

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 18, 2009
MICROSOFT CORPORATION * 9:00 A.M.

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

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

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P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated.

All right. I understand the parties had a matter to take up before we bring the jury in.

MR. WHITE: Yes, we do, Your Honor.

THE COURT: All right.

MR. WHITE: I have three matters I'd like to discuss with the Court this morning.

The first is perhaps the most substantive of all three of the issues, but last evening, Plaintiffs received for the first time -- well, received a PowerPoint slide presentation of Defendant on the issue of the non-infringement opinions of his expert, Mr. Gray.

And we learned for the first time last night, Your Honor, that Mr. Gray will be advancing a theory of non-infringement that is nowhere discussed or reported in his expert report.

If I could have Slide 47 of Defendant's PowerPoint presentation.

Slide No. 47, Your Honor, begins a series of slides regarding one of Dr. Gray's non-infringement.

1 And the title of this slide indicates the theory, and it
2 says that Word does not find positions in the input
3 content stream. And that -- that non-infringing
4 argument stems from this Court's construction of the
5 term compiling a map of metacodes.

6 And in this slide, Defendants have
7 indicated that -- through highlighting, that the phrase
8 finding the positions of the metacodes in and relative
9 to an input content stream, that Word does not perform
10 that step.

11 We asked Defendants in interrogatories to
12 state each and every basis of non-infringement they had.
13 They did not identify this argument.

14 As a consequence, our expert, Dr. Rhyne,
15 was not able to address this issue in his opening expert
16 report on infringement. And we have -- we have examined
17 Dr. -- I'm sorry -- Mr. Gray's expert report and cannot
18 find anywhere in there where he has advanced this theory
19 of non-infringement. And we believe that he shouldn't
20 be allowed to do so in front of the jury.

21 THE COURT: All right. Response?

22 MR. KUDLAC: Thank you, Your Honor.

23 In Mr. Gray's report, there was a reference to all the
24 reasons that he felt that the Word 2003 and 2007 did not
25 infringe.

1 On Page 2 of his report, he says: My
2 full opinions on these matters are set forth in the
3 following sections and attachments.

4 Attachment 3 to Mr. Gray's report is
5 approximately a 90-page recitation of examples of
6 importing files into Word 2003 or 2007 and the
7 decomposition of those files and how the data structures
8 that have been accused this week or last week have
9 been -- are populated during that process of importing a
10 file.

11 And as we've already heard testimony, it
12 is during that decomposition and analysis that the data
13 structures are analyzed -- or populated, created, and
14 then the input content stream, which Dr. Rhyne has
15 referred to as either an XML or a Word ML file, are
16 analyzed to see whether you find the positions in and
17 relative to that file.

18 Mr. Gray went through in painstaking
19 detail in those attachments the process by which an XML
20 file or a Word ML file is analyzed and the resulting
21 information loaded into Word.

22 In his -- in the body of his expert
23 report, one of his opinions was that the compiling step
24 was not followed by Word 2003 and 2007. And by
25 incorporating his opinions and the analysis from the

1 90-page attachment in -- Attachment 3 to his rebuttal
2 expert report, we think that he has given fair notice of
3 his opinion that the compiling step, including the
4 finding positions in and relative to the input content
5 stream were advanced to i4i, and they had full notice of
6 that.

7 THE COURT: Okay. Response?

8 MR. WHITE: Yes, sir, I do, Your Honor.

9 If I could -- John, what is the page where the compiling
10 is?

11 MR. CAMPBELL: 29.

12 MR. WHITE: If I could find the page in
13 his report.

14 The purpose of an expert report is to put
15 the Plaintiff on fair notice of what are the
16 non-infringing arguments that the expert for the
17 Defendant is going to advance at trial. We tried to
18 determine that through discovery in the discovery phase.
19 They never identified this.

20 And what you see here and heard
21 Mr. Kudlac say is sort of a piecemeal. Well, he said
22 that the term -- the compiling term isn't met. And if
23 you go back to the exhibits, there's a support back
24 there that he could have perhaps said or gave a basis
25 for it.

1 But the issue is whether Mr. Gray
2 provided in his expert report a statement of his opinion
3 that finding the positions of the metacodes in and
4 relative to the input content stream is not met by the
5 Word program.

6 Now, at Page 28 where Mr. Kudlac referred
7 to -- if I could have Page 28 -- this is where he
8 provides his opinions or the bases on which he finds
9 that the compiling step is not satisfied.

10 And he first sets forth the Court's claim
11 construction, dutifully and accurately providing what
12 the Court construed that term to mean, including the
13 phrase finding the positions of the metacode in and
14 relative to the input content stream.

15 Then if you turn over to Page 29,
16 Mr. Gray, very meticulously and methodically, sets forth
17 in great detail each and every basis of why he finds
18 that that compiling step is not satisfied by Word.

19 And there are seven bases listed, and
20 then he gives a much more detailed analysis, spanning
21 Pages 29 and 30, of each one of the bases. And within
22 those bases, nowhere can you find a statement that he
23 believes that finding the positions of the metacodes in
24 and relative to the input content stream is not
25 performed by the Word products.

1 There is no way that Plaintiff was put on
2 fair notice that Mr. Gray would come to this Court today
3 and advance this theory of non-infringement. And we
4 don't believe he ought to be allowed to do it to the
5 jury.

6 THE COURT: All right. Response?

7 MR. KUDLAC: Your Honor, Dr. Rhyne has
8 already addressed this issue in front of the jury.
9 From the opening statement there was one of the -- if
10 you remember, the three-part slide. This was
11 essentially one of the three parts that was addressed by
12 Mr. Powers in the opening. Dr. Rhyne addressed this in
13 his direct testimony.

14 And if I could turn to -- have --

15 THE COURT: Well, let me ask you: Was it
16 included in Dr. Rhyne's expert report?

17 MR. KUDLAC: I'm going to a particular
18 page, Page 10, of the Attachment 3 that I spoke of.

19 And if we could pull up the bottom
20 paragraph there, five or so lines from the bottom -- I'm
21 sorry -- Mr. Gray's expert report.

22 THE COURT: Now, is this Mr. Gray's
23 expert report?

24 MR. KUDLAC: Yes, it is. I'm sorry. I
25 misspoke.

1 I'm sorry. Was it addressed in
2 Dr. Rhyne's expert report?

3 THE COURT: That was my question, yes.

4 MR. KUDLAC: Dr. Rhyne went through --

5 THE COURT: You were talking about
6 Dr. Rhyne, weren't you, or are you misspeaking?

7 MR. KUDLAC: I apologize. I think I
8 mixed up the names. I meant to say that this was --
9 this was, in fact, addressed in Mr. Gray's report to --
10 and I wanted to point out the particular page of his
11 attachment where he -- where he said --

12 THE COURT: I thought you were going with
13 your argument somewhere about Mr. Powers had said in
14 opening statement, and then Dr. Rhyne had testified, and
15 you were referring to Dr. Rhyne's report.

16 Am I misunderstanding you?

17 MR. KUDLAC: I misspoke, Your Honor. I
18 apologize for that. Mr. Powers --

19 THE COURT: Well, let's start over. Your
20 response, please.

21 MR. KUDLAC: My apologies.

22 Mr. Powers addressed this issue in
23 opening statement. Dr. Rhyne --

24 THE COURT: Addressed what issue?

25 MR. KUDLAC: The -- the finding the

1 positions in the input content stream.

2 Then Dr. Rhyne, on his direct testimony,
3 offered an opinion about it and presented evidence about
4 whether the Word 2003/2007 --

5 THE COURT: Okay. I don't recall whether
6 that's true or not, but that led to my question. I
7 mean, are you saying that because he brought it up that
8 you should be able to bring it up, even though it's
9 perhaps not in your expert report, or where are you
10 going?

11 MR. KUDLAC: What I'm -- what I'm trying
12 to say is that Dr. Rhyne has already testified on this.
13 He's had ample opportunity to opine on it, and, in fact,
14 did on the stand during the course of the trial.

15 The fact that he's been on notice about
16 this from the original expert report where Mr. Gray
17 recited the details, as well as Dr. Rhyne and Dr. Martin
18 had recited the details of the parsing of the input
19 content streams, they obviously went through all of the
20 detail about this and had provided information and
21 evidence. And Dr. Rhyne did, in fact, provide an
22 opinion here about whether this limitation was met.

23 THE COURT: Okay.

24 MR. KUDLAC: So in Mr. Gray's expert
25 report on Page 10, the last few lines talk about the

1 import process there. And you can see that Mr. Gray has
2 made reference to the SDT bookmark first PLC and the
3 bookmark last PLC.

4 That's what we've seen on this Figure 12
5 that has been talked about all the week as the CP first
6 and CP limits. And Mr. Gray says that those data
7 structures are not derived from the input content
8 stream, and he gives his reasons for -- for that
9 analysis.

10 It is simply that information and the
11 methodology by which that's done that Mr. Gray intends
12 to opine about.

13 THE COURT: Okay. Response?

14 MR. WHITE: Your Honor, what Mr. Gray was
15 describing here was in great detail how the internal
16 workings of the Word program worked regarding all of the
17 issues of dealing with the input content stream and
18 creation of what we contend to be the metacode map and
19 map content.

20 But this is nothing but supporting
21 documentation for a technical discussion of what Word
22 does. In the body of his report where he's supposed to
23 provide his opinions about what his opinion is of how
24 Word, because it works in a certain way, forms a basis
25 of non-infringement for which the Plaintiff should be

1 put on fair notice so that its expert can address it.

2 Mr. Gray does not have anything in his
3 report, other than this little technical discussion at
4 Page 10. This in no way -- I'd have to be clairvoyant
5 to determine that this now is now a basis for a
6 contention that the Court's claim construction of
7 finding the positions of the metacode in and relative to
8 an input content stream is a -- that Microsoft has that
9 as a basis of non-infringement.

10 Mr. Gray didn't put it in his report. He
11 shouldn't be allowed to talk about it. And they're
12 trying to, by going back to these technical details of
13 the technology, somehow say, well, i4i, you should have
14 understood that that's what we were going to say at
15 trial, even though in his body of his report he says
16 nothing about it.

17 THE COURT: All right. Put the slide
18 back up that had the list of opinions which you had up
19 first.

20 MR. WHITE: That was Slide 47.

21 MR. CAMPBELL: Page 28 and 29.

22 MR. WHITE: Oh, that's Page 20 -- yes --
23 it would be 29 and 30, Your Honor.

24 THE COURT: And go back to 28. Page 28
25 of Dr. Gray's expert report is entitled, Paragraph

1 6.2.1.4, Third Limitation of Claim 14 that deals with
2 that compiling step; is that correct?

3 MR. WHITE: Yes, sir, Your Honor.

4 MR. KUDLAC: That's right.

5 THE COURT: All right. And then go to
6 Page 29, if you would.

7 Then the third paragraph says: To
8 summarize the Court's claim construction order requires
9 the data structure form during the top compiling step
10 that is alleged to be the metacode map must reach the
11 following criteria, and then it goes through each of
12 those.

13 And then it says in the next paragraph:
14 Based upon the Court's claim construction and the
15 arguments advanced by i4i, believe that Microsoft Word
16 2003 do not practice the method in which you had the
17 step of compiling a map of metacodes in the distinct
18 storage means by locating, detecting, and addressing the
19 message from metacodes for the following reasons.

20 Then he lists Reason No. 1, the alleged
21 metacode map is not formed/created in the required way.

22 And then at Page 30, No. 2, the alleged
23 metacode map does not include all the required elements.
24 And then there are various subcategories for that.

25 Anywhere in that section, is there any

1 reference to the opinion that he is now wanting to
2 express?

3 MR. KUDLAC: There is not using the exact
4 words of the claim construction.

5 THE COURT: Okay. But where in there is
6 there something that gives the Plaintiff fair notice
7 that he is going to be -- express the opinion that was
8 referred to on Slide 47 of Plaintiffs' presentation?

9 MR. KUDLAC: Actually, the very first
10 point on Page 29, which says the alleged metacode
11 map does not perform --

12 THE COURT: Excuse me. Go back to
13 Page 29.

14 Which -- Point 1 at the bottom?

15 MR. KUDLAC: Point 1 at the bottom: The
16 alleged metacode map is not formed/created in the
17 required way.

18 From the claim construction, we see
19 exactly the way in which the metacode map is required to
20 be formed or created. And part of that is, of course,
21 the finding the positions in and relative to the input
22 content stream.

23 THE COURT: That's one -- maybe one of
24 the steps under the Court's claim construction, but
25 where in there does he opine what he is wanting to now

1 opine?

2 MR. KUDLAC: The exact words of the claim
3 construction are not found, admittedly, within that
4 paragraph of Dr. -- of Mr. Gray's opinion.

5 However, if you consider the entirety of
6 Mr. Gray's opinion, which tells us that he's going to
7 opine that the alleged metacode map is not formed in the
8 required way, looking at the previous paragraph talking
9 about the locating, detecting, and addressing, which is
10 exactly what he has construed with that finding, the
11 positions of language.

12 And when we look back to the attachment
13 where he goes through in painstaking detail exactly how
14 that process occurs. It's under those circumstances
15 that I think i4i has been under fair notice that that is
16 something that is within the scope of Mr. Gray's
17 opinions.

18 THE COURT: Okay. Final word?

19 MR. WHITE: Your Honor, this is
20 Dr. Gray's report that you've been handed with all of
21 the attachments involved and an incredible amount of
22 technical discussion.

23 But the body of his expert report where
24 he sets forth his opinions, and Your Honor has looked at
25 them; and that the alleged metacode map is not formed or

1 created in the required way is the statement of No. 1,
2 but then he breaks it down into subcategories as to what
3 about the way that it was formed and created that
4 doesn't meet the claim limitation.

5 And nowhere on Page 29 or over on Page 30
6 will you find Mr. Gray saying that one of the bases is,
7 is that Word does not find the positions of the
8 metacodes in and relative to the input content stream.

9 And, Your Honor, he should just not be
10 allowed to offer that opinion today in front of the
11 jury.

12 THE COURT: All right. Plaintiffs'
13 objection is sustained.

14 What's next?

15 MR. WHITE: The other matter, Your Honor,
16 is in Mr. Gray's invalidity report, he makes reference
17 to two documents: Defendant's Exhibit 2395 and 2396,
18 which were the IRAP applications that Mr. Vulpe
19 submitted to the Canadian government.

20 If I could have Slide 72 of the
21 invalidity report.

22 Your Honor, this is -- this is the
23 reference to the -- one of those two documents, the IRAP
24 documents. Neither one of those two documents,
25 Defendant's Exhibit 2395 and 2396, are contained within

1 Mr. Gray's expert report regarding the invalidity issue
2 that he is obviously going to offer an opinion that he
3 is now relying on those documents.

4 And since they're not in his expert
5 report, we don't believe he should be allowed to testify
6 to the jury regarding those two documents.

7 THE COURT: Response?

8 MR. KUDLAC: Mr. White is correct; those
9 documents were not cited in his expert report, but
10 Mr. Gray is not going to be offering an opinion that he
11 relied on them to form his opinions of invalidity
12 concerning the SEMI S-to-the-4th system.

13 However, Mr. Gray has been sitting here
14 and listened to all the testimony about those documents,
15 and it's his opinion that those documents confirm the
16 opinion that he formed in -- that is expressed in his
17 expert report, that the SEMI S-to-the-4th system does,
18 in fact, invalidate the claims of the Vulpe patent.

19 MR. WHITE: Your Honor --

20 MR. KUDLAC: That is something that has
21 happened throughout this trial. People have commented
22 on the evidence as it comes in after they've heard it.
23 It seems to be that that is a fair comment for Mr. Gray
24 to show that that has, in fact, confirmed his opinion.

25 MR. WHITE: This jury is not going to be

1 able to separate out the issue about whether he's
2 confirming or whether he's relying on it, because the
3 way in which it is going to be presented, he's going to
4 present it as though it is part of his opinion that
5 the -- that this -- that this patent is invalid.

6 It wasn't in his expert report. We
7 didn't have an opportunity to have our expert prepared.
8 He submitted his expert reports -- rebuttal expert
9 report on invalidity and did not address these
10 documents, because Plaintiff hadn't raised them.
11 But the Plaintiff -- I'm sorry -- Defendant had those
12 documents, Your Honor, when all of the expert reports in
13 this case were submitted. So there was no excuse for
14 them not to have brought it forth if, in fact, they were
15 relying on it as evidence to confirm Mr. Gray's opinion
16 that the patents are invalid.

17 THE COURT: How big of a deal are these
18 documents in your view with regard to -- I mean, is it a
19 minor thing or a big thing as far as the import of it to
20 the jury?

21 MR. WHITE: Well, we're concerned, Your
22 Honor, that the jury is going to give great import to
23 it, because it was prepared by Mr. Vulpe and submitted
24 to the -- to the -- to the Patent Office. I know --

25 THE COURT: Excuse me. Did Mr. Gray have

1 these documents when he did his report?

2 MR. KUDLAC: These documents were
3 available at the time, yes, Your Honor.

4 THE COURT: Why did he not include the
5 reference to them as support and now he wishes to?

6 MR. KUDLAC: They were not documents that
7 he relied on. He was looking more at the technical
8 documents at the time that were available to him, and he
9 relied on them, and they form the basis of his opinion.
10 But now that we've heard the testimony and seen these
11 documents, as they've been talked about by the
12 inventors, it seems to confirm his opinion that --

13 THE COURT: And what is there in the
14 testimony that's new or different than what he had in
15 his file when he -- available to him to review?

16 MR. KUDLAC: The admissions by Mr. Vulpe
17 that these are, in fact, documents that were sent to
18 IRAP that were -- that were authored by him and sent to
19 the authorities in Canada, and that these are
20 representative of what he considered to be --

21 THE COURT: Was that not self-evident
22 from the documents that he had in his file?

23 MR. KUDLAC: Not that they were actually
24 sent in and provided to somebody outside of i4i.

25 THE COURT: Response?

1 MR. WHITE: Well, Your Honor, I believe
2 that the documents that were produced to us -- to
3 Defendant showed that those applications were, in fact,
4 sent.

5 And not only that, but the Canadian
6 government believed he was worthy and provided him with
7 the funding that he had requested to complete the
8 development of the invention.

9 Those slides, if you'll look at it, are
10 clearly, purely argumentative. They're not being put up
11 there for any other purpose than to argue as another
12 basis for Mr. Gray's opinion that the patents are
13 invalid based on these two documents.

14 And we think that the Court shouldn't
15 allow Mr. Gray to discuss these particular documents in
16 front of the jury. It wasn't in his expert report. We
17 didn't have an opportunity to rebut it in our reports,
18 and it shouldn't be allowed to.

19 MR. KUDLAC: Certainly, they have an
20 opportunity to -- their experts have seen the same
21 evidence, heard the same testimony that Mr. Gray has.

22 THE COURT: I don't see where the
23 testimony has changed what the effect of the documents
24 are. I mean, both sides had them.

25 And I guess I just keep coming back to --

1 my question is, if they were important enough now, why
2 weren't they important enough then?

3 MR. KUDLAC: The reason that they are
4 important now is, in fact, because of the test -- the
5 clarifying testimony of Mr. Vulpe that these
6 documents -- and I believe Mr. Owens testified about
7 them as well -- that these documents were things that
8 were prepared and sent, and that later on, the
9 government did respond to them by funding the further
10 research or development.

11 That is not something that from the
12 documents was clear during the discovery process. That
13 is something that was only developed here at trial, and,
14 therefore, it seems that that is something that could be
15 commented on as confirmatory or confirming the opinions
16 that Mr. Gray has already formed, and if Mr. Rhyne, who
17 has also -- or Dr. Rhyne, who has also heard the same
18 testimony, can fairly comment on them in rebuttal.

19 THE COURT: Let me see the documents.
20 Does somebody have them?

21 Mr. Powers, are you -- I'm sorry --
22 Mr. White, are you recommending -- I mean, are you
23 suggesting that the documents on their face from a
24 review would lead an -- put an expert on reasonable
25 notice that if they're relevant that he would know it

1 from the face of it or could make further inquiry?

2 MR. WHITE: Yes, sir. Based upon the
3 opinions that he did advance, he's relying upon the SEMI
4 S-to-the-4th system as an anticipation. It's throughout
5 his report.

6 He's now taking this IRAP application
7 that makes reference to the S-to-the-4th system as
8 evidence that that system, years before, was practicing
9 the invention, because, in the application, he says that
10 a single metacode model -- model was implemented on
11 i4i's flagship product, S-to-the-4th.

12 But that statement is about what happened
13 in 1994 after he filed the patent. But Mr. Gray is
14 putting it up there for the purpose of trying to
15 convince the jury that, in fact, Mr. Vulpe was saying
16 that back in 1993, '92 when the S4 product was being --
17 as it existed then at SEMI, somehow now is practicing
18 the invention, therefore, invalidating the patent.

19 The documents are in evidence, Your
20 Honor. If they want to comment about those documents in
21 their closing, fine.

22 What we're complaining about, we don't
23 want to see Mr. Gray getting up there and putting that
24 up and saying for the first time -- he didn't have it in
25 his expert report -- say today, looky here, that

1 statement shows that it anticipates and it supports my
2 opinion. I think it is highly prejudicial.

3 THE COURT: How is it prejudicial?

4 MR. WHITE: Well, in the sense that it
5 allows the jury to see, once again, a statement -- and
6 the -- the -- the date of this document is -- is --
7 actually is shown there is in late '94, after the patent
8 application had already been filed. And his statement
9 there is about what he was currently doing, not what he
10 had done at a previous time.

11 And as I said, those documents are in
12 evidence. If they want to comment about them to the
13 jury in their closing, they can certainly do so. But I
14 think, because Mr. Gray never identified them, didn't
15 have an opportunity for us to depose him on it, didn't
16 allow us an opportunity to prepare a rebuttal expert
17 report addressing it, that he shouldn't be allowed to
18 put it up there in such an argumentative way before the
19 jury.

20 That's how we see it, Your Honor.

21 MR. KUDLAC: One thing that has changed
22 from discovery through the testimony today -- or through
23 today is the direct link of the SEMI S-to-the-4th system
24 to these documents.

25 If you recall the testimony from

1 Mr. Vulpe and the timeline that was created, there was
2 no other S-to-the-4th product, not ever. That --
3 therefore, these documents only through the testimony
4 have been linked directly to the SEMI system that was
5 sold in 1992 and 19 -- and been installed in 1993. That
6 testimony never existed before last week.

7 THE COURT: How would Defendants be
8 prejudiced by not -- the Court not allow him to go into
9 it, but you've got the documents in and you can argue
10 it?

11 MR. KUDLAC: It seems to be that fair --
12 that Mr. Gray should have the opportunity to fairly
13 comment on the evidence that he's heard so far at the
14 trial as to whether that confirms or doesn't the
15 opinions that he has -- that he has previously formed.

16 MR. WHITE: Mr. Vulpe's deposition, Your
17 Honor, was taken, I think perhaps four days over the
18 course of this lawsuit; certainly three. And not one
19 time in any of those depositions did he get asked about
20 this, what he meant by it, when did he do this, what did
21 he -- what did he mean by the comments that are
22 highlighted in this particular slide.

23 That they had the full opportunity to
24 develop the facts behind these documents; and that
25 Mr. Gray could have relied on that testimony in forming

1 his opinion if he was going to rely on it for purposes
2 of his invalidity opinions.

3 It isn't; he didn't; it's not in his
4 report. And we are seeing it for the first time today.
5 And we think that the Court should not allow Mr. Gray
6 the opportunity to argue these documents, which weren't
7 in his report, to the jury.

8 MR. KUDLAC: I beg to differ with one of
9 the opinions asserted by Mr. White.

10 These documents were produced late in
11 discovery, essentially on the eve of the last day of
12 Mr. Vulpe's deposition. And, in fact, they were not
13 produced from the files of i4i. They were produced from
14 McLean Watson's files, not from i4i.

15 And they were produced just before the
16 last deposition. So the full and fair opportunity to
17 depose Mr. Vulpe or anyone else on these during the
18 discovery period is not correct.

19 THE COURT: All right. Plaintiffs'
20 objection is overruled.

21 What's next?

22 MR. WHITE: Your Honor, Slide No. 24.
23 May I have that put up, XML For the Rest of Us?

24 Your Honor, the Court may recall at the
25 pretrial conference that Plaintiffs raised an issue of

1 motion in limine to exclude Defendants from making
2 reference to an article that Mr. Vulpe wrote in the year
3 2000, two years after his patent had issued, called XML
4 For the Rest of Us.

5 Because in a footnote in that article,
6 Mr. Vulpe used the term metacode, which is a term this
7 Court has construed. It is a term that is in the claims
8 of the -- of the asserted claims in this case.

9 And in that statement, Mr. Vulpe did not
10 write about metacodes in the sense of his patent, and
11 made a statement where it seems that he was including
12 within the scope of the term metacode, both XML tags,
13 which is his contention in this case, and formatting the
14 metacodes, which, in this case, we contend is not
15 covered by the Court's definition.

16 And I was concerned, Your Honor, by their
17 reliance upon that document that they were going to
18 argue claim construction to the jury by trying to get
19 the jury to believe that Mr. Vulpe's 2000 article
20 somehow has now modified the Court's definition of what
21 a metacode is, because they want -- their contention is
22 that if the metacode definition covers formatting
23 command codes, that they believe they have a basis to
24 invalidate the patent.

25 And this document, written after the

1 patent issued, should in no way be allowed to be used to
2 reargue claim construction of the meaning of the term
3 metacodes.

4 Now, why did Defendants prepare this
5 slide and juxtapose the Court's definition against
6 Mr. Vulpe's footnote statements?

7 It is for no other purpose than to
8 reargue that Mr. Vulpe believes, the inventor, believes
9 that metacodes in his patent cover both formatting
10 command codes and XML tags. It was the fear -- and the
11 Court assured -- I'm sorry -- counsel from Microsoft
12 assured the Court they wouldn't do that.

13 MR. KUDLAC: We assured the Court that we
14 would not be rearguing claim construction and that is
15 exactly what we are not doing.

16 What we are doing is showing that, in
17 fact, what Mr. Vulpe said in this, XML For the Rest of
18 Us, is consistent with what the patent says about what
19 metacodes are, which is consistent with what the Court's
20 ruling of a -- of the definition of metacode.

21 That's the point of this slide. It is
22 not that we are trying to contradict the claim
23 construction.

24 THE COURT: I'm starting to smell another
25 claim construction issue.

1 MR. KUDLAC: Not at all.

2 MR. WHITE: That's where we are, Your
3 Honor.

4 MR. KUDLAC: Not at all. We are --

5 THE COURT: Okay. Proceed at your own
6 risk. Objection's overruled.

7 If the Court determines it's a claim
8 construction issue, the Court, as I've told y'all at
9 pretrial, when you don't bring these things up
10 beforehand, it puts me in a position of having to rule
11 on it during the middle of trial. And I'll do it if I
12 have to.

13 What's next?

14 MR. KUDLAC: Thank you, Your Honor.

15 MR. WHITE: That's it, Your Honor, from
16 Plaintiffs.

17 MR. CAWLEY: Well, there are three
18 documents, Your Honor, that we have some objections to.
19 I don't know if any of them are going to come up with
20 the first witness.

21 So if we could ask that Microsoft give us
22 a heads-up before some witness goes on that these are
23 relevant to, at some point we'll need to address these.

24 THE COURT: Is that agreeable?

25 MR. POWERS: Yes, Your Honor.

1 THE COURT: All right. Anything further?

2 MR. CAWLEY: No, Your Honor.

3 MR. WHITE: Nothing further, Your Honor.

4 THE COURT: All right. Bring the jury
5 in.

6 (Jury in.)

7 COURTROOM SECURITY OFFICER: All rise for
8 the jury.

9 THE COURT: All right. Please be seated.

10 All right. Good morning. Welcome back.

11 I hope you had a restful weekend and are ready to go
12 again.

13 So we're going to start back up with the
14 evidence in the case. And I'm sorry we were late
15 getting started. There were a few matters that the
16 Court had to take up.

17 We've been working here since 9:00, so
18 don't think we were just all out drinking coffee. But
19 sorry we got you started late, but we'll get going here.

20 All right. Who will be your first
21 witness, Mr. Powers?

22 MR. POWERS: Dr. Simonson will be our
23 first witness, but do you wish us to do the exhibits to
24 be admitted first?

25 THE COURT: Yes, that will be fine. Go

1 ahead.

2 MR. POWERS: We have a list of the
3 exhibits that we exchanged with counsel and offered, I
4 believe, as Defendant's list of exhibits to be admitted
5 as No. 2 or 3, I think. 2.

6 THE COURT: No. 2?

7 MR. POWERS: Yes, Your Honor.

8 THE COURT: All right. Defendant's list
9 of exhibits No. 2, is there any objection to that list
10 of exhibits by Plaintiffs?

11 MR. CAWLEY: No, Your Honor.

12 THE COURT: All right. Those exhibits
13 are admitted.

14 MR. CAWLEY: Plaintiffs have a similar
15 list. The Court has this list already.

16 THE COURT: All right. Plaintiffs has a
17 list -- is this a new list?

18 MR. CAWLEY: It is new, current as of the
19 end of the day on the 15th. So could we mark that --

20 THE COURT: Have those been admitted
21 already?

22 MR. CAWLEY: No. Most of them have been
23 admitted already, but there are a couple that were
24 additions on the 15th.

25 THE COURT: Are these cumulative --

1 MR. CAWLEY: Yes.

2 THE COURT: -- of all of your exhibits?

3 MR. CAWLEY: Yes.

4 THE COURT: All right. Any objection to
5 that list?

6 MR. POWERS: No, Your Honor. Both of us
7 actually have exchanged lists of what we thought were
8 all the exhibits admitted through the end of the day
9 Friday.

10 I've given such a list to Ms. Ferguson,
11 and we've exchanged that and both sides have no
12 objection to each other's lists.

13 THE COURT: So both sides stipulate that
14 what -- what's the Plaintiffs' new exhibit number for
15 their latest exhibit list?

16 COURTROOM DEPUTY: I believe it's 3, Your
17 Honor.

18 THE COURT: All right. Plaintiffs'
19 Exhibit No. 3 and Defendant's Exhibit No. 2 of the
20 exhibit lists numbers, both of you are stipulating that
21 all of those have been offered and admitted?

22 MR. CAWLEY: I think the stipulation
23 would be, Your Honor, that all have been offered and are
24 not objected to, and we are asking the Court to admit
25 them. So there are a few on the list that have not

1 previously been admitted.

2 THE COURT: That's fine.

3 Is there any objection from either side
4 to the other side's list of exhibits that have either
5 been admitted or that are offered?

6 MR. POWERS: No, Your Honor.

7 MR. CAWLEY: No objection.

8 THE COURT: They are all admitted.

9 You may call your next witness.

10 MR. LENDER: Thank you, Your Honor.

11 Microsoft would like to call as its first witness
12 Professor Itamar Simonson, and he has not yet been
13 sworn.

14 THE COURT: All right. Please come
15 forward.

16 COURTROOM DEPUTY: Please raise your
17 right hand.

18 (Witness sworn.)

19 THE COURT: Please have a seat.

20 MR. LENDER: May I proceed, Your Honor?

21 THE COURT: Yes, you may.

22 ITAMAR SIMONSON, DEFENDANT'S WITNESS, SWORN

23 DIRECT EXAMINATION

24 BY MR. LENDER:

25 Q. Good morning.

1 A. Good morning.

2 Q. Professor Simonson, would you please
3 introduce yourself to the jury.

4 A. My name is Itamar Simonson.

5 Q. And where do you live?

6 A. I live at Stanford, California.

7 Q. And would you just tell us about your
8 educational background, please.

9 A. Yes. I have an undergraduate degree in
10 economics and political science. I have an MBA from
11 UCLA, and I have a Ph.D. from Duke University, Fuqua
12 School of Business.

13 Q. And where do you currently work?

14 A. I'm the Sebastian S. Kresge Professor of
15 Marketing at the Graduate School of Business, Stanford
16 University.

17 Q. And can you just tell the jury what the focus
18 of your research and expertise is all about?

19 A. Yes. I've worked in different areas. I've
20 done a lot of work on consumer behavior, how buyers make
21 decisions, various elements of marketing, how they
22 influence consumers, how companies can provide better
23 service for consumers; and perhaps most relevant to the
24 current matter, I've done work on survey methods.

25 Q. And approximately, how many different

1 consumer surveys have you been involved with in your
2 career?

3 A. Well over 1,000.

4 Q. Have you taught any courses related to the
5 art of conducting surveys?

6 A. Yes. For example, I've taught a doctoral
7 course at Stanford on methods for conducting surveys and
8 research more generally. And virtually every course
9 that I teach, both at the doctoral level and MBA level,
10 I talk about how to conduct surveys.

11 Q. And do you sit on any editorial boards
12 dealing with market research and consumer behavior?

13 A. Yes. I'm on eight tutorial boards of
14 journals, such as The Journal of Marketing Research,
15 Journal of Consumer Research, Journal of Consumer
16 Psychology, Journal of Marketing, and other journals.

17 Q. And have you received any awards or
18 recognition for your researching work?

19 A. Yes. I've received several awards such as
20 twice the award for the article on market research that
21 has had the greatest impact on the marketing field
22 during the previous five years.

23 I received the award for the best article in
24 The Journal of Consumer Research. I have received the
25 Ferber Award from the Association for Consumer Research.

1 I received twice the award for the best reviewer of --
2 evaluator of consumer research submitted to The Journal
3 of Consumer Research.

4 Q. Thank you.

5 Now, were you here when Dr. Wecker testified
6 about his survey?

7 A. Yes.

8 Q. And what do you understand Dr. Wecker's field
9 of expertise to be?

10 A. I believe he stated that in his report here
11 that his area is applied mathematics and statistics.

12 Q. Now, is applied mathematics and statistics
13 the same thing as being an expert on surveys?

14 A. No, not at all. To be an expert on
15 surveys, you need to know how to design, for example,
16 a questionnaire, how to word or how to phrase
17 questions, how to set the experiment, for example,
18 have what we call a test group and control group, and
19 then how to derive conclusions from the results.

20 On the other hand, statistics has to do with
21 the manner in which you analyze data.

22 Q. Okay. Well, let's turn to the work that you
23 did for this case.

24 What was your assignment in this case?

25 A. I was asked to evaluate the -- Dr. Wecker's

1 survey and determine whether we could base conclusions
2 based on its result, that is, whether the results and
3 the survey as a whole is reliable.

4 Q. And what did you do to prepare to give the
5 opinions that you're about to give today?

6 A. I evaluated Dr. Wecker's report and survey.
7 I read his deposition testimony. I read portions of the
8 report of i4i's damages expert, Mr. Wagner. I was here
9 for the trial testimony of Dr. Wecker and Mr. Wagner.

10 Q. Can you explain to the jury your general
11 understanding of the purposes of the Wecker survey in
12 this case?

13 A. Yeah. My understanding is that in the case,
14 if Microsoft is found to be liable, then any damages to
15 which the Plaintiff would be entitled to would depend on
16 the extent of actual use of the specific allegedly
17 infringing functionality.

18 And therefore, my understanding is that the
19 survey was supposedly designed to estimate the degree of
20 actual use.

21 Q. Now, before we get to the details of your
22 opinions, can you just give the jury an overview of what
23 your opinions are?

24 A. Yes. It's my conclusion that Dr. Wecker's
25 survey violated the most basic principles of how surveys

1 are conducted. It failed to follow the standard with
2 respect to how surveys are designed, conducted, and
3 analyzed. And as a result of those fatal flaws, we
4 cannot base any conclusions for any purpose on this
5 survey.

6 Q. Now, can you identify for the jury the
7 specific flaws that you believe are contained in
8 Dr. Wecker's survey?

9 A. Yes. In fact, I've prepared a slide with the
10 six key problems that I identified.

11 Q. Okay. Well, why don't we walk through each
12 of the six flaws that you've identified.

13 And let's start with your first criticism,
14 where you write -- where you wrote, no basis to know
15 respondents understood the question.

16 Now, what did you mean by that?

17 A. Well, the questions were very complex,
18 included many terms that most people are not familiar
19 with. And, of course, to the extent that respondents do
20 not understand the questions, their answers are not
21 meaningful, because we simply cannot rely on answers of
22 someone who does not understand the questions.

23 And I think it perhaps might be useful to
24 take a look at one of the 40 questions that were
25 included in the survey.

1 Q. Yeah. I put one up for us.

2 Is this typical, the type of question that
3 was included in the survey?

4 A. Yes. That's one of those 40 questions.

5 Q. And for what period of time were respondents
6 asked, in November of 2008, these types of questions
7 that we see on the screen?

8 A. Well, they were asked for 2008. The survey
9 itself was conducted, I believe, towards the end of
10 November of 2008. And they were asked all the way until
11 2003.

12 And if I may, I think it might just be useful
13 to read one of -- one question, this one question, just
14 to get an idea of what was included in those questions.

15 So allow me to read it.

16 Q. Please. Thank you.

17 A. First: Thinking about those computers that
18 had Word 2007 as an installed application, at any time
19 during calendar year 2008, what percentage would you say
20 used Word at least once during that year to open an XML
21 document containing custom XML and then save it, whether
22 with or without changes, in any of the following
23 formats: Dot XML, dot docx, dot docm, single file web
24 page, or web page format but not web page filtered
25 format?

1 That's one question. I mean, I could go
2 ahead and count the various terms that are included
3 here, such as XML document, custom XML, single file web
4 page, web page filtered format, and so on.

5 Q. What's wrong with this type of a question in
6 your opinion?

7 A. Well, to give a meaningful answer to such a
8 question, you need to understand it. And Dr. Wecker
9 never tried to find out whether the respondent
10 understood any of those terms.

11 Q. Well, why is it important to have clear
12 questions when designing a survey?

13 A. Well, as I said, one thing, if you don't
14 understand the question, you cannot give meaningful
15 answers to it.

16 Furthermore, we know, based on a great deal
17 of research on the use of surveys, that even a slight
18 change in wording can have major impact on the results.

19 If I may give an example.

20 Q. Please. Can you give us -- can you give us
21 an example?

22 A. Sure. So, for example, in one well-known
23 study, all of the respondents were asked to taste cooked
24 ground beef. They were then divided into two separate
25 groups.

1 One group, as they were tasting the ground
2 beef, were told, you're tasting ground beef that is 80
3 percent lean.

4 The other percent -- I'm sorry -- the other
5 group was told you're tasting ground beef that is 20
6 percent fat. As I said, they were all tasting the same
7 beef.

8 Later, they were asked to -- how -- how much
9 they liked -- how much they enjoyed the ground beef.
10 Those people who were told it was 80 percent lean liked
11 it a lot more than those who were told that it is 20
12 percent fat.

13 This just illustrates the point that even
14 slight wording changes can have big impacts on the
15 results.

16 Q. Let's go back to your criticism slide, and
17 let's turn to your second survey flaw, ask for behavior
18 of others.

19 Now, what did you mean by that?

20 A. Well, the entire survey was based on the idea
21 that you do not have to interview the actual users,
22 which would be the normal way which you would do it.

23 You would think that in a survey like that,
24 you would have -- if you decide to go with the survey
25 approach, you would have a sample of actual users and

1 ask them, because they probably do know how they're
2 using -- whether they're using XML files with custom
3 XML, how they open it, how they save it, and so on.

4 But that was not the approach in Dr. Wecker's
5 survey. Instead, what he did was, he asked -- he asked
6 the IT -- someone from IT Department, such as a
7 technician that is setting up computers, to estimate the
8 percentage of all employees in the organization who, on
9 a typical day, or for the entire year, opened files --
10 certain kinds of files and saved them in very particular
11 formats.

12 And I simply cannot understand how it is
13 possible that someone, for example, who sets up
14 computers, would know how people in the organization --
15 let's say there are 1,000 people in the organization.

16 So as we know, each person works in his or
17 her office or cubical doing his own thing, and there's
18 no way for someone from -- who is setting up computers
19 or anyone from the IT Department to know how those
20 people are using Word and whether they're using certain
21 features.

22 So the whole idea of the survey was what's
23 flawed.

24 Q. Professor Simonson, wouldn't you expect
25 people to say they didn't know, if they weren't

1 qualified to answer the questions being asked?

2 A. Well, unfortunately, many will not, because
3 in this survey, unlike -- contrary to the most basic
4 principle of surveys where you have to tell respondents
5 right away -- at least the sentence that I have used
6 repeatedly in my survey goes as follows: If you don't
7 know or you're not sure, please don't guess. Just tell
8 me you don't know, and we'll go on to the next question.
9 Because I think it's very important to tell the
10 respondent that it's okay to say don't know, if you
11 don't know. We don't want you to guess.

12 Contrary to that principle, respondents were
13 never told that they had the don't-know option. They
14 were never told not to guess.

15 On the contrary -- if we can go back to the
16 question that we looked at.

17 So if you look at this question, I think it's
18 clear. It's a very complicated question. Let's say the
19 respondent says, I don't know. Then the interviewer was
20 instructed to say, Your best estimate is fine.

21 Well, even if those respondents were not
22 receiving \$35, they may very well try to be helpful.
23 They feel it's their obligation to give an answer. They
24 have no idea, but they'll -- they're essentially asked
25 to guess.

1 Because, normally, if the respondent says, I
2 don't know, not only is it told upfront that there is a
3 don't-know option, but if someone says don't know, you
4 move on to the next question.

5 Here, the opposite was done. Respondents
6 were told, Your best estimate is fine.

7 Q. Well, Professor Simonson, when we looked at
8 the -- when we looked at the survey questionnaire and
9 questioned Dr. Wecker, we saw that one of the options --
10 you can see it right there -- No. 2 says, Don't know.

11 A. Yes. But that was never mentioned to the
12 respondents. So they were not told that there is a
13 don't-know option.

14 Of course, there are some respondents that,
15 you know, they will say, I don't know.

16 And you say, Well, your best estimate is
17 fine.

18 And they'll say, I'm sorry. I just will
19 not -- I have no clue. I don't have any idea, and they
20 will refuse.

21 In that case, the interviewer was forced to
22 say don't know. So we do have some don't-know answers.

23 Q. Now, Professor Simonson, is there a known
24 phenomenon in conducting surveys that people will give
25 their opinion even when they don't know?

1 A. Oh, of course.

2 Q. And is that -- I'm sorry.

3 A. Go ahead.

4 Q. Has that principle been written about in
5 scholarly works about conducting surveys?

6 A. Yes. And that's certainly something that
7 I've covered a lot in my doctoral courses on survey
8 matters.

9 Q. All right. Well, let's keep going through
10 the survey. I think we covered No. 3, encouraged
11 guessing already, so let's go to No. 4.

12 Doesn't show alleged infringing use. What do
13 you mean by that?

14 A. Well, understand that in this particular
15 manner, there are certain -- only certain types of files
16 that are opened, and then only if they are saved in a
17 very particular format are they regarded as infringing.
18 And I understand that's something that's agreed by both
19 parties.

20 Therefore, the survey had to be designed in
21 such a way that if someone said, yes, I'm opening XML
22 files with custom XML and saving them in dot something,
23 we would know for sure whether that means that this
24 person is using Word in an infringing manner or not.

25 However, the questions, as worded, did not

1 allow us to make that determination. As a result, we
2 cannot really rely on those results.

3 Q. Well, let's -- let's go to your next
4 criticism and cover that quickly. Failure to use a
5 control.

6 Now, could you first explain to the jury,
7 what do you mean by a control?

8 A. Well, in general, control is designed as a
9 benchmark, to measure the error or noise in the survey.
10 And it might be useful to give a couple of short
11 illustrations.

12 Q. Please. Thank you.

13 A. So first, let's say that we -- there is a
14 pharmaceutical company that says, we just found an
15 ingredient, happiness ingredient. If you take our pill
16 once a day, you'll be happier.

17 Well, let's say that people are given this
18 pill for a week, and then we measure their happiness,
19 and indeed, on average, they're happier.

20 Could we then say this did happen because of
21 the ingredient? No, we could not, because maybe, just
22 because people are taking the pill, they believe that
23 they feel happier.

24 Therefore, we need a control group where we
25 have a similar group of people who are taking another

1 pill. They do not know that their pill is not -- does
2 not contain that happiness ingredient. They think it
3 is, so they're in the same condition exactly.

4 Let's say it's a sugar pill. They take it,
5 and then we measure their happiness. And now we can
6 compare the first group with the second group and find
7 out the -- the real impact of that ingredient.

8 And just another quick example, suppose that
9 we wanted to measure the effect of a Dallas Cowboys
10 game, let's say, on Sunday at noon on the number of cars
11 traveling on I-20.

12 Well, we could go to I-20 and count the
13 number of cars traveling, let's say, at 10:00 or 11:00
14 a.m. before the game. But that would be very
15 inaccurate. In fact, it will inflate the impact of the
16 Cowboy's game, because even when there are no Cowboy's
17 games, there are some cars traveling on I-20.

18 So what we need to do is to have a control
19 condition where we go on another Sunday, at the same
20 time, but on a date when there are no Cowboy's games,
21 count the number of cars, that's a control, and then we
22 can subtract it to find out the next impact of the
23 Cowboy's -- the Cowboy's game.

24 Q. Did Dr. Wecker use a control with his survey?

25 A. He had no control whatsoever.

1 Q. Is it your expert opinion that Dr. Wecker
2 should have?

3 A. Oh, it was absolutely necessary, considering
4 all the problems that we have already identified.

5 Q. All right. Let's go to your last criticism
6 on the list, the survey flaws.

7 Dr. Wecker changed the survey answers. Now,
8 what do you mean by that?

9 A. Well, it's, again, clear, during his
10 cross-examination, and as we can see from the data,
11 almost all -- or virtually all of the respondents who
12 indicated that there was some custom XML used in their
13 companies provided inconsistent answers. So they said
14 one thing one minute, and they said something
15 inconsistent the next minute.

16 And I should kind of, as a side note,
17 indicate that in general, even when respondents are --
18 are -- are -- do not quite understand the -- the
19 questions, they will at least try to be consistent.
20 People don't like to contradict themselves.

21 But when you have a survey like this with so
22 many complicated terms that you are really not qualified
23 to answer, and you are asked about other people in the
24 organization, it's really hard to keep track of what you
25 said a minute ago, which might explain why virtually all

1 of the respondents who indicated any custom XML use
2 provided inconsistent answers.

3 So what Dr. Wecker did, he changed their
4 answers.

5 Q. Well, Professor Simonson, in the more than
6 1,000 surveys that you've been involved with, have you
7 ever changed the answers you received from the
8 respondents in the survey?

9 A. Oh, of course not. That would violate the
10 most basic principle of surveys.

11 Q. What should Dr. Wecker have done instead?

12 A. Well, the only option that he had, in my
13 view, is -- if he decided to go with the surveys, was to
14 correct all the fatal flaws of his survey and conduct
15 another survey.

16 Q. All right. Now, when Dr. Wecker testified, I
17 believe he talked about three specific respondents. It
18 was No. 119, 262, and 168. And he actually alluded to a
19 fourth during his direct exam, Respondent 660.

20 Well, we didn't actually discuss that
21 respondent in any detail, so what I'd like to do is,
22 real briefly, just look a little closer at Respondent
23 660's answers as it pertains to Word 2007.

24 Is that okay?

25 A. Sure.

1 Q. And would you walk the jury just through the
2 answers that 660 gave as it pertained to Word 2007?

3 A. Okay. So in Question 1A, that respondent was
4 simply asked about the number of computers that had Word
5 2007 as an installed application. The respondent said
6 two. Okay. The company had two computers with Word
7 2007.

8 Okay. The next question, the respondent was
9 asked about the percentage that not only used Word 2007,
10 but they also opened XML documents containing custom
11 XML. That respondent now said 5, 5 percent, okay?
12 We just -- we already have here one problem, because 5
13 percent of two, that's a really small number. That's
14 about .1, which is essentially zero.

15 And then in a later question, he was -- he or
16 she was asked about the number of different computers
17 ever -- that ever had Word 2007 as an installed
18 application at any time -- that means from the beginning
19 of January through the time of the survey, the end of
20 November -- during the calendar year 2008.

21 Now that respondent said zero.

22 Q. Okay. So, Professor Simonson, what were the
23 options available to Dr. Wecker for Respondent 660 as it
24 pertained to Word 2007 use?

25 A. Well, one option would be simply to go with

1 Question 3A and say, well, this person said we had zero
2 computers with Word 2007 at any time in 2008, just go
3 with that.

4 Q. What was the other option?

5 A. Well --

6 THE WITNESS: If you can go back to the
7 previous slide.

8 A. So as you recall, in the first question, that
9 respondent said that there are two computers with Word
10 2007. Then in the second question, the respondent said
11 5 percent of two.

12 Now, Dr. Wecker had this rule, when he was
13 changing answers, that whenever percentages didn't make
14 sense, he changed -- he assumed that the respondent
15 didn't really mean percent; he meant to say whole
16 computers.

17 So, in other words, that would leave to -- to
18 assume that there was -- what was said in Question 1B,
19 five computers.

20 Q. So just so we're all on the same page, what
21 Dr. Wecker did was take an answer that was 5 percent of
22 two and changed that to five out of two?

23 A. Yes, which, of course, is impossible, because
24 if there are only two computers that have Word 2 --
25 2007, it would be impossible to have five computers that

1 have both Word 2007 and open certain kinds of files.

2 Q. So what did Dr. Wecker do with that response?

3 A. Well, so what he did, he made a further
4 change. He converted the five computers to two
5 computers.

6 In other words, the respondent said 5
7 percent. Dr. Wecker first changed it to five computers.
8 Then he recognized that it still didn't make sense,
9 because you cannot have five out of two, so he made a
10 further change as if the respondent said two out of two.

11 Q. So he went from 5 percent of two to five out
12 of two to two out of two or a hundred percent?

13 A. That's exactly right.

14 Q. Well, what did Dr. Wecker do with the fact
15 that the respondent had later said that there are
16 actually no computers in Word 2007?

17 A. He just ignored that.

18 Q. Are the changes that Dr. Wecker made to
19 Respondent 660 typical of the types of changes that
20 Dr. Wecker made to other respondents' answers?

21 A. Yes, they are.

22 Q. Now, are the changes that Dr. Wecker made to
23 the survey respondents' answers conservative in your
24 opinion?

25 A. Oh, they are not conservative at all. They

1 just -- as I said, they violate the most basic
2 principles of surveys. You do not change the responses
3 of any respondent.

4 The only thing you can do, if you see
5 inconsistent answers -- and I must say I've never
6 encountered anything close to what happened in this
7 survey. Sometimes you find a couple of percent of
8 inconsistency, but the fact that almost all respondents
9 who said that there was some custom XML gave
10 inconsistent answers, it just, in my mind, is unheard
11 of.

12 Q. Last question, Professor Simonson. In your
13 expert opinion, is the Wecker survey reasonable and
14 reliable in this case?

15 A. Oh, not at all. If you consider the fact
16 that the terms were unclear; the people who were asked
17 questions, they could not answer; they were asked about
18 other people's use; the questions really did not address
19 the specific allegedly infringing functionality; there
20 was no control; and all this massive data changes, that
21 means that the survey is completely unreliable for any
22 conclusions or for any estimate of damages.

23 Q. Thank you.

24 MR. LENDER: I pass the witness.

25 THE COURT: All right.

1 Cross-examination.

2 MR. CAWLEY: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. CAWLEY:

5 Q. Good morning, Dr. Simonson.

6 A. Good morning.

7 Q. Now, you've just told us that among other
8 things in the marketing field, you consider yourself to
9 be an expert on performing surveys; is that correct?

10 A. That's correct.

11 Q. And I think you said you had performed
12 something like a thousand of them?

13 A. Well over a thousand.

14 Q. Well over a thousand. Excuse me.

15 And you understand that the purpose of the
16 survey in this case is -- is an effort to determine how
17 many of Microsoft's customers who buy Word products that
18 are capable of using XML functionality, how many of
19 those customers actually do certain things relating to
20 XML with the product.

21 Do you understand that?

22 A. That's my understanding.

23 Q. Okay. And do you understand, from the
24 combination of Dr. Wecker's survey testimony and
25 Dr. Wagner's testimony about the damages, that basically

1 they concluded that less than 2 percent -- for purposes
2 of calculating damages, they are concluding that less
3 than 2 percent of Microsoft's customers are actually
4 going to do it in an infringing way?

5 You heard that, didn't you?

6 A. I -- I don't remember that exact number, but
7 I'll take your representation.

8 Q. Okay. And you also heard Dr. Wecker explain
9 that the reason that percent is so small, in his
10 opinion, is not because that's what actually happens out
11 in the real world, but because if anyone in the survey
12 failed to respond, either by refusing to participate, or
13 for that matter, just hanging up the phone, he assumed,
14 for purposes of his opinion, that they did not infringe.

15 Do you remember that?

16 A. I remember that he said that. I did not find
17 it -- his conclusion about that persuasive.

18 Q. And you don't find it persuasive because you
19 would assume fairly that at least some of these people
20 who hung up the phone might use it to infringe.

21 A. No. Putting aside the fact that I would have
22 never conducted such a survey, it is true that it's
23 possible that some of those other respondents might have
24 used it. It's conceivable.

25 However, it's -- if I -- it is just as likely

1 or perhaps much more likely that many of the -- of those
2 19 or 20 respondents who did report some custom XML use
3 and saving it in certain formats actually do not for all
4 the reasons that I indicated.

5 Q. So do you have any reason to believe that the
6 approximately 950 people who were targets of the survey,
7 who hung up the phone or refused to answer or didn't
8 participate, do you have any reason to believe that none
9 of them infringe?

10 A. Obviously, they were not interviewed, so no
11 one has data about them.

12 But I would say that it's possible that a few
13 of them did use it. I don't know about infringing.

14 Obviously, we don't --

15 Q. Okay.

16 A. -- we do not have that information. But as I
17 said, those 19 respondents for whom we do have answers
18 probably are not actually using the allegedly infringing
19 functionality.

20 Q. Well, why are you telling the jury,
21 Dr. Simonson, that it's possible that a few of those
22 950-odd might infringe? How do you know it's a few?

23 A. I think it would be sheer speculation on
24 anyone's part, but what would be the answers of those
25 people who were never interviewed.

1 Q. My question to you, sir, is, as an
2 objective -- I assume you're attempting to testify
3 objectively here, correct?

4 A. Of course.

5 Q. Why did you tell the jury that it's possible
6 that -- of those 950 who didn't answer, that it's
7 possible that a few might infringe?

8 A. Well, as I said, I have no information and
9 neither does Dr. Wecker. My understanding is that even
10 though I'm not an expert on the technical aspect, that
11 this functionality is used by certain software
12 engineers. So it's a very select group.

13 Q. Isn't the truth, sir, that you don't know if
14 it's a few or a quarter or a half or three-quarters?

15 A. It could be every single one of them, but, of
16 course --

17 Q. Thank you.

18 A. -- that would be totally unrealistic.

19 So given that these people were not
20 interviewed, one of the principles of surveys is that
21 you never speculate about the answers of people who were
22 never interviewed.

23 Q. But my question to you was, you don't know,
24 right?

25 A. Yeah. Neither does Dr. Wecker. Of course,

1 no one knows.

2 Q. And even though you are an expert in surveys,
3 you didn't perform a survey of your own, did you?

4 A. That's correct.

5 Q. Microsoft, although they have hired you to
6 come here and testify about what's wrong with
7 Dr. Wecker's survey, did not ask you to perform a survey
8 to come up with what you might consider to be the
9 correct estimate, did they?

10 A. That is correct. Because Microsoft had the
11 customer experience data, which is based on actual
12 behavior of users, and that is the data that were
13 collected in the process of -- or for -- for the purpose
14 of making business decisions so that appears to be more
15 reliable, and so there was no need for a survey.

16 Q. Well, that really wasn't my question, sir.
17 My question was: You're a survey expert, and you
18 weren't asked to perform a survey here, were you?

19 A. That is correct.

20 Q. And you don't have anything to do with
21 setting up or evaluating the correctness of Microsoft's
22 internal CEIP data, do you?

23 A. That is correct. I was not asked to do that.

24 Q. All right, sir. Now, you criticize
25 Dr. Wecker for making edits to the respondents' answers.

1 And I think that in your expert report -- and I'm sorry.
2 I should have given you these binders before.

3 MR. CAWLEY: May I approach, Your Honor?

4 THE COURT: Yes, you may.

5 MR. CAWLEY: Does Your Honor want a copy
6 of the report?

7 THE COURT: No. That's all right.

8 Q. (By Mr. Cawley) But there's a copy of the
9 report there in front of you, if you -- if you want to
10 consult it.

11 This is a written report that you prepared,
12 correct?

13 A. That is correct.

14 Q. And you prepared it as part of your
15 responsibilities as an expert witness in this case,
16 correct?

17 A. That is correct.

18 Q. And you provided a copy of it, of course, to
19 the lawyers for i4i.

20 A. That's correct.

21 Q. And in your expert report, you went a little
22 further than you went on the stand today. You accused
23 Dr. Wecker of a blatant violation of basic ethical
24 standards.

25 Do you remember that?

1 A. I do remember that.

2 Q. And you know that Dr. Wecker is a teacher
3 sometimes at your university, don't you?

4 A. I think he mentioned it.

5 Q. He did.

6 And you complain that he was unethical
7 because he had violated something called the CASRO,
8 C-A-S-R-O, code of ethics.

9 What is CASRO?

10 A. CASRO is an organization of market research
11 firms to which the company ORC, which he used to collect
12 his data, belongs to.

13 Q. Okay. Let's take a look at the quotation
14 from your expert report on Slide 2.

15 This -- you recognize this as a part of your
16 expert report?

17 A. Yes.

18 Q. And do you recognize that what you're quoting
19 here is part of the CASRO code of ethics?

20 A. That -- that -- that is correct.

21 And -- and I should note --

22 Q. Let --

23 A. -- in addition to the CASRO notes, they're
24 just general principles --

25 Q. Okay. Well, let's --

1 A. -- about how you analyze data.

2 Q. What I'd -- what I'd like to ask you about
3 now is the one you quoted in your report right after you
4 called Dr. Wecker -- or Dr. Wecker unethical, okay?

5 And it says here, beginning at B, A research
6 organization's report to a client or the public should
7 contain, or the research organization should be ready to
8 supply to a client or the public on short notice, the
9 following information about the survey.

10 Did I quote that correctly?

11 A. You did.

12 Q. And then it goes on on the next slide,
13 they're supposed to report a description of any special
14 scoring, data adjustment, or indexing procedures used.
15 Did I read that correctly, sir?

16 A. Yes.

17 Q. This CASRO code of ethics that you used to
18 call Dr. Wecker unethical itself envisions the
19 possibility of a data adjustment, doesn't it?

20 A. Where -- what are you referring to? A data
21 adjustment here.

22 Q. Yes, sir.

23 A. Yeah. That -- that does not refer to
24 changing the responses of respondents. You never change
25 the responses of respondents.

1 Data adjustment might be like editing, such
2 as taking care of missing data, or let's say that the
3 survey is designed to be -- to include only adults, 18
4 and over, and by mistake, someone who is 16 was
5 interviewed, you can delete that file. You never change
6 the answers of respondents.

7 And in this case -- and I should note here,
8 you said unethical. I would not judge Dr. Wecker as
9 unethical. What he did in this case was unethical. Not
10 only did he make all those changes, but he failed to
11 mention any of those changes in his report.

12 Q. So you're telling the jury that he was
13 unethical in his report, but he's not unethical?

14 A. Well, I -- I -- I never judge a person based
15 on just one thing. I think it would be unfair to him
16 and unfair to anyone.

17 Q. Yes, sir.

18 A. I was asked to evaluate this particular
19 survey, and in this particular survey, changing
20 massively the answers of virtually all pertinent
21 respondents, never mentioning it in the report, would be
22 considered, not just by me, by any survey expert in the
23 field, unethical.

24 Q. And you say that despite the very
25 organization's code of ethics that you quote in your

1 expert report, clearly envisions the possibility of data
2 adjustment, true?

3 A. No. Data adjustment, as I said, does not
4 mean changing answers by trying to believe that I know
5 what they were thinking when they gave a very different
6 answer.

7 Q. Now, Dr. Simonson, you are not a
8 statistician, correct?

9 A. I am a regular user of statistics. And, in
10 fact, for the surveys that I conduct, in -- I would say,
11 in 99 percent of the cases, I use statistics on my own
12 or with the help of my doctoral students in order to
13 analyze the data.

14 I'm not a lecturer on statistics, and
15 therefore, I do not consider myself as a statistician.

16 Q. Okay. There was a lot of answer there, and
17 maybe -- maybe we could go a little faster if I could
18 ask you just to answer my question directly.

19 You're not a statistician, are you, sir?

20 A. I'm just a user of statistics. I do not have
21 a degree in statistics.

22 Q. All right. Thank you, sir.

23 You know, in designing the survey, that
24 Dr. Wecker introduced the questions with certain
25 screening questions before he asked about the actual use

1 of the computers, correct?

2 A. That is correct.

3 Q. And you know that those screening questions
4 were designed to help ensure that the people answering
5 the questions would be IT professionals in the
6 organization.

7 A. I think that I -- I do not remember the exact
8 wording. I believe that Dr. Wecker defined it as people
9 from the IT Department who set up computers or something
10 to that effect.

11 Q. Okay. And I know that -- that those of us
12 who work in large organizations have an idea of what an
13 IT Department is, but it's possible that some of us who
14 don't may not have heard that expression.

15 What does IT stand for?

16 A. Information technology.

17 Q. Information technology.

18 And I notice -- I couldn't help but notice
19 that several times during your testimony to the jury,
20 you talked about technicians that set up computers.

21 Is it your understanding that that's all that
22 IT professionals do, is set up computers?

23 A. Information technology, I can tell you, for
24 example, about the business school where I work at my
25 university. They do set up computers. They upload

1 software.

2 For example, they would upload Microsoft
3 Office on the computers whenever someone purchases a new
4 computer. If I have a problem, let's say a virus or
5 some other problem, I would call on the IT professionals
6 to help us solve that problem.

7 Q. So it's their job to know, not only
8 technically how the computers are set up physically, but
9 what software is running on them and how it's working,
10 correct?

11 A. Well, they do know which software they
12 uploaded on the computer, that is correct.

13 Q. Okay. You criticized Dr. Wecker's work
14 because you said, I believe, in some of the points that
15 we saw on the board, that you thought he asked the wrong
16 questions.

17 Do you remember that?

18 A. I do. I don't know if I worded it as the
19 wrong questions, but if you're talking about No. 4
20 there, yes.

21 Q. Were you here for Dr. Rhyne's testimony, when
22 he talked about the questions?

23 A. I -- I think I was here for some of his
24 testimony. I'm not sure I was here for the entire
25 testimony.

1 Q. Did you read -- I'm sorry for interrupting
2 you, sir.

3 Did you read Dr. Rhyne's expert report?

4 A. I received it -- I reviewed it at some point.
5 Portions of it are above my level of technical
6 expertise.

7 Q. Well, that's really what I want to ask you
8 about. You're not an expert in computer science,
9 correct?

10 A. That's correct.

11 Q. And I gather that you're probably not an
12 expert in the use of XML.

13 A. Certainly not.

14 Q. So you don't really, yourself, have the
15 expertise necessary to say whether the questions that
16 the survey asked revealed infringing use or not, do you?

17 A. Well, I -- I was here for the testimony of
18 Dr. Wecker, and in response to a -- questions of
19 counsel, he said that based on his questions, it is not
20 possible to distinguish between infringing functionality
21 and non-infringing functionality that -- which might be
22 related to the fact that apparently, as he said, he was
23 not told or he had not been told what the purpose of the
24 survey was.

25 Q. Okay. But my point is this: If there's a

1 dispute about whether the question asked in the survey
2 necessarily means that someone responding to it
3 infringed or didn't infringe, you don't have the
4 technical knowledge necessary to resolve that dispute,
5 do you?

6 A. I'm not sure I understand. I do not have
7 technical knowledge, but the specifics I do know. And
8 he said it here from this stand, that his questions do
9 not allow us to distinguish between allegedly infringing
10 functionality -- in other words, if someone says yes, we
11 still do not know whether what that person said yes to
12 is infringing or not.

13 That's the only thing I know. I don't know
14 the technical aspects of that.

15 Q. But -- so you're not capable of helping the
16 jury understand whether the technical question that was
17 asked to the IT professionals in the survey revealed
18 infringing uses or not.

19 A. Well, I think that there seems to be
20 consensus.

21 In other words, both Dr. Wecker and I are in
22 agreement that his questions did not allow us to
23 determine whether a yes answer to his questions means
24 that the computers were used in an infringing manner or
25 not.

1 So I don't -- I don't think I need to
2 understand the technical aspects behind it to agree with
3 him on that.

4 Q. Okay. That's fair enough, although I didn't
5 really ask you what you needed to understand or not.
6 I'm just trying to establish that if there's a dispute,
7 and Microsoft claims that the question that was asked
8 was technically, in terms of XML technology, the wrong
9 question, you're not an XML expert, and you can't say,
10 can you?

11 A. If I understand your question correctly, then
12 if there is dispute about the scope of the patent, I'm
13 certainly not the person to resolve that issue.

14 Q. Thank you, sir.

15 You spent some time on your direct testimony
16 talking about instances in which respondents might or
17 might not say, I don't know.

18 Do you remember that?

19 A. Yes.

20 Q. But it's true, isn't it, that many of the
21 survey respondents, in fact, answered, I don't know to
22 the questions.

23 A. Yeah, of course, because there are some
24 people, as I said, who despite all encouragement, would
25 just refuse to say anything.

1 And I think these are the best respondents
2 you'd like to have in a survey, people who, if they
3 really do not know, say, I don't know.

4 Unfortunately, there are many, who even
5 though they do not know or do not even understand the
6 questions, still do provide answers.

7 Q. Okay. I think there was an answer to my
8 question in there, but let me be sure.

9 My question to you, sir, was: Isn't it true
10 that many of the respondents of the questions, in fact,
11 answered, I don't know? And I think you said, yes,
12 that's true?

13 A. Yes. There are some who did. I don't know
14 the exact percentage.

15 Q. Thank you, sir.

16 Let me move on now quickly and talk about
17 some of the analysis that you didn't report of some of
18 these survey responses.

19 And if we look at PowerPoint Slide No. 5, do
20 you recognize this document?

21 And I won't make it difficult. This is
22 Exhibit F to Dr. Wecker's report, and this -- this
23 document contains survey responses that Dr. Wecker
24 received back from ORC that actually carried out the
25 telephone calls, correct?

1 A. Yes. I mean, I do not remember the exhibit
2 number, but if we could see the next page, perhaps that
3 would help.

4 Q. Well, let's -- let's -- instead of doing
5 that, let's just move on and look at some of the data in
6 this exhibit. And look at PowerPoint 6.

7 This is a discussion from your report that's
8 on Page 41, if you want to look it up, and you were
9 analyzing, as you've just done before the jury, some of
10 the responses, and you said, According to Question 6
11 asserted claims, zero Word 2007 computers opened files
12 containing custom XML and saved them in dot XML, dot
13 docx, dot docm format during 2008.

14 Do you see that?

15 A. I do remember that, yes.

16 Q. Is that what you wrote in your report?

17 A. That's what I wrote, and there are --

18 Q. Let's -- let's --

19 A. -- this is -- this is one typo. There are a
20 couple of other typos.

21 As I think Dr. Wecker accurately described
22 the data sheet from ORC, I think he referred to it as
23 9 -- 9 -- 9 fit -- 9-foot long ugly spreadsheet. That's
24 what I worked from.

25 And there are a couple of places where I had

1 typos in my report. They did not change the
2 conclusions. Those respondents are still inconsistent.

3 Q. I think my question to you, sir, was, this is
4 what you wrote in your report, correct?

5 A. That is correct.

6 Q. Do you think the accuracy of your report is
7 important?

8 A. I think it's important. As I said, there
9 were two typos. Did not change any of my conclusions.

10 Q. And I guess you wouldn't consider a typo to
11 be a data adjustment.

12 A. Actually, type -- well, you can call it -- I
13 think that's a matter of semantics.

14 Q. Well, let's go on then. I don't want to get
15 hung up on semantics. Let's take a look at your -- at
16 the actual data.

17 You said that Question 6A was zero Word
18 computers. And if we look at the next slide, do you
19 recognize this as something on that spreadsheet?

20 I know it's not that easy to see, so -- so
21 let's go on to the next slide that will call out
22 specifically what we're looking for here.

23 Do you see in No. 7, we have some boxes here,
24 and it's pretty small and not easy to see, but this
25 identifies which respondent we're talking about, right?

1 A. That's correct.

2 Q. And that arrow down on the left points to
3 Respondent 409, the one you were just talking about in
4 your report.

5 A. That is correct.

6 Q. And then this talks about the Question 6A,
7 right?

8 A. Yes.

9 Q. And where they intersect gives the answer
10 that came back on the survey, correct?

11 A. That's correct.

12 Q. And what does it say?

13 A. 25.

14 Q. And your report didn't say 25, did it?

15 A. That's correct. It said zero.

16 Q. The report said zero, right?

17 A. That is correct.

18 Q. So you were wrong?

19 A. Yes. I -- I was wrong on this number, and I
20 would have reached the same conclusion about 409
21 regardless.

22 Q. Well, I didn't ask you about your
23 conclusions, sir. And I know that you have a point to
24 make here, and I know you've been hired to do that, but
25 I think we'll get through this a lot faster if, with

1 respect, I can ask you a question, and you would answer
2 the question.

3 You made a mistake here, right?

4 A. That is correct.

5 Q. People make mistakes, but you happened to
6 make this one in your report.

7 A. That is correct.

8 Q. Let's go on to look at the next slide, No. 8.
9 You also said in your report, in examining and
10 criticizing Dr. Wecker's work, that regarding Word 2003,
11 the respondent initially said in Questions 2C and D that
12 none -- that's zero -- of the computers that opened
13 files containing custom XML, representing 1 percent of
14 the Word 2003 installations in November 2008, saved them
15 in either of the format categories, correct?

16 A. Right.

17 Q. That's what you said in your report.

18 A. Which respondent -- which respondent is this?

19 Q. Well, let's look at the -- let's look at Page
20 42 of your report.

21 You see the language we're quoting here
22 starts three lines down from the top of the page?

23 A. That's correct.

24 Q. What respondent were you referring to?

25 A. This was, I believe, 6 --

1 Q. 470?

2 A. 470.

3 Q. 470. All right.

4 And now, let's look at -- you said that in 2C
5 and 2D, the answers were zero, correct?

6 A. That is correct.

7 Q. Okay. Let's go to Slide No. 9, and let's
8 look at what the survey actually said.

9 Same sort of format as before, correct? The
10 respondent we're looking at, 470, is down here
11 (indicating), right?

12 A. Right.

13 Q. And the question they asked, 2C, is here
14 (indicating), right? And they didn't say zero, did
15 they?

16 A. They said 1 percent.

17 Q. It said 1.

18 A. 1 percent.

19 Q. Well, the entry in that cell is a 1, correct?

20 A. Right. But that's --

21 Q. All right.

22 A. Question 2C is -- refers to percentages.

23 Q. Yes, sir.

24 A. So this person said 1 percent.

25 Q. Yes, sir. And I guess my question to you

1 was: There's not a zero in that box, is there?

2 A. That is correct.

3 Q. There's a 1 in the box, correct?

4 A. That's correct. 1 percent.

5 Q. Let me ask you the next question -- next --
6 same question for the next thing you said was a zero.

7 That's question 2D, and let's see the answer.

8 You said there's a zero in that box, and, in
9 fact, there is a 1 in that box, correct?

10 A. That's correct. 1 percent.

11 Q. All right, sir. And, finally, let's -- let's
12 take a look at Paragraph 82 of your report. And the
13 part I want to look at is on the slide, if that's easier
14 to find. It's on Slide 11.

15 You criticized Dr. Wecker's analysis of the
16 answers here by saying that Respondent 284 answered
17 question 2D and said that 10 percent of the company's
18 computers currently save files in a certain way.
19 But that respondent later said in Question 6C that in
20 the year 2008, 100 percent of the computers save files
21 in a certain way.

22 Do you see that?

23 A. I do.

24 Q. And you said that was nonsensical or at least
25 highly unlikely because the use would have to decline

1 that sharply?

2 A. I think in the next sentence, I said it very
3 clearly. Such answers could only possibly make sense if
4 the percentage of Word 2003 installations that save in
5 this format declined by 90 percent during 2008.

6 Q. Okay. Well, let's -- let's understand that.
7 Question 2D somebody said that 10 percent of the company
8 computers -- well, actually, let's -- let's -- let's
9 take a look at Slide 12 so we can see what it has.

10 That question asks, Question 6C, what
11 percentage would you say, for Word 2003, during the
12 calendar year, right?

13 A. Yes.

14 Q. And that's what -- the answer was given 100
15 percent.

16 A. That's correct.

17 Q. And the next question on the next slide asks:
18 Still thinking about those computers with 2003
19 installed, what percentage would you say were used to
20 open an XML document containing custom XML during a
21 typical workday.

22 Do you see that?

23 A. I do.

24 Q. And that answer was 10 percent.

25 A. That is correct.

1 Q. Isn't it altogether possible that only 10
2 percent of the people working at a business would use
3 their computer to open custom XML on any particular
4 day -- typical workday, but that over the course of the
5 year, all of them would eventually?

6 A. I think it's conceivable, and I stated it
7 very clearly in my report.

8 Q. Well, sir, I guess on -- well, never mind.
9 Thank you, Dr. Simonson.

10 A. Thank you.

11 MR. CAWLEY: And, Your Honor, I'll pass
12 the witness.

13 THE COURT: Any redirect?

14 MR. LENDER: No, Your Honor.

15 THE COURT: All right. You may step
16 down.

17 All right. Ladies and Gentlemen of the
18 Jury, I think we'll take a short break this morning.

19 We'll be in recess until five minutes
20 until 11:00.

21 COURT SECURITY OFFICER: All rise.

22 (Recess.)

23 COURT SECURITY OFFICER: All rise for the
24 jury.

25 (Jury in.)

1 THE COURT: Please be seated.

2 All right. Who will Defendant's next
3 witness be?

4 MR. POWERS: Your Honor, may Dr. Simonson
5 be excused?

6 THE COURT: Excuse me?

7 MR. POWERS: May Dr. Simonson be excused?

8 MR. CAWLEY: No objection.

9 THE COURT: Yes. Yes, he may.

10 MR. KUDLAC: Microsoft calls as its next
11 witness Robert Little.

12 THE COURT: Robert Little, all right.

13 MR. KUDLAC: Your Honor, I have binders
14 that I would like to hand out.

15 THE COURT: Excuse me?

16 MR. KUDLAC: I have binders I would like
17 to hand out.

18 ROBERT LITTLE, DEFENDANT'S WITNESS, SWORN

19 DIRECT EXAMINATION

20 BY MR. KUDLAC:

21 Q. Good morning, Mr. Little.

22 A. Good morning.

23 Q. Would you introduce yourself to the jury.

24 A. Yes. My name is Robert Little.

25 Q. Where do you work?

1 A. I work at Microsoft.

2 Q. Do you work in the Seattle area for
3 Microsoft?

4 A. Yes, I do.

5 Q. What kind of work do you do for Microsoft?

6 A. I'm a software development manager.

7 Q. What is a software development manager at
8 Microsoft?

9 A. So as a software development manager, I'm in
10 charge of keeping the team on schedule. I'm in charge
11 of -- I have a couple of leads that report to me. I'm
12 in charge of budgeting, purchasing computers, that sort
13 of thing.

14 Q. How long have you worked for Microsoft?

15 A. I've been with Microsoft full-time for over
16 16 years now.

17 Q. Did you grow up in the Seattle area?

18 A. No, I didn't.

19 Q. Where did you grow up?

20 A. Southern California.

21 Q. Did you go to college?

22 A. Yes.

23 Q. Where did you go to school?

24 A. I spent a year at the University of
25 California at Irvine and two and a half years at the

1 University of Oregon.

2 Q. What did you study at the University of
3 California at Irvine?

4 A. Information and computer science.

5 Q. What did you study at the University of
6 Oregon?

7 A. Computer and information science.

8 Q. Why did you transfer from the University of
9 California-Irvine to the University of Oregon?

10 A. So in the first year at Irvine, my mom
11 retired and moved up to Oregon, and to help out with my
12 stepfather, I moved up there the following year.

13 Q. Did you work while you were going to college?

14 A. Yes, I did.

15 Q. Where did you work?

16 A. I worked over the summer at a grocery store
17 called Fred Meyer (phonetic spelling), and I also spent
18 two summers at Microsoft.

19 Q. Let's talk about some of your time at
20 Microsoft.

21 Did you intern there?

22 A. Yes, I did.

23 Q. When did you first intern at Microsoft.

24 A. The summer of 1991, I was an intern at
25 Microsoft.

1 Q. What did you work on while you were at
2 Microsoft in the summer of 1991?

3 A. I worked on Word for Windows.

4 Q. What did you do on Word for Windows while you
5 were there?

6 A. I was a software test engineer.

7 Q. And did that product actually ship while you
8 were there?

9 A. Yes, it did.

10 Q. And you mentioned that you worked two summers
11 at Microsoft.

12 When was the next summer?

13 A. The next summer was 1992, and I was a
14 software development intern.

15 Q. How long were you there in 1991? How long
16 did you work for Microsoft that first time?

17 A. That was a six-month internship.

18 Q. And the second time, how long were you there?

19 A. Three months.

20 Q. And as a software development intern, what
21 did you do at Microsoft?

22 A. I worked on Word for Windows.

23 Q. And what part of Word did you work on during
24 that summer of 1992?

25 A. I did some internal memory management things.

1 I did some other basic debugging routines.

2 Q. Now, did you graduate from the University of
3 Oregon?

4 A. No, I did not.

5 Q. Tell us why not.

6 A. Well, after my second internship at
7 Microsoft, they gave me a job offer for March the
8 following year, and it was -- it was just too much -- it
9 was too good to pass up.

10 Q. And so that's when you started at Microsoft
11 full-time was March of 1993?

12 A. That's correct.

13 Q. What was your -- your first project when you
14 got to Microsoft as a full-time employee? What did you
15 work on then?

16 A. For a couple of days, I worked on the
17 conversions team in Word, and then I moved over and
18 worked on the international versions of Word for
19 Windows.

20 Q. What do you mean by the conversions team?

21 A. So back in 1993, there were a number of -- of
22 word processor formats that were out there that were
23 very popular. And in order to open another word
24 processor's files, if, for instance, you were using Word
25 Perfect or something, you would have to use a file

1 converter in order to load that into Word.

2 Q. I believe Dr. Rhyne mentioned a Word Perfect
3 file converter for Word.

4 Did you actually work on that?

5 A. Yes, I did. I actually worked on the Word
6 Perfect converter.

7 Q. Now, when you got to Microsoft in 1993 as a
8 full-time employee, which -- which version of Word were
9 you working on at that time?

10 A. I was working on Word 6.0.

11 Q. Now, during your work, did you become
12 familiar with the source code for Word 6?

13 A. Yes, I did.

14 Q. Do you recall what other versions of Word
15 were being shipped at that time when you first started
16 at Microsoft?

17 A. For Windows, we would have been shipping Word
18 2.5, and on the Macintosh we would have been shipping
19 Word 5.1.

20 Q. How long did you work as a -- as a developer
21 on Word?

22 A. I was a developer on Word until 2006, so I
23 guess about 13 years.

24 Q. Did you hold different positions, or were you
25 always a developer on Word?

1 A. I -- I was a developer, a development lead,
2 those two positions, through Word.

3 Q. What's the difference between a developer and
4 a development lead?

5 A. Development lead has people that report to
6 him, so he's responsible for performance reviews and
7 what-not. We're also responsible for helping them
8 schedule their own -- their own features in the
9 products. And we're responsible for making sure that --
10 that they also stay on schedule.

11 Q. After you left the Word team, what -- what
12 position did you move to?

13 A. I took a -- I took a job as the software
14 development manager for Publisher and Text Services.

15 Q. What is Publisher?

16 A. Publisher is a Microsoft product that ships
17 in the Office box. People might know it. It -- it
18 makes -- you can use it to make calendars; you can use
19 to it make postcards, those sorts of things.

20 Q. Does Publisher use XML?

21 A. No, it doesn't.

22 Q. Let's go back to the beginning when you
23 started working on the Word 6 project.

24 What -- what particularly, after you worked
25 on the conversions team, what did you work on? I

1 believe you said the international version. What is
2 that?

3 A. This international version would have been
4 the French and the German versions of Word. I wasn't
5 responsible -- I don't speak French or German, but I was
6 responsible for the programming of them for things like
7 making the dialogues work correctly and what-not.

8 Q. I see.

9 MR. KUDLAC: Could I have Exhibit 2181 on
10 the screen, please?

11 And could you zoom in just on the top
12 paragraph there?

13 Q. (By Mr. Kudlac) Mr. Little, I've put
14 Exhibit 2181 up on the screen.

15 What is this?

16 A. This looks like a press release for Word 6
17 for Windows.

18 Q. And it says November 3rd, 1993. Do you
19 remember that Word 6 came out right about that time?

20 A. Yes. We would have finished up development
21 around October of '93, yes.

22 Q. Was there a beta release or a prerelease of
23 Word 6?

24 A. Yes, there was.

25 Q. When was that?

1 A. That would have been around May of '93.

2 Q. And when was -- you mentioned MAC Word 5.1.
3 When was that released?

4 A. It would have been around November of '92.

5 Q. How do you know that?

6 A. My wife was a tester on Word, and she worked
7 on the Macintosh version.

8 Q. I see.

9 MR. KUDLAC: Can we put up Exhibit 2186,
10 please?

11 Could you blow up the top half of that?

12 Q. (By Mr. Kudlac) We have put up Exhibit 2186.
13 What is this, sir?

14 A. That looks like the -- the about box, or
15 sometimes we call it the splash screen, for Word 5.1.

16 Q. Now, have you examined the source code that
17 was produced in this case for Word, the Word 6 product?

18 A. Yes, I have.

19 Q. I have here Exhibit 2200.

20 Is this the source code for Word 6 that was
21 produced in this case?

22 A. I believe that which you have is some of the
23 source code.

24 Is that all the source code or something?

25 Q. This is all -- this is some of the source

1 code, correct?

2 A. Yeah. I think all of it would be bigger.
3 Yes, that is the source code as it read when -- when
4 Word 6 was built.

5 Q. Thank you.

6 Did you also examine the MAC Word 5.1 source
7 code that was produced in this case?

8 A. Yes, I did.

9 Q. I've got Exhibit 2199. Is this the portion
10 of the source code for MAC 5.1 that was -- that we've
11 used in this case?

12 A. Yes, it is.

13 Q. Let's -- let's move forward in time to Word
14 2003, and you testified that you worked on Word back
15 in -- Word 6 back in 1993.

16 Did you work as a development lead or as a
17 developer on Word 2003?

18 A. I was a development lead on -- on Word 2003.

19 Q. And in the development of Word 2003, as a
20 development lead, what were your responsibilities?

21 A. Again, I was responsible for the people that
22 reported to me for their -- making sure their schedules
23 are in order, helping with designing the architecture,
24 helping them design the architecture. And I also was
25 responsible for my own features.

1 Q. When did you start the initial planning for
2 Word 2003?

3 A. We would have started that probably around
4 September of 2000.

5 Q. You understand in this case that there's been
6 certain accusations against Word 2003 and Word 2007
7 about a particular functionality.

8 Do you understand that?

9 A. Yes, I do.

10 Q. And do you understand that that particular
11 functionality deals with what has been called custom XML
12 and the reading in of certain types of files, right?

13 A. Yes.

14 Q. Were you involved in the development of that
15 accused functionality for the Word 2003 source code?

16 A. Yes, I was.

17 Q. What was your role in the development of that
18 particular accused functionality of Word 2003?

19 A. So as a development lead, it actually was my
20 responsibility to design the architecture for this
21 functionality that we're talking about.

22 Q. Were there any others on your team that were
23 involved in that development?

24 A. Yes.

25 Q. Can you tell us about a few of those people?

1 A. So on my team, Andrew Bishop would have been
2 responsible more for Word ML than for what's been
3 accused here.

4 Mark Sunderland worked on some of the user
5 interface that we call the validation.

6 Daniel Snyder was responsible for some of the
7 Word ML. Tony Krueger was responsible for some Word ML
8 and some other functionality.

9 And Ziyi, Z-I-Y-I, Wang was responsible for a
10 lot of the embedded -- embedded characters that we've
11 seen. You've seen those little angle brackets in the
12 Word document stream, that's -- that was a lot of the
13 stuff that he did.

14 Q. You mentioned word ML. What is Word ML?

15 A. So Word ML, it's kind of shorthand for word
16 processing ML, but that's a mouthful, so we don't say it
17 like that.

18 It's a -- it's an XML format that Microsoft
19 designed to represent a word document in XML.

20 Q. Does Word ML also have those less-than and
21 greater-than signs and slashes?

22 A. Yes. It's an XML file.

23 Q. Now, we've heard a number of names associated
24 with the Word 2003 team and about some interaction or
25 meetings between i4i and Microsoft, and I'd like to ask

1 you about some of those people.

2 One of the names was Brian Jones. Do you
3 know Brian Jones?

4 A. Yes, I do.

5 Q. Did Mr. Jones write any of the source code
6 for Word 2003?

7 A. No, he didn't.

8 Q. Did he design any of the data structures that
9 we've seen up on the slide for the charts? Did he
10 design any of those data structures?

11 A. No.

12 Q. Do you know Chris Pratley?

13 A. Yes, I do.

14 Q. And did Mr. Pratley write any of the source
15 code for Word 2003 or 2007?

16 A. No.

17 Q. Did he design any of the data structures that
18 have been talked about in the last week?

19 A. No.

20 Q. Do you know Marcin Sawicki?

21 A. Yes.

22 Q. Did he design -- did he write any of the
23 source code?

24 A. No, he didn't.

25 Q. Did he design any of the data structures?

1 A. No, he didn't.

2 Q. If we were looking at an organizational chart
3 and we had you on the org chart at Microsoft at the time
4 that Word 2003 was developed, would you give us an idea
5 of where Mr. Sawicki lies on that organization chart?

6 A. So if you think of an organizational chart,
7 if you think of where you are in relationship to the
8 bottom, you would have me one up from the bottom; you
9 would go all the way up the development chain to the
10 general manager; you'd come all the way down the program
11 admin chain to the same level as I'm at, about one up
12 from the bottom. And that would be where Martin (sic)
13 Sawicki would be.

14 Was Mr. Sawicki ever an executive at Microsoft during
15 that time?

16 A. No, he wasn't.

17 Q. You mentioned program management. What is
18 program management at Microsoft?

19 A. So a program manager at Microsoft is
20 responsible for coming up with user scenarios, thinking
21 about, you know, what the user would want to do, how it
22 should look on the screen, what -- what the user
23 interface is going to look like, those sort of things.

24 They also schedule meetings for us.

25 Q. I see.

1 slide in Mr. Little's slide deck, please?

2 Q. (By Mr. Kudlac) We've put up Slide 2, which
3 is something that we saw used with Mr. Wagner last week
4 when he was testifying.

5 Could you tell us what some of the new
6 features for Word 2003 that are shown on this slide?

7 A. Sure. We have research and reference, clear
8 type, reader view, formatting, and editing restrictions,
9 document workspace, digital rights management.

10 And that's all I can see on that.

11 Q. What is research and reference?

12 A. Research and reference is -- it's a feature
13 that we added so you could take parts of your document,
14 maybe a word or a sentence, and a window would come up
15 on the side, and it would let you maybe look up the
16 definition of that word or maybe translate that sentence
17 into another language.

18 Q. You mentioned digital rights management,
19 also. What is that?

20 A. Digital rights management is a way for you to
21 be able to control what someone can do with your
22 document.

23 So if I wanted to send a document to you and
24 I wanted to make sure that only you would read it and
25 that you couldn't send it to someone else, that I would

1 use digital rights management to do that.

2 Q. Is there another new feature for Word 2003
3 that wasn't included on this list?

4 A. Yes. I noticed that -- we call something
5 called ink annotations, which is a fancy way of saying
6 that you can take a pen and write on a tablet, and you
7 can write on your document.

8 Q. Okay. A tablet, you mean like a tablet PC
9 that has a fancy screen on it?

10 A. Exactly.

11 Q. I see.

12 How many people worked on the source code for
13 Word 2003?

14 A. There were 19 of us.

15 Q. How many development leads were involved?

16 A. Including myself, there were three.

17 Q. We have heard a fair amount of testimony in
18 this case about XML already, and we've seen some
19 documents where Microsoft talks about the importance of
20 XML.

21 First, just to be clear, is XML the same
22 thing as custom XML?

23 A. No.

24 Q. You've also heard about the accused
25 functionality. Is -- the accused functionality, is that

1 all there is to custom XML and Word 2003 or 2007?

2 A. No. There's a lot to do with custom XML that
3 hasn't been accused.

4 Q. Could you give us an idea, in terms of
5 developer weeks, how much of the development of XML
6 for -- generally, for 2003, how -- how big of a project
7 that was and compare that to the development of the
8 accused custom XML functionality?

9 A. So we like to add things up in what we call
10 developer weeks or developer dates, and we had 76 weeks
11 of developer time scheduled for XML. Forty of those
12 weeks were Word ML that we've talked about. And another
13 30 weeks were the custom XML functionality that hasn't
14 been accused at all, the editing behaviors and how you
15 spellcheck these documents.

16 That leaves us with about six weeks of time.
17 That's about how much time we spent on what we've been
18 talking about here as the accused functionality.

19 Q. Now, who was the target audience for the
20 custom XML functionality, just generally, the custom XML
21 functionality 2003?

22 A. We were definitely targeting a developer
23 audience.

24 Q. What do you mean by a developer audience?

25 A. We were targeting people who were -- who were

1 building things on top of Word, who would build
2 solutions for customers, that sort of thing.

3 Q. Why did you add the custom XML functionality
4 to Word back in 2003 -- or Word 2003?

5 A. Well, we knew that people had been building
6 on top of Word, and some of the things that we had in
7 Word for structure, like bookmarks, they didn't provide
8 all the functionality they wanted.

9 They didn't -- people wanted to have
10 something that was like XML. They wanted to have
11 either -- XML had become a really big thing. And we
12 knew that people wanted to be able to program against
13 XML.

14 And so we wanted to add this functionality on
15 top of the things we've already got in order to provide
16 a really robust platform for people to build on top of.

17 Q. Does Microsoft have any on problem with
18 developers or others building on top of Word?

19 A. No. No, not at all.

20 Q. Why not?

21 A. Because Microsoft is interested in selling to
22 a very big audience of people, and we know that there's
23 no way we can make every single person with every --
24 every specific scenario happy.

25 So it's really important for people to build

1 on top of it and deliver these custom sort of solutions.
2 We've also heard them as vertical solutions to these
3 customers.

4 So, no, we really -- we really -- we really
5 appreciate -- we really want people to build on top of
6 us.

7 Q. Let me ask you about the custom XML
8 functionality, the change between 2003 and 2007.

9 Did -- did the custom XML functionality that
10 has been accused here, that you understand to be accused
11 here, did that change between 2003 and 2007?

12 A. No, not really.

13 Q. Now, we've heard about the -- the default
14 file format in Word 2007 changed to the dot docx format.
15 What is the docx format?

16 A. So the docx file format is a -- it's a new
17 file format. It's a package; it's compressed, so it's
18 smaller than the file format of before.

19 And it's based on -- parts of it are based on
20 XML; parts of it are based on other -- other
21 international standards with sort of a goal of being
22 open and transparent.

23 Q. You mentioned earlier that Word ML was
24 compliant with the XML standard.

25 Was Word ML a proprietary format to

1 Microsoft?

2 A. No, it's not.

3 Q. Let me ask you to look at the screen. I'll
4 put up Exhibit 2143.

5 Is this the XML specification that Word ML or
6 word processing ML is written to?

7 A. Yes, it is.

8 Q. And is there a standard that also applies to
9 word processing ML or the 2007 version of Word ML?

10 A. Yes.

11 MR. KUDLAC: And I'd like to put up
12 Exhibit 385.

13 Q. (By Mr. Kudlac) And is this the standard that
14 applies for the word processing or Word ML that is in
15 Word 2003?

16 A. Yes. This is ECMA 376.

17 Q. How did ECMA 376 come about?

18 A. So while we were developing the docx file
19 format, we knew we wanted to get as much support and
20 standardization of it as we could. And as it turned
21 out, there was a lot of industry support for that as
22 well.

23 So it actually turns out that folks like
24 Apple and Intel, and even the Library of Congress, got
25 together with Microsoft to take it to the ECMA Standards

1 Committee and sponsored it to become an international
2 standard.

3 Q. We've heard about the default file format in
4 Word 2007. Can Word 2007 open files in the dot doc,
5 D-O-C, format?

6 A. Yes, it can.

7 Q. And if you use Word 2007 to open a dot doc
8 file, what -- how will it be saved by default?

9 A. So if you had opened a dot doc file, then we
10 would save it back out as a dot doc file.

11 Q. Why is that?

12 A. Well, if you loaded a dot doc file,
13 presumably, you got it from somebody and you don't want
14 to change the file format. You want to give it back to
15 them in the same format that you got it in, so...

16 Q. All right. Let's go back to the Word 2003
17 development time for the accused functionality here.
18 You said you started the initial planning back in about
19 September of 2000. When did you figure out how you were
20 going to implement what has been referred to here as
21 custom XML?

22 A. That would have been shortly after we
23 released Word XP or Word 2002. So that would have been
24 around March -- March of 2001.

25 Q. That timeframe between September of 2000 and

1 March or so of 2001, were you working full time on the
2 Word 2003 development, or were you working on something
3 else?

4 A. No. We were still -- we were still in the --
5 in the shipping process of 2000 -- again, of the Word
6 2002 project.

7 So you would have days where you'd have
8 emergencies and trying to ship the product, and then
9 you'd have a lot of time to think about the next
10 version, too.

11 Q. Was -- was a beta release ever made of 2003?

12 A. Yes.

13 Q. And when was that?

14 A. It would have been November of 2002.

15 Q. Between the time of the beta release in
16 November of 2002 and the final release later of 2003,
17 did the custom XML functionality that's been talked
18 about here, did that change at all?

19 A. No, it didn't really change.

20 Q. Let's talk a little bit more specifically
21 about the functionality of the accused software here and
22 the data structures that we've been talking about.
23 Where did the design of those data structures come from?

24 A. So the -- any new data structures that came
25 from -- would have probably been me. We also based our

1 design on some data structures we already had.

2 Q. What do you mean by data structures you
3 already had?

4 A. Well, so many of the data structures that
5 we've been talking about actually have been around in
6 the Word source code since -- well, since before I
7 started at Microsoft, so...

8 Q. What are those data structures in particular?

9 A. The PLC data structure, the STTB data
10 structure, those two.

11 Q. What is an STTB?

12 A. It's a string table. It's the way of storing
13 pieces of text.

14 Q. What's a PLC?

15 A. PLC is a data structure that we use. It
16 stores character positions, and it stores information
17 about those character positions.

18 Q. What -- what had you previously used the PLC
19 and the STTB data structures for in Word before Word
20 2003?

21 A. Oh, there's a lot of things we used them for.
22 One of the things that we reused for this XML
23 functionality would have been bookmarks.

24 Q. What's a bookmark?

25 A. So a bookmark in Word is a way to take a part

1 of your document, a word or a sentence or maybe even the
2 whole document, and take that range and associate a name
3 with it.

4 Q. A name like what?

5 A. A name like anything. A name like -- a name
6 like title, a name like this is interesting. We don't
7 know, because it's up to the user to give it a name.

8 MR. KUDLAC: Your Honor, may I use one of
9 the easels to put up a board?

10 THE COURT: Yes, you may.

11 Q. (By Mr. Kudlac) Can you still see that?

12 A. Yes.

13 Q. I've put up Figure 12 from Dr. Martin's
14 report that we've heard some testimony about already,
15 and I'd like to ask you about some of the data
16 structures that are -- that are referenced there, and in
17 particular, the data structures that are referenced in
18 that -- that merged structure.

19 Do you have an understanding of what type or
20 what name of a data structure the first column there in
21 the merged structure, what that refers to?

22 A. Yes.

23 Q. What is it?

24 A. That would be referring to the PLC bkf.

25 Q. So that -- is that one of the PLC data

1 structures?

2 A. Yes, it is.

3 Q. And what about the second column? What do
4 you understand that represents?

5 A. That would represent the PLC bkl.

6 Q. So, again, is that another one of those PLC
7 data structures?

8 A. Yes, it is. Yes, it does.

9 Q. And did Word use PLC data structures before
10 Word 2003?

11 A. Yes.

12 Q. All right. And let's talk about the last
13 column there. I believe it's called ELMNT info.

14 What do you understand that refers to?

15 A. That would refer to an STTB data structure.

16 Q. When you added data structures to Word 2003,
17 is it those older PLC and STTB data structures that you
18 used?

19 A. Yes.

20 Q. Why did you add a copy of them into Word 2003
21 instead of just reusing exactly the ones that you had
22 before?

23 A. Well, you can imagine, if you were a user and
24 you had a document that had bookmarks in them, because
25 you actually marked ranges with whatever you wanted them

1 to be, if we then used those -- that exact same -- the
2 exact same set of bookmarks, we would suddenly be taking
3 over the ones that you already had.

4 So we had to make a copy of them so we could
5 have our own place to store it.

6 Q. Did Word -- MAC Word 5.1 and Word 6 products
7 that you talked about earlier, did they use PLC and STTB
8 data structures for bookmarks?

9 A. Yes, they did.

10 Q. Let me ask you a few more questions about
11 that.

12 You mentioned that you had worked on some
13 file conversion aspects earlier in Word 6; is that
14 right?

15 A. Yes.

16 Q. And in that file conversion, was the RTF file
17 used at all?

18 A. Yes.

19 Q. What is an RTF file?

20 A. So an RTF file is a file that contains rich
21 text formatting. That's what RTF stands for. And RTF
22 contains key words and control codes and document
23 content. So that's what an RTF file is.

24 Q. Did RTF support the use of bookmarks?

25 A. Yes, it did.

1 Q. How long has RTF been around?

2 A. Oh, again, from before I started at
3 Microsoft. I think it was sometime in the mid-to-late
4 '80s.

5 Q. In Word 6, was it possible to read in an RTF
6 file that used bookmarks and bring that into a Word
7 document?

8 A. Yes.

9 Q. And that would convert it into the dot doc
10 format?

11 A. Yes, it did.

12 Q. Now, when you -- when you would read in an
13 RTF file with bookmarks in Word 6, how would those --
14 those bookmarks be important?

15 Would they use those PLC and STTB data
16 structures?

17 A. Yes, it would.

18 MR. KUDLAC: If I could have Slide 3.

19 Q. (By Mr. Kudlac) Mr. Little, I have put up on
20 the screen Slide 3.

21 Can you tell us what that is?

22 A. Yes. This is an RTF file that I created that
23 represents the letter that we've seen the last couple of
24 days.

25 Q. The letter that's shown up in the CP stream

1 on Figure 12 there?

2 A. Yes, exactly.

3 Q. And how did you create this RTF document?

4 A. I created it by loading -- or typing the
5 letter into Word, inserting bookmarks around everything,
6 and saving it in RTF. And then to simplify things for
7 us, I took out a lot of the formatting codes that we
8 didn't need to see.

9 Q. Which version of Word did you type the letter
10 into?

11 A. Word 6.

12 Q. And then you saved it out as RTF?

13 A. Yes.

14 Q. Let's go through a few of these codes.

15 The first one there says -- has a curly brace
16 and then a slash and then RTF 1. What does that mean?

17 A. That's the RTF keyword that tells you it's an
18 RTF file and tells you what version of RTF to expect.

19 Q. And the next line down, again, starts with
20 that curly brace and then has slash, star, slash, bkmk
21 start, and then letter and then a curly brace close.

22 What is that?

23 A. That's the RTF instruction for, basically,
24 the start of a bookmark.

25 Q. And then on the next line, we see something

1 that says slash par. What does that mean?

2 A. That's the RTF instruction for inserting a
3 paragraph marker.

4 Q. Was there a -- a public standard for RTF back
5 in 1993?

6 A. Yes.

7 MR. KUDLAC: Chris, could I have
8 Exhibit 2043 on the screen? And if you could highlight
9 the top block. Great.

10 Q. (By Mr. Kudlac) Is Exhibit 2043 the RTF
11 specification that was -- that was available back in
12 1994?

13 I believe it says -- is showing over there.
14 Is that the one from 1994?

15 A. Yes, it is.

16 Q. And was there also another version of this
17 that was available back in 1992 and before?

18 A. Yes, there would be.

19 MR. KUDLAC: Can we turn to Page 23?
20 Let me back up a moment. Could I have Exhibit 2042,
21 please?

22 And, again, could we highlight the top
23 there?

24 Q. (By Mr. Kudlac) Is Exhibit 2042 the 1992
25 version of the RTF specification?

1 A. Yes. That's the June of '92 version.

2 Q. Thank you.

3 MR. KUDLAC: Can we turn to Page 23 of
4 that specification? And if you would, pull up the
5 bottom half of the page that talks about bookmarks.

6 Q. (By Mr. Kudlac) Is this the portion of the
7 1992 RTF specification that talks about bookmarks?

8 A. Yes, it is.

9 Q. Thank you.

10 MR. KUDLAC: Can we go back to Slide 3,
11 please.

12 Q. (By Mr. Kudlac) Now, as part of your work on
13 Word 6, did you have work with the importation of files,
14 like this RTF file, into -- into Word?

15 A. Yes, I did.

16 Q. And are you familiar with the process that
17 Word 6 used for reading in this file and populating the
18 bookmark structures?

19 A. Yes.

20 MR. KUDLAC: Your Honor, if we could, we
21 would like to have Mr. Little approach the easel, and
22 using the data structure diagrams that are up there,
23 show us how the bookmark structures in Word 6 would have
24 been populated using the Word 6 importation of an RTF
25 product.

1 A. So the first thing that we would do, we would
2 look at that RTF instruction, that back slash RTF that
3 we talked about, and that would tell Word that it's got
4 an RTF file and what version it's going to be seeing.
5 The next thing that you would get is that bookmark start
6 instruction. And let me show you one here. Well --

7 THE COURT: Let me ask counsel, do you
8 have a slide of that that will come up on the screen?

9 MR. KUDLAC: The slide of Figure 12?

10 THE COURT: Yes.

11 MR. KUDLAC: We can get one, yes.

12 THE COURT: If you wouldn't mind putting
13 it up on the screen, so...

14 THE WITNESS: Do you want me to wait?

15 THE COURT: No. Go ahead.

16 THE WITNESS: Okay.

17 A. So we'll imagine that the bookmark start
18 instruction was there.

19 The first thing that we would do, since we
20 know that that -- that that bookmark start is for the
21 letter bookmark, and we know what position we're at,
22 because we haven't imported any content at all. The
23 document is empty, so we know the position is zero. I
24 have a bad habit of doing that. We know the name of the
25 bookmark is letter.

1 Q. (By Mr. Kudlac) Let me stop you right there.
2 You wrote letter in that last column. Which -- which
3 data structure is that last column representing in Word
4 6?

5 A. That's the STTB data structure.

6 Q. And was the text for letter actually stored
7 right in that data structure?

8 A. In Word 6, yes, it was stored right in that
9 data structure.

10 Q. Is that a difference between the way that
11 Word 6 worked and Word 2003 or 2007, which is shown up
12 on that board?

13 A. So for XML, for the structured document tags
14 that we've been talking about, the letter would be
15 stored somewhere else.

16 Q. So you wouldn't use those -- the same data
17 structures that are shown to the right of that
18 three-column box called merged for display purposes; is
19 that right?

20 A. No. No. In fact, in Word 6, we wouldn't use
21 any of that.

22 Q. Okay. Well, let's make the board accurate.
23 So why don't you cross those out, the ones that are not
24 used in Word 6.

25 A. So to be completely accurate there, we --

1 there's no bmds in Word 6, and none of these data
2 structures would be used in Word 6 either.

3 Q. All right. And there's also a reference to a
4 dom up in the top right. Is that -- was that there in
5 Word 6?

6 A. No. You're correct.

7 Q. Would you like a copy of the RTF file to
8 refer to?

9 A. Sure.

10 Q. So what happened next after you wrote the
11 letter into the STTB data structure?

12 A. So after we put the zero in that CP first and
13 we put the name of the bookmark, letter, into that third
14 column for the STTB -- back up.

15 So the next instruction that we would see is
16 that par, which tells us that there's a paragraph mark
17 or new paragraph starting.

18 So now we actually have content that we're
19 inserting. And I'll go ahead and put that symbol for a
20 paragraph markup.

21 We continue reading the file, and now we're
22 going to see the instruction for starting a bookmark,
23 and the name of that bookmark is going to be member ID.
24 So we need to know what position we are in the document,
25 and now we know we're one into the document, and we're

1 going to go ahead and fill out the member ID, which is
2 the name of the bookmark, and then we'll continue
3 parsing the file.

4 As we continue reading the file, the next
5 content that we see is that number, that member ID,
6 which is actually document content. And so we're going
7 to go ahead and insert that into the document now.

8 As we continue reading the file, we're going
9 to see another instruction, and this time that
10 instruction is going to tell us that we have the end of
11 the bookmark. We have the bookmark end instruction, and
12 it tells us which bookmark is ending. In this case, we
13 have the member ID ending.

14 Now that we know that we're ending, we need
15 to know what position we're at in the document, which is
16 one, two, three -- sorry -- one, two, three, four, five,
17 six. So now we can fill out the ending location of
18 member ID.

19 And then we would go ahead and condition this
20 for the rest of the file.

21 Q. So for the member ID, you have filled out all
22 three of the different data structures, the two PLC data
23 structures and the STTB data structure?

24 A. That's right.

25 Q. And the -- is it the information that is put

1 into those three data structures respectively, the 1,
2 the 6, and the text of member ID?

3 A. That's correct.

4 Q. And what do -- the 1 and 6 that are part of
5 those three data structures, what does that tell you?

6 A. That tells us where the bookmark begins and
7 where it ends. So it tells us the range of that
8 bookmark.

9 Q. And if -- if Word 6 was to continue reading
10 through the entire file, would it populate the rest of
11 the entries in those three different data structures?

12 A. Yes. We'd go ahead and fill the rest of that
13 table out.

14 Q. All right. Now, did -- so do the rest of the
15 table that has those two different columns?

16 A. Correct.

17 Q. Now, did Mac Word 5.1 work the same way for
18 reading in RTF files that had bookmarks?

19 A. Yes, it did.

20 Q. Why don't we go ahead and label the top of
21 the board with Mac Word 5.1 and Word 6.

22 A. (Complies.)

23 Q. And the next symbol was the paragraph symbol.
24 What would happen when -- when it would parse that
25 symbol, the paragraph command?

1 A. If we were to continue parsing this file,
2 then we would insert another paragraph, put a paragraph
3 mark right there (indicating).

4 Q. All right. Thank you. I think you can
5 return to the stand now.

6 A. (Complies.)

7 Q. When you used Mac Word 6 or 5.1, could you
8 save that file you just imported into the dot doc
9 format?

10 A. Yes.

11 Q. And what would happen to those three
12 different data structures if you saved them in the dot
13 doc format?

14 A. Those three data structures, they would
15 pretty much be saved out the way that you see them here.
16 They would be saved out to disk that way.

17 Q. And can you save the file -- after you had
18 imported it from RTF, could you save it back out to RTF?

19 A. Yes, you could.

20 Q. And then what would it look like if you saved
21 it out from RTF?

22 A. It would look like we see here.

23 Q. On the -- on Slide 3?

24 A. On the slide, yes.

25 Q. All right.

1 MR. KUDLAC: Let's turn to Slide 4,
2 please.

3 Q. (By Mr. Kudlac) And what have you shown on
4 this slide?

5 A. So this is what Word 6.0 would show if you
6 loaded the RTF file that we just saw in the previous
7 slide.

8 MR. KUDLAC: And let's turn to Slide 5,
9 please.

10 Q. (By Mr. Kudlac) And what have you shown here?

11 A. So in Word 6.0, there was a -- an option to
12 show where the bookmarks were. So you could actually
13 see in your document where a bookmark started and ended.

14 And this screen shot of Word 6.0 shows what
15 you would see if you turned that option on.

16 Q. How could you turn that option on?

17 A. You would go to the tools menu command, and
18 you would go to options, and there's a show bookmarks, I
19 think, on the view.

20 Q. Are they -- are they sort of large gray
21 braces that appear around -- for example, 23987, is that
22 an indication of where the bookmarks are?

23 A. Yes. They're -- they're not -- they're sort
24 of square -- square brackets; they're not angle
25 brackets.

1 Q. I see. Thank you.

2 MR. KUDLAC: Now let's turn to Slide 6,
3 please.

4 Q. (By Mr. Kudlac) And what do you -- what have
5 you shown here in that table that says bookmark and
6 bookmark name?

7 A. So if you were to go and say edit bookmarks,
8 because you wanted to see all the bookmarks that you had
9 in your doc, to go and find them, then this is -- this
10 is the dialogue that would come up to show you all the
11 bookmarks in your document.

12 Q. And how do you get to that dialogue box?

13 A. You would go to the edit menu and say edit
14 bookmarks.

15 MR. KUDLAC: Let's turn to Slide 7,
16 please.

17 Q. (By Mr. Kudlac) And what have you shown here
18 in Slide 7?

19 A. So if you select a -- one of those names --
20 in this case, I selected member ID -- and then you click
21 on the go to button that you see there, it would
22 highlight and -- and show you where in the document
23 member ID was.

24 Q. Thank you.

25 Now, were -- you mentioned, while you were at

1 the board, the less-than and greater-than sign that were
2 down in the -- in the content stream. Were you here in
3 the courtroom when we talked to -- when I talked to
4 Dr. Martin about adding and deleting custom XML tags to
5 Word 2003 or 2007?

6 A. Yes, I was.

7 Q. And we discussed what had to happen, what you
8 had to have access to in order to be able to do that.

9 Do you recall that testimony?

10 A. Yes.

11 Q. And I believe you agreed that in order to add
12 or delete a custom XML tag in either Word 2003 or 2007,
13 that you had to have access to both -- those three data
14 structures, as well as the other data structures, both
15 the data structures and the CP stream.

16 Do you remember that?

17 A. Yes, I do.

18 Q. Did you design Word to work that way?

19 A. Yes, I did.

20 Q. Why did you do that?

21 A. So one of the things that's really important
22 with custom XML tags in Word is -- and maybe anywhere --
23 is that you need to know if the user wants to be before
24 your tag or in front of your tag, or if you have two of
25 them, maybe between two tags.

1 And without having that extra character in
2 the document, that -- the open bracket for the start of
3 the tag or the close bracket for the end of the tag,
4 it's really, really hard to find that out.

5 And so I designed the data structures, and I
6 designed this approach to solve that problem.

7 Q. So leaving those less-than and greater-than
8 signs in the -- in the content, was that part of the
9 solution?

10 A. Yes.

11 Q. I see.

12 Now, you've -- you've heard some testimony
13 also about how Word imports XML files having custom XML
14 and the various parsings or reading through that takes
15 place.

16 Do you recall that?

17 A. Yes.

18 Q. Now, if Word has an XML file that is not --
19 it's in its Word ML format, can -- can Word open that
20 file directly?

21 A. No, it can't.

22 Q. Why not?

23 A. So when you open an XML file, you have to
24 understand what -- what the XML tags mean, and the only
25 XML tags that Word understands is Word ML.

1 MR. KUDLAC: Can we have Slide 8, please?

2 Q. (By Mr. Kudlac) What do you have shown here
3 in Slide 8?

4 A. So this is an example of what Word would be
5 able to read. It has -- well, it's an example of a Word
6 ML file.

7 Q. Can you tell us where one of the examples of
8 Word ML is in Slide 8?

9 A. Sure. The W, colon, P is a word ML tag. W,
10 colon, PPR is a -- is a Word ML tag.

11 Q. What does W, colon, P, the less-than W,
12 colon, P, greater than, what does that -- what does that
13 tell Word ML?

14 A. So that -- that particular XML tag tells Word
15 that what's inside of that W, colon, P is a paragraph.

16 Q. And down lower in the screen, it has a less
17 than and then the W, colon, T and a greater than. What
18 does the W, colon, T in those brackets mean?

19 A. So when -- when it encounters the W, colon,
20 T, it knows that the contents of that element is -- it's
21 text. It's information that's supposed to be inserted
22 into the document.

23 Q. So text as opposed to something else?

24 A. Yes.

25 Q. Such as a picture?

1 A. Right.

2 Q. Is there a Word ML command or instruction
3 with those less-than and greater-than signs for picture?

4 A. Yes. I believe it's W, colon, pict.

5 MR. KUDLAC: Your Honor, may I pull out
6 the flip chart for a moment?

7 THE COURT: Yes, you may.

8 MR. KUDLAC: Thank you.

9 Q. (By Mr. Kudlac) Can you see that, Mr. Little?

10 A. Yes, I can.

11 Q. Now, on the flip chart, we have what have
12 been labeled as some non-infringing uses. And I believe
13 No. 1 and No. 3 are using Word 2003 or 2007 to open a
14 dot doc or a dot dot, D-O-T, file having custom XML.

15 Do you see those?

16 A. Yes, I do.

17 Q. Can you give me an example of where a user
18 might want to open a dot doc or a dot dot file
19 containing custom XML in Word?

20 A. Sure. If you think about -- maybe you --
21 maybe a form that you fill out a lot, maybe it's a --
22 maybe it's an application, or maybe it's an inventory
23 form. It's something. It's got a lot of formatting.
24 It's got bold. It's got a lot of stuff in it that makes
25 it look good, but there's also data in the form.

1 It's -- it's really common for someone to
2 spend the time to make it look really good in Word and
3 mark it up with the XML tags and everything and then
4 save that as a template so that at any future time, the
5 next week, the next month, all you have to do is say,
6 please give me a new document based on this template,
7 and now you've got the form already there, and it's
8 already marked up for you.

9 Q. Why would a user want to save it as dot doc
10 or dot, D-O-T?

11 A. Well, for one, it's the format that they're
12 used to. It's the format they've been using for years.
13 It's faster than XML.

14 Q. What do you mean it's faster than XML?

15 A. Well, one of the reasons we went with binary
16 for so many years is because it's really fast to load.
17 It talks the same language as the computer.

18 XML is -- it's words; it's text. You have to
19 parse it. You have to understand all the parts of it.
20 It's slower, and it's -- sometimes it can be bigger.

21 Q. Are there any other reasons that you know of
22 that a user would want to save, in Word 2003 or Word
23 2007, in the dot doc or dot, D-O-T, format when they're
24 using custom XML rather than in dot XML or dot docx or
25 dot docm, I think we've seen, too.

1 A. Well, I mean, there's -- there's a lot of
2 reasons that especially companies and big companies
3 don't move to the new file formats or a different file
4 format, and that's because they're worried about the
5 people that they work with.

6 Sometimes in a big company, only parts of the
7 company will move to a new file format or something, or
8 maybe they're working with a customer or client that
9 only works in the doc format. So that's another couple
10 of reasons.

11 Q. Well, we've seen an example of Word 2007 as
12 it was -- as it's distributed in a box, and in here, is
13 there a DVD?

14 A. Yes.

15 Q. When Word 2003 or 2007 is distributed in a
16 box like that and on a DVD, is that DVD actually used
17 during the running of Word 2003 or 2007?

18 A. No, it's not.

19 Q. Well, why not?

20 A. Because you have to install from the DVD on
21 to your machine, you have to install the product
22 completely before you can run it.

23 Q. So you can't run it from the DVD?

24 A. No, you can't.

25 Q. Just a few more questions, Mr. Little.

1 There has been talk, as you've heard, about
2 some interaction between i4i and Microsoft. Before this
3 lawsuit, had you ever heard of Michel Vulpe or Stephen
4 Owens, the inventors on the '449 patent?

5 A. No, I hadn't.

6 Q. Before this lawsuit, had you heard of any of
7 the i4i products, such as S4/Desktop or S4/Text or
8 Tagless Editor?

9 A. No.

10 Q. Before this lawsuit, had you ever seen the
11 '449 patent?

12 A. No, I hadn't.

13 Q. One final question, Mr. Little. Who came up
14 with the Word source code and the design for Word 2003
15 and 2007, the custom XML functionality?

16 A. Me and my team did.

17 Q. Thank you, Mr. Little.

18 MR. KUDLAC: Your Honor, I have no
19 further questions. I would like to offer the marked up
20 Mac Word 5.1 and Word 6.0 board into evidence.

21 THE COURT: All right. What is the
22 number?

23 MR. KUDLAC: I believe 4.

24 THE COURT: Excuse me?

25 MR. KUDLAC: 4.

1 THE COURT: 4, Defendant's Illustrative
2 No. 4?

3 MR. CAWLEY: No objection.

4 THE COURT: All right. Admitted.

5 How long do you anticipate, Mr. Cawley?

6 MR. CAWLEY: Well, if the question, Your
7 Honor, is will I be through by noon, no. So 45 minutes.

8 THE COURT: Okay. I think we'll go ahead
9 and break for lunch then at this time.

10 Ladies and Gentlemen, we'll be in recess
11 for lunch until 1:00 o'clock. Please remember my
12 instructions that I've given you previously. Don't
13 discuss the case among yourselves or with anyone else.
14 See you at 1:00 o'clock.

15 COURT SECURITY OFFICER: All rise.

16 (Jury out.)

17 (Lunch 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