

# EXHIBIT D

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

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APRIL 20, 2010

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

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

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09:35:08 1 input that help a conscientious, thoughtful jury do  
09:35:12 2 its job.  
09:35:12 3 MR. BUTLER: Q. So you are trying to help  
09:35:13 4 the jury to do its job.  
09:35:16 5 A. Yes.  
09:35:17 6 Q. That's the role of your report?  
09:35:21 7 A. Again, we have added much more detail than  
09:35:24 8 that. So, yes, with all the detail we discussed,  
09:35:27 9 obviously.

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09:37:50 17 Q. What background do you bring that  
09:37:54 18 provides -- that would enable you -- that would  
09:37:56 19 qualify you to speak to the jury on policy and  
09:37:59 20 economic issues?  
09:38:01 21 A. I am happy if you want to turn to the CV,  
09:38:03 22 which we have marked as 2007. But as you and I both  
09:38:07 23 well know, I am an academic. That's primarily what  
09:38:11 24 I do. I have been an academic for something on 14,  
09:38:14 25 15 years now. I had tenure at University of

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09:38:16 1 Chicago, tenure at UCLA. And my academic work,  
09:38:21 2 which my guess is filling that binder in front of  
09:38:24 3 you.  
09:38:24 4 So, while I can talk about it, my academic  
09:38:25 5 work has always focused on trying to articulate and  
09:38:28 6 think about these economic and public policy  
09:38:31 7 articulations of intellectual property law. That's  
09:38:35 8 what I do.  
09:38:36 9 And I think, as you turn through all my  
09:38:38 10 years of writing, what I write about, what I think  
09:38:40 11 about, what I teach about, what I research is this  
09:38:43 12 very theme of, you know, why is the law how it is?  
09:38:47 13 What are we trying to do? How does it work? Why  
09:38:49 14 does it matter?  
09:38:50 15 And I have been writing about these  
09:38:53 16 things, talking, teaching about these things for  
09:38:55 17 years.  
09:38:56 18 In addition, again, as you well know --  
09:38:58 19 and I am happy to turn in detail if it's helpful  
09:39:02 20 throughout 2007 -- there are many other things in my  
09:39:05 21 background that again just resonate perfectly to  
09:39:09 22 this. This is what I do.  
09:39:10 23 In the sense -- to give one example, the  
09:39:13 24 Journal of Law and Economics, which legal audiences  
09:39:18 25 know -- a lay audience might not -- but it is I

<p style="text-align: right;">Page 34</p> <p>09:39:20 1 think widely viewed as the top law and economics 09:39:24 2 journal in the country, and has been that way for 09:39:26 3 years and years. 09:39:27 4 I served as an editor there for many 09:39:28 5 years, where the editor is one of a handful of 09:39:32 6 people, three or four, depending on how we are 09:39:35 7 doing, picking the scholarship that is the best of 09:39:38 8 the best of the best that would get published there, 09:39:40 9 working with the authors to sharpen their ideas, 09:39:43 10 speak them more clearly, make sure they are right. 09:39:46 11 Lots of stuff in my resume. I am happy to 09:39:50 12 turn through it. It makes my mom proud. But I 09:39:53 13 think my academic hat matches perfectly to the 09:39:55 14 expertise one needs to do what I want to do in this 09:39:58 15 case, which is talk about these economic and public 09:40:00 16 policy issues.</p>	<p style="text-align: right;">Page 36</p>
<p style="text-align: right;">Page 35</p>	<p style="text-align: right;">Page 37</p>

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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,

15 (Pages 54 to 57)

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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

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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.

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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

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10:29:56 6 MR. BUTLER: Q. When you read the Clarke  
10:29:58 7 report, you concluded that Mr. Clarke got some  
10:30:01 8 things wrong; right?  
10:30:02 9 A. Yes.  
10:30:03 10 Q. And you have drawn some opinions and made  
10:30:10 11 some -- drawn some conclusions and rendered some  
10:30:12 12 opinions -- and are prepared to render some opinions  
10:30:16 13 on the issues that you believe Mr. Clarke got wrong.  
10:30:20 14 Correct?  
10:30:21 15 A. Yes.

17 (Pages 62 to 65)



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10:34:34 22 MR. BUTLER: Q. So your rebuttal to  
10:34:36 23 Mr. Clarke consists of your views on the economic  
10:34:42 24 and public policy issues relating to copyright  
10:34:44 25 damages?

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10:34:45 1 A. Yes.  
10:34:47 2 Q. Do you have any specific rebuttal to any  
10:34:51 3 of the numbers, the specific numbers recited in  
10:34:56 4 Mr. Clarke's report as -- with respect to damages  
10:34:59 5 calculations?  
10:35:00 6 A. I think both of us understand the economic  
10:35:03 7 and public policy underpinnings have huge impacts on  
10:35:09 8 the numbers. That's part of the reason why it is  
10:35:11 9 relevant to think about those things.  
10:35:12 10 So if I am right and he is incorrect about  
10:35:15 11 some of the policy and economics, his numbers would  
10:35:18 12 certainly be challenged and undermined by those  
10:35:23 13 differences.

<p style="text-align: right;">Page 70</p>	<p style="text-align: right;">Page 72</p> <p>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?</p>
<p style="text-align: right;">Page 71</p>	<p style="text-align: right;">Page 73</p> <p>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.</p>



<p style="text-align: right;">Page 78</p> <p>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.</p> <p>10:47:40 14 Q In what way or ways can actual damages be 10:47:43 15 measured in a copyright infringement case?</p>	<p style="text-align: right;">Page 80</p>
<p style="text-align: right;">Page 79</p>	<p style="text-align: right;">Page 81</p>

<p>Page 86</p>	<p>Page 88</p> <p>10:58:55 24 Q. So the opinions you express in your report 10:58:57 25 you believe are not controversial; they are</p>
<p>Page 87</p>	<p>Page 89</p> <p>10:58:59 1 supported by the case law? 10:59:02 2 MR. FALZONE: Objection to the form. The 10:59:04 3 question is vague. 10:59:07 4 THE WITNESS: I think the opinions in my 10:59:09 5 report are supported by economic and public policy 10:59:12 6 analysis. It is also true that cases often echo 10:59:16 7 these points. 10:59:17 8 I just want to make sure we have cause and 10:59:20 9 effect right. The cases talk about these things 10:59:22 10 because they are adopting the economic and public 10:59:25 11 policy rationales that have developed organically 10:59:30 12 from cases and scholarship in all these years of 10:59:33 13 evolution. 10:59:34 14 I am not leaning on a specific case report 10:59:36 15 for what I say in this report. I point you to some 10:59:39 16 examples, for instance, just to show places where 10:59:42 17 these things have come up. 10:59:44 18 I think the basis for my views is much 10:59:47 19 more broad than just looking at what the cases have 10:59:52 20 explicitly said, but instead is leaning on this 10:59:56 21 wealth of scholarship, which things I have been a 11:00:00 22 part of for well over a decade.</p>

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11:10:56 14 Do you agree that in the US of A in determining  
11:11:00 15 actual damages in a copyright infringement case one  
11:11:03 16 way of measuring that is by examining lost profits?  
11:11:06 17 A. I do.

11:11:16 24 Q. Okay. And do you -- are you aware of any  
11:11:19 25 other way akin to lost profits of measuring actual

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11:09:51 8 Q. 504(a)(1) says, "the copyright owner's  
11:09:54 9 actual damages and any additional profits of the  
11:10:00 10 infringer, as provided by subsection (b)."  
11:10:03 11 Do you see that?  
11:10:03 12 A. I do.  
11:10:04 13 Q. Do you see the words "actual damages"  
11:10:05 14 there?  
11:10:06 15 A. I do. I see what -- my mind was taking me  
11:10:09 16 to the longer phrase, "the actual damages suffered  
11:10:11 17 by him or her as a result of the infringement."  
11:10:14 18 That's what was going on off in my head as the  
11:10:16 19 phrase.  
11:10:16 20 Q. Okay. Do you see the phrase "actual  
11:10:18 21 damages" there?  
11:10:19 22 A. I do.  
11:10:19 23 Q. And what is your understanding of the ways  
11:10:21 24 in which actual damages can be determined in a  
11:10:25 25 copyright infringement case?

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11:11:23 1 damages under the Copyright Act?  
11:11:25 2 MR. FALZONE: Objection to the form of the  
11:11:26 3 question. It's vague.  
11:11:29 4 THE WITNESS: When the Copyright Act  
11:11:31 5 allows us to think about actual damages, we use many  
11:11:34 6 different ways of articulating what that is.  
11:11:36 7 Whether -- how you want to label them I have no  
11:11:40 8 interest in quarreling with.  
11:11:41 9 I want to make sure that you and I  
11:11:43 10 understand that actual damages can be measured by  
11:11:45 11 things like looking at the fair market value of the  
11:11:47 12 asset, and how the asset's fair market value might  
11:11:50 13 have been properly measured as a measure of the  
11:11:53 14 actual damages suffered by him or her as a result of  
11:11:56 15 the infringement.

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11:16:19 22 Q Okay Other than lost profits and  
11:16:21 23 hypothetical license, are you aware of other  
11:16:24 24 measures of assessing actual damages that have been  
11:16:30 25 adopted by the courts as an appropriate measure for

27 (Pages 102 to 105)

Page 106		Page 108			
11:16:33	1	actual damages?	11:18:48	1	A. Absolutely.
11:16:34	2	A. Yes.			
11:16:36	3	Q. How many such examples do you have in			
11:16:39	4	mind?			
11:16:44	5	A. At least two.			
11:16:45	6	Q. Okay. And what are they?			
11:16:47	7	A. The fair market value measure, which			
11:16:49	8	itself embraces several components, and Georgia			
11:16:53	9	Pacific factors, to the extent your language about a			
11:16:56	10	hypothetical license might under-articulate what			
11:16:59	11	those factors ask us to consider.			
11:17:01	12	Q. Okay. So in your view the Georgia Pacific			
11:17:05	13	factors are used not to establish lost profits and			
11:17:09	14	not to establish a hypothetical license, but for			
11:17:11	15	some other purpose?			
11:17:14	16	MR. FALZONE: Objection to form.			
11:17:15	17	Mischaracterizes the testimony.			
11:17:16	18	THE WITNESS: No, that is not my view.			
11:17:18	19	MR. BUTLER: Q. Okay. Your view is that			
11:17:19	20	the Georgia Pacific factors are employed in order to			
11:17:22	21	assess a hypothetical license; right?			
11:17:27	22	A. Among other things, yes.			
11:17:28	23	Q. Among other things. I beg your pardon,			
11:17:30	24	yes.			
11:17:33	25	And you mentioned also fair market value			
Page 107		Page 109			
11:17:35	1	measure. Is that fair market value measure used to			
11:17:39	2	determine a -- damages under a hypothetical license?			
11:17:45	3	A. Sometimes yes, and sometimes no.			
11:17:47	4	Q. Is it also used sometimes in your view to			
11:17:49	5	assess lost profits?			
11:17:53	6	A. Yes.			
11:17:54	7	Q. Is it -- is a fair market value measure			
11:17:57	8	sometimes used for something other than assessing			
11:18:00	9	lost profits and a hypothetical license?			
11:18:03	10	A. I think, depending on how we want to			
11:18:07	11	articulate categories -- you say hypothetical			
11:18:08	12	license, I said hypothetical negotiation -- the fair			
11:18:10	13	market value might be a useful input to hypothetical			
11:18:13	14	negotiation, which is, under some views, part and			
11:18:17	15	parcel of lost profits. That's for the lawyers to			
11:18:20	16	articulate, which categories line up to which. From			
11:18:24	17	an economic perspective, when you ask about lost			
11:18:28	18	profit, I want to know about the harm to the			
11:18:31	19	rightful owner, and the fair market value comes into			
11:18:34	20	that economic question.			
11:18:36	21	Q. So the fair market value has a role, in			
11:18:38	22	your view, with respect to determining lost profits,			
11:18:41	23	and it also has a role -- it can have a role with			
11:18:45	24	respect to determining hypothetical license or			
11:18:47	25	hypothetical negotiation. Right?			



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11:41:46 15 Q. Okay. And do you in your report recite  
11:41:49 16 any specific case that supports that notion that  
11:41:53 17 avoided costs can be used in a -- as a measure of  
11:41:55 18 damages in a copyright infringement case?  
11:41:58 19 A. I cite cases for the many economic  
11:42:02 20 propositions, but not as an example of courts  
11:42:06 21 picking up on those themes. But I don't view the  
11:42:10 22 purpose of my report to cite cases, just to say what  
11:42:12 23 the law is. That's not my role.

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11:42:26 5 Q. You indicated earlier that you had read  
11:42:31 6 Mr. Clarke's report and that you had some -- had  
11:42:38 7 drawn some conclusions and rendered some opinions in  
11:42:40 8 rebuttal to that report. Do you recall our  
11:42:43 9 discussion of that earlier today?  
11:42:44 10 A. I recall our discussion, yes.  
11:42:46 11 Q. And we discussed one of the areas in  
11:42:54 12 Mr. Clarke's report that you think -- where you  
11:42:57 13 think Mr. Clarke got it wrong, and you think you  
11:43:00 14 have some different and rebuttal information in  
11:43:05 15 connection with that. Do you recall talking about  
11:43:07 16 Mr. Clarke's report, and you mentioned one instance  
11:43:09 17 -- one of the ways you think Mr. Clarke made an  
11:43:12 18 error?  
11:43:13 19 A. I do.  
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.

29 (Pages 110 to 113)

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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.  
11:44:09 11 Q. Okay. Just so it's clear now, I want to  
11:44:12 12 get from you the list of all the things that you  
11:44:15 13 think -- the list of things you think Mr. Clarke got  
11:44:20 14 wrong in his report. We might get into some of  
11:44:23 15 those in greater detail, but I just want a general  
11:44:25 16 list now.  
11:44:26 17 A. Absolutely.  
11:44:26 18 Q. The first of them we discussed earlier  
11:44:29 19 today. You think Mr. Clarke was wrong when he  
11:44:31 20 referred only to actual use rather than looking  
11:44:34 21 at -- what might have been done rather than actual  
11:44:40 22 use.  
11:44:41 23 I am not sure I said that correctly, so  
11:44:43 24 can you please refresh my recollection of what that  
11:44:46 25 issue was?

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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.

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11:44:47 1 A. I would appreciate that.  
11:44:48 2 Q. I would appreciate that, too.  
11:44:49 3 A. So the first theme is that Mr. Clarke  
11:44:52 4 would repeatedly focus on the events as they  
11:44:54 5 actually transpired, even when economic and public  
11:44:59 6 policy considerations would ask us to consider other  
11:45:03 7 things, like what the parties expected would happen  
11:45:06 8 as compared to what did happen. And so that theme  
11:45:10 9 of which you then articulated one example, and there  
11:45:14 10 are several more, but that's the theme at the high  
11:45:16 11 level that I think you are asking for.  
11:45:17 12 Q. Okay.  
11:45:18 13 A. And then the second theme we just did, and  
11:45:21 14 I don't need to repeat the theme about legitimate  
11:45:24 15 alternatives.  
11:45:25 16 Q. Okay.  
11:45:26 17 A. Shall we move on to the third theme?  
11:45:28 18 Q. Please.  
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

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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.

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11:54:35 20 Q Okay In what way do you believe  
11:54:37 21 paragraph 47 rebuts that proposition, that  
11:54:40 22 particular theme of Mr Clarke?  
11:54:42 23 A One of the key take-aways from the first  
11:54:48 24 two opinions I render in the report, the opinion of  
11:54:52 25 the copyright incentive system and the opinion that

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11:54:57 1 the way it works is by reducing free riding, one of  
11:55:00 2 the take-aways of that is that the copyright system  
11:55:03 3 is trying to get parties not to free ride, but  
11:55:07 4 instead to negotiate ahead of time or compete  
11:55:10 5 legitimately.  
11:55:12 6 When we get a situation when there has  
11:55:12 7 been infringement, we have obviously failed in that  
11:55:12 8 mission. We haven't negotiated ahead of time. We  
11:55:18 9 haven't competed legitimately. And so when we get  
11:55:20 10 to a moment where there is infringement, as I talk  
11:55:22 11 about in paragraph 47, the damages regime is to  
11:55:26 12 think about, how do we calculate damages so that we  
11:55:29 13 don't do this next time, so there isn't this  
11:55:33 14 terrible incentive not to do what the copyright  
11:55:36 15 system rightly cheers for, which is negotiation or  
11:55:40 16 legitimate competition?  
11:55:41 17 And if you want to impact how an infringer  
11:55:45 18 or a potential infringer thinks about that key  
11:55:48 19 moment, that moment, "Hey, do I ask? Do I just do  
11:55:50 20 it?" one key thing to know is, wait a minute. What  
11:55:53 21 were they thinking would happen in the future?

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12:00:55 14 Q. In what way does paragraph 47 of your  
12:00:57 15 report, Exhibit 2006, rebut that view of Mr. Clarke?  
12:01:03 16 A. As we spoke of in a slightly longer  
12:01:07 17 response, paragraph 47 is pointing out that one of  
12:01:09 18 the key moments in the analysis is the moment that  
12:01:12 19 the infringer is making a choice between moving  
12:01:16 20 forward with infringement, negotiating or doing  
12:01:18 21 something completely legitimate.  
12:01:21 22 And if the purpose of the damages regime  
12:01:23 23 is in part to influence that choice, as I speak  
12:01:27 24 about it throughout the report, in particular in 47,  
12:01:30 25 but elsewhere as well, if the purpose is to

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12:01:32 1 influence that choice, a key input is, what was the  
12:01:36 2 infringer thinking, what were they expecting would  
12:01:39 3 happen, rather than what necessarily did happen?  
12:01:41 4 Because a decision made at this moment would have to  
12:01:44 5 turn on what they expected rather than what actually  
12:01:46 6 happened.

<p style="text-align: right;">Page 134</p> <p>12:07:30 22 Q. I misspoke. Could you please tell me what 12:07:34 23 the six opinions are that you render in your 12:07:36 24 opinion? 12:07:36 25 A. I would be happy to. And just to help</p>	<p style="text-align: right;">Page 136</p> <p>12:08:37 2 Q. Okay. And you have a second opinion?</p> <p>12:08:54 11 The second opinion is that the structure, 12:08:56 12 the policy, and the economics are being implemented 12:08:59 13 here through a restriction on free riding, which is 12:09:02 14 an economic concept I talk about in the report and 12:09:05 15 we can talk about together. 12:09:06 16 But the second opinion is articulating 12:09:08 17 that copyright law does this heavy lifting, not in a 12:09:12 18 million other ways, which might have been plausible, 12:09:14 19 but by restricting free riding per se. And I talk 12:09:18 20 about why that has economic and policy charm to it.</p>
<p style="text-align: right;">Page 135</p> <p>12:07:38 1 your own tracking, I tried to break those into the 12:07:42 2 boldface headings of, I want to say, part four as 12:07:44 3 the six opinions. So let's run through them so we 12:07:46 4 have a good record together, you and I. 12:07:49 5 So the first opinion -- 12:07:50 6 And I will be brief, for our purposes, and 12:07:51 7 you can ask for more detail if you would like it. 12:07:51 8 The first opinion is this core concept 12:07:55 9 that the copyright system is an incentive system, 12:07:58 10 and that we need an incentive system because the 12:07:59 11 works being protected are works where we have 12:08:02 12 someone who is going to be investing time and money 12:08:04 13 and energy to create the work. They want it. And 12:08:07 14 so the copyright system is an incentive to get 12:08:11 15 authors to do that, to get investors to back them 12:08:14 16 doing that, and so on.</p>	<p style="text-align: right;">Page 137</p> <p>12:09:40 2 Q. Okay. And you have a third opinion, which 12:09:42 3 is at letter C on page 17, I presume. 12:09:46 4 A. Correct. 12:09:46 5 Q. Then what is that? 12:09:47 6 A. Third opinion -- again, I will add more 12:09:49 7 detail if it's helpful. The third opinion is that 12:09:52 8 damages remedies are the backstop that makes those 12:09:57 9 first two moves work. 12:09:58 10 If you are going to have an incentive 12:10:00 11 system and you are going to do it by restricting 12:10:03 12 free riding, you have got to then have a system for 12:10:05 13 assessing damages when free riding happens, which is 12:10:08 14 to say there must be a consequence, a backstop, to 12:10:12 15 someone who does not allow the incentive and free 12:10:14 16 riding intuitions to do that heavy lifting. 12:10:19 17 And so opinion C talks about how damage 12:10:21 18 analysis is that backstop, and talks about some of 12:10:24 19 the information that is important to damages 12:10:28 20 analysis achieving that purpose.</p>

12:11:11 13 Q. What is the fourth opinion in your report?  
12:11:15 14 A. The fourth, fifth, and sixth opinions now  
12:11:19 15 reflect the first three, but with a more specific  
12:11:23 16 focus on this fight. As you might perceive as you  
12:11:26 17 read the report, the first three opinions are the  
12:11:28 18 underlying public policy and economics at a high  
12:11:32 19 level, an abstract level, away from this particular  
12:11:35 20 fight.  
12:11:35 21 As we move to the next three, we take  
12:11:38 22 those same ideas and apply, which means number four  
12:11:40 23 is talking about how the incentive story, the  
12:11:45 24 copyright law, is trying to protect certain kinds of  
12:11:48 25 expression and give people an incentive to create

12:11:51 1 them and back them and nurture them and develop them  
12:11:53 2 and market them and all the rest, that that really  
12:11:57 3 fits here, that there is protected expression that  
12:12:00 4 is the kind of protection the copyright system means  
12:12:04 5 to back, and that we need these incentives, because  
12:12:06 6 these are works of authorship where there was and  
12:12:10 7 needed to be real investment of money, time,  
12:12:13 8 reputation, and so on.  
12:12:14 9 And so the fourth theme is taking the  
12:12:19 10 first, but now more richly applying it to the  
12:12:22 11 protected expression at issue in this fight.

12:14:48 10 Q. Right. Let me step back, sir.  
12:14:50 11 You included here in your fifth opinion,  
12:14:52 12 if I understood you correctly, the facts as known to  
12:14:56 13 you in this case, or rather you applied those to  
12:15:02 14 your -- in connection with your second opinion.  
12:15:04 15 Right?  
12:15:10 16 A. With our previous conversation applied  
12:15:13 17 taken as a given, yes.  
12:15:14 18 Q. Okay. What facts that you believe are  
12:15:17 19 specific to this case did you incorporate into your  
12:15:19 20 rendering your fifth opinion?  
12:15:23 21 A. A number of things. Let's do it in  
12:15:25 22 conversation. Then we could check that I have not  
12:15:28 23 forgotten anything.  
12:15:29 24 A number of things. One thing I talk  
12:15:31 25 about are the fact that there is creative expression

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12:15:36 1 here. And that relies on some factual information,  
12:15:40 2 which I cite in the footnotes to where it comes  
12:15:43 3 from, but information about the choices that were  
12:15:46 4 available to programmers, information about the  
12:15:49 5 personality that shows up in the resulting products.  
12:15:53 6 And so I talk about getting some of that  
12:15:56 7 information from some of the Oracle employees. I  
12:15:59 8 also reflect some of that just from my own computer  
12:16:02 9 science background, having seen first-hand portions  
12:16:05 10 of code.  
12:16:07 11 And I reflect in this fifth opinion facts,  
12:16:12 12 including the creativity that is there, the fact  
12:16:16 13 that there is protected expression that would be  
12:16:19 14 part of this incentive analysis that I wrote about.  
12:16:24 15 I also then summarize some of the facts,  
12:16:26 16 just to help us be able to speak about the software  
12:16:29 17 and the databases.  
12:16:31 18 MR. BUTLER: Q. Okay. Aren't you  
12:16:33 19 forgetting someone who is sitting in this room with  
12:16:36 20 whom you consulted in that regard?  
12:16:39 21 Did you talk to Mr. Mandia?  
12:16:42 22 A. Oh, did I talk to Mr. Mandia? I believe I  
12:16:45 23 did talk to Mr. Mandia, yes.  
12:16:46 24 Q. I think it says that in footnote -- maybe  
12:16:49 25 56.

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12:16:50 1 A. Yeah, that sounds...  
12:16:53 2 Q. Do you recall speaking with Mr. Mandia  
12:16:54 3 about these topics?  
12:16:55 4 A. Yeah, yeah. Absolutely. Sorry. So many  
12:16:58 5 people. So much going on. Absolutely, I talked to  
12:17:02 6 Mr. Meyer and Mr. Mandia, yes.  
12:17:04 7 You said footnote 56?  
12:17:06 8 Yeah, right. And I disclosed it right  
12:17:08 9 there in 56, that's exactly right, confirmed with  
12:17:13 10 Mr. Mandia, Julie O'Shea, Norm Ackermann, and Linda  
12:17:13 11 Fowler, exactly, in talking with those folks.  
12:17:13 12 And as I write in 56, this is also  
12:17:16 13 consistent with my own understanding of computer  
12:17:18 14 science, and so on. And so many sources for the  
12:17:21 15 facts that I then reflect in the process of building  
12:17:26 16 the fifth opinion. And I believe the fifth opinion  
12:17:29 17 also talks about some of the accused acts of free  
12:17:32 18 riding.  
12:17:33 19 Q. Okay. The sources of the information you  
12:17:36 20 had were those three individuals you referred to  
12:17:41 21 before, as reflected in footnote, I think, 52.  
12:17:47 22 Let me just make sure.  
12:17:49 23 A. Yeah, 52, 55. There are a bunch of  
12:17:51 24 places. I tried to be really careful to make sure  
12:17:54 25 you knew what I was thinking of. 52.

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12:17:56 1 Q. So you spoke with an individual named  
12:17:59 2 Julie O'Shea?  
12:18:00 3 A. I did.  
12:18:00 4 Q. Is she an Oracle employee?  
12:18:03 5 A. I believe she is an Oracle employee.  
12:18:05 6 Q. And is her -- what do you understand her  
12:18:07 7 focus, her primary area of expertise to be -- her  
12:18:10 8 primary knowledge base to be with respect to  
12:18:13 9 Oracle's products that are at issue in this  
12:18:15 10 litigation?  
12:18:15 11 A. I believe that Ms. O'Shea has experience  
12:18:19 12 directly herself doing some form of this  
12:18:22 13 programming, which is either creating data files or  
12:18:25 14 creating other types of programming files, but that  
12:18:29 15 she has her hand in the actual creation process,  
12:18:33 16 which is what I was asking about.  
12:18:35 17 Q. You believe her to be a programmer, or at  
12:18:38 18 least at one point in her career at Oracle?  
12:18:41 19 A. I believe her to have programmed, or to  
12:18:43 20 have been involved in the programming process  
12:18:47 21 closely during her career at Oracle.  
12:18:49 22 Q. Okay. Do you know offhand whether she  
12:18:50 23 was -- had some involvement in the JDEdwards  
12:18:54 24 product?  
12:18:57 25 A. I believe that she did. I believe that

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12:19:00 1 she did. I believe that when I spoke with  
12:19:02 2 Ms. O'Shea it was specifically about JDEdwards.  
12:19:05 3 Q. Okay.  
12:19:06 4 A. I also believe we have my notes somewhere  
12:19:08 5 in this stack, which would make sure I have  
12:19:12 6 remembered correctly. But I believe I spoke with  
12:19:14 7 Julie O'Shea about the JDEdwards product.  
12:19:18 8 Q. Okay. And Mr. Ackermann, did you speak  
12:19:20 9 with him about JDEdwards also?  
12:19:23 10 A. I don't believe so, no.  
12:19:24 11 Q. What did you speak with him about  
12:19:26 12 generally as far as product lines, Oracle product  
12:19:28 13 lines goes?  
12:19:30 14 A. I believe with Mr. Ackermann I spoke about  
12:19:32 15 some of the PeopleSoft code, and looked at some of  
12:19:35 16 the PeopleSoft code, and was able to ask questions  
12:19:38 17 about it.  
12:19:39 18 Q. Okay. And Ms. Linda Fowler?  
12:19:47 19 A. I believe Ms. Fowler was in the same  
12:19:51 20 conversation as Mr. Ackermann on the same substance.  
12:19:55 21 Q. So, also about PeopleSoft code?  
12:19:59 22 A. I believe so.  
12:20:00 23 Q. Okay. Did you speak with anyone at Oracle  
12:20:03 24 with respect to Siebel code?  
12:20:10 25 A. I believe when I spoke with Ms. O'Shea

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12:20:14 1 that we at a minimum drew some analogies more  
12:20:19 2 broadly than just JDEdwards, including the Siebel  
12:20:24 3 code.  
12:20:25 4 Q. Okay. And did you discuss Siebel with  
12:20:27 5 Mr. Ackermann or with Ms. Fowler?  
12:20:30 6 A. I do not believe that I did.  
12:20:32 7 Q. Okay. Did you discuss Oracle database  
12:20:35 8 software with Ms. O'Shea?  
12:20:39 9 A. Can you clarify, when you refer to Oracle  
12:20:42 10 database software, which?  
12:20:45 11 Q. Sure. Is that a -- you are aware that  
12:20:48 12 Oracle -- several Oracle-branded products are at  
12:20:52 13 issue in this litigation. You said you read the  
12:20:54 14 fourth amended complaint, for example. You know  
12:20:56 15 that one of those product lines is called JDEdwards?  
12:21:00 16 A. Yes.  
12:21:00 17 Q. And we have spoken a moment ago about  
12:21:03 18 that. And another product line is PeopleSoft?  
12:21:05 19 A. Yes.  
12:21:06 20 Q. And another product line is Siebel?  
12:21:08 21 A. Yes.  
12:21:09 22 Q. Are you aware that there have been  
12:21:11 23 accusations made by Oracle concerning Oracle  
12:21:14 24 database software in this case?  
12:21:17 25 A. Again, I am not sure of that phrase, as to

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12:21:20 1 which products fall into which buckets, in that my  
12:21:24 2 questions, as I talk about in the report, what I  
12:21:26 3 need to know about the software products doesn't  
12:21:29 4 take me to be an expert as to what they each do, and  
12:21:34 5 which rely on databases and which don't and so on.

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<p>Page 154</p>	<p>Page 156</p> <p>12:30:27 1 that have been copied without permission but not 12:30:32 2 used should be accounted for somehow in a copyright 12:30:36 3 infringement damages analysis? 12:30:39 4 A With the flag to our conversation about 12:30:41 5 "use" being ambiguous a moment ago, absolutely 12:30:47 6 Q What's your legal basis for that position, 12:30:48 7 if any?</p>
<p>Page 155</p> <p>12:30:23 25 Q Okay Is it your opinion that materials</p>	<p>Page 157</p> <p>12:32:19 22 Q What else is included -- I beg your 12:32:20 23 pardon -- in your rebuttal to theme one? 12:32:22 24 A Not at all So I have a number of other 12:32:24 25 examples, not at all meant to be exhaustive, but</p>

Page 158		Page 160	
12:32:28	1	meant to be helpful in sharpening our disagreement.	
12:32:31	2	Q. What are they?	
12:32:31	3	A. The next helpful one might be page 22 of	
12:32:33	4	the Clarke report, which is whatever exhibit number	
12:32:37	5	it is, 2011.	
12:33:04	15	Q. Okay. The very bottom of page 22, that	
12:33:07	16	last paragraph.	
12:33:08	17	A. Yes, the last sentence in the last	
12:33:10	18	paragraph, correct.	
12:33:11	19	Q. Okay. And what do you disagree with, with	
12:33:15	20	respect to that statement by Mr. Clarke?	
12:33:18	21	A. I believe it's the same mistake. He	
12:33:20	22	focuses on the -- what could be determined with a	
12:33:26	23	high degree of precision in terms of what actually	
12:33:29	24	transpired, and even uses that as if that means we	
12:33:32	25	should ignore what was expected, the reasonable	
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12:33:38	1	royalty measure, which -- that has lots of parts to	
12:33:42	2	it, as you know. But that is a measure that says,	
12:33:46	3	"Hey, at the time of the infringement, what did the	
12:33:50	4	parties expect?" Which is to say it's a different	
12:33:53	5	measure than the measure that says what actually	
12:33:55	6	happened.	
12:33:56	7	So just because we might be able to come	
12:33:59	8	up with a damages measure based on what actually	
12:34:02	9	happened, that doesn't remotely take off the table	
12:34:05	10	our public policy and economic interest in also	
12:34:09	11	thinking about these other measures, like what the	
12:34:12	12	parties expected in the context of the reasonable	
12:34:14	13	royalty conversation.	

<p style="text-align: right;">Page 162</p> <p>12:37:29 25 Q. What else on the first topic, first Clarke</p>	<p style="text-align: right;">Page 164</p> <p>12:39:04 1 much more than what he is allowing there.</p>
<p style="text-align: right;">Page 163</p> <p>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</p>	<p style="text-align: right;">Page 165</p>

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12:42:37 20 Q. Okay. Do you have any opinions on what  
12:42:39 21 ought to be considered in determining what a fully  
12:42:42 22 paid-up license -- in calculating damages based on a  
12:42:45 23 fully paid-up license theory?  
12:42:48 24 A. Yes.  
12:42:49 25 Q. What are those -- what are your opinions

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12:42:51 1 as to what should be included?  
12:42:53 2 A. The same inputs that my report speaks  
12:42:59 3 toward and explains the relevance of apply to the  
12:43:03 4 fully paid-up license analysis just as strongly as  
12:43:06 5 the other frameworks.  
12:43:08 6 Q. What are the other frameworks?  
12:43:10 7 A. The fair market value as measured by  
12:43:15 8 income. Fair market value as measured by costs,  
12:43:20 9 lost profits, disgorgement.  
12:43:22 10 We have all these different damages  
12:43:25 11 theories which my report endeavors to explain the  
12:43:30 12 economics and public policy of. I draw no special  
12:43:34 13 distinction between a paid-up license versus what  
12:43:38 14 Mr. Clarke writes of.  
12:43:43 15 Q. Okay. Other issues with respect to theme  
12:43:46 16 one in the Clarke report?  
12:43:48 17 A. Sure. Another example is actually just on  
12:43:49 18 the next page, which is page 29 of the exhibit.  
12:43:53 19 Q. Okay.  
12:43:53 20 A. I am in the first full paragraph on the  
12:43:56 21 page. And in the middle the sentence of interest to  
12:44:01 22 me is "Mr. Meyer's approach assumes that the number  
12:44:05 23 of customers TomorrowNow should pay for was equal to  
12:44:09 24 the number of new customers SAP estimated  
12:44:14 25 TomorrowNow would win from Oracle after the License

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12:44:16 1 was in effect. Such an approach cannot possibly be  
12:44:21 2 related to actual use."  
12:44:23 3 Q. Okay. And what's your problem there? Why  
12:44:26 4 do you think that's wrong?  
12:44:29 5 A. Mr. Clarke here is explicit that he is  
12:44:31 6 rejecting the estimates, predictions, and  
12:44:35 7 expectations, which, as you know, I think is wrong  
12:44:38 8 on economics and public policy, that it is relevant  
12:44:41 9 to think of estimates and expectations. And so he  
12:44:44 10 is being direct, which I appreciate, in saying,  
12:44:47 11 "Hey, I don't do that." And I think he needs to.  
12:44:52 12 Q. Do you, to the best of your knowledge --  
12:44:54 13 strike that.  
12:44:55 14 Is it your understanding that Mr. Meyer  
12:44:58 15 has adopted the economic and public policy positions  
12:45:02 16 that you espouse in your report when he calculates  
12:45:06 17 damages in his report?  
12:45:08 18 MR. FALZONE: Objection to form. Vague.  
12:45:11 19 Calls for speculation.  
12:45:15 20 THE WITNESS: I believe his analysis is  
12:45:17 21 consistent with the economic and public policy  
12:45:19 22 justifications I articulate. I don't know what to  
12:45:21 23 make of a word like "adopted," which seems to have  
12:45:23 24 more of a -- more meaning to it than that. I  
12:45:26 25 believe Mr. Meyer's analysis is consistent with the

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12:45:29 1 framework I articulate as well.  
12:45:31 2 MR. BUTLER: Q. Okay. So from your  
12:45:33 3 perspective as someone with, as you have said,  
12:45:35 4 expertise in the area of economics and public  
12:45:38 5 policy, the economic and public policy underpinnings  
12:45:42 6 of the copyright law with a particular emphasis on  
12:45:46 7 copyright damages, from that perspective you think  
12:45:49 8 Mr. Meyer correctly adopted -- correctly  
12:45:52 9 incorporated the positions that you believe are  
12:45:55 10 correct with respect to how damages ought to be  
12:45:57 11 calculated in this case?  
12:45:59 12 MR. FALZONE: Objection. Vague.  
12:46:00 13 Mischaracterizes testimony.  
12:46:03 14 THE WITNESS: I think he correctly did his  
12:46:05 15 job, in light of those same public policy and  
12:46:11 16 economic intuitions. I am just resisting this  
12:46:14 17 adoption idea, because I don't know what you mean by  
12:46:16 18 it. But I think you and I understand each other.  
12:46:19 19 MR. BUTLER: Q. You think he is correct  
12:46:20 20 because he -- at least in part because he agrees --  
12:46:23 21 because his calculations, at least in part, are  
12:46:28 22 supported by the economic and public policy issues  
12:46:31 23 that you espouse in this case?  
12:46:35 24 A. I think he is correct because he is doing  
12:46:38 25 what the law requires him to do. I think to

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12:46:42 1 understand what he is doing we need to, in addition,  
12:46:44 2 speak of the economic and public policy  
12:46:48 3 underpinnings in order to take what will surely be  
12:46:52 4 radically different numbers from Mr. Meyer on the  
12:46:54 5 one hand and Mr. Clarke on the other and know what  
12:46:57 6 to think about that difference. So I don't know  
12:47:01 7 that I agree with your sentence per se.  
12:47:03 8 Q. Are you -- can you point to any  
12:47:07 9 conclusions that Mr. Meyer drew that you think are  
12:47:15 10 based on or supported by your economic and public  
12:47:18 11 policy views of copyright law damages?  
12:47:21 12 MR. FALZONE: Objection. Vague.  
12:47:22 13 Overbroad.  
12:47:23 14 THE WITNESS: If "supported by" means  
12:47:26 15 consistent with, I believe his report is fully  
12:47:28 16 consistent with the economic and public policy  
12:47:32 17 principles that I articulate. I think if  
12:47:35 18 "supported" means something having more legal weight  
12:47:39 19 to it, I would appreciate it if you would unpack the  
12:47:42 20 word for me.

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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.

14:00:54 13 Q. Are there any other -- are there any cases  
14:00:57 14 in which you are referring -- relying, excuse me --  
14:00:59 15 in your conclusion that Mr. Clarke is wrong with  
14:01:02 16 respect to each of these points with respect to  
14:01:04 17 theme one?  
14:01:06 18 A. Again, consistent with my understanding of  
14:01:07 19 my proper role, I have not leaned on cases per se,  
14:01:15 20 and don't want to go down the path of articulating  
14:01:18 21 cases and so on.  
14:01:19 22 My role is to articulate the economic and  
14:01:22 23 public policy underpinnings. And that is the basis  
14:01:25 24 against which I am comparing what Mr. Clarke says,  
14:01:28 25 and I trust the lawyers will handle cases and that

<p>Page 182</p> <p>14:01:31 1 side of it in their job.</p>	<p>Page 184</p>
<p>Page 183</p>	<p>Page 185</p>

47 (Pages 182 to 185)

Page 186		Page 188	
		14:08:53	1 sufficiently precise to do the work that needs to be
		14:08:58	2 done when one thinks about legitimate alternatives
		14:09:02	3 in these damages calculations.
		14:09:05	4 Q. In what way do you think he is incorrect
		14:09:07	5 here?
		14:09:10	6 A. From an economic and public policy
		14:09:13	7 perspective, when we look at legitimate alternatives
		14:09:17	8 it's important to really understand the details
		14:09:19	9 about how equivalent those alternatives are and when
		14:09:23	10 and how available those alternatives are, and to do
		14:09:28	11 that in a very nuanced way, thinking, for instance,
		14:09:31	12 about whether the alternative has a different risk
		14:09:35	13 profile or would have a different perception to the
		14:09:38	14 market or enable a different quality of service or
		14:09:42	15 performance or would entail different costs or would
		14:09:49	16 require a different timing for provision of service,
		14:09:52	17 which is a long way of saying that details really
		14:09:57	18 matter if you are using this information in its
		14:10:00	19 proper way. And I was concerned that the details
		14:10:03	20 were not fully fleshed out in how he was using that
		14:10:08	21 information.
		14:10:11	22 Q. What is the basis for your suggesting that
		14:10:14	23 he was incorrect in not reciting the alternatives of
		14:10:18	24 having different risk profiles, a lot of different
		14:10:22	25 costs, quality of service, et cetera, as you just
14:07:33	25 Q. All right. And then your second theme is		
Page 187		Page 189	
14:07:35	1 you had a reaction to his commentary about	14:10:24	1 recited?
14:07:39	2 legitimate alternatives.	14:10:25	2 A. I didn't see that detail in the exposition
14:07:41	3 A. Yes.	14:10:29	3 in the report, and I believe the economic and public
14:07:41	4 Q. Do you remember that discussion, when you	14:10:31	4 policy rationales require that type of detail.
14:07:44	5 talked about your second theme?		
14:07:45	6 A. Yes.		
14:07:45	7 Q. Can you point out, please, the places in		
14:07:47	8 the Clarke report where you think he is incorrect on		
14:07:51	9 this second theme?		
14:07:52	10 A. Sure. I thought the best place in the		
14:07:56	11 Clarke report for this reaction was starting with		
14:07:59	12 page 135.		
14:08:03	13 Q. Okay.		
14:08:08	14 A. And this is a multi-page section where he		
14:08:10	15 talks about the alternatives that he thinks are		
14:08:16	16 relevant to consider as you think about damages.		
14:08:21	17 Q. Where does that begin on page 135?		
14:08:23	18 A. I believe that is with his header 8.9, and		
14:08:26	19 then he continues to expand through page 136 and		
14:08:30	20 137, 138, 139, 140. He goes on for several pages in		
14:08:40	21 talking about these ideas.		
14:08:41	22 Q. So you believe he is incorrect when he		
14:08:43	23 refers to the alternatives that should go into the		
14:08:47	24 calculation of the hypothetical license?		
14:08:51	25 A. I worry that the analysis isn't		



<p>Page 190</p>	<p>Page 192</p> <p>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?</p>
<p>Page 191</p>	<p>Page 193</p> <p>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.</p>

<p style="text-align: right;">Page 194</p> <p>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.</p>	<p style="text-align: right;">Page 196</p> <p>14:19:35 1 This test is written that way for a 14:19:37 2 reason. It's a willing buyer, and thinking about 14:19:40 3 the negotiation a willing buyer would have, because 14:19:44 4 otherwise, in a case of infringement, the innocent 14:19:48 5 copyright owner would be stuck with the limitations 14:19:54 6 of the infringer. What if the infringer is 14:19:57 7 incompetent, wasteful, and so on? 14:19:59 8 No reason in any of the policy analysis, 14:20:02 9 economic analysis, that we would want an infringer 14:20:05 10 not only -- that we would want a copyright holder 14:20:07 11 not only to suffer infringement, but also then have 14:20:11 12 compensation be determined exclusively by the 14:20:15 13 weaknesses of the infringer.</p>
<p style="text-align: right;">Page 195</p> <p>14:18:53 11 Q. Did you rely on the -- can you pinpoint 14:18:58 12 any case that supports your proposition here that 14:19:02 13 the proper way to look at this hypothetical 14:19:05 14 negotiation is to look at a given generic willing 14:19:09 15 buyer, if you will, versus this -- these particular 14:19:12 16 parties? 14:19:13 17 A. Again, with my standard caveat about 14:19:15 18 cases, just so we have a good record, I think all 14:19:18 19 the cases do. I think you are hard pressed to find 14:19:21 20 a case that uses that language and doesn't say a 14:19:24 21 willing buyer is the proper measure. 14:19:27 22 And it is proper, not just because the 14:19:29 23 courts say it, but when you think through the 14:19:32 24 economic and public policy issues that we discuss 14:19:34 25 here, it's exactly right.</p>	<p style="text-align: right;">Page 197</p>

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14:22:11 1 Q. You said you thought that was wrong  
14:22:12 2 because he failed to look at the parties'  
14:22:16 3 expectations. Was there some other thing he also  
14:22:19 4 failed to do with respect to theme one?  
14:22:21 5 A. I think the fair market value is a third  
14:22:23 6 important -- so there are damages measures that look  
14:22:27 7 at what these parties expected, there are damages  
14:22:29 8 measures that look at what actually transpired, and  
14:22:32 9 there are damages measures that look at the fair  
14:22:34 10 market value, which might include expectations of  
14:22:36 11 other non-involved parties. And those are the three  
14:22:40 12 main buckets I have in mind as we are discussing  
14:22:42 13 theme one.

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51 (Pages 198 to 201)

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14:29:22 1 I am on page 60.  
14:29:26 2 Q. Okay. And that -- 6.4, avoided costs?  
14:29:30 3 A. Yes.  
14:29:32 4 Q. Okay.  
14:29:34 5 A. The passage here -- well, go ahead.  
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.

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14:28:52 16 Q. Okay. Now, theme three, are there some  
14:28:56 17 parts of the Clarke report that you believe are  
14:28:59 18 incorrect on this fourth theme?  
14:29:03 19 A. Yes. There is a fourth theme as well.  
14:29:05 20 Q. Okay. And where are those parts in your  
14:29:07 21 report?  
14:29:07 22 A. I noted section 6.4 as one place to  
14:29:12 23 sharpen our conversation. And I apologize. I don't  
14:29:14 24 have a page number for 6.4, but we will get it in a  
14:29:18 25 moment

52 (Pages 202 to 205)

<p style="text-align: right;">Page 206</p> <p>14:33:14 14 Q. Is there another example of the fourth 14:33:17 15 theme, or is that the only one you had in your 14:33:19 16 notes? 14:33:19 17 A. That's the only one I had marked in my 14:33:21 18 notes. 14:33:22 19 Q. Okay. What is your understanding of the 14:33:23 20 term "avoided costs" as Mr. Clarke has recited it 14:33:26 21 here? 14:33:26 22 A. Avoided costs, as I understand it, are 14:33:31 23 costs that did not need to be incurred because of 14:33:35 24 the infringement. 14:33:42 25 Q. What is that comprised of, in your view?</p>	<p style="text-align: right;">Page 208</p>
<p style="text-align: right;">Page 207</p> <p>14:33:44 1 A. In context here I think avoided costs 14:33:48 2 would include the costs that the defendants would 14:33:52 3 have had to incur to get themselves the work that 14:33:58 4 instead they got through infringement. And so those 14:34:02 5 costs might be development costs, research costs, 14:34:04 6 manpower, equipment, anything that would be a 14:34:08 7 necessary cost to get defendants to the position it 14:34:13 8 got instead through the infringement. 14:34:20 9 Q. Development costs in your view is an 14:34:22 10 appropriate measure? 14:34:22 11 A. The costs that defendants would have 14:34:25 12 incurred to develop the software, yes. 14:34:27 13 Q. What's the basis for your saying that? 14:34:38 14 A. I believe that is the accepted 14:34:39 15 understanding of how the concept of avoided costs is 14:34:44 16 used in economic and public policy analysis, which 14:34:47 17 is to say the economic and public policy analysis 14:34:51 18 wants to understand what was the benefit to the 14:34:53 19 infringer of the infringing act. And naturally one 14:34:56 20 of the benefits is the infringer didn't have to 14:34:59 21 incur these costs.</p>	<p style="text-align: right;">Page 209</p> <p>14:37:35 24 Q. How does avoided cost factor in, in your 14:37:39 25 view, in a determination of damages based on the</p>

<p style="text-align: right;">Page 210</p> <p>14:37:45 1 lost profits? 14:37:51 2 A. When you say lost profits, are you 14:37:56 3 intentionally turning away from actual damages? The 14:37:59 4 term changed in the two questions. 14:38:01 5 You asked me about actual damages, which 14:38:04 6 is our larger category. And it certainly fits into 14:38:07 7 actual damages, if that's the question you intended 14:38:09 8 to ask. 14:38:11 9 Under actual damages, as you know, one of 14:38:13 10 the articulations is fair market value, because fair 14:38:17 11 market value is what was denied the copyright owner. 14:38:19 12 And as you think about fair market value, 14:38:21 13 one way, one input into fair market value could very 14:38:25 14 well be the cost that someone would have to incur to 14:38:27 15 achieve the same work of authorship or an equivalent 14:38:34 16 work of authorship.</p>	<p style="text-align: right;">Page 212</p>
<p style="text-align: right;">Page 211</p>	<p style="text-align: right;">Page 213</p>



<p style="text-align: right;">Page 222</p> <p>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</p>	<p style="text-align: right;">Page 224</p>
<p style="text-align: right;">Page 223</p>	<p style="text-align: right;">Page 225</p>



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15:15:03 1 violation of the Copyright Act?

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15:14:51 22 Q. What other types of copying are permitted,  
15:14:55 23 in your view? You said here in 16 not all copying  
15:15:00 24 is forbidden. You talked about ideas can be copied.  
15:15:00 25 What other things can be copied and not be in

62 (Pages 242 to 245)

Page 250	Page 252  15:25:48 3 Q. Okay. What about copying of information 15:25:53 4 that's in the public domain? Does the copyright law 15:25:55 5 of the United States prevent or prohibit the copying 15:25:58 6 of information that's in the public domain?
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15:47:37 4 Q. Where a programmer has chosen the most  
15:47:39 5 efficient method of achieving his or her stated  
15:47:39 6 programming goals, the merger doctrine might be  
15:47:42 7 applied in a given instance to deny protection to  
15:47:44 8 the elements of a program that are dictated purely  
15:47:47 9 by efficiency concerns.  
15:47:48 10 Is that a -- an accurate statement?  
15:47:51 11 A. It is.

69 (Pages 270 to 273)

<p style="text-align: right;">Page 334</p>	<p style="text-align: right;">Page 336</p> <p>17:34:52 21 Q. Okay. You said you spoke with Mandia at 17:34:56 22 some point. 17:34:57 23 A. Yes. 17:34:57 24 Q. Okay. Relative to this report, I mean. 17:35:00 25 Before you drafted this report you spoke with</p>
<p style="text-align: right;">Page 335</p>	<p style="text-align: right;">Page 337</p> <p>17:35:03 1 Mr. Mandia? 17:35:04 2 A. Yes. 17:35:04 3 Q. In fact, that's reflected here in those 17:35:06 4 paragraphs we are looking at. 17:35:07 5 A. There is a footnote which flags a 17:35:09 6 conversation with Mr. Mandia, correct. 17:35:11 7 Q. What did you tell Mr. Mandia that relates 17:35:13 8 to this, these sections of your report? 17:35:16 9 A. I understand. 17:35:17 10 I spoke with Mr. Mandia. I asked 17:35:20 11 questions, obviously. But what I told him was I had 17:35:22 12 talked to him about my understanding of the proper 17:35:25 13 way to think about what it means to be creative. 17:35:27 14 Q. You told him your understanding of what it 17:35:30 15 means to be creative? 17:35:31 16 A. Correct. 17:35:31 17 Q. Okay. What else did you tell him? 17:35:33 18 A. I believe I also told him about why 17:35:35 19 creativity is important as part of copyright law, 17:35:39 20 and specifically a component of this idea of 17:35:42 21 protected expression. 17:35:47 22 Q. So even though you did not study on your 17:35:50 23 own every line of code and -- you nonetheless stand 17:35:58 24 by your conclusion here that enterprise application 17:36:01 25 software is creative in its entirety?</p>

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17:36:04 1 A. I don't believe that is my conclusion.  
17:36:06 2 Q. Okay. Then I am adding in adjectives that  
17:36:09 3 shouldn't be there.  
17:36:10 4 A. You are.  
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 --  
17:36:38 17 Q. I know you resist. I know that. I see  
17:36:40 18 that, Professor.  
17:36:41 19 A. Just want to make sure you and I are  
17:36:44 20 communicating. I don't like "every" as an entirety  
17:36:47 21 of something. I don't think that's a valid opinion  
17:36:49 22 for me to have.  
17:36:49 23 Q. Okay. But you will acknowledge, sir,  
17:36:51 24 since you didn't study it on your own, that there  
17:36:54 25 could be some enterprise application software that

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17:36:57 1 fits your definition of enterprise application  
17:36:59 2 software that does not qualify as creative under  
17:37:01 3 your definition.  
17:37:03 4 A. Correct, where some might be, some lines  
17:37:05 5 of code, a subset of something, absolutely.  
17:37:08 6 Q. We didn't say how big or small. We just  
17:37:09 7 said some.  
17:37:09 8 A. Some, yes.  
17:37:10 9 Q. There are some. You acknowledge that.  
17:37:11 10 A. I do.  
17:37:13 11 Q. So you told Mr. Mandia your understanding  
17:37:13 12 of what it means to be creative. And what else did  
17:37:16 13 you tell him?  
17:37:17 14 A. Again, I told him about the legal  
17:37:19 15 importance of creativity, how it fits into the idea  
17:37:21 16 of protected expression, and the concepts of, I  
17:37:24 17 believe the case name of Feist, just so he would  
17:37:27 18 understand why I think those issues are important,  
17:37:29 19 because I was under the impression that they might  
17:37:31 20 be important for him also.  
17:37:33 21 Q. Okay. Anything else that comes to mind  
17:37:35 22 now?  
17:37:35 23 A. Of what I told him?  
17:37:37 24 Q. Yes.  
17:37:37 25 A. No.

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17:37:38 1 Q. Do you recall whether he told you  
17:37:40 2 anything?  
17:37:41 3 A. Yes. I believe I asked some questions  
17:37:42 4 just to make sure I was understanding this alphabet  
17:37:47 5 soup of SQRs, SQCs, COBOLs, and the like. And so I  
17:37:52 6 asked questions to make sure I had gotten that down  
17:37:54 7 to the detail I needed to, to satisfy myself on  
17:37:57 8 these issues we had been speaking of.  
17:38:00 9 Q. Did he provide any code to you in snippet  
17:38:01 10 form, entire form, in any form?  
17:38:04 11 A. Not at that time.  
17:38:05 12 Q. Before you finalized this report, did he?  
17:38:07 13 A. Not before I finalized the report.  
17:38:09 14 Q. Has he since?  
17:38:09 15 A. In the context of the Mandia report, yes.  
17:38:15 16 Q. Is it in the context of the Mandia report  
17:38:17 17 that you obtained the software that you referenced  
17:38:20 18 earlier that you said you reviewed after you filed  
17:38:23 19 your report?  
17:38:23 20 A. In part.  
17:38:25 21 Q. And there was some other source for  
17:38:27 22 software that you reviewed after you filed your  
17:38:29 23 report other than what came in the Mandia report?  
17:38:31 24 A. Yes.  
17:38:32 25 Q. And what was the source of that?

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17:38:33 1 A. There was a declaration filed by Norm  
17:38:35 2 Ackermann --  
17:38:36 3 Q. Okay.  
17:38:36 4 A. -- which had some exhibits, I believe,  
17:38:38 5 which were code.  
17:38:39 6 Q. Okay.  
17:38:40 7 A. And I looked at the code there as well.  
17:38:41 8 Q. Any other sources?  
17:38:42 9 A. None that come to mind.  
17:38:44 10 Q. Okay. Was it your understanding that the  
17:38:50 11 information you provided Mr. Mandia was helpful for  
17:38:53 12 his report, or did you believe it was helpful for  
17:38:56 13 your report, or both?  
17:38:59 14 A. I believe it was a two-way conversation to  
17:39:01 15 be helpful to both of our understandings. I don't  
17:39:05 16 know -- yeah.  
17:39:06 17 Q. So you and he did not review any code  
17:39:08 18 excerpts together, did you?  
17:39:10 19 A. No, we did not.  
17:39:11 20 Q. Did he provide any additional information  
17:39:15 21 to you concerning -- with respect to your conclusion  
17:39:18 22 that the enterprise application software is  
17:39:22 23 creative?  
17:39:24 24 A. I believe my conversation with Mr. Mandia  
17:39:27 25 was fully consistent with my conclusions in

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17:39:30 1 paragraph 56, but also wholly redundant to the --  
17:39:33 2 there was nothing new in the conversation that in  
17:39:37 3 any way affected the conclusions in paragraph 56.

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17:46:57 14 Q. And that's a conclusion that you drew in  
17:46:59 15 your report here, in your opinion in your report.  
17:47:03 16 Right?  
17:47:05 17 A. I don't make any -- I don't think I make  
17:47:08 18 any opinion, a final step like that. I don't think  
17:47:12 19 that is my role. I make opinions about the economic  
17:47:14 20 public policy issues and public expression. I don't  
17:47:17 21 think I can say anything at the end of the day,  
17:47:19 22 "Therefore it's infringement."

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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

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<p style="text-align: right;">Page 354</p> <p>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.</p>	<p style="text-align: right;">Page 356</p>
<p style="text-align: right;">Page 355</p>	<p style="text-align: right;">Page 357</p>

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18:09:04 1 Mr. Pinto's report you say, "it estimates the  
18:09:07 2 significant savings SAP enjoyed by copying instead  
18:09:10 3 of competing legitimately."  
18:09:11 4 A. Yes, I do.  
18:09:12 5 Q. Okay. You said, "That is a highly  
18:09:14 6 relevant measure of the fair market value of the  
18:09:17 7 material SAP infringed." Do you see that?  
18:09:20 8 A. I do.  
18:09:21 9 Q. What is the basis for your conclusion that  
18:09:24 10 it is a highly relevant measure?  
18:09:27 11 A. The fair market value is trying to capture  
18:09:32 12 what the expression is worth. And one standard  
18:09:36 13 measure of what expression is worth is what would it  
18:09:38 14 cost to create it, or to create something that is  
18:09:40 15 equivalent in a rich, full sense.  
18:09:44 16 And so what Mr. Pinto does, in my  
18:09:47 17 understanding, is articulate the cost measure that  
18:09:51 18 matches up quite nicely to the fair market value  
18:09:54 19 analysis.

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18:08:43 19 Q. You say you reviewed the declaration of  
18:08:46 20 Paul Meyer, et cetera. And then you also mentioned  
18:08:51 21 in there portions of the expert report of Mr. Meyer  
18:08:55 22 and Mr. Pinto's report --  
18:08:57 23 Right?  
18:08:58 24 A. Yes.  
18:08:59 25 Q. -- on page 27. And you said -- in

1 CERTIFICATE OF REPORTER

2 I, SARAH LUCIA BRANN, a Certified  
3 Shorthand Reporter, hereby certify that the witness  
4 in the foregoing deposition was by me duly sworn to  
5 tell the truth, the whole truth, and nothing but the  
6 truth in the within-entitled cause;

7 That said deposition was taken in  
8 shorthand by me, a disinterested person, at the time  
9 and place therein stated, and that the testimony of  
10 the said witness was thereafter reduced to  
11 typewriting, by computer, under my direction and  
12 supervision;

13 That before completion of the deposition,  
14 review of the transcript [X] was [ ] was not  
15 requested. If requested, any changes made by the  
16 deponent (and provided to the reporter) during the  
17 period allowed are appended hereto.

18 I further certify that I am not of counsel  
19 or attorney for either or any of the parties to the  
20 said deposition, nor in any way interested in the  
21 event of this cause, and that I am not related to  
22 any of the parties thereto.

23 DATED: April 27, 2010

24 Sarah Lucia Brann

25 SARAH LUCIA BRANN, CSR No. 3887