

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.