

1 THE COURT: Is there anything, Counsel?

2 MR. SINGER: Not from us, Your Honor.

3 MR. BRENNAN: Your Honor, we had conferred  
4 about the Ryan Tibbitts deposition. We have agreed that  
5 we can continue that discussion so we can give a  
6 description later.

7 THE COURT: Okay.

8 MR. BRENNAN: I want to let you know, we were  
9 working --

10 THE COURT: You have one more break, then.

11 MR. BRENNAN: Thank you.

12 THE COURT: Ms. Malley.

13 (Jury brought into the courtroom.)

14 THE COURT: Mr. Normand, is this your witness?

15 MR. NORMAND: Yes. We would call as the next  
16 witness, by video deposition, Maureen O'Gara, who was  
17 deposed on March 23, 2007.

18 THE COURT: Thank you.

19 (Designated portions of the deposition were played, as  
20 follows:)

21 Q. What do you do for a living?

22 A. I'm a journalist.

23 Q. And how long have you been a journalist?

24 A. Since about 1972.

25 Q. Do you cover a certain particular industry?

1 A. Yes. I cover the computer industry.

2 Q. And how long have you been covering the  
3 computer industry?

4 A. Since 1972.

5 Q. Are you aware that Novell has issued an  
6 announcement claiming that Novell, and not SCO, owns the  
7 UNIX copyrights?

8 A. Yes.

9 Q. I'd like to now show you a document that will  
10 be marked as Exhibit 1080. It's a document that contains  
11 an article entitled Novell To Try To Shoot Down SCO IP  
12 Claims, by Maureen O'Gara.

13 Do you see that article within the document?

14 A. Yes, I do.

15 Q. And does that appear to be the document that we  
16 were just talking about in which you wrote about Novell's  
17 announcement about its alleged ownership of UNIX  
18 copyrights?

19 A. Yes.

20 Q. And what's the date of the article?

21 A. It's dated May 28.

22 Q. And, again, is that consistent with your  
23 recollection of the article and the announcement?

24 A. Yes.

25 MR. NORMAND: Your Honor, SCO moves into

1 evidence Exhibit 172 based on the foundation that  
2 Ms. O'Gara just laid.

3 MR. HATCH: No objection, Your Honor.

4 THE COURT: It will be admitted.

5 (SCO Exhibit 172 received in evidence.)

6 MR. NORMAND: Mr. Calvin, could you put that up  
7 for the jurors.

8 And Mr. Calvin, Your Honor, has highlighted the  
9 language that Ms. O'Gara is going to be subsequently  
10 asked about.

11 Q. Before you published this article, did you  
12 speak with Novell?

13 A. Yes.

14 Q. Did you speak with someone named Chris Stone of  
15 Novell?

16 A. Yes.

17 Q. And what was Mr. Stone's position at Novell, if  
18 you knew at the time?

19 A. I believe he was vice-chairman.

20 Q. What did Mr. Stone tell you about Novell's  
21 public announcement in which he was going to assert its  
22 purported ownership of the UNIX copyrights?

23 A. Well, he informed me of the substance of what  
24 the story is about, that they were going to -- what is  
25 the right word -- assert their ownership.

1 Q. Did he say -- did he say anything about the  
2 reasons why they were issuing that announcement on that  
3 date?

4 A. Yes, he did.

5 Q. And what did he say?

6 A. He said they were doing it because SCO's  
7 earnings were that day.

8 Q. And did he say anything about the effect, the  
9 intended effect of the announcement on that date?

10 A. The reason that they were doing it, as I  
11 understood it, was to confound SCO's stock positions.

12 Q. And when you say "confound SCO's stock  
13 position," can you be a little more specific or can you  
14 clarify in any way?

15 A. Well, I think the object of the game was to  
16 throw a monkey wrench into the works.

17 Q. Well, when you say that they were trying to  
18 confound or throw a monkey wrench, what -- can you  
19 explain that in some other way?

20 A. They were trying to upset, upset the stock  
21 price.

22 Q. And when you say "the stock price," whose stock  
23 price?

24 A. SCO's. I'm sorry. SCO's.

25 Q. Did Mr. Stone say anything about harming SCO?

1 A. Logically, there wouldn't be any other  
2 reason.

3 Q. So, you -- you understood that to be the  
4 intent?

5 A. That's what I understood.

6 Q. Do you know if there is any reference to your  
7 conversation with Mr. Stone that we've been talking about  
8 in this article?

9 A. Yes, I do. In the one, two, the third  
10 paragraph.

11 Q. Okay.

12 A. And it begins, "The letter."

13 Q. Would you read -- you can go ahead and read  
14 that into the record.

15 A. Is that all right?

16 Q. Yeah.

17 A. "The letter which Novell is supposed to post to  
18 its website today, right before SCO reports its quarterly  
19 results-- "

20 Q. Can you continue?

21 A. "-- says that Novell owns the IP and that SCO  
22 merely shares in certain rights that it acquired from  
23 Novell by way of the original SCO, the old Santa Cruz  
24 Operation."

25 Q. And did you write that paragraph as part of

1 this article?

2 A. Yes.

3 Q. Did he say anything more than SCO is supposed  
4 to report its quarterly results on May 28?

5 A. He led me to understand that the reason that  
6 they were doing it on the 28th, that they were posting  
7 their -- their cease-and-desist letter, was because SCO  
8 was -- had its earnings report.

9 Q. So, I understand you to be saying that he led  
10 you to understand something. But I need to --

11 A. He said --

12 Q. You're on to it. I'm trying to figure out  
13 what you --

14 A. Yeah --

15 Q. -- took away from it versus what he --

16 A. No --

17 Q. -- actually said to you.

18 A. No. There was no -- there was no lack of  
19 clarity. There was no lack of clarity, sir.

20 Q. Well, then, what was clear in exact -- in his  
21 words versus what you took away from it?

22 A. He was saying to me that the reason that they  
23 were doing this was because of SCO's -- SCO's earning  
24 report. I'm sorry. And I'm -- it's just -- that's just  
25 the way it is.

1 Q. And so my question to you is, is it your  
2 testimony, under oath, that Mr. Stone conveyed to you, in  
3 words, that the reason Novell was doing this announcement  
4 on the 20 -- on the date it was doing it, was so it would  
5 be coincident with SCO's report of its quarterly results?

6 A. Yes.

7 Q. And what words or substance of the conversation  
8 do you precisely recall him using in order for him to  
9 convey that, as opposed to you to infer it?

10 A. Maybe it was the laughter that I remember most  
11 about it.

12 Q. All right. So tell me about that.

13 A. Well, he basically -- I guess the right --  
14 maybe the right way to characterize it was chortled.

15 Q. And what do you recall of the chortling?

16 A. That was at the end of the -- our conversation.  
17 It was shortly after we, you know, we hung up. I think  
18 we had been on the phone for a little bit of time going  
19 through all this. And he explained to me -- and that's  
20 why it appears in this story, that the coincidence -- it  
21 appears in this story because he drew my attention to it.

22 Q. And did -- so, I think we have chortling at the  
23 end of the conversation. And we have --

24 A. About that. It wasn't, you know, like -- it  
25 was about, about the fact that they were putting out

1 the -- their statement on that day. That was what the  
2 laughter was about.

3 Q. So, let me see if I have accurately captured  
4 the back and forth over the last few minutes.

5 A. Okay.

6 Q. One. Mr. Stone said to you, "We are releasing  
7 a statement about the ownership of the UNIX copyrights."  
8 Two. Mr. Stone drew your attention to the fact that SCO  
9 was reporting its quarterly results the next day. And,  
10 three, Mr. Stone chortled?

11 A. Okay. There is an absence of causality in  
12 there.

13 Q. You have put your finger on my question.

14 A. All right. And so the step that's left out is  
15 that there was a connection between these, step A and  
16 step B.

17 Q. And my question is, what did Mr. Stone say that  
18 specifically identified that connection, as opposed to  
19 you inferring from the --

20 A. I'm sorry. I'm not inferring, all right? I  
21 don't remember the exact words, but it wasn't an  
22 inference. It was a statement. And I would only be  
23 putting, you know, words in his mouth. I can't remember  
24 it, the exact words, but the meaning was quite clear.  
25 Chris Stone told me that they were going to drop this

1 little bomb shell on SCO, and they were going to do it on  
2 the 28th of May because that was the day that SCO's  
3 numbers were coming out.

4 Q. And that's what you conveyed to SCO's counsel  
5 in the lobby of the hotel?

6 A. I think that that's, yes, an accurate  
7 statement, yes.

8 Q. You didn't use the word "bomb shell" with  
9 him?

10 A. No.

11 Q. And Mr. Stone didn't use the word "bomb shell"  
12 with you?

13 A. No.

14 Q. Bomb shell is your characterization today?

15 A. Right.

16 Q. Now, if you look at --

17 A. But that's what it was intended to be.

18 Q. That's the way you understood it?

19 A. No. That was the way the world was supposed to  
20 understand it because -- because it is a bomb shell,  
21 sir.

22 Q. And so my question for you is, when you think  
23 of this concept of causality, what do you have in mind as  
24 being the cause and the effect, as you understood it?

25 A. All right. Let me recount. My understanding

1 is that -- no. Let me rephrase that. It's not my  
2 understanding. What happened was that Novell put out a  
3 statement saying that it owned UNIX. If it owned UNIX,  
4 then SCO didn't have a leg to stand on.

5 Q. Is it fair to say that you don't recall the  
6 specific words that Mr. Stone used when he talked about  
7 the causality, as you have been saying?

8 A. Right.

9 Q. But is it clear in your mind that he conveyed  
10 to you this notion of a causality?

11 A. Yes.

12 Q. And, specifically, that he conveyed to you that  
13 the reason for the timing of Novell's announcement was to  
14 impact, or as you said earlier, to upset the price of  
15 SCO's stock?

16 A. Yes.

17 MR. NORMAND: Your Honor, that completes SCO's  
18 Designations.

19 THE COURT: All right. Thank you.

20 Mr. Jacobs?

21 MR. JACOBS: Your Honor, Novell has some  
22 additional testimony of Ms. O'Gara.

23 THE COURT: All right.

24 (Whereupon further designations of Ms. Ogara's  
25 deposition were played as follows:)

1 Q. Ms. O'Gara, do you have any notes of your  
2 conversation with Mr. Stone?

3 A. No.

4 Q. Is it your practice to take notes as you're  
5 talking with sources?

6 A. My notes are more in the way of just phrases.

7 Q. Phrases that people say to you?

8 A. Yeah.

9 Q. So you can capture the words they used?

10 A. Right.

11 Q. What do you recall of the exact words Mr. Stone  
12 used with you in reporting to you the planned  
13 announcement?

14 A. I can't.

15 Q. You saw no news value in a statement to you by  
16 a Novell executive that conveyed to you that the reason  
17 Novell was releasing its statement on a particular date  
18 was because SCO was reporting its quarterly results that  
19 same date?

20 A. I know that that seems, in isolation, like that  
21 should be really important, okay? But, there were so  
22 many issues in this very complicated matter, that that  
23 would make a great side bar or a followup, maybe, but we  
24 were talking about something else in this story, and I  
25 thought -- I didn't know where it was all going to go,

1 and I've known Chris a long time. Sometimes I get  
2 protective.

3 Q. When you conferred with the public relations  
4 people at SCO; first of all, were you conferring with  
5 Blake Stowell?

6 A. Conferring? I don't confer with the PR people.  
7 I called Blake Stowell, yes.

8 Q. Well, that's, I guess, my question is, so,  
9 what -- why did you forward for this string of e-mails?

10 A. I have absolutely no --

11 Q. Let me finish -- let me finish my question.  
12 Why did you forward this string of e-mails from Frank  
13 Jalics, J-a-l-i-c-s, in which he accused you of being  
14 on -- in a nut shell, on SCO's side?

15 A. Yeah.

16 Q. Why did you forward that to SCO under an  
17 e-mail, "I want war pay."?

18 A. I don't remember the context of the thing,  
19 but --

20 Q. Do you remember why you forwarded it?

21 A. No.

22 Q. Does it strike you as peculiar that a  
23 journalist would forward to one of the sides in a dispute  
24 a string of e-mails she got from a reader?

25 A. I don't -- I don't know what the right answer

1 to that question is because I don't know the context.

2 Q. Well, what's the context here?

3 A. I'm probably just complaining about getting  
4 this kind of crap, you know, all the time. People can't  
5 read and don't know what the heck is going on and got it  
6 wrong to begin with, just -- just, you know, saying that,  
7 you know, you think you've got it tough, Blake, you  
8 should see it from my side.

9 That's no big deal.

10 Q. And then you forwarded that string to  
11 Mr. Stowell with a, what I took to be a kind of a  
12 humorous remark, "I want war pay."

13 A. Right.

14 Q. And then Stowell says back to you, "Keep  
15 fighting the good fight."

16 A. Right.

17 Q. So, let me show you another e-mail. We'll mark  
18 this as 191. This is one that you would not have seen  
19 before but I think it's important that you see. So, if  
20 you look at your -- at the e-mail highlights of what  
21 looks to be an Adobe Acrobat attachment --

22 A. What do you mean e-mail highlight?

23 Q. Your e-mail highlights, "As against the  
24 backdrop of a thin IBM response to SCO's billion dollar  
25 suit against it, SCO claims it has found line-for-line

1 plagiarism of SVR V in Linux and has renewed its threat  
2 to pull IBM's SVRX license in six weeks."

3 Do you see that?

4 A. This indicates to me that this is a list of  
5 headlines. In some -- some copies of our e-mail  
6 distributions, in the front they -- they have a list of  
7 the headlines. So, the first story -- these are  
8 different stories. 01 is a story with that headline. 02  
9 is a story with that headline. I don't -- 03 and 04.  
10 Yeah. So what?

11 MR. JACOBS: Your Honor, at this point Novell  
12 would move to admit A-14.

13 THE COURT: Any objection?

14 MR. NORMAND: No objection, Your Honor.

15 THE COURT: It will be admitted.

16 (Novell Exhibit A-14 received in evidence.)

17 MR. JACOBS: And Mr. Lee has highlighted the  
18 portion of this e-mail that Ms. O'Gara will testify to  
19 next.

20 Q. Okay. So the lead story there is IBM Tries  
21 Non-defense Defense --

22 A. Yeah.

23 Q. -- Against Billion Dollar SCO Suit.

24 A. Yeah.

25 Q. And you send that to your readers, and Blake

1 Stowell forwards it internally under an e-mail to Darl  
2 McBride, the CEO of SCO --

3 A. Yeah.

4 Q. -- which says, "Once again Maureen is coming  
5 through for us. We own the entire front page."

6 Do you see that?

7 A. Yeah. So what?

8 Q. So my question for you is, was Mr. Stowell  
9 working with you --

10 A. No.

11 Q. -- to get prominent coverage for the SCO/IBM  
12 lawsuit?

13 A. No. Absolutely not. Absolutely not. Never.

14 Q. So, this is an e-mail to you dated May 30,  
15 2005, Exhibit 196 produced under SCO 1647696 to 697. Do  
16 you see that?

17 A. I don't see a date on it.

18 Q. Right at the top.

19 A. Oh, there it is.

20 Q. "I need you to send a jab PJ's way."

21 Do you see that?

22 A. Uh-huh.

23 Q. Who is PJ?

24 MR. JACOBS: Novell moves into evidence S-45,

25 Your Honor.

1 MR. NORMAND: No objection, Your Honor.

2 THE COURT: It will be admitted.

3 (Novell Exhibit S-45 received in evidence.)

4 A. PJ is the purported author of the Groklaw  
5 site.

6 Q. What is the Groklaw site?

7 A. It is a website that follows the SCO case -- I  
8 should say cases, maybe, but --

9 Q. And then you did, in fact, write a story about  
10 PJ or Pamela Jones, didn't you?

11 A. Yes.

12 Q. So, in 196, Stowell says in the subject line,  
13 "I need you to send a jab PJ's way," and that's March 30  
14 2005?

15 A. Yeah.

16 Q. And 197 is your May 9 to 13, 2005 issue of  
17 Client Server News 2000, correct?

18 MR. JACOBS: Your Honor, Novell moves into  
19 evidence D-14.

20 MR. NORMAND: No objection, Your Honor.

21 THE COURT: It will be admitted.

22 (Novell Exhibit D-14 received in evidence.)

23 A. Yeah.

24 Q. And the lead story is Who is Pamela Jones?

25 A. Yeah.

1 Q. Right?

2 A. Yes.

3 Q. Is there -- is there a causal relationship  
4 between Blake Stowell's e-mail to you and the appearance  
5 of the story in Client Server News 2000, May 9 to 13,  
6 2005?

7 A. No.

8 Q. You did it independently? You did the story on  
9 PJ --

10 A. I have reason to do a story on Pamela Jones  
11 that has nothing to do with SCO.

12 Q. And, in your -- in that article you said, "A  
13 few weeks ago, I went looking for the elusive harridan  
14 who supposedly writes the Groklaw blog about the SCO v.  
15 IBM suit."

16 Do you see that?

17 A. Yes.

18 Q. What is a harridan?

19 A. I suppose I could look it up in the  
20 dictionary.

21 Q. Why did you use the word?

22 A. Because it's accurate.

23 Q. In what way is it accurate?

24 A. Have you read Groklaw?

25 Q. I'm sorry. I get to ask the questions.

1 A. If you read Groklaw, you would know that  
2 harridan was the right word.

3 Q. Well, let's look --

4 A. There is a difference between a good word and  
5 the right word.

6 Q. Let's see if you agree with this definition.  
7 "Harridan. Noun. A woman regarded as scolding and  
8 vicious."

9 A. Hum.

10 Q. Is that why -- is that a definition that  
11 applies to your use of the word "harridan" in --

12 A. I think it's accurate.

13 Q. Scolding and vicious?

14 A. Uh-huh.

15 Q. As you sit here today, are you -- do you have  
16 any regrets over printing 197?

17 A. No.

18 Q. You don't have? Do you have any regrets about  
19 finding the identity -- reporting information, personal  
20 information about Pamela Jones?

21 A. No.

22 Q. And, again, "Who is Pamela Jones" had nothing  
23 to do -- the story on 197, your testimony is, it had  
24 nothing to do with Blake Stowell's March 30, 2005 e-mail  
25 with the subject "I need you to send you a jab PJ's way."

1           A.    I think he defines what the jab would be, which  
2 is something that we ignored, you know.

3           Q.    The answer is?

4           A.    No.

5           MR. JACOBS:  That concludes our additional  
6 testimony.

7           THE COURT:  All right.  Thank you, Counsel.  
8           Next witness?

9           MR. HATCH:  Your Honor, we would call John  
10 Maciaszek.

11          THE COURT:  All right.

12                                 JOHN MACIASZEK,

13 the witness hereinbefore named, being first duly  
14 cautioned and sworn or affirmed to tell the truth, the  
15 whole truth, and nothing but the truth, was examined and  
16 testified as follows:

17          MS. MALLEY:  And if you would please state and  
18 spell your name for the Court.

19          THE WITNESS:  John Maciaszek, spelled,  
20 M-a-c-i-a-s-z-e-k.

21          MS. MALLEY:  Thank you.

22                                 DIRECT EXAMINATION

23 BY MR. HATCH:

24          Q.    Good morning, Mr. Maciaszek.

25          A.    Good morning.

1 Q. I've got a little bit of a flu, so I hope you  
2 can hear me.

3 A. Well, I'm fighting a little bit of a cold  
4 myself, so we can commiserate.

5 Q. We'll all have it eventually.

6 Q. Could you give us a brief description of your  
7 educational background.

8 A. Yes, I got a bachelor's degree in mathematics  
9 from St. Peter's College in Jersey City.

10 Q. What did you do after you graduated from  
11 college?

12 A. Well, simultaneously with graduation, I was  
13 commissioned in the U.S. Army and went in and served two  
14 years with the Headquarters XVIII Airborne Corp in Fort  
15 Bragg, North Carolina.

16 Q. Did you remain in the military?

17 A. Yes. After I got off of active duty, I served  
18 20 years as a reservist and retired in 1987.

19 Q. Okay. Going back to when you got done with  
20 your active duty, did you then go into the workforce?

21 A. Yes. I was employed by AT&T Bell Laboratories  
22 in Holmdel, New Jersey.

23 Q. And at Bell Laboratories, what was your first  
24 job there?

25 A. I was a software developer.

1 Q. Okay. And did you receive advancements during  
2 your time there?

3 A. Yes, I did.

4 Q. What did you end up -- the last job you had?

5 A. Well, I was a product manager and for parts of  
6 the microsystems business that AT&T was doing at that  
7 point in time.

8 Q. Okay. At some point, did you begin to work on  
9 the UNIX operating system?

10 A. Yes. In December, 1991, I transferred to USL,  
11 which was a fully separate subsidiary of AT&T at the  
12 time, and I became a product manager for UNIX products.

13 Q. Okay. What does a product manager do?

14 A. Well, I mean, a product manager is sort of like  
15 a -- I like to put it as sort of like an orchestra  
16 leader. The job is to ensure that all parts of the  
17 company, all the different aspects required to put a  
18 product into the marketplace, work together to make the  
19 product as good as it's going to be.

20 That includes working with engineering, working  
21 with sales, working with marketing, manufacturing,  
22 licensing and legal to get all the pieces together to  
23 bring the product to market. And, once it's out there,  
24 your job is to support the sales force as well and plan  
25 for future revisions of the product.

1 Q. How long did you do that for AT&T's subsidiary  
2 USL?

3 A. Well, I did that until USL was acquired by  
4 Novell, I think it was in 1993, and subsequent to that I  
5 moved to SCO and then Caldera.

6 Q. Okay. When you went to Novell, did you  
7 physically move?

8 A. No. We stayed in the same location  
9 initially.

10 Q. And did your job change at all?

11 A. No, not in any way, shape or form.

12 Q. Okay. And when you went -- when Novell then  
13 sold the business to Santa Cruz Operation, did you change  
14 locations?

15 A. No.

16 Q. Did your job stay the same?

17 A. Essentially, yes.

18 Q. Okay. So, is it fair to say for most of the  
19 last 18 years, you have been working with the UNIX  
20 system?

21 A. That's correct.

22 Q. Now, at some -- when did you become aware of  
23 the sale of the UNIX business from Novell to Santa Cruz  
24 Operation?

25 A. Well, it was some time after the signing of the

1 initial APA. We were notified. I think it was Mike  
2 Defazio who was in charge of the Novell UNIX business at  
3 that time and informed all the employees of the pending  
4 sale. This was prior to the closing date, obviously.

5 THE COURT: Mr. Maciaszek, could I get you to  
6 speak into the microphone a little bit more?

7 THE WITNESS: Sure.

8 THE COURT: Thank you.

9 THE WITNESS: Sorry.

10 Q. BY MR. HATCH: What did Mr. Defazio tell the  
11 workers at your shop about the sale?

12 A. Well, I mean, basically what he said was the  
13 entire business, UNIX business, was being transferred  
14 from Novell to SCO. SCO was purchasing the business.

15 Q. Did he say that -- did he say whether Novell  
16 was retaining anything from the business?

17 A. No. Our understanding was that the business  
18 was being transferred in its entirety to SCO.

19 Q. Okay. Now, was the business run any  
20 differently when you were under the umbrella of Novell  
21 than it was when you were under the umbrella of USL?

22 A. No. It was fundamentally the same.

23 Q. And so, at some point, did -- how did the  
24 transition happen from Novell to Santa Cruz?

25 A. Well, there were transition teams put together

1 between the time of the initial signing and then, I  
2 think, through February of 1996, transition teams which  
3 included people from both Novell and SCO to ensure that  
4 the business moved in a very smooth and orderly way to  
5 SCO.

6 Q. Were you one of the Novell employees that was  
7 in charge -- involved in the transition?

8 A. Yes, I was.

9 Q. What was your responsibility?

10 A. Well, my fundamental responsibility was to  
11 bring to market the final product that was listed in the  
12 APA, UnixWare, 2.1, get the licenses done for that, as  
13 well as to interact with our OEM partners with respect to  
14 explaining to them what the new product was and facts  
15 about the actual purchase.

16 Q. Okay. Who appointed you to the transition team  
17 at Novell?

18 A. Honestly, I can't recall who it was. It might  
19 have been Sabbath, Steve Sabbath or somebody else. I'm  
20 not sure who the actual person was.

21 Q. Okay. Now, what -- specifically, what were you  
22 told to do as part of this transition team?

23 A. Well, we were told to bring the business  
24 completely under the control of SCO.

25 Q. Okay. Were you given statements of work?

1           A.    Yes.  Each -- there must have been, I mean, 15  
2 or 20 different transition teams, each of which put  
3 together a statement of work as to what items of work  
4 they were going to accomplish.  I think the target date  
5 was February 1 to have it all completed, or certainly  
6 shortly there -- after the closing date, and those SOW's  
7 were put in detail as to what was going to be done and  
8 listed both who was on the team, that particular team,  
9 from both SCO and Novell.

10          Q.    Okay.  let me show you what's been marked as  
11 Exhibit 560.  Is this one of the statement of works that  
12 you were talking about?

13          A.    Yes.  This one dealt with the licensing and  
14 contract management organization.

15          Q.    And I notice that, on the second page, there is  
16 a letter here that mentions your name as well?

17          A.    Yes.  That's correct.  I'm familiar with that  
18 letter.

19               MR. HATCH:  Your Honor, I would move Exhibit  
20 560.

21               MR. JACOBS:  No objection, Your Honor.

22               THE COURT:  Okay.  It will be admitted.

23               (SCO Exhibit 560 received in evidence.)

24          Q.    Mr. Maciaszek, the jury can now see this.  It  
25 shows -- it says, SOW.  Is that statement of work?

1 A. That's correct.

2 Q. Okay. What's the period of time you said this  
3 is for?

4 A. From December 1, or the closing date, until the  
5 first of February.

6 Q. Okay . And what did you understand that period  
7 to be?

8 A. Well, that was the transition period. The  
9 intent is to have everything done by that time and that  
10 the transfer of employees would have occurred by the  
11 first of February.

12 Q. Okay. Again, you're a Novell employee at this  
13 time, right?

14 A. That is correct.

15 Q. Okay. Now, the second paragraph, you see where  
16 you it says: Act as SCO's worldwide agent for UnixWare  
17 and SVRX and any other Novell source code products being  
18 transferred to SCO.

19 Do you see that?

20 A. Yes, I do.

21 Q. Who is it referring to that's going to act as  
22 SCO's agent?

23 A. The Novell employees who are going to do the  
24 work.

25 Q. Okay. So your understanding was, who was

1 acting as whose agent during this period?

2 A. Well, it was clear that the Novell employees  
3 were acting as agents of SCO at that point in time, given  
4 at the closing date all the assets were transferred to  
5 SCO.

6 Q. Okay. And, down in paragraph 2, responding to  
7 customers inquiries about the products and transfer of  
8 the ownership to SCO, was that consistent with what you  
9 understood was your responsibility as part of this  
10 transition team?

11 A. Absolutely.

12 Q. Okay. And by "transfer the ownership," what  
13 did that mean to you?

14 A. Well, all the asset and intellectual property  
15 were moving, and eventually selected people moved as  
16 well.

17 Q. Okay. And did you ever -- anybody from Novell,  
18 any of your bosses, ever tell you that there was some  
19 limitation on what was being transferred?

20 A. Absolutely not.

21 Q. Now, I notice for Novell, it was signed by a --  
22 who is that that signed it?

23 A. Louis Ackerman, who was the manager of the  
24 contracts organization.

25 Q. Okay. Okay. Now, do you know what it means to

1 mark a product with a copyright?

2 A. Yes.

3 Q. What does it mean?

4 A. Essentially what you're doing is identifying  
5 the fact that you are the owner of the product.

6 Q. Okay. Where is that put on the product?

7 A. Well, exteriorly, it would be as part of what I  
8 would call the skins of the product, since we are talking  
9 about -- if we're talking about shrink-wrapped product.  
10 It would be on the outside of the boxes, on the CD labels  
11 and also included in the software.

12 Q. Okay. So, as a Novell employee during this  
13 transition period, what were you told to do about marking  
14 the products?

15 A. Well, the products were to be marked for SCO's  
16 copyright. Pardon me.

17 Q. And that would include -- when you say "skin,"  
18 what does that mean?

19 A. Well, it would be the boxes. If you go to a  
20 store, you buy a software box off the shelf, you look at  
21 the outside, it will have a copyright notice on it. If  
22 you look at the individual CD's you get as part of the  
23 product, it will have a copyright notice as well,  
24 identifying who the owner of the copyright is and what  
25 the effective dates are.

1 Q. And you were instructed to do that by your  
2 bosses at Novell?

3 A. That's correct.

4 Q. Now, during this transition, did Novell take  
5 any other steps to notify its customers of the transfer  
6 of the business to SCO?

7 A. Well, certainly letters went out to all of the  
8 OEM customers that I am aware of, notifying them of the  
9 transfer of ownership from Novell to SCO.

10 Q. Okay. And were visits made as well?

11 A. Yes. As part of the transition, I participated  
12 in visits to the OEM customers, certainly the ones in  
13 Europe. I remember vividly making trips to ICL Olivetti  
14 and Siemens in Germany. So, we went out to make a visit  
15 to make sure they were aware of the fact that the  
16 transition was occurring

17 Q. Okay. And there were letters that were  
18 involved in that?

19 A. Absolutely correct.

20 MR. HATCH: I'd like to have -- like you to put  
21 Exhibit 592 on the screen.

22 Q. BY MR. HATCH: And 592 is a large group of  
23 letters which were introduced earlier. I'm just going to  
24 look at one of these. This is a letter -- who is this  
25 letter to?

1 A. Siemens Nixdorf.

2 Q. All right. Have you seen this letter before?

3 A. Yes, I have.

4 Q. Okay. Was Siemens one of your clients?

5 A. Yes.

6 Q. Okay. During the entire time you were at  
7 Novell?

8 A. Well, I don't know the entire time, but  
9 certainly a goodly portion of the time I had  
10 responsibility for interactions with Siemens, yes.

11 Q. Okay. And did you have any dealings with  
12 Siemens during this transition period?

13 A. Yes. As I indicated, we made a visit to  
14 Siemens in Munich.

15 Q. Okay. In the letter --

16 Let's highlight the first paragraph,  
17 Mr. Calvin, if you would.

18 It says: As you may have heard, Novell has  
19 transferred to the Santa Cruz Operation, Inc., SCO,  
20 Novell's existing ownership in UNIX-based offerings and  
21 related products, collectively the transferred products.

22 Do you see that?

23 A. Yes, I do.

24 Q. Is that consistent with what you were told to  
25 tell the customers as part of the transition team for

1 Novell?

2 A. Yes, it is.

3 Q. Now, these meetings -- well, let's see.

4 Let's go down also -- Mr. Calvin, could you  
5 highlight the "please direct" paragraph.

6 In the letter it also said:

7 Please direct all future correspondence  
8 regarding this matter to SCO at the following address.

9 Why did he do that?

10 A. Well, there was a lot of -- first of all,  
11 payments of royalties and other things needed to be -- we  
12 needed to notify them who the new receiving parties were  
13 going to be at SCO for any of that correspondence.

14 Q. Okay. Why would they -- why would you do that?

15 A. Because SCO is now the owner of the products,  
16 and all dealings have to go to SCO.

17 MR. HATCH: Okay, Mr. Calvin, would you  
18 highlight the signature line.

19 Q. BY MR. HATCH: And, just to be clear, this was  
20 a letter coming from Novell, correct?

21 A. Yes.

22 Q. You eventually -- did you eventually meet with  
23 the people at Siemens?

24 A. Yes, I did.

25 Q. Did you meet with them alone?

1           A.    No.  There was a joint team, including both  
2 members of SCO as well as Novell and, at the time I made  
3 the visit, I believe -- I'm pretty sure I was still a  
4 Novell employee.

5           Q.    Why were you taking SCO employees?

6           A.    Well, SCO employees were being taken to  
7 introduce them to the OEM's and to establish with the  
8 OEM's the credibility of SCO which, compared to Novell  
9 and previous USL, was a smaller company, and introduce  
10 the engineering people, the salespeople that they were  
11 going to be dealing with going forward, to make sure  
12 that -- excuse me -- the customers were confident that we  
13 could continue, and I use the "we" in the sense, since I  
14 was part and parcel of the transition, could continue to  
15 carry on the business and the interactions as they were  
16 used to having it done.

17          Q.    Okay.  What was communicated to the customer,  
18 Siemens, in this case about the ownership?

19          A.    Well, Siemens was informed, in concert with,  
20 you know, reiterating what we sent to them in the  
21 letters, that, in fact, SCO had acquired all ownership  
22 rights to the business.

23          Q.    Okay.  Now you met with other customers as  
24 well, correct?

25          A.    That's correct.

1 Q. Let me give you what's been marked as SCO  
2 Exhibit 751.

3 A. Yes.

4 Q. Are you familiar with this letter?

5 A. Yes, I am.

6 Q. Okay. This is a letter -- is this part of your  
7 transition as well?

8 A. Well, this came -- the original letter was,  
9 yes. The subsequent letter, signed by Mr. Murphy, was a  
10 followup to the original letter.

11 Q. Okay. Let's -- you were part of the -- the  
12 original letter you say is starting at page 2?

13 A. Yes. That's correct.

14 MR. HATCH: Your Honor, I would move admission  
15 of Exhibit 751.

16 MR. JACOBS: No objection, Your Honor.

17 THE COURT: It will be admitted.

18 (SCO Exhibit 751 received in evidence.)

19 Q. BY MR. HATCH: All right. Let's start on the  
20 second page. This is a January 29, 1996 letter to Tad  
21 Tung; is that right?

22 A. That's correct.

23 Q. This is similar to the letter we just saw with  
24 Siemens that went off early in the transition period?

25 A. Similar, yes.

1 Q. And had similar language.

2 Just highlight the first few lines in the "this  
3 is to inform" paragraph, Mr. Calvin, if you would,  
4 please. Just do the whole paragraph.

5 It says:

6 This is to inform that you with respect to each  
7 of the Novell offerings listed on Attachment A, for which  
8 you are currently licensed, Novell's right as licensor  
9 under such agreements have been assigned to the Santa  
10 Cruz Operation.

11 Do you see that?

12 A. Yes, I do, basically telling them that the  
13 business had transferred.

14 Q. Okay. Now, you had indicated --

15 Let's go two back to the first page. This is a  
16 letter also to Tad Tung. If we could go to the date June  
17 19, 1996, so about five months later, correct?

18 A. That's correct.

19 Q. Why were you having further communications with  
20 Tad Tung?

21 A. Well, my understanding is that Tad Tung -- the  
22 original letter was something that Tad Tung needed  
23 clarification on for their own purposes. I'm not sure  
24 what their legal rationale was, but they needed something  
25 that was signed by all parties.

1 Q. Okay. They wanted both sides to admit that  
2 this had happened?

3 A. That's correct.

4 Q. Okay. And if we go down, let's see, the first  
5 line it says:

6 As you are aware, the ownership of the UNIX  
7 operating system has been transferred from Novell, Inc.  
8 to the Santa Cruz Operation.

9 Do you see that?

10 A. Yes.

11 Q. All right. And that was consistent with what  
12 the communications you were having with the customers?

13 A. Oh, absolutely, and it's consistent with the  
14 original letter that was sent to Tad Tung in January.

15 Q. I hate to have to ask this, but was there any  
16 limitation ever?

17 A. No.

18 Q. Their only concern was that they wanted to make  
19 sure both sides were agreeing?

20 A. That's correct.

21 MR. HATCH: All right. If we can go down to  
22 the signature page, Mr. Calvin, if you would, or the  
23 signature line

24 Q. BY MR. HATCH: It was signed by who for Santa  
25 Cruz?

1           A.    That was Bill Murphy, who had been with Novell  
2 and had transferred to Santa Cruz in the contract  
3 organization.

4           Q.    Okay.  And by Novell?

5           A.    Cindy Lamont, who was also part of the --  
6 originally part of the contract organization and stayed  
7 with Novell.

8           Q.    Okay.  And was your understanding that this was  
9 sufficient for Tad Tung?

10          A.    Absolutely.  Yes.  Tad Tung countersigned it.

11          Q.    Now, these customers you were visiting, what  
12 kind of customers were they?

13          A.    Well, they were OEM's.  That's original  
14 equipment manufacturers is what that abbreviation stands  
15 for.  Fundamentally what they were is they were source  
16 code licensees who had the rights to make derivative  
17 works of UNIX code and begin shipping those products  
18 themselves.  By making a derivative work, they sort of  
19 customized it to operate most efficiently on their  
20 hardware systems, which they sold the two together.

21          Q.    What rights did an OEM customer typically get?

22          A.    The got the right to make derivative works and  
23 to --

24          Q.    Just stop there.  What does that mean, to make  
25 a derivative work?

1 A. Well, it means to take the original source  
2 code, the original source code that we delivered as part  
3 of their license, and make modifications to that code to  
4 customize it for their own use on their own hardware.

5 Q. Okay. What other rights did they get?

6 A. They had the right also to make distribution of  
7 the resulting product that they created and to --  
8 obviously, as part and parcel of that, they paid  
9 royalties for the privilege of doing that.

10 Q. Okay. Now, what mechanism did Novell, later  
11 SCO, use to grant these OEM manufacturers those rights?

12 A. Well, there were multiple agreements involved,  
13 from the source code agreement which covered some  
14 generalized terms and conditions, through the actual  
15 product license, which would be specific to a particular  
16 release of UNIX or UnixWare, coupled with the  
17 distribution agreement which allowed them the right to  
18 distribute and had some terms and conditions in there  
19 like some of the discount schedules.

20 Q. What were the form of those types of  
21 agreements?

22 A. I'm not sure what you mean.

23 Q. Were they license agreements?

24 A. Yes. They were all license agreements.

25 Q. If you weren't able to license to the OEM's the

1 right, to give them the rights you talked about, would  
2 you have a viable business?

3 A. No. You wouldn't be able to carry out that  
4 business.

5 Q. And what do you have to have to be able to  
6 grant those rights?

7 A. You have to have ownership.

8 MR. JACOBS: Objection, Your Honor, lacks  
9 foundation, calls for a legal conclusion, and  
10 speculation.

11 THE COURT: Rephrase the question, please.

12 Q. BY MR. HATCH: You have to have a license to be  
13 able to -- the license gives them these rights, as you  
14 understand?

15 A. That's correct.

16 Q. And do you have an understanding of what you  
17 need to be able to have the ability to give a license to  
18 a client?

19 A. Well, you need to own -- you need to own the  
20 code, and you need to have the copyrights associated with  
21 it. That's certainly the way I understand it.

22 Q. So your understanding is the copyrights are  
23 required to operate SCO's business?

24 A. Yes.

25 MR. JACOBS: Same objection, Your Honor.

1 THE COURT: Overruled.

2 Q. BY MR. HATCH: Now, after the business was sold  
3 from -- and the transition was done from Novell to SCO,  
4 how did the agreements that the business used with its  
5 customers change from the way they were when they were at  
6 Novell?

7 A. They were identical, save the change in name.  
8 In other words -- as a matter of fact, if you look back  
9 at one of the things that you asked me to look at  
10 earlier, it specifically says that we should be doing it  
11 that way; namely, you take the existing contracts that  
12 Novell was using, and if you're using Word or some other  
13 software product, you do a global change of Novell to SCO  
14 and substitute the appropriate addresses. And those were  
15 the agreements that we used.

16 Q. Do you have an understanding why you would use  
17 the same agreements?

18 A. Well, it was multiple, but the main reason was  
19 we ensured that the business was carried on in exactly  
20 the same methodology, that the customers who we were  
21 doing business with understood the licenses and were  
22 comfortable that they understood we were doing the  
23 business in exactly the same way. And this avoided the  
24 need to go out and do all new contracts.

25 Q. You were giving them the same rights as you did

1 when it was Novell?

2 A. Yes.

3 Q. And expecting the same payments?

4 A. Yes.

5 Q. All right. Now, at some point, in 1996, did  
6 you become aware that IBM was trying to buy out of its  
7 contractual royalty obligations to SCO?

8 A. Yes, I did.

9 Q. How did you become aware of that?

10 A. I received a phone call. It was either in late  
11 March or early April, I don't recall which, but a phone  
12 call from Larry Buffard who was a salesman with Novell,  
13 responsible for various customers.

14 Q. Okay. So, at this point, you had transitioned  
15 over to SCO?

16 A. That is correct. I was in SCO at the time.

17 Q. All right. What did Mr. Buffard tell you?

18 A. Well Larry, who I had known since USL days,  
19 basically said that they wanted to do a buyout of the IBM  
20 royalties for SVR 3.2 and some other modifications to  
21 their agreement.

22 Q. How did you respond to that?

23 A. I responded in a negative way, saying I didn't  
24 think, number 1, they had the right to tell us to do  
25 that; number 2, that I don't think our management would

1 go along with this. And I immediately escalated and  
2 requested that Larry send me a formal letter request as  
3 to exactly what he wanted done.

4 Q. Okay. Let me give you a copy of what's been  
5 marked as Exhibit 67. Do you recognize this letter,  
6 Mr. Maciaszek?

7 A. Yes, I do.

8 Q. Okay. What is it?

9 A. It's the formalized request backing up his  
10 phone call to me, laying out more detail of the terms and  
11 conditions that they were looking for us to do as part of  
12 a letter agreement.

13 MR. HATCH: Okay. Your Honor, I'd move for  
14 admission of Exhibit 67.

15 MR. JACOBS: No objection, Your Honor.

16 THE COURT: It will be admitted.

17 (SCO Exhibit 67 received in evidence.)

18 Q. So, did you -- so, what did Mr. Buffard say in  
19 the letter? Was it consistent with the phone call?

20 A. Yes. It just expanded on the details, laid out  
21 what the amount of money was going to be for the buyout  
22 and detailed what kind of source code changes that he was  
23 looking to have done.

24 Q. All right. Did you take issue with what he was  
25 requesting to do with IBM?

1           A.   Well, yes, from multiple levels.  I mean, first  
2 of all, a buyout of any kind at that point would fly in  
3 the face of a strategic direction of the APA, which was,  
4 in effect, to get customers who were on SVR 3.2 and  
5 earlier or later releases to move to UnixWare.  A  
6 customer with a buyout would be not very readily disposed  
7 to making a transition, number 1.  Number 2, he was  
8 asking us to modify source code rights, which we  
9 fundamentally objected to.  The bulk of that revenue  
10 belonged to us.  Number 3, the pricing he was asking for,  
11 in my opinion, was ridiculously low.

12          Q.   Okay.  Who responded to Mr. Buffard's letter?

13          A.   Well, I escalated that up through my chain of  
14 management, and I believe that a look and/or Scott  
15 McGregor were involved in the process of response.

16          Q.   All right.  You continued to be involved in  
17 this issue, though; is that correct?

18          A.   Yes.  That's correct.

19          Q.   Let me show you what has been marked as Exhibit  
20 179.  Do you recognize this letter?

21          A.   Yes.

22          Q.   Is this a letter that was worked on by your  
23 team at SCO to respond to Mr. Buffard's letter?

24          A.   Yes.  This was addressed directly to  
25 Mr. Frankenberg, who was obviously the top man at

1 Novell.

2 MR. HATCH: Okay. I'd move admission of  
3 Exhibit 179 Your Honor.

4 MR. JACOBS: No objection.

5 THE COURT: It will be admitted.

6 (SCO Exhibit 179 received in evidence.)

7 Q. BY MR. HATCH: The ultimate letter 179 that we  
8 are seeing --

9 If you go to the second page to the signature  
10 block, Mr. Calvin.

11 -- this was sent by Mr. Mohan who, it says  
12 here, is president and chief executive officer of SCO; is  
13 that correct?

14 A. That is correct.

15 Q. And what did you understand was the response  
16 going back to Novell?

17 A. Well, essentially saying this was not something  
18 we thought should be done and objecting to even the  
19 thought of doing it.

20 Q. Did Mr. -- did the letter indicate that -- the  
21 issue you raised about paid up licenses?

22 A. I believe it did.

23 Q. Okay. And did it -- were you --

24 A. It was consistent, I believe, with my view of  
25 what the impact would be on customers moving to

1 UnixWare.

2 Q. Okay. And did --

3 And let's look at the date of that letter,  
4 Mr. Calvin, if you would.

5 It was April 23, 1996; is that correct?

6 A. Yes.

7 Q. And that's consistent with your understanding?

8 A. Yes, it is.

9 Q. Okay. Now, do you have an understanding of  
10 what was -- what Novell did next?

11 A. Well, my understanding is that, essentially,  
12 Novell went and did an agreement with IBM in spite of  
13 this letter.

14 Q. Okay. And you eventually got a copy of that  
15 agreement?

16 A. Yes, I did.

17 Q. Let me show you what's been marked as Exhibit  
18 707. Is this the agreement you received a copy of?

19 A. Yes, it is.

20 Q. Okay. And what did you understand this to be?

21 A. Well, it was the buyout agreement between --  
22 well, with IBM. Let's put it that way.

23 MR. HATCH: Your Honor, I'd move admission of  
24 Exhibit 707.

25 MR. JACOBS: No objection, Your Honor.

1 THE COURT: Okay. It will be admitted.

2 (SCO Exhibit 707 received in evidence.)

3 MR. HATCH: Would you turn to the last page,  
4 Mr. Calvin.

5 Q. BY MR. HATCH: The letter that Mr. Mohan sent  
6 was April 23, correct?

7 A. That's correct.

8 Q. What was the date of this letter?

9 A. The 26th.

10 Q. So, it's three days after Mr. Mohan's letter?

11 A. Yes.

12 Q. Did Novell bother to have any communications  
13 between Mr. Mohan's letter and this agreement they cut  
14 with IBM?

15 A. Not that I'm aware of.

16 Q. Okay. So, three days later, I notice there is  
17 a signature block here for -- it says "Novell, Inc., on  
18 behalf of the Santa Cruz Operation." Do you see that?

19 A. Yes, I do.

20 Q. Did you have an understanding of why there  
21 needed to be a signature block for the Santa Cruz  
22 Operation?

23 A. Well, because we were the owners of the  
24 contracts.

25 Q. And there was a signature space for that. Who

1 signed on behalf of SCO?

2 A. James T. Sullivan.

3 Q. Is he a SCO employee?

4 A. No.

5 Q. Who was he?

6 A. He was a V.P. of sales at Novell.

7 Q. All right. So what was your reaction to this,  
8 SCO signing a deal -- or Novell signing a deal with IBM  
9 and signing on your behalf?

10 A. It wasn't very, you know, favorable. Let's put  
11 it that way.

12 Q. You can't speak of it in open court?

13 A. Pardon me. I mean, that's a very soft  
14 description of what I would think of somebody signing for  
15 us.

16 Q. Now, what was the reaction from SCO?

17 A. SCO's reaction was essentially the same as  
18 mine, not very favorable, and I believe -- well, my  
19 understanding is we began to institute a lawsuit against  
20 them.

21 Q. Okay. And during this entire time, did Novell  
22 ever say that they owned the copyrights or they could do  
23 this without SCO's agreement?

24 A. No.

25 MR. JACOBS: Objection, Your Honor. The

1 witness lacks foundation for all the statements Novell  
2 made to all the people on the SCO side.

3 THE COURT: Well, rephrase the question.

4 Q. BY MR. HATCH: Did anyone at Novell ever tell  
5 you that they could do this without SCO's agreement?

6 A. No.

7 Q. Did they ever tell you that they owned the  
8 copyrights and could do whatever they wanted?

9 A. No.

10 Q. As a matter of fact, they kind of -- your  
11 understanding is that they put Santa Cruz Operation, SCO,  
12 into the signature block because you had to sign it,  
13 right?

14 A. That's correct.

15 Q. Okay. How was this matter resolved?

16 A. Well, ultimately, it got resolved -- there were  
17 multiple thrusts, but there was an Amendment 2 signed to  
18 the agreement, the APA, which effectively closed out this  
19 kind of nonsense in the future, made it very clear that  
20 this could not be done without joint approval by both  
21 parties, and either one could simply say, "I didn't want  
22 to do it" and didn't need to justify it.

23 Also there was a revised agreement signed with  
24 IBM which was called Amendment X and then there was a  
25 closure agreement where SCO agreed not to sue IBM and for

1 which there was a payment.

2 Q. Okay.

3 Mr. Calvin, Exhibit 08, which has been received  
4 into evidence.

5 THE COURT: What was the number again?

6 MR. HATCH: 08. I believe it has already been  
7 admitted.

8 Q. BY MR. HATCH: Is this the amendment that  
9 you're talking about?

10 A. Yes, Amendment Number X and Roman numerals  
11 called 10 or X, depending on how you want to read it.

12 MR. HATCH: Okay, Mr. Calvin, could you go to  
13 the signatures page.

14 Q. BY MR. HATCH: So, after you resolved all the  
15 issues, then, this time there was, again, a signature  
16 space for Santa Cruz Operation, right?

17 A. Yes.

18 Q. At this time, it doesn't say Novell on your  
19 behalf, right?

20 A. Right.

21 Q. And then who signed it this time on behalf of  
22 SCO?

23 A. Steve Sabbath, who was our V.P. of corporate  
24 legal.

25 MR. HATCH: That's all I have, Your Honor.

1 THE COURT: Mr. Jacobs.

2 CROSS EXAMINATION

3 BY MR. JACOBS

4 Q. Good morning Mr. Maciaszek.

5 A. Good morning.

6 Q. Good to see you well, sir.

7 A. Thank you.

8 Q. You understood that Novell thought it had the  
9 rights to enter into the buyout agreement with IBM in the  
10 winter of 1996, correct?

11 A. I don't know what they thought, but obviously  
12 they didn't. I don't believe they had the right, but --

13 Q. Let me ask you to take a look, sir, at Novell  
14 Exhibit K-6. Do you see you're a recipient of the e-mail  
15 at the top of the string, Mr. Maciaszek, in 1996?

16 A. Yes.

17 MR. JACOBS: Your Honor we off K-6 into  
18 evidence.

19 THE COURT: Any objection to K-6, Mr. Hatch?

20 MR. HATCH: Objection. Hearsay, Your Honor.

21 MR. JACOBS: It's not hearsay, Your Honor.  
22 It's an e-mail exchange at the time with Mr. Maciaszek  
23 that informed his understanding, which I just asked him  
24 about.

25 THE COURT: I will overrule the objection.

1 (Novell Exhibit K-6 received in evidence.

2 Q. BY MR. JACOBS: Mr. Maciaszek, that's an e-mail  
3 to you from -- on April 1, 1996, correct?

4 A. Yes, it is.

5 Q. And it says -- and you're sort of copied on it.  
6 From Biff to Jeff, or Jeff to Biff, I guess -- no, Jeff  
7 to Biff.

8 A. Yes.

9 Q. These are people you are working with at SCO at  
10 the time, correct?

11 A. Yes.

12 Q. And the e-mail says -- it's referring to SVRX  
13 buy-outs. Do you see that?

14 A. Yes.

15 Q. And SVRX licenses were the preexisting UNIX  
16 licenses that SCO was administering and collecting the  
17 royalties for under the asset purchase agreement,  
18 correct?

19 A. Yes.

20 Q. And the e-mail says:

21 I believe that Novell views that a section of  
22 the asset transfer agreement gives them that right. That  
23 section is the one that deals with Novell being the  
24 company that can change terms on existing UNIX licenses  
25 and direct SCO to make those changes. I think Novell

1 would also view that only they have the ability to  
2 renegotiate the existing agreements.

3 Do you see that?

4 A. Yes, I do.

5 Q. And then, Biff goes on and says:

6 That is my understanding from reading the  
7 agreements and from discussions while at Novell. It  
8 seems you think the intent of the agreement was different  
9 from SCO's viewpoint. Given that, we need to talk in  
10 depth and determine what SCO should do to force  
11 clarification.

12 Do you see that?

13 A. Yes, I do.

14 Q. So you understood that Novell genuinely  
15 thought, at the time, that it had the right to do buyouts  
16 of SVRX agreements, correct?

17 A. Well, that certainly was Biff's position at  
18 that point, yes.

19 Q. Did you e-mail him back and say, "No, I don't  
20 think Novell thinks that."

21 A. I don't recall.

22 Q. And, in fact, you became familiar, over the  
23 course of this matter, with 4.16 of the asset purchase  
24 agreement, and you know the provision that Biff is  
25 referring to in that e-mail, don't you?

1 A. Well, 4.16 was originally crafted and  
2 unmodified, but it was changed in Amendment 2.

3 Q. With respect to buyouts, sir, correct?

4 A. Correct.

5 Q. And, in fact, it worked both ways, right? SCO  
6 could not enter into agreements relating to buyouts  
7 without Novell's participation, correct?

8 A. That's correct.

9 Q. And, in fact, SCO entered into an agreement  
10 with SUN that related to a SUN buyout without Novell's  
11 participation in 2003, didn't it, sir?

12 A. That was not a buyout, as I understood it, but,  
13 yes, if you want to put it that way.

14 Q. What is an SVRX license, sir?

15 A. Well, an SVRX license, I guess it would be  
16 vaguely defined, but it would be any of the SVR 4.0, 4.  
17 whatever, 4.1, 4.2 and prior licenses, as all the prior  
18 products thereof.

19 Q. And is there any limitation as to what  
20 component of the package of agreements that you testified  
21 to on examination by Mr. Hatch, is there a limitation as  
22 to what component of those agreements constitutes an SVRX  
23 license?

24 A. Not that I'm aware of, no, but I don't think  
25 it's completely defined in there either.

1 Q. It's true, is it not, sir, that SVRX license,  
2 the term is kind of a creature of the asset purchase  
3 agreement?

4 A. Yes. That's correct.

5 Q. It didn't really have a meaning in the -- in  
6 your business before the asset purchase agreement?

7 A. That's correct.

8 Q. And it's also true that, in 1996, you were  
9 briefly involved in the -- I'm sorry -- in the potential  
10 litigation that Santa Cruz was going to bring against  
11 Novell arising out of this disagreement about the IBM  
12 buyout, correct?

13 A. Peripherally, yes.

14 Q. In fact, you signed a declaration, did you not,  
15 sir?

16 A. Yes.

17 Q. Let me show it to you.

18 THE COURT: What number is this, Mr. Jacobs?

19 MR. JACOBS: 248, Your Honor.

20 THE COURT: I'm sorry?

21 MR. JACOBS: 248. SCO Exhibit 248.

22 Q. BY MR. JACOBS: Would you check for me, sir,  
23 that that is your signature on the back page. You have  
24 that?

25 A. Yes.

1 Q. And it's dated June 13, 1996?

2 A. Yes.

3 Q. And if you would take a look --

4 Your Honor, may I publish to the jury paragraph  
5 21, the paragraph I'm about to ask him about?

6 THE COURT: Why don't you offer it first.

7 MR. JACOBS: I will offer, for the limited  
8 purpose of paragraph 21, Your Honor, SCO Exhibit 248.

9 THE COURT: Mr. Hatch?

10 MR. HATCH: Your Honor, I mean, either it's in  
11 or not. I don't think he should be able to read it. I  
12 think it's hearsay and it shouldn't be in. He has the  
13 opportunity to ask him about this, and I don't think he  
14 has gotten to the point --

15 THE COURT: Mr. Hatch, I didn't understand what  
16 your objection is.

17 MR. HATCH: I'm going to object to -- hearsay.  
18 And it's not -- if he's using it for Impeachment, I don't  
19 think he's set it up for that, yet.

20 MR. JACOBS: I'll do it whichever way you want,  
21 Your Honor. I'm happy to ask him --

22 THE COURT: He may be right. You probably  
23 ought to set more foundation --

24 MR. JACOBS: Sure.

25 THE COURT: -- if you're going to be using this

1 exclusively for impeachment purposes.

2 MR. JACOBS: Actually, I was trying to refresh  
3 his recollection as to what he said in 1996 with  
4 precision, Your Honor.

5 THE COURT: Okay.

6 MR. JACOBS: Can I use it for that purpose?

7 THE COURT: Yes.

8 MR. JACOBS: May I publish paragraph 21 to the  
9 jury?

10 THE COURT: No. Let's have him look at it and  
11 see if he can have an answer to your question about it.

12 Q. BY MR. JACOBS: Based on paragraph 21 of your  
13 declaration, Mr. Maciaszek, do you recall that the IBM  
14 SVRX license was -- consisted, among other things, of  
15 SOFT-00015 and SUB-00015A?

16 A. Those would be two components of their total  
17 licenses, yes.

18 Q. Thank you, Mr. Maciaszek. Now let's talk for a  
19 minute about UnixWare. You mentioned in Mr. Hatch's  
20 questioning of you that part of your responsibility was  
21 the transition of the UnixWare product that was under --  
22 that was undergoing work, at that time, between Novell  
23 and Santa Cruz, correct?

24 A. Yes.

25 Q. And that release was going to be UnixWare 2.1?

1 A. That is correct.

2 Q. And you were instructed to put the Santa Cruz  
3 copyright notice on UnixWare 2.1?

4 A. Yes.

5 Q. The then current release of UnixWare that was  
6 going to go out from Santa Cruz, correct?

7 A. Yes.

8 Q. UnixWare is an amalgam of code from a variety  
9 of sources, correct, sir?

10 A. That's correct.

11 Q. It includes Netware code, correct?

12 A. Yes.

13 Q. Did you think that, by putting the Santa Cruz  
14 copyright notice on UnixWare 2.1, you were claiming  
15 copyright ownership to Netware?

16 A. No.

17 Q. So, we have to be a little more grandular,  
18 don't we, when trying to -- a little more specific in  
19 trying to understand what a copyright notice really  
20 means, correct?

21 A. Well, one could say that, yes.

22 Q. Similarly, we saw -- we've seen a lot of  
23 letters that went to customers in the winter of 1996 that  
24 said that Novell had transferred its ownership interest  
25 in UNIX, UnixWare, various formulations, to Santa Cruz.

1 You recall the letters that Mr. Hatch asked you about,  
2 correct, sir?

3 A. Yes.

4 Q. Did you think that those letters were informing  
5 the customers that Novell had transferred its ownership  
6 interest in the Netware components of UnixWare?

7 A. Absolutely not.

8 Q. The customer didn't really need to know that  
9 level of detail, did they?

10 A. In terms of what, the imbedded products that  
11 were included in the release?

12 Q. Correct.

13 A. Right.

14 Q. They just needed to know, look, the business is  
15 transferring in some large sense to Santa Cruz. After  
16 the transition, you're going to deal with Santa Cruz.  
17 Correct, sir?

18 A. That was fundamentally what they were being  
19 told.

20 Q. And that was really all they needed to know at  
21 that point, didn't they?

22 A. Well, they needed to know that we had the  
23 rights to do what we were doing.

24 And there was no question -- there was no  
25 dispute about that, right, sir? It was very clear that

1 Santa Cruz was going to be the face, under the asset  
2 purchase agreement, to the customers, right?

3 A. Among other things, yes.

4 Q. So they were going to, for example, collect all  
5 the royalties and pass them through to Novell on a 95/5  
6 percent basis?

7 A. That was part and parcel of what was being  
8 done, yes.

9 Q. But the customer really didn't need to know  
10 that, did they?

11 A. What, that we were transferring 95 percent?  
12 No, I don't think so.

13 Q. So the letters don't say anything to the  
14 customers about, oh, by the way, we are going to pass  
15 most of the revenue we get from your Legacy licenses back  
16 to Novell?

17 A. We also didn't tell them how much we paid  
18 for the business, either.

19 Q. So, you kind of told the customers what they  
20 needed to know in order for them to interact with Santa  
21 Cruz, but you didn't go underneath and tell them all the  
22 details of the asset purchase agreement, correct, sir?

23 A. Right. We would answer any questions that they  
24 had. That was part and parcel of one of the reasons we  
25 visited them.

1 Q. Under the IBM buyout, in the IBM buyout  
2 dispute, there was ultimately a resolution of the matter,  
3 correct?

4 A. That's correct.

5 Q. And, at the end of the day, Novell actually  
6 kept most of the money from IBM, didn't it, sir?

7 A. That's correct, subject to what was given to  
8 SCO as part of the settlement agreement.

9 Q. Even given the settlement agreement, sir, most  
10 of the money went to Novell?

11 A. That's correct.

12 Q. Thank you, Mr. Maciaszek?

13 THE COURT: Mr. Hatch?

14 REDIRECT EXAMINATION

15 BY MR. HATCH:

16 Q. Just so we're clear, when Mr. Jacobs said that  
17 IBM -- I mean Novell kept most of the money. How much  
18 did SCO get?

19 A. SCO received a million and a half dollars. I  
20 think the total sum paid by IBM was approximately 10.

21 Q. So that was more than 5 percent of the total  
22 amount paid, correct?

23 A. Without doubt.

24 Q. Okay.

25 A. Even I can do that arithmetic.

1 Q. We don't have to break it down.

2 A. I would say that was about three times what  
3 would be the normal 5 percent.

4 Q. Okay. Now, on this buyout issue, too, when you  
5 refer to the buyout that Novell couldn't -- it couldn't  
6 be done after Amendment 2, did that refer to buyouts of  
7 the old SVRX royalties?

8 MR. JACOBS: Objection, Your Honor. Now we're  
9 calling for a legal conclusion about the meaning of  
10 Amendment Number 2.

11 MR. HATCH: No. What was your understanding?

12 THE COURT: Just one second, counsel.

13 MR. HATCH: Sure.

14 THE COURT: There was testimony elicited about  
15 Amendment Number 2, I believe by you, Mr. Jacobs, was  
16 there not?

17 MR. JACOBS: There was, Your Honor.

18 THE COURT: Now, is this to clarify what was  
19 raised on cross, or is this something new?

20 MR. HATCH: Well, I think there was some on  
21 clarity both from direct and from the cross, so I think  
22 it's both.

23 THE COURT: All right. Go ahead and ask the  
24 question again. Try not to elicit a legal conclusion.

25 MR. HATCH: All right. I will try that.

1 Q. BY MR. HATCH: What was your understanding of  
2 the buyouts that couldn't be done, going forward, after  
3 Amendment 2?

4 A. Well, it would have been anything that Novell  
5 had a royalty interest in.

6 Q. Okay. The old royalty buyouts?

7 A. Yes.

8 Q. Okay. Now, Mr. Jacobs indicated that customers  
9 don't need to know everything. You remember that  
10 discussion?

11 A. Yes.

12 Q. There are some things a customer does need to  
13 know, correct?

14 A. Yes.

15 Q. Does it need to know who can enforce the  
16 copyrights in the contracts?

17 A. Yes.

18 Q. And who actually owns the business?

19 A. Yes.

20 Q. And that's what you were trying to tell them in  
21 the Tad Tung and other letters, correct?

22 A. That's correct.

23 Q. Now, Mr. Jacobs also asked you about they  
24 didn't need to know about Netware. Do you recall that?

25 A. That's correct.

1           MR. HATCH: Could you bring up, again, the Tad  
2 Tung letter. I think it's 751. The second page of this,  
3 if you would go to that, Mr. Calvin, and scroll down a  
4 little bit.

5           It says: Among the products included in  
6 Amendment A are the specific products for which you are  
7 currently licensed by Novell.

8           Is it your understanding that's what was being  
9 transferred?

10          A. Yes.

11          MR. HATCH: Could you go to the attachment A,  
12 Mr. Calvin.

13          Q. BY MR. HATCH: Okay. Mr. Maciaszek, is there  
14 any Netware involved in attachment A?

15          A. No.

16          Q. Okay. What's being transferred in attachment  
17 A?

18          A. All of the UNIX and UnixWare products and other  
19 associated, what we called auxiliary products in  
20 Amendment 1.

21          MR. HATCH: Mr. Calvin, if you could go back to  
22 the first page of that exhibit.

23          Q. BY MR. HATCH: And the last paragraph in the  
24 letter, Mr. Maciaszek, if you would read that to us, of  
25 what Novell said it's doing here.

1 A. "We attempted to cover all --"

2 Q. The last paragraph. It starts out "By."

3 A. "By Novell's counter signature, they  
4 acknowledge such transfer has taken place."

5 Q. Do you understand what that transfer was?

6 A. All of the assets associated with the UNIX  
7 business.

8 Q. Thank you.

9 MR. HATCH: Your Honor, that's all I have.

10 THE COURT: All right.

11 MR. JACOBS: Your Honor, a quick question from  
12 here, if I may.

13 THE COURT: Yes.

14 RE CROSS EXAMINATION.

15 BY MR. JACOBS:

16 Q. Mr. Maciaszek, take a look, again, at  
17 attachment A to Exhibit 751.

18 A. Yes.

19 Q. The second line is "All UnixWare releases up to  
20 and including UnixWare release 2."

21 Do you see that?

22 A. Yes.

23 Q. UnixWare includes Netware components, does it  
24 not, sir?

25 A. Yes.

1 Q. So your answer to Mr. Hatch was incorrect;  
2 isn't it, sir? This UnixWare is referring to a product  
3 that embraces code that consists of new code, old code,  
4 Netware code, Legacy UNIX code; correct sir?

5 A. Well, that product contains lots of stuff,  
6 including third-party code, which we had the rights to  
7 because all the contracts were assigned.

8 Q. Under license, sir, correct?

9 A. Under contractual agreement, yes.

10 Q. But, in saying that we have acquired ownership  
11 of those products, you were not intending to convey --

12 A. We owned the products.

13 Q. And not necessarily --

14 A. And not every component contained --

15 THE COURT: Mr. Maciaszek. I'm sorry.

16 Mr. Jacob is going to ask you the question.

17 THE WITNESS: Okay.

18 Q. BY MR. JACOBS: You and I are actually in sync.  
19 You owned the products, as a whole, in the large sense,  
20 but there could be old code that you don't own, there  
21 could be Netware code that you don't own, and the two  
22 would coexist perfectly well, sir, wouldn't they?

23 A. No. I wouldn't agree with exactly the way you  
24 said that. I mean, we owned code other than the code  
25 that we specifically didn't own, which would include

1 Netware and some third-party stuff that we had rights to,  
2 to ship for either royalties or for no charge. I am not  
3 talking specifically about prior releases of UNIX. We  
4 owned that stuff.

5 Q. Well, and that's what's in dispute in this  
6 lawsuit, sir, correct?

7 A. Ownership rights? My view is that -- I don't  
8 understand how you can claim that you own it if the APA  
9 says that you sold it.

10 Q. Well, and that's precisely what's in dispute,  
11 sir, correct?

12 A. I don't know what's exactly in dispute.

13 Q. But the point is that by saying you own  
14 something at the product level, and informing customers  
15 that ownership of the products has transferred, you're  
16 not necessarily saying anything about particular lines of  
17 code that are embedded in that product. Isn't that true,  
18 sir?

19 A. Well, we certainly are not saying that we own  
20 the Netware stuff, yes.

21 MR. JACOBS: Thank you very much, sir.

22 MR. HATCH: Your Honor, I do have one quick  
23 thing.

24 If you could bring this exhibit back up,  
25 Mr. Calvin.

1 REDIRECT EXAMINATION

2 BY MR. HATCH:

3 Q. Just to the point Mr. Jacob just raised, to the  
4 extent there was anything that Novell had retained,  
5 they --

6 Go ahead to page 4 of this. Let's see. Keep  
7 going. No. Back. I went too far. Back one more. All  
8 right. Highlight the middle part of that.

9 It says:

10 If you are also licensed by Novell for source  
11 code offerings other than those listed in attachment A,  
12 then you should contact Novell.

13 Is that what that's saying?

14 A. Yes.

15 MR. HATCH: Okay. Thank you, Your Honor.

16 MR. JACOBS: I'm sorry, Your Honor.

17 RE-CROSS EXAMINATION

18 BY MR. JACOBS:

19 Q. Mr. Maciaszek, Mr. Hatch just misled you,  
20 didn't he? Didn't he, sir?

21 A. I don't know what you mean.

22 Q. Isn't it true that that is referring to  
23 completely different products, such as Netware, licensed  
24 at the product level, and not referring to code that's  
25 embedded in UnixWare?

1           A.    It's referring to specific products other than  
2 those listed on the list, yes.

3           MR. JACOBS:  Thank you, Your Honor.

4                               REDIRECT EXAMINATION

5 BY MR. HATCH:

6           Q.    Those that aren't on Exhibit A?

7           A.    That's correct.

8           THE COURT:  All right.  May this witness be  
9 excused?

10          MR. HATCH:  Yes, Your Honor.

11          MR. JACOBS:  Yes, Your Honor.

12          THE COURT:  Mr. Maciaszek, that means you do  
13 not need to worry about being recalled.  Go about your  
14 business.  But I would instruct you to please not discuss  
15 your testimony with any other witnesses in this case or  
16 in the presence of any other witness or communicate the  
17 nature of your testimony to anybody else.

18          THE WITNESS:  Thank you, Your Honor.  Do I have  
19 the right and to sit and listen to subsequent, or not?

20          THE COURT:  Yes, you do, since you're not going  
21 to be recalled.

22          THE COURT:  Mr. Singer?

23          Mr. Normand?

24          MR. NORMAND:  Your Honor, our next witness is  
25 Mr. Nagle.  Do you want us to get started?

1 THE COURT: Yes. Let's get started. We have  
2 15 minutes.

3 MS. MALLEY: Mr. Nagle. Do you want to come  
4 forward, and I'll swear you in.

5 ANDREW NAGLE,  
6 the witness hereinbefore named, being first duly  
7 cautioned and sworn or affirmed to tell the truth, the  
8 whole truth, and nothing but the truth, was examined and  
9 testified as follows:

10 MS. MALLEY: And if you would please state and  
11 spell your name for the Court.

12 THE WITNESS: My name is Andrew Nagle. First  
13 name Andrew. A-n-d-r-e-w. Nagle. N-a-g-l-e.

14 MS. MALLEY: Thank you.

15 DIRECT EXAMINATION

16 BY MR. NORMAND:

17 Q. Good morning, Mr. Nagle. Are you currently  
18 employed?

19 A. I am employed by the SCO Group.

20 Q. What is your position at SCO Group?

21 A. I am the Senior Director of Product Development  
22 at the SCO Group.

23 Q. And, in brief, what are your responsibilities?

24 A. In that position, I manage and direct the  
25 activities of the SCO engineers that are working on our

1 UNIX products, and I also manage a small team of  
2 technical support engineers that support our customers  
3 who are using that product or those products.

4 Q. What are those current UNIX products?

5 A. The currently shipping binary UNIX products are  
6 OpenServer 507, OpenServer 6 and UnixWare 714. In  
7 addition, there are a long list of source code products  
8 that are available for those who express interest.

9 Q. Could you briefly describe your educational  
10 background.

11 A. My most recent degree is from Carnegie Melon  
12 University. I have a Ph.D. in electrical engineering  
13 from there, and, prior to that, a master's degree in  
14 electrical engineering. I did my undergraduate work at  
15 the University of Delaware, where I hold a Bachelor of  
16 Electrical Engineering and a Bachelor of Arts in  
17 English.

18 Q. What did you do after you received your  
19 bachelor degrees?

20 A. While I was at the University of Delaware, I  
21 was enrolled in ROTC, and I spent four years following my  
22 undergraduate work in the U.S. Army Air Defense  
23 Artillery, for most of that time stationed in Germany.

24 Q. And could you briefly summarize the rest of  
25 your work experience, prior to SCO?

1           A.    Coming out of Carnegie Melon, I was employed at  
2 Bell Laboratories.  In that position, I was in a hardware  
3 development lab for -- let's see, I started in '78, so  
4 for about six years.  Then, at the end of the six years,  
5 my wife took a job in a different town and so I  
6 volunteered for an internal transfer at Bell  
7 Laboratories, and we moved to the town where my wife was  
8 working.

9                    It was then that I came into what became the  
10 UNIX division.  And then, from '84 until now, I have been  
11 in various positions, mostly in engineering, in the UNIX  
12 division doing things from everywhere from application  
13 development work all the way to directly supporting the  
14 engineers in developing the UNIX operating system itself.

15          Q.    And how have your responsibilities at these  
16 different UNIX companies compared?

17          A.    For the most part, they were planning and  
18 project management kinds of roles in all of the UNIX  
19 companies.  I didn't really change jobs so much when the  
20 companies changed hands.  I kept doing what I was doing  
21 because that was the right thing for me to be doing at  
22 the time.  And then, eventually, I took over as head of  
23 engineering.

24          Q.    When you were at Novell in 1996, what was your  
25 role -- in 1995.  Excuse me, Mr. Nagle.

1           A.    For awhile, at Novell, I was a project manager  
2 for the software development of the UNIX operating  
3 system. And then, toward the end of my time at Novell,  
4 for the development of UNIX 2.1, I then was the manager  
5 of the build group at Novell which is responsible for  
6 taking the source code that is developed by the SCO -- or  
7 the Novell engineers, at the time, pulling it all  
8 together in essentially what would have amounted to an  
9 overnight software build, creating the binary UNIX  
10 product that our test engineers could then test.

11          Q.    And when you were at Novell in 1995, do you  
12 recall learning of the asset purchase agreement?

13          A.    I recall that, on a day, we were surprised by  
14 an invitation to the cafeteria at the Novell facility in  
15 Floren Park. And then the head of the engineering  
16 division, Mike Defazio, announced to us that Novell had  
17 pretty much decided to exit the UNIX business and that  
18 they had struck a deal with the Santa Cruz Operation to  
19 take over the UNIX business but that the SCO -- the SCO  
20 company was not in a position to take over -- take on all  
21 of the engineers that were then at Novell, and so they  
22 had struck a separate arrangement for some of the  
23 engineers to get deals in the neighborhood with another  
24 company at the time.

25                   So, what we mostly learned that day is that all

1 of us were pretty much looking at the end of a job with  
2 Novell, and we could interview with these other companies  
3 and try to land a position.

4 Q. And do you recall whether there was a  
5 transition period after Mr. Defazio's announcement?

6 A. Yes. There was -- after the deal closed with  
7 the Santa Cruz Operation, there was a period of time  
8 during which Novell was required to finish up certain  
9 deliverables that were part of the deal in order that  
10 Novell could make delivery of these things to the Santa  
11 Cruz Operation so that, at the end of the transition  
12 period, Santa Cruz would have a complete business that  
13 was then ready to go forward.

14 Q. Did you play any role in that transition  
15 period?

16 A. I played several. As the build manager for the  
17 UnixWare 2.1 release, it was my job to continue in that  
18 role and to see to it that the release itself, under a  
19 plan -- under Novell's auspices, that the UnixWare 2.1  
20 release was completed. I also had several other roles  
21 during the transition to help to manage the transfer of  
22 the UNIX intellectual property, the entire content of the  
23 source code control system, the entire content of the bug  
24 tracking system, all of our user documentation, all of  
25 those software files needed to be transferred to the

1 Santa Cruz Operation. And I participated in that as  
2 well.

3 Q. You said "source code control system." What is  
4 that?

5 A. Source code control system is a very large  
6 database that holds all of the source code control --  
7 source code associated with the UNIX development, dating  
8 all the way back to the days of AT&T. The earliest  
9 releases would have been in that source code control  
10 system, all the way up to the then current release, which  
11 was UnixWare 2.1.

12 Q. So, to be clear, during the transition period  
13 in 1995, who was your employer?

14 A. Novell.

15 Q. And did Novell do anything during that time  
16 about copyright notices on Novell's UNIX products  
17 at that time?

18 A. The UnixWare 2.1 --

19 Q. Now, stop. What is UnixWare 2.1, at that  
20 point, late 1995?

21 A. UnixWare 2.1 was the latest version of UNIX  
22 that was in development at Novell. The development for  
23 UnixWare 2.1 started at least six months prior to the  
24 close of the asset purchase agreement. It was when  
25 UnixWare 2.1 was started. If the asset purchase

1 agreement was contemplated, we, the engineers, were  
2 completely unaware of it.

3           So, it was, as I say, the latest, most current  
4 release of the UNIX System V operating system in  
5 development at Novell at the time the asset purchase  
6 agreement was announced. And it was part of the deal  
7 that, immediately upon completion of that product and  
8 immediately upon completion of the transition, that the  
9 Santa Cruz Operation would be in a position to begin  
10 shipping that product as a Santa Cruz product. It was  
11 never a Novell product. It was Santa Cruz Operation's  
12 first UnixWare product, UnixWare branded product. They  
13 had other -- I'll stop there.

14       Q.    Before I stopped you, I had asked you about  
15 whether in late 1995 Novell did anything about copyright  
16 notices on that UnixWare product?

17       A.    Right. Part of the development of the UnixWare  
18 product, and as part of the deal, SCO required Novell to  
19 place copyright notices indicating that the copyright was  
20 owned by the Santa Cruz Operation, SCO.

21       Q.    And how do you know that?

22       A.    I was -- as the build manager, I participated  
23 in various committees that managed the development of the  
24 UNIX operating system. One of those was named the  
25 modification request review board, which we of course

1 abbreviated to MRRB and this team would meet either one  
2 or two times a week, depending on the volume of  
3 modification requests, another name for which, of course,  
4 is bug report.

5           Modification requests would come in various  
6 flavors. Some would be requests to add features. Others  
7 would be legitimate bug reports that needed a fix. One  
8 such modification request was the requirement to add  
9 copyrights indicating the ownership of the copyright  
10 transferring from Novell to SCO. And I sat on that  
11 board. The board approved that modification request.  
12 The record of that approval is still in the bug tracking  
13 system that we have at the SCO Group.

14       Q.    Mr. Nagle, let me show you what's been marked  
15 as SCO Exhibit 35 entitled Statement Of Work. Do you  
16 recognize that document?

17       A.    I do.

18       Q.    Did you have occasion to work with this  
19 document during the transition period you have been  
20 describing?

21       A.    Yes, I did.

22           MR. NORMAND: Your Honor, we would move SCO 35  
23 into evidence.

24           MR. JACOBS: Could I have a copy.

25           No objection, Your Honor.

1 THE COURT: Exhibit 35 will be admitted.

2 (SCO Exhibit 35 received in evidence.)

3 MR. NORMAND: So, Mr. Calvin, let's blow up  
4 Roman numeral I and the title of the document.

5 Q. BY MR. NORMAND: Mr. Nagle, to the best of your  
6 recollection, and briefly, could you describe what this  
7 document is?

8 A. This document describes the work that Novell  
9 was required to perform in order to complete the  
10 development of UnixWare 2.1 and deliver it to SCO so that  
11 SCO could begin shipping it.

12 Q. Do you recognize the name on the top right?

13 A. That's William J. Klinger. He was my boss.

14 Q. And, again, in summary, what was the work that  
15 Novell needed to complete under this statement of work?

16 A. At the time of the -- when the deal closed, the  
17 UnixWare 2.1 release had remaining about a month or two  
18 of additional development and test work that the  
19 engineering team still needed to complete. There was  
20 documentation work that still needed to be completed.  
21 And there were some -- there was some, a bit of feature  
22 work that still needed attention, all of which is  
23 actually documented in later tables in this document.

24 MR. NORMAND: Mr. Calvin, could we go to the  
25 second page of the document and bring out the paragraph

1 and following bullet points for paragraph, beginning with  
2 "In addition to the changes."

3 Q. BY MR. NORMAND: Do you have that language in  
4 front of you, Mr. Nagle?

5 A. I do.

6 Q. Do you see the reference to the third bullet  
7 point down, "SCO copyrights added to documentation and  
8 software."

9 A. I do.

10 Q. Is that something that you can recall?

11 A. Yes.

12 Q. And can you briefly describe for the jury what  
13 that meant to represent?

14 A. Well, that was a formal recording of the  
15 request from SCO that such copyrights would be added to  
16 the UnixWare 2.1 product prior to having it delivered to  
17 the Santa Cruz Operation for shipment after the close of  
18 the development period. This request here, then, would  
19 have resulted in the modification request that I referred  
20 to earlier.

21 Q. The first paragraph of the language that's  
22 blown up refers to PCB. Do you see that language?

23 A. I do.

24 Q. What did that refer to in this context?

25 A. The PCB is the product change board. That was

1 another one of the committees that we had that was  
2 involved with the development of our UNIX products. The  
3 product change board was a very high level board. It was  
4 populated more by marketing and customer relations types  
5 than by engineers, although engineers were represented.  
6 The product change board was responsible for -- to  
7 approve or disapprove feature changes to the operating  
8 system.

9 Q. And so, reading from this document, "SCO  
10 copyrights added to documentation and software," that was  
11 an issue that had been addressed by the product change  
12 board?

13 A. Well, what this says is that, in addition to  
14 the changes approved by the PCB through the development  
15 process, the following changes have been made at the  
16 request of SCO. So what I read that to be that SCO  
17 requested that the copyrights be added and that the PCB,  
18 in this case, was not involved.

19 Q. And with respect to SCO copyrights being added  
20 to documentation and software, do you know if that was,  
21 in fact, done?

22 A. I do. I'm aware of several of the engineers  
23 that actually did the work, and I recently reviewed the  
24 modification requests that recorded the activity that  
25 they did and the source files that reflect their work.

1 Q. Two more bullet points down it says,  
2 "References to Novell and documentation removed." Do you  
3 recall that issue?

4 A. I do. In a similar way, the documentation  
5 development process during this time was actually very  
6 much a software process because the documentation that we  
7 delivered was delivered in online form so that people  
8 could read it on their screens and so the changes that  
9 were made were done in software files on disks and then  
10 the documentation was created from that. So the same  
11 sort of modification requests would have recorded  
12 these -- the removal of references to Novell.

13 Q. And, Mr. Nagle, do you know whether the  
14 modifications show that Novell continued to own the  
15 copyrights in Netware files?

16 A. Oh, they did. Yes. The Netware components of  
17 UnixWare remained the property of Novell, and the  
18 copyright notices reflected that.

19 Q. Did the modifications, however, show that SCO  
20 now owned the UNIX copyrights?

21 A. Yes, they did.

22 Q. Mr. Nagle, can you generally describe the  
23 development process for UNIX releases?

24 THE COURT: Excuse me, Mr. Normand. Would this  
25 be a good time the take a break?

1 MR. NORMAND: It would be fine, Your Honor.

2 THE COURT: How long do you think you will take  
3 with this witness?

4 MR. NORMAND: Ten minutes, Your Honor, at  
5 most.

6 THE COURT: Is anyone over there hungry? Can  
7 you wait ten more minutes?

8 All right. Let's finish your direct, then.

9 MR. NORMAND: All right. Thank you, Your  
10 Honor.

11 Q. BY MR. NORMAND: The question, Mr. Nagle, was  
12 whether you could generally, now, briefly describe the  
13 development processes for UNIX releases.

14 A. Yes. We would -- when it was time to start a  
15 new release, we would start our activity with the top --  
16 what we call top of tree in the source code control  
17 system, the most current version of the latest release  
18 that we were shipping in the field. Based on input from  
19 marketing resources in the company and estimates of the  
20 amount of work involved, we would agree to a technical  
21 prospectus and then engineers would go about making  
22 additions to the previous release.

23 Then the previous release would be continuously  
24 modified over a period ranging from 12 to 24 months and  
25 then the new release would be built, and we would begin

1 shipping the next release.

2 Q. Now, Mr. Nagle, going back to your days at  
3 Novell, what was the version of UNIX before they started  
4 calling UNIX UnixWare?

5 A. It would have been System V release 4.2 MP. MP  
6 is for multi-processor.

7 Q. And have you had occasion to look at the asset  
8 purchase agreement?

9 A. I have. It's been some time, but I have read  
10 the asset purchase agreement.

11 Q. Do you know whether System V release 4.2 MP is  
12 identified among the transferred products in the asset  
13 purchase agreement?

14 A. It is. It's listed on a list of product names  
15 under the heading SVRX.

16 Q. Mr. Nagle, let me show you what's been marked  
17 as SCO Exhibit 82. Have you seen this document before?

18 A. Yes, I have.

19 Q. And can you identify it for me?

20 A. It's a registration of a copyright.

21 MR. NORMAND: I think, Your Honor, the parties  
22 have stipulated to the admission of these registrations,  
23 including this document.

24 MR. JACOBS: That's correct, Your Honor. We  
25 have an e-mail exchange on that and probably can do it

1 off line and not take jury time with it.

2 THE COURT: All right. Exhibit 82 can be  
3 admitted without objection; is that correct?

4 MR. JACOBS: Correct, Your Honor.

5 THE COURT: All right.

6 (SCO Exhibit 82 received in evidence.)

7 Q. BY MR. NORMAND: Mr. Nagle, now that the jury  
8 can see this document, what do you understand this  
9 document to be?

10 A. This appears to be a copyright registration.

11 Q. And let's --

12 MR. NORMAND: Mr. Calvin, below, at the bottom  
13 of the registration, the number 4.

14 Q. BY MR. NORMAND: Can you see, Mr. Nagle, who  
15 has filed this registration?

16 A. Novell has filed this registration.

17 MR. NORMAND: Mr. Calvin, if you could pull up  
18 the date on the top right.

19 Q. BY MR. NORMAND: Do you see the date,  
20 Mr. Nagle?

21 A. I do.

22 MR. NORMAND: And could you take both of those  
23 down, Mr. Calvin, and bring out number 1.

24 Q. BY MR. NORMAND: What is the product for which  
25 this registration corresponds, Mr. Nagle?

1 A. It says UNIX System V release 42 MP. It's  
2 missing the dot.

3 Q. Is this the release of UNIX that we were just  
4 talking about before they started calling it UnixWare?

5 A. Yes.

6 Q. How does this operating system compare to your  
7 first version of UnixWare?

8 A. This version of UNIX is -- was essentially  
9 rebranded and some cosmetic and a few minor features  
10 added to it to create UnixWare 2.0. UnixWare 2.0 is  
11 almost entirely UNIX System V release 4.2.

12 Q. Mr. Nagle, when you were at Novell, did you  
13 know that Santa Cruz put its copyright notice on UnixWare  
14 2.1 CD's?

15 A. On UnixWare 2.1?

16 Q. CD's.

17 A. CE's?

18 Q. CD's.

19 A. Oh, CD's. Sorry. Yes. I was aware of that.  
20 They would have done that at the time that Santa Cruz  
21 Operation first started shipping the product.

22 Q. And I know I can approach. Do you recognize  
23 that CD?

24 A. I do.

25 Q. And could you explain, just quickly, for the

1 jury what it is?

2 A. This is a CD containing UnixWare release 2.1.

3 MR. NORMAND: Your Honor, we've marked that CD  
4 physically as SCO Exhibit 752. A copy of it is SCO  
5 Exhibit 513, so we would move to admit it.

6 MR. JACOBS: No objection, Your Honor.

7 THE COURT: 752 will be admitted.

8 (SCO Exhibit 752 received in evidence.)

9 Q. BY MR. NORMAND: Mr. Nagle, do you know whether  
10 the box contains a Santa Cruz copyright notice? And let  
11 me ask you, more in your bailiwick, do you know whether  
12 the source code that's in the CD or the material in the  
13 CD has a Santa Cruz copyright notice?

14 A. I do know that the software for UnixWare 2.1  
15 contains SCO copyrights.

16 Q. How do you know that?

17 A. That was the activity we referred to earlier  
18 where the engineers made the modifications that inserted  
19 such copyrights.

20 Q. How do you know that they are Novell  
21 engineers?

22 A. I was working with them at the time that the  
23 changes were made, and it was in the -- I know that the  
24 modification requests that I reviewed indicated that the  
25 changes were made in November of 1995.

1 MR. NORMAND: Mr. Calvin, could you pull up  
2 Exhibit A to SCO Exhibit 655.

3 Q. BY MR. NORMAND: Mr. Nagle, do you recognize  
4 that Exhibit A?

5 A. Yes, I do.

6 Q. And could you identify what it is?

7 A. This is a -- the front page of the online user  
8 documentation for the command reference manual in  
9 UnixWare 2.1, and it says at the top of it, the first end  
10 line under the title, it says "copyright 1996, the Santa  
11 Cruz Operation."

12 MR. NORMAND: Your Honor, SCO Exhibit 655 is a  
13 declaration. We don't purport to put the declaration  
14 into evidence, but we would like to put Exhibit A and the  
15 next two exhibits in based on Mr. Nagle's testimony about  
16 his review of those same materials. So we would propose,  
17 in short, to put in a redacted version of SCO Exhibit  
18 655.

19 MR. JACOBS: I have no objection to Exhibit A  
20 or B, Your Honor. They are -- I believe it is clear that  
21 they are screens from UnixWare 2.1, and, on that  
22 understanding, we have no objection. I do not yet know  
23 what Exhibit C is from this witness so I'm not sure what  
24 Mr. Normand is proposing.

25 MR. NORMAND: Fair enough. We'll start with

1 Exhibit A and B, Your Honor.

2 THE COURT: All right. Exhibit A and B are  
3 Exhibits to the original declaration designated as  
4 Exhibit 655 and will be admitted.

5 (SCO Exhibits A and B to Exhibit 655 received in  
6 evidence.)

7 MR. NORMAND: Thank you, Your Honor.

8 Q. BY MR. NORMAND: Mr. Nagle, now that the jury  
9 can see Exhibit A, would you briefly describe, perhaps,  
10 again, what they are looking at?

11 A. Yes. This is the opening page of the command  
12 reference manual user documentation that is included in  
13 the -- online in UnixWare 2.1.

14 Q. I see, in the middle of the picture, a  
15 copyright notice, "copyright 1996, the Santa Cruz  
16 Operation, Inc." Do you see that language?

17 A. I do.

18 Q. And who would have added that copyright notice?

19 A. It would have been done by the Novell engineers  
20 during November of 1995, after the asset purchase  
21 agreement had been announced.

22 Q. And were you a member of the Novell review  
23 board at the time that these copyright notices were  
24 added?

25 A. Yes, I was.

1 Q. Let's look at Exhibit B.

2 If you could pull that up the same way,

3 Mr. Calvin.

4 If I asked you the same questions, would you

5 give the same answers with respect to this exhibit,

6 Mr. Nagle?

7 A. Yes.

8 Q. So, with respect to both Exhibit A and B, you

9 approved these changes to the copyright notices?

10 A. Yes, as part of the modification review

11 board.

12 Q. Do you know if the log that you described

13 earlier reflecting these changes has changed at all since

14 1995?

15 A. As a bug reporting database, it would have been

16 locked and unchanged since the last entry was made

17 relative to this software.

18 Q. Now, the last thing, Mr. Nagle, if you could

19 look at Exhibit C, which the jury shouldn't see yet.

20 Next exhibit, Mr. Calvin. Thank you. If you

21 could pull that up.

22 Do you recognize what this is, Mr. Nagle?

23 A. I do.

24 Q. And could you briefly describe what it is.

25 A. It says an interactive session on UnixWare 2.1

1 executing the command UNAME on this system.

2 Q. And what is this -- what is the significance of  
3 this screen?

4 A. UNAME is a command on the UNIX systems that  
5 identifies its credentials. One of the things that I see  
6 here is that the release associated with UnixWare 2.1 is  
7 listed here as 4.2 MP.

8 MR. NORMAND: And, on that basis, Your Honor, I  
9 would move Exhibit C into evidence as part of this  
10 redacted SCO Exhibit 655.

11 MR. JACOBS: No objection, Your Honor.

12 THE COURT: It will be admitted also.

13 (SCO Exhibit C to Exhibit 655 received in evidence.)

14 Q. BY MR. NORMAND: Now, two more questions,  
15 Mr. Nagle. You mentioned a revision control system. Can  
16 the record in the revision control system be changed?

17 MR. HATCH: You didn't show that to the jury,  
18 did you, after it was admitted?

19 MR. NORMAND: That's true. Let's show Exhibit  
20 C to the jury.

21 Q. BY MR. NORMAND: So, once again, Mr. Nagle, now  
22 that the jury can see this, can you explain what you just  
23 said about the reference to release 4.2 MP, two or three  
24 lines in the exhibit?

25 A. Just to be really clear, for those that are not

1 familiar with how a UNIX system behaves, the dollar sign  
2 in the upper left-hand corner is a prompt that the user  
3 sees when they are invited to enter a command. The next  
4 character is UNAME minus cap X. That's a command that's  
5 given to the UNIX system, and its says, "Please tell me  
6 the credentials about this system. Tell me everything  
7 that is important about this system." And so the entries  
8 you see then are listed, system, node, release, kernel  
9 ID, machine, blah, blah, blah. The important item here  
10 is the release, which is 4.2 MP, which demonstrates that  
11 that UnixWare 2.1 is based on -- at System V release 4.2  
12 MP.

13 Q. Thank you, Mr. Nagle. And the question I had  
14 asked was whether the revision control system that we've  
15 been talking about, whether that can be changed?

16 A. Under normal circumstances, no, but, I mean, to  
17 answer the question, since it's software, the right  
18 person with the right credentials can always make a  
19 change in a database.

20 Q. To the best of your knowledge, has the record  
21 reflecting that Novell changed the copyrights to Santa  
22 Cruz, to the best of your knowledge, has that record  
23 changed since 1995?

24 A. It has not. The record that displays today  
25 looks exactly the same as the record that would have

1 displayed in 1995, to my eyes.

2 MR. NORMAND: Thank you, Your Honor.

3 THE COURT: All right. We will take our recess  
4 and come back for the cross examination of Mr. Nagle.

5 MS. MALLEY: All rise for the jury.

6 (Jury leaves the courtroom.)

7 THE COURT: Anything, counsel?

8 MR. SINGER: We have one issue, Your Honor. I  
9 had indicated that we wished to introduce, as admissions,  
10 Answers to our Second Amended Complaint, three specific  
11 paragraphs, which have admitted that the allegations made  
12 in the May 28 letter, December 22 press release, and on  
13 the copyright registrations apply to UNIX and UnixWare.  
14 Those are clear admissions from the standing Answer.  
15 Novell has indicated that they are going to try some  
16 effort to amend the pleadings to conform with the  
17 evidence.

18 My position on that is, first, we certainly  
19 don't agree to that. And, number 2, that's something  
20 that would occur later if they present evidence to try to  
21 do so. At this point the issue is simply our ability to  
22 admit, as admissions of Novell, what they said in their  
23 standing Answer to the Complaint, and I believe I am  
24 entitled to do that.

25 THE COURT: Mr. Jacobs.

1           MR. JACOBS: Your Honor, I think, as has become  
2 clear -- I wonder if the witness could be excused for  
3 this.

4           THE COURT: Yes, Mr. Nagle, if you would,  
5 please. Thank you. Mr. Nagle, no, you don't want to go  
6 out that way. You'll get lost.

7           MR. JACOBS: As has become clear from the  
8 testimony, Your Honor, the words that were chosen six  
9 years ago have now become sharpened and clarified with  
10 the benefit of the actual trial. It has never been  
11 Novell's contention, to begin with, and I think this is  
12 clear from lots of back and forth, the UnixWare that  
13 Santa Cruz developed and that SCO developed after the  
14 asset purchase agreement, that Novell claimed copyright  
15 in those entire products. So the answer would be  
16 confusing, as read. It would be quite confusing to the  
17 jury to hear.

18           Secondly, the actual evidence that's come in at  
19 trial is that Novell has said we owned the, quote, UNIX  
20 copyrights. And so I think that's going to be confusing  
21 to the jury as well. The actual statements say UNIX and  
22 do not say UnixWare. Our procedural proposal was to  
23 amend the Answer, if that's necessary. I appreciate  
24 where Mr. Singer is coming from. It's in the Answer.  
25 But now we know a lot more and the jury knows a lot more,

1 and we are concerned about confusion.

2 THE COURT: Mr. Singer?

3 MR. SINGER: This is an admission. Our  
4 contention is that when they slandered our title, it was  
5 both the UNIX and UnixWare. It was alleged that way.  
6 The statements say, specifically, for example, SCO  
7 subsequently registered claims to UNIX and UnixWare  
8 copyrights with the United States copyright office. They  
9 specifically alleged. Novell admits that on May 28,  
10 2003. Jack Messman sent a letter to Darl McBride of SCO  
11 in order to assert Novell's claims to the UNIX and  
12 UnixWare copyrights. This is a company that is well  
13 aware of what UnixWare is and what UNIX is. These have  
14 never been amended.

15 I am entitled titled to have them put before  
16 the jury as admissions of Novell that when they put out  
17 this slander it applied to UNIX and UnixWare products.  
18 And this is an 11th hour change to try to say, "Well, we  
19 only asserted claim to UNIX. We didn't assert claim to  
20 UnixWare." Their statements pertain to both UNIX and  
21 UnixWare, and I am entitled to put that in.

22 THE COURT: Counsel, the Court will let you  
23 know what it is thinking at the end of the break, all  
24 right? Thank you. We will take 20 minutes.

25 (Short break.)