

COPY

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 92-1667

UNIX SYSTEM LABORATORIES, INC.,)

Plaintiff)

vs.)

BERKELEY SOFTWARE DESIGN, INC.,)
and THE REGENTS OF THE)
UNIVERSITY OF CALIFORNIA,)

Defendant.)

December 8, 1992
Greenville, North Carolina
9:20 o' clock A. M.

DEPOSITION

OF

DAVID FRASURE



KING'S COURT REPORTING SERVICES
Post Office Box 7323
Rocky Mount, North Carolina 27804
(919) 937-6663

LAURI S. CROWDER
Court Reporter
PENNY HARPER
Court Reporter

APPEARANCES:

**LAW OFFICES OF PAUL, HASTINGS, JANOFSKY & WALKER,
by JAMES W. KENNEDY, ESQ., and**

**UNIX SYSTEM LABORATORIES, INC., by
THEODORE M. WEITZ, ESQ.
appearing on behalf of the Plaintiff.**

**HELLER, EHRMAN, WHITE & MCAULIFFE, by
LESLIE A. FITHIAN, ESQ.
appearing on behalf of Berkeley Software
Designs, Inc.**

**CROSBY, HEAFEY, ROACH & MAY, by
CARLA J. SHAPREAU, ESQ.
appearing on behalf of the University of
California.**

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1 WHEREUPON, at 9:20 a.m.:
2 DAVID FRASURE, first having been duly sworn, testified as
3 follows during DIRECT EXAMINATION by MS. LESLIE A.

4 FITHIAN:

5 Q. Okay, can you state your name for the record,
6 please?

7 A. It's David Frasure.

8 Q. Okay. And can you tell me your home address?

9 A. Yes; it's Route 2, Box 561-D. Ayden -- A-Y-D-
10 E-N -- North Carolina.

11 Q. Have you ever been deposed before?

12 A. Yes.

13 Q. How many times?

14 A. Twice.

15 Q. What kind of lawsuit was it?

16 A. One was -- well, they were both witnesses to -
17 - to traffic accidents.

18 A. I see; okay. Well, just as a reminder, I'll
19 go over some of the basic procedures today. You've been
20 sworn in, so you're testifying under oath just as though
21 you were in a court of law, and the penalty of perjury
22 applies just as though you were in a court of law despite
23 the informal appearance of the setting.

24 As I question you, if you have any problem
25 understanding the question, feel free to ask for

1 clarification as necessary. Everything you say and
2 everything I say or -- or the attorneys here say will be
3 turned into a transcript which you'll have an opportunity
4 to read and if necessary correct after the Deposition.
5 If you make substantive changes to the answers, we can
6 comment upon that later; but you'll also have the
7 opportunity to just correct things like typographical
8 errors and that sort of thing.

9 Are you under any type of disability today,
10 such as medication or illness that would prevent you from
11 testifying accurately?

12 A. No.

13 Q. Okay. When were you last -- well, let me ask
14 where -- you were employed with Unix System Laboratories
15 at one point; is that right?

16 A. No.

17 Q. No? Were you employed by AT and T or an
18 affiliate of AT and T?

19 A. Yes.

20 Q. Okay. Can you tell me what the name of that
21 company was?

22 A. Well, I was employed with originally Western
23 Electric Company, and then the federal government
24 divested AT and T and there was a corporate name change
25 to AT and T. And then the last company name that I was

1 with was AT and T Information Systems, so it was really
2 three different names, though I worked with the company.
3 I was with them for almost eighteen years.

4 Q. Okay. When did you first join and when I say
5 the company, I mean AT and T or the affiliate that you
6 were employed by?

7 A. I first was employed with the -- I worked with
8 AT -- or with Western Electric as a consultant for a
9 little over three years. I began in I believe it was
10 October of 1968, then effective February of 1972 -- I'm
11 not sure of the date -- I became a direct employee with
12 Western Electric Company.

13 Q. What year was that?

14 A. 1972. I really don't know the year in which
15 Western Electric, at least the division I was with, was
16 renamed AT and T. It was probably 1982-83 time frame,
17 then I was -- the division I was with was renamed to AT
18 and T Information Systems.

19 Q. What division was it? Can you describe it?

20 A. With Information Systems?

21 Q. Right.

22 A. The division, I was in the Unix software
23 licensing organization.

24 Q. When did the Unix software licensing
25 organization come into existence?

1 A. I do not know.

2 Q. Was it already in existence in February of
3 1972?

4 A. I -- I really don't know. I have to assume
5 that it was, but I -- I don't know.

6 Q. When you joined the company, was it in
7 existence?

8 A. I was not familiar with it when I joined the
9 company.

10 Q. Okay. When you first joined the company, what
11 was your position?

12 A. I was a programmer, computer programmer.

13 Q. What type of programming were you doing?

14 A. Was doing technical engineering programs as
15 well as business programming. Wrote systems software,
16 applications software for business applications as well
17 as technical applications for the company.

18 Q. Did you work on the Unix Systems software?

19 A. Not at that time, no.

20 Q. Did you at a later time?

21 A. When we say work on the systems software, I
22 did not -- I have never worked on Unix operating system
23 software. I have used -- been a user . . .

24 Q. I see.

25 A. . . . of the software, but I have never

1 developed any of the Unix System code.

2 Q. Okay. And when did you join the licensing
3 organization?

4 A. It was either late '83 or early '84; I -- I
5 really don't recall.

6 Q. What was your position when you first joined?

7 A. The licensing organization?

8 Q. Yes.

9 A. I was an assistant manager, which was an AT
10 and T management structure. They went from department
11 chief to assistant manager to manager. Of those I was a
12 -- received a promotion and went -- went in as an
13 assistant manager.

14 Q. Promotion from your programming position, or
15 was there an intervening promotion?

16 A. There was an intermediate promotion.

17 Q. And what was that?

18 A. That was department chief.

19 Q. And which department was -- was it?

20 A. I was -- at that time I was with the data
21 center; had nothing to do with -- with Unix software, and
22 I was in the assistant programming area at that time, and
23 I was promoted to a department chief, which is a second-
24 level supervision within AT and T at the time. I'm not
25 sure what their structure is today, and worked with

1 assistant programming and then I received a lateral
2 transfer to where I was responsible for all the computer
3 system corporate instructions.

4 The company had a set of corporate
5 instructions that controlled how we deal with computer
6 software and procedures for use of computers throughout
7 the entire company.

8 Q. This was internal procedures?

9 A. Yes, that's correct. And then I was promoted
10 from that job into the Unix software licensing position.

11 Q. Okay. And what were your responsibilities
12 when you joined the Unix software licensing organization?

13 A. I was the -- responsible for the software
14 licensing agreements. I had a number of account
15 executives that worked for me who were the customer
16 interfaces, and they, you know, they -- they were the
17 customer interface for the -- the software agreements and
18 the sublicensing agreements, and they reported to me and
19 -- and I got involved in negotiations of -- of
20 agreements, that type thing.

21 Q. When you said you were responsible for
22 software licensing agreements, did -- did you have any
23 responsibilities other than being involved in
24 negotiations?

25 A. Such as? I'm not sure what you're asking.

1 Q. I guess I'm trying to just find out more
2 specifically what types of responsibilities you had with
3 respect to the licensing software -- of software.

4 A. Well, yes, I -- there was what we called a --
5 a Unix strategy was an internal nomenclature, and one of
6 the things that was my responsibility was I was trying to
7 proliferate the use of binary Unix in the marketplace,
8 and we had goals and objectives by which means we would
9 achieve that. So in addition to having the licensing
10 responsibility, I was also in marketing of the -- of Unix
11 software products.

12 Q. What Unix software products were you marketing
13 at that time?

14 A. The operating system. We had Programmer's
15 Workbench. We had a number of compilers. There was -- I
16 don't really recall all the products, but they were all
17 source code oriented products that we were licensing,
18 trying to get the computer OEM's to those products on
19 their -- on their computers.

20 Q. Okay, and when you said you were trying to
21 proliferate the use of binary . . .

22 A. Yes.

23 Q. . . . Unix, how were you going about that?

24 A. We were working with the -- we had targeted
25 major computer equipment manufacturers such as IBM and

1 Digital Equipment Company that actually produced
2 computers, and we also worked with major software
3 companies, and we were trying to encourage them to
4 provide Unix on a variety of host machines, be they
5 personal computers or large mainframes or so on. We
6 worked with corporations and so on, so what we are trying
7 to do was to encourage them to provide a binary product
8 to the marketplace.

9 Q. Did AT and T or its affiliates ever provide a
10 binary Unix product to the marketplace?

11 A. Yes.

12 Q. Can you tell me what binary products
13 were

14 A. They provided the operating system. At the
15 time, AT and T was producing -- Western Electric was
16 producing a -- a series of computers they called 3-B's.

17 Q. Uh-huh.

18 A. They were 3-B2's and 3-B5's; I really don't
19 remember all the numbers, but they were all provided with
20 -- with Unix operating system on them.

21 Q. In binary only or . . .

22 A. Binary only.

23 Q. Uh-huh.

24 A. Yes. And they had various other compilers,
25 products that -- Programmer's Workbench and so on that

1 they provided on -- on those computers. They also
2 introduced the Unix PC personal computer and several
3 other work stations, personal computer types that
4 provided a -- a binary copy of the operating system.

5 Q. Okay. Now, other than marketing of the
6 software products and the responsibility in licensing
7 negotiations, did you have any other responsibilities
8 when you joined the licensing organization?

9 A. I think those were my primary
10 responsibilities. I -- I'm sure I had other little
11 things that -- that I was responsible for, but they -- I
12 don't recall what they were.

13 Q. Okay.

14 A. But those were my main objectives.

15 Q. Okay. And did your position change from
16 assistant manager to some other position at some point?

17 A. No.

18 Q. Okay. Who was your boss who you were working
19 for?

20 A. His name was Otis Wilson.

21 Q. Okay. And was that throughout the entire
22 period?

23 A. Yes.

24 Q. Now in your -- in your capacity as assistant
25 manager, were you ever involved in communications with

1 The University of California?

2 A. Yes.

3 Q. Can you describe what involvement you had with
4 The University of California?

5 A. That's kind of a wide-open question. I mean,
6 spans a number of years. I'm not sure what -- can you be
7 more specific?

8 Q. Was it your responsibility on an ongoing basis
9 to have contacts with The University of California?

10 A. No. I had one of my account executives, her
11 name was Gertrude Williams, who was the -- the prime
12 interface between The University of California and AT and
13 T, and I was only involved on an as-need-be basis.

14 And that's really the way the relationship
15 worked with all of our customers. I was -- just kind of
16 got involved as need be if -- if thing -- anything got
17 out of the ordinary.

18 Q. Do you recall any particular instances in the
19 case of The University of California in which you got --
20 you were involved . . .

21 A. Yes.

22 Q. . . . in some type of issue?

23 A. Yes.

24 Q. Can you tell me which instances you recall?

25 A. Well, and I really don't know where to start

1 here, I guess. It's -- I've kind of lost track of -- of
2 time frames of things, but I was made aware indirectly
3 from another licensee through one of my account
4 executives that The University of California had plans to
5 distribute a product in source-code format that -- to
6 non-licensees and -- of AT and T. And at that point one
7 of my jobs I guess as part of -- and perhaps this goes
8 back to the previous question, what other things did --
9 did I do. I did enforce contracts to the best of my
10 ability, I did -- I was responsible for -- for trademark
11 violations and anything that would relate to the Unix
12 product.

13 When I received this information and
14 requested -- requested more details, I then took it upon
15 myself to -- I asked Gertrude Williams, my account
16 executive, to find out who I should be talking to at the
17 university, and I made -- and I -- and I made contact
18 with -- attempted to make contact with an attorney at The
19 University of California. Her name was Mary McDonald. I
20 believe it was . . .

21 Q. Can you tell me when you made that contact,
22 the approximate time frame we're talking about?

23 A. Sometime in 1985. I would have to say that it
24 was mid-1985.

25 Q. You contacted Mary McDonald?

1 A. Yes. Yes. And I finally had a verbal
2 conversation with Mary. I had left numerous messages and
3 she never returned any of my calls, and by chance one day
4 she just happened to answer the telephone and I
5 introduced myself to her. And she really did not want to
6 talk with me, and she requested something in writing from
7 -- from me, from AT and T, as to who I was and that -- if
8 I had the -- the authority that -- that I said I did.

9 So I sent her a letter on AT and T stationery
10 introducing myself and -- and what my job was, and I
11 really didn't hear back from her in response to that.

12 I finally got ahold of her again, and she
13 said she would not accept the letter, that she needed a
14 letter from -- signed by Otis Wilson since all the
15 previous contacts had been from Otis . . .

16 Q. Uh-huh.

17 A. . . . and I was a new player.

18 So a letter was prepared for Otis's signature
19 that verified that the letter that I had sent was indeed
20 who I said I was, and -- and then Mary and I after that
21 talked on a number of occasions about source code
22 exchange and what we had -- we had heard is a -- a -- I'm
23 not sure what the correct term is, rumor or hearsay or
24 what, but we heard they were going to make a distribution
25 of the software to non-licensees.

1 Q. Where did you hear that?

2 A. I'd heard it through another licensee who had
3 reported it to one of my account executives, Chuck Green,
4 and Chuck came to me about it, and one of the things that
5 -- like I say, that I did pursue, if you want to consider
6 me a -- to be a policeman of -- of some type, but we did
7 pursue all such claims to see if they were -- they were
8 valid or not, or rumors or whatever.

9 And as a result of the conversations with
10 Mary, we set up a meeting at the university and I -- I do
11 not recall the date. I -- I think it was late 1985, in
12 the fall of 1985 and we -- we had a meeting with Mary and
13 actually a large number of people from The University of
14 California.

15 Q. Do you recall who was present at the meeting?

16 A. Well, from the AT and T side was Otis Wilson,
17 an attorney by the name of Geoff Green -- G-E-O-F-F --
18 Green, and myself. Mary was there, and I believe -- and
19 I'm not sure of the -- the structure within the . . .

20 I believe Mary had a -- a boss who is -- was
21 a lady and also an attorney. I'm . . .

22 Q. Uh-huh.

23 A. I'm not sure of her name. I don't recall what
24 her name was, but she was present at the meeting. And
25 then there was a number of gentlemen present. I don't

1 recall any of their names and -- and throughout the
2 meeting, the meeting took place afternoon, took place
3 really till -- till after 5:00 o'clock in the afternoon,
4 probably started somewhere 1:00, 1:30. There was a
5 number of people in and out that appeared to be students.
6 They were casually dressed, so I'm -- I'm not sure. Some
7 of them asked questions as we talked, but the meeting
8 proceeded throughout the afternoon.

9 Q. Do you recall what was discussed at the
10 meeting?

11 A. Yes. The primary objective of the meeting was
12 to discuss the various licenses that AT and T provided
13 and -- such as an educational license, an administrative
14 license, a commercial license for the software itself,
15 sublicensing agreements, contractor provisions, source
16 code exchange provisions, those type of things.

17 We also at the time had a number of licenses
18 for various versions of the operating system. By
19 versions, I mean those that would run on a Motorola
20 machine and those that would run on a National
21 Semiconductor base machine and -- and Intel machine and
22 so on, and -- and we license those as separate products,
23 and we discussed the rules of source code exchange
24 regarding those products.

25 Q. Can you tell me on that subject what was said

1 at the meeting?

2 A. There was a . . .

3 Q. General substance.

4 A. Well, the general substance was on the source
5 code exchange. We also got into the methods and concepts
6 issues that were in the license, but basically we were --
7 Unix started out long before I was in the organization,
8 thirty-two -- System Thirty-two many releases, and they
9 had a System Three -- Roman numeral three release, and we
10 went to System Five, and we discussed how you could
11 exchange source code that a -- that a Thirty-two V
12 customer could provide that source code, for instance, to
13 a System Three or a System Five customer, but a System
14 Five customer could not provide their code to someone who
15 did not have an equivalent license.

16 So we went through the exchange provisions
17 and then we also went through examples of methods and
18 concepts and contractor provisions and -- and the use of
19 the code, modifications to it and further license. We
20 had an interest, I guess, is probably the right word in -
21 - in anything that was developed as an enhancement or an
22 improvement or a change based on our source code and that
23 if our code was part of the product then we considered
24 that it was governed by the license.

25 Q. And if your code was not part of the product?

1 A. Well, if it was used as part of the
2 development -- I really need to be careful here on
3 words, I guess.

4 If the source code, the Unix source code was
5 -- was required, was used to generate the enhancement,
6 was required to have the -- the rest of the enhancements
7 work, then we had an interest in it.

8 It's been a long time. I'm not sure of the
9 right -- the right key words to use, but we went through
10 those discussions with them and what we felt the, you
11 know, the agreement said.

12 We also discussed contractor provisions which
13 allowed a licensee to contract with someone to develop
14 software and then when that development was done
15 everything had to come back to them and we expressed
16 concern I guess with -- Otis and I used the term mental
17 contamination, that if you have been exposed to the
18 source code and its methods and concepts, even though you
19 give something back to the -- the licensee, there was --
20 there was concern there that someone could go off on
21 their own and develop what they thought was their own
22 product but really using the methods and concepts and
23 techniques that were in the product that they had
24 previously used.

25 Q. What was said on that subject at the meeting

1 that you recall?

2 A. I just recall discussing it. We -- there was
3 a lot of the hypothetical-type things that were provided,
4 that -- that were discussed at the meeting, and I do
5 recall -- I do not know this. I would assume that they
6 were graduate students. I had no idea who their -- their
7 names was, but they were -- they were asking a number of
8 questions and we kind of discussed, okay, well, if you've
9 got a group of people over here developing a set of
10 source code and they have never seen the Unix source
11 code, they've never been too exposed to it and the
12 develop a product completely on their own, then that's
13 one thing. But if they're developing a product with the
14 benefit of Unix or perhaps they have used it for -- for a
15 number of years, ten years, and then they think they're
16 going to go off and develop something on their own that's
17 an operating system that may look like Unix, we had -- we
18 expressed our concern that -- that we had an interest in
19 that product.

20 Q. What was the University's response at the
21 meeting?

22 MR. KENNEDY: Excuse me. The response
23 generally, or the response to any specifics?

24 A. Response to what, I guess.

25 Q. To that particular point that you just

1 mentioned.

2 MR. KENNEDY: To the particular hypothetical?

3 Q. Right. If that hypothetical was ever
4 discussed.

5 A. Just -- just -- just listened.

6 Q. They didn't have any response, verbal?

7 A. If they did, I don't -- I don't recall it.

8 Q. Okay. Do you recall anything else being
9 discussed at that meeting?

10 A. I'm not sure how to -- how to answer that --
11 that question. Being discussed, I mean, the whole -- the
12 whole discussion was oriented around the licensing
13 agreement and what its provisions were.

14 We did -- at the meeting we -- we had went
15 out there -- we had heard from one of our other
16 licensees, as I had indicated, that -- that Berkeley
17 University was planning to make a distribution sometime
18 in the -- in the spring of 1986 of a source code product
19 to non-licensees, and that subject was brought up at the
20 meeting.

21 I don't recall specific words, but I believe
22 it was acknowledged that there was at least some thought
23 or some intent of doing that, and really, right -- right
24 at the conclusion of the meeting, and I -- and I think
25 it's probably one of the things that terminated the

1 meeting, because Otis Wilson spoke up and said, well, if
2 you continue to pursue that we will consider that you are
3 in violation of your software agreements and we'll --
4 we'll have to bring a suit against you to stop that, and
5 within minutes the meeting was over.

6 Q. Was the nature of the planned release
7 discussed at the meeting?

8 A. The type of software. . .

9 Yeah, I -- I do not recall what the product -
10 - product was. I'm not sure if it was a networking
11 product or -- or -- I don't think it was a -- I think it
12 was a what I would consider in my terminology being add-
13 on type product. It was not the operating system as
14 such, but the operating system contained a bunch of
15 different things more than just operating code.

16 It -- it -- some of the -- the original
17 licensing agreements contained compilers and text editors
18 and everything else, and I'm really not sure it had
19 networking software, UUCP, a variety of things, and I
20 really don't recall what specific part of that that there
21 was an intent to distribute. But there was some type of
22 an acknowledgement that they were -- they had such plans,
23 because that's when Otis Wilson told them that if they
24 pursued that that we would consider them in violation of
25 the agreement.

1 Q. And what was it about what they were planning
2 to distribute that caused you to consider that possibly a
3 violation of the agreement if they pursued it?

4 A. Because Unix source code had been instrumental
5 in its development.

6 Q. Was the Unix source code -- was Unix source
7 code included in the product they were planning to
8 distribute?

9 A. I don't know, 'cause we were never told.

10 Q. Was that something that you asked about at the
11 meeting?

12 A. I'm sure we did. I don't recall a specific
13 instance of -- of that. I wish I could recall the
14 specific software that we were talking about, but the --
15 we considered at the time that the -- the product was a -
16 - it was based on Unix, it was -- could be an enhancement
17 or a modification to the operating system.

18 Q. Now, did anything come out of this meeting in
19 terms of later conclusions or communications?

20 A. We heard from the same licensee probably -- I
21 don't know the time frame -- I really don't know if it
22 was the end of 1986 or early -- I'm sorry -- at the end
23 of 1985 or early '86. But the same licensee who had
24 notified us of the previous intent also notified us that
25 they had suspended their -- their plans to not distribute

1 that software.

2 Q. And do you recall which licensee that was?

3 A. Yes, it was Mount Xinu -- Unix spelled
4 backwards.

5 Q. Did you -- are you aware of any further
6 communications with the University in connection with
7 that subject?

8 A. No, the -- the only other thing that I can
9 recall I think that -- I had a number of -- of
10 conversations with Mary McDonald after that meeting. I
11 really don't remember too much their content. I did tell
12 her that I had heard that their -- their plans had been
13 stopped. I don't know that she really acknowledged that
14 or not, but however she did convey to me on one of the
15 occasions I talked to her that -- that the University was
16 planning to release a new version of their software
17 product, and I believe it was four point three if I'm not
18 mistaken, and that she did confirm to me at that point
19 that it only contained Thirty-two V software and nothing
20 -- nothing beyond that.

21 And I think she conveyed that to me because
22 of our meeting. She wanted to make sure that there was
23 no misunderstanding that the new version of the software
24 contained something that -- that it shouldn't contain in
25 accordance with the licensing agreement.

1 Q. Okay. I'm going to refer to the next exhibit,
2 which is D-34.

3 MR. KENNEDY: Actually it's a group of
4 documents.

5 Q. Yes; D-34.

6 Okay, we've marked as Exhibit D-34 a group of
7 documents produced by the Plaintiff in this action and
8 numbered P-210 through 246. If you want to just take a
9 moment to look through it.

10 A. (Complied.)

11 Were these produced stapled together?

12 Q. I believe so. I don't think we stapled them
13 ourselves other than how they were when we got them.

14 A. Okay.

15 **** BRIEF PAUSE ****

16 A. Well, I forgot one of the company names, I
17 see. AT and T Technology is. . .

18 Q. Okay. Okay, now if you'll look at the page of
19 this group of documents that's Bates number 243 . . .

20 A. Uh-huh.

21 Q. . . . it's a letter dated May 15, 1985. In
22 looking down about -- looking at the second paragraph in
23 the letter regarding the definition of licensed software
24 in the granting clause, comma, AT and T does not assert
25 any ownership interest in any modification or derivative

1 work made by licensee and does not consider that such
2 definition claims such an interest.

3 Do you see that paragraph?

4 A. Yes.

5 Q. Were you involved at all in the preparation of
6 this letter, by the way?

7 A. I -- I don't recall what I . . .

8 Maybe if I can digress for a minute and . . .

9 Q. Okay.

10 A. . . . tell you procedures that we followed.

11 During this time frame of 1985, by that time
12 I -- I think I was probably six to nine months before I
13 really got up to speed on -- on all the licensing
14 agreements within the organization. At this time, I was
15 very much involved in negotiation of contracts.

16 Side letters, such as this, this type of
17 letter should be called a contract side letter, once the
18 language had been developed in conjunction with our
19 attorneys, AT and T attorneys that -- that were pretty
20 much dedicated to the licensing of the product and we
21 felt comfortable with that language and we negotiated it
22 one time, then that language -- that paragraph became a
23 standard paragraph that we would provide -- use to
24 provide clarifications or something to any other licensee
25 that had a -- that had a question.

1 So whether I was involved with the actual
2 preparation of this letter, I don't know. I was involved
3 with the language associated here, but I really don't
4 recall . . .

5 Q. This particular letter?

6 A. Yes.

7 Q. Okay.

8 A. They were standard type clarifications
9 paragraphs that -- that we provided, and I would think
10 you would see that same paragraph verbatim in a number of
11 letters with licensees.

12 Q. And why did -- why was that paragraph written,
13 not necessarily in this particular letter, but you're
14 saying as a standard clarification?

15 MR. KENNEDY: Objection to form. I'm not
16 sure you've laid a foundation.

17 Q. Were you -- were you involved in this
18 particular paragraph, this is the second paragraph of the
19 page Bates number 243?

20 A. Was I involved in the development of that
21 language?

22 Q. Right.

23 A. Yes.

24 Q. Okay. And can you tell me why that language
25 was developed, or written?

1 A. Yes, it was -- that -- that language was
2 provided to a number of licensees in educational software
3 agreements as -- as well as commercial type software
4 agreements that -- that if a licensee on their own
5 developed modifications to the operating system, that was
6 -- that was theirs to the extent that it did not include
7 -- and I really need to watch my words here, it's been a
8 number of years, so I -- I hope I'm saying things the
9 right way, but to the extent that it did not include Unix
10 source code or the methods and concepts and stuff that --
11 that were -- that were associated with it, so if someone
12 wrote two or three lines of code as a system modification
13 to put in there, that code was theirs, but the embodiment
14 of that code and all the other things around it were --
15 AT and T had an interest in; I mean, it was ours.

16 Q. Okay. And looking at the third paragraph, it
17 says:

18 . . . However, for clarification, AT and
19 T proposes to amend such definition by substituting the
20 following therefor . . .

21 And after that it has a definition of
22 licensed software.

23 Were you involved in the preparation of that
24 language?

25 A. To the best of my knowledge I was.

1 Q. Okay. Now, if you look at the definition of
2 licensed software in the agreement, the July 1, 1983
3 System Five agreement that this letter refers to, it's on
4 page -- page number 212 of this same exhibit, D-34 . . .

5 Yes, a preliminary question, is that language
6 paragraph clarifying licensed software -- is that
7 clarifying the provision that's on page Bates number 212
8 in the first paragraph after agree as follows.

9 MR. KENNEDY: Objection to form.

10 You may answer.

11 You're asking -- well, if you're asking him
12 for a legal conclusion, then I object as to form.

13 Q. Your understanding as to whether the letter
14 clarifying licensed software is clarifying the definition
15 of licensed software contained in the paragraph on page
16 Bates number 212, the first paragraph after agree as
17 follows.

18 A. I -- I can't answer that. This -- I need to
19 look at . . .

20 Q. I'll direct your attention to -- if you look
21 in the middle of that paragraph, it says licensed
22 software in capital letters means all or any portion of
23 the computer programs, other information and
24 documentation and then it has three subparts. There's
25 little I -- I and there's two little I's and three little

1 I's.

2 A. Uh-huh.

3 MR. KENNEDY: Same objection.

4 **** Brief Pause ****

5 A. What was your question again?

6 Q. Okay. Let me -- let me re-ask the question.

7 Looking at the page Bates number 243, the
8 third paragraph says:

9 . . . For clarification, AT and T proposes to
10 amend such definition by substituting the following
11 therefor.

12 And at the top of the same page it talks
13 about a clarification to amend the definition of licensed
14 software.

15 Is it your understanding that the definition
16 of licensed software being clarified is the definition on
17 page 212 of this agreement, Bates number 212?

18 A. It would appear that way, but I really -- I
19 really don't know. There's not reference here to the --
20 to the software agreement number.

21 MS. SHAPREAU: There's reference to the date.

22 Q. If you look at the re line . . .

23 A. Uh-huh.

24 Q. . . . on the top of the letter.

25 MR. KENNEDY: Are we both arguing with Mr.

1 Frasure?

2 MS. FITHIAN: No, I'm just directing his
3 attention to the re line on the letter , the letter being
4 Bates number 243, July 1, 1983 educational software
5 agreement relating to Unix Five. . .

6 A. It would appear that it's -- that it's
7 changing that definition, yes.

8 Q. Okay. And as I look at the amended
9 definition, it appears to drop out the subparagraph
10 three, the three little I's; is that correct?

11 MR. KENNEDY: Objection to form.

12 A. I can't say that it -- that it does drop out
13 the three little I's.

14 Q. Why not?

15 A. Well, there's other things at the end of that
16 paragraph about designated CPU's and stuff that are not
17 repeated here, so I -- I really . . .

18 Q. Okay, just let's focus for a moment on the
19 language in the subparagraph three, which says:

20 . . . Prepared by licensee as a modification
21 of or a derivative work based on any of the materials so
22 listed or furnished.

23 That language was removed from the definition
24 of licensed software in the May 15, 1985 letter; isn't
25 that right?

1 MR. KENNEDY: Objection to form.

2 A. I -- I don't know whether I agree with that or
3 not. I . . .

4 Q. Well, do you see that language in the letter?

5 A. No, I don't see it. No, I don't see it here.

6 MR. KENNEDY: Why don't you point him to the
7 other language, Counsel?

8 A. My only hesitation is there's, you know, there
9 is no reference . . .

10 I'm -- I'm just not sure.

11 Q. So the answer was, though, you don't see that
12 particular language in the May 15, 1985 definition of
13 licensed software?

14 A. No, it's not there. I don't know that it
15 eliminates the -- the little three -- three I in -- in
16 that paragraph, though.

17 Q. But the language that was in little three
18 I . . .

19 MR. KENNEDY: Objection to form.

20 Q. . . . has been eliminated?

21 MR. KENNEDY: Objection to form.

22 Don't answer that question. Let her go to
23 the judge and -- and get you to be required to answer
24 that question.

25 Let's move on; you've asked the question

1 three times, Ms. Fithian. The language -- you can show
2 it to the judge, you can show it to the jury, and the
3 judge or the jury can see whether the language is there
4 or is not there.

5 MS. FITHIAN: Just so I understand, though,
6 you . . .

7 MR. KENNEDY: They can also see the other
8 language.

9 MS. FITHIAN: Just so I understand, you are
10 instructing him not to answer that question?

11 MR. KENNEDY: That's correct.

12 MS. FITHIAN: Okay.

13 MR. KENNEDY: Move on.

14 I tell you what, because Mr. Frasure lives in
15 Greenville, I'll withdraw that instruction. You reframe
16 it appropriately, he can answer it, but it's already been
17 answered twice.

18 (As requested Court Reporter read back the
19 last question.)

20 MR. KENNEDY: Is that the question you want
21 him to answer?

22 MS. FITHIAN: Yes.

23 MR. KENNEDY: That's not the last question
24 you asked.

25 MS. FITHIAN: Well, let's just -- we'll go

1 forward with that question.

2 WITNESS MR. FRASURE: Can I hear it again; I
3 didn't . . .

4 MS. SHAPREAU: No, the record has to reflect
5 the question that was asked.

6 MR. KENNEDY: Yeah, the question that was
7 asked was whether the language at paragraph little three
8 I has been removed from the agreement. As to that
9 question . . .

10 MS. FITHIAN: From the definition of licensed
11 software . . .

12 MR. KENNEDY: Right.

13 MS. FITHIAN: . . . in the agreement.

14 MR. KENNEDY: As to that question, I have an
15 objection to form and am losing patience with this
16 inquiry. If you want to ask Mr. Frasure whether he can
17 find that identical language followed by the Roman
18 numeral three in the proposed amended definition, and if
19 he sees it there, if you think that advances the inquiry,
20 go ahead and ask him that.

21 A. Well, the language of little three . . .

22 Q. Well, specifically the language of little
23 three says:

24 . . . Prepared by licensee as a
25 modification of or a derivative work based on any of the

1 materials so listed or furnished.

2 MR. KENNEDY: Please try to refrain from
3 interrupting him.

4 Q. That's the language. I wanted to clarify the
5 question.

6 A. Well, that language is not in the May 15th
7 letter.

8 Q. Okay.

9 A. You see, by reading it, I don't know that it
10 was the intent of this letter to remove that language.

11 That's my -- my answer.

12 Then I have reasons for my hesitation as to
13 why I think it was -- was not to delete that language,
14 based on other things that we had did at times in side
15 letters. In other words, we had issued side letters
16 where it -- it -- it may have something -- as an example,
17 if we were to delete three, we would have said three and
18 then we would have said deleted behind it, so I think we
19 can probably find references in side letters where we
20 specifically, where "I" things were itemized, they were -
21 - it would show that it was deleted.

22 So that's why I can't answer that question in
23 -- in reading this, because I know what we did in other
24 situations, so that's what leads me to think that we had
25 not -- it was not the intent to -- to delete that; I

1 don't know.

2 MR. KENNEDY: To the extent it could be
3 regarded as an objection to form under any construction,
4 if you were to -- to attempt to utilize this testimony, I
5 would ask the Court to read to the jury the entire
6 paragraph, including the last sentence which you have
7 failed to read at this point.

8 Q. I'm getting to the last sentence. I'm getting
9 to the last -- I'm getting to the last sentence.

10 Okay, now looking back at the May 15, 1985
11 letter, which is Bates number P-243 being Exhibit D-34,
12 the last sentence reads -- the last sentence of licensed
13 software definition reads:

14 . . . Licensee agrees that any modification
15 or derivative work prepared by it that contains any
16 licensed software shall be treated as licensed software
17 hereunder.

18 So under this definition of licensed
19 software, a derivative work would be treated -- require
20 to be treated as licensed software if it contained
21 licensed software; is that your understanding?

22 A. Yes, if it contained licensed software in
23 accordance with the -- the -- the agreement. There's
24 more to the agreement than -- than just that paragraph,
25 though, which there's other portions of paragraphs that

1 cover methods and concepts and -- and stuff, so I would
2 say to the extent that you're -- you're talking about
3 licensed software as covered by the agreement, the entire
4 agreement, then I would assume that's correct.

5 Q. Okay. And do you know why this clarification
6 letter was written?

7 A. At the request of the University. I mean we -
8 - we do not generate these letters without some inquiry
9 to cause them.

10 Q. Did you receive such a request?

11 A. I don't recall receiving such a request
12 specifically from the University. We received other type
13 requests for clarifications from other licensees, but I -
14 - I don't specifically recall this request.

15 Q. Did your requests from other licensees similar
16 to the request from the University that led up to this
17 letter of clarification?

18 A. I think we provided similar language or the
19 same language to other licensees, so -- as a result of a
20 request from them, yes.

21 Q. Now, looking at the page that's Bates number
22 P-215 on Exhibit D-34, there's subparagraph 101-A of the
23 license agreement, and 101-A states:

24 . . . Uses for academic and educational
25 purposes means uses directly related to teaching and

1 degree-granting programs and use in non-commercial
2 research by students and faculty members, including any
3 uses made in connection with the development of
4 enhancements or modifications to the licensed software
5 provided that neither the results of such research nor
6 any enhancement or modification so developed is intended
7 primarily for the benefit of a third party . . .

8 And then there's subparagraph two:

9 . . . Such results, enhancements and
10 modifications all to the extent that they do not include
11 any portion of licensed software are made available to
12 anyone, including AT and T and its associated companies,
13 without restriction on use, copying or photodistribution,
14 notwithstanding any proprietary right such as a copyright
15 or a patent right that could be asserted by licensee, its
16 students or faculty members.

17 And I'll stop there.

18 Under this provision, is it your
19 understanding that to the extent the University made
20 enhancements or modifications to a licensed software that
21 did not include licensed software, they were supposed to
22 distribute that to anyone, make it available to anyone?

23 A. Well, it says here the results is the results
24 of your research, which may not include a software --
25 piece of software at all. It could be a discovery, it

1 could be anything that -- that the -- the software was
2 used for.

3 If the modifications -- I don't know -- I
4 just need to read the language again; it's been a long
5 number of years since I've read this.

6 **** Brief Pause ****

7 I would have to conclude that by reading this
8 paragraph, the 101-A which you -- which you reference
9 here, I guess it was little -- little I two, long as it's
10 in accordance with paragraph 408 of the same agreement on
11 page 216, then it could be -- it could be made available
12 to someone.

13 It's -- it's hard, I think, to discuss what a
14 specific sentence or items means in here without taking
15 it in context of the entire agreement. First, outline
16 what the provisions are, and then once all those are
17 known I think you can probably go back and -- and discuss
18 it, but to take something in context just by itself
19 without the benefit of the rest of the agreement, I
20 think that's hard to answer a question like that.

21 Q. Well, do you need time to look at the rest
22 of the agreement to -- before you answer that question
23 or . . .

24 A. Well, I just -- I -- no, I answered the
25 question.

1 Q. Okay. And when you referred to paragraph four
2 point oh eight, can you read what you were referring to
3 in there, please?

4 A. This is a licensing agreement.

5 . . .It shall hold the -- the licensed
6 software in confident for AT and T and its associated
7 companies. Licensee further agrees that it shall not
8 make any disclosure of the licensed software, including
9 methods or concepts utilized therein to anyone.

10 Well, this -- this paragraph 408 that we were
11 just talking about says does not make any disclosure of
12 the licensed software including methods or concepts
13 utilized therein to anyone except students and faculty
14 members of licensee to whom such disclosure is necessary
15 to the something or other for which rights are granted
16 hereunder, but then if you -- if -- if you read that
17 paragraph and when it talks about that whoever you make
18 it available to, whether they're students or faculty,
19 they have to be made aware of the provisions that they
20 can't disclose it, so I think one -- one thing kind of
21 leads to another in -- in the agreement. So if I read
22 that 408, it -- it doesn't say you can't make it
23 available to -- you can't make it available to anyone
24 except students and faculties and -- and that by itself
25 was not -- say well, they're -- they're free of this

1 agreement.

2 It doesn't say that, because there's other
3 parts of this agreement that say that if you expose it,
4 they have to be aware of it and they have to, you know,
5 they have to abide by the agreement as well, so . . .

6 Q. So if I understand what you're saying, are you
7 saying that if they were distributing products and
8 modifications in accordance with 101-A, so long as they
9 did not include any portion of licensed software or so
10 long as they did not disclose the methods or concepts
11 utilized in licensed software, that they could be
12 distributed or made available to anyone? Was that your
13 understanding?

14 A. Well, I need to go back -- I really want to be
15 careful in the words that I use here.

16 I would -- I would think what this is saying
17 is that if the software -- if it did not contain any
18 portion of the -- of the licensed software product, the -
19 - or in some method reveal methods and concepts and
20 techniques, that it's possible, I can't say for sure.
21 I'd have to sit down and read the entire agreement and
22 reread the side letter.

23 Some of these things, I think, become
24 nebulous, because if you develop your own system
25 modifications and you use -- and it works with the

1 software that was licensed, there is a -- there is a very
2 good chance you are revealing methods and concepts just
3 strictly through the interface technique that -- that's
4 used, so . . .

5 Q. But assuming -- when you said it's possible,
6 you were saying it's possible that this agreement was
7 saying they should distribute it to anyone so long as it
8 did not include the licensed software of disclose methods
9 or concepts used in the licensed software?

10 MR. KENNEDY: Objection to form.

11 A. My interpretation of this is if -- if you were
12 developing software modifications without the benefit of
13 the licensed software, then you could distribute those,
14 but if you developed them with the benefit of the
15 licensed software that you could not distribute them to
16 anyone in this case if you mean anyone who is a non-
17 licensee.

18 So I believe this -- this . . .

19 Q. What do you base that on in the agreement.

20 MR. KENNEDY: Excuse me; I don't think he was
21 through with his answer.

22 Q. Oh, I'm sorry.

23 A. I believe that if you were to use the licensed
24 software as a research tool and -- or -- and you had made
25 modifications to that software to derive certain

1 equations or perform certain investigations, then I think
2 the fruits of that -- that research are made available to
3 anyone who would request it.

4 I do not believe that the -- the software
5 product -- licensed software and the enhancements that
6 you may have made to perform that research should be made
7 available to everyone. I -- I . . .

8 Q. But if you look at the results -- at the
9 paragraph 101-A, it says that such uses include uses made
10 in connection with the development of enhancements or
11 modifications to the licensed software, and then if you
12 look at . . .

13 A. What part were you reading from then?

14 Q. I'm looking in 101-A.

15 A. Uh-huh. What . . .

16 MS. SHAPREAU: Fifth line down.

17 A. Fifth line down?

18 MS. SHAPREAU: That's correct.

19 Q. Right. Including uses made in connection with
20 the development of enhancements or modifications to a
21 licensed software. And then if you look at little two,
22 subparagraph little two -- two little i's, says:

23 . . . Provided that such results,
24 enhancements and modifications all to the extent that
25 they do not include any portion of licensed software are

1 made available to anyone without restriction on use.

2 MR. KENNEDY: Is that a question?

3 Q. First I want him to read the -- the language.

4 So isn't it true that that language includes
5 enhancements and modifications in what is supposed to be
6 distributed, and not purely the results?

7 MR. KENNEDY: Objection to form. Legal
8 conclusion, argumentative, violates the rule of
9 completeness.

10 A. I guess I'm -- I'm really having a hard time
11 following your -- your question. I -- perhaps we're
12 reading this paragraph completely different. I -- I
13 don't know.

14 Let me just read it here again if I can.

15 Q. Sure.

16 **** Brief Pause ****

17 A. I guess I -- I feel like we're -- we keep
18 saying the same thing over and over.

19 Q. Well, can I -- I'll ask a new question.

20 You indicated before that you thought only
21 the results of research and not enhancements and
22 modifications were to . . .

23 A. No, I -- I didn't mean to say that.

24 Q. Maybe I misunderstood you.

25 A. I was saying as an example the results of the

1 research can -- should -- I think the agreement is -- is
2 clear that if the results of the research, in other
3 words, if you use the software to do research, you
4 perform calculations . . .

5 Q. Uh-huh.

6 A. . . . with it or analyze it or however you
7 want to interface with the software, that the results of
8 that research, which are non-software oriented, need to
9 be made available to everyone.

10 Q. And then this -- isn't it true also that
11 it says enhancements and modifications to the extent
12 they not -- do not include any portion of licensed
13 software . . .

14 A. Yes; that's right.

15 Q. . . . are also to be made available?

16 A. Yes, and I'll -- and again, I think that's
17 where reading the -- reading the agreement differently,
18 because the licensed software to me encompasses methods
19 and concepts techniques, so that's why I go back to my
20 previous statement that if -- if you develop such
21 enhancements without the benefit of the source code, then
22 I think those can be made available to anyone.

23 As an example, if -- if you were to say to
24 write me a device driver that I want to -- to drive this
25 machine that monitors the heart or something, and you --

1 you do that without the benefit of the source code, then
2 I think that belongs to the licensee. In other words,
3 they can do whatever they want to with it, but to the
4 extent at some point where it gets involved with the
5 source code, then I -- and its methods and concepts, then
6 I think there -- there's a restriction on its -- on its
7 use, so . . .

8 Q. Where do you find that restriction in the
9 agreement?

10 MR. KENNEDY: Excuse me. Merely to preserve
11 an objection, I wanted to preserve one objection to the
12 prior question. The exchange was somewhat rapid-fire.
13 Go ahead.

14 A. I -- I'm really not trying to be stubborn, I
15 just don't follow your -- your question.

16 Q. Well, the language in 101-A, again focusing on
17 the little subparagraph two says:

18 . . . Such results, enhancements . . .

19 A. And modification. . .

20 Q. . . and modifications, all to the extent
21 that they do not include any portion of licensed
22 software . . .

23 A. Yes, I . . .

24 Q. . . are made available to anyone.

25 A. And I -- yes. Yes, and I agree . . .

1 MR. KENNEDY: Let me talk to Mr. Frasure.

2 I don't think there's -- that's just a
3 statement by opposing counsel, and it sounds very
4 argumentative to me. She's got to frame her question. I
5 know you're trying to help her out, and I appreciate
6 that; I'm sure she does as well. But she hasn't asked
7 you a question.

8 Q. So under that language where it says that
9 results, enhancements and modifications to the extent
10 they do not include any portion of licensed software, the
11 -- are to be made available, isn't it correct, to anyone
12 so long as they do not include the licensed software?

13 MR. KENNEDY: You're asking his understanding
14 as . . .

15 Q. Yes.

16 MR. KENNEDY: . . . as it reads in the text?

17 Q. Your understanding.

18 A. I'll go back to what I said a little bit ago.
19 I believe that sentence is being read out of context with
20 the rest of the agreement.

21 Q. Well -- and then, my follow-up question is
22 what in the agreement do -- what else in the agreement do
23 you think one needs to look at in order to . . .

24 A. Method -- the -- the paragraph . . .

25 Q. . . .provide. . .

1 A. . . . four point oh eight that was on page
2 216, and that's where we're talking about that the
3 licensee is going to hold the software in confidence and
4 shall not make any disclosure of the licensed software
5 including methods or concepts utilized therein to anyone.

6 Q. Uh-huh. So as long as the enhancement or
7 modification does not include any portion of licensed
8 software in it and so long as it does not disclose
9 methods or concepts used in the licensed software, is it
10 your understanding that it was to be distributed to
11 anyone?

12 MR. KENNEDY: Objection to form.

13 You may answer.

14 A. I would say that it -- that it -- it would
15 have to be made available to anyone if it was made
16 available to someone, anyone that would request it would
17 -- would get it -- would be able to receive it, but I
18 guess that -- that's all I can say. I -- I think you're
19 trying to get me to say something that I don't agree
20 with. I don't think the agreement said that.

21 Q. Well, do you not -- do you disagree with my
22 prior . . .

23 MR. KENNEDY: Excuse me. He wasn't . . .

24 Q. I'm sorry; you're right.

25 MR. KENNEDY: . . . through with his answer.

1 Q. I'm sorry; go ahead.

2 A. No, I'm just saying that this agreement, I
3 think, is -- is -- is very comprehensive, and to look at
4 any one specific statement with -- again, without looking
5 at the entire agreement I think is -- just can't be done,
6 so if we were to sit here and -- and review all of it and
7 then try to go back and assemble it, you can't say
8 everything in one sentence, so there are provisions here
9 that we have to be I guess concerned with as -- as I
10 answer that question.

11 That's why I wanted to look at the rest of
12 the agreement.

13 Q. Okay, why don't we take a break now, and
14 during the break why don't you go ahead and look at the
15 rest of the agreement and then we'll come back and . . .

16 A. Well, do you have more questions about this
17 agreement?

18 Q. Well, I -- to the extent that you think
19 looking at the agreement will . . .

20 A. I -- I meant that, I guess, in a general
21 sense, that I, you know we were -- we were stuck on -- on
22 that one paragraph, that one subitem, little two, and
23 again, I think that's a -- a statement that we're talking
24 about out of context without reviewing other parts of the
25 agreement, and I think that's where -- where 408 . . .

1 Q. Are there any parts other than 408 that you
2 think would affect how you read or understand that
3 section 101?

4 A. I think that's the . . .

5 MR. KENNEDY: Objection. Objection to form.

6 Counsel, we've not designated Mr. Frasure as
7 an expert witness to offer opinion testimony concerning
8 how he construes the meaning of these agreements today,
9 and I just want that to be clear in the record, because
10 candidly I'm puzzled by we've spent in excess of thirty
11 minutes asking him how walking into this Deposition today
12 he would understand or what he understands these
13 agreements to mean. I don't think it's relevant. I
14 think it's a waste of time, but it's your Deposition.

15 A. I don't have any other -- I have scanned this
16 agreement, and I think the -- the thing that's of most
17 concern to me in discussing that paragraph is 408 with
18 methods and concepts.

19 Q. In section -- looking now just at section 408,
20 that provides that licensee may not make any disclosure
21 of the methods and concepts in the licensed software.

22 A. Uh-huh.

23 Q. Is that your understanding?

24 A. In addition to other restrictions, that's --
25 that's my understanding; yes.

1 Q. Okay. But with respect to the methods and
2 concepts, what is restricted in that paragraph is the
3 disclosure of those methods and concepts.

4 MR. KENNEDY: Objection to form.

5 Q. Is that right? Is that your understanding, in
6 this paragraph?

7 A. Disclosure has many forms, so it -- if I look
8 at the -- the word disclosure as having many forms, then
9 -- then I would agree with that.

10 Q. Okay.

11 A. Not just -- not just one form, but many.

12 You can reveal how things are done by the way
13 you do other things, and that's a disclosure.

14 Q. In looking at paragraph four point oh nine on
15 the same page, that's page number 216 of Exhibit D-34 --
16 actually, I don't mean -- is it? Yes.

17 Four point oh nine, it states:

18 . . . The obligations of licensee and of
19 its students and faculty members under section four point
20 oh eight shall survive and continue after any termination
21 of rights under this agreement; however, such obligations
22 shall not extend to any information relating to the
23 licensed software which is now available to the general
24 public or which later becomes available to the general
25 public by acts not attributable to licensee, its students

1 or faculty members.

2 A. Uh-huh.

3 Q. So under that provision, section four oh eight
4 would restrict disclosure of methods and concepts
5 utilized in the licensed software only to the extent that
6 those methods and concepts are not available to the
7 general public or do not later become available to the
8 general public through acts not attributable to licensee,
9 its students or faculty members; is that your
10 understanding?

11 MR. KENNEDY: Objection to form.

12 A. Well, that's -- I -- I guess we have to
13 interpret that. One of the things that general public
14 means, there's a number of textbooks that are published
15 about Unix operating system, and -- and how it operates
16 and -- and things, so there's -- I -- I think that's one
17 piece of information that's made available to the general
18 public, but . . .

19 Q. So -- oh, excuse me.

20 A. And I would not interpret this, though, that
21 if another licensee was to go out and to make copies of
22 the Unix software and distribute them overnight to the
23 world, I don't think that that would constitute that it
24 was -- that it was available.

25 In other words, if someone has violated their

1 -- their agreement . . .

2 Q. But if something were in a textbook, for
3 example, a method or concept was discussed in a textbook
4 that one could buy in a bookstore, then that method or
5 concept could be disclosed?

6 MR. KENNEDY: Are you . . .

7 A. No, I would not agree with that.

8 MR. KENNEDY: Okay.

9 A. Someone may have published it incorrectly, so
10 I -- I can't agree with that statement, because there --
11 there are people who are very familiar with the operating
12 system who -- who may write a textbook that would
13 inadvertently disclose something that they should not --
14 not disclose. True, it's been put -- it's been put out
15 and -- and made available, but someone could also be in -
16 - in violation of their -- their agreement, so I just
17 can't agree with your statement without taking some
18 exception to it.

19 Q. What if it were a textbook that was put out
20 with -- either by AT and T or its affiliates or with the
21 consent of AT and T?

22 Let's take the first instance -- by AT and T
23 itself?

24 A. If -- if the text was a . . .

25 MR. KENNEDY: Objection to form.

1 You may answer.

2 A. If -- I would assume that if the text was
3 freely made available to the public and it was published
4 by AT and T, then -- then anything that was in there,
5 someone could use.

6 Q. And what if the book was sold in bookstores
7 that was -- with the consent of AT and T?

8 A. If AT and T . . .

9 MR. KENNEDY: Objection to form.

10 You may answer. I just think it's very . . .

11 Q. I'm almost finished.

12 MR. KENNEDY: . . . unclear what it is that
13 you're getting at with -- with what I think are ambiguous
14 hypotheticals. But to the extent Mr. Frasure can give
15 you his understanding today, I'm not preventing you from
16 getting at it.

17 Q. (To Mr. Kennedy:) Thank you.

18 A. Well, I think if AT and T -- appropriate
19 people within AT and T had reviewed the text and approved
20 it, then, I mean I would just have to assume that someone
21 -- anyone could use it.

22 Q. All right. Let's take a break now.

23 **** RECESS ****

24 by Ms. Fithian:

25 Q. You mentioned earlier something you called

1 source code exchange. Can you describe what you meant -
2 what that is?

3 A. There are provisions in the software license
4 agreement that would allow one licensee that had a
5 specific license to exchange source code with another
6 licensee. There are certain restrictions that are based
7 on that source code exchange.

8 Unix had a number of release levels or
9 versions how -- whatever terminology you would want to
10 use to it. Thirty-two V was -- was one; System Three,
11 the Roman numeral three was -- was another; System Five
12 was another. And the provisions were that if you were a
13 System Three licensee you could exchange source code with
14 any other System Three licensee, and you could receive
15 code from a Thirty-two V licensee, but you could not give
16 your System Three code to someone who had a lower license
17 level, for instance, a Thirty-two V. So you could -- a
18 Thirty-two V could provide source code to a System Five
19 licensee, but a System Five licensee could not provide it
20 to a -- to someone who was on a license for a Thirty-two
21 V or for System Three.

22 So there were restrictions on it. On the
23 System Five license, there were also a number of versions
24 of System Five software that were designed to run on
25 specific machines. They were designed to run, as I

1 recall, I -- I don't recall if there was -- there was
2 four or five, but there was -- there was a version to run
3 on Digital Equipment Company machines, those machines
4 that used Intel processors, those machines that used
5 National Semi processors, those that used Motorola, and
6 there was -- there was one other one that -- that really
7 named -- never really truly blossomed into -- into
8 fruition, so if you were a Vax or a Dec licensee of
9 System Five, you could only exchange source code with
10 another Dec licensee of System Five. You could not
11 exchange source code with someone who had a -- an Intel
12 version license because you would be obtaining the
13 technology outside of the scope of the license, so the --
14 the System Five licenses were specific in the version
15 that you had.

16 So one of the provisions of the contract,
17 they'll allow you to exchange source code with certain
18 restrictions with other -- with other licensees of Unix
19 operating system.

20 Q. And if I understand you correctly, if you had
21 a System Five license, you could obtain System Three,
22 System Five or Thirty-two V from another licensee.

23 A. If -- if you were -- you have to be careful
24 with system -- with your type of System Five. You had
25 to be licensed in the product family of technology,

1 whether it be Digital Equipment Company on Intel or
2 someone, so . . .

3 Q. Within a product family . . .

4 A. Yes.

5 Q. . . . if you had a System Five license, you
6 could obtain System Five, System Three or Thirty-two V
7 source code from another licensee?

8 A. That's right.

9 Q. Okay. Let's mark as the next exhibit D-35, a
10 document, it's numbered P twelve eight twenty-three
11 through P twelve eight forty-five.

12 Can you identify what the document that's
13 been marked as D-35 is?

14 A. No.

15 Q. No? Okay.

16 Have you ever seen the document before?

17 A. Not to my knowledge. It was issued after I
18 left AT and T.

19 Q. I see. Let me -- actually I should get back
20 to the chronology and complete that.

21 When did you leave AT and T?

22 A. The last day of March of -- last working day
23 of March of 1987.

24 Q. And I believe you said before that your
25 position did not change once you joined the licensing

1 organization; is that correct?

2 A. That's correct.

3 Q. Did your responsibilities change at all?

4 A. I took on additional responsibilities. My --
5 my original responsibilities did not change. There was a
6 -- one of the other assistant managers that was in the
7 organization who is responsible for interfacing with
8 customers in terms of technical support or technical
9 questions left the organization and went to Summit. So
10 his people reported to me, so I took on additional . . .

11 Q. Who was that?

12 A. Who was that? Dave Syndell was his name.

13 The public relations people came to work for
14 me and the -- the technical support staff came to work
15 for me and the -- excuse me -- that maintained our
16 machine and that would interface with customers and
17 answer questions.

18 Q. Okay, let's mark this as D-36. It's documents
19 produced by Plaintiff with Bates numbers P five five
20 seven zero through P five five seven three.

21 Take a moment to look through the document,
22 and let me know when you're done looking at it.

23 A. (Complied.)

24 All right.

25 Q. Now, I noticed in the second paragraph, it

1 says:

2 . . . We propose to furnish you a copy
3 of Unix System Five eleven seven fifty version and to
4 grant you the right to use such version and any other
5 software identified in the attached Software List for
6 Unix System Five for an upgrade fee of one thousand U. S.
7 dollars.

8 And if you look at the last page of the
9 Exhibit D-36, there's a document called Software List for
10 Unix System V.

11 Under this letter, is the software listed on
12 System V all available for the one thousand dollar
13 upgrade fee?

14 A. Say that again; I didn't understand your
15 question.

16 Q. Okay. Looking at the second paragraph on the
17 first page of D-36 . . .

18 A. Uh-huh.

19 Q. . . . it says:

20 . . . We grant you the right to use such
21 version and any other software identified in the attached
22 Software List for Unix System V for an upgrade fee of one
23 thousand U. S. dollars.

24 A. Uh-huh.

25 Q. So looking now at the last page of the list,

1 all of the different versions listed on here were
2 available for one thousand -- a one thousand dollar
3 upgrade fee?

4 A. It -- no, it says that you're allowed to use
5 those.

6 Q. Okay. And looking at the last page, there is
7 a distribution fee next to the various versions. Does
8 that mean that these versions were available for the
9 distribution fee?

10 MR. KENNEDY: Objection to form.

11 A. It means that they could obtain them from AT
12 and T for four hundred dollars, which included the -- at
13 that time, as I recall, the magnetic media with the
14 software on it and the -- and the documentation. I
15 believe this -- well, I'll let you ask the questions.

16 Q. Okay. So the one thousand dollars gave the
17 right to use it and then for each particular version the
18 -- the licensee wanted to obtain from AT and T they would
19 in addition pay the distribution fee?

20 A. Yes.

21 Q. Is that the . . .

22 A. If they . . .

23 MR. KENNEDY: I'm sorry. To use -- you said
24 to use it?

25 Q. It.

1 MR. KENNEDY: What is it?

2 Q. Okay, let me clarify the question.

3 Okay, the one thousand dollar upgrade fee, I
4 believe you said, was granting -- to grant the right to
5 obtain the right to use . . .

6 A. It granted the right to use that -- that
7 software; that's correct.

8 Q. And by that software, what do you mean?

9 A. That's on the attachment.

10 Q. Okay. By -- the attachment is Bates number P-
11 5573?

12 A. Yes.

13 Q. Okay.

14 A. What . . .

15 Q. So you obtain the right to use the software
16 listed on page 5573 for the one thousand dollar upgrade
17 fee, and in addition, you paid a distribution fee in
18 order to obtain the particular version you wanted?

19 A. You paid to AT and T that distribution fee if
20 you elected to get that software from AT and T.

21 Q. Okay. And could get that software without
22 paying the distribution fee by getting it from somebody
23 else?

24 A. Yes.

25 Q. You would get it from another licensee?

1 A. Another licensee of that technology; yes.

2 Q. Okay.

3 MR. KENNEDY: Could -- I think the record may
4 be unclear. Could you clarify -- I mean, we kept going
5 back and forth with that software and it and -- and the
6 like.

7 Q. I think the last question was clear, but we
8 were talking about the software listed in the software
9 list for Unix System Five contained on page P-5573.

10 That was your -- that's what you were
11 answering to; is that right?

12 A. Yes, well I -- what I said was that for the
13 thousand dollar upgrade fee, in -- this corporation
14 receives which we term the Vax version or Dec version of
15 the Unix System Five, that's where the eleven slash seven
16 fifty -- that was a Dec computer model number -- that for
17 that upgrade fee they were allowed to use these versions
18 of the software, and they had the option of either
19 paying AT and T a distribution fee to obtain those or
20 they could go to another licensee and obtain them.

21 Q. Okay.

22 MR. KENNEDY: By those, are you referring to
23 the software on the software list page 5573?

24 A. Yes.

25 MR. KENNEDY: Okay. Thanks.

1 Q. Okay. And, then, let's mark as the next
2 exhibit . . .

3 So this is D-37?

4 Okay, D-37 is page Bates number P-5241
5 through P-5253, again documents produced by the Plaintiff
6 in this action, and I'll direct your attention to the
7 page Bates number P-5243, paragraph number two point oh
8 two. If you want to read that paragraph and let me know
9 when you're finished.

10 A. (Complied.)

11 Q. Before I ask -- are you finished reading that
12 portion?

13 A. Uh-huh.

14 Q. Before I ask you a question specific to that,
15 I'll ask you a more general question about this
16 particular agreement. It's called Software Agreement
17 Between Western Electric Company and Advanced Business
18 Communications, Inc., for Unix System Five, and it's --
19 it says:

20 . . . Effective as of January 15, 1984.

21 Do you know if this is a standard form
22 agreement that was used for commercial licensing
23 agreement System Five?

24 A. It appears that it was.

25 Q. Looking at the first page after the title

1 page, which is Bates P-5242, at the very top of the page
2 there is some letters and numbers that says W six Roman
3 numeral five corp oh seven oh one eight three dash one.

4 Is that a revision number of the agreement?

5 A. Yes. Uh-huh.

6 Q. Okay. And the last numbers where it says
7 seven oh one eight three one, is that a -- is that a
8 reference to a date?

9 A. It was -- it -- normally a date. This is
10 really prior to my coming with the organization, but our
11 general method was -- with the number was the date that
12 the form was revised and was put into effect to be used,
13 yes.

14 Q. Okay. And I think you said that you had
15 joined the license organization in either late '83 or
16 early '84?

17 A. Early '84, uh-huh.

18 Q. Okay. So this one -- this particular
19 agreement, which is effective January 15, 1984, maybe
20 went into effect around the same time as you joined the
21 licensing organization?

22 A. Yes. The -- I did not -- I guess probably for
23 the first -- I was more of an observer, really, for
24 probably four to six months and sat with the attorneys
25 and with Otis in various meetings and was, you know, in

1 the process of learning . . .

2 Q. Uh-huh.

3 A. . . . so this agreement would have been
4 entered into some time, if I was with the organization,
5 in my early -- early introduction to the organization. I
6 really don't recall the date.

7 Q. Okay. Did you -- can you tell from looking at
8 this agreement whether this was an agreement that was in
9 use when you completed your sort of training process?

10 MR. KENNEDY: You mean whether this form of
11 agreement?

12 Q. Right.

13 A. I don't believe so. I believe we had modified
14 it again.

15 Q. Again?

16 A. Uh-huh.

17 Q. Okay. Now, looking at the page with Bates
18 numbers 5243, paragraph two point oh two, it states:

19 . . . Within a reasonable time after a
20 CPU becomes a source CPU pursuant to Section two point oh
21 one C, other than by replacing another source CPU,
22 Western or one of its affiliates will furnish to licensee
23 without payment of a distribution fee, one copy of the
24 version of software requested by licensee from the
25 available versions in the attached issue of the software

1 list for Unix System Five. Such list identifies the
2 various versions of Unix System Five and other Unix
3 operating systems that may be used under this agreement
4 and their applicable distribution fees.

5 Now, is the list referenced in this paragraph
6 the list that's the last page of the Exhibit Bates
7 numbered 5253?

8 MR. KENNEDY: Counsel, I don't have any
9 particular concern with that question other than to as to
10 its form, but I don't see the point in asking Mr. Frasure
11 about this agreement in view of his testimony that this
12 agreement really predates his active involvement in the
13 licensing operation and when he became more actively
14 involved following training, the agreement had changed,
15 at least without laying additional foundation.

16 Q. Is it your understanding that . . .

17 A. It appears to be the list that's referenced,
18 yes.

19 Q. Okay. And it appears to be similar to the
20 letter that we saw in Exhibit D-36, doesn't it, in that
21 the software . . .

22 A. Without comparing, it appears to be the same.

23 Q. Okay. And as with that letter, the software
24 listed on page Bates 5253 was all available to the System
25 Five licensee for the distribution fee; is that your

1 understanding?

2 A. If they -- yeah, what it said was you got one
3 of these at no cost. I mean, it was included in the cost
4 of the license. The cost of the license at that time
5 included a distribution.

6 Q. I see.

7 A. And then you could obtain other ones for a --
8 for an appropriate fee.

9 Q. I see. Okay. And like with the letter, could
10 one also obtain these from another licensee without
11 having to pay a distribution fee to AT and T?

12 A. Yes.

13 Q. Okay.

14 Okay, Exhibit D-38 is documents P-8539
15 through P-8543 produced by Plaintiff in this action.

16 Now, if you'll look -- and the document
17 appears to be a letter written to Digital Equipment
18 Corporation and signed by Otis Wilson.

19 Now, looking at the paragraph down of the
20 letter, it says:

21 . . . With respect to point four, object
22 software is not limited to machine executable object code
23 but may include the source coding of files listed in the
24 section entitled Object Software in the Schedule for Unix
25 System Three attached to the referenced software

1 agreement or the schedule for Unix System Five attached
2 to the proposed letter agreement. See the definition for
3 object software in the referenced software agreement.

4 Is it -- was it your understanding when you
5 were involved in licensing that -- and particularly in
6 licensing or sublicensing of object code, that the object
7 software included some source code . . .

8 A. Yes.

9 Q. . . . as well?

10 A. Yes.

11 Q. Okay. And -- okay, let's mark this the next
12 exhibit in order, D-39, which is a copy of a document
13 produced by The University of California in this action.

14 Now, looking at page eight . . .

15 MS. SHAPREAU: Excuse me.

16 MS. FITHIAN: Uh-huh.

17 MS. SHAPREAU: What -- could you tell me what
18 this is?

19 MS. FITHIAN: It's Unix Version System Three
20 commercial.

21 MS. SHAPREAU: Thank you. What is the date?

22 MS. FITHIAN: The date is -- it says
23 effective as of December 1, 1982 between AT and T and The
24 Regents of the University of California Unix System
25 Three.

1 MS. SHAPREAU: Thank you.

2 MR. KENNEDY: Has -- has the University made
3 only one production of documents to BSDI?

4 MS. FITHIAN: I believe that's the case.

5 MR. KENNEDY: Okay. So I -- may I assume
6 that. . .

7 MS. SHAPREAU: I'm assuming this has been
8 produced . . .

9 MR. KENNEDY: . . . that we've -- because we
10 don't have -- they weren't Bates numbered. My
11 understanding is everything that was given to BSDI has
12 since been given to us.

13 MS. SHAPREAU: That's correct, and I -- I
14 believe the second batch will be Bates numbered.

15 MR. KENNEDY: Okay.

16 by Ms. Fithian:

17 Q. Okay, looking at page eight under the
18 definitions appendix, there is a definition of object
19 software in this agreement that states:

20 . . . Object software means all or any
21 portion of licensed software comprising the computer
22 programs and other information listed in the section
23 entitled Object Software and the documentation listed in
24 the sections entitled. . . Document and On-Line
25 Documentation in the attached schedule for Unix System

1 Three.

2 And attached to the agreement there is a
3 schedule for Unix System Three, and under this definition
4 of object software, when you look at the schedule page
5 four item number three is entitled Object Software in the
6 System Three schedule.

7 Is it correct that all of the programs under
8 the object software number three heading were to be
9 treated as object code -- object software under the
10 agreement?

11 MR. KENNEDY: Objection to form.

12 Q. Was it your understanding?

13 A. I don't -- I can only assume by reading the
14 words there that we read that that's what it means, that
15 these items that are -- that are listed are considered to
16 be object software.

17 Q. Okay.

18 A. As part of not only object software, part of
19 the object software.

20 Q. Okay. And looking at the list of files under
21 object software, and particularly looking at three point
22 five, the user file system, does that include source
23 files as well?

24 A. I couldn't tell you for sure by looking at the
25 names of some of the files. I would -- I would say that

1 it includes non-object code. It may be text.

2 For instance, I spot here at the top of the
3 third column a file called Ben slash Help . . .

4 Q. Uh-huh.

5 A. . . . which is normally written text that when
6 you ask for help on the computer it -- it brings it up.
7 There are other files that were used that you're familiar
8 with, shells that were in the provider's part of Unix.
9 They are executed in real time. In other words, they are
10 -- those items are not compiled into object code and sent
11 out as -- as binary or object code, they -- they're
12 interpreted is the correct term at the time that you want
13 to execute that, so they -- you consider those to be
14 source code.

15 I'm not familiar with . . .

16 If you look down at the fourth item from the
17 -- from the bottom on the -- on page six, there's a file
18 there Games slash Vibes slash Quiz.

19 Q. Uh-huh.

20 A. Slash and macros, and macros are normally a
21 source code type of product or of any type that could be
22 called into a program dynamically to be used, so there is
23 -- I'm sure that -- I can only theorize that these
24 contain some -- some type of source code, based on my
25 previous exposure to the system.

1 Q. Looking at the next page on the list, page
2 seven . . .

3 A. Yes.

4 Q. . . . that include files, are those source
5 files?

6 A. I can't . . .

7 MR. KENNEDY: Objection to form.

8 Go ahead.

9 A. Typically, an include file is a a source file;
10 however, I can't speak for these. I'm -- I'm not a -- a
11 Unix System programmer, so I'm not that familiar with the
12 system, but I can only say that typically an include file
13 is some type of a source file.

14 Q. Do you know what a -- an include file, what
15 the purpose of an include file is?

16 A. So you don't have to keep repeating the same
17 code over and over and over again to -- you just --
18 there's a term called include. There's a difference
19 between call and include. Include is the ability to
20 bring in source code in -- in a repetitive method so you
21 don't have to -- your programs don't have to be so big,
22 so hard.

23 Q. Is that a -- would you call that a text file?

24 MR. KENNEDY: Could we establish a context?

25 Q. That meaning an include file?

1 MR. KENNEDY: I mean, you've made no effort
2 to lay foundation whatsoever, and he's testified that he
3 wasn't involved in programming Unix.

4 So if you could . . .

5 MS. FITHIAN: I'm just asking for his
6 understanding. He was the . . .

7 WITNESS MR. FRASURE: The only thing I
8 can . . .

9 MS. FITHIAN: . . . did say that he used the
10 Unix System as a programmer.

11 MR. KENNEDY: Just as long as there's a
12 context. I don't have any problem with you asking about
13 the area as long as we have context.

14 by Ms. Fithian:

15 Q. So the question was, do you -- did you know --
16 would you consider that the include files should be text
17 files as you used that term a few questions ago?

18 A. They could be. I'm sure they -- they would
19 include some type of text, yes. And they may include
20 some type -- a code that can be interpreted. I mean, I --
21 - I'm just not that familiar with these files.

22 Q. Okay. Okay, in looking at the same document,
23 the same exhibit, at least, Exhibit D-39, there is
24 another document called supplemental agreement attached
25 to the main agreement after all the schedules.

1 MS. SHAPREAU: What was the date of the
2 supplemental agreement?

3 MS. FITHIAN: The supplemental is -- it
4 states effective as of December 1, 1982, and it's called
5 Supplemental Agreement, Time Sharing.

6 MR. KENNEDY: Let the record reflect that it
7 predates Mr. Frasure's involvement with licensing.

8 by Ms. Fithian:

9 Q. Do you know what is meant by time sharing, or
10 do you have any understanding what is meant in the
11 supplemental agreement in Exhibit D-39 when it says time
12 sharing?

13 A. Time sharing is a -- is -- is a phrase that
14 can have many definitions, and it really is a -- I can --
15 I can read this if you'd like and theorize what it --
16 what it means, but I'm -- you know, time sharing, I --
17 I'm not familiar with this agreement. I'd have to read
18 it and . . .

19 Q. Have you . . .

20 A. . . . but I think it -- it looks like -- at
21 least by paragraph 301 they're talking about someone
22 dialing in remotely to access the computer.

23 Q. Have you been involved in or have any
24 familiarity with time sharing agreements, supplemental
25 agreements such as this one, even if it's not necessarily

1 the identical agreement?

2 A. The same type of things were covered under
3 System Five agreements under a sublicensing agreement,
4 and the royalties paid under the sublicensing agreement
5 were a function of how many users could use the object
6 computer. So there was a fee for a one-to-two-user
7 system and a fee from two to six or eight or whatever
8 those numbers were, but fee was structured on basically
9 at that time on how large the machine was or its ability
10 to handle people who were dialed into it on a -- on a --
11 a remote terminal.

12 So the same type of things were covered under
13 the System Five agreement in a little bit different
14 terminology; it wasn't called time sharing, it was called
15 number of users.

16 Q. I see. And so someone under the System Five
17 agreement, if a licensee wanted to sublicense the object
18 software and source -- source files included in the
19 object software schedule, they could provide that on a
20 time-sharing basis, on a dial-up basis in other words?

21 A. That's correct.

22 MR. KENNEDY: Objection to form.

23 Q. And the fees would depend on how many users
24 could dial up a particular computer at a given time?

25 A. That's correct.

1 Q. Was there a limit on the total number of users
2 that -- other than a technical limit, was there a limit
3 placed by AT and T?

4 A. There was -- there was parameters established,
5 like I said, from one to two and -- and from three to six
6 or three to eight. I don't recall the amount, but it got
7 up to a point and I don't know if it was greater than a
8 hundred and twenty-eight or greater or whatever if your
9 machine had that -- that amount of technical speed to --
10 to handle it then you -- you paid appropriate fee for
11 that.

12 So the -- I believe the term time sharing
13 disappeared.

14 Q. I see. And would the -- what we've been
15 referring to as the time sharing rights tend to be
16 provided in a separate supplemental agreement from the
17 basic binary sublicensing right?

18 A. Are you talking about this specific agreement?

19 Q. Well, just in general in your experience.

20 A. No, they were provided as part of the System
21 Five sublicensing agreement.

22 Q. I see.

23 Okay, we've marked as Exhibit D-40 a two-page
24 document with Bates numbers P-5524 through P-5525.

25 Just take a moment to look at it.

1 A. (Complied.)

2 Q. Okay. Now, this letter -- looking at
3 paragraph two, and by the way, it's a letter to Mr.
4 William Gates at Microsoft with original signed by G.
5 Baldwin. Now, it states in the second paragraph:

6 . . . This letter is written approval from
7 Western Electric for you to transmit object code binary
8 software to any of the countries listed in the attached
9 schedule pursuant to such customer agreements with your
10 customers and to approve transmittal of such software to
11 such countries.

12 Looking at the particular schedule attached
13 here, is it true that the object version of the software
14 could be furnished to any customer in these countries,
15 any of the countries listed on the schedule?

16 MR. KENNEDY: In view of the date, I'd really
17 appreciate it if you would lay a foundation . . .

18 MS. FITHIAN: I'll start by asking his
19 understanding, and then I'll -- I will . . .

20 MR. KENNEDY: Well . . .

21 MS. FITHIAN: . . . ask him about his own
22 personal experience.

23 MR. KENNEDY: I gotta tell you. I try not --
24 I mean, it's your Deposition, and I try not to direct
25 the areas that you get into; that's your decision. But

1 you persist in getting -- and you've done this with
2 numerous witnesses -- the understanding, subjective
3 understanding of individual witnesses, views of what
4 agreements mean when agreements or letters are either the
5 best evidence of what they mean or they speak for
6 themselves with no indication of other communications,
7 whether the subjective understandings were communicated
8 to other persons and the like, all of which I think is
9 very much irrelevant and a waste of time, and while --
10 while I wouldn't cut you off, Mr. Frasure no longer works
11 for AT and T or USL, and time is limited. And to the
12 extent that we're -- we're -- we're in a position where
13 we need to call him back, I am not threatening to bring
14 to the judge's attention such inquiry, but I certainly
15 reserve my right to do so.

16 I do wish we would proceed in a somewhat more
17 orderly fashion by establishing so that I don't have to
18 go back and -- and do it on the record whether documents
19 have been seen before or whether Mr. Frasure -- he may
20 well very -- may well be familiar with letters like this,
21 but some reference . . .

22 MS. FITHIAN: I mean to get into that if I am
23 allowed to ask any further questions.

24 by Ms. Fithian:

25 Q. Do you remember the question?

1 A. No.

2 Q. Looking at this particular letter, is it your
3 understanding that the -- that it permits the object
4 software to be distributed to any customer in any of the
5 countries listed on the attached schedule?

6 A. It appears that, yes.

7 Q. Now, when you were involved in licensing, was
8 there a similar provision in place such that binary or
9 object versions of software could be distributed to
10 anyone within a particular list of countries?

11 A. If -- yeah, they -- they could be distributed
12 to a specific set of countries; that's correct. Yeah.

13 Q. Uh-huh.

14 A. There were restrictions on the countries.

15 Q. Okay. And anyone within the countries on the
16 particular list that was current at a given time could
17 obtain the binary or object software?

18 A. Yes.

19 MR. KENNEDY: Objection to form.

20 Q. I'm sorry; I didn't hear your answer.

21 A. I would -- I would assume so, yes. I'm
22 hesitant in asking. I need to . . .

23 Q. As far as you know; your understanding?

24 A. Well, the term anyone in those countries
25 bothers me, and I'd say within -- within reason there

1 were -- that if -- if a copy was being sold, licensed to
2 someone in that country that they just didn't enter that
3 country for the sole purpose of obtaining the software to
4 go back and take it to some other country where it wasn't
5 licensed.

6 But I think as a -- probably as a general
7 statement that's true.

8 Q. Did AT and T have any involvement in the
9 licensing of the binary version by its licensees?

10 MR. KENNEDY: Object.

11 A. What do you mean by involvement? I -- I'm not
12 sure what you're asking.

13 Q. When a licensee with a sublicensing agreement
14 wanted to license -- sublicense an object version of Unix
15 software to someone in any of the countries listed,
16 assuming they entered into the appropriate agreement with
17 that licensee, was there any restriction by AT and T on
18 who could enter into such agreements?

19 MR. KENNEDY: Objection to form.

20 A. I'm still not clear what you're asking. There
21 was -- the sublicensing agreement had a -- a number of
22 provisions that the holder of that agreement, when they
23 distributed a binary product, had to fulfill, and if they
24 fulfilled those and other federal requirements that --
25 that govern certain things that could be shipped out of

1 the country, long as they were in compliance with that,
2 then, I mean yeah, we -- we did have something to say
3 about its distribution, but everything we had to say was
4 in -- was in the sublicensing agreement.

5 Q. Okay.

6 A. But the sublicensing agreement, I just might
7 add, is not -- is not the sole restrictions placed on the
8 product, because there were federal export restrictions
9 and otherwise there are rules in effect by the federal
10 government that they had to be aware of as well.

11 MR. KENNEDY: Excuse me.

12 You referenced an agreement but didn't direct
13 Mr. Frasure to any of the provisions of it.

14 Do you intend to come back . . .

15 MS. FITHIAN: Well, I think he referenced an
16 agreement in his testimony.

17 MR. KENNEDY: No, he referenced his -- his
18 understanding of . . .

19 MS. FITHIAN: Right.

20 MR. KENNEDY: . . . of agreements --
21 commercial sublicense agreements. I simply want to
22 reserve my right to move to strike any testimony to the
23 extent that it is -- it is to be used or attempted to be
24 used in any way to be definitive as to what the agreement
25 said in light of the fact that you haven't shown the

1 agreements to Mr. Frasure.

2 And for you to understand that what rights
3 were granted were in our view granted under the license
4 agreement and that license agreements are the best
5 evidence, so I -- to the extent that that can be
6 construed as an objection to form, I want my position to
7 be clear on this record so that if later you attempt to
8 cite to Mr. Frasure's testimony and we say that testimony
9 doesn't do it, you've got to go to the agreements, and
10 you want Mr. Frasure back, I want you to understand I'm
11 objecting to form now so that we understand each other.

12 MS. FITHIAN: Can I just take a short break
13 so I can. . .

14 **** BRIEF RECESS ****

15 by Ms. Fithian:

16 Q. Let me know when you're done . . .

17 A. I'm just perusing; I'm not sure what you're
18 after.

19 Q. Okay. Right. I just wanted you to glance at
20 it before I started asking questions.

21 Okay, we've marked as Exhibit D-41 documents
22 with Bates number P-5559 through P-5569, and looking at
23 the third page in the exhibit with Bates number 5561
24 that's called AT and T Technologies, Inc., Sublicensing
25 Agreement.

1 Is this a sublicensing agreement for object
2 software of the Unix operating system?

3 A. To distribute object software, yes.

4 Q. Okay. And are you familiar with this
5 particular version of the sublicensing agreement?

6 A. Yes.

7 Q. Is this one that you -- or that was in use
8 while you were . . .

9 A. It was one of them that was in use, yes. We -
10 revised it again, I believe.

11 Q. Okay. And if you look at page two of the
12 agreement Bates number 5562, under the Roman numeral two
13 heading, Grant of Rights, you see section two point oh
14 one.

15 Does that section contain the limitations on
16 sublicensing of the object software?

17 MR. KENNEDY: Objection to form.

18 If you're going to be asked to give your
19 understanding of this agreement today, Mr. Frasure, I'd
20 like you to make sure that you take the time necessary to
21 review it. It's a nine-page agreement.

22 I also object to the extent the question
23 calls for a legal conclusion.

24 A. I don't think I can answer that question
25 without reading it. I mean, it's been -- it's been right

1 -- it's been five or six years since I read this
2 agreement. I can't really answer that question without
3 taking the time to read it.

4 Q. Okay, why don't you go ahead and take the time
5 to read the agreement?

6 MR. KENNEDY: Let the record reflect that by
7 my watch, which I think is accurate, it's now 12:17 p.m.

8 A. (Complied.)

9 by Ms. Fithian:

10 Q. Okay, now . . .

11 MR. KENNEDY: Let the record reflect it's
12 12:28 p.m.

13 Q. Now, if you'll look at page two of the
14 agreement, and again looking at paragraph two point oh
15 one, it states:

16 . . . Notwithstanding any provisions to the
17 contrary in the software agreement, AT and T grants to
18 licensee personal nontransferrable and nonexclusive
19 rights . . .

20 And then under subparagraph A it states:

21 . . . To make copies of sublicensed products
22 and to furnish either directly or through distributors
23 such copies of sublicensed products to customers anywhere
24 in the world subject to U. S. government export
25 restrictions for use on customer CPU's save for each such

1 customer's internal business purposes provided that the
2 entity furnishing the sublicensed products obtains
3 agreement as specified in section two point oh two from
4 such a customer before or at the time of furnishing each
5 copy.

6 That provision -- is it your understanding
7 that that provision permits the licensee to distribute
8 copies of the sublicensed products to customers anywhere
9 other than in countries subject to U. S. government
10 export restrictions?

11 A. No, I don't -- I don't interpret it that way.

12 Q. Can you explain?

13 A. Well, it refers back to the software
14 agreement, and in the software agreement, I believe it
15 specified countries that -- that were allowed to -- we
16 were allowed to have products go into, so . . .

17 Q. Allowed under the Export Administration laws?

18 A. I'd have to go back and look at that language.
19 All I'm saying is I don't think this is an inclusive
20 paragraph right here. I mean, I think there's other
21 things that says notwithstanding any provision to the
22 contrary in the software agreement, so I'm -- I think
23 there are things that are in the basic software agreement
24 that also control this.

25 Q. That control sublicensing of object software?

1 A. Well, no; I'm just saying I think it would
2 control -- I'd -- I'd have to go back. I -- I'm not
3 clear to the countries that are specified in the software
4 agreement. I mean, I'd have to go back and read that and
5 see how that ties into this, but there are restrictions
6 about the distribution of the source -- source code to
7 certain countries, and I'm not sure how that implies, how
8 it's -- how it's related to this. I mean it . . .

9 Q. Well, then. . .

10 A. It's been too long ago. I -- I just -- I
11 would have to go back and look at it and see.

12 Q. So you're not sure how that applies to the
13 object distributions?

14 A. Today I'm not.

15 MR. KENNEDY: Counsel, do you know whether
16 this is an agreement for Unix System software or for some
17 other product?

18 Q. (To Mr. Kennedy:) I believe it is, but it
19 looks like you need to refer to the agreements number
20 soft zero zero zero six four.

21 A. Well, with . . .

22 MR. KENNEDY: David, I'm sorry; there's no
23 question again.

24 Q. Mr. Frasure, do you know whether this is an
25 agreement that refers to the Unix software?

1 A. No, I -- my comment I was going to make is
2 you've got to look at the software agreement because it
3 references the products and the fees paid for -- to be
4 paid.

5 This unto itself I don't think will tell you.

6 Q. Okay. But if you looked at the approval slip,
7 the second page of the exhibit, it says covering software
8 products covered by agreement number soft zero zero zero
9 six four; does that indicate that the products covered by
10 this agreement are the same as those covered by agreement
11 number soft zero zero zero six four?

12 A. I would think not.

13 Q. You would think no?

14 A. I -- I don't think it does.

15 The reason I say that is you could -- you
16 could license source code for twenty different products,
17 but you only may sublicense one. So there's language in
18 here that says if you paid the appropriate sublicensing
19 fees and so on, which I read earlier today, and you've
20 notified AT and T and all the -- the appropriate things,
21 then you can sublicense, so there's many many companies
22 that -- that license source code that do not sublicense
23 all the products. . .

24 Q. Well, how would you -- how would you determine
25 which particular products this agreement was covering for

1 sublicensing?

2 A. I'd look at the software agreement.

3 Q. Right, and isn't that the agreement number
4 soft zero zero zero six four?

5 A. Uh-huh. Yeah.

6 Q. So looking at that agreement, you could
7 determine what products were being sublicensed --
8 sublicensed and rights were being granted for? Is that
9 correct?

10 A. I don't know. I mean, I'd have to look at it
11 and see. I don't know how to answer your question.

12 Q. Okay.

13 A. There's got to be verification that the
14 appropriate sublicensing fees had been paid with -- for
15 the -- that gave you the right to sublicense the product
16 and so on, so I mean, I don't recall in detail what
17 everything was on those agreements. I'm not sure if it
18 did say that you paid the sublicensing fee or not.

19 Q. Okay. The next exhibit, D-42, is a letter to
20 Ms. Mary McDonald dated November 28, 1984.

21 Is that your signature on the letter?

22 A. Yes.

23 Q. Okay. And did you . . .

24 (Brief Pause.)

25 Okay, if you look at page two of this . . .

1 Well, before I -- before we go on, why don't
2 you identify what agreement is attached to the letter in
3 Exhibit D-42 if you can.

4 A. Well, it says that it's for thirty -- Unix
5 Thirty-two V Time Sharing System, Version one.

6 Q. Now looking at the re line on the letter, it
7 says:

8 . . . re: License agreement between American
9 Telephone and Telegraph Company and The Regents of The
10 University of California for the Fourth Berkeley Software
11 Distribution.

12 If you look at the agreement that's attached,
13 is that the agreement for the fourth -- a proposed
14 agreement for the fourth Berkeley software distribution?

15 A. It appears that it is.

16 MR. KENNEDY: Could we establish whether
17 this is Mr. Frasure's signature and if he has any
18 recollection . . .

19 MS. FITHIAN: I thought I just asked him
20 that.

21 MR. KENNEDY: Have you done that? I'm sorry.
22 And did you establish whether he recalls this instance at
23 all so you know whether he's testifying based on what he
24 remembers or interpreting something today?

25 Q. Do you recall writing this letter?

1 A. Yes.

2 Q. And were you involved in the preparation of
3 the agreement that's attached to the letter?

4 A. No.

5 Q. Do you know who was involved in preparing the
6 agreement?

7 A. I believe the attorney that was involved in
8 this was Geoff Green, which I had mentioned earlier, and
9 I believe Otis Wilson was involved in this.

10 Trying to establish a -- a time frame in --
11 in my mind about this, but I -- I can't.

12 Q. Okay. Let me just mark the next in order --
13 keep -- keep that one; don't give that one back yet.

14 Okay, document 43 is a document that was
15 produced in this action by The University of California
16 and it is -- appears to be a letter to Mr. Frasure from
17 Mary McDonald.

18 Do you recall receiving this letter?

19 A. Yes, uh-huh.

20 Q. Okay. And looking at page two of the letter
21 in item number four, it states:

22 . . . Paragraph seven, sublicensing. I need
23 to discuss with you the proposed provision that object
24 code sublicenses may be in the form of a notice as I am
25 not certain what this means.

1 Do you recall any discussion with Mary
2 McDonald on that point?

3 A. Let me just read paragraph seven, please.

4 (Brief Pause.)

5 Would you repeat your question?

6 Q. Yeah. The question is looking at the letter
7 marked Exhibit D-43 where it talks about paragraph seven,
8 the statement:

9 . . . I need to discuss with you the proposed
10 provision that object code sublicenses may be in the form
11 of a notice as I am not certain what this means.

12 Do you recall having any discussions with Ms.
13 McDonald on that subject?

14 A. No, not specifically. I -- I'm trying to
15 recall.

16 I -- I really don't recall if I talked with
17 Mary about the notice or not. I do not know.

18 Q. Okay. Now, looking at Exhibit D-42, the
19 agreement that was attached to your letter to Ms.
20 McDonald, in paragraph seven it states:

21 . . . Such object. . . sublicenses may
22 be in the form of a notice.

23 Do you know or do you have an understanding
24 as to what was meant by that provision?

25 A. To the best that I recall, that was what we

1 called a -- a shrink wrap agreement where the license was
2 put on the product and it was covered in shrink wrap and
3 the laws said that if someone obtained that package and
4 opened the shrink wrap, then they abided by the agreement,
5 and to the best of my recollection, that's what we. . .

6 Q. And did AT and T permit sublicensees to
7 distribute the object version via -- using the shrink
8 wrap license as you defined it?

9 MR. KENNEDY: The object version of what?

10 MS. FITHIAN: Of Unix operating code.

11 MR. KENNEDY: This -- this is not an
12 agreement dealing with Unix, I take it.

13 MS. FITHIAN: Well, no.

14 Now I'm clarifying . . .

15 MR. KENNEDY: As long as we understand . . .

16 MS. FITHIAN: Sure.

17 MR. KENNEDY: . . . that it's an agreement
18 dealing with codes derived from Unix . . .

19 MS. FITHIAN: Fine.

20 MR. KENNEDY: . . . but admittedly so.

21 MS. FITHIAN: Let's talk . . .

22 MR. KENNEDY: Well, yeah; I mean . . .

23 MS. FITHIAN: Let's just talk about . . .

24 MR. KENNEDY: What's been referenced is not
25 an agreement, either, it's a proposed draft, not -- but -

1 - you're not dealt with the signed agreement.

2 MS. FITHIAN: Right.

3 MR. KENNEDY: I just want you to understand,
4 Mr. Frasure, we're shifting gears now, and now we're not
5 talking about Berkeley four dot two BSD Software but
6 again about Unix software.

7 A. I can only go back to the document that I
8 requested to read . . .

9 Q. Uh-huh.

10 A. . . . a little bit ago and -- and -- and on
11 page 5563 of your Exhibit 41, paragraph 202, I believe
12 that it says the United States and other jurisdictions
13 were enforceable copyright covering the computer programs
14 of the sublicensed product, whatever that product is.
15 The agreement specified in 201 may be a written agreement
16 signed by the customer or a written agreement on the
17 package containing the sublicensed product that is fully
18 visible to the customer.

19 Says in all other jurisdictions such
20 agreement must be a written agreement signed by the
21 customer. So I believe you asked did we make a shrink
22 wrap agreement available as a feature or . . .

23 Q. Uh-huh.

24 A. Yes. That's correct; yes.

25 Q. Okay. I'll show you Exhibit D-44, a letter

1 that was produced by The University of California in this
2 action, to Ms. Mary McDonald from Mr. Frasure.

3 Do you recall -- well, first of all, is that
4 your signature on the letter?

5 A. Yes.

6 Q. Do you recall sending Ms. McDonald this
7 particular letter?

8 A. Yes, I remember. Uh-huh.

9 Q. Okay. And looking at the second paragraph, it
10 talks about a revised paragraph seven, and it talks about
11 that revised paragraph being unacceptable because of the
12 limitation on AT and T's sublicensing rights.

13 Do you recall what issue was being addressed
14 in that paragraph?

15 A. I'd need to see the letters.

16 Q. Okay. I don't have a copy of the September 24
17 and 25 letter, but looking at Exhibit D-43, item number
18 4-B . . .

19 A. What one are we looking at again?

20 Q. Looking at Exhibit D-43, this is the letter to
21 you from Ms. McDonald . . .

22 A. Uh-huh.

23 Q. . . . dated January 17, 1985. She's proposing
24 in item 4-B that certain words be added. If you'll read
25 that . . .

1 A. Uh-huh.

2 Q. . . . provision, the words that she wants
3 added are:

4 . . . Provided that AT and T sublicense with
5 sublicensees and their sublicense with others contain the
6 covenants and restrictions of paragraphs eight, nine and
7 ten of this agreement.

8 MS. SHAPREAU: I'd like to object that
9 there's a lack of foundation here, and I think that . . .

10 MS. FITHIAN: Well, I'm. . .

11 MS. SHAPREAU: . . . there's a lack of
12 foundation. But we may be able to eliminate at the
13 break . . .

14 MS. FITHIAN: Are you finished with all the
15 letters?

16 MS. SHAPREAU: I have one of them, and I
17 believe it's been produced, but I'm not certain about
18 that.

19 A. To me there's -- there's eleven months between
20 these letters. I don't know what's -- I can't in any way
21 relate this letter to. . .

22 Q. You don't . . .

23 Okay. And you don't, looking at this letter,
24 recall what restrictions were being proposed?

1 A. No.

2 MS. FITHIAN: Okay. Okay, why don't we go
3 ahead and break for lunch?

4 **** LUNCHEON RECESS ****

5 DIRECT EXAMINATION of MR. FRASURE by MS. FITHIAN

6 (continued):

7 Q. Mr. Frasure. . .

8 A. In reviewing these documents at the
9 beginning . . .

10 Q. Are these documents . . .

11 MR. KENNEDY: I'm sorry; are you taking this
12 down?

13 (Court Reporter responded in affirmative.)

14 MR. KENNEDY: Oh, okay. Go ahead.

15 A. Somewhere near the beginning of the
16 Deposition, I had made a statement that we had a meeting
17 at The University of California in late '85 about a
18 product that I thought was -- we had heard was going to
19 be released in -- in early '86; and after reviewing these
20 documents, I think I'm a year off. I believe the meeting
21 was probably in late '84 or about in '85 early, simply
22 because I see at this time that -- that Mary McDonald and
23 I were freely corresponding with each other, and prior to
24 this, she didn't know who I was.

25 As I had indicated, I had to send her a

1 letter to say who I was and . . .

2 Q. Uh-huh.

3 A. . . . my boss had to send a letter, and after
4 that meeting, we pretty much -- the correspondence
5 between Mary and AT and T was -- was through me. So I
6 believe I was a year off in my . . .

7 Q. So late '84 is the meeting you . . .

8 A. Yeah.

9 Q. . . . talked about this morning?

10 A. Yes. Yeah, rather than 1985, so I was just a
11 year off in my timing. It's been a -- it's been a . . .

12 Q. It's a long time.

13 A. . . . long time. Yeah.

14 MS. SHAPREAU: Okay, so are we ready to
15 plunge ahead?

16 WITNESS MR. FRASURE: Sure.

17 MS. FITHIAN: I'm going to turn it over to
18 Carla now, and . . .

19 WITNESS MR. FRASURE: Okay.

20 MS. FITHIAN: . . . then I may have some
21 follow-ups.

22 *****

23 **EXAMINATION of MR. FRASURE by MS. CARLA SHAPREAU:**

24 Q. Okay. As I mentioned to you before the
25 Deposition started, my name is Carla Shapreau, and I

1 represent The University of California.

2 And I just want to state for the record that
3 the University has not answered yet in this case, and it
4 has raised some objections regarding jurisdiction.

5 However, we're appearing here today for the
6 convenience of all the parties in the cause so that we
7 can proceed with discovery, and by doing that we're not
8 waiving any objection to jurisdiction.

9 Okay, Mr. Frasure, the document that's been
10 just marked as Exhibit 45 is a document dated April 1985.
11 And on the face sheet it says AT and T, and there's a
12 dollars sign and then the word "echo" in small case
13 letters, and it's identified by Bates numbers P-10702
14 through 10713.

15 And I want to direct your attention just
16 specifically to one page, okay, which is page Bates
17 number 10708.

18 Okay, and could you just take a minute -- I'm
19 just concerned with the right-hand column of this page.
20 Take a -- the time you need to review that.

21 A. The entire right-hand column?

22 Q. Actually, yes.

23 A. (Complied.)

24 Q. At the first paragraph references your name,
25 and I wanted to ask you, do you first of all recall being

1 involved in any way with providing any information for
2 this publication which has been marked as Exhibit No. 45?

3 A. Yes. Uh-huh.

4 Q. Okay. And did your involvement -- well, why
5 don't you tell me what your involvement was with this
6 specific issue to the best of your recollection.

7 A. With this specific issue?

8 Q. Uh-huh. Yes.

9 A. I -- I couldn't tell you.

10 Q. Did you have ongoing involvement with
11 providing information for this publication. . .

12 A. This publication was put out by Otis Wilson's
13 organization, and there was another gentleman whose name
14 I'd mentioned earlier, Dave Sandell, who had
15 responsibility at that time. He was at my level; he was
16 an assistant manager also. He had responsible for
17 technical customer interface, he had responsibility for
18 the public relations people and so on, and the public
19 relations people at this date were reporting to Dave
20 Sandell, and he -- his people basically collected this
21 information and -- and we put this letter out. It was
22 just trying to be a vehicle, constant communications with
23 our -- with our licensees.

24 I can't say that I had any direct input to
25 this -- this particular issue. It was a -- I -- I see

1 that the column you directed my attention to was a --
2 was a result of some seminars that we held throughout the
3 United States with our licensees providing them with
4 information.

5 Other than that, I mean, we -- we published a
6 number of these documents called Dollar Echo and -- on a
7 -- on a periodic basis, so I really can't tell you how
8 much of a direct involvement in this particular issue
9 that I had.

10 Q. Okay. So did you -- did you -- do you recall
11 seeing this specific issue when it came out?

12 A. I think so. Yes, uh-huh.

13 Q. Okay. And the first paragraph states that the
14 business and technical seminars held March 3rd through
15 4th, and again this document is dated April 1985 . . .

16 A. Yes.

17 Q. . . . and March 6th and 7th, Dave Frasure,
18 Sales Manager, Software Sales and Licensing, described
19 several modifications that will be made to AT and T's
20 software contracts.

21 Do you recall -- does that accurately reflect
22 the general substance of . . .

23 A. Yes.

24 Q. Let me finish my question or the transcript
25 will be broken.

1 Okay. This accurately reflects the general
2 substance of the modifications that AT and T was going to
3 be making to its software contracts.

4 A. Well, each one of these is just a one-sentence
5 synopsis, so . . .

6 Q. Right. Okay.

7 A. . . . you know, the language change wound up
8 to be significant.

9 Q. Specific.

10 A. Yeah. But this was -- this was a highlight of
11 items, yes.

12 Q. Okay. Now, the second paragraph states these
13 changes are in response to direct feedback from AT and T
14 -- AT and T's licensees and are intended to make the
15 contracts more responsive to the needs of the licensees.
16 And then there's a summary of a list of highlights.

17 Do you have a specific recollection -- well,
18 let me -- let me strike that and go to the very last
19 highlight on this page in the right-hand column which is
20 entitled Clarification of Ownership of Derived Works, and
21 the language of the highlight reads:

22 . . . Language changes will be made to
23 clarify ownership of modifications or derivative works
24 prepared by a licensee.

25 Could you describe for me what was meant by

1 this?

2 A. You mean the clarification?

3 Q. Yes.

4 A. Well, as I recall, and I -- and I think that
5 as we looked at some of the agreements this morning there
6 was a definition of a licensed product and it -- and it
7 mentioned modifications and so on to it. And there was
8 always a question -- I won't say always -- there was in -
9 - in a large number of cases there was always a question
10 as to who the owner of those modifications were, and
11 similar to the letter that we saw this morning, there was
12 a clarification made. And one thing that -- that we did
13 is that if we found that we were continually doing the
14 same thing over and over with a number of licensees, then
15 that was a flag to us that the agreement should probably
16 be changed to provide this clarification, so that's --
17 that's what was meant by that.

18 Similar to the contractor provision up top,
19 there was a number of licensees who always wanted to have
20 -- take under contract with them, a company to perform
21 work on their behalf, and it seemed like with most of the
22 software agreements we were having to generate another
23 agreement called Contractors' Provisions, so we just
24 decided that we would give everyone that opportunity or
25 that thing directly in the contract.

1 Q. Okay. And do you recall specifically the
2 types of questions licensees were asking regarding
3 modification -- modifications or derivative works and the
4 ownership thereof?

5 A. Well, I think the question was basically who -
6 - who owns that -- that code. Again, you get into -- we
7 would get into a -- a number of hypothetical cases when
8 negotiating a contract. And if, you know, someone
9 decided to revoke their license or suspend it, they would
10 only to have to provide back to us the software product
11 that we gave them or destroy that, but they were still
12 bound by the -- by the agreement to preserve any
13 knowledge of the product or -- or what they had gained
14 from it. So all we were trying to do is to clarify that
15 there was -- they owned the -- the modifications, any --
16 any derivative or enhancements that they made to the
17 product, but it was also going to be treated as part of
18 the product.

19 Q. Okay. By they, you mean the licensee
20 owned . . .

21 A. The licensee, yes.

22 Q. . . . modifications and enhancements of the
23 product?

24 A. Uh-huh.

25 Q. Of the licensed software?

1 A. Of the licensed software. Then it, you know,
2 it was just a clarification as regarding ownership and
3 ownership only.

4 Q. Now your specific role in the modifications
5 and clarifications to the licenses, and at this time I
6 believe it was System Five, this time meaning in the mid-
7 1985 time frame, could you just describe specifically
8 what your role was with educational and commercial
9 licenses and the clarification and modification of those
10 licenses for System Five?

11 A. What my role was really to work with our
12 internal attorneys, and again, in most of these cases it
13 was Geoff Green who made the revisions to the contract.
14 And we would convey to Geoff what -- what we would like
15 to see in the contract, and then he would come up with a
16 draft of words, and then we would massage it and modify
17 it.

18 There were a number of occasions that we
19 would ask a licensee to review that language to see if
20 they felt like it covered what -- what they were after so
21 there wouldn't -- the changed language would not spur any
22 further changes of clarification. And so my role was
23 really in the -- in defining what we were -- what we were
24 attempting to do and -- and some of the restrictions or -
25 - or the restrictions or whatever that would apply to

1 that.

2 Q. Okay. And so the modifications and
3 clarifications that were made in the mid-1985's to the
4 System Five license agreement Unix your role involved
5 reviewing that language . . .

6 A. Yes.

7 Q. . . . and the modifications there, so you were
8 familiar with those modifications and clarifications?

9 A. Yeah; I don't recall the words of what they
10 were today, but I mean, I was involved in them.

11 Q. I understand. . .

12 MR. KENNEDY: Before we go into another
13 document, I see this document has been designated by USL
14 as financial confidential. I believe that's a mistake.
15 Perhaps you could clarify and ask Mr. Frasure on the
16 record whether he had an understanding about the
17 availability of this document.

18 Q. (To Mr. Kennedy:) Do you -- to whom it was
19 available?

20 MR. KENNEDY: Yeah, was . . .

21 Q. I think it -- it was available -- I think he
22 actually mentioned that this was provided to AT and T
23 licensees.

24 Is that right?

25 A. Yes, I think -- there used to be a statement

1 up front.

2 MR. KENNEDY: May I simply ask him whether --

3 Mr. Frasure, was distribution of the dollar
4 sign echo publication limited to licensees, to your
5 knowledge?

6 A. I don't know. I . . .

7 MR. KENNEDY: Okay. We'll -- we'll -- I
8 don't want to delay any longer. We'll look into it,
9 but . . .

10 MS. SHAPREAU: Okay.

11 MR. KENNEDY: . . . I was surprised to see
12 the financial confidential designation; I thought that we
13 had not designated these as confidential.

14 MS. SHAPREAU: In any way?

15 MR. KENNEDY: That's right, but at the time
16 being, we should continue to treat them as financial
17 confidential until we have a chance to get clarification.

18 by Ms. Shapreau:

19 Q. Mr. Frasure, just for -- since I would like to
20 go on -- I'm sorry -- so we can go on as quickly as
21 possible, I'm going to just direct your attention to the
22 one page . . .

23 A. Okay.

24 Q. . . . I have a very brief question about, but
25 for the record, this is an August 1985 AT and T Dollar

1 Echo document similar to the prior exhibit, Bates stamps
2 P-10714 through P-10725, and I wanted to direct your
3 attention to page five of the document, which is Bates
4 stamps 102 -- excuse me -- 10720, and specifically to the
5 left-hand column under the heading Changes to the
6 Software Agreement, the third paragraph down.

7 That's the only paragraph I have a question
8 about, so why don't you take the time you need to review
9 that?

10 A. Are you talking about where it says section
11 two point zero one?

12 Q. Yes, section two point zero one.

13 A. (Complied.)

14 Uh-huh.

15 Q. Okay, have you had a chance to read that?

16 A. Uh-huh.

17 Q. Okay, and I just would like to ask you do you
18 recall reading this particular edition of Echo in August
19 of 1985?

20 A. I think so; yeah.

21 Q. Okay. Could you give me some idea what is
22 meant by this paragraph that starts with section two dot
23 zero one?

24 A. I'd have to look at the -- the software
25 agreement to see what that sentence was.

1 Do we have a copy of it?

2 Q. Okay, I think we have a copy of it.

3 Okay, this -- there's a document that's been
4 marked in a prior Deposition as Defendant's Exhibit 25,
5 and I want to direct your attention to this page and
6 thereafter, and that document. . . educational
7 boilerplate. It's soft zero zero zero eight nine.

8 A. Uh-huh.

9 Q. Do you know whether that is the document based
10 on the date -- what is the date on that document?

11 A. The -- indicates a date of 07/01/83, it looks
12 like. I can't really tell if that's a three or a five.

13 Q. What is the date that it was signed?

14 A. Eighty-five.

15 Q. Eighty-five; okay.

16 A. But I was looking at the -- the revision up
17 here in the -- in the form. It's AT and T Information
18 Systems, so that's -- says 05/01/84 dash 07/01/85 . . .

19 Q. Okay.

20 A. . . . which I guess that's in '85.

21 Q. Do you know whether or not -- looking at the
22 second page of that agreement that's been previously
23 marked Exhibit 25 to paragraph two dot zero one, do you
24 know whether or not that's the paragraph that's referred
25 to in the Exhibit 46 that commences with section two dot

1 zero one?

2 A. It appears to be; yes.

3 Q. Okay. Could you give me some idea of what
4 this sentence means in the AT and T Dollar Echo document
5 marked as Exhibit 46?

6 MR. KENNEDY: Objection to form.

7 Q. If you -- if you have an understanding as to
8 what the echo document was referring to when it was
9 published in August of 1985.

10 A. Well, it appears that it's talking, the way I
11 read this, about this last sentence in -- in two oh one
12 little A.

13 MR. KENNEDY: Could you simply read that
14 sentence into the record?

15 A. Sure. It says:

16 . . . AT and T IS claims no ownership
17 interest in any portion of such a modification or
18 derivative work that is not part of the software product.

19 Q. Okay, and then the -- the phrase in -- and
20 you're reading from the contract, right?

21 A. Yes, that's correct.

22 Q. . . .marked as educational boilerplate. Then
23 the -- the -- the sentence in the echo document marked as
24 Exhibit No. 46 states:

25 . . . The last sentence was added to assure

1 licensees that AT and T will claim no ownership in the
2 software that they developed, only the portion of the
3 software developed by AT and T.

4 A. Yes.

5 Q. Period. Does this -- is this sentence related
6 to the earlier paragraph we read in the prior Dollar Echo
7 publication?

8 A. Yes, I believe this is the -- the next version
9 of the -- the language had -- I believe it had been
10 developed by the -- this publication, and the supervisor
11 responsible for the contracts had went through and given
12 a paragraph by paragraph itemization of the -- of the
13 changes.

14 Q. So this is just a further discussion of the
15 same issue . . .

16 A. Yes.

17 Q. . . . that we earlier talked about in Exhibit
18 No. 46?

19 A. Yes.

20 Q. Did you get -- do you know whether AT and T
21 got feedback from licensees during the interim between
22 these two publications on this specific issue of
23 modification and enhancement?

24 A. Feedback in terms of what?

25 Q. Questions . . .

1 A. Well, as I said earlier, we always received
2 questions. I say always, I've got to be careful as to
3 how I use that word. A number of occasions we received
4 questions regarding ownership, and that -- again, that's
5 why we put this clarification in there, trying to reduce
6 the number of side letters to licensing agreements that
7 would clarify the ownership issue.

8 Q. Is there a reason why this came up twice in
9 the span of from April to August in these different
10 issues?

11 A. Well, what happened was we conducted the --
12 the seminars in March, and so the April issue is just no
13 more than telling all the things that were talked about
14 at the seminars.

15 Q. Okay.

16 A. I made presentations regarding the contracts
17 and language at -- at those seminars, and so the April
18 issue was just no more than stating the fact that this is
19 what happened. And then the next issue, which was dated
20 August, was just -- the language had been developed at
21 that time, to my recollection had been provided as a
22 specimen agreement to a number of licensees for their
23 comments to see if there was, as I indicated before, that
24 we wouldn't raise further clarifications to be required,
25 and we proceeded with revising the contract.

1 Q. Okay. And it looks like this -- there was a
2 new contract being put into -- into place for System Five
3 Unix operating system; is that correct?

4 A. Well, it was a -- well, the new contract was
5 as is highlighted here in the changes that were -- that
6 were made to it, yes.

7 Q. Okay, and those were embodied in what's
8 previously been marked as Defendant's Exhibit No. 25,
9 specifically the document entitled AT and T Information
10 Systems Educational Software Agreement, that's E soft
11 dash zero zero zero eight nine?

12 MR. KENNEDY: Are you asking him whether all
13 of the changes that are referenced in Exhibit 46 were
14 embodied, or just the one change that we've been
15 discussing in section two point oh one?

16 Q. Just the one change we've been discussing.

17 A. To my knowledge, and I'd really have to go
18 back and look, but to the best of my knowledge, that --
19 for the one segment that we've been talking about was
20 incorporated in all the different software agreements, be
21 it educational or administrative or commercial.

22 Q. Okay. And then -- and that's what has been
23 marked as a Defendant's Exhibit. . .

24 A. It appears that's what it is, yes.

25 Q. Okay. Okay, Mr. Frasure, I wanted to ask you

1 a series of questions just to get a little -- little
2 background.

3 I know it's been a long time, but I wanted to
4 go back to the meeting at Berkeley and I'm hoping that
5 some of the documents I have will help kind of put some
6 of the pieces together for all of us.

7 A. Okay.

8 Q. Actually, before -- before I do that, I want
9 to ask you one additional question, and I want you to
10 hold on to the educational boilerplate, maybe that will
11 help you, but these -- these words come up in all the
12 agreements but this one that you referred to, the
13 educational boilerplate, which is part of exhibit --
14 Defendant's Exhibit No. 25.

15 During the time that you were employed at AT
16 and T from the '83-'84 time period through 1987, what was
17 your understanding of what encompassed a result of --
18 strike that -- a modification of the licensed software?

19 A. Well, could be -- a modification could be
20 changing a line of code, it could be adding a line or
21 lines, or it could be deleting lines of code.

22 Q. Now, could that be distinguished from
23 enhancing? Did enhancement mean something different to
24 you during that time frame?

25 A. From a view that I took of it, no; enhancement

1 and modification were the same thing. Enhancement was a
2 term that was used to satisfy customers, I guess, in the
3 fact that they felt like they made improvements in the
4 product, but really modifications were the -- were the
5 key things.

6 Q. Okay. So someone added -- you mentioned
7 adding a line of code. If they added a completely
8 original line of code that they developed themselves to
9 the existing source code, you considered that an
10 enhancement of the . . .

11 A. Considered it a modification.

12 Q. . . . software?

13 Or an enhancement?

14 A. I -- I said I would not consider it an -- I
15 would consider it as a modification.

16 Q. Okay. Okay. I just want to understand since
17 we're using these terms what the difference is. . .

18 A. I -- I think the term enhancement -- the only
19 term that has a meaning to me is modification.

20 Q. Okay.

21 A. Enhancement is a -- something that you
22 perceive to be an enhancement or an improvement, and it's
23 -- I think that's left up to the -- the originator or the
24 user. Modification is the -- the thing, I believe, that
25 we're after.

1 Q. So if we see enhancement in a license
2 agreement or a letter, what was your understanding that
3 AT and T meant during the time that you were employed by
4 AT and T by the use of the word enhancement?

5 MR. KENNEDY: Objection to form.

6 Q. Well, please . . .

7 MR. KENNEDY: Well, here's my problem. We've
8 seen it in many different agreements, many different
9 contexts, and I don't think that -- I think it creates a
10 very significant potential for confusion on the record to
11 ask for a single definition of what that word meant in
12 various contexts.

13 Q. Did the definition of the word enhancement in
14 various contracts and side letters -- is it your
15 understanding that the meaning of that word changed from
16 letter to letter or license to license?

17 A. No.

18 Q. Okay. And I just want to understand, based on
19 your personal experience working for AT and T, what
20 either you or others at AT and T understood enhancement
21 to mean and how that varied from modification, if you
22 know.

23 A. I can only speak from my, I guess,
24 understanding, or at least interpretation of it, the way
25 I always . . .

1 Enhancement was a -- was a term that was --
2 that was -- that was relative. Modification was the --
3 was the key word. Enhancement perhaps could be another
4 word for modification, but I . . .

5 Q. It could be different as well, under certain
6 circumstances?

7 A. Yeah, and enhancement is -- I think that's
8 something that's -- that's completely in the -- in the
9 eye of the beholder or the originator. I don't, you
10 know, it's -- it's like modifying a car and the kid says
11 I enhanced it; it goes from zero to a hundred in three
12 seconds, and his dad says, well, you ruined it, you know.

13 I mean, it's something that's just relative
14 to the person involved. I think modification is the --
15 is the key.

16 Q. Okay. Do you have a recollection in your
17 communications both in writing and oral with The
18 University of California whether you ever communicated
19 with them as to what the meaning of a modification was?

20 A. Yes, I do.

21 Q. Okay. And is it anything other than what
22 you've just testified to?

23 A. I don't believe it was; I believe it was . . .

24 Q. And -- I'm sorry.

25 A. I believe it was in accordance with what --

1 what I was just telling you.

2 Q. Anything additional? Is there anything else
3 that you included in modification other than what you've
4 already testified to that you communicated to The
5 University of California in any way?

6 A. Well, one thing that I can go back to, I
7 guess, and -- and, you know, we're -- we're talking about
8 a meeting that lasted a number of hours out there -- all
9 afternoon. So it's hard to recall all the specific
10 things that were said.

11 The only thing I do know is that we went
12 through a number of hypothetical cases or examples of
13 ownership, and if something was developed completely
14 independent of the product without the benefit of the
15 licensed software, it seemed that the ownership issues
16 may be -- may be very clear in that case. But if there's
17 -- if the product was used or the people developing the -
18 - the new product, you know, you can lock them up in a
19 room, but again, they have been exposed to Unix operating
20 systems for a number of years.

21 We -- I guess it starts to get fuzzy as to
22 where the ownership is.

23 Q. Okay.

24 A. You start to use methods and concepts that are
25 -- they have -- you have learned to use or been trained

1 to use or whatever, then we -- we felt like there was a -
2 - an interest in that product.

3 Q. Okay. So going back to the issue of what was
4 communicated to The University of California regarding
5 what could be encompassed in a modification, is there
6 anything else?

7 I just want to get the best -- a -- complete
8 understanding of what communication . . .

9 A. Yeah. To my knowledge the modification . . .

10 MR. KENNEDY: Excuse me. I just want to make
11 clear we're understanding. You mean is there anything
12 else he can remember saying on the topic of modification
13 other than everything he's testified about modification
14 at some point during his testimony today?

15 MS. SHAPREAU: That's correct.

16 MR. KENNEDY: Okay. Go ahead.

17 A. I -- I've always felt and I think conveyed to
18 the licensees or whoever we were talking to that a
19 modification was an addition or change to or the deletion
20 from.

21 Q. Okay. Do you recall any communications you
22 had or were present at that enhancement was discussed
23 with the University and what that meant?

24 A. (No verbal response.)

25 Q. I'm wondering if anybody distinguished between

1 the terms during your meetings or communications with the
2 University.

3 A. I don't recall that.

4 Q. Okay. And then I would also like to ask you
5 about derivative work, and I'm not asking for a legal
6 conclusion, I'm just asking for your common understanding
7 of that in your dealings with the University and as an
8 employee of AT and T.

9 Did the definition of a derivative product or
10 work vary in any way from what you've earlier testified
11 is a modification, or is it somehow different?

12 A. Well, derivative product is a result of the
13 modifications, and we -- I -- I guess I consider the
14 derivative product to be something that you would -- it
15 would be executable or usable in its entire form.

16 In other words, it's a -- it's a product that
17 will stand on its own, but it's strictly as a result of
18 the modifications that have been made to the -- to the
19 software.

20 Q. And then the last word I wanted to ask you
21 about is the result is the word you -- you had used
22 earlier . . .

23 A. Yes.

24 Q. . . . and I wanted to make sure I understood
25 what you meant by that. The result of research, what

1 would be encompassed in the results to the best of your
2 understanding in the 1983-84 time period through 1987?
3 What did that include?

4 MR. KENNEDY: As that term appears where? In
5 discussions with people, in documents?

6 Q. Well, let me ask you this first.

7 Did a different meaning attach to the word
8 result as we -- as has come up earlier in this Deposition
9 -- did a different meaning attach to the word result in
10 licenses and letters and communications, or was it
11 basically the same understanding with respect to that
12 word?

13 MR. KENNEDY: Was his understanding basically
14 the same?

15 Q. Okay.

16 A. Yeah, I -- I think that's the thing to say,
17 that my understanding of the word result was always . . .

18 Q. Okay.

19 A. . . . the same.

20 Q. And what was -- what was your understanding of
21 the word result?

22 A. Well, I interpreted the word result the way it
23 was worded in the contract to be the -- the result of an
24 effort that was really non software-related.

25 In other words, the outcome was not software-

1 related. The computer was used -- the software was used
2 for research purposes and something was discovered as a
3 result of the use of that software, so that was the
4 results of it.

5 In other words, if you could come to a -- to
6 a conclusion about -- about a -- a bunch of numbers or
7 some research project and you categorize it and you made
8 this discovery and it had nothing to do with -- with the
9 software product itself, it was the -- the software was
10 just processing the data -- the information.

11 Q. Was it your understanding that it could have
12 included software? That the result could have included
13 software?

14 A. I again had a -- well, let me just answer the
15 question. No. I -- I have a mindset -- the -- a
16 modification is a modification and that involves three
17 things, and you can add one line of code or a thousand
18 lines of code or ten thousand . . .

19 Q. You've already told us about that.

20 A. Yeah.

21 MR. KENNEDY: Well, yeah, I think you . . .

22 As long as the records that it's -- he talked
23 about more than just adding code; he talked about other
24 things and I think . . .

25 Q. Right, and . . .

1 A. Changing.

2 Q. . . . changing, right.

3 MR. KENNEDY: Okay. All right. Very well.

4 Q. I'm not -- I'm just trying to . . .

5 MR. KENNEDY: No, I understood. I
6 understood, but I just thought that he wasn't done
7 answering.

8 Go ahead.

9 Q. Okay. Now, did you ever communicate your
10 understanding of what the word result meant to anybody at
11 the University?

12 A. I don't believe I did, but I believe Otis
13 Wilson did in the meeting that we discussed earlier. The
14 examples of -- of what results have -- what result was.

15 Q. And you were present at that meeting?

16 A. Yes.

17 Q. Okay. And what do you recall he told the
18 University regarding the meaning of the word result?

19 A. Just similar to what I -- I just described,
20 that if the -- if the software was being used to -- for
21 analytical purposes or to -- to accumulate and process
22 data and make decision on it, that type thing, you know,
23 it may be interfaced to some type of monitoring machine,
24 specific device drivers, but the result of the processing
25 when -- when a discovery was made or something like that,

1 that that result had to be made available to -- to
2 anyone.

3 Q. Okay. Other than the meeting that you've
4 earlier testified about that happened in 1984 with the
5 University, do you recall any other meeting that you were
6 present at with the University regarding their license
7 for Unix?

8 A. No, it was the only one.

9 Q. Okay.

10 Mr. Frasure, I want you to take a look at
11 what's been marked as Exhibit No. 47, and for the record
12 it's dated July 30th, 1984, and it's a letter that
13 appears to bear your signature to Colleen Schwartz from
14 The University of California. I want you to take a
15 minute to look at that.

16 A. (Complied.)

17 Q. You had earlier mentioned in your testimony
18 that the source exchange program limited licensees to
19 exchanging within hardware families essentially; is that
20 correct?

21 A. For System Five, that's correct.

22 Q. Is that only for System Five?

23 A. To my knowledge it was only for System Five.

24 Q. Okay. Just -- why don't you tell me, is this
25 -- do you recognize this as your signature?

1 A. Yes.

2 Q. Okay. And do you recall writing this letter?

3 A. Yes.

4 Q. Okay. Why don't you tell me very briefly what
5 this letter's about?

6 A. Well, what we're stating here is that the --
7 the -- the licenses that are required that must be in
8 place before Berkeley can make a distribution of the --
9 of the four -- four point one four point two BSD software
10 to them, source code to them, and . . .

11 Q. So is this -- so that I understand, you're
12 informing the University that for System Five -- excuse
13 me -- for distribution of four point one or four point
14 two BSD . . .

15 A. Yes, what -- earlier today -- well, I'll let
16 you ask the question so I don't presume what you're --
17 you're going to ask me.

18 Q. Okay, this -- the first sentence states:

19 . . . This is to inform you that licensees
20 desiring to obtain. . .four point one and slash or four
21 point two distribution of the Unix operating system must
22 have a source license with AT and T for the DEC -- D-E-C
23 -- caps -- family of Unix software; i.e., Unix Thirty-two
24 V, System Three, System Five, System Five Release One or
25 System Five Release Two.

1 A. Yes.

2 Q. To your recollection, is this the first time
3 that you had advised the University that there was a
4 limitation on hardware families for the distribution BSD
5 code?

6 A. No. It was not the first time.

7 Q. Okay. When was the first time, do you recall?

8 A. Well, the -- no, I don't -- I don't recall,
9 but the Unix licenses were -- were set up for System Five
10 by family -- what we call family types, either DEC, the
11 AT and T 3-B, the Motorola, Intel, National
12 Semiconductor, as we had discussed earlier today.

13 Q. Do you recall whether there was any response
14 on the part of the University to this discussion of a
15 limitation of distribution of BSD code non-DEC licensees?

16 A. There was a question whether it could be
17 distributed to them.

18 Q. Do you remember whether there was any -- well,
19 strike that.

20 **** Brief Pause ****

21 Q. I want to give you all the time you need to
22 look at that. I'm going to be making brief points, so I
23 think if you'll cover it, that would be great, but again,
24 I don't want to rush you in any way.

25 This letter's dated December 17th, 1984, and

1 it is from Mr. Towers to your attention, and it pertains
2 to the previous exhibit, I believe.

3 Do you recall receiving this letter?

4 A. Yes.

5 Q. Okay. Apparently -- well, why don't you
6 describe for me what your understanding of the
7 University's response to your letter of July 30th, 1984
8 was?

9 A. Would you restate the question?

10 Q. Yeah. I'm sorry.

11 What -- could you just describe for me your
12 understanding of the University's response that's --
13 that's evidenced in this Exhibit 48 to the non-DEC family
14 restrictions on distribution of BSD code?

15 A. Well, I think there was a -- a -- in Mr.
16 Towers' letter, I think there was a misunderstanding of
17 what we -- what we said. The information that had been
18 provided to us was that the Berkeley Software released
19 four point one and four point two were -- were based on
20 the Thirty-two V license, or the Thirty-two V product --
21 distributed product, and therefore, we weren't putting
22 any -- any type of unilaterally imposed -- well, we
23 weren't changing the Thirty-two V, we were just stating
24 that before anyone can receive a Berkeley distribution,
25 they've got to have one of these licenses.

1 As we had talked about earlier today, that
2 the source code exchange provision allowed you to
3 exchange up, if you will, to a higher-level license, but
4 the higher licensee could not go down. So my reaction to
5 the letter was I believe there was a major
6 misunderstanding of what -- what was attempted to be
7 conveyed here.

8 Q. Okay, and the second paragraph refers to
9 Thirty-two V license agreement executed -- there's two
10 dates here, October 2nd, 1981 and October 27th, 1981.

11 Do you have any understanding as to -- or do
12 you have any reason to doubt that that's the Thirty-two V
13 license agreement that was at issue in this letter?

14 A. Based on the -- on the date stated here, I
15 assume it was the Thirty-two V agreement.

16 Q. But you don't have any specific recollection
17 of that here today?

18 A. No.

19 Q. Okay. Okay. Now, during this time frame when
20 this correspondence was taking place, do you know -- do
21 you have any recollection as to whether AT and T and DEC
22 were planning on or had entered into an agreement whereby
23 DEC would offer to the public a binary version of Unix?

24 A. I'm not sure that I understand your question,
25 'cause I believe the agreements, you know, sublicensing

1 agreements, were already in place with DEC.

2 Q. With -- between AT and T and DEC?

3 A. Yes.

4 Q. Okay. Do you know whether any -- this time
5 period that we're talking about, the '84-'85 time period,
6 DEC expressed any interest to both AT and T or to
7 Berkeley that they wanted the four BSD version of Unix in
8 order to develop their binary version?

9 A. What took place between DEC and the school, I
10 mean I really don't know. DEC . . .

11 Q. But I'm interested in whether AT and T had any
12 understanding. There may have been a three-way
13 communication; I don't know. I'm mostly wondering if you
14 have any recollection.

15 A. No, the -- the Digital Equipment product that
16 they sublicensed -- I believe they called Ultrix -- was -
17 - was based on Berkeley's four point one or four point
18 two software, and they were within their contractual
19 right to acquire that software and -- and, you know, make
20 a derivative product that the sublicense. It had nothing
21 to do with us.

22 Q. Who had a -- I'm sorry.

23 Who had a contractual right?

24 A. I mean -- DEC did.

25 Q. To do what?

1 A. To receive the source code for four dot one or
2 four dot two from Berkeley under the source code exchange
3 provision.

4 Q. Well, but Berkeley had to agree to what --
5 they had a right to license to whomever they chose?

6 A. Yeah, but I'm saying that far as AT and T was
7 concerned . . .

8 MR. KENNEDY: Objection to form.

9 Go ahead.

10 A. . . . they could receive the source code,
11 because they -- they had the appropriate license in
12 place.

13 I'm not sure if that's what you're asking.

14 Q. And they were -- they were -- if -- if
15 Berkeley -- let me strike that. I'll just move on to the
16 next question.

17 A. I'm left confused, I guess.

18 Q. Okay.

19 A. If I said something to confuse you . . .

20 Q. No, my understanding is DEC, because they were
21 a licensee of AT and T, could have -- they were eligible
22 to receive any version of Thirty-two V . . .

23 A. That's right.

24 Q. . . . but the BSD code, which contained
25 Thirty-two V as well as BSD's work, that was something

1 that was up to the University to decide who they wanted
2 to license to; is that your understanding from your
3 experience?

4 MR. KENNEDY: With the proviso that they not
5 license beyond valid Unix source code licensees?

6 Q. At this time, yes.

7 MR. KENNEDY: That's the problem I had with
8 your earlier question. You said to whomever they
9 pleased, and I don't think anyone has ever competed with
10 BSD . . .

11 Q. No, in this time frame when they were
12 licensing BSD code to AT and T licensees.

13 It was the University's prerogative to decide
14 whether or not that they were going to license a BSD
15 product to DEC or not. Is that your understanding?

16 A. Under what agreement?

17 Q. Under four point one and four point two,
18 during this time frame, the '84-'85 time frame?

19 A. I'm not sure that I . . .

20 Q. Let's move on, because you didn't work for the
21 University. I was just wondering -- you wouldn't know
22 what their prerogative was, but I was wondering whether,
23 you know, what your understanding was if DEC wanted to
24 use the BSD version for their binary product, if they had
25 wanted to use that, they would have had to deal with the

1 University to get that; isn't that right?

2 A. That's right; we would not have provided that
3 for them. I guess I just -- I got lost there and still
4 am as to what -- what the questions were about, so . . .

5 MR. KENNEDY: Is the University contending
6 that with respect to four dot one and four dot two it was
7 free to license that software to some Unix System Thirty-
8 two V licensees but to deny licensees -- deny other Unix
9 licensees the distribution of that software?

10 MS. SHAPREAU: That's not the issue I'm
11 focusing on. I'm just basically -- I'm trying to
12 understand the background of the non-DEC family
13 restrictions, and that's -- I'm not -- that's not a
14 contention we're raising, but I was just asking the
15 witness his understanding.

16 WITNESS MR. FRASURE: The -- my under-
17 standing . . .

18 MR. KENNEDY: There's no -- there's no --
19 there's no question pending.

20 by Ms. Shapreau:

21 Q. For everybody's benefit, I'm going through a
22 lot of these documents. I just want to try and get a
23 good picture of these documents relating to these non-DEC
24 family restrictions so I have an understanding, but I'm
25 not understanding what was going on at the time.

1 I've just handed you, Mr. Frasure, what's
2 been marked as Exhibit No. 49 dated -- the first page is
3 dated September 24th, 1985, and it is a letter from Mary
4 McDonald to Ms. Gertrude Williams of AT and T, and
5 attached to that is a marked-up draft of a license
6 agreement, I believe it's the BSD code.

7 And did you at any time -- do you believe
8 you've ever seen this letter or this marked-up copy of
9 the BSD license agreement?

10 A. Yes, I believe so.

11 Q. Were you working with Ms. Williams on the
12 issue of getting the license agreement for four point two
13 BSD finalized?

14 A. No.

15 Q. Do you know who she worked with, who
16 supervised her?

17 A. I need to -- let me just scan this for a
18 minute.

19 Q. Forgive me. At the very last paragraph, it
20 says -- the last full paragraph, that sentence, the last
21 sentence says enclosed are copies of this letter and the
22 enclosures. . . Geoff Green.

23 A. Yeah.

24 Q. Okay. I've just got two brief questions on
25 this, so you don't need to become familiar with

1 everything unless you want to.

2 A. Okay.

3 Q. Okay. I wanted to ask you, there is a page
4 with a heading at the top, Rider Seven?

5 A. Uh-huh.

6 Q. Which I believe replaces that notice provision
7 that before the break Ms. Fithian was asking about.

8 It says:

9 . . . Sublicensing may be implemented using
10 the agreements and procedures acceptable to AT and T for
11 its current release of Unix operating systems, including
12 the use as AT and T deems appropriate of agreements for
13 object code. . . end user accepts by opening the package
14 containing the object code.

15 Do you recall any communications while you
16 were employed at AT and T from the '83-'84 time period to
17 '87 regarding the enforceability of shrink-wrap licenses?

18 A. Do I recall conversations with who, with the
19 University?

20 Q. No, with anybody at AT and T regarding the
21 enforceability of those licenses.

22 MR. KENNEDY: You may answer yes or no.

23 A. Yes.

24 Q. Okay. And without revealing any
25 attorney/client privileged material, could you tell me

1 the substance of those conversations?

2 A. I was I guess in a -- trying to get educated
3 on the subject from the AT and T attorneys and what -- I
4 guess what the current law was and interpretation or --
5 or whatever the right words are was that when someone
6 opened a shrink-wrap agreement, you know, the way the
7 license was presented and so on. So, you know, we had a
8 number of discussions about that, and I was -- like I
9 say, trying to get educated on the subject.

10 We provided those -- the licensee -- the
11 sublicensee the ability to use shrink-wrap agreements
12 where they were enforceable.

13 Q. Was there any discussion that you recall
14 regarding whether or not they were enforceable, they
15 meaning shrinkwrap licenses?

16 MR. KENNEDY: You may answer yes or no.

17 A. No. I don't recall that. I . . .

18 Q. Was there an assumption that they were
19 enforceable, in terms of the discussions you -- you were
20 involved in?

21 MR. KENNEDY: Could we hold on just a second?

22 MS. SHAPREAU: Sure.

23 MR. KENNEDY: Had you finished your prior
24 answer?

25 A. I just answered no, I didn't . . .

1 MR. KENNEDY: Right.

2 A. . . . know. I was -- I was told they were
3 enforceable.

4 Q. Okay. Who told you that?

5 A. The attorneys.

6 Q. Do you remember having any conversations with
7 anyone at the University regarding the enforceability of
8 shrinkwrap licenses?

9 A. No.

10 Q. Okay. And then I wanted to address your
11 attention to the very last page of this document which is
12 seven -- sub-A on sublicensing. Apparently in the
13 University's marked-up copy they were trying to add I
14 believe this language to the four point two BSD contract,
15 and it's -- why don't you read the subparagraph A and
16 give me your understanding of this if you can as you --
17 if you can recall as you read it in the -- in the 1985
18 time period when you got it?

19 A. Uh-huh.

20 MR. KENNEDY: I'm having real trouble
21 following. Where are we, now?

22 Q. I'm sorry; the very last page of this exhibit.
23 It's seven little a . . .

24 MR. KENNEDY: Oh, okay.

25 Q. Just that first paragraph, and again, I'm

1 focusing on this non-DEC family distribution issue.

2 MR. KENNEDY: Could -- could we go off the
3 record for just a minute?

4 **** BRIEF PAUSE ****

5 by Ms. Shapreau:

6 Q. Mr. Frasure, could you give me your
7 understanding of what the University was proposing in
8 paragraph seven small A on the last page of Exhibit 49?

9 A. Yeah; let me read it.

10 (Brief Pause.)

11 They were -- they were trying to restrict AT
12 and T and -- in who -- if we used the -- the four point
13 two BSD enhancements, modifications in our product
14 distribution, then they wanted to -- the University
15 wanted to restrict AT and T as to who that product could
16 be sublicensed to.

17 Q. So AT and T initially, as we started this
18 discussion of non-DEC family restrictions, was telling
19 the University that they couldn't distribute beyond the
20 DEC family their BSD code, and they wanted to make the
21 reciprocal restriction to AT and T that if AT and T had
22 the BSD code, you -- AT and T couldn't then distribute to
23 non-DEC families?

24 A. That's correct.

25 Q. So this is kind of a reciprocal restriction?

1 A. Uh-huh.

2 MR. KENNEDY: Well . . .

3 Q. Mr. Frasure, I've just asked you to look at
4 what's been previously marked as Exhibit 44, which is a
5 document dated November 4th, 1985 from you to Mary
6 McDonald, and it appears to be responding to the prior
7 exhibit. Is that your understanding?

8 A. Yes.

9 MR. KENNEDY: Forty-four responds to forty-
10 nine?

11 A. Forty-nine.

12 Q. That's . . .

13 We're clear now.

14 MR. KENNEDY: Is that right, Mr. Frasure?

15 A. Yes, that's right.

16 MR. KENNEDY: Okay.

17 Q. Now, directing your attention to the second
18 paragraph where you state that this proposed paragraph
19 seven which you have just talked about in the prior
20 exhibit was unacceptable because it limited AT and T
21 sublicensing rights, what did you mean by that?

22 A. Where are you reading in that?

23 Q. I'm sorry. Maybe I could ask it another way.

24 Does the first sentence of the second
25 paragraph basically confirm what we just discussed, that

1 AT and T -- I'm sorry. I'd rather that you tell me.

2 The second paragraph, the first sentence -
3 could -- do you recall what you meant by that -- by that
4 sentence?

5 MR. KENNEDY: You're referring to the
6 sentence:

7 . . . Your revised paragraph seven of the
8 proposed agreement is unacceptable to AT and T because of
9 the limitation on AT and T's sublicensing rights.

10 Q. That's correct.

11 Thank you, Mr. Kennedy.

12 A. I'm not sure what you're asking me. The
13 sentence says what -- what we found was unacceptable to
14 AT and T.

15 Q. Okay, and it was unacceptable because it
16 limited AT and T's sublicensing rights?

17 A. Yes.

18 Q. And how did it limit AT and T's sublicensing
19 rights?

20 A. Well, the proposed language, as I recall
21 reading it here a few minutes ago, said that we could not
22 sublicense a product unless -- let's go back and read it.

23 . . . To only those parties to whom the
24 University may under present or future terms imposed by .
25 . . license releases of four BSD.

1 MR. KENNEDY: Mr. Frasure was reading from
2 Exhibit 49.

3 A. So I interpreted that to mean that we could
4 not provide the product to -- to anyone other than what
5 the University could provide a product.

6 Q. Okay, and then there's a sentence in the
7 middle of the second paragraph that starts with such,
8 says:

9 . . . Such a limitation by the University
10 would be inconsistent with AT and T's requirement that
11 the . . . research, including software enhancements and
12 modifications from the educational use of AT and T
13 software be made available without restriction by an
14 educational licensee if they are made available at all.

15 What is your understanding of what that
16 sentence means, if you recall?

17 You wrote this letter in 1985; if you recall
18 what you meant at the time, I would be interested in
19 that.

20 A. Well, the educational agreement, as we talked
21 about earlier, provides for the distributing to the
22 appropriate licensee of -- of any modifications to the --
23 to the software. If we're talking about a binary
24 product, if AT and T was to receive the four point two
25 BSD source code and incorporate it into a -- a product,

1 then it would have the right to -- to sublicense that --
2 that product.

3 So, in other words, the software agreement
4 that the University entered into said that if they made
5 the code available, that it would -- it would have to be
6 made available to another -- to another appropriate
7 licensee -- appropriately licensed licensee.

8 Q. Regardless of the hardware family? Is that
9 the point that you were making?

10 A. No. Remember those -- the agreements have
11 evolved in the hardware family evolved with the System
12 Five product, so you know it depends upon what -- what
13 agreement or set of agreements that you're -- that you're
14 looking at.

15 Q. Was it your understanding throughout your
16 employment at AT and T that the fruits of research by
17 licensees, particularly educational licensees, including
18 software enhancements and modifications, if they were
19 going to be made available at all they should be made
20 available without restriction to other AT and T
21 licensees?

22 MR. KENNEDY: Objection to form.

23 A. If they were appropriately licensed, they
24 should be made available to them, yes, upon request.

25 Q. Now if -- if there was an AT and T licensee

1 who didn't have a license for DEC family and they wanted
2 to obtain the BSD product, do you know how much they'd
3 have to pay to get a DEC family license from AT and T?

4 A. I don't recall. There was -- excuse me.
5 There was various schedules that if you were a -- a
6 System Five licensee, say for -- for the AT and T 3-B and
7 you wanted to obtain a -- the DEC version of that, then
8 there was a -- a fee to be paid, but I don't recall what
9 that fee is.

10 Q. Okay, Mr. Frasure, I just handed you a letter
11 dated February 26th, at least stamped dated February
12 26th, 1986. It appears to be maybe a side letter
13 agreement that's signed by Mr. Wilson, and it's to the
14 Regents of the University of California.

15 Why don't you take a minute to -- to look at
16 that?

17 A. I remember the letter.

18 Q. Oh, you do remember the letter? Okay.

19 Why don't you tell me what this letter is
20 about?

21 A. Well, it gave the University the -- the right
22 to provide the BSD versions, at -- at that time it was
23 for four one, four two and the potential four three to
24 any System Five licensee, regardless of the -- the family
25 of code.

1 Q. Okay. So they -- in the end of this -- this
2 negotiation period, the University was free to distribute
3 its product, which contained Thirty-two V, to any AT and
4 T licensee, regardless of hardware family?

5 A. Up through the -- the System Five releases,
6 yes . . .

7 Q. Okay.

8 A. . . . that were -- that were specified in I
9 think some of the earlier correspondence the release zero
10 one and two.

11 Q. Because you testified earlier that there was a
12 limitation by family, and so I wanted to just --
13 obviously it's been a long time, and I . . .

14 A. Well . . .

15 Q. . . . wanted to clarify that point.

16 A. The -- the limitation that I -- that I talked
17 about before was the interchange of source code between
18 System Five licensees. In other words, I knew all this
19 had happened. I knew this was where you were going, but
20 between the interchange of -- of the source code between
21 System Five licensees, in other words, if someone had a
22 DEC System Five license and they had made a -- a drive to
23 work out of it, they could not exchange it with a 3-B
24 licensee unless they upgraded their contract to receive
25 that.

1 MS. SHAPREAU: Okay.

2 Why don't we take a break?

3 **** BRIEF RECESS ****

4 by Ms. Shapreau:

5 Q. Okay, take a look at page 000215, that's the
6 Bates number . . .

7 MR. KENNEDY: Of Exhibit 34.

8 Q. . . . of Exhibit 34.

9 Thank you, Mr. Kennedy.

10 I know that this has been -- this specific
11 provision was discussed earlier today, paragraph one
12 point zero one a . . .

13 A. Yes.

14 Q. . . . and I'd like to ask you a specific
15 question.

16 If a licensee of AT and T during this time
17 frame of '84-'85 -- this is -- and again for the record
18 this is a System Five license agreement that we're
19 looking at -- if a licensee of AT and T developed
20 software which did not contain any licensed software, and
21 by licensed software, maybe I should ask you . . .

22 My understanding of licensed software, and I
23 would like your understanding is AT and T's source code,
24 could be its object code, its methods and concepts,
25 documentation pertaining to that. Is there anything else

1 that you would include in -- what is your understanding
2 of what was included in the licensed software as used in
3 -- in Exhibit . . .

4 A. All those things specified in the -- in the
5 agreement. I mean, the agreement makes reference . . .

6 Q. Right.

7 A. . . . to the various things, whether be it
8 documentation or whatever, so it's all those items
9 covered by the agreement.

10 Q. Okay. And why -- you know, I hate to have
11 more than one document going at a time, but maybe it will
12 help us answer this question.

13 If you could refer in that same packet to
14 page Bates stamped 000243, which is the letter dated May
15 15th, 1985 from AT and T to The University of California,
16 the definition of licensed software is discussed.

17 A. Yeah, I see page 243; I don't know where the
18 rest of the letter is.

19 **** Brief Pause ****

20 Q. Focusing now on just the words licensed
21 software as a defined term in the System Five license
22 agreement, the document that has been marked as Exhibit
23 No. 51, which is dated May 15th, or stamped May 15th,
24 1985 signed by Otis Wilson to the Regents states in the
25 middle of it:

1 . . . Licensed software means . . .

2 And this is a clarification -- the letter
3 states it's a clarification; quote:

4 . . . Licensed software means all or any
5 portion of computer programs, other information and
6 documentation. . .

7 Little "I" in parens. . .

8 . . . listed in the attached schedule for
9 Unix System Five, VACS version, and any additional
10 schedule forwarded pursuant to section two point oh three
11 of appendix A, or, -- little two -- furnished to licensee
12 by AT and T or any of its associated companies in
13 conjunction with any provision of support services for
14 any Unix System Five.

15 So just focusing on this clarification, could
16 you give me your understanding in this time frame of 1985
17 what specifically comprised the licensed software.

18 MR. KENNEDY: There's another sentence . . .

19 Q. Okay, well, let me read that. The next
20 sentence reads:

21 . . . Licensee agrees that any modification
22 or derivative work prepared by it that contains any
23 licensed software shall be treated as licensed software
24 hereunder.

25 Now, I just want to understand what could

1 possibly comprise the licensed software. Would that --
2 could you tell me the components of what your
3 understanding in May '85 would have been included in the
4 licensed software? If you recall what your understanding
5 was in 1985.

6 A. Licensed software would have been . . .

7 Q. Would it have been the source code?

8 A. . . . would have been the source code or some
9 portion of it, with modifications made to it by the
10 licensee.

11 Q. Where do -- where do you get the understanding
12 that a modification to the source code falls within the
13 definition of licensed software?

14 A. It says licensee agrees that any modifications
15 or derivative work prepared by it that contains any
16 licensed software . . .

17 Q. Okay.

18 A. . . . shall be treated . . .

19 Q. Okay.

20 A. . . . as licensed software.

21 Q. Okay. So we're talking about modifications
22 that contain the licensed software as opposed to a
23 hypothetical where somebody could develop -- a licensee
24 of AT and T could develop a product that did not contain
25 any licensed software.

1 I'm trying to understand . . .

2 A. Okay. I'll -- let me go back to my . . .

3 Q. Go ahead.

4 MR. KENNEDY: Go ahead. Please answer it,
5 though.

6 I'm objecting to form. Go ahead.

7 A. I want -- I want to go back to my -- my
8 comments from -- from this morning in that the rest of
9 the agreement needs to be taken into consideration, and
10 that's where I believe the paragraph that I was -- cited
11 this morning, paragraph 408 that has to deal with methods
12 and concepts . . .

13 Q. Okay.

14 A. . . . I believe is a key part of the . . .

15 Q. Okay.

16 A. . . . agreement. And earlier today on several
17 occasions I've use the -- the example, I think, that if -
18 - if someone has been exposed to the source code and has
19 used the source code and then goes off on their own and
20 wanted to develop a product that subconsciously or
21 through rote or whatever the words are developed a
22 product that contained the methods and concepts,
23 techniques that we're using, then it's -- I don't know
24 what the right word to use -- understanding,
25 interpretation or what -- that -- that AT and T would

1 have a -- an interest in that product.

2 Q. Okay. So if -- just so I understand, so that
3 we can go from step to step, I'm just trying to
4 understand.

5 So licensed software -- your understanding of
6 licensed software in the 1985 time period in the System
7 Five license agreement could include source code of AT
8 and T's; is that correct?

9 A. Yes.

10 Q. Okay. And it could include object code of AT
11 and T's as well?

12 A. Yes.

13 Q. Okay. And it could also include documentation
14 of AT and T's; is that correct?

15 A. Yes.

16 Q. And it also could include methods and concepts
17 of AT and T's included in their System Five product; is
18 that correct?

19 A. Yes.

20 Q. Okay. Now, if a -- if a -- a licensee of AT
21 and T developed a product that did not have source code
22 of AT and T's, object code of AT and T's, documentation
23 of AT and T's or methods and concepts of AT and T's, but
24 they had had access to an AT and T license but that their
25 product didn't contain any of the things I've just

1 referenced, that product would not contain any quote
2 unquote licensed software; is that correct?

3 MR. KENNEDY: Objection to form.

4 MS. SHAPREAU: What's your objection?

5 MR. KENNEDY: Well, two things. One, to the
6 extent it calls for a legal conclusion; and secondly, in
7 your laundry list of items, you didn't include
8 modification or derivative work, which are terms in the
9 contract which Mr. Frasure has identified as aspects of
10 licensed software under these agreements.

11 by Ms. Shapreau:

12 Q. Did you ever . . .

13 Strike that.

14 Why don't you look -- a little bit earlier in
15 Exhibit 51, the second paragraph, which states:

16 . . . Regarding a definition of licensed
17 software in the granting clause, AT and T does not assert
18 any ownership interest in any modification or derivative
19 work made by licensee and does not consider that such
20 definition claims such an interest.

21 What did AT and T mean by that in 1985?

22 You earlier had stated that you were familiar
23 with this document.

24 A. Yes.

25 Q. Okay.

1 MR. KENNEDY: You're asking for his -- his
2 understanding of what AT and T as a company was trying to
3 communicate?

4 Q. Yes.

5 This -- what I've just read to you states AT
6 and T does not assert an ownership interest in any
7 modification or derivative work made by licensee. Now,
8 if that . . .

9 A. That . . .

10 Q. And my understand, and correct me if I'm
11 wrong, is that if a modification or derivative work did
12 not contain licensed software, which you'd earlier
13 described as source code, object code, documentation and
14 methods and concepts . . .

15 A. Uh-huh.

16 Q. . . . then AT and T did not assert any
17 ownership interest in that; isn't that correct?

18 MR. KENNEDY: Objection to form.

19 You may answer.

20 A. Well, I -- I don't think I can answer that --
21 that question with -- with -- with a yes or no. I mean,
22 AT and T, when I was with them, never claimed any
23 ownership in any . . .

24 Q. I'm sorry, could you start over?

25 I didn't hear . . .

1 A. When I was with -- with AT and T in the
2 licensing organization, we never claimed -- AT and T
3 never claimed any ownership in a modification to the
4 extent that it didn't include the . . .

5 Q. Licensed software.

6 A. . . . the licensed software. So if you added
7 lines of code to the source code product, those lines of
8 code belonged to the licensee, and AT and T never claimed
9 ownership . . .

10 Q. Okay.

11 A. . . . of -- of those, but it kept -- I think
12 the agreement says to the extent that it doesn't contain
13 the licensed software, so the intent here was that we did
14 not want -- did not want someone using the methods and
15 concepts within the software or using the source code
16 product to develop another product . . .

17 Q. Okay.

18 A. . . . to provide to someone.

19 Q. Okay. So that if an AT and T licensee
20 developed a software that was a modification or
21 derivative work which did not contain source code, object
22 code, documentation or methods and concepts of AT and
23 T's, AT and T did not assert an ownership interest in
24 that product. Is that your understanding -- was that
25 your understanding in May of 1985?

1 A. It has no ownership in that portion of the
2 product.

3 Q. Okay.

4 A. But it doesn't mean that it's not part of the
5 licensed software, I don't think. I think there's two --
6 two things here that we're talking about, licensed
7 software and -- and ownership, which I think are two
8 completely separate subjects.

9 Q. So you're suggesting -- why don't you tell me
10 what you . . .

11 A. No, I just -- the only reason I said that, I
12 felt like you were drawing a conclusion that -- something
13 that I didn't say.

14 Q. So you're suggesting that an AT and T
15 licensee, if they develop a modification or a derivative
16 work that contains no source code, object code,
17 .documentation or methods and concepts of AT and T's Unix
18 operating system, that licensee owns the product but
19 there are further restrictions on that -- on that -- the
20 licensee's development?

21 MR. KENNEDY: Objection to form.

22 You may answer.

23 A. No.

24 Q. So they -- they own that?

25 A. They own . . .

1 Q. That modification or derivative work under
2 those specific restrictions that we've just discussed?

3 MR. KENNEDY: Objection to form.

4 You may answer.

5 Q. Do you think it's unclear? Do you want me to
6 re-ask it?

7 MR. KENNEDY: Well, I -- I think it's -- I --
8 I think that certain things are unclear and very
9 hypothetical, but I do think that you should -- because
10 you're talking about . . .

11 MS. SHAPREAU: I'm trying . . .

12 MR. KENNEDY: . . . developing in -- in the
13 air . . .

14 MS. SHAPREAU: Okay.

15 MR. KENNEDY: . . . without any . . .

16 And then, when Mr. Frasure talks about
17 development . . .

18 MS. SHAPREAU: Okay. I would rather that you
19 not get into a lot of detail here, but -- or we could go
20 outside and discuss it. Maybe I'll just re-ask this
21 question, okay, if there's a problem.

22 MR. KENNEDY: It's -- it's -- it's your
23 Deposition.

24 MS. SHAPREAU: Okay. I mean, I want the
25 clarification from you, but I don't want you to assist

1 the witness in any way with your descriptions.

2 MR. KENNEDY: I am probably the only lawyer
3 in this litigation who tends to limit his objections to
4 say objection to form. I've read the transcripts of the
5 other Depositions.

6 MS. SHAPREAU: And I certainly appreciate
7 that.

8 MR. KENNEDY: I see the continuing . . .

9 MS. SHAPREAU: Well, I certainly have
10 not . . .

11 You've never accused me of that. . .

12 MR. KENNEDY: No.

13 by Ms. Shapreau:

14 Q. Okay. Okay.

15 Again, focusing on Exhibit 51, which is the
16 May 15th, 1985 letter, the second paragraph states:

17 . . . Regarding the definition of licensed
18 software in the granting clause, AT and T does not assert
19 any ownership interest in any modification or derivative
20 work made by licensee and does not consider that such
21 definition claims such an interest.

22 Now, you were involved with this document at
23 the time of its preparation; right?

24 A. Yes.

25 Q. Okay. Just so I understand what your

1 understanding was when you were involved in the
2 preparation of this document, if a licensee of AT and T
3 developed a software -- developed a software product that
4 was a modification or derivative work of the Unix System
5 but contained no literal source code, no literal object
6 code of AT and T's, no documentation of AT and T's and no
7 methods and concepts of AT and T's, that portion of the
8 AT and T licensee's product that didn't contain any of AT
9 and T's proprietary information was owned by that
10 licensee; is that correct?

11 MR. KENNEDY: Objection to form.

12 You may answer.

13 A. Yes.

14 MS. SHAPREAU: What's your objection?

15 MR. KENNEDY: Would you like me to clarify,
16 on the record?

17 MS. SHAPREAU: If it's lengthy I'd prefer
18 going out in the hall.

19 MR. KENNEDY: No, I just simply -- my
20 objection is that it's -- is not consistent . . .

21 MS. SHAPREAU: Well, I'd just like to correct
22 my questions so that. . .

23 MR. KENNEDY: I think it's -- I think -- I
24 think it's -- it's not consistent with prior testimony
25 and you were -- rather than accepting the words of Mr.

1 Frasure, you were attempting to reduce his testimony to a
2 sound bite that will . . .

3 MS. SHAPREAU: Okay, this is -- this is not a
4 brief objection. If you want to go out into the hall,
5 I'd be more than happy to talk to you about it.

6 MR. KENNEDY: Please continue; it's your
7 Deposition. I've made my objection to form. I don't
8 think . . .

9 MS. SHAPREAU: It's the sound bite objection;
10 right?

11 by Ms. Shapreau:

12 Q. I just want to understand what AT and T meant
13 and you meant by this letter in May 15th of 1985?

14 MR. KENNEDY: He's testified -- I mean, you
15 can ask him about this till doomsday. He's testified
16 extensively about what it meant.

17 MS. SHAPREAU: Well, I -- I needed
18 clarification on the earlier testimony. I -- I think
19 that there were additional questions that needed to be
20 asked.

21 MR. KENNEDY: He's -- I think he's answered
22 your question.

23 MS. SHAPREAU: Okay.

24 MR. KENNEDY: Was there an answer?

25 A. I just want to express something. We've --

1 we've -- we've gone around here about this question and -
2 - and I -- I feel like there's been perhaps some
3 confusion or interchange of words incorrectly regarding
4 one completely separate subject to me, which is
5 ownership, and the other is licensed software, and the
6 two are not interchangeable, so that was the reason that
7 I attempted to make a distinction before.

8 Q. Okay. So let me state my understanding of the
9 paragraph we've been discussing based on what you've just
10 said.

11 That if a licensee of AT and T developed a
12 product that was a modification or derivative work that
13 did not contain any source code of AT and T's or their
14 object code, documentation, or methods and concepts and
15 that was not licensed software, then that licensee of AT
16 and T had an ownership interest in that modification or
17 enhancement; is that right?

18 A. They -- I think the question gets compounded.
19 They -- I think the software agreement clearly says that
20 those things are -- belong to the licensee and that AT
21 and T has no ownership in those. I think the -- the --
22 to me the license agreement is explicit in providing that
23 -- stating that AT and T claims no ownership in that.

24 Q. Interest in modifications or derivative works
25 as we've just discussed them?

1 A. Yes.

2 However, I guess I just wanted to point out
3 and I feel this is where we got hung up, was that that's
4 a completely separate subject from the -- from the
5 license -- software license product. So . . .

6 Q. I don't understand what you mean.

7 A. Well, the fact that you generate a line of
8 code, you own that code, that's yours. It doesn't mean
9 that it's exclusive of the software product. That's all
10 I'm saying.

11 Q. Exclusive of the software product?

12 A. It means it's -- you can take that code out.
13 I guess that it's -- I'm saying . . .

14 Q. So you could -- you could segregate the code
15 that was . . .

16 MR. KENNEDY: Excuse me.

17 Q. I'm sorry. Go ahead.

18 MR. KENNEDY: I believe you interrupted him.

19 Q. Forgive me.

20 A. Now, I just -- ownership, to me is a very
21 clear and distinct subject from the licensed software
22 product. If -- if you generate the code, add code to it
23 then I think, clearly the software agreement and the side
24 letter said that you owned that. That didn't say that it
25 was not part of the -- the software licensed product . . .

1 Q. So what are you suggesting? You owned it but
2 because it was part of the agreement, what does that --
3 can you tell me the significance of that?

4 A. Well, I -- I'm just saying I want to make a
5 distinction. I'm not sure where we are going with this.
6 It's just that I'm saying that the ownership belongs
7 clearly to the originator of -- of that code, but it --
8 it could be construed to be part of the software product.
9 I think . . .

10 Q. Which software product?

11 You're talking about . . .

12 A. Under the software agreement.

13 Q. You're talking about the licensed software?

14 A. Yes.

15 Q. I'm not . . .

16 A. Yes.

17 Q. Okay. If we could use the same term, that
18 would help me.

19 A. Licensed software.

20 MR. KENNEDY: Could I now ask Mr. Frasure to
21 leave the room?

22 MS. SHAPREAU: Yes.

23 MR. KENNEDY: Because I do want to make a
24 statement on the record.

25 MS. SHAPREAU: Okay.

1 **** (Mr. Frasure exited the room.)

2 MR. KENNEDY: Just briefly. There are a
3 whole host of reasons why I object to this line of
4 inquiry. One is that it is extremely hypothetical; two
5 is that it's calling for legal conclusions. Three is
6 that you're asking for someone to interpret a document as
7 if he were an expert on contracts. And I'm not at all
8 sure that even had he been designated as an expert, that
9 such testimony would be admissible.

10 What concerns me most, however, is that the
11 University must or should know how it developed its
12 software. It knows or should know whether its engineers
13 had access to UNIX Thirty-two V source code. Whether
14 they used it, referred to it . . .

15 MS. SHAPREAU: Is this an objection?

16 MR. KENNEDY: It's . . .

17 MS. SHAPREAU: I just want to know why we're
18 getting a lecture.

19 MR. KENNEDY: No. It's because -- it's to
20 try to flush out what's concerning me. I've sat back and
21 let -- let you and Ms. Fithian make your inquiries of Mr.
22 Frasure, virtually uninterrupted, with occasional
23 objections to form; saying nothing more on the record
24 unless I'm invited to clarify it. Now, I'm clarifying
25 it.

1 It's one thing to ask this witness, here are
2 some facts to assume. A fact -- assume someone went off
3 in a clean room and did X,Y,Z, or assume that people with
4 access to the code did the following and this is what
5 their final product looks like, would you in your own
6 personal understanding regard that as a derivative work.
7 But you're not doing that.

8 What you're doing is -- we're playing word
9 games here with words in this contract. This contract
10 means whatever a court construes it to mean. If a court
11 regards it as ambiguous then maybe whatever shared
12 understandings the parties communicated to each other may
13 have some admissible relevance. But I think it's
14 inappropriate and I think it's unfair to continually try
15 to take his forthcoming testimony and reduce it to words
16 that you believe give you an advantage in this case, when
17 you're not taking into account all of the various
18 permutations of what he said.

19 He said earlier that if -- that you were not
20 free under the agreement -- the University was not free
21 under the agreement, to develop software-- . . .

22 MS. SHAPREAU: I'd like to just -- before we
23 go any further. I'd like to keep track of the time this
24 is going so that we can add it to the time.

25 MR. KENNEDY: I'll be done -- I'll be done in

1 thirty seconds.

2 . . .--without the benefit of -- with the
3 benefit of Unix.

4 He's talked about using that software and no
5 attempt has been made to follow that up.

6 Finally, I want to say one other thing. It
7 shouldn't be a surprise to anyone in this room that not
8 claiming an ownership interest in a portion of code which
9 is developed is a far different cry -- cry from saying
10 that the University has a right to distribute the entire
11 derivative work to non-licensees of USL. And that's what
12 this case is about. This case isn't about ownership
13 interests in lines of code. It's about the distribution
14 of code, which we claim is built upon and derived from AT
15 and T and USL code to non-licensees of USL.

16 I think that -- that I'm just personally
17 frustrated at the time that we have been spending on this
18 issue. And the insistence upon asking the same questions
19 again and again and again, to try to persuade this
20 witness to agree to formulations that you find favorable
21 to your case.

22 MS. SHAPREAU: Okay. I'd like to respond to
23 your comments.

24 The University certainly believes that these
25 issues are very important. I believe I'm not asking this

1 witness anything in an expert capacity. He was there and
2 was involved in the preparation of this letter. I'm
3 entitled to ask him what his understanding was at that
4 time. I think the hypothetical that I was asking him was
5 very similar to the things that he was mentioning during
6 his discussions with the University. I think that it's
7 completely proper. I think it's really inappropriate of
8 you to lecture us on the subject. I don't think that
9 you're right. He was there, he knows what was meant;
10 I'm asking about what he meant. And I don't think
11 there's anything improper.

12 I mean -- you know, I -- I would really
13 appreciate clarification if there's an objection based on
14 anything that I -- that I said, in terms of form that I
15 could correct because I would certainly like to do that.
16 But I'm not asking for his expert testimony. He's a
17 percipient witness -- so. And I don't want to frustrate
18 you. So, what can I say? I'll do everything I can to
19 reduce your level of frustration.

20 Do you have anything to say Mr. Weitz?

21 MR. WEITZ: Yes, actually I do. One brief
22 comment, which is that I believe that in your desire to
23 get out the next question, Mr. Frasure is starting words
24 and regularly not getting to quite finish. I think if
25 you would pause a little longer, his answers -- I think

1 a lot of his answers are cut off and incomplete as a
2 result of your going to the next question. Sometimes you
3 change your question in the middle and interrupt
4 yourself; that's okay. But sometimes you interrupt him
5 and I think that's a concern.

6 MS. SHAPREAU: Well, I certainly would --
7 would request that you mention that I wait until he
8 pauses; I try and do that. I certainly don't think that
9 I have interrupted. I wish you would tell me . . .

10 (Both Parties Speaking At Same Time.)

11 MS. SHAPREAU: Well, it's hard to determine a
12 pause from an end. And you know, we should encourage him
13 that if he has something to say to say it. I think he's
14 -- might have gotten that feeling that that's what he
15 should do throughout this deposition, because that's come
16 up earlier. So we can mention that to him when he comes
17 in.

18 MR. KENNEDY: No. No. We're not going to
19 discuss with Mr. Wilson how -- I'm sorry -- with Mr.
20 Frasure any adjustments in the manner of his testimony,
21 other than -- if that's what you're suggesting.

22 MS. SHAPREAU: I really don't want to
23 interrupt the man. We certainly have not made any
24 effort . . .

25 MS. FITHIAN: If he feels he's being -- if he

1 feels he's getting interrupted, I think it's
2 inappropriate to say . . .

3 MR. KENNEDY: No, that's not -- we thought
4 you were suggesting is -- is -- what I thought you were
5 saying is that we were going to suggest to him that he
6 tends to pause a lot.

7 MS. SHAPREAU: Of course not.

8 MR. KENNEDY: He's entitled to answer it in
9 whatever way he wants to answer it.

10 MS. SHAPREAU: I just wouldn't want him to be
11 cut off. I don't think he has been. By and large when
12 that's come up, somebody's said something.

13 MR. WEITZ: Should I ask Mr. Frasure to
14 return?

15 MR. KENNEDY: Please do.

16 **** BRIEF PAUSE ****

17 EXAMINATION of MR. FRASURE by MS. SHAPREAU, CONTINUED:

18 Q. Just to wind up, I want to ask you one last
19 question on this point.

20 If a product developed by a licensee of AT
21 and T, again -- well, why don't I preface this -- start
22 over. Strike that.

23 I'm referring to Exhibit No. 51, the document
24 that we've been discussing, which clarifies and amends
25 the definition of licensed software.

1 If a licensee develops a software product
2 that contains source code, object code, methods and
3 concepts, or documentation of AT and T's, that would not
4 be defined as licensed software; is that correct?

5 MR. KENNEDY: Objection to form.

6 A. I have to qualify my -- my answer by saying
7 if it was developed independent of the licensed
8 software . . .

9 Q. Okay. Let me -- I don't want to interrupt
10 you.

11 A. No. I say if it was developed independent of
12 the licensed software and without benefit of it, then to
13 me that's a -- that is the licensee's product. In other
14 words, if they were completely separate and divorced from
15 this and the people who developed that product didn't
16 have the benefit of the knowledge of this product. I
17 mean there are -- there are companies that developed
18 software products all the time without the benefit of
19 this, and introduce them.

20 I'm cautious in my answer because I
21 think that it needs qualification. If they had the
22 benefit of the licensed software when they did that,
23 then. . .

24 I still feel like we're talking about --
25 about two separate things here. One is ownership and one

1 is what is the licensed product.

2 Q. Okay. So focusing on the licensed software,
3 you're suggesting that -- that if an AT and T licensee,
4 by merely having access to the licensed software, even if
5 their -- a product that they developed contains no
6 methods and concepts, documentation, source code or
7 object code of AT and T's, that that product is somehow
8 still licensed software?

9 A. I don't think I said that. I think we're
10 going to have to get down to . . .

11 Q. So you . . .

12 A. . . . perhaps an example.

13 Q. Okay.

14 A. That if a -- a company -- a licensee had a
15 facility and people in it that never had -- had used the
16 UNIX source code and they set off and they developed a
17 product on their own, then I -- in my opinion, then AT
18 and T has no interest in that product.

19 Q. Forgive me. I don't know that I understand
20 your hypothetical completely.

21 This is -- if an AT and T licensee has a
22 licensed UNIX operating system and they've looked at it
23 and they've worked with it, then they go ahead and
24 develop a product that doesn't have actual source code,
25 object code, documentation, or methods and concepts of AT

1 and T's, is it my understanding -- do I understand you to
2 be saying that that licensee's product falls under the
3 definition of licensed software?

4 A. I don't -- I really don't think that I can
5 answer the -- the question clearly. I guess I have my --
6 it's very difficult to try to answer some of these
7 questions, because I think of the methods and the
8 concepts issue. There's a -- I've used the term at least
9 one time, mental contamination, if you will, of being --
10 being exposed to a product. You know, I think a clear
11 cut hypothetical case would be that if you have a
12 licensee and they have two physical locations and you've
13 got this group out here that's never seen the UNIX source
14 code and they go off and they develop a product, then I
15 would think clearly that that is that licensee's product
16 and AT and T has no interest in it.

17 However, if the other location that had
18 access to that source code and there were people working
19 on that new product that had worked with the UNIX
20 software to some extent -- I don't know what that extent
21 is because we're talking in general terms here -- then I
22 would think that there's a chance that AT and T would
23 have an interest in that product.

24 Q. Okay. So that I understand you. What you're
25 suggesting is that if an AT and T licensee has had access

1 to the UNIX operating system, such that -- you've used
2 the term mental contamination?

3 A. Yes.

4 Q. They've been mentally contaminated, meaning
5 they had some recollection of the UNIX operating system
6 by merely seeing it and working with it -- that AT and T
7 would then have an interest in any product that such a
8 licensee would develop, even if that product contained no
9 actual source code, object code, documentation, or
10 methods and concepts of AT and T's?

11 MR. KENNEDY: Objection to form.
12 Mischaracterizes testimony.

13 You may answer.

14 Q. I'm asking -- I'm asking the witness if that's
15 a correct understanding of what he had testified to.

16 MR. KENNEDY: Same objection.

17 You may answer.

18 A. I guess I would answer that question in the
19 fact -- saying that there is a chance that AT and T may
20 have an interest in it. I'm not going to say that --
21 that they do or they don't, but I'm going to say that
22 there's a chance that they have an interest in -- in that
23 product. Yes.

24 Q. Under what circumstances would they have an
25 interest -- would AT and T have an interest in the

1 licensee's product because they had had mental access to
2 the AT and T Unix operating system?

3 A. Well, I think the fact that they -- they had
4 access to it -- I'm really not trying to be -- to be
5 stubborn with you but techniques, methods and concepts
6 are things that -- that we use in every day life that we
7 have been trained -- we have learned by experience to
8 use. I think that for someone to say, well, we're not
9 using AT and T's methods and concepts is -- is a -- it's
10 a statement that -- someone may think that because they
11 subconsciously aren't aware that they were, but they
12 could be, that's why I have to answer the question by
13 saying there's a chance that they -- they do.

14 I mean you do things for so long and develop
15 styles and techniques, then for someone to say, well, it
16 doesn't contain AT and T's methods and concepts, I -- I
17 think may be hard to say if someone has worked with a
18 product for -- for some number of -- period of time.

19 Q. Okay. Assuming an objective person were to
20 determine whether or not the product we've been
21 hypothetically discussing, assuming there were no methods
22 and concepts of AT and T's in the licensee's product, do
23 you think AT and T would have an interest in that
24 licensee's product, if they'd had access to the UNIX
25 operating system?

1 MR. KENNEDY: Objection to form.

2 A. I don't know.

3 Q. My understanding of what you've just stated is
4 the licensee himself may think that it does or doesn't
5 have a methods and concepts of AT and T in the product.

6 But objectively if it had no methods and
7 concepts -- if the product had no methods and concepts of
8 AT and T's, would AT and T have an interest in that
9 product?

10 MR. KENNEDY: Objection to form.

11 Q. I'm just trying to understand what -- what --
12 what . . .

13 A. The only -- the only thing that I can go back
14 to is the example I used just a few minutes ago.

15 If a licensee had two locations and one
16 location had no benefit, no exposure to the source code
17 and they developed a product, then I think the -- the
18 answer is clear that AT and T has no interest in that.

19 Q. Okay.

20 A. Based on the -- on the software agreement.
21 However, if their -- the other location that has had
22 exposure to the software and uses the software and some
23 of those same people that were using that software
24 undertake development of another product, all I'm saying
25 is there is a chance. I can't say yes or no. All I can

1 say is there's a chance that . . .

2 Q. Okay. So there's a chance . . .

3 A. . . . that AT and T has an interest.

4 Q. Okay. So this licensee -- this hypothetical
5 licensee of AT and T's, we're talking about a chance that
6 their product if they've had access to AT and T's
7 licensed software, that their product could have methods
8 and concepts of AT and T's but it might not have methods
9 and concepts of AT and T's?

10 A. That's true.

11 Q. In the circumstance where an AT and T licensee
12 has had access to the UNIX operating system and there are
13 no methods and concepts of AT and T's in their product --
14 in the licensee's product, am I correct in understanding
15 then that AT and T would not have an interest in that
16 licensee's product?

17 MR. KENNEDY: Objection to form.

18 A. If it -- if it was that clear, in your
19 example, then I would -- I would say they -- they do not
20 have an interest in it.

21 Q. Okay.

22 A. If it was -- if it was that clear. However,
23 my -- in my answers the reason I'm hedging is sometimes I
24 just don't know that it's -- that it is that clear.
25 That's why I'm hesitant to answer with a yes or no.

1 Q. Okay. Now, the hypotheticals that we've been
2 discussing . . .

3 A. Yes.

4 Q. . . . in the last half hour or so, did you
5 communicate any of those hypotheticals in your meeting
6 with the University in 1984?

7 A. Yes.

8 Q. You did?

9 A. Sure did. Spent quite a bit of time.

10 Q. Was it a similar discussion that we're having
11 today?

12 A. Yes.

13 Q. Okay.

14 A. Yes. Very similar.

15 Q. Did you ever communicate to the University
16 what AT and T's understanding of methods and concepts
17 was?

18 A. I think there were references similar to what
19 I have made here today, of styles and techniques . . .

20 Q. You mentioned interface?

21 A. Yes. Methods, techniques of accomplishing
22 something within the code, sequencing things in a certain
23 manner. Yes, those were discussed and -- and presented
24 to them. We went through hypothetical examples exactly
25 like we did here, where a company has two locations and

1 one has not been mentally contaminated and the other is.
2 I don't think that -- I think the answers given in some
3 of those cloudy cases were similar to what I have said
4 here right now. There's a chance that there is -- we
5 can't say yes or no, but there's a chance.

6 Q. What was the University's. . .

7 I just want to mention, if I'm ever
8 interrupting you I want you to tell me because I want you
9 to finish your thoughts. Okay?

10 A. Uh-huh.

11 Q. Okay. Do you recall what the University's
12 response to this discussion was?

13 A. Well, I don't know what the University's
14 response was.

15 Q. Did they express that to you, that's what I
16 would like to know?

17 A. Well, I believe there were -- there were
18 individuals at that meeting that were -- were in and out.
19 I perhaps sterotypically assumed that they were students
20 because of their attire. But, you know, I think there
21 was some objection to some of our discussions.

22 Q. Do you remember what those objections were?

23 A. Well, they -- similar to what your questions
24 have been, I think. You know, trying to make a clear cut
25 definition in our answers where you cannot make a clear

1 cut definition. There -- you know, without looking at a
2 specific example, I -- I think that it's hard -- it's
3 hard to say.

4 MR. KENNEDY: Could we find out from Mr.
5 Frasure if he recalls which of the various hypotheticals
6 that were discussed today, were discussed with the
7 University?

8 Q. Certainly.

9 MR. KENNEDY: Which scenarios were discussed?

10 Q. I hate to have you repeat every hypothetical.

11 Was there any hypothetical that you discussed
12 today that you did not discuss with the University in
13 1984?

14 A. I -- you know, we went through I think
15 several. One was -- was a stand alone company as I said,
16 that had no -- no exposure. There was development of a
17 product who -- they -- was in conjunction with someone
18 who had ongoing access to the product. There was
19 development of a product who -- someone -- and I'll go
20 back to the term that Otis and I used to use, was mental
21 contamination of the product that set off on their own
22 and developed a product. And that's where I say there's
23 a chance that AT and T had an interest in the product.

24 Q. Okay.

25 A. So I -- I think the only one that's clear cut

1 is the -- is the stand alone, if you're looking for an
2 ownership issue or a licensed product issue.

3 I might add one thing that we did discuss,
4 also, that was in line with this, was regarding the
5 contractors' provisions. I'm not sure if you're familiar
6 with contractors' provisions with the software agreement.
7 That's where -- I had mentioned earlier today -- a
8 licensee perhaps if they did not have the technical staff
9 or whatever, they would license with another company to
10 develop the product for them. They brought them under
11 the scope of the software agreement. Then when that
12 development effort was done, they severed their
13 relationship. We -- in our examples, we did say that
14 there's a -- if that company now and those people that
15 had access to the UNIX code go off-- . . .

16 Q. You mean the contractors?

17 A. The contractor, yes.

18 . . .--go off and develop a product that
19 there's a -- there is also a chance that -- that AT and T
20 has an interest in that product.

21 Q. But if that product contains no source code,
22 object code, documentation, or methods and concepts of AT
23 and T, then AT and T would not have a property interest
24 in that product; is that correct?

25 MR. KENNEDY: Objection to form.

1 A. If it was that clear then I would say there is
2 no interest.

3 Q. Okay.

4 A. I'm not sure that it is that clear, that's why
5 we used the example. Again it was a mental
6 contamination, if you will. That company had exposure to
7 -- to the product.

8 Q. Do you believe there's ever a circumstance
9 where someone has had access to the UNIX operating system
10 and worked with it on a day to day basis, that they could
11 develop a product that didn't contain -- no -- excuse me
12 -- that they could develop a product that didn't contain
13 the methods and concepts contained in the UNIX operating
14 system?

15 A. Sure.

16 Q. And then AT and T would not have an interest
17 in that product; right? Is that correct?

18 MR. KENNEDY: Objection to form.

19 MS. SHAPREAU: What's your objection?

20 MR. KENNEDY: Provided it didn't otherwise
21 violate the agreement.

22 by Ms. Shapreau:

23 Q. Okay. Well, I don't -- I've asked this
24 question before. You -- you basically -- so that I
25 understand you -- are suggesting that if somebody has had

1 access, a licensee or a contractor pursuant to a license
2 agreement has had access on an ongoing basis to the UNIX
3 operating system and they develop a product that doesn't
4 have source code, object code, documentation, or methods
5 and concepts of AT and T's, then that licensee is free to
6 do whatever they want with that product; isn't that
7 correct?

8 MR. KENNEDY: Objection to form.

9 A. If it's that -- if it's that clear, that's
10 right.

11 Q. Okay.

12 A. It's theirs.

13 Q. Okay.

14 A. Yes.

15 Q. And obviously that's going to be a factual
16 matter. We are talking in the abstract here, but I'm
17 just trying to get your understanding of the terms of
18 these various agreements and the modifications and
19 clarifications.

20 A. (Moved head up and down.)

21 **** BRIEF PAUSE ****

22 Q. I want you to hold onto the System Five
23 Exhibit.

24 A. Okay.

25 Q. Okay. Mr. Frasure, I've just given you a

1 document dated August 15, 1984, signed by Mr. Wilson, to
2 the Regents. It references someone named Mr. R.D.
3 Hoffman.

4 Who's Mr. Hoffman?

5 A. Mr. Bob Hoffman. He worked for me; he was an
6 account executive.

7 Q. Did he deal on a regular basis with the
8 University of California?

9 A. No. He was a back-up person for Gertrude
10 Williams.

11 Q. Okay. I want to ask you a question about this
12 document, but to answer the question you're going to need
13 to look at Exhibit 34, which is the System Five license
14 agreement, paragraph one point zero one A. It's page P
15 zero, zero, zero, two, one, five. That's the page of the
16 license agreement that I think that this letter refers
17 to.

18 Let me ask you first, are you familiar with
19 this letter?

20 A. I have seen the language before. I can't
21 really say that I'm familiar with the letter, but I have
22 seen -- seen the language.

23 Q. Okay. In the middle of the page the paragraph
24 states:

25 We agree that the following may be

1 considered as part of the above referenced agreements.
2 We require that provision, such as in section one point
3 zero one A of the referenced agreement.

4 . . .By referenced agreement, this document
5 refers to the July 1st, 1983 UNIX System Five Agreement.

6 . . .The referenced agreement be included in
7 our educational software agreements. Reduced fees are
8 granted based on acceptance of such provisions. By way
9 of clarification, while we do not require that results,
10 enhancements and modifications be made public, we do
11 require that if the material is to be released at all it
12 must be -- made -- it must be available to anyone.

13 Before I ask you a question, I want to direct
14 your attention back to the System Five license under --
15 it's paragraph one point zero one A, sub -- little -- two
16 little I's.

17 A. Uh-huh.

18 Q. Which states:

19 Such results, enhancements, and
20 modifications all to the extent that they do not include
21 any portion of licensed software, are made available to
22 anyone, including AT and T and its associated companies
23 without restriction on use, copying, or further
24 distribution.

25 And then the sentence goes on.

1 Am I correct in understanding what AT and T
2 meant at the time of this August 15th, 1984 letter,
3 regarding the System Five agreement, was that if a
4 licensee developed their result, enhancement, or
5 modification that did not include any portion of the
6 licensed software, that that product could then be made
7 available to anyone?

8 MR. KENNEDY: Objection to form.

9 You may answer.

10 A. I -- I guess. I've read the words here.

11 Would you mind repeating the question or
12 having her read it back?

13 Q. Would you read it back?

14 (The previous question was read to the
15 witness.)

16 A. I guess the term anyone is -- is -- in reading
17 this is my concern. It's referencing the software
18 agreement. I have an interpretation. It's been a number
19 of years since I have seen this language. I guess I have
20 a

21 Q. Do you remember what was meant by this?

22 MR. KENNEDY: Excuse me.

23 Q. Oh, I'm sorry.

24 MR. KENNEDY: Were you done, Mr. Frasure?

25 A. No. Go ahead and ask the question. Or yes.

1 Go ahead and ask the question.

2 Q. Maybe I could just focus your answer. I just
3 want to get your recollection of what your understanding
4 of this was in the 1984 time period.

5 A. Any one -- as I stated earlier today, the
6 results are one thing to me, which are -- are separate
7 from any software modification.

8 Enhancements and modifications be made public
9 here and available to anyone.

10 I have to interpret this as being another
11 licensee, because it's referencing the software
12 agreement.

13 Q. Okay. So that I understand you. Your
14 understanding in August of 1984, of the word public and
15 anyone is an AT and T licensee. That's what you're
16 telling me?

17 A. I've broken it up into two categories and I
18 find it hard to. I think I read this differently now
19 than perhaps I did back then.

20 Q. I want your understanding at the time, in
21 1984, if you recall that, sitting here today?

22 A. (No verbal response.)

23 Q. Is your understanding -- is your recollection
24 that your understanding in August of 1984 was that the
25 words public and anyone as used in this paragraph in

1 Exhibit 52 meant AT and T licensees?

2 MR. KENNEDY: For the reasons he's already
3 testified to?

4 Q. I don't know what that means. I think the
5 question is fairly straight forward.

6 A. I don't know.

7 Q. Okay. Did you ever have any communication
8 with the University regarding your understanding of the
9 words public and anyone in Exhibit 52?

10 A. Not that I recall.

11 Q. Okay. Can you describe for me your
12 involvement in AT and T's license -- licensing with the
13 University for BSD code? Did you have much involvement
14 in that?

15 A. For the transfer of the code to AT and T?

16 Q. For the license that was in place that allowed
17 the transfer of Berkeley code to UNIX?

18 A. No. I had -- really had no direct involvement
19 in that. There's -- I believe when the correspondence
20 that we looked at earlier today was addressed to me, but
21 I was not involved in that negotiation.

22 Q. Okay. Do you know who was responsible in the
23 time period that you were employed at AT and T in the
24 licensing department for ensuring that the terms of the
25 agreement for BSD code were put into place?

1 A. What specific parts of the agreement?

2 Q. (Moved head up and down.)

3 A. In other words, the agreement as I recall
4 covered things like we would have to provide credit if
5 that was given to us.

6 Q. That's a good example. What about that one?

7 A. Okay. Well, there was -- that was outside of
8 my organization. That was the -- that would have been
9 the technical group. That whoever used that -- that code
10 had to provide the acknowledgements in the documentation.
11 I believe the acknowledgements in the code. I think the
12 author's name is in the code. But I had no -- no
13 involvement in that.

14 Q. So the technical group was responsible for
15 making sure that appropriate credit was given in AT and T
16 products that contained BSD code pursuant to license with
17 the University?

18 A. Well, the -- the name technical organization
19 is kind of a generic thing. But there was those
20 developers that took that source code if there were any
21 modifications put into the -- to the UNIX product.
22 Obviously if they picked up those -- those lines of code
23 and incorporated them and -- and if any of -- additional
24 functions or capabilities were provided as a result of
25 those modifications then they were, as I understood it,

1 were to acknowledge those people in the documentation, as
2 well if it was -- if that information was presented AT
3 and T.

4 Q. How did the people in the technical division
5 of AT and T get that information? Wouldn't they get that
6 from licensing since the licensing had the license
7 agreement?

8 A. No. The -- what we're talking about is the
9 product itself, not the licensing. In other words, the
10 licensing agreement was in place. The code and any
11 documentation was transmitted to the technical
12 organization within AT and T.

13 Q. Okay. So the technical organization within AT
14 and T got the BSD license?

15 A. Well, they were aware of the provisions of the
16 license but they got the code directly from the
17 University.

18 Q. Do you know who in the technical division
19 would have been responsible in the time period that you
20 were at AT and T for making sure that the credit
21 provision, for example, in the license agreement for BSD
22 code was fulfilled?

23 A. Well, I don't know the individual. I know the
24 manager of the organization. His name was Mike DeFazio,
25 D-E-F-A -- I think it was Z-I-O.

1 Q. Okay. So he would have been . . .

2 A. He was over the organization that had -- I
3 believe he was over the organization that had that
4 responsibility.

5 Q. Okay. So to your understanding, your
6 recollection, no one in the licensing department at AT
7 and T during the time you were employed there was
8 responsible for ensuring that the, for example, the term
9 which required proper credit to the University of
10 California for the use of its code. There's nobody in
11 the licensing department that was responsible for
12 ensuring that that requirement was fulfilled; is that
13 correct?

14 A. Yeah. We -- our responsibility was that we
15 provided the terms of the agreement to the -- to that
16 organization.

17 Q. And what was the name of that organization,
18 specifically?

19 A. I don't know. All I know is that -- I recall
20 is generically a technical organization. It was located
21 at -- headquarters at Summit, New Jersey, and it was
22 headed up by Mike Defazio.

23 Q. Do you remember any of the names of other
24 people in that division that might have had some
25 responsibility for ensuring that the terms of the

1 agreement with Berkeley were fulfilled?

2 A. Specifically, no. No. I recall a number of
3 names of individuals, but I can't say that any one of
4 them had part of the responsibility or all of the
5 responsibility. It's my belief that it fell in Mike
6 Defazio's organization, but beyond that I can't -- I
7 can't tell you any individuals.

8 Q. Do you know whether any Berkeley Code was ever
9 -- Berkeley code or documentation was ever used in any
10 UNIX product?

11 A. No. I don't know that. I don't know.

12 Q. Do you know whether AT and T ever paid the
13 University of California for any of its results,
14 enhancements, or modifications to the UNIX operating
15 system?

16 A. I don't know. I'm hesitating because . . .

17 Q. Why don't I -- why don't I clarify it,
18 actually?

19 A. Okay.

20 Q. Other than the cost of processing and
21 obtaining code from the University of California, do you
22 know whether AT and T ever paid any money to the Regents
23 for its results, enhancements, or modifications to the
24 UNIX operating system, other than the costs of getting
25 that product?

1 A. I don't know. And the reason that I'm
2 hesitant is that I have a vague recollection that there
3 was -- there was some type of exchange that was going to
4 occur, but I don't know if that ever occurred. I think
5 there was a discussion about it, but it's vague. I don't
6 have any -- any -- other than I think there was some
7 vague -- I mean there's a vague memory there of something
8 to take place for some -- some fee. I don't really know
9 what it was involved with.

10 Q. Okay. So you don't have any specific
11 recollection that AT and T ever paid any money to the
12 University of California for its results, enhancements,
13 or modifications other than their cost of reproduction of
14 product; is that accurate?

15 A. Yes. I have nothing concrete that I can
16 recall.

17 Q. Do you know why AT and T, during your
18 employment at AT and T, might have wanted any of the code
19 developed by the University of California?

20 A. No.

21 Q. Mr. Frasure, I've just handed you document,
22 it's kind of hard to read the date, but it appears to be
23 September, 1985 and it's Bates number P zero, zero, zero,
24 nine, eight, nine, seven. It's to all account
25 executives, subject Kernel Newsletter.

1 Do you know what a Kernel Newsletter is?

2 A. (No verbal response.)

3 Q. Well, first let me ask you, is this your
4 signature on this page?

5 A. Yes.

6 Q. Do you remember writing this document?

7 A. I think so. Yes.

8 Q. Okay. What's a Kernel Newsletter?

9 A. I'm trying to recall.

10 Q. Okay.

11 A. Let me finish reading the letter here.

12 (Brief Pause.)

13 I have to assume that it was an internal
14 document that I . . .

15 Q. Okay. I don't want you to guess about
16 anything. I just want your recollection of the facts.

17 A. I remember writing the letter. It was
18 important to me that we -- we exchange information. That
19 one account executive in working with a customer would to
20 the best of our ability -- if we developed a side letter,
21 would be made aware of the language that was used and for
22 what reason that it was used. So we weren't continually
23 trying to do -- to develop new ground. Specifically what
24 the Kernel Newsletter was I cannot tell you. I only have
25 to make an assumption about it.

1 Q. So you -- do you have any specific
2 recollection on any Kernel Newsletters on issues of
3 modification of any licensing agreements that we've
4 discussed today?

5 A. What I have a recollection of is that we -- we
6 did -- say we -- I wanted my account executives to
7 disseminate the information to save the new -- any new
8 side letters that were developed with the licensees so
9 everyone was familiar with the language. I don't --
10 beyond how we published. What the Kernel Newsletter was,
11 I can't tell you anything beyond that. I mean I had an
12 objective in trying to do this.

13 Q. Mr. Frasure, I've just shown you what's been
14 as Exhibit No. 54, which is a document dated January
15 16th, 1986, written by Mr. Ferrari to your attention.

16 Do you recall this letter?

17 A. Yes, I do.

18 Q. This letter states:

19 In response to your request, this
20 letter is to inform you that the four point three
21 Berkeley Software Distribution, BSD, is based on UNIX
22 Thirty-two V, as have been all previous BSD releases.

23 A. Yes.

24 Q. Why was -- what was the request that AT and T
25 made to the University of California referenced in this

1 letter?

2 A. What was the request?

3 Q. Yes.

4 A. I specifically can't tell you. I thought
5 there was a -- I had made a reference this morning to
6 the fact that -- that Berkeley had notified us that the
7 four point three was based on Thirty-two V. I thought I
8 read something here this morning that said to the extent
9 of the next release, or something. I don't recall what I
10 read this morning. I think there was reference to it
11 here some place that I read. That future releases to the
12 extent that they contained Thirty-two V or something.
13 But I don't recall the vehicle of the request. I feel
14 certain that -- that it must have been in writing. But
15 we're wanting something back from the University to know
16 what the product contained, whether it was -- if it
17 included any System Three or any System Five source code
18 -- source code products.

19 Q. Was that the focus to determine which UNIX
20 operating system four point three is based on?

21 A. Yes.

22 Q. Thirty-two V, System Three or System Five?

23 A. What it contained . . .

24 Q. So that was the focus, which product?

25 A. Yes.

1 Q. Okay. Why -- why did AT and T want that
2 information?

3 A. To make sure that if there was to be a
4 recipient of that product that they were appropriately
5 licensed. In other words, at one time, you know, people
6 would -- would call in or the University would call in to
7 verify that someone was -- was a licensee. If it was
8 going to contain something that was beyond Thirty-Two V,
9 we had to ensure that we responded correctly to that.

10 Q. In this time frame, January 1986, was AT and T
11 the one who was responsible for verifying that someone
12 had an appropriate license to obtain a BSD product?

13 A. I . . .

14 MR. KENNEDY: Distributed by whom?

15 Q. Distributed by the University of California.

16 A. I don't recall. There was a . . .

17 Q. Well, you're asking this -- I'm sorry answer
18 your -- answer the question, please.

19 A. There was a -- a procedure published as -- as
20 I recall. I do not recall the time frame, it's been too
21 long ago. But there was a procedure by which we -- where
22 we discussed the source code exchange provisions that we
23 were to respond in verbal to the licensee, but the
24 licensee had the responsibility to write down the date
25 and the person that they talked to, and so on, so we

1 could always trace back and be verified. That procedure
2 was -- was in place. There was also a -- other
3 procedures that required copies of the signature page of
4 the license and other things.

5 To answer your question specifically who had
6 the responsibility at this time, I can't -- I can't tell
7 you.

8 Q. Okay. You don't -- you don't recall at this
9 time?

10 A. I don't recall.

11 Q. Okay.

12 A. But our organization did continually get
13 inquiries from licensees.

14 Q. Okay.

15 MR. KENNEDY: I believe that document has
16 been marked as an exhibit.

17 Q. Yes. That's correct. Is that your question,
18 whether or not it had been?

19 MR. KENNEDY: No. I was just mentioning that
20 I think the document had been . . .

21 Q. What document?

22 MR. KENNEDY: That Mr. Frasure my be
23 referring to had been marked as an exhibit.

24 A. The procedure.

25 MR. KENNEDY: With the procedure.

1 Q. I'm sorry.

2 Mr. Frasure, you came on board at AT and T
3 shortly before AT and T divested; is that -- is that
4 right?

5 A. No. It was quite some time before that. I
6 thought.

7 Q. Okay. Could you just briefly describe for me
8 how AT and T's marketing goals -- because you've had some
9 responsibility in -- in marketing from what you've
10 testified to, how were AT and T's marketing goals changed
11 when AT and T divested?

12 MR. KENNEDY: Assumes facts not in evidence.
13 You may answer.

14 Q. Did -- okay, I'll rephrase.

15 Did AT and T's goals regarding marketing
16 change after they divested?

17 A. I believe they did; yes.

18 Q. Okay. Do you remember the date of the
19 divestiture?

20 A. No.

21 Q. Okay. How did those goals change?

22 A. Well, I -- I can't specifically tell you
23 because at -- at the time of the divestiture I was not
24 involved in any marketing activities. Prior to
25 divestiture AT and T and Bell Laboratories and so on made

1 -- made things available to -- to companies and to
2 people. Corporations or whatever; I probably should not
3 say people, but to companies on some basis. Then after
4 divestiture we found that we were in competition with
5 those same -- same corporations that may have provided
6 information to previously. So we set out with marketing
7 strategies to try to gain our fair share in the
8 marketplace. I can only speak of the -- the UNIX
9 software licensing and sublicensing. I mean that's all I
10 ever had exposure to in terms of marketing with AT and T.
11 So I really can't say what that effort was before
12 divestiture because my only involvement in it was after
13 the divestiture of AT and T. That's when I went to work
14 for the software licensing organization.

15 Q. Okay. And just for clarification. You had
16 mentioned earlier that you had no -- you didn't play a
17 role in negotiating. Correct me if I'm wrong. I'd asked
18 you earlier some questions about the BSD code and the
19 licenses that AT and T entered into for that code. I
20 believe, and correct me if I'm wrong, that you stated
21 that you didn't have any . . .

22 A. That I had no direct -- I reviewed the
23 documents and made comments on them but I had no direct
24 negotiation with the University on those documents.

25 Q. Okay. Who had the direct negotiation with the

1 University on those documents?

2 A. To the best of my recollection it was -- it
3 was Mike Defazio's, again, organization. And we -- we
4 reviewed the documents but they were involved with the
5 basic negotiation of the agreement in conjunction with
6 the attorneys.

7 Q. So Mike Defazio's department, which you've
8 described earlier as the technical department, they
9 actually were the ones that negotiated the terms of the
10 BSD license agreement?

11 A. To the best of my knowledge. Mike's
12 organization was technical and he had other -- other
13 responsibilities within his organization. He was an
14 individual over a rather large organization. So he had
15 responsibility for setting up certain business
16 relationships between AT and T and -- and other -- other
17 companies, licensees. His involvement was rather diverse
18 at his level. So, I mean, it just was not strictly a
19 technical organization.

20 Q. You mentioned that although you didn't have
21 any direct involvement you -- you did it -- went over one
22 of the terms, the credit provisions of the BSD?

23 A. The what provisions?

24 Q. The credit provision of the BSD license. Do
25 you have some recollection of the terms of the BSD

1 licensing?

2 A. Yes. Yes. I reviewed the document and
3 commented on it.

4 Q. Okay. And why were you commenting on the
5 documents?

6 A. Wanting to make sure that they were consistent
7 with other documents that we had put in place with other
8 licensees.

9 **** Brief Pause ****

10 MS. SHAPREAU: Okay. We would like to finish Mr.
11 Frasure's deposition today and we're making every effort
12 to do that. We have noticed depositions for tomorrow
13 morning at 9:30 with Mitzi Bonn. Both Ms. Fithian and
14 myself are catching what we -- what I believe are the
15 only -- taking two flights to get to Greensboro, so we
16 can be there -- making ever effort to be there. I don't
17 want it to be construed that we weren't willing to stay
18 to finish this deposition, because we simply won't be
19 able to get the deposition tomorrow if we don't stop at a
20 reasonable hour in order to catch two airplanes to get
21 there.

22 I -- I would like an agreement from you if
23 that's possible. You know we could stay here until 9:00
24 tonight, but we wouldn't be able to find a way to get to
25 Mitzi Bonn's deposition tomorrow, since it's a three and

1 a half to four hour drive.

2 MR. KENNEDY: I'm not sure what you're asking
3 of

4 MS. SHAPREAU: I just don't want to have -- I
5 want to make every effort to finish. I just don't want
6 there to be an objection from you that we would have any
7 problem with continuing this, if we can't finish today
8 to another time.

9 MR. KENNEDY: The thing is, I would like to
10 do everything possible to . . .

11 MS. SHAPREAU: To finish today.

12 MR. KENNEDY: . . . finish Mr. Frasure,
13 principally because of the location. It is . . .

14 MS. SHAPREAU: I know. I agree.

15 MR. KENNEDY: Casting no aspersions upon the
16 fine people of Greenville, you guys are way out there in
17 terms of geography. It's a trek to get out here for
18 everybody, so if we could get it done today. And indeed
19 Mr. Frasure runs a business, so I know that -- he's
20 communicated to me that he would much rather finish today
21 if at all possible.

22 MS. SHAPREAU: Let's just forge ahead here.

23 MS. FITHIAN: Yes.

24 MS. SHAPREAU: Okay.

25 MS. FITHIAN: Let's see how quickly we can

1 get through . . .

2 MS. SHAPREAU: Let me just try to get through
3 this as quickly as I can.

4 by Ms. Shapreau:

5 Q. I wanted to ask you. My understanding is Mr.
6 Wilson signed the contract with the University of
7 California for four point three, BSD. Do you know if
8 that's correct or not?

9 A. I don't know. I assume he did.

10 Q. Do you have a recollection of that?

11 A. I have no recollection. I assume he did.

12 Q. Okay. Do you know whether he -- did you have
13 any discussions with him regarding the preparation and
14 negotiations of the contract with the University of
15 California for the four -- Berkeley Software
16 Distribution, that four point two and four point three in
17 it?

18 A. I don't know. Let me see that again, if I
19 could.

20 Q. Okay. Okay. Why don't I just go ahead and
21 mark this? I only have one. I'm sorry.

22 MR. KENNEDY: It's okay.

23 Q. Oh. This one has been marked already.

24 I want you to take a look at what's
25 previously been marked as Exhibit 42. I'm going to try

1 to ask you some brief questions.

2 MR. KENNEDY: I don't think. Forty-two is
3 not the signed agreement.

4 Q. That's right. That's fine. That's not what
5 my question is about. That's okay. This is a draft, but
6 I'm aware of that.

7 MR. KENNEDY: Okay.

8 Q. Okay. Mr. Frasure, could you take a look at
9 page one of this draft agreement and under the witness
10 section, the second paragraph states:

11 Whereas the Regents of the University
12 of California is the proprietor and owner of enhancements
13 and additions to Thirty-two B, which together with parts
14 of Thirty-Two V comprise computer programs and
15 documentation entitled Fourth Berkeley Software
16 Distribution, version Four point two BSD, Berkeley
17 software.

18 Did you personally ever communicate with the
19 University regarding this paragraph?

20 A. Not that I recall.

21 Q. Do you know whether -- who else at AT and T
22 might have communicated with the University of California
23 regarding this paragraph?

24 A. Only in a general -- in general.

25 Q. I'm interested in a -- in a name of an

1 individual.

2 A. Well, I would -- I would say that perhaps Otis
3 Wilson had discussed it with them.

4 Q. Okay.

5 A. I do not recall having a conversation with the
6 University with -- regarding that paragraph.

7 Q. Okay. Why don't you look through this briefly
8 and tell me whether you have any specific recollection of
9 having communications with the University of California
10 regarding any paragraph in this document? I know we're
11 short on time, but if you could do that for me I would
12 appreciate it.

13 A. I really do not recall having any -- any
14 conversation with anyone at the University regarding this
15 agreement.

16 Q. How about any conversation with anybody within
17 AT and T regarding any of these provisions in this draft
18 agreement?

19 A. (No verbal response.)

20 Q. Do you have any specific recollection of
21 having any conversations in 1984 with anybody at AT and
22 T, about any of these provisions?

23 A. Let me start from the -- I recall talking with
24 -- with the attorney that I primarily worked with within
25 AT and T -- we had three attorneys -- regarding the

1 proper credit and recognition. I recall talking to a
2 gentleman who works for Mike Defazio called Tony Baresse
3 -- named Tony Baresse, about this. I was trying to gain
4 an understanding of . . .

5 Q. By "this," you mean the credit provisions?

6 A. Yes, ma'am.

7 I just wanted to have an understanding of --
8 of what it was.

9 Q. Tony -- how do you spell Baresse?

10 A. I believe it was B-A-R-E-S-S-E, if I'm not
11 mistaken.

12 Q. Okay. And what was Tony Baresse's role?

13 A. He was a -- a -- I'm not sure what level he
14 was. But he worked for one of the people that reported
15 directly to Mike Defazio and he had a number of manager
16 level people that reported to him.

17 Q. Well, before I go on to the next person could
18 you tell me the substance of the conversations, if you
19 recall them?

20 A. Just trying to gain an understanding of what
21 the intent was here and carrying it out.

22 Q. What was your understanding of the intent
23 here?

24 A. It was my understanding that if the credits
25 and recognition names of individuals or whoever was

1 provided with -- with the source code or with any
2 documentation, that it -- it would be carried forth if AT
3 and T published it or used that code it would be in the
4 source code as well as in any documentation.

5 Q. Do you have any other recollection of any
6 conversations you've had with anybody at AT and T and the
7 University, those two organizations, regarding any other
8 provision in this draft agreement, regarding the meaning
9 of the terms in this agreement?

10 A. The only other thing that I recall was talking
11 about the indemnification paragraph, but I don't recall
12 the substance of the conversations. They were strictly
13 with the -- with the attorney. I . . .

14 Q. Okay. Okay. So -- I just want to make sure.
15 There is no other provision in this draft license
16 agreement that you recall discussing with anybody at the
17 University or AT and T?

18 A. I have no -- no recollection of any other
19 conversations.

20 Q. Do you know whether you made telephone calls
21 and had conversations with anybody at the University
22 during the process of negotiating this particular
23 agreement?

24 A. To the best of my knowledge I do not.

25 MS. SHAPREAU: All right.

1 *****

2 CROSS-EXAMINATION of MR. FRASURE by MR. KENNEDY:

3 Q. Mr. Frasure, during your involvement with the
4 licensing of UNIX system software, did you have any
5 involvement in decisions on the part of AT and T to grant
6 or deny software licenses to applicants who were seeking
7 a license?

8 A. Yes.

9 Q. What was the nature of your involvement,
10 generally?

11 A. Well, generally we tried to look at an
12 applicant to see if they -- if they really needed a
13 license. There were a number of companies for various --
14 that applied for a license that we denied them to. We
15 felt they had no valid reason for it or we felt for some
16 reason the license would not be protected. There was
17 really a number of reasons that we would use as criteria
18 to deny a license. We would deny -- I was involved in
19 the denial of a couple licenses because of the Dunn and
20 Bradstreet reports that came in on the -- on the
21 companies; they had bad credit reports. When requested
22 to produce some type of records or recordings they --
23 they could not produce them. They were behind in payment
24 of royalty fees to other companies for other products.
25 We decided that it was not a wise decision to provide

1 them with a license.

2 I denied licenses to companies that were
3 really -- there were individuals within the company who
4 wanted to obtain a license, rather than the company
5 itself. We felt that a binary product would be suitable
6 for them, either from AT and T or from one of our
7 licensees. There was a number of times we would direct a
8 -- a customer -- if you want to call them a customer --
9 inquiry of a license to -- to one of our competitors,
10 based on what their product need was. We would deny them
11 a license because we felt that they -- they really didn't
12 have a valid reason for it or a need for it.

13 There were large corporations who would apply
14 for a license who wanted to -- let me restate that.

15 There were large corporations who,
16 individuals within the corporation would want a license.
17 They would want to negotiate the license themselves or
18 have their department head license it, rather than their
19 corporate general counsel. They did not want to take the
20 license to that high a level in the company. We would
21 deny really working with them because we felt that it was
22 the desires of an individual rather than the desires of
23 the company to obtain the license.

24 We participated in a lot of trade shows and
25 that would stimulate interest in UNIX licenses. There

1 was number of them that we would turn down. I recall
2 turning down a license to -- I'm not sure how to refer to
3 it as a company or what, but someone who came to us for
4 an educational license. Because they had a -- they said
5 they were running a non-profit organization and they
6 really had no charter from the state that they were in
7 saying that they were an educational institution. He
8 produced -- the individual produced a couple of pieces of
9 paper that said they were non-profit, but we felt like
10 that they were after a license for other than using it
11 for educational purposes. They were denied.

12 So there was a number of cases where we would
13 deny licenses to -- to a -- to a company or I guess a
14 corporation if they applied for one.

15 Q. Let me deal first with the instances that
16 you've referred to in which licenses were denied based on
17 the results of a Dunn and Bradstreet review.

18 Did you conduct that Dunn and Bradstreet
19 review yourself?

20 A. No.

21 Q. Who conducted that?

22 A. We had two paralegals in the organization.
23 One's -- the lady's name was Ruth Rideout; and the other,
24 I can see her plain as day but I don't recall her name
25 right now. But they -- when the request for license

1 would come in, one of the first things that we would do
2 would be to run a Dunn and Bradstreet, the paralegals
3 would do that. If the results come back that they were -
4 - they were satisfactory, we would -- we would pursue
5 with the next step and try to ensure that the company
6 applying for the license had a valid reason for the
7 license and just did not want to obtain it.

8 Back during the time that I was with the
9 organization it -- in some respects it seemed to be a fad
10 to be able to try to get a license with some companies.
11 So we had to weed out those requests to really protect
12 the software because in some of those requests we just
13 felt like the software would not be protected.

14 I've lost track of your question. I guess I
15 digressed.

16 Q. How did they results of the Dunn and
17 Bradstreet check come to your attention in those
18 instances in which you ended up denying license
19 applications?

20 A. I'm not really sure. It was that the Dunn and
21 Bradstreet come back and typically if it come back
22 unfavorable, the account executive would relay that to
23 the licensee. If the licensee continued to push for it,
24 I always wanted to make the account executive the good
25 guy and I was the bad guy. I always wanted to provide an

1 order of escalation. So I would get involved in -- so
2 not to jeopardize any customer relations, if it was easy
3 for the account executive to blame it on his boss rather
4 than tell the individual themselves. So I would get
5 involved in talking with the customer and review it and
6 question them. I have questioned them on the things in
7 the Dunn and Bradstreet report, in terms of their
8 financial position and their ability to -- to pay for the
9 license.

10 In one case there was a corporation who
11 wanted a sublicensing agreement and although they would
12 not get that agreement until they paid us, we had
13 questions -- I had questions in my mind that they would
14 be able to pay the fees if they did sublicense a product.
15 So I denied those -- those requests for licenses.

16 Q. The denials that you're referring to that grew
17 out of the unfavorable Dunn and Bradstreet reviews, were
18 the companies making those applications based in the
19 United States?

20 A. Yes.

21 Q. You referenced as well denials of a new
22 license where a licensee was behind on royalty payments.

23 Do you remember that?

24 A. The licensee? Yes. We would -- we would go
25 after -- one of the provisions of the sublicensing

1 agreement required that you pay your -- your royalties on
2 a quarterly basis. We tracked those and if the licensee
3 would get behind, then we would start sending registered
4 letters to them as reminders. We reminded them of what
5 they owed and we did not get even a report from them as
6 to how many copies that they sold. We would -- in
7 several cases took action to suspend their sublicensing
8 of a product until the fees were caught up and paid.

9 Q. And in those instances were those companies or
10 licensees ones that were based in the US?

11 A. To my knowledge they were all based in the
12 United States; yes.

13 Q. You mentioned as well cases in which licenses
14 were denied because based on AT and T's investigation AT
15 and T concluded that it was individuals who were really
16 interested in acquiring source code licenses rather than
17 the companies for which they were employed.

18 Were those instances as well ones in which
19 the companies were doing business in the US?

20 A. Yes.

21 Q. You referred as well to a case in which a
22 license was denied to an entity because AT and T was not
23 satisfied with its proof, if you will, regarding its not-
24 for-profit status.

25 Was that a licensee that was operating, doing

1 business in the US?

2 A. Yes, it was.

3 Q. All of the instances that you've referred to,
4 did they involve licenses by US based entities seeking to
5 use UNIX system source code in relation to their US
6 operations?

7 A. Yes.

8 MR. KENNEDY: I've got nothing further.

9 *****

10 RE-DIRECT EXAMINATION of MR. FRASURE by MS. FITHIAN:

11 Q. Okay. Now, you had talked about -- are you
12 finished?

13 MR. KENNEDY: Yes.

14 Q. Okay. You talked about companies being denied
15 aid for source co-license because they had an unfavorable
16 Dunn and Bradstreet report.

17 What did you mean by an unfavorable Dunn and
18 Bradstreet Report?

19 A. They owed people a lot of money. They were
20 late in their payments beyond terms of contracts they had
21 entered into. Normally a company, when it does business
22 with a supplier or something like that, it enters into
23 sometimes the terms that they are going to pay and a
24 certain time frame. So if they are ninety days or six
25 months overdue in that, there is no reason for me think

1 they are going to treat me any better or A T and T any
2 better than they did someone else.

3 Q. Okay. And you mention people being denied --
4 actually you talked about licenses being suspended or
5 sublicensing of product being suspended because people
6 were behind in payment of royalty fees.

7 A. Yes.

8 Q. In those instances, those were customers who
9 already had a license?

10 A. Yes.

11 Q. And the license was then suspended?

12 A. Well, there was action taken to suspend the
13 license and you know, we would -- we would start
14 enforcement of that and generally agreements were made to
15 remedy the situation. But we would take action to do
16 that because they were not in accordance with their
17 sublicensing agreement.

18 Q. Okay. And you said in some instances you
19 decided that a prospective license, you did not have a
20 valid reason . . .

21 A. Yes.

22 Q. . . .for pending license.

23 What was a valid reason?

24 A. Well . . .

25 Q. Or what did you mean by a valid reason? Let

1 me put it that way.

2 A. What I meant by an invalid reason, normally we
3 provided the license to a corporation because they were
4 either going to use the product internally for their own
5 use and there's a term called port. They would modify it
6 to run on certain selected group of hardware that they
7 had and they wanted to take the advantages of a UNIX
8 operating system and use that within the company. Then
9 those companies would enter the corporate level with an
10 agreement. As I indicated there were individuals within
11 corporations who just wanted to get their hands, I felt,
12 on the source code so that they could play with it
13 themselves and do things that were not in the company's
14 interest. When they would refuse to take the agreement
15 to the appropriate level within the company so an
16 individual who was designated to negotiate on behalf of
17 the company, and when they refuse to take it to that
18 level, we would deny all license. I did not feel that it
19 was a good business practice to negotiate an agreement
20 with some organization that was way down in the corporate
21 structure.

22 Q. But in those instances, if the company -- if
23 the company did take it to the appropriate levels for
24 negotiating agreements that would not be a problem;
25 right?

1 A. That's right. If we understood what they were
2 going to do with the product.

3 Q. So assuming if they took it to the appropriate
4 level that would not be a reason for deny it?

5 A. That's true, if -- yes, that's right.

6 MS. SHAPREAU: That being what, I'm unclear?

7 MS. PITHIAN: The fact that an individual
8 who was not appropriated in the initial . . .

9 MS. SHAPREAU: Thank you.

10 A. We have to be careful here because a lot of
11 these companies were not big companies, they were very
12 small companies that were made up of a few individuals
13 and we had to exercise caution in those companies as
14 well. So one individual in a company could wear a lot of
15 different hats and we wanted to ensure that the software
16 was going to be protected and we tried to the best of our
17 ability to determine if they were going to fold up within
18 three months or six months and things get dispersed to
19 the wind. We -- you lose control of it that way, so we
20 had to satisfy ourself that the licensee was going to
21 indeed be able to fulfil the requirements of the
22 contract. Anyone can sign a contract, but you don't know
23 where you're going to stand in a few months if they go
24 belly-up in bankruptcy.

25 Q. So assume that you were dealing with your

1 appropriate person within a company to enter into
2 contracts, and that you felt that they were able and
3 willing to protect the software and you felt they were
4 able to pay for it in those instances, there would be no
5 reason for denial of the license; is that correct?

6 MR. KENNEDY: Objection to form.

7 Q. In those instances there was no reason for
8 denial?

9 MR. KENNEDY: Objection to form.

10 A. I think that's probably true.

11 Q. Now, I've marked as Exhibit D 55, a letter to
12 you from someone named John W. Wake from Prentiss Hall,
13 Inc., dated July 23, 1986.

14 Do you recall receiving this letter?

15 A. Yes.

16 Q. I'm sorry; let me identify it by Bates number
17 as well. It's produced by Prentiss in this action and
18 it's Bates number is P -- P 12-158 through P 12-156. I'm
19 sorry.

20 And do you recall receiving this letter?

21 A. Yes.

22 Q. Okay. And it says:

23 . . . Enclosed is a copy of the manuscript as
24 we discussed, Guide to Writing A UNIX Device Driver by
25 people at MassCom.

1 And the second paragraph says:

2 . . .Please let us know if, one, AT and T has
3 no reason to bar publication of this work and, if AT and
4 T finds this to be a helpful contribution to existing
5 literature.

6 Do you recall responding to this letter?

7 A. To my knowledge, it was -- it was responded
8 to; yes.

9 Q. Do you recall what the response was?

10 A. No.

11 Q. I'm sorry?

12 A. No.

13 Q. You don't recall?

14 A. I -- no, I don't recall.

15 Q. So you don't recall whether AT and T objected
16 to the request?

17 A. Not in this case; no, I don't. I mean, I'd
18 really have to look at the correspondence dating back to
19 this.

20 Q. Are you aware of any instances in which AT and
21 T or its affiliated company reviewed code submitted by
22 third parties to determine whether it contained any AT
23 and T proprietary code?

24 A. Yes.

25 Q. How many such instances are you aware of?

1 A. I couldn't give you a specific number. If I
2 had to guess, I would say five to six instances.

3 Q. And do you recall whether any of those
4 instances you informed the person making the request that
5 the code did not contain any AT and T proprietary code?

6 A. Yes, there were some that we said did not
7 contain any.

8 Q. Can you identify any specific instances?

9 A. By names, no.

10 Q. What was done to make that determination?

11 A. The code that would be provided to us similar
12 to what text was -- that came from Prentiss Hall here,
13 was sent to Summit, New Jersey. Again, it was Mike
14 Defazio's organization and the code was reviewed by the
15 applicable people there to determine if -- if it looked
16 like it had any AT and T code in it or methods and
17 concepts or whatever and they would make a determination.
18 They would send me back their findings in writing and
19 then I would just really paraphrase or use the paragraphs
20 that they provided to me to respond to the customer. I
21 was a customer interface. We did not want the customer
22 working with them. You lose control of things that way,
23 so I was a customer interface. So I myself or my people
24 made no determination of that whatsoever.

25 Q. Do you know what criteria were applied by the

1 people who were making the determination?

2 A. No. They were the experts in the system. I
3 had not idea what they used.

4 Q. Do you know whether in any of the instances
5 the person submitting the code who had written the code
6 being submitted had access UNIX source code?

7 A. I really can't call -- recall specifically. I
8 do recall that there was some add-on type applications or
9 products that would run with the operating system and
10 they were a license. So they had developed something off
11 on the side. I don't know if it was attached process or
12 what it was but them being a licensee did want
13 confirmance (sic) from AT and T that it was okay to
14 provide that product and that AT and T had no interest in
15 the product.

16 Q. And do you recall any such instances in which
17 the response was that AT and T had no interest and . . .

18 A. Yes.

19 Q. And that it was not subject to AT and T
20 licensing?

21 A. Yes.

22 MS. FITHIAN: Go ahead.

23 *****

24 RE-EXAMINATION of MR. FRASURE by MS. SHAPREAU:

25 Q. Who in the technical department reviewed the

1 code in this code review process we were just discussing?

2 A. I don't know. The -- Mike Defazio's
3 organization, and he reported to a gentleman by the name
4 of Bill Shay. They had access to people with an AT and T
5 Bell Laboratories who were still writing code for the
6 UNIX operating system and somehow they made a
7 determination by looking at the code and what its
8 application was, what it was to do to funnel it to the
9 right development organization for its review.

10 Q. So AT and T Bell Labs determined which
11 development organization to send . . .

12 A. No. AT and T -- someone would -- they would
13 look at it and they would actually go out to the
14 individuals responsible for that part of the code in the
15 operating system.

16 Q. So it would depend on who originally developed
17 that part of it?

18 A. Yes.

19 Q. Do you remember the names of any of those
20 specific developers who were involved?

21 A. I had very little interface with -- with those
22 people. I had talked with a number of individuals but I
23 don't know if they were the ones who actually reviewed
24 the source code or not.

25 Q. Do you remember the names of the individuals

1 that you talked with?

2 A. Brian Kernigan was a gentleman I had talked
3 with on several occasions.

4 Q. Was he a technical person?

5 A. Yes. He was one of the original developers of
6 the UNIX operating system.

7 Q. Do you know if he still with AT and T?

8 A. I have no idea. I don't know.

9 Q. So he might have reviewed the code in some
10 circumstances?

11 A. He may have. I don't know whether he did or
12 not.

13 Q. Any other developers that you remember the
14 names of?

15 A. I can't place one right now. They are hanging
16 around the tip of my tongue but I can't come up with a
17 name right now.

18 Q. I want to bounce back to the licensing
19 discussion earlier, just to clarify.

20 You talked about a hypothetical where an
21 individual in a corporation might apply for a license?

22 A. Yes.

23 Q. Is there an individual who wasn't part of a
24 corporation but he met the financial criteria who wanted
25 to use the UNIX operating system for his or her own

1 internal business uses, would AT and T license to that
2 kind of individual?

3 MR. KENNEDY: Objection to the form to the
4 extent you characterized Mr. Frasure's testimony as
5 hypothetical. He talked about instances in which
6 licenses were in fact denied.

7 Q. Okay. What I -- do you understand my
8 question?

9 A. Yes. To my knowledge, we never licensed an
10 individual for the software. I mean, I'm not aware
11 personally that we ever granted a license to an
12 individual.

13 Q. Do you know whether an individual ever applied
14 for a license?

15 A. I don't recall if one ever did.

16 Q. Based on what you know or your experience with
17 AT and T, and this is a hypothetical, if an individual
18 had applied for a license at the time you were employed
19 at AT and T and it was for an individual's internal
20 business purpose and they had good credit, do you have
21 any reason to believe that AT and T would not have
22 granted them a license to use UNIX operating systems?

23 A. Probably -- I feel they would have been denied
24 a license.

25 Q. Why is that?

1 A. It would determine to what they wanted to use
2 the product -- the product for. I would feel . . .

3 Q. If it was for internal business uses.

4 MR. KENNEDY: Excuse me.

5 Q. I clarified.

6 MR. KENNEDY: No, I'm sorry. I just didn't -
7 - I thought Mr. Frasure had not finished his answer. I
8 thought that he was interrupted.

9 MS. SHAPREAU: I was trying to -- I think
10 that maybe he hadn't recalled that I had said what the
11 purpose was. So just to make things -- to try to get
12 clarified.

13 A. In that case, we would have tried to steer
14 them to one of the sublicensees to buy a binary product
15 and for them to use it for their own internal business
16 applications and we did that on a number of occasions
17 with companies. We would refer them to either our AT and
18 T information sales people as a sales lead or we would
19 refer them to someone like Unisoft or to MicroSoft or to
20 IBM. It would be a hardware company or a software
21 company to try and find a computer and a software that
22 would fulfill the needs.

23 Q. Okay. So if an individual didn't qualify for
24 whatever reason for your source product, you would in
25 many circumstances direct them to give an object or use?

1 A. That's it.

2 Q. Okay.

3 A. That's why we would always do that. We would
4 direct them to a -- we would try to understand what they
5 were really wanting to do and direct them to someone who
6 provided an object module that we thought would satisfy
7 the need.

8 Q. You don't actually have any specific
9 recollection of an individual on their own running their
10 own business making a request?

11 A. I do not recall.

12 Q. Okay. Forgive me, I'm going to take a minute
13 to look at my notes.

14 (Brief Pause.)

15 There were two ways in which an AT and T
16 licensee who had an AT and T license, for example,
17 precluded to -- excuse me. Let's say an AT license -- an
18 AT and T licensee had a license for a System 5.

19 My understanding from your prior testimony
20 that there are two ways that AT and T licensee for System
21 Five could have gotten a copy of Thirty-two B to use.
22 One is they could have paid a fee to AT and T and gotten
23 a copy that way or they could have gone through an
24 exchange with another AT and T licensee and gotten a copy
25 of Thirty-two B by that means; is that correct?

1 A. Yes. I believe in one of the exhibits or
2 whatever we're calling these things that we looked at
3 earlier today, I think that it says the Thirty-two B was
4 no longer available from AT and T. So if I -- it seems
5 to me that one of the schedules that we looked at said
6 that Thirty-two B was no longer available. Maybe I
7 misread it, maybe it was B Six or B Seven that wasn't
8 available. But . . .

9 Q. Well, the documents will speak for themselves
10 in terms of the schedule.

11 A. Yeah, but you could obtain it one way or the
12 other.

13 I mean you could obtain it from a licensee
14 or from AT -- if AT and T still made a distribution of
15 it.

16 Q. Okay. Do you know whether AT and T ever
17 reviewed the shrinkwrap licenses that any of its licensee
18 used for binary distributions?

19 A. We received the licenses for review of the
20 shrinkwrap agreements; however, we refused to comment on
21 them.

22 In other words, we would send them back and
23 we said as long as your company and your attorneys feel
24 that they are meeting the terms of the sublicensing
25 agreement, then that's your decision. We will not give a

1 yes or no on that.

2 We did not want to be party, I guess, to
3 something that could happen in the future.

4 Okay?

5 MS. SHAPREAU: Mr. Frasure, thank you very
6 much for your time.

7 -----
8 WHEREUPON, the Deposition of David Frasure was concluded.

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STATE OF NORTH CAROLINA

COUNTY OF DARE

C E R T I F I C A T I O N

I, Lauri S. Crowder, a North Carolina Court Reporter and Notary Public, do hereby certify that the foregoing pages, numbered one through _____, are, to the best of my knowledge, a true and accurate transcription of the testimony of David Frasure which was taken by me in the Stenomask method on December 8, 1992; and was transcribed under my personal supervision.

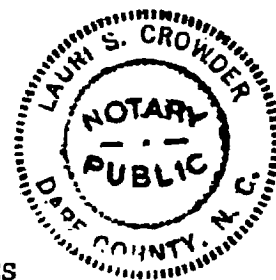
I further certify that I have no financial interest in the outcome of this action. Nor am I a relative, employee, attorney or counsel for any of the parties.

WITNESS my Hand and Seal on this 16th day of December, 1992.

My Commission Expires on July 12, 1995.

Lauri S. Crowder

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5 I, Penny S. Harper, a North Carolina Court Reporter
6 and Notary Public, do hereby certify that the foregoing
7 pages are, to the best of my knowledge, a true and
8 accurate transcription of the testimony of: David Frasure
9 taken by me in the Stenomask method on: December 8th,
10 1992; and was transcribed under my personal direction.

11 I further certify that I have no financial interest
12 in the outcome of this action. Nor am I a relative,
13 employee, attorney or counsel for any of the parties.

14 WITNESS my Hand and Seal on this 16th day of
15 December, 1992.

16 My Commission Expires on October 25, 1997.

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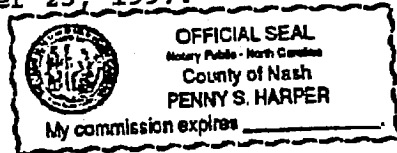
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1 I N D E X

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4 Re-Direct 210

5 by Ms. Fithian

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8 Re-Examination 217

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