

Volume 5

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ORACLE AMERICA, INC.,)	
)	
Plaintiff,)	
)	
VS.)	No. C 10-3561 WHA
)	
GOOGLE, INC.,)	
)	
Defendant.)	San Francisco, California
)	April 20, 2012

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

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(Appearances continued on next page)

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CATHERINE LACAVERA
Google Corporate Representative

- - -

PROCEEDINGS

1
2 **APRIL 20, 2012**

7:30 a.m.

3
4 (Proceedings held in open court, outside
5 the presence and hearing of the jury.)

6 **THE COURT:** Good morning. Welcome back, please be
7 seated.

8 You lawyers are staying in good health. Usually by
9 now somebody is got the flu. So far so good for you all, huh?

10 So let's pick up with the -- I'd like to get your
11 input on the sheet of paper I gave you yesterday.

12 **MR. JACOBS:** Your Honor, I've got to confess. I
13 violated your order in literal terms, but I hope I met the
14 spirit of it. I declined to give you a handwritten markup
15 because I didn't want to inflict my handwriting on the Court.

16 (Whereupon, document was tendered
17 to the Court.)

18 **MR. BABER:** Your Honor, I'm happy to say we did abide
19 by your order, but we have both a handwritten and a typed one
20 in case my handwriting is not as decipherable as it could be.

21 (Whereupon, document was tendered
22 to the Court.)

23 **THE COURT:** Thank you.

24 **MR. JACOBS:** Just so it's clear on the record, I've
25 given you a mark to show changes.

1 **THE COURT:** Okay. You gave me two things.

2 **MR. JACOBS:** I gave you two copies, your Honor.

3 **THE COURT:** Oh, it's the same thing.

4 And the one you gave me a has got the handwritten
5 things.

6 **MR. BABER:** And we can provide one, like Oracle has,
7 showing the changes in the typed one if you would like.

8 **THE COURT:** No, no. This is fine. We're going to
9 have a discussion about this in due course, but I think it's
10 better if I read your write-up.

11 Now we go to... I had a list of things to take up.
12 Here we go.

13 I have this question. And I need to be precise so if
14 you want me to repeat this question, I will. But when you use
15 the term "class libraries," "class libraries," do you mean only
16 the already compiled object code or do you mean the already
17 compiled object code and the source code? And this is when you
18 use the term "class libraries."

19 So who wants to go first?

20 **MR. JACOBS:** Your Honor, given the precision of the
21 question, I'd like to check with the folks at -- that are the
22 key person of this vocabulary and make sure we get it exactly
23 right.

24 **THE COURT:** All right.

25 **MR. BABER:** Your Honor, Brucer Baber for Google.

1 When we've used the term "class libraries," we are
2 referring to both when it's in source code form, as you would
3 get it from Google, if you download it from the, web for
4 example. That's in source code. And when we are referring to
5 our -- the programs or the functions, the code for the
6 functions, that is in the implementations of the APIs, the part
7 that actually does the work, the actual computer code, which
8 starts out in source code format when you first get it and then
9 it is compiled into -- it's not object code, but it's compiled
10 code, bytecode. So it might appear in that other form either
11 in a development environment, on a handset, et cetera. But
12 it's the same code, basically just in two different forms.

13 So when we talk about the libraries we are referring
14 to the code.

15 **THE COURT:** No, no, not libraries. Class libraries.

16 **MR. BABER:** And I was going to also say, "class
17 libraries," I think we have used that interchangeably;
18 libraries, class libraries, core libraries. We have used the
19 word "libraries" to really refer to that body of code that
20 performs the functions as opposed to just the name of the API
21 or the English language description of the API. The libraries
22 are the parts that are in there that actually do the work when
23 you call it.

24 **THE COURT:** All right. So does that mean the
25 implementation?

1 **MR. BABER:** Yes.

2 **THE COURT:** When you use the use the term "class
3 libraries," does that have any different meaning than
4 "implementation"?

5 **MR. BABER:** No, your Honor. If I go back to Dr.
6 Bloch's chart from yesterday.

7 Everything here in his orange box (indicating) where
8 it says implementation, which is actually the code that
9 performs the function once you give it the right input, and
10 there's lots of also blocks of this prewritten code that appear
11 in this very large computer file, those are the libraries that
12 we're referring to.

13 **THE COURT:** All right. So let me give Mr. Jacobs
14 another shot at it.

15 You're free to comment now, if you wish, or if you
16 want to address this after you huddle with your clients, that's
17 fine, too.

18 **MR. JACOBS:** Yes, your Honor, I think that would be
19 best. There's probably a place that one can go to get a formal
20 definition of these terms and given -- again, given the
21 precision of the question, I would like to make sure we get it
22 right.

23 **THE COURT:** Sure.

24 All right. Now, next question is -- I think I asked
25 this yesterday and I think I know the answer. This is a

1 question to Google.

2 Does Google admit to factually copying the SSO and
3 declarations of Java API elements from the Java documentation
4 or from the Java implementations?

5 **MR. VAN NEST:** Could I have that question again, your
6 Honor, please?

7 **THE COURT:** Yes. And let me also -- I'll explain, at
8 least in part, why it matters so you'll have that.

9 Does Google admit to factually copying the SSO and
10 declarations of the Java API elements? Let's say, from just
11 the Java documentation. I'll leave it there for now.

12 One of the reasons this matters is in doing the jury
13 instructions, if you admit to having used that to copy from,
14 then we don't have to get into substantial similarity. The
15 test becomes more simple.

16 And, also, I'll point out yesterday I think you said
17 that when the -- in the clean room, Google engineers, in fact,
18 did have the documentation and, in fact, the whole point was to
19 copy the declarations and the SSO. So that's what I'm trying
20 to get at.

21 **MR. VAN NEST:** I'm going to let Mr. Baber address
22 that.

23 **MR. BABER:** Your Honor, if I may.

24 I believe the premise -- I'll answer your question
25 and, also, I want to talk about the premise of it because there

1 are lots of cases that say even some copying is not the end of
2 the day in a copyright case. There still must be substantial
3 similarity between the works -- or virtual identity between the
4 works as a whole, as a whole, as to protectable elements. So
5 some copying is not, in fact, the end of the day in terms of
6 the infringement question.

7 In response to your first question, I would say no.
8 Google did not copy the specifications or -- the SSO or the
9 declarations. What Google -- what Google used were the API
10 specifications, the names that have been chosen for the APIs --
11 which, of course, the name tells you what package it's in, what
12 class it's in, et cetera -- and the specific method signatures
13 that are part of the specifications.

14 So the word "declarations" has been kicked around a
15 fair amount --

16 **THE COURT:** Then using the chart over there, show me
17 which part you did copy and which part you did not copy.

18 **MR. BABER:** Your Honor, the first -- the three parts
19 that Dr. Bloch identified as being part of the name. Basically
20 everything above the implementation (indicating). In other
21 words, the package it's in, the full method signature of the
22 method, including it's, quote, declaration.

23 **THE COURT:** Well, but if that was copied -- I thought
24 you said you did not -- I asked you if you copied the
25 declaration, and you said, "No." Now you're saying, "Yes."

1 **MR. BABER:** I apologize, your Honor, if I wasn't
2 clear.

3 Yes. The declarations and the actual names of each
4 of the methods in the class libraries, that's information that
5 dealt with Apache, from Sun, from books, from lots of other
6 places. Yes, we used, because we had to use -- as Dr. Bloch
7 explained yesterday, we had to use those names just as they
8 have always been used because that's what defines the API as a
9 functional matter.

10 So, yes, these elements we all used. They are the
11 same ones that had always been used.

12 **THE COURT:** Let me come to the point that you were
13 making which -- the work as a whole. What do you say was the
14 work as a whole?

15 **MR. BABER:** Your Honor, I think it's -- for purposes
16 of this trial there are two works as a whole on the plaintiff's
17 side. They have accused us of infringing their copyright in
18 the Java Platforms Standard Edition Version 1.4 and Version
19 5.0. Those are the two different works they have pleaded in
20 their complaint and they have said, "Google, you infringe our
21 copyrights in these two works."

22 So that's it on the plaintiff's side.

23 **THE COURT:** All right. So you fall back on the
24 pleadings and say they are stuck with the pleadings.

25 **MR. BABER:** Absolutely, your Honor. We believe they

1 are stuck with the copyright registrations and the works that
2 they asserted in their complaint, just like they are stuck with
3 the same group of patents they asserted.

4 **THE COURT:** Didn't I rule on summary judgment that
5 they were not stuck with -- what did I say on -- you raised
6 this point on summary judgment and I did not grant your motion,
7 but I'm fuzzy on why.

8 **MR. BABER:** You did, your Honor. It came up in the
9 summary judgment motion on the diminimus argument, whether or
10 not the nine lines in rangeCheck, for example, you compare --
11 what work do you compare it to when you decide it's diminimus?
12 And there was a dispute as to what was the relevant work, but
13 for purposes of infringement analysis, we believe it's pretty
14 clear.

15 There have been some cases that talked about, well,
16 what is a work for purposes of registration? Okay? But the
17 Court -- the cases have always started with, it's the
18 plaintiff's job to do two things: To identify its copyrighted
19 work and to show that it's ridge time period.

20 So in this case, just for example, they have not put
21 anywhere in discovery or anywhere else any registration for
22 just the 37 APIs, or just the file in which rangeCheck appears,
23 or just the files that they say were copied from the source
24 code. There are no separate registrations for those works.

25 The works they chose to register -- and they could

1 have gotten if they wanted to. They could have tried to get
2 separate registrations for each of those files claiming each
3 one was a separate work, but there are some cases -- and we can
4 brief it further, if your Honor wants.

5 There are some cases that say, well, if you want to
6 try and even take the approach that those are separate works,
7 you've got to show they have independent merit or value, if you
8 will. So for purposes of summary judgment you said, Well, what
9 Oracle relies on doesn't really control. That's a registration
10 process and it doesn't control here. So I'm going to reserve
11 on that question as to what are the works for purposes of
12 applying diminimus analysis.

13 But it's the same question on --

14 **THE COURT:** All right. So hold that thought.

15 Is it the same work for purposes of substantial
16 similarity, fair use and diminimus copying?

17 **MR. BABER:** Yes, your Honor, I believe so.

18 **THE COURT:** All of those?

19 **MR. BABER:** Has to be.

20 **THE COURT:** Whatever the work is you don't have to
21 have three different or two different. We have the comparison
22 work is one item, whatever that item is.

23 **MR. BABER:** That's correct, your Honor.

24 **THE COURT:** Do you agree with that?

25 **MR. BABER:** Yes.

1 **THE COURT:** Let me pause on that.

2 Mr. Jacobs, do you also agree with that?

3 **MR. JACOBS:** The last piece of it or the starting
4 point?

5 **THE COURT:** The last piece. Whatever the work as a
6 whole is, that we should tell the jury to compare against or --
7 whatever the -- let me start over.

8 Whatever the work as a whole is, it's the same for
9 substantial similarity purposes, fair use purposes and
10 diminimus copying purposes.

11 **MR. JACOBS:** I would like to consider that question,
12 your Honor.

13 Where I am able to -- where I'm able to agree with
14 Mr. Baber is that I think we have to define something that has
15 some independent significance. We have to define an "it."
16 Where I disagree with him is that the relevant starting point
17 is exclusively that which was registered.

18 In this particular case we have class libraries. We
19 have a code, each -- that has a beginning and end and a
20 copyright notice at the top of it. And we all know what the
21 beginning and end is. We have seen it illustrated by Mr.
22 Bloch's chart, for example.

23 So I think we can compare class library to class
24 library reserving on the technical question what we mean by
25 that specific technical concept.

1 Moreover, in looking at all three of the questions --
2 and this is why I can't give you a "yes" or "no" answer right
3 away -- there's lots of law that says you don't escape
4 copyright infringement by what you add. You look at that which
5 was taken. And so if it's a couple hundred lines in a memoir
6 or a biography of Gerald Ford, even in a lengthy article, you
7 look at those couple hundred lines and you say: Does that have
8 -- is that protected expression? Is it taken? Is it
9 infringing?

10 So we have to mediate between -- as we figure out how
11 to analyze that expression, we have to mediate between that
12 which was registered, that which was a copyright notice on it,
13 that which was a clear beginning and an end, and these
14 doctrines that say you don't escape infringement -- a
15 plagiarist does not escape infringement by what he adds.

16 **THE COURT:** I think that must be correct. I'm
17 willing to accept that you -- if you steal somebody's work and
18 add a lot more to it, that doesn't take away from the fact that
19 you stole their work to begin with.

20 I don't think, though, that anyone is arguing --
21 you're not disagreeing with that, are you?

22 **MR. BABER:** No, your Honor.

23 **THE COURT:** I think this contest here comes down to
24 how many lines of code are there in these 37, 15 million?

25 **MR. BABER:** Well, that's the other issue, is what is

1 the accused work? The thing is, they accuse Android. Android
2 is 15 million lines of code.

3 **THE COURT:** About how many lines of code are in the
4 37 APIs?

5 **MR. BABER:** Your Honor, I'm not sure. They provided
6 a count last week of 100,000 lines, something like that, out of
7 15 million.

8 **THE COURT:** So let's go with that. So you've got
9 100,000 lines and if you counted up the number of lines of
10 declarations, it would probably be 37, but maybe it's -- let's
11 say it's three or four times that many. It's still going to be
12 a tiny percentage of 100,000.

13 So, but the comparison that I'm trying to get at is,
14 what is the work as a whole? Is it the 37 APIs? Is it -- here
15 is the part that -- here is the part that is a little strange
16 about this. Is this for the judge to decide or the jury to
17 decide?

18 **MR. BABER:** I believe the question of what is the
19 work at issue is the question for the Court, because otherwise
20 you can't instruct the jury.

21 And I want to go back, because I want to make clear
22 what I said earlier. We believe absolutely that for purposes
23 of infringement, for purposes of fair use, the two works that
24 are being compared have to be the same.

25 Now, but if, for example -- it sounds like Mr. Jacobs

1 may make an argument that, well, okay, each of these 12 files,
2 these individual 12 little files that have something that they
3 say is copied, well, each of those is a separate work.

4 He's going to try and convince you that, okay, for
5 infringement purposes you have lots of different works that the
6 jury has to consider. You have to consider the copyright in
7 arrays.java where the rangeCheck code appears. You have to
8 consider a separate -- but none of those copyrights exist.

9 That's why we have a copyright registration system,
10 is that so when the Court is doing this kind of analysis in an
11 infringement case, it's very easy to see. What is the
12 plaintiff's work? The plaintiff's work is what the plaintiff
13 decides to take to the copyright office and register the
14 copyright in, because otherwise can they at trial pick and
15 choose and say, well, 37 APIs or all the APIs?

16 **THE COURT:** Didn't I reject that argument?

17 **MR. BABER:** No, your Honor. You rejected that
18 argument and said the question was an open question.

19 **THE COURT:** Okay. It seems a little hard on the
20 judge that the complaint could say -- what did it say again?
21 That was the work --

22 **MR. BABER:** The complaint said, we have lots and lots
23 of copyrights on Java. The two that you infringe are attached.
24 They are Version 1.4 of the platform and Version 5.0 of the
25 platform.

1 **THE COURT:** It seems strange that we would get all
2 the way to the end of the trial and the day comes where I have
3 to instruct the jury and that's the point at which I have to
4 decide. That could be a complicated analysis.

5 Was there a point in the case where an interrogatory
6 was answered where they said, "What do you contend is the work"
7 -- you know, "What are we going to be fighting at trial," or do
8 we have to default all the way back to the complaint?

9 **MR. BABER:** Your Honor, there were never -- we never
10 served interrogatories about legal questions like that, but the
11 issue did come up. I mean, it came up in the --

12 Well, I don't know if your Honor will recall, early
13 on we filed the motion to dismiss the copyright claim on the
14 grounds that it hadn't been sufficiently pleaded. And they
15 came back and said, "Well, sure it is. We've identified the
16 relevant copyrights in the amended complaint, and here are some
17 exhibits that show what we think is some of the copying." So
18 that issue went away, but they clearly were relying on the two
19 copyrights that they had asserted.

20 Then at discovery they started saying, "Well, we have
21 got a whole bunch of other copyrights." And we had some
22 correspondence back and forth. I wrote a letter to Mr. Jacobs
23 and I said, Michael, I want to make it very clear. As far as
24 we are concerned, the works for purposes of this case -- we are
25 on an expedited discovery calendar. The works are the two

1 you've pleaded. If you want to rely on anything else and claim
2 anything else is infringed, you should have amended your
3 complaint back when you had time to do so. And as far as we
4 are concerned, those are the works. That was your choice. And
5 that was confirmed in the early case management order.

6 **THE COURT:** All right. Here is -- it's time to bring
7 the jury in, but I want to give Mr. Jacobs a chance to have a
8 verbal -- take a minute and make your point in response to what
9 I just heard.

10 **MR. JACOBS:** I think we're mixing two issues. There
11 is the question of what release of Java was at issue. And we
12 attached to our complaint the registrations, I believe, for 1.4
13 and 5.0. That was the best information we had about which
14 particular versions of Java were copied when the copying took
15 place. So was it 1.7? 1.8? We attached 1.4 and .5.

16 What they were driving at in that back-and-forth is,
17 well, you're abandoning any rights to intermediate or later
18 versions, which is just wrong. That was just technically
19 legally wrong. You know, you're not limited to the specific
20 registrations you attach to the complaint.

21 That is not the relevant question here, which is what
22 really -- driving to the bottom line: What will we tell the
23 jury they should be comparing? What is the A to the B? I
24 think we should brief that to your Honor and give you something
25 more focused and helpful.

1 **THE COURT:** I agree you should. I've already given
2 you one briefing assignment due Sunday at 3:00 o'clock. This
3 is a separate one, also due Sunday at 3:00 o'clock.

4 **MR. JACOBS:** Thank you, your Honor.

5 **THE COURT:** I want you to understand some of the
6 points that are on my mind.

7 One is: Is it the same standard for substantial
8 similarity, fair use and diminimus copying? That is, is the
9 same body of work, a work as a whole, is it the same for all
10 purposes? And in even -- when you were comparing the nine
11 lines of code out of 15 million, is it nine versus 15 or is it
12 nine versus something else?

13 There is a different -- a different problem that's
14 lurking here, and it's a procedural one, and that is: Should
15 the plaintiff be held to what it pleaded in the complaint
16 and/or what the copyrights are on? In other words, what is the
17 copyrighted work? And that -- and if you want to get into what
18 the give-and-take was in your correspondence, fine, but I -- I
19 find it strange that we would have -- you know, like on the
20 patent side, we have these rules where you specify what it is
21 that's being infringed so that the -- it's clearly on the table
22 what's infringed, what's not.

23 Now, on the copyright side, we don't have rules like
24 that. I would have just thought you'd default to look at the
25 complaint and the complaint would tell us. But I don't know

1 the answer to that and I need the help of the lawyers.

2 It seems strange that I would have to go through an
3 entire trial and only then would it -- would the scales fall
4 from my eyes and I would see clearly what the work as a whole
5 is. I don't know. You lawyers are great. You'll figure this
6 out for me.

7 Yes, Mr. Van Nest. As soon as I said Sunday at 3:00
8 o'clock, I saw you jump up over there.

9 **MR. VAN NEST:** I was just going to ask your Honor if
10 we could have 10 pages on that one as well.

11 **THE COURT:** Yes.

12 **MR. VAN NEST:** You'll see --

13 **THE COURT:** And you can have as many -- please don't
14 give me -- you know, I know you'll use good common sense. The
15 larger and bigger your binders that you submit, your exhibits,
16 the more harder it is.

17 But you can have -- in addition to the 10 page, you
18 can have your backup correspondence and whatever you think I
19 need to see, but, please, minimize rather than maximize.

20 I think by the end of next week we'll be very close
21 to the end of the evidence on this phase. We probably won't
22 finish it by the end of next week, but we will be very close to
23 it. And I want to have a good set of draft instructions to
24 give you so that -- that's the timeline that I'm working
25 against.

1 **MR. VAN NEST:** Okay. That makes a lot of sense. I
2 think that's right, your Honor.

3 **THE COURT:** Okay. I have a few minutes, if you have
4 issues to bring up with me.

5 **MR. JACOBS:** We have some exhibits that we have
6 agreed on, your Honor.

7 **THE COURT:** All right. Let me get my list.

8 **MR. JACOBS:** So Google had stipulated to the
9 admission of the following trial exhibits. And I'll do it like
10 I did yesterday. I'll stop at about every eight or nine or so.

11 748, 749 --

12 **MR. VAN NEST:** Give me a moment, your Honor, please.

13 **THE COURT:** Sure.

14 (Brief pause.)

15 **MR. VAN NEST:** I'm ready, your Honor.

16 **THE COURT:** Go ahead.

17 **MR. JACOBS:** 751, 7- --

18 **THE COURT:** 748. Start with 748 again.

19 **MR. JACOBS:** 748, 749, 751, 752, 753, 2800, 2801,
20 2802, 3341, 3342, 3343, 3344, 3345, 3346, 3347, 3348, 3349.

21 **MR. VAN NEST:** No objection, your Honor.

22 **THE COURT:** All received.

23 (Trial Exhibits 748, 749, 751, 752, 753, 2800, 2801,

24 2802, 3341, 3342, 3343, 3344, 3345, 3346, 3347, 3348,

25 3349 received in evidence)

1 **MR. JACOBS:** 45.1, 45.2, 45.3, 46.20, 46.21, 46.22,
2 46.23, 46.24, 46.25, 46.26, 46.27, 46.28.

3 **THE COURT:** Agreed?

4 **MR. VAN NEST:** No objection.

5 **THE COURT:** All of those are received in evidence.
6 (Trial Exhibits 45.1, 45.2, 45.3, 46.20, 46.21,
7 46.22, 46.23, 46.24, 46.25, 46.26, 46.27, 46.28
8 received in evidence)

9 **MR. JACOBS:** 741, 767, 770, 771, 773, 862.

10 **MR. VAN NEST:** No objection.

11 **THE COURT:** All received.
12 (Trial Exhibits 741, 767, 770, 771, 773, 862 received
13 in evidence)

14 **MR. JACOBS:** 1030, 1031, 1032, 1033, 1034, 1035,
15 1036, 1037, 1038, 1039, 1040.

16 **MR. VAN NEST:** No objection, your Honor.

17 **THE COURT:** Okay. In.
18 (Trial Exhibits 1030, 1031, 1032, 1033, 1034, 1035,
19 1036, 1037, 1038, 1039, 1040 received
20 in evidence)

21 **THE COURT:** More?

22 **MR. JACOBS:** We have some deposition designations in
23 the form of Trial Exhibit 1064 that will be played.

24 (Whereupon, document was tendered
25 to the Clerk.)

1 **THE COURT:** Is that all teed up? Is there any ruling
2 needed by me?

3 **MR. JACOBS:** No, your Honor.

4 **THE COURT:** All right. Great. Thank you.
5 Anything more?

6 **MR. JACOBS:** That's it from us, your Honor. Thank
7 you.

8 **THE COURT:** Mr. Van Nest?

9 **MR. VAN NEST:** I don't think we have any issues, your
10 Honor.

11 **THE COURT:** Did you all do the -- didn't I ask for
12 one page that has the names of the lawyers? Did I do that?

13 **MR. JACOBS:** Names of the lawyers.

14 **THE COURT:** Yes, because I -- where is Mr. Boies
15 today? They don't know how to spell that. And, you know,
16 they'll like girls and boys. They will get it wrong.

17 I want the lawyers -- I want them to understand how
18 the names are spelled of the lawyers.

19 **MR. VAN NEST:** You hadn't asked us for that, but
20 we'll do it.

21 **THE COURT:** Okay. I'm wrong, but --

22 **MR. VAN NEST:** You asked us for Who's Who of
23 witnesses.

24 **THE COURT:** Yes, that's right. Okay. So add this to
25 it.

1 I have another list, so they can have the names
2 straight of all the lawyers who are performing in court. I
3 just think it's a courtesy to you and, but it's also a courtesy
4 to the jury so they will not write down the wrong name.

5 **MR. VAN NEST:** You want pictures on there, your
6 Honor?

7 **THE COURT:** You can do a little baseball card, you
8 know.

9 (Laughter.)

10 **THE COURT:** 145 trials.

11 **MR. VAN NEST:** My average? I'm not sure --

12 **THE COURT:** Your batting average, yeah.

13 **MR. VAN NEST:** My average.

14 Your Honor, are we going to begin the morning with
15 summaries or with our witnesses and do the summaries at the end
16 of the day? What did you have in mind on that?

17 **THE COURT:** Well, I'd like to do it at some point.
18 What do you all think? Do you want to do it now?

19 **MR. JACOBS:** The advantage of doing it now, your
20 Honor, is that we're -- last night we worked with the state of
21 the record as we had it. Whereas, the state of the record will
22 change during the day.

23 **THE COURT:** Let's take -- you've got 10 minutes per
24 side. How is that?

25 **MR. VAN NEST:** That's fine, your Honor.

1 **THE COURT:** Are we done with the last witness?

2 **MR. JACOBS:** Yes.

3 **THE COURT:** All right. This will be a good point to
4 do that.

5 I want to come back to one thing. There is a danger
6 whenever you have these exhibits come in automatically. I want
7 you to be clear on this. Yesterday you gave me a good example
8 of this.

9 It was the downloading of some website. The fact
10 that something is stipulated into evidence does not necessarily
11 stipulate as to when it was available. So if the website comes
12 in -- is that one of these items here?

13 **MR. JACOBS:** Yes, your Honor.

14 **THE COURT:** All right. That's not proof as to
15 when -- unless it says on the website when it was. If it says
16 on the website, then, okay, I guess there's some proof as to
17 when it was.

18 But the fact that a -- say, a picture or a photograph
19 or some item is stipulated into evidence does not necessarily
20 say as of the -- the jury would just have to guess at when it
21 was taken.

22 So you all need to be aware that stipulating
23 something into evidence does not necessarily stipulate to
24 something that's outside the four corners of that exhibit.

25 **MR. JACOBS:** Understood, your Honor. We anticipate

1 that it's in the -- within the four corners, but we will double
2 check.

3 **THE COURT:** All right, thank you.

4 Okay. Let's bring in the jury.

5 (Jury enters courtroom at 8:02 a.m.)

6 **THE COURT:** Welcome back. Be seated. Everyone still
7 over there in great health?

8 (Jury nodding affirmatively.)

9 **THE COURT:** Good.

10 I see you're smiling because you know it's Friday.

11 (Laughter.)

12 Okay. We're going to do something that I think is
13 designed to be of extra assistance to you, the jury, and that
14 is in about 20 minutes we're going to go to our next witness.

15 I'm guessing we're a third of the way through the
16 first phase of the evidence, something like that, maybe a
17 little more than that, but we're making good progress. I
18 promise you that. The lawyers are working hard to streamline,
19 the case as best as possible, and I we have excellent lawyers
20 in this case. I'm sure you've recognized that already.

21 Now, what we're going to do for the next 20 minutes
22 is I'm letting the lawyers each have 10 minutes to summarize
23 for you what they think has been proven or not proven so far,
24 or to look forward to the rest of this phase and to say what is
25 about to come or will be coming soon, or to say anything which

1 they think will help put what you've heard so far or about to
2 be heard here into its overall context of the issues that you
3 will be having to decide.

4 This is sort of just like a time-out, a little
5 time-out to give you a heads-up. Okay? See what we're doing?

6 Now, remember what I've said so many times? Is
7 anything that a lawyer ever says evidence? No. You know that.
8 But nonetheless, this is a very useful exercise and I ask you
9 to give --

10 Mr. Jacobs, you get to go first. He gets 10 minutes
11 to address you. Please go ahead.

12 **SUMMARY**

13 **MR. JACOBS:** Thank you, your Honor.

14 Well, we're already deeply steeped into the world of
15 Java. I'm sure when Google puts on its case, you'll hear a lot
16 of Android. You will know more about this technology than you
17 ever imagined you would when you came in for jury service
18 perhaps thinking this might be some murder trial. It's not
19 that dramatic, but I think you get a sense for the drama.

20 You've seen the CEOs of both companies. You've seen
21 the commitment of the Oracle representatives to this matter
22 and, of course, our total commitment to just trying to make
23 this as clear for you as we possibly can so that at the end
24 when we ask you to render a verdict, you'll have the
25 information you need to do that properly.

1 We have seen early on in the case the basic Java
2 licensing model and the fact that Java is widely licensed by
3 companies across the United States and across the world. And
4 it's licensed in a variety of ways for a variety of purposes.

5 You've heard that there are these commercial licenses
6 and you've heard that there are these specification and TCK
7 licenses that enable, in the first case, people just to take
8 Java code from Oracle; in the second case, for them to make
9 their own implementations from the specification so they can
10 write their own detailed code. But with this whole structure
11 in place, the consistency of Java is maintained across vendors
12 and across computers and across computing devices.

13 There are different kinds of Java for different
14 classes of computing devices and Google wants to argue that
15 that is fragmentation. But, of course, none of us expect to
16 take a credit card out and run big databases on it. We expect
17 on a credit card to be able to stick it into a machine. And
18 when we take a cell phone out, we don't expect to run very
19 large programs. We expect to run cell phone applications.

20 So Java has kind of grades of Java, but across the
21 vendors and across the computers the consistency is maintained
22 because companies follow the rules. And those are technical
23 rules and those are legal rules in the Java licensing system.

24 And those rules are backed up by intellectual
25 property rights. The way the licenses and the consistency gets

1 enforced is that Sun, now Oracle, has intellectual property
2 rights as a backstop. And that's why this is an intellectual
3 property case. That's why this is a copyright case, because
4 one important backstop is copyright rights.

5 And you will see copyright notices. You will see,
6 when you go back in the jury room, we had admitted into
7 evidence copyright registration certificates like 476, all of
8 which go to show two things.

9 (Document displayed)

10 One, that Oracle did what was needed to confirm its
11 intellectual property rights; and, secondly, how seriously
12 Oracle and Sun took copyright protection by regularly and
13 repeatedly registering their copyrights with the copyright
14 office.

15 And you have heard that Google is an outlier; that
16 Google is the only company today that is using Java APIs
17 created by Oracle or Sun that is not in the licensing model,
18 that has not taken one of these licenses. And you heard this
19 not only from Larry Ellison. You heard this from Larry Page,
20 who said he could not name a single company that has done what
21 Google has done.

22 And so, what's this? What's going on here? Why
23 should Google be the exception? Why Google alone, among all
24 the Java licensees or potential licensees, do they play by
25 their own set of rules?

1 As we have now proven with evidence that is admitted,
2 for example Trial Exhibit 1, they knew they needed a license
3 back in 1995. "Must take license from Sun." And that
4 specifically there was a licensing mechanism that Google had in
5 mind. They were going to take the license and the TCK.

6 Now, they wanted to use it in a way that Sun wasn't
7 comfortable with. Sun had business interests to protect, too.
8 But Google knew they needed a license.

9 And Larry Page understood this. The CEO of Google
10 was repeatedly advised about the importance of getting a
11 license from Sun. And this is what he testified.

12 "You understood that Mr. Rubin was proposing
13 that the Google Java Virtual Machine passed
14 the TCK certification. That's part of that
15 licensing structure."

16 And you've now seen by another admitted exhibit,
17 Trial Exhibit 7, that Google understood that they had two
18 options: Go down a path of independent development using
19 technology that had nothing to do with Java, or if Sun wouldn't
20 grant a license, make enemies along the way.

21 I'll say this in closing, I'll say it now. We don't
22 want to really be suing Google over this. We want them to be
23 part of the Java community playing by the same set of rules.
24 But when Andy Rubin writes, "We may make enemies along the
25 way," I'm sorry, Oracle has to defend it's intellectual

1 property rights.

2 And what Google took, these API designs, this is not
3 trivial stuff. They are going to try and say, "Android, it's
4 huge. These API designs are small and trivial." But you've
5 seen how creatively significant they are and how commercially
6 significant they are.

7 So person after person steeped in Java has explained
8 to you how creative the process is of designing APIs. You
9 heard from Mr. Screven about API design being a very creative
10 process with insight and thought, and compared to other
11 programming tasks, compared to writing that detailed code
12 underneath the boxes from yesterday's sketch, it's the API part
13 that is the creative design part.

14 And then you heard from Dr. Reinhold, who has been
15 doing this for many years. He is the Java API guy. And he
16 told you how creative the design process was for APIs.

17 And then, of course, you saw Mr. Bloch's presentation
18 in which he told the world over and over again -- doing this
19 from Google, mind you. Mr. Bloch is at Google, saying that API
20 design is a noble and rewarding craft. And then in his
21 testimony:

22 **"QUESTION:** API design is tough.

23 **"ANSWER:** Yes, designing a good API is tough.

24 **"QUESTION:** Like any work of craftsmanship?

25 **"ANSWER:** I agree with that.

1 **"QUESTION:** Creating a beautiful painting is
2 tough.

3 **"ANSWER:** I'm not sure if that's
4 craftsmanship or art, but I guess that's a
5 fine distinction.

6 **"QUESTION:** And an API design you said, I
7 believe, is a noble and rewarding craft;
8 correct, sir?

9 **"ANSWER:** Yes, I certainly believe that."
10 And then he even acknowledged that there are
11 aesthetic matters in API design. "An API that displays good
12 aesthetics will be easy to use."

13 And then you heard -- and this is, for something
14 that's not very, not a big deal just a little bit of copying,
15 Google will say. You heard from Dr. Reinhold that the java.nio
16 package took two years to develop. The APIs took two years to
17 design.

18 Now, you've learned a lot more than you ever imagine,
19 more than you could possibly know about how the API and the
20 code and documentation are all related. And critically you now
21 understand that when we talk about this documentation and the
22 specification, we're talking about something that has its
23 origins in the actual source code file, and that what goes into
24 the documentation by this Documentation Extractor, is a mix of
25 narrative that the programmer wrote with an idea that that

1 would be narrative in the documentation and actual programming
2 statements that are captured by the Documentation Extractor and
3 placed into the paper.

4 And so when we talk about an Application Programming
5 Interface, we're talking about the design of the program and
6 those statements above Dr. Bloch's line, right here
7 (indicating), getting into the specification. This is a
8 programming language statement that becomes part of the
9 Application Program Interface specification.

10 And you will see...

11 **THE COURT:** Down to about one more minute to go.

12 **MR. JACOBS:** ...detailed evidence in the coming hours
13 of what the copying actually looks like in Android.

14 Now, you also saw yesterday the line-by-line copying
15 that occurred and that Mr. Bloch apologized for. You'll see
16 more of that.

17 And you will -- you're getting a better understanding
18 of the problem that Google's particular form of copying has
19 caused because they have fragmented Java. They have broken the
20 consistency of the Java model, and Andy Rubin and Larry Page
21 understood how important avoiding fragmentation was to Sun and
22 they understand how important avoiding fragmentation is to
23 Oracle.

24 And, you know, you've seen this graphic and now you
25 understand what the worry is, what the concern is that Google

1 will fracture and create a Tower of Babel instead of a
2 consistent Java programming language.

3 They say they are in the Java Community Process.
4 They took offense. You heard from Google's counsel in his
5 opening that we didn't include them in the list of companies
6 that participate. Well, are they in or are they out? Are they
7 helping Java or are they fragmenting Java? Are they voting yes
8 or are they voting no?

9 You heard from Mr. Bloch yesterday, Google passed the
10 only commercial "no" vote against the next release of Java.
11 There's a slide show about the programming language, the APIs.
12 You've seen the testimony that backs up this slide showing the
13 dramatic difference between the size of language and the little
14 bit of overlap between what's in the language manual and what's
15 in the Application Programming Interfaces.

16 There's questions about Apache Harmony. It's a
17 complicated subject, but the bottom line is Apache Harmony did
18 not have a license. They never got a license. Were they mad
19 about it? Absolutely. But they didn't get permission to build
20 and ship commercially their class libraries, and that's what
21 Google has taken in Android.

22 And every document you have seen from Google in this
23 case, including now Trial Exhibit 326, all the way through 2009
24 and 2010, no one will say -- there is no document that will
25 say, "We're okay, because we took from Apache." There is no

1 such evidence.

2 **THE COURT:** All right. You're a minute or so over
3 already.

4 Thank you, Mr. Jacobs.

5 All right. You may have an extra minute as well,
6 Mr. Van Nest.

7 **MR. VAN NEST:** Thank you, your Honor.

8 **SUMMARY**

9 **MR. VAN NEST:** Good morning, everyone.

10 I want to start by saying thank you. We have been
11 paying attention to the fact that you're paying attention. So,
12 you guys have been very attentive and we know it's been a long
13 week and we really appreciate it. And I'm not sure who is
14 happier that it's Friday, you guys or us over here.

15 And I want to thank Judge Alsup. It's unusual to get
16 a chance to address the jury before you even start your
17 evidence in your case, but that's the position I'm in. So I
18 appreciate that. And I'll try to be helpful and sort of
19 summarize where we are on the key evidence points.

20 Now, I want to start with what's in dispute now that
21 we have had about a week of testimony.

22 Not in dispute, Java programming language free for
23 everybody to use. That's not in dispute. You've seen
24 testimony on that. Judge Alsup gave you a little summary on
25 Wednesday. Anybody can use the Java programming language.

1 The names of all these class files and method names
2 and so on, they are all free to use. You got a summary from
3 Judge Alsup on that as well.

4 The source code, the so-called implementation code
5 that Dr. Bloch talked about yesterday, that's the code in the
6 libraries that does the work. That wasn't -- there's no claim
7 that that is copied. That is all original Google work done by
8 Google engineers and taken from Open Source projects like
9 Apache.

10 So what we're really down to, the big issue in the
11 case, is whether or not the Structure, Selection and
12 Organization of the APIs. That's what they are claiming is --
13 has been infringed in this case, and the fact of the matter is
14 that that API structure was in the public domain, used by years
15 along with the language. Sun was aware that others were using
16 it, like Apache, GNU and others and didn't do a thing.

17 And Google's Android system does the same thing with
18 those APIs that GNU did, that Apache did, that Sun was fully
19 aware of and, as you'll see next week, that Dr. Schwartz,
20 Jonathan Schwartz said was a rocket on Java.

21 So let's put the theme board up.

22 (Document displayed)

23 These are the four things I said we'd prove, and I
24 just want to give a quick recap of where we are on those.

25 Sun gave the Java language to the public.

1 Can I have the next slide please?

2 Mr. Ellison was their first witness. He moved around
3 on this issue, but this is a party admission from Mr. Ellison.

4 **"QUESTION:** You understand that nobody owns
5 the Java programming language?

6 **"ANSWER:** That's right.

7 **"QUESTION:** Anybody can use it without any
8 royalty at all?

9 **"ANSWER:** That's right."

10 That's established, as you heard, from Judge Alsup on
11 Wednesday. So the programming language is out there and folks
12 can use it.

13 Next. So what's left? Let's go back just a minute.
14 The other part of that first bullet point is that the APIs have
15 been used for years as part of the language. You've heard some
16 very important testimony about the fact that without the APIs,
17 the language isn't much use.

18 So they are saying the language is free, you can use
19 it, but you can't use the APIs. As I said, that's like saying
20 you can use English, but don't use the nouns and verbs.

21 Let's have our next slide, please.

22 There were two pieces of testimony on that so far.
23 There will be a lot more. Dr. Bloch, who was here yesterday:

24 **"QUESTION:** If you didn't have any APIs,
25 could you do anything with the language?

1 **"ANSWER:** You could waste time with it, and
2 that's pretty much it.

3 **"QUESTION:** If there were no APIs, the Java
4 programming language wouldn't be much use."

5 That's Dr. Reinhold said near the very end of his
6 testimony; no APIs, couldn't do much with it.

7 That's item one, and you'll hear a bit more about
8 that.

9 Item two. Dr. Bloch said yesterday GNU Classpath,
10 which I mentioned in the opening, we actually helped them get
11 going. GNU was a separate implementation of the same Java
12 libraries and the same APIs that we're talking about here.
13 GNU was out there Open Source. Dr. Bloch, as a Sun employee,
14 was helping them get that done. So that's a second piece of
15 importance evidence.

16 Third piece of importance evidence, you know now
17 Apache was out there using these APIs, the same Structure,
18 Selection and Organization they are claiming now, and they have
19 been out there for years.

20 Next slide, please.

21 This was, again, their witness. Dr. Kurian.

22 "So in '05, '06, '07, '08, Apache was using
23 the same libraries and the same APIs we're
24 talking about without a license from Sun."

25 Apache was out there selling -- now, there's an

1 Apache license that Apache gives. When Mr. Rubin is here next
2 week, you'll hear that Google is distributing Android under the
3 Apache license, which allows you to use all the APIs, some of
4 the APIs, none of the APIs. The Apache license is what Google
5 has been distributing under.

6 But the key point of Apache is not its license. The
7 key point is, Sun was fully aware that here is somebody out
8 there making these libraries and APIs available and they didn't
9 do anything about it. Apache was there. Mr. Schwartz is going
10 to say, they were free to ship as long as they didn't call
11 their product Java. If they didn't call it Java, they were
12 free to ship.

13 Last piece of evidence important on this issue, the
14 APIs, is what Mr. Lindholm said. He testified. Remember, he
15 was at Sun. He was our last witness last night. He was at
16 Sun. Then he's at Google. At Sun his understanding was:

17 "The organization of software APIs are free
18 for use by other people."

19 You'll hear a lot more of that, too, but all these
20 engineers believe you can use an API, and they have been using
21 them, and no one has been complaining about that because that's
22 what you need. It's a system of organization in order to use
23 the language. If you're going to build these libraries, you've
24 got to have a way to access those.

25 Now, my second bullet point was that Google built

1 Android using Google technology and Open Source. You haven't
2 learned a lot about that because the Google witnesses haven't
3 been here. We'll touch on that next week.

4 But you know from Mr. Kurian that he believed that
5 Google was using Apache technology, and that's exactly right.
6 That's exactly right. A lot of the libraries were built from
7 Apache technology, and you'll hear about that.

8 My third bullet point was that when Android was
9 released, Sun approved it. And Sun said, you're a rocket. Now
10 we have had a little bit of evidence on that. You saw the
11 videotape of Mr. Ellison at JavaOne. Mr. Ellison got up at
12 JavaOne in front of all these developers and said, "We are
13 flattered that Android is using Java" -- flattered -- "and we
14 expect to see more of it from our friends at Google."

15 Now, you'll hear a lot more about that next week when
16 Mr. Schwartz is here, but even Mr. Ellison, when he acquired
17 the company, got up and the first thing he said to the Java
18 community was, "We like Android. We know we're choosing Java.
19 We're flattered by it and we expect to see a lot more of that
20 in the future. You will hear from Mr. Schwartz next week on
21 that subject." You'll hear from Mr. Schwartz next week on that
22 subject.

23 The last point on my set of slides was that Google's
24 use of the Structure, Selection and Organizations of these APIs
25 was absolutely fair. They transformed Java from something that

1 wouldn't work on a smart phone to something that works great on
2 a smart phone. That's transformation. They made a fair use of
3 this Structure, Selection and Organization and you know that
4 now, two really key pieces of evidence. Mr. Ellison told you
5 that he learned when he bought the company that Sun had tried
6 and failed to build a smart phone. They hadn't been able to
7 fund it. They bought some technology to try to do it. They
8 had an effort to do it. They couldn't do it.

9 You also know that Mr. Ellison tried to do it.

10 Next slide.

11 Mr. Ellison had Project -- no, let's go back.

12 Project Java Phone. Now, there's two key points
13 about this evidence. One is, Oracle tried and failed. They
14 couldn't turn Java into a smart phone using the Java SE
15 Platform. They also were trying to build on top of Android.
16 Target Android handset manufacturers. Target single operating
17 system Android. Run Java ME on Android.

18 If Android was a fragment or Android was hurting
19 Java, why in the world with Mr. Ellison and Oracle try to build
20 a product on top of Java? That's exactly what they were trying
21 to do.

22 And you heard him say when this failed they
23 considered buying technology to get into the smart phone market
24 from RIM and from Palm. RIM makes Blackberry. Palm makes the
25 Treo.

1 When that didn't work you heard him say, "I talked to
2 Google. I made a business proposal to Google, to work with
3 Google." "When that didn't work," I asked him, "what was the
4 next thing that happened?" "This lawsuit."

5 This lawsuit is not about fragmentation. It's not
6 about their I.P. Oracle wants to participate in the smart
7 phone market without doing any work. They want money from
8 Android based on Google's work, not their work.

9 Now, we've heard all this holy talk about, you know,
10 the Holy Grail of fragmentation. That's baloney and you know
11 it from what Dr. Reinhold said yesterday. There are how many
12 flavors of Java we now heard? In the opening it was "write
13 once, run anywhere". Anywhere.

14 Now, we heard yesterday from Dr. Reinhold. There is
15 an SE platform, an EE platform, an ME platform and a Card. And
16 if you write for one of those platforms, your program won't run
17 on any other program. It's not "write once, run anywhere".
18 Dr. Reinhold admitted that. He finally backed off.

19 Can I have the last slide, please?

20 **THE COURT:** This will have to be your next point
21 because you're on the 11 minutes.

22 **MR. VAN NEST:** Thank you, your Honor.

23 "Write once, run anywhere" was never a promise that
24 if you wrote code for one Java Platform, it would magically
25 work on another.

1 And you know from his testimony yesterday that even
2 from the ME platform, one platform, there are multiple flavors
3 of that. There is ME, and MIDP, and CLC, and CDLC. And he
4 said yesterday, none of knows platforms worked together. It
5 got so bad they had to have a project called One Java. They
6 created a project to fix their own fragmentation, and Oracle
7 killed that when they bought the company.

8 So this case is not about their intellectual
9 property. It is about getting a claim on the smart phone
10 market.

11 So I very much look forward to getting back here next
12 week with our witnesses and giving you the story of what was
13 done, why we did what we did, why Android is based on Google
14 technology and Open Source technology, and why I'll be asking
15 you in closing for a finding that there is absolutely no
16 infringement here based on the evidence you will have heard by
17 then.

18 Thank you.

19 **THE COURT:** Thank you.

20 **MR. VAN NEST:** Thank you, your Honor.

21 **THE COURT:** Next witness.

22 **MR. NORTON:** We call Brian Swetland.

23 **THE COURT:** All right. Very well. Let's bring him
24 forward.

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BRIAN SWETLAND,

called as a witness for the Plaintiff herein, having been first
duly sworn, was examined and testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you.

THE COURT: Thank you. Welcome again.

See how my microphone -- you've got to be this close.

THE WITNESS: Like that?

THE COURT: It will move around to make it easier for
you, but that's about right.

Why don't you say your name?

THE WITNESS: Brian Swetland.

THE COURT: Everybody hear okay?

Say it again.

THE WITNESS: Brian Swetland.

THE COURT: Great.

Go ahead, counsel.

MR. NORTON: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. NORTON:

Q. Good morning, Mr. Swetland.

A. Good morning.

Q. We've not met. My name is Fred Norton.

You currently are employed at Google, is that
correct?

1 A. That is correct.

2 Q. And you are a senior staff software engineer?

3 A. This is correct.

4 Q. And you work on Android?

5 A. Yes.

6 Q. And you've worked on Android since Google acquired Android
7 in 2005, is that right?

8 A. That is correct.

9 Q. And you were employed at Android even before Google
10 acquired Android, is that correct?

11 A. That is correct.

12 Q. Before you worked at Android, you worked at a company
13 called Danger, Incorporated?

14 A. That is correct.

15 Q. And you were there from 2000 to the fall of 2004?

16 A. That is correct.

17 Q. Andy Rubin was one of the founders of Danger, is that
18 right?

19 A. This is right.

20 Q. He was there at the same time that you were?

21 A. He left a year, year-and-a-half prior to me, I believe.

22 Q. Around 2003?

23 A. I think so.

24 Q. Now, while you were at Danger, Danger developed a mobile
25 phone called Hiptop, is that right?

1 A. That is right.

2 Q. Sometimes called the Sidekick?

3 A. Yes.

4 Q. And that Sidekick was released in the fall of 2002?

5 A. That sounds correct.

6 Q. And the programming language for applications on the
7 Hiptop was Java, right?

8 A. That is correct.

9 Q. And the Hiptop or Sidekick, it had a virtual machine,
10 right?

11 A. Yes.

12 Q. Now, at the time the Hiptop was released, it had an
13 incompatible -- that is not compatible -- implementation of the
14 Java specification, correct?

15 MS. ANDERSON: Objection. Lacks foundation.

16 THE COURT: Well, do you know the answer to that
17 question or not?

18 THE WITNESS: Umm, yes. I think.

19 THE COURT: All right. Objection overruled. Please
20 answer.

21 A. Umm, the virtual machine on the Hiptop was not a Java
22 Virtual Machine. So it was not compatible with Java.

23 BY MR. NORTON:

24 Q. Now, while you were at Danger, you say you never came into
25 contact with Sun's source code, is that right?

1 A. Umm, to the best of my knowledge, no. I have not seen
2 Sun's source code while I was at Danger.

3 Q. All right. And you contend that Danger developed its
4 incompatible Java implementation in a clean and independent
5 way, right?

6 A. All the work I did on the Danger virtual machine was, you
7 know, done in a clean room fashion.

8 Q. Just to sum up here. Danger had a mobile phone, right?

9 A. Correct.

10 Q. That used Java as the application programming language,
11 right?

12 A. Correct.

13 Q. It was incompatible with Java, with the Java
14 specification?

15 A. Do you mean the Java language specification or the virtual
16 machine specification?

17 Q. Virtual machine specification.

18 A. Because it was not a Java virtual machine.

19 Q. The answer is it was incompatible with the Java virtual
20 machine specification?

21 A. The Danger virtual machine not being a Java virtual
22 machine, yes, it's not compatible with the Java virtual machine
23 specification.

24 Q. And that implementation was developed in what you believe
25 was a clean and independent way?

1 A. Yes.

2 Q. All right. And yet Danger took a license from Sun,
3 correct?

4 A. That is my understanding.

5 Q. And Danger took a license from Sun to the TCK, is that
6 correct?

7 A. I believe so, but, you know, I was not present as part of
8 the license negotiation.

9 Q. Had. But you understood that danger had taken a license
10 from Sun and used the TCK?

11 A. I believe that was the case.

12 Q. And once Danger took the TCK, it worked to make its
13 implementation compatible with the Java specification, correct?

14 A. I think that was the case. I was not involved with that
15 part of the project at that point.

16 Q. Now, one of the people you met with during discussions
17 between Sun and Danger was Tim Lindholm, wasn't it?

18 A. I believe he was at a meeting, yes.

19 Q. And at that time Mr. Lindholm was representing Sun,
20 correct?

21 A. I believe so, yes.

22 Q. And he was representing Sun in discussions between Sun and
23 Danger about Danger's Sidekick mobile device, correct?

24 A. I believe so.

25 Q. And Mr. Lindholm was one of the people from Sun telling

1 Danger that Danger needed to take a license from Sun for the
2 Sidekick, correct?

3 **A.** I really wasn't involved in the license side of
4 discussions, just, you know, their technical issues.

5 **Q.** But you did know that it was Sun's position that the
6 specification itself was copyrighted, correct?

7 **A.** Umm, I was not aware of that.

8 **Q.** You were aware at that time that Sun's position was that
9 the method signatures, the specifications, method signatures
10 were copyrighted, correct?

11 **A.** I do recall mention that Sun claimed copyright on the
12 method signatures.

13 **MR. NORTON:** So may I approach the witness?

14 **THE COURT:** Yes.

15 (Whereupon, document was tendered
16 to the witness.)

17 **BY MR. NORTON:**

18 **Q.** I've handed the witness Exhibit 149.

19 (Document displayed)

20 **Q.** Mr. Swetland, do you recognize that email?

21 **A.** I do.

22 **Q.** That's an email that you sent on May 1st -- I'm sorry,
23 May 31st, 2006?

24 **A.** Yes.

25 **Q.** And you sent it to Mr. Rubin, is that right?

1 A. That is correct.

2 Q. And you sent it to another person whose email address is
3 danfuzz@google?

4 A. Yes.

5 Q. And that's Dan Bornstein, right?

6 A. Yes.

7 Q. And Mr. Bornstein, he also worked at Danger before he
8 worked at Android, right?

9 A. That is correct.

10 MR. NORTON: I move the admission of Exhibit 149.

11 MS. ANDERSON: No objection, your Honor.

12 THE COURT: 149 received in evidence.

13 (Trial Exhibit 149 received
14 in evidence)

15 BY MR. NORTON:

16 Q. Now, you wrote to Mr. Rubin and to Mr. Bornstein about
17 Sun.

18 "Whatever happened to their 'we own copyright
19 on the method signatures' bullshit argument."
20 Right?

21 A. That is correct.

22 Q. On May 31, 2006 you knew that Sun still claimed a
23 copyright on the method signatures of the specification, right?

24 A. I don't know if they still claimed it. I knew that at one
25 time they made such a claim while I was at Danger.

1 Q. On May 31st, 2006 you didn't know any differently,
2 correct?

3 A. That is correct.

4 Q. Nothing had changed between the time you were at Danger
5 and the time you were at Android, correct?

6 A. Nothing about since -- very, very broad.

7 Q. Your knowledge about what Sun claimed about it's copyright
8 and the method signature had not changed?

9 A. That is correct.

10 Q. And you did nothing to investigate whether Sun had a valid
11 claim that they owned the copyright on the method signature?

12 A. Correct. I was not involved in such an investigation, no.

13 Q. But whether you were involved in such an investigation or
14 not, you took no steps to determine whether or not that claim
15 was valid?

16 A. No.

17 Q. That was just somebody else's job, right?

18 A. Not my role as an engineer to do that, no.

19 Q. Now, you worked at Danger and now you work at Android,
20 correct?

21 A. That is correct.

22 Q. Mr. Bornstein, also at Danger, now an Android -- or, then
23 an Android engineer, correct?

24 A. Correct.

25 Q. And was an Android engineer until sometime in 2011,

1 correct?

2 **A.** I believe that's correct.

3 **Q.** Mr. Rubin was at Danger, now Android, correct?

4 **A.** That is correct.

5 **Q.** Hiroshi Lockheimer was at Danger, now at Google, and works
6 on Android, correct?

7 **A.** That is correct.

8 **MR. NORTON:** May I approach?

9 (Whereupon, document was tendered
10 to the witness.)

11 **BY MR. NORTON:**

12 **Q.** I've handed the witness Exhibit 13.

13 Is this an email from you to Mathias Agopian?

14 **A.** It is.

15 **Q.** And you sent this email on January 3rd, 2006, is that
16 right?

17 **A.** That appears to be correct.

18 **Q.** And you sent this to Mr. Rubin, amongst others, is that
19 correct?

20 **A.** That is correct.

21 **MR. NORTON:** I move the admission of Exhibit 13.

22 **MS. ANDERSON:** No objection, your Honor.

23 **THE COURT:** 13 received.

24 (Trial Exhibit 13 received
25 in evidence)

1 **MR. NORTON:** Thank you, your Honor.

2 (Document displayed)

3 **BY MR. NORTON:**

4 **Q.** Now, if we go down, there is an email that says, "On
5 January 2, 2006 Brian Swetland wrote"?

6 **A.** Yes.

7 **Q.** And below that there is a lot of text, but I want to focus
8 on, "Reasons to shift to a primarily Java API."

9 **A.** This appears to be some other document though.

10 **Q.** I just want you to focus on the words, "Reasons to shift
11 to a primarily Java API."

12 Do you see those words?

13 **A.** I see those words.

14 **Q.** And as you pointed out, there are lots of words underneath
15 that, right?

16 **A.** I believe you pointed that out.

17 **Q.** And you think that's some other document?

18 **A.** I believe this entire double indented section is some
19 other email or document that I quoted in the single indented
20 section, is what it looks like to me.

21 **Q.** All right. Very good.

22 So then if we can go up, you responded to this email,
23 correct?

24 **A.** To Mathias' question?

25 **Q.** Yes.

1 **A.** And Mathias' question was in response to, "Reasons to
2 shift to a primarily Java API."

3 Mr. Agopian wrote:

4 "Has this decision been taken already or are
5 we talking/arguing about it?"

6 **A.** Yes.

7 **Q.** And you responded to that?

8 **A.** I did.

9 **Q.** And your response was:

10 "I think we're pretty set on it, but are
11 still working on addressing issues people may
12 have with it."

13 Correct?

14 **A.** Correct.

15 **Q.** And the reason to shift to a primarily Java API, you said,
16 you were pretty set on it as of January 2006?

17 **A.** That's in the email, yes.

18 **MR. NORTON:** May I approach?

19 **THE COURT:** You may.

20 (Whereupon, document was tendered
21 to the witness.)

22 **BY MR. NORTON:**

23 **Q.** I've handed the witness Trial Exhibit 23.

24 And this, once again, this is an email from you to
25 three other people who work at Google, correct?

1 A. Correct.

2 Q. And can you identify those three people by names other
3 than email addresses?

4 A. You want their given names?

5 Q. Yes, their names. The email addresses are fadden@
6 Google.com, ficus@google.com and CJD@google.com.

7 A. That would be Andy McFadden; Ficus, Kirk Patrick and Chris
8 DeSalvo.

9 Q. And did all those people work on Android?

10 A. They did at this time.

11 MR. NORTON: I offer Exhibit 23.

12 MS. ANDERSON: No objection, your Honor.

13 THE COURT: 23 received.

14 (Trial Exhibit 23 received
15 in evidence)

16 MR. NORTON: And may I approach?

17 THE COURT: You may.

18 (Whereupon, document was tendered
19 to the witness.)

20 BY MR. NORTON:

21 Q. Mr. Swetland, you have Exhibit 314. And this is an email
22 from Robert Griesemer to you, is that correct?

23 A. That is correct.

24 Q. And it was an email sent on August 5, 2005, is that right?

25 A. That is correct.

1 Q. And the title of that email is "Re: Java VM for Android,"
2 is that right?

3 A. That is the title.

4 MR. NORTON: I move the admission of Exhibit 314.

5 MS. ANDERSON: No objection, your Honor.

6 THE COURT: Received.

7 (Trial Exhibit 314 received
8 in evidence)

9 MR. NORTON: No further questions.

10 THE COURT: Cross-examination.

11 CROSS EXAMINATION

12 BY MS. ANDERSON:

13 Q. Good morning, Mr. Swetland.

14 A. Good morning.

15 THE COURT: One second. Mr. Rutherford, would you
16 like a cough drop?

17 JUROR RUTHERFORD: Yes.

18 THE COURT: Dawn, would you take this over to
19 Mr. Rutherford.

20 How about some water? Would you like some water.

21 JUROR RUTHERFORD: No.

22 THE COURT: Are you okay?

23 JUROR RUTHERFORD: Yes.

24 THE COURT: Okay.

25 Thank you. You may continue.

1 **MS. ANDERSON:** Thank you, your Honor.

2 I'll wait for a minute while the witness pours a
3 little water for himself as well.

4 **BY MS. ANDERSON:**

5 **Q.** Mr. Swetland, before we begin talking about some of these
6 documents, please tell the jury where you live?

7 **A.** Palo Alto, California.

8 **Q.** And how long have you lived in northern California?

9 **A.** I've lived in the Bay Area for about 14 years now.

10 **Q.** What is your educational background?

11 **A.** I studied computer engineering at the University of
12 Illinois at Urbana Champaign.

13 **Q.** And can you tell the jury briefly in order where you've
14 worked over the years, your main places of employment over the
15 years?

16 **A.** Back in the beginning, a lot of small companies; but when
17 I moved to the Bay Area in 1998, I worked for a company in
18 Menlo Park called Be, Incorporated that operating systems for
19 desktop computers. Spent two years there.

20 And in spring of 2000, I joined a very small start-up
21 called Danger, Inc. that was building a next generation smart
22 phone; voice and data communication device. I worked there for
23 roughly four-and-a-half years.

24 And in the -- in late 2004 I left Danger to join
25 another very small start-up called Android that was looking to

1 build a next generation phone operating system. That start-up
2 was purchased by Google in July of 2005.

3 Since then I have been the systems software architect
4 and lead on the Android project at Google.

5 Q. And during the bulk of your time at Google, what aspect of
6 the Android Platform has been your focus?

7 A. My primary focus has been on the kernel and device
8 drivers, the lowest level software that interacts with the
9 actual hardware that makes the phone work.

10 Q. Now, in the course of the years that you've worked in the
11 computer industry, have you had occasion to learn about the
12 Java programming language?

13 A. Yes, I have.

14 Q. When did you first learn about Java?

15 A. I think I first encountered Java possibly mid to late
16 2005 -- 1995 not 2005. That wouldn't make any sense. In 1995
17 when I was at the University of Illinois.

18 Q. And did there come a time when you started to actually use
19 the Java programming language in your work?

20 A. Umm, before I had moved to California in 1997 and '98, I
21 had worked for a company that did web technology servers and
22 such called Neoglyphics and I did some Java programming for
23 them.

24 Q. And, again, what years was that approximately?

25 A. 1997 to early 1998.

1 Q. And did you have occasion to use Java programming language
2 in your work at Danger?

3 A. Umm, I wrote some of the Danger library code and a little
4 bit of application code in Java.

5 Q. How did you actually learn how to program in Java?

6 A. Umm, I think my first encounter with Java again was in
7 1995 when the language was first released by Sun.

8 It was interesting at the time because it was this
9 new programming language. And I think I mostly learned by, you
10 know, just tinkering with the compiler, writing little programs
11 and reading some tutorials that had been posted online about
12 the language.

13 Q. Did you ever read any books about Java to help learn how
14 to program in the language?

15 A. I think at one point I borrowed or purchased a copy of the
16 *Java Programming Language*, which was an introductory book in
17 Java.

18 Q. All right. And did those materials you reviewed to learn
19 how to program in Java include discussion of Java APIs?

20 MR. NORTON: Objection, leading.

21 THE COURT: What extent, if at all. Remember magic
22 words.

23 BY MS. ANDERSON:

24 Q. To what extent, if at all, did the materials you reviewed
25 include discussion of Java APIs?

1 **A.** Pretty much all examples of how to write programs in the
2 language involved use of sort of standard Java libraries and
3 APIs.

4 **Q.** As a programmer in Java over the years, have you had an
5 understanding as to whether or not the language is free for
6 use?

7 **A.** My understanding like all, you know, other similarly --
8 and, actually, I'm not aware of programming languages that
9 aren't free for use.

10 **Q.** And how about Java APIs? Have you had an understanding
11 over the years as a Java programmer as to whether Java APIs
12 were free for use?

13 **A.** My understanding is they would be. Otherwise, how could
14 you write meaningful programs without, you know...

15 **Q.** You were asked some questions earlier about the time you
16 spent working at the company called Danger related to
17 development of the Hiptop; do you recall generally those
18 questions?

19 **A.** I do recall.

20 **Q.** You also testified that you had learned that Danger took a
21 license from Sun eventually, is that right?

22 **A.** That was my understanding, yes.

23 **Q.** Did you have an understanding as a Danger employee as to
24 why it took that license?

25 **A.** My understanding was that we felt that the company --

1 **MR. NORTON:** Objection.

2 **THE COURT:** Any question that uses the word
3 "understanding" almost automatically calls for hearsay. I
4 don't like that form of question. Both sides have used it.
5 I'm not being critical of you. The other side has used it,
6 too, but a question that calls for understanding -- and the
7 Oracle lawyers will now remember this, because it's your
8 objection. I don't like that question. It calls for hearsay.

9 Sustained.

10 **MS. ANDERSON:** Thank you, your Honor.

11 **THE COURT:** And I'm going to remind the Oracle
12 lawyers of the same ruling if there is an objection going the
13 other way.

14 Any question -- except for experts, of course. I
15 guess experts can. But fact witnesses, anything that calls for
16 "what was your understanding," that's a hearsay question.

17 So sustained.

18 **MS. ANDERSON:** Thank you, your Honor.

19 **BY MS. ANDERSON:**

20 **Q.** During your time, your years at Google, Mr. Swetland, I
21 believe you testified you always worked on the Android team, is
22 that right?

23 **A.** I have always worked on Android, yes.

24 **Q.** All right. Throughout all the years that you have worked
25 on Android, has Tim Lindholm ever been a member of the Android

1 team at Google, to your knowledge?

2 **A.** No, he was not.

3 **Q.** Have you ever known Mr. Lindholm to contribute any code
4 whatsoever to the Android project?

5 **A.** I do not believe there is any code from Tim in the
6 project.

7 **Q.** Do you have any understanding as to what connection, if
8 any, Mr. Lindholm ever had with regard to Android?

9 **A.** I think he may have been consulted by executive management
10 on sort of business development-type issues.

11 **Q.** Thank you.

12 I'd like to turn your attention to Exhibit 149, which
13 you discussed earlier. Just put that before you, please.

14 **A.** Okay.

15 **Q.** All right. In this e-mail you sent along a link that you
16 printed in this particular correspondence. What is that a link
17 to?

18 **A.** I believe this is the home page of the Google Web Toolkit
19 project.

20 **Q.** What is that?

21 **A.** The Google Web Toolkit was a technology created by a team
22 at Google that allows you to write programs in the Java
23 programming language, and then convert them into JavaScript,
24 which, while the names appear similar, is actually a very
25 different language that runs in Web browsers to allow you to

1 write programs in the Java language, but allow them to run in a
2 standard web browser without Java VM attached or included.

3 Q. And in your e-mail you were asked a question about the
4 last sentence of the e-mail, which starts with the word
5 "whatever." And in it you're asking about what happened to a
6 particular argument from Sun. Do you see that?

7 A. I see that.

8 Q. What did you mean by that?

9 A. Uhm, as mentioned previously, Sun advanced this argument
10 when approaching Danger about licensing. And it seemed
11 surprising to me that if they had such concern about this
12 copyright on method signatures that, you know, there were a
13 number of projects that Google Web Toolkit is only one, but
14 most recent, that supported those APIs, and did not appear to
15 be drawing any reaction or, you know, backlash from Sun.

16 Q. What other projects are you referring to?

17 A. Well, there's been a whole number of small Java VMs
18 written by Google. The common, like, sort of computer science
19 student project. But there's been a lot of small, medium, and
20 large Java, you know, VM language implementations over the
21 years.

22 There's been some fairly high-profile ones, like the
23 GNU Compiler project, GCJ, which is a GNU compiler for Java,
24 that compiles the Java language to native code, like x86 PC.

25 And the GNU Classpath project, which was a complete

1 implementation of all of these standard Java APIs to enable
2 that, as well as things like the Apache Harmony project, which
3 was another open source, you know, project that provided a Java
4 virtual machine and the standard libraries.

5 None of these projects seemed to fall afoul of, you
6 know, this concern that had been expressed about these APIs.

7 **Q.** Thank you.

8 Would you turn now to Exhibit 13, which I believe is
9 before you.

10 **A.** Okay.

11 **Q.** And you were asked a few questions about this earlier by
12 Oracle's counsel, but I want to draw your attention to the
13 section of this document that has the double carrots, the
14 double indents indicated on it. Do you see it starts about
15 one-third of the way down the page and continues on?

16 **A.** I see that.

17 **Q.** And if I remember correctly, you testified that this is a
18 portion that you do not believe you personally wrote; is that
19 correct?

20 **A.** That's correct.

21 **Q.** All right. Drawing your attention to the fifth paragraph
22 of that section, that starts with the word "the negotiations
23 with Sun."

24 **A.** I see that.

25 **MS. ANDERSON:** Okay. Ben, could we have that

1 highlighted, please? Thank you.

2 **BY MS. ANDERSON:**

3 **Q.** There's a reference in here to the word, "Brian." Do you
4 see that in this paragraph?

5 **A.** I do.

6 **Q.** What, if anything, did that indicate to you about whether
7 or not you wrote this section?

8 **A.** It seems unlikely it was authored by me, given the way it
9 refers to me in the third-party. It's just kind of a strange
10 way to talk about yourself.

11 **Q.** And with regard to a reference to someone named Brian
12 being perhaps scarred by a Danger experience, do you see that
13 reference?

14 **A.** I see that.

15 **Q.** Is there anything about that that rings true? Were you in
16 any way scarred by your Danger experience?

17 **A.** That, you know, I believe is a reference to my unhappiness
18 that Danger ended up taking this Sun license after spending all
19 the time building a clean room implementation, you know, based
20 on an argument that did not seem, you know, valid.

21 **Q.** Do you have knowledge as to why you believe Danger took
22 that license?

23 **A.** My recollection --

24 (Mr. Norton stands up from counsel table.)

25 **THE COURT:** Is this going to be hearsay, or something

1 you know of your own firsthand knowledge?

2 **THE WITNESS:** Uhm, I guess it would be hearsay
3 because it's --

4 **THE COURT:** Hearsay means somebody told it to you.

5 **THE WITNESS:** Yes.

6 **THE COURT:** Firsthand is you were there and made the
7 decision yourself, or you were in the room when the decision
8 was made.

9 **THE WITNESS:** I did not make the decision in this
10 case.

11 **THE COURT:** I don't think he knows the answer to that
12 question.

13 **MS. ANDERSON:** Thank you, Your Honor.

14 **THE COURT:** Is that your objection?

15 **MR. NORTON:** Yes, Your Honor.

16 **THE COURT:** Sustained.

17 **BY MS. ANDERSON:**

18 **Q.** Before we move on, do you have Exhibit 314 before you,
19 sir? I just want to make sure if you have it or not.

20 **A.** I do.

21 **Q.** You do. Okay. Could you please pull that out.

22 **A.** All right.

23 **Q.** I don't believe you asked many, if any, questions about
24 this particular document, so I had a few for you.

25 First of all, is this an e-mail exchange,

1 Mr. Swetland, that you participated in back in August 2005?

2 **A.** It is.

3 **Q.** And drawing your attention to the very top e-mail, the one
4 that's addressed to you directly, do you see that?

5 **A.** I see.

6 **Q.** All right. It starts with, "I can't really comment on
7 your project." Do you see that?

8 **A.** I do.

9 **Q.** All right. So in this particular e-mail there's a
10 reference to a number of people. And I won't be able to
11 pronounce all these names correctly, but starting with Urs
12 Hölzle, Srdjan Mitrovic. And then moving down the paragraph a
13 little more, Todd Turnidge, David Stoutamire, and Ben Gomes.

14 Do you see those names?

15 **A.** I do.

16 **Q.** And down a little more, Tim Lindholm and Frank Yellin. Do
17 you see that?

18 **A.** I do.

19 **Q.** Did any of those individuals work on the Android project,
20 to your knowledge?

21 **A.** To my knowledge, none of these people worked on Android.

22 **Q.** Thank you.

23 And, again, I just want to make sure you have the
24 right folders before you. Do you have the folder of Exhibit
25 200 before you, sir?

1 A. 200 which?

2 Q. 200. Do you have 200 before you?

3 A. I do not see that exhibit here.

4 Q. I didn't think you had that one. Okay. Thank you.

5 And how about Exhibit 419, do you have that one
6 before you?

7 A. I am not seeing that either.

8 Q. Okay. Thank you.

9 All right. And my last question to you,
10 Mr. Swetland, is whether you have Exhibit 33 before you?

11 A. Exhibit what?

12 Q. 33. I just want to make sure we've covered --

13 A. I don't appear to have a 33 either.

14 MS. ANDERSON: I have no further questions. Thank
15 you, Mr. Swetland.

16 THE WITNESS: Thank you.

17 THE COURT: Anything more?

18 MR. NORTON: Yes, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. NORTON:

21 Q. Mr. Swetland, whether you were scarred by the experience
22 or not, you did know that Danger took a license from Sun after
23 all the work that you had done on Danger's clean room
24 implementation, correct?

25 A. Correct.

1 Q. And you knew that the reason that Sun gave for why Danger
2 was required to take a license was that Sun held a license on
3 the method signatures, a copyright on the method signatures,
4 correct?

5 A. Well, I heard that from Andy -- again, my understanding,
6 this hearsay thing --

7 THE COURT: If you get into hearsay, I'm going to let
8 Ms. Anderson come back and put her hearsay part in, too, to
9 explain why. It would only be fair to do that.

10 MR. NORTON: I am seeking the information solely for
11 the purpose of establishing his knowledge.

12 THE COURT: All right. You can ask the question.

13 Ms. Anderson, on recross I'm going to let you ask the
14 question that I didn't allow you to.

15 MS. ANDERSON: Thank you, Your Honor.

16 THE COURT: Go ahead.

17 BY MR. NORTON:

18 Q. Now, Android uses those Java API method signatures;
19 doesn't it?

20 A. That is my understanding.

21 Q. You made reference to what you called high-profile
22 implementations of the Java virtual machine, in response to
23 questions from Ms. Anderson. Do you recall that?

24 A. I do.

25 Q. You don't know what discussions or agreements there were

1 between any of those companies and Sun; do you?

2 **A.** I do not.

3 **Q.** You don't know if those companies took licenses; do you?

4 **A.** I do not.

5 **Q.** You don't know if Sun told them to cease and desist what
6 they were doing; do you?

7 **A.** I do not.

8 **Q.** With respect to GNU Classpath, you testified that was a
9 complete implementation of the specification?

10 **A.** That was my understanding.

11 **Q.** Have you examined it to see if it was a complete
12 implementation?

13 **A.** I have not.

14 **Q.** And so you don't know whether it's a complete
15 implementation?

16 **A.** Not with certainty, no.

17 **Q.** Apache Harmony, is that a complete implementation?

18 **A.** I guess by the same terms, I don't know.

19 **Q.** Android is not a complete implementation of the Java
20 specification; is it?

21 **A.** I don't know.

22 **Q.** It's your testimony, sir, that you do not know whether
23 Android is a complete implementation of the Java specification?

24 **A.** Based on your assertion that without examining it and --
25 which I haven't done, I don't see how I could answer that

1 question.

2 **Q.** Do you have Exhibit 314 in front of you?

3 **A.** I do.

4 **Q.** I just want to clarify one thing. If we go down to the
5 bottom part of the page.

6 (Document displayed.)

7 **MR. NORTON:** Thank you.

8 **THE WITNESS:** The first page?

9 **BY MR. NORTON:**

10 **Q.** Yes, sir. This e-mail states, "On 8/5/2005 Brian Swetland
11 wrote," and then there is a series of paragraphs. One of them
12 begins "license choice"?

13 **A.** Yes.

14 **Q.** You wrote that paragraph, correct?

15 **A.** I did. This appears to be an e-mail quoted from me.

16 **MR. NORTON:** Nothing further.

17 **THE COURT:** Ms. Anderson, you may ask that question.

18 **MS. ANDERSON:** Yes, Your Honor. That one question.

19 **RE CROSS EXAMINATION**

20 **BY MS. ANDERSON:**

21 **Q.** Mr. Swetland, why do you understand Danger took a license?

22 **A.** My understanding was that as a small startup about to ship
23 our first product, being approached by a large company with far
24 more resources, that we did not want to deal with the potential
25 expense of litigation around this issue when we were, you know,

1 focused entirely on trying to get our first product into the
2 market.

3 **MS. ANDERSON:** Thank you. No further questions, Your
4 Honor.

5 **THE COURT:** Anything, Mr. Norton, on that last
6 question?

7 **MR. NORTON:** Yes, Your Honor. One moment, please.
8 Nothing further.

9 **THE COURT:** May this witness be excused, not subject
10 to recall?

11 Please, you have to answer. May I excuse the
12 witness, not subject to recall?

13 **MS. ANDERSON:** Certainly, in our case, Your Honor, I
14 don't know if there may be a later phase the witness may be
15 needed. Certainly not this one. We're releasing him. He is
16 our employee.

17 **THE COURT:** Do you want him on recall or not?

18 **MR. NORTON:** No, Your Honor.

19 **THE COURT:** You are free to go. You are not subject
20 to recall. Thank you, Mr. Swetland.

21 **THE WITNESS:** Thank you, Your Honor.

22 **THE COURT:** Please leave behind our exhibits. The
23 lawyers will take care of it. You have a great day. Thank
24 you.

25 **THE WITNESS:** I will.

1 **THE COURT:** Okay.

2 (Witness excused)

3 **THE COURT:** All right. Next witness. We're going to
4 start with the next witness, and go until about 9:20, 9:30.

5 Members of the jury, are all of you okay with going a
6 while longer? Good. Let's call the next witness.

7 **MR. JACOBS:** Your Honor, we call Bob Lee. But before
8 Mr. Lee actually takes the stand, we would like you to read one
9 of the deemed admitted.

10 **THE COURT:** Have a seat just, for a second. We'll
11 swear you in.

12 Now, let me -- do you have it handy, or do I need to
13 fish it out somewhere?

14 **MR. JACOBS:** Yes, Your Honor.

15 **THE COURT:** Hand it up to me.

16 **MR. JACOBS:** Circled the items we would like you to
17 read.

18 **THE COURT:** Okay. There are two, right?

19 **MR. JACOBS:** Correct.

20 **THE COURT:** Okay. As I told you in the past, over
21 there in the jury box, before the case comes to trial there is
22 a lot of investigation and what we call discovery. The
23 depositions, the documents are exchanged, and so forth.

24 In addition, there are what we call pleadings, which
25 are more formal documents that state the accusations and

1 defenses, and so forth, of the respective parties.

2 And sometimes in the trial something that was
3 admitted in one of these documents becomes important or -- it's
4 up to the jury to decide what's important, but one side or the
5 other wants to remind everyone that the party made that
6 statement in their prior pleading.

7 Let's just take a different case. Let's say you had
8 a case involving a traffic accident, and at one point in a
9 pleading one side said that the light was red. Okay. And then
10 by the time they get to trial, they want to say, well, we're
11 not sure the light was red. Maybe it was almost red.

12 And so they -- the judge may say to the jury in a
13 case like that, well, in the pleadings the particular party in
14 question actually said that the light was red and admitted
15 that. Okay.

16 So in this case, we're going -- both sides have
17 identified some things in the pleadings and other proceedings
18 that came before the trial that they would like me to remind --
19 not remind, but say to you, the jury, that the other side made
20 the following statement. Okay.

21 And right now I'm only going to focus on two. There
22 are only a handful of these, but two of them I'm going to read
23 to you. These are ones that Oracle wishes to have admitted
24 against Google. And so I'm going to read those.

25 And these are statements that have been made in the

1 pleadings in this case by Google. And you may consider it as
2 evidence. It's not conclusive. You can consider it along with
3 all the other evidence in the case. But it is a point that
4 will count as evidence in the case, and you may give it such
5 weight as you think it deserves.

6 I will read the first one, and I will do this slowly.
7 This is the only time you're going to hear this unless it's
8 brought up in the closing arguments.

9 Google has made the following statement prior to
10 trial:

11 "Sun released the specifications for Sun's
12 Java platform, including Sun's Java virtual
13 machine, under a free-of-charge license that
14 allowed developers to create clean room
15 implementations of Sun's Java specifications.

16 If these implementations demonstrate
17 compatibility with the Java specification,
18 then Sun would provide a license for any of
19 its intellectual property needed to practice
20 the specification, including patent rights
21 and copyrights.

22 "The only way to demonstrate compatibility
23 with the Java specification is by meeting all
24 of the requirements of Sun's Technology
25 Compatibility Kit, TCK, for a particular

1 edition of Sun's Java.

2 "Importantly, however, TCKs were
3 available" -- sorry -- "were only available
4 from Sun; initially were not available as
5 open source; were provided solely at Sun's
6 discretion; and included several
7 restrictions, such as additional licensing
8 terms and fees.

9 "In essence, although developers were free to
10 develop a competing Java virtual machine,
11 they could not openly obtain an important
12 component needed to freely benefit from Sun's
13 purported open sourcing of Java."

14 So that's statement number one. That statement was
15 made by Google before trial.

16 Now, here is the next statement. It's a little
17 shorter. Quote:

18 "Although Sun eventually offered to open
19 source the TCK for Java SE, Sun included
20 field of use restrictions that limited the
21 circumstances under which Apache Harmony
22 users could use the software that Apache
23 Software Foundation created, such as
24 preventing the TCK from being executed on
25 mobile devices."

1 Close quote. That's the second statement.

2 Again, these statements may be considered by you as
3 evidence. It's not conclusive. It must be -- it should be
4 considered by you in connection with all of the evidence in the
5 case, and it's up to you to decide how much weight, if any, to
6 give to these particular items of evidence.

7 All right. That's done. There will be two or three
8 more like this before the trial is over. And Google, for its
9 part, has some it wishes to use against Oracle, but, right now,
10 Oracle has the floor.

11 Now, thank you for that. And our witness will now
12 please stand and raise his right hand.

13 **BOB LEE**,
14 called as a witness for the Plaintiff herein, having been first
15 duly sworn, was examined and testified as follows:

16 **THE WITNESS:** I do.

17 **THE CLERK:** Thank you.

18 **THE COURT:** All right. Welcome, again. Please sit
19 about this close. You see how close I am?

20 **THE WITNESS:** Yeah.

21 **THE COURT:** You are too far. So you need to move it.
22 No, this will move.

23 **THE WITNESS:** Oh.

24 **THE COURT:** There. Say your name.

25 **THE WITNESS:** My name is Bob Lee.

1 **THE COURT:** L-e-e?

2 **THE WITNESS:** Yes, sir.

3 **THE COURT:** Thank you. Welcome, again.

4 Counsel, please go ahead.

5 **THE WITNESS:** Thank you.

6 **DIRECT EXAMINATION**

7 **BY MR. JACOBS:**

8 **Q.** Good morning, Mr. Lee. I'm Mike Jacobs.

9 **A.** Good morning. Nice to meet you.

10 **Q.** You worked at Google from October 2004 to January 2010?

11 **A.** Yes, sir.

12 **Q.** And now you work at another company?

13 **A.** Yes, sir, Square.

14 **Q.** You joined the Android team early on, when there were only
15 about a dozen people in the project, correct?

16 **A.** Yes, sir.

17 **Q.** And while you were on the Android team, were you the core
18 library lead --

19 **A.** For the majority of the time, yes.

20 **Q.** Approximately September 2007, until you left Google,
21 correct?

22 **A.** Uhm, October 2007. It might have been earlier than that,
23 but I'm not sure. I think I joined probably -- I had to guess,
24 it would be around more like 2006 or early 2007. And, yes,
25 until I left Google.

1 Q. I want to get the period in which you were the core
2 library lead.

3 A. I joined the Android team in 2006, I believe. And I
4 became the core library lead shortly after. I mean, we're
5 talking like six years ago, so I don't remember exactly how
6 long after.

7 Q. The Android core libraries are the core libraries that
8 include libraries in the Java namespace, like java.security,
9 java.io, java.lang, et cetera, correct?

10 A. Those are the names of the packages, yes.

11 Q. And there are also libraries in the core libraries that
12 are in the javax namespace, correct?

13 A. Yes.

14 Q. And such as the package javax.sql?

15 A. Yes.

16 Q. And there are lots of libraries in the Android system with
17 the word "Java" in them, correct?

18 A. Yes, with the word "Java" in their names, yes.

19 Q. And Android implements part of the Java SE library APIs,
20 and not other parts, correct?

21 A. Yes.

22 Q. And the Java APIs Android supports are good stuff from
23 Java?

24 A. Can you elaborate on that? Good stuff -- this came up in
25 the deposition. Good stuff is kind of a vague term.

1 **THE COURT:** This sounds like you, in your own
2 deposition, used that phrase.

3 **MR. JACOBS:** That's absolutely right.

4 **THE COURT:** You didn't use that phrase?

5 **THE WITNESS:** I think that was used -- someone else
6 used it in an instant message conversation, and then they asked
7 me --

8 **THE COURT:** I see. Is that the way it came up?

9 **THE WITNESS:** Yes.

10 **THE COURT:** Then you're going to have to do it the
11 hard way, Mr. Jacobs. Sorry. I didn't guess right. Okay.

12 **MR. JACOBS:** We'll see, Your Honor.

13 **THE COURT:** Ask a fresh question.

14 **MR. JACOBS:** I bet you did guess right.

15 Could we play from Mr. Lee's transcript, at 487,
16 line -- page 48, line 7 to 16. Clip 8.

17 (Video deposition clip played in open court; not
18 reported.)

19 **BY MR. JACOBS:**

20 **Q.** And you stand by that testimony; correct, sir?

21 **A.** I do like the Java APIs, yes.

22 **Q.** And you're quite familiar with the Java API
23 specifications?

24 **A.** Very.

25 **Q.** You consulted the Java API specifications to make sure

1 that the Android code for the corresponding core libraries
2 would be consistent with those specifications, correct?

3 **A.** Yes.

4 **Q.** The Java API specifications that you consulted were
5 available on Sun's website, correct?

6 **A.** Yes.

7 **Q.** And you consulted those Java API specifications while you
8 were doing work for Google on Android, correct?

9 **A.** Yes.

10 **Q.** You saw that there were copyright notices on the Java API
11 specifications when you consulted them, correct?

12 **A.** Yes.

13 **Q.** You're familiar with the TCK, the Technology Compatibility
14 Kit, correct?

15 **A.** Yes.

16 **Q.** In fact, you wanted Android to be able to run against the
17 TCK, at one point, correct.

18 **A.** Yes.

19 **Q.** And you understood --

20 **A.** A TCK. Which TCK would you specify?

21 **Q.** Well, it would be a Sun TCK, correct?

22 **A.** Yes. So Java has various platforms, but to kind of
23 simplify, you know, there's, like, the Java SE platform, which
24 is aimed at desktops. Then there's the Java ME platform, which
25 is another set of APIs aimed at mobiles. But when I say

1 "mobiles" in that case it's aimed at, like, tiny feature
2 phones. Like Nokia --

3 (Reporter interrupts)

4 **THE COURT:** You're talking so fast it's impossible to
5 follow you.

6 **THE WITNESS:** I'm sorry.

7 **A.** So Java ME is aimed at feature phones, which have --
8 you'll remember, I don't know if you've had one like maybe a
9 Motorola Razor or a Nokia phone with a small screen and big
10 buttons. As you know, like the apps on those phones aren't
11 very sophisticated compared to an iPhone or an Android phone,
12 for example.

13 So if Android were to, I guess, adhere to a Java
14 platform, it would be more likely some future platform that
15 would be maybe similar to Java SE but aimed at mobiles.

16 So my ultimate goal, because I work a lot on these
17 what I thought were open Java standards, would have been to
18 create a mobile platform that Android could have implemented
19 and other similar mobile devices could have also supported.
20 Like the iPhone could have supported it, theoretically.

21 **BY MR. JACOBS:**

22 **Q.** And Android has never passed a TCK, to the best of your
23 knowledge; correct, sir?

24 **A.** No. We've never tried to run against one.

25 **Q.** Now, you worked with an outside company called Noser, to

1 implement core libraries according to the Java APIs, correct?

2 **A.** Yes, sir.

3 **Q.** Noser was an outside contractor hired by Google to

4 implement core libraries according to the Java API

5 specifications, correct?

6 **A.** Yes.

7 **Q.** And the Noser statement of work, in fact, includes a list

8 of Java libraries that Noser was to develop for Android?

9 **A.** So, what was it, again? I'm sorry.

10 **Q.** The Noser statement of work includes a list of Java

11 libraries that Noser was engaged to develop for Android?

12 **A.** I think I recall seeing that during the deposition, yes.

13 **Q.** And, in fact, the Java class libraries that are included

14 in that statement of work, the statement of work between Google

15 and Noser, were implemented in Android and supported by Android

16 in the very first version of Android, with very few exceptions,

17 correct?

18 **A.** Yes.

19 **Q.** Show you Exhibit 405, please.

20 **MR. JACOBS:** May I approach, Your Honor?

21 **THE COURT:** You may.

22 **BY MR. JACOBS:**

23 **Q.** Exhibit 405 is an e-mail exchange between you and Eric

24 Schmidt, dated May 30, 2008, correct?

25 **A.** Yes.

1 **MR. JACOBS:** Offer 405 in evidence, Your Honor.

2 **MR. BABER:** No objection.

3 **THE COURT:** Did you say 2405?

4 **MR. JACOBS:** Sorry. 405.

5 **THE COURT:** 405 is received. Go ahead.

6 (Trial Exhibit 405 received in evidence.)

7 **BY MR. JACOBS:**

8 **Q.** Now, Eric Schmidt was one of the three top executives at
9 Google in 2008, correct?

10 **A.** Yes, he was the CEO.

11 **Q.** And you wrote to him on May 30, 2008, about Apache Harmony
12 correct?

13 **A.** Yes.

14 **Q.** And the jury has heard about this disagreement between
15 Apache Harmony and Sun, so I want to just focus on a portion of
16 this in my questioning of you.

17 And if you go to the middle of the "I hope"
18 paragraph. And we'll start with, "Sun puts field of use
19 restrictions."

20 Do you see that there? It's being highlighted on the
21 screen, if that would aid your examination.

22 **A.** Yes, I do.

23 **Q.** And so you wrote to Eric Schmidt, the CEO of the company:

24 "Sun puts field of use restrictions in the
25 Java SE TCK licenses which prohibit Java SE

1 implementations from running on anything but
2 a desktop or server."

3 **A.** Yes.

4 **Q.** And you went on:

5 "These restrictions prevent Apache Harmony
6 from independently implementing Java SE.
7 Harmony can't put those restrictions on their
8 own users and still Apache license the code."
9 Do you see that?

10 **A.** Yes.

11 **Q.** And then you went on to say:

12 "Not to mention Android (though that's water
13 under the bridge at this point)."
14 Do you see that?

15 **A.** Yes.

16 **Q.** So you were advising Eric Schmidt of this issue between
17 the members of the Java community and Sun over these field of
18 use restrictions, correct?

19 **A.** Yes. I think it's important to note here, also --

20 **Q.** I'm on the clock, as I've said a few times. So if the
21 answer is "yes," let me move on to the next question.

22 **A.** Okay.

23 **Q.** And Google's counsel can ask you for more explanation.

24 So by "this e-mail" you were informing Eric Schmidt
25 that there was no TCK available for using Apache Harmony in

1 Android and running it on machines other than the desktops or
2 servers, correct?

3 **A.** No TCK available for using Apache Harmony in Android?

4 No, I would say no to that. What I was going to say
5 before was that Java SE is a very specific thing. To say that
6 I'm a Java SE implementation, now you're using kind of a brand
7 name. For example, to give analogy --

8 **Q.** Mr. Lee, I'm sorry.

9 **A.** I was saying that you could not create an implementation
10 that's called Java SE because you would have to have permission
11 to use a brand like that. It's like I couldn't make a soda
12 that has the exact same ingredients as Coca-Cola and call mine
13 Coca-Cola.

14 **Q.** Well, Mr. Lee, that's a very interesting point; isn't it?

15 As of May 30, 2008 were you planning on calling
16 Android Java?

17 **A.** I don't think so.

18 **Q.** And when you said it's "water under the bridge at this
19 point," you meant you already made the decision to adopt the
20 Apache core libraries into Android under your supervision;
21 correct, sir?

22 **A.** To -- well, we adopted -- those were actually adopted
23 before I became the core library lead.

24 **Q.** So that's what "water under the bridge" meant; didn't it,
25 sir?

1 **A.** I don't exactly recall what -- let me read it again.

2 Android. Yes. I would -- well, I would say that it meant that
3 we could not call Android Java.

4 **Q.** You don't say that anywhere, do you, in this e-mail; do
5 you, sir?

6 **A.** Uhm, no, I guess --

7 **Q.** What you say is that:

8 "These restrictions prevent Apache Harmony
9 from independently implementing Java SE, not
10 to mention Android."

11 Don't you, sir?

12 **A.** Java SE, as in, yeah, like a Java SE compatible
13 implementation, yes.

14 **Q.** I would like to show you Exhibit 281.

15 **MR. JACOBS:** May I, Your Honor?

16 **THE COURT:** Yes, you may. How much longer do you
17 have?

18 **MR. JACOBS:** I have about ten minutes.

19 **THE COURT:** All right. Please continue.

20 **BY MR. JACOBS:**

21 **Q.** Exhibit 281 is an e-mail to you, from one of your group
22 members, Hiroshi Lockheimer.

23 And then on -- sorry. It's an e-mail exchange, but
24 in the middle there's an e-mail to you from Hiroshi Lockheimer.
25 And at the top is a response from you, correct?

1 **A.** Yes.

2 **Q.** And in this --

3 **MR. JACOBS:** I offer this into evidence, Your Honor,
4 281.

5 **MR. BABER:** No objection.

6 **THE COURT:** Received.

7 (Trial Exhibit 281 received in evidence.)

8 **THE COURT:** You may publish it.

9 (Document displayed.)

10 **BY MR. JACOBS:**

11 **Q.** I would like to focus on the message to you from Hiroshi
12 Lockheimer. Hiroshi Lockheimer was somebody you had worked
13 with for some years; isn't that true?

14 **A.** Yes.

15 **Q.** At both Danger and at Google, correct?

16 **A.** I never worked at Danger.

17 **Q.** I'm sorry. I confused you.

18 How long had you worked with Hiroshi Lockheimer?

19 **A.** Just the -- I think he was on the Android project the
20 whole time. Maybe he joined -- no, he joined shortly after the
21 Android project. I'm not sure exactly when, but he did
22 eventually become the director of the Android project, which is
23 a type of manager.

24 **Q.** And he said to you:

25 "I'm a little nervous about signing Noser up

1 to do any more work for us - but that's from
2 a purely business perspective. Those guys,
3 their management team are super shady."

4 Do you see that?

5 **A.** Yes, I do.

6 **Q.** Now, in implementing the core libraries that support the
7 Java API specifications in Android, one of the things that
8 your -- that you and your colleagues had to do was write
9 comments in the core library code that would eventually find
10 its way in the API documentation for Android, correct?

11 **A.** Yes.

12 **Q.** And is it your testimony, sir, that that was done in a
13 clean room?

14 **A.** That the comments were written in a clean room?

15 **Q.** Yes.

16 **A.** Uhm, that would be without looking at the other
17 specifications?

18 **Q.** Yes.

19 **A.** No, I would not say that.

20 **Q.** So when writing the comments, the comment writers on the
21 Android team were looking at the comments in the Java
22 documentation, correct?

23 **A.** Yes.

24 **Q.** And what instructions were they given about how to avoid
25 copyright infringement comment to comment?

1 **A.** Uhm, I guess this would be equivalent to paraphrasing a
2 book or an article, or something like that. So, obviously, you
3 don't copy it word for word.

4 **Q.** And you don't paraphrase either; correct, sir?

5 **A.** Uhm, well, I believe they did paraphrase.

6 **Q.** That your developers did --

7 **A.** Paraphrase -- my understanding of the word "paraphrase" is
8 to take something and put it into your own words.

9 **Q.** As opposed to taking something from someone else and
10 changing a word here or there to make it look like you put it
11 in your own words but not; correct, sir?

12 **A.** Uhm, I'm not an expert on that.

13 **Q.** Well, let's take a look at what your developers did.

14 What I'm going to ask you is if you think this is
15 their own words, in your expression, or whether it is, in my
16 expression, taking somebody else's language and changing a word
17 here or there in order to make it look like it's in your own
18 words.

19 **A.** Right.

20 **Q.** So let's take a look, first of all, at Trial Exhibit 610.2
21 on the left, and Trial Exhibit 767 on the right. And we're
22 looking at the documentation from Java on the left and the
23 Android on the right. And we're looking for the documentation
24 for javax.crypto.CipherInputStream. Both of these exhibits
25 have been admitted.

1 **MR. BABER:** Your Honor, I would like to object.

2 **THE COURT:** What's the objection?

3 **MR. BABER:** These documents were never provided to us
4 before Mr. Lee's examination. Last night, late, they
5 identified to us very large files without any identification
6 which parts of them they might use with this witness.

7 **THE COURT:** Time for a break. Fifteen minutes.
8 Remember the admonition.

9 **THE CLERK:** All rise.

10 (Jury exits courtroom at 9:29 a.m.)

11 **THE COURT:** Thank you. Mr. Lee, you can step
12 outside. You don't need to be here for this.

13 **THE WITNESS:** Here?

14 **THE COURT:** No, that way.

15 (Laughter)

16 **THE COURT:** All right. Be seated.

17 Mr. Baber, what's the issue?

18 **MR. BABER:** Your Honor, as you know, under your
19 procedures they are required to identify the exhibits they will
20 use on direct.

21 This is a third-party witness on the stand. They
22 identified documents for Mr. Lee a week ago, or so. Last
23 night, at 10:00 o'clock or so, for the first time they
24 identified two very large source code files, gigantic files.

25 They didn't identify whatever it is he is now going

1 to show the witness. They didn't identify what parts of these
2 very large files he intended to show the witness. And, as I
3 say, they didn't identify this to us until 10 o'clock last
4 night, after we had already gone through the process of them
5 identifying experts -- identifying documents. We
6 counter-designated where appropriate, et cetera.

7 And we've given them a lot of slack on lots of late
8 identifications of things, but this is a whole nother kind of
9 exhibit that they never before, until 10 o'clock last night,
10 indicated they were going to try to use with this third-party
11 witness.

12 **THE COURT:** Is that true?

13 **MR. JACOBS:** It is true as factually as Mr. Baber
14 recounts, with this exception. We have identified these
15 exhibits along the way for possible use with witnesses. It
16 became clear to us that as the core library lead, Mr. Lee is
17 the right person to ask about the creation of the documentation
18 from the core libraries.

19 **THE COURT:** Don't the guidelines require more than
20 that?

21 **MR. JACOBS:** They do, Your Honor.

22 **THE COURT:** All right. We're going to do the
23 following. How many days' notice -- here's what we'll do.
24 We'll postpone this witness, bring him back on Monday. And
25 we'll go to somebody else. We'll pick it up right there on

1 Monday.

2 Look, Mr. Baber, I'm not going to say to the
3 plaintiff that they cannot get into this ever. If that's
4 your --

5 **MR. BABER:** Absolutely not, Your Honor.

6 **THE COURT:** If you just want an extension until
7 Monday, that's okay. The jury will -- it's easy to explain to
8 the jury, and we'll move on.

9 **MR. BABER:** And, Your Honor, might I ask, since these
10 are massive files, whatever parts he wants to show the witness
11 if he's got little side-by-sides, or whatever, I think those
12 are the documents we should get.

13 **THE COURT:** That's a reasonable request. You ought
14 to do that by the end of today.

15 **MR. JACOBS:** Understood, Your Honor. Thank you.

16 **MR. BABER:** Thank you, Your Honor.

17 I'm sorry, Your Honor. Since this happened last
18 night, the witness is now on the stand. Obviously, I haven't
19 had a chance to talk to Mr. Lee about these documents. That
20 was the whole point of getting advance notice.

21 How do we want to handle that, given Your Honor's
22 rule about speaking with the witness once he's begun
23 cross-examination?

24 **MR. JACOBS:** I think it's only fair that he be given
25 a chance to review these documents with the witness, Your

1 Honor.

2 **THE COURT:** All right. We'll do that.

3 **MR. BABER:** Thank you, Your Honor.

4 **THE COURT:** Okay. We're going to take a short,
5 15-minute break ourselves.

6 Do you have your next witness ready to go?

7 **MR. NORTON:** Mr. Morrill. Is he here? We'll make
8 sure, Your Honor.

9 **THE COURT:** All right. Fifteen minutes. Thank you.

10 **MR. VAN NEST:** Excuse me, Your Honor. Should we
11 bring Mr. Lee back in so you can excuse him? How do you want
12 to deal with that? I think we need to tell the jury something.

13 **THE COURT:** Well, if you promise me that he will be
14 here Monday morning, then he can -- you can just tell him he's
15 excused for now, but he's got to be back at 7:30 on Monday
16 morning.

17 **MR. VAN NEST:** I don't know that. He's under
18 subpoena from -- he's not an employee.

19 **THE COURT:** Is that okay? Can we handle it that way,
20 or do you want me to order him back?

21 **MR. JACOBS:** We'll take his assurance, Your Honor.

22 The only point I would make is that in the
23 conversation with Mr. Lee, because he is on cross-examination,
24 the only subject that they should discuss with him are the
25 exhibits we're going to send over.

1 **THE COURT:** That's understood.

2 Okay. All right. Can you assure me he'll be back on
3 Monday morning?

4 **MR. VAN NEST:** We're going to find out.

5 **THE COURT:** If he won't, then you bring him back in
6 and I'll order him to come back. All right. That's the way it
7 would normally be done.

8 Okay. So you all have a good 15-minute break. See
9 you in a few minutes.

10 (Recess taken from 9:33 a.m. to 9:55 a.m.)

11 **THE COURT:** All right. Let's go back to work. Sorry
12 for the short delay.

13 My law clerk is going to give you a draft order.
14 It's not final. Please, be seated. Give you a draft order.
15 And this goes to -- you'll see.

16 Before I finalize it, I want to give you a chance to
17 tell me if you have heartburn over any aspect of it. I don't
18 think you will. This is sort of routine in cases where there
19 are things the judge has got to find. But I want to give you
20 your shot at trying to suggest modifications. You don't have
21 to do that today. Maybe by Monday you can do that, or maybe --
22 on Sunday, at the same time, you submit another little comment
23 on this, will be fine.

24 Okay. Let's --

25 **MR. VAN NEST:** Your Honor, would it be possible to

1 give us until Monday on this one? We have the two other
2 briefs.

3 **THE COURT:** Sure. Take until Monday at 7:00.

4 **MR. JACOBS:** I'm sorry, Your Honor. Just to be
5 clear, the task for us is to comment on this form of order
6 rather --

7 **THE COURT:** Yeah. I could just send that out and say
8 you're stuck with it and too bad for you. And I don't think
9 you would even complain about it, because I think it's routine.
10 But if it does give you heartburn in some respect, there's time
11 for you to fly spec it and tell me how you would like to change
12 it.

13 **MR. JACOBS:** Thank you, Your Honor.

14 **THE COURT:** All right. Now, I don't have my jury
15 here. Are you ready with your next witness?

16 **MR. NORTON:** Yes, Your Honor.

17 **THE COURT:** All right. Hang on a second.

18 **THE CLERK:** All rise.

19 (Jury enters the courtroom at 9:57 a.m.)

20 **THE COURT:** All right. Please be seated. And let me
21 say, I apologize for the slight delay. It's my fault.

22 The lawyers have done a good thing. They have agreed
23 that the witness on the stand, Mr. Bob Lee, will be delayed
24 slightly in order for us to take up another witness and give
25 counsel an opportunity to review some documents that were

1 provided a little later than they should have been. Sometimes
2 this happens in the trial.

3 But, Mr. Lee will be back. We're just going to pick
4 it up Monday morning with Mr. Lee, right where we left it off.
5 So don't -- don't put him out of your mind. But he'll come
6 back.

7 Meanwhile, we're going to go to the next witness.
8 And that witness will be?

9 **MR. NORTON:** Daniel Morrill.

10 **THE COURT:** All right. Let's bring him forward.
11 State your name.

12 **THE WITNESS:** Dan Morrill.

13 **THE COURT:** Spell that for me.

14 **MR. NORTON:** Yes, Dan Morrill. M-o-r-r-i-l-l.

15 **THE COURT:** Like in the Morrill Act, 1962. A famous
16 Act.

17 All right. Welcome, sir. Are you okay?

18 **THE WITNESS:** (Nods head.)

19 **THE COURT:** Great. Why don't you stand right there
20 and raise your right hand. You need to raise your right hand.

21 **DANIEL MORRILL,**

22 called as a witness for the Plaintiff herein, having been first
23 duly sworn, was examined and testified as follows:

24 **THE WITNESS:** I do.

25 **THE CLERK:** Thank you.

1 **THE COURT:** Great. Now, do you see the microphone?
2 You need to be this close, and it will move around. Make it
3 easier on you. So if you want to pull it closer --

4 **THE WITNESS:** Okay.

5 **THE COURT:** It needs to be this close, though. Why
6 don't you say your name into the mic.

7 **THE WITNESS:** Okay. Is that acceptable?

8 **THE COURT:** Good, yes. Say your name.

9 **THE WITNESS:** My name is Daniel Lawrence Morrill.

10 **THE COURT:** Wonderful. Go ahead.

11 **MR. NORTON:** Thank you, Your Honor.

12 **DIRECT EXAMINATION**

13 **BY MR. NORTON:**

14 **Q.** Good morning, Mr. Morrill.

15 **A.** Good morning.

16 **Q.** We have not met before, but my name is Fred Norton. I'm
17 counsel for Oracle.

18 **MR. NORTON:** Your Honor, there are still some
19 exhibits from the prior witness on the stand. May I take
20 those?

21 **THE COURT:** Please, take them away.

22 **BY MR. NORTON:**

23 **Q.** Mr. Morrill, you are employed by Google; is that right?

24 **A.** That's correct.

25 **Q.** And you've been at Google since 2006?

1 A. Since 2006, yes.

2 Q. And you joined the Android team in around middle of 2009?

3 A. Uhm, formally, yes. I was working closely with them
4 since, probably, about mid 2007.

5 Q. All right. And what did you do beginning mid-2007, with
6 respect to Android?

7 A. Uhm, excuse me. In -- starting in about mid-2007, I was
8 on the developer relations team, and eventually became the lead
9 of that team.

10 Q. Beginning in mid 2009, you became the technical program
11 manager for Android compatibility; is that correct?

12 A. That's correct.

13 Q. And in that role, one of the things that you did was you
14 were manager of the team that maintains the Compatibility Test
15 Suite; correct?

16 A. Yes, that was one of my responsibilities.

17 Q. And you also oversaw and were the editor for a document
18 called the Compatibility Definition Document; is that also
19 correct?

20 A. Also correct.

21 Q. Is it fair to say that the purpose of -- I'm sorry, the --
22 your role as technical manager for compatibility was, among
23 other things, to make sure that compatible Android devices are
24 capable of running third-party software correctly?

25 A. Uhm, I guess I would say that my role was to define the

1 criteria that, you know-- to define the criteria of a device
2 which can run the applications compatibly.

3 Q. So we are clear, there are devices in the world that run
4 the Android platform, right?

5 A. Yes, that's correct.

6 Q. Those are smart phones, right?

7 And those -- you have to say yes or no, just so our
8 record is clear.

9 A. Yes.

10 Q. And those smart phones are manufactured by companies other
11 than Google, correct?

12 A. That's correct.

13 Q. And Google itself has manufactured an Android smart phone,
14 correct?

15 A. No, not to my understanding.

16 Q. Google released a phone called the Nexus, correct?

17 A. There have been a variety of phones that have Nexus in the
18 name, that have been built by other companies that Google had
19 like a co-branding arrangement with.

20 Q. By Google having "a co-branding arrangement with,"
21 Google's name was put on the phone along with the
22 manufacturers' name, correct?

23 A. That's correct.

24 Q. And part of your job as the technical program manager was
25 to make sure that the version of Android that was on those

1 other companies' Android phones was compatible with the Android
2 software that Google had helped to develop, correct?

3 **A.** No. The reason -- the distinction that I'm making is
4 simply that there was another team that worked with OEMs
5 directly, and they made sure that individual devices were
6 compatible. My job was just to define the technical criteria
7 for that, so that's the distinction I make there.

8 **Q.** So you would define the technical criteria that would
9 establish whether or not a third-party's phone was compatible?

10 **A.** Yes. I would describe myself as like sort of the editor
11 of that, yes.

12 **Q.** And by those "technical criteria" we're talking about
13 requirements, requirements to be considered compatible,
14 correct?

15 **A.** Yes.

16 **Q.** Now, you are familiar with the Java class libraries;
17 aren't you?

18 **A.** Yes, I'm familiar with the Java class libraries.

19 **Q.** In fact, you use them, right?

20 **A.** I do not myself write code on a routine basis anymore, but
21 I have in the past, yes.

22 **MR. NORTON:** May I approach the witness?

23 **THE COURT:** Yes.

24 **BY MR. NORTON:**

25 **Q.** Mr. Morrill, if you would take a look, I've handed you

1 Exhibit 51. And you recognize Exhibit 51 as the Android API
2 packages, correct?

3 **A.** Yes. This appears to be a listing of the APIs that are
4 included in Android 2.1.

5 **Q.** And Google publishes that list on a website, the Android
6 Developers website, correct?

7 **A.** Yes, that's correct.

8 **MR. NORTON:** I offer Exhibit 51 -- I'm sorry, Exhibit
9 51 is already in evidence. It's published. Thank you.

10 (Document displayed.)

11 **BY MR. NORTON:**

12 **Q.** All right. If you could please turn to page 4 of the
13 document.

14 **A.** Okay.

15 **Q.** And you'll see in the left-hand column there's a series of
16 names, correct?

17 **A.** Yes.

18 **Q.** And just a little bit more than a quarter of the way down
19 the page, we see java.awt.font?

20 **A.** Yes, I see those.

21 **Q.** And as we continue down, there are still more packages
22 that begin with the name "java," right?

23 **A.** Yes, that's correct.

24 **Q.** And if you look at the fifth page, there are still more
25 names that begin with "java" and then "javax," correct?

1 A. Yeah.

2 Q. And then if we go all the way to the sixth page, there are
3 still more packages that begin with "javax," correct?

4 A. Yes.

5 Q. Now, all of those packages that begin with "java" or
6 "javax," those are all in Android, correct?

7 A. Uhm, I would say that, yes, they're available on Android
8 devices.

9 Q. And all of those, pursuant to the requirements, the
10 compatibility criteria, all of those packages must be
11 implemented by Android devices to be considered compatible,
12 correct?

13 A. That's correct.

14 Q. Now, Android ships an implementation of the Java APIs --
15 ships an implementation of the APIs that includes
16 implementations of those Java class libraries, right?

17 A. Yes.

18 Q. That implementation includes the names of each of these
19 Java class libraries, correct?

20 A. Yes, that's correct.

21 Q. And each of these -- if we were looking at this on
22 Internet, we could click on each of these names and see
23 subclasses, correct?

24 A. Yes, that's correct.

25 Q. And those names are the same names as those that appear in

1 the Java class libraries, correct?

2 **A.** I'm sorry, could you repeat that.

3 **Q.** Sure. The names that are in the implementation, in
4 Android's implementation of the Java class libraries, those are
5 the same names as used by Java, right?

6 **A.** Yes.

7 **Q.** All right. And not just the names -- do you need some
8 water, Mr. Morrill?

9 **A.** Yeah. It actually is empty. I would appreciate it if
10 some is available.

11 **MR. NORTON:** Thank you, Mr. -- oh, may I approach?

12 **THE COURT:** You may.

13 **BY MR. NORTON:**

14 **Q.** Let me know when you're ready.

15 So not only does the Android implementation of these
16 Java APIs, not only does it use the names but it also uses the
17 form/organization of those APIs in the same way that Java does,
18 right?

19 **A.** I don't -- I don't understand what you mean by "form" or
20 "organization" in this context. Can you elaborate.

21 **MR. NORTON:** Can we play, as a party admission,
22 Mr. Morrill's deposition transcript, page 56, line 24, through
23 57, line 12. That's line 3.

24 (Video deposition clip played in open court; not
25 reported.)

1 **BY MR. NORTON:**

2 **Q.** Now, you're familiar with the term "Java SE," right?

3 **A.** Yeah, the Standard Edition.

4 **Q.** And you know it's also sometimes called J2SE, correct?

5 **A.** Uh-huh.

6 **Q.** Now, the Java packages that are in Android, those are a
7 subset of the packages that are actually in J2SE, correct?

8 **A.** Yes, that's correct.

9 **Q.** So Android includes some but not all of the Java packages
10 that are in J2SE, correct?

11 **A.** That's correct.

12 **Q.** And what we see on Exhibit 51 is precisely what that
13 subset is, correct?

14 **A.** Yes, that's correct.

15 **MR. NORTON:** Can we play, as a party admission,
16 Mr. Morrill's deposition, page 151, lines 1 through 9.

17 (Video deposition clip played in open court; not
18 reported.)

19 **BY MR. NORTON:**

20 **Q.** Now, so we're clear --

21 **MR. KWUN:** Your Honor, we don't object to the playing
22 of the deposition excerpt, but we do object to its admission as
23 a party admission. Mr. Morrill is not a director or managing
24 agent of the company.

25 **MR. NORTON:** Under Rule 801, it's a party admission,

1 Your Honor.

2 **THE COURT:** Under which rule?

3 **MR. NORTON:** It is a party -- it would satisfy the
4 hearsay exception under 801. It is a party admission. He need
5 not be a managing director. It need only be within the scope
6 of his agency. And he has already testified as to what his job
7 is.

8 I'll develop it further, if I need.

9 **THE COURT:** Well, let's be clear. When we say party
10 admission, I'm usually thinking of it in terms of Rule 32, and
11 whether or not it can be played to the jury for any purpose.

12 There's also the party admission exception to hearsay
13 rule. And that's a different -- that's a different animal.
14 You're not objecting over there to it being played for the
15 jury, are you?

16 **MR. KWUN:** No, Your Honor.

17 **THE COURT:** All right. So let's just be clear to the
18 jury that when something comes in as evidence and Mr. Norton
19 says it's being played as a party admission, it is not being
20 played as some sort of locked in stone, concrete, it can't be
21 disputed, is forever binding on Google. No. If that's what
22 you meant, no.

23 This is just one more item of information that's
24 available to the jury to be weighed in connection with all of
25 the rest of the evidence in the case. And it should not be

1 taken as some sort of evidence with extra value or conclusive
2 value. I don't think that's what Mr. Norton meant. I think
3 what he was referring to, rules of evidence and so forth.

4 But the jury should not be -- both sides have used
5 that phrase. I want to be clear. There is no extra weight to
6 be given. It's up to you to decide how much weight to give to
7 something. But there's no extra weight to be given to
8 something once it comes into evidence. You consider it along
9 with all of the other evidence in the case, and decide how much
10 weight to give to it.

11 So since there is no objection to it coming into
12 evidence at all -- right? Correct?

13 **MR. KWUN:** Correct, Your Honor.

14 **THE COURT:** Then it's just going to be one more item
15 in the overall mix for the jury to consider.

16 Thank you. Please proceed.

17 **MR. NORTON:** Thank you, Your Honor.

18 **BY MR. NORTON:**

19 **Q.** I want to be clear about compatibility. What you test in
20 your job or -- I apologize. What you define the requirements
21 for in your job is whether Android devices will be compatible
22 with Android, correct?

23 **A.** Uhm, that seems like kind of a insufficiently precise way
24 to put it.

25 **Q.** Tell me the precise way that you would put it.

1 A. What I would say that we do is, the compatibility program,
2 in general, is intended to make sure that compatible Android
3 devices can run applications written to the Android SDK.

4 Q. Now, android does not support Java applications, correct?

5 A. That is correct.

6 Q. And so Android is not Java compatible, correct?

7 A. That's correct.

8 Q. Now, one -- you testified already that one of the
9 documents that Google publishes is -- or that you prepare is
10 the Compatibility Definition Document, correct?

11 A. That's correct.

12 Q. And the Compatibility Definition Document that is, in
13 turn, published by Google, correct?

14 A. That's correct.

15 MR. NORTON: May I approach the witness?

16 THE COURT: You may.

17 BY MR. NORTON:

18 Q. Mr. Morrill, you have Trial Exhibit 749 in front of you.
19 And that document is the Compatibility Definition Document, is
20 it not?

21 A. It is the Compatibility Definition Document for Version
22 2.2.

23 Q. And you were the editor of that document, correct?

24 A. Yes, that's correct.

25 Q. And that document defines the requirements for a device to

1 be considered compatible, right?

2 **A.** Some of the terms are optional, but, yes, in general it
3 defines the requirements.

4 **Q.** And the terms that are in the CDD, those are the ones that
5 are defined as requirements; those are binding requirements
6 because that's what compatible means, right?

7 **A.** That's right.

8 **Q.** Google not only publishes requirements for what it takes
9 to be compatible, but it discourages OEMs, phone manufacturers,
10 from even changing the code in Android, correct?

11 **A.** We discourage them from making changes to the code that
12 would introduce bugs. But there's no requirement that they not
13 change the code.

14 **Q.** But there are requirements that they cannot change certain
15 things, in order to be compatible, correct?

16 **A.** Uhm --

17 **Q.** That was poorly phrased.

18 **A.** That they comply with certain clauses, yes. I don't know
19 what you mean here by "certain things."

20 **Q.** Fair enough. If you turn to Exhibit 749, to page 4 --

21 **A.** Uh-huh.

22 **Q.** There's a Section 3.1.

23 **A.** Yes, I see it.

24 **Q.** "Manage API Compatibility," correct?

25 **A.** Yes.

1 Q. And this is one of the requirements, correct?

2 A. Yes, this is one of the requirements.

3 Q. And what the document states is, "Device
4 implementations" -- and device implementations means the
5 version of Android that is installed on the OEM's phone,
6 correct?

7 A. That's right.

8 Q. (As read)

9 "Device implementations must not omit any
10 managed APIs, alter API interfaces or
11 signatures, deviate from the documented
12 behavior, or provide no-ops, except where
13 specifically allowed by this compatibility
14 definition."

15 Is that right?

16 A. That's right.

17 Q. That is a requirement, right?

18 A. That is a requirement.

19 Q. So to be a compatible Android device, that device must
20 satisfy this section -- requirement of Section 3.1?

21 A. That's correct.

22 Q. If you'd turn, please, to Section 3.6, which is on page 8.

23 All right. And starting with the second sentence, it
24 says, "To ensure."

25 "To ensure compatibility with third-party

1 applications, device implementers" --

2 Now, device implementers, those are the OEMs, again
3 correct?

4 **A.** That's correct.

5 **Q.** (As read)

6 "Device implementers MUST NOT make any
7 prohibited modifications - see below - to
8 these package namespaces."

9 So this is a requirement, again, right?

10 **A.** That's correct.

11 **Q.** "Must not" is all in capital letters; isn't it?

12 **A.** (Nods head.)

13 **Q.** And the package namespaces, that cannot be changed include
14 "java" and "javax," correct?

15 **A.** Yes, those are included.

16 **Q.** All right. And then the prohibited modifications include:

17 "Device implementations must not modify the
18 publicly-exposed APIs on the Android platform
19 by changing any method or class signatures,
20 or by removing classes or class fields."

21 Correct?

22 **A.** That's also correct.

23 **Q.** That's also a requirement to be compatible, correct?

24 **A.** That is also a requirement.

25 **Q.** Now, Google not only has these specified requirements,

1 Google also has the compatibility test suite, correct?

2 **A.** That's correct.

3 **Q.** And so Google not only tells device manufacturers that you
4 must comply with the requirements in the Compatibility
5 Definition Document, it also has its own test to ensure that
6 OEMs are actually following those requirements; is that right?

7 **A.** Uhm, not all requirements are testable in that manner,
8 but, yes, the CTS tests as many of them as possible.

9 **Q.** So we have two levels then. We have a set of
10 requirements, and we have a test that covers as many as
11 possible of the requirements in the Compatibility Definition
12 Document, correct?

13 **A.** Yes, that's correct.

14 **Q.** And the test, that's the Compatibility Test Suite, right?

15 **A.** Yes, that's correct.

16 **Q.** And one of the things that the compatibility test suite
17 tests is the presence of the APIs; is that right?

18 **A.** The presence of the listed APIs, yes.

19 **Q.** The list of APIs are the ones on Trial Exhibit 51, that we
20 discussed near the start of your testimony. Is that right?

21 **A.** Yes, that's correct.

22 **Q.** Now, Google has something called the Android Market; is
23 that right?

24 **A.** That's correct.

25 **Q.** And the Android Market -- well, why don't you just tell

1 us, what is the Android Market?

2 **A.** Uhm, the Android Market, which is now known as Google Play
3 relatively recently, but the Android Market is a store
4 application available on an Android device, that allows users
5 to get applications to run on their Android devices.

6 **Q.** Now, if an OEM wants the phone that they put out in the
7 world to be able to access that Android market, they must be
8 certified compatible, correct?

9 **A.** Uhm, I'm not entirely sure on the business side of this,
10 but what I know is that a device must be compatible as a
11 prerequisite to request access to Android Market.

12 **Q.** So in order to request access to Android Market, the
13 device first must be compatible?

14 **A.** That's correct.

15 **Q.** And so in order for an OEM to be able to tell people who
16 buy this phone that you will be able to get the applications
17 available through the Android Market, first they must be
18 certified compatible?

19 **A.** We don't have a certification program but, yes, they must
20 comply with the Compatibility Definition Document.

21 **Q.** In order to use the Android brand, they must pass the
22 Compatibility Test Suite and satisfy the definitions, the
23 requirements in the Compatibility Definition Document, correct?

24 **A.** My understanding is that the trademark is handled the same
25 way as access to Android Market is.

1 Q. All right. And Google actually prevents incompatible
2 implementations of Android from getting access to the Android
3 Market, correct?

4 A. That, I actually don't know. I'm not sure if we've ever
5 made exceptions to that.

6 Q. Now, there are a number of large companies that make
7 Android phones; is that right?

8 A. Uhm, there's a number of companies. I don't know if you
9 call it "large" but, yeah.

10 Q. Well, Motorola is one of those companies, correct?

11 A. Motorola is one.

12 Q. And Motorola makes Android-compliant smart phones?

13 A. They make Android-compatible smart phones, yeah.

14 Q. And Samsung makes Android-compatible smart phones,
15 correct?

16 A. That's correct.

17 Q. And HTC makes Android-compatible smart phones, correct?

18 A. Also correct.

19 Q. And LG makes Android-compatible smart phones, correct?

20 A. Also correct.

21 Q. And each of those Android-compatible smart phones from
22 Motorola, from Samsung, from HTC, and from LG, those all have
23 the Android brand, correct?

24 A. Yeah. My understanding is that at least one does from
25 each, yeah.

1 Q. Are you aware of any incompatible devices offered by any
2 of those manufacturers?

3 A. No, I'm not specifically aware of any.

4 Q. And do you know the number of Android activations,
5 compatible Android activations, how many devices are activated
6 each day?

7 A. It's been some time since I've looked at the statistics
8 for that, but I believe it's something on the order of -- the
9 last I looked as of about a month or two ago -- something --
10 about 750,000 per day, on average.

11 Q. 750,000 Android-compatible devices every single day?

12 A. The last time that I checked stats, yes.

13 Q. Since every one of those devices is Android compatible,
14 every one of those devices has the Java APIs that are listed on
15 Exhibit 51, correct?

16 A. It has implementations of those APIs, yes.

17 MR. NORTON: Nothing further.

18 THE COURT: All right. Cross-examination.

19 Remind the jury your name.

20 MR. KWUN: Michael Kwun for Google.

21 THE COURT: Great. The floor is yours.

22 CROSS EXAMINATION

23 BY MR. KWUN:

24 Q. Mr. Morrill, can you tell the jury a little bit about your
25 educational background.

1 **A.** Sure. I have a bachelor's degree in physics and computer
2 science from Clarkson University. And I have a master's degree
3 in computer science from Western Polytechnic Institute.

4 **Q.** And are you familiar with the Java programming language?

5 **A.** Yeah.

6 **Q.** When did you first learn to program in the Java language?

7 **A.** First learned as an undergraduate, I believe in the -- my
8 last two years of college, which I think would have been
9 '97-'98.

10 **Q.** How did you learn to program in the Java language?

11 **A.** I found a online tutorial like a web page that kind of
12 taught you how to program. So I sort of self-taught myself
13 from a website.

14 **Q.** And did that tutorial include any instruction about the
15 Java APIs?

16 **A.** Yeah, definitely.

17 **Q.** And in your experience -- so how many years have you been
18 programming in Java?

19 **A.** Off and on, probably about 10 to 12, I guess.

20 **Q.** And in your 10 to 12 years of programming in the Java
21 programming language, have you ever written a Java program that
22 didn't use the Java APIs?

23 **A.** Uhm, no.

24 **Q.** You testified a little bit about compatibility and in
25 particular about the Compatibility Definition Document and the

1 Compatibility Test Suite.

2 If somebody wants to use the Android code, are they
3 required to be -- to pass a Compatibility Test Suite?

4 **A.** Certainly not.

5 **Q.** Are they required to comply with the Compatibility
6 Definition Document?

7 **A.** No.

8 **Q.** So they can use the Android code without doing either of
9 those things?

10 **A.** That's right. They can use the Android code whatever they
11 want.

12 **Q.** So why then do people comply with the Compatibility
13 Definition Document?

14 **A.** Because it's to everyone's advantage to have, you know,
15 what we would call in the industry is like a thriving
16 ecosystem.

17 **Q.** And are you aware of companies that use the Android code
18 without having passed the Compatibility Test Suite or complying
19 with the Compatibility Definition Document?

20 **A.** I am.

21 **Q.** Can you give us some examples?

22 **A.** Yeah I can think of two. Barnes & Noble has a product
23 called a Nook, which at least one model runs the Android
24 software. And Amazon has a product called the Kindle Fire,
25 which also runs a version of the Android software.

1 Q. And for the jury's benefit, what is the Nook?

2 A. The Nook is an E-book reader. It's about this big
3 (indicating) and you can pick books on it and read books on it.

4 Q. And what is the Kindle Fire?

5 A. A Kindle Fire is also an E-book reader but is also a
6 tablet computer.

7 Q. So if somebody passes the CTS -- well, first of all, you
8 said that Google doesn't have a certification program. What
9 did you mean by that?

10 A. I just mean that it's possible for an OEM to achieve
11 compatibility regardless of whether they get any kind of
12 official rubber stamp or anything like that from Google.

13 Q. And when they pass the CTS, is that something they do,
14 that they test for, or something that Google tests for?

15 A. It's something that the OEMs run on their own devices.

16 Q. So they self-report certification -- or self-report
17 compatibility, I should say?

18 A. Yes, exactly.

19 Q. Okay. And if a partner passed the CTS, based on that do
20 you know whether or not the partner has changed any Android
21 code?

22 A. You could usually or at least frequently tell, but you
23 can't necessarily be sure.

24 Q. So you can usually tell that they have changed the code or
25 haven't changed the code?

1 A. You can usually tell that they have altered the code.

2 Q. Is there any way, based on the results of the CTS, that
3 you could determine that they haven't changed the code?

4 A. Is there a -- just make sure I understand the question
5 you're asking. Is there a way to make sure that -- can the CTS
6 be used to determine if they have not changed the code?

7 Q. Correct.

8 A. No.

9 Q. Okay. So, and then -- but you said you can only tell that
10 they have changed the code?

11 A. Yes.

12 Q. How can you tell that?

13 A. Like, I think two ways. If you pick up a phone for many
14 OEMs, many of us like to customize the user interface. We'll
15 make it look different, change colors and so on. To do that,
16 that requires that they have made customizations to the Android
17 source code.

18 So if you pick up a device and it doesn't look like
19 what we call the stock or, you know, original version of
20 Android, you know that they must have made some kind of a code
21 change to it.

22 Similarly, occasionally we will see an OEM ship a
23 device on a new, you know, CPU chip or something like that that
24 Google has never interacted with or seen before and when that
25 happens they, obviously, had to do changes to the code in order

1 to make their -- the software run on this new kind of hardware.

2 **Q.** And you testified a moment ago that Android does not
3 support Java applications. So does Android support
4 applications that are written in the Java language?

5 **A.** Yes, that's correct.

6 **Q.** So what did you mean when you said it does not support
7 Java applications?

8 **A.** "Java" is kind of a big and almost vague term in a way.
9 As an engineer, it's one of those things that it means
10 something to us in kind of a subtle way. And it's sort of like
11 if you go outside and look at a car, everybody knows what a car
12 looks like. You know, it might have, you know, some wheels are
13 bigger than others or, you know, some might have a steering
14 while on the right-hand side if you are in the UK, but it's
15 still a car and you know a car when you see it.

16 In a way that's sort of how engineers think of Java.
17 You know, it's the whole laundry list of things. Like, does it
18 run Java virtual machine? Does it run Java bytecode? There's,
19 like, a whole list of things.

20 **Q.** So, again, what language do people typically use when they
21 write programs for the Android, for the -- for Android, the
22 Android platform?

23 **A.** They typically use the Java programming language.

24 **MR. KWUN:** May I approach the witness, your Honor?

25 **THE COURT:** You may.

1 (Whereupon, document was tendered
2 to the witness.)

3 **BY MR. KWUN:**

4 **Q.** I have handed you what's been marked as Trial Exhibit
5 2301. And do you recognize this document?

6 **A.** Yes. This appears to be a printout of a particular page
7 on our source.entry.com website.

8 **MR. KWUN:** Offer into evidence, your Honor.

9 **MR. NORTON:** No objection.

10 **THE COURT:** 2301 is received.

11 (Trial Exhibit 2301 received
12 in evidence)

13 **BY MR. KWUN:**

14 **Q.** Mr. Morrill, can you could turn to Page 4 of Exhibit 2301?
15 You see there is a heading in there that says "Compatibility.
16 What does 'compatibility' mean?"

17 **A.** I see that.

18 **Q.** Okay. And then a little further down you see -- just a
19 second.

20 Actually, if you turn to Page 5.

21 **A.** Five, okay.

22 **Q.** You see where it says right at the top: "Is compatibility
23 mandatory?"

24 **A.** Yes, I do see that.

25 **Q.** Can you read the paragraph underneath that?

1 **A.** Sure. Quote:

2 "No. The Android compatibility program is
3 optional. Since the Android source code is
4 open, anyone can use it to build any kind of
5 device. However, if a manufacturer wishes to
6 use the Android name with their product or
7 wants access to Android Market, they must
8 first demonstrate that the device is
9 compatible." Unquote.

10 **Q.** Then is that basically what you were talking about before
11 in your earlier testimony?

12 **A.** Yes, exactly so.

13 **Q.** Mr. Morrill, how long have you been on the Android team?

14 **A.** Formally since about mid-2009 and closely working with
15 them since 2007.

16 **Q.** And so in your informal role working with them since 2007,
17 you were working with the Android team when the -- when Google
18 originally announced, publicly announced Android; is that
19 correct?

20 **A.** Oh, yes. Definitely.

21 **Q.** And when did Google publicly announce Android?

22 **A.** We announced Android on November 5th, 2007.

23 **Q.** And do you remember reading any responses to that
24 announcement from Sun?

25 **MR. NORTON:** Objection. Beyond the scope.

1 **MR. KWUN:** Your Honor, it's just one or two
2 questions.

3 **THE COURT:** All right. You're allowed -- does this
4 mean you're not going to call him back in your case?

5 **MR. KWUN:** Yes, your Honor.

6 **THE COURT:** I will allow you to do that, but I'm not
7 necessarily saying that this is without prejudice to objection
8 to specific questions.

9 But, all right. Go ahead.

10 **BY MR. KWUN:**

11 **Q.** So, Mr. Morrill, do you remember hearing any responses out
12 of Sun or learning about any responses out of Sun in response
13 to the public announcement of Android?

14 **A.** Yeah. In fact, there was a blog post by the CEO that
15 was -- that we thought was pretty remarkable.

16 **MR. KWUN:** May I approach the witness, your Honor?

17 **THE COURT:** Yes.

18 (Whereupon, document was tendered
19 to the witness.)

20 **BY MR. KWUN:**

21 **Q.** I have handed you Trial Exhibit 2352. Is this the blog
22 post that you're talking about?

23 **A.** Yes, it is.

24 **Q.** And you read this blog post in early November, 2007?

25 **A.** Yes, I did.

1 Q. Where did you -- where was this blog post?

2 A. This was posted to Sun's website.

3 MR. KWUN: Your Honor, I offer 2352 into evidence.

4 MR. NORTON: Objection.

5 THE COURT: Objection is?

6 MR. NORTON: 403, and 401 and 402.

7 THE COURT: Those objections are overruled.

8 Received. What's the number?

9 MR. KWUN: 2352.

10 THE COURT: All right. Received in evidence.

11 (Trial Exhibit 2352 received

12 in evidence)

13 BY MR. KWUN:

14 Q. Who was the author of this blog post?

15 A. The author of this blog post was Jonathan Schwartz.

16 Q. I think you just said this, but just to be sure, what was
17 his role at Sun at the time?

18 A. He was the CEO of Sun.

19 Q. Okay. Can you read the first two paragraphs of this blog
20 post?

21 A. Sure. Title is "Congratulations Google, Red Hat and the
22 Java Community."

23 And then the text reads:

24 "I just wanted to add my voice to the chorus

25 of others from Sun in offering my heartfelt

1 congratulations to Google on the announcement
2 of their new Java/Linux phone platform,
3 Android. Congratulations."

4 "I'd also like Sun to be the first platform
5 software company to commit to a complete
6 developer environment around the platform as
7 we throw Sun's NetBeans developer platform
8 for mobile devices behind the effort. You've
9 obviously done a ton of work to support
10 developers on all Java-based platforms and we
11 are pleased to add Google's Android to the
12 list." End Quote.

13 That's the first two paragraphs. Did you want me to
14 read more?

15 **Q.** Could you read the fourth paragraph? And if you could
16 read a little slower for the benefit of the reporter, that
17 would be great.

18 **A.** Of course. Sorry.

19 Fourth. Quote:

20 "And needless to say, Google and the Open
21 Handset Alliance just strapped another set of
22 rockets to the communities' momentum - and to
23 the vision defining opportunity across ours
24 (and other) planets."

25 **Q.** So you said this was -- you thought this was a rather

1 remarkable blog post a moment ago. Why did you think it was
2 remarkable?

3 **A.** Well, internally the team, we were not privy to the
4 details, but we knew there had been some kind of interaction
5 with Sun around Android.

6 But what particularly struck us was that even though,
7 you know, that was the context, that we still have the CEO of
8 Sun offering congratulations. And what I, myself, found
9 particularly interesting was more than that, this actual
10 commitment of engineering resources in regards to this NetBeans
11 product.

12 **Q.** So you're talking about the second paragraph of the blog
13 post there when you say NetBeans?

14 **A.** Yes, exactly.

15 **Q.** What is NetBeans?

16 **A.** NetBeans is what we call an integrated development
17 environment, which is just a -- it's an engineering tool that's
18 kind of the main piece of software that we used to write
19 applications.

20 **Q.** So when Sun said that they were going to throw NetBeans --
21 the NetBean developer platform for mobile devices behind the
22 effort, that meant that they were supporting?

23 **MR. NORTON:** Objection.

24 **BY MR. KWUN:**

25 **Q.** That meant that they were supporting Android?

1 **THE COURT:** The objection is?

2 **MR. NORTON:** Foundation. Being asked to interpret
3 what the document meant.

4 **THE COURT:** That's true. Sustained.

5 **BY MR. KWUN:**

6 **Q.** What did you understand that to mean?

7 **MR. NORTON:** Objection. Relevance, plus 401 and 402.

8 **THE COURT:** Sustained. We're just calling for a
9 speech. This is just a speech.

10 No. Next question.

11 **BY MR. KWUN:**

12 **Q.** And this blog post, did you discuss this blog post with
13 other members of the Android team?

14 **MR. NORTON:** Objection, hearsay.

15 **THE COURT:** Sustained.

16 **MR. NORTON:** Your Honor, we're well beyond the two or
17 three questions we were promised.

18 **THE COURT:** I know. On my fingers I can count up to
19 10, and we're past 10, and you said two or three.

20 **MR. KWUN:** I'm sorry, your Honor. No more questions.

21 **MR. VAN NEST:** Your Honor, may I interpose and
22 request a brief sidebar with the court before this witness
23 leaves?

24 **THE COURT:** Sure.

25

1 (Whereupon, the following proceedings
2 were held at side bar.)

3 **THE COURT:** Go ahead.

4 **MR. VAN NEST:** The plaintiff has made a big deal out
5 of claiming that Google could not show any reliance on the
6 statements by Mr. Schwartz.

7 Now, we have a number of witnesses who are going to
8 testify that they read it. They saw it. They discussed it and
9 they understood various things from it. And that's the only
10 way I think that we could establish reliance.

11 Reliance is not an element of all our equitable
12 defenses, but it is of some. And unless we have a little
13 latitude -- we don't need much with this witness, but unless we
14 have a little latitude to allow him to discuss what he read,
15 how he understood it --

16 **THE COURT:** What's he going to say? Has he even said
17 that he himself relied on it?

18 **MR. VAN NEST:** He hasn't yet.

19 **THE COURT:** No.

20 **MR. VAN NEST:** Because you haven't allowed -- what
21 he's going to testify to, I believe, is that he read it. He
22 understood it as an endorsement. He already said that; that he
23 was impressed that they were going to put engineering resources
24 behind it.

25 He discussed it with others at Google, others in the

1 engineering department, and that his understanding of it was
2 that Sun had approved Android based on statements by the CEO.

3 Now, Michael, is he going to say anything more than
4 that?

5 **MR. KWUN:** That's about it.

6 **MR. VAN NEST:** So unless I can, unless we have some
7 way of proving that --

8 **THE COURT:** Well, what was his decision making
9 authority in this project?

10 **MR. VAN NEST:** Michael?

11 **MR. KWUN:** He was responsible for the compatibility
12 testing suite and the compatibility definition document.

13 **MR. NORTON:** Not at that time.

14 **THE COURT:** Well, I think you could ask him this
15 question: What, if any, influence did this announcement have
16 on your personal course of action in either seeking or not
17 seeking a license from Oracle, or in that case Sun?

18 **MR. VAN NEST:** Sun.

19 **THE COURT:** Now, probably he will answer he had
20 nothing to do with licensing. I don't know. Did he?

21 **MR. VAN NEST:** I think that --

22 **THE COURT:** But he can -- if he had something to do
23 with licensing and can say, "Based on this, I decided not to
24 seek a license, I thought it was cool with Sun," okay, I can
25 see that. But the mere fact that people are talking about it

1 in the hallways, that's not proof of reliance.

2 There could have been somebody in the legal
3 department knew good and well that they needed a license or
4 not. I don't know. But that's -- if you're going to try to
5 prove up reliance just that they are talking about it in the
6 hallways, that doesn't prove much.

7 **MR. VAN NEST:** Well, your Honor, I don't disagree,
8 but I don't think it can be limited just to those people with
9 decision making authority.

10 For example, there will be witnesses to say this was
11 known to us. It was discussed with me. They may or may not
12 have actually read the blog post, but became aware of it
13 through discussion at Google and relied on it.

14 Now, it's --

15 **THE COURT:** How -- he can't say they relied on it.

16 **MR. VAN NEST:** Mr. Morrill is not involved in
17 licensing, but I ought to at least be able to establish that he
18 read it and discussed it with others at Google, within Google,
19 to lay the foundation for other witnesses who will say, "Yeah,
20 we were aware of it. It was a big topic of discussion and I
21 relied on it in this way."

22 **MR. NORTON:** Your Honor, the foundation for testimony
23 from other witnesses comes in through those other witnesses
24 with respect to their knowledge and their decision making. Mr.
25 Morrill can't testify as to what those other witnesses knew,

1 nor what they decided to do, nor what they relied on.

2 **THE COURT:** They could testify that they knew about
3 it through hallway discussions.

4 **MR. VAN NEST:** Yes.

5 **MR. NORTON:** That is not -- excuse me.

6 **THE COURT:** That's not hearsay. That would be -- you
7 know, he can testify firsthand as to what he, himself, said or
8 what others said, not their -- not the other people's reliance
9 or reactions. I could see that distinction being wrong.

10 **MR. VAN NEST:** That's all we're trying to elicit from
11 this witness.

12 **MR. NORTON:** Your Honor, it's still hearsay.

13 **THE COURT:** It wouldn't be hearsay for that limited
14 purpose.

15 **MR. NORTON:** If I may?

16 Do I understand the limited purpose of the testimony
17 is -- I'm afraid I do not understand.

18 **THE COURT:** Here is the one question I will allow you
19 to ask, even though you're way beyond two or three.

20 You've got to be honest with me when you tell me -- I
21 would have made you bring this witness back in your case if I
22 had known it was going to be 10 questions.

23 All right. Here is the question you can ask: Did
24 you specifically discuss this blog with other people at Google?
25 "Yes" or "no." That's it. And he can't say what they said to

1 him in response. He can't say they relied. If he starts doing
2 that, I'm going to interrupt him and instruct the jury to
3 disregard what he said.

4 So be careful and don't try to slip something in
5 there. That's all he can do. Was it discussed? Did you,
6 yourself, participate in discussions with other people on this
7 subject?

8 **MR. NORTON:** Your Honor, I understand the ruling. I
9 do want to note that we certainly -- we served the
10 interrogatory. We asked for all the bases for their
11 affirmative defenses and reliance on this blog post by anyone.
12 This was never disclosed as one of the bases. And if your
13 Honor is going to allow this testimony --

14 **THE COURT:** This is coming too late for me. That's
15 an objection that I might have listened to earlier, but it's
16 too late now.

17 All right. That's the ruling.

18 **MR. VAN NEST:** We understand it, your Honor. Thank
19 you.

20 **MR. NORTON:** Thank you.

21 (Whereupon, the following proceedings were
22 held in open court, in the presence and
23 hearing of the jury.)

24 **BY MR. KWUN:**

25 **Q.** Mr. Morrill, referring to this blog post, did you,

1 yourself, personally discuss this blog post with others on the
2 Android team?

3 And I just want to know whether you did discuss it,
4 not what the discussions were.

5 **THE COURT:** "Yes" or "no." Go ahead.

6 **A.** Yes.

7 **BY MR. KWUN:**

8 **Q.** Thank you. No further questions.

9 **THE COURT:** All right. Thank you.

10 **REDIRECT EXAMINATION**

11 **BY MR. NORTON:**

12 **Q.** Mr. Morrill, you testified that there are about 750,000
13 Android compatible devices activated every day, correct?

14 **A.** Yes.

15 **Q.** And that number does not include the additional devices,
16 like the Kindle Fire and the Barnes and Noble E-Book reader
17 that you described as not defined as compatible, correct?

18 **A.** That's correct.

19 **Q.** So the number of devices that are out there that are --
20 actually include the Java packages that are listed on
21 Exhibit 51 is even more than 750,000 activated every day,
22 correct?

23 **MR. KWUN:** Objection, foundation.

24 **THE COURT:** Do you know the answer?

25 **THE WITNESS:** No.

1 **BY MR. NORTON:**

2 **Q.** Now, Mr. Kwun showed you Exhibit 2352.

3 **A.** He did.

4 **Q.** Have you ever seen a license agreement before?

5 **A.** I'm sorry. Say again?

6 **Q.** Have you ever seen a license agreement before?

7 **A.** License agreement? In what sense, for --

8 **Q.** In any sense.

9 **A.** I'm pretty familiar with copyright license agreements for
10 OEM source software, sure.

11 **Q.** Exhibit 2352. Is that a license agreement or a blog post?

12 **MR. KWUN:** Objection. Calls for a legal conclusion.

13 **THE COURT:** It's argument. It's okay to argue, but
14 you've got to wait for the closing argument. This isn't
15 argument.

16 **MR. NORTON:** Fair enough. Thank you, your Honor.

17 May I approach the witness?

18 **BY MR. NORTON:**

19 **Q.** I'm going to hand the witness Exhibit 245.

20 (Whereupon, document was tendered
21 to the witness.)

22 **Q.** Mr. Morrill, is this an email that you sent on May 23rd,
23 2008?

24 **A.** Yes.

25 **Q.** And you sent it to Justin Mattson, is that right?

1 A. That's correct.

2 Q. And you sent it to a distribution called Advocates, is
3 that right?

4 A. That's correct.

5 Q. And that's a distribution of people who work for Google?

6 A. Yes.

7 Q. And you sent it to a distribution called AndroidPR.
8 That's another group of people that work at Google, correct?

9 A. That's correct.

10 Q. This is an email that you sent from your work address?

11 A. I assumed so.

12 MR. NORTON: We offer Exhibit 245.

13 MR. KWUN: Objection, your Honor. The exhibit was
14 never disclosed to him.

15 MR. NORTON: It is offered in response to the door
16 opening with Exhibit 2352.

17 THE COURT: Is 2352 listed here?

18 MR. NORTON: The defendant disclosed Exhibit 2352.
19 We did not.

20 In response to their questions, I would like to
21 examine Mr. Morrill on the statements that appear in Exhibit
22 245, defendants having opened the door.

23 MR. KWUN: Your Honor, this is a May 2008 email
24 that -- 2352 is a blog post from November of 2007.

25 MR. NORTON: I can connect them.

1 **THE COURT:** Go ahead. I will let you use --

2 **MR. NORTON:** I can direct your Honor --

3 **THE COURT:** Was he at Google when he made this
4 document?

5 **BY MR. NORTON:**

6 **Q.** Mr. Morrill, you were a Google employee on May 23rd, 2008,
7 were you not?

8 **A.** I was.

9 **Q.** And you were working on Android at that time, correct?

10 **A.** I would not have been formally on the team, but, yes, I
11 would have been working in my capacity as developer relations.

12 **THE COURT:** I'm going to allow 245 in. Go ahead.

13 (Trial Exhibit 245 received

14 in evidence)

15 **BY MR. NORTON:**

16 **Q.** Mr. Morrill, if you would turn to -- let me just be quick.

17 This is an email that you sent, correct? Correct,
18 Mr. Morrill?

19 **A.** One moment. Let me...

20 **Q.** Let's just start at the first one, at the very top of the
21 page.

22 **A.** Yes. The block at the top is an email I sent.

23 **Q.** And there is a whole chain of emails beneath that,
24 correct?

25 **A.** Yes. My email was a reply to several others.

1 Q. And you -- when you sent this email on May 23rd, 2008, you
2 had all these emails in your in box, correct?

3 A. Yes, that's correct.

4 Q. Now, if we turn to the second page, you'll see that
5 there -- the email from the second page on is a news article
6 that appeared on CNET.com; do you see that? About halfway down
7 the page?

8 A. Uh-huh.

9 Q. All right. And then it says "May 22, 2008, 4:00 a.m.
10 PDT." Do you see that?

11 A. Yes.

12 Q. And from there on the exhibit is this article that
13 appeared on CNET, correct?

14 A. That's what it -- where it says it appeared, yes.

15 Q. All right. Great.

16 And then if you'd turn to Page 4, please.

17 (Witness complied.)

18 Q. This is an article about Android, is it not?

19 A. Yes, it is.

20 Q. And you see about a little than less than halfway down the
21 page it says "Licensing Choices"?

22 A. Yes, I see that.

23 Q. All right. And it states there:

24 "Google has been criticized for not working
25 with existing Open Source projects. In

1 addition, Sun Microsystems has expressed
2 concern that Google's development of Dalvik
3 could fragment the Java world so that that
4 Java software for running Android
5 applications wouldn't work on other Java
6 phones and vice-versa."

7 Do you see that?

8 **A.** I do see that.

9 **Q.** So you were aware on May 23rd, 2008 that Sun had expressed
10 concern that Android would fragment Java, correct?

11 **A.** I wouldn't say that I was aware of that.

12 **Q.** Did you or did you not have this email?

13 **A.** I saw that it was a report in my in box, sure.

14 **Q.** And you didn't just see it. You emailed it around to a
15 couple of groups of employees at Google, right?

16 **A.** I did not. I was asked about it.

17 **Q.** You forwarded the entire email string to the AndroidPR
18 group, did you not, Mr. Morrill?

19 **A.** Yes, that's correct, I did.

20 **Q.** The entire email, right?

21 **A.** Yes.

22 **Q.** Including the article?

23 **A.** Uh-huh.

24 **Q.** That said Sun is concerned in May 2008 that Android is
25 fragmenting Java, correct?

1 A. I forwarded an email that included that line, yes.

2 Q. Now, when you were shown Exhibit 2352, the date on that is
3 November 5, 2007, is that right?

4 A. I'm sorry. Say again?

5 Q. Exhibit 2352, do you still have it in front of you?

6 A. Yes.

7 Q. The date on that is what?

8 A. 5 November of 2007.

9 Q. 5 November, 2007.

10 Now, on that day had Google already written most of
11 the Android platform?

12 A. I don't know actually. I'm not sure how much of the code
13 got rewritten after that point.

14 Q. But on November 5, 2007 Google had not released the
15 Android SDK, had it?

16 A. That's correct. The SDK was released a week later.

17 Q. A week later. So on November 5, 2007 the world had not
18 yet seen the Android SDK, had not yet been released by Google,
19 correct?

20 A. That's correct.

21 Q. All right. So when Mr. Schwartz wrote his blog post, the
22 SDK had not yet been released, is that right?

23 A. That's correct.

24 Q. But on May 31, 2008, by that time the SDK had been
25 released, correct?

1 A. You said May 31?

2 Q. 2008.

3 A. We're referring to an email dated May 23rd, are we not?
4 Am I looking at the right document?

5 Q. Well, you tell me which document you're looking at.

6 A. I'm sorry. Say again?

7 Q. Just so we're clear. Mr. Kwun showed you an email dated
8 November 5, 2007.

9 A. Yep.

10 Q. All right. And you called that an endorsement, right?

11 A. Sure.

12 Q. And that endorsement was made before the SDK had been
13 released, correct?

14 A. That's correct.

15 Q. All right. And then I showed you -- I showed you
16 Exhibit 245, which showed that Sun expressed concern, correct?

17 A. That somebody said Sun had expressed concern, yes.

18 Q. And that document is dated May 31, 2008, right?

19 A. No --

20 Q. I'm sorry. Now I understand. May 23rd, 2008.

21 A. Yes, exactly.

22 Q. I apologize.

23 So May 23rd, 2008 is after the SDK was released,
24 correct?

25 A. That's correct.

1 Q. All right. So after the SDK was released, you knew that
2 Sun had expressed concern that Android would fragment Java,
3 correct?

4 A. I, again, don't remember. I would not say that I knew.

5 Q. But you had -- you were on notice from the email --

6 A. Sun didn't tell me that they had concerns. I just, you
7 know, had seen that other people had reported this.

8 Q. Sure. Well, you didn't have any conversations with Sun
9 about this at all, did you?

10 A. That's correct.

11 Q. Thank you. No further questions.

12 RECROSS EXAMINATION

13 BY MR. KWUN:

14 Q. Mr. Morrill, looking at Exhibit 245. When you -- with the
15 email that you wrote, what were you focused on?

16 A. I had been, as I recall, or -- well, I don't really
17 remember this email, but just from the block of text at the
18 top, it looks like I had been specifically asked about a
19 specific claim made about lines of code in the Android source
20 tree.

21 Q. Was your email discussing that statement in the CNET
22 article that you were asked about?

23 A. No. I was not addressing any of that.

24 Q. And on May 23rd, 2008 what concerns, if any, did you have
25 about Sun's position with respect to Android?

1 **A.** I'm sorry. Repeat the question?

2 **Q.** On May 23rd, 2008 what concerns, if any, did you have
3 about Sun's position with respect to fragmentation of Java?

4 **A.** I didn't really have an opinion.

5 **MR. KWUN:** No further questions.

6 **MR. NORTON:** Very briefly, your Honor.

7 **FURTHER REDIRECT EXAMINATION**

8 **MR. NORTON:** If we can stick with Exhibit 245? And
9 stay on the first page, please.

10 (Document displayed)

11 **BY MR. NORTON:**

12 **Q.** Mr. Kwun asked you what you were -- why you were writing
13 about this particular article, correct?

14 **A.** I'm sorry. Why I was writing --

15 **Q.** Mr. Kwun asked you why you had forwarded -- what your
16 focus was --

17 **A.** Yes, yes.

18 **Q.** (Continuing) -- in forwarding this article?

19 **A.** Correct.

20 **Q.** All right. And there was a quote attributed to you about
21 lines of code?

22 **A.** Yes, that's correct.

23 **Q.** Thank you.

24 And you believed you had been -- your quote had been
25 taken out of context, right?

1 A. I have not read the whole thing, but --

2 Q. Well, let's just stay on the first page. There is an
3 email here from Mr. Rubin, right?

4 A. Yes.

5 Q. On the first page towards the bottom.

6 So Mr. Rubin also received this email, correct?

7 A. Yes.

8 Q. And Mr. Rubin said:

9 "I caught up with Dan at breakfast. This
10 quote was taken out of context."

11 Right?

12 A. Yes. It says that.

13 Q. And "this quote" refers to your statement about lines of
14 code?

15 A. Without reading the document, I don't know what it refers
16 to.

17 Q. All right.

18 A. I mean, there were a number of quotes in the original
19 article.

20 Q. Is it fair to say that if you were quoted in an article
21 published on CNET and it got the attention of Mr. Rubin that
22 you had been quoted incorrectly, that you would have read the
23 whole article to make sure that any other statements that are
24 attributed to you or anyone else were right?

25 MR. KWUN: Objection. Calls for speculation.

1 **THE COURT:** Would it have been your normal practice
2 in these circumstances to have read the whole article? You can
3 either say "yes" or "no."

4 **THE WITNESS:** Yes.

5 **THE COURT:** End of story. Let's stop.

6 **MR. NORTON:** Nothing further. Thank you.

7 **THE COURT:** All right. We're going to excuse this
8 witness unless somebody -- you said we're not calling him back?

9 **MR. KWUN:** That's right, your Honor.

10 **THE COURT:** Can this witness be excused?

11 **MR. NORTON:** Yes, your Honor.

12 **THE COURT:** You are excused for good. You don't have
13 to come back.

14 **THE WITNESS:** Thank you.

15 (Witness excused.)

16 **THE COURT:** Go to the next witness and go about 20
17 minutes before the next break.

18 Next witness.

19 **MR. NORTON:** We will play the videotaped deposition
20 of Rafael Camargo.

21 **THE COURT:** How long will it about?

22 **MR. NORTON:** I understand it's a 20-minute clip --
23 I'm sorry. I understand it's much shorter now. It's eight
24 minutes.

25 **THE COURT:** Is it teed up and ready to go?

1 **MR. JACOBS:** I'm sorry. Before we start, there is
2 one exhibit in the deposition, your Honor, and it's already
3 been admitted.

4 **THE COURT:** Great. So is it teed up and ready to go?
5 Yes?

6 **MR. JACOBS:** Yes.

7 **THE COURT:** All right. But one second.

8 I need to say to the members of the public who are
9 standing back there, I need to ask you to settle down. If you
10 want to leave, you're welcome to leave, but let's not make a
11 distraction while the evidence is being presented.

12 So if anybody else wants to get up and go, now is the
13 time to do it.

14 (Brief pause.)

15 **THE COURT:** Thank you.

16 I want to also say, I appreciate the members of the
17 press getting those key boards that don't make noise. That's
18 been a big improvement.

19 All right. Roll the tape.

20 **WHEREUPON:**

21 **RAFAEL CAMARGO,**
22 called as a witness for the Plaintiff herein, testified via
23 videotaped deposition played in open court in the presence and
24 hearing of the jury, not reporter by the court reporter.

25 (Time noted: 10:59 a.m.)

1 **MR. JACOBS:** That concludes the testimony of
2 Mr. Camargo.

3 **THE COURT:** All right. How long will the next
4 witness be?

5 **MR. NORTON:** Next witness will be Dr. Mitchell, your
6 Honor. He will be our expert, and so we --

7 **THE COURT:** Well, this would be a good point to break
8 then. 15 minutes. Please remember the admonition.

9 **THE CLERK:** All rise.
10 (Jury exits courtroom at 11:08 a.m.)

11 **THE COURT:** Be seated.

12 **MR. JACOBS:** Your Honor, I apologize. Our next
13 witness will be Mr. Cizek.

14 **THE COURT:** Mister who?

15 **MR. JACOBS:** Mr. Cizek, C-I-Z-E-K.

16 **THE COURT:** How long will he be?

17 **MR. NORTON:** The direct will be about 25 minutes.

18 **THE COURT:** All right. Mitchell, what is Mitchell
19 testifying about?

20 **MR. JACOBS:** He's testifying about APIs and about
21 what he found on investigating APIs and source code in Android.

22 **THE COURT:** We will take a 15-minute break ourselves.
23 (Whereupon there was a recess in the proceedings
24 from 11:09 a.m. until 11:25 a.m.)

25 **THE COURT:** Please be seated. Back to work. All

1 set?

2 **MR. JACOBS:** Your Honor, your deputy advised me that
3 we had not moved the deposition designations into evidence.

4 **THE COURT:** You don't have to move the designations
5 if it has already been played to the jury. Designations don't
6 go into the jury room, but it would be good for the clerk to
7 have it as part of the record.

8 **MR. JACOBS:** Let's be clear that Exhibit 1064 is the
9 designations of Rafael Camargo that have just been played.

10 **THE COURT:** Just put it on Dawn's desk and that will
11 be for the Court of Appeals.

12 **MR. JACOBS:** Thank you, your Honor.

13 (Attorney complied.)

14 **THE COURT:** All right. All ready to go now?

15 **MR. NORTON:** Yes, your Honor.

16 **MR. PURCELL:** Yes, your Honor.

17 **THE COURT:** All right. I will go collect the jury.

18 (Jury enters the courtroom at 11:26 a.m.)

19 **THE COURT:** All right. Welcome. Be seated everyone,
20 except for the witness.

21 Mr. Norton, you may announce or call your next
22 witness. Who will that be?

23 **MR. NORTON:** We call Leo Cizek.

24 **THE COURT:** How do you spell that?

25 **MR. NORTON:** C-I-Z-E-K.

1 **THE COURT:** Welcome, Mr. Cizek. Please raise your
2 right hand.

3 **LEO CIZEK,**

4 called as a witness for the Plaintiff herein, having been first
5 duly sworn, was examined and testified as follows:

6 **THE WITNESS:** Yes, I do.

7 **THE COURT:** Thank you. Please be seated.

8 You need to sit this close to the microphone to make
9 it work.

10 **THE WITNESS:** Is this good?

11 **THE COURT:** Yes, and you can move it around. You can
12 tilt it back.

13 Why don't you say your name?

14 **THE WITNESS:** Leo Cizek.

15 **THE COURT:** Perfect. Go ahead, counsel.

16 **DIRECT EXAMINATION**

17 **BY MR. NORTON:**

18 **Q.** Good morning, Mr. Cizek.

19 **A.** Good morning.

20 **Q.** Where are you currently employed?

21 **A.** Oracle America.

22 **Q.** And how long have you been employed there?

23 **A.** Since January, 2010 when Oracle acquired Sun Microsystems.

24 **Q.** And prior to that date, where did you work?

25 **A.** Sun Microsystems.

1 Q. How long did you work at Sun?

2 A. Since September, 2000.

3 Q. All right. Now, what do you do in your job at Oracle?

4 A. Java technology and source code licensing. It's basically
5 sales for the various versions of Java and that -- my title is
6 account manager.

7 Q. To what extent, if at all, was your job different when you
8 were at Sun?

9 A. Essentially the same.

10 Q. And do you work with any particular type of customer in
11 your job in licensing sales?

12 A. Two types primarily; device manufacturers, and what we
13 call value added providers who develop software, but then they
14 then resell to device manufacturers.

15 Q. Now, have you ever met Andy Rubin?

16 A. Yes.

17 Q. When did you first meet Mr. Rubin?

18 A. I probably met him late fall, 2001.

19 Q. And what were the circumstances under which you met Mr.
20 Rubin?

21 A. Well, we had talked by phone before we met, but I was
22 informed that he worked as CEO and co-founder of a company
23 called Danger, Inc. in Palo Alto and that they had done an
24 implementation of Java for the device they were -- had designed
25 and that they would need commercial use license and to achieve

1 compatibility before they shipped their product commercially.

2 **Q.** Now, do you -- Mr. Rubin's role at Danger, do you know
3 what that role was?

4 **A.** Well, he told me he was president -- at that time
5 president and CEO and that he was one of the four co-founders.

6 **MR. NORTON:** May I approach the witness?

7 **THE COURT:** You may.

8 (Whereupon, document was tendered
9 to the witness.)

10 **BY MR. NORTON:**

11 **Q.** I have handed the witness Exhibit 2016.

12 Mr. Cizek, do you recognize that document?

13 **A.** Yes.

14 **Q.** And who created this document?

15 **A.** I did.

16 **Q.** And what was the purpose for which you created it?

17 **A.** Basically to summarize some written notes that I had taken
18 over the years to give a chronology of the major events that
19 happened from when I first made contact with Danger to when we
20 closed the licensing deal.

21 **Q.** How do you use this form in your work, if at all?

22 **A.** Well, I used the predecessor to this form, which also had
23 the handwritten notes on it. I just used to keep track of
24 what's going on day-to-day. The reason I summarize it is once
25 the deal is closed, just I think it makes sense to be able to

1 recreate the history, go back and remind myself what happened
2 as things change in the future.

3 **MR. NORTON:** We offer Exhibit 2016.

4 **MS. ANDERSON:** Objection, your Honor. Relevance and
5 403. This relates to Danger, not to Google.

6 **THE COURT:** All right. Those two objections are
7 overruled. What's the number?

8 **MR. NORTON:** 2016.

9 **THE COURT:** 2016.

10 Received in evidence.

11 (Trial Exhibit 2016 received
12 in evidence)

13 **MR. NORTON:** Thank you, your Honor.

14 **BY MR. NORTON:**

15 **Q.** Now, when you first spoke to Mr. Rubin at this time in
16 2001, what did you tell him?

17 **A.** Well, I --

18 **MS. ANDERSON:** Objection, your Honor, hearsay.

19 **THE COURT:** Well, it depends on what it's being
20 offered for.

21 Is this being offered to prove up notice in a
22 transaction?

23 **MR. NORTON:** Notice, knowledge, state of mind of the
24 person hearing the statement.

25 **MS. ANDERSON:** Your Honor, if I may at this time,

1 there was no Google representative involved in any of these
2 communications.

3 **THE COURT:** Did Mr. Rubin later become part of
4 Google?

5 **MS. ANDERSON:** He did later, your Honor, yes, but not
6 at this time.

7 **THE COURT:** Well, this would go -- depending on how
8 much weight the jury gives to the testimony, it would go to the
9 information available to Mr. Rubin that would subsequently have
10 been known to him and possibly have influenced his decision
11 making.

12 So the testimony will be allowed. The jury will be
13 told that this is -- you may consider this only for -- only for
14 the purpose, it's a limited purpose, of what information was
15 available to the people, if any, who heard the statement the
16 witness is about to testify to.

17 With that limitation, objection overruled.

18 **MS. ANDERSON:** Thank you, your Honor.

19 **THE COURT:** Please continue.

20 **BY MR. NORTON:**

21 **Q.** The question was: What did you tell Mr. Rubin when you
22 spoke to him in 2001?

23 **A.** Well, I explained to him my role and that the reason I was
24 calling him was that I had been informed that they had done a
25 Java implementation and that there were a couple of

1 requirements that Sun Microsystems had for companies that
2 planned to commercially ship something that incorporated a
3 Java, Java technology.

4 One was that they achieve compatibility, and another
5 was that they enter into a commercial use license with Sun.

6 Q. Now, how many times did you meet with Mr. Rubin while he
7 was at Danger?

8 A. Six; six, seven, eight times, something like that.

9 Q. And did anyone other than yourself from Sun participate in
10 those meetings?

11 A. Yes, depending on the meeting. I think Vineet Gupta was
12 with me at virtually all the meetings. Also, Tim Lindholm and
13 one of the Sun attorneys called in a couple of times.

14 Q. And at that time who was Mr. Lindholm's employer?

15 A. Sun, Sun Microsystems.

16 Q. And what was Mr. Lindholm's role, if any, in the
17 discussions with Danger about a Java license?

18 A. His title at the time, if I remember correctly, was chief
19 technology officer for the client systems group at Sun. And
20 the client systems group owned and managed the Java Micro
21 Edition technologies.

22 So Tim was -- because Danger had done something
23 fairly unique in their implementation of Java, we had Tim
24 consulting with us on -- and with them, on how to -- what would
25 be involved in terms of achieving compatibility. So it was

1 primarily technical advice from Tim.

2 **Q.** When did Danger release its implementation of its -- well,
3 I'm sorry.

4 Do you know what Danger called the device on which it
5 had a Java implementation?

6 **A.** Once it was released, I learned that -- two names. The
7 name Hiptop, which was the Danger branded name, and the name
8 Sidekick, which was the T-Mobile branded name.

9 **Q.** And when did Danger release its Java implementation, the
10 Sidekick or Hiptop?

11 **A.** I believe it was October, 2002.

12 **Q.** And if we look at Exhibit 2016, towards the bottom of the
13 page there is a note October 1, 2002. "Hiptop now available
14 via T-Mobile," under the name Cizek?

15 **A.** Yes, I don't know if that was the exact date that it
16 became available. Maybe that was a few days later that I read
17 a second article talking about the name Sidekick. I don't
18 recall.

19 **Q.** All right. Now, when Danger released Sidekick, at that
20 time did Danger have a Java commercial use license from Sun?

21 **A.** No.

22 **Q.** Now, at that time had Danger taken any steps to resolve
23 Sun's concerns that the Sidekick was incompatible?

24 **A.** Umm, other than having meetings with us and discussing
25 what would be involved, no. I mean, they had not -- they had

1 not signed the agreement that would have given them access to
2 the Technology Compatibility Kit. So there really wasn't much
3 they could do.

4 **Q.** And the Technology Compatibility Kit, is that sometimes
5 called the TCK?

6 **A.** Yes. TCK is the acronym.

7 **Q.** What was your reaction to learn that the Hiptop Sidekick
8 had been released in the fall of 2002?

9 **A.** Well, I was surprised and disappointed and, also,
10 concerned that now there was a non-compatible Java
11 implementation on the market.

12 **Q.** So subsequent to learning that Danger had released the
13 Sidekick, did you have any further meetings with Mr. Rubin?

14 **A.** Yes. The meeting that I -- there was a particular meeting
15 where the sole focus -- other than the previous meetings which
16 had been largely technical in nature, we had a meeting that
17 was -- the sole focus of which was the need for them to become
18 a licensee.

19 **Q.** Where did that meeting take place?

20 **A.** It was Danger's headquarters, which at that time were in
21 downtown Palo Alto.

22 **Q.** And who attended from the Sun side at that meeting?

23 **A.** Vineet Gupta and myself.

24 **Q.** And who attended from the Danger side?

25 **A.** There was Andy Rubin, an in-house counsel and an external

1 counsel as well.

2 **Q.** Now, did you or Mr. Gupta express Sun's position on the
3 release of the Sidekick at that meeting?

4 **A.** Yes. Mr. Gupta explained that -- you know, what -- they
5 did not yet have the right to do what they had done, i.e.,
6 release that product commercially since they didn't have a
7 commercial use license since, number one, they hadn't achieved
8 compatibility; number two, they didn't have a commercial use
9 license.

10 **Q.** And did Mr. Rubin have any response?

11 **MS. ANDERSON:** Objection, your Honor, hearsay.

12 **THE COURT:** Sustained. We're getting into this for
13 purposes of the information made known to Mr. Rubin, not what
14 Mr. Rubin made known to others.

15 **MR. NORTON:** Thank you, your Honor.

16 **BY MR. NORTON:**

17 **Q.** To what extent, if any, did Mr. Gupta explain why it was
18 that Sun was of the view that Danger required a license?

19 **MS. ANDERSON:** Your Honor, may I request the same
20 instruction to the jury on this issue as well?

21 **THE COURT:** Yes. It's all being offered solely to --
22 solely for you to consider what information was made known to
23 Mr. Rubin back in 2002.

24 Please answer the question.

25 **A.** Well, during the discussion, at one point Mr. Gupta

1 noticed that there was a book on the table in front of him.
2 That subject of the particular was the particular Java
3 technology that they had implemented called CLDC. It's part of
4 the Java Micro Edition. And he opened it to the copyright page
5 and he pointed to the copyright Page which had the
6 specification license for CLDC, specification license
7 agreement. And he said, "You know, it states right here that
8 if you want to ship a product commercially based on the
9 specification, then you need to contact Sun Microsystems and
10 license any compatibility tests or words -- TCKs that pertain
11 to that technology.

12 **Q.** Now, after that meeting did Danger, in fact, enter into a
13 license agreement with Sun for Java technology?

14 **A.** Yes. Sometime later, but yes.

15 **MR. NORTON:** May I approach?

16 **THE COURT:** You may.

17 **MR. NORTON:** Excuse me, your Honor. One moment,
18 please.

19 (Brief pause.)

20 **BY MR. NORTON:**

21 **Q.** At the time that Danger entered into a license with Sun
22 for Java technology, was Mr. Rubin still employed at Danger?

23 **A.** Yes. He had told me about a week before they signed the
24 agreement --

25 **MS. ANDERSON:** Objection, your Honor. Hearsay again.

1 **THE COURT:** The question only asked you, "Was he
2 still employed?" And you said, "Yes." And that answers the
3 question.

4 Next question.

5 **MR. NORTON:** Thank you.

6 May I approach?

7 **THE COURT:** Yes.

8 (Whereupon, document was tendered
9 to the witness.)

10 **BY MR. NORTON:**

11 **Q.** I handed the witness what was previously marked as Trial
12 Exhibit 1026.

13 Do you recognize that document, Mr. Cizek?

14 **A.** Yes.

15 **Q.** And what is it, please?

16 **A.** It's an internal copy in the sense that part of the
17 material in it is for internal use only. That is a copy of an
18 executed --

19 **MS. ANDERSON:** Excuse me. Excuse me, your Honor. I
20 apologize for interrupting, but we do not reflect that this has
21 been admitted into evidence based on our list, 1026, as the one
22 that was disclosed to us for use with this witness.

23 **MR. NORTON:** Correct. It has not been published.
24 I'm trying to lay the on foundation for it to be moved into
25 evidence.

1 **MS. ANDERSON:** My apologies.

2 **BY MR. NORTON:**

3 **Q.** So do you recognize Defendant's Exhibit 1026?

4 **A.** Yes.

5 **Q.** And what do you recognize it to be?

6 **A.** It's an internal document that includes an executed copy
7 of the Sun Community Source License, or SCSL, and including the
8 commercial license for Danger.

9 **MR. NORTON:** We move the admission of 1026.

10 **MS. ANDERSON:** We object on relevance, 403 and likely
11 to confuse the jury, particularly in this phase of this
12 litigation, your Honor.

13 **THE COURT:** May I see the exhibit?

14 **MR. NORTON:** Yes, your Honor.

15 (Whereupon, document was tendered
16 to the Court.)

17 (Brief pause.)

18 **THE COURT:** Well, possibly counsel is correct. So
19 we're not going to show this to the jury and it won't be
20 admitted just yet until we can have a further conversation out
21 of the presence of the jury. So 1026 will be in limbo for
22 awhile. So don't show that to the jury yet.

23 **MS. ANDERSON:** Thank you, your Honor.

24 **THE COURT:** It's enough -- it's okay for you to say
25 that a license was entered into and move on to something new,

1 but to get into these specific details like this, I'm beginning
2 to see the merit in the 403 objection.

3 **MR. NORTON:** Your Honor, may I ask the witness about
4 a specific part of the agreement that the witness discussed
5 with Mr. Rubin?

6 **THE COURT:** What does that have to do with what --
7 just give me a phrase that I can focus on.

8 **MR. NORTON:** A phrase in the document or a phrase --

9 **THE COURT:** Well, I mean, so I'll know what you're
10 talking about.

11 **MR. NORTON:** Sure. The subject matter of the
12 testimony would be Mr. Cizek's discussions with Mr. Rubin about
13 what Danger was agreeing to license.

14 **THE COURT:** All right. You can ask that.

15 **BY MR. NORTON:**

16 **Q.** Mr. Cizek, to what extent, if any, did the agreement
17 between Sun and Danger address Danger's rights to Oracle's
18 source code.

19 **A.** Well, regarding the primary technology being licensed,
20 which was CLDC, at Mr. Rubin's request we entered a section
21 which stated that Danger had not looked at any Sun source code,
22 or as it's called in the document original code, but source
23 code for that Java technology.

24 **Q.** And who requested that that clause be included in the
25 agreement?

1 **A.** Andy Rubin.

2 **MS. ANDERSON:** Objection. Hearsay, your Honor.

3 **THE COURT:** Well, it's proving up a transaction. For
4 that purpose it's not hearsay. So that -- proving up a
5 transaction is never hearsay. Overruled.

6 So answer the question. Did you say Mr. Rubin?

7 **THE WITNESS:** Yes, Mr. Rubin was -- he was the person
8 that indicated that this was a requirement if we wanted to
9 close the license agreement, yes.

10 **THE COURT:** All right. Next question.

11 **BY MR. NORTON:**

12 **Q.** And to what extent, if any -- I'm sorry.

13 So we can be clear. Is there a particular part of
14 the agreement that addressed this particular issue?

15 **A.** Yes. Section 4 of Attachment F, which is the very last
16 attachment.

17 **MR. NORTON:** Once again, I move the admission of
18 Exhibit --

19 **THE COURT:** We're going to postpone that discussion
20 until later.

21 **MR. NORTON:** I understand, your Honor. Thank you.

22 **THE COURT:** It may come in, but I want to hear about
23 this out of the presence of the jury.

24 **MR. NORTON:** Thank you, your Honor.

25

1 **BY MR. NORTON:**

2 **Q.** To what extent, if any, did that section address Danger's
3 rights to use Sun's Java specifications?

4 **A.** That Section 4 did not address that. Was that your
5 question?

6 **Q.** It is. Thank you.

7 To what extent did the agreement between Sun and
8 Danger, if any, to what extent did the agreement between Sun
9 and Danger grant Danger the rights to use Sun's Java
10 specifications?

11 **A.** Well, that's all that it granted in the sense that since
12 it explicitly left out source code, they were licensing the
13 right to make commercial use of code that they developed that
14 used the specification, CLDC specification.

15 **Q.** Thank you.

16 Now, after you closed the agreement between Sun and
17 Danger, did you have occasion to speak with Mr. Rubin again?

18 **A.** Yes.

19 **Q.** And when you did next speak to Mr. Rubin?

20 **A.** After he had left Danger. It was late 2004 or very early
21 2005.

22 **MR. NORTON:** May I approach?

23 **THE COURT:** Yes.

24 (Whereupon, document was tendered

25 to the witness.)

1 **BY MR. NORTON:**

2 **Q.** Mr. Cizek, this is Exhibit 2001. And if I can direct you
3 to the second page of that document?

4 **A.** Uh-huh.

5 **Q.** Do you see about halfway down there is an email. It says.
6 "From: Andy Rubin" and "To: Leo Cizek."

7 Do you see that?

8 **A.** "Subject Re: Java JTWI Licensing Issues."

9 **Q.** Yes.

10 **A.** Yes.

11 **Q.** And do you recognize this document?

12 **A.** Yes.

13 **Q.** And can you tell us what it is, please? Without quoting
14 anything from it, just tell us what it is?

15 **A.** It's the first email I received from Mr. Rubin after he
16 had become an employee of Google. I had never seen this email
17 address before. I knew what his previously email address was.

18 This was basically announcing, I guess, to me that he
19 had -- that Google had been the company that his -- he had told
20 me that his company was going to be acquired.

21 **Q.** Let me just stop you there, if you don't mind.

22 **MR. NORTON:** We would move the admission of
23 Exhibit 2001.

24 **MS. ANDERSON:** No objection, your Honor.

25 **THE COURT:** Received in evidence.

1 (Trial Exhibit 2001 received
2 in evidence)

3 **BY MR. NORTON:**

4 **Q.** All right. Would you please read now what Mr. Rubin wrote
5 to you on August 4, 2005?

6 **A.** Sure.

7 "Hi Leo. Thanks for connecting as discussed.
8 I'd like your help getting a meeting between
9 the Google people (myself and Tim Lindholm)
10 and Vineet Gupta.

11 "We can talk about our project, our strategy
12 and how it might be mutually beneficial to
13 work together (again).

14 Thanks, Andy."

15 **Q.** If we go down a little bit further on that same page,
16 Mr. Rubin was responding to an email from you, is that correct?

17 **A.** Yes.

18 **Q.** And can you read that email please?

19 **A.** The email from me reads:

20 "Hi, Andy. I believe you said that you had
21 an internal meeting scheduled for July 26th
22 in which you would be discussing how to
23 proceed with licensing JTWI from Sun. When
24 convenient, could you please give me a call
25 to discuss? Thanks, Leo."

1 Q. July 26, that would be July 26, 2005?

2 A. Yes.

3 Q. Now, there was a reference in this document to JTWI. Can
4 you explain what JTWI is?

5 A. It stands for Java Technology for the Wireless Industry.

6 Q. Now, after you received that email from Mr. Rubin, did
7 you, in fact, meet with him?

8 A. Yes.

9 Q. And about how many times -- did you, to an extent, discuss
10 Java licensing with Mr. Rubin in those subsequent meetings?

11 A. Yes.

12 Q. And how many meetings did you have with Mr. Rubin to
13 discuss Java licensing; you, yourself?

14 A. There were three that I personally attended.

15 Q. When was the first of those three?

16 A. Not long after the date August 4th when he sent the email
17 requesting a meeting. I would say a week later.

18 Q. And who attended that meeting on behalf of Sun?

19 A. Myself and Vineet Gupta.

20 Q. And do you recall who attended on behalf of Android?

21 A. That first meeting, Andy Rubin and Tim Lindholm.

22 Q. And at that time Mr. Lindholm was employed by whom?

23 A. By Google.

24 Q. And to what extent -- well, what did you discuss at that
25 meeting concerning Java licensing for Android?

1 **A.** There are a couple of things brought up by Mr. Rubin. One
2 was that the project that he had originally outlined to me when
3 he was at his previous employer, that they now felt that they
4 would want to distribute to device manufacturers -- this is
5 called Project Android by this point. That they would want to
6 have a distribution agreement with device manufacturers be some
7 sort of Open Source agreement. That was one, something I had
8 not heard before.

9 And another thing was that they were evaluating which
10 of the two Java Micro Edition technologies would be more
11 appropriate for what they wanted to do for this software
12 platform that was focused or intended for smart phones.

13 **Q.** And then did you have any further meetings -- you said
14 there were three meetings?

15 **A.** Yes.

16 **Q.** When was the second meeting?

17 **A.** Sometime in November.

18 **Q.** And do you recall, where was that meeting? Where did it
19 take place?

20 **A.** All three meetings were in Google's corporate headquarters
21 building campus, down in Mountain View.

22 **Q.** Who from Sun attended that second meeting?

23 **A.** In person? Vineet Gupta and myself.

24 **Q.** And then on the Google side, who attended from Google?

25 **A.** In person, Andy Rubin, Brian Swetland, and a third person

1 whose title was Chief Open Source Officer, I think, with
2 Google.

3 **Q.** Thank you.

4 To what extent, if any, was there discussion of Java
5 licensing for Google Android at that second meeting?

6 **A.** Well, there was a discussion, further discussion on
7 whether open source would be something that Sun would
8 countenance as a way of licensing, having Google license to
9 their device manufacturers.

10 There was the reiteration by Sun, Vineet and myself,
11 that they did need a commercial use license to proceed before
12 we could finalize the other topics they wanted to discuss in
13 terms of a partnership. And, I guess, as far as licensing
14 goes, that's about it.

15 **Q.** Now, there was a third meeting. When did that third
16 meeting take place?

17 **A.** Early December 2005.

18 **Q.** And who attended that meeting on the Sun side?

19 **A.** Again, in person, Vineet Gupta and myself. The most
20 important person that was not there in person but called in was
21 Allen Brenner.

22 **Q.** And at that time what was Allen Brenner's role at Sun?

23 **A.** Vice-president and general manager of client systems
24 group.

25 **Q.** And from the Google side? Who attended from the Google

1 side?

2 **A.** Andy Rubin, Brian Swetland and Dan Bornstein in person,
3 and a number of people called in.

4 **Q.** Now, to what extent did Mr. Brenner participate in the
5 conversations at that meeting by phone?

6 **A.** Well, he sort of led a large part of the discussion.
7 There were two things that were of concern to him. One was
8 that he was trying to convince Andy Rubin that they should use
9 the Sun implementation of the particular technology. This is
10 now CDC, as opposed to the technology used by Danger. Sun had
11 it's own optimized implementation that Mr. Brenner was trying
12 to convince Andy Rubin to use. That was one.

13 And then the second topic or issue on which he was
14 trying to change Mr. Rubin's mind, was to try and convince him
15 not to use Open Source for licensing to the proposed Google
16 customers.

17 **Q.** Okay. Now, on the first topic, Mr. Brenner's proposal
18 that Google use Sun's optimization of the implementation of the
19 Java technology, did Mr. Rubin -- what, if anything, did Mr.
20 Rubin say in response to that particular proposal?

21 **A.** Well, he said there was two reasons why that could not
22 happen. He said, first of all, that his engineers were fairly
23 well advanced in their own implementation, independent
24 implementation of CDC, number one, and basically it was too
25 far -- they were too far ahead to turn back.

1 And the second reason was that there was --
2 technically speaking, Sun's implementation wouldn't fit their
3 requirements.

4 **Q.** Now, at that time when you were working in licensing for
5 Sun in 2005, at that time did Sun permit companies to do
6 independent implementations of its specifications?

7 **A.** Yes. As had been done by Danger.

8 **Q.** To what extent did Sun impose requirements on those
9 independent implementations of Java technology?

10 **MS. ANDERSON:** Objection. Overbroad, your Honor.

11 **THE COURT:** Overruled. Please answer.

12 **A.** Basically the requirement that Sun stipulated for
13 customers making commercial use of their own independent
14 implementations were the same as for customers that used Sun's
15 source code. That is, number one, they had to achieve
16 compatibility and, number two, they had to have a commercial
17 use license in place specifying royalties.

18 **BY MR. NORTON:**

19 **Q.** Now, after that December meeting, did you continue to have
20 any role in the discussions between Sun and Google concerning
21 Java licensing for Android?

22 **A.** No.

23 **Q.** After December 2005, did you have any other discussions
24 with anyone from Google regarding Android?

25 **A.** Yes. In, I think, April of 2009, I had a discussion where

1 the person from Google wanted to discuss Java Standard Edition.
2 But I brought up the subject of Android, and we discussed that,
3 as well.

4 Q. So what was the name of the person whom you spoke to, who
5 worked for Google?

6 A. Martin Buccholz.

7 Q. And what was the reason that you found yourself speaking
8 to Mr. Buccholz?

9 A. Mr. Buccholz had contacted a colleague of mine, indicating
10 that he wanted to discuss with the correct person at Sun the
11 possibility of Google's licensing the source code to Java
12 Standard Edition so that they could get access to a particular
13 type of support. Getting, like, advance notice on security bug
14 fixes.

15 Q. Before you actually spoke to Mr. Buccholz, to what -- what
16 did you do, if anything, to prepare for that call?

17 A. I met with Vineet Gupta, forwarding the e-mail trail that
18 had been forwarded to me, and met with Vineet Gupta to take his
19 advice.

20 Q. And what did you -- what did you decide to do as a result
21 of speaking to Mr. Gupta, with respect to your phone call with
22 Mr. Buccholz?

23 A. When I called Mr. Buccholz -- this was a conference call,
24 by the way -- I had a colleague on that line with me, as well,
25 a systems engineer from Sun.

1 I explained that Sun would be very interested in
2 looking into the possibility of doing a source license
3 agreement covering Java SE and providing just the type of
4 support that they were requesting.

5 But I said that there would be something that would
6 have to be fixed, first, which is the fact that regarding
7 Android there was no commercial use license; and, as we
8 understood it, Android was shipping an incompatible version of
9 Java, commercially.

10 Q. What did Mr. Buccholz say in response?

11 A. Said, well, we don't need a commercial use license
12 agreement. The Android group didn't use any Sun Java source
13 code. They just used the Java specifications. Plural,
14 specifications.

15 Q. And are you certain Mr. Buccholz said the Android
16 engineers had used the specifications?

17 A. Yes, because I immediately summarized the wording in an
18 e-mail to Vineet Gupta.

19 MR. NORTON: No further questions.

20 THE COURT: Cross-examination.

21 MS. ANDERSON: Thank you, Your Honor.

22 CROSS EXAMINATION

23 BY MS. ANDERSON:

24 Q. It's just good afternoon, Mr. Cizek.

25 A. Good afternoon.

1 Q. I have to check.

2 We met before, once before. I'm Christa Anderson,
3 counsel for Google. Good to see you.

4 You testified earlier that you've been with Sun and
5 then Oracle, now, for about 12 years. Is that right?

6 A. (No audible response.)

7 Q. During all the years you have worked at Sun and now
8 Oracle, you have worked in, basically, the same role, as
9 account manager. True?

10 A. Yes.

11 Q. And as an account manager, you have been involved in,
12 primarily, licensing discussions regarding licensing aspects of
13 the Java platform, true?

14 A. Yes.

15 Q. Among the platforms that you've licensed over the years
16 are Java ME, as we've been calling it, Java SE, and Java EE; is
17 that correct?

18 A. Yes.

19 Q. And Java ME is Java Micro Edition, true?

20 A. (No audible response.)

21 Q. And if you would, for the court reporter --

22 (Reporter interrupts.)

23 A. Oh. I said yes.

24 Q. Java ME is the platform that you seek to license for
25 smaller devices, true?

1 **A.** Yes, it's -- actually, there's two configurations. One
2 for even smaller devices, and one for small but not so small.

3 **Q.** Right. So there's two flavors. One flavor targeting what
4 we've been calling feature phones, and another flavor targeting
5 smart phones, correct?

6 **A.** Yes. The higher-end one targets not only phones, it
7 targets embedded devices, generally. But to the extent it
8 targets phones it would be smart phones, yes.

9 **Q.** All right. And that's referred to as CDC, correct?

10 **A.** Yes.

11 **Q.** And in all the years that you have served as a Sun and now
12 Oracle salesman for these Java licenses, you've never had a
13 customer that manufactures smart phones, true?

14 **A.** Well, I think Danger manufactured a smart phone, with the
15 Sidekick. To me, it was certainly the first smart phone
16 targeted at consumers, as opposed to the Blackberry, which was
17 not my customer.

18 **MS. ANDERSON:** May we please play, Your Honor, page
19 32, line 14, through page 33, line 18, of the witness's
20 deposition?

21 **THE COURT:** Hearing no objection, go ahead.

22 (Video deposition clip played in open court; not
23 reported.)

24 **MR. NORTON:** Your Honor, for completeness, we ask
25 that the deposition be read through page 35, line 6.

1 **THE COURT:** How many lines extra is that?

2 **MR. NORTON:** A long answer, but it's two questions.

3 **THE COURT:** Well, if it's long then you can do it on
4 redirect.

5 **MR. NORTON:** Thank you, Your Honor.

6 **THE COURT:** Go ahead.

7 **BY MS. ANDERSON:**

8 **Q.** Mr. Cizek, I would like you to take before you Exhibit
9 2001, which I believe your counsel placed in front of you. Do
10 you have it there?

11 **A.** Yes.

12 **Q.** This is an e-mail exchange you participated in with
13 Mr. Gupta, correct?

14 **A.** Yes.

15 **Q.** And you described to the jury the fact that Mr. Rubin, in
16 this e-mail exchange, had asked specifically to set up a
17 meeting with Sun, to talk about working together, right?

18 **A.** Yes.

19 **Q.** All right. And, in response, in the internal exchange at
20 Sun about the request from Mr. Rubin, Mr. Gupta explained to
21 you that -- that he and Jonathan Schwartz were in the middle of
22 negotiating a larger Google deal, and discussing that with
23 Google and Jonathan Schwartz regarding a toolbar; is that
24 correct?

25 **A.** Yes.

1 Q. All right. And, specifically, you understood at the time
2 that you got this e-mail, in August of 2005, that people senior
3 to you at Sun wanted to have a broader relationship with
4 Google, right?

5 A. Yes.

6 Q. Let's take a look at Exhibit 2013. I'm going to place it
7 before you.

8 MS. ANDERSON: Your Honor, may I approach?

9 BY MS. ANDERSON:

10 Q. There you go.

11 Exhibit 2013 before you, Mr. Cizek, is a presentation
12 you received via e-mail from Google, correct?

13 A. Yes.

14 MR. NORTON: Objection.

15 THE WITNESS: I assume that I received it via e-mail.
16 What I had saved was just the document itself. But since I had
17 it, I assume I received it as an e-mail attachment.

18 BY MS. ANDERSON:

19 Q. And you received it from Google, right?

20 A. Yes.

21 Q. Drawing your attention to the first page of this
22 document -- oh, excuse me.

23 MS. ANDERSON: May I move this in evidence? Your
24 Honor, I would like to move in evidence Exhibit 2013.

25 MR. NORTON: No objection.

1 **THE COURT:** Received in evidence.

2 (Trial Exhibit 2013 received in evidence.)

3 **MS. ANDERSON:** Thank you. If it's published to the
4 jury now.

5 (Document displayed.)

6 **BY MS. ANDERSON:**

7 **Q.** I would like to draw your attention, Mr. Cizek, to this
8 document. It's entitled "Monetization Proposal," correct?

9 **A.** Yes.

10 **Q.** And the first sentence of this document states, quote:

11 "Google is seeking partnerships with leading
12 wireless technology companies and service
13 providers to collaboratively develop an open
14 source handset platform."

15 Do you see that?

16 **A.** Yes.

17 **Q.** You understood that's what Google was interested in, in
18 talking with Sun, right?

19 **A.** Yes.

20 **Q.** Now let's take a look at Exhibit 2002.

21 **MS. ANDERSON:** Your Honor, may I approach?

22 **THE COURT:** Yes.

23 **BY MS. ANDERSON:**

24 **Q.** You recognize Exhibit 2002, correct?

25 **A.** Yes.

1 Q. All right. This, again, is an e-mail exchange you had
2 with Mr. Gupta and Mr. Persi at Sun, in September 2005,
3 correct?

4 A. Yes.

5 MS. ANDERSON: Your Honor, I move in evidence Exhibit
6 2002.

7 MR. NORTON: No objection.

8 THE COURT: Received.

9 (Trial Exhibit 2002 received in evidence.)

10 (Document displayed.)

11 BY MS. ANDERSON:

12 Q. This is an e-mail exchange, Mr. Cizek, that you engaged in
13 with Mr. Gupta at Sun on the subject of Google's desire to open
14 source a platform for smart phones, right?

15 A. Yes.

16 Q. And Mr. Gupta was a person senior to you at Sun, true?

17 A. Well, he was senior in the sense that his title was
18 director. And I was an original --

19 Q. Thank you.

20 A. But I didn't report to him, so in that sense we were
21 neither senior nor junior to each other.

22 Q. And it's correct you followed his guidance if he told you
23 to negotiate with someone or not regarding Google, correct?

24 A. Ultimately, I would take guidance from my direct
25 supervisor. But if that was not contradicted by my direct

1 supervisor, then I would.

2 Q. Thank you.

3 And in the e-mail exchange you had with Mr. Gupta, in
4 the first paragraph on the first page there, Mr. Gupta
5 explained to you that he wanted to change the plan for what
6 Andy Rubin at Google wanted to do with respect to open
7 sourcing, right?

8 A. Yes.

9 Q. So in that specific paragraph he says, quote:

10 "I want to turn this into my idea of shipping
11 their apps on our J2ME OIs instead of what
12 Andy is trying to do."

13 Right?

14 A. Yes.

15 Q. That's what he said, correct?

16 A. (Nods head.)

17 Q. And that was the effort made by Sun throughout these early
18 negotiations to try to change Google's mind from having an open
19 source platform, right?

20 A. Well, to the extent that they were going to use Java, the
21 idea was that, yes, if they wanted to use Java then they would
22 have to use the standard -- we would hope to convince them to
23 use the standard licensing model for Java.

24 Q. Now, drawing your attention to the first meeting you
25 discussed earlier with your counsel, you had explained that

1 there were a total of three meetings you attended with Google,
2 right?

3 **A.** Yes.

4 **Q.** All right. And, in fact, you don't remember much about
5 that first meeting with Google, right?

6 **A.** I remember pretty much what I just stated under oath here,
7 but not much more.

8 **Q.** In fact, during that first discussion that you had with
9 Mr. Rubin at Google, in August of 2005, he explained to you
10 that Google had not decided what technology they wanted to use
11 for Android, right?

12 **A.** That's true. He said they were evaluating CDC versus
13 CLDC, yes.

14 **Q.** And others, correct? They hadn't committed to Sun, right?

15 **A.** He didn't say they were evaluating anything else other
16 than those two technologies from Sun. He didn't say that to
17 me.

18 **Q.** All right. There was discussion during that first meeting
19 that you attended about open sourcing, true?

20 **A.** Yes. Very generally, but, yes.

21 **Q.** And at the time you didn't completely understand that
22 concept; is that fair?

23 **A.** That's true. I did not completely understand it.

24 **Q.** All right. Now, let's move on.

25 You spoke about a second meeting that you attended,

1 that occurred sometime in or around October of 2005. Is that
2 right?

3 **A.** I think it was November, yeah.

4 **Q.** Okay. Let's take a look at Exhibit 2004.

5 **MS. ANDERSON:** May I approach, Your Honor?

6 **BY MS. ANDERSON:**

7 **Q.** This is an October 27, 2005, e-mail exchange among
8 yourself, Mr. Rubin, and Mr. Gupta, correct?

9 **A.** Yes.

10 **MS. ANDERSON:** Your Honor, I move this in evidence,
11 please.

12 **MR. NORTON:** No objection.

13 **THE COURT:** Thank you. Received in evidence.

14 (Trial Exhibit 2004 received in evidence.)

15 (Document displayed.)

16 **MS. ANDERSON:** Thank you, Your Honor.

17 **BY MS. ANDERSON:**

18 **Q.** Exhibit 2004 is an e-mail exchange that actually lays out
19 action items that arose from the second meeting that you
20 attended with Mr. Rubin at Google, correct?

21 **A.** Uhm, I believe that this is summarizing the action items
22 from the second meeting, yes.

23 **Q.** Right. So we see there it says, "Action items from last
24 meetings." Do you see that?

25 **A.** Yes.

1 Q. And below it there are three items listed with numbers,
2 and then a few others underneath it, correct?

3 A. Yes.

4 Q. And number one on the action items is "open source
5 licensing model," correct?

6 A. Yes.

7 Q. And, again, Google wanted an open source licensing model
8 for its new platform, correct?

9 A. Yes.

10 Q. And below that you see there's a reference to "CLDC-HI
11 applicability (versus Google internal implementation.)" Do you
12 see that?

13 A. Yes.

14 Q. In fact, what that's a reference to is the fact that Sun
15 wanted to sell to Google its own implementation of an aspect of
16 Java ME, while Google wanted to use an internal implementation
17 that it would develop in a partnership with Sun; is that right?

18 MR. NORTON: Objection.

19 THE COURT: Sorry? Is there an objection?

20 MR. NORTON: Yes.

21 THE COURT: What is it?

22 MR. NORTON: I was unable to follow the question.

23 THE COURT: What?

24 MR. NORTON: I was unable to follow the question.

25 THE COURT: Did you understand the question?

1 **THE WITNESS:** I believe I did.

2 **THE COURT:** All right. Please answer.

3 **THE WITNESS:** Google had a point of view that was --
4 that they were leaning towards using open source, and Sun was
5 trying to convince them otherwise. Yes, so, in essence, that's
6 true.

7 I'm not sure that internally Google had completely
8 decided that's what they wanted to do. But, certainly, that's
9 what Andy Rubin was telling us.

10 **BY MS. ANDERSON:**

11 **Q.** All right. Because he had proposed from the very
12 beginning -- and we saw it in that earlier exhibit -- a
13 partnership of developing together a new platform for mobile
14 phones, right?

15 **A.** Yes.

16 **Q.** Thank you. Let's take a look at Exhibit 2006.

17 **MS. ANDERSON:** May I approach, Your Honor?

18 **THE COURT:** Yes.

19 **BY MS. ANDERSON:**

20 **Q.** Do you recognize Exhibit 2006 as an e-mail exchange among
21 yourself, Mr. Rubin, Ms. Cole, Mr. Gupta, Ms. Garcia, and
22 Mr. Fresko, from November of 2005?

23 **A.** Yes. Some of those people were not in the meeting, or
24 maybe called in, but, yes.

25 **MS. ANDERSON:** Your Honor, I move in evidence Exhibit

1 2006.

2 **MR. NORTON:** No objection.

3 **THE COURT:** Thank you. Received in evidence.

4 (Trial Exhibit 2006 received in evidence.)

5 (Document displayed.)

6 **MS. ANDERSON:** Thank you, Your Honor.

7 **BY MS. ANDERSON:**

8 **Q.** Drawing your attention, Mr. Cizek, to this e-mail
9 exchange. This is another of the e-mail exchanges regarding
10 the Sun-Google meetings that were occurring in the 2005-2006
11 time frame, right?

12 **A.** Yes.

13 **Q.** And in this e-mail you're actually setting up some
14 meetings. The first one was to talk about open source, right?

15 **A.** Yes.

16 **Q.** That's what it indicates in that first -- second sentence
17 in the paragraph, correct?

18 **A.** Yes.

19 **Q.** And then later on you said you were trying to schedule the
20 second meeting:

21 "Which will be a presentation/discussion by
22 Sun on the virtues of our CLDC HotSpot
23 implementation and why Google may find it to
24 be preferable to Google's developing its own
25 CLDC implementation."

1 Do you see that?

2 **A.** Yes.

3 **Q.** And, in fact, that's what was being discussed at these
4 meetings, as well, right?

5 **A.** Yes.

6 **Q.** All right. I would like to show you Exhibit 2008.

7 **MS. ANDERSON:** Your Honor, may I approach?

8 **THE COURT:** Yes, you may.

9 **BY MS. ANDERSON:**

10 **Q.** Mr. Cizek, Exhibit 2008 is a contact report that you
11 prepared, ultimately, as an Oracle employee regarding Google.
12 Is that true?

13 **A.** Yes.

14 **MS. ANDERSON:** Your Honor, I move in evidence Exhibit
15 2008.

16 **MR. NORTON:** No objection.

17 **THE COURT:** Received.

18 (Trial Exhibit 2008 received in evidence.)

19 (Document displayed.)

20 **BY MS. ANDERSON:**

21 **Q.** Mr. Cizek, Exhibit 2008 is a contact report that you
22 notate on from time to time in the course of your work as an
23 account manager at Sun and then Oracle, right?

24 **A.** Yes.

25 **Q.** And this has been sort of an ongoing document that has had

1 things added to it over the years at Sun and then Oracle?

2 **A.** Yes.

3 **Q.** This particular contact report specifically relates to
4 Google, true?

5 **A.** Yes.

6 **Q.** And we see here on the top left side a reference to Google
7 and Andy Rubin regarding Android, right?

8 **A.** Yes.

9 **Q.** All right. And then drawing your attention down, in a
10 section that's entitled, "Note/history."

11 **MS. ANDERSON:** If we could get that up, please.

12 Thank you.

13 **BY MS. ANDERSON:**

14 **Q.** This is a place where you've made notations by date of
15 various events, right?

16 **A.** Yes.

17 **Q.** All right. And these are notations you've made, from time
18 to time, in the course of your work communicating with Google
19 on behalf of Sun, right?

20 **A.** Right. As I stated regarding the Danger notes, I took
21 handwritten notes. And then, from time to time, when I ran out
22 of paper I would drastically summarize them and print them
23 in -- and type them in and print them out, which is what I did
24 to create this.

25 **Q.** And then on May 25th, 2006, in the notes history section

1 you have an entry there regarding Android communications.

2 Fair? Google communications regarding Android, right?

3 **A.** Yes.

4 **Q.** All right. And in this particular entry you stated,
5 quote:

6 "After many meetings, including Alan Brenner,
7 it was agreed that the two companies cannot
8 come to a meeting of minds on how to work
9 together re CDC-HI and open source."

10 Is that right?

11 **A.** Yes.

12 **Q.** And that's, in fact, what happened on or about May of
13 2006, right?

14 **A.** Well, that's what I was told.

15 **Q.** That's what you understood was the state of Sun-Google
16 discussions at the time?

17 **A.** Based on what I was told, yes.

18 **Q.** And you were told that by people that you understood had
19 knowledge at the company, correct?

20 **A.** Yes.

21 **Q.** Including Mr. Gupta, right?

22 **A.** Yes.

23 **Q.** Let's take a look at Exhibit 2009.

24 **MS. ANDERSON:** Your Honor, may I approach?

25 **THE COURT:** Yes, you may.

1 **BY MS. ANDERSON:**

2 **Q.** Exhibit 2009 is an e-mail exchange among yourself and
3 Mr. Gupta, from March of 2007, right?

4 **A.** Yes.

5 **MS. ANDERSON:** Your Honor, I move in evidence Exhibit
6 2009.

7 **MR. NORTON:** No objection.

8 **THE COURT:** Thank you. Received.

9 (Trial Exhibit 2009 received in evidence.)

10 (Document displayed.)

11 **BY MS. ANDERSON:**

12 **Q.** All right. Mr. Cizek, this e-mail exchange, which goes on
13 from -- for several pages, arises out of a newspaper or press
14 article concerning a statement about Google's plans to design a
15 mobile phone. Is that right?

16 **A.** Yes.

17 **Q.** And that's referenced on the fifth page of this 11-page
18 exhibit, correct?

19 **A.** Yes.

20 **MS. ANDERSON:** It's the second paragraph there, Ben,
21 at the top.

22 **THE WITNESS:** Yes.

23 **BY MS. ANDERSON:**

24 **Q.** Thank you.

25 Now, in this e-mail exchange you had discussions

1 internally with Mr. Gupta about the subject, right?

2 **A.** Yes.

3 **Q.** And, in fact, you wanted to contact Google, specifically
4 Mr. Rubin, to talk about this development; is that right?

5 **A.** Yes.

6 **Q.** And Mr. Gupta told you to hold off; is that right?

7 **A.** Yes.

8 **Q.** All right. He told you to wait and he'd let you know if
9 you had the green light to talk to Google about licensing Java
10 platform; is that right?

11 **A.** Yes.

12 **Q.** And in the course of this e-mail exchange -- the very top
13 e-mail, Ben, of the first page here -- we see the first
14 paragraph that Mr. Gupta wrote. Do you see that?

15 **A.** Yes.

16 **Q.** All right. And in this first paragraph on Exhibit 2009,
17 Mr. Gupta explained, quote:

18 "What we have been discussing will probably
19 lead to bigger SMI stuff - maybe like
20 Armstrong- so we will need to be grounded in
21 our expectations ... but I will try to see
22 how we can manage both, including our
23 commercial interests."

24 Do you see that?

25 **A.** Yes.

1 Q. In fact, that's what he told you. He told you to hold off
2 because they're trying to work on bigger stuff with Google; is
3 that right?

4 A. Yes.

5 Q. And you followed Mr. Gupta's instruction, right?

6 A. Yes.

7 Q. Take a look at Exhibit 2010.

8 MS. ANDERSON: Your Honor, apologize. May I
9 approach?

10 THE COURT: Yes.

11 MS. ANDERSON: Sorry.

12 THE COURT: I'll explain to the jury, at some point,
13 why is it that the lawyers ask to approach. I bet you're
14 wondering that over there. I'm going to tell you in due
15 course.

16 (Laughter)

17 THE COURT: Courthouse secret.

18 But I don't want to interrupt Ms. Anderson, so
19 continue on.

20 MS. ANDERSON: Thank you, Your Honor.

21 BY MS. ANDERSON:

22 Q. Exhibit 2010 is an e-mail exchange among yourself,
23 Mr. Gupta, and Mr. Persi, from April of 2007, correct?

24 A. Yes.

25 MS. ANDERSON: Your Honor, I move in evidence Exhibit

1 2010.

2 **MR. NORTON:** No objection.

3 **THE COURT:** It's received.

4 (Trial Exhibit 2010 received in evidence.)

5 (Document displayed.)

6 **BY MS. ANDERSON:**

7 **Q.** Mr. Cizek, this is a continuation of the e-mail exchange
8 we were just looking at in the last exhibit; is that right?

9 **A.** Yes.

10 **Q.** And drawing your attention on the first page of Exhibit
11 2010, a little past halfway down the middle of that first page,
12 it says "Vineet Gupta," and then below it, it says
13 "April 2007." Do you see that?

14 **A.** Yes.

15 **Q.** So you, in fact, followed up with Mr. Gupta in April of
16 2007, to find out if it was okay for you to contact Google
17 about Java licensing; is that right?

18 **A.** Yes. There's no date. It says "Leo Cizek wrote."
19 Sometime before April 2nd, I wrote an e-mail to Vineet saying,
20 "Any update on this?" Yes.

21 **Q.** And, in response, Mr. Gupta told you, "You need to
22 continue waiting." Right above there. There you go. Isn't
23 that right?

24 **A.** Yes.

25 **Q.** And, specifically, what you were hoping to talk to Google

1 about was the subject that you wrote about in the paragraph
2 just above there; is that right?

3 **A.** Yes.

4 **Q.** Okay. You explained to Mr. Gupta that you had hoped to
5 schedule a meeting with Andy, in order to, quote:

6 "Discuss the advantages to Google of becoming
7 a commercial use licensee of Java ME for the
8 Google phone versus the disadvantages of
9 going open source."

10 Do you see that?

11 **A.** Yes.

12 **Q.** And you also recognized you thought it was a longshot
13 because you knew Google was intent on developing an open source
14 platform, right?

15 **A.** Well, actually, what I was referring to here was the fact
16 that Sun -- yes. I guess so, yeah.

17 **Q.** Thank you.

18 And above that, again, Mr. Gupta told you to hold
19 off, right?

20 **A.** Yes.

21 **Q.** And that's because there were bigger discussions going on,
22 beyond you, at Sun about the relationship with Google and
23 broadening it, correct?

24 **A.** Well, he had said that in a previous e-mail. That may
25 have still been the case here. I don't know.

1 Q. You understood that was still the case, right?

2 A. I only knew that he was waiting to hear from Rich Green
3 before giving me the green light to go and contact Andy.
4 That's all I know.

5 Q. Okay. Now, while Sun executives like Mr. Gupta were
6 telling you to hold off on pursuing discussions with Google
7 about Java licensing, Sun did want you to continue to discuss
8 things with Google on other fronts and other deals, correct?

9 A. Yes.

10 Q. And, in fact, in or around 2007-2008, you negotiated with
11 Google the Sun Office deal, where Google would distribute a
12 product called StarOffice, right?

13 A. Yes.

14 Q. And that's -- StarOffice is something like Microsoft
15 Office, but a Sun version, correct?

16 A. Yes. It's not a Java technology. It was -- at that time
17 we were also dealing with some other products, and StarOffice
18 was one of them, yes.

19 Q. All right. And, in fact, the biggest deal that you ever
20 had negotiated was the toolbar deal with Google, right?

21 A. Well, there were two toolbar deals, yeah.

22 Q. Very substantial financially for you, right?

23 A. Were, indeed, yes.

24 Q. And they had nothing to do with Android, true?

25 A. That's true.

1 Q. They were an arrangement under which when someone
2 downloaded a particular Java-related product, a pop-up bar
3 would show up inviting them to download the Google Toolbar; is
4 that right?

5 A. Yes. To the extent that customers were downloading the
6 free version of Java that was available on the Internet, that
7 ad would pop up.

8 Q. And, again, that went on for several years, that deal with
9 Google, right?

10 A. Yes.

11 Q. And throughout your career, that was the single largest
12 deal you had with any of your customers on an annual basis,
13 right?

14 A. Uhm, yes.

15 Q. Let's turn, now, to Exhibit 2019.

16 MS. ANDERSON: Your Honor, may I approach?

17 THE COURT: You may.

18 BY MS. ANDERSON:

19 Q. Exhibit 2019 is an e-mail from you to Mr. Lehrbaum, copied
20 to Mr. Harris, dated October 2007, correct?

21 A. Yes.

22 MS. ANDERSON: Your Honor, I move in evidence Exhibit
23 2019.

24 MR. NORTON: No objection.

25 THE COURT: Received.

1 (Trial Exhibit 2019 received in evidence.)

2 (Document displayed.)

3 **BY MS. ANDERSON:**

4 **Q.** And, so, in the same time period of 2007 and 2008, when
5 you were discussing other deals with Google, including the
6 StarOffice deal, you also reached out or sought to reach out to
7 Google on other fronts, correct?

8 **A.** Yes.

9 **Q.** All right. And this is an e-mail exchange that you had
10 with a Mr. Lehrbaum. Who is Mr. Lehrbaum?

11 **A.** He is a former employee of Sun Microsystems and Oracle,
12 who at the time was in marketing in the client systems group.
13 So regarding JavaFX as it pertained to mobile.

14 **Q.** All right. And you sent this e-mail to Mr. Lehrbaum
15 because you had a conference call scheduled with Google for the
16 following Monday, correct?

17 **A.** Yes.

18 **Q.** And in that conference call your goal would be to try to,
19 quote:

20 "Uncover potential revenue opportunities and
21 Adsense for search agreement, for example,
22 around JavaFX mobile."

23 Right?

24 **A.** Yes.

25 **Q.** This is another example where you, acting on behalf of

1 Sun, were reaching out to Google to try to find other ways to
2 generate revenue. Had nothing to do with licensing Java ME,
3 right?

4 **A.** Well, in this case, yes. Yes.

5 **Q.** I would like to show you Exhibit 2021.

6 **MS. ANDERSON:** Your Honor, may I approach?

7 **THE COURT:** Yes.

8 **BY MS. ANDERSON:**

9 **Q.** Exhibit 2021 is an e-mail exchange among Mr. Zandman,
10 Mr. Harris, Mr. Genewich, and yourself, dated November 2007,
11 correct?

12 **A.** Yes.

13 **MS. ANDERSON:** Your Honor, I move in evidence Exhibit
14 2021.

15 **MR. NORTON:** No objection.

16 **THE COURT:** Received in evidence.

17 (Trial Exhibit 2021 received in evidence.)

18 (Document displayed.)

19 **BY MS. ANDERSON:**

20 **Q.** Mr. Cizek, who is Tom Harris?

21 **A.** He's a systems engineer now with Oracle, who was at that
22 time with Sun. Systems engineer in the Java sales group.

23 **Q.** Okay. and you sent this e-mail in November of 2007 --
24 excuse me. Let me strike that. I apologize.

25 This was an e-mail exchange that you received in

1 November of 2007, which included a discussion from Mr. Harris,
2 correct?

3 **A.** Yes.

4 **Q.** And that starts a little bit past halfway down the first
5 page of Exhibit 2021, right?

6 **A.** Yes.

7 **Q.** All right. Generally speaking, in this discussion
8 Mr. Harris is talking about APIs in various paragraphs related
9 to various companies, correct?

10 **A.** Yes.

11 **Q.** Drawing your attention to the second page of this exhibit,
12 Mr. Harris proposes some ideas that may work. Starting about
13 halfway down that second page. Do you say that?

14 **A.** Yes.

15 **Q.** And among the other ideas that Mr. Harris proposed to you
16 was, quote:

17 "Once we fully understand the Android
18 distribution SDK, propose a custom Google WTK
19 incorporating the Android Distro APIs if JME
20 compatible along with OpenSocial APIs."

21 Right?

22 **A.** Yes.

23 **Q.** And then Mr. Harris goes on to talk about, in that last
24 bullet, that he -- commenced with the words "discuss
25 internally." Do you see that?

1 A. Yes.

2 Q. Mr. Harris talks about, quote:

3 "If Sun's CSG wants to leverage Google APIs
4 for these specific types of apps it may
5 play."

6 Do you see that?

7 A. Yes.

8 Q. All right. In November of 2007, were you the Google
9 account representative --

10 A. Yes.

11 Q. -- for Sun?

12 A. Yes.

13 Q. And so --

14 A. Well, for -- for Java related and, as we've seen, some
15 other products, such as StarOffice, but, yeah.

16 Q. So it didn't surprise you to have received an e-mail
17 exchange in Exhibit 2021, in light of the fact that it
18 discussed Android, correct?

19 A. Right, yes, correct.

20 **THE COURT:** How much more do you have, Ms. Anderson?

21 **MS. ANDERSON:** I'm very close to finished, Your
22 Honor. Just a few more questions.

23 Your Honor, may I approach?

24 **THE COURT:** Yes.

25

1 **BY MS. ANDERSON:**

2 **Q.** I would like to show you Exhibit 2026.

3 **A.** Thank you.

4 **Q.** Thank you.

5 Mr. Cizek, this is an e-mail from you to
6 Mr. Lehrbaum, copied to Mr. Periakaruppan, Mr. Harris, and
7 Mr. Singh, from May of 2008, correct?

8 **A.** Yes.

9 **Q.** Who is Mr. Lehrbaum?

10 **A.** As I identified before, he was, at that time, an employee
11 of Sun, and was in marketing, in the client systems group.

12 **Q.** And, again, you're participating in this exchange because,
13 among other things, you are a Google -- a representative for
14 Google related to Java, right?

15 **A.** Yes.

16 **Q.** All right. And then drawing your attention below, in the
17 e-mail exchange, where it says "Jacob Lehrbaum wrote," do you
18 see that?

19 **A.** Yes.

20 **Q.** Isn't it true that in this e-mail Mr. Lehrbaum expressed
21 to you the view that Google's Android was a potentially
22 dangerous competitor. Is that right?

23 **A.** Yes.

24 **MS. ANDERSON:** All right. If I had not done so, Your
25 Honor, I move in evidence Exhibit 2026.

1 Do you recall that?

2 **A.** Yes.

3 **Q.** Were there Java licensees for smart phones other than your
4 clients?

5 **A.** Well, yes.

6 **Q.** And can you give us some examples?

7 **A.** The best known one -- I don't think the term smart phone
8 was used in those days -- was the Blackberry. Research in
9 Motion, which became -- is now my account, but I didn't close
10 it. And they become a licensee in 2000, many years ago.

11 **Q.** Now, Ms. Anderson showed you a number of documents dated
12 in the 2007 time period. Do you recall that?

13 **A.** Yes.

14 **Q.** All right. If we can look -- I'm sorry, the timeline
15 disappeared. Excuse me.

16 **MR. JACOBS:** I'll get it.

17 **BY MR. NORTON:**

18 **Q.** Before I do that, then, let's go back to 2005.

19 Would you look at Exhibit 2004, which should be among
20 those that Ms. Anderson gave you. It's on the screen to your
21 right.

22 **A.** Oh, okay. That's fine.

23 **Q.** Now, if we go down to the third paragraph of Mr. Gupta's
24 e-mail, he states:

25 "I have dropped AI's ..."

1 Those are action items?

2 **A.** Yes.

3 **Q.** (As read:)

4 "... 4, 5, 6 and 7 as they were either Sun
5 internal AIs, or they morph into business
6 model and overall licenses that will need to
7 be put in place."

8 **A.** Yes.

9 **Q.** What understanding, if any, did you have as to whether
10 whatever decision Google made, a license would still be
11 necessary?

12 **A.** Well, that was always my understanding. And what's
13 written here seems to be consistent with that. And they seemed
14 to agree, as well, because we went and spent a lot of time
15 discussing how we could get there.

16 **Q.** And then Ms. Anderson showed you the action item number 2
17 on this document, which was, "CLDC-HI applicability versus
18 Google internal implementation."

19 What understanding, if any, did you have as to
20 whether one, both, or neither of those two alternatives would
21 require a license?

22 **A.** Well, my understanding is that either would require a
23 license. As I think I stated previously, whether
24 implementation is done independently or with the -- the use of
25 Sun source code, the licensing requirements are essentially the

1 same.

2 Q. All right. Now, at some time -- sorry. So you also have
3 Exhibit 2021; is that right?

4 A. Up on the screen?

5 Q. It is.

6 A. Okay, yes.

7 Q. All right. This is another one of the documents Ms.
8 Anderson showed you. And she noted, as she went through it,
9 there's a reference in there to OpenSocial APIs.

10 Do you see that at the bottom of the -- of the
11 exhibit? Actually, we need to scroll down a little bit for
12 you. I'm sorry.

13 A. Yes.

14 Q. All right. Do OpenSocial APIs, did you understand that to
15 have anything to do with Android?

16 A. I understood that it had nothing to do with Android. It's
17 something entirely separate. At least that was my
18 understanding. I don't -- I don't know much about them. I
19 just -- the context leads me to believe they are totally
20 separate.

21 Q. All right. And then this document is dated November 11,
22 2007; is that right?

23 A. Yes.

24 Q. Okay. If we turn to the second page, which has an e-mail
25 from some date prior -- go down to the middle -- it says,

1 "Ideas that may work."

2 **A.** Yes.

3 **Q.** And then it says, "Once we fully understand the Android
4 Distro SDK."

5 What understanding, if any, did you have in
6 November 11, 2007, as to what the Android Distro or SDK was?

7 **MS. ANDERSON:** Objection. Foundation.

8 **THE COURT:** Understanding calls for hearsay.

9 Sustained.

10 **BY MR. NORTON:**

11 **Q.** Did you have any understanding --

12 **THE COURT:** Same thing. Would just be somebody's --
13 this is a witness affiliated with you, so we can't get into
14 hearsay.

15 **MR. NORTON:** Your Honor --

16 **THE COURT:** He has to have direct, personal
17 knowledge.

18 **MR. NORTON:** I'm trying --

19 **BY MR. NORTON:**

20 **Q.** What did you mean by the phrase, "Once we fully understand
21 the Android Distro SDK"?

22 **MR. VAN NEST:** Objection. Foundation.
23 Mischaracterizes the document.

24 **THE COURT:** Is this something you wrote?

25 **THE WITNESS:** I believe it was not. I believe this

1 was wording probably from Tom Harris. If I had the whole
2 document, I could check.

3 **THE COURT:** Sustained.

4 **MR. NORTON:** I'll move on.

5 **THE COURT:** I would like to finish this witness
6 today.

7 **MR. NORTON:** Yes.

8 **BY MR. NORTON:**

9 **Q.** Did you ever tell Mr. Rubin that he could do -- that
10 Google could do an independent implementation of Java
11 technology without a license?

12 **A.** Without a commercial use license? No, I never told him
13 that.

14 **MR. NORTON:** No further questions.

15 **MS. ANDERSON:** No questions, Your Honor.

16 **THE COURT:** May Mr. Cizek be excused? I'm going
17 to -- I hear no objection. You are free to go.

18 **THE WITNESS:** Okay.

19 **THE COURT:** You are not subject to recall. Thank
20 you. Have a great weekend.

21 **THE WITNESS:** Thank you. You too.

22 (Witness excused)

23 **THE COURT:** Well, I'm going to say this. It's been a
24 long week. It's 20 minutes until 1:00. We're going to give
25 you a few minutes extra off today, and we're not going to start

1 a new witness. You know why? Because I promise you if we did,
2 they would just repeat it all on Monday morning because they --
3 on the theory that you forgot it over the weekend. So there's
4 no point in starting a brand-new witness.

5 And I want to say a few things about, I'm serious
6 when I say no research about the case. No research about the
7 lawyers. No research about these products. You must stay away
8 from all that until the case is over, and then you'll be free
9 to go back and see what you were missing.

10 No -- no looking at news programs, radio programs,
11 news articles, blogs. I don't know what I'm leaving out, but
12 you get the general idea.

13 Please don't talk to your loved ones or friends about
14 this case. Keep an open mind until the very end.

15 I think we're pretty close to being on track. I
16 don't -- I don't think we've fallen behind. And so there we
17 go. Any other admonitions before the break for the weekend?

18 **MR. VAN NEST:** I don't believe so, Your Honor. Thank
19 you.

20 **MR. JACOBS:** No, Your Honor.

21 **THE COURT:** You all have a great weekend. We'll see
22 you back here the normal time Monday morning.

23 **THE CLERK:** All rise.

24 (Jury out at 12:43 p.m.)

25 **THE COURT:** All right. Please be seated.

1 All right. Timewise, I hope you're all trying to
2 keep track yourself because if I do a material -- I don't have
3 a fancy computer. This is what I have (indicating.)

4 (Laughter)

5 **THE COURT:** This is a pencil. Pencil and columns.
6 So if you think I'm off by ten minutes or more, you let me
7 know. But I have 560 minutes have been used by plaintiff; 329
8 minutes used by defendant.

9 Now, 17 hours of your time, that's what -- you have
10 17 hours for this phase, each side. So that's 1,020.

11 So that means that, Oracle, you've used now more than
12 half your time and you need to save some time for
13 cross-examination.

14 And at this rate it looks like Google will be putting
15 some time in the bank unless they use up a lot more time.

16 And so Oracle over there don't -- you know, if they
17 wind up getting more time than you in the patent phase or the
18 other phases, then look back.

19 I question what that last witness added to this case.
20 You know, you lawyers have good reasons for what you did, but
21 to my mind that was not a necessary witness. So don't come
22 back and say to me, oh, that was not a good use of the jury's
23 time. So if you want to use your time on that when you run out
24 of time, that's going to be the end of it. There's no more
25 extensions.

1 Now, maybe I'll be surprised and find that there was
2 some -- some wonderful nugget lurking there that went right by
3 me.

4 Okay. I have a few more -- at least one more
5 question, and this is for -- a variation of the same question
6 for both sides.

7 Let me start with Mr. Van Nest.

8 I'm confused a bit on -- I have heard two things that
9 may be inconsistent but may be completely reconcilable, and so
10 something is not registering with me right.

11 Sometimes I hear you say that the source code was all
12 done by Google in a clean room, the implementations -- to use
13 that word. Other times I hear you say no, it was done by
14 somebody called Apache.

15 And so how can it be in a clean room and you can say
16 that and they -- for all we know, Apache plagiarized it. So
17 which was it? Was it done by Apache or it was done by Google?

18 **MR. VAN NEST:** Well, no. What I've said, Your Honor,
19 is both. What I've said is that the source code and the
20 libraries was either written by -- from scratch by Google or
21 using open source projects and other contributions.

22 Remember when I went through the stack in the
23 opening, that Android platform, and I showed that this came
24 from open GL and this came here? They did use a lot of other
25 open source and, in connection with the core libraries, a lot

1 of that did come from Apache. So Apache had an implementation,
2 their own independent implementation of Java.

3 **THE COURT:** How do we know it was independent? Has
4 anyone vetted that to see if the lines match up?

5 **MR. VAN NEST:** Well, yeah. I mean, absolutely.
6 These guys have (indicating). They hired an expert, whom
7 you're about to hear from. And then they hired some other
8 folks to scrutinize every single line, every line in every file
9 in the Android libraries. And they came up with 12 files.
10 You've heard about those before. Two of them were Timsort and
11 those others. Those are the other only files that they came up
12 with.

13 And I think their expert -- is he in the room? I
14 guess I can't ask him to leave, but I think they did a
15 comprehensive review of every line. And they came up with nine
16 lines of code by Mr. Bloch and a few other hundred lines in
17 these other miscellaneous files that never made it on a phone.
18 So there's no dispute about that.

19 But you're right, Google didn't write every word of
20 the source code from scratch. Some of it they took from open
21 source and freely available technology, as I've been telling
22 the jury.

23 **THE COURT:** All right. Now, that helps me
24 understand. Thank you.

25 So, Mr. Jacobs, let me ask you. After your -- we're

1 going to hear from your expert.

2 Is it true what Mr. Van Nest said, that after going
3 through millions of lines of code, that's what it comes down
4 to, in terms of direct copying, putting aside the 37 -- 37
5 declarations and the -- and the structure sequence and
6 organization?

7 **MR. JACOBS:** Putting aside the 37 packages of
8 application programming interfaces, we have -- what we have
9 accused is in that list we gave you of copying. What we have
10 accused of copying is what we have in that list we gave you.

11 In addition, we will demonstrate that the
12 documentation is, in many cases, paraphrased, in the sense that
13 I use the word; that is, small substitutions or moving around
14 of text apparently intended to disguise the copying.

15 In addition, the clean room is typically an
16 affirmative put on by the defendant. The defendant establishes
17 that we set up a set of procedures and guidelines to limit the
18 materials that were used during the development process and,
19 critically, to limit the kinds of people who are employed on
20 the development process.

21 And so when we say they didn't have a clean room,
22 what we're saying is they've never shown, and we can prove that
23 they failed to establish, those kind of guidelines or
24 procedures to develop independently an implementation.

25 **THE COURT:** But -- okay. I appreciate the

1 explanation, but when -- is it Dr. Mitchell?

2 **MR. JACOBS:** Dr. Mitchell, yes.

3 **THE COURT:** When he testifies on cross-examination,
4 I'm assuming, I don't know, he will admit that he tried his
5 best to find as many lines, and the only lines he found were
6 those nine and those files that were word for word. Right?

7 **MR. JACOBS:** I don't think he will -- I think that is
8 what he will say, yes.

9 **THE COURT:** All right. So --

10 **MR. JACOBS:** But I would --

11 **THE COURT:** -- what difference does it make whether
12 there was a clean room or not a clean room? That's question
13 number one.

14 Question number two is, even if there was a clean
15 room for the half that didn't come from Apache -- I'm assuming
16 it's half, I don't know what it really was -- if -- I guess I
17 don't understand Google's argument that you could just go
18 out -- if somebody is out there possibly misusing, like Apache
19 possibly was -- I don't know that they were, but if there was a
20 debate over Apache and you just start using what Apache put out
21 there, how can you say that that absolves you of any
22 wrongdoing?

23 You step into their shoes. If Apache was in the
24 wrong, then you step into their shoes. I don't get that
25 argument. And if half of it came from Apache, what good does

1 it do you to put in a clean room? Because the other half is
2 already -- if it's infected, it's already infected.

3 So I don't know why you keep making this big point
4 out of Apache. Tell me -- help me out what that.

5 **MR. VAN NEST:** There's a couple points, Your Honor.
6 Maybe I need to be a little more clear. One is that
7 Mr. Mitchell and his crew, they looked at Apache too. There's
8 no question that Apache is clearly an independent
9 implementation just like Google. They didn't use any source
10 code either. So that's step one in the analysis.

11 They went out and did their own -- in 2005, did their
12 own independent implementation, and these guys have checked
13 that out and they couldn't find any copying in Apache either.

14 So -- but our primary position on Apache is that,
15 number one, the source code wasn't copied either by Google or
16 by Apache from Java. And that's not been established. Except
17 for these few miscellaneous trivial files and Mr. Bloch
18 testified about his nine lines yesterday, that's -- that's all
19 independently done.

20 We, Google, licensed from Apache the right to
21 distribute the Apache code, which they used, in Android under
22 the Apache license. Our point about Apache is simply that
23 Apache, like GNU, was known to Sun and operating out there in
24 the market -- you know, had this platform available.

25 Sun may or may not have had disputes with them, but

1 Apache never took a license. And they operated for five, six,
2 seven years all the way through 2010, 2011. And our point is
3 that the Apache fight, whatever it was, it wasn't about whether
4 you can use APIs or not.

5 This API thing is an invented-after-the-fact deal by
6 Oracle. This is all made up. None of these people were
7 talking about APIs back then. Rubin was trying to buy
8 technology from Sun, and that's what they were negotiating as
9 part of an overall partnership. And when that fell -- that's
10 what you just heard from Cizek.

11 **THE COURT:** All right. Did the Apache have the 37
12 APIs?

13 **MR. VAN NEST:** It had those and more. And under the
14 Apache license, Apache said you can use all of them, some of
15 them, none of them.

16 **THE COURT:** What was then the -- at the time that
17 Google acquired those rights under a license with Apache, what
18 I'm somehow understanding is there was a cloud over Apache in
19 the form of a dispute with Sun or with Oracle. I'm not sure
20 which.

21 **MR. VAN NEST:** Well, it --

22 **THE COURT:** But -- wait, wait. What was that dispute
23 as it was publicly known?

24 **MR. VAN NEST:** What it was, as I understand and the
25 evidence will develop further, was that Apache wanted to call

1 itself Java compatible.

2 In other words, they wanted a full license so they
3 could say, We are Java, rather than, We're Apache using the
4 Java language. And there was a fight about whether they could
5 get it.

6 And Oracle and Google and the whole industry wrote
7 Sun and said they ought to get that right. And Sun, for
8 whatever reason, said no, we're not going to do that. And so
9 Apache kept operating under -- always the way they had. The
10 source code was out there.

11 And what Mr. Schwartz will say -- has said in his
12 deposition was, the fight with Apache was over the right to
13 call themselves Java. If they didn't want to use the word
14 "Java" in their product, you know, they didn't want to brand it
15 Java, then fine. The code was available. They could
16 distribute the code. There was no -- no issue about the code.

17 What Mr. Schwartz will say is the beef was, can you
18 call yourself Java compatible? I'm not going to let you do
19 that. Just like Android, we don't call ourselves Java
20 compatible either.

21 **THE COURT:** Mr. Schwartz was at which company?

22 **MR. VAN NEST:** Sun. He was the CEO of Sun. And he
23 was fully aware of Apache, fully aware of Android, fully aware
24 of GNU. And his view was, if you don't want to call yourselves
25 Java, if you don't want our trademark, fine. That's the point.

1 And we want to work with people. We don't sue our customers.

2 As you just heard from Mr. Cizek, Google was a big
3 customer of Sun. So Google and Sun were doing business all the
4 time. And they were doing business day by day. And you'll
5 hear testimony, Your Honor, about Mr. Schwartz talking to
6 Mr. Schmidt and -- about a lot of things, including Android.

7 Mr. Schwartz wanted to build some products on top of
8 Android just like Mr. Ellison tried to do. And all this was
9 all out in the open and everybody knew who was using what APIs.

10 And none of this API thing came up til after Oracle
11 bought the company and tried to get into the market and
12 couldn't. Now, all of a sudden, these APIs are a huge deal.

13 And that's why, Your Honor, this is the fundamental
14 issue. The problem that we're all having is this copyright
15 claim they have is a little crazy. It's the selection,
16 structure and organization. I mean, come on. None of the
17 engineers talk about that. None of the business people ever
18 talked about that. That's a lawyer-made-up argument for this
19 case, because they didn't copyright any such thing.

20 And I'm terribly worried from the verdict forms that,
21 you know, what they want to do is they want to chop down the
22 size of their copyright so it custom fits what they now claim
23 we're using. Everybody's known what we've been using for
24 years. They never got a copy on anything like selection,
25 structure and organization. And Mr. Jacobs admitted that the

1 other day.

2 **THE COURT:** Now, I know that's what you argue, and
3 maybe in the long-run you're right, maybe you're not. I am not
4 going to decide right away this -- whether the copyright
5 extends to protecting the structure.

6 I am going to let that go to the jury without
7 prejudice to taking it away depending on how it comes out. But
8 I want this case to go up to the Court of Appeals on a record
9 where we don't have to come back and retry it, if I'm wrong or
10 right, depending on which way it were to come out.

11 And I want, also, the Court of Appeals to have the
12 maximum number of options. So even if you're right -- and I'm
13 not saying that you're right about it, but even if you are
14 right, the jury -- we're going to get a verdict on the
15 structure, sequence, and organization probably in two weeks.

16 **MR. VAN NEST:** I'm totally with you. Your Honor, I'm
17 with you on that. And I know you wouldn't decide until you've
18 seen our Sunday 3 o'clock briefing on this anyway. I know
19 that.

20 But my point is --

21 **THE COURT:** Even after that. Even after that.

22 **MR. VAN NEST:** I know, Your Honor.

23 **THE COURT:** I feel like -- I think we ought to try to
24 create a record -- this is going to go up on appeal. I would
25 like to have a record for the benefit of the appellate judges

1 that will give them the most information and the most field
2 of -- you know, whichever way they want to go on these issues
3 of SSO, I want to give them the best record I can.

4 **MR. VAN NEST:** I -- I'm totally with you on that,
5 Your Honor. My point was directed to the issue that we talked
6 about a little earlier today, which is, what do you compare it
7 to?

8 It can't be that a copyright owner, who gets a
9 copyright on an entire platform, can then later figure out what
10 it is --

11 **THE COURT:** We're working on that.

12 **MR. VAN NEST:** Yeah.

13 **THE COURT:** I'm thinking about it. I'm doing my own
14 research. My law clerks are helping me. But unlike these law
15 firms here, I on have a limited staff. So Sunday at 3:00, I'll
16 be very interested in it.

17 And that basic issue is, what is the comparison made
18 against? What is the copyrighted work?

19 **MR. VAN NEST:** Right.

20 **THE COURT:** And does Mr. Jacobs have the right to
21 take a pair of scissors and cut out of the copyright the SSO
22 and say this is what they infringe as opposed to the other
23 15 million lines of code? I don't know the answer to that.
24 That's where you lawyers come in.

25 **MR. VAN NEST:** Thank you, Your Honor. I didn't have

1 anything else.

2 **THE COURT:** Anything else by the other side?

3 **MR. JACOBS:** I think Your Honor's expression was apt.
4 There was a cloud over Apache. And this may be an important
5 aspect of the instructions to work on. Google took Apache
6 as -- stepped into their shoes is exactly right.

7 There's no immunity for Google if Apache code
8 implements the APIs in the Apache core libraries that Google
9 adopted, the fact that they got it from Apache has no bearing
10 on this unless there is some affirmative defense to
11 infringement, which we believe they will not be able to prove.

12 **THE COURT:** But was the cloud one that had the words
13 API -- 37 APIs floating up there in the sky or was the cloud
14 one that was over, don't use Java, that's our trademark? I
15 don't know.

16 **MR. JACOBS:** It was very much the former, Your Honor.
17 There's absolutely nothing about the trademark. Jonathan
18 Schwartz will have a very interesting examination and
19 cross-examination or.

20 You may recall that on the examination of Mr. Bloch
21 yesterday, I asked him whether he was aware of the
22 communication from Apache in which they threw in the towel and
23 moved Harmony, which is the project from which these core
24 libraries come, into the attic.

25 And in that message, in that official communication

1 from Apache, they said, We recognize that the specifications
2 are proprietary. And that has nothing to do with the
3 trademark. That has to do with the API specifications that
4 Apache based its implementation on. So Apache, when they threw
5 in the towel, they knew it was all about these specifications.

6 And we'll show you an e-mail from Mr. Rubin in which
7 Mr. Rubin acknowledges that Sun's APIs are copyrighted and you
8 have to take the TCK. So this is no new issue. And that was
9 the point of the Danger discussion.

10 **THE COURT:** Well, but when they said the APIs, did
11 they say -- does the phrase "structure, sequence,
12 organization" --

13 **MR. VAN NEST:** No.

14 **THE COURT:** -- is that anywhere in there?

15 **MR. JACOBS:** No.

16 **THE COURT:** Here's what happened. They used
17 different implementing code. And so was the fight over whether
18 you could use the APIs with the original Sun code or was it --
19 or was Sun saying you can't even use our APIs with brand-new
20 code?

21 **MR. JACOBS:** The latter, Your Honor. Very much the
22 later, because that was the whole point of the Apache dispute.
23 Apache is a nonprofit, a group of companies come together and
24 they decide to create what they articulate as an independent
25 implementation conforming to the Java specifications.

1 So if Apache's goal had been achieved, there would
2 have been yet another one of these compatible implementations
3 out there, which we've heard discussed in the trial, in which
4 the code is uniquely written -- hold the thought of this, you
5 know, what this -- what this box means in terms of code
6 (indicating). Hold it, separate that issue out.

7 Apache says, We're going to write an independent
8 implementation of the Java specification top to bottom. And
9 then we are going to get a TCK from Sun and we are going to
10 pass the TCK and we will even be able to say now we are
11 compatible.

12 And Sun says, You can have a TCK, but that TCK is
13 going to have a field of use restriction to desktops and
14 servers.

15 And Apache says, You can't do that. And the members
16 of the JCP, including, you heard, Oracle at the time, on the
17 buy side instead of the sell side. When Oracle was trying to
18 protect itself, as you heard from Oracle witnesses, against the
19 decay of Sun, Oracle was backing this independent
20 implementation as well.

21 And these companies went to Sun and said, We think
22 you should grant us a TCK with a broad field of use, take away
23 the field of use restrictions, because we want Apache
24 Harmony -- now, compatible -- fully-compatible Apache Harmony
25 to be able to use -- to be able to be used on all kinds of

1 devices. And Sun said no. And Sun executives said no. And
2 Sun executives publicly said no.

3 And so Apache Harmony had this ongoing disagreement.
4 Ultimately, that disagreement gets resolved when Oracle,
5 exercising more energetic leadership, gets the OpenJDK project
6 moving along more aggressively, and IBM and other companies
7 that were backing in part Apache Harmony say, no more Apache
8 Harmony, we're going to work on OpenJDK, which is under the
9 GPL.

10 And that's when Apache Harmony throws in the towel --
11 or that's when Apache Foundation throws in the towel, writes
12 the letter to Oracle which says we recognize your
13 specifications are proprietary, and puts the Harmony project in
14 the attic.

15 And we could lay all this out. It's really all in
16 public documents, Your Honor.

17 **THE COURT:** I think -- I hope the evidence does lay
18 it all out on both sides. I like to hear this. It helps me
19 absorb the evidence. But if these points are important in the
20 trial, I hope both sides prove up your respective views.

21 **MR. JACOBS:** You bet.

22 **THE COURT:** So, Mr. Van Nest, what -- since
23 Mr. Jacobs has -- says that you're totally wrong, I'll give you
24 the last word. What's your view about what was on the cloud?

25 **MR. VAN NEST:** Well, the evidence is going to show,

1 Your Honor, that from Mr. Schwartz's perspective he told people
2 you can ship Harmony, you just can't call it Java.

3 This -- what's not particularly relevant and not in
4 the evidence and not in any of the discovery is what Mr. Jacobs
5 just told you. All that's happened recently.

6 All that stuff with Apache, Oracle has gone over and
7 they want to basically shut down the JCP. The open source
8 isn't helping them anymore now that they own Java. Right --
9 open source was great when they were out there as a
10 beneficiary, but now that they're on the other side they're not
11 in favor of open source anymore. That's all happened in the
12 last year.

13 **THE COURT:** At the moment that Google took its
14 license, what year was that? From Apache.

15 **MR. VAN NEST:** Well, probably 2007 or '8. Somewhere
16 in there.

17 **THE COURT:** All right. At the time that happened,
18 had Mr. Schwartz said it's okay to ship --

19 **MR. VAN NEST:** Yes.

20 **THE COURT:** -- and just don't call it Java?

21 **MR. VAN NEST:** Yes. Yes.

22 **THE COURT:** Is that in writing?

23 **MR. VAN NEST:** Yes.

24 **THE COURT:** Really? What exhibit is that?

25 **MR. VAN NEST:** Well, I showed an excerpt from it in

1 the opening. I'd have to go back and make reference. But I
2 showed an excerpt from it in the opening. It's a statement --
3 what I showed in the opening was an excerpt from a press
4 release where Mr. Schwartz said you can ship as long as you
5 don't call it Java. Harmony can ship today.

6 **THE COURT:** Calling it Java, even your own code
7 starts off Java.

8 **MR. VAN NEST:** That's different. I mean branding.
9 Everybody -- everybody that's using -- as you know, everyone
10 that's implementing a Java-based library has got to use that or
11 you can't run --

12 **THE COURT:** So you mean?

13 **MR. VAN NEST:** I mean -- yes, I mean -- or, you know,
14 publicizing that you're Java compatible, you have the blessing
15 of Sun and you're Java compatible and you get the brew cup and
16 all that.

17 Now, were there other issues in Apache? I'm sure
18 there were. But let me just clarify. Our main pitch on the
19 Apache point is that people like these engineers have been
20 using these APIs for years without any complaint.

21 You've now heard Mr. Lindholm say it. You heard, I
22 believe, Mr. Swetland said it. You're going to hear a lot more
23 people say it, that they all understood that, you know, you
24 could use the APIs, they're part of using the language.

25 And what you can't do is copy the source code in the

1 libraries. That's why people are told -- and you're right,
2 what's the point of clean room one way or the other as long as
3 now that we know none of the source code is from Sun, now the
4 job got done. Maybe it wasn't done perfectly, but it got done.
5 Because Apache doesn't have any copied code in their libraries
6 and neither does Google, with, you know, these trivial
7 exceptions.

8 So our main point on Apache is not that, you know,
9 the Apache license absolves us of all -- any guilt that would
10 be there. That's not the point of that. The point is that
11 Apache was out there operating, offering this open source
12 license. Everybody knew what it was. Everybody knew what the
13 dispute was.

14 Google operated under Apache and operated openly and
15 disclosed what it was doing to Sun. And as you just heard from
16 Cizek, Sun's attitude was, well, we got to keep dealing with
17 Google, let's find some other ways to make money and maybe
18 eventually Google will buy our device. They'll buy our -- our
19 virtual machine and they'll buy J2ME and let's find some sales
20 opportunities.

21 Once it was clear that Google didn't want to partner
22 with Sun because they wanted to go open source, Sun said fine.
23 Everybody knew what was happening. And then periodically,
24 later on, Sun came back and said, hey, how about buying our
25 product instead of using yours? So Cizek did that. Others did

1 that.

2 That's what Mr. Ellison was doing in 2010 when he
3 talked to Eric Schmidt. How about using our virtual machine
4 and -- you know, boots faster, runs faster, it's all better.
5 So nothing was hidden or secret. That's the point.

6 **THE COURT:** Let me -- one last question, just about
7 the drill for next week.

8 Is Dr. Mitchell your last witness?

9 **MR. JACOBS:** No, Your Honor. We will probably call
10 Andy Rubin.

11 **THE COURT:** Then will he be your last witness?

12 **MR. JACOBS:** Probably, Your Honor. We'll be doing
13 our final notifications this weekend, but I think we'll
14 probably finish with Mr. Rubin and turn the case over to them.

15 **THE COURT:** On Monday?

16 **MR. JACOBS:** Yes. We may have some deposition stuff
17 to do that'll be brief.

18 **THE COURT:** And Dr. Mitchell, how long will he be?

19 **MR. JACOBS:** Well, I haven't been doing -- honestly,
20 Your Honor, I haven't been that great at estimating the amount
21 of cross-examination time that's been done.

22 **THE COURT:** No, on direct.

23 **MR. JACOBS:** Probably an hour and a half.

24 **THE COURT:** You'll be ready to go on Monday, I hope?

25 **MR. VAN NEST:** Your question?

1 **THE COURT:** With your -- start your case.

2 **MR. VAN NEST:** That's the first I'm hearing of it,
3 but we'll be ready to go. We'll be ready to go.

4 **THE COURT:** Do you think you're going to use all of
5 your time?

6 **MR. VAN NEST:** I'm not sure. We're going to be
7 meeting this afternoon and over the weekend and we'll figure it
8 out. But right now we've used about a third of our time. I
9 think we're roughly on target, but there's a lot to put in.

10 **MR. BABER:** Your Honor, may I just ask on behalf of
11 Bob Lee, remember we interrupted his examination.

12 **THE COURT:** You have to bring him back.

13 **MR. BABER:** Start with him first thing Monday
14 morning?

15 **THE COURT:** We'll start with him first thing Monday.

16 **MR. JACOBS:** Yes, thank you for the reminder.

17 **THE COURT:** Thank you for reminding me. That's
18 exactly right, yeah.

19 **MR. VAN NEST:** We have some witness issues next week,
20 but I'll try to work those out with Mr. Jacobs. We may have to
21 shuffle people around a little bit, but we've been pretty good
22 at that.

23 **THE COURT:** I have this thought about the case, that
24 about two-thirds of this case should be very close to being
25 stipulated to, though maybe a slight fuzziness on the

1 stipulations. And about one-third of it is in controversy, on
2 just the copyright part.

3 So I'm not asking you to stipulate to anything. I'm
4 sure that you wouldn't do that. But what I can ask you to do
5 is think of ways to help the jury understand what is genuinely
6 controverted.

7 And -- I'll give you an example. Oracle has made a
8 lot out of the fact that the word we got to get a license or
9 take a license from Sun was used in various e-mails over the
10 last ten years. And I can understand that and I'm not in any
11 way being critical of Oracle for putting that in. I think good
12 for you, you got that evidence. That helps you.

13 But it is -- it's one kettle of fish to say we need a
14 license because we're going to use their source code and their
15 implementation and another when the program is switched to
16 we're not even going to use their implementation, we're going
17 to do our own implementation so we don't have to go and get a
18 license.

19 And I -- so I worry some that the jury may get the
20 impression that these statements about needing a license are
21 not taking those important differences into account.

22 The best I can say on that is that there are good
23 lawyers on both sides.

24 Mr. Van Nest, you'll just have to explain that in
25 your closing.

1 But it does seem to me that this is something that
2 the lawyers could come closer to presenting in a way where
3 you're on the same page on that, so that when it does go to the
4 jury we are teeing up for them the points that are genuinely in
5 dispute and those that should be conceded or close to conceded
6 are, you know, conceded.

7 I can point to examples on both sides. I am not
8 picking on Oracle here. I can definitely point to examples on
9 both sides on this one.

10 All right. I find this to be one of the toughest
11 things I've ever had to do. The law is tough. It's not like
12 the -- this is harder than a patent case because this copyright
13 part on the computer thing is not settled. And then the facts
14 are very hard. So this is a tough problem for the judge.

15 So here's what you should do, this being Friday.
16 After 4 o'clock -- it's not 4 o'clock yet, but you should go
17 back to your hotel and have a double --

18 (Laughter)

19 **THE COURT:** -- a double single-malt Scotch. That's
20 what I'm trying to say.

21 **MR. JACOBS:** If you could issue that order, Your
22 Honor, I think it would help.

23 (Laughter)

24 **MR. VAN NEST:** I was just about to duck in the face
25 of another briefing assignment.

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/s/ Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter

/s/ Debra L. Pas

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Friday, April 20, 2012