

1 (Recess)

2 THE COURT: What will be next?

3 MR. SINGER: I believe what will be next is we  
4 will turn over the baton, although we are not resting our  
5 case, and, Mr. LaSala, we are informed, would be their first  
6 witness.

7 MR. ACKER: That is correct, Your Honor.

8 MR. SINGER: There are a couple of issues  
9 concerning Mr. LaSala before bringing back the jury, if we  
10 could take a few moments now.

11 THE COURT: Let's do it.

12 MR. SINGER: One of them I think is a very quick  
13 issue, and I believe I'm entitled to elicit the fact that  
14 there is a joint defense agreement between IBM and Novell,  
15 and it goes to credibility. I am not planning on using the  
16 agreement or going beyond that, but I believe that is  
17 relevant just like other things are relevant to the  
18 credibility of witnesses.

19 MR. ACKER: We would disagree, Your Honor.  
20 Essentially he is trying to put before the jury that there  
21 are protected communications between I.B.M. and Novell and  
22 we think that is improper.

23 THE COURT: Well, let me see. Are you trying to  
24 put before the jury that there are protected communications,  
25 or are you focusing only on the fact that there is a joint

1 defense agreement?

2 MR. SINGER: Only on the latter.

3 MR. ACKER: That is the very purpose for the joint  
4 defense agreement. That is the very essence of the joint  
5 defense agreement itself.

6 THE COURT: But if there are no questions elicited  
7 to that effect, the jury will never know that.

8 MR. ACKER: Well, then there is no relevance to  
9 the fact that there is one.

10 MR. SINGER: The relevancy is that they have  
11 entered into a joint defense agreement believing that their  
12 interests are aligned.

13 THE COURT: I will allow you to ask a limited  
14 question to that extent.

15 MR. SINGER: Your Honor, there are three documents  
16 that --

17 MR. ACKER: Before we move on, we ask that the  
18 jury be instructed as to what is a joint defense agreement,  
19 Your Honor, so that the jury has context to place that in.

20 MR. SINGER: Well --

21 MR. ACKER: Otherwise it is going to be left as it  
22 is, something that is nefarious or untold as opposed to it  
23 is common in everyday --

24 THE COURT: May I ask this, if I ask Mr. Singer to  
25 elicit from your witness what it is in the most bare bones

1 terms, would that be an agreeable way to do this?

2 MR. ACKER: I'll do it on redirect. I need to be  
3 allowed to do it on redirect.

4 THE COURT: You certainly will be allowed to do  
5 that.

6 MR. SINGER: There are three documents, and these  
7 are Exhibits 6, 7 and 8 to the memorandum which we submitted  
8 to the Court on privilege and that will come up in  
9 connection with Mr. LaSala's testimony. These are all  
10 internal documents among lawyers, for the most part, at  
11 Novell. There may be a business party in one of the  
12 communications. Part of the documents were redacted and we  
13 don't think these are admissible.

14 First of all, they are self-serving hearsay. You  
15 can't create a memorandum and then say, well, I'm going to  
16 introduce this to help prove the point of what would be  
17 contained within the context of that memorandum. Beyond  
18 that, there is a serious privilege issue. In the course of  
19 this communication you selectively redact certain parts and  
20 want to use other parts of the same memorandum. The  
21 attorney-client privilege protects communications, and they  
22 can't selectively use part of these communications while  
23 withholding others.

24 MR. ACKER: What these are, Your Honor, is these  
25 are e-mails that Mr. Jones wrote immediately after having

1 telephone conversations with Mr. McBride. In fact, these  
2 are exhibits that Mr. Singer himself has shown to witnesses  
3 including Chris Stone when he testified and he was shown  
4 these exhibits by SCO.

5 THE COURT: Have they been admitted?

6 MR. ACKER: They have not been admitted, Your  
7 Honor.

8 MR. SINGER: No.

9 MR. ACKER: He is wrong about the hearsay issue as  
10 well, but I'll get to that in a second.

11 The only portions that have been redacted, Your  
12 Honor, are legal advice or opinions of lawyers in the  
13 e-mails. The actual substance, that is the factual  
14 percipient witness testimony regarding what was said by  
15 Mr. McBride to Mr. Jones on these different dates, that has  
16 not been redacted and that was inquired about at length in  
17 Mr. LaSala's deposition and in Mr. Jones' deposition as  
18 well. So he is wrong about the privilege issue.

19 On the hearsay issue, it is a quintessential past  
20 recollection recorded, Your Honor. Here is a guy that has a  
21 telephone conversation with Mr. McBride, types an e-mail  
22 saying what was said some seven years ago, and he certainly  
23 can use that document at the very least to testify about the  
24 substance of the conversation. We would submit under past  
25 recollection recorded it is also admissible as a non-hearsay

1 document.

2 THE COURT: I can see it being used to refresh his  
3 memory, if he is asked do you remember the conversation and  
4 do you remember what was said and what may have been  
5 communicated without the document itself being admitted.

6 You're seeking its admission --

7 MR. ACKER: Well, I don't know how the testimony  
8 is going to go, Your Honor, but we certainly can use these  
9 documents with these witnesses to place them in the frame of  
10 mind of when certain conversations occurred and when they  
11 learned about certain conversations and then allow them to  
12 testify --

13 THE COURT: To refresh their memory?

14 MR. ACKER: Yes, and to testify about the  
15 substance of what they knew.

16 THE COURT: Again, the documents can be used to  
17 refresh memory without being admitted to the jury.

18 MR. ACKER: I understand, Your Honor. I also  
19 think that this is a classic example of past recollection  
20 recorded. There are many events where they took place years  
21 ago where someone contemporaneously wrote it down at the  
22 time of the event immediately after the event what happened.  
23 The classic example is writing down a license plate after  
24 seeing it outside a window. Seven years from now you may  
25 not remember that license plate, but you know you wrote it

1 down and you can testify, yes, I saw it and I wrote it down.  
2 You can look at the piece of paper that you wrote it done on  
3 and say, yes, that is it, then you certainly can use that  
4 document to testify and we also think it is admissible.

5 MR. SINGER: There are very limited exceptions for  
6 this past recorded recollection. If the witness is to  
7 testify from his memory he can't introduce a self-serving  
8 document. If he does not have a recollection it can be used  
9 to refresh his recollection, but it does not come into  
10 evidence. I think that would resolve the issue, as long as  
11 you are not seeking to move this into evidence. If you're  
12 not seeking to move it into evidence, I don't think we need  
13 to deal with the privilege issue, because he is just using  
14 it to refresh recollection.

15 MR. ACKER: Then, of course, if there is  
16 cross-examination of Mr. Jones or Mr. LaSala on these  
17 conversations with Mr. McBride, or SCO attempts to cast  
18 doubt on their ability to recall the conversations or what  
19 the substance of the conversations are, then we certainly  
20 can use the documents as evidence that this is a prior  
21 consistent statement and past recollection recorded to  
22 bolster their memory of that conversation when it is being  
23 alleged that they can't remember.

24 THE COURT: The rule on recorded recollection says  
25 that the memorandum of record may be read into evidence but



1 and were talking about UNIX code, you were referring to  
2 pre-asset purchase agreement versions of UNIX, right?

3 A. In what context?

4 Q. Well, when you were talking to potential licensees  
5 about the SCOSource program.

6 A. In part, yes.

7 Q. In fact, if we could take a quick look at Trial Exhibit  
8 1, and we would like you to look at Schedule 1.1-A, Roman  
9 numeral six that you were asked about by Mr. Normand.

10 You'll see that there are various products that you  
11 have described, and each of those products is a pre-asset  
12 purchase agreement version of UNIX, correct?

13 A. I believe that is the case, yes.

14 Q. Then if we could take a look at amendment number two to  
15 the asset purchase agreement, and Mr. Normand asked you  
16 about subpart B of amendment number two.

17 Let's just read together what this provision of  
18 amendment number two addresses. You'll see at the top it  
19 says, quote, except as provided in Section C below, and  
20 notwithstanding the provisions of Article 4.16, Sections B  
21 and C of the agreement, any potential transaction with an  
22 SVRX licensee which contains a buy out of any such  
23 licensee's royalty obligation shall be managed as follows.

24 Do you see that?

25 A. I do see that.

1 Q. Then there are five numbered paragraphs.

2 Do you see those as well?

3 A. Yes.

4 Q. So amendment number two and this subpart B that is  
5 addressed by its own terms, was focused on the buy out of  
6 licensee's royalty obligations, right?

7 A. That language is there, yes.

8 MR. BRENNAN: Thank you. No further questions.

9 THE COURT: You may step down. Thank you. Unless  
10 you would rather stay.

11 THE WITNESS: It was a lot of fun.

12 THE COURT: Mr. Singer.

13 MR. SINGER: Your Honor, at this time, while there  
14 are other witnesses we will be calling later in the week, we  
15 are yielding the floor to Novell.

16 THE COURT: Mr. Acker?

17 MR. ACKER: Novell would call as its first witness  
18 Mr. Joe LaSala, and he will be here in a second.

19 JOSEPH A. LaSALA, JR.

20 Having been duly sworn, was examined

21 and testified as follows:

22 THE WITNESS: Yes. Good morning.

23 My name is Joseph A. LaSala, Junior. The last  
24 name is L-a-S-a-l-a.

25 DIRECT EXAMINATION

1 BY MR. ACKER

2 Q. Good morning, Mr. LaSala.

3 A. Good morning.

4 Q. Tell the ladies and gentlemen what you do for a living.

5 A. Yes. I am general counsel of a company outside of  
6 Washington, D.C. called Discovery Communcations.

7 Q. Is there any relationship between Discovery  
8 Communcations and the Discovery Channel?

9 A. Yes. The Discovery Channel is part of Discovery  
10 Communcations.

11 Q. That is the channel of the Deadliest Catch, am I right?

12 A. Yes, among others.

13 Q. How long have you had that job, sir?

14 A. Since mid January of 2008.

15 Q. What are your responsibilities as general counsel at  
16 Discovery Communcations?

17 A. Broadly I'm responsible for all legal matters that the  
18 company is involved with. I supervise a legal department of  
19 about 20 lawyers on a worldwide basis. I advise management  
20 and the board of directors of the company on legal matters.

21 Q. Back up and tell the ladies and gentlemen of the jury  
22 what both your undergraduate and advanced degrees are in.

23 A. Yes. I received a bachelor's degree from the Catholic  
24 University of America in Washington, D.C. in 1976. I  
25 received a law degree from the Columbus School of Law at the

1 Catholic University of America in 1981.

2 Q. What job did you have before going to work for

3 Discovery Communications?

4 A. I was general counsel at Novell.

5 Q. During what period of time were you general counsel for

6 Novell?

7 A. From July of 2001 through mid January of 2008.

8 Q. Generally what were your responsibilities in that

9 position between 2001 and 2008?

10 A. Similar to those that I have at Discovery. Again, I

11 was the general counsel there responsible for all of the

12 legal matters at Novell, supervising the staff of lawyers,

13 and advising the management of the company and the board of

14 directors on legal issues.

15 Q. Who were the senior executives that you worked with

16 during the period at Novell between 2002 and 2003?

17 A. Principally Mr. Jack Messman, who was the C.E.O. of the

18 company, Mr. Chris Stone who was the C.O.O. of the company,

19 and Mr. Carl Ledbetter, who was our chief technology officer

20 and our then C.F.O., chief financial officer.

21 Q. Why did you decide to leave Novell in 2008 and go to

22 Discovery?

23 A. I had an opportunity to go to Discovery. I was

24 recruited by the company to come to work for them, and after

25 considering all of the alternatives and considering what was

1 in the best interest of myself and my family I decided to  
2 make the move.

3 Q. Let me place you back in time to the fall of 2002. At  
4 some point during the fall of 2002 did you become aware of  
5 issues at Novell relating to a man by the name of Darl  
6 McBride and a company called SCO?

7 A. Yes, I did.

8 Q. How did you become aware of those issues?

9 A. I received a series of e-mails and phone conversations  
10 from a lawyer who worked for me conveying to me  
11 conversations that he and others had had with Mr. McBride  
12 around that time.

13 Q. Had you ever heard of Mr. McBride or SCO prior to the  
14 fall of 2002?

15 A. No, I don't believe that I had.

16 Q. Let me show you what we have marked as K-11.

17 If you could take a look at that, sir.

18 Do you recognize K-11?

19 A. Yes, I do.

20 Q. What is it?

21 A. This is an e-mail from Mr. Jones to me and one of our  
22 colleagues concerning a conversation that he had had with an  
23 assistant to Mr. McBride around this time. It advises --

24 Q. Before going into the substance of it, is this an  
25 e-mail that you received on or about November 20th of 2002?

1 A. Yes, it is.

2 Q. In addition to receiving this e-mail from Mr. Jones,  
3 did you also speak with Mr. Jones?

4 A. I did.

5 Q. Did Mr. Jones relay to you information regarding his  
6 conversation with Mr. McBride?

7 A. He did.

8 Q. What did he say?

9 MR. SINGER: Objection. This is hearsay. Mr.  
10 Jones works for Novell.

11 MR. ACKER: It goes to Mr. LaSala's state of mind,  
12 which is clearly at issue given their slander of title.

13 THE COURT: The Court will overrule the objection.

14 BY MR. ACKER

15 Q. What did Mr. Jones say?

16 A. Mr. Jones conveyed to me the substance of his  
17 conversation that he received from Mr. McBride's assistant,  
18 which was essentially that she was asked by Mr. McBride to  
19 gather documents related to an asset purchase agreement that  
20 occurred between S-C-O and Novell in the mid 1990s.

21 In addition, Mr. Jones told me that he understood that  
22 one of the purposes of the request to be to further SCO's  
23 interest in asserting intellectual property rights that it  
24 thought it owned related to UNIX against Linux end users.

25 Q. What was your reaction to this initial conversation

1 with Mr. Jones?

2 A. Well, my initial reaction to this conversation was,  
3 again, pretty much one event at a busy day at Novell. It  
4 was the first I had heard of this kind of thing. I said to  
5 Mr. Jones, well, thank you, and I appreciate you telling me  
6 and keeping me informed. Let me know of any further  
7 developments.

8 Q. Let me show you another document that we have marked as  
9 Exhibit R-11.

10 Do you recognize that e-mail?

11 A. Yes, I do

12 Q. Is this another e-mail that you received from Mr.  
13 Jones?

14 A. It is.

15 Q. And the date you received it?

16 A. December 4, 2002.

17 Q. What information did Mr. Jones provide to you in this  
18 e-mail, R-11?

19 A. Well, he wanted to update me on further communications  
20 that he and one of this colleagues had with Mr. McBride at  
21 SCO. He conveyed to us Mr. McBride's renewed request for  
22 Novell's help in getting these documents that he had been  
23 asking for.

24 He, for the first time to my knowledge, referenced the  
25 fact that SCO was intending to announce a Linux licensing

1 program, and that he very much wanted Novell's cooperation  
2 in getting copies of those agreements in furtherance of  
3 SCO's Linux licensing program.

4 Q. Your reaction to this second e-mail and communication  
5 from Mr. Jones, was it any different than your reactions to  
6 the first?

7 A. Well, slightly. I guess my concern would be slightly  
8 more heightened at that point, understanding that Mr.  
9 McBride had in mind a specific program related to Linux, and  
10 I knew at our company that Novell had interests in getting  
11 into and had taken certain steps and made certain  
12 investments in the Linux business, so I was I guess slightly  
13 more concerned at that point about what Mr. McBride might be  
14 up to.

15 Q. At this point in time, in December of 2002, had you  
16 gone back and read the asset purchase agreement or any of  
17 its amendments?

18 A. No, I had not.

19 Q. Were you involved at all in the asset purchase  
20 agreement and the execution or negotiations of the agreement  
21 back in 1995 or 1996?

22 A. No, I was not.

23 Q. What was your response back, if any, to Mr. Jones  
24 getting the second communication in early December of 2002?

25 A. Well, my response was, okay, Greg, keep me posted for

1 sure if you get anything further, because this seems to be  
2 going in a more serious direction than perhaps we had  
3 initially thought. Mr. McBride makes reference to Greg and  
4 Greg tells me that in his e-mail that, you know, he might be  
5 elevating the conversation to others in the company.

6 Q. Let me show you what we have marked as N-12.

7 Do you recognize what has been admitted as N-12?

8 A. Yes, I do.

9 Q. What is that?

10 A. This is a copy of a press release that SCO issued on  
11 January 22, 2003, where it announces the establishment of  
12 SCOsource to license the UNIX intellectual property.

13 Q. Did you become aware of this announcement on or about  
14 January 22?

15 A. Yes, I did.

16 Q. What was your reaction at Novell when you saw this  
17 press release in January?

18 A. Our concern at this point is very high, as you might  
19 imagine, given our interest in Linux, that upon reflection  
20 this fulfilled Mr. McBride's promise that he was going to be  
21 announcing a campaign against Linux end users asserting that  
22 SCO was the owner of the copyrights to UNIX. We had a point  
23 of view ourselves on that ownership position that we  
24 subsequently did more work on, and so we were quite  
25 concerned at this point in time.

1 Q. Why is Novell concerned that SCO is announcing this  
2 SCOSource product? Why does that create issues for Novell?

3 A. Principally because Novell, as I mentioned a few  
4 moments ago, had previously announced its intention to get  
5 involved in the Linux business. There had been a lot of  
6 work done, there had been a lot of planning done, and we  
7 viewed Linux as an area of computing that we thought we  
8 could really create some value and service customers well.  
9 We saw this as a threat to our potential business  
10 opportunities and our ability to be successful with Linux.

11 Q. Why was this campaign a threat to Novell's intent to  
12 get into the Linux business?

13 A. Because if Mr. McBride and SCO were threatening Linux  
14 end users with copyright infringement and making demands for  
15 payment from them, that would have the potential to slow  
16 down our own initiatives and throw some roadblocks in the  
17 way of our ability to conduct our own business. It would  
18 effect existing relationships with customers as well as  
19 potentially future relationships with potential customers.

20 Q. Let me show you another e-mail that is marked as W-12.

21 Do you recognize what we have marked as W-12?

22 A. Yes, I do.

23 Q. What is it?

24 A. It is yet another e-mail from Mr. Jones to me dated  
25 February the 25th of 2003, where he updates me on subsequent

1 conversations that one of our colleagues had with Mr.  
2 McBride concerning the subject that Mr. McBride had been  
3 calling about, the copyright ownership related to UNIX and  
4 his desire to get copies of the asset purchase agreement.  
5 Mr. Jones tells me that our colleague, and his name was Mr.  
6 Wright, told Mr. McBride that we were not in a position to  
7 fully evaluate the request at that time.

8 Again, Mr. McBride suggested that he had a relationship  
9 with Mr. Messman, our C.E.O., and that he might have to take  
10 it upon himself to elevate this issue to Mr. Messman.

11 Q. Given the information that you have to date about the  
12 earlier communications in the fall of 2002, and the  
13 announcement of SCOSource and now this e-mail, what is your  
14 reaction in February of 2003?

15 A. Our concern is quite heightened at this point in time.  
16 Again, coming on the heels of the SCOSource announcement  
17 just a few weeks before, and wherein SCO asserted its  
18 ownership of the UNIX copyrights, and the fact that Mr.  
19 McBride was continuing to ask us for documentation and  
20 cooperation such that he could pursue this campaign really  
21 caused us concern.

22 Q. At some point in time do you and your staff sit down  
23 and review the A.P.A.?

24 A. Yes, we did.

25 Q. Approximately when was that?

1 A. Well, I don't remember exactly when it was that we  
2 began to review the A.P.A. in earnest. It was around this  
3 time, though. I would say it was sometime in the February,  
4 late February time frame is my best recollection.

5 Q. Upon that review, what conclusion did you reach?

6 A. Well, the conclusion that I reached after our review of  
7 the asset purchase agreement was that Novell was the  
8 rightful owner of the UNIX copyrights, and that they had not  
9 transferred to SCO as a result of the asset purchase  
10 agreement that was executed in 1995.

11 Q. What portion of the A.P.A. did you base that conclusion  
12 on?

13 A. Well, there is a particular schedule attached to the  
14 agreement. It is referred to as Schedule 1.1-B and it is  
15 entitled excluded assets. It lists assets which are  
16 excluded from the transfer. Copyrights are expressly  
17 excluded from the transfer of the assets pursuant to that  
18 schedule.

19 Q. Did you learn on or about early March of 2003 about a  
20 lawsuit that SCO filed against International Business Machines or  
21 I.B.M.?

22 A. I did.

23 Q. How did you become aware of that?

24 A. I became aware of it through the press and on the web.  
25 It was a significant development in the industry, the fact

1 that SCO was choosing to sue I.B.M., and there was publicity  
2 about that.

3 Q. Was there significant publicity about it?

4 A. Yes, there was significant publicity about it. It was  
5 well reported and well known throughout the industry. There  
6 was a lot of commentary about it and a lot of attention paid  
7 to it.

8 Q. Did that lawsuit combined with the other information  
9 that you had about SCOsource at that point, did that give  
10 you any concern regarding Novell's business interests?

11 A. Yes, it did. It suggested to us in the strongest form  
12 possible that SCO was serious about promoting its campaign  
13 against Linux, and that this was the first official salvo  
14 that it was going to launch against the Linux community.

15 That really concerned us because of what I have said,  
16 our ongoing and continuing interest in the Linux business  
17 for ourselves. We were concerned about our own business  
18 prospects as a result of all of this.

19 Q. After the lawsuit against I.B.M., did you receive  
20 communication from someone representing I.B.M.?

21 A. Yes, I did.

22 Q. Can you explain that to the jury?

23 A. Yes. I don't recall the exact date, but it was within  
24 a matter of days after the lawsuit against I.B.M. was filed,  
25 that I received a call from a gentleman named Mr. David

1       Marriott that was outside counsel for I.B.M. He called me.

2             I remember I took the call at home on my cell phone at  
3       the end of the day. He called me and asked me if I was  
4       aware of the lawsuit. I told him that I was. And whether  
5       or not I was aware that Novell had certain rights under the  
6       asset purchase agreement that could be beneficial to I.B.M.?

7       I told him that, you know, we were really just beginning to  
8       get into our analysis of the asset purchase agreement, and  
9       that I would take a look at it carefully and make our own  
10      judgment about the effect of this language that he was  
11      referring me to, and make our own independent judgment about  
12      it.

13      Q. Did you make any promises to Mr. Marriott about what  
14      Novell may or may not do?

15      A. No, I did not.

16      Q. Did he make any demands of Novell in terms of what they  
17      should or should not do?

18      A. No, he did not.

19      Q. About how long did this conversation last?

20      A. No more than five minutes. It was less than five  
21      minutes to my recollection.

22      Q. All right. At some point did you yourself have a  
23      direct conversation with Mr. McBride on this issue of  
24      copyright ownership?

25      A. Yes. I was a participant in a telephone conversation

1 between Mr. Stone and Mr. McBride.

2 Q. Let's set the stage for the jurors.

3 Where were you and Mr. Stone?

4 A. I was in Mr. Stone's office.

5 Q. Do you recall approximately when this was?

6 A. My recollection is that it was in the mid May time  
7 frame.

8 Q. Do you recall who called whom?

9 A. My recollection is that Mr. Stone placed that call, but  
10 that he was returning a call from Mr. McBride to Mr. Stone.

11 Q. Were you able to hear that conversation?

12 A. Yes. I was on the speakerphone, and Mr. Stone told Mr.  
13 McBride that I was in the room.

14 Q. Do you recall the substance of the conversation?

15 A. I do.

16 Q. What was that?

17 A. Well, it was essentially Mr. McBride reiterating what  
18 had now been repeated requests to Novell to have an  
19 amendment to the asset purchase agreement so that SCO could  
20 get the copyrights.

21 Q. What was the response from either yourself or  
22 Mr. Stone?

23 A. It was Mr. Stone who responded, and he told Mr. McBride  
24 that Novell had no interest in transferring those copyrights  
25 to SCO, that by this time we had a firm view that those

1 copyrights were owned by Novell, and that we had no interest  
2 in participating in his SCOsource license campaign against  
3 Linux end users.

4 Q. At this point in time, the mid May time frame, had you  
5 or to your knowledge anyone else seen an executed copy of  
6 amendment number two to the asset purchase agreement?

7 A. No.

8 Q. Had you seen an unexecuted copy?

9 A. I may have seen an unexecuted copy of amendment number  
10 two by that time.

11 Q. Do you recall under what circumstances?

12 A. Yes. I think it was Mr. Jones who advised me around  
13 that time that we had located an unexecuted copy of a  
14 document that was entitled amendment number two, asset  
15 purchase agreement.

16 Q. What was your reaction to seeing the unexecuted  
17 amendment?

18 A. My reaction was first and principally that I thought  
19 this document had no legal effect because it was not  
20 executed. I read it. It was interesting what it said, but  
21 I concluded that it had no legal effect and pretty much  
22 dismissed it. I have been involved in enough transactions  
23 over the course of my career to know that drafts of  
24 documents are made with regularity, and more often than not  
25 they are not executed. I saw it as a document that had no

1 legal effect on the question at issue.

2 Q. Did you give any instructions to anyone in your legal  
3 team about making efforts to see if there was an executed  
4 version of it?

5 A. I did. I recall sometime around then asking Mr.  
6 Lundberg, who was a lawyer who worked for me at the time, to  
7 look, to conduct -- you know, I think I said to him words to  
8 the effect, Jim, turn the company upside down because if  
9 there is an executed copy of amendment number two in  
10 Novell's files, that is something that would be relevant and  
11 we would like to know about that.

12 Jim told me that he had done that and reported back  
13 sometime later that, you know, we have sent people off site  
14 and looked through various files within the law department  
15 and, you know, despite these efforts we could not find an  
16 executed copy of amendment number two in the company's  
17 files.

18 Q. Let me show you another document that was been admitted  
19 as H-14.

20 If you could take a look at that.

21 A. Okay.

22 Q. Do you recognize that document?

23 A. I do.

24 Q. What is it?

25 A. It is a letter dated May 12, 2003 to Mr. Messman, the

1 C.E.O. of Novell, from Mr. McBride. I came to understand  
2 that the exact version of this letter had also been sent to  
3 some 1,500 companies in the United States.

4 Q. In mid May, the same date?

5 A. I believe it was the same date.

6 Q. What was the reaction in the software community when  
7 this letter went to Mr. Messman as well as thousands of  
8 letters, to 1,500 other companies?

9 A. It was -- the attitude was game on here, I guess. Mr.  
10 McBride has decided to assert, we believe incorrectly,  
11 ownership of the UNIX copyrights against hundreds of  
12 companies including Novell, and is seeking to enforce what  
13 he believed to be were his company's rights with respect to  
14 the ownership of the UNIX copyrights against Linux end  
15 users.

16 So the reaction in our company was profound, and the  
17 reaction throughout the computing industry was like nothing  
18 I had seen in the time that I was at Novell working in the  
19 computing industry. There was a lot of commentary on it and  
20 a lot of information around the web with respect to what  
21 Mr. McBride was up to. It was quite concerning I would say  
22 to most companies and most people knowledgeable and involved  
23 in the industry.

24 Q. Did Novell make a decision sometime after May 12th and  
25 after Mr. Messman received this letter that it needed to

1 respond?

2 A. Yes, we did.

3 Q. Was that response to be public?

4 A. Well, after we received this letter, as you might  
5 imagine, I got together with my colleagues and we began  
6 thinking about what an appropriate response would be, and  
7 whether the response should be private or public. We  
8 concluded after some thought and deliberation that we  
9 finally had to make the public aware of our position on this  
10 very important issue, because Mr. McBride's campaign against  
11 Linux was in full swing about this point.

12 To my knowledge Novell had made no public comment at  
13 all at this point in time. That is my recollection. We  
14 thought, given the full force of the campaign that had been  
15 launched, and now that this May 12th letter, which made some  
16 demands on Linux end users and some allegations that we  
17 thought were unfounded and inappropriate to make, we felt it  
18 was important to respond specifically and substantively to  
19 Mr. McBride's letter and to make that document public as  
20 well.

21 Q. What form was the response to take?

22 A. In the form of a letter to Mr. McBride and in the form  
23 of a press release publishing in effect the letter to the  
24 public.

25 Q. Who was tasked with overseeing the preparation of both

1 the letter back to Mr. McBride and the press release?

2 A. I was.

3 Q. Did you do that?

4 A. I did.

5 Q. Was there a date selected that this letter was to go  
6 back to Mr. McBride and the press release was to be  
7 released?

8 A. No.

9 Q. Did you subsequently select a date?

10 A. I didn't select a date, per se, but the letter went out  
11 on May the 28th.

12 Q. Why was it that the letter went out on May the 28th?

13 A. Because that is when it was ready to go and all were  
14 comfortable with the letter itself and the position that we  
15 had taken, and it was ready to go on that day.

16 Q. Was the letter sent on May 28th in order to somehow  
17 impact an earnings announcement that SCO had on that same  
18 day?

19 A. No.

20 Q. Are you certain of that?

21 A. Yes, I am.

22 Q. Did you even know that SCO had an earning announcement  
23 on May the 28th before the letter went out and the press  
24 release went out?

25 A. I did not.

1 Q. What was the reason for putting out the letter and  
2 responding to Mr. McBride? Was it done in order to somehow  
3 injure SCO or Mr. McBride, or was it done to protect  
4 Novell's interests?

5 A. It was totally motivated to protect Novell's interests.  
6 I have explained to you a little bit about our initiative  
7 into this business, this Linux business. As you can  
8 imagine, for a company that was preparing to devote a lot of  
9 resources and spend a lot of money getting into the  
10 business, this campaign of SCO's and Mr. McBride's really  
11 had the potential to disrupt all of that.

12 With due respect, I had no opinion and I had really no  
13 care, per se, with respect to Mr. McBride or Mr. McBride's  
14 business. I was concerned about Novell's business and  
15 Novell's business interests.

16 Q. Let me show you what we have marked as K-15 and J-15.

17 THE COURT: Mr. Acker, you realize that none of  
18 these exhibits have been admitted?

19 MR. ACKER: I realize that, Your Honor. Many of  
20 these have already been admitted through other witnesses,  
21 Your Honor.

22 BY MR. ACKER

23 Q. Do you recognize those two documents, sir?

24 A. Yes, I do.

25 Q. Can you tell the ladies and gentlemen of the jury what

1 each is?

2 A. Document J-15 is the letter that we have just been  
3 talking about, Mr. Messman's response to Mr. McBride's May  
4 12th letter. As you can see, it is dated May 28th.

5 Document K-15 is the press release that Novell issued  
6 that day announcing that we had sent this letter to Mr.  
7 McBride and quoting relevant portions of the letter, and  
8 then attaching the letter itself to the press release.

9 MR. ACKER: I would move for the admission of J-15  
10 and K-15.

11 MR. SINGER: These are already in evidence as SCO  
12 exhibits, but we have no objection.

13 THE COURT: This is a problem, Mr. Acker.

14 MR. ACKER: I will make this promise to the Court,  
15 that what goes to the jury is only one copy of these, but  
16 the witness is testifying as to these, so if we can show  
17 these to the jury while he is testifying.

18 THE COURT: J-15 and K-15 will be admitted.

19 Counsel, I do request, respectfully, that you both  
20 make certain that we do not send duplications of the  
21 documents to the jury.

22 MR. ACKER: I understand. Thank you.

23 (Defendant's Exhibits J-15 and K-15  
24 were received into evidence.)

25 BY MR. ACKER

1 Q. Let's take a look at first starting with the press  
2 release which is K-15.

3 MR. ACKER: If we could highlight that, Mr. Lee,  
4 the whole press release.

5 BY MR. ACKER

6 Q. Now, in the first paragraph of that press release,  
7 Mr. LaSala, Novell wrote defending its interests in  
8 developing service to operate on the Linux platform, Novell  
9 today issued a dual challenge to the SCO Group over its  
10 recent statements regarding its UNIX ownership and potential  
11 intellectual property right claims over Linux.

12 Do you see that?

13 A. I do.

14 Q. Was that statement true when you made it on May 28th,  
15 that you were putting out this press release in order to  
16 defend Novell's interests?

17 A. Absolutely.

18 Q. Do you believe that statement still to be true to this  
19 day?

20 A. Yes, I do.

21 Q. Is there anything that has happened in the almost seven  
22 years since this press release came out that would make you  
23 think that anything different, other than this press release  
24 put out, in order to defend Novell's interest?

25 A. No, nothing has subsequently happened that has changed

1 my view on that.

2 Q. Then in this next paragraph down, and we can highlight  
3 that, first, Novell challenged SCO's assertion that it owns  
4 the copyrights and patents to the UNIX System V, pointing  
5 out that the asset purchase agreement entered into between  
6 Novell and SCO in 1995 did not transfer those rights to SCO.

7 Did you believe that to be the case when this went out  
8 on May the 28th?

9 A. Yes, I did.

10 Q. Do you still believe that to be the case today?

11 A. Yes, I do.

12 Q. Then you also indicate, second, Novell sought from SCO  
13 facts to back up its assertion that certain UNIX System V  
14 code has been copied into Linux. Novell communicated these  
15 concerns to SCO via letter, text below, from Novell,  
16 chairman and C.E.O., Jack Messman, in response to SCO making  
17 these claims.

18 Do you see that?

19 A. Yes, I do.

20 Q. Why was it that Novell was putting SCO to its proof,  
21 that is, asking them what in fact was their claim with  
22 respect to UNIX and Linux and why were you doing that?

23 MR. SINGER: I object, Your Honor. This was  
24 previously objected to on a privilege.

25 THE COURT: Mr. Acker, I'm going to have to rely

1 on the representation.

2 MR. ACKER: I will move on.

3 MR. SINGER: I can show you the precise cite.

4 BY MR. ACKER

5 Q. Let me ask you this question. Was your request of SCO  
6 that it actually put forth proof to support its claim, was  
7 that done in an attempt to somehow harm SCO?

8 A. Not at all, no.

9 Q. Then you attached to this press release the actual  
10 letter that Mr. Messman sent back to Mr. McBride on the same  
11 day which has been admitted into evidence, correct?

12 A. Yes.

13 Q. Did anyone at I.B.M. tell you, or to your knowledge  
14 anyone else at Novell, that it should put out this press  
15 release on May the 28th?

16 A. No.

17 Q. To your knowledge did I.B.M. exert any influence that  
18 resulted in the press release on May 28, 2003?

19 A. No, none whatsoever.

20 Q. Did you put out this press release on May the 28th in  
21 order to protect Novell's interests or some other company's  
22 interests?

23 A. Totally to protect Novell's business interests.

24 Q. Would you believe that you would have been doing your  
25 job as general counsel of the company if you had not

1 responded to Mr. McBride's activities up to the middle of  
2 May of --

3 A. No. I felt it was imperative upon us to respond in a  
4 formal and public and forceful way to Mr. McBride's May 12th  
5 letter.

6 Q. At some point after the press release went out on May  
7 the 28th, did you become aware that there was in fact an  
8 executed copy of amendment number two to the asset purchase  
9 agreement?

10 A. I did.

11 Q. How did that happen?

12 A. My recollection is that on the evening of June the 5th  
13 that Mr. Messman advised me that he had had a conversation  
14 with Mr. McBride, and that Mr. McBride told him that SCO had  
15 identified a copy of an executed version of amendment number  
16 two, and that he, Mr. McBride, would be faxing that to us.  
17 That is how I found out about it.

18 Q. When did you actually see the document? Was it that  
19 night or the next day?

20 A. It would have been the evening of June the 5th. I  
21 can't remember the exact time.

22 Q. Then did you subsequently receive that morning of June  
23 6th, receive a letter from Mr. McBride?

24 A. We did.

25 Q. Let me show you what we have marked as Z-15.

1900

1 Do you recognize that?

2 A. I do.

3 Q. What is that?

4 A. This is a letter from Mr. McBride to Mr. Messman dated  
5 June the 6th, 2003, that Mr. Messman received, my  
6 recollection is, the morning of June the 6th.

7 MR. ACKER: I move for the admission of Z-15, Your  
8 Honor.

9 MR. SINGER: Again, this is already in evidence,  
10 but we have no objection.

11 THE COURT: Z-15 will be admitted.

12 (Defendant's Exhibit Z-15 was  
13 received into evidence.)

14 BY MR. ACKER

15 Q. In this letter did Mr. McBride make demands of Mr.  
16 Messman and Novell?

17 A. Yes, he made numerous demands, outlined principally in  
18 the second half of the letter.

19 Q. If we could scroll down, you are referring to the  
20 numbered bullet points?

21 A. The paragraph that is prior to the numbered bullet  
22 points, as well as to the numbered bullet points.

23 Q. Let me read it first and then you can explain what  
24 impact this had on the company.

25 A. Sure.

1901

1 Q. SCO will hold a press call today at 11:00 a.m. Eastern  
2 Standard Time to clear up the matter so that our  
3 shareholders and customers are fully aware of SCO's rights  
4 with respect to the UNIX copyrights. You have time before  
5 that call to take the following corrective action in order  
6 to possibly mitigate any liability on the part of you, Jack  
7 Messman and Novell to SCO, and to your own shareholders for  
8 your false and groundless accusations.

9 What was your reaction and what were the allegations  
10 that Mr. McBride was making toward Novell in his letter on  
11 the morning of June the 6th?

12 A. In the previous portion of the letter Mr. McBride  
13 alleges that our release of the press release on May 28th  
14 violated the United States securities laws. As you can  
15 imagine, as the general counsel of the company that type of  
16 allegation made against the company that I was the general  
17 counsel of was taken quite seriously, because those laws are  
18 laws that lawyers and companies spend a lot of time making  
19 sure that we comply with.

20 The assertion by Mr. McBride that our company and our  
21 C.E.O. were violating U.S. securities laws I thought was  
22 outrageous and unsupported by the facts and circumstances.

23 Q. What if any impact did the fact have that Mr. McBride  
24 was going to hold a press conference at 11:00 that day have?

25 A. I felt somewhat -- I guess I would say our company felt

1 pressed by Mr. McBride. He made these demands that are  
2 outlined in the lower half of this letter essentially saying  
3 that unless you comply with the demands that I am making of  
4 you, and the implication to me, the strong implication was  
5 that he would be making references to these allegations  
6 about violations of U.S. securities law in his call at  
7 11:00. That is how I read this.

8 Q. Did you decide that you needed to respond?

9 A. Yes. I decided that I needed to respond very quickly.

10 Q. What was the nature of your response that you thought  
11 was appropriate?

12 A. I wrote a letter back to Mr. McBride as quickly as I  
13 could. The letter addressed two subjects. One was these  
14 allegations that he had made against our company regarding  
15 securities laws violations. The other related to a  
16 commentary on the fact that an executed copy of amendment  
17 number two had been found.

18 Q. Let me show you what we have marked as Exhibit Y-15.

19 MR. ACKER: This has been admitted, Your Honor, as  
20 SCO Exhibit Number 97.

21 BY MR. ACKER

22 Q. Take a look at the letter, Mr. LaSala.

23 First let's take a look at your letter on June 6, 2003.  
24 You wrote I have received your letter to Jack Messman with  
25 respect to Novell's May 28th press release. For your

1 information, Novell today has issued a press release with  
2 respect to amendment number two. A copy is attached for  
3 your ease of reference.

4 Your letter contains absurd and unfounded accusations  
5 against Novell and others, coupled with a veiled threat to  
6 publicly state those allegations in a SCO press release call  
7 to be held at 11:00 a.m. Eastern Standard Time.

8 What allegations, absurd and unfounded accusations were  
9 you referring to in your letter back to Mr. McBride?

10 A. That paragraph --

11 THE COURT: Just a moment.

12 MR. SINGER: Excuse me. This was also a subject  
13 that was objected to as privileged in his deposition, page  
14 40, line 22.

15 MR. ACKER: This letter was the subject of pages  
16 of deposition testimony. He was asked directly about all of  
17 this in his deposition and gave the answers that he is about  
18 to give, Your Honor.

19 THE COURT: Mr. Acker, take a look at what  
20 Mr. Singer has.

21 MR. ACKER: Page and line, please.

22 MR. SINGER: Page 40, line 1, May of 2007, through  
23 page 41, line 3.

24 MR. ACKER: I'm sorry?

25 MR. SINGER: Page 40, line 1, through page 41,

1 line 3.

2 MR. ACKER: This has nothing to do with this part  
3 of the letter.

4 MR. SINGER: It is the June 6 press release.

5 THE COURT: He is asking about the letter.

6 MR. SINGER: If you're drawing a distinction  
7 between the letter and the attached press release, and I  
8 think the objection was to the press release --

9 MR. ACKER: Well, as to the press release, I know  
10 that there were pages of testimony about the press release,  
11 Your Honor. If you're going to make an objection regarding  
12 the press release, we'll have to have a discussion about --

13 THE COURT: Go ahead. You asked him a question  
14 about the letter. Go ahead and ask the question.

15 Do you want the question reasked, Mr. LaSala?

16 BY MR. ACKER

17 Q. When you were talking in your letter about the absurd  
18 and unfounded accusations, what were you referring to, Mr.  
19 LaSala?

20 A. This was a reference to Mr. McBride's allegations that  
21 Mr. Messman, the C.E.O. of Novell, and Novell itself had  
22 violated U.S. securities laws.

23 Q. If we could turn to the next page, you also put out a  
24 press release on that day?

25 A. Yes, we did.

1 Q. Is that what we're looking at now?

2 A. Yes.

3 Q. In that press release Novell stated in a May 28th  
4 letter to SCO, Novell challenged SCO's claims to UNIX patent  
5 and copyright ownership, and demanded that SCO substantiate  
6 its allegations that Linux infringes SCO's intellectual  
7 property rights. Amendment number two to the 1995  
8 SCO-Novell asset purchase agreement was sent to Novell last  
9 night by SCO.

10 That was true, correct?

11 A. Yes.

12 Q. That was the first time to your knowledge anyone at  
13 Novell had seen an executed copy of amendment two?

14 A. Yes.

15 Q. To Novell's knowledge this amendment is not present in  
16 Novell's files.

17 Do you see that?

18 A. I do.

19 Q. When this press release went out on June 6, 2003, did  
20 you also believe that statement to be true?

21 A. Yes, I did.

22 Q. Did you later find out that, in fact, there was a copy,  
23 an executed copy of amendment number two at Novell?

24 A. I later found out that there was an executed copy of  
25 amendment number two at Novell.

1 Q. Was that located before or after this press release  
2 went out?

3 A. To the best of my knowledge after this press release  
4 went out.

5 Q. So despite your instructions to your legal team to go  
6 and find it, they were not able to locate it before June 6,  
7 2003?

8 A. That is correct.

9 Q. Then you wrote and the press release states the  
10 amendment appears to support SCO's claims that ownership of  
11 certain copyrights for UNIX did transfer to SCO in 1996.

12 Correct?

13 A. Yes. That is what the press release says.

14 Q. What did you mean by that statement?

15 A. Well, I meant that on first blush, the first reading of  
16 the amendment, a hurried reading of the amendment that the  
17 amendment appeared to support claims of transfer of  
18 ownership of copyrights.

19 Q. Upon further reflection what was your conclusion about  
20 whether it did or did not?

21 A. My conclusion was that it did not.

22 Q. Why did Novell put this out to the public? Why did  
23 Novell do this?

24 A. Again, I think there were two motivations for Novell  
25 putting this out to the public that morning. The first we

1907

1 have talked about, those allegations that Mr. McBride had  
2 leveled against us, and we felt it important to respond to  
3 him and we did that, so that he would refrain from saying  
4 that our company had violated the securities laws on his  
5 11:00 call that morning.

6 Perhaps more importantly with respect to the ownership  
7 issue of the copyrights, we were getting -- we, the company,  
8 and colleagues of mine in the company were getting calls  
9 from the press that morning, asking us for comments on the  
10 fact that SCO had found and identified amendment number two,  
11 and that SCO was taking the position that amendment number  
12 two cleared up the question of ownership of copyrights.

13 Apparently someone had leaked that to the press, and we  
14 were getting numerous calls that morning, and we felt  
15 compelled to be responsive to those, again, particularly in  
16 light of the fact that Mr. McBride had scheduled an 11:00  
17 call that morning. So we wanted to get something out and we  
18 needed to do it quickly.

19 Q. What was the plan in place going forward after the June  
20 6th, 2003 press release to determine the impact, if any, of  
21 amendment number two on the asset purchase agreement?

22 A. Well, my colleagues and I set about to best understand  
23 as we could amendment number two in the context of the  
24 entirety of the asset purchase agreement. We spent, as you  
25 might imagine, a considerable amount of time working on

1 that.

2 Q. Let me show you what has been marked as F-16. Let me  
3 show you F-16, and this has been admitted as SCO exhibit, I  
4 believe, 672.

5 Do you recognize that letter?

6 A. Yes, I do.

7 Q. Can you tell the ladies and gentlemen of the jury what  
8 it is?

9 A. Well, this is a letter from me to Mr. McBride dated  
10 June 9th 2003. In it I advise Mr. McBride of what Novell's  
11 rights are under Section 4.16-B of the asset purchase  
12 agreement. It was written in furtherance of the letter that  
13 we had sent to Mr. McBride on May the 28th. In this letter  
14 we tell Mr. McBride that we will be, again, pursuant to our  
15 rights under the asset purchase agreement, that we will be  
16 directing SCO to waive any right that it may claim to  
17 terminate an I.B.M. SVRX license.

18 Q. Prior to putting out this letter asking SCO to waive  
19 its claims with respect to SVRX licenses, I.B.M.'s SVRX  
20 license, had you had any other conversations with anyone  
21 from I.B.M.?

22 A. Yes.

23 To be clear, this letter merely tells SCO that it  
24 should waive its claims to terminate I.B.M.'s SVRX licenses.  
25 Yes, I did have a conversation with someone at I.B.M. prior

1 to this letter going out.

2 Q. Do you remember approximately when that was?

3 A. It would have been between -- I think it was in early  
4 June, between the time of the May 28th letter and the time  
5 of this letter.

6 Q. Who participated in the call?

7 A. The participants in the call were myself, Mr. Rosenberg  
8 from I.B.M., I believe at the he time was the general  
9 counsel of I.B.M., and Mr. Marriott, who was I.B.M.'s  
10 outside counsel, and Mr. Michael Jacobs from Morrison &  
11 Forester representing Novell, so the four of us participated  
12 in the call.

13 Q. What was the substance of the call?

14 A. The substance of the call, again, was Mr. Marriott  
15 explaining to us his view of how the asset purchase  
16 agreement worked, and asking that we consider waiving all  
17 claims that SCO had made or might make against I.B.M. with  
18 respect to I.B.M.'s SVRX license.

19 Q. How did you and your counsel respond?

20 A. Mr. Jacobs responded on my behalf and he said to the  
21 I.B.M. lawyers that, you know, we are in the process of  
22 reviewing these documents. We have taken a careful look at  
23 them. While the request was made that Novell waive all  
24 claims that SCO might make, that we would look at each on a  
25 case by case basis and make our own determination and act

1 accordingly. If we felt that the interpretation that I.B.M.  
2 was suggesting was the correct one, that then we would act  
3 in that way, and if we felt it was not correct, then we  
4 wouldn't.

5 Q. Was that analysis done?

6 A. That analysis was done.

7 Q. Did that result in this letter on June 9th?

8 A. It did.

9 Q. Can you explain to the ladies and gentlemen of the  
10 jury, because it has been a little confusing, exactly what  
11 it is that you're asking or directing that SCO do in this  
12 letter and what provisions of the A.P.A. you believe gave  
13 you, that is Novell, the right to do so?

14 A. We are relying on an important provision of the asset  
15 purchase agreement that reserved to Novell certain rights  
16 with respect to existing SVRX licenses. Novell had a  
17 continuing economic interest in those licenses. We had been  
18 told and had learned that SCO had put I.B.M. on notice that  
19 it, SCO, was going to terminate that license because of the  
20 assertion that it, SCO, was the owner of the copyrights.

21 Now, Novell had realized substantial economic benefit  
22 from this license that we had entered into with I.B.M. in  
23 the mid nineties, is my recollection, and we had been paid  
24 about \$10 million by I.B.M. for a fully paid up irrevocable  
25 perpetual license, and --

1911

1 Q. Let me stop you there. When you use those words, fully  
2 paid up irrevocable license, what does that mean to you?

3 A. It means they got a license to SVRX code forever, and  
4 that they would owe us no further money, that it was paid  
5 up, fully paid up at that time, and that the license could  
6 not be revoked by Novell.

7 Q. What was your understanding of what SCO was attempting  
8 to do in this time frame?

9 A. SCO, my understanding is, put I.B.M. on notice that it,  
10 SCO, was telling I.B.M. that it planned to terminate that  
11 license, and to do so by a date certain, which I believe was  
12 June the 13th of 2003.

13 Q. What if any impact did you believe that that step, the  
14 termination of the I.B.M. license, would have on Novell's  
15 business interests?

16 A. Well, that act by SCO could have significant negative  
17 implications for Novell. As I said, I.B.M. had paid Novell  
18 about \$10 million. If I.B.M. was going to have its license  
19 revoked by SCO, then it was conceivable that I.B.M. might  
20 seek to recoup its payment to us, the \$10 million that it  
21 had paid us for its irrevocable license. That was a concern  
22 to us.

23 Q. Why is it that you made the decision to direct SCO to  
24 waive and not terminate the I.B.M. license?

25 A. Well, we have that right under 4.16-B of the asset

1 purchase agreement, that is the rights related to existing  
2 SVRX licenses at the time of that agreement, and we  
3 controlled and retained the right to direct SCO to waive any  
4 claim that it might make against any of those licensees. I  
5 trust you can understand why we would do that, because we  
6 had an economic interest in those licenses, and if SCO was  
7 going to seek an amendment or a waiver or a revocation of  
8 licenses, it was in our interest to be sure that they  
9 couldn't do that and that they didn't do that.

10 This was something upon my reading of the contract that  
11 strongly indicated that the parties had thought that through  
12 and had arranged the contract that way for that purpose.

13 Q. Was this done, this asking of SCO to waive its claim  
14 against I.B.M. or to not terminate its license, was that  
15 done in order to harm SCO or just to protect Novell's  
16 business interests?

17 A. No. Again, we had no interest in harming SCO. We were  
18 looking out for Novell's business interests. In this case  
19 there was at least \$10 million at stake, and I could imagine  
20 a claim coming to Novell seeking not only \$10 million, but  
21 \$10 million plus, you know, ten year's of interest. This  
22 was a concern.

23 Q. Let me show you another letter that you wrote on June  
24 26, 2003.

25 A. June 24th?

1 Q. I'm sorry. June 24th, yes.

2 THE COURT: What is this marked as?

3 MR. ACKER: S-16.

4 THE COURT: Has a version of this already been  
5 admitted?

6 MR. ACKER: I don't believe so, Your Honor.

7 MR. SINGER: We are not certain that this has  
8 previously been admitted. We do not have an objection.

9 MR. ACKER: I move the admission of S-16. Your  
10 Honor.

11 THE COURT: S-16 will be admitted.

12 (Defendant's Exhibit S-16 was.

13 received into evidence.)

14 BY MR. ACKER

15 Q. On June 24th you wrote another letter to Mr. McBride,  
16 correct, Mr. LaSala?

17 A. I did.

18 Q. Can you sum up for the ladies and gentlemen of the jury  
19 what you're asking from SCO in this letter written on June  
20 24, 2003?

21 A. Well, essentially we're asking SCO for copies of the  
22 SVRX licenses that it announced to the public that it had  
23 entered into with third parties.

24 Q. If we could go down to the paragraph that begins with  
25 amendment number two --

1 A. Yes.

2 Q. You wrote, amendment number two to the asset purchase  
3 agreement reinforces the restrictions on SCO providing that  
4 Novell, as well as SCO, has the right to approve any  
5 transaction with an SVRX licensee which concerns a buy out  
6 of any such licensee's royalty obligation.

7 Do you see that?

8 A. I do.

9 Q. What is it that you're asking for from SCO? In this  
10 letter, simply put, what were you asking him?

11 A. Copies of recent licenses that they had entered into  
12 with Microsoft and another at that point unnamed party,  
13 because we felt that we had an economic interest in those  
14 licenses.

15 Q. Why did you think you had an economic interest?

16 MR. SINGER: I object, Your Honor. I don't think  
17 these are issues that are before us in this case.

18 THE COURT: I'll overrule the objection.

19 BY MR. ACKER

20 Q. Why did you make this simple request of SCO?

21 A. Because consistent with our rights in this Section  
22 4.16-B that we have been talking about, SCO did not have the  
23 right to enter into new SVRX licenses, except in some  
24 limited circumstances. We learned from their securities  
25 filings that they had in fact entered into new SVRX

1 licenses. We thought that to the extent that they had done  
2 so, that we might have an economic interest in whatever  
3 license arrangement they had made.

4 Q. How would that economic interest -- where would that  
5 come from?

6 A. It would come from royalties that these parties would  
7 pay under the license to SCO, and arguably we thought  
8 rightfully would belong to us.

9 Q. Why is it that Novell would be entitled to royalties  
10 that had been paid to SCO?

11 A. Because SCO didn't have the authority to enter into  
12 these new SVRX license, and to the extent that they had done  
13 so our view was that, you know, those proceeds from those  
14 SVRX licenses belong to us because of our ownership position  
15 with respect to the copyrights.

16 Q. Was that part of the --

17 MR. SINGER: Your Honor, may we approach?

18 THE COURT: Yes.

19 (WHEREUPON, a bench conference was begun.)

20 MR. SINGER: Your Honor, we filed a motion in  
21 limine that dealt with the fact that the determination of  
22 these licenses and the 2.5 million to Novell -- in other  
23 words, all events relating to the 2008 trial shouldn't come  
24 in here and that motion in limine was granted, if I recall.  
25 That is exactly the line of questioning that Mr. Acker is

1 getting into, the interpretation and whether the Microsoft  
2 and Sun agreement or SVRX licenses and royalties. This  
3 doesn't bear on copyright and ownership issues. It goes  
4 right into the areas which this Court --

5 MR. ACKER: There is a claim for specific  
6 performance and we have a defense to that claim for specific  
7 performance and material breach of the A.P.A. Those are  
8 Court issues that the Court is to decide. We attempted to  
9 not have those come in front of the jury and be issues and  
10 SCO didn't want to. They wanted all this to come in before  
11 the jury. That is why Mr. LaSala is here and this is the  
12 testimony that we're providing.

13 THE COURT: Does this go to the issue of unclean  
14 hands?

15 MR. ACKER: And it goes to the issue of a material  
16 breach and preventing them from moving forward on this  
17 specific -- both issues.

18 MR. SINGER: We had also filed, and I believe the  
19 Court ruled in our favor, that there was nothing here -- a  
20 breach by virtue of this provision that would affect our  
21 rights with regard to copyright ownership, and there were  
22 motions in limine that were argued and the Court ruled on  
23 this subject, and the mere fact that he is asserting that  
24 this relates specifically to performance does not create a  
25 predicate for getting in or bringing in that part of the

1917

1 case that was already decided and adjudicated now into this  
2 proceeding.

3 They argued that we couldn't raise issues here  
4 that we had breached, and the Court said, no, it did not  
5 find that our failure to pay over those royalties  
6 constituted a basis to relieve them from their obligations  
7 that are at issue in this case, and --

8 MR. ACKER: If we can have a stipulation that Mr.  
9 LaSala's testimony and the other witness's testimony on this  
10 issue from the bench trial would be admissible here for the  
11 issues that the Court is to decide, I'll move on to another  
12 issue.

13 THE COURT: Say that again.

14 MR. ACKER: If we can have a stipulation that the  
15 testimony from the bench trial from Mr. LaSala and other  
16 witnesses on these issues, that is like Sun and Microsoft,  
17 the licenses, and the failure of SCO to provide those  
18 licenses to Novell when requested in 2003, then if they'll  
19 agree that the Court can consider that and decide those  
20 issues, then I don't need to go into it with Mr. LaSala.

21 MR. SINGER: We'll agree that you may consider it  
22 in that fashion on those issues.

23 THE COURT: By way of reference to those parts of  
24 the transcript in your proposed findings of fact and  
25 conclusions of law?

1 MR. SINGER: Yes.

2 MR. ACKER: Yes.

3 THE COURT: That is what we'll do.

4 MR. SINGER: So no further discussion of these  
5 subjects with Mr. LaSala or other witnesses?

6 MR. ACKER: Not in front of the jury.

7 MR. SINGER: Okay.

8 (WHEREUPON, the bench conference was concluded.)

9 BY MR. ACKER

10 Q. Let me show you another letter, sir, T-16, which has  
11 been admitted as SCO 678.

12 Do you recognize that letter?

13 A. I do.

14 Q. If we could highlight the first paragraph.

15 On June 26th you wrote to Mr. McBride, Mr. LaSala, and  
16 you write to address SCO's recent statements to the press  
17 and securities filing in your amended complaint in the  
18 I.B.M. case and other materials, that SCO owns all of the  
19 intellectual property rights associated with UNIX and  
20 UnixWare. For example, your June 6th press release states  
21 that SCO owns all rights to the UNIX and UnixWare  
22 technology, and the description of your SCOSource program on  
23 your web site states that SCO owns the patents and  
24 copyrights and core technology associated with the UNIX  
25 system.

1           Go to the next paragraph. Then you write very clearly,  
2           SCO's statements are simply wrong.

3           Do you see that?

4           A. Yes.

5           Q. Now, why is it on June 26, 2003 that in this letter to  
6           Mr. McBride that you're referencing the public statements  
7           since June 6th, and you're telling him his statements are  
8           wrong.

9           Why do you do that?

10          A. Well, it had become a bit of a practice of ours to try  
11          to rebut at every opportunity that we could every  
12          misstatement that Mr. McBride made, public misstatements  
13          that Mr. McBride made about the ownership issue. I must  
14          tell you that it was a challenge to keep up. I'm sure that  
15          we missed some occasions, but in this instance we were  
16          writing in furtherance of the June 6th letter, and we were  
17          doing so in response to continued public statements being  
18          made by SCO that it was the rightful owner of the  
19          copyrights. I would remind you that we were doing this in a  
20          private way. We were sending private letters back to him  
21          and he was making public statements.

22          Q. Why did you feel it was necessary to tell Mr. McBride  
23          privately that his statements about ownership were wrong?

24          A. Well, we wanted it to be clear to Mr. McBride that he  
25          should not be relying on anything that we had previously

1 said with respect to the ownership of the copyrights in a  
2 way that would permit him to make -- continue to make  
3 assertions that SCO was the owner of the copyrights. That  
4 is what this letter did.

5 It was, again, to put Mr. McBride on notice that we  
6 believed strongly that we were the rightful owners and that  
7 they were not, and that to the extent that they may have  
8 been relying on something that we had previously said on  
9 June the 6th, that they should not so rely on that. To be  
10 clear, we believed that their statements were wrong.

11 Q. In telling Mr. McBride on June 26th in a private letter  
12 that you thought that he was wrong about ownership, were you  
13 intending somehow to harm SCO?

14 A. No. Again, we had no interest in harming SCO. Our  
15 desire was to look out for Novell's business interests, and  
16 this certainly -- this correspondence was certainly in  
17 furtherance of that.

18 Q. I'm going to show you what we have marked as D-18.

19 MR. ACKER: This has been admitted as SCO Exhibit  
20 105, Your Honor.

21 BY MR. ACKER

22 Q. Do you recognize that letter, sir?

23 A. Yes, I do.

24 Q. Is this a letter that you wrote to Mr. McBride on  
25 August 4, 2003?

1 A. Yes, it is.

2 Q. Let's take a look at the first paragraph. This letter  
3 is in furtherance of my letter of June 26th, 2003 concerning  
4 ownership of the copyrights in UNIX. It follows your recent  
5 announcement that SCO has registered its claim to copyrights  
6 in UNIX System V with the U.S. Copyright Office.

7 Was that something that Novell became aware of in early  
8 August of 2003?

9 A. Yes, it was.

10 Q. Then you wrote in the second paragraph, we dispute  
11 SCO's claim to ownership of the copyrights. The asset  
12 purchase agreement in Schedule 1.1-B contains a general  
13 exclusion of copyrights from the assets transferred to Santa  
14 Cruz Operation. Amendment number two provides an exception  
15 to that exclusion, but only for copyrights required for  
16 Santa Cruz Operation to exercise its rights with respect to  
17 the acquisition of UNIX and UnixWare technology.

18 Then you continue in the third paragraph, in other  
19 words, under the asset purchase agreement and amendment  
20 number two, copyrights were not transferred to Santa Cruz  
21 Operation unless SCO could demonstrate that such a right was  
22 required for Santa Cruz Operation to exercise the right  
23 granted to it in the A.P.A. Santa Cruz Operation has never  
24 made such a demonstration, and we certainly see no reason  
25 why Santa Cruz Operation would need ownership copyrights in

1 UNIX System V in order to exercise the limited rights  
2 granted SCO under the A.P.A., nor is there any reason to  
3 think that a transfer of the copyrights required for SCO to  
4 exercise its A.P.A. rights necessarily entails the transfer  
5 of the entire set of exclusive rights associated with  
6 particular copyrighted computer programs.

7 Then in the final paragraph to Mr. McBride you wrote  
8 unless and until SCO is able to establish that some  
9 particular copyright right is required for SCO to exercise  
10 its rights under the A.P.A., SCO's claim to ownership of any  
11 copyrights in UNIX technologies must be rejected, and  
12 ownership of such rights instead remains with Novell.

13 Do you see that?

14 A. Yes, I do.

15 Q. Was that your belief of how, if at all, amendment  
16 number two impacted the A.P.A. in August of 2003?

17 A. Yes, it is.

18 Q. Is that still your belief today?

19 A. Yes, it is.

20 Q. Did you convey that belief in no uncertain terms to Mr.  
21 McBride on August 4th, 2003?

22 A. Yes, we did. With this letter we think we accomplished  
23 that.

24 Q. Did you do that publicly or privately?

25 A. This again was a private letter.

1 Q. Why did you take that step? Why did you write Mr.  
2 McBride this letter on August 4, 2003 and tell him what  
3 Novell's position was under the asset purchase agreement as  
4 amended by amendment number two?

5 A. Because SCO had taken yet additional steps in a very  
6 public fashion to assert its ownership of the copyrights,  
7 and it did so by seeking to register its copyrights at the  
8 U.S. Copyright Office. That is public.

9 As I mentioned in one of my previous answers, we  
10 thought it is important to continue to put SCO on notice  
11 that we disagreed with the public positions they were  
12 taking. We did so repeatedly throughout the course of the  
13 summer. This was the latest example of that effort on our  
14 part.

15 Q. Did Novell itself take steps to register the UNIX  
16 copyrights at some point?

17 A. Yes, we did.

18 Q. Explain that.

19 A. At some time later, and I believe it was in September,  
20 but I may not have the time frame exactly right, Novell  
21 chose to register the copyrights to SVRX and to UNIX at the  
22 copyright office itself. We, in fact, completed that  
23 registration.

24 Q. And with those steps and in writing Mr. McBride and  
25 telling him Novell's position regarding the asset purchase

1 agreement and registering the copyrights, was that done in  
2 an attempt to harm SCO or was that done to protect Novell's  
3 business interests?

4 A. No. It was not done at all to harm SCO. Again, it was  
5 done in furtherance of these business interests of Novell  
6 that we have been talking about.

7 Q. Let me show you another letter F-21. It has been  
8 admitted as SCO's Exhibit 243.

9 Do you recognize that letter?

10 A. Yes, I do.

11 Q. There is no date on the first page, but if we go to the  
12 second page you can bring up the date.

13 A. Yes.

14 Q. This is a letter that you wrote to Mr. Tibbitts on  
15 October 7th, 2003, right?

16 A. Yes.

17 Q. Why are you writing this letter, F-21, or SCO Exhibit  
18 243 to Mr. Tibbitts in early October of 2003?

19 A. Because it had come to our attention that SCO was  
20 taking the position that code development by I.B.M. or  
21 licensed by I.B.M. from a third party, which I.B.M. then  
22 incorporated into its version of Linux, could be subject and  
23 would be subject to a license effort by SCO against I.B.M.  
24 for that code that I.B.M. had developed on its own.

25 Q. Boiling it down, what are you saying?

1 A. We are essentially saying to Mr. Tibbitts in this  
2 letter that the I.B.M. code that it had developed and  
3 contributed to its variant of UNIX was not subject to claims  
4 of ownership by SCO, and we take him through in some detail  
5 our rationale for that.

6 Q. Then if you take a look at the final paragraph of the  
7 letter you write, accordingly, pursuant to Section 4.16 of  
8 the asset purchase agreement, Novell hereby directs SCO to  
9 waive any purported right SCO may claim to require I.B.M. to  
10 treat I.B.M. code itself as subject to the confidentiality  
11 obligations or use restrictions of the agreement.

12 A. Yes.

13 Q. Do you see that?

14 A. Yes.

15 Q. Why were you doing this?

16 A. Well --

17 Q. What was in Novell's business interest to do this?

18 A. Again, if SCO had the ability to allege a breach of  
19 contract against I.B.M. or any other user of SVRX code,  
20 which it then developed its own code and built on top of  
21 that basic code, if SCO had the ability to say that that  
22 newly created code was subject to a confidentiality  
23 agreement, then SCO could claim a breach of that agreement,  
24 and that has a further potential to disrupt the business  
25 relationships that we had with I.B.M. and others.

1           We'll see I believe in a moment that there is other  
2           correspondence regarding other companies, and it was in our  
3           interest to again put SCO on notice that it didn't have this  
4           right to do this. This was one more attempt in our view by  
5           SCO to further disrupt the Linux business. As I have  
6           described, we had a real keen interest in that business,  
7           because of our participation in it and our entry into it,  
8           and the investments that we made in it. Again, this was an  
9           instance where it came to our attention that SCO was making  
10          these types of claims, and in this case I believe it was a  
11          breach of contract claim against I.B.M.

12          Q.    Were you doing this in order to hurt SCO or to protect  
13          Novell's business interests?

14          A.    No. Again, not to hurt SCO, but to protect Novell's  
15          business interests.

16                THE COURT: Mr. Acker, look for a good time for us  
17          to take our recess.

18                MR. ACKER: This is a good time.

19                THE COURT: Ms. Malley.

20                (WHEREUPON, the jury leaves the proceedings.)

21                THE COURT: Anything, counsel?

22                MR. SINGER: No, just perhaps the question how  
23          much longer --

24                MR. ACKER: I would say less than 30 minutes, Your  
25          Honor.

1 THE COURT: Okay.  
2 Let's take 20 minutes, counsel.  
3 (Recess)  
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