

1 THE COURT: You may proceed, Mr. Normand.

2 MR. NORMAND: Thank you, Your Honor.

3 May I approach, Your Honor?

4 THE COURT: You may.

5 MR. NORMAND: This is a copy of the bulk of the  
6 exhibits that we'll be using.

7 THE COURT: Are these all in? Have they all been  
8 admitted?

9 MR. NORMAND: With one exception, Your Honor. And  
10 when we get to that, I'll offer it.

11 Q. BY MR. NORMAND: Mr. Jones, do you recognize  
12 Schedule 1.1(A) to the APA?

13 A. I'm familiar with it. It's not up there right now.  
14 I don't have the exhibit to myself.

15 Q. And you referenced the schedule of assets that is  
16 in 1.1(A) earlier; correct?

17 A. Correct.

18 Q. And that's in Item 6 of the APA; right?

19 A. Right.

20 Q. And there's no UnixWare release identified in  
21 Item 6; correct?

22 A. I'm not certain in that -- my only uncertainty is  
23 that I knew the early release of UnixWare was based on  
24 Release 4.2. And so I just -- I'm not certain whether that  
25 version of 4.2 corresponds to what was in UnixWare release or

1 not. That's my only uncertainty.

2 Q. Your view is UNIX System 5 Release 4.2 MP is the  
3 same or virtually the same as the first release of UnixWare;  
4 correct?

5 A. That's a lot more than I said. I just -- I think  
6 that the early version of UnixWare corresponds to 4.2. But  
7 sitting here today, I'm just not certain. So if it is the  
8 case, then there's UnixWare in the schedule. If it's not the  
9 case, then UnixWare is not there.

10 Q. So looking at Item 6 now, you don't think Novell  
11 retained any interest in any UnixWare royalties after the APA;  
12 correct?

13 A. If none of those identified as SVRX releases are  
14 UnixWare, then the SVRX licenses and the corresponding  
15 royalties would relate to UnixWare. So it's just a factual  
16 question that I have. And that was -- when I was -- earlier  
17 when you were asking me about UNIX everything I said was based  
18 on whether or not any of these releases are, in fact, a  
19 version of UnixWare.

20 Q. But in your view, the place to look to determine  
21 what royalties arose is Item 6; correct?

22 A. Yeah, that's right. Item 6 is where there's a  
23 reference to that in Section 4.16.

24 Q. You said earlier in your understanding that  
25 System V prior products are only licensed when consideration

1 was given for the prior products; right?

2 A. I think I said generally. To the extent that I had  
3 an opportunity to see examples that that's what I've seen. So  
4 that's what I said.

5 Q. You're aware of examples of UNIX licensees who were  
6 not charged any price for getting prior products; correct?

7 A. I don't believe I am. I'm not saying that that has  
8 never happened. But I don't think I'm aware of any examples.

9 MR. NORMAND: This is SCO Exhibit 369. It may not  
10 be in the book, Your Honor, as it turns out.

11 Blow up the top half.

12 Q. BY MR. NORMAND: Do you recognize this document,  
13 Mr. Jones? Software agreement for Nihon SCO, Limited;  
14 correct?

15 A. I just need to actually read the document here.  
16 Yes.

17 Q. Page 10?

18 MR. MELAUGH: Can I ask Mr. Normand to give a copy  
19 to the witness? Do you have a copy?

20 THE COURT: Do you have a copy that you can give to  
21 him?

22 MR. NORMAND: Somewhere, Your Honor.

23 THE WITNESS: Thank you.

24 MR. NORMAND: Blow up the top half.

25 MR. ERIC WHEELER: Yes, sir.

1 Q. BY MR. NORMAND: Mr. Jones, Exhibit A to this  
2 document at Page 10 reflects an initial designated CPU price  
3 of \$375,000; correct?

4 A. Just a second. I'm trying to find it here.

5 Q. It's at Page 10. Do you see Item A, 1A?

6 A. I want to make sure it's the same page. It's kind  
7 of clipped at the top.

8 Okay. Right.

9 Q. And if you turn to Page 32, Mr. Jones. There are  
10 no prior products listed; correct?

11 A. Page 32?

12 Q. Correct.

13 A. I'm really thrown by the numbering.

14 Q. Do you not see this on the screen? Do you want me  
15 to blow it up?

16 A. Well, I'd like to be able to see it in context.  
17 And you're referring to page 32. I'm simply not tracking on  
18 the pages.

19 Q. Bates number is 1042612.

20 A. Okay.

21 Q. So for this supplement, the initial CPU price is  
22 \$375,000, and there are no prior products listed; correct?

23 A. There are no prior products in this exhibit. I've  
24 never seen this agreement before. I'm not familiar with the  
25 way it's organized. So all I can really say is I know this

1 exhibit says that, but I'm not familiar with the agreement.

2 Q. Okay.

3 May I approach, Your Honor?

4 THE COURT: You may. What exhibit are you talking  
5 about?

6 MR. NORMAND: SCO 370.

7 Q. BY MR. NORMAND: SCO 370 is a UNIX agreement  
8 concerning UNISYS; correct?

9 A. Yes.

10 Q. Do you see at Page 4 which is --

11 A. I think the Bate stamp number would help.

12 Q. It's easier?

13 A. Yeah.

14 Q. Bates 1039897.

15 A. Okay.

16 Q. In Section 1A, the initial designated CPU price is  
17 \$375,000; correct?

18 A. Correct.

19 Q. If you turn to Bates 1039921. A lengthy list of  
20 prior products; correct?

21 A. Right. There is a list, right.

22 Q. So these two documents reflect the same initial per  
23 CPU price for UnixWare licenses whether or not the prior  
24 products are listed; correct?

25 A. Again, I'm not familiar with the documents. I can

1 simply say that that information appears on the two pages that  
2 we saw in each agreement. I have never studied this document.  
3 I'm not familiar with the way it's organized and how it works.

4 Q. Well, having seen what I've shown you, it's clear  
5 that --

6 MR. MALAUGH: Mr. Normand, is this a demonstrative  
7 that you intend to use?

8 We have a stipulation such that demonstratives that  
9 are going to be used with witnesses must be disclosed 24 hours  
10 in advance.

11 MR. NORMAND: This is from the opening.

12 THE COURT: It's from what?

13 MR. NORMAND: The opening argument that Mr. Singer  
14 did, Your Honor.

15 MR. SINGER: I used those two in my opening.

16 THE COURT: I thought he did.

17 MR. MALAUGH: I think our understanding of the  
18 agreement was that if someone was going to use something with  
19 the witness, we would be told it was going to be used with the  
20 witness.

21 MR. NORMAND: I don't need to use it, Your Honor.  
22 But I do have a different understanding of the meaning of the  
23 stipulation.

24 THE COURT: Well, I don't have any understanding of  
25 the meaning of that yet. So apparently you two have a

1 different ones. But now it's not relevant; right.

2 MR. NORMAND: I'll ask Mr. Jones a question without  
3 using the exhibits.

4 THE COURT: All right.

5 Q. BY MR. NORMAND: Based on what I've shown you on  
6 these two licenses, the same per CPU price per unit where a  
7 license was charged whether or not the system prior products  
8 was listed; correct?

9 A. The same price was listed on the page whether or  
10 not the exhibit identified a product or not. And that's all I  
11 can say, is those words appear. And I haven't studied the  
12 agreements, so I don't know how they work.

13 Q. You are a lawyer; right?

14 A. I think lawyers actually need to read documents to  
15 understand them, nonetheless.

16 Q. I understand.

17 Now, in your view, one needs the details in the  
18 transaction at issue to determine whether there is an  
19 incidental licensing that's SVRX with UnixWare; correct?

20 A. I'm sorry. Could you say that again?

21 Q. In your view, one needs to understand the details  
22 of the transaction at issue to determine whether there has  
23 been incidental licensing of any SVRX with UnixWare; correct?

24 A. Once you understand the circumstances of the  
25 transaction.

1           Q.    Now, on the issue of whether any SVRX source code  
2           was licensed incidentally to UnixWare in Microsoft agreement,  
3           you think Microsoft views are irrelevant?

4           A.    As to SVRX agreement, yes.

5           Q.    And as to whether there's been any incidental  
6           licensing; correct?

7           A.    Yes.

8           Q.    And the same is true as to Sun's view in its  
9           agreement as to whether there's been incidental licensing;  
10          correct?

11          A.    Yes.

12          Q.    But you do think the overall facts and  
13          circumstances surrounding the transaction are relevant;  
14          correct?

15          A.    Well, the circumstances of the transaction -- yeah,  
16          to some extent that needs to be understood.

17          Q.    To a significant extent; correct?

18          A.    Yes.

19          Q.    And primarily, you think the actual terms of the  
20          agreements are the most important to determining whether there  
21          has been incidental licensing; correct?

22          A.    Not necessarily. I mean, the terms -- the terms of  
23          an agreement might not fully reflect the circumstances behind  
24          the transaction.

25                MR. NORMAND: Your Honor, may I play a clip from

1 Mr. Jones' deposition?

2 THE COURT: Yes. Tell us.

3 MR. NORMAND: May 10, 2007; Page 246 Line 16 to  
4 Page 247 Line 1.

5 THE COURT: Thank you.

6 MR. MALAUGH: It was May 10th? Thanks.

7 MR. NORMAND: If that's not going to work, I can  
8 read it, Your Honor.

9 THE COURT: Is it not going to work? All we're  
10 getting so far is it sounds like someone backing up.

11 MR. ERIC WHEELER: That is the audio, Your Honor.

12 THE COURT: If you can read it if you can't get it  
13 to work.

14 Q. BY MR. NORMAND: Mr. Jones, I asked the following  
15 question, and you gave the following answer:

16 Question. So in Novell's view --

17 MR. MELAUGH: Can I ask -- I'm sorry I'm having  
18 difficulties, but could you give him a copy of the transcript  
19 to Mr. Jones so he can follow along with you?

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

21 THE COURT: Oh, yes. Yes.

22 Q. BY MR. NORMAND: This is at Page 246 Line 16:

23 Question. So in Novell's view whether the  
24 UnixWare had been licensed or whether the SVRX had  
25 been licensed incidentally with UnixWare is

1 something to be determined from the terms of the  
2 agreements; is that right?

3 Answer. Well, as I said, I think terms of  
4 the agreement would be the most important  
5 consideration. And my response is I think I  
6 suggested the overall facts and circumstances, and  
7 those facts and circumstances I think are probably  
8 the most important thing in the terms.

9 Do you recall being asked that question and giving  
10 that answer?

11 A. Vaguely. But here it is, so....

12 Q. Now, beginning in October of 2002, you had several  
13 communications with SCO; right?

14 A. Yes.

15 Q. And there were in your best estimate four to six  
16 conversations between Novell and SCO during that time?

17 A. Something like that. I don't know.

18 Q. And to your recollection, in October of 2002,  
19 Mr. McBride told that you SCO was starting to look into the  
20 possibility of Linux end users using UNIX code; correct?

21 A. Yes.

22 MR. NORMAND: Will you pull up SCO 398?

23 MR. ERIC WHEELER: Yes, sir.

24 Q. BY MR. NORMAND: And in this e-mail, in the fall of  
25 2002, you refer to that earlier conversation with Mr. McBride;

1 correct?

2 THE COURT: This is SCO 390?

3 MR. NORMAND: Yes, Your Honor -- 398.

4 THE COURT: Pardon me?

5 MR. NORMAND: 398.

6 MR. MELAUGH: And again, Your Honor, if I could ask  
7 counsel to follow the general practice and give the witness a  
8 copy of the exhibit that he's referring to so that the witness  
9 can see the context of what you're blowing up.

10 Q. BY MR. NORMAND: Mr. Jones, do you need a copy of  
11 this exhibit to understand this question?

12 A. Not this one. But in general I really appreciate  
13 having the exhibits.

14 Q. Of course.

15 And you recall in this document that a few weeks  
16 earlier on November 15th --

17 A. I actually didn't answer your question. But you  
18 had asked me the question about --

19 Q. Do you think this e-mail reflects your discussions  
20 with Mr. McBride?

21 A. Yes.

22 Q. This is an e-mail from November 15th, 2002;  
23 correct?

24 A. Right.

25 Q. And you recall that a few weeks earlier on that

1 date, Mr. McBride, quote:

2 Expressed interest in pursuing Linux users  
3 who may be using misappropriated UNIX code. End quote.

4 Right?

5 A. Right.

6 Q. This is SCO 397, e-mail dated November 20th, 2002,  
7 from yourself. And in this e-mail you described a  
8 conversation with Mr. McBride that you and Dave Wright had  
9 that same day; correct?

10 A. Just a second.

11 (Time lapse.)

12 THE WITNESS: Yes.

13 Q. BY MR. NORMAND: You recount the possible efforts  
14 by SCO to assert claims relating to infringing uses of SCO's  
15 UNIX libraries by end users of Linux; correct?

16 A. Right.

17 MR. NORMAND: 399.

18 Q. BY MR. NORMAND: To some extent you may be able to  
19 find it. It's tabbed.

20 A. Okay. Thanks.

21 Q. We're on 399 now.

22 I'm told we may need some time technically to be  
23 able to use the documents this way, which I think is faster.  
24 But I defer to how Your Honor wants to proceed. It may take  
25 us three to four minutes.

1 THE COURT: To get this up and running?

2 MR. NORMAND: Yes, sir.

3 THE COURT: Well, we better wait. I think it  
4 ultimately would be quicker.

5 MR. NORMAND: I agree, Your Honor.

6 (Time lapse).

7 THE COURT: There are no -- there are no interlude  
8 non-exhibit questions you could ask? If there aren't, there  
9 aren't.

10 MR. NORMAND: I'm sort of in the middle of this  
11 topic.

12 (Time lapse.)

13 Q. BY MR. NORMAND: There is a discrete area that we  
14 can turn to, Mr. Jones, if you're comfortable with that. We  
15 can go back to this.

16 A. Yes.

17 Q. You spoke about the Solaris files with counsel in  
18 your direct examination. Do you remember that?

19 A. Yes.

20 Q. Exhibits 439 to 59?

21 A. It sounds right.

22 Q. Do you know what functions these files perform in  
23 Solaris?

24 A. I didn't. No. I didn't attempt to understand what  
25 their functionality was.

1 Q. Do you know what function these files performed,  
2 SVR4-389?

3 A. No. In neither case did I look at them to what  
4 their functionality was.

5 Q. Do you know if the files originated in SVR4-386?

6 A. Meaning that the first version in which they  
7 appeared?

8 Q. Yes.

9 A. I don't know.

10 Q. You said that Novell had a hard copy of SVR4-386;  
11 correct?

12 A. A hard copy?

13 Q. A hard copy of the source code?

14 A. If I said that I'm mistaken. We have SVRX source  
15 code. But if you understood me to say that we have hard  
16 copies of it, I didn't intend to say that. That would be a  
17 huge printout.

18 Q. I didn't mean to say you printed it out. I mean  
19 you have access to the actual source code?

20 A. Okay. I understood you to mean by hard copy we had  
21 a printout of the system.

22 Q. No. Why did Novell have the source code of the  
23 SVR4-386?

24 A. I don't know why we wouldn't.

25 Q. Novell transferred all copies of its source code

1 for UNIX and UnixWare to Santa Cruz in 1995; correct?

2 A. There is a license of technology back to Novell.  
3 The technology license agreement. It was contemporaneous with  
4 the asset purchase agreement. So -- there are certain bounds  
5 on the license, but we're perfectly entitled to have copies of  
6 the pre APA SVRX according to the terms of that license  
7 agreement.

8 Q. Now you identified 21 OpenSolaris filings that you  
9 found; correct?

10 A. Yeah. There were 21 that we talked about today.

11 Q. And all of those files are in UnixWare 1; correct?

12 A. I don't know whether they're in UnixWare 1.

13 Q. You did not look at that, did you?

14 A. I did not look at that.

15 Q. Now, you testified, Mr. Jones, your views as to  
16 what money Novell is entitled to under the Sun agreement in  
17 2003. Do you recall that?

18 A. Yes.

19 Q. And you said you didn't think that the 2003 Sun  
20 agreement was a customarily license agreement. Do you recall  
21 that?

22 A. I think I said -- I can't recall -- that may have  
23 been the question. I think what I said it was extraordinary.  
24 I can't recall if I said, used the words, it's not customary.  
25 But I do recall using the word extraordinary.

1           Q.    The 1994 Sun agreement was extraordinary, as well,  
2    wasn't it?

3           A.    Yeah.  I'd say it's not a typical agreement.  It's  
4    a buyout of source code rights.  Buyout, excuse me, of source  
5    code royalty obligations.

6           Q.    Now, Novell seeks all 10 million that was paid for  
7    the 2003 Sun agreement?

8           A.    Yes.

9           Q.    The 2003 Sun agreement does provide some broad  
10   rights with respect to UnixWare; correct?

11          A.    Yes.

12          Q.    And you asses no value to that UnixWare license;  
13   correct?

14          A.    No.  As I stated, there has been no value specific  
15   to the UnixWare portion suggested by SCO.  And given the  
16   relationship between Novell and SCO in this regard and SCO  
17   being the fiduciary and no value being, having been assigned  
18   by SCO, I conclude that we're entitled to all of it.

19          Q.    So your view is the only reason that Novell is  
20   entitled to all of it is because SCO hasn't suggested an  
21   apportionment?

22          A.    Well, I don't think that -- you know, there would  
23   have to be some legitimate apportionment established, and one  
24   has not even been suggested.

25          Q.    But your view is the most important thing to look

1 at to determine whether there's been incidental licensing is  
2 in terms of the agreement; correct?

3 A. Well, let me see here. I mean, obviously what  
4 we've talked about is the facts and circumstances and the  
5 terms and conditions both mattering, having to look at all of  
6 it. And so in my deposition you asked me the question, I said  
7 one was more important than the other, and today I said the  
8 other is more important. They're both important. They're all  
9 important in understanding the agreement. I don't truly know  
10 that gets us anywhere by trying to say one is more important  
11 than the other. But the circumstances, the facts and  
12 circumstances, the terms, all of those need to be considered.

13 Q. One can't reasonably review the 2003 Sun agreement  
14 and conclude that no money was paid for the broad UnixWare  
15 license; correct?

16 A. I don't think one can conclude that the monies paid  
17 were not to some extent in consideration with the UnixWare  
18 related rights. But I have no way of knowing how much of it  
19 was for that.

20 Q. Your view is SCO should forfeit whatever money it  
21 might be entitled to because it hasn't suggested a specific  
22 apportionment; right?

23 A. In light of the fiduciary relationship that exists  
24 between the parties and the fact that SCO executed this  
25 without Novell's approval and involvement and SCO has not been

1       forthcoming with some suggestion as to what the value should  
2       be for the UnixWare portion, yes.

3             Q.    You think SCO should forfeit the money?

4             A.    Well --

5             Q.    You just said yes.

6             A.    Well, then --

7             Q.    So that's your answer.

8             A.    Well, I guess forfeit the money is a  
9       characterization.

10            Q.    You're an attorney.  I've asked you a question.  
11       What's your view?  Is it forfeiture?

12            A.    What my view is is that there's no reason Novell  
13       should forfeit any of the monies itself given the position  
14       that Novell is in, given that Novell was excluded.

15            Q.    That begs the question, doesn't it?  We were here  
16       to determine who gets what, what the relative value is of this  
17       license.

18            A.    Absolutely.  And, of course, as I've expressed and  
19       you certainly are going to disagree with me, that from my  
20       perspective, given the fiduciary relationship and all the  
21       factors that I've described, that if there's a party that's at  
22       risk of forfeiting or foregoing some consideration as between  
23       Novell and SCO, it should be SCO.

24            Q.    Section 3 of the Microsoft agreement is the  
25       UnixWare license; correct?

1           A.    Yes.

2           Q.    It was \$7 million worth of the UnixWare license;  
3           correct?

4           A.    You know, I just know there's money there. I have  
5           not memorized the payment amounts for each section of that  
6           agreement.

7           Q.    The Sun UnixWare license is broader than the  
8           Microsoft UnixWare license, isn't it?

9           A.    I haven't looked at the two in those terms.

10          Q.    Well, you testified at some length in your direct  
11          examination about how much thought you've put into this. The  
12          Section 3 Microsoft license is narrower than -- Section 3  
13          license of Microsoft UnixWare is narrower than Sun's UnixWare  
14          license; correct?

15          A.    Is the question whether I said that before or  
16          whether that's a fact?

17          Q.    No. I'm asking you a yes or no question right now.

18          A.    Right now. Well, the elements of a license in its  
19          breath I think are the technology that are licensed and the  
20          rights that are conferred. And the rights that are conferred  
21          in the Sun agreement I can't imagine more expansive rights  
22          than those. I haven't looked at the Sun agreement and the  
23          Microsoft agreement side by side to see if there's any  
24          meaningful distinction in the technologies that are  
25          identified. So I simply haven't looked at the agreement from

1 that perspective. I haven't thought of it that way.

2 Q. You're not able as you sit here to compare the  
3 scopes of the UnixWare license of Microsoft 2003 to the scope  
4 of the UnixWare of Sun in 2003; that's your testimony?

5 A. Are you asking me to do that now?

6 Q. I'm asking you --

7 A. I have not done it before.

8 Q. How could you not have done that and apportion any  
9 value to the Sun license?

10 A. For the reasons that I've stated before.

11 Q. The UnixWare license in the Sun agreement is worth  
12 at least \$7 million, isn't it? Wouldn't it follow from the  
13 act of the Section 3 UnixWare license in Microsoft was for  
14 \$7 million?

15 A. I have not, you know, come here today having  
16 attempted to made any specific valuations, just as SCO has not  
17 offered any specific valuations. And my position as between  
18 Novell and SCO is it's incumbent on SCO to do that. And if  
19 they haven't done it, then they're the ones that should bear  
20 the risk of foregoing consideration.

21 Q. But you concede that if you're wrong about that  
22 point, if you're wrong about that burden that you think  
23 applies to SCO, then there is value to the UnixWare components  
24 in the Sun agreement. That is your view, isn't it?

25 A. Can you say that again?

1           Q.    If you're wrong about your argument that SCO should  
2           forfeit the value of any UnixWare license in the Sun  
3           agreement, if you're wrong about that, there is value to the  
4           UnixWare Sun agreement, isn't there?

5           A.    I don't understand what you're saying.  There's  
6           value to the UnixWare --

7           Q.    Are you suggesting that Sun take no money, no  
8           consideration for the broad UnixWare license it received in  
9           2003?

10          A.    I'm just confused because the whole agreement  
11          characterizes the UnixWare agreement.  And you're specifying  
12          the UnixWare portions?

13          Q.    I understand Novell's position to be that there's  
14          at least a broad UnixWare license in the Sun agreement.  I  
15          understand that Novell takes the position, that there's more  
16          than that as well.  And SVRX components.  Are we on the same  
17          page?

18          A.    No.  Where I got disconnected from you is that you  
19          said that the Sun UnixWare license.  And what I've heard SCO  
20          do is it characterize the entire agreement as a UnixWare  
21          license.  And you just asked me if there's value associated  
22          with it.  And I think, well, yeah, Sun paid for it.  So I  
23          wasn't sure if you were asking about the entire agreement.

24          Q.    I'm asking just about what you regard as the  
25          UnixWare portion.

1           A.    The UnixWare portion?  Yeah.  I've never said --  
2           I'm drawing some conclusion that there's no value in the  
3           UnixWare related rights that are conferred.  But the question  
4           is, how do you establish some valuation for apportionment  
5           purposes?  And SCO has not provided anything on that.  And  
6           again, under those circumstances, I feel Novell's entitled to  
7           conclude that that money should be Novell's, and Novell should  
8           not be required to forfeit something here.

9           Q.    Your view that Novell gets all the money, the  
10          10 million, is based on a legal argument; correct?

11          A.    Well, it's based on -- legal arguments don't exist  
12          in a vacuum.  It's based on the factual circumstances and the  
13          legal arguments arising out of the fiduciary relationship that  
14          exists between the two parties.

15          Q.    Your view that Novell gets everything is not based  
16          on an objective assessment of what was paid for the rights in  
17          the 2003 Sun agreement, is it?

18          A.    It's not -- it does not reflect any type of  
19          economic valuation or analysis or anything of that nature.

20          Q.    I want to turn back to your discussions with SCO in  
21          the fall of 2002.

22          A.    Okay.

23          Q.    I won't be much longer.

24                   Exhibit 400, Mr. Jones.  It should be in that book.

25                   THE COURT:  This is SCO 400?

1 MR. NORMAND: Yes, Your Honor.

2 THE WITNESS: Yes. I've got it.

3 Q. BY MR. NORMAND: Now, at the time of these  
4 discussions with Mr. McBride, Novell had no interest  
5 whatsoever in supporting any UNIX infringement claims against  
6 end users of Linux; correct?

7 A. Yes. I think that's correct. And that's what our  
8 executives advised me.

9 Q. Novell's efforts were prioritized in other places;  
10 correct?

11 A. Well -- I guess I just say yes, just by virtue of  
12 the fact that this didn't have priority. So....

13 Q. Now, at the time of these discussions Novell was  
14 fully moving in the direction of being involved in Linux;  
15 correct?

16 A. That's correct.

17 Q. And you didn't say that to SCO in these  
18 discussions; correct?

19 A. No. I mean, to me I think we had acquired Zimeon  
20 at that point, which is the Linux desktop company. So that  
21 was public knowledge. And any other information that I had  
22 about Novell's investigations would have been confidential, so  
23 no.

24 Q. You didn't raise any objections with respect to the  
25 perspective licenses that Darl had mentioned; correct?

1           A.    I did not understand the licenses that would be  
2 granted.

3           Q.    You understood --

4           A.    Darl, he came to me requesting help with due  
5 diligence and assessing what SCO's rights would be.  I  
6 confided that once they understood what their rights would be,  
7 they would act accordingly.  So not having known the terms  
8 that would have been offered to people in any such program or  
9 any agreement and also just understanding that SCO seemed to  
10 be investigating intellectual property rights to understand  
11 the bounds what they might properly do, I don't think there  
12 was any need for me -- I don't know what I would have objected  
13 to.

14          Q.    He specifically told you that they were concerned  
15 about the use of UNIX code and use of UNIX code by Linux end  
16 users; correct?

17          A.    That's right.

18          Q.    What did you understand UNIX code to be?

19          A.    At that point I wouldn't know.

20          Q.    Didn't think about it?

21          A.    There wouldn't be -- as has been discussed, there  
22 is a wide variety of UNIX code that's been developed over the  
23 years.  So how would I know what specific code he would be  
24 discussing?  He did mention -- the one specific thing that  
25 Darl mentioned was the library.  But I couldn't understand,

1       you know, in the vast scheme of things, you know, where that  
2       would factor in or under what terms it would be offered or --  
3       you know, my information was very scant.

4             Q.     But you knew it concerned Linux and UNIX; correct?

5             A.     That I knew.

6             Q.     And Novell's position is that it retained  
7       substantial rights in the UNIX business; correct?

8             A.     We have substantial rights in pre-APA SVRX.  UNIX  
9       would be a pre-APA SVRX as a subset of UNIX.  So when someone  
10       says they're going to do something with UNIX, I cannot know if  
11       they're taking about something that would implicate Novell's  
12       interest or not.

13            Q.     And you understood SCO to be contemplating a  
14       program on its own; correct?

15            A.     Yes.  On its own -- well, what do you mean by, on  
16       its own?

17            Q.     You understood that SCO was interested in pursuing  
18       its own efforts against Linux end users; correct?

19            A.     Yeah.  I guess I just need not to jump to a  
20       conclusion here.  They were asking for Novell's cooperation  
21       and assistance to the extent of helping them identify  
22       documents or due diligence purpose and things of that nature.  
23       And, of course, they had questions about the terms of the  
24       earlier agreements.  And whether or not they had any  
25       involvement with third parties was something I had no

1 knowledge of. So I was hasty to say they were going alone.  
2 That was what I just described was the extent of the knowledge  
3 that I had.

4 Q. You're not suggesting that Mr. McBride had asked  
5 you to be a business partner in pursuing these Linux end  
6 users, are you?

7 A. What do you mean by business partner?

8 Q. It was SCO's effort and they were asking for due  
9 diligence support from Novell; right?

10 A. Yeah. The nature of the cooperation, and, you  
11 know, partnering covers a wide variety of activities. So  
12 Mr. McBride suggested, as he explained earlier here today, you  
13 know, hey, Novell, if you help support us in some way, what we  
14 intend to do that could have some business benefit to you.  
15 And so, Novell, what we want of you is to help us do due  
16 diligence. We think that will help support our efforts.

17 So is that partnering? I think that's some form of  
18 partnering. But that's the extent of what Mr. McBride  
19 explained to me. He didn't explain something beyond that to  
20 me or suggest something beyond that.

21 Q. This is Exhibit SCO 87, Your Honor.

22 THE COURT: Okay.

23 Q. BY MR. NORMAND: Mr. Jones, I want to go back to a  
24 couple of letters that we discussed. In 1996, you were  
25 employed by Novell; correct?

1           A.    Yes.

2           Q.    Now, in 1996, Novell informed its customers and  
3 business partners that Novell had transferred its existing  
4 ownership interest in all releases of UNIX and UnixWare to  
5 Santa Cruz; correct?

6           A.    Could you say that again? I was looking at the  
7 document, and you were speaking.

8           Q.    I said in 1996 Novell represented to its customers  
9 and business partners that it had transferred its existing  
10 ownership interest in all releases of UNIX and UnixWare to  
11 Santa Cruz; correct?

12                    This paragraph that is Attachment A. You can go to  
13 Attachment A.

14           A.    I guess the only liberty -- I mean, this letter was  
15 sent. I simply don't have the personal knowledge of how  
16 extensively it was sent, but I think you said its customers.  
17 So I don't know how many -- I just don't know how many  
18 customers received it. But this letter does reference in this  
19 exhibit all releases of UNIX System V and prior releases of  
20 the UNIX system. And the letter would be inconsistent, of  
21 course, with the asset purchase agreement.

22           Q.    But Novell did make these representations to  
23 Prentice-Hall; correct?

24           A.    It's sent -- well, you know, again, I assume  
25 Prentice-Hall received it, Novell wrote this in a letter to

1       Prentice-Hall by an Novell employee.

2               Q.    Novell said that it was assigning its right under  
3       its agreements that concerned those releases; correct?

4               A.    If this letter says that, it's inconsistent with  
5       the asset purchase agreement.

6               Q.    Let's go to Exhibit 411.

7               THE COURT:   SCO 411?

8               MR. NORMAND:   Yes, Your Honor.

9               Q.    BY MR. NORMAND:   This is a letter from Mike DeFazio  
10       to SunSoft.  Do you know what SunSoft is?

11              A.    I thought it was a software division of Sun.

12              Q.    You're correct.

13              A.    Okay.

14              Q.    And Novell specifically told Sun that Novell had  
15       transferred its existing ownership interest and all releases  
16       of UNIX and UnixWare; correct?

17              A.    This letter says that, and it's inconsistent with  
18       the APA.

19              Q.    Who signed this letter?

20              A.    Michael J. DeFazio.

21              Q.    What was his position?

22              A.    I don't know his precise title, but he was -- I  
23       know he had significant responsibilities for Novell's UNIX  
24       business.  You know, I regard him as having headed it up,  
25       really, at certain points in time.

1 Q. Was he head of the organization within AT&T and USL  
2 and later Novell responsible for product management, marketing  
3 and licensing terms and conditions for UNIX from 1984 to 1995?

4 A. I don't know what you're reading. It sounds  
5 plausible. It's obvious I don't come in here with that  
6 specific knowledge in my mind. But that sounds plausible.

7 Q. But you think he was wrong about what he said?

8 A. Yes.

9 MR. NORMAND: SCO 136.

10 Q. BY MR. NORMAND: There is a SCO -- what number is  
11 this?

12 MR. ERIC WHEELER: 136.

13 MR. NORMAND: 136, Your Honor.

14 Q. BY MR. NORMAND: This is a similar letter to  
15 Microsoft; correct?

16 A. Just a second.

17 MR. NORMAND:

18 Your Honor, I don't think there's a stipulation as  
19 to this document, so I move for its admission.

20 THE COURT: 136.

21 MR. MELAUGH: No objection.

22 THE COURT: Well, it's on the list, isn't it?

23 THE CLERK: It is not on the list.

24 THE COURT: 136. It's on my list.

25 SCO Exhibit 136.

1 THE CLERK: I don't have a 136 on mine, on my list.

2 THE COURT: Well, I'll admit it. It's on my list.

3 (Whereupon, SCO 136 was received.)

4 MR. NORMAND: Thank you, Your Honor. We'll cure  
5 the confusion.

6 Q. BY MR. NORMAND: Now, in these letters, Mr. Jones,  
7 Novell was telling people to deal directly with Santa Cruz;  
8 correct?

9 A. I've been reading the other part of the letter. So  
10 just a second.

11 (Time lapse.)

12 Q. BY MR. NORMAND: Have you had a chance to review  
13 the document?

14 A. Yes. Yes. It's consistent with what you said.  
15 These are -- it's informing the parties that the contracts  
16 have been assigned to SCO. So in effect that they should, you  
17 know, they should be dealing with SCO then.

18 Q. And Novell told Sun and Microsoft that; is that  
19 correct?

20 A. SunSoft and Microsoft.

21 Q. My colleagues remind me that when we went down with  
22 the system, I was on one of your e-mails.

23 A. Okay.

24 Q. Your infamous e-mails.

25 A. Infamous.

1 MR. NORMAND: This is still 399, Your Honor.

2 Q. BY MR. NORMAND: Do you have that e-mail in front  
3 of you, Mr. Jones?

4 A. Hang on just a second. Tab -- this is Exhibit --  
5 yeah, I've got this.

6 THE COURT: SCO 399.

7 THE WITNESS: Right. Thanks.

8 Q. BY MR. NORMAND: Let me know when you've had a  
9 chance to review it.

10 A. Okay.

11 (Time lapse.)

12 THE WITNESS: Okay.

13 Q. BY MR. NORMAND: Thank you, Mr. Jones.

14 You said on December 4th, 2002, that you and Mr.  
15 Wright had returned a phone call from Mr. McBride; correct?

16 A. Yes.

17 Q. And you said that Darl reiterated his request from  
18 Novell's assistance, and then he informed us that next week  
19 SCO will announce a Linux licensing program; correct?

20 A. Correct.

21 Q. That's an accurate statement; correct?

22 A. I believe so.

23 Q. In your review of this document, have you had seen  
24 any statements that you made that you think are inaccurate?

25 A. That I made that are inaccurate?

1 Q. Correct.

2 A. I think the only thing I might take issue with is  
3 my poor writing in the second sentence of the fourth paragraph  
4 where I talk about potential increase of the declining  
5 \$8 million revenue stream.

6 Q. But the rest of your statements in the e-mail you  
7 believe are accurate?

8 A. Yeah. And I think, as Mr. McBride was saying, I  
9 think he was just suggesting that the decline would slow, not  
10 that there would be some substantial increase or something of  
11 that nature.

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

13 THE COURT: Yes.

14 Q. BY MR. NORMAND: I hand you two last documents,  
15 Mr. Jones.

16 A. Okay.

17 Q. These are Novell 468 and 469. This is a Novell  
18 letter to Microsoft from September of 2007; correct?

19 A. Well, there are two letters. I'm sorry. We were  
20 on --

21 Q. I'm sorry. I'm on 468.

22 A. Okay.

23 Q. And 469 is a letter to Sun.

24 A. Yeah.

25 Q. And the content of the letter is the same; correct?

1 A. I don't know.

2 Q. Let's do 468.

3 A. Okay.

4 Q. Have you seen this letter before?

5 A. I think I have. I've seen so many documents. But  
6 I believe I've seen it.

7 Q. In this letter, Mr. LaSala, who was general counsel  
8 at the time; correct?

9 A. Yes.

10 Q. Tells Microsoft, quote:

11 We believe that the 2003 agreement is  
12 unenforceable, void or invalid, and hence that  
13 there may be copyright issues arising out of  
14 Microsoft's use of UNIX or UnixWare code in which  
15 Novell retains copyright ownership.

16 Do you see that line?

17 A. Yes.

18 Q. Does that statement reflect Novell's position  
19 today, as well?

20 A. Yes.

21 Q. Exhibit 469 is a letter to Sun. And it contains in  
22 bottom third of the letter the same statement; correct?

23 A. I think they're not quite identical. But you're  
24 asking if that still reflects Novell's position? That's the  
25 question?

1 Q. Right.

2 A. I believe so.

3 MR. NORMAND: Nothing further, Your Honor.

4 THE COURT: Pardon me?

5 MR. NORMAND: Nothing further.

6 THE COURT: Thank you, Mr. Normand.

7 Anything else, Mr. Melaugh?

8 MR. MELAUGH: Your Honor, we have no further  
9 questions of this witness.

10 THE COURT: Thank you, Mr. Jones. You may call  
11 your next witness.

12 MR. JACOBS: Your Honor, we have no further  
13 witnesses. We have a couple of exhibits to move into  
14 evidence. And we would request the opportunity to just check  
15 this evening against the exhibits that we looked at to make  
16 sure that they were either part of the stipulation or we moved  
17 them into evidence.

18 THE COURT: What exhibits are you talking about?

19 MR. JACOBS: So 430, Novell Exhibit 430 is the  
20 letter to the Arbitral Tribunal in which SCO stated that it  
21 had no further claims after this Court's copyright decision.

22 THE COURT: This is Novell 430.

23 MR. JACOBS: Correct.

24 THE COURT: Any objection?

25 MR. SINGER: No objection.

1 THE COURT: 430 is received.

2 (Whereupon, Novell Exhibit 430 was received.)

3 MR. JACOBS: And Novell Exhibits 468 and 469 are  
4 the two exhibits that you just saw in the examination of  
5 Mr. Jones. The letters from last September to Microsoft and  
6 Sun.

7 THE COURT: You want them in twice?

8 MR. JACOBS: No. He did not move them into  
9 evidence.

10 THE COURT: Didn't he? I thought he did.

11 MR. NORMAND: I missed the reference to the  
12 exhibits number. I'm sorry.

13 THE COURT: It's SCO.

14 MR. JACOBS: No. I believe it's Novell.

15 THE COURT: Novell 468 and 469.

16 MR. NORMAND: I would like to move them into  
17 evidence. Thank you.

18 THE COURT: I thought you would. 468 and 469 are  
19 received.

20 (Whereupon, Novell Exhibits 468 and 469 were received.)

21 MR. JACOBS: And then if we may, Your Honor, just  
22 check, we don't know of anything we left out. But we would  
23 like to check this evening on whether there were any further  
24 exhibits.

25 THE COURT: We'll check at the end of the trial, as

1 well, for both of you. All right.

2 MR. JACOBS: Otherwise we rest, Your Honor.

3 THE COURT: Thank you.

4 MR. SINGER: Your Honor, we would like to move at  
5 this time for an involuntary dismissal of these claims. I'm  
6 not going to ask to argue at this time, but argument on a  
7 certain basis later today. But we simply would like to do so  
8 on the basis of all the papers that have been submitted  
9 including arguments in our trial brief and proposed findings.

10 THE COURT: All right. And I'll take those motions  
11 under advisement.

12 And you may call your first witness.

13 MR. SINGER: That is John Maciaszek.

14 THE COURT: You want this on the record? Because  
15 we can't hear you if you do.

16 MR. SINGER: We would like to put on the record  
17 reserving the right to using these blowups used in the  
18 openings with any witnesses that will be called tomorrow. We  
19 won't use them with Mr. Maciaszek today.

20 THE COURT: You will not today?

21 MR. SINGER: I don't think we'll need them with  
22 Mr. Maciaszek.

23 THE COURT: All right. Well, that almost gives you  
24 your 24-hour notice.

25 Come forward and be sworn, please. Right here in

1 front of the clerk of court. Right there. That will be good.  
2 Thanks.

3 THE CLERK: Please raise your right hand.

4 JOHN MACIASZEK,  
5 called as a witness at the request of SCO Group,  
6 having been first duly sworn, was examined  
7 and testified as follows:

8 THE WITNESS: I do.

9 THE CLERK: Thank you. Please take the witness  
10 stand right there.

11 Please state your name and spell it for the record.

12 THE WITNESS: John Maciaszek, M-A-C-I-A-S-Z-E-K.

13 THE CLERK: Thank you.

14 DIRECT EXAMINATION

15 BY MR. SINGER:

16 Q. Good afternoon, Mr. Maciaszek.

17 A. Good afternoon.

18 Q. When were you first employed by AT&T or any company  
19 involved in the UNIX business?

20 A. Well, I started in AT&T back in 1966. The UNIX  
21 business portion was when I moved into USL in December of  
22 1991.

23 Q. So that's when you would date back your beginning  
24 of involvement with UNIX?

25 A. Centrally, yes. Before that I had peripheral

1 interactions relative to it on other product lines.

2 Q. When you started with USL, UNIX System Labs, in  
3 1991, what were your responsibilities?

4 A. I had product management responsibility for some  
5 components of the operating system business, as well as  
6 ultimately responsibility for the interaction between USL,  
7 Novell and the joint venture Univell.

8 Q. Did there come a time when your employment changed  
9 either to a new company or your responsibilities changed?

10 A. Fundamentally I've been a product manager ever  
11 since joining USL, all the way through the changes through  
12 Novell and through Caldera and back to SCO again.

13 Q. Has products for which you have managed include the  
14 UNIX System V products?

15 A. Yes.

16 Q. And do they include UnixWare?

17 A. Yes.

18 Q. What is your current employment?

19 A. I'm currently employed by SCO on a part-time basis.  
20 I'm sort of semiretired at the moment.

21 Q. Where do you live?

22 A. I live in Marlboro, New Jersey.

23 Q. And have you worked consistently in New Jersey on  
24 AT&T and UNIX System Labs and so forth?

25 A. Yes. Yes. I was born in New Jersey, and except

1 for my time in the Army, I lived there all my life.

2 Q. Mr. Maciaszek, was there a time when you worked for  
3 Novell?

4 A. Yes.

5 Q. What was that time period?

6 A. It was a time period when Novell acquired USL from  
7 AT&T. And during -- I was there during that entire duration  
8 before the sale to Santa Cruz.

9 Q. Were your responsibilities the same?

10 A. Essentially the same, yes. I was product manager.

11 Q. And when the sale occurred to Santa Cruz, did you  
12 go over to Santa Cruz?

13 A. Yes, I did.

14 Q. And did you continue with those responsibilities?

15 A. Yes.

16 Q. And similarly forwarded to SCO?

17 A. Yes.

18 Q. Was there a licensing group that was at Novell at  
19 the time that the asset purchase agreement was entered into?

20 A. Yes, there was.

21 Q. And what happened to that licensing group or most  
22 of the members of the group after the agreement was executed?

23 A. They basically moved over to SCO. I believe  
24 everybody with possibly one or two exceptions moved to  
25 Novell -- I mean to SCO.

1 Q. They moved from Novell to SCO?

2 A. That's right.

3 Q. Did they continue with the licensing of UNIX for  
4 Santa Cruz?

5 A. Yes, they did.

6 Q. And you remained part of that group?

7 A. Well, I was not in the licensing group. But in  
8 product management. And obviously I had responsibilities to  
9 interact with the licensing group to put together the  
10 schedules.

11 Q. Can you explain what the Santa Cruz UNIX licensing  
12 group did?

13 A. They were responsible for the legal aspects of new  
14 schedules that got put together for new product offerings.  
15 I'm talking in this case about source code products. Plus  
16 they were responsible for all the contracts that were  
17 negotiated with customers for both binary and source and  
18 interacted with all the sales organizations worldwide.

19 Q. What is UnixWare?

20 A. What is UNIX or UnixWare is the latest, depending  
21 on the number you want, it's -- what is UnixWare. The next  
22 release of UNIX System V that we offer in both binary package  
23 format today as well as potentially source licenses for it.

24 Q. Are you familiar with SVR4.2 MP?

25 A. Yes.

1 Q. What does that stand for?

2 A. That's System V Release 4.2 multiprocessing  
3 version.

4 Q. How did that relate to UnixWare?

5 A. Well, that was the predecessor to UnixWare 2.  
6 UnixWare 2 essentially contains the bulk of SVR4.2 MP, plus  
7 some additional user interface code that was built on top of  
8 that.

9 Q. What does the MP mean?

10 A. Multiprocessor. That's today's technology.  
11 Typically all the computers you see today have more than a  
12 single processor in it.

13 Q. Is that important?

14 A. That contains the code that enables the operating  
15 system to support those multiprocessors.

16 Q. Is that an important development?

17 A. Absolutely. I mean, there were very few today even  
18 at the desktop level that you buy with -- having only a single  
19 processor.

20 Q. You mentioned after SVR4.2 MP you had UnixWare 2?

21 A. Yes.

22 Q. Was there a UnixWare 1?

23 A. Yes. UnixWare 1 was actually based on SVR4.2, no  
24 MP, which was a single processor version of the operating  
25 system. And UnixWare 1 was produced as part of the joint

1 venture of Univell and USL. Univell did some work on the user  
2 interfaces. Novell added some code with respect to the  
3 NetWare, and then the product was sold, was initially sold as  
4 a packaged product. The initial units were packaged products  
5 by Univell.

6 Q. Was UnixWare 2.0 the first multiprocessing version  
7 of UnixWare?

8 A. That's correct.

9 Q. Now, did the versions of UnixWare build on the  
10 earlier System V UNIX code?

11 A. Yes, of course.

12 Q. And after -- at the time of the APA, did you have a  
13 transfer of the UnixWare business to Santa Cruz?

14 A. Yes.

15 Q. And did Santa Cruz continue in development and  
16 release of its own versions of UnixWare?

17 A. Yes, it did.

18 Q. Did it make any modifications to the UnixWare  
19 operating system?

20 A. Every new version contains modifications to support  
21 new hardware, support new features that were needed by the  
22 more modern applications that were coming to the market.

23 Q. And you also were employed at the time in 2001 when  
24 Santa Cruz sold its business to Caldera?

25 A. Yes, I was.

1 Q. And what happened to the UNIX licensing group at  
2 that time?

3 A. That crew moved, as far as I can recall, lock,  
4 stock and barrel to Caldera.

5 Q. And your involvement continued throughout?

6 A. Yes, that's correct.

7 Q. Okay. Now, at Novell, with respect to UnixWare,  
8 did you have any involvement in the negotiation or oversight  
9 of UnixWare licenses?

10 A. Yes.

11 Q. Can you explain what your responsibility was?

12 A. As a product manager, my recollection is that I was  
13 involved in putting together the UnixWare 2 license, to model  
14 it so that it paralleled our package product introducing what  
15 the discount structure would be.

16 Q. Can you describe generally what a UnixWare license  
17 provided at that time?

18 A. The UnixWare license provided access to the source  
19 code of the corresponding package product and would enable an  
20 OEM or other licensee to construct an identical product to  
21 what we were shipping as packaged product or to use the source  
22 code to produce a version of UnixWare that would run under  
23 alternate architecture. The products that we were selling  
24 then and continue to sell now are targeted at the Intel  
25 market. But at that time, there clearly were other chipsets

1 that were in the marketplace. And a licensee of that source  
2 code could produce a version that would run on those alternate  
3 architectures.

4 Q. Let me go over that a little bit and make sure I  
5 understand the set.

6 There were some SCO UnixWare products that were  
7 just sold out to the market; is that correct?

8 A. The packaged product, yeah.

9 Q. And that would be --

10 A. Excuse me. We're almost out of water here.

11 THE COURT: Just enough for you.

12 THE WITNESS: Right. It looks that way.

13 Q. BY MR. SINGER: Are you ready now?

14 A. Yes.

15 Q. The end user -- the packaged products go to end  
16 users; is that correct?

17 A. Ultimately to the end users, yes. We sold through  
18 a multi-tier distribution and still do.

19 Q. Now, you mentioned you also licensed source code to  
20 OEMs, original equipment manufacturers; is that right?

21 A. Right. Those are computer manufacturers.

22 Q. And your point was they could use that to develop  
23 their own type of operating system based on that source code  
24 and sell those products?

25 A. Right. They would either modify it because they

1 had a different central processing architecture or they would  
2 need to make improvement so that it would perform best on  
3 their hardware over and above, you know, other hardware.

4 Q. When you gave one of those OEMs a license to do  
5 that with the UnixWare source code, could they use any part of  
6 the UnixWare source code for developing their own product?

7 A. Yes, of course.

8 Q. And that would include the System V source code  
9 that may have originated back in 1969 or later times?

10 A. Well, whatever was in UnixWare was UnixWare.

11 Q. There was no distinction in terms of what the  
12 customer could use?

13 A. No, absolutely not.

14 Q. Now, when you licensed UnixWare and at the time  
15 that you were Novell, did Novell grant the customer any  
16 license to any older versions of the System V products?

17 A. Well, the standard practice going back to AT&T days  
18 was to grant the right to use prior products as part of the  
19 new products.

20 Q. And you said that goes back to AT&T days?

21 A. Oh, yeah. Started well before I joined the  
22 organization. Go back and look at the SVR1.1 prior, and there  
23 were always prior products listed there.

24 Q. Did you obtain --

25 A. Is it okay if I have a cough drop?

1 THE COURT: Sure.

2 THE WITNESS: Thank you.

3 Q. BY MR. SINGER: And if you need more water --

4 A. No. I still got the water. When I talk a lot I  
5 tend to cough.

6 Okay. Let's go.

7 Q. Okay. Did you have personal knowledge of that  
8 licensing of prior products at the time that you joined UNIX  
9 Systems Labs?

10 A. Oh, yes. I mean, I was involved in creating the  
11 4.2 license, so I understand very well what the situation was.

12 Q. Were the customers who were given those prior  
13 products asked to pay anything extra for the prior products?

14 A. Absolutely not.

15 Q. And is that a consistent practice throughout the  
16 time that you have been at Novell and both its predecessor and  
17 successor companies?

18 A. Absolutely. I can't remember or recall any  
19 occasion where there would be any even thought given to charge  
20 them for that.

21 Q. Was there any requirement imposed that you would  
22 only give the prior -- the access or right to use prior  
23 products to those licensees who had bought for value that  
24 earlier version?

25 A. No.

1 Q. That's not something you looked into?

2 A. No. Absolutely not. That was part of the standard  
3 license in general. We use the same license for all licensed  
4 users.

5 Q. Now, when the original equipment manufacturer  
6 entered into a license, what types of fees did they pay?

7 A. Well, there would be a fee for the software  
8 agreement, a fee for the sublicensing agreement and a fee for  
9 the individual schedules or the individual licensees with  
10 particular releases of the product.

11 Q. Was the fee for the actual source code, was that a  
12 one-time fee or something that would recur?

13 A. It was a one-time fee.

14 Q. And then you mentioned there would also be a fee  
15 for distribution?

16 A. That's right. The sublicensing fee.

17 Q. Was that also a one-time fee?

18 A. It in effect became a one-time fee. It was listed  
19 each time. But if somebody already had one, we typically  
20 didn't charge them again.

21 Q. Was there a third source of fees or royalties  
22 involved?

23 A. Well, the most obvious fee and the most generic was  
24 the one when you distributed the products there would be a  
25 royalty or per copy fee that was paid for each copy of the

1 product, the derivative work that was distributed.

2 Q. Is that sometimes referred to as a binary fee?

3 A. Binary per copy fee, right.

4 Q. And what does the binary refer to?

5 A. Well, it is non-source. In essence, it's a running  
6 pro product that has been created when compiling, linking  
7 source code into a binary. In essence, think about the CD  
8 that you put in when you install Windows. That's a binary  
9 product. You don't get the source code to Windows.

10 Q. And that fee, of course, would vary depending on  
11 how many products were sold?

12 A. There was a discount schedule, and also it would  
13 depend on what release you were shipping. Over the historical  
14 time the fees tended to go up as time marched on.

15 Q. Now, I'd like to show you Exhibit 141. This is  
16 SCO 141.

17 May I approach the witness, Your Honor?

18 THE COURT: Yes.

19 Q. BY MR. SINGER: Mr. Maciaszek, do you recognize  
20 this exhibit?

21 A. Yeah. This looks to me like a 2.1 schedule for the  
22 UnixWare 2.1.

23 Q. You see a customer name on the second page?

24 A. Right. NCR.

25 Q. Okay. And was this a license for UnixWare 2.1

1 source code?

2 A. That is correct.

3 Q. Now, if you turn to Exhibit I, prior products on  
4 Page 24 --

5 A. Okay. I'm there.

6 Q. Okay. Is this a list of prior products which NCR  
7 was given rights to use in connection with this license?

8 A. Yes, that is correct.

9 Q. Was any additional fee charged to NCR to make use  
10 of any of these products?

11 A. No.

12 Q. Was there anything special about this treatment of  
13 NCR from what you treated other customers at this time?

14 A. Absolutely not. This is a standard schedule, as  
15 best I can tell from looking at it.

16 Q. Did there come a later point in time after this  
17 when you stopped listing particular prior products on a  
18 schedule?

19 A. Yes. With UnixWare 7.

20 Q. Why was that done?

21 A. Well, the plain thrust there, if you go look at the  
22 history, at that time we were primarily in the packaged  
23 product business. The majority of OEMs had already downsized  
24 and eliminated their engineering organization. So our goal  
25 with UnixWare 7 was a standard binary product that would go

1 into the marketplace. Consequently, we didn't add the  
2 additional prior products because we wanted to maximize the  
3 similarity of all releases of UnixWare.

4 Q. If a customer wanted to use, make some use of a  
5 prior product they had had, was that a problem?

6 A. No.

7 Q. Did you charge anything extra for that?

8 A. No. To my knowledge, I don't think anybody -- we  
9 actually did -- I don't think we actually modified anybody for  
10 that purpose. But had they asked, we would have added the  
11 additional prior products without any issue.

12 Q. Do you recall in the period of time that was the  
13 way you approached the license whether anyone even asked to  
14 use the prior products?

15 A. I don't believe anyone ever did. I'm not -- I  
16 certainly can't recall anyone who did.

17 Q. Can you turn to Page 6 of the license, which has  
18 Paragraph 10. Can you see the section, perhaps we can blow it  
19 up, called the Novell NetWare software?

20 A. Yes, I do.

21 Q. What does that paragraph mean to you?

22 A. Well, NetWare was a component of UnixWare 2. There  
23 was some components of NetWare. At that time, Novell had the  
24 strategy, not unlike the one I referred to earlier about  
25 UnixWare 7, of wanting to make NetWare ubiquitous across all

1 operating systems. So UnixWare 2 contained NetWare  
2 components. And in essence, what this is saying is that you  
3 had to include -- wait a minute. Let me read this one -- oh,  
4 you could only use the source code for NetWare should you  
5 choose to license it; in essence, to fix bugs, but not to make  
6 derivative work. That was to keep NetWare standards.

7 Q. So this was a limitation on the use of NetWare,  
8 which was a Novell product, which was being sold along with  
9 the UnixWare?

10 A. Yes, that's correct. If you were a licensee of  
11 UnixWare 2.1, we would have delivered to you the complete  
12 source code to build that product coupled with some binary  
13 components that you couldn't change. NetWare was one of them.  
14 There were some other third-party components. NetWare source  
15 was licensable as an add-on to the 2.1. I believe if you look  
16 at the first page of the schedule there is a separate price  
17 for it. This paragraph is constraining what you could do with  
18 that source should you choose to optionally license it.

19 Q. Was there any restriction, Mr. Maciaszek, in the  
20 license agreement on earlier versions of UNIX software, not  
21 talking about NetWare now, but UNIX software that may have  
22 been developed by Novell or its predecessors?

23 A. No.

24 Q. So this was specific for NetWare?

25 A. That's correct. NetWare was considered to be the

1 crown jewels of Novell at the time. And I would assume it  
2 still is today.

3 Q. Now, when -- you've discussed the fact there was no  
4 separate source code licensing fee for including prior  
5 products; is that correct?

6 A. That's correct.

7 Q. Now, let's say you have a binary product that one  
8 of these companies developed using that source code. Was  
9 there a method that was used to determine what royalty scale  
10 you would use; in other words, whether the royalty would be  
11 calculated by the most recent UnixWare version or an earlier  
12 version of the System V code?

13 A. The royalty was always based on the latest source  
14 code that was incorporated and used to build the derivative  
15 work. So if you were shipping 2.1, you would read this  
16 schedule, and it would tell you exactly what you would have to  
17 pay.

18 Q. What if you have a derivative work that has some  
19 old System V code in it and some more recent versions in  
20 UnixWare, how would you determine the royalty in that  
21 situation?

22 A. The royalty was the same.

23 Q. What would it be based on?

24 A. Pardon me? It would be based according to this  
25 schedule, what we said it was for UnixWare 2.1. That was the

1 whole purpose of the prior products.

2 Q. How much code of UnixWare would there need be to  
3 trigger the UnixWare royalty as opposed to one of the older  
4 royalties?

5 A. Well, that's the concept. The one-line-of-code  
6 concept said if you licensed UnixWare 2.1 and it was the  
7 latest release, if you took a single line of code from  
8 UnixWare and included it in a derivative work, your derivative  
9 work as you distribute it would be subject to the terms,  
10 conditions and obviously royalties which were part thereof of  
11 the UnixWare 2.1 schedule. So you'd pay based on UnixWare if  
12 you took one line of code from UnixWare sources and put it in  
13 derivative work.

14 Q. That's why it's called one line of code?

15 A. That's correct.

16 Q. So even if 99 percent of the code in that  
17 derivative product was an older System V version, if it was  
18 one line of UnixWare, it would trigger UnixWare royalty?

19 A. That is correct.

20 Q. And under the APA, are you aware whether any  
21 UnixWare royalties had to be remitted to Novell?

22 A. No UnixWare royalties remitted to Novell. There  
23 would have been possibly royalties paid on UnixWare based upon  
24 the business model that was part of the APA. But that was  
25 never achieved, so we never did pay.

1 Q. You're referring now to the part of the APA which  
2 had a special UnixWare royalty?

3 A. That is correct.

4 Q. And that was never achieved, you said?

5 A. As far as I know it was never achieved. And as the  
6 product manager I would have been aware if we were paying  
7 those royalties.

8 Q. And by achieved, the sales never reached the level  
9 that that would be kicked in by?

10 A. That's correct. It was a business plan that was  
11 stipulated as part of the APA. And if we achieved certain  
12 targets, then some royalties potentially would have gone back  
13 to Novell. But that was never achieved.

14 Q. Okay.

15 I have nothing further. Thank you.

16 THE COURT: Thank you.

17 You may cross-examine, Mr. Jacobs.

18 MR. JACOBS: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. JACOBS:

21 Q. Mr. Maciaszek, good afternoon.

22 A. Good afternoon.

23 Q. Could you take a look again at SCO 141, please.

24 A. Is that what I'm looking at now?

25 Q. Yes. That's that NCR license.

1           A.    Okay.

2           Q.    And if you look at the second line, you see it?  It  
3   says, supplement Number 112?

4           A.    Yes.

5           Q.    Can you explain, please, what that means?

6           A.    Well, that says to me that there would have been  
7   111 prior agreements or supplements that NCR had executed  
8   prior to this one.

9           Q.    And in each of those 111 prior agreements or  
10   supplements, NCR would have paid fees for that supplement?

11          A.    I would have assumed -- I would assume so.  I can't  
12   testify if that's correct since I'm not aware of them.

13          Q.    That was -- based on the ordinary license practice,  
14   which you testified that you're familiar with, that would be  
15   your assumption?

16          A.    Yes.

17          Q.    So at least in this particular case, this was not a  
18   fresh out-of-the-box license of March 31, 1997, of  
19   UnixWare 2.1 to NCR with no history to it, was it?

20          A.    It was a fresh 2.1.  There was clearly interaction  
21   and history for NCR's relationship going back all the way to  
22   AT&T, obviously.

23                   THE COURT:  Excuse me.  All the way back to what?

24                   THE WITNESS:  To AT&T when they first licensed  
25   their first substantiation of UNIX from AT&T.  And I can't

1 tell you what that was.

2 THE COURT: Okay.

3 THE WITNESS: It was before my time.

4 THE COURT: Excuse me, go ahead.

5 Q. BY MR. JACOBS: Take a look, please, sir, at the  
6 prior products section of this agreement. I believe you told  
7 us it was Exhibit I. This would be Page 77766 on this  
8 exhibit.

9 A. Okay.

10 Q. And I believe you testified -- I think you might  
11 have just been mistaken about the meaning of Mr. Singer's  
12 question. He asked you whether there were any restrictions on  
13 the use of the prior products, and you said no. That's not  
14 quite right; correct?

15 A. Well, in this particular case, there was a  
16 restriction with respect to the corporation of NetWare in the  
17 application server and personal edition, if that's what I'm  
18 reading.

19 Q. Well, there were restrictions on, for example, the  
20 use of SCO UnixWare 2.0 under this license agreement, are  
21 there not, sir?

22 A. I think I just said what it was. I said that if,  
23 in fact, you deleted NetWare from your derivative work, then  
24 you were only able to use 2.0 and 1.1.

25 Q. Let me ask you -- perhaps I could ask it this way,

1       sir. Take a look at prior products, and you see that it says,  
2       SCO UnixWare Release 2.0. Do you see that?

3             A. Yes.

4             Q. Was it your understanding under this agreement that  
5       the customer was free to publish the source code of SCO  
6       UnixWare 2.0 on its website?

7             A. No, absolutely not.

8             Q. Why not? What restricted him?

9             A. I would assume it would have been -- the place that  
10       you would find that restriction would be in the software  
11       agreement.

12            Q. In the --

13            A. Software agreement.

14            Q. In the software agreement which governs all the  
15       software licenses --

16            A. Unless it's superceded, yes.

17            Q. You would be pretty shocked if a customer said, you  
18       got the rights to release 2.0. Under a 2.1 agreement, we can  
19       do whatever we want with it including publishing it on our  
20       website?

21            A. That was not -- that certainly would not be  
22       authorized under the software agreement.

23            Q. And publishing the software code on the website  
24       would be a big deal in your capacity as a product manager?

25            A. Yes.

1 Q. Why?

2 A. Well, it depends on what you were publishing, what  
3 purpose you were publishing it for.

4 Q. You're publishing the entire source code for  
5 SCO UnixWare 2.0.

6 A. That would have been a violation of your  
7 contractual rights.

8 Q. And substantial injury to the owner of SCO  
9 Release -- UnixWare 2.0?

10 A. Yes.

11 Q. And the same with, say, let's pick one,  
12 UNIX System V Release 4.2 Intel386 Implementation. Everything  
13 you said about SCO UnixWare 2.0 applies to that release, as  
14 well; correct?

15 A. Well, it's a matter of greed. The bulk of that  
16 stuff was obsolete at the time.

17 Q. If a customer under your tenure as product manager,  
18 say when you were at Novell --

19 A. Yes.

20 Q. -- and let's go back a little bit, had published on  
21 its website, Internet is just coming into being, and they  
22 publish on their website UNIX System V Release 4.0 Intel386  
23 the Version 3 implementation, that would have been a big  
24 surprise, wouldn't it?

25 A. Yes, it would have been.

1 Q. And it would have been a substantial potential  
2 injury to the business you were responsible for?

3 A. Absolutely.

4 Q. Now, you talked about the development practices of  
5 the UNIX operating system. You testified that modifications  
6 were added over time with each successive release. Do you  
7 recall that testimony?

8 A. Yes.

9 Q. And isn't it a fact, sir, that modifications also  
10 include deletions of code over time?

11 A. That is correct. Substitutions, as well.

12 Q. And I think in answer to a question from Mr. Singer  
13 that was driving at a somewhat similar point, you said,  
14 whatever is in UnixWare is in UnixWare. Do you recall that  
15 answer?

16 A. Yes.

17 Q. And in order to know whether any particular code  
18 from a prior release has been carried forward all the way to  
19 the present day, you would actually have to look at the code  
20 and compare it, wouldn't you?

21 A. To be definitive, yes.

22 Q. And it's quite possible that code from, say, UNIX  
23 System 4.0, pick your release, has been deleted over time and  
24 is not in the current version of UnixWare?

25 A. That's correct. It could have been deleted or it

1       could have been substituted or enhanced.

2               Q.    And the same is true for, say, UNIX System IV, pick  
3       your release, and, say, SCO UnixWare 2.1?

4               A.    That's correct.

5               Q.    Under the OEM agreements, an OEM licensee could  
6       create its own version of UNIX and put its name on it, say,  
7       Sun Solaris; correct?

8               A.    That's correct.

9               Q.    And it is, indeed, your understanding that Sun  
10      Solaris is based upon a UNIX System V release; correct?

11              A.    That is correct.

12              Q.    Do you happen to know which release, sir?

13              A.    To be perfectly frank, no, I don't. I have not  
14      looked at the Solaris code recently, so I do not know.

15              Q.    It is true that Solaris was developed before the  
16      1995 asset purchase agreement; correct?

17              A.    Yes.

18              Q.    And it would not surprise you if you found  
19      substantial code predating the asset purchase agreement in Sun  
20      Solaris?

21              A.    No. It wouldn't surprise me if there were code  
22      from the prior release, no.

23              Q.    And at any particular point in time, an OEM  
24      licensee could stop taking additional releases of UNIX or  
25      UnixWare and develop it on its own path; correct?

1           A.    That's correct.

2           Q.    And, in fact, some OEMs did that; correct?

3           A.    Yes.

4           Q.    For example, Sun Solaris; correct?

5           A.    Yes.

6           Q.    They -- in so far as their code refresh, if you  
7 will, from any of the UNIX businesses was concerned, it was  
8 frozen in time as of the last schedule attached to their  
9 software agreement; correct?

10          A.    I would have assumed, yes.  I think it was 4.0, but  
11 I'm not positive.

12          Q.    And that code as to Sun, that older code, that is  
13 the UNIX code on which then as of that date and going forward,  
14 unless they were to sign a new license, they were building  
15 their variance on; correct?

16          A.    Yes.

17          Q.    And --

18          A.    I would assume there would be code from other  
19 sources, as well.  But, yes.

20          Q.    You're right.  I didn't actually ask that quite  
21 precisely enough.

22                 In so far as the UNIX code is concerned, once  
23 they're frozen in time as of their latest schedule, that is  
24 the UNIX code on which they were relying; correct?

25          A.    Correct.

1           Q.    And as to Sun in that case, that UNIX code has  
2           substantial value, doesn't it?

3           A.    Well, you'd have to ask Sun that.  I mean, I can't  
4           answer that question.

5           Q.    Well, if you went to them and say, after the asset  
6           purchase agreement went to them in 1996 and said, you know  
7           what, we want you to strip out all of that UNIX System V  
8           Release 4 code from Sun Solaris, what do you think their  
9           reaction would have been?

10          A.    It wouldn't have been favorable.

11          Q.    Because it would have been a substantial injury to  
12          their business, would it not, sir?

13          A.    Yes.

14          Q.    Have you in preparing for your testimony studied  
15          any other examples of UnixWare licensing other than the NCR  
16          Corporation?

17          A.    Studied?

18          Q.    Yes.

19          A.    No, not to my knowledge.  I don't recall studying  
20          anything.

21          Q.    Have you surveyed the UNIX licenses that SCO and  
22          its predecessors have entered into to try and form an  
23          understanding whether your testimony today about the practices  
24          is, in fact, supported by the actual underlining documents?

25          A.    I did not study all licenses, no.

1 Q. Did you study any of the licenses?

2 A. I'm aware of a good number of them.

3 Q. But did you go back and check before you testified  
4 today to see whether the documents relating to UNIX licensing  
5 practices support your testimony today?

6 A. Probably casually, yes. I don't recall any detail  
7 going back over all of those licenses.

8 Q. Thank you.

9 Thank you, Your Honor. No further questions.

10 THE COURT: Thank you.

11 Mr. Singer?

12 MR. SINGER: Just a couple of questions.

13 REDIRECT EXAMINATION

14 BY MR. SINGER:

15 Q. Mr. Maciaszek, if Sun, once they get a UnixWare  
16 source code license incorporates one line of that UnixWare  
17 program into their new Solaris products, do they have to pay  
18 royalties on the binary products based on the UnixWare  
19 schedule?

20 A. Yes.

21 Q. Is that an application to what you discussed as the  
22 one-line-code rule?

23 A. That is correct.

24 Q. Can you think of any reason why Sun would buy a  
25 license from UnixWare if they weren't interested in making use

1 of new technology?

2 A. It doesn't make any sense to me.

3 Q. Now, with respect to the NCR agreement,  
4 Exhibit 141, you were asked about the fact that there were a  
5 lot of earlier supplements as being 112. Are prior  
6 supplements also done whenever there are additional CPUs which  
7 are being added to the license to make use of the software?

8 A. Yes, that is correct.

9 Q. Are they done for additional distributions of the  
10 software?

11 A. Yes, that is correct.

12 Q. So it doesn't necessarily mean a new release of the  
13 operating system?

14 A. Oh, absolutely not. There are all kinds of  
15 ancillary products that would end up being on one of these  
16 supplement licensing forms.

17 Q. So did NCR's rights to make use of prior software  
18 products as set forth in this UnixWare license depend in any  
19 way on the fact there were 112 prior supplements?

20 A. Absolutely not.

21 Q. Your answer?

22 A. Absolutely not.

23 MR. SINGER: Nothing further.

24 THE COURT: Thank you.

25 Anything else, Mr. Jacobs?

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MR. JACOBS: No, Your Honor.

THE COURT: I assume this witness may be excused?

MR. SINGER: He may.

THE COURT: You may be excused.

We'll be in recess now until 3 o'clock when you'll  
be back to argue the motions.

MR. JACOBS: Great.

MR. SINGER: Can we leave everything as it is, Your  
Honor?

THE COURT: Sure.

(Whereupon, the trial proceedings were concluded.)

\* \* \* \* \*

1 STATE OF UTAH )  
2 ) ss.  
3 COUNTY OF SALT LAKE )

4 I, KELLY BROWN HICKEN, do hereby certify that I am  
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of  
7 the foregoing matter on April 30, 2008, and thereat reported  
8 in Stenotype all of the testimony and proceedings had, and  
9 caused said notes to be transcribed into typewriting; and the  
10 foregoing pages number from 207 through 280 and 355 through  
11 constitute a full, true and correct report of the same.

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

14 And hereby set my hand and seal, this \_\_\_\_ day of  
15 \_\_\_\_\_ 2008.

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KELLY BROWN HICKEN, CSR, RPR, RMR