

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 19, 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

COURT SECURITY OFFICER: All rise for the jury.

(Jury in.)

THE COURT: Please be seated.
All right, good morning, Ladies and Gentlemen.

Ready to go back again today?

Okay. All right. We're going to go back with the evidence.

I did visit with the lawyers after you left yesterday, and I think that the evidence is going to move very promptly this morning. And we should, hopefully, be through with the evidence around the noon hour or a little after, something like that today. Then we will see where we are.

MR. CAWLEY: May we do our daily offer of exhibits, Your Honor?

THE COURT: Yes, you may.

And what number is --

MR. CAWLEY: 4. This is Plaintiffs' 4.

THE COURT: Plaintiff's Exhibit List No. 4. And it's cumulative?

MR. CAWLEY: Cumulative list of all

1 exhibits through today.

2 THE COURT: And you offer all of those on
3 there that have not been previously admitted?

4 MR. CAWLEY: Yes, Your Honor.

5 THE COURT: Any objection?

6 MR. CAWLEY: No.

7 MR. POWERS: No objection.

8 THE COURT: All right. Very good. Thank
9 you.

10 MR. POWERS: Your Honor, similarly, we
11 have a cumulative list today. And we only have one
12 exhibit, and none are objected to.

13 THE COURT: All right. And that will be?

14 MR. POWERS: 3 and 3A, I think.

15 THE COURT: 3 and 3A. All right. Very
16 well.

17 And you offer all of those that have not
18 been previously offered?

19 MR. POWERS: I do, Your Honor.

20 THE COURT: All right. And any
21 objection?

22 MR. CAWLEY: No, Your Honor.

23 THE COURT: All right. They are
24 admitted.

25 All right. You may proceed with your

1 next -- with the cross-examination, Mr. White.

2 STEPHEN GRAY, DEFENDANT'S WITNESS, SWORN

3 CROSS-EXAMINATION

4 BY MR. WHITE:

5 Q. Good morning, Mr. Gray.

6 A. Good morning.

7 MR. WHITE: Your Honor, may I approach
8 the easel?

9 THE COURT: Yes, you may.

10 Q. (By Mr. White) Mr. Gray, I'd like to start
11 this morning with my questions that go back to yesterday
12 regarding some testimony you gave about this poster,
13 this Plaintiffs' Exhibit 537, because there was
14 something you said that I was confused about.

15 I believe that you testified -- and I'm not
16 going to, perhaps, use the exact words you used -- but
17 something to the effect that the data elements CP first,
18 CP limit, and element info data elements that were shown
19 here in this -- this drawing, that you testified that
20 those -- that those data elements did not exist in
21 memory.

22 Do you recall that testimony, or were you
23 simply testifying that the way it's presented in this
24 drawing didn't exist in memory in that fashion?

25 A. I think what I testified to is the latter. I

1 believe that what I was intending to testify to anyway,
2 if I got it right, was to make the suggestion that the
3 three columns that are there, that generally -- or
4 frequently, as we've seen them in the past, have a red
5 box around them, that that data structure, as stated in
6 that way, did not exist in memory in that form.

7 Q. In that form, meaning they weren't side by
8 side in memory?

9 A. They weren't in the data structure in
10 memory -- in a declared data structure in memory that
11 contains those three columns in that form, yes. That's
12 what my intention was anyway.

13 Q. But your testimony is that the data elements,
14 CP first, CP limit, and element info did exist in memory
15 in the Word 2007 program, correct?

16 A. Leave at that with a slight -- just a slight
17 modification to it.

18 I don't believe that the data elements are
19 named CP first, CP limit, and element info; that they
20 have different names in the data structures that
21 represent the source for the data that is then in
22 this -- in this merged structures for display purposes.

23 Q. So your testimony was that that information
24 exists in the data structures within Word; it just
25 didn't exist in this form.

1 Is that your testimony?

2 A. With respect to the -- to the column in that
3 table that's labeled CP first and the column in that
4 table that's labeled CP limit, I think that's true.

5 In the Word 2003 and 2007 products, though,
6 in the column labeled element info, there's actually a
7 series of -- of pointers, I think, that I referred to
8 that need -- and actually, intervening software that
9 needs to be chased to enable the insertion of the data
10 into the -- what's labeled there as the element info
11 column in Words 2003 and 2007.

12 Q. Now, is it true, Mr. Gray, that there is a
13 one-to-one-to-one relationship between each -- the
14 elements in each one of those three data elements?

15 A. Well --

16 Q. In other words, one element will relate to an
17 element in the other data structure that would relate to
18 yet another element in the third data structure?

19 A. Again, let me just -- I think -- I think
20 we're going to probably agree at the end of this, but
21 let me just clarify a little bit.

22 There is a -- in the column that's labeled CP
23 first relates to the bookmark first structure. There is
24 a corresponding entry in what's referred to here as CP
25 limits and of another -- in the data structure called

1 CP -- I mean, bookmark last. And there is a
2 relationship between those.

3 That relationship needs to be -- or the data,
4 as it exists in memory, needs to be reorganized in order
5 to make this one-to-one relationship as it appears here,
6 because the order of those data elements in those data
7 structures is not as represented here.

8 I think we talked about that. Remember, we
9 had to reorganize the actual data elements themselves.

10 Q. But you're -- I'm sorry.

11 A. The third one is a little different. The
12 third one is the element info as labeled here, which is
13 the -- the -- the name of the tag is really what it's
14 intended to be.

15 In the case of Words 2003 and 2007, another
16 row in this -- in this table may also refer to a tag
17 name. So there's not a one-to-one-to-one; it's a
18 one-to-one-to-one-or-more relationship.

19 Q. Now, you understand that Mr. Little testified
20 in his deposition that there -- this is, quote,

21 QUESTION: Is there a one-to-one
22 correspondence between the entries in the PLC bkf field,
23 cbkl, and the hsttb tables, and the answer was yes.

24 So as far as the criticism that you had of
25 this representation of Dr. Martin, that there was not

1 necessarily a straight row-by-row-by-row relationship
2 between these three data elements; is that correct?

3 A. That's part of -- part of what I had said.
4 Could I -- if I could just go back to what Mr. Little's
5 testimony was about. Was it referring to Words --
6 Microsoft Word 6 and Mac Word 5, or was he referring at
7 that point to 2003 and 2007?

8 Q. I believe it was 2003 and 2007. But let's
9 move on. I want to ask you a question, if I could, sir,
10 about the bmds table that is shown here in this chart.

11 A. Yes, I see that.

12 Q. Now, that table is the result of a single
13 struct command in the C language in the Word 2007
14 program?

15 A. My recollection is that the bmds is a
16 structure in -- not a structure that sets in -- alone.
17 It is a -- my recollection is it is a structure that's
18 included within the DoD, but yes.

19 Q. So it is defined by a single struct command?

20 A. I believe that's the configuration. I don't
21 remember specifically if those are the exact four data
22 elements within that structure. But if you represent
23 that it is, I presumed that you've looked at it.

24 Q. I'm asking you, Mr. Gray. Is it or isn't it?

25 A. My memory just doesn't serve me as to whether

1 or not it's specifically that way, but it looks -- that
2 looks familiar to me, that it would be, yes.

3 Q. Well, I listened very intently yesterday,
4 Mr. Gray, regarding your testimony on this exhibit as to
5 whether you had an opinion that Dr. Martin made any
6 mistakes in his representation of the relation -- the
7 elements and the relationships that are depicted on this
8 figure.

9 And I don't believe you said there were any;
10 is that correct?

11 A. I don't recall having stated that there are
12 any mistakes in that there are any inaccuracies in
13 the -- in Figure 12. However, I don't know that I've
14 ever made a detailed evaluation of Figure 12 to say
15 that.

16 But I don't think yesterday that I testified
17 that I recollected any mistakes or errors in the
18 analysis.

19 Q. And so the jury can rely upon the accuracy of
20 this drawing for the contentions and the evidence that
21 i4i has presented to the Court in this litigation,
22 correct?

23 A. Well, again, with the proviso -- and I think
24 this is an important one -- that the configuration of
25 the merged structures for display purposes as depicted

1 here has some implications that I think I -- I don't
2 necessarily agree with.

3 But in terms of the way the data structures
4 and representations from -- from the code itself, I
5 think that -- that part of it's accurate. There's just
6 some implications regarding that one table that we've
7 spoken about at length, I think, that I have some
8 reservations about the implications there.

9 MR. WHITE: All right. Could I have
10 Slide 1?

11 Q. (By Mr. White) Mr. Gray, I want to talk to
12 you about the issue of data structure. There's been a
13 lot of testimony about that, and I have here a slide of
14 the Court's claim construction for the term map of
15 metacode.

16 And in the definition that the Court
17 provided, it used a term of art called data structure.
18 And the meaning of that term has become a disputed issue
19 regarding your expert opinion and that of Dr. Rhyne.

20 Do you agree?

21 A. We've had a lot of conversation about the
22 term data structure, I agree.

23 Q. Now, in connection with the term that was
24 construed by the Court, map of metacodes, the term data
25 structure doesn't appear anywhere in the claims,

1 correct?

2 A. I think that's accurate.

3 Q. It's -- it's only that the definition
4 provided by the Court included this term -- this term of
5 art, data structure, that -- that we find the data
6 structure as part of map of metacodes; is that correct?

7 A. I think that the -- that the claims or the
8 specification, I know, refers to structure, and so, I
9 think perhaps the term data structure itself is
10 introduced by the Court's claim construction.

11 Q. Now, the Court -- you looked at the Court's
12 claim construction order, correct?

13 A. Yes, I have.

14 Q. And you see that the Court did not provide a
15 definition to the parties of the meaning of the term
16 data structure to guide it in connection with the work
17 that it did in this case, right?

18 A. Would you ask that again?

19 Q. The Court did not provide a definition to the
20 parties of what the meaning of data structure was in its
21 order, correct?

22 A. I believe that is correct. And the order
23 doesn't -- doesn't specifically define what the term
24 data structure is -- is defined as. I think that's --

25 Q. Do you understand that when the Court

1 construed this term map of metacodes, that it was
2 required to give the -- the ordinary and customary
3 meaning to the term that a person of ordinary skill in
4 the art would understand those term -- that term to
5 mean?

6 Do you understand that?

7 A. I think that's true, yes.

8 Q. So in deciding on what is the appropriate
9 definition for the term data structure, which is part of
10 the definition, that you should determine what a person
11 of ordinary skill in the art at the time this invention
12 was made would understand that term to mean, correct?

13 A. Yes, that's --

14 Q. And that guided you in your efforts to try to
15 determine what you thought data structure meant to that
16 person of ordinary skill; is that correct?

17 A. I think part of what -- what I did was to
18 identify the term data structure, and I used -- tried to
19 use that term data structure as one -- a person of
20 ordinary skill in the art would use it in my analysis,
21 yes.

22 Q. All right. Now, you know that -- that the --
23 although the Court didn't give us a specific definition
24 of data structure, it did tell us who this person of
25 ordinary skill in the art was.

1 MR. WHITE: If I could have my next
2 slide.

3 Q. (By Mr. White) In fact, I believe that you
4 gave some testimony yesterday that you were aware of the
5 Court's definition of what a person of an ordinary
6 skill -- who he was and that you relied on that
7 definition in some of your opinions, correct?

8 A. I did say that yesterday in my --

9 Q. Well, here is the Court's definition. It
10 says that a person of ordinary skill in the art would
11 have a bachelor of science degree in computer science or
12 electrical engineering with an emphasis on computer
13 systems, in addition to two to three years of
14 programming experience.

15 And that's the definition that guided you
16 when you developed or adopted your definition of what a
17 data structure meant, correct?

18 A. Yes, that's true.

19 Q. All right.

20 MR. WHITE: Now, can I have my next
21 slide?

22 Q. (By Mr. White) Here, I want to show you
23 Dr. Rhyne's qualifications, and you saw this in
24 connection with his direct testimony that Dr. Rhyne is
25 someone who holds three degrees in electrical

1 engineering and over 50 years of practicing as an
2 electrical engineer.

3 And you -- you will agree that within the
4 field of electrical engineering that the IEEE standard
5 dictionary of terms is an authoritative source for
6 people working in the electrical engineering field to
7 reference when they need to know the definition of
8 something, correct?

9 A. Yeah. The IEEE dictionary is one that people
10 who have degrees, for example, in electrical engineering
11 might rely upon, yes.

12 Q. And Dr. Rhyné referenced the IEEE standard
13 dictionary of electrical and electronic terms and found
14 that there was a definition for the term data structure,
15 and there's a parenthetical here that says it is
16 applicable to the software industry.

17 And we're -- we're dealing with software
18 programs here, correct?

19 A. Yes, we are.

20 Q. And so he -- the definition provided there
21 says a physical or logical relationship among data
22 elements designed to support specific data manipulation
23 functions.

24 Do you see that?

25 A. I do.

1 Q. Now, you were in the courtroom when Dr. Rhyne
2 gave his direct testimony, and he explained how
3 definitions such as this one come into existence in the
4 IEEE standard dictionary, correct?

5 A. I wasn't in Court when he made that
6 explanation.

7 Q. And he explained that scientists and
8 engineers from all over the world or all over the
9 country come together to meet and try to determine and
10 come up with clear, concise, unambiguous definitions of
11 terms that can, once it be agreed on, can become a part
12 of this dictionary; is that correct?

13 A. Yes. I think the word you used there is try,
14 and that's -- that's correct.

15 Q. Do you agree that this is an authoritative
16 dictionary for someone working in the electrical
17 engineering field?

18 A. I do.

19 Q. In fact, you have relied upon the IEEE
20 dictionary in connection with opinions that you have
21 given in other litigations as an expert; is that
22 correct?

23 A. I -- I presume so. I'm not sure. I don't
24 recollect vividly sitting here right now, but I presume
25 that to be the case.

1 Q. Well, do you recall testifying in your
2 deposition?

3 MR. WHITE: If I could have a copy of
4 Mr. Gray's deposition.

5 Q. (By Mr. White) If I could refer, Mr. Gray, to
6 Page 142 of your deposition to Line 15 of that
7 deposition.

8 You were asked the question: Have you ever,
9 in your work as an expert, had occasion to reference any
10 of the IEEE technical dictionaries?

11 ANSWER: I think I have.

12 QUESTION: Have you ever cited them to
13 support your opinions?

14 ANSWER: Yes. I remember in a matter a
15 while back using a definition from the IEEE dictionary
16 in at least one of the previous opinions that I had.

17 Is that accurate, Mr. Gray?

18 A. Yeah. The question you asked me a moment ago
19 is, do I remember, and I said, yeah, I presume so. But
20 I couldn't remember vividly sitting here right now which
21 one it was.

22 Q. But in connection with this case, you have
23 chosen not to use the definition from the IEEE standard
24 dictionary for the term data structure, because you find
25 it to be ambiguous; is that correct?

1 A. I think that there is some ambiguity. I
2 think in my deposition testimony, I suggested that there
3 was some ambiguity with respect to this particular
4 matter.

5 Q. So you chose not to adopt it, and although
6 you did agree that -- that it was okay for people in the
7 IEEE, but it just wasn't okay for you in this case; is
8 that correct?

9 A. Well, one of the things that has been --

10 Q. Is that correct, Mr. Gray, or not? Did you
11 so testify?

12 A. Say -- then ask me the question again,
13 please.

14 Q. I said you felt that the definition in the
15 IEEE was okay for people in the IEEE, but it was not
16 okay for you; is that correct?

17 A. I believe in my deposition that I said that
18 the IEEE definition was created by people in the IEEE,
19 yes.

20 Q. And that you were not going to adopt that
21 definition for the definition you were going to apply,
22 when you formed your opinions regarding non-infringement
23 in this case, correct?

24 A. I don't believe that I have applied this
25 definition for the term data structure in my analysis.

1 Q. In fact, you said you tried -- you have
2 something different at Page 144 of your deposition, at
3 Line 5. Beginning at Line 5, you were asked: You said
4 you used something different. What did you use? What
5 do you use?

6 ANSWER: To me, data structure is
7 something that has been declared that contains -- a
8 declared structure that contains the data. That is, the
9 data struct. That is the idea of a data structure that
10 I used.

11 So this is the definition you applied to the
12 term data structure as representing what a person of
13 ordinary skill in the art in the electrical engineering
14 field would understand data structure to mean; is that
15 correct?

16 A. Again, I think about it as a programmer and a
17 programmer --

18 Q. Is that true or not, Mr. Gray?

19 A. And as a programmer, I think about it in
20 terms of a data structure with the data elements in it.
21 That was -- that was the response that I was giving
22 there.

23 Q. But that's the definition you applied to the
24 term data structure in forming your opinions on
25 non-infringement, correct?

1 A. That's the way I think about it, yes.

2 Q. So you were thinking about it the way you
3 think about it as a programmer, but not as the way a
4 person of ordinary skill in the art would understand it,
5 as you're required to do so under the law; is that
6 correct?

7 A. Well, I think that the inference you're
8 drawing is that a person of ordinary skill in the art
9 would necessarily rely upon the IEEE definition.

10 Q. Mr. Gray, can I get an answer to my question;
11 yes or no?

12 A. I gave you -- I tried to answer your
13 question. I'm sorry if I didn't answer it.

14 Q. In connection with the definition that you
15 adopted, you adopted what you thought it meant as
16 opposed to what a person of ordinary skill in the art
17 would understand the term to mean in forming your
18 opinions of non-infringement; is that correct; yes or
19 no?

20 A. No, I don't think so.

21 Q. So the term of this single struct, you
22 believe that that's how a person of ordinary skill in
23 the art would understand that term?

24 A. I think that's one of the definitions that
25 they may very well use.

1 Q. You didn't cite any authority for that
2 definition in connection with your opinion; is that
3 correct?

4 A. I believe that's correct.

5 Q. Now, in connection with the opinions that you
6 have submitted in this case, you listed a number of
7 documents that you reviewed prior to the time you formed
8 your opinions, correct?

9 A. Yes, I did.

10 Q. And in that list, a very long comprehensive
11 list, you listed all of the Markman briefs, all the
12 claim construction briefs submitted by the parties in
13 connection with the claim construction phase of this
14 case, including having reviewed the transcript from the
15 claim construction hearing held in this very courtroom;
16 is that correct?

17 A. I believe that's accurate, yes.

18 Q. And you considered the content, the
19 information that was contained in all of that -- of
20 those documents before you adopted your opinions; is
21 that correct?

22 A. I -- yes, that's -- that's an accurate
23 statement.

24 Q. And you had the opportunity to consider
25 everything that was provided in those documents in, for

1 example, determining what a person of ordinary skill in
2 the art would understand a data structure to mean,
3 correct?

4 A. That's an accurate statement, I think.

5 MR. WHITE: Can I have my next slide,
6 please?

7 Q. (By Mr. White) I have here, Mr. Gray, an
8 excerpt from the transcript of the hearing that was held
9 on claim construction in this Court in which
10 representatives from Microsoft and representatives from
11 i4i argued to the Court their proposed definitions for
12 these terms, specifically map of metacode.

13 Do you recall reviewing this portion of the
14 transcript?

15 MR. KUDLAC: Your Honor, I'm going to
16 object to the question. It's not a precise definition,
17 and it does not show the complete statement that was
18 made by me, which was a comment on the data structure.
19 It doesn't show the totality of what was stated at the
20 hearing, and it was not a definition.

21 THE COURT: Overruled.

22 Q. (By Mr. White) Now, you read this before you
23 formed your opinion of what data structure meant; is
24 that correct, Mr. Gray?

25 A. I recollect having reviewed this, yes.

1 Q. And in connection with the Court asking the
2 representative from Microsoft, the Court: Is there a
3 difference between distinct storage and, quote, data
4 structure, end quote?

5 And in response counsel responded that:
6 Well, yes, Your Honor. The distinct storage, as we will
7 hear later, there are numerous elements -- numerous
8 claim limitations that talk about distinct storage
9 means. That is something that will be addressed
10 separately.

11 Then he goes into an explanation of what a
12 data structure is. A data structure is simply, in a
13 sense, a construct, things that are organized in such a
14 way that they are related to each other and addressed as
15 a single entity or can be addressed as a single entity.

16 It is a very high-level description of what
17 a, quote, data structure is; but a, quote, data
18 structure, end quote, is, in a sense, a collection of
19 pieces of data that are organized in a particular way.
20 They can be -- of course, a data structure can be stored
21 in numerous different places.

22 Do you see that?

23 A. Yes, I do.

24 Q. And in forming your definition of what a
25 person of ordinary skill in the art would understand the

1 term data structure to mean, which was precisely the
2 statement made by Microsoft's counsel to the Court to
3 convince the Court that's what a person of ordinary
4 skill would understand, you chose not to -- to adopt
5 this particular definition; is that correct?

6 A. I don't think the definition that I've chosen
7 is contrary to this or deviates from this.

8 Q. The part about the data structure is, in a
9 sense, a collection of pieces of data that are organized
10 in a particular way, you didn't include that as part of
11 your definition, did you?

12 A. I don't find that inconsistent with the way I
13 think about a data structure.

14 Q. Now, the term that we're talking about here
15 is map of metacodes, what is the map of metacodes, and
16 it seems to center around the meaning of what a data
17 structure is, as far as your opinions of
18 non-infringement; is that correct?

19 A. That's one of the -- one of the areas, yes.

20 Q. And it's your opinion that because data
21 structure has this single construct definition that
22 you've applied to it, that you have found
23 non-infringement, because the word data structures that
24 support custom XML are comprised of many data
25 structures, individual data structures; is that correct?

1 A. Well, I think that the representation that's
2 on from Figure 12, which -- which is, again, doesn't
3 exist in memory and is actually labeled as merged
4 structures for display purposes, is not a data structure
5 as the way -- the way I look at it.

6 Q. Now, you heard the opening in which counsel
7 suggested to the jury that it should look very closely
8 at what i4i is going to tell the jury -- jury as its
9 side of the case.

10 Do you recall that?

11 A. I do.

12 Q. And, in fact, it showed this photograph of
13 what appeared to be two similar objects, only to turn
14 out, when closer inspection, one was the Great Wall of
15 China.

16 Do you remember that?

17 A. I do.

18 Q. Well, let's -- let's flip that around and
19 let's try to take a look at all the information that's
20 been presented by Microsoft regarding its explanation of
21 the word data structures as to whether or not the map of
22 metacodes may be found there.

23 MR. WHITE: And I'd like to have the next
24 slide.

25 Q. (By Mr. White) Mr. Gray, I have a figure here

1 that shows putting it altogether, putting all the
2 information that is contained in the various data
3 structures and data elements of the Word program.

4 And you will recall that in the '449 patent,
5 there's a simple SGML example of a document called the
6 Secret Life of Data.

7 A. Yes, I remember that.

8 Q. And you remember it had some -- some simple
9 SGML tags embodied in the content stream?

10 A. I do recall.

11 Q. Yes. And in this figure -- well, by the way,
12 Mr. Gray, do you recognize this figure?

13 A. This chart?

14 Q. This chart, yes.

15 A. Yes, I do -- I think I do.

16 Q. And what is it?

17 A. I think, if I'm not mistaken, that this is a
18 chart that was presented yesterday in -- in -- in my
19 testimony; I think in Mr. Little's testimony as well.

20 Q. Is this a -- a figure from your expert
21 report?

22 A. I don't recollect if it's a figure from my
23 expert report or not.

24 Q. Well, you recognize the tags in here
25 chapter -- or I should say the element names chapter,

1 title, para?

2 A. Yes, I do.

3 MR. WHITE: Could I have Mr. Gray's
4 expert report regarding non-infringement, Exhibit 3?
5 It's at Page 24 of your report.

6 Q. (By Mr. White) There appears to be a -- this
7 Figure 25, which shows the element name and the CP, and
8 then down below, there is the mapped content of the --
9 the internals of Microsoft Word for the Secret Life of
10 Data.

11 Do you see that?

12 A. Yes, I do.

13 Q. My next slide, Dr. Gray, I've taken your
14 chart, which supposedly represent the in-memory
15 representation of the data from the processing of that
16 simple input SGML document, the Secret Life of Data.

17 Now, I've shown beside your chart, Column 10,
18 the metacode map out of the '449 patent. And if you'll
19 notice, sir, this -- they're almost identical. You
20 notice that there is the element name in your chart and
21 that there's an element name in the preferred
22 embodiment.

23 Do you see that?

24 A. I see what you've highlighted here, yes.

25 Q. And do you see the end, the element name of

1 your figure, there's chapter, title, para, chapter; as
2 in the element column out of the metacode map in the
3 patent, there's chapter, title, title.

4 Do you see that?

5 A. Yes, I do.

6 Q. In fact, if I go down through the comparison,
7 I can show that each of the metacodes that are contained
8 in your chart, the element names are found in the
9 element names of the '449 patent.

10 And you agree, sir, that the chart you show
11 in your expert report of the in-memory representation of
12 the processing of the very same input SGML document
13 produces the identical SGML -- I'm sorry -- metacode
14 map, correct?

15 A. It produces a metacode map that contains the
16 same element names and not exactly the same addresses,
17 but -- but yes.

18 Q. But the addresses of the CP, the character
19 position, for both of them map to the mapped content
20 representation in memory of their respective
21 embodiments.

22 The word embodiment on the left and the
23 word -- I mean, the patent embodiment on the right,
24 correct?

25 A. I think that's accurate, yes.

1 Q. Let's talk quickly about metacodes.

2 MR. WHITE: If I could have my next
3 slide, please.

4 Q. (By Mr. White) The Court construed the term
5 metacodes as an individual instruction which controls
6 the interpretation of the content of the data.

7 Do you see that?

8 A. Yes, I do.

9 Q. And in connection with your opinion, you have
10 added to that definition the requirement that each
11 metacode must include the delimiter characters left
12 angle bracket, right angle bracket, correct?

13 A. I suggested that an individual instruction
14 includes the opening and closing brackets, yes.

15 Q. I think it's more than just a suggestion,
16 Mr. Gray.

17 Doesn't it form the basis of your opinion
18 that Microsoft Word doesn't infringe, because in its
19 in-memory representation, it doesn't store the left
20 angle bracket and the right angle bracket with each one
21 of the tag names? Is that correct?

22 A. That's accurate.

23 Q. So it's not just a -- it forms the foundation
24 of your opinion, correct?

25 A. Yes.

1 Q. Okay. Now, in this definition the Court
2 gave, the Court did not expressly require that the angle
3 brackets of the tags were part of the metacode, did it?

4 A. It did not -- it did not identify the angle
5 brackets. It used the term individual instruction.

6 Q. It did not make it an express requirement of
7 that definition, correct?

8 A. It did not identify the angle brackets. It
9 says instruction.

10 Q. But you testified just a moment ago you read
11 all the Markman briefs; you read all of the transcript
12 of the hearing, so you know what the parties argued; you
13 know what the Court heard in oral argument; and that the
14 content of --

15 MR. WHITE: Can we go back to the
16 previous slide?

17 I'm sorry. I meant to go to the forward
18 slide. I'm sorry. The next slide. The next slide,
19 please.

20 Q. (By Mr. White) That in the Markman process,
21 the claim construction process, the parties argued
22 extensively what was contained in the metacode map and
23 whether the information contained in the metacode map
24 should be made a part of the Court's constructions.
25 And you saw that when you read the transcript and the

1 briefs, correct?

2 A. I know that it's been -- yes, I know it was
3 argued.

4 Q. So there was extensive presentation to this
5 Court that whether or not we should take something out
6 of this map and then pose it as a requirement of the
7 claims.

8 And in connection with the Court's
9 construction of metacode, it had all of that information
10 before it and chose not to include the left angle
11 bracket and the right angle bracket as part of the
12 metacode, correct?

13 A. I think I disagree with that statement. I
14 think yesterday, in my testimony, what I suggested was
15 that the opening angle bracket and the closing angle
16 bracket is what elevates -- for example, on the
17 right-hand side here -- the term chapter to that of
18 being an instruction.

19 That's -- that's what I was intending to --
20 that's what I'm trying -- tried to convey yesterday.

21 Q. As I understand, that's what you did. I'm
22 suggesting to you that the Court was presented with that
23 very same issue, and it chose not to include it as an
24 express requirement of the definition of metacode, but
25 that didn't stop you.

1 You went back to Figure 1 or back to
2 Column 10, and you said, well, looky there, I can see
3 that those right angle brackets, left angle brackets
4 were included in this preferred embodiment, so I'm going
5 to make it an express requirement, correct?

6 MR. KUDLAC: Your Honor, may we approach?

7 THE COURT: Yes, you may.

8 (Bench conference.)

9 MR. KUDLAC: I apologize for the
10 interruption. Mr. White is wrong, that it was never,
11 ever a question as to whether the angle brackets were
12 required to be included.

13 The argument there for metacode was it
14 came right out of the specification. There is a line in
15 the specification that says an individual instruction
16 that controls the interpretation of the content of the
17 data. And there's a parenthetical or a comma separating
18 it that said, i.e., it differentiates the content.

19 That's all that was argued at the Markman
20 hearing, whether that would be part of the definition of
21 metacode or not. The question of angle brackets and
22 slashes never once came up. Not once.

23 THE COURT: What's your point?

24 MR. KUDLAC: He's misrepresenting the
25 record.

1 THE COURT: You can handle it on cross.

2 (Bench conference concludes.)

3 MR. WHITE: Thank you, Your Honor.

4 Q. (By Mr. White) Now, my question: When you
5 decided to determine what a metacode meant, you went
6 back to this metacode map figure at the top of
7 Column 10, and there you found the angle brackets.

8 And so you have now developed this position
9 that metacode, in addition to it being an individual
10 instruction which controls the interpretation of the
11 content of the data, also includes the delimiter
12 characters, correct?

13 A. I think that's an accurate statement.

14 MR. WHITE: I believe I may have used up
15 all of my time. I pass the witness.

16 THE COURT: Thank you.

17 Is there any redirect?

18 MR. KUDLAC: No, Your Honor. Thank you.

19 THE COURT: All right. You may step
20 down.

21 All right. Who will your next witness
22 be?

23 MR. TORCHIA: Your Honor, we have some
24 video to play.

25 THE COURT: All right. Who is going to

1 be your first witness?

2 MR. TORCHIA: We will be playing
3 deposition testimony from Donald Cowan.

4 THE COURT: Donald Cowan?

5 MR. TORCHIA: Yes. Mr. Cowan was a -- or
6 is a professor at the University of Waterloo in Ontario,
7 and he has testimony relating to the Rita prior art.

8 THE COURT: Related to what?

9 MR. TORCHIA: To the Rita prior art
10 reference.

11 THE COURT: All right. And how long is
12 his deposition?

13 MR. TORCHIA: I think it's about 10
14 minutes, Your Honor. I can find the exact time for you.
15 It is 14 minutes, Your Honor.

16 THE COURT: All right. I believe about
17 10 minutes of that is Microsoft and about 5 is i4i's; is
18 that right?

19 MR. TORCHIA: Yes, Your Honor.

20 THE COURT: All right. Proceed.

21 MR. TORCHIA: Before we start the tape,
22 with Your Honor's permission, I will read into the
23 record some trial exhibit numbers that correspond with
24 the deposition exhibit numbers that the jury is going to
25 hear in the tape.

1 THE COURT: All right.

2 MR. TORCHIA: So Deposition Exhibit
3 No. 252 is Trial Exhibit No. 2074; Deposition
4 Exhibit 253 is Trial Exhibit No. 2075; Deposition
5 Exhibit 255 is Trial Exhibit No. 2076; Deposition
6 Exhibit 258 is Trial Exhibit No. 2078.

7 (Video playing.)

8 QUESTION: Good morning, Dr. Cowan.

9 ANSWER: Good morning.

10 QUESTION: Can you state and spell your
11 name for the record.

12 ANSWER: My name is Donald, D-O-N-A-L-D,
13 Douglas, D-O-U-G-L-A-S, Cowan, C-O-W-A-N.

14 QUESTION: And how long had you worked
15 for the University of Waterloo?

16 ANSWER: Since September 1960.

17 QUESTION: When did you hold a position
18 with Watcom?

19 ANSWER: It was in the '80s. Again, I
20 would have to go to my CV to figure out the exact
21 timing, but it was sort of mid-'80s, early to mid-'80s,
22 maybe late '80s.

23 QUESTION: Very good.

24 Did Dr. Riel Smit then -- was he the one
25 that actually wrote the code for Rita?

1 ANSWER: He wrote the original code for
2 Rita. Again, I -- I cannot recall the details, but I'm
3 sure we did other changes after he left. But he wrote
4 the original system.

5 QUESTION: Okay.

6 ANSWER: I supervised his thesis, okay,
7 meaning that I guided him and made sure his presentation
8 was appropriate. I did not write any code.

9 QUESTION: Okay. Did you have any
10 involvement in any changes that Rita may have undergone
11 after that?

12 ANSWER: No. No. Other than perhaps
13 advising, but I had certainly no -- I did not write
14 code.

15 QUESTION: And did you have any
16 involvement with -- with Dr. -- Dr. Riel Smit's work on
17 the Rita class generator?

18 ANSWER: Again, I supervised, if you
19 will, in the sense of he worked with me and with other
20 people in our research group, but I did not write any
21 code.

22 QUESTION: Do you know -- do you know how
23 many versions of Rita exist or existed?

24 ANSWER: More than one, but, again, I
25 can't tell you for sure exactly. You know, as I say,

1 that's over 20 years -- over 20 years ago.

2 QUESTION: So is -- am I correct to
3 understand that you don't know what changes were made
4 during the various versions of Rita?

5 ANSWER: I don't remember. At the one
6 time, I would have known, but I do not remember now.

7 QUESTION: Today you don't --

8 ANSWER: No.

9 QUESTION: -- you don't know?

10 In supervising Dr. Riel Smit's work, did
11 you ever look at the source code for Rita?

12 ANSWER: I don't remember whether I did
13 or not.

14 QUESTION: Why did you look at the Rita
15 source code recently?

16 ANSWER: I was approached by the lawyer
17 on my right -- well, actually, his colleague, and -- by
18 the firm represented by the lawyer on my right as to
19 whether we had -- was -- was Rita what we claimed it was
20 in the literature.

21 And I went back and recovered that code
22 from the archives and had a quick look at it to make
23 sure, for instance, that it was complete. We have an
24 archive of our code, and, you know, as time goes by,
25 sometimes archives get forgotten, as you can appreciate.

1 In our case, they're -- the archives are pretty good.
2 And so we were just recovering it from the archive to
3 make sure it was a complete set.

4 QUESTION: How did you verify that it was
5 a complete set?

6 ANSWER: I ran it.

7 QUESTION: Okay.

8 ANSWER: And then I looked at the code
9 itself, and I consulted with Mr. Smit to make sure that
10 it seemed -- seemed complete.

11 QUESTION: When you say you ran it,
12 did -- you mean you ran an executable version --

13 ANSWER: I -- I --

14 QUESTION: -- or you compiled --

15 ANSWER: Yeah, I ran an executable
16 version. I did not compile it.

17 QUESTION: You did not compile the source
18 code?

19 ANSWER: I did not compile the source
20 code, because the source code, of course, had been
21 compiled in the past. That's why we had an executable.

22 QUESTION: So in the archive, not only
23 did you have the source code, but you also had an
24 executable version?

25 ANSWER: We had -- yeah, that's it.

1 QUESTION: Did -- did you look at the
2 source code to see how the program operated at source
3 code level?

4 ANSWER: No, I did not.

5 QUESTION: To -- just to try to take a
6 little bit of a shortcut here, if I asked you questions
7 about how Rita worked at a source code level, do you
8 think you would be able to answer those questions?

9 ANSWER: Hmmm, not at this time in my
10 life, no. I might have been able to answer them 20
11 years ago.

12 QUESTION: Are you familiar with
13 Microsoft's relationship with the University of
14 Waterloo?

15 ANSWER: Not -- I mean, Microsoft does
16 have a relationship with the University of Waterloo, as
17 Bill Gates makes his tours about every two or three
18 years, and the only Canadian university he stops at and
19 speaks at is the University of Waterloo.

20 I am not part of any of those
21 relationships, so I don't have any idea about, you know,
22 what -- they are, obviously -- I'm sure they fund people
23 to do research. They don't fund me, okay?

24 QUESTION: So you located the source code
25 for Rita on the research lab's archive?

1 ANSWER: Yeah. Actually, I asked one of
2 my colleagues to do it for me, Mr. Mulholland, whose
3 name you already have --

4 QUESTION: Right. Okay.

5 ANSWER: -- and say within 10 to 30
6 minutes, I would -- I had it.

7 QUESTION: Okay. So Mr. Mulholland
8 located the --

9 ANSWER: Yeah.

10 QUESTION: -- source code for Rita on the
11 research lab's archives and provided it to you?

12 ANSWER: Yeah.

13 QUESTION: And then you provided it to
14 Microsoft's counsel; is that correct?

15 ANSWER: That is correct.

16 QUESTION: Have you ever provided the
17 source code for Rita to anyone else?

18 ANSWER: No.

19 QUESTION: Do you generally give out
20 source code to anyone that asks?

21 ANSWER: No.

22 QUESTION: A slightly different question.
23 Are you aware of anyone having access to the Rita source
24 code other than the University of Waterloo employees,
25 the research lab, yourself, Dr. Riel Smit, and now

1 Microsoft?

2 ANSWER: No. Okay. Now, just to make
3 sure, our research employees at the University of
4 Waterloo.

5 QUESTION: And what -- generally, what is
6 the purpose of the Rita software application?

7 ANSWER: When you create a document, you
8 have to identify the different sections of the
9 document -- when you create a document -- sorry -- for
10 computer processing, I should explain, you have to
11 identify the sections of the document so that when you
12 feed it into the computer, the -- the processing -- what
13 processing has to go on will be understood.

14 The thing is, you have to mark those
15 sections with what we call tags, and tagging can be a
16 very tedious and error-prone process. So the objective
17 of Rita was to allow the -- to support the correct
18 insertion of these tags.

19 QUESTION: Thank you.

20 Dr. Cowan, I am going to hand you what I
21 will mark as Defendants' Exhibit 252. Let me start
22 over. We have to go from the beginning.

23 ANSWER: This looks like the disk that we
24 sent to your firm with the Rita software on it, and
25 certainly, the writing up in my corner -- up in this

1 corner looks like my writing.

2 QUESTION: Do you know what version of
3 Rita was provided to Microsoft on Defendants' Exhibit
4 252?

5 ANSWER: Frankly, I forgot to look, but
6 if you want to know, it's very easy. You just look in
7 the box that comes -- you know, every piece of software
8 has one, and it will tell you.

9 QUESTION: Was the Rita software provided
10 to Microsoft in Defendants' Exhibit 252, was that Rita
11 software offered for sale?

12 ANSWER: Yes, it was offered for sale in
13 the -- oh, roughly, about late '80s, early '90s and
14 beyond.

15 QUESTION: Who offered the software for
16 sale?

17 ANSWER: We -- the computer systems group
18 made an arrangement with a company called Watcom
19 Products, which was part of Watcom, to market and
20 distribute the software. So the computer systems group
21 originated the software. The software was then passed
22 over to them for sale and distribution.

23 QUESTION: And, Dr. Cowan, I'm going to
24 mark Defendants' Exhibit 253, and it has Bates labels
25 MS-i4i00702231 through MS-i4i00702255.

1 Dr. Cowan, do you recognize this
2 document?

3 ANSWER: Yes. It is a copy of a paper
4 that was published in Electronic Publishing 1991.

5 QUESTION: At the time you wrote this
6 document, was it an accurate and faithful representation
7 of your understanding of the particular aspects of the
8 Rita software application?

9 ANSWER: Yes, it certainly was. And of
10 course, it was reviewed -- I was a primary author, but
11 it was reviewed, obviously, with the other authors who
12 contributed to it in various ways.

13 QUESTION: Dr. Cowan, I'm going to hand
14 you what I've marked as Defendants' Exhibit 255.
15 Dr. Cowan, it bears the Bates label MS-i4i01013585
16 through MS-i4i01013595.

17 Dr. Cowan, do you recognize this
18 document?

19 ANSWER: Yes. This was a -- the previous
20 document we discussed, it's this document -- that
21 document formatted and laid out for an internal report
22 series that was produced by the Department of Computer
23 Science at the University of Waterloo. And as the date
24 shows there, this was published in 1990 and was No. 35
25 in a series.

1 Now, these were internal in the sense
2 that they were not refereed by anybody. They were
3 external in the sense that they were accessible to
4 anybody in the world who wanted to have a copy.

5 QUESTION: Dr. Cowan, I'm handing you
6 what I have marked as Defendants' Exhibit 256, Bates --
7 bearing Bates label MS-i4i00702257 through
8 MS-i4i00702373.

9 Dr. Cowan, do you recognize this
10 document?

11 ANSWER: Yes. This is -- as it says on
12 the cover, the document -- reference document for the
13 Waterloo Rita document class generator, which is the --
14 allows us to define a document type, which can then be
15 given to the Rita structured editor.

16 QUESTION: Is Defendants' Exhibit 256
17 the -- a copy of the version that you provided to
18 Microsoft?

19 ANSWER: Yes.

20 QUESTION: And where did you get this --
21 where did you get Defendants' Exhibit 256?

22 ANSWER: This version I received from
23 Mr. Pianosi, the author, who had it stored in a box at
24 home.

25 QUESTION: Dr. Cowan, I'm handing you

1 what I have marked as Defendants' Exhibit 258 bearing
2 Bates label MS-i4i00701648 through MS-i4i00701830.

3 Dr. Cowan, do you recognize this
4 document?

5 ANSWER: This is a search report
6 published by the Computer Science Department at the
7 University of Waterloo, which was actually a copy of
8 Riel Smit's Ph.D. thesis. Quite often, we would take a
9 Ph.D. thesis and publish it as a research report.

10 QUESTION: When was this document --
11 Dr. Cowan, excuse me.

12 When was -- when was Defendants' Exhibit
13 258 written?

14 ANSWER: The thesis was written over the
15 period of late '86 to early '87. If I remember
16 correctly, it was defended in March of 1987, and then we
17 eventually published this version. The hard copy
18 thesis, of course, was published in March/April 1987.
19 That's part of the University regulations.

20 QUESTION: Dr. Cowan, do you remember
21 what features you may have added after this document was
22 written in 1990?

23 ANSWER: I don't think we added any, but
24 I can't be sure of that.

25 QUESTION: Dr. Cowan, with regard to the

1 Rita source code, at that time, what kind of changes
2 were you making after 1992 to the Rita source code?

3 ANSWER: Primarily, fixing bugs and
4 performance improvement as --

5 QUESTION: Dr. Cowan --

6 ANSWER: -- as opposed -- sorry -- as
7 opposed to providing brand new features.

8 QUESTION: Dr. Cowan, I'm handing you
9 what I have marked as Defendants' Exhibit 260 bearing
10 Bates range MS-i4i01009288 through MS-i4i01009305.

11 Dr. Cowan, do you recognize what is
12 contained in this document?

13 ANSWER: Hmmm, you know, some of them are
14 a little different than others, but, basically, they're
15 all fairly consistent.

16 What these are, are letters to groups
17 that purchase what we -- what was known as the
18 information workbench, and one of the components of the
19 information workbench was the Waterloo Rita document
20 editor.

21 So the -- specifically, the information
22 workbench was sold, or shall we say, made available for
23 sale across North America. The -- these -- it was sold
24 to -- through the Ontario -- through a contract with the
25 Ontario government to schools in Ontario, high schools

1 in Ontario, and it was also made available in other
2 provinces, and I know that there was at least some
3 communication in the United States about purchasing it.

4 QUESTION: Dr. Cowan, how did you obtain
5 this copy of Defendants' Exhibit 260, Bates labeled
6 MS-i4i01009288?

7 ANSWER: I contacted Ms. Gail McMane --
8 that's Gail, G-A-I-L, McMane, capital M, little C,
9 M-A-N-E, who I had known for many, many years, who
10 currently works at iAnywhere but worked at Watcom
11 before, when it was Watcom, and asked her if she could
12 search their old files to see if there were any examples
13 of sales being made.

14 QUESTION: And if we could look just
15 briefly at Exhibit 255. It's towards the bottom.

16 ANSWER: Got it.

17 QUESTION: Okay. So you don't know where
18 this particular copy came from?

19 ANSWER: Well, this particular copy came
20 from, no.

21 QUESTION: Okay.

22 (End of video clip.)

23 MR. TORCHIA: That's it for Mr. Cowan,
24 Your Honor.

25 THE COURT: All right.

1 MR. TORCHIA: Our next witness will be
2 Louden Owen, and his will take 10 minutes.

3 Mr. Owen is the managing partner of
4 McLean Watson Capital, and he's a member of the Board of
5 Directors for i4i.

6 THE COURT: All right.

7 MR. TORCHIA: And with the Court's
8 permission, I'll read some exhibits into the record.

9 THE COURT: All right.

10 MR. TORCHIA: All right. So Deposition
11 Exhibit 288 is Trial Exhibit 2095; Deposition Exhibit
12 297 is Trial Exhibit 2102; Deposition Exhibit 320 is
13 Trial Exhibit 2108.

14 (Video playing.)

15 QUESTION: Good morning, Mr. Owen.

16 ANSWER: Morning.

17 QUESTION: You're the managing partner of
18 McLean Watson Capital; is that correct?

19 ANSWER: Yes.

20 QUESTION: And how long have you been the
21 managing partner?

22 ANSWER: Since 1996.

23 QUESTION: Were you one of the founders
24 of McLean Watson Capital?

25 ANSWER: Yes.

1 QUESTION: McLean Watson is a venture
2 capital firm; is that right?

3 ANSWER: Correct.

4 QUESTION: What does a venture capital
5 firm do?

6 ANSWER: We invest in and help build
7 companies.

8 QUESTION: You're also a solicitor?

9 ANSWER: Correct.

10 QUESTION: And a barrister?

11 ANSWER: Yes.

12 QUESTION: And forgive me for maybe not
13 knowing, but those are similar to what we might call in
14 the U.S. as lawyers?

15 ANSWER: Yes.

16 QUESTION: You've been the Chairman of
17 the Board for i4i, Inc., since McLean Watson became an
18 investor in '96; is that right?

19 ANSWER: I believe so.

20 QUESTION: And you've been involved in
21 the operation of i4i, Inc., since that time?

22 ANSWER: Not in the operations, but I've
23 been involved as a member of the Board of Directors, and
24 in some cases, as a -- as a legal advisor to i4i, but
25 not in operations.

1 QUESTION: As a member of the Board of
2 Directors, did you have any input as to what kind of
3 business i4i would engage in?

4 ANSWER: The -- the Board of Directors
5 would carefully review, discuss, and vote on a number of
6 matters.

7 One of the things that we would review on
8 a regular basis was the business of the company. And,
9 of course, there was an interaction between, typically,
10 the Chief Executive Officer and the members of the board
11 about the company's operations and direction.

12 QUESTION: As a board -- member of the
13 Board of Directors, did you have some influence on the
14 direction, the business that the company i4i, Inc.,
15 engaged in?

16 ANSWER: The -- yes, because the board
17 would approve the business plans of the company.

18 QUESTION: Did McLean Watson invest in
19 i4i through a particular fund?

20 ANSWER: Yes.

21 QUESTION: Was it more than one?

22 ANSWER: I'm sorry. You're referring to
23 the original investment or --

24 QUESTION: Total.

25 ANSWER: Yes.

1 QUESTION: And what were the -- what were
2 the funds -- what was the original fund that McLean
3 Watson used to invest in i4i, Inc.?

4 ANSWER: The fund is called McLean Watson
5 Softech.

6 QUESTION: What other McLean Watson funds
7 were used to invest in i4i, Inc.?

8 ANSWER: McLean Watson Ventures II.

9 QUESTION: Northwater, you're talking
10 about Northwater Capital Management?

11 ANSWER: Northwater has, I believe, two
12 different arms, but it's Northwater Capital Management
13 and Northwater Intellectual Property Fund.

14 QUESTION: When you first found out about
15 Northwater, what did you find out about what kind of
16 investments they did?

17 ANSWER: Northwater itself is an
18 investment group that's -- they do a lot of different
19 investments.

20 I believe what you're asking is when we
21 first contacted Northwater with respect to the
22 intellectual property group?

23 QUESTION: It is.

24 ANSWER: And they were doing -- as I
25 recall, Northwater did several things. One of them was

1 assisting in -- in funding enforcement of patents and
2 patent litigation.

3 QUESTION: Was the Northwater patent
4 fund -- the avenue relating to litigation or enforcement
5 of patents, was that the avenue you pursued with
6 Northwater?

7 ANSWER: That was one of avenues that we
8 discussed and then -- or that we asked them about, and
9 yes, that is the avenue we ultimately pursued.

10 QUESTION: And in 2002, i4i faced a very
11 significant cash management crisis; is that correct?

12 ANSWER: A cash --

13 QUESTION: Cash flow crisis?

14 ANSWER: Cash flow, yeah. Very
15 significant challenges, yes.

16 QUESTION: And that was all throughout
17 the year of 2002; isn't that right?

18 ANSWER: I think it was -- it started
19 early in '02, and it continued -- I don't know if it
20 continued throughout the year and levels of severity,
21 but it was a very tough year.

22 QUESTION: And it certainly recurred at
23 the end of 2002 when there was a concern about funds
24 that were going to come in that were later determined
25 that weren't going to come in and whether or not to pay

1 taxes --

2 ANSWER: Uh-huh.

3 QUESTION: -- isn't that right?

4 ANSWER: I don't recall a decision about
5 whether or not to pay taxes.

6 QUESTION: There was -- there was some
7 discussion about whether to allocate funds that were
8 coming from the Patent Office to pay payroll or taxes.
9 Do you remember that?

10 ANSWER: Oh, I remember the company being
11 in a very -- very tough position in terms of its cash
12 availability, yes.

13 QUESTION: Is the primary business of
14 i4i, LP, licensing and enforcing the '449 patent?

15 ANSWER: Yes.

16 QUESTION: Does i4i, LP, make any
17 products?

18 ANSWER: No.

19 QUESTION: Does i4i, LP, sell any
20 products?

21 ANSWER: No.

22 QUESTION: Does i4i, LP, generate any
23 revenue any way other than by licensing the patent or
24 settling lawsuits?

25 ANSWER: Yes.

1 QUESTION: How?

2 ANSWER: Interest on capital.

3 QUESTION: Any other way?

4 ANSWER: And -- not that I'm aware of.

5 QUESTION: Are the assets of i4i, LP, the
6 '449 patent and the cash contributed by its investors
7 and any interest that it has made, it has gained?

8 ANSWER: I guess it depends how you're
9 looking at assets. We think the assets of i4i, LP, are
10 the people and the people that are willing to help with
11 the company.

12 So if you're looking at it from a sort of
13 raw balance sheet perspective, on the balance sheet, it
14 would be interest gained, the patent, capital, retained
15 earnings, et cetera.

16 QUESTION: All right. Great. I'll ask
17 the question.

18 Mr. Owen, can you tell me what the
19 approximate ownership of i4i, LP, is today broken down
20 by the various owners?

21 ANSWER: Yes.

22 QUESTION: Would you, please?

23 ANSWER: I believe Mr. Vulpe, Michel
24 Vulpe, is just over 9 percent; McLean Watson, in
25 aggregate, the two funds, are over 51 percent;

1 Northwater is just over 33 percent; Ontario Teachers'
2 Pension Plan is just over 2 percent; and other is just
3 under 4 percent.

4 QUESTION: Mr. Owen, I've handed you a
5 document that I've marked as Defendants' Exhibit 297,
6 which on the front says McLean Watson Softech, Inc.,
7 meeting of the Board of Directors, November 28th, 2003,
8 12:00 p.m.

9 Do you recognize that document?

10 ANSWER: I believe so.

11 QUESTION: And does it include the
12 Softech board minutes from a meeting from September
13 12th, 2003?

14 ANSWER: It's a blank page. Oh, I'm
15 sorry, over the page. Appears to.

16 QUESTION: Mr. Owen, I've handed you what
17 has previously been marked as Defendants' Exhibit 272,
18 which is a couple of e-mails dated December 5th, 2003.
19 The -- the one at the top is from you to Mr. Vulpe and
20 Mr. Stewart and some other people, and the second bullet
21 point there says, Valuation probably not far off, given
22 tax loss, and then it makes reference to Point 2.

23 Do you see that?

24 ANSWER: I do.

25 QUESTION: If you'd look at the original

1 e-mail that's part of Exhibit 272, the second point
2 says, The value of the company at the end of the process
3 appears to be \$2 million.

4 Do you see that?

5 ANSWER: I do.

6 QUESTION: Is the valuation that you were
7 referring to in your second bullet point in Exhibit 272
8 where you say, The valuation probably not far off, given
9 tax loss, is that what is shown down below in the
10 original e-mail as the value of the company at the end
11 of the process appears to be \$2 million?

12 ANSWER: I believe that's the point I'm
13 referring to.

14 QUESTION: Thank you.

15 Mr. Owen, I've handed you what I've
16 marked as Defendants' Exhibit 320, which appears to be a
17 chain of e-mails.

18 Do you recognize Defendants' Exhibit 320?

19 ANSWER: I do.

20 QUESTION: Is it a chain e-mails
21 beginning on February 15th, 2005, between yourself and
22 John Stewart?

23 ANSWER: Yes.

24 QUESTION: As part of the ordinary
25 business of McLean Watson, was this e-mail retained as

1 part of the business?

2 ANSWER: I -- yes.

3 (End of video clip.)

4 MR. TORCHIA: Okay. Your Honor, that's
5 all we have of Mr. Owen.

6 THE COURT: All right. Whose next?

7 MR. TORCHIA: Next is Stuart Angus.

8 THE COURT: Stuart?

9 MR. TORCHIA: Angus.

10 THE COURT: Angus.

11 MR. TORCHIA: Mr. Angus is the -- was the
12 former President of i4i and is currently a partner at
13 McLean Watson.

14 THE COURT: All right. And how long is
15 his deposition?

16 MR. TORCHIA: His deposition is a total
17 of just over four minutes.

18 THE COURT: All right. Thank you.

19 MR. TORCHIA: And with your permission,
20 Your Honor, I have one exhibit to read for the record.

21 THE COURT: Yes, you may.

22 MR. TORCHIA: Deposition Exhibit 133 is
23 Trial Exhibit 2033.

24 And with the Court's permission, could we
25 dim the lights?

1 THE COURT: Could you what?

2 MR. TORCHIA: Can we dim the lights with
3 the Court's permission?

4 THE COURT: They are dimmed.

5 MR. TORCHIA: Okay.

6 (Video playing.)

7 QUESTION: Good morning, Mr. Angus. How
8 are you today?

9 ANSWER: Fine. Thank you.

10 QUESTION: Can you tell me who you work
11 for?

12 ANSWER: I work for McLean Watson.

13 QUESTION: And what is McLean Watson?

14 ANSWER: McLean Watson is a venture
15 capital company.

16 QUESTION: Is it a venture capital
17 company located here in Toronto?

18 ANSWER: Yes.

19 QUESTION: How long have you worked for
20 McLean Watson?

21 ANSWER: Since January 2002.

22 QUESTION: Do you have a title with
23 McLean Watson?

24 ANSWER: Partner.

25 QUESTION: Have you always been a partner

1 at McLean Watson?

2 ANSWER: Yes.

3 QUESTION: During the period of time that
4 you had involvement with i4i, Inc., before you became a
5 director more recently, so starting in 2002 and
6 continuing through the period of 2003, did you hold any
7 positions at i4i, Inc.?

8 ANSWER: I was the President.

9 QUESTION: And were you paid by i4i,
10 Inc.?

11 ANSWER: Yes.

12 QUESTION: And that was also while you --
13 were you also still a partner at McLean Watson?

14 ANSWER: Yes.

15 QUESTION: So you still got paid by
16 McLean Watson, also?

17 ANSWER: Yes.

18 QUESTION: When you were the President of
19 i4i, Inc., was your role, as you somewhat described your
20 role, to try and get the company to cash flow positive
21 or cash flow break even?

22 ANSWER: Correct.

23 QUESTION: Can you generally summarize
24 what steps you took to achieve that?

25 ANSWER: Well, on the expense side, did

1 whatever we could do to reduce operating expenses; and
2 on the sales side, the revenue side, undertook steps to
3 try and improve the revenue of the organization. I
4 would say those are the two big pieces.

5 QUESTION: Sir, I've handed you a
6 document marked as Defendants' Exhibit 133, which is
7 titled Stuart Angus presentation made, May 2003. What
8 is it?

9 ANSWER: I believe -- not a hundred
10 percent certain, but I believe it was a slide deck that
11 I used to present to the LPs of McLean Watson at the
12 annual meeting.

13 QUESTION: The LPs?

14 ANSWER: Limited partners.

15 QUESTION: Who are the limited partners
16 of McLean Watson?

17 ANSWER: Those are the people that
18 invested money in McLean Watson.

19 QUESTION: And what was the reason for
20 creating and giving this presentation to the LPs of
21 McLean Watson?

22 ANSWER: Well, we, as a GP, give annual
23 reporting to our LPs of the status of our funds.

24 QUESTION: You say we as a GP. Are you
25 referring to McLean Watson?

1 ANSWER: That is correct.

2 QUESTION: So would you turn to Page 17
3 in Exhibit 133. The paper is entitled Reasons Why Glass
4 is Half Full.

5 ANSWER: Yes.

6 QUESTION: The last entry there says:
7 Getting updraft from Microsoft and growing acceptance of
8 XML.

9 What did you mean by that?

10 ANSWER: I can't be a hundred percent
11 certain, but I think Microsoft was talking about XML,
12 and therefore, if a large entity like Microsoft talks
13 about XML, it makes it a more acceptable item in the
14 marketplace.

15 QUESTION: By that, do you mean in a
16 sense validation of the market for XML?

17 ANSWER: Yeah. Yes.

18 QUESTION: And would that have tended to
19 have a positive effect on i4i's abilities to sell its
20 products?

21 ANSWER: That's what it says.

22 (End of video clip.)

23 MR. TORCHIA: Okay. Your Honor, that's
24 all we have from Mr. Angus.

25 THE COURT: All right. Who will be next?

1 MR. TORCHIA: Next is Mr. Richard Owens.

2 THE COURT: All right.

3 MR. TORCHIA: Richard Owens is a former
4 member of the Board of Directors of i4i. And there's no
5 exhibits to read into the record, so we'll proceed.

6 (Video playing.)

7 QUESTION: Good morning, Mr. Owens.

8 ANSWER: Good morning.

9 QUESTION: Mr. Owens, you understand that
10 you're here today to give a deposition in connection
11 with the i4i versus Microsoft case, correct?

12 ANSWER: I do.

13 QUESTION: And you, Mr. Owens, were a
14 lawyer that represented i4i at the time of the filing of
15 the application for the 5,787,449 patent, correct?

16 ANSWER: I was.

17 QUESTION: Now, you were also a member of
18 the Board of Directors of i4i?

19 ANSWER: Yes.

20 QUESTION: -- for a period of time,
21 correct?

22 ANSWER: Yes.

23 QUESTION: For what period were you a
24 member of the Board of Directors for i4i?

25 ANSWER: Well, I resigned in 2006, and I

1 do not remember when I was elected. It was -- it was at
2 the -- it was after financing, and -- but it would have
3 been, you know, late 1990s. I'm sorry. I don't
4 remember the date.

5 QUESTION: Do you have any recollection
6 of major competitors that i4i had in 2002 and 2007?

7 ANSWER: There were two classes of
8 competitors. Open Text, as a broad document management
9 solution, was one that occurs to me.

10 QUESTION: Okay.

11 ANSWER: But I remember in board
12 meetings, others would be mentioned in competitions for
13 large contracts, but they were firms that I only heard
14 of once or twice in that context, and I do not recall
15 their names.

16 QUESTION: So other than Open Text, you
17 don't remember any competitor from 2002 and 2007 that
18 significantly impacted i4i's ability to achieve success
19 in the marketplace?

20 ANSWER: No, I do not.

21 QUESTION: And the board -- as a member
22 of the Board of Directors, is that the kind of
23 information that you would have been exposed to?

24 ANSWER: Sure.

25 QUESTION: Okay. You never heard of

1 Microsoft referred to as a competitor in space for i4i's
2 product?

3 ANSWER: Not that I recall, no.

4 (End of video clip.)

5 MR. TORCHIA: So, Your Honor, that's all
6 we have from Mr. Owens. We have one more tape to play.

7 THE COURT: All right.

8 MR. TORCHIA: And that one is the
9 deposition of Timothy Sweet. Mr. --

10 THE COURT: Who? Timothy?

11 MR. TORCHIA: Timothy Sweet.

12 THE COURT: All right.

13 MR. TORCHIA: He is a former i4i
14 employee. He was a former director of development at
15 i4i, and we've got five minutes for our side and one
16 minute of i4i's designations.

17 And there's just one document to read in.
18 That's Deposition Exhibit 142 is Trial Exhibit 2038.

19 (Video playing.)

20 QUESTION: Good morning, Mr. Sweet.

21 ANSWER: Good morning.

22 QUESTION: Could you state your full name
23 for the record, please.

24 ANSWER: Yeah. Full legal name is
25 Timothy James Sweet.

1 QUESTION: Now, how long were you
2 employed at i4i?

3 ANSWER: I was employed there
4 approximately four and a half years.

5 QUESTION: And what were those four
6 years, from what year to what year?

7 ANSWER: 2000 to late 2004.

8 QUESTION: And what was your role at i4i
9 when you began in 2000?

10 ANSWER: When I began, I was brought on
11 on a short-term contract to do some code analysis, so
12 just looking at some software code.

13 QUESTION: Sure. Am I correct in
14 understanding that you testified about two roles you
15 had, one as a contract developer --

16 ANSWER: Yes.

17 QUESTION: -- and one as a full-time
18 employee developing software; is that correct?

19 ANSWER: Yes.

20 QUESTION: Did you have any other roles
21 other than those two roles?

22 ANSWER: Yes.

23 QUESTION: What was -- what were your
24 other roles?

25 ANSWER: I became the director of

1 professional services, and after that, I became the
2 director of development.

3 QUESTION: So what were your
4 responsibilities as the director of professional
5 services?

6 ANSWER: That's numerous, but they
7 involved performing customizations for clients' specific
8 applications of the software, specifically revolving
9 around the editing tools.

10 QUESTION: I put before you as Exhibit
11 142 a document entitled Microsoft Office, Microsoft
12 Office 11, Overview of Developer Technologies.

13 It's a document from i4i's files.

14 ANSWER: Yeah.

15 QUESTION: And it's Bates labeled
16 i4i764354 to 764377. Have you ever seen this document,
17 Mr. Sweet?

18 ANSWER: I don't know.

19 QUESTION: You can take a look at it, if
20 you like. So do you recognize this document?

21 ANSWER: No.

22 QUESTION: Okay. Was i4i a paid
23 subscriber to the Microsoft Developer Network?

24 ANSWER: I believe so.

25 QUESTION: And would that provided --

1 would that subscription have provided i4i with quick
2 access to information about what was going to be coming
3 up in Microsoft's products?

4 ANSWER: Yes.

5 QUESTION: Okay. And i4i, as a company
6 that makes plug-ins for Microsoft's product, would have
7 paid close attention to that material, correct?

8 ANSWER: To some of it.

9 QUESTION: Would it have paid close
10 attention to the material relating to XML?

11 ANSWER: I believe so.

12 QUESTION: Let's turn to Page i4i764361.

13 ANSWER: 764361?

14 QUESTION: Yeah. See how it describes in
15 this page Word as an XML editor for customer-defined
16 schemas?

17 ANSWER: Yes.

18 QUESTION: Is this the kind of thing that
19 i4i would pay attention to, the kind of detail that i4i
20 would pay attention to, in reading documents from that,
21 it would receive from the developer network?

22 ANSWER: I believe so.

23 QUESTION: Did you -- do you recall
24 seeing screens like this relating to what was going to
25 be released in Word 11? And when I see screens like

1 this, I'm referring to the diagram on Page i4i764361.

2 ANSWER: I'm trying to think, and maybe I
3 can clarify. I remember seeing the screens in the
4 product. I don't know if I saw it prior to the product.

5 QUESTION: Okay. So you would have seen
6 the screens in the product at what time?

7 ANSWER: I'm not sure. Sorry.

8 QUESTION: Other than that, you -- would
9 there be others at i4i that would pay attention to this
10 kind of information that we see on i4i764361 relating to
11 how Microsoft's products were going to be handling XML?

12 ANSWER: I'd expect so.

13 QUESTION: Do you know who those people
14 would be?

15 ANSWER: I don't know. I mean, I'm sure
16 Michel Vulpe would have been interested. I don't know
17 who else (A) was on the team at the time or would have
18 been focused on it. Probably on the marketing side as
19 well.

20 QUESTION: Did you see the i4i -- did you
21 read the i4i patent or the '449 patent in around 1998?

22 ANSWER: Yes.

23 QUESTION: Okay. And you read the patent
24 in detail and understood it by 2001, correct?

25 ANSWER: Understand is a tough question,

1 because it is an invention. I would speculate that,
2 yes.

3 QUESTION: Okay. And you knew how -- you
4 knew about the Word beta release literature we talked
5 about in 2002, correct?

6 ANSWER: I expect I would have as part of
7 my job.

8 QUESTION: Okay. And you knew about the
9 XML-related features that were released in Word 2003 at
10 least as early as the product release in 2003, correct?

11 ANSWER: Yes.

12 QUESTION: All right. And you stayed on
13 at i4i until the end of 2004, correct?

14 ANSWER: If not beginning of 2005, I'm
15 sure, yeah.

16 QUESTION: And from the period of 2000 to
17 2004 or early 2005 --

18 ANSWER: Yeah.

19 QUESTION: -- you never came to your own
20 conclusion that Microsoft's Word product was infringing
21 the '449 patent, correct?

22 ANSWER: I don't recall that, no.

23 QUESTION: You don't recall that?

24 ANSWER: I don't recall ever coming to
25 that conclusion, no.

1 QUESTION: Okay.

2 (End of video clip.)

3 MR. TORCHIA: Okay. Your Honor, that's
4 all the tape we have.

5 With your permission, I'll hand up copies
6 of the transcripts for the court reporter.

7 THE COURT: All right. Very well.

8 What will be next?

9 MR. LENDER: Your Honor, our next witness
10 will be Dr. Keith Ugone.

11 THE COURT: Okay. Let's go ahead and
12 take our morning break, I think, before we start that.

13 So we'll be in recess until 20 -- let's
14 say 20 minutes until 11:00. So we'll be in recess until
15 then.

16 COURT SECURITY OFFICER: All rise.

17 (Jury out.)

18 (Recess.)

19 COURT SECURITY OFFICER: All rise.

20 (Jury in.)

21 THE COURT: Please be seated.

22 All right. Mr. Lender, you may proceed.

23 MR. LENDER: Your Honor, we call
24 Dr. Keith Ugone to the stand, and he needs to be sworn,
25 Your Honor.

1 THE COURT: All right. Very well.

2 Please raise your right hand.

3 (Witness sworn.)

4 MR. LENDER: Your Honor, it wouldn't be a
5 witness without a book. May I approach and --

6 THE COURT: Yes, you may.

7 MR. LENDER: Thank you.

8 May I proceed?

9 THE COURT: Yes, you may.

10 KEITH R. UGONE, Ph.D., DEFENDANT'S WITNESS, SWORN

11 DIRECT EXAMINATION

12 BY MR. LENDER:

13 Q. Dr. Ugone, would you please introduce
14 yourself to the jury.

15 A. Yes. My name is Keith Raymond Ugone. Last
16 name is spelled U-G-O-N-E, and I am an economist.

17 Q. Where do you live?

18 A. I live in Grand Saline, so if you know where
19 Trade Days at Canton is, it's east of Canton.

20 Q. Would you tell us about your educational
21 background, please?

22 A. Yes. I have an undergraduate degree, a
23 bachelor's degree in economics from the University of
24 Notre Dame, which I got in 1977.

25 I have a -- excuse me -- a master's degree in

1 economics from the University of Southern California,
2 which I received in 1979. So if you follow college
3 football, that's a major contradiction going to those
4 two schools.

5 And then in 1983, I received a Ph.D. in
6 economics from Arizona State University.

7 Q. Dr. Ugone, let's just briefly discuss your
8 history. What did you do after you got your Ph.D.?

9 A. Well, I received my Ph.D., as I said in 1983,
10 and then I taught for a couple of years at one of the
11 California State University Systems schools, Cal State
12 Northridge just north of Los Angeles. So I taught
13 college economics full-time for a number of years.

14 And then in 1985, I joined PriceWaterhouse,
15 and you've probably heard of them. They count the
16 Academy Award ballots, but that's not what I did. I did
17 financial consulting, and I worked with PriceWaterhouse
18 and later PricewaterhouseCoopers from 1985 all the way
19 up until the end of 2003, so about 18 years.

20 And I joined Analysis Group, which is who I
21 work with today.

22 Q. Just briefly, what do you do at Analysis
23 Group?

24 A. Well, I'm what's called a managing principal,
25 but, essentially, I run the office, the Dallas office,

1 of Analysis Group, and I do what's called client service
2 work.

3 Q. And what is client service work?

4 A. Client service work is that companies hire
5 Analysis Group or hire me to do financial analysis,
6 economic analysis, or even damages-related analysis.
7 So when firms find themselves in disputes, much like the
8 firms here in the courtroom today, I'm often hired or
9 retained to do the work that's relevant to whatever the
10 issue is. And so I'm retained by clients, we call that
11 client service work.

12 Q. And have you done that type of work in patent
13 cases before this one?

14 A. Yes.

15 Q. Have you published any articles in your
16 field?

17 A. Yes, I do have articles.

18 Q. Have you published any articles pertaining to
19 patent infringement damages?

20 A. Yes. I do have an article on patent
21 infringement damages.

22 Q. Let's turn to the work you actually did for
23 this case.

24 And, specifically, what was your assignment
25 for this case?

1 A. I really had two assignments. The first
2 assignment was to evaluate the claim damages that i4i
3 was claiming as presented by Mr. Wagner. You heard him
4 testify last week. So I was asked to evaluate his work.

5 And then I was also asked to form an
6 independent opinion as to what I thought the appropriate
7 amount of damages would be under certain conditions.

8 And those conditions would be if the jury
9 finds that Microsoft is infringing the '449 patent and
10 if the jury finds that the patent is valid, then what
11 would be the appropriate amount of damages under those
12 conditions.

13 Q. And if the jury were to find that there was
14 no infringement or the patent is invalid, what would
15 your opinion be?

16 A. Then there would be no damages.

17 Q. Okay. What did you do to prepare to give
18 your opinions today to the jury?

19 A. Well, I reviewed a lot of documents. You've
20 seen a lot of documents that have been produced in this
21 matter, so I reviewed documents. I reviewed deposition
22 transcripts. I reviewed the report of Mr. Wagner. He
23 actually had a number of reports, which I reviewed.
24 I issued a report myself. I read the deposition
25 transcript of Mr. Wagner. I was deposed myself.

1 And since Wednesday, I've been attending trial, so I've
2 heard a number of the witnesses at trial as well.

3 Q. Now, before we get into the details of your
4 opinions, can you tell the jury whether you think
5 Mr. Wagner's damages numbers are reasonable or not?

6 A. Well, I really have two major issues with
7 Mr. Wagner's -- the figures that he presented to the
8 jury.

9 One, that I think he's way overstating claim
10 damages should those conditions be met that I talked
11 about previously.

12 But also I find that his analysis and his
13 damages figures fail the basic reasonableness test, so I
14 think he's overstated damages. And there's some basic
15 reasonableness tests that his analysis fails.

16 Q. Can you walk us through some of the
17 reasonableness checks that you believe Mr. Wagner's --
18 Mr. Wagner's damages fail to meet?

19 A. Yes. In fact, I've got a slide that
20 summarizes them, so I'll list out a high-level summary,
21 then we'll go in detail on each of those.

22 When we talk about reasonableness check
23 failures, what I'm really saying there is, do the
24 numbers make sense? Do they make sense from an economic
25 perspective?

1 All the data that we've looked at, does
2 Mr. Wagner's analysis make sense given that data or does
3 it not make sense?

4 So there's four points I'm going to talk
5 about. The first one has to do with the valuations of
6 i4i. And I feel as though Mr. Wagner's conclusions,
7 claim damages conclusions, are inconsistent with the
8 valuations for i4i. So that's the first point.

9 The second point is, as you recall, he was
10 using XMetaL, which is a software application as a
11 benchmark, almost as the beginning point for doing his
12 claim damages calculations. And I found that to be
13 unreasonable.

14 And there's also a purchase price of XMetaL
15 that I'll get into. So there are a number of issues
16 related to XMetaL that I think render his analysis as
17 unreasonable and clearly overstates claim damages.

18 The third point I want to talk about is that
19 there are a number of different benchmarks that were
20 available to Mr. Wagner that he didn't use. So he
21 defaulted to XMetaL. Remember, he's using that XMetaL
22 price of \$499, but there were other benchmarks he could
23 have used. If he had used those other benchmarks, he
24 would have gotten significantly different numbers.

25 And the last point I want to talk about --

1 and I think the jury has heard a lot about this -- has
2 to do with the Wecker survey data versus what's called
3 some CEIP user data that Microsoft keeps track of.

4 And Mr. Wagner used the Wecker survey data,
5 which led to a huge range in claim damages compared to
6 the actual data that's compiled by Microsoft.

7 So that's what I'm going to talk about here.

8 Q. Let's walk through each of these in a little
9 bit more detail, and let's start with the first
10 reasonableness check failure, valuations of i4i, Inc.

11 Can you explain how Dr. Wagner's damages
12 numbers are not reasonable when compared to the
13 valuations of i4i?

14 A. Yes. And I think the jury has seen some
15 documents on this, and we just heard some deposition
16 testimony by videotape concerning what's the -- what was
17 the value of i4i around the time that there would have
18 been a hypothetical negotiation between i4i and
19 Microsoft.

20 And we'll talk a little bit more detail about
21 the hypothetical negotiation, but that's if the parties
22 had negotiated a license, what's the economic events and
23 factors that are going on around that period of time?

24 Well, during that period of time, as we saw
25 from the deposition testimony and which are in numerous

1 documents, the valuation of i4i -- i4i was roughly put
2 in the 1.5-million to 2-million dollar range.

3 Well, when you hear that about the company,
4 what its value is relative to the 200 million to \$207
5 million in claim damages that Mr. Wagner was putting
6 forth, that just doesn't make sense, given the economics
7 of what was happening at the time and how one comes up
8 with those sort of valuations.

9 Q. Let's look at two exhibits that are in
10 evidence: DTX2088 and DTX2237, and let's start with
11 2088.

12 Is this one of the documents that you're
13 relying on for purposes of the testimony you just gave
14 about the i4i valuations between 1.5 and \$2 million?

15 A. Yes.

16 Q. And what does Defendant's Exhibit 2088 tell
17 you?

18 A. Well, this was an e-mail chain. I think the
19 jury has heard that term. And we can see that it's
20 between Mr. Vulpe up at the top there and Mr. Owen, but
21 it starts out at the bottom, and it says on Point No. 2,
22 the value of the company at the end of the process
23 appears to be \$2 million. And then essentially that's
24 validated.

25 If you go back to the top e-mail -- didn't

1 mean to get ahead there -- it says the valuation
2 probably is not far off, given the tax loss value.

3 Q. I'm sorry. Who was the person who agreed and
4 validated the 2-million-dollar valuation?

5 A. That would have been Mr. Owen.

6 Q. What is the date of this e-mail?

7 A. And so his validation of that number was
8 December 5th, 2003.

9 Q. Let's take a look at the next exhibit,
10 Defendant's Exhibit 2237.

11 Now, is this also a document that you relied
12 upon for purposes of the testimony you gave about i4i's
13 own valuations between 1.5 and \$2 million?

14 A. Yes.

15 Q. And if we can just turn to the third page of
16 this document, the document that starts at the top with
17 Loudon Owen.

18 MR. LENDER: And just bring up the bottom
19 half of that, please.

20 Q. (By Mr. Lender) What does this tell you,
21 Dr. Ugone?

22 A. Well, there's a returns analysis. You can
23 see that in the -- in the panel that's presented there.

24 But if you look at the far left, it says
25 enterprise value, and, really, that's just a fancy name

1 for valuing a company.

2 But enterprise value at market was 1.5
3 million, which is close to that 2 million that we saw
4 previously. So here is a second document that puts the
5 valuation of i4i in the 1.5 million to 2-million-dollar
6 range.

7 Q. And just so -- I want to make sure the jury
8 can see it. There's a reference to a Footnote No. 1
9 when it talks about the enterprise value of \$1.5
10 million.

11 What does it say for the explanatory note for
12 Footnote 1?

13 A. That says the best guess value if sold today.

14 Q. Let's just turn to the last page of this
15 document for a moment, Page 6.

16 And you'll see there's a section in the
17 bottom that talks about -- this is where Mr. Owen talks
18 about revised role for Northwater -- excuse me --
19 revised role for McLean Watson.

20 Do you see that?

21 A. Yes, I do.

22 Q. And there are two things that it says there.
23 First goal point says: What else can we do to increase
24 value? There's a bullet point. Sue Microsoft and/or
25 align with a giant.

1 There's another bullet point: What can we do
2 to achieve liquidity faster? One of the bullet points
3 says: Possibly sue Microsoft over patent issue.

4 Now, what does it mean when someone says
5 achieve liquidity faster?

6 A. Liquidity really has to do with do you have
7 cash to pay your bills. Think of it that way. So it's
8 just a fancy term for that.

9 In other words, you have expenses; you have
10 payroll; you have your operating expenses. And
11 companies who have a cash crunch where they're
12 struggling for cash but they've got to make those sort
13 of expenditures, getting liquidity is getting cash as
14 quickly as you can.

15 Q. Now, Dr. Ugone, we've heard in this case that
16 i4i LP was set up to bring this lawsuit and that there
17 was a transaction between i4i Inc. and i4i LP in
18 September of 2006 where the patent was sold from i4i
19 Inc. to LP.

20 A. Yes.

21 Q. Have you reviewed that transaction in
22 connection with the opinions you're giving today?

23 A. Yes.

24 Q. Did any money actually change hands between
25 the parties?

1 A. I'm not aware of any money going between the
2 parties. There were units, but there was not money.

3 Q. Okay. Let me show you just one more document
4 on this point. It's Defendant's Exhibit 2238.

5 MR. LENDER: Chris, can you bring that
6 up?

7 Q. (By Mr. Lender) Did you review this document
8 in connection with the opinions you're giving in this
9 case?

10 A. Yes, I'm sorry. What -- I scanned the
11 screen. I know I reviewed this, but what exhibit number
12 is it?

13 Q. Defendant's Exhibit 2238.

14 A. Yes, I'm there.

15 Q. And you have the document entitled McLean
16 Watson, Softech Fund Quarterly Report?

17 A. Yes.

18 Q. Dated March 31st, 2002?

19 A. That's correct.

20 Q. Let's turn to the second page, and much of
21 this has been redacted, but I want to just look at the
22 first two sentences in that paragraph.

23 Do you see that?

24 A. Yes, I do.

25 Q. It's a little small, so let me just read it:

1 With 10 million of invested capital, i4i is the Fund's
2 largest investment. 2001 proved to be a difficult year
3 for i4i, resulting in significant going concern issues
4 and a write-down of this investment to \$100,000.

5 Now, what is the significance of these facts
6 to your opinion, Dr. Ugone?

7 A. Well, again, it's another indicator of value.
8 So we saw previously the valuations of i4i of 1.5
9 million to 2-million-dollar range, and here we see that
10 McLean Watson had an investment of -- for this
11 particular fund, had a 10-million-dollar investment in
12 i4i.

13 And what they're doing is saying that
14 investment is no longer worth that; it's now only worth
15 a hundred thousand dollars. There was this permanent
16 write-down.

17 So I like to think in terms of indicators of
18 value, and that's another indicator of value of the
19 whole value for i4i.

20 Q. What does it mean when a company talks about
21 going concern issues? What does that mean?

22 A. Going concern issue is really -- it's almost
23 a term that applies to, is the company going to make it
24 another 12 months, or is that in doubt?

25 So that's when you usually hear that term.

1 Q. Okay. Let's -- let's go back now and bring
2 up the screen again about the reasonableness check
3 failures.

4 A. Yes.

5 Q. Let's turn to the second one you listed,
6 XMetaL list price and purchase price. Let's start with
7 the first part of that, XMetaL list price.

8 What are you talking about there?

9 A. Well, there's really two points that I want
10 to make there, and this has to do with the economic and
11 reasonableness of Mr. Wagner's conclusion and the
12 benchmark he was using.

13 So, remember, to come up with a reasonable
14 royalty rate, he started off with a benchmark value and
15 then did certain calculations. So its almost like an
16 inverted pyramid. If you take that first number, if
17 there's a problem with it, that whole inverted pyramid
18 is going to fall over.

19 Well, he's using as a benchmark the XMetaL
20 list price of \$499. Well, if you just think about it
21 that's two times the price of Word 2003, for example,
22 which is allegedly containing the accused functionality.
23 So his benchmark is two times the price that Word 2003
24 was selling for. So that part doesn't make sense.

25 And the other part that doesn't make sense is

1 we've all seen that Word 2003 has thousands of
2 functionalities, and the accused functionality is just
3 one of those thousands of functionalities.

4 So you put all of that together and using the
5 XMetaL list price of \$499 as the beginning point just
6 doesn't make economic sense.

7 Q. Dr. Ugone, you've also heard in this case
8 about the fact that Mr. Powers went out and bought the
9 student version of Office 2007 for less than the
10 reasonable royalty that Dr. Wagner came up with of \$98.

11 Does that provide any indication to you
12 regarding the reliability of using XMetaL as a
13 benchmark?

14 A. Well, that doesn't make sense either, because
15 the student version has the thousands of functionalities
16 also, depending on how the jury finds, has the accused
17 functionality. And here you have a situation where the
18 royalty rate would be greater than the price of the
19 student version of Word.

20 Q. Let's turn to the second part of your XMetaL
21 reasonableness check failure.

22 What are you talking about when you refer to
23 the purchase price of the XMetaL company?

24 A. There are really two things you want to look
25 at here. One was, what was the list price of XMetaL?

1 That was the \$499.

2 Well, it turned out that XMetaL, which was
3 owned by a certain company, that company was purchased
4 by another software company, and that company
5 purchased -- that purchased the company that makes
6 XMetaL made that purchase for \$18 million.

7 So while it may seem that the price of XMetaL
8 was high, \$499, when you look at the aggregate value of
9 having that and other things that were included in that
10 company, that entire company got sold for about \$18
11 million, which is significantly less than the \$200
12 million to \$207 million that Mr. Wagner's claiming i4i's
13 damages are.

14 So his benchmark, again, fails the
15 reasonableness test.

16 Q. All right. Thank you.

17 Let's turn to the next one, the next
18 reasonableness checks that you talked about which is use
19 of different benchmarks.

20 What are you referring to there?

21 A. Well, Mr. Wagner had a number of different
22 choices. So we heard about XMetaL --

23 MR. LENDER: I'm just going to have him
24 go to the next slide.

25 A. And what we did here is list some other

1 options that Mr. Wagner could have followed. But he
2 talked about XMetaL. And what we're showing here is
3 that if we understand the use of XMetaL, what were some
4 of the other options that he could have used as his
5 benchmark.

6 The first one we have there is the list price
7 for i4i Inc.'s S4/Text. That's the product that i4i had
8 that they say embodies the teachings of the '449 patent.
9 That product sells for -- \$275 was the list price at the
10 time. But Mr. Wagner is using \$499 rather than the 275
11 that S4/Text had as a list price.

12 If you make that switch, if you switch out
13 XMetaL as sort of the proxy for the value that
14 Mr. Wagner is using, and instead use the list price of
15 S4/Text, Mr. Wagner's claim damages figures would
16 decrease 44 percent. So that was the first thing I
17 wanted to point out.

18 We also heard some testimony that there were
19 some price differences between the various Microsoft
20 Office editions. And there was an edition that, the
21 Professional Edition, that allegedly includes the
22 accused features, and that had a 50-dollar price
23 difference between a version that is not accused. And
24 so Mr. Wagner -- I don't agree with this for a lot of
25 other reasons, because there's a lot of other

1 differences between those -- those various editions of
2 Microsoft Office.

3 But if you use Mr. Wagner's thought process
4 that that \$50 is due to the accused functionality, if
5 you use that instead of the XMetaL sort of baseline
6 price, that would have caused an 88 percent decline in
7 claim damages, just going through the formulas that he
8 had presented to the jury.

9 I already talked about the XMetaL as a
10 company was sold for \$18 million. If that was a
11 benchmark, claim damages go down 91 percent. And then I
12 believe in Mr. Wagner's testifying on cross-examination,
13 there was discussion about the TECSEC license that
14 Microsoft had entered into for \$3 million, and that was
15 used as proxy instead or as a measure of value of the
16 accused functionality, claim damages would have
17 decreased 98 percent.

18 So what we're showing here is the sensitivity
19 of Mr. Wagner's calculations to alternative benchmarks
20 that he could have used. And each of these would lead
21 to a significant reduction in claim damages.

22 Q. Thank you.

23 MR. LENDER: Can you go back to the
24 reasonableness check slide?

25 Q. (By Mr. Lender) Let's just quickly cover the

1 last reasonableness check failures where you wrote CEIP
2 user data versus Wecker survey.

3 Can you first, please, just remind the jury
4 what you're referring to when you talk about the CEIP
5 user data?

6 A. Well, the CEIP user data, you've heard a lot
7 about this. This is data that Microsoft keeps track of.
8 It's actual data and they use this data, you know, to
9 look for improvements in what they're providing the
10 customers. So they try to keep track of the features
11 and functionalities that users use for their programs.

12 And it's a voluntarily program, and so when
13 people are using their program, they've agreed to let
14 Microsoft keep track of what functionalities and what
15 features are being used. So that's actual data, and
16 it's used by millions of users of these programs versus
17 the Wecker survey data where I think there was 46
18 respondents.

19 But the main point that I want to get out is,
20 is that when you compare this actual data that Microsoft
21 has versus the Wecker survey data, you get this huge
22 range Mr. Wagner had in his report, but he didn't
23 present here at trial, that if you use the CEIP user
24 data damages -- claim damages from his perspective --
25 which I still disagree with -- are around 22 million.

1 But what he presented here at trial with the Wecker
2 survey data was the 200 to 207 million. So you get this
3 huge range and inconsistency in the claim damages
4 figures.

5 Q. Dr. Ugone, what's the problem with having a
6 range that falls somewhere between 22 million on the one
7 hand and 207 million on the other hand?

8 A. Well, it tells you about the impreciseness of
9 the range. Now, there are times that you may have a
10 range. It could be because of, you know, you're looking
11 at different time periods.

12 But here he's using the same methodology.
13 It's not because of different time periods. It's
14 underlying data. One's a survey that we've seen some of
15 the problems with the survey as testified by
16 Dr. Simonson compared to the actual data that Microsoft
17 uses in the normal course of business.

18 Q. Let's turn to a new topic. Let's talk about
19 the hypothetical negotiation that we've heard a little
20 bit about.

21 What is the hypothetical negotiation? Can
22 you just remind the jury about that?

23 A. Sure. Sometimes this is a little complex,
24 but in the real world, you have actual negotiations.
25 So there can be a company that has a patent. There can

1 be another company that wants to license that patent.
2 So they sit down at a table, and they have actual
3 negotiations.

4 And a number of things can happen. They can
5 enter into an actual license agreement or, for whatever
6 reason, maybe they don't reach an agreement and they
7 walk away from the negotiating table, and nobody signs a
8 license.

9 Well, we have a different situation here.
10 There's an allegation of infringement. If the jury
11 finds that Microsoft is infringing the '449 patent and
12 if the jury finds that the patent is valid, you need
13 guidance as to what that license would have looked like,
14 if the parties had actually entered into a negotiation
15 for a license to the '449 patent.

16 Now, because that license never happened, we
17 call it a hypothetical negotiation or a hypothetical
18 license.

19 Q. And are there certain assumptions that you
20 need to make in the context of the hypothetical
21 negotiation?

22 A. Yes.

23 Q. Would you tell the jury what those are?

24 A. It's the usual assumptions are that in
25 whatever patent we are talking about -- in this case

1 here, the '449 patent -- is valid, enforceable, and
2 infringed.

3 So I have to make that assumption, because if
4 I don't make that assumption, then there are no damages
5 from an economic perspective. You assume you have a
6 willing licensor and a willing potential licensee, that
7 they're willing to enter into these negotiations.
8 That's a critical assumption.

9 You also assume that the parties are smart,
10 that they're prudent negotiators; that they have
11 knowledge of all relevant facts and reasonable
12 expectations. These are important business decisions,
13 so they have to be prudent negotiators.

14 So those are the types of things I do have to
15 assume in a hypothetical negotiation.

16 And then the one important distinction from
17 the real world is there has to be an outcome. You can't
18 say, oh, they never would have reached an agreement.

19 Q. Now in the context of the hypothetical
20 negotiation, is what is going on in the real world
21 matter?

22 A. Yes, absolutely.

23 Q. And in your opinion, did Mr. Wagner consider
24 the actual world data points?

25 A. No. There are a number of real world data

1 points he did not consider.

2 Q. Let's talk about just a couple of them.

3 We've already talked about the valuations for
4 i4i of 1.5 to 2 million, so I won't go through that
5 again.

6 But we have heard some testimony about i4i's
7 poor financial condition that actually occurred prior to
8 the release of Word 2003.

9 Is this actual world evidence relevant to the
10 hypothetical negotiation?

11 A. Yes, it is.

12 Q. And why is that?

13 A. Well, maybe there's an easy way to think
14 about this. i4i had their patent and they were trying
15 to commercialize a product. And up to the point of the
16 alleged infringement by Microsoft -- so we're talking
17 prior to any alleged wrongful conduct -- their sales
18 were very, very low. They were losing a lot of money.
19 I think up to that point, they've almost lost \$20
20 million. So they were having a real difficulty
21 commercializing their product. So that's Point No. 1.

22 Point No. 2 is they were also having some
23 quality control problems with their products.

24 Q. Now, we have -- we've heard testimony
25 throughout the trial about the fact that at the time of

1 the hypothetical negotiation, right around the time that
2 i4i was considering either going out of business or
3 selling the whole company for a nominal amount, would
4 those facts -- would those types of facts be the types
5 of things that Microsoft and i4i would both know when
6 they were sitting down to negotiate a license during the
7 hypothetical negotiation?

8 A. Yes. As I said, both negotiating teams, the
9 potential licensor, i4i, the potential licensee,
10 Microsoft, would go into the negotiation smart. You do
11 your homework. You know all the relevant information.
12 So Microsoft would have known that i4i's attempts to
13 commercialize its product were not successful at all;
14 had very, very low sales; and would also know that i4i
15 was losing money and was in financial difficulty.

16 Q. Okay. Let's turn to a different topic.
17 Let's turn to the so-called 25-percent rule.

18 Do you recall Mr. Wagner testifying about
19 that?

20 A. Yes, I do.

21 Q. Do you agree with Mr. Wagner, that a
22 25-percent rule should be used in this case?

23 A. No, I do not agree at all with him.

24 Q. And why is that?

25 A. Well, to help the jury remember, what

1 Mr. Wagner did was he took that XMetaL benchmark price
2 of the \$499. He multiplied that times Microsoft's
3 profit margin. Then he said, well, my baseline royalty
4 rate is going to be 25 percent of that.

5 So he was essentially taking 25 percent of
6 the profits associated with this \$499 other product.
7 We've already talked about there is a problem with the
8 XMetaL \$499. Now there's a problem with that 25
9 percent.

10 But he's basically saying we're going to give
11 a quarter of those profits to i4i in the form of a
12 royalty payment. The major problem with that is, when
13 you have a product that has thousands of
14 functionalities, that whole methodology just breaks
15 down.

16 And you think about it, if there were just
17 four patents using the methodology that Mr. Wagner
18 advocates, a hundred percent of the profits would be
19 gone.

20 And the way to think about it is, what would
21 prudent negotiators do? And prudent negotiators,
22 actually on both sides, would know the impossibility of
23 that. That's what doesn't make sense about the
24 25-percent rule.

25 Q. Now even though Mr. Wagner applied a

1 25-percent rule, does he agree with you regarding the
2 problems associated with using a 25-percent rule in a
3 case like this one where the accused product has
4 thousands of functions that are not accused of
5 infringement?

6 A. Yes, I believe he knows those difficulties.

7 Q. Let's now just turn briefly and talk about
8 the Wecker survey. That's another thing that Mr. Wagner
9 relied upon in connection with his damages opinions?

10 A. Yes.

11 Q. Now we've all heard from Professor Simonson
12 and we've all heard from Dr. Wecker, so I'm not going to
13 go through all the issues on the Wecker survey again.
14 But I just want to talk to you about one part of the
15 Wecker survey.

16 You may recall that when I examined
17 Dr. Wecker and Professor Simonson, we talked about just
18 four of the respondents. Again, those numbers were
19 Respondent 168, 660, 262, and 119.

20 And when Dr. Wecker was on the stand, he
21 suggested that the changes that he made to these folks'
22 answers really wasn't any big deal.

23 Have you calculated the impact on
24 Mr. Wagner's damages numbers just based on the changes
25 he made to just those four respondents?

1 A. Yes, I did.

2 MR. LENDER: Can we put up the next
3 slide, please?

4 Q. (By Mr. Lender) Can you tell us what this
5 slide shows, please?

6 A. I had access to Mr. Wagner's -- or
7 Dr. Wecker's computer programs. And also from
8 Mr. Wagner's report, I was able to duplicate his
9 calculations.

10 And what I'm showing here is just that
11 Dr. Wecker's fixes to those four respondents that we
12 show here increased damages by over \$80 million or over
13 40 percent. So it turns out that Dr. Wecker's changes
14 and Mr. Wagner's claim damages amounts, those damage
15 amounts were very sensitive to those changes that
16 Dr. Wecker did to the tune of \$80 million dollars just
17 on these four.

18 Q. Okay. Let's turn to another issue.

19 Are licenses entered into by the parties in
20 the real world relevant to trying to figure out what
21 Microsoft and i4i would have agreed to for a royalty to
22 the '449 patent in the hypothetical negotiation?

23 A. Yes, they are relevant.

24 Q. And did you review any evidence in that
25 regard?

1 A. Yes, I did.

2 Q. And have you prepared a slide summarizing
3 some of the work that you have done?

4 A. I have a slide -- the first slide I have
5 summarizes the licenses I reviewed.

6 Q. Okay. Can you just briefly tell us what this
7 summary slide tells us?

8 A. So the title is called Microsoft's Licensing
9 Practices. So what I'm trying to summarize here is that
10 these licenses that were turned over in this case,
11 produced by Microsoft, are inbound licenses, meaning
12 that they've -- they were the licensee on these
13 licenses.

14 And what indicators do these licenses give
15 us? Indicators of values.

16 So there were 12 Microsoft inbound patent
17 license agreements that were turned over. So the first
18 thing is the patent license agreements that deal with
19 software patents, the hypothetical negotiation was
20 roughly -- that we talked about would have been in 2003
21 and licenses were turned over in the 1999 to 2007 time
22 period.

23 Now, what's interesting is all of those
24 license agreements, those 12 that were software patent
25 license agreements, were lump-sum payments, okay? They

1 weren't running royalty rate payments.

2 Remember, Mr. Wagner was saying \$98 per copy
3 of Word that was found to infringe, whereas in these
4 license agreements, Microsoft just paid a lump sum. And
5 that lump sum, which is a paid-up amount, ranged from
6 \$10,000 to \$5 million.

7 Q. Dr. Ugone, did you determine whether any of
8 Microsoft's real world patent licenses are particularly
9 relevant in this case?

10 A. Yes. They did provide some indications of
11 value, yes.

12 Q. And which are the ones that you thought were
13 the most relevant to this case?

14 A. Well, there were -- there were three. There
15 was something called a TECSEC license. There was
16 something called a Timeline license, and then there was
17 something called a TopTier license. But I made those
18 determinations two ways based looking at the licenses
19 but also from some deposition testimony of Microsoft
20 personnel.

21 So there was sort of two ways of looking at
22 that.

23 Q. I just want to briefly walk through those
24 three licenses, if we could, and if you could turn in
25 your book to Defendant's Exhibit 2246.

1 That's a -- let me know when you get that.

2 A. I'm there.

3 Q. Okay. What is Defendant's Exhibit 2246?

4 A. As called out at the top of the screen there,
5 it says Patent License Agreement, Effective Date March
6 2004. That's not quite highlighted yet, but it's a
7 license agreement between TECSEC and Microsoft
8 Corporation.

9 Q. Okay.

10 MR. LENDER: And if you could just
11 highlight Paragraph 1.3.

12 Q. (By Mr. Lender) And can you tell the jury
13 what -- what products this TECSEC license covers?

14 A. Yes. There's two things in this paragraph.
15 One that it talks about digital rights management, and
16 sometimes it's referred to as information rights
17 management. But that's the subject matter of the
18 license agreement.

19 And it covers Microsoft Office 2003 products,
20 which includes Word 2003, which is one of the accused
21 products here.

22 Q. And digital rights management, that's
23 sometimes referred to as DRM?

24 A. DRM, yes.

25 Q. Is that what you see in Paragraph 1.3?

1 A. Yes.

2 Q. What is your understanding as to what digital
3 rights management or information rights management is
4 about?

5 A. We actually heard Mr. Little testify to that.
6 That's one of the features -- the new features in Word
7 2003. But that has to do with security issues related
8 to the use of the software and documents that are
9 created by Word 2003, for example.

10 MR. LENDER: Your Honor, may I approach,
11 please?

12 THE COURT: Yes, you may.

13 Q. (By Mr. Lender) Dr. Ugone, what I'd like to
14 hand to you is a copy of Word 2003, and also ask --
15 actually, that's an exhibit. It's a copy of the box,
16 which is an exhibit which is Plaintiffs' Exhibit 643.
17 I would like you to just take a look at this box for
18 Word 2003 for a moment.

19 MR. LENDER: And, Chris, if we can turn
20 to the second page of the exhibit, which is actually the
21 back of the box.

22 Let me know when you are there. Can you
23 expand that?

24 Q. (By Mr. Lender) Now, Dr. Ugone, what does the
25 back of the box tell you in terms of the features and

1 functions that Microsoft highlighted for its new
2 product, Word 2003?

3 A. Well, as you can imagine, so I have a copy of
4 Microsoft -- Microsoft Office Word 2003. And as you
5 might expect on the back of the box, they highlight some
6 of the features and functionalities contained in the
7 software application or applications.

8 And so what they do is, if you look at the
9 screen here, if you look at the two columns that are at
10 the top, you can see that they're highlighting XML
11 support. You can kind of see that bold as the last
12 bullet point on the left.

13 And then over on the right, you can see a
14 bolded enforce permission controls. That has to do with
15 security and digital rights management or information
16 rights management. But that's also highlighted as a new
17 feature contained in Microsoft Office Word 2003.

18 Q. If we just look at the bottom of -- which
19 talks about which Microsoft Office 2003 edition is best
20 for you, does -- the information rights management
21 technology, does that get the same prominence as the XML
22 technology?

23 A. Right. So they're both listed there. You
24 can see what's being highlighted here. The last two
25 line items, one dealing with XML technology; the other

1 dealing with IRM or information rights management
2 technology.

3 So both are equal and highlighted on the back
4 of the box and are being promoted by Microsoft.

5 Q. Does the Word 2003 box with the new product
6 talk anywhere specifically about custom XML?

7 A. No, I do not see custom XML anywhere.

8 Q. Okay.

9 MR. LENDER: Can we go back to the TECSEC
10 agreement for a moment, Defendant's Exhibit 2246?

11 If you could just turn to Page 10, Chris.

12 Q. (By Mr. Lender) Do any of the patents in the
13 TECSEC license relate to XML technology?

14 A. Actually, yes. If you go to Page 10 and then
15 look at the third from the bottom, so this license
16 agreement actually had a number of patents and patent
17 applications.

18 The third from the bottom of the patent
19 number, Serial No. 6694433, the title of that patent is
20 XML Encryption Scheme.

21 So this license agreement not only covers
22 some of the new functionalities that are in Word 2003,
23 but one of the patents that are covered in this license
24 agreement also relates to XML technology.

25 Q. Can you remind us how many patents are

1 licensed under the TECSEC agreement?

2 A. Well, the patents and applications are
3 roughly around 70.

4 Q. How much did Microsoft agree to pay TECSEC as
5 a lump sum under the TECSEC license agreement?

6 A. That was \$3 million.

7 MR. LENDER: And just so we can see,
8 would you pull up the next one?

9 Q. (By Mr. Lender) Let's talk about the Timeline
10 agreement you reviewed. That's Defendant's Exhibit 2247
11 in your book. Let me know when you're there, Dr. Ugone.

12 A. I'm there.

13 Q. Now, when was the Timeline agreement executed
14 between Microsoft and Timeline?

15 A. You see at the top, it says Patent License
16 Agreement, but the first line, beginning with the word
17 agreement, says dated this 1st day of June, 1999. So
18 June 1999.

19 Q. How many patents do you understand were
20 licensed under the Timeline agreement?

21 A. I believe there's one.

22 Q. And just in general, what is your general
23 understanding of the technology that was licensed to
24 Microsoft under the Timeline agreement?

25 A. Well, it has to do with, in a sense, data

1 gathering or data acquisition from multiple sources.

2 MR. LENDER: And, now, Chris, if you
3 could just pull up Section 1.4, Page 2 of the Timeline
4 agreement.

5 Q. (By Mr. Lender) What products were covered
6 under the Timeline agreement?

7 A. Essentially, all of Microsoft's products.
8 You can see where the definition of what licensed
9 products are, Shall mean any current or future product
10 or service developed, manufactured, offered, or
11 distributed by or for Microsoft.

12 Q. How much did Microsoft pay Timeline under the
13 Timeline agreement?

14 A. This was for \$5 million.

15 Q. Let's turn briefly to the TopTier agreement,
16 Defendant's Exhibit 2248, in your book. Let me know
17 when you're there.

18 A. I'm there.

19 Q. When was the TopTier agreement executed and
20 entered into between Microsoft and TopTier?

21 A. So if we read that first line, it says, This
22 OEM license and partnering agreement is made this -- I
23 believe that says 26th day of February, 2001. So
24 February 2001.

25 Q. How many patents were covered under this

1 agreement?

2 A. I think there was one as well.

3 Q. And what is your general understanding of the
4 technology that was covered under the TopTier agreement?

5 A. This relates to HTML-related technology.

6 Q. And what is HTML technology?

7 A. It's another sort of markup language. I
8 think the jury has heard that there's XML, which is a
9 markup language and SGML, which is a markup language as
10 well.

11 Q. What was the lump sum royalty payment to
12 Timeline (sic) under this agreement?

13 A. It was \$2 million.

14 Q. Now, Dr. Ugone, can you explain to the jury
15 what is the significance of these three licenses to your
16 hypothetical negotiation analysis?

17 A. Well, think about it this way: You have a
18 hypothetical negotiation. So what you have to think
19 about is, when both parties go into that hypothetical
20 negotiation, how would they have been negotiating?
21 So that's sort of the first thing, and we've talked
22 about that a little bit.

23 But what we have here are some indicators of
24 values. So, for example, if you take the TECSEC
25 license, just as an example, that covers the technology

1 digital rights management. That was new to Word 2003,
2 okay?

3 It was, in a sense, treated, for marketing
4 purposes, the same way as the XML capability, and so it
5 gives us an indicator value of what negotiators would
6 have come to for a license for the '449 patent. So it's
7 an indicator value.

8 So these licenses give us a range of where
9 the negotiations would have ended at the time of the
10 hypothetical negotiation.

11 Q. Does the fact that Microsoft has paid lump
12 sums of between 2 million and 5 million for prior
13 licenses in the real world tell you anything about the
14 reasonableness of Mr. Wagner's damages calculations?

15 A. Well, it tells me about the unreasonableness
16 of Mr. Wagner's calculations. He's saying 200 to \$207
17 million, and I've tried to discuss all of these other
18 indicator values and what the problems were with his
19 analysis. But that's telling us that he's way
20 overstating claim damages.

21 Q. And, Dr. Ugone, we're getting close to the
22 end here. Let's briefly turn to the second part of your
23 assignment.

24 Did you perform your own Georgia-Pacific
25 analysis to determine what the damages would be in this

1 case in the event the jury were to find infringement and
2 find that the patent was valid?

3 A. Yes, I did.

4 Q. And are these the factors that you
5 considered?

6 A. Yes. So these are -- I call them
7 Georgia-Pacific considerations. Sometimes they're
8 called the Georgia-Pacific factors.

9 But these are guidance factors or
10 considerations provided by courts that say, well, when
11 you're trying to figure out how parties would have
12 negotiated and what the outcome of this hypothetical
13 negotiation would have been, here's the factors to
14 consider.

15 Now, these aren't exclusive. That doesn't
16 mean you can't take other things into account, but it's
17 fairly generally accepted that these are the factors you
18 look at.

19 Q. And did you analyze all 15 of these factors?

20 A. Yes, I did.

21 Q. Which ones did you think were the most
22 relevant?

23 A. Well, I've got another slide where I've
24 highlighted some of them. And while I analyzed all 15
25 Georgia-Pacific factors, I've talked a little bit and I

1 think I'm going to talk even a little bit more here
2 about the highlighted ones and what's important about
3 these highlighted ones.

4 Q. Can you tell us what's important about the
5 highlighted ones, the six that you've highlighted?

6 A. And again, what we're trying to do here is
7 figure out probably two things. One, what are the
8 indicators of value? In other words, in the
9 negotiation, where would the parties have ended up?
10 That's the first thing.

11 The other thing we're trying to figure out
12 are, what are some of the forces or pressures that would
13 be present in that negotiation session? What would each
14 of the parties be saying that leads to that final
15 outcome? That's very important.

16 So that's why I've looked at these
17 Georgia-Pacific considerations.

18 So the first one has to do with i4i, Inc.'s
19 licensing agreements. And there really were no i4i
20 licensing agreements, so we didn't have that to rely
21 upon.

22 But we do know sort of the financial
23 condition of i4i, and we do know that they were having
24 difficulty selling their product and being profitable.

25 So that would have been very important during

1 the hypothetical negotiation.

2 Q. What about the indicators of value that you
3 saw that i4i said put on its own company?

4 A. You saw that on the valuations, that they
5 were valuing themselves between 1.5 million and \$2
6 million.

7 Q. Microsoft licensing agreements, is that
8 referring to the three licenses we've already talked
9 about, the 2- to 5-million-dollar range?

10 A. That's correct, yes.

11 Q. What do you mean by the commercial
12 relationship factor? What is that about?

13 A. Well, this one -- this one is actually very
14 interesting, because we've seen testimony on this, and
15 it was in the documents, that i4i considered what
16 Microsoft was doing with XML to be an opportunity.

17 So they were actually going to gain from and
18 perceived themselves as being able to gain from what
19 Microsoft was doing with XML. So that would have been
20 an important consideration in the hypothetical
21 negotiation.

22 Q. What about Factor 8, the profitability and
23 commercial success factor? What is that about?

24 A. And this one you can kind of look at from two
25 different perspectives, which I've hinted at already.

1 One is from the i4i perspective, and then the other is
2 from the Microsoft perspective, because those are the
3 two parties negotiating.

4 i4i was having difficulties commercializing
5 their product. They could not do it themselves. Their
6 revenues were low. They had negative profits, which
7 means they were losing money. They had lost a
8 substantial amount of money all the way leading up to
9 the hypothetical negotiation. In a sense, they couldn't
10 go it alone.

11 Whereas you look on the other side, Microsoft
12 is a successful company. They bring a lot of resources
13 to bear. They have -- they have the marketing
14 expertise. They have the technical expertise. They
15 have, if you think about it, the brand name Microsoft
16 and what that means, in terms of their products and a
17 good brand name that they have and quality of their
18 products.

19 So Microsoft, very successful, very
20 successful products, good brand name. They're bringing
21 that to the table, and they're bringing some huge
22 contributions to the table relative to i4i.

23 So that tells us something about the forces
24 and pressures that would be going to in that negotiating
25 session.

1 Q. What about Factor 11, the value of the
2 patented technology?

3 A. And some of these start to be a little
4 duplicative. It's the same sort of thing, that i4i was
5 having difficulties selling the product embodying the
6 teachings of the '449 patent.

7 Q. And the last one, of course, you have is the
8 hypothetical negotiation.

9 Would the parties know all this information
10 that you've been talking about at the hypothetical
11 negotiation?

12 A. As I've said before, I mean, these are
13 sophisticated business people. They go in the
14 negotiations smart. They go in prudent. They would
15 know all the factors that I was talking about.

16 Q. Based on your analysis of these indicators of
17 value and all 15 of these different factors, what did
18 you conclude?

19 A. I concluded that should the jury find that
20 Microsoft does infringe the '449 patent and should the
21 jury find that the patent is indeed valid, then the
22 appropriate amount of damages would be between 2 and \$5
23 million.

24 Q. Thank you, Dr. Ugone.

25 MR. LENDER: I have no further questions.

1 THE COURT: All right.

2 Cross-examination.

3 CROSS-EXAMINATION

4 BY MR. CAWLEY:

5 Q. Good morning, Dr. Ugone.

6 Do you have a copy of your deposition there?

7 A. I do not.

8 Q. And your expert report?

9 A. No, I do not.

10 Q. May I provide you with both?

11 MR. CAWLEY: Your Honor, may I approach
12 the witness?

13 THE COURT: Yes, you may.

14 A. This must be a hint.

15 Q. (By Mr. Cawley) I just want to make sure that
16 things can proceed quickly.

17 Now, Dr. Ugone, since you're a professional
18 in this business of testifying about patent damages, you
19 know that the right to a reasonable royalty for patent
20 infringement comes from the U.S. Congress, don't you?

21 A. If I understood your question, yes, there are
22 certain statutes and laws that, in a sense, codify what
23 damages are, yes.

24 Q. All right. Well, let's take a look at one of
25 them. Have you read this before?

1 A. Yes, I have.

2 Q. This is the law passed by our Congress many,
3 many years ago that's sort of the foundation of
4 collecting damages for patent infringement, isn't it?

5 A. Everybody refers to this paragraph, yes.

6 Q. And it says that upon finding for the
7 claimant -- and I guess here, that means someone who's
8 claiming that their patent has been infringed -- the
9 Court shall award the claimant damages adequate to
10 compensate for the infringement, but in no event, less
11 than a reasonable royalty.

12 And you're familiar with that, aren't you?

13 A. Yes, I am.

14 Q. And you understand that this law in our
15 country has been the law that Congress passed certainly
16 as long as you've been doing this work, correct?

17 A. Yes.

18 Q. Now, Mr. Ugone --

19 A. Probably older than me.

20 Q. Okay. Dr. Ugone, is everybody equal under
21 this law?

22 A. If I understand your question, this is the
23 law of the land, and it gives guidance to people such as
24 myself that evaluate claim damages.

25 So, yes, I take this very seriously that the

1 claimant, if infringement is found and if the patent is
2 valid, should be awarded damages adequate to compensate
3 for the infringement, but no less than a reasonable
4 royalty.

5 Q. And you agree that everybody is equal under
6 our laws?

7 A. I agree with that beyond just this -- this
8 particular code.

9 Q. So if -- under this law, if someone invents
10 something and gets a patent and assuming that that
11 patent is valid and enforceable and someone infringes
12 their patent, that person is entitled, under this law,
13 to recover a reasonable royalty at least, right?

14 A. Absolutely, yes.

15 Q. Okay. Well, what if instead of a person
16 owning the patent, a company owns the patent? Are they
17 treated equally under the law?

18 A. Actually, just -- just in case there was any
19 confusion, when you were saying person previously, I was
20 generalizing it to companies as well.

21 But my answer would be the same whether it's
22 a person or a company.

23 Q. A company would be treated the same under the
24 law, right?

25 A. Yes. Yes.

1 Q. If someone invests in the patent and becomes
2 a part owner, is the investor treated equally under the
3 law?

4 A. Yes.

5 Q. If someone buys the patent from the person
6 who invented it, is the buyer, now the new owner, of the
7 patent treated equally under this law?

8 A. We're going quickly here, but whoever has
9 rights to a claim of damages, my understanding -- I'm
10 not a lawyer, so I'm just doing this from my experience
11 and my view as an economist, but whoever has a claim to
12 damages would be treated equally, if I understand your
13 question.

14 Q. Yeah. Whoever? Even --

15 A. If they have a right to damages.

16 Q. Even bankers?

17 A. If -- if they're an owner and they have a
18 claim to those damages -- again, I'm just answering as a
19 layman here, so I want to be careful. I can't -- I
20 don't want to go too far here, because I don't know what
21 the law says, but from an economic perspective, if you
22 have a claim to damages, I would believe that they would
23 be treated equally.

24 Q. Now, Dr. Ugone, do you think that a company
25 that owns a patent should be treated equally under this

1 law even if that company is unprofitable?

2 A. It should be treated equally, so I don't
3 disagree with that at all. But remember what we're
4 doing here.

5 In the determination of a reasonable
6 royalty -- so this is where you can't just sort of take
7 out two words and not understand what's going beyond
8 that -- a reasonable royalty is the reasonable amount
9 the parties would have negotiated in this hypothetical
10 negotiation.

11 So what you can't do is forget the economic
12 forces or pressures that would be present in that
13 negotiation.

14 Having said that, yes, under the law, they
15 should be treated equally, but there are economic facts
16 or circumstances that could result in different
17 outcomes.

18 Q. But even considering those facts and
19 circumstances, you would agree with me that under our
20 laws, even an unprofitable company is entitled to
21 recover not less than a reasonable royalty if its
22 patents are infringed?

23 A. I don't disagree with you, but I stand by my
24 prior answer. You have to remember what would have
25 happened in the negotiation, and there's times where

1 there's forces or pressures in that negotiation that is
2 going to lead to a different outcome, depending on what
3 the parties are contributing to that negotiation.

4 I agree with you that a company can get
5 damages, even if they're losing money, but you can't
6 lose sight of the economic forces and pressures.

7 Q. All right. Thank you, Dr. Ugone.

8 You would also agree with me, wouldn't you,
9 that a company might lose money if its patents are
10 infringed?

11 A. Yes, that could happen.

12 Q. Okay.

13 A. Theoretically, that could happen.

14 Q. Absolutely.

15 You talked on your direct testimony about
16 some of the valuations of i4i that you looked at, and I
17 think you mentioned one that was about \$2 million?

18 A. Yes.

19 Q. And one that was 1-1/2 million?

20 A. Yes. If --

21 Q. But you looked at a lot of valuations, didn't
22 you?

23 A. And just for the record, that was actually --
24 we didn't go into this, but that was actually Canadian
25 dollars.

1 Q. Okay.

2 A. We skipped over that.

3 Q. Okay.

4 A. But it's really Canadian dollars.

5 Q. Okay. And Canadian dollars fluctuate in
6 value from back in the good old days, when they were
7 less than a U.S. dollar, until some of the rugged days
8 we're in now where it's sort of unpredictable, right?

9 A. I was comfortable with the 1.5 to 2 million.

10 Q. Okay. And that's the ones you just testified
11 to the jury about, right?

12 A. Yes.

13 Q. But you, in your expert report, prepared sort
14 of a summary of the valuations you looked at, didn't
15 you?

16 A. Absolutely. I wanted to be complete in
17 everything I looked at.

18 Q. Okay. Well, maybe -- maybe -- you being
19 complete, maybe you mentioned this in your direct
20 testimony, and I just didn't hear it.

21 So let's take a look at Exhibit 24 to your
22 report.

23 A. Okay.

24 Q. This is just the cover page of your report
25 you see on the screen here, right?

1 A. Yes.

2 Q. And this is Exhibit 24, correct?

3 A. Yes.

4 Q. Okay. Now, in your direct testimony, when
5 you were being complete, you say, you mentioned to the
6 jury this 2-million-dollar valuation and the
7 1.5-million-dollar valuation, right?

8 A. Yes. So we're looking at --

9 Q. Were there any higher evaluations that you --
10 well, didn't get around mentioning in your direct
11 testimony?

12 A. Okay. Now, two -- two answers. Yes, there
13 were higher valuations.

14 Q. Okay. That really was the answer to my
15 question. You said that there were.

16 For example -- and I don't want to spend a
17 bunch of time on this, going through all of them, but
18 how about this one (indicating)? What was the valuation
19 there?

20 A. I'm sorry. I can't see the pointer.

21 So in August of 1999, at the height of the
22 technology boom, there was a very high valuation that
23 even i4i -- if I remember that document correctly, i4i
24 didn't even believe that valuation.

25 So there are some numbers there that are in

1 the hundreds of millions of dollars, but they're not
2 relevant to the time period of the hypothetical
3 negotiation.

4 Q. Can you read them?

5 A. Is there a particular -- you want me to read
6 the highlighted one?

7 Q. Yes, sir.

8 A. So in January 2001 -- so that's really right
9 before the big crash occurred, it says 120 million to
10 170 million. And if you look at that document, even i4i
11 says they don't believe that number.

12 Q. What about the year before that?

13 A. It was 500 million to 750 million.

14 Q. And how about the year after -- the second
15 valuation in January of 2001?

16 A. That was 77 million to 135 million.

17 Q. Okay. So isn't it true, Dr. Ugone, that the
18 complete story, as you put it, is that there's a whole
19 range of valuations for this company here?

20 A. I don't think that's the complete story at
21 all, and I would say that would mischaracterize what
22 we're looking for and we're looking at here. I can't
23 agree with you at all.

24 Q. You, in the course of your career, have been
25 asked to place a valuation on a small privately-held

1 company, haven't you?

2 A. I've been asked to do that.

3 Q. Can it be difficult?

4 A. Yes, it's very difficult.

5 Q. Okay. Why is it difficult?

6 A. Well, one -- a couple of reasons. There's a
7 number of different ways you can do a valuation of a
8 company.

9 One has to do with what's called a discounted
10 cash flow analysis. What does that mean? You're trying
11 to predict out to the future the sales and profitability
12 of the company and come up with a value of that.

13 It turns out, if you're way off on those
14 projections, which all of these were, then you're way
15 off on the valuations. So you have to be very, very
16 careful when you do that sort of projection.

17 The other way to figure out the value of a
18 company is just like when you try to sell your house.
19 You look for comparable houses, or in this case,
20 comparable companies, and you use that as a benchmark.

21 So those are the two major ways of coming up
22 with valuations. Depending on the facts, that can
23 either be hard to do or it can be easy to do on whether
24 you can get the appropriate data. But that's some of
25 the uncertainty when you're doing valuations, especially

1 of closely held private companies.

2 Q. Okay. And let's focus on that last few words
3 you just said, a closely held private company.

4 Some companies we hear referred to as
5 publicly traded, right?

6 A. Yes.

7 Q. So that means that you can go out and buy and
8 sell their stock and that there is a marketplace for
9 that stock.

10 A. Yes.

11 Q. And that marketplace helps set a value on
12 that company.

13 A. Since there's millions of people trading the
14 stock and if it's an official market, yes, we know the
15 value of the share of stock right away.

16 Q. But for a company like i4i, there's no stock,
17 at least publicly available. There's no marketplace.
18 It's a publicly buy it and sell it. So you can't really
19 use that to value the company, can you?

20 A. You can't use stock market valuations in the
21 same sense that you just said, and so people default to
22 or use those two methodologies that I have described to
23 the jury.

24 Q. But, Dr. Ugone, in light of everything you've
25 said, both on your direct and cross, and your

1 experience, you'd agree, wouldn't you, that there's a
2 lot of uncertainty involved in evaluating many small,
3 privately held companies.

4 A. I don't disagree with that. In fact, that's
5 probably the point.

6 Q. Thank you, sir.

7 Let's talk about the Georgia-Pacific factors.
8 We've heard them about -- a couple of times. You had a
9 slide that showed all 15 of them.

10 A. Uh-huh.

11 Q. And you said you considered each one.

12 A. Yes.

13 Q. Okay. And if not each one, at least most of
14 those 15 Georgia-Pacific factors, you look at and other
15 people who do your kind of work look at to try and
16 consider whether that factor has an upward influence on
17 what the royalty rate would have been or a downward
18 influence on what the reasonable royalty would have been
19 or maybe no influence at all, correct?

20 A. Yes. So we're trying to identify in the
21 negotiation sessions --

22 Q. Okay.

23 A. -- what would the parties consent to, what
24 are the forces or pressures present in that negotiating
25 session.

1 Q. All right. So you look at all 15, and for
2 every one of them, you tried to decide, is this going to
3 have -- help Microsoft and have a lowering effect on the
4 rate, or is it going to raise the rate, or is it going
5 to be neutral?

6 A. I'm okay with you, but I never said to
7 myself, this is going to help Microsoft.

8 Q. Okay. But you understand that if it lowers
9 the rate, it will mean less money that Microsoft will
10 have to pay as a reasonable royalty, all of the things
11 being equal.

12 A. I'm trying to come up with the correct amount
13 of the damages, regardless of who the Defendant is.

14 Q. Okay. But my question is, you understand
15 that if something lowers the royalty rate, that all
16 things --

17 A. Then whoever the Defendant is in this case,
18 Microsoft, would pay less, yes.

19 Q. Okay. All right. That's all I'm asking you.
20 So really the question that I want to ask you is: When
21 you considered all 15, how many did you decide had an
22 upward effect?

23 A. There were a number that were neutral, and
24 then the rest all had a downward effect.

25 Q. So your answer is, you didn't find a single

1 one of the 15 that had an upward effect, correct?

2 A. That's correct.

3 Q. Now let's talk about the hypothetical
4 negotiation. And once again, let's set the stage for
5 that.

6 When are you saying that the hypothetical
7 negotiation would have occurred?

8 A. That would be mid-2003.

9 Q. Mid-2003.

10 And does a hypothetical negotiation mean that
11 somewhere -- I guess we don't really know where, but
12 somewhere at least a representative of Microsoft and a
13 representative of i4i would get together and they'd
14 negotiate a deal. That's what we're going to pretend
15 hypothetically, right?

16 A. For the purpose of our questions, I'll accept
17 that, yes.

18 Q. Okay. Now, in the real world, though,
19 Microsoft could choose whether or not it wanted to
20 negotiate at all, correct?

21 A. As I mentioned previously, in the real world,
22 you could have negotiations, and people could walk away
23 from the table and not reach an agreement.

24 So I think what you said encompasses that.

25 Q. Okay. And if Microsoft chose to negotiate in

1 the real world, it could dispute whether or not it
2 infringes i4i's patent.

3 A. I'm sorry. Would you ask the question again?

4 Q. Sure. Let me ask it a little bit different
5 way.

6 In the real world -- not the world in this
7 courtroom where we're doing the hypothetical
8 negotiation. Out in the real world, if Microsoft even
9 showed -- even chose to show up for a negotiation with
10 i4i, it could say to i4i in the negotiation, well, we
11 don't want to have to pay, or if anything, very little,
12 because we don't infringe your patent. They could say
13 that, couldn't they?

14 A. I understand your question. Yes. One of the
15 negotiating points could be we don't think we need a
16 patent because we don't think we're infringing.

17 Q. Okay. And likewise, in the real-world
18 negotiation, Microsoft, if it chose to show up at all,
19 could show up and say, well, another reason we want to
20 pay you very little is, we think your patent's no good;
21 it's invalid, right?

22 A. That could be a negotiating point, yes.

23 Q. And at the end of the day, Microsoft could
24 choose to either do a deal or to get up and walk out,
25 correct?

1 A. They could do a deal. And I know Microsoft
2 is respectful of people's intellectual property, yes,
3 and they could do a good deal and get a license.

4 Q. Dr. Ugone, I don't think I really asked you
5 about your impression of Microsoft's respect of people's
6 intellectual property rights. I think my question to
7 you was, in the real world, Microsoft could walk out and
8 not do a deal at all, correct?

9 A. And I've already said that, yes.

10 Q. Okay. But things are different here in the
11 courtroom in the hypothetical negotiation, aren't they?

12 A. Yes.

13 Q. In the hypothetical negotiation that we're
14 going to assume, the law requires that Microsoft has to
15 negotiate, correct?

16 A. Yes. And I have said that, yes.

17 Q. And furthermore, the law requires that in
18 that negotiation, Microsoft has to assume that it
19 infringes i4i's patent, right?

20 A. The assumption that I said at the very
21 beginning was valid, enforceable, and infringed, yes.

22 Q. Thank you.

23 My next question, Microsoft has to assume
24 that the patent is valid. Do you agree?

25 A. Absolutely.

1 Q. And at the end of the day, you've already
2 told us, in the hypothetical negotiation here in the
3 courtroom, Microsoft can't walk away; it has to do a
4 deal for a reasonable royalty.

5 A. Absolutely.

6 Q. Now, in doing your work and helping the jury
7 and all of us understand what you think would have
8 happened in that hypothetical negotiation, did you
9 evaluate what Microsoft's opening offer would have been?

10 A. No. Since I had what actual agreements were
11 made, I didn't have to come in and say here's what
12 Microsoft would have -- Microsoft's first position would
13 have been or here's the last position. So, no, I didn't
14 do that.

15 Q. Well, I didn't ask you if you had to do it; I
16 asked you if you did it.

17 You didn't do it, did you?

18 A. No.

19 Q. Okay. And likewise, you didn't evaluate what
20 i4i's original demand in that negotiation would have
21 been either, did you?

22 A. No, I did not, because I was able to converge
23 to the solution about having to do this process of what
24 would have been the back and forth until you got to the
25 answer --

1 Q. Uh-huh.

2 A. -- because I had other indicators as a value
3 of that answer.

4 But you're right. I didn't do Microsoft's
5 opening position or i4i's opening position.

6 Q. Okay. Now, earlier in your testimony, I
7 believe that I asked you if it was possible that
8 infringing someone's patent -- a company's patent might,
9 under some circumstances, reduce their profitability,
10 and you agreed that under some circumstances, it might,
11 correct?

12 A. Yes. We can be more explicit, but I would
13 agree with you, yes.

14 Q. Okay. And then you've also told us on your
15 direct examination that because i4i was unprofitable,
16 Microsoft would expect it to accept less in this
17 hypothetical negotiation.

18 Didn't you say that?

19 A. Actually, I said a little bit more than that.
20 I can explain. But that would be -- not deliberately,
21 but a little bit of a misunderstanding of what I said.
22 I can explain what I said.

23 Q. Well, what did you say?

24 A. What I was saying is -- is, again, what are
25 the economic forces or pressures in the negotiating

1 session.

2 What I'm saying is, is that i4i was having
3 problems commercializing their product. They had low
4 sales, negative profitability or losses. Microsoft has
5 resources that can make the product successful.

6 So the point is, who's going to be bringing
7 the most to the table here? And the issue is, with
8 Microsoft's brand name, capital, and their marketing and
9 their good programmers, they would be able to help take
10 i4i's technology and make it successful.

11 But the point is, that's something that
12 Microsoft contributes to the product. And prudent
13 licensors and licensees, the potential licensee would
14 not pay for that which they themselves are bringing to
15 the table. That's the point I was making.

16 Q. Well, maybe my mistake was, I really wasn't
17 asking you about the point you were making; I was asking
18 you about one of the things that I think was buried in
19 that answer, and it was that you've told this jury, have
20 you not, that one of the things that would make a
21 difference in the hypothetical negotiation is that i4i
22 was unprofitable.

23 A. And I just explained what that meant, which I
24 also said to the jury before; I just didn't want you to
25 misunderstand --

1 Q. I think we're all -- I think we're all on the
2 same page, and I'm afraid to say it, but isn't the page
3 we're on that if Microsoft's infringement reduced the
4 profitability of i4i, you're saying Microsoft should get
5 a better deal because of it?

6 A. You've now connected a whole bunch of dots
7 that I didn't talk about and don't make any sense to me.
8 I was talking about the profitability before the accused
9 product was even on the market.

10 Q. Well, if it doesn't make any sense to you,
11 then let's move on to something else.

12 Isn't it true that the more important the
13 patented feature is in the product, that that would have
14 a higher -- it would tend to make the royalty rate
15 higher?

16 A. Agree, holding all other factors constant.

17 Q. Sure. And you understand that it's important
18 to Microsoft to be able to introduce new features into
19 its products, such as Word, that not only attract new
20 customers but encourage old customers to upgrade to new
21 versions of the product?

22 A. I would not disagree that Microsoft is in the
23 business of, yes, selling software copies, yes. So they
24 want to encourage behavior to do that.

25 Q. When you say you would not disagree, is that,

1 in English, you agree?

2 A. That's economist speak for yes. I'm sorry.

3 Q. Okay. Okay. Well, we appreciate that
4 translation.

5 And you understand, don't you, for your
6 review of documents in this case, that to encourage
7 people to upgrade to new versions of Microsoft's
8 products, they tell them in various places and in
9 various ways what's new and what's important?

10 A. Yes.

11 Q. There's a document we've seen several times
12 and seen it so many times, I don't even want to take the
13 time now to pull it out again, but do you remember the
14 document that we've seen from Microsoft that was part of
15 the launch of Office 2003 in New York that described or
16 said that the foremost improvement in Word 2003 was
17 customer-defined XML?

18 Do you remember that?

19 A. I remember you using that document during
20 this trial, yes.

21 Q. And you had read that before you even came to
22 Court, hadn't you?

23 A. Yes, absolutely.

24 Q. Let's take look at another document -- or we
25 didn't look at that one, but let's look at another one,

1 actually, this time, Plaintiff's Exhibit 179.

2 This should be in the book in front of you,
3 if you have a hard time reading it on the screen.

4 A. Yeah. The screen is kind of fuzzy.

5 Q. Yeah.

6 A. What exhibit is it?

7 Q. 179. And I'll enlarge the part I'm
8 interested in in a minute.

9 The first question I want to ask you is, down
10 at the bottom of the first page you see is an e-mail
11 from Chris Pratley.

12 Do you see that?

13 A. I'm sorry. I'm at 179, and I do see an
14 e-mail from Chris Pratley, yes.

15 Q. And you remember hearing that he works for
16 Microsoft?

17 A. Yes.

18 Q. And let's look at what Mr. Pratley had to say
19 in April of 2003 in his e-mail.

20 He says, We love XML, especially arbitrary or
21 customer-defined XML, which is far more powerful than
22 the particular schema that a word processor or another
23 app. might use.

24 And then skipping over some stuff just to
25 save time, he says, We emphasize customer-defined

1 schemas, because we truly believe with all our hearts
2 that that's where the future is. Seriously.

3 Did you consider that document when you were
4 doing the work in this case, Dr. Ugone?

5 A. I mean, I'm aware of this document. I can't
6 tell you with certainty whether it's one I -- I don't
7 recall off the top of my head whether I saw it before or
8 not, but I understand this argument, and it has to do
9 with XML and customer-defined or arbitrary XML.

10 And my understanding is that what's accused
11 in this case is different, but I'll take the words for
12 face value of what he's saying.

13 Q. And you understand that what's accused in
14 this case is different?

15 A. My understanding is, is that there's
16 something very specific that's being accused; that it's
17 not just XML, but it's a small component of XML.

18 Q. Who gave you that understanding?

19 A. I understand that from everything that
20 I've -- know about this case.

21 Q. Well, specifically, where did you get the
22 understanding you just described?

23 A. Well, from legal documents, from discussions
24 with Microsoft personnel, from discussions with
25 Microsoft's technical expert, from the testimony I've

1 seen at trial.

2 Q. And does that understanding form a part of
3 the basis of your opinion here?

4 A. Well, it's -- the basis of my opinion is, is
5 that the accused functionality is just a small component
6 or feature contained in the overall Word product. I
7 would say that's what -- that's the basis of my opinion.

8 Q. Nobody's arguing about whether there are many
9 features in Word, Dr. Ugone. What we're talking about
10 now is the importance of the XML feature.

11 And I think you told us you're not sure if
12 you read Mr. Pratley in 2003 saying, We believe with all
13 our hearts that that's where the future is. Seriously.
14 You're not sure if you read that or not, are you?

15 A. I -- you know, we can actually look in my
16 report and see if that's in my document review section.
17 I looked at a lot of documents, some of which had a
18 similar phraseology.

19 Q. Let's take a look at Plaintiff's Exhibit 183.
20 Here's another e-mail. If we go to the next page --
21 actually, this is a series of e-mails, of course -- and
22 find the highlighted language.

23 MR. CAWLEY: You don't have the
24 highlighted language on 183?

25 No? Okay. Well, let's skip it. Let's

1 go to 192. Do we have the emphasized language for that?

2 Q. (By Mr. Cawley) Do you see Plaintiffs'
3 Exhibit 192?

4 A. I'm sorry. I see what you've highlighted
5 here and you've enlarged, yes.

6 Q. A Microsoft document. Do you see that?

7 A. Yes.

8 Q. Did you consider it in arriving at your
9 opinion?

10 A. By 2010, we think that more than 80 percent
11 of new content is going to be created in XML.

12 I did see documents that talk about -- that
13 Microsoft considered XML to be important, yes.

14 Q. Wow. You see here that it says that by 2010,
15 Microsoft thinks that more than 80 percent of new
16 content is going to be created in XML.

17 That sounds pretty important; wouldn't you
18 agree?

19 A. That's what they -- they write here. It
20 says, We're just at the beginning of what's possible
21 with XML.

22 I mean, obviously, the only thing I would
23 encourage is that we need to look at this in context,
24 but I don't disagree with what that sentence is saying.

25 Q. And even in the documents you showed us in

1 your direct examination, when you showed us, remember,
2 Plaintiffs' -- or Exhibit -- I guess it must have been
3 Defendant's Exhibit 643, the box, the Word box.

4 Do you remember that?

5 A. Yes.

6 Q. And you -- that's the box that people would
7 pick up in the store, if they were buying something in
8 the computer store. There it is right there
9 (indicates).

10 A. Yes. Yes.

11 Q. And right on the back, it touts support for
12 XML, doesn't it?

13 A. Yeah. It says exchange data with other
14 systems using XML technology. Don't disagree with that.

15 Q. You were asked about the copy of Microsoft
16 Word that Microsoft's lawyer bought over Amazon and
17 showed to the jury in the opening statement, and you're
18 aware, aren't you, that no damages in this case are
19 being requested by i4i for individual purchasers --
20 non-business purchasers of any Microsoft product?

21 A. The damages figure that Mr. Wagner presented
22 to the jury, the 200 million to the 207 million, would
23 not have included the student version.

24 But in Mr. Wagner's report, the alternative
25 numbers he had would have included the student version.

1 Now, I can only guess as to why certain things happen,
2 and I don't want to do that, but in Mr. Wagner's report,
3 he would have been claiming damages on that version
4 of --

5 Q. Were you here when Mr. Wagner testified?

6 A. Yes.

7 Q. And you heard him say that his damage figure
8 wouldn't include that copy of Word, because it wasn't
9 used in a business.

10 Do you remember?

11 A. I don't disagree with you.

12 Q. Okay. And you understand that his 98-dollar
13 figure is not \$98 for everybody who buys a copy of Word.
14 You understand that, don't you?

15 A. Yes.

16 Q. You understand that that \$98 would only apply
17 to the customers of Microsoft who are businesses and
18 actually use it in an infringing way, correct?

19 A. That's my understanding, yes.

20 Q. You say, Dr. Ugone, that in this hypothetical
21 negotiation, the negotiators would have agreed to either
22 a lump-sum payment, one payment of 2 to \$5 million, or
23 some kind of running royalty with a cap; is that
24 accurate?

25 A. Yes.

1 Q. And what's the alternative to that kind of
2 arrangement?

3 A. Well, if I understand your question, that
4 there's -- if you think about licensing agreements, it
5 can be structured -- the payments can be structured many
6 different ways.

7 There could be a running royalty rate, which
8 means somebody pays a certain amount per amount sold.
9 You can either pay on the revenues or you could pay a
10 per-unit amount on the units sold.

11 The other extreme is, you can pay a lump-sum
12 amount, or you can pay a lump-sum amount with a cap on
13 that lump-sum amount.

14 So there's a wide range of payment structures
15 for a licensing agreement.

16 Q. So you understand that Mr. Wagner expressed
17 the opinion that i4i and Microsoft would have agreed to
18 a deal where Microsoft pays a running royalty. For as
19 long as they continue to infringe, they pay a reasonable
20 royalty.

21 That's what he said, right?

22 A. Yes.

23 Q. And you said, on the other hand, no, they
24 just pay a lump sum or put a maximum on the royalty, and
25 it wouldn't be any more than \$5 million.

1 A. That's correct.

2 Q. And you think Microsoft would have insisted
3 on that at the hypothetical negotiation, right?

4 A. Yes.

5 Q. Well, have you asked anybody at i4i if they
6 would have agreed to it?

7 A. Very difficult for me to answer that.
8 I know from -- you know and I know that because of the
9 legal system, I can't go up to the i4i individuals and
10 ask them that question --

11 Q. Okay. Fair enough.

12 A. -- so you've put me in a difficult position.

13 Q. All right. You haven't asked them.

14 Has anybody asked i4i if they would have agreed to that?

15 A. I think Mr. Wagner said he asked them.

16 Q. And they said they wouldn't, right?

17 A. He said they would have wanted a running
18 royalty rate.

19 Q. And once again, this is the hypothetical
20 negotiation we're talking about in the courtroom, right,
21 where i4i has rights granted by law that it may not have
22 in the real-world negotiation?

23 A. May I respond?

24 Q. Do you agree with me?

25 A. I'm sorry. If that's a question, I can

1 respond, but I don't know if it's a --

2 Q. It is a question, and my question is, do you
3 agree with me?

4 A. Partially but not completely.

5 The result has to be a reasonable royalty.
6 It's not what people want to pay. It's not what people
7 want to accept. It's always true that sellers want
8 more. It's always true that buyers want less. That's
9 just a truism in the world.

10 The question is, what would reasonable people
11 have come to?

12 Q. Well, and let's ask about your own
13 professional experience.

14 You get hired from time to time to express
15 opinions like this for people, like Microsoft in this
16 case, who are accused of infringing someone's patent,
17 correct?

18 A. Yes.

19 Q. And from time to time, when you've been
20 representing people like that, when your client is
21 someone accused of infringing a patent, from time to
22 time, you've expressed the opinion that a lump sum or a
23 cap on the royalty would be appropriate, correct?

24 A. Yes.

25 Q. But sometimes you get hired to testify for

1 people like i4i who have a patent and are accusing
2 someone else of infringing it.

3 A. So I get hired to do the economic analytical
4 work to determine what a reasonable royalty situation --
5 answer would be in that situation, yes.

6 Q. Isn't it true, Dr. Ugone, that when you've
7 been hired by the people that owns the patent and is
8 seeking to recover a reasonable royalty, you've never
9 testified that a lump sum or a cap is appropriate?

10 A. I believe that to be correct, yes.

11 Q. All right, sir. You told us about some
12 license agreements of Microsoft that you looked at.
13 How many license agreements is Microsoft a party to?

14 A. I'm sorry. In terms of -- if you would just
15 put a little bit more meat on the question. I'm not
16 sure I'm with you.

17 Q. Well --

18 A. You mean over a certain period of time or
19 ever?

20 Q. Ever.

21 A. Yeah. I can't speak to that.

22 Q. Don't know?

23 A. No.

24 Q. But you only looked at 13, right?

25 A. I looked at the 13 that were produced in this

1 case, yes.

2 Q. How did you choose the 13 license agreements,
3 the 13 Microsoft license agreements, that you
4 considered?

5 A. This is, obviously, a complicated answer, but
6 my understanding is that in the legal environment, there
7 has to be production of documents, of relevant
8 documents. And Microsoft produced 13 such agreements
9 that met the criteria that I put on that one slide in
10 front of the jury.

11 Q. Well, met the criteria according to who?

12 A. Well, there were certain criteria that
13 Microsoft was asked -- and I can't -- I need to be
14 careful here. I can't speak to what happened between
15 you and the Microsoft attorneys.

16 Q. Well, let me ask you what you can speak about
17 then.

18 Where did you get the 13 that you considered?

19 A. Those were produced by Microsoft and had the
20 attributes that I testified to.

21 Q. Where did you get them?

22 A. They came from Microsoft to Microsoft's
23 attorneys, probably to you, but then to me.

24 Q. Well, I didn't send them to you.

25 A. No. I'm saying, at that time, they were

1 distributed.

2 Q. Isn't the truth, Dr. Ugone -- because it's
3 getting a little late here -- isn't the truth that
4 Microsoft's attorneys gave you the 13 you considered?

5 A. Every document that I have comes through the
6 attorneys.

7 Q. Isn't it true that Microsoft's attorneys gave
8 you the 13 that you considered?

9 A. I got those ultimately through the attorneys,
10 but that's the mechanism by which documents are
11 produced.

12 Q. And did you ever ask to see any more besides
13 those 13?

14 A. I don't recall if I asked to see more, but we
15 had extensive discussions about those documents.

16 Q. Did you ever ask to see or even ask if
17 Microsoft had any additional licenses relating to XML
18 that you weren't shown?

19 A. Actually, I can't recall. We might have had
20 discussions about that, but I can't tell you with
21 certainty I asked that question.

22 Q. So you based your opinion on three, right,
23 Timeline, TECSEC, and TopTier?

24 A. Let's be careful. I based my opinion on the
25 totality of what's in my report. One section deals with

1 the 13 agreements that were produced, and then
2 ultimately came down to three license agreements, yes.

3 Q. And none of the three that you considered
4 relate to custom XML tags, do they?

5 A. That's correct.

6 Q. Only one of them says anything about XML
7 whatsoever, correct?

8 A. One talks about XML; one talks about HTML;
9 and one talks about the digital rights management, which
10 we've discussed.

11 Q. I think my question was, only one has any
12 mention of XML, correct?

13 A. That's correct.

14 Q. And that mention is that in a list of 70
15 patents attached to the back of that agreement, one of
16 them talks about XML encryption?

17 A. Yes.

18 Q. Based on the time you've sat in the
19 courtroom, Dr. Ugone -- and I know you haven't been here
20 all the time -- but have you heard any testimony about
21 XML encryption?

22 A. No. There hasn't been discussions of XML
23 encryption.

24 Q. You testified -- and I won't drag you through
25 it again -- that in the hypothetical negotiation here in

1 the courtroom that Microsoft has to assume the patent is
2 infringed and that the patent is invalid, correct?

3 A. Yes.

4 Q. Did Timeline have to assume that in
5 negotiating their license agreement?

6 A. Did Timeline have to assume --

7 Q. I should have said, did Microsoft have to
8 assume that in negotiating the Timeline license
9 agreement?

10 A. We've already discussed this. There's
11 important things that happen in the real world, in terms
12 of the outcome of benchmarks and licenses.

13 But, occasionally, some of those dynamics
14 could be a little bit different in terms of what the
15 parties are negotiating.

16 So they don't necessarily go in and say --

17 Q. Then --

18 A. -- what you're saying.

19 Q. -- if it's true that Timeline and TecSec and
20 TopTier, in those negotiations, Microsoft could come in
21 and say, your patent's no good; we don't infringe,
22 you're saying that would be a little bit different than
23 a hypothetical negotiation?

24 A. Well, the reason why I'm comfortable with
25 that difference is that it's generally accepted to look

1 at license agreements as a proxy of value.

2 That's Georgia-Pacific Factor 1, 2, and
3 there's another one, 12, but it's also supported by the
4 rest of the analysis I did. That's why I'm comfortable
5 with my conclusions in spite of the fact of what you're
6 saying.

7 Q. I didn't ask you about your conclusion. What
8 I asked is, and let me just ask it again.

9 You agree with us, Dr. Ugone, wouldn't you,
10 that under the confinement of a hypothetical
11 negotiation, that it would be a lot different, because
12 unlike these three license agreements, Microsoft would
13 have to make certain assumptions here in the courtroom
14 that it didn't have to make with Timeline and TecSec?

15 A. There's a different assumption there, yes.

16 Q. Okay. Last question and last document.
17 Let's take a look at Plaintiffs' Exhibit 117.

18 This relates to that CEIP data, the data that
19 Microsoft keeps to try and get information about how
20 people are using its products.

21 Did you look at this document in arriving at
22 your opinion?

23 A. Again, I would have to check. I looked at a
24 lot of documents. I'd have to check to see if I looked
25 at this specific one.

1 Q. Okay. Well, there's some information here
2 from Microsoft about its CEIP data collection. And I've
3 sort of -- since the information is in these two columns
4 and appears on two different pages, I've joined the two
5 columns together so we can read it.

6 A. Actually, if you could just tell me the page,
7 because I've got a fuzzy screen here, and I'd also like
8 glasses.

9 So are you looking at the top of -- are you
10 looking at the top of the second page? I see that.

11 Q. The bottom of the first.

12 A. Oh, okay. I'm with you.

13 Q. Okay?

14 A. Okay.

15 Q. So reading the first column, Microsoft tells
16 us that enterprise data is underrepresented in SQM data.
17 Do you see that?

18 A. Are you looking at the bottom one?

19 Q. I'm reading the whole thing straight down.

20 A. Oh, okay.

21 Q. Enterprise data is underrepresented in SQM
22 data.

23 A. I'm with you. I see how you're reading it
24 now, yes.

25 Q. Okay. And then under the column, Reasoning,

1 Microsoft says: Many large organizations or
2 organizations with strong IT influence do not opt into
3 the CEIP program and, therefore, do not send data.

4 Do you see that?

5 A. Yes, I do see that.

6 Q. Thank you, Dr. Ugone.

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

9 THE COURT: All right. Redirect?

10 MR. LENDER: Very brief, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. LENDER:

13 Q. Dr. Ugone, i4i's counsel asked you about
14 whether accused infringement can hurt i4i's profits.
15 The losses that you focused on in connection with your
16 opinions, when did those losses take place for i4i?

17 A. Those all occurred prior to the date of
18 alleged first infringement.

19 Q. And what were i4i's losses when it attempted
20 to sell its products, even before Microsoft started to
21 sell Word 2003?

22 A. So leading up to, I'd say, mid-2003, I think
23 it was over \$20 million.

24 Q. And have you -- did you analyze i4i's losses
25 for the period of time after Microsoft started selling

1 Word 2003?

2 A. Yes.

3 Q. And how did Microsoft -- excuse me -- how did
4 i4i's losses compare for the period after Microsoft
5 started selling Word 2003 as compared to before?

6 A. Actually, the losses were less.

7 Q. I'm sorry?

8 A. Their losses were less.

9 Q. Now, Dr. Ugone, you've reviewed some of the
10 documents that we've talked about in this case, correct?

11 A. Yes.

12 Q. Did Mr. Vulpe say, after he tested Word 2003,
13 that it was his opinion that Word 2003 would actually
14 help i4i?

15 A. Yes, that he viewed it as an opportunity.

16 Q. And were you sitting in the courtroom when we
17 played the deposition from Stuart Angus, the former
18 President of i4i and a member of McLean Watson?

19 A. Yes.

20 Q. And did Stuart Angus believe that Microsoft
21 Word 2003 would actually lead to an updraft for i4i?

22 A. That's correct.

23 Q. Does an updraft mean an improvement for i4i?

24 A. That's a good thing.

25 MR. LENDER: Your Honor, may I approach

1 real quick, the board?

2 THE COURT: Yes, you may.

3 Q. (By Mr. Lender) Can you see this, Dr. Ugone?

4 A. Yes.

5 Q. Now, you were asked a little bit about -- let
6 me just go back to this.

7 You were asked by i4i's lawyers about your
8 understanding of the accused functionality in this case.

9 Do you remember that?

10 A. Yes.

11 Q. And when --

12 MR. LENDER: May I approach again, Your
13 Honor?

14 THE COURT: Yes, you may.

15 Q. (By Mr. Lender) When Dr. Rhyne was on the
16 stand, Mr. Powers went through different uses of custom
17 XML, and these were a list of things that did not
18 infringe.

19 And do you see the top one talks about
20 opening a dot doc file containing custom XML?

21 A. Yes.

22 Q. You see the -- Dr. Rhyne said that that
23 actually did not infringe the '449 patent.

24 A. That's correct. I heard that testimony.

25 Q. Is that consistent with your understanding

1 that the dot doc file is not alleged to infringe the i4i
2 patent by anyone in this courtroom?

3 A. I'm not the technical person, but that's my
4 understanding.

5 Q. And I'd like to just real quick ask you about
6 one of the exhibits that Mr. Cawley just asked you
7 about, PX179.

8 Do you recall being asked some questions
9 about PX179?

10 A. Yes.

11 Q. And I want to just read to you a paragraph
12 that Mr. Cawley didn't read, but I would like to read to
13 see if it might be relevant to this case.

14 And if you could turn to the second page of
15 that document, Paragraph 7.

16 A. Yes.

17 Q. Let me just read that for the jury. It may
18 be a little hard to read. This is what Mr. Pratley
19 wrote in Paragraph 7 of this document:

20 If we were trying to impose a new file format
21 on users, we would default to a new format and that
22 would be that. Instead, we default to dot doc, because
23 that is what 300 million people out there today use and
24 can read.

25 If we defaulted to some new XML format, they

1 would have a problem, and customers who got 2003 would
2 have a problem working with them.

3 Since Word ML is not about new file format to
4 us, we do not use it as a default. XML is quite weak as
5 a file format compared to binary in many ways, although
6 we love its portability and accessibility.

7 Is that what Mr. Pratley said in this e-mail
8 from April 30th of 2003?

9 A. Yes.

10 MR. LENDER: Thank you, Your Honor. I
11 have nothing further.

12 THE COURT: Any recross?

13 MR. CAWLEY: No Your Honor.

14 THE COURT: All right. Very well. You
15 may step down.

16 All right. Who will be Defendant's next
17 witness?

18 MR. POWERS: Microsoft rests, Your Honor.

19 THE COURT: All right. Microsoft rests.
20 Is there going to need to be rebuttal testimony?

21 MR. CAWLEY: Yes, Your Honor.

22 THE COURT: About how long do you
23 anticipate?

24 MR. CAWLEY: An hour.

25 THE COURT: An hour? Okay. Very good.

1 All right. Ladies and Gentlemen of the
2 Jury, where we are at this stage, it's 12:10. I'm going
3 to go ahead and give you your lunch recess now, and I'm
4 going to give you a little longer than usual.

5 So I'm going to give you, let's see,
6 until 1:45. So you'll have about an hour and a half for
7 lunch. And one of the reasons I'm doing that is I have
8 some matters that will take about 30 minutes for me to
9 take up with the attorneys during this noon hour.

10 So we're going to be working, but there's
11 no reason y'all need to be sitting in the jury room, so
12 we'll give you a little extra long lunch hour.

13 We'll come back, and then we'll hear the
14 rebuttal testimony and cross-examination. That will
15 probably take an hour, hour and a half, something like
16 that, and then we'll see where we are from there.

17 So very good. Remember my instructions.
18 Have a good lunch, and we'll see you right after lunch.

19 COURT SECURITY OFFICER: All rise.

20 (Jury out.)

21 THE COURT: Please be seated.

22 All right. Mr. Cawley, is there going to
23 be one witness or two?

24 MR. CAWLEY: One witness.

25 THE COURT: All right. One witness. All

1 right.

2 MR. CAWLEY: And also, Your Honor --
3 excuse me for -- we have a motion that we want to make
4 after the resting of --

5 THE COURT: Okay. All right.

6 MR. CAWLEY: -- the Defendant.

7 THE COURT: All right. Very good.

8 What -- oh, after the resting of
9 Defendant's case?

10 MR. CAWLEY: Yes, Your Honor. We want to
11 make a JMOL motion.

12 THE COURT: All right. You may do that
13 at this time.

14 MR. CAWLEY: Right at this time?

15 I'm going to ask Ms. Harting to come up
16 and do it.

17 THE COURT: Well, I tell you what, let's
18 do that after lunch. And what I want to do after lunch,
19 I'm -- Ms. Houston has a copy of our Court's Charge, and
20 I'm going to pass that out to you at this time to both
21 parties.

22 And if you'll be looking that over, and
23 we'll plan to be back here at 1:30, at which time I will
24 hear your motion for JMOL, and I'll hear any objections
25 to the Court's charge.

1 We will then proceed with the rebuttal
2 testimony and however long the cross takes. And we're
3 probably going to be hitting round 3:30 there, and I'll
4 make a decision whether to charge the jury this
5 afternoon or wait and do it in the morning.

6 I don't think we're going to get it to
7 the jury tonight, although depending on when we get
8 through, I may give them that option, but probably be in
9 the morning before we argue.

10 All right. Any questions?

11 All right. Y'all have a good lunch.

12 We'll see you back here at 1:30.

13 COURT SECURITY OFFICER: All rise.

14 (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