GASEY: That's right.  
 17 MR. KREVITT: You may recall, Your Honor,  
 18 that the Plaintiffs had said they were going to question  
 19 Mr. Tiemann about it and didn't question Mr. Tiemann  
 20 about it.  
 21 They also had an opportunity after I  
 22 showed the document to ask questions and they didn't.  
 23 THE COURT: I'm satisfied on 904 that he  
 24 recognized it, gave parameters for it, and fully  
 25 supported it. The Court's satisfied with its

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1 reliability.  
 2 975?  
 3 MR. GASEY: Both 975 and 976 also, Your  
 4 Honor, fall both into the same boat. They're  
 5 third-party, out-of-court statements, one by the DOD and  
 6 one by the White House blog, third-party statements.  
 7 MR. KREVITT: They're not being offered  
 8 for the truth of the matter asserted. We're not  
 9 offering them to prove anything about the Department of  
 10 Defense's mission.  
 11 THE COURT: They're just offered to show  
 12 that they have that software, right?  
 13 MR. VICKREY: Your Honor, then that's not  
 14 unlike all the articles that they objected to that we  
 15 sought to bring in.  
 16 MR. KREVITT: Your Honor, I'm the one  
 17 introducing it, so I thought maybe I would --  
 18 THE COURT: Let me hear -- Mr. Vickrey was  
 19 giving me his explanation. Remind me, did I strike  
 20 articles?  
 21 MR. VICKREY: You did, Your Honor.  
 22 THE COURT: What were those?  
 23 MR. VICKREY: They were articles about  
 24 degree of usage, what industry analysts are saying about  
 25 these software features. And in my -- conceptually, I'm

1 not seeing a difference.

2 MR. REITER: Well, I do see a difference,  
3 Your Honor. I dealt with those yesterday in that they  
4 are trying to present those for the truth of the matter  
5 asserted; that is, that they are popular; that they are  
6 important; people want them.

7 The distinction here with Mr. Krevitt is  
8 just that the Department of Defense uses open-source  
9 software, not that it's great, not that it's good; just  
10 uses it.

11 MR. HILL: Not that you need another  
12 lawyer up here, the document says the Department of  
13 Defense uses open-source software. If that's not true,  
14 then what are they offered for?

15 MR. KREVITT: We are not offering it for  
16 that proposition.

17 THE COURT: What are you offering it for?

18 MR. KREVITT: We're offering the document,  
19 Your Honor, to show how the Department of Defense has  
20 described the open-source software as well as the White  
21 House, because there's an issue regarding open-source  
22 software and how it's perceived.

23 And we are simply describing a document  
24 and offering it to show how the White House has  
25 described it. It has nothing to do with whether the

1 Department of Defense -- it really is important to the  
2 Department of Defense.

3 THE COURT: I think I struck them  
4 yesterday, and I'm going to strike these two in  
5 fairness. 975 and 976 are not accepted.

6 MR. GASEY: Thank you, Your Honor.

7 MS. DICKMAN: Thank you.

8 THE COURT: All right. We need to give  
9 you your time. The Plaintiffs have used 7 hours, 36  
10 minutes. The Defendants have used 7 hours, 29 minutes.  
11 So we're close to even. But we have a ways to go.

12 Next item, we need to talk about where  
13 we're going, right?

14 MR. GASEY: Well, there are two items.  
15 One, I don't want to speak out of place for Mr. Reiter,  
16 but he proposed, and I agree, that both by way of an  
17 attempt to minimize the burden on Your Honor and both by  
18 the way of, I guess, a mea culpa of sorts, but a joint  
19 mea culpa -- but given the differences in formatting, in  
20 order to kind of expedite the jury instruction process,  
21 Mr. Reiter had a suggestion -- I think it's a good  
22 one -- to have basically I guess a lock-down of one or  
23 two lawyers per side to go ahead and try and at least  
24 comparably format and narrow down the disputes with the  
25 jury instructions to minimize taxing the Court.

1 THE COURT: I've had my clerks working on  
2 this. How far along are we on it?

3 THE CLERK: I just finished it, but...

4 THE COURT: I tell you what let's do,  
5 We're going to -- let's go on to what we're doing  
6 tomorrow, and then we're all going to take a look at  
7 what the clerks have been working on and what I think  
8 will bring us to a narrow number of issues, and we will  
9 try to deal with them.

10 So what are we doing tomorrow?

11 MR. REITER: Tomorrow --

12 MR. KREVITT: We will finish up with  
13 Mr. Rex relatively quickly, Your Honor. I don't know  
14 how much is cross.

15 THE COURT: Excuse me, Mr. Rex. You're a  
16 wonderful witness. I just think that we've heard a lot  
17 of testimony to this effect from Mr. Tiemann.

18 MR. KREVITT: Yes. I understand, Your  
19 Honor. We'll get through that relatively quickly in the  
20 morning.

21 MR. REITER: And then we will have  
22 Mr. Steinman, who will be very brief, similar to  
23 Mr. Riveros. And then I believe we will have Dr. Gray,  
24 our non-infringement expert, and then Dr. Wilson for  
25 invalidity.

1 THE COURT: And when do you think we  
2 finish?

3 MR. REITER: Well, we will do our best,  
4 Your Honor, but --

5 THE COURT: I haven't heard damages. When  
6 do we hear from Dr. Putnam?

7 MR. REITER: That's Dr. Putnam who will be  
8 our last witness, Your Honor, and given --

9 THE COURT: So we have one, two, three,  
10 four, five more witnesses?

11 MR. REITER: Yes, Your Honor.

12 THE COURT: Okay. We're going to move  
13 quickly, right?

14 MR. KREVITT: Yes, Your Honor.

15 THE COURT: I think that when I start  
16 sustaining all the objections, you get the idea --

17 MR. KREVITT: That helps us understand,  
18 Your Honor.

19 THE COURT: -- that we want to move  
20 quicker, and the objections seem to speed things along,  
21 so...

22 Okay.

23 MR. REITER: We also have --

24 THE COURT: Just from the Court's  
25 standpoint, I was very hopeful we'd finish up the

1 testimony tomorrow so that Friday morning, with a fresh  
2 mind, our jury could hear their instructions, hear the  
3 closing arguments, and go out to deliberate.

4 And, of course, if we have to take a  
5 witness in the morning, that probably won't completely  
6 dissipate the freshness of their minds, but we don't  
7 want to get too far into the day, or we'll put a lot of  
8 pressure on ourselves with respect to both the  
9 instructions and the closing arguments.

10 Seems to me like you want -- you both have  
11 a strong interest in having lots of time to play with  
12 those closing arguments with a very attentive jury. So  
13 what we'll do by the way on the closing arguments is  
14 remember we're going to keep those even in time,  
15 regardless of where the time has broken down to that  
16 point. We're going to be even on those.

17 What did we agree on?

18 MR. GASEY: I believe Your Honor said that  
19 you left it to us to go ahead and reach agreement on  
20 that.

21 THE COURT: I'm thinking an hour apiece  
22 ought to do it. But do you think -- you know, if you  
23 want an hour and 15 or something, that's fine, too.

24 MR. HILL: Your Honor, we don't need that  
25 much time.

1 MR. GASEY: I'm certainly willing to do  
2 less.

3 MR. KREVITT: Why don't we huddle, Your  
4 Honor, and make a decision to Your Honor tomorrow.

5 THE COURT: That will be just fine. The  
6 way I would foresee that happening is I'll give my -- I  
7 presume you'd wish me to give my instructions first.

8 MR. REITER: Yes, Your Honor.

9 THE COURT: I would give my instructions,  
10 then we would hear from the Plaintiff. We'll take a  
11 break, come back, and we'll hear from the Defendant.

12 And do you want another quick break before  
13 rebuttal or --

14 MR. HILL: Not necessary.

15 MR. GASEY: Not necessary.

16 THE COURT: Rebuttal can follow on pretty  
17 quickly. And then we'll send them forward. And it  
18 would be really nice if that happened to coincide with  
19 the lunch break. If not, I understand, okay?

20 MR. GASEY: The one open item we still had  
21 was, Your Honor wanted us to set aside a bit of time to  
22 review the physicals.

23 MR. REITER: Computers.

24 THE COURT: Yes.

25 MR. REITER: We have them; they're out in

1 the --

2 THE COURT: Good.

3 Now, one other thing, Mr. Hill and  
4 Mr. Reiter gave a good suggestion on how to deal with  
5 the directed verdict. Is this the time you'd want to  
6 make sure it's on the record or --

7 MR. REITER: Well, we can just submit it  
8 in writing.

9 MR. GASEY: We're agreeable.

10 THE COURT: That's just fine. We have on  
11 the record a full acknowledgement that it was made in  
12 the timely fashion, and the Court accepted it in a  
13 timely fashion, if writing saves us time.

14 MR. REITER: Well, with one caveat. If I  
15 make it orally, do I have a better chance of winning?

16 THE COURT: It's pretty customary that the  
17 Court deals with those things as part of the JMOL at the  
18 end of trial.

19 MR. REITER: No, I understand, Your Honor.

20 THE COURT: And so -- but you do have to  
21 make the motion.

22 MR. REITER: I understand.

23 THE COURT: So you have preserved the  
24 motion, and the Court, I'm sure, would have, in any  
25 event, dealt with it all in the post-trial phase.

1 MR. HILL: Your Honor, do you have a time  
2 limit on when you want them to file that motion so if  
3 the Court wants to hear argument, we'll have a chance to  
4 review it and the Court will be prepared at the end of  
5 the case and renew motions?

6 MR. REITER: We can get something filed  
7 tomorrow. It would be relatively perfunctory, but it  
8 will cover all of it.

9 THE COURT: Yeah, I think you just need to  
10 invoke issues. What you're doing is protecting your  
11 rights to appeal.

12 Where does this go on appeal?

13 MR. REITER: 9th Circuit.

14 THE COURT: Wherever those pointy headed  
15 people are, we'll find them.

16 Good. Is that --

17 MR. LYON: Do you want us to bring the  
18 computers forward.

19 THE COURT: Sure. Why don't we do the  
20 computers. And meantime, we can double-task here.

21 Do you have your jury instruction people,  
22 or are they the same? We could stick a couple of each  
23 of you in the back room with my law clerks, and we could  
24 start just putting yellow markers on what we really need  
25 to talk through.

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(Court adjourned.)  
CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

\_\_\_\_\_  
DONNA COLLINS, CSR  
Deputy Official Court Reporter  
State of Texas No. 1086  
Expiration Date: 12/31/10

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Date