

1 THE COURT: You may cross-examine, Mr. Jacobs.

2 MR. JACOBS: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. JACOBS:

5 Q. Good afternoon, Mr. Hunsaker.

6 A. Good afternoon.

7 Q. You've spent by my calculation about over 10 years
8 in the computer business?

9 A. More than that. Since about 1989.

10 Q. Selling products?

11 A. Correct.

12 Q. Going to customers and saying, we've got a value
13 proposition for you?

14 A. Yes.

15 Q. And it's in the functionality of our software or
16 hardware, that value proposition?

17 A. Yes.

18 Q. It will do good things for your business. It will
19 allow you to perform functions better than you were performing
20 them before?

21 A. Are you saying generally speaking or in a certain
22 context?

23 Q. In selling the kinds of products you've sold in
24 your career in the computer industry.

25 A. Sure. You're trying to provide value for value to

1 the customers.

2 Q. But the value is value to the customer and actually
3 enhancing the operation of their business?

4 A. You want to improve, absolutely sell something that
5 they will need, that they'll use and add value to what they
6 will use.

7 Q. Have you ever done anything like SCOSource before?

8 A. No.

9 Q. Pretty usual product, isn't it?

10 A. I don't know in terms of how unusual it is. I just
11 know it's important for people to protect their intellectual
12 assets.

13 Q. That's what it was about it; right? It wasn't
14 about offering customers functionality to drive their
15 business; it was about SCO's efforts to protect what it
16 believed were its intellectual property assets; correct?

17 A. That's partially true. I mean, clearly some
18 customers wanted to and chose to use Linux, and so we offered
19 them a way to be clean, if you will, by using infringing SCO
20 technology.

21 Q. You actually stopped selling Linux; right? You got
22 out of the Linux business, and your relationship with Linux
23 was as asserter of intellectual property and licensor;
24 correct?

25 A. Yeah. Over time we stopped selling and

1 distributing our Linux release.

2 Q. Was UNIX System V Release 4, UNIX System V
3 Release 4 code commercially valuable in the context of
4 SCOsource?

5 A. It was commercially valuable as it related to -- we
6 were offering the latest versions of our UnixWare product in
7 our System V Release 5 technology. So as the commercially
8 valuable code that was found in prior versions of System V,
9 whatever version or release it was that came forward, that
10 technology and the latest version was commercially valuable.

11 Q. Different question. Now we're shifting over to
12 SCOsource, which you were involved in selling; correct?

13 A. I was involved absolutely in those activities. I
14 was not responsible for selling SCOsource licenses. That was
15 done by Chris Sontag and his own sales team. I was not
16 responsible for that sales organization, and frankly did not
17 sell the licenses myself.

18 Q. Well, let me ask it this way. When you were
19 examining the question of what's commercially valuable under
20 the direct examination of SCO's counsel, were you asking that
21 question -- were you answering that question in the context of
22 SCOsource?

23 A. I'm not sure I follow the question.

24 Q. Were you answering the question of whether older
25 code is commercially valuable, did you have in mind SCOsource

1 campaign when you were answering that question?

2 A. Once again, the focus that we put forth at the time
3 when we entered the SCOsource licensing was to develop a
4 licensing program based on our UnixWare technology, our latest
5 System V code. And we offered that to our customers and Linux
6 users to indemnify them, so to speak, based on our technology.

7 Q. Is it your testimony that System V Release 4 code,
8 whether or not it was carried forward into the latest release
9 of UnixWare but SCO believed was found in Linux, was not
10 commercially valuable?

11 A. What I'm saying is commercially valuable is the
12 technology that moved forward into at the time the UNIX System
13 V Release 5 code. And whatever code that was that came forth
14 was what we determined at that time commercially valuable
15 because that's what customers were willing to pay for. People
16 weren't interested in old technology that didn't run on
17 certain hardware or wouldn't work and function with drivers or
18 other -- or applications. They were looking for our latest
19 and greatest technology that was found in System V Release 5.
20 And that was the impetus of the SCOsource licensing program.
21 It was derived based on that technology.

22 Q. And that is a determination that you recall having
23 been made in the context of SCOsource?

24 A. I didn't have to make that determination. It
25 was -- and from my viewpoint, once again in sales and

1 marketing, I don't reflect back on old technology and old
2 products. It's just -- our customers don't look back at old
3 technology and old products as, yes, that's what I want. They
4 want the latest technology, the relevant technology that works
5 with their hardware and applications. And so that's what we
6 derive the program based on is the current version of the time
7 of our UnixWare technology. So it's based on that.

8 Q. But you weren't selling technology or product and
9 SCOsource to customers; you were selling immunity from
10 intellectual property lawsuits; correct?

11 A. We were selling a license that was based on our
12 latest technology, our UNIX System V technology.

13 Q. Do you know for a fact, Mr. Hunsaker, that the code
14 that SCO alleged was found in Linux was also found in
15 UNIX System V Release 5?

16 A. I'm not a legal expert. I'm not an engineer. I
17 don't know all the technical ins and outs. All I know is that
18 the code that was found in our UNIX System V or latest UNIX
19 products was what we found to be infringed upon in Linux. And
20 so that's what we focused our IP program around.

21 Q. And when did that become clear to you, sir?

22 A. Well, I think that's all I talked about. We
23 started learning about this in the late 2002 time frame based
24 on our libraries, and then in 2003 with other instances of our
25 technology.

1 But, you know, I think others could talk more about
2 that than myself. Once again, I was focussed on our products
3 and our product business and realized talking to customers
4 that, all right, there's some issues here.

5 Q. You understood that the SCOSource campaign had
6 another dimension that made it different from your traditional
7 product sales, which was that it was heavily -- heavily
8 involved lawyers; correct?

9 A. Well, I'm not sure I follow your question.

10 Q. By March 2003, SCO's in litigation with IBM; right?

11 A. Yes. I think it was about that time frame.

12 Q. And you knew there was a lot of legal activity
13 surrounding the SCOSource campaign?

14 A. I don't know if there was legal activity around the
15 SCOSource campaign or if there was legal activities around the
16 lawsuits that were going on at the time.

17 Q. And you're separating those from SCOSource?

18 A. Well, I'm just saying that the issue -- and once
19 again, I'm not an expert. I know there's a contract dispute.
20 It was one of the issues that relates to IBM, but I don't
21 think we're here to talk about that.

22 MR. JACOBS: Your Honor, may I approach?

23 THE COURT: Yes.

24 Q. BY MR. JACOBS: Mr. Hunsaker, I've handed you
25 Novell Exhibit 270. Would you take a look at that for a

1 minute, please.

2 A. Uh-huh (affirmative).

3 MR. JACOBS: This has been pre-admitted, Your
4 Honor.

5 Q. BY MR. JACOBS: Mr. Hunsaker, Novell's Exhibit 270
6 is an e-mail that you sent to the -- an e-mail that's called
7 execgroup. Do you see that?

8 A. Yes.

9 Q. And that's the senior executives of SCO?

10 A. Yes.

11 Q. And you were one of them?

12 A. Yes.

13 Q. And you attended a meeting on December 11th, 2003,
14 and you were responsible for taking notes that day.

15 A. I don't know if I was responsible for taking notes,
16 but it appears that I summarized some of the discussion points
17 of that day.

18 Q. And you were -- it's December 2003. SCOSource has
19 been under way for about a year. You're looking ahead to 2004
20 and you're laying your plans; correct?

21 A. It seems to be what we were discussing.

22 Q. And you had some revenue goals at SCO 48485. Do
23 you see that?

24 A. Yes.

25 Q. And that was discussed at that meeting?

1 A. Sure.

2 Q. And by the way, "OPS Council," what does that mean?

3 A. Operations.

4 Q. And you were part of the operations council?

5 A. Yes.

6 Q. And the operations council had various strategy
7 meetings around SCOSource?

8 A. This wasn't around SCOSource. This was around our
9 overall business.

10 Q. SCOSource was discussed at many OPS committee OPS
11 council meetings?

12 A. Well, as you can see here, we're talking about
13 we're running a company. So the operations council gets
14 together to discuss all aspects of running a business, setting
15 goals for the company, motivating employees, setting strategy,
16 direction, trying to create, you know, the next phase of our
17 business, yes.

18 Q. And the answer to my question is "yes"?

19 A. What was your question?

20 Q. The OPS council discussed SCOSource on various
21 occasions?

22 A. Yes.

23 Q. And if you go down among the goals for 2004, it
24 says, "emerge as industry leader for IP." Do you see that?

25 A. Uh-huh (affirmative).

1 Q. And then, "gain Linux justice." Do you see that?

2 A. Uh-huh (affirmative).

3 Q. And that was something that was discussed at the
4 meeting, "gain Linux justice"?

5 A. I don't recall specifically, but it is documented
6 here.

7 Q. And down at the next heading, the heading is
8 SCOSource, and it refers to Chris Sontag as the general
9 manager; correct?

10 A. Yes.

11 Q. And among the activities of SCOSource that's being
12 discussed there is litigation. Do you see that?

13 A. Yes.

14 Q. And litigation against IBM. Do you see that?

15 A. Yes, I see that.

16 Q. And end users and others. Do you see that?

17 A. Yes.

18 Q. So litigation was part of the SCOSource activities
19 that were contemplated when you were discussing SCOSource in
20 this meeting; correct?

21 A. Not necessarily. I mean, clearly there was
22 litigation going on at the time. So that was part ongoing
23 litigation as I believe at this time. I don't know if all my
24 days are correct. But, sure. That's a relevant discussion
25 when you're involved in litigation with other companies in OPS

1 council.

2 Q. And then there's a reference to the licenses that
3 SCOSource might offer. Do you see that?

4 A. Yes.

5 Q. And RTU, the right to use. That's the SCO
6 intellectual property license for Linux as you understood it;
7 correct?

8 A. Yeah. The right to use our intellectual property
9 in Linux.

10 Q. And then SCOx actually is about product
11 development; correct?

12 A. Yeah. It was a name we used for a certain period
13 of time to describe our general UNIX business.

14 Q. I'd like to scroll down, I'd like you to look down
15 and we will scroll down to the bottom fifth of the e-mail.
16 You took the following notes:

17 What is our business model for SCOSource and
18 SCOx? SCOSource. Take 1500 penguins and create a
19 room in Lindon and line them up and place the
20 company brand on each one of them. We then send
21 out a letter within the next few weeks which takes
22 our code claims and demonstrates to customers what
23 we have found to date. We let the end user know
24 that, "if they want to be safe, they need to
25 remove the offending code from Linux in order to

1 continue to use legally. Once you have cleaned up
2 your system, you will be clean."

3 Do you see that?

4 A. I do.

5 Q. That was something discussed at this meeting as a
6 undoubtedly humorous way of discussing the SCOSource ideas at
7 the time; correct?

8 A. I do not recall that discussion, but I see it here
9 in this document.

10 Q. And then it refers to the codes. It says:
11 Code such as JFS, Malloc, RCU, et cetera.

12 Do you see that?

13 A. Yes.

14 Q. And that was the code in this discussion SCO was
15 thinking about making clear to customers is contained in
16 Linux; correct?

17 A. Based on what it states here, that's what it's
18 referring to. I'm not going to testify specifically what code
19 is or is not found in Linux. That's not my area of expertise.
20 I don't understand all the technology.

21 Q. And you don't know whether JFS is found in System V
22 Release 4 code?

23 A. Once again, you're talking to the wrong guy about
24 those types of issues. I was focused on sales and marketing
25 activities.

1 Q. If JFS was found in System V Release 4, would you
2 agree that it is commercially valuable in the context of the
3 SCOsource as represented by this discussion?

4 A. Well, I'll repeat. Once again, what we do, if it
5 was valuable it would be found in our latest versions of our
6 UNIX System V technology. And that's where it would be found
7 because that's where we were focusing on licensing and
8 selling. So I can't recall -- I can't talk about older
9 technology.

10 Q. So let me understand the basis for what you've said
11 because you said it several times.

12 Do you recall a specific discussion in the context
13 of SCOsource in which it was represented to your satisfaction
14 that all the code that was the focus of the SCOsource campaign
15 was found in the latest release of SCO's software?

16 A. You know, once again, I don't know if I'm the --
17 have the technical understanding of all the codes, so I'm not
18 going to pretend to know that. All I know is that we were
19 selling and marketing our latest versions of our products to
20 our UNIX customers. And then when it came to our SCOsource IP
21 agreements, it was a license based on our latest technology of
22 our products and all the commercially valuable technology that
23 was found in our latest releases. You'll have to talk to
24 other experts about specific codes. I don't know. I just
25 know that we sold what customers wanted, and it was the latest

1 and greatest stuff.

2 Q. And then the notes recount the discussion around
3 what would happen next after the penguins were released, I
4 suppose:

5 We will require the CEO and CIO to respond to
6 this letter call to action.

7 Do you see that?

8 A. Yes.

9 Q. And then you describe what the letter -- or the
10 meeting -- in the meeting there was a discussion of what the
11 letter needs to state. Do you see that?

12 A. I do.

13 Q. And it says:

14 We will state the facts and the demands, the
15 timeline and the consequence.

16 Do you see that?

17 A. I do.

18 Q. And the consequence is the license cost of, gee,
19 only \$700 or \$1400 a server, and litigation, \$\$\$\$. Do you see
20 that?

21 A. I do.

22 Q. And that was part of the discussion that the
23 license would be cheaper than the litigation; right?

24 A. I don't know what it means. I don't remember this
25 document, frankly.

1 Q. And then there was some analysis in the meeting
2 about who might take what course of action. Do you see that?

3 A. Uh-huh (affirmative).

4 Q. And that there was a plan that was described
5 including, if you go -- scroll down a little bit, lawsuit 1
6 and lawsuit 2. Do you see that?

7 A. Yes.

8 Q. And then scrolling up a little bit. Item 2,
9 letters sent December 17th. Do you see that?

10 A. Yes, I do.

11 Q. So let me ask you about an exhibit we saw here
12 previously. Novell Exhibit 274. Novell Exhibit 274 is a
13 letter sent on December 19th, two days after the December 17th
14 date referenced in the plan of action that we just discussed.
15 Do you see that?

16 A. Yes.

17 Q. And if you -- if we scroll down on the letter now,
18 and illuminate that paragraph. And do you see that it refers
19 to AT&T binary interfaces down there?

20 A. Could you highlight that for me?

21 Q. Yes. That paragraph right there.

22 A. Okay.

23 Q. Do you see it's referring to AT&T binary
24 interfaces?

25 A. I see where it states that, yes.

1 Q. Could you take a look at this letter and tell me
2 whether it says anywhere anything about SCO's latest and
3 greatest technologies?

4 A. No. I didn't author this letter. I don't remember
5 any details in the letter. And so once again, I'm not able
6 really to testify specifically about the contents and the
7 timeframe in which it was written.

8 Q. I want to ask you about OpenSolaris. What do you
9 know about OpenSolaris?

10 A. Not a whole lot. I do know that that it's a Sun
11 product.

12 Q. What kind of Sun product? Is it a word
13 processing --

14 A. It's an operating system.

15 Q. So you know it's an operating system. You know
16 that OpenSolaris is open source operating system; right?

17 A. Yes.

18 Q. And you know that it's based on System V code that
19 predates the asset purchase agreement in 1995?

20 A. I don't know what it's about. Again, my focus has
21 not been in the technology as much as selling and marketing.

22 Q. Did you have selling and marketing concerns around
23 the release of OpenSolaris?

24 A. I remember I had questions at the time, but I don't
25 remember anything specifically.

1 Q. All right. Let's take a look at your questions.
2 May I approach?

3 THE COURT: Yes.

4 Q. BY MR. JACOBS: We're looking at Novell
5 exhibit 327. And Novell Exhibit 327 is an e-mail from you
6 to -- an e-mail that's called "Darlstaff." Do you see that?

7 A. Yes.

8 Q. Is that another e-mail for the executive team?

9 A. It was an alias for the directed course of Darl
10 McBride.

11 Q. And you labeled it, "internal confidential." Do
12 you see that?

13 A. I do.

14 Q. And it attaches -- it attaches several articles,
15 but it attaches an article about SCO having given the green
16 light to OpenSolaris. Do you see that?

17 A. Yes.

18 Q. And let's go through the article first so we can
19 see the context of your question. So if you can scroll down.
20 And this is an article that came out in April 15th, 2005. Do
21 you see that?

22 A. Yes.

23 Q. And it reports an announcement by SCO that it won't
24 raise legal challenges to Sun's plan to open source the
25 Solaris UNIX operating system. Do you see that?

1 A. Yes.

2 Q. And then it goes on to talk about the fact that SCO
3 is in litigation with IBM. And then if we scroll down a
4 little bit more. And the article reports:

5 Sun plans to release OpenSolaris under its own
6 open source common development and distribution
7 license this summer. And SCO's chief executive
8 Darl McBride said SCO has no problem with that.
9 "We believe we have a pretty good idea of what Sun
10 is trying to do, close quote.

11 Do you see that?

12 A. I see it.

13 Q. And then he goes on to say:

14 After reviewing what their plans are and
15 reviewing what our agreements with them are, we
16 feel comfortable with the direction they're going,
17 he added. Sun took out a fresh UNIX System V
18 license from -- there's a typo there. It must
19 mean SCO -- in February 2003 joining Microsoft
20 Corp. as one of only a handful of SCO source
21 licensees.

22 Do you see that?

23 A. Yes.

24 Q. And then you read this letter, and then you ask to
25 Darlstaff:

1 Do you really give the green light? Are
2 we as confident in Sun's position with OpenSolaris
3 as this article intimates? I personally still have
4 my doubts. I think we should discuss.

5 Do you see that?

6 A. I do.

7 Q. So this got your attention, this announcement.

8 A. Apparently so.

9 Q. Different from Sun's release it and refresh it of
10 the regular Solaris system; correct?

11 A. I don't know specifically.

12 Q. Well, something about these plans caught your
13 attention. It wasn't the fact that it was a new release; it
14 was the fact that it was open source, wasn't it?

15 A. I think I was trying to ask, since I had nothing to
16 do with any license agreements to Sun or others, that I was
17 wanting to understand what this means. And so I was posing a
18 question here. Help me understand this so I can then convey
19 what I need to my team.

20 Q. Well, you said:

21 I personally have my doubts.

22 What do you mean by that?

23 A. I don't know what I meant by that. I just wanted
24 more clarification. I needed to understand asking some
25 questions. Once again, I was not involved in those

1 transactions. I just needed to understand some specifics if I
2 needed to answer any questions.

3 Q. Well, do you think you would have written that
4 e-mail if you had concluded this was a minor blip in the
5 evolution of operating systems software?

6 A. Well, I would hope as a responsible sales manager
7 that represents employees and customers that I would need to
8 understand the specifics about such announcements so I would
9 ask questions. It doesn't mean things weren't right or wrong.
10 It's just part of a process you go through in day-to-day sales
11 or marketing management. Help me understand. You know,
12 digest the information and move forward.

13 Q. I think I'm not asking simple enough questions, so
14 let me ask a very simple one.

15 Did you consider the announcement of OpenSolaris,
16 an open source version of Solaris operating system to be
17 significant?

18 A. I didn't know the significance because I didn't
19 understand what it meant. So that was why I was asking the
20 question.

21 Q. As you sit here today, do you think it's
22 significant?

23 A. It's relevant. I don't know how significant it is.

24 Q. Let's take a look at Exhibit 227. You have that in
25 front of you from before. But if it's not right there, I have

1 another copy. This is the e-mail that you were asked about on
2 your direct examination.

3 A. Uh-huh (affirmative).

4 Q. Do you have it handy?

5 A. The one from the previous?

6 Q. No. No. Sorry. I'll give you another copy.
7 May I, Your Honor?

8 THE COURT: Yes.

9 Q. BY MR. JACOBS: Now, just to set the context,
10 Mr. Hunsaker, this e-mail is being written in the summer of
11 2003; correct?

12 A. That's what it says, yes.

13 Q. And litigation is already under way between SCO and
14 IBM; correct?

15 A. I believe so. I don't recall the exact date.

16 Q. And you're aware by this time of the significance
17 of litigation to the preparation of documents and e-mails;
18 that is, that what you write is likely to be discovered in
19 litigation; correct?

20 A. I don't recall if I was fully aware of all those
21 items.

22 Q. Did you have an understanding by this time that you
23 could continue on as normal and write casual e-mails?

24 A. Well, I hope, you know, I wouldn't write casual
25 e-mails. I want to write e-mails that make sense and reflects

1 thought at that time.

2 Q. Now, you've testified probably between half a dozen
3 and a dozen times that SCOSource was selling the latest and
4 greatest technology; correct?

5 A. Yes.

6 Q. And how do you square that, sir, with what you
7 wrote in this e-mail? That is, that UnixWare has nothing to
8 do with SCOSource?

9 A. Once again, you must remember I'm not an engineer.
10 And from the perspective that I had at the time and I have
11 today, it's based on a product, a specific deliverable, a SKU
12 that was called UnixWare and/or OpenServer. And it is
13 different because that's how we think in the sales and
14 marketing world. We're selling and marketing a particular
15 product to our customer. And as I stated, it has its part
16 number and materials and CDs and so forth.

17 And so in that respect, it was absolutely
18 different. And it's very clear to me. There's nothing here
19 that I'm hiding, if you will, because in my mindset, it was
20 different in terms of the product. But as it relates to the
21 technology, the underlying technology, it's based off of our
22 UnixWare 7.1.3 technology.

23 Q. And we just explored that, sir. And I believe you
24 testified that you weren't really the right person to ask
25 about whether the SCO intellectual property license for Linux,

1 what technology was implicated in that. Isn't that what you
2 told me a few minutes ago?

3 A. What I said is understanding all the technical bits
4 and bites within the operating system, I'm not one to testify
5 on that. All I know is that we sell the latest technology
6 that we have that is relevant to customers that has what they
7 need in the product.

8 Q. So let me ask you again, sir. Do you recall a
9 specific discussion in which it was represented to you that
10 with the SCO intellectual property license for Linux, SCO is
11 licensing its customers to its latest -- the Linux licensees
12 to its latest and greatest technology?

13 A. Sure. Yes.

14 Q. And when you recorded notes at this meeting in
15 December, you believe that JFS, Malloc and RCU were SCO's
16 latest and greatest technologies?

17 A. Once again, I'm not going to comment about the
18 technology code that you've talked about. If it was relevant
19 and needed by our customers, it would still be found and
20 contained in the latest version of our UNIX System V
21 technology.

22 Q. And who represented that to you, sir? Who
23 represented to you that what is at issue in the Linux
24 operating system and the accusations SCO was making about it
25 is in SCO's latest and greatest technology?

1 A. It seems pretty obvious to me just in the course of
2 discussions that we're developing a license based on UnixWare.
3 You've seen evidence of that, and we priced it accordingly.
4 Once again, we don't sell old stuff that is irrelevant; we
5 sell our latest technology and bring that forward. So it was
6 1 plus 1 equals 2.

7 Q. Do you believe, sir, that whatever was incorporated
8 or that you believed, you institutionally, SCO, the company
9 believed was incorporated in the Linux from UNIX was
10 commercially viable?

11 A. Can you repeat the question?

12 Q. Yeah. It's not a very good one. Let me start
13 over.

14 You had a belief about methods and concepts and
15 codes from UNIX having been incorporated into Linux; correct?

16 A. That's my understanding.

17 Q. Do you believe that those methods and concepts and
18 codes are commercially valuable?

19 A. Yes.

20 Q. And why do you believe that?

21 A. It's how -- based on how the product has been
22 developed and the intellectual property that we've created as
23 a company and how we derived our releases, it's spent years
24 and years developing that technology. And someone takes your
25 stuff, you're going to protect and fight for your rights.

1 Q. In fact, you believe, sir, that that code and those
2 methods and concepts converted Linux into a hardened
3 enterprise quality operating system, don't you?

4 A. Well, once again, I'm not sure I'm the best one to
5 testify on those issues. I did not -- was not responsible for
6 the SCOSource business. I did not sell the SCOSource
7 technology. We had a separate division and team, sales team
8 that focussed on those areas. We were just focussed on
9 protecting our intellectual property and selling the latest
10 and greatest technologies to our customers, whether it be to
11 our Linux or IP license.

12 MR. JACOBS: Your Honor, I would like to publish
13 Mr. Hunsaker's transcript in the IBM case dated November 10,
14 2005. And I'd like to read from that transcript.

15 THE COURT: Tell us pages and lines.

16 MR. JACOBS: Yes. Page 45 Line 3 through
17 46 Line 1.

18 THE COURT: Go ahead.

19 Q. BY MR. JACOBS: And you have a copy of that
20 transcript in front of you, sir, if you would like to follow
21 along.

22 A. Sure.

23 Q. Question. Let's first take from a
24 business perspective.

25 Answer. Well, the relationship clearly

1 over time waned in terms of the relationship as
2 they were looking to migrate their solutions to
3 a Linux platform. So, therefore, as a result of
4 that, our revenues declined. And the relationship
5 has become, you know, very stagnant, if anything
6 at all. And once again, we attribute that. And
7 had this not all occurred with the rise and support
8 from IBM and other companies, you know, using
9 SCO's intellectual property and disclosing methods
10 and concepts that, you know, Linux from the outset
11 was always viewed as a hobbyist operating system
12 mainly for desktops for scale and architecture, not
13 at the enterprise, not hardened, not ready to
14 run mission critical applications like you'll
15 see within Sherwin Williams, within AutoZone,
16 within these customers.

17 UNIX and SCO was the de facto standard for the
18 Intel architecture. And through various initiatives
19 and breach of contracts, Linux was given a huge
20 boost through various, you know, code and methods
21 and information such as it would cause extreme
22 damage to SCO's business.

23 Did you give that testimony in response to that
24 question?

25 A. I don't recall. I spent 30 hours in depositions.

1 I don't recall just a slice of that. But if that's what was
2 stated, yes.

3 Q. And, in fact, didn't you believe, sir, that the
4 contribution of what you believed to be SCO intellectual
5 property to Linux converted Linux from a hobbyist desktop
6 system into a hardened enterprise ready to run mission
7 critical applications operating system?

8 A. Clearly there was a direct correlation between the
9 code that was found within our technology, within SCO UNIX
10 that was placed in Linux illegally, we believe, through a
11 breach of contract that did propagate the Linux operating
12 system through our latest technologies.

13 Q. Did the alleged contribution of code and methods of
14 concepts -- and methods and concepts from what you believed to
15 be SCO UNIX into Linux convert Linux from a hobbyist desktop
16 operating system to an enterprise hardened ready to run
17 mission critical applications operating system?

18 A. As I testified there, that is part and parcel to
19 what went wrong and how we believe and I believed at the time
20 Linux did advance through the use of our technology.

21 Q. Thank you, Mr. Hunsaker.

22 MR. CYRULNIK: No questions.

23 THE COURT: Thank you, Mr. Jacobs.

24 I assume this witness may be excused.

25 And you may call your next witness.

1 MR. CYRULNIK: Your Honor, we call Jay Peterson.

2 THE COURT: Come forward and be sworn, please,
3 right here in front of the clerk of court.

4 THE CLERK: Come right up here, please. Raise your
5 right hand.

6 JAY PETERSEN,
7 called as a witness at the request of SCO Group,
8 having been first duly sworn, was examined
9 and testified as follows:

10 THE WITNESS: I do.

11 THE CLERK: Thank you. Please take the witness
12 stand.

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

14 THE WITNESS: Jay Petersen. J-A-Y P-E-T-E-R-S-E-N.

15 THE CLERK: Thank you.

16 THE COURT: Go ahead, Mr. Cyrulnik.

17 MR. CYRULNIK: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. CYRULNIK:

20 Q. Good afternoon Mr. Petersen. Are you currently
21 employed?

22 A. Yes, I am.

23 Q. What is your current employment?

24 A. I'm director at UNIX Engineering at SCO Group.

25 Q. How long have you held that position a director for

1 SCO?

2 A. Since 1997.

3 Q. And when did you first start working for SCO?

4 A. 1995 when SCO acquired the UNIX business from
5 Novell.

6 Q. And were you involved in the UNIX business prior to
7 joining SCO?

8 A. Yes, I was. I joined Bell Labs in 1980, did
9 systems engineering for five years. In 1985, I joined the
10 UNIX development group in Bell Labs, worked there that until
11 1990. At that point, I left and went to a Windows startup
12 software company for a few years. I came back to Novell,
13 again came back to UNIX in 1993 and stayed there through the
14 transition desk of SCO.

15 Q. So with the exception of the three-year period when
16 you joined the startup company, you were involved in the UNIX
17 companies for almost 20 years?

18 A. Right.

19 Q. And before you began with Bell Labs in 1980, can
20 you briefly describe your employment?

21 A. Yeah. Before that I had a career in academia as a
22 physicist. I worked at the University of Minnesota and the
23 last five years at Yale University. I did a lot of
24 programming in the course of that work.

25 Q. And so it's fair to say you've almost got 35 years

1 worth of programming experience?

2 A. Yes.

3 Q. And can you briefly summarize your educational
4 background for the Court?

5 A. Yeah. I have a bachelor's degree in math from the
6 University of Michigan in 1969; a master's degree in 1971 and
7 a PhD in physics in 1974.

8 THE COURT: Could you pull the mike down just a
9 little bit?

10 THE WITNESS: Sure.

11 THE COURT: Thank you.

12 Q. BY MR. CYRULNIK: Mr. Peterson, I'd like to go back
13 to the 2000 period, 2000 to 2003 time period for the moment.
14 And can you generally describe your role with SCO during that
15 period?

16 A. Yeah. At that point I was involved in the
17 development of new releases of the UnixWare, probably 7.12 in
18 that time frame.

19 Q. And what were your responsibilities?

20 A. I was managing a group of engineers that were
21 building that product.

22 Q. And you say you were involved in developing
23 UnixWare 7.12, I believe it was?

24 A. Right.

25 Q. At that time?

1 From an engineering perspective, did you have an
2 understanding as to how a new release of UnixWare was
3 developed?

4 A. Yes. I'd seen that going on for 20 years and was
5 involved in that process at that point, too.

6 Q. And can you explain to the Court what your
7 understanding was as to how a new release of UNIX System V was
8 developed?

9 A. Yeah. We would, of course, start with the previous
10 lease, work with our customers to understand what new things
11 needed to be added, what other things could be taken out.
12 This is a commercial product, of course, so that was all
13 driven by the value, either value had to be added to that
14 system or there were parts that were no longer any commercial
15 value, and we dropped those out.

16 Q. And Mr. Peterson, during your 20 years in the UNIX
17 business, were you personally involved in that process of
18 designing a new release?

19 A. Yes, I was. Often my role involved working with
20 some of our major customers, hardware vendors, for example.
21 They were the ones most interested in giving us requirements
22 for new features. As they developed new hardware, the
23 operating system had to reflect those new features or it
24 wouldn't be useful, and the hardware wouldn't be fully taken
25 advantage of.

1 Q. And can you give the Court an example or some
2 examples of features or technology that would not have been
3 carried forward to the next release of UNIX System V?

4 A. Yeah. A lot of that was driven by the evolution of
5 the hardware itself. Either the core processor or the devices
6 that are connected to the computer. Simple examples are some
7 kind of devices just became completely obsolete and wouldn't
8 be recognized today, things like paper tape readers and
9 teletypes, any special support we had in the operating system
10 for those things is long gone at this point.

11 Q. So there was specific codes in the operating system
12 that dealt with interfacing with those things that you
13 mentioned, tapes or floppy disks?

14 A. Right. Drivers in those cases and other hardware
15 aspects. Typically everything new about hardware or not had
16 some analog or supporting code in the operating system.

17 Q. So with respect to that specific code that dealt
18 with a piece of hardware, for example, a floppy disk, would
19 you carry that piece of code forward when replacement of
20 floppy disks came out, for example?

21 A. No, we wouldn't. We would want to simplify our
22 code base. And our customers would tell us they didn't want
23 that in there. They didn't want to struggle with supporting
24 things, old devices, either. So we were both decided to move
25 old code out.

1 Q. And code related to hardware that was still in use
2 and wanted in the marketplace, what did you do with that code?

3 A. We carried it forward. You know, for example, if
4 we added something new in a particular release and that kind
5 of hardware continued. USB is an example of that. We added
6 that in the late '90s, and, of course, USB has gotten more and
7 more important. So that code has been carried forward and
8 further evolved.

9 Q. Mr. Peterson, I'd like to now turn to a little
10 later in the time period 2002-2003 and focus in on then for a
11 moment. Were you involved with any agreements that SCO
12 entered into during that time period?

13 A. Yes, I was.

14 Q. And which agreements were those?

15 A. We had a source license agreement with Sun and
16 another one with Microsoft.

17 Q. Let's begin with the Microsoft agreement. I'd like
18 to show you Exhibit SCO 237.

19 MR. ACKER: Can I have a copy of that, please?

20 MR. CYRULNIK: Sure.

21 Your Honor, may I approach?

22 Q. BY MR. CYRULNIK: If you can flip approximately to
23 the sixth or seventh page of that Exhibit SCO 237.

24 Do you recognize this document, Mr. Peterson?

25 A. Yes, I do.

1 Q. And is this a document that memorialized the
2 agreement of Microsoft that you said you were involved in in
3 2003?

4 A. Yes, it is.

5 Q. Were you involved in negotiating the Microsoft
6 agreement?

7 A. A little bit, yes.

8 Q. Who was the lead negotiator of that agreement?

9 A. Chris Sontag.

10 Q. What was the primary involvement that you had with
11 that agreement?

12 A. As I said, a little bit while it was being drafted,
13 but most of the work I did on this was delivering technology
14 that was licensed by Microsoft from us.

15 Q. And which sections of this agreement relate to the
16 technology that you delivered to Microsoft?

17 A. I think Section 3 is a licensing UnixWare and is a
18 delivery of UnixWare code, and Section 4 gives further rights
19 to the UnixWare code and also adds OpenServer code and prior
20 products.

21 Q. And I believe you stated --

22 MR. ACKER: I'm sorry. The exhibit is on the
23 screen. What exhibit is it?

24 MR. CYRULNIK: It's SCO 237.

25 (Discussion held off the record.)

1 THE COURT: Did you want that on the record?
2 Because she couldn't hear you if you did.

3 MR. CYRULNIK: Sorry about that.

4 MR. ACKER: No, Your Honor. It's just the copy of
5 the agreement that he's given me has the amendment in front so
6 I'm confused, but I think I found where I am. Thank you.

7 Q. BY MR. CYRULNIK: Mr. Petersen, I believe you
8 testified that Section 3 of the Microsoft agreement related to
9 an option to purchase UnixWare license?

10 A. Yes.

11 Q. And then you said Section 4 of the agreement, I
12 believe you testified, related to an option to purchase a full
13 UnixWare license, an OpenServer license and you said older
14 technology, as well?

15 A. Yes.

16 Q. And did you have an understanding as to the
17 difference between the UnixWare license under the first
18 option, Section 3, and the expanded UnixWare license under
19 Section 4 that you referenced?

20 A. Yes, I did. And in Section 3 there were some
21 limitations on the way Microsoft could use the code it was
22 licensing. It could only use it in a subset of the products
23 it sold, and I think it had to appear in something called the
24 SFU, services for UNIX. So it kind of restricted the amount
25 of places that they could sell this code.

1 Q. And if you could turn to Section 3.7 of the
2 agreement. Are those the license limitations that you were
3 referring to when you said the Section 3 license had
4 limitations?

5 A. That's right. Yes.

6 Q. And as an engineer or based on your involvement in
7 the negotiations of the agreement, did you have an
8 understanding as to why Microsoft would want the restrictions
9 in Section 3.7 lifted?

10 MR. ACKER: Objection; calls for speculation as to
11 what Microsoft thought.

12 THE COURT: Well, he asked if he had an
13 understanding.

14 Did you have one?

15 THE WITNESS: Yeah, I had an understanding.

16 THE COURT: You can ask him how he obtained it.

17 MR. CYRULNIK: Sure.

18 Q. BY MR. CYRULNIK: What was the basis for that
19 understanding?

20 A. Well, the way that the license was structured and
21 the conversations that I had in particular about this section,
22 Microsoft was concerned about how it could use this technology
23 to provide compatibility through this SFU feature. And the
24 negotiations about 3.7 involved what was the scope of that,
25 how many systems, what kind of limitations they could have on

1 that, so....

2 Q. Did you have an understanding at the time as to the
3 significance of that restriction?

4 A. Yeah. It was my understanding was what they were
5 doing was this license was so they could add better
6 compatibility to UNIX into Microsoft. And that's why they
7 wanted this.

8 Q. And, Mr. Peterson, under Section 4 under the
9 Microsoft agreement, under the option delineated in Section 4,
10 were the restrictions or those that you just described, were
11 those lifted?

12 A. Yeah. It basically gave them broader rights to use
13 this compatibility, take this compatibility approach with
14 every version of Windows if they wanted to. And it kind of
15 broadened their ability.

16 Q. I believe you testified, look at Section 4 now,
17 that there were in addition to the expanded UnixWare license
18 there were other under Section 4 there was an OpenServer
19 license?

20 A. Right.

21 Q. And there was also Legacy UNIX product that were
22 provided under Section 4?

23 A. That's right.

24 Q. And I believe you testified, were you involved in
25 collecting the deliverables, the source code that was

1 ultimately provided to Microsoft under this agreement?

2 A. Yes, I did collect that and deliver it to
3 Microsoft.

4 Q. I'd like to direct your attention to SCO
5 Exhibit 391. And if you'll take a look at that document.
6 Tell me if you recognize it.

7 A. Yes, I do.

8 Q. And this document appears to be a series of e-mail
9 exchanges between you and someone named Doug Miller or
10 Rich Wickham?

11 A. That's right.

12 Q. Who's Doug Miller?

13 A. Doug Miller was a UNIX -- or rather a Microsoft
14 technical director.

15 Q. And did you interact with Doug Miller during the
16 2003 time period?

17 A. Yeah. Through e-mails like this.

18 Q. Turn to Page 2 of that exhibit. And I believe
19 there's an e-mail dated September 2nd, 2003, to you from
20 Doug Miller. Do you see that on the back of the page?

21 A. Yes, I do.

22 Q. And will you zoom in on the bottom lines? You
23 write:

24 As was suggested in Exhibit C, there are a few
25 older items, items that we no longer have. These

1 are noted as not available on the spreadsheet.

2 Regards.

3 A. Right.

4 Q. Do you recall writing that?

5 A. Yes.

6 Q. Mr. Petersen, did you collect all the source code
7 that was ultimately delivered to Microsoft?

8 A. Yes, I did.

9 Q. You were personally in charge of that?

10 A. Yes.

11 Q. And did you provide Microsoft with all the UnixWare
12 source code?

13 A. Yes.

14 Q. Did you provide Microsoft with all the OpenServer
15 source code?

16 A. Yes.

17 Q. And did you provide Microsoft with all the older
18 UNIX technology source code?

19 A. No. We didn't provide them everything on that
20 list. And that's why I sent this e-mail and also had a
21 spreadsheet that kept them apprised of what we could or
22 couldn't find.

23 Q. In response to this e-mail, do you recall
24 Mr. Miller ever communicating to you that Microsoft had a
25 problem with SCO's inability to provide some of the older

1 legacy code?

2 A. No.

3 Q. Did Microsoft ever ask for an adjustment of the
4 price that they paid under Section 4?

5 A. No.

6 Q. Were you surprised that Microsoft didn't demand any
7 adjustment for the price after writing this e-mail?

8 A. No, not at all.

9 Q. And as an engineer, do you have an understanding as
10 to why Microsoft didn't demand any adjustment for the price?

11 MR. ACKER: Same objection; calls for speculation.
12 Calls for hearsay. It's based upon a conversation.

13 THE COURT: Sustained.

14 MR. CYRULNIK: I'll rephrase.

15 Q. BY MR. CYRULNIK: Did you ever have any
16 conversations with Mr. Miller with respect to the inabilities
17 of SCO to provide older legacy technology to Microsoft?

18 MR. ACKER: Objection; calls for hearsay.

19 THE COURT: Well, he can answer that yes or no, so
20 we don't know whether it does or not.

21 MR. ACKER: All right. I agree.

22 THE WITNESS: No.

23 Q. BY MR. CYRULNIK: Okay. Would you turn to Page 1
24 of the document that you're looking at, it's a subsequent
25 e-mail nine days later, September 11th. And it's an e-mail

1 from you again to Doug Miller. And focus in on the bottom
2 Number 2. You write:

3 CD number 2 in the OpenServer source product
4 contains restricted third party source, the
5 OpenServer analogs of Exhibit B restricted source
6 for UnixWare. Since the focus of the contract was
7 on UnixWare technology, we never addressed the
8 restricted source that is in the OpenServer
9 product.

10 Is that a fair reading of what you wrote?

11 A. Yes.

12 Q. Can you explain what you meant by, "since the focus
13 of the contract was on the UnixWare technology," when you
14 wrote that in 2003?

15 A. Well, Section 3, of course, was all about UnixWare.
16 The discussions that we had was providing compatibility for
17 the latest version of UNIX, which was UnixWare. So my
18 assumption, then, was what they were most interested in was
19 UnixWare compatibility. That's why we had all this detail
20 about the parts of UnixWare that they could use. This was a
21 question about, did they require the same thing for
22 OpenServer? And they didn't. And that's why they were
23 interested in that product.

24 Q. I'd like to now turn to the other agreement you
25 said you were involved in. I believe you testified you were

1 involved in the Sun agreement in 2003, as well?

2 A. Yes.

3 Q. Let me show you SCO Exhibit 185. Do you recognize
4 that document, Mr. Petersen?

5 A. Yes, I do.

6 Q. What is that document?

7 A. This is the license that we negotiated with Sun.

8 Q. Were you involved in the negotiating the Sun
9 agreement?

10 A. No, I was not.

11 Q. Who did negotiate that agreement?

12 A. Chris Sontag.

13 Q. What was the extent of your involvement with the
14 Sun agreement?

15 A. I was given a copy of it after it was signed and
16 told to deliver the technology that we -- Sun had gotten
17 rights to in this agreement.

18 Q. I'd like to -- if you can flip on SCO Exhibit 185
19 to Attachment 1, which is towards the end. Page 11 of the
20 agreement.

21 A. Okay. Yep.

22 Q. Mr. Peterson, when you say you were involved in the
23 technology, is this the technology that you were providing Sun
24 under the 2003 agreement?

25 A. Yes, that's right.

1 Q. And can you briefly review for the Court the
2 deliverables that SCO provided to Sun under this agreement?

3 A. I'm sorry. Repeat that.

4 Q. Sure. Can you briefly review for the Court the
5 deliverables that SCO provided to Sun under the 2003
6 agreement?

7 A. All right. There was a current UNIX source code
8 described here. Drivers for UnixWare and for OpenServer and
9 then prior UNIX products.

10 Q. And that current UnixWare source code, that was
11 listed under Page 12 on Number 2?

12 A. Right. That was open UNIX 8 UnixWare 7.1.2, 7.1.3.

13 Q. And before that list, I think you said the other
14 older technologies that you provided to Sun?

15 A. Right.

16 Q. And under Number 3 on Page 12 of the agreement, are
17 those the drivers that you were referring to?

18 A. Yes, that's right.

19 Q. I'd like to start with the UnixWare on the old UNIX
20 source code that you provided Sun. Did you collect that code
21 personally?

22 A. Yes, I did.

23 Q. And did you provide Sun with all of the older
24 releases of System V?

25 A. No. We couldn't find all the releases on this

1 list. So I had to tell them we couldn't deliver everything.

2 Q. And did Sun ever communicate to you it had a
3 problem with the fact that you weren't able to deliver all of
4 the older releases of System V?

5 A. No.

6 Q. Did it ever ask for a price adjustment?

7 A. No.

8 Q. Were you able to provide Sun with all of the
9 UnixWare source code?

10 A. Yes.

11 Q. And I believe you said the other aspects of what
12 you provided in addition to UnixWare and the older UNIX source
13 code were their drivers?

14 A. Right.

15 Q. Mr. Peterson, what are drivers?

16 A. That's software that's added to the operating
17 system to support a particular device, a special kind of disk
18 drive or some other thing that gets connected to a computer.

19 Q. All right. Are drivers important in an operating
20 system?

21 A. Yes, they are. Typically when a person buys a
22 computer they want to have peripherals added to it. Most of
23 those are supported by drivers.

24 Q. Did you personally collect and deliver to Sun the
25 drivers that were required to be provided to Sun under this

1 agreement?

2 A. Yes.

3 Q. And where were those drivers from? Which operating
4 system?

5 A. UnixWare and OpenServer.

6 Q. Do you remember how many drivers you provided?

7 A. It was hundreds.

8 Q. I'd like to show you SCO Exhibit 19. I'd like to
9 ask you if you recognize the document?

10 A. Yes, I do.

11 Q. And it's entitled, Clarification of License Grant
12 to UnixWare and OpenServer Drivers; is that correct?

13 A. That's correct, yep.

14 Q. And what role did this document play in your
15 collecting and gathering the drivers that were required to be
16 provided to Sun under the 2003 agreement?

17 A. Well, we needed to provide Sun. The OpenServer and
18 UNIX were drivers, but there was a difference in the rights we
19 had and the rights we could transmit to Sun. So this document
20 explained that. Most of the drivers, you know, we had the
21 source code and we could provide the source and Sun could use
22 the source. In some cases the drivers had come from third
23 parties, and there were restrictions associated with those
24 drivers. And this document explained those.

25 Q. Mr. Peterson, did you provide Sun with any

1 non-UnixWare or OpenServer in particular any pre-UnixWare
2 System V drivers?

3 A. No.

4 Q. And as an engineer, did you have an understanding
5 as to what Sun would be able to do with drivers in conjunction
6 with the operating system it was getting?

7 A. Yeah. We would let them produce a version that
8 would support this hardware. In the case of Sun, Sun had a
9 Solaris for Intel products, and these drivers could be used or
10 modified to provide support for those hardware devices in
11 Solaris.

12 Q. Did Sun ever request any older drivers?

13 A. No.

14 Q. I'd like to direct your attention to SCO
15 Exhibit 391, please. And if you could turn to the middle of
16 that exhibit. I apologize. It's not numbered in an easy
17 fashion. But if you turn to the middle of the exhibit,
18 there's a page labeled 74 at the bottom. It appears after
19 Exhibit D. And the top of the page it's an e-mail.

20 A. Okay. Yes, I have it.

21 Q. I think we have it on the screen over here. I'd
22 like to zoom in on the top half. And do you recognize what
23 that e-mail exchange was?

24 A. Yes, I do.

25 Q. And I believe it says it's an e-mail from you,

1 Jay Petersen, to Andy, A-N-D-R-E-W-R, at Sun, dated Monday,
2 the 21st of April 2003?

3 A. Yes.

4 Q. Who is Andy?

5 A. Andy was Andy Roach. He was a technical director
6 in the UNIX development group at Sun. He's the person that I
7 delivered all the code to.

8 Q. Okay. You wrote to Andy in the second paragraph of
9 that e-mail:

10 I have a question about older binary drivers.
11 There are binary drivers in some of the earlier
12 versions of UnixWare. In some cases, these are
13 just earlier versions of the latest binary
14 drivers. And in other cases, they may simply be
15 obsolete. The vendor may be out of business, et
16 cetera. Do you think we need to list all the
17 binary drivers in all the earlier versions of
18 UnixWare that we have shipped you? My feeling is
19 that if you wanted to use any driver, the version
20 you would want would be the one from the latest
21 version of UnixWare or OpenServer, parentheses,
22 the list in the letter, end paren.

23 Do you see that, Mr. Petersen?

24 A. Yes.

25 Q. Can you explain the background of what prompted you

1 to ask Andy Roach that question?

2 A. Yeah. We'd done a lot of research on the current
3 drivers so we knew what our rights were, and we knew what we
4 could tell Sun about. There were older drivers and older
5 versions of UnixWare. And this was really a question whether
6 we had to do all that hunting down to find out whether, you
7 know, exactly what the situation was with the older drivers.
8 I don't think they were important to Sun. That's why I wrote
9 this e-mail.

10 Q. And those old drivers were from the older versions
11 of UnixWare. Those were a couple years old. How old were the
12 versions of UnixWare?

13 A. Yeah. It would have been the oldest 1995. And
14 some of the other ones would have been in the late '90s.

15 Q. Did you ask Andy whether he wanted you to provide
16 him with the even older drivers of pre-UnixWare releases?

17 A. No. That didn't come up.

18 Q. Why not?

19 A. Well, he didn't ask for them, and it wasn't spelled
20 out in the agreement. And the focus really was on the latest
21 drivers, again, because they were the most valuable and useful
22 things.

23 Q. Okay. Mr. Petersen, I'd like to show you one other
24 series of exhibits. And they're in your booklet. They begin
25 with Novell Exhibit 440. And I'm just going to list them for

1 the record. It's Novell Exhibits 440, 441, 442, 443, 444,
2 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456,
3 457, 458 and 459.

4 A. Right.

5 Q. And can you briefly look at those exhibits,
6 Mr. Petersen?

7 A. Yes, I have.

8 Q. The let's take the first one as an example.
9 Exhibit, Novell Exhibit 440. Can you describe what that is?

10 A. Yeah. It's a comparison of a file called diskusg.c
11 in OpenSolaris on the left-hand side; and on the right-hand
12 side, it's a file with the same name taken from the source
13 code tree of System V Release 4-386.

14 Q. As an engineer, have you had occasion to review
15 source files such as these?

16 A. Yes, I have.

17 Q. And this particular document, 440, is comparing,
18 like you said, two source files?

19 A. Right.

20 Q. And it was a source file from OpenSolaris on the
21 left-hand side and AT&T SVR4 on the right-hand side?

22 A. Yes.

23 Q. What does the comparison show?

24 A. It shows there is code in the OpenSolaris file that
25 is the same code in the SVR4 file. The two files aren't

1 identical. There's more code usually on the Solaris side, but
2 there are exact matches on many lines.

3 Q. So would you say these are similar?

4 A. Yes.

5 Q. Mr. Petersen, do you know whether the file that's
6 identified over here from OpenSolaris, the source file from
7 OpenSolaris, whether that also appears in UnixWare?

8 A. Yes, it does.

9 Q. It does.

10 A. UnixWare 1.1 in particular, that's the one that I
11 looked at, has the same file with the same name.

12 Q. I'd like to turn to Novell Exhibit 441. This is
13 the second of 21 exhibits that Novell has introduced on this
14 front.

15 Can you briefly describe the relationship between
16 in exhibit and the previous one?

17 THE COURT: While he's finding that, I don't know
18 what Kim's list shows, but mine shows that 444 and 454 and 457
19 were not admitted. They're your exhibits, though, so I assume
20 you're going to use them and you don't care.

21 MR. ACKER: They're fine.

22 MR. CYRULNIK: I will move to admit them.

23 THE COURT: 444, 454 and 457 are received.

24 (Whereupon, Novell Exhibits 444, 454 and
25 457 are received.)

1 Q. BY MR. CYRULNIK: I'll repeat the question. I'm
2 just asking if you can briefly describe to the Court what this
3 Exhibit 441, Exhibit 441 depicts?

4 A. Yeah. This is the same format as the previous
5 exhibit, except it's now talking about a file called
6 dispadmin.c. And again, there's a Solaris version and there's
7 a SVR4-386 version. And once again, OpenSolaris lines
8 superset, that is, many of the lines in the right-hand side
9 are present in the left-hand side.

10 Q. I'd just like to ask you the same question that I
11 asked you with respect to the previous exhibit. Mr. Petersen,
12 do you know whether the OpenSolaris source file on the
13 left-hand side of the page also appears in UnixWare?

14 A. Yeah. The same case as before, there's a file of
15 exactly the same name and UnixWare 1.1, and it's substantially
16 similar to both of these files.

17 Q. And I'm not going to bore everybody with all the
18 exhibits. But did you do a similar exercise in terms of
19 researching the 21 exhibits, the 21 source filings?

20 A. Yes.

21 Q. That are OpenSolaris and SVR 4?

22 A. Yeah. I looked at every one of these and found the
23 same file in UNIX 1.1.

24 Q. Every one of the 21 filings in OpenSolaris are in
25 UnixWare, as well?

1 A. Yes.

2 Q. Thank you, Mr. Petersen.

3 No further questions, Your Honor.

4 THE COURT: Thank you, Mr. Cyrulnik.

5 Mr. Acker, you may cross-examine.

6 MR. ACKER: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. ACKER:

9 Q. I hand you a copy of your prior testimony. It's
10 crowded up there.

11 Good afternoon, Mr. Petersen.

12 You testified a bit about your impressions
13 regarding the Sun and Microsoft license on direct; correct?

14 A. Yes.

15 Q. Is it fair to say that you were not involved in the
16 negotiation of the Microsoft license; correct?

17 A. No. I was involved a little bit in the negotiation
18 of the Microsoft license, the wording in Section 3.

19 Q. Okay. Why don't we take a look at your deposition.
20 It's your IBM deposition on February 27th, 2006. And it's at
21 Page 150, Lines 1 to 10.

22 THE COURT: Has that been published?

23 MR. ACKER: If I could, Your Honor.

24 Q. BY MR. ACKER: And you provided this testimony back
25 in 2006.

1 Okay. Do you know how many source code
2 licenses were sold during that time frame?

3 That's the question.

4 Answer. Two that I'm aware of.

5 Question. Two from October 2002 to fall
6 2003?

7 Answer. Right.

8 And who were those sold to?

9 Answer. Sun and Microsoft.

10 Question. And were you involved in the
11 negotiations for these source code licenses?

12 Answer. No.

13 A. Yes.

14 Q. Is that testimony accurate?

15 A. Yes, it was. If you read a little further, you'll
16 see that I modified that testimony.

17 Q. Well, what you modified when you testified further
18 was that you were involved in collecting and delivering source
19 code pursuant to the licenses; correct?

20 A. No. But I think if I read starting from Line 12,
21 it says:

22 Chris Sontag was. I don't know who else was
23 in both cases -- well, let me clarify that. I was
24 not involved at all in the Sun license. I was
25 involved in negotiating some of the details in the

1 Microsoft license now that I think about it.

2 Q. And those details related to the amendment of the
3 license; correct?

4 A. No. They related to the wording in Section 3.

5 Q. As to the Sun license, you never sat down with
6 anyone from Sun and engaged in negotiations with them about
7 the license; that is correct?

8 A. That's right. With Sun, no.

9 Q. So when you testified in direct that you made
10 certain assumptions about the Sun licenses and Microsoft
11 licenses, those were just that, assumptions; correct?

12 A. Yes.

13 Q. And that's not based on any interaction you had
14 during the negotiation process with anyone from Sun; correct?

15 A. I didn't negotiate with anyone from Sun during
16 that, yeah, during the contract negotiation, that's right.

17 Q. And you were actually part of the SCOSource
18 program; correct?

19 A. Yes. I worked for Chris Sontag at that point.

20 Q. You were Chris Sontag's deputy beginning the fall
21 of 2002 in the SCOSource program; correct?

22 A. That's right.

23 Q. But you were not involved in the negotiation of the
24 Sun license; correct?

25 A. That's right.

1 Q. And you were only minimally involved in the
2 negotiation of the Microsoft license?

3 A. Right.

4 Q. And any testimony that you've given of either of
5 those licenses are simply assumptions; right?

6 A. That's right. Based on my technical understanding
7 of what was going on.

8 Q. But not based on discussions with anyone at Sun or
9 Microsoft during those negotiations; right?

10 A. The only exchanges I had were e-mail exchanges
11 clarifying things we could or couldn't do. So I got an
12 impression of what they were thinking about doing from that.
13 But, you're right. Nobody from Sun said precisely, this is
14 what we're going to do.

15 Q. And no one from Sun precisely said, this is why we
16 entered into this license; right?

17 A. That's right.

18 Q. And similarly, for Microsoft you talked about what
19 might or might not be delivered after the license was
20 executed; correct?

21 A. That's right.

22 Q. Now, as I mentioned, you were asked late in 2002 to
23 join Mr. Sontag to run the SCOSource licensing campaign at
24 SCO; correct?

25 A. Right.

1 Q. And you were brought in to help with SCOSource in
2 order to generate more revenue from SCOSource code licenses or
3 to generate new source code licenses; correct?

4 A. Well, to generate more revenue from SCO's
5 intellectual property, not necessarily limited to source
6 licensing.

7 Q. All right. Why don't we take a look at your
8 deposition 2-27-08, IBM deposition. At Page 117 Line 16 to
9 24.

10 If I could publish that, Your Honor.

11 THE COURT: Yes, you may.

12 THE WITNESS: I'm sorry. What page was that again?

13 Q. BY MR. ACKER: Sure. 117.

14 A. Okay.

15 Q. Line 16 to 24.

16 MR. CYRULNIK: You said 2-27-08. Did you mean
17 2-27-06?

18 MR. ACKER: I did.

19 Q. BY MR. ACKER: Do you have that page, sir?

20 A. Yes, I do.

21 Q. And we have it up on the screen for you. And you
22 were asked the following questions and provided the following
23 answers:

24 And why don't you then help me explain
25 that. You said you were brought on to help

1 generate more source code license sales; is that
2 correct?

3 There's an objection and you answered:

4 No. Yeah, I was brought on to explore new
5 ways of generating revenue from our source code
6 licenses or generating new source code licenses.

7 Correct?

8 A. Right.

9 Q. And that's why you were asked to join -- that's why
10 you understood why you were asked to join SCOSource; right?

11 A. Right.

12 Q. And the source code that was going to be licensed
13 in the SCOSource program was SCO's UNIX source code; correct?

14 A. Right.

15 Q. And after you were assigned to SCOSource, you soon
16 met with lawyers including Darl McBride's brother
17 Kevin McBride to map out the strategy for the SCOSource
18 campaign; correct?

19 A. Yes. I was involved in that, yes.

20 Q. So you come on in October, and immediately you're
21 meeting with lawyers including Mr. McBride's brother in order
22 to map out how SCOSource is going to work; right?

23 A. Yes.

24 Q. And that included working out a litigation
25 strategy; right?

1 A. There was some discussion of litigation at that
2 point, I think. Yeah.

3 Q. And it's true, isn't it, that the SCOSource
4 licenses and the SCOSource program are broader than the
5 traditional AT&T licenses and give broader source code rights?
6 Isn't that right?

7 A. Well, I'm not an expert in licensing. My
8 impression is, yes, they do give broader rights.

9 Q. And the SCOSource licenses were licensing the,
10 quote, same materials as the traditional AT&T source code
11 licenses; right?

12 A. I'm not sure I understand what you mean by the same
13 materials.

14 Q. Okay. Let's take a look at your deposition again
15 at Page 315 Line 24 carry over to 316-7.

16 If I could publish that?

17 THE COURT: Yes.

18 Q. BY MR. ACKER:

19 Question. What's the difference, then? Why
20 were some of them SCOSource licenses as opposed to
21 just source code licenses?

22 And your answer:

23 As much as anything it's the time when
24 they sign the license. The licenses are broader,
25 give broader source code rights than some of

1 the -- than the traditional AT&T licenses. But
2 nonetheless, they're licensing the same materials.
3 The rights are just different.

4 Correct?

5 A. Okay. That's what I said, yes.

6 Q. That's a true statement; right?

7 A. Yes. And this -- yes. And what I meant here by it
8 was the same materials, meaning the source code, the
9 intellectual property and that source code.

10 Q. And when you referred to that, you were referring
11 to the UNIX, the SCO UNIX source code; correct?

12 A. Yes.

13 Q. And the source code rights under the SCOSource
14 licenses were broader than other SCOSource codes licenses --
15 strike that.

16 And the SCOSource licenses under the SCOSource
17 program were broader than other SCO regular code licenses
18 because they had fewer restrictions on sublicensing and
19 distribution and exposure of the source to the licensing
20 customers; correct?

21 A. That's right. Given as shown by the two examples
22 that we've already seen, the Sun and the Microsoft license.

23 Q. And in both the Sun and the Microsoft licenses,
24 they obtain broader rights, that is, Sun and Microsoft did, to
25 sublicense the code they got to their customers; correct?

1 A. Yes.

2 Q. And that was the SCOSource program; right?

3 A. Yes. That was part of it.

4 Q. Both were part of the SCOSource program; correct?

5 A. Yes.

6 Q. Let me show you an exhibit. Exhibit 233.

7 Have you had a chance to look at that exhibit that

8 we marked as Exhibit 233?

9 A. Okay.

10 Q. Why don't we start at the bottom. And if you could

11 highlight -- this is an e-mail. In the middle of the document

12 is an e-mail from you, and you've attached to the bottom a

13 snippet from an article or it looks like a link to an article

14 regarding Sun OpenSolaris; right?

15 A. Right.

16 Q. And you sent the e-mail to Chris Sontag on the 6th

17 of August 2003; right?

18 A. Yes.

19 Q. And what the article is talking about is that, Sun

20 takes a crack at desktop Windows, eWEEK. Do you see that?

21 A. Yes.

22 Q. And it says:

23 A Sun Microsystem executive told a Linux world

24 audience that its new Mad Hatter product, a

25 unified desktop offering based on Linux, will be

1 priced at half of the Microsoft charges for a
2 Windows environment. Sun's chief software
3 engineer, Jonathan Schwartz, also said that Sun
4 would protect its customers from any potential
5 Linux-related legal action from SCO.

6 Do you see that?

7 A. Yes.

8 Q. And you were the deputy of the SCOSource program --

9 A. Yes.

10 Q. -- at this time?

11 A. Yes.

12 Q. In July of 2003?

13 A. Yes, I was.

14 Q. And the purpose of that program was to give -- take
15 licenses or get licenses of people who are using Linux;
16 correct?

17 A. No, not necessarily. The licenses we've just
18 talked about are for Sun and Microsoft, and they didn't use
19 Linux.

20 Q. But the focus of the SCOSource program was to --
21 1,000 letters went out from Mr. McBride to Linux users all
22 over the country; correct?

23 A. That was one of the aspects of that program.

24 Q. And in that letter, Mr. McBride told those users of
25 Linux, Hey, we think our IP is in Linux; correct?

1 A. That's correct.

2 Q. And he told them, you better take a license from us
3 or you're going to get sued; correct?

4 A. I don't remember exactly how he said that. But,
5 yes, that was the impression.

6 Q. And that was the SCOSource program; right?

7 A. Yes.

8 Q. And when you see this, you become concerned;
9 correct?

10 A. Yes. Yeah.

11 Q. And why don't we take a look at your e-mail up
12 above.

13 You wrote to Chris Sontag, your boss, head of
14 SCOSource:

15 Hi, Chris. Looks like Sun intends to use its
16 broader license to protect its Linux customers.

17 Do you see that?

18 A. Yes, I do.

19 Q. And then you wrote:

20 That's fine. But I hope they don't decide to
21 go after the rest of the market.

22 Do you see that?

23 A. Yes.

24 Q. What did you mean when you wrote that?

25 A. Well, I knew that Sun had broader rights and that

1 they could sublicense some of those rights. And I was
2 wondering whether they were going to -- whether that was the
3 interpretation. What they were talking about here was their
4 Linux stuff, their Linux program. And I wondered whether they
5 would try to take that and do anything more than that.

6 Q. You were worried that they were going to provide
7 indemnity to all of these Linux users out there; right?

8 A. I didn't know if they could or not, but I wondered
9 if whether that was an issue.

10 Q. And that was a concern for you as a deputy at
11 SCOsource; correct?

12 A. Yes.

13 Q. And that would have been a commercial -- that would
14 have commercial value for Sun if they could provide indemnity
15 to customers that were using their OpenSolaris product; right?

16 A. It would.

17 Q. It would be valuable, extremely valuable; right?

18 A. Yes.

19 Q. And it would seriously undermine the SCOsource
20 program; correct?

21 A. It could, yes.

22 MR. ACKER: I don't have anything else, Your Honor.

23 THE COURT: Thank you, Mr. Acker.

24 Any redirect, Mr. Cyrulnik?

25 MR. CYRULNIK: No, Your Honor.

1 THE COURT: You may step down Mr. Petersen.

2 I assume this witness may be excused?

3 MR. ACKER: Yes. On behalf of Novell, Your Honor.

4 MR. CYRULNIK: And on behalf of SCO.

5 THE COURT: You don't want to do another witness
6 today? You better tell me where we are and whether we need to
7 come in at 8 o'clock to get out at 1:30.

8 MR. SINGER: Your Honor, we only have one remaining
9 witness. It will be a short witness, Mr. Nagle. I think the
10 direct will be 10 or 15 minutes. I don't know about cross.

11 THE COURT: Do you have any rebuttal?

12 MR. JACOBS: I don't think we'll have a rebuttal
13 case, Your Honor. The last thing we need to do is there are a
14 few exhibits we need to move in.

15 THE COURT: So you only have one more witness, and
16 the witness won't take very long?

17 MR. SINGER: That's right, Your Honor.

18 THE COURT: Well, let's come in at 9:00, then.
19 How long will your closing arguments?

20 MR. SINGER: I think 30 minutes would be
21 sufficient.

22 MR. ACKER: 30, 45, Your Honor.

23 THE COURT: So maybe an hour and a half total.

24 All right. So let's see. We'll see you at
25 9 o'clock in the morning.

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MR. SINGER: Thank you, Your Honor.

THE COURT: You'll get an extra half hour of sleep
or worry.

Thank you. We'll be in recess.

(Whereupon, the court proceedings were concluded.)

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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 May 1, 2008, and thereat reported in
8 Stenotype all of the testimony and proceedings had, and caused
9 said notes to be transcribed into typewriting; and the
10 foregoing pages number from 503 through 636 constitute a full,
11 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