

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 20, 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,  
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P R O C E E D I N G S

(Jury in.)

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated.

Well, good morning, Ladies and Gentlemen  
of the Jury.

Welcome back. As you know, we've  
completed all of the evidence. You heard the Court's  
Charge late in the day yesterday. Appreciate your  
patience during that.

Had a good night's sleep; the lawyers  
have. And they're ready to present their closing  
arguments to you now. It's going to be an hour per  
side, so -- just so you'll kind of know what to expect,  
a lot of things to cover.

So at this time, the Court will recognize  
counsel for i4i for purposes of closing statement.

MR. CAWLEY: Thank you, Your Honor.

A few years ago, I had the opportunity to  
serve on a jury. And, of course, for me it was a  
wonderful experience to be able to see this process from  
the other side of the jury box.

And I remember very well that it was a  
little bit frustrating when the judge gave us the same

1 instruction that Judge Davis has given you, that we  
2 weren't allowed to actually talk about the reasons that  
3 we were there all during the trial.

4           But once the arguments were over, as they  
5 will be in about two hours now, the judge told us we  
6 were free to go and begin our deliberations. And we  
7 were very excited to talk about the case. We wanted to  
8 talk about the evidence we heard. We wanted to talk  
9 about the lawyers. There were a lot of things that a  
10 lot of us wanted to talk about.

11           But as we had those talks, it began to  
12 dawn on us that even though we had heard a lot, and  
13 there was a lot of evidence to try and understand and  
14 piece together, that basically our job in resolving that  
15 case came down to just a few big important questions.

16           And I think, as you discuss the evidence  
17 in this case, you may have something like the same  
18 experience. I think you'll find that this case, when  
19 boiled down to just the basics, involves four big  
20 questions.

21           First, does Microsoft infringe i4i's  
22 patent?

23           Second, is Microsoft's infringement  
24 willful?

25           Third, is the i4i patent invalid?

1                   And, finally, how much is i4i entitled to  
2 as a reasonable royalty?

3                   And you will remember, in fact, that --  
4 and we'll look at them in more detail in a few  
5 minutes -- but yesterday, Judge Davis very briefly  
6 showed you the questions that you'll be asked to  
7 actually fill out answers to. And I think you'll find  
8 that they basically are these four fundamental  
9 questions.

10                   What I want to do this morning is  
11 basically to remind you of some of the evidence that you  
12 have seen and how it seems to us that that evidence will  
13 help you answer these questions.

14                   But before I do that, I want to stop at  
15 the very beginning, and I want to talk to you in  
16 particular about two things. I want to talk to you  
17 about Michel Vulpe saying that he lied, and I want to  
18 talk to you second about bankers.

19                   You will remember that last Friday  
20 afternoon on the stand, Mr. Vulpe admitted that he lied  
21 to a man named Lum in a piece of paper that he sent  
22 Mr. Lum in 1994, and that he also sent a piece of paper  
23 or had been in agreement with Mr. Scott Young in which  
24 he either exaggerated or maybe even lied again.

25                   I want to start off at the very beginning

1 by reminding you what that evidence is.

2           This, Defendant's Exhibit 2051, is the  
3 piece of paper -- actually several pieces of papers --  
4 the documents that Mr. Vulpe said he sent to Mr. Lum in  
5 1994. You will remember that there are several pages of  
6 it, and on this last page, Mr. Vulpe made this statement  
7 to Mr. Lum:

8           I am currently exploring the patenting of  
9 some fundamental ideas used in Infrastructures'  
10 technology. The basis of the patent and the preliminary  
11 work on the valiation (sic) precedes Infrastructures'.

12           You'll remember that this is the  
13 statement that Mr. Vulpe admitted to you on the stand on  
14 Friday was not true. It was a lie, he said. It  
15 happened in 1994. He sent this to Mr. Lum, and as far  
16 as we know, only to Mr. Lum.

17           You will remember he explained to you the  
18 reason that he did that. He said that he was worried  
19 that i4i was going to go down and the patent might be  
20 tied up with it.

21           The patent at this point in time was  
22 still only an application, so he basically wanted to  
23 keep his options open about the possibility of putting  
24 the patent somewhere else other than with i4i, because,  
25 after all, since he was working with i4i when he

1 conceived of the patent, i4i would be entitled to it.

2 Now, what you didn't hear him say, but  
3 you had heard earlier in the day, is that two months  
4 after Mr. Vulpe made this statement to Mr. Lum, i4i  
5 asked him to do what he was supposed to do and to assign  
6 the patent application to i4i. And he did that.

7 So Mr. Vulpe never followed through with  
8 his attempt to keep his options open about where he put  
9 the patent.

10 The second statement is this one  
11 (indicates). This is an agreement in 1996 between Scott  
12 Young, who you saw on videotape -- videotaped testimony,  
13 i4i, and Mr. Vulpe. You'll recall that Mr. Young said  
14 that they had gotten into a dispute, and they entered  
15 into this agreement to settle that dispute.

16 As part of the settlement, they agreed to  
17 this (indicates). They agreed to refrain from  
18 interfering with the other party in any manner. And  
19 they even went so far as to specifically spell out what  
20 Mr. Vulpe would say if he was ever asked about  
21 Mr. Young's connection with i4i.

22 And Mr. Vulpe and Mr. Young in this  
23 agreement agreed that he would say that Mr. Young worked  
24 for and helped grow the business of i4i, including its  
25 U.S. customer base during 1995 and 1996, and that he

1 voluntarily resigned from i4i in 1996. That's how they  
2 agreed to respond in case anyone ever asked for a  
3 reference, for example.

4           You'll remember that there's no testimony  
5 that anybody ever did ask for that, so although this was  
6 an agreement to make this statement, there's no  
7 suggestion that it ever actually got made to anybody.

8           And you'll remember the testimony about  
9 what the phrase, Mr. Young worked for, really means.

10           The evidence is undisputed that Mr. Young  
11 was a consultant; that he expended his efforts or worked  
12 on behalf of i4i full-time for a couple of years.

13           But the evidence is also undisputed that  
14 he was never technically an employee of i4i.

15           Now, Ladies and Gentlemen, i4i does not  
16 ask you to condone Mr. Vulpe lying to Mr. Lum. i4i does  
17 not condone that lie. After all, it's i4i that would  
18 have been victimized by it if the plan to pull the  
19 patent out of i4i had ever come to pass.

20           But we do believe it's important that you  
21 put this into the context of what you will be asked to  
22 actually decide in this case.

23           During the course of this litigation, you  
24 won't be surprised to hear that i4i produced over a  
25 million pages of documents to Microsoft: E-mails,

1 documents like these, many other things.

2           You won't be surprised to hear that  
3 Microsoft's team of lawyers poured through those  
4 documents and found these two statements that they bring  
5 before you today.

6           But, Ladies and Gentlemen, I'll suggest  
7 to you this is really not a case about whether Mr. Vulpe  
8 lied to Mr. Lum in 1994. This is not a trial about  
9 whether Mr. Vulpe lied.

10           Judge Davis has not, and I don't believe  
11 he will, ask you any questions about whether Mr. Vulpe  
12 lied or not, because even though no one condones that  
13 activity, the fact of the matter is, this is a lawsuit  
14 about patent infringement.

15           And the issue is: Does Microsoft use  
16 i4i's patent and refuse to pay fair value for using that  
17 invention?

18           That's the issue. And I respectfully  
19 suggest to you that Microsoft's attempt to put Mr. Vulpe  
20 on the stand and prove him a liar is an effort at  
21 misdirection, to ask you to decide this case, because  
22 you don't like that kind of behavior by Mr. Vulpe, and  
23 to ignore the facts about Microsoft's infringement and  
24 refusal to pay fair value.

25           You certainly learned from seeing some of

1 the things that happened just in this trial that a lot  
2 of effort went into getting here. Mr. Vulpe's  
3 deposition was taken, and I can tell you that there are  
4 rarely any surprises in the courtroom for the people who  
5 have been working on this case for a couple of years.

6 i4i knew that Mr. Vulpe would be asked on  
7 the stand; i4i knew that he would have to admit that  
8 this statement to Mr. Lum in 1994 was a lie. Even  
9 though they knew that, they asked Mr. Vulpe to come here  
10 so you could hear his testimony directly. He didn't try  
11 and hide what he did. He admitted it.

12 But I suggest to you again, that's not  
13 what this case is about. It's not a trial of  
14 Mr. Vulpe's being a liar or not when he made that  
15 statement to Mr. Lum. It's an issue of whether  
16 Microsoft infringes this patent.

17 Now, the second thing I said I wanted to  
18 talk to you about before we look at that evidence is  
19 bankers.

20 You'll recall that Microsoft's lawyer,  
21 from virtually the very first words he said in his  
22 opportunity to address you in the opening statement,  
23 said: This is a case about bankers.

24 Well, that's a little ironic, since you  
25 heard that there's no suggestion -- there's no evidence

1     whatsoever that bankers have anything to do with i4i.

2                     There are investors; that's true.  But  
3     that's also true of virtually every small technology  
4     company in the world.

5                     But I want you to understand and help you  
6     remember more specifically what Microsoft's lawyers told  
7     you and then ask you to consider why they did it.

8                     Here's what they said in the opening  
9     statement:  We think that what the evidence will show  
10    here is that the enforcement of this patent is brought  
11    wrongly, but that will be for you to decide.

12                    The issue here begins with the parties.  
13    And I think of cases -- and there's lots of different  
14    ways to think about them -- as being either engineer  
15    cases or banker cases.

16                    He went on:  Engineer cases are often  
17    ones that are brought to protect a patent, to protect a  
18    successful patent from being copied.  That's not what  
19    this case is about, in our view based on the evidence.

20                    Other cases, the banker cases, are ones  
21    where you didn't have a very successful product, and the  
22    bankers decide to try and get their money out another  
23    way.  We think the evidence will show that is what this  
24    case is about.

25                    Do you think it's possible that

1 Microsoft's lawyers called this a bankers' case in the  
2 hope that you would be caught up in anger against  
3 bankers, who, after all, got us into a terrible  
4 financial mess, and that you would decide this case  
5 because they had told you that i4i was a bunch of  
6 bankers?

7           Fortunately, Judge Davis yesterday, in  
8 his charge, gave you some very clear instructions about  
9 how to deal with this attempt at misdirection by  
10 Microsoft. And here's what Judge Davis told you. This  
11 appears on, I think, the next to the last page of the  
12 written charge, if you want to read it again when you go  
13 back into your deliberations.

14           Judge Davis told us yesterday that you  
15 should consider and decide this case as a dispute  
16 between persons of equal standing in the community, of  
17 equal worth, and holding the same or similar stations in  
18 life. This is true in patent cases between  
19 corporations, partnerships, or individuals.

20           A patent owner is entitled to protect its  
21 patent rights under the United States Constitution.

22           This includes bringing suit in a United  
23 States District Court for money damages for  
24 infringement. This may be done regardless of whether  
25 the owner of the patent is an individual, a partnership,

1 a bank, a small company with only a few investors, or a  
2 large company made up of many investors.

3 The law recognizes no distinction among  
4 types of patent owners. A patent owner may be a  
5 competitor of an accused infringer, but it does not have  
6 to be.

7 The characterization of a patent lawsuit  
8 as good or bad or as misuse of the patent laws, based  
9 upon the status of the patent owner, is inappropriate  
10 and should not play any part in your deliberations. All  
11 corporations, partnerships, and other organizations  
12 stand equal before the law, regardless of size or who  
13 owns them, and are treated as equals.

14 With that in mind, Ladies and Gentlemen,  
15 let's look at some of the actual facts about the case.

16 The first is, does Microsoft infringe?

17 Here you heard extensive testimony from  
18 Dr. Tom Rhyne. He took you through these charts of the  
19 claims of the patents, and the reason that we did that  
20 and marked these things with green checks is, frankly,  
21 so you could remember that he had done it, and I  
22 wouldn't have to attempt to take the time to do it here  
23 again today.

24 But I hope you will recall that he went  
25 through each piece or element of Claim 14 and

1 demonstrated to you, with documents and diagrams, how it  
2 is present in the Microsoft products.

3 He did the same thing with Claim 18 and  
4 the same thing with Claim 20, concluding that all  
5 three -- that Microsoft infringes all three of the  
6 claims that are asserted in the patent.

7 He then explained to you how Microsoft  
8 had encouraged others to infringe by giving them support  
9 and directions about how to use Microsoft's products in  
10 an infringing manner.

11 He told you there were no substantial  
12 non-infringing uses of the product, and demonstrated to  
13 you with documents how that was the case.

14 You'll remember the testimony of  
15 Dr. Martin, a software engineer and professor, who  
16 helped prepare this diagram which formed the basis of  
17 Dr. Rhyne's opinion.

18 Now, Ladies and Gentlemen, as I said  
19 before, I think what you'll find as an answer from  
20 Microsoft -- just as they have attempted to misdirect  
21 you into making this a trial about whether Mr. Vulpe  
22 lied to Mr. Lum, and they tried to misdirect you into  
23 making you think that this is a trial about bankers, I  
24 think you'll find that their response to the evidence in  
25 this case is going to be a series of misdirections,

1 pointing you in any direction they can in the hopes that  
2 you'll follow at least one of their suggestions and  
3 conclude that Microsoft is not obligated to pay fair  
4 value for its use of this invention.

5 We've already seen the first direction  
6 they want to give you is that this is a case about  
7 bankers, but we heard Judge Davis pretty well put a stop  
8 to that.

9 The next thing they'll try and convince  
10 you is, if you won't decide the case based on bankers,  
11 that Microsoft doesn't infringe.

12 And why do they say that is?

13 Well, the first thing they say is we  
14 didn't copy. Mr. Little wrote the software, and he  
15 didn't copy anything. He did it all on his own.  
16 Another piece of misdirection.

17 And, fortunately, another one that Judge  
18 Davis put a stop to.

19 In his charge yesterday, he told you  
20 clearly that infringement does not require proof that  
21 the person copied a product or the patent. It's  
22 entirely possible to infringe a patent. Even if you  
23 don't copy anything, if you use the idea that someone  
24 else got a patent on, that's patent infringement.

25 Well, don't copy won't work, because Judge Davis shot it

1 down.

2 Microsoft next tells you, how about  
3 considering that the delimiters are part of the  
4 metacode.

5 Now, you'll remember the definitions here  
6 that the delimiters are these little arrowheads that go  
7 in various directions, but the content of the tags is in  
8 the tag name.

9 Here, for example, is member ID.

10 And what Microsoft wants you to -- wants  
11 you to say here is that, since in the Microsoft product,  
12 the tag name is stored in final memory, but they don't  
13 bother to store those little delimiter marks, which are  
14 always the same, and everyone knows they're always  
15 there, that that must not be a metacode map.

16 Well, fortunately, Judge Davis has given  
17 us a claim construction that answers that question.  
18 Judge Davis tells us that a metacode means an individual  
19 instruction which controls the interpretation of the  
20 content of the data.

21 Those little arrow marks don't control  
22 the interpretation of the content of any data. That's  
23 done by the member ID part of it, by the tag itself.  
24 That's what Microsoft stores. They absolutely infringe  
25 under the Court's claim construction.

1                   Well, if you won't buy that reason for  
2 not infringing, Microsoft's got another one and maybe  
3 you'll follow this: There's no data structure.

4                   Ladies and Gentlemen, it's almost hard to  
5 believe that -- in a pure software product, which does  
6 nothing but manage data and is composed of the countless  
7 structures that you heard testimony about, it's almost  
8 difficult to believe that Microsoft would stand in front  
9 of you and say, well, our product doesn't have a data  
10 structure.

11                   Data structure, as you've heard, is  
12 defined by the IEEE dictionary. It applies to software,  
13 and it means the physical or logical relationship among  
14 data elements, designed to support specific data  
15 manipulation functions.

16                   I would suggest to you, Ladies and  
17 Gentlemen, that there is surely no question in this case  
18 that the relevant Microsoft software is a data  
19 structure.

20                   Now, as I already mentioned, Judge Davis  
21 will ask you, after your deliberation, to answer some  
22 specific questions. And the first question he'll ask  
23 you to answer deals with infringement.

24                   Did i4i prove, by a preponderance of the  
25 evidence -- you'll remember that means more than 50

1 percent -- that Microsoft infringes Claims 14, 18, or 20  
2 of the '449 patent?

3 Now, of course, it's your job and your  
4 job alone to answer these questions based on the  
5 evidence, and I won't presume as to what your answer  
6 will be. But I will tell you that if you believe the  
7 evidence shows that Microsoft infringes these claims of  
8 the patent, then you should answer yes for all three  
9 claims.

10 The next big question in the case is, is  
11 Microsoft's infringement willful?

12 And this brings into question some of the  
13 story that you've been hearing about what really  
14 happened here with Microsoft from the very beginning.  
15 And I want to briefly review some of that evidence with  
16 you.

17 You'll remember that a man named Jean  
18 Paoli, in early 2001, wrote this memo within Microsoft.  
19 He described the bad news for us. And he basically said  
20 that Microsoft was in deep trouble, because the market  
21 wanted an XML editor, and they were nowhere.

22 That concern went up to the man at the  
23 very top, Mr. Bill Gates, who, at about the same time,  
24 wrote in an e-mail that now the market wants a great XML  
25 editor, and it's hard to say we're the leader of the XML

1 revolution if we don't have an editor.

2 Mr. Sawicki, who you'll hear was -- you  
3 have heard about, his position in Microsoft, at the same  
4 time, observed that building support for arbitrary  
5 schemas from scratch is extremely difficult. And just  
6 the facts that we can insert arbitrary XML tags into  
7 Word docs and validate them today is way beyond what we  
8 were dreaming of as feasible in Word 11 when we were  
9 getting started in March 2001.

10 And you'll remember, ironically, that it  
11 was at this very time, the spring of 2001, that Chris  
12 Pratley of Microsoft and others wrote: Here's a great  
13 example of a huge customer interested in XML. The  
14 federal government, the Department of Defense has been  
15 searching for ways to create knowledge and then find it,  
16 once it's created.

17 And this customer is a significant  
18 portion of the revenues within North America in the  
19 federal government, and I worry they can replace our  
20 cash cow.

21 You heard what happened next in this  
22 story. Since Microsoft didn't have the ability to  
23 satisfy this customer, who wanted to use Word as an  
24 editor for XML, they turned to i4i. They asked i4i to  
25 attend a meeting with them in Washington, D.C. And

1 Mr. Tulley and Mr. Thomas demonstrated to Microsoft  
2 representatives how the i4i invention worked, how it  
3 would solve Microsoft's problem.

4           You'll recall that Mr. Thomas was invited  
5 to a meeting with the government, and that afterwards,  
6 the Microsoft representative said: The only way we  
7 could do this was with a third-party plug-in, and i4i  
8 came through for us.

9           You'll remember that Mr. Belk was that  
10 man's name from Microsoft. And after that meeting,  
11 after i4i came through -- through for them, he prepared  
12 this document, which showed i4i, in the upper right-hand  
13 corner, and Microsoft Office, in the bottom, pairing up.  
14 And he presented that proposed -- proposed customer  
15 solution to intelligence agencies, seven of them, across  
16 31 different intelligence offices.

17           But then you'll remember that strange  
18 turn of events. You'll remember that Microsoft had  
19 invited i4i, specifically Mr. Thomas, to attend this big  
20 meeting of people who were working on this problem. But  
21 then Mr. Zukerberg uninvited i4i and told them that it  
22 was due to a miscommunication on the Microsoft end.

23           But, Ladies and Gentlemen, you saw that  
24 wasn't true. There was no miscommunication. You saw  
25 that happen, because Mr. Zukerberg wrote that: My main

1 concern with i4i is that if we do the work properly,  
2 there won't be a need for their product.

3           And then this series of e-mails. You'll  
4 remember that i4i sent an e-mail to Microsoft, reminding  
5 them that i4i had a patent and telling them the patent  
6 number.

7           You'll remember that that went up to  
8 Mr. Sawicki, who sent it to several other people, and  
9 told them, thanks, we saw this tool some time ago and  
10 met its creators. Word 11 will make it obsolete. It  
11 looks great for XP, though.

12           What an extraordinary 24 words  
13 Mr. Sawicki wrote there.

14           In the last sentence, it looks great for  
15 XP, though, he acknowledges to others within Microsoft  
16 that the i4i invention works great with the earlier  
17 Microsoft Word product. But then he goes on to tell us:  
18 We don't need to pay attention to these guys. Basically  
19 ignores their patent, because Microsoft is going to make  
20 them obsolete by doing what i4i does.

21           And at this point, Ladies and Gentlemen,  
22 I'd like to remind you of some of these names: Chris  
23 Pratley went to Washington, D.C., and saw the i4i  
24 invention.

25           Martin Sawicki was there, too. He saw

1 the i4i invention. He got the e-mail that had i4i's  
2 patent number. He said it's great, but we're going to  
3 make it obsolete.

4 Brian Jones was at the meeting. He saw  
5 i4i's invention. He got Mr. Sawicki's e-mail saying,  
6 we're going to make it obsolete. It clearly had the  
7 patent number on it.

8 Andy Zuckerberg, yeah, he was at the  
9 Washington, D.C., meeting too. He saw the invention.  
10 He's the man who uninvited i4i from the big XML meeting  
11 and gave as the true reason, we won't have a need for  
12 them if we do our job right.

13 Ladies and Gentlemen, where are these  
14 men?

15 Was it not worth Microsoft's trouble to  
16 bring one of them here to Court to explain these facts  
17 to you?

18 Well, Microsoft says, of course, despite  
19 all those facts, our infringement wasn't willful. And,  
20 basically, their excuse is they had their heads in the  
21 sand.

22 They say that Mr. Little was working hard  
23 on the code. He didn't get any of those e-mails. He  
24 didn't know about the patent, and I believe him.  
25 Mr. Little seemed to give very honest testimony.

1 But what they ignored is, in the office down the hall,  
2 Mr. Jones, Mr. Sawicki, Mr. Zukerberg, and others, they  
3 knew about the patent. They had seen the patented  
4 invention.

5 Why didn't they tell Mr. Little, who they  
6 knew was working on this very same thing, you know, we  
7 might want to take a look at this?

8 Mr. Little told you, if he had known  
9 there might be a patent covering what he did, he could  
10 have asked a lawyer about it. But nobody ever mentioned  
11 it to him. Because people at Microsoft didn't bring to  
12 this trial, they chose to keep their heads in the sand,  
13 to ignore the patent.

14 You heard Mr. Little testify that though  
15 he had never done it before, he was confident that if  
16 somebody had told him about a patent number, he could  
17 have found it within minutes.

18 And let's remember, if they had taken  
19 just minutes to pull up just the first page of the  
20 patent, they would have seen that its title is a method  
21 and system for manipulating the architecture and the  
22 content of the document separately from each other,  
23 exactly what Mr. Little was working on.

24 They would have seen from the first page  
25 that this deals with different metacode maps and mapped

1 content. That's what Mr. Little was doing. They'd see  
2 that it talks about the means for selecting, locating,  
3 and addressing metacodes.

4 And in the summary, they'd see it's about  
5 a map of metacodes found in the document that's produced  
6 and provided and stored separately from the document.

7 The map indicates the location and  
8 addresses of the metacodes in the document. Exactly the  
9 solution for the XML problem that Mr. Little was working  
10 on so hard in 2001 and 2002.

11 And yet, the people just down the hall at  
12 Microsoft apparently couldn't be bothered to look up the  
13 patent from the number that they had in the e-mail and  
14 to mention it to somebody.

15 If, Ladies and Gentlemen, after  
16 considering this evidence, you believe that Microsoft's  
17 infringement was willful, then you would answer Question  
18 No. 2 yes.

19 The next big question is, is the patent  
20 invalid?

21 And here Microsoft bears the burden of  
22 proving, not just by 51 percent, but by clear and  
23 convincing evidence that the Patent Office made a  
24 mistake.

25 You'll recall that the United States

1 Patent Office considered this patent for four years, and  
2 it was only at the end of that lengthy study and lengthy  
3 examination process that they agreed that the patent was  
4 something new that was entitled to protection.

5 So where does Microsoft try and lead you  
6 here?

7 They're going to tell you that the patent  
8 is invalid. Well, maybe you'll believe this. Maybe  
9 you'll believe it's invalid because Word 5 and 6 did  
10 what the invention did; because Word 5 and 6, the  
11 earlier Microsoft documents, had something called  
12 bookmarks.

13 But, Ladies and Gentlemen, you'll  
14 remember that you heard from the very beginning of this  
15 case that none of the Microsoft products, until 2003,  
16 had the ability to support XML.

17 I specifically asked Mr. Little: Well,  
18 when you were considering how to do custom XML -- this  
19 is, again, back in the timeframe that we've been talking  
20 about -- you thought that the bookmark approach would be  
21 too fragile and wouldn't work, correct?

22 And he answered: Well, I would agree  
23 with the first statement and probably the second  
24 statement of conclusion. There's some context there,  
25 but yes.

1                   Mr. Little admitted the bookmarks  
2 wouldn't work.

3                   Remember, that this is vividly  
4 illustrated, because you heard about this product that  
5 was called SGML Author for Word. This is something that  
6 Microsoft didn't even write. They were so desperate for  
7 some way to handle SGML, the predecessor to XML, that  
8 they went off and bought this software from somebody  
9 else so they could offer something to their customers.

10                  One of them said, to keep the market at  
11 bay and offer them at least something, because they  
12 didn't have a way to support XML.

13                  And yet they say to you: Well, yeah, the  
14 patent is invalid, because Word already did it.  
15 The evidence shows that it did not.

16                  Well, if you won't follow them on Word 5  
17 and 6, how about another argument that Microsoft has  
18 made, the Rita and DeRose editors.

19                  Now, you heard so little about these that  
20 I won't spend much time on them, but, basically, there  
21 is a patent called the Rita patent. And it shows  
22 something that is entirely different from the i4i  
23 invention.

24                  You've heard from the very beginning from  
25 all the witnesses that the i4i invention is about

1 keeping the content in one place in memory and the map  
2 of metacodes to show where the tags go in another place  
3 so you can keep that content, the document, clean.

4           The Rita patent uses something totally  
5 different, but it's called a tree. You heard a little  
6 bit about it yesterday, and it basically means that you  
7 follow the tree down so little bits of the content are  
8 all the way down the tree.

9           See, here, there's a section and then  
10 there will be some content under heading, a paragraph, a  
11 paragraph. And under each of those, there will be some  
12 text (indicates).

13           Basically, instead of keeping the content  
14 in one place, as the patent describes, this tree  
15 approach spreads that content all down the branches and  
16 the leaves of the tree, something totally different, as  
17 Dr. Rhyne explained to you yesterday.

18           And the DeRose patent is really no  
19 different, although the tree is drawn a little bit  
20 differently, here you'll see it's actually upside down  
21 with the trunk at the top and the branches and leaves at  
22 the bottom.

23           But it basically uses the same thing; a  
24 series of what you've heard described as software  
25 pointers that show which way to go on the tree, and then

1 content that is not kept in one place, as it is in the  
2 i4i patent, but is spread all down the tree.

3 Well, if you won't buy Microsoft's  
4 argument and you won't follow them on the Rita and  
5 DeRose editors, how about SEMI? Maybe you'll conclude  
6 that i4i's own product that it sold to SEMI makes the  
7 patent invalid.

8 Well, you heard quite a bit of confusing,  
9 I would suggest, testimony about SEMI. But let's review  
10 carefully the important testimony and evidence.

11 The first witness you heard from the  
12 trial was Mr. Stephen Owens. You'll remember that while  
13 he was a consultant with i4i, he actually wrote the  
14 software code that's in the SEMI product.

15 He gave this testimony; he was asked:  
16 Did you -- did you come to understand what the folks  
17 that had to create these documents thought about your  
18 product?

19 He answered: Yes, sir. I had a number  
20 of conversations with people who had to create documents  
21 for SEMI, and they weren't real happy at being forced to  
22 type what they thought had a pretty meaningless code.

23 And then he showed us a picture of what  
24 the people at SEMI, who weren't real happy, were having  
25 to deal with in the i4i product. This is what is on the

1 computer screens of the SEMI employees whose job it was  
2 to create these documents all day long.

3 And not surprisingly, they weren't happy  
4 about it, because it doesn't look like an ordinary  
5 document. It, frankly, looks like a mess.

6 This is the problem that the invention  
7 solved, when they finally thought of the solution.

8 If the SEMI product already had the  
9 invention, you wouldn't be seeing a document that looks  
10 like this with tags in it.

11 If the SEMI product already had the  
12 invention, you'd see a clean, normal-looking document at  
13 SEMI, because, remember, the invention takes all these  
14 tags out and puts it somewhere else, leaving a clean  
15 document.

16 This evidence demonstrates to you, Ladies  
17 and Gentlemen, that the SEMI product did not have the  
18 invention. The SEMI product was the problem that was  
19 later solved by the invention.

20 And you heard some testimony by videotape  
21 from Mr. Scott Young, who was not a software engineer;  
22 he's a lawyer. But, nevertheless, he told you some  
23 things about the SEMI product, but I want to be very  
24 clear, because it went by pretty fast, exactly what  
25 Mr. Young told you.

1           He was asked this question: Okay. So  
2 let's say I have an SGML document that has a hundred  
3 tags, 50 start tags and 50 end tags. Is all the  
4 structure going to be in one place, all the hundred tags  
5 in one place and all the content in another place?

6           ANSWER: No. The tags are going to  
7 follow along with the individual pieces of content.

8           QUESTION: What do you mean follow along?

9           His answer: If it's a heading, for  
10 example, in a document, it's going to be bold, and it's  
11 going to have header tags on it.

12           If there's then a paragraph underneath  
13 that, it's going to have a para tag around that  
14 particular piece of content.

15           If there's then a list between that, it's  
16 going to be separated by list items and list tags.

17           QUESTION: So in a file, you have the  
18 structure intermixed with the content?

19           ANSWER: Yes.

20           That, Ladies and Gentlemen, is exactly  
21 the opposite of the invention. When the structure and  
22 the content are not intermixed, they're separate.  
23 That's the whole point of the invention to solve the  
24 SEMI problem.

25           And, finally, on the issue of whether or

1 not the patent is valid, whether the Patent Office did  
2 their job well, Judge Davis instructed you on some  
3 things called additional considerations about  
4 obviousness. And I want to discuss those with you  
5 briefly, because they're fortunate in a way, because  
6 unlike a lot of this very complicated patent law stuff,  
7 these are some common-sense things you can look at to  
8 help you decide whether the patent was obvious or not.

9           So, for example, if others tried and  
10 failed to solve this problem, sounds like the solution  
11 maybe wasn't so obvious.

12           If there was a long-felt need for the  
13 invention that nobody did before, well, if it had been  
14 obvious, surely someone would have come up with it, if  
15 there was a need.

16           If there's disbelief in the industry,  
17 people are skeptical that it might work, and if the  
18 invention has received praise from people in the  
19 industry, those are all common-sense indicators to you  
20 the patent was not obvious.

21           And let's see what the evidence says  
22 about these four factors.

23           Failure of others. Here's Mr. Sinofsky  
24 again, talking about the SGML Author for Word product.  
25 That came out of the mid-'90s, and it turned Word into a

1 highly structured and painful-to-use editor. We sold a  
2 very small number of copies of this, but kept the  
3 community at bay.

4 A failed product that tried to do what  
5 the invention had successfully done.

6 A long-felt need. In this press release  
7 from Microsoft, Mr. Paoli says: With Office 11, we're  
8 addressing a fundamental concern that we've heard over  
9 and over and over again from our customers.

10 Disbelief. This is Mr. Thomas pointing  
11 out in his testimony to you in this document that many  
12 SG/XML experts consider the separation of markup from  
13 content, as the invention at worst, as defeating the  
14 purpose of markup, and, at best, as introducing enormous  
15 complexity and processing overhead to coordinate the  
16 two.

17 And finally praise. You'll remember that  
18 the technical writers praised i4i, when its invention  
19 was patented, and even the United States Patent Office  
20 itself sent this certificate of thanks and  
21 congratulations to i4i, when the Patent Office decided  
22 to buy and use i4i's invention.

23 Ladies and Gentlemen, after you've  
24 considered this evidence, if you believe that Microsoft  
25 has failed to prove by clear and convincing evidence the

1 patent is invalid, then you should answer Question 3 no  
2 for each claim.

3 And that brings us to the last  
4 consideration: How much is i4i entitled to as a  
5 reasonable royalty?

6 You'll remember the evidence here came  
7 first from Dr. Wecker. He is a statistician who has  
8 worked at various universities and now has his own firm.

9 He explained to you how he helped design  
10 a survey to determine at least an estimate of how many  
11 users might use this in an infringing manner.

12 And his conclusion was that it was at  
13 least 1.8 million, and I'll talk about that number a  
14 little more in a minute. But that was his conclusion as  
15 a result of the survey.

16 Then you heard Mr. Michael Wagner. He  
17 chose as a benchmark a starting place for the value of  
18 this XML function, not to everybody, not to people who  
19 don't use it, but just to people out in the marketplace  
20 who were willing to buy a product that does nothing but  
21 help you do XML.

22 He had a number of choices ranging all  
23 the way up to \$799, but he chose the one that was the  
24 next to the cheapest, at \$499, to begin his analysis.  
25 He concluded, based on those factors, that a reasonable

1 royalty in this case ranges from barely under \$200  
2 million to \$207 million.

3 Now, where does Microsoft try to send you  
4 in consideration of what is a fair price, a reasonable  
5 royalty, for their use of this invention?

6 Well, they tell you that the damages are  
7 too high. First, they say it is a bad survey.

8 Please remember, in considering the  
9 survey, two things. First of all, remember Judge Davis'  
10 instruction to you -- and you might want to read it  
11 again if you think that it's useful when you go back to  
12 your deliberations -- that damages don't have to be  
13 calculated with mathematical precision.

14 I'm sure that no survey is perfect, and a  
15 lot of you probably have some experience with surveys  
16 and know how they're carried out. But it's important  
17 that you remember what Dr. Wecker did and how  
18 extraordinarily conservative he was.

19 Remember that he had the company who  
20 actually placed the calls, placed calls to 988 different  
21 U.S. businesses to ask them about their use of XML. He  
22 was able to get responses, people who are willing to  
23 talk on the phone and seemed to know what they were  
24 talking about, from 46 of those.

25 For the 950-odd that either wouldn't

1 talk, didn't answer the phone, couldn't find a good  
2 person to talk to, he put every one of those in  
3 Microsoft's column and assumed that they did not  
4 infringe.

5 The only people he assumed or found or  
6 estimated to be infringing were the ones who actually  
7 responded to the survey and actually said that they did.

8 And, Ladies and Gentlemen, don't forget  
9 in considering the reasonableness of Dr. Wecker's  
10 estimate of 1.8 million Microsoft customers, Microsoft  
11 has a hundred million customers of the Word product that  
12 could be used to infringe.

13 And here's what Microsoft itself says  
14 about XML of those customers: That the improvement in  
15 2003, that the foremost improvement, is the ability to  
16 do XML and consider this Microsoft estimate.

17 In Plaintiffs' Exhibit 192, they  
18 estimated -- they think that more than 80 percent of new  
19 content is going to be created in XML by the year 2010.  
20 Does it really strike you as unreasonable, in the face  
21 of these Microsoft estimates, 80 percent of the new  
22 content is going to be in XML by next year?

23 Does it strike you as unreasonable that  
24 Dr. Wecker found that less than 2 percent of Microsoft's  
25 Word customers use it in an infringing manner, use XML?



1 least, the opening session of my closing remarks. I  
2 will have about 10 minutes, after Microsoft's attorneys  
3 have talked to you, just to wrap things up and talk  
4 about a couple of other things.

5 But I'll give you a little advance look.  
6 In that 10 minutes, I'm going to want to go back to the  
7 big questions in this case. I'm going to want to talk  
8 to you one more time about what's really at stake in  
9 this matter, the issues that you're really going to be  
10 asked to decide, and one more time discuss with you some  
11 bits of evidence that may help you answer those  
12 questions.

13 Thank you.

14 THE COURT: All right. Thank you,  
15 Mr. Cawley.

16 Ladies and Gentlemen of the jury, is  
17 everybody okay? Anybody need a break or anything?

18 Okay. Very well.

19 Counsel for Microsoft, Mr. Powers.

20 MR. POWERS: Thank you, Your Honor.

21 Would you dim the lights?

22 Thank you.

23 Well, good morning again for the last  
24 time. If there's one thing that we think the evidence  
25 has shown in this case, it's that this is a case that

1 should never, ever have been brought.

2           The best way to judge a case on whether  
3 it's a good case or a bad one is the difference between  
4 what witnesses say in the courtroom when they're trying  
5 to get \$200 million and what they said and did in the  
6 past. Because some people will say and do a lot of  
7 things to try to get \$200 million.

8           And often the truth is found by looking  
9 at what they said and did outside of the courtroom years  
10 before. And when you look at that comparison in this  
11 case, I think you'll find the truth. The truth is,  
12 Microsoft doesn't infringe, and the patent is invalid,  
13 and i4i is entitled to nothing.

14           The first place we look is what the key  
15 witnesses in this case thought and said and did at the  
16 time.

17           You'll recall that in the fall of 2002,  
18 before Word 2003 was introduced, i4i, and specifically  
19 Mr. Vulpe, got an advance copy of Word 2003, and they  
20 studied it carefully. They studied it and learned that  
21 it imported a custom XML file into Word. And Mr. Vulpe  
22 admitted that's exactly what they're now accusing of  
23 infringement.

24           Did he say anything to Microsoft about  
25 infringement? Did he say anything internally within i4i

1 about infringement? No. Not because he was unable to  
2 do so, because he didn't think so. What he told us was  
3 congratulations, great product.

4 If he really thought there was  
5 infringement, if he thought this was such a threat to  
6 his company, he would have said something to us, and  
7 then we could have had a discussion.

8 You hear counsel for i4i say we didn't  
9 investigate the patent. Of course not. We're being  
10 told congratulations about the product, not that we  
11 think it infringes your patent.

12 And Mr. Vulpe admitted that there's not a  
13 single document anywhere, not an e-mail, not a memo,  
14 nothing, where he even raised the issue of whether  
15 Microsoft might be infringing his patent. But he knew  
16 about the patent. He knew about Microsoft Word. He had  
17 torn it apart. That tells you more about what the truth  
18 is in this case.

19 In fact, not only did he not say it  
20 didn't infringe -- or infringed, he said it was great.  
21 This is his internal comment about the advanced copy he  
22 received.

23 He says this creates opportunities for  
24 us. Not a single word about this is a risk; this is a  
25 problem for us; this might infringe. Those actions,

1 those words at the time tell you a lot more about  
2 whether there's infringement in this case.

3 But it's not just Mr. Vulpe. His  
4 co-inventor, Mr. Owens, he also knew about Word. He  
5 also knew about the patent. He also didn't come to any  
6 conclusion that it infringed.

7 So the two inventors, by their real  
8 actions, knew there was no infringement. But they're  
9 not the only ones.

10 Mr. Sweet, whose deposition testimony you  
11 saw yesterday, also one of their technical people, he  
12 knew about the patent. He studied Word. He didn't  
13 think there was infringement.

14 Keith Thomas, the vice president of  
15 technology for i4i. Does he say that this patent is  
16 valid? Does he say this patent is important? To the  
17 contrary, he calls it a red herring, which means it's a  
18 false issue.

19 He said the patent is actually a problem,  
20 and even more significantly, in the next line, he says  
21 we went away from the patent because it was a wrong  
22 approach. We did not base Version 4 on the concepts of  
23 the patent. That tells you this case really isn't about  
24 the patent.

25 So we release Word in October of 2003,

1 three and a half years pass, and all of a sudden, the  
2 lawsuit comes out of the blue. Not a single word about  
3 there being a possible infringement either inside i4i or  
4 out. And that lawsuit was filed by the limited  
5 partnership, not even the company that had the patent  
6 originally.

7           So what changed? The patent didn't  
8 change. The product didn't change. The two things that  
9 really determine the merits of the case, those didn't  
10 change.

11           What changed was the reason for bringing  
12 the case, which is why this is a bad case. What changed  
13 was who controlled i4i. McLean Watson and Northwater  
14 took over control.

15           Now, this is the Court's instruction  
16 yesterday that counsel for i4i just put up, and I wanted  
17 to put it up as well, because it's important.

18           Judge Davis instructed you yesterday that  
19 a patent owner is entitled to protect its rights, and  
20 that means any patent owner, including a bank.

21           And of course, he's right. He's the  
22 judge. But the issue is, is this a case about  
23 protecting their patent rights, or is it a case about  
24 something else?

25           And that's why, in the opening statement,

1 I said exactly the same thing. I said we're not here  
2 because Mr. Vulpe felt aggrieved by patent infringement.  
3 He didn't think there was infringement. His actions  
4 show that.

5 I also said, well, even bankers can bring  
6 meritorious lawsuits. And you have to look at the  
7 merits of the lawsuit carefully.

8 So we're in agreement, the issue here  
9 isn't whether bankers own i4i. The issue is, why was  
10 the lawsuit brought, and what are the merits of the  
11 lawsuit? That's the issue.

12 We know the answer to the question,  
13 though, because the bankers tell you exactly why they  
14 brought the lawsuit. It's not to protect the patent;  
15 it's not for the reason patent lawsuits should brought;  
16 it's because they've lost \$25 million even before Word  
17 2003 was introduced.

18 They faced what they called a financial  
19 crisis. They said, what can we do? Mr. Loudon (sic),  
20 who was then the Chairman of the Board, Loudon Owen,  
21 said, well, how can we achieve liquidity faster?  
22 That's not protecting the patent. That's not what Judge  
23 Davis said is the right reason to bring a lawsuit.  
24 That's, how do you get your money out of the company  
25 when you've lost it all?

1           That's what -- that's the reason this  
2 lawsuit was being brought. Not to protect the patent,  
3 not for all the good reasons that you can bring a  
4 lawsuit.

5           Mr. Loudon Owen says, well, maybe we can  
6 sell this thing to somebody that hates Microsoft and get  
7 our money out that way. That's why we're here today.

8           Perhaps the best summary is Mr. Vulpe's  
9 own e-mail to Mr. Owens just after the lawsuit was  
10 filed. Does he say, we're going to protect our patent  
11 rights? Does he say, we are absolutely going to protect  
12 what we invented? He says no, the game is afoot.

13           That tells you what this is. It's a game  
14 to them. But it's not a game. It's serious. And yet  
15 they treat it as a game and just a way to try to take  
16 money out of Microsoft, which has a big fat target on  
17 its back.

18           Why? Because Microsoft is successful.  
19 But that success is based on the hard work of our own  
20 engineers, like Rob Little. And what's wrong is for a  
21 company to come in and try to take advantage of that  
22 success as a game to achieve liquidity. That's why this  
23 lawsuit should never have been brought.

24           What is this case about? The two key  
25 issues: Does Word work the same way as the Vulpe

1 patent? Yes, there's infringement, or no, there's not.

2 Second, did the Patent Office have the  
3 right information? Is this patent valid?

4 But we've seen two or three more issues  
5 come up. Third is credibility. Counsel for i4i said,  
6 well, it's not about whether Mr. Vulpe is a liar.

7 That's not true.

8 The issue is, can you rely upon what's  
9 being told? Mr. Vulpe is the founder of i4i. Mr. Vulpe  
10 is their lead witness on this issue. If he's a liar in  
11 this courtroom, then they have no case either.

12 It's also about right and wrong. The  
13 question is, is it right for them to bring a case like  
14 this? Is it right for them just to try to achieve  
15 liquidity by suing Microsoft because of its success? We  
16 think the answer to that question is no.

17 It's equally important to ask what this  
18 case is not about. It's not about whether XML was good.  
19 You've seen now probably 15 times their top five or ten  
20 favorite e-mails saying XML is important; XML's good;  
21 XML's valuable.

22 That's not the issue in this case. We  
23 agree with that. They didn't invent XML. In fact,  
24 Microsoft was one of the groups that invented XML.  
25 That's not what this case is about.

1           Does Word support XML? That's not what  
2 this case is about either. You can use XML all day and  
3 all night, 365 days a year, and not infringe this  
4 patent. And they've admitted to that. Yet all of their  
5 documents say XML or custom XML, that that's not enough.  
6 You recall it has to be stored in a very particular way,  
7 because if they use Word ML, our own invented XML, no  
8 infringement, and even they admit that.

9           They say i4i included the patent number  
10 in marketing materials. That's true.

11           Did they ever say, hey, we think what  
12 you're doing is covered by this patent, or you should  
13 look at this patent? No.

14           They said, we have great technology.  
15 Please buy our company, or please use our product.  
16 That's marketing material. That's not what this case is  
17 about either.

18           Finally, meetings between Microsoft and  
19 i4i. They talked for quite a long time about those  
20 meetings, trying to get you to think that we got their  
21 technology and copied it. But we know we didn't.

22           Here's the testimony of their own expert,  
23 Mr. Wagner, on the question of XML. He admits there's  
24 not a single document where we promoted the accused  
25 products based on the specific accused functionality.

1 It's not enough to say XML; it's not enough to say  
2 custom XML. It has to be with these specific formats.

3 You recall that over and over again, not  
4 a single document that we promoted it that way and not a  
5 single person that they could prove bought it for that  
6 reason.

7 So XML isn't enough. You have to look  
8 closer.

9 Now, on the question of all these  
10 meetings, they've admitted over and over again,  
11 Mr. Tulley and Mr. Thomas, yeah, we had the meetings,  
12 but, i4i is not saying anything was copied by Microsoft  
13 from i4i. Nothing. That's why that evidence is a red  
14 herring.

15 On the question of infringement, Word is  
16 different in a way that matters to the patent. In a  
17 way, it's not surprising, because the products here,  
18 Word 2003 and 2007, they come after many, many other  
19 versions of Word.

20 Not surprisingly, when you're building  
21 Word 2003, you build on what you've done in the past.  
22 You use Word technology, Microsoft technology. You  
23 don't turn around and drop all of that and go with  
24 something that somebody else did.

25 That's exactly what Mr. Little testified

1 to. They had the man here who wrote the code they're  
2 accusing. He's the guy. They had him on the stand for  
3 an hour.

4 Did they ask him a single question about  
5 what he did with the code he wrote for Word 2003 or '7?  
6 No. Remember, they read him e-mail after e-mail after  
7 e-mail from other people that he wasn't on the e-mail.  
8 Some of them he'd never met.

9 They had the man who wrote the code  
10 they're here accusing for an hour and didn't ask him a  
11 single question relevant to what he did. That tells you  
12 how important the infringement issue is in this case to  
13 i4i.

14 Now, you heard counsel for i4i say, we  
15 didn't bring Mr. Sawicki or Mr. Jones. That's true.  
16 They deposed every single one of them. They could have  
17 played those depositions for you.

18 The answer is, none of them said anything  
19 helpful for i4i. The evidence was not helpful. They  
20 could have brought those witnesses in by deposition.  
21 They chose not to.

22 Here's the three key issues on  
23 infringement.

24 Now, this isn't a question of  
25 misdirection. Each of these is in the claim. This is

1 required for infringement. They have to show all three  
2 of these. If any one of them is missing, there's no  
3 infringement.

4 That's the Court's instruction. They  
5 have to show each and every element, and if the use  
6 doesn't contain one or more, there is no infringement.  
7 That is from the Court's instructions.

8 Not only will we show you that one of  
9 those is missing, we'll show you that all three are  
10 missing.

11 First, the question of the metacode map.  
12 Counsel for i4i says this is misdirection. It's  
13 straight in the claim, and it's straight out of the  
14 Court's claim construction. That's not misdirection.  
15 That's what's required for infringement.

16 The misdirection is saying, well, if you  
17 have XML, you infringe. That's not what the claim says.  
18 So the issue under the Court's claim construction is, is  
19 there a data structure that contains that map of  
20 metacodes?

21 You'll recall Dr. Rhyne put up something  
22 on the left that looked like a data structure, and it  
23 turns out, hidden behind that red box that he drew on  
24 it, are the words merged structures for display  
25 purposes.

1           So it's not a data structure, as the  
2 Court's claim construction required. It's a whole bunch  
3 of things that he put together in an imaginary structure  
4 and presented it as if it were one, because he's trying  
5 to make you think that it looks like the one in the  
6 patent.

7           But it doesn't. In fact, when you  
8 actually get down to it and you look at Figure 13 from  
9 somebody else's report, it turns out there's all sorts  
10 of structures. So it's not a data structure, and he's  
11 now admitted that.

12           This is Figure 12. You'll recall that,  
13 and you'll recall me sitting down with Mr. -- Dr. Rhyne,  
14 and he actually circled all eight of the data  
15 structures.

16           And those data structures, you don't have  
17 to guess as to whether they're a structure. In the Word  
18 code, they are called a structure. Remember, they're  
19 called struct.

20           So you know what a data structure is and  
21 isn't. If there had been a thing that was a data  
22 structure for the metacode map, the code would have said  
23 so. It didn't.

24           So under the Court's -- under the literal  
25 reading of the Court's claim construction, it's quite

1 clear there is no infringement.

2 But even that was incomplete. There are  
3 a lot more structures he admitted were there, too, but  
4 they were admitted for display purposes. Sorry.

5 So what's Dr. Rhyne's response? He goes  
6 to this IEEE dictionary and says, well, a data structure  
7 can be any sort of logical relationship between  
8 different things. Remember, he left out the definition  
9 of data elements that was three pages earlier.

10 Dr. Rhyne said, we can combine all of  
11 these structures, these big structures, and call it one  
12 big structure. That's not what it says. It says data  
13 elements can be combined, not structures.

14 Then you go look and see what the  
15 definition of data element is. That's something that  
16 can't be divided. Of course, the structures can be.  
17 It's a data cell. He admitted, under that construction,  
18 that that's not what a data structure is.

19 So he said, well, everything really is  
20 now a data structure. Anything that can be linked or  
21 related in some way, that's a data structure.  
22 Everything's a data structure.

23 Well, but that caused a problem for him,  
24 too, because the patent says you can't have the content  
25 and the metacodes in the same structure.

1           So everything can't be the same  
2 structure, so what did they do? You recall they drew a  
3 line around what they were calling the data structure,  
4 and they started over there on the left, came all the  
5 way down, took a sharp right turn to avoid that content,  
6 and said, well, just that part.

7           Well, wait a minute. Why would you  
8 exclude the content down there? Was it because there's  
9 no relationship between the metacode -- what they're  
10 calling the metacode map? No. There is. There are  
11 those same dotted lines that are existing between the  
12 content and the -- and what he's calling the map and the  
13 other parts.

14           So they're related in the same way, but  
15 somehow he's going to exclude them. Why is that? Well,  
16 because the patent says they have to be excluded.

17           He admits, well, no, actually, they're  
18 all sort of in the same house, and he admits there's no  
19 objective way to do it. What that means is, he's making  
20 it up as he goes along.

21           When you create this line, it just avoids  
22 the content for no good reason. That shows you how  
23 arbitrary and wrong the process is.

24           So then what does he say? Well, maybe  
25 I'm wrong. Dr. Rhyne says, Maybe I'm wrong about this,

1 but it's close enough.

2 But the Court's instruction says it has  
3 to be done in substantially the same way and  
4 substantially the same result.

5 He admits the way is that the structure  
6 of that metacode map has to be small and simple. The  
7 one on the right is small and simple. That's from the  
8 patent. The one on the left that has at least eight  
9 structures spread all over the place, even he wouldn't  
10 call that small and simple.

11 So it's not the same way. It's also not  
12 the same result. Dr. Rhyne admitted that the result is  
13 that you can edit the metacodes without touching the  
14 content. Dr. Martin admits squarely, you've got to  
15 touch the content when you edit the metacode.

16 So the way and the result are different  
17 in Word from the Vulpe patent, so there's no  
18 infringement on the data structure, under Dr. Rhyne's  
19 own testimony and admission.

20 The second issue, the map must contain  
21 metacodes. This isn't a misdirection. It's straight in  
22 the claim and straight out of the Court's claim  
23 construction. It's right down the middle of the  
24 fairway.

25 So does it? We look at what he calls the

1 metacode map. That green box on the right, that's the  
2 place where he's got to say it contains the metacode.  
3 Does it? What it contains is a pointer. He admits  
4 that. That is not contained in the metacodes, and he  
5 admitted it is not. What it contains is a pointer that  
6 sends you to all those different other boxes.

7           But even if you accepted that as  
8 containing the metacode, which it doesn't, if you look  
9 at the right-hand side of the patent, the patent tells  
10 you what contained in the metacode means. The metacode  
11 itself is right there. Not a pointer, the metacode.  
12 But if you go through that whole process, what you get  
13 back is not the metacode. You get back the metacode  
14 name without those brackets, the greater than and less  
15 than and the slash.

16           And Dr. Rhyne admitted that squarely.  
17 You don't get the whole metacode; you get just the name.  
18 And Dr. Rhyne admitted many, many times -- there's no  
19 dispute about this -- that the metacode, the tag  
20 includes those brackets and the slash.

21           He says both the SGML standard and XML  
22 standard refer to the combination of the tag name --  
23 remember, that's just the name, the member ID name he  
24 was talking about -- and the brackets, and in addition  
25 to the slash is a tag.

1           The tag is not just a name. You got to  
2 have the brackets, too. He said that multiple times.  
3 The brackets are part of the tag. They're part of what  
4 the standard refers to as the tag.

5           So that leads us to one simple, clear  
6 question: Is the whole tag the metacode or just the tag  
7 name? Because if the whole tag is the metacode, he  
8 admits we don't infringe at all.

9           This was his slide. He said the name,  
10 just a member ID without the bracket, that's what he's  
11 saying is a metacode. He admits the whole tag requires  
12 the brackets.

13           So what's the answer? Is it the tag  
14 that's the metacode or just the name?

15           Well, in his report, he answers that. He  
16 said at Page 8 of his initial report, yes, the tags are  
17 the metacode. Not the name, the tags. He admits he  
18 said it. He admits he said it again. The tag includes  
19 the brackets, and the tag is the metacode.

20           So then I said, well, I was being a  
21 little loose at that time. I was being imprecise. And  
22 I clarified myself later. You heard him say yesterday  
23 that he didn't really clarify himself; what he did was  
24 change his opinion when he realized this meant there was  
25 no infringement.

1           That's not what an expert's supposed to  
2 do. He's supposed to have an opinion, right or wrong.  
3 But what he did was, all right, before I said the tag is  
4 the metacode; now that I know that means no  
5 infringement, I'm going to say the tag name is the  
6 metacode.

7           It's for you to judge how credible that  
8 position is from supposedly an independent expert.  
9 You'll recall I asked him this question: So if the jury  
10 follows what you said on Page 8 of your expert report --  
11 where he said the tags are metacode -- then they should  
12 find no infringement.

13           And he said, That's what they should do,  
14 if they want to take that outside of everything else,  
15 arguing that if that was just really one isolated  
16 statement, then you shouldn't rely on it.

17           Well, let's see how isolated it was.  
18 Here's the Court's instruction. The definition of a  
19 metacode is an individual instruction which controls  
20 interpretation of the content of the data.

21           So the question is, does the tag control  
22 the interpretation of the content, or does the tag name?

23           Well, Dr. Rhyne answered that. It's the  
24 tag which controls the interpretation of the content.  
25 I'm not in a position to disagree with that, which I

1 guess means he agrees. Tag, not the tag name.

2 Dr. Rhyne again.

3 QUESTION: Tags define the content,  
4 right? That's what your exhibit says.

5 ANSWER: Yes, it does.

6 QUESTION: The tag, which includes the  
7 delimiter.

8 ANSWER: Yes.

9 Dr. Rhyne again.

10 QUESTION: If you don't have the  
11 brackets, the name member ID, without the brackets,  
12 would not, quote, control the interpretation of the  
13 content of the data, which is the Court's requirement.  
14 Do you agree with that statement?

15 He waffles a little bit, but then he  
16 says, I'll say yes.

17 So Dr. Rhyne squarely admits over and  
18 over and over again that under the Court's construction,  
19 the thing that controls the content -- the  
20 interpretation of the content is not the name but the  
21 whole tag.

22 And why is that? That's because without  
23 the brackets, the tag name is just text. It will have  
24 no effect at all. He admitted that squarely.

25 But it's not just Dr. Rhyne. Mr. Owens,

1 the named inventor on the patent, says it over and over  
2 and over again in trial.

3 QUESTION: The SGML tag, not the name, is  
4 a metacode within the meaning of your patent?

5 ANSWER: Yes, sir.

6 Tag, not the name.

7 Mr. Owens again.

8 QUESTION: Less than/greater than sign,  
9 did you discuss those tags?

10 ANSWER: Yes, sir. In the patent, we  
11 refer to those as metacodes.

12 The tags are the metacodes in the patent,  
13 according to the inventor.

14 Mr. Owens again.

15 QUESTION: Tags, which are called  
16 metacodes in the patent, is that all there is to the  
17 metacode map, just a list of names?

18 ANSWER: No, sir. That wouldn't be  
19 enough.

20 Mr. Thomas, VP of technology at i4i.

21 QUESTION: XML tag is the metacode.  
22 That's the one with the less-than sign and greater-than  
23 sign?

24 ANSWER: That's correct.

25 Every technical witness here admitted it

1 is the tag which is the metacode; it's the tag that  
2 controls the interpretation of the content; not just the  
3 name.

4           The patent shows repeatedly the tag with  
5 the brackets over and over again. Doesn't discuss  
6 anything else as being a metacode.

7           Let's look at the evidence Dr. Rhyne  
8 relied upon on this issue. He relied on the standard.  
9 And he highlighted for you that part at the top that  
10 said best characterizes it.

11           What he left off was the part at the  
12 bottom, which says it's the combination of that generic  
13 identifier, the name, and the delimiters, which is  
14 called the start tag or end tag.

15           So it's the tag itself with, clearly, the  
16 brackets.

17           The other slide that Dr. Rhyne used shows  
18 squarely that it's the tags that define the meaning of  
19 the content, not just the tag name. That is clear on  
20 one -- the key issue in the case.

21           So on the second question, does the map  
22 contain the metacodes, no, even under Dr. Rhyne's square  
23 admissions.

24           The third issue -- and remember, i4i has  
25 to win every single one of these under the Court's

1 instruction, and they can't win any of them.

2 The third issue is this input stream  
3 question. Again, straight in the claim, straight out of  
4 the Court's claim construction.

5 You'll recall that Word adds material to  
6 that input stream in a way the patent doesn't. And this  
7 is what we showed you in opening statement.

8 Dr. Rhyne's own chart admitted it. He  
9 highlighted Steps 1 and 2 and then 5 and 7 but left out  
10 Step 3 where he talks about this adding and putting it  
11 into a temporary file.

12 Well, I asked him about that. He said  
13 this conversion step of Step 3, that's where you add a  
14 bunch of stuff and convert it. He said, yeah, that's  
15 when you're putting the Word ML wrapper around it. And  
16 then he was forced to admit that that's exactly what i4i  
17 said its patent prevents.

18 In their i4i-at-a-Glance document that  
19 they rely upon so much, they say the patent, the  
20 patented technology, allows you to structure information  
21 without converting or duplicating. That's exactly what  
22 Word 2003 and 2007 do under Dr. Rhyne's own analysis.

23 So the third issue that they have to  
24 prove, they also can't prove either.

25 So in the first question of whether

1 Microsoft Word infringes, no, it does not, because Word  
2 works differently than the Vulpe patent.

3 On the second question, did the Patent  
4 Office have the right information, and is the Vulpe  
5 patent valid? Four reasons that it's not.

6 Word, prior versions of Word, the SEMI  
7 product, Rita, and DeRose.

8 First thing is, of course, i4i says you  
9 should trust this Examiner who spent four years. The  
10 Examiner didn't have a chance to look at any of the four  
11 things we're showing you.

12 So it's your role in our system to decide  
13 whether the patent's valid. The Examiner has not ruled  
14 on that question.

15 Prior version of Word. No doubt that  
16 it's prior art. Mr. Little explained to you in detail  
17 how it works. He shows that, in fact, in Word, unlike  
18 Word 5 and 6, unlike the accused products, the actual  
19 name is, in fact, in what they're calling the map.

20 You don't have to move those pointers  
21 around and go to all those different structures. The  
22 name is right there: Member ID. There was no  
23 cross-examination of him on that issue at all.

24 No debate that Word is prior art. No  
25 question about it. It was released long before.

1           So the only issue, the only issue that  
2 Dr. Rhyne raised on Word, is whether the RTF codes in  
3 Word are metacodes.

4           And you'll recall he put up that slide  
5 that said Word 5 and 6 didn't support XML or SGML.

6           Well, that's true, because it hadn't been  
7 invented yet.

8           But the Court's claim construction  
9 doesn't say it has to be SGML or XML; just that it has  
10 to be a metacode where it controls interpretation of the  
11 content.

12           So Dr. Rhyne says, nope, those RTF  
13 formatting codes, those are not metacodes in the meaning  
14 of the patent.

15           He says paragraphs in RTF, that just  
16 tells you it's a carriage return. But they have the  
17 same codes. Paragraph in the RTF; paragraph in the  
18 Vulpe patent. Title in RTF; title in the Vulpe patent.  
19 What they're telling you here is that, well, paragraph  
20 isn't the metacode in RTF, but it is over here in the  
21 Vulpe patent.

22           Title, that's not a metacode in RTF, even  
23 though it's doing the same thing, but, yes, it's a  
24 metacode over here in the Vulpe patent. That simply is  
25 not credible.

1                   Mr. Vulpe says SGML is an example of a  
2 metacode, as is RTF. That's the testimony I read to  
3 Dr. Rhyne yesterday. Square admission by Mr. Vulpe that  
4 RTF is a metacode within the meaning of this patent.

5                   And you heard that Mr. Owens said the  
6 same thing.

7                   Dr. Rhyne, Dr. Rhyne says, yes, para,  
8 that's a metacode within the meaning of the Court's  
9 construction, but -- even though it doesn't tell you  
10 anything about content, which he admitted was the  
11 Court's requirement.

12                   So he admits that paragraph is a  
13 metacode, even though it tells you nothing about  
14 content. But then he talks about bolding in RTF and  
15 says, well, that's not a metacode. Doesn't tell you  
16 anything about content.

17                   Well, wait a minute. That doesn't make  
18 any sense, because bold tells you more than paragraph.  
19 Paragraph just says you're starting a new paragraph.  
20 Bold tells you that there's something important about  
21 that.

22                   So that actually is telling you something  
23 about the content, and Dr. Rhyne is forced to admit  
24 that. But under his interpretation, paragraph, which  
25 tells you nothing about content, is a metacode, and

1 bold, which does tell you something about content, is  
2 not.

3 The only way of rationalizing that is  
4 he's trying to protect the patent, not that he's being  
5 consistent. So that, you'll have to judge his  
6 credibility.

7 Mr. Owens says paragraph is a metacode in  
8 the patent, but it's not a metacode in RTF. That same  
9 inconsistency.

10 So on Word 5 and 6, there's really only  
11 one question you have to decide: Are those RTF codes  
12 metacodes? Mr. Vulpe said squarely they are. They  
13 clearly control interpretation of the content, because  
14 bold does so. And it has the same code, paragraph and  
15 title.

16 How can they be metacodes for one and not  
17 metacodes for the other when they're doing the same  
18 thing? That just doesn't make sense.

19 Second, SEMI S-to-the-4th product.

20 Now, this one, again, comes down to a  
21 very simple question. The Court's claim construction is  
22 very clear. This is called the on-sale bar. Absolute  
23 rule in the Patent Office. No relief, no slack.

24 If you sell or offer for sale a product  
25 more than a year before the patent application was

1 filed, it's invalid. It is a strict, strict rule. No  
2 exceptions.

3 What's the timing? It's very easy to  
4 see. Patent application was filed actually June 2 of  
5 '94. You go back a year, June 2 of '93. So if it was  
6 sold or offered for sale before, then the patent's  
7 invalid.

8 Everyone agrees the SEMI system was  
9 installed in February of '93, well more than a year  
10 before, and sold back in '92. So no question the SEMI  
11 S-to-the-4th product was sold.

12 So the only question that's left, the  
13 only question that's left is whether the SEMI  
14 S-to-the-4th product practiced the patent. If it did,  
15 that patent's invalid, because they got a head start on  
16 commercialization. That's what the rule prevents. If  
17 it doesn't practice the patent, then it doesn't  
18 invalidate it.

19 We know, from what i4i and Mr. Vulpe and  
20 others said and did at the time, which, again, is much  
21 more credible than what they're saying here in Court  
22 when they're trying to get \$200 million, that it did  
23 practice the patent.

24 This is Exhibit 2395, which is his  
25 submission to the Canadian government. And he says

1 Infrastructure has applied for a U.S. patent -- and he  
2 gives the serial number -- to protect specific  
3 technology that it has developed.

4           The initial implementation is embedded  
5 into Infrastructures' S-to-the-4th product, targeted to  
6 the semiconductor and publishing industries.

7           He admitted squarely at least five times  
8 that the only S-to-the-4th product that existed at the  
9 time he wrote those words is the SEMI product.

10           So Mr. Vulpe, in his own words, at the  
11 time said, yes, that SEMI S-to-the-4th product is  
12 patented. If you believe what he wrote then, his patent  
13 is invalid now.

14           And he said it then for a very good  
15 reason. The patent number, of course, lines up. He  
16 admitted it was exactly the same patent.

17           He didn't just say it then; he said it  
18 again. In another application, he said, we filed a U.S.  
19 patent application, and that single metacode model is  
20 implemented on i4i's flagship product S-to-the-4th. The  
21 only product that existed at that time, he admitted  
22 squarely, as did Mr. Owens, was the SEMI product.

23           So the SEMI product embodied that patent.  
24 He admitted it, and he said it twice. If you believe  
25 either of those things that he wrote at the time, then

1 this patent is invalid.

2 But it's not just that. He also wrote to  
3 Mr. Lum. This is an investor that he was trying to  
4 convince to invest in the company.

5 And he said the basis of the patent and  
6 the preliminary work on the validation precedes  
7 Infrastructures', which is true. The SEMI product  
8 started before he founded Infrastructure. SEMI was in  
9 '92. He founded i4i in January of '93. That is exactly  
10 true.

11 So what did he do in Court? He came in  
12 and said, I lied. I lied to Mr. Lum. It will be for  
13 you to decide whether he's telling the truth here in  
14 Court when he said he lied or whether he was telling the  
15 truth at the time in document after document after  
16 document when he didn't have a reason to lie about \$200  
17 million.

18 Now, it's not just Mr. Vulpe. Mr. Owens  
19 testified under oath that the product that embodied the  
20 patent was S-to-the-4th, which was SEMI. Here's his  
21 testimony.

22 QUESTION: Which of i4i's products do you  
23 understand embody your invention that you know about?

24 ANSWER: Well, the only system I had  
25 direct interaction with was S4.

1           Just S4. No other nomenclatures. Not  
2 S4/Text; not S4/Editor, just S4. That's SEMI.

3           QUESTION: Well, what other versions of  
4 S4 did you work on?

5           ANSWER: All I don't remember, from the  
6 first, from the earliest, yes.

7           And what was the earliest he worked on?  
8 SEMI. That's the only product he worked on.

9           So he admitted -- Mr. Vulpe admitted that  
10 what they patented was that SEMI system, and that's the  
11 best evidence you have in this courtroom about that.

12           Mr. Owens admitted that that SEMI system  
13 allowed you to decompose an SGML document into different  
14 parts and store them separately. That's exactly what  
15 this patent is about. You've heard that many, many  
16 times.

17           Now, the only independent evidence you  
18 have -- because you have both Mr. Owens and Mr. Vulpe  
19 saying totally inconsistent things between what they  
20 said and did at the time and what they say here in  
21 Court, the independent evidence you have is Mr. Young.  
22 He worked for SEMI. He was the man who bought the  
23 system from Mr. Vulpe. And he was the one Mr. Vulpe  
24 convinced to come work for him.

25           Mr. Young says squarely, yes, Vulpe told

1 me that his patent covered our SEMI system.

2           Okay. That's pretty straightforward. At  
3 that time, Mr. Vulpe didn't have a reason to lie.

4           Mr. -- Mr. Young also said -- and this is  
5 very important -- the whole reason we bought the system  
6 from i4i was based on the separation of structure and  
7 content, which is what the patent's claiming. There's  
8 no -- nothing that contradicts that.

9           And finally, when Mr. Vulpe was trying to  
10 convince Mr. Young to come join i4i, he said, by the  
11 way, we've patented what we did in SEMI. That means the  
12 company is more valuable, and you should come and join  
13 us.

14           So either he was lying to Mr. Young all  
15 that time as well, or he was telling the truth then and  
16 lying here.

17           Here's the document that counsel for i4i  
18 just put up in closing argument. It says, well, SEMI  
19 couldn't have infringed, because, look, it's that mess  
20 of a document, has everything mixed together, the codes  
21 and content.

22           And the example they put up sure did.  
23 But Mr. Vulpe's testimony was squarely to the contrary.  
24 His testimony after that was put up: You were just  
25 testifying with your lawyer about whether the SEMI

1 product could separate metacodes and content, and you  
2 said no.

3 That's what he said on direct  
4 examination. Said, yeah, that's right.

5 But, in fact, in the SEMI product, on  
6 that editor screen, you can see the text without the  
7 tags.

8 So they showed you the version that had  
9 it all together and said, ah-ha, see, it practiced the  
10 patent. What they didn't show you is the part where you  
11 could also look at it totally without. And that's what  
12 they say the patent did. Mr. Vulpe admitted that  
13 squarely. No hesitation on that question.

14 And the editor screen makes that clear.  
15 Talks about the metacodes. It has the metacode map on  
16 the bottom and the content.

17 You recall the testimony. The content  
18 alone is up there on D, the top part of the screen. The  
19 metacodes are down there in E. They're separate.

20 But, finally, you got Mr. Thomas.  
21 Mr. Thomas says the Newbridge product that they  
22 ultimately sold, that product used the patented  
23 technology. Yep, absolutely. No question about it.

24 And Mr. Vulpe said, well, that Newbridge  
25 product, that was just another implementation of the

1 SEMI product.

2           So you have lots and lots and lots of  
3 evidence at the time that showed that the SEMI product  
4 was exactly what they patented. Mr. Vulpe said it  
5 repeatedly; Mr. Owens said it; Mr. Thomas, the VP of  
6 technology said it.

7           Mr. Vulpe comes here, Mr. Owens comes  
8 here and says, well, it couldn't have been. We didn't  
9 invent it until November of '93.

10           So you've got to decide who you believe.  
11 Do you believe Mr. Vulpe back when he wrote all those  
12 documents at the time and didn't have a  
13 200-million-dollar gleam in his eye, or do you believe  
14 him now when he says, oh, we didn't invent it until  
15 2000 -- November of 2000 -- November of '93.

16           Well, one way you can answer that  
17 question is, what proof is there that he actually didn't  
18 invent it until November of '93? Is there a single  
19 e-mail about this Eureka moment?

20           He said it was the most significant event  
21 in his life and in his company, and he can't produce a  
22 single document, anything that says, yes, in fact,  
23 November of '93 is when we invented it.

24           Does that make sense to you?

25           Not a single e-mail, he testified, not a

1 single memorandum. Both he and Mr. Owens kept notebooks  
2 of their important events. Those notebooks are gone for  
3 some reason. Somehow we don't see them.

4 Source code, he decides to destroy the  
5 source code. Did he do it to save space? No. It's  
6 about this case.

7 Why would he destroy source code that  
8 they worked for months to create? Well, that will be  
9 for you to decide. But there's zero evidence to support  
10 this claim in court that -- just what they said on the  
11 stand, that they didn't invent it until November of '93.

12 And the Court's instruction on this was  
13 really clear. Corroboration of oral testimony: Oral  
14 testimony alone is insufficient to prove prior invention  
15 or that something is prior art.

16 Well, that's all you've got, is oral  
17 testimony, especially where the oral testimony comes  
18 from an interested witness. Well, Mr. Vulpe is  
19 certainly that. Or a witness testifying on behalf of an  
20 interested party. They're certainly both that.

21 If you find that the party has not  
22 corroborated the oral testimony with other evidence, you  
23 are not permitted to find that the subject of that oral  
24 testimony qualifies as prior art or supports a prior  
25 date of invention; yet that's exactly what they're

1 asking you to do.

2           You take away their oral testimony, all  
3 you have is what they said and did at the time, which  
4 says that SEMI was the patented system, and that makes  
5 it invalid.

6           Now, what else do they try to argue?

7           Well, Mr. Owens got up and tried to say,  
8 well, SEMI couldn't have been the patented system  
9 because it was on Mac, and I did the patent on a PC. He  
10 said that repeatedly.

11           QUESTION: Did you ever make the patent  
12 run on a Macintosh?

13           ANSWER: Oh, no, never. SEMI, that was  
14 running on a Macintosh.

15           Then I did a little cross-examination of  
16 him, and I said, Well, were you trying to make the point  
17 that because the invention was done on a PC and the SEMI  
18 was done on Apple, that they must be different?

19           He said, yes, sir, that's exactly the  
20 point I was trying to make.

21           Well, there's one big, big problem with  
22 the argument that the patent can't cover an Apple  
23 system, which is what SEMI was. It's the patent.

24           And the patent says -- when it's  
25 recommending a system to use with the invention, does it

1 recommend a PC system they say they developed it on?

2 No.

3 It was Apple's Quadra 800 with an Apple  
4 monitor and an Apple keyboard, which turns out to be  
5 exactly what they recommended and put into the SEMI  
6 installation manual. We recommend you use a Quadra with  
7 a 14-inch Apple monitor.

8 So apart -- it's the opposite of what  
9 they're trying to prove. They tried to tell you that  
10 SEMI can't be the invention because it was on a Mac. It  
11 turns out the patent tells you the invention is on a  
12 Mac.

13 That takes us to the Rita patent. And  
14 you heard counsel for i4i say that the Rita patent --  
15 well, Rita and DeRose, those are just trees.

16 But then what you heard Dr. Rhyne admit  
17 yesterday was, well, yes, but so is i4i's product.

18 That's a tree, too. It's not whether it's a tree.

19 That's a misdirection. The question is, is it prior  
20 art? There's no debate about that. Long, long before.

21 And what does it do? Does it do the same  
22 thing that i4i claims in the patent? Well, you heard  
23 Dr. Cowan's testimony and Mr. Gray's testimony.

24 Automatically paragraph, that para, for  
25 example, again, that's a metacode in the patent, does

1 the same thing.

2 Beginning of the document, end of the  
3 document, doing exactly what the patent says it claimed  
4 to have invented, but Rita did it long before.

5 The DeRose patent is very similar.  
6 Again, it's clearly prior art, long before Mr. Vulpe  
7 filed his patent application. No debate that it's way  
8 before.

9 Mr. Gray walked through exactly each way  
10 that there's a metacode map and why it -- why it  
11 invalidates the patent.

12 And you heard no cross-examination of him  
13 at all on that issue. None. They had a full chance to  
14 cross-examine Mr. Gray on both Rita and DeRose, and they  
15 chose to ask no questions at all. That tells you a lot,  
16 too.

17 Let's talk about credibility, because  
18 credibility is, at the end of the day, one of the more  
19 important issues, if not the most issue in every single  
20 case.

21 They came here with some witnesses asking  
22 for \$200 million. The Court's instruction says you  
23 should look at whether that witness testified falsely  
24 concerning an important fact; at some other time, the  
25 witness said or did something that differs from the

1 testimony they gave.

2           And we've shown you over and over and  
3 over again that what their witnesses said and did at the  
4 time is squarely inconsistent with what they're saying  
5 here on the stand. And that credibility, according to  
6 the Court's instruction, is central to every lawsuit.

7           You heard in i4i's opening statement that  
8 this lawsuit is a story about people. Well, the most  
9 important person is Mr. Vulpe. And let's look at his  
10 credibility.

11           According to him, he lied to his  
12 investors when he said to Mr. Lum, the basis of the  
13 patent and preliminary work precedes Infrastructures'.

14           He now says that was a lie, that he was  
15 willing to lie to the man who was asking for money to  
16 protect him, as he put it. Well -- initially, he tried  
17 not to say that. Remember, he said, well, I was  
18 exaggerating.

19           And the question was, well, exaggerating  
20 is a nice way of putting it. You were lying to Mr. Lum.  
21 His answer, when it comes down to it, yes.

22           So he didn't come here to fess up; he  
23 came up here to say, well, I may have been exaggerating  
24 a little. He was lying. He says he was lying. We  
25 think he was actually telling the truth to Mr. Lum,

1 because it's consistent with all the other evidence.

2           And we think he was lying here, because  
3 here he's trying to say that he didn't tell the truth.  
4 And at the time, he's saying he was trying to protect  
5 his own interest against those of i4i. So we have a man  
6 who admits that he will lie to protect his interest, and  
7 you'll have to decide whether he's lying then or lying  
8 now.

9           Second, he's contending that he lied to  
10 the Canadian government when he asked them for money,  
11 too. This is Exhibit 2295. He says, yep, that was a  
12 lie.

13           When I said that the initial  
14 implementation of the patent was in S-to-the-4th, nope,  
15 that wasn't true. But then when he tried to explain it  
16 here in Court -- and he also said it in the second  
17 application. Remember that, i4i's flagship product  
18 application?

19           When he was in Court, he tried to explain  
20 it by saying, well, what I was saying in those documents  
21 was a reference to Stephen's work that came after.

22           Remember that was the S-to-the-4th plus  
23 patent that i4i's counsel wrote on the board?

24           But the problem is, there wasn't any such  
25 product. And so when he said that he was referring to a

1 product that was later, he was lying, and he admitted  
2 that there was no such product that he possibly could  
3 have been referring to.

4           And this was his chart. You recall this  
5 timeline that they created, and his lawyer wrote, well,  
6 S4 plus patent over here. And what he tried to tell you  
7 is, that's what I was referring to when I said product  
8 in both of these representations to the Canadian  
9 government.

10           But then on cross-examination, he had to  
11 admit, well, there is no product there. The only  
12 product was SEMI S-to-the-4th. And that's the only  
13 thing he was referring to.

14           And so on the stand, he made that  
15 explanation, and it wasn't true, and he was forced to  
16 admit it wasn't true, because there was no product.  
17 Now, that doesn't stop there, unfortunately. Mr. Vulpe  
18 lied in sworn declaration to this Court, to Judge Davis.

19           Here's the declaration.

20           He swears, under penalty of perjury, just  
21 three weeks ago, that Mr. Young never worked for i4i.  
22 He doesn't say he was never technically an employee; he  
23 was an independent contractor. He's trying to say he  
24 never worked for us at all.

25           Well, that just wasn't true. But he said

1 it under oath, because he thought it would help him.  
2 What he said on direct examination, trying to explain  
3 that away was, well, he wasn't an employee; he was a  
4 consultant. That's not what he said under oath he was.  
5 He didn't say he was a consultant, not an employee. He  
6 said he never worked for i4i.

7 That's not true. He was selling products  
8 for i4i. Mr. Vulpe was forced to admit that's true.

9 QUESTION: And you wouldn't call that  
10 working for i4i?

11 ANSWER: Well, he's working on behalf of  
12 i4i.

13 It will be for you to decide whether he  
14 was truthful when he was making that declaration, under  
15 penalty of perjury, to this Court.

16 But also when he was testifying, he had  
17 no problem understanding what working for i4i meant. He  
18 was asked, even by his own lawyer, how long did Mr.  
19 Young work for i4i as a consultant?

20 We finalized the relationship in mid or  
21 early '96.

22 So he knew, when he said that statement  
23 to the Court, he was lying, but he was willing to do it  
24 anyway. And that tells you a lot about his credibility.

25 He also said Mr. Young worked for and

1 helped grow the business of i4i. Now, counsel for i4i  
2 says, well, he was just saying that as part of a  
3 settlement agreement.

4 Well, so he's willing to lie then, too,  
5 according to his testimony to you. We think it was  
6 true, but according to him, yeah, I was agreeing to lie.  
7 Here's a man who has said over and over again, I will  
8 lie when it suits my purpose.

9 Now, he's tried to tell you he was lying  
10 back when he said something before he was asking for  
11 \$200 million. It will be for you to decide whether, in  
12 fact, he's lying now, trying to get \$200 million.

13 But he also lied to Scott Young, his own  
14 lawyer. When you heard Mr. Young's videotape, his own  
15 lawyer asked him this question: After two years of  
16 working exclusively for i4i and then being lied to, did  
17 you feel betrayed?

18 And you remember the lie. Mr. Young was  
19 working for two years for Mr. Vulpe, and Vulpe says,  
20 well, I'm tired. I don't want to do this anymore. I  
21 want to go do something else.

22 Turns out he was just finally getting the  
23 funding, and he wanted to take Mr. Young's shares and  
24 give it to the bankers. That's what the lie was. And  
25 his own lawyer admitted that he lied to Mr. Young at

1 that time, too.

2 So he's lied all those times, and now  
3 he's also done something that tells you a lot about his  
4 credibility, and that's Mr. Owens.

5 Mr. Owens, you'll recall, was owed over  
6 \$73,000 by Mr. Vulpe for five or six years. Mr. Vulpe  
7 never paid him.

8 Then Mr. Vulpe called him up and said, I  
9 need your help in this lawsuit. I need you to come  
10 testify, and Mr. Owens says, I want that -- Mr. Owens  
11 said, hey, how about my money?

12 And Mr. Vulpe, all of a sudden, comes up  
13 with the \$73,000 and pays Mr. Owens three weeks before  
14 his deposition in this case was taken. That tells you a  
15 lot about Mr. Vulpe's credibility as well.

16 Now, you can't assess the credibility of  
17 the people who were actually running i4i during this  
18 relevant period because they didn't come to testify.

19 They're in the back of the courtroom,  
20 many of them, but they didn't come to testify.

21 Now, you may sense a similarity here  
22 between this slide and what counsel for i4i showed you,  
23 and that's because they copied it from me for the last  
24 trial we had with these guys.

25 Now, imitation being the most sincere

1 form of flattery, I'll take the flattery, and I won't  
2 sue them for it. We don't bring bad lawsuits.

3 The point of this, though, is to show how  
4 i4i has taken dramatically inconsistent positions in  
5 this case, because that goes to the credibility of the  
6 claim that's before you as well.

7 Let's start with something really basic:  
8 Whether the thing that Mr. Vulpe said and Dr. Rhyne said  
9 was the core of this case, whether that thing is, in  
10 fact, invented by Mr. Vulpe, the metacode map.

11 Mr. Vulpe, on direct examination,  
12 absolutely, I invented it. And I asked him that, and he  
13 said yes. That's central to your patent, and he thinks  
14 he invented it.

15 And then I showed him the facts. And  
16 after we walked through the facts, I said, so you now  
17 acknowledge that you didn't invent the concept of the  
18 metacode map.

19 I -- yeah, fair enough.

20 So what he said was the core of the  
21 patent, he didn't invent.

22 Copying. Counsel for i4i said they don't  
23 have to prove copying. Well, in opening statement and  
24 about a third of their case, with all these meetings,  
25 they're trying to prove it.

1                   Opening statement: Microsoft took that  
2 invention. Microsoft took the invention and moved it to  
3 Word.

4                   Well, that's just not what happened.  
5 Mr. Tulley and Mr. Thomas admitted squarely Microsoft  
6 copied nothing.

7                   Third, whether a para is a metacode.

8                   Mr. Owens: It's not a metacode when it's  
9 in RTF. Oh, but a metacode in SGML, yeah, that's --  
10 para is a metacode there.

11                  Dr. Rhyne: Paragraph, that is a  
12 metacode?

13                  No, I wouldn't agree with that.

14                  Later on: Well, para is a metacode  
15 within the meaning of the Court's construction. He said  
16 yes.

17                  On the importance of the patent, you  
18 heard Keith Thomas come testify the patent is essential.  
19 It's the heart of the product.

20                  Well, what did he say at the time? At  
21 the time, he said, the patent is a red herring, and we  
22 did not base Version 4 on the concept of the patent.

23                  Why?

24                  Because it didn't work very well.

25                  It's for you to judge how consistent that

1 is and how credible that is.

2 Microsoft's secret XML plan. Again, a  
3 statement to you in opening statement from i4i's lawyer.  
4 i4i didn't know Microsoft's internal plans. It was a  
5 secret until the day of the opening statements.

6 What did Mr. Vulpe admit? He admits that  
7 in 2001, Microsoft said to him flat out, we're going to  
8 put XML in Word 2003. He knew it in 2001. So this  
9 supposedly secret plan, that's wrong, too.

10 Quality problems. You heard Mr. Cox and  
11 Mr. Vulpe say, no, no, I've never heard anything about a  
12 quality problem.

13 Well, it turns out that's not true  
14 either. When you go look at the memo that Mr. Cox  
15 received from Mr. Thomas, he says, our products are very  
16 buggy and error-prone.

17 But beyond that, this is something that  
18 was discussed routinely with the Board of Directors, and  
19 Mr. Cox is a member of the board.

20 Here's an example from February of 2002,  
21 right in the heart of the time period where we have  
22 product quality issues that are pushing off our revenue,  
23 and the Patent Office, well, they're really unhappy  
24 because of their problems, and they're telling all the  
25 other governments not to buy our product.

1                   Mr. Vulpe says yes, in fact, quality  
2 problems of i4i's products were discussed as an ongoing  
3 issue at the board, ongoing issue.

4                   But Mr. Cox comes here before you and  
5 says, I've never heard of anything like that. But he  
6 was in all those board meetings.

7                   Word 11 made i4i obsolete. You heard  
8 that in opening statement. You heard it in closing  
9 argument.

10                  Well, Mr. Thomas got up and said, yeah, I  
11 heard my lawyer say that in opening statement, but I  
12 can't agree with that.

13                  All right. That tells us something about  
14 the credibility of the claim.

15                  The PTO order? Again, in the opening  
16 statement, with Mr. Vulpe's testimony, that was amazing.  
17 The Patent Office loved our product.

18                  Well, it turns out they had problems with  
19 the product and canceled the agreement. So it turns out  
20 that the PTO didn't love the product quite so much.

21                  Competition with Microsoft. This is  
22 where there's some flipping and flopping all over the  
23 place as well. Does i4i compete with Microsoft?

24                  Mr. Vulpe squarely, before you, when he  
25 testified, said yes. Mr. Thomas, no, it doesn't compete

1 at all. And you heard testimony yesterday from Mr.  
2 Owens, Richard Owens, no, there's no competition from  
3 Microsoft. I sat in the board and never heard it.

4 Substantial use. This is a subject Dr.  
5 Rhyne testified about. You remember that list where we  
6 walked through 12 different uses and he wrote yes on  
7 every single one of them, that these are all uses of  
8 Word and XML, which don't infringe?

9 Because you could use Word ML, which we  
10 invented, that doesn't infringe. You could use even  
11 custom XML and store it as a dot doc. That doesn't  
12 infringe. You could store it as a dot dot. That  
13 doesn't infringe.

14 All of these uses, he says, well, those  
15 aren't substantial. He admitted twice that he's not an  
16 XML expert. Doesn't really know how people store it.

17 But their own evidence they put in with  
18 the Wecker survey showed that those non-infringing uses  
19 dwarf, by 50 percent or more, what they're calling  
20 infringing uses.

21 So how credible is that to say there's no  
22 substantial amount of infringing use when, in fact, most  
23 people, according to their own flawed survey, used a  
24 non-infringing method.

25 And, finally -- this also tells you a lot

1 about credibility. You heard Mr. Cox get up and say,  
2 yeah, this patent has huge value. The company has huge  
3 value. I was blown away. Well, he had the opportunity  
4 to buy a lot of stock options in this case. They were  
5 given to him.

6 Did he invest his own money? No. That  
7 tells you a lot about whether he really thinks there's  
8 value in that patent. If he thought so, he'd have  
9 invested his own money. He didn't.

10 Let's talk briefly about damages. The  
11 Court's instruction, part -- just after what counsel for  
12 i4i read to you is, they have to be with reasonable  
13 certainty. Not mathematical precision, but the patent  
14 owner is not entitled to damages if they are remote or  
15 speculative.

16 What do we have here? We have their  
17 expert, their damages expert, Mr. Wagner, admitting that  
18 i4i is not entitled to damages unless they show someone  
19 actually used it in that dot doc or dot dot -- non-dot  
20 doc or non-dot dot format.

21 He admitted nobody has bought this  
22 because of the non-infringing uses. He said that  
23 earlier. They rely entirely on that Wecker survey to  
24 try to show that somebody used it and what they accused.

25 That Wecker survey shouldn't have been in

1 this courtroom. That Wecker survey had them guessing.  
2 It asked one man how 19,000 people used their computers  
3 on a daily basis, and it relies on that and tries to get  
4 you to rely on that.

5 That survey, you heard from Dr. Simonson  
6 and Dr. Wecker, used none of the standard controls. It  
7 was just designed to get to a result. It has no value  
8 in this case at all.

9 Mr. Wecker said, I was conservative.  
10 Why? How did I do that? Well, I always picked the  
11 bigger number. If there was inconsistency, if the  
12 respondent said 50 percent one time and 25 percent and I  
13 couldn't figure out what they meant, I just picked the  
14 bigger number, because I thought that was conservative.  
15 It's for you to decide how credible that is.

16 Mr. Wagner, the damages expert, he  
17 uses -- relies on the Wecker survey, admits that surveys  
18 are rarely useful.

19 Reasonable royalty. Admitted that the  
20 industry practice that you should follow is a lump sum.  
21 He said, well, you ought to have \$200 million for this  
22 single feature, but he admits in the real world,  
23 licenses are from \$10,000 to 5 million.

24 Basically, at the end of the day, his  
25 position is that in late 2003, i4i, which had \$20,000 in

1 the bank, and was about to go out of business would have  
2 held out for \$207 million, because that's what he thinks  
3 they're entitled to.

4           It's for you to decide whether that's  
5 credible.

6           i4i has sat there and said, I'm not  
7 settling for a penny less than \$207 million when I've  
8 got \$20,000 in the bank and I'm going to have to shut  
9 the doors tomorrow. That doesn't make sense.

10           That's what they're asking for, despite  
11 the fact that every other damage indicator is very, very  
12 low.

13           They're asking for a hundred dollars for  
14 every user that I showed you that that same  
15 functionality was bought for \$97. That doesn't make  
16 sense either.

17           I'd like to finish with a couple of  
18 thoughts. This case is about infringement and about  
19 validity. We've shown you that evidence. It's a lot  
20 about credibility, but it's also about right and wrong.  
21 Was it right for i4i to do nothing, to lie in the weeds  
22 and say, we don't want to have dialogue with Microsoft,  
23 and then sue us for almost four years on -- after almost  
24 four years of silence, after telling us congratulations?

25           That's not right.

1           Is it right to come to you and base a  
2 claim on lies? That's not right either.

3           Is it right to base a claim on missing  
4 evidence? They could have proved what the SEMI system  
5 did, if they had kept their lab notebooks and if they  
6 had kept their source code, instead of destroying them.

7           That's not right.

8           And finally, is it right for this group  
9 of bankers to come asking you for a bail-out, to say we  
10 want to achieve liquidity? We're not here to protect  
11 the patent; we're just trying to get our money. Because  
12 that's what they said internally when they didn't think  
13 you would see the documents.

14           Now, I won't get to stand up after  
15 Mr. Cawley does. That's their right as the Plaintiff.

16           He has 10 minutes to talk, and I won't be  
17 able to say a thing.

18           I will ask you, though, to see if he  
19 answers any of these questions. Because a lot of these  
20 questions are the central questions in the case, on  
21 whether they meet their burden of proof.

22           Why did all those people who knew Word  
23 and knew the patent never say a word about infringement?  
24 Not because they didn't have the source code, which was  
25 their explanation. It's because they sued without the

1 source code. It's because they knew there was no  
2 infringement.

3 Why did i4i destroy the evidence that  
4 would have proved the case?

5 How can para be a metacode in one and not  
6 another?

7 If everything is a data structure, why  
8 wasn't that content in the structure? Why didn't they  
9 take that hard right turn? Those questions I don't  
10 think they're going to answer for you in the last 10  
11 minutes. And if there's not an answer to those  
12 questions, then they simply don't have an answer.

13 I'd like to close with some words from  
14 President Tyler, after whom Tyler, the city, is named.  
15 In his State of the Union address in 1841, he was  
16 addressing, ironically, a banking crisis, similar to  
17 this one. Banks are going out of business, because they  
18 made a bunch of bad loans.

19 And he said something -- he expressed a  
20 value that I think is exactly what the value should  
21 govern in this case. He said, quote, wealth can only be  
22 accumulated by the earnings of industry and the savings  
23 of frugality.

24 That's what Microsoft has done. It's  
25 earned money with the hard work of people like Rob

1 Little and others. i4i has not. They had a product  
2 that failed. They had a patent that doesn't work.  
3 They're here asking for a bail-out. President Tyler  
4 didn't give bankers a bail-out. We would ask for you  
5 not to give one here either.

6 We would ask you to say no to  
7 infringement; yes to invalidity; and send them home and  
8 send a message that says these types of claims should  
9 not be brought.

10 Thank you very much for your attention.

11 THE COURT: Thank you, Mr. Powers.

12 Mr. Cawley, rebuttal.

13 MR. CAWLEY: Thank you, Your Honor.

14 Ladies and Gentlemen, you've heard, I'm  
15 sure with relief, that I only have 10 minutes to talk to  
16 you about some things. So, obviously, I need to be  
17 brief and just focus on the most important things that I  
18 think you've heard in this case.

19 And as I mentioned, I want to structure  
20 my comments to you here not around the questions that  
21 Microsoft's lawyer thinks I should be talking about but  
22 the questions that Judge Davis has told you that you  
23 should be considering in this case.

24 Because what you just heard for the last  
25 hour is yet more examples of Microsoft asking you to

1 decide this case, not based on what Judge Davis has told  
2 you is important and the questions that he has told you  
3 is important, but on the distractions and misdirections  
4 that Microsoft has been talking about from the very  
5 beginning.

6           Even though Judge Davis told you  
7 yesterday that it is inappropriate to say that this is a  
8 bad case because of who the investors in i4i may be,  
9 Microsoft continues to do exactly that in their closing  
10 argument.

11           You'll remember that they told you from  
12 the beginning and still say now, well, Microsoft -- or  
13 i4i is owned by bankers, but the evidence has shown you  
14 there are no bankers who are investors in i4i. There  
15 are some investment companies, but they're not bankers.  
16 Are there any investors from i4i here today? Would you  
17 stand up?

18           Microsoft's lawyer just told the jury  
19 that plenty of the investors are sitting in the back of  
20 the courtroom. That wasn't true, Ladies and Gentlemen.  
21 Why would Microsoft tell you something like that that is  
22 simply false?

23           It's a distraction.

24           And all the talk about credibility, do  
25 you remember the discussion that we just heard over the

1 last hour and all the documents about whether Mr. Young  
2 worked for i4i or was just a consultant with i4i? Do  
3 you remember all that?

4 What, Ladies and Gentlemen, has that got  
5 to do with any of the questions that Judge Davis has  
6 asked you to answer?

7 So let's talk about what Judge Davis has  
8 told you is important in this case.

9 First of all, infringement. Microsoft's  
10 principal point here is that, well, i4i had some of the  
11 information from Microsoft about their infringing  
12 product maybe as early as 2002, and they didn't sue  
13 until much later, and they never said anything about it.

14 And yet, Ladies and Gentlemen, don't  
15 forget you heard Mr. Little, when he was on the stand,  
16 say that from the kind of things that i4i was able to  
17 get from Microsoft before this lawsuit was filed, the  
18 manuals and the ability to actually use the product, you  
19 can't tell from that whether there was infringement.

20 You have to have the source code to tell  
21 that. And Microsoft doesn't give the source code to  
22 anybody like i4i.

23 Yes, i4i sent a note of congratulations  
24 about the product, but, once again, without the source  
25 code, they weren't able to tell that it infringed at

1 that time.

2           You heard Microsoft, in trying to defend  
3 themselves against proof of infringement, say, well, we  
4 didn't copy anything. And yet remember again, Judge  
5 Davis told you yesterday copying has got nothing to do  
6 with infringement. You can infringe a patent, if you do  
7 what that patent protects, whether you copied anything  
8 or not.

9           Now, Ladies and Gentlemen, we obviously  
10 don't have time in a few minutes to go back through all  
11 of Dr. Rhyne's testimony about infringement. But you'll  
12 remember I told you at the beginning of the case that  
13 Dr. Rhyne was a professional educator; that he had a  
14 great deal of experience in explaining these difficult  
15 concepts to people who may not ordinarily deal with  
16 them; and that he would show you how Microsoft's  
17 products infringe the i4i patent.

18           I told you that you would understand that  
19 testimony, and what I meant by that is not that everyone  
20 of you would understand it; some of you went into this  
21 case thinking that maybe some of these computer matters  
22 are not really your cup of tea.

23           But some of you have experience in  
24 matters like this; some of you have actual training in  
25 computer technology.

1                   That's the reason that I assured you,  
2 maybe not as to every individual, but as a jury that you  
3 would be able to understand Dr. Rhyne's testimony and  
4 understand the basis for his conclusions that Microsoft  
5 infringes the patent.

6                   The next question that the Judge will ask  
7 you about is whether Microsoft's infringement is  
8 willful.

9                   This, remember, is the story, the story  
10 of the men: Jones, Sawicki, others who went to  
11 Washington, D.C., to invent -- to see the i4i invention;  
12 who got the e-mail that told them the patent numbers;  
13 who told each other, don't worry; we're going to make it  
14 obsolete.

15                   What does Microsoft have to say about  
16 their failure to bring those men here to explain  
17 themselves?

18                   Well, all they told you is, well, i4i  
19 took their deposition. They could have read things to  
20 you out of your deposition.

21                   Ladies and Gentlemen, we showed you the  
22 documents. We showed you the e-mails about what those  
23 men knew, when they knew it, and what their plan was.

24                   If they wanted to try and make excuses,  
25 if they wanted to explain those documents away, they're

1 the ones who should have come here. They're Microsoft  
2 employees. They could have made an explanation to you,  
3 if they had one.

4 On the next question of the invalidity of  
5 the patent. On the Word product, Word 6, remember the  
6 fundamental evidence that's shown you Word did not work  
7 with SGML.

8 Yeah, it's true; XML may not have been  
9 invented till later, but SGML had been. It was invented  
10 in the 1980s and Word couldn't do it.

11 The evidence showed you on the SEMI  
12 product that i4i sold that the SEMI employees hated that  
13 product. The bosses at SEMI liked it; the employees  
14 hated it. And why did they hate it?

15 Because it couldn't take the tags out of  
16 the document. The SEMI product was the problem, not the  
17 solution of the invention.

18 Mr. Owens, the first witness in the case,  
19 the man who wrote the SEMI products computer code, told  
20 you the invention was not in SEMI.

21 Mr. Owens is not an investor in i4i.  
22 He's not an employee of i4i. He has nothing to gain  
23 from having told you when he invented this invention  
24 along with Mr. Vulpe, and that it was after the product  
25 was given to SEMI.

1                   Mr. Young's testimony on the same  
2 subject, the man at SEMI, said the content and the tags  
3 were mixed.

4                   And, finally, we heard about this  
5 destroyed source code. Well, first of all, nobody ever  
6 testified that it was destroyed. It wasn't saved.  
7 Nobody can find it, but nobody said they went out to  
8 destroy it.

9                   And, remember, Microsoft has looked for  
10 that source code, not just from i4i, but they can't find  
11 it at SEMI either. Nobody bothered to save it once it  
12 became no longer useful.

13                   But don't be confused, Ladies and  
14 Gentlemen. The Judge has instructed you very clearly  
15 that the burden of proof on this issue of validity lies  
16 with Microsoft. It's their burden to show you what the  
17 code is. It's not i4i's burden to try and bring the  
18 code here to show you that it didn't do something.

19                   There's no testimony that the code was  
20 intentionally destroyed. The fact of the matter is that  
21 nobody can find it, because nobody's using it anymore,  
22 not i4i, not SEMI, not anybody.

23                   And that failure of proof means that  
24 Microsoft cannot show you that SEMI renders the patent  
25 invalid.

1           And, finally, on the subject of the  
2 amount of a reasonable royalty. Remember that the  
3 survey results showed 1.8 million users in an infringing  
4 way, but that is estimated to be less than 2 percent of  
5 all Microsoft customers for these products.

6           That, despite the uncontested fact that  
7 Microsoft projects that up to 80 percent of new content  
8 will be in XML by next year.

9           I suggest that the evidence shows you  
10 that this is an extraordinarily conservative approach to  
11 the value of Microsoft's use of this invention.

12           Ladies and Gentlemen, it's been a long  
13 time for i4i's day in court to come. And now the day is  
14 finally here when you will have an opportunity to write  
15 the final chapter to this story.

16           We appreciate your time and your patience  
17 and your attention, and we look forward to your  
18 decision.

19           THE COURT: Thank you, Mr. Cawley.

20           All right. Ladies and Gentlemen of the  
21 Jury, we started here Monday a week ago. I told you  
22 then you were going to hear the voir dire examination  
23 and the opening statements; then you're going to hear  
24 the evidence and the closing arguments and the Court's  
25 Charge. All of that has been done now.

1           The final thing that you were to do is to  
2 deliberate and reach a verdict, and that's what I'm  
3 about to release you to do.

4           Now, when I do so, you have sort of been  
5 at the mercy of the Court and the lawyers all week, but  
6 you're now in the driver's seat. And when you go in  
7 there, I want you to select your foreman as your first  
8 order of business.

9           And then I'd like for you to decide  
10 whether you would like to break for lunch, go out to  
11 lunch, and then come back and start deliberating, or  
12 whether you would rather go ahead and deliberate and  
13 have the Court order some sandwiches in for you. We can  
14 get you some Subway sandwiches, if that would be your  
15 preference.

16           But do that first thing and send that --  
17 ask your foreman to send me out a note letting me know  
18 what you've decided.

19           If you decide to go to lunch before you  
20 actually begin your deliberations and take a break, then  
21 I'm going to ask the people in the courtroom to remain  
22 in here, allow you to kind of get a head start on the  
23 restaurants and that type of thing, and then you can  
24 come back after your lunch.

25           You should not deliberate on this case

1 unless all eight of you are present. So if there's two  
2 people late getting back from lunch, don't start talking  
3 about the case.

4 And whoever is selected as your  
5 foreperson, that's their responsibility to be sure that  
6 everybody follows the Court's instructions, everybody's  
7 in the room. Even if someone needs to go to the  
8 restroom during your deliberations, you should stop  
9 deliberating until everyone comes back in.

10 And the reason for that is simple: That  
11 the collective minds of you, the eight jurors, should  
12 hear everything that everyone else has to say and hear  
13 all deliberations and not just part of it.

14 Now, again, if you recess during your  
15 deliberations, if you decide to go to lunch, follow my  
16 instructions and do not discuss the case during that  
17 time.

18 After you have reached your verdict, your  
19 foreperson is to fill in the form, verdict form with  
20 your answer to the questions.

21 Do not reveal your answers -- do not  
22 reveal your answers until such time as you are  
23 discharged, unless otherwise directed by me. You must  
24 never disclose to anyone, not even to me, your numerical  
25 division on any question.

1           Again, if you want to communicate with me  
2 at anytime, please give your written message, signed by  
3 your foreperson, to the court security officer who will  
4 bring it to me. I will respond as promptly as possible.

5           You're going to have copies of -- we will  
6 send with you the Court's Charge, the verdict form, a  
7 copy for each of you. We will also send to you all  
8 exhibits. It may take a little while for those to get  
9 in there, but they will all be sent to you.

10           Again, thank you for your attention  
11 during the trial. I wish you well during your  
12 deliberations. And you are now to retire to the jury  
13 room to begin your deliberations.

14           COURT SECURITY OFFICER: All rise.

15           (Jury out at 11:07 a.m.)

16           THE COURT: Please be seated.

17           All right. I know that there is some  
18 other evidence for the Court to be offered. We're going  
19 to take a break in just a moment until we find out what  
20 the jury wants to do.

21           If they decide that they would like to  
22 take a lunch break, again, I would ask that people  
23 remain here for five or ten minutes to allow them to  
24 escape the courthouse.

25           If they decide to go ahead and begin

1 deliberating and we get them sandwiches, then everyone  
2 is free to go on their way.

3           If they take a break, we'll take a break  
4 for lunch, too. We'll come back after lunch; I'll hear  
5 your testimony.

6           If they don't take a break, I may go  
7 ahead and hear the testimony here before lunch. We'll  
8 know that in the next 10 or 15 minutes.

9           I want to propose something to the  
10 parties for your consideration, and I'd like to get your  
11 feedback when I -- when I come back in after our recess.

12           And that is this: I oftentimes hear  
13 lawyers and parties wonder what the jury thought of the  
14 presentation, of the witnesses, of the trial, and maybe  
15 a desire to talk to them.

16           I do not allow attorneys, unilaterally,  
17 to contact my jurors.

18           I've also had jurors -- I go back and  
19 visit with them after the case every time to thank them  
20 for their service. I tell them I can't discuss any of  
21 the merits of the case with them, but I would be glad to  
22 answer any questions about the process or how they were  
23 treated, anything we could do to serve them better while  
24 they're serving in jury service.

25           And we have a nice conversation usually,

1 and they're very, very nice. Sometimes they kind of  
2 want to get into, you know, what happened in the trial,  
3 and I say, well, I'm sorry, I can't discuss that with  
4 you.

5 But it's occurred to me that after the  
6 verdict comes in in this case and after the Court's  
7 received the verdict, the case is over and the jury is  
8 discharged, that I'm considering, if the attorneys are  
9 interested -- and I'd like to know your level of  
10 interest and give you a chance to think about it, and  
11 you can let me know when I come back in.

12 But I'm considering -- I haven't decided  
13 that I'm going to do it. I want your input. But I'm  
14 considering, after I have that conversation with the  
15 jurors, inviting any of those that would like to come in  
16 and have an off-the-record conversation with the  
17 attorneys and with the Court, with me sort of  
18 supervising it.

19 Go ahead -- let's see what the jury has  
20 to say here.

21 We are going to take a 10-minute break  
22 and then return to deliberate.

23 So that is their decision. So I'll ask  
24 everyone to sort of remain in the courtroom while they  
25 take their break, and then you'll be -- then we'll take

1 a break probably till about 11:30, and then I'll come  
2 back in and hear your testimony, and then we'll go from  
3 there.

4 They'll probably be sending out a note at  
5 some point for sandwiches or something.

6 Anyway, coming back to my question, I'm  
7 considering giving them the option of those who would  
8 like to visit with the attorneys under the scenario I've  
9 described, just to talk about the case, talk about the  
10 presentation, what they may have questions about why  
11 didn't this witness testify or that. May be helpful to  
12 y'all; may be helpful to them.

13 I'm considering doing that experiment.  
14 And the ones that aren't interested, let them go on and  
15 go. The ones that are, I would bring them back in and  
16 let y'all have a conversation, a short one, a respectful  
17 one.

18 Again, not going into their deliberations  
19 or the real -- anything that would be covered by their  
20 deliberations, but more on the presentation and that  
21 type of thing.

22 So y'all think about that. Let me know  
23 what your thoughts on it are when I come back. I'm  
24 going to recess for about 20 minutes, and we will  
25 reconvene at 11:30, at which time I'll begin hearing

1 your testimony.

2 MR. PARKER: Judge, did the jury indicate  
3 they had selected a foreperson?

4 THE COURT: Yes, they have. And the  
5 foreperson is Barbara Greer, who is --

6 MR. PARKER: No. 1.

7 THE COURT: -- Juror No. 1.

8 All right. Very well.

9 Any further questions?

10 All right. We'll be in recess until  
11 11:30.

12 COURT SECURITY OFFICER: All rise.

13 (Recess.)

14 (Jury out.)

15 COURT SECURITY OFFICER: All rise.

16 THE COURT: Please be seated.

17 All right. I understand there are some  
18 things with regard to exhibits that need to be  
19 addressed; is that correct?

20 MR. CAWLEY: Well, as I understand the  
21 issue, Judge, what we've been doing is every day, if we  
22 have any exhibits, we take that up. During the course  
23 of the day, it may come up.

24 The next morning, we come up with a  
25 cumulative list of all the exhibits. So we have a list

1 that is cumulative through the end of the day yesterday.

2 THE COURT: Okay. All right. And -- and  
3 is there no objection to the list?

4 MR. CAWLEY: And we have -- I'm sorry for  
5 interrupting the Court. We have a separate list of  
6 exhibits for today at the bench trial.

7 THE COURT: All right. Well, we'll worry  
8 about the bench trial in a minute. Let's deal with what  
9 the jury needs.

10 Is there -- what is -- have you marked  
11 that list as Plaintiffs' Exhibit List No. 5?

12 MR. CAWLEY: No. 5.

13 THE COURT: All right. Is there any  
14 objection to those exhibits?

15 MR. POWERS: No objection, Your Honor.

16 THE COURT: All right. Those are  
17 admitted and made part of the record.

18 And, Ms. Ferguson, you may send those  
19 exhibits in.

20 And does do the Defendant have one?

21 MR. POWERS: We do, Your Honor.

22 THE COURT: All right. And what number  
23 is that?

24 MR. POWERS: I believe 4.

25 THE COURT: All right. Defendant's

1 Exhibit List No. 4.

2 Is there any objection to the exhibits  
3 that are listed on that list?

4 MR. CAWLEY: No, Your Honor.

5 THE COURT: All right. Ms. Ferguson, you  
6 can send in the other exhibits related to that.

7 The jury just sent out a note --  
8 Ms. Ferguson, do you have that note or --

9 COURTROOM DEPUTY: We may have left it in  
10 chambers, Judge.

11 THE COURT: Anyway, they were very  
12 specific as to what type of sandwich tray they wanted,  
13 tea sweetener, and assorted cookies. So it appears  
14 they're going to eat.

15 I've decided I'm going to eat, and all of  
16 y'all ought to go eat. So I'm going -- we're going to  
17 break. I'll come back probably -- let's say 12:45 and  
18 be an hour and 10 minutes.

19 How long is the additional evidence to  
20 the bench going to take? About 20 minutes per side?

21 MR. CAWLEY: 20 minutes -- 15, 20  
22 minutes.

23 THE COURT: Okay. We'll plan to start  
24 back at 12:45. It may be 1:00 o'clock. We'll see. Is  
25 that agreeable? Anybody have any problem with that?

1 MR. POWERS: No problem, Judge.

2 THE COURT: Now, I have one other thing  
3 to bring up with y'all. I'm going to share this with  
4 you over lunch.

5 Ms. Ferguson brought in to me this  
6 morning a present, and it is a mouse covered with  
7 sparkly things and a bite taken out of it, and it says:  
8 Yummy Mouse, salted with metacodes.

9 So I'm going to allow all the lawyers to  
10 enjoy that and have part of that with your lunch.

11 And we'll be in recess until 12:45.

12 COURT SECURITY OFFICER: All rise.

13 (Lunch recess.)

14 (Jury out.)

15 COURT SECURITY OFFICER: All rise.

16 THE COURT: Please be seated.

17 All right. Did the parties have an  
18 opportunity to consider whether they would be interested  
19 in visiting with any of the jurors post-verdict?

20 MR. CAWLEY: Plaintiffs would, Your  
21 Honor.

22 THE COURT: Okay.

23 MR. LENDER: I'm sorry? What did you  
24 say?

25 MR. CAWLEY: Yes, we would.

1                   MR. LENDER: Your Honor, first of all, I  
2 want to apologize that Mr. Powers had to leave. His  
3 son's graduation from high school is tomorrow, so he  
4 took the opportunity to get on a plane and actually  
5 attend.

6                   THE COURT: All right.

7                   MR. LENDER: He sends his apologies.  
8 We've talked internally. We think it would be  
9 inappropriate for all the reasons that the Court has  
10 historically not allowed it.

11                   THE COURT: You think it would be in --

12                   MR. LENDER: Inappropriate.

13                   THE COURT: Inappropriate.

14                   MR. LENDER: We think that the jury  
15 deliberative process should be kept sacrosanct. We  
16 don't see how we're going to avoid getting into the  
17 deliberative process.

18                   For all the reasons why Your Honor has  
19 embraced in the past to do it, we would prefer that we  
20 don't do that in this particular case.

21                   THE COURT: Okay. Well, I will take that  
22 under advisement. Thank you.

23                   All right. Who -- who's going to go  
24 first with inequitable conduct?

25                   MR. CAWLEY: Well, I think that since

1 it's their case, they should.

2 THE COURT: Okay. Very well.

3 MR. KUDLAC: Thank you.

4 MR. LENDER: Okay.

5 MR. KUDLAC: Your Honor, Microsoft would  
6 re-call Stephen Gray.

7 THE COURT: Okay. Stephen Gray.

8 STEPHEN GRAY, DEFENDANT'S WITNESS, SWORN

9 DIRECT EXAMINATION

10 BY MR. KUDLAC:

11 Q. Good afternoon, Mr. Gray. Welcome back.

12 A. Good afternoon.

13 Q. We talked about this the other day on Monday  
14 when you were on the stand, but would you remind us  
15 whether, as part of your work on this case, you studied  
16 the prosecution history, the back and forth between the  
17 patent applicants and the Patent Office?

18 A. Yes, I did.

19 Q. And did you also study the cited references  
20 that were cited on the face of the '449 patent?

21 A. Yes, I did.

22 MR. KUDLAC: Could we pull up Slide 74  
23 from your invalidity presentation?

24 Q. (By Mr. Kudlac) And this is the cover of the  
25 Vulpe patent.

1                   And are those the four references listed  
2 there on the front, the Handley, Mizuta, Rosenbaum, and  
3 Kugimiya references?

4           A.       Yes, they are.

5           Q.       Those are the ones that you studied?

6           A.       I did.

7           Q.       Among others, right?

8           A.       Among others.

9           Q.       In your analysis -- well, in your analysis,  
10 do you recall seeing the references to the SGML standard  
11 in the Vulpe patent itself in the second column, I  
12 believe it was?

13          A.       Yes, I did.

14          Q.       Now, as part of the prosecution of the '449  
15 patent, were there any SGML editors disclosed to the  
16 Patent Office?

17          A.       No. There's none in the references cited  
18 here that I -- no.

19          Q.       Were -- in the text, the specification, the  
20 body of the patent, the '449 patent, were there any SGML  
21 editors disclosed?

22          A.       Not that I recollect.

23          Q.       Was the -- was there any source code for any  
24 SGML disclosed to the Patent Office?

25          A.       No.

1 Q. Now, was -- the source code for the SEMI  
2 S-to-the-4th system that we've heard so much about, was  
3 that disclosed to the Patent Office?

4 A. No, it was not.

5 Q. Were -- any of the manuals or materials from  
6 i4i or from SEMI, were any of those disclosed to the  
7 Patent Office?

8 A. No, they were not.

9 Q. All right. Well, let's take a look at the  
10 prosecution history.

11 MR. KUDLAC: If we could have Exhibit  
12 2002, and in particular, Page 106, please.

13 Q. (By Mr. Kudlac) Now, this is an office  
14 action -- if we look at Page 106, this is an office  
15 action dated April 1st of 1997.

16 Would you please give us a description, if  
17 you would, of where the prosecution stood at this point?

18 A. Well, the Claims 1 to 19 of the applicants'  
19 claims, 1 through 19 and 21 were pending, but at this  
20 point had been rejected. And I think that's what this  
21 document shows.

22 Q. And those were all the claims at this point  
23 were rejected?

24 A. My recollection is that those were all the  
25 claims that were pending at that point.

1 Q. All right. Let's turn to Page 108, which is  
2 a little bit further in this April 1st office action.

3 MR. KUDLAC: And if we could, please pull  
4 up the section that talks about the Kugimiya reference  
5 there. I believe it's the first couple of paragraphs.

6 Q. (By Mr. Kudlac) If you would, please tell us  
7 what's the -- what's the Examiner telling the applicants  
8 at this point with respect to Kugimiya?

9 A. Well, essentially, the Examiner is telling  
10 the applicants that the reason for the rejection of  
11 Claims 1 through 19 and 21 is that they are being  
12 anticipated by Kugimiya.

13 Q. And Kugimiya is what we looked at the other  
14 day as Exhibit 2364; is that right?

15 A. That's correct.

16 Q. All right. Now let's look at what happened  
17 next after the rejection of all --

18 THE COURT: Excuse me just a moment.

19 MR. KUDLAC: Sorry.

20 (Pause.)

21 THE COURT: Okay. Juror Note No. 1 says:  
22 We need a whiteboard, two colored markers, and a  
23 calculator.

24 Does -- can the parties help provide  
25 that?

1 MR. CAWLEY: Certainly, Your Honor.

2 THE COURT: If y'all will give those to  
3 the court security officer and carry them over by the  
4 door for him, he'll take them in.

5 MR. CAMPBELL: Yes, Your Honor.

6 THE COURT: All right. We've delivered  
7 the whiteboard, two colored markers, and a calculator.  
8 You may proceed.

9 MR. KUDLAC: Thank you, Your Honor.

10 Q. (By Mr. Kudlac) Let's turn to Page 119 to see  
11 what happened next after this rejection.

12 MR. KUDLAC: And can we pull up the  
13 bottom paragraph, please?

14 Q. (By Mr. Kudlac) Mr. Gray, would you please  
15 explain what happened here?

16 This is part of the response of the April 1st  
17 office action.

18 Would you please explain what the applicants  
19 are telling the Patent Office with respect to Kugimiya  
20 as compared to their invention?

21 A. Well, this -- this passage is really speaking  
22 to the fact that the -- that the applicants' metacode  
23 map is achieved -- or it represents a separation of  
24 content and architecture of a document and that the  
25 separation is achieved by extracting metacodes from the

1 existing document and the mapped content, the content  
2 that it refers to, and storing them in a -- or creating  
3 those two entities and then storing them persistently as  
4 the map of the location of the metacodes in distinct  
5 memory -- store them separately in distinct memory.

6 Q. And this is where they emphasize the word  
7 persistent?

8 A. And they did. They emphasized the word  
9 persistent, and they gave the meaning, non-temporary.

10 Q. I see.

11 All right. Let's turn to what happened next.

12 MR. LENDER: If we could turn to Page 129  
13 of the file history. And if we could highlight the  
14 center box there, the Examiner Interview Summary.

15 Q. (By Mr. Kudlac) Mr. Gray, could you please  
16 explain what was going on at this point during the  
17 prosecution, after the applicants had responded to that  
18 rejection over Kugimiya?

19 A. Well, there was an interview that was  
20 conducted between the Patent Office --  
21 representatives -- representative from the Patent Office  
22 and representatives from the applicants.

23 A fellow -- a person by the name of Almis  
24 Jankus from the PTO attended, as well as Michel Vulpe,  
25 and a person named Glenn Perry, who I understand is one

1 of the attorneys for the applicants.

2 Q. What was discussed at this interview between  
3 Mr. Vulpe, Mr. Perry, and Mr. Jankus of the Patent  
4 Office?

5 A. Well, further down in this chart, it states  
6 that the purpose of the interview was to discuss the  
7 claim language as compared to the Kugimiya reference,  
8 especially with reference to persistence of distinct  
9 storage and metacode menus.

10 Q. And with respect to the distinct storage, is  
11 it the metacode map that you understand is required to  
12 be put into distinct storage by the claims?

13 A. Yes, it is.

14 Q. All right. Well, let's turn to what happened  
15 next.

16 MR. LENDER: If we could, please, turn to  
17 Page 133 of the file history, and pull up the remarks  
18 paragraph in the center there.

19 Q. (By Mr. Kudlac) Now, this is remarks that  
20 were filed by the applicant after the interview; is that  
21 right?

22 A. That's correct.

23 Q. Where they summarized what happened at the  
24 interview?

25 A. That's my -- yes, that's correct.

1 Q. Now, what did the applicants say here about  
2 the Kugimiya reference and the persistence aspect of the  
3 invention of the '449 patent?

4 A. Well, apparently, during the -- during the  
5 interview, there seemed to be an agreement reached that  
6 the -- that the Kugimiya reference does not teach  
7 providing a menu of metacodes in persistent storage for  
8 the metacode map.

9 Q. And further down, does it talk about how it  
10 contrasts the invention with Kugi -- with the Kugimiya  
11 reference?

12 A. Yeah. I think that -- I think attorneys for  
13 the applicants were trying to contrast the persistent  
14 storage requirement of the metacode map in the  
15 application with what Kugimiya did, which was actually  
16 to temporarily store the metacode map.

17 And so that was -- the purpose there was to  
18 contrast the two things.

19 Q. And did they not only contrast Kugimiya, but  
20 as they say here, many other references?

21 A. Yes. They made the statement -- and this is,  
22 again, the attorneys for the applicants made the  
23 statement that there are many other references that also  
24 temporarily store metacodes.

25 Q. So is it the case that the distinction that

1 the applicants were making over Kugimiya was that it  
2 didn't persistently store the metacode map?

3 A. That's right. It didn't -- it didn't store  
4 the metacode map in persistent storage.

5 Q. All right. Let's take a look at what the  
6 Kugimiya patent did disclose for just a moment.

7 MR. KUDLAC: If we could have  
8 Exhibit 2364, please.

9 Q. (By Mr. Kudlac) Mr. Gray, would you please  
10 explain -- we've heard some about the Kugimiya patent,  
11 but could you explain in general what the Kugimiya  
12 patent discloses?

13 A. So the Kugimiya patent really pertains to a  
14 translation system, a document translation system to  
15 translate from one language into another language. And  
16 it's particularly focused on documents that have  
17 embedded markup signs, as it's referred to there in the  
18 title.

19 But, really, what they're talking about is  
20 tags. It has embedded tags. So it's -- the patent  
21 addresses the problem of translating from one  
22 language -- translating a document with embedded tags  
23 from one language into another language.

24 And in particular, the examples that are  
25 shown in the -- in the specification of the patent have

1 to do with translating from English to Japanese. I  
2 think the figure shows something like that.

3 Q. Were these SGML tags that Kugimiya was  
4 talking about?

5 A. In particular, this was directed to -- this  
6 was discussed, SGML tags, as being the embedded tags in  
7 the source documents, yes.

8 Q. All right. Thank you.

9 MR. KUDLAC: Could we please have Page 10  
10 of the Kugimiya patents, which has Figures 12 and 13?

11 Q. (By Mr. Kudlac) What is shown in Figure 12  
12 and 13 in Kugimiya with reference to how it does this  
13 translation process in the selecting of tags?

14 A. Well, Figure 12 is what's referred to as  
15 Buffer A. And what is contained in Figure 12 is the  
16 actual original source document.

17 If you look at the doc -- if you look at the  
18 document, it happens to be written in English, and  
19 it's -- the first line, I think, is telling us to what  
20 is intended here.

21 What the intent of the patent is, is to take  
22 that English language document that has embedded tags  
23 and translate it into another language, maintaining the  
24 relationships of the tags to the original document.

25 So in the case here, Buffer A, we see one of

1 the most useful points of this, and then there's the  
2 metacode, the opening metacode tag, then a term, which  
3 is actually a term, and then the word tag and the  
4 closing met -- closing SGML tag.

5           So what they're saying here is that they want  
6 to be able to translate this document but maintain the  
7 SGML tag called term surrounding the actual word tag.  
8 So that's what is in Buffer A, the original document is  
9 preserved in Buffer A and translated into another form,  
10 which we'll probably see later here.

11           Figure 13 is actually a representation of the  
12 metacode map itself. As you can see on the far  
13 right-hand side, there's a column called tag. And those  
14 represent the tags which were encountered in the  
15 original source document.

16           The first line there shows that the first tag  
17 is called term, and term relates to the first line in  
18 Buffer A, and it -- the word position, it indicates it's  
19 the effective area or point in which the tag has its  
20 influence.

21           The word -- which is the far left-hand  
22 column. That's the word position, which shows the  
23 address.

24           And then the word number really talks about  
25 the number of words that that particular tag pertains

1 to.

2 Q. And was Buffer F the metacode map that was  
3 being referred to?

4 A. Buffer F is the metacode map.

5 Q. All right.

6 MR. KUDLAC: Could we please have  
7 Figure 15, which is on Page 15, which shows us  
8 Figure 18?

9 There we go.

10 Q. (By Mr. Kudlac) What is shown here?

11 A. So in Buffer E, as the Kugimiya refers to it,  
12 is the translated document, which is, again, the English  
13 document that we saw in Buffer A translated.

14 And the metacode tags, or the SGML tags, are  
15 reinserted into the translated document so that the SGML  
16 tags pertain to the translated document in the same way,  
17 in the same relationship that they did to the original  
18 source document.

19 MR. KUDLAC: Okay. Can we please have  
20 Slide 90 from Mr. Gray's invalidity presentation?

21 Q. (By Mr. Kudlac) Now, considering the  
22 argument that the applicants made about Kugimiya in  
23 the file history, could the applicants have made that  
24 argument if the SEMI S-to-the-4th system had been  
25 before the Examiner?

1           Could they have said that these many other  
2 references in Kugimiya teach the use of only temporary  
3 storage of metacodes, considering what SEMI S-to-the-4th  
4 shows?

5           A.     No, I would think not. I would think that  
6 the -- that the -- SEMI S-to-the-4th teaches the  
7 persistence of the metacodes in the metacode -- in the  
8 metacode map.

9           Q.     Now, in your opinion, would the SEMI  
10 S-to-the-4th system have been cumulative of the prior  
11 art that was before the Examiner of the Vulpe patent?

12          A.     No. Once again, Kugimiya was the reference  
13 that identified the metacode map but did so in a  
14 temporary fashion, and S-to-the-4th teaches persistence.

15          Q.     All right. Let's take a look at Slide 88 of  
16 your invalidity presentation.

17                 Mr. Gray, do you have an opinion as to  
18 whether the SEMI S-to-the-4th system, in combination  
19 with Kugimiya, would make the claims of the Vulpe patent  
20 obvious?

21          A.     Yeah. My opinion, that the combination of  
22 Kugimiya with the S-to-the -- SEMI S-to-the-4th would  
23 render all of the claims of the i4i obvious.

24          Q.     And would you please explain that opinion?

25          A.     Well, again, there's -- there is sufficient

1 motivation to combine these here. I mean, both of --  
2 both Kugimiya and the -- the S-to-the-4th system both  
3 address the same problem, which is electronic document  
4 handling.

5           And it particularly focused on electronic  
6 document handling where there is embedded SGML tags so  
7 that it's the same field and addressing kind of the same  
8 problem, which is how to handle embedded tags in that  
9 kind of -- in those kinds of documents.

10           There is also, again, the -- most of the  
11 problem in the same way, which is to separate the  
12 content in the -- in the structure. One resists the  
13 metacode map; one doesn't.

14           But they approached the problem -- the  
15 solution to the problem the same way. And when you  
16 combine them, you get an expected result. Nothing that  
17 would be extraordinary as a result of combining the two.  
18 For example, if you were to think of a problem for a  
19 person who had the problem of trying to dis -- well,  
20 let's just take the scenario of an American company that  
21 has a Japanese subsidiary that needs to be able to  
22 create documents in the United States and want to be  
23 shared with the Japanese subsidiary.

24           One of the ways to do that is -- would be to  
25 combine the translation services of Kugimiya with the

1 text -- with the SGML document editing functions of SEMI  
2 S-to-the-4th, which would then provide you a mechanism  
3 that you could insert into the flow -- document flow a  
4 translation, which would now be able to distribute the  
5 documents to both the United States and a Japanese  
6 subsidiary as to allow for the use of those documents.

7 So that would be a reason there's a problem  
8 and somebody faced with it would be likely to want to  
9 try and combine the SGML document editing functions from  
10 SEMI S-to-the-4th with the translation services or  
11 functions that are opined in the Kugimiya patent.

12 And I might also add that editors that did  
13 SGML editing, as well as translation systems, were  
14 well-known to persons of ordinary skill in the art.

15 Q. Now, assuming that the SEMI S-to-the-4th  
16 system is found to not have a metacode map, would it  
17 have been obvious to use the metacode map of Kugimiya in  
18 combination with the SEMI S-to-the-4th system?

19 A. Yes. That's what I think.

20 Q. Thank you.

21 MR. KUDLAC: No further questions.

22 THE COURT: Cross-exam.

23 MR. CAMPBELL: Yes, Your Honor.

24 THE COURT: Excuse me a moment. We have  
25 another note.

1 (Pause.)

2 THE COURT: All right. I have Juror Note  
3 No. 2 that says one juror wants to know if he can take a  
4 10-minute break, provided the remainder of us do not  
5 discuss the case.

6 And give a response note?

7 MR. CAWLEY: I think -- I thought you  
8 were asking me to reply.

9 THE COURT: I'm just going to tell them  
10 that's fine. I'm just saying, that will be fine.  
11 I'll ask everyone to stay in the courtroom while the  
12 juror takes a 10-minute break. Must have one smoker on  
13 that jury.

14 All right. Mr. Campbell, you may  
15 proceed.

16 MR. CAMPBELL: May I approach, Your  
17 Honor?

18 THE COURT: Yes.

19 CROSS-EXAMINATION

20 BY MR. CAMPBELL:

21 Q. Good afternoon, Mr. Gray.

22 A. Good afternoon.

23 Q. I just want to ask you a few questions just  
24 to clarify a few things for the record.

25 You never saw the source code for SEMI; is

1 that correct?

2 A. That's correct.

3 Q. Did you ask SEMI for the source code?

4 A. I asked for -- I asked to try to see the  
5 source code. I asked the attorneys that I was working  
6 with for the source code, but I don't recollect having  
7 personally asked SEMI directly.

8 Q. Do you -- do you know if any attorneys asked  
9 them for the source code?

10 A. I don't have any knowledge of that.

11 Q. Did you ask them to ask for the source code?

12 A. I asked for the source code.

13 Q. You didn't say, though, could you see if SEMI  
14 has the source code?

15 A. I don't recollect having made that exact  
16 request. I asked for the source code. I asked to see  
17 the source code. I don't think I asked him to ask SEMI,  
18 and I don't remember doing that.

19 Q. So is the answer no?

20 A. I think so.

21 Q. Okay. Now, in your report, you rely  
22 exclusively on the SEMI manual and Mr. Young; is that  
23 correct?

24 A. There may have been another reference in my  
25 report, but for the most part, it is the user reference

1 manual in my report, and certainly, that's what my  
2 testimony here at trial has been about, is the user  
3 reference manual and the testimony of Mr. Young.

4 Q. All right.

5 A. And I suppose some testimony -- corroborated,  
6 if you will, by testimony from Mr. Owens and Mr. Vulpe.

7 Q. And Mr. Young never saw the source code, did  
8 he?

9 A. Mr. Young, to my knowledge, did not see the  
10 source code.

11 Q. Now, I think you've been here when both  
12 Mr. Little and Dr. Rhyme testified that you can't  
13 determine whether the claims of the '449 patent, or at  
14 least Claims 4, 18, and 20, are satisfied without  
15 looking at the source code.

16 Have you been in trial for that testimony?

17 A. Yes, I think so.

18 MR. CAMPBELL: If we could look at --

19 Q. (By Mr. Campbell) Well, let me ask you, do  
20 you disagree with that?

21 A. I think whether or not source code is  
22 required is really based upon, you know, an individual  
23 case-by-case basis. So I think that probably in this  
24 particular case, I disagree.

25 Q. So you disagree with Mr. Little on that

1 point?

2 A. On the SEMI source code, yes.

3 Q. Let's look at PX79, which is the SEMI manual  
4 you talked to your counsel about.

5 Do you have -- you can look at their version  
6 or the one that's in the notebook I gave you as PX79.

7 A. I'll look right off the screen, if that's  
8 okay.

9 Q. That's fine.

10 MR. CAMPBELL: And if we could look at  
11 Page 14.

12 Q. (By Mr. Campbell) Now, if you look there at  
13 the bottom of Page 14, it talks about a hierarchical  
14 tree display.

15 Do you see that?

16 A. I do. I see references to a hierarchical  
17 tree display, yes.

18 Q. So isn't it possible that the SEMI source  
19 code used a tree to display the document?

20 A. Yes, it is.

21 Q. Okay. You were here during Dr. Rhyne's  
22 testimony that the SGML standard talks about using a  
23 tree as a document representation.

24 Were you here for that testimony?

25 A. I was here for that testimony, yes.

1 Q. And you could -- could you design a piece of  
2 software that uses a tree to allow a view into just the  
3 content, a view into just the tags?

4 A. Yes, I think so.

5 Q. Okay. Now, you know what a DTD is, correct,  
6 Mr. Gray?

7 A. I do.

8 Q. A DTD is not part of a document.

9 A. That's correct.

10 Q. And a DTD is not a metacode map.

11 A. That's correct as well.

12 Q. Okay. Now, Mr. Gray, isn't one of the  
13 general goals of SGML and XML to allow data to be reused  
14 or repurposed?

15 A. Yes.

16 Q. If data were used -- or data repurposing,  
17 that's just a general benefit from using SGML. That's  
18 not a benefit of the '449 patent, right?

19 A. That's correct.

20 Q. And isn't it true that SGML in general is  
21 often described as separating parts of the document?

22 A. I've seen references that generally allude to  
23 that, yes.

24 Q. Okay. Let's -- let's just -- let's just look  
25 at one. Let's look at PX131. We'll put it on the

1 screen, if you would rather. And this is the SGML  
2 standard.

3 MR. CAMPBELL: And if we could go to Page  
4 59.

5 Q. (By Mr. Mr. Campbell) This is Annex A of the  
6 SGML standard.

7 Have you seen this before?

8 A. Yes, I have.

9 Q. And on Page 59, it says there: Text  
10 processing and word processing systems typically require  
11 additional information to be interspersed among the  
12 natural text of the document being processed.

13 This added information, called markup, serves  
14 two purposes: Separating the logical elements of the  
15 document. That's A.

16 Do you see that?

17 A. I do.

18 Q. Do you agree with that?

19 A. I do.

20 Q. And when the SGML standard here is talking  
21 about separation, they're not talking about separation  
22 of the document into a metacode map and mapped content,  
23 right?

24 A. It could be.

25 Q. Do you think that's what this means?



1 microsoft.com.

2 Do you see that?

3 A. I --

4 Q. At the very -- at the very bottom there?

5 A. Yes. Well, actually, let me pull that one  
6 up. You're right. That one is a little small.

7 Q. It is a little small.

8 A. Where are we now?

9 Q. It is PX424.

10 A. Do you know which tab it is here?

11 Q. I believe 4.

12 A. There we go. It's under Tab 4. Well, you  
13 know what? That document's still small.

14 Q. It is small. But you can see that it's from  
15 microsoft.com there at the bottom, can't you?

16 A. Yes.

17 Q. Okay. And at the top, you can see in bigger  
18 print, it says XML Glossary.

19 Do you see that?

20 A. Yes, I do.

21 Q. Okay. And then a little ways down, it says  
22 extensible markup language, XML.

23 Do you see that in the second paragraph?

24 A. Yes, I do.

25 Q. And then the last sentence there says: Most

1 importantly, XML provides a way of separating data from  
2 the methods that act on it and the way it is presented.

3 Do you see that?

4 A. Yes, I do.

5 Q. Okay. Do you agree with that statement?

6 A. Yes, I do.

7 Q. Let's look at one more. Let's look at PX83.

8 This is a presentation from Mr. Paoli called XML in  
9 Office.

10 Do you see that?

11 A. I do.

12 Q. And if we look at Page 3, Mr. Paoli makes  
13 a -- has a bullet there that says: Describes a  
14 document's structure and meaning and keeps data storage  
15 separate from the layout and format of the data.

16 Do you see that?

17 A. I do see that.

18 Q. Do you agree with that?

19 A. I'd have to look at the rest of the document.

20 I don't know if I've studied that document. But I,  
21 sitting here now, don't have any reason to believe it's  
22 a false statement or that there's something inherently  
23 wrong with it. I just don't know the context of it.

24 Q. Well, at the top of the slide, it says: The  
25 Basics: What is XML?

1                   MR. CAMPBELL:  If we could -- can we blow  
2 up the whole slide?

3           A.       Uh-huh.

4           Q.       (By Mr. Campbell) Is that -- is that a basic  
5 attribute of XML?

6           A.       The way this is expressed, yes.

7           Q.       Do you agree with that?

8           A.       Yes.

9                   MR. CAMPBELL:  Let's just look at one  
10 more.  Let's pull up PX82.

11          Q.       (By Mr. Campbell) And this is a press release  
12 of Microsoft's.

13                   MR. CAMPBELL:  If we go to Page 2 --  
14 first of all, let's go back to Page 1, so we can give  
15 Mr. Gray some context.

16          Q.       (By Mr. Kudlac) At the very bottom there, do  
17 you see where it says customer-defined XML schemas?

18          A.       Yes, I do.

19          Q.       Okay.  Now let's go to the top of Page 2.  
20 That's where that carries over.

21                   And it says:  Microsoft has invested heavily  
22 in building XML into the heart of Office applications.  
23 This allows data to be separated from the way it is  
24 presented and shared across applications and processes  
25 as needed rather than locked in specific documents.

1 Do you agree with that statement?

2 A. I agree that that's one of the things that it  
3 proves to someone who's using XML and structuring  
4 documents using XML.

5 Q. And that has nothing to do with separating  
6 things within the source code into a metacode map and  
7 mapped content. That's just general attribute of XML,  
8 correct?

9 A. I agree. These have all kind of been general  
10 attributes of XML.

11 Q. Now, did you read Mr. Owens' 30(b)(6)  
12 deposition?

13 A. I believe so, yes.

14 Q. Let's look at Mr. Owens' 30(b)(6) deposition.  
15 If we turn to Page 235, let me just read this into the  
16 record.

17 Mr. Owens was asked: Is it possible that  
18 there was an off-screen memory location that contained  
19 the entire entity content, both tags and content?

20 And Mr. Owens says: Yes, it's a -- so as I  
21 say, I'm not certain; I can't be certain; but it's  
22 extremely likely that we used an off-screen area that  
23 had all of the content and the tags combined in a -- in  
24 a single entity and that each of these, both the  
25 document outline view and the text editor window, were

1 created by parsing that off-screen content and  
2 displaying it on the screen.

3 Do you see that?

4 A. Yes, I do.

5 Q. And then on Page 236, Mr. Owens was asked:  
6 Now, you indicated that there were two modes for the  
7 text editing window: One in which the tags were hidden,  
8 and one in which the tags were shown.

9 How would that relate -- functionality relate  
10 to this off-screen memory hypothetical embodiment?

11 Mr. Owens answers: Yeah, that was a real win. So in  
12 the hypothetical embodiment, you take the off-screen and  
13 flip it onto the screen, pretty much instant. The user  
14 sees all the tags and content there, because that's  
15 really what they're editing in the first place anyway.

16 QUESTION: And if you didn't want to show  
17 tags, what would you do?

18 ANSWER: So then you'd have to parse the  
19 document and display only the content in between the  
20 tags and just leave off the tags.

21 Do you see that?

22 A. I do.

23 Q. In that testimony, Mr. Owens is saying it's  
24 extremely likely that the tags and the content were  
25 intermixed, isn't he?

1           A.     He indicates that they were stored in an  
2 intermixed fashion. I think that he also indicates that  
3 there's some hypothetical and some uncertainty in his  
4 testimony about how this actually operated to his  
5 recollection or how it actually functioned.

6           But yes. I mean, generally, that's what he's  
7 saying, that it could be stored as a combination of the  
8 content and the tags.

9           Q.     And i4i's response to Microsoft's  
10 Interrogatory No. 3, which asks about the SEMI system,  
11 also describes the SEMI system as having entities  
12 wherein content and tags were intermixed.

13           Did you read that?

14           A.     I probably read that, yes.

15           Q.     Does that -- does that sound right to you?

16           A.     Sounds like the answer to that question, yes.

17           Q.     And even Mr. Young, in his deposition,  
18 testified that content and structure were intermixed in  
19 SEMI.

20           Did you read that?

21           A.     I did read that.

22           Q.     Now, you would agree with me, right, that the  
23 '449 patent, the background of the invention described  
24 systems where content and tag were intermixed?

25           A.     Yes.

1 Q. So -- just a couple of last questions.  
2 It's also been described that the SEMI system decomposed  
3 a document into entities.

4 Have you read that?

5 A. I have.

6 Q. Now, you talked about the references that  
7 were cited in the prosecution history, and one of those  
8 references is Handley.

9 Did you read that reference?

10 A. I have read that reference. Not for a while,  
11 but I've read it.

12 Q. And the Handley reference is separating  
13 things into entities, correct?

14 A. Right.

15 Q. And the Patent Examiner knew about Handley.

16 A. I think Handley was cited, yes.

17 Q. One last question. Isn't it typical in  
18 software that if you're going to add new features or  
19 functionality to an existing product or create a new  
20 product so that you have something to work with, that  
21 you'll start with that something to work with?

22 A. Say that again.

23 Q. Let me ask it a different way.

24 I think we've seen in this trial, Microsoft  
25 talk about how Word has built on top of previous

1 versions of Word.

2 Do you recall that testimony?

3 A. I do.

4 Q. And so is it typical in your experience for  
5 someone developing software and testing it out and maybe  
6 adding a new feature, trying something new, if they have  
7 something that they can start with, they might start  
8 with that source code base?

9 A. Typically, that's referred to as baseline,  
10 yes.

11 Q. And then they would add to that?

12 A. That's pretty typical for software  
13 development.

14 Q. Okay. And they would have to test out that  
15 new feature with that source code base, see how it would  
16 work, see if it affected any other parts of the source  
17 code.

18 That type of -- that type of activity is  
19 typical in software development; would you agree?

20 A. To continue to add new features and functions  
21 to a baseline and then snap a new baseline, yes.

22 THE COURT: Just a moment, please.

23 (Pause.)

24 THE COURT: Juror Note No. 3. Jury Note  
25 No. 3 says: We have reached a decision, and we have

1 answered the necessary questions. So, apparently, we  
2 have a verdict.

3 Would you like to finish up your thought?

4 Are you about through?

5 MR. CAMPBELL: I just have one more  
6 question.

7 THE COURT: All right.

8 Q. (By Mr. Campbell) So it's typical, then, that  
9 if you're adding a new feature, you would use the  
10 baseline, add a new feature, and for a while, you would  
11 be testing that product to see how that new feature  
12 worked with the existing code mix?

13 A. That makes sense.

14 Q. Thank you, Mr. Gray.

15 THE COURT: Any redirect?

16 MR. KUDLAC: Two questions.

17 REDIRECT EXAMINATION

18 BY MR. KUDLAC:

19 Q. You have recently heard a lot about the  
20 trees.

21 Does the fact that you have a tree mean that  
22 you can't have a metacode map and mapped content?

23 A. Of course not.

24 MR. KUDLAC: I made it in one. Thank  
25 you, Your Honor.

1 THE COURT: All right. Do the Defendants  
2 have any other -- you may step down, Mr. Gray.

3 MR. KUDLAC: May he be excused?

4 THE COURT: Yes.

5 MR. LENDER: Your Honor, we have a short  
6 deposition we'd like to play, which is actually a clip  
7 from their inequitable conduct expert. It's a very  
8 short clip. I think it's, what, three minutes?

9 MR. TORCHIA: Less.

10 MR. LENDER: Less than three minutes.

11 THE COURT: And is the Plaintiff going to  
12 have some witnesses?

13 MR. WHITE: Yes, Your Honor. We will  
14 call Mr. Vulpe, very short examination.

15 THE COURT: All right. I think we'll go  
16 ahead and receive the jury verdict and take a break, and  
17 then we'll come back and do that.

18 MR. LENDER: Thank you.

19 THE COURT: How long do you anticipate  
20 with Mr. Vulpe?

21 MR. WHITE: No longer than about 15  
22 minutes.

23 THE COURT: All right. Well, I'm not  
24 going to keep the jury waiting.

25 You may bring the jury in.

1 COURT SECURITY OFFICER: All rise for the  
2 jury.

3 (Jury in at 1:30 p.m.)

4 THE COURT: All right. Please be seated.  
5 All right. If the foreperson of the jury would fold the  
6 verdict form and hand it to the court security officer.

7 All right. Ms. Ferguson, if you would, please read the  
8 verdict.

9 COURTROOM DEPUTY: In Case  
10 No. 6:07-CV-113, i4i versus Microsoft, verdict form:

11 Question No. 1:

12 Answer as to Claim 14, 18, and 20, all  
13 yes.

14 Answer to Question No. 2, answer is yes.

15 Question No. 3: As to Claim 14, 18, and  
16 20, answer is no.

17 And answer to Question No. 4: \$200  
18 million.

19 Signed and dated by the jury foreperson.

20 THE COURT: Thank you, Ms. Ferguson.

21 Is there any request to poll the jury?

22 MR. CAWLEY: Not from the Plaintiffs,  
23 Your Honor.

24 MR. LENDER: Not from the Defendants.

25 THE COURT: All right. Ladies and

1 Gentlemen of the Jury, I want to thank you on behalf of  
2 the parties and the Court. You have worked extremely  
3 hard for the last almost eight days now, and you've paid  
4 attention through long and tedious testimony.

5 You have completed the final stage of  
6 this case, which is your deliberations and reaching a  
7 verdict, and with the Court's thanks and that of both  
8 parties, I want to thank you for your service.

9 I'm about to excuse you to the jury room,  
10 and if you will go there and wait, someone will be there  
11 to meet you in a moment.

12 Again, thank you for your service, and  
13 you are released to the jury room.

14 I will give you one final instruction,  
15 and that is that no one should be contacting you  
16 regarding this case to discuss it with you. You are  
17 free to speak to anyone you wish, but it's your choice,  
18 and no one should be asking to speak to you. If anyone  
19 should contact you, please notify me.

20 You are released to the jury room at this  
21 time.

22 COURT SECURITY OFFICER: All rise.

23 (Jury out.)

24 THE COURT: Please be seated.

25 All right. Before we resume and hear the

1 remaining testimony on inequitable conduct, I'm going to  
2 take a -- probably about a 20-minute break, till, say,  
3 five minutes, till maybe 2:00 o'clock.

4 I'm going to go visit with the jury. In  
5 light of the parties not being able to agree to have an  
6 informal conference with the jury, we will dispense with  
7 that, but I will follow my usual practice of thanking  
8 the jury for their service.

9 We'll resume at 2:00 o'clock.

10 COURT SECURITY OFFICER: All rise.

11 (Recess.)

12 (Jury out.)

13 COURT SECURITY OFFICER: All rise.

14 THE COURT: All right. Please be seated.

15 All right. Defendants have a video that  
16 they wish to play; is that correct?

17 MR. LENDER: Yes, Your Honor. We would  
18 like to play a short video clip from Irving Rappaport.

19 Irving Rappaport was i4i's expert on the  
20 issue of inequitable conduct.

21 THE COURT: Okay.

22 MR. LENDER: Thank you.

23 (Video playing.)

24 QUESTION: Mr. Rappaport, can you please  
25 state your full name for the record.

1                   ANSWER: Irving Shale (phonetic spelling)  
2 Rappaport.

3                   QUESTION: And your opinion as set forth  
4 in your report is that i4i has not engaged in  
5 inequitable conduct, correct?

6                   ANSWER: That's correct.

7                   QUESTION: And I'm going to show you a  
8 copy of the file history from the '449 patent previously  
9 marked as Defendant's Exhibit No. 3. Let me just make  
10 sure I'm giving you the right copy.

11                   Let's turn to the next office action,  
12 which I believe is at FH 106.

13                   ANSWER: Yes.

14                   QUESTION: Okay. And the fourth office  
15 action reject -- which starts at FH 106, rejected the  
16 '449 patent based on Kugimiya, correct?

17                   ANSWER: That's correct.

18                   QUESTION: And is it -- is it fair to say  
19 that you have not studied the Kugimiya patent?

20                   ANSWER: Yes, not -- not in any detail,  
21 no.

22                   QUESTION: And if you go to FH 133, which  
23 is the same as Page 2 of the applicants' response --

24                   ANSWER: Uh-huh.

25                   QUESTION: -- do you see where in the

1 remarks they're talking about the Kugimiya reference, on  
2 Page 2?

3 ANSWER: Let's see. Looks like it's in  
4 the report line from -- in the remarks section.

5 QUESTION: Yes. During the interview we  
6 discussed --

7 ANSWER: We discussed how the invention  
8 differs from the Kugimiya reference.

9 QUESTION: Okay. And you see there the  
10 applicants' wrote: We seemed to reach agreement that  
11 the reference does not teach providing a menu of  
12 metacodes or a persistent storage for the metacode map.

13 ANSWER: Yes, I see that.

14 QUESTION: Do you understand that  
15 Kugimiya disclosed a metacode map?

16 ANSWER: Again, I -- I believe that --  
17 that it probably did disclose a metacode map.

18 QUESTION: The applicants -- you  
19 understand the applicants were arguing that Kugimiya did  
20 not teach the persistent storage of that metacode map,  
21 correct?

22 ANSWER: That's what this sentence where  
23 it says, we seemed to reach agreement that the reference  
24 does not teach providing a menu of metacodes, and that's  
25 in quotes, menu of metacodes, for a persistent storage

1 for the metacode map.

2 QUESTION: Mr. Rappaport, would a prior  
3 art system that persistently stored the metacodes be  
4 material prior art in this case?

5 ANSWER: It could be relevant.

6 QUESTION: And, Mr. Rappaport, would a  
7 prior art system that persistently stored the metacodes  
8 be material, even if it did not include a metacode map  
9 because the system could be combined with Kugimiya,  
10 which did have a metacode map?

11 ANSWER: It's possible.

12 (Video clip concluded.)

13 MR. LENDER: Your Honor, for the  
14 assistance of the court reporter, may I hand up what was  
15 just displayed in the deposition?

16 THE COURT: Yes, you may.

17 MR. LENDER: Thank you.

18 THE COURT: And did you have some -- an  
19 exhibit list relating to your inequitable conduct  
20 exhibits?

21 MR. LENDER: I believe, Your Honor,  
22 that --

23 THE COURT: Or were they all admitted in  
24 the case?

25 MR. LENDER: They were all admitted in

1 the case, yes.

2 THE COURT: All right. Any further  
3 evidence?

4 MR. LENDER: That's it, Your Honor, other  
5 than the cross-examination of Mr. Vulpe.

6 THE COURT: All right. And you rest --  
7 okay -- for purposes of inequitable conduct?

8 MR. LENDER: Yes, please.

9 THE COURT: All right. Response?

10 MR. WHITE: Yes, Your Honor.

11 We would call Michel Vulpe. Mr. Vulpe  
12 will address two equitable issues in his testimony the  
13 question of laches and inequitable conduct.

14 THE COURT: Okay.

15 MR. WHITE: May I proceed, Your Honor.

16 THE COURT: Yes, you may.

17 MICHEL VULPE, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN

18 DIRECT EXAMINATION

19 BY MR. WHITE:

20 Q. Mr. Vulpe, when did i4i first become  
21 concerned that Microsoft's custom XML support in Word  
22 2003 might be an infringement of the '449 patent?

23 A. In early 2004.

24 Q. What happened to cause that concern?

25 A. I read an article on the internet as a result

1 of the newspaper -- a news subscription that I get that  
2 prompted me to be concerned. I then contacted our Board  
3 of Directors and Loudon Owen about my concerns.

4 Q. What was the name of that internet  
5 publication?

6 A. I believe it's called CNET.

7 Q. And what was it about that CNET article that  
8 caused you any concerns?

9 A. There was some discussion in this CNET  
10 article about the manipulation of standards -- the  
11 standards process that caused me to be concerned.

12 Q. Now, you indicated that you contacted  
13 Mr. Owens.

14 Was Mr. Owens the Chairman of the Board of  
15 the Board of Directors?

16 A. That's correct. He also acts as counsel on  
17 occasion.

18 Q. Well now, what did -- happened as a  
19 consequence of you contacting Mr. Owens?

20 A. Mr. Owen raised concern that this could be  
21 potentially a legal matter and struck a task force of  
22 the Board under his direction.

23 That moved forward to hire Dr. Sweet, Michael  
24 Sweet, to explore, with my cooperation, the issue of  
25 whether, in fact, Word 2003 may separate metacodes and

1 content.

2 Q. Now who is Dr. Sweet?

3 A. Dr. Sweet is a consultant who works for i4i;  
4 has worked for i4i on an occasional basis over many  
5 years.

6 Q. And what is the expertise of Mr. Sweet?

7 A. Dr. Sweet is a math -- is a mathematician and  
8 has worked in the computer science industry for many  
9 years writing operating systems, programming languages,  
10 and designed hardware.

11 Q. Now, why did you retain the services of  
12 Mr. Sweet?

13 A. I felt that he had the expertise and  
14 qualifications on a wide range of software issues that  
15 could be brought to bear on this matter.

16 Q. Well, what happens next?

17 A. Dr. Sweet and I engaged in some analysis work  
18 with using the publicly available information about Word  
19 2003. And towards the end of 2004, we reported back to  
20 the Board that we felt there was reason to be concerned.

21 Q. And what action did the Board take as a  
22 response of your reporting back the results of the  
23 investigations that you and Dr. Sweet had conducted?

24 A. The Board accepted the report and authorized  
25 the expenditure of funds to pursue this matter further

1 with U.S. counsel. We're a Canadian firm; we needed to  
2 find a U.S. firm to help us out.

3 Q. And what was the name of the U.S. firm that  
4 you retained?

5 A. We retained Robins Kaplan; they're based in  
6 Boston, I believe.

7 Q. And did you have any meetings with Robins  
8 Kaplan to discuss this matter?

9 A. Yes. We discussed it with Robins Kaplan.  
10 Robins Kaplan then they hired Dr. Sweet to provide  
11 continuity in the analysis and pursue the matter  
12 further.

13 Q. And did there come a time when the Robins  
14 Kaplan firm offered an opinion to i4i concerning their  
15 investigation?

16 A. Yes, sir. Robins Kaplan came back to us  
17 towards the latter half of 2005 with a report, and we  
18 took that report and the information we had gathered up  
19 previously and came to the belief that there -- we were,  
20 in fact, in a situation where our patent was being  
21 infringed.

22 MR. LENDER: Your Honor, I move to strike  
23 that last question and answer. We asked Mr. Vulpe at  
24 his deposition about the advice that he got from Robins  
25 Kaplan, the prior law firm, and we were blocked from

1 those questions based on privilege.

2 So I ask that that Q and A be stricken  
3 from the record and not considered by the Court.

4 THE COURT: Response?

5 MR. WHITE: Your Honor, the substance of  
6 what Mr. Vulpe has reported was not the substance of the  
7 actual report that they received. It was his opinion or  
8 his impressions of what the Robins Kaplan firm told him,  
9 which led i4i to take the next step in this  
10 investigation of the possible infringement of the in --  
11 of the Word 2003 of this '449 patent.

12 MR. LENDER: Your Honor, two things.  
13 The Sweet analysis that they're referring to, they  
14 actually produced inadvertently in this case and then  
15 called it back. So the idea that he's now going to talk  
16 about the report of infringement that they inadvertently  
17 produced and asked for it back is completely  
18 inappropriate and should not be considered by this  
19 Court.

20 THE COURT: All right.

21 MR. WHITE: The document counsel just  
22 referred to has nothing to do with the Robins Kaplan  
23 report.

24 THE COURT: All right. Restate your  
25 question.

1 Q. (By Mr. White) Now, at the end of the --  
2 2005, I believe you testified that you received a report  
3 back from the Robins Kaplan firm; is that correct?

4 A. That's correct.

5 Q. What action did you take then as a  
6 consequence of that report?

7 A. We went back to the Board of Directors and  
8 took the knowledge we got from that report and the  
9 knowledge we had previously and came to a collective  
10 conclusion that we believed we now had an infringement  
11 situation.

12 Q. Well, what action did you take then?

13 A. We then started looking for U.S. counsel,  
14 which would have included Robins Kaplan as a  
15 possibility, who would represent and serve our  
16 interests, act as our representative in this situation.

17 Q. And what specific action did you take?

18 A. We talked to a number of firms, asked them  
19 how they would represent us, their mode of business  
20 practice. We asked them, obviously, about costs; got  
21 some pretty horrendous numbers upwards of 25 million in  
22 some cases, and analyzed those things.

23 We came eventually through that process to  
24 McKool Smith in mid -- I believe it was mid-2006, and  
25 came to appreciate the services of McKool Smith and

1 engaged McKool Smith towards the end of 2006.

2 Q. And during the time that you were  
3 interviewing these U.S. litigation law firms in 2006,  
4 was i4i engaged in any other activities regarding this  
5 litigation?

6 A. Yes, sir. We were engaged in raising funds  
7 to help us fight this litigation.

8 Q. And how did you do that?

9 A. We came into contact with a firm called  
10 Northwater Capital, who had a patent defense fund. And  
11 we discussed this issue with them. We exchanged term  
12 sheets, came to an agreement that they would help --  
13 help fund this -- this activity.

14 Q. And when did you retain the McKool Smith Law  
15 Firm to represent you in connection with this  
16 litigation?

17 A. To the best of my recollection, towards the  
18 end of 2006.

19 Once we had done that, McKool Smith  
20 immediately launched into what I understand to be known  
21 as a Rule 11 process, and we worked with them under  
22 their clear guidance as to go further on this Rule 11  
23 process.

24 Q. Do you recall when this litigation was first  
25 filed?

1           A.       It was the beginning of 2007, pretty much  
2 immediately after the Rule 11 analysis had been  
3 completed. And McKool Smith came back to us with the  
4 recommendation that we should proceed.

5           Q.       Would you turn in your binder, Mr. Vulpe, to  
6 Plaintiffs' Exhibit 600?

7                    Do you recognize this document?

8           A.       Yeah. This is my notebooks from the January  
9 '94 to April '94 period.

10          Q.       Now, you say this is my notebook.

11                    Can you explain to the Court what you mean by  
12 that?

13          A.       I have a habit of keeping a notebook of  
14 significant meetings -- significant meetings that I  
15 have, and I write down what the major salient events  
16 are.

17          Q.       The entries on the various pages of this  
18 exhibit, are those in your handwriting?

19          A.       Yes, sir, they are. By and large, almost all  
20 of them. There may be some other notes by other people,  
21 but this is my handwriting, by and large.

22          Q.       Would you turn to the page that ends in the  
23 Production No. 6911?

24                    Have you found that page?

25          A.       Yes, I have.

1 Q. Can you identify for the record what  
2 notations you've entered on this page, what they are?

3 A. Yes. This is a note from a meeting with  
4 Dr. Brian Barlow, who we had retained to help us in the  
5 process of filing for a patent application.

6 It identifies -- if I can turn over to the  
7 second page as well.

8 Q. Before you do that, can you tell me what the  
9 date of this meeting is?

10 A. February 18th, 1994.

11 Q. Now, this is shortly after the fax that you  
12 sent to Dr. Barlow attaching your write-up of your  
13 invention?

14 A. Yes, sir.

15 Q. And is this the first meeting you had with  
16 Dr. Barlow after that fax was delivered?

17 A. To the best of my recollection, yes.

18 Q. Do you recall who was at the meeting besides  
19 yourself and Dr. Barlow?

20 A. I can't be sure, but I would expect Stephen  
21 Owens would have been there as well.

22 Q. Now, would you explain to the Court what is  
23 contained in your notes of that meeting with Dr. Barlow  
24 on February 18th, 1994?

25 A. The salient points that Dr. Barlow impressed

1 on us about the process of what it takes to actually  
2 develop a patent application.

3 Q. Now, why would Dr. Barlow be telling you  
4 that?

5 A. Dr. Barlow is -- indicated to us he's not a  
6 software specialist and that it would be our  
7 responsibility to actually write the specification under  
8 his guidance.

9 Q. All right. Now, as to the notes there,  
10 what -- what is your recollection today of what you  
11 wrote down and what you recall of the conversations you  
12 had with Dr. Barlow?

13 A. Well, there are -- he went through what a  
14 patent is largely about, and he identified a number of  
15 very important points for us. They're emphasized by  
16 underlines on these couple of pages.

17 The first -- the one on this page here is the  
18 issue of prior art and our duty of -- I guess it's  
19 called candor -- to provide all the information that we  
20 knew that was relevant to the invention.

21 Q. Now, you have the word prior art underlined.  
22 Why did you underline that?

23 A. Because -- well, I see it's the first thing  
24 Dr. Barlow brought to our attention, as obviously No. 1  
25 is the most important and underlined, because he

1 stressed the importance of this issue.

2 Q. And what did you write next to the term prior  
3 art?

4 A. Educating the examining person of what exists  
5 already, what is being done now, what does -- what we  
6 are proposing to improve on that, assume that the reader  
7 knows -- knew nothing, and what is the fault with the  
8 current model.

9 Q. And would you turn over to the next page,  
10 6913?

11 A. Yes, sir.

12 Q. And what -- what have you noted here of that  
13 meeting?

14 A. Further points towards this, two -- two  
15 points underlined that we need to set up the prior art  
16 as a straw man.

17 Q. Stop right there, Mr. Vulpe.

18 What did you understand that comment from Dr.  
19 Barlow to mean?

20 A. To explain the current state of the art as we  
21 knew and to explain what it is -- was going on in the  
22 current state of the art as we understood it.

23 Q. And what's the reference to straw man?

24 A. It's to explain in as much detail as possible  
25 so that the reader can understand what the current state

1 of the art is.

2 Q. Now, the straw man, is that something you are  
3 going to knock down?

4 A. Yes, it is, sir.

5 Q. What's the next comment you have in your  
6 note?

7 A. What -- what -- what's our objective? What  
8 are we proposing?

9 And this refers to how it is our invention  
10 would improve on the current state of the art as we  
11 understood it.

12 Q. Now, you understood when you left this  
13 meeting with Dr. Barlow that it was going to be yours  
14 and your co-inventor, Mr. Stephen Owens', responsibility  
15 to actually prepare the text of the specification?

16 A. Yes, sir.

17 Q. Did you -- did you think that was in any way  
18 unusual?

19 A. No. This was our first application, and we  
20 did not think this was unusual in any way.

21 Q. Well now, have you ever heard of the term  
22 duty of candor in connection with the filing and  
23 prosecution of a United States patent application?

24 A. Yes, sir.

25 Q. When did you hear about that?

1           A.       When Dr. Barlow indicated to us here in the  
2 very beginning in the prior art, he indicated to us we  
3 had this duty of candor.

4           Q.       Well, what did you understand the duty of  
5 candor to mean?

6           A.       That we had to disclose everything that we  
7 knew about the area of the invention, and we had an  
8 ongoing responsibility to do that throughout the entire  
9 prosecution of the patent.

10          Q.       Well, in drafting the -- the specification,  
11 do you believe that you and your co-inventor, Mr. Owens,  
12 satisfied the duty of candor?

13          A.       Yes, sir, we do.

14          Q.       Well, specifically, how do you believe that  
15 you did that?

16          A.       We described what we understood about word  
17 processing systems and what we understood about SGML  
18 editing systems in areas around the XML standard and  
19 various types of text encoding.

20          Q.       Would you take a look at Plaintiffs' Exhibit  
21 No. 4?

22                    Do you recognize this to be the open  
23 declaration that you and Mr. Owens executed in your  
24 filing of the application in the United States Patent &  
25 Trademark Office?

1 A. What I see on the screen, I do, yes.

2 Q. Actually, I believe that what you see on the  
3 screen is a portion of the prosecution history of the  
4 application. It's at Page, of the file history, 38, I  
5 believe.

6 In the center, you'll see an FH number.

7 A. Right. Thank you. I found it.

8 Q. Is that the oath and declaration that you  
9 signed?

10 A. Yes, it is, sir.

11 Q. Now, did anything happen attendant to the  
12 execution of this oath and declaration regarding any  
13 meetings with Mr. Richard Owens?

14 A. Yes, Richard Owens, who was Dr. Barlow's boss  
15 at Smith Lyons.

16 Prior to our signing this, he took both  
17 Stephen and I and explained to us in no uncertain terms  
18 our obligations to have disclosed everything and to meet  
19 this duty of candor throughout the entire prosecution  
20 history of the patent.

21 Q. Now, who -- who is Richard Owens?

22 A. Richard Owens is a lawyer at the firm Smith  
23 Lyons, and as I indicated, he's Dr. Barlow's boss.

24 Q. Does he practice intellectual property law in  
25 Canada?

1 A. Yes, he does.

2 Q. Now, Mr. Vulpe, did you ever have any intent  
3 to deceive the United States Patent & Trademark Office  
4 by withholding information about any prior art known to  
5 you prior to the filing of the '449 patent?

6 A. No, sir.

7 Q. You understand that the duty of candor is a  
8 continuing duty?

9 A. Yes, sir.

10 Q. And what do you understand continuing duty to  
11 mean?

12 A. Should we become aware of anything in regards  
13 to the invention during the prosecution of the patent,  
14 we had to disclose that to the Patent Office.

15 Q. And did you become aware of any prior art  
16 during the four years that this application was pending  
17 that you considered to be relevant to the invention you  
18 were seeking a patent on?

19 A. No, sir.

20 Q. When you signed this oath and declaration,  
21 Mr. Vulpe, did you believe that you had complied with  
22 your duty of candor?

23 A. Yes, sir.

24 MR. WHITE: I pass the witness, Your  
25 Honor.

1 THE COURT: All right.

2 Cross-examination?

3 MR. LENDER: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. LENDER:

6 Q. Good afternoon, Mr. Vulpe.

7 A. Good afternoon.

8 Q. Mr. Vulpe, you knew about the SEMI  
9 S-to-the-4th product at the time of the filing of your  
10 patent application, correct?

11 A. That's correct.

12 Q. In fact, both you and Mr. Owens developed the  
13 SEMI S4 product, correct?

14 A. Along with others, yes, sir.

15 Q. And I think I got this right, and I looked on  
16 the monitor on Page 152, but I want to make sure that I  
17 understood what you were saying.

18 Your understanding was that your duty to  
19 disclose extended to everything you knew about the area  
20 of the invention.

21 Isn't that what you just said?

22 A. That's correct, sir.

23 Q. But you didn't disclose lots and lots of  
24 material information about the SEMI S-to-the-4th system  
25 to the Patent Office; Isn't that right?

1           A.       We believed that in the descriptions. We  
2 provided word processing systems and SGML editors; we  
3 provided information that was relevant to the invention,  
4 yes, sir. And that would have included the S4 --  
5 S-to-the-4th system.

6           Q.       Let's -- let's go through that. Let's talk  
7 about that very carefully.

8                    You didn't disclose the specifics as to how  
9 the SEMI S-to-the-4th system worked in memory to the  
10 Patent Office, right?

11           A.       We disclosed what we believed was relevant to  
12 understand the invention -- sorry -- understand the  
13 state of the art as it pertains to the invention.

14           Q.       Mr. Vulpe, my question was: You did not  
15 disclose to the Patent Office how the SEMI S-to-the-4th  
16 system worked in memory, correct?

17           A.       Not specifically so. We referred and we  
18 discussed the way word processors and SGML editors  
19 worked. We believed ours was just another one of those  
20 classes of tools.

21           Q.       Well, the Judge and the Court has heard a lot  
22 about data structures in this case.

23                    You didn't disclose the data structures  
24 behind the SEMI S-to-the-4th system in the Patent  
25 Office; isn't that correct?

1           A.     I'd have to look at the application, but, no,  
2 I don't believe we did.

3           Q.     And you didn't disclose the SEMI source code  
4 to the Patent Office, right?

5           A.     No, we did not.

6           Q.     And at the time you filed your patent  
7 application, you did have in your possession the SEMI  
8 source code, correct?

9           A.     That's correct.

10          Q.     But you didn't disclose it, did you?

11          A.     No, we did not.

12          Q.     You didn't disclose to the Patent Office that  
13 there was a specific sale and installation of the SEMI  
14 product more than a year before the patent application  
15 was filed; isn't that right?

16          A.     That's correct.

17          Q.     And you didn't disclose the documents that  
18 you and Mr. Powers talked about, about the statements  
19 you made back in 1994 about the SEMI system, correct?

20          A.     Which documents are you referring to?

21          Q.     Let's take a look at the first one.

22                   MR. LENDER: Chris, can you put up  
23 DX2395?

24          Q.     (By Mr. Lender) Do you remember this  
25 document, Mr. Vulpe?

1           A.     Yes, I do.

2           Q.     And you didn't disclose DTX2395 to the Patent  
3 Office where you wrote to the Canadian government in  
4 June of 1994, just days after you filed your patent  
5 application, that i4i had applied for a patent on  
6 technology it had developed, and that the initial  
7 implementation is embedded in i4i's S-to-the-4th  
8 product, correct?

9           A.     This is a government submission to the  
10 government for funding. We didn't see why it would be  
11 relevant to understanding the field -- the invention.

12                   MR. LENDER: Can you open up the project  
13 technical background?

14           Q.     (By Mr. Lender) This is a document you wrote,  
15 Mr. Vulpe, in June of 1994, correct?

16           A.     That's correct.

17           Q.     And you wrote this document just days after  
18 you filed for your patent application, correct?

19           A.     That's correct.

20           Q.     And this is a document you wrote to the  
21 Canadian government seeking funding, correct?

22           A.     That's correct.

23           Q.     And in this document, just days after you  
24 filed for your patent application, you told the Canadian  
25 government that Infrastructures -- that's referring to

1 your company, i4i, correct?

2 A. That's correct.

3 Q. That i4i has applied for a patent to protect  
4 specific technology that it has developed. The initial  
5 implementation is embedded into Infrastructures'  
6 S-to-the-4th product, which is a vertical market  
7 document, development, and managing application targeted  
8 to the semiconductor and publishing industries.

9 That's what you wrote, correct?

10 A. That's correct.

11 Q. And the reference to the semiconductor,  
12 that's a reference to SEMI, correct?

13 A. Yes, sir.

14 Q. And you did not disclose this document,  
15 DTX2395, to the Patent Office to let them know what you  
16 had told the Canadian government.

17 Isn't that the truth?

18 A. We disclosed what we -- what we believed to  
19 be relevant to the invention and the state of the art of  
20 the invention -- of the invention in our application.

21 Yes, we did.

22 Q. Well, Mr. Vulpe, did anyone tell you that you  
23 weren't supposed to disclose documents where you  
24 described your invention to third parties?

25 A. I'm sorry?

1 Q. Did anyone tell you that you were exempt from  
2 disclosing documents that you wrote describing your  
3 invention to third parties?

4 A. No.

5 Q. And this document that you wrote to the  
6 Canadian government, just days after you filed for your  
7 patent application, describing your invention, you did  
8 not disclose this document ever to the Patent Office,  
9 correct?

10 A. I didn't disclose this document, sir, and I  
11 don't see how this describes the invention.

12 Q. You don't think the Patent Examiner would be  
13 interested in seeing how the inventor described his own  
14 invention to third parties?

15 You don't think that's material for a Patent  
16 Examiner?

17 A. I'm not qualified to say, sir. We disclosed  
18 what we believed and what we had been provided with by  
19 our counsel on the field -- state of the art at the time  
20 and the improvements the invention was about.

21 Q. You understood in your meeting with  
22 Dr. Barlow, you were told to disclose anything, anything  
23 and everything you knew about the area of the invention.

24 Wasn't that your testimony just a moment ago?

25 A. Can I go back and look at those pages,

1 please?

2 Q. The Court can check that. That was on  
3 Page 152 of your transcript. I have no ability to go  
4 back to it.

5 But that's what you said on Page 152 on the  
6 transcript just five minutes ago.

7 MR. LENDER: Let's put up another  
8 exhibit, Chris: Defendant's Exhibit 2396.

9 Q. (By Mr. Lender) Do you remember this  
10 document, Mr. Vulpe?

11 A. Yes, I do.

12 Q. This is another document that you submitted  
13 to the Canadian government, this time in September of  
14 1994, correct?

15 A. That's correct.

16 MR. LENDER: If you can just go to that  
17 second page, Paragraph 3.

18 Q. (By Mr. Lender) This is your handwriting,  
19 correct?

20 A. No, it's not.

21 Q. But you adopted this, correct? You signed  
22 this document?

23 A. I did sign this document.

24 Q. You stand by what's written in Paragraph 3,  
25 don't you?

1 A. That's correct.

2 Q. And in Paragraph 3, in September of 1994, you  
3 wrote to the Canadian government that a U.S. Patent  
4 application was filed.

5 That's your patent, correct?

6 A. That's correct.

7 Q. And you wrote that a single metacode model  
8 implemented in i4i flagship product, S-to-the-4th,  
9 vertical market product, correct?

10 A. That's correct.

11 Q. And the product that you're referring to here  
12 is the SEMI product, correct?

13 A. The evolution thereof, yes.

14 Q. And, again, you did not disclose Defendant's  
15 Exhibit 2396, the application you made to the Canadian  
16 government to the Patent Office, correct?

17 A. We did not disclose this to the Patent  
18 Office; that's correct.

19 Q. Let me show you one more, Defendant's Exhibit  
20 2051.

21 You'll recall this document, Mr. Vulpe. This  
22 is the one where you wrote a fax to Charles Lum.

23 Do you remember that?

24 A. That's correct.

25 Q. This document you actually wrote three months

1 prior to filing for your patent, correct?

2 A. Look back on it -- March, yes; that would be  
3 correct.

4 MR. LENDER: Would you go to that last  
5 piece -- the last page?

6 The page before.

7 Q. (By Mr. Lender) And you remember this is  
8 where Mr. Powers asked you some questions, and you said  
9 that the basis of the patent and the preliminary work on  
10 the validation precedes Infrastructures', correct?

11 A. That's correct.

12 Q. And when you were examined by Mr. Powers, you  
13 made clear that what you were referring to was a period  
14 prior to the formation of i4i, which would be back in  
15 the 1992 time period, correct?

16 A. For parts of this sentence, yes, that's true.

17 Q. And, again, you never told the Patent Office  
18 about this document, correct?

19 A. No, sir, we did not.

20 Q. And you understood, Mr. Vulpe, that your duty  
21 to disclose and your duty of candor existed throughout  
22 the prosecution of the '449 patent, correct?

23 A. That's correct.

24 Q. But you knew when you filed your patent, it  
25 extended the whole time through; isn't that right?

1 A. That's correct.

2 Q. Now, Mr. Vulpe --

3 MR. LENDER: May I approach?

4 THE COURT: Yes, you may.

5 Q. (By Mr. Lender) -- I want to hand you this  
6 thick document, Defendant's Exhibit 2202. And you may  
7 recall you were asked some questions about this.

8 This is a copy of the SEMI S-to-the-4th  
9 manual; isn't that right?

10 A. It appears to be, yes.

11 Q. So this is a manual that refers to a specific  
12 product that you sold to SEMI more than a year before  
13 you filed for your patent, correct?

14 A. Yes, that's correct.

15 Q. And you never disclosed to the Patent  
16 Office -- you never gave them a copy of that manual,  
17 correct?

18 A. No, we did not.

19 Q. You didn't disclose any information from the  
20 manual so that the Patent Examiner could decide for  
21 himself whether the SEMI system worked just like the way  
22 you're claiming SGML editor were disclosed in the patent  
23 or whether the SEMI system worked a different way,  
24 correct?

25 A. I'm sorry. Could you repeat the question?

1 Q. You didn't disclose any information from this  
2 manual so that the Patent Examiner could decide for  
3 himself whether the SEMI system was the same as the SGML  
4 editor that you claim were disclosed in the patent or  
5 whether it was different, correct?

6 A. No. We believe we had -- we covered the  
7 substance of this in our disclosure about SGML editors  
8 and word processors.

9 Q. Well, Mr. Vulpe, if I actually sit down and  
10 look through your entire patent, I won't see the word  
11 SGML editor anywhere in there, will I?

12 A. I don't know. I'd have to go and look.

13 Q. Well, you know you didn't use the words SGML  
14 editor anywhere in the patent, right?

15 A. We certainly talked about SGML as a  
16 technology in great detail.

17 Q. You didn't disclose anything about SGML  
18 editors; isn't that correct?

19 A. I would have to go back and read the details.  
20 I haven't got --

21 Q. Okay. Now, let's go to Page 104 of the SEMI  
22 S-to-the-4th manual.

23 A. I'm sorry. Which page are we looking at?

24 Q. It's up on the screen, Page 104.

25 A. Sure.

1 Q. Let me know when you're there.

2 A. Okay.

3 Q. Okay. You have before you, you see on  
4 Page 104, it's the editor screen --

5 A. Yes.

6 Q. -- from the SEMI S-to-the-4th product?

7 A. Yes, sir.

8 Q. You didn't tell the Patent Office that the  
9 SEMI S-to-the-4th system had a document outline view and  
10 an editor, correct?

11 A. That's not disclosed in the application. No,  
12 it's not.

13 Q. And the document outline view, that's the  
14 view where you can actually look at and edit the  
15 metacodes, correct?

16 A. I'd have to read this in detail. If you will  
17 give me the time to do so, then -- can I do that?

18 Q. You understand, right, that the document  
19 outline view is the outline that tells you what all the  
20 tags are that are in the document, correct?

21 If you look at the next page.

22 A. Right, Section Point E starts your tag list  
23 with a tag stamp, yes.

24 Q. The structure tag list, that's the list of  
25 the metacodes, correct?

1           A.     Yes, SGML tags in this document chart, yes.

2           Q.     In the SGML -- SGML tags, those are the  
3 metacodes, correct?

4           A.     That's correct.

5           Q.     And you understood, Mr. Vulpe, that the SGML  
6 metacodes were persistently stored in the SEMI system,  
7 correct?

8           A.     They were stored in the document, yes.

9           Q.     They were persistently stored, because that's  
10 what allowed you to view them and edit them in the  
11 document outline view, correct?

12          A.     They were persistently stored in the  
13 documents, part of the content -- part of the overall  
14 screen, yes.

15          Q.     Okay. You also know that the SEMI system had  
16 a menu of metacodes, correct?

17                 That's B1, the structural tag box, the tags  
18 which define the layout of the document.

19                 Do you see that on 104?

20          A.     I'm sorry. Which -- which element are you  
21 referring to here?

22          Q.     Box B1, the structural tag box, tags which  
23 define the layout of the documents.

24                 That's the menu of the metacodes, correct?

25          A.     Sorry about that.

1           B1? These are B1 which define the layout of  
2 the document. That's correct; that's what it says here.

3           Q.     Okay. So to be clear, so there's no dispute  
4 between anyone around here, the SEMI S-to-the-4th  
5 system, both persistently stored the metacodes and also  
6 had a menu of metacodes, correct?

7           A.     It persistently stored the metacodes in  
8 this -- in line with the rest of the content. And, yes,  
9 as it says here, it had a menu which defines the layout  
10 of the document.

11          Q.     And the metacodes aren't just persistently in  
12 the document; you know that the metacodes are  
13 persistently stored in the document outline view,  
14 correct?

15          A.     I don't know that, sir. I don't have the  
16 source code to look at those.

17          Q.     Well, Mr. Vulpe, you never disclosed the  
18 source, and we talked about that, but you can see from  
19 the document, it says the document outline view provides  
20 a structured tag list attached to the text within the  
21 text editing window, correct?

22          A.     Where are you, please?

23          Q.     Page 105.

24          A.     Which point?

25          Q.     The document outline view has a structured

1 tag list that's attached to the text within the text  
2 editing window, right?

3 A. That's what it says here, yes.

4 Q. And you knew that the metacodes were  
5 persistently stored in the SEMI S-to-the-4th system,  
6 correct?

7 A. In the -- in with the rest of the content,  
8 yes.

9 Q. Well, actually, sitting here, isn't the truth  
10 is that you can't remember whether it's persistently  
11 stored in the DOV or it's persistently stored in the  
12 document?

13 You just said that a moment ago. You're not  
14 sure, right?

15 A. All I have, sir, to read is from what this  
16 thing -- this -- these two diagrams in these documents  
17 say, so I'm working from what these things say, and I'm  
18 agreeing with what is being said in here.

19 Q. And, Mr. Vulpe, you know that Kugimiya  
20 disclosed a metacode map, right?

21 A. That's correct.

22 Q. And the only argument that you made to the  
23 Patent Office to get around Kugimiya was that the  
24 metacode map wasn't persistently stored and that there  
25 was no menu of metacodes.

1 Do you remember that?

2 A. I remember that particular issue. I don't --  
3 I would have to read the whole thing to get the details  
4 on what was said about Kugimiya.

5 Q. I don't want there to be any confusion, so  
6 let's just pull up the file history, PX No. 4. We can  
7 turn to Page 133 of the file history.

8 A. Are we finished with this?

9 Q. Put that to the side for a moment.

10 A. Okay. Where are you, please?

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

12 THE COURT: Yes, you may.

13 Q. (By Mr. Lender) This is a copy of the file  
14 history, Plaintiffs' Exhibit 4.

15 Would you turn to Page 133, Mr. Vulpe? Let  
16 me know when you're there.

17 A. I'm there.

18 Q. And you recall this is the remark that your  
19 attorney filed with the Patent Office discussing the  
20 Kugimiya reference, correct?

21 A. It appears to be, yes.

22 Q. That's where you wrote, during the interview,  
23 we discussed how the present invention differs from the  
24 Kugimiya reference, correct?

25 Is that correct?

1 A. That's what it says here, yes.

2 Q. And what your attorney wrote on your behalf  
3 is, We seemed to reach agreement that the reference does  
4 not teach providing a menu of metacodes or a persistent  
5 storage for the metacode map.

6 Do you see that?

7 A. That's what it says there, yes.

8 Q. So those are the two arguments you made to  
9 try and get around the Kugimiya reference, correct?

10 A. That was the position we took, yes, sir.

11 Q. And you knew, when you were prosecuting your  
12 patent, that the SEMI S-to-the-4th system both  
13 persistently stored the metacodes and had a menu of  
14 metacodes.

15 We just talked about that, correct?

16 A. We talked about what is in this document,  
17 yes.

18 Q. And you knew that the duty to disclose and  
19 the duty of candor required you to disclose anything,  
20 anything that would be within the area of the invention?

21 A. As Dr. Barlow told us, the prior art thing,  
22 we were to educate an examining person on what exists  
23 today, what we believe to be the state of the art, and  
24 that's what we believe we did, sir.

25 Q. And, Mr. Vulpe, you understood that your duty

1 of candor didn't just extend to prior art that would  
2 anticipate the '449 patent, correct?

3 A. I'm sorry?

4 Q. You understood that your duty of candor  
5 extended, not just to stuff that would invalidate the  
6 patent, but it also extended to stuff that would render  
7 the patent obvious when combined with references that  
8 were disclosed to the Patent Office, correct?

9 A. We understood that we had to disclose  
10 anything that would help the -- what we knew and would  
11 help understand the field of the invention, yes.

12 Q. And you understood that duty extended not  
13 just to prior art that would anticipate or render the  
14 patent invalid; it also extended to potential  
15 obviousness combinations, correct?

16 A. I believe so, yes.

17 Q. And that meant that if you had a piece of  
18 prior art that you could combine with a piece of prior  
19 art that wasn't before the Patent Office, if those two  
20 together would have rendered the patent obvious, you had  
21 a duty to disclose it, correct?

22 A. If you were aware of such, yes.

23 Q. And you were clearly aware of the SEMI  
24 S-to-the-4th product. We talked about that, right?

25 A. That's correct.

1 Q. And despite understanding that that was your  
2 duty of candor, you never told the Patent Office about  
3 the SEMI product; you never told the Patent Office that  
4 you had sold it more than a year before; and you never  
5 told them about the source code; and you never told them  
6 about this manual; isn't that right?

7 A. We did not disclose the specifics of the SEMI  
8 system. As I've said many times previously, we  
9 disclosed and discussed it in the setting -- setting up  
10 the -- what we believed and what we knew about the prior  
11 art.

12 Q. Well, Mr. Vulpe, are you trying to suggest to  
13 the Court that you felt that because you had disclosed  
14 an SGML editor in the background, even though we've said  
15 that it doesn't have to use the word editor, that  
16 somehow the SEMI system would be cumulative? Is that  
17 what you're trying to suggest?

18 A. I'm not fully familiar with the term  
19 cumulative.

20 Q. Well, is what your trying to say is that you  
21 didn't need to really talk about all the details of the  
22 SEMI system because what you had disclosed is basically  
23 good enough?

24 A. We believe that we had disclosed -- as we  
25 were advised by our counsel, that we had disclosed all

1 the information.

2 Q. And your view, essentially, was that because  
3 you had disclosed some stuff about SGML, that there was  
4 no reason to disclose the SEMI S-to-the-4th as well,  
5 because, basically, it would be the same thing?

6 A. We disclosed what we had been told by counsel  
7 was necessary to disclose. We believe we disclosed  
8 that.

9 And I should point out that Mr. Richard Owens  
10 is Stephen Owens' brother. He is an intellectual  
11 property lawyer in Canada, and he had knowledge that we  
12 were working on the SEMI system.

13 MR. LENDER: Your Honor, at this point --  
14 again, I don't want to violate any of the in limines we  
15 talked about earlier, but we believe that the issue of  
16 the reexam is particularly pertinent to -- pertinent to  
17 inequitable conduct, because the reexam shows that the  
18 cumulative hypo -- position that Mr. Vulpe is trying to  
19 say --

20 THE COURT: All right. You can go into  
21 the reexam for the Court, outside the presence of the  
22 jury.

23 MR. LENDER: Thank you. I appreciate  
24 that, Your Honor. Thank you.

25 May I approach?

1 THE COURT: Yes, you may.

2 Q. (By Mr. Lender) Mr. Vulpe, I'm handing you a  
3 copy of Defendant's Exhibit 2369, which is a copy of the  
4 reexam office action dated January 23rd, 2009.

5 Mr. Vulpe, were you made aware by anyone that  
6 your '449 patent -- that a decision has been made to  
7 grant reexamination because a substantial question of  
8 patentability has been raised in regards to your patent?

9 A. It's my understanding that the reexam has  
10 been granted, yes.

11 Q. Okay. Now, Mr. Vulpe, you understand that  
12 the basis for the reexam and the basis for the granting  
13 of the reexam by the Patent Examiner were two pieces of  
14 prior art that actually have been discussed in this  
15 case. That's DeRose and Rita, correct?

16 A. I've never seen this document before, sir,  
17 and I was not present during any of the deliberations in  
18 this case.

19 Q. Okay. Well, you can see in Paragraph 1 --

20 MR. LENDER: If we can just pull that up  
21 on the fourth page of the document.

22 A. Where are you, please?

23 Q. (By Mr. Lender) Page 4, first paragraph. Do  
24 you see that?

25 And you can see that the two pieces of prior

1 art that form the basis of the Patent Office saying  
2 there's a substantial question of patentability were  
3 DeRose and Rita.

4 Do you see that?

5 A. Yes, I do.

6 Q. Okay. You are aware, are you not, that Rita  
7 discloses an SGML editor, correct?

8 A. I'm not familiar with the Rita product, sir.

9 Q. Well, let's -- let's assume for the purposes  
10 of my question, that the Court has heard all about Rita  
11 and that Rita discloses an SGML editor.

12 Would you accept my representation?

13 A. That doesn't inform me of anything other than  
14 Rita's an SGML editor, perhaps.

15 Q. And it's your view that the SEMI system is  
16 also just an SGML editor, correct?

17 A. Yes, sir, or parts -- one -- the editor part  
18 is yes.

19 Q. And if you turn, if we could -- and the SGML  
20 editor is particularly pertinent to the issues of  
21 invalidity and inequitable conduct in this case.

22 You understand that, correct?

23 A. Yes, I do.

24 Q. Now, let's turn to the seventh page of the  
25 Patent Office -- Patent Office's decision to grant

1 reexam, and let's look at Paragraph 10. And  
2 specifically, I want to look at the second part of that  
3 on Page 7.

4 MR. LENDER: And if you would just pull  
5 up the whole top, the whole paragraph 11, please, Chris.

6 Q. (By Mr. Lender) Now, if you look in the  
7 middle, the first -- the first full sentence talks about  
8 Rita.

9 Do you see that? Right there, Rita?

10 A. Yes.

11 Q. And it says, Rita uses both a tree structure  
12 and a field list, which is a sequentially linked list in  
13 the same order as the text on the screen to represent  
14 documents.

15 A node in a tree or a field list contains  
16 descriptors and pointers to the actual text, providing  
17 for separate storage of the text content and the  
18 structure of the document that persists while the  
19 document is being edited.

20 Cowan also teaches the use of a menu of  
21 metacodes. Thus, it appears that the Cowan discloses at  
22 least one, if not both of the elements of the claims  
23 that applicant argued were not taught by Kugimiya to  
24 obtain the patent.

25 Do you see that?

1           A.       I see that.

2                   MR. WHITE:  Your Honor, I have an  
3  objection.  I'm sure, at some point, we're going to  
4  figure out where he's going with this, but he's asked  
5  the witness to look at this request for reexamination on  
6  the basis of two pieces of prior art, which this witness  
7  has never seen even to today.

8                   This issue of inequitable conduct is  
9  regarding whether he discharged his duty to disclose to  
10 the Patent Office what he knew prior to, at the time of  
11 the filing, and during the pendency of the application.  
12 This has happened just last year and --

13                  THE COURT:  Wait.  Was it last year or  
14 this year?

15                  MR. WHITE:  Well, actually, I think it  
16 was --

17                  THE COURT:  Last year?

18                  MR. WHITE:  Earlier this year, right.  
19 So -- and it's two pieces of prior art that the witness  
20 said he isn't aware of, didn't know about.

21                  So I'm not quite sure of the relevance of  
22 why we're getting into this.  He asked him about the  
23 SEMI system, clearly, something he knew.  That's a  
24 different issue.  I think he's wasting the Court's time.

25                  THE COURT:  All right.  Mr. Lender, where

1 are you going with this?

2 MR. LENDER: Your Honor, Mr. Vulpe just  
3 said a moment ago that he felt that he didn't need to  
4 disclose the SEMI system, which both persistently stored  
5 the metacodes and had a menu of metacodes, the two  
6 things that Kugimiya didn't have, because he says, well,  
7 it was disclosed generally in the patent.

8 This shows that a similar piece of prior  
9 art that has persistent storage of the metacodes and a  
10 menu of metacodes was deemed relevant enough that the  
11 Patent Examiner said that that raised a substantial  
12 question of patentability.

13 It is exactly the same issue. What he  
14 says as to why the SEMI S-to-the-4th system would be  
15 irrelevant, the Patent Examiner said that essentially  
16 the same SGML editor, in this case, Rita, did raise an  
17 issue of patentability, and it undermines the notion  
18 that there was no big deal that he never disclosed this.

19 MR. WHITE: Moreover, Your Honor,  
20 everything that counsel is referring to, that's their  
21 characterization of it that they gave to the Patent  
22 Office as the basis of their request.

23 We're not -- I mean, this issue of  
24 inequitable conduct really goes to whether Mr. Vulpe  
25 knew of something and didn't disclose it. These

1 references here, he didn't know about.

2           They can make their argument in their  
3 briefs according to whether they think that the SEMI  
4 system, he did know about and didn't disclose, was  
5 material or not. But to get into these two pieces of  
6 reference, this is a -- this has to do with the request  
7 for reexamination.

8           That process will run its course in the  
9 normal, ordinary way that those things proceed. And  
10 then, ultimately, the Court is going to determine that  
11 these claims are patentable over this art.

12           THE COURT: All right. The objection is  
13 sustained. Let's move on to something else.

14           MR. LENDER: Okay. That's fine, Your  
15 Honor.

16           Q.       (By Mr. Lender) There's no dispute that you  
17 knew all about the SEMI S-to-the-4th system, and you  
18 never disclosed the details of it to the Patent Office,  
19 correct?

20           A.       How many times do I have to agree with you on  
21 that?

22           Q.       Thank you.

23           Let me move on to a different issue. This is  
24 the questions that Mr. White asked you about regarding  
25 the issue of equitable estoppel and laches, and you

1 said, in response to Mr. White's questions, that you  
2 started becoming concerned about infringement in 2004,  
3 correct?

4 A. That's correct.

5 Q. And you never once told Microsoft about your  
6 concerns ever until you sued them in 2007; is that  
7 correct?

8 A. That's correct.

9 Q. But you did send them a congratulations, you  
10 know. We saw that, right?

11 A. I was congratulating John Paoli on his  
12 success in getting the XDOCS into Office 11, one of the  
13 world's -- not Office, but Office generally, which was  
14 the world's largest sellers and users of the software.  
15 It was a significant achievement for Mr. Paoli, so I  
16 said to him congratulations and still do.

17 Q. Is that a yes to my question? You did send  
18 him a congratulations e-mail?

19 A. I sent it to John Paoli on a personal basis  
20 saying congratulations on getting XDOCS into the world's  
21 best-selling piece of software.

22 THE COURT: Counsel, didn't we go through  
23 all of this in front of the jury? I mean, I recall this  
24 testimony earlier.

25 MR. LENDER: Yes. That's fine, Your

1 Honor.

2 THE COURT: Okay.

3 MR. LENDER: We won't go -- I was only  
4 going to ask just a couple of questions. There was one  
5 piece that I wanted to -- it's just a lead into the  
6 question I was going to get to.

7 THE COURT: All right.

8 Q. (By Mr. Lender) And you recall that Microsoft  
9 wrote you in 2006 -- as late as 2006, after you said you  
10 spoke to attorneys from Robins Kaplan, asking you, what  
11 is i4i's plans with regard to Word 2007, correct?

12 You remember that?

13 A. It's from Finland? Is what you're referring  
14 to?

15 Q. Yes. In connection with that, yes.

16 A. Yes, I remember.

17 Q. And you never said, at that point, in 2006,  
18 that you believed that Microsoft infringed your patent,  
19 right?

20 A. As I said before, Microsoft -- we got the  
21 word from our reseller in Finland that Microsoft was  
22 offering for free to replace our product and was  
23 capturing the business that we had been there and  
24 successfully had for a number of years, and we had no  
25 idea whether this was part of Microsoft's strategy to

1 help undermine or bolster their case to supplant us at  
2 the Ministry of Finance. So we did not respond to that.

3 Q. So when Microsoft wrote to you in 2006  
4 seeking your plan, you never accused them of  
5 infringement, correct?

6 A. This was not a question of infringement; it's  
7 a question of business strategy to try to retain a  
8 customer where Microsoft was abusing its position and  
9 trying to give the stuff away for free, where Index and  
10 i -- Index and i4i had successfully done business for  
11 many years.

12 Q. Now, Mr. Vulpe, you talked a little about an  
13 analysis that Mike Sweet had done for you, correct?

14 A. That's correct.

15 Q. And you know that Mike Sweet raised  
16 significant invalidity issues in that analysis, correct?

17 A. I'm sorry?

18 Q. Mr. Sweet raised -- said that there were  
19 significant invalidity problems with i4i's '449 patent  
20 based on prior art versions of Word; isn't that right?

21 A. Mr. Sweet -- or Dr. Sweet raised a number of  
22 concerns. Dr. Sweet is not a patent attorney; he's a  
23 technologist.

24 Q. And one of the issues that Mr. Sweet raised,  
25 when you went to ask him to look at the patent, he

1 raised serious, serious invalidity questions based on  
2 prior art versions of Word; isn't that right?

3 A. Again, Dr. Sweet is a technologist; he's not  
4 a patent attorney.

5 Q. I'm sorry. My question is, didn't he, in  
6 fact, raise serious invalidity questions about i4i's  
7 '449 patent based on prior art versions of Word? Isn't  
8 that right?

9 A. He may or may not -- he may or may not have.  
10 Do you have documents that I could, please, see to that  
11 effect?

12 Q. Unfortunately, we don't, because those were  
13 documents that your side produced to us and then --

14 MR. WHITE: Objection, Your Honor. That  
15 is absolutely argumentative and unnecessary.

16 THE COURT: Sustained.

17 MR. WHITE: This issue -- they withdraw  
18 (sic) their motion to have those compelled.

19 Q. (By Mr. Lender) The last issue I want to get  
20 in with you, Mr. Vulpe, you know who -- a woman by the  
21 name of Lisa Sanchez?

22 A. Yes, I do.

23 Q. And you know --

24 A. She's deceased.

25 Q. I'm sorry?

1 A. Unfortunately, I understand she's deceased.

2 Q. You understand she died sometime in June of  
3 2005?

4 A. I don't know exactly when. All I know is  
5 that she's deceased.

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

7 THE COURT: Yes, you may.

8 Q. (By Mr. Lender) I'm going to hand you  
9 Defendant's Exhibit 2383 and ask you if this refreshes  
10 your recollection that Ms. Sanchez passed away in June  
11 of 2005.

12 A. I've never seen this before.

13 Q. Does it refresh your recollection one way or  
14 the other?

15 A. I've never seen this before.

16 Q. You know Ms. Sanchez was deeply involved in  
17 the issues of managing and monitoring the performance of  
18 the SEMI S-to-the-4th, correct?

19 A. If I recall -- I can't remember for sure, but  
20 I believe she was a senior technical editor at SEMI,  
21 yes.

22 Q. She was involved in the efforts to develop,  
23 install, and maintain the SEMI S-to-the-4th system,  
24 right?

25 A. At an end user level, she certainly was, yes.

1 Q. You expect that she probably used the SEMI  
2 system on a daily basis, right?

3 A. She used it. When and how often, I don't  
4 know.

5 Q. And you understand that she -- she's  
6 deceased, correct?

7 A. We've gone through that, yes.

8 Q. Thank you.

9 MR. LENDER: No further questions.

10 THE COURT: All right. Redirect?

11 MR. WHITE: Very few, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. WHITE:

14 Q. Mr. Vulpe, would you turn to Plaintiffs'  
15 Exhibit No. 1 in your binder, please, a copy of the '449  
16 patent?

17 A. Yes.

18 Q. It's a copy of the '449 patent?

19 A. Yes, sir.

20 Q. Would you turn to Column 3 of that  
21 specification, please? Reading at -- starting at Line  
22 21, there's a paragraph that says current practice  
23 suffers from inflexibility.

24 Do you see that?

25 A. Yes, sir.

1 Q. Would you read the first two or three  
2 sentences of that section of the spec?

3 A. Current practice suffers from inflexibility.  
4 Documents combining structure and content are  
5 inflexible, because they are -- because they tie  
6 together structure and content in a single unit, which  
7 must be modified together.

8 Q. Stop you right there.

9 Documents combining structure and content,  
10 what is that, sir?

11 A. That would be the content of the words and  
12 the tags that go in to define how these things are to be  
13 interpreted.

14 Q. Would SGML be an example of documents  
15 combining structure and content?

16 A. Yes, sir.

17 Q. You said that they're inflexible because they  
18 tie together structure and content into a single unit,  
19 which must be modified together.

20 What did you mean by that?

21 A. Well, the content is in line -- or sorry --  
22 the tags are -- tags are in line, and you have to deal  
23 with them as a whole object in whatever editor it is,  
24 both simultaneously.

25 Q. So if you were making changes to the content,

1 you would have to make it in that document combining  
2 both structure and content?

3 A. That's correct.

4 Q. If you were making a change to the tags or  
5 the structures, you'd have to make those changes in the  
6 document combining both structure and content as a  
7 single unit?

8 A. That's correct.

9 Q. Is that the way the SEMI S-to-the-4th system  
10 worked?

11 A. To the best of my recollection, yes.

12 Q. Now, there's been a lot of discussion about  
13 your application to IRAP.

14 Do you recall that?

15 A. Yes, sir.

16 Q. Both here today, as well as in front of the  
17 jury, correct?

18 A. Yes, sir.

19 Q. Now, we established in your direct testimony  
20 before the jury that the date of those IRAP applications  
21 was August 1994.

22 Do you recall that?

23 A. Yes, sir.

24 Q. When did you file your patent application?

25 A. Before that. I believe it was in June.

1 Q. In June 1994?

2 A. That's correct.

3 Q. Now, as of June 2nd, 1994, the day that you  
4 filed your patent, did i4i have in its computers the  
5 source code for the S-to-the-4th system that was  
6 installed and running on the computers at SEMI in  
7 California?

8 A. Yes, it did.

9 Q. You had exclusive control over that source  
10 code; am I right?

11 A. That's correct.

12 Q. If anybody want wanted to make a modification  
13 to it, who could do that, Mr. Vulpe?

14 A. Only i4i people.

15 Q. Now, you submitted this application on August  
16 8th, I believe it was, 1994, to the Canadian government  
17 requesting funds to allow you to complete some  
18 development work on your source code; is that correct?

19 A. That's correct.

20 Q. Now, you said in that application -- and by  
21 the way, the document that you submitted to the Canadian  
22 government, is it prior art to your invention?

23 A. I don't believe so, sir.

24 Q. It happened -- it was created after you had  
25 already had your U.S. application on file; is that

1 right?

2 A. Yes, sir.

3 Q. Now, your application says you had  
4 implemented a one-dimensional embodiment of your  
5 invention into the S-to-the-4th product.

6 A. That's what it said, yes.

7 Q. What did that mean, Mr. Vulpe?

8 A. That we had it on a PC form, which is  
9 different from the SEMI. It was on a Mac. And we would  
10 take in and put in a single dimensional -- we built some  
11 software that I directed Steve Owens to develop to put  
12 it into -- well, what we were working on, a port on the  
13 S-to-the-4th SEMI system to a PC.

14 Q. Was the creation date of the implementation  
15 of that one-dimensional embodiment of your invention  
16 into the source code of the S-to-the-4th product you had  
17 there at your facilities done after you filed your  
18 patent in the United States?

19 A. I believe it was, yes.

20 Q. So it wasn't prior art that you were writing  
21 about when you submitted that application to the  
22 Canadian government; is that right?

23 A. No, sir, I don't believe so.

24 Q. Now, the Lum memo that counsel put in front  
25 of you in which you had said that the basis of the

1 patent and the validation preceded Infrastructures',  
2 we've had a lot of testimony about that, too, sir; is  
3 that correct?

4 A. That's correct.

5 Q. What was the date of that fax that you sent  
6 to Mr. Lum? Was it about March of '94?

7 A. That's correct, yes.

8 Q. Now, that was after the date that you  
9 submitted the fax to Dr. Barlow with a written  
10 disclosure of your invention; is that right?

11 A. That's correct.

12 Q. So as of the date of the Lum document, that  
13 document was not prior art to your invention; is that  
14 right?

15 A. I'm sorry?

16 Q. It was not prior art to your invention.

17 A. No, no, certainly not. The invention, you  
18 can read where it was in November.

19 Q. And you had actually provided a written  
20 description which was found that ultimately it existed,  
21 so it could be produced in this litigation; is that  
22 correct?

23 A. That's right.

24 Q. So the Lum document itself wasn't prior art  
25 either, was it?

1 A. No.

2 Q. And your duty of candor is not to submit  
3 stuff to the prior art -- I'm sorry -- to the Patent  
4 Office that's not prior art, correct?

5 A. That's my understanding, yes, sir.

6 Q. Okay.

7 MR. WHITE: No further questions, Your  
8 Honor.

9 THE COURT: Any redirect?

10 MR. LENDER: Your Honor, I just would  
11 like to offer for the Court's consideration the -- the  
12 grant of reexamination, Defendant's 2369, for the  
13 reasons that I stated when I argued why I thought it was  
14 relevant for the examination.

15 THE COURT: All right. Any objection?

16 MR. WHITE: Well, yes, Your Honor. I  
17 believe that that -- it -- there was some questions --  
18 no objection, Your Honor.

19 THE COURT: All right. Be admitted.  
20 What number is that?

21 MR. LENDER: It's Defendant's No. 2369.

22 THE COURT: Okay. 2369.

23 MR. WHITE: And Plaintiffs would offer  
24 into evidence, Your Honor, at this time Plaintiffs'  
25 Exhibit 600, which is the handwritten notebook of

1 Mr. Vulpe, which Mr. Owens spoke -- testified regarding.  
2 We've now authenticated and identified this document and  
3 offer it into evidence.

4 THE COURT: All right. Any objection?

5 MR. LENDER: No objection, Your Honor.

6 THE COURT: Be admitted.

7 MR. WHITE: This is the bench list.

8 MR. CAMPBELL: Your Honor, we also have a  
9 list of the exhibits that were used today for the bench  
10 trial, including exhibits used in the cross-examination  
11 of Mr. Gray, as well as the exhibits that Mr. White used  
12 with Mr. Owens -- or Mr. Vulpe. Excuse me.

13 THE COURT: All right. What's the number  
14 of that? That's the Plaintiffs' --

15 MR. CAMPBELL: 6.

16 THE COURT: -- bench list.

17 MR. CAMPBELL: 6.

18 THE COURT: All right. Plaintiffs'  
19 Exhibit List No. 6, which is the exhibits tried to the  
20 bench, any objection to those exhibits?

21 MR. LENDER: Well, even though I haven't  
22 seen the list, I'll, obviously, accept Counsel's  
23 representation that those were the exhibits that were  
24 given, in which case we have no objection.

25 THE COURT: All right. Be admitted.

1 All right. Any further documents?

2 You may -- are y'all through with

3 Mr. Vulpe?

4 MR. WHITE: Yes, Your Honor.

5 May he be excused?

6 THE COURT: Yes, he may.

7 Thank you, Mr. Vulpe.

8 All right. Any further exhibits to

9 offer?

10 MR. CAMPBELL: No, Your Honor.

11 MR. LENDER: No, Your Honor, other than  
12 if you would like for us to give you a list of the  
13 exhibits that were admitted in the main trial that would  
14 be relevant to inequitable conduct. Otherwise, we have  
15 no additional exhibits.

16 THE COURT: Well, I believe you can do  
17 that in your briefing, if you would like to.

18 All right. Defendant rests on its  
19 inequitable -- or its inequitable conduct defenses?

20 MR. LENDER: We do, Your Honor.

21 THE COURT: All right. And Plaintiff  
22 rests?

23 MR. WHITE: Yes, Your Honor.

24 THE COURT: And Defendant finally closes?

25 Okay.

1 All right. What else can the Court help  
2 you with today?

3 MR. LENDER: Your Honor, the one question  
4 I wanted to ask is whether it would be helpful to the  
5 Court -- we talked at the start of the case about  
6 submitting findings of fact and conclusions of law.

7 We actually submitted them before the  
8 evidence came in, and whether it would be helpful to  
9 Your Honor -- and we still would like to submit proposed  
10 findings of fact. Probably don't need to do the  
11 conclusions of law again, but based on the actual  
12 evidence for inequitable conduct, if that would be  
13 helpful to the Court.

14 And the same for the equitable issues,  
15 obviously, the laches and the equitable estoppel.

16 THE COURT: Yes. Yes, you can do that.  
17 I will just say generally, though, I find submitted  
18 findings of fact and conclusions of law not a whole lot  
19 of help to me. They're just so broad and repetitive and  
20 unuseful. But you can certainly submit them.

21 MR. LENDER: Yeah. We -- we will -- we  
22 will endeavor -- I'll make sure our team makes it very  
23 focused and nonargumentative, Your Honor.

24 THE COURT: All right. Very good.

25 MR. CAWLEY: Your Honor, a couple of

1 matters. Is Your Honor going to set a schedule for  
2 post-verdict briefing?

3 THE COURT: Yes. And I would like to set  
4 that very expeditiously, and let me explain why.

5 I am nearing the end of my year where I  
6 have law clerk turnover in the office. We have a lot on  
7 our platter right now, but I would like to get all of  
8 the briefings and hearings we've had, I'd like to have  
9 this thing wrapped up by the end of July.

10 So that's -- that's -- I'm willing to  
11 entertain any suggestions you may have or -- that's my  
12 goal.

13 MR. CAWLEY: Might I suggest, Your Honor,  
14 if you give us an opportunity to confer with the other  
15 side to come up with an agreed schedule, I'm sure we  
16 should be able to do that.

17 Sort of concluding with that is, the  
18 Plaintiff will be seeking a permanent injunction. Does  
19 the Court envision having a separate hearing on that  
20 issue or submitting it on paper?

21 THE COURT: I'll have to think about  
22 that.

23 MR. CAWLEY: All right. Thank you, Your  
24 Honor.

25 THE COURT: You know, I would like to

1 have all of my work -- I would like to have this out of  
2 my hands by the end of July.

3 So that means y'all need to be on a very  
4 expedited schedule. Any injunctive relief, any  
5 willfulness relief the Plaintiff seeks, any motions that  
6 either side wishes to make, we're going to need those in  
7 pretty quick, but we'll try to get an order out within  
8 the next few days.

9 If y'all would like to meet and confer,  
10 if you can do so promptly and get us your -- give us a  
11 proposal, and I will accept proposals from -- I tell you  
12 what. Today's Wednesday. How quickly do you think  
13 Plaintiff can have a proposal, Mr. Cawley?

14 MR. CAWLEY: A proposed briefing  
15 schedule?

16 THE COURT: Yes.

17 MR. CAWLEY: I don't see why we can't  
18 have a proposal to you by Friday.

19 THE COURT: Okay. All right. Let's say  
20 by noon on Friday then, if you would.

21 MR. CAWLEY: All right.

22 THE COURT: All right. And if there's  
23 any disagreements on the schedule, just as in the  
24 charge, indicate your disagreements so that we can see  
25 who's advocating for what, and then we'll try to get an

1 order entered by Monday for you.

2 MR. CAWLEY: Thank you, Judge.

3 THE COURT: All right. Thank you,  
4 gentlemen.

5 Is there anything further?

6 MR. CAWLEY: No, Your Honor.

7 MR. WHITE: No, Your Honor.

8 MR. KUDLAC: No, Your Honor.

9 THE COURT: Have a good weekend.

10 COURT SECURITY OFFICER: All rise.

11 THE COURT: And well deserved break for  
12 both sides.

13 Oh, one other thing, Ms. Ferguson, all of  
14 these notebooks on the floor, if you would put these up  
15 here, and if you would come and pick up your respective  
16 notebooks, and you can take those back and use them  
17 again.

18 (Court adjourned.)

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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