

1 (10:20 A.M.)

2 THE COURT: Counsel, the Court will not allow the  
3 jury to hear that portion of the deposition of Mr. Levine  
4 that's in question. I believe that it would be inconsistent  
5 with the Court's prior ruling, and I believe that the prior  
6 ruling was well founded. So if you would make certain that  
7 that part is not presented to the jury.

8 MR. NORMAND: Thank you, Your Honor.

9 THE COURT: Is there something else we need to deal  
10 with before we bring the jury in?

11 MR. BRENNAN: Just a quick housekeeping matter in  
12 terms of order, Your Honor. We've had a bit of a dialogue  
13 during the break. As Novell understands it, the order of the  
14 remaining videotape depositions today will be Mr. Mohan will  
15 be next, and then Mr. Michels following, and then Mr. Levine,  
16 the witness that you just made reference to in your comments,  
17 Your Honor.

18 And then, at least as we've played through the time here,  
19 it looks like there will still be time available. And I  
20 believe, certainly SCO's attorneys can speak for themselves,  
21 that they may try to bring over their next witness, who will  
22 be a live witness. And if that can't be arranged, we'd have a  
23 time gap. We would expect that that vacuum would be filled  
24 with a charge against the plaintiffs for not using the time or  
25 some other remedy that the court might think appropriate.

1 THE COURT: Mr. Singer.

2 MR. SINGER: We don't disagree with what Mr. Brennan  
3 has said. I mean we'll try to get -- if there is time left  
4 over after running through those three depositions, and it  
5 makes sense to start Mr. Broderick if there's more than just a  
6 few minutes, we'll try to present him. But we certainly  
7 understand if he's not ready to go, if there's some gap of  
8 time, that would be on our account.

9 THE COURT: Would you have any -- are you prepared  
10 to deal with Mr. Broderick if he is brought on live?

11 MR. BRENNAN: We are, Your Honor.

12 THE COURT: I would prefer that we not waste any  
13 time, the jury's time.

14 MR. SINGER: And that's our preference as well, and  
15 we're trying to get him ready to go in the afternoon if  
16 there's some time.

17 MR. NORMAND: We need to get him into a suit, Your  
18 Honor.

19 The Court: A suit.

20 MR. NORMAND: A suit.

21 THE COURT: You know, the marshals have suits  
22 downstairs I think. I'm not sure about the fit, but --

23 All right, Ms. Malley, if you'd please bring the jury in.

24 (jury present)

25 MR. NORMAND: Your Honor, the next witness SCO will

1 call by video deposition is Alok Mohan, who was deposed on  
2 February 23rd, 2007.

3 (Alok Mohan called as a witness via videotape deposition)

4 Q In 1995 were you the President of the Santa Cruz  
5 Operation?

6 A I was CEO around that time, '95 to '98.

7 Q Were you President and CEO Of the Santa Cruz Operation in  
8 1995?

9 A I was Chief Operating Officer for a short while, and then  
10 I became CEO.

11 Q Do you remember what your position was at the time of the  
12 transaction between Novell and Santa Cruz Operation?

13 A I was the CEO.

14 Q Were you also a member of the Board of Directors?

15 A Yes.

16 Q And would it be fair -- what would -- you were aware that  
17 there was a contract relating to the transaction between  
18 Novell and Santa Cruz; correct?

19 A Yes.

20 Q Would it be fair to say that your involvement in the  
21 Novell/Santa Cruz deal was only at a high level?

22 A I was involved as a CEO, at the CEO Level.

23 Q Would it be fair to say that your involvement as the CEO  
24 For Santa Cruz on the Novell/Santa Cruz transaction was only  
25 at a high level?

1 A What do you mean by high level?

2 Q Do you recall having characterized your involvement in  
3 the Novell/Santa Cruz transaction as at the high level?

4 A Well, I was the CEO and there were a lot of people  
5 involved within the transaction from our side, so I was  
6 involved as a CEO.

7 Q So is it fair to say that your involvement in the  
8 Novell/Santa Cruz deal was only at a high level?

9 A Yes.

10 Q Is it fair to say that you were not involved in the  
11 details of the legal documents that were executed as part of  
12 the Novell/Santa Cruz deal?

13 A I was involved in the normal processes. I was involved  
14 in reviewing documents. I was not involved in writing them.  
15 And the detail level of negotiations, I was not involved in  
16 that, although I did have some discussions with Duff Thompson,  
17 as well as Frankenberg.

18 Q You said, "I was involved in reviewing documents." As  
19 you sit here today, what documents do you recall reviewing as  
20 part of the Novell/Santa Cruz transaction?

21 A I recall looking at the APA and reviewing that.

22 Q Is it fair to say that you were -- you did not  
23 participate in the negotiation meetings between  
24 representatives of Novell and Santa Cruz when the legal  
25 document was being drafted?

1 A I was --

2 MR. NORMAND: Objection to form.

3 THE WITNESS: -- involved in the negotiations with  
4 Duff Thompson, and -- at a -- and, again, at a strategy and  
5 CEO level. The specific drafting of the documents were done  
6 by people, and I was not involved in that.

7 Q Now, you signed the Asset Purchase Agreement; is that  
8 right?

9 A That's true.

10 Q Did you review the document before signing it?

11 A Yes, I did.

12 Q Did you go through it in a -- on a detailed basis by  
13 yourself?

14 A I read it.

15 Q Did you read the Asset Purchase Agreement from the front  
16 cover to the end?

17 A Yes.

18 Q And I take it that when you signed the Asset Purchase  
19 Agreement on September 19th, 1995, you had no reason to  
20 believe it was inaccurate?

21 A Yes, I agree with that.

22 Q And you had no reason to believe that the Asset Purchase  
23 Agreement was not clear?

24 A It -- it -- these complex documents, it -- it represented  
25 as best as we could tell at that time what the intent was.

1 And I looked at it, as I do all documents, with that in mind,  
2 and it looked right to me so I signed it, yes.

3 Q When you read the document before you signed it, nothing  
4 jumped out at you as being unclear; is that a fair  
5 statement?

6 A Yes.

7 Q And when you signed the document on September 19, 1995,  
8 you had no reason to believe that that contract did not  
9 accurately reflect the parties' intent; correct?

10 A That's right.

11 Q One of the other items that Santa Cruz got through its  
12 transaction with Novell in 1995 was the right to sell  
13 UnixWare; correct?

14 A We bought the business.

15 Q Santa Cruz got the right to sell UnixWare; right?

16 A And, again, I -- I -- I will just keep it in terms of we  
17 bought the business. We could do whatever we wanted to do it.  
18 As part of that could we sell UnixWare? Absolutely. But as  
19 part of the whole -- it's the whole business we bought.

20 Q And in 2000 do you recall that Santa Cruz agreed to sell,  
21 among other things, the SCO OpenServer product to Caldera?

22 A This is where I was not -- I was on the Board. I was not  
23 the CEO at that time. I was further removed from the  
24 business, but -- so keep that in mind as you ask these  
25 questions. Yes, we entered in an agreement to sell the Unix

1 business to Caldera.

2 Q And when you say that Santa Cruz agreed to sell the Unix  
3 business to Caldera, I take it you're referring to not only  
4 the SCO OpenServer product but also the Unix business that it  
5 had purchased from Novell?

6 A Yes, everything.

7 Q In your personal view, what rights, if any, did Novell  
8 retain after the Asset Purchase Agreement with Santa Cruz?

9 A I -- my belief has always been, and I believe we bought  
10 the whole business. And I -- the intent of that -- intent of  
11 that agreement, when I was talking to Duff Thompson and at  
12 least in the higher level discussions, was we were buying the  
13 whole business. It wasn't leaving any rights behind.

14 It was -- what happened was that since we couldn't afford  
15 the purchase price of the SVRX revenue stream, which is like  
16 checks coming in every month, basically what it was, and we  
17 couldn't afford it. We couldn't pay the present value of what  
18 that stream would be. We also felt that there was a  
19 difference of opinion about what that stream is. And so as I  
20 looked at it, it was a financial engineering -- it was a  
21 transaction bridge between what we were willing to pay and  
22 what they were willing to pay. What they wanted was to allow  
23 them to keep that revenue stream.

24 Now, to keep a revenue stream, they needed the ability  
25 to -- I assume -- the ability to make sure that we kept the

1 clients. If they had a problem with the SVRX, that we will  
2 take care of -- or that problem is taken care of. But I was  
3 not -- at least at our level, I was not thinking of that we're  
4 leaving any rights like they owned anything or any rights of  
5 that kind, no.

6 Q And So I -- I want to be clear. What particular rights  
7 then do you think Novell retained? You said -- you said --  
8 let me look at it this way. You said -- you said you thought  
9 that Santa Cruz was leaving no rights behind.

10 A Yeah, pretty much.

11 Q So is it a fair statement then that you believe that  
12 Novell was retaining no rights?

13 A My -- without -- without getting into the specific  
14 documents, which every -- there were a lot of other people in  
15 the organization who could do that for you. From a -- the  
16 view of what we're buying, we're buying the whole business,  
17 and we -- we had all the rights as we bought the business.

18 There was a revenue stream that -- and -- and I have to  
19 assume that there is some ways to protect that revenue stream,  
20 but I can't tell you what that would be, but it was not like  
21 we were leaving something behind. We were buying the  
22 business.

23 Q I want to fairly characterize what you're saying, so  
24 correct me if I'm wrong. Is it a fair characterization of  
25 your testimony that you believe that Novell was retaining no



1 rights through this transaction, but that it was retaining a  
2 revenue stream related to SVRX?

3 A Yeah. I was -- I'm trying to state this is what my --

4 Q And I'm only talking about your personal belief, no one  
5 else's.

6 A It's not so much a belief, because I know that there's  
7 documents that have a certain defined definition of what they  
8 can and cannot do. My negotiation, my involvement, was that  
9 it was -- we bought the business. And there were some aspects  
10 of things, and I can't tell you what they were, to allow them  
11 to protect the fact that the revenue stream -- that they get  
12 paid. And -- but I can't tell you anymore than that.

13 Q You keep referring to documents that you could look at.  
14 Are you referring to the contract?

15 A Yeah, I assume.

16 Q Okay. So if I wanted to know what rights Novell  
17 retained, can I look at the contract and find out?

18 A You'll have to look at it.

19 Q Is it true that if I wanted to find out what rights  
20 Novell did retain, I could look at the contract?

21 A I don't know that.

22 Q You believe that Santa Cruz got the Unix copyrights  
23 through the APA; is that right?

24 A We believe I bought the whole business. That includes  
25 all kinds of stuff. And -- and, you know, I gave you the

1 answer. I think we bought -- we got the whole thing.

2 Q Okay. But you haven't -- you haven't confirmed. Is --  
3 is -- are the Unix copyrights part of the Unix business?

4 A Absolutely.

5 Q What is the basis of your opinion that Santa Cruz got the  
6 business?

7 A That -- that's -- that was the whole discussion and  
8 intent, negotiations. That's my recollection of what we were  
9 doing.

10 Q Now, back to the topic of Unix copyrights. Are you aware  
11 that the subject of Unix copyrights was specifically addressed  
12 in the contract?

13 A No, I'm not aware of that.

14 Q When you signed this document, you -- did you actually  
15 look to see whether or not there were any provisions in here  
16 relating to Unix copyrights?

17 A I -- I think -- I think we have to -- what I'm trying to  
18 get across is it is not one item at a time. It is the  
19 entirety of the document as I read it. I felt then that this  
20 was buying the business. And I -- I -- it's not about  
21 specific provisions. It was the entirety of the document.  
22 And to me the business includes copyrights.

23 Q I'll just repeat the question. Is it your testimony that  
24 you can't just look at the excluded assets provision to  
25 determine whether or not Unix copyrights were included in the

1 transaction?

2 A Again, you got to look at the whole thing as an entirety.  
3 And there were some issues relating to -- and that's why there  
4 were amendments to these documents. And -- but my -- my point  
5 that the intent was that we're buying the whole Unix business,  
6 that included copyrights, etcetera, still that's what I  
7 believe.

8 Q Do you recall who else at Novell you were dealing with  
9 beside Mr. Frankenberg?

10 A The other person that I dealt with on the APA or the  
11 discussion leading up to that was Duff Thompson.

12 Q Duff Thompson was the person that you were speaking to  
13 before the Asset Purchase Agreement was executed?

14 A Right.

15 Q When you signed the declaration, were you content that  
16 the language of the declaration reflected your views?

17 A Yes, I think so.

18 Q Looking at paragraph four of your declaration, Mr. Mohan,  
19 you say in the third Sentence of that paragraph four quote:  
20 "To the extent anyone is claiming that Novell retained the  
21 Unix copyrights or that Novell retained the right to waive  
22 material breaches of Unix system V agreements years after the  
23 sale to Santa Cruz, such claims are contrary to my  
24 understanding, intent and agreement. I would not have agreed  
25 to do -- to those terms if anyone had suggested that that was

1 what Novell was offering," end quote. Do you see that  
2 language?

3 A Yes.

4 Q Why would you not have agreed to those terms if someone  
5 had suggested that that was what Novell had offered?

6 A Well, I -- I was -- I can speak to the strategy and the  
7 intent was we wanted to buy the business. I made this point  
8 earlier today. And the business included all the assets,  
9 which included in my view copyrights. And what -- and we're  
10 kind of buying the stuff lock, stock and barrel. It would  
11 have been that way if you could have afforded the present  
12 value of the royalty stream, but because of cash constraints  
13 we had to -- cash constraints and the differences -- potential  
14 differences on what the value of that future stream would be,  
15 that we said we'd pass the revenue on to Novell, 95 percent of  
16 it on to -- to Novell.

17 But as I saw it, we bought the business that included all  
18 this stuff. And if you -- if you don't buy -- an evaluation  
19 in my mind was set based on we bought the whole business.

20 Q Why would you not have agreed to the terms of the deal if  
21 someone had told you that the Unix copyrights were being  
22 retained by Novell?

23 A I felt -- I believe that is all part of the value of what  
24 we were buying, and it's -- it's an assessment of the value of  
25 what you buy, what you pay for. And to me that was -- that

1 was part of what we had bought, and it would be a lot less  
2 value without it in my view.

3 Q Why would you not have agreed to the terms of the  
4 transaction if anyone had suggested to you that Novell  
5 retained the right to waive material breaches of Unix System V  
6 agreements?

7 A If they could waive material breaches, then we did not  
8 control Unix System V as an asset. It was of less value to  
9 us.

10 Q You say in paragraph five quote, "As the Chairman of the  
11 Board of Santa Cruz in 2001, I understood that Santa Cruz  
12 conveyed to Caldera International, Inc. all of the Unix and  
13 UnixWare assets that Santa Cruz owned, including all of the  
14 Unix intellectual property rights, such as the copyrights that  
15 Santa Cruz had obtained from Novell," end quote. Do you see  
16 that language?

17 A Yes.

18 Q Is that an accurate statement?

19 A I think so.

20 MR. NORMAND: Your Honor, at this point we would ask  
21 to publish to the jury SCO exhibit 526, which is already in,  
22 And to highlight the portions of that exhibit that Mr. Mohan  
23 will be subsequently asked about.

24 THE COURT: Go ahead.

25 MR. NORMAND: This is the press release from

1 September 20th, 1995 after the execution of the APA. The  
2 first paragraph of the press release states quote, "The Santa  
3 Cruz Operation, Inc. and Novell Inc. today announced a  
4 definitive agreement for SCO to purchase the Unix business  
5 from Novell."

6 Next paragraph down: "Alok Mohan, President and CEO Of  
7 SCO, said, 'This extends SCO's leadership position in the  
8 Business Critical Server market. Our customers and resellers  
9 not only get a powerful Unix operating system, but also the  
10 most advanced network services in the world. Novell's  
11 advanced network services, such as NetWare Directory Services,  
12 are setting the standard for business networking. Our  
13 customers will be able to integrate their Business Critical  
14 Servers with their existing work groups to provide their  
15 people with greater access to corporate data."

16 And on page two of this press release there's a --

17 Mr. Calvin, let's start with the top paragraph -- those  
18 two.

19 The first paragraph is a quote from Robert J.  
20 Frankenberg, Chairman and CEO of Novell. And then the next  
21 paragraph states: "According to the terms of the agreement,  
22 SCO will acquire Novell's UnixWare business and Unix  
23 intellectual property."

24 And I'd like to continue with the deposition, Your Honor.

25 Q -- Mr. Mohan, what's previously marked as Exhibit 1028.

1 Exhibit 1028 is titled "Press Release" under SCO letterhead.  
2 The title of the press release is, quote: "SCO acquires Unix  
3 business from Novell and licenses NetWare technology," end  
4 quote.

5 Do you see that you're quoted in the second paragraph of  
6 the first page?

7 A Yes.

8 Q And do you see that Robert Frankenberg, Chairman and CEO  
9 Of Novell, is quoted at the top of the second page?

10 A Yes.

11 Q The press release states on page two, in the first  
12 sentence of the second paragraph quote: "According to the  
13 terms of the agreement, SCO will acquire Novell's UnixWare  
14 business and Unix intellectual property," end quote. Do you  
15 see that language?

16 A Yes.

17 Q Does that language accurately reflect your understanding  
18 of the transaction?

19 A This language is consistent with what I've been saying  
20 today about we bought the business. We bought the UnixWare  
21 and Unix intellectual property. We bought the business. And  
22 that's what I thought we were buying, and I still believe  
23 that's what we bought.

24 Q Did anyone from Novell ever say to you prior to the  
25 execution of the APA that Novell intended to retain any Unix

1 or UnixWare copyrights?

2 A No.

3 Q Did anyone from Santa Cruz ever say to you prior to the  
4 execution of the APA that they understood that Novell intended  
5 to retain any Unix or UnixWare copyrights?

6 A No.

7 Q You say in paragraph six of your declaration quote: "In  
8 approximately early April, 1996, it came to my attention that  
9 Novell, purportedly on behalf of itself and Santa Cruz, was  
10 planning to enter into an agreement with IBM purportedly  
11 amended its Unix license agreements by granting IBM a buyout  
12 of its binary royalty obligations and expanding its source  
13 code rights," end quote. Do you see that language?

14 A Yes.

15 Q Did anyone from Novell ever say to you at anytime in 1996  
16 that Novell had retained any Unix or UnixWare copyrights under  
17 the APA?

18 A No, I don't recall that.

19 Q Did anyone from Santa Cruz, including Santa Cruz' outside  
20 counsel, say to you at anytime in 1996 that they believed  
21 Novell had retained any Unix or UnixWare copyrights?

22 A I don't recall that.

23 Q Was it ever your view in the course of 1996 that Novell  
24 had the right to direct Santa Cruz to waive its rights under  
25 its SVRX licenses?



1 A No. Again, I thought we had bought the business so we  
2 had the rights. And if someone else could just tell us to  
3 waive the rights, then what did we buy? So I -- I -- I  
4 felt -- I had felt that we bought the business.

5 Q Do you recall whether Mr. Frankenberg or anyone else at  
6 Novell ever said to you that Novell had retained the rights to  
7 waive Santa Cruz' rights under Santa Cruz' SVRX agreements?

8 A No.

9 Q Was it ever your understanding of the APA that Novell had  
10 the right to prevent SCO from exercising its rights with  
11 respect to SVRX source code under the agreement?

12 A It was our business, it was our ownership, and we could  
13 do according to whatever our rights were.

14 MR. NORMAND: Your Honor, we would propose to move  
15 into evidence SCO exhibit 180 on the basis of foundation laid  
16 a few minutes ago by Mr. Mohan regarding a dispute that had  
17 arisen concerning IBM.

18 THE COURT: Mr. Jacobs.

19 Mr. JACOBS: Yes, Your Honor. Could we have a quick  
20 sidebar, Your Honor?

21 THE COURT: Yes. Do you want this on the record?

22 Mr. JACOBS: Yes, please.

23 (bench conference discussion according to the reporter's  
24 ability to hear and understand what was said)

25 Mr. JACOBS: I want to make sure at the time --

1 (Reporter interrupted due to inability to hear and understand)  
2 (inaudible) there was a stand-still agreement between the  
3 companies in agreeing that this sort of correspondence would  
4 not come in in the event of a future dispute. I want to have  
5 an understanding that if we don't object on the basis of that  
6 agreement to this exhibit coming in, that SCO will not object  
7 to corresponding exhibits from our side coming in with respect  
8 to the nature of this dispute.

9 MR. NORMAND: We have no objection. We have no such  
10 objection.

11 THE COURT: All right.

12 Mr. JACOBS: That's fine, Your Honor.

13 (In open court)

14 Mr. JACOBS: In light of our sidebar, Your Honor, no  
15 objection.

16 THE COURT: Exhibit 180 will be admitted.

17 (Plaintiff's Exhibit 180 received in evidence)

18 MR. NORMAND: This is a letter dated April 19th,  
19 1996 from Mr. Mohan identified as President and Chief  
20 Executive -- sorry -- from Mr. Frankenberg, CEO of Novell, to  
21 Mr. Mohan, President and Chief Executive Officer of SCO.

22 The first paragraph says: "Dear Alok, thank you for your  
23 letter today. I understand your deep concern about this  
24 matter. We had been expecting your response yesterday and  
25 have already continued our discussions with IBM today. I will

1 do my best to make sure that we address your concerns in our  
2 ongoing negotiations. In addition, I believe I need to  
3 clarify some potential misconceptions in your letter."

4 The letter continues: "First of all, I would like to  
5 clarify that we are not granting IBM any additional rights  
6 beyond what they already have. With the minor exception of  
7 allowing IBM's VAR -- VAR's to make minor modifications to AIX  
8 code to support unique hardware devices and allowing IBM's  
9 major accounts to make temporary fixes from AIX source code,  
10 the proposed transaction does not grant any additional rights  
11 beyond those granted other similarly situated Unix licensees.  
12 Specifically no right to sublicense source code is being  
13 granted."

14 And we'd like to continue with the deposition at this  
15 point, Your Honor.

16 THE COURT: All right.

17 Q Mr. Mohan, what's been marked as Exhibit 1064, a letter  
18 to you from Mr. Frankenberg dated April 19th, 1996. The  
19 letter contains the following language in the -- beginning in  
20 the second paragraph, quote: "First of all, I would like to  
21 clarify that we are not granting IBM any additional rights  
22 beyond what they already have, with the minor exception of  
23 allowing IBM's VAR's to make minor modifications to AIX code  
24 to support unique hardware devices and allowing IBM's major  
25 accounts to make temporary fixes from the AIX source code.

1 The proposed transaction does not grant any additional rights  
2 beyond those granted other similarly situated Unix licensees,"  
3 end quote.

4 Do you see that language?

5 A Yes.

6 Q Was it ever your understanding of Amendment-X that IBM  
7 received additional rights beyond what it already had, with  
8 the exceptions that I just read into the record?

9 A I believe that -- that we did not grant any additional  
10 rights in this buyout of the -- of the kind which is we talk  
11 about here.

12 Q Assuming that Santa Cruz got the Unix copyrights in this  
13 deal, would possession of the Unix copyrights have been a  
14 significant part of Santa Cruz' business going forward?

15 A I don't know what you mean by a significant part. I  
16 can't parse an asset purchase that has all these pieces that  
17 we buy to parse it to -- to try to assign values within this  
18 stuff. We bought the business. We paid a certain price for  
19 the business. Business includes everything. It's like a  
20 human being, you know, just you -- your arms and legs and  
21 everything are part of you. It's part of the business.

22 MR. NORMAND: Your Honor, that completes SCO's  
23 designations for Mr. Mohan's deposition testimony.

24 Mr. Jacobs: And we have some counterdesignations,  
25 Your Honor.

1 THE COURT: All right. Go ahead, please.

2 Q You weren't participating in the meetings that were  
3 occurring between the respective parties that were --

4 A I was not.

5 Q -- drafting the document?

6 A I was not.

7 Q Would you agree with me that both companies, Novell and  
8 Santa Cruz, had very capable skilled legal teams that were  
9 representing it in this transaction?

10 A You're looking for my opinion?

11 Q I'm asking for your opinion.

12 A My opinion is that these lawyers are probably pretty  
13 good, yes.

14 Q I assume as Chief Executive Officer you've been involved  
15 in a number of transactions over the years?

16 A Uh-huh. You're looking for my opinion?

17 Q I'm asking for your understanding.

18 A My opinion is that these lawyers are probably pretty  
19 good, yes.

20 Q I assume as Chief Executive Officer you've been involved  
21 in a number of transactions over the years?

22 A Uh-huh, yes.

23 Q And you would use experienced and capable law firms in  
24 representing you in complex transactions such as this?

25 A We would try to.

1 Q Would you agree with me that Santa Cruz and Novell at the  
2 time of the transaction were experienced companies in software  
3 transactions?

4 A Yes.

5 Q They were both large companies?

6 A We were a \$200,000,000 revenue company at that time.  
7 Novell was larger.

8 Q Would you agree with me that the transaction between  
9 Novell and Santa Cruz in 1995 was an arms-length transaction?

10 Mr. NORMAND: Objection to form.

11 THE WITNESS: Yes. We were two separate companies,  
12 and there was no other connection between them.

13 Q Would you -- you have no reason to believe that either  
14 company was in an unfair bargaining position at the time of  
15 the deal?

16 MR. NORMAND: Objection to form.

17 THE WITNESS: I don't think so.

18 Would you agree with me that the contract is the  
19 most important item in determining what the terms of the deal  
20 are?

21 MR. NORMAND: Objection, asked and answered.

22 THE WITNESS: And you want my opinion on that?

23 Q Asking for your understanding based on your experience.

24 A I think contract is one of the most important things,  
25 yes.

1 Q And based on your experience and understanding, companies  
2 make their business decisions based upon the terms in a  
3 contract; is that right?

4 MR. NORMAND: Objection to form.

5 THE WITNESS: Yes.

6 Q And if there's a dispute in the future after a  
7 transaction, the first thing the parties would look to is the  
8 contract to determine what the terms of the deal were; is that  
9 right?

10 MR. NORMAND: Objection to form.

11 THE WITNESS: Yes.

12 Q And oftentimes disputes, such as in this case, they don't  
13 arise until many years down the road?

14 A Many years? Yes.

15 Q And would you agree with me that when they do, the  
16 contract is the best evidence of the parties' rights and  
17 obligations under the deal?

18 MR. NORMAND: Objection to form.

19 THE WITNESS: Yes.

20 Q This is a Santa Cruz press release dated December 6th,  
21 1995, entitled "SCO Takes Major Step in Consolidating Unix  
22 System Market".

23 A Uh-huh.

24 Q And below that it says, "SCO Completes Agreement With  
25 Novell, Significantly Increasing Market Strength; Industry

1 Partners Endorse".

2 A Uh-huh.

3 Q And do you see the -- again, the date of this was

4 December 6th, 1995, which was the date of the closing of the  
5 Novell/Santa Cruz deal.

6 A Yep.

7 Q Do you recall that?

8 A I see it here, yeah.

9 Q Is this one of the press releases that you would have  
10 reviewed in -- as your -- in your role as Chief Executive  
11 Officer of Santa Cruz?

12 A Probably, I just don't recall this particular -- a  
13 specific press release.

14 Q The second full paragraph it says quote: "SCO has  
15 already planned a stream of product and technology releases  
16 reaching beyond the year 2000. These releases will include  
17 the next release of the SCO UnixWare system in 1996; the next  
18 release of SCO OpenServer system in 1996; a Compatibility Tool  
19 Kit in 1996 for creating applications that run on both the SCO  
20 UnixWare system and the SCO OpenServer system; and a 1997  
21 release that merges the SCO UnixWare system and the SCO  
22 OpenServer system. SCO is also working closely with its  
23 strategic allies, HP and Novell, to develop a highly -- a high  
24 availability, high RAS, 64 bit Unix system for the next  
25 generation intel architecture expected to ship in 1998."



1 A Uh-huh.

2 Q As you sit here today, do you have any reason to believe  
3 that this was not Santa Cruz' plan after the closing of the  
4 Novell/Santa Cruz transaction?

5 A I have no recollection that it wasn't our plan.  
6 Generally at -- I remember at SCO we had road maps. We always  
7 had road maps on our products, and they would have had events  
8 like these. So it does not look unusual that we would have a  
9 road map.

10 Q And this press release that was issued on December 6,  
11 1995 is what Santa Cruz was telling the marketplace its plans  
12 were going forward; correct?

13 A Some aspects of it, yes. That particular paragraph you  
14 just read, it talks about future years.

15 Q And you see where it talks about release of a merged  
16 product in 1997?

17 A Yes, it does. That's what I read right now.

18 Q And I'll hand you another exhibit that we'll mark as  
19 exhibit 72. Mr. Mohan, this is another press release dated  
20 September 20, 1995 entitled "HP, Novell and SCO to deliver  
21 high volume Unix OS with advanced network and enterprise  
22 services".

23 A Uh-huh.

24 Q Do you see that?

25 A Yes.

1 Q I'm referring to the second bullet point --

2 A Uh-huh.

3 Q -- on page one --

4 A Uh-huh.

5 Q -- where it reads, and I quote: "SCO has purchased the  
6 UnixWare business from Novell and will consolidate its SCO  
7 OpenServer system and Novell's UnixWare into a merged high  
8 volume intel-based Unix operating system that provides  
9 interfaces in common with HP-Unix." Do you see that?

10 A Yes, I see it.

11 Q Is that consistent with your memory of the transaction?

12 A Yeah.

13 Q I'm going to get into that in a second. The  
14 consideration that was paid from Santa Cruz to Novell as part  
15 of the Asset Purchase Agreement was Santa Cruz' issuance of  
16 stock to Novell; right?

17 A Yes.

18 Q And I'd ask you to turn to page two of the contract.

19 A Yeah.

20 Q And do you see subparagraph-A? It says, "Consideration  
21 for assets: stock"?

22 A Yes.

23 Q And I quote: "On the terms and subject to the conditions  
24 set forth in this agreement, as full payment for the transfer  
25 of the assets by buyer to -- by seller to buyer, at the

1 closing buyer shall assume the assumed liabilities and issue  
2 to seller 6,127,500 shares of fully paid and non-assessable  
3 shares of common stock to buyer." Do you see that?

4 A Yes.

5 Q Is that consistent with your memory that Santa Cruz paid  
6 Novell 6,127,500 shares of stock for this purchase?

7 A Yes. It's in this agreement, and I've signed this  
8 agreement. I assume the data is correct. But if you're  
9 asking if I remember 6,127,500, I do not remember the exact  
10 number, but it's here on this document.

11 Q Do you know who Steve Sabbath is?

12 A Yes.

13 Q Who is Steve Sabbath?

14 A Our legal counsel.

15 Q Is he the lead legal --

16 A Yes.

17 Q -- Counsel for Santa Cruz?

18 A Yes.

19 Q Did you trust Mr. Sabbath's judgment at the time?

20 A Yes.

21 Q When you use the phrase asset purchase agreement, are you  
22 referring to the September 19th, 1995 agreement?

23 A Yes.

24 Q So, again, let me make sure I'm clear. It is your  
25 testimony --

1 A Uh-huh.

2 Q -- that the September 1995 contract reflects the intent  
3 of the parties concerning what the deal was about?

4 A The -- it's -- if you read the whole thing in its  
5 entirety, it -- it reflects what we were trying to do.

6 Q Let me ask this question. Do you have any contractual  
7 basis at all as we sit here today for your belief that the  
8 Unix business was transferred to Santa Cruz in its entirety?

9 A My belief is that the APA in its entirety gave us the  
10 right to the business.

11 Q Let me ask the question again. As you sit here today,  
12 can you point me to any specific contractual provision in  
13 support of that belief?

14 A Short of going through the document line by line, I --  
15 I -- I can't tell you the answer to that question. I -- I can  
16 tell you what the APA was, what the intent was, what we were  
17 trying to do, and it was the purchase of the Unix business.

18 Q So you would need to go through this contract to answer  
19 that question; is that right?

20 A Probably.

21 Q Paragraph four of your declaration says, "I have reviewed  
22 the declarations of Jim Wilt October '04, and Steve Sabbath,  
23 October '04."

24 A Yeah. That's the one -- that's the ones I've looked  
25 at.

1 Q Were you -- at any point were you ever aware that Steve  
2 Sabbath had submitted a second declaration?

3 A After this? Before?

4 Q Or before?

5 A I -- I was not aware -- I'm aware of it now that there  
6 was an earlier declaration, but not when I looked at the  
7 10-04, and I do not know of any declaration after 10-04.

8 Q Are you aware that in Mr. Sabbath's other declaration he  
9 stated that Novell retained significant rights after the asset  
10 purchase agreement, including the Unix copyrights?

11 A I just found out about the --

12 MR. NORMAND: Objection to form.

13 THE WITNESS: -- Previous declaration the last day  
14 or so.

15 Q So we're handing you exhibit 76, which is a December  
16 22nd, 2003 declaration of Steve Sabbath. Do you see that?

17 A Yep.

18 MR. NORMAND: Your Honor, can we stop the tape for a  
19 moment?

20 THE COURT: Yes.

21 MR. NORMAND: Can we stop the tape for a moment and  
22 have a sidebar?

23 THE COURT: You may.

24 MR. NORMAND: Thank you, Your Honor.

25 THE COURT: On the record?

1 MR. NORMAND: Yes.

2 (Bench conference discussion according to the reporter's  
3 ability to hear and understand).

4 THE COURT: Counsel, I want you to speak up. The  
5 jury can't hear you no matter what, so speak loudly and  
6 clearly.

7 MR. NORMAND: Your Honor, I can try to find the  
8 documentation, but I had believed that we had objected to this  
9 and it had been excluded. It's clearly hearsay on its face.  
10 He's citing a declaration that someone else has signed.

11 Mr. JACOBS: Let me introduce Mr. Daniel Muino to  
12 Your Honor. He's been working on these designations as we try  
13 to keep up with SCO's designations.

14 Mr. MUINO: Good morning, Your Honor.

15 THE COURT: Good morning.

16 Mr. MUINO: As I recall, I believe we had agreed as  
17 to a horse trade on this whereby this testimony from Mohan  
18 would come in for the exchange for something else. I think we  
19 have to --

20 (the reporter interrupted due to an inability to  
21 hear clearly).

22 I believe we had come to an agreement on this. There may  
23 have been a misunderstanding, but I thought we had agreed to  
24 keep this in exchange for testimony that you had objected to  
25 in the course of our negotiation on this.

1 MR. NORMAND: I apologize to Your Honor. I wish we  
2 had a record here that reflects this. It's hard for me to  
3 imagine I would have wanted this to come in. It's so clearly  
4 hearsay. But I have no reason to dispute Mr. Muino's  
5 description of what he understood. And I don't want to keep  
6 Your Honor or the jury waiting. I'm not sure I have a great  
7 solution other than the two of us taking three or four minutes  
8 and trying to check our notes. I don't know if that -- that's  
9 acceptable to Your Honor.

10 THE COURT: Why don't we do that. Let the jury  
11 stand, get their attention back to where it ought to be. So  
12 why don't you take the time you need and see if we can't  
13 reconcile this.

14 MR. NORMAND: Thank you, Your Honor.

15 Mr. MUINO: Thank you.

16 THE COURT: Ladies and gentlemen, we're going to  
17 take a brief recess, but here in the courtroom. So if you'd  
18 like to stand for a few minutes while the attorneys do some  
19 quick consulting.

20 (brief pause)

21 MR. SINGER: Your Honor, we apologize. We sorted it  
22 out. The video can continue.

23 MR. JACOBS: Your Honor, with your permission, we're  
24 just going to roll back about 15 seconds to start the sequence  
25 over.

1 THE COURT: That will be fine. Before you do  
2 though, if you'll hold on.

3 Ladies and gentlemen, I have to ask you this. During the  
4 sidebars, do any of you hear anything that is being said, even  
5 close?

6 A JUROR: No.

7 THE COURT: You can see our lips move?

8 A JUROR: Just a lot of fuzz.

9 THE COURT: All right, thank you.

10 Go ahead.

11 Q So we're handing you exhibit 76, which is a December  
12 22nd, 2003 declaration of Steve Sabbath. Do you see that?

13 A Yep.

14 Q I'd ask you to turn to page 6, paragraph 11.

15 A Uh-huh.

16 Q It reads, quote: "Under the Asset Purchase Agreement,  
17 Novell retains significant Unix related assets following the  
18 sale. For example, schedule 1.1(b) of the Asset Purchase  
19 Agreement provided that much of the Unix System V intellectual  
20 property would not be transferred to Santa Cruz by listing the  
21 following items as excluded assets." And then it goes on to  
22 quote Roman V on intellectual property from excluded assets.  
23 "A: all copyrights and trademarks, except for the trademarks  
24 Unix and UnixWare." Do you see that?

25 A Uh-huh, I see it.



1 Q Do you agree with Mr. Sabbath's statement in paragraph 11  
2 that we just read?

3 A No. As I've stated so many times to you, I believe that  
4 we were buying the Unix business, and we were buying the  
5 complete business, except for the economic financial binary  
6 revenue stream. That was my intent. That was what my belief  
7 is, and it still is belief, irrespective of number 11 on page  
8 six on this old document, which is not something I'd seen  
9 before.

10 Q Mr. Mohan, I'm -- I've handed you exhibit 80 --

11 A Yes.

12 Q -- which is the proxy statement -- I'll represent to you  
13 is the proxy statement that was sent to Santa Cruz  
14 shareholders.

15 A Okay.

16 Q Can you just look --

17 MR. JACOBS: Your Honor, at this point we would like  
18 to move into evidence Novell's Exhibit J10, which is a  
19 Santa Cruz proxy statement sent to shareholders. We will trim  
20 this exhibit so that only the relevant pages are provided to  
21 the jury. We'll be looking at pages 132 and 133.

22 THE COURT: Any objection?

23 MR. NORMAND: No objection, Your Honor.

24 THE COURT: It will be admitted.

25 (Defendant's Exhibit J10 received in evidence)

1 Q Look at the first couple pages of this, which are letters  
2 from Steve Sabbath to the shareholders describing what this  
3 document is.

4 A Yep.

5 Q Do you have any reason to believe this is not a proxy  
6 statement that was sent out to shareholders on around 2001  
7 prior to the Caldera transaction?

8 A I have no basis.

9 Q And do you see that on page 132 there is a description of  
10 Santa Cruz' intellectual property, runs from page 132 to  
11 133?

12 A Uh-huh.

13 Q I'd ask you to take a look at that, please.

14 THE COURT: Mr. Jacobs, do you want to read that as  
15 we had Mr. Normand do?

16 Mr. JACOBS: Thank you, Your Honor. I think the  
17 jury can read along with us pretty quickly, and I'd rather not  
18 use the time for that.

19 THE COURT: All right.

20 Did you all get that read?

21 A JUROR: We're not that fast.

22 THE COURT: Have you all now read it? Anyone who  
23 has not? All right.

24 Mr. JACOBS: Your honor, I think if anyone is still  
25 reading it on the jury, the next question and answer sequence

1 will make clear the point of this excerpt in any case.

2 THE COURT: Go ahead, please.

3 A Do you want me to read all of page 133?

4 Q Just the section called intellectual property that begins  
5 on 132 and runs onto 133.

6 A Okay.

7 Q Do you see that nowhere in this intellectual property  
8 section does Santa Cruz claim to own the Unix copyrights?

9 A If you're asking if I can read English and say there's no  
10 word copyright, my answer is yes, there is no word copyright  
11 in here.

12 Q Did anyone from Novell at the time of the Asset Purchase  
13 Agreement ever say to you or any representative of Santa Cruz  
14 that SCO, after the transaction, would own the Unix  
15 copyrights?

16 A Again, the same answer. No one from -- that I work with  
17 from Novell, which would be limited people, Frankenberg and  
18 Duff Thompson, they did not speak to copyrights, so they did  
19 not tell me that they'd kept it. They did not tell me they'd  
20 given it to us. So it's neither in nor out.

21 Q To your knowledge, at the time of the Asset Purchase  
22 Agreement did anyone from Santa Cruz expressly say to Novell,  
23 "We want the Unix copyrights as part of this transaction"?

24 A I would -- I would not know that. I -- that level, and I  
25 don't recall any such -- I would not know that.

1           Mr. JACOBS: That completes the testimony of this  
2 witness, Your Honor.

3           THE COURT: Thank you, Mr. Jacobs.

4           Mr. Normand, if you would, please, your next one.

5           MR. NORMAND: Your Honor, we next call -- we propose  
6 to present the designations of Doug Michels, who was at Santa  
7 Cruz.

8           THE COURT: The deposition was taken when?

9           MR. NORMAND: March 28th, 2007.

10          THE COURT: Thank you.

11          (Douglas Michels called as a witness via video deposition)

12       Q    -- September of '95 at SCO?

13       A    Dates aren't my favorite thing, but as best as I can  
14 determine, I was probably CTO At that point, Executive  
15 Vice-President and CTO.

16       Q    Are there other possibilities or are you --

17       A    I was there for 20 years and I had half-a-dozen titles,  
18 and it never really changed my job much, so I never worried  
19 about what the title was.

20       Q    Well, how would you characterize your participation in  
21 the Asset Purchase Agreement negotiations?

22       A    Well, I was very involved in the initiation of it, and I  
23 was very involved in the strategy behind it, and I was very  
24 involved in the high level structure of the agreement, and I  
25 was involved in supervising pretty directly the people who

1 were negotiating the details of the agreement.

2 Q When you say you were involved in the initiation of the  
3 agreement, can you tell me what you mean by that?

4 A Well, unfortunately this is a very long time ago, and I'm  
5 really bad at dates and, you know, trying to -- trying to get,  
6 you know, remote facts in exactly the right order. But, you  
7 know, the discussion of essentially acquiring Unix had been  
8 going on for ten years. And before Novell even bought Unix we  
9 were involved in discussing it with A.T. & T.

10 And so I believe this particular round that went to the  
11 Asset Purchase Agreement was kicked off by Mike DeFazio  
12 contacting me at a Uniform conference and opening up the  
13 discussion. I mean I know he contacted me and I know he  
14 opened up the discussion, and I'm pretty sure that it was that  
15 conversation that went to the Asset Purchase Agreement, but it  
16 could have been -- it could have been a different iteration.  
17 I'm not a hundred percent sure. This was as a -- as I say, a  
18 ten year process.

19 Q Understandable. Can you put even a rough time frame on  
20 Mr. DeFazio's initial conversation with you?

21 A Well, we'd have to go identify when Uniform in Dallas  
22 was, but I suspect it was, you know, within a few months of  
23 the negotiations getting serious.

24 Q You also said that you were involved in the strategy of  
25 the Asset Purchase Agreement. Can you tell me more about what

1 you meant by that?

2 A Sure. It's a big -- a major decision for the company  
3 to -- to, you know, make that bet. So the whole issue of did  
4 we want to own it? Did -- what did we want to do with it?  
5 How do we figure out how to pay for it? I mean That was  
6 all -- that was all, you know, discussions that were strategic  
7 in nature and that I was involved with.

8 Q And you also mentioned that you supervised the people who  
9 negotiated the deal. Who were those people?

10 A Primarily Jim and Geoff and some of the legal people, but  
11 the real business development team was Jim Wilt and Geoff  
12 Seabrook. And, again, I don't recall whether -- whether they  
13 were directly reporting to me at that point or not, or one of  
14 them was and one of them wasn't.

15 I mean, again, over the years they often reported to me,  
16 and I worked very closely with -- whether they were reporting  
17 to me or someone else, we worked very closely as the team and  
18 business development was one of the -- one of my main roles.  
19 I met with them regularly, and whatever issues came up that  
20 they had trouble resolving, they would -- they would come to  
21 me, so --

22 Q Apart from your initial meetings with Mr. DeFazio, did  
23 you have other meetings face-to-face with Novell personnel as  
24 part of the APA negotiations?

25 A Yes.

1 Q With whom?

2 A I don't remember.

3 Q How -- how many meetings would you say?

4 A Two or three.

5 Q Okay. Do you recall the time period of those? Was it  
6 close to the execution? Earlier?

7 A Both.

8 Q Do you recall anyone who was at -- present at those  
9 meetings, either from your side or from Novell?

10 A Well, certainly Jim Wilt and Geoff Seabrook and I think  
11 Ed Chatlos, some of the legal -- some of the legal people.

12 Q Do you recall any of the legal people?

13 A Kim Madsen on our side. I don't remember the names of  
14 the Novell legal people.

15 Q Do you have an understanding as to what the purpose of  
16 the Asset Purchase Agreement was?

17 A Sure.

18 Q What is your understanding of the purpose of the Asset  
19 Purchase Agreement?

20 A We were buying the original A.T. & T./Unix business from  
21 Novell, who had bought it from A.T. & T.

22 Q And what's the basis for that statement? What leads you  
23 to say that?

24 A That was the deal.

25 Q Um --

1 A That's what Mike and I talked about in Dallas and that's  
2 what the deal was, was Novell didn't want it anymore, we'd  
3 always wanted it. He said, "Do you want to buy it?" I said,  
4 "Yeah." We bought it.

5 Q I want to talk a bit about some of the subsidiary related  
6 agreements that came along with the Asset Purchase Agreement.  
7 Did you have any involvement in the negotiation of the  
8 technology licensing agreement?

9 A Yeah. I tried to stay completely away from the actual  
10 mechanics of the agreement and stick to who was getting what.  
11 And what was in which piece of paper, I mean, I completely --  
12 you know, had a great business development team. We had a  
13 good legal team. You know, as long as they found the right  
14 way to engineer the documentation to match what -- what we had  
15 agreed at a business level needed to happen, you know, as to  
16 which agreement did what, you know, that wasn't my job.

17 Q I take it then the answer is no, that you didn't have  
18 involvement in the actual negotiation of the technology  
19 licensing agreement?

20 A I don't know if I did or not. I had involvement in  
21 what -- what we got or what they had or who did what, which  
22 document it went into, I don't know.

23 Q Do you recall seeing drafts of the technology licensing  
24 agreement?

25 A I saw stacks of paper on people's desks.



1 Q But do you have any specific recollection of --

2 A Did I read them?

3 Q Do you have any specific recollection of seeing drafts of  
4 the technology license agreement?

5 A I'm sure they were in the stacks of paper on people's  
6 desks that I saw, but I didn't read them.

7 Q How about the Operating Agreement? Do you have any  
8 recollection of being involved in the negotiation of the  
9 Operating Agreement?

10 A Same answer. I was involved in the negotiation of the  
11 deal. I was involved in the several page summary that all  
12 those agreements stemmed from. And I was involved in  
13 determining, you know, what we would give and what they would  
14 give. And when issues came up about how would something work,  
15 because in writing the agreements they would come up against  
16 some -- some edge condition, and then they might bring it to  
17 me and say, "Well, what do you think should happen in this  
18 edge condition?" And we'd discuss it, and they'd go off and  
19 do it. So was I involved in the agreement. I'm sure I was.  
20 Do I know which agreement evolved out of which discussion?  
21 No.

22 Q To clarify, you don't have any memory of being  
23 specifically involved in the negotiation of the Operating  
24 Agreement?

25 A I was specifically involved in the negotiation of all the

1 agreements, but I don't know what agreements were -- resulted  
2 from what conversations. I was involved in the entire  
3 process. I had daily discussions with the people doing the  
4 negotiation, and they would come to me with issues and  
5 concerns and discussions about how should something work. I  
6 never asked them, "Well, does that go in the Operating  
7 Agreement or does that go in the Technology License  
8 Agreement?" I didn't care. Didn't matter to me.

9 Q I understand that you were involved in the deal  
10 generally, and I understand the testimony you've given so far.  
11 What I'm trying to do now is compartmentalize that a bit and  
12 see if you have any memory specific to particular  
13 agreements?

14 A I have no memory specific to any specific agreement.

15 Q Did you have any involvement in the negotiation of  
16 Amendment No. 1 to the Asset Purchase Agreement came a few  
17 months later?

18 A Same answer.

19 Q No memory specific to --

20 A I was involved in the discussions leading up to every  
21 agreement. I was not focused on what pieces of paper came out  
22 of those discussions.

23 Q Continuing in paragraph nine of your declaration on page  
24 two, the last sentence of it reads, "There was no intent to  
25 grant Novell any rights to waive or to direct or require SCO

1 to waive any of its intellectual property rights or  
2 protections contained in the Unix licenses." What's the basis  
3 for that statement?

4 A We bought the whole business.

5 Q Except for certain revenue streams though; isn't that  
6 right?

7 A We bought the whole business. We partially paid for it  
8 with the residual revenues from certain contracts.

9 Q As to those contracts, did Novell retain any rights?

10 A It was purely a financial arrangement. We bought the  
11 whole business. The only rights they retained was rights  
12 preventing us from arbitrarily destroying that revenue  
13 stream.

14 Q What rights were those?

15 A Well, I mean if -- if we were to go to the customer and  
16 say, "Okay, you don't have to pay anymore," then they would  
17 have to approve that because that would be damaging their  
18 revenue stream.

19 Q And I -- so I understand your testimony, and what I'm  
20 trying to do here is drill down a bit. You've testified about  
21 the intent of the deal, and you're testifying specifically  
22 about the intent as applied to Novell's rights, and I want to  
23 know why you believe this is the intent. Is this something  
24 that was told to you? Is this something -- you know --

25 A This was the agreement that I reached with Novell, that

1 the group meetings -- I mean it was clear from day one in our  
2 strategy we were buying the business. We needed to control  
3 the customers. We didn't need to be -- have Novell also  
4 talking to our customers.

5 The reason that -- even on the residual revenue stream  
6 that they essentially got all the money, we said we're going  
7 to collect the money for you because we don't even want you  
8 talking to our customers at all. That was the discussion.  
9 The reason we demanded the five percent was we needed that  
10 just to cover our costs to collect the money because we were  
11 collecting it on behalf of Novell because they were not to  
12 ever talk to our customers. Otherwise we would have just let  
13 them collect the money.

14 I mean that was clearly discussed by all parties, that we  
15 were to be the complete relationship management of that -- of  
16 all customers, and we should be the only ones ever talking to  
17 them.

18 Q And what I'm talking about is something a little more  
19 specific than that than relationship manager. Novell retained  
20 certain revenue streams, we've agreed. And Novell has argued  
21 in this case that it retained certain rights with respect to  
22 those contracts. One of those rights is the ability to  
23 command SCO to do certain things as concerns those contracts.  
24 I take it that's inconsistent with your memory of the  
25 negotiations; is that right?

1 A That's correct.

2 Q And tell me more about why it's inconsistent with your  
3 memory of the negotiations. Can you come up with anything  
4 specifically?

5 A Yes. Our -- our agreement with Novell was that we were  
6 buying the entire business. We would have all relationship  
7 management and account control with those customers. How can  
8 you have all account control if somebody else can order you to  
9 do something with them? Doesn't make any sense. It's  
10 inconceivable. We would never agree to that.

11 Q Did they say at any point during -- did Novell convey  
12 that it didn't have the authority to direct SCO to make  
13 changes to SVRX licenses at any point to you?

14 A As I said, I'm talking about their actions, not what they  
15 said. Their actions were that they made direct contact with a  
16 customer and directly modified the license agreement with a  
17 customer, and we said that's a breach of contract, and they  
18 negotiated a settlement.

19 Q I take it then the answer to my question is no, you never  
20 heard Novell say something like that?

21 A I'm not saying that.

22 Q Okay. I'll ask you the question again. Did you ever  
23 hear Novell tell --

24 A You know --

25 Q -- you that -- that they did not have the authority to

1 direct SCO to take actions as concerned SVRX licenses?

2 A We had a very long discussion, set of discussions, with  
3 Novell about the incorrect actions they had taken. And you're  
4 asking me to recall specific conversations that happened ten  
5 years ago, and I don't. But in those conversations they did  
6 acknowledge that maybe they had exceeded the rights under  
7 their license agreement, and they were willing to enter into  
8 settlement discussions.

9 Q What was your involvement in those agreements? Did you  
10 for example draft any of the language of those agreements?

11 A Oh, sure, of course. I love to write legal contracts.

12 Q I take it the answer is no, you did not write any of the  
13 language in those agreements?

14 A No, I did not write any of the language in those  
15 agreements.

16 Q You're not going to go to law school?

17 A I was involved in the discussions about the settlement  
18 and what we would be willing to settle for and, you know,  
19 what -- you know what -- what we needed them to agree to do to  
20 avoid this happening in the future. How it got implemented  
21 and what amendments, I don't know.

22 Q Do you recall reviewing any of the drafts of the  
23 agreements that surrounded this, whether it be Amendment No. X  
24 or Amendment No. 2 or whatever agreement?

25 A We always worked from term sheets. And term sheets are

1 things that lawyers don't write. They're simple. They're  
2 easy to read. They're clear. They're in English. I reviewed  
3 term sheets.

4 Q So I take it then the answer is no, you do not recall  
5 reviewing any drafts of the actual language of the amendments  
6 or agreements that took place as part of this?

7 A Only to the extent that it was the same as the language  
8 in the term sheet, which it may or may not have been.

9 Q Do you recall there being term sheets as part of this  
10 effort to resolve this dispute?

11 A There was some form of term sheet. What form it was in,  
12 whether it was e-mails or whether there was an actual, you  
13 know, Word document, I don't know. But there was definitely a  
14 short English summary of what the terms of the settlement  
15 would be.

16 Q And I take it you were involved in the term sheet portion  
17 of this --

18 A Yes --

19 Q -- Negotiation?

20 A Absolutely.

21 Q Who else was involved in that?

22 A Alok, and I'm sure Geoff, Steve Sabbath, Kim. I don't  
23 know who else.

24 Q You testified this morning that one of the purposes of  
25 the APA was to buy the original Unix business. Do you recall

1 that?

2 A Yes.

3 Q Was one of the purposes of the APA to buy the UnixWare  
4 business as well?

5 A Yeah. What I meant was the intent was to buy the  
6 business that had originally started at A.T. & T. and Bell  
7 Labs, and then became U.S.L., and then was acquired by Novell,  
8 and then -- and that -- that whole business is also what  
9 created UnixWare. But I mean we bought the employees and the  
10 body of that business, which included everything they ever  
11 did, which obviously included UnixWare, as well as SVR IV and  
12 SVR III and SVR V.

13 Q Do you recall -- independent of how it was embodied in a  
14 particular agreement, do you recall the issue of a license  
15 back to Novell in --

16 A Yes. We wanted to make sure that that license didn't  
17 give them any rights to go back into the Unix business or to  
18 use that technology other than had incidentally perhaps crept  
19 in. And so we -- we did effectively grant them rights to Unix  
20 technology as necessary to protect them from any incidental  
21 use of Unix inside of their existing products.

22 Q And did you have an understanding at the time as to the  
23 basis on which Santa Cruz granted Novell rights to the Unix  
24 technology?

25 A The basis, what do you mean?



1 Q Was it your view that Santa Cruz owned rights in the Unix  
2 technology as of the date of the license back to Novell?

3 A Of course. We bought the business. And as a result of  
4 buying the business, we owned all the intellectual property.

5 Q Was it ever your understanding when you were at Santa  
6 Cruz that in order to acquire any Unix or UnixWare copyrights,  
7 Santa Cruz was obligated to go back to Novell and make a case  
8 as to why Santa Cruz needed the copyright?

9 A Of course not.

10 Q Did any attorney --

11 A We owned the business.

12 Q Did any attorney from Santa Cruz ever tell you any such  
13 thing?

14 A No.

15 Q Did any executive or any employee of Santa Cruz ever tell  
16 you such thing?

17 A Not that I can recall. If they did, I would have laughed  
18 them out of my office.

19 Q Let me direct your attention to paragraph nine, which you  
20 looked at earlier with Mr. Melaugh. You say in the last  
21 sentence, quote, "There was no intent to grant Novell any  
22 right to waive or to direct or require SCO to waive any of its  
23 intellectual property rights or protections contained in the  
24 Unix licenses," end quote. Do you see that language?

25 A Yes.

1 Q Does that language accurately reflect your intent?

2 A Yes, it does.

3 Q I have a few follow-ups. Let's begin where we left  
4 off -- or he left off. And Mr. Normand just listed through a  
5 series of bases for your testimony about the intent of the  
6 deal. One of those bases was communications back from SCO  
7 employees. What specific communications back from SCO  
8 employees were you referring to?

9 A Again I had close, close interaction with particularly  
10 Geoff Seabrook and Jim Wilt, as well as Kim and Steve and the  
11 legal department and had, you know, virtually daily e-mails or  
12 phone calls or conversations.

13 Q Okay.

14 A Continuous conversations I mean.

15 Q Can you recall any specific e-mail, telephone  
16 conversation, in-person conversation that has informed the  
17 testimony that you've given today?

18 A Oh, sure, ten years ago on Tuesday I think it was -- no,  
19 of course not. I mean we talked daily.

20 Q I'm going to -- I'm going to ask the same thing about  
21 each of the topics Mr. Normand went through, but maybe we can  
22 shortcut it.

23 A That would be nice.

24 Q What is your opinion as to the scope of that phrase,  
25 namely, copyrights required for SCO to exercise its rights,

1 and so on? What copyrights does that include?

2 A I mean I believe the scope of the term here is all  
3 copyrights relating to the Unix business: Source code,  
4 documentation, screens, you know, training materials, you  
5 know, brochures, marketing literature. I mean, you know,  
6 there's millions of copyright things in a business.

7 Q Why are all those copyrights required for SCO to exercise  
8 its rights with respect to the acquisition?

9 A We took over the business. We were in the business of  
10 selling intellectual property. We were in the business of  
11 supporting the intellectual property. We were in the business  
12 of providing training. We were in the business of providing  
13 marketing materials. We couldn't do any of that without  
14 owning the copyrights.

15 Q Just one question. You said in response to a question  
16 from Mr. Melaugh that you assumed to the copyrights we're  
17 going over. Do you recall using words to that effect?

18 A Okay, I might have.

19 Q To the extent that you did, what did you mean by that?

20 A I meant that the only way I know of and anyone on my team  
21 knew of to buy a software business is to buy the copyrights.  
22 And there's no way we would have ever done a deal to buy a  
23 software business where we didn't get the copyrights and all  
24 the other intellectual property. That's what you're buying.  
25 And especially in the case of Unix with its convoluted

1 intellectual property history and whatnot, to not -- to not  
2 get that stuff would be to not do the deal.

3 And so it was implicit in everything we did, everything  
4 we thought. Every single person on my team understood that.  
5 The lawyers understood it. The business development people  
6 understood it. I mean it's just -- it's so essential it's,  
7 you know, like breathing oxygen. I mean there's no way that  
8 deal could have happened without getting the copyrights.

9 Q What's the basis for that testimony?

10 A And we had, you know, many meetings, many dinners. I  
11 mean it was just implicit. It's in the -- it's in the water.  
12 I mean you -- you don't buy software companies without buying  
13 the intellectual property, and you don't buy the intellectual  
14 property without buying the copyrights.

15 Q But no one from Novell ever said to you, "We're  
16 transferring the Unix copyrights as part of this deal"?

17 A I have no idea what people said ten years ago.

18 Q You don't have a memory of someone saying that?

19 A Specific words? I have no memory of any specific words  
20 at all from ten years ago.

21 Q Or words to that effect?

22 A You know, I'm not going to testify to words I don't  
23 remember. I know that -- I know with certainty that everybody  
24 involved understood the copyrights were part of the deal.

25 Q Did anyone from Novell -- I believe you were asked did

1 anyone from Novell ever tell you that Novell owned the Unix  
2 copyrights. Did anyone from Novell ever tell you that SCO  
3 owned the Unix copyrights between the time of the Asset  
4 Purchase Agreement and 2001?

5 A You know, the reason I can say with certainty that nobody  
6 from Novell ever said that they did is because that's so  
7 preposterous a thing, I would remember it.

8 Q Well, Mr. Normand asked you I think a fairly specific  
9 question, whether SCO held itself out to be the owner of the  
10 Unix copyrights --

11 A Yes.

12 Q -- between 1995 and 2001?

13 A We thought ourselves to be the owner of everything. We  
14 owned Unix. We owned the product. We spent a lot of money.  
15 We gave away 20 percent of our company to buy Unix. Of course  
16 we held ourselves out to be the owner of Unix.

17 Q I'm talking specifically about copyrights in this  
18 instance.

19 A In my mind they're not separable. If you own UNIX, you  
20 own the copyrights. It's a legal distinction that you're  
21 making that doesn't parse to a -- to a normal human being. I  
22 don't -- I don't know how to answer your questions. It's  
23 jibberish.

24 Q Apart from the license deals, are you aware of any other  
25 instance in which SCO held itself out specifically to be the

1 owner of the UNIX copyrights, as opposed to Unix generally?

2 A I don't -- I'd have to think about that. I don't know.

3 Q If you need a moment to think about it, I'm happy to --

4 A I can think about it for a couple hours I might not know.

5 I mean I don't think that way. We don't talk about

6 copyrights. But I'm sure there are places where we held

7 ourselves out to own the copyrights, because there's no

8 question in our minds that we did. You're asking me to recall

9 where specifically ten years ago we might have said something

10 obvious, and that's a very hard question.

11 Q If you don't have a memory of it, you don't have a memory

12 of it. I'm not asking you definitively whether it occurred or

13 not. I'm just asking you about your recollection.

14 A Well, you know, I guarantee you we put copyright notices

15 in every document we wrote. How could we do that if we didn't

16 own the copyrights? We put copyright notices in every module

17 of source code we wrote. They all said we owned the

18 copyrights. So there's two more examples. We signed

19 non-disclosure agreements with people. I'm sure they included

20 copyrights.

21 So I mean it's everywhere. Everything we did. There's

22 no -- there's no break in this pattern. We owned Unix. We

23 owned the copyrights. We owned the trademarks. We owned the

24 intellectual property, and every action we took represents

25 that.

1           MR. NORMAND: Your Honor, that concludes our  
2 designations of Mr. Michels' amusing testimony.

3           MR. JACOBS: We have some small amounts of  
4 additional testimony.

5           The Court: How long do you think it will take,  
6 Mr. Jacobs?

7           MR. JACOBS: Ten minutes.

8           THE COURT: Would you have any objection if we were  
9 to take our break before you start?

10          MR. JACOBS: No.

11          THE COURT: Let's take a 20 minute recess.

12                               (Jury excused)

13          After Mr. Michels, you will have who again?

14          MR. NORMAND: Mr. Levine, Your Honor.

15          THE COURT: Will his be very long?

16          MR. NORMAND: I think it adds up to 20, 25 minutes.

17          MR. SINGER: Ours is 18 minutes. I'm not sure how  
18 much is designated by Novell.

19          MR. NORMAND: Apparently it adds up to more like 35  
20 minutes, Your Honor.

21          THE COURT: Do you have anything before we recess?

22          MR. JACOBS: No, Your Honor.

23          MR. SINGER: No, Your Honor.

24          THE COURT: We'll take 20 minutes then.

25                               (recess 11:47 a.m.)