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1 (Short recess)

2 THE COURT: You may proceed.

3 MR. ACKER: Thank you, Your Honor.

4 Q. Mr. Sontag, before the break, I believe we left
5 off with Exhibit 312. If you would look at that, please.
6 This is another intellectual property agreement between
7 the SCO Group and Lane Furniture, correct?

8 A. Yes.

9 Q. And, again, if you take a look at the
10 definitions -- if you would go to the next one, please --
11 what's being licensed here is SCO IP, and, again, the
12 definition is SCO UNIX-based code in Section -- in
13 paragraph 1.7, and then the definition of what that is is
14 UNIX System V or UnixWare, correct?

15 A. Yes.

16 Q. Did Lane Furniture pay SCO any money for this
17 license?

18 A. I believe so.

19 Q. Do you know how much?

20 A. I do not.

21 Q. Were any of those funds remitted to Novell?

22 A. No.

23 Q. Did you ask permission before entering into
24 this agreement with Lane Furniture?

25 A. No.

1 Q. Would you take a look at Exhibit 332. This is
2 another SCOSource IP license, this time between OCE
3 printing and SCO, correct?

4 A. Yes.

5 Q. And if you would take a look at the
6 definitions, if you go to the second page, please, again,
7 it's the same definition. SCO IP means SCO UNIX-based
8 code, correct?

9 A. Yes.

10 Q. And the definition of what that is, SCO
11 UNIX-based code, is UNIX SCO System V or UnixWare,
12 correct?

13 A. Yes.

14 Q. And you were paid -- or SCO was paid \$49,500
15 actually by Siemens for this license, correct? Does that
16 sound right?

17 A. I believe that to be the case.

18 Q. And, again, none of that money was remitted to
19 Novell, correct?

20 A. No.

21 Q. And you didn't seek permission before entering
22 into this agreement, correct?

23 A. No.

24 Q. Take a look at the Exhibit 286. This is
25 another SCO group intellectual property license, correct?

1 A. Yes.

2 Q. And this time it's entered into with Questar,
3 correct?

4 A. Yes.

5 Q. And why don't we take a look at the definition
6 section of this agreement. Here the definition was a
7 little different as to what SCO IP rights were, correct?

8 A. Yes.

9 Q. And what was licensed to Questar was SCO IP
10 rights, which shall mean SCO's intellectual property
11 rights in any and all past, current or future versions
12 of -- or portions of SCO's software products commonly
13 known as UNIX System V and/or UnixWare correct?

14 A. Yes.

15 Q. That's what the license grant was, correct?

16 A. Yes.

17 Q. And if you take a look at paragraph 114 -- I'm
18 sorry, 2.1 -- well, let's go back to -- if we could
19 highlight 114.

20 And, again, the definition of UNIX-based code
21 there includes both UNIX System V or UnixWare, right?

22 A. Yes.

23 Q. And Questar paid SCO \$19,125 for this license,
24 correct?

25 A. Yes.

1 Q. And none of that money was remitted to Novell,
2 correct?

3 A. No.

4 Q. And you didn't seek Novell's permission before
5 entering into that license, right?

6 A. No.

7 Q. One last exhibit to show you. Let me show you
8 what we've marked as Exhibit 227, Novell 227. And,
9 Mr. Sontag, please feel free to look at any part of the
10 exhibit, but I'm going to ask you about the e-mail on the
11 second page in the middle of the page.

12 A. Okay. Just a moment.

13 Q. Sure.

14 A. Okay.

15 Q. Now, if you could take a look at that e-mail on
16 the second page, in the middle of the page, it's an
17 e-mail from Jeff Hunsaker at SCO to yourself, Mr. McBride
18 and others at SCO. And it's sent on July 31, 2003,
19 correct?

20 A. Yes.

21 Q. And what was Mr. Hunsaker's position -- his
22 position at SCO was Senior Vice President of Worldwide
23 Sales and Marketing, right?

24 A. I believe that to be the case.

25 Q. And Mr. Hunsaker currently is the president and

1 CEO of SCO, right?

2 A. I think at least the president of SCO
3 Operations or something like that. I'm not sure what his
4 exact title is now.

5 Q. And what he said in the middle of 2003, this
6 e-mail followed a conference call about this SCOSource
7 licensing program, right?

8 A. Yes.

9 Q. And the subject line there is: SCOSource
10 issues and buyoff, correct?

11 A. Yes.

12 Q. And he wrote Darl, Chris, Kim and Kevin,
13 correct?

14 A. Yes.

15 Q. And then he wrote:

16 During our SCOSource con call today, we
17 discussed and would like to propose the following. The
18 official name of this program will be the SCO UNIX IP
19 Compliance License Program.

20 Correct?

21 A. Yes.

22 Q. And that's the name that was eventually used
23 for this program of these contracts that we have
24 just been through, right?

25 A. Yes, at least for a period of time.

1 Q. And then he wrote:

2 This is not a Unixware 7.13 SKU, right?

3 A. Yes.

4 Q. And then he wrote:

5 The license is called a SCO UNIX IP license for
6 Linux. The only rights that this license provide is for
7 Linux binary runtime copies. When we are ready to issue
8 a similar license for AIX, it will be called the SCO UNIX
9 license for AIX.

10 Correct?

11 A. Yes.

12 Q. Then he followed up with these words:

13 There is no connection between UnixWare,
14 OpenServer and the SCO UNIX IP license whatsoever.
15 Right?

16 A. Well, I wouldn't agree with that
17 characterization. These licenses are based on the same
18 underlying IP that is in UnixWare and OpenServer.

19 Q. He is the current president of SCO,
20 Mr. Hunsaker, right?

21 A. Yes.

22 Q. And what he wrote, at the time this program was
23 taking off, in July of 2003, is:

24 There is no connection between UnixWare,
25 OpenServer and the SCO UNIX IP license whatsoever.

1 Right?

2 A. I disagree with that characterization.

3 Q. And then he continued:

4 They are independent.

5 Correct?

6 A. Yes. That's what he put.

7 Q. And in 2003, that's what the Senior V.P. of
8 Worldwide Sales and Marketing of SCO, how he
9 characterized the SCOSource program, right?

10 A. They are not the same product, but they are --
11 the SCOSource license is IP based upon the UnixWare and
12 OpenServer products.

13 MR. JACOBS: I don't have anything further,
14 Your Honor.

15 THE COURT: Thank you.

16 Mr. Normand, you may examine.

17 MR. NORMAND: Thank you, Your Honor.

18 CROSS EXAMINATION

19 BY MR. NORMAND:

20 Q. Good afternoon, Mr. Sontag.

21 A. Good afternoon.

22 Q. Is it fair to say that, during your tenure at
23 SCO, you used the terms UnixWare and System V
24 interchangeably from time to time?

25 A. Yes.

1 Q. Why did you do that?

2 A. One of the primary reasons is that we were
3 thinking about possibly renaming UnixWare to be System V,
4 and that was under serious consideration until we
5 determined there would be a lot of certification and a
6 substantial amount of costs in renaming UnixWare, and so
7 we determined that that was not possible. But, in terms
8 of describing UnixWare, OpenServer, all of that, we would
9 often use UNIX System V as the overall umbrella name for
10 all of SCO's UNIX technologies.

11 Q. What was the point of using the phrase System V
12 as an umbrella or a short name for all that technology?

13 A. It was just short for saying UNIX System V.

14 Q. Were you always careful to draw distinctions
15 between the UnixWare trade name for the latest release
16 and other uses of System V?

17 A. No.

18 Q. I want to start, Mr. Sontag, where Mr. Acker
19 started, with Novell Exhibit 147. This was a document
20 that referred to SVR 4 software libraries. Do you recall
21 looking at that document?

22 A. Yes.

23 Q. This was the draft press release that you went
24 through. Do you recall that?

25 A. Yes.

1 Q. Now, do you know what libraries are?

2 A. Libraries are a portion of an operating system
3 that are used for applications to communicate with
4 operating system.

5 Q. Do you know whether there are SVR 4 libraries
6 in UnixWare?

7 A. I suspect that may be very well what those
8 libraries are called. I don't specifically remember, but
9 those libraries are referring to the UnixWare runtime
10 libraries.

11 Q. Are libraries the same as releases of a
12 software product?

13 A. No. Libraries are just a portion of an
14 operating system release.

15 Q. OSR 5 libraries you refer to in this document
16 as well. Do you know what that's a reference to?

17 A. I believe that's referring to the OpenServer
18 Version 5 runtime libraries.

19 Q. And what was OpenServer?

20 A. OpenServer was a version of UNIX developed by
21 Santa Cruz that was based on UNIX System V, Release 3.

22 Q. Let me take a step back, Mr. Sontag. When did
23 you join SCO?

24 A. October of 2002.

25 Q. And with whom did you deal in acquiring an

1 understanding of the subject matter that has been
2 discussed?

3 A. Of a lot of individuals inside of SCO, Bill
4 Broderick, John Maciaszek, the attorneys, Jeff Hunsaker,
5 a whole host of people.

6 Q. Had you worked at Novell previously?

7 A. Yes, I have.

8 Q. Turn to Novell 159.

9 THE COURT: What number?

10 MR. NORMAND: 159.

11 Q. This is the document, Mr. Sontag, in which SCO
12 makes the statement that it is the developer and owner of
13 SCO UnixWare and SCO OpenServer, both based on UNIX
14 System V technology. Do you recall reading the
15 document?

16 A. Yes.

17 Q. And do you recall Mr. Acker referring to the
18 tree of a software system?

19 A. Yes.

20 Q. And what did you understand him to mean?

21 A. Well, what I understand it to mean is: When
22 software is developed, you build a version. You build a
23 release and then usually, if you're going to create a
24 subsequent release of that software, you create a new
25 branch of software, start again, and make modifications

1 to that version of software and so on and so on, just
2 like when you're developing a document, a legal document,
3 maybe, in a legal environment with a number of
4 colleagues, you may create a first version of a document,
5 circulate that, make modifications, you know, get the
6 responses back, publish a new revision of that document
7 and so on and so on.

8 Q. Now, you testified earlier about your
9 understanding of the relationship between SVR 4 and UNIX
10 System V, Release 4 and Unixware. Do you recall that
11 testimony?

12 A. UnixWare is based on SVR 4. It's developed out
13 of SVR 4 and actually the first version of UnixWare is
14 based on SVR, I think, 4.1.

15 Q. Mr. Sontag, this is attachment 1 to the Sun
16 agreement. Do you recall viewing this earlier today?

17 A. Yes.

18 Q. And do you see Section 2, a description of
19 technology, additional technology?

20 A. Yes.

21 Q. And do you see the fourth line there, System V,
22 Release 4.2 and products?

23 A. Yes.

24 Q. And then do you see the parenthetical there?

25 A. Yes. UnixWare 1, UnixWare 1.1, UnixWare

1 1.1.1.

2 Q. You took part in negotiating this agreement,
3 correct?

4 A. Correct.

5 Q. What did you understand that reference in
6 attachment 1 to mean, that parenthetical reference?

7 A. Well, that was previous releases of UnixWare.

8 Q. What is your understanding of when UnixWare was
9 developed?

10 A. UnixWare was developed in the early '90's,
11 primarily when Novell was -- had ownership for the UNIX
12 intellectual property.

13 Q. And do you see the next line in this
14 attachment, System V, Release 4.2 MP and products?

15 A. Yes.

16 Q. I take it your intent was the same, by using
17 that parenthetical?

18 A. Yes.

19 Q. Okay.

20 Will you pull up Novell Exhibit 173, and at the
21 bottom of the third page.

22 This is the document, Mr. Sontag, that the
23 first paragraph at the top in the blowup, it says:

24 In the past SCO's UnixWare and OpenServer
25 license agreements did not allow these UNIX libraries to

1 be used outside of SCO's operating systems.

2 Do you see that language?

3 A. Yes, I do.

4 Q. Do you know whether a Unixware license relates
5 to technology that goes back to the days of AT&T?

6 A. Yes.

7 Q. Do you know whether SCO ever paid Novell any
8 money for the technology going back to AT&T that was part
9 of the UnixWare license?

10 A. No, I don't believe they did.

11 Q. Do you have a view as to whether the UnixWare
12 license allowed the licensee to use the SVR 4
13 libraries?

14 A. I believe they would.

15 Q. And what's the basis for that understanding?

16 A. That was the libraries that were included with
17 UnixWare.

18 Q. Now, at the time of the SCOSource agreements
19 that you reviewed in some detail, were you concerned
20 about the use of UnixWare and OpenServer technology with
21 Linux?

22 A. Yes.

23 Q. In what way?

24 A. That any of that IP had been misappropriated in
25 any form or fashion into Linux.

1 Q. Okay.

2 Will you pull up SCO Exhibit 402.

3 Mr. Sontag, SCO Exhibit 402 is SCO System V for
4 Linux sales guide, internal use only. Are you roughly
5 familiar with this document?

6 A. Yes.

7 Q. Could we go to the first page. And this is the
8 executive summary of the document. I take it you've seen
9 this before?

10 A. Yes.

11 Q. Who is Jay Peterson?

12 A. Jay Peterson was an employee of the SCOsource
13 division. He worked for me.

14 Q. Do you see in the middle of the paragraph, it
15 says:

16 The first product is called SCO System V for
17 Linux Release 1.0, SCO UNIX runtime libraries.

18 A. Yes.

19 Q. And the next sentence:

20 It licenses the SCO OpenServer COFF static
21 shared libraries.

22 Do you see that?

23 A. Yes.

24 Q. What was your understanding of what that
25 meant?

1 A. That the primary product of that first release
2 of the SCOSource runtime library was the OpenServer COFF
3 runtime libraries.

4 Q. And what is your basis for that understanding?

5 A. Because that's what I understood it to be at
6 the time.

7 MR. NORMAND: Would you go to page 8 and blow
8 up the top part of that.

9 Q. This paragraph, the first one in the section
10 called SCO UNIX Applications, has the following sentence:

11 ELF is the newer and current System V format
12 and is used in UnixWare.

13 A. Yes.

14 Q. What does that reference mean?

15 A. That's referring to that the primary runtime
16 libraries in UnixWare are also called ELF.

17 Q. Now, if you look at page 11, the bottom
18 paragraph.

19 If you would pull that up.

20 The following language appears:

21 Some of our existing OpenServer UnixWare
22 customers may be considering a migration to Linux. If
23 they are, the SSVL product may be attractive to them,
24 since it can enable them to run existing OpenServer or
25 UnixWare applications on Linux.

1 What does that language signify?

2 A. It's just saying, you know, that kind of a
3 basis for actually starting this program was that we had
4 some of our existing customers that came to us and said:
5 Hey, we would like to be able to run our UNIX
6 applications either for OpenServer or UnixWare on Linux.
7 Can you help us, you know, come up with a method to be
8 able to do that?

9 And that was the basis for starting SCOSource.
10 And the first product that was released was intended to
11 provide that solution for those customers.

12 Q. One more snippet from this document. The next
13 page, second full paragraph, contains the following
14 statement:

15 In some cases we believe they may be using our
16 libraries already to run OpenServer or UnixWare
17 applications.

18 Do you see that language?

19 A. Yes.

20 Q. Is this reflective of a view that at the
21 beginning of the SCOSource program, you were concerned
22 about the use of OpenServer in UnixWare technology?

23 A. Well, we had customers that came to us and said
24 that they were doing this very thing. They were using
25 the runtime libraries on Linux, and their review of the

1 end user license agreement for OpenServer or UnixWare
2 made them come to, I believe, the correct conclusion that
3 that was not appropriate. They wanted to be able to
4 accomplish that in an appropriate manner, and so they
5 came to SCO asking for us to provide a method for them to
6 license those libraries to use with Linux.

7 Q. And the date of this document is February,
8 2003, right?

9 A. I believe so, yes.

10 Q. Is it fairly early in the SCO program process?

11 A. Yes, it is.

12 Q. Novell Exhibit 194. This is a document you
13 were asked about earlier, a letter to Fortune 1000
14 companies?

15 A. Yes.

16 Q. Do you recall going over this document? And
17 this document contains a statement that there had been,
18 in SCO's view, System V code copied into Linux. Do you
19 recall that?

20 A. Yes.

21 Q. Was it your view, at the time, that the System
22 V code that had been copied into Linux was part of
23 UnixWare?

24 A. It very well could be. I mean, the vast
25 majority of the code is, you know, identical to what is

1 in UnixWare, that we had concerns with.

2 Q. We have in the second paragraph from the
3 bottom, the statement that we have evidence that portions
4 of UNIX System V software code have been copied into
5 Linux and that additional other portions of UNIX System V
6 software code have been modified and copied into Linux.

7 Do you see that statement?

8 A. Yes.

9 Q. Are there methods and concepts, in your view,
10 that were developed by AT&T that are in UnixWare?

11 A. Yes.

12 Q. In your view, is there code developed by AT&T
13 that is in UnixWare?

14 A. Yes.

15 Q. And, in your view, did you have the right to
16 license that material to customers without submitting any
17 payment for those rights to Novell?

18 A. Yes.

19 Q. Next page, top. You say:

20 Consistent with this effort, on March 7 we
21 initiated legal action against IBM for alleged unfair
22 competition and breach of contract with respect to our
23 UNIX rights.

24 Do you see that sentence?

25 A. Yes.

1 Q. In your agreements with Microsoft, Sun
2 SCOSource agreements, did you ever purport to license
3 anything other than SCO's IP rights?

4 A. No.

5 Q. You were asked about Mr. -- or Dr. Cargill's
6 expert report. Do you recall that?

7 A. Yes.

8 Q. 428, page 3.

9 And if you would blow up that bottom paragraph.
10 Dr. Cargill states in this report:

11 Overall, Linux is a substantial copy of the
12 UNIX SVR 4 operating system.

13 Do you see that language?

14 A. Yes.

15 MR. NORMAND: And can you side-by-side that
16 with page 12 of the Sun agreement?

17 Q. We went over, Mr. Sontag, this language in the
18 bottom of the divided documents. System V, Release 4.2
19 and products, and then the parenthetical in UnixWare?

20 A. Yes.

21 Q. And Dr. Cargill is concluding that Linux is a
22 substantial copy of the SVR 4 operating system. Do you
23 see that?

24 A. Yes.

25 Q. You were told in your examination that

1 Dr. Cargill had concluded that Linux is substantially
2 similar to SVR 4. Do you recall that?

3 A. Yes.

4 Q. Is it fair to say that one could equally
5 accurately say that Linux is substantially similar to
6 UnixWare?

7 A. Yes.

8 Q. Had you had occasion to read this report --

9 A. I had not.

10 Q. -- before it was presented or given to you
11 today?

12 A. No, I had not.

13 Q. You're familiar with Malloc code?

14 A. Yes, I am.

15 Q. And how did your -- or SCO's reliance on Malloc
16 code come to unfold?

17 A. I think it was in February or March or April of
18 2003, that we became aware of the Malloc code example
19 of -- you know, kind of some fairly obvious and
20 easy-to-see literal copyright infringement that had
21 occurred, was code that was in a Silicon Graphics set of
22 open source software that was part of Linux that was
23 substantially the same as the UNIX System V, Release 4.2
24 ES code that it had licensed to Silicon Graphics.

25 And it was very plain and apparent to see that

1 there was a substantial amount of direct, literal copying
2 that had occurred, which was actually surprising to me
3 that it would be so obvious and not munged up more than
4 it was.

5 Q. The Malloc code is from UNIX System V, Release
6 3, is that correct?

7 A. The Malloc code is in many previous releases of
8 UNIX and small modifications or additions made to that
9 code with each additional release, but it's been
10 substantially similar for many UNIX releases, and the
11 code is substantially similar between UnixWare and many
12 previous, you know, releases, at least through the last
13 10 or 20 years and.

14 Q. And in your view, when you were with SCO, did a
15 license to UnixWare permit the licensee to use the Malloc
16 code?

17 A. Yes.

18 Q. Novell 274. You were shown this letter from
19 Mr. McBride to Lehman Brothers. Do you recall briefly
20 reviewing this document?

21 A. Yes.

22 Q. And in the document, Mr. McBride makes
23 reference to, quote, SCO's rights in UNIX.

24 Do you recall that?

25 A. Yes.

1 Q. Again, in all these agreements we are talking
2 about, did SCO purport to release or license any
3 technology other than the ones that it thought it had
4 rights to?

5 A. No.

6 Q. Page 2, towards the bottom. Do you recall
7 looking at that long list of files and going through this
8 language?

9 A. Yes.

10 Q. Is there ABI code in UnixWare?

11 A. Yes, there is.

12 Q. How do you know that?

13 A. I have been made aware of that through the
14 course of our investigations, and so I was aware that
15 there was ABI code in UnixWare.

16 Q. Let's look at Novell 57. Maybe SCO 57.

17 Do you recall going over the Sun agreement with
18 Mr. Acker?

19 A. Yes, I do.

20 Q. Can you take a step back and tell me how it
21 came to be that there was a 2003 Sun agreement?

22 A. Back in the late fall of 2002, we had a
23 business and engineering meeting with Sun; some of Sun's
24 executives, some of SCO's executives, some our engineers,
25 their engineers, trying to determine if there was, you

1 know, business opportunities working together, and I
2 think at that time, we had told them that we had, you
3 know, additional SCO intellectual property that we would
4 be willing to discuss with them and license; that we were
5 also interested in potential joint marketing
6 opportunities and otherwise.

7 And in early 2003, we started having
8 discussions with Sun about licensing UnixWare into their
9 products. Sun was -- had a substantial UNIX business in
10 the form of Solaris that, at the time, only ran on a
11 specialized version of a processor called a spark
12 processor. They had a desire to be able to run their
13 Solaris operating system software on a more general
14 PC-type, Intel-compatible processors, which is the
15 primary capability of SCO's UnixWare releases and all of
16 the software drivers that we had available with UnixWare.

17 So they became interested in taking a license
18 for the UnixWare source code and the drivers in order to
19 develop an Intel-compatible version of Solaris, and that
20 was the primary motivation for the discussions and the
21 ultimate license agreement that was entered into in 2003.

22 Q. You referred to drivers. What are drivers?

23 A. Drivers are additional pieces of code that
24 allow peripherals, a network card, a keyboard, different
25 components or portions of the computer hardware to be

1 able to interact and operate with the operating system.
2 They are an important piece that if you don't have a
3 broad array of software drivers available, that operating
4 system will not work with a wide variety of hardware
5 that's available out there, limiting your potential
6 customer base.

7 Q. And did Sun get drivers?

8 A. Yes, they did.

9 Q. In the 2003 agreement?

10 A. Yeah. It was very important for them.

11 Q. Drivers for what?

12 A. For UnixWare.

13 Q. Did they get drivers for the older System V
14 technology?

15 A. No, they did not.

16 Q. Do you think they could use the older System V
17 releases as a stand-alone product without the drivers for
18 them?

19 MR. ACKER: Objection. Calls for
20 speculation.

21 THE COURT: I'll let him testify as to his
22 understanding of that.

23 THE WITNESS: It wouldn't make sense. If
24 you're developing a software product, you want to use the
25 latest version of the source code of that software to

1 develop that product because it would have the latest bug
2 fixes and features and capabilities. Same with being
3 necessarily compatible with the hardware drivers that
4 would be associated with that operating system product.

5 Q. You went through a couple of attachments to the
6 1994 Sun agreement and then the 2003 Sun agreement.

7 Could we pull those up side-by-side? It's
8 Novell 187 and Novell 5. And at 187, go to page 11, and
9 in 5, would you pull up page 19.

10 Do you recall going through these attachments,
11 Mr. Sontag?

12 A. Yes, I do.

13 Q. And I think, although you haven't had time to
14 pore over it, these are the same list of products,
15 correct?

16 A. Yes. They appear to be basically the same.

17 Q. Now, as of 2003, Sun already had rights to all
18 of these products, correct?

19 A. Yes. I believe so.

20 Q. And this will be a little bit redundant to what
21 you've testified to, but in general, what did you
22 understand those rights to be as of 2003?

23 A. As of 2003, Sun had the most substantial rights
24 of any UNIX licensee. They had source code for, you
25 know -- they had source sublicensing rights, very broad

1 source sublicensing rights that no other UNIX licensee
2 had, which is why they had paid a substantial amount of
3 money because they had the ability, without any
4 involvement of Novell or SCO or whoever was in control of
5 the UNIX contracts, to be able to license the Solaris
6 source code to their customers who, in turn, could also
7 sublicense the software. That was a substantial right.

8 Q. Sun had paid 82 1/2 million dollars for those
9 rights, correct?

10 A. Correct.

11 Q. Could Sun, under that 1994 agreement,
12 distribute its Solaris product to as many as a hundred
13 licensees?

14 A. Yes.

15 Q. A thousand?

16 A. A thousand. A million. They, in turn, could
17 sublicense that source code to their customers, so, it
18 could -- Solaris could be very broadly distributed very
19 easily, with the rights that Sun had in the 1994
20 agreement.

21 Q. Now, what do you recall discussing with Sun
22 about whether there were confidentiality restrictions in
23 the 1994 agreement?

24 A. I had raised that there were confidentiality
25 provisions. They, as part of the negotiating, tit for

1 tat, kind of strongly stated that they believed that most
2 of those confidentiality provisions had been undermined
3 or waived by disclosures of the UNIX code over the years.
4 They gave examples of the Lion's Book and some other
5 examples to make their point. I, in doing my job, tried
6 to press back and emphasize that I thought it was
7 important that they, you know, had confidentiality
8 provisions.

9 Their position was that, with their broad
10 licensing rights and what they were intending to do, they
11 felt that they had the right to basically, in a, you
12 know, Sun's sort of style, release an open source version
13 of Solaris with the rights they had in 1994.

14 Q. And do you think that position by Sun bore on
15 the price that was negotiated for the agreement?

16 A. For the 1994 agreement?

17 Q. The 2003.

18 MR. ACKER: Objection. That calls for
19 speculation. He can't possibly know what's in Sun's
20 mind.

21 MR. NORMAND: Mr. Sontag negotiated the
22 agreement. He can recall parts of negotiations,
23 inferences, and can make conclusions from what Sun was
24 telling them how much they might be willing to pay.

25 THE COURT: Overruled. Go ahead.

1 THE WITNESS: Certainly Sun felt like they
2 already had substantial rights and they had already paid
3 a substantial amount of money for their -- you know, the
4 UNIX rights that they already had in the 1994 agreement.
5 Their primary interest was in being able to enable a
6 Solaris-on-Intel version, and their primary interest was
7 then the UnixWare rights that we would be licensing to
8 them. And that was, I believe, where they viewed the
9 preponderance of the value to lie.

10 Q. Would it be fair to say that, as of the 2003
11 agreement, Sun was already in the business of
12 commercially licensing its derivative work, Solaris?

13 A. Yes.

14 Q. And the SVRX material therein?

15 A. Yes.

16 Q. Now, you mentioned, in response to one of
17 Mr. Acker's questions, that there was an important
18 restriction on what was described to you as open source
19 rights in the 2003 agreement. Can you expand on that a
20 little?

21 A. Well, this was one area that they wanted to be
22 able to make sure they -- you know, that the open
23 sourcing that they intended to do, which they believed
24 they already had rights to do, that they had complete
25 coverage for. So this is another kind of

1 belt-and-suspenders sort of addition they wanted in the
2 agreement was to broaden the confidentiality provision to
3 allow them to, you know, under a -- you know, a specific
4 version of an open source license that was not Linux,
5 that valued the software, they could, you know, with the
6 addition of the 2003 agreement, open source in a manner
7 that was, you know, defined by the 2004 agreement.

8 Q. This is the for-value language that you're
9 talking about?

10 A. The for-value language, that it was intended
11 that they could not release Solaris under the Linux GPL
12 open source license that would not pass muster with the
13 for-value provision in the 2004 agreement.

14 Q. And, again, a little redundant, but why did
15 that matter to you, that restriction?

16 A. Well, we wanted to make sure that Solaris was
17 not just, wholesale, dumped into Linux, that that would
18 be a problem, but we felt that Sun had substantial rights
19 and that if they were doing another version of open
20 source that met with the requirements in the agreement,
21 that they had the rights to do so.

22 MR. NORMAND: Would you pull up Novell Exhibit
23 5 at page 20 -- let's do Novell 187.

24 Q. This is, when we get to it, the second page of
25 the attachment to the Sun agreement that goes over the

1 technology that was licensed to them.

2 Do you recall going over that?

3 A. Yes.

4 Q. And there were various SVR 4.1 and 4.2 releases
5 listed on that second page. Do you recall that?

6 A. Yes.

7 Q. And do you recall being asked about releases
8 identified in a schedule to the APA?

9 A. Yes.

10 Q. I take it you had occasion to review the APA
11 during your tenure at SCO?

12 A. I did review it a number of times.

13 Q. And you were asked about the schedule that
14 identified what you called products. Do you recall that?

15 A. Yes.

16 Q. And I wanted to ask you some questions about
17 the similarity between that list of products and this
18 list of products in attachment 2, page 2 of the Sun
19 agreement. Page 2 of the Sun agreement -- I'll just read
20 to you until we get this up -- lists the following two
21 products as -- may I approach, Your Honor?

22 THE COURT: You may.

23 Q. As the most recent two new releases to which
24 Sun gained rights under the 2003 agreement. Do you see
25 that?

1 A. Yes.

2 Q. And could you read what those two releases are?

3 A. Open UNIX 8, also known as UnixWare 7.1.2, and
4 System V, Release 5 and, parenthetically, UnixWare 7.0,
5 7.01, 7.1, 7.11, 7.1.1 plus LKP.

6 Q. At the top of the page are there SVR releases
7 listed?

8 A. Yes.

9 Q. And what are those releases?

10 A. System V, Release 4.1 ES, 3B2; System V,
11 Release 4.1 C2, 3B2; System V, Release 4.1 ES; System V,
12 Release 4.2 and products; UnixWare 1.0, 1.1 and 1.1.1;
13 and System V, Release 4.2 MP and products; UnixWare 2.0,
14 2.1 and 2.12.

15 Q. And what is the MP?

16 A. Multiprocessor.

17 Q. And what can you tell me about how that release
18 of System V came about?

19 A. Different versions of UnixWare were released,
20 some that would support a single computer processor,
21 other versions that allowed for the software to be run
22 across multiple processors at the same time, to allow
23 more work to be accomplished at the same time, allowing
24 the processing to occur more quickly.

25 MR. NORMAND: May I approach, Your Honor?

1 THE COURT: You may.

2 Q. I'm handing you, Mr. Sontag, a copy of the APA.

3 Turn to the schedule that you were asked about earlier.

4 A. Schedule 1.1A?

5 Q. Yes.

6 A. Assets?

7 Q. Yes.

8 And if you would blow up the bottom line, item
9 66.

10 Now, with reference to attachment 1 to the Sun
11 agreement that we were looking at earlier --

12 A. Yes.

13 Q. -- the most recent releases of System V that
14 were included in the attachment to the Sun agreement,
15 System V 4.1 ES/3B2, is that product included in the list
16 in the APA?

17 A. Yes, it is.

18 Q. 4.1 C2/3B2, is that included in the list in the
19 APA?

20 A. Yes.

21 Q. Do you see an ES/3B2 product listed?

22 A. I'm assuming that's it right there, but maybe
23 I'm reading it wrong.

24 Q. Does that say ES/3B2?

25 A. No, it does not.

1 Q. Does it say ES/C23B2?

2 A. No.

3 Q. So those two most recent System V releases in
4 the Sun agreement aren't listed in the APA as products,
5 are they?

6 A. No.

7 Q. What have you understood the term "open source"
8 to mean during your tenure at SCO?

9 A. Well, it varies. There's different open source
10 licenses, but, in general, the high level, it is making
11 the source code available to various parties, your
12 customers or others, that they can then view or modify
13 that source code. In some cases, there are requirements
14 on returning the modifications back or making the
15 modifications available to others.

16 Q. And your understanding of the 2003 Sun
17 agreement is that such rights, at least in full, were not
18 given to Sun; is that correct?

19 A. Prior to the 2003 agreement?

20 Q. In the 2003 agreement.

21 A. The 2003 agreement gave them limited open
22 source rights. There were restrictions to what they
23 could do in terms of open sourcing in the 2003
24 agreement.

25 Q. You were asked, Mr. Sontag, whether you knew

1 why two System V releases in the 1994 Sun agreement had
2 been described as deliberately omitted. Do you recall
3 those questions?

4 A. Yes.

5 Q. And do you recall what your answer was?

6 A. I do not.

7 Q. Do you know whether Sun had already had a
8 license to those releases of System V before the 1994
9 agreement?

10 A. I do not know.

11 Q. Do you know whether they had already had a
12 license and terminated the license?

13 A. Sun?

14 Q. Yes.

15 A. I do not know.

16 Q. Who, at SCO, might know the answer to that?

17 A. I suspect Bill Broderick, John Maciaszek would
18 be the ones that most likely would know that answer.

19 Q. Now, to state the obvious, at the time of the
20 2003 Sun agreement, Sun was an existing licensee of UNIX;
21 is that right?

22 A. Yes.

23 Q. And I think you testified earlier that part of
24 what Sun obtained under the 2003 agreement was the right
25 to obtain copies of the older versions of System V; is

1 that right?

2 A. Yes.

3 Q. This is from amendment number 1 to the APA. I
4 take it you had occasion to review that amendment during
5 your tenure at SCO?

6 A. Yes.

7 Q. This amends part of the APA to state as
8 follows, paraphrasing of course: Buyer, Santa Cruz,
9 shall be entitled to retain 100 percent of the following
10 categories of SVRX royalties. And Rule 2 says that
11 source code right-to-use fees under existing SVRX
12 licenses and the licensing of additional CPU's, and from
13 the distribution by buyer of additional source code
14 copies.

15 Do you see that language?

16 A. Yes.

17 Q. As of the 2003 agreement, Sun already had
18 source code copies to all of the System V releases that
19 were listed in the 1994 agreement, correct?

20 A. Yes.

21 Q. And when you were shown earlier, by Mr. Acker
22 and by myself, the similarity of System V releases
23 between the 2003 agreement and the 1994 agreement, what
24 Sun is obtaining is additional copies of those same
25 releases, correct?

1 A. Yes.

2 Q. You were asked by Mr. Acker, paraphrasing,
3 whether, to your understanding, SCO had the right to
4 license the prior System V products with the UnixWare
5 license. Do you recall that question?

6 A. Yes.

7 Q. Mr. Sontag, I want to show you language from,
8 again, amendment 1 to the APA, which provides as follows:

9 Buyer, Santa Cruz, shall have the right to
10 enter into amendments of the SVRX licenses as may be
11 incidentally involved through its rights to sell and
12 license UnixWare software.

13 Do you see that?

14 A. Yes.

15 Q. And then, at the bottom, it says:

16 Buyer shall not enter into new SVRX licenses
17 except in the situation specified in little "i."

18 Do you recall reviewing this language during
19 your tenure at SCO?

20 A. Yes.

21 Q. Do you recall forming a view as to what it
22 meant for SCO to have the right to license SVRX material
23 incidentally to licensing UnixWare?

24 A. That was the basis of my belief that SCO had
25 that right.

1 Q. You were shown this language earlier,
2 Mr. Sontag -- well, the first paragraph, the letter in
3 which Mr. Luehs, I think it is, says that the agreement
4 between Santa Cruz and Novell requires prior written
5 approval from Novell for all new agreements or changes to
6 current agreements relating to System V.

7 Do you see that language?

8 A. Yes.

9 Q. Is it your understanding that if Santa Cruz was
10 executing a Unixware license that it didn't need to get
11 Novell's approval to license SVRX material with that
12 UnixWare license?

13 A. That was my understanding.

14 Q. Now, this document is dated May 20, 1996,
15 correct?

16 A. Yes.

17 Q. This is a letter from Novell three days later,
18 May 23, 1996, in which Novell says that it has
19 transferred to SCO Novell's existing ownership interest
20 in UNIX system-based offerings and related products. Do
21 you see that language?

22 A. Yes.

23 Q. Was it your understanding, during your tenure
24 at SCO, that SCO could license UnixWare however it
25 wanted?

1 A. Yes. That was my understanding.

2 Q. And was it your understanding that SCO could
3 license System V products with UnixWare? Was that your
4 understanding?

5 A. Yes.

6 Q. You were asked about the Microsoft agreement.
7 Do you recall that?

8 A. Yes.

9 Q. And, again, in summary, can you tell me how it
10 came to be that you ended up in negotiations with
11 Microsoft regarding that agreement?

12 A. In early 2003, we came in contact with
13 Microsoft representatives who were interested in pursuing
14 a possible license to UnixWare technologies to use in
15 some of their, what they called UNIX-compatibility
16 products within Microsoft Windows. It started a set of
17 negotiations that occurred through the early part of 2003
18 culminating in the UnixWare license agreement with
19 Microsoft.

20 Q. Now, in the time leading up to the beginning of
21 those negotiations, had SCO made any public statements or
22 assertions that there was any SCO IP in any Microsoft
23 products?

24 A. I believe there had been some, you know, broad
25 discussion that there might be IP issues, and not only in

1 Linux but other operating systems, including possibly
2 Windows.

3 Q. And was that a focus of your discussions with
4 Microsoft or was it more collateral?

5 A. It certainly was a portion of the discussion
6 because they certainly wanted to have, you know,
7 appropriate IP coverage for their products.

8 Q. Now, in Section 2 of the Microsoft agreement,
9 SCO releases any claims it might have against Microsoft;
10 is that right?

11 A. Yes.

12 Q. In that agreement, Section 2, did SCO purport
13 to release any of Novell's claims that it might have
14 against Microsoft?

15 A. No.

16 Q. Did SCO claim to have the right to release
17 claims for IP that it didn't own?

18 A. No.

19 Q. Section 2.2 of the Microsoft agreement which
20 you spoke about earlier is a license for Microsoft
21 products.

22 A. Yes.

23 Q. Does that section pertain to any particular
24 technology?

25 A. It pertains to UnixWare.

1 Q. Did you purport to license to Microsoft any
2 intellectual property that you didn't have rights in?

3 A. No.

4 Q. This is the term sheet that was shown to you
5 earlier. Can you tell me a little bit about how this
6 came to be created?

7 A. I think there was a desire to -- that Microsoft
8 wanted to know what we could possibly have available to
9 license to them. They had, you know, certain things that
10 they were interested in. And I, you know, with the help
11 of others, put together a list of possible topic areas
12 that could be of interest to Microsoft that was the basis
13 for starting a discussion.

14 Q. Is that list of products in paragraph 3 in any
15 particular order?

16 A. No, they are not.

17 Q. The System V term that you assumed Microsoft
18 would be familiar with?

19 A. I think they would be.

20 Q. Perhaps even more so than UnixWare?

21 A. Yes.

22 Q. Section 3 of the Microsoft agreement was a
23 Unixware license, correct?

24 A. Yes, it was.

25 Q. Was it a full UnixWare license?

1 A. It was a limited UnixWare license to only a
2 limited set of Microsoft products.

3 Q. Your understanding of this Court's August '07
4 order is that Novell owns the SVRX copyrights that are in
5 UnixWare. Is that fair to say?

6 A. I do understand that.

7 Q. So, when you licensed Microsoft UnixWare, you
8 were licensing the right to use Novell copyrighted
9 material under the Court's order; is that right?

10 A. That would be a determination that you could
11 come to.

12 Q. Did you pay Novell any money for that Section 3
13 UnixWare license?

14 A. No, we did not.

15 Q. Do you know if Novell is seeking any money from
16 that Section 3 license?

17 A. I don't believe they are.

18 Q. Section 4 of the Microsoft agreement. Could
19 you describe your discussions with Microsoft regarding
20 that section.

21 A. Microsoft was interested in having a couple of
22 options when they undertook the source code license for
23 UnixWare. They wanted to be able to first evaluate the
24 source code and determine if it would be useful to them.
25 So that was provided to them under the initial agreement.

1 They wanted to have the option to be able to use the
2 technology in a set of products, which was the first
3 option or Section 3 of the agreement. And then they also
4 wanted to have the rights to use the UnixWare source code
5 and derivative products in all of their products, broadly
6 across all of Microsoft products. And that was the
7 primary component of Section 4. So that was a second
8 option that they could obtain.

9 Q. In your discussions with Microsoft regarding
10 this agreement, what did you say to them about the
11 subject matter of the expanding UnixWare license in
12 Section 4? What do you recall discussing with them?

13 A. That it was a significant expansion of their
14 rights for how they could utilize that UnixWare source
15 code, that it wasn't just a limited set of products that
16 had a fairly small, you know, distribution footprint, but
17 it was all of Microsoft's products and millions and
18 millions of products. And that was a substantial
19 expansion in how they could use that UnixWare
20 technology.

21 Q. Now, in Section 4 you also licensed Microsoft
22 OpenServer source code; is that right?

23 A. Yes.

24 Q. What do you recall discussing with Microsoft
25 about the utility of that license?

1 A. That allowed Microsoft to also have the ability
2 to have compatibility with a, you know, broad range of
3 OpenServer applications that were out there for which it
4 was a large installed base and large customer base of
5 OpenServer so that it was another very big and
6 substantial part of that, you know, Section 4 agreement
7 was an OpenServer source code agreement.

8 I do not believe there is anybody else that has
9 ever been able to license the OpenServer source code.

10 Q. SCO had never licensed the OpenServer source
11 code?

12 A. No. It was contemplated, I think, with a few
13 possible customers but was never executed with any
14 licensee. So OpenServer had never been licensed in
15 source code before.

16 Q. OpenServer was the more profitable of the two
17 main products at SCO, correct?

18 A. It was 2/3 of the business.

19 Q. Openserver had a larger installed base than
20 UnixWare did, correct?

21 A. That's correct.

22 MR. ACKER: Objection. Leading.

23 THE COURT: Sustained. It is leading.

24 Q. When you were negotiating the 2003 Microsoft
25 agreement, did you have a view as to the value of the

1 OpenServer license relative to the value of the expanded
2 UnixWare license in Section 4?

3 A. I would view them both as, you know,
4 substantial portions of the value of Section 4. How I
5 would split between them, I'm not sure. I mean, the
6 expansion of UnixWare distribution was significant. The
7 source code, you know, license for OpenServer on its own
8 was significant.

9 Q. And, in your view at the time, why was it
10 relevant to Microsoft's business, for us lay people, that
11 there was a large installed base of OpenServer users?

12 A. It provided Microsoft with potential
13 opportunities to sell products to that large installed
14 base of OpenServer customers, and so, in some cases, for
15 the first time Microsoft Windows-based products to a set
16 of customers that they may have never dealt with
17 before.

18 Q. Now, having exercised the options in Section 3
19 and Section 4, and with the Section 4 license, Microsoft
20 now had a full UnixWare license, correct?

21 A. That is correct.

22 Q. And Section 4 is also a license to older System
23 V releases; is that right?

24 MR. ACKER: Your Honor, it's still leading, the
25 last two questions. Every question ends with "correct"

1 or "is that right?" It's his witness.

2 MR. NORMAND: This is a cross examination, but
3 if we want to do a hard and fast rule, I'll ask only
4 open-ended questions.

5 THE COURT: It sort of is and sort of isn't.

6 MR. ACKER: I understand that, but, given the
7 relationship between counsel and the witness, I think
8 it's appropriate to be a non-leading question.

9 THE COURT: Try not to lead. I'll sustain the
10 objection. Where are you?

11 MR. SONTAG: You're asking where I am with the
12 witness?

13 THE COURT: No, just on this last series of
14 questions.

15 MR. SONTAG: As to the Microsoft agreement?
16 Probably five minutes.

17 THE COURT: Just the last couple of questions.

18 MR. SONTAG: Do you want me to start over?

19 THE COURT: Just the last couple of questions.
20 I don't know that he answered them. We got a leading
21 objection.

22 MR. SONTAG: I'm sorry. I understand.

23 Q. By Mr. Sontag: I guess the question was: Why
24 were you willing to enter into a license to prior
25 releases of System V in Section 4 of the Microsoft

1 agreement?

2 A. Well, it was typical with a, you know, UnixWare
3 and preceding UNIX source code licenses, to provide a
4 license to the prior products. The fact we broke it up
5 and put it into the second release was just, in some ways
6 a convenient place to put it. But it was not
7 something -- the prior products was not something that
8 Microsoft was viewing as highly valuable. I mean, we did
9 not provide all the versions that -- of prior product.

10 And we had told them that we may not be able to
11 provide them all because they are very old, you know,
12 source tapes that, in some cases, had turned to dust.
13 But there was no objection on the part of Microsoft that
14 they didn't receive all the versions that were listed on
15 that schedule. We provided them with the ones that we
16 were able to get, and that was sufficient for them, and
17 there was no desire or need on Microsoft's part to alter
18 the value of, you know, that agreement based on that.

19 Q. Did you have any understanding, at the time of
20 the execution of the agreement, as to whether Microsoft
21 was going to use those prior releases of System V as
22 stand-alone products?

23 A. No. We had no expectation that they would use
24 it. If you are developing a software product, again, as
25 I've said a number of times previously today, you would

1 want to utilize the latest version of the source code for
2 the development of a new product. And especially with a
3 UNIX-based operating system product that has built into
4 it a high degree of backward compatibility, you would
5 want to use the latest to take advantage of all the new
6 features and bug fixes, and you would still have that
7 backward compatibility. There is no need to go to a
8 prior release.

9 Q. Do you recall entering into an amendment 3 to
10 the Microsoft agreement?

11 A. Yes.

12 Q. And can you recall --

13 Actually, can you bring it up? And blow up
14 that paragraph B.

15 Do you recall discussing and negotiating this
16 paragraph in the agreement?

17 A. Yes.

18 Q. It says, and I understand it's hard to read:

19 The parties recognize that, A, parts of the
20 software, excluding material portions of the kernel,
21 may be distributed by Microsoft by default in the
22 majority of the editions.

23 This is in section 3, right?

24 A. yes.

25 Q. Section 3 is a license for UnixWare, correct?

1 A. Yes.

2 MR. ACKER: Same objection, Your Honor.

3 Leading.

4 MR. NORMAND: We are talking about the text of
5 an agreement. We can take five minutes and walk through
6 it.

7 THE COURT: You can answer that, which you did.

8 THE WITNESS: Yes.

9 Q. What is your understanding as to what rights
10 Microsoft gained in this paragraph B of amendment 3?

11 A. That they would be able to license the UnixWare
12 software into a majority of their, you know, Windows
13 products.

14 Q. Did you have any view, at the time of the
15 execution of the agreement or its amendments, as to
16 whether Microsoft had any intention to use the older
17 System V releases in its Windows products?

18 A. My understanding is they had no intention of
19 using the older UNIX versions for anything other than a
20 source analysis project that they were contemplating.

21 Q. Now, I asked you a similar question earlier as
22 about Sun, as to whether you had a view as to whether
23 they intended to use the older System V releases as a
24 stand-alone product. Do you recall my asking you that
25 question?

1 A. I kind of recall that.

2 Q. We discussed drivers. Do you recall that?

3 A. Yes.

4 Q. Did there come a time when you entered into a
5 clarification agreement as to the Sun 2003 agreement
6 regarding the subject matter of drivers?

7 A. Yes. There was an amendment to the agreement
8 that was related to the drivers, binary and source code
9 drivers for UnixWare.

10 Q. This is SCO Exhibit 189. I think you might
11 have objected to it. Let me ask one foundational
12 question. Were the drivers sent?

13 A. The drivers were --

14 Q. The drivers addressed in this agreement, were
15 they sent to Sun?

16 A. Yes, they were.

17 MR. NORMAND: I would like to move the document
18 into evidence, Your Honor.

19 MR. ACKER: No objection.

20 THE COURT: SCO 189 is received.

21 (SCO Exhibit 189 received in evidence.)

22 Q. And can you quickly summarize for me how this
23 came about?

24 A. I don't recall the specifics, but I think it
25 was very important to Sun that they receive all the

1 drivers that they possibly could to UnixWare that -- for
2 which there were not restrictions that we could not
3 provide them to them, and this amendment was just for
4 them to ensure that they were receiving all of the
5 drivers for UnixWare that we could provide them. And we
6 did, in turn, provide those UnixWare drivers to them.

7 Q. Do you know whether Sun received the rights to
8 OpenServer drivers?

9 A. I believe we provided those drivers to them as
10 well.

11 Q. Do you know whether Sun received any rights
12 under this clarification to drivers to older System V
13 releases?

14 A. No. I believe they did not.

15 MR. NORMAND: Novell 422, if you could blow
16 that up.

17 Q. Do you recall reviewing this document,
18 Mr. Sontag, with Mr. Acker?

19 A. Yes, I do.

20 Q. And do you recall a reference -- I think it's
21 on page 2. This is a reference to SCO IP. Do you see
22 that reference?

23 A. Yes.

24 Q. And do you see, in the second line in the top
25 paragraph, SCO's intellectual property ownership or

1 rights?

2 A. Yes, I do.

3 Q. In this agreement, did you purport to release
4 or license anything other than SCO's intellectual
5 property rights?

6 A. No, we not.

7 Q. Did you pruport to release or license any of
8 Novell's rights?

9 A. No, we did not.

10 Q. There's a reference, I believe, in that
11 agreement to UNIX-based code. Do you recall that?

12 A. Yes.

13 Q. Is UnixWare UNIX-based code?

14 A. Yes, it is.

15 Q. Is OpenServer UNIX-based code?

16 A. Yes, it is.

17 Q. To the best of your knowledge, did you ever pay
18 Novell anything for the System V code or old SVRX code in
19 any release of UnixWare or OpenServer?

20 A. No, we did not.

21 Q. There is a reference in Novell Exhibit 422 to,
22 quote, SCO's standard commercial license. Do you recall
23 that phrase?

24 A. Yes.

25 Q. Do you have an understanding as to whether,

1 under its standard commercial license for UnixWare,
2 whether SCO licensed prior System V products?

3 A. I know that in the UnixWare source code
4 agreement that was provided, up until the most recent
5 versions of the UnixWare source code agreement, that the
6 prior versions were specifically listed. In the most
7 recent version of the UnixWare license, that was omitted
8 only for the purpose of reducing the size of the
9 agreement, but my understanding is that it was still
10 provided to a customer if they requested it, and it was
11 implicitly included.

12 Q. Do you have an understanding as to why that
13 was?

14 A. Because that was the standard practice of SCO
15 and its predecessors in terms of licensing the UNIX
16 software, that source code licensees of different
17 versions could interact with each other or share code in
18 certain cases, if they were of a similar licensing level,
19 and that was enabled by the fact that they would be
20 licensed to all prior versions, depending on the version
21 they licensed at that point.

22 So, that was a standard practice that had been
23 used by SCO, by Novell, by AT&T, USL and part of the
24 licensing of the UNIX code, and it continued with
25 UnixWare.

1 Q. You were shown a series of agreements towards
2 the end of Mr. Acker's questions, and I think we can
3 safely lump those together and call them SCOSource
4 agreements. Do you recall doing that?

5 A. Yes.

6 Q. How did you come about arriving at a price for
7 these SCOSource agreements?

8 A. I -- we determined that we wanted to price it
9 basically at the same price as UnixWare, so a comparable
10 capability of UnixWare, if it was a 1-CPU system, was
11 priced at, you know, \$1400, which was the same price for
12 UnixWare.

13 Q. And who did you speak with on that issue?

14 A. Oh, I had gotten input from John Maciaszek and
15 also from Jeff Hunsaker, who were more familiar with the
16 UnixWare price list than I was.

17 Q. Now, was there any source code given to a
18 licensee under a SCOSource license?

19 A. No, there was not.

20 Q. Could you describe, to the best of your view,
21 what the license was in the SCOSource license?

22 A. It was primarily a release, aspects of a
23 covenant not to sue and a Unixware license and SCO IP
24 license.

25 Q. Now, you were shown the phrase in several of

1 the agreements, quote, SCO's IP rights. Do you recall
2 that?

3 A. Yes.

4 Q. In these SCOSource agreements, did SCO purport
5 to release anything other than its rights?

6 A. No, we did not.

7 Q. Did SCO purport to license anything other than
8 its rights?

9 A. No.

10 Q. You were shown Novell Exhibit 227. This is the
11 Jeff Hunsaker e-mail. Do you recall that?

12 A. Yes.

13 Q. And in that e-mail, Mr. Hunsaker's says that
14 this is not a Unixware 7.13 SKU. Do you recall that?

15 A. Yes.

16 Q. Do you know what SKU is?

17 A. Stock-keeping unit or -- a box of UnixWare
18 software, in this case.

19 Q. Were these SCOSource agreements simply UnixWare
20 licenses for purposes of stock keeping?

21 A. No. They were a separate package and agreement
22 and separate SKU.

23 Q. Now, you were asked further about
24 Mr. Hunsaker's statement that --

25 If we could pull it up.

1 Mr. Hunsaker's says:

2 There is no connection between a UnixWare
3 OpenServer and the SCO UNIX IPC license whatsoever.

4 Do you see that statement?

5 A. Yes.

6 Q. Now, taking it alone, just pulled out of that
7 document, do you agree with it?

8 A. There is no similarity of the license? Yes.
9 The licenses are not the same.

10 Q. Now, did Mr. Hunsaker negotiate these
11 agreements, by the way?

12 A. No, he not.

13 Q. Who did?

14 A. I was involved in that, along with our
15 attorneys.

16 Q. What was Mr. Hunsaker's position at the time
17 that he made this statement?

18 A. I believe he was over worldwide sales for the
19 UNIX business. He did not have responsibility for
20 primary sales for SCOsource-related products. That was
21 done by me through my own sales group.

22 Q. Did you ever speak with Mr. Hunsaker in
23 conjunction with your negotiation of the SCOsource
24 agreements?

25 A. No.

1 Q. Did you have discussions, Mr. Sontag, with
2 Novell in late 2002?

3 A. Yes, we did.

4 Q. Can you describe the nature of those
5 discussions?

6 A. We had a number of back and forth discussions
7 between representatives from Novell and myself and, in
8 some cases, with Darl McBride. In our case, we were
9 interested in clarifying the language of the Asset
10 Purchase Agreement related to excluded assets. In the
11 case of Novell, they were interested in finding out or
12 interested in SCO's involvement with United Linux. That
13 was the overall nature of the conversations in late
14 2002.

15 Q. Can you recall who you had discussions with?

16 A. I had a number of conversations with Gregg
17 Jones and at least one conversation with another
18 gentleman from Novell, whom I can't remember his name at
19 this moment.

20 Q. And did you have occasion to speak with
21 Mr. McBride about his discussions with Novell?

22 A. I did.

23 Q. And what was the general nature of those
24 discussions?

25 MR. ACKER: Objection. Hearsay, Your Honor, if

1 he's going to relate what Mr. McBride told him.

2 MR. NORMAND: This goes to state of mind, but
3 we can cut it short if there are concerns, Your Honor.

4 THE COURT: He can answer the question asked,
5 the general nature, without saying what somebody else
6 said. So, talk about the general nature.

7 THE WITNESS: His discussions, as I understood
8 it from Mr. McBride, were very similar to my discussions
9 that I had primarily with Gregg Jones.

10 Q. Did you, in your discussions with Novell, ever
11 ask Novell to partner in the SCOSource program that you
12 were contemplating?

13 A. No, I did not.

14 Q. Did you, when you were speaking with Novell,
15 ever ask Novell to participate in the SCOSource
16 program?

17 A. No, I did not.

18 Q. Did you have a view, at the time of these
19 discussions, as to whether Novell would have any right to
20 any monies you might receive under the SCOSource
21 program?

22 A. No. I did not believe they would have any
23 rights.

24 Q. Did anyone from Novell suggest to you that they
25 thought they had some right to the monies you might

1 receive under this program?

2 A. No.

3 Q. Did you have a view, at the time of these
4 discussions, as to whether SCO had the authority to
5 execute the SCOSource agreements it was contemplating?

6 A. I believed we had those rights.

7 Q. Did anyone, in your discussions with Novell,
8 ever suggest to you that they thought they could limit
9 your authority to execute these agreements that you were
10 contemplating?

11 A. No.

12 Q. Did you ever have discussions with Novell
13 about -- before the execution of the agreement -- your
14 authority to execute the 2003 Sun agreement?

15 A. No, we did not.

16 Q. Did you have any trepidation about whether SCO
17 had the authority to execute that agreement?

18 A. No. I had no concern.

19 Q. Now, the 1994 Sun agreement, that concerned a
20 buyout; is that right?

21 A. Yes, it did.

22 Q. In what sense?

23 A. It was a buyout for Sun of their binary
24 distribution of Solaris, so they would not have to make
25 payment for every copy of Solaris that they sold.

1 Q. Do you know whether, at the time of the 1994
2 agreement, Sun was paying binary royalties?

3 A. Prior to the 1994 --

4 Q. Yes.

5 A. -- time frame? I believe they likely were
6 making royalty payments.

7 Q. Do you know whether, as of the 2003 agreement,
8 Sun was paying any binary royalties?

9 A. No. They would not be.

10 Q. How come?

11 A. Because they already had a buyout in the 1994
12 agreement.

13 Q. In the 2003 agreement, did you amend or change
14 that 1994 buyout?

15 A. No, we did not.

16 Q. Can you explain what you mean?

17 A. The buyout related to -- you know, to Solaris
18 for SVR code binary distribution and was taken care of by
19 the '94 agreement.

20 Q. And did you have any understanding, as of the
21 2003 agreement, as to whether Sun was intending to use
22 the UnixWare technology and license?

23 A. It was my understanding they were intending to
24 use the UnixWare technology.

25 Q. Did you have an understanding, at the time of

1 that 2003 agreement, as to whether any of the code that
2 was in Solaris was also in UnixWare?

3 A. There would be substantial portions that would
4 be very much the same because Solaris was, you know,
5 based on, you know, a previous version of UNIX System V,
6 similar to UnixWare.

7 Q. Did you have a view, as of the time of the 2003
8 agreement, as to whether Sun would have paid UnixWare
9 royalties for its distribution of Solaris if not for the
10 terms of the 2003 agreement?

11 MR. ACKER: It calls for speculation and
12 hearsay, Your Honor.

13 MR. NORMAND: It does call for speculation. I
14 don't know that that's necessarily a basis for precluding
15 him from answering.

16 THE COURT: I'll let him answer.

17 Go ahead.

18 THE WITNESS: No. I don't believe Sun would
19 have to be paying a UnixWare royalty for what they were
20 doing with Solaris prior to the 2003 agreement.

21 Q. Now, what about what they would do with Solaris
22 after the 2003, if all they had gotten was a Unixware
23 license and if there was code in UnixWare that was also
24 in Solaris? What kind of royalties would Sun be
25 paying?

1 A. Similar to the royalties that we would have
2 other UnixWare source code licensees pay.

3 Q. And can you explain what kind of royalties
4 those were?

5 A. It would vary, but it would be on the order of
6 tens to hundreds of dollars per unit shipped on an
7 ongoing royalty basis.

8 Q. Now, at the time of the execution of the
9 Microsoft agreement, what was your view as to the
10 relative value of the SVRX component of that agreement?

11 A. Insignificant. It was licensed as a matter of
12 course. I don't believe that Sun -- or Microsoft was
13 valuing it at all. What they were valuing was the
14 UnixWare source code, the UnixWare binary distribution
15 rights and broad binary distribution rights and
16 OpenServer source code distribution rights.

17 Q. And at the time of the 2003 Sun agreement, what
18 was your view as to the relative value of the new
19 SVRX-related rights that Sun had acquired?

20 A. They had almost all of those rights already.
21 What they acquired were new rights to UnixWare, which is
22 what they needed to develop their, you know,
23 Solaris-on-Intel product offerings.

24 MR. NORMAND: No further questions, Your
25 Honor.

1 THE COURT: Thank you. I assume your redirect
2 will be more than three to five minutes?

3 MR. ACKER: Yes. That's a good assumption,
4 Your Honor.

5 THE COURT: My hearing starts at 2:30 so we
6 will take up again at 8:30 in the morning. If you want
7 to leave stuff here, if you just push it aside a little,
8 nobody is going steal it. I don't think they would want
9 it. We'll see you at 8:30 in the morning.

10 And you get to come back, Mr. Sontag.

11 MR. NORMAND: Thank you, Your Honor.

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25 (Whereupon the proceedings were concluded.)

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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I am a Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of the foregoing matter on April 29, 2008, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages constitute a full, true and correct record of the proceedings transcribed;

That I am not of kin to any of the parties and have no interets in the outcome of the matter;

And hereby set my hand and seal this 29th day of April, 2008.

REBECCA JANKE, CSR, RPR, RMR