

IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF TEXAS
 MARSHALL DIVISION
 IP INNOVATION, L.L.C.)
 and TECHNOLOGY LICENSING)
 CORP.,)
)
 Plaintiffs)
) Civil Docket No.
 VS.) 2:07-CV-447-RRR
) April 26, 2010
 RED HAT, INC. and)
 NOVELL, INC.)
)
 Defendants) 1:00 P.M.

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

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

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

1 statements are intended to assist you in understanding
 2 the evidence that you'll receive. Whatever these
 3 lawyers say, however, is not the evidence.
 4 After the opening statements, the
 5 Plaintiffs will call witnesses and present evidence.
 6 Then the Defendants will do the same. They'll present
 7 witnesses, and those witnesses will present the
 8 evidence. That's the basis for your decision.
 9 After the parties' main case is completed,
 10 the Plaintiffs may be permitted to present a little
 11 rebuttal evidence. After all that evidence is
 12 completed, the lawyers will again address you to make
 13 final arguments. Those are arguments. They're going to
 14 try to interpret the evidence to you, but it's your
 15 interpretation of the evidence that counts.
 16 After all that evidence is presented, I
 17 will give you the applicable law. You will then retire
 18 and deliberate.
 19 Keep an open mind throughout the trial.
 20 Don't decide anything based on the first witness or the
 21 second witness or -- you've got to hear it all.
 22 Then the closing arguments will give you
 23 some ideas about how you may finally decide the case,
 24 and that will be done according to the instructions that
 25 I give you.

1 APPEARANCES CONTINUED:
 2 FOR THE DEFENDANT: MR. JOSH A. KREVITT
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 16 Palo Alto, California 94304
 17 * * * * *

18 P R O C E E D I N G S
 19 (Jury in.)

20 THE COURT: Ladies and Gentlemen, I have a
 21 few preliminary instructions for you just to give you
 22 some foundation, and then we're going to go right to the
 23 opening statements in the case.
 24 You've now been sworn as a jury to try
 25 this case, and as the jury, you'll decide all the
 disputed questions of fact. As the judge, I will have
 the job of deciding the questions of law and procedure.
 From time to time during the trial and at the end, I'll
 give you my instruction on the rules of law that you
 must follow in making your decision.
 Soon the lawyers from each side will make
 what's called an opening statement. The opening

1 Pay close attention to the testimony and
 2 evidence. Now, if you'd like to make any notes, you're
 3 welcome to do that. If you do take notes, be careful to
 4 not get so involved in your writing that you miss the
 5 evidence that's going on. This is what you're to pay
 6 attention to. The notes are just to aid your memory.
 7 Your memory could later be different from your notes.
 8 Rely on your memory.
 9 If you do not take notes, you can rely on
 10 your own independent memory of what you have. Don't be
 11 unduly influenced by the notes of other jurors. This is
 12 like final exam in school. You know, you rely on what
 13 you learned, not on what your neighbor might have
 14 written in his or her notes.
 15 Even though the court reporter is making
 16 stenographic notes of everything that's said, a
 17 typewritten copy will not be available to you. On the
 18 other hand, any exhibits that are brought into this
 19 trial may be available to you during your deliberation.
 20 Until the trial is over, as you know,
 21 you're not to discuss the case with anyone, and don't
 22 permit anyone to discuss it during the case in your
 23 presence. You don't even discuss it with each other
 24 until I instruct you that it's time to deliberate.
 25 Now, if anyone should attempt to discuss

1 the case with you or approach you concerning this case,
2 you let me know immediately. Hold yourself completely
3 apart from the people involved in this case. Marshall
4 is a small town, and we can all run into each other at
5 lunch, but we should take great care to stay separate.

6 You don't sit with the attorneys or talk
7 to them, other than polite hellos, and how-are-you's.
8 You, of course, can sit with each other, if you'd like
9 to go to lunch together, but you don't discuss the case.

10 Do not make any independent investigation
11 of the case. You don't go on the internet and look up
12 some facts or check your understanding of something you
13 heard. That's not appropriate.

14 Base everything on what you hear here. No
15 independent work here.

16 Don't consult dictionaries, textbooks,
17 encyclopedias. You don't talk to other people who may
18 be knowledgeable about this matter, and that's not even
19 your wife or husband or -- none of that's appropriate.

20 Now, during the trial, it may be necessary
21 for me to confer with the lawyers occasionally out of
22 your hearing or even to ask questions of witnesses while
23 you're elsewhere. I'll handle those matters. And when
24 I think -- I'll make sure that you know what's going on
25 so that you're not out of the loop.

1 Now, there's one additional thing I'm
2 going to let you do, and that's a little unusual. I'm
3 going to let you -- if you have some burning question
4 about something that a witness has testified to, you can
5 write your question down, and you can give that question
6 to one of my assistants here, and they'll give it to me.
7 And I will present it to the attorneys, and they will
8 try and work that into questions that they ask later of
9 witnesses.

10 Of course, it could always be that the
11 time to ask that question has passed, and they might not
12 be able to get back to it. But at least this gives you
13 some way that you can, if something's really bothering
14 you about the technology or the law, you can write down
15 a question, and I'll see if we cannot find a way to
16 answer it for you.

17 Now, to help you follow the evidence I'm
18 going to give you a summary of the positions of the
19 parties. They've prepared this, so it's suitable to
20 both of them. The Plaintiffs in this case are IP
21 Innovation, LLC, and Technology Licensing Corporation.
22 And we'll refer to them as Plaintiffs or IPI sometimes.

23 The Defendants are Red Hat and Novell, and
24 we'll refer to them as Defendants, usually, here.

25 This case involves three patents. I could

1 give you the numbers, but they'll give them to you
2 later, all right? They're each entitled User Interface
3 with Multiple Workspaces for Sharing Display System
4 Objects.

5 For convenience, the parties and I will
6 often refer to the three patents as the patents-in-suit,
7 or by using the last three numbers of the patents,
8 namely, the '412 patent you'll hear about; the '521
9 patent you'll hear about, and the '183 patent.

10 You don't have to worry about those
11 numbers now. They'll be very familiar to you by the end
12 of the week.

13 The Plaintiffs filed suit in this court
14 seeking money damages for allegedly infringing the
15 patents-in-suit by using, selling, or offering for sale
16 the products that the Plaintiffs argue are covered by
17 Claims 1 and 21 of the '412, Claim 8 of the '521, and
18 Claim 1 of the '183.

19 Plaintiffs also argue that the Defendants
20 induced their customers to infringe those patents.

21 Defendants deny that they have infringed
22 or actively induced infringement of the claims of those
23 patents. Defendants also argue that the asserted claims
24 of the patents are invalid.

25 I'll instruct you later as to the ways in

1 which the claims of a patent may be invalid. In
2 general, however, a patent is invalid if it's not new or
3 it's obvious, in view of the state of the art at the
4 relevant time, or if the inventors aren't properly named
5 in the patent.

6 Now, your job will be to decide whether or
7 not Defendants have infringed any of the patents or
8 whether or not those claims are invalid. If you decide
9 that the Defendants have infringed any valid asserted
10 claim of the patents, then you will need to decide the
11 money damages to be awarded to the Plaintiffs.

12 Let me talk about the patents for just a
13 minute. The '412, '521, and '183 generally describe a
14 computer-based graphical user interface that spans
15 across multiple workspaces. Computer-based graphical
16 user interface, multiple workspaces.

17 You'll get all that more later.

18 Within a workspace is a collection of
19 display objects called tools that have visibly
20 distinguishable features, icons, or windows. They'll
21 show you all this. This is just introduction.

22 The display objects can be shared between
23 workspaces. When a user switches between workspaces to
24 perform different tasks, the display objects that are
25 common among the workspaces are displayed in the new

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1 workspace and are perceptible as the same.
 2 This will be clear when you see it all in
 3 front of you.
 4 Let me tell you just a little bit about
 5 the law now.
 6 In deciding the infringement validity
 7 issues, you'll be asked to consider certain legal
 8 standards. The first issue you'll be asked to decide is
 9 whether Defendants have infringed the claims of the
 10 patents-in-suit.
 11 Infringement is assessed on a
 12 claim-by-claim basis. So pay attention to those claims
 13 and the claim words. That will be a lot of your duty
 14 here.
 15 I will explain the requirements of
 16 infringement in detail at the conclusion. In general,
 17 however, Defendants may infringe by using, selling, or
 18 offering to sell a product or method that meets all the
 19 requirements of an asserted claim.
 20 Defendants may also indirectly infringe by
 21 inducing someone else or another entity to infringe by
 22 meeting all those requirements. To prove indirect
 23 infringement, they must show that Defendants were aware
 24 of the patents and they intended to cause others to
 25 infringe the patents, and that infringement was actually

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1 carried out by others in the United States.
 2 Plaintiffs must show Defendants'
 3 infringement by a preponderance of the evidence. I'll
 4 tell you more about that later.
 5 Another issue you will be asked to decide
 6 is whether the claims of the patents-in-suit are
 7 invalid. A patent can be invalid for a number of
 8 reasons, including that the subject matter of the claims
 9 is not new or is obvious.
 10 For a claim to be invalid because it's not
 11 new, the Defendants must show that all of the elements
 12 of the claim are present in a single previous system, or
 13 sufficiently described in that previous printed
 14 publication or patent.
 15 We call these previous devices or
 16 publications or even patents prior art.
 17 If a claim is not new, it's said to be
 18 anticipated by the prior art. I'll tell you more about
 19 that at the end of the case again. This is just to get
 20 you up to speed on these requirements. I'll also tell
 21 you how a device or a publication may become prior art.
 22 Another way that a claim can be invalid is
 23 that it may have been obvious at the time of invention.
 24 Even though every element of a claim is not shown in the
 25 prior art, a claim may still be invalid if it would have

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1 been obvious to a person of ordinary skill in the field
 2 of technology at the relevant time before the invention.
 3 You will need to consider a number of
 4 questions in deciding whether the asserted claims are
 5 obvious.
 6 A patent may also be invalid if too few or
 7 too many of the actual inventors are named on the patent
 8 or if there was no collaboration or concerted efforts
 9 among the named inventors. Defendants must show
 10 invalidity by clear and convincing evidence.
 11 I'll tell you more about that later.
 12 If you decide that any asserted claim of
 13 the patents-in-suit has been infringed and is not
 14 invalid, then you will need to decide any money damages
 15 to be awarded to Plaintiffs to adequately compensate
 16 them for the infringement. A damages award should put
 17 Plaintiffs in approximately the same financial position
 18 they would have been in if the infringement had not
 19 occurred, but in no event may the damages award be less
 20 than what Plaintiffs would have received if they had
 21 been paid a reasonable royalty.
 22 I'll tell you later how to compute a
 23 reasonable royalty, but you may not include in your
 24 award any additional amount as a fine or a penalty.
 25 Only decide what's necessary to compensate Plaintiffs

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1 for the infringement. That is sufficient punishment.
 2 There's no additional punitive damages, just
 3 compensation.
 4 I'll give you more instructions on that
 5 later, too.
 6 Now, let me tell you how our procedure's
 7 going to happen, and that's the last thing I'm going to
 8 tell you before we get to the opening acts here.
 9 First, each side is going to make an
 10 opening argument -- excuse me -- an opening statement
 11 really. It's not an argument. It's simply an
 12 opportunity for the lawyers to explain what they think
 13 the evidence will show. They are not going to argue at
 14 this point.
 15 Right, Gentlemen and Ladies?
 16 There are two standards of proof that you
 17 will apply to the evidence depending on the issue you're
 18 deciding.
 19 On some issues, you must decide whether
 20 certain proof -- facts have been proven by a
 21 preponderance of the evidence. A preponderance means
 22 that the fact to be proven is more likely true than not;
 23 the scale tipping, as we discussed earlier. The
 24 evidence in favor of that fact is sufficient to tip the
 25 scale, even if only slightly in favor of one party or

1 the other.
 2 On other issues, you must use a higher
 3 standard to show whether a fact has been proven by clear
 4 and convincing evidence. That means you have to be left
 5 with an abiding conviction that the truth of that fact
 6 is highly probable.
 7 These standards are different from the
 8 standard you may have heard about in criminal
 9 proceedings where a fact must be proven beyond a
 10 reasonable doubt. On a scale of these various standards
 11 of proof, as you move from the preponderance of evidence
 12 where it only tips it slightly in favor of the party to
 13 beyond reasonable doubt where the fact must be proven to
 14 a very high degree of certainty, you may think of the
 15 clear and convincing standard as being between those two
 16 standards.
 17 We're not doing anything with reasonable
 18 doubts here; that's criminal law. We're not there. We
 19 do have slightly tipping the scale and then the clear
 20 and convincing standard.
 21 After the opening statements, Plaintiffs
 22 will present their evidence in support of the contention
 23 that the claims of the patents have been infringed by
 24 Defendants. To prove infringement of any claims, the
 25 Plaintiffs must persuade you that it's more likely than

1 opportunities to explain what they believe the evidence
 2 has shown or what they believe upcoming evidence will
 3 show.
 4 Your decisions, again, are not influenced
 5 by what the attorneys choose to make in their
 6 explanations. The attorneys' comments are not evidence
 7 The attorneys are just commenting for the purpose of
 8 instructing you to help you understand what they're
 9 presenting.
 10 After all the evidence has been presented,
 11 first I'll give you the law that you're supposed to
 12 apply. Then they will give closing arguments. These
 13 are arguments. These are when they will try to persuade
 14 you that their view of the evidence is the correct view.
 15 The only really correct view is yours.
 16 I think -- with those comments, I think
 17 we're ready to begin. Do you think so, Mr. Gasey?
 18 MR. GASEY: Yes, I do. Thank you, Your
 19 Honor.
 20 THE COURT: Do you think so, Mr. Krevitt?
 21 MR. KREVITT: Yes, Your Honor.
 22 THE COURT: Okay. Then let's do it.
 23 Mr. Gasey --
 24 MR. GASEY: Thank you, Your Honor.
 25 THE COURT: You may proceed.

1 not that Defendants have infringed that claim.
 2 Plaintiffs will then also put in evidence
 3 on the amount of damages they believe they are entitled
 4 to receive for that infringement. Plaintiffs must prove
 5 the amount of damages that they contend they should
 6 receive by a preponderance of the evidence.
 7 Defendants will then present their
 8 evidence that the asserted claims of the patents-in-suit
 9 are invalid. To prove invalidity of any claim,
 10 Defendants must persuade you by clear and convincing
 11 evidence that the claim is invalid.
 12 In addition to presenting their evidence
 13 of invalidity, Defendants may also put on evidence
 14 responding to the Plaintiffs' proof of infringement
 15 damages.
 16 Plaintiffs may then put on additional
 17 evidence responding to Defendants' evidence that the
 18 asserted claims are invalid. And they can offer any
 19 additional evidence of infringement at that point, too.
 20 This is called the rebuttal period. So
 21 we're hearing first the Plaintiffs' witnesses, then the
 22 Defendants' witnesses, and then the Plaintiffs may call
 23 these rebuttal evidence witnesses.
 24 During the presentation of the evidence,
 25 the attorneys for the parties will be given brief

1 MR. GASEY: My name is Art Gasey. I'm the
 2 lead lawyer for Plaintiffs in this case, Technology
 3 Licensing Corporation and IP Innovation.
 4 You should know about our clients.
 5 Technology Licensing Corporation, or TLC, as you'll hear
 6 it referred to sometimes, is a company that was started
 7 about 12 years ago by an inventor, Mr. Carl Cooper,
 8 who's here in the gallery today.
 9 Mr. Cooper started his own company, Pixel
 10 Instruments, after working as an engineer for years and
 11 years. He decided with all of the inventions that he's
 12 come up with -- he's come up with about 50 patentable
 13 inventions -- that he was going to take some of those
 14 patents and have them protected by forming his own
 15 company.
 16 He started that company, which was called
 17 TLC, about 12 years ago.
 18 Now, at that time, he decided to get a
 19 partner and invest in and co-own his patents, because he
 20 needed the kind of time and money and expertise that a
 21 company like IP Innovation, his partners, could provide.
 22 Now, as a result of their partnership,
 23 they were successful. And one of the results of this
 24 success was that they were able to buy some patents from
 25 Xerox Corporation. This case today is about the story

1 of those patents.
 2 Now, I think what I saw on the voir dire
 3 this morning, everybody has heard about Xerox
 4 Corporation. Everybody knows it's a copier company.
 5 But what some of you may not know is that back in the
 6 1970s and '80s, Xerox set up a special research center
 7 out in Palo Alto, California.

8 It was dedicated to go ahead and figure
 9 out ways to help users, help people figure out how they
 10 could use their office tools, things like copiers and
 11 computers. And the result of this years and years of
 12 research came up with some incredible tools that you all
 13 may use every day in an office or at home. Things like
 14 the mouse or the laser printer or the personal computer,
 15 all ideas from Xerox.

16 The goal, again, was to help people figure
 17 out ways to use their office tools.

18 Now, the patents in this case were the
 19 result of inventions that Xerox's researchers came up
 20 with. This case is about three things. It's a story
 21 about that invention, that innovation by scientists at
 22 Xerox.

23 It's a story about the success of that
 24 innovation. You can see how much it's been used by
 25 others and how much it's being used right now.

1 And third, it's about the companies, the
 2 Defendants, who decided to go ahead and use this
 3 property without paying for it.

4 Now, the story of the invention begins
 5 about 25 years ago. It begins in the middle of the
 6 1980s. And the first witness that you're going to hear
 7 from later on this afternoon is a gentleman back in the
 8 gallery right now, Dr. Austin Henderson. You're going
 9 to learn that Dr. Henderson is an inventor and a
 10 scientist. He's got about ten patents to his name.

11 He lives in Easton, Connecticut, but he's
 12 agreed to come down here today to testify. He's worked
 13 on improvements in human-computer interaction for over
 14 45 years.

15 And by human-computer interaction, we mean
 16 how to help you understand and be able to better use
 17 your tools, how to be able to better use your computer
 18 to figure out what all the different features are that
 19 can be used to help you.

20 He's highly educated. He has a doctorate
 21 degree from MIT, and he was one of a team of scientists
 22 that worked at this research center run by Xerox
 23 Corporation, a center called Xerox Park, Palo Alto
 24 Research Center.

25 Now, one of the problems that

1 Dr. Henderson and his co-inventors worked on was the
 2 idea of how a user can go ahead and manage computer
 3 workspaces or desktops.

4 And one of the things related to that was
 5 what he and his co-workers sometimes referred to as the
 6 messy desktop problem. Most of you that have used
 7 computers for any period of time will have different
 8 situations where you've got, you know, five, six, seven,
 9 ten different applications open and trying to go ahead
 10 and navigate through your computer, trying to navigate
 11 through this whole screen, which is sometimes called the
 12 workspace or desktop, becomes a real problem.

13 All the different things that you're
 14 trying to do sometimes end up getting in the way. And
 15 one of the related problems of that is that unlike when
 16 you're working with paper, you've got a very limited
 17 space available. Most computers only have a screen size
 18 of 15 or 17 inches. It's not as big as a real physical
 19 desktop. Your virtual desktop on your computer has very
 20 limited space.

21 So Dr. Henderson and his co-inventors came
 22 up with a number of solutions, ways to go ahead and help
 23 folks.

24 First, one of the solutions in this
 25 invention process was the concept of virtual desktops.

1 What you see here is a graphical or pictorial
 2 representation of a computer, and this is a figure
 3 you're going to see that's in the three patents that are
 4 here today.

5 And what Dr. Henderson and his
 6 co-inventors realized is that you could figure out
 7 different ways to go ahead and have different screens,
 8 different complete screens, workspaces or desktops that
 9 you could go ahead and switch between.

10 And in connection with that process, he
 11 realized that -- a number of additional solutions to
 12 help in that invention, to help in what became the
 13 patents. Specifically, he realized that he needed to be
 14 able to separate and have different applications for
 15 different tasks.

16 For instance, imagine you're using a
 17 computer in your office and you've got some things that
 18 you're going to go ahead and use and require a notebook
 19 to go ahead and write out memos on. And for other
 20 things, maybe you need a calculator, because you're
 21 working on accounting or you need to be able to add up
 22 some numbers.

23 These very basic pictures of the triangle
 24 and the cylinder are just meant to represent icons, any
 25 icons that may be different and may be separated into

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1 different workspaces.
 2 One of the other things that became part
 3 of the invention was the ability to switch between those
 4 workspaces. Those doors represent something that's
 5 supposed to stick in your mind to say, you know what, if
 6 I want to switch from one workspace to another, I'm
 7 going to go ahead and click on the door and be able to
 8 pop from one screen to the other, pop from one workspace
 9 to the other.
 10 One of the other things they also realized
 11 is that even with having what's called multiple virtual
 12 workspaces, multiple screens that you can switch
 13 between, you're still going to need to be able to share
 14 some tools.
 15 For instance in this case, you're talking
 16 some about what they call a text editor, but it's
 17 something like a Microsoft Word program where you type
 18 out a memo. They realized that even if you wanted to go
 19 ahead and separate your tools into different groups by
 20 what kind of tasks you were doing, then you might need
 21 to go ahead and refer to the same tool.
 22 Importantly, you might need to go ahead
 23 and be able to recognize that tool so you could use it
 24 quickly.
 25 Now, the inventors -- the evidence is

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1 going to show what happened in this invented process,
 2 what the parts of the puzzle were that came together to
 3 result in the invention that they patented.
 4 The first one that happened in time was --
 5 there's a Mr. John Maxwell. He was a researcher at
 6 PARC, and he worked on a program known as -- that became
 7 known as the Cedar Multiple Desk Tops Program. And he
 8 worked on it about 1983 and 1984.
 9 The second part of the puzzle was provided
 10 by Dr. Stuart Card and Dr. Henderson, who you're going
 11 to hear from today. They began their work in the summer
 12 of 1985. And the initial material that they worked on
 13 became known as the Rooms Project. Again, all involved
 14 in the virtual desktop problem and how to solve the
 15 problem with messy desktops.
 16 You're going to hear how in 1986, the
 17 summer of 1986, while Dr. Card and Dr. Henderson were
 18 still thinking up and still developing their invention,
 19 they found out about Mr. Maxwell's work. They found out
 20 through a patent attorney inside Xerox.
 21 And as a result, they talked to
 22 Mr. Maxwell. After being able to find out what
 23 Mr. Maxwell's approach was, they were able to go ahead
 24 and build and offer additional features to this whole
 25 invention.

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1 Importantly, at the end of 1986, they
 2 began the process of applying for a patent. They had
 3 filed an invention disclosure with their patent attorney
 4 back in July 1986, but still built on more features to
 5 their invention.
 6 Importantly, at the beginning of 1987,
 7 when it became time for them to draft the patent
 8 application and think of all the things that were going
 9 to come into their invention, all three of the
 10 co-inventors sat down and talked together and worked
 11 together for a period of three months.
 12 And eventually, they filed a patent
 13 application that became each of the patents-in-suit,
 14 what's called the '412 patent, the '521 patent, and the
 15 '183 patent.
 16 We've got here today the actual physicals.
 17 There's only one original, one ribboned copy you can get
 18 when you get a patent issued. This one is the '412
 19 patent.
 20 The full number, just so you can
 21 understand why we do this, the seven-digit number,
 22 frankly, people can't keep that in their heads. The
 23 full number of this patent is 5,072,412, but because
 24 it's just the way things are done in patent law, we
 25 always refer to it by the last three digits.

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1 Now, this patent -- these three patents
 2 all came from a single patent application. And I know
 3 that you heard this morning about a 20-minute videotape
 4 about what happens in the patent office and what the
 5 parts of a patent are.
 6 Now, one of the interesting things about
 7 this, because all of this comes from one patent
 8 application in 1987, but resulted in three different
 9 patents, one of which was issued in 1991, one of which
 10 was issued in 1995, and one of which was issued in 1997,
 11 there are some different parts.
 12 Specifically, if you go ahead and look at
 13 the drawings of each of the patents, you'll see that
 14 they're all identical. Same thing with respect to the
 15 descriptions. It's all the same descriptions in terms
 16 of all the different versions, all the different
 17 embodiments, all the different ways of going ahead and
 18 practicing the invention.
 19 It's got the same summary, but the
 20 difference is in the claims. Each of the patents have
 21 different sets of claims that go ahead and define the
 22 boundaries of their rights.
 23 When you think about it, the claims are
 24 really like the boundaries of your property, whether
 25 it's a fence or whether it's just the deed that goes

1 ahead and describes the boundaries of what is yours,
2 what is your exclusive rights.

3 And, you know, like any sort of property
4 owner, like if you're a homeowner, you've got certain
5 rights and certain obligations. And one of the rights
6 that you have is like any homeowner, an intellectual
7 property owner, a patent owner can give permission for
8 people to come on and use their property.

9 But you also run the risk that like any
10 patent owner, somebody can go ahead and come on your
11 property without permission. They can use your property
12 without asking.

13 The difference is, is that unlike your own
14 homes where if somebody went ahead and trespassed on
15 your property and started going through your house, you
16 could call the police. We don't have the police to go
17 ahead and prevent people from using my clients' property
18 without their permission. That's what brings us here
19 today.

20 Now, this -- in the field of patents,
21 there's a specific name for giving permission for
22 somebody to come on your property. That's called a
23 license.

24 Generally, a license involves when one
25 company that wants the rights to go ahead and use a

1 that's him up there -- that says: We contribute less
2 than 20 percent of what makes up what they call the
3 Linux kernel. It's the material that they use to create
4 the software that's accused of infringement in this
5 case.

6 What Red Hat and what Novell do, what the
7 Defendants do, is pick and choose the features that
8 users -- that they know users want to put in their
9 software. They take them and they incorporate them into
10 their software.

11 You're going to hear how Novell does the
12 same thing, too. Novell, like Red Hat, competes with
13 Microsoft. They compete with Windows. They want their
14 customers to go ahead and use their products instead of
15 Windows. And they want to be able to leap-frog, to move
16 ahead of Windows.

17 They needed to make sure that they had a
18 computer product that -- or software that a user would
19 want bad enough to switch from Microsoft Windows to
20 them.

21 So what did they do?

22 They tested their products. As a matter
23 of fact, they spent about 1500 hours of testing to find
24 out which parts of a given design worked. In other
25 words, what features worked and what ones didn't. The

1 patent pays money, and in exchange, the patent owner
2 goes ahead and gives them rights to use the patent.

3 On the other hand, if somebody refuses to
4 go ahead and pay any money for patent rights and uses it
5 anyway, they're called an infringer. As a result of an
6 infringer, a patent owner has the constitutional right
7 to protect their invention and bring a lawsuit to get
8 paid for what was used.

9 Now, the patents in this suit were already
10 licensed to several parties, several software companies
11 that most folks know of, companies like Hewlett-Packard
12 and Apple Corporation.

13 There are several other licenses, too,
14 you're going to hear from software companies. There are
15 two software companies that are a little less known, but
16 the value has been recognized.

17 Now, the evidence is also going to show
18 that the Defendants recognized the value -- recognized
19 the worth of these inventions, the multiple virtual
20 desktops, but that they didn't pay for them.

21 Red Hat and Novell take most of the
22 features that they use in their software from outside
23 their company. The evidence is going to show -- you're
24 going to see an article from an industry magazine that
25 quotes words from Red Hat's CEO, Mr. Whitehurst --

1 parts that worked well, they used. And the parts that
2 didn't, they threw away.

3 And some of the features that they kept,
4 that they used throughout all the different products
5 that are accused in this case are the features that
6 include what's covered by my clients' property.

7 This testing took literally 1500 hours of
8 videotape of users using their products to see what
9 worked and what didn't. And the result is we know that
10 it worked, because people in the industry knew that the
11 multiple virtual desktops feature was a big, big
12 difference.

13 As a matter of fact, it was one of the
14 biggest differences between Windows and Linux. These
15 products are what's called Linux products rather than
16 Windows products. It's a category of software.

17 In the Windows world they only had one
18 desktop; the Linux products that are accused here have
19 typically four desktops, but they can have more. They
20 have the ability to go ahead and separate your screen so
21 that you can have different tools for different sets of
22 tasks.

23 And if there was no other reason to switch
24 from Microsoft Windows to the Defendants' products,
25 virtual desktops would be more than enough reason to go

1 ahead and switch.
 2 Now, the evidence will show that several
 3 of the Defendants' software products took and used the
 4 features covered by my clients' patents.

5 For Red Hat, you're going to see two
 6 groups of products. One is called Fedora and one is
 7 called Red Hat Enterprise Linux; sometimes called RHEL.
 8 Both have the same virtual workspace/virtual desktop
 9 feature.

10 The other defendant, Novell, their product
 11 also has two groups. One's called openSUSE, and the
 12 other one is called SUSE Linux Enterprise. There's two
 13 types of that. One that's used with desktop computers
 14 and one used with servers.

15 Now, you're going to hear evidence from
 16 witnesses like the Plaintiffs' technical expert,
 17 Dr. Myron Zimmerman. In that process, Dr. Zimmerman is
 18 going to go ahead and compare these software products
 19 with the claims of my clients' patents. You're going to
 20 see different features in the operation of that
 21 software.

22 Here you've got a typical desktop -- well,
 23 in this case, it's a laptop, but the view of the whole
 24 screen is called the desktop. And what you're going to
 25 see down in the corner is four different squares. In

1 here -- you're going to see that each and every element
 2 is met.

3 In other words, that -- what the
 4 Defendants do goes ahead and reads upon and meets every
 5 limitation, every phrase of the four claims that were
 6 involved here.

7 There are two claims of the '412, Claim 1
 8 and Claim 21, Claim 8 of the '521, and Claim 1 of the
 9 '183.

10 Now, it's going to take quite a bit of
 11 time to go through Dr. Zimmerman's testimony, and we
 12 apologize for that in advance, but that's necessary,
 13 because we have to go ahead and meet our burden of
 14 proof. And in order to do that, we're going to focus on
 15 just a small subset of what we think was used. We're
 16 going to focus on just these four claims.

17 Now, in response to our evidence, the
 18 Defendants are going to offer a whole parade of
 19 defenses. They're going to say we don't infringe.
 20 They're going to say the patents are no good; the Patent
 21 Office made a mistake.

22 And they're going to point you to some
 23 different pieces of prior art. You're going to hear
 24 evidence about some things that Xerox did previously;
 25 one thing called Xerox Star. You're going to hear about

1 each of those squares is a miniature version of a
 2 different virtual desktop.

3 And when a user goes ahead and clicks on
 4 one of those squares, you're able to present a different
 5 desktop. Each of those desktops allows you the ability
 6 to put different windows, different applications so that
 7 you can go ahead and separate out your tasks.

8 For instance, you could have a web browser
 9 on one; you could have something like Microsoft Word or
 10 the ability to write memos on another. But one of the
 11 other things that's going to be shown is that in each of
 12 these different desktops, they share some of the same
 13 tools.

14 If you need to go ahead and throw
 15 something in the trash or need to look at different
 16 things inside of your computer, it's got the same icons
 17 that you can go ahead and have access. You've got the
 18 same tools, things that every user will recognize as
 19 being the same tool across each of the different
 20 desktops, and the ability of a user to go ahead and
 21 click on those different desktops.

22 When you go ahead and compare that --
 23 those features against the language of the claims -- and
 24 you're going to see a fairly big blowup of the claim
 25 language of each of the four claims that are involved

1 things that Apple did previously, and you're going to
 2 hear about articles from folks like an academic by the
 3 name of Dr. Chan.

4 They're going to say that even if we do
 5 infringe and even if your patent is new, it's still
 6 invalid because you named the wrong inventors. They're
 7 going to say that instead of Xerox naming three people,
 8 they should have named only two or only one person.

9 And they're going to say that even if the
 10 patents are invalid and infringed, we really don't owe
 11 you hardly anything, because your patents are worthless.

12 Now, the evidence is going to show that
 13 they do infringe. The evidence is going to show that
 14 they've got the ability to switch between desktops.
 15 They've got the ability to go ahead and present shared
 16 icons, shared tools to a user, and that they go ahead
 17 and meet each and every limitation that the claims call
 18 for.

19 The evidence is also going to show that
 20 what the Defendants are relying upon to go ahead and try
 21 and say our patent is not new, this issue has been
 22 looked at already. The Patent Office, you're going to
 23 see, has looked at some of the very same articles, some
 24 of the very same products that the Defendants are trying
 25 to second-guess now; things like the article from

1 Dr. Chan, things like prior materials from Apple
2 Corporation, and things like the Xerox Star that I
3 mentioned.

4 Now, the evidence will also show that the
5 named inventors, the folks that all participated in
6 drafting this patent application are co-inventors. The
7 evidence will show that the inventors did talk to each
8 other in 1986 about their work, and that in early 1987,
9 they worked together in finishing their invention and
10 providing a patent application to the Patent Office.

11 And when they went ahead and provided that
12 patent application, they signed an oath that said we are
13 the original first and joint inventors of the subject
14 matter of these claims. They believed it then, and they
15 believe it now.

16 Finally, the Defendants will say that even
17 if the patent is valid and infringed, it's not worth
18 anything. As Mr. Reiter pointed out this morning, the
19 Defendants' whole business model makes a big deal of the
20 fact their software is free; we give it away. And
21 that's true.

22 But what they don't tell you is that Red
23 Hat makes money, I often say, specifically by selling
24 free software. Those aren't my words. Those are the
25 words of Red Hat's CEO. You're going to hear evidence

1 were previously. You're going to hear evidence about
2 licenses that went ahead and required payments on a
3 per-copy basis.

4 You're going to hear rates of royalties,
5 rates of licenses on a range of 25 cents to 99 cents per
6 copy. And you're going to hear that we're going to be
7 asking for millions of dollars, because that's the value
8 of the property that they took, and that's the value of
9 my clients' property.

10 Now, the Defendants get the last word
11 right now. So what we ask is that after they're done
12 talking, listen to the evidence, and we'll come back in
13 the closing statement to talk about what you've seen.

14 Thank you.

15 THE COURT: Mr. Krevitt, you may proceed.

16 MR. KREVITT: Thank you, Your Honor. I'm
17 going to give Mr. Gasey his script, so I don't get
18 confused.

19 Good afternoon, Ladies and Gentlemen. I
20 represent Red Hat and Novell, as you know by now, the
21 Defendants in this case. We are very excited to be here
22 and to present evidence, and I'm eager to tell you all
23 about Red Hat and Novell.

24 It was, I confess, a bit frustrating
25 listening to Mr. Gasey's opening statement, though.

1 that they make money and that they've been able to build
2 a very, very profitable model by giving away free
3 software. They make hundreds of millions of dollars a
4 year doing this.

5 And how do they do this?

6 They do it by giving away things like my
7 clients' property away for free in order to make a
8 profit. They've trespassed on my clients' property.

9 Once you've gotten in mind how much money
10 they've made, think about how much they've used my
11 clients' property.

12 Now, in the process, you're going to hear
13 evidence where they say, you know, we don't really know
14 how many copies of this software were given away; we
15 don't keep track of it. But the fact of the matter is,
16 they do.

17 As a matter of fact, these folks keep
18 websites that go ahead and track very specific numbers
19 on how many copies of the software are given away. As a
20 matter of fact, if you look at just the numbers up there
21 for one group of the infringing software, you're talking
22 about millions and millions of copies of this software.

23 In the end, we ask you to be fair and
24 consider the value of my clients' property. You're
25 going to hear evidence about what some of the licenses

1 There is so much to this case, so much that the evidence
2 will show in this case that you didn't hear. It's a
3 little like listening to one side of a telephone
4 conversation and having really no sense of the overall
5 story. And so I'm going to give you the rest of the
6 story or at least a sense of what the rest of the story
7 is, and I think you'll see it's very different from what
8 you just heard.

9 And there are some very specific things.
10 Mr. Gasey said that there's a license for 99 cents a
11 copy. There is no such license. There will be no
12 evidence of it, period. Mr. Gasey told you that TLC
13 bought the patents from Xerox. Not true. Xerox gave
14 TLC the patents. They didn't buy the patents from
15 Xerox. And the way they got the patents is they
16 asserted other patents against Xerox. So TLC asserts
17 patents against Xerox, and to make that case go away,
18 Xerox gives them these patents, and you'll see evidence
19 of that.

20 They told you that -- Mr. Gasey told you
21 that Apple recognized the value of these patents.
22 Mr. Gasey didn't tell you that Apple did not take a
23 license to these patents until TLC and IPI sued Apple,
24 and then Apple made a relatively small payment, given
25 the billions of dollars that Apple pays, covering seven

1 years and all of Apple's products. And they did that
2 only after they had been sued and only to make the case
3 go away.

4 So there is an awful, awful lot that you
5 haven't heard, and I'm going to spend a little time now
6 going through what the evidence will show, what we
7 believe the witnesses and the evidence and the documents
8 that you will hear will make very clear to you.

9 First, I want to talk about infringement,
10 and I want to make very clear that the Defendants, Red
11 Hat and Novell, have never used the ideas in these
12 patents, period, and on that question of infringement,
13 the evidence will be clear.

14 Mr. Hill said earlier today that the
15 patents are about workspaces and desktops and switching
16 from one workspace to another, and Mr. Hill said, it's
17 no more complicated than that. It's no more complicated
18 than that. Well, it isn't complicated, but it's a lot
19 more specific than that. That is not what these patents
20 cover. That is not what Xerox invented.

21 Workspaces had been around for years long
22 before these patents. Switching from one workspace to
23 another workspace had been around for years long before
24 these patents, so we're going to demonstrate that to
25 you. These patents are specific.

1 use every day. I confess, I wasn't familiar with almost
2 any of the terms before I started working on this case,
3 but I have a big advantage over you. While you've been
4 on the job for a few hours, I've been involved a lot
5 longer, and I've spent a lot of time thinking about how
6 can we present this to you-all, how can we explain in a
7 simple, straightforward way what these patents cover,
8 what's the property that the Plaintiffs do have, and
9 what's the property the Plaintiffs don't have, what is
10 the scope of the patents, what do they require.

11 And that will help you then apply that to
12 our products. And when you do, when you do that
13 comparison of what the patents actually cover to what
14 our products actually do, as I say, it will be clear
15 there's no infringement.

16 So here's how I think about it, and we
17 encourage you to keep this in mind. It's a relatively
18 simple concept that this case boils down to. The
19 patents don't just cover switching from one workspace to
20 another workspace. The patents require that when you
21 switch from one workspace to another workspace, that
22 there be flexibility and continuity, and we're going to
23 explain these terms. I'm going to talk about them in a
24 moment, and you're going to hear about them in this
25 case, but they're required.

1 Mr. Gasey told you that the claims govern
2 the patents, and he put on a nice graphic that showed a
3 yard and a fence around it. What you didn't see,
4 though, is the actual claims in this case, and when you
5 see them, you'll see they take up a lot of space. This
6 is what the Plaintiffs must prove infringes. Every
7 single word of these claims, the Plaintiffs must show we
8 do.

9 If it were just as simple as switching
10 from one workspace to another workspace and no more
11 complicated than that, it would have taken far fewer
12 words to say it. That's not what the patents claim.
13 It's not what the patents cover. And when you
14 understand -- and we're going to show you this in this
15 case. When you understand what the patents actually
16 cover, what that fence really is, and then you
17 understand what our products do, it will be very clear
18 that our products do not infringe. They simply do not
19 use the ideas in the patents, and that's going to be
20 very important.

21 And you're going to hear a lot of
22 technical terms throughout this trial, and there's going
23 to be some technical experts from the Plaintiffs and the
24 Defendants, both sides, and some of these terms may be
25 terms with which you're not familiar, terms you don't

1 You have to have flexibility between the
2 workspaces, flexibility to arrange things however you
3 want. We'll get into that in more detail. And you need
4 continuity. You need the ability to continue your work.
5 When you move from one workspace to the next, you can
6 continue your work. Those are the requirements,
7 flexibility and continuity, and you've got to have both,
8 and you've got to have them every time, and if you
9 don't, there's no infringement.

10 And as we will demonstrate in this case,
11 our products don't do that. Our products can't do that.
12 That is not possible using our products. There are no
13 display objects. That's a term you heard this morning.
14 There are no things you'll see on the screen that
15 provide both the flexibility and continuity to move from
16 one workspace to the next workspace.

17 And again, I know -- I'm just throwing
18 those terms out, and they may not be sinking in yet, but
19 I want you to keep them in mind because as you hear the
20 evidence, this will assist, I think, in understanding
21 why the patents are real specific and why our products
22 don't do what the patents claim.

23 And the question of property rights is
24 interesting. Mr. Hill asked some questions of the panel
25 earlier this morning. I thought they were interesting,

1 about oil and gas and royalties, and you get -- you get
 2 royalties if someone's using your property, or you have
 3 to pay royalties if you're using somebody else's
 4 property. But here's the key thing. If you're not
 5 using somebody else's property, you don't have to pay
 6 royalties. And if somebody came up to you and said,
 7 hey, you're using my property, I want a royalty. And
 8 you knew you weren't using their property, that would be
 9 pretty frustrating. That would be wrong. It would
 10 certainly be unfair.

11 And then if after you said, well, I'm not
 12 using your property, they just went ahead and sued you,
 13 brought a lawsuit in federal court and asked a jury like
 14 you-all to award them lots of money, millions of
 15 dollars, even though you know you're not using their
 16 property, that would be very frustrating. And that's
 17 exactly what's going on in this case, and we're going to
 18 demonstrate that to you. You won't have to take my word
 19 for it. We're not using their property. We're not
 20 using what the patents claim. We never have. We don't
 21 infringe. That's very important.

22 The other thing that I want to talk about
 23 is that the ideas in the patents are not new. Now,
 24 Mr. Gasey tried to make that sound dismissive, and he
 25 said, you're going to see a parade of defenses. It's

1 burden to demonstrate that, that's our job, we're going
 2 to meet that burden, and we are going to meet that
 3 burden in ways that I think make it very clear to you
 4 that these patents were not new. Others had come up
 5 with the ideas before.

6 And the important thing to understand here
 7 is that you-all have a role when it comes to invalidity.
 8 Mr. Hill emphasized that the government approved these
 9 patents, and of course that's true in the first
 10 instance. But as Judge Rader explained and as you saw
 11 in the video, it's your decision. It's your decision --
 12 not to second-guess. It's your decision whether these
 13 patents are valid or not.

14 And that -- you are a crucial part of the
 15 process. Congress put that power in your hands to
 16 evaluate whether these patents are valid or not. And
 17 here's a critical thing to keep in mind when you make
 18 that determination. The systems that we're going to
 19 show you, the Commodore Amiga, the Macintosh, other
 20 systems were not shown to the patent office. They did
 21 not have the systems.

22 So when you see Dr. Wilson who is our
 23 technical expert, when you see him move around on the
 24 screen the workspaces, and you see they do exactly what
 25 the patents claim, keep this in mind: You're seeing

1 not really that insignificant an issue as to whether
 2 they're entitled to the property at all in the first
 3 place, and we're going to demonstrate that they're not.

4 The patents in this case are not new. The
 5 ideas were done before. That's very important. Long
 6 before the folks that came up with these ideas, putting
 7 aside whether they were good ideas or not good ideas,
 8 others had done it first, and we're going to show you
 9 the systems. We're not just going to ask you to take
 10 our word for it. We're going to bring these systems in.
 11 They will be here in the courtroom. You'll see them,
 12 and you won't just see the systems; you'll see the way
 13 they work.

14 Our expert is going to come up, he's going
 15 to fire up this Macintosh from a quarter of a century
 16 ago, and he's going to show you how workspaces work, how
 17 they move around, and why they do everything the patent
 18 claims. The Commodore Amiga, if it doesn't crash, as it
 19 sometimes does, we're going to show you the same thing.
 20 We're going to show you that those things right here --
 21 no dispute that they were before the patents; that
 22 question is not in dispute. The only question is: Do
 23 these do what the patents claim? And the answer is,
 24 yes, they do, and we'll demonstrate that to you.

25 And so while it is true that we have a

1 something that the patent examiner did not when the
 2 Patent Examiner allowed these patents.

3 So it's not -- we're not arguing that the
 4 patents saw this and made a mistake and asked you to
 5 second-guess it. The Patent Office did not get to see
 6 these systems in operation. And when you do, it will be
 7 clear that these systems do exactly what the patent
 8 claimed, and therefore, the patents are invalid. And as
 9 I say, we will make that clear to you. We understand
 10 that that's our burden.

11 Mr. Gasey emphasized Xerox and the ideas
 12 that Xerox came up with, and of course, we're not
 13 disputing that Xerox came up with some good ideas. It
 14 probably won't surprise you to learn that Xerox came up
 15 with some not-so-great ideas, and that's what we're
 16 talking about here. That's why you've heard of the
 17 mouse, but you haven't heard of the multiple workspaces
 18 before today. Some ideas are great. Some ideas are
 19 less great.

20 And the other thing to keep in mind is
 21 Xerox is not here today. Xerox is not in the room.
 22 Xerox gave these patents away years ago. Xerox is not
 23 the Plaintiff.

24 The Plaintiff is Technology Licensing
 25 Corporation and IP Innovation. And Mr. Hill this

1 morning and Mr. Gasey this afternoon both emphasized
2 that these companies exist to help small inventors, that
3 these companies are designed to work with small
4 inventors to make sure that their intellectual property
5 is protected.

6 That may be true some of the time; I don't
7 know. I really don't, but that has nothing to do with
8 this case. There is no small inventor here. There's no
9 small company here. IP Innovation and Technology
10 Licensing Corporation own these patents, and they're
11 asking you for a lot of money for them, period.

12 And keep this in mind when you hear about
13 those Plaintiffs: They don't really exist as companies
14 in the way we normally think about companies. They
15 don't have any employees. They don't have any products
16 They don't have any -- they don't make products. They
17 don't do research and development.

18 MR. HILL: Objection, Your Honor. We are
19 a corporate entity with legal rights, and for
20 Mr. Krevitt to stand here and to disparage it as if
21 we're some second-class citizen goes across the line.

22 MR. KREVITT: Your Honor, I'll withdraw
23 that comment. I don't mean --

24 MR. HILL: And Your Honor, I would ask for
25 a curative instruction on that. Him simply withdrawing

1 money from my clients as they can. We're going to
2 demonstrate that to you, and that's a fact.

3 And it's not surprising that Xerox would
4 have given these patents away. Mr. Gasey told you how
5 valuable these patents are. Well, Xerox had a different
6 experience. Xerox came up with the patents, developed
7 the ideas, patented the ideas. Xerox had a very
8 different experience than you just heard Mr. Gasey
9 explain.

10 Xerox tried to make a product that used
11 these ideas. The product wasn't successful. Xerox
12 tried to get other companies to take a license to these
13 patents, went out and tried to get other companies to
14 pay them money to use the patents, and you'll hear that
15 didn't work out well for Xerox either. Xerox got three
16 licenses -- three licenses in the 14 years they owned
17 the patents.

18 One license was for \$110,000 to
19 Hewlett-Packard, just \$110,000. Hewlett Packard never
20 made another payment. Another license was from Silicon
21 Graphics, and you'll hear about this. They paid
22 \$95,000. That's it, one time, no more money. And the
23 third license was from a company called Central Point,
24 and there's no evidence at all that they made any
25 payment at all.

1 it after he said those kind of harmful things doesn't
2 do.

3 MR. KREVITT: Your Honor, it's not harmful
4 if they accurately to describe the Plaintiffs. The
5 Plaintiffs have no employees. The Plaintiffs have no
6 products. The Plaintiffs exist to acquire patents and
7 try to get as much money for those patents as they can.

8 THE COURT: We're just setting forward
9 what we're going to talk about. We'll talk about them
10 later.

11 MR. KREVITT: Thank you, Your Honor.

12 MR. HILL: Your Honor, can we discuss the
13 curative instruction?

14 THE COURT: Yeah, we will later.

15 MR. KREVITT: Let me be clear, Ladies and
16 Gentlemen. I'm not here to disparage the Plaintiffs.
17 The Plaintiffs have a right to assert patents that they
18 want to assert, but when the Plaintiffs tell you that
19 their job is to protect small inventors, it's my job to
20 point out that that has nothing to do with what's going
21 on in this case. There is no small inventor here. You
22 won't find them. You won't find her. She's not here.
23 He's not here.

24 This is about companies that have gotten
25 patents from Xerox years ago now trying to get as much

1 So we've got three licenses, one around
2 100,000; another for around 100,000; and one, no payment
3 that anyone can tell. That's what Xerox got, grand
4 total, decade and a half, \$200,000, from all the
5 companies in a world that it wanted to pay licensing
6 revenue. That's what it got.

7 So it gives the patents to IPI and TLC,
8 and IPI and TLC now own the patents and are asserting
9 them against us.

10 One other thing I want to mention, the
11 feature that is accused of infringement in this case has
12 been in Red Hat's products since 1997. Novell's
13 products came later. That's why I'm distinguishing
14 between them. But it's been out there in Red Hat's
15 products since 1997. Xerox owned the patents, remember,
16 up until 2004. Never once in all the times Xerox was
17 trying to get money for these patents, in all the time
18 it wanted people to pay to use the patents, never once
19 did Xerox ever call Red Hat and say, hey, you're using
20 our patents, give us some money, never once contacted
21 them. The reason they didn't is because Red Hat doesn't
22 use the patents.

23 And then even after IPI and TLC get the
24 patents, even after they get the patents in 2004, they
25 don't do anything with them either.

1 MR. HILL: Your Honor, I'm going to object
 2 again. If Mr. Krevitt is going to present evidence of
 3 what Xerox thought on why they did something and that's
 4 truly a preview of evidence -- this is opening
 5 statements, not arguments -- that would be a fair
 6 comment. There's no such evidence of that in the
 7 record, and for him to indicate to the jury that that's
 8 coming is improper.

9 MR. KREVITT: Your Honor, we will present
 10 evidence from which the jury will conclude or infer
 11 everything I'm saying today.

12 THE COURT: Proceed.

13 MR. KREVITT: So what were we talking
 14 about? Xerox licenses the patents, 100,000, 100,000,
 15 zero. Okay. Then IPI and TLC get the patents. They
 16 get them in 2004. They do nothing with them. They
 17 don't call Red Hat. They don't call Novell. You heard
 18 how valuable the patents are. You heard how important
 19 they are. This has been in Red Hat's products, Novell's
 20 products for every single minute they have the patents,
 21 never once call us, never once say, hey, we think you're
 22 using our patents.

23 Now, the patents expired in 2008, December
 24 2008. The patents are gone now. The patents have a
 25 certain term as you all heard in the patent video, and

1 about the patents.

2 And I know that's hard to read, so we're
 3 make that a little easier because there's a few things
 4 in the letter that I think are interesting and want to
 5 point out.

6 First, the Niro firm on behalf of IPI and
 7 TLC identify the patents. Again, there will be evidence
 8 this is the very first time that my clients have ever
 9 heard of the patents. So they identify the patents, and
 10 then they say, we're contacting you to begin
 11 negotiations. We want to start a negotiation about our
 12 patents. We're now identifying them to you for the
 13 first time, and we want to have a discussion about them.
 14 We want you to look at them, and we want to begin a
 15 negotiation.

16 The next thing they say, all within the
 17 same letter, is IPI -- IP Innovation's preference for
 18 settlement. We don't want a lawsuit. That's what they
 19 say, and they say it several times. Our clients prefer
 20 to amicably but promptly resolve all issues through a
 21 settlement rather than through litigation.

22 So they write a letter on October 8, 2007,
 23 and they say, we don't want a lawsuit, we're not
 24 interested in that. We want to begin negotiations.
 25 Then what they do, they also say, we'd very much

1 they have now expired because they were applied for so
 2 long ago. So now IPI and Technology Licensing Corp.,
 3 they have the patents. It's 2004, 2005, 2006, 2007.
 4 They've done nothing with these patents. They've never
 5 called our clients. They've gotten no money for them,
 6 and the patents are about to expire. Remember, they're
 7 expiring at the end of 2008.

8 So what do they do? Well, it's October
 9 2007, and they decide the only way they're going to get
 10 some money is to go after someone, so they decide to go
 11 after Red Hat and Novell, and the way they do that is
 12 interesting. I just want to briefly explain how Red Hat
 13 and Novell learned for the very first time about these
 14 patents.

15 Red Hat and Novell get this letter, and
 16 I'm showing you one to Novell. Just take my word for it
 17 that there is a virtually identical letter to Red Hat,
 18 different address, and it identified the different
 19 product name, but it's basically the same letter. And
 20 they send this, as you can see, on October 8, 2007.
 21 Actually, IPI and TLC don't send the letter. To be
 22 precise, the Niro, Scavone law firm sends the letter,
 23 the same Niro, Scavone firm that represents the
 24 Plaintiffs here at trial. That's who sends the letter
 25 to Red Hat. First time Red Hat or Novell had ever heard

1 appreciate if you'd take the next three weeks, 20 days,
 2 look at these issues. They ask you to do your own
 3 evaluation of the infringement risk. Take a look at the
 4 issues, consider the infringement risks, take a couple
 5 weeks, a few weeks, 20 days, and get back to us, because
 6 after all, we don't want a lawsuit. That's what they
 7 say. That's on October 8, 2007.

8 So what do they do? Well, the very next
 9 day, October 9, 2007, they sue my clients less than 24
 10 hours after contacting my clients by letter. After
 11 raising for the first time these patents; after saying
 12 they want to begin negotiations; after saying they don't
 13 want a lawsuit; after saying take three weeks, 20 days,
 14 take a look at this stuff, do your own evaluation, the
 15 very next day, less than 24 hours, they file a lawsuit
 16 against my clients.

17 My clients learned about this lawsuit,
 18 incidentally from the web. They didn't learn about it
 19 from the Niro firm. They didn't learn about it from the
 20 Plaintiffs. They learned about it when somebody picked
 21 up a lawsuit and called Red Hat and Novell, and said,
 22 well, it looks like you've been sued, which of course,
 23 had come as a big surprise in light of the letter that
 24 Red Hat and Novell had received less than 24 hours
 25 earlier.

1 And the reason, as we will show, that they
 2 did that is they never planned to negotiate, and they
 3 never planned to engage in any kind of discussion. They
 4 knew that the only way they were going to get any money
 5 out of these patents, as they were coming real close to
 6 expiring, was to sue, and that's because the patents
 7 aren't new and the patents aren't useful and the patents
 8 aren't infringed.

9 So they sue our clients, and they hope
 10 that one day -- now we fast forward to today, that one
 11 day a group like you will award them an awful lot of
 12 money, and that's how we get here. That's what we're
 13 doing here today.

14 And so now let's take a look, if I may, at
 15 Red Hat and Novell because the picture you heard a few
 16 moments ago is not entirely accurate regarding Red Hat
 17 and Novell. So I want to describe the companies and
 18 their business in just a little bit more detail.

19 So Red Hat and Novell -- these are clients
 20 of Red Hat and Novell. They didn't know I was going to
 21 do this, but I am so proud to be representing them. And
 22 this gives you a sense of the companies around the world
 23 that use their software. These are Red Hat and Novell
 24 customers.

25 Mr. Gasey, at least to my ears, portrayed

1 It's the kind of computer that has a keyboard and a
 2 screen, and we interact with it as humans.

3 And then there are other computers that
 4 are called servers. This is -- I was not familiar with
 5 this. Let me just take a moment and explain what a
 6 server is. Behind the operations, when you look at the
 7 clients -- the customers that Red Hat and Novell have,
 8 like Wal-Mart, there is massive amounts -- another
 9 customer of the Defendants is the New York Stock
 10 Exchange -- massive, massive amounts of data that has to
 11 be processed every single day.

12 Wal-Mart, for example, every purchase,
 13 every coupon, where the trucks are going, where the
 14 products are coming from, massive amounts of data that
 15 are processed and stored and accessed ultimately, and
 16 that data is stored and processed by these big computers
 17 called servers. They're not computers in your home.
 18 They're not computers that any of us use unless you
 19 happen to have a job in computer infrastructure.

20 This is what they look like, and they
 21 exist in these huge warehouses that are filled with
 22 servers. They're called server farms, actually. And to
 23 give you some scale of this, because this was hard for
 24 me to get until somebody walked me through it, there are
 25 warehouses that are acres and acres big filled with

1 open-source software as this pirated software that you
 2 take this and you just throw it out there. These are
 3 some of the most respectable companies in the world.
 4 Everything from University of Texas and Texas Children's
 5 Hospital, Warner Music Group and Sony and NASA all use
 6 software provided by Red Hat or Novell. My sense is
 7 that if Red Hat and Novell resembled in any way the
 8 companies Mr. Gasey portrayed, these companies would not
 9 do business with them. And as the evidence will show,
 10 Red Hat and Novell do not resemble in any way the
 11 companies Mr. Gasey portrayed.

12 So what do Red Hat and Novell provide?
 13 What is their business? Well, Red Hat and Novell
 14 provide software. They provide software that is used on
 15 computers. They provide many kinds of software, but
 16 chiefly they provide operating systems, at least chiefly
 17 as relevant for today. They provide operating systems.
 18 Operating systems, you'll hear, are the brains of the
 19 computer. They're the software that lets a computer do
 20 all the things a computer does.

21 And one thing I want to point out is that
 22 there are two kinds of computers, and this will be
 23 relevant in this case. I just want to identify it now.
 24 There are desktop computers, and those are the kinds of
 25 computers that you see there or maybe you have at home.

1 these computers. And because people don't interact with
 2 them, because they're really just to store information
 3 and to process information, they're often underground.
 4 The server farms can be underground. They can be out in
 5 the desert, and they can be huge.

6 One customer you'll hear about has a
 7 server farm that is 16 acres big, just to give you some
 8 sense of that. Maybe you-all can process that in your
 9 head. I couldn't. So to give you some sense of that,
 10 that's if you took Cowboys Stadium in Dallas and cleared
 11 it out, took out all the seats, took out all the
 12 concession, and just kept the shell of Cowboys Stadium
 13 and then filled it up with computers, not the kind of
 14 computers we look at, but these kind of computers, the
 15 whole thing, not just the outside, but the everything,
 16 and then buried it underground, you'd have a sense of
 17 what a server farm is like.

18 And the reason this is important is
 19 because 90 percent of the customers of Red Hat and 90
 20 percent of the customers of Novell use their software on
 21 servers. So we have desktop products, as you'll see,
 22 that are used on desktops. About 10 percent of our
 23 products are used on desktops, which is why when the
 24 whole jury pool was asked, have you ever heard of Red
 25 Hat, nobody raised their hand. And when the jury pool

1 was asked, have you ever heard of Novell, one person
2 raised their hand and was wrong.

3 And that's because while you all heard or
4 may have heard of Windows, a Microsoft operating system
5 and the way that works, these are not generally designed
6 for the desktop. They're not designed for you-all to go
7 and buy them. They can be used for that, but it only
8 accounts for, as I say, a small portion of the use that
9 our customers make of them and very little at-home usage
10 for companies that use this on various desktops within
11 their companies. So that's the difference between
12 desktop and server software.

13 Now, Mr. Gasey talked about open-source
14 software, so I need to talk about it a little bit
15 because it is different. Red Hat and Novell are
16 open-source companies, and I want to explain to you what
17 that means. There are two kinds of software, again, at
18 the highest level. One is proprietary software, and one
19 is open-source software.

20 What proprietary software is -- what that
21 means is that one company -- take Microsoft. We spent a
22 lot of time talking about Microsoft today, probably to
23 the consternation of my clients, but take Microsoft, for
24 example. Microsoft is a proprietary software company.
25 What that means is Microsoft has a lot of engineers, and

1 free can see all of the source code of my clients'
2 products. Everyone can see it for free. There are no
3 secrets, and that's very important.

4 So why would a company operate in this
5 environment? Why would a company operate where nothing
6 that they provide is secretive. Here's why.

7 Open-source is built on what used to be a revolutionary
8 idea, a new idea, and now, as you can see by the
9 customers that we have, is no longer such a new idea.
10 And that is, if everyone around the world, if all of you
11 and all of these smart people and people in Europe and
12 people in Asia, if everyone can see the code and
13 everyone can make changes and suggestions, folks sitting
14 in their basements or in their kitchens, people that are
15 computer engineers, people that are just really smart
16 17-year-old kids, if everyone around the world can look
17 at the source code, tear it apart, criticize it, suggest
18 improvements, every single day around the world,
19 millions, millions of open-source software engineers are
20 making changes and improvements to the software.

21 The idea is that if you operate in that
22 environment where everything is open and available and
23 everyone can be making changes and improvements, you'll
24 wind up with the very best ideas. You'll wind up with
25 the best software because you will harness, not just

1 they're really smart, and they work at Microsoft, and
2 they try to come up with a product, a software product,
3 and it's secret. It's like the recipe for Coke.

4 You can't see -- you can use Microsoft
5 products, but you can't see the source code. You can't
6 copy it. When you click, I accept the terms of this
7 software, if you've ever done that, I don't know if
8 you've ever read it -- a lot of people don't -- but one
9 of the things it says is you can't copy it. You can't
10 make a copy for your friends and distribute it. That's
11 not permitted. And the source code, the actual
12 underlying code, which you'll hear about, is secret.
13 Nobody can get access to it.

14 So Microsoft builds the code, controls the
15 code, develops it, and then it sells it to you. So if
16 you want Microsoft's Windows system, you have to buy it.
17 It may come on your computer when you buy that, but you
18 have to buy it. And when you want another copy of it,
19 you've got to buy another copy of it. That's
20 proprietary. That's one model.

21 Open-source is entirely different. There
22 are no secrets with open-source software. The
23 underlying source code, what some companies like
24 Microsoft consider the crown jewels is freely accessible
25 and knowable to everyone. Everyone immediately and for

1 really smart engineers at Microsoft, however many there
2 are, but the whole world. So Red Hat and Novell has
3 really really smart engineers too, but they also get the
4 benefits of you and all these folks and everyone else
5 around the world that make changes to the open-source
6 software.

7 And the other thing to keep in mind about
8 the open-source software is this. All of Red Hat and
9 Novell's products are free. They don't charge a dime
10 ever. There are no exceptions to that.

11 Now, Mr. Gasey put a slide up from a quote
12 from an executive at Red Hat that said Red Hat
13 contributes only 20 percent of the software and the
14 Linux kernel, and we'll explain those things. Mr. Gasey
15 actually turned that on its head. That's a really cool
16 thing that Red Hat contributes 20 percent, and here's
17 why.

18 The open-source software, remember,
19 everyone around the world is contributing, everyone
20 around the world is making changes. So you would think
21 one company would not be in a position to contribute
22 fully one fifth of all the software that is included in
23 the open-source Linux software, and we'll explain that.
24 But Red Hat does that because of the smart engineers
25 that work at Red Hat. Novell also makes dramatic

1 contributions -- and you'll hear about this -- to the
2 open-source software.

3 So you have Red Hat's contributions, and
4 you have Novell's contributions, but you also have all
5 the contributions from everyone around the world. And
6 we put this here just because I like the quote, but it's
7 the idea upon which open-source is based: Nobody is as
8 smart as everybody. No matter how smart, no matter how
9 educated, no matter how brilliant a company you have,
10 you can't be as smart and educated and as brilliant as
11 everyone around the world. That's how open-source
12 works.

13 How does open-source make money? How does
14 a company like Red Hat and Novell make money, you may be
15 asking, if we give everything away for free? We're
16 making money somehow. The way we make our money is for
17 our products -- you saw them in here earlier -- for our
18 products, we sell subscriptions. You don't need to buy
19 a subscription. Let me be clear. It's not just another
20 way to get money. All our products are free, period.
21 You don't need to do anything with a subscription.

22 But if you want technical support, if you
23 want services, if you want certain updates, certain
24 certifications, then you can take a subscription, and
25 Red Hat and Novell provide that, and they provide

1 code, we get the benefit of more people reviewing and
2 improving it. That's open-source; that's how it works.

3 So the White House is having its software
4 freely available, everyone can look at it on the theory
5 that if you've got lots of really smart people looking
6 at the software, they're going to make improvements and
7 make it better and better. And it's not just the White
8 House. Let's look at the next one, and there are many
9 many, so I'll stop after this, I promise.

10 This is the Department of Defense from
11 October of last year in a memorandum to the Secretaries
12 of the military departments, the Chairman of the Joint
13 Chiefs of Staff, Undersecretaries of Defense, lots of
14 other folks you see up here. And as you can see right
15 in the beginning -- this is right in the beginning of
16 the memo -- to effectively achieve its missions -- we're
17 talking about the missions of the Department of Defense
18 of the United States of America -- to effectively
19 achieve its missions, the Department of Defense must
20 develop and update its software capabilities faster than
21 ever to anticipate new threats and to respond -- and
22 respond to continuously changing requirements. The use
23 of open-source software can provide advantages in this
24 regard. So you've -- whatever you think of the White
25 House and whatever you think of the Department of

1 services to you. That's how Red Hat and Novell make
2 money, selling those kinds of subscriptions. Never sell
3 their software to anyone ever, completely free. You-all
4 could, as Judge Rader said, not during this trial, but
5 when this trial is over, you-all could go to Red Hat's
6 website, you-all could go to Novell's website, and
7 download their software immediately and for free.

8 And I want to now show you also, when we
9 talked about open-source and there was the suggestion --
10 maybe it was just to my ears -- that this was some
11 inappropriate business method because things are just
12 taken and distributed for free, not only do all of those
13 customers that you saw a moment ago use open-source
14 software, use Red Hat and Novell software, but lots and
15 lots of government agencies too and government agencies
16 you-all have heard of.

17 So let's look at the White House, for
18 example. On Tuesday of last week, six days ago, the
19 White House issued this press release. And as you can
20 see, it's talking about open-source, and it's talking
21 about open-source in exactly the way I talk about
22 open-source today. It says, this code is available for
23 anyone to review, use, or modify. We are excited to see
24 how developers across the world put our work to good use
25 in their own applications. By releasing some of our

1 Defense, here they are telling you how important
2 open-source software is to them and how important and
3 valuable it is as a means of improving software for
4 everyone.

5 So that's open-source software. If we
6 just look at our products very quickly. These are our
7 products. I just want to go ahead and define them so
8 when you hear the names, you can have it in your mind.
9 The red ones, as you can guess, are the Red Hat
10 products. Novell's products are on the right in the
11 white boxes. They are called Red Hat Linux Server, and
12 that's the Red Hat software for servers. Red Hat Linux
13 Desktop, that's the Red Hat software for Desk Tops.
14 These are sometimes abbreviated as RHEL. We'll explain
15 why it's actually Red Hat Enterprise Linux.

16 And Novell's SUSE Linux Enterprise server,
17 Novell's SUSE Linux Enterprise desktop. Those are the
18 different software products that these companies
19 provide. 90 percent of the customers, as I said
20 earlier, are server products. These are the products,
21 always free. The only thing we sell, and you don't need
22 to get it, is a subscription, as I said a moment ago.

23 Now, we do have -- and I want to put those
24 up on the screen because you're going hear these names
25 too. Red Hat and Novell -- and we'll explain this in

1 more detail in this case -- need a way, with all of this
 2 software out there, all of this open-source software --
 3 there's, as I said, millions of programmers, thousands
 4 and thousands of different options -- Red Hat and Novell
 5 need a way to get from all of that software that's out
 6 there floating around, some good, some bad, some great.

7 How do you get from that to the small
 8 number of packages, the small number of features that
 9 they're going to put in their products and ultimately
 10 sell -- not sell, of course, distribute, excuse me, and
 11 sell subscriptions for -- and you'll hear about these.
 12 These are their research and development projects. It's
 13 Fedora for Red Hat, openSUSE for Novell. These are
 14 their research and development projects. They're called
 15 proving grounds often. The way these work is these
 16 are -- one way to think about it is training camps.

17 Novell and Red Hat take lots of different
 18 software, a lot more than will ever wind up in their
 19 products. They put it all together in Fedora for Red
 20 Hat or openSUSE for Novell, and they distribute that.
 21 And they say to folks, work on this software, look at
 22 it, test it, use it, play around with it, give us your
 23 ideas. And based on the way people use it, based on
 24 whether it's good or bad, it's helpful or not, based on
 25 the way it works with each other, whether it needs

1 products do, you'll understand there's no infringement.
 2 So let's talk about these patents. What
 3 do they cover, what do they relate to? Here's what they
 4 relate to. They relate to workspaces and display
 5 objects. You heard that. And if you look at Figure 1A
 6 and 1B of the patent, and we'll use those because
 7 Mr. Gasey used them, so you'll have a frame of
 8 reference. These are workspaces as that term is used in
 9 the patent. These are workspaces, the whole box.

10 There's one workspace in Figure 1A,
 11 another workspace in Figure 1B. Each of the items on
 12 the workspaces are called display objects. Obviously no
 13 computer screen really looks like this. This is a
 14 picture to try to help you understand what the patents
 15 cover. So you have workspaces, and you have your
 16 display objects, but as I said at the outset and as
 17 you'll hear -- I apologize in advance -- numerous times,
 18 the inventors did not develop or come up with the idea
 19 of just having the workspaces and different display
 20 objects. The patents are much more specific than that.

21 So what did the patents -- what do they
 22 disclose? What did the inventors come up with? They
 23 came up with a way to go from one workspace to the other
 24 workspace with this flexibility and continuity that I
 25 mentioned earlier. So we're going to talk about that

1 further development, they take out from the research and
 2 development projects some of the software that will wind
 3 up in their products. So the products are the ones that
 4 were in the boxes on the previous slide. These are, as
 5 you'll hear, their research and development projects,
 6 Fedora and openSUSE.

7 So now let's look -- we can shift gears to
 8 the patents, and I know you're going to hear a lot of
 9 evidence, and you're probably eager to do that, but
 10 Mr. Gasey talked about the claims and the property line.
 11 He actually never walked through a claim, and I think
 12 that's because when you see a claim, you realize there's
 13 a lot of limitations and it's easier to do what
 14 Mr. Gasey did, which is just sort of tell you that our
 15 products have what the claims require.

16 What I want to do is walk you through what
 17 these patents actually relate to, and I'm going to try
 18 to do it -- I'm going to try my best to do it in a way
 19 that's simple and straightforward. There will still be
 20 stuff that won't make perfect sense, and that's my
 21 fault, but hopefully when you hear this and hear the
 22 evidence, it will make some sense to you. And
 23 particularly, because when you understand, as I said
 24 earlier, what the products do and then, excuse me, what
 25 the patents cover and then you understand what our

1 now.

2 Keep in mind, as Mr. Reiter said earlier
 3 today, these patents were applied for in 1987. The
 4 world has changed a lot since 1987. Since Ronald Reagan
 5 was in office, the world has changed a lot, in no way
 6 more than with technology. I don't know about you, I
 7 didn't have a cell phone in 1987. I didn't have a
 8 computer at home in 1987, and now cell phones at least
 9 are basically everywhere. So the world has changed an
 10 awful lot.

11 But in 1987, computer screens were really
 12 small. Keep that in mind. And we're going to show you
 13 some of the computer screens. You'll see the Macintosh,
 14 and you'll see how small it is compared to these huge
 15 screens that we have in front of us today, and that's
 16 important. Keep that in mind; you had these small
 17 computer screens. And the inventors came up with this
 18 idea it'd be cool if you could have essentially more
 19 than one computer screen for different tasks. So maybe
 20 you want one computer screen, which is called a
 21 workspace for your word processing, to use Mr. Gasey's
 22 example, so you might want to set up a workspace that is
 23 especially designed to be helpful for your word
 24 processing. And you may want to set up a different
 25 workspace in a different way that may be helpful for

1 your browsing the Internet or doing e-mail or whatever
2 it is.

3 So you want to have multiple workspaces,
4 let's say two for the moment. Go back to 1A and 1B.
5 You have -- so you have multiple workspaces, and you
6 have display objects on them, but what the inventors
7 came up with is first the flexibility to arrange your
8 workspaces any way you want. That's the first thing to
9 keep in mind, the flexibility to arrange the real estate
10 in that small screen, to allocate it any way you want.
11 You see that here again in the stylized way with Figure
12 1A and 1B.

13 So the example up there, you have a, b, c,
14 d; we'll call that the word processing program that
15 Mr. Gasey did. And as you see in 1B, this user has set
16 up the workspace differently. That's you setting up
17 your workspaces in advance. You're not working on them
18 yet. You're setting them up for a particular task, and
19 you can move them around. You can change the shape.

20 You can look at a, b, c, d -- it's a
21 smaller shape. It's in a different position. You could
22 arrange the workspaces any way you want. You have the
23 flexibility to arrange these display objects any way you
24 want. That variable is the first thing. That's the
25 flexibility part to arrange the workspaces any way you

1 b, c, d there, and that's because you can continue your
2 work, flexibility to arrange them however you want,
3 continuity to let you continue your work. So hopefully
4 that was clear, but we have an example, and I'll go
5 through it quickly.

6 Let's say you have one workspace -- and of
7 course this is just a mock-up -- and you say I want to
8 have a word processing workspace. So what do you do?
9 Well, you put your word processing program -- that would
10 be big -- but you also want access to the internet,
11 because sometimes you're doing a document or you're
12 working, you want to be able to do shopping and you want
13 your calendar.

14 So this is how you arrange your first
15 workspace. You're going to set it up. You're going to
16 allocate your resources on your first workspace in this
17 way, but then you want a second workspace because,
18 again, you want different workspaces that have different
19 tasks, so you can switch to them so it is optimized,
20 most efficient for a particular task. We call this one
21 the internet workspace for no good reason.

22 If you were to set up an internet
23 workspace, you'd have the internet, and that would be
24 big, and you'd put that in the center because you're
25 going to use that a lot, and then you have your calendar

1 want. And when you arrange this workspace, it doesn't
2 affect how you arrange that workspace.

3 But the next thing the inventors wanted to
4 include -- and this is in the claims, as you'll see --
5 is, as Mr. Gasey said, you need to be able to continue
6 your work. So when you go from your one workspace to
7 your next workspace, you don't want to lose everything
8 you were just doing. Maybe you want to continue doing
9 some of the things you were doing in your first
10 workspace.

11 So you see that with the a, b, c, d. You
12 have a, b, c, d, and although you've changed the size,
13 you've changed the location of the word processing
14 program in 1D and you've arranged them differently, you
15 can continue your work. And that's why they have the
16 same letters.

17 The patent explains that that's supposed
18 to show that you can continue your work. That's the
19 continuity, the flexibility to arrange them however you
20 want and continuity to continue your work from one to
21 the next. And because of that continuity, you recognize
22 the display objects as the same tool. We'll explain
23 what that means as we go through here.

24 But if you see a, b, c, d, you don't have
25 any problem recognizing that as the same tool as the a,

1 and your document. So you have two workspaces, and you
2 fill them both up.

3 You see, of course, that you have the
4 flexibility to arrange them any way you want; they're
5 arranged differently, and you have the continuity,
6 though -- you probably can't tell, but this is supposed
7 to be and, in fact, is exactly the same as what's in
8 that document.

9 So when you switch from -- here's where
10 you're working on your document, and then you want to
11 switch over and do some shopping on Toys "R" Us, but you
12 want your document available to you because that's how
13 you set up your workspace, and you want to be able to
14 continue your work. You have a brilliant idea you want
15 to add to your document. You don't have to go back to
16 the first workspace.

17 So that is the flexibility and
18 continuity -- and I know I keep using those words, but
19 it really does boil down -- the essence of these patents
20 boils down to those two concepts, and as I said at the
21 outset, you've got to have them both.

22 Flexibility isn't enough, just to arrange
23 workspaces differently, and continuity isn't enough, and
24 the inventors made clear the key part of the patent was
25 this flexibility of arranging the workspaces. You've

1 got to have both. You've got to have them every time.
 2 You've got to have this flexibility and
 3 continuity, and we don't. We can't. Our products do
 4 not have flexibility and continuity ever. There are no
 5 display objects. That's just a term out of the patent;
 6 that's why I'm using it.

7 In our products that have flexibility and
 8 continuity, you cannot, using our products, set up two
 9 workspaces and arrange them differently however you
 10 want -- that's the flexibility part -- and also go from
 11 one workspace to the next workspace and continue your
 12 work. There are some things that we have flexibility
 13 and some that we have continuity to some limited extent,
 14 but the patents require both. You've got to have both,
 15 and you've got to have them every time, and we never
 16 have them.

17 And as a consequence -- and this will be
 18 clear to you throughout this case -- as a consequence,
 19 our products cannot infringe. We are not within that
 20 fence on Mr. Gasey's slide. We're next door, we're down
 21 the street, we're in another city. We are not on the
 22 patent's property. We do not do what the patents claim,
 23 and because of this no flexibility and no continuity,
 24 because we don't do what the patents claim, there can be
 25 no infringement.

1 server farms.

2 So you have a situation where 90 percent
 3 of our customers don't even use our software with
 4 displays, and displays are a requirement of every single
 5 claim in this case. There can be no infringement
 6 without displays. No displays, no infringement.

7 Now let's talk quickly about invalidity,
 8 and I know I mentioned that at the outset, and not
 9 surprisingly, Mr. Gasey emphasized that it's our burden
 10 to show invalidity, and that's right. And we will show
 11 it clearly. To use Judge Rader's language, we will
 12 provide clear and convincing evidence, very clear, very
 13 convincing evidence, that the patents are invalid. We
 14 just had them on the screen here some and showed you
 15 earlier.

16 We're going to have Dr. Wilson, as I
 17 mentioned, come in and demonstrate the Macintosh,
 18 demonstrate the Amiga. These things were not before the
 19 patent office. These systems were not shown to the
 20 patent office. So when the Examiner sitting at that
 21 desk that you saw in the video working hard to figure
 22 out whether these patents should be allowed or not in
 23 the first place, the Examiner did not have what you will
 24 have, which is these systems. The Examiner did have
 25 documents, did have some descriptions, and you'll see

1 You can't do 1A and 1B. In its essence,
 2 that's what the case boils down to. You cannot do --
 3 this is right out of the patents. With our products,
 4 you can't do it. That's what the patents show. In our
 5 products, you can't do it. So there's no infringement,
 6 and we will demonstrate that to you. Mindful, of
 7 course, that it's their burden to prove infringement, it
 8 will be clear that there's no infringement in this case
 9 based on the evidence.

10 There are numerous other reasons we don't
 11 infringe these patents. I don't want to get into those
 12 in any detail because I don't want to try your patience
 13 any more than I already have or will continue to as I
 14 move on to other topics. But I just want to mention
 15 one, and that is every single claim requires a display.
 16 Every single claim in this case requires a display. A
 17 display is just a computer screen, a monitor. It's what
 18 you all are thinking of when you hear the word, display.

19 We provide software; you heard that
 20 earlier. We don't provide displays ever. We never
 21 provide displays; we provide software. And what's more,
 22 when our customers use our software, this is why I
 23 mentioned a couple times the 90 percent. When the vast
 24 bulk, and I mean the vast bulk, of our customers use our
 25 software, they do so in these displayless, no-display

1 that. He didn't have the actual systems, wasn't able to
 2 see what Mr. Gasey showed you when he tried to show
 3 infringement.

4 When Mr. Gasey showed you our product to
 5 try to make you think there's infringement, he didn't
 6 show you a manual. He didn't say, here's a technical
 7 manual from Red Hat. He showed you the system. He
 8 showed you what it looks like. That's because he knows
 9 that's necessary. It's going to be necessary for us,
 10 and it will be sufficient when you see how the systems
 11 work, something the Examiner in this case did not see.
 12 So keep that in mind when you hear the evidence, that
 13 the systems you will see, the systems you will see in
 14 operation, were never shown to the Examiner. You will
 15 see those for the first time.

16 So the Apple MacIntosh Switcher -- I'll
 17 just mention that one briefly. As I said, that's been
 18 around since the mid '80s, and that had a program called
 19 Switcher, and as the name suggests, it was a program to
 20 switch from one workspace to another workspace. And you
 21 will see that it has all of the elements of the claim,
 22 the Apple Switcher product does.

23 We're also going to show you the Amiga and
 24 other prior art. And when you see that -- and when you
 25 again keep in mind that no one else, meaning not the

1 Examiner saw that -- you'll understand why these patents
2 are not new, why these patents should not have been
3 allowed.

4 Finally, on invalidity, Mr. Gasey referred
5 to this inventorship issue, whether the right inventors
6 were named or not. And Mr. Gasey had a graphic, I
7 think, of the three inventors sitting on a puzzle or
8 something, which made it look like they were all
9 together, fit nicely in a puzzle together with some
10 lights going back and forth and a light bulb or
11 something.

12 The evidence in this case will show that
13 one of the inventors, Mr. John Maxwell, never worked
14 with the other inventors, period. That's what the
15 evidence is going to show. He did not collaborate at
16 all with the other inventors on these patents. That's a
17 big deal because, as Mr. Gasey said, as Judge Rader
18 instructed, if there is no collaboration among
19 inventors, the patent is invalid. And here we will show
20 you that there was no collaboration among the inventors;
21 you will see that evidence.

22 And a very important thing which is
23 similar to the prior art, there was no way for the
24 Examiner, for the patent office to know that. So it's
25 not a technicality that the patent office thought about

1 period in this case is 14 months, just over a year.
2 Judge Rader will instruct you on the law and how we get
3 to those 14 months, but take my word for it, there is no
4 dispute in this case, none, that the damages period is
5 14 months, from when they sued us in October of 2007 to
6 when the patents expired in December of 2008, period.
7 14 months; that's it.

8 And the other thing to keep in mind is
9 what Judge Rader said, which is the purpose of damages
10 is to compensate the Plaintiff for our use. If you were
11 to determine that we used the patents, what would a
12 reasonable compensation be? Both damages experts will
13 explain that the way you normally think about that is if
14 we had sat down with the Plaintiffs, Red Hat and Novell
15 had sat at a conference table with the Plaintiffs and
16 tried to hammer out a deal to use these patents for 14
17 months, how much would we have paid? What would have
18 been a reasonable amount to pay?

19 And so how should you think about that?
20 How should you think about damages? Well, I think you
21 will see in this case that the best evidence of what it
22 would be reasonable for us to pay is what others paid.
23 That's just common sense. When you buy a car or a TV, a
24 cup of coffee, anything, you want to be charged what
25 other people are charged for the same TV, the same car,

1 and said, well, not a big deal, we'll let this patent
2 alone. There was no way for the Patent Examiner to know
3 that.

4 We discovered it because in the course of
5 the litigation, you're allowed to take the depositions
6 of people, and we deposed Dr. Henderson who is here, and
7 we deposed John Maxwell, about whom you'll hear. And we
8 deposed other people, and you'll hear what they said at
9 their depositions, and you'll judge for yourself whether
10 there's any ambiguity when they say, we did not
11 collaborate together. And as a consequence, the patents
12 are invalid. We'll demonstrate that to you.

13 And finally, I want to address damages.

14 We don't think you're going to have to
15 reach damages in this case. The patents are not
16 infringed. The patents are invalid. As a consequence,
17 the Plaintiffs are not entitled to any damages at all.
18 So I'm somewhat hesitating to address damages at all
19 because I don't think you're ever going to get to it. I
20 don't think you should get to it, but you've heard
21 something about it, and I want to give you a preview of
22 what the evidence will show in this regard because it
23 will very clearly paint a different picture.

24 Here's something you didn't hear from the
25 Plaintiffs that I want you to keep in mind. The damages

1 the same cup of coffee. You don't want to be told that
2 Joe who is here 10 minutes earlier paid five bucks for a
3 cup of coffee, but for you it's 150 bucks. That would
4 be unfair; that would be unreasonable. Everyone would
5 think that's crazy.

6 As you will see in this case, that's what
7 the Plaintiffs are asking for. They are asking for
8 much, much more money than others have paid to use these
9 patents. They are asking for almost 40 times more for
10 Red Hat alone than others have paid for these patents,
11 40 times more.

12 The other thing they're doing is not only
13 are they asking for much, much more money, they are
14 asking for much, much more money to use the patents for
15 much less time. So the other parties that took
16 licenses -- and we'll walk through these -- and paid
17 much less money got to use them for 14 years, much less
18 money, got to use them for 14 years. The Plaintiffs are
19 asking for much more money, millions of dollars for us
20 to have used the patents for 14 months.

21 So Dr. Jon Putnam, who's our damages
22 expert will be here, and Dr. Putnam has a Ph.D. in
23 economics, and he's got lots of fancy charts and ways to
24 explain why that doesn't make any sense, but you don't
25 need a Ph.D. in economics to know that it is unfair to

1 demand, it is unfair to ask a jury to award much, much
2 more money, 40 times more money to use something for
3 much, much less time, about a tenth of the time. So
4 don't take my word for it. Let's look at a couple of
5 the licenses quickly that you're going to see.

6 Hewlett-Packard took a license in 1994
7 from Xerox. Mr. Gasey said that Hewlett-Packard
8 recognized the value of this technology. This is what
9 Hewlett-Packard actually did. It took a license for 14
10 years and paid \$110,000, not another dime ever. That's
11 what Hewlett-Packard paid.

12 Next, Central Point took a license from
13 Xerox, because that's who owned the patents at the time,
14 in 1994, and there is no evidence -- we have a question
15 mark because we're not positive, but there is no
16 evidence that Central Point paid anything, another
17 license, another 14 years, no evidence of any payment.
18 So we'll put that as a zero question mark.

19 Next, Silicon Graphics takes a license.
20 They take a license a year later, so it's for 13 years,
21 and they pay one payment, lump sum, all in, \$95,000. So
22 the best evidence -- and you'll hear this from the
23 witnesses in this case -- of what a reasonable damages
24 award is what did others pay. What did others pay to
25 get to use these patents for -- and how much time did

1 i-touches and iPods and iPhones, and they make billions
2 of dollars doing it. And they got a license for seven
3 years for \$1.25 million dollars. That's the only other
4 license.

5 Our damages period is 14 months, as I said
6 several times, and if we were to forget entirely the
7 fact that Apple makes much, much, much more money than
8 my clients and we were to ignore all of that and the
9 fact this license covered all of Apple's products and we
10 looked just at the time, the 14-month period would
11 produce a damages award of about \$200,000. So you see a
12 pattern there, 110,000, 95,000, 200,000, and one of
13 these things is not like the other when you understand
14 what Plaintiffs' damages award is -- demand is in this
15 case. Millions of dollars, they're going to ask you to
16 award.

17 So all of the evidence will show with
18 respect to damages what we hope will just be common
19 sense. It is unreasonable, not fair, to ask to be
20 awarded so much more money, 40 times more money for so
21 much less time, about a tenth of the time, as I've said
22 earlier.

23 And so in the end, Ladies and Gentlemen,
24 you're going to hear, be subjected to lots of witnesses,
25 lots of evidence, and I hope you'll keep these things in

1 they get to use it? It's like a rental car agreement,
2 right?

3 So you ask two questions. How much did
4 somebody -- how much are you going to charge me per day,
5 and how long do I get to rent it? It would certainly be
6 unfair if somebody tried to charge you to rent a car
7 much more money for one day than they charged somebody
8 else to rent the same car for a month. That's what's
9 happening in this case. These are the actual licenses.

10 This is the evidence. The only other license -- there
11 is only one other license. In the entire two-decade
12 life of these patents, there was only one other license.

13 IPI entered into a license with Apple.
14 You heard about that earlier. Apple took a license that
15 covered seven years. Our damages period is 14 months.
16 That is six times the length of our damages period. So
17 Apple takes a license for a seven-year period, which is
18 six times the length of our damages, period, and Apple
19 pays a million and a quarter. Keep in mind IPI had to
20 sue Apple to get them to take the license. So earlier,
21 you heard Apple recognized the value. Apple made a
22 payment to make IPI go away, having been sued.

23 This license covered all of Apple's
24 products. I don't know how much you all know about
25 Apple's products, but they sell Macintosh computers and

1 mind, and I hope that in the end, I'll be able to have
2 kept my promise and demonstrate very clearly that the
3 patents are not infringed, we never used them ever, and
4 that the patents are invalid. The ideas are not new.
5 They should never have been allowed in the patent office
6 in the first place.

7 Thank you very much. We appreciate your
8 patience, and my clients, my colleagues appreciate your
9 time this week very much.

10 If you'll indulge me, there is one person
11 I did want to introduce, my colleague, Mark Lyon, who
12 wasn't here this morning, and you'll be hearing from him
13 as well today. Thank you.

14 THE COURT: Ladies and gentlemen, let's
15 take 15 minutes, and then we'll come back and hear our
16 first evidence.

17 (Jury out.)

18 THE COURT: Let's take a second. We had
19 two issues that came up there.

20 One had to do with characterizing the
21 Plaintiff. Mr. Krevitt, you came close, but I don't
22 think you crossed the line. I don't want disparaging
23 comments. I think you can characterize the facts and
24 point out what is the character or the nature or the
25 description of the Plaintiffs in this case. That should

1 not be disparaging. I think you approached that line,
2 but don't cross it, or I will sustain an objection in
3 the future.

4 The second point was whether or not you
5 will present evidence. That, we'll just have to hold in
6 abeyance, won't we? If he presents evidence, then he
7 will have presented evidence. If he doesn't present
8 evidence, at that point, I will give some kind of
9 instruction to the jury that you may recall there was a
10 comment about something to be provided, and in the
11 Court's estimation, it hasn't been provided so you
12 should disregard any comment to that effect.

13 MR. HILL: Thank you for that
14 consideration, Your Honor.

15 THE COURT: So that's my thoughts on our
16 two issues that arose. Any further comments, Mr. Hill,
17 Mr. Gasey?

18 MR. HILL: It's not a comment, Your Honor,
19 and I just want to ask the Court's preference. I'd
20 prefer this be done in front of the jury. Some do not,
21 but we plan before the commencement of evidence to
22 invoke Rule 615 for the exclusion of witnesses other
23 than experts. Until that --

24 THE COURT: Why don't we do that -- that's
25 something they can hear. Do you feel differently?

1 THE COURT: Okay. I'll trust you. Why
2 don't we take 10 minutes, and then we'll come back and
3 we'll be ready for the jury.

4 (Recess.)
5 (Jury in.)

6 THE COURT: Thank you. Let's -- are you
7 ready to proceed, Mr. Hill?

8 MR. HILL: Yes, Your Honor, we are.

9 At this time, Plaintiff would invoke Fair
10 Rule of Evidence 615 for the exclusion of witnesses
11 prior to the time of their testimony. We'd ask the
12 Court to exempt expert witnesses as well as witnesses
13 once they have testified.

14 THE COURT: Okay. Let me just explain
15 very quickly. Under the rules in federal courthouses,
16 fact witnesses do not remain in the courtroom to hear
17 each other testify. Anyone who's testifying about facts
18 step out of the courtroom when other witnesses are
19 testifying except, as Mr. Hill suggested, if there are
20 expert witnesses, they're offering opinions, so it's not
21 fact, and also if they have already testified, they can
22 remain too. So you'll sometimes see witnesses leave the
23 courtroom just before others testify, and you'll see
24 other witnesses come in. That will explain a little
25 what's going on.

1 MR. REITER: Well, I just wanted to make
2 it clear that our corporate representatives, I believe
3 under the rules, are permitted to be here --

4 THE COURT: Well, of course.

5 MR. REITER: -- even though they may be a
6 witness.

7 THE COURT: That's -- we all understand
8 that.

9 MR. HILL: We have no quarrel with that,
10 Your Honor.

11 THE COURT: I'll just -- I'll say that
12 it's customary in federal court rooms fact witnesses do
13 not listen to each other's testimony, and so we'll ask
14 some witnesses to leave when certain fact witnesses are
15 on the stand. The same rule doesn't apply to experts.

16 MR. HILL: That was our request, Your
17 Honor, that exemption be provided for experts and then
18 also that witnesses be excused from the rule once they
19 have testified.

20 THE COURT: I've only been burned on that
21 once where they wanted to call them later. Remember,
22 those sorts of things can happen.

23 MR. HILL: I will commit too, Your Honor,
24 that if we keep them in the courtroom, we won't call
25 them again.

1 Mr. Hill, would you start your case.

2 MR. HILL: Thank you, Your Honor. At this
3 time, the Plaintiff would call Dr. Austin Henderson.
4 Mr. Gasey will be presenting him as a witness.

5 THE COURT: Thank you. Please take a seat
6 over here.

7 Mr. Gasey, would you care to inquire?

8 MR. GASEY: Thank you, Your Honor.

9 AUSTIN HENDERSON, JR., PLAINTIFFS' WITNESS, SWORN
10 DIRECT EXAMINATION

11 BY MR. GASEY:

12 Q. Could you please state your name, sir.

13 A. Dougall Austin Henderson.

14 Q. Where do you live, sir?

15 A. In Easton, Connecticut.

16 Q. And how old are you?

17 A. I'm 67.

18 Q. Are you married?

19 A. I am.

20 Q. Any kids?

21 A. Three.

22 Q. Any grandkids?

23 A. Two.

24 Q. Dr. Zimmerman (sic), are you getting paid for
25 your testimony here today?

1 A. I am not, although I have an agreement with
 2 Xerox to cover my time and expenses.
 3 Q. Do you have any written agreement in place
 4 about that compensation?
 5 A. I do not.
 6 Q. Do you have any interest in the outcome of the
 7 case?
 8 A. My reputation.
 9 Q. Okay. Actually, what I meant was a monetary
 10 interest in the outcome of the case. Do you stand to
 11 make more money if the Plaintiffs win?
 12 A. No.
 13 Q. Sir, you're one of the named inventors on the
 14 patents we've been discussing here today, right?
 15 A. Yes.
 16 Q. As a matter of fact, you're the named inventor
 17 on about 10 U.S. patents, right?
 18 A. Yes.
 19 Q. Let me show you a slide up here. Can you tell
 20 me, does that appear to be the U.S. patents on which
 21 you're a named inventor?
 22 A. It does.
 23 Q. Now, I'd like to show you your three U.S.
 24 patents that are involved in this case, the '412, '521,
 25 and '183.

1 A. In late 1978.
 2 Q. So prior to 1978, prior to your work at PARC,
 3 did you have any experience in helping people figure out
 4 how to use machines?
 5 A. Well, it goes a long way back. I've been doing
 6 it for about 45 years.
 7 Q. Now, did that start through job experience or
 8 experience as a student?
 9 A. Actually, while I was a student, my first
 10 encounter with computers was with a life insurance
 11 company. I was helping them do -- writing their checks.
 12 Q. About when was this?
 13 A. This was in 1963.
 14 Q. And you said, while you were a student. Where
 15 were you a student at then?
 16 A. I was at Queens University in Kingston,
 17 Ontario, Canada. I got a bachelor's degree in
 18 mathematics with a minor in physics.
 19 Q. You're talking about work that you did in 1963
 20 in check-writing functions. What caused you to do that
 21 work?
 22 A. Well, I was interested in sort of playing the
 23 game. I was in mathematics, and as a mathematician, one
 24 of the options was to become an actuary, so I went to a
 25 life insurance company, and while I was there, I saw

1 MR. GASEY: Your Honor, may I approach the
 2 witness?
 3 THE COURT: You certainly may.
 4 Q. (BY MR. GASEY) Sir, are these the original
 5 ribbon copies that are patents on which you are a named
 6 co-inventor?
 7 A. They are.
 8 Q. And were these patents a result of work that
 9 you did at Xerox?
 10 A. Actually, Xerox PARC, yes.
 11 Q. Okay. And what is Xerox PARC?
 12 A. Xerox PARC is a research center in Palo Alto
 13 set up by Xerox to explore how computers would change
 14 the office.
 15 Q. And what generally was your job responsibility
 16 at Xerox PARC?
 17 A. Well, for 10 years, I was a member of the
 18 research staff and then, for two, a manager in research
 19 and, for four, a manager in architecture.
 20 Q. And during this 16-year period, what kinds of
 21 things did you work on?
 22 A. Well, I was primarily interested in how we
 23 could help people operate machines, copiers, computers.
 24 Q. About when did you start your work at Xerox
 25 PARC?

1 computers, and I thought, this is more fun.
 2 Q. Why was that so interesting?
 3 A. Well, I had done electric trains as a kid, and
 4 I loved them because it was a matter of having a small
 5 number of very well-defined parts which you could put
 6 together in whatever amazing way you could imagine. And
 7 this seemed like electric trains for big kids.
 8 Q. So how did that grow from working in that one
 9 computer experience to working towards helping people
 10 learn how to better use those kinds of machines?
 11 A. Well, a couple years later, working for another
 12 company, I was helping them handle supplies coming in,
 13 the management of their contracts, and I asked my boss
 14 what happens when the stuff that's delivered is more
 15 than what was in the contract. And he said, oh, that
 16 will never happen. That sort of bothered me a little
 17 bit, so I went and talked to the people in contracts,
 18 and they said, no, no, no, it happens all the time, and
 19 they gave me lots of reasons. And from that, I learned
 20 that you better pay attention to what people are really
 21 doing, what their needs really are rather than what we
 22 might just want to give them.
 23 Q. Now, after you finished this work during your
 24 summers at college and after you got your bachelor
 25 degree, did you get any further education in this area?

1 A. I got a master's degree at the University of
2 Illinois in computer science, and then a Ph.D. at MIT in
3 electrical engineering, but it was a place where
4 computer science was at that time.

5 Q. So they didn't have a degree for computer
6 science --

7 A. Not per se.

8 Q. Okay. When you were at MIT getting your
9 doctorate degree, did you have any specialty?

10 A. My doctoral dissertation is called the binding
11 model, which was a theoretical study of how to make
12 computer software more easily usable by programmers.

13 Q. Now, while you were getting your doctorate at
14 MIT, did you get any additional work experience in
15 helping people develop user software solutions?

16 A. I spent quite a bit of time at MIT's Lincoln
17 Laboratory doing interactive graphics applications, and
18 then I spent time -- part-time as a student at Bolt,
19 Beranek and Newman, a technical consulting firm doing
20 work on air traffic control and then e-mail.

21 Q. What time frame was this work on e-mail at --
22 is it Bolt, Beranek and Newman?

23 A. BBN, we sometimes call it. Started the work in
24 1974, and it went through 1978.

25 Q. They had e-mail back in 1974?

1 A. Well, they did not initially. The job of --
2 that BBN was involved with was working on the ARPANET
3 which became the internet. And while we were working
4 there, we recognized that there was a need -- user need
5 for moving notes from one computer to another and
6 thought, oh, hey, we could use the ARPANET as a way of
7 doing that, of connecting one computer to another, and
8 that led to e-mail.

9 Q. When did you leave Bolt, Beranek and Newman?

10 A. 1978, late 1978.

11 Q. So you left there to go to Xerox then?

12 A. To Xerox PARC, right.

13 Q. Why did you join Xerox PARC at that time?

14 A. Well, over the 1970s, Xerox at PARC had been
15 developing quite a reputation for creating equipment
16 that was going to make a big difference to what happened
17 in offices, and I thought it would be fun to get in on
18 the party.

19 Q. All right. Now, you saw earlier from my
20 opening statement Xerox PARC was responsible for things
21 like the mouse, the laser printer, and the personal
22 computer, right?

23 A. It was.

24 Q. Now, when you first joined Xerox PARC in 1978,
25 what kinds of work did you do?

1 A. For the first couple of years, I was writing
2 some game programs which helped people learn how to fix
3 electronic circuits.

4 Q. And what time frame was that over, roughly?

5 A. That would have been late '78 to sometime in
6 1980.

7 Q. And after that project, what kind of work did
8 you do for Xerox PARC?

9 A. I spent the next five years looking at the
10 central issue that we might expect of Xerox, a copier
11 company, namely, how do you operate a copier and then
12 how do we make that easier.

13 Q. Did you have any other responsibilities or jobs
14 at that time besides working on how to help people use a
15 copier?

16 A. Well, one of the things I did was act as a
17 mentor in a program that Xerox was part of with MIT in
18 which students would come and spend time as co-ops, and
19 I was mentoring them, and students included people like
20 John Maxwell.

21 Q. Now, this is the same John Maxwell who's listed
22 as a co-inventor on those patents in front of you?

23 A. Yes.

24 Q. Now, Dr. Henderson, you were earlier in the
25 room when the judge was instructing everybody about the

1 differences between attorney argument and evidence,
2 right?

3 A. I was, yes.

4 Q. And you heard how he indicated that the
5 evidence, the facts are what matter, not what the
6 attorney argument is, right?

7 A. Yes.

8 Q. And you heard during Mr. Krevitt's opening
9 statement, he said that you were not collaborating with
10 John Maxwell on the inventions that are in this patent?

11 THE COURT: Hold on a just second,
12 Mr. Gasey.

13 MR. REITER: I believe this is a bit
14 leading, Your Honor. He's putting words in the witness'
15 mouth. If we could restructure these questions in a
16 nonleading format.

17 THE COURT: I do think that the witness is
18 going to need to testify, Mr. Gasey, a little bit more.

19 MR. GASEY: That's fine.

20 Q. (BY MR. GASEY) Did you hear what Mr. Krevitt
21 said, that you were not -- do you deny collaborating
22 with John Maxwell?

23 A. I heard Mr. Krevitt say that I did not
24 collaborate with John Maxwell, and that's just not true.

25 Q. There's not an ounce of truth to that?

1 A. No truth.

2 Q. Okay. Now, during the time frame when you were
3 working as a mentor to John Maxwell and working on
4 copiers, what was this time frame, roughly?

5 A. This would have been 1980 through 1985.

6 Q. Okay. And what did you turn to after that at
7 Xerox PARC?

8 A. I was -- at that point, I became interested in
9 the question of the messy desktop.

10 Q. And what's your description of the messy
11 desktop problem?

12 A. As we've already heard a number of times, but
13 I'll say again, the issue is that people have a lot of
14 material that they need to work on in doing any given
15 task. And if you have a small desktop like a computer
16 screen, the screen gets extremely messy. Things begin
17 to get on top of each other. You have to move windows
18 out of the way in order to get to the things you want to
19 get to, and it becomes a very messy desktop.

20 This is an example. What we see here, a
21 screen from my computer at the time, this was a title
22 bar and a clock and a typescript window here, which was
23 kind of always there. Over here -- this window, that
24 one, and that one is for e-mail. We can see a couple of
25 windows here which were used for document management

1 and all of the other windows here have been pulled in on
2 top for me to do a programming job, which is what I'm
3 working on at the time I took this imaging.

4 Q. Now, for this messy desktop problem, what was
5 the source of that problem?

6 A. Well, one of the sources is the fact that the
7 computer desktops are much smaller than the kind of
8 space you need for working on most problems.

9 Q. You said one source of the problem, right? Are
10 there any other sources?

11 A. Well, the single source was that it's too much
12 space for a single task, but most people are working on
13 more than one task. And consequently, they move between
14 the already over-cramped space around the single task to
15 having managed -- to manage the documents and tools for
16 all of their tasks, switching between them.

17 Q. So other than limited screen space and multiple
18 tasks going on at the same time, were there any other
19 sources to this problem?

20 A. Yes. The difficulty is that if you separate
21 the documents into piles associated with the separate
22 tasks, you've got a problem. That is that some of the
23 documents are needed in a number of the different tasks.
24 And consequently, they need to be in more than one of
25 these piles at once. And consequently, as you move

1 between the piles, you have to make sure that the ones
2 which need to be shared will appear in the new
3 workspaces as you move to them.

4 Q. And how did you get assigned to these messy
5 desktop problems back then?

6 A. Well, at PARC, you really didn't get assigned
7 to things. It was an environment in which if there was
8 a problem that interested you, you could go and pursue
9 it, and I did.

10 Q. And how is it that you pursued at least some of
11 these problems?

12 A. Well, in the summer of 1985, Stu Card was
13 looking at the messy desktop problem, and he knew that I
14 could write some code and help him out, and so he asked
15 me, would I be interested in getting involved.

16 Q. And -- by the way, is this Mr. Card or
17 Dr. Card?

18 A. He's Dr. Card.

19 Q. And is this the same Dr. Stuart Card who's
20 listed as another co-inventor on the patents in front of
21 you?

22 A. Yes.

23 Q. What is -- what was Dr. Card's background that
24 got him involved in this process?

25 A. Well, Dr. Card was a cognitive scientist. He

1 had done psychology and computer science at Carnegie
2 Mellon University, and he was -- he spent much of his
3 career at Xerox PARC. And he had gotten interested in
4 this problem of how do we get the computer to be helpful
5 in helping people address the messy desktop problem.

6 Q. And you said Dr. Card approached you in the
7 summer of '85; is that right?

8 A. Yes.

9 Q. And what was the time period over which you
10 worked with Dr. Card in trying to solve some of these
11 problems?

12 A. Well, from the summer of '85 through '86 into
13 about March of '87.

14 Q. Okay. And what was -- what was kind of the
15 starting point for your solutions or at least some of
16 your solutions to the messy desktop problems?

17 A. Well, the messy desktop problem had been looked
18 at before, and one of the solutions was to take the
19 windows that are on your screen and to squeeze the ones
20 you don't want to make them quite small leaving the ones
21 you do want big in the center. That was something
22 called fisheye views of the -- and then when you do the
23 switch, the squeezing changes.

24 Another solution we tried is to make one
25 huge workspace of which you -- the screen was only

1 seeing a little piece of it, and then you could sort of
2 move around over that big screen and get to the places
3 you want to do that.

4 Q. Okay. And did you ever in this process look at
5 the idea of multiple workspaces?

6 A. Yes, we did. Starting in January of 1986, we
7 got into the idea of looking at multiple workspaces.

8 Q. Okay. Now, you saw earlier both myself and
9 Mr. Krevitt pulling up Figures 1A and 1B of your
10 patents, right?

11 A. Yes, I did.

12 Q. And are these, in fact, examples of multiple
13 workspaces?

14 A. They are.

15 Q. But they're not the only examples of multiple
16 workspaces discussed, though, right?

17 A. That's correct.

18 Q. Okay. Now, you started dealing with multiple
19 workspaces at what time again in 1986?

20 A. In January 1986.

21 Q. And you continued working on multiple
22 workspaces after that point?

23 A. Yes. Oh, yes.

24 Q. Can you give me some examples on how you
25 improved upon multiple workspaces during this time

1 frame?

2 A. The primary problem that we had seen with just
3 multiple workspaces, of which there were examples, was
4 the one of the need for sharing and, consequently,
5 working to arrange it so that you could take and
6 arrange -- that same document would be in more than one
7 workspace; arranging it so that you could take a
8 document with you as you changed workspaces, simply
9 addressing the major question that way; arranging it so
10 that you could move between the workspaces in response
11 to the work; giving you an overview of all the
12 workspaces you had and then providing you the capacity
13 to change which documents were in which workspaces
14 through the overview.

15 Q. Now, did you during this 1986 time frame as you
16 were progressing with different additions on to your
17 inventive work, did you show any versions of your work?

18 A. We wrote a paper in the summer of 1986 talking
19 about the work.

20 Q. Did you create any visual demonstrations, any
21 videos or anything like that?

22 A. Did we create some videotapes? Yes.

23 Q. Did you record any of these demonstrations?

24 A. We did.

25 Q. And did you provide copies of these

1 demonstrations to the parties in this case?

2 A. I did.

3 Q. Let me show you --

4 MR. GASEY: If I may approach the witness,
5 Your Honor.

6 Q. (BY MR. GASEY) Let me show you a copy of a
7 videotape that has been identified and marked as
8 Plaintiff's Exhibit 166. Can you tell me, does that
9 appear to be the videotape -- or a videotape which you
10 provided in this case?

11 A. Yes, it does. It looks like a videotape that
12 we created for a conference.

13 Q. Okay. And this was created in April 1987?

14 A. That's correct.

15 Q. Let me show you a clip from this video. We
16 went ahead and recorded it digitally because some folks
17 don't have VHS players anymore. I do, but some folks
18 don't.

19 Can you tell me what this picture shows?

20 A. Well, you've got the computer screen, and what
21 we're seeing is the overview, and each of these clusters
22 is a workspace. It shows a screen, and inside that --
23 each workspace, there are windows.

24 Q. Okay. Let me show you another clip from this
25 demonstration. Can you walk me through what it shows?

1 THE COURT: Mr. Gasey, if at any point you
2 want to change the lighting, you can let me know.

3 MR. GASEY: Actually, if there's any way
4 we can dim the lighting a little bit. Is that better?
5 All right.

6 Can you run that video clip?

7 A. So what we're doing is just moving in so you
8 can see the windows better, and then you can see me drag
9 one window down to another workspace. Then here you can
10 see me drag and copy so that this same window is in two
11 different workspaces.

12 Q. (BY MR. GASEY) Now, was the invention you were
13 working on in this time frame limited to instances where
14 windows were moved from one desk space to another or
15 copied?

16 A. No. We tried to provide the capacity to do
17 everything through this or as much as possible. Here
18 you can see me delete a window. Here you can see me
19 reshape it to be where I might want it to be.

20 Q. Let's back up to a little bit before this tape.
21 In the 1986 time frame, what kinds of other approaches
22 that had been tried were you looking at? I think you
23 mentioned one was fisheye?

24 A. Fisheye, right, and then we had talked about
25 the big screen, and then there were the other

1 implementations of multiple workspaces.
 2 Q. Like what?
 3 A. There's Xerox -- Xerox Star. We had looked at
 4 Smalltalk project view. There are many different things
 5 that we had looked at in trying to understand what was
 6 there and how our work was different.
 7 Q. And did you become aware of any other attempts
 8 to use multiple workspaces in this time frame at Xerox
 9 PARC?
 10 A. Yes. We discovered that John Maxwell had
 11 created a system called Desk Tops in the Cedar
 12 environment, which had multiple desktops.
 13 Q. And this is the same John Maxwell that you've
 14 been mentoring as a co-op, right?
 15 A. That is correct.
 16 Q. Where was his office relative to yours?
 17 A. It was at the other end of the building but the
 18 same building.
 19 Q. Same building. Okay. When you discovered
 20 Mr. Maxwell's work -- by the way, who was it that you
 21 discovered Mr. Maxwell's work through?
 22 A. Well, Jim Baren, who is the in-house patent
 23 attorney, became aware of the fact that we were working
 24 on -- at the beginning of some ideas that looked like
 25 they might be -- constitute an invention. When we

1 save the structure of a collection of workspaces, which
 2 you really need to do because if you want users to
 3 invest a great deal of time, as you do to support their
 4 task structure, you have to protect them against
 5 computer crashes or any other reason for turning the
 6 computer off. You need to be able to reconstitute the
 7 collection of workspaces. John had not done that. We
 8 felt that work needed to be done.
 9 Q. Now, you mentioned you talked with Mr. Maxwell
 10 about his work. What specifically did you talk about
 11 with him back then?
 12 A. Well, just -- the whole spread of the problem
 13 and what it was about, but the details are 25 years ago,
 14 and I don't remember exactly what we talked about when
 15 doing that work.
 16 Q. Okay. I'd like to show you an article that was
 17 submitted from the same summer of 1986 time frame.
 18 MR. GASEY: Your Honor, may I approach the
 19 witness?
 20 THE COURT: You may.
 21 Q. (BY MR. GASEY) In order to save time, I'm
 22 going to hand you a binder to go over the remaining
 23 exhibits that I'd like to address briefly.
 24 If you could please turn to what
 25 we've marked and identified as Plaintiffs' Exhibit 149.

1 created an invention proposal, it went to Jim. Jim had
 2 seen an invention proposal from John, and he could say,
 3 oh, I see, they're both beginning to do work in the same
 4 area.
 5 Q. Now, when you discovered about Mr. Maxwell's
 6 work, and -- did you look at it?
 7 A. Yes.
 8 Q. Did you talk to Mr. Maxwell?
 9 A. Yes. We went and talked with him. We began to
 10 work with him.
 11 Q. And based upon looking at his work and talking
 12 to Mr. Maxwell, did you come to the conclusion that he
 13 had solved the problem you and Dr. Card had been looking
 14 at?
 15 A. No. We concluded that he had gotten -- started
 16 down the same road that we were on, but there were a
 17 number of things that he didn't have.
 18 Q. Like what?
 19 A. He had -- he had what he called an overview,
 20 but we didn't really regard it as such because for us we
 21 really wanted to be able to manipulate through that
 22 overview. He had a fixed picture of the workspaces that
 23 needed more work to turn it into something that we
 24 regarded as needed to make this invention really work.
 25 And then he had also not provided a way to

1 THE COURT: You wouldn't happen to have
 2 one of those for me, would you, Mr. Gasey?
 3 MR. GASEY: Sure thing, Your Honor.
 4 Q. (BY MR. GASEY) This is an article that you and
 5 Dr. Card wrote, right?
 6 A. Yes, it is.
 7 Q. And is this an article where you comment upon
 8 Mr. Maxwell's work?
 9 A. It is. On page 215, there's a reference to
 10 John's work.
 11 Q. That's where it says the Cedar program --
 12 A. A third example of multiple virtual workspaces,
 13 the Cedar programming environment, yes.
 14 Q. Any other references? Take a look at page 238
 15 of that article. Tell me whether you see anything from
 16 Mr. Maxwell on that.
 17 A. Yes. In the section on navigation, it's the
 18 lower part of the page. It talks about, this is like
 19 the Smalltalk project browser or more particularly the
 20 Cedar Desk Tops overview.
 21 Q. And that reference to the Cedar Desk Tops
 22 overview is Mr. Maxwell?
 23 A. Is Mr. Maxwell, yes.
 24 Q. Okay. Take a look at page 242 of that article.
 25 Do you see there's --

1 A. In the acknowledgments, we specifically
2 reference John Maxwell in the discussions that we had
3 with him about the Cedar windows.

4 Q. Okay. And those are the discussions you
5 mentioned before?

6 A. Yes.

7 Q. Okay. Now, during this time frame -- and by
8 the way, when was this article submitted?

9 A. Well, this was submitted to the transactions on
10 graphics in the summer of 1986.

11 Q. During this time frame when you're submitting
12 this article commenting upon Mr. Maxwell's work, were
13 you and Dr. Card still developing solutions to the messy
14 desk problems?

15 A. Yes, we continued to do work on it.

16 Q. Like what? What were you doing?

17 A. Well, more work on the overview, the efforts to
18 get it such that you could see particular -- you could
19 ask in the overview about particular windows and where
20 else do we see this.

21 Q. Were you still adding any features to your
22 solution at this time?

23 A. Yes.

24 Q. During this time frame, did you or Dr. Card
25 record any notes that would have reflected any ongoing

1 one?

2 MR. REITER: Your Honor?

3 THE COURT: Yes? Excuse me.

4 Mr. Reiter?

5 MR. REITER: I previewed this this
6 morning. This is Dr. Card's handwriting. This is
7 Dr. Card's notebook. It's not Dr. Henderson's notebook.
8 I explained that he doesn't have personal knowledge. In
9 fact, in his deposition, I asked him questions about --

10 THE COURT: Why don't we deal with
11 those -- at this point, the witness is just explaining
12 what is here. If you have a specific objection to a
13 specific point, I'll see you again.

14 MR. GASEY: I think he just has already
15 testified, Your Honor, that he's seen this material.
16 We're not trying to get him to speculate on anything.

17 Q. (BY MR. GASEY) Who wrote that?

18 A. That's Stu Card's handwriting up there, and
19 then here, that's my handwriting, which is on a piece of
20 paper which has been pasted into the notebook.

21 Q. And what was the time frame? What was the date
22 of those notes?

23 A. That, we need to go back to page 52. It looks
24 like July 16th of '86.

25 THE COURT: Mr. Gasey, I need him to

1 work?

2 A. Yes. I mean, Stu kept a notebook. And as a
3 matter of course, we would write in his -- or he'd write
4 in his notebook. I saw it a lot. Occasionally, I'd
5 write in it. Sometimes we'd take notes of mine and
6 paste them in.

7 Q. Okay. I'd like you to take a look in your
8 binder at what has been marked as Plaintiffs' Exhibit
9 156, and this is an exhibit you saw at your deposition,
10 right?

11 A. Yes, it is.

12 Q. Can you tell me what it is?

13 A. This is a copy of the -- one of Stu's --
14 Dr. Card's notebooks.

15 Q. And the start date on the cover indicates that
16 it was first used on or about May 30th of 1986; is that
17 right?

18 A. Yes.

19 Q. Okay. Take a look at page 52 of that notebook,
20 and there's going to be a series of pages following
21 after it, specifically pages 55 through 58. Do you
22 recognize any of the entries in those pages?

23 A. Well, the -- on page 52, you explicitly --
24 there's a date, but on page 58, you can see up at the
25 top, you can see in Stu's handwriting -- can we go back

1 identify at each point whose handwriting and who's
2 making the entry.

3 MR. GASEY: Sure, Your Honor.

4 Q. (BY MR. GASEY) Do you know why you wrote those
5 notes in that July 1986 time frame?

6 A. I don't know specifically. We were continuing
7 to work putting together -- trying to get our heads
8 straight about what we had and what we were doing.

9 Q. Okay. Were you still adding on new solutions,
10 new features to your inventions?

11 A. Yes, we were.

12 Q. Like what?

13 A. I don't remember all of the details and when
14 they actually occurred. There was the notion of doors
15 we talked about, but there was a notion of back doors
16 which when you went through into -- as part of an
17 interrupt when you went through to a new workspace, a
18 door would be created which would bring you back to
19 where you left.

20 Q. Now, did you give any further papers after that
21 first July 1986 article that explained your work on the
22 messy desk problem?

23 A. Well, we submitted a paper -- first, Stu Card
24 went to triple AI and gave a demonstration of the -- of
25 our Rooms prototype.

1 Q. And when was that?
 2 A. That was in August of 1986.
 3 Q. And you said, the first. What happened next
 4 after that?
 5 A. Next after that was -- because you had asked
 6 about papers. We had submitted a paper -- or we did
 7 submit a paper in September of '86 to the CHI
 8 Conference.
 9 Q. What is CHI?
 10 A. CHI is Computer/Human Interaction. It's a
 11 flagship professional conference for those of us who are
 12 interested in users using computers.
 13 Q. Okay. Take a look, if you would, in your
 14 notebook at what has been labeled and marked as
 15 Plaintiffs' Exhibit 139. And is that the paper that you
 16 and Dr. Card submitted to the CHI Conference?
 17 A. It is.
 18 Q. And let me point out page 58 of that article.
 19 Do you see any reference to Mr. Maxwell and his work on
 20 that page?
 21 A. Down at the very bottom of the second column,
 22 it talks about similarities to other systems, and
 23 there's a reference to Cedar contained a fixed overview
 24 of 16 screens written by John Maxwell.
 25 Q. Now -- and this is the same Maxwell work that

1 you had discussed in the summer with him and mentioned
 2 in your earlier paper?
 3 A. Yes.
 4 Q. Now, when you submitted this paper to CHI in
 5 September of 1987, were you still working on adding yet
 6 more features to the solutions that you were coming up
 7 with that you were inventing for the messy desk
 8 problems?
 9 A. Yes.
 10 Q. Like what?
 11 A. I don't remember all of the details, but we
 12 might take a look at some of them that were recorded in
 13 Stu's notebook.
 14 Q. Do you see any that you worked on after the CHI
 15 paper in his notebook?
 16 A. Let me go back to that.
 17 On page 130, notebook page 130, you
 18 can see at the top a collection of three diagrams which
 19 indicate something which we were inventing at the time
 20 called Catalogues.
 21 Q. Okay. And what's the date on that entry?
 22 A. That is October 12th.
 23 Q. And what -- October 12th of 1986?
 24 A. Yes. I'm sorry. Yes.
 25 Q. And this is after both the papers that you did?

1 A. Right. The paper had been submitted to the CHI
 2 Conference in September.
 3 Q. And this is part of your invention that you
 4 were working on?
 5 A. Yes, we were just adding -- adding features.
 6 This was -- yeah.
 7 Q. What is the Catalogue?
 8 A. The problem we were looking at there -- we were
 9 sort of taking for granted the fact that we had multiple
 10 workspaces and that you have them interlinked in the way
 11 with shared objects. And consequently, this became a
 12 very powerful way of delivering software by taking a set
 13 of workspaces and then being able to save them and then
 14 load them down into somebody else's computer, and you
 15 would have a ready-to-go set of workspaces for doing a
 16 particular kind of task or collections of tasks.
 17 Q. So it presented an interface, a different user
 18 interface for presenting multiple workspaces?
 19 A. Yes. I mean, we -- yes, exactly.
 20 THE COURT: This is from the Card
 21 notebook, right?
 22 MR. GASEY: That's correct, Your Honor.
 23 THE COURT: In whose handwriting? I need
 24 that each time.
 25 THE WITNESS: That is Stu Card's

1 handwriting.
 2 Q. (BY MR. GASEY) And is this a feature -- take a
 3 look at Figures 23 and 24 of your '412 patent, that is,
 4 Plaintiffs' Exhibit 1. Does that show the Catalogue
 5 feature put in that patent?
 6 A. It does.
 7 Q. Okay.
 8 A. The -- you can see Figure 23 has the -- has the
 9 Catalogue closed with the tabs, but 24, we show it
 10 opened with some of the possible workspaces that were
 11 available in the Catalogue for downloading.
 12 Q. Now, after this -- well, strike that. At what
 13 point do you begin trying to look at patenting your
 14 inventions, your solutions?
 15 A. Well, we submitted the invention proposal in
 16 the early summer of 1986.
 17 Q. And is that when you began drafting your patent
 18 application?
 19 A. No. That didn't start until January of 1987.
 20 Q. And who was involved in that drafting process
 21 besides yourself?
 22 A. All four of us. I mean, There was the patent
 23 attorney, Jim Beran and then John Maxwell, me, and
 24 Stu -- Dr. Card.
 25 Q. So -- and how long was this process?

1 A. Well, we worked at that for about three months.
 2 The difficult work there was getting -- was
 3 understanding how it was that the work that had been
 4 done in Desk Tops and the work that had been done in
 5 Rooms, both were pointing at a collection of a deeper
 6 set of ideas that we were trying to get at. And so we
 7 were struggling to try to figure out what it was that we
 8 had that was new because there were a lot of things that
 9 were available out there already that we needed to
 10 understand, was there actually anything new here.

11 Q. So in figuring out whether there was something
 12 new, did you disclose everything to your patent lawyer
 13 that you were aware of that you believed related to your
 14 work?

15 A. Yes.

16 Q. Like what?

17 A. Well, there was the paper by Chan, the Xerox
 18 Star. There was the work by Apple. There were many
 19 different papers and pieces of work that we were aware
 20 of.

21 Q. Okay.

22 A. I don't remember all of the details at this
 23 point. I just remember that we were trying to get
 24 everything we could get our hands on to address this
 25 question.

1 Q. Take a look at the citation of what the Court
 2 referred to as prior art and the listing in your patent
 3 in Plaintiffs' Exhibit 1, and take a look at the section
 4 we've highlighted up here. Is that the Chan paper that
 5 you were referring about?

6 A. It is.

7 Q. That's one of the things that you disclosed to
 8 your patent lawyer and he disclosed to the patent
 9 office?

10 A. He did.

11 Q. And that's the same Chan paper you discussed in
 12 your article?

13 A. Yes, it is.

14 Q. Now, take a look at another section of the
 15 listing of prior art that's listed on your '412 patent,
 16 the listing that we highlighted here for the -- what's
 17 called the 8010 Star Information System. What's that?

18 A. That's what's generally called Xerox Star and
 19 was the first Xerox product which was introducing
 20 desktop computing to the business world.

21 Q. And let me show you another listing in there.
 22 There's a reference that you see on Plaintiffs' Exhibit
 23 1 to MacWrite Manual, Apple Computer, Inc.?

24 A. I do.

25 Q. And what is that?

1 A. That's the manual for the MacWrite application
 2 which ran on Apple computers.

3 Q. Now, do you recall specifically any other
 4 references -- I mean, there's a lot of references here
 5 on Plaintiffs' Exhibit 1, right?

6 A. There are, and exactly which ones we dealt
 7 with, as I said, I don't remember. It's 25 years ago.

8 Q. Okay. Now, how long again did the process take
 9 between you and Dr. Card and Mr. Maxwell and Mr. Beran?

10 A. About three months.

11 Q. You talked to each other then during that time
 12 frame?

13 A. A lot. I mean, we were struggling with trying
 14 to figure out what was -- what it is that we had.

15 Q. Did you write each other about it?

16 A. We did, e-mails --

17 Q. Did you have meetings?

18 A. -- time in conference rooms, white boards
 19 covered with stuff.

20 Q. Now, at the end of that three-month process,
 21 did you submit a patent application on what you had come
 22 up with?

23 A. Yes -- well, Jim Beran did on our behalf.

24 Q. And at that time, do you recall having signed
 25 an oath that you submitted with your patent application?

1 A. I do.

2 Q. Let me show you a copy of that one up on the
 3 screen. It's in your book of exhibits as Plaintiffs'
 4 Exhibit 4, and it states in the relevant part that you
 5 are an original first and joint inventor. Plural names
 6 are signed below on the subject matter, which is claimed
 7 and for which a patent is sought on the system entitled.

8 Do you see that?

9 A. I do.

10 Q. In that oath, you stated your belief that you
 11 thought you and Dr. Card and Mr. Maxwell were
 12 co-inventors, right?

13 A. Yes.

14 Q. Do you think that you collaborated with one
 15 another during that three-month time frame?

16 A. Yes.

17 Q. Did you believe that what you swore to in that
 18 oath was true when you submitted it in March of 1987?

19 A. I do.

20 Q. Do you still believe it's true today?

21 A. I do.

22 Q. After you filed your patent application, how,
 23 if at all, did your work at Xerox PARC change?

24 A. Well, at that time, I was beginning to work
 25 more and more with the European lab of Xerox called

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1 EuroPARC in Cambridge, England.
2 Q. So did you move to a different office then?
3 A. Half time. I was back and forth across the
4 Atlantic.
5 Q. Okay. So after your first patent application
6 was filed earlier -- the first application that resulted
7 in these patents was filed in March of 1987, did you
8 have any further involvement in the patenting process?
9 A. Very little other than I was receiving e-mails
10 from Jim Beran reporting on the process of the -- of
11 whatever happens in getting a patent to become a patent
12 application to become a patent.
13 Q. Do you recall any of the details of those
14 communications?
15 A. I saw some e-mail messages, but I don't
16 remember any of the details.
17 Q. Okay.
18 A. That was really Jim's job.
19 Q. Now, in the context of the solutions that you
20 worked on, what is -- have you ever heard of the term,
21 Rooms?
22 A. Well, yes. We used that term to refer to the
23 prototype that we had built.
24 Q. Okay. And was Rooms your solution to the messy
25 desk problem?

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1 A. It was the one -- one of the two solutions that
2 we were looking at. The other one was John Maxwell's.
3 And together those were the basis for deriving the --
4 what the key ideas were.
5 Q. Let me show you some columns on your patent.
6 Look at, for instance, Plaintiffs' Exhibit 1, Columns 43
7 and 44. Do you see a reference to discussions of Rooms?
8 A. I do.
9 Q. For instance, it shows Rooms includes an
10 overview, catalogue, sharing of display system objects,
11 inclusions of workspaces and other features. One of the
12 things mentioned is a catalogue, right, that you had
13 worked on?
14 A. Yes.
15 Q. And that work, again, was when?
16 A. The catalogue was in October and following that
17 of '86.
18 Q. Okay. Now, in 1987 when you were talking to
19 and meeting with your patent lawyer and Mr. Maxwell and
20 Dr. Card, was that work part of your Rooms work?
21 A. We were basing the discussions on the Rooms
22 work, but it was going on beyond and articulating what
23 would be done in the way which was beyond what Rooms
24 itself was.
25 Q. So it wasn't limited to Rooms?

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1 A. No. It was going to -- it was taking on the
2 larger question that was expressed in the patent or we
3 were trying to express in the patent.
4 Q. Did you collaborate with Mr. Maxwell and
5 Dr. Card on anything outside of Rooms in this time
6 frame, that is, in early 1987?
7 A. Well, Rooms was just the one embodiment. I
8 mean, all of that work in trying to work to get the
9 central ideas which were in the patent was all beyond
10 Rooms itself.
11 Q. Okay. Did you come up with any new features
12 that you added to your patent application?
13 A. The -- a number of them, yes.
14 Q. Okay. And these features ended up in your
15 patent application?
16 A. They did.
17 Q. Okay. Now, you've heard that the Defendants
18 say they think there wasn't a misjoinder and that you
19 and Mr. Maxwell and Dr. Card didn't co-invent, right?
20 A. Yes.
21 Q. Do you agree?
22 A. No.
23 Q. Why not?
24 A. Because we worked very hard together, all of
25 the discussions during the fall of '86, but primarily

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1 the very hard work in developing and articulating the
2 ideas that are in the patent.
3 MR. GASEY: Thank you, sir. I have no
4 further questions.
5 THE COURT: Mr. Reiter, would you care to
6 inquire?
7 MR. REITER: A few questions, Your Honor.
8 THE COURT: Certainly.
9 CROSS-EXAMINATION
10 BY MR. REITER:
11 Q. Good afternoon, Dr. Henderson.
12 A. Good afternoon.
13 Q. Good to see you again.
14 A. And you, sir.
15 Q. Do you recall that we spoke, I think it was,
16 last September, September 2009; is that right?
17 A. Yes.
18 Q. And I took your deposition in this case?
19 A. Yes.
20 Q. And you were under oath in that deposition; you
21 swore to tell the truth, just like you did here, right?
22 A. Yes.
23 Q. And you told the truth, didn't you?
24 A. Yes.
25 Q. Now, you just heard from Mr. Gasey, and there

1 were some questions that I heard about what was in your
2 patent and things that you had worked on.

3 Now, your patent application in your
4 patent, an embodiment of that is the Rooms work, right?
5 You were trying to embody Rooms or describe the
6 embodiment of Rooms in the patent; isn't that correct?

7 A. We were trying to get the ideas that are
8 inherent in Rooms and in Desk Tops pulled out of the
9 particulars of the Cedar environment or the Lisp
10 environment and abstract it away to the point where you
11 can get at what the things are that are new.

12 So until -- it's not just an embodiment of
13 the work we did in Rooms. It's getting to the central
14 new pieces.

15 Q. But Rooms was the work that you and Dr. Card
16 did; isn't that right?

17 A. That is correct.

18 Q. All right. And the patent reflects the
19 embodiment that Rooms is, the system that Rooms is;
20 isn't that right?

21 A. Among -- among -- among other things. I mean,
22 Rooms is one of the things that leads to the patent, as
23 does Desk Tops.

24 Q. Desk Tops is another embodiment?

25 A. Yes, of the --

1 application?

2 A. That's correct.

3 Q. Now, the '412 patent is the first patent to
4 issue, and that issued in 1991; is that right?

5 A. I guess that's -- yes. That is the date on it,
6 yes.

7 Q. And there were actually, I guess, three other
8 patents that issued. One that's not at issue or not
9 involved in this case, but the other two being the '521
10 and the '183, right?

11 A. I believe that's the case.

12 Q. And the '521 patent issued in 1995. Does that
13 sound about right?

14 A. I don't -- I mean, at the time of the
15 deposition, I didn't remember at all, because I hadn't
16 seen any of the patents. Right.

17 Q. You had never seen, in fact, the patents
18 before --

19 A. That's right. I hadn't seen the patents. I
20 had been involved in the drafting but not of the
21 wording, which is getting the ideas; actually, the
22 production of the patents was something Jim did.

23 Q. Over the course of the years and over the
24 course of the work you did, you never thought to look to
25 see what the patent looked like until I showed it to you

1 Q. And the patent, in fact, says that.

2 MR. REITER: And if we could put up the
3 '412 patent, which I believe is PX1 at 43, Lines --
4 Column 43, Lines 10 to 15.

5 Q. (By Mr. Reiter) It says: The invention has
6 been implemented in two distinct systems, Desk Tops, and
7 the other as noted above, is Rooms; is that right?

8 A. Right.

9 Q. And you don't have any reason to disagree with
10 that, two systems, right?

11 A. That's right.

12 Q. And they are distinct?

13 A. That's right.

14 Q. Okay. Now, the first patent was filed in March
15 of 1987. I think Mr. Gasey went through that with you
16 and you explained that.

17 A. I believe that's the case, but exactly when Jim
18 put it in, I don't recall.

19 Q. And did I hear you say that you helped write
20 part of the application; you helped draft it?

21 A. I helped -- I helped with the others to get at
22 the ideas. Jim did all the putting it in -- taking the
23 ideas and expressing those in the formulation which
24 would be appropriate for a patent, not my set of skills.

25 Q. So you didn't write any part of the patent

1 that day in September?

2 A. As a matter of fact, yes.

3 Q. Now, I just want to make sure I understood your
4 testimony, your introduction.

5 You no longer work for Xerox, do you?

6 A. I do not.

7 Q. And you're not here representing Xerox or Xerox
8 since we started?

9 A. I am not.

10 Q. And you work for Pitney Bowes still?

11 A. That's correct.

12 Q. Now, a few things also we've been talking about
13 windows and workspaces and virtual desktops. You and
14 Dr. Card didn't invent Windows, did you?

15 A. We did not.

16 Q. And Mr. Maxwell didn't invent Windows, did he?

17 A. I don't believe so.

18 Q. And you and Dr. Card or you and Dr. Card and
19 Mr. Maxwell didn't invent the concept of workspaces, did
20 you?

21 A. We did not.

22 Q. And you didn't invent the concept of multiple
23 virtual workspaces, did you?

24 A. We did not.

25 Q. And you didn't even invent the idea of

1 switching between workspaces, did you?
 2 A. We did not.
 3 Q. Now, you were here during the jury selection
 4 when I was asking questions, and I think Mr. Hill was
 5 asking some questions, too?
 6 A. Yes.
 7 Q. Okay. And did you recall or did you hear
 8 Mr. Hill represent that the invention was simply
 9 switching from one workspace to the other, was that
 10 simple?
 11 Do you remember him saying that?
 12 A. I don't actually.
 13 Q. You don't? Well, it's not that simple, is it?
 14 A. No.
 15 Q. Just switching from one workspace to another?
 16 A. No, it's not.
 17 Q. And others had done that before your work,
 18 right?
 19 A. That's correct.
 20 Q. And, in fact, your patent talks about something
 21 called Smalltalk, right?
 22 A. Yes.
 23 Q. And you're familiar with that, that's a
 24 programming language; is that right?
 25 A. Programming language, programming environment.

1 yes.
 2 Q. And it was supposed to be, I think you
 3 explained it to me in your deposition, a programming
 4 language so simple children could use it.
 5 Do you recall that?
 6 A. That's correct. I think that's what Allen Kay
 7 was trying to do, yes.
 8 Q. You and Dr. Card and Mr. Maxwell didn't invent
 9 Smalltalk?
 10 A. We did not.
 11 Q. And Smalltalk permitted two independent views
 12 or windows of a single application, right?
 13 A. I believe it did, but -- yes.
 14 Q. And you could modify the data in one window, or
 15 in one view, and have it visible in another view.
 16 Do you recall that discussion where you
 17 had -- I think it was about the model view controller?
 18 A. Yes.
 19 Q. So Smalltalk had two different windows, and you
 20 can have an application in one and modify it and have
 21 that modification show up in the other; is that right?
 22 A. In two different windows on the same screen,
 23 looking at the same different models, so that's the
 24 model views. So the windows are the views and the model
 25 is the application.

1 Q. And the controller is like the desktop; is that
 2 right?
 3 A. It's the linkage between all of the things that
 4 go to cause a coherence between the images in the two
 5 views -- two windows.
 6 Q. Right. But Smalltalk did have these two
 7 separate windows or workspaces that you could work on
 8 and manipulate, right?
 9 A. Yes.
 10 Q. Now, I did get a chance after the deposition to
 11 look at your videotape, and I do find it interesting,
 12 and I saw some of what you-all went through. And I saw
 13 part of it you were explaining -- and I think it was in
 14 the overview screen that you were working on; is that
 15 right?
 16 A. In the clip you've seen here?
 17 Q. Yes.
 18 A. That was the overview, yes.
 19 Q. Right. And that was part of Rooms, right?
 20 A. It was.
 21 Q. Desk Tops, Mr. Maxwell's work, did not have an
 22 overview, did it?
 23 A. No. It had what was referred to in his work as
 24 a -- just a fixed set of images.
 25 Q. So no overview?

1 A. No fully operable overview of the form that we
 2 were looking for.
 3 Q. Well, your patent says that Desk Tops does not
 4 have an overview. Do you have any reason -- and I can
 5 put that up.
 6 MR. REITER: Why don't we put up Column 43
 7 again, Line 46, please.
 8 Q. (By Mr. Reiter) Desk Tops does not have an
 9 overview. Do you have any reason to disagree with what
 10 your patent says?
 11 A. I think -- I think we are perhaps arguing over
 12 exactly what is meant by overview. The overview that we
 13 were looking for in Rooms, as I've just testified, was
 14 fully operable, whereas the overview that was in Desk
 15 Tops was not and was not a fully operable overview.
 16 That's the sense I take that to mean.
 17 THE COURT: Will you ask Dr. Henderson to
 18 clarify what overview means?
 19 MR. REITER: Sure.
 20 Q. (By Mr. Reiter) Dr. Henderson, I have a
 21 suggestion for a good question.
 22 What does overview mean?
 23 A. For us, what we were looking for in a lot of
 24 the work that we did was an overview that you could
 25 operate -- what you could operate through and manipulate

1 the windows in the various different workspaces; that
2 you could rearrange your workspace.

3 MR. REITER: Maybe if I could put up
4 Figure 5 from the patent, please.

5 Q. (By Mr. Reiter) That's an overview, is it not,
6 Dr. Henderson?

7 A. Yes.

8 Q. And that comes from your Rooms implementation,
9 right?

10 A. Yes.

11 Q. And this type of an overview was not in Desk
12 Tops, was it?

13 A. I believe that's correct, yes.

14 MR. REITER: Does that help, Your Honor?

15 THE COURT: Thank you.

16 Q. (By Mr. Reiter) Now, we were talking about the
17 video that you showed just a few moments ago, and in the
18 overview screen, I think you were able to show moving a
19 display object or a tool from one workspace to another
20 in the overview.

21 Do you recall that?

22 A. Yes.

23 Q. And you were -- I think in one instance you
24 copied that display object, a window, from one workspace
25 to another.

1 Did I get that right?

2 A. You -- you copied -- so the window when copied
3 is then the -- when you go to the workspaces, you'll be
4 finding it's the same window. You're not copying the
5 window. What you're copying is the location where that
6 window is going to be in the -- in the new -- in the new
7 workspace.

8 Q. Right. It's not actually the same window,
9 because you're in two different workspaces, right?

10 A. It may very well be the same window, but when
11 you -- when you go, but --

12 Q. It's a representation of the same information?

13 A. Well, I mean, as you pointed out with the text
14 editor, if you change its shape, then it may not look
15 exactly the same. And it may be that you could choose
16 to use a new window or not.

17 Q. Well, let's take a step back, because I know we
18 talked about this quite a bit at your deposition.

19 You said when you change its shape, you
20 may see that or not. You're talking about you can
21 change the shape of the window that you were working on
22 in the first workspace.

23 MR. REITER: And why don't we put up
24 Figures 1A and B, please, and maybe that will help
25 everybody.

1 Q. (By Mr. Reiter) So, for example, I could change
2 the shape -- well, let me take a step back. Strike
3 that.

4 Window 12 and Window 22 were supposed to
5 represent the same window, right, or perceptible as the
6 same; is that right? 12 and 22?

7 A. Yes.

8 Okay. I've got it here. It's a little
9 hard to read 12 and 22.

10 Q. The a, b, c, d and the a, b, c, and you can't
11 see the d?

12 A. Yes.

13 Q. Right. And so I can change the shape of Window
14 12 and the workspace represented on Figure 1A, but it
15 wouldn't change the shape of Window 22 in the workspace
16 in Figure 1B; is that right?

17 A. When you move to Workspace 1B, the window would
18 be reshaped, would have a different shape.

19 Q. You're saying that if I changed the shape of
20 the Window 12 in Workspace Figure 1A, that's also going
21 to change the shape of the window --

22 A. No. I'm sorry. They're independent.

23 Q. Okay. They're independent.

24 So I can change the shape of -- I just
25 want to make sure --

1 A. Now, the point is that you, in fact, have them,
2 so that if you want it to be big in this one and small
3 in that one, you get it. But it's the same it.

4 Q. Right. So I have the flexibility to change it
5 in one window and leave it the same in the other window?

6 A. Yes.

7 Q. Okay. And if I change the information in the
8 window -- so if I delete the character c in Window 12
9 and then I go through the door in Figure 1A and I go
10 into Figure 1B, that c is going to be deleted in
11 Window 22; is that right?

12 A. Yes, because the information is provided by the
13 application.

14 Q. Right. And that content is continuous, right?
15 I didn't say that well.

16 The content stays constant between the two
17 windows. So when I want to resume my work in the second
18 workspace, Figure 1B, I can go ahead and do that; I
19 don't have to recreate everything, right?

20 A. Once you move, then it's the same content;
21 that's right.

22 Q. Right. Okay.

23 A. And there's the continuity of when you come
24 back to 1A, you'll discover the content has continued.

25 Q. Right.

1 A. And the window will be where it was when you
2 left. It's the continuity of location as well.

3 Q. Continuity of location and also continuity of
4 data, right?

5 A. That's a question of whatever the application
6 is doing, but yes.

7 Q. But in what we were talking about, the data
8 would be continuous?

9 A. That's correct.

10 Q. Right. Okay.

11 A. And that, for me, is the distinction. Again,
12 we're getting way down into the details of how the
13 patent reflects the distinctions of the work that we
14 really thought we did. And that was the work that Jim
15 Beran did to put it into the patent form. So I'm --

16 Q. Right. But the patent is supposed to represent
17 the detail, all of that work that you and Dr. Card did
18 to implement the Rooms project, right?

19 A. I and Dr. Card and John Maxwell together had
20 gotten to a collection of ideas, which -- and so that
21 the patent is supposed to represent those key ideas and
22 nothing else.

23 Q. Okay. But the patent is supposed to
24 represent -- you said we were getting down into the
25 weeds or the details.

1 It's supposed to represent those details,
2 right?

3 A. It's supposed to represent the key details,
4 right.

5 Q. And what we just talked about, about moving
6 back and forth, those are some of the key details,
7 right?

8 A. Yes.

9 Q. Now, I'd like to talk a little bit about the
10 work that you did with Dr. Card on the one hand and then
11 Mr. Maxwell on the other. I asked you several questions
12 at your deposition about this.

13 Do you recall?

14 A. I do.

15 Q. Okay. And you and Dr. Card had an invention
16 proposal together; is that right?

17 A. Yes.

18 Q. And you and Dr. Card, without Dr. Maxwell,
19 submitted that invention proposal to Mr. Beran, the
20 patent attorney; is that right?

21 A. I believe that's right.

22 Q. And Mr. Maxwell --

23 A. Although, I think it was Stu who did it; it
24 wasn't me.

25 Q. Mr. Maxwell was not involved in preparing that

1 invention proposal?

2 A. Correct.

3 Q. And Mr. Beran found out that Mr. Maxwell had
4 done some similar work, right?

5 A. Yes.

6 Q. Okay. And you said that Mr. Maxwell was at the
7 other end of the building from you and maybe you bumped
8 into each other every once in a while in the halls; is
9 that right?

10 A. And over lunch. There was only a single
11 cafeteria, and I knew John well from the 6A Program, and
12 so, yeah -- but, yeah.

13 Q. Now, Mr. Maxwell's work was a few years before
14 you. The Desk Tops work was a few years before the work
15 that you and Dr. Card did; is that right?

16 A. From the dates, I conclude that that's the
17 case. It was done when we first encountered it. John
18 wasn't working on it when we encountered it, yes.

19 Q. Now, we talked about the patent and Rooms being
20 an embodiment of the patent. And in fact, even some of
21 the questions that Mr. Gasey asked you, you talked about
22 overviews being part of Rooms and the catalogue, too.

23 MR. REITER: And if we could put up Figure
24 23 of the '412 patent.

25 Q. (By Mr. Reiter) That's from Rooms as well, the

1 catalogue that you were talking about with Mr. Gasey,
2 right?

3 A. Yes.

4 Q. Now, Mr. Maxwell never collaborated with you or
5 Dr. Card on Rooms, did he?

6 A. No.

7 Q. And you worked separately -- you and Dr. Card
8 worked separately from the work that Mr. Maxwell did on
9 Desk Tops, didn't you?

10 A. He did Desk Tops, and we did Rooms, right.

11 Q. And those two were distinct projects?

12 A. That's correct.

13 Q. And, in fact, when you were working on Rooms
14 with Dr. Card, you didn't even know about Desk Tops, did
15 you?

16 A. Well, for the -- until the summer of '86. But
17 for the subsequent six months, we were fully aware of
18 it.

19 Q. Okay. But when you and -- now, I asked you at
20 your deposition --

21 A. Yes.

22 Q. -- when you were working -- when you and
23 Dr. Card were working on Rooms, were you aware of
24 Mr. Maxwell's work on Desk Tops, and do you recall what
25 your answer was?

1 A. I think my answer was no --
 2 Q. And you didn't explain --
 3 A. -- until that point.
 4 Q. I'm sorry, Dr. Henderson. You didn't explain
 5 any of the dates or the additional information, did you?
 6 A. No.
 7 Q. Okay. And you also testified that you were
 8 uncertain of the context of Mr. Maxwell's works, didn't
 9 you?
 10 A. That's correct.
 11 Q. You didn't work on Desk Tops. You didn't know
 12 anything about it; you were uncertain of the work that
 13 he did?
 14 A. That's correct.
 15 Q. And at your deposition, you never testified
 16 about -- when I asked you about -- some questions about
 17 the application process, you never testified that you
 18 and Mr. Maxwell and Dr. Card all gathered together to
 19 work on the patent, did you?
 20 A. I don't remember the details of the deposition.
 21 I certainly remember working with John and Stu very hard
 22 on the -- getting from the embodiments to the idea that
 23 is involved in that.
 24 Q. So are you testifying that after you learned
 25 about Desk Tops, you tried to work on an implementation

1 Rooms; is that right?
 2 A. Yes. This is the Transactions on Graphics
 3 article.
 4 MR. REITER: And if we could turn to
 5 Page 215 and towards the bottom of the page, around
 6 here, blow that up, please.
 7 Q. (By Mr. Reiter) Now, there are a number of
 8 systems that you and Dr. Card describe in there under
 9 the multiple virtual workspaces section; isn't that
 10 right?
 11 A. That's correct.
 12 Q. And one of those is the Cedar Programming
 13 Environment, right?
 14 A. Yes.
 15 Q. There's also the Chan paper, right?
 16 A. Yes.
 17 Q. Now you're not testifying that you collaborated
 18 or worked with Mr. Chan, did you -- or are you?
 19 A. We did not.
 20 Q. And there's also, I think, a little bit above
 21 the Cedar, maybe three or four lines, there's Dataland.
 22 You didn't work on that; you're not claiming that was
 23 part of your invention and you collaborated with the
 24 inventors?
 25 A. I did not. It was not part of our invention.

1 or tried to figure out what it was?
 2 A. We learned about -- I'm sorry. Ask your
 3 question again.
 4 Q. Are you testifying now that after you learned
 5 about Desk Tops that you tried to figure out its
 6 implementation or tried to work with it?
 7 A. No.
 8 Q. So you never worked with Mr. Maxwell's work?
 9 A. We saw it; he demoed it to us; we talked about
 10 it.
 11 Q. But you never worked --
 12 A. I don't know what you mean by worked with. But
 13 to the extent of his going on and continuing to develop
 14 it, he was not doing that, and we did not do that.
 15 Q. But you never spent time, did you,
 16 Dr. Henderson, to try and figure out what the Desk Tops
 17 implementation was, did you?
 18 A. Certainly we did at the time. When I was at
 19 the deposition, I was 25 years away from it and didn't
 20 remember the details.
 21 Q. Now, a couple questions about the article,
 22 PX149.
 23 MR. REITER: And if we could put that up,
 24 please.
 25 Q. (By Mr. Reiter) That is one of your articles on

1 Q. There were a lot of different systems that you
 2 and Dr. Card looked at in the course of your work. We
 3 talked about Smalltalk, Dataland, Chan. There were many
 4 differences?
 5 A. At the time of the deposition, I didn't
 6 remember a number of them.
 7 Q. Okay. And you hadn't taken the time to really
 8 prepare for the deposition and refresh yourself?
 9 A. I had not.
 10 Q. Okay. Now, one last question -- or one last
 11 series of questions on the article.
 12 MR. REITER: If we could go to the very
 13 last page after the references, PX563, and blow up the
 14 received right at the very bottom.
 15 Yeah, right there.
 16 Q. (By Mr. Reiter) And you can see at the very
 17 bottom of the screen it says received July '86, revised
 18 November 1986, and accepted November 1986?
 19 A. Yes.
 20 Q. Now, do you recall revising this any more after
 21 November of 1986?
 22 A. I don't. Stu was interacting with TOGS. My
 23 guess is it may have frozen at that point.
 24 Q. Well, the reason I have that question is if you
 25 look at, for example, Reference 15, it talks about a

<p style="text-align: right;">Page 145</p> <p>1 presentation that happened in April of 1987. So it 2 appears that this document was, in fact, modified at 3 least after November of 1986. 4 And, in fact, if we go to Reference No. 3 5 on the previous page, you'll see, I think, your other 6 paper where Dr. Card prevented at CHI -- you mentioned 7 that -- in 1987. 8 A. Both Stu and I. 9 Q. Both of you? 10 A. Yeah, it was a joint presentation. 11 Q. But that was in 1987? 12 A. That was in 1987, right. 13 Q. Right. So this article must have been modified 14 after 1986 to get those references in. 15 A. I would guess that that is true. The issue of 16 the Transactions on Graphics actually was published in 17 July of '87, and the process of '86 to '87 is a process 18 of interacting with the journal. 19 MR. REITER: I have no further questions, 20 Your Honor. 21 Thank you, Dr. Henderson. 22 THE WITNESS: Thank you. 23 THE COURT: Would you suspend for just one 24 second? 25 Thank you, Mr. Reiter.</p>	<p style="text-align: right;">Page 147</p> <p>1 conference, which is part of the ACM proceedings from 2 the special interest group on computer-human 3 interaction. 4 So you'd have to find the library which 5 has those proceedings. I'm sure we can also find it -- 6 copies, if people are interested. 7 THE COURT: Thank you, Mr. Gasey. Now, 8 are we through with this witness, Mr. Gasey? 9 MR. GASEY: Yes, we are. 10 THE COURT: All through? 11 MR. REITER: Yes, Your Honor. 12 THE COURT: You may step down, 13 Mr. Henderson (sic). 14 Mr. Gasey, would you care to call someone, 15 your next witness? 16 MR. GASEY: Yes, Your Honor. Next, we 17 would like to call Mr. Carl Cooper. 18 THE COURT: While Mr. Cooper is coming in, 19 why don't we stand up for a second. 20 MR. REITER: Your Honor, we talked about 21 attorney argument at various times. I think that was in 22 your instructions. 23 THE COURT: Sure. 24 MR. REITER: If I might have a few words 25 with the jury.</p>
<p style="text-align: right;">Page 146</p> <p>1 Would you care to inquire further, 2 Mr. Gasey? 3 MR. GASEY: No, thank you. We have no 4 further questions. 5 THE COURT: Mr. Reiter, would you take a 6 look at this, or Mr. Gasey, either one, together? 7 Nice to see you guys working together. 8 MR. GASEY: I can ask this, if you want. 9 THE COURT: Okay, good. 10 REDIRECT EXAMINATION 11 BY MR. GASEY: 12 Q. Dr. Henderson, we have a couple questions from 13 the jurors I'd like to relay. 14 Is it Dr. Or Mr. Maxwell? 15 A. It's Mr. Maxwell. 16 Q. Okay. And I have a question about whether 17 there was a Rooms article published anywhere, to your 18 knowledge. 19 A. A Rooms article? 20 Q. Right. 21 A. Well, the -- both of these documents are 22 published and available. The Transactions on Graphics 23 article is in that journal, which is available in the 24 public libraries. And the article from the CHI 25 conference in '87 appears in the proceedings of that</p>	<p style="text-align: right;">Page 148</p> <p>1 THE COURT: With the jury? 2 MR. HILL: We would object to that. 3 MR. REITER: Well, argument -- 4 MR. HILL: Your Honor, I don't understand. 5 MR. REITER: We had talked about argument, 6 Your Honor, between witnesses, interim argument, 7 attorney argument. That was in your instructions, I 8 believe, that the attorneys will at various points in 9 time be permitted to address the jury and present 10 limited amounts of argument. 11 We raised that at the pretrial. I was 12 asking for that opportunity. 13 MR. GASEY: Your Honor, our understanding 14 was this was solely for introduction of the witness, not 15 for a commentary. 16 THE COURT: Let's use that as a tool of 17 introducing witnesses, perhaps to introduce how your 18 witness will present and what they'll present. It would 19 disrupt, I think, the normal flow of the case to have 20 that kind of argument in the middle. 21 Will that work? 22 MR. KREVITT: Your Honor, if I may 23 address -- obviously, we'll proceed however Your Honor 24 wishes. 25 THE COURT: Certainly you will.</p>

1 MR. KREVITT: I just wanted to point out
2 in the instructions that Your Honor provided to the jury
3 this morning, it provides for the type of argument that
4 Mr. Reiter alluded to.

5 THE COURT: What did I say?

6 MR. KREVITT: May I approach? May I
7 approach, Your Honor?

8 THE COURT: Was I under oath?

9 MR. KREVITT: You were very articulate,
10 Your Honor.

11 THE COURT: Let's see. During the
12 presentation of the evidence, the attorneys for the
13 parties will be given brief opportunities to explain
14 what they believe the evidence has shown or what they
15 believe upcoming evidence will show.

16 MR. REITER: This was agreed to by the
17 parties, Your Honor, and I want to --

18 MR. GASEY: Our understanding of that,
19 Your Honor, is simply that we're going to talk about who
20 the witness is, introduce them. I mean, I don't
21 think -- closing argument should be closing argument.
22 We need to minimize and best use the time of the jurors,
23 in my opinion.

24 MR. REITER: Your Honor, if Mr. Gasey
25 would let me finish, I was going to say that I think

1 with my jury. I'm the one who wins favor.

2 MR. HILL: I'm like a dog to a bone,
3 Judge. I can't help it.

4 THE COURT: Let's take five minutes.
5 (Jury out for recess.)

6 (Jury in.)

7 THE COURT: Please be seated.

8 Mr. Gasey, Mr. Hill, who will be calling
9 our next witness?

10 MR. GASEY: That would be me, Your Honor.

11 THE COURT: All right.

12 MR. GASEY: Your Honor, Plaintiffs would
13 like to call Mr. J. Carl Cooper.

14 THE CLERK: Raise your right hand, please.
15 (Witness sworn.)

16 THE COURT: Please take your stand up
17 here.

18 Mr. Gasey, you may proceed.

19 MR. GASEY: Thank you, Your Honor.

20 JAMES CARL COOPER, PLAINTIFF'S WITNESS, SWORN
21 DIRECT EXAMINATION

22 BY MR. GASEY:

23 Q. Mr. Cooper, could you please state your name.

24 A. My full name is James Carl Cooper. I go by
25 Carl, because my dad and I have the same first name.

1 it's appropriate to follow the instructions -- we agreed
2 to that -- in allowing the attorneys -- and it would
3 work for both sides -- to explain to the jury what the
4 evidence just showed as it pertains to the issues in the
5 case as appropriate.

6 That was an agreement that counsel had,
7 and as you said, this document was agreed to before we
8 submitted it.

9 THE COURT: I don't, unfortunately, see
10 any agreement right now. Let's proceed under kind of
11 the standard way that I'm familiar with, which is we'll
12 have our arguments at the end.

13 And for -- you can take a little liberties
14 in introducing witnesses, I think, to lay out what
15 they're going to talk about, and in that sense provide a
16 little context and I guess argumentation as to what
17 they're going to be presenting. But let's not interrupt
18 each other's cases. I think that's better.

19 Mr. Hill?

20 MR. HILL: Your Honor, if I can ask one
21 indulgence. I just, by observation, heard some of the
22 sounds the jury made when we stood up a few minutes ago.
23 And I wondering if maybe a few minutes' break might be
24 in order before we start the next witness.

25 THE COURT: You're trying to win favor

1 Q. And where do you live currently, Mr. Cooper?

2 A. Incline Village, Nevada.

3 Q. How old are you?

4 A. 60.

5 Q. And what is your occupation?

6 A. I'm an inventor, electrical engineer by
7 training.

8 Q. Now, you are the corporate representative on
9 behalf of Technology Licensing Corporation in this case,
10 right?

11 A. That's correct.

12 Q. And what's your job with TLC?

13 A. I'm General Manager of TLC.

14 Q. Are you married?

15 A. Yes, I am.

16 Q. Have any kids?

17 A. Yes, two. Both adults finally.

18 Q. Where did you grow up, sir?

19 A. I grew up in with Watonga, Oklahoma.

20 Q. Did you go to school in Oklahoma?

21 A. I did. I went to grade school and high school
22 in Watonga, and I got my engineering degree in Oklahoma
23 State in Stillwater.

24 Q. What was that degree in at Oklahoma State?

25 A. It was a BS in electrical engineering.

1 Q. And did you work while you were in college?
 2 A. I did.
 3 Q. What did you do?
 4 A. I worked my way through college with several
 5 jobs, but most importantly, I worked as a maintenance
 6 and operations engineer at the campus TV station.
 7 Q. Was that your first experience or exposure to
 8 working on electronics like that?
 9 A. No, it wasn't. I received my first exposure to
 10 electronics back in Cub Scouts and got my first job in
 11 electronics when I was 11 at the local radio and TV
 12 repair shop that I used to go to and pester for parts
 13 for my radio projects.
 14 Q. So did television and radio technology become a
 15 passion of some sorts?
 16 A. It did. I've always enjoyed it. I find it
 17 very interesting, and, fortunately, I've been able to
 18 make a halfway decent living in the electronics
 19 industry.
 20 Q. Did you work as an electrical engineer after
 21 college?
 22 A. Yes. Actually, starting at my first real
 23 full-time job, slightly before I graduated from college,
 24 I got a job at the Stillwater Board of Education
 25 installing a television studio for that facility for use

1 Q. What did you do after that?
 2 A. Well, I got married. I actually got a job
 3 offer arising out of my first invention, got married,
 4 and moved to California to work for Consolidated Video
 5 Systems in Sunnyvale, California, Silicon Valley.
 6 Q. And how long were you at Consolidated Video?
 7 A. About three years. I had worked there for a
 8 while. They were bought out by Harris, had some changes
 9 in structure and management, and I moved on from there.
 10 Q. And where did you move to from Consolidated
 11 Video Systems?
 12 A. I went to Ampex Corporation in Redwood City,
 13 California, another Silicon Valley company. And, again,
 14 worked there in engineering and engineering management
 15 on a government project.
 16 Q. Did this work have anything to do with
 17 television or video technology as well?
 18 A. It was a digital recorder operating at speeds
 19 similar to those in television and video technology.
 20 Ampex, of course, is well-known to people in the
 21 industry as being the inventor and developer of the
 22 first videotape recorder.
 23 And my work was a digital tape-recorder,
 24 but it wasn't specifically identified in one manner or
 25 another. And some aspects of the job are considered

1 for producing educational videotapes for the high
 2 school.
 3 Q. And about when was that?
 4 A. That was in '72, as I recall.
 5 Q. And after that job in Stillwater, what was your
 6 next work experience?
 7 A. I went to Consolidated Video Systems -- or
 8 excuse me -- I misspoke. I went to Electronic Products
 9 Corporation in Cleveland and worked there as an engineer
 10 and engineering manager.
 11 Q. What did they do?
 12 A. Well, they -- they're no longer in business,
 13 but at the time I was there, they sold and installed
 14 television systems and television equipment primarily
 15 for professional production facilities.
 16 Example, one of our bigger projects was
 17 installing the television studio in the Cleveland
 18 Coliseum for production of sports programs out of the
 19 coliseum.
 20 Q. Okay. How long did you work for Electronic
 21 Products?
 22 A. It was about seven years.
 23 Q. And after that timeframe -- that would have
 24 been, what, about 1980?
 25 A. Roughly.

1 confidential even today.
 2 Q. Now, when was it about that you left Ampex?
 3 A. About '82, as I recall.
 4 Q. And after you left Ampex, where did you go?
 5 A. I went out on my own. I started consulting,
 6 and my departure from Ampex is a little indefinite,
 7 because I actually stayed around doing consulting work
 8 for them for quite a while after I ceased to be a
 9 full-time employee.
 10 But in any event, I started out as a
 11 consultant, and that led to forming Pixel Instruments
 12 Corporation, and I stayed with that for quite some time.
 13 Q. What is Pixel Instruments Corporation? What do
 14 they do?
 15 A. Pixel Instruments now sells audio and video
 16 signal processing equipment for the professional
 17 television industry. And, in fact, that's what it has
 18 done throughout its entire existence, although the
 19 particular products have changed over the years.
 20 Q. So your company, Pixel, actually manufactures
 21 and sells equipment?
 22 A. That's correct, except it's not my company
 23 anymore. I sold it a couple years ago.
 24 Q. When did you sell it, about?
 25 A. In '06. A couple of the long-time employees

1 were really kind of chomping at the bit to take over,
2 and I was at the point where had I had more than enough
3 work to do and was happy to make arrangements to
4 transfer ownership of the company to them.

5 Q. You talked about -- I think it was television
6 broadcast equipment.

7 Can you give me an example of the kinds of
8 products Pixel makes or made?

9 A. Yes. Generally, in the television industry,
10 there are two fields of equipment: Broadcast and
11 commercial, or consumer. The consumer equipment is
12 typically televisions and recorders and things of that
13 nature that people have in their house.

14 The professional equipment, the broadcast
15 and commercial, are devices that are used by television
16 stations and used by what are called production houses,
17 television production companies to make movies and
18 commercials and things like that.

19 Pixel predominantly has sold equipment in
20 the professional field, has not sold any equipment in
21 the consumer field, although a lot of the technology
22 developed at Pixel has ended up in consumer products.

23 Q. Now, you said earlier that you were an
24 inventor. Have you been awarded any patents?

25 A. Yes. I have over 50 patents, U.S. patents that

1 A. Yes. For example, video frame synchronizers
2 are an important product in the television industry now.
3 They used to be big boxes the size of a window
4 air-conditioner that sold for 35 or \$40,000. That was
5 way back in my work at Consolidated Video Systems. And
6 these days, they're incorporated in an integrated
7 circuit. Pixel has had some video frame synchronizer
8 products.

9 Another example would be audio delays used
10 for audio synchronizers to maintain or to correct lip
11 synch errors where the transmitted audio and video have
12 a different timing relationship than they should. And
13 you see people with their mouth moving after they start
14 speaking.

15 We also have products to measure video
16 delays and audio delays and to measure lip synch errors.
17 Those are just some of the examples.

18 Q. And did you manufacture anything using the
19 inventions in your 50 or so patents?

20 A. Yes. Actually, most of Pixel Instruments'
21 products utilized one or more of the patented inventions
22 of those patents. Some of them are later sync
23 correction products and video frame correction products,
24 actually used inventions covered by dozens of patents.

25 Q. Did Pixel own these patents?

1 have issued naming me as an inventor. There are another
2 handful of foreign counterparts to those patents that
3 have been awarded.

4 Q. Let me show you up on the screen what is --

5 MR. GASEY: Can we lower the lights a
6 little bit? I know there are so many of them, frankly,
7 that it's a little tough to see some of them.

8 Q. (By Mr. Gasey) But does this appear to be some
9 of your patents, looking at the screen in front of you?

10 A. Yes, it does. I haven't actually checked, so
11 I'm not absolutely certain they're all there.

12 (Pause in the proceedings.)

13 THE COURT: You may proceed, Mr. Gasey.

14 MR. GASEY: Thank you, Your Honor.

15 Q. (By Mr. Gasey) Out of these 50 or so patents
16 you've been awarded, what fields are they in?

17 A. The great bulk of them are in audio and video
18 signal processing for the television industry. There
19 are a few that are not related. I have a patent, for
20 example, on a nozzle for a pool sweep, because I was
21 tired of it spraying water on my window. But most of
22 them are electronics for television.

23 Q. Okay. Other than television, can you give me
24 some examples of the types of products your invention
25 would be used with?

1 A. Pixel owned some of them; I owned some of them
2 personally; Technology Licensing Corporation owns some
3 of them. And that is still the situation, although the
4 particular ones have been transferred about, depending
5 on the need over the years.

6 Q. Now, you mentioned Technology Licensing
7 Corporation. Who created Technology Licensing
8 Corporation?

9 A. Actually, my wife, her sister, and a friend
10 created the company. We had been hooked up with the
11 previous invention promotion company, and that didn't
12 work out.

13 And so in discussing what we should do, my
14 wife thought we could form a company and take over --
15 take over that work. And that's, in fact, what
16 happened.

17 Q. What was it about the -- was it -- who is it
18 that represented you previously?

19 A. It was a company called Video Processing
20 Technology that was run by a -- an attorney named
21 Leckrone, and we started with Mr. Leckrone, I think, in
22 '88 and got rid of him in about '96-'97 timeframe.
23 Needed to have somebody take over that work.

24 Q. Did -- was there -- had Mr. Leckrone done
25 something wrong to you?

1 A. Yes.
 2 Q. What had he done?
 3 A. Quite a few things. Embezzlement, fraud,
 4 allowing patents to go abandoned, self-dealing, a
 5 variety of things.
 6 Q. Is he still a lawyer?
 7 A. He is. I noticed that his ticket was not
 8 active for several years. We actually took the
 9 gentleman to court and won our case. That episode
 10 lasted for some six years or something like that. Never
 11 sue a lawyer if you're in a hurry, believe me.
 12 Q. So with that experience in mind, you formed
 13 TLC?
 14 A. That's correct.
 15 Q. And you partnered with IP Innovation around
 16 then, right?
 17 A. That's correct. People we could trust.
 18 Q. Why?
 19 A. Well, TLC had really been set up toward the end
 20 of the time when we were ending our relationship with
 21 VIDPRO. And most of the money that had been accumulated
 22 over the years from patent licensing and what have you
 23 had actually been spent in the litigation with VIDPRO.
 24 We did get some recoveries but not enough to make up for
 25 what we had spent in getting to that point.

1 A. A couple dozen, probably in the order of 30 or
 2 so, 32, 34, somewhere in that range.
 3 Q. Can you give me what types of companies you've
 4 dealt with in this process?
 5 A. Virtually all of the major professional and
 6 consumer television equipment manufacturing companies.
 7 Most of the larger computer printer companies that build
 8 high-quality printers have been licensed, and other
 9 fairly high-tech but unknown outside of the industry
 10 television broadcast equipment manufacturing companies.
 11 Q. Now, one of the -- you mentioned that there are
 12 three different groups of patents that TLC and IP
 13 Innovation partnered on, right?
 14 A. That's correct.
 15 Q. Can you tell me, are there numbers or names
 16 associated with any of them?
 17 A. Yes. And in particular in relation to our case
 18 here, there's a family of image resolution improvement
 19 patents that we refer to as the '780 family. I think it
 20 has five or six patents in it now. And it is the
 21 licensing and commercialization effort with respect to
 22 that family that brings us here today.
 23 Q. Now, one of the groups of companies that you
 24 licensed up for that '780 family of patents, the
 25 resolution enhancement family of patents, were for

1 And so TLC basically had a lot of really
 2 good valuable patents but not a lot of resources either
 3 in terms of capital or in terms of personnel available,
 4 particularly attorneys, to go out and license and
 5 protect those patents.
 6 Patent licensing is a difficult job. It
 7 takes time, it takes money. You have to be willing to
 8 assert and claim your patent rights if you're going to
 9 license, because nobody is going to license anything
 10 that they can get for free.
 11 So we partnered with IP Innovation. That,
 12 at the time, was managed by a gentleman named Tony
 13 Brown, and that was a very successful partnership and
 14 has been since then.
 15 Q. And how many patents did you partner with for
 16 TLC and IP Innovation?
 17 A. I think initially there were three major
 18 portfolios, a collection of odds and ends, patents, and
 19 the total number of patents at the time was probably
 20 about 18 or 20. And since then, the numbers have grown,
 21 because additional patents have been granted in some of
 22 those patent families.
 23 Q. Now, as a result of your partnership with IP
 24 Innovation, about how many licenses have TLC and IP
 25 Innovation been granted?

1 printer companies, right?
 2 A. That's correct.
 3 Q. And that includes a license that you had with
 4 Xerox, correct?
 5 A. That's correct.
 6 Q. And were you involved in negotiating that
 7 license?
 8 A. Yes, I was.
 9 Q. Was that -- was that a company that licensed
 10 pursuant to litigation, or was that outside of
 11 litigation?
 12 A. It was predominantly outside litigation. We
 13 had been involved with Dell in litigation. In fact,
 14 Mr. Reiter, I think, was involved in that.
 15 But in any event, Dell was selling, among
 16 other products, printers that were manufactured by
 17 Xerox. They suggested we talk to Xerox. Xerox and IP
 18 and TLC sat down and had some pretty productive
 19 discussions, and we ended up with an agreement that we
 20 think was very beneficial to all companies.
 21 Q. And why were you -- you were litigating with
 22 Dell, but you didn't litigate with Xerox?
 23 A. I don't recall that we ever had to file against
 24 Xerox. This has been involved in licensing now for
 25 about 25 years, and there have been a great number of

1 license negotiations and companies.
2 But in any event, what I do recall is
3 Xerox was actually pretty happy and willing to sit down
4 with us and discuss our mutual differences and come up
5 with a solution.

6 MR. GASEY: Your Honor, may I approach the
7 witness?

8 THE COURT: You may.

9 Q. (By Mr. Gasey) I'd like to hand you a binder,
10 sir, so we can go through some of the documents that
11 were generated pursuant to the agreement you got with
12 Xerox.

13 The first exhibit I'd like you to look at
14 is Plaintiffs' Exhibit 7. Can you tell me what that
15 document is, sir?

16 A. Yes. This is the license with Xerox I was just
17 speaking of, dated November 15th, 2004.

18 Q. And pursuant to that agreement, what did you --
19 what did you get from Xerox?

20 A. Well, we received cash from Xerox, and we also
21 received assignment -- in other words, took title to a
22 number of Xerox's patents in lieu of additional cash
23 payments.

24 Q. Okay. So you didn't have to pay them for the
25 patents that they gave you. You -- instead of cash, you

1 A. This is an assignment agreement. As a part of
2 the Xerox license agreement, we have a number of legal
3 documents that the attorneys put together, but this is
4 an assignment agreement whereby Xerox is assigning
5 patents to us.

6 Those patents are listed at the end of the
7 agreement in Exhibit A, but basically what the agreement
8 is saying is Xerox is assigning the ownership of those
9 patents to TLC and IP Innovation. There are royalty and
10 payment terms related to that.

11 In addition to recognizing the arrangement
12 whereby Xerox received the license under our '780
13 resolution enhancement patent family, we agreed to take
14 these patents to go out and commercialize the patents,
15 and Xerox would receive royalty payments back according
16 to a fairly complicated schedule under this assignment
17 agreement.

18 Q. Now, this agreement -- it calls Technology
19 Licensing Corporation -- you look at that -- it calls
20 them the buyers, right?

21 A. Well, TLC and IP are the buyers, yes.

22 Q. Right, jointly. Jointly, they bought those
23 patents, right?

24 A. That's correct.

25 Q. Now, on top of the patents, they went ahead and

1 gave them rights under your patents?

2 A. Well, I didn't quite understand that, but what
3 happened was Xerox got a license from us to cover their
4 printers under our resolution enhancement family. They
5 paid to us cash. And they also paid to us some of their
6 patents in place of them paying to us additional cash.

7 In essence, we agreed to buy some patents
8 from them as part of the agreement, although we didn't
9 actually write them a check for the patents we got. We
10 just took it off of the money they paid us.

11 Q. So under this agreement, depending upon the
12 amount of money that TLC and IP Innovation recover,
13 Xerox could stand to receive some of that money, receive
14 some of that payment?

15 A. That's correct.

16 MR. KREVITT: Your Honor, I would ask that
17 Mr. Gasey refrain from the leading questions and
18 essentially testifying and ask questions that will
19 elicit testimony from the witness, please.

20 THE COURT: Mr. Gasey?

21 MR. GASEY: That's fine, Your Honor.

22 Q. (By Mr. Gasey) Take a look next, if you will,
23 at Plaintiffs' Exhibit 8.

24 Can you tell me what that document is,
25 sir?

1 paid you how much money?

2 A. A million dollars.

3 Q. Was there ever any -- any assignment documents
4 that were executed pursuant to this agreement?

5 A. Yes. There are additional assignment documents
6 for the patents that, if I recall correctly, are
7 recorded in the Patent Office. Just like you have a
8 deed to your house that gets recorded with the county
9 recorder that shows everybody you own the property, with
10 patents, patents are property very much like your house
11 or the lot your house is on.

12 And those assignments get recorded in the
13 Patent Office to give everybody notice that you're the
14 owner of those patents.

15 Q. Let me have you look, if you would, at
16 Plaintiffs' Exhibit 10, 11, and 12 in your binder.

17 And are those the assignments that you
18 recorded in the Patent Office to reflect your ownership?

19 A. Yes, they are.

20 Q. Why do TLC and IP Innovation jointly own those
21 patents?

22 A. It basically stems from the fact that the '780
23 patent family that I invented was assigned jointly to
24 TLC and to IP as part of the process of setting up the
25 arrangement with IP. So being joint owners of the '780

1 family, we came to the understanding it would be best to
2 be joint owners of the Xerox patent family.

3 Q. Now, included in the patents that were
4 purchased, there was a total of how many patents?

5 A. Ten or so, I think.

6 Q. And that includes the three patents that are
7 involved in the lawsuit here today?

8 A. That's correct.

9 Q. Now, after TLC and IP Innovation acquired these
10 patents, they bought them from Xerox, what did they do
11 with them?

12 A. Well, the first thing we did was basically set
13 up a licensing program to license the patents to
14 prospective licensees, users of the technology,
15 companies that already used it, and companies that
16 wanted to use it.

17 Q. And were you aware of what Red Hat and Novell
18 were doing at that time?

19 A. No, we were not.

20 Q. Who was the first person that -- first company
21 that you became aware of that you tried to talk to about
22 their use of these patents?

23 A. That was Apple Computer.

24 Q. Do you remember when you went ahead and
25 contacted them?

1 A. No, I'm sorry. I don't have that date
2 committed to memory.

3 Q. Okay. When you met with them, first of all,
4 was it just letter-writing, or did you have a meeting
5 with them?

6 A. We initially contacted Apple, and in true,
7 big-company fashion, that contact didn't go very far.
8 They pretty much did what we concluded was stonewalling,
9 basically trying to delay and avoid discussions with
10 them. It's fairly common among some big corporations.

11 Q. And so what happened?

12 A. We sued them.

13 Q. And after you sued them, did they decide that
14 they wanted to go ahead and sit down and meet with you?

15 A. Yes. Lawsuits tend to establish patent
16 holders' rights. They're very valuable for setting a
17 bright dateline for establishing those rights, and once
18 we did that, then Apple decided they would sit down and
19 talk to us. And they actually ended up, at that point,
20 being fairly accommodating.

21 Q. And when you say they were accommodating, what
22 happened? Was there a telephone call or a meeting or
23 letters?

24 A. Well, there were some telephone calls back and
25 forth between Apple people and our attorneys, and they

1 ultimately wanted to be able to sit down with us and
2 present their positions and listen to our position. And
3 we, in fact, did that.

4 Q. When you say they wanted to present their
5 positions, who presented it?

6 A. Apple had an in-house attorney, a lady. I only
7 remember one of her names. I think it was Plotkin, and
8 I don't remember if it was her married name or last name
9 or a hyphenated name.

10 Anyway, this lady was an in-house patent
11 attorney for Apple, had access to Apple's confidential
12 information about the product -- actually, at that time
13 product and planned new product that we had identified.
14 Had information about what they were planning to do in
15 the future.

16 And we sat down with her and talked and
17 discussed, you know, where we were and where we both
18 wanted to go.

19 Q. When you say product and planned product, what
20 are you referring to?

21 A. Well, they had an existing product that we
22 believed infringed at the time, and they didn't think
23 they infringed.

24 Q. What was that product? Do you remember?

25 A. It was a big cat; it was a tiger. I think it

1 was referred to internally as Tiger, and we -- they had
2 a -- the lady had a PowerPoint presentation as to what
3 you could and could not do in that product, in that
4 Apple product.

5 And we watched that and explained it and
6 asked questions and discussed it. And actually, I
7 believe through that discussion and through, frankly,
8 her honesty, we came to have a better understanding of
9 how that product worked.

10 Q. Now, what was your understanding of how that
11 product worked as a result of that meeting?

12 A. It had the ability to change desktops, but in a
13 way that was different than we originally envisioned.
14 You could only change desktops in Tiger by changing
15 users, which was a rather cumbersome process. It wasn't
16 a process where one user could simply have a desktop for
17 doing one chore and another desktop for doing another
18 chore and switch between them.

19 You actually had to change users, and it
20 was quite different than we had originally believed it
21 was.

22 Q. Now, when you were talking earlier, you
23 mentioned an exchange about a -- I think it was a
24 product and a planned product. You talked about
25 product, this Tiger.

1 Did you recall what the planned product
 2 was you discussed?
 3 A. It was another cat, a leopard or a cheetah or
 4 something. Anyway, it's a product that we had learned
 5 about through their press releases in sort of -- in the
 6 interim time, in that timeframe. And they wanted to
 7 discuss it, because they wanted to release it, and they
 8 wanted to have some of -- some of the patented features
 9 that we had in the patents in the product. And we were
 10 certainly happy to give them a license to do that, if we
 11 could get fair payment for it. And we discussed that as
 12 well.
 13 Q. What did you discuss about that? You say it
 14 was a planned product. Was this something that was
 15 supposed to be released?
 16 A. It was. It missed its release date and got a
 17 new release date. It was about -- I don't know -- eight
 18 or ten months late, sometime later. And she didn't come
 19 out and say it, but I got the feeling that they weren't
 20 going to release it until they could get the patent
 21 coverage they needed or find out that they didn't want
 22 to buy it.
 23 So we talked about that quite a bit.
 24 MR. GASEY: I'm not sure if Your Honor
 25 wants us to break for the day.

1 weren't going to put it in unless they could get a
 2 license for that at a decent price.
 3 MR. GASEY: Your Honor, I think we're
 4 probably at as good a break point as any for the day.
 5 THE COURT: All right, fine.
 6 Ladies and Gentlemen, please be here
 7 promptly at 8:30 tomorrow so we can start. And
 8 remember, no talking to anyone. You remember all the
 9 rules.
 10 Thank you for your service today.
 11 (Jury out.)
 12 THE COURT: You can step out. We have a
 13 little business here.
 14 First, why don't I give you the time
 15 consumed by each party.
 16 The Plaintiffs have consumed 1 hour, 53
 17 minutes. The Defendants have consumed 1 hour, 25
 18 minutes all total today.
 19 All right. So we'll keep track of that as
 20 we proceed.
 21 We also need to have somebody deal with
 22 documentary evidence, each party. Who will be -- I need
 23 somebody who will make motions and somebody who will
 24 comment on motions so we can get them all in.
 25 MR. GASEY: Your Honor, Plaintiffs would

1 THE COURT: Do you think you can hold
 2 their interest much past 5:30?
 3 MR. GASEY: I don't want to hold these
 4 folks late. I definitely don't want to be accused
 5 of causing --
 6 THE COURT: I'm on their side, but you
 7 know the best time to stop, within five minutes here or
 8 so.
 9 MR. GASEY: We can -- I can just ask a
 10 couple more questions, and if you want, we can adjourn
 11 for the day.
 12 THE COURT: Okay. That will be good.
 13 Q. (By Mr. Gasey) As a result of these
 14 considerations -- by the way, do you know how Leopard
 15 operated as opposed to -- or had any understanding as to
 16 how Leopard operated as opposed to Tiger?
 17 A. Yes. Leopard was actually planned as a product
 18 that had the different switchable workspaces for a user
 19 that were, for lack of a better word, say efficiently
 20 switchable.
 21 And they thought that that was a nice
 22 feature to put into that particular product. They
 23 wanted to use it, but even though they had planned to
 24 use it and had advertised those features to be
 25 competitive, and I think competitive with Windows, they

1 respectfully request we get the following exhibits
 2 admitted into evidence. Plaintiff's Exhibit 1, 2, and
 3 3, each of the patents-in-suit, the --
 4 THE COURT: You need to kind of --
 5 MR. REITER: If we could slow down.
 6 No objections on those, Your Honor.
 7 THE COURT: You know, what I kind of
 8 recommend would be the best -- you guys do what you want
 9 with your teams, but I'd almost think that -- this young
 10 lady is Ms. Dickman.
 11 Ms. Dickman. And does Ms. Dickman have a
 12 counterpart on the other side?
 13 All right. Mr. Stewart, why don't you let
 14 them come right up here and talk to me. They know
 15 exactly what they're doing. And they should perhaps
 16 throughout the -- this will catch you off guard a little
 17 bit, Mr. Stewart.
 18 But what I'd suggest maybe is that each of
 19 you through the day, you know, stay in touch with each
 20 other so you know exactly which -- who's offering what
 21 on each side, so when she steps up, she'll give me the
 22 numbers and -- all of them. And you'll say, well, the
 23 only problems we have are with 43, 26, and 13, and then
 24 we'll talk about those.
 25 You can draw upon your brothers and

1 sisters behind you, if you want to do it that way, but
 2 at least in terms of keeping track of the evidence, I'll
 3 rely on you two folks.
 4 MS. DICKMAN: Yes, sir.
 5 MR. STEWART: Sure.
 6 THE COURT: If that works with your --
 7 MS. DICKMAN: That's fine with me.
 8 THE COURT: Your beloved senior counsels
 9 here.
 10 MR. REITER: Your Honor, Mr. Gasey and I
 11 were saying -- I'm not sure if the Court knows this.
 12 You know, they're not lawyers.
 13 THE COURT: That doesn't bother me. Does
 14 it bother you?
 15 MR. REITER: Well, no. I think that it
 16 makes sense for them to keep in touch with one another
 17 as to what is presented to the jury.
 18 MR. GASEY: I trust your organization.
 19 THE COURT: I think so, and I'm just happy
 20 to have them serve as they're serving you. So that's
 21 just fine with me.
 22 MR. REITER: Okay.
 23 THE COURT: And these ladies won't report
 24 me to Judge Ward, right, that I'm allowing a breach of
 25 the rules in the Eastern District?

1 MS. DICKMAN: Would you like me to break
 2 it down by witness or just the numbers?
 3 THE COURT: I think all we need are the
 4 numbers. And then I understand this is procedures
 5 catching you all off guard right now, but you give me
 6 the numbers, and then I'll give you plenty of time,
 7 Mr. Stewart, to consult with whoever you need to and see
 8 what you need to object to.
 9 MS. DICKMAN: All right. The Plaintiffs
 10 offer the following exhibits: PX1, PX2, PX3, PX4,
 11 PX139, PX149, PX156, PX166, PX7, PX8, PX10, PX11, and
 12 PX12.
 13 THE COURT: Okay. Those have all been
 14 offered today at one time or another, referred to at
 15 some time or another today?
 16 MS. DICKMAN: Yes, Your Honor.
 17 THE COURT: And that's all of them that
 18 have been referred to today?
 19 MS. DICKMAN: By Plaintiffs, yes.
 20 THE COURT: Fine. That's what I need to
 21 know.
 22 Now, Mr. Stewart, take whatever time you
 23 need to see if you've got any objections to any of
 24 those.
 25 (Pause in the proceedings.)

1 THE COURT: Ms. Dickman, if you need a
 2 recommendation for law school, let me know.
 3 Same offer to Mr. Stewart, of course,
 4 keeping things even.
 5 MR. GASEY: We don't want to lose her,
 6 Your Honor.
 7 THE COURT: My law clerks are telling me
 8 I'm doing it all wrong, too.
 9 MR. REITER: Not to beat a dead horse,
 10 Your Honor, but PX156, which is the lab notebook, I
 11 don't have an objection to the pages that Dr. Henderson
 12 authored himself, but I think it's inappropriate for him
 13 or for Plaintiffs to have the entire notebook put into
 14 evidence, because, as I said, Dr. Henderson was not
 15 familiar with the entirety of the notebook.
 16 THE COURT: Do you need the whole
 17 notebook, Ms. Dickman, Mr. Gasey?
 18 MR. GASEY: Yes. Under the Rule of
 19 Completeness, we'd like it, yeah. I think --
 20 THE COURT: Well, he referred to, if I'm
 21 recalling correctly, three or four places. And I'm very
 22 happy to give you a context on either side of those, but
 23 this is an awful lot of -- there's a hundred pages here.
 24 MR. GASEY: If there's pages he didn't
 25 reference, we can go over a list with the Defendants

1 that I think might be agreeable, because I think there
 2 might be other pages that other witnesses they're going
 3 to be perhaps offering and deposition testimony that
 4 were identified.
 5 So I think it maybe makes sense to make
 6 sure there's one collective set of pages as to that
 7 exhibit.
 8 THE COURT: Are you going to want to come
 9 back to this, Mr. Reiter?
 10 MR. REITER: Standing here right now, Your
 11 Honor, I honestly don't know. Maybe we can hold this to
 12 abeyance and come back after the deposition testimony is
 13 played.
 14 THE COURT: I hate to let things slip away
 15 from us. We'll forget them and then we'll have an
 16 incomplete record.
 17 MR. REITER: Well, we do have two very
 18 qualified people.
 19 THE COURT: We do. That's why I found
 20 this system works. If I have somebody who's following
 21 every page and that becomes their full-time job, they're
 22 better than we are.
 23 MR. GASEY: We do, because Ms. Dickman
 24 just pointed out their objections to our exhibit list,
 25 and they never objected to Plaintiffs' Exhibit 156 on

1 any basis.
 2 THE COURT: Well, but they're objecting
 3 now, so I've got to deal with it now. So it's an
 4 appropriate objection.
 5 MR. GASEY: Your Honor, doesn't the --
 6 don't the Defendants, by virtue of never having raised
 7 any objection, have that deemed waived as part of the
 8 pretrial order?
 9 MR. HILL: That's the provision of our
 10 local discovery order entered in case.
 11 MR. REITER: Your Honor, we had expected
 12 that they would be able to place the appropriate
 13 foundation. And as I said, I don't have a problem with
 14 certain pages, because Dr. Henderson talked about it.
 15 Dr. Card was on their may-call list as was
 16 Dr. Henderson. We didn't know that Dr. Card was --
 17 THE COURT: I think it's an appropriate
 18 objection. I think it's appropriate for them to raise
 19 their objection.
 20 But it's -- you know, if I have to rule on
 21 it now, I'll give you the pages that have been
 22 recognized and referred to by the witness and a context
 23 therein, but beyond that, I can't allow things in that
 24 haven't been substantiated. There's no foundation for
 25 it.

1 And, Mr. Stewart, you can check that with
 2 Ms. Dickman, and then she'll move 156, as I've
 3 suggested, A, B, C, D, whatever, I'll grant that.
 4 And everything else will not, at this
 5 point, be part of the record. And then tomorrow and the
 6 next day, you'll all be familiar with kind of what I'm
 7 expecting, and this will go just like that.
 8 MR. REITER: I'm sure there will be some
 9 other things.
 10 THE COURT: That's what you get paid to
 11 do, and I get paid to make fun of it.
 12 MR. REITER: Absolutely, Your Honor.
 13 THE COURT: But it's all fun in the end.
 14 Ready.
 15 MS. DICKMAN: PX156-A, which is marked
 16 XP001702; PX156-B, which is marked XP001753 through
 17 XP001760.
 18 THE COURT: Those are the pages you're
 19 giving me, right, Ms. Dickman?
 20 MS. DICKMAN: Yes.
 21 THE COURT: You're following this,
 22 Mr. Stewart?
 23 MR. STEWART: Could we go back to that
 24 last one?
 25 MS. DICKMAN: PX156-C, which is XP001836

1 So how would you like to handle that,
 2 Mr. Gasey?
 3 MR. GASEY: Well, what I would suggest
 4 then, Your Honor, is that we take a few pages on either
 5 side in order to give it context as well as the cover
 6 page, of course, and just leave it at that.
 7 THE COURT: For now. And then if we come
 8 back now -- Ms. Dickman, this is where you get
 9 double-paid, because now you've got to read -- you've
 10 got to come up with --
 11 MS. DICKMAN: The specific pages?
 12 THE COURT: Yeah, you're going to have to
 13 come up with -- what's the number of this.
 14 MR. GASEY: Plaintiffs' Exhibit 156.
 15 THE COURT: So you're going to have to
 16 have a 156-A, B, C, D, E, however many, and I'll allow
 17 those in. But I'm not allowing in all of 156 at this
 18 time. So can you and Mr. Stewart do that right now?
 19 MS. DICKMAN: Sure. May I use one of the
 20 books in the --
 21 THE COURT: You can indeed.
 22 And what I need is -- I'll give you a page
 23 before and a page after everything he has referred to up
 24 to now. And that will be A, B, C, D, and however many
 25 direct references we had.

1 through XP001837. Right?
 2 MR. GASEY: I'm sorry.
 3 MS. DICKMAN: This is the last page you
 4 wanted.
 5 MR. GASEY: Yeah, that's the last page he
 6 referred to.
 7 MS. DICKMAN: Okay. So that is what we
 8 offer out of Plaintiffs' 156.
 9 THE COURT: All right. Mr. Stewart, I'll
 10 give you a second to make sure you have no objection to
 11 that.
 12 COURT ROOM DEPUTY: Can you give me the
 13 first range?
 14 MS. DICKMAN: The first range is XP001702,
 15 which is the cover of the notebook.
 16 THE COURT: Okay. Now, any objection,
 17 Mr. Stewart?
 18 MR. STEWART: No objection.
 19 THE COURT: Fine. Then I can now admit
 20 all of your moved documents to the record, and they are
 21 part of our record.
 22 Now, this gets a little complex, but
 23 you'll need to have separated out those pages now which
 24 we've admitted.
 25 MS. DICKMAN: I can do that tonight.

1 THE COURT: Good. Because in the event we
2 give this to the jury, they will get only what I've
3 admitted and not everything else.

4 MS. DICKMAN: Yes, Your Honor.

5 THE COURT: So we'll have to have that
6 all -- we're trusting you and Mr. Stewart to do that for
7 us.

8 MS. DICKMAN: I will do that tonight.

9 THE COURT: And then tomorrow, as
10 everything is admitted, you're going to have to check
11 with your counsel and make sure you know which -- what
12 the objections are in advance so this can go like
13 clockwork.

14 Good. Thank you.

15 MR. GASEY: Thank you, Your Honor.

16 THE COURT: Now, what else do I need to
17 talk to my counsel about this evening?

18 What I'd like to hear at this point,
19 Mr. Gasey or Mr. Hill, is your brief summation of what
20 you expect to do tomorrow, and then I'd like to hear --
21 well, that's probably enough. And then you can tell me
22 tomorrow morning if you expect to have any major
23 concerns with that.

24 Mr. Gasey?

25 MR. GASEY: In one word, Your Honor,

1 tomorrow we'd like to finish.

2 THE COURT: That's fine with me.

3 MR. GASEY: Specifically, we're going to
4 go ahead and finish, obviously, Mr. Cooper in the
5 morning.

6 THE COURT: Okay.

7 MR. GASEY: And then once the Defendants
8 have finished their cross-examination of Mr. Cooper,
9 then the next person that we call live would be
10 Dr. Myron Zimmerman, our technical expert back there.

11 THE COURT: All right. Mr. Zimmerman, can
12 you wave your hand?

13 Thank you, Mr. Zimmerman -- Dr. Zimmerman?

14 DR. ZIMMERMAN: Either one works.

15 THE COURT: Okay. Excuse me.

16 MR. GASEY: And then after that, there is
17 our damages expert, Mr. Joseph Gemini, who just stepped
18 out.

19 THE COURT: Mr. Gemini stepped out. We
20 know -- just before he says anything, you know that this
21 is an area of the Court's particular concern.

22 MR. GASEY: I appreciate, Your Honor.

23 THE COURT: I can anticipate that the
24 Court may wish to speak to Mr. Gemini.

25 What time do you suppose we'd get to him?

1 MR. GASEY: I would say probably early to
2 mid-afternoon, probably shortly after lunch would be my
3 guess.

4 THE COURT: Okay. I might like a little
5 time with Mr. Gemini out of the jury's presence, but
6 we'll take a look at that as it occurs.

7 MR. GASEY: All right. That would be the
8 last of our live witnesses for the case-in-chief. There
9 would be some potential reading in.

10 I know Your Honor has dealt with the
11 issues of calling Dr. Putnam and folks such as that, but
12 that's something that presumably we could handle in our
13 rebuttal case. If you want to keep things divided,
14 obviously it would be something that we'd rely upon in
15 our proofs. But if the Defendants are keen on just
16 having them called when they present their
17 case-in-chief, we could --

18 THE COURT: Is this something you need to
19 escape their directed verdict motion?

20 MR. GASEY: Potentially. I'd want to
21 speak with my co-counsel.

22 THE COURT: Well, then you're going to
23 have to probably have Mr. Reiter -- excuse me.

24 MR. KREVITT: I'm glad I came first.

25 THE COURT: Mr. Krevitt and Mr. Reiter,

1 you'd have to -- you know, they have a right to make
2 their directed verdict motion. And so you'd have to
3 have enough in the record at that point to escape that,
4 which means we might have to call Mr. Putnam twice, if
5 we have to.

6 MR. GASEY: All right.

7 THE COURT: Unless you can get some kind
8 of agreement from them with --

9 MR. KREVITT: Your Honor, if I may.

10 THE COURT: Yes.

11 MR. KREVITT: I'm confused why Mr. Putnam
12 would be relevant to the Plaintiffs' case. The
13 Plaintiffs, of course, has the burden on damages. They
14 have to present their case.

15 THE COURT: I'm just kind of taking my cue
16 from Mr. Gasey.

17 MR. KREVITT: That's my fear.

18 THE COURT: He's suggesting to me that he
19 needs Mr. Putnam for his case-in-chief, and I'm --

20 MR. GASEY: The short answer is, Your
21 Honor, as Your Honor recalls, you reopened damages to
22 discovery.

23 THE COURT: I did, yes.

24 MR. GASEY: The Defendants -- we asked for
25 a witness. They never provided a fact witness.

1 THE COURT: So you're going to -- okay.
2 I'm putting this back together. Mr. Putnam is going to
3 be part of that?

4 MR. GASEY: Exactly, Your Honor.

5 MR. REITER: Now I'm a little confused,
6 because Dr. Putnam is an expert witness. He's not a
7 fact witness. We had a call with Your Honor a week ago
8 today, seems like quite a long time ago, where we were
9 discussing issues, and the issue of additional fact
10 depositions never came up.

11 I assume that there was some
12 correspondence. There was some correspondence about
13 other things that didn't come up. So if they're asking
14 to take --

15 THE COURT: They are entitled to call, if
16 they'd like to. If they wish to elicit some -- I
17 presume factual testimony from Dr. Putnam.

18 MR. GASEY: That's correct, Your Honor.

19 THE COURT: And we'll deal with it at the
20 time, won't we?

21 MR. GASEY: It may not be the case. As a
22 matter of full confession, it will be my partner,
23 Mr. Vickrey, that will be involved in that.

24 THE COURT: All right. Let's not cross --
25 I see the confusion. Let's not cross bridges before we

1 deposition on Wednesday. They were able to ask him all
2 the questions they needed to understand what those
3 documents are and what that information is.

4 Mr. Gemini has now presented four reports.
5 Four reports, Your Honor. We got one. Another one
6 after we spoke with you on Monday. And if Mr. Gemini
7 needs to rely on that additional information and do
8 another report tonight, I guess that's something that
9 we'll see, but --

10 THE COURT: Mr. Gasey?

11 MR. GASEY: We have a couple of things to
12 do. We don't have time for Mr. Gemini's report tonight.
13 What we do want is to make sure that we're not attacked
14 for the lack of admissibility of facts that they
15 themselves have failed to produce until last week and
16 never had a fact witness for us to be able to
17 authenticate.

18 MR. REITER: Mr. Gemini put in a fourth
19 report after Dr. Putnam's deposition. And, in fact,
20 that fourth report says I'm doing this in response to
21 Dr. Putnam's deposition and what I just learned from
22 reading that deposition.

23 So Mr. Gemini was more than able to take
24 into account everything that Dr. Putnam relied on,
25 everything that Dr. Putnam said both in his supplemental

1 have to.

2 Go ahead, Mr. Reiter.

3 MR. REITER: With all due respect, Your
4 Honor, I have to prepare.

5 THE COURT: Yes, you sure do.

6 MR. REITER: And right now I don't know
7 what to prepare. Mr. Gasey said he was going to try to
8 finish his case tomorrow.

9 THE COURT: Mr. Gasey, can you enlighten
10 them as to what you need Mr. Putnam for?

11 MR. GASEY: Specifically, I believe we'd
12 like to get information from Mr. Putnam that he relied
13 upon and the damages report he submitted last week
14 regarding unit volume information --

15 THE COURT: That's what I thought, and so
16 he will testify as to where he got that and --

17 MR. REITER: And that's it? I mean --

18 MR. GASEY: Well, it's the facts that were
19 previously unproduced that are identified for the first
20 time in his deposition -- in his expert report.

21 Those facts were withheld from us, and we
22 need to be able to figure out some way to have those be
23 relied upon and made of record to support our case.

24 MR. REITER: The facts have been produced
25 to them. It's a few documents. They took Dr. Putnam's

1 report which was in response to the third Gemini report
2 as well as what Dr. Putnam said in his deposition.

3 So to have Dr. Putnam --

4 THE COURT: Let me ask one quick question.

5 Is there a document that you have seen for
6 the first time with Mr. Putnam that needs to be part of
7 your case?

8 MR. GASEY: The potential documents that I
9 can see are some documents related to unit volume
10 information.

11 THE COURT: Can that be made part of the
12 record without Mr. Putnam testifying?

13 MR. GASEY: I'm not aware of anybody else
14 that's ever talked to or been aware of it. Just to the
15 contrary, their fact witnesses have continuously said we
16 have no idea why unit volume --

17 MR. REITER: Dr. Putnam testified that he
18 received that information from Mr. Tiemann, who is a
19 witness, and who was also deposed long ago before this
20 new theory was ever presented to us.

21 But Dr. Putnam received that information
22 from Red Hat from Mr. Tiemann, who is a witness. And,
23 again, it is their burden to prove damages. They have
24 all of the information. They have had all of the
25 opportunity to account for that information.

1 And Mr. Gemini put in another report
 2 after -- after Dr. Putnam submitted his report and was
 3 deposed. And that information was discussed at
 4 Dr. Putnam's deposition.
 5 MR. KREVITT: If I may, Your Honor.
 6 It sounds like your question went to
 7 admissibility and that if we don't challenge the
 8 admissibility, it makes this problem go away.
 9 I think we'll agree to that, if you give
 10 us the overnight to look at the documents. We want to
 11 be in a position, Your Honor, when their case is done to
 12 make a motion for directed verdict, which we're
 13 confident will be a meritorious motion.
 14 MR. GASEY: One thing simply in light of
 15 the comments I heard from Mr. Reiter is if Mr. Tiemann
 16 is the gentleman to whom -- can speak to those exhibits,
 17 we'll just call him at first. He's a fact witness.
 18 THE COURT: Sounds like we've talked
 19 enough that you two can work this out.
 20 MR. KREVITT: I think if the Plaintiffs
 21 identify the documents they have in mind, we'll be able
 22 to take a position and work this out.
 23 THE COURT: Okay. And let's -- we'll --
 24 let me give you some time to see if you can't work this
 25 out, and I'll talk to you tomorrow morning. But we know

1 this evening?
 2 That will work just fine.
 3 MR. GASEY: Thank you, Your Honor.
 4 MR. REITER: One more question. You said
 5 you're going to read in deposition testimony?
 6 MR. GASEY: Well, it's either going to be
 7 reading in deposition testimony or taking Mr. Tiemann
 8 adverse. I want to talk with my co-counsel about it.
 9 MR. REITER: Well, are you going to be
 10 reading in deposition testimony at all? We need to have
 11 completeness, so if you could get that to us.
 12 MR. GASEY: Yeah. Obviously, when we get
 13 materials to you, we'll get identification of pages.
 14 THE COURT: Do you need me for this?
 15 MR. GASEY: I don't think so.
 16 THE COURT: You guys can work this one
 17 out.
 18 Anything else you might need me for?
 19 MR. GASEY: I don't think so, Your Honor.
 20 THE COURT: That -- how disappointing. I
 21 thought I was more important. I thought I had a role
 22 around here.
 23 Okay. I'll see you -- I kind of like the
 24 idea of meeting just before we get started. I think we
 25 can use the courtroom tomorrow, because we won't have

1 where they're going.
 2 We're going to finish with Mr. Cooper,
 3 then we'll hear the substantive expert, then we'll hear
 4 the damages expert, right?
 5 MR. GASEY: That's right, Your Honor.
 6 THE COURT: And if there's no issues about
 7 admissibility, we won't have any other witnesses. If
 8 there are, I don't know.
 9 MR. GASEY: In that regard, Your Honor,
 10 assuming that we are able to finish all three witnesses
 11 and cross them, we're probably going to need
 12 identification of who their lead-off witness is going to
 13 be so we can prepare for their presentation.
 14 THE COURT: All right.
 15 MR. KREVITT: We will think about that.
 16 We had reached an agreement by 8:00 o'clock the night
 17 before to identify any witnesses. We'll huddle and
 18 identify at least a witness to fill any potential space
 19 at the end of the day.
 20 THE COURT: Can you give me an idea now?
 21 Give me a couple names so I --
 22 MR. KREVITT: It will either be an expert
 23 or Mr. Tiemann. Mr. Tiemann is here from Red Hat.
 24 THE COURT: All right. Then you'll give
 25 them specifically what you're thinking by 8:00 o'clock

1 jurors in here. So let's be here about 8:00, and we can
 2 check our notes before we start at 8:30.
 3 Thank you very much. Good day.
 4 (Court adjourned.)
 5 CERTIFICATION
 6
 7 I HEREBY CERTIFY that the foregoing is a
 8 true and correct transcript from the stenographic notes
 9 of the proceedings in the above-entitled matter to the
 10 best of my ability.
 11
 12
 13
 14 _____ Date
 15 DONNA COLLINS, CSR
 16 Deputy Official Court Reporter
 17 State of Texas No. 1086
 18 Expiration Date: 12/31/10
 19
 20 _____ Date
 21 GLENDA FULLER, CSR
 22 Deputy Official Court Reporter
 23 State of Texas No. 1042
 24 Expiration Date: 12/31/10
 25