In The Matter Of:

THE SCO GROUP, INC., v.
INTERNATIONAL BUSINESS MACHINES CORPORATION

DAVID P. RODGERS
June 10, 2004

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RODGERS, DAVID P.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
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THE SCO GROUP, INC.,)
)
Plaintiff/)
Counterclaim-Defendant,)
) Case No.
-against-) 203CV-0294 DAK
)
INTERNATIONAL BUSINESS)
MACHINES CORPORATION,)
)
Defendant/)
Counterclaim-Plaintiff.)
_____)

DEPOSITION OF
DAVID P. RODGERS

Thursday, June 10, 2004
Volume 1 (Pages 1 - 216)

REPORTED BY: ANA M. DUB, RMR, CRR, CSR 7445 (03-351091)

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--oOo--

BE IT REMEMBERED that, pursuant to Subpoena, and on Thursday, June 10, 2004, commencing at 8:06 a.m. thereof, at the Doubletree Hotel, 2050 Gateway Place, Santa Clara, California, before me, Ana M. Dub, a Certified Shorthand Reporter, Registered Merit Reporter, and Certified Realtime Reporter, personally appeared

DAVID P. RODGERS

_____

called as a witness by the Defendant and Counterclaim Plaintiff International Business Machines Corporation, who, having been first duly sworn, was examined and testified as follows:

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--oOo--

PROCEEDINGS

THE VIDEOGRAPHER: Here begins Videotape No. 1 in the deposition of David Rodgers, in the matter of The SCO Group v. IBM, in U.S. District Court, District of Utah, Case No. 2:03CV-0294 DAK.

Today's date is June 10th, 2004. The time on the video monitor is 8:06.

The video operator today is Patrick Murray, a notary public, contracted by LegaLink New York of New York, New York.

This video deposition is taking place at 2050 Gateway Place, San Jose, California, and was noticed by Christopher Kao of Cravath, Swaine & Moore.

Counsel, please voice-identify yourselves and state whom you represent.

MR. KAO: Chris Kao, with Cravath, Swaine & Moore LLP, on behalf of defendant IBM and the witness here today, Mr. Rodgers.

MR. HEISE: Mark Heise, from Boies Schiller, on behalf of The SCO Group; and here with me today is Mark James, also on behalf of The SCO Group, from Hatch, James & Dodge.

THE VIDEOGRAPHER: The court reporter today is Ana Dub of LegaLink.

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Will the reporter please swear in the witness.

DAVID P. RODGERS,

sworn by the Certified Shorthand Reporter, testified as follows:

EXAMINATION BY MR. KAO

MR. KAO: Q. Good morning. Can you please state your full name for the record, Mr. Rodgers.

A. Yes. I'm David Parran Rodgers.

Q. And can you please state your full address.

A. 21359 Toll Gate Road, Saratoga, California.

Q. Can you review your educational history with me, for the record, after high school?

A. Okay. I attended Carnegie-Mellon University, Pittsburgh, Pennsylvania. I graduated in 1968 with a Bachelor of Science in electrical engineering.

Q. Did you do any studies after that?

A. I did an incomplete M.B.A. program at Clark University in Worcester, Massachusetts.

Q. Now, can you review your -- briefly review your employment history for me after graduating from Carnegie-Mellon?

A. Right. I worked for a time for Carnegie-Mellon University. After Carnegie-Mellon, I joined Digital Equipment Corporation in Maynard, Massachusetts. After Digital Equipment, I joined

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Sequent Computer Systems in Portland, Oregon. After Sequent, Compaq Computer Systems in Houston, Texas. After Compaq, I joined Brightlink Networks in Sunnyvale, California. And after Brightlink, IP Unity in Milpitas, California, where I'm currently employed.

Q. Can you tell me approximately the years that you were at Digital?

A. I was employed by Digital from 1973 to 1983.

Q. And what years were you employed at Sequent?

A. From 1983 to 1996.

Q. Can you review the positions that you held at Sequent from 1983 to 1996?

A. Yes. I joined the company as the vice president of engineering. After vice president of engineering, I was the chief information officer. During a posting in France, I was responsible for remote development sites in Europe and in Japan. And when I returned to the United States, I was head of the professional services organization.

Q. While you were the vice president of engineering, you were based in the --

A. In --

Q. -- United States?

A. -- Portland, Oregon.

Q. And when was your posting overseas?

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A. From 1991 to 1993.

Q. And when you returned in 1993, you were then in professional services?

A. Yes.

Q. And what responsibilities did you have while you were in the professional services group?

A. It was principally interacting with customers and go-to-market partners around solution creation, systems engineering, helping customers to architect large-scale enterprise business applications.

Q. And from approximately 1986 -- or excuse me -- 1983 to 1991, you were the vice president of engineering?

A. That's correct.

Q. Can you describe for me the responsibilities that you had while you were the vice president of engineering?

A. Right. My -- the product of Sequent at the time consisted of a hardware platform, an operating system, and some additional application software to make that system useful. My responsibilities were to supervise the hardware development, the software development, the documentation, and the testing of those two products.

Q. By the "two products," you mean the

operating --
A. The hardware and the software.
Q. -- system?
A. The operating system and the hardware.
Q. Okay. And sorry. Maybe I'm getting confused. I think you mentioned that there was a hardware platform, operating system software, and then application software.
A. Right.
Q. So as the vice president of engineering, you were responsible for what with respect to those three categories?
A. I supervised the individuals doing the work.
Q. After leaving Sequent in 1996, I believe you said you went to Compaq.
A. That's correct.
Q. How many years were you employed at Compaq?
A. Approximately three years. Two of the years I was posted in Houston, and the third year I was posted in California, Cupertino.
Q. And can you briefly describe for me what your responsibilities were at Compaq?
A. Right. I joined Compaq as vice president of business applications, which was both an engineering and a marketing responsibility that comprised relationships

with key application providers like SAP, Baan, PeopleSoft, Oracle, Microsoft, and some others.
And the engineering component of that job was to create configuration tools and go-to-market aids for the Compaq indirect sales channel.
Q. And approximately what year did you leave Compaq?
A. It was in 1999, right at the end.
Q. And you went to Brightlink Networks?
A. I went to Brightlink Networks, yes.
Q. How long were you at Brightlink?
A. About two years. The company ceased operations.
Q. In approximately 2001?
A. It ceased operations in, I think, April of 2001. Might have been a little later. The winding down took some time.
Q. And after that, you went to IP Unity?
A. Yes.
Q. And what is it you currently do at IP Unity?
A. I'm responsible for hardware and software development of an enhanced services product for telephony; "enhanced services" meaning voice mail, conferencing, other applications such as find-me, follow-me, caller screening.

Q. Forgive me. I think I skipped over this earlier, but of course, at any time during this deposition if you need to take a break, just let me know and we'll take a break. And if I ask you any questions that you don't understand, let me know and I'll try to rephrase so you understand what I'm asking.
I guess I should also ask if you've ever been deposed before.
A. Yes, I have.
Q. Can you tell me in what circumstance you were deposed before?
A. I was a party in an automobile accident case, and I gave my deposition as a result of that suit, and the case was eventually settled.
Q. You did not end up testifying at trial in that case?
A. I did not.
Q. And how long ago was that?
A. It was in -- I don't remember the date of the deposition, but it was in 2001 that the accident took place.
Q. Did that accident occur around here?
A. It occurred very near my home.
MR. KAO: Okay. For the record, at the Frasure deposition, I screwed up and we didn't use

consecutive numbering; but at -- my understanding is today at the Wilson deposition, they're going to pick up where Sontag left off --
MR. HEISE: Okay.
MR. KAO: -- which I believe was 74. So they're going to start with 75.
MR. HEISE: Okay.
MR. KAO: So I'm going to start -- we'll just have this marked as 100. That should give enough space --
MR. HEISE: That's fine.
MR. KAO: -- I think.
And I'm sorry about the --
MR. HEISE: We knew it was going to happen. It was just a matter of when.
MR. KAO: So this will be Exhibit 100.
(Whereupon, Defendant's Exhibit 100 was marked for identification.)
MR. KAO: Q. You've been handed by the court reporter, Mr. Rodgers, what's been marked as Exhibit 100 in this case. And I'll ask you to review this exhibit, and my first question, after you've had a chance to review it, is whether or not you recognize what Exhibit 100 is.
A. Yes. This is my deposition, prepared last

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year.
Q. Declaration?
A. I'm sorry. Declaration. Sorry.
Q. Just to clarify, have you been deposed in this case --
A. I have not been deposed --
Q. -- apart from today?
A. -- in this case before today. I'm sorry.
Q. And if you look at page 6 of this declaration, is that your signature, Mr. Rodgers?
A. Yes, it is.
Q. Now, without -- as your counsel, I instruct you not to reveal any communications you had -- direct communications you've had with me. But without doing so, can you describe how it is that this declaration, Exhibit 100, came to be prepared?
A. Certainly. I was contacted by your office, I think by you personally, to ask if I recalled the fact situation around some contracts between AT&T and Sequent. And after some discussion and some question and answer, a draft declaration was prepared by your offices. I received that draft, edited it, corrected it, made it conform to my recollection. And then a final form was prepared for my signature. I executed it and returned it to you.

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Q. Do you have in your possession any of the markups that you did --
A. I do not.
Q. -- on the draft?
A. I do not.
Q. I'll ask you to take your time to review each of the paragraphs in your declaration, and after you've done so, can you let me know?
A. Certainly.
I'm ready.
Q. Do you believe everything that you've stated in your declaration to be true and accurate --
A. Yes.
Q. -- to the best of your knowledge?
Is there anything about -- anything in this declaration that you wish to change?
A. No. It's an accurate statement.
Q. Okay. Now, turning back just to the page that's marked page 2, I'll ask you to look now at some specific paragraphs within your declaration.
First, as to paragraph 1, is everything contained in paragraph 1 true and accurate?
A. Yes.
Q. Okay. Looking at paragraph 2, is everything contained in paragraph 2 true and accurate?

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A. Yes.
Q. Now, in paragraph 2 you state that you executed several agreements with AT&T Technologies for the licensing of Unix software. Do you see that?
A. Yes.
Q. And attached as Exhibit 1 there is a document titled "AT&T Technologies, Inc., Software Agreement." Do you see that?
A. Mm-hmm, yes.
Q. Can you look at that exhibit? Do you recognize this document?
A. Yes, I do.
Q. Can you tell me what it is?
A. This particular document gives Sequent the right to access the source code for AT&T software and essentially to use it to produce additional works on the Sequent hardware.
Q. And do you recall what particular software this software agreement related to?
A. It was a version of AT&T System V. I don't actually remember which edition of AT&T System V it was. I think it was 5.2, but I don't recall.
Q. Unix System V?
A. Unix System V.
Q. And at the bottom of the page on this

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agreement, there's a signature there. Is that your signature?
A. It is.
Q. And you executed this software agreement on behalf of Sequent?
A. I did.
Q. If you can look at the document behind Tab 2, which is titled "AT&T Technologies, Inc., Sublicensing Agreement."
A. Yes.
Q. Do you see that?
A. Mm-hmm.
Q. Do you recognize this agreement?
A. Yes, I do.
Q. Can you tell me what this agreement is?
A. This agreement gives Sequent the right to distribute the work, based on the AT&T System V source code that was previously licensed, to its customers, both directly and indirectly.
Q. And at the bottom of the first page, there's a signature there. Is that your signature?
A. It is.
Q. And did you execute this sublicensing agreement on behalf of Sequent?
A. I did.

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Q. And if you can look with me at the document behind Tab 3, which is titled "AT&T Technologies, Inc., Substitution Agreement," do you recognize this agreement?
A. I do.
Q. Can you tell me what this is?
A. I don't recall the precise terms that were being modified, but it essentially was an agreement between the companies to change certain specific terms of the earlier agreement.
Q. And is that your signature at the bottom of the page?
A. It is.
Q. And did you execute this agreement on behalf of Sequent?
A. I did.
Q. And turning back to your declaration itself, at paragraph 2 of your declaration, are the three agreements that we just looked at the agreements that you discuss in paragraph 2 of your declaration?
A. Yes, they are.
Q. Now, if you can turn to page 3 of your declaration, I'll refer you to paragraph 5; and I'll ask you, for the record, just to read your statement in paragraph 5.

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A. Yes.
"Although I did not personally negotiate the Sequent Agreements with representatives of AT&T Technologies, I carefully reviewed the agreements myself and with other Sequent employees before executing them and have personal knowledge of the parties' understanding of, and intent behind, the terms and conditions of the agreements."
Q. Is that a true and accurate statement?
A. It is.
Q. And can you explain to me what your involvement was with the negotiation and execution of the agreements that you executed on behalf of Sequent?
A. Yes. At the time, Sequent had need to extend its basic product offering, the Dynix operating system, to allow additional applications that were built for the AT&T System V operating environment, which is different than the Unix BSD 4.2 environment that the Sequent product was built upon. And so Sequent needed to have access to the source code in order to make that possible. Roger Swanson and others in the software development team worked with people at AT&T to secure a license to that source code so that the work could begin.

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And my role in that was to review the documents and to ascertain the intent of the parties, make sure that we were getting what we needed and that it was a fair deal.
Q. During the course of the negotiations with AT&T, did you have any personal interactions with anyone from AT&T?
A. From time to time, I participated in conference calls. I don't recall -- it's possible, but I don't recall that we ever met face to face. I think they were all telephone interactions.
Q. And on these conference calls, were the terms of the licensing agreements discussed?
A. Yes, they were.
Q. Do you remember who from AT&T was on these conference calls?
A. I do not. The one thing I do remember is that it wasn't the guy who signed the agreement. It wasn't Mr. Wilson. It was another guy, but I don't remember who it was.
Q. Do you -- have you ever had any interactions with Mr. Wilson?
A. I might have since. I mean, I might have met him at some conference or something like that, but not during this time.

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Q. Do you remember what other Sequent representatives were on the conference calls with AT&T?
A. Usually, it would have been Roger Swanson, who is the director of software engineering. We may have included some of the key software engineers at the time that we were discussing particular technical issues.
Q. Do you remember who those individuals were?
A. I don't remember precisely. It probably would have been Bob Beck, who was the principal software architect for the Dynix operating system. Might have been Bob Kasten, who was also a principal software engineer. But I don't have a precise recollection.
Q. You've mentioned in your testimony the Dynix operating system. Can you just explain --
A. Yes.
Q. -- what you're referring to when you say that?
A. Yes. Sequent -- the principal product, as I mentioned earlier, of Sequent was a hardware platform that consisted of multiple microprocessors sharing a common memory structure, and the operating environment was a variant of Unix that was derived from the Berkeley Standard Distribution 4.2 code. So Dynix was a variant adapted to the multiple microprocessor architecture of the Sequent hardware.
Q. Did you have any involvement in developing the

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Dynix operating system?
A. I wouldn't claim architectural or any authorship. Yes, of course I wrote programs and reviewed plans, and I had a direct involvement in the development of the Dynix operating system, but I would not consider myself an author of the software.
Q. Do you recall approximately when the first version of the Dynix operating system was created?
A. The first working version probably was created sometime in early 1984.
Q. And do you specifically recall that the Dynix operating system was based on the Berkeley -- the BSD 4.2 release, or is that --
A. No. That's --
MR. HEISE: Objection to form.
You may answer.
MR. KAO: Q. Oh, I should also note that during the course of the deposition, counsel may object. So you should give -- before answering any of my questions, you should pause and allow counsel to interpose an objection.
A. Shall I answer?
Q. Yeah, you can answer if you --
A. Yes, the Dynix operating system was based on the Berkeley Standard Distribution 4.2 version.

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Q. Going back to the conference calls you discussed being a part of with AT&T, what was the purpose of those calls, to the best you can recall?
A. The licensing agreement is somewhat vague, and so we wanted to understand the meaning or the intent of some of the paragraphs.
Q. Let's turn back to your declaration. And looking at paragraph 6, I'll ask you to read paragraph 6 for the record, if you could.
A. Yes.
"It was my understanding that the licensing agreements that I executed were standard form agreements used by AT&T Technologies to license Unix software products to its users. The Software Agreement granted Sequent the right to use Unix software products, including source code, for its internal business purposes. The agreement further granted Sequent the right to modify Unix software products and to prepare" --
THE COURT REPORTER: Excuse me.
MR. KAO: You may need to read a little slower so the court reporter can get everything down.
THE WITNESS: Oh, excuse me. Where shall I pick up?

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(Record read.)
THE WITNESS: "The agreement further granted Sequent the right to modify Unix software products and to prepare derivative works based upon such products."
MR. KAO: Q. Are your statements in paragraph 6 true and accurate?
A. Yes.
Q. And can you explain what you mean by the statement that it was your understanding that the licensing agreements were standard form agreements?
A. Yes. If I may give you some context, AT&T's interest at this point in time was to create a broader following for the System V variation of Unix, and so the -- they had a kind of a proselytizing or marketing program going on to get people signed up to use the A T&T Unix variant.
As a consequence of that, there were applications written for the System V variant of Unix that Sequent wanted to have access to; and so we needed to license from AT&T the specific elements, the specific APIs that were necessary to allow those -- those applications to run.
That meant that we needed to look at the source code, take those little elements of the source

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code that were System V specific, and weld them into the Dynix operating system environment.
Q. When you say "APIs," what do you mean by that?
A. Application programming interfaces.
Q. Do you remember, sitting here today, what specific elements of the Unix System V program Sequent wanted access to?
A. I don't recall a specific -- I mean, I can say generally that it was the system calls of System V, which are somewhat different than the system calls of Berkeley, but I don't remember precisely which application needed which system call.
Q. And can you just describe for me what a system call is?
A. Right. An operating system generally is a resource allocation piece of programming. And things that the operating system allocates are pieces of memory, access to a processor, access to a storage device such as a disk, access to a terminal device. The system calls are the way the software expresses the need to access one of those resources.
Q. I guess, going back to a question that I asked, I'm not sure -- maybe I asked it unclearly -- about your -- that you answered the question earlier that I had asked about what it is you meant by the fact

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that you executed standard form agreements used by AT&T Technologies.

A. Yes. AT&T provided a document, and -- which is the document that's here under Tab 1, and they represented it as the form that they used routinely with all of their customers, all of their partners, to provide access to the source code.

Q. Did anyone from AT&T at any point ever communicate to you that they intended to treat their licensees for Unix System V the same way?

MR. HEISE: Objection to form.

You may answer.

THE WITNESS: I don't recall that particular content.

MR. KAO: Q. Turning now to paragraph 7 of your declaration, can you read paragraph 7 --

A. Yes.

Q. -- for me, please.

A. "Section 2.01 of the Software Agreement states that Sequent's right to use includes the right to modify such SOFTWARE PRODUCT and to prepare derivative works based on such SOFTWARE PRODUCT, providing that the resulting materials are treated hereunder as part of the original SOFTWARE PRODUCT.' I

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did not understand this language to give AT&T Technologies the right to assert ownership or control over modifications or derivative works prepared by Sequent, except to the extent that the licensed Unix software product was included in such modifications or derivative works. I would never have signed an agreement that would grant ownership or control to AT&T Technologies over modifications or derivative works prepared by Sequent to the extent those modifications or derivative works contained no part of the Unix software product licensed from AT&T Technologies."

Q. Are the statements that you make in paragraph 7 of your declaration true and accurate?

A. They are.

Q. Can you -- well, first, let's look at the document behind Tab 1, at the software agreement.

A. Yes.

Q. Is the language that you read from in your declaration contained in Section 2.01 of this agreement that's attached as Tab 1?

A. Yes, it is.

Q. And can you explain to me -- well, strike

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that.

You state that you did not understand this language to give AT&T Technologies the right to assert ownership or control over modifications or derivative works prepared by Sequent, except to the extent that the licensed Unix software product was included in such modifications or derivative works.

Do you see that?

MR. HEISE: Objection; form.

You may answer.

MR. KAO: Q. Do you see that in your declaration?

A. Yes, I do see that.

Q. Can you explain to me what you mean by that?

A. It would have been foolish of me, as an officer of a venture finance start-up company, to give away the rights to the company's core products in perpetuity. I mean, I certainly would not have done that. So my understanding -- and this was confirmed in some phone calls -- my understanding was that what AT&T wanted to hold private was their contribution, their source code contribution, and that that work which had already been created by Sequent and any work that in the future was created by Sequent, not based upon that source code, remained the property of Sequent.

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Q. Did you understand Section 2.01 of the software agreement to impose any restrictions on Sequent's use of code that Sequent developed on its own?

A. No, I did not.

Q. Even if that code was contained in a Dynix product that had Unix System V code in it?

MR. HEISE: Objection to form.

You may answer.

THE WITNESS: Yes. My understanding of the license is that the Unix System V code had to be maintained as the AT&T private property and withheld from disclosure but, if there were other elements of the software product created by Sequent, that those were Sequent's to dispose of as it chose.

MR. KAO: Q. If you can turn to page 4 of your declaration, I'll have you read paragraph 8 of your declaration, if you could. I guess, for the court reporter's benefit and for the jury's benefit, if you could take your time and read it slowly.

A. Certainly.

"As I understood the Software Agreement between Sequent and AT&T Technologies, Sequent was free to use, copy, distribute or disclose any modifications or derivative works developed by Sequent, provided that it

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did not copy, distribute or disclose any portion of the licensed Unix software product source code (except as otherwise permitted by the licensing agreements)."

Q. Are the statements that you make in paragraph 8 of your declaration —

A. They are.

Q. -- true and accurate?

And can you tell me what you base your understanding of the software agreement on?

A. A combination of reading of the document and conversations with my staff and the AT&T parties to the agreement.

Q. And when you say "my staff," can you --

A. Principally, Roger Swanson and Bob Beck and others.

Q. And is that the understanding you had when you executed these agreements?

A. Yes, it is.

Q. I'll ask you to now read paragraph 9 into the record, if you could. Take your time.

A. "It is my understanding that Sequent's Dynix products might include some small parts of the licensed Unix System V source code, although I don't [sic] personally know

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whether it does or not. I also do not know whether Dynix is so similar to Unix System V that it may be" -- "may properly be viewed as a 'derivative work' based on Unix System V, particularly in light of the fact that Dynix was originally created using Berkeley Software Design" -- parenthetically -- "('BSD') Unix as a base and not AT&T Technologies' Unix System V. In any event, as I understood the Sequent Agreements, Sequent was free to use, copy, distribute, or disclose Dynix (including source code), provided that it did not copy, distribute or disclose any Unix System V source code that might be contained therein (except as otherwise permitted by the licensing agreements)."

Q. Mr. Rodgers, are the statements that you make in paragraph 9 of your declaration true and accurate?

A. Yes, they are.

Q. Now, in paragraph 9 you discuss the fact that -- well, strike that.

Do you know -- do you have any personal knowledge as to what Unix System V code is contained in Dynix?

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A. I do not.

Q. Do you have any personal knowledge as to what BSD Unix code is contained in Dynix?

A. A substantial portion, but I couldn't claim to know what proportion.

Q. What is your understanding of what the term "derivative work" means?

A. A derivative work is something that contains all or part of some other piece of work.

Q. Do you have an understanding of what the term "modifications" mean?

A. "Modifications" means either an augmentation, meaning an additional function, or a change to accommodate some other factor.

Q. And by "augmentation," do you mean adding -- well, how do you augment something?

MR. HEISE: Objection; form.

You may answer.

MR. KAO: Q. You could answer.

A. "Augmentation" means an additional function.

If I can use an example, based on the earlier description, the Unix operating environment, as conceived both by Berkeley and by AT&T, had no notion of multiple processors and the need to preserve the content of a cache memory system in order to improve

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performance. So an augmentation that exists in Dynix is so-called processor affinity. It's the ability of a program to say: I would like to continue running on the processor that I was running on before so that I can preserve those dynamic memory contents and, as a result, operate at a higher speed.

So an augmentation that exists in Dynix is processor affinity. It's a system call that doesn't exist in another version of Unix, that specifically allows for a program to get higher execution speed.

Q. And is an augmentation implemented through new source code?

A. It's completely new source code.

Q. Now, you also mentioned, in your understanding of the word "modification," that it could include changes.

A. That's right.

Q. Can you explain to me what you mean by that?

A. Certainly. For example, the compilers that were used to build the Dynix operating system are the Berkeley-derived compilers, and there are subtle differences in the way symbols are treated. And so it might be necessary, if you wanted to compile, without adding additional function, a System V source module to make a modification that was really cosmetic or had no

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meaning other than to make it compatible with the form of the compiler. So you might change a symbol from having a dollar sign in it to not having a dollar sign in it to make it compatible.

Q. Have you ever heard of something, Mr. Rodgers, called Dynix/ptx?

A. Yes. That was a later version of the Dynix operating system that was prepared that had a higher degree of compatibility with the System V operating environment.

Q. Do you know when Dynix/ptx was created?

A. I don't have a precise date recollection. It was certainly during my tenure at Sequent, but I don't have an exact recollection. And it was certainly -- certainly after 1985, 1986.

Q. Did -- earlier you talked about the Dynix operating system. Did the Dynix operating system continue to exist after Dynix/ptx was created, or was it replaced by Dynix/ptx?

A. They coexisted. Gradually -- AT&T ultimately was successful in their campaign to proselytize the System V operating environment, and so more and more application software was created for the System V operating environment. And although there were new applications created for the BSD family of Unixes, they

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were mostly aimed at technical and university-oriented markets.

Sequent continued to sell both Dynix and Dynix/ptx, but as its business became more and more commercially oriented, aimed at high-end business systems and commercial applications based on databases, I would say the proportion of Dynix/ptx to Dynix sales changed in favor of Dynix/ptx.

Q. In paragraph 9, then, of your declaration, are you referring to Dynix or Dynix/ptx?

A. Actually, both of the products, Dynix and Dynix/ptx, started from the same source base. In this paragraph, I'm actually referring to the Dynix, the predecessor operating environment, but the paragraph applies to both versions of the product. The core of the Dynix/ptx operating system is also Berkeley derived.

Q. I'll ask you to review now paragraph 10 of your declaration for yourself. There's no need to read that into the record.

A. Yes.

Q. Is that a true and accurate statement?

A. It is.

Q. And I'll ask you also to review paragraph 11 of your declaration to yourself.

A. Okay.

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Q. Is that an accurate statement?

A. It is.

Q. And in paragraph 11, you note that Section 7.06(a) of the software agreement includes language concerning confidentiality; is that right?

A. Yes, I do.

Q. Can you turn with me to the software agreement that's attached behind Tab 1 of your declaration. And there, if you can turn to Section 7.06(a).

A. Okay.

Q. My only question is whether this Section 7.06(a) that appears in the software agreement is the same section that you discuss in your declaration.

A. Yes, it is.

Q. Now, turning back to your declaration, to paragraph 12, can you read paragraph 12 into the record for me?

A. Okay.

"It was my understanding that the purpose of this confidentiality provision from the perspective of AT&T Technologies was to protect the Unix System V source code that it was licensing. Although there is reference in Section 7.06(a) to 'methods or

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concepts'" -- in quotes -- "I had no understanding at the time that AT&T Technologies was interested in protecting anything other than the Unix source code."

Q. Is that true and accurate?

A. It is.

MR. HEISE: Excuse me.

MR. KAO: Q. Can you -- well, first, can you explain to me where you get your understanding of the purpose of Section 7.06(a) of the software agreement?

A. From the reading of the document and from the conversations with AT&T Technologies folks.

Q. And what is it in particular that you base your understanding that AT&T Technologies was not interested in protecting methods or concepts?

A. Actually, there are several things that lead to that understanding.

The first is that contemporaneous with this document and with Sequent's work, AT&T employees and others were publishing books and generally exposing the structure of the Unix operating system. Universities, by this time, had switched to training young engineers in software methods using the Unix operating system. So the notion of protecting the methods or concepts of Unix actually was turned on its head. Instead of protecting,

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they were actually exposing and proselytizing methods or concepts because they were trying to build a broad base of technical workers who were competent in the technologies.

So as a consequence, it was very clear from the paragraph and from the conversations that what they were mostly interested in was just keeping the source code under control.

Q. Did you ever ask anybody from AT&T to delete that language from the software agreement?

A. I did not because we had an understanding what it referred to.

Q. Do you know if anybody from your staff ever asked anyone from AT&T to delete the language?

A. Not to my knowledge.

Q. Did anybody, in your discussions with AT&T, ever attempt to define for you what the term "methods or concepts" means?

A. It's a pretty vague term, but I would say an example of a method is how to produce digits for printing from a binary number.

And the technique, of course, is well known. You divide by the base. The remainder is the digit to which you add the base of the character. In ASCII, it's 60 octal. You take, then, the quotient and divide it

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again by the base, producing the next digit, and so on.

So that's an example of a method where repeated division by the base, using the remainder to produce a character and using the quotient to do the next digit until it becomes zero.

Q. Is the method that you described something that's a method from Unix System V, or were you just giving an example?

A. That's certainly used in Unix System V, but it's an example of a method that probably goes back to the origin of numbers. Probably the Greeks did it.

Q. With respect to this Section 7.06(a), did you understand AT&T to be asserting any right to control methods or concepts contained in the Dynix software?

MR. HEISE: Objection to form.

You may answer. Excuse me.

THE WITNESS: Certainly not. In fact, the later agreement that we had with AT&T suggested that they didn't have such concepts and that they needed Sequent to help them develop them.

MR. KAO: Q. Can you tell me what later agreement you're referring to?

A. We did a consulting agreement with AT&T later on, where we added some multiprocessor enhancements for System V.

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Q. Were you involved in negotiating that agreement?

A. I don't recall direct involvement. I think it was probably Michael Simon who did that one.

Q. And who is Michael Simon?

A. He was the V.P. of marketing at the time.

Q. Do you know what time period that agreement was entered into?

A. I have no precise recollection.

Q. And can you describe for me generally what that agreement entailed?

A. It was basically a consulting services agreement where Sequent technical resources would be applied to development on behalf of AT&T.

Q. Do you know if any work was ever performed pursuant to that agreement?

A. I believe so, but I don't have direct knowledge.

Q. Was that agreement entered into while you were vice president of engineering?

A. Actually, I think it was after I had moved on to be CIO or even later.

Q. What did it -- sorry.

Was it executed during a time that you were overseas, or were you still in Portland?

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A. I don't have a precise recollection.

Q. Do you have any recollection of specifically what technology was involved in that agreement?

A. Only generally, that it related to multiprocessing.

Q. Turning back to your declaration, paragraph 13, can you read paragraph 13 for the record, please?

A. Yes.

"As I understood the agreement regarding confidentiality, Sequent had no obligation to keep confidential any information embodied in any of the software products provided to Sequent, provided that Sequent did not disclose source code (except as otherwise permitted by the license agreements). In addition, as I discuss above, Sequent had no obligation to keep confidential any modification or derivative work developed by Sequent that did not include . . . System V" -- "Unix System V source code. Sequent was free to use, copy, distribute or disclose such modifications and derivative works, provided that it did not copy, distribute or disclose any portions of the licensed Unix

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source code (except as otherwise permitted by the license agreements)."
Q. Are the statements that you make in paragraph 13 of your declaration --
A. They are.
Q. -- true and accurate?
And again, I'll ask you what you base your understanding of the software agreement on.
A. Again, it's based on a reading of the agreement and conversations with AT&T personnel at the time.
Q. At several places in your declaration, including in this paragraph, you say that "except as otherwise permitted by the license agreements."
Do you see that?
A. Yes, I do.
Q. What do you mean by that?
A. There are certain elements that are in the source code that actually have to be reproduced.
I think a trivial example is the copyright notice which is in the source code but we're required to reproduce it in viewable form, so . . .
Header files are another example of things that have to be exposed in order to make the operating environment usable.

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Q. What's a header file?
A. It's a source module that contains symbol definitions.
Q. And what do you mean by they had to be exposed?
A. In order to make a program that effectively uses the System V calls, you have to have those symbols defined for the program.
Q. And was it your understanding that AT&T permitted those header files to be disclosed without any restriction?
A. Yes. They have to be.
Q. Did somebody from AT&T ever tell you that?
A. No. It's how it works.
Q. Let me ask you to turn to the last page of your declaration, and I'll ask you to read paragraph 14 into the record.
A. "The confidentiality provision of the Software Agreement provided that Sequent was not required to keep a software product confidential if it became 'available without restriction to the general public.' As" -- quoted -- "I understood the agreement, Sequent would be free to disclose, without any restriction whatsoever, information that

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became available without restriction to the general public by acts not attributable to Sequent or its employees."
Q. Are those statements true and accurate --
A. They are.
Q. -- Mr. Rodgers?
Now, the language that you referred to in paragraph 14, is that language contained in Section 7.06(a) of the software agreement that's attached behind Tab 1 to your declaration?
A. Yes, it is.
Q. And can you tell me what your understanding of that language is based on?
A. Yes. The -- in fact, generally, in confidentiality agreements, there are some basic provisions that if the owner of the restricted information makes it public, say through a public disclosure, or that someone else lawfully in possession of that information makes it public or it's independently discovered or it's subject to a court order, that that information then becomes free for disclosure. That was my understanding -- even though that language here is vague, that was my understanding as to what it meant to be otherwise accessible.
Q. Did you have any discussions with anyone at

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AT&T specifically about that language?
A. I don't recall those discussions.
Q. If you could look now at paragraph 15 of your declaration.
A. Yes.
Q. I'll ask you to read that into the record. And again, take your time for the court reporter.
A. Mm-hmm.
"Although I do not recall any particular definition being given to the term 'available without restriction to the general public,' at the time the Software Agreement was executed, I believe a number of circumstances would meet the definition. For example, a software product or any part of a software product would be considered 'available without restriction to the general public' if it was lawfully published by someone outside of Sequent. I believe that any number of books and other materials have been published regarding the Unix software, and that the information contained in those materials at least would not be subject to the confidentiality restrictions in the Software Agreement."

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Q. Are the statements that you make in paragraph 15 of your declaration true and accurate?
A. They are.
Q. Can you explain for me the circumstances that you believe would be considered -- well, strike that.
Can you just explain to me the circumstances that you discuss in your declaration and how that would make something available without restriction to the general public?
A. Yes. As I've said previously, AT&T was on a marketing campaign, and they were encouraging or perhaps allowing a number of their employees to publish books, documenting the inner workings of Unix System V. They were encouraging professors at universities to teach their students on how to develop and enhance the Unix operating environment.
So in particular, I was in possession of a book at the time that talked a lot about how Unix worked internally. There were lots of books published then and since on how Unix works internally. And at least if you read the preface, many of those were actually encouraged by AT&T Technologies.
Q. Do you remember the names of any of the books that you had regarding Unix?
A. There are zillions. The one I remember

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personally is Unix System Primer, but -- and I won't be able to give you a precise title, but there was another book I remember that was the Design of the Unix Operating System. That's an approximate title.
Q. Was the author of that a guy by the name of Maurice Bach or Bach, by any chance?
MR. HEISE: Objection to form.
THE WITNESS: Yeah, Maury Bach certainly would have been one of the authors.
MR. KAO: Q. And those are -- strike that.
Do you have those books pursuant to any license from AT&T?
A. No. Those were freely available. You go to the bookstore.
Q. Did those books, to the extent you remember, contain any source code from Unix System V?
A. There were source code fragments in many of the books.
Q. Are there any other circumstances that you believe would meet the definition of "available without restriction to the general public," sitting here today?
A. Certainly a public announcement would qualify as available to the general public.
Q. Now, after -- after leaving Sequent, did you have the occasion to ever review these agreements that

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we've been talking about here today?
A. Until our first contact, I did not.
Q. I'd like you now just to turn to the software agreement itself, which is the document behind Tab 1 of your declaration.
A. Yes.
Q. And in particular, at Section 2.01.
A. Okay.
Q. And my question to you is whether, in your understanding of Section 2.01, AT&T placed any restrictions on the use of Sequent's Dynix source code that it wrote on its own?
MR. HEISE: Objection to form.
You may answer.
THE WITNESS: None that I understood from my reading or my conversations. My reading of this paragraph and my understanding of this paragraph is that it relied -- or it referred only to the Unix System V source code that was contributed by AT&T.
MR. KAO: Q. I'll ask you to look at Section 2.05 of this agreement. And my question for you is whether you understood Section 2.05 of this agreement to place any restrictions on Sequent's use of the Dynix source code that Sequent wrote on its own?
A. No, I did not understand this to --

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MR. HEISE: Let me --
THE WITNESS: -- apply.
MR. HEISE: -- object to form as well, but --
THE WITNESS: Sorry.
MR. HEISE: -- I was a little bit slow on the draw. That was my fault.
MR. KAO: Q. I'll ask you to look at Section 4.01 of the agreement.
A. Yes.
Q. And my question is whether you understood Section 4.01 to place any restrictions on Sequent's export of any Dynix source code that Sequent wrote on its own.
MR. HEISE: The same objection.
You may answer.
THE WITNESS: No, I did not understand this to apply to Sequent's own source code.
MR. KAO: Q. Let me ask you to turn to Section 7.06(a) of the agreement. And can you review that for yourself.
A. Yes.
Okay.
Q. And my question is whether you understood Section 7.06(a) to place any restrictions on Sequent's ability to disclose Dynix source code that Sequent wrote

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on its own.
MR. HEISE: Objection; form.
You may answer.
THE WITNESS: Again, no, I did not understand this to apply to the Sequent source code.
MR. KAO: Q. And finally, I'll have you look at Section 7.10 to the software agreement.
A. Okay.
Q. And my question is whether you understood Section 7.10 to restrict Sequent's ability to sell, lease, or otherwise transfer or dispose of any Dynix source code that Sequent wrote on its own.
MR. HEISE: Same objection.
You may answer.
THE WITNESS: No. This, in particular, would have been crazy if I had interpreted it as applying to the Sequent source code, because that was the -- one of the key assets of the company. To bind a key asset would have required a board decision.
MR. KAO: Can we go off the record?
THE VIDEOGRAPHER: Going off the record. The time is 9:08.
(Recess taken.)
THE VIDEOGRAPHER: We are back on the record. The time is 9:31.

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MR. KAO: Q. I just have a few remaining questions for you, Mr. Rodgers. And you might as well pretend like I'm sitting over there --
A. Okay.
Q. -- so the video will look all right.
A. All right.
Q. First question for you is, you referred to Dynix/ptx in your testimony earlier. And I was curious to know what it is that "ptx" stands for.
A. Ptx is kind of a tweak on POSIX. The government was promulgating some standards for Unix at the time under the rubric of POSIX, which I think was also known as P1109, or something like that, at the time. In any case, "psx," which was a more obvious reference to POSIX, wasn't available; so we settled on "ptx" as the reference to POSIX compliance. And that was to give us some more credibility in government sales.
Q. What is POSIX?
A. POSIX is a government standard for Unix application programming interfaces. It's -- there are, as you probably know, a lot of government standards designed to improve the portability and the cost-effectiveness of government procurements, and POSIX is one of those standards relating to Unix.

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Q. Do you know which agency within the government issued POSIX standards?
A. I don't, at this moment in time, remember who was doing it. It was probably Commerce, but I don't know.
Q. Was there an independent -- was it actually a government agency, or was it some sort of joint, you know, independent -- joint government and commercial body? Do you know?
A. Like a lot of these standards activities, there are contributors and hangers-on and authorizers and sponsors. And so it was government-sponsored, contributed-to-by-private-sector activity.
Q. And I think you mentioned POSIX compliance before. What does it mean to be compliant with POSIX?
A. To comply with the POSIX standard, you have to implement the system program interface, the application programming interface, and the system calls in a specific way so that the applications run the way they're expected to run and that there are no unexpected side effects of the way it's implemented.
Q. While you were employed at Sequent, did Sequent ever, to your knowledge, disclose any Unix System V source code without permission?
A. Not to my knowledge.

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Q. Did Sequent ever export any Unix System V source code without permission?
A. Not to my knowledge.
Q. Did Sequent ever transfer -- well, let me ask it this way: Did Sequent ever sell, lease, or otherwise transfer or dispose of any Unix System V source code without permission?
A. Not to my knowledge.
Q. Did Sequent ever allow any other entities to use Unix System V source code without permission?
A. Not to my knowledge.
Q. Did Sequent ever use Unix System V source code in any way that was not permitted by its license with AT&T?
A. Not to --
MR. HEISE: Objection to form.
You may answer.
THE WITNESS: Not to my knowledge.
MR. KAO: That's all I have.
EXAMINATION BY MR. HEISE
MR. HEISE: Q. Good morning, Mr. Rodgers.
A. Good morning.
Q. As I mentioned earlier, I'm Mark Heise, representing The SCO Group in this case. And as Mr. Kao mentioned, to the extent I ask you a question that is

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unclear to you or I mumble or do something to prevent you from answering, just please let me know. I'll be glad to rephrase it or try and accommodate your concerns.

You and I have never met before; is that correct?

A. That's correct.

Q. And I want to essentially follow the same format that you did with the lawyer for IBM. I'm going to go through some of your personal history and then go through some of the statements that you made in the affidavit.

The address that you gave us earlier in Saratoga, is that your home or office address?

A. That's my home.

Q. What is your office address?

A. It's 475 Sycamore, S-y-c-a-m-o-r-e, Drive in Milpitas, California.

Q. And that's for IP Unity?

A. That's IP Unity.

Q. Do you currently own any stock in IBM?

A. I may. My personal investment advisers invest in mutual funds, and so from time to time I may.

Q. Other than a possible investment in a mutual fund, you don't own individual shares of IBM?

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A. Correct.

Q. With respect to some of your personal history, you know, I have to ask these questions. Have you ever been arrested?

A. No.

Q. Have you ever been convicted of any crime?

A. No.

Q. You mentioned that you were in an automobile accident in 2001.

A. Yes.

Q. Were you the plaintiff in that case or the defendant in that case?

A. I was the defendant.

Q. And you said it ultimately --

A. Settled.

Q. -- settled.

What was the name of the plaintiff in that case?

A. His last name is Kitikoon. I don't recall his first name.

Q. Do you have a copy of the deposition that you gave in that case?

A. I do not.

Q. Who was your lawyer in that case?

A. It was the insurance company lawyer, and his

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name was, I think, Mike McDonald, but that's not -- I don't recall his name.

Q. Is he here in San Jose or Saratoga?

A. Yes, he's in San Jose.

Q. In terms of your professional background after you graduated from college, you indicated that you began at Digital Equipment Corporation in approximately 1973.

A. That's right.

Q. From the time that you graduated in 1968 up until 1973, how were you employed?

A. I was employed by Carnegie-Mellon University, in the computer science.

Q. That's right. You mentioned that.

A. Right.

Q. I forgot.

As your employment at Carnegie-Mellon, did you have any involvement whatsoever with licensing of any type at Carnegie-Mellon?

A. I don't recall doing any.

Q. How about with Digital Equipment Corporation? What was your position there?

A. My position was as a development engineer and later as a development manager, and it was a series of engineering jobs.

Q. So in those engineering jobs, did your

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position require you to review or execute licenses on behalf of Digital?

A. No.

Q. When you went to Sequent in approximately 1983, I think you indicated for us that you were there as the vice president of engineering from approximately 1983 to 1991. Is that correct?

A. I wasn't V.P. of engineering that whole time, but I was V.P. of engineering initially and then in a variety of other roles until I left the company.

Q. Okay. Then I misunderstood, then.

If we could, if you could just track for us your roles, because what I -- this is what I understood, and maybe it's high level enough to be accurate.

Vice president of engineering from 1983 to 1991, chief information officer in Europe from '91 to '93, and then head of professional services from approximately 1993 to 1996.

A. The misunderstanding is that from about '88 to '91, I was CIO; '91 to '93, I was in Europe as the --

Q. Okay.

A. -- European engineering manager.

Q. Thank you for correcting that.

In your role as vice president of engineering from '83 to approximately '88, did you execute any

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software license agreements other than the ones that we've talked about this morning?
A. Yes. I'm sure we licensed a variety of tools and other technology for engineering.
Q. What companies would you have executed license agreements on behalf of Sequent during that time frame?
A. I don't recall specific names at this point in time, but we would have had license agreements with -- I can't think of the name of the company -- with a compiler company that I think was called Green River Software or something like that. In any case, it was a Bay Area company that had compiler technology that we used. We had some license agreements for some test tools. We had some license agreements with Mentor Graphics for the computer-aided design workstations. We had -- I'm trying to think what else.
In any case, the bulk of the license agreements were for engineering tools, and then there were a couple of license agreements that were for software that was passed through to the customer, a Fortran compiler, a C compiler, and so on.
Q. Could you tell us or give us an approximation of the number of licenses? Are we talking about four or five? Are we talking about 40 or 50? Just --
A. Oh, it's not in the tens. It's going to be

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countable on the fingers of two hands.
Q. Okay. Were you the person that was assigned to execute all of these licenses, or was there somebody else in the company that was also involved at the execution level?
A. It was certainly a matter of convenience, whoever -- whatever executive was around at the time that the license agreement needed to be signed. I saw a lot of them, but certainly not every one of them.
Q. Was there a person at Sequent that was designated to negotiate the licenses on behalf of Sequent, whether it be with AT&T or Mentor Graphics or any of these test tool companies?
A. Again, it would depend a little on what the nature of it was. So, for instance, Roger Swanson, who was the director of software engineering, did a lot of the software licenses, specifically the compilers and the source code licenses. Walt Mayberry would have done the hardware licenses and -- the hardware design tool licenses. But again, it was a small company, so it was whoever was in town at the time.
Q. Is that how it ended up that you signed on behalf of Sequent? You happened to be in town as opposed to some of the other engineers that had the authority to sign?

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MR. KAO: Objection to form.
MR. HEISE: Q. You may answer.
MR. KAO: You can answer.
THE WITNESS: Okay. Sorry.
In the case of that license agreement, I had more involvement perhaps because it was a major piece of function, but it certainly wasn't necessary that I be the person executing.
MR. HEISE: Q. And the reason I'm asking is, you indicated earlier that you did not personally negotiate any of the terms.
A. Right.
Q. And so I was wondering why the person who did negotiate the terms was not that. And it seems to be that you're telling us that it just happened that you were the person that would have been in town that day to sign the agreement.
A. It was probably --
MR. KAO: Objection to form.
Give me a chance to object, but you can answer the question.
THE WITNESS: Okay. It was probably a little more than that, because it was a technical issue. But yeah, it would have been one of the executives who was executing on the recommendation of the director of

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software engineering.
MR. HEISE: Q. And the director of software engineering, I've already forgotten his name and you've said it three times.
A. Roger Swanson.
Q. Okay. What was the process that Sequent would follow when it would license? And just to give you an idea of what I'm talking about, would it be done by committee headed by Roger Swanson? He would meet with all of you? Would it go to the legal department? Just, if you could, walk us through the steps of Sequent wants to license X product. How does Sequent go about doing that during the time that you were there?
A. Okay. First, there's a difference between licensing a product for internal use and licensing a product for incorporation in resale.
And so for internal use, they were largely standard form licenses: negotiate the best price you can for as few seats as you can buy and get on with it. So there wasn't a lot of negotiating.
In the case of a product for resale, as it would have been for the compilers or operating system components, again there would be a cost consideration. Is there an appropriate royalty that's not unsustainable from a commercial perspective? Are the licensing terms

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fair, meaning there's no undue restriction on the ability to distribute, for example?

And then whoever happened to be the subject matter expert -- in the case of most of the software, it was Roger -- would proceed to engage with whoever was the source of the technology and come to a draft agreement. We'd read it over, have a discussion with -- to see if we could move them around a little bit, if that was necessary, and then executed the document.

Q. So in the case --

A. There wasn't a corporate counsel to respond to the question.

Q. Okay. So in the case of an agreement for internal use -- which you understood the Unix System V agreement to be for internal purposes only; right?

A. It varied at different moments in time. The initial agreement was for internal use. It was to get access to the source code --

Q. Correct.

A. -- so that we could put a System V face on the Dynix operating system.

At the point in time when there was a derivative work prepared and it was ready for sale, then we executed the next agreement, which was to give us distribution rights for that.

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Q. Just so that we're clear on the record, what you're referring to is initially what was executed for internal business purposes only was Exhibit 1 to Exhibit 100, the software agreement?

A. That's correct.

Q. And then, when you were ready to distribute the derivative work, it was based upon entering into Exhibit 2 to Exhibit 100; is that correct?

A. That's correct.

Q. Okay. When you entered into Exhibit 2, the sublicensing agreement to Exhibit 100, that was to allow Sequent to distribute in binary form only; is that correct?

A. That's correct.

Q. And so that we all understand, binary form is different than source form; is that correct?

A. That's correct.

Q. Could you tell us the difference between source code versus binary or object code?

A. Right. At the highest level, source code is human readable and binary code is machine readable or computer executable. Specifically, the binary form will be a highly encoded representation of the detailed instructions for whatever the program is, and the source code will be a representation in something close to a

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language --

Q. Right.

A. -- that humans can interpret that gives them control over what algorithm is being executed.

The source code form often will be larger than the binary code form. The source code form almost always will have a layer of abstraction like a library between it and the binary code form.

Q. And so if we were to look at the binary form, it would just appear as a series of 1s and 0s?

A. That's correct.

Q. After your tenure as the vice president of engineering at Sequent, during which time you executed these agreements, for the remainder of your time at Sequent, either as the chief information officer or head of professional services, did you have any involvement in executing any other licenses on behalf of Sequent?

A. Certainly as the CIO, I executed license agreements for software for internal use. We used Oracle extensively. There were a number of accounting programs and other programs that we used.

As professional services head, I don't recall executing any license agreements. I might have done one with respect to -- with Lotus Corporation with respect to Notes, but I don't have a specific recollection of

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that.

Q. Again, in terms of these other licenses, Oracle or Lotus that were for internal business purposes, can we count those on a hand or two or are those in the dozens?

A. Still small numbers.

Q. Okay.

A. Yes.

Q. After you left Sequent in approximately 1996, you said you went to Compaq Corporation?

A. That's right.

Q. As the vice president of business applications, did you have any responsibility for executing licenses on behalf of Compaq?

A. No.

Q. How about during your tenure at Brightlink? Did you have any responsibility for negotiating or executing license agreements on behalf of Brightlink?

A. Yes. Again, it would have been engineering tools.

Q. So not for internal business purposes? The other type of --

A. Correct.

Q. -- contracts?

And how about at IP Unity? Do you have any

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involvement in the execution or negotiation of license agreements?
A. Yes.
Q. And are those for internal use only license agreements or for the tools and the like?
A. Both types.
Q. Of the companies other than Sequent, which we're obviously discussing this morning, have you executed or been involved in the negotiation of any license agreements with AT&T or any of its successors for Unix System V code?
A. Not to my recollection.
Q. You had indicated earlier that you met with Mr. Kao, the lawyer for IBM, sometime in 2003. Is that correct?
A. I don't recall the exact date, but I've met with Mr. Kao two times before today.
Q. Okay. Let's -- if you could, sir, tell us the first time that you met with Mr. Kao.
MR. KAO: Again, I'd caution the witness not to reveal any attorney-client communications, but you are able to answer Mr. Heise's question here.
THE WITNESS: Okay. After the preparation of my document here, I had the occasion to meet with Mr. Kao here in San Jose; and basically, we just

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reviewed the content of the document and confirmed that it was an accurate statement of my recollection.
MR. HEISE: Q. Okay. I may have used a word that unnecessarily confined your answer, so let me just take one step back. When is the first time you had any contact with anybody on behalf of IBM?
A. Okay. That would have been in 2003. It was a phone call. Again, I don't recall whether it was Mr. Kao or someone else from his office who made the initial contact, but it was a phone call asking me if I was the guy who signed the document.
Q. Was anything else discussed in that first phone call?
A. Again, I don't have a precise recollection; but I probably, in the first phone call, recounted the general sequence of events.
Q. Okay. And in that first phone call, could you recount for us the general sequence of events that took place at that point?
A. Yes. The history of Sequent is that it started off building a multimicroprocessor hardware platform running the Unix operating system, and it chose the Unix Berkeley Standard Distribution as the source basis for that operating system. Its innovations were in the area of symmetric multiprocessing and parallel

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processing.
At some point in time, it became necessary to expand the base of application software that was available for the platform in order to expand sales, and this was a time when the applications were being written for a number of variants of Unix, but the most prominent ones were the Berkeley variant and the System V variant. And so we sought to license System V technology from AT&T in order to add that second flavor, that second body of application code.
So we -- Roger engaged with someone at AT&T. I don't actually recall how we got to find out who would do the licensing. And we executed the source agreement, which is this Exhibit 1; started working on it; developed a first version of the Dynix operating system that had a so-called System V personality. And internally, we referred to it as "the oil slick" because that was about how much difference there was. And we went to market with that, and that was adequate to secure some additional applications.
Over time, as POSIX and AT&T's marketing program were successful, there were more applications available for the System V API variant, and so we needed to make a more faithful expression of the System V system calls, and so that was the -- when we started

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building and marketing the Dynix/ptx variant. Continued to market both versions of the software.
Eventually -- there were several platform changes during this time, first going from a National Semiconductor 32-bit -- 16-bit micro to a 32-bit micro to an Intel 386-based product to an Intel 486-based product; and ultimately, very close to the end of my employment at Sequent, we started working on distributed coherent cache architecture that was an opportunity to scale up the number of processors that could be put in a shared memory architecture.
MR. KAO: Could we go off the record for one second?
THE VIDEOGRAPHER: Going off the record. The time is 9:56.
(Discussion off the record.)
THE VIDEOGRAPHER: We're back on the record. This marks the end of Tape No. 1 in the deposition of David Rodgers. We're going off the record. The time is 9:57.
(Recess taken.)
THE VIDEOGRAPHER: We're back on the record. This marks the beginning of Tape No. 2 in the deposition of David Rodgers. The time is 10 o'clock.
MR. KAO: For the record, Mr. Rodgers just

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testified as to communications he had with either myself or somebody at my law firm before we agreed to represent Mr. Rodgers.

Mr. Rodgers informed me at break that he wasn't sure if he actually had those discussions with me or with somebody else before or after. So I don't intend his testimony to be a waiver -- to constitute a waiver of the attorney-client privilege to the extent that those discussions happened after we agreed to represent him.

MR. HEISE: Q. When I was asking you the question, this was all what I understood was in the first phone conversation. So that's where I'm limiting my questions to right now.

A. Okay. So I've misled you. Describing things that happened in a series of conversations and the first meeting.

Q. Okay. Then let me make sure that we're all perfectly clear on the record.

You indicated you got a phone call from somebody at IBM's counsel's office, asking if you are the David Rodgers that signed the agreement.

A. Yes.

Q. You indicated that in that conversation, other matters were discussed. And so I thought you had

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indicated you talked about the history of Sequent in that initial conversation and that's what you just provided to us. Is that correct?

A. Yes.

Q. What else was discussed in that first conversation when you were contacted by IBM's attorneys?

A. I don't have a precise recollection, but probably I was asked would I be willing to document my recollection.

Q. Was anything else discussed during that first conversation?

A. No.

Q. Did you take any notes from that first conversation?

A. I did not.

Q. Did you prepare any -- any documentation as a result of that first conversation, specifically in response to the request of would you document what took place?

A. I did not.

Q. When was the next time you had any contact with anybody from IBM's attorneys' offices?

A. I met with Mr. Kao here in San Jose, and that was my opportunity to see the -- these exhibits.

Q. Were there any other discussions, phone calls,

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correspondence from the time of that initial phone call and the time that IBM's attorneys came and met you here in San Jose, California?

A. None that I recall. I mean, possibly one to organize the meeting, but . . .

Q. At that second meeting, who was in attendance?

A. Myself and Mr. Kao.

Q. Nobody else?

A. Right.

Q. Was that at your home or your office?

A. Actually, it was here in San Jose, but I don't recall where it was.

Q. Besides the three exhibits that were attached to Exhibit 100, were you shown anything else at that second meeting?

MR. KAO: And here, at that meeting, we agreed to represent Mr. Rodgers. So I'm going to instruct the witness not to answer that. And I --

MR. HEISE: Well, let me --

MR. KAO: The fact that the exhibits were disclosed, I also would not -- you know, I would like to state that's not intended to waive the privilege.

MR. HEISE: Well, then let me just explore this for just one moment.

Q. During your first meeting with IBM's attorneys

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here in San Jose, California, did a point in time -- at what point in time during that meeting was there a discussion about IBM's attorneys representing you?

A. Sometime during the meeting. I don't recall whether it came up at the beginning or, you know, after the pleasantries, but sometime during that meeting.

Q. Was there ever a point in time in which you have signed or -- scratch that.

Was there ever a point in time when you had a written agreement that IBM's attorneys were going to represent you?

A. No.

Q. Have you had discussions about them representing you? Let me --

A. Unclear.

Q. Let me put that back into English.

You do not have a written agreement with anybody representing IBM in this case --

A. That's correct.

Q. -- to be your attorney?

A. That's correct.

Q. Would it be fair, then, to say that the agreement that IBM's attorneys represent you is only oral?

A. That's correct.

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Q. And you don't recall what was said in this meeting with Mr. Kao before you came to this oral understanding of the fact that IBM's attorneys were going to also represent you in this case?
A. No. As I said, we might have exchanged pleasantries or something.
Q. How long was the meeting?
A. Maybe an hour.
Q. After that meeting, when was the next contact you had by anyone who was also representing IBM in this case?
A. There was a later phone call. I don't have a precise recollection as to time.
Q. With whom?
A. I think it was with Mr. Kao. And my recollection is it was just "Are you available to give a deposition?"
Q. Approximately when would that phone call have been?
A. Actually, let me correct myself. The next contact would have been to discuss the review of a draft declaration and then, after that, it would have been to discuss my willingness to give a deposition.
Q. Okay. In looking at your Exhibit 100, this declaration that you signed, it indicates that it was

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signed on November 5th, 2003.
A. Yes.
Q. Is that when, in fact, it was signed?
A. Yes.
Q. So using November 5th, 2003 as a date of which we are certain, how far before that was your first contact by phone with Mr. Kao and then your meeting with Mr. Kao? Can you tell us that?
A. I have no recollection.
Q. Was it within days? Weeks? Months?
A. I would guess that it's more a span of weeks.
Q. From the time that you said -- excuse me -- Mr. Kao and you met and the declaration was prepared, did you prepare the declaration during that time frame?
A. No. I gave the fact statements, and then the declaration was prepared by someone in Mr. Kao's office and delivered to me -- I think it was delivered electronically -- for review. I marked it up.
Q. When you say "electronically," you mean as an attachment to an e-mail?
A. Yes.
Q. Do you maintain your sent or deleted e-mails?
A. For a period of time.
Q. Do they become automatically deleted, or do you have to manually permanently delete them?

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A. I purge them every two or three months.
Q. Do you know whether you've purged the e-mails going back and forth between you and the lawyers for IBM?
A. Not definitively.
Q. Can you agree not to purge any of the e-mails that go between you and IBM's attorneys until this case has been resolved?
A. Well, depends on when that is.
Q. Certainly for the next 12 months, so that in the event we need to see them, they won't be made more difficult to retrieve by going to archives and all that?
A. I can't agree to keep them on-line. That's what I have to do to maintain the integrity of my e-mail. What I can do is agree to preserve them in some machine-readable form.
Q. That would be fine.
When you got the first draft of this declaration prepared by IBM's attorneys, you indicated you had made some changes to it and sent those back.
A. Yes.
Q. What changes were made to it?
A. Don't have a precise recollection. I think there were a number of incorrect references to Dynix and Unix System V. I think there was one statement that

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just seemed awkwardly put. It was substantively accurate, but it wasn't technically accurate.
Q. Was there anything from your first phone call that was not included in the declaration that was ultimately prepared by IBM's attorneys?
A. Not to my recall, but . . .
Q. How many times was there a back-and-forth of changing this declaration before you signed it on November 5th, 2003?
A. I recall only one update, one edit.
Q. After November 5th, 2003, when you signed the declaration prepared by IBM's attorneys, did you have any further contact with anybody representing IBM in this case?
MR. KAO: Again, I'll caution the witness to limit the answer to whether you had contact and not what the substance of the communications were.
THE WITNESS: And your question is between November 5th and now?
MR. HEISE: Q. As we sit here today, correct.
A. Yes.
Q. Okay. When was the next contact after you executed this declaration, November 5th, 2003, that you had contact with the lawyers for IBM?
A. Sometime earlier this year I was contacted,

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asking if I was available.
MR. KAO: I mean, again, I don't intend that to be a waiver of the attorney-client privilege. I think Mr. Heise was just asking -- you are allowed to tell Mr. Heise the occasions on which you were contacted --
THE WITNESS: I see.
MR. KAO: -- and how often and the dates, to the extent you can remember them, but I instruct you not to disclose the content of any communications between you and myself.
MR. HEISE: Q. So sometime in 2004 you were contacted again by --
A. Yes.
Q. -- IBM's attorneys?
And was that telephone or in person?
A. Telephone.
Q. How long was that conversation, approximately?
A. Would have been a short conversation.
Q. After that short telephone conversation, did you have any further contact with IBM's attorneys?
A. Yes.
Q. When was that?
A. Relatively recently. It would have been in the last month.

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Q. Was that in person or by telephone?
A. By telephone.
Q. Okay. Was that also a short telephone conversation, or was that a --
A. Basically a short call.
Q. After that phone conversation, did you have any other contact with anybody representing IBM?
A. Yes.
Q. When was that?
A. Yesterday.
Q. Was that in person or by phone?
A. It was in person with Mr. Kao.
Q. How long was your meeting -- how long was your meeting with Mr. Kao yesterday?
A. Not including lunch, about an hour.
Q. Did you meet today before your deposition?
A. Briefly.
Q. You indicated that Roger Swanson was the director of software at Sequent.
A. That's correct.
Q. Do you know where he is currently?
A. I believe that he resides in either Portland or Beaverton, Oregon.
Q. Do you know where he's employed?
A. I don't know.

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Q. When's the last time that you had contact with Mr. Swanson?
A. It's been years.
Q. In preparation to give your deposition today, have you taken any steps?
MR. KAO: Again, I would --
THE WITNESS: I don't understand the question.
MR. HEISE: Q. Have you done anything to prepare yourself for today's deposition?
MR. KAO: And again, I would instruct the witness, to the extent it discloses any attorney-client communications, that you not answer the question.
THE WITNESS: I read the document.
MR. HEISE: Q. Have you reviewed anything other than the Exhibit 100 with its attachments?
MR. KAO: I'm going to instruct the witness not to answer the question.
MR. HEISE: On what basis?
MR. KAO: On the basis of attorney-client privilege.
MR. HEISE: Q. Have you had conversations with anyone other than your attorney --
MR. KAO: The same position you guys took.
MR. HEISE: Q. -- about your deposition today?

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A. I told my father I was going to do it.
Q. Have you talked with anybody who is a witness in this case or a potential witness in this case?
A. I don't think so. I suppose that's possible.
Q. For example, you didn't talk to Mr. Swanson?
A. I have not.
Q. You just said you hadn't talked to him in years. So that's what I'm trying to get at, is whether you've talked to anybody, if you've talked to Mr. Wilson, who you said --
A. No.
Q. -- signed this agreement and that sort of thing. Okay.
During the time that you were at Sequent, who else besides Mr. Swanson was involved in the negotiations, discussions, or execution of the license for the Unix System V software that's attached to your declaration?
A. I don't have a precise recollection. It's possible that any number of people were. And it's certainly likely that we would have discussed the agreement at the executive staff meetings, but as to negotiations, I think it was probably only Roger and a couple of the other staff members who I've mentioned before.

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Q. Was there anybody that would be, in your mind, the person who was the lead negotiator on behalf of Sequent since, as you've indicated, you had no personal contact with AT&T?

MR. KAO: Objection; mischaracterizes the witness's testimony.

MR. HEISE: Q. Okay. You can answer the question.

A. Roger is the lead negotiator, was the lead negotiator. I was certainly on phone calls with AT&T personnel at various points in time.

Q. Did you participate, or were you just listening?

A. Be hard to imagine me not participating.

Q. Okay. Who at AT&T was on these phone calls?

A. That, I don't have a precise recollection of. As I said, I don't think it was Mr. Wilson, and I don't remember the name of the lead guy on the AT&T side.

Q. Was it just one person from AT&T?

A. There's certainly one person with whom we worked most frequently, but I recall that there were other people involved in the process.

Q. What do you mean by that, others involved in the process?

A. Preparing the drafts and transmitting the

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documents, things like that.

Q. When you say "preparing the drafts," what drafts are you referring to?

A. The drafts of this license agreement.

Q. Well, Sequent didn't prepare those drafts.

A. That's correct. They were prepared by AT&T.

Q. So I thought from your testimony before you indicated that this was a -- you had been told this was a standard form agreement --

A. Yes.

Q. -- and that you had to sign it?

A. Yeah.

Q. So what terms, if any, were negotiated differently from the standard form agreement?

A. None that I'm aware of. I mean, you had to put the names and addresses and parties into the document.

Q. So would it be fair, then, to say that there really was no negotiation other than price?

MR. KAO: Objection to form.

MR. HEISE: Q. You may answer.

A. Okay.

MR. KAO: Yeah, sorry.

MR. HEISE: You can tack that onto the end of every time somebody says "objection" unless he says it's

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attorney-client privilege.

MR. KAO: Yeah. Unless I instruct you not to answer, you can still answer the question.

THE WITNESS: It wasn't -- I would say except for price, it wasn't about the language. It was -- and all of the discussions about intent or meaning were oral.

MR. HEISE: Q. Okay. And that's -- I'm just trying to make sure we're very clear on this.

AT&T said, "Here's the agreement." No terms are negotiated, changed in any way, other than discussions of price?

MR. KAO: Objection to form.

THE WITNESS: I don't think it was that heavy-handed. I mean, I think they said, "We want to recruit you as a System V licensee. Is there anything here that gives you particular heartburn?"

But it wasn't -- you know, it wasn't like, "Let's start drafting from the first paragraph."

MR. HEISE: Q. Okay. And when you were asked something along the lines of "Is there anything here that gives you particular heartburn?" if there was anything, none of those terms were changed from the standard agreement?

A. Not that I recall. It was a pretty benign

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agreement.

Q. If you could, sir, just at a general level of what you've described as a benign agreement, this Exhibit 1, the software agreement, what is your understanding as to what it provided to Sequent?

A. You're speaking just of the first agreement?

Q. Just to the first agreement.

A. The first agreement provides Sequent with access to the AT&T System V source code for its internal use, and that internal use was preparation of a derivative work that incorporated System V APIs.

Q. Did it incorporate anything from System V other than the application programming interfaces, the APIs?

MR. KAO: Objection to form.

You can answer.

THE WITNESS: Not that I know of. As I've said before, there were probably some things like copyright notices and header files and things like that that had to be, just as a matter of making it useful, copied from the System V source.

MR. HEISE: Q. And do you recall whether Sequent had licensed System V, Release 3, or System V, Release 4, or any other particular release of System V?

A. To my recollection, only 5.2 was licensed.

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Q. And when you say "5.2," you're seeing System V, Release 2?
A. Yes.
Q. Do you know whether any subsequent agreements were ever entered into by Sequent for licensing of System V code besides the three that are attached to your declaration?
A. Not to my knowledge.
Q. Do you know whether Sequent ever license System V, Release 4?
A. I don't know that.
Q. After you left Sequent in 1996, did Sequent continue to use Unix, to your knowledge?
A. You mean continue to sell it as a product?
Q. Continue to use -- I may have misspoken.
After you left, do you know whether Sequent continued to use Unix System V?
A. Internally -- I'll answer it: Internally, Sequent used Dynix as its operating system for its own commercial applications and, of course, others, Windows. It continued to sell both Dynix and Dynix/ptx.
Q. Well, you understood that both Dynix and Dynix/ptx contained Unix System V code?
MR. KAO: Objection to form.
THE WITNESS: No.

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MR. HEISE: Q. You have no understanding of that?
A. First, I don't know it. And Dynix itself doesn't have, to the best of my knowledge, any System V code in it.
Q. Do you know whether it contains anything from System V, whether it be source code, methods and concepts, structures, sequence and organization, anything —
MR. KAO: Objection.
MR. HEISE: Q. -- whatsoever from Unix System V?
MR. KAO: Objection to form.
THE WITNESS: I don't know that explicitly.
MR. HEISE: Q. Was there any reason, besides having access to the Unix System V application programming interfaces, that Sequent licensed Unix System V?
A. I can't state what value I would put on it, but there was certainly a marketing value to having -- to being an AT&T System V licensee.
Q. Why is that?
A. It's essentially attraction of customers and third-party application developers.
Q. Was the marketing value of being an AT&T

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customer something that Sequent would allow its customers to advertise?
MR. KAO: Objection to form.
THE WITNESS: I don't understand the question.
MR. HEISE: Sure. I'll be glad to --
Q. So, for example, the marketing value of being an AT&T customer, would Sequent tell its customers that it could tell the world that it's using Dynix which is derived from AT&T?
A. No.
MR. KAO: Objection to form.
MR. HEISE: Q. Do you know whether Sequent has stated, either publicly or internally, that Dynix is derived from Unix System V?
A. I don't know that explicitly. I doubt that that statement was made.
Q. At the time that you signed Exhibit 1 to Exhibit 100, which you characterized as a benign agreement, was there anything that you found unclear or ambiguous in the document itself?
A. Yes.
Q. Okay. Tell us, at the time that you signed it, what you thought was unclear or ambiguous.
A. Well, there are many terms, many things that are imprecise. In this particular case, the definition

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of "software product" just says System V source code. It's not a listing of all the modules. Methods and procedures is not specific as to are these patented methods, are these industry-standard procedures, covered by a standards body. I mean, there's lots of imprecision in this document.
Q. Well, that's what I'm trying to find out from you is: What in this agreement you believe was unclear or ambiguous at the time that you entered into it? So, so far you've identified Section 1.04, the definition of "software product"; and in Section 7.06, the methods and concepts.
Is there anything else that you believed was unclear or ambiguous at the time that you entered into -- excuse me -- Exhibit 1 to Exhibit 100?
MR. KAO: Objection to form.
THE WITNESS: I don't have a specific recollection of something that I thought was unclear at the time. I remember only that we needed to ask them some questions about what their intent was.
MR. HEISE: Q. In these conversations that you've indicated you believe took place between Sequent and AT&T, was it -- were they limited solely to discussions of what the intent was or was there anything else discussed during these conversations?

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A. The ones that I was party to, it was mostly about what the intent was. I don't know what the other ones were.
Q. Have you seen a single document from Sequent or AT&T that memorialized these discussions that you've described regarding the intent of the parties to this written agreement?
A. I haven't seen --
MR. KAO: Objection to form.
THE WITNESS: I have not seen such a document.
MR. HEISE: Q. Is there anything else that you can identify for us that you believe was clear -- excuse me -- unclear or ambiguous other than what we've just discussed in Section 1.04 and Section 7.06, the definition of "software product" and "methods and concepts," respectively?
MR. KAO: Objection to form. Are you asking for his recollection of what he remembers from the time period or sitting here today?
MR. HEISE: I'm still back at the time of entering into this agreement.
THE WITNESS: Not to my recollection.
MR. HEISE: Q. Having had the opportunity to review the agreements again this morning, having had the opportunity to review them apparently on several

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occasions with counsel for IBM, is there anything that you view in this agreement that is unclear or ambiguous today?
MR. KAO: Objection to form.
You can answer.
THE WITNESS: Look, today I would also critique it on the parenthetical exceptions, "except as otherwise may be permitted," since there's no reference there.
MR. HEISE: Q. And what paragraph are you referring to, sir?
A. The phrase "except as otherwise may be authorized or permitted." I'll see if I can find you a citation here. It's in the confidentiality paragraph.
Q. That would be Section 7.06.
A. That's not it.
Well, I'm not finding it right away. But there's a parenthetical note in several occasions that just says -- it provides an exception to the confidentiality rule, but there's no citation. So it's vague as to what those exceptions are and where they might reside. This is not a monument to drafting.
MR. KAO: I was going to say, if it may speed things up, I think he's talking about 7.06(a), but --
MR. HEISE: Well, that's what I thought he was

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looking at, so -- but I'm --
MR. KAO: But, yeah.
THE WITNESS: Yeah.
MR. KAO: Is that what you're --
THE WITNESS: But I couldn't find the --
MR. HEISE: Q. I want you to take whatever time you need to --
MR. KAO: Yeah, look through the document and see.
THE WITNESS: Let me look ahead at the next one, see if I find it there.
MR. KAO: Did they get out of order?
Oh, it could be that -- looks like his copy is --
THE WITNESS: I got them scrambled.
MR. KAO: -- gotten out of order. Yeah.
THE WITNESS: Okay.
I know it's not in there. I'll be careful here.
I think it's my error. The parenthetical notes are in my declaration, not in the document.
MR. HEISE: Q. So that portion of your declaration is unclear?
A. I don't think it's unclear.
MR. KAO: Objection to form.

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MR. HEISE: Q. My question before was: When you signed the agreement, what did you believe was unclear and ambiguous? And you identified 1.04 --
A. Two items.
Q. -- software products, and methods and concepts in 7.06.
A. Right.
Q. I then asked you: As you sit here today, after having the opportunity to review with counsel for IBM, go through all this stuff again, is there anything further that you found to be unclear or ambiguous? And you said, "The parenthetical "except as otherwise permitted." And I asked you where that is in the document, and it does not appear in the document.
A. That's correct.
Q. And the document I'm referring to is Exhibit 1, the software agreement; right?
A. Yes.
Q. So that is not something that --
A. That is not something --
Q. -- is newly found to be --
A. That is correct.
Q. -- ambiguous or unclear?
A. That's correct.
Q. And in fact, where that appears is in your

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affidavit or declaration?
A. In my declaration, that's right.
Q. Is there anything else, sir, either at the time or as you sit here today, that you can identify for us in this software agreement that you believe is unclear or ambiguous?
MR. KAO: Objection to form.
THE WITNESS: No. I think the initial document is very clear. It's a grant of access to source for internal use.
MR. HEISE: Q. Well, let's talk about that grant of right to use for internal use.
You're referring to Section 2.01; is that correct?
A. Yes.
Q. And actually, I'm going out of order. I'm going to get back to that in one second.
The first item that you indicated was unclear at the time that you signed it was Section 1.04, the software product.
A. Yes.
Q. The agreement states that:
"SOFTWARE PRODUCT means materials such as COMPUTER PROGRAMS, information used or interpreted by COMPUTER PROGRAMS and

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documentation relating to the use of COMPUTER PROGRAMS. Materials available from AT&T for a specific SOFTWARE PRODUCT are listed in the Schedule for such SOFTWARE PRODUCT."
Is that a correct statement of what the agreement defines "software product" under Section 1.04?
A. That is.
Q. What is unclear about the definition of "software product" as set forth in the agreement?
A. In this particular case, it's not an exact list of what those programs are. The definition is clear, so far as it goes, in that it's the programs. It doesn't state that they're in source form. It's pretty vague as to information used or interpreted by computer programs, because that might come from human beings as well as be part of the text files and documentation files. So it's a pretty wide-open definition.
Q. Well, in fact, sir, computer programs is defined both to include source code and object code.
A. Yes.
Q. So it is clear with respect to that, is it not?
MR. KAO: Objection to form.
THE WITNESS: It's clear that it includes source and object forms, and then it goes -- however, it

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goes on to talk about interpreted information. It's pretty expansive.
MR. HEISE: Q. That's correct. It's much more expansive than just source code, is it not?
MR. KAO: Objection to form.
THE WITNESS: Yes.
MR. HEISE: Q. Was there anything unclear about the fact that 1.04 covered much more than simply source code?
MR. KAO: Objection to form.
THE WITNESS: No, it's not unclear that it covers much more. What it is unclear about is: What are those items?
MR. HEISE: Q. Well, you would agree that it defines "computer programs" to include source code in object code format; right?
A. Yes.
Q. It also expands to include information used or interpreted by computer programs and documentation relating to the use of the computer programs.
So you understood that there were more than just source code being covered by the term "software product"?
A. Yes.
Q. With respect to 2.01, the one we were just

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getting ready to talk to before I interrupted myself, it indicates that:
"AT&T grants to LICENSEE" -- in this case, meaning Sequent -- "a personal, nontransferable and nonexclusive right to use in the United States each SOFTWARE PRODUCT identified in the one or more Supplements hereto, solely for LICENSEE'S own internal business purposes and solely on or in conjunction with DESIGNATED CPUs for such SOFTWARE PRODUCT."
Is that a correct statement, sir?
A. Yes, that's a . . .
Q. And it's in here where it makes clear one of the topics we were talking about earlier, that it's for licensee's own internal business purposes, which is how you had characterized this agreement before. Is this where you're getting the language from --
A. Yes.
Q. -- that this was a document memorializing that it was for Sequent's own internal business purposes?
A. Right.
MR. KAO: Objection to form.
MR. HEISE: Q. Would you agree, sir, that it clearly limits the right of Sequent to use the product

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in the United States?
A. Yes.
MR. KAO: Objection to form.
MR. HEISE: Q. Do you know whether the software product was used outside the United States by Sequent at any time?
MR. KAO: Objection to form.
THE WITNESS: I assume you're referring to the period of time that this agreement alone was in force?
MR. HEISE: Q. No. I need to ask you what you mean by "this agreement alone was in force."
A. After the distribution rights agreement was signed, then certain elements, as part of the binary distribution, might have been distributed outside of the United States.
Q. Okay. And I appreciate you making that clarification, because I'm talking strictly source code, not binary code.
A. Okay.
Q. So my question to you is: Do you know whether Sequent at any time distributed source code covered by this software agreement outside the United States?
A. Not to my knowledge.
MR. KAO: Objection to form.
MR. HEISE: Q. Did Sequent have any

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facilities outside of the United States?
A. It did.
Q. Where?
A. It had sales offices in the U.K., outside of London. It had sales offices in Hong Kong. It had sales offices in France and Paris. It had sales offices in Japan, outside of Tokyo.
Q. Did Sequent have engineers working anywhere outside the United States?
A. Yes.
Q. Did it have engineers working on Dynix outside the United States?
A. Do you mean in the creation of Dynix or in the support or –
Q. At any time after the System V code was licensed from AT&T.
MR. KAO: Objection to form.
THE WITNESS: Of course. I mean, part of the sales process and technical sales is to have an engineer tell the customer when the sales guy's lying.
MR. HEISE: Q. Do you know whether Unix System V was used by Sequent in India, for example?
A. Not to my knowledge.
MR. KAO: Objection to form.
MR. HEISE: Q. Did Sequent have engineers

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working on Dynix with access to Unix System V in India?
MR. KAO: Objection to form.
THE WITNESS: Not to my knowledge.
MR. HEISE: Q. Did Sequent, in fact, have engineers in India?
MR. KAO: Objection to form.
THE WITNESS: During my tenure at Sequent, no. I'm aware that Sequent made outsourcing arrangements with Indian firms later, although I don't think that those were related to System V.
MR. HEISE: Q. What do you think they were related to?
A. I think they were related to other product support issues.
Q. Were they related to Dynix?
A. They may have been related to Dynix, yes.
Q. In Section 2.01, is there anything that you thought was unclear or ambiguous at the time that you signed it or as you sit here today, after having reviewed it on various occasions both by yourself and with IBM's counsel?
MR. KAO: Objection to form.
THE WITNESS: There's nothing particularly unclear. I mean, it has the same vagueness that we discussed earlier.

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MR. HEISE: Q. The next sentence in Section 2.01 says:
"Such right to use includes the right to modify such SOFTWARE PRODUCT and to prepare derivative works based on such SOFTWARE PRODUCT, provided the resulting materials are treated hereunder as part of the original SOFTWARE PRODUCT."
Do you see where I'm reading from?
A. I do.
Q. Did you understand that to be identifying what Sequent could or could not do with the Unix System V code that it had licensed?
MR. KAO: Objection to form.
THE WITNESS: I understood it to mean that Sequent was required to maintain the confidentiality of the System V materials that might have been embodied in the derivative work.
MR. HEISE: Q. What did you understand the phrase "the resulting materials" to be referring to in that sentence?
A. In this paragraph, "the resulting materials" would apply to the source code, the object code that was derived from that source code, and the documentation that would describe the behavior of that object code.

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Q. Did you understand that the resulting materials referred to the modifications and derivative works based on the software products?
A. I don't understand your question.
Q. In this sentence where it says, ". . . provided the resulting materials are treated hereunder as part of the original SOFTWARE PRODUCT," did you understand, sir, that the phrase "the resulting materials" was referring to the modifications and derivative works based on the software product?
A. No, I did not.
Q. What did you believe it was referring to?
A. To the original System V source code and object code.
Q. Well, if that's the case then, sir, why wouldn't there just be a period after "software product" and you would eliminate the entire second half of that sentence?
MR. KAO: Objection to form.
THE WITNESS: I don't know.
MR. HEISE: Q. Isn't that what you are now telling us you understood the sentence to mean, that the second half of that sentence didn't mean anything differently than the first half?
MR. KAO: Objection to form.

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THE WITNESS: No. My comprehension of this paragraph is that there's an unmodified software product and a modified software product that incorporates other things created by Sequent and that with regard to the unmodified portion, the same treatment applies.
MR. HEISE: Q. Well, when you would give a customer a copy of Dynix code --
A. Yes.
Q. Source code, not object code.
A. That didn't occur frequently.
Q. But you did make provision for that? There were licenses for customers to get source code, was there not?
A. There was at least one that I know of.
Q. When a customer would get source code, would it come on a CD or a digital tape as "Here is Dynix," or how would it be provided to a customer?
A. I don't actually recall how the distribution was done.
Q. Would it separate out, this part is Unix System V; this part is BSD; this is Sequent's changes, additions, modifications?
A. The source code distributions that I recall were piecemeal, that as they -- for instance, it was a parallel programming library that was distributed. They

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were specific to -- the one that I recall very precisely is that in working with Oracle, we needed their help to modify a particular treatment so that Oracle would run better.
Q. So --
A. So it was a piece, is the short answer.
Q. So is Oracle the only company that you can recall Sequent ever providing access to source code?
MR. KAO: Objection to form.
THE WITNESS: There probably were others. That's the one I recall.
MR. HEISE: Q. So whenever Sequent would provide Dynix to customers, with the exception of Oracle and possibly a few others, it was always in object code format?
A. The typical distribution was object, yes.
Q. Would the object code format encompass all of Dynix, including the BSD portions, the Unix System V portions, and whatever changes, modifications, derivative works that Sequent created for Dynix?
A. If your meaning is that, for instance, for the System V environment, there would be header files that are different and the object code to do the conditional symbolic link treatment was included in that object code, yes.

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Q. It would be one unified product that would be given to a customer?
MR. KAO: Objection.
MR. HEISE: Q. Wouldn't be in bits and pieces, would it?
MR. KAO: Objection to form.
THE WITNESS: Well, now there were optional components. I mean, you didn't get everything.
MR. HEISE: Q. What would be an optional component?
Well, first, you said, ". . . now there are optional components." Was that a change, or is that how it always was?
A. No, it was always -- starting at the beginning, there was only one product; but --
Q. Well, what are you refer- --
A. -- after there were subsequent developments to enhance the product, then the customer didn't, for example, get the compiler if they didn't buy the compiler.
Q. So is that what you're referring to when you talk about "optional components," the compiler?
A. That's an example.
Q. What else are you referring to when you say "optional components"?

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A. The parallel programming library was another example. I'm trying to recall now what else we made optional.
Q. Can you think of anything else?
A. No. I don't have a good recall of what was optional.
MR. HEISE: Why don't we just take a couple-minute break. I need to . . .
THE VIDEOGRAPHER: Going off the record. The time is 10:50.
(Recess taken.)
THE VIDEOGRAPHER: We are back on the record. The time is 11:03.
MR. KAO: I think at the break Mr. Rodgers had the opportunity to review the software agreement with respect to the provision that he was looking for that was vague, and so he would like to clarify for the record.
MR. HEISE: Q. Sure.
A. I apologize. I was looking for an open parenthesis, and actually, there's no parenthetical note in the agreement.
Q. What phrase are you looking for now?
A. It's actually in -- I think it's 7.06(a). And the phrase is "at any time becomes available without

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restriction to the general public." That phrase.
Q. And just so that this is all in context, you're identifying the phrase that "at any time becomes available without restriction to the general public" from Section 7.06(a) as something that you find to be unclear or ambiguous, as you sit here today. It's not something that you found unclear and ambiguous at the time that the agreement was entered into. Is that correct?
A. No. What I was saying is that at the time, my interpretation of that phrase was based upon my experience with other confidentiality agreements. It's not explicit in this agreement, but it requires interpretation from context.
Q. What was your understanding at the time leading up to the execution of this agreement what this phrase meant, based on your experience?
A. As I stated, I think in response to Mr. Kao's question, it was either as publicly disclosed by the originator or the information is independently derived or becomes public through the result of a court proceeding.
Q. I'm having trouble understanding, based upon what you've described as your understanding what similar-type phrases mean in your experience, what is

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unclear about this particular phrase as identified by you in 7.06 about becoming available without restriction to the general public.
A. Your question was: Is this -- in essence, was: Where did I find this document vague? And my response was, in this particular respect, most such documents are more explicit and so you're forced to rely upon context or experience.
Q. Is there anything else in this document besides what we've discussed in 1.04 and 7.06?
A. I think we also covered 2.01, because it relies on the software product definition is open to interpretation. The paragraph itself is not vague, but the interpretation is open.
Q. Okay. In reviewing paragraph 5 of your declaration, sir, we talked about much of this when Mr. Kao was examining you, and I just want to follow up on a few points.
Here you indicate that you did not personally negotiate. In your mind, who was it that was personally negotiating this agreement?
A. Roger Swanson.
Q. Okay. So not the other executives you identified, Mr. Beck or Mr. Kasten. It was really Roger Swanson that was negotiating?

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A. Correct.
Q. Are there any other Sequent employees besides Mr. Swanson, Mr. Beck, or Mr. Kasten with whom you reviewed these agreements before signing on behalf of Sequent?
A. It's possible. I don't have a specific recollection.
Q. Given that, would it be fair to assume you don't have a specific recollection of discussions with these other possible Sequent employees?
A. That's accurate.
Q. Okay. Hate to beat something to death, but occasionally you have to.
Later on in this paragraph you state that you, quote, have personal knowledge of the parties' understanding of, and intent behind, the terms and conditions of the agreements.
Could you tell us where you get your personal knowledge of AT&T's understanding of the terms and conditions of the agreements?
A. It would have come through either the conference calls or a recounting of the consultations with AT&T coming from Roger and others.
If I can be more specific, there are elements of the System V source code that, by the nature of the

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Unix operating environment, have to be exposed to the customer. And it's just how the system is built. The system uses text files for configuration. The system, as I've previously said, uses header files to bind things in.

So we had to clarify the AT&T intent, because the definition of "software product" was so wide-open that no, they didn't mean make it unusable; they meant just don't expose, in bulk, the source code.

Q. Well, besides the header files being allowed to be exposed, what else was discussed between Sequent and AT&T that could be exposed before you entered into this agreement?

THE WITNESS: Again --

MR. KAO: Objection to form.

You can answer.

THE WITNESS: I don't have a specific recollection. What I can recount to you is just that there are -- because Unix is built with a lot of text files that are meant to be interpreted or used as configuration information, there are elements of the operating system that are open, that just have to be open. That's the nature of the operating system.

MR. HEISE: Q. Was it your understanding, then, that as a licensee of Unix System V, that you

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could provide or make public the header files of Unix System V or the text files of Unix System V?

MR. KAO: Objection to form.

You can answer.

THE WITNESS: Yes, certain of those things are necessary.

MR. HEISE: Q. That's what I'm trying to, you know, winnow down as to what you mean by that. Let's just stick with the header files, for example.

What in the header files was discussed that could be made publicly available by Sequent without Sequent violating the terms of confidentiality?

MR. KAO: Objection to form.

You can answer.

THE WITNESS: I don't have a specific recollection about what was discussed, but the header files, in their entirety -- certain header files, in their entirety, have to be exposed.

MR. HEISE: Q. Which header files have to be exposed publicly from Unix System V?

A. You're asking a question I can't answer from own knowledge.

Q. Then how do you know that header files must be exposed from System V?

A. As a person experienced using Unix.

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Q. Okay. What about text files? What text files, if any, were discussed between Sequent and AT&T that you understood could be publicly displayed from Unix System V?

A. Again, we probably wouldn't have discussed it at the level of it's RC1.txt or something like that. We would have discussed it as the system configuration files or the disk table or things like that.

Q. Okay. So besides header files and text files, was anything else discussed that you believe Sequent could publicly display from Unix System V and still be in complete compliance with the terms of the software agreement?

MR. KAO: Objection to form.

THE WITNESS: We would have also had to confirm that we could document known defects. When the product is distributed in binary form, you have to be able to tell your customers "Don't rely on the CPO-H parameter." And that would be a reference to a System V component, but it's referring to a defect in that component.

MR. HEISE: Q. Well, would you provide them the source code for that component?

A. No, we would not.

Q. So there's still -- just telling a customer

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that gets it in only the binary, the 1s and 0s, that there's a defect in X portion is not identifying System V code or modification or derivative work, is it?

A. Well --

MR. KAO: Objection to form.

THE WITNESS: That's where the definition of "software product" causes the problem, because it's so expansive, it includes the documentation, which includes the release notes, which includes the defect list. So that's where it gets tangled up.

MR. HEISE: Q. Okay. So that was your concern, by way of example: Identifying for a customer that X has a defect is somehow violating the terms of the confidentiality clause as written in this agreement?

A. If you interpret it --

MR. KAO: Objection to form.

THE WITNESS: -- the way it's written, yes, that could cause you a problem.

MR. HEISE: Q. Any other examples that were discussed with AT&T besides this header files, text files, or defect notes?

A. I wouldn't have been party to the whole of the conversation.

Q. Did you ever see any correspondence between Sequent and AT&T regarding Sequent's belief that it

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could, in full compliance with the agreement, disclose header files, text files, or identify in defect notes?
A. I did not.
MR. KAO: Objection to form.
MR. HEISE: Q. Did you see correspondence regarding Sequent's ability to reveal anything from System V other than what I just described? So that I'm not limiting it just to header files, text files, and defect notes.
A. I did not.
Q. These conversations that we've been discussing about the -- what you've characterized as the intent behind the terms and conditions of the agreements, were these conversations that took place before entering into this agreement?
A. Yes.
Q. Were there any conversations afterwards?
A. I'm sure there were. I don't have a specific recollection.
Q. So you cannot relate to us any of the conversations that took place after the agreement was executed regarding what you've described as the intent behind the terms and conditions of the agreements?
A. No, not with any precision.
Q. In paragraph 6, you start with:

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"It was my understanding that the licensing agreements that I executed were standard form agreements . . . ."
From whom did you get that understanding?
A. I don't know the name of the person. It would have been one of the AT&T representatives who portrayed the documents as a standard form license agreement.
Q. So it was strictly a statement by someone. It wasn't that you had seen other AT&T agreements for software code?
A. That's correct.
Q. Continuing on in this declaration that you signed, in your second sentence you state:
"The Software Agreement granted Sequent the right to use Unix software products, including source code, for its internal business purposes."
The way that this sentence was written and which you signed, you seem to indicate that Unix software products is something more than source code.
A. Yes.
Q. What did you understand the Unix software products to be besides source code?
A. It also includes the object code for the unmodified System V, includes the documentation.

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Q. What documentation?
A. There's a set of man pages, they're called, which document the commands.
Q. Anything else?
A. I'm sure there were release notes and various other pieces of descriptive information.
Q. Anything else?
A. Not to my specific recollection.
Q. The phrase "for its internal business purposes," we talked about this earlier. That appears in Section 2.01; is that correct?
A. Mm-hmm.
Q. You have to say "yes" or "no" out loud.
A. Sorry. Yes.
Q. What did you understand "internal business purposes" to mean?
A. Our intent -- I'll start with that -- was to use the System V materials to create the derivative work. How I interpret internal business purposes is for anything that might please the company. So we might have done a benchmark on a System V platform, which I do recall that we did. So it would have been anything we chose to do for our own education and satisfaction.
Q. In other words, keep it within Sequent?
A. Yes.

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MR. KAO: Objection to form.
MR. HEISE: Q. You continue on that:
"The agreement further provided [sic] Sequent the right to modify Unix software products and to prepare derivative works based upon such software products."
A. Yes.
Q. What did you understand it to mean that, as you say here, that Sequent had the right to modify Unix software products?
A. So modifications can take two forms. They can either be an augmentation, the creation of a new capability; or they can be an adaptation, making something that would work except for some minor incompatibility. And I gave some examples earlier about symbol definitions and character sets and things like that as an example of the latter.
Q. And if Sequent -- well, could you tell us what, if anything, from Unix System V that Sequent modified?
A. In either sense?
Q. In either sense of how you are defining "modification."
A. Yes. The two examples that I can recall precisely are we modified the way in which Unix System V

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semaphores work in order to perform better. The semantics of a -- perhaps I should say that a semaphore is a software object that allows for multiple users of a single resource to coordinate their access to that single resource so that they don't collide.

The meaning of a semaphore in System V is different than the meaning of a semaphore release in BSD, and the consequence of that difference in meaning is that System V is less efficient. So in the case of Sequent, we modified, in the sense of augmentation, the way that System V semaphores work so that they were as efficient as the Dynix operating system made them be.

Q. Just to interrupt your train of thought for just one second, when you talk about the System V semaphores, is that also sometimes referred to as System V IPCs?

A. IPC is one of the users of it, but that's not -- it's not the same.

Q. So it's a subset of semaphores, or am I overstating?

A. Interprocess communication is a bigger concept than -- than a semaphore.

Q. Okay. I didn't mean to interrupt. So you were saying the things that you believed that Sequent modified from System V is modified the way that the

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semaphores work. Is there anything else?

A. I'm sure there were many other things, but -- and not least of which is adapting System V to run in a large-scale multiprocessor environment, to do resource management in a way that was more efficient with a large number of processors.

A small diversion here. The common wisdom at the time was that -- driven largely by the mainframe world, was that multiprocessors stopped being more efficient than uniprocessors at about four processors, which was a true statement but only true because of the way that the operating systems were implemented.

So coming back to your question, there were lots of modifications underneath the covers that allowed for the System V semantics to be expressed in an efficient way on a larger-scale multiprocessor.

Q. Well, if I were to look at Dynix code, for example, how would I be able to determine the modifications of the System V semaphores that now appears in the Dynix code?

A. The simple answer is I don't know. The more complicated answer is if the software developer was being a good boy that day, they would have commented it.

Q. The comment would have indicated that "These semaphores are from System V, and I've changed it by

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doing X, Y and Z"?

A. Yes.

Q. Are there any other instances that you can identify for us where Sequent modified System V code for use in any of its Dynix products?

A. I'm struggling to think of another example. But I would say, generally, there were also lots of adaptations where the system product code was modified in some largely cosmetic way to make it compatible with the compiler technology we were using. For a variety of reasons, the binary output format for System V and the binary output format for Berkeley are different in an incompatible way. And so we would have done adaptations, essentially low-value changes, so that the binary output formats could be compatible.

Q. If I'm trying to determine all of the instances of modifications, meaning either new or adaptations, in Dynix that came from System V and a developer was not being a good boy that day, how would I go about determining anything else that was modified or -- modified from System V?

MR. KAO: Objection to form.

THE WITNESS: First, I would say it would be an extremely difficult assignment because the modifications would have taken place over an extended

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period of time by many people.

An approach that I would adopt, if I were given that assignment, is to see if I could recover the RCS logs. Sequent, like many companies, maintain a source control system called RCS; and I would attempt to recover, from some archival storage medium, the RCS logs.

MR. HEISE: Q. In this same sentence that we were just discussing -- we just got done talking about the modification to the Unix System V. What was your understanding of the right to, quote, prepare derivative works based upon such products, meaning Unix System V?

A. I think my interpretation is straightforward. It means incorporate some or all of the source code, the object code, or the documentation into a resultant source, object, or document.

Q. Can you identify for us, in Sequent's Dynix products, any source, object, or documentation that was incorporated from Unix System V?

A. I don't have specific knowledge.

Q. Do you know whether, in fact, that did take place?

A. Well, we can infer from the earlier discussion that certainly some of the parameterization files might have been incorporated and certainly some of the release

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notes might have been incorporated.
Q. If I were to attempt to determine the source, object -- the source code, the object code, or the documentation that was incorporated from System V into some version of Dynix, how would I go about doing that?
MR. KAO: Objection to form; calls for speculation.
THE WITNESS: That's a near impossibility.
MR. HEISE: Q. Well, your answer is 100 percent right, because for me to go about doing that is an impossibility. So maybe I should rephrase the question.
For you to determine what source code, object code or documentation from Unix System V appears, either in whole or in part, in Dynix, what steps would you have to undertake?
MR. KAO: Objection to form.
THE WITNESS: First, let me say, I am not a forensic expert in document comparison.
MR. HEISE: Q. Right.
A. So my first step would be to go find one.
But the techniques that are well understood are that you scan the relevant material for repeating patterns that are above chance probability. And that's true for whether those repeating patterns are in source

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code or documents or object code.
Q. From the time that the software agreement was executed in 1985, how many versions of Dynix or Dynix/ptx did Sequent create?
A. I don't know a precise number. Once again, a small number. Releases happened maybe once a year, but I don't have a precise number.
Q. Not limiting your answer to release, how many changes would occur between, let's say, Release 1 and Release 2? And I'm just making up numbers just for discussion purposes. Would there just be, you know, two or three minor changes, or would it go through numerous changes between Release 1 and Release 2 that the public actually saw?
MR. KAO: Objection to form.
THE WITNESS: There would be probably thousands of changes between releases.
MR. HEISE: Q. Would those changes either appear in the programmer's notes in the code or on the RCS, the control system?
A. The check-ins would occur in the RCS logs. The developer might make small changes, a few changes, or large changes, hundreds or even thousands of changes between check-ins. There's no way to know that.
Q. You're going to have to forgive me because I'm

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not a hundred percent sure what you mean by "check-ins."
A. Sorry.
Q. So if we could just take one step backwards.
If here is Version 1 of Dynix or Dynix/ptx, one of the Sequent products, a programmer, you said, checks in on the RCS log. What does that mean?
A. Let me start with a just a high-level description.
Q. Okay.
A. As with, I'm sure, preparation of legal documents, if you have more than one contributor, you have the problem of synchronizing the contributions.
So in the case of source code, some tool -- in the Sequent case, it was called RCS -- would provide a mechanism where a copy would be checked out, meaning removed from access by others, and that copy is then assigned to a particular developer. They'll do whatever changes or inspection, whatever modification they need to make; and then they will restore the now modified version to full access, to check it in to the source control system. At that point that it's checked in, it's now accessible to some other developer to make their changes.
Q. Given that Sequent certainly had more than one engineer, if, for example, you've checked out your --

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and you're working on a particular version and then Engineer No. 2 is also working -- I guess Engineer No. 2 cannot also be working on that same version that you checked out.
A. Unfortunately, yes, they can. And herein lies the bigger challenge, in that it's perfectly acceptable for the developer who's checked it out to second a copy to another developer, and then they take upon themselves the task of reconciling any incompatible changes.
Q. Okay. So to be able to identify the changes which would include incorporating System V source code or object code, the first step, from what you've described, would be get the RCS logs?
MR. KAO: Objection.
MR. HEISE: Q. Is that correct?
MR. KAO: Objection to form.
THE WITNESS: That would be my approach.
MR. HEISE: Q. And if you didn't have access to the RCS logs, how would you go about determining what Unix System V source code, object code, or documents were incorporated, in whole or in part, into Dynix?
MR. KAO: Objection to form.
THE WITNESS: Again, I do not qualify as someone --
MR. HEISE: Q. I understand.

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A. -- who can do this; but my approach, if that was your question, would be to get some sort of comparison tool -- and there are now some very sophisticated ones that are being used by universities to detect plagiarism -- identify suspect areas, and then have a software expert identify whether the similarity that arose in that -- as a result of that activity was as a consequence of the movement of source code or simply because the algorithm required that particular expression.

Q. And just to put this in context, how many lines of code does Dynix -- a version of Dynix comprise?

A. Oh, I have no idea today. I would guess that it's on the order of 1 to 2 million.

Q. And what about the Unix System V code that you'd have to be comparing it against?

A. System V.2 is actually pretty small, if you exclude the utilities and the --

Q. Right.

A. -- things like that.

So it wouldn't be huge. It would be in the hundreds of thousands maybe.

Q. And then you would have to get this computer program to do the comparison for you?

A. Right.

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MR. KAO: Objection to form.

THE WITNESS: And most importantly, you'd have to -- once you had suspect areas, you'd have to have someone who is a technical expert in the expression of algorithms say, "Yeah, it's for sure that that's a copy of the source code because it's written so badly" or some other reason; or "Oh, no. There's only one way to express that."

And I gave an example earlier. There's really only a couple of ways to do digit production when you're printing, and so everybody's going to write the same code.

MR. HEISE: Q. Right. That, of course, is a time-consuming task?

A. Yes.

MR. KAO: Objection to form.

MR. HEISE: Q. With respect to Section 7 of your affidavit, you are making reference to Section 2.01.

A. Let me -- yes, I am.

Q. And in particular, you quote the portion that appears in the second sentence of 2.01.

A. Yes.

Q. I'm curious, in Section 2.01, you identify in the next sentence, you state:

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"I did not understand this language to give AT&T Technologies the right to assert ownership or control over modifications or derivative works prepared by Sequent, except to the extent that the licensed Unix software product was included in such modifications or derivative works."

Rather than telling us what you did not understand this language to give AT&T Technologies the right to, what did you understand it, in fact, did give AT&T the right with respect to Sequent?

MR. KAO: Objection to form.

THE WITNESS: My understanding of AT&T's rights were to the ownership, authorship and ownership of the source code that was delivered to Sequent and, to such extent as that source code was carried forward in the derivative work, that ownership prevailed; the consequence being that they had a right to control the distribution of the portions which they owned.

MR. HEISE: Q. Well, what I don't understand, sir -- and hopefully you can clear up for us -- is nowhere in Section 2.01 does the word "own" or "ownership" or "control" appear. So where is it that you're coming up with your understanding of what this language did not do?

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MR. KAO: Objection to form.

THE WITNESS: The keyword in my reading of Section 2.01 of the document is in the last phrase:

". . . provided [that] the resulting materials are treated hereunder as part of the original SOFTWARE PRODUCT."

MR. HEISE: Q. Right.

A. So "treatment," again, is an open-ended word. Treated in what context?

Q. What did you understand them to be treated?

A. So my understanding of the word "treated" here was with regard to confidentiality, not with regard to intellectual property ownership.

Q. So then what you understood on Section 2.01 was that it was not discussing ownership but, instead, was stating that the right to use includes the right to modify and to prepare derivative works, providing the resulting materials are treated confidentially?

MR. KAO: Objection to form.

MR. HEISE: Q. Is that what you're telling us?

A. Yes.

Q. Did Sequent maintain in confidence its Dynix source code?

A. To the best of my knowledge, we did.

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Q. Other than, I think you said, Oracle having a right to view Dynix's source code -- first, when Oracle got the right to view Dynix source code, did it do so pursuant to a license from Sequent?
A. It was -- I can't say that it was a license agreement. I'm sure there was a confidentiality agreement.
Q. Do you know whether Oracle or any other company that was allowed to see Sequent's Dynix code was also required to get a source viewing license from AT&T or any of its successors, including SCO?
MR. KAO: Objection to form.
THE WITNESS: I don't know that with certainty. I recall anecdotally that we did check with other companies with whom we partnered to do development that they had an AT&T license.
MR. HEISE: Q. So, to your knowledge, Dynix code was always maintained in confidence?
A. To the best of my knowledge.
Q. Do you know whether at any point in time Dynix code has not been maintained in confidence?
MR. KAO: Objection to form.
THE WITNESS: Now you have to be specific with respect to which portion of Dynix code.
MR. HEISE: Q. Any portion of Dynix code.

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A. And so as I've previously explained, certain elements of Dynix which were wholly created by Sequent have been made available. And as a consequence of the design of the operating system, specific pieces of the Dynix operating system are routinely made public.
Q. If we could, I'd like to address those separately.
You said certain elements of Dynix code have been made publicly available. What elements of Dynix code have been made publicly available?
A. The one that I explicitly know about is the parallel programming library.
Q. How was that made publicly available?
A. There was a little distribution kit made, and there was a little handbook published.
Q. And when was that done?
A. A long time ago. Maybe '85, '84 sometime.
Q. So sometime prior to entering into the agreement with AT&T?
A. I don't know the timing.
Q. Well, if it was '84, it would have been before; if it was '85, it would have been right around that time.
A. Yeah.
Q. Are you aware of any other elements of Dynix

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code that have been made publicly available besides this distribution kit?
A. Not explicitly.
Q. Do you know whether any portions of Dynix have been made available publicly by contribution of it to Linux?
A. I don't know that from own knowledge. I've heard that reported.
Q. From whom have you heard it reported?
MR. KAO: I guess I would caution you, to the extent you learned things from counsel, you're not to disclose that; but if you learned such information from anywhere else --
THE WITNESS: Yeah.
MR. KAO: -- you can testify to that.
THE WITNESS: I've seen some Web article, or something like that, that talked about various contributions.
MR. HEISE: Q. Other than the distribution kit, some Web article that you may have seen regarding Dynix code being contributed to Linux, are you aware of any other instance in which Dynix code was made publicly available?
A. None to my explicit knowledge.
Q. Why would -- why was it important to Sequent

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to keep the Dynix code confidential?
MR. KAO: Objection to form.
THE WITNESS: At the time -- times, of course, change; but at the time, Sequent had a performance and a stability advantage over its competitors because of the way in which we implemented the parallel processing and the resource allocation. And like all trade secrets, I mean, it has some value at the time.
Eventually, as happens in the computer industry, somebody figures out how to do it in another way and then you're done.
MR. HEISE: Q. Right. Now, you also indicated that you thought certain portions of Dynix, based upon its design, were routinely made publicly available. What specifically are you referring to?
A. I'm just referring to the release notes which describe defects, the configuration files, the header files, as we have talked about.
Q. You're not including source code in that?
A. Not including algorithmic source.
Q. Now, with respect to 2.01 and your understanding that it meant to keep the resulting materials as confidential, I still don't understand how it is that from that you are indicating your view that you did not understand this language to cover subjects

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such as ownership and control that are nowhere mentioned in there.
MR. KAO: Objection to form.
THE WITNESS: Well, I think that's my point, is that the word "treated" is pretty open-ended.
MR. HEISE: Q. And I understand that's your statement and that you've said you believe that to mean to be covering confidential --
A. Right.
Q. -- or confidentiality requirements.
A. So if you're asking how did I come to that understanding of the word "treated," it was through a conversation with the AT&T guys.
Q. Tell us about that conversation.
A. You know, I don't think I can recount it word for word, but it would have been along the lines of "You're certainly not trying to capture my source code."
And it's not something I would have done or even could have done.
Q. Well, when you say "capture," are you talking about that AT&T indicated to you that it would not be claiming ownership in --
A. Yes.
Q. -- Dynix?
A. That's correct.

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MR. KAO: Objection to form.
MR. HEISE: Q. Do you understand there to be a difference between ownership and control?
A. There can be.
Q. What's your understanding of the difference between ownership and control?
A. I mean, to own something means that I have the right to dispose of it as I choose. To control something -- examples might be restrictive covenants in a deed or something like that -- simply means that I have the ability to restrain certain actions.
Q. Would you agree that the ability to restrain certain actions would also include the right to dictate what an owner of the property can do with that property?
MR. KAO: Objection to form.
THE WITNESS: As in my example, yes.
MR. HEISE: Q. And included in your example, would it be that the fact that somebody owns something, they can be restricted in disposing of what it is that they own?
MR. KAO: Objection to form.
THE WITNESS: It's possible.
MR. HEISE: Q. Now, you conclude in paragraph 7 that you never -- I quote:
"I would never have signed an agreement that

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would grant ownership or control to AT&T Technologies . . . ."
And then you continue on. Is this a statement on your part as to what you would do, or is this a statement of Sequent's corporate position?
MR. KAO: Objection to form.
THE WITNESS: I think it can be interpreted both ways; that is, acting on behalf of Sequent, I was not authorized to bargain away the intellectual property rights of Sequent's investment of years in the Dynix source code.
As an individual -- and I hope that, you know, I wasn't being made a fool by the AT&T lawyers. As an individual, I did not interpret this language and the words of explanation that were given to me as meaning that AT&T had any -- was making any attempt to take control of my source code.
MR. HEISE: Q. Did you understand, when you viewed the word "treated" as restricting confidentiality, that that was going to place restrictions on your source code?
MR. KAO: Objection to form.
THE WITNESS: Yes, with regard to disclosure.
MR. HEISE: Q. And in fact, from what you've described to us, other than what you may have read in a

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Web posting, Dynix -- or excuse me -- Sequent did not make public Dynix that contained Unix System V at any point in time?
MR. KAO: Objection to form.
THE WITNESS: Not to my knowledge.
MR. HEISE: Q. Based upon what we've discussed so far, I'd like to clarify your understanding of Dynix.
Is it your understanding, as you sit here today, that Dynix or Dynix/ptx contains some or no part of Unix System V?
A. First, let me state, I don't know --
Q. Okay.
A. -- today. I have no idea.
Q. Well, how about let's then take you back to a time when were you there last in 1996.
A. In the past, I think I can state with reasonable confidence that Dynix did not contain any System V source code --
Q. Okay.
A. -- given its derivation.
I can be reasonably certain that Dynix/ptx had some elements of System V source code embodied in it; in particular, some of the utilities.
Q. Would you agree then that with Dynix/ptx

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embodying or containing Unix System V, that it was subject at least to this confidentiality restriction that we've been discussing?
A. Those portions --
MR. KAO: Objection to form.
THE WITNESS: -- which were derived from System V, yes.
MR. HEISE: Q. And we've already discussed about how you would, at least according to you, go about and identify those, quote, portions of Dynix.
A. Yes.
Q. Why is it that you believe it only restricts those portions as opposed to Dynix/ptx?
A. Because in my interpretation, the restrictions apply to those things which are owned by AT&T and do not apply to those things which are owned by Sequent.
Q. And according to the way that you're interpreting this, only if you found actual System V source code, that's the only thing that could not be -- that had to be treated confidentially?
A. Essentially. We've talked earlier about the methods and procedures issue as well.
Q. We're going to get to that, but I'm trying to just follow the format of your --
A. Yeah.

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Q. Okay. When you state that you don't know whether Dynix is a derivative work based on Unix System V, what's preventing you from being able to make that determination?
A. And you're now saying Dynix or Dynix/ptx?
Q. Well, I'm going to -- I'll clarify it as Dynix/ptx.
A. Okay.
Q. And I guess what I should do -- I'll let you answer the question as to Dynix/ptx; then I'll ask you another question.
A. Okay. Dynix/ptx is almost certainly a derivative work of Unix System V.
Q. In paragraph 8 of your declaration, sir, you start the sentence with "As I understood the Software Agreement between Sequent and AT&T Technologies . . . ," and then you continue on. I just want to focus on your first part there of --
A. Yes.
Q. -- "as I understood . . . ."
Is that from your reading of the agreement only, or is that from some other sources?
A. It relies upon my conversations with the AT&T individuals.
Q. In paragraph 9 is when you first used the word

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"Dynix." So I know you talked about this a little bit earlier, so I just want to see if I can make sure the record's clear.
Dynix starts out, and then after Unix System V is licensed, Dynix/ptx is created, but at the same time, they're both being sold. And eventually, does Dynix cease or does it just -- what happens?
MR. KAO: Objection to form.
THE WITNESS: Both products continue on. Ultimately, the marketplace for Dynix/ptx was larger than the marketplace for Dynix for Sequent.
MR. HEISE: Q. Given that statement, that the Dynix/ptx became the larger marketplace, did there come a point in time when Dynix just stopped being worked on or sold and that it was strictly Dynix/ptx?
MR. KAO: Objection to form.
THE WITNESS: I don't know that from own knowledge. I can't speculate. I don't know.
MR. HEISE: Q. In terms of just trying to give us a broad view of Dynix and Dynix/ptx, when Dynix/ptx is where the marketplace was going for the high-end business computing, what is the relative ratio between how much of Sequent was devoted to Dynix/ptx versus its former product of Dynix?
MR. KAO: Objection to form.

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THE WITNESS: Certainly within development, the bulk of the resources would have been working on Dynix/ptx because it was under development.
MR. HEISE: Q. Right.
A. And Dynix itself would have been getting, of course, bug fixes and customer support attention from development and probably enhancement. As I've previously described, the hardware platform evolved over time. So with each new hardware platform, then Dynix would get revisited to test it, make it compatible, take advantage of any new hardware.
Q. Would it be fair to say that more than 50 percent of the company's revenues, expenses, resources, and the like were devoted to Dynix/ptx once that was the product line that was being developed by --
MR. KAO: Objection.
MR. HEISE: Q. -- Sequent?
MR. KAO: Excuse me. Objection to form.
THE WITNESS: After some period of time, I would say yes to revenues. Expenses, I would say no to. SG&A was always bigger. And so it depends.
MR. HEISE: Q. Okay. That's a fair response. But I think you've made clear Dynix/ptx was on the upswing and Dynix without the ptx was on the downswing. Is that --

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MR. KAO: Objection to form.
MR. HEISE: Q. -- an accurate statement?
A. It was certainly not being evolved, yeah.
Q. In terms of your role as the vice president of engineering, we know that you at least signed one or more license agreements.
A. Yes.
Q. What else was encompassed in your role? What I'm getting at is to find out what, if any, work you were doing on Dynix or Dynix/ptx.
A. Okay. Let me answer the second question first --
Q. Okay.
A. -- which is that any work I might have done on Dynix/ptx would have been limited to writing a utility program or editing a text file for English grammar. You would certainly not consider me a contributor to Dynix/ptx in any way.
Q. Okay.
A. And I referred to myself as the programmer of last resort.
With regard to my duties, my job was essentially to maintain the organization. So to recruit new engineers, to sustain the engineers that we did have, to make sure that they received adequate training,

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that there were project plans in place, to monitor the project development schedules, to meet with customers, and to act as a part of the sales process, and to -- as a member of the executive team, to make strategic decisions.
MR. HEISE: Two things that are coming up right now. One, we need it take a tape change break.
THE WITNESS: Okay.
MR. HEISE: And also, I need to check out of the hotel.
THE WITNESS: Okay.
MR. KAO: All right.
THE WITNESS: All right.
MR. HEISE: If we could just go ahead and --
MR. KAO: Why don't we just --
MR. HEISE: -- make this a lunch break.
MR. KAO: -- go off the record then.
MR. HEISE: Yeah.
THE VIDEOGRAPHER: This marks the end of Tape No. 2 in the deposition of David Rodgers.
We're going off the record. The time is 11:59.
(Luncheon recess taken at 11:59 a.m.)
--oOo--

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AFTERNOON SESSION 1:02 P.M.
(Mr. James not present.)
THE VIDEOGRAPHER: We're back on the record. This marks the beginning of Tape No. 3 in the deposition of David Rodgers. The time is 1:02.
MR. HEISE: Q. Sir, just continuing on a little bit past where we left off, if I can direct your attention to Section 11 of your declaration.
A. Okay.
Q. You identified this as the confidentiality clause, and I think you indicated earlier that this was one of the areas -- although I may be misspeaking, so please feel free to correct me -- this was one of the areas that you thought had ambiguity in it or was not clear at the time that you signed the agreement?
A. Yes, particularly with regard to methods or concepts.
Q. Okay. Was there anything in Section 7.06 at the time that you were discussing and ultimately executed the agreement that you thought was unclear or ambiguous other than the section pertaining to methods or concepts?
A. No. Again, this paragraph is clear in its own sense, although it relies upon the software products definition that has some vagueness to it.

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Q. Right. But I'm just focusing you on anything else in 7.06 that you thought was unclear at the time that you were negotiating or people were negotiating and you ultimately executed the software agreement besides what you've identified as methods or concepts and now referring back to the definition of "software products" from Section 1.04. Anything else?
A. No. That's it.
Q. Would you agree, then, sir, that the restriction was with respect to all parts of the software products subject to this agreement and not just some parts?
A. Can you say that --
MR. KAO: Objection to form.
THE WITNESS: -- in a different way?
MR. HEISE: Q. Sure. In reviewing Section 7.06, it states that:
"[The] LICENSEE," meaning Sequent, "agrees that it shall hold all parts of the SOFTWARE PRODUCTS subject to this Agreement in confidence for AT&T."
Based upon that language, would you agree that Sequent was obligated to hold all parts of the software products subject to this agreement in confidence for AT&T as opposed to just some or -- as opposed to some

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parts?
MR. KAO: Objection to form.
THE WITNESS: Okay. So as I've previously said, with the comprehension that the parts of the software product, meaning the source code, the algorithmic portion of the source code, but not with regard to documentation, some documentation elements, some scripting elements.
So the short answer is no, I don't agree.
MR. HEISE: Q. Okay. So that's going back to your view that the definition of Section 1.04 and software products is not clear to you?
MR. KAO: Objection to form.
THE WITNESS: Well, I made an assumption at the time, clarified by conversation, about what was and was not in scope.
MR. HEISE: Q. And we've talked about that --
A. We've talked about that.
Q. -- at length.
And do you have anything further to add as to what you assumed or decided or heard was encompassed in software products that we've not already discussed this morning?
A. We've covered it.
Q. With respect to this statement in

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Section 7.06, that it includes methods and concepts as being something that will not be disclosed, who did you speak to at AT&T that indicated to you that that clause of restricting methods and concepts does not apply to Sequent?
A. Again, I don't recall the name of the individual. It was whoever Roger had on the call.
And as I think I mentioned earlier, I'm also relying upon my knowledge at the time that many of the methods and concepts for Unix were already disclosed by other -- other means.
Q. Well, did you or anyone at Sequent attempt to modify the agreement so that it no longer included the phrase "including methods or concepts utilized therein" so that it would be clear that Sequent was not, in fact, restricted in its use of the methods and concepts of Unix System V?
A. Not to my knowledge.
MR. KAO: Objection to form.
THE WITNESS: Sorry.
MR. KAO: Give me a chance to object.
THE WITNESS: Not to my knowledge. We were relying upon the assurances of AT&T folks on how they were going to enforce the language.
MR. HEISE: Q. And those assurances -- I

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think we've covered this -- were never in writing regarding this methods and concepts clause; is that correct?
A. Not to my knowledge.
Q. And the reason that you believed that the methods and concepts could not be restricted or was not subject to the restrictions of this agreement was because they appeared in the public?
A. Many of them, yes, had already appeared in public.
Q. Okay. Could you identify for us the methods and concepts of Unix System V that publicly appeared that were used in Dynix/ptx?
MR. KAO: Objection to form.
THE WITNESS: I can give you an example. I certainly can't enumerate all of them.
MR. HEISE: Q. If you could just tell us all that you can identify for us.
A. So, for example, the notion of a treed directory structure, which is fundamental to Unix, is well documented in lots of literature. The concept of an I-node as a way of traversing a directory tree. The concept of dynamic memory allocation. The concept of a process identifier.
Q. Did you say a process identifier?

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A. Process identifier, PID. I'm trying to think of -- the concept of a file handle.
There are a whole series of concepts associated with Unix around the file system, basically treats the file system as an extended text string without any real delimiters.
Q. Anything else, sir?
A. I'm running out of -- you know, if you get me long enough, I might come up with some more, but . . .
Very many of the concepts are documented and well explained in the text that were available at the time and certainly in text available since.
Q. Okay. I noticed in introducing each of these categories, you identified them as the concept, for example, of a treed structure or as an I-node.
What about the method of actually implementing that concept? Was that also publicly displayed in these texts and other public forum that you --
A. In many cases, yes.
Q. So you could see the actual manner in which the source code was written for I-nodes in System V in these texts?
A. Right. You would typically find a fragment of C language programming that would show tree traversal or something like that.

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Q. And when you talk about a fragment, what do you mean by "a fragment"?
A. It will be less than all of a source module, but the core lines of code in a source module that are actually doing the work.
Q. Why would it be limited to merely a fragment in these texts as opposed to the entire file?
MR. KAO: Objection to form. It calls for speculation.
MR. HEISE: Q. You can answer.
MR. KAO: You can answer the question.
THE WITNESS: Because there's a lot of chaff in a source module. There's usually about a dozen lines of commentary that have a copyright notice and authorship indication and, you know, a few comments about what the intent of the module is.
And very often, particularly if you're just trying to be illustrative, you don't need to provide all the symbol definitions. Those are things you can establish by context as you're reading the code.
MR. HEISE: Q. So when you've been talking about fragments, it's eliminating copyright notice, authorship, comments, and definitional portions of that particular file?
A. Yes.

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MR. KAO: Objection to form.
MR. HEISE: Q. Is there anything else that would be eliminated from these fragments besides actual source code?
MR. KAO: Objection to form. Are we talking about the context of these books that he's talking about?
MR. HEISE: He's been talking about these methods and concepts that appear publicly in books.
MR. KAO: Okay.
MR. HEISE: And I'm just trying to establish what it is that he believes is in these books and what isn't.
Q. So you've identified what you've been using the term "fragments" of it appear. And a fragment, at least as I understand it from you, is the source code, taking away the copyright, the authorship, comments, and definitional section.
Is there anything else that does not appear in these fragments, or are you telling us that if you strip all that, you're left with all the source code that appears in a given file?
A. Now it will depend upon the example and the author. Sometimes the author will use ellipses, omitting a repetitive section of the code. So, for

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example, if the code is a case statement, where it wants to treat -- where the code is intended to treat a series of values -- you know, let's say it's the digits from 0 to 9 -- the author might show the code for digit 0, digit 1, skip all the digits up to 9, and just show the code for digit 9.
Q. If all of the necessary information appears in these public texts, why would a company like Sequent bother to enter into a license to get what's otherwise publicly available?
MR. KAO: Objection to form.
THE WITNESS: First of all, the presumption that all of the code appeared in the text is incorrect. It doesn't.
MR. HEISE: Q. Was there any part of the code that was necessary that did not appear in the text?
MR. KAO: Objection to form.
THE WITNESS: Many parts.
MR. HEISE: Q. With respect to the read-copy update at Sequent, were you -- were you at Sequent when that technology was written?
MR. KAO: Objection to form.
THE WITNESS: I think not.
MR. HEISE: Q. Do you have any understanding about read-copy update, how it interfaces with a kernel,

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where it's located, anything like that; or is that, since it was not during your tenure, something that you are not familiar with?
A. I'm not familiar with.
Q. Fair enough. How about NUMA, Non-Uniform Memory Access? Were you involved in the authorship or creation of that at Sequent?
A. In the sense of architecture, yes. In the sense of coding, no.
Q. In terms of architecture, is it your understanding that this NUMA technology operates inside the kernel?
A. NUMA implementation appears at many layers. It appears at the hardware layer, requiring some specific behaviors of the cache and the bus. It appears in the operating system that requires some specific behaviors with regard to memory allocation and process dispatch and I/O handling. It appears occasionally in certain kinds of applications, such as database applications, that need to be cognisant of the underlying architecture.
Q. The NUMA technology, was that in Dynix/ptx?
A. It was eventually in Dynix/ptx. It wasn't initially in Dynix/ptx.
Q. Is started in Dynix, is your understanding?

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A. That's a harder question. I don't know, is the best answer.
Q. Does NUMA appear in Dynix/ptx?
A. NUMA support certainly appears in Dynix/ptx.
Q. Well, when you talked about NUMA appearing at various levels, hardware, operating system, at the operating system level, does it appear in the kernel?
A. It will appear principally in the kernel.
Q. But with the NUMA that appears, I think you said, principally in the kernel at the operating system level, how does it interface with the existing kernel?
MR. KAO: Objection to form.
THE WITNESS: Not clear what your question is.
MR. HEISE: Q. Does the kernel have to be modified in any way to accept the NUMA code or technology that's being incorporated?
MR. KAO: Objection to form.
THE WITNESS: Yes.
MR. HEISE: Q. When you talk about -- I think you used this word earlier, a code module? Is that my making things up, or --
A. No.
Q. -- is that something that you said earlier?
A. Right.
Q. Okay. Trying to get an understanding on your

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view of what did or did not have to be maintained in confidence or could be made public or disposed of, et cetera. If -- when you're using the phrase "code module," could you tell me what you mean by that? Is that an entire file? Is it a part of a file? I'm just trying to get a handle on that.
A. First of all, it would almost certainly be a file. It might be multiple files, but it would be at least one file.
And under most circumstances, a module is a piece of code that implements a function. It's not complete by itself. It has to be bound with other functions and bound into the overall operating environment, but it would implement a specific function.
So, for example, malloc, which is the way that memory is allocated in the Unix operating environment, is a module that appears in lots of Unixes; but the implementation of malloc, which is give me a piece of virtual memory, will make some calls on lower-level system services that will actually do the allocation of physical memory, the backing store -- meaning the disk that keeps the physical memory when it's not in the main memory -- allocate page table entries, potentially makes notice to -- of the kind of usage of the memory allocation. If it's for I/O, it's special. And that

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part of the module could be completely different from one Unix to the next.
So if you looked at it from the top, they all look like malloc. If you look at it from the bottom, they all look different.
Q. So using memory allocation as an example of a code module, was that memory allocation from Unix System V incorporated into Dynix/ptx, to your knowledge?
A. I don't know, is the accurate statement. My guess is not.
Q. Okay. Can you identify for us a code module that was used in Dynix/ptx?
MR. KAO: Objection to form.
THE WITNESS: Not specifically.
MR. HEISE: Q. Well, then let's talk about code module X.
A. Okay.
Q. If we have code module X that is put into Dynix/ptx, what is your understanding as to what Dynix can do with code module X that came from Unix System V?
MR. KAO: Objection to form.
THE WITNESS: Okay. Whatever the module might be, it will have some application programming interface; it will have some exposed symbol, which is the way in which it's called; and it'll have some parameters, in

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most cases, that are specified in the documentation.
MR. HEISE: Q. So if code module X is incorporated into Dynix/ptx from System V, is it true that it contains then Unix System V code in that module?
MR. KAO: Objection to form.
THE WITNESS: It's possible.
MR. HEISE: Q. Okay.
A. It's not required.
Q. Okay. So just by way of example, then, if we did have code module X that has Unix System V source code in it and that is put into Dynix, is it your understanding that the Unix System V code that appears in that code module X must be maintained in confidence?
A. Yes, if it were copied from the System V source.
Q. What if the -- in the process of taking the Unix System V code module X and putting it into Dynix, would that require that additional lines of code be written so that it would function with the Dynix/ptx system?
A. Quite likely.
Q. Okay. That's what I assumed, but I just wanted to be sure.
A. And just by completeness, if it's a module that doesn't make sense in the Dynix/ptx context, you

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might subtract lines of code. That is, it might simply return successful.
Q. Okay. In that situation where, however, you have to add lines of code to this code module X so that it functions properly with Dynix/ptx, what is your understanding as to what Sequent's obligations are to maintain in confidence the source code? In the example I just gave you, you've got source code that Sequent wrote so that it would work, and then you've got the original Unix System V source code that appears in code module X.
A. Right. On the presumption that it's a single file, if it were a mix of Unix System V code and Sequent-authored code, most likely the entirety would be held in confidence because it would be hard to expose only the changed lines.
Q. Okay. What about if, after going through numerous changes because of programmers dealing with it through Version 1 to Version 2, the Unix System V code lines don't appear as they did in Unix System V? What, if anything, is Sequent obligated to do now with that code module X?
MR. KAO: Objection to form.
THE WITNESS: In my reasoning, if the function X is now performed in some other way, including the null

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way, then it ceases to have any System V content and it's disclosable at the choice of Sequent, of course.
MR. HEISE: Q. So if the lines get rewritten so that they no longer appear as they were in Unix System V, at that point Sequent is no longer obligated to maintain it in confidence?
A. Now it's on a fine point. That is, you know, did you just change A to B? I wouldn't consider that to be a sufficient difference. If the module was rewritten to implement the function with a new algorithm and there were no lines of the original code, then I would say yes.
Q. Even though it's performing the same function as originally?
A. Right. The functions are specified by the operating system interface.
Q. Do you make any distinction in this example as to whether we're taking about C code versus header file code?
MR. KAO: Objection to form.
THE WITNESS: Yes. I mean, again, you can have the same either huge difference or small difference as the possibility. But because header files generally have to be exposed in order to allow use, they're treated differently.

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MR. HEISE: Q. If there was a code module that -- let's call it code module Y, that contains structures and sequences and organization as it appears in System V, is that, according to your understanding of the software agreement, restricted in any manner?
MR. KAO: Objection to form.
THE WITNESS: It would depend. If the reason for the similarity were essentially that there wasn't any other way to do it, then it would hinge on who authored it and when. If the reason the similarity was there was because it was just copied, then yeah, I would agree that that would be subject to the constraints.
MR. HEISE: Q. So if you have code module Y that has structure, sequence, and organization that came from Unix System V and it's not the only way to do something, your understanding is that that would be restricted and would have to be maintained in confidence; is that correct?
MR. KAO: Objection to form.
THE WITNESS: Yes.
MR. HEISE: Q. What if over time that same code module Y that contained the structure, sequence, and organization from System V was rewritten so many times between Version 1 and Version 2 that came out from Sequent so that it no longer followed that original Unix

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System V structure, sequence, and organization? Would you consider that something that also had to be maintained in confidence, or could that be provided publicly?
MR. KAO: Objection to form.
THE WITNESS: Generally, no.
MR. HEISE: Q. No, it would not need to be maintained --
A. Would not need to be maintained.
Q. -- in confidence?
No, it would not need to be maintained in confidence?
A. Yes. Or yes to a no.
Q. Yes, I am correct that would not need to be maintained in confidence, according to you?
A. Yes.
(Mr. James joins the proceedings.)
MR. HEISE: Q. Are you aware of any publications that provided source code for Unix System V, Release 4.0?
A. I have no awareness.
Q. Well, you had mentioned earlier -- I need to maybe look at my notes -- that you had -- you had a book -- I think it was the Unix System Primer.
A. Mm-hmm.

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Q. Is that the one that you said you had in your possession?
A. Yes.
Q. -- that identified Unix.
So, first, is this -- when you talk about that, are you talking about identifying fragments in Unix?
A. Yes.
Q. Do you know whether that Unix System Primer was identifying source code from Unix System V, Release 4.0?
A. I don't know. I don't think so because it appeared much earlier than System V, Release 4.
Q. When is the book that you're talking about, this Unix System Primer?
A. Oh, 1983.
Q. Were there ever times in which Sequent or AT&T did address specific terms of the license in writing?
MR. KAO: Objection to form.
THE WITNESS: I'm not clear what the question is.
MR. HEISE: Okay. I'll be glad to try and rephrase it.
Q. We've talked at length about certain issues that you said you discussed and learned the intent of

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AT&T; for example, definition of "software product" or what needed to be maintained in confidence, whether it was methods or concepts. And all those were oral, nothing in writing; is that correct?
A. That's correct.
Q. So my question is: Were there ever times when something was put in writing about any aspect of the contractual relationship between Sequent and AT&T, either from AT&T or from Sequent?
MR. KAO: Objection to form.
THE WITNESS: Yes. Again, I don't have a recollection of the date; but at some later time, AT&T contracted with Sequent to do development work which required disclosure of the Dynix source code to AT&T. And so there was a document about that time.
MR. HEISE: Q. Okay. How about with respect to the Unix System V code? So I understand your example was with respect to the Dynix code.
A. Mm-hmm.
Q. So with respect to the Unix System V code that was licensed from AT&T, was there ever anything in writing between AT&T and Sequent pertaining to this Exhibit 1 to Exhibit 100?
A. Not to my knowledge.
MR. HEISE: Let me hand you a couple of

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documents and just see if this refreshes your recollection at all.
One, I only have one copy of, so we'll mark that as 101. And the other I do have copies for the whole gang, which we'll mark as 102.
And you can just put the sticker over it.
THE WITNESS: Thank you.
(Whereupon, Deposition Exhibits 101 and 102 were marked for identification.)
MR. KAO: I guess we should give that to her first.
So this one is 102?
MR. HEISE: Yes.
MR. KAO: Okay.
MR. HEISE: And this is going to be 103, which -- oh, that's your copy.
(Whereupon, Deposition Exhibit 103 was marked for identification.)
MR. HEISE: And 101 is the sole copy. I apologize for that.
MR. KAO: You want to start with 101?
MR. HEISE: Yes, but I'm going to have to ask you to give it back to me since, as I mentioned, it was the only copy and it's not stapled and all sorts of other maladies.

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Q. This document makes reference to an April 1983 software agreement as modified, and it's regarding Release 2.0.
A. Okay.
Q. And it appears to have a signature for Otis Wilson and for yourself, talking about various terms of that earlier 1983 agreement.
A. Okay.
Q. Is that how changes would be communicated between Sequent and AT&T pertaining to the agreement, whether it's the earlier version of the 1983 or these 1985 agreements that are attached to your Exhibit 100 declaration?
A. That's what I --
MR. KAO: I object to form. And could I just have a chance to look at the document --
MR. HEISE: Here you go. Absolutely.
MR. KAO: -- along with the witness --
MR. HEISE: Yeah.
MR. KAO: -- before we ask questions about it, since we don't have a copy?
MR. HEISE: Q. Are you done?
A. Yes.
Q. Have you had to time to look at it? Because I'm not really asking you substantively about the

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contents of the document as much as I am about trying to understand the way in which Sequent and AT&T would operate when there were anything that needed to be addressed regarding the agreements.

This one, obviously, Exhibit 101, references an earlier agreement between AT&T --

A. Right.

Q. -- and Sequent.

Were you involved in the negotiation or execution of the earlier agreement, the 1983 --

A. Yes.

Q. -- that's referenced?

A. I'm presuming that we're talking about --

Q. Well, this references a 1983 agreement, and that's why -- I'm just trying to get clarification on that first.

A. I have no recollection of that.

Q. Okay. Then going back to my original question, is this your understanding as to how AT&T and Sequent would operate when they were addressing terms in the documents; namely, there would be this correspondence from AT&T and then you or someone at Sequent would sign and return the document?

MR. KAO: Objection to form.

THE WITNESS: I presume so. I mean, I don't

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have a recollection. I'm trying to remember now. I don't think I joined Sequent until July of 1983. So this -- the agreement that's referred to here would have been executed by somebody else.

MR. HEISE: Q. Okay.

A. And with regard to is this how we would exchange notes, I think we probably would have exchanged -- when we requested something different, we probably would have phoned them, said "How do you want to deal with this?"

Q. And after a phone call was made, it would be memorialized in a letter and then you would sign it and return it back to AT&T? Was that the procedure?

MR. KAO: Objection to form.

THE WITNESS: I don't recall that as an ongoing process.

MR. HEISE: Q. Well, if you could, sir, turning your attention to Exhibit 102, which does make reference to Exhibit 1 of your declaration, the software agreement.

A. Right.

Q. Apparently somebody at Sequent had asked for a particular copy of a book.

A. Right.

Q. And then, again, is that your signature that

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appears on the document?

A. It is my signature.

Q. And again, was this the procedure that would be followed to identify any issues between AT&T regarding the software agreement; namely, a letter from AT&T that would be countersigned by you?

MR. KAO: Objection to form.

THE WITNESS: Actually, this exhibit gives me one other piece of recollection, which is that it was Ira Kistenberg who was on the phone calls most of the time.

MR. HEISE: Q. Is Mr. -- could you spell the last name?

A. K-i-s-t-e-n-b-e-r-g.

Q. You're reading his name off the --

A. Off the --

Q. -- bottom of the document?

A. Off the document.

Q. So he was the AT&T person --

A. Right.

Q. -- who was on the phone calls?

A. So, but to answer your question, this would be the form that we would take when we asked for something additional.

Q. Okay. And what about Exhibit 103?

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THE WITNESS: Do you have this one?

MR. KAO: Yeah.

MR. HEISE: Q. Is that your signature that appears on 103?

A. Yes, it is.

Q. While you're taking the time to review it, my question is: When terms were changed or clarified or discussed, is this the procedure that would be followed: AT&T would provide you with correspondence and you would countersign it and return it?

A. That would certainly --

MR. KAO: Object to form.

THE WITNESS: That would certainly be the case with regard to correspondence.

Okay.

MR. HEISE: Q. You've had the opportunity to --

A. I did read it, yes.

Q. -- review this?

Having had the opportunity to review Exhibits 101, 102, and 103, just to make sure I covered it for all three, it does have your signature on each of these exhibits; is that correct?

A. It is mine.

Q. And with respect to 103, this was a -- this

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was correspondence regarding the sublicensing agreement, meaning the one for the binary --
A. That's correct.
Q. -- code?
And was this an example of how terms would be discussed or clarified when AT&T and Sequent concluded that something needed to be clarified?
MR. KAO: Objection to form.
THE WITNESS: In this particular case, I believe that this was a general -- a general change in terms that was not initiated by Sequent. There was nothing new requested by Sequent. They obviously had somebody whose behavior they didn't like and they wanted to clarify.
MR. HEISE: Q. And Sequent agreed to it by indicating --
A. By acknowledging the letter.
Q. -- by indicating and countersigning the document and returning it to AT&T; is that correct?
A. Yes, we did.
Q. Having had the opportunity to review Exhibits 101, 102, and 103, does this refresh your recollection at all as to written correspondence being the manner in which changes or clarifications to the various agreements would occur; namely, they would be

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done in writing and countersigned by Sequent or somebody at Sequent?
MR. KAO: Objection to form.
THE WITNESS: If there was a material change, if it was an increment of rights or content.
MR. HEISE: Q. Continuing on, sir, with your declaration, in paragraph 14, again, you start a sentence with "As I understood the agreement . . . ."
Is that from your reading of the agreement or from any other basis?
A. It's based on having read the agreement, having had the conversations with the parties.
Q. And then in paragraph 15, we touched on this before, about the phrase from Section 7.06 of "available without restriction to the general public" not having a particular definition or example attached to it. Do you recall that?
A. Yes.
Q. You indicate in your declaration under oath that you believe there are a number of circumstances that would meet the definition of "available without restriction to the general public"?
A. Yes, I do.
Q. The example that's provided here, was that provided by the lawyers or is that an example that was

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provided by you?
A. The example was mine.
Q. Did you provide any other examples that do not appear in your declaration?
MR. KAO: To -- let me -- let me ask. Are you asking did he provide other examples in discussions with counsel, or did he provide other examples in the declaration, which I think speaks for itself?
MR. HEISE: I will clarify.
Q. Prior to orally agreeing to have Cravath, Swaine & Moore, IBM's lawyers, represent you, did you have any discussions with them about other examples from you, not from them, of instances that would meet the definition of, quote, available without restriction to the general public?
A. I don't have a specific recollection. In recollecting the conversation, I explicitly remember mentioning books, and I probably -- this is speculation -- I probably would have mentioned public speaking engagements by AT&T personnel.
Q. Backtracking for just one second, but you just brought it up a few minutes ago and it jogged my memory, you talked about this situation where Dynix code was revealed to AT&T. Was that pursuant to a written agreement?

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A. Yes, it was.
Q. When's the last time that you looked at that agreement?
A. I don't think I ever looked at that agreement.
Q. Okay. I guess I assumed something that did not occur.
How is it that you became aware of the terms of that agreement between AT&T and IBM for AT&T to review the Dynix code?
MR. JAMES: AT&T and Sequent?
MR. KAO: Objection to form.
MR. JAMES: You said "AT&T and IBM."
MR. HEISE: Thank you. I will go ahead and start that one over.
Q. How is it you became aware of any of the terms between AT&T and Sequent for AT&T to view the Dynix code?
A. Again, no specific recollection. The likely occurrence was that Michael Simon spoke at an executive staff meeting about the agreement with AT&T, and my part in that would be to execute on the fulfillment.
Q. Okay. Are you aware of any books, going back to your paragraph 15, that provide source code from Unix System V in greater than a fragment?
A. I personally am unaware of them. It would not

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be shocking to me that there are texts in use at universities.
Q. Do you have any understanding, sir, as to the confidentiality obligations of universities that have Unix System V?
A. No, I do not.
Q. Do you know one way or the other whether universities, its employees, and students are obligated to maintain in confidence Unix System V and all the other items identified in the agreements between AT&T and the universities?
A. I don't know that.
Q. You indicated that another possible example of situations where something would become available without restriction to the general public would occur because of speaking engagements.
A. Yes.
Q. Could you tell us what you're referring to there?
A. There, as there are in many industries, industry gatherings, industry events where technical people will give talks on how a particular problem was solved or how a particular marketplace need was addressed. And it was very frequently the case that a developer from AT&T or other company would stand up and

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talk about how they did something really cool.
Q. In these discussions, would they provide the entire source code for that particular item that they may have been discussing?
A. It's not likely, because in a public speaking event, you're limited as to time and you're not likely to go through it line by line. However, you'll -- in such a case, you'll usually provide the key block diagram of how the module's put together and then some of the key code fragments to say, "Here's how this problem was solved."
Q. In your experience, did you ever see -- did you ever attend any speaking functions where AT&T personnel talked about source code?
A. I'm sure I did. I don't remember a specific incident.
Q. Do you recall any instance in which more than just source code fragments were ever revealed at any of the engagements that you attended?
A. No, I can't imagine that.
MR. HEISE: If we could just take a short break and I'll check my notes, and --
THE WITNESS: Sure.
MR. HEISE: -- we might get you out of here.
THE WITNESS: Awesome.

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MR. HEISE: Thank you, sir.
THE VIDEOGRAPHER: Going off the record. The time is 1:50.
(Recess taken.)
THE VIDEOGRAPHER: We're back on the record. The time is 2:11.
MR. HEISE: Q. Sir, I just have a few quick areas I just want to touch base on.
When you gave us your employment history from Carnegie-Mellon all the way through IP Unity, were there any breaks between times when you, for example, went from Digital to Sequent or Sequent to Compaq that are not covered?
A. The only break in my employment was after I left Brightlink and before I started at IP Unity.
Q. What did you do during that time?
A. I took the summer off and looked for a job.
Q. Okay. Because Brightlink decided it was time to go belly-up?
A. Yep.
Q. All right. What was the reason that you left Sequent?
A. Essentially, because Sequent was no longer sort of at the forefront of enterprise application innovation.

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The context here is that my expertise over time at Sequent had become IT oriented. My stint as the CIO and as the professional services guy gave me a lot of insight into how businesses were using open sy stems technology and enterprise scale applications like SAP and Oracle. And at that point in time, Compaq was making a big push to partner with those application providers and to use the Windows NT platform as a vehicle to kind of crash the cost of enterprise computing, and that seemed like an innovative thing to do.
Q. Okay. What about this Roger Swanson? Do you know why he left Sequent?
A. I don't. In fact, I don't even know when he left Sequent.
Q. Okay. How is it that you believe he's in Beaverton or Portland, Oregon, area?
A. I think I maintain sort of peripheral contact with ex-Sequent employees through an Internet mail group called Ex-Sequent, and I've seen Roger a ppear there in some postings.
Q. Got it. Then the last thing I just wanted to ask you about, and I meant to earlier, is in paragraph 5 of your declaration.
A. Okay.

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Q. Specifically what I'm not understanding is, in your declaration you state:
"Although I did not personally negotiate the Sequent Agreements with representatives of AT&T . . . I carefully reviewed the agreements myself with other Sequent employees before executing them . . . ."
And then you continue on.
A. Yes.
Q. In reading this, it doesn't indicate anywhere in here that you talked with AT&T personnel. Because you specifically state that you did not personally negotiate the Sequent agreements with AT&T personnel.
Is that just an inaccurate statement as it appears in No. 5?
MR. KAO: Objection to form.
THE WITNESS: I certainly did make contact with AT&T personnel during this process. And the intent of this statement was just to say that I didn't participate in the drafting; I did participate in the review.
MR. HEISE: I don't have anything further at this time.
You may or may not be aware that we were in court earlier this week about your deposition, and for

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the reasons that were stated at length there, we're going to reserve the right to come back when we get additional documentation. But for today, I very much appreciate the time that you've given us, sir.
THE WITNESS: Thank you.
MR. KAO: I just have a few questions that I'll go through with you. But --
THE WITNESS: Okay.
MR. KAO: -- although I may be sitting over here, you can pretend like I'm sitting in Mark's seat.
MR. HEISE: Exactly. I'll be the puppet master.
FURTHER EXAMINATION BY MR. KAO
MR. KAO: Q. The first question I had was: With respect to Dynix/ptx, are you aware of what third-party code, apart from code written by Sequent, is in Dynix/ptx?
A. I don't have specific knowledge. I can say that there are pieces of third-party code in Dynix/ptx, one element of which was written by Oracle. And there are others, but I don't know them specifically.
Q. Based on your understanding of the licensing agreement, would AT&T have the right to control in any way Sequent's use or disclosure or distribution of that third-party code in Dynix?

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MR. HEISE: Objection to form.
You may answer.
MR. KAO: Q. Dynix/ptx, I should say.
A. I would hope not. That's certainly not my interpretation of the licensing agreement.
Q. In your telephone discussions with representatives of AT&T, did you believe that the -- well, strike that.
Let me ask it this way: When you were having phone discussions with AT&T about the Unix System V license that you were entering into, did you have discussions regarding changes that Sequent wanted to make to the agreement?
MR. HEISE: Objection to form.
You may answer.
THE WITNESS: No. It was just trying to clarify what was the intent of the language and how they were going to enforce it.
MR. KAO: Q. Did you yourself feel any need to document in writing your discussions with AT&T Technologies regarding the license agreement?
A. I did not.
Q. And why is that?
A. Perhaps naïvely, I took them at their word.
Q. Do you know if anyone on your staff at Sequent

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attempted to document discussions with AT&T?
A. It's possible, but not to my knowledge.
Q. Now, if you can look at the software agreement again with me, when Mr. Heise was questioning you, you looked at Section 1.04 --
A. Yes.
Q. -- of the agreement. Do you remember that?
A. Yes.
Q. And I believe you testified that that -- at the time that you executed this agreement, you believed that that particular section was vague. Do you remember that testimony?
A. Yes, I do.
Q. Can you explain to me in what sense you believe this section to be vague?
MR. HEISE: Objection.
You may answer.
THE WITNESS: Okay. The description of computer programs and documentation, the capture in that language is too broad to be practical. As we've discussed previously, the essence of Unix requires that some of the source be exposed and modifiable by the customers. Certainly the documentation has to be exposed to customers. And so it's just overbroad.
MR. KAO: Q. Did you have -- do you recall

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specific discussions you had with AT&T Technologies regarding this Section 1.04?
A. I don't have a specific recollection, only clarifying that their intent was not to make the source code unusable.
Q. In other words, you don't remember the exact words they told you?
A. That's correct.
Q. But you do remember discussions where you talked about this section?
A. Right.
MR. HEISE: Objection.
THE WITNESS: We clarified the intent.
MR. HEISE: Objection to form.
I know she doesn't want two of us speaking at the same time. She definitely doesn't want three of us speaking at the same time.
MR. KAO: Q. Let me ask it this way: Can you just tell me what discussions you remember having with AT&T generally about this Section 1.04?
MR. HEISE: Objection.
You may answer.
THE WITNESS: Only that the intended interpretation of this paragraph was not to restrict our ability to create the derivative work or to sell a

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usable product.
MR. KAO: Q. Can you explain what you mean by that?
A. That those things which are necessary to be exposed to make use of the resulting Dynix/ptx or Dynix would be within the interpretation of this paragraph.
Q. I'm not sure I'm understanding your answer.
What materials did you understand AT&T to consider part of the software product?
MR. HEISE: Objection.
You may answer.
THE WITNESS: The language is inclusive of object code, source code, and documentation. We clarified with AT&T that that would not be construed to limit our ability to expose those pieces of source code that were necessary for customization or those pieces of documentation that were necessary for use.
MR. KAO: Q. And I think in -- when you were discussing this issue with Mr. Heise, the source code that you were referring to were header files?
A. Among them, yes.
Q. Now, did you understand this Section 1.04 to include, as part of the software product, any materials or any source code developed by Sequent on its own?
A. I did not.

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MR. HEISE: Objection.
You may answer.
THE WITNESS: Sorry.
MR. KAO: Q. Did you have any discussions with AT&T regarding whether AT&T considered the software product to include source code that Sequent developed on its own?
MR. HEISE: Objection.
You may answer.
THE WITNESS: I don't recall a specific conversation.
MR. KAO: Q. Do you recall general discussions?
MR. HEISE: Same objection.
THE WITNESS: No, I don't recall a specific conversation. I recall being satisfied that our -- we were not bargaining away the rights to our intellectual property.
MR. KAO: Q. And how did you become satisfied with that?
A. Through a verbal assurance from someone at AT&T.
Q. Now, in response to questions from Mr. Heise, I believe you testified that Sequent attempted to maintain the Dynix/ptx source code confidential. Is

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that correct?
A. That's correct.
Q. As you understand the license agreements with AT&T for Unix System V, did Sequent attempt to maintain the Dynix/ptx source code confidential because it was obligated to under the agreement or because it chose to do so as a matter of business practice?
MR. HEISE: Objection.
You may answer.
THE WITNESS: Both of those.
MR. KAO: Q. Can you explain what you mean by that?
A. Yes. Certainly, the Dynix/ptx source code that was derived from AT&T was required to be maintained in confidentiality; and for that matter, any third-party contributions that were similarly covered would have had to be maintained in confidentiality.
And then in my view, Sequent was free to do what it would with its own source code; but as I explained earlier, we had, at least for the time, a competitive advantage in performance and stability that we wanted to maintain as a trade secret.
Q. Did Sequent maintain its Dynix/ptx source code confidential from AT&T Technologies?
A. It did.

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MR. HEISE: Objection.
You may answer.
MR. KAO: Q. If AT&T requested the Dynix/ptx source code, would you have provided -- would Sequent have provided that source code to AT&T without a license from Sequent?
MR. HEISE: Objection.
You may answer.
THE WITNESS: With an appropriate nondisclosure document or a license.
MR. KAO: Q. Did you understand the license agreement that you entered into with AT&T for Unix System V to give AT&T the right to obtain the source code that Sequent developed on its own without any license agreement from Sequent?
MR. HEISE: Objection.
You may answer.
THE WITNESS: No.
MR. KAO: Q. Now, in response to a question from Mr. Heise, you stated that you believed that Dynix/ptx was a derivative work of Unix System V. Do you remember that testimony?
A. Yes.
Q. Can you tell me what you base that answer on?
A. Dynix/ptx, because it was -- it had a System V

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personality, would be required to contain, at the very least, the utilities that are a part of Unix System V that are not a part of the Berkeley Standard Distribution.
Q. Do you know if Dynix/ptx today still contains that Unix System V code?
A. I don't know it from personal knowledge. I would make that assumption.
Q. During the time that you were at Sequent, did you know, based on personal knowledge, that there was any Unix System V code contained in Dynix/ptx?
MR. HEISE: Objection.
You may answer.
THE WITNESS: I did not inspect the code to know that to be true.
MR. KAO: Q. Do you recall discussing with Mr. Heise the NUMA technology earlier?
A. Yes.
Q. Can you explain for me what the NUMA technology is?
A. NUMA is an acronym for Non-Uniform Memory Access, and it's a way of constructing multiprocessor, multimemory computer systems that give the appearance of having a single shared memory, but the physical realization is multiple distributed memories.

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The Non-Uniform Memory Access refers to the speed of access for memory that's attached directly to a particular processor being faster than memory that's attached to another processor in the cluster. It's a technology that existed a long time before and independent of Unix or any other operating system.
Q. Do you understand the NUMA technology that Sequent developed for Dynix/ptx to be based on any code contained in Unix System V?
MR. HEISE: Objection.
You may answer.
THE WITNESS: It's almost certainly not based on Unix System V code.
MR. KAO: Q. And why is that?
A. There's no contemplation of inhomogeneous memory access or distributed memory in Unix System V.
Q. Are there any methods or concepts within Unix System V upon which the NUMA technology that Sequent developed for Dynix/ptx are based on?
A. There are certainly related concepts in Unix System V. We mentioned earlier interprocess communication. That is a concept that's useful independent of Non-Uniform Memory Access. But certainly, an application that wants to take advantage of a NUMA machine will lean more heavily on it because

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it's oriented toward communication that doesn't depend on memory speed of access.
Q. I guess I don't -- I mean, I may be lost in the technology. Is the NUMA technology based on those methods or concepts within Unix System V?
A. No, it is not. I'll give you a little bit more.
We talked earlier about different programs wanting to make access to a common resource. It doesn't matter what that resource is.
In a shared memory architecture, you can utilize a relatively inefficient synchronization technique called a spin lock, where all the processes that want to access the resource keep looking at a common memory location and waiting for their number to come up essentially.
In a Non-Uniform Memory Access machine, that would be very inefficient, because except for the processor that happened to be close to the memory location that was being referenced, all the other processors would have to be using some expensive access mechanism to look at that memory location.
So in a NUMA architecture, it's more efficient to use interprocess communication, which is more of a wake-me-when-it's-my-turn mechanism rather than a

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I'll-keep-waiting-until-I-see-it's-my-turn mechanism.
Q. And is the interprocess communication concept something unique to Unix System V?
A. No, not at all.
MR. HEISE: Objection.
You may answer, which you already did.
MR. KAO: Q. Is that a method or concept that is used by Unix System V?
A. Yes, it is.
MR. HEISE: Same objection.
THE WITNESS: Yeah.
MR. KAO: Q. Do you know what the origin of that concept is from?
A. I don't know from own knowledge. It's lost in the history of computer science.
Q. Now, you looked at Section 7.06(a) of this agreement with Mr. Heise earlier, and I just want to ask you some questions about that. And in particular, I think you looked at the first sentence, which says that:
"LICENSEE agrees that it shall hold all parts of the SOFTWARE PRODUCTS subject to this Agreement in confidence for AT&T."
A. Yes.
Q. Do you see that?
And I believe your testimony was that -- well,

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strike that.
Let me ask it this way: Is it your understanding of this provision in the software agreement that Sequent was to hold all parts of the Unix System V source code in confidence for AT&T?
A. Yes.
MR. HEISE: Objection.
You may answer.
THE WITNESS: Yes, that's my understanding.
MR. KAO: Q. Is it your understanding from this agreement that licensee, meaning Sequent, has to hold all parts of the Dynix/ptx software in confidence for AT&T?
MR. HEISE: Objection.
You may answer.
THE WITNESS: No, that's not my understanding.
MR. KAO: Q. What is your understanding of what Sequent has to hold in confidence for AT&T with respect to Dynix/ptx?
MR. HEISE: Same objection.
You may answer.
THE WITNESS: Those modules or components which are wholly or in part comprised of the System V source code would have to be held in confidence. Those modules or components that are independent of Unix

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System V source code are disclosable at the discretion of Sequent.
MR. KAO: Q. And looking now at the next sentence, which includes the language "methods or concepts utilized therein," did you understand this Section 7.06(a) to require Sequent to hold in confidence methods and concepts contained in Dynix/ptx?
MR. HEISE: Objection.
You may answer.
THE WITNESS: It would be a similar response. That is, if there were some patented method within the System V source code, that would certainly be required to be held in confidence. If it was an invention of Sequent alone, then it was, again, Sequent's discretion.
MR. KAO: Q. Now, if you can turn with me to Section 2.01, which I believe you also reviewed with Mr. Heise, I believe you testified that as you understood the meaning of the word "treated," that that was distinguishing between ownership on the one hand and treatment of something as confidential on the other. Is that --
MR. HEISE: Objection.
MR. KAO: Q. -- correct?
MR. HEISE: You may answer.
THE WITNESS: That's accurate.

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MR. KAO: Q. Okay. Now, with respect to code that Sequent developed on its own for Dynix/ptx, was it your understanding that this Section 2.01 required Sequent to treat that code as confidential?
MR. HEISE: Objection.
You may answer.
THE WITNESS: Please repeat the question.
MR. KAO: Can you just read it back.
(Record read.)
THE WITNESS: My understanding is that if the code were purely a Sequent development, that that would not be subject to the provisions of this license agreement.
MR. KAO: Q. In testimony that you gave when speaking with Mr. Heise, you recognized the distinction between ownership and control. Do you remember that?
A. Yes, I do.
Q. Do you believe that -- well, let me ask it in two parts. First, do you believe that Sequent owned the source code that it developed for Dynix/ptx?
MR. HEISE: Objection.
You may answer.
THE WITNESS: I believe that Sequent owned, in its entirety, the source code for Dynix. I believe that Sequent owned those portions of Dynix/ptx which were not

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contributed by others, including AT&T.
MR. KAO: Q. Do you believe that Sequent controlled and had the right to control the source code for Dynix/ptx that it developed on its own?
MR. HEISE: Objection.
You may answer.
THE WITNESS: Yes, I believe that subject to limitations that were applied by the licensed third-party components, that Sequent controlled those portions, again, in the entirety for those portions which were uniquely Sequent's and jointly for those portions which third parties were involved.
MR. KAO: Q. Now, do you recall earlier discussing with Mr. Heise how one would go about determining whether there is Unix System V code in Dynix?
A. Yes.
Q. If I wanted to know with res- -- well, let me give you some background here.
Do you understand that, at least as it's -- at least as the plaintiff SCO alleges, IBM has contributed code from Dynix/ptx to Linux?
MR. HEISE: Objection.
You may answer.
MR. KAO: Q. Do you have an understanding of

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that or not?
A. I do, but you were my source.
Q. Oh. Well, if I -- let me --
I'll put on the record that that was not meant to be a waiver of the attorney-client privilege.
MR. HEISE: Too late.
MR. KAO: Q. Assume with me that -- assume with me that IBM has contributed source code from Dynix/ptx to Linux. Whether or not that's true, let's assume that's the case for the purposes of my question here.
A. Okay.
Q. Can you do that?
A. I can do that.
Q. If I wanted to determine whether there was any Unix System V code contained in the source code that was contributed from Dynix/ptx to Linux, how would I do that?
MR. HEISE: Objection.
You may answer.
THE WITNESS: The most reliable mechanism would be to do a source-to-source compare and, as I previously described, after suspect areas are identified, to have a software expert determine whether those are chance likenesses or the result of copying.

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MR. KAO: Q. Would I need the modification histories for Dynix/ptx in order to make that determination, whether there was Unix System V code contained in the contributions to Linux?
MR. HEISE: Objection.
You may answer.
THE WITNESS: You would not.
MR. KAO: Q. Now, in your understanding of the term "derivative work," does something need to contain code from Unix System V in order to be considered a derivative work of Unix System V?
MR. HEISE: I'm sorry to interrupt. Could you just repeat the question?
MR. KAO: Sure. I'm not -- I'm probably not asking it in a very clear way.
MR. HEISE: No. Somebody just distracted me for a moment.
MR. JAMES: Here, I'll shut the door.
MR. KAO: Q. As you under- -- well, let me just ask you this way: How do you understand -- what do you understand a derivative work to be?
A. A derivative work is something which contains a part or all of some other preexisting work.
Q. Okay. So what would you consider to be a derivative work of Unix System V?

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A. I would consider a source module or a document which contained some substantial portion, meaning not a comment line consisting of a semicolon, some substantial portion of Unix System V.
Q. Would I need the modification history of Dynix/ptx in order to determine whether Dynix/ptx contains source code from Unix System V?
MR. HEISE: Objection.
You may answer.
THE WITNESS: You wouldn't.
MR. KAO: Q. I could just do a comparison between the Unix System V source code and the Dynix source code; correct?
A. Yes.
MR. HEISE: Objection.
You may answer.
THE WITNESS: And then, after that, an inspection.
MR. KAO: Q. Now, as you understand the term "modification," does something need to have Unix System V code in it to be considered a modification of Unix System V code?
MR. HEISE: Objection.
You may answer.
THE WITNESS: I think it's the same. That is,

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if the Unix System V code is substantively unchanged -- we used the example of changing a -- removing a dollar sign -- then, yes, I would consider that.
MR. KAO: Q. And I could determine whether something, then, was a modification of Unix System V code without having access to the revision histories?
MR. HEISE: Objection.
You may answer.
THE WITNESS: Yes, you could.
MR. KAO: Q. I could do that by comparing the Unix System V code to the modified Unix System V code?
A. Yes, you could.
MR. HEISE: Objection.
MR. KAO: Q. What information would the revision -- I think you called it -- maybe I should ask you. What did you call Sequent's revision history information?
A. The RCS logs.
Q. What information would the RCS logs give me that having all the source code to Dynix/ptx would not give me?
A. It would give you the programmer's intent for the change.
Q. If you had the source code itself, could you determine whether something was based on Unix System V

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without having the programmer's notes?
MR. HEISE: Objection.
You may answer.
THE WITNESS: With some high probability, yes.
MR. KAO: Q. When you talk about Dynix/ptx source code, what are you referring to? What universe of source code is considered Dynix/ptx source code?
A. You need to give me a time bound for this.
Q. Sure, okay. We've been talking in this deposition just generally about Dynix/ptx source code. And all I'm trying to understand is: If you were asked by -- if you were asked by a customer or anybody else to provide them with the Dynix/ptx source code, what would you provide them with? I guess let's say at the time that you were at Sequent.
A. Okay. Generally, when someone wants access to the source code, they want access to the kernel, to the libraries, to the utilities, to the on-line and off-line documents, and to the makefile.
Q. That's what you would consider to be Dynix/ptx?
A. Right.
Q. Now, do the RCS logs that you discuss include code that never made its way into a release of Dynix/ptx?

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A. Lots.
Q. Would you consider that code to be part of Dynix/ptx?
A. No.
Q. What is a release of Dynix/ptx? Can you explain that for the record?
A. Certainly. A software release is the completed, tested, documented, and authorized for distribution version of a particular piece of software. So the release viewed from inside the organization would include the source, would include the tools, would include the build files. A release as viewed from outside the organization would be the binary code, the release notes, the documentation.
Q. And releases are assigned different numbers to identify them?
A. Yes. A release will typically have a major and a minor version number. Sometimes more precision than that if there's a lot of either customer-specific or other variation.
Q. If I wanted to determine if any code in a release of Dynix/ptx is based on any code in Unix System V, would I need to have the RCS logs?
MR. HEISE: Objection.
You may answer.

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THE WITNESS: No. The straightforward method would be to DIF the files module by module.
MR. KAO: Q. When you say "DIF the files," what do you mean?
A. A utility that would do a line-by-line comparison of the source code and identify where lines were either added or subtracted or changed.
Q. In order to determine whether a particular release of Dynix/ptx contained code implementing any methods or concepts of Unix System V, would I need the RCS log?
MR. HEISE: Objection.
You may answer.
THE WITNESS: You might, only with regard to programmer intent.
A more likely place to find it would be in the release notes.
MR. KAO: Q. And release notes are -- well, strike that.
Are release notes provided with -- to customers?
A. Yes, they are. They're part of the distribution.
MR. KAO: That's all I have for you.
MR. HEISE: Just a few follow-up questions.

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THE WITNESS: Sure.
FURTHER EXAMINATION BY MR. HEISE
MR. HEISE: Q. Before entering into the agreement on behalf of Sequent, you've indicated that you carefully reviewed it and discussed it with Sequent personnel and were involved in some phone conversations with AT&T personnel. Is that correct?
A. That is correct.
Q. In all of the time that you carefully reviewed this agreement, did you note paragraph 4 on page 1 of the agreement? And just so that the record's clear, in paragraph 4 it states that:
"This Agreement and its Supplements set forth the entire agreement and understanding *between the parties as to the subject matter* hereof and merge all prior discussions between them, and neither of the parties shall be bound by any conditions, definitions, warranties, understandings or representations with respect to such subject matter other than as expressly provided herein or as duly set forth on or subsequent to the date of acceptance hereof in writing and signed by a proper and duly authorized representative of the party to be bound

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thereby."
Did you carefully review that clause as well?
A. I did.
Q. And you understood that that meant all of the terms of the agreement were set forth in the agreement alone; right?
A. Yes.
Q. When we were talking earlier about keeping the Dynix code confidential, you stated, both in your declaration and here, that you did not want to be bargaining away the rights to Sequent's IP. Do you recall that?
A. Yes, I do.
Q. AT&T telling Sequent to keep Dynix confidential when Sequent was keeping Dynix confidential was not a bargaining away of any of Sequent's IP rights, *was it?*
MR. KAO: Objection to form.
THE WITNESS: No.
MR. HEISE: Q. When we talk about Dynix/ptx, just so we're clear, that arose after the Unix System V license was entered into that we've been discussing all day today; right?
A. That is correct.
Q. And the -- the kernel of Dynix/ptx, was that

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from Unix System V?
MR. KAO: Objection to form.
THE WITNESS: No, it was not.
MR. HEISE: Q. What was the core or the basis of the Dynix/ptx operating system?
MR. KAO: Objection to form.
THE WITNESS: The core was a combination of the Berkeley Standard Distribution 4.2 version and code created by Sequent.
MR. HEISE: Q. And are you suggesting that the only code that came from Unix System V in Dynix/ptx were the utilities?
MR. KAO: Objection to form.
THE WITNESS: I can't state that as an *absolute. Certainly, the preponderance of the code in* Dynix/ptx predates the licensing of AT&T System V.
MR. HEISE: Q. But in terms of after the Unix System V license was entered into, are you suggesting that the only source code that was used from Unix System V were the utilities as they appear in Unix System V?
MR. KAO: Objection to form.
THE WITNESS: No. There would have been a few system services that would have been in the kernel.
MR. HEISE: Q. In reviewing Section 2.01, in

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particular the phrase -- or sentence:
"Such right to use includes the right to modify such SOFTWARE PRODUCT and to prepare derivative works based on such SOFTWARE PRODUCT, provided the resulting materials are treated hereunder as part of the original SOFTWARE PRODUCT."
Do you see where I'm reading from?
A. Yes, I do.
Q. If the phrase "resulting materials" is determined to mean the modifications or derivative works of Unix System V -- and for our purposes, consider that Dynix/ptx -- would you agree that Dynix/ptx would have to be maintained in confidence?
MR. KAO: Objection to form.
THE WITNESS: If the -- you're posing a *hypothetical, that is, "resulting materials" is an -- is* determined to mean any source code. Is that accurate?
MR. HEISE: Q. I'm asking you if the phrase "resulting materials" is determined to include Dynix/ptx as a modification or derivative work based on Unix System V, would you agree that in that case, Dynix/ptx would be required to be maintained in confidence and could not be publicly displayed?
MR. KAO: Objection to form.

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THE WITNESS: If, hypothetically, the resulting materials was inclusive of all of the Dynix/ptx source code, then yes, I would agree it would have to be maintained in confidence.
MR. HEISE: Q. With respect to the RCS log -- the Revision Control System, I guess it stands for.
A. Yes.
Q. You were asked a series of questions as to whether it would be helpful to have that -- or excuse me -- whether it would be needed or necessary to have that. Would you agree that it would be helpful to have the RCS to be able to track the history of the code as it appears in Dynix/ptx?
MR. KAO: Objection to form.
THE WITNESS: It would actually both be helpful and confusing, because the progression of a piece of software from one release to the next is a series of additions and subtractions, and so you'd have to know what you were looking at.
The real help in the RCS logs is the statement of programmer intent, like "I'm adding a new module" as opposed to "I'm modifying such-and-such to fix a bug" or something like that.
MR. HEISE: Q. Well, if in determining where Unix System V either source code or methods and concepts

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appear in Dynix, would you agree that it would be necessary to have every version of Dynix/ptx from the beginning until present as opposed to just the last few versions?
A. Not --
MR. KAO: Objection --
MR. HEISE: -- of Dynix/ptx.
MR. KAO: Objection to form.
THE WITNESS: Actually, it would be simpler to start with the last version and DIF it against the first version. The middle versions -- and let me elaborate by saying, the progression of Dynix/ptx toward the NUMA-Q, N-U-M-A-Q, architecture probably resulted in the subtraction of more and more System V code because it was inappropriate.
So it would actually be confusing to go to the middle releases. Starting with the beginning and the end would be better.
MR. HEISE: Q. So at a bare minimum, to undertake a complete analysis, you would need the first copy and the last copy?
A. That would be the ideal.
MR. KAO: Objection to form.
MR. HEISE: Q. Would you agree it would be impossible, in the absence of having the first copy of

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Dynix/ptx, to be able to see what Unix System V was throughout Dynix/ptx from the beginning to the end?
MR. KAO: Objection to form.
THE WITNESS: Impossible, I don't think I'd go for.
MR. HEISE: Q. What would you go for? Extremely difficult?
A. It just makes it a little harder to figure out, yeah.
Q. But if you were given the task, what you would require to do it would be the first copy and the last copy of Dynix/ptx --
MR. KAO: Objection to form.
MR. HEISE: Q. -- is that correct?
A. Actually, the first copy I was referring to in that statement was the copy of the System V.2 distribution as delivered by AT&T pursuant to this agreement.
Q. Okay.
A. And the last copy would be whatever version of Dynix/ptx is the now current Dynix/ptx.
Q. Well, if -- using a statement you made earlier, where there was addition and subtraction of code, how would one be able to determine what System V code was in Dynix without access to all of the versions

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if over time some code is put in, some code is taken out?
MR. KAO: Objection.
MR. HEISE: Q. If you're only looking at the last version of Dynix/ptx.
A. I don't think I'm tracking the question.
Q. Okay. Let me try and break it into a couple bits then.
A. Okay.
Q. If one is to look at Dynix/ptx to locate System V code, to locate System V methods and concepts, et cetera, you've indicated you need to have the System V release that was given to Dynix and you would also want the last version of Dynix/ptx.
A. Correct.
Q. Would you also agree that to determine, over time, what System V code was included in Dynix/ptx, you would need to see the prior versions from the beginning of Dynix/ptx until the last version of Dynix/ptx?
MR. KAO: Objection to form.
THE WITNESS: If your question is would I -- if I wanted to know at any instant in time --
MR. HEISE: Q. Exactly.
A. -- what System V code was in or out?
Yeah, I would need whatever -- the code

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snapshot at that instant in time. I'm having a hard time tracking the question because I'm not -- the only ones that count are the ones that were released.

Q. That's really what the judge is going to decide. So I'm just trying to get from you a clear understanding of if -- just making up numbers -- if there were ten releases of Dynix/ptx, if there was System V code that was in Release No. 4 but it doesn't appear subsequently in Release No. 10, the last one --

A. Mm-hmm.

Q. -- I would have no way of knowing that unless I had access to Release No. 4; right?

A. That's so, if you needed to know that --

Q. Right.

A. -- particular fact.

Let me elaborate by saying, let's suppose -- this is a hypothetical, but let's suppose that the developer wants to introduce a System V module to Dynix/ptx, and they just want to run an experiment: Does this thing bind? Are there any missing symbols? So they might put the code in, compile it. It throws out a million compiler errors, all these missing symbols. And then they figure out how they're going to deal with that set of missing symbols.

So that's why I'm questioning the utility of

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looking at the interim versions. It's an experiment, not necessarily a result.

Q. I understand. But it's an experiment that makes use of Unix System V?

A. Sure.

Q. Okay. And I would have no way of knowing what use of Unix System V occurred unless I had access to the RCS, in your example?

MR. KAO: Objection to form.

THE WITNESS: Well, the RCS would give you the programmer's intent, but not necessarily what was --

MR. HEISE: Q. I'd need to see the code --

I'm sorry. We broke the rule.

I would need to see the code, not necessarily the RCS, in the example we were just discussing?

A. Yes, you would need to see the code.

MR. HEISE: If you give me just 30 seconds to review my notes, we might be done.

As I said before, subject to our reservations, I again thank you for your time today.

THE WITNESS: Thank you.

MR. KAO: I just have two quick questions.

MR. HEISE: Uh-oh.

FURTHER EXAMINATION BY MR. KAO

MR. KAO: Q. One, Mr. Heise was just asking

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you a series of questions where he was referring to versions of Dynix/ptx.

A. Yes.

Q. Did you understand him to be referring to releases of Dynix/ptx? Do you make a distinction in your mind between versions and releases?

A. Actually, that was the source of my confusion. In my opinion, the things that are relevant to inclusion or noninclusion of source code are the releases, and they're -- as development proceeds, there are many, many versions.

Q. What's the difference, in your mind, between a version and a release, just so I understand?

A. A collection of source gets compiled one day and it might run; it might not run. It's just a point in time. And the essence of Mr. Heise's questions were: How would I determine over all time, essentially, what was the inclusion or noninclusion? And I was trying to figure out why that was an important thing to know.

Q. I understand. But in responding to -- in responding to Mr. Heise's questions, I was just trying to understand what it was that you were -- you had in your mind. Were you -- were you -- were you responding as to versions or as to releases?

MR. HEISE: Objection.

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You may answer.

THE WITNESS: My response was both to versions and releases because of the confusion about whether for any moment in time, you want to know what was included or whether at specific release points, when someone outside of Sequent might have had access, you would know what was included. So I was responding to both terms.

MR. KAO: Q. Okay. Is it the case that as far as Sequent was concerned, the code that was contained in a release is what is considered Dynix/ptx?

A. That's accurate.

Q. The only other question I have is back now to Section 2.01. Mr. Heise asked you some questions, and I just wanted to make sure I understood what you were saying. Looking at the last sentence, which says:

"Such right to use includes the right to modify such SOFTWARE PRODUCT and to prepare derivative works based on such SOFTWARE PRODUCT, provided the resulting materials are treated hereunder as part of the original SOFTWARE PRODUCT."

And I believe Mr. Heise asked you to assume that the words "resulting materials" are to be defined to include Dynix/ptx.

A. In its entirety.

Q. In its entirety.
Now, if that's the case, then it was your testimony that Dynix/ptx, in its entirety, has to be treated confidentially; correct?
A. That's correct.
Q. Now, if you were to take out pieces of the code from Dynix/ptx that Sequent developed on its own, would Sequent still have an obligation, in your understanding of this language, to treat those materials as confidential, even assuming that the whole has to be treated confidential?
MR. HEISE: Objection.
You may answer.
THE WITNESS: In my opinion, no. That is, if I create something independent of what ultimately becomes a derivative work, that's a separately treatable and disclosable, in this case, item when it becomes a part of the derivative work. The entirety of the derivative work is the thing that's bound by the confidentiality.
MR. KAO: Q. Under the assumption that Mr. Heise --
A. Under the assumption that it was so determined.
Q. So even under that assumption, Sequent would

still have the right to pull materials out of Dynix/ptx and disclose those materials as it chose to?
MR. HEISE: Objection.
You may answer.
THE WITNESS: That would be my opinion.
MR. KAO: That's all I have.
MR. HEISE: A couple of quick follow-ups and we will hopefully be done.
FURTHER EXAMINATION BY MR. HEISE
MR. HEISE: Q. When we were talking earlier about seeing what System V code appeared in Dynix/ptx at any moment in time, that is when we would need to have access to all the versions as opposed to the final releases. Is that a correct statement?
A. Yeah. If it were important to know on any given day, yes.
Q. Do you know whether the contributions of Dynix/ptx that went to Linux came from Dynix/ptx as the whole or if they came from the separate place where they were independently developed and incorporated into Dynix/ptx?
MR. KAO: Objection to form.
THE WITNESS: I don't know.
MR. HEISE: Again, subject to the reservations, I thank you for your time today.

MR. KAO: I don't have any follow-up.
THE VIDEOGRAPHER: Here marks --
MR. KAO: Just one more question.
THE VIDEOGRAPHER: Here marks the end of Tape No. 3 in the deposition of David Rodgers.
The original videotapes will be retained by LegaLink New York at 420 Lexington Ave., Nos. 2108 and 2112, New York, New York.
Going off the record. The time is 3:04.
(Whereupon, the deposition was adjourned at 3:04 p.m.)
--oOo--
I declare under penalty of perjury the foregoing is true and correct. Subscribed at _____, California, this ____ day of _____, 2004.

_____
David P. Rodgers

CERTIFICATE OF REPORTER
I, ANA M. DUB, a Certified Shorthand Reporter, Registered Merit Reporter, and Certified Realtime Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in the within-entitled cause;
That said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein stated, and that the testimony of the said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;
That before completion of the deposition, review of the transcript [ ] was [X] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.
I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition, nor in any way interested in the event of this cause, and that I am not related to any of the parties thereto.
DATED: June 14, 2004.

_____
ANA M. DUB, RMR, CRR, CSR No. 7445