

1 Q. Is that -- is that -- is there any correlation
2 at all?

3 A. I can think of many different ways that there
4 would be no correlation.

5 Q. And so would it be -- would it be reasonable if
6 somebody wanted to understand what the usage of Fedora
7 is in the United States, would it be reasonable to use
8 the revenue numbers of the RHEL products to do that?

9 A. I think it would be utterly unreasonable.

10 Q. Do you, Mr. Tiemann, believe in the United
11 States patent system?

12 A. Yes.

13 Q. Why -- why do you believe in the United States
14 patent system?

15 A. Well, I -- I come from a family of inventors.

16 Q. What do you mean by that?

17 A. Well --

18 Q. You -- you have family members that are patent
19 owners, is that what you mean by inventors?

20 A. Yeah. Yes, that's what I mean.

21 Q. Can you explain that?

22 A. My -- my brother has two U.S. patents. My
23 father had 135 patents at the time of his death, and two
24 more were issued after the time of his death. And I
25 grew up in a household where patents were a daily

1 of his patents that won him a lot of other awards was
2 recognized for the Nobel Prize in 2009. And those
3 patents that he created in all fields of engineering
4 were a marvel to me.

5 Q. So that's -- that's obviously very impressive.
6 But how -- how did your father react -- you're not in a
7 field that focuses on patents. I'm trying to think how
8 to set that question up. And so how did your father, a
9 man who had clearly been committed to and benefited --
10 benefited from the patent system feel when he learned
11 his son was going to be engaged in the open-source
12 community?

13 A. Well, he gave me his blessing, and he told me
14 he was proud. He taught me to program when I was 11.
15 And when I chose to go into computers, he gave me
16 encouragement.

17 When I said I was going to drop out of
18 Stanford, you know, where he got a Ph.D., and start a
19 company based on open-source software, he said, go get
20 them. And about three or four years after when it was
21 clear that that company was on the path to success, he
22 invited me to GE to make a presentation about how our
23 software could help GE make better products.

24 And that presentation resulted in our
25 first contract with General Electric around 1993-1994.

1 conversation around the dinner table.

2 Q. With 135 patents, would -- would getting a
3 patent be cause for celebration or did it just become
4 that's what dad does at the office?

5 A. No, it was -- it was -- it was great news. We
6 were -- we were very proud. We were very proud, and his
7 accomplishments were amazing.

8 I remember when he got his 25th patent,
9 they gave him a plaque, and we put a plaque in the
10 hallway between the kitchen and the dining room. And
11 for his 50th patent, he got some other special
12 commemorative awards. And -- and there were not many
13 people at General Electric that had 50 patents. He was
14 in a really elite company.

15 And then when he got 75 patents, I think
16 that was around the time that GE gave him the award, the
17 Coolidge Award is what GE gives to their best inventors.
18 Coolidge invented the X-Ray, too. And was next to
19 Thomas Edison, People at GE thought that he was the most
20 important inventor, though Thomas Edison is more famous

21 But my dad invented the CCD for digital
22 imaging, he invented the CAT scanner, he invented
23 ultrasonic imaging, he invented signal processing for
24 the HDTV. One of his early inventions resulted in
25 somebody else winning the Nobel Prize in 1973, and one

1 Q. That was your first contract?

2 A. With GE.

3 Q. Yes.

4 A. We -- we -- we had to eat, so we sold contracts
5 within, you know, six months of starting the company.

6 Q. Yes.

7 MR. KREVITT: I have nothing further, Your
8 Honor.

9 Thank you.

10 THE WITNESS: Thank you.

11 THE COURT: Mr. Hill.

12 MR. HILL: Thank you, Your Honor.

13 THE COURT: Would you care to inquire?

14 CROSS-EXAMINATION

15 BY MR. HILL:

16 Q. Mr. Tiemann, how are you today?

17 A. Very well. Thank you, Mr. Hill.

18 Q. We haven't had the chance to meet formally. So
19 I want to introduce myself. My name is Wesley Hill. As
20 you know, I represent the plaintiffs, IP Innovation and
21 Technology Licensing Corporation.

22 Is this your first time in East Texas,
23 Mr. Tiemann?

24 A. Yes, it is.

25 Q. Well, let me -- let me say as a person of the

1 area, welcome.
 2 A. Thank you very much.
 3 Q. Now, Mr. Tiemann, there's a number of things I
 4 want to talk to you about today, a number of the things
 5 that you and Mr. Krevitt covered.
 6 But before I do that, I want to talk about
 7 one thing that you didn't cover. You guys covered a lot
 8 of areas, but in my listening, I didn't hear that you
 9 said anything about whether the products you distribute
 10 at Red Hat include the technology protected by my
 11 clients' patents; is that right?
 12 A. I -- that's an interesting question. My
 13 understanding is that the technology --
 14 Q. I'm not looking for your understanding.
 15 A. Okay.
 16 Q. I just want to know in the ground that you and
 17 Mr. Krevitt covered, there was no discussion about
 18 whether the technology in your products actually
 19 incorporates technology covered by my clients' patents,
 20 was there?
 21 A. There was no such discussion.
 22 Q. Thank you.
 23 And I don't mean to cut you off,
 24 Mr. Tiemann. I -- the Judge keeps us on a clock, and
 25 I'd just ask for the -- the same courtesy that I know

1 Mr. Krevitt discussed with you. I want to talk to you
 2 about Plaintiffs' Exhibit 269.
 3 Plaintiffs' Exhibit 269 -- I apologize,
 4 but it's a little hard to see. We'll get to the
 5 beginning there where you can see it -- is an article
 6 that was published on internetnews.com. You can see the
 7 title of the article there, November 21, 2008. Red Hat
 8 Fedora claims it's the leader in Linux. Do you see
 9 that?
 10 A. I do.
 11 Q. And this was a reporter writing an article for
 12 a publication. And I want to look at the first two
 13 paragraphs. We've got them, you can see there, and then
 14 we'll look at the third paragraph, as well. I'll give
 15 you a chance to read that, and I'll read along with you.
 16 Counting Linux users is no easy task since
 17 there is typically no requirement for users to register
 18 their installations. Yet Linux distributions do try and
 19 count users in an attempt to quantify their user base
 20 and relative footprint in the operating systems space?
 21 Red Hat's Fedora Community Linux distribution has now
 22 tallied its user base. Do you see that?
 23 A. I do.
 24 Q. It says that you have tallied your user base,
 25 and then it goes on to say that it's a number that on

1 Mr. Krevitt tried to ask for from folks at times. We'll
 2 go question and answer.
 3 Now, first off, I want to get into one
 4 thing that you and Mr. Krevitt covered towards the end
 5 of your testimony, and that gets us to this issue of
 6 whether Red Hat tracks or can even determine, if it
 7 wants to, the number of users of its software products.
 8 And, specifically, I want to talk to you a little more
 9 about Mr. Fields. Who is Mr. Fields?
 10 A. Mr. Fields is an engineer at Red Hat.
 11 Q. His name is Paul Fields. How long has he been
 12 with Red Hat?
 13 A. Probably three, maybe four years.
 14 Q. And what's -- what's his formal position?
 15 A. We don't use formal titles very often, but I
 16 know that he is associated with -- he's a Red Hat
 17 representative to the Fedora project.
 18 Q. And the Fedora project is part of Red Hat,
 19 correct? Red Hat sponsors and runs that project?
 20 A. It's a -- it is a Red Hat project.
 21 Q. And Mr. Fields is an employee of the company,
 22 the company has confidence in him?
 23 A. That is correct.
 24 Q. Well, I want to talk to you a little bit about
 25 some other things. We saw the one document that

1 the surface will make it the largest installed base of
 2 any Linux distribution, with at least 9.5 million users,
 3 possibly as many as 10.5 million.
 4 Now, let's look at the next paragraph
 5 because that's where it tells us where the reporter is
 6 getting information. The total number of users has
 7 always been an incredibly difficult number to measure.
 8 A. I agree.
 9 Q. You agree with that statement, don't you?
 10 A. I do.
 11 Q. And that's a statement by Mr. Fields. But he
 12 says, if you total up all of the unique IPs on Fedora 7,
 13 8, and 9, it adds up to about 9.5 million boxes right
 14 now?
 15 A. I disagree with that.
 16 Q. You disagree with that statement?
 17 A. Yes.
 18 Q. Let's look at the bottom of this document, the
 19 last paragraph. And it goes on to say that this 9
 20 million that Mr. Fields has tallied does not include
 21 users of Red Hat Enterprise Linux. So we know the total
 22 number of users, if you put Enterprise together,
 23 according to Mr. Fields, with Fedora is in excess of
 24 9.5 million dollars -- excuse me -- 9.5 million users,
 25 don't we?

1 A. According -- according to Mr. Frields, yes.
 2 Q. And then there's another statement here, it
 3 says, in a recent analysis event, Red Hat executive
 4 vice-president, Paul Cormier. Who is Paul Cormier?
 5 A. Paul Cormier is -- is a -- one of the
 6 co-presidents of Red Hat in charge of the engineering
 7 and the business units. So he is responsible for the
 8 RHEL product business, among other functions.
 9 Q. Another employee in whom you have confidence?
 10 A. He is a very senior executive of Red Hat.
 11 Q. Well, he said in a presentation that the
 12 company currently has over 2.5 million paid
 13 subscriptions for its Red Hat Enterprise Linux offer?
 14 A. I see that.
 15 Q. Do you disagree with that?
 16 A. I have no reason to disbelieve it.
 17 Q. Let's look at the next page, the document
 18 continues on. Top two paragraphs -- excuse me, top
 19 three.
 20 As a result, Frields agreed that the total
 21 Red Hat family of Linux distributions could exceed 13
 22 million users?
 23 A. I disagree with that.
 24 Q. And let's look at the paragraph here where it's
 25 a quote from Mr. Frields. He says he's personally

1 correct us.
 2 And in this particular case, I would go to
 3 Paul and say, Paul, you need correction.
 4 Q. Mr. Tiemann, why would Mr. Frields be out in
 5 the marketplace promoting as fact the number of users of
 6 your products if the company -- you being chief -- a
 7 higher executive in the company than he, didn't have
 8 confidence in the numbers? Why would you let him do
 9 that?
 10 A. Well, we can't control everybody, and --
 11 Q. So you're -- you're saying Paul Frields is a
 12 rogue employee who's out there propagating lies within
 13 the marketplace?
 14 A. There's a big difference between propagating
 15 lies and company propaganda.
 16 Q. So it's propaganda. So in the courtroom, it's
 17 not good enough because it's propaganda, but in the
 18 marketplace, you think that's an okay business practice?
 19 Is that what you're saying, Mr. Tiemann?
 20 A. It is a well-accepted practice in American
 21 businesses to make positive strong claims about one's
 22 position relative to competitors.
 23 Q. Is it a well-accepted practice in American
 24 business to put information in your filings with the
 25 Securities and Exchange Commission that may not be

1 exceedingly distrustful about people who put out numbers
 2 without backing up the way they found those numbers. Do
 3 you see that?
 4 A. I agree with that.
 5 Q. And he says, we always document our numbers so
 6 others can verify them if they want.
 7 A. I agree.
 8 Q. We're not just pulling them out of a hat.
 9 A. Yep.
 10 Q. Mr. Frields seems to believe in his numbers,
 11 doesn't he?
 12 A. I appreciate that he says that he always
 13 documents his numbers so that others can verify them, if
 14 they want, because in this process of documentation
 15 where he has taken unique IP addresses on the one hand
 16 and systems on the other, added those two numbers
 17 together to magically create users, that is something
 18 whose documentation allows me to say that makes no
 19 sense.
 20 Q. So you believe Mr. Frields -- you don't have
 21 confidence in him?
 22 A. I don't have any confidence in that analysis.
 23 I've been doing open-source software for a long time,
 24 and one of our key goals is to make all of our errors
 25 obvious so that somebody smarter than us can come in and

1 accurate?
 2 A. That is not a well-accepted practice. That
 3 practice is frowned on very heavily.
 4 Q. Of late, it seems it may be a frequent
 5 practice, but it's not a -- it's not an accepted
 6 practice; is that right?
 7 A. That is absolutely correct.
 8 Q. And let's look a little bit at the 10-K. Now,
 9 first, let me get you to explain to the jury, if you
 10 would, what is a 10-K filing with the Securities and
 11 Exchange Commission?
 12 A. A 10-K filing is a report that public companies
 13 file with the SEC to provide all necessary information
 14 that is required. It's kind of like a big 1040 tax form
 15 for companies, except a little more complicated than
 16 that.
 17 Q. Let's talk about -- you say you don't track
 18 users. Do you track revenue?
 19 A. Of course, we track revenue.
 20 Q. Okay. Let's look specifically at Plaintiffs'
 21 Exhibit 100. And can you identify that for me?
 22 A. That appears to be our 10-K form filed on April
 23 19, 2008, for the fiscal year ending February 29, 2008.
 24 Q. And I want to look specifically -- this is a
 25 publicly-available document, is it not?

1 A. That is correct. Anybody can download it from
2 the internet.

3 Q. And let me make sure I -- I make clear, as
4 well. Red Hat files this because it's a publicly-traded
5 company, right?

6 A. I -- I believe that's correct.

7 Q. And Red Hat -- but just to make sure so nobody
8 misunderstands, a publically-traded company doesn't mean
9 you're a charity or you're some public-good
10 organization, right?

11 A. We do -- publicly-traded company simply means
12 that the public can buy shares and own a percentage of
13 Red Hat by buying those shares.

14 Q. Your stock is available on the stock exchange
15 like --

16 A. That's --

17 Q. -- GE's stock or --

18 A. Yeah. In fact, we're available on that same
19 exchange.

20 Q. And what that means, though, is that Red Hat is
21 a for-profit corporation, correct?

22 A. That is correct.

23 Q. And the job of Red Hat executives, like the
24 jobs of any executives of any for-profit corporation, is
25 to maximize value for its shareholders, right?

1 Q. Please.

2 A. For the year ended February 29th, 2008, total
3 revenue increased 30.6 percent or \$122.4 million to \$523
4 million from \$400.6 million for the year ended February
5 28th, 2007.

6 Q. And that would be the total annual revenue for
7 your company; is that right?

8 A. Yes.

9 Q. The 523 million number?

10 A. Yes.

11 Q. And then if we look at the last sentence that
12 begins on this page but ends on the next, that's what I
13 want to focus on.

14 A. Yes. Okay.

15 Q. And it says, the success of our business model
16 is influenced by the acceptance and widespread
17 deployment of our open-source technologies. Our ability
18 to generate subscription revenue on a per installed
19 system basis for Red Hat Enterprise Technology and our
20 ability to increase annual average subscription revenue
21 per customer by providing additional value to our
22 customers in the form of additional technology
23 infrastructure and providing customers with additional
24 services.

25 A. I agree with that.

1 A. Yes.

2 Q. And that's why it does what it does; is that
3 right?

4 A. That is one of the -- that -- that is a guiding
5 principle of how we manage our business.

6 Q. In fact, there's a fiduciary obligation to
7 those shareholders for you to have that guiding
8 principle, isn't there?

9 A. Thanks to the Supreme Court, yes.

10 Q. Let's look specifically at Page 39 of --

11 MR. HILL: I think it's another three
12 pages in there. I'm sorry. I may have my numbers
13 wrong.

14 Q. (By Mr. Hill) And we're going to look right at
15 the bottom, the last paragraph, and I know that's hard
16 to see. It's small print. And I'm hopeful that the
17 jury -- the folks in the jury can see that.

18 A. I can read it.

19 Q. Can you read it? Okay.

20 And, specifically, the first sentence
21 there, can you tell us what information that's
22 conveying?

23 A. It is conveying information about absolute
24 revenue and revenue growth on a year-to-year basis.
25 Would you like me to read it?

1 Q. Is it your testimony to this jury that despite
2 Mr. Fields' statements to the public, that despite your
3 comments that your ability to continue the success of
4 your business includes the ability to generate revenue
5 subscriptions on a per installed system basis and your
6 ability to increase on a per customer basis, that Red
7 Hat cannot determine how many users it has of its
8 products?

9 A. That is --

10 Q. Is that your testimony, your sworn testimony to
11 this jury?

12 A. That -- that is my testimony.

13 Q. I apologize for taking a second, Mr. Tiemann.
14 I took a lot of notes, and I've got to sort through
15 them.

16 A. I'll take a drink of water.

17 Q. Thank you. I wish I had one. I think
18 somebody's going to -- somebody is going to fix me up.

19 A. We can work together.

20 Q. They did better than me and Mr. Gibbons, we
21 spilled it all over the floor this morning?

22 Now, I want to talk to you a little bit
23 about open source. As I understand it the open-source
24 community is a community; it's not -- it doesn't include
25 all the businesses in the world. It's just one way of

1 doing business; is that right?

2 A. That's right. We talked about having our
3 community hat on which is different than our Red Hat hat
4 on.

5 Q. And we talked earlier about property rights.
6 We were talking about -- you were talking about patent
7 rights specifically?

8 A. Yes.

9 Q. Have there been -- you have patents of your
10 own, is that --

11 A. I do not.

12 Q. Has a company that you've ever owned or
13 developed had patents?

14 A. I believe that we were issued patents as part
15 of Cygnus Solutions and that those patents conveyed to
16 Red Hat when we were acquired. Red Hat has filed over
17 1,000 patent applications, and I believe so far we've
18 been granted 42 patents.

19 Q. So Red Hat has patents of its own?

20 A. Yes, it does.

21 Q. Software patents?

22 A. They are patents. They do not have a special
23 designation on the ribbon copy that says, this is a
24 software patent.

25 Q. Well, are some of the claims in some of those

1 patents performed by software?

2 A. To be honest, I have not reviewed those patents
3 in detail, so I can't say without seeing an exhibit what
4 exactly is covered by any claims.

5 Q. But the idea of the open-source community is
6 that if you choose to participate -- and that's key,
7 isn't it?

8 A. Yes, it is.

9 Q. It's a voluntary process?

10 A. Yes, it is.

11 Q. If you choose to participate, you can have
12 access to other things other people have contributed?

13 A. Yes.

14 Q. And in exchange, you make what you may
15 contribute available to everyone else?

16 A. That's basically right.

17 Q. But if you choose not to participate you still
18 retain all of your property rights, don't you?

19 A. I -- so anybody -- everybody who has property
20 rights maintains those property rights whether they
21 participate or not.

22 Q. So if you have private property rights and you
23 choose not to contribute that property --

24 A. Yes.

25 Q. -- to the open-source community --

1 A. Yep.

2 Q. -- it's still yours?

3 A. It's still yours.

4 Q. And the open-source community has no right to
5 tread on that private property, do they?

6 A. No right at all.

7 Q. So if someone develops a new idea and they
8 think it's a worthwhile idea, they can do one of two
9 things. They could go and try to get patent protection

10 for that idea if they think it's worthwhile and

11 something they want to promote and maybe make a living
12 from, couldn't they?

13 A. Yes.

14 Q. That's the proprietary model, typically?

15 A. You don't need a patent to make proprietary
16 software. Microsoft created huge value for themselves
17 before they ever had any patents at all.

18 Q. But if a person wants to innovate and then take
19 advantage of that innovation for their own
20 benefit --

21 A. Yeah.

22 Q. -- there's nothing wrong with that, is there?

23 A. There's nothing wrong with doing it with
24 copyright, with trade secret, trademark, patents.

25 Q. That's the American way, isn't it?

1 A. That is the American way.

2 Q. We reward innovation in this country under our
3 patent system by giving inventors exclusive rights to
4 those new and novel ideas in exchange for them
5 disclosing that new and novel invention to the public;
6 isn't that right?

7 A. I was with you in the very first thing you
8 said. We reward innovation, I completely agree with
9 that. That is the American way.

10 Q. And one of the ways that we do that under the
11 American patent system is that if someone has a new and
12 novel idea and they go to the patent office and they are
13 willing to disclose that idea to the patent -- or,
14 excuse me, to the public, they, in return, receive the
15 exclusive rights to that idea for a certain period of
16 years; isn't that right?

17 A. That is correct.

18 Q. And patents are public, aren't they?

19 A. The -- the documents for the patents are
20 public, but the patents themselves, I believe, as you
21 would explain, are private property.

22 Q. Well, exactly. They're private property, but
23 if you wanted to go review patents --

24 A. Yes.

25 Q. -- these patents right here --

1 A. Yes, yes.
 2 Q. -- at the patent office --
 3 A. That's right.
 4 Q. -- you could go check them out like a library
 5 and look at them?
 6 A. Yes. Yep. My --
 7 Q. And you can do that for any patent that's ever
 8 been issued in this country, couldn't you?
 9 A. Yes, in fact, you can.
 10 Q. And the reason we make those available is we
 11 want innovators to disclose their ideas so that others
 12 can learn from them and hopefully progress technology?
 13 A. That is what my dad taught me when I was eight.
 14 Q. That's a good thing, isn't it?
 15 A. Yes.
 16 Q. And if a person discloses to the public their
 17 new and novel idea and the government reviews it and
 18 upon that review agrees it's a new and novel idea,
 19 they'll give them patent protection; isn't that right?
 20 A. They'll give them a patent.
 21 Q. They'll give them a patent. And the patent
 22 provides certain rights, and chief among those rights is
 23 the right to exclude others from using your invention
 24 without your permission; isn't that correct?
 25 A. If the patent is valid, yes.

1 Q. Is a patent presumed valid when it is issued by
 2 the patent office?
 3 A. It is presumed valid.
 4 Q. Let me ask you one thing about that. I notice
 5 one thing that Mr. Krevitt had asked you at one point,
 6 and I wanted to follow up on it.
 7 He said that -- he mentioned at one point
 8 toward the end there, even if the plaintiff proved
 9 infringement and validity. Do you remember him saying
 10 that?
 11 A. I do.
 12 Q. We don't have to prove validity, do we?
 13 A. I believe that part of this trial, as I
 14 understood the proceedings so far, is that there is an
 15 open question of validity and that it is possible for
 16 the defense to basically prove with a clear and
 17 convincing case that the patent is not valid.
 18 Q. So it's to the Defendants, it's the Defendants'
 19 chore, not the Plaintiffs' chore?
 20 A. That's correct.
 21 Q. But the presumption is a patent is valid --
 22 A. Right.
 23 Q. -- correct?
 24 A. It's presumed valid but it's not necessarily
 25 valid.

1 Q. But it's presumed valid because the patent
 2 office has reviewed it and approved it, and it's
 3 presumed valid until someone comes forward with clear
 4 and convincing evidence to the contrary?
 5 A. Correct.
 6 Q. I just wanted to make sure we didn't get mixed
 7 up on that.
 8 A. I'm with you.
 9 Q. Now, let's get back to our discussion of these
 10 patent rights versus the open-source community.
 11 Now, I described one scenario, which is I
 12 come up with something. I want to be -- follow the
 13 American dream and make a success, be a success,
 14 hopefully achieve financial success based on my work and
 15 my property, and so I seek patent protection. And if I
 16 get it, I can then sell my idea to those who wish to use
 17 it, and I can profit from my innovation, correct?
 18 A. My father taught me that you cannot patent an
 19 idea. A patent is very, very specific about what it can
 20 contain, and my understanding is that you sell a license
 21 to practice the inventions disclosed.
 22 But the idea of patenting ideas was
 23 something which as soon as he told me about patents, he
 24 said, you cannot patent an idea.
 25 Q. Well, I apologize if I used loose language.

1 A. Okay.
 2 Q. What I mean by that is you can patent a device
 3 if you come up with a new invention?
 4 A. Correct.
 5 Q. You can patent the way of doing something, a
 6 method?
 7 A. Right.
 8 Q. And we see claims in this case?
 9 A. Right.
 10 Q. Both methods and systems --
 11 A. Right.
 12 Q. -- for doing something?
 13 A. Right.
 14 Q. And then I can profit from that?
 15 A. You can -- you can sell a license, and if you
 16 make a profit, then that means you earned more than you
 17 spent.
 18 Q. And that's capitalism, isn't it?
 19 A. That is one form of capitalism.
 20 Q. And that is what a lot of companies choose to
 21 do, is they choose to do their own innovation, their own
 22 development, and then sell that innovation and
 23 development to others who want to use it, correct?
 24 A. A lot of them use trademarks, a lot of them use
 25 copyrights, a lot of them use trade secrets. Coca-Cola

1 was never patented. It was a trade secret. They made a
 2 lot of money on a secret.
 3 Q. And it's theirs?
 4 A. And it's theirs.
 5 Q. It belongs to them?
 6 A. And they own it.
 7 Q. And let's contrast that now with the
 8 open-source area. If someone comes up with a new idea
 9 and they're going to participate in what you advocate,
 10 which is the open-source community --
 11 A. Yep.
 12 Q. -- that means they don't take their idea and
 13 seek protection for it and seek to profit from it by
 14 limiting others' access. They voluntarily surrender it,
 15 correct, to others' use?
 16 A. That's essentially correct.
 17 Q. And in exchange for that, they get what?
 18 A. In exchange for that, they get the benefit of
 19 working with people who are smarter than they are,
 20 teaching them how to take what they thought was a good
 21 idea and make it a better idea. They --
 22 Q. So -- I'm sorry. I didn't mean to cut you off?
 23 A. Okay. They -- they -- they profit from that
 24 from gaining the reputation that being the smartest guy
 25 in the room, you can get paid a lot of money to go from

1 room to room to room with your great ideas and the
 2 fountain of great ideas.
 3 Q. So even if their idea is a great idea in and of
 4 itself, it's a wonderful idea and it could be a very
 5 valuable and profitable idea --
 6 A. Yes.
 7 Q. -- if they choose --
 8 A. Yes.
 9 Q. -- they can turn it over to everybody else?
 10 A. That is correct.
 11 Q. And then everyone else can use it and work from
 12 it, and they get, I guess, a that-a-boy pat on the back
 13 of having helped everybody?
 14 A. You're -- you're -- you're describing very well
 15 the question I asked myself, could I really make a
 16 business out of this? That was a big question. It took
 17 me two years to get over the fear of doing business that
 18 way.
 19 Q. Well, in fact, you built your own business? It
 20 was called -- would you tell me?
 21 A. Cygnus.
 22 Q. Cygnus. And Cygnus --
 23 A. C-Y -- C-Y-G-N-U-S, to help the reporter.
 24 Q. And -- thank you. And I apologize if my speech
 25 impediment they call East Texas drawl makes it harder on

1 the court reporter.
 2 You had your own business, Cygnus, and you
 3 had developed a way of doing business, correct?
 4 A. That is correct.
 5 Q. And it was valuable?
 6 A. It has been.
 7 Q. And it belonged to you?
 8 A. It belonged to me and the two other
 9 co-founders, we were equal partners.
 10 Q. And you and the two other co-founders didn't
 11 choose to donate that to the public good, that way of
 12 doing business. You decided to sell it to Red Hat; is
 13 that right?
 14 A. Well, we sold -- we sold the business to Red
 15 Hat. We -- the -- the way of doing business was not
 16 something that we could particularly sell.
 17 Q. You sold your business to Red Hat?
 18 A. We sold the business to Red Hat.
 19 Q. How much did you sell your business to Red Hat
 20 for?
 21 A. That transaction was valued at 687 million
 22 dollars in stock.
 23 Q. So Red Hat obviously found what you had to
 24 offer quite valuable?
 25 A. They did.

1 Q. And now Red Hat makes its money by depending on
 2 others to give it their innovation so that Red Hat can
 3 sell services surrounding that innovation and profit
 4 from it; is that correct?
 5 A. We profit from it because we give as good as we
 6 get.
 7 Q. So you depend on others to voluntarily give you
 8 their ideas without compensation so that you and Red Hat
 9 can chase the profits that you're obligated to chase for
 10 your shareholders by selling services surrounding that
 11 contribution; isn't that right?
 12 A. I hate to do this, but if you could reask the
 13 question so I can focus on it because my -- my attention
 14 span did not quite capture that.
 15 Q. Okay.
 16 A. I'm sorry.
 17 Q. And I apologize.
 18 What Red Hat does is it asks people to
 19 voluntarily contribute their innovation to Red Hat so
 20 that you can incorporate it into a product around which
 21 you can then profit by selling services and support
 22 technology, correct?
 23 A. I would not exactly characterize it that way.
 24 Q. Is it way off?
 25 A. It's maybe -- it's -- it's -- it's sort of a

1 little bit the wrong side of the equation.
 2 Q. Well, let's talk a little bit more about
 3 software patents.
 4 A. Okay.
 5 Q. Software patents get in the way of Red Hat's
 6 way of doing business, don't they?
 7 A. They can.
 8 Q. And the software that you distribute may, in
 9 fact, contain other people's proprietary information,
 10 might it?
 11 A. It's theoretically possible.
 12 Q. And you don't make reference -- any warranty
 13 or -- or representation to the people that take your
 14 free software that it might not infringe someone else's
 15 patent rights?
 16 A. I don't think that we warrant and indemnify
 17 people who download the free software, that that is
 18 true. But we practice, as best we can, the ability to
 19 make sure that we do not infringe other people's
 20 intellectual property.
 21 Q. Well, I'm probably getting a little far afield
 22 here. So let me, in the interest of time, just cut to
 23 the chase, Mr. Tiemann.
 24 Just because you're in the open-source
 25 business doesn't mean that the software you distribute

1 infringement.
 2 Q. And the fact that you give it away doesn't
 3 change that, does it?
 4 A. No, that has nothing to do with it.
 5 Q. Let's talk about the private property rights in
 6 the form of software patents.
 7 A. All right.
 8 Q. You've said in the past that you hate software
 9 patents; isn't that right?
 10 A. Probably true.
 11 Q. I want to show you something specifically.
 12 I'll just let you confirm for me whether it's accurate
 13 or not. I'll just put it here on the document camera.
 14 MR. HILL: Can you switch this on? Thank
 15 you.
 16 Q. (By Mr. Hill) This, Mr. Tiemann, is a
 17 publication, news article.
 18 MR. KREVITT: Your Honor, I hate to
 19 interrupt Mr. Hill's examination.
 20 We were provided no notice of this
 21 document pursuant to the parties' agreement and to
 22 exchange documents. The only exception is documents
 23 used for impeachment. There's no inconsistent statement
 24 that's been established yet.
 25 THE COURT: I'll give Mr. Hill latitude on

1 may not practice other people's private property -- or
 2 private innovations, that they haven't chosen to give to
 3 that open-source community, does it?
 4 A. If you look at all the patent lawsuits in the
 5 country over the last 10 years, everybody has got a
 6 problem with infringement at some point in time if they
 7 have any significant revenues. And so to characterize
 8 that we uniquely suffer from this problem I think is not
 9 fair.
 10 Q. Well, I'm not asking whether you suffer from a
 11 problem.
 12 A. Okay.
 13 Q. What I'm asking is, is the open-source
 14 community above the law?
 15 A. Absolutely not.
 16 Q. The same patent laws that apply to me or apply
 17 to you apply to the open-source community and to Red
 18 Hat?
 19 A. That is correct, and we honor those laws.
 20 Q. If you're distributing a product that contains
 21 someone else's protected technology, you're an
 22 infringer; isn't that right?
 23 A. If we don't have a license to distribute that
 24 technology, then that would, I believe -- I'm not a
 25 lawyer, but I believe that that would meet a test of

1 this.
 2 MR. KREVITT: Thank you, Your Honor.
 3 MR. HILL: Thank you. The intent wasn't
 4 to impeach, Your Honor.
 5 THE COURT: Proceed, Mr. Hill. You don't
 6 need to talk about it anymore.
 7 Q. (By Mr. Hill) Now, can you see that okay,
 8 Mr. Tiemann?
 9 A. I can. It's a little low on the screen.
 10 Q. Let me see if I can pull it up.
 11 A. There you go. That's good.
 12 Q. All right. This is another business
 13 publication. This is from BNET Business Network, part
 14 of ZDNET.
 15 Are you familiar with those?
 16 A. I am.
 17 Q. And it says: Red Hat exec takes Sun to task on
 18 open source. It's published September 24, 2004.
 19 Do you see that?
 20 A. Yes.
 21 Q. It says: Top Red Hat executive has attacked
 22 the open-source credentials of its sometime business
 23 partner Sun Microsystems.
 24 It goes on to talk about a web blog
 25 posting: Thursday, Michael Tiemann -- that's you -- Red

1 Hat's Vice President of Open Source Affairs, criticized
2 Sun for its support of software patents and its decision
3 to keep Java a proprietary software.

4 A. I see that.

5 Q. Specifically, I want to look at the next page,
6 and I want to look at the last sentence of this
7 paragraph that I put the little brackets around.

8 Do you see that okay?

9 And it's a question that you posed. I'll
10 give you time to catch up.

11 A. Is this the thing in the box?

12 Q. Yes.

13 A. Okay. I've got it.

14 Q. And it says -- the last sentence there of that
15 paragraph: Would you put your financial muscle in
16 lobbying credibility behind fighting software patents,
17 something our community universally hates because it
18 threatens our ability to innovate?

19 A. I see that.

20 Q. Software patents threaten what you perceive as
21 your company's business model and your ability to
22 innovate; isn't that right?

23 A. That is correct.

24 Q. Do you really think you have to be able to take
25 other people's protected property to be able to

1 somebody like my clients, who own a patent or inventor,
2 like Dr. Henderson that you heard from earlier, who put
3 his blood, sweat, and tears into this invention -- do
4 you think they should be heard to complain when a
5 company begins distributing to millions and millions of
6 customers their proprietary software?

7 A. They should be heard -- if you're talking about
8 complaining in the public speech, which is what I was
9 doing with my web posting. I was trying to get my
10 fellow business people and Americans to understand my
11 position and join with me and say, hey, if Congress can
12 change the law in 1984 to allow businesses to
13 collaborate on new innovation, maybe Congress can say
14 it's the best thing for the Department of Defense; it's
15 the best thing for the White House; it's the best thing
16 for the New York Stock Exchange. Maybe America would be
17 better off if we took this new invention, open source,
18 and made it more legally protected.

19 So that kind of complaint, I'm sure your
20 client already complains in various places about the
21 burdens of being a patent holder. But in terms of legal
22 complaint the question that I would -- you know, to me
23 when I hear the question of legal complaint, the
24 question is, what is the basis?

25 And the basis requires infringement, and I

1 innovate?

2 A. It has nothing to do with taking anybody's
3 property.

4 MR. KREVITT: Your Honor, I object. The
5 question wasn't designed --

6 THE COURT: He can -- Mr. Tiemann can
7 continue to respond to the questions.

8 A. This is not a question of taking. This is a
9 question of how companies are able to spend their
10 resources in their plans to innovate.

11 And when our people have to spend years of
12 effort trying to demonstrate that a baseless allegation
13 is false, then that takes away from our ability to
14 innovate, and it puts us in a courtroom and just forces
15 us to litigate.

16 To me, that is not an efficient use of our
17 development resources or our financial resources. And
18 we would not have that problem if people would give to
19 us the same promise we give to them, which is full
20 freedom to practice our patents under open source.

21 Q. (By Mr. Hill) But what if they don't want to?

22 A. If they don't want to, I -- I will follow the
23 law, but I will follow the law and complain.

24 Q. Well, do you also agree that it's -- there's an
25 equal complaint to be had on the other side of that by

1 don't believe we infringe. In fact -- we don't
2 infringe.

3 Q. I understand that's your company's contention
4 in the lawsuit. That's why we're here.

5 A. Right.

6 Q. Because we have a difference of opinion.

7 A. Right.

8 Q. You understand that my client does have a
9 complaint, and they're voicing that complaint in this
10 courtroom?

11 A. And I believe in equal access to the law. And
12 so I believe at the end of the day, it is proper for
13 both complaints to be heard and for a ruling to be made
14 on which complaint is the more valid.

15 Q. I want to get back to something you said just a
16 second ago. You cited that you're complaining in the
17 court of public --

18 A. Yes.

19 Q. -- public arena.

20 A. Well said.

21 Q. And also complaining to Congress that maybe the
22 law should be different in certain regards; is that
23 right?

24 A. Well, to be honest, I don't remember any
25 specific complaints to Congress, because I don't have

1 the kind of clout that Bobby Ray Inman had when he was
2 President of MCC.

3 Q. Well, your company has lobbied the Supreme
4 Court of the United States as well for the abolition of
5 software patents; isn't that right?

6 A. I would not be surprised to learn that.

7 Q. But it's because you think that the more
8 acceptable business model is one in which we decrease
9 the number of private rights, private personal property
10 rights in this country, and take away people's rights in
11 exchange for a community where rights can be just open
12 and communally shared?

13 A. I go back to the Constitution and the specific
14 wording that explains why we even have patents and
15 copyrights, which is to promote progress in science and
16 the useful arts. And I agree with that with all my
17 heart.

18 And when I read what Thomas Jefferson said
19 as first Commissioner of the Patent Office and upon his
20 many reflections of the good and the bad of what evolved
21 out of the patent system, I find myself really agreeing
22 with that fundamentalist view that Thomas Jefferson
23 expressed, which is that an idea should not be patented.

24 Q. And our Constitution protects people's life,
25 liberty, and property, correct?

1 Q. Let's talk about the products you do
2 distribute. You're not trying to tell this jury that
3 you don't make money off the software you distribute,
4 are you?

5 A. We have tried to tell the jury, and with your
6 permission, I'll tell them again.

7 We sell subscriptions to Red Hat
8 Enterprise Linux and other software. We also make money
9 by selling training and consulting services.

10 Q. So free isn't really free?

11 A. It's just like a horse. If a horse shows up,
12 it might be free that afternoon, but if you have to take
13 it to the vet and you've got to feed it, sooner or later
14 it costs a lot of money.

15 These complex software systems are just
16 like that. You can get the software for free, but they
17 need help every day. And that's what we sell, the
18 ongoing help.

19 Q. In this part of the world, we understand about
20 selling a man a horse.

21 So let me talk to you a little bit about
22 your software. You intend to make money surrounding
23 this software. That's why you put it out there. This
24 software is your entree to then be able to put your
25 for-profit products on top of it, correct?

1 A. That's right.

2 Q. And to enhance your business model, you want to
3 see less property in this world so that you can profit
4 off of selling services surrounding what used to be
5 others' private property; isn't that correct?

6 A. It's a balance and a trade-off. It's a balance
7 and a trade-off that some models work better than
8 others; some models work better at a given time than
9 others. And we have seen how much good can be done when
10 people work together, and we believe that that is the
11 best way to build technology, which is why we've chosen
12 that as opposed to the proprietary model of what
13 Microsoft practices or opposed to the practices of IPI.

14 We've chosen our best guess about how to
15 make money and hire more people to do more work.

16 Q. So it's a given to your ability, taken to your
17 need-type paradigm you're pursuing?

18 A. No. I think it's more the American way.

19 Q. Because you know who said given to your
20 ability, taken to your need, don't you?

21 A. That was Jefferson?

22 Q. That was Karl Marx.

23 A. Oh, okay.

24 Q. Let's talk about something else.

25 A. All right.

1 A. It's a two-part process, a two-step process.
2 We intend to sell Red Hat Enterprise Linux and to profit
3 from the sale of Red Hat Enterprise Linux. And we
4 refresh the ideas in that product and the capabilities,
5 and we find new competitive ideas of what happens in the
6 universe that Fedora helps us see.

7 Q. It's a loss leader essentially, your software?

8 A. Anything that doesn't make money, I guess, is a
9 loss leader. We don't make any money on Fedora. It's
10 research and development.

11 Q. Do you know what a loss leader is? Do you know
12 what that means?

13 A. I do.

14 Q. Well, I'll tell you my understanding of it and
15 you can see if we share the same understanding.

16 I worked for a Brookshire grocery store as
17 a kid growing up, and we would have sales. When the
18 sale paper came out on Tuesday, the front page would
19 have some product on the front that they're selling way
20 cheaper than they can really sell.

21 A. Yes.

22 Q. They might sell milk for 99 cents a gallon.

23 A. I understand that.

24 Q. And the point is to get people in the door.

25 A. Yep.

1 Q. And so you lose money on the milk, but you know
2 you're going to make it up everywhere else.

3 A. Yep.

4 Q. That's what you do with your software products,
5 isn't it?

6 A. Well, we don't -- we make our software sources
7 available for free, I'll grant you that. But we don't
8 provide, to my knowledge, you know, 99-cent versions of
9 RHEL as a loss leader to get people to come into our
10 store.

11 And, in fact, they don't have to come into
12 our store. They can download the sources without ever
13 being customers, so I think that's very different than
14 the idea of a loss leader.

15 It's a research and development project.
16 There's a great university in Austin, Texas, where
17 people come to learn and you pay all that tuition and
18 what you get out is a degree and you get knowledge,
19 right? But is that a loss leader?

20 I don't think so. It's a totally
21 different thing. It's about education.

22 Q. There's no question that that free software is
23 there for a purpose and the purpose is money.

24 A. The purpose of that software is to help us
25 refresh the product so that we can move it forward. The

1 So we might have some super wonderful
2 thing that we want to do in our product, but we can't
3 because some other company has a patent and we know that
4 that patent reads on what we want to do. And so we
5 won't do it, because we can't practice a patent that we
6 don't have a license to.

7 But we might have a patent that's valuable
8 to that other company. And so instead of taking money
9 over to those people, we can say we've got a patent. Or
10 maybe we take a patent and some money and we trade.

11 And so patents function like those
12 property deeds in the Monopoly game. Money functions
13 like money in the Monopoly game. Sometimes you pay
14 money; sometimes you trade cards; and sometimes you make
15 a deal with both money and cards.

16 But we are creating value for the company
17 that we hope to trade with people, if that comes to it,
18 or that we hope to use for maximizing value in other
19 ways. It's our right just, as it's your right, to take
20 a valid patent and assert it as we choose.

21 And one of the remarkable things that we
22 choose to not do is assert it against the open-source
23 community.

24 Q. Why would you hold patents instead of
25 consistent with your open-source community simply

1 money comes from the product.

2 Q. And if you're found to be using someone else's
3 protected property in Fedora, or RHEL as it's called,
4 are you saying that Red Hat gets off scot free because
5 you don't know how extensive your infringement might be,
6 because you say you can't track the number of users?

7 A. We will obey the law and we will obey the
8 Court.

9 Q. You understand that the patent statute
10 guarantees a patent owner at least a reasonable royalty
11 for infringement, don't you?

12 A. I do.

13 Q. And you're not saying if we infringe, we can't
14 figure out how many people we give it to, so sorry?

15 A. I fully understand that what is at issue in
16 this case are some patents and not the patent system.

17 Q. I'm going to go over one last thing.

18 You talked earlier about Red Hat having
19 its own patents.

20 A. Yes.

21 Q. Why?

22 A. Well, many reasons. One reason is because, as
23 we've already heard in this case, one of the valuable
24 things that a patent gives you is the ability to
25 practice other patents you may not have.

1 dedicating those for public use? Why are you holding
2 back certain patents?

3 A. Well, because not everybody in the public
4 community plays by the world as we wish it would be.
5 And so we use them -- we use them as a shield, and we
6 have the ability to use them in other ways, if we have
7 cause to do so. That's part of what private property is
8 all about.

9 Q. So you have it both ways?

10 A. We -- well, if having it both ways is how you
11 see it, then that's how we have it.

12 Q. Let me ask you one last question or two, and I
13 will sit down and try to save everybody's time.

14 Who is Matthias Clasen?

15 A. Matthias Clasen is a principal software
16 engineer at Red Hat.

17 Q. And he testified by deposition in this case as
18 a 30(b)(6) witness. Did you hear that?

19 A. I heard that testimony yesterday.

20 Q. He was speaking as a representative of the
21 company?

22 A. Yes, he was.

23 Q. Where does he work?

24 A. He works at Red Hat.

25 Q. Is he here in Marshall this week?

1 A. Not to my knowledge.
 2 Q. Where is he at?
 3 A. I imagine that he is wherever he works. I
 4 don't know if he works in Boston. There's 3200
 5 employees at Red Hat, and I don't know the location of
 6 every one.
 7 MR. HILL: I'll pass the witness, Your
 8 Honor.
 9 Thank you, Mr. Tiemann.
 10 THE COURT: Mr. Krevitt, would you care to
 11 inquire further?
 12 MR. KREVITT: I do, Your Honor, just
 13 briefly.
 14 RECCROSS-EXAMINATION
 15 BY MR. KREVITT:
 16 Q. Karl Marx. I wasn't expecting that. I wasn't
 17 expecting that.
 18 THE COURT: Do you have a question,
 19 Mr. Krevitt?
 20 MR. KREVITT: I do.
 21 Q. (By Mr. Krevitt) Mr. Hill said that you keep
 22 some of your inventions, patents. Red Hat gets patents.
 23 A. Me personally?
 24 Q. No. Red Hat keeps its patents and doesn't give
 25 them to anyone, and so in that way it has it both ways.

1 It gets patents and keeps them for itself, but yet it's
 2 getting innovations from other people?
 3 A. I do. It's missing one fact.
 4 Q. All right. Maybe you're anticipating my
 5 question. Why don't you tell me what that fact is.
 6 A. The fact is that we do grant to the open-source
 7 community the value of practicing those patents, and we
 8 don't ask for any royalty or any payment. We give free
 9 permission to them. So we treat the open-source
 10 community in a fully fair way, both ways, and --
 11 Q. Just to be clear -- just to be clear --
 12 A. Yes.
 13 Q. -- that means every person in the world that
 14 agrees that how -- that they will participate in the
 15 open-source community and share their innovations is
 16 free at all times without permission, without contacting
 17 you to use your patents; is that right?
 18 A. Essentially. I can make it more precise, if
 19 you want.
 20 Q. Please.
 21 A. So Red Hat has something called the patent
 22 promise, and we post it on our website, and we think
 23 it's so important when you go to our whole website and
 24 you see all the different nav bars, at the bottom of the
 25 page on every page, you can click on the patent promise

1 to see what promises we make.
 2 And what we say in that patent promise is
 3 if you practice a method that we have covered by a
 4 patent and you use one of the open-source licenses that
 5 we list as an acceptable license -- because we don't
 6 want any random person to say, you know, this is an
 7 open-source license, give me your patents, right?
 8 So we enumerate what are the acceptable
 9 licenses, which are all well-known and well-understood
 10 by the open-source community. And then we say, if
 11 you're doing it under one of these licenses, you can do
 12 it with no fear that Red Hat will come against you and
 13 assert a patent against you in that way.
 14 That's a little more precise, I hope.
 15 Q. I think it was. So there -- and I think you
 16 said Red Hat has 40 patents; is that right?
 17 A. My understanding is 42 have been issued to Red
 18 Hat so far.
 19 Q. And how many pending applications?
 20 A. Well, I think we've filed over a thousand. I
 21 don't know precisely how many are pending.
 22 Q. So ballpark, we're talking about over a
 23 thousand patents or patent applications?
 24 A. That's a lot of money going to patent
 25 attorneys.

1 Q. Okay. And that's all protection that -- if
 2 those patents come out of the Patent Office, that's all
 3 protection that would be Red Hat's to use any way it
 4 wants; is that right?
 5 A. Any way it wants and --
 6 Q. And following up on Mr. Hill's discussion of
 7 the patent system, that means that Red Hat could, if it
 8 wanted, exclude everyone from using all of those
 9 inventions in all of those patents?
 10 MR. HILL: Your Honor, I object to
 11 Counsel's leading during the redirect.
 12 MR. KREVITT: I'm just following up.
 13 THE COURT: I think you can pose a
 14 question that lets Mr. Tiemann answer.
 15 MR. KREVITT: Sure.
 16 Q. (By Mr. Krevitt) What rights would Red Hat have
 17 if it wished to, to assert those patents or patent
 18 applications when they issue out of the Patent Office?
 19 A. When they issue out of the Patent Office, Red
 20 Hat has every right in the world to assert that patent
 21 against anybody who infringes the claims of the patent,
 22 and --
 23 Q. So Red Hat could, if it chose to, do what IPI
 24 is doing here and sue people?
 25 A. That is exactly correct.

1 Q. But Red Hat has made a commitment; is that the
2 patent promise you were talking about?

3 A. We have made a choice and that choice is that
4 we offer patent peace to those who put their software
5 under a set of open-source licenses, and we reserve all
6 of our rights that the patents provide for anybody who
7 chooses to work in another way.

8 Q. And that's true -- is that true of everybody
9 who contributes to open source; they all keep their
10 patent rights, if they have any patent rights?

11 A. Yes. We don't say that you lose your patent
12 rights by joining Red Hat. But what we do say is we can
13 reject your software, if it's encumbered by patents that
14 you cannot grant to the whole open-source community.

15 Q. Now, are there instances in which somebody will
16 say to Red Hat, hey, we think you're infringing our
17 patents? Has that happened? Or we think to use this
18 technology, you would be infringing our patents?

19 A. There's well-known software out there which we
20 are very cautious about, because we are convinced that
21 in order to implement that software, we would have to
22 practice claims from a non-expired patent.

23 Q. So are you saying you're concerned, because to
24 incorporate that functionality in your product might
25 mean that you fell within the scope of someone else's

1 patent?

2 A. Exactly. And we avoid that.

3 Q. By avoid that, what do you mean?

4 A. That means that if we are aware or have reason
5 to believe that a particular piece of software is
6 covered by a patent that does not provide the rights,
7 the necessary rights for anybody in the open-source
8 community to practice that patent, then we will say --
9 we will not put that into our open-source projects.

10 Q. And is that just talk, or are there examples of
11 Red Hat having put its money where its mouth is and not
12 put features in that might infringe someone's patents?

13 A. There's a really great example of that.
14 There's a file format called MP3, which is used for
15 music and media files, and the MP3 encoders and decoders
16 are covered by software patents. And we preemptively
17 said that we will not accept any implementation of MP3
18 players in our Fedora Project, because we do not want to
19 trespass across those patents. And that has really hurt
20 the popularity of Fedora.

21 Q. What do you mean hurt? Has it put you at a
22 competitive disadvantage?

23 A. It has. We heard earlier about another
24 distribution who is not present in the courtroom, the
25 Ubuntu distribution. They, as I understand, are based

1 in London, UK, and they happily include an MP3 player
2 and they have been rapidly overtaking the popularity of
3 our Fedora Project and other Linux distributions,
4 because, to paraphrase an old song, I want my MP3.

5 And so we can't provide that as an
6 open-source implementation, even though we know how to
7 do it. It's easy to write the code; it's impossible to
8 get the patent rights we need. So we are literally deaf
9 and dumb as far as the computer is concerned, because we
10 can't do audio files legally, and so we don't.

11 Q. So you could just add it and hope for the best
12 that they wouldn't sue you, right?

13 A. That's not how we do business.

14 Q. It isn't?

15 Are you looking at taking anyone's
16 property rights away?

17 A. No.

18 Q. That's not Red Hat's mission, to take away
19 people's property rights?

20 A. No. Our mission is to add value to our
21 customers and return value to our shareholders.

22 Q. Do you know, roughly, how long the feature
23 that's accused of infringement in this case has been in
24 the Red Hat distributions?

25 A. My understanding is that the accused feature

1 first appeared in 1997.

2 Q. And do you know who owned -- just from having
3 sat through this trial already, do you know who owned
4 the patents in 1997, the patents that are at issue in
5 this case?

6 A. It was the Xerox Corporation.

7 Q. Do you know until how long the Xerox
8 Corporation has had those patents?

9 A. They had those patents until 2004.

10 Q. And then in 2004, the Plaintiffs were given
11 those patents?

12 A. That is my understanding from this trial.

13 Q. At any time ever between 1997, when this
14 feature appeared in your products, and 2004, when Xerox
15 gave the patents to the Plaintiffs, at any time in any
16 way did Xerox ever contact Red Hat and say, hey, we
17 think we've got a problem with our patents?

18 A. I'm unaware of any such contact by Xerox of any
19 person associated with Red Hat or the Fedora Project.

20 Q. And because of the open-source nature of your
21 products, the way you do what you do -- the way you do
22 this feature that's accused of infringement has been
23 publicly available every second it's been out there; is
24 that right?

25 A. That's right. We don't know how many users

1 have been exposed to that feature, but it's more than
2 one.

3 Q. Well, I guess my point is, we know that
4 starting in 1997, the -- there was nothing secret about
5 it.

6 A. Nothing secret.

7 Q. Nothing that Xerox couldn't have seen --

8 A. No.

9 Q. -- in '97?

10 A. No.

11 Q. Or '98 or any year.

12 And then in 19 -- excuse me -- in 2004,
13 the Plaintiffs in this case got the patents?

14 A. Yes.

15 Q. And in October of 2007, they sued Red Hat?

16 A. Yes.

17 THE COURT: Excuse me. I see Mr. Hill on
18 his feet.

19 MR. HILL: Your Honor, I don't mean to
20 drag things out, but I believe this is beyond the scope
21 of the cross-examination. There was no licensing with
22 Xerox or any of that chronology.

23 THE COURT: I don't remember that.

24 MR. KREVITT: Your Honor, there was
25 extensive examination on whether or not Red Hat cares

1 about possibly infringing people's patents. In one part
2 of the question and answer on that is when any patents
3 are brought to their attention, they act immediately and
4 responsibly.

5 THE COURT: You may proceed.

6 MR. KREVITT: Thank you, Your Honor.

7 Q. (By Mr. Krevitt) So you recall in 2004 that
8 Plaintiffs are given the patents; in 2007, they go ahead
9 and sue Red Hat?

10 A. Yes.

11 Q. And at any time before the notice letter -- and
12 just so we're all clear, I'm referring to the letter
13 that the Niro firm sent the day before they sued us.

14 A. October 8, 2007?

15 Q. Yes. Yes.

16 At any time before Red Hat received that
17 notice letter in the years from 2004 to 2007, did the
18 Plaintiffs or anyone on behalf of the Plaintiffs, the
19 Niro firm, anyone ever bring these patents to Red Hat's
20 attention?

21 A. Not to my knowledge at all.

22 Q. No one ever said, hey, we think you've got a
23 problem?

24 A. Nobody.

25 Q. Okay. Now, I asked you whether the feature was

1 secret, and you said it wasn't. And we were talking
2 about whether Xerox could have known about it.

3 Remember that?

4 A. Yes.

5 Q. In fact, do you recall seeing earlier today an
6 exhibit during Mr. Gemini's testimony, which was a
7 Microsoft/Xerox agreement?

8 A. I do.

9 Q. And do you recall that that agreement
10 specifically identified Linux?

11 A. I saw it not only identifying Linux, but
12 actually Linux as a category of a broader open-source
13 software domain. And so it specified not only Linux,
14 but it specified many other open-source programs,
15 including GNOME and others.

16 Q. And it's GNOME that has the feature that's
17 accused of infringements; is that right?

18 A. That is correct.

19 Q. So we know Xerox knew about this feature,
20 correct?

21 A. We know that they knew about GNOME.

22 Q. We know they knew at least about GNOME. Fair
23 enough. Good clarification.

24 I think you answered some questions as to
25 your feelings on software patents, and nobody in the

1 courtroom was left with any ambiguity regarding those
2 feelings.

3 Do you think that this litigation is an
4 example of why you dislike software patents?

5 A. This -- the litigation is precisely the problem
6 that I wrote about extensively, not just in that but in
7 other postings.

8 And to give you an example of this, the --
9 it was in 1995 that I had an SGI computer on my desktop,
10 and I remember seeing the notice that was on that very
11 screen that a particular feature, which I happened to
12 not use, would disappear from the computer.

13 And I thought to myself, it's a software
14 patent, and I wonder what the consequence of this
15 software patent will be in my life. And at the time, I
16 just thought, I'm losing a feature off the desktop. And
17 I had no idea that that notice in 1995 in Mountainview,
18 California, would land me in a courtroom in Marshall,
19 Texas, 15 years later.

20 Q. What, sir, about this lawsuit -- what about
21 this lawsuit makes you uncomfortable with some of these
22 software patents that are out there?

23 A. The thing that makes me the most uncomfortable
24 is that the question of infringement is something which,
25 as a technical person and as a computer user, I can find

1 no basis for the claims that are being alleged against
2 Red Hat, and yet here we are taking the jury's time to
3 decide this issue.

4 And so the question -- if infringement can
5 be such a questionable case, then that limits people's
6 willingness to innovate, because who knows what is
7 contained in the next 300,000 patent applications going
8 to the Patent Office or the next 150,000 patents that
9 are coming out.

10 How is it possible to safely talk with
11 somebody, get an idea, implement it, and not have, 15
12 years later, litigation come down on your head?

13 Q. Maybe that answer answers my next question.
14 But I wanted to ask another question, which was just
15 following up on Mr. Hill's first.

16 Mr. Hill seemed to take us for task,
17 probably me more than you, for not raising the question
18 of whether the technology that's accused of infringement
19 in this case actually infringes.

20 Do you remember that?

21 A. Yes.

22 Q. Okay. Does the technology that's accused of
23 infringement in this case infringe in your view?

24 A. Not in my view.

25 MR. KREVITT: I think that's all I have,

1 Dr. Zimmerman that testified. And this jury heard his
2 testimony, and I think they may have a little different
3 view of whether this is a frivolous lawsuit or not based
4 on that testimony. But you didn't have the benefit of
5 hearing that, did you?

6 A. I'm sorry, I did not.

7 Q. Now, you understand, don't you, Mr. Tiemann,
8 that my clients have not joined your club, right? Your
9 open-source community?

10 A. They have not offered to us the promise that we
11 offer to others. We would gladly accept the promise to
12 practice those claims of now expired patents in our
13 products. I guess now we have no fear today, but this
14 is about the past.

15 Q. This is about the past. They want to keep
16 their private property theirs and not donate it to your
17 community. And you understand that the reason they're
18 in this courtroom is because they don't want their
19 property freely given away by you.

20 Do you understand that?

21 A. I understand that they're in this courtroom to
22 try to win a judgment.

23 Q. And would you agree with me that a company can
24 make bigger margins if you don't have to develop your
25 own technology?

1 Your Honor.

2 THE COURT: Mr. Hill, anything further?

3 MR. HILL: Yes, Your Honor, thank you.

4 RE-CROSS-EXAMINATION

5 BY MR. HILL:

6 Q. Mr. Tiemann, I want to cut to the chase to the
7 very end of what Mr. Krevitt was asking you about.
8 You're calling this a frivolous lawsuit, aren't you?

9 If you're going to say it, just come on
10 out and say it.

11 A. This is a very serious lawsuit.

12 Q. You said it was baseless?

13 A. I believe our software does not infringe, and
14 so there's no basis for damages.

15 Q. So you're calling this a frivolous lawsuit.

16 A. It's a very serious lawsuit with allegations
17 that we owe millions of dollars. I take it very
18 seriously.

19 Q. And you say we have no basis for our claim of
20 infringement. Let me ask you then, I assume you were in
21 the courtroom. You heard the testimony from
22 Dr. Zimmerman?

23 A. I was absent during his testimony. I
24 apologize.

25 Q. Oh, okay. Well, there was a gentleman named

1 A. I don't know that I would agree with that as a
2 general economic principle.

3 Q. Having people give you the technology you
4 provide rather than having to spend money on research
5 and development to develop it all yourself certainly
6 cuts costs, doesn't it?

7 A. It cuts some costs; it adds other costs. We
8 have to sift through billions of lines of source code to
9 figure out which 200 million we're going to put into the
10 next version of Fedora. There's a lot of cost in having
11 access to a billion lines of source code.

12 Q. I guess just like having to sort through what
13 people donate runs up cost for the Goodwill?

14 A. It does. And I don't see the people who run
15 Goodwill making a lot of money.

16 Q. Well, let's talk about one last thing.

17 You mentioned that my client sued you
18 right after they sent a notice letter; isn't that right?

19 A. I don't think I was the one who made that
20 mention.

21 Q. Well, I'll just say it as fact. We sued you
22 right after we sent you a notice letter.

23 A. Yes.

24 Q. I want to show you something. I want to show
25 you a copy of Plaintiffs' Exhibit 326.

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1 Can you tell us what this is?
2 A. This is a license which I helped write in 1991.
3 Q. Is this an open-source license?
4 A. Yes, it is.
5 Q. And it's a Version 2?
6 A. Yes, it is.
7 Q. And that's a valid version under which your
8 products can be distributed and people can participate
9 in the open-source community?
10 A. Yes, it is.
11 Q. And I want to look at the second to the last
12 paragraph right down here.
13 MR. HILL: Thank you.
14 Q. (By Mr. Hill) And it says: Finally, any free
15 program is threatened constantly by software patents.
16 A. I see that.
17 Q. And then the last sentence says: To prevent
18 this, we have made it clear that any patent must be
19 licensed for everyone's free use or not licensed at all.
20 A. I see that.
21 Q. Do you think my client might have sued you
22 because they knew if they signed a license with you,
23 they'd have to license everybody in the world as a
24 result through you, because you wouldn't sign a license
25 otherwise, would you?

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1 A. Do you understand the use of the word free
2 there? Do you understand that that word, free, is not
3 meant to imply free of charge, but it is meant to mean
4 free as in freedom.
5 Q. You will not take a license from a third party
6 unless that party agrees that their software can be
7 distributed into the open-source community and
8 reproduced freely after that, will you?
9 A. That is correct.
10 Q. Do you think that might give somebody reason to
11 figure it's not going to do me any good to negotiate
12 with this guy?
13 A. I think that might give somebody who has a very
14 short lifespan left on their patent and someone willing
15 to make a lump-sum payment for dismissing whatever the
16 remaining claim value is on that short term, that that
17 would look like a very attractive offer.
18 MR. HILL: I pass the witness, Your Honor.
19 Thank you.
20 THE COURT: Mr. Krevitt?
21 MR. KREVITT: I have no further questions.
22 THE COURT: Thank you. You may step down.
23 THE WITNESS: Thank you very much.
24 THE COURT: Mr. Krevitt, would you like to
25 call Mr. Reiter, so to speak?

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1 MR. KREVITT: I'll switch seats with my
2 colleague, Your Honor.
3 MR. REITER: You get me again, Your Honor,
4 or the jury gets me again.
5 Just a question, Your Honor. We're
6 approaching 3:00 o'clock. Do you want us to start the
7 next witness, or would you like to take the --
8 THE COURT: You're trying to win the
9 favor.
10 MR. REITER: It's my turn.
11 THE COURT: Okay. Let's take our break.
12 (Recess.)
13 (Jury in.)
14 THE COURT: Please be seated.
15 And, Mr. Reiter, I see you're on your
16 feet.
17 MR. REITER: Defendants would like to call
18 their next witness, Mr. Gerry Riveros.
19 COURT ROOM DEPUTY: Raise your right hand,
20 please.
21 (Witness sworn.)
22 THE COURT: You may proceed.
23 MR. REITER: Your Honor, I have notebooks.
24 GERRY RIVEROS, DEFENDANTS' WITNESS, SWORN
25 DIRECT EXAMINATION

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1 BY MR. REITER:
2 Q. Good afternoon. Would you state your name for
3 the record, please?
4 A. Yes, my name is Gerry Riveros.
5 Q. And who are you, Mr. Riveros? What do you do?
6 A. I work for Red Hat and I'm here to explain how
7 Red Hat markets Red Hat Enterprise Linux and also
8 explain how our customers use our software.
9 Q. What's your position at Red Hat?
10 A. I'm a senior product marketing manager for our
11 server product.
12 Q. Where do you work?
13 A. I work in North Carolina.
14 Q. Is that on the campus of North Carolina State?
15 A. That's correct, yeah, North Carolina State
16 University.
17 Q. You went to the University?
18 A. No, I didn't. I went to Michigan.
19 Q. Big 10 school?
20 A. Definitely.
21 Q. Where are you from originally?
22 A. I'm from the Midwest. I'm from Indiana.
23 Q. How did you get to North Carolina?
24 A. Taking the job. I've always wanted to work for
25 Red Hat. That's one of the key companies, and I got the