

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

i4i LIMITED PARTNERSHIP * Civil Docket No.
 * 6:07-CV-113 (LED)
VS. * Tyler, Texas
 *
 * May 15, 2009
MICROSOFT CORPORATION * 9:00 A.M.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE LEONARD E. DAVIS
UNITED STATES DISTRICT JUDGE
AND A JURY

APPEARANCES:

FOR THE PLAINTIFF: MR. GORDON WHITE
 MR. KEVIN BURGESS
 MR. JOHN CAMPBELL
 MS. GRETCHEN HARTING
 McKool Smith
 300 West Sixth Street
 Suite 1700
 Austin, TX 78701

 MR. DOUGLAS CAWLEY
 MR. JEFFREY CARTER
 MR. TOM FASONE
 MR. JONATHAN YIM
 MR. JOHN CURRY
 McKool Smith
 300 Crescent Court, Suite 1500
 Dallas, TX 75201

APPEARANCES CONTINUED ON NEXT PAGE:

COURT REPORTERS: MS. SUSAN SIMMONS, CSR
 MS. JUDITH WERLINGER, CSR
 Official Court Reporters
 100 East Houston, Suite 125
 Marshall, TX 75670
 903/935-3868

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

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APPEARANCES CONTINUED:

FOR THE PLAINTIFF: MR. ROBERT M. PARKER
Parker Bunt & Ainsworth
100 East Ferguson, Suite 1114
Tyler, TX 75702

FOR THE DEFENDANT: MR. MATTHEW POWERS
Weil Gotshal & Manges
201 Redwood Shores Parkway
Redwood City, CA 94065

MR. DAVID LENDER
MR. PAUL TORCHIA
MR. STEVEN KALOGERAS
MS. ARIAN NEWELL
Weil Gotshal & Manges
767 Fifth Avenue
New York, New York 10153

MR. KEVIN KUDLAC
MS. AMBER ROVNER
MR. TODD PATTERSON
Weil Gotshal & Manges
8911 Capital of Texas Highway
Building One, Suite 1350
Austin, TX 78759

MR. ANDREW CULBERT
Microsoft Corporation
One Microsoft Way, Building 8
Redmond, WA 98052

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P R O C E E D I N G S

COURT SECURITY OFFICER: All rise.

(Jury out.)

THE COURT: Please be seated.

All right. Good morning.

Do we have some matters to take up before we bring the jury in?

MR. POWERS: We do, Your Honor.

I wanted to advise the Court of what the issues were and get Your Honor's guidance as to when you would like to address them.

Neither one needs to be addressed before the witnesses this morning. So if you wish to take -- start with the jury, we can do it over the lunch hour, if that was your preference.

But I wanted to find out what -- what -- how you wanted to handle it.

THE COURT: Okay.

MR. POWERS: The first issue relates to a violation of an agreed motion in limine. Your Honor will recall that one of the agreed motions in limine was that i4i would not describe Microsoft as a monopolist.

THE COURT: As to what?

MR. POWERS: Monopolist.

1 And Mr. Wagner, in his testimony on
2 Wednesday, blurted that out as one of his reasons, in
3 response to a question from Mr. Lender, as to why the
4 25-percent rule had never been used in a negotiation by
5 Microsoft.

6 He said at Page 119, well, that's because
7 they're a monopolist, which, of course, is a clear
8 violation of the Court's order on the agreed motion in
9 limine.

10 Counsel then, on redirect examination,
11 referenced that testimony exactly and then went back and
12 made it worse by talking about using that power,
13 Microsoft is able to impose this term or impose that
14 term, which is a further violation of the motion -- of
15 the agreed motion in limine order.

16 So, again, we don't have to address -- I
17 don't think that's going to come up in the issues this
18 morning, but what our request is going to be, of course,
19 is that that testimony be stricken and that the Court
20 give some statement to the jury that it was improper to
21 be asked and answered and that they should disregard it,
22 or something to that effect. That's the first issue.

23 THE COURT: Okay. Response?

24 MR. POWERS: The second issue relates to
25 the --

1 THE COURT: Let me get the response to
2 that.

3 MR. CAWLEY: Your Honor, first of all,
4 it's true; Mr. Wagner did blurt out the M word. That's
5 the subject of the -- of the order in limine.

6 There's certainly nothing in the order of
7 limine that prohibits references to Microsoft being a
8 powerful, dominant company. He did use the M word, but
9 he immediately thereafter went on to say that it's in a
10 good way; that Microsoft got in a position that it is,
11 because it does things right.

12 So I wish he hadn't said it. He
13 certainly was cautioned not to go off, and there was no
14 question that was posed to him about Microsoft as a
15 monopolist, but he did use that word.

16 THE COURT: All right. Don't use the M
17 word anymore and tell all your witnesses not to.

18 What's next?

19 MR. POWERS: The second issue, Your
20 Honor, relates to the question of the reexamination.
21 And Your Honor will recall that you had previously
22 denied Microsoft's request to introduce evidence
23 regarding the reexamination of the patent-in-suit.
24 And one thing has changed materially in the trial, and
25 we wanted to bring that to the Court's attention and

1 ask, based on that change, that Your Honor reconsider
2 your ruling.

3 The change is in Dr. Rhyne's testimony.
4 Dr. Rhyne, when I asked him a straightforward question
5 that during the prosecution of the '449 patent-in-suit,
6 that Microsoft did not have an opportunity to
7 participate, which, of course, is true.

8 He injected voluntarily the fact that
9 there was a well-known procedure, referring to the
10 reexam, where Microsoft could have done so.

11 And, of course, the impression -- if
12 we're not allowed to introduce evidence of the reexam,
13 the impression that the jury is left with -- based on
14 Dr. Rhyne's totally gratuitous testimony, which was not
15 even responsive to the question but attempting to
16 undermine the effect of the truthful answer to the
17 question, the effect on the jury would be that there was
18 this procedure where Microsoft could have done something
19 and didn't.

20 And that negative pregnant implication
21 is, of course, prejudicial to Microsoft created by Dr.
22 Rhyne's gratuitous line that was not necessary to
23 respond to the question and was injected for the
24 specific purpose of trying to create that impression
25 with the jury.

1 Because all I asked him was, during the
2 prosecution of the patent-in-suit, Microsoft had no
3 opportunity to participate, and the answer to that is
4 plainly true.

5 But he instead chose to try to undermine
6 that by injecting, voluntarily again, this notion of the
7 reexam.

8 So now not to let us introduce evidence
9 that, in fact, Microsoft did participate in the very
10 procedure that he flagged for the jury and the results
11 of that is required, because Dr. Rhyme opened the door.
12 And he opened the door for a specific, gratuitous
13 purpose that is prejudicial to Microsoft.

14 THE COURT: Okay. Did he use the -- did
15 he specifically, by name, refer to the procedure for
16 reexamination?

17 MR. POWERS: He did not use the word
18 reexam, but he described a reexam procedure exactly.

19 THE COURT: Okay. Do you have his
20 testimony transcribed?

21 MR. POWERS: We do.

22 THE COURT: Okay. Response?

23 MR. CAWLEY: Yes, Your Honor.

24 This -- this -- if I could set the stage
25 procedurally here briefly, Your Honor.

1 This is a motion in limine -- relates to
2 motion in limine filed by i4i in which the Court granted
3 prohibiting any reference to Microsoft's reexam.

4 The status of that is, very late in the
5 game -- and I don't even know the date, but maybe --
6 maybe somebody does, if it's relevant -- but not very
7 long ago, Microsoft filed for a reexam of this patent.

8 As the Court knows, when you file for a
9 reexam, you don't have to make any showing of
10 invalidity. You don't have to carry a burden of proof.
11 You just have to satisfy the requirements for reexam.

12 Ninety-eight percent of those
13 applications are granted by the PTO, and this one has
14 been, unsurprisingly. No action has been taken on it by
15 the PTO.

16 As we argued in the motion in limine, to
17 allow Microsoft to say not only have we filed the
18 reexam, but the PTO has granted it, well now, that's
19 extremely prejudicial, and we've opened up a huge can of
20 worms where we either have to put on expert testimony
21 about the reexam procedure and what it means and what it
22 doesn't mean; or we have to ask Your Honor to give legal
23 instructions to the jury about the reexam procedure and
24 what it means and what it doesn't mean, all of which, I
25 would suggest, doesn't really cure the prejudice of

1 introducing something that is legally irrelevant for the
2 clear purpose of prejudicing the jury.

3 Now, in terms of Mr. Rhyne's testimony,
4 he was asked:

5 QUESTION: I'm sorry. I didn't mean to
6 interrupt you. So no other party can come in and say,
7 wait, here's a piece of prior art you're missing. None
8 of that's possible, right?

9 That's a pretty open-ended question.
10 It's not confining him just to the application process.
11 The question is, none of that's possible.

12 His answer: Not -- not at that point.
13 There is a well-defined procedure that's available,
14 after the patent is issued, but at this point, no other
15 party would be aware that this is taking place.

16 Now, Microsoft, if they were -- consider
17 that inappropriate, could have objected to that answer
18 as nonresponsive. I'm not sure it is nonresponsive.
19 And the Court could have ruled on its responsiveness or
20 nonresponsiveness and maybe even given some kind of
21 curative instruction.

22 But they didn't do that, and we would
23 respectfully suggest that there is no reason for the
24 Court to revisit this order in limine.

25 THE COURT: Okay.

1 MR. POWERS: For the Court's reference,
2 that's at Page 97, Lines 4 through 11 of the morning
3 transcript from May 13th.

4 THE COURT: Do you have that for me?

5 MR. POWERS: Certainly. I will be happy
6 to give it to you.

7 MR. CAWLEY: Could I say one other thing,
8 Your Honor?

9 THE COURT: Yes.

10 MR. CAWLEY: I apologize. Just a
11 clarification.

12 And I should have said, in case I'm not
13 crystal clear, this is Mr. Powers' question to
14 Dr. Rhyne, not ours.

15 THE COURT: All right. Well, I'm going
16 to look at this. I'll take a closer look at it.

17 Anything more?

18 MR. POWERS: May I respond briefly to
19 counsel's comments on this issue?

20 THE COURT: Yes, uh-huh.

21 MR. POWERS: Your Honor will recall that
22 on the motion in limine, you were balancing the
23 relevance versus the prejudice, and counsel says it's
24 not relevant to anything. That's not true.

25 It is squarely relevant. The Alcatel

1 case, in fact, granted summary judgment, in part, based
2 on it. It is squarely relevant to the question of
3 willfulness.

4 Willfulness has an objective prong, which
5 asks whether objectively, forgetting Microsoft's state
6 of mind or anything else -- whether objectively, there
7 is a reasonable argument that the patent is invalid.

8 Now, the fact that the Patent Office has,
9 quote -- has declared, quote, a substantial new question
10 of patentability, based on the same prior art references
11 that are at issue here --

12 THE COURT: All right. But isn't
13 willfulness determined at the time of infringement?

14 MR. POWERS: No, it is not. It is
15 throughout. And the cases are clear that you can use
16 evidence during the trial to establish that.

17 It is objective. It is not -- it's not a
18 question of a particular point in time. It's objective.

19 THE COURT: Response, counsel?

20 MR. CAWLEY: Well, it -- it -- it is --
21 it is -- it is an objective standard, of course, but it
22 is not logical, nor is it legally correct, to argue that
23 you can go out and take a very preliminary procedure
24 from the Patent Office in which they've made no ruling,
25 other than to find that you've satisfied the

1 requirements of a reexam.

2 There is no substantive legal activity of
3 meaning that has been taken by the Patent Office
4 relevant to this patent.

5 Your Honor understands that, but we
6 respectfully suggest that there's a grave danger that
7 the jury will not.

8 THE COURT: Okay.

9 MR. POWERS: On that issue, Your Honor, I
10 beg to differ. The Patent Office isn't just checking
11 boxes about whether they fill the form in right.
12 They are forming a substantive judgment on whether,
13 quote, a substantial new question of patentability has
14 been reached, close quote.

15 That is -- that is a substantive
16 determination by the Patent Office. And certainly, Your
17 Honor can advise the jury that it's -- that the process
18 continues and that the patent -- this is a preliminary
19 decision and all of that.

20 But, (a), it is clearly relevant to the
21 question of -- to the objective prong of willfulness.

22 But, (b), at least here more to the
23 point, it is directly responsive to the negative
24 pregnant implication that Dr. Rhyne deliberately
25 injected improperly in response to a question.

1 He was deliberately attempting to imply
2 that although Microsoft had no opportunity to
3 participate during the original reexam, that there's a
4 well-established procedure afterwards where they could
5 have.

6 And if the jury hears nothing about that,
7 he will succeed in his attempt to plant an inference in
8 the jury's mind that Microsoft didn't and should have.
9 And that inference is false and highly prejudicial, and
10 that is classic, pure door-opening, and that changes
11 completely the --

12 THE COURT: Well, Counsel, what is your
13 response to Plaintiffs' argument that this was not
14 objected to at the time the testimony was made and could
15 have been cured with a simple instruction at that time?

16 MR. POWERS: It came in and blurted in.
17 It was in at that point.

18 THE COURT: Why didn't you object to it
19 at that time?

20 MR. POWERS: We didn't object to it,
21 because it was, in my mind, not objectionable. It
22 opened the door. It opened the door to a line of
23 testimony, and it was already in.

24 And at that point, it was done. If it
25 had been a question, I could have objected to it, but it

1 wasn't.

2 THE COURT: Well, you could have objected
3 and asked for it to be stricken, or in the alternative,
4 approached the Court at that time, and I could have made
5 a decision at that time whether to strike it or to allow
6 evidence of the reexamination.

7 MR. POWERS: That's true. But nothing
8 would have been different then versus now. There's no
9 difference.

10 THE COURT: All right. The Court will
11 take it under advisement.

12 Anything further before we bring the jury
13 in?

14 MR. POWERS: No, Your Honor.

15 With respect to the motion in limine,
16 could we -- we would ask for an order striking the
17 testimony that flows from -- was the violation and a
18 statement from the Court to the jury that it was
19 improper and should be disregarded.

20 THE COURT: In lieu of offering evidence
21 of reexam?

22 MR. POWERS: I'm sorry. I'm referring
23 now to the monopolist issue.

24 THE COURT: I really think doing that at
25 this point would call more attention to it than

1 otherwise. I don't think it's that egregious of a
2 statement.

3 There was an agreed motion in limine on
4 it. How I would have ruled on a motion in limine, I
5 don't know. But I think it was not that unreasonable of
6 a response based on the questions. So I'm not going to
7 give any further instruction to the jury.

8 Anything further?

9 MR. POWERS: Nothing further.

10 THE COURT: All right. Bring in the
11 jury.

12 MR. CAWLEY: I have one.

13 THE COURT: All right.

14 MR. CAWLEY: May Witnesses Tulley and
15 Thomas be excused?

16 THE COURT: Any objection?

17 MR. POWERS: No objection, Your Honor.

18 THE COURT: Yes, they may.

19 MR. CAWLEY: Thank you, Your Honor.

20 THE COURT: All right. Bring the jury
21 in, please.

22 MR. POWERS: Both sides do have a large
23 number of exhibits that they wanted to give lists to the
24 Court for introduction.

25 Do you wish that to be done live in front

1 of the jury?

2 THE COURT: Yes.

3 COURT SECURITY OFFICER: All rise for the
4 jury.

5 (Jury in.)

6 THE COURT: Be seated.

7 Good morning, Ladies and Gentlemen of the
8 Jury. Did y'all have a good day off yesterday?

9 A JUROR: No. We worked.

10 THE COURT: I did, too. I know how that
11 is.

12 Well, welcome back. And we're going to
13 get started back with the testimony today. I anticipate
14 that the Plaintiff will rest this morning, and we will
15 begin the Defendant's case. Then we will come back on
16 Monday and continue. So, hopefully, Monday or Tuesday,
17 we'll -- we'll be nearing the end of the trial.

18 So, anyway, continue to pay close
19 attention today.

20 And, Mr. Cawley, who will your next
21 witness be?

22 MR. CAWLEY: Thank you, Your Honor.

23 Our next witness will be Dr. William
24 Wecker.

25 THE COURT: All right.

1 MR. CAWLEY: And, Your Honor, this
2 witness has not been sworn.

3 THE COURT: All right. Dr. Wecker, if
4 you would come forward and raise your right hand and be
5 sworn, please.

6 (Witness sworn.)

7 THE COURT: All right. You may have a
8 seat, Dr. Wecker.

9 Before we begin with his testimony,
10 Ladies and Gentlemen of the Jury, I believe both sides
11 have some exhibits that they wish to offer for the
12 record. So we'll take care of that housekeeping matter
13 first.

14 Do Plaintiffs have any exhibits?

15 MR. POWERS: We can do ours while they're
16 finding their list, Your Honor, if that would help.

17 THE COURT: All right.

18 MR. CAWLEY: Is this the list?

19 THE COURT: One moment.

20 MR. CAWLEY: Is this it?

21 Okay. Your Honor, this is the list.

22 Shall we just mark it as Exhibit 4?

23 THE COURT: That will be fine.

24 Does counsel for Defendant have a copy of
25 that list?

1 MR. CAWLEY: It's been exchanged.

2 MR. POWERS: This is the other one -- we
3 have exchanged lists, and we have no objection.

4 THE COURT: All right. So we're going to
5 mark that as -- what's the next exhibit number for
6 Plaintiffs' exhibit list?

7 COURTROOM DEPUTY: 51.

8 THE COURT: Now, that's -- this is --
9 this is an exhibit or an exhibit list exhibit?

10 COURTROOM DEPUTY: The exhibit list would
11 be List No. 2.

12 THE COURT: No. 2. That's what I
13 thought.

14 All right. Plaintiffs' Exhibit List
15 No. 2 has been marked and identified.

16 Are there any objection to the exhibits
17 listed on Plaintiffs' Exhibit List No. 2?

18 MR. POWERS: No, Your Honor.

19 THE COURT: All right. They're admitted.
20 Now, do the Defendants have a list?

21 MR. POWERS: We do, Your Honor.

22 THE COURT: All right. And that would be
23 Defendant's Exhibit List No. 2 as well?

24 MR. POWERS: I believe it's 1.

25 THE COURT: No. 1. Okay.

1 MR. POWERS: I believe I just read them
2 in before.

3 THE COURT: All right. Defendant's
4 Exhibit List No. 1, Mr. Cawley, have Plaintiffs received
5 a copy of that and reviewed it?

6 MR. CAWLEY: Yes, Your Honor, and we have
7 no objection.

8 THE COURT: All right. The exhibits
9 listed on Defendant's Exhibit List No. 1 are admitted.

10 Thank you. You may proceed, Mr. Cawley.

11 MR. CAWLEY: May I approach the witness?

12 THE COURT: Yes, you may.

13 WILLIAM WECKLER, Ph.D., PLAINTIFFS' WITNESS, SWORN

14 DIRECT EXAMINATION

15 BY MR. CAWLEY:

16 Q. Would you state your name for the record,
17 please.

18 A. I'm William Wecker.

19 Q. And what is your profession, Dr. Wecker?

20 A. I'm a statistician.

21 Q. Let's talk a little bit more in a minute
22 about what a statistician is, but first tell the jury,
23 if you would, what were you asked to do in this case?

24 A. I was asked to estimate the number of
25 installations of Microsoft Word 2003 and 2007 at

1 businesses in the United States that performed certain
2 opening and closing actions that were specified to me by
3 Plaintiffs' counsel.

4 Q. All right. Can you tell us what those
5 opening and closing actions were?

6 A. Yes. I made a chart that tells you.

7 I looked at a number of different opening and
8 closing actions, but the ones that ended up being used
9 by Mr. Wagner, as I performed my estimate, were the ones
10 shown on this slide.

11 They are the opening of an XML document
12 containing custom XML and then saving that document in
13 one of a number of possible formats. The dot XML format
14 or the dot docx or the dot docm or the single-file web
15 page or the web page format but not including a web page
16 filtered format.

17 Q. All right. And as a result of the work that
18 you did in this case, Dr. Wecker, what was your estimate
19 of the number of installations that performed those
20 actions?

21 A. More than 1,850,000.

22 Q. And did you provide that number to Mr.
23 Wagner, who we heard from yesterday testifying about his
24 opinion on the amount of a reasonable royalty?

25 Not yesterday; it was the day before.

1 A. Well, I wrote a report, and that number is
2 contained in the report. And I understand, then, that
3 report was passed on to Mr. Wagner.

4 Q. Okay. I want to ask you some more questions
5 in a minute, but to just spend a little while giving the
6 jury some more background of how you did the work in
7 this case to allow you to arrive at that estimate.

8 But before we do that, let's find a little
9 bit more out about you and what qualifies you to do work
10 like this.

11 Can you briefly tell the jury about your
12 educational experience?

13 A. Yes. I graduated in 1963 from the United
14 States Air Force Academy with a Bachelor of Science
15 degree in basic sciences. And then after a number of
16 years in the military service, I returned as a civilian
17 to the University of Michigan, where I received a Master
18 of Science degree, then a Ph.D. degree in statistics in
19 applied mathematics.

20 Q. You -- you skipped over some years there.
21 You mentioned that you were in the military service.

22 Tell us about your military service.

23 A. Okay. Briefly, after I graduated from the
24 Air Force Academy, I came here to Texas in Laredo to do
25 pilot training; that and married my wife at the time,

1 still my wife.

2 And then went into fighter-type aircraft and
3 flew fighters all around the world for the Air Force
4 until eventually we moved to a more traditional
5 occupation.

6 Q. Okay. So you were a fighter pilot in
7 Vietnam, for example?

8 A. Yes.

9 Q. Did you receive any military decorations?

10 A. Yes.

11 Q. What?

12 A. Well, several, but the most proud -- the one
13 I'm most proud of is the Distinguished Flying Cross.

14 Q. Let's go back, though, to your academic
15 experience.

16 After you graduated from the University of
17 Michigan with a doctor's degree in statistics and
18 applied mathematics, what did you do then?

19 A. I accepted an appointment at the University
20 of Chicago teaching statistics and other areas of
21 mathematics.

22 Q. And how long were you there doing that?

23 A. About 13 years, but I didn't stop doing that.
24 I just did it in another place. I moved to California
25 and continued doing a professor's job at another

1 university, the University of California at Davis.

2 Q. And how long were you at UC at Davis?

3 A. Several more years for a total of almost 20
4 years.

5 Q. And when you were a professor for those 28 or
6 9 years, did you teach students?

7 A. Sure.

8 Q. You taught them subjects in applied
9 mathematics and statistics?

10 A. Sure, graduate students. I didn't have any
11 undergraduates, but I taught in the graduate school,
12 essentially, every year.

13 Q. Did you do research?

14 A. Yes. Those are research universities, and
15 the majority of the time I spent was in statistical
16 research.

17 Q. Did you publish articles and chapters in
18 books?

19 A. Yes. Yes.

20 Q. All of these, I assume, are still on the
21 subject of applied mathematics and statistics?

22 A. Right. Did that, and then there were other
23 duties that are generally lumped under service to the
24 profession, such as I was an editor for more than 20
25 years of the major statistical journals in the United

1 States.

2 Q. First of all, what is a statistical journal?

3 A. If you're a university researcher, that's the
4 place where you publish your research findings. Two
5 particular journals that I was involved with are The
6 Journal of the American Statistical Association, which
7 is the flagship journal of that association, probably
8 the prominent statistical journal in the world.

9 And then I was on the editorial board of
10 another one as well, The Journal of Business and
11 Economics Statistics, which is a specialty journal for
12 statistics as applied to business and economic issues,
13 also run by The American Statistical Association.

14 Q. Now, when you tell us about these journals,
15 were you merely someone who wrote articles that appeared
16 in those journals?

17 A. Well, I did that, but I also operated as an
18 editor in the peer-review process for determining
19 whether somebody's submitted article will be published
20 or not.

21 That's a -- that's a very responsible job,
22 because a young professor's whole career depends on
23 whether he can get his work published or not. So I
24 always took that job extremely seriously and spent a lot
25 of time with careful review of the work of others so

1 that I wouldn't mistreat them due to inattention and
2 injure someone's career.

3 Q. When you left your -- your career as a
4 full-time professor of statistics and applied
5 mathematics, what did you do then?

6 A. Well, in 1990, I formed a company, a
7 consulting company, that -- where I began to practice
8 what I had been teaching. And that's what I do today.
9 I run a small consulting company of about 25
10 statisticians and mathematicians, and we consult with
11 people all over the world on issues of statistics and
12 applied mathematics.

13 Q. Okay. I want to hear -- let the jury hear a
14 little bit more about that, but first let me ask you,
15 that since you've left the university world, have you
16 continued to teach occasionally?

17 A. Yes. I haven't really left the university
18 world, but I've certainly left a full-time professor
19 job.

20 But I continue to get invitations to teach,
21 and I, from time to time, do that. I've taught at
22 Stanford and University of Chicago, not full-time, and
23 even moved the whole family to Czechoslovakia for one
24 semester, and we taught in the major university there in
25 Prague. So I continue to keep my hand in.

1 Q. All right. Let's turn back now to the
2 company that you founded in 1990. You told us generally
3 what it does.

4 What -- what kind of clients does your
5 company serve in doing statistical work?

6 A. Well, all kinds. Statistical problems come
7 up in everybody's business. So we have automobile
8 companies and airline companies and airline
9 manufacturers and banks and pharmaceutical companies,
10 just any -- any business that you can think of.

11 Governments, local, state, federal
12 governments, even some foreign governments.

13 Q. So are all these clients that have come to
14 you to get help with matters that involve statistics?

15 A. Yes.

16 Q. And have you sometimes consulted with parties
17 in litigation, such as you have done in this case?

18 A. I have done that many times.

19 Q. So let's turn now a little more specifically
20 to the work that you did in this case.

21 Could you tell us in basic terms what you did
22 to estimate the number of Word 2003 and 2007 products in
23 businesses in the U.S. that were used to perform the
24 actions that you've identified?

25 A. Yes. After thinking about it, I decided that

1 the best way to do that would be to ask knowledgeable
2 people in businesses what their activities were when it
3 came to the use of Microsoft Word and XML files. And I
4 proposed that to counsel, and they invited me to proceed
5 with that work.

6 Of course, there's more than 13 million
7 businesses in the United States, and it is totally
8 impractical to visit them all, but I designed a
9 statistically representative sample of those businesses
10 so that the businesses that I -- where I was able to
11 conduct interviews, would that be representative of the
12 full 13 million. So I could then have a scientifically
13 basis for extrapolating from the ones I talked to to the
14 ones I didn't talk to.

15 Q. Okay. Is there a shorthand name for this
16 work that you recommended and did?

17 A. A sample survey is the shorthand name.

18 Q. Okay. And it's interesting that you use the
19 expression, sample survey. We hear about surveys a lot.
20 We constantly read about them in the newspaper, hear on
21 the news about a survey that got done.

22 What is a sample survey?

23 A. Well, those words are meant to convey that
24 there's a statistician doing the designing, because,
25 since about 1940, when the sample survey methodology was

1 fully -- nearly fully developed -- there has been some
2 development since -- but mostly, it was developed by at
3 least the 1950s.

4 It has been understood that the key to a
5 valid extrapolation from a sample is a statistical
6 selection of a certain very special kind involving
7 random number generators so that you don't -- so that
8 you have an even-handed selection process.

9 So I would not include in sample surveys
10 convenience surveys where just somebody goes out and
11 picks people that they think might be interesting to
12 talk to. I don't have that in mind at all. I have in
13 mind the statistical kind.

14 Q. Are sample surveys, such as you've described,
15 commonly used to make estimates of quantities in large
16 groups or populations?

17 A. It's become absolutely routine. The federal
18 government uses it to estimate things we hear on the
19 radio, like the unemployment rate or the inflation rate.
20 Those are all done with sample surveys. And I've talked
21 to the people who do it in Washington.

22 Businesses use it all the time to assess
23 various aspects of their business. Accounting people
24 use it when they do audits. It's just routine that they
25 take proper statistical samples. So it's very common.

1 Q. Have you previously participated in the
2 design and execution or carrying out of sample surveys?

3 A. Yes. I've done that several times -- many
4 times. In fact, I'm involved in, I think, three at this
5 very moment.

6 Q. Tell us more specifically, then, how did you
7 go about putting together and carrying out your sample
8 survey in this case?

9 A. Well, the procedure in this case is fairly
10 standard. The first -- there's three steps. The first
11 step is the step of designing which businesses to
12 interview. That's the statistician's role there. And
13 so I did that design step.

14 Then the next step is the actual collection
15 of the information where you go to the business. In
16 this case, it was a telephone survey, so you do it by
17 telephone. And you collect the information that you're
18 interested in.

19 And then the third step is that all that
20 information comes back to the statistician -- that's
21 me -- and I review everything for completeness and
22 correctness and reasonableness and make any edits or
23 adjustments that are necessary, and finally combine all
24 that information to make the estimates that I then pass
25 on in my report.

1 Q. Okay. Let's take those steps, and one at a
2 time, I want to ask you specifically what you did in
3 this case.

4 You said the first one was to select the
5 sample of the businesses to be contacted. How did you
6 do that?

7 A. Well, I did that by getting access to a very
8 large list of businesses in the United States. I used
9 the Dun & Bradstreet list that has more than 13 (sic)
10 U.S. businesses, all kinds of businesses, big ones and
11 small ones.

12 Q. Did you say 13 U.S. businesses?

13 A. 13 million U.S. businesses.

14 This is very commonplace that statisticians
15 go to select samples for -- of businesses for whatever
16 purpose they have in mind.

17 Q. Well, 13 (sic), as you've already said, is
18 kind of an unwieldy number.

19 A. 13 million.

20 Q. What did you do to select a sample of that?

21 A. Well, that's on this slide here. It's a
22 little complicated, but first I divided up the database
23 into nine slices. We call them strata. So that the big
24 companies were all in one stratum, and then the very
25 small companies were all in another, and so on up the

1 ladder.

2 There are several good statistical reasons
3 for doing that, but probably the most obvious is then
4 your sample is sure to have good coverage of all the
5 different kinds of businesses.

6 And then over on the right here, you can see
7 the sample that I drew using a random number generator
8 of a total of 988 businesses out of this large database
9 with some in each category of the size category.

10 Q. So just very generally, first of all, 988 is
11 kind of a peculiar number. How did you come up with a
12 sample of 988?

13 A. I didn't start with 988. I started with a
14 nice round number of a thousand, and so I'll answer your
15 two parts here.

16 So how did I start -- why did I start with a
17 thousand?

18 And the answer to that is, I knew that in
19 surveys of this kind that many people will not
20 participate in the survey. You may have a company
21 policy against it, or they may be too busy or for
22 whatever reason.

23 So I needed to have what would ordinarily be
24 an unusually large sample of a thousand, because we
25 needed to contact that many businesses in order to get

1 somewhere between 25 and a hundred people who would
2 respond for that company and fill out the interview
3 questionnaire that I needed.

4 So that's the starting point of 1,000, so
5 that I could get somewhere in the range of 25 to a
6 hundred.

7 Then when I actually drew the sample, I got a
8 latest update of the Dun & Bradstreet list, and a couple
9 of companies in the top end had dropped off or moved to
10 another stratum, so I had 11 fewer to select. And that
11 didn't bother me; 988 was as good as a thousand for my
12 purpose.

13 And then by -- just as a luck of the random
14 generator number, I happened to pick Microsoft, and the
15 lawyers all turned white and told me that I wasn't
16 supposed to be calling them. And so I said, okay, well,
17 I'll subtract them. And so that got me down to have 12
18 fewer, and I ended up with 988 in my sample.

19 Q. Let me just make sure that I understand what
20 you said.

21 On this chart that we're looking at, you've
22 got this column, number of employees; that's information
23 that you just decided to create those categories, right?

24 A. Right.

25 Q. So they range from huge companies with more

1 than a hundred thousand employees at the bottom all the
2 way up to small companies with less than 20 employees at
3 the top; is that right?

4 A. Very large businesses and then all different
5 sizes down to the smallest business.

6 Q. And then from the Dun & Bradstreet list of
7 all businesses in the United States, this third column,
8 population size, tells us how many businesses fall
9 within each of these categories, right?

10 A. That's true. Most people are surprised when
11 they learn that most of the business activity in America
12 is small business. You can see about 12 million small
13 businesses out there. That's -- that's the professor
14 talking here. I was just trying to educate on the
15 point.

16 But whatever the number was is recorded here
17 all the way up to the very large businesses that there
18 aren't that many of.

19 Q. All right. And then in this last column,
20 sample size, you, doing your work as a statistician,
21 decided how many businesses in each of these size
22 categories you should put in your sample of 988,
23 correct?

24 A. Yes.

25 Q. And then once you decided, for example, that

1 you were going to put 252 small business in there, you
2 just randomly picked 252 out of this 12 million?

3 A. That's right.

4 Q. Okay. Now, once you did this first step of
5 randomly selecting who the sample would be, tell us
6 about the second step.

7 How was the information collected from this
8 988 targets?

9 A. Okay. So to perform the actual telephone
10 interview, I used a company named Opinion Research
11 Corporation that's in the business full-time of doing
12 telephone surveys, and worked together with them to
13 design a script so that the interviewers didn't just
14 call up and ask whatever they felt like.

15 They call up and they ask the questions that
16 I wanted them to ask in the same order, in a very
17 disciplined way, which is what one needs to do in these
18 situations.

19 Q. All right. Tell us a little more about this
20 company, Opinion Research Corporation.

21 A. They're a very well-known survey company.
22 They were founded in 1938, and they've been in this
23 business ever since.

24 They do surveys for the federal government,
25 Center for Disease Control.

1 Have you ever watched CNN, you see that CNN
2 reports surveys from time to time. I happen to know
3 that Opinion Research Corporation does the surveys for
4 CNN. And they have the facilities to do that.

5 This isn't just a matter of somebody calling
6 up on the phone. It's actually a computerized process.
7 So with training that takes place for the interviewers
8 and auditing and oversight, it's really quite an
9 extensive operation to do telephone surveys. And they
10 have all that training and equipment.

11 Q. And they carry this out under your direction?

12 A. They do.

13 Q. And you mentioned that you helped develop a
14 script that the people actually manning the telephones
15 would use.

16 Is there a copy of that script?

17 A. Yes, it was in my report.

18 Q. Okay. Can you show us a picture of it?

19 A. (Complies.)

20 Q. All right. And that's Plaintiffs' 365?

21 A. It's a several-page document. This is just
22 the cover. I think we'll have to have an enlargement to
23 actually read it.

24 Q. Okay. Can you tell us more about the script
25 then?

1 A. Okay. I have some enlargements that will
2 help me do that.

3 The script had two parts: The screening
4 questions and then the substantive questions. And you
5 can tell a screening question, because the questions all
6 have numbers on them. And the screening questions start
7 with an S, and then the substantive questions start with
8 a Q.

9 So here's an early question, Question S1b,
10 and this is the part of the telephone interview where
11 the interviewers are trying to find the person that is
12 knowledgeable and able to answer the following
13 questions.

14 So here's a question that says: Are you the
15 person who handles the setup and administration of
16 computers for your business?

17 And then here's another one that, after
18 asking them various questions -- I'm jumping around in
19 the script -- it says: Are you the right person to be
20 speaking to about this, or should I be speaking to
21 somebody else, trying to make sure that they are getting
22 to the right person.

23 Then here's screening Question 6, asking if
24 they're aware of the computer language XML.

25 And then here I jumped into the substantive

1 questions. You see a Q question here. Thinking about
2 those computers with Word 2007 currently installed, what
3 percent would you say -- and I'll just paraphrase -- are
4 used to open an XML document containing custom XML in a
5 typical workday?

6 I call this question, for short, the
7 typical-day question.

8 A couple more comments, then I'll stop. But
9 they wouldn't even get to this question, if the
10 respondent hadn't answered the right way to the
11 preceding question, Question Q1.

12 Question Q1 asked them: Has anybody at your
13 business in the last six years ever used Microsoft Word
14 to open an XML document, and if they say no, then they
15 don't get any of these questions.

16 But if they say yes, now we're down to
17 finding out how much and when and where, and the issue
18 of whether there's any such activity that has already
19 been settled.

20 So if a respondent is answering this question,
21 they've already told the interviewers that there's some
22 of this activity going on. And this question and 39
23 others then are given to them.

24 And with a total of 40 questions, I can
25 pretty much nail down the general use of Word and XML

1 over the course of years at that particular business.

2 Q. Dr. Wecker, I notice on this question, Q1b,
3 one of the possible answers that they're asked is that
4 they don't know.

5 A. Yes. I always allow them to say they don't
6 know, because maybe they don't know. And especially
7 when we get back years in time, maybe they weren't at
8 the company and they don't know, or for some other
9 reason they don't know, and they tell you they don't
10 know.

11 Usually, this question is the easy question.
12 This is the -- my -- in some ways, my best question,
13 because it's asking them about right now, I know you're
14 here; you're on the phone. And so -- and you're a
15 person who deals with the setup and administration of
16 computers. These are the kinds of things you know, and
17 so what's the answer to that?

18 They may not know, even that person, what
19 happened in 2003. They may have to say I don't know.

20 Q. All right. Dr. Wecker --

21 A. By the way, when they say they don't know, I
22 count zero.

23 Q. Okay. We'll -- I want to make sure the jury
24 completely understands that, so we'll talk about that a
25 little bit more in a minute.

1 Let me ask you this: When you selected these
2 988 businesses to be called, did you make an initial
3 estimate -- you've already told us that many would not
4 respond for various reasons -- did you make an initial
5 estimate of how many actual responses you expected to
6 get back?

7 A. Yes. Opinion Research Corporation, who does
8 this every day, said it was their estimate that we would
9 get between 25 and a hundred.

10 Q. And how many did you get?

11 A. 46, right in the range they thought would
12 happen.

13 Q. Was anything done to encourage participation
14 in the survey?

15 A. Lots of things to encourage. First, they
16 called up to three times to make the appointment with
17 the person that would be the right person.

18 Also, these interviewers are trained to be
19 very good at getting through gatekeepers and getting to
20 the right people. That's sort of a practical part of
21 the job. It is also very helpful that the interviewers
22 are very professional in how they conduct themselves and
23 that the interview not be overly long so that people
24 will be inclined to participate.

25 And we also offered, at ORC's recommendation,

1 a small 35-dollar incentive for the roughly 10 minutes
2 it took people to do this.

3 Q. Did they get that incentive regardless of
4 what they answered?

5 A. Right. They can say -- they can answer
6 Question Q1 that they don't have any of that activity at
7 this company, and the interview is essentially over, and
8 they get mailed \$35.

9 Q. Is that kind of small incentive typical in
10 encouraging participation in telephone surveys?

11 A. Yes. It's become more and more the common
12 thing to do, and it is generally approved of by
13 statisticians as a good way to get more participation.

14 Q. Sorry.

15 Did the company that was ORC that was
16 actually making the telephone calls, do the people
17 making the calls know what answers would be helpful or
18 not helpful to you or to i4i or anything like that?

19 A. They did not. I was very careful to keep
20 them totally blind as to what kind of answers would be
21 viewed as favorable to any party at all.

22 Q. All right. And did -- did ORC at the end of
23 this process produce a copy of certain data resulting
24 from the answers to the survey?

25 A. Right. When they were done with this, they

1 made a computer spreadsheet that contained all the
2 responses from all of the parties that they had
3 contacted.

4 Q. Is that Plaintiffs' Exhibit 366?

5 A. Yes. This is a cover page for it.

6 Let me see if I have -- yes, here's a page.

7 Q. Okay. Well, fortunately, you're the one that
8 has to read this and not us.

9 And I guess, was that the third step after
10 they provided this back to you, then does your job, as
11 the statistician, get back to them?

12 A. Yes. I can do a little better with this
13 here. I think I made it with some annotations.

14 This is a very ugly spreadsheet. It's 9 feet
15 long, and no one could love this spreadsheet. But this
16 is the way they sent it to me, and it does have all the
17 information, and I can show you.

18 The respondents are numbered, and they are in
19 the first column. And so I'll pick on Respondent 168 as
20 an example, because I'm going to make an example out of
21 168 in just a moment.

22 And then moving about 4 feet to the right in
23 this long spreadsheet, I pick on Question Q3a, which is
24 one of the substantive questions, and I can read that
25 the respondent answered 4 to that question.

1 So all the information is in there. It's in
2 a very clumsy way for people to look at, but I took
3 this, read it into my computers, and then printed it out
4 again in ways that are much more convenient so I display
5 all the information in easy form for study.

6 Q. Okay. Once you get this 9-foot-long
7 spreadsheet from ORC, the results of their survey, do
8 you just accept it face value and proceed to crunch the
9 numbers, or do you do something to check it?

10 A. I do not accept it at face value. I go
11 through every single number.

12 Q. So every sale and number we see up here, you
13 go through?

14 A. Right, because, as statistical work goes,
15 this is not that large a data set, so it's manageable.
16 I've worked with some data sets that are in the hundred
17 million role category, and you can't look at every
18 number there. You have to use statistical filters and
19 so on to deal with them.

20 But always, it's important to look through
21 the numbers, check for inconsistencies and anomalies and
22 try to generally whip the data set into appropriate
23 shape where it would deserve the name of data.

24 Q. Okay. And is there a name for this process?

25 A. Statisticians call this statistical data

1 editing --

2 Q. Okay.

3 A. -- or sometimes --

4 Q. Tell us -- give us an example of some entry
5 on this that required statistical data editing.

6 A. Yes. Here's an example. This is an example
7 from Respondent 168. I've got two questions here.

8 Q3a did not require any editing, but it's
9 necessary to explain that one first. To paraphrase, it
10 asks how many different computers had Word 2007
11 installed in the year 2008, and the respondent said they
12 had four.

13 This is a very small company with only four
14 computers installed.

15 Q. Okay. That's the response, four, right here
16 (indicates)?

17 A. Right. That's what they recorded, and that's
18 what was sent to me by the interviewers. And I had no
19 difficulty with that. So I interpreted that to be four
20 computers with no struggle.

21 But then they were asked in the Question 6a,
22 thinking about those four computers, what percent would
23 you say had used Word to open an XML document and then
24 save it in a certain -- one of several formats. And
25 they said three.

1 Well, they're getting this question over the
2 telephone and a very close-listening person would have
3 heard the question say what percentage and would have
4 said --

5 Q. What percentage right here?

6 A. They wouldn't -- they would have said --
7 instead of three computers, they would have said 75
8 percent of four, but most people don't think like that
9 when they have small numbers. They would say three or
10 four, three out of four.

11 And would interpret the question naturally as
12 what portion of the computers, what part of the
13 computers. So I see that normally. This is just the
14 nature of the English language. The English language is
15 not mathematics, and there's always room for
16 interpretation in a question.

17 Q. So given that this -- what -- the end product
18 of your job here is an estimate?

19 A. Right.

20 Q. Do you -- is it commonly accepted in your
21 field of statistics that translating these pure number
22 answers from an imprecise language is appropriate?

23 A. Yes. We have long names for it, like logical
24 imputation and so on, but they all amount to using your
25 head.

1 Three percent of four computers isn't even a
2 whole computer.

3 Q. So this answer three really did mean three
4 percent; that means they're saying that on less than one
5 computer a year they did this?

6 A. I don't -- I don't believe that. I think
7 that it's very common, and I saw it in this data and
8 I've seen it elsewhere, when you ask questions like this
9 where the numbers are very small, that they tend to
10 think in -- most naturally, in terms of the number of
11 part, like three out of four.

12 And so my interpretation -- I don't really
13 see this as changing the answer. I'm interpreting that
14 when they said three, they meant three computers.

15 Q. All right. And let's take another example.
16 I don't want to take the time -- everybody's time to go
17 through illustrating it, but let's just take another
18 respondent that you made a statistical edit to.

19 660, just tell us about that.

20 A. I don't have a slide for that, but
21 essentially the same thing came up with that respondent.
22 Not a very small company with two computers, as I
23 recall. I may be wrong about two computers. It's a
24 very small number of computers.

25 And when asked a question like this, they

1 said one; one computer did certain actions. Well, same
2 thing. They don't mean 1 percent of a computer, because
3 that's not even a whole computer. They mean one
4 computer, and so that's another example where I used --

5 Q. All right. And are there other examples
6 where you found it necessary and appropriate to make
7 this kind of edit to the data?

8 A. Yes, although the very large proportion of
9 those edits were with Respondent 168, because, remember,
10 there's 40 questions for each respondent. Thirty of
11 them allow them to give these percentage-type answers,
12 and Respondent 168 was very systematic and always
13 answered in terms of computers rather than in terms of
14 percent. So there are 30 edits right there for that
15 168.

16 Q. And just to put this process in
17 perspective -- we're near the end here -- if some other
18 statistician said, well, I want to know -- I want to
19 know what would happen if you didn't make the edits; if
20 you just treated the answer one as 1 percent of the
21 computer, just like it came -- just like it came in the
22 spreadsheet, how much of a difference in terms of the
23 percentage of the number of users you've calculated
24 would it make, if you didn't have any edits at all?

25 A. Okay. I can answer that.

1 Of the edits that had any effect at all --
2 because some edits had no effect, because they were in a
3 part of the question that weren't used for the
4 estimate -- but for those edits that had any effect
5 whatsoever, there were four that increased and four that
6 decreased the estimate.

7 Of those eight, four up and four down, only
8 one had what I would call a material effect, and that's
9 this one right here, the 168. All of the other seven
10 combined, their total effect was, I think, 1.4 percent
11 of the estimate of 1,850,000.

12 So for all but this one respondent, the edits
13 really didn't amount to very much at all. And so I
14 didn't spend a lot of time agonizing over it, because it
15 didn't matter.

16 And this one -- No. 168, this one had some
17 fair effect. When the calculation was all done, this
18 increased the estimate by a little over 15 percent,
19 15 -- I don't want to say the number, because I could be
20 wrong -- maybe 15.4 percent, something like that.

21 So that's noticeable, but not, again,
22 controlling of the result by any means.

23 Q. All right. Now, you've taken us to the point
24 of the process where you've gotten the data. You've
25 gone through every cell of a 9-foot spreadsheet to make

1 necessary statistical edits.

2 Let me ask you another question. And this
3 is -- this is near the end here, but it's very
4 important, I think, to understand what you've done here.

5 You told us that the whole number of people
6 you called -- you didn't call, but you had people
7 call -- was 988, and you got 46 responses out of that,
8 right?

9 A. Yes.

10 Q. Out of those 46 responses, how many people at
11 the end of the day said, yes, we do this?

12 A. 19 out of 46.

13 Q. So, roughly -- and forgive me, I'm no
14 statistician here -- something like about half said,
15 yes, we do; and about half said, yes, we don't?

16 A. Little less than half.

17 Q. Little less than half said we don't?

18 A. Said we do.

19 Q. Said we do. Okay. A little less than half
20 said we do; a little more than half said we don't.

21 Now, how, then, did you deal with -- what is
22 it -- 900 and how many that didn't respond?

23 A. 42.

24 Q. 942. So 942 didn't respond.

25 Did you assume that since the people who

1 didn't respond are roughly 50/50, or close, that the
2 people who didn't respond, if they would have answered,
3 would have been about the same?

4 A. No. That's -- that's not unreasonable, and
5 some people do that, but I didn't do that.

6 Q. What did you do?

7 A. I took every one of those 942 that I couldn't
8 contact and treated them just as if I had contacted
9 them, and they told me zero. So I used the absolute 0
10 for 942 times and combined it with the 46 where I had
11 some zeros and some non-zeros and then made the estimate
12 using all 988 numbers, most of which I treated as if
13 they were 0.

14 Now, I don't really believe that in the 942,
15 if you could contact them, they would all be zeros.
16 That's astronomically improbable that the 46 that I just
17 happened to contact are the only ones who could answer
18 non-zero values.

19 Almost certainly others are out there, but
20 not in my calculation. I treated them all as zeros.

21 Q. So if somebody didn't respond, refused to
22 answer, didn't know, you, for the purpose of doing your
23 work, assumed that not a one of them uses Microsoft's
24 product to infringe?

25 A. That's right.

1 Q. Okay. Did you summarize the results of your
2 work somewhere?

3 A. Yes. In my report, I had a table that
4 collected up all the results.

5 Q. That's Exhibit 364?

6 A. Right.

7 Q. And tell us again your conclusion.

8 A. Well, let me pause on this table that's too
9 small to read but make a few comments.

10 Remember, I said that there were 40
11 substantive questions of different kinds of opening and
12 closing at different time periods. And so the reason
13 there are so many numbers on here is that they're for
14 giving the details of the answer to all those specific
15 questions for the years 2003, '04, '05, '06, '07, '08,
16 and then I had two questions in 2008, one for the
17 typical day, the question I like the most, and then for
18 the year.

19 Now, there's -- the part that I put yellow on
20 here -- you can see the yellow -- that's not one of the
21 responses. That's my calculation, combining all of the
22 questions.

23 So I take all of the answers for the
24 different years, plus the typical day, and I, company by
25 company, find the largest number of computers that they

1 report.

2 Now, maybe largest sounds like I'm being
3 greedy or overreaching but not really. Think of this
4 example: Suppose I had two years and a company reported
5 three computers in one year and nine in the next. I
6 don't take 19.

7 What did I say, three and nine?

8 Q. Yes.

9 A. Let's do ten and nine.

10 Ten and nine, so I don't take nineteen; I
11 take ten, because I don't have a way to know if the
12 computers in the second year may be the same computer.
13 They might be different; they might not.

14 But the only way to proceed conservatively is
15 that I don't double-count them. So I can't go wrong by
16 just taking the ten and not using the nine.

17 So taking the largest value is really an
18 underestimate. Although it sounds like it's an
19 overstatement; it isn't.

20 So I do that company by company, combining
21 all the questions, including the typical-day question.
22 And I have a blowup here of that result for the full
23 period of 2003 through 2008, and that's the result here,
24 the 1,852,163.

25 Q. All right. Thank you, Dr. Wecker, for that

1 explanation.

2 But just from the off chance that anybody
3 doesn't remember my question, so what's the answer?
4 What's the estimate?

5 A. The number on the right of the slide,
6 1,852,163, is the estimated number of computers that had
7 Word 2003 and 2007 installed --

8 Q. And do you believe --

9 A. -- and had these actions.

10 Q. Do you believe that that estimate is
11 conservative?

12 A. Oh, it's way low. I'm confident of that
13 because of my serious downward bias I introduce when I
14 put nothing but zeros in for the 942. So it's accurate
15 given its assumptions, but it's almost certainly low.

16 Q. All right. So after you reached that
17 conclusion, given that you've described that you've been
18 very conservative because of this downward bias, did you
19 do anything to check that number to determine the
20 magnitude of that downward bias?

21 Let me put the question another way that may
22 be a little more of an English way.

23 Can you give us an idea, if instead of doing
24 what you did in treating every person who didn't respond
25 as having said we don't do it -- if you had assumed that

1 some of them, in fairness, probably do it and just
2 weren't willing to participate, what difference would it
3 have made?

4 MR. LENDER: Your Honor, objection. This
5 is beyond the scope of his expert report.

6 THE COURT: All right.

7 MR. CAWLEY: It's in the schedule of his
8 report, Your Honor -- or actually a production -- it's a
9 schedule in his report.

10 THE COURT: Well, restate your question,
11 please.

12 MR. CAWLEY: Yes, sir.

13 Q. (By Mr. Cawley) Have you made any
14 calculations to determine the magnitude of the downward
15 bias for treating all the non-responding businesses as
16 zero?

17 A. Yes.

18 Q. Tell us about that.

19 A. If one were to assume that the 942 businesses
20 that were -- we were not able to contact would have, if
21 contacted, answered in the same fashion as the ones
22 contacted, that would have added another 28 million to
23 this 1.8 million.

24 And if only half of them that would have
25 answered in the same fashion, it would have added 14

1 million -- more than 14 million.

2 And if only 10 percent of them had been like
3 the ones that were contacted and the rest nothing but
4 zeros, it would have added 2.8 million to this number,
5 this 1.8 million.

6 Q. Okay. Thank you, Dr. Wecker.

7 MR. CAWLEY: I pass the witness.

8 THE COURT: All right. Cross-exam?

9 MR. LENDER: Yes, please. Thank you.

10 CROSS-EXAMINATION

11 BY MR. LENDER:

12 Q. Good morning, Dr. Wecker.

13 A. Good morning.

14 Q. Your field is statistics and applied
15 mathematics, correct?

16 A. Correct.

17 Q. In fact, I think you mentioned that your
18 degree is in statistics and applied mathematics.

19 A. Yes.

20 Q. You have no degrees in marketing, correct?

21 A. None.

22 Q. You have no formal training in the science of
23 conducting surveys, correct?

24 A. I disagree with that. The science of
25 conducting surveys is a statistical science, and that's

1 what I am trained in.

2 Q. I'm sorry. The question I'm asking is the
3 formal training by actually crafting the questions to
4 the survey, not the analysis, the statistical analysis.

5 A. I have not had training in crafting questions
6 outside of self-study.

7 Q. Okay. You've never written on the subject of
8 conducting surveys, right?

9 A. Not specifically in the kind of --

10 Q. You mentioned that you teach, but you've
11 never taught on this subject of conducting surveys,
12 right?

13 A. Well, that's not true. I think you'll read
14 in my deposition, if my memory serves, that that
15 question came up.

16 I've taught doing surveys many, many times in
17 the course of my teaching.

18 Q. I'm sorry. Have you ever taught your
19 students how to craft the questions to a survey?

20 A. Yes. I usually hold up a book that I like a
21 lot called The Art of Asking Questions, and I think I
22 may have mentioned that in the deposition.

23 Q. Let's be clear about one thing. Before this
24 case, you had never in your entire life designed a
25 survey for a patent infringement case; isn't that

1 correct?

2 A. True.

3 Q. And you've never received any awards or
4 recognition on the subject of conducting actual surveys,
5 right?

6 A. Right.

7 Q. You're not an expert in XML, correct?

8 A. I'm not.

9 Q. You're not an expert in custom XML, correct?

10 A. That's correct.

11 Q. And you've never spoken with any of the
12 technical or damages experts that i4i hired for this
13 case, correct?

14 A. Only socially in the last day or two, but not
15 in the course of my work.

16 Q. And you've never reviewed any of the expert
17 reports that were prepared by any of the experts hired
18 by i4i, correct?

19 A. That's correct. I did my work entirely
20 independently.

21 Q. And the survey that you designed, that was
22 conducted towards the end of 2008. I believe it was in
23 November of 2008?

24 A. Yes.

25 Q. And I believe you testified to this, but I

1 want to make sure you and I are on the same page. You
2 understand now that your survey is being used by
3 Plaintiffs' damages expert, Michael Wagner, to estimate
4 the number of users who supposedly opened an XML
5 document containing custom XML in a -- in an alleged
6 infringing way, right?

7 That's your understanding now?

8 A. Yes. I have understood that for some time;
9 that my report went to him, and he used the numbers that
10 I indicated.

11 Q. But at the time that you actually designed
12 and conducted your survey, you didn't know what the
13 results of your survey would be used for, correct?

14 A. I think I had -- I think I was told the
15 general idea, but I didn't -- it didn't matter to me.
16 They can use it for what anybody wants to use them for.

17 Q. Let's be clear, when you worked on designing
18 and conducting your survey, you did not know what the
19 results of your survey would be used for, correct?

20 A. No, I don't think so. I think I had a pretty
21 clear idea they were going to be used in some fashion, I
22 didn't know the details, by a damages expert.

23 MR. LENDER: Your Honor, may I approach?

24 THE COURT: Yes, you may.

25 Q. (By Mr. Lender) Here's a copy of your

1 deposition, Mr. Wecker -- excuse me -- Dr. Wecker.

2 A. Sure.

3 Q. We may use this during your exam.

4 And, Dr. Wecker, I'm going to take out my
5 marked copy, and I'm going to ask you to turn, if you
6 would, to Page 89 of your deposition, Lines 20 to 22.

7 And were you asked this question, and did you
8 give this answer?

9 QUESTION: Do you have an understanding
10 as to what the results of your survey have been used.

11 ANSWER: No.

12 A. That's true. I had no specific
13 understanding.

14 Q. (By Mr. Lender) It's fair to say that you
15 didn't know that the estimates you came up with from
16 your survey were going to be used to estimate the number
17 of alleged infringers in this case; isn't that also
18 right?

19 A. I did not have any specific knowledge. I did
20 have -- and maybe I should have given a longer answer --
21 some general notion that they were going to be used in
22 the case by a damages expert, but I didn't know how and
23 I didn't know much about it.

24 Q. Let's turn to your deposition on Page 172,
25 Line 20. We're going to read from Line 20 to 173, Line

1 2. Let me know when you get there.

2 A. 172?

3 Q. Please.

4 A. I'm ready.

5 Q. QUESTION: Is it your understanding that the
6 estimates that are provided in the right three columns
7 of Exhibit D are being used to estimate the number of
8 infringers in this case?

9 ANSWER: I have no idea how they're being
10 used. How my work gets used in this case is something I
11 have no idea about.

12 That was your testimony?

13 A. Right. I have no -- I had no specific idea
14 at that time of what any -- who would be using them and
15 in exactly what way. I didn't know that.

16 Q. Okay.

17 A. I still don't.

18 Q. Now, in designing a survey that's going to be
19 used for purposes of identifying consumer use of a
20 certain accused functionality in a product, you would
21 agree with me that it's important to follow standard
22 survey procedures and protocols, correct?

23 A. Your question, respectfully, is kind of vague
24 for me. I guess I would want to know what you had in
25 mind by standard protocols. There is no book that says

1 here are the standard protocols of surveys.

2 Q. Let me ask you this: Do you agree it's
3 important to ask clear and understandable questions?

4 A. That's good.

5 Q. Is it important to make sure that the people
6 who are responding to the survey are capable of
7 answering the questions that are being asked?

8 A. I would agree that it's important to get to
9 people that would have the knowledge that you're
10 interested in, yes.

11 Q. It's also important to make sure that the
12 respondents provide accurate responses to the questions
13 being asked, right?

14 A. That's -- that's hard to do. You can
15 certainly do a lot to help with that, yes.

16 Q. Okay. It's important to make sure that the
17 people responding to the survey are not simply guessing,
18 but they're providing information they actually know,
19 right?

20 A. Right. If they don't know, we want them to
21 tell you they don't know.

22 Q. And in a case like this, you'd agree that
23 it's very important to make sure that the questions
24 being asked actually result in identifying uses of the
25 accused functionality in an alleged infringing way,

1 right?

2 A. That sounds like a legal question. I didn't
3 really get tutored in what constitutes infringement. I
4 was just given the specific actions, and if that's
5 infringement, then it's infringement. But I don't know
6 that it is.

7 Q. Well, Dr. Wecker, let me ask you this: Let's
8 say, if the yes answers to the questions that you
9 provided in your survey --

10 A. I'm sorry. I didn't get the first part.

11 Q. I'm sorry, Dr. Wecker. Let's assume that
12 people that are answering affirmatively to the questions
13 you asked, that those people were actually identifying
14 uses that everyone in this courtroom agrees doesn't
15 infringe the patent.

16 Wouldn't you agree that your survey would,
17 therefore, be not as much value to us?

18 A. I don't know. I don't know what constitutes
19 infringement. So everyone in this courtroom can't know
20 that, because I don't know what constitutes
21 infringement. I just know what these actions are that I
22 asked about.

23 Q. Okay.

24 A. And I don't know if that's infringement.
25 It's a legal question.

1 Q. All right. You understand that the purpose
2 of your survey was to try to identify people that used
3 the functionality that's accused of infringement in this
4 case, don't you?

5 A. Maybe I understood that, but what I really
6 understood was that I wanted to find out what the -- who
7 was using their computers for the specific actions that
8 I wrote down and put up on the slides.

9 And I recognize that has something to do with
10 infringement, because this is a case about that, but I
11 didn't have to know what the legal decisions would be
12 about what's infringement and what isn't in order to do
13 my work, and I didn't look into it.

14 Q. I don't -- I don't disagree with you, but you
15 would agree that if people that were responding to your
16 survey were actually identifying uses that everyone
17 agrees doesn't infringe the patent, your survey wouldn't
18 be of much use for us; isn't that right?

19 A. If everyone agrees that the actions that I've
20 identified are of no importance to this courtroom, then
21 maybe you should just excuse me now.

22 Q. Let's keep going and see where we go.

23 Now, in this case, you did not conduct any of
24 the actual surveys, correct?

25 A. That's not true.

1 Q. Let me make -- I'm sorry. I wasn't being
2 clear.

3 You didn't actually interview any of the
4 companies who responded to the survey, right?

5 A. That's correct.

6 Q. What you did is, you hired a separate firm --
7 you called them, I think, Opinion Research
8 Corporation -- to actually conduct the survey, right?

9 A. To actually do the interviews. I considered
10 the work that I did as part of conducting the survey.

11 Q. And not only did you not talk to anyone who
12 actually responded to the survey; you didn't talk to
13 anyone from ORC, who conducted the survey, right?

14 A. I think I said in my deposition that I may
15 have been on a conference call when we were talking to
16 that person who was our contact there, but I didn't
17 remember for sure.

18 Q. Okay. So sitting here today, you don't
19 specifically know whether you spoke to anyone at ORC who
20 actually was on the phone asking the people the
21 questions, correct?

22 A. I know that my staff did repeatedly, and I
23 may have been involved in one conference call, but I
24 didn't remember for sure.

25 Q. Now, the survey questions, they were not

1 designed entirely by you, correct?

2 A. Oh, that's true, right.

3 Q. The survey questions were actually prepared
4 by your firm in collaboration with ORC and the attorneys
5 representing i4i in this case, correct?

6 A. Right. And the attorneys essentially -- I
7 think I'm being helpful here. I don't mean to be
8 unresponsive.

9 The attorneys essentially told us what they
10 wanted me to inquire about. And then we took it from
11 there and worked up a script with ORC. So all parties
12 were involved.

13 Q. Now, the survey doesn't actually ask people
14 about their own use of opening XML documents containing
15 custom XML, correct?

16 A. It didn't mean to exclude their own use, but
17 it was asking knowledgeable people about use generally
18 in the company, at least that portion of the company
19 that they said they knew about.

20 Q. Right. You weren't asking people what they
21 were doing; you were asking people to estimate what
22 other people were doing within the company, correct?

23 A. With the understanding that I wasn't
24 eliminating what they were doing. If they were
25 performing these actions, it was -- they, obviously,

1 should include themselves as well.

2 Q. Well, Dr. Wecker, from the survey question
3 and results, we can't tell whether any respondent was
4 actually a computer user as the survey questions were
5 asking about, correct?

6 A. The respondents are companies.

7 Q. The people who responded to the survey,
8 Dr. Wecker, from the questions and the results, you
9 don't know whether any of those respondents themselves
10 had actually done any of the acts that you were asking
11 about, correct?

12 A. I understand now. You mean by respondent,
13 the individual who we identified at the company. And,
14 right, I never asked a question that would attempt to
15 distinguish the particular use by that particular
16 individual.

17 Q. All right. What the survey question was
18 about was asking the person on the phone to estimate
19 what other people were doing at the company with custom
20 XML for as far back as five years to 2003, correct?

21 A. Not quite, because I have to remind you that
22 we didn't eliminate their own use. So it was asking
23 about use at the company that would include their use
24 and other people's use.

25 Q. Okay. Well, let's take a look at some of the

1 survey. Here's what I'm going to do, if it's okay with
2 you.

3 You have in front of you Plaintiffs' Exhibit
4 365, which is the actual survey questionnaire, and you
5 have Plaintiffs' Exhibit 366, which is the survey data.
6 And what I've done, to make it easier for everyone, is
7 I've created some slides that bring the questions and
8 the answers together.

9 And you can look at the screen, if you want,
10 or you can look at the actual responses, whatever --
11 whatever's easier for you.

12 A. Just a moment. I have my deposition exhibit,
13 so I can put the script in front of me and the survey
14 responses, so go ahead, please.

15 Q. Now, some of the people who responded to the
16 survey worked at large companies with thousands of
17 employees, correct?

18 A. Yes.

19 Q. In fact, the one I put up, the example I put
20 up, Respondent 107, said that there were 19,000
21 computers with Word 2003 installed in his or her
22 company, correct?

23 A. Yes, 19,000 at the current time.

24 Q. Right. And what your survey does is it
25 relies on this single employee, who responded to the

1 survey, to tell you how all of those 19,000 computers
2 are being used on a typical workday, right?

3 A. Right.

4 Q. And for this particular person, he said that
5 25 percent, or about 5,000 computers, had opened an XML
6 document containing custom XML on a typical workday.

7 A. Yes.

8 Q. So it's your claim to us that this one person
9 actually knows what 19,000 people are doing with their
10 computers, and this one person knows that 5,000 people
11 are opening an XML document containing custom XML; is
12 that right?

13 A. Well, it's not actually 5,000, but the key
14 part of your question is, yes, I'm calling a person,
15 whose job it is to know about the computers and what's
16 going on in the company, and asking them for their
17 estimates.

18 Q. Okay. And just a couple of others just to
19 give you a sense.

20 These are some of the other folks that
21 responded to your survey, and you can see that the range
22 of the number of computers at all these different
23 companies was somewhere between -- in this example,
24 these eight I put up, between 370 computers and 5,500
25 computers, right?

1 A. Okay.

2 Q. And again, it's your claim that each of the
3 people who responded for each of these companies, they
4 actually know how all these computers were used on a
5 typical workday at their company, right?

6 A. Well, they wouldn't know exactly, but they
7 are the right person to ask to make an estimate, because
8 that's what they do for their living.

9 Q. Well, let me ask you, your survey didn't ask
10 any of the people who responded to the survey for the
11 basis for them having knowledge of the use of others of
12 Word 2003 and Word 2007, right?

13 A. Didn't ask it, but it was contained in the
14 screening questions. The basis is the knowledgeable
15 position that they have as the person responsible for
16 the staff and administration and computers and the
17 affirmative responses to the other screening questions.

18 Have we got the right person here, and they
19 would say yes.

20 Maybe they're lying to me; maybe they're
21 making it all up; but that's not my experience in this
22 kind of situation. To the extent that they are being
23 truthful, they are the right people to talk to.

24 Q. Well, Dr. Wecker, would a technician who sets
25 up computers be someone who sets up computers at a

1 company?

2 A. They may work for the person responsible, but
3 we always ask them, how many computers in your company
4 do you -- can you give me answers for?

5 And if it's not the whole company, then tell
6 me how many that you feel comfortable giving the answers
7 for. That's one of the screening questions.

8 Q. Well, what's --

9 A. And then --

10 Q. I'm sorry.

11 A. -- then we say, only answer me about those
12 computers where you think you can give me the answers.

13 Q. Well, you agree with me that a technician
14 would qualify as somebody who sets up computers at a
15 company, right?

16 A. Yes, but not the person responsible for it.
17 They would be one of the people on the -- on the -- to
18 have a job, right.

19 Q. And the survey did nothing to test whether
20 anyone who was responding to the survey actually tracked
21 the custom XML usage at the company, correct? There's
22 no question like that in the survey.

23 A. There's no question, and I wouldn't expect
24 them to be doing that. They would just have to know it
25 out of their general knowledge.

1 Q. Let's take a look at one of the actual
2 questions from your survey. And I'm just going to read
3 it to the jury. This is Question 6F, just so that -- in
4 case people can't see it. This is one of the questions
5 that you asked.

6 Thinking about those computers that had Word
7 2003 as an installed application at anytime during
8 calendar year 2005, what percentage would you say used
9 Word at least once during that year to open an XML
10 document containing custom XML and then save it, whether
11 with or without changes, in dot XML, dot docx, dot docm,
12 single-file web page, or web page format, but not web
13 page filtered format? If necessary, your best estimate
14 is fine.

15 Now, Dr. Wecker, this is a pretty typical
16 question of the type of questions that you asked of
17 people responding to the survey, right?

18 A. Yes. I asked a question like this for a lot
19 of different time periods, right.

20 Q. And the survey never asked people whether
21 they understood this question, correct?

22 A. It doesn't say, at the end of the question,
23 do you understand me, but it does give them a chance to
24 say that they don't know or that -- if they say they
25 don't understand, then we just put it as don't know.

1 Q. Okay. The term XML document is used in every
2 substantive question in your survey, correct?

3 A. That's right.

4 Q. And the survey never asked people whether
5 they understood what the term XML document meant, right?

6 A. The survey reads to the person what XML
7 document is going to mean in these questions, so it
8 didn't ask them, but it explained it to them.

9 Q. Yeah, but it never asked people whether they
10 understood what they were told it meant, correct?

11 A. I think it does implicitly, because it allows
12 people to say that they don't know things.

13 Q. Well, the survey didn't ask people if they
14 knew what XML is or to describe what XML is, right?

15 A. It asked if they were familiar with XML,
16 and then it went on to give a lengthy definition of
17 what the questions would mean when they used the
18 phrase XML document, and it was very precise.

19 Q. Dr. Wecker, the survey didn't ask people if
20 they knew what XML is or to describe what XML is; isn't
21 that right?

22 A. I know you want me to agree with you, but I
23 don't know how. If you ask a person if they know -- if
24 they're familiar with XML, it seems to me to come
25 awfully close to saying that they know what it is. They

1 say yes.

2 Q. Dr. Wecker, would you turn to Page 98 of your
3 deposition, please?

4 A. Yes.

5 Q. Line 2 to Line 8. Let me know when you get
6 there.

7 A. I'm sorry. Just a moment. Page again,
8 please?

9 Q. I'm sorry. Page 98, Line 2 to Line 8 of your
10 deposition.

11 A. Okay.

12 Q. QUESTION: So the survey was not set up with
13 a set of questions such as, do you know what XML is;
14 describe what you understand XML to be; and then a list
15 of perhaps respond -- I'm sorry -- with a list of
16 perhaps acceptable answers to establish the person's
17 understanding, right?

18 ANSWER: Right. Didn't do that.

19 Those are your answers?

20 A. Sure. That's the correct answer to that
21 question, but that wasn't your question.

22 Q. The only screening question that you gave
23 pertaining to XML was, are you aware of the computer
24 language or specification known as XML, right?

25 A. Right. That's a screening question, right.

1 Q. That's the only screening question you asked
2 as it pertained to the issue of XML, correct?

3 A. Yes, but I count, as part of the
4 questionnaire, the long, detailed explanation of what
5 the questionnaire meant when it talked with XML. It's
6 part of the questionnaire.

7 Q. And, Dr. Wecker, since you didn't ask people
8 if they knew what XML was or to describe what XML is,
9 you only asked them if they were aware of it, every
10 single person in this courtroom would qualify under that
11 question, correct, as it pertains to that question?

12 A. To that question? I don't know what
13 everybody here's qualified to do. I suppose, since the
14 trial has been using the term a lot, maybe everybody or
15 most would qualify.

16 Q. Now, the question -- this question, this
17 typical question ends with the phrase, if necessary,
18 your best estimate is fine, right?

19 A. Yeah. That's not a good understanding. You
20 don't actually read that. The bold is -- see, this is
21 all being done by aid of a computer. And so the -- you
22 don't read that part.

23 You stop with the -- the part -- see if those
24 are still marked, right there (indicating). And then
25 only if the interviewer finds that it's necessary to

1 prompt the person, they can say that they can give a
2 best estimate.

3 Q. But every single substantive question in your
4 survey ends with this possibility that, when necessary,
5 they can go forward and say your best estimate is fine,
6 correct?

7 A. Sure. You can't do better than a best
8 estimate in this case. Nobody's going to know the exact
9 number.

10 Q. And you have no idea how often someone
11 responding to your survey was encouraged to give a best
12 estimate when they responded, I don't know, right?

13 A. I don't know how many times the interviewer
14 had to invite them to give their best estimate, no.
15 That's not recorded.

16 Q. But you do admit that when a person didn't
17 know the answer to the question, they were encouraged to
18 give a best estimate, right?

19 A. Well, I don't think that's how it works. If
20 they say they don't know, then you record don't know.

21 Q. Dr. Wecker, can you turn to Page 100 of your
22 deposition, Line 20? Let me know when you're there.

23 A. Go ahead.

24 Q. Okay. Question at Page 100, Line 20 of your
25 deposition:

1 QUESTION: Were there any instructions in
2 the survey script that told the respondents that
3 accuracy was important?

4 ANSWER: I don't remember that phrase,
5 although a provision is made for people who don't know
6 something to say they don't know it and -- but a best
7 estimate is encouraged.

8 A. Right. That's all true.

9 Q. Okay. Now, every substantive question in the
10 survey also uses the term custom XML, right? You can
11 see it right there in the -- in the example we've been
12 using?

13 A. Not every question in the survey.

14 Q. Every substantive question in the survey.

15 A. No, not in every substantive question, but
16 every question that's of this kind does.

17 Q. Right. Every question that was asking about
18 the people's usage of computers pertain to the issue of
19 custom XML, right?

20 A. Right.

21 Q. And let's just -- let's all look at the
22 definition of custom XML, so we can all be on the same
23 page. This was the definition that you used for custom
24 XML. And again, so that the jury can see it, I'll read
25 it into the record.

1 Next, when I refer to custom XML, I mean XML
2 that is not native to Microsoft Word. Custom XML
3 usually appears with a pink tag when viewed in Microsoft
4 Word.

5 Please note that Word ML and Word Processing
6 ML are native to Microsoft Word. So Word ML and
7 Microsoft -- Micro -- so Word ML and Word Processing ML
8 are not custom XML.

9 That was the definition that you used for
10 custom XML, correct?

11 A. Yes.

12 Q. And the survey didn't ask the people who were
13 responding to the survey whether they understood what
14 was meant by custom XML; isn't that right?

15 A. No. It didn't ask that question.

16 Q. And the survey didn't ask people, for
17 example, whether they understood what was meant by the
18 phrase not native to Microsoft Word; isn't that also
19 right?

20 A. It didn't ask them that, but it already found
21 people that know what those things are.

22 Q. Well, Dr. Wecker, you also said in the
23 definition of custom XML, that it usually appears with a
24 pink tag when viewed in Microsoft Word. How often
25 doesn't it?

1 A. I don't know. That's a -- I didn't write
2 this. The people from the -- Marge provided me this
3 definition. I don't know that much about XML.

4 Q. Okay.

5 A. I've seen it, and when I see it, it has pink
6 tags. I guess I've seen it.

7 Q. Now, Dr. Wecker, the survey did not instruct
8 people of the need to be truthful, right?

9 A. It didn't say you need to be truthful, no.

10 Q. And the survey did not instruct people not to
11 guess if they didn't know or weren't sure, correct?

12 A. Didn't use those words, but I think it's
13 implicit. They were never asked to guess.

14 Q. The survey did not instruct people not to
15 guess.

16 A. It didn't say -- you're right. It didn't say
17 don't guess.

18 Q. Now, Dr. Wecker, were you here when Dr. Rhyne
19 testified in Court?

20 A. Not -- I came in while he was already
21 testifying, so I came in on the tail end of it.

22 Q. Were you here when Dr. Rhyne said that no
23 one -- or practically no one would ever receive a
24 document as a dot doc or as a dot dot?

25 A. I don't remember, but I'll -- let's go

1 from -- I understand what you've said, so that's good
2 enough.

3 Q. Okay. This --

4 MR. LENDER: Can we put up, please, the
5 Exhibit D, which is the results that you talked about
6 with Plaintiffs' counsel a minute ago?

7 Q. (By Mr. Lender) And he talked about --

8 MR. LENDER: Go to the right column,
9 please, not the back left column. Yeah.

10 Q. (By Mr. Lender) And you talked about this
11 last right column, because that's what you said was what
12 Mr. Wagner used for purposes of calculating his damages
13 in this case, right?

14 A. Yes.

15 Q. Dr. Wecker, your survey shows that more
16 people use custom XML with the dot doc or dot dot format
17 than the ones you were looking for; isn't that right?

18 A. That's not a good interpretation. Remember,
19 the numbers here are only of a first use.

20 So to take an example, a person could save an
21 XML document in dot doc, find out that it lost a lot of
22 the information he wanted to save and never do it again.
23 And then from then on, maybe a hundred times, they would
24 do it in dot XML.

25 Q. Your survey doesn't answer that question,

1 right?

2 A. No, it doesn't. It only -- that's the
3 problem with your interpretation of this result. It
4 doesn't count how many times something happens, only the
5 first occurrence of things.

6 Q. Okay. Well, Dr. Wecker, just so we're all on
7 the same page, based on just the numbers that we're all
8 looking at, which is your extrapolation based on the
9 data from those 46 respondents --

10 A. Uh-huh.

11 Q. -- the numbers that you're reporting in
12 Exhibit D, in virtually every single instance, the
13 number for who was saving as a dot doc or dot dot is
14 higher than the number that you report for the people
15 that are saving as a dot XML or a dot docx or a dot
16 docm; isn't that right?

17 A. It's higher, but it doesn't mean that there's
18 more of it.

19 Q. And you don't know whether it's more of it or
20 not, right?

21 A. Not from the survey. I have my own
22 knowledge, but that's apart from the survey.

23 Q. Okay. Let me ask you this about the survey.
24 The survey does not distinguish between different types
25 of XML documents containing custom XML, right?

1 A. I'm thinking. That's correct.

2 Q. And the survey also doesn't distinguish among
3 the different ways that you can open an XML document,
4 right?

5 A. Correct.

6 Q. And the definition of custom XML that we all
7 looked at a moment ago does not distinguish between
8 whether the file containing custom XML has an extension
9 of a dot XML or a dot doc, right?

10 A. It does not distinguish.

11 Q. So you don't know, you don't personally know
12 whether -- when these folks were responding to the
13 survey, whether they were referring to a dot XML or a
14 dot doc, right?

15 A. You know, I'd have to look more closely at
16 the question. When I -- if I hear the question an XML
17 document, it makes me think of a dot XML document, but
18 possibly there could be confusion there. I wouldn't
19 think so.

20 Q. Dr. Wecker, you don't personally know whether
21 any of the folks who were responding to the survey,
22 whether they were referring to a dot XML or a dot doc;
23 isn't that right?

24 A. That's right. It just says an XML document.

25 Q. For all we know, it's possible that every

1 single person who responded to the survey could have
2 been talking about a dot doc. You can't eliminate that
3 possibility; isn't that right?

4 A. I'd be glad to bet you on that.

5 Q. In fact, you know that it could be anything
6 at all, because there's no restriction in the questions,
7 right?

8 A. No. But good sense has to weigh in here.
9 Everybody that I've talked to in my company, for
10 example, understands an XML document to be a dot XML
11 document.

12 Q. Well, Dr. Wecker, why don't you turn to Page
13 117 of your deposition and let's look at your questions
14 and answers starting on Line 19. Let me know when
15 you're there.

16 A. 117?

17 Q. Page 117, Line 19, yes, please. Let me know
18 when you're there.

19 A. Yes.

20 Q. QUESTION: And that definition doesn't
21 distinguish whether the custom XML, the file containing
22 custom XML has an extension of dot XML or dot doc or
23 dotc.

24 ANSWER: It doesn't say that.

25 QUESTION: So it could be anything. There's

1 no restriction, right?

2 ANSWER: It is whatever it is, is a better
3 way to say it.

4 Those are your questions, and those are your
5 answers?

6 A. Yeah. And I think I came around to agreeing
7 with you, that that's possible, but didn't seem likely.

8 Q. You don't actually know how likely it is or
9 not, because you didn't talk to any of the people who
10 responded to the survey; isn't that the truth?

11 A. Sure. I didn't talk to the survey people,
12 but I've talked to lots of other people, and so I have
13 some knowledge.

14 Q. Now, Dr. Wecker, we heard some testimony from
15 Dr. Rhyne about what he referred to as contributory
16 infringement and inducing infringement. Were you here
17 for any of that testimony?

18 A. No, I didn't hear that.

19 Q. Let me just ask you a couple of questions,
20 though.

21 Your survey doesn't tell us whether anyone
22 who opened an XML document containing custom XML in Word
23 did it as a result of encouragement by Microsoft; isn't
24 that right?

25 A. It doesn't deal with that issue at all.

1 Q. And your survey also doesn't tell us whether
2 anyone who opened an XML document containing custom XML
3 in Word did so as a result of some technical assistance
4 they received from Microsoft; isn't that also right?

5 A. Yeah. Didn't address that.

6 Q. Okay. Dr. Wecker, let's turn to a different
7 topic. Do you know what a control is?

8 A. No. It can be a lot of things.

9 Q. Well, a control is something that people in
10 the survey business use to make sure you're getting
11 accurate results, correct?

12 A. Not very often but sometimes.

13 Q. I'm sorry. It's your -- let me -- it's your
14 view that experts, survey experts don't typically use
15 controls? Is that your testimony?

16 A. Sometimes you see it; sometimes you don't.

17 Q. And a control, you'd agree, is a standard
18 technique that's used in conducting surveys, right?
19 It's used all the time?

20 A. Not all the time. That was my point.
21 Sometimes --

22 Q. To be clear -- I'm sorry. To be clear, your
23 survey used no control whatsoever, correct?

24 A. You're going to have to tell me what you mean
25 by control. It's a pretty general word.

1 Q. Well, let's talk about a control -- have you
2 ever heard of using a control where you ask respondents
3 the same questions that are contained in your survey,
4 but you actually ask them about a non-existing feature
5 to see if you get similar results from the respondents
6 so that it allows you to figure out whether people are
7 actually responding correctly to the questions or
8 they're just not understanding them?

9 Have you ever used a control like that?

10 A. No. I wouldn't have used it here, because
11 I'm afraid they would just hang up on me.

12 Q. Okay. Sitting here right now, as the
13 architect of this survey, can you identify any control,
14 the standard type of controls that are used all the time
15 in surveys, that you used in connection with this
16 survey?

17 A. Yes. The thing that comes as controlling
18 here are really screening questions. It's controlling
19 to get a person who knows what he's talking about in
20 this area, and if you just pick the first person who
21 came on the phone and you wanted to know if they
22 understood about the things you need them to understand,
23 there's a variety of ways you could do that.

24 And maybe you would give them a little test,
25 if they would be willing to sit still for it, which they

1 wouldn't.

2 But a better way, and the way I chose, was to
3 find out what their job was at the company and make sure
4 that they knew about the things, or at least professed
5 to know about the things, that I was interested in.

6 Q. But the control you're referring to are the
7 questions we talked about already about whether the
8 person was involved in setting up the computers and
9 whether the person was simply aware of XML, correct?

10 A. And other things.

11 Q. Okay. Now, Dr. Wecker, again, you may not
12 have been here for this testimony, but we heard from
13 Dr. Rhyne that Claim 18, one of the asserted patents
14 (sic) in this case, requires that a schema be attached.
15 Will you take that representation from me, if you
16 weren't here for that testimony?

17 A. I wasn't here, and I don't even know what it
18 means.

19 Q. Your survey doesn't tell us whether any of
20 the people who said they opened a document containing
21 custom XML in Word did so with a schema attached; isn't
22 that right?

23 A. Right. There's no question like that.

24 Q. All right. Let's turn to another topic,
25 which is --

1 A. Now, just a moment.

2 Q. Please.

3 A. There's no question that has the word schema
4 in it, but a person skilled in the subject of schemas
5 might be able to look at my questionnaire and the
6 answers and answer that question, because it might be
7 logically implied, but I can't do that.

8 Q. Let's be very clear. Your survey doesn't
9 tell us how often anyone opened an XML document
10 containing a schema attached or whether it ever happened
11 at anytime, correct?

12 A. Not as far as I know. I just didn't want to
13 rule out that somebody else, who knows more about
14 schemas, couldn't look at this and figure it out.

15 Q. Okay. I want to turn now to another topic.
16 It's the issue that you talked about -- I think you
17 referred to it either as data editing, and at a
18 different time, you referred to it as logical
19 implementation?

20 A. Imputation.

21 Q. Imputation?

22 A. Imputation is a much broader area, but
23 logical imputation is a word you see sometimes.

24 Q. Okay. And data editing, that's the term that
25 you used to describe the process you went through where

1 you changed some of the answers from the actual answers
2 you got to what you believe they must have meant?

3 A. When you say changed, as much as how I
4 understood the answer.

5 So if a person says one, I don't change the
6 one to take that example; I just understand it to mean
7 one computer, because 1 percent of three computers
8 doesn't make sense.

9 Q. What you did is, you took the actual answers
10 that you got from the survey, and you interpreted them
11 or changed them to what you actually thought they must
12 have meant.

13 A. That's close enough. I think everybody gets
14 the idea.

15 Q. Would you agree with me, Dr. Wecker, that
16 data imputation or data editing can't fix a flawed
17 survey?

18 A. Well, it can't fix some things, but it can
19 sure fixed the things I fixed.

20 Q. Well, if the survey asks the wrong questions
21 or the people responding to the survey just don't
22 understand the questions being asked or the people who
23 are responding to the survey were simply guessing, no
24 amount of data imputation can turn that type of a survey
25 into a reliable survey; wouldn't you agree with that?

1 A. I think I agree, but it seems to overlook
2 that we give them an opportunity to say they don't know
3 when they don't know.

4 Q. Let's talk about the actual responses you got
5 from the survey.

6 I think you said of the 46 people who
7 responded to the survey, only about 19 claim that folks
8 within their company had opened an XML document
9 containing custom XML in Word; is that right?

10 A. That's my recollection.

11 Q. And you do -- you do admit, there's no
12 dispute, you do admit that there were inconsistencies in
13 the responses that you got from those survey
14 respondents, correct?

15 A. Sure there were. And it would be a miracle
16 if there were not 40 different questions. It's like
17 working a numerical crossword puzzle that has to all
18 line up in rows and columns. And doing it over the
19 telephone, without notes, it's never going to work out
20 exact.

21 Q. And when you saw inconsistent responses from
22 all these folks who responded to the survey, you didn't
23 call any of them back to see what they actually meant,
24 right?

25 A. Didn't need to.

1 Q. And you didn't ask ORC to call any of them
2 back to see what they actually meant, right?

3 A. Didn't need to. That was -- that's a
4 possibility, and sometimes one does that, but I didn't
5 need to here, because there was only one case that
6 amounted to anything, and I thought it was obvious.

7 Q. The one case you're referring to where you
8 said, well, you understood what they meant, it was
9 obvious, that's Respondent 168 that you talked about on
10 your direct, right?

11 A. Right.

12 Q. You know, what I'd like to do is, let's put
13 168 to the side. Let's walk through some of the other
14 respondents, and let's see what happens.

15 Is that okay?

16 A. All right.

17 Q. Okay. Well, again, I put this together to
18 make it easy for the jury and for you, and I want to
19 focus first on Respondent No. 262.

20 A. Yes.

21 Q. And the question, the first question for
22 Respondent No. 262, he was asked, How many computer --
23 how many employees are at the company?

24 And this person said 3,000 employees, right?

25 A. Just a minute. I have his data. Just a

1 minute.

2 Okay. I don't have that question, but I see
3 you do here, yes.

4 Q. Respondent 262 has 3,000 employees at the
5 company, right?

6 A. Okay.

7 Q. And of -- for those 3,000 people, Respondent
8 262 said that 2,000 computers had Microsoft Word 2003 on
9 it, right?

10 A. At the current time, right.

11 Q. Okay. And then we're going to go through
12 your questions, and Question 2B asked: Well, what
13 percentage of those computers with Word 2003 currently
14 installed were used to open an XML document containing
15 custom XML on a typical workday?

16 And this person said 75 percent, right?

17 A. Yes.

18 Q. And, again, just going forward, the person
19 was also asked: On a typical workday, how often people
20 opened an XML document containing custom XML and saved
21 it as dot doc or dot dot?

22 And the person said 75 percent again.

23 And then when asked about the dot XML format, the person
24 said 75 percent as well, right?

25 A. Yes, sir.

1 Q. So for this respondent, this person said that
2 they claimed to know that 75 percent of 2,000 computers
3 that had Word 2003 on it had opened an XML document
4 containing custom XML and Word and saved it in one of
5 those two formats, the dot doc or the dot XML, right?
6 75 percent of 2,000. You with me?

7 A. It wasn't restricted to those two, but I --
8 with that understanding, I'm with you.

9 Q. We're talking, right now, this person is
10 saying that 75 percent of those 2,000 computers were
11 used to open a document -- an XML document containing
12 custom XML in Word, right?

13 A. Right.

14 Q. And that same person said 75 percent for the
15 right-hand column, that Mr. Wagner relied upon, for
16 people that had opened that document and saved it as a
17 dot XML, dot docx or dot docm, right?

18 A. At some time or another, right.

19 Q. Okay. Now, later in the survey, you asked
20 this person: Well, how many computers had Word 2003 on
21 it at any time during 2008?

22 And this time the person said there were no
23 computers, right?

24 A. I'm with you.

25 Q. And, in fact, when we went in and you asked

1 speak mathematics, but we speak English, and it's always
2 there that you can interpret it more than one way.

3 Q. Dr. Wecker, let's be very clear. For this
4 person, Respondent 262 -- I'm sorry -- Respondent 262,
5 for 2008, the year 2008, for Word 2003, you had two
6 choices available. One choice was 75 percent, and one
7 choice was zero; isn't that right?

8 A. Right. I had two questions for this same
9 time period.

10 Q. And what you went with was 75 percent; isn't
11 that right?

12 A. Sure.

13 Q. And it's your view that picking 75 percent
14 over zero, that that's being conservative?

15 A. Sure. Because I'm not trying to get an
16 average or a total; I'm trying to find out the
17 recollection they have of the most occurrences of a
18 certain thing.

19 And there they answer my best and easiest
20 question for them, that -- currently what's happening on
21 a typical workday. And there they gave me some numbers.
22 And the recollection for the entire year, they,
23 apparently, had more trouble with answering that
24 question.

25 Q. You don't know which one of these is actually

1 the right one; isn't that right?

2 A. Well, if I assume that I'm getting truthful
3 answers from them and they're doing their best here,
4 that I take them at their word; that on a typical day,
5 they had what they reported, and then at various other
6 times in the year, they might have had different
7 results, and maybe had none at some time.

8 Q. You don't know whether, for 2008, the right
9 answer is 75 percent or zero, correct?

10 A. Well, I have my understanding from this data,
11 and I think zero is just not likely.

12 Q. You picked 75 percent over zero, correct?

13 A. That was their answer. I didn't make it up.

14 Q. Now, for this same person, there were similar
15 problems with his answers for Word 2007; isn't that
16 right?

17 And let's look at it real quick. For
18 Question 1A, the person was asked: How many computers
19 at your company have Microsoft Word 2007 as an installed
20 application?

21 And the person said 500 computers, right?

22 A. Right.

23 Q. And then he was asked: How many of those
24 computers were used to open an XML document containing
25 custom XML during a typical workday?

1 And the person said 50 percent, right?

2 A. Right.

3 Q. Later when asked about calendar year 2008, at
4 anytime, the person again said 500 computers.

5 So this person was consistent on the number
6 of computers, right?

7 A. Yes.

8 Q. But when asked the question about what
9 percentage, at anytime in 2008, had opened an XML
10 document containing custom XML, the person now said 25
11 percent, right?

12 A. Right.

13 Q. So, again, you were faced with two choices:
14 It could be 50 percent of 500 or 25 percent of 500, and
15 you, once again, went with the higher number, 50
16 percent; isn't that right?

17 A. Right. They both could be correct, because
18 the usage may change over time. And so if you ask them
19 at anytime, they may have some time in mind where the
20 answer was 25 percent.

21 Q. Dr. Wecker, the person -- there were two
22 choices available to you, 25 percent or 50 percent, and
23 you went with the bigger number; isn't that right?

24 A. I always went with the bigger number, because
25 that's the right way to do it.

1 Q. Oh -- I'm sorry.

2 A. Once there's a single identification of this
3 particular use, I reported that.

4 Q. It's your view that always going with the
5 bigger number is being conservative. That's your
6 testimony?

7 A. Yes. In this -- not in all cases, but in the
8 way this calculation works, it is conservative.
9 If I had -- I certainly wouldn't want to add them
10 together. If I had two numbers and one was 100 and one
11 was 50, I wouldn't add them together to get 150. I
12 wouldn't average them. I would say that on a typical
13 day, there was 100. I'll go with what your answer was
14 on that.

15 Q. Dr. Wecker, I don't -- I'm not going to go
16 through every single respondent that had inconsistent
17 answers where you did data imputation, but I'd like to
18 go through one more example.

19 And, again, it's not the example you talked
20 about with the lawyers when they were questioning you.
21 This is Respondent 119.

22 Is that okay?

23 A. Sure.

24 Q. And again, Respondent 119, the first question
25 asked: How many employees work at your company?

1 The Respondent 119 said there were 13
2 employees, right?

3 A. I don't have that, but I see you do, yes.

4 Q. Okay. And then when the person was asked:
5 Well, how many computers at the company had Word 2003 as
6 an installed application, the person said 25 computers.

7 A. Right.

8 Q. So this person says that they have twice as
9 many computers with Word 2003 than it has employees,
10 right?

11 A. That's what -- that's what they say.

12 Q. And you don't know whether that's accurate or
13 not. That's just -- you're just taking that
14 person's answer as --

15 A. What they say, it's perfectly reasonable. My
16 company has more than twice as many. So it's not crazy.

17 Q. Yeah, but you don't actually know whether
18 this is accurate or not, right? You're just accepting
19 this answer?

20 A. I'm accepting the answer.

21 Q. Now --

22 THE COURT: Mr. Lender, we need to take a
23 break at some point. Are you at a good stopping spot,
24 or are you about through?

25 MR. LENDER: I have less than five

1 minutes.

2 THE COURT: All right. Go ahead.

3 MR. LENDER: Thank you.

4 Q. (By Mr. Lender) Now, Respondent 119, when
5 he -- when -- was asked: Well, what percentage of
6 computers with Word 2003 were used to open an XML
7 document containing custom XML Word -- custom XML and
8 Word during a typical workday and then saved in one of
9 the file formats that are at issue in the case, this
10 person said 100 percent, right?

11 A. Yes.

12 Q. But, of course, later when asked about
13 anytime during the calendar year 2008, this person said
14 50 percent, right?

15 A. Sure, because it could have been different at
16 a different time of year.

17 Q. And, again, you were faced with an option.
18 Your option was 100 percent or 50 percent, and you went
19 with 100 percent, right?

20 A. Right.

21 Q. You have no idea what caused any of these
22 inconsistent answers that you chose to change or go
23 with, right? You don't know what actually caused the
24 inconsistencies.

25 A. The first question was easier, when you said,

1 do I have any idea. Sure, I have a pretty good idea.

2 Q. Do you think it's possible that the reason
3 why is maybe the respondents weren't listening carefully
4 to the questions?

5 A. I think that could be part of it, yes.

6 Q. It could also be -- and also you can't
7 eliminate the possibility that the respondents simply
8 didn't understand the questions, right?

9 A. I think I put that down to where I
10 essentially eliminate it. Because if they don't
11 understand, they can just say they don't understand.

12 Q. Actually, you don't know how often, when
13 people said they didn't know, they were encouraged to
14 guess. We already covered that, right?

15 A. We never encouraged them to guess.

16 Q. You never encouraged them to guess?

17 A. No, never. Best estimate.

18 Q. Okay.

19 A. There's a big difference.

20 Q. It's possible that people were -- the reason
21 why there's so much inconsistencies is that people were
22 just giving their best estimates, right?

23 A. Sure. Best estimates are almost certainly
24 going to be not perfectly consistent.

25 Q. You can't eliminate the possibility that

1 people were actually guessing, right?

2 A. I can't guarantee it, no. Try to get
3 responsible people and treat them in a professional way
4 and hope I got responsible answers.

5 Q. You don't know how many people were answering
6 the questions just because they wanted to get the \$35,
7 right?

8 A. They get the \$35 even if they answer that
9 they don't have any of this activity. So I wouldn't --
10 I wouldn't think this is -- going through the full
11 questionnaire is a very good way to get \$35.

12 Q. The questionnaire took about 10 minutes to go
13 through, right?

14 A. Yes.

15 Q. And the people who didn't want to
16 participate, they didn't get the \$35, right?

17 A. Well, if we couldn't reach them or if they
18 didn't pass the screening or -- then they were not
19 included.

20 Q. The inconsistencies --

21 A. But they don't have to go through the whole
22 questionnaire; all they have to do is go to the first
23 question and say no, they don't have any of this
24 activity, and they still get the \$35.

25 Q. The answers -- the inconsistencies could have

1 been the result of simply data entry error by the people
2 who were doing the survey, right?

3 A. Anything's possible, but --

4 Q. And all these possibilities we're talking
5 about, you don't know for sure what caused these
6 inconsistencies, right?

7 A. No. I think you have to take them on one at
8 a time, because when you look at a real specific
9 example, the situation usually clarifies.

10 Q. Okay. Last issue, less than a minute.

11 MR. LENDER: Put up Exhibit D, please.

12 Q. (By Mr. Lender) Again, Exhibit D is the data
13 that you mentioned was used by Mr. Wagner to estimate
14 the damages.

15 MR. LENDER: And let's pull up that last
16 column again.

17 Q. (By Mr. Lender) And this is the -- these
18 numbers are the numbers that you used taking the 46
19 people responding to the survey and extrapolating the
20 answers of the entire population to the 13 million total
21 companies, right? These are the extrapolated results?

22 A. Right.

23 Q. And were you in the courtroom when Mr. Wagner
24 testified?

25 A. Yes.

1 Q. So you know that what Mr. Wagner has done is,
2 he's taken your numbers, based on the survey respondents
3 you got in November of 2008, and he's actually
4 extrapolated additional damages through the date of
5 trial, through May 15th, right?

6 A. Yeah, I heard that.

7 Q. And you know that by doing that, he actually
8 increased the damages amount by more than \$25 million;
9 isn't that right?

10 A. I don't remember that number. I'll take your
11 word for it.

12 Q. Okay. The fact is, however, that you're not
13 aware of any statistically valid way of projecting how
14 much the numbers in the far right corner -- column will
15 increase by the time of trial; isn't that right?

16 A. Not true. I have looked at what he did, and
17 his method looks sensible to me, and I can tell you what
18 I said in my deposition.

19 Q. I'm going to read it to the jury, if we
20 could. And if you could turn to Page 137, Line 25 in
21 your deposition.

22 A. Give me just a moment. Page again, please?

23 Q. Page 137, Line 25, please.

24 A. I got it.

25 Q. QUESTION: From the data that you presented

1 in Exhibit D, is there a statistically valid way of
2 projecting how much -- by how much the numbers in the
3 far right-hand column for either the 2003 to 2008 row,
4 to be the top row, or the 2008 row will increase by the
5 time of trial?

6 ANSWER: I don't know how to do that.

7 A. Sure.

8 Q. That was your answer, right?

9 A. Sure. I didn't know how to do it. I didn't
10 have enough information. But I've since seen how he did
11 it, and it looks reasonable.

12 MR. LENDER: No further questions. Thank
13 you.

14 THE COURT: All right. Is there any
15 redirect?

16 MR. CAWLEY: I hate to try everybody's
17 patience, Judge, but I have two questions written down.

18 THE COURT: Okay. Two questions. We'll
19 accommodate that.

20 MR. CAWLEY: Do you want me to do that
21 now?

22 REDIRECT EXAMINATION

23 BY MR. CAWLEY:

24 Q. Dr. Wecker, you told us that to some extent,
25 you really didn't know what purpose your survey was

1 going to be put to. Is that a bad thing?

2 A. I don't think so. I didn't -- I may have had
3 a general idea, but I didn't have any specific
4 understanding, and I didn't need to. To make my
5 estimates, I don't need to know what's going to be done
6 with it.

7 Q. And discussing these statistical edits that
8 you've talked about at some length, remind us again,
9 other than that adjustment that you were asked about,
10 168, where you assumed that the answer three meant three
11 out of four computers and not 3 percent of four
12 computers, other than that one, how much of a difference
13 did all your edits make?

14 A. They were four up and four down, and all the
15 others came out the 1.4 percent of an effect. Very
16 small.

17 Q. All right. And if you include the 168, where
18 you assumed that three meant three out of four
19 computers, how much difference do your edits make?

20 A. Yeah. That one was a larger one, about 15
21 percent. So the total is just a little over 16 percent.

22 Q. All right.

23 MR. CAWLEY: No further questions, Your
24 Honor.

25 THE COURT: Any further recross?

1 MR. LENDER: No. Thank you, Your Honor.

2 THE COURT: All right. Very well. You
3 may step down.

4 All right, Ladies and Gentlemen of the
5 Jury. We're going to take a fairly short break, since
6 we're so close to lunch, so we'll take about -- a break
7 until 11:10, so -- give everybody a chance to stretch
8 their legs.

9 COURT SECURITY OFFICER: All rise.

10 MR. CAWLEY: Your Honor, may this witness
11 be excused?

12 THE COURT: Yes, he may.

13 (Jury out.)

14 (Recess.)

15 (Jury out.)

16 COURT SECURITY OFFICER: All rise.

17 THE COURT: Please be seated.

18 All right. The parties had something
19 before we bring the jury in?

20 MR. POWERS: Yes, Your Honor, one item.

21 You will recall that when we were arguing the Dauberts a
22 couple of weeks ago, you said that you were denying them
23 as of that time but that we could re-raise the issue
24 once you heard the testimony so that you had the full
25 context of the issues for the two questions that we had

1 raised, the two questions being Mr. Wagner's reliance on
2 the XMetaL benchmark and the Wecker survey.

3 So, formally, we are re-raising, as a
4 motion to strike, both of those things for the reasons
5 stated in the Daubert motion, as supported now by the
6 additional testimony that you've heard.

7 THE COURT: Okay. Thank you. That's
8 overruled.

9 Anything further?

10 Bring the jury in.

11 (Jury in.)

12 THE COURT: Please be seated.

13 All right, Mr. Cawley. Who will be your
14 next witness?

15 MR. WHITE: Your Honor --

16 THE COURT: Mr. White?

17 MR. WHITE: -- we call Michel Vulpe.

18 THE COURT: Okay. Mr. Vulpe.

19 MR. WHITE: May we proceed, Your Honor?

20 THE COURT: Yes, you may.

21 MICHEL VULPE, PLAINTIFFS' WITNESS, SWORN

22 DIRECT EXAMINATION

23 BY MR. WHITE:

24 Q. Good morning, Mr. Vulpe.

25 Would you please introduce yourself to the

1 jury.

2 A. My name is Michel Vulpe.

3 Q. Where are you employed?

4 A. Infrastructures for Information.

5 Q. What is your position at i4i?

6 A. I'm the Chief Technology Officer.

7 Q. What are your duties as the Chief Technology
8 Officer at i4i?

9 A. I'm responsible for the architecture and
10 design of our software products.

11 Q. Would you turn, Mr. Vulpe, in your witness
12 binder, there in front of you, to Exhibit No. 1, which
13 is a copy of the '449 patent?

14 A. (Complies.)

15 Q. Are you the Michel Vulpe that's named as the
16 coinventor of this patent?

17 A. Yes, I am.

18 Q. Now, the patent was -- the application that
19 issued to this patent was filed on June the 2nd, 1994,
20 and it issued on July the 28th, 1998; is that correct?

21 A. That's correct.

22 Q. To whom did this patent issue?

23 A. To Infrastructures for Information.

24 Q. Now, when the application was filed that
25 issued as the '449 patent, did you and Mr. Owens assign

1 your rights in the invention and the application over to
2 i4i?

3 A. We did.

4 Q. Could you turn to Exhibit No. 5 and tell me
5 if that is the assignment that you and Mr. Owens
6 executed?

7 MR. WHITE: And I'll state for the record
8 that the first page of this exhibit is an official
9 communication from the United States Patent & Trademark
10 Office reporting that the assignment was properly
11 received and filed and recorded in the assignment
12 records.

13 Q. (By Mr. White) But would you turn over to the
14 second page of this transmittal letter and tell me if
15 you recognize this as the assignment that you and
16 Mr. Owens executed?

17 A. Yes, sir, I recognize it.

18 Q. Do you see the signatures there? Are those
19 yours and Mr. Owens' signatures?

20 A. Yes, they are.

21 Q. Do you remember receiving the ribbon copy of
22 the '449 patent when the patent issued?

23 A. Yes, I do, sir.

24 Q. What did you do with that ribbon copy when
25 you received it?

1 A. We had it -- we had it framed. We were very
2 proud of it.

3 MR. WHITE: Your Honor, may I approach?

4 THE COURT: Yes, you may.

5 Q. (By Mr. White) Mr. Vulpe, I want to place on
6 the easel here for the jury to see, is this the framed
7 copy or the ribbon copy of the patent that you received
8 from the Patent Office?

9 A. Yes, it is.

10 Q. Why did you have it framed?

11 A. Well, we were very proud of it. It was a --
12 we thought it was a very good piece of work, and it was
13 a long struggle to get it, and we were very proud of
14 what we had done.

15 Q. What did you do with this framed ribbon copy?

16 A. We hung it up in the reception area of the
17 office so everybody coming in to visit could see the
18 patent and understand that this was the foundation of
19 the company.

20 MR. WHITE: Your Honor, we would offer
21 the framed ribbon copy of the patent in as Plaintiffs'
22 Illustrative Exhibit No. 3.

23 THE COURT: Any objection?

24 MR. POWERS: No objection.

25 THE COURT: Be admitted.

1 Q. (By Mr. White) Mr. Vulpe, would you briefly
2 summarize your educational background since graduating
3 from high school?

4 A. I have a Bachelor of Arts honors in political
5 science from the University of Victoria in British
6 Columbia. It's about a hundred miles north of Seattle,
7 Washington. And I have a Master of Arts from the
8 University of Toronto in Toronto, Ontario, Canada.

9 Q. Where do you currently reside?

10 A. I live in Toronto.

11 Q. Were you born in Canada?

12 A. Yes, I was.

13 Q. Are you a life-long resident of Canada?

14 A. No, I'm not. I've lived a fair number of
15 years in the United States.

16 Q. What are some of the cities that you've lived
17 in in the United States?

18 A. I've lived in Detroit, Michigan; I've lived
19 in Los Angeles, California; and Washington, D.C.

20 Q. What brought you to live in Detroit?

21 A. My father's a doctor; he's a neurologist.
22 And he taught neurology at the university there, Wayne
23 State University.

24 Q. And did you go to high school in Detroit?

25 A. Yes, I did. I graduated from high school.

1 Q. Did you graduate?

2 A. I graduated from high school there.

3 Q. I understand that when you went to live in
4 Washington, D.C., that you were doing some consulting
5 work for the Smithsonian Institute; is that correct?

6 A. That's correct.

7 Q. How did you come to be doing consulting work
8 for the Smithsonian?

9 A. The Smithsonian recruited me; they approached
10 me to come and help out on what's known as the Inventory
11 Project.

12 Q. Well, why did they approach you?

13 A. I had been doing some work in how one might
14 apply library automation technology to museum
15 collections management, and they had heard about it from
16 somewhere and gave me a call.

17 Q. Well, what was the nature of the consulting
18 work you did for the Smithsonian?

19 A. Well, the Smithsonian had been tasked by
20 Congress to catalog -- build a catalog of all the items
21 in the collection and to supplement that with a tracking
22 system for all the activities around the objects in the
23 collection.

24 Q. How many objects were in the collection when
25 you were doing the consulting work?

1 A. Best guess at the time was approximately 110
2 million objects.

3 Q. Well, in doing the work you were doing for
4 the Smithsonian, were there any problems you
5 encountered?

6 A. Well, if you can imagine, there were a lot of
7 problems. One of the most fascinating ones and one
8 that's stuck with me ever since is what I call the
9 point-of-view problem. And --

10 Q. Would you give us an example of what you're
11 talking about?

12 A. Sure. The point-of-view problem is, how do
13 you understand something?

14 Take an example, say my wife, for instance.
15 I understand my wife is a life-long soul mate and
16 partner. Her mother understands her as a daughter. Her
17 father understands her as a daughter from a different
18 perspective, obviously.

19 Her friends understand her as a shopping
20 friend. And her fellow workers view her as a fellow
21 employee, perhaps somebody specializing and being very
22 good in customer relations.

23 So everybody has a different understanding
24 about this one person, and every one of them uses a
25 different vocabulary and way of describing why that

1 person's important to them.

2 Q. And how did that point-of-view issue arise in
3 connection with your work?

4 A. Well, the Smithsonian collection is -- as the
5 curators there describe it, all objects known to God or
6 man. And you have art historians, engineers, and
7 anthropologists and archeologists and so on, all who
8 study and write about the objects in the collection.

9 And every one of them approaches it from
10 their own point of view, and we couldn't come up with a
11 consensus about what most of the objects were, because
12 everybody was coming at it from their point of view, and
13 we couldn't come up with any consensus as to how to
14 describe the objects we were supposed to catalog and
15 track.

16 Q. Do you do any continuing consulting work for
17 the Smithsonian today?

18 A. Yes, I do. I have ongoing work with them.
19 In fact, we have a version of our product installed
20 there as we speak.

21 Q. You mentioned that you currently reside in
22 Toronto. How did you get back to Canada?

23 A. Well, my wife wanted to go to library school.
24 There's a terrific library school just south of Toronto,
25 about a hundred miles, so we ended up back in Toronto.

1 Q. i4i, the Plaintiff in this case, are you the
2 founder of that company?

3 A. Yes, I am.

4 Q. When did you first form i4i?

5 A. I initially formed i4i in 1989 under a
6 different name, Image Online.

7 Q. And when did you change the name to i4i?

8 A. I believe, to the best of my recollection, it
9 was late '92/early '93.

10 Q. What was the business of i4i when you formed
11 it?

12 A. Software consulting.

13 Q. Well, what were some of your early clients?

14 A. I had a number of clients, the City of San
15 Mateo in California, for instance. SEMI in Silicon
16 Valley is probably the most notable one.

17 Q. Well, the SEMI work has become very relevant
18 in this lawsuit. I'd like to spend some time talking
19 about that -- that consulting job.

20 When did that work with the SEMI company in
21 California begin?

22 A. To the best of my recollection, it was '91,
23 '92 perhaps.

24 Q. What is the business of the SEMI company?

25 A. SEMI is a trade organization for the

1 semiconductor industry, and their main -- one of their
2 main activities is the publishing of standards for the
3 semiconductor industry.

4 Q. What did you do for them?

5 A. They asked us to address three problems,
6 the -- or sorry -- four problems.

7 The first one was to create a database for
8 their standards documents so they could keep a database
9 on their documents.

10 The second one was to allow them to publish
11 these documents using a technology known as SGML that --
12 for both paper and electronic distribution.

13 The third was to build -- build functionality
14 to manage the voting process around the standards.
15 Standards are built by consensus.

16 And the fourth was to build an editor using a
17 commercial off-the-shelf word processor to create the
18 SGML documents.

19 Q. When you were doing this consulting work for
20 SEMI, did you have any company employees to help you?

21 A. No, I did not.

22 Q. Did you retain any consultants to do that
23 work?

24 A. Yes. I hired a number of contractors to help
25 me out on this.

1 Q. Did that include Mr. Stephen Owens?

2 A. Yes, it did.

3 Q. How did you come to meet Mr. Owens?

4 A. Stephen is the younger brother of my
5 next-door neighbor, Richard Owens, who also happens to
6 be a lawyer and acts on behalf of i4i.

7 Q. Did you ever deliver a product to SEMI?

8 A. Yes, we did.

9 Q. What was the name of that product?

10 A. It was called the SEMI Standard Support
11 System, known colloquially as S-to-the-4th. It was S
12 superscript 4.

13 Q. So S-to-the-4th power?

14 A. That's correct.

15 Q. Would that be a fair way to say that?

16 A. That's correct.

17 Q. Now, when was it that i4i delivered the SEMI
18 S-to-the-4th product to the SEMI computers?

19 A. There were a number of deliveries. The final
20 one, to the best of my recollection, would have been
21 early 1993.

22 Q. Did the product that you delivered the
23 S-to-the-4th power product deliver what i4i contracted
24 for -- I'm sorry -- SEMI contracted for?

25 A. Yes. They were -- they were happy with it,

1 they signed off, and we entered into a maintenance
2 agreement to continue supporting the product.

3 Q. What did i4i install on the computers at the
4 SEMI company?

5 A. We installed executables. It's actually the
6 machine code that is executed on a Macintosh.

7 Q. Did you provide the source code for the
8 S-to-the-4th product to SEMI?

9 A. No, sir, we did not.

10 Q. Where did you keep that code?

11 A. We kept that code in Toronto in our
12 computers.

13 Q. Why did you do that?

14 A. I'm sorry?

15 Q. Why did you do that?

16 A. We had a maintenance agreement, and if we had
17 to make corrections or adjustments or improvements, we
18 would have the source code there to make that -- to do
19 that.

20 Q. Would it be possible for you to take the
21 source code of the company and productize it into other
22 products?

23 A. We could have evolved it, yes.

24 Q. Does the source code for the SEMI
25 S-to-the-4th system exist today?

1 A. No, it does not.

2 Q. And why is that?

3 A. Our contractual obligations to SEMI expired.
4 It was on a Macintosh platform, which was no longer of
5 interest to us, and so we destroyed it in the normal
6 course of business.

7 Q. All right. I want to move forward in time a
8 little bit, and I want to talk about the conception of
9 the invention that led to the '449 patent.

10 When did you and Mr. Owens first conceive of
11 the idea that's now disclosed and claimed in the '449
12 patent?

13 A. To the best of my recollection, it would have
14 been late '93, most likely November of 1993.

15 Q. What were the problems that you and Mr. Owens
16 were encountering that led the two of you to this
17 invention?

18 A. Well, it was -- actually, there's two sets of
19 problems. Stephen was working on the editor, creating
20 the SGML editor, and he was down in the trenches doing
21 that.

22 I was, obviously, helping him in that
23 activity, but I constantly had this point-of-view issue
24 that I was very concerned with and was -- when I had
25 been introduced to SGML, I saw it as a very powerful

1 technology that might help out with that, but I couldn't
2 quite figure out how to do it.

3 And when we came up with this, all of a
4 sudden, we were able to solve these two problems.

5 Q. Do you recall anything about your reactions
6 whenever you realized that you and Mr. Owens had really
7 come up with something you considered to be new and
8 different?

9 A. Well, I -- we were very excited. It was kind
10 of like I guess what you call a eureka moment. It was
11 like, Steve, we've got it; this is amazing.

12 Q. Well, after you and Mr. Owens had conceived
13 of this idea, what did you do -- then do with the
14 invention?

15 A. Well, as software engineers do, we sat down
16 and tried to figure out how we might implement this in
17 software.

18 Q. Did a point in time come when you began to
19 think that perhaps this idea might be patentable?

20 A. Yes.

21 Q. And when did that happen?

22 A. That would have been in February of '94.

23 Q. And what did you do?

24 A. I contacted Richard Owens, who, as I
25 mentioned, was acting as corporate counsel, and he put

1 me in touch with Dr. Brian Barlow, who's a patent
2 attorney.

3 Q. Now, would you turn, Mr. Vulpe, to
4 Exhibit 595 in your binder, and tell me if you can
5 recognize that document.

6 A. Yes, I do.

7 Q. What is this?

8 A. This is a fax from myself to Dr. Barlow at
9 Smith Lyons, the firm Barlow and Owens worked at.

10 Q. What's the date of this document?

11 A. February 14th, 1994.

12 Q. Why did you prepare this fax?

13 A. I wanted to inform Dr. Barlow about what the
14 invention was, give him a broad outline of what the
15 invention was.

16 Q. Well, the fax in Exhibit 595 refers to an
17 attachment that represents a write-up of what you
18 discussed with Dr. Barlow at a luncheon meeting.
19 Would you take a moment and take a look at that
20 attachment to this exhibit?

21 And I had a slide prepared, as well as having
22 that --

23 MR. WHITE: Your Honor, may I approach
24 the easel?

25 THE COURT: Yes, you may.

1 Q. (By Mr. White) Mr. Vulpe, I had this slide
2 enlarged, which shows a portion of the attached write-up
3 to your fax.

4 MR. WHITE: And if I may, Your Honor,
5 could the witness approach the easel?

6 THE COURT: Yes, he may.

7 Q. (By Mr. White) Mr. Vulpe, I'm going to hand
8 you a marker, and I'm going to ask you, if you would,
9 sir, to explain what is shown here on this
10 demonstrative.

11 A. What's shown here are three parts of the
12 invention. Here is the text, which is referred to --
13 oh, I'm sorry. Here is the text -- here is the text --

14 THE COURT: I don't -- I don't believe
15 it's on. You need to turn -- I believe it's on the
16 bottom of it.

17 THE WITNESS: Does that work?

18 COURTROOM DEPUTY: It's on.

19 THE COURT: Okay. It's on.

20 THE WITNESS: Does that work? Does that
21 work now?

22 THE COURT: Can y'all hear?

23 No.

24 A JUROR: We can hear.

25 THE COURT: You can hear?

1 A JUROR: We can hear.

2 THE COURT: All right. Just speak
3 loudly.

4 A. Three parts. Up here is the test, which is
5 referred to as the raw content. It's just the words.
6 Over here is the first map, a map which contains two
7 things: Codes, which would have been extracted from
8 this contact when it was brought in, according to the
9 map; and the offset, sort of the locations where the
10 codes are supposed to, as we say in the patent report,
11 insert their equals.

12 Now, here is the resolution of the raw
13 content with the map where we've taken the code and
14 embedded them into the raw content to create an SGML
15 document or part of an SGML document, according to the
16 rules of the map.

17 Q. (By Mr. White) Would you select one of the
18 codes that's listed in this Map 1 and demonstrate to the
19 jury how you would have that code inserted into the
20 texturing that appears at the top of that exhibit?

21 A. I'll just take the first one, the para. And
22 when we take the para, which is here -- I hope you can
23 see that.

24 Q. Are you highlighting that in yellow?

25 A. I'm highlighting the para in yellow.

1 And I look at the map and go, this is an offset of zero,
2 so location of zero. So I then put it right here, and
3 there's -- there's the para identified there.

4 Now, SGML tags work in pairs, so I would then
5 go --

6 Q. Before you do that, now, when you say you put
7 it here, is that offset the offset for the text stream
8 at the top of the slide?

9 A. That's correct. Offset zero is that para
10 right there (indicating).

11 Q. But it's the offset for the texturing at the
12 top of the slide?

13 A. Yes, the offset there, yes.

14 Q. Okay. Now, you've -- you've highlighted what
15 appears to be the para word or code that's in the XML
16 document at the bottom, but I notice that there's some
17 angle brackets, left angle bracket and right angle
18 bracket, that surrounds that para; is that correct?

19 A. That's correct.

20 Q. Would you explain to the jury what that
21 represents.

22 A. The angle brackets represent delimiters in
23 SGML. So in order to make this code here into an
24 SGML -- something that SGML technology will understand,
25 I have to add these delimiters to it to make it

1 recognizable to the SGML tools. So they come in after
2 I've brought this in.

3 Q. Now, you were talking about pairs.

4 A. Right. Well, SGML typically tags pairs and
5 codes -- so I would look here, and I would find an end
6 para here, and I would take this guy here, and I would
7 put this guy right down here (indicating).

8 And you'll note that I've left the end over
9 here in SGML. What that tells me, that translates that
10 end into this back slash here to identify that this is
11 the end of this particular para of that pair.

12 Q. Thank you, Mr. Vulpe. You can return to the
13 witness stand.

14 A. (Complies.)

15 MR. WHITE: Your Honor, we would offer as
16 Demonstrative -- Plaintiffs' Illustrative Exhibit -- I
17 believe it's No. 4, the demonstrative here of PX595.

18 THE COURT: All right. Any objection?

19 MR. POWERS: No objection.

20 THE COURT: Be admitted.

21 Q. (By Mr. White) After meeting with Dr. Barlow,
22 Mr. Vulpe, what did you do next with patenting of your
23 invention?

24 A. Well, both Dr. Barlow and Mr. Owens advised
25 me that this was a very expensive process to actually

1 get a patent, file for a patent, so before we went ahead
2 and did that -- or I went ahead and did that, I
3 instructed Steve to -- he was working for me as a
4 contractor -- to start implementing -- see if we could
5 actually implement this in software.

6 Q. And Steve there is referring to Stephen
7 Owens, your coinventor?

8 A. That's correct.

9 Q. Would you turn to Exhibit 594 in your binder?
10 Do you recognize this document?

11 A. Yes, I do.

12 Q. What is it?

13 A. It's a first draft of the patent application.

14 Q. Did Mr. Owens prepare that document?

15 A. Yes, he did.

16 Q. What's the date of it?

17 A. April 13th -- April 13th, 1994.

18 Q. Did you have any input on the content of that
19 first-draft specification?

20 A. Yes, I did. Stephen and I worked on it
21 together.

22 Q. Well, after submission of this draft
23 application to Dr. Barlow, did you ultimately file a
24 patent application with the Patent & Trademark Office?

25 A. Yes, we did.

1 Q. And that happened on June the 2nd, 1994?

2 A. That's correct.

3 Q. Now, turn to Exhibit 627, Mr. Vulpe.

4 What is -- what is this document?

5 A. This is a quarterly report from myself to the
6 i4i Board of Directors at the time.

7 Q. And the date of this report?

8 A. Is June 8th, 1994.

9 Q. If you'll turn to the sixth page of that
10 exhibit, there's a section in there that is entitled
11 Technology Development.

12 A. Yes, sir.

13 Q. Do you see that?

14 A. I do.

15 Q. Would you read aloud the introductory
16 paragraph and explain to the jury what you're telling
17 the Board of Directors in that paragraph?

18 A. This paragraph, I'm stating, Infrastructures
19 is in the final stages of productizing its current
20 technology as a vertical package for the semiconductor
21 industry.

22 Q. Let me stop you there and ask you, what is a
23 vertical package for the semiconductor industry?

24 A. It's a solution that would have been built
25 around the C standard.

1 Q. And it was intended to be for the
2 semiconductor industry?

3 A. Yes, it was.

4 Q. Now, please continue.

5 A. The technology product, known formerly as
6 S-to-the-4th, will include the following modules, and
7 then there's a list of software modules.

8 Q. Now, the reference there to S-to-the-4th
9 power, what is that referring to?

10 A. That's in reference to the Macintosh base at
11 SEMI.

12 Q. That's the product that you delivered to SEMI
13 in 1993?

14 A. That's correct.

15 Q. Now, who had the source code for this -- this
16 product, S-to-the-4th power?

17 A. We did.

18 Q. So you're indicating that you're in the final
19 stages of productizing S-to-the-4th.

20 Can you tell the jury what that productizing
21 effort was?

22 A. It was a -- a number of steps were involved.
23 The first was to move it over to the PC environment.
24 Macintosh was no longer a viable business platform, so
25 we were moving it to the Windows environment. We added

1 some new modules, software modules, to it, and we were
2 increasing general flexibility of the product.

3 Q. What was the intent of i4i in doing this?

4 A. We wanted to sell this product to the
5 semiconductor industry on the Windows platform.

6 Q. At this time -- this is now June the 8th of
7 1994 -- did i4i have a commercial product to sell at
8 that time?

9 A. No, we did not.

10 Q. So this was your first effort to try to have
11 a product that you could actually sell?

12 A. That's correct.

13 Q. Now, at the bottom of this page of this
14 technology development discussion, would you read aloud
15 what you wrote there to the Board of Directors?

16 A. Concurrent to the S-to-the-4th work,
17 Infrastructures had filed -- has filed for patent
18 protection for what it believes may be a fundamental
19 technology patent.

20 Q. And that had happened on June the 2nd, four
21 days earlier?

22 A. That's correct.

23 Q. Continue.

24 A. Infrastructures does not plan to aggressively
25 market or promote the patent technology at this point.

1 It is fundamentally --

2 Q. What did you mean by that?

3 A. We had to patent -- we had to file for the
4 patent. We had some early code, and we really didn't
5 know exactly what we wanted to do with this. We were
6 still very much in the exploratory stages.

7 MR. WHITE: Your Honor, may I approach?

8 THE COURT: Yes, you may.

9 Q. (By Mr. White) Mr. Vulpe, I have prepared
10 a demonstrative and, hopefully, accurately reflect
11 the testimony that you have just now given to this
12 jury. And I would like to go over it, if I may, sir,
13 to be sure that what I've indicated here is factually
14 correct.

15 You testified that the SEMI S-to-the-4th
16 system was installed and running on the computers of the
17 SEMI Company in early 1993; is that correct?

18 A. That's correct.

19 Q. And on this timeline that I've shown across
20 this chart, I have at the start of the year 1993, start
21 of 1994, and the start of 1995.

22 You understand that?

23 A. Yes, I do.

24 Q. Now, you also said that when I asked you when
25 did you and Mr. Owens conceive of your invention, you

1 said the two of you thought it was near the end of 1993,
2 around November; is that accurate?

3 A. That's correct.

4 Q. Now, are there any documents that exist today
5 that you could find that would corroborate that?

6 A. Most unfortunately not.

7 Q. Okay. But what we have found is that on
8 February the 14th, two months into the year, you
9 provided to Dr. Barlow a write-up of what you understood
10 your invention to be.

11 Is that accurate?

12 A. That's correct.

13 Q. And we looked at your map and how it would be
14 mapped of raw content, right?

15 A. That's correct.

16 Q. Now, also on April the 13th, 1994, a
17 first-draft specification was submitted to Dr. Barlow
18 from Stephen Owens, right?

19 A. That's correct.

20 Q. And then, ultimately, on June the 2nd, about
21 two months later, the patent application that issued as
22 the '449 patent was actually filed with the Patent
23 Office?

24 A. That's correct.

25 Q. And on that day, actually four days later,

1 you prepared a report to the Board of Directors of i4i,
2 telling them what you were doing regarding your product
3 development; is that correct?

4 A. That's correct.

5 Q. Now, you were present at the opening and in
6 this courtroom; is that correct, Mr. Vulpe?

7 A. Yes, I was.

8 Q. And you heard Microsoft's counsel say that
9 they contend that the invention of the '449 patent is
10 anticipated by the S-to-the-4th product that was
11 installed and running on the SEMI system in early 1993.

12 Do you understand that?

13 A. Yes, I heard that.

14 Q. Do you understand what anticipation means?

15 A. Yes, I do.

16 Q. What does it mean?

17 A. That it was already there.

18 Q. So they're contending that the invention that
19 you only conceived of in November, disclosed to your
20 patent attorney in early February of '94, prepared a
21 draft application a few -- two months later, two months
22 after filing a patent application, that that invention
23 was actually embodied and running in the SEMI
24 S-to-the-4th system.

25 Is that true, sir?

1 A. No, it's not.

2 Q. And why? Why do you believe that?

3 A. Well, there's two reasons.

4 Obviously, we hadn't even conceived of it
5 back when we were working at SEMI, and I look here at
6 the documents, and I look at the time chart.

7 MR. WHITE: Could I ask you to pull up
8 Exhibit 627?

9 Go to that last page of -- the page of
10 the technology development and highlight that first
11 paragraph and the last paragraph and juxtapose them
12 together.

13 Q. (By Mr. White) Mr. Vulpe, what do those two
14 paragraphs say to you?

15 A. They say, on one hand, we're going to
16 productize the S-to-the-4th, the basis that we've done
17 with SEMI; on the other hand, we've got this entirely
18 different, separate activity that we have just come up
19 with around this, what we refer to, as a fundamental
20 technology patent.

21 And that we have no real understanding of how
22 to productize it or where it was going to play out in
23 our strategy at this point.

24 Q. Now, I noticed, Mr. Vulpe, that there is a
25 time interval between when you had your first meeting

1 with Dr. Barlow and you gave him the facts, and when
2 Mr. Owens actually prepared the first-draft
3 specification and gave it to him.

4 A. That's correct.

5 Q. What was going on in that interval of time?

6 A. Stephen was asked by myself to work on
7 implementing the invention and software.

8 Q. And you were trying to validate to make sure
9 it could -- it could be done?

10 A. That's correct.

11 Q. And so did you commission Mr. Owens to begin
12 writing source code to implement and practice the
13 invention of what became the '449 patent?

14 A. Yes, I did, sir.

15 Q. Who was paying for that work?

16 A. I was paying for it personally.

17 Q. Now, you indicated that he started writing
18 source code. When did i4i stop writing source code
19 attempting to practice the invention of the '449 patent?

20 A. We have never stopped. We continue to work
21 on this.

22 Q. So that means if I were to draw a line of
23 activity within i4i to practice the invention within
24 your source code, it would start when you asked
25 Mr. Owens, please see if you can verify that our

1 invention will work in source code?

2 A. That's correct.

3 Q. And that is continuing up until today?

4 A. Absolutely.

5 Q. So if I draw a line, that would
6 representative activity within i4i of trying to come to
7 the marketplace with products that practice your
8 invention; is that right?

9 A. That's correct.

10 Q. Well, all right. Let's look now at your --
11 at your report to the Board of Directors, because you
12 say: We are in the final stages of productizing our
13 technology.

14 And you've explained that that was to try to
15 productize it for the vertical package for the
16 semiconductor industry; is that right?

17 A. That's correct.

18 Q. Did there ever come a time, Mr. Vulpe, when
19 as part of that productizing, that you included within
20 that work the work that Mr. Owens had successfully
21 reduced to practice during this period in early 1994?

22 A. Yes. We -- I believe it was in the late
23 summer/early fall of '94, we put that in there to start
24 testing it out, to see what role it might play in the
25 product.

1 Q. Well, if this is June of 1994 and this is
2 January of 1995, approximately where within that
3 interval of time did you actually start practicing the
4 invention in the S-to-the-4th product?

5 A. Probably in the August timeframe, somewhere
6 in there, maybe a little bit earlier.

7 Q. So if I pick a spot right here and I draw a
8 vertical line and I write S-to-the-4th, plus the patent,
9 will you understand that that represents the time that
10 you believe when i4i had source code practicing the
11 patent in the S-to-the-4th source code at the company?

12 A. Yes. That's correct.

13 Q. When you were in the process -- i4i was in
14 the process of productizing the S-to-the-4th product,
15 did i4i have any sales organization to actually go out
16 and sell your products once you came to market?

17 A. No, we did not.

18 Q. Well, what did you do to solve that problem?

19 A. I entered into -- or i4i entered into a
20 contractual relationship with Scott Young.

21 Q. Who is Scott Young?

22 A. Scott Young was the project manager for the
23 implementation at SEMI.

24 Q. And that's how you met and came to know
25 Mr. Young?

1 A. That's correct.

2 Q. Well, you say that you hired him. Did you
3 approach Mr. Young or did Mr. Young approach you about a
4 relationship?

5 A. Mr. Young approached us, best I can recall.

6 Q. All right. Now, if you would, take a look at
7 Exhibit 651 in your binder, Mr. Vulpe.

8 Ultimately, is this the agreement, the
9 consulting agreement, that you entered into with Scott
10 Young with Infrastructures Data Systems, Inc., as the
11 consultant for i4i?

12 A. It's the nondisclosure agreement that we had,
13 yes, between Infrastructures as the firm and Scott
14 Young, IDS, as the consultant, yes.

15 Q. Infrastructures Data Systems, Inc., what is
16 that?

17 A. That's a company that was -- that Scott Young
18 was with. And to the best of my recollection, actually,
19 I helped Scott Young set that company up in California.

20 Q. And that's a California corporation?

21 A. Yes, it is, sir.

22 Q. And you were one of the Board of Director
23 members?

24 A. I believe I was.

25 Q. Now, why did you enter into a nondisclosure

1 agreement with Mr. Young?

2 A. Well, I wanted to ensure that all of --
3 whatever corporate secrets and product strategies and so
4 forth would not be disclosed without due authorization.

5 Q. Now, why did you hire Mr. Young again?

6 A. I wanted Mr. Young to help sell what we were
7 building in the North American market.

8 Q. Now, wasn't he actually hired to be your
9 outside sales director for developing customers in North
10 America?

11 A. That's correct.

12 Q. Would that relation -- well, first of all,
13 what is the date of this?

14 A. If I can, it's May 7th, 1994.

15 Q. So in -- around May, and this is June, so it
16 would have been around in this time period, when you
17 would have entered into the NDA with Scott Young; is
18 that right?

19 A. Correct.

20 Q. It was the intent of i4i in entering into
21 this relationship that Mr. Young would become your sales
22 manager for sales in North America?

23 A. That's correct.

24 Q. Would it be logical that he would want to
25 know what it is that you're doing product-wise so that

1 he would know what he has to go out and sell?

2 A. Yes, it would be.

3 Q. Did you ever disclose such information to
4 him?

5 A. We disclosed what we believed would help him
6 out in the sales process, yes.

7 Q. How long did Mr. Young work for i4i as a
8 consultant?

9 A. I believe we finalized the relationship in
10 mid -- early or mid-1996.

11 MR. WHITE: Your Honor, I would mark for
12 identification as Plaintiffs' Demonstrative No. 5, I
13 believe, the timeline chart that Mr. Vulpe has testified
14 to.

15 THE COURT: All right. Any objection?

16 MR. POWERS: No objection, Your Honor.

17 THE COURT: Be admitted.

18 Q. (By Mr. White) All right. Now, we've been
19 talking about efforts to try to productize the
20 S-to-the-4th system and that you started practicing the
21 invention in and around August/September timeframe of
22 1994.

23 Did you ever come to the market with a
24 commercial product that practiced the invention of the
25 '449 patent?

1 A. Yes, we did.

2 Q. What was that product called?

3 A. It was called the SGML Application Server.

4 Q. Was that S-to-the-4th -- was the invention
5 being practiced in it?

6 A. No, it was not. We were not getting very far
7 with S-to-the-4th, so we decided to pull the work that
8 Stephen was doing and focus our corporate activities on
9 that.

10 Q. Well, what was the SGML Application Server
11 supposed to do?

12 A. It did a number of things. It provided an
13 interactive SGML parser, which was a total unique
14 product innovation at the time in the marketplace. It
15 handled a one-dimensional map.

16 There's one map for the raw content, and it
17 provided an API that would allow a software developer to
18 use it to build SGML solutions in any number of
19 environments.

20 Q. Well, do you still sell the SGML Application
21 Server today?

22 A. Not by that name, but we still do, yes.

23 Q. What is it called today?

24 A. Today, it's called -- it's evolved through a
25 number of names. S4/Text, Tagless Editor. It's now

1 known as S40.

2 Q. What is S4/Desktop?

3 A. S4/Desktop is an implementation that we built
4 with the SGML Application Server that supports multiple
5 maps.

6 MR. WHITE: Can I have Exhibit 626?

7 Q. (By Mr. White) Would you take a look at that
8 exhibit, Mr. Vulpe?

9 A. 626?

10 Q. 626, what is this?

11 A. This looks like a piece of marketing
12 literature for S4/Desktop.

13 Q. And S4/Desktop was your first -- S4/Desktop
14 was the product that you renamed for the SGML
15 Application Server with additional features?

16 A. That's correct.

17 Q. Would you look at the last drawing on that
18 brochure, the last page?

19 A. Yes.

20 Q. There's a block diagram there?

21 A. Yes.

22 Q. Is the SGML Application Server shown there?

23 A. Yes, it is.

24 Q. What is it?

25 A. It's part of the S4/Solution.

1 Q. And did the S4/Solution, that was the
2 implementation of your multiple map idea?

3 A. That's correct.

4 Q. Did the S4 -- let me ask you: Why did you
5 choose the name S4/Desktop?

6 A. As we started to appreciate more and more
7 what we had invented, we thought -- the mission of the
8 company became how do we deliver SGML to desktop
9 applications, whether word processors, CAD tools,
10 graphic systems, whatever. So we wanted to sell to the
11 desktop.

12 Q. What is the desktop?

13 A. It's the interface of the environment that
14 users work with on a day-to-day basis.

15 Q. Okay. Did the S4/Desktop product ever evolve
16 into other products for i4i?

17 A. Yes, it did.

18 Q. And S4/Text, was that one of them?

19 A. Yes, it was.

20 Q. Were there various versions of S4/Text?

21 A. A number of versions, yes, sir.

22 Q. There's been reference to the Tagless Editor.
23 What was the Tagless Editor version of S4/Text?

24 A. Tagless Editor was actually a very needed
25 innovation. What it did is it hid in the Microsoft Word

1 interface all the SGML tags so that a user could
2 actually create an SGML document without actually seeing
3 the tags or interacting with the tags in the GUI.

4 Q. Seeing the tags is objectionable?

5 A. It certainly is. A lot of people find it
6 very confusing and disorienting.

7 Q. So your Tagless Editor hid it in the
8 background so people didn't have to burden themselves
9 with knowing what the tags were or where they should go?

10 A. Exactly.

11 Q. Look at Exhibit 299, if you would, Mr. Vulpe.
12 Is this a portion of a manual or Version 2.2 of S4/Text
13 that is the Tagless Editor product?

14 A. Yes. This is a developer guide for S4/Text.

15 Q. And this product was available in early 2000?

16 A. Yes, it was.

17 Q. Who were some of the customers for this new
18 Tagless Editor product of yours?

19 A. There were a number of them. Bristol-Myers
20 Squibb. Certainly, the most notable was the U.S. Patent
21 & Trademark Office.

22 Q. Well now, how did the U.S. Patent & Trademark
23 Office come to work with i4i?

24 A. They contacted us. They had a project that
25 required SGML, and they wanted it inside the familiar

1 interface, such as Microsoft Word.

2 Q. Why was the word interface important?

3 A. Well, what they wanted to be able to provide
4 to their constituency, that is, patent agents and
5 attorneys, is the ability to create patents in SGML so
6 they could be machine-processed or e-filed, if you will,
7 at the Patent Office. And they wanted SGML to provide
8 all the data information inside these documents.

9 Q. E-file, does that mean file the application
10 electronically with the Patent Office as opposed to
11 sending them paper?

12 A. That's correct.

13 Q. Did the Patent Office select your product to
14 meet their requirements?

15 A. They certainly did.

16 Q. And when did that happen?

17 A. That would have been 2000. I couldn't
18 remember exactly when.

19 MR. WHITE: Let me see Exhibit 618.

20 Q. (By Mr. White) This appears to be some sort
21 of a newspaper article.

22 Can you tell us what this is?

23 A. It's an article by -- from the -- sorry --
24 from the Financial Post, which is Canada's equivalent to
25 the Wall Street Journal. And it discusses i4i's success

1 at the U.S. Patent Office.

2 Q. Now, the title of this article is Toronto
3 Data Firm, i4i, Patents the Future.

4 A. That's correct.

5 Q. There's a photograph there of three
6 gentlemen. Who are those --

7 A. Well, the guy looking down with the glasses
8 is myself; in the middle is Mr. Rick Makos, who we had
9 just hired as CEO; and the other gentleman is Mr. Bill
10 Cox, who's a member of our Board of Directors.

11 Q. All right. How did you feel about the Patent
12 Office, the United States Patent Office, selecting your
13 product to meet its requirements?

14 A. We were thrilled and honored. This is a
15 terrific opportunity, a huge application, and we were
16 thrilled to be able to participate in that.

17 Q. Did you ever receive any sort of an
18 expression of how the Patent Office felt about your
19 product?

20 A. Yes, we did, sir.

21 MR. WHITE: Could I have the next slide?

22 Q. (By Mr. White) Mr. Vulpe, what am I looking
23 at here in this slide?

24 A. This is a framed copy of the sort of
25 appreciation document or certificate the USPTO staff

1 sent to us.

2 Q. Let me --

3 MR. WHITE: May I approach, Your Honor?

4 THE COURT: Yes, you may.

5 Q. (By Mr. White) I want to hand you what
6 appears to be the framed certificate of appreciation.
7 Can you hold that up to the jury in what -- what is
8 written on that certificate?

9 A. Well, it's thank yous and congratulations on
10 a successful software delivery, and it's signed by all
11 members of the U.S. Patent & Trademark technical staff.

12 Q. Are they the ones that you were working with
13 in order to determine whether or not the i4i S4/Text
14 Tagless Editor would meet the requirements of the U.S.
15 Patent & Trademark Office?

16 A. Yes, it was.

17 Q. What did you do with this framed certificate
18 of correction -- certificate of appreciation?

19 A. Well, we had it framed when we got it,
20 because we were really proud of it. Then we hung it up
21 right in the office in the reception area right next to
22 the patent. And we thought, wow, this is amazing. We
23 get a patent; we get contracted by the U.S. Patent
24 Office to build a solution using the patent to make more
25 patents.

1 We thought it was a really nice little
2 binding of everything we were about.

3 MR. WHITE: Your Honor, I would offer in
4 as Plaintiffs' Demonstrative No. 67, the framed copy of
5 the certificate of appreciation.

6 THE COURT: Any objection?

7 MR. POWERS: No objection, Your Honor.

8 THE COURT: Be admitted.

9 Let me ask, Mr. White, how much longer
10 you anticipate on direct.

11 MR. WHITE: Your Honor, enough that
12 perhaps a lunch break now would be a good idea.

13 THE COURT: All right. I think we're
14 close and we're due, so, Ladies and Gentlemen of the
15 Jury, we're going to take our lunch break at this time.

16 We will be in recess until 1:15.

17 I would remind you of your instructions
18 not to discuss the case among yourselves or with anyone
19 else. And we will see you back here after lunch.

20 MR. PARKER: Your Honor, may we
21 substitute photographs for the two framed?

22 THE COURT: Yes, you may.

23 COURT SECURITY OFFICER: All rise.

24 (Jury out.)

25 (Recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ _____
SUSAN SIMMONS, CSR
Official Court Reporter
State of Texas No.: 267
Expiration Date: 12/31/10

Date

/s/ _____
JUDITH WERLINGER, CSR
Deputy Official Court Reporter
State of Texas No.: 731
Expiration Date 12/31/10

Date