

ATTACHMENT D

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Seller's Patents and Patent Applications Affecting the Business

Inventor/Country		Status	Serial/Patent No.	Date
A. <u>Owned by Seller</u>				
1.	Wong I			
	USA	Filed	07/814,854	12/30/91
	Canada	Mailed		11/12/92
2.	Raye I			
	USA	Patented	4,580,218	4/1/86
	Italy	Patented	1,205,650	3/23/89
	West Germany	Patented	0155284	11/22/90
	Great Britain	Patented	0155284	11/22/90
	France	Patented	0155284	11/22/90
	Japan	Filed	503,183/84	8/6/84
3.	Wehr 2			
	USA		7/374,380	6/30/92
	Unintentionally Abandoned To Be Revived			
	Canada	Filed	2,018,319-5	6/5/90
	Japan	Filed	170,411	6/29/90
	Belgium	Filed	90306750.2	6/20/90
	France	Filed	90306750.2	6/20/90
	Great Britain	Filed	90306750.2	6/20/90
	West Germany	Filed	90306750.2	6/20/90
	Italy	Filed	90306750.2	6/20/90
	Netherlands	Filed	90306750.2	6/20/90
	Sweden	Filed	90306750.2	6/20/90
4.	Alecci			
	1-1-1	Abandoned	07/468,435	8/1/91
	Alecci			
	2-2-2	Continuation Under Rule 1.62 of Alecci 1-1-1	07/742,149	1/14/93

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<u>Inventor/Country</u>	<u>Status</u>	<u>Serial/Patent No.</u>	<u>Date</u>
Canada	Filed	2030438-3	11/21/90
Italy	Filed	90313205.8	12/5/90
Sweden	Filed	90313205.8	12/5/90
Spain	Filed	90313205.8	12/5/90
Germany	Filed	90313205.8	12/5/90
Great Britain	Filed	90313205.8	12/5/90
France	Filed	90313205.8	12/5/90
Japan	Filed	16791/91	1/18/91
5. Andrade			
1-1-1			
USA	Filed	07/524,182	3/29/90
Canada	Filed	20388433-9	3/22/91
Japan	Filed	089094	3/29/91
Germany	Filed	91302438.6	3/20/91
Italy	Filed	91302438.6	3/20/91
Great Britain	Filed	91302438.6	3/20/91
France	Filed	91302438.6	3/20/91
6. Doshi-Sahs			
1-1			
USA	Filed	08/280,307	1/26/94
7. R.C. Pike			
One-Half	Patented	4,555-775	11/26/85
Undivided			
Interest with AT&T			

*Note: Seller and AT&T believe the Pike Patent is being infringed by third parties and certain of such parties have alleged that said patent is invalid.

ATTACHMENT E

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Selling Copyrights in Product(s) of Business

TITLE OF THIS WORK	REGISTRATION NUMBER
SYSTEM V BINARY COMPATIBILITY SPECIFICATION	TX 2 824 712
UNIX® SYSTEM V BINARY INTERFACE: WE® 32000 Processor Supplement	TX 2 824 713
SYSTEM V APPLICATION BINARY INTERFACE Intel386™ Processor Supplement	TXu 498 197
UNIX® SYSTEM V/386 RELEASE 4: Mouse Driver Administrator's Guide	TXu 455 747
UNIX SYSTEM V/386 RELEASE 4 Network User's and Administrator's Guide	TX 2-943-774
UNIX SYSTEM V/386 RELEASE 4 PC-Interface Administrator's Guide	TX 2-900-957
UNIX SYSTEM V/386 RELEASE 4 Programmer's Guide: SCSI Driver Interface	TX 2 902 863
UNIX SYSTEM V APPLICATION BINARY INTERFACE Motorola 38000 Processor Supplement	TX 2 902 556
UNIX SYSTEM V/386 RELEASE 4 MULTIBUS® Reference Manual	TX 2 902 542
UNIX® SYSTEM V RELEASE 4: Product Overview and Master Index	TX 2 902 862
UNIX® SYSTEM V RELEASE 4 PROGRAMMER's GUIDE: XWIN™ Graphical Windowing System The X Toolkit	TX 2 902 861
UNIX® SYSTEM V RELEASE 4 Programmer's Guide: XWIN™ Graphical Windowing System Xlib-C Language Interface	TX 2-900-958
UNIX® SYSTEM V RELEASE 4 Programmer's Guide: XWIN™ Graphical Windowing System Addenda: Technical Papers	TX 2-0901-148
UNIX SYSTEM V/386 RELEASE 4 Integrated Software Development Guide	TX 2 931 646

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TITLE OF THIS WORK	REGISTRATION NUMBER
UNIX® SYSTEM V/386 RELEASE 4: Product Overview and Master Index	TX 2 925 901
UNIX® SYSTEM V RELEASE 4 PROGRAMMER'S GUIDE: X11/NeWS® Graphical Windowing System NeWS	TX 2-946-827
UNIX® SYSTEM V RELEASE 4 Programmer's Guide: X11/NeWS® Graphical Windowing System tNt Technical Reference Manual	TX 2-900-956
UNIX® SYSTEM V RELEASE 4 PROGRAMMER'S GUIDE: X11/NeWS® Graphical Windowing System Server Guide	TX 2 902 864
UNIX® SYSTEM V RELEASE 4 PROGRAMMER'S GUIDE: X11/NeWS® Graphical Windowing System XVIEW™	TX 2 907 117
UNIX® SYSTEM SOFTWARE READINGS	TX 2 900 246
UNIX® SYSTEM V RELEASE 4 Programmer's Reference Manual Operating System API for Intel Processors	TX 3 218 268
UNIX® SYSTEM V RELEASE 4 User's Reference Manual/System Administer's Reference Manual for Intel Processors <u>Commands m-z</u>	TX 3 221 656
UNIX® SYSTEM V RELEASE 4 Integrated Software Development Guide for Intel Processors	TX 3 221 657
UNIX SYSTEM V RELEASE 4 User's Reference Manual/System Administrator's Reference Manual for Intel Processors <u>Commands, a-1</u>	TX 3 227 639
UNIX® SYSTEM V RELEASE 4 Programmers Guide: Streams for Intel Processors	TX 3 218 286

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TITLE OF THIS WORK	REGISTRATION NUMBER
UNIX® SYSTEM V RELEASE 4 Device Driver Interface/Driver Kernel Interface Reference Manual for Intel Processors	TX 3 232 578
UNIX® SYSTEM V RELEASE 4 Master Index for Motorola Processors	TX 3 221 653
UNIX SYSTEM V RELEASE 4 Device Driver Interface/Driver Kernel Interface Reference Manual for Motorola Processors	TX 3 220 500
UNIX® SYSTEM V RELEASE 4 User's Reference Manual/System Administrator's Reference Manual for Motorola Processors <u>Commands a-1</u>	TX 3 220 331
UNIX® SYSTEM V UTILITIES RELEASE NOTES	TX 2 123 158
UNIX® SYSTEM V STREAMS PROGRAMMERS GUIDE	TX 2 123 157
UNIX® SYSTEM V STREAMS PRIMER	TX 2-120-499
UNIX® SYSTEM V PROGRAMMER'S GUIDE	TX 2-120-502
UNIX SYSTEM V/386 RELEASE 4 MULTIBUS® Installation and Configuration Guide	TX 2 902 541
UNIX SYSTEM V/386 RELEASE 4 Transport Application Interface Guide	TX 2 881 542
UNIX SYSTEM V/386 RELEASE 4 Device Interface/Driver Kernel, Interface (DDI/DKI) Reference Manual	TX 2-883-235
UNIX SYSTEM V/386 RELEASE 4 Migration Guide	TX 2-890-470
UNIX SYSTEM V/386 RELEASE 4 System Administrator's Reference Manual	TX 2 881 543
UNIX SYSTEM V/386 RELEASE 4 PROGRAMMER'S REFERENCE MANUAL	TX 2-853-760

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TITLE OF THIS WORK	REGISTRATION NUMBER
UNIX SYSTEM V/386 RELEASE 4 User's Reference Manual	TX 2-890-471
UNIX SYSTEM V APPLICATIONS BINARY INTERFACE: <u>SPARC™ Processor Supplement</u>	TX 2 862 662
UNIX SYSTEM V APPLICATION BINARY INTERFACE: <u>Motorola 68000 Processor Family Supplement</u>	TX 2 870 036
UNIX® SYSTEM V RELEASE 4 User's Reference Manual	TX 2 820 791
UNIX® SYSTEM V RELEASE 4 USER'S GUIDE	TX 2 832 010
UNIX® SYSTEM V RELEASE 4 ANSI C TRANSITION GUIDE	TX 2 820 798
UNIX SYSTEM V RELEASE 3.2 SYSTEM ADMINISTRATOR'S GUIDE	TX 2 832 116
UNIX® SYSTEM V RELEASE 4 DEVICE DRIVER INTERFACE/DRIVER KERNEL INTERFACE (DDI/DKI) REFERENCE MANUAL	TX 2 820 792
UNIX® SYSTEM V RELEASE 4 PROGRAMMER'S GUIDE POSIC conformance	TX 2 820 885
UNIX® SYSTEM V RELEASE 4 PROGRAMMER'S GUIDE: Streams	TX 2 833 114
UNIX® SYSTEM V RELEASE 4 PROGRAMMER'S REFERENCE MANUAL	TX 2 832 009
UNIX® SYSTEM V RELEASE 4 NETWORK USER'S AND ADMINISTRATOR'S GUIDE	TX 2 832 008
UNIX® SYSTEM V RELEASE 4 SYSTEM ADMINISTRATOR'S REFERENCE MANUAL	TX 2 830 989

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TITLE OF THIS WORK	REGISTRATION NUMBER
UNIX® SYSTEM V RELEASE 4 PROGRAMMER'S GUIDE: Ansi C and Programming Support Tools	TX 2 820 849
UNIX® SYSTEM V RELEASE 4 PROGRAMMERS GUIDE: System and Application Packaging Tools	TX 2 825 383
UNIX® SYSTEM V RELEASE 4 MIGRATION GUIDE	TX 2 820 886
UNIX® SYSTEM V RELEASE 4 PROGRAMMER'S GUIDE: Character User Interface (FMLI and FTT)	TX 2 825 299
UNIX® SYSTEM V RELEASE 4 BSD/XENIX® COMPATIBILITY GUIDE	TX 2-878-051
UNIX® SYSTEM V RELEASE 4 PROGRAMMER'S GUIDE: Networking Interfaces	TX 2 838 313
SYSTEM V APPLICATION BINARY INTERFACE	TX 2 847 222
AT&T UNIX System V/386, Release 3.2 Utilities Release Notes	TX 2 454 845
AT&T UNIX SYSTEM V/386 Release 3.2 Streams Primer	TX 2 454 847
UNIX SYSTEM V/386 Release 3.2 User's Guide	TX 2-488-749
AT&T UNIX SYSTEM V/386: Programmer's Guide, Vol. II	TX 2 454 884
UNIX SYSTEM v/386 Release 3.2 Programmer's Reference Manual	TX 2 494 658
UNIX SYSTEM V/386 Release 3.2 Streams Programmer's Guide	TX 2 497 054
UNIX SYSTEM V/386: Network Programmer's Guide	TX 2 366 626

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TITLE OF THIS WORK	REGISTRATION NUMBER
UNIX® SYSTEM V/386: Programmer's Reference Manual	TX 2 373 759
UNIX® SYSTEM V/386: User's Guide, 2nd edition	TX 2-363-829
UNIX® SYSTEM V/386: User's Reference Manual	TX 2 365 627
UNIX® SYSTEM V/386: System Administrator's Reference Manual	TX 2-371-952
UNIX® SYSTEM V/386: Streams Programmer's Guide	TX 2-367-657
UNIX® SYSTEM V/386: Programmers' Guide	TX 2-400-593
UNIX® SYSTEM V/386: Streams Primer	TX 2 366 645
UNIX® SYSTEM V/386: System Administrator's Guide	TX 2 378 091
UNIX® SYSTEM V/386: Utilities Release Notes	TX 2 366 532
UNIX® SYSTEM V NETWORK PROGRAMMERS GUIDE	TX 2 117 799
UNIX® SYSTEM V: User's Guide, 2/E	TX 2 052 293
UNIX® SYSTEM V RELEASE 3.2: Framed Access Command Environment (FACE) User's Guide	TX 2 611 527
UNIX® SYSTEM V RELEASE 3.2: Form and Manu Language Interpreter (FMLI) Programmer's Guide	TX 2 605 294
UNIX® SYSTEM V RELEASE 3.2: Utilities Release Notes	TX 2-611-984
UNIX® SYSTEM V RELEASE 3.2: Programmer's Guide, Volume II	TX 2 595 940
UNIX® SYSTEM V RELEASE 3.2: System Administrator's Reference Manual	TX 2-611-860

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TITLE OF THIS WORK	REGISTRATION NUMBER
UNIX® SYSTEM RELEASE 3.2: User's Guide	TX 2-611-861
UNIX® SYSTEM V RELEASE 3.2: Programmer's Guide, Volume I	TX 2-611-862
UNIX® SYSTEM V BINARY COMPATIBILITY SPECIFICATION: WE® 32000 Processor Supplement	TX 2 824 711
UNIX® SYSTEM V RELEASE 4: OPEN LOOK™ Graphical User Interface Programmer's Reference Manual	TX 2-900-893
UNIX® SYSTEM V RELEASE 4: Programmer's Guide: OPEN LOOK™ Graphical User Interface	TM 2-900-966
UNIX® SYSTEM V RELEASE 4 OPEN LOOK™ GRAPHICAL USER INTERFACE USER'S GUIDE	TX 2-901-147
UNIX® SYSTEM V RELEASE 3.2: System Administrator's Guide	TX 2 611 530
UNIX® SYSTEM V RELEASE 3.2: Streams Programmer's Guide	TX 2 604 382
UNIX® SYSTEM V RELEASE 3.2: Programmer's Reference Manual	TX 2 605 292
UNIX SYSTEM V: Documentor's Workbench, <u>Reference Manual</u>	TX 2 986 119
UNIX SYSTEM V: Documentor's Workbench, <u>User's Guide</u>	TX 2 986 118
UNIX System V/386 Release 3.2 System Administrator's Guide	TX 2 454 792
AT&T UNIX System V/386 Release 3.2 Network Programmer's Guide	TX 2 454 846
THE UNIX™ SYSTEMS USER's GUIDE	TX 1 788 418
UNIX® SYSTEM RELEASE 3.2: Programmer's Guide, Volume I	TX 2-611-862

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TITLE OF THIS WORK	REGISTRATION NUMBER
UNIX SYSTEM V/386: Programmer's Guide, Vol II	TX 2 454 884
UNIX® SYSTEM V RELEASE 4 User's Reference Manual/System Administrator's Reference Manual for Motorola Processors <u>Commands m-z</u>	TX 3 218 267
UNIX® SYSTEM V RELEASE 4 System Files and Devices Reference Manual for Motorola Processors	TX 3 221 654
UNIX® SYSTEM V RELEASE 4 Programmer's Reference Manual: Operating System API for Motorola Processors	TX 3 221 655
Operating System Utility Programs	TXu 301 868
UNIX® Operating System Edition 5 and Instruction Manual	TXu 510 028
UNIX® Operating System Edition 6 and Instruction Manual	TXu 511 236
UNIX® Operating System Edition 32V and Instruction Manual	TXu 516 704
UNIX® Operating System Edition 7 and Instruction Manual	TXu 516 705

ATTACHMENT F

CERTAIN THIRD PARTY ROYALTY PAYMENTS

<u>THIRD PARTY VENDOR</u>	<u>PRODUCTS [OR COMPONENTS OF PRODUCT(S)] ON WHICH ROYALTY IS DUE</u>	<u>ROYALTY BASED ON</u>	<u>Royalties Paid 8/1/94 - 7/31/95</u>
(1) <u>Microsoft</u>	SVR3/SVR4/UW tgt hw of 386/486 PE, AS	binary units binary units	Over \$1.5 Million
(2) <u>Veritas</u>	Veritas products AS, ODM	source/binary revenue binary units	Over \$1.0 Million (< \$1.5)
(3) <u>OSF</u>	Motif product PE, AS, MOTIF KIT, SDK	source/binary units reference binary units binary units	\$1M commitment thru 1997 (buy-out)
(4) <u>Locus</u>	Locus Merge 3.1 PE, AS, ADVMRG, SRVMRG	binary units binary units	Over \$1.5 Million

Attachment G

Seller Contracts Containing Business-Related Rights

which are Terminable in the Event of Acquisition

- October 16, 1992 Master Purchase and License Agreement between Seller and Electronic Book Technologies, Inc.
- June 1, 1995 CDE/MOTIF PST Joint Development Agreement among Seller and Digital Equipment Corporation; Hitachi, Ltd.; International Business Machines Corporation; Fujitsu Limited; Open Software Foundation, Inc.; X Consortium, Inc. and Sun Microsystems, Inc.
- May 10, 1994 Trademark Relicensing Agreement between Seller and X/Open Company, Ltd.
- February 28, 1995 Software License Agreement between Seller and Atria Software, Inc.
- February 7, 1987 Development and License Agreement now in effect between Seller and Microsoft Corporation.

NOVELL-SCO-Proprietary (Restricted)
Not for disclosure to third parties

CONFIDENTIAL

SCO1185988

**REPRESENTATIONS AND WARRANTIES OF BUYER
DISCLOSURE SCHEDULE**

3.3 Capitalization

Series C Agreement between The Santa Cruz Operation, Inc. and Microsoft Corporation.

The Company is in the process of granting Hambrecht & Quist warrants to purchase 50,000 shares of Common Stock at \$7.75 per share as partial consideration for services provided to the Company pertaining to the subject transaction.

Also see 3.8 below.

3.7 Litigation

In August 1993, a securities class action lawsuit was filed in Superior Court of San Francisco, California and is now pending in the Superior Court of Santa Clara County, California against the Company, Douglas Michels, Lars Turndal, Dan Steinle, Larry Michels and the Company's underwriters. The lawsuit alleges violations of the Securities Act of 1933, pertaining to alleged misrepresentations and omissions in the Company's Registration Statement and Prospectus in connection with its initial public offering. In May 1994, the case was dismissed. The plaintiffs filed a notice of appeal in June 1994.

In February 1995, Micro-Quick Systems, Inc., a software dealer, commenced legal action against the Company in the California Superior Court in San Bernadino County seeking to recover unspecified damages in excess of \$1,000,000. Micro-Quick alleges the Company failed to deliver conforming product and failed to support said product.

In May 1995, an action was filed in the Superior Court of Santa Cruz County, California by a former employee against the Company and two current employees alleging sexual harassment, employment discrimination, breach of contract and related claims.

In August 1995, JSB Computer Systems, Ltd., a software vendor, filed a complaint against the Company in the Superior Court of Santa Cruz County, alleging breach of contract for failure to make appropriate payments under the contract. JSB seeks to recover unspecified damages in excess of \$100,000.

The Company does not believe any of these lawsuits individually or in the aggregate will have a material adverse impact on the Company.

3.8 Absence of Certain Changes

The Company has held and continues to hold informal discussions with Microsoft Corporation regarding the purchase by the Company of Microsoft's equity in the Company, in whole or in part. No commitments have been made by either party.

3.10 Tax Returns and Reports

(i) SCO is in compliance with all material filing requirements. Those filing requirements that SCO may not be in compliance with will not have a material adverse effect on the business condition of SCO. Returns in this latter category include an IXI Corporation California return for 9/93, possible Arizona and Tennessee income tax returns, various sales tax returns in the states of Washington, Wisconsin, Tennessee, etc. and business license returns in Washington and Fairfax County, Virginia.

(ii) SCO is in compliance with all employer tax requirements.

(iii) No material tax delinquencies are outstanding against SCO. The items mentioned in (i) above may give rise to delinquencies, but not of a material amount. See (iv) below for waivers of the statute of limitation.

(iv) SCO is undergoing an IRS audit for the fiscal years 9/90 and 9/91 and has extended the statute of limitations for those years to 12/31/95. The IRS auditor has advised that he will also audit 9/92, but this has not been officially confirmed. SCO is undergoing a Texas sales tax audit and nexus queries have been received from Tennessee, Wisconsin and Washington. None of the audits or queries are expected to have a material adverse effect on the business condition of SCO.

(v) None of SCO's assets are treated as "tax-exempt use property" within the meaning of IRC 168(h).

(vi) SCO is not, and has not been, a "US real property holding corporation" within the meaning of IRC 897(c)(2).

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

THE SCO GROUP, INC.,

Plaintiff,

vs.

NOVELL, INC.,

Defendant.

**MEMORANDUM DECISION AND
ORDER**

Civil Case No. 2:04CV139DAK

This matter is before the court on the following motions: Novell's Motion for Partial Summary Judgment or Preliminary Injunction [Docket No. 147]; SCO's Cross-Motion for Summary Judgment or Partial Summary Judgment on Novell's Third, Sixth, Seventh, Eighth and Ninth Counterclaims [Docket No. 180]; Novell's Motion for Summary Judgment on SCO's First Claim for Slander of Title for Failure to Establish Special Damages [Docket No. 277]; Novell's Motion for Partial Summary Judgment on SCO's Non-Compete Claims in its Second and Fifth Claims [Docket No. 273]; Novell's Motion for Partial Summary Judgment on Copyright Ownership of SCO's Second Claim for Breach of Contract and Fifth Claim for Unfair Competition [Docket No. 271]; Novell's Motion for Partial Summary Judgment on its Fourth Claim [Docket No. 171]; SCO's Cross-Motion for Partial Summary Judgment on Novell's Fourth Claim [Docket No. 224]; SCO's Motion for Partial Summary Judgment on its First, Second, and Fifth Claims and Novell's First Claim [Docket No. 258]; and Novell's Motion for Summary Judgment on SCO's First Claim for Slander of Title and Third Claim for Specific

Performance [Docket No. 275]. The court held hearings on these motions on January 23, 2007, May 31, 2007, and June 4, 2007, and took the motions under advisement. After carefully considering the memoranda and other materials submitted by the parties, and the law and facts applicable to these motions, the court issues the following Memorandum Decision and Order.

BACKGROUND

The SCO Group, Inc. ("SCO") began this action in state court asserting a single cause of action against Novell, Inc. ("Novell") for slander of title based on public statements Novell made claiming that it had retained the UNIX and UnixWare copyrights when it sold certain assets of its UNIX and UnixWare business to SCO's predecessor in interest. After Novell removed the case to this court, the parties proceeded to add several claims and counterclaims to the action. SCO added claims for breach of the parties' Asset Purchase Agreement and Technology License Agreement, specific performance, copyright infringement, and unfair competition. Novell added counterclaims against SCO for slander of title, breach of the Asset Purchase Agreement, declaratory relief regarding the parties' rights and obligations under the Asset Purchase Agreement, restitution/unjust enrichment, and accounting.

UNIX was originally developed by AT&T. In 1983, AT&T developed a new version of UNIX called UNIX System V, Release 1. Other versions were also subsequently developed. These releases are referred to as SVR1, SVR2, SVR3, and SVR4, or generically SVRX. In 1993, Novell purchased UNIX-related assets from AT&T's subsidiary, UNIX System Laboratories, and paid over \$300 million for those assets. Decl. Tor Braham at ¶ 4.

A. The APA and Contemporaneous Agreements

(1) *The APA*

SCO's predecessor in interest, Santa Cruz Operations Inc.,¹ and Novell entered into an Asset Purchase Agreement ("APA") dated September 19, 1995. Decl. Mark James Ex. 1 ("APA"). The APA acknowledges in its "Recitals" section that Novell was "engaged in the business of developing a line of software products currently known as Unix and UnixWare, the sale of binary and source code licenses to various versions of Unix and UnixWare, the support of such products and the sale of other products which are directly related to Unix and UnixWare (collectively, the "Business")." APA Recital A. It is further stated in the APA that the Boards of Directors of Novell and Santa Cruz "believe it is in the best interests of each company . . . that [Santa Cruz] acquire certain of the assets of, and assume certain of the liabilities of [Novell] comprising the Business (the "Acquisition"). *Id.* Recital B. As part of the consideration for the Acquisition, Santa Cruz agreed to issue Novell 6,127,500 shares of Santa Cruz's Common Stock, which some witnesses have approximated to be worth between \$125 to \$150 million at the time of the transaction. *Id.* Recital C.

Article I of the APA outlines the Acquisition by breaking it down into categories relating to the purchase of assets, payments, the transfer of customers, non-assignment of certain items, transitional contracts, the license back of assets, and the closing. *Id.* §§ 1.1-1.7. The APA's provision entitled "Purchase and Sale of Assets" provides:

On the terms and subject to the conditions set forth in this Agreement, Seller will sell, convey, transfer, assign and deliver to

¹ Five years after the APA, Santa Cruz was purchased by Caldera. Caldera changed its name to The SCO Group.

Buyer and Buyer will purchase and acquire from Seller on the Closing Date (as defined in Section 1.7) all of Seller's right, title, and interest in and to the assets and properties of Seller relating to the Business (collectively the "Assets") identified on Schedule 1.1(a) hereto. Notwithstanding the foregoing, the Assets to be so purchased shall not include those assets (the "Excluded Assets") set forth on Schedule 1.1(b).

Id. § 1.1(a). With respect to their "Intellectual Property" provisions, Schedule 1.1(a) and Schedule 1.1(b) are consistent. Schedule 1.1(b) sets forth as Excluded Assets the following "Intellectual Property": "All copyrights and trademarks, except for the trademarks UNIX and UnixWare" and "All Patents." *Id.* Sched. 1.1(b) § V.A, V.B. Schedule 1.1(a) sets forth as Assets to be transferred the following "Intellectual Property": "Trademarks UNIX and UnixWare as and to the extent held by Seller (excluding any compensation Seller receives with respect of the license granted to X/Open regarding the UNIX trademark)." *Id.* Sched. 1.1(a) § V.

Another significant aspect of the APA is the agreement between the parties with respect to future SVRX Royalties. Under the payment provisions of the APA, Novell retained "all rights to the SVRX Royalties notwithstanding the transfer of the SVRX Licenses to [Santa Cruz]." *Id.* § 1.2(b). Santa Cruz agreed to pass through one-hundred percent of the SVRX Royalties to Novell, and Novell agreed to pay Santa Cruz a five percent administrative fee. *Id.* Santa Cruz obtained "legal title and not an equitable interest in such royalties within the meaning of Section 541(d) of the Bankruptcy Code." *Id.* More specific details of the parties' agreement regarding SVRX Royalties will be discussed later in this Background Section.

(2) The Bill of Sale

The APA itself did not transfer assets. Rather, it described the assets that would be transferred in the future when the transaction closed. The APA provided that at the transaction's

Closing, Novell would deliver a "Bill of Sale" transferring Novell's title to the "Assets" described in the APA to Santa Cruz. Under Section 1.7 of the APA, Novell was to deliver to Santa Cruz "all bills of sale, endorsements, assignments, consents to assignments to the extent obtained and other instruments and documents as [Santa Cruz] may reasonably request to sell, convey, assign, transfer and deliver to [Santa Cruz] [Novell's] title to all the Assets." *Id.* § 1.7(b)(iii).

Accordingly, Novell and Santa Cruz executed a "Bill of Sale" on December 6, 2005, when the transaction closed. Decl. Mark James Ex. 3. The Bill of Sale stated that in accordance with Section 1.1(a) of the APA, Novell "does hereby transfer, convey, sell, assign, and deliver" to Santa Cruz "all of the Assets." *Id.* The Bill of Sale further stated that all capitalized terms had the meanings set forth in the APA as amended by Amendment No. 1. *Id.* Therefore, the Assets so transferred were those listed on Schedule 1.1(a) and not those listed on Schedule 1.1(b). *See* APA § 1.1(a). Moreover, the Bill of Sale recognized that it was intended only to document "the sale and assignment of the Assets to Buyer, and that the [APA] is the exclusive source of the agreement and understanding between Seller and Buyer respecting the Assets." Decl. Mark James Ex. 3.

(3) *The TLA*

The APA also required Santa Cruz to execute a separate license granting Novell the right to use technology included in the transferred Assets and derivatives, subject to certain limitations. APA § 1.6. Section 1.6 of the APA states that Santa Cruz must execute a license agreement concurrent with the Closing of the APA which grants Novell "a royalty-free, perpetual, worldwide license to (i) all of the technology included in the Assets and (ii) all

derivatives of the technology included in the Assets.” *Id.*

Novell and Santa Cruz implemented this requirement by executing the Technology License Agreement (“TLA”) on December 6, 1995, in connection with the APA’s Closing. Decl. Mark James Ex. 4 (“TLA”). The TLA states that Novell retains a “non-exclusive, non-terminable, worldwide, fee-free license” to use “Licensed Technology” under certain conditions. TLA II.A. As with the parties’ Bill of Sale, the TLA states that certain defined terms, such as “Licensed Technology,” have the “meanings attributed to such terms in the Asset Purchase Agreement.” *Id.* I. The term “Licensed Technology” is defined in the APA as “all of the technology included in the Assets and all derivatives of the technology included in the Assets.” APA § 1.6.

With regard to internal business operations, the TLA granted Novell an unrestricted license to “use, reproduce and modify, and authorize its customers to use, reproduce, and modify, Licensed Technology.” TLA II.A.(1). With regard to external use, the TLA granted Novell a license to “sublicense and distribute, and authorize its customers to sublicense and distribute, such Licensed Technology and modifications thereof, in source and binary form.” *Id.* II.A.(2). This license as to external use was subject to the following limitation: “provided, however, that (1) such technology and modifications may be sublicensed and/or distributed by Novell solely as part of a bundled or integrated offering (“Composite Offering”); (ii) such Composite Offering shall not be directly competitive with core application server offerings of SCO, and (iii) the Licensed Technology shall not constitute a primary portion of the value of such Composite Offering.” *Id.* SCO contends that these provisions constitute a non-compete provision, whereas Novell argues that they are merely a limitation on its license.

The TLA further stated that this limitation “shall cease to exist” in the event of a “Change of Control” of Santa Cruz. *Id.* B. The TLA states that “Change of Control” shall have the meaning attributed to it in the APA. *Id.* I. Under Section 1.6 of the APA, which provides for the license back of assets and which provides the basis for entering the TLA, it states that “the license agreement shall also provide [Novell] with an unlimited royalty-free, perpetual, worldwide license to the Licensed Technology upon the occurrence of a Change of Control of [Santa Cruz] described in Section 6.3(c) hereof.” APA § 1.6. Section 6.3(c) of the APA is entitled “Expansion of Seller’s Rights Relating to the Licensed Technology upon a Change of Control” and provides that

[u]ntil two (2) years from the Closing Date, in the event [Santa Cruz] has merged with, sold shares representing 50% or more of the voting power of [Santa Cruz] to, sold all or substantially all of [Santa Cruz’s] assets to, or engaged voluntarily in any other change of control transaction with, any party identified by [Novell] on Schedule 6.3(a) hereof, or in the event any party identified by [Novell] on Schedule 6.3(a) hereof, shall acquire shares representing 50% or more of the voting power of [Santa Cruz], [Novell] shall automatically have unlimited, royalty-free, perpetual rights to the Licensed Technology.

Id. § 6.3(c).

Section 1.6 of the APA further provides that “[i]n the event of a Change of Control of [Novell] (as described in Section 6.6 hereof), the license granted pursuant to the license agreement shall be limited to [Novell’s] products either developed or substantially developed as of the time of the Change of Control.” *Id.* § 1.6. Section 6.6(c) of the APA is entitled “Change of Control” and provides that

For purposes of this Agreement, a “Change of Control” with respect to one party shall be deemed to have occurred whenever (i)

there shall be consummated (1) any consolidation or merger of such party in which such party is not the continuing or surviving corporation, or pursuant to which shares of such party's common stock would be converted in whole or in part into cash, other securities or other property, other than a merger of such person in which the holders of such party's common stock immediately prior to the merger have substantially the same proportionate ownership of common stock of the surviving corporation immediately after the merger, or (2) any sale, lease, exchange or transfer (in one transaction or a series of related transactions) of all or substantially all the assets of such party, or . . . (v) any other event shall occur with respect to such party that would be required to be reported in response to Item 6(e) (or any successor provision) of Schedule 14A of Regulation 14A promulgated under the Exchange Act."

Id. § 6.6(c)

In 2001, Santa Cruz sold its UNIX business to Caldera Systems, Inc., the immediate predecessor to SCO. The assets sold by Santa Cruz included all of the UNIX assets that it had purchased from Novell in 1995, plus other assets that collectively accounted for 100% of Santa Cruz's operating income and 94.7% of its net revenues.

In the TLA, the parties recognized that the TLA and the APA "constitute the entire understanding between the parties with respect to its subject matter, and supersede all prior understandings, both written and oral, between them relating to such subject matter." TLA VIII.

(4) Amendment No. 1

On December 6, 1995, a few months after the APA was signed and the date the transaction closed, Novell and Santa Cruz signed Amendment No. 1. Decl. Mark James Ex. 2 ("Am. No.1"). Amendment No. 1 made several clarifying amendments, including specific revisions to Schedule 1.1(a) and 1.1(b). Am No. 1 ¶¶ K, L. "All other terms and conditions of the [APA] remain[ed] in full force and effect." Am. No. 1 at 10. Amendment No. 1 did not

change the description of Intellectual Property that was included and excluded from the transferred Assets under Schedules 1.1(a) and 1.1(b). *See id.* ¶¶ K, L.

Amendment No. 1 also made amendments to the APA with respect to the agreement regarding SVRX Licenses and Royalties that will be discussed in a later section.

(5) Extrinsic Evidence

Both parties have submitted a substantial amount of evidence in connection with the negotiation and execution of the APA and its amendments, as well as the parties' conduct after the APA was signed.

(a) Purpose of Agreement

Santa Cruz's stated purpose for entering the APA with Novell and acquiring the UNIX and UnixWare business was to be the supplier of Unix to the industry and to develop a future consolidated version of Unix that ran on an Intel processor. Decl. Mark James Ex. 6 ("Mohan Dep.") at 38-39. Beyond that, SCO has provided little evidence as to its intent with respect to specific provisions of the Agreement or its business strategy for structuring such a complex relationship between the parties. Novell, however, has produced significant evidence as to its business strategy and intent with respect to specific provisions.

In early 1995, Novell decided to divest itself of certain UNIX-related assets. Decl. James R. Tolonen at ¶ 4. Although Novell wanted to sell the entire UNIX and UnixWare business to focus on its Netware product, it became clear during negotiations with Santa Cruz that Santa Cruz could not afford to purchase the entirety of Novell's UNIX and UnixWare assets and rights. *Id.* ¶ 4. Consequently, Novell and Santa Cruz focused on a more limited deal that also included a forward looking revenue stream for Novell.

Novell has submitted evidence that an important consideration for its sale of UNIX assets was Santa Cruz's commitment to develop enhanced UnixWare products that were compatible with Novell's Netware product. The APA required Santa Cruz to develop a merged product that would combine Novell's version of the UNIX operating system with Santa Cruz's version of UNIX. APA § 4.18. Novell and Santa Cruz hoped that the merged product would provide a commercially successful alternative to Microsoft's Windows system. Decl. Tor Braham at ¶ 8. Novell's Netware product needed an alternative operating system if it was to compete with Microsoft. *Id.* Novell also had a strong interest in the development of a commercially successful UNIX operating system that would run on Intel's 64-bit processors because it would expand the market for Netware. *Id.* ¶ 13-14; Decl. David Bradford at ¶ 1,3; Decl. James Tolonen at ¶ 12.

Novell had concerns about entrusting the future of UNIX and Novell's UNIX-related interests to Santa Cruz. Decl. David Bradford at ¶ 7. David Bradford, Novell's Senior Vice President and General Counsel, states that there were serious concerns about Santa Cruz's viability as a company, and Novell became focused on building in protections for Novell in the event that Santa Cruz went bankrupt. *Id.* ¶ 8.

First, Santa Cruz was given legal title to SVRX Licenses "and not equitable interest in such royalties within the meaning of Section 541(d) of the Bankruptcy Code." APA § 1.2(b). According to the principal drafter of the APA, Tor Braham, this provision was added to decrease the risk that Novell's receipt of SVRX revenues would be impacted if Santa Cruz went into bankruptcy. Decl. Tor Braham ¶ 10.

Second, Novell asserts that it intended to exclude all copyrights from the assets to be transferred in order to protect its future SVRX revenues. *Id.* at 18-19; Decl. David Bradford ¶¶

11-12; Decl James Tolonen ¶ 11. In the event Santa Cruz went into bankruptcy, the UNIX and UnixWare copyrights would not be part of the bankruptcy estate and the bankruptcy trustee could not assert an interest in them. Decl. Tor Braham ¶ 14, Decl David Bradford ¶ 9; Decl. James Tolonen ¶ 12. Excluding copyrights from the transferred assets also protected Novell's other UNIX-related interests. Retaining ownership of the copyrights would strengthen Novell's rights to negotiate buy-outs of the SVRX Licenses and to receive future revenues. Decl. Tor Braham ¶ 14; Decl. James Tolonen ¶ 12. Furthermore, it put Novell in a better position to ensure successful development of future versions of the UNIX operating system.

SCO's extrinsic evidence regarding Santa Cruz's inability to proceed with a cash deal appears to conflict. Many of SCO's witnesses refer to the value of the stock Santa Cruz provided as consideration as evidence that such a sum would purchase Novell's whole UNIX-related business. Such testimony, however, is at odds with other witness testimony stating that the deal would not have proceeded without the creation of a future revenue stream for Novell. Testimony that additional revenue was necessary is consistent with the amount Novell paid for its acquisition of UNIX assets from AT&T and the fact that the shares of stock Santa Cruz transferred were only part of the consideration provided in the APA.

The consideration provided through future royalties significantly complicated the agreement and the parties' ongoing relationship. SCO, however, has provided virtually no evidence from its perspective as to the purpose of or strategy behind the creation of a continuing stream of revenue for Novell other than some testimony that it could not afford to acquire it and the deal would not have proceeded otherwise.

(b) Drafts of Agreement

The correspondence between Novell and Santa Cruz prior to the date the APA was signed shows that significant revisions were made to the agreement. A September 8, 1995 draft of Schedule 1.1(a), which listed the assets to be transferred, included “all patents, patent applications, copyrights . . . and all other intellectual property . . . that pertain to Unix or UnixWare.” Decl. Tor Braham at ¶ 15, Ex. 6.

Novell’s outside counsel drafted a new schedule of assets to be included in the asset transfer as well as a schedule of assets to be excluded from the transfer. *Id.* ¶ 15. The new Schedule 1.1(a) deleted copyrights, patents, and all other intellectual property from the assets to be transferred. The revised Schedule 1.1(a) included only the UNIX and UnixWare trademarks as the “Intellectual Property” included in the transaction. The new Schedule 1.1(b), which listed the assets excluded from the transfer, listed all copyrights, all patents, and all trademarks except for the UNIX and UnixWare trademarks.

Novell submitted evidence demonstrating that during the negotiations, David Bradford, Tor Braham, Aaron Alter, and Burt Levine all reviewed and approved the language in the Excluded Assets Schedule 1.1(b). *Id.* ¶ 16. SCO has not provided evidence from witnesses on the Santa Cruz side of the transaction with respect to their review of the asset schedules. In fact, there is no evidence from any of Santa Cruz’s outside counsel and very little evidence from Santa Cruz’s in-house legal department regarding the drafting of the APA.

(c) Parties’ Conduct

Both parties have also submitted in support of their respective interpretations of the APA extrinsic evidence of the parties’ conduct in relation to the APA.