

1 (Recess)

2 THE COURT: Ready, counsel?

3 MR. SINGER: There was one item we wanted to bring
4 up before the jury returns and before we formally rest our
5 case, and that relates to the introduction of just these two
6 figures from the 10-K that relate to the net worth of
7 Novell, which come in for punitive damages.

8 MR. NORMAND: I misunderstood Your Honor's
9 directive, after speaking with my colleagues, and I thought
10 your point was when you said let's see how it goes, that I
11 could see if Mr. Jones's direct would allow me to use the
12 document with him. Apparently that was not how the rest of
13 the members of my team interpreted what Your Honor said, so
14 I didn't make an effort to use it with him because I thought
15 the scope of his direct --

16 MR. BRENNAN: Your Honor, on that subject I don't
17 think there was a misunderstanding and there was no attempt
18 made to use it. I think they have run out of the right now
19 to try to do that with Mr. Jones.

20 MR. NORMAND: I just actually saw Mr. Jones in the
21 hall, so if we are going to get to the point of the
22 silliness of calling Mr. Jones back or asking Mr. Russell to
23 stand up to answer four or five questions, we can do that,
24 but I don't know on what grounds Novell is going to dispute
25 the substance of this 10-K.

1 THE COURT: I would agree that perhaps you
2 misunderstood, but the Court's intention was that you be
3 allowed to make the offer and a lay foundation, then there
4 could have been an objection, but if you misunderstood it is
5 the Court's problem and I want you to be able to solve it.

6 So we can either have Mr. Jones stay and bring him
7 back, or if you want to have another witness called that can
8 accomplish the same thing, whatever is most efficient.

9 MR. BRENNAN: Your Honor, just as were considering
10 the point, there is an issue regarding Mr. Jones's
11 examination by Mr. Normand. The Court may recall that
12 during Mr. Normand's cross-examination of Mr. Jones he made
13 an express, explicit reference to previous trial testimony,
14 not deposition testimony, trial testimony in the context of
15 asking Mr. Jones about copyright ownership issues.

16 Novell believes that that has left the impression
17 in the minds of the jury that there was a previous trial
18 related to copyright ownership issues, and given the
19 limitations we have been faced with explaining the outcome
20 of these various matters, perhaps a suggestion in the jury's
21 mind that that issue in a previous trial was decided
22 differently than now in this proceeding.

23 This, again, is a case where in our view
24 plaintiff's counsel through its own questioning has opened
25 the door and has created an issue of confusion. What we

1 would ask the Court to do to resolve that point of
2 confusion, is to instruct the jury that there was in fact a
3 previous trial between Novell and SCO, and not on the issue
4 of ownership but others, that a judgment was entered in
5 Novell's favor and that that wasn't reversed by the Tenth
6 Circuit. Otherwise, the jury is left to wonder about all of
7 this by virtue of the way SCO's attorneys conducted the
8 examination.

9 I would just note as well, Your Honor, that it is
10 my understanding that there had been a previous agreement
11 that if there was to be any reference to previous testimony,
12 that it would be phrased in that terminology and not trial
13 testimony. That agreement was not observed.

14 THE COURT: Go ahead, Mr. Normand.

15 MR. NORMAND: Well, I can speak to the issue or
16 Your Honor can speak to it first.

17 THE COURT: The Court's recollection is that the
18 questions asked about prior testimony, and it was not prior
19 trial testimony, and it was Mr. Jones who raised the issue
20 about it being trial testimony. That was concerning to the
21 Court, but he then went on with a broad explanation about
22 how this was at the end of the trial and in trying to work
23 through something at the trial and so on and so forth.

24 I don't think it can be laid at the feet of Mr.
25 Normand, when he asked a question about in your prior

1 testimony is this not what you said?

2 MR. BRENNAN: Would the Court view it differently
3 if, in fact, the question that referenced trial was in the
4 question rather than the answer?

5 MR. NORMAND: Your Honor, my recollection is as
6 yours, that Mr. Jones raised it. I can't say that I
7 remember chapter and verse how the question was phrased.
8 Mr. Acker asked me where the testimony came from and I told
9 him it was from trial, and Mr. Jones may have heard me speak
10 with Mr. Acker.

11 I took care not to ask Mr. Jones any substantive
12 questions, after his long answer and explanation about the
13 trial, I didn't ask him anything about the trial. I was
14 trying to stay away from that issue. One, I don't think the
15 jury picked up on this issue that Mr. Brennan has raised.
16 Two, the solution proposed is grossly overbroad. At most,
17 you should tell the jury there was a prior trial and that it
18 was on different issues than are at issues here, but I don't
19 think the jury is drawing a big distinction between the
20 trial and the deposition testimony.

21 MR. BRENNAN: Your Honor, it seems to me that
22 speculation by SCO's counsel about what the jury is drawing
23 or not is always drawn in their favor. SCO always puts it
24 in the position of, well, this is what I think the jury
25 would have done or wouldn't have done and it is favorable to

1 them.

2 I sit on the side of a defendant who is being
3 accused of slandering title and damages have been sought of
4 \$250 million. I believe that we have every right and
5 entitlement to make it clear to the jury what really has
6 happened, when SCO's attorneys have invited the problem.

7 THE COURT: I am not sure that they did. That is
8 my problem. Even if he had simply made reference to trial
9 testimony, I don't believe that by itself would have raised
10 the issue. I believe it was Mr. Jones's explanation in
11 great detail about what happened at the trial that may have
12 raised any type of issue at all.

13 I think in fairness and to avoid the issue, the
14 Court will instruct the jury when they return that there was
15 reference in Mr. Jones's testimony to a prior trial, but
16 understand that it is not the same trial involving the
17 issues in this case and just leave it at that.

18 MR. BRENNAN: Thank you, Your Honor.

19 Back to the question of how we ought to proceed in
20 light of the misunderstanding regarding how to seek to
21 introduce information from Mr. Jones, may I confer with my
22 colleagues for one minute?

23 THE COURT: Go ahead.

24 (Time lapse)

25 MR. BRENNAN: Your Honor, our suggestion in light

1 of the apparent misunderstanding, is that the parties
2 stipulate to the admission of -- I believe it is form 8-K.

3 Is that correct? 10-K.

4 MR. NORMAND: 10-K.

5 MR. BRENNAN: That it simply be admitted into
6 evidence without further discussion or explanation.

7 MR. NORMAND: If that has built into it that it
8 can be addressed at closing, then we would --

9 THE COURT: If it is an admitted exhibit, then it
10 certainly can be referred to at closing.

11 MR. BRENNAN: With that understanding, we would
12 just stipulate to the admission of the 10-K.

13 THE COURT: What is it marked as?

14 MR. NORMAND: It is marked as SCO Exhibit 552,
15 Your Honor.

16 MR. SINGER: It will be redacted to just reflect
17 the information on I think the first page with respect to
18 the market capitalization of Novell, and on page 26 with
19 respect to the stockholder equity of Novell.

20 MR. BRENNAN: Our understanding, of course, is
21 that the admission of that redacted 10-K would be subject to
22 our reservation of all rights and arguments relative to the
23 entitlement to punitive damages and otherwise, Your Honor.

24 THE COURT: Certainly.

25 Exhibit 552 as redacted, and in the form and way

1 that Mr. Normand just represented it would be redacted, will
2 be admitted.

3 (Plaintiff's Exhibit 552 was
4 received into evidence.)

5 MR. BRENNAN: Thank you, Your Honor.

6 THE COURT: Ms. Malley, please bring the jury in.

7 (WHEREUPON, the jury enters the proceedings.)

8 THE COURT: Ladies and gentlemen, before we
9 continue with the examination of Mr. Messman, I do need to
10 instruct you on one thing. During the examination of Mr.
11 Jones there was a reference to a prior trial. You may
12 remember that there was an exchange between Mr. Normand and
13 Mr. Jones about Mr. Jones's prior testimony in another
14 trial.

15 That trial did not have anything to with the
16 issues that you are going to be asked to address in this
17 trial, so you should not pay any attention unduly to the
18 fact that there was a prior trial, nor draw any conclusions
19 about what that trial was about.

20 Go ahead, Mr. Singer.

21 MR. SINGER: Thank you, Your Honor.

22 BY MR. SINGER

23 Q. Mr. Messman, before the break I was asking you about
24 the August 4, 2003 letter.

25 Do you recall that question?

1 A. Yes.

2 Q. I was asking you if there was any new information which
3 came to light between the June 6 press release and the
4 August 4th letter.

5 Do you recall that?

6 A. I recall the question.

7 Q. Was there any such additional information that came to
8 light between June 6 and August 4?

9 A. I don't recall.

10 Q. Would it be fair to say that you're not aware of any
11 such new information?

12 A. It could be that I wasn't aware of it, but I don't
13 recall that I was not aware of it.

14 Q. Well, is it fair to say that you don't think there were
15 any new materials?

16 A. If I thought there were new materials, I would have
17 said I recalled them.

18 Q. As far as you know, there wasn't anything different
19 that Novell had on August 4th that it didn't on June the
20 6th?

21 A. I don't recall.

22 Q. And yet the company reached a completely different
23 position in its August 4th letter than in the one on June
24 the 6th, correct?

25 MR. ACKER: Your Honor, that is argumentative and

1 it misstates his testimony.

2 THE COURT: Sustained.

3 MR. SINGER: I will rephrase the question.

4 BY MR. SINGER

5 Q. Did you after August the 4th authorize Novell to file
6 copyright registrations for UNIX copyrights in September and
7 October of 2003?

8 A. Yes.

9 Q. Were you aware that those copyrights covered the same
10 versions of UNIX that AT&T had obtained copyright
11 registrations on and which were transferred -- the copyright
12 registrations were left with Santa Cruz back in 1995?

13 A. I was not aware that they were left with Santa Cruz. I
14 was under the impression that they were still registered in
15 AT&T's name.

16 Q. Did you have an understanding that those were the same
17 copyrights which were being referred to in your June the 6th
18 letter?

19 A. Yes, they were. It was my opinion and I was of the
20 opinion that they were the same.

21 Q. Did you have an understanding in September and October
22 of 2003 that SCO had at that time copyright registrations in
23 its name for those copyrights?

24 A. I was informed that SCO had filed registrations on top
25 of the AT&T registrations.

1 Q. Now, in October and November -- September, October and
2 November you didn't go public with respect to any of those
3 registrations, correct?

4 A. They were a matter of public record. If anybody wanted
5 to go get them they are at the U.S. patent office.

6 Q. But you didn't issue a press release about them,
7 correct?

8 A. Correct.

9 Q. You didn't publish your August 4th letter either, did
10 you?

11 A. I would have to see the letter to remember.

12 Q. It is Exhibit 105.

13 This letter was not published as a press release,
14 correct?

15 MR. ACKER: Objection, vague as to time.

16 BY MR. SINGER

17 Q. At the time, in August of 2003.

18 A. I don't think it was.

19 Q. Now, did you approve a press release that was issued on
20 December 22nd, 2003, which is SCO Exhibit 517?

21 A. I'm familiar with that press release. I was involved
22 with all press releases, so I'm sure I approved it.

23 Q. And you understood that this press release stated that
24 Novell believes that it owns the copyrights in UNIX and has
25 applied for and received copyright registrations pertaining

1 to UNIX consistent with that position; is that correct?

2 A. Yes.

3 Q. Now, why was December 22nd, 2003 chosen as the date to
4 inform the public about copyright registrations that you had
5 obtained in August or September or October?

6 A. I don't know.

7 Q. Well, I would like to show you a demonstrative exhibit,
8 which is a calendar of 2003. I would like you to assume for
9 the moment that we have accurately indicated the dates of
10 SCO's earnings releases for the calendar year 2003 as having
11 been February 26, May 28th, August 14th and December 22nd.

12 Mr. Messman, as former chairman of a public company you
13 understand that the earnings release dates are important
14 dates for a public company, correct?

15 A. Yes.

16 Q. Now, May 28th, we have already covered was the date
17 that Novell issued its first public claimed ownership of the
18 UNIX copyrights, correct?

19 A. That is correct.

20 Q. Is it your understanding that that was a coincidence,
21 that that also happened to be the date that SCO announced
22 its earnings for the preceding quarter?

23 A. It was coincidence.

24 Q. December 22nd, 2003, when SCO issued its earnings for
25 the year to date period before that, also happened to be the

1 date that you issued a press release pertaining to the
2 copyright registrations and reasserting ownership of UNIX
3 copyrights, correct?

4 A. That is the date we released this press release,
5 correct.

6 Q. Do you have an understanding as to why that precise
7 date was chosen?

8 A. Mr. LaSala came to me and asked me about putting the
9 information that the public didn't have on our Web site and
10 I approved doing it. I did not approve the date. I assumed
11 he was going to do it as soon as he could.

12 Q. So you don't have any understanding of why that
13 specific date was chosen?

14 A. I do not.

15 Q. Do you believe it is just a coincidence that that also
16 was the date that SCO's earnings were released?

17 A. I think it is coincidence.

18 Q. Now, there are only two public statements by Novell in
19 2003 asserting copyright ownership, correct, the one in May
20 and the one in December? May 28th and December 22nd,
21 correct?

22 A. There were a number of letters. I don't know which
23 ones were public, but there were a number of letters between
24 us and SCO where we asserted the ownership of copyrights and
25 patents.

1 Q. I think my question -- maybe I didn't phrase it
2 clearly -- but was about public assertions like in press
3 releases. Those were only on May 28 and December 22nd,
4 correct?

5 A. I would have to see all of the press releases to answer
6 that question. I can't recall.

7 Q. Are you aware of any others?

8 A. Not off the top of my head.

9 Q. So assuming that those are the only two public
10 statements by Novell in calendar year 2003 asserting
11 copyright ownership, and if my assumption is right that
12 those are the dates in which you have SCO earnings releases,
13 both of those fell on dates, two of the four dates that SCO
14 released earnings for the whole calendar year and that was a
15 coincidence, correct?

16 A. Assuming that those were the only two announcements
17 that we made, that is a coincidence.

18 Q. Mr. Messman, were you following SCO's stock at all in
19 2003?

20 A. I had a lot of things to do and I was not following
21 SCO's stock.

22 Q. In fact, weren't you aware of the fact that in May of
23 2003 SCO's stock was going up and down?

24 A. I knew that the volume of press releases from SCO was
25 going up and down. I wasn't following their stock.

1 Q. I would like to ask you to take a look at what is clip
2 eight of your deposition.

3 MR. SINGER: Mr. Calvin --

4 MR. ACKER: Can I have the page and line?

5 MR. SINGER: This is page 56, line 20, to 57, line
6 3.

7 Mr. Calvin, would you play that clip.

8 (WHEREUPON, the following deposition clip was
9 played.)

10 Q. Were you subsequently aware that SCO's stock price
11 declined 30 percent in the immediate aftermath of your press
12 release?

13 A. SCO's stock price was going up and down during that
14 period of time based on what was happening and what Darl was
15 saying in the marketplace. I can't recall what it did on
16 any given day when we were making these.

17 BY MR. SINGER

18 Q. Do you agree that that was your testimony, Mr. Messman?

19 A. Yes.

20 Q. You agree that you were aware that SCO's stock price
21 was going up and down during that period of time in 2003?

22 A. I was aware, but I was not following it.

23 Q. In January of 2004 did you approve the announcement of
24 a Linux indemnification program?

25 A. Yes.

1 Q. I would like you to look at SCO Exhibit 756.

2 Was this a press release on January 13, 2004 announcing
3 that indemnification program?

4 A. Yes.

5 Q. And in connection with this release did you state in
6 the statement that says Novell's unique --

7 MR. SINGER: Let me first move Exhibit 756 into
8 evidence.

9 MR. ACKER: It is already in evidence.

10 BY MR. SINGER

11 Q. If we turn to Novell's unique legal rights, and we go
12 down a little further on the page --

13 MR. SINGER: Mr. Calvin, expand that.

14 BY MR. SINGER

15 Q. You stated at that time that Novell had rights which
16 include, and if we turn to the next page, the third point
17 was as previously confirmed by Novell, copyright
18 registrations on UNIX SVRX releases consistent with Novell's
19 position that it retained ownership of these copyrights.

20 You approved that?

21 A. Yes.

22 Q. Now, are you aware, Mr. Messman, that Chris Stone, who
23 at the time was the number two man in the company, your vice
24 chairman, made a statement at an open source development
25 conference in March 2004 regarding the ownership of UNIX?

1 A. I am aware that Chris made several presentations to
2 several trade groups, but I am not aware of the particular
3 one you're talking about.

4 Q. Are you aware of a conference where Mr. Stone stood up
5 and said publicly that we still own UNIX, referring to
6 Novell still owning UNIX?

7 A. Yes. I mean, I think that is true so it wouldn't
8 bother me that he said that.

9 Q. You think it is a true statement that Novell still owns
10 UNIX?

11 A. Yes.

12 Q. How long after that statement did you wait before
13 asking Mr. Stone to leave Novell?

14 A. We sent Mr. Stone away to Harvard for I think it was a
15 nine to 12 week program. He was gone for a period of time.
16 In may have been May or June before he left the company.

17 Q. Was Mr. Stone asked to leave Novell?

18 A. No.

19 Q. Thank you.

20 THE COURT: Mr. Acker.

21 MR. ACKER: Just a very few questions, Your Honor.

22 CROSS EXAMINATION

23 BY MR. ACKER

24 Q. Mr. Messman, take a step back a little bit and tell the
25 ladies and gentlemen of the jury about your undergraduate

1 and graduate degrees.

2 A. I have a degree in chemical engineering from the
3 University of Delaware in 1962, and a degree in business
4 from the Harvard Business School in 1968.

5 Q. Were you at Novell in the beginning of the company?

6 A. Yes.

7 Q. Can you explain that for the jury, please.

8 A. Well, I had been running a consumer products company
9 through most of the seventies and I joined Safeguard
10 Scientifics -- I believe it was in the 1980s, late '80, and
11 Safeguard had made a significant investment in a company
12 called Novell Data Systems, Inc. It was in trouble. I was
13 asked to come out to Provo and figure out what to do. I did
14 that.

15 After an analysis that took maybe three or four weeks,
16 I called back to the head office and said I think we ought
17 to shut it down. They instructed me to do that. It was not
18 just as if we could just turn the key overnight and shut the
19 thing down. We decided it would be better if we did an
20 orderly liquidation, because we had lots of spare parts that
21 could be used by other manufacturers of the equipment. We
22 started to try to sell the parts to various people in the
23 industry.

24 In the course of terminating various people I ran
25 across three young fellows from Brigham Young University who

1 were programmers on contract to Novell.

2 To make a long story short, they had a product that I
3 recognized the potential of. I decided, and I convinced
4 Safeguard, who wanted to get out of the business, I
5 convinced them to recapitalize the company, and we changed
6 the name from Novell Data Systems to Novell, Inc. I was the
7 C.E.O. My job was to get this business off the ground with
8 a software strategy, and ultimately to hire my replacement.
9 I hired Ray Norda as my replacement, and Mr. Norda gets all
10 the credit for having built the company to what it is today.

11 Q. What was the product that the three young programmers
12 from BYU had?

13 A. It was NetWare. It was a piece of software that
14 allowed computers to interact with one another at the same
15 time. It was something that hadn't been done at that point
16 in time.

17 Q. After Mr. Yarrow became the C.E.O., did you remain on
18 the Novell board?

19 A. Mr. Norda.

20 Q. I'm sorry. After Mr. Norda became C.E.O., did you
21 remain on the Novell board?

22 A. I went off the board for I think about a year, because
23 I left Safeguard and went to work in the cable business in
24 New York City. When they got ready to go public I rejoined
25 the board. Other than a period of maybe a year, I have been

1 associated with Novell since 1980.

2 Q. Were you on the board in September of 1995?

3 A. I was.

4 Q. Let me show you what we have admitted into evidence as
5 Z-3.

6 Do you recognize that as the minutes of the Novell
7 board of directors meeting on Monday, September 18, 1995?

8 A. I do.

9 Q. Were you present for that telephonic board meeting?

10 A. I was.

11 Q. Was there a discussion at that board meeting regarding
12 the asset purchase agreement?

13 A. Yes.

14 Q. Is this the meeting at which that asset purchase
15 agreement was approved?

16 A. Yes.

17 Q. Was there a discussion at the meeting about whether
18 copyrights would be included or excluded from that sale?

19 A. It was -- I don't know whether to say mandatory or not,
20 but it was important that they were not included, because we
21 felt SCO was a company that was a little bit of a fledgling
22 company, and we were worried that this revenue stream that
23 we were getting from the UNIX licenses would be at risk, and
24 we insisted that we keep the copyrights and patents so that
25 if anything happened to SCO that we would be able to get

1 full control of the revenue stream.

2 Q. Was the fact that the copyrights were to be excluded
3 from the deal, was that discussed at the board meeting on
4 September the 18th, 1995?

5 A. Absolutely. That was the key part of the deal that
6 convinced the board to do that deal.

7 Q. Let me fast forward now and ask you a few questions
8 about some documents and dates.

9 On May 28, 2003 Novell issued a press release claiming
10 ownership of the UNIX copyrights.

11 A. Yes.

12 Q. Tell the ladies and gentlemen of the jury why Novell
13 did that.

14 A. Well, I think the marketplace both for UNIX and for
15 Linux was being bombarded by accusations that Mr. McBride
16 was making that were in our opinion untrue. He was claiming
17 that it was UNIX and Linux -- he was claiming that all Linux
18 users, end users, not just the companies but the end users,
19 probably should have to pay a license to use Linux. It is
20 an open source community which develops Linux, which is all
21 about not paying any licenses. It is free software.

22 This was a very confusing time and a tumultuous time.
23 UNIX customers and UNIX licensees were calling to ask what
24 is going on with my license? Linux customers were delaying
25 their orders until they figured out what was going on with

1 regard to having to pay a royalty.

2 Q. Was that press release put out to protect Novell's
3 business interests or to harm SCO?

4 A. We did it to protect Novell's interests and to protect
5 our shareholders and to protect the revenue stream.

6 Q. How many conversations have you had with Mr. McBride in
7 your life?

8 A. I have had one telephone conversation with him and one
9 meeting with him.

10 Q. The telephone conversation, was that on the evening of
11 June the 5th?

12 A. It was.

13 Q. Can you describe that conversation for the jury,
14 please.

15 A. Well, it was late at night because everybody in my
16 office had gone home. I was still there. The call came in
17 and, therefore, I answered it. I normally don't answer the
18 calls that come in directly. I answered it and it was Mr.
19 McBride. He says, have you got it? I said, what are you
20 talking about? He said, well, amendment two. I said, no, I
21 don't have amendment two.

22 He made a few comments, and I don't recall all of the
23 conversation, and we hung up. Shortly after that a fax copy
24 came and somebody in our office that was still around
25 brought it into my office and showed it to me. Mr. McBride

1 called again and said, now do you have it? I said obviously
2 I did have it. He then said it took him three to four
3 months to find it himself. I said we hadn't had it until
4 you sent it. He asked me what did I think of it. I said,
5 well, I have not had a chance to review it and contemplate
6 what it means.

7 He said, have you talked to I.B.M. about this? I said
8 I wouldn't have talked to I.B.M. if I just got it, but I
9 talk to I.B.M. about a lot of things. He was quite agitated
10 and excited. I didn't know him well enough to say whether
11 he was mad, but we hung up on the phone call and I proceeded
12 to then talk to my general counsel the next morning.

13 Q. At any point during that conversation did you say words
14 that in any manner conveyed to Mr. McBride that you believed
15 that SCO owned the UNIX copyrights?

16 A. Absolutely not.

17 Q. Any doubt in your mind about that?

18 A. None.

19 Q. Another press release was put out on December the 22nd
20 of 2003.

21 Can you tell the ladies and gentlemen of the jury why
22 Novell did that?

23 A. Well, again, it was a one-sided conversation that Mr.
24 McBride was having with the marketplace and at trade shows
25 and at press conferences and in press releases and things of

1 that nature. We thought he was wrong.

2 The Linux community, which is a very open community,
3 wanted to know what was going on. We felt that the best way
4 to tell our side of the story was not to interpret the
5 documents and make press releases, that we ought to just put
6 the information out on our Web site so that everybody could
7 see it and make their own judgments.

8 Q. One final topic.

9 At some point in the fall of 2003 Novell began the
10 acquisition of a Linux company SUSE Linux?

11 A. Yes.

12 Q. Can you tell the ladies and gentlemen of the jury why
13 it was that Novell sought to acquire SUSE Linux?

14 A. Well, I think that there was a great deal of concern
15 about what was going to happen to Linux if Mr. McBride's
16 accusations were true. We were looking for a way to solve
17 that problem, and one of the ways was for us to acquire a
18 Linux operating system company.

19 I think it was late September or early October when we
20 were made aware that SUSE Linux was available for sale. We
21 got the brochures from the investment bankers and we read
22 them, and we thought that there was a possibility that we
23 would be interested, so we started a process of making bids.
24 We won the bid, which allowed us to then negotiate
25 exclusively with the sellers. The sellers were venture

1 capitalists, not the company itself. Venture capitalists
2 owned the company and they were interested in maximizing the
3 price that they got.

4 We did our due diligence and then closed the deal I
5 think in the first or second week of January of 2004.

6 Q. In connection with that deal, did I.B.M. subsequently
7 purchase \$50 million worth of Novell stock?

8 A. They did, at my suggestion. I was worried that we were
9 paying \$210 million for a company that had very little
10 revenues but had great technology. I was trying to figure
11 out how to get comfortable with that risk. We decided that
12 we would call some of the bigger players in the industry to
13 figure out whether they would join us in some way in
14 supporting us.

15 I called Bill Zeigler, who was the executive at I.B.M.
16 that I was dealing with on a regular basis, and I asked him
17 if he would be willing to give us some comfort that we were
18 doing the right thing. He asked me, well, what form did I
19 think the comfort would come in? I didn't think we wanted
20 him to buy a piece of the SUSE Linux deal, because then we
21 wouldn't own 100 percent, so I suggest an investment in
22 Novell.

23 So he said, well, how much do you think we ought to
24 invest? Well, it has to be something that the marketplace
25 would think would be significant. He said, well, what is

1 that number? I said, I think it is \$50 million.

2 He said he would consider it. I think it was a week or
3 two later, and I can't recall exactly the time frame, but he
4 came back and said they would do it. We did not close that
5 transaction until after -- I think it was in March or early
6 April, so the SUSE Linux acquisition closed in January, and
7 they made their investment in late March or early April.

8 Q. 2004?

9 A. 2004.

10 Q. Was there any relationship at all to the events
11 involving SCO in 2002 and 2003 and I.B.M.'s investment in
12 Novell regarding SUSE Linux?

13 A. There is no connection.

14 MR. ACKER: That's all that I have, Your Honor.

15 THE COURT: Mr. Singer.

16 REDIRECT EXAMINATION

17 BY MR. SINGER

18 Q. Mr. Messman, I would like you to take a look at Exhibit
19 754.

20 Do you recognize this to be a memorandum that
21 Mr. Bradford sent to you and other members of the Novell
22 board of directors on September 15, 1995, three days before
23 the board meeting that you have testified about?

24 A. I don't remember it, but I'm sure that I got it if it
25 was sent to the board of directors. I was a director. I am

1 reading it now.

2 Q. Why don't you take a look at it. You can see on the
3 first page that it says there is certain information
4 pertaining to SCO which is being included, including item E,
5 a term sheet for the proposed transaction.

6 Do you see that?

7 A. Yes, I do.

8 Q. Would you turn to the term sheet.

9 MR. SINGER: Mr. Calvin, would you blow up the
10 first two items, what Novell transfers and what Novell
11 retains.

12 BY MR. SINGER

13 Q. The term sheet that you received right before the board
14 meeting from the general counsel, Mr. Bradford, said that
15 Novell transfers to SCO UNIX technology assets and UnixWare
16 technology assets, correct?

17 A. I see that.

18 Q. And it says Novell retains all patents, that it will
19 have a license back to UNIX and UnixWare for internal use
20 and resale in bundled products, and Tuxedo and other
21 miscellaneous unrelated technology.

22 Do you see that?

23 A. I see that.

24 Q. Do you see anywhere on that list of what Novell retains
25 that word copyrights?

1 A. Not on this list.

2 Q. This was the term sheet that accompanied a memorandum
3 sent by the general counsel to the board of directors in
4 advance of the meeting, correct?

5 A. Yes, sir.

6 Q. Now, let's take a look at the board minutes which are
7 Exhibit Z-3.

8 MR. SINGER: Mr. Calvin, can you expand the first
9 page of the minutes where it says proposed sale of UnixWare
10 business and equity investment in SCO?

11 BY MR. SINGER

12 Q. Do you understand that this summarizes the discussion
13 of what was being discussed by the board in connection with
14 that transaction?

15 A. Yes.

16 Q. Do you see where it says Mr. Bradford and
17 Mr. Frankenberg first confirmed that the directors had
18 received the materials on several transactions and then
19 there is a summary of the discussion. That discussion then
20 continues, and I would like you to read these three
21 paragraphs, and I am going to ask you to read the first
22 paragraph on the next page which is a continuation of this.

23 So you have my question in mind, my question is going
24 to be, do you see any reference in this summary of the
25 discussion at the board meeting to copyrights?

1 A. Not in the first three paragraphs.

2 Q. Look and see if there is any reference to that in the
3 fourth paragraph.

4 A. No, there is no reference there.

5 Q. The only reference is in the text of the resolution,
6 which then follows.

7 MR. SINGER: Mr. Calvin, blow up where it says
8 resolved.

9 BY MR. SINGER

10 Q. After the resolution there is a summary which says that
11 Novell will transfer to SCO its UNIX and UnixWare technology
12 assets --

13 A. Where are you, Mr. Singer?

14 Q. This is on the resolution. It is highlighted on the
15 screen.

16 Do you see that?

17 A. Yes.

18 Q. The only reference to copyrights is then in the third
19 paragraph under the word resolved, where it says Novell will
20 retain all of its patents, copyrights and trademarks,
21 correct?

22 A. Yes.

23 Q. It also goes on to say that there would be a worldwide
24 license back to UNIX and UnixWare for internal use and
25 resale in bundled products, correct?

1 A. Yes.

2 Q. And that would be a license back of the technology
3 being sold, correct?

4 A. Of the technology being sold, right.

5 Q. One of the copyrights that was not being transferred
6 was NetWare copyrights, correct?

7 A. Yes.

8 Q. Now, it is your testimony that you have a specific
9 recollection of the copyright issue being discussed even
10 though it is not captured in the discussion summary in the
11 board of director minutes, correct?

12 A. Yes. It is the prerogative of boards to make decisions
13 based on discussions that take place.

14 Q. Even though it was not mentioned as something being
15 retained in a term sheet that was provided to the board in
16 advance of this meeting?

17 A. Yes. Terms change as the board discusses them.

18 Q. Is it your testimony that the transaction changed from
19 Friday the 15th of September to when the board met to
20 consider this on the 18th of September?

21 A. All I can tell you is that we were very concerned about
22 any transactions with Santa Cruz Operation, which I have
23 characterized as a fledgling corporation, and we were
24 worried that we were turning over this very valuable stream
25 of royalties to a company that may not make it, so we

1 retained the copyrights and patents.

2 Q. You have a distinct recollection in now 2010, that at
3 this board meeting that was 15 years ago, that the board was
4 told the copyrights were not being sold, correct?

5 A. It was a point of discussion at the board meeting and
6 that is how we resolved it as this resolution shows.

7 Q. Do you recall anything else that Mr. Bradford said with
8 respect to the assets being told and not sold, leaving aside
9 what you have just seen in the minutes, do you recall
10 anything else except the copyrights and patents not being
11 sold?

12 A. Well, that was the most important from my point of view
13 and I remember that, but there probably were other things
14 that I don't remember.

15 Q. Isn't it true that at least as of the time of your
16 deposition in 2007 that you couldn't recall anything else
17 that Mr. Bradford said with respect to the assets being sold
18 or not sold other than your recollection about copyrights
19 and patents?

20 A. If my earlier deposition said that it is probably true
21 because my memory is -- I'm 70 years old and my memory is
22 getting worse.

23 Q. Let's take a look at clip two, page 27, 19 to 28, 03,
24 to see if that is in fact what you said.

25 MR. ACKER: Your Honor, he just confirmed the

1 deposition testimony. I don't know what the purpose is of
2 playing the clip.

3 THE COURT: Unless there is something contrary to
4 what he testified to in the deposition testimony, I don't
5 think it would appropriate for you to show it.

6 BY MR. SINGER

7 Q. As you sit here today, Mr. Messman, you agree that at
8 the time of your deposition the only thing that you recall
9 Mr. Bradford saying was this recollection that you have
10 regarding the copyrights and patents?

11 A. Yes, because it was the most important thing covered.

12 Q. With respect to the press release that was issued after
13 the transaction, I would like you to look at SCO Exhibit
14 526. This was a press release issued September 20, 2005.

15 I am sorry. 1995.

16 If we scroll down, why don't we scroll down a little
17 bit further for a moment. Do you see that it says Santa
18 Cruz Operation and Novell today announced a definitive
19 agreement for SCO to purchase the UNIX business from Novell?

20 Do you see that?

21 A. I see that.

22 Q. Do you see that under the agreement Novell will receive
23 approximately 6.1 million shares of SCO common stock? Then
24 if we go down to the next page, do you see that there is a
25 quote from Robert Frankenberg, chairman and C.E.O. of

1 Novell?

2 Do you see that?

3 A. Yes.

4 Q. Do you have any reason to believe that this was not the
5 approved joint press release by Novell and SCO after the
6 announcement of the transaction?

7 A. I don't think it is a joint press release.

8 Q. Well, you wouldn't quarrel with Mr. Frankenberg's view
9 on that, since he was the chairman, would you?

10 MR. ACKER: Your Honor, I just object if he is
11 referring to the testimony of another witness in the trial.
12 I don't think --

13 MR. SINGER: I don't think I expressly referred to
14 testimony.

15 MR. ACKER: I don't think Mr. Frankenberg is
16 quoted, Mr. Frankenberg saying that this is a joint press
17 release and --

18 MR. SINGER: Now it is Mr. Acker who is referring
19 to the testimony of witnesses.

20 MR. ACKER: He needs to ask this witness's
21 knowledge. Ask him if he thinks this is a joint press
22 release. That is the question.

23 THE COURT: It is not appropriate for you to be
24 asking this witness to comment on the testimony of another
25 witness. If you can elicit testimony that would not do

1 that, please.

2 BY MR. SINGER

3 Q. Do you think Mr. Frankenberg would be in a position to
4 say, since he was chairman and C.E.O. of Novell at the time,
5 whether this was an approved press release on behalf of
6 Novell as well as Santa Cruz?

7 A. He was in a position to know what the deal was.

8 Q. Do you see in the next paragraph it says according to
9 the terms of the agreement SCO will acquire Novell's
10 UnixWare business and UNIX intellectual property, correct?

11 A. I see that.

12 Q. Now, I would like to turn to the issue that you
13 discussed in cross-examination about the timing of I.B.M.'s
14 investment in Novell. You referred to that as March and
15 April of 2004, correct?

16 A. I think that is when it closed.

17 Q. But, in fact, the commitment of I.B.M. to invest \$50
18 million was made in November of 2003, correct?

19 A. I think we made an announcement about that. Whenever
20 that was is when it took place.

21 Q. What is your best recollection?

22 A. I thought it was sometime in December, but you could be
23 right that it was earlier.

24 Q. Okay. During that same period of time, the fall of
25 2003, are you aware of whether or not Novell took action to

1 waive SCO's legal claims against I.B.M.?

2 A. Yes, we did.

3 Q. In fact, you did that on June 12th and in October and
4 then again in February of 2004, correct?

5 A. I can't recall the February one, but I think the first
6 two are correct.

7 Q. In the middle of that process is when I.B.M. made a \$50
8 million investment in Novell?

9 A. I think it is coincidental. The two are unconnected.

10 Q. In fact, you didn't need the \$50 million in order to
11 purchase SUSE Linux because you had \$750 million in cash on
12 your balance sheet at the time?

13 A. That is correct. We didn't need the money, but we
14 needed their commitment to support us in the marketplace.

15 Q. It is just a coincidence that these things all happened
16 at the same time?

17 A. They didn't happen at the same time. The waiver of the
18 patents and the copyright issues and the investment by
19 I.B.M. were at different times of the year.

20 Q. Well, are you aware of whether or not I.B.M. asked
21 Novell in June of 2003 to exercise its waiver rights at that
22 time?

23 A. I am not aware of that.

24 MR. SINGER: Thank you.

25 THE COURT: Mr. Acker?

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1 MR. ACKER: I don't have anything else, Your
2 Honor.

3 THE COURT: Counsel, may this witness be excused?

4 MR. SINGER: Yes.

5 THE COURT: Mr. Acker?

6 MR. ACKER: Yes. Thank you.

7 THE COURT: Mr. Messman, you do not need to worry
8 about being re-called. I would caution you, however, to
9 please not discuss your testimony with any other witnesses
10 in this case or in the presence of any other witness, or
11 communicate to anyone who will be a witness the nature of
12 your testimony in any way.

13 THE WITNESS: When can I find out what happens?

14 THE COURT: I am confident that you'll find out
15 very quickly after the rest of us do.

16 THE WITNESS: Thank you.

17 THE COURT: Again, you don't have to worry about
18 being re-called. You may return to your place of residence.

19 Mr. Jacobs.

20 MR. JACOBS: Your Honor, our next witness is
21 Michael DeFazio by deposition.

22 (WHEREUPON, the following deposition was played.)

23 Q. Good morning, Mr. DeFazio.

24 A. Good morning.

25 Q. Were you the head of the organization responsible for

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1 product management, marketing and licensing terms and
2 conditions for the UNIX System V operating system from 1984
3 until 1995, first with AT&T, then with USL and finally with
4 Novell?

5 A. I was the head from 1984 to 1995.

6 Q. After 1995, Mr. DeFazio, when Novell sold certain of
7 its UNIX related assets to the Santa Cruz Operation, Inc.,
8 which is now known as Tarantella, did you continue to be
9 involved in Novell's remaining UNIX business in, primarily
10 in an administrative and advisory capacity?

11 A. Yes, I had to help out to make sure Novell implemented
12 its part of the agreement. I also had a different
13 responsibility within Novell in that period.

14 Q. What were your responsibilities with respect to the
15 UNIX operating system during the period from 1984 through
16 1995?

17 A. My initial responsibilities when I transferred into the
18 organization was to head the product management
19 organization. Over the course of time I assumed increasing
20 responsibilities. I always maintained the product
21 management organizational responsibility. I then assumed
22 responsibility for licensing operations. I assumed
23 responsibility for our overseas affiliates in Japan and
24 Europe. I assumed UNIX marketing responsibility and I
25 assumed UNIX development responsibility.

1 By the time we were in USL, I was the executive vice
2 president responsible for the overall UNIX system business
3 and within Novell, after we were merged into Novell, and
4 some period of time we consolidated UNIX operations within
5 Novell, and I was named executive vice president and general
6 manager of the so-called UNIX system group within Novell.

7 Q. And in January 1994 did you become executive vice
8 president of UNIX systems group of Novell?

9 A. Yes, I did.

10 Q. Did there come a point when you met with Mr.
11 Frankenberg and Mr. Michaels to discuss the possibility of a
12 sale of Novell's UNIX business to Santa Cruz?

13 A. Yes, there was in, I believe, it was July of 1995,
14 perhaps June.

15 Q. Would it be fair to say Mr. DeFazio that at that time
16 that you were the senior executive most knowledgeable within
17 Novell regarding UNIX?

18 A. Yes, that's correct.

19 Q. And did you spend, well, how much time, Mr. DeFazio,
20 did you spend negotiating that transaction with Novell?

21 A. I met with Doug Michaels and Bob Frankenberg and out of
22 that meeting we agreed to pursue a sale. I then with Ed
23 Chatlos and Ty Mattingly, Bob Frankenberg's assistant,
24 traveled and met with Doug Michaels and some of this
25 colleagues in Santa Cruz with a specific proposal for how we

1 would do that sale.

2 We came out of that meeting with a high-level
3 agreement. I went back and we put together a team headed by
4 Ed Chatlos to work the details of how we would implement
5 that, and I spent essentially all of my time subsequently
6 working in one way or another aspects of that deal.

7 Now, most of my time after that meeting was spent
8 working within Novell itself on all of the details,
9 architecting the way we would do it. Working the time
10 frames and working the large number of personnel issues that
11 were associated with this since the organization had
12 probably 400 people at that time.

13 So I can't give you a number of hours other than to say
14 this was my prime job in that period and there was a strong
15 team of people, Novell people, Novell lawyers, Novell
16 outside lawyers working with their counterparts at Santa
17 Cruz to put together the details of the deal.

18 Q. On September 19, 1995 Novell entered into an asset
19 purchase agreement with Santa Cruz; is that right?

20 A. That is correct.

21 Q. Is it agreeable if during this deposition we refer to
22 the asset purchase agreement between Novell and Santa Cruz
23 as the A.P.A.?

24 A. Yes.

25 Q. Did there come a point when Novell sold certain UNIX

1 assets to Santa Cruz pursuant to the A.P.A.?

2 A. Yes.

3 Q. Do you have any understanding, sir, as to whether
4 Novell retained any rights with respect to the UNIX System V
5 source code licensing business?

6 A. Yes.

7 Q. Including those under the I.B.M. related agreements and
8 the Sequent related agreements?

9 A. Novell retained substantive rights under the agreement,
10 as we had two UNIX system businesses and really sold Santa
11 Cruz one of them.

12 Q. And referring you to the last sentence of paragraph 10
13 of your declaration would you agree that the rights retained
14 by Novell were what you considered to be significant,
15 substantive rights?

16 A. Yes, I would.

17 Q. I believe you testified earlier that you understood
18 Novell to have retained significant assets in that sale; is
19 that right?

20 A. That is correct.

21 Q. And did the retained assets include, as you understand
22 it, important intellectual property and significant
23 substantive rights under the UNIX System V source code
24 license agreement such as the I.B.M. related agreements and
25 the Sequent related agreements?

1 A. Yes, that's correct.

2 Q. And was responsible for negotiating the sale of

3 Novell's UNIX business to Santa Cruz?

4 A. Ed Chatlos and I were primarily responsible.

5 Q. How many UNIX businesses did Novell then have?

6 A. The way we looked at the UNIX business, we parsed it
7 into two components at that time. A UnixWare business and a
8 source licensing or legacy System V business.

9 Q. And what was the purpose of each of those businesses,
10 if you would briefly describe it?

11 A. The UNIX System V source licensing business was the
12 outgrowth of the original way that we provided UNIX system
13 technology to the marketplace where we provided it in source
14 form customers were adapted it to their marketplace needs,
15 they in turn would ship a binary version of the operating
16 system to their customers, pay us a royalty.

17 The UnixWare business was Novell actually developing a
18 final binary form version of the UNIX operating system that
19 was targeted to Intel specific X86 computer systems,
20 basically PCs and servers and providing that product, that
21 operating system product in binary form into the
22 marketplace.

23 Q. And initially did Santa Cruz express an interest in
24 purchasing both of the businesses?

25 A. Yes, when Ed Chatlos, I and Ty Mattingly visited them,

1 as I related earlier, the idea was that we would sell all of
2 the UNIX system, both the UNIX system business to Santa
3 Cruz.

4 Q. And is that in fact what happened?

5 A. No, it is not. The value that we, Novell placed on the
6 combination of those two businesses was much, much larger
7 than Santa Cruz was in a position to pay for the business,
8 and so they basically in that meeting I referred to said
9 this is too expensive, whether we agree with your value or
10 not, it's still too expensive. We, Santa Cruz, in the form
11 of Doug Michaels came up with an idea and said, why don't we
12 just buy the going forward business, the UnixWare business
13 from you. Why don't you, Novell, retain the source
14 licensing business.

15 And it was very clear to me very quickly that since
16 most of the financial value we placed on the combination of
17 those two businesses was attributable to the UNIX source
18 licensing royalty stream that in fact that idea by Doug
19 Michaels was very good, and although we had to rework some
20 of the financials that that idea would allow us to get to an
21 agreement, whereby we could provide the UnixWare business to
22 SCO at a price much closer to what they could afford.

23 Q. Do you recall, Mr. DeFazio, what value you attributed
24 to both of the businesses combined?

25 A. I believe that our initial proposal going into that

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1 meeting was for a composite value of about \$800 million.

2 That's my recollection.

3 Q. Do you have a recollection of what portion of the \$800
4 million you attributed to the source code portion of the
5 business?

6 A. Certainly the majority of that 800 million would be
7 attributed to the source code business, but I don't recall
8 the specific fraction.

9 Q. Do you recall how Novell reacted to the Santa Cruz
10 proposal?

11 A. I reacted very well to it, because it struck me that
12 this was a way that we would close a financials value gap
13 that looked to be otherwise insurmountable. So I
14 complimented Santa Cruz, I said this is a very creative
15 idea, and I said it's good with me. I'm going to take it
16 back to my management, meaning Bob Frankenberg.

17 And it was very good from a Novell viewpoint because
18 although it meant we did not receive the kind of immediate
19 payoff from Santa Cruz that we had estimated the value of
20 the two businesses would be, what we did receive was a
21 substantial payment in cash and equity in Santa Cruz
22 Operation in excess of \$100 million, but we maintained the
23 source legacy business.

24 At the time the \$800 million I mentioned had two
25 components, the source business in UnixWare, much of the

1 UnixWare component was projected growth from the future.
2 The value that UnixWare was contributing in 1995 was much
3 smaller and so by implementing this proposal Novell was able
4 to in essence maintain or keep the vast majority, 80 to 90
5 percent of the revenue stream from the two UNIX businesses
6 while shedding the vast majority of the expenses associated
7 with those two business, shedding perhaps 90 percent. So
8 Novell maintained a royalty stream that was financially
9 significant, very high margin, because the costs going
10 forward after the sale would be very, very small.

11 Q. As you understood the deal, Mr. DeFazio, did Novell
12 generally receive any royalties payable under the UNIX
13 System V source code license agreements including the I.B.M.
14 related agreements and the Sequent related agreements and
15 Novell paid Santa Cruz a five percent administrative fee for
16 its services in collecting such royalties?

17 A. Yes, that was the way that we implemented the deal.
18 The royalties would flow through to Novell from Santa Cruz
19 and they would be paid five percent for their work in
20 administering that.

21 Q. And you said twice, I believe, that Novell retained
22 significant assets following the sale; is that right?

23 A. That's correct.

24 Q. Do you recall that there was a provision in the A.P.A.
25 known as 4.16B?

1 A. Yes.

2 Q. Let me refer you, if I might, to Exhibit 8 to your
3 declaration. And in specific the Section 4.16 B. It's at
4 page 24 of Exhibit A to your declaration.

5 A. Page 24 says 4.16.

6 Q. Right. And if you just look down the page you'll see a
7 subsection B. Do you see that, it begins buyer shall not.

8 A. Yes.

9 Q. Would you just take a minute to refresh your memory as
10 to the contents of that section.

11 A. Yes. Yes.

12 Q. Now, substituting Santa Cruz for the term buyer and
13 Novell for the term seller, Section 4.16B provides in part
14 Santa Cruz shall not, comma, and shall not have the
15 authority to, comma, amend, comma, modify or waive any right
16 under or assign any SVRX license without the prior written
17 consent of Novell, period. In addition, at Novell's sole
18 discretion and direction Santa Cruz shall amend, supplement,
19 modify or waive any rights under or shall assign any rights
20 to any SVRX license to the extent so directed in any manner
21 or respect by Novell. In the event that Santa Cruz shall
22 fail to take such action concerning the SVRX licenses as
23 required herein, Novell shall be authorized and hereby is
24 granted the right to take any action on Santa Cruz' own
25 behalf.

1 Do you see that?

2 A. Yes, I do.

3 Q. Let me ask you, Mr. DeFazio, if you would tell me
4 please what you understood to be the intent of this
5 provision?

6 A. Yes. My understanding of this when we came back with
7 the notion that we would retain one business and sell the
8 other one, that was a high-level concept. And to then go
9 forward and do the A.P.A., which you can see from here is
10 perhaps 150 or 200 pages of documentation took a lot of work
11 on the part of SCO people and Novell people and outside
12 attorneys and the drafting of the document I was not
13 involved in, but the teams were involved. However, I had
14 provided specific guidance recognizing that this future
15 royalty stream would be very significant to Novell. And not
16 knowing exactly how we would craft the terms in the document
17 to protect that royalty stream I had said we have to
18 bulletproof, and I used those words, bulletproof, that's a
19 business term I think not a legal term, bulletproof the
20 parts of the agreement to make sure that Novell's ongoing
21 financial interests, which I knew would be very significant,
22 would be maintained, that there would be no loop holes
23 possible for Santa Cruz to be able to somehow get around
24 Novell collecting that -- that royalty.

25 So with that general guidance of bulletproofing the

1 team then went off and parts of the A.P.A. reflect the
2 team's creation or ideas on how to achieve that
3 bulletproofing and this section is an example of that. So
4 this is part of the implementation to make sure that
5 Novell's ongoing lucrative financial interest would be
6 maintained and assured.

7 Q. Was it your understanding that the A.P.A. at the time
8 was intended to transfer the copyrights for UNIX to Santa
9 Cruz?

10 A. No. The A.P.A. as it was written retained it and my
11 understanding was that the retention was a way the team
12 crafted the words to implement the goal of bulletproofing
13 this financial asset stream. I was not involved in any
14 discussions within Novell or certainly with Santa Cruz that
15 talked about transferring the copyright or not transferring
16 it. It just appeared this way in the A.P.A. and that's what
17 was executed.

18 Q. So your testimony concerning the copyright issue is
19 based on your reading of the A.P.A.; is that fair to say?

20 A. Well, it is based on two things. It's my reading of
21 the A.P.A., but also my recalling that I was not involved in
22 any discussions one way or the other keeping the copyright
23 or transferring it. It just wasn't discussed with me and
24 wasn't discussed -- wasn't an issue that was escalated and
25 certainly wasn't discussed in my meetings with Santa Cruz.

1 That would be, you know, kind of a specific of the deal, not
2 part of the broad discussions on the whole concept of what
3 we were trying to do with the A.P.A.

4 Q. But that would have been something within Ed Chatlos'
5 realm of responsibility if there were discussions about
6 that?

7 A. If there was a discussion and an impasse on that
8 question that certainly would have been escalated to me.

9 Q. If there was not an impasse but there was a discussion
10 was that something that would have been within Mr. Chatlos'
11 responsibility?

12 A. The entire A.P.A. if there was no impasse or
13 disagreement between the two parties generally that would
14 just take place and until it was reviewed for signature a
15 lot of the details we wouldn't even have been, I wouldn't
16 even have been aware of.

17 Q. And Mr. Chatlos would have been the person, the point
18 person for those portions?

19 A. He should have been aware of those details as team
20 leader, yes.

21 Q. If Novell owned the copyrights to UNIX why did Novell
22 need to take out a license from Santa Cruz to be able to use
23 the UNIX product?

24 A. Yeah, I was going to say that the way that you phrased
25 that to me is more a legal question.

1 Q. Do you have any sense from a business perspective?

2 A. Yeah, the business perspective is that we had
3 transferred -- the asset to Santa Cruz, Novell wanted to
4 retain rights to do some things with that technology in the
5 future. The copyright retention portion that I spoke to
6 earlier I linked to more this goal of bulletproofing and
7 making sure that Novell's binary legacy revenue stream was
8 protected. The technology license gave Novell the right, if
9 they had wanted it to, for example, add Unix software into
10 its products like NetWare and in turn ship those to the
11 market, irrespective of what we were doing with our legacy
12 UNIX source business, our source licensee, so that's kind of
13 two different things.

14 Q. Well, if Novell was bulletproof, to use your term, with
15 respect to the ownership of the copyrights, then why did it
16 need a license as a business perspective from Santa Cruz in
17 order to be able to use that UNIX technology?

18 A. It was bulletproofed relative to the revenue stream.
19 It needed the license because this had nothing to do with
20 the revenue stream. This was to give Novell the rights to
21 take UNIX and very specifically combine it with its core
22 product which was NetWare if it chose to do and ship those
23 into the marketplace.

24 Q. Now, you talked about I think you used the term
25 bulletproofing in connection with this provision you're

1 aware, are you not, that I.B.M. bought a fully paid up
2 license with respect to UNIX System V in 19 -- in the mid
3 1990s, right?

4 A. Yes, we discussed that earlier, 1996, April.

5 Q. So, if that was the case, then what need was there on
6 the -- on behalf of Novell to waive rights, source code
7 rights with respect to agreements that had already been
8 fully paid up? What bulletproofing or what interest was
9 being protected conceivably have been protected by Novell
10 under those circumstances?

11 A. I think you'd have to ask the Novell the need, what I
12 tried to say in conjunction with this and these exhibits
13 382 and so forth is that what Novell did was consistent with
14 my understanding of their rights in the A.P.A. I did not
15 try to comment on their motivations for doing that, which is
16 what I think you're asking when you say the need.

17 Q. Well, was it your understanding that Novell under the
18 A.P.A. had the right to modify provisions or cancel
19 provisions of SVRX source code agreements, software
20 agreements without having any -- without protecting any
21 interest that they had at stake in connection with the
22 royalty rights that they had retained?

23 A. Novell had the right if they felt a legacy licensee was
24 violating the license to take some actions and Novell had
25 the right to ensure which is part of the bulletproofing that

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1 the old Santa Cruz company could not take any actions which
2 would mess up its arrangement with those customers.

3 MR. JACOBS: That completes Novell's introduction
4 of testimony from Michael DeFazio. This was from a
5 deposition dated January 13, 2005.

6 THE COURT: Thank you.

7 MR. NORMAND: Your Honor, SCO has some counter
8 designations.

9 THE COURT: Do you know long those would be?

10 MR. NORMAND: I have been told it is about eight
11 and a half minutes.

12 THE COURT: Okay. Let's go ahead then.

13 MR. NORMAND: Thank you.

14 (WHEREUPON, the following deposition was played.)

15 Q. Are you currently represented in connection with this
16 case by Mr. Jacobs as well?

17 A. Yes, I am.

18 Q. And who is paying his fees?

19 A. His fees are being paid for by Novell.

20 Q. You signed a declaration in this case I believe in
21 October of 2003?

22 A. Yes.

23 Q. Who had drafted that declaration?

24 A. I.B.M. drafted it as a result of the meeting that I had
25 with them.

1 MR. NORMAND: Your Honor, there was a problem with
2 the videotape during the deposition, so this following clip
3 did not make it onto the videotape. I would propose to read
4 the question and answer into the record and then have the
5 videotape continue.

6 MR. JACOBS: No objection, Your Honor.

7 MR. NORMAND: Question, after the sale, did your
8 work focus on Novell's broader network strategy? Answer,
9 yes. After the sale I took over a group that had to do with
10 Novell business processes that span the entire company, and
11 was sort of in support of what Novell was trying to
12 accomplish with a new networking strategy that it was
13 implementing post UNIX. I still continued, as I said
14 earlier, with my administrative oversight responsibilities
15 for any residual UNIX system related activities.

16 THE COURT: All right.

17 (WHEREUPON, the following deposition was played.)

18 Q. Do you have an understanding, Mr. DeFazio, as to
19 whether there was an amendment two to the A.P.A.?

20 A. I have an understanding that there was an amendment two
21 to the A.P.A.

22 Q. And in paragraph 53 of the declaration you say that you
23 were not involved in negotiating amendment number two, and
24 that you do not have personal knowledge as to what it was
25 intended to accomplish and are unable to address what it

1 means. Is that an accurate statement?

2 A. That is correct.

3 Q. Were you directly involved in negotiating the April
4 1996 amendment or amendment X?

5 A. No, I was not.

6 Q. During much of your examination by Mr. Marriott you
7 were referring to a particular document or holding a
8 document in front and reading it while he was asking you
9 questions, was that the declaration that I.B.M. drafted for
10 you?

11 A. This is my declaration of October 2003, correct.

12 Q. And is that the document that you've had in front of
13 you during your entire examination by Mr. Marriott?

14 A. Yes.

15 Q. Who requested that you provide that declaration in
16 connection with this case?

17 A. At the end of my first meeting with I.B.M. Mr. Marriott
18 and/or his colleague Gabe Saltarelli asked me if I would be
19 willing to provide a declaration and I said I would be
20 willing to do so if someone else did the initial drafting.

21 Q. And that someone else who did the drafting was I.B.M.

22 --

23 A. Yes.

24 Q. -- counsel?

25 You, with reference to the asset purchase agreement, do

1 you remember being asked questions about that agreement?

2 A. Yes.

3 Q. Okay. The negotiation team from Novell was led by a
4 person named Ed Chatlos; is that correct?

5 A. That's correct.

6 Q. Is it your view that Mr. Chatlos would have a strong
7 understanding of Novell's intent with respect to that
8 transaction?

9 A. Yes.

10 Q. Is there anybody who had a better understanding of
11 Novell's intent with respect to that transaction than Mr.
12 Chatlos that you know of?

13 A. Well, I certainly think that I had an understanding of
14 the intent and I certainly think that my boss, Bob
15 Frankenberg, had an understanding of the intent, and I'm
16 sure that our outside counsel had an understanding. Ed was
17 in the top tier of people with a very good understanding,
18 yes. Ty Mattingly was another one.

19 Q. And you said that you did not have any involvement with
20 amendment number two to the asset purchase agreement; is
21 that right?

22 A. That's correct.

23 Q. Were you still employed by Novell at at the time of
24 amendment number two?

25 A. Yes, I was.

1 Q. So is it fair to say that after putting the negotiation
2 team together and attending the first meetings that you
3 discussed with Mr. Marriott that Mr. Chatlos was the person
4 who had primary day-to-day responsibility for the
5 negotiation of the A.P.A.?

6 A. That's my perception, and it was Ed Chatlos I looked to
7 during this process as, you know, the principal.

8 Q. And with respect to amendment number two, is it your
9 view that amendment number two did not effect any
10 significant or substantial changes to the parties' deal as
11 it was embodied in the A.P.A.?

12 A. Well, I can't really answer that because amendment two
13 was, I was not involved in that.

14 Q. Do you think that you would have been involved if it
15 had been, if it had effected a substantial change to the
16 parties agreement under the A.P.A.?

17 A. I think I would have been involved if it required being
18 escalated to me. Apparently it did not.

19 Q. You spoke with Mr. Marriott about two businesses that
20 in your view were bifurcated for purposes of the A.P.A.
21 transaction?

22 A. Yes.

23 Q. And you referred to one of those as the source code,
24 source licensing business, right?

25 A. Yes.

1 Q. That's the one in your view that was retained by Novell
2 under the A.P.A.?

3 A. Correct.

4 Q. Does that source licensing business include the
5 licensing of source code or is it just the collection of
6 binary sub, you know, royalties on sublicense products?

7 A. It was primarily the collection of royalties, but to
8 the extent that a licensee needed to extend its source code
9 rights to additional CPUs, additional computers, I believe
10 Novell would be paid a nominal fee for that under those
11 agreements, but by far the vast majority of those revenues
12 came about from binary royalties attributable to licensees'
13 shipments of binary forms of the UNIX operating system.

14 Q. And those binary forms of the UNIX operating system
15 were binaries distributed under already existing UNIX source
16 code licenses; is that correct?

17 A. That's correct.

18 Q. Now, the other portion, the portion that was
19 transferred, as you said, to Santa Cruz through the A.P.A.
20 is, I believe you described it as the UnixWare side of the
21 business. Is that an accurate description?

22 A. I called it the UnixWare business and it reflected the
23 binary product that Novell developed but UnixWare was also
24 the then current source product, so beyond SVRX UnixWare was
25 our latest and greatest instantiation of UNIX system

1 technology and what we transferred was that current
2 technology and as importantly the engineering wherewithal to
3 continue to evolve that technology in the form --

4 Q. Okay.

5 A. -- of a subset of the engineering team.

6 Q. Let me rephrase the question. In your view was the
7 UNIX, was it the intent of Novell to transfer the
8 intellectual property of the UNIX program to Santa Cruz
9 through the asset purchase agreement?

10 A. To the extent that that was a part of that business,
11 yes, that would be my understanding.

12 Q. And was the intellectual property in UNIX an important
13 part of the going forward UnixWare business?

14 A. Yes.

15 Q. You said earlier that there was a team that was
16 involved in preparing this language for Novell. Who was on
17 that team?

18 A. Well, Ed Chatlos was the leader of the team and it
19 consisted of people from finance, from internal legal and
20 from outside legal.

21 Q. And in your view would Mr. Chatlos have a good
22 understanding of what 4.16B was intended to mean by Novell?

23 A. I would assume that he would, but I'm not sure, you
24 know, I can't say specifically. He has a detailed
25 understanding of every piece but as the guy I looked to I

1 would hope I could have dialogued if I needed to at the time
2 with him on various pieces.

3 MR. NORMAND: Your Honor, that completes SCO's
4 designations for Mr. DeFazio.

5 THE COURT: Thank you.

6 Ladies and gentlemen, we'll now take a 20-minute
7 recess.

8 MR. JACOBS: I am sorry, Judge. Just one second.
9 Okay. I thought it was incomplete.

10 THE COURT: Is it complete?

11 MR. JACOBS: Yes.

12 THE COURT: That was all you needed from Mr.
13 DeFazio?

14 MR. JACOBS: Yes.

15 THE COURT: 20 minutes.

16 (WHEREUPON, the jury leaves the proceedings.)

17 THE COURT: When we return we'll start with
18 Mr. Brown?

19 MR. JACOBS: That is correct.

20 THE COURT: Is he going to go long enough to
21 finish today?

22 MR. JACOBS: I believe so.

23 THE COURT: I guess that wasn't a good question on
24 my part. Will he take the entire time?

25 MR. JACOBS: Yes, I believe so.

1 THE COURT: Thank you, counsel. 20 minutes.

2 (Recess)

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