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BY **D. MARK JONES, CLERK**
DEPUTY CLERK

BRENT O. HATCH

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March 15, 2010

By Email

Honorable Ted Stewart
United State District Court
District of Utah

Re: IBM Deposition Testimony

Your Honor:

Novell objects to SCO's use of deposition testimony of three former SCO employees, Lawrence Gasparro, Philip Langer and Gregory Pettit. These three individuals were deposed as part of discovery in the action between SCO and IBM. Novell has objected to the entirety of these depositions on the grounds that they are inadmissible hearsay because Novell was not a party to that case.

This deposition testimony is admissible in this trial. It has long been the "bedrock authority" in the Tenth Circuit that "testimony adduced in a prior suit may be admissible in a subsequent suit even if the parties are not identical, so long as the issues are so similar that the party-opponent in the prior case had the same interest and motives in his cross-examination that the present opponent has." Minyen v. Am. Home Assurance Co. v. Aetna Life Ins. Co., 443 F.2d 788, 791 (10th Cir. 1971) (citing authority); accord Clay v. Buzas, 208 F.R.D. 636, 638 (D. Utah 2002) (same); see also Bankers Trust Co. v. Rhoades, 108 B.R. 423, 430-31 (S.D.N.Y. 1989) (citing Minyen). The authority in the Tenth Circuit reflects the governing principle across jurisdictions. See, e.g., SEC v. Antar, 120 F. Supp. 2d 431, 445-46 (D.N.J. 2000); Aamco Transmissions, Inc. v. Marino, Civ. A. Nos. 88-5522, 88-6197, 1991 WL 142652, at *2 (E.D. Pa. July 22, 1991); Miwon, U.S.A., Inc. v. Crawford, 629 F. Supp. 153, 154 n.3 (S.D.N.Y. 1985).

This approach applies pursuant to Federal Rule of Civil Procedure 32(a), which is a basis for admissibility independent of the Rules of Evidence. Clay, 208 F.R.D. at 638; see also Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 914 (9th Cir. 2008); Ueland v. United States, 291 F.3d 993, 995-96 (7th Cir. 2002); In re Complaint of Bankers Trust Co., 752 F.2d 874, 888 n.17 (3d Cir. 1984).

With respect to the questions the deponents answered in the excerpts at issue,¹ IBM and Novell shared the exact same interest and motives. In February 2004, many months before the depositions at issue, SCO had made the following allegations against IBM in SCO's Second Amended Complaint (Docket No. 108 in Case No. 03-CV-0294):

IBM has engaged in a course of conduct that is intentionally and foreseeable calculated to undermine and/or destroy the economic value of UNIX anywhere and everywhere in the world, and to undermine and/or destroy plaintiff's rights to fully exploit and benefit from its ownership rights in and to UNIX System V Technology, the UNIX Software Code, SCO OpenServer, UnixWare and their derivatives, and thereby seize the value of UNIX System V Technology, the Unix Software Code, SCO OpenServer, UnixWare and their derivatives directly for its own benefit and indirectly for the benefit of its Linux distribution partners.

(SCO's Second Amended Complaint ¶ 183 (Fed. 27, 2004) (emphasis added).) SCO had further alleged:

Specifically, commencing on or about May 2003, Novell began falsely claiming that Novell, not SCO, owned the copyrights relating to UNIX System V. On information and belief, IBM had induced or otherwise caused Novell to take the position that Novell owned the copyrights—a position that is flatly contradicted by the Asset Purchase Agreement. Since that time, Novell has improperly registered the same copyrights that it sold to SCO and that SCO had previously registered.

(Id. ¶ 199 (emphasis added).) SCO further alleged that IBM's conduct was "intentionally and maliciously designed to destroy plaintiff's business livelihood and all opportunities of plaintiff to derive value from its Unix based assets in the marketplace. As such, this Court should impose and award punitive damages against IBM in an amount to be proved and supported at trial." (Id. ¶ 207 (emphasis added).)

These allegations presented in the IBM case the same question of damages at issue in this trial – namely, the extent to which SCO has been harmed as a result of Novell's public claims of copyright ownership. Faced with the foregoing allegations, and request for punitive damages, IBM and its counsel had the exact same interests and motives as Novell has in cross-examining the deposition witnesses – namely, to undercut SCO's allegations that SCO has suffered any significant harm to its business as a result of

¹ Copies of SCO's designations for each of these witnesses are attached to this letter as Exhibit A.

Novell's claims of copyright ownership. The cross-examination of SCO's salespeople on that issue pertained directly to IBM's defenses to SCO's claims. In light of the undisputed facts, the deposition testimony at issue here is as admissible in this action as it would be if it had been taken in this case.

If more were needed, IBM and Novell and their counsel have discussed the lawsuits for years, and they have long and formally claimed a "common interest" privilege with respect to their discussions concerning the litigation. In January 2006, in the deposition of IBM executive Scott Handy, counsel for IBM stated: "Our position is that – that there – to the extent there were communications, if any, between IBM lawyers and between – and Novell or Novell lawyers, that those communications are protected by an attorney-client privilege or by the work product doctrine or common interest privilege." (Deposition of Scott Handy (Jan. 26, 2006), at 59:4-12 (Ex. B).) In February 2007, in turn, Novell's General Counsel, Joseph Lasala, testified that there is a "joint defense or common interest agreement between Novell and IBM relating to the two SCO litigations." (Deposition of Joseph Lasala (Feb. 8, 2007), at 60:18-21 (Ex. C).) He testified that his recollection was that the agreement had commenced "around the end of May" in 2003, "give or take, you know, weeks on either side." (*Id.* at 60:22-61:9.) A few months later, Novell's counsel further stated that "our position is that any post-litigation communications subject to a privilege, including a joint-defense privilege, would be off limits." (Deposition of Joseph Lasala (May 16, 2007), at 122:21-24 (Ex. C).)

Novell's and IBM's mutual acknowledgement of the overlapping issues in the two cases thus further underscores that when IBM cross-examined the salespeople at issue here, IBM had the same interests and motives as Novell in addressing the issue of how, and to what extent, Novell's public claims of copyright ownership had harmed SCO's ability to benefit from its UNIX-related ownership rights. Indeed, in the attached excerpts, counsel for IBM asked almost all of the questions concerning the effect of Novell's statements on SCO's business. SCO respectfully requests that the Court admit the designated testimony from these three SCO employees at trial.²

Respectfully yours,



Brent Hatch

c: Sterling Brennan, Daniel Muino

² If the Court admits the testimony as a general matter, SCO will confer with Novell and attempt to resolve individual objections to specific designations and counter-designations.

EXHIBIT A

Lawrence Gasparro
October 6, 2004

Page:	0012:22 - 0012:23	Gasparro, Lawrence - 10/07/2004
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0012:22 :51 22 Q. When did you first start at SCO?
Notes:		0012:23 :55 23 A. 1995.
Page:	0253:14 - 0254:05	Gasparro, Lawrence - 10/07/2004
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0253:14 :51 14 Q. Did you and Mr. Sontag make
Notes:		0253:15 :53 15 presentations to customers?
		0253:16 :54 16 A. Yes.
		0253:17 :56 17 Q. Did you educate them on the legal
		0253:18 :00 18 basis for your actions?
		0253:19 :01 19 A. I believe we were successful.
		0253:20 :03 20 Q. Can you just tell me what it is
		0253:21 :04 21 that you explained to those customers with
		0253:22 :06 22 respect to the legal action?
		0253:23 :10 23 A. As I recall, we had identified
		0253:24 :15 24 certain segments within the AT&T source code
		0253:25 :19 25 agreement between AT&T, Novell and SCO there
		0254:00 1 Gasparro
		0254:02 :23 2 were excerpts of that contract inserted into the
		0254:03 :26 3 slide presentation and a display of the SGI
		0254:04 :32 4 infraction of the literal copying of the source
		0254:05 :35 5 code into Linux.
Page:	0268:24 - 0269:12	Gasparro, Lawrence - 10/07/2004
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0268:24 :57 24 Q. Do you have an understanding of
Notes:		0268:25 :58 25 what the intellectual property license for Linux
		0269:00 1 Gasparro
		0269:02 :01 2 that's referred to in this document is?
		0269:03 :04 3 A. Yes, I do.
		0269:04 :04 4 Q. Can you tell me what that is?
		0269:05 :06 5 A. Yes. The SCO IP, affectionately
		0269:06 :10 6 called IP license for Linux, was a product that
		0269:07 :13 7 we announced August 5th, 2003 to provide Linux
		0269:08 :18 8 end users with an option at their discretion to

		0269:09 :28 9 cover any issues or resolve -- resolve is the
		0269:10 :34 10 wrong word, but to, in other words, purchase a
		0269:11 :37 11 license to protect themselves against any risk
		0269:12 :41 12 associated with UNIX source code in Linux.
Page:	0269:22 - 0290:06	Gasparro, Lawrence - 10/07/2004
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0289:22 :07 22 Q. Can you identify for me the
Notes:		0289:23 :11 23 customers that purchased such a license?
		0289:24 :14 24 A. I can attempt to identify a few
		0289:25 :16 25 for you.
		0290:00 1 Gasparro
		0290:02 :17 2 Q. Please.
		0290:03 :20 3 A. Computer Associates, EV1 Web
		0290:04 :26 4 Hosting, ISP. There were a number of smaller
		0290:05 :45 5 organizations, maybe individuals that obtained
		0290:06 :45 6 this license.
Page:	0292:06 - 0293:08	Gasparro, Lawrence - 10/07/2004
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0292:06 :34 6 Q. Did you sell any of these golden
Notes:		0292:07 :37 7 compliance licenses, to the best of your
		0292:08 :39 8 knowledge?
		0292:09 :39 9 A. The EV1 transaction I believe
		0292:10 :43 10 qualified for that, yes.
		0292:11 :45 11 Q. Were you personally involved in
		0292:12 :47 12 the EV1 sale?
		0292:13 :48 13 A. Yes, sir.
		0292:14 :48 14 Q. Who did you deal with at EV1?
		0292:15 :51 15 A. I dealt with the CEO.
		0292:16 :54 16 Q. Who was that?
		0292:17 :55 17 A. Mr. Robert Marsh and counsel.
		0292:18 :00 18 Q. Do you recall who his counsel was?
		0292:19 :02 19 A. I believe it's Mr. Eric Schaefer.
		0292:20 :04 20 Q. Do you know what law firm he might
		0292:21 :08 21 be affiliated with?

0292:22 :08 22 A. It was an external firm in
 0292:23 :10 23 Houston.
 0292:24 :11 24 Q. Do you know the amount of the sale
 0292:25 :15 25 for that license?
 0293:00 1 Gasparro
 0293:02 :16 2 A. I do. The transaction was
 0293:03 :21 3 \$800,000 plus additional terms in marketing
 0293:04 :29 4 contribution.
 0293:05 :33 5 Q. Do you have any understanding of
 0293:06 :35 6 how much additional there was?
 0293:07 :37 7 A. I think the original agreement was
 0293:08 :40 8 three to 600,000

Page: 0302:17 - 0303:06 Gasparro, Lawrence - 10/07/2004

Issue: ☒ Gen. Depo Designations 0302:17 :53 17 Q. Did you have any involvement in
Notes: 0302:18 :55 18 negotiating a license with Dell?
 0302:19 :58 19 A. Yes, I was very involved with that
 0302:20 :02 20 opportunity.
 0302:21 :03 21 Q. Did Dell ever purchase a license?
 0302:22 :06 22 A. Not to my knowledge.
 0302:23 :07 23 Q. Did you have discussions with
 0302:24 :11 24 individuals at Dell?
 0302:25 :11 25 A. Yes, sir.
 0303:00 1 Gasparro
 0303:02 :11 2 Q. Who did you have discussions with?
 0303:03 :23 3 A. I had a face-to-face meeting at
 0303:04 :23 4 Dell corporate headquarters with an attorney.
 0303:05 :23 5 first name Harry, can't recall his last name.
 0303:06 :24 6 My apologies to you.

Page: 0303:21 - 0304:13 Gasparro, Lawrence - 10/07/2004

Issue: ☒ Gen. Depo Designations 0303:21 :15 21 Q. Did anyone from Dell ever
Notes: 0303:22 :19 22 communicate to you why it was that they
 0303:23 :21 23 ultimately decided not to purchase a license?

0303:24 :23 24 MR. MAGNANINI: Objection to
 0303:25 :25 25 form.
 0304:00 1 Gasparro
 0304:02 :25 2 A. No.
 0304:03 :29 3 Q. So how did the discussion come to
 0304:04 :31 4 end with Dell?
 0304:05 :35 5 A. As I recall the communication had
 0304:06 :41 6 ceased from their end.
 0304:07 :45 7 Q. Did you make attempts to follow
 0304:08 :47 8 up?
 0304:09 :47 9 A. Yes.
 0304:10 :48 10 Q. And they did not communicate with
 0304:11 :51 11 you any further?
 0304:12 :52 12 A. The attorney -- right -- basically
 0304:13 :56 13 ignored my request, as I recall.

Page: 0329:21 - 0330:07

Gasparro, Lawrence - 10/07/2004

Issue: ☒ Gen. Depo Designations

0329:21 :47 21 Q. And in going to the -- it may be

Notes:

0329:22 :55 22 the last point -- you were asked earlier about
 0329:23 :59 23 if you received any negative feedback from your
 0329:24 :05 24 sales force members concerning the licensing
 0329:25 :06 25 program?

0330:00 1 Gasparro

0330:02 :06 2 A. Yes, sir.

0330:03 :09 3 Q. And you said that in your mind

0330:04 :12 4 there was negative feedback because people

0330:05 :14 5 weren't purchasing licenses. Was the SCO

0330:06 :18 6 licensing program affected by Novell's claim?

0330:07 :22 7 A. Dramatically.

Page: 0330:20 - 0330:23

Gasparro, Lawrence - 10/07/2004

Issue: ☒ Gen. Depo Designations

0330:20 :02 20 Q. Was SCO's licensing program

Notes:

0330:21 :05 21 negatively affected by Novell's claims of

0330:22 :09 22 ownership?

0330:23 :10 23 A. Yes.

Page: 0334:05 - 0335:24

Gasparro, Lawrence - 10/07/2004

Issue: ☒ Gen. Depo Designations

0334:05 :16 5 Q. With respect to the last questions

Notes:

0334:06 :20 6 that Mr. Magnanini asked you, do you know of

0334:07 :26 7 specific sales that were lost as a result of --

0334:08 :31 8 well, strike that.

0334:09 :32 9 Mr. Magnanini asked you about

0334:10 :34 10 Novell's claims?

0334:11 :35 11 A. Yes, sir.

0334:12 :36 12 Q. What was your understanding of

0334:13 :37 13 what he meant by asking that?

0334:14 :40 14 A. Well I visited with a number of

0334:15 :45 15 large corporate Linux end users in the United

0334:16 :48 16 States as well as my assigned team and we were

0334:17 :52 17 providing proposals for consideration to

0334:18 :57 18 corporate accounts and many of the accounts

0334:19 :01 19 responded sometimes in writing or written record

0334:20 :03 20 and/or e-mail or just in direct conference calls

0334:21 :09 21 why they would object to obtaining such a

0334:22 :12 22 license. And the Novell claim of copyright was

0334:23 :17 23 a major factor as to why several customers did

0334:24 :20 24 not sign the agreement with SCO.

0334:25 :22 25 Q. Can you identify the specific

0335:00 :1 1 Gasparro

0335:02 :24 2 customer?

0335:03 :26 3 A. Yes, I have. There is a list of

0335:04 :34 4 customers that we assembled as my sales

0335:05 :37 5 organization that was approximately 50 to

0335:06 :39 6 \$60 million of licensing opportunities that we

0335:07 :42 7 created in the first six months of the licensing

0335:08 :46 8 program and were involved in discussions based

0335:09 :51 9 on those amounts.

0335:10 :54 10 Right now a couple of those
 0335:11 :57 11 accounts that cited ownership issues I believe
 0335:12 :01 12 to be Ford Motor, Google, Cisco and there were
 0335:13 :06 13 numerous other, but I'm very familiar with the
 0335:14 :08 14 dollar amount because I owned that amount 50 to
 0335:15 :19 15 \$60 million of licensed opportunity.
 0335:16 :19 16 Q. And how did you arrive at that 50
 0335:17 :19 17 to 60 million-dollar amount?
 0335:18 :19 18 A. Thank you. The proposals that --
 0335:19 :21 19 there are written records of the proposals that
 0335:20 :24 20 were assembled, that is, the total amount of
 0335:21 :29 21 licensing opportunities that the customers
 0335:22 :32 22 ultimately denied the licensing acceptance
 0335:23 :35 23 because of specifically naming Novell in
 0335:24 :41 24 copyright ownerships.

Page: 0335:25 - 0336:07

Gasparro, Lawrence - 10/07/2004

Issue: ☒ Gen. Depo Designations

0335:25 :41 25 Q. I guess I'm trying to ask, how is

Notes:

0336:00 1 Gasparro

0336:02 :45 2 that number determined? What is that based on?

0336:03 :47 3 A. As an example, let's say, the list

0336:04 :49 4 price of a product was a dollar, and company A

0336:05 :52 5 had 500, company B had quantity 600, that's how

0336:06 :58 6 we assembled those numbers. So based upon

0336:07 :01 7 volume and unit pricing.

Philip Langer
November 5, 2004

Page: 0010:16 - 0010:19 Langer, Phil - 11/05/2004

Issue: ☒ Gen. Depo Designations 0010:16 When did you first become employed by

Notes: 0010:17 The SCO Group?

0010:18 A June, I think, 30th, '98 from the original Santa

0010:19 Cruz operations.

Page: 0010:23 - 0012:16 Langer, Phil - 11/05/2004

Issue: ☒ Gen. Depo Designations 0010:23 What was your position when you joined

Notes: 0010:24 Santa Cruz?

0011:01 A Sales associate.

0011:02 Q And what were your responsibilities in that

0011:03 position?

0011:04 A I was responsible -- I was responsible to a

0011:05 mentor who was the corporate account manager for three

0011:06 states in the Midwest: Illinois, Wisconsin and Indiana.

0011:07 And I was associated with doing sales tasks, learning

0011:08 cold calling, learning the sales process for the next

0011:09 half year and then next year.

0011:10 Q Okay. And what types of products were you

0011:11 selling at that point in time?

0011:12 A Unix.

0011:13 Q Okay.

0011:14 A Unix support and services.

0011:15 Q Okay. Would that be UnixWare and OpenServer

0011:16 or --

0011:17 A Yes.

0011:18 Q Both of those products?

0011:19 A Yes.

0011:20 Q What was the next position that you held within

0011:21 Santa Cruz?

0011:22 A Corporate account manager.

0011:23 Q And when did you become corporate account

0011:24 manager?

0012:01 A I think late -- let's see, late -- probably been
 0012:02 late '99, 2000, right around there in the first quarter.
 0012:03 Q And what was your responsibility as the
 0012:04 corporate account manager?
 0012:05 A To deal with large corporate account end users,
 0012:06 named account lists within my state area, which at that
 0012:07 time I think was Southern Ohio, Kentucky and Missouri.
 0012:08 Q And, again, you were selling UnixWare and
 0012:09 OpenServer at that point in time?
 0012:10 A UnixWare, OpenServer, support and services
 0012:11 around then.
 0012:12 Q How long did you hold that position?
 0012:13 A Until 2 -- through December -- or actually
 0012:14 through January 2004.
 0012:15 Q Through January 2004?
 0012:16 A Yes.

Page: 0013:11 - 0013:24

Langer, Phil - 11/05/2004

Issue: ☒ Gen. Depo Designations

0013:11 Q In January 2004 what position did you take at

Notes:

0013:12 The SCO Group?

0013:13 A I took the position of the regional director of
 0013:14 intellectual property licensing.

0013:15 Q And what were your responsibilities in that
 0013:16 role?

0013:17 A My responsibilities were sales of our Unix Linux
 0013:18 IP license.

0013:19 Q And you held that position until you left in
 0013:20 August 2004?

0013:21 A Right, correct.

0013:22 Q And who did you report to from January 2004 to
 0013:23 August 2004?

0013:24 A Larry Gasparro.

Page: 0072:23 - 0074:08

Langer, Phil - 11/05/2004

Issue: ☒ Gen. Depo Designations

Notes:

0072:23 Q Now, after February 2004, when you became the

0072:24 regional director for intellectual property licensing.

0073:01 did you then have any sales of licenses to customers?

0073:02 A Yes.

0073:03 Q Okay. Can you tell me which customers you were

0073:04 involved in selling licenses to?

0073:05 A I got -- We did deal with Questar, which I think

0073:06 I got credit for, but I didn't have any dealings with.

0073:07 So it came into my bucket, so to speak, and I probably

0073:08 got the last contract faxed from them, but I didn't do

0073:09 any of the selling.

0073:10 Q Okay.

0073:11 A And then we did the EV1 deal, and everyone's

0073:12 entered in. Those were the only two. I can't think if

0073:13 there was any like little onsie, twosie things. I can't

0073:14 remember, but those were the two significant.

0073:15 Q Okay. Did you have any involvement with

0073:16 Computer Associates?

0073:17 A No.

0073:18 Q So those were the only two customers that you

0073:19 can recall that actually purchased licenses?

0073:20 A Right.

0073:21 Q Do you recall who you contacted to purchase

0073:22 licenses during that time period, from February to

0073:23 August 2004?

0073:24 A No. I mean, I contacted a lot of people. I

0074:01 couldn't tell you off the top of my head.

0074:02 Q And how was the responsibility divided? Did you

0074:03 contact all of the people within this Midwestern region

0074:04 or was it nationwide?

0074:05 A I had the west region, which went from Illinois

0074:06 basically down over, except for Northern California,

0074:07 Washington and Oregon. I had Southern California and

0074:08 the rest of the Western states.

Page: 0126:24 - 0127:09

Langer, Phil - 11/05/2004

Issue: ☒ Gen. Depo Designations

0126:24 Q Did there become a point in time when Novell

Notes:

0127:01 raised a question over the title to SCO's IP in Unix?

0127:02 A Yes.

0127:03 Q And then do you recall them making those

0127:04 pronouncements publicly?

0127:05 A Yes.

0127:06 Q And did the fact that Novell made those public

0127:07 pronouncements questioning SCO's ownership of Unix's IP

0127:08 negatively impact your ability to sell licenses?

0127:09 A Yes.

Page: 0135:06 - 0137:01

Langer, Phil - 11/05/2004

Issue: ☒ Gen. Depo Designations

0135:06 Q Do you know when Novell made this announcement

Notes:

0135:07 that you talked about with Mr. Samuels?

0135:08 A Novell first made the announcement, it was last

0135:09 year in 2003, that they were questioning the claims of

0135:10 the Unix that I think we -- we came out with our

0135:11 amendment to. They recanted. And then they came out

0135:12 later, I think it was like August 2003, that kind of

0135:13 timeframe, they started leaking that they owned it.

0135:14 And then once the suit was filed it came to

0135:15 kind of a hole. I mean, we were always -- We started to

0135:16 get a lot more once Novell started that they owned and

0135:17 they can indemnify because they had Unix rights, were

0135:18 making that public. Then all the licensees, potential

0135:19 licensees became very interested in, well, if you don't

0135:20 own it, we're not going to buy a license from you, which

0135:21 really, you know, put a hold to selling licenses.

0135:22 Q So it's your testimony that you were unable to

0135:23 sell licenses because of Novell's announcement?

0135:24 MR. SAMUELS: Object to the form of the question.

0136:01 THE WITNESS: Yes. I mean, it put a pretty big

0136:02 dampening effect on how we were able to approach people

0136:03 when the intellectual property you're trying to license

0136:04 to them is in question of ownership.

0136:05 MR. KAO: Q Did you ever do anything to show to

0136:06 customers that you were in fact the owner of the

0136:07 copyrights at issue?

0136:08 A I mean, we would tell them to look at our

0136:09 website for Amendment 2 and read through the contracts.

0136:10 You can see that it was transferred. You know, we've

0136:11 been selling Unix for six years. Up until now there has

0136:12 never been -- You know, customers were paying for Unix.

0136:13 Other licensees had licensed Unix's intellectual

0136:14 property. You know, we had this -- You know, to us, it

0136:15 was a no brainer. We had owned it. We had been selling

0136:16 Unix. It was ours.

0136:17 Q Have you -- Oh, you can finish if I interrupted.

0136:18 A So we went into our website with our contracts.

0136:19 Q Did you ever make any presentations to customers

0136:20 about the ownership issue?

0136:21 A No, I mean, not specifically on that. We may

0136:22 have mentioned that, you know, look at our -- I mean,

0136:23 we'd point them to the contracts and here are the

0136:24 contracts. You take a look -- Have your legal team look

0137:01 over the contracts, advise you of what to do.

Page: 0137:06 - 0141:22

Langer, Phil - 11/05/2004

Issue: ☒ Gen. Depo Designations

0137:06 Q Did you have any projections of what revenues

Notes:

0137:07 you could have obtained were it not for Novell's

0137:08 announcement?

0137:09 A I don't have any projections on hand. I know we

0137:10 had a pipeline that we're starting to build, and when

0137:11 the Novell issue started to come up, I mean, I thought
0137:12 we were going to be able to do at least -- I mean, a
0137:13 couple million to 3 million in my territory I was hoping
0137:14 for. But when that type of -- Once the questioning of
0137:15 the ownership came out, the pipeline was killed.

0137:16 Q And this pipeline that you're talking about, are
0137:17 you using pipeline in the same sense that you were
0137:18 reviewing -- you were using the word pipeline in
0137:19 response to the earlier exhibit that we looked at?
0137:20 Exhibit 239 I believe it was.

0137:21 A Similar, in that these were companies I had
0137:22 talked to, involved with, had talked about or we were in
0137:23 dealings with to set up meetings. So there was
0137:24 potential there. But, no, there was no one exactly on
0138:01 the front doorstep ready to purchase a license.

0138:02 Q So you didn't have any reasonable expectation of
0138:03 this revenue?

0138:04 MR. SAMUELS: Object to the form of the question.

0138:05 THE WITNESS: We did have expectation because we
0138:06 were in involvement with them and they were interested
0138:07 in hearing about our licensing and possibly buying a
0138:08 license.

0138:09 MR. KAO: Q So -- Just so we're clear, when you
0138:10 used the word pipeline with respect to the Linux sales,
0138:11 you had no reasonable expectation of sales, but when you
0138:12 used the pipeline here, you did have a reasonable
0138:13 expectation of sales; is that what you're saying.

0138:14 MR. SAMUELS: Object to the form of the question.

0138:15 THE WITNESS: Yes, different type of -- When I use
0138:16 pipeline, yes, there were different types of pipeline.

0138:17 For the Linux sales, that would have been new
0138:18 business that was outside my normal business of Unix.

0138:19 This was my pipeline of my only business that I was
0138:20 working on at this time. So this was deals I was
0138:21 actually in front of daily and I had to close to make
0138:22 commission. So I was much more involved in that
0138:23 pipeline than the other.

0138:24 MR. KAO: Q And this is starting in February 2004
0139:01 that you're talking about the pipelines?

0139:02 A Yes.

0139:03 Q Was that before or after Novell made their
0139:04 announcement?

0139:05 A That would be -- Well, their initial
0139:06 announcement before we could counter was before I took
0139:07 over this.

0139:08 Q Okay. So you were still -- You were projecting
0139:09 \$2 to \$3 million of revenue in your region even after
0139:10 Novell made their announcement; is that what you're
0139:11 saying?

0139:12 A Because they recanted. They made their initial
0139:13 announcement. Then they recanted after Amendment 2 and
0139:14 then it started to trickle up. And then once a -- once
0139:15 we were heading to court with Novell, then it became a
0139:16 true -- it was viewed as the ownership issue is in
0139:17 question, and that was in -- I think that was in
0139:18 mid-January or February, mid-February, because we had
0139:19 built up this, and then once people started to hear wind
0139:20 of what this lawsuit was coming down, because not
0139:21 everybody is dealing with it like everyone else -- like
0139:22 we are all day to day, then it becomes they start doing
0139:23 their homework and they realize, hey, there's some
0139:24 question about the ownership.

0140:01 You know, until that gets really settled and it

0140:02 looks like that it's not -- you know, it looks like it

0140:03 may be a possible problem for you, then we're not going

0140:04 to talk about it until that issue has been cleared up.

0140:05 Q And just so we're clear, were you projecting 2

0140:06 to 3 million of revenue annually, for the year, or for a

0140:07 specific quarter?

0140:08 A I thought I could do that for the year. I mean,

0140:09 with some of the accounts we had on, we had large

0140:10 accounts, and with the list pricing now, that can go up

0140:11 or down depending on, you know, who's buying, who's

0140:12 selling.

0140:13 Q And these would all be new customers to SCO,

0140:14 correct, not old customers?

0140:15 A Correct.

0140:16 Q Did any of the potential customers that you

0140:17 approached give you as a specific reason for declining

0140:18 to buy a license that Novell had claimed to own the

0140:19 copyrights?

0140:20 A Regal Entertainment Group. I think that's what

0140:21 they are, Regal Entertainment Group. They were set.

0140:22 They were moving forward with looking -- looking forward

0140:23 to buy a license, and they wanted to get it done within

0140:24 the month. I think this was the end of April. They

0141:01 finally came back and said we can't purchase a license

0141:02 because we can't buy your intellectual property because

0141:03 there's not clear title on it like we do when we buy

0141:04 movies, which have clear copyright title. So we can't

0141:05 make the same type of intellectual property investment

0141:06 with you as we would with our other vendors.

0141:07 Q Do you know what the size of the potential sale

0141:08 to Regal was?

0141:09 A It was -- It was on their front end. It would

0141:10 have been I think 3 to -- \$300,000, \$350,000.

0141:11 Q Apart from Regal, were there any other customers
0141:12 that you remember specifically saying that we were not
0141:13 going to purchase a license because of Novell's
0141:14 announcement?
0141:15 A I had some letters back from some. I think one
0141:16 was -- I think possibly -- I can't remember. I mean, I
0141:17 can't remember the exact companies, but I know I had a
0141:18 couple letters back that said, you know, until your
0141:19 ownership issue is settled, please do not contact us.
0141:20 then we'll be willing to sit down and work that out.
0141:21 But if you have an ownership issue, we cannot buy
0141:22 anything from you.

Gregory Pettit
October 7, 2004

Page:	0006:06 - 0006:11	Pettit, Gregory - 10/07/2004
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0006:06 :01 6 Q. Mr. Pettit, are you currently
Notes:		0006:07 :04 7 employed by The SCO Group?
		0006:08 :05 8 A. Yes, I am.
		0006:09 :08 9 Q. What is your current position?
		0006:10 :10 10 A. Regional director, intellectual
		0006:11 :12 11 property licensing.
Page:	0008:23 - 0009:05	Pettit, Gregory - 10/07/2004
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0008:23 :11 23 Q. What jobs have you held since
Notes:		0008:24 :13 24 graduation?
		0008:25 :15 25 A. I spent a year with Nixdorf
		0009:00 1 Pettit
		0009:02 :21 2 Computer, a year with a company called SDL, four
		0009:03 :27 3 years with Boeing Computer Services, ten years
		0009:04 :32 4 with Digital Equipment and 11 plus years with
		0009:05 :37 5 SCO. The original SCO now The SCO Group.
Page:	0106:22 - 0107:02	Pettit, Gregory - 10/07/2004
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0106:22 :04 22 Q. Do you know what SCOsource is?
Notes:		0106:23 :07 23 A. SCOsource is an umbrella statement
		0106:24 :18 24 for a group of people at SCO who are worrying
		0106:25 :22 25 about SCO's intellectual property in the
		0107:00 1 Pettit
		0107:02 :28 2 marketplace.
Page:	0114:22 - 0115:08	Pettit, Gregory - 10/07/2004
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0114:22 :13 22 Q. Did any -- during the summer of
Notes:		0114:23 :18 23 2003, did any customer approach you and ask you
		0114:24 :22 24 about SCO's alleged intellectual property rights
		0114:25 :24 25 in Linux?
		0115:00 1 Pettit
		0115:02 :25 2 A. I'm sure we had discussions with
		0115:03 :28 3 customers who were interested in understanding
		0115:04 :32 4 why, why we were saying what we were saying.

0115:05 :34 5 Q. Do you remember which customers
 0115:06 :36 6 approached you about this?
 0115:07 :42 7 A. NASDAQ, Getronics, CVS those were
 0115:08 :56 8 the folks I can think of off the top of my head.

Page: 0123:23 - 0125:03

Pettit, Gregory - 10/07/2004

Issue: ☒ Gen. Depo Designations

Notes:

0123:23 :26 23 Q. Did you or someone else actually
 0123:24 :30 24 meet with Raytheon on this issue?

0123:25 :31 25 A. Yes.

0124:00 :1 1 Pettit

0124:02 :32 2 Q. Did you go to the meeting?

0124:03 :33 3 A. Yes.

0124:04 :33 4 Q. Who else went?

0124:05 :35 5 A. Larry Gasparro.

0124:06 :41 6 Q. What additional information was
 0124:07 :43 7 given to Raytheon at the meeting?

0124:08 :46 8 A. We had a presentation, as I

0124:09 :51 9 recall, that just touched on two points, we had

0124:10 :56 10 problems with our intellectual property in Linux

0124:11 :02 11 in two ways: one was copyrighted material and

0124:12 :07 12 one was by contract.

0124:13 :11 13 Q. Were any specific examples of code
 0124:14 :17 14 provided to Raytheon?

0124:15 :18 15 A. I don't recall if the Malloc code

0124:16 :22 16 was shown or just referred to. I believe it was

0124:17 :25 17 referred to.

0124:18 :40 18 Q. So it was just you and

0124:19 :42 19 Mr. Gasparro at the meeting?

0124:20 :43 20 A. Yes.

0124:21 :47 21 Q. What was Raytheon's response to
 0124:22 :50 22 your presentation?

0124:23 :52 23 A. Basically it was thank you for the

0124:24 :56 24 information and as a result of sensitizing them

0124:25 :00 25 to a potential problem. they were going to just

0125:00 1 Pettit

0125:02 :05 2 go off and investigate and understand how they

0125:03 :07 3 were using Linux in-house.

Page: 0129:08 - 0130:06

Pettit, Gregory - 10/07/2004

Issue: ☒ Gen. Depo Designations

0129:08 :51 8 Q. Were there other customers who

Notes:

0129:09 :53 9 asked for more information but didn't want to

0129:10 :59 10 set up a meeting quite yet?

0129:11 :00 11 A. Yes.

0129:12 :00 12 Q. Do you remember which ones those

0129:13 :03 13 were?

0129:14 :03 14 A. Again, are you asking me as a

0129:15 :06 15 result of this?

0129:16 :07 16 Raytheon was the only thing that

0129:17 :08 17 happened.

0129:18 :08 18 Q. As a result of this or as a result

0129:19 :10 19 of any other communications you might have had

0129:20 :13 20 about SCO's alleged property rights in Linux?

0129:21 :20 21 A. Yes, there were several others. I

0129:22 :26 22 want to make sure -- I get confused on some of

0129:23 :28 23 the financial shops. I believe it was -- we'll

0129:24 :34 24 come back to them.

0129:25 :36 25 Pixar, Cisco --

0130:00 1 Pettit

0130:02 :43 2 Q. Sorry, Cisco with a C or S?

0130:03 :46 3 A. C.

0130:04 :54 4 -- Merrill Lynch. There were

0130:05 :00 5 several others who expressed interest in seeing

0130:06 :05 6 more material.

Page: 0130:15 - 0130:20

Pettit, Gregory - 10/07/2004

Issue: ☒ Gen. Depo Designations

0130:15 :14 15 Q. Did you offer any of the customers

Notes:

0130:16 :17 16 a license for the use of this alleged

		0130:17 :21 17 intellectual property?
		0130:18 :22 18 A. I was asked to prepare a proposal.
		0130:19 :26 19 Q. Asked by who?
		0130:20 :28 20 A. Merrill Lynch.
Page:	0131:13 - 0132:03	Pettit, Gregory - 10/07/2004
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0131:13 :42 13 Q. Did you ever prepare a proposal
Notes:		0131:14 :44 14 for Merrill Lynch?
		0131:15 :45 15 A. Yes.
		0131:16 :47 16 Q. What were the terms of the
		0131:17 :49 17 proposal?
		0131:18 :57 18 A. For this range of machines, it's
		0131:19 :00 19 this much money. For this range of machines,
		0131:20 :03 20 it's this much money.
		0131:21 :08 21 Q. What was Merrill Lynch's response?
		0131:22 :11 22 A. They chose to not pursue the
		0131:23 :17 23 proposal because of the activities of Novell,
		0131:24 :24 24 which confused the marketplace and who owned the
		0131:25 :29 25 UNIX intellectual property. And that was the
		0132:00 1 Pettit
		0132:02 :39 2 primary reason for them postponing any action on
		0132:03 :43 3 the proposal.
Page:	0143:24 - 0144:09	Pettit, Gregory - 10/07/2004
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0143:24 :24 24 Q. You're looking at what has been
Notes:		0143:25 :27 25 marked as Exhibit 162. Please take a look at
		0144:00 1 Pettit
		0144:02 :30 2 that and let me know if you recognize this
		0144:03 :32 3 document.
		0144:04 :32 4 (Witness reviewing document.)
		0144:05 :50 5 A. Yes.
		0144:06 :52 6 Q. The exhibit is a letter from
		0144:07 :55 7 Sylvia Khatcherian from Morgan Stanley to
		0144:08 :02 8 yourself?

		0144:09 :02 9	A. Uh-huh.
Page:	0145:08 - 0145:17	Pettit, Gregory - 10/07/2004	
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0145:08 :19 8	Q. Do you remember ever providing
Notes:		0145:09 :22 9	Morgan Stanley with the additional information
		0145:10 :26 10	Ms. Khatcherian is asking for?
		0145:11 :28 11	A. I don't believe we did. Again,
		0145:12 :37 12	the point they made the licensing program was to
		0145:13 :49 13	work with people who were interested in working
		0145:14 :52 14	with us. And Morgan Stanley's position was one
		0145:15 :04 15	of show me more information and, by the way,
		0145:16 :12 16	disprove press reports about SCO's claim of
		0145:17 :16 17	ownership.
Page:	0149:16 - 0150:24	Pettit, Gregory - 10/07/2004	
Issue:	<input checked="" type="checkbox"/> Gen. Depo Designations	0149:16 :33 16	Q. You've been handed what's been
Notes:		0149:17 :35 17	marked as Exhibit 165.
		0149:18 :41 18	Would you take a look at that and
		0149:19 :43 19	let me know if you recognize this letter?
		0149:20 :47 20	(Witness reviewing document.)
		0149:21 :05 21	A. Yes.
		0149:22 :06 22	Q. Do you remember if in response to
		0149:23 :09 23	this letter you or anyone else at SCO provided
		0149:24 :13 24	Google with any additional information regarding
		0149:25 :17 25	SCO's alleged rights to the Linux code?
		0150:00 :1 1	Pettit
		0150:02 :20 2	A. Yes. Again, the specifics of this
		0150:03 :24 3	letter I don't recall but we had several
		0150:04 :27 4	interactions with Michael. Some of the
		0150:05 :31 5	interaction -- unfortunately, he had sent me
		0150:06 :34 6	correspondence I hadn't received, so that was
		0150:07 :36 7	the tone of this letter. But when we finally
		0150:08 :38 8	hooked up, the essence of the communication was.
		0150:09 :41 9	Michael, we're prepared to come in

0150:10 :44 10 nondisclosure, walk you through the material so
 0150:11 :47 11 you can make an educated decision on what the
 0150:12 :50 12 exposure was.
 0150:13 :54 13 Q. Did you ever have a meeting?
 0150:14 :56 14 A. No.
 0150:15 :56 15 Q. Why not?
 0150:16 :56 16 A. Michael chose not to.
 0150:17 :57 17 Q. Did he say why?
 0150:18 :03 18 A. I wasn't the last guy to talk to
 0150:19 :05 19 him so, no, I don't know what the answer was.
 0150:20 :07 20 Q. Who was the last guy to talk to
 0150:21 :10 21 him?
 0150:22 :12 22 A. I don't know. I know I handed it
 0150:23 :14 23 over to other people who worked with Michael for
 0150:24 :19 24 a while and then let it go.

Page: 0167:05 - 0167:25 Pettit, Gregory - 10/07/2004

Issue: ☒ Gen. Depo Designations 0167:05 :19 5 Q. In conjunction with the Raytheon

Notes: 0167:06 :22 6 and your discussions with them in terms of
 0167:07 :24 7 trying to get them to receive a license, at that
 0167:08 :28 8 point in time were you having difficulty with
 0167:09 :33 9 potential licensees as result of activities by
 0167:10 :36 10 Novell?
 0167:11 :37 11 A. Absolutely.
 0167:12 :37 12 Q. And did those activities by Novell
 0167:13 :41 13 make it difficult for you to obtain licenses for
 0167:14 :52 14 companies, including Raytheon?
 0167:15 :52 15 A. Absolutely.
 0167:16 :52 16 Q. And did the activities of Novell
 0167:17 :52 17 include activities that brought into question
 0167:18 :54 18 whether you, in fact, owned the intellectual
 0167:19 :57 19 property you were trying to license?
 0167:20 :59 20 A. Yes.

0167:21 :59 21 Q. And were those questions that were
0167:22 :04 22 raised by Novell what caused you having great
0167:23 :06 23 difficulty, if not impossibility, in selling any
0167:24 :09 24 licenses?
0167:25 :09 25 A. Yes.

EXHIBIT B

CONFIDENTIAL

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

-----x

THE SCO GROUP, INC., a Delaware
corporation,

Plaintiff/Counterclaim Defendant,

against Civil No. 2:03CV-0294 DAK

INTERNATIONAL BUSINESS MACHINES
CORPORATION, a New York
corporation,

Defendant/Counterclaim-Plaintiff

-----x

CONFIDENTIAL

SCOTT HANDY

New York, New York

Thursday, January 26, 2006

Reported by: Steven Neil Cohen, RPR

Job No. 180878

ESQUIRE DEPOSITION SERVICES
1-800-944-9454

CONFIDENTIAL

1 Handy - Confidential
2 conversations between counsel and the
3 witness while he was preparing for his
4 deposition?
5 MS. BACH: Right. I am not sure
6 because if it was 30(b)(6) that that
7 would be prohibited by a privilege.
8 MR. SHAUGHNESSY: I think if you
9 are asking about the content of what
10 IBM's lawyers may have told him during
11 the course of preparing him for his
12 deposition that that would be
13 privileged and if that is the question
14 that you asked then I would instruct
15 you not to answer that question.
16 MS. BACH: Okay. I guess what I
17 am trying to get at is something that
18 you can clarify for me.
19 In your objection to this topic
20 you raised, I believe, an
21 attorney-client privilege objection or
22 a work product objection and what I am
23 trying to understand is whether it is
24 your position that there is somehow a
25 privilege between communications

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1 Handy - Confidential
2 between IBM's legal department and
3 Novell.
4 MR. SHAUGHNESSY: Yes. Our
5 position is that -- that there -- to
6 the extent there were communications,
7 if any, between IBM lawyers and
8 between -- and Novell or Novell
9 lawyers, that those communications are
10 protected by an attorney-client
11 privilege or by the work product
12 doctrine or common interest privilege.
13 MS. BACH: What is the basis for
14 that assertion?
15 MR. SHAUGHNESSY: Well, I am not
16 going to debate the assertion with you
17 on the record.
18 The communications are protected.
19 We have instructed this witness not to
20 testify as to those communications and
21 you and I are free to discuss it off
22 the record but I don't think it is
23 appropriate to debate it on the record.
24 MS. BACH: Okay.
25 BY MS. BACH:

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1 Handy - Confidential
2 Q. To your knowledge -- I believe
3 you have testified that you don't have
4 knowledge on the subject but I want to make
5 sure we have a clear record here.
6 To your knowledge were there any
7 communications between -- and this is just
8 a yes or no here, not the substance --
9 between IBM legal -- IBM's legal department
10 and Novell?
11 MR. SHAUGHNESSY: Were there even
12 any communications?
13 BY MS. BACH:
14 Q. Regarding the subject matter of
15 these topics.
16 A. Not that I am privy to or aware
17 of.
18 Q. I believe you said you wouldn't
19 know one way or the other whether or not
20 such communications had occurred.
21 A. Correct.
22 MS. BACH: Can we go off the
23 record for a quick break?
24 THE VIDEOGRAPHER: Off the video
25 record at 2:39 p.m.

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1 Handy - Confidential
2 (Recess)
3 THE VIDEOGRAPHER: Back on the
4 video record at 2:52 p.m.
5 BY MS. BACH:
6 Q. Mr. Handy, are you able to
7 testify one way or the other whether or not
8 IBM and Novell have a joint defense
9 agreement on the subjects that are the
10 topic of the notice?
11 A. No.
12 MS. BACH: I think that we have
13 exhausted this topic within the
14 parameters of the witness's
15 preparedness.
16 I just want to state for the
17 record that we have two objections.
18 The first is that we feel that
19 there would be no privilege or work
20 product protection attached to
21 communications between IBM and Novell
22 on these subjects, and the second is
23 that we feel that this witness was
24 unprepared, even if such a privilege
25 could be asserted, because within the

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EXHIBIT C

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

THE SCO GROUP, INC., :
a Delaware corporation, :
Plaintiff, :
VS. : CIVIL NO.
NOVELL, INC., : 2:04CV00139
a Delaware corporation, :
Defendant. :

VIDEOTAPED DEPOSITION OF JOSEPH A. LASALA, a
witness called by and on behalf of the
Plaintiff, taken pursuant to the applicable
provisions of the Federal Rules of Civil
Procedure, before Sandra L. Bray, Registered
Diplomate Reporter, CSR Number 103593, and
Notary Public in and for Commonwealth of
Massachusetts, at the offices of Ropes & Gray,
One International Place, Boston, Massachusetts,
on Thursday, February 8, 2007, commencing at
9:23 a.m.

1 interpret Paragraph A of Amendment Number 2,
2 it's not immediately obvious from the language
3 of Paragraph A?

4 MR. BRAKEBILL: Form, argumentative.

5 A. I'm sorry. What's not immediately obvious?
6 Q. The view that Novell ultimately came to that it
7 didn't effect the transfer of copyrights but,
8 rather, creates limited circumstances in which
9 Santa Cruz could obtain copyrights.

10 MR. BRAKEBILL: Form, argumentative.

11 A. Well, we've never acknowledged that it does
12 effect copyright transfer.

13 Q. No, I didn't mean to suggest that you ever did.

14 A. Okay.

15 Q. What I'm asking is, the view that you have
16 formed of what Paragraph A of Amendment Number 2
17 means with respect to copyright transfer is not
18 a meaning that is immediately obvious from the
19 language of Paragraph A; is it?

20 MR. BRAKEBILL: Form, argumentative.

21 A. I guess that's correct, but it's clear and was
22 clear immediately upon review and has been since
23 then that the language of Amendment Number 2 did
24 not effect the transfer of copyrights.

1 Q. No, I've heard you just say that, and I don't
2 mean to quibble with that. I mean to ask a
3 narrow question, which is, the view that you
4 have formed of what Paragraph A means as you've
5 articulated it to me is not immediately obvious
6 from the language of Paragraph A; is it?

7 MR. BRAKEBILL: Form, argumentative.

8 A. I don't know. I'm not sort of connecting with
9 your question. I mean the form -- say it again.

10 Q. My questions arise out of the fact that twenty
11 days after having seen Amendment Number 2,
12 you're making the statements that we've reviewed
13 in this June 26th, 2003 letter.

14 A. Right.

15 Q. I don't think it's controversial for me to ask
16 you whether the fact that you're using that
17 language three weeks after having seen the
18 document suggests that there are answers to
19 questions that aren't immediately obvious from
20 the language.

21 A. Okay.

22 MR. BRAKEBILL: Wait. I'm not sure if
23 there was a question there, but form, compound,
24 argumentative. Is that, like, a statement?

1 A. I guess that's fair. And we, in fact, say
2 further in the letter that we're still reviewing
3 the asset purchase agreement to review the
4 rights transferred to SCO, so I won't quibble
5 with your assertion.

6 Q. Have you had occasion to speak with anyone who
7 negotiated the APA regarding any aspect of the
8 APA? I think I asked you the question earlier
9 about copyright transfer. Now, I'm sort of
10 broadening the question.

11 A. Any aspect of the APA?

12 Q. Yes.

13 A. I have not.

14 Q. And have you had occasion to speak with anyone
15 who negotiated Amendment Number 2 regarding any
16 aspect of Amendment Number 2?

17 A. I have not.

18 Q. Mr. LaSala, is there a joint defense or common
19 interest agreement between Novell and IBM
20 relating to the two SCO litigations?

21 A. Yes.

22 Q. And when did that agreement begin?

23 MR. BRAKEBILL: Foundation, form.

24 A. I don't recall.

1 Q. The agreement did begin at some point, correct?

2 A. Yes. I don't recall precisely when it began.

3 Q. Can you recall roughly? Because I'm going to
4 have to structure questions around honoring that
5 privilege.

6 A. Yeah. My recollection, that it was sometime
7 around the end of May, give or take, you know,
8 weeks on either side, but I don't remember
9 exactly when it was.

10 MR. NORMAND: Ken, is that a question
11 that has an obvious answer or is it something we
12 should wait for a break for, the date when this
13 joint defense and common agreement began?

14 MR. BRAKEBILL: The reason why I
15 objected is because there's a built-in
16 assumption in your question that privilege only
17 begins with an actual agreement. I'm not sure
18 that answered your question, but his memory is
19 what it is, I guess, would be my response to
20 you.

21 MR. NORMAND: Why don't you and I talk
22 about it on the break? I can talk about
23 something else right now.

24 Q. I'm handing you, Mr. LaSala, what's been

- 1 A. I don't know.
 2 Q. Is it your view personally as you sit here today
 3 that you could see how one could read Amendment
 4 Number 2 to support SCO's claim that the UNIX
 5 copyrights did transfer?
 6 A. No.
 7 Q. Was that your personal view as of June 6th,
 8 2003, that one could read Amendment Number 2 to
 9 support SCO's claim that the UNIX copyrights did
 10 transfer?
 11 A. My view is reflected in the press release. It
 12 says the amendment appears to support SCO's
 13 claim. That's a qualifier that I felt gave us
 14 some latitude to come back and further explain
 15 upon further review of the amendment, without
 16 the pressures that we were under, what we
 17 thought it did mean, and we did that.
 18 Q. But I take it your view is also expressed in the
 19 words you used five minutes ago when you said,
 20 "We just said we could see how one could read
 21 the amendment to support SCO's claim that the
 22 ownership did transfer"?
 23 A. Yes, at that time.
 24 Q. And that's no longer your view?

- 1 A. Yes.
 2 Q. And that's because you spent more time with the
 3 two sentences in Paragraph A of Amendment
 4 Number 2?
 5 MR. BRAKEBILL: Mischaracterizes
 6 testimony, argumentative.
 7 Q. Well, explain how it's wrong.
 8 MR. BRAKEBILL: Argumentative.
 9 A. Yeah. I mean -- I don't know whether or not --
 10 you made the -- you asked the question whether
 11 or not anyone else talked to anyone who
 12 negotiated Amendment Number 2, and we decline to
 13 get into that, but based upon work that had been
 14 done subsequent to June the 6th, we came to a
 15 much more declarative view as to what the
 16 meaning of the amendment was. You know, if we
 17 had had -- not had the pressures of time that we
 18 talked about, you know, I'd like to think that
 19 the initial public statement about this would
 20 have been more definitive as to what our view
 21 is.
 22 Q. And what was the time pressure that you were
 23 facing?
 24 A. Well, we were --

- 1 MR. BRAKEBILL: Asked and answered.
 2 MR. NORMAND: I don't think so.
 3 Q. What was the time pressure? What impelled you
 4 to send out this press release when you did on
 5 June 6th, 2003?
 6 MR. BRAKEBILL: Compound, asked and
 7 answered.
 8 Q. You can answer.
 9 MR. BRAKEBILL: There's two questions
 10 in there.
 11 A. So we received this on the evening of June the
 12 6th. There were press inquiries being made as
 13 what we thought about it, and importantly,
 14 Mr. McBride had sent a letter to us, as I
 15 recall, in the morning of June the 6th which
 16 advised us that he was having a press call at
 17 11 o'clock that day to, you know, talk about all
 18 of this. So we felt it important for business
 19 reasons to put a statement out as to the -- our
 20 then current view on Amendment Number 2.
 21 Q. And you thought it was important for business
 22 reasons because SCO's reliance on Amendment
 23 Number 2 was sufficiently credible that people
 24 in the market would believe it, correct?

- 1 A. No.
 2 MR. BRAKEBILL: Mischaracterizes
 3 testimony.
 4 Q. Well, then why -- what business interests were
 5 you protecting?
 6 MR. BRAKEBILL: Argumentative.
 7 A. Look, Darl McBride had been talking a lot in
 8 recent days back then about this issue and
 9 written letters and things like that, and he --
 10 in our view, he was attempting to, you know,
 11 further his agenda by publicizing the Amendment
 12 Number 2, and we were being asked by the press
 13 for our response to that. It was a period of
 14 some haste and rush, and we felt the need to get
 15 something out; and that's what we did.
 16 And, you know, I wish we had had more
 17 time to think about it, but we only had so much
 18 time at the time to think about it.
 19 Q. Did you think at the time this press release was
 20 issued that SCO's reliance on Amendment Number 2
 21 with respect to the issue of copyright transfer
 22 was credible?
 23 A. No.
 24 Q. And yet you use this language that the amendment