

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

14
15 BEFORE THE HONORABLE TED STEWART
16 -----
17 March 11, 2010
18 Jury Trial
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24 REPORTED BY: Patti Walker, CSR, RPR, CP
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1 SALT LAKE CITY, UTAH; THURSDAY, MARCH 11, 2010; 8:30 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning.

4 Do we have anything before we bring the jury in?

5 MR. SINGER: I don't believe so, Your Honor. I
6 did want to note that we have decided not to call Mr. Davis,
7 so we simply have depositions today. We have five
8 depositions lined up, four of them are ready to proceed. On
9 the fifth one, there are two objections, which perhaps at a
10 break could be resolved. But other than that, we have all
11 depositions for today all set ready to go.

12 THE COURT: All right.

13 MR. BRENNAN: Your Honor, just on that later
14 point, my impression is the deposition that Mr. Singer has
15 referenced is the deposition of Mr. Levine; am I accurate?

16 MR. SINGER: Yes.

17 THE COURT: The one over which there is dispute.

18 MR. BRENNAN: If the Court would like, we could do
19 it at a break. On the other hand, I don't think this issue
20 has been properly or timely tendered to the Court in line
21 with the instructions you gave us before. So if you want to
22 do it on the fly, we can do that.

23 THE COURT: Is there anything in writing that I
24 can look at during the break?

25 MR. SINGER: We can give you a copy of the

1 transcript. The objection is to two passages.

2 THE COURT: So you are objecting to something
3 designated by defendants?

4 MR. SINGER: I think the other way around, they
5 are objecting.

6 MR. BRENNAN: The very short version, without
7 trying to argue it now, is we believe this is contrary to
8 the motion in limine on this witness. I think the express
9 terms of the motion in limine would prevent this. There are
10 some other problems with the question and answer.

11 THE COURT: If you would give me what you have in
12 writing and I'll try to look at it at the first break and
13 decide whether I need argument or whether or not I can rule.

14 MR. BRENNAN: I'm sorry. I had my shirt sleeve
15 tugged.

16 THE COURT: I just said I would like to look at
17 what you have in writing and I'll decide whether or not I
18 need further argument or whether or not I might be able to
19 decide. You are correct that the timing on this is not what
20 the Court had requested. I don't want to waste trial time
21 either.

22 MR. BRENNAN: What we have at this juncture, Your
23 Honor, we have Your Honor's motion in limine, we have the
24 testimony that's at issue, we have the other testimony that
25 formed the basis for the Court's motion in limine. What we

1 don't have is a formal written position on that.

2 THE COURT: I think I should be able to discern
3 whether I need it from what you have. If you would just
4 give that to Mr. Copeland right now.

5 MR. SINGER: Just for the record, the issue
6 concerns the highlighted portion of page 161, line 11,
7 through page 162, line ten of Burt Levine's deposition.

8 MR. BRENNAN: Thank you.

9 Also for the record, Your Honor, what I will be
10 tendering does have our handwriting. I hope that's not
11 offensive to the Court. But this is the Court's motion in
12 limine with the highlighted portions, and also from the same
13 deposition the witness's testimony essentially saying he
14 didn't know anything about Amendment No. 2. That page
15 referenced is page number 190, lines 11 through 22.

16 THE COURT: All right.

17 MR. BRENNAN: Thank you, Your Honor.

18 THE COURT: Thank you.

19 Counsel, if there is nothing else, I'll have Ms.
20 Malley bring the jury in.

21 Was Mr. Davis the elderly gentleman who has been
22 sitting through trial?

23 MR. SINGER: Yes.

24 THE COURT: Is his health not good, is that the
25 problem?

1 MR. SINGER: He does have some health issues, that
2 was one factor that played a role in our decision.

3 THE COURT: Okay.

4 MR. SINGER: We looked at, though, the fact
5 that -- just to get us back on schedule, we concluded we
6 didn't need him.

7 THE COURT: I just hate for someone to suffer
8 through three days of trial and not get the reward of being
9 able to testify. Maybe he wouldn't deem it to be a reward.

10 MR. SINGER: I think he is disappointed.

11 MR. JACOBS: As am I, Your Honor.

12 (Jury present)

13 THE COURT: Good morning, ladies and gentlemen.

14 Earlier in the trial it was explained to you what
15 a deposition is. And today the witnesses that you will be
16 hearing will all be by way of video depositions, depositions
17 that were taken and videos were made of them. One of
18 them -- I believe the first one will be Mr. Messman.

19 Is that correct?

20 MR. SINGER: That's correct, Your Honor.

21 THE COURT: I think I should indicate to the jury
22 that he will be called as a live witness later in the trial,
23 but plaintiffs wanted to put this part of his deposition
24 before you earlier in the trial than he will be available.
25 So you will hear from him again.

1 Mr. Singer, with that introduction, if you would
2 like to go ahead, please.

3 MR. SINGER: Thank you, Your Honor.

4 We call, through deposition, the deposition of
5 Jack Messman that was taken in Boston, Massachusetts on
6 February 7th, 2007.

7 (Jack Messman Deposition)

8 Q I would like to begin with your background. When did
9 you join Novell?

10 A I've been associated with Novell since -- I think it
11 was 1981. I was a member of a venture capital firm called
12 Safeguard Scientifics, and we had a significant investment
13 in Novell, which was called Novell Data Systems at the time.
14 And it was a hardware manufacturer manufacturing a PC disk
15 drive and a printer. And we decided to change the strategy
16 of the company in '81 because the competitors' products were
17 significantly lower. So I became CEO for about two years
18 and turned the company into a software company. I then
19 hired Ray Noorda as my replacement, and other than a brief
20 period I've been on the board of Novell since then. Then in
21 2001 Novell acquired Cambridge Technology Partners, where I
22 was the CEO, and after the merger I became the CEO of the
23 combined companies. And my predecessor at Novell, Eric
24 Schmidt, left to become CEO of Google.

25 Q Did you have any personal involvement in the

1 transaction by which Novell sold certain assets to Santa
2 Cruz?

3 A I was a director of the company at the time. Other
4 than that, I had no personal involvement.

5 Q So as a director -- do you recall if that transaction
6 required board approval?

7 A Yes, it did.

8 Q And you approved the transaction; is that correct?

9 A The board approved the transaction.

10 Q Other than considering and approving the board, at the
11 board level, you had no other involvement in the negotiating
12 of the asset purchase agreement and other documents related
13 to that transaction; is that fair?

14 A Yes.

15 Q This is Exhibit 1, which has previously been marked,
16 and it's the asset purchase agreement between Santa Cruz
17 Operation and Novell dated September 19, 1995.

18 Have you ever read this agreement from cover to cover?

19 A Yes.

20 Q When did you first do so?

21 A I would say it was in 2003.

22 Q Can you be more exact?

23 A I would say it was after SCO raised certain issues in
24 the marketplace.

25 Q Well, more precisely, do you recall if you had read the

1 asset purchase agreement prior to a press release which was
2 issued by Novell on May 28th, 2003?

3 A May 28th. I think that's the press release in response
4 to a letter that Darl sent me from SCO, and I probably
5 didn't read it. I did glance at it, but I didn't study it
6 in-depth until sometime after that.

7 Q Do you recall ever having a discussion with anyone
8 prior to May 28th, 2003 on what was intended by the asset
9 purchase agreement?

10 A No.

11 Q That would include, then, by definition, the
12 individuals who had been involved in negotiating the deal
13 and drafting the documents back in 1995?

14 A Yes.

15 Q You never spoke with them prior to May 28th, 2003?

16 A Yes.

17 Q About the intent of the asset purchase agreement. Did
18 you have any personal involvement in the negotiation of
19 Amendment No. 2 to the asset purchase agreement?

20 A No.

21 Q Did you have any involvement with the drafting of
22 Amendment No. 2?

23 A No.

24 Q Were you surprised to learn of the existence of
25 Amendment No. 2?

1 A Yes.

2 Q You had not previously seen it in the course of your
3 work at Novell?

4 A I had not seen a signed copy.

5 Q Had you seen an unsigned copy?

6 A Yes.

7 Q When did you see an unsigned copy of Amendment 2?

8 A It was just prior to the conversation that I had with
9 Darl in early June.

10 Q My question precisely is: Did you take certain steps
11 to determine whether Novell had executed Amendment No. 2?

12 A Yes.

13 Q Did you determine whether or not Novell had executed
14 Amendment No. 2?

15 A Ultimately we did.

16 Q How much time elapsed before you made that
17 determination?

18 A My recollection is that we found our version of the
19 signed copy a couple months after Darl sent me a signed
20 copy.

21 Q Is it true that Novell had in its possession at all
22 relevant times in 2003 a signed copy of Amendment No. 2?

23 A No. It was only after Darl sent it to me that we had a
24 signed copy.

25 Q Did you subsequently find a signed copy in Novell's

1 files?

2 A A couple of months later we did.

3 Q Did you have any reason to believe that that copy was
4 not in Novell's files throughout the period in question, say
5 back from the beginning of 2003?

6 A I don't know where -- we didn't know where it was, and
7 we looked in all the normal spots, and ultimately we found
8 it in the finance files rather than in the legal department
9 or the contracts department.

10 Q So let me see if I can just clarify this point. You
11 had Amendment No. 2 in the finance department at Novell,
12 correct?

13 A Yes, that's where it was found.

14 Q You have no reason to believe that it wasn't in the
15 finance department of Novell say throughout the year 2003?

16 A I have no reason to believe that, right.

17 Q It's just you weren't aware that it was in those files?

18 A I was not aware of it.

19 Q Do you know if others at Novell were aware that
20 Amendment No. 2 was in fact signed and in the finance
21 department files?

22 A To my knowledge, nobody knew that we had a signed copy
23 of Amendment 2.

24 MR. SINGER: Your Honor, at this point we would
25 like to put Amendment No. 2, which is in evidence as part of

1 SCO Exhibit No. 1, before the jury, which is what the
2 witness is looking at in the deposition.

3 THE COURT: Any opposition to that?

4 MR. ACKER: I think the deposition should just be
5 played as it is, Your Honor, as opposed to interjecting
6 exhibits throughout it.

7 MR. SINGER: Your Honor, the questioning is about
8 the exhibit. The witness has the exhibit before him. The
9 exhibit is in evidence. It's just the jury following the
10 deposition. What we propose to do is put the exhibits on --
11 certain exhibits which we would move into evidence, if they
12 have not already been admitted into evidence -- this one is
13 in evidence -- and ask that certain portions that are
14 relevant be blown up, published to the jury, then taken down
15 and continue with that passage of the deposition, as we
16 would do if the witness was here at trial.

17 MR. ACKER: If they wanted to do that and
18 highlight the deposition that way, they should have asked
19 questions at the deposition to highlight those portions of
20 the exhibit as opposed to this sort of presentation.

21 THE COURT: Mr. Acker, I believe Mr. Singer is
22 correct. If Mr. Messman was here, this would have been the
23 appropriate time to allow the publishing. So the Court will
24 permit it.

25 MR. SINGER: Mr. Calvin, could you blow up -- what

1 is, for the record, before the jury is Amendment No. 2,
2 which is part of Trial Exhibit SCO 1, and would ask if you
3 could blow up the first part, section A. From the top down
4 to section A, highlight that section.

5 May I read this into the record?

6 THE COURT: Go ahead and read it into the record.

7 MR. SINGER: A, with respect to schedule 1.1(b) of
8 the agreement titled Excluded Assets, section V, subsection
9 A shall be revised to read: All copyrights and trademarks,
10 except for the copyrights and trademarks owned by Novell as
11 of the date of the agreement required for SCO to exercise
12 its rights with respect to the acquisition of UNIX and
13 UnixWare technologies. However, in no event shall Novell be
14 liable to SCO for any claim brought by any third party
15 pertaining to said copyrights and trademarks.

16 I would like to resume with the playing of
17 Mr. Messman's deposition.

18 THE COURT: If you would, please.

19 Q If we turn to Amendment 2, which is also in front of
20 you.

21 A Yes.

22 Q If you'd look at section A. Do you see it refers back
23 to a schedule of excluded assets, and it states that, all
24 copyrights and trademarks, except -- and this would be an
25 item of excluded assets, you understand that, correct?

1 A Yes.

2 Q You understood that when you read this in 2003 for the
3 first time?

4 A Uh-huh.

5 Q This was modifying the assets that Novell got to keep
6 under the agreement?

7 A Yes.

8 Q It would be all copyrights and trademarks, except for
9 the copyrights and trademarks owned by Novell as of the date
10 of the agreement required for SCO to exercise its rights
11 with respect to the acquisition of UNIX and UnixWare
12 technologies. Do you see that?

13 A Yes.

14 Q I would like to show you what --

15 MR. SINGER: We would like to, at this point, put
16 before the jury the exhibit, which is the letter to
17 Mr. McBride dated May 28th, 2003. And I thought I moved
18 this into evidence previously. This would be SCO Trial
19 Exhibit 94.

20 I would like to move Exhibit 94 into evidence at
21 this time.

22 THE COURT: Mr. Acker.

23 MR. ACKER: No objection, Your Honor.

24 THE COURT: It will be admitted.

25 (Plaintiff's Exhibit 94 was received into

1 evidence.)

2 MR. SINGER: If I could similarly publish this to
3 the jury in the same fashion.

4 THE COURT: I'm assuming that this letter is now
5 going to be testified to by Mr. Messman, that's why we're
6 doing this; is that correct?

7 MR. SINGER: Yes. This is now going to be
8 discussed.

9 Mr. Calvin, can you go down to the second page,
10 page 2, and the last paragraph.

11 This is from the letter of May 28th, 2003, from
12 Jack Messman to Darl McBride. This paragraph reads,
13 importantly, and contrary to SCO's assertions, SCO is not
14 the owner of the UNIX copyrights. Not only would a quick
15 check of U.S. Copyright Office records reveal this fact, but
16 a review of the asset transfer agreement between Novell and
17 SCO confirms it. To Novell's knowledge, the 1995 agreement
18 governing SCO's purchase of UNIX from Novell does not convey
19 to SCO the associated copyrights. We believe it unlikely
20 that SCO can demonstrate that it has any ownership interest
21 whatsoever in those copyrights. Apparently, you share this
22 view, since over the last few months you have repeatedly
23 asked Novell to transfer the copyrights to SCO, requests
24 that Novell has rejected. Finally, we find it telling that
25 SCO failed to assert a claim for copyright or patent

1 infringement against IBM.

2 Please continue with the deposition.

3 Q -- has previously been marked as Exhibit 1012, which is
4 a letter from you to Mr. McBride dated May 28th, 2003. Is
5 this a letter which was sent by Novell -- in fact, sent by
6 you as CEO of Novell to Mr. McBride, who was the president
7 and CEO of the SCO Group?

8 A Yes.

9 Q Did you approve this letter before it was sent?

10 A Yes.

11 Q Do you recognize that in this letter you made the
12 statement that appears in paragraph -- the last paragraph on
13 page 2, quote, SCO is not the owner of the UNIX copyrights;
14 is that correct?

15 A Yes.

16 Q At the time when you stated this to SCO, had you fully
17 reviewed personally the entire APA?

18 A I think I had at this time.

19 Q You had not been read -- in fact, you were not aware of
20 Amendment No. 2?

21 A That's right.

22 Q At the time you made this statement on May 28th, 2003,
23 you had not spoken about the intent of the APA with any of
24 the individuals who had previously been at Novell and had
25 negotiated that deal or drafted those documents, correct?

1 A I did not talk with them about the intent. I only knew
2 what the agreement said.

3 Q Had you instructed either Mr. Stone or anyone else to
4 go back and speak with the people who had actually
5 negotiated the transaction on behalf of Novell and see what
6 was intended with respect to the transfer of copyrights?

7 A I would assume that they would do that as a normal
8 course of their work.

9 Q But you never made such an express instruction?

10 A I never instructed them to do so.

11 Q I would like to show you --

12 MR. SINGER: At this point, I would like to move
13 into evidence SCO Exhibit 525, which is the press release
14 which published the May 28th, 2003 letter.

15 MR. ACKER: No objection, Your Honor.

16 THE COURT: It will be admitted.

17 (Plaintiff's Exhibit 525 was received into
18 evidence.)

19 MR. SINGER: I would like to publish this in the
20 same fashion before the jury before the witness proceeds to
21 testify concerning this letter.

22 THE COURT: Go ahead.

23 MR. SINGER: Could you show the top part first,
24 the press release.

25 THE COURT: It may be best if you, again,

1 emphasize the date of this press release.

2 MR. SINGER: This is the press release from Novell
3 dated May 28th, 2003. The heading is Novell challenges SCO
4 position, reiterates support for Linux. Provo, Utah. May
5 28th, 2003. Defending its interest in developing services
6 to operate on the Linux platform, Novell today issued a dual
7 challenge to the SCO Group over its recent statements
8 regarding its UNIX ownership and potential intellectual
9 property right claims over Linux.

10 First, Novell challenged SCO's assertion that it
11 owns the copyrights and patents to UNIX System V, pointing
12 out that the asset purchase agreement entered into between
13 Novell and SCO in 1995 did not transfer these rights to SCO.
14 Second, Novell sought from SCO facts to back up its
15 assertion that certain UNIX System V code has been copied
16 into Linux. Novell communicated these concerns to SCO via a
17 letter, text below, from Novell chairman and CEO Jack
18 Messman in response to SCO making these claims.

19 Mr. Calvin, could you go down to the last -- what
20 would be the paragraph that appears on the second page of
21 the letter.

22 This is the reproduction of the letter. Could you
23 go down a little bit further?

24 This is the same paragraph that was previously
25 read into the record from the May 28th, 2003 letter

1 beginning with the statement, importantly, and contrary to
2 SCO's assertions, SCO is not the owner of the UNIX
3 copyrights.

4 Could you resume the playing of Mr. Messman's
5 deposition.

6 Q -- Exhibit 1013, which is a press release issued by
7 Novell on May 28th, 2003. Did you approve the issuance of
8 this press release by Novell?

9 A Generally, yeah, I reviewed all press releases.

10 Q In this case you approved the issuance of the press
11 release that appears as Exhibit 1013?

12 A Yes.

13 Q Do you recognize that the text of the letter from you
14 to Mr. McBride, which we've just been looking at, Exhibit
15 1012, was reproduced in the press release?

16 A Yes.

17 Q Included therefor in the press release is your
18 statement, which we've seen in the letter and we're now
19 looking at in the press release, where you stated, quote --
20 this appears on the second page of the press release, the
21 third paragraph before the bottom, quote, SCO is not the
22 owner of the UNIX copyrights. Do you see that?

23 A You're on page 2 of this --

24 Q Page 2. It would be the third paragraph from the
25 bottom. Importantly, and contrary to SCO's assertions, SCO

1 is not the owner of the UNIX copyrights?

2 A I see that.

3 Q So is it fair to say that Novell, through your action
4 as CEO, intentionally communicated to the public on May
5 28th, 2003, that SCO did not own the UNIX copyrights; is
6 that correct?

7 A Yes.

8 Q Is it fair to say that you released the letter to
9 Mr. McBride, your May 28th letter, in a press release so as
10 many people as possible would read about it?

11 A That was the mechanism by which we could get our side
12 of the story out. I didn't have a feeling as to who would
13 read it.

14 Q At the time you wanted to get your position out as
15 broadly as possible; is that correct?

16 A Sure.

17 Q Were you subsequently aware that SCO's stock price
18 declined 30 percent in the immediate aftermath of your press
19 release?

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

24 Q Clearly at the time of the press release, because it
25 was the same day as your May 28th letter, you also had at

1 that time no personal knowledge and had not spoken to any of
2 the individuals who negotiated the APA or its amendments
3 with respect to the transfer of the copyrights, correct?

4 A That's correct.

5 Q At the time of the press release on May 28th, just the
6 same as the time of the letter, you were unaware of the
7 existence of Amendment No. 2; is that correct?

8 A That's correct.

9 Q We haven't marked that yet --

10 MR. SINGER: At this time, I would like to move
11 the admission of SCO Exhibit 96, which is Mr. LaSala's
12 letter to Mr. McBride of June 6th, 2003, which accompanies
13 the June 6th, 2003 press releases. It's the next document
14 the witness will testify to.

15 MR. ACKER: No objection, Your Honor.

16 THE COURT: It will be admitted.

17 (Plaintiff's Exhibit 96 was received into
18 evidence.)

19 MR. SINGER: Mr. Calvin, could you put Exhibit 96
20 on the screen and highlight or enlarge the portion of the
21 text.

22 This is a letter from Joseph A. LaSala, senior
23 vice president, general counsel and secretary of Novell, to
24 Darl McBride, the president and CEO of the SCO Group, dated
25 June 6th, 2003.

1 Dear Mr. McBride, I've received your letter to
2 Jack Messman with respect to Novell's May 28th, 2003 press
3 release.

4 For your information, Novell has today issued a
5 press release with respect to Amendment No. 2. A copy is
6 attached for your ease of reference.

7 Your letter contains absurd and unfounded
8 accusations against Novell and others, coupled with a veiled
9 threat to publicly state those allegations in a SCO press
10 call to be held today at 11:00 a.m. eastern standard time.
11 Novell continues to demand that SCO cease and desist its
12 practice of making unsubstantiated allegations, including
13 the allegations contained in your letter of June 6, 2003.
14 Sincerely, Joseph A. LaSala.

15 Turn to the press release, please.

16 This is for immediate release June 6th, 2003.

17 THE COURT: This was part of Exhibit 96?

18 MR. SINGER: Yes. This is part of Exhibit 96.

19 THE COURT: All right.

20 MR. SINGER: Novell statement on SCO contract
21 amendment. Provo, Utah. June 6, 2003. In a May 28th
22 letter to SCO, Novell challenged SCO's claims to UNIX patent
23 and copyright ownership and demanded that SCO substantiate
24 its allegations that Linux infringes SCO's intellectual
25 property rights. Amendment No. 2 to the 1995 SCO-Novell

1 asset purchase agreement was sent to Novell last night by
2 SCO. To Novell's knowledge, this amendment is not present
3 in Novell's files. The amendment appears to support SCO's
4 claim that ownership of certain copyrights for UNIX did
5 transfer to SCO in 1996. The amendment does not address
6 ownership of patents, however, which clearly remain with
7 Novell.

8 Novell reiterates its request to SCO to address
9 the fundamental issue Novell raised in its May 28 letter:
10 SCO's still unsubstantiated claims against the Linux
11 community.

12 Mr. Calvin, continue with the deposition.

13 Q This has previously been marked as Exhibit 1014.

14 Have you seen this letter before that Mr. LaSala wrote
15 Mr. McBride?

16 A Yes.

17 Q Did you approve Mr. LaSala sending it?

18 A Yes.

19 Q Did you review Mr. LaSala's letter in the press release
20 that's associated with it prior to it being sent?

21 A Yes, I did review it.

22 Q And approved it being sent?

23 A Yes.

24 Q You agree this letter was written in response to the
25 letter from Mr. McBride of the same date that we had just

1 seen?

2 A This is responding to Novell's May 28th -- I'm sorry.
3 He's responding on the June 6th to the May 28th, and then
4 we're responding to him.

5 Q This was a response to demands that SCO had made that
6 Novell clear up the record with respect to ownership of
7 copyrights, correct?

8 A That's the demands they were making in their letter,
9 yes.

10 Q And that press release, which was issued on June 6th,
11 the response is the one which appears on the second page of
12 this Exhibit 1014, correct?

13 A That's it.

14 Q That press release states that, in a May 28th letter to
15 SCO, Novell challenged SCO's claims to UNIX patent and
16 copyright ownership and demanded that SCO substantiate its
17 allegations that Linux infringes SCO's intellectual property
18 rights. Amendment No. 2 to the 1995 SCO-Novell asset
19 purchase agreement was sent to Novell last night by SCO. To
20 Novell's knowledge, this amendment is not present in
21 Novell's files. The amendment appears to support SCO's
22 claim that ownership of certain copyrights for UNIX did
23 transfer to SCO in 1996. The amendment does not address
24 ownership of patents, however, that clearly remain with
25 Novell.

1 That statement was issued with your approval as an
2 official Novell press release on June 6, 2003, correct?

3 A I did approve the release of this.

4 Q Everything in that statement was true and correct, to
5 the best of your knowledge?

6 A Yes.

7 Q These statements are all true and correct, to the best
8 of your knowledge?

9 A Yes.

10 Q Now the statement that to Novell's knowledge Amendment
11 No. 2 is not present in Novell's files, it turns out that
12 statement was false, correct?

13 A No. There was no signed amendment in our files.

14 Q You had determined at a later time that there was a
15 signed copy in the CFO's files?

16 A Yes.

17 Q Don't you consider the CFO's files to be Novell's
18 files?

19 A Sure.

20 Q At the time Novell said this, it was not aware that
21 that signed copy was in Novell's files. It later turned out
22 to be in Novell's files; is that correct?

23 A Yes.

24 MR. SINGER: I would now like to move into
25 evidence SCO Exhibit 105, which is correspondence between

1 Mr. LaSala and Mr. McBride dated August 4, 2003.

2 MR. ACKER: No objection, Your Honor.

3 THE COURT: It will be admitted.

4 (Plaintiff's Exhibit 105 was received into
5 evidence.)

6 MR. SINGER: This is a letter, again, from Joseph
7 A. LaSala, senior vice president, general counsel and
8 secretary, to Darl McBride, president and chief executive
9 officer of the SCO Group, dated August 4, 2003.

10 Can you blow up the text of the letter so the jury
11 can read this?

12 Dear Mr. McBride. This is further to my letter of
13 June 6th, 2003 concerning ownership of the copyrights in
14 UNIX and follows your announcement that SCO has registered
15 its claim to copyrights in UNIX System V with the U.S.
16 Copyright Office. We dispute SCO's claim ownership to these
17 copyrights.

18 MR. ACKER: Your Honor, if we're going to read the
19 exhibit, we should read the whole exhibit as opposed to just
20 portions.

21 THE COURT: Let's go ahead and read the whole
22 thing, then.

23 MR. SINGER: The asset purchase agreement, in
24 schedule 1.1(b), contains a general exclusion of copyrights
25 from the assets transferred to Santa Cruz Operation.

1 Amendment No. 2 provides an exception to the exclusion, but
2 only for, quote, copyrights required for Santa Cruz
3 Operation to exercise its rights with respect to the
4 acquisition of UNIX and UnixWare technologies, close quote.

5 In other words, under the asset purchase agreement
6 and Amendment No. 2, copyrights were not transferred to
7 Santa Cruz Operation unless SCO could demonstrate that such
8 a right was, quote, required for Santa Cruz Operation, close
9 quote, to exercise the rights granted to it in the APA.
10 Santa Cruz Operation has never made such a demonstration,
11 and we certainly see no reason why Santa Cruz Operation
12 would have needed ownership of copyrights in UNIX System V
13 in order to exercise the limited rights granted SCO under
14 the APA. Nor is there any reason to think that a transfer
15 of the copyrights required for SCO to exercise its APA
16 rights necessarily entails transfer of the entire set of
17 exclusive rights associated with a particular copyrighted
18 computer program.

19 Unless and until SCO is able to establish that
20 some particular copyright right is, quote, required for SCO
21 to exercise its rights under the APA, SCO's claim to
22 ownership of any copyrights in UNIX technologies must be
23 rejected, and ownership of such rights instead remains with
24 Novell. Sincerely, Joseph LaSala.

25 Would you please continue the deposition.

1 Q I would like to now show you Exhibit 1023, which is
2 another piece of correspondence between Mr. LaSala and
3 Mr. McBride that's been dated August 4th, 2003.

4 Did you review this letter and approve it before it was
5 sent?

6 A Yes.

7 Q In this letter, is it fair to say Novell rejects SCO's
8 claim to ownership of any copyrights in UNIX technologies?

9 A Yes.

10 Q What background materials or other information not
11 available to Novell in June of 2003 have resulted now in
12 August of 2003 Novell taking this position?

13 A I don't think there were any new materials. There was
14 a lot more attention devoted to the agreement and
15 understanding the agreement.

16 Q So there was no new information that came to light,
17 that you're aware of, between June 6th, 2003 and August 4th,
18 2003?

19 A Not that I'm aware of.

20 Q The position that Novell took in this letter was,
21 quote, and I'm quoting from the third paragraph, we
22 certainly see no reason why Santa Cruz Operation would have
23 needed ownership of copyrights in UNIX System V in order to
24 exercise the limited rights granted SCO under the APA. Nor
25 is there any reason to think that a transfer of the

1 copyrights required for SCO to exercise its APA rights
2 necessarily entails transfer of the entire set of exclusive
3 rights associated with a particular copyrighted computer
4 program.

5 That was Novell's position; is that correct?

6 A Yes.

7 Q Which of those two things is Novell's position, as you
8 understand it, that no copyrights at all transferred or that
9 only partially a copyright transferred, as suggested by the
10 last sentence I read?

11 A My view is that we sold SCO the right to develop the
12 code further than what it was at the time we sold it, we
13 transferred the business to them, and they were going to
14 evolve the code, particularly to try to unify UNIX, the
15 various flavors UNIX and sell UnixWare.

16 Q So it's your view --

17 A And they didn't need the copyrights to do that.

18 MR. SINGER: At this point we have the Wall Street
19 Journal article dated September 20, 1995 that is already in
20 evidence. This is SCO Exhibit 133. With the Court's
21 permission, we would publish it at this time.

22 THE COURT: Go ahead.

23 MR. SINGER: This is the Wall Street Journal
24 article dated September 20, 1995. I would like to publish
25 the first two paragraphs.

1 Novell Inc. today is expected to announce plans to
2 relinquish control of the widely used UNIX operating system
3 to Santa Cruz Operation Inc. and Hewlett-Packard Company.
4 The deal includes the purchase by Santa Cruz Operation of
5 most trademarks and intellectual property associated with
6 UNIX software, one person familiar with the situation said.
7 He said he expects SCO to pay about \$140 million, some of
8 which will be shares of SCO, a Santa Cruz, California
9 company, that sells its own version of UNIX.

10 Mr. Calvin, can you continue with the deposition,
11 please.

12 Q I'd like to show you a Wall Street Journal article as
13 the next exhibit. This is Exhibit 1030, Wall Street Journal
14 article back on September 20, 1995. Do you recall whether
15 you've ever seen this before?

16 A I don't recall it.

17 Q You were on the board of Novell and may have read it in
18 The Wall Street Journal back then?

19 A I may have read it, yes.

20 Q Do you see where in this Wall Street Journal article it
21 states in the second paragraph, the deal includes the
22 purchase by Santa Cruz Operation of most trademarks and
23 intellectual property associated with UNIX software, one
24 person familiar with the situation said? Do you see that?

25 A I see it.

1 Q Now if your position is correct, no intellectual
2 property transferred to SCO, right?

3 A That's correct.

4 Q Do you know if Novell ever took any steps to correct
5 The Wall Street Journal's characterization to the public of
6 what had been sold?

7 A I don't know of any steps they took.

8 Q Are you aware of any public statement made by Novell
9 after 1995, after the APA was signed, where Novell publicly
10 stated it owned the copyrights up until the time, of course,
11 of your press release of March of 2003 -- May of 2003?

12 A I don't know of any such thing, but they did do another
13 transaction similar to this with BEA, and I know they may
14 have made some comments then, but I don't know for sure.

15 Q Certainly as you sit here today, you are not aware of
16 any public statement made during that eight-year period
17 between the closing of the asset purchase agreement in 1995
18 and the press release which we've been looking at on May
19 28th, 2003 where Novell ever asserted ownership of UNIX
20 copyrights?

21 A I'm not aware of any of that.

22 Q Look at Exhibit 1, and e-mail from Chris Sontag at SCO
23 to Greg Jones at Novell. It says, attached is a first cut
24 at a side letter to clarify the issues we discussed
25 yesterday. I'll give you a call later, and so forth.

1 Turning to Exhibit 2, you see a proposed letter. Have you
2 ever seen this before?

3 A No.

4 Q Do you see that the proposed letter that SCO asked
5 Novell to sign in February 2003 would, quote -- would
6 clarify that, quote, all right, title and interest in and to
7 the copyrights associated with SVRX agreements held by
8 Novell at the time of the asset purchase agreements were
9 intended to be included in the included assets identified on
10 schedule 1.1(a).

11 A I see that, yes.

12 Q When you've earlier testified that it was your
13 understanding that what SCO was asking for was a transfer of
14 the copyrights rather than a clarification that those had
15 transferred, were you aware of this correspondence between
16 Mr. Sontag and Mr. Jones?

17 A No. I just became aware of it right now.

18 Q I take it, then, in the May 28th, 2003 press release,
19 which told the public that SCO had asked for a transfer of
20 the copyrights, you were not aware of the February 2003
21 correspondence that we're looking at which asked for
22 clarification that those had been transferred; is that
23 correct?

24 A That's correct. I've never seen this before.

25 Q When did you retire as the chief executive officer of

1 Novell?

2 A June 21st, 2006.

3 Q Are you a stockholder in Novell at present?

4 A Yes.

5 Q Without wanting to pry into your financial affairs,
6 would you say that your share ownership of Novell is
7 material to yourself?

8 A Yes.

9 Q When did Novell begin considering a Linux strategy as
10 part of its business?

11 A It was late 2002.

12 Q At the time when it first considered Linux as part of
13 its strategy, what role did you envision Linux would play in
14 Novell's overall business strategy?

15 A At the time we were going to take the services that
16 were in NetWare and make them work on top of the Linux
17 operating system.

18 Q At that time Novell didn't contemplate, either directly
19 or through a subsidiary, being engaged in the business of
20 distributing Linux itself?

21 A I think that -- our approach was to put the NetWare
22 services on top of SuSE Linux, Redhat, even United Linux.
23 We didn't care what Linux was underneath. Our strategy was
24 to put our services on top of Linux.

25 Q But in late 2002 is when you decided that Novell should

1 make the Linux strategy a significant part of Novell's
2 business strategy moving forward?

3 A Yes.

4 Q When Novell decided it was going to pursue a Linux
5 strategy in late 2002, did that lead you to believe it was
6 important to have a relationship involving Linux with IBM?

7 A Well, we wanted to put NetWare on Linux and have IBM,
8 Dell and HP sell it. All three of those companies had been
9 involved with selling NetWare and had NetWare customers, and
10 we felt that was a good transition to put NetWare on top --
11 the NetWare services on top of Linux so they could
12 transition their customers to NetWare on Linux.

13 Q So one aspect of the Linux strategy, which would
14 involve IBM, would be IBM selling a product of NetWare on
15 top of Linux, correct?

16 A Yes.

17 Q Did there come a time when IBM paid Novell \$50 million
18 to assist in its Linux strategy?

19 A They paid us -- they bought \$50 million worth of our
20 stock, at my request, to give me comfort that they were
21 going to support the Linux strategy.

22 Q When did that occur?

23 A We bought -- I think I said we bought SuSE Linux either
24 in November or December -- I think it was November, and then
25 the investment occurred like February or March of the

1 following year.

2 Q When did you first discuss with IBM them making a \$50
3 million investment in the stock of Novell?

4 A We had pretty much finished the negotiations with the
5 sellers of SuSE Linux and the bidding got up to
6 \$210 million. We had \$750 million worth of cash on our
7 balance sheet, we didn't need the cash, but I wanted to make
8 sure that if we bought this company, we would have support
9 in the marketplace. So I called IBM to ask them what
10 comfort they could give me that they were going to be there
11 if we bought this company, bought SuSE Linux, and they
12 asked --

13 Q Please continue.

14 A They asked me what were my thoughts as to what they
15 could do.

16 And we had talked about this back at Novell, and we
17 were of the opinion that the best way that they could do
18 that would be to sell our products and make an investment in
19 the company, that would give a signal to the marketplace
20 that they supported our acquisition of SuSE Linux.

21 Q My initial question was, when did you first discuss
22 this with IBM. I think you discussed how the conversation
23 came about, but you didn't put a date on that?

24 A I was saying we made the acquisition in November, and I
25 think it was in -- it was just before we closed that I

1 called them. I would say it was November.

2 Q Of 2003?

3 A 2003.

4 MR. SINGER: Your Honor, this completes the
5 plaintiff's designations from Mr. Messman's deposition.
6 There are a series of designated testimony that Novell
7 wishes to present.

8 THE COURT: All right.

9 Q Now was it your understanding in 2003 that any
10 copyrights were being transferred under this agreement by
11 Novell to Santa Cruz?

12 A It was my understanding that they were not being --
13 they were not part of the assets being sold.

14 Q When did you first come to that understanding?

15 A Upon reading the asset purchase agreement.

16 Q Did you have any understanding one way or the other
17 before reading the asset purchase agreement?

18 A I think in the board presentation they made to us in --
19 whenever it was, '81 or so. '83? No. Whatever that board
20 presentation was, they basically said to us that the
21 copyrights and the patents were not being sold.

22 Q Who said that?

23 A Well, I think David Bradford, who was the general
24 counsel, was making the presentation.

25 Q He was the general counsel at the time of Novell?

1 A Yes.

2 Q You have a distinct recollection of this board meeting,
3 which would have been 1995, not 1981 or 1983?

4 A '95, right. Okay.

5 Q You have a distinct recollection now in 2006 that at
6 this board meeting in 1995 the board was told that the
7 copyrights and patents were not being sold?

8 A Yes.

9 Q Do you recall anything else that Mr. Bradford said with
10 respect to assets being sold and not sold?

11 A No.

12 Q Just the issue about the copyrights?

13 A He explained the entire transaction, and it was a
14 structured transaction, not a straightforward buy and sell.
15 And it was complicated, and therefore we took time to
16 understand what was being sold and what wasn't being sold.
17 We were concerned about SCO and its viability, and we wanted
18 to protect ourselves, because we had these royalty
19 agreements out there, and therefore that was an issue that
20 we were concerned about.

21 Q Did have you an understanding, based on what
22 Mr. Bradford had said, that Novell was going to retain
23 certain rights to receive royalties on existing licenses in
24 order to -- to actually be part of the payment for the
25 company?

1 MR. BRAKEBILL: Foundation.

2 A Yes. We were selling certain of the assets that we had
3 brought from AT&T, but not all of them, and we were not
4 selling the existing royalty agreements, and we were not
5 selling the copyrights and the patents.

6 Q If we turn to Amendment 2, which is also in front of
7 you.

8 A Yes.

9 Q If you would look at section A. Do you see it refers
10 back to a schedule of excluded assets, and it states that
11 all copyrights and trademarks, except -- and this would be
12 an item of the excluded assets, you understand that,
13 correct?

14 A Yes.

15 Q You understood that when you read this in 2003 for the
16 first time?

17 A Um-hum.

18 Q This was modifying the assets that Novell got to keep
19 under the agreement?

20 A Yes.

21 Q It would be all copyrights and trademarks, except for
22 the copyrights and trademarks owned by Novell as of the date
23 of the agreement required for SCO to exercise its rights
24 with respect to the acquisition of UNIX and UnixWare
25 technologies. Do you see that?

1 A Yes.

2 Q What was your view in 2003 as to which copyrights were
3 necessary for SCO to exercise its rights with respect to the
4 acquisition of UNIX and UnixWare technologies?

5 MR. BRAKEBILL: Foundation.

6 Q Did you have any understanding?

7 A My understanding was that they didn't need any
8 copyrights and patents to do what they were planning to do,
9 which was to evolve the code that sat on top of the SVRX
10 licenses.

11 Q This letter was sent to you May 12, 2003 by Mr. McBride
12 of SCO. It's been previously marked as Exhibit 1021, dated
13 May 12, 2003. Is this a letter which you received by fax on
14 that date?

15 A I don't know how I received it.

16 Q Is this a letter that you received on or about that
17 date?

18 A I recall getting this letter. Whether this is the
19 one -- I mean, I received this letter.

20 Q Did you understand from this letter that SCO was
21 asserting claims that Linux infringed on its UNIX rights?

22 A Let me read it.

23 Yeah, I mean, that's what the assertion is, that UNIX
24 is -- I mean, that Linux is violating the UNIX copyrights.

25 Q What did you do in response to this letter?

1 A I think this is the initiation of my getting involved
2 with these contracts and reviewing them and getting the
3 officers who reported to me to start to address the issue
4 and what we should do about it.

5 Q Why did Novell publish as a press release your letter
6 to Mr. McBride of May 28, 2003?

7 A Well, there was a feeding frenzy in the stock market
8 with regard to this issue that SCO continued to feed, and
9 many of the statements that SCO was making were, in our
10 opinion, misleading. And the press and the market weren't
11 hearing our responses or our actions, so we decided that we
12 had to be the ones who told them the other side of the
13 story.

14 Q Did you have an understanding when you issued the press
15 release that it was likely to adversely affect SCO's stock
16 price?

17 A No.

18 Q You didn't think it would affect SCO's stock price to
19 publicly state that SCO did not own the UNIX copyrights?

20 A I didn't have an opinion as to what it would do to
21 SCO's stock price.

22 Q When you're saying there is a feeding frenzy in the
23 market, did you believe that SCO's stock was trading upwards
24 because of a misunderstanding with respect to what rights it
25 in fact enjoyed?

1 A I don't think it was a misunderstanding with what
2 rights they enjoyed because the market didn't know. The
3 market was trying to find out.

4 Q You were trying to correct or inform that market by
5 making the statement that SCO did not in fact own the
6 copyrights; is that correct?

7 MR. BRAKEBILL: Objection.

8 A We were trying to make the market aware of our side of
9 the story, because the market was not being told the full
10 story, in our opinion.

11 Q Well, you were doing more, weren't you, Mr. Messman,
12 than saying, it's our position that SCO didn't own the
13 copyrights, you were saying definitively that SCO is not the
14 owner of the UNIX copyrights?

15 A Yes.

16 Q Correct?

17 A Yes.

18 Q Now you were also questioning in this letter the
19 assertions by SCO with respect to the infringement of its
20 UNIX rights by Linux; is that correct?

21 A Yes.

22 Q At this time, as of May 28th, 2003, what says
23 investigation had you personally done as to whether or not
24 any of the technology in Linux violated any of the
25 intellectual property rights in UNIX?

1 A Personally I had done none of that.

2 Q Did you ask Mr. Stone or anyone else at Novell to
3 investigate whether or not Linux had within it any
4 technology that would be protected by any of the
5 intellectual property rights associated with UNIX?

6 A Well, we didn't think that there was any UNIX in Linux,
7 and we were asking -- as I recall the sequence of events, we
8 were asking SCO to tell us where the offending code was and
9 if there was.

10 Q My question is a little bit different, Mr. Messman.
11 Maybe I didn't make it clear. My question was whether or
12 not you had asked anyone at Novell to investigate the issue
13 of whether any of Linux violated any of the intellectual
14 property protection in UNIX?

15 MR. BRAKEBILL: Apart from counsel?

16 MR. SINGER: Yes.

17 A No. I don't know how we would have done that, but I
18 didn't ask anybody to do that. It would be a tremendous
19 effort.

20 Q Following Mr. McBride's faxing that to you, did you
21 call Mr. McBride back shortly after that?

22 A He called me back.

23 MR. BRAKEBILL: Foundation.

24 THE WITNESS: I'm sorry.

25 Q He called you back, is your recollection, a second

1 time?

2 A Yes.

3 Q You're sure about that --

4 A No.

5 Q -- that you never placed a call to him? No. But
6 that's just your best recollection?

7 A My best recollection, Darl was calling me.

8 Q Did you agree with Mr. McBride on that phone call that
9 Amendment No. 2 confirmed that Novell had transferred the
10 UNIX and UnixWare copyrights to SCO?

11 A No.

12 Q You're certain about that?

13 A I'm sure we didn't transfer the copyrights for that
14 amendment.

15 Q My question is, are you sure you didn't agree with
16 Mr. McBride on the phone back on or about June 3, 2003, that
17 Amendment 2 had confirmed the transfer of copyrights?

18 MR. BRAKEBILL: Objection to form.

19 A My conversation with him only confirmed that we now had
20 a signed of copy Amendment 2. That's all we talked about.

21 Q Do you recall asking Mr. McBride what SCO wanted Novell
22 to do in consequence of Amendment No. 2?

23 A No.

24 Q You're not saying that didn't occur, you just don't
25 recall it?

1 A I don't think I would have asked that question, because
2 I hadn't focused on Amendment 2 yet.

3 Q Do you recall Mr. McBride saying that SCO wanted a
4 public statement by Novell that SCO is the copyright holder?

5 A No, I don't recall that.

6 Q Did Mr. McBride ask you about what involvement IBM had
7 had in your actions of May 28th?

8 A I do recall him asking that question.

9 Q What did you say?

10 A I think I said something to the effect that I talk with
11 IBM about a lot of things, and that's the way I left it.

12 Q In fact, had you talked to IBM specifically about the
13 issue of copyrights?

14 A No.

15 Q Had you talked about SCO's claims with respect to Linux
16 with IBM?

17 A No.

18 Q Why didn't you just deny to Mr. McBride that there had
19 been any communications with IBM on those subjects?

20 MR. BRAKEBILL: Form.

21 A I didn't know what specifically his intent was. It was
22 a nonanswer. I talk to IBM about a lot of things.

23 Q Are you aware of whether anyone at Novell, prior to May
24 28, 2003, had talked with anyone at IBM regarding what
25 position Novell should take regarding SCO's ownership of

1 copyright?

2 A I think I'm aware that at least Mr. LaSala talked to
3 them.

4 Q You were aware, even at the time of this press
5 statement, that there was an unsigned copy that had been in
6 Novell's files, correct?

7 MR. BRAKEBILL: Form, mischaracterizes earlier
8 testimony.

9 A I was aware that there was an unsigned copy of
10 Amendment 2, but there could have been unsigned copies of
11 other things too. They don't become binding until they are
12 signed.

13 Q As of the date of this press release, you had become
14 aware of the fact Amendment No. 2 had been signed, right?

15 A That's the purpose of that first statement.

16 Q Right. And that is the reason why you're informing the
17 public on June 6, 2003 that Amendment No. 2 appears to
18 support SCO's claim that ownership of certain copyrights for
19 UNIX did transfer to SCO in 1996; is that correct?

20 MR. BRAKEBILL: Form.

21 A We're saying that this amendment appears to support
22 SCO's claim. We're not saying that Amendment 2 transferred
23 the copyrights.

24 Q As you sit here today, who do you identify in your
25 mind, if you know, were the individuals who were in fact

1 involved at Novell in the asset purchase agreement
2 transaction?

3 MR. BRAKEBILL: Foundation.

4 A Well, we had a law firm that was doing most of the
5 work.

6 Q Which law firm was that?

7 A Wilson Sonsini. And I can't remember the guys in
8 corporate development that were working on this. There were
9 several of them. As a board member I'm talking, not as the
10 CEO of the company.

11 Q Right. You were a board member then?

12 A Yeah.

13 Q The position that Novell took in this letter was,
14 quote, and I'm quoting from the third paragraph, we
15 certainly see no reason why Santa Cruz Operation would have
16 needed ownership of copyrights in UNIX System V in order to
17 exercise the limited rights granted SCO under the APA. Nor
18 is there any reason to think that a transfer of the
19 copyrights required for SCO to exercise its APA rights
20 necessarily entails transfer of the entire set of exclusive
21 rights associated with a particular copyrighted computer
22 program.

23 That was Novell's position; is that correct?

24 A Yes.

25 Q I mean which of those two things is Novell's position,

1 as you understood it, that no copyrights at all transferred
2 or that only partially a copyright transferred, as suggested
3 by the last sentence I read?

4 MR. BRAKEBILL: Form, compound, argumentative.

5 A My view is that we sold SCO the right to develop the
6 code further than what it was at the time we sold it, we
7 transferred the business to them, and they were going to
8 evolve the code, particularly to try to unify UNIX, the
9 various flavors of UNIX, and sell UnixWare.

10 Q So it's your view --

11 A And they didn't need the copyrights to do that.

12 Q So it's your view that the transaction did not transfer
13 the intellectual property rights in UNIX to Santa Cruz?

14 A Yes.

15 Q Are you under any type of agreement with Novell that
16 requires you to continue to cooperate with them in
17 connection with litigation matters?

18 A No.

19 Q Do you have any type of nondisparagement agreement with
20 Novell?

21 A No.

22 Q Do you have any consulting agreement or other agreement
23 with Novell?

24 A No.

25 Q Would you agree they would either need to get the

1 copyright or they would need to get a license or sublicense
2 in order to be able to conduct a business of selling
3 end-user licenses to UnixWare?

4 MR. BRAKEBILL: It calls for a legal conclusion.

5 A My view is they would be selling the stuff that they
6 developed on top of UnixWare or SVRX, which they had
7 develop. Remember, my view is, they had to evolve the code,
8 they couldn't just take SVRX and sell it. They had to
9 evolve the code to something more that they then had the
10 intellectual property rights to.

11 Q I'm not talking about the legacy of SVRX products. I'm
12 talking about UnixWare now. Do you deny SCO had the right
13 after the closing to sell UnixWare --

14 A No.

15 Q -- in the form that 2.0 existed at the time of the
16 closing -- to sell UnixWare in the form that it existed at
17 the time of the closing?

18 MR. BRAKEBILL: It calls for a legal conclusion.

19 A Quite frankly, I haven't studied the UnixWare side of
20 all this, so I can't come to a conclusion on that without
21 further study.

22 Q Why didn't you enter into an agreement with them that
23 would obligate them to sell and promote SuSE Linux as
24 opposed to a \$50 million cash investment in their stock?

25 MR. BRAKEBILL: Form.

1 A They wanted to make sure they treated all participants
2 in the Linux business equally, they had a relationship with
3 Readhat, and they didn't want to exclusively sell our
4 products, they wanted to get more than one into their
5 customer base.

6 Q My initial question was, when did you first discuss
7 this with IBM. I think you discussed how the conversation
8 came about, but you didn't put a date on that?

9 A I was saying we made the acquisition in November, and I
10 think it was in -- it was just before we closed that I
11 called them. I would say it was November.

12 Q Of 2003?

13 A 2003.

14 Q Now what was -- if any action that SCO took was subject
15 to being overruled by Novell, and Novell could force SCO to
16 take any action which it wanted, then what, in essence, was
17 SCO buying under the agreement?

18 MR. BRAKEBILL: Form, argumentative, asked and
19 answered.

20 A SCO was buying the rights to develop -- further develop
21 the SVRX code to create a merged product, to create a
22 product that would bring the UNIX industry together
23 hopefully to better compete with NT. That was the business
24 that they were buying into.

25 MR. SINGER: Your Honor, that completes the

1 designations and cross designations from the deposition of
2 Jack Messman. Do you want us at this time to proceed with
3 the next deposition?

4 THE COURT: I think we probably ought to get
5 started into it, if you would, please.

6 MR. NORMAND: Your Honor, the next witness whose
7 designations we'll play is Jim Wilt, who is in Santa Cruz.

8 THE COURT: Mr. Normand, will the deposition be
9 identified when this was taken? If not, would you please do
10 so.

11 MR. NORMAND: Yes, Your Honor. It was taken on
12 January 26th, 2007.

13 THE COURT: Thank you.

14 (James Wilt Deposition)

15 Q Do you recall the title you had at the time of the
16 asset purchase agreement?

17 A I believe my title was vice president of business
18 development. I had taken a very generic title.

19 Q And how about after that, did your title change when
20 you went into product engineering?

21 A Yes. I was senior vice president of products.

22 Q And did you have another position after senior vice
23 president of products?

24 A Yes.

25 Q What was that?

1 A I ran the consulting services business unit. I was
2 president of -- I think it was president of consulting
3 services. I'm not sure of the exact title.

4 Q What were your responsibilities as president of
5 consulting services?

6 A The consulting services was a business unit that
7 bespoke programming or services to help install or to create
8 programs that went along with the software.

9 Q Have we gotten up to the point of the SCO-Caldera
10 transaction yet or are we still in the period between the
11 asset purchase agreement and that transaction?

12 A It was while I was the -- ran the consulting services
13 that the Caldera transaction happened.

14 Q You said you were involved in some of the initial
15 discussions concerning that transaction. At what point in
16 the transaction did you stop your involvement?

17 A Relative to Caldera?

18 Q Relative to the Caldera. This is the SCO-Caldera
19 transaction I'm talking about.

20 A As we got into more details, we discussed it as a
21 management group.

22 Q Are you familiar with which assets were transferred as
23 part of that transaction to Caldera and which assets were
24 not?

25 A Of a general nature.

1 Q I take it then that the UNIX business of SCO
2 transferred to Caldera as part of the SCO-Caldera
3 transaction?

4 A That's correct.

5 Q Do you know -- as a preliminary matter, do you know who
6 Edward Chatlos is?

7 A Yes.

8 Q Who is he?

9 A He was the individual that we negotiated the agreement
10 with from Novell.

11 Q Would it be fair to say, though, that you were more
12 active in the negotiations at the beginning and less active
13 at the end of the negotiations?

14 A Less active -- probably less active.

15 Q Certainly. With this text in mind and recalling your
16 meetings with Novell leading up to the asset purchase
17 agreement, do you recall anyone from Novell ever
18 communicating to you affirmatively, specifically, that
19 Novell was selling SCO the UNIX or UnixWare copyrights?

20 A I do not have specific recollection of somebody
21 communicating they were transferring that explicitly in
22 terms of saying copyrights because it was such a fundamental
23 part of an asset purchase that if you didn't have copyrights
24 and such go along with it, there was no asset purchase.
25 It's called a license. We did not discuss a license. We

1 discussed a purchase. So there are a lot of things that we
2 didn't explicitly cull out as part of the purchase because
3 they were just assumed. I mean, when you walk out the door,
4 I assume your head goes with you, and the same thing is true
5 when you buy the assets. Copyrights and things like that
6 have got to go with it.

7 Q So to be clear, no one from Novell ever said to you
8 copyrights are part of this deal, we're selling you the
9 copyrights?

10 A That's not what I said. I said I could not recall
11 anyone explicitly saying it. If they did, it's not
12 something that would have been so out of the ordinary for me
13 to remember because, as I said, it was just a natural part
14 of what you expected to have transferred. So if somebody
15 made such a statement, it would not be remarkable and not be
16 something that one would remember.

17 On the other hand, if somebody would have said we're
18 not selling them to you, it would have been extremely
19 remarkable and probably would have ended the negotiations.

20 Q Just so I understand, though, you do not recall anyone
21 saying that copyrights were part of the assets transferred
22 as part of the APA?

23 A Is that the same question you asked before?

24 Q I'm asking that question now.

25 A I'm asking is that the same question you asked before?

1 It sounds like it. If it is, it's the same answer that I
2 gave before. It's not a remarkable statement that I would
3 have remembered.

4 Q I'm not asking whether it's remarkable or not. I'm
5 just asking if you recall anyone saying, from Novell,
6 copyrights were part of the assets transferred?

7 A And my answer is I have no recollection because it is
8 not something that would have been remarkable to remember.

9 Q Do you have any stock options in the entity that's the
10 plaintiff in this action, The SCO Group, Inc.?

11 A No.

12 Q Do you know whether any members of your immediate
13 family own any stock or stock options in The SCO Group, the
14 entity that is the plaintiff in this action?

15 A Not that I know of.

16 Q Mr. Wilt, you were handed an Exhibit 25 --

17 MR. NORMAND: Your Honor, there is reference to a
18 declaration. Obviously we're not undertaking to admit the
19 declaration into evidence. That's what is being referred
20 to.

21 THE COURT: All right.

22 Q -- earlier in the day, which is described as your first
23 declaration. Have you had occasion recently to review that
24 declaration?

25 A Yes. I did read through it last night.

1 Q Is there any part of the declaration that you feel is
2 inaccurate or that you would like to correct?

3 A No.

4 Q If I could direct your attention to some language in
5 that declaration. I'm looking at paragraph 7 at the end
6 where you say, in referring to the negotiations from August
7 to September 1995 between Santa Cruz and Novell, that you,
8 quote, understood Mr. Chatlos to be Novell's chief
9 negotiator during those negotiations. Is that a correct
10 statement?

11 A This is a correct statement.

12 Q You say in paragraph 8, quote, it was my understanding
13 and intent during those negotiations that SCO would acquire
14 Novell's entire UNIX and UnixWare business, including the
15 copyrights. I do not recall and do not believe that there
16 ever was any instance in which anyone at SCO or Novell ever
17 stated or exhibited any contrary intent or understanding to
18 me or anyone else.

19 Is that an accurate statement?

20 A That's an accurate statement.

21 Q You say in the back half of paragraph 9, quote, it was
22 my intent on behalf of SCO to acquire, through the APA,
23 Novell's entire UNIX and UnixWare business, including the
24 UNIX and UnixWare source code and all associated copyrights,
25 and I believed then, open parens, as now, close parens, that

1 Novell's intent was to tell sell all of those assets and
2 rights.

3 Is that an accurate statement?

4 A Yes, that's an accurate statement. You wouldn't have
5 had a business without having the copyrights and trademarks.

6 Q You say in paragraph 12, quote, I do not recall anyone
7 on either side of the negotiations or transaction ever
8 suggesting that Novell would retain a copyright relating to
9 UNIX or UnixWare. I am not aware of any discussions,
10 whether general or specific, during the negotiations that
11 contradict my understanding of the transaction as set forth
12 in this declaration.

13 Is that an accurate statement?

14 A That is an accurate statement.

15 Q You say in paragraph 16, quote, pursuant to the APA,
16 the parties also signed a technology licensing agreement in
17 early December 1995 in which Novell licensed source code
18 rights from SCO. In my view, this licensing agreement was
19 consistent with SCO's ownership of the UNIX and UnixWare
20 copyrights following the closing of the APA, end quote.

21 Is that an accurate statement?

22 A That's an accurate statement because if you look at the
23 technology licensing agreement, it includes our giving
24 Novell the right to reproduce and license, under certain
25 conditions, that code, which if we didn't own the copyrights

1 and such, we wouldn't have had to give to Novell and
2 wouldn't have been able to give to Novell.

3 Q I direct you back to paragraph 10 of your declaration.
4 It states, quote, paragraph 4.16 of the APA pertains to the
5 binary royalty income stream that Novell retained through
6 the APA. The parties agreed to the language in paragraph
7 4.16(b) in order to allow Novell to manage that royalty
8 stream within the operation of SCO's customer source code
9 licenses -- not at the expense of SCO's right to enforce its
10 intellectual property protections under any such licenses,
11 and not to permit Novell to waive any of those protections.
12 I have reviewed Amendment No. 2 to the APA and believe that
13 the language therein confirms that intent. In light of my
14 intent, and based on my understanding of the parties'
15 intent, I do not believe that Novell had or has any right to
16 waive, or to direct or require SCO to waive any of its
17 intellectual property rights or protections.

18 Is that an accurate statement?

19 A That's an accurate statement.

20 Q Let me direct your attention, Mr. Wilt, to what was
21 marked earlier as Exhibit 27, which was described as your
22 second declaration.

23 A Okay.

24 Q Have you had occasion recently to review Exhibit 27?

25 A Yes, I reviewed this yesterday again.

1 Q Is there any aspect of Exhibit 27 that you believe is
2 incorrect or that you would like to correct?

3 A No.

4 Q Let me ask you about some specific paragraphs in this
5 declaration. You say in paragraph 4, quote, Santa Cruz's
6 intent and agreement under the APA and Amendment No. 1 was
7 for Novell to transfer the entire UNIX business, including
8 the UNIX source code and copyrights to Santa Cruz except for
9 binary royalties paid under the existing agreements pursuant
10 to which UNIX System V, open paren, quote, SVRX, end quote,
11 close parens, licensees were paying such royalties, and
12 which Novell conveyed to Santa Cruz under the APA as part of
13 the UNIX business.

14 Is that an accurate statement?

15 A That's an accurate statement, and it was the existing
16 licenses at the time of the transfer to SVRX that Novell
17 retained, you know, the equity interest, the financial
18 interest in.

19 MR. NORMAND: Your Honor, that completes SCO's
20 designations of Mr. Wilt.

21 MR. JACOBS: Your Honor, we have no counter
22 designations.

23 THE COURT: We'll go ahead and take a recess now.

24 Ms. Malley.

25 (Jury excused)

1 THE COURT: Mr. Singer, let me ask you something
2 about Mr. Levine's deposition testimony. The Court's motion
3 in limine stated that Mr. Levine would only be allowed to
4 testify as to the second amendment if he had personal
5 knowledge in contrast to simply looking at it and saying,
6 well, reading it now, this is what my interpretation would
7 be. Have you supplied the Court -- and I said that because
8 you were given the opportunity to provide a foundation for
9 him having been involved in the negotiations so he would
10 know what was the intent of the second amendment. Have you
11 supplied the Court anything that would establish that
12 foundation of his personal involvement or is it just simply
13 his reading of the second amendment saying this is what I
14 think it means?

15 MR. SINGER: May I have a moment, Your Honor?

16 THE COURT: Yes. And if it's easier, Mr. Normand,
17 if you would just answer the question.

18 MR. NORMAND: Can I run my answer by Mr. Singer?
19 Run it by the Court first.

20 THE COURT: You may be safer if you run it by Mr.
21 Singer.

22 MR. NORMAND: I won't be long. We don't dispute
23 that we don't have a factual foundation that he was involved
24 in the drafting. We do think it would be relevant,
25 particularly in light of the sorts of questions that have

1 been asked of witnesses already. He was an in-house
2 attorney, and in effect the question is asking him, do you
3 have a view as to what copyrights are required. And I don't
4 think he would be anymore instructing the jury on what the
5 law of copyright is. I think he's offering at least a
6 largely relevant view as to his view why would you need
7 copyright ownership. That's how we interpreted his answer
8 to that question.

9 THE COURT: Do you wish to respond, Mr. Brennan?

10 MR. BRENNAN: Your Honor, I think this falls
11 squarely within the scope of the Court's motion in limine.
12 It's already been established that he did not have personal
13 involvement regarding Amendment No. 2. We tendered to the
14 Court the testimony that confirmed that.

15 In addition, I think a problem with this question
16 and the answer is the answer is not even responsive to the
17 question and it was objected to at the time. So we have a
18 couple of issues here. Number one, it's beyond the scope of
19 this witness's personal knowledge. Number two, and because
20 of number one, it falls within the ambit of the Court's
21 prior motion in limine ruling. Number three, the question,
22 as put to him, is whether he has a view as to what
23 copyrights were necessary. The answer doesn't even reveal
24 that.

25 For all those reasons, this particular question

1 and answer are objectionable and should not be presented to
2 the jury.

3 MR. NORMAND: Your Honor, I think what Mr. Brennan
4 said is begging the question a little bit. I think
5 Mr. Levine's response can be read to say I see the word
6 required, my view of what is required is all the copyrights.
7 So I read this as a clarification that all the copyrights
8 came over. I think the trial concerns, in significant part,
9 trying to help the jury understand what copyrights are
10 required, and I think the testimony of attorneys who were at
11 both companies is relevant to that issue. He is an attorney
12 whose testimony we want to rely on.

13 THE COURT: I will look at it. My concern is that
14 it becomes, then, expert testimony, speaking as an expert as
15 an attorney, as Mr. Davis was going to testify. And he was
16 designated as an expert and everything else was -- the T's
17 were crossed and the I's dotted to permit him. I just
18 don't -- let me take a look at it.

19 MR. NORMAND: The only comment I would add, maybe
20 you made the point jokingly in limine arguments about
21 Mr. Davis, but you pointed out that if he were not an
22 attorney, you wanted to get in his testimony if he were not
23 an attorney, we would hear an objection that he is not an
24 attorney.

25 THE COURT: Good point. All right. You are

1 throwing that back at me now, aren't you?

2 MR. NORMAND: I didn't mean to, Your Honor.

3 MR. SINGER: Mr. Normand obviously now understands
4 the comment you made on that point.

5 THE COURT: Which was injudicious on my part. I
6 never meant to insult Mr. Normand when I said that.

7 MR. BRENNAN: Your Honor, just so we're clear on
8 the point, the situation here, if we're going to have any
9 lawyer or any person, who is unconnected, uninvolved, to
10 come into this courtroom and say, I've read these words and
11 this is what I think it means, we would have a whole slew of
12 people. I could invite a number of lawyers from Salt Lake
13 to come in and offer that opinion.

14 THE COURT: Mr. Davis was uniquely qualified
15 because of the number of transactions he had been involved
16 in, and that was what the Court was relying on in allowing
17 him to testify. I don't know that we've got anything here
18 that would put Mr. Levine in that same category.

19 MR. NORMAND: While I would agree with that, Your
20 Honor, I still think it goes to the weight of his testimony.
21 That's for the jury to decide.

22 THE COURT: I will take a look at it and I will
23 let you know as soon as we come back from the break.

24 We'll take 15 minutes, counsel.

25 (Recess)