

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

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

6           Q. Right. Okay.

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

9           Q. Specific.

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

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

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

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

25           Could you describe for me what was meant by

1 this?

2 A. You mean the clarification?

3 Q. Yes.

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

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

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

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

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

21 A. The licensee, yes.

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

24 A. Uh-huh.

25 Q. Of the licensed software?

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

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

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

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

1 that.

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

6 A. Yes.

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

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

11 Q. I understand. . .

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

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

20 MR. KENNEDY: Yeah, was . . .

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

24 Is that right?

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

1 up front.

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

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

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

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

10 MS. SHAPREAU: Okay.

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

14 MS. SHAPREAU: In any way?

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

18 by Ms. Shapreau:

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

23 A. Okay.

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

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

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

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

12 Q. Yes, section two point zero one.

13 A. (Complied.)

14 Uh-huh.

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

16 A. Uh-huh.

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

20 A. I think so; yeah.

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

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

1 Do we have a copy of it?

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

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

8 A. Uh-huh.

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

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

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

14 A. Eighty-five.

15 Q. Eighty-five; okay.

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

19 Q. Okay.

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

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



1 zero one?

2 A. It appears to be; yes.

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

6 MR. KENNEDY: Objection to form.

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

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

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

15 A. Sure. It says:

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

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

21 A. Yes, that's correct.

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

25 . . . The last sentence was added to assure

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

4 A. Yes.

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

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

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

16 A. Yes.

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

19 A. Yes.

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

24 A. Feedback in terms of what?

25 Q. Questions . . .

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

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

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

15           Q. Okay.

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

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

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

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

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

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

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

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

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

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

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

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

7 A. Okay.

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

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

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

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

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

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

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

11 A. Considered it a modification.

12 Q. . . . software?

13 Or an enhancement?

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

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

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

20 Q. Okay.

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

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

5 MR. KENNEDY: Objection to form.

6 Q. Well, please . . .

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

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

17 A. No.

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

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

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

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

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

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

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

20                  A. Yes, I do.

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

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

24                  Q. And -- I'm sorry.

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



1 what I was just telling you.

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

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

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

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

23 Q. Okay.

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

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

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

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

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

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

15 MS. SHAPREAU: That's correct.

16 MR. KENNEDY: Okay. Go ahead.

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

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

24 A. (No verbal response.)

25 Q. I'm wondering if anybody distinguished between

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

3 A. I don't recall that.

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

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

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

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

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

23 A. Yes.

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

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

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

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

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

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

15 Q. Okay.

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

18 Q. Okay.

19 A. . . . the same.

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

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

25 In other words, the outcome was not software-

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

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

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

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

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

20 A. Yeah.

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

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

25 Q. Right, and . . .

1 A. Changing.

2 Q. . . . changing, right.

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

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

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

8 Go ahead.

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

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

15 Q. And you were present at that meeting?

16 A. Yes.

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

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

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

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

8 A. No, it was the only one.

9 Q. Okay.

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

16 A. (Complied.)

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

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

22 Q. Is that only for System Five?

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

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

1 A. Yes.

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

3 A. Yes.

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

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

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

15 A. Yes, what -- earlier today -- well, I'll let  
16 you ask the question so I don't presume what you're --  
17 you're going to ask me.

18 Q. Okay, this -- the first sentence states:

19 . . . This is to inform you that licensees  
20 desiring to obtain. . .four point one and slash or four  
21 point two distribution of the Unix operating system must  
22 have a source license with AT and T for the DEC -- D-E-C  
23 -- caps -- family of Unix software; i.e., Unix Thirty-two  
24 V, System Three, System Five, System Five Release One or  
25 System Five Release Two.



1 A. Yes.

2 Q. To your recollection, is this the first time  
3 that you had advised the University that there was a  
4 limitation on hardware families for the distribution BSD  
5 code?

6 A. No. It was not the first time.

7 Q. Okay. When was the first time, do you recall?

8 A. Well, the -- no, I don't -- I don't recall,  
9 but the Unix licenses were -- were set up for System Five  
10 by family -- what we call family types, either DEC, the  
11 AT and T 3-B, the Motorola, Intel, National  
12 Semiconductor, as we had discussed earlier today.

13 Q. Do you recall whether there was any response  
14 on the part of the University to this discussion of a  
15 limitation of distribution of BSD code non-DEC licensees?

16 A. There was a question whether it could be  
17 distributed to them.

18 Q. Do you remember whether there was any -- well,  
19 strike that.

20 \*\*\*\* Brief Pause \*\*\*\*

21 Q. I want to give you all the time you need to  
22 look at that. I'm going to be making brief points, so I  
23 think if you'll cover it, that would be great, but again,  
24 I don't want to rush you in any way.

25 This letter's dated December 17th, 1984, and

1 it is from Mr. Towers to your attention, and it pertains  
2 to the previous exhibit, I believe.

3 Do you recall receiving this letter?

4 A. Yes.

5 Q. Okay. Apparently -- well, why don't you  
6 describe for me what your understanding of the  
7 University's response to your letter of July 30th, 1984  
8 was?

9 A. Would you restate the question?

10 Q. Yeah. I'm sorry.

11 What -- could you just describe for me your  
12 understanding of the University's response that's --  
13 that's evidenced in this Exhibit 48 to the non-DEC family  
14 restrictions on distribution of BSD code?

15 A. Well, I think there was a -- a -- in Mr.  
16 Towers' letter, I think there was a misunderstanding of  
17 what we -- what we said. The information that had been  
18 provided to us was that the Berkeley Software released  
19 four point one and four point two were -- were based on  
20 the Thirty-two V license, or the Thirty-two V product --  
21 distributed product, and therefore, we weren't putting  
22 any -- any type of unilaterally imposed -- well, we  
23 weren't changing the Thirty-two V, we were just stating  
24 that before anyone can receive a Berkeley distribution,  
25 they've got to have one of these licenses.

1           As we had talked about earlier today, that  
2 the source code exchange provision allowed you to  
3 exchange up, if you will, to a higher-level license, but  
4 the higher licensee could not go down. So my reaction to  
5 the letter was I believe there was a major  
6 misunderstanding of what -- what was attempted to be  
7 conveyed here.

8           Q. Okay, and the second paragraph refers to  
9 Thirty-two V license agreement executed -- there's two  
10 dates here, October 2nd, 1981 and October 27th, 1981.

11           Do you have any understanding as to -- or do  
12 you have any reason to doubt that that's the Thirty-two V  
13 license agreement that was at issue in this letter?

14           A. Based on the -- on the date stated here, I  
15 assume it was the Thirty-two V agreement.

16           Q. But you don't have any specific recollection  
17 of that here today?

18           A. No.

19           Q. Okay. Okay. Now, during this time frame when  
20 this correspondence was taking place, do you know -- do  
21 you have any recollection as to whether AT and T and DEC  
22 were planning on or had entered into an agreement whereby  
23 DEC would offer to the public a binary version of Unix?

24           A. I'm not sure that I understand your question,  
25 'cause I believe the agreements, you know, sublicensing

1 agreements, were already in place with DEC.

2 Q. With -- between AT and T and DEC?

3 A. Yes.

4 Q. Okay. Do you know whether any -- this time  
5 period that we're talking about, the '84-'85 time period,  
6 DEC expressed any interest to both AT and T or to  
7 Berkeley that they wanted the four BSD version of Unix in  
8 order to develop their binary version?

9 A. What took place between DEC and the school, I  
10 mean I really don't know. DEC . . .

11 Q. But I'm interested in whether AT and T had any  
12 understanding. There may have been a three-way  
13 communication; I don't know. I'm mostly wondering if you  
14 have any recollection.

15 A. No, the -- the Digital Equipment product that  
16 they sublicensed -- I believe they called Ultrix -- was -  
17 - was based on Berkeley's four point one or four point  
18 two software, and they were within their contractual  
19 right to acquire that software and -- and, you know, make  
20 a derivative product that the sublicense. It had nothing  
21 to do with us.

22 Q. Who had a -- I'm sorry.

23 Who had a contractual right?

24 A. I mean -- DEC did.

25 Q. To do what?

1 A. To receive the source code for four dot one or  
2 four dot two from Berkeley under the source code exchange  
3 provision.

4 Q. Well, but Berkeley had to agree to what --  
5 they had a right to license to whomever they chose?

6 A. Yeah, but I'm saying that far as AT and T was  
7 concerned . . .

8 MR. KENNEDY: Objection to form.

9 Go ahead.

10 A. . . . they could receive the source code,  
11 because they -- they had the appropriate license in  
12 place.

13 I'm not sure if that's what you're asking.

14 Q. And they were -- they were -- if -- if  
15 Berkeley -- let me strike that. I'll just move on to the  
16 next question.

17 A. I'm left confused, I guess.

18 Q. Okay.

19 A. If I said something to confuse you . . .

20 Q. No, my understanding is DEC, because they were  
21 a licensee of AT and T, could have -- they were eligible  
22 to receive any version of Thirty-two V . . .

23 A. That's right.

24 Q. . . . but the BSD code, which contained  
25 Thirty-two V as well as BSD's work, that was something

1 that was up to the University to decide who they wanted  
2 to license to; is that your understanding from your  
3 experience?

4 MR. KENNEDY: With the proviso that they not  
5 license beyond valid Unix source code licensees?

6 Q. At this time, yes.

7 MR. KENNEDY: That's the problem I had with  
8 your earlier question. You said to whomever they  
9 pleased, and I don't think anyone has ever competed with  
10 BSD . . .

11 Q. No, in this time frame when they were  
12 licensing BSD code to AT and T licensees.

13 It was the University's prerogative to decide  
14 whether or not that they were going to license a BSD  
15 product to DEC or not. Is that your understanding?

16 A. Under what agreement?

17 Q. Under four point one and four point two,  
18 during this time frame, the '84-'85 time frame?

19 A. I'm not sure that I . . .

20 Q. Let's move on, because you didn't work for the  
21 University. I was just wondering -- you wouldn't know  
22 what their prerogative was, but I was wondering whether,  
23 you know, what your understanding was if DEC wanted to  
24 use the BSD version for their binary product, if they had  
25 wanted to use that, they would have had to deal with the

1 University to get that; isn't that right?

2 A. That's right; we would not have provided that  
3 for them. I guess I just -- I got lost there and still  
4 am as to what -- what the questions were about, so . . .

5 MR. KENNEDY: Is the University contending  
6 that with respect to four dot one and four dot two it was  
7 free to license that software to some Unix System Thirty-  
8 two V licensees but to deny licensees -- deny other Unix  
9 licensees the distribution of that software?

10 MS. SHAPREAU: That's not the issue I'm  
11 focusing on. I'm just basically -- I'm trying to  
12 understand the background of the non-DEC family  
13 restrictions, and that's -- I'm not -- that's not a  
14 contention we're raising, but I was just asking the  
15 witness his understanding.

16 WITNESS MR. FRASURE: The -- my under-  
17 standing . . .

18 MR. KENNEDY: There's no -- there's no --  
19 there's no question pending.

20 by Ms. Shapreau:

21 Q. For everybody's benefit, I'm going through a  
22 lot of these documents. I just want to try and get a  
23 good picture of these documents relating to these non-DEC  
24 family restrictions so I have an understanding, but I'm  
25 not understanding what was going on at the time.

1 I've just handed you, Mr. Frasure, what's  
2 been marked as Exhibit No. 49 dated -- the first page is  
3 dated September 24th, 1985, and it is a letter from Mary  
4 McDonald to Ms. Gertrude Williams of AT and T, and  
5 attached to that is a marked-up draft of a license  
6 agreement, I believe it's the BSD code.

7 And did you at any time -- do you believe  
8 you've ever seen this letter or this marked-up copy of  
9 the BSD license agreement?

10 A. Yes, I believe so.

11 Q. Were you working with Ms. Williams on the  
12 issue of getting the license agreement for four point two  
13 BSD finalized?

14 A. No.

15 Q. Do you know who she worked with, who  
16 supervised her?

17 A. I need to -- let me just scan this for a  
18 minute.

19 Q. Forgive me. At the very last paragraph, it  
20 says -- the last full paragraph, that sentence, the last  
21 sentence says enclosed are copies of this letter and the  
22 enclosures. . . Geoff Green.

23 A. Yeah.

24 Q. Okay. I've just got two brief questions on  
25 this, so you don't need to become familiar with



1 everything unless you want to.

2 A. Okay.

3 Q. Okay. I wanted to ask you, there is a page  
4 with a heading at the top, Rider Seven?

5 A. Uh-huh.

6 Q. Which I believe replaces that notice provision  
7 that before the break Ms. Fithian was asking about.

8 It says:

9 . . . Sublicensing may be implemented using  
10 the agreements and procedures acceptable to AT and T for  
11 its current release of Unix operating systems, including  
12 the use as AT and T deems appropriate of agreements for  
13 object code. . . end user accepts by opening the package  
14 containing the object code.

15 Do you recall any communications while you  
16 were employed at AT and T from the '83-'84 time period to  
17 '87 regarding the enforceability of shrink-wrap licenses?

18 A. Do I recall conversations with who, with the  
19 University?

20 Q. No, with anybody at AT and T regarding the  
21 enforceability of those licenses.

22 MR. KENNEDY: You may answer yes or no.

23 A. Yes.

24 Q. Okay. And without revealing any  
25 attorney/client privileged material, could you tell me

1 the substance of those conversations?

2 A. I was I guess in a -- trying to get educated  
3 on the subject from the AT and T attorneys and what -- I  
4 guess what the current law was and interpretation or --  
5 or whatever the right words are was that when someone  
6 opened a shrink-wrap agreement, you know, the way the  
7 license was presented and so on. So, you know, we had a  
8 number of discussions about that, and I was -- like I  
9 say, trying to get educated on the subject.

10 We provided those -- the licensee -- the  
11 sublicensee the ability to use shrink-wrap agreements  
12 where they were enforceable.

13 Q. Was there any discussion that you recall  
14 regarding whether or not they were enforceable, they  
15 meaning shrinkwrap licenses?

16 MR. KENNEDY: You may answer yes or no.

17 A. No. I don't recall that. I . . .

18 Q. Was there an assumption that they were  
19 enforceable, in terms of the discussions you -- you were  
20 involved in?

21 MR. KENNEDY: Could we hold on just a second?

22 MS. SHAPREAU: Sure.

23 MR. KENNEDY: Had you finished your prior  
24 answer?

25 A. I just answered no, I didn't . . .

1 MR. KENNEDY: Right.

2 A. . . . know. I was -- I was told they were  
3 enforceable.

4 Q. Okay. Who told you that?

5 A. The attorneys.

6 Q. Do you remember having any conversations with  
7 anyone at the University regarding the enforceability of  
8 shrinkwrap licenses?

9 A. No.

10 Q. Okay. And then I wanted to address your  
11 attention to the very last page of this document which is  
12 seven -- sub-A on sublicensing. Apparently in the  
13 University's marked-up copy they were trying to add I  
14 believe this language to the four point two BSD contract,  
15 and it's -- why don't you read the subparagraph A and  
16 give me your understanding of this if you can as you --  
17 if you can recall as you read it in the -- in the 1985  
18 time period when you got it?

19 A. Uh-huh.

20 MR. KENNEDY: I'm having real trouble  
21 following. Where are we, now?

22 Q. I'm sorry; the very last page of this exhibit.  
23 It's seven little a . . .

24 MR. KENNEDY: Oh, okay.

25 Q. Just that first paragraph, and again, I'm

1 focusing on this non-DEC family distribution issue.

2 MR. KENNEDY: Could -- could we go off the  
3 record for just a minute?

4 \*\*\*\* BRIEF PAUSE \*\*\*\*

5 by Ms. Shapreau:

6 Q. Mr. Frasure, could you give me your  
7 understanding of what the University was proposing in  
8 paragraph seven small A on the last page of Exhibit 49?

9 A. Yeah; let me read it.

10 (Brief Pause.)

11 They were -- they were trying to restrict AT  
12 and T and -- in who -- if we used the -- the four point  
13 two BSD enhancements, modifications in our product  
14 distribution, then they wanted to -- the University  
15 wanted to restrict AT and T as to who that product could  
16 be sublicensed to.

17 Q. So AT and T initially, as we started this  
18 discussion of non-DEC family restrictions, was telling  
19 the University that they couldn't distribute beyond the  
20 DEC family their BSD code, and they wanted to make the  
21 reciprocal restriction to AT and T that if AT and T had  
22 the BSD code, you -- AT and T couldn't then distribute to  
23 non-DEC families?

24 A. That's correct.

25 Q. So this is kind of a reciprocal restriction?

1 A. Uh-huh.

2 MR. KENNEDY: Well . . .

3 Q. Mr. Frasure, I've just asked you to look at  
4 what's been previously marked as Exhibit 44, which is a  
5 document dated November 4th, 1985 from you to Mary  
6 McDonald, and it appears to be responding to the prior  
7 exhibit. Is that your understanding?

8 A. Yes.

9 MR. KENNEDY: Forty-four responds to forty-  
10 nine?

11 A. Forty-nine.

12 Q. That's . . .

13 We're clear now.

14 MR. KENNEDY: Is that right, Mr. Frasure?

15 A. Yes, that's right.

16 MR. KENNEDY: Okay.

17 Q. Now, directing your attention to the second  
18 paragraph where you state that this proposed paragraph  
19 seven which you have just talked about in the prior  
20 exhibit was unacceptable because it limited AT and T  
21 sublicensing rights, what did you mean by that?

22 A. Where are you reading in that?

23 Q. I'm sorry. Maybe I could ask it another way.

24 Does the first sentence of the second  
25 paragraph basically confirm what we just discussed, that

1 AT and T -- I'm sorry. I'd rather that you tell me.

2 The second paragraph, the first sentence -  
3 could -- do you recall what you meant by that -- by that  
4 sentence?

5 MR. KENNEDY: You're referring to the  
6 sentence:

7 . . . Your revised paragraph seven of the  
8 proposed agreement is unacceptable to AT and T because of  
9 the limitation on AT and T's sublicensing rights.

10 Q. That's correct.

11 Thank you, Mr. Kennedy.

12 A. I'm not sure what you're asking me. The  
13 sentence says what -- what we found was unacceptable to  
14 AT and T.

15 Q. Okay, and it was unacceptable because it  
16 limited AT and T's sublicensing rights?

17 A. Yes.

18 Q. And how did it limit AT and T's sublicensing  
19 rights?

20 A. Well, the proposed language, as I recall  
21 reading it here a few minutes ago, said that we could not  
22 sublicense a product unless -- let's go back and read it.

23 . . . To only those parties to whom the  
24 University may under present or future terms imposed by .  
25 . . license releases of four BSD.

1 MR. KENNEDY: Mr. Frasure was reading from  
2 Exhibit 49.

3 A. So I interpreted that to mean that we could  
4 not provide the product to -- to anyone other than what  
5 the University could provide a product.

6 Q. Okay, and then there's a sentence in the  
7 middle of the second paragraph that starts with such,  
8 says:

9 . . . Such a limitation by the University  
10 would be inconsistent with AT and T's requirement that  
11 the . . . research, including software enhancements and  
12 modifications from the educational use of AT and T  
13 software be made available without restriction by an  
14 educational licensee if they are made available at all.

15 What is your understanding of what that  
16 sentence means, if you recall?

17 You wrote this letter in 1985; if you recall  
18 what you meant at the time, I would be interested in  
19 that.

20 A. Well, the educational agreement, as we talked  
21 about earlier, provides for the distributing to the  
22 appropriate licensee of -- of any modifications to the --  
23 to the software. If we're talking about a binary  
24 product, if AT and T was to receive the four point two  
25 BSD source code and incorporate it into a -- a product,

1 then it would have the right to -- to sublicense that --  
2 that product.

3 So, in other words, the software agreement  
4 that the University entered into said that if they made  
5 the code available, that it would -- it would have to be  
6 made available to another -- to another appropriate  
7 licensee -- appropriately licensed licensee.

8 Q. Regardless of the hardware family? Is that  
9 the point that you were making?

10 A. No. Remember those -- the agreements have  
11 evolved in the hardware family evolved with the System  
12 Five product, so you know it depends upon what -- what  
13 agreement or set of agreements that you're -- that you're  
14 looking at.

15 Q. Was it your understanding throughout your  
16 employment at AT and T that the fruits of research by  
17 licensees, particularly educational licensees, including  
18 software enhancements and modifications, if they were  
19 going to be made available at all they should be made  
20 available without restriction to other AT and T  
21 licensees?

22 MR. KENNEDY: Objection to form.

23 A. If they were appropriately licensed, they  
24 should be made available to them, yes, upon request.

25 Q. Now if -- if there was an AT and T licensee



1 who didn't have a license for DEC family and they wanted  
2 to obtain the BSD product, do you know how much they'd  
3 have to pay to get a DEC family license from AT and T?

4 A. I don't recall. There was -- excuse me.  
5 There was various schedules that if you were a -- a  
6 System Five licensee, say for -- for the AT and T 3-B and  
7 you wanted to obtain a -- the DEC version of that, then  
8 there was a -- a fee to be paid, but I don't recall what  
9 that fee is.

10 Q. Okay, Mr. Frasure, I just handed you a letter  
11 dated February 26th, at least stamped dated February  
12 26th, 1986. It appears to be maybe a side letter  
13 agreement that's signed by Mr. Wilson, and it's to the  
14 Regents of the University of California.

15 Why don't you take a minute to -- to look at  
16 that?

17 A. I remember the letter.

18 Q. Oh, you do remember the letter? Okay.

19 Why don't you tell me what this letter is  
20 about?

21 A. Well, it gave the University the -- the right  
22 to provide the BSD versions, at -- at that time it was  
23 for four one, four two and the potential four three to  
24 any System Five licensee, regardless of the -- the family  
25 of code.

1 Q. Okay. So they -- in the end of this -- this  
2 negotiation period, the University was free to distribute  
3 its product, which contained Thirty-two V, to any AT and  
4 T licensee, regardless of hardware family?

5 A. Up through the -- the System Five releases,  
6 yes . . .

7 Q. Okay.

8 A. . . . that were -- that were specified in I  
9 think some of the earlier correspondence the release zero  
10 one and two.

11 Q. Because you testified earlier that there was a  
12 limitation by family, and so I wanted to just --  
13 obviously it's been a long time, and I . . .

14 A. Well . . .

15 Q. . . . wanted to clarify that point.

16 A. The -- the limitation that I -- that I talked  
17 about before was the interchange of source code between  
18 System Five licensees. In other words, I knew all this  
19 had happened. I knew this was where you were going, but  
20 between the interchange of -- of the source code between  
21 System Five licensees, in other words, if someone had a  
22 DEC System Five license and they had made a -- a drive to  
23 work out of it, they could not exchange it with a 3-B  
24 licensee unless they upgraded their contract to receive  
25 that.

1 MS. SHAPREAU: Okay.

2 Why don't we take a break?

3 \*\*\*\* BRIEF RECESS \*\*\*\*

4 by Ms. Shapreau:

5 Q. Okay, take a look at page 000215, that's the  
6 Bates number . . .

7 MR. KENNEDY: Of Exhibit 34.

8 Q. . . . of Exhibit 34.

9 Thank you, Mr. Kennedy.

10 I know that this has been -- this specific  
11 provision was discussed earlier today, paragraph one  
12 point zero one a . . .

13 A. Yes.

14 Q. . . . and I'd like to ask you a specific  
15 question.

16 If a licensee of AT and T during this time  
17 frame of '84-'85 -- this is -- and again for the record  
18 this is a System Five license agreement that we're  
19 looking at -- if a licensee of AT and T developed  
20 software which did not contain any licensed software, and  
21 by licensed software, maybe I should ask you . . .

22 My understanding of licensed software, and I  
23 would like your understanding is AT and T's source code,  
24 could be its object code, its methods and concepts,  
25 documentation pertaining to that. Is there anything else

1 that you would include in -- what is your understanding  
2 of what was included in the licensed software as used in  
3 -- in Exhibit . . .

4 A. All those things specified in the -- in the  
5 agreement. I mean, the agreement makes reference . . .

6 Q. Right.

7 A. . . . to the various things, whether be it  
8 documentation or whatever, so it's all those items  
9 covered by the agreement.

10 Q. Okay. And why -- you know, I hate to have  
11 more than one document going at a time, but maybe it will  
12 help us answer this question.

13 If you could refer in that same packet to  
14 page Bates stamped 000243, which is the letter dated May  
15 15th, 1985 from AT and T to The University of California,  
16 the definition of licensed software is discussed.

17 A. Yeah, I see page 243; I don't know where the  
18 rest of the letter is.

19 \*\*\*\* Brief Pause \*\*\*\*

20 Q. Focusing now on just the words licensed  
21 software as a defined term in the System Five license  
22 agreement, the document that has been marked as Exhibit  
23 No. 51, which is dated May 15th, or stamped May 15th,  
24 1985 signed by Otis Wilson to the Regents states in the  
25 middle of it:

1 . . . Licensed software means . . .

2 And this is a clarification -- the letter  
3 states it's a clarification; quote:

4 . . . Licensed software means all or any  
5 portion of computer programs, other information and  
6 documentation. . .

7 Little "I" in parens. . .

8 . . . listed in the attached schedule for  
9 Unix System Five, VACS version, and any additional  
10 schedule forwarded pursuant to section two point oh three  
11 of appendix A, or, -- little two -- furnished to licensee  
12 by AT and T or any of its associated companies in  
13 conjunction with any provision of support services for  
14 any Unix System Five.

15 So just focusing on this clarification, could  
16 you give me your understanding in this time frame of 1985  
17 what specifically comprised the licensed software.

18 MR. KENNEDY: There's another sentence . . .

19 Q. Okay, well, let me read that. The next  
20 sentence reads:

21 . . . Licensee agrees that any modification  
22 or derivative work prepared by it that contains any  
23 licensed software shall be treated as licensed software  
24 hereunder.

25 Now, I just want to understand what could

1 possibly comprise the licensed software. Would that --  
2 could you tell me the components of what your  
3 understanding in May '85 would have been included in the  
4 licensed software? If you recall what your understanding  
5 was in 1985.

6 A. Licensed software would have been . . .

7 Q. Would it have been the source code?

8 A. . . . would have been the source code or some  
9 portion of it, with modifications made to it by the  
10 licensee.

11 Q. Where do -- where do you get the understanding  
12 that a modification to the source code falls within the  
13 definition of licensed software?

14 A. It says licensee agrees that any modifications  
15 or derivative work prepared by it that contains any  
16 licensed software . . .

17 Q. Okay.

18 A. . . . shall be treated . . .

19 Q. Okay.

20 A. . . . as licensed software.

21 Q. Okay. So we're talking about modifications  
22 that contain the licensed software as opposed to a  
23 hypothetical where somebody could develop -- a licensee  
24 of AT and T could develop a product that did not contain  
25 any licensed software.

1 I'm trying to understand . . .

2 A. Okay. I'll -- let me go back to my . . .

3 Q. Go ahead.

4 MR. KENNEDY: Go ahead. Please answer it,  
5 though.

6 I'm objecting to form. Go ahead.

7 A. I want -- I want to go back to my -- my  
8 comments from -- from this morning in that the rest of  
9 the agreement needs to be taken into consideration, and  
10 that's where I believe the paragraph that I was -- cited  
11 this morning, paragraph 408 that has to deal with methods  
12 and concepts . . .

13 Q. Okay.

14 A. . . . I believe is a key part of the . . .

15 Q. Okay.

16 A. . . . agreement. And earlier today on several  
17 occasions I've use the -- the example, I think, that if -  
18 - if someone has been exposed to the source code and has  
19 used the source code and then goes off on their own and  
20 wanted to develop a product that subconsciously or  
21 through rote or whatever the words are developed a  
22 product that contained the methods and concepts,  
23 techniques that we're using, then it's -- I don't know  
24 what the right word to use -- understanding,  
25 interpretation or what -- that -- that AT and T would

1 have a -- an interest in that product.

2 Q. Okay. So if -- just so I understand, so that  
3 we can go from step to step, I'm just trying to  
4 understand.

5 So licensed software -- your understanding of  
6 licensed software in the 1985 time period in the System  
7 Five license agreement could include source code of AT  
8 and T's; is that correct?

9 A. Yes.

10 Q. Okay. And it could include object code of AT  
11 and T's as well?

12 A. Yes.

13 Q. Okay. And it could also include documentation  
14 of AT and T's; is that correct?

15 A. Yes.

16 Q. And it also could include methods and concepts  
17 of AT and T's included in their System Five product; is  
18 that correct?

19 A. Yes.

20 Q. Okay. Now, if a -- if a -- a licensee of AT  
21 and T developed a product that did not have source code  
22 of AT and T's, object code of AT and T's, documentation  
23 of AT and T's or methods and concepts of AT and T's, but  
24 they had had access to an AT and T license but that their  
25 product didn't contain any of the things I've just



1 referenced, that product would not contain any quote  
2 unquote licensed software; is that correct?

3 MR. KENNEDY: Objection to form.

4 MS. SHAPREAU: What's your objection?

5 MR. KENNEDY: Well, two things. One, to the  
6 extent it calls for a legal conclusion; and secondly, in  
7 your laundry list of items, you didn't include  
8 modification or derivative work, which are terms in the  
9 contract which Mr. Frasure has identified as aspects of  
10 licensed software under these agreements.

11 by Ms. Shapreau:

12 Q. Did you ever . . .

13 Strike that.

14 Why don't you look -- a little bit earlier in  
15 Exhibit 51, the second paragraph, which states:

16 . . . Regarding a definition of licensed  
17 software in the granting clause, AT and T does not assert  
18 any ownership interest in any modification or derivative  
19 work made by licensee and does not consider that such  
20 definition claims such an interest.

21 What did AT and T mean by that in 1985?

22 You earlier had stated that you were familiar  
23 with this document.

24 A. Yes.

25 Q. Okay.

1 MR. KENNEDY: You're asking for his -- his  
2 understanding of what AT and T as a company was trying to  
3 communicate?

4 Q. Yes.

5 This -- what I've just read to you states AT  
6 and T does not assert an ownership interest in any  
7 modification or derivative work made by licensee. Now,  
8 if that . . .

9 A. That . . .

10 Q. And my understand, and correct me if I'm  
11 wrong, is that if a modification or derivative work did  
12 not contain licensed software, which you'd earlier  
13 described as source code, object code, documentation and  
14 methods and concepts . . .

15 A. Uh-huh.

16 Q. . . . then AT and T did not assert any  
17 ownership interest in that; isn't that correct?

18 MR. KENNEDY: Objection to form.

19 You may answer.

20 A. Well, I -- I don't think I can answer that --  
21 that question with -- with -- with a yes or no. I mean,  
22 AT and T, when I was with them, never claimed any  
23 ownership in any . . .

24 Q. I'm sorry, could you start over?

25 I didn't hear . . .

1           A. When I was with -- with AT and T in the  
2 licensing organization, we never claimed -- AT and T  
3 never claimed any ownership in a modification to the  
4 extent that it didn't include the . . .

5           Q. Licensed software.

6           A. . . . the licensed software. So if you added  
7 lines of code to the source code product, those lines of  
8 code belonged to the licensee, and AT and T never claimed  
9 ownership . . .

10          Q. Okay.

11          A. . . . of -- of those, but it kept -- I think  
12 the agreement says to the extent that it doesn't contain  
13 the licensed software, so the intent here was that we did  
14 not want -- did not want someone using the methods and  
15 concepts within the software or using the source code  
16 product to develop another product . . .

17          Q. Okay.

18          A. . . . to provide to someone.

19          Q. Okay. So that if an AT and T licensee  
20 developed a software that was a modification or  
21 derivative work which did not contain source code, object  
22 code, documentation or methods and concepts of AT and  
23 T's, AT and T did not assert an ownership interest in  
24 that product. Is that your understanding -- was that  
25 your understanding in May of 1985?

1           A. It has no ownership in that portion of the  
2 product.

3           Q. Okay.

4           A. But it doesn't mean that it's not part of the  
5 licensed software, I don't think. I think there's two --  
6 two things here that we're talking about, licensed  
7 software and -- and ownership, which I think are two  
8 completely separate subjects.

9           Q. So you're suggesting -- why don't you tell me  
10 what you . . .

11          A. No, I just -- the only reason I said that, I  
12 felt like you were drawing a conclusion that -- something  
13 that I didn't say.

14          Q. So you're suggesting that an AT and T  
15 licensee, if they develop a modification or a derivative  
16 work that contains no source code, object code,  
17 documentation or methods and concepts of AT and T's Unix  
18 operating system, that licensee owns the product but  
19 there are further restrictions on that -- on that -- the  
20 licensee's development?

21                 MR. KENNEDY: Objection to form.

22                 You may answer.

23          A. No.

24          Q. So they -- they own that?

25          A. They own . . .

1 Q. That modification or derivative work under  
2 those specific restrictions that we've just discussed?

3 MR. KENNEDY: Objection to form.

4 You may answer.

5 Q. Do you think it's unclear? Do you want me to  
6 re-ask it?

7 MR. KENNEDY: Well, I -- I think it's -- I --  
8 I think that certain things are unclear and very  
9 hypothetical, but I do think that you should -- because  
10 you're talking about . . .

11 MS. SHAPREAU: I'm trying . . .

12 MR. KENNEDY: . . . developing in -- in the  
13 air . . .

14 MS. SHAPREAU: Okay.

15 MR. KENNEDY: . . . without any . . .

16 And then, when Mr. Frasure talks about  
17 development . . .

18 MS. SHAPREAU: Okay. I would rather that you  
19 not get into a lot of detail here, but -- or we could go  
20 outside and discuss it. Maybe I'll just re-ask this  
21 question, okay, if there's a problem.

22 MR. KENNEDY: It's -- it's -- it's your  
23 Deposition.

24 MS. SHAPREAU: Okay. I mean, I want the  
25 clarification from you, but I don't want you to assist

1 the witness in any way with your descriptions.

2 MR. KENNEDY: I am probably the only lawyer  
3 in this litigation who tends to limit his objections to  
4 say objection to form. I've read the transcripts of the  
5 other Depositions.

6 MS. SHAPREAU: And I certainly appreciate  
7 that.

8 MR. KENNEDY: I see the continuing . . .

9 MS. SHAPREAU: Well, I certainly have  
10 not . . .

11 You've never accused me of that. . .

12 MR. KENNEDY: No.

13 by Ms. Shapreau:

14 Q. Okay. Okay.

15 Again, focusing on Exhibit 51, which is the  
16 May 15th, 1985 letter, the second paragraph states:

17 . . . Regarding the definition of licensed  
18 software in the granting clause, AT and T does not assert  
19 any ownership interest in any modification or derivative  
20 work made by licensee and does not consider that such  
21 definition claims such an interest.

22 Now, you were involved with this document at  
23 the time of its preparation; right?

24 A. Yes.

25 Q. Okay. Just so I understand what your

1 understanding was when you were involved in the  
2 preparation of this document, if a licensee of AT and T  
3 developed a software -- developed a software product that  
4 was a modification or derivative work of the Unix System  
5 but contained no literal source code, no literal object  
6 code of AT and T's, no documentation of AT and T's and no  
7 methods and concepts of AT and T's, that portion of the  
8 AT and T licensee's product that didn't contain any of AT  
9 and T's proprietary information was owned by that  
10 licensee; is that correct?

11 MR. KENNEDY: Objection to form.

12 You may answer.

13 A. Yes.

14 MS. SHAPREAU: What's your objection?

15 MR. KENNEDY: Would you like me to clarify,  
16 on the record?

17 MS. SHAPREAU: If it's lengthy I'd prefer  
18 going out in the hall.

19 MR. KENNEDY: No, I just simply -- my  
20 objection is that it's -- is not consistent . . .

21 MS. SHAPREAU: Well, I'd just like to correct  
22 my questions so that. . .

23 MR. KENNEDY: I think it's -- I think -- I  
24 think it's -- it's not consistent with prior testimony  
25 and you were -- rather than accepting the words of Mr.

1 Frasure, you were attempting to reduce his testimony to a  
2 sound bite that will . . .

3 MS. SHAPREAU: Okay, this is -- this is not a  
4 brief objection. If you want to go out into the hall,  
5 I'd be more than happy to talk to you about it.

6 MR. KENNEDY: Please continue; it's your  
7 Deposition. I've made my objection to form. I don't  
8 think . . .

9 MS. SHAPREAU: It's the sound bite objection;  
10 right?

11 by Ms. Shapreau:

12 Q. I just want to understand what AT and T meant  
13 and you meant by this letter in May 15th of 1985?

14 MR. KENNEDY: He's testified -- I mean, you  
15 can ask him about this till doomsday. He's testified  
16 extensively about what it meant.

17 MS. SHAPREAU: Well, I -- I needed  
18 clarification on the earlier testimony. I -- I think  
19 that there were additional questions that needed to be  
20 asked.

21 MR. KENNEDY: He's -- I think he's answered  
22 your question.

23 MS. SHAPREAU: Okay.

24 MR. KENNEDY: Was there an answer?

25 A. I just want to express something. We've --



1 we've -- we've gone around here about this question and -  
2 - and I -- I feel like there's been perhaps some  
3 confusion or interchange of words incorrectly regarding  
4 one completely separate subject to me, which is  
5 ownership, and the other is licensed software, and the  
6 two are not interchangeable, so that was the reason that  
7 I attempted to make a distinction before.

8 Q. Okay. So let me state my understanding of the  
9 paragraph we've been discussing based on what you've just  
10 said.

11 That if a licensee of AT and T developed a  
12 product that was a modification or derivative work that  
13 did not contain any source code of AT and T's or their  
14 object code, documentation, or methods and concepts and  
15 that was not licensed software, then that licensee of AT  
16 and T had an ownership interest in that modification or  
17 enhancement; is that right?

18 A. They -- I think the question gets compounded.  
19 They -- I think the software agreement clearly says that  
20 those things are -- belong to the licensee and that AT  
21 and T has no ownership in those. I think the -- the --  
22 to me the license agreement is explicit in providing that  
23 -- stating that AT and T claims no ownership in that.

24 Q. Interest in modifications or derivative works  
25 as we've just discussed them?

1 A. Yes.

2 However, I guess I just wanted to point out  
3 and I feel this is where we got hung up, was that that's  
4 a completely separate subject from the -- from the  
5 license -- software license product. So . . .

6 Q. I don't understand what you mean.

7 A. Well, the fact that you generate a line of  
8 code, you own that code, that's yours. It doesn't mean  
9 that it's exclusive of the software product. That's all  
10 I'm saying.

11 Q. Exclusive of the software product?

12 A. It means it's -- you can take that code out.  
13 I guess that it's -- I'm saying . . .

14 Q. So you could -- you could segregate the code  
15 that was . . .

16 MR. KENNEDY: Excuse me.

17 Q. I'm sorry. Go ahead.

18 MR. KENNEDY: I believe you interrupted him.

19 Q. Forgive me.

20 A. Now, I just -- ownership, to me is a very  
21 clear and distinct subject from the licensed software  
22 product. If -- if you generate the code, add code to it  
23 then I think, clearly the software agreement and the side  
24 letter said that you owned that. That didn't say that it  
25 was not part of the -- the software licensed product . . .

1 Q. So what are you suggesting? You owned it but  
2 because it was part of the agreement, what does that --  
3 can you tell me the significance of that?

4 A. Well, I -- I'm just saying I want to make a  
5 distinction. I'm not sure where we are going with this.  
6 It's just that I'm saying that the ownership belongs  
7 clearly to the originator of -- of that code, but it --  
8 it could be construed to be part of the software product.  
9 I think . . .

10 Q. Which software product?

11 You're talking about . . .

12 A. Under the software agreement.

13 Q. You're talking about the licensed software?

14 A. Yes.

15 Q. I'm not . . .

16 A. Yes.

17 Q. Okay. If we could use the same term, that  
18 would help me.

19 A. Licensed software.

20 MR. KENNEDY: Could I now ask Mr. Frasure to  
21 leave the room?

22 MS. SHAPREAU: Yes.

23 MR. KENNEDY: Because I do want to make a  
24 statement on the record.

25 MS. SHAPREAU: Okay.

1 \*\*\*\* (Mr. Frasure exited the room.)

2 MR. KENNEDY: Just briefly. There are a  
3 whole host of reasons why I object to this line of  
4 inquiry. One is that it is extremely hypothetical; two  
5 is that it's calling for legal conclusions. Three is  
6 that you're asking for someone to interpret a document as  
7 if he were an expert on contracts. And I'm not at all  
8 sure that even had he been designated as an expert, that  
9 such testimony would be admissible.

10 What concerns me most, however, is that the  
11 University must or should know how it developed its  
12 software. It knows or should know whether its engineers  
13 had access to UNIX Thirty-two V source code. Whether  
14 they used it, referred to it . . .

15 MS. SHAPREAU: Is this an objection?

16 MR. KENNEDY: It's . . .

17 MS. SHAPREAU: I just want to know why we're  
18 getting a lecture.

19 MR. KENNEDY: No. It's because -- it's to  
20 try to flush out what's concerning me. I've sat back and  
21 let -- let you and Ms. Fithian make your inquiries of Mr.  
22 Frasure, virtually uninterrupted, with occasional  
23 objections to form; saying nothing more on the record  
24 unless I'm invited to clarify it. Now, I'm clarifying  
25 it.

1           It's one thing to ask this witness, here are  
2 some facts to assume. A fact -- assume someone went off  
3 in a clean room and did X,Y,Z, or assume that people with  
4 access to the code did the following and this is what  
5 their final product looks like, would you in your own  
6 personal understanding regard that as a derivative work.  
7 But you're not doing that.

8           What you're doing is -- we're playing word  
9 games here with words in this contract. This contract  
10 means whatever a court construes it to mean. If a court  
11 regards it as ambiguous then maybe whatever shared  
12 understandings the parties communicated to each other may  
13 have some admissible relevance. But I think it's  
14 inappropriate and I think it's unfair to continually try  
15 to take his forthcoming testimony and reduce it to words  
16 that you believe give you an advantage in this case, when  
17 you're not taking into account all of the various  
18 permutations of what he said.

19           He said earlier that if -- that you were not  
20 free under the agreement -- the University was not free  
21 under the agreement, to develop software-- . . .

22           MS. SHAPREAU: I'd like to just -- before we  
23 go any further. I'd like to keep track of the time this  
24 is going so that we can add it to the time.

25           MR. KENNEDY: I'll be done -- I'll be done in

1 thirty seconds.

2 . . .--without the benefit of -- with the  
3 benefit of Unix.

4 He's talked about using that software and no  
5 attempt has been made to follow that up.

6 Finally, I want to say one other thing. It  
7 shouldn't be a surprise to anyone in this room that not  
8 claiming an ownership interest in a portion of code which  
9 is developed is a far different cry -- cry from saying  
10 that the University has a right to distribute the entire  
11 derivative work to non-licensees of USL. And that's what  
12 this case is about. This case isn't about ownership  
13 interests in lines of code. It's about the distribution  
14 of code, which we claim is built upon and derived from AT  
15 and T and USL code to non-licensees of USL.

16 I think that -- that I'm just personally  
17 frustrated at the time that we have been spending on this  
18 issue. And the insistence upon asking the same questions  
19 again and again and again, to try to persuade this  
20 witness to agree to formulations that you find favorable  
21 to your case.

22 MS. SHAPREAU: Okay. I'd like to respond to  
23 your comments.

24 The University certainly believes that these  
25 issues are very important. I believe I'm not asking this

1 witness anything in an expert capacity. He was there and  
2 was involved in the preparation of this letter. I'm  
3 entitled to ask him what his understanding was at that  
4 time. I think the hypothetical that I was asking him was  
5 very similar to the things that he was mentioning during  
6 his discussions with the University. I think that it's  
7 completely proper. I think it's really inappropriate of  
8 you to lecture us on the subject. I don't think that  
9 you're right. He was there, he knows what was meant;  
10 I'm asking about what he meant. And I don't think  
11 there's anything improper.

12 I mean -- you know, I -- I would really  
13 appreciate clarification if there's an objection based on  
14 anything that I -- that I said, in terms of form that I  
15 could correct because I would certainly like to do that.  
16 But I'm not asking for his expert testimony. He's a  
17 percipient witness -- so. And I don't want to frustrate  
18 you. So, what can I say? I'll do everything I can to  
19 reduce your level of frustration.

20 Do you have anything to say Mr. Weitz?

21 MR. WEITZ: Yes, actually I do. One brief  
22 comment, which is that I believe that in your desire to  
23 get out the next question, Mr. Frasure is starting words  
24 and regularly not getting to quite finish. I think if  
25 you would pause a little longer, his answers -- I think

1 a lot of his answers are cut off and incomplete as a  
2 result of your going to the next question. Sometimes you  
3 change your question in the middle and interrupt  
4 yourself; that's okay. But sometimes you interrupt him  
5 and I think that's a concern.

6 MS. SHAPREAU: Well, I certainly would --  
7 would request that you mention that I wait until he  
8 pauses; I try and do that. I certainly don't think that  
9 I have interrupted. I wish you would tell me . . .

10 (Both Parties Speaking At Same Time.)

11 MS. SHAPREAU: Well, it's hard to determine a  
12 pause from an end. And you know, we should encourage him  
13 that if he has something to say to say it. I think he's  
14 -- might have gotten that feeling that that's what he  
15 should do throughout this deposition, because that's come  
16 up earlier. So we can mention that to him when he comes  
17 in.

18 MR. KENNEDY: No. No. We're not going to  
19 discuss with Mr. Wilson how -- I'm sorry -- with Mr.  
20 Frasure any adjustments in the manner of his testimony,  
21 other than -- if that's what you're suggesting.

22 MS. SHAPREAU: I really don't want to  
23 interrupt the man. We certainly have not made any  
24 effort . . .

25 MS. FITHIAN: If he feels he's being -- if he



1 feels he's getting interrupted, I think it's  
2 inappropriate to say . . .

3 MR. KENNEDY: No, that's not -- we thought  
4 you were suggesting is -- is -- what I thought you were  
5 saying is that we were going to suggest to him that he  
6 tends to pause a lot.

7 MS. SHAPREAU: Of course not.

8 MR. KENNEDY: He's entitled to answer it in  
9 whatever way he wants to answer it.

10 MS. SHAPREAU: I just wouldn't want him to be  
11 cut off. I don't think he has been. By and large when  
12 that's come up, somebody's said something.

13 MR. WEITZ: Should I ask Mr. Frasure to  
14 return?

15 MR. KENNEDY: Please do.

16 \*\*\*\* BRIEF PAUSE \*\*\*\*

17 EXAMINATION of MR. FRASURE by MS. SHAPREAU, CONTINUED:

18 Q. Just to wind up, I want to ask you one last  
19 question on this point.

20 If a product developed by a licensee of AT  
21 and T, again -- well, why don't I preface this -- start  
22 over. Strike that.

23 I'm referring to Exhibit No. 51, the document  
24 that we've been discussing, which clarifies and amends  
25 the definition of licensed software.

1                   If a licensee develops a software product  
2 that contains source code, object code, methods and  
3 concepts, or documentation of AT and T's, that would not  
4 be defined as licensed software; is that correct?

5                   MR. KENNEDY: Objection to form.

6                   A. I have to qualify my -- my answer by saying  
7 if it was developed independent of the licensed  
8 software . . .

9                   Q. Okay. Let me -- I don't want to interrupt  
10 you.

11                   A. No. I say if it was developed independent of  
12 the licensed software and without benefit of it, then to  
13 me that's a -- that is the licensee's product. In other  
14 words, if they were completely separate and divorced from  
15 this and the people who developed that product didn't  
16 have the benefit of the knowledge of this product. I  
17 mean there are -- there are companies that developed  
18 software products all the time without the benefit of  
19 this, and introduce them.

20                   I'm cautious in my answer because I  
21 think that it needs qualification. If they had the  
22 benefit of the licensed software when they did that,  
23 then. . .

24                   I still feel like we're talking about --  
25 about two separate things here. One is ownership and one

1 is what is the licensed product.

2 Q. Okay. So focusing on the licensed software,  
3 you're suggesting that -- that if an AT and T licensee,  
4 by merely having access to the licensed software, even if  
5 their -- a product that they developed contains no  
6 methods and concepts, documentation, source code or  
7 object code of AT and T's, that that product is somehow  
8 still licensed software?

9 A. I don't think I said that. I think we're  
10 going to have to get down to . . .

11 Q. So you . . .

12 A. . . . perhaps an example.

13 Q. Okay.

14 A. That if a -- a company -- a licensee had a  
15 facility and people in it that never had -- had used the  
16 UNIX source code and they set off and they developed a  
17 product on their own, then I -- in my opinion, then AT  
18 and T has no interest in that product.

19 Q. Forgive me. I don't know that I understand  
20 your hypothetical completely.

21 This is -- if an AT and T licensee has a  
22 licensed UNIX operating system and they've looked at it  
23 and they've worked with it, then they go ahead and  
24 develop a product that doesn't have actual source code,  
25 object code, documentation, or methods and concepts of AT

1 and T's, is it my understanding -- do I understand you to  
2 be saying that that licensee's product falls under the  
3 definition of licensed software?

4 A. I don't -- I really don't think that I can  
5 answer the -- the question clearly. I guess I have my --  
6 it's very difficult to try to answer some of these  
7 questions, because I think of the methods and the  
8 concepts issue. There's a -- I've used the term at least  
9 one time, mental contamination, if you will, of being --  
10 being exposed to a product. You know, I think a clear  
11 cut hypothetical case would be that if you have a  
12 licensee and they have two physical locations and you've  
13 got this group out here that's never seen the UNIX source  
14 code and they go off and they develop a product, then I  
15 would think clearly that that is that licensee's product  
16 and AT and T has no interest in it.

17 However, if the other location that had  
18 access to that source code and there were people working  
19 on that new product that had worked with the UNIX  
20 software to some extent -- I don't know what that extent  
21 is because we're talking in general terms here -- then I  
22 would think that there's a chance that AT and T would  
23 have an interest in that product.

24 Q. Okay. So that I understand you. What you're  
25 suggesting is that if an AT and T licensee has had access

1 to the UNIX operating system, such that -- you've used  
2 the term mental contamination?

3 A. Yes.

4 Q. They've been mentally contaminated, meaning  
5 they had some recollection of the UNIX operating system  
6 by merely seeing it and working with it -- that AT and T  
7 would then have an interest in any product that such a  
8 licensee would develop, even if that product contained no  
9 actual source code, object code, documentation, or  
10 methods and concepts of AT and T's?

11 MR. KENNEDY: Objection to form.  
12 Mischaracterizes testimony.

13 You may answer.

14 Q. I'm asking -- I'm asking the witness if that's  
15 a correct understanding of what he had testified to.

16 MR. KENNEDY: Same objection.

17 You may answer.

18 A. I guess I would answer that question in the  
19 fact -- saying that there is a chance that AT and T may  
20 have an interest in it. I'm not going to say that --  
21 that they do or they don't, but I'm going to say that  
22 there's a chance that they have an interest in -- in that  
23 product. Yes.

24 Q. Under what circumstances would they have an  
25 interest -- would AT and T have an interest in the

1 licensee's product because they had had mental access to  
2 the AT and T Unix operating system?

3 A. Well, I think the fact that they -- they had  
4 access to it -- I'm really not trying to be -- to be  
5 stubborn with you but techniques, methods and concepts  
6 are things that -- that we use in every day life that we  
7 have been trained -- we have learned by experience to  
8 use. I think that for someone to say, well, we're not  
9 using AT and T's methods and concepts is -- is a -- it's  
10 a statement that -- someone may think that because they  
11 subconsciously aren't aware that they were, but they  
12 could be, that's why I have to answer the question by  
13 saying there's a chance that they -- they do.

14 I mean you do things for so long and develop  
15 styles and techniques, then for someone to say, well, it  
16 doesn't contain AT and T's methods and concepts, I -- I  
17 think may be hard to say if someone has worked with a  
18 product for -- for some number of -- period of time.

19 Q. Okay. Assuming an objective person were to  
20 determine whether or not the product we've been  
21 hypothetically discussing, assuming there were no methods  
22 and concepts of AT and T's in the licensee's product, do  
23 you think AT and T would have an interest in that  
24 licensee's product, if they'd had access to the UNIX  
25 operating system?

1 MR. KENNEDY: Objection to form.

2 A. I don't know.

3 Q. My understanding of what you've just stated is  
4 the licensee himself may think that it does or doesn't  
5 have a methods and concepts of AT and T in the product.

6 But objectively if it had no methods and  
7 concepts -- if the product had no methods and concepts of  
8 AT and T's, would AT and T have an interest in that  
9 product?

10 MR. KENNEDY: Objection to form.

11 Q. I'm just trying to understand what -- what --  
12 what . . .

13 A. The only -- the only thing that I can go back  
14 to is the example I used just a few minutes ago.

15 If a licensee had two locations and one  
16 location had no benefit, no exposure to the source code  
17 and they developed a product, then I think the -- the  
18 answer is clear that AT and T has no interest in that.

19 Q. Okay.

20 A. Based on the -- on the software agreement.  
21 However, if their -- the other location that has had  
22 exposure to the software and uses the software and some  
23 of those same people that were using that software  
24 undertake development of another product, all I'm saying  
25 is there is a chance. I can't say yes or no. All I can

1 say is there's a chance that . . .

2 Q. Okay. So there's a chance . . .

3 A. . . . that AT and T has an interest.

4 Q. Okay. So this licensee -- this hypothetical  
5 licensee of AT and T's, we're talking about a chance that  
6 their product if they've had access to AT and T's  
7 licensed software, that their product could have methods  
8 and concepts of AT and T's but it might not have methods  
9 and concepts of AT and T's?

10 A. That's true.

11 Q. In the circumstance where an AT and T licensee  
12 has had access to the UNIX operating system and there are  
13 no methods and concepts of AT and T's in their product --  
14 in the licensee's product, am I correct in understanding  
15 then that AT and T would not have an interest in that  
16 licensee's product?

17 MR. KENNEDY: Objection to form.

18 A. If it -- if it was that clear, in your  
19 example, then I would -- I would say they -- they do not  
20 have an interest in it.

21 Q. Okay.

22 A. If it was -- if it was that clear. However,  
23 my -- in my answers the reason I'm hedging is sometimes I  
24 just don't know that it's -- that it is that clear.  
25 That's why I'm hesitant to answer with a yes or no.



1 Q. Okay. Now, the hypotheticals that we've been  
2 discussing . . .

3 A. Yes.

4 Q. . . . in the last half hour or so, did you  
5 communicate any of those hypotheticals in your meeting  
6 with the University in 1984?

7 A. Yes.

8 Q. You did?

9 A. Sure did. Spent quite a bit of time.

10 Q. Was it a similar discussion that we're having  
11 today?

12 A. Yes.

13 Q. Okay.

14 A. Yes. Very similar.

15 Q. Did you ever communicate to the University  
16 what AT and T's understanding of methods and concepts  
17 was?

18 A. I think there were references similar to what  
19 I have made here today, of styles and techniques . . .

20 Q. You mentioned interface?

21 A. Yes. Methods, techniques of accomplishing  
22 something within the code, sequencing things in a certain  
23 manner. Yes, those were discussed and -- and presented  
24 to them. We went through hypothetical examples exactly  
25 like we did here, where a company has two locations and

1 one has not been mentally contaminated and the other is.  
2 I don't think that -- I think the answers given in some  
3 of those cloudy cases were similar to what I have said  
4 here right now. There's a chance that there is -- we  
5 can't say yes or no, but there's a chance.

6 Q. What was the University's. . .

7 I just want to mention, if I'm ever  
8 interrupting you I want you to tell me because I want you  
9 to finish your thoughts. Okay?

10 A. Uh-huh.

11 Q. Okay. Do you recall what the University's  
12 response to this discussion was?

13 A. Well, I don't know what the University's  
14 response was.

15 Q. Did they express that to you, that's what I  
16 would like to know?

17 A. Well, I believe there were -- there were  
18 individuals at that meeting that were -- were in and out.  
19 I perhaps stereotypically assumed that they were students  
20 because of their attire. But, you know, I think there  
21 was some objection to some of our discussions.

22 Q. Do you remember what those objections were?

23 A. Well, they -- similar to what your questions  
24 have been, I think. You know, trying to make a clear cut  
25 definition in our answers where you cannot make a clear

1 cut definition. There -- you know, without looking at a  
2 specific example, I -- I think that it's hard -- it's  
3 hard to say.

4 MR. KENNEDY: Could we find out from Mr.  
5 Frasure if he recalls which of the various hypotheticals  
6 that were discussed today, were discussed with the  
7 University?

8 Q. Certainly.

9 MR. KENNEDY: Which scenarios were discussed?

10 Q. I hate to have you repeat every hypothetical.

11 Was there any hypothetical that you discussed  
12 today that you did not discuss with the University in  
13 1984?

14 A. I -- you know, we went through I think  
15 several. One was -- was a stand alone company as I said,  
16 that had no -- no exposure. There was development of a  
17 product who -- they -- was in conjunction with someone  
18 who had ongoing access to the product. There was  
19 development of a product who -- someone -- and I'll go  
20 back to the term that Otis and I used to use, was mental  
21 contamination of the product that set off on their own  
22 and developed a product. And that's where I say there's  
23 a chance that AT and T had an interest in the product.

24 Q. Okay.

25 A. So I -- I think the only one that's clear cut

1 is the -- is the stand alone, if you're looking for an  
2 ownership issue or a licensed product issue.

3 I might add one thing that we did discuss,  
4 also, that was in line with this, was regarding the  
5 contractors' provisions. I'm not sure if you're familiar  
6 with contractors' provisions with the software agreement.  
7 That's where -- I had mentioned earlier today -- a  
8 licensee perhaps if they did not have the technical staff  
9 or whatever, they would license with another company to  
10 develop the product for them. They brought them under  
11 the scope of the software agreement. Then when that  
12 development effort was done, they severed their  
13 relationship. We -- in our examples, we did say that  
14 there's a -- if that company now and those people that  
15 had access to the UNIX code go off-- . . .

16 Q. You mean the contractors?

17 A. The contractor, yes.

18 . . .--go off and develop a product that  
19 there's a -- there is also a chance that -- that AT and T  
20 has an interest in that product.

21 Q. But if that product contains no source code,  
22 object code, documentation, or methods and concepts of AT  
23 and T, then AT and T would not have a property interest  
24 in that product; is that correct?

25 MR. KENNEDY: Objection to form.

1 A. If it was that clear then I would say there is  
2 no interest.

3 Q. Okay.

4 A. I'm not sure that it is that clear, that's why  
5 we used the example. Again it was a mental  
6 contamination, if you will. That company had exposure to  
7 -- to the product.

8 Q. Do you believe there's ever a circumstance  
9 where someone has had access to the UNIX operating system  
10 and worked with it on a day to day basis, that they could  
11 develop a product that didn't contain -- no -- excuse me  
12 -- that they could develop a product that didn't contain  
13 the methods and concepts contained in the UNIX operating  
14 system?

15 A. Sure.

16 Q. And then AT and T would not have an interest  
17 in that product; right? Is that correct?

18 MR. KENNEDY: Objection to form.

19 MS. SHAPREAU: What's your objection?

20 MR. KENNEDY: Provided it didn't otherwise  
21 violate the agreement.

22 by Ms. Shapreau:

23 Q. Okay. Well, I don't -- I've asked this  
24 question before. You -- you basically -- so that I  
25 understand you -- are suggesting that if somebody has had

1 access, a licensee or a contractor pursuant to a license  
2 agreement has had access on an ongoing basis to the UNIX  
3 operating system and they develop a product that doesn't  
4 have source code, object code, documentation, or methods  
5 and concepts of AT and T's, then that licensee is free to  
6 do whatever they want with that product; isn't that  
7 correct?

8 MR. KENNEDY: Objection to form.

9 A. If it's that -- if it's that clear, that's  
10 right.

11 Q. Okay.

12 A. It's theirs.

13 Q. Okay.

14 A. Yes.

15 Q. And obviously that's going to be a factual  
16 matter. We are talking in the abstract here, but I'm  
17 just trying to get your understanding of the terms of  
18 these various agreements and the modifications and  
19 clarifications.

20 A. (Moved head up and down.)

21 \*\*\*\* BRIEF PAUSE \*\*\*\*

22 Q. I want you to hold onto the System Five  
23 Exhibit.

24 A. Okay.

25 Q. Okay. Mr. Frasure, I've just given you a

1 document dated August 15, 1984, signed by Mr. Wilson, to  
2 the Regents. It references someone named Mr. R.D.  
3 Hoffman.

4 Who's Mr. Hoffman?

5 A. Mr. Bob Hoffman. He worked for me; he was an  
6 account executive.

7 Q. Did he deal on a regular basis with the  
8 University of California?

9 A. No. He was a back-up person for Gertrude  
10 Williams.

11 Q. Okay. I want to ask you a question about this  
12 document, but to answer the question you're going to need  
13 to look at Exhibit 34, which is the System Five license  
14 agreement, paragraph one point zero one A. It's page P  
15 zero, zero, zero, two, one, five. That's the page of the  
16 license agreement that I think that this letter refers  
17 to.

18 Let me ask you first, are you familiar with  
19 this letter?

20 A. I have seen the language before. I can't  
21 really say that I'm familiar with the letter, but I have  
22 seen -- seen the language.

23 Q. Okay. In the middle of the page the paragraph  
24 states:

25 . . . . We agree that the following may be

1 considered as part of the above referenced agreements.  
2 We require that provision, such as in section one point  
3 zero one A of the referenced agreement.

4 . . .By referenced agreement, this document  
5 refers to the July 1st, 1983 UNIX System Five Agreement.

6 . . .The referenced agreement be included in  
7 our educational software agreements. Reduced fees are  
8 granted based on acceptance of such provisions. By way  
9 of clarification, while we do not require that results,  
10 enhancements and modifications be made public, we do  
11 require that if the material is to be released at all it  
12 must be -- made -- it must be available to anyone.

13 Before I ask you a question, I want to direct  
14 your attention back to the System Five license under --  
15 it's paragraph one point zero one A, sub -- little -- two  
16 little I's.

17 A. Uh-huh.

18 Q. Which states:

19 . . . . Such results, enhancements, and  
20 modifications all to the extent that they do not include  
21 any portion of licensed software, are made available to  
22 anyone, including AT and T and its associated companies  
23 without restriction on use, copying, or further  
24 distribution.

25 And then the sentence goes on.



1 Am I correct in understanding what AT and T  
2 meant at the time of this August 15th, 1984 letter,  
3 regarding the System Five agreement, was that if a  
4 licensee developed their result, enhancement, or  
5 modification that did not include any portion of the  
6 licensed software, that that product could then be made  
7 available to anyone?

8 MR. KENNEDY: Objection to form.

9 You may answer.

10 A. I -- I guess. I've read the words here.

11 Would you mind repeating the question or  
12 having her read it back?

13 Q. Would you read it back?

14 (The previous question was read to the  
15 witness.)

16 A. I guess the term anyone is -- is -- in reading  
17 this is my concern. It's referencing the software  
18 agreement. I have an interpretation. It's been a number  
19 of years since I have seen this language. I guess I have  
20 a . . . .

21 Q. Do you remember what was meant by this?

22 MR. KENNEDY: Excuse me.

23 Q. Oh, I'm sorry.

24 MR. KENNEDY: Were you done, Mr. Frasure?

25 A. No. Go ahead and ask the question. Or yes.

1 Go ahead and ask the question.

2 Q. Maybe I could just focus your answer. I just  
3 want to get your recollection of what your understanding  
4 of this was in the 1984 time period.

5 A. Any one -- as I stated earlier today, the  
6 results are one thing to me, which are -- are separate  
7 from any software modification.

8 Enhancements and modifications be made public  
9 here and available to anyone.

10 I have to interpret this as being another  
11 licensee, because it's referencing the software  
12 agreement.

13 Q. Okay. So that I understand you. Your  
14 understanding in August of 1984, of the word public and  
15 anyone is an AT and T licensee. That's what you're  
16 telling me?

17 A. I've broken it up into two categories and I  
18 find it hard to. I think I read this differently now  
19 than perhaps I did back then.

20 Q. I want your understanding at the time, in  
21 1984, if you recall that, sitting here today?

22 A. (No verbal response.)

23 Q. Is your understanding -- is your recollection  
24 that your understanding in August of 1984 was that the  
25 words public and anyone as used in this paragraph in

1 Exhibit 52 meant AT and T licensees?

2 MR. KENNEDY: For the reasons he's already  
3 testified to?

4 Q. I don't know what that means. I think the  
5 question is fairly straight forward.

6 A. I don't know.

7 Q. Okay. Did you ever have any communication  
8 with the University regarding your understanding of the  
9 words public and anyone in Exhibit 52?

10 A. Not that I recall.

11 Q. Okay. Can you describe for me your  
12 involvement in AT and T's license -- licensing with the  
13 University for BSD code? Did you have much involvement  
14 in that?

15 A. For the transfer of the code to AT and T?

16 Q. For the license that was in place that allowed  
17 the transfer of Berkeley code to UNIX?

18 A. No. I had -- really had no direct involvement  
19 in that. There's -- I believe when the correspondence  
20 that we looked at earlier today was addressed to me, but  
21 I was not involved in that negotiation.

22 Q. Okay. Do you know who was responsible in the  
23 time period that you were employed at AT and T in the  
24 licensing department for ensuring that the terms of the  
25 agreement for BSD code were put into place?

1 A. What specific parts of the agreement?

2 Q. (Moved head up and down.)

3 A. In other words, the agreement as I recall  
4 covered things like we would have to provide credit if  
5 that was given to us.

6 Q. That's a good example. What about that one?

7 A. Okay. Well, there was -- that was outside of  
8 my organization. That was the -- that would have been  
9 the technical group. That whoever used that -- that code  
10 had to provide the acknowledgements in the documentation.  
11 I believe the acknowledgements in the code. I think the  
12 author's name is in the code. But I had no -- no  
13 involvement in that.

14 Q. So the technical group was responsible for  
15 making sure that appropriate credit was given in AT and T  
16 products that contained BSD code pursuant to license with  
17 the University?

18 A. Well, the -- the name technical organization  
19 is kind of a generic thing. But there was those  
20 developers that took that source code if there were any  
21 modifications put into the -- to the UNIX product.  
22 Obviously if they picked up those -- those lines of code  
23 and incorporated them and -- and if any of -- additional  
24 functions or capabilities were provided as a result of  
25 those modifications then they were, as I understood it,

1 were to acknowledge those people in the documentation, as  
2 well if it was -- if that information was presented AT  
3 and T.

4 Q. How did the people in the technical division  
5 of AT and T get that information? Wouldn't they get that  
6 from licensing since the licensing had the license  
7 agreement?

8 A. No. The -- what we're talking about is the  
9 product itself, not the licensing. In other words, the  
10 licensing agreement was in place. The code and any  
11 documentation was transmitted to the technical  
12 organization within AT and T.

13 Q. Okay. So the technical organization within AT  
14 and T got the BSD license?

15 A. Well, they were aware of the provisions of the  
16 license but they got the code directly from the  
17 University.

18 Q. Do you know who in the technical division  
19 would have been responsible in the time period that you  
20 were at AT and T for making sure that the credit  
21 provision, for example, in the license agreement for BSD  
22 code was fulfilled?

23 A. Well, I don't know the individual. I know the  
24 manager of the organization. His name was Mike DeFazio,  
25 D-E-F-A -- I think it was Z-I-O.

1 Q. Okay. So he would have been . . .

2 A. He was over the organization that had -- I  
3 believe he was over the organization that had that  
4 responsibility.

5 Q. Okay. So to your understanding, your  
6 recollection, no one in the licensing department at AT  
7 and T during the time you were employed there was  
8 responsible for ensuring that the, for example, the term  
9 which required proper credit to the University of  
10 California for the use of its code. There's nobody in  
11 the licensing department that was responsible for  
12 ensuring that that requirement was fulfilled; is that  
13 correct?

14 A. Yeah. We -- our responsibility was that we  
15 provided the terms of the agreement to the -- to that  
16 organization.

17 Q. And what was the name of that organization,  
18 specifically?

19 A. I don't know. All I know is that -- I recall  
20 is generically a technical organization. It was located  
21 at -- headquarters at Summit, New Jersey, and it was  
22 headed up by Mike Defazio.

23 Q. Do you remember any of the names of other  
24 people in that division that might have had some  
25 responsibility for ensuring that the terms of the

1 agreement with Berkeley were fulfilled?

2 A. Specifically, no. No. I recall a number of  
3 names of individuals, but I can't say that any one of  
4 them had part of the responsibility or all of the  
5 responsibility. It's my belief that it fell in Mike  
6 Defazio's organization, but beyond that I can't -- I  
7 can't tell you any individuals.

8 Q. Do you know whether any Berkeley Code was ever  
9 -- Berkeley code or documentation was ever used in any  
10 UNIX product?

11 A. No. I don't know that. I don't know.

12 Q. Do you know whether AT and T ever paid the  
13 University of California for any of its results,  
14 enhancements, or modifications to the UNIX operating  
15 system?

16 A. I don't know. I'm hesitating because . . .

17 Q. Why don't I -- why don't I clarify it,  
18 actually?

19 A. Okay.

20 Q. Other than the cost of processing and  
21 obtaining code from the University of California, do you  
22 know whether AT and T ever paid any money to the Regents  
23 for its results, enhancements, or modifications to the  
24 UNIX operating system, other than the costs of getting  
25 that product?

1           A. I don't know. And the reason that I'm  
2 hesitant is that I have a vague recollection that there  
3 was -- there was some type of exchange that was going to  
4 occur, but I don't know if that ever occurred. I think  
5 there was a discussion about it, but it's vague. I don't  
6 have any -- any -- other than I think there was some  
7 vague -- I mean there's a vague memory there of something  
8 to take place for some -- some fee. I don't really know  
9 what it was involved with.

10           Q. Okay. So you don't have any specific  
11 recollection that AT and T ever paid any money to the  
12 University of California for its results, enhancements,  
13 or modifications other than their cost of reproduction of  
14 product; is that accurate?

15           A. Yes. I have nothing concrete that I can  
16 recall.

17           Q. Do you know why AT and T, during your  
18 employment at AT and T, might have wanted any of the code  
19 developed by the University of California?

20           A. No.

21           Q. Mr. Frasure, I've just handed you document,  
22 it's kind of hard to read the date, but it appears to be  
23 September, 1985 and it's Bates number P zero, zero, zero,  
24 nine, eight, nine, seven. It's to all account  
25 executives, subject Kernel Newsletter.



1 Do you know what a Kernel Newsletter is?

2 A. (No verbal response.)

3 Q. Well, first let me ask you, is this your  
4 signature on this page?

5 A. Yes.

6 Q. Do you remember writing this document?

7 A. I think so. Yes.

8 Q. Okay. What's a Kernel Newsletter?

9 A. I'm trying to recall.

10 Q. Okay.

11 A. Let me finish reading the letter here.

12 (Brief Pause.)

13 I have to assume that it was an internal  
14 document that I . . .

15 Q. Okay. I don't want you to guess about  
16 anything. I just want your recollection of the facts.

17 A. I remember writing the letter. It was  
18 important to me that we -- we exchange information. That  
19 one account executive in working with a customer would to  
20 the best of our ability -- if we developed a side letter,  
21 would be made aware of the language that was used and for  
22 what reason that it was used. So we weren't continually  
23 trying to do -- to develop new ground. Specifically what  
24 the Kernel Newsletter was I cannot tell you. I only have  
25 to make an assumption about it.

1 Q. So you -- do you have any specific  
2 recollection on any Kernel Newsletters on issues of  
3 modification of any licensing agreements that we've  
4 discussed today?

5 A. What I have a recollection of is that we -- we  
6 did -- say we -- I wanted my account executives to  
7 disseminate the information to save the new -- any new  
8 side letters that were developed with the licensees so  
9 everyone was familiar with the language. I don't --  
10 beyond how we published. What the Kernel Newsletter was,  
11 I can't tell you anything beyond that. I mean I had an  
12 objective in trying to do this.

13 Q. Mr. Frasure, I've just shown you what's been  
14 as Exhibit No. 54, which is a document dated January  
15 16th, 1986, written by Mr. Ferrari to your attention.

16 Do you recall this letter?

17 A. Yes, I do.

18 Q. This letter states:

19 . . . . In response to your request, this  
20 letter is to inform you that the four point three  
21 Berkeley Software Distribution, BSD, is based on UNIX  
22 Thirty-two V, as have been all previous BSD releases.

23 A. Yes.

24 Q. Why was -- what was the request that AT and T  
25 made to the University of California referenced in this

1 letter?

2 A. What was the request?

3 Q. Yes.

4 A. I specifically can't tell you. I thought  
5 there was a -- I had made a reference this morning to  
6 the fact that -- that Berkeley had notified us that the  
7 four point three was based on Thirty-two V. I thought I  
8 read something here this morning that said to the extent  
9 of the next release, or something. I don't recall what I  
10 read this morning. I think there was reference to it  
11 here some place that I read. That future releases to the  
12 extent that they contained Thirty-two V or something.  
13 But I don't recall the vehicle of the request. I feel  
14 certain that -- that it must have been in writing. But  
15 we're wanting something back from the University to know  
16 what the product contained, whether it was -- if it  
17 included any System Three or any System Five source code  
18 -- source code products.

19 Q. Was that the focus to determine which UNIX  
20 operating system four point three is based on?

21 A. Yes.

22 Q. Thirty-two V, System Three or System Five?

23 A. What it contained . . .

24 Q. So that was the focus, which product?

25 A. Yes.

1 Q. Okay. Why -- why did AT and T want that  
2 information?

3 A. To make sure that if there was to be a  
4 recipient of that product that they were appropriately  
5 licensed. In other words, at one time, you know, people  
6 would -- would call in or the University would call in to  
7 verify that someone was -- was a licensee. If it was  
8 going to contain something that was beyond Thirty-Two V,  
9 we had to ensure that we responded correctly to that.

10 Q. In this time frame, January 1986, was AT and T  
11 the one who was responsible for verifying that someone  
12 had an appropriate license to obtain a BSD product?

13 A. I . . .

14 MR. KENNEDY: Distributed by whom?

15 Q. Distributed by the University of California.

16 A. I don't recall. There was a . . .

17 Q. Well, you're asking this -- I'm sorry answer  
18 your -- answer the question, please.

19 A. There was a -- a procedure published as -- as  
20 I recall. I do not recall the time frame, it's been too  
21 long ago. But there was a procedure by which we -- where  
22 we discussed the source code exchange provisions that we  
23 were to respond in verbal to the licensee, but the  
24 licensee had the responsibility to write down the date  
25 and the person that they talked to, and so on, so we

1 could always trace back and be verified. That procedure  
2 was -- was in place. There was also a -- other  
3 procedures that required copies of the signature page of  
4 the license and other things.

5 To answer your question specifically who had  
6 the responsibility at this time, I can't -- I can't tell  
7 you.

8 Q. Okay. You don't -- you don't recall at this  
9 time?

10 A. I don't recall.

11 Q. Okay.

12 A. But our organization did continually get  
13 inquiries from licensees.

14 Q. Okay.

15 MR. KENNEDY: I believe that document has  
16 been marked as an exhibit.

17 Q. Yes. That's correct. Is that your question,  
18 whether or not it had been?

19 MR. KENNEDY: No. I was just mentioning that  
20 I think the document had been . . .

21 Q. What document?

22 MR. KENNEDY: That Mr. Frasure my be  
23 referring to had been marked as an exhibit.

24 A. The procedure.

25 MR. KENNEDY: With the procedure.

1 Q. I'm sorry.

2 Mr. Frasure, you came on board at AT and T  
3 shortly before AT and T divested; is that -- is that  
4 right?

5 A. No. It was quite some time before that. I  
6 thought.

7 Q. Okay. Could you just briefly describe for me  
8 how AT and T's marketing goals -- because you've had some  
9 responsibility in -- in marketing from what you've  
10 testified to, how were AT and T's marketing goals changed  
11 when AT and T divested?

12 MR. KENNEDY: Assumes facts not in evidence.  
13 You may answer.

14 Q. Did -- okay, I'll rephrase.

15 Did AT and T's goals regarding marketing  
16 change after they divested?

17 A. I believe they did; yes.

18 Q. Okay. Do you remember the date of the  
19 divestiture?

20 A. No.

21 Q. Okay. How did those goals change?

22 A. Well, I -- I can't specifically tell you  
23 because at -- at the time of the divestiture I was not  
24 involved in any marketing activities. Prior to  
25 divestiture AT and T and Bell Laboratories and so on made

1 -- made things available to -- to companies and to  
2 people. Corporations or whatever; I probably should not  
3 say people, but to companies on some basis. Then after  
4 divestiture we found that we were in competition with  
5 those same -- same corporations that may have provided  
6 information to previously. So we set out with marketing  
7 strategies to try to gain our fair share in the  
8 marketplace. I can only speak of the -- the UNIX  
9 software licensing and sublicensing. I mean that's all I  
10 ever had exposure to in terms of marketing with AT and T.  
11 So I really can't say what that effort was before  
12 divestiture because my only involvement in it was after  
13 the divestiture of AT and T. That's when I went to work  
14 for the software licensing organization.

15 Q. Okay. And just for clarification. You had  
16 mentioned earlier that you had no -- you didn't play a  
17 role in negotiating. Correct me if I'm wrong. I'd asked  
18 you earlier some questions about the BSD code and the  
19 licenses that AT and T entered into for that code. I  
20 believe, and correct me if I'm wrong, that you stated  
21 that you didn't have any . . .

22 A. That I had no direct -- I reviewed the  
23 documents and made comments on them but I had no direct  
24 negotiation with the University on those documents.

25 Q. Okay. Who had the direct negotiation with the

1 University on those documents?

2 A. To the best of my recollection it was -- it  
3 was Mike Defazio's, again, organization. And we -- we  
4 reviewed the documents but they were involved with the  
5 basic negotiation of the agreement in conjunction with  
6 the attorneys.

7 Q. So Mike Defazio's department, which you've  
8 described earlier as the technical department, they  
9 actually were the ones that negotiated the terms of the  
10 BSD license agreement?

11 A. To the best of my knowledge. Mike's  
12 organization was technical and he had other -- other  
13 responsibilities within his organization. He was an  
14 individual over a rather large organization. So he had  
15 responsibility for setting up certain business  
16 relationships between AT and T and -- and other -- other  
17 companies, licensees. His involvement was rather diverse  
18 at his level. So, I mean, it just was not strictly a  
19 technical organization.

20 Q. You mentioned that although you didn't have  
21 any direct involvement you -- you did it -- went over one  
22 of the terms, the credit provisions of the BSD?

23 A. The what provisions?

24 Q. The credit provision of the BSD license. Do  
25 you have some recollection of the terms of the BSD



1 licensing?

2 A. Yes. Yes. I reviewed the document and  
3 commented on it.

4 Q. Okay. And why were you commenting on the  
5 documents?

6 A. Wanting to make sure that they were consistent  
7 with other documents that we had put in place with other  
8 licensees.

9 \*\*\*\* Brief Pause \*\*\*\*

10 MS. SHAPREAU: Okay. We would like to finish Mr.  
11 Frasure's deposition today and we're making every effort  
12 to do that. We have noticed depositions for tomorrow  
13 morning at 9:30 with Mitzi Bonn. Both Ms. Fithian and  
14 myself are catching what we -- what I believe are the  
15 only -- taking two flights to get to Greensboro, so we  
16 can be there -- making ever effort to be there. I don't  
17 want it to be construed that we weren't willing to stay  
18 to finish this deposition, because we simply won't be  
19 able to get the deposition tomorrow if we don't stop at a  
20 reasonable hour in order to catch two airplanes to get  
21 there.

22 I -- I would like an agreement from you if  
23 that's possible. You know we could stay here until 9:00  
24 tonight, but we wouldn't be able to find a way to get to  
25 Mitzi Bonn's deposition tomorrow, since it's a three and

1 a half to four hour drive.

2 MR. KENNEDY: I'm not sure what you're asking  
3 of . . . .

4 MS. SHAPREAU: I just don't want to have -- I  
5 want to make every effort to finish. I just don't want  
6 there to be an objection from you that we would have any  
7 problem with continuing this, if we can't finish today  
8 to another time.

9 MR. KENNEDY: The thing is, I would like to  
10 do everything possible to . . .

11 MS. SHAPREAU: To finish today.

12 MR. KENNEDY: . . . finish Mr. Frasure,  
13 principally because of the location. It is . . .

14 MS. SHAPREAU: I know. I agree.

15 MR. KENNEDY: Casting no aspersions upon the  
16 fine people of Greenville, you guys are way out there in  
17 terms of geography. It's a trek to get out here for  
18 everybody, so if we could get it done today. And indeed  
19 Mr. Frasure runs a business, so I know that -- he's  
20 communicated to me that he would much rather finish today  
21 if at all possible.

22 MS. SHAPREAU: Let's just forge ahead here.

23 MS. FITHIAN: Yes.

24 MS. SHAPREAU: Okay.

25 MS. FITHIAN: Let's see how quickly we can

1 get through . . .

2 MS. SHAPREAU: Let me just try to get through  
3 this as quickly as I can.

4 by Ms. Shapreau:

5 Q. I wanted to ask you. My understanding is Mr.  
6 Wilson signed the contract with the University of  
7 California for four point three, BSD. Do you know if  
8 that's correct or not?

9 A. I don't know. I assume he did.

10 Q. Do you have a recollection of that?

11 A. I have no recollection. I assume he did.

12 Q. Okay. Do you know whether he -- did you have  
13 any discussions with him regarding the preparation and  
14 negotiations of the contract with the University of  
15 California for the four -- Berkeley Software  
16 Distribution, that four point two and four point three in  
17 it?

18 A. I don't know. Let me see that again, if I  
19 could.

20 Q. Okay. Okay. Why don't I just go ahead and  
21 mark this? I only have one. I'm sorry.

22 MR. KENNEDY: It's okay.

23 Q. Oh. This one has been marked already.

24 I want you to take a look at what's  
25 previously been marked as Exhibit 42. I'm going to try

1 to ask you some brief questions.

2 MR. KENNEDY: I don't think. Forty-two is  
3 not the signed agreement.

4 Q. That's right. That's fine. That's not what  
5 my question is about. That's okay. This is a draft, but  
6 I'm aware of that.

7 MR. KENNEDY: Okay.

8 Q. Okay. Mr. Frasure, could you take a look at  
9 page one of this draft agreement and under the witness  
10 section, the second paragraph states:

11 . . . . Whereas the Regents of the University  
12 of California is the proprietor and owner of enhancements  
13 and additions to Thirty-two B, which together with parts  
14 of Thirty-Two V comprise computer programs and  
15 documentation entitled Fourth Berkeley Software  
16 Distribution, version Four point two BSD, Berkeley  
17 software.

18 Did you personally ever communicate with the  
19 University regarding this paragraph?

20 A. Not that I recall.

21 Q. Do you know whether -- who else at AT and T  
22 might have communicated with the University of California  
23 regarding this paragraph?

24 A. Only in a general -- in general.

25 Q. I'm interested in a -- in a name of an