

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

--oOo--

ORACLE CORPORATION, a)
Delaware corporation, ORACLE)
USA, INC., a Colorado)
corporation, and ORACLE)
INTERNATIONAL CORPORATION, a)
California corporation,)
)
Plaintiffs,)
)
vs.) 07-CV-1658 (PJH)
)
SAP AG, a German corporation,)
SAP AMERICA, INC., a Delaware)
corporation, TOMORROWNOW,)
INC., a Texas corporation, and)
DOES 1-50, inclusive,)
)
Defendants.)
_____)

VIDEOTAPED DEPOSITION OF DOUGLAS LICHTMAN

APRIL 20, 2010

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

REPORTED BY: SARAH LUCIA BRANN, CSR 3887 (#427358)

TEXT REMOVED - NOT RELEVANT TO MOTION

09:04:39 12 MR. BUTLER: Q. Good morning. We met a
09:04:42 13 few moments ago, but for the record would you state
09:04:44 14 your full name, please?
09:04:45 15 A. Sure. My name is Douglas Lichtman.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

09:27:47 19 Q. You understand therefore that Oracle has
09:27:50 20 asserted a number of claims against the defendants
09:27:56 21 in this case, including various federal and state --
09:28:02 22 California state law claims; right?
09:28:05 23 A. I understand that Oracle has many
09:28:07 24 different claims in there. My focus has been on the
09:28:11 25 copyright issues, and so I don't have much to

09:28:15 1 comment on the others.

09:28:16 2 I really focused on the issues that were
09:28:18 3 relevant to my own testimony rather than focusing
09:28:21 4 more generally on what is a large and complicated
09:28:23 5 case.

09:28:24 6 Q. So your focus has been on copyright
09:28:26 7 issues.

09:28:27 8 A. Correct.

TEXT REMOVED - NOT RELEVANT TO MOTION

09:29:23 20 Q. The first one says, "One purpose of this
09:29:25 21 Report is to offer an economic perspective on the
09:29:29 22 public policy justifications of copyright law, with
09:29:34 23 particular emphasis on copyright law's damages
09:29:41 24 regime." Do you see that?

09:29:44 25 A. I do.

09:29:45 1 Q. What do you mean by that?

09:29:47 2 A. I think paragraph one I am trying to
09:29:50 3 articulate what is the big work this report is meant
09:29:54 4 to do, which is to articulate these economic and
09:29:57 5 public policy justifications for copyright law and,
09:30:00 6 as I say in particular, copyright law's damages
09:30:06 7 regime.

09:30:07 8 Q. One of your purposes is to offer an
09:30:11 9 economic -- economic -- is to provide economic
09:30:20 10 rationales for the copyright law?

09:30:21 11 MR. FALZONE: Objection to the form of the
09:30:22 12 question.

09:30:24 13 MR. BUTLER: Q. Is that a fair summary of
09:30:27 14 that stated purpose?

09:30:28 15 A. I think the purpose is to articulate the
09:30:30 16 existing economic and public policy rationales for
09:30:34 17 copyright law's damages regimes, so not me coming up
09:30:38 18 with my own. This is not scholarship in that sense.

09:30:42 19 The purpose is -- put it this way. The
09:30:44 20 jury at some point is going to have to do a damages
09:30:48 21 analysis, going to have to come up with a number.

09:30:50 22 And my view, my understanding, and what
09:30:52 23 this report reflects, is that to help the jury do
09:30:55 24 that work we need a couple kinds of inputs.

09:31:00 25 One kind of input is the expertise

09:31:02 1 represented by someone like Mr. Meyer, where he has
09:31:06 2 expertise in looking at the numbers and offering
09:31:09 3 very much a trees perspective, if you use the forest
09:31:13 4 versus trees standard analogy.

09:31:16 5 Someone like Mr. Meyer has expertise in
09:31:18 6 really taking the jury to numbers, and how to think
09:31:22 7 about the numbers, and how to do intuitive and
09:31:25 8 sometimes not-so-intuitive mathematics with the
09:31:28 9 numbers. That's one input that they need.

09:31:31 10 I think another important input the jury
09:31:34 11 needs is more of the forest perspective, which is to
09:31:37 12 say the context for, why do we do all that numbers
09:31:40 13 work? What's the point? What's the law trying to
09:31:42 14 accomplish? Why do those numbers matter? How do
09:31:45 15 those numbers work?

09:31:46 16 And I view a key purpose of my testimony
09:31:50 17 and report to be a way of articulating those
09:31:53 18 economic and public policy justifications,
09:31:58 19 explanations.

09:31:59 20 Again, I like to think of them as context.
09:32:01 21 Let's make sure the jury hears that input also. And
09:32:05 22 then the jury would hopefully be in a great position
09:32:07 23 to marry up all of that information, the trees, the
09:32:11 24 numeric details from Mr. Meyer, from Mr. Clarke, to
09:32:14 25 the extent he has numeric details, and so on.

09:32:17 1 Let the experts in that category
09:32:18 2 articulate the numbers, and then someone like me
09:32:22 3 comes in with expertise on the policy and economic
09:32:24 4 issues to help make sure the jury understands what
09:32:28 5 we are doing and why, and how it all fits together.
09:32:32 6 And that was what I was trying to reflect
09:32:35 7 in paragraph one.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

09:36:08 4 Q. My question is how you expect to help the
09:36:10 5 jury. That's my specific question. So you intend
09:36:12 6 to educate the jury on the context, the legal and
09:36:15 7 economic context behind copyright damages?

09:36:18 8 A. Not --

09:36:20 9 MR. FALZONE: Same objection. Asked and
09:36:21 10 answered.

09:36:23 11 THE WITNESS: Sorry.

09:36:24 12 I think the economic and public policy
09:36:27 13 justifications for the law -- I think you
09:36:31 14 accidentally misspoke in your question.

09:36:33 15 My job is to come in and articulate these
09:36:36 16 economic and public policy intuitions that explain
09:36:40 17 all these moving parts. And the damages reports in
09:36:44 18 this case number hundreds and hundreds of pages.
09:36:48 19 And when we ask a jury to wade through all that and
09:36:51 20 pick a number to deal with all the testimony they
09:36:53 21 will have to hear, I think part of the inputs they
09:36:55 22 need is a conversation with someone like me, where
09:36:59 23 we can talk about, what are we doing? Why? How
09:37:03 24 does it work? What are the policy and economic
09:37:06 25 motivations underneath all of this damages analysis

09:37:08

1

and damages law?

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

09:53:54 9 Q. Do you think you are qualified to crunch
09:53:56 10 numbers and come up with actual damages numbers in
09:53:59 11 copyright infringement cases?
09:54:01 12 MR. FALZONE: Objection to the form of the
09:54:02 13 question. It's vague. It's ambiguous.
09:54:05 14 THE WITNESS: I alone would not hold
09:54:09 15 myself up as an expert for actually doing the
09:54:11 16 mathematical calculations. I believe there are more
09:54:14 17 qualified experts, like Mr. Meyer, to do the actual
09:54:17 18 what you call crunching of numbers.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

10:24:05	23	Q. Is there -- beg your pardon. Is there
10:24:09	24	anything in your report that you believe rebuts any
10:24:14	25	of the opinions rendered by SAP's damages experts,

10:24:26 1 expert?

10:24:27 2 A. Yes.

10:24:27 3 Q. What is that?

10:24:28 4 A. I think at two levels the answer to that
10:24:31 5 question is yes.

10:24:32 6 On one level, for instance, you think
10:24:34 7 about Mr. Clarke. I think, when you look at
10:24:36 8 Mr. Clarke's report, he takes positions that are
10:24:39 9 inconsistent and sometimes irreconcilable with the
10:24:43 10 positions I have taken, which is another way of
10:24:46 11 saying that when you look at what I say, it rebuts
10:24:49 12 some of what he says. And conversely I am sure he
10:24:52 13 would want to stand by his views.

10:24:54 14 But many of the explanations I offer, if
10:24:58 15 I'm right, he is wrong in some of the moves that he
10:25:01 16 made. And to that extent category one is, what I
10:25:07 17 said, even not having read his report, turns out to
10:25:11 18 push back against some of what he says.

10:25:12 19 On a second layer I also ultimately hope
10:25:16 20 to testify directly in response to Mr. Clarke. And
10:25:19 21 obviously that information, while implicit in my
10:25:23 22 report, is not explicit, because I hadn't had
10:25:26 23 Mr. Clarke's report yet.

10:25:27 24 But there are specific things we mentioned
10:25:30 25 earlier that, now that I have read Mr. Clarke's

10:25:32 1 report, I think he has got some things that are
10:25:34 2 wrong or incomplete. And in addition to the
10:25:38 3 discussion in my actual report as we look at here in
10:25:40 4 the exhibit, I have now more things to say to very
10:25:45 5 specifically speak back to Mr. Clarke and some of
10:25:48 6 the things Mr. Clarke did.

10:25:50 7 Q. What is it that you think Mr. Clarke has
10:25:52 8 wrong in his report?

10:25:54 9 A. I prepared some notes. As you know, I
10:25:57 10 might lightly refer to them as we go, if that's
10:26:00 11 permissible. But at a high level I tried to
10:26:03 12 organize them into categories -- and I marked a
10:26:06 13 bunch of specific examples in the report. But at a
10:26:08 14 high level there were a couple of categories of
10:26:11 15 things that I thought he got wrong or incomplete.

10:26:14 16 One, and probably the most pervasive
10:26:17 17 thing, is Mr. Clarke seemed to always think of
10:26:19 18 damages in only one theory, which is a theory where
10:26:25 19 damages are tied to what actually turned out to
10:26:29 20 transpire in the real world. And so no matter what
10:26:33 21 damages theory he purports to be applying or
10:26:37 22 explaining or arguing about, he always explicitly or
10:26:42 23 implicitly slips back into thinking of the world
10:26:45 24 only as it actually turned out to happen, and I
10:26:47 25 think that's wrong. We can talk in more detail

10:26:50 1 about that.

10:26:51 2 But the damages regime does and should,
10:26:54 3 when we talk about the logical why and the policy
10:26:57 4 and economics underneath it -- but copyright law has
10:27:01 5 more than that. And it allows for damages measures
10:27:03 6 that not only go to what actually transpired, but
10:27:06 7 damages measures that also go to things like what
10:27:09 8 the parties expected at a relevant time.

10:27:12 9 And so one category of things that I was
10:27:15 10 uncomfortable with in Mr. Clarke's report -- and
10:27:18 11 again, I have got a bunch of specific examples that
10:27:20 12 I point out, if you want to talk about them. But
10:27:24 13 one category I was uncomfortable with was this
10:27:26 14 category where he seemed to always go back to what
10:27:30 15 actually transpired, even when that isn't the
10:27:32 16 relevant economic or public policy move for the
10:27:35 17 damages articulation he was supposed to be thinking
10:27:38 18 about.

10:27:38 19 So that's the first category.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

Page 65

10:32:27 3 Q. And you feel your report, though, needs
10:32:29 4 some supplementation in order to address the issues
10:32:33 5 addressed in Mr. Clarke's report?
10:32:34 6 MR. FALZONE: Objection to the form of the
10:32:35 7 question. It's vague, ambiguous.
10:32:40 8 THE WITNESS: I don't know that my report
10:32:41 9 needs supplementation. I had planned to and hope to
10:32:46 10 testify both based on my report and in addition
10:32:49 11 testify in response to things raised by Mr. Clarke.
10:32:52 12 I am not aware of any rule of the court that
10:32:55 13 requires us to also do that through a supplemental
10:32:57 14 report. But I defer to the attorneys to figure that
10:33:00 15 out.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

10:35:42 22 Q. Did you -- you said Mr. Clarke was wrong
10:35:48 23 because he talks about what actually transpires.
10:35:52 24 What did you mean by that?
10:35:53 25 A. Throughout the report -- and again, I have

10:35:55 1 specific examples, if that's helpful to our
10:35:57 2 conversation. Throughout the report Mr. Clarke,
10:36:00 3 whether he says he is doing it or not, always seems
10:36:03 4 to go back to what actually happened when he is
10:36:07 5 doing his calculations. And I believe that's
10:36:10 6 incorrect, in that copyright law, for very good
10:36:17 7 public policy and economic reasons, allows the
10:36:20 8 decision-maker to think more broadly than that.

10:36:22 9 Some measures of damages absolutely turn
10:36:25 10 on what actually happened. Other measures of
10:36:27 11 damages turn on other things, for example, what the
10:36:30 12 parties expected at a relevant time.

10:36:32 13 And Mr. Clarke sometimes explicitly says,
10:36:36 14 "No, I am not going to think about it that way," and
10:36:38 15 sometimes he just implicitly doesn't, through the
10:36:41 16 way he defines a word or the way he runs a number
10:36:44 17 calculation. He implicitly seems to always default
10:36:48 18 to what actually, actually happened, which again,
10:36:51 19 relevant, sure thing, but not the only way we
10:36:55 20 measure damages.

10:36:55 21 And so I thought he is incorrect often
10:36:59 22 when he makes that move, and that he is ignoring
10:37:02 23 some things that he is not supposed to ignore on
10:37:04 24 economic and public policy grounds.

10:37:06 25 Q. What specific things does he ignore?

10:37:08 1 A. Again, should we turn to some examples in
10:37:11 2 the report? Would that be a helpful way to add some
10:37:13 3 detail together?

10:37:15 4 Q. In whose report? In your report?

10:37:17 5 A. In Mr. Clarke's report.

10:37:18 6 Q. In Mr. Clarke's report. Okay.

10:37:21 7 A. Yes?

10:37:21 8 Q. Yes.

10:37:22 9 A. Sure. Why don't we start -- I have a
10:37:24 10 marked-up copy of Mr. Clarke's report that I marked
10:37:27 11 up which I was going to use in conjunction with my
10:37:30 12 notes.

10:37:30 13 Q. Does this marked-up copy reflect your
10:37:34 14 views and opinions concerning Mr. Clarke's report?

10:37:38 15 A. It memorializes some of the examples that
10:37:41 16 help me to articulate my reactions.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

10:38:52 17 Q. We are going to start going through this,
10:38:55 18 Professor Lichtman, and at some point, hopefully
10:38:59 19 fairly soon, we will have some additional copies
10:39:03 20 which we will mark as an exhibit. But let's start
10:39:06 21 now. You are referring to the document entitled
10:39:08 22 "Stephen K. Clarke Expert Report, March 26, 2010"?
10:39:15 23 A. Yeah, I agree. That's exactly the
10:39:17 24 document I have in my hands.
10:39:18 25 Q. And just so we are almost literally on the

10:39:21 1 same page, it ends on page 294. Is that the
10:39:24 2 document you have?

10:39:25 3 A. That is the document I have. It ends on
10:39:27 4 294.

10:39:28 5 Q. And there is a signature on that page?

10:39:29 6 A. There is.

10:39:30 7 Q. Dated 2/26/10?

10:39:32 8 A. There is.

10:39:33 9 Q. Signature of Stephen K. Clarke?

10:39:35 10 A. I assume so, yes.

10:39:37 11 I am not going to be exhaustive in all the
10:39:40 12 things, but I marked a bunch of examples on this
10:39:42 13 theme, just so that you and I can be clear in terms
10:39:45 14 of understanding what I might testify to.

10:39:47 15 So if you start on page two, in footnote
10:39:50 16 10 Mr. Clarke writes, "I define Subject IP as the
10:39:54 17 portion of the Software and Support Materials
10:39:56 18 allegedly infringed and actually used by
10:40:01 19 TomorrowNow."

10:40:03 20 And I highlighted here, because you can
10:40:07 21 see -- this is an example of the move that troubles
10:40:09 22 me -- he defines the space not to be what was
10:40:13 23 infringed, but more narrowly than that. It was
10:40:18 24 infringed and then ultimately used.

10:40:20 25 And the distinction I want to draw -- and

10:40:23 1 we will hopefully make clear together as we walk
10:40:26 2 through examples -- when you make a move like
10:40:28 3 "actually used," you are now using information about
10:40:31 4 what really happened in the world that might not be
10:40:33 5 relevant under some of the economic and public
10:40:36 6 policy damages theories.

10:40:38 7 Some of the theories again allow you to
10:40:40 8 think of what actually happened, how it would play
10:40:42 9 out, and so on. Some don't. Some ask what did the
10:40:46 10 parties expect at the time, for example.

10:40:48 11 And so to make a definition -- it looks
10:40:50 12 like a subtle move, but to make the definition to
10:40:53 13 include not only what was infringed but what was
10:40:56 14 actually used is kind of peeking ahead to what
10:40:59 15 happened, which will be inappropriate in some of the
10:41:03 16 proper damages articulations.

10:41:05 17 Q. Okay. So you think the phrase "actually
10:41:07 18 used" is improper here.

10:41:09 19 A. I do, in some applications within the
10:41:13 20 damages frameworks that we will speak of.

10:41:16 21 Q. You mentioned a moment ago that Mr. Clarke
10:41:21 22 in his report had -- discusses a particular way to
10:41:26 23 measure damages. And you said, "That's not the only
10:41:29 24 way we measure damages." What are the ways in which
10:41:32 25 you measure damages?

10:41:34 1 A. The way I measure damages isn't -- isn't
10:41:36 2 necessarily relevant. The "we" there was the royal
10:41:40 3 we, as it were.

10:41:42 4 Copyright law embraces a variety of ways
10:41:45 5 to measure damages, and I think those are nicely
10:41:48 6 reflected in the Meyer report, which we can get to
10:41:50 7 at a later time. But copyright law embraces
10:41:54 8 different ways, different lenses through which to
10:41:57 9 look at a conflict and understand what the
10:41:58 10 appropriate damages would look like.

10:42:00 11 One of those ways is trying to understand
10:42:02 12 the fair market value of the asset in question, the
10:42:04 13 infringed copyright-eligible work. Another of those
10:42:10 14 ways is to look at the profits that were wrongly
10:42:15 15 achieved to the benefit of the infringer. Another
10:42:20 16 of those ways is to look at the profits that were
10:42:22 17 wrongly denied the proper copyright owner.

10:42:26 18 And then in copyright law there is a lot
10:42:29 19 of moving parts inside those articulations. And as
10:42:33 20 we know, because it's so well reflected in the Meyer
10:42:36 21 report, there are a lot of tools that are used to
10:42:38 22 talk all that out, measures of actual and expected
10:42:41 23 and avoided costs, measures done in analogy to
10:42:48 24 Georgia Pacific factors, things like this.

10:42:51 25 So a lot of ways of framing the issue.

10:42:54 1 But broad categories, I think those three are the
10:42:57 2 main ones of relevance here, fair market value,
10:43:01 3 wrongful gains by the infringer, if they turned out
10:43:05 4 to infringe and to be wrongful, and wrongfully lost
10:43:08 5 profits by the rightful copyright owner. So a lot
10:43:13 6 of categories in addition to all the other moving
10:43:16 7 parts.

10:43:16 8 Q. What other moving parts?

10:43:18 9 A. That's my placeholder for things like
10:43:20 10 Georgia Pacific, which is a way of thinking about
10:43:22 11 the evidence and making sure we see things that are
10:43:25 12 intuitively relevant but might be used in support of
10:43:29 13 many of those conversations.

10:43:30 14 It's not like copyright law comes with a
10:43:32 15 little checklist, here are the only ways to do it.
10:43:36 16 And so, while I break it down into categories which
10:43:39 17 I think are reflected also in the Meyer report, I
10:43:41 18 just want to make sure you and I communicate well
10:43:43 19 that that encompasses some other ways of looking at
10:43:46 20 evidence, like the Georgia Pacific factors.

10:43:50 21 Q. What else do you encompass in this notion
10:43:53 22 of yours, moving parts other than Georgia Pacific
10:43:57 23 factors?

10:43:58 24 A. The ones I have mentioned are what comes
10:43:58 25 to mind.

10:43:59 1 Q. How about any others?

10:44:00 2 A. Just to make sure that we have got a good
10:44:04 3 communication, things like the avoided costs is an
10:44:05 4 input into the others, is around in all the
10:44:09 5 conversations and clearly relevant. Georgia
10:44:11 6 Pacific. Nothing else specifically comes to mind in
10:44:14 7 terms of what's in that phrase.

TEXT REMOVED - NOT RELEVANT TO MOTION

10:44:31 17 Q. The copyright law, as you know -- you are
10:44:33 18 a copyright law expert, are you?

10:44:35 19 A. For the purposes of my presence in this
10:44:38 20 room, my expertise is more properly defined as an
10:44:41 21 expert in the economics and public policy
10:44:44 22 justifications for aspects of copyright law and
10:44:47 23 particular damages. But I think it's important for
10:44:50 24 you and I to be precise, given my role here today.

TEXT REMOVED - NOT RELEVANT TO MOTION

10:46:31	18	So as we sit here today, copyright law
10:46:34	19	welcomes these things that economics and public
10:46:37	20	policy teach. It welcomes fair market value
10:46:40	21	analysis as one lens through which to look. It
10:46:43	22	welcomes a focus on the wrongful gains by the
10:46:46	23	infringer as one lens through which to look. It
10:46:50	24	welcomes focus on the lost profits by the rightful
10:46:54	25	owner as one lens through which to look.

10:46:57 1 And yet the statute plus the case law has
10:47:00 2 taken us through a growth over the years. Our
10:47:03 3 understanding is sharper today than it was a few
10:47:06 4 decades ago. And as we sit here today all of these
10:47:08 5 economic and public policy articulations are now
10:47:12 6 embraced in the case law as properly as to think
10:47:14 7 about the admittedly difficult puzzle of damages.

10:47:20 8 Q. Are you aware that actual damages are
10:47:25 9 awardable under the US Copyright Act?

10:47:31 10 A. Yes.

10:47:34 11 Q. That's a concept that's familiar to you,
10:47:37 12 actual damages?

10:47:39 13 A. Yes.

10:47:40 14 Q. In what way or ways can actual damages be
10:47:43 15 measured in a copyright infringement case?

10:47:48 16 A. Damages, there are a number of ways you
10:47:50 17 could think about what the actual damages were.
10:47:52 18 Sometimes actual damages is, you know, articulated
10:47:56 19 by looking at a very, very specific interaction,
10:48:01 20 like a sale that didn't happen. And the evidence
10:48:04 21 would be in the form of, "Hey, I would have made
10:48:06 22 that sale, but I didn't."

10:48:11 23 Sometimes the evidence is of a different
10:48:13 24 pattern. It's like a fair market value analysis,
10:48:16 25 where the analysis allows us to look and say, "Wait

10:48:19 1 a minute. There was a change in the ownership of
10:48:23 2 the copyright-eligible asset, and that change was
10:48:28 3 caused by the infringing party, and that change kind
10:48:31 4 of had an impact. There was a value to that change.
10:48:34 5 And we want to figure out what the fair market value
10:48:37 6 of that was. What is -- what happened, and how did
10:48:40 7 that change the welfare of the rightful copyright
10:48:43 8 owner?"

10:48:44 9 And with a lot of different -- and the
10:48:46 10 Meyer report talks about, even in more detail as you
10:48:50 11 dig deeper into those sentences, you could figure
10:48:52 12 out harm by looking at the stream of income that
10:48:56 13 never showed up. You can figure out harm by
10:48:59 14 figuring out how various cost measures were changed,
10:49:02 15 how similar deals looked and would have looked if
10:49:05 16 only there hadn't been the bad act.

10:49:08 17 The actual harm type measure is in that
10:49:12 18 way kind of a tent, an umbrella that has gradually
10:49:18 19 been populated with a lot of different ways of
10:49:21 20 thinking about what bad thing happened to the
10:49:23 21 rightful owner, what was the economics of that bad
10:49:26 22 thing.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

10:49:52 9 Q. Is it your understanding as you sit here
10:49:53 10 today that Mr. Meyer has not discussed these various
10:49:59 11 issues that you have just mentioned in his report,
10:50:03 12 lost sales, fair market analysis, costs measured
10:50:09 13 where there were changes brought about by the
10:50:12 14 alleged infringement, harms caused, et cetera?
10:50:15 15 These various things you have been mentioning in
10:50:18 16 your previous answer, is it your understanding that
10:50:20 17 Mr. Meyer did not discuss those in his report?
10:50:23 18 MR. FALZONE: Objection to the form of the
10:50:24 19 question.
10:50:25 20 THE WITNESS: Mr. Meyer talks about those
10:50:27 21 topics from the perspective of his expertise. I
10:50:30 22 talk about those topics from the perspective of
10:50:33 23 mine.
10:50:33 24 So while we are both talking about
10:50:34 25 damages, and we might even both talk about a

10:50:37 1 particular way of thinking about damages, we talk
10:50:39 2 about it using different tools and bringing a
10:50:42 3 different value. Because his expertise is what you
10:50:45 4 and I have referred to as the trees expertise. My
10:50:48 5 expertise is what we have referred to as the forest
10:50:51 6 expertise. And those are different.

10:50:53 7 And so while we are talking about similar
10:50:55 8 topics, we are bringing different information and
10:50:58 9 different value, hopefully, to the ultimate
10:51:00 10 decision-maker.

10:51:01 11 MR. BUTLER: Q. And so you discuss the
10:51:03 12 same general topics as he, but you look at it from a
10:51:07 13 perspective of someone who has an economics and
10:51:09 14 public policy background rather than a damages
10:51:12 15 background?

10:51:14 16 MR. FALZONE: Objection to the form of the
10:51:15 17 question.

10:51:16 18 MR. BUTLER: Q. Excuse me. You look at
10:51:16 19 it from the perspective of someone who has an
10:51:18 20 economics and public policy background as related to
10:51:21 21 copyright damages versus someone who is an
10:51:24 22 economist. Right?

10:51:26 23 MR. FALZONE: Objection to the form of the
10:51:27 24 question. Vague. Mischaracterizes the testimony.

10:51:31 25 THE WITNESS: I look at it from the

10:51:32 1 perspective of the economic and public policy
10:51:36 2 articulation you just echoed. Mr. Meyer looks at it
10:51:40 3 from a different perspective, which I don't think I
10:51:41 4 would so narrowly cast as merely from -- I think
10:51:45 5 your word was the perspective of an economist, or
10:51:49 6 some such thing.

10:51:50 7 There are two buckets here. And you can
10:51:52 8 work to be precise as to what those buckets are. My
10:51:53 9 bucket is the economic and public policy intuitions.
10:51:55 10 The other bucket is this bucket that really
10:51:57 11 facilitates what you have referred to as the number
10:52:01 12 crunching. It's a level of economic detail applied
10:52:04 13 to specific calculations. And what I understand
10:52:08 14 Mr. Meyer to be doing is that aspect of relevant
10:52:11 15 information, and what I do is the other aspect of
10:52:14 16 relevant information.

10:52:14 17 MR. BUTLER: Q. Do you consider Mr. Meyer
10:52:16 18 to be a damages expert?

10:52:18 19 A. Yes.

10:52:20 20 Q. Do you consider yourself to be a damages
10:52:22 21 expert in the same way that he is?

10:52:24 22 A. In the same --

10:52:25 23 MR. FALZONE: Objection to the form of the
10:52:26 24 question. It's vague. It's ambiguous.

10:52:29 25 THE WITNESS: We are both damages experts

10:52:30 1 with different expertise, and hence different value
10:52:33 2 to brand. So are we both damages experts?
10:52:36 3 Absolutely. Are we the same? No, I don't think so.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

11:38:37 22 Q. Your understanding is that Mr. Meyer did
11:38:41 23 not directly rely on your report to crunch numbers
11:38:45 24 and calculate numbers in this case; right?
11:38:48 25 MR. FALZONE: Objection as to form.

11:38:49 1 Vague.

11:38:51 2 THE WITNESS: Rely on my report? I don't

11:38:53 3 think so.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

11:43:14 20 Q. What are the other general areas in which
11:43:17 21 you think -- or topics on which, or issues with
11:43:22 22 respect to which you think Mr. Clarke made an error
11:43:25 23 in his report?
11:43:26 24 A. Just for the record, I am referring to my
11:43:28 25 own notes here in front of me.

11:43:30 1 I had three other general topics that I
11:43:33 2 reacted to while reading the Clarke report.
11:43:36 3 The second topic in my list was a reaction
11:43:40 4 to his commentary about legitimate alternatives to
11:43:44 5 the accused infringing activities. And my concern
11:43:49 6 was that the report didn't seem to be appropriately
11:43:54 7 precise in articulating those legitimate
11:43:58 8 alternatives in terms of how comparable they were
11:44:03 9 when they were available and how they differed on
11:44:07 10 other measures like those.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

11:45:29 19 A. The third theme, I think in Mr. Clarke's
11:45:37 20 analysis he ran much of his damages analysis with
11:45:42 21 defendants in mind, even when economics and public
11:45:45 22 policy would have had other people in mind.
11:45:47 23 So, to be slightly more precise, when we
11:45:49 24 think about a hypothetical negotiation between a
11:45:53 25 willing buyer and a willing seller, my sense is

11:45:58 1 Mr. Clarke always in his analysis thought a willing
11:46:00 2 buyer means defendants. And that's not quite right.
11:46:05 3 A willing buyer could well have been someone other
11:46:08 4 than defendants who would have been there to buy at
11:46:10 5 the relevant time.

11:46:12 6 And so the third category is the slippage
11:46:14 7 between stand-ins that ought to have been more
11:46:19 8 general to what Mr. Clarke would use, which was
11:46:23 9 these defendants per se.

11:46:32 10 Again I am happy to talk in more detail,
11:46:34 11 but you were looking for the high level.

11:46:37 12 Q. Thank you, Professor.

11:46:40 13 A. Can I talk about the fourth?

11:46:42 14 Q. The fourth.

11:46:43 15 A. The fourth -- and I am interested to see
11:46:44 16 what Mr. Clarke actually says when deposed and
11:46:47 17 testifying on this, but my sense from his report is,
11:46:51 18 when he thinks about avoided costs, he is reluctant
11:46:55 19 to look at that information on a number of theories
11:46:58 20 where it is in fact relevant.

11:47:00 21 So, for example, when he thinks about
11:47:03 22 avoided costs, he seems to say that's not relevant
11:47:06 23 when you are measuring the unlawful benefit to the
11:47:10 24 infringer. And if it is what he is saying, I think
11:47:13 25 that's wrong.

11:47:13 1 Avoided costs is important information
11:47:17 2 that motivates a number of these theories. It might
11:47:21 3 be understanding fair market value. It might be
11:47:24 4 part of measuring the infringer's unlawful profits,
11:47:27 5 and so on. So the fourth thing for me is he has
11:47:31 6 taken too narrow a view of the relevance of avoided
11:47:35 7 costs in his analysis.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

11:48:57 11 MR. BUTLER: Q. Sure. I will do my very
11:48:58 12 best at that. You said you have these four themes
11:49:01 13 in mind that you think you are in the right
11:49:03 14 position, based on your expertise, to rebut
11:49:05 15 Mr. Clarke. Right?
11:49:06 16 A. Yes.
11:49:08 17 Q. In rebutting those points, if you have
11:49:10 18 that opportunity, in rebutting those four points or
11:49:14 19 themes, will you be relying on anything in your
11:49:18 20 report?
11:49:19 21 A. Yes.
11:49:19 22 Q. Will you also be relying on anything
11:49:21 23 that's not in your report?
11:49:22 24 A. Yes.
11:49:23 25 Q. And what is that?

11:49:24 1 A. Mr. Clarke's report.
11:49:26 2 Q. Anything else?
11:49:29 3 A. My own expertise, as reflected in the
11:49:33 4 report.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

12:31:28	22	Q. When you say Mr. Clarke was right or
12:31:31	23	wrong, you are not commenting there about the facts
12:31:34	24	there. You are talking about you think his analysis
12:31:36	25	was incorrect in focusing on things that were

12:31:40 1 actually used or events that actually transpired.

12:31:43 2 Right? You think it's his analysis that's wrong,

12:31:47 3 not the facts.

12:31:48 4 A. Oh, correct. I don't mean to say anything

12:31:50 5 about the facts. Thank you for that sharpening. I

12:31:52 6 mean to speak about the analysis, absolutely.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

12:37:29

25

Q. What else on the first topic, first Clarke

12:37:32 1 theme? Going back to the Clarke report you talked
12:37:34 2 about -- now we are on page 22.

12:37:37 3 A. Yeah, page 22. If you go to page 28.

12:37:41 4 Q. Okay. I am there.

12:37:48 5 A. Sorry. I am catching up to you.

12:37:59 6 Two sentences on 28 jumped out. The very
12:38:01 7 top one, that's a partial sentence which runs over,
12:38:04 8 it looks like, from 27. So maybe we start on 27 to
12:38:09 9 get the full sentence.

12:38:11 10 He writes, "On the other hand, when the
12:38:12 11 intellectual property involved is substantial in
12:38:14 12 itself or it is a major component of a significant
12:38:17 13 or successful product, licenses tend to be made on a
12:38:20 14 rate or unit basis so that the real rewards and
12:38:24 15 contributions of the licensed technology to the end
12:38:26 16 product are appropriately measured and compensated."

12:38:29 17 Q. Okay. And you think that's wrong?

12:38:31 18 A. Here again, he is adopting a damages view
12:38:35 19 that focuses only on what actually transpired, thus
12:38:41 20 abandoning the other valid damages frameworks that
12:38:47 21 look to other things, like what the parties
12:38:50 22 expected, or fair market value.

12:38:51 23 He is locking himself into one world view,
12:38:55 24 and thus economic and public policy justifications
12:39:00 25 of copyright law as reflected in the law allow for

12:39:04 1 much more than what he is allowing there.

12:39:06 2 Q. So if I understand correctly, you are not
12:39:08 3 suggesting that he is wrong here. You just think
12:39:11 4 there is more that he should have considered.

12:39:13 5 MR. FALZONE: Object to the form of the
12:39:14 6 question. Mischaracterizes testimony.

12:39:16 7 THE WITNESS: I -- it all depends what he
12:39:21 8 testifies to ultimately. I read that sentence as
12:39:26 9 him saying that we cannot look at expectations
12:39:28 10 because we must look at what actually happened. And
12:39:31 11 that's wrong, if that is his testimony. Maybe it's
12:39:33 12 not, but that's what that sentence sounds like and
12:39:36 13 got me nervous about.

12:39:38 14 MR. BUTLER: Q. So that's how you
12:39:40 15 interpreted that sentence, that you thought it was
12:39:42 16 limited to what actually transpired, and because of
12:39:44 17 that understanding on your part, you thought it was
12:39:46 18 wrong.

12:39:46 19 A. Correct.

12:39:47 20 Q. Okay.

12:39:47 21 A. And then there is a similar sentence also
12:39:50 22 on 28, right before header 3.5.

12:39:54 23 Q. Right before header 3.5. Okay.

12:39:57 24 A. Right. Here again, note the language of
12:39:59 25 "actually generated."

12:40:00 1 Q. I am sorry. Which sentence?

12:40:02 2 A. The last sentence prior to 3.5.

12:40:03 3 "Rationally, SAP would only pay a license fee based
12:40:08 4 on a percentage of the support fees actually
12:40:10 5 generated by TomorrowNow."

12:40:14 6 Again, arguing that we only focus on what
12:40:17 7 transpired, rather than recognizing that a damages
12:40:23 8 analysis does much more than that, in addition.

12:40:26 9 Q. What else does a damages analysis do, in
12:40:28 10 addition to focusing on what actually transpired?

12:40:32 11 A. What the parties expected at a relevant
12:40:34 12 time, and fair market value at a relevant time.

12:40:44 13 Q. What relevant time?

12:40:46 14 A. It depends on specifically what
12:40:48 15 infringement we are speaking of and what damages
12:40:50 16 theory we are speaking of.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

12:56:46 19 Q. Okay. Another way copyright law measures
12:56:50 20 damages is by taking into account what the parties'
12:56:53 21 expectations were?
12:56:54 22 A. Yes.
12:56:54 23 Q. So in addition to actual events that
12:56:59 24 transpired and parties' expectations, what are the
12:57:02 25 other ways that copyright law measures damages?

12:57:04 1 MR. FALZONE: Objection. This has been
12:57:06 2 asked and answered.
12:57:07 3 THE WITNESS: One other example would be a
12:57:08 4 version of the fair market value measure, which
12:57:10 5 would look at the expectations of non-parties in
12:57:14 6 addition to the expectations of parties, in that the
12:57:17 7 fair market value is determined, quite obviously, by
12:57:20 8 the market. And so there is another type of
12:57:23 9 expectation that might be relevant for that measure.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

14:15:42 23 Q. Okay. And your third theme? Or I beg
14:15:44 24 your pardon. In the Clarke report where you think
14:15:49 25 Mr. Clarke made an error, where is that identified?

14:15:52 1 A. It looks like it's page 201.

14:16:04 2 Q. Okay. Where on that page?

14:16:05 3 A. Just checking my notes for one moment.

14:16:08 4 Q. Sure.

14:16:14 5 A. So the sentence that jumped out on 201 is

14:16:17 6 the sentence right above 8.15.1, where he wrote,

14:16:21 7 "The ultimate arrangement must represent a business

14:16:24 8 proposition and it must be fair to both sides and

14:16:26 9 allow TomorrowNow and SAP to make a 'reasonable

14:16:29 10 profit.'"

14:16:30 11 Q. What's wrong with that?

14:16:33 12 A. This is an example, and it is elsewhere in

14:16:36 13 the report as well, of where Mr. Clarke focuses on

14:16:39 14 TomorrowNow and SAP, not realizing that, in

14:16:45 15 addition, or maybe realizing but not explicitly, not

14:16:49 16 walking through the reality that you also, to do

14:16:50 17 these analyses the way they are supposed to be done,

14:16:53 18 need to think about other potential parties.

14:16:59 19 So to be more precise, if you look --

14:17:05 20 sorry. Scanning that paragraph above...

14:17:12 21 So in this section, for instance,

14:17:13 22 Mr. Clarke is trying to think through the willing

14:17:16 23 buyer, willing seller hypothetical. And the

14:17:19 24 hypothetical is a willing buyer, not this willing

14:17:23 25 buyer.

14:17:24 1 And yet when Mr. Clarke writes about it
14:17:26 2 and thinks about it, he assumes the test is, what
14:17:29 3 would this willing buyer be willing to do? And
14:17:32 4 there is no reason necessarily to make that jump.

14:17:34 5 It might be, depending on what damages
14:17:37 6 theory we are thinking through, that the right basis
14:17:40 7 is what a reasonable buyer, what the market, and so
14:17:43 8 on. You are not necessarily stuck with the
14:17:47 9 economics of the infringer who is actually accused
14:17:51 10 as one thinks through some of these damages
14:17:53 11 measures.

14:17:53 12 Q. What is the basis for your conclusion that
14:17:56 13 it is incorrect to focus on this willing buyer
14:17:59 14 versus a willing buyer?

14:18:01 15 A. That itself is indeed in the language. I
14:18:05 16 think Mr. Clarke, I believe, has that very language
14:18:07 17 in his own report.

14:18:08 18 But my basis is again the analysis that I
14:18:10 19 did in my report, which in turn relies and is fully
14:18:14 20 consistent with a wealth of scholarship and case law
14:18:17 21 on how do we think about these damages puzzles,
14:18:21 22 including, for instance, the appropriateness of
14:18:23 23 looking at the fair market value, the
14:18:25 24 appropriateness of doing the hypothetical
14:18:27 25 negotiation with a willing buyer, not this willing

14:18:30 1 buyer, and so on.

14:18:31 2 But my reactions all are based on what I

14:18:33 3 say in my report, as contrasted with what I read

14:18:37 4 from Mr. Clarke.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

14:29:40 6 Q. Why do you think Mr. Clarke is wrong in
14:29:42 7 that 6.4, paragraph 6.4?

14:29:43 8 A. My concern with 6.4 is it appears that
14:29:47 9 Mr. Clarke is unwilling to embrace avoided costs as
14:29:56 10 an important and relevant input across many of these
14:29:59 11 damages articulations. And in a view, in my view,
14:30:04 12 and I think the proper analysis, avoided costs is a
14:30:08 13 key component to many of these damages areas.

14:30:21 14 Q. What is the basis for your conclusion that
14:30:25 15 in a proper analysis avoided cost is a key component
14:30:29 16 to many of these damages areas?

14:30:32 17 A. Again, the same chain we followed before.
14:30:34 18 Most of my reactions are based on my own report,
14:30:37 19 which in turn is based on and widely consistent with
14:30:40 20 the case law, scholarship, and modern economic
14:30:43 21 thinking on economics and public policy issues. But
14:30:47 22 I directly use my report.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

14:39:57	23	Q. Okay. So you believe that the learned
14:40:00	24	treatises and the case law supports your view that
14:40:04	25	avoided costs is a factor in the determination of a

14:40:08 1 hypothetical license; right?

14:40:12 2 A. Yes.

14:40:14 3 MR. FALZONE: Objection to the form.

14:40:14 4 Mischaracterizes testimony.

14:40:16 5 MR. BUTLER: Q. And you also believe that

14:40:17 6 avoided costs is -- the notion of using avoided

14:40:20 7 costs as a determinant in the calculation of fair

14:40:23 8 market value also is supported by the case law and

14:40:27 9 learned treatises. Right?

14:40:28 10 A. I do.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

14:45:05 5 Q. Okay. So in your understanding of the
14:45:12 6 copyright law and the damages scheme, if, let's say,
14:45:18 7 it cost, I don't know, \$200 million to make the
14:45:22 8 movie Avatar, and if someone downloads a copy
14:45:27 9 without authorization and sells it to -- someone
14:45:35 10 does that and sells it to 10 friends at \$10
14:45:41 11 apiece --

14:45:42 12 That's \$100 cash that's exchanged hands;
14:45:44 13 right?

14:45:44 14 -- in your view the damages for that
14:45:46 15 copyright infringement would be \$200 million or
14:45:49 16 something else?

14:45:50 17 A. I think my view would be there are many
14:45:52 18 ways we would talk about damages in a given case.
14:45:55 19 And the reason is exactly the hypothetical you have
14:45:57 20 moved to, which is to say we have many ways of
14:46:00 21 thinking about damages, because in some cases they
14:46:03 22 resonate and some they don't.

14:46:05 23 And so copyright law -- and I believe all
14:46:07 24 of the experts in the case agree there are many ways
14:46:10 25 to articulate damages theories, many different ways

14:46:13 1 of thinking about the evidence. And some play
14:46:15 2 really well in some situations. Some play less
14:46:20 3 well. And avoided cost is no different from the
14:46:22 4 rest.

14:46:23 5 So would we allow discovery and discussion
14:46:26 6 of an avoided cost measure? Absolutely. Might a
14:46:30 7 decision-maker decide that another measure is more
14:46:32 8 appropriate? Also quite possibly yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

14:48:19 16 Q. So in some cases avoided costs would apply
14:48:22 17 and be the appropriate measure, and in fact you
14:48:24 18 think in this case, involving Oracle and SAP and
14:48:28 19 TomorrowNow, you think avoided costs is appropriate
14:48:31 20 here. Right?
14:48:32 21 A. I do.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

14:49:14 19 Q. And you would think it's appropriate in
14:49:16 20 this case. Now, does someone need Professor
14:49:19 21 Lichtman to decide whether it's appropriate in a
14:49:22 22 given case or not? And if not, how does one
14:49:24 23 determine that?
14:49:25 24 MR. FALZONE: Objection to the form of the
14:49:27 25 question. Vague.

14:49:28 1 THE WITNESS: I think our colloquy here
14:49:30 2 perfectly answers our colloquy earlier about forest
14:49:35 3 and trees.

14:49:36 4 Mr. Meyer and Mr. Clarke, they do what
14:49:38 5 they are supposed to do, to varying degrees, walking
14:49:42 6 through all the different ways to measure damages,
14:49:44 7 laying out the numbers, doing that as faithfully as
14:49:47 8 they are able.

14:49:48 9 Yet when we turn to a jury, the jury is
14:49:51 10 going to be given a series of different numbers for
14:49:53 11 the same fight.

14:49:56 12 Indeed, even Mr. Clarke will give several
14:49:59 13 different numbers for the same fight. If you do it
14:50:02 14 this way, it's this number. If you do it that way,
14:50:04 15 it's that number. That's why I think of the
14:50:07 16 forest-and-trees analogy.

14:50:09 17 Mr. Meyer and Mr. Clarke and Mr. Pinto,
14:50:12 18 all of these experts will do what the law tells them
14:50:16 19 to do in running through different ways to think
14:50:19 20 about damages. And they will come up with different
14:50:22 21 numbers, both themselves, because they are doing
14:50:25 22 different techniques, and vis-a-vis each other.
14:50:27 23 Mr. Clarke and Mr. Meyer, it seems plainly likely,
14:50:30 24 will disagree.

14:50:32 25 To figure out which is which, we need to

14:50:34 1 say more to the decision-maker, here most likely the
14:50:36 2 jury. We need to say more. The jury needs to
14:50:38 3 understand, why are we all doing all this? Why are
14:50:42 4 there so many different ways of talking about
14:50:44 5 damages? What are we trying to accomplish by giving
14:50:47 6 damages? All the kinds of things that I think I get
14:50:51 7 to speak to, to help the jury understand.

14:50:52 8 What's the point here? It's incentives.
14:50:55 9 How do we get there? It's stopping free riding. If
14:50:59 10 we let free riding happen, what do we need to do?
14:51:02 11 We have got to assess damages, because we have got
14:51:05 12 to make sure people don't choose to free ride. We
14:51:07 13 want them to pause at that moment and do what the
14:51:10 14 law is set up to do, which is go compete in a
14:51:12 15 legitimate fashion, go get a license.

14:51:15 16 And so my very communication, my very
14:51:18 17 expertise is exactly relevant, because of the
14:51:21 18 conversation you and I are having. Because, gosh,
14:51:22 19 if not, how is the jury going to know how to deal
14:51:26 20 with your Avatar hypothetical?

14:51:30 21 You can imagine in that litigation some
14:51:32 22 expert getting up there and doing what you did,
14:51:35 23 amongst five other things. And if the jury doesn't
14:51:38 24 know why we are doing the math, why these theories
14:51:40 25 exist, and how they impact real world behavior over

14:51:42 1 time, and all the rest, the jury has no way of
14:51:44 2 picking between the numbers offered by a single
14:51:47 3 expert, let alone meshing the competing numbers of
14:51:50 4 multiple experts.

14:51:53 5 I don't expect this jury to say, "Hey,
14:51:53 6 what does Lichtman think? Let's do Lichtman."

14:51:55 7 I am not going to tell them what number to
14:51:57 8 pick. Not my place. But I think it's entirely
14:52:00 9 helpful, if we want that jury to come up with an
14:52:02 10 accurate, thoughtful number, given the trees, given
14:52:05 11 the input the other experts will give them, I think
14:52:08 12 they need to hear these bigger contextual points
14:52:12 13 about what the system is designed to do from an
14:52:16 14 economic and public policy perspective.

14:52:18 15 And you are right. As you give me Avatar,
14:52:20 16 that's what my mind is doing, as I say, well, if it
14:52:24 17 were up me, gosh, that doesn't sound right, does it?
14:52:28 18 Because I know what copyright is about and I know
14:52:31 19 what damages are about, and that seems like a hammer
14:52:34 20 squishing a fly.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

14:56:09 10 Q. Have you ever, in any case in the US
14:56:13 11 District Court, testified before a jury on the topic
14:56:16 12 of what you have told us is your expertise, the
14:56:19 13 economic and public policy underpinnings of
14:56:21 14 copyright law's damages scheme?
14:56:26 15 A. No.
14:56:26 16 Q. Are you aware of any person who has
14:56:28 17 testified as an expert on that topic in any district
14:56:31 18 court in this country?
14:56:32 19 MR. FALZONE: Objection to form. Vague.
14:56:33 20 Ambiguous. Overbroad.
14:56:35 21 THE WITNESS: Gosh, I never got to
14:56:37 22 research that question. I am not aware.
14:56:40 23 MR. BUTLER: Q. None comes to mind among
14:56:42 24 all these colleagues in academia that you have, and
14:56:44 25 so on? You don't remember anyone telling you that

14:56:47 1 they have testified as an expert on the economic and
14:56:49 2 public policy underpinnings of copyright damages?

14:56:52 3 MR. FALZONE: Same objection.

14:56:53 4 THE WITNESS: Yeah, I actually think that
14:56:55 5 Peter Menell at Berkeley has.

14:56:58 6 MR. BUTLER: Q. Okay.

14:56:59 7 A. But I am not 100 percent sure. But I
14:57:02 8 believe that Peter has.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15:03:11 10 Q. Do you think it's necessary in a case like
15:03:12 11 this to have testimony like you're -- like the
15:03:14 12 testimony you are prepared to provide?
15:03:15 13 A. I do.
15:03:16 14 Q. Why is that?
15:03:18 15 A. I think without the economic and public
15:03:20 16 policy context the jury is lacking a key input it
15:03:24 17 needs to evaluate what will otherwise be conflicting
15:03:29 18 huge quantities of data.
15:03:34 19 They will get numbers from Mr. Meyer.
15:03:37 20 They will get numbers from Mr. Clarke. They will
15:03:40 21 get numbers from Mr. Pinto. Different numbers from
15:03:43 22 all of them, on different theories.
15:03:45 23 And I don't know how we have confidence
15:03:47 24 that the jury can get to an accurate number if all
15:03:51 25 they get is that, rather than, in addition, getting

15:03:54 1 several other kinds of inputs, one of which is an
15:03:57 2 understanding of what the economic and public policy
15:04:00 3 rationales are.

15:04:03 4 Q. So you think it's necessary in a case like
15:04:06 5 this. Is this case unique in that regard?

15:04:09 6 MR. FALZONE: Objection to the form of the
15:04:10 7 question. Vague as to "necessary."

15:04:12 8 THE WITNESS: I would imagine there are
15:04:15 9 some cases where it is not necessary. But I don't
15:04:17 10 know that this case is unique, as in the one and
15:04:21 11 only one.

15:04:21 12 I think this case is in a class of cases
15:04:24 13 where the damages discussions are complicated and
15:04:28 14 involve numbers of huge consequence and have a lot
15:04:31 15 of differing views. And I think that's a messy soup
15:04:37 16 for a well-intentioned, thoughtful jury to be asked
15:04:41 17 to swim alone.

15:04:42 18 MR. BUTLER: Q. If this case, in your
15:04:44 19 view, is not unique, though, in requiring that kind
15:04:46 20 of expertise, do you have some explanation as to why
15:04:49 21 you can't think of any other copyright case where --
15:04:52 22 in a district court in this country where that kind
15:04:55 23 of testimony was offered?

15:04:57 24 A. I don't know that that statement is true,
15:05:00 25 and I think it might be a little confusing, so let's

15:05:03 1 fully answer.

15:05:04 2 So I do think in general this kind of
15:05:06 3 testimony does come in. I think what might be
15:05:09 4 striking here is that I want to do that piece and
15:05:14 5 that alone. I think in the regular cases we often
15:05:17 6 have damages experts come up and do both forest and
15:05:20 7 trees. I think it's very, very standard. I think
15:05:23 8 if we grabbed almost any transcript from a major
15:05:27 9 case the damages experts would talk forest and talk
15:05:30 10 trees.

15:05:30 11 Q. Okay.

15:05:31 12 A. I think what's calling your attention here
15:05:33 13 is that I want to do a piece of that, but not all of
15:05:37 14 it. I don't think I am an appropriate person to do
15:05:40 15 trees, to do the crunching of the numbers, like you
15:05:43 16 and I discussed. I would say no to that, if asked
15:05:47 17 to do it. Not my thing.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15:06:57

25

Q. Okay. If you were counsel of record in a

15:07:07 1 case, if this case were pending in Illinois, for
15:07:07 2 example, or if you were admitted here pro haec vice,
15:07:13 3 couldn't you present the economic and public policy
15:07:19 4 underpinnings as counsel for one of the parties in
15:07:21 5 this case?

15:07:21 6 MR. FALZONE: Objection to the form of the
15:07:23 7 question. Calls for speculation.

15:07:24 8 THE WITNESS: I don't think in the same
15:07:25 9 way.

15:07:27 10 MR. BUTLER: Q. Why is that?

15:07:28 11 A. Well, think of our analysis first of
15:07:30 12 Mr. Meyer versus myself. And I think the same
15:07:32 13 conversation applies. Mr. Meyer and I are both
15:07:34 14 going to talk about damages, and we are both going
15:07:37 15 to talk about some similar words about damages.
15:07:40 16 Cost, this and that. But our expertise is
15:07:43 17 different, and the exact things we will help the
15:07:45 18 jury think about are different. Forest and trees
15:07:49 19 has been our stand-in for that difference.

15:07:51 20 I think vis-a-vis a great lawyer, I think
15:07:54 21 a great lawyer would talk at some depth and in some
15:07:58 22 way about the policy and economics, but not in the
15:08:01 23 same depth and the same way that an expert in that
15:08:05 24 method of analysis would.

TEXT REMOVED - NOT RELEVANT TO MOTION

15:17:04 11 MR. BUTLER: Q. Professor Lichtman, I
15:17:05 12 have handed you what we printed out from the UCLA
15:17:09 13 web site. You teach at UCLA; right?
15:17:12 14 A. I do.
15:17:12 15 Q. And you teach courses, among other things,
15:17:14 16 on copyright law; right?
15:17:16 17 A. I do.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15:28:18 3 Q. And you said that one of the reasons why
15:28:21 4 you think your testimony in this case is necessary
15:28:23 5 to help the jury reach a decision is because of the
15:28:26 6 huge numbers that are at issue in this case.

15:28:28 7 MR. FALZONE: Objection. Objection to
15:28:30 8 form. Mischaracterizes the testimony.

15:28:32 9 MR. BUTLER: Q. Do you remember saying
15:28:32 10 that, testifying to that?

15:28:35 11 A. You have had a list of things that I
15:28:37 12 thought made this case complicated in ways that
15:28:43 13 would help to have extra input of this sort.

15:28:46 14 Q. Okay. So it's -- one of the things that
15:28:48 15 you think complicates this case, thereby
15:28:50 16 necessitating your expert opinion, is the fact that
15:28:52 17 the damage numbers sought by Oracle are very high;
15:28:56 18 right?

15:28:56 19 A. Yeah. That might be one of many, but
15:28:59 20 sure.

15:28:59 21 Q. That's what I am saying. Is it one of
15:29:01 22 many? I think we are in agreement there.

15:29:03 23 A. Yes.

15:29:03 24 Q. If the damages numbers were substantially
15:29:05 25 lower, you think that that would -- that that factor

15:29:07 1 would disappear, and that would not militate toward
15:29:09 2 having you serve as an expert in this case?

15:29:12 3 A. Again, I think you and I are in full
15:29:14 4 agreement. But lots of other reasons in that
15:29:18 5 initial sentence for me. But obviously if a factor
15:29:24 6 isn't present, it isn't present, which is to say
15:29:26 7 having the large numbers is one reason it's helpful
15:29:33 8 to have explanations.

15:29:34 9 Q. What's the dollar number where it becomes
15:29:36 10 necessary for an expert like you to step in?

15:29:39 11 A. I don't think there is one.

15:29:41 12 Q. Why in this case do you think it is -- why
15:29:41 13 is the dollar number in this case one of the
15:29:44 14 factors?

15:29:45 15 A. I think that when a jury hears the kinds
15:29:47 16 of conversations they will likely to hear from
15:29:51 17 Mr. Meyer, Mr. Pinto, and Mr. Clarke, there might be
15:29:54 18 some difficulty in the jury understanding what those
15:29:58 19 numbers have to do with anything. They will sound
15:30:00 20 like numbers of different sizes, big and small. And
15:30:02 21 the big ones, they might say, "Well, wait a minute.
15:30:04 22 That is a big number. Why would the law move that
15:30:08 23 kind of number? What is the law doing here?"

15:30:11 24 And so I think that, in addition to all
15:30:12 25 these other things we have spoken of, puts the jury

15:30:13 1 at a disadvantage, if all they get is what we call
15:30:17 2 the trees, a bunch of big numbers, small numbers, a
15:30:21 3 bunch of dueling conversations about how to measure
15:30:23 4 damages.

15:30:23 5 I think it's hard for a normal human being
15:30:27 6 to process, thoughtful, well-intentioned -- to hear
15:30:31 7 big numbers without context for understanding what
15:30:34 8 they do. It's a tough job for a jury if we want the
15:30:38 9 jury to do an accurate analysis.

TEXT REMOVED - NOT RELEVANT TO MOTION

15:30:51 14 Q. If there were fewer damage theories being
15:30:54 15 put forth, would testimony like yours be required,
15:30:56 16 do you think?

15:30:57 17 MR. FALZONE: Objection to the form.
15:30:58 18 Vague.

15:30:59 19 THE WITNESS: I think so. I think
15:31:01 20 testimony like mine would be enormously helpful in a
15:31:07 21 wide range of cases.

15:31:09 22 MR. BUTLER: Q. Okay.

15:31:10 23 A. I think it's required in a case where
15:31:13 24 there is a substantial chance that the jury would
15:31:16 25 benefit from having the context from the damages

15:31:21 1 information they get.

15:31:22 2 Q. Okay. How do you judge whether the jury
15:31:25 3 would benefit or not? On what are you basing your
15:31:28 4 assessment that the jury would benefit in this case
15:31:30 5 from having you testify on those issues?

15:31:43 6 A. I think we are more leaning on common
15:31:45 7 sense reactions to what one perceives as one reads
15:31:48 8 these other reports and what they communicate on the
15:31:51 9 absence of context.

15:31:54 10 I also lean on my own experience as an
15:31:57 11 expert in this field, knowing that -- for instance,
15:32:00 12 when you gave me your Avatar hypothetical, we
15:32:04 13 quickly both realized that what I did was run
15:32:06 14 through the very kinds of things in my report to
15:32:09 15 understand how to think about even your simple,
15:32:13 16 disarmingly simple, Avatar example.

15:32:16 17 And so I think it's no question that my
15:32:19 18 view is this is helpful, would be helpful in maybe
15:32:22 19 all cases, although I understand that there are cost
15:32:25 20 limitations to doing things like this. Every time
15:32:28 21 there is a fight, there is judicial constraints and
15:32:32 22 the like.

15:32:32 23 But I think it's helpful for a
15:32:34 24 decision-maker, myself included on your Avatar
15:32:37 25 hypothetical, to be able to think through what we

15:32:39 1 are doing and why. And so I am a fan of it.

15:32:42 2 I would be tempted to say, you know, why
15:32:45 3 the wide range of cases? And then we have to be
15:32:48 4 careful about whether that makes sense as a use of
15:32:50 5 societal resources to have someone like me doing
15:32:52 6 that work, where it's patiently sitting through that
15:32:52 7 work, to juries patiently sitting through that work.

15:32:59 8 Q. You think expertise like yours ought to be
15:33:02 9 offered in even more cases.

15:33:05 10 A. I think quite possibly, again, with the
15:33:06 11 caveat that we have got to then think about whether
15:33:08 12 it's worth that kind of energy from all of these
15:33:10 13 decision-makers. Here I think it is. This is a big
15:33:13 14 fight, with lots of complexities and lots of
15:33:17 15 importance to the world. And so yeah, I think a
15:33:19 16 little time thinking about the context is clearly
15:33:20 17 necessary.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15:34:05 5 Q. I am just trying to move this along,
15:34:06 6 Professor. Forgive me.
15:34:08 7 I am really asking for a list kind of
15:34:10 8 thing here. So we will go back if we need some
15:34:13 9 explanation.
15:34:13 10 You said it's complex damage theories and
15:34:17 11 multiple damage theories and a high dollar value at
15:34:21 12 stake. What else makes it a case that warrants
15:34:24 13 having testimony like yours? Just a list of them.
15:34:27 14 We will go back and fill it in if we need to.
15:34:30 15 A. Sure. A large number of inputs into each
15:34:34 16 of those damages theories. The large number --
15:34:38 17 different types and evidence that comes in will be
15:34:41 18 discussed and thrown around.
15:34:43 19 MR. BUTLER: Q. Okay. What else?
15:34:49 20 A. I think the social importance of the
15:34:52 21 fight.
15:34:52 22 Q. What importance? I beg your pardon.
15:34:55 23 A. The social importance.
15:34:57 24 Q. Social importance. Okay.
15:34:57 25 A. This is core to what copyright law is

15:35:00 1 about.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

Page 263

15:37:11 2 Q. Do you think that Mr. Meyer did not
15:37:13 3 adequately and fully explain the basis for his
15:37:18 4 numbers in his report?

15:37:23 5 A. I believe he adequately and fully
15:37:25 6 explained the basis for the numbers in his report.

TEXT REMOVED - NOT RELEVANT TO MOTION

16:20:32 1 Q. Professor Lichtman -- Professor Lichtman,
16:20:40 2 in paragraph 54, paragraph 54 of your report, you
16:20:47 3 state --

16:20:54 4 Are you there?

16:20:55 5 A. I am. Thank you.

16:21:01 6 Q. -- that it's necessary to more precisely
16:21:04 7 describe the software and support materials that are
16:21:06 8 in dispute.

16:21:07 9 And with that goal in mind, prior to
16:21:09 10 writing this report, you wrote that you participated
16:21:12 11 in two interactive demonstrations run by Oracle
16:21:16 12 developers Julie O'Shea, Norm Ackermann, and Linda
16:21:19 13 Fowler.

16:21:21 14 Those are the three individuals we spoke
16:21:23 15 about earlier today; right?

16:21:25 16 A. Yes.

16:21:25 17 Q. What is an interactive demonstration in
16:21:26 18 this context? What interactive demonstration did
16:21:29 19 you participate in?

16:21:32 20 A. With Mr. Ackermann and Ms. Fowler we used
16:21:37 21 something -- I think that's called WebEx -- which
16:21:42 22 allowed them to open on my screen some windows
16:21:45 23 through which they could then show me things, code
16:21:49 24 snippets, software applications running, and the
16:21:51 25 like.

TEXT REMOVED - NOT RELEVANT TO MOTION

16:38:08	22	Q. All right. Now, in paragraph 56 you
16:38:15	23	defined enterprise application software. Is that a
16:38:21	24	definition that you developed on your own, or were
16:38:24	25	you given that definition by someone else?

16:38:27 1 A. That's actually my definition, reflecting,
16:38:28 2 obviously, the conversations and the documents I had
16:38:33 3 seen.

16:38:33 4 But ultimately when I sat to write the
16:38:36 5 report I wanted to write my own definition of words,
16:38:39 6 so I knew what I was saying. And so literally every
16:38:43 7 word in that paragraph was me articulating what I
16:38:46 8 understood and wanted these words to mean, so I
16:38:49 9 could then talk about what I wanted to talk about --

16:38:51 10 Q. Okay.

16:38:51 11 A. -- without getting into the crazy level of
16:38:53 12 detail of the SQRs and the COBOLs and so on, which I
16:38:57 13 felt was better and more appropriately and precisely
16:39:02 14 handled by other experts. So literally this is me
16:39:05 15 defining words for my own use.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

16:40:19	21	Q. Okay. You conclude here that enterprise
16:40:22	22	application software is creative. Do you see that,
16:40:24	23	toward the middle of paragraph 56?
16:40:28	24	A. Sorry. I am just looking for the exact
16:40:30	25	sentence.

16:40:30 1 Q. One, two, three, four, five, six, seven,
16:40:34 2 eight lines down, it starts.

16:40:38 3 A. Enterprise application software is
16:40:39 4 creative. Yes. Thank you.

16:40:40 5 Q. Is it your opinion that enterprise
16:40:43 6 application software as you have defined it is
16:40:45 7 creative?

16:40:46 8 A. Yes.

16:40:46 9 Q. And by creative do you mean copyrightable?
16:40:51 10 It meets the requirements under the copyright law;
16:40:53 11 is that what you mean?

16:40:56 12 A. I believe that the fact that it is
16:40:59 13 creative means that it is copyright eligible with
16:41:02 14 respect to the originality prong of that test, yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

16:44:48 17 Q. So when you looked at some of the code --
16:44:50 18 you said you looked at code excerpts?
16:44:52 19 A. Yes.
16:44:53 20 Q. How many excerpts did you look at?
16:44:54 21 A. I don't know the precise number.
16:44:56 22 Q. Approximately.
16:44:57 23 A. Yeah, something in the ballpark of a
16:45:00 24 dozen, I would guess, during each of these calls.
16:45:02 25 Q. And what is a snippet, code snippet you

16:45:05 1 refer to? What is a code snippet?

16:45:08 2 A. A section of code, rather than the
16:45:10 3 entirety of code.

16:45:11 4 Q. In what languages were the code snippets
16:45:15 5 written?

16:45:17 6 A. I don't explicitly remember. I do
16:45:20 7 remember that all of the code shown on my system was
16:45:23 8 written in languages that I could translate roughly,
16:45:26 9 to know what it is the code was doing and what it is
16:45:29 10 I was seeing. But I don't remember specific
16:45:35 11 languages.

16:45:35 12 Q. How many lines of code were in each
16:45:37 13 snippet?

16:45:39 14 A. I don't remember exactly.

16:45:40 15 Q. Approximately?

16:45:42 16 A. I would say, ballpark, anywhere from 10 or
16:45:45 17 11 to, you know, 50 or 60.

16:45:55 18 Q. What applications did these snippets
16:45:58 19 relate to? Did you find that out during the course
16:46:00 20 of your interactive demonstration?

16:46:03 21 A. I am sure it was mentioned at the time.
16:46:05 22 It wasn't a detail that I thought important to my
16:46:08 23 work, and so I did not pay particular attention to
16:46:11 24 remembering that detail.

TEXT REMOVED - NOT RELEVANT TO MOTION

16:51:29 13 Q. So you did not -- you certainly didn't see
16:51:31 14 all of the code that's alleged to be infringed in
16:51:34 15 this case; right?
16:51:35 16 A. Of course.
16:51:35 17 Q. You saw a very small fraction of it;
16:51:38 18 right?
16:51:38 19 A. Presumably, yes.
16:51:40 20 Q. Did you -- you didn't see all of the code
16:51:44 21 in the PeopleSoft family of products; right?
16:51:48 22 A. Correct.
16:51:48 23 Q. And you didn't see all the code in the
16:51:50 24 JDEdwards family.
16:51:52 25 A. Correct.

16:51:52 1 Q. You didn't see all the Siebel code.

16:51:54 2 A. Correct.

TEXT REMOVED - NOT RELEVANT TO MOTION

16:52:49 21 MR. BUTLER: Q. Did you ascertain whether
16:52:50 22 any of the snippets you saw are part of the
16:52:54 23 applications that are accused of infringement in
16:52:56 24 this case? Are they snippets from any of the
16:52:58 25 applications that are accused of infringement?

16:53:01 1 A. I ascertained by asking whether the
16:53:06 2 snippets were part of the materials at issue in the
16:53:09 3 case. Whether they are part of applications or not
16:53:12 4 is not a question -- I am not asked.
16:53:14 5 Q. So you didn't tie in -- you have no way of
16:53:16 6 connecting the snippets you saw with any of the
16:53:19 7 registrations, copyright registrations, that have
16:53:22 8 been asserted in this case; right?
16:53:24 9 MR. FALZONE: Objection to the form of the
16:53:25 10 question.
16:53:26 11 THE WITNESS: I certainly have not offered
16:53:28 12 any opinions as to which registrations would be
16:53:31 13 relevant to the code I saw, no.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

16:54:49 15 Q. In paragraph 56 you state that "I assume
16:54:54 16 that the enterprise application software was written
16:54:56 17 by one or more employees of independent
16:54:59 18 contractors -- one or more employees, or independent
16:55:02 19 contractors who in turn worked for Oracle or for
16:55:05 20 companies since acquired by Oracle."
16:55:07 21 You assumed that; right?
16:55:09 22 A. For the purposes of paragraph 56, yes.
16:55:12 23 Q. For the purpose of other paragraphs of
16:55:14 24 this you made different assumptions?
16:55:16 25 A. No.

16:55:16 1 Q. So for the purpose of your report you
16:55:18 2 assumed that.
16:55:18 3 A. Yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17:06:56 8 Q. Were you able to assess on your own
17:06:58 9 whether any of that other code was -- contained the
17:07:01 10 various programming choices that you think would be
17:07:05 11 indicative of creativity?
17:07:08 12 A. My assessment relied on my conversations
17:07:11 13 with the three individuals.
17:07:12 14 Q. Right. On your own, other than what they
17:07:15 15 told you, did you have some independent way of
17:07:17 16 assessing whether programming choices played a role?
17:07:21 17 A. No.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17:24:53	18	Q.	Before the break we were just talking
17:24:55	19		about the code that you studied in the course of the
17:25:01	20		interactive demonstrations, and you indicated that
17:25:04	21		you saw various snippets, and we talked about that.
17:25:07	22		We talked about the fact that you had conversations
17:25:09	23		with those three named people about other code.
17:25:13	24		Is it correct, though, that you did not --
17:25:18	25		It is correct, is it not, that you did not

17:25:20 1 see all of the PeopleSoft, JDEdwards, and Siebel
17:25:25 2 code during the course of your interactive
17:25:27 3 demonstrations?

17:25:28 4 A. I know you just wanted me to give you a
17:25:30 5 yes or no, but give me one second to say something
17:25:32 6 about your question. When you say code that I
17:25:36 7 studied, I just want to be sure we aren't
17:25:37 8 miscommunicating.

17:25:39 9 Q. Bear with me. I am not sure --

17:25:39 10 A. It's an important point that we might have
17:25:42 11 gotten confused on together.

17:25:44 12 Q. Then maybe I ask the question? Studied
17:25:47 13 maybe is the wrong word.

17:25:48 14 A. Yeah, I am worried now that we are mis --

17:25:48 15 Allow me just one extra minute. I will
17:25:52 16 give you a bonus minute over your seven hours if you
17:25:55 17 need it.

17:25:56 18 When we have been talking about paragraph
17:25:58 19 56 and the footnote and so on, the bulk of what I
17:26:00 20 mean to point you and readers of the report to are
17:26:03 21 these conversations with these people who know what
17:26:06 22 they are doing.

17:26:06 23 Julie O'Shea, Norm Ackermann, and Linda
17:26:07 24 Fowler are programmers and people involved in
17:26:09 25 programming. They did examples. They showed me

17:26:12 1 code. But we have been through so many questions,
17:26:13 2 you and me, I don't want the wrong impression to be
17:26:17 3 left that I am sitting here saying I read the code
17:26:20 4 and I made these decisions. Not at all.

17:26:23 5 My note says this precisely. And just to
17:26:23 6 make sure you and I get it precisely, my reliance
17:26:24 7 here is on the conversations with people who know
17:26:26 8 what they are doing.

17:26:27 9 I can separately tell you, as a computer
17:26:29 10 science person who does understand what I was
17:26:31 11 looking at, that they are redundantly separately
17:26:35 12 also true, that when I see these things, yeah, what
17:26:39 13 they said totally resonated. There is choice in
17:26:42 14 these things that I saw. Intuitively that sounds
17:26:43 15 right, as a general matter of specifically for the
17:26:45 16 snippets. But you and I have done so much back and
17:26:49 17 forth, I think we have put the focus in the wrong
17:26:53 18 place.

17:26:53 19 When I write paragraph 56, and I drop
17:26:54 20 footnote 52, I mean what I say and I say what I
17:26:56 21 mean. I am leaning on the conversations with these
17:26:58 22 people who really know what they are doing. I am
17:27:01 23 not meaning to sit here and say that I as a computer
17:27:04 24 science guru made the judgment, although my
17:27:06 25 judgments would be similar to theirs.

17:27:07 1 I am meaning to say that, look, I asked
17:27:10 2 these questions. I asked for these calls, because I
17:27:13 3 needed to know, from the people who know, is there
17:27:16 4 choice? Is there personality?

17:27:17 5 And so my reliance in footnote 52 is on
17:27:20 6 the conversations which were involved showing me
17:27:25 7 stuff and talking about examples, and so on.

17:27:27 8 But you and I have gone so many rounds on
17:27:29 9 code. You say code I studied. And I still don't
17:27:32 10 want to be misunderstood. That's not what I meant
17:27:36 11 to say in 52. Footnote 52 is telling me I talked to
17:27:40 12 people who know what they are doing. I asked them
17:27:40 13 questions that I knew were important to my analysis,
17:27:40 14 and I got answers, both with respect to specific
17:27:45 15 snippets and more generally.

17:27:47 16 Q. Okay. So you relied heavily on what those
17:27:49 17 three individuals told you about the code with
17:27:54 18 respect to personality and choices.

17:27:57 19 A. And indeed what they told me was what I
17:28:00 20 needed to draw the conclusions I do in the text.

17:28:04 21 You are right that, in addition,
17:28:05 22 overlapping, it all resonates with me. But I was
17:28:11 23 precise in footnote 52. And then as we have been
17:28:16 24 chatting I am worried we lost sight of the precision
17:28:20 25 of 52. The conversation is the key thing. That's

17:28:23 1 what I needed to know, and everything else is
17:28:26 2 wonderful extra confirmation, but just that.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17:36:13 5 Q. You do not draw the conclusion that
17:36:14 6 enterprise application software in its entirety is
17:36:17 7 creative. There might be parts of it that are not
17:36:19 8 creative; right?
17:36:20 9 MR. FALZONE: Objection to the form of the
17:36:21 10 question. It's vague. It's ambiguous.
17:36:25 11 MR. BUTLER: Q. Right?
17:36:26 12 A. My conclusion is, as a general matter, and
17:36:27 13 consistent with all of the snippets I have seen, and
17:36:31 14 based on the conversation I have had, as a general
17:36:33 15 matter enterprise application software is creative.
17:36:36 16 I resist phrases like "every," and --

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17:41:50 17 Q. You drew a conclusion as to whether
17:41:52 18 many -- with respect to the Oracle fixes you drew a
17:41:55 19 conclusion that many, if not all of them, are
17:41:57 20 creative, using your definition of creative?
17:42:00 21 A. Yes.
17:42:00 22 Q. And was that based on your conversations
17:42:05 23 with those three individuals we mentioned before?
17:42:07 24 A. Yes.
17:42:07 25 Q. Were any of the snippets related to Oracle

17:42:09 1 fixes, do you know?

17:42:10 2 A. Yes.

17:42:11 3 Q. So some were applications and --
17:42:12 4 enterprise application software, and some qualified
17:42:17 5 as fixes, using your definitions?

17:42:21 6 A. Yes, I believe so.

17:42:22 7 Q. Okay. And as a result of your
17:42:24 8 conversation with those three individuals, using
17:42:26 9 that same analysis of programmer choices and
17:42:31 10 personality, you drew the conclusion that many if
17:42:34 11 not all of the fixes at issue in this dispute are
17:42:37 12 creative. Right?

17:42:40 13 A. Through the conversations at both levels,
17:42:42 14 right.

17:42:43 15 Q. Yes.

17:42:43 16 A. Separately and independently, yes.

17:42:45 17 Q. Okay.

17:42:46 18 A. The conversation -- I asked the general
17:42:47 19 questions about fixes to get an understanding. They
17:42:49 20 also showed me snippets and discussed snippets with
17:42:52 21 me. And those were independent, overlapping,
17:42:54 22 basically.

17:42:56 23 Q. How many fixes did you study? Any?

17:42:59 24 A. I don't know.

17:43:01 25 Q. Do you know how many were discussed with

17:43:02 1 you during the interactive demonstrations?

17:43:07 2 A. The definitions in 56 and 57 I wrote

17:43:10 3 after, so at the time of the demonstrations I wasn't

17:43:12 4 putting them in these mental buckets. This is how I

17:43:15 5 gradually massaged what I knew, to get a clean

17:43:18 6 articulation.

17:43:19 7 Q. So you don't know one way or the other how

17:43:21 8 many fixes you saw, but you think you saw at least

17:43:24 9 one.

17:43:25 10 A. Yes.

17:43:26 11 Q. Do you think you saw at least one

17:43:28 12 PeopleSoft fix, related fix, or you don't know?

17:43:32 13 A. I think so. We certainly discussed, even

17:43:34 14 if I didn't see.

17:43:36 15 Q. Do you think you saw one Siebel-related

17:43:38 16 fix?

17:43:38 17 A. I don't know for sure.

17:43:39 18 Q. And you think you saw at least one

17:43:42 19 JDEdwards-related fix?

17:43:45 20 A. I don't know for sure.

17:43:45 21 Q. So you certainly didn't see all of the

17:43:48 22 various fixes that are at issue in this lawsuit;

17:43:50 23 right?

17:43:52 24 A. Agreed.

17:43:55 25 Q. The -- were you able to determine whether

17:43:59 1 any of the fixes that you saw are covered by Oracle
17:44:05 2 copyright registrations at issue in this case?
17:44:12 3 A. No.
17:44:13 4 Q. Were you able to determine whether any of
17:44:15 5 the enterprise application software you saw in this
17:44:16 6 case was covered by Oracle's copyright registrations
17:44:20 7 asserted in this case?
17:44:22 8 A. Not a question I looked at.
17:44:23 9 Q. So, "no" was the answer?
17:44:24 10 A. No.
17:44:25 11 Q. Okay. Now, sir, would you please go back
17:44:28 12 to paragraph 19? SAP -- you reported here, "Here,
17:44:34 13 however, SAP has crossed the line." When you say
17:44:36 14 "crossed the line," you mean crossed the line from
17:44:40 15 legal, permissible copying to illegal copying?
17:44:42 16 A. Yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17:46:42 9 Q. But in your view if someone has committed
17:46:44 10 the kind of free riding that you talk about in
17:46:46 11 violation of these public policies, is that -- is
17:46:50 12 that unlawful copying?
17:46:55 13 A. Yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17:51:29	18	Q. The second step is -- you start describing
17:51:31	19	in paragraph 61. And you then, in paragraph 62,
17:51:35	20	recite -- "Unauthorized Reproduction" is the heading
17:51:46	21	of 62.
17:51:47	22	In these paragraphs 62, 63, 64, 65, am I
17:51:51	23	correct that what you are doing is you are setting
17:51:53	24	forth a particular provision of the Copyright Act in
17:51:57	25	paragraph one, and then paragraph two, and then

17:51:59 1 paragraph three respectively in 62, 63, 64? And
17:52:03 2 then in addition you also summarize what you think
17:52:09 3 are the allegations that support any claim of
17:52:11 4 infringement of that provision; right?

17:52:13 5 A. Yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

17:52:22 10 Q. And you set forth in the first paragraph
17:52:24 11 your general assessment of the law of paragraph
17:52:28 12 106(1). Right?

17:52:31 13 A. I wouldn't describe it that way. The
17:52:33 14 purpose of these paragraphs is to articulate the
17:52:35 15 free riding so that I could then apply my analysis
17:52:39 16 from the earlier part of the report about free
17:52:42 17 riding and how it's thought of to the specific
17:52:45 18 facts.

17:52:46 19 I don't mean to make legal conclusions in
17:52:48 20 these paragraphs. I am more articulating the fodder
17:52:51 21 of, "Hey, here is this fight. Here is the
17:52:53 22 copyrighted, protected expression. Here is the
17:52:56 23 alleged free riding. And now let's use those
17:52:58 24 specific inputs and use that to play through the
17:53:03 25 earlier part of the report," which had laid out

17:53:05 1 these economic and public policy articulations.
17:53:08 2 This is the necessary trees I needed to have the
17:53:12 3 case-specific conversation at the back of my report.
17:53:14 4 Q. Okay. So in the first sentence you
17:53:16 5 reference 106(1) as prohibiting unauthorized
17:53:21 6 reproduction of copyrighted works, copyrighted
17:53:24 7 material, excuse me. And then you list two types of
17:53:26 8 unauthorized reproduction as being alleged in this
17:53:29 9 case. You are there summarizing from the fourth
17:53:33 10 amended complaint allegations that you think reflect
17:53:36 11 unauthorized reproduction; right?
17:53:38 12 A. Yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

17:53:49 17 Q. In paragraph 63, Professor, you list --
17:53:50 18 you recite 106(2), and you indicate what that
17:53:54 19 prohibits in the first sentence. Right?
17:53:57 20 A. Yes.
17:53:57 21 Q. And then you list in the sentences that
17:53:59 22 follow what you understand to be the allegations in
17:54:02 23 the complaint that support a claim of unauthorized
17:54:07 24 derivative work. Right?
17:54:09 25 A. Yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

17:54:49 18 Q. You said that "SAP TN allegedly created
17:54:54 19 unauthorized derivative work when it used
17:54:55 20 copyrighted Oracle Fixes and/or copyrighted Oracle
17:54:58 21 Enterprise Application Software to create code or
17:55:02 22 data for its customers." Right?
17:55:05 23 A. I am sorry. I was on the next sentence.
17:55:07 24 It looks like I had the wrong one.
17:55:10 25 Which sentence are you reading?

17:55:13 1 Q. Sure. In 63 -- I don't know, just below
17:55:17 2 the halfway point. "SAP TN allegedly created
17:55:23 3 unauthorized fixes --"
17:55:23 4 A. Got it.
17:55:23 5 Q. -- et cetera.
17:55:24 6 "-- unauthorized derivative work --"
17:55:25 7 Do you see that?
17:55:25 8 A. "-- when it used copyrighted Oracle Fixes"
17:55:25 9 dah, dah, dah, "to create code or data for its
17:55:30 10 customers." I do see that.
17:55:31 11 (Clarification requested by reporter.)
17:55:31 12 THE WITNESS: "To create code or data for
17:55:31 13 its customers."
17:55:31 14 I see the sentence.
17:55:33 15 What was your question on that sentence?
17:55:34 16 MR. BUTLER: Q. How does that conduct
17:55:36 17 that you describe here create a derivative work?
17:55:48 18 A. Well, derivative work is copyright law's
17:55:54 19 category for thinking about things that might be
17:55:57 20 based on something that was copyrighted but
17:55:59 21 different in a relevant way as defined by the
17:56:01 22 statute.
17:56:01 23 And so when I write here that there was
17:56:03 24 allegedly created an unauthorized derivative work,
17:56:06 25 when it used copyrighted fixes to create code or

17:56:10 1 data, that is the flow of a derivative work
17:56:13 2 allegation, using something that's copyrighted to
17:56:16 3 create something else.

17:56:17 4 And then obviously we need to understand
17:56:19 5 exactly what was created, which, you know, is the
17:56:22 6 understanding we have from the earlier paragraphs
17:56:25 7 when I defined things like an Oracle fix and so on.

17:56:30 8 Q. Okay. Did you assess on your own
17:56:34 9 individually how the work being created is
17:56:38 10 transformative?

17:56:41 11 A. At a general level, yes. Not in a
17:56:43 12 specific way, no.

17:56:46 13 Q. How did you do that in a general way?

17:56:49 14 A. Part of my understanding, just from seeing
17:56:52 15 all these materials we have done, so my definition
17:56:55 16 of an Oracle fix, for instance, gives us a general
17:56:58 17 sense of what that is. My definitions of the
17:57:01 18 enterprise software gives us a general sense.

17:57:03 19 And so seeing an allegation that says,
17:57:05 20 "Hey, you took an Oracle fix. You took application
17:57:10 21 software and created a different kind of fix or
17:57:12 22 software," that in a general sense gives me the
17:57:16 23 pattern of what we need to talk about derivative
17:57:19 24 work. But I then did not study that in a rich way.
17:57:21 25 I was merely here articulating the free ride.

17:57:26 1 Q. So at a high level you assessed that. But
17:57:28 2 with respect to any particular work that could be --
17:57:31 3 that has been described as being, or accused of
17:57:35 4 being a derivative work, you didn't, with respect to
17:57:37 5 any particular work, assess whether that was that
17:57:40 6 transformation or not; correct?

17:57:43 7 A. Correct.

17:57:43 8 Q. Paragraph 64 I think we can get through
17:57:45 9 pretty quickly, because I think you are going to
17:57:47 10 tell me it's the same kind of thing. You recite in
17:57:50 11 paragraph -- in the first sentence, 106(3) what you
17:57:56 12 indicate is a prohibition under the Copyright Act,
17:57:58 13 and then you describe some allegations from the
17:58:01 14 fourth amended complaint that you believe would
17:58:04 15 establish infringement of, or a violation of that
17:58:09 16 provision of the Act. Right?

17:58:10 17 A. Yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

18:02:37 15 Q. In drawing conclusions -- excuse me. In
18:02:40 16 writing these provisions, 62, 63, 64, 65, did you
18:02:49 17 assess whether any of the acts that you think are --
18:02:53 18 could be violations of the Copyright Act instead
18:02:56 19 were licensed and permitted under the relevant
18:03:00 20 contracts?
18:03:03 21 A. Only as a very general matter.
18:03:06 22 Q. But you didn't study specific customer
18:03:09 23 contracts.
18:03:09 24 A. I did not.
18:03:10 25 Q. So you don't know one way or the other

18:03:11 1 whether any of the software -- enterprise software
18:03:15 2 applications that you think might have been
18:03:18 3 implicated under 106(1) indeed were subject to a
18:03:24 4 license under a customer -- license exception under
18:03:28 5 the relevant customer agreement.
18:03:31 6 A. Again, only as a general matter. I don't
18:03:33 7 know about any specific license.
18:03:35 8 Q. All right. And the same thing with
18:03:36 9 respect to derivative works and unauthorized
18:03:39 10 distribution. You didn't assess any specific
18:03:42 11 contract rights that might have been applicable to
18:03:45 12 see whether any given derivative work or any given
18:03:50 13 distribution might have been permitted under the
18:03:52 14 relevant contracts.
18:03:54 15 A. Correct.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

18:11:29 2 Q. Okay. You have not studied any of the
18:11:36 3 registrations that are asserted in this case; right?
18:11:41 4 A. Correct.
18:11:42 5 Q. And have you analyzed any of the deposit
18:11:45 6 materials that were filed in conjunction with any of
18:11:47 7 those registrations?
18:11:49 8 A. Have not.

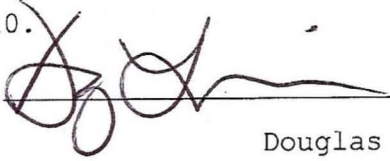
TEXT REMOVED - NOT RELEVANT TO MOTION

18:12:14 17 Q. You indicated on page -- let's see here.
18:12:26 18 In paragraph 10, page two, that you -- from time to
18:12:29 19 time, you advise a diverse mix of clients on
18:12:33 20 strategy and litigation issues related to
18:12:36 21 intellectual property. Does the copyright
18:12:39 22 infringement case you just referred to fall into
18:12:41 23 that category?
18:12:49 24 A. It could well fit in that category, it
18:12:52 25 could. Sure.

18:12:53 1 I am just reading the paragraph. Give me
18:12:56 2 12 seconds.
18:13:00 3 Yeah, that's probably the best place to
18:13:04 4 think about that.
18:13:04 5 Q. What case is that?
18:13:05 6 A. I am currently representing the Associated
18:13:08 7 Press in their litigation against Shepard Fairey
18:13:13 8 about the Obama Hope poster.
18:13:16 9 Q. Where is that pending?
18:13:17 10 A. New York.
18:13:17 11 Q. In the Southern District of New York?
18:13:20 12 A. I am so immersed in this right now, I have
18:13:22 13 no clue what court we are in. I have been digging
18:13:27 14 in here for the moment.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

18:27:08 8 I declare under penalty of perjury the
18:27:08 9 foregoing is true and correct. Subscribed at
18:27:08 10 Los Angeles, California, this 26 day
18:27:08 11 of May, 2010.
18:27:08 12 
18:27:08 13 Douglas Lichtman

14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, SARAH LUCIA BRANN, a Certified Shorthand 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 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 [X] was [] 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: April 27, 2010

Sarah Lucia Brann

SARAH LUCIA BRANN, CSR No. 3887