

1 IN THE UNITED STATES DISTRICT COURT
2 DISTRICT OF UTAH, CENTRAL DIVISION
3
4 THE SCO GROUP, INC., a Delaware)
5 corporation,)
6 Plaintiff,)
7 vs.) Case No. 2:04-CV-139TS
8 NOVELL, INC., a Delaware)
9 corporation,)
10 Defendant.)
11 _____))
12 AND RELATED COUNTERCLAIMS.)
13 _____))

14
15 BEFORE THE HONORABLE TED STEWART
16 -----
17 March 12, 2010
18 Jury Trial

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24 REPORTED BY: Patti Walker, CSR, RPR, CP
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1 SALT LAKE CITY, UTAH; FRIDAY, MARCH 12, 2010; 8:30 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning.

4 Counsel, I am prepared to rule on the O'Gara
5 deposition designations unless one of you feels you need to
6 address it here orally.

7 MR. BRENNAN: Your Honor, it depends on what the
8 ruling is. Perhaps I should wait.

9 THE COURT: So do you want me to give you my
10 ruling and then let you argue it?

11 MR. BRENNAN: Perhaps your sense, and if I need to
12 say anything after that, I'll raise my hand, if that's fair.

13 THE COURT: I don't think you need to stand.

14 MR. BRENNAN: Thank you.

15 THE COURT: Mr. Normand, Mr. Singer, Mr. Hatch, do
16 any of you?

17 MR. HATCH: As I understand it, we're down to just
18 the third set of designations and, of course, one is that
19 they be able to -- again, back to the discussion that's
20 already there. You know, the jury is going to be able to
21 draw its conclusions. Any prejudice from what has already
22 been agreed to could be in there. So it's just cumulative,
23 for that matter. We're obviously very concerned about the
24 mention of specific sites. I think not having the .com
25 doesn't really improve that. It makes it easy to see, and

1 it is a particularly sensitive matter, as we discussed
2 previously with Your Honor and Your Honor indicated as well.

3 THE COURT: Thank you, Mr. Hatch.

4 Counsel, the Court is going to allow providing to
5 the jury those designated portions of the O'Gara deposition
6 that are in dispute and found at pages 64, 66, 67 and 69.
7 The Court will note that, in its opinion, the probative
8 value of this testimony does far outweigh the
9 prejudicial value. There is prejudicial value. I
10 understand your argument and I also understand the reference
11 to Groklaw would be of some concern, but the Court is more
12 concerned that they are looking at The Salt Lake Tribune or
13 some other source. I don't believe making reference to an
14 obscure Web site name without it being designated
15 necessarily as a Web site, per se, is going to somehow or
16 another draw attention to this jury to go look at,
17 particularly in light of the instructions the Court has
18 given. I think this jury is being very careful and I
19 believe that the risk is rather small that that is going to
20 result in any type of violation of the instructions of the
21 Court.

22 Mr. Hatch.

23 MR. HATCH: Yeah. My only comment to Your Honor
24 would be I think, on this matter, that is hardly an obscure
25 site because I think if you type in the names of the

1 parties, it's one of the first things that comes up with
2 pretty much any search engine.

3 THE COURT: I understand that, but, again, they
4 could be looking at much more readily available sources than
5 that.

6 So, counsel, I do have to ask you, we received
7 yesterday -- well, I guess it was -- it was received
8 yesterday, the petition for writ of certiorari in the above
9 entitled cases filed on March 4th, 2010, and placed on the
10 docket of the United States Supreme Court on March 8th. Do
11 you have any sense for whether or not this matter is going
12 to be taken by the Supreme Court, thus make this trial moot?

13 MR. SINGER: Your Honor, it's our view that it's
14 remote that the Supreme Court is going to take writ
15 certiorari from the Tenth Circuit's opinion. First of all,
16 it's a nonfinal decision -- not in the sense that it isn't a
17 final decision of the Tenth Circuit, but just for the reason
18 that this case has simply been remanded for trial, and after
19 that trial the issue will go forward, if necessary, to the
20 Tenth Circuit and parties have the rights to go beyond that.

21 But, second, this is a case where there was no
22 dissent on the Tenth Circuit panel. There was a motion made
23 by Novell to stay the mandate. That was denied. There was
24 a motion to the Tenth Circuit for en banc reconsideration.
25 That was denied with apparently no judge in active service

1 thinking that it should be reconsidered. We do not believe
2 that there is a circuit court conflict on this issue.

3 And for all those reasons, we think the odds of
4 the Supreme Court will take this case are low, and, of
5 course, the odds that the Supreme Court takes any case are
6 very low.

7 THE COURT: Thank you, Mr. Singer.
8 Mr. Jacobs.

9 MR. JACOBS: Your Honor, I certainly agree with
10 the last point Mr. Singer made, the odds of any certiorari
11 petition being granted are low. On all the other points, we
12 have the opposite view. We set them forth in your
13 certiorari petition. We haven't moved for a stay because,
14 frankly, I think I would have a hard time persuading the
15 Court just, given the odds, that the Court should stay this
16 trial pending the writ -- petition for writ of certiorari.

17 SCO's response is due I believe April 8th to the
18 petition, sometime in April, so the Supreme Court's
19 consideration of this is going to take into April or May.

20 MR. SINGER: We would likely, Your Honor, seek an
21 extension of time. Novell sought two extensions of time
22 that were granted by the Court in filing its petition. I
23 think, given that we're sort of tied up for the next few
24 weeks, the court might deem a short extension of time to be
25 reasonable.

1 THE COURT: So neither one of you are saying we
2 ought to quit and go home then?

3 MR. SINGER: That's certainly our position, Your
4 Honor.

5 MR. JACOBS: That's correct, Your Honor. We're
6 enjoying ourselves.

7 THE COURT: Do either of you have anything else
8 before we bring the jury in?

9 MR. SINGER: Not from the plaintiffs.

10 MR. BRENNAN: No. Thank you, Your Honor.

11 Ms. Malley.

12 Counsel, I'm assuming that these rather
13 intimidating white packages over here are the depositions
14 that will be read today; is that correct?

15 MR. ACKER: No, Your Honor. I think those are Mr.
16 Broderick's prior trial testimony and deposition testimony.
17 It's just potential for purposes of impeachment of Mr.
18 Broderick.

19 THE COURT: Okay. Thank you.

20 MR. NORMAND: Your Honor, do you want us to bring
21 in Mr. Broderick now?

22 THE COURT: Yes. Have him come in, but don't have
23 him yet take the witness stand, please.

24 (Jury present)

25 THE COURT: Good morning, ladies and gentlemen of

1 the jury. I would remind you that we, yesterday, had Mr.
2 Broderick as a witness. We'll continue with his
3 examination.

4 And, Mr. Broderick, if you would please come
5 forward and re-take the witness chair. I will remind you
6 that you are still under oath.

7 DIRECT EXAMINATION (Cont.)

8 BY MR. NORMAND:

9 Q Good morning, Mr. Broderick.

10 A Good morning.

11 Q When we left off yesterday afternoon, you were talking
12 about what you described as the umbrella software agreement.
13 Do you remember that?

14 A Yes.

15 MR. NORMAND: Mr. Calvin, would you put that up.

16 BY MR. NORMAND:

17 Q Do you recognize this document, Mr. Broderick?

18 A Yes, I do.

19 Q And can you briefly describe what it is?

20 A This is the software agreement that was executed
21 between AT&T Technologies and IBM.

22 Q What does the number on the top right of the first page
23 of this document signify?

24 A It says SOFT-00015. Each licensee, when they license a
25 software agreement, were assigned a specific number.

1 MR. NORMAND: Could we go to page 2 of this
2 document. And bring out section 2.01.

3 BY MR. NORMAND:

4 Q The beginning of this paragraph, Mr. Broderick, says,
5 AT&T grants to licensee a personal, nontransferable and
6 nonexclusive right to use in the United States each software
7 product identified in the one or more supplements hereto.
8 Do you see that language?

9 A Yes, I do.

10 Q Let's go to section 1.04 on the same page. Is this a
11 definition of software product that was just referred to in
12 that grant of rights?

13 A Yes.

14 Q It says, software product means materials such as
15 computer programs, information used or interpreted by
16 computer programs and documentation relating to the use of
17 computer programs. Do you see that language?

18 A Yes.

19 Q Let's go to section 1.02 on the same page. Is this a
20 definition of computer program that was just used in the
21 definition we went over?

22 A Yes.

23 Q It states, computer program means any instruction or
24 instructions, in source-code or object-code format, for
25 controlling the operation of a CPU. Do you see that

1 language?

2 A Yes.

3 Q Can you, when we add this all up, explain what's going
4 on with the software agreement? What rights are being
5 potentially given? What rights are potentially at issue?

6 A What it's doing is it's granting the rights. If you
7 take the supplement -- if you execute a product schedule
8 license, it gives you the rights to source code, to source
9 code computer programs. It's the instructions in
10 source-code format that you can use and you can modify -- a
11 CPU is a computer. It tells you that you can use the source
12 code on a computer and develop a product.

13 Q You referred to a product schedule license or a
14 supplement. What is that?

15 A Well, when you -- everybody who wants to get source
16 code has to execute a software agreement. That's our
17 umbrella. That's really our protections agreement. That's
18 where we get our protections.

19 Q How is it your protections?

20 A Well, it's provisions for confidentiality and what
21 rights of restrictions to a source code product that they
22 license.

23 Q What do the confidentiality restrictions mean, in your
24 experience? What is the point of them?

25 A Well, we're giving them our source code. It's our

1 family jewels. It's restricted to only people that, you
2 know, have a need to know. It's the developers in-house,
3 they have to protect that. They can't distribute the source
4 code out to anybody else. They can't tell anybody.

5 It also provides confidentiality for the methods and
6 concepts in it. So they can't use our source code and then
7 go out and tell their friends how the source code works.
8 It's pretty heavy duty protection of our family jewels.

9 MR. NORMAND: Now will you pull up SCO 167.

10 BY MR. NORMAND:

11 Q I don't believe this is yet in evidence. It should be
12 on your screen, Mr. Broderick. Do you recognize this
13 document?

14 A Yes. This is a product license that IBM took out.
15 It's numbered number 47, and it is for a UNIX System V
16 Release 3.0.

17 MR. NORMAND: Can we highlight that language on
18 the top right?

19 BY MR. NORMAND:

20 Q How are you familiar with this document?

21 A I worked with -- anybody who licenses a source code
22 ends up with a -- first, before they get the source code,
23 they have to execute a product license.

24 Q How are you personally familiar with this document?

25 A I worked with IBM in their licensing. I did not -- I

1 didn't do this one. This was before I did. But I worked
2 with IBM and I knew the licenses that they had.

3 MR. NORMAND: Your Honor, I move SCO 167 into
4 evidence.

5 THE COURT: Any objection?

6 MR. ACKER: No, Your Honor.

7 THE COURT: It will be admitted.

8 (Plaintiff's Exhibit 167 was received into
9 evidence.)

10 MR. NORMAND: Mr. Calvin, can you pull out and
11 show the title of this document to the jury.

12 BY MR. NORMAND:

13 Q So explain briefly, once again, what purpose this
14 document serves in relation to the software agreement that
15 we just looked at?

16 A This actually licenses a software product. The
17 software agreement is the general terms and conditions to be
18 able to do this. It has the overall protections.

19 MR. NORMAND: Let's pull out the top right of that
20 document, Mr. Calvin, with the number.

21 BY MR. NORMAND:

22 Q Now is this agreement number the same as the one we
23 looked at, the software agreement, earlier?

24 A Yes.

25 Q How do those two correspond?

1 A Everything is -- everything is done -- since it's so
2 important to be able to keep track of who is licensed,
3 everything is done by a licensing mechanism. It's almost
4 like a library decimal system. So if IBM has a software
5 agreement SOFT-00015, and then every time they license a new
6 software product or a new designated CPU, new computer to
7 use it on, they execute a new supplement and they would get
8 a new number so we can reference -- when we talk with them
9 about a license they have, we can reference, you know, under
10 your software agreement X, Y, Z, we're looking at these
11 supplement numbers, and we're both talking about the same
12 thing.

13 Q Now you referred also yesterday to a sublicensing
14 agreement. This will be the last in our three issues we're
15 talking about in this lecture.

16 MR. NORMAND: Can you pull up SCO Exhibit 3.

17 BY MR. NORMAND:

18 Q Do you see that document on your screen, Mr. Broderick?

19 A Yes.

20 Q What's it titled?

21 A AT&T Technology Sublicensing Agreement.

22 Q How are you personally familiar with this document?

23 A I've worked with it. It's, you know --

24 MR. NORMAND: Your Honor, I, frankly, don't recall
25 if this is in evidence. If it's not, then I'll move it in.

1 THE COURT: Number 3?

2 MR. NORMAND: Yes, Your Honor.

3 THE COURT: Any objection?

4 MR. ACKER: No objection.

5 THE COURT: Exhibit 3 will be admitted.

6 (Plaintiff's Exhibit 3 was received into
7 evidence.)

8 BY MR. NORMAND:

9 Q Now this language on the top right, once again, Mr.
10 Broderick, what is the significance of that number on the
11 top right of this document?

12 A Well, you lost the first letter I think from a two-hole
13 punch, but it's SUB-00015A, and that was the number assigned
14 to the IBM sublicensing agreement, and each licensee would
15 have.

16 MR. NORMAND: Can we go to the second page of this
17 document and highlight 2.01(a).

18 BY MR. NORMAND:

19 Q This document says, AT&T grants the licensee personal,
20 nontransferable and nonexclusive rights: To make copies of
21 sublicensed products. Do you see that language?

22 A Yes.

23 Q Let's go to section 1.04 on the same page. And this
24 says, sublicensed product means, computer programs in
25 object-code format based on a software product.

1 Now taking those two definitions, can you explain the
2 purpose and operation of a sublicensing agreement?

3 A That granted the overall rights to distribute a
4 sublicensed product. A sublicensed product is -- I talked
5 yesterday about if you went to the store and you bought
6 Microsoft Windows. That's a binary product. A binary
7 product is an object code form. You can't change it. You
8 can just use it. So what this is granting them is rights,
9 if they have a license for a specific software product, to
10 take that software product and distribute a binary. It's
11 the same thing as allowing somebody to distribute Microsoft
12 Windows. You can't modify it at that point, just use it.

13 Q Now with all of this in mind, let's go back to an
14 exhibit we looked at yesterday, SCO 580. This was the
15 Prentice-Hall letter. Do you recall discussing that?

16 A Yes.

17 MR. NORMAND: Can you bring up the first paragraph
18 of the text.

19 BY MR. NORMAND:

20 Q This was a letter, Mr. Broderick, in which Novell was
21 explaining that it had transferred to the Santa Cruz
22 Operation, Inc. its existing ownership interests in UNIX
23 System-based offerings and related products as listed in
24 attachment A of this letter. Do you recall this?

25 A Yes.

1 MR. NORMAND: And can we go to attachment A of
2 this letter. Let's bring out that full set as well as we
3 can, Mr. Calvin.

4 BY MR. NORMAND:

5 Q Mr. Broderick, what are these lists comprised of? What
6 are these things?

7 A These are all the different software products -- part
8 of the list of the software products that we licensed under
9 product licenses.

10 MR. NORMAND: Can we go to the next page. The
11 next page, and the next page.

12 BY MR. NORMAND:

13 Q So all of those products, it's your understanding, had
14 been transferred by Novell to SCO?

15 A Yeah, that's what they say.

16 Q How was it that a company would go about licensing
17 products such as those listed here?

18 A They would contact us, salespeople directly, and say
19 they wanted to take a license. If they already had a
20 software agreement in place, we would prepare a supplement
21 product license for them, numbered sequentially, and send it
22 out for execution. If they didn't have a software agreement
23 in place, we would send them a software agreement to
24 execute. And then when they executed that, we would send
25 them the supplement.

1 Q In your experience -- you took over that business after
2 you transferred to Santa Cruz following the APA?

3 A Yes.

4 THE COURT: Mr. Broderick, let me ask you a
5 question. This may show my great ignorance here, but there
6 has been fairly constant reference to a flavor of UNIX
7 during the course of this trial. Would it be accurate to
8 say that the license agreement and the software agreement
9 together allow the licensee to create a flavor of UNIX and
10 then the sublicense agreement allows them to market that
11 flavored UNIX product?

12 THE WITNESS: Well, they couldn't take a license
13 for a software product until they had a software agreement.
14 And it's that product license that allows them to create a
15 flavor. And then they could not distribute their binary of
16 that flavor until they had executed a sublicensing
17 agreement.

18 THE COURT: Okay.

19 MR. NORMAND: Thank you, Your Honor.

20 BY MR. NORMAND:

21 Q Now, Mr. Broderick, did there come a time when --

22 A Kind of makes my job sound boring, doesn't it?

23 Q I didn't say that.

24 THE COURT: I was afraid you were going to be
25 offended that I used the term flavor. At your level, that

1 probably is not the phrase that you would use.

2 THE WITNESS: We use that all the time.

3 BY MR. NORMAND:

4 Q Did there come a time when the entire UNIX business
5 transferred from Santa Cruz to the company that's now known
6 as SCO?

7 A Yes.

8 Q And do you recall when that happened?

9 A The official date was May of 2001.

10 Q Did your responsibilities and obligations with respect
11 to overseeing the entire UnixWare business, contract aspects
12 thereof, change in any way when they were transferred from
13 Santa Cruz to SCO?

14 A At Santa Cruz I handled primarily U.S. domestic
15 business. When we transferred to SCO, I won the whole
16 world.

17 Q Congratulations.

18 We're going to show you SCO Exhibit 592. I don't think
19 that's in evidence. This is another category of the letters
20 that Novell sends out. Do you recognize this document?

21 A I recognize the contents of the letter. It was similar
22 to a lot of other letters that went out. I don't remember
23 specifically this customer.

24 Q Why do you recognize the document at all?

25 A Well, when we were in the transition teams, we had to

1 notify the licensees that Novell was selling the business.

2 Burt Levine was assigned the job of drafting up the
3 letter. And he did it -- when he drafted it up, he sent it
4 around to some of us for a second set of eyes to see if he
5 got everything correct in it. We said yes.

6 Then what they do is -- a standard licensee, where
7 there was no requirement for them to approve an assignment,
8 they just got blanket letters. They had a form letter that
9 was signed by -- I believe Stu Adamson, who was our
10 controller at the time, they did one of those things in
11 Microsoft Word where they throw the addresses in and they
12 sent them out.

13 Then we had to go through the files and we had to find
14 third-party suppliers and people we had special agreements
15 with that required them to approve any assignment. We had
16 to modify the letter a little bit telling them that, okay,
17 Novell sold the business to Santa Cruz, your agreement is
18 being assigned to Santa Cruz, talk with them from now on,
19 please sign this as your approval.

20 MR. NORMAND: Your Honor, I move SCO 592 into
21 evidence.

22 MR. ACKER: No objection.

23 THE COURT: It will be admitted.

24 (Plaintiff's Exhibit 592 was received into
25 evidence.)

1 MR. NORMAND: Mike, can you pull up the first
2 paragraph.

3 BY MR. NORMAND:

4 Q This states in the letter from Novell, as you may have
5 heard, Novell has transferred to The Santa Cruz Operation,
6 Inc. Novell's existing ownership interest in UNIX
7 System-based offerings and related products, collectively
8 transferred products. Do you see that language?

9 A Yes.

10 Q From your work, following the transition, do you know,
11 approximately, how many such letters Novell sent out to
12 these licensees and partners?

13 A My guess is about 3,000. I've got copies for all of
14 them and there were boxes filled in my office for a long
15 time.

16 MR. NORMAND: Can we pull up the signature, Mike.

17 BY MR. NORMAND:

18 Q Who signed this letter, Mr. Broderick?

19 A That's Burt Levine. He's a lawyer at Novell. He's the
20 sole lawyer of the UNIX group. He came from USL with us.

21 Q Now where was Mr. Levine located?

22 A In our offices in New Jersey. The UNIX developers and
23 finance people and contracts people that were with Novell
24 were all located in Florham Park, New Jersey, and Burt was
25 located there with us.

1 Q From your work following the transition from Novell to
2 Santa Cruz, are you aware of any letter saying that any
3 customers should deal with Novell concerning copyright
4 issues?

5 A No.

6 Q Are you aware of any letter saying Novell retained any
7 copyrights?

8 A No.

9 Q Let's do one more of these, Mr. Broderick. Turn to SCO
10 Exhibit 22. Do you recognize that document?

11 A I've seen this one, yes.

12 Q I take it you recognize it on the same basis that you
13 have recognized these earlier letters?

14 A Yes.

15 MR. NORMAND: I move SCO 22 into evidence, Your
16 Honor.

17 MR. ACKER: No objection.

18 THE COURT: It will be admitted.

19 (Plaintiff's Exhibit 22 was received into
20 evidence.)

21 MR. NORMAND: Now, Mike, let's pull up the top
22 left to show who this letter is to.

23 BY MR. NORMAND:

24 Q Did you have occasion in your work to deal with
25 Microsoft Corporation, Mr. Broderick?

1 A Not a lot, but I have had some dealings with them.

2 MR. NORMAND: Let's pull up the first paragraph of
3 the letter, Mike.

4 BY MR. NORMAND:

5 Q So this is another one of the letters with the
6 following language, as you may know, Novell transferred to
7 The Santa Cruz Operation, Inc. its existing ownership
8 interests in UNIX System-based offerings and related
9 products. Do you see that language?

10 A Yes.

11 Q In the next paragraph, this letter also contains, in
12 the second sentence, similar language to what we saw
13 earlier, it makes immeasurably more business sense for SCO,
14 as the owner of the software in which the components may be
15 included, to handle directly with Microsoft any matters that
16 may become relevant under the subject agreement. Do you see
17 that language?

18 A Yes.

19 Q How does that language comport with your understanding
20 of Santa Cruz's responsibilities and rights following the
21 transition?

22 A Well, Santa Cruz bought the business of technology.
23 They had all the contracts. Microsoft -- it was a product
24 that Microsoft had that Santa Cruz had used in the UNIX
25 operating system. And by buying the UNIX operating system,

1 they got all the contracts for all the third-party
2 suppliers, and this is just one of those letter to a
3 third-party supplier.

4 Q Let's look at the next page and the signature.

5 MR. NORMAND: Can you bring that up, Mike.

6 BY MR. NORMAND:

7 Q Who was Michael DeFazio?

8 A He was a Novell senior vice president in charge of the
9 UNIX business. He was located with us in New Jersey.

10 Q Now following this transition and during the course of
11 your work at Santa Cruz and SCO, did you have any
12 understanding of what rights Novell had retained with
13 respect to the APA?

14 MR. ACKER: Calls for speculation, Your Honor.

15 Also, there is no foundation.

16 BY MR. NORMAND:

17 Q Did you have in your month-to-month work while at Santa
18 Cruz and SCO occasion to deal with Novell with respect to
19 any rights it had retained under the APA?

20 A Yes, I did.

21 Q How so?

22 A Well, when we had the transition meetings, we were
23 still all Novell employees. They identified people who were
24 going to Santa Cruz and people who were staying Novell. And
25 they pulled up contracts binding these people together, and

1 we went through portions of the asset purchase agreement
2 because it had some ongoing requirements.

3 Q When you say they pulled?

4 A Novell management pulled us together. And part of
5 those ongoing requirements, they showed us sections of the
6 asset purchase agreement. One of them was section 4.16
7 which talks about Novell's retaining some binary royalty
8 rights. As part of the purchase price, you know, they got
9 stock and they got these ongoing royalties for the older
10 UNIX System V products.

11 And in the asset purchase agreement, there were some
12 restrictions that, as employees who were going to SCO, we
13 had to follow and the employees staying with Novell had to
14 make sure we followed them. One of them was we couldn't do
15 anything to jeopardize that royalty stream. It was money in
16 the bank to them. We weren't allowed to touch it.

17 We talked about it, and what we couldn't do was, once
18 we became Santa Cruz Operation, we couldn't go to the
19 licensee and say, look, you're paying \$100 per copy on a
20 royalty for this product, take a license with us, we'll
21 charge you \$50 a copy, and then beat Novell out of their
22 royalty stream. We weren't allowed to do that. There were
23 restrictions on our entering into new licenses.

24 Q Mr. Broderick, going back to what we started today, in
25 your experience and your view, what was the source of the

1 royalty streams? Where did those come from?

2 A They came from the product schedules. When you
3 license -- when you license a product, the product schedule
4 has the royalty listing, you know, what you had to pay.

5 MR. NORMAND: Now, Mike, let's go to Section 4.16
6 of the APA. Bring out (a).

7 BY MR. NORMAND:

8 Q Now, Mr. Broderick -- I'm sure the jury appreciates our
9 patience as we go through this -- this is the language in
10 which the APA refers to all, quote, SVRX licenses, as listed
11 in detail under item VI of schedule 1.1(a) hereof. Do you
12 see that language?

13 A Yes, I do.

14 MR. NORMAND: Mike, can you go to schedule 1.1(a)
15 and item VI.

16 BY MR. NORMAND:

17 Q Mr. Broderick, have you had occasion to review item VI
18 of schedule 1.1(a)?

19 A Oh, yes.

20 BY MR. NORMAND:

21 Q So the previous page, at the bottom --

22 MR. NORMAND: Let's first highlight for the jury,
23 Mike, the top. This is schedule 1.1(a), and highlight
24 number VI at the bottom.

25 //

1 BY MR. NORMAND:

2 Q It says, all contracts relating to the SVRX licenses
3 listed below. Now in your experience, Mr. Broderick, what
4 are actually listed below in item VI? What are those
5 things?

6 A These are the source code products that we had product
7 schedules for and we issued licenses for.

8 Q Now going back to section 4.16, following that
9 transition meeting and based on your experience at Santa
10 Cruz and then SCO, what was your understanding as to what
11 SVRX licenses referred to?

12 A SVRX licenses referred to the source code licenses for
13 the products for -- all of the products that we licensed,
14 excluding UnixWare.

15 Q And let's look at section 4.16(b). This is the
16 language that says, buyer shall not, and shall not have the
17 authority to amend, modify or waive any right under or
18 assign any SVRX license without by the prior written consent
19 from seller. In addition, at seller's sole discretion and
20 direction, buyer shall amend, supplement, modify or waive
21 any rights under, or shall assign any rights to, any SVRX
22 license to the extent so directed in any manner or respect
23 by seller. Do you see that language?

24 A Yes, sir.

25 Q Now in the course of your work, did you develop an

1 understanding of what rights Novell had with respect to
2 waiving or modifying SVRX licenses?

3 A Sure. I actually worked with Novell on some of those.

4 Q What was the understanding you had as to the scope of
5 those rights?

6 A They had rights to tell us to modify or have approval
7 for modifications of changes to the licenses, the product
8 schedules.

9 Q Did you have an understanding as to why they had the
10 right to do that?

11 A Because that's where the royalties came into play.
12 They were continuing to get the royalty stream as part of
13 the purchase price, so they had the right to manage that
14 royalty stream.

15 Q Now at the start of the day we were talking about what
16 we call the umbrella software agreement. Do you remember
17 that?

18 A Yes.

19 Q In your view and your experience, if Novell had the
20 right to waive or modify SCO's rights under the software
21 agreement, what would be the consequences?

22 A It would destroy our business.

23 Q Why?

24 A Because of the provisions -- that's where all our
25 protections lie, the provisions of confidentiality, the

1 rights on -- limited rights for them not to just use the
2 source code to modify it, not to distribute the source code.
3 If they could waive those rights, Santa Cruz bought the
4 business from Novell, Novell could just turn around the next
5 day and destroy the business.

6 Q Now, Mr. Broderick, I want to show you SCO Exhibit 213.
7 It's going to come up on your screen. It's not yet in
8 evidence. This is a letter to you. Do you recognize this
9 document?

10 A Yes, I do.

11 Q It's from Novell; is that right?

12 A Yes.

13 Q And did you have occasion to receive this letter during
14 your work at Santa Cruz?

15 A Yes.

16 MR. NORMAND: Your Honor, I move SCO 213 into
17 evidence.

18 MR. ACKER: No objection.

19 THE COURT: It will be admitted.

20 (Plaintiff's Exhibit 213 was received into
21 evidence.)

22 BY MR. NORMAND:

23 Q Now before we start to highlight this letter for the
24 jury, could you briefly describe the background with respect
25 to this company Cray that gave rise to this correspondence?

1 A Sure. Cray Research had a license going back to UNIX
2 System Laboratories. They licensed UNIX. And Cray built
3 super computers, those multimillion dollar computers mostly
4 used by the government. They were very high powered
5 computers. They sold for sold multimillions of dollars.
6 They had a special license with us where they not only had
7 the right to distribute the binaries with their products,
8 but they were given a special right to deliver source code
9 with that computer.

10 Q And did there come to be some dispute or discussion
11 with Cray about its rights?

12 A No. Actually the discussions slash dispute came with
13 SGI. Silicon Graphics bought Cray Research. They contacted
14 me. And Silicon Graphics had been given a binary royalty
15 buyout by Novell, so they didn't have to pay royalties
16 anymore. They had paid a lump sum up front. When they
17 bought Cray Research, they said we're putting Cray
18 underneath our buyout provisions. And I had said, nice try,
19 but no. And we discussed this back and forth for a while.

20 Q And what was the result of the discussions?

21 A The discussions weren't going anywhere. So I went to
22 my boss and I said, you know, we get five percent of these
23 binary royalties. I've been spending about that much
24 talking with them. This is a binary royalty deal. Why
25 don't we turn this over to Novell and say, look -- under the

1 APA, we have to take reasonable efforts to protect and
2 collect their royalties. I have expended that. So we went
3 to Novell and said, you know, here's the situation, you deal
4 with it as it applies to the binary royalties. You can't
5 touch any of the source code fees, rights or anything else,
6 but you do the binary stuff, I'm done.

7 MR. NORMAND: Mike, let's pull up the signatures
8 at the bottom.

9 BY MR. NORMAND:

10 Q Do you have an understanding, Mr. Broderick, as to why
11 this is signed by two people?

12 A It was signed by -- it was signed by Steve Sabbath and
13 Ryan Richards. Ryan Richards sent the letter to Steve
14 Sabbath, who was our general counsel at Santa Cruz, sign it
15 saying, yep, we agree to this.

16 MR. NORMAND: Mike, pull up the middle paragraph.

17 BY MR. NORMAND:

18 Q This language says, by signature below, SCO authorizes
19 Novell to negotiate and conclude with Cray the issue of
20 Craig's intention to operate under the SGI agreements for
21 all SVRX royalty-generating binary shipments. Do you see
22 that language?

23 A Yes.

24 Q This is an instance in which SCO is authorizing Novell
25 to undertake to deal with SGI with respect to Cray; is that

1 right?

2 A Yes.

3 Q Now, Mr. Broderick, when you were part of the UNIX
4 group at USL and Novell, did those companies amend and
5 modify rights under product schedule licenses?

6 A Certainly, often.

7 Q How so?

8 A There were hundreds of them. Most of them had to do
9 with --

10 Q When you say hundreds of them, what do you mean?

11 A Hundreds of license agreements. Any time we modified a
12 product schedule -- generally a product schedule that we
13 did, it had to be in writing. The software agreement says
14 any modifications to product schedules or anything, we both
15 have to sign it. So what they would do --

16 Q Why did those companies have occasion to amend and
17 modify the product schedule licenses with frequency?

18 A It generally had to do with royalties they would pay.
19 A lot of the companies would come and say, I'm only using a
20 portion of the UNIX I have embedded in my product. I only
21 need these sections, so I don't want to pay the full
22 royalty. Let's negotiate a lower royalty. We would do a
23 letter agreement modifying the product license so they would
24 pay the lower royalty.

25 Q When you were at USL and Novell, did those companies

1 sometimes waive rights under product schedule licenses to
2 cut a licensee a break, for example?

3 A By waive rights, you mean -- they do letter agreements
4 waiving -- if somebody licensed a source code product, there
5 was a one-time, up-front fee for the source code. And
6 depending on the source code product, if it was an operating
7 system, it would be anywhere from \$100,000, to UnixWare,
8 which is \$375,000. If they were a current licensee and we
9 wanted them to move to the next release that we were coming
10 out with, we would do a letter agreement and offer them a
11 lower one-time fee for the source code. So that was
12 essentially a waiver of something under a license.

13 Q Did all those activities relate to and surround the
14 product schedule licenses?

15 A Absolutely.

16 Q Now after the APA, did Novell direct SCO and Santa Cruz
17 to amend or modify the product schedule licenses from year
18 to year?

19 A Yes, they did.

20 Q How so?

21 A In each product schedule there is a provision for the
22 royalties to be increased. What they could do is -- when
23 you sign a license, you have to -- you agree to pay
24 royalties. And there are a lot of people that have taken --
25 there are people that are still shipping a product based on

1 UNIX System V Release 3.2. That was licensed back in the
2 1980s, which they continue to develop and they continue to
3 ship. So in the product schedule there is a provision that
4 we can increase their royalties based on an increase in the
5 consumer price index, and we can increase it annually.

6 After we went to Santa Cruz, the finance person at
7 Novell directed me each year to notify the licensees that we
8 were increasing the royalties by this consumer price index.

9 Q Was it your understanding, after this set of transition
10 meetings concerning the APA, that Novell had sought to
11 preserve for itself the same rights of waiver and
12 modification that it had before the APA was executed?

13 A I'm sorry. Could you repeat that?

14 Q Yes. The question is, was it your understanding,
15 following the transition meetings, that Novell wanted to
16 retain that same waiver of rights, same rights to modify
17 product schedule licenses after the APA that it had before
18 the APA?

19 A As it related to the binary royalties.

20 Q Was that your understanding?

21 A Yes.

22 Q Now, until 2003, to your knowledge did Novell ever
23 direct Santa Cruz or SCO to waive its rights under or to
24 amend or to modify any software agreement?

25 A No, but that's not where the royalties are generated,

1 so that wouldn't be a right they retained.

2 Q To your understanding?

3 A To my understanding.

4 Q Now did there come a time you learned that Novell had
5 directed SCO to waive its claim that IBM had breached IBM's
6 software agreement?

7 A I have heard that.

8 Q What was your reaction?

9 A They're nuts.

10 Q What was the basis for that reaction?

11 A They had no rights to do that. They had a right to
12 protect their royalty binary stream, not to waive -- if they
13 had the rights to waive provisions under the software
14 agreement, that would have put us out of business, destroy
15 the entire value of our company.

16 Q Now did there come a time when you learned that Novell
17 was claiming that under the APA Santa Cruz had obtained only
18 a license?

19 A I heard that.

20 Q What was your reaction to that?

21 A They're nuts.

22 Q Why?

23 A Well, first of all, I have been in contracts for almost
24 20 years. If I license something to somebody, I call it a
25 license. If I sell something to somebody, I call it a

1 purchase agreement or a sale.

2 Q Please continue.

3 A The agreement between Santa Cruz and Novell is an asset
4 purchase agreement. It's a purchase agreement. Also,
5 throughout the agreement, Novell was referred to as the
6 seller, not the licensor. Santa Cruz is referred to as the
7 buyer, not the licensee. And I've never done a license
8 where I've transferred all right, title and interest in an
9 asset.

10 Q Now, Mr. Broderick, as of the fall of 1995 -- it may
11 take a couple minutes to explain this, but as of the fall of
12 1995, totally apart from the APA, did Santa Cruz already
13 have a UNIX license?

14 A Yes, they did.

15 MR. NORMAND: Mike, can we pull of SCO 706.

16 BY MR. NORMAND:

17 Q Do you recognize this document, Mr. Broderick?

18 A Yes.

19 Q On what basis do you recognize it?

20 A It's a letter to Santa Cruz Operation from O.L. Wilson.
21 He used to be in charge of the licensing group at AT&T.

22 Q What is your personal knowledge of this document?

23 A It's among the documents that I worked with and have
24 seen.

25 MR. NORMAND: Your Honor, I move SCO 706 into

1 evidence.

2 MR. ACKER: Your Honor, I don't think that's a
3 sufficient foundation. This document predates his work at
4 Novell and/or SCO. He doesn't seem to be able to identify
5 where and when he used it or saw it.

6 BY MR. NORMAND:

7 Q Mr. Broderick, in your personal experience, did you
8 have occasion to review and consider the terms of Santa
9 Cruz's license during your work at Novell, Santa Cruz and
10 SCO?

11 A Yeah. I went through the licenses when we were told we
12 were going to be working for them to find out what they were
13 doing and who they were.

14 Q Did you do that as part of your job responsibilities?

15 A I did that out of curiosity and trying to stay
16 employed.

17 THE COURT: Would your review have included this
18 agreement that you would have reviewed?

19 THE WITNESS: I'm sorry?

20 THE COURT: Would your review have included review
21 of this agreement?

22 THE WITNESS: I pulled out all of Santa Cruz's
23 documents, licenses. I don't remember specifically seeing
24 this document. But I looked at everything Santa Cruz had.

25 MR. ACKER: Same objection, Your Honor.

1 MR. NORMAND: Could we go to the next page of the
2 document, Mr. Calvin. The next page.

3 BY MR. NORMAND:

4 Q Do you recognize this document, Mr. Broderick?

5 A Yes, I do.

6 Q On what basis do you recognize it?

7 A It's Santa Cruz's software agreement.

8 Q Is this the agreement you were referring to earlier
9 that you referred to and reviewed in the course of your job
10 responsibilities?

11 A Yes, I did.

12 Q Do you now recall reviewing this document?

13 A Yes.

14 MR. NORMAND: Your Honor, I move SCO 706 into
15 evidence.

16 THE COURT: Mr. Acker.

17 MR. ACKER: No objection, Your Honor.

18 THE COURT: It will be admitted.

19 (Plaintiff's Exhibit 706 was received into
20 evidence.)

21 MR. NORMAND: Now, Mr. Calvin, can we pull up the
22 first three paragraphs, including the title.

23 BY MR. NORMAND:

24 Q This document is titled AT&T Information Systems, Inc.
25 Software Agreement. The first paragraph identifies the

1 Santa Cruz Operation, Inc. Do you see that reference, Mr.
2 Broderick?

3 A Yes, I do.

4 Q Now what would be the point -- let me start this way.

5 Summarizing what we started the day with, what is your
6 understanding of what -- as of 1995, what is your
7 understanding of what the scope of Santa Cruz's rights were
8 under this license and the corresponding sublicensing or
9 product schedules?

10 A Under this license -- under this license, it's like
11 every other license --

12 Q You say license?

13 A Well, I mean under this agreement. Sorry.

14 Q I should be clearer. Do you know whether Santa Cruz
15 executed a product schedule license under this operating
16 agreement?

17 A Yes, they did.

18 Q Taking these together, what was your understanding of
19 what Santa Cruz's rights were as of 1995 under the software
20 agreement and license?

21 A Well, under the software agreement, they had rights to
22 acquire source code products.

23 Q Do you know if they did?

24 A Yes, they did.

25 Q Do you know if they built a UNIX business around the

1 software agreement and license that they took?

2 A Yes, they did.

3 Q How do you know that?

4 A I know that because they were a licensee and we knew
5 what our licensees were doing. They paid royalties. And
6 they actually distributed a binary. They were the only
7 company I knew of -- the reason I got to know them is
8 because when we were talking about the business, it was
9 mostly OEM computer, original computer manufacturers that
10 license our software and they put the UNIX on their
11 computer. Santa Cruz had a different business model, which
12 is why I got to know them when I was working at USL and
13 Novell. Santa Cruz wasn't a computer manufacturer. They
14 took the UNIX operating system and they created a UNIX
15 binary similar to Microsoft Windows, but it was a UNIX
16 operating system.

17 Q Is that a flavor?

18 A That would be a flavor. And they distributed that.
19 They distributed it to distributors. They would sell it to
20 companies like Dell or Compaq, who had personal computers,
21 and instead of putting Microsoft Windows on the computer,
22 they put Santa Cruz's UNIX on the computer.

23 Q Now in the fall of 1995, based on your experience, if
24 Santa Cruz had wanted to license the most recent version of
25 UNIX, if it had wanted to license UnixWare, all it wanted

1 was a license to UnixWare, about how much would it have paid
2 for that kind of license?

3 A The standard unit for a source license was \$375,000,
4 but current licensees that licensed UnixWare were generally
5 given a break in the price. You know, it was the effort to
6 move them to the next release and keep them current with
7 what we were doing. So they probably would have paid less
8 than the \$375,000.

9 Q Now, Mr. Broderick, I want to show you a slide that
10 Novell used in its opening argument.

11 THE COURT: Mr. Normand, before you do. This
12 agreement is with AT&T. Was this agreement, to your
13 knowledge, still in effect even though AT&T had sold the
14 UNIX business to Novell?

15 THE WITNESS: Yes, it was still in effect. All
16 the agreements just transferred through. The agreements
17 were, essentially -- the agreements were, essentially, a
18 perpetual for source code. The reason that was was the
19 companies that license the source code, the large IBM,
20 Hewlett-Packard, they expended a lot of money and a lot of
21 resources to create their flavor, and they wouldn't -- they
22 wouldn't sign an agreement that said, okay, after you spend
23 all this time and all this effort, we're going to cancel
24 your agreement.

25 //

1 BY MR. NORMAND:

2 Q Were there circumstances in which these UNIX companies
3 did retain the right to terminate a licensee's rights under
4 the software agreement?

5 A The licensee could terminate any time they wanted. We
6 could terminate the license if they breached a provision of
7 the agreement.

8 Q I see.

9 A Absolutely, if -- you know, as I said before, this was
10 our family jewels we were letting these people have. If
11 they were doing something wrong with the source code, we
12 were going to shut them down.

13 Q Okay.

14 MR. NORMAND: Thank you, Your Honor.

15 BY MR. NORMAND:

16 Q I had asked Mike to put up the slide that Novell had
17 used in its opening argument, and I wanted to ask you some
18 questions about this slide, Mr. Broderick.

19 A Sure.

20 Q Do you see the top half of the exhibit reflects the
21 sale of the UNIX business from AT&T to USL and then from USL
22 to Novell?

23 A Yes.

24 Q Do you see the bottom half of the slide lists
25 Hewlett-Packard, HP, Sun and IBM?

1 A Yes.

2 Q In your experience, what was the nature of HP's, Sun's
3 and IBM's involvement with UNIX?

4 A They were a licensee.

5 Q Now let's start with HP. Did you have any involvement
6 in the licensing of UNIX to HP?

7 A Yes.

8 Q When did that occur?

9 A Through my time at Novell and Santa Cruz.

10 Q Did HP create its own flavor of UNIX called, as
11 indicated here, HP-UX?

12 A Yes, they did.

13 MR. NORMAND: Mike, can you bring back up schedule
14 1.1, please. Let's put up the first paragraph.

15 BY MR. NORMAND:

16 Q Now, Mr. Broderick, when HP licensed UNIX, did Novell
17 or its predecessor also transfer to HP all copies of UNIX
18 and UnixWare?

19 A No, they did not.

20 MR. NORMAND: Let's bring the slide back up, Mike.

21 BY MR. NORMAND:

22 Q When HP licensed UNIX from Novell, did Novell transfer
23 all of its employees in the UNIX licensing group to HP?

24 A No, they did not.

25 Q So you remained at Novell along with the rest of the

1 employees in the UNIX licensing group after that HP license?

2 A Yes, I did.

3 Q Let's move on to IBM. Did IBM license UNIX from Novell
4 or its predecessors?

5 A Yes.

6 Q That's the agreement we started the day with, right?

7 A Yes.

8 Q Now when IBM licensed UNIX, did the parties execute a
9 license purchase agreement?

10 A No. They executed a license.

11 Q When IBM licensed UNIX from Novell or its predecessors,
12 were the UNIX engineers instructed to go into the UNIX
13 source code and add copyright notices?

14 A No, they were not.

15 Q Let's move on to Sun, also indicated in the slide.
16 When Novell licensed UNIX to Sun, did Novell or its
17 predecessor license back the UNIX technology so it could use
18 that technology in its own products?

19 A No, it did not.

20 Q Did Novell send out letters to its customers and
21 partners informing them that Novell had transferred its
22 existing ownership interest in UNIX to Sun?

23 A No.

24 Q So returning to the slide that Novell created for the
25 jury, in your view, where does SCO fit into the diagram?

1 A On the same level, directly to the right of Novell.

2 Q Why do you say that?

3 A Because Santa Cruz bought their business, just like
4 Novell bought the business.

5 Q Now, Mr. Broderick, with all of this in mind -- we're
6 getting close here -- let me return to your participation in
7 that transition process in 1995. As part of that process,
8 did you separate materials that Novell was keeping from the
9 materials that Santa Cruz would take possession of?

10 A Yes, I did.

11 Q Why did you do that?

12 A Because Novell was -- Novell was retaining certain
13 products that were part of the -- the Novell UNIX group had
14 not only the UNIX operating system, but they had some other
15 products and they had some agreements related to those
16 products that were not going to Santa Cruz. So we had to go
17 through all of the legal and financial files, intellectual
18 property files and pull out the files that were related to
19 products that are -- business that was not going to Santa
20 Cruz and was staying with Novell.

21 Q Did you receive any direction from anyone in this
22 regard?

23 A Yes, we were told.

24 Q Who told you?

25 A Novell management. At the time we were all Novell

1 employees. We had just been designated you're going to
2 Santa Cruz, you're staying with Novell. So we went into the
3 file room and we were told what to look for. Obviously all
4 the NetWare agreements and files have to be pulled out. So
5 what we did is we put a couple of tables in the center of
6 the file room, and anything related to NetWare was put on
7 the table.

8 Then we looked -- there was the tuxedo product and some
9 kind of data management product, and Novell was retaining
10 that. That was not getting sold to Santa Cruz. So any
11 files relating to this tuxedo product were pulled out.

12 And then also there was a product called documented
13 workbench. It is an old product from AT&T, USL, but Novell
14 also was not selling that to Santa Cruz. So any files we
15 found relating to the documented workbench were pulled out.

16 What we did is we tried to isolate all the files that
17 Novell needed to retain. Then the resulting files were
18 going to be Santa Cruz's files. So we went through all
19 these files and pulled them out and said, okay, Novell,
20 here's, you know, what you asked for, these are all the
21 files you need. They said, yes. We said, okay, take them.

22 Q Now, Mr. Broderick, as part of that process, which
23 company took possession of the UNIX and UnixWare copyright
24 registration certificates that were in New Jersey?

25 A I'm assuming Santa Cruz because we have them now.

1 Q How do you know we have them now?

2 A They are in Lindon.

3 Q Lindon?

4 A Utah.

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

6 THE COURT: You may, and you don't need to ask,

7 Mr. Normand.

8 MR. NORMAND: Thank you, Your Honor. I ask for

9 Mr. Broderick's sake.

10 BY MR. NORMAND:

11 Q Do you recognize those materials, Mr. Broderick?

12 A Yes. I saw these when we were -- there was a point in
13 time after Caldera bought us that we shipped also the legal
14 files to Lindon, and on one of my trips out to Lindon, we
15 were organizing the files and came across this and we made a
16 decision on where to file it.

17 Q What do you understand those materials to be?

18 A These are copyright registrations related to UNIX.

19 Q What do the green tabs on the side of those say, Mr.

20 Broderick? Are there exhibit numbers?

21 A The first one here says Exhibit 487.

22 Q What does the second one say?

23 A Exhibit 488.

24 Q Now before we get into those in a little more detail, I

25 want to show you and the jury, Mr. Broderick, a schedule to

1 the APA. Let's start with the seller disclosure schedule.

2 MR. NORMAND: Go to page 1 of that, Mike. The
3 page before that, I believe.

4 THE COURT: Mr. Normand, Mr. Broderick asked if he
5 could stretch for just a second.

6 MR. NORMAND: Of course.

7 THE WITNESS: I'm getting old.

8 BY MR. NORMAND:

9 Q We're going to show you the seller disclosure schedule
10 in the APA. This appears at the end of the APA. And the
11 second page of the seller disclosure schedule refers to --
12 let's start at section 2.10, bring all that out. This
13 refers to intellectual property. There is a reference at
14 the bottom, attachment E to this schedule contains a listing
15 of seller's copyright registrations covering products
16 related to the business. Do you see that?

17 A Yes.

18 Q So let's go to the first page of attachment E to the
19 APA.

20 THE COURT: Just one second, Mr. Normand. The
21 jury should be seeing this, correct?

22 MR. NORMAND: That's right, Your Honor.

23 THE COURT: He's doing the APA.

24 MR. NORMAND: I'm sorry.

25 THE COURT: You need to back up because they

1 didn't see that last one.

2 MR. NORMAND: Mike, let's go back to the seller
3 disclosure schedule. Let's highlight that top language of
4 the first page of the seller disclosure schedule so the
5 jurors can see what it says. This is in the APA, schedule
6 to the APA. Let's go to the second page of this schedule.
7 Highlight that section 2.10 language. See the reference to
8 intellectual property, and there is a reference at the
9 bottom, attachment E to this schedule contains a listing of
10 seller's copyright registrations covering products related
11 to the business.

12 So now let's, in turn, go to attachment E, page 1.
13 Bring up the title. Attachment titled Selling Copyrights in
14 Products of Business. Let's go to page 8. Let's highlight
15 those bottom three references.

16 BY MR. NORMAND:

17 Q Mr. Broderick, do you have an understanding of what,
18 with respect to this first reference, UNIX Operating System
19 Edition 6 is?

20 A Yes.

21 MR. ACKER: Object. He needs to read the whole
22 line, and instruction manual.

23 MR. NORMAND: I'm asking him if he understands
24 what the first part of the line is.

25 //

1 BY MR. NORMAND:

2 Q Is the instruction manual separate from the UNIX
3 Operating System Edition 6?

4 A The instruction manual tells you how to use the
5 Operating System Edition 6.

6 Q Now we're going to put on your screen, Mr. Broderick,
7 what's been marked as SCO Exhibit 486.

8 THE COURT: 486 or 487?

9 MR. NORMAND: 486, Your Honor.

10 THE COURT: This the jury should not see.

11 MR. NORMAND: That's correct. In fact, I'm not
12 sure 487 and 488 are in.

13 THE COURT: 485, 486, 487, 488 have not been
14 admitted yet.

15 MR. NORMAND: Correct, Your Honor.

16 BY MR. NORMAND:

17 Q Do you recognize Exhibit 486, Mr. Broderick?

18 A It's a copyright registration.

19 Q Let's go to 487. Let's go to page 3 of 487. Now can
20 you tell, Mr. Broderick, if the exhibit on the screen
21 corresponds to 487 in your book?

22 A It looks like it corresponds.

23 Q Are you familiar with these copyright registration
24 certificates?

25 A I've seen them, yes.

1 Q On what basis have you seen them?

2 A When we were filing out in Lindon, Utah, I believe I
3 thumbed through them. When we were doing the filing out in
4 Lindon, Utah, I was doing that filing with a woman named
5 Joanie Bingham, B-i-n-g-h-a-m, and we were deciding how to
6 file. We were doing the customers and the licensees
7 alphabetically, and I told her she should set up a separate
8 area for those things, like the copyright registrations. I
9 looked through the binders at that time and saw what they
10 were and said, put them in a file called copyrights.

11 Q Have you maintained ultimate control of these materials
12 since that time?

13 A They did in Lindon, yes.

14 Q And did they do so at your direction?

15 A I told her to file them and not throw them out. That's
16 my direction.

17 Q Apparently she did that.

18 A She did a good job. She didn't throw them out.

19 MR. NORMAND: Your Honor, I move SCO 487 into
20 evidence.

21 MR. ACKER: No objection, Your Honor.

22 THE COURT: It will be admitted.

23 (Plaintiff's Exhibit 487 was received into
24 evidence.)

25 //

1 MR. NORMAND: Now, Mike, can you highlight the
2 language in number one were it says title of this work.

3 BY MR. NORMAND:

4 Q It says UNIX Operating System Edition 32V and
5 Instruction Manual. Do you see that language, Mr.
6 Broderick?

7 A Yes.

8 MR. NORMAND: Bring that down, Mike, and pull up
9 the top right. Actually, you can get rid of the operating
10 system reference. Can we pull that, Mike, up side by side
11 or top to bottom with the corresponding number in attachment
12 E of the APA.

13 BY MR. NORMAND:

14 Q Now, Mr. Broderick, what is the number on the top right
15 of the certificate of copyright registration? Can you see
16 that, the registration number?

17 A TXu 516 704.

18 Q Do you see a corresponding number in the attachment to
19 the seller disclosure schedule in the APA?

20 A Yes, I do. Same number.

21 MR. NORMAND: Let's bring up for Mr. Broderick SCO
22 Exhibit 488. Let's go to page 3.

23 THE COURT: 488 has not yet been admitted.

24 MR. NORMAND: Correct, Your Honor.

25 //

1 BY MR. NORMAND:

2 Q Can you see, Mr. Broderick, the document on your
3 screen, the right side of your screen --

4 MR. NORMAND: Let's do SCO 488, Mike.

5 BY MR. NORMAND:

6 Q The question is going to be whether the document that
7 comes up on your screen corresponds to 488 in the book
8 that's in front of you.

9 MR. NORMAND: Let's go to page 3.

10 THE WITNESS: The two documents correspond.

11 MR. NORMAND: Your Honor, I move SCO 488 into
12 evidence.

13 MR. ACKER: No objection.

14 THE COURT: It will be admitted.

15 (Plaintiff's Exhibit 488 was received into
16 evidence.)

17 MR. NORMAND: Mike, can you do the same
18 comparison.

19 THE COURT: Mr. Singer, you can be heard in that
20 microphone.

21 MR. SINGER: I'm sorry.

22 BY MR. NORMAND:

23 Q Do you see the number on the copyright registration,
24 Mr. Broderick, top right?

25 A Yes, I do.

1 Q Can you see if that corresponds to the number in the
2 attachment to the seller disclosure schedule in the APA?

3 A They are the same.

4 MR. NORMAND: Let's bring those down, Mike.
5 Actually take them out. We'll just look at page 3 of the
6 registration. Highlight the first half of the language 1
7 and 2.

8 BY MR. NORMAND:

9 Q Do you see, Mr. Broderick, the reference in 2, in sort
10 of the middle of that highlighted where it says nature of
11 authorship?

12 A Yes.

13 Q What does it say?

14 A Computer program.

15 Q Is it your understanding that UNIX Operating System
16 Edition 7 is a computer program?

17 A Oh, yes.

18 MR. NORMAND: Just a moment, Your Honor.

19 Your Honor, we would like to move into evidence as
20 well the other copyright registration certificates, and I
21 don't have the list handy. Maybe I can do that on redirect
22 or with some other witness. Just to flag that issue for the
23 Court.

24 THE COURT: All right.

25 MR. NORMAND: Thank you, Mr. Broderick. No

1 further questions.

2 THE COURT: Mr. Normand, thank you.

3 Mr. Acker.

4 THE WITNESS: Do you want your books back?

5 MR. NORMAND: I'll take them.

6 THE COURT: Will you be using those books, Mr.

7 Acker?

8 MR. ACKER: We'll put them on that table over

9 there.

10 CROSS-EXAMINATION

11 BY MR. ACKER:

12 Q I'll give you these, Mr. Broderick, just in case.

13 Good afternoon.

14 A Good afternoon.

15 Q How are you?

16 A Pretty good.

17 Q Where do you currently work, sir?

18 A The SCO Group.

19 Q And do you have any equity interest in the company?

20 A I do. I have a little over 6,000 shares of stock that

21 I purchased through the stock purchase plan and I have a

22 number of options that are -- I think because we're in

23 Chapter 11 are frozen.

24 Q How many options do you have, sir?

25 A About 30,000.

1 Q So you have shares of stock that if SCO's stock price
2 rises, you will gain financially, correct?

3 A That's true.

4 Q And you also have shares -- 30,000 shares of stock. Do
5 you know what the strike price is for those shares of stock?

6 A Anywhere from 24 cents. Better than 50 percent of them
7 are around nine, \$10.

8 Q So if those shares with a strike -- options of strike
9 price of 24 cents, if SCO's stock price was to go up to \$10,
10 you would make \$10 per option, correct?

11 A That's true, but on half of them I would make about 30
12 cents.

13 Q So if SCO's stock price were to rise, you would gain
14 financially, correct?

15 A Sure.

16 Q Now you were not involved in the negotiation of the
17 asset purchase agreement; is that right?

18 A That's true.

19 Q And you were not present at the Novell board meetings
20 in September of 1995 when the asset purchase agreement was
21 approved, correct?

22 A That's true.

23 Q And you had no involvement with any of the amendments
24 to the asset purchase agreement, correct?

25 A That's true.

1 Q Now you're a contract guy, right?

2 A I'm a contracts guy.

3 Q Let me ask you a little bit about contracts. You would
4 agree with me, wouldn't you, that a written contract
5 provides a written record of what the parties agreed to?

6 A That's the intent of a contract, yes.

7 Q And in a written contract, you want to be as clear as
8 possible in case there are misinterpretations in the future
9 about what the parties intended, correct?

10 A That's the intent of the contract, yes.

11 Q And the reason for putting it in writing is so there is
12 no misinterpretation years down the road about what the
13 parties agreed to, right?

14 A That's correct.

15 Q You want a written record so people in the future
16 cannot say the contract said one thing when it actually said
17 another, correct?

18 A That's the intent, yes.

19 Q You also want a contract so people don't forgot what
20 they agreed to years after it's put in writing, right?

21 A Correct.

22 MR. ACKER: Could we bring up SCO 04, please.

23 BY MR. ACKER:

24 Q We looked at this when Mr. Normand was taking you
25 through your direct examination. This is a software license

1 agreement between AT&T and IBM, right?

2 A Correct.

3 Q And this is one of the contracts that was first
4 purchased by Novell and eventually went to Santa Cruz; is
5 that right?

6 A Yes.

7 Q And you actually administered, at times, this contract,
8 correct?

9 A Correct.

10 Q And the reason that the words and the clauses are put
11 in the contract is so that both parties know what their
12 rights and obligations are, right?

13 A That's the intent, yes.

14 Q The reason that the words are put in the contract is so
15 that years after the contract was executed, you can pick up
16 the written document, you can look at it, you can read it,
17 and you can know what the rights and the obligations are of
18 each side, correct?

19 A Correct.

20 Q And when you enter into these sorts of agreements with
21 a party, you expect that party to comply with and abide by
22 the written terms of the agreement, right?

23 A Yes.

24 Q And you don't expect somebody on the other side of a
25 contract to, years later, just tell you orally, well,

1 despite what the words in the contract say, that is not what
2 we meant and therefore we're not going to abide by the
3 written contract, right?

4 A That's always been my intent.

5 Q That's your practice, right?

6 A Yes.

7 Q That's the way it works, right?

8 A Yes.

9 Q So, for instance, if we take a look at the third page
10 of this agreement, paragraph 2.05, this is a license
11 agreement, and this 2.05 excludes certain rights, in other
12 words, it says, no right is granted by this agreement for
13 the use of software products directly for others, or for any
14 use of software products by others, right?

15 A Yes.

16 Q In essence, back when this agreement was executed years
17 ago, AT&T was telling IBM you can't give these rights to
18 other people, they are just for you, right?

19 A Yes.

20 Q And they put it in writing, right?

21 A Yes.

22 Q They put it in writing so that 15 or 20 years later
23 someone from IBM couldn't say, well, we think when we made
24 this agreement, we really thought we had the right to give
25 these rights to other people, right?

1 A Yeah.

2 Q So you put it in writing so both parties know what the
3 agreement is, right?

4 A Yes.

5 Q What you can and can't do, right?

6 A Yes.

7 Q Despite that somebody may come years later and say what
8 they thought or hoped or wished the contract was, they are
9 stuck with what the language is? You would agree with me,
10 wouldn't you?

11 A In most cases, yeah, I agree.

12 Q Because that's the way contracts work, right?

13 A Yes.

14 Q Let me ask you about SCO Exhibit 03, please. Now I got
15 a little confused, but let me see if I can clear it up.

16 You talked about three types of licensing agreements
17 you entered into. This umbrella agreement that you enter
18 into with an entity sort of sets the general terms and
19 conditions of the relationship between the parties, correct?

20 A Yes.

21 Q Then there would be a first layer of agreement, which
22 would be a source code license where the licensee could take
23 a source code, could develop code on top of it, could make
24 their own flavor of UNIX; is that right?

25 A Yes.

1 Q And below that would be another licensing agreement,
2 which is what this one is, which is a sublicensing agreement
3 that allows the person who developed the new flavor of UNIX
4 to then turn around, put it into binary code, then license
5 to a customer, correct?

6 A Yeah. I wouldn't say it's below the -- you know, I
7 don't know if you are talking about hierarchy of priorities.
8 You have the software agreement, general terms and
9 conditions for licensing a software product. The
10 sublicensing agreement is the umbrella for distributing a
11 binary. Then you have the licenses where you actually
12 license a product and you can work with it, and that just
13 determines the royalties. So the hierarchy isn't a product
14 schedule under the sublicensing agreement.

15 Q I didn't mean to say that one was more superior to the
16 others, simply there are three types of licenses.

17 A Okay.

18 Q They are all related and they all work together, they
19 are all integrated, correct?

20 A Yes.

21 Q If you would take a look at paragraph 4 of SCO Exhibit
22 3.

23 MR. ACKER: If you would go there, Tom, an
24 highlight, please.

25 //

1 BY MR. ACKER:

2 Q It reads -- this is the agreement, again, where the
3 producer of the flavor of UNIX who has licensed the source
4 code rights is now sublicensing the binary code, and this
5 sublicensing agreement, together with the software agreement
6 and its supplement, sets forth the entire agreement and
7 understanding between the parties as to the subject matter
8 hereof.

9 What that is saying is that these three agreements that
10 you've talked about, the umbrella agreement, the source code
11 agreement and the sublicensing agreement, are all
12 interrelated, correct?

13 A Yeah. You have to have a software agreement in order
14 to have a sublicensing agreement. And you have to have a
15 software agreement in order to license a product.

16 Q It's those three agreements together that form the
17 relationship or define the bounds of the relationship
18 between the licensor and the licensee?

19 A Correct.

20 Q You talked about licenses with Sun and Microsoft. Do
21 you recall that testimony?

22 A Yes.

23 Q If we could -- let me show you a couple of agreements.
24 Let me show you what we've marked as Exhibit N-13 and T-13.

25 Have you had a chance to look at those, sir?

1 A I see them. How much detail do you want me to look at
2 them?

3 Q Just take a look, and start with N-13. It's a license
4 agreement that was entered into between SCO -- new SCO, the
5 plaintiff in this case, and Sun in 2003, correct?

6 A Uh-huh. (Affirmative)

7 Q You have to answer yes or no.

8 A Yes.

9 Q You also have T-13, which is an agreement that was
10 entered into between SCO, the plaintiff in this case, and
11 Microsoft in, again, 2003, right?

12 A Yes.

13 Q You are familiar with these licenses, correct?

14 A I'm familiar with them, yes.

15 Q Now as part of the APA, you understood that --

16 THE COURT: Mr. Acker, do you want these
17 admitted?

18 MR. ACKER: Yes. I move to have N-13 and T-13
19 admitted, Your Honor.

20 THE COURT: Any objection?

21 MR. NORMAND: No objection.

22 THE COURT: They will be admitted.

23 (Defendant's N-13 and T-13 were received into
24 evidence.)

25 //

1 BY MR. ACKER:

2 Q These two agreements, N-13 and T-13, they were entered
3 into between SCO, the plaintiff in this case, Sun and
4 Microsoft, correct?

5 A Yes.

6 Q After the APA was signed, first Santa Cruz, and then
7 SCO, had the ability to develop their new version of
8 UnixWare, correct? That was part of the APA?

9 A They owned the technology. They could do with it what
10 they want.

11 Q So they had the ability to the source code rights and
12 they could take that source code and build a new version of
13 UNIX on top of it, correct?

14 A They didn't have source code rights, they had ownership
15 of the source code.

16 Q I understand that's your opinion. But they had the
17 ability to build new code on top of the old UNIX code,
18 correct?

19 A Correct.

20 Q And they built different versions of UnixWare on top of
21 that, correct?

22 A Correct.

23 Q And that took place from 1995 until 2003, they were
24 continuing new versions of UnixWare coming out, right?

25 A Yes, correct.

1 Q They call these different revs or different versions of
2 it the new improved version of software, correct?

3 A Correct.

4 Q And in your business you have this one line of code
5 theory, correct?

6 A Correct.

7 Q The one line of code says that if you purchase the
8 most -- even one line of code of the most recent version of
9 the software, you pay that price for the software, right,
10 the price for the most recent version?

11 A No, that's not correct. The one line of code rule is
12 if you have a release of a software that you have developed
13 a derivative work and you are releasing a binary, you
14 license a later release of the code and you use one line of
15 code in your current binary release, then you have to pay
16 the royalties for that later release. It's not if you just
17 license it, you have to use it.

18 Q Use it and use it by creating -- building on top of it
19 and sublicensing it in binary form?

20 A Yes.

21 Q It's true, isn't it, that in these two agreements,
22 N-13, the Sun agreement, and T-13, the Microsoft agreement,
23 that what was being licensed in both of these agreements was
24 the most recent version of UnixWare, correct?

25 A Correct.

1 Q And so the jury understands, in 2003, when SCO entered
2 into a license agreement, the Sun agreement, N-13, what it
3 was licensing and what the value that Sun was paying for was
4 the most recent version of UnixWare, correct?

5 A Okay. Yes.

6 Q Is that true?

7 A True.

8 Q And then similarly for the Microsoft agreement entered
9 into, again, by SCO and Microsoft in 2003, what Microsoft
10 was paying for and the value they were getting was for the
11 most recent version of UnixWare, right?

12 A Well, Microsoft was also getting some release from some
13 claims. They were also getting a release that SCO wouldn't
14 sue them for certain things. Microsoft included more.

15 Q But you would agree with me that the vast majority of
16 what it was that Microsoft was paying money for in T-13, the
17 Microsoft license entered into in 2003, was for the rights
18 of the most recent versions of UnixWare?

19 A I don't know that for a fact.

20 Q Well --

21 A I'm familiar with the agreement. I don't know how you
22 parse out the amount of money that -- the value of the
23 agreement, whether it was for the release or whether it was
24 for the technology that was licensed. That's something
25 somebody else should probably answer.

1 Q But take a look at T-13. You see there is a --

2 THE COURT: T-13?

3 MR. ACKER: Yeah, T-13.

4 BY MR. ACKER:

5 Q If we go to Exhibit A of T-13, and if we could
6 highlight the top line, SCO UnixWare 7 Release 7.1.3. That
7 was the most recent version of UnixWare in 2003, correct?

8 A Correct.

9 Q And below that there are a number of additional
10 releases, correct, earlier software and other items?

11 A Yes, but I'm not sure what all of them are. I'm about
12 as technical as a doorknob.

13 Q But the real value and what really Microsoft was paying
14 for, setting the release aside, the release portion of this
15 agreement, getting the rights to the software, what they
16 were really paying for was the ability to use the most
17 recent version of SCO UnixWare 7, right?

18 A Yes.

19 Q Similarly, if you take a look at Exhibit C, you see at
20 the top there is Open UNIX 8 Release 8 and UnixWare 7
21 Release 7.0? Do you see that?

22 A Yes.

23 Q Those are the most recent versions of UnixWare and Open
24 UNIX, right?

25 A Yes.

1 Q And down below there is a bunch of older code, right,
2 on the schedule?

3 A Correct, but the SCO Open Server Release 5, that was
4 just as current as the UnixWare 7. That was just another
5 product.

6 Q But the real value, what Microsoft was paying for,
7 other than the release in the agreement, was the most recent
8 version of software of UnixWare, right?

9 A That's my opinion. You would have to ask Microsoft,
10 though.

11 Q But that's your opinion as the contracts guy at SCO,
12 correct?

13 A Yes.

14 Q Is that right?

15 A Yes.

16 Q And all of the older code listed below, that's simply
17 just added to the schedule as a routine practice, but that
18 wasn't what Microsoft was paying to get, right?

19 A I don't know.

20 Q Isn't it true that it's your normal practice that when
21 you license the most recent version of software, you also
22 provide licenses to the older versions just as a matter of
23 course?

24 A We provide the right to access, and that's because
25 every release is built on a preceding release.

1 Q But the real value in what the customers or licensees
2 are paying for is the most recent version of software,
3 right?

4 A Correct.

5 Q That was true both for Sun and Microsoft in 2003,
6 right?

7 A Yes.

8 THE COURT: Mr. Acker, would you please look for
9 an appropriate time for the morning recess?

10 MR. ACKER: It's an appropriate time.

11 THE COURT: It would be. All right.

12 Ms. Malley.

13 (Jury excused)

14 THE COURT: Do you have anything, counsel, before
15 we take the recess?

16 MR. NORMAND: Not from us, Your Honor.

17 MR. ACKER: No, Your Honor.

18 THE COURT: We'll take 15 minutes.

19 (Recess)

20

21

22

23

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