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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

	_____)	
THE SCO GROUP, INC.)	
)	
Plaintiff/Counterclaim-Defendant,)	
)	
vs.)	Case No.
)	
)	2:04-CV-139 DAK
NOVELL, INC.,)	
)	
Defendant/Counterclaim-Plaintiff.)	
)	

BEFORE THE HONORABLE DALE A. KIMBALL

DATE: JUNE 4, 2007

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

VOLUME II

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1 JUNE 4, 2007

SALT LAKE CITY, UTAH

2 P R O C E E D I N G S

3 * * *

4

5 THE COURT: We're here this morning in the
6 matter of SCO Group vs. Novell, Inc., 2:04-CV-139. For
7 Plaintiff, Mr. Stewart Singer.

8 MR. SINGER: Good morning, Your Honor.

9 THE COURT: Good morning. And Mr. Edward
10 Normand and Mr. Mark Chaney.

11 MR. NORMAND: Good morning, Your Honor.

12 For defendant, Mr. Michael Jacobs.

13 MR. JACOBS: Good morning, Your Honor.

14 THE COURT: Mr. Thomas Mr. Karrenberg.

15 MR. KARRENBURG: Yes, Your Honor.

16 Mr. Brakebill had to step out for a minute.

17 THE COURT: I was going to say Mr. Brakebill is
18 here, but I don't see him.

19 MR. KARRENBURG: He'll be in, in just a
20 second.

21 THE COURT: All right. Now, first we're going
22 to argue the cross motions on the Fourth Counterclaim
23 regarding the SVRX licenses, correct? No?

24 MR. SINGER: I think it's a motion and a cross
25 motion on the fourth claim.

1 THE COURT: Yeah. The cross motion. What did
2 I say, the cross claim? Cross --

3 MR. SINGER: We understand we're going to argue
4 both motions at the same time.

5 THE COURT: So, how do you want to do this?

6 MR. JACOBS: Your Honor, I think we moved
7 first on this one.

8 THE COURT: So you go first, and you're going
9 to tell me why I ought to grant your motion and not grant
10 his.

11 And you're going to do the same.

12 And you each get a brief reply.

13 How much time are you going to take on this
14 one?

15 MR. JACOBS: Half an hour.

16 THE COURT: All right. Go ahead, Mr. Jacobs.

17 MR. JACOBS: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. JACOBS: When we were here on our previous
20 4.16-B) related -- 4.16 related motion, we argued our
21 claim to money that SCO had received from SUN and
22 Microsoft based on the contention that all or some of
23 that money was SVRX royalties within the meaning of the
24 Asset Purchase Agreement. The focus of SCO's opposition
25 to that motion was a source-versus-binary distinction and

1 a distinction between then existing SVRX licenses and
2 future SVRX licenses.

3 On this motion, which goes to Novell's rights
4 under 4.16-B), to waive claims that SCO has made against
5 IBM and Sequent, the focus of SCO's argument has shifted,
6 and now they are arguing really with intense focus on
7 this product-supplement-versus-software -- software
8 agreement distinction that's found in the structure of
9 the SVRX licenses that Novell inherited from AT&T.

10 So I thought what I would do is spend a little
11 bit of time walking through the structure of the UNIX
12 licenses so we can see exactly what SCO is arguing and
13 what legal effect it might have. And I'm going to be
14 relying on the Brakebill declaration that came with this
15 motion and some exhibits that are attached to it. Do you
16 have that?

17 THE COURT: Go ahead.

18 MR. JACOBS: And I'm going to be -- of course,
19 we have the binder from Thursday. Do you have your copy
20 of that?

21 THE COURT: She can go get it.

22 MR. JACOBS: That's all right. We have an
23 extra one. Do you have one?

24 THE COURT: I guess I thought you would give me
25 a new one today.

1 MR. JACOBS: And I've also given you, Your
2 Honor, a copy of the draft Amendment No. 2 to the Asset
3 Purchase Agreement that's attached to the Amadia
4 declaration, which is submitted formally as part of our
5 motion for summary judgment on the copyright claim. As
6 we will see, it has relevance to arguments SCO is
7 advancing on 4.16-B).

8 So, if you have the Brakebill declaration
9 there, Your Honor, let's start with Exhibit 25, which is
10 where the dispute begins.

11 THE COURT: Okay.

12 MR. JACOBS: Exhibit 25 is the March 6, 2003
13 letter from SCO to IBM in which SCO says: We're the
14 successors to a set of UNIX-related licensing agreements.
15 Because of the Asset Purchase Agreement, we have rights
16 to enforce under those agreements, and we accuse you of
17 violating those agreements, and we're going to terminate
18 the license that you received from AT&T and that was
19 made, quote, irrevocable, unquote, by Amendment X.

20 And you know lot of that history from the IBM
21 motion.

22 Just as an aside, at the top of page 3, the
23 claim that SCO is advancing at this point is a violation
24 of their trade secrets rights which, as we know, is no
25 longer in the case. And so, if you look at the top of

1 the letter, you will see that SCO is referring to
2 Software Agreement Number SOFT 15, Sublicense Agreement
3 Sub 15-A, Substitution Agreement, Side Letter and
4 Amendment X.

5 Now, if you take a look at Amendment X, which
6 is Exhibit 13 to the Brakebill declaration, you will see
7 in the recitals how Amendment X incorporates the previous
8 agreements that related to this version of UNIX, and, in
9 particular, it cites the version of UNIX. So it's UNIX
10 System V Release 322 in the second line of the recitals.
11 And then Amendment X recites a series of agreements that
12 licensed to IBM, UNIX System V Release 3.2, and there's
13 the SOFT 15 agreement referenced there. There's the
14 sublicensing agreement referenced there, and there's a
15 supplement number 170.

16 And what that agreement -- now, this is an --
17 this is an agreement that was concluded after months of
18 negotiation between SCO, Novell and IBM, so the lawyers
19 are intensely involved in this.

20 THE COURT: You mean Amendment X?

21 MR. JACOBS: Amendment X, yes. The agreement
22 says Novell acquired AT&T's rights under the related
23 agreements, and the related agreements are all the
24 agreements; the SOFT 15, Sub 015, Supplement 170. And
25 then there's the Asset Purchase Agreement, and SCO

1 purchased, and -- it says: SCO purchased and Novell
2 retained certain rights with respect to the related
3 agreements.

4 So, right there in the recitals, it's
5 specifying that Novell retained rights with respect to
6 the related agreements; not merely the supplement, but
7 the entire package of licensing agreements. So, right
8 there in 1996, close to the time of the Asset Purchase
9 Agreement, the parties are documenting their
10 understanding at the time, and it is making clear that
11 Novell retained rights with respect to the entire package
12 of agreements that licensed UNIX System V Release 3.2 to
13 IBM.

14 Well, as I mentioned, SCO is focusing -- and as
15 the briefing makes clear, SCO is focusing on this Product
16 Supplement distinction, so let's look at the supplement.
17 And that's Exhibit 12 to the agreement. Now the
18 supplement starts out by crossreferencing the agreement
19 to which it relates, and that's SOFT 15, and then at the
20 top it says Supplement 170. And if you look at the
21 supplement, you will see that it is a lengthy list of
22 locations for designated CPU's, the name of the specific
23 software product, and per-copy fees.

24 And perhaps importantly, depending on how you
25 view these agreements, it makes it quite clear that

1 there's a lot of source code involved in the supplement.
2 In fact, there's reference after reference after
3 reference to source in the supplement. It's just on the
4 right-hand column of the supplement.

5 Now, if you go -- now, as I mentioned, 190 --
6 and as you have seen from the other documents, 190
7 relates to SOFT 15, so let's take a look at SOFT 15,
8 which is Exhibit 5 to the Brakebill declaration. And
9 this is, if you will, the master agreement. And it sets
10 up the basic structure of the SVRX licensing arrangements
11 that AT&T established. And in paragraph 2 of the
12 software agreement, it makes clear that the way you make
13 a software product -- say UNIX System V Release 3.2 --
14 part of this agreement is you execute a Product
15 Supplement. And the Product Supplement or Product
16 Supplements then become a part of the software agreement.
17 It says that in paragraph 2.

18 And then if you look at the body of the
19 agreement, of the SOFT agreement, you will see that it's
20 in Article 2 that the licensee is actually granted
21 rights, granted rights to use the software product
22 identified in the supplement. And then importantly, in
23 terms of the way SCO has tried to tee up the argument,
24 it's Article 5 that actually says the licensee has an
25 obligation to pay.

1 So the supplement will set forth the fee
2 Schedule, but it's Article 5 that actually establishes
3 the binding obligation on the part of the licensee to pay
4 the fees that are set forth in the Product Supplement,
5 and the reason I focus on that at this stage is that part
6 of SCO's core argument here is that all of this
7 section -- Article 4 -- these Article 4 provisions,
8 including 4.16-B), were about protecting Novell's revenue
9 stream.

10 And that's why we should focus exclusively on
11 the Product Supplement because that's where the prices
12 are. But the obligation to pay is set forth in Article 5
13 of the software agreement. So, in short, it is the
14 software agreement that grants the substantive rights to
15 the SVRX products listed in the supplement, including the
16 rights to use, modify, distribute, prepare derivative
17 works and, in the case of Supplement 19 -- 170, those are
18 rights with respect to source code.

19 So, back to the dispute. IBM has threatened to
20 terminate -- I'm sorry. SCO has threatened to terminate
21 IBM's SVRX license. The industry is in an uproar, and
22 Novell steps in at Exhibit 27. And Exhibit 27 is the
23 letter from Novell to SCO in which Novell laid out its
24 view that "irrevocable" meant "irrevocable" and that SCO
25 didn't have the right to terminate IBM's software

1 agreement and that it -- it was directing SCO, pursuant
2 to Section 4.16-B), to waive termination of the license.

3 SCO responds at Exhibit 28 of the Brakebill
4 declaration, and in the very first paragraph, the
5 capitalized term "SVRX License," is used. So it's a
6 letter to the CEO of Novell from SCO: Dear Jack. This
7 letter is in response to yours of June 9, 2003. In your
8 June 9 letter, you attempt to assert claims on behalf of
9 IBM with respect to its SVRX capital "L" license with
10 SCO.

11 So, at this stage, SCO has not come up with a
12 theory why IBM's SVRX small "l" licenses are not also
13 capital "L" licenses, although the letter does go on to
14 explain SCO's view about why Novell doesn't have the
15 right Novell asserts.

16 Then in Exhibit 31, Novell writes again to SCO
17 and says: We have the right under 4.16-B) to direct you.
18 If you don't take the action we direct you to take, then
19 we have the right to take that action on your behalf. We
20 are hereby taking that action on your behalf, and we are
21 waiving termination.

22 And then, in Exhibit 33, Exhibit 33 is the
23 letter in which Novell directed SCO to waive its claims
24 regarding IBM-developed code. And, again, you have the
25 issue in the IBM case of what the license agreement

1 means. Novell had a view. Novell expressed that view in
2 that letter and said to SCO: We disagree with you. We
3 direct you to waive your claims about the use of
4 IBM-developed code, and if you don't, we will take action
5 on your behalf, which Novell subsequently did.

6 So that sets up the dispute that we are asking
7 you to rule on summary judgment. You've seen the
8 language of 4.16-B) for many times, I'm sure, but just to
9 remind ourselves that the second sentence says: In
10 addition, at seller's sole discretion and direction,
11 buyer shall amend, supplement, modify or waive any rights
12 under or shall assign any rights to any SVRX license to
13 the extent so directed in any manner or respect by
14 seller. In the event that buyer shall fail to take any
15 such action concerning the SVRX licenses, as required
16 herein, seller shall be authorized and hereby is granted
17 the rights to take any action on buyer's own behalf.

18 Now, we established, I think, in the last
19 hearing that this set of provisions in Article 4 of the
20 Asset Purchase Agreement set up SCO as Novell's agent and
21 its fiduciary with respect to the administration of SVRX
22 licenses. And this provision, Section 4.16(b) is, in that
23 sense, then, the -- both the grant -- part of the grant
24 of and a restriction on the rights of Novell's agent and
25 fiduciary SCO and makes it clear that Novell retained

1 plenipotentiary authority over the administration of the
2 SVRX licenses and, after all, Novell could even demand
3 that the license be assigned back to Novell under the
4 assignment clause of that provision.

5 As I mentioned, SCO says that SVRX licenses are
6 only the Product Supplements and they have a parsing of
7 the included-assets list that they believe supports that
8 argument. We think this argument makes very little
9 sense, and let me show you why. Suppose we go with SCO
10 on this argument and we say that Novell retained 4.16(b)
11 rights only with respect to Product Supplement 170.
12 That's the supplement at issue in the waiver of SCO's
13 claims against IBM. That's the supplement that makes
14 UNIX System V Release 3.2 subject to the software
15 agreement.

16 Now, just as an aside, if you go to look at the
17 list of SVRX licenses, UNIX System V Release 3.2 is
18 there. So there's no question that UNIX System V Release
19 3.2 in some way falls within the scope of SVRX licenses.

20 Under SCO's reading of 4.16(b), if we
21 substitute Product Supplement 170 for the language, it
22 would read: In addition, at seller's sole discretion and
23 direction, buyer shall amend, supplement, modify or waive
24 any rights under or shall assign any rights to Product
25 Supplement 170 to the extent so directed in any manner or

1 respect by seller.

2 And then there would be the right of Novell to
3 take action on SCO's behalf if SCO didn't follow that
4 direction. All of the rights of the licensor and the
5 rights of the licensee with respect to Product Supplement
6 170, and hence, all the rights with respect to UNIX
7 System V Release 3.2 are set forth in the software
8 agreement in Amendment X and the other instruments that
9 relate to Product Supplement 170.

10 Product Supplement 170 is legally inert. It
11 grants no rights. It imposes no obligations. It's a
12 menu. It's a price list, but it is not a definition of
13 legal rights and obligations. So, in order to waive
14 rights with respect to product 170, you have to look at
15 what those rights are, what, in this case, SCO's rights
16 are. And where do you go to find what SCO's rights are
17 with respect to Product Supplement 170? You go to the
18 documents that Product Supplement 170 is expressly made a
19 part of and integrated into. And in that case, that
20 would be SOFT 15 or Amendment X.

21 Now, SCO basically ignores this problem in the
22 analysis that it gives the Asset Purchase Agreement. It
23 says that its issues had do with -- it's IBM issues had
24 to do with source code and so it tries to draw the
25 source/binary distinction again. But Product Supplement

1 170, as we have seen, is all about source code. It's all
2 about a grant of rights to IBM, the price list and
3 Schedule with respect to source code.

4 So Novell retained the right, even under their
5 theory, to direct SCO to amend, modify, supplement or
6 waive any rights under the source code for UNIX System V
7 Release 3.2. Again, this is their -- even assuming that
8 you sort of start in looking at the definition of SVRX
9 license with Product Supplements.

10 Now, I've handed you a -- the exhibit from the
11 Amadia declaration because it not only is relevant to the
12 copyright argument but it's relevant to SCO's Amendment
13 No. 2 argument. And SCO's argument, if you look at
14 Amendment No. 2, in paragraph (b) (5) it says: This
15 amendment does not give Novell the right to increase any
16 SVRX licensee's rights to SVRX source code, nor does it
17 give Novell the right to grant new SVRX source code
18 licenses. In addition, Novell may not prevent SCO from
19 exercising its rights with respect to SVRX source code in
20 accordance with the agreement.

21 Now, the plain language of Amendment No. 2 is
22 that this paragraph 5, first of all, relates to buyouts
23 because it's indented from Section B of Amendment No. 2,
24 and, secondly, it's internal to the amendment. This
25 amendment does not give Novell the right -- well, we have

1 never claimed that Amendment No. 2 gave Novell some
2 rights with respect to SVRX licensee source code.

3 And then it says: Novell may not prevent SCO
4 from exercising its rights with respect to SVRX source
5 code in accordance with the agreement.

6 Again, we have never argued that we were trying
7 to prevent SCO to exercise some right with respect to
8 SVRX source code that was granted by the Asset Purchase
9 Agreement. So the plain language of Amendment No. 2
10 defeats SCO's argument. But, if you look at the draft
11 that was sent over by Steve Sabbath of Santa Cruz in
12 1996, and you look at the -- at the out-to-the-margin
13 paragraph underneath C, SCO -- Santa Cruz proposed
14 Amendment No. 2 to say: As stated in Amendment Number 1
15 to the agreement, Novell has no rights or interest in the
16 source code pertaining to the SVRX licenses.

17 THE COURT: Your argument is that that didn't
18 survive?

19 MR. JACOBS: I'm sorry?

20 THE COURT: Your argument is that that didn't
21 make it into the final agreement?

22 MR. JACOBS: Exactly. And we know what it
23 means -- clearly we know what it means to say what the
24 APA said versus what this amendment says. Moreover, it's
25 quite clear what's happening by way of, again, the

1 geography of the amendment, that it's moving into an
2 indented position enumerated under B.

3 Our view, Your Honor, is that Amendment No. 2
4 and paragraph 5 of Amendment No. 2 has absolutely nothing
5 to do with the issues pertaining to Section 4.16(b) and
6 Novell's rights to direct SCO in that connection. What
7 happened in 2003 is that SCO made a sudden turn of
8 business direction. They broiled the industry. They
9 upset well-settled expectations about the meaning of SVRX
10 license provisions.

11 As I mentioned, you already have the IBM motion
12 on the meaning of the licenses, but Novell took a
13 position about the meaning of the licenses and exercised
14 its rights over its fiduciary, its agent SCO, to rein it
15 in, in what Novell viewed as SCO asserting an untenable
16 position with respect to what the license meant.

17 We ask that the Court, on summary judgment,
18 rule with the plain language of Section 4.16(b), that
19 Novell had the right to direct SCO to take any action
20 with respect to SVRX licenses and to give the waiver that
21 Novell executed with respect to the claims SCO asserted
22 their full force and legal effect.

23 THE COURT: Thank you, Mr. Jacobs.

24 Mr. Singer.

25 MR. SINGER: Your Honor, if I might approach, I

1 have a couple of books.

2 THE COURT: All right. Thank you.

3 MR. SINGER: Your Honor, first of all, I'd like
4 to thank the Court and also thank Novell for the
5 consideration paid in rescheduling this argument for me
6 due to the loss of my mother last week. I appreciate
7 that.

8 THE COURT: Sorry about your mother. And
9 that's no problem.

10 MR. SINGER: Thank you, Your Honor.

11 Thank you for your cooperation.

12 I'd like to begin with an observation that
13 applies both to this motion and the one that we argue
14 later regarding copyright ownership because if the Court
15 sits back for a moment and looks at Novell's twin
16 positions, those positions would mean that SCO paid over
17 \$200 million for a UNIX and UnixWare business where it
18 did not get the Court intellectual property protection,
19 copyrights protecting UNIX and UnixWare, and left in
20 Novell's hands the absolute right to reach in,
21 countermand, waive and direct how SCO would conduct that
22 business in the future.

23 We submit that is contrary to the intent of the
24 APA as reflected in that document itself. If one turns
25 to our tab number 1, one sees that Novell's claim would

1 allow any SVRX licensee to use, disclose and profit from
2 source code without any protection or compensation to
3 SCO. Their position would say they could reach in and
4 waive any material breach of any contract related to SVRX
5 source code, and it would destroy the value of UnixWare
6 source code and licensing, which are built on that prior
7 SVRX technology.

8 By contrast, at tab 2, we show that in the
9 agreement itself, it was contemplated that the APA would
10 transfer all rights and ownership of UNIX and UnixWare to
11 Santa Cruz. That was expressly stated in Section
12 1.3(a)(1) of the APA: It is the intent of the parties
13 that all of the business, which is a defined term, and
14 all of the seller's backlog relating to the business be
15 transferred. And "business" is defined as the business
16 involving UNIX and UnixWare.

17 On the Schedule, which we will talk about more
18 later this morning, the Schedule of included assets
19 provides that all of seller's right, title and interest
20 to the assets are being sold; all rights and ownership of
21 UNIX and UnixWare are being sold. It is fundamentally
22 inconsistent with the transaction provided for in the APA
23 to give Section 4.16(b) the reading that Novell has asked
24 you to give it. It does not make sense that any party
25 would pay \$200 million for a business and not have the

1 right to run that business.

2 We would like to turn to 4.16, and I would like
3 to spend time on that because we submit it has a meaning.
4 It has a limited meaning to protect the binary royalty
5 stream and existing binary royalties, which Novell was
6 counting on for part of the purchase price, but not more
7 than that. And it specifically does not have this broad
8 interpretation based on the plain language meaning.

9 Now, I have taken Section 4.16 and put it on
10 this board. It also appears at tab 4 in the book. SVRX
11 licenses are not specifically defined as such in the APA.
12 They are referred to under 4.16(a). There is not a
13 definition which says, for example, that an SVRX license
14 is every contract that relates to any binary code, source
15 code or relates to SVRX products. You won't find that in
16 this section or any section of the APA.

17 What you have is a provision under A, which
18 says SVRX licenses, as listed in detail under Item 6 of
19 Schedule 1.1(a) hereof and referred to herein as SVRX
20 royalties. Schedule 1.1(a) is a Schedule of the assets
21 being sold by Novell to SCO in the transaction. If we
22 turn, for a moment to that particular provision -- and
23 that's also found -- the point I'm making is at tab 5.
24 What do we learn?

25 We do not have a provision under 6 which

1 says -- and this is, I think, the key misunderstanding
2 upon which Novell's argument is predicated. They act as
3 though this Item 6 says: SVRX licenses are all contracts
4 relating to the following products.

5 It doesn't say that. What it does, in
6 transferring assets to SCO, it says that all contracts
7 relating to the SVRX licenses. And then that was amended
8 from just those to auxiliary product licenses, which are
9 collectively the SVRX licenses, the SVRX licenses and the
10 auxiliary product licenses listed below. It
11 distinguishes between all contracts, which is what's
12 being transferred to SCO in Section 6 of this Schedule,
13 and the SVRX licenses themselves, which are the ones
14 supposed to be listed below.

15 Of course the confusion engendered here is that
16 licenses, as such, are not listed below. Products are
17 listed below, which is, we submit, an ambiguity that is
18 created by the way this was put together and, therefore,
19 requires one to go back to the 4.16 to understand what
20 was the scope of rights that was retained by Novell.

21 And when you look at 4.16, we think it follows
22 from -- all of this deals with royalties, which, as we've
23 argued before, meant the existing royalty stream on
24 binary code products. The source code royalties, to the
25 extent there was any confusion about that, were given up

1 by Novell in Amendment 1. And B is a protection that
2 should be read related to those royalties, and there is
3 nothing in here which says, when it says SVRX license,
4 that any contract relating to an SVRX license is within
5 the scope of what Novell could waive.

6 And specifically, we submit, it doesn't include
7 the contracts that are at issue here because those
8 contracts were in fact transferred by a different Section
9 of the APA Schedule 1. Section 3 of that document
10 provides that all of seller's rights pertaining to UNIX
11 and UnixWare under any software development contracts,
12 licenses and other contracts to which seller is a party,
13 including, without limitation -- and then you go to the
14 next page of the Schedule of Assets which are sold, and
15 you come to Item L, Software and Sublicensing Agreements.

16 This includes the source code and sublicensing
17 agreements that seller has with OEM's, which obviously
18 includes IBM as an original equipment manufacturer. The
19 software and sublicensing agreements are not part of
20 Section 6. They are part of Section 3. If the parties
21 contemplated that Novell, for some reason, would have a
22 right to interfere with SCO's administration of 3-L, then
23 that would have been what is set forth somewhere in the
24 APA. It isn't there.

25 Their misunderstanding is that they are reading

1 Section 6 wrong. They are reading Section 6, where it
2 says that all contracts relating to the SVRX licenses are
3 transferred to SCO, as meaning something it doesn't say.
4 It does not say that SVRX licenses means all contracts
5 relating to the following products. That's not in
6 Schedule 1. It's nowhere in the APA. And that is the
7 foundation on which the entire argument being made by
8 Novell rests.

9 Now I'd like to spend just a moment talking
10 about the role of the Product Supplements in connection
11 with this because -- and the software and sublicensing
12 agreements, as opposed to the SVRX licenses. Software
13 agreements, such as the ones under Section 3(1) -- and we
14 address this at tab 7 in our book. Software agreements
15 give original equipment manufacturers, like IBM, the
16 right to use source code in UNIX to have created their
17 own UNIX flavor.

18 So the original agreements which we are suing
19 IBM under are related to giving them the source code of
20 UNIX, saying you can make derivative products. They made
21 those flavors, like AIX and Dynix, and they were subject
22 to restrictions. The sublicensing agreements give those
23 manufacturers the right to duplicate and distribute those
24 UNIX flavors in a binary code format that doesn't
25 disclose the actual code in usable form if someone wants

1 to take it and put it in another product.

2 And those two agreements, the software
3 agreements and the sublicensing agreements, are part of
4 what's transferred under Section 3(1) of Schedule 1 as to
5 which there is no right in the APA for Novell to
6 intervene and interfere with how SCO runs that business.

7 Now, the Product Supplements are
8 product-specific licenses that have to be signed by the
9 OP, the manufacturer, before you sell the product to end
10 users for use on specific CPU's, central processing
11 units, and which set the royalties, the binary royalties,
12 which is what Novell has a retained interest in and is
13 what, we submit, therefore, was the purpose of B, to
14 protect those royalties, and is what was the intent of
15 listing products in this Section. It is the only
16 interpretation that makes sense in light of the
17 structure, language of this provision.

18 And, in fact, contrary to what Novell suggests,
19 the Product Supplements do set forth rights, the rights
20 for payments of the applicable fees set forth in those
21 Product Supplements. And those Product Supplements and
22 the binary rights were subject to buyouts, like occurred
23 with IBM and Hewlett-Packard and others, whereby a party
24 would come in, as IBM did, and seek, for one lump sum, to
25 buy out those rights. And especially after that occurs,

1 Novell has no right to come in then, years after the
2 fact, and say: Now we want to come back and we want to
3 revisit how SCO administers its source code contracts
4 with IBM.

5 Now, Novell has suggested that somehow there is
6 some interest that they are protecting because they don't
7 like SCO's position in the IBM case. If SCO's position
8 is warranted, this Court will so rule, and Novell is
9 under no jeopardy from IBM under any of these agreements
10 where royalties have been paid up. If SCO is wrong, then
11 no rights take effect as a result of SCO's litigation, as
12 well, on Novell. Novell has no interest that it is
13 legitimately seeking to protect by the actions that it is
14 seeking to take.

15 Your Honor, I think it's also important that
16 the Court interpret these provisions in light of the rest
17 of the APA. It is, as the Court is aware, settled law
18 that one should interpret a clause consistently with
19 other provisions in a contract and in a way that doesn't
20 render those other provisions in the contract
21 meaningless. We have put some of that law into our
22 argument exhibits at tab 9. I don't think there can be
23 much dispute with that principle.

24 Let us consider, though, what it would mean --
25 at tab 9, I should say, and at tab 10 which says the APA

1 must be construed to effectuate the purpose of the
2 contract. And at tab 11 we give just a few examples of
3 how Novell's interpretation would make a sham of the APA.
4 Whereas Schedule 1.1(a) grants SCO all rights and
5 ownership of UNIX and UnixWare, under Novell's
6 interpretation, they would have a veto under every
7 decision which SCO might seek to make, either directing
8 SCO how to take action or, if SCO disagreed with it, to
9 take that action itself.

10 Schedule 1.1(a) granted SCO all of seller's
11 rights pertaining to UNIX and UnixWare under these
12 software development contracts, like the IBM contract.
13 It doesn't say: Except for Novell's right, as the
14 seller, to come back in and change any decision that SCO
15 seeks to make.

16 Schedule 1.1(a) grants SCO all of seller's
17 claims arising after the closing date, but Novell takes
18 the position that they can come in here and, when SCO
19 believes its business is threatened by a breach by IBM,
20 that SCO is 80 percent of the UNIX-on-Intel market, and
21 IBM's actions in distributing code were undermining that
22 business by giving it away to Linux, and seeks to protect
23 it's intellectual property rights, SCO says: You can't
24 do that. You don't have these claims. You don't have
25 these rights. We still have them. We can tell you not

1 to exercise them.

2 That is fundamentally at odds with and, we
3 submit, makes a sham of all these other provisions of the
4 APA for which SCO paid over \$200 million.

5 Now, there's one additional part of the APA
6 which we think makes it even clearer that Novell does not
7 have these rights, and that is Amendment 2. First of
8 all, how did Amendment 2 arise? Amendment 2 and
9 Amendment X, which you have heard Novell's counsel talk
10 about, came about at the same time in connection with the
11 negotiations with Novell and with IBM that arose when
12 Novell tried unilaterally to enter into an agreement with
13 IBM for a buyout.

14 And as we'll get to a little bit later in more
15 detail when we talk about extrinsic evidence, it was
16 principally because Novell -- if Novell had the rights
17 which they claim they have under 4.16, you wouldn't have
18 an Amendment X. You wouldn't have an Amendment 2. They
19 could have just taken this action unilaterally.

20 Amendment 2 made clear that Novell's rights
21 do not extend to taking action that affects SCO's rights
22 regarding source code, such as the rights it is seeking
23 to pursue in its claims against IBM under these
24 contracts. Section B of Amendment 2 said:
25 Notwithstanding the provisions of Article 4.16 -- so it's

1 a limitation on 4.16, Sections B and C -- any potential
2 transaction with an SVRX licensee which concerns a buyout
3 of such licensee's royalty obligations shall be managed
4 as follows.

5 Now, IBM was such a licensee. There was a
6 buyout concerning its royalty obligations. There is no
7 reason why this an amendment, which arose in the context
8 of a dispute involving IBM, somehow doesn't apply to
9 Novell's future relationship with IBM. Of all third
10 parties out there, these restrictions should apply to
11 Novell's relationship with IBM.

12 In restriction 5, which says that not only did
13 the amendment not give Novell the right to increase an
14 SVRX licensee's rights to SVRX source code, it says: In
15 addition, Novell may not prevent SCO from exercising its
16 rights with respect to SVRX source code in accordance
17 with the agreement, with the APA. That language, we
18 think, is key because it confirms that Novell cannot do
19 exactly what it's seeking to do here.

20 Now, in response to that, Novell says: Well,
21 this was moved from a draft from outside of the whole
22 Section to a subparagraph of (b)(5), and, therefore, it
23 should be considered limited to buyout transactions. And
24 I would suggest to that, two things. Number 1, this was
25 a buyout transaction involving IBM. So, even if one

1 accepted that limitation, it still should apply to IBM
2 going forward.

3 It doesn't say that once the buyout is over,
4 you can come back later and suddenly waive rights that
5 you couldn't waive in connection with the buyout. And,
6 secondly, the reason it refers to buyouts, we submit, is
7 that outside the context of a buyout, there was no
8 plausible basis for Novell to assert --

9 THE COURT: No what?

10 MR. SINGER: Excuse me?

11 THE COURT: There was no what?

12 MR. SINGER: No plausible basis for Novell to
13 assert it had any rights to interfere with source code or
14 the administration of source code by SCO. It was only in
15 this buyout scenario that the issue came up. And if you
16 look -- another way of looking at it is this, we submit,
17 Your Honor: If Novell could waive rights in advance of a
18 buyout or waive rights after a buyout, unilaterally, it
19 would be meaningless to restrict what Novell could do
20 during the buyout process itself. They could either do
21 it before or afterwards.

22 The only sensible interpretation of this
23 language is that it prevents the very action which Novell
24 seeks to take here, unilaterally reaching into the
25 relationship between SCO and a third party, such as IBM,

1 and trying to restrict SCO from exercising its rights
2 with respect to source code in connection with the
3 agreement.

4 It is on this basis of the language that we
5 believe we are entitled to our cross motion for summary
6 judgment on plain language of the agreement being
7 granted, saying that this language precludes the
8 interpretation that Novell advances.

9 Now, if the Court were to disagree and, after
10 looking at these different provisions, find that there is
11 ambiguity, I want to spend a few moments in discussing
12 the role of extrinsic evidence both in terms of what the
13 parties said at the time, as well as their subsequent
14 actions. I'm not going to belabor the legal authorities,
15 which the Court has heard us argue on several other
16 occasions regarding the role of extrinsic evidence in
17 interpreting the APA under California law. We have set
18 forth those authorities at tab 13.

19 The basic principle is that if a contract is
20 reasonably susceptible to a particular interpretation,
21 that extrinsic evidence should be considered to aid in
22 its interpretation by the Court.

23 At tab 14, and on a chart which I'm going to
24 put up now for Your Honor, we see here what that
25 extrinsic evidence indicates with respects to the issue

1 before the Court. And what it reflects is that Novell's
2 own executives, at the time; not Novell's executives that
3 are currently in office, but the Novell executives at the
4 time that the APA was agreed to and amended, agreed that
5 Section 4.16 did not give Novell the rights to waive
6 SCO's intellectual property protection in the way in
7 which they have sought to do it here with respect to IBM.

8 That starts with -- and I'd like to just
9 mention a few of those individuals. Mr. Frankenberg, who
10 was the CEO at the time, he said: It dealt with SVRX
11 licensing fees. That was the purpose of 4.16.

12 Duff Thompson, personally involved in
13 negotiations with Santa Cruz officials. He said that
14 it's simply wrong to say that they had right -- that
15 Novell retained rights to waive claims that Santa Cruz or
16 its successors might have regarding breaches of System V
17 source code agreement. That does not comport with the
18 instructions he received or the negotiations.

19 Ty Mattingly, who was Mr. Frankenberg's
20 personal liaison with the Novell negotiating team and
21 heavily involved in the negotiations: Novell simply
22 doesn't have the right to waive IBM breaches. And he
23 says, basically, it's an absurd position that Novell is
24 taking.

25 The same is true for Ed Chatlos, Burt Levine,

1 the Novell attorney, Mr. Broderick. So here's a half a
2 dozen people who don't work for Santa Cruz, they work for
3 Novell at the time, and they all agree that Novell's
4 interpretation is simply wrong.

5 At tab 16 and, briefly, on another chart which
6 I will put before Your Honor, is the other side of the
7 transaction from Santa Cruz. And the senior executives
8 there involved in the transaction, including the CEO,
9 General Counsel, the Chief Negotiator, all agree that
10 that is not the intent of Section 4.16(b). And in the
11 book at tab 17, we have more quotes from those
12 individuals indicating that.

13 It is well established, Your Honor, that
14 post-contract behavior by the parties are an important
15 guide to interpreting the intent. Those authorities are
16 set forth at tab 18 in the book. One case from
17 California says a practical construction placed by the
18 parties is sometimes the best evidence of their
19 intention.

20 I'd like to focus just on a couple of those
21 post-contract pieces of evidence to show how they confirm
22 our position. At tab 16 -- excuse me -- at tab 19, we
23 discuss Novell's conduct in the IBM buyout, and I focus
24 on that conduct, that episode in 1996, because it simply
25 can't be reconciled with Novell's current motion. The

1 APA was closed in December of 1995. Very soon
2 thereafter, a dispute arose because in April of 1996,
3 Novell unilaterally negotiated a buyout of IBM's royalty
4 obligations, and it included things such as source code
5 Santa Cruz objected to that. They told
6 Mr. Frankenberg that our agreements provide SCO with
7 exclusive rights regarding source code. There was then
8 an exchange of correspondence in April and June of 1996
9 between Mr. Frankenberg of Novell and Mr. Mohan who was
10 the CEO at Santa Cruz. In those letters Mr. Frankenberg
11 never asserted that SCO had the right, under Section
12 4.16(b) to simply do this unilaterally, which is the
13 right which SCO -- Novell maintains today.

14 What happened after that is you had a
15 three-party agreement. Novell and Santa Cruz, together
16 with IBM, entered into Amendment X. And you also had
17 this Amendment No. 2. If, at any time there, Novell
18 believed that they could simply exercise these rights,
19 they would have done that. They had already signed an
20 agreement with IBM. If they believed, at the time, they
21 had the right that Novell today maintains they have, they
22 simply would have said: We insist, under Section 4.16(b)
23 that you go along with the buyout that we agreed with
24 IBM.

25 That isn't what happened.

1 If one turns to tab 20, one looks at the HP
2 buyout, and there you have a written statement by Novell
3 which says Novell has no present or future reversionary
4 interest in any source code royalties and that Novell's
5 rights regard HP binary royalty obligations, which is a
6 distinction between source code and binary that we have
7 been drawing throughout this case.

8 The same is true of Novell's admissions in the
9 Cray buyout in tab 21. In addition, Novell's position
10 here is completely inconsistent with statements made
11 publicly after the APA was signed. Very shortly after
12 the APA was signed, Larry Bouffard, Novell's worldwide
13 sales director for UNIX, stated on October 18, 1995 --
14 and we reproduce this at tab 23.

15 He said: With respect to SCO and the UnixWare
16 and UNIX business, they have, quote, bought it lock,
17 stock and barrel. Once the transaction is closed in
18 November or December, we will have no more involvement
19 with this business.

20 But, of course, here you have Novell arguing
21 they have such rights and involvement they can
22 countermand any decision they want by SCO regarding that
23 business.

24 I would like to raise one final point, your
25 Honor, that even if one interpreted the agreements as

1 broadly as Novell interprets them here, they are still
2 violating the implied obligation of good faith and fair
3 dealing in seeking to waive the rights we have asserted
4 against IBM.

5 At tab 24 we have the general law, which is
6 that every contract has that implied obligation. At tab
7 25, the fact that under California law, it specifically
8 is applicable where a party gives -- a contract gives a
9 party discretionary authority. Tab 26, we indicate that
10 in fact, until 2006; in other words, during the time
11 relevant to this case when this agreement was entered
12 into, California law prohibited the disclaimer of such an
13 obligation of good faith.

14 The only exception, which is dealt with at tab
15 27, is where limiting the discretion of the party would
16 contradict the express rights of a party, such as in the
17 Carma case where it was an express understanding that the
18 landlord could cancel the lease so as to increase the
19 rental rate by entering into a new lease.

20 Section 4.16 does not give Novell such rights.
21 Instead, it gives it discretion. And like the Locke vs.
22 Warner Brothers case and other cases, that discretion is
23 bounded by good faith.

24 Now, Novell's final argument there is to say:
25 Well, we can't have a good faith obligation to SCO

1 because SCO is our fiduciary. But SCO's fiduciary status
2 is only with respect to collecting and turning over the
3 royalties under Section 4.16(a), royalties that we
4 believe are limited to existing binary licenses. Nothing
5 creates a fiduciary relationship on SCO with respect to
6 the rest of the UNIX and UnixWare business which it's
7 been sold.

8 In fact, I would submit, Your Honor, that if
9 Novell's position were correct, and it had the rights to
10 come in and countermand how SCO ran its UNIX and UnixWare
11 business, it would be charged in with being a fiduciary
12 because it would then be in a position of not only
13 advising us but basically controlling that business. And
14 as we indicate in the case cited at tab 28, in that
15 situation they would not only have a good faith
16 obligation to us but a fiduciary obligation to us.

17 Finally, at tab 29, we point out the obvious,
18 that Novell doesn't even try to argue as a matter of
19 summary judgment, that their exercise of these rights is
20 an exercise of good faith and fair dealing.

21 Your Honor, for all these reasons, we submit
22 that Novell's motion should be denied and SCO's cross
23 motion should be granted, and I would like to save my
24 remaining minutes for rebuttal.

25 THE COURT: Thank you, Mr. Singer.

1 Mr. Jacobs, what do you say about the last half
2 of Mr. Singer's argument? He makes a plain meaning
3 argument, but then he says when you look at the extrinsic
4 evidence and the post-contract conduct and documents, he
5 wins. Talk to me about that

6 MR. JACOBS: Let's start with the IBM buyout
7 because it cuts in exactly the opposite direction. It is
8 four months after the closing of the Asset Purchase
9 Agreement, and Novell does exactly what SCO says it
10 should have done in order to confirm that it had the
11 rights that it believed it had. It went out and it
12 actually executed an amendment, a buyout amendment with
13 IBM in April.

14 SCO objected. As SCO has put it, SCO has
15 demonstrated in its evidence, it threatened a lawsuit.
16 The parties went ahead and agreed on a buyout. SCO was
17 paid a settlement amount. That is a settlement
18 agreement. Its has an express no-admission clause in it,
19 so that settlement agreement is out for evidentiary
20 purposes. If you look at the way the money was allocated
21 from the buyout, SCO took its 5 percent fee, confirming
22 that the buyout is all about SVRX licenses, precisely as
23 prescribed in Article 4 in Section 4.16.

24 So the extrinsic evidence entirely supports
25 Novell here. Now, Novell settled that dispute with SCO,

1 but, again, four months after the Asset Purchase
2 Agreement is signed, Novell is directing SCO -- Santa
3 Cruz. I'm trying to keep the distinction straight
4 here -- is directing Santa Cruz to execute a buyout with
5 IBM. Frankenberg testified: We kept a lot of the
6 protections in the agreements in order to do buyouts.

7 It's true that, later on, when Novell and Cray
8 and HP are doing some buyouts, that Novell decided to
9 give some more rights to SCO in the context of those
10 specific buyouts, but that is no confirmation and no
11 waiver of Novell's rights under Section 4.16(b), which
12 survives to this day.

13 So the IBM buyout really cuts very much against
14 SCO. Yes, there was settlement of a dispute, but
15 virtually contemporaneously with the execution and
16 closing of the Asset Purchase Agreement, Novell is
17 starting to execute these buyout agreements with IBM and
18 others. SCO, as you can tell from the letters they
19 submitted, Santa Cruz thought this was a huge issue for
20 them.

21 The issue was compromised in the context of
22 IBM, but the rights in Section 4.16(b), aside from the
23 modification of the management of buyouts -- a key word
24 in Amendment No. 2, the "management" of buyouts. Aside
25 from that compromise about future buyouts, Section

1 4.16(b) remained unchanged, and the parties had an
2 opportunity, at that moment, to change 4.16(b) more
3 generally. The parties could have written in, at that
4 moment: This provision applies only to the protection of
5 Novell's binary royalty retained interest.

6 That's the way SCO wishes 4.16(b) read. They
7 are trying to change the plain language of 4.16(b) to
8 something that just isn't there.

9 As for this global point that we paid all this
10 money and look what we got, first of all the price keeps
11 on going up. There is -- right there on the board it's
12 125 million. Now it's 200 million. There are documents
13 that suggest it was even less. It was 6.7 million shares
14 of SCO, of Santa Cruz, whatever they were valued at at
15 the time. But, secondly, it's very clear what happened
16 here. The original idea was a straight out asset
17 purchase, a sale from Novell to Santa Cruz that mirrored
18 the purchase by Novell from AT&T.

19 We now know much more than we did earlier on in
20 this lawsuit about the negotiating history. We now know
21 that, in the last three weeks, the documents were changed
22 substantially to document the fact that Novell was
23 retaining this interest in the SVRX revenues, and that is
24 why the agreement gets changed and these provisions get
25 added. 4.16 gets added in the last couple of weeks of

1 the negotiations.

2 But that doesn't take away their force. The
3 fact is that, as to SVRX, in contrast to UnixWare, as to
4 SVRX, Santa Cruz had very, very limited rights. They got
5 essentially the right to administer the relationship with
6 the customer and a 5 percent fee so that they could have
7 the contact with the customer and try to upgrade the
8 customer to UnixWare. As to UnixWare, they got the
9 business, and, in a larger sense, they got to keep the
10 royalties unless they hit a certain threshold.

11 That's the deal SantaCruz cut. That's the deal
12 SCO inherited when it bought from Santa Cruz. To now go
13 back and say: Well, sure, they retain the 95 percent,
14 but all the protections that Novell built in to protect
15 that 95 percent were only going to read very narrowly.
16 When those narrow limitations aren't in the contract,
17 that's rewriting the contract, and that's what the law
18 prohibits. Thank you.

19 THE COURT: Thank you, Mr. Jacobs.

20 Mr. Singer.

21 MR. SINGER: Your Honor, first of all, with
22 respect to the buyout agreement, if Novell had the rights
23 which it claims here, when it reached its original
24 agreement unilaterally with IBM, and SCO objected, IBM --
25 or rather Novell would simply exercise its rights under

1 4.16 and say: We are directing you to accept this
2 buyout. We are directing you to amend these licenses
3 with these terms. And if SCO further protested, it would
4 seek to do what it sought to do here and take that action
5 itself.

6 On the contrary, Novell did no such thing, and
7 even in its letters back and forth, Novell's executives
8 never asserted that 4.16(b) gave them the right to take
9 this action. The whole reason you had a resolution of
10 this is because there were rights of SCO which Novell
11 could not overturn. Those rights were then clarified and
12 made stronger by Amendment 2, which came out of that
13 process, and SCO received not 5 percent, but \$1.5 million
14 plus additional source code payments if IBM would buy
15 additional source code properties, plus protections in
16 Amendment 2.

17 You cannot reconcile their actions with either
18 4.16 or what we had quoted not as simply giving rights to
19 SCO with respect to HP and Cray, but admissions they make
20 about what rights Novell had if those are limited to
21 binary protection.

22 Mr. Jacobs refers to being uncertain as to what
23 was actually paid for this business. At tab 3 in the
24 book we have provided, it indicates it was 17 percent of
25 Santa Cruz common stock which, at the time, was about \$50

1 million in valuation; the royalty stream on existing
2 licenses, which resulted in more than \$200 million being
3 paid, and potential royalties on future UnixWare sales
4 under certain conditions that expired in December of
5 2002.

6 To believe that they paid over \$200 million and
7 didn't have the right to run their business and protect
8 their intellectual property makes no sense. The final
9 position is, Mr. Jacobs says: Well, what we got was
10 great with respect to UnixWare, but virtually nothing
11 with respect to UNIX and SVRX, but that is not what the
12 agreement says. The agreement doesn't say: You're
13 getting the UnixWare business but just limited rights in
14 UNIX.

15 It says: You're getting all of the business.
16 And we went over that intent coming right out of the
17 language of the APA earlier.

18 And, in addition, Mr. Jacobs says: We didn't
19 get this. But the people who ran his client at the time
20 of this deal uniformly say something different.
21 Mr. Jacobs can't point to one Novell executive, at the
22 time of the APA, who defends, as consistent with the
23 contract, the position that Novell articulates today with
24 respect to Section 4.16.

25 THE COURT: Thank you, Mr. Singer.

1 Let's take a break. We have left the copyright
2 ownership motion, correct?

3 MR. SINGER: Yes, Your Honor, and we moved
4 first on that one.

5 THE COURT: So you argue first on that one

6 MR. JACOBS: That is fine.

7 THE COURT: About how long are you going to
8 take on those?

9 MR. SINGER: 30 minutes in total between
10 principal and rebuttal.

11 MR. JACOBS: Same, Your Honor.

12 THE COURT: All right. Let's reconvene at
13 about 10:15. Thank you.

14 (Short break.)

15 Mr. Singer.

16 MR. SINGER: Thank you, Your Honor. Again,
17 with your permission, if I can approach and give you a
18 copy of our argument exhibits.

19 THE COURT: Yes.

20 MR. SINGER: Your Honor, I think of Novell's
21 position with respect to the issues on this motion, which
22 concern our ownership of the copyrights, that Novell is
23 seeking to defend the indefensible. We point out at tab
24 1 this is a case involving the sale of a software
25 business, UNIX and UnixWare business. And yet Novell's

1 position is we did not get the core intellectual property
2 that protects those operating systems, the copyrights on
3 UNIX and UnixWare.

4 So when you have a party that seeks to defend
5 that type of a position, what do you see? You see a
6 party arguing that conveyance of all rights and ownership
7 of UNIX and UnixWare, without limitation, did not convey
8 copyrights to UNIX and UnixWare. There's no dispute with
9 respect to the case law that generally determines a
10 transfer of all right, title and interest to computer
11 programs can, in the words of the Southern District of
12 New York, who construed the case, can only mean that the
13 transfer of the copyrights, as well as the actual
14 computer programs, are meant.

15 You also find a party like Novell struggling to
16 obscure Amendment 2's clarification that excluded assets
17 did not include copyrights required for the UNIX business
18 and ignoring clear testimony from senior executives and
19 business negotiators, again on both sides.

20 Now, why is this important? This arises in the
21 context of a slander of title claim that we have brought.
22 In 1995, the APA conveyed from Novell to Santa Cruz the
23 UNIX and UnixWare businesses. From 1996 to 2003, as I
24 will get into in more detail, Novell never disputed that
25 Santa Cruz owned these copyrights, and their actions are

1 inconsistent with their position that they retained
2 ownership.

3 However, after the dispute with IBM arose in
4 May of 2003, Novell publicly claimed it still owned the
5 UNIX copyrights; in fact, in a press release that
6 evidence in the record indicates was timed to inflict
7 maximum damage on SCO. In June of 2003, Novell, by that
8 time, had received Amendment 2. They, in deposition
9 later, admitted they had it in their files but they never
10 looked at it when they made their May 28 announcement,
11 and on June 26 they issued what appeared to be a
12 retraction.

13 They admitted that Amendment 2, quote, appeared
14 to support -- those words -- "appeared to support" SCO's
15 claims of ownership to the copyrights. And then, after
16 that, they did a 180 degree reversal and appeared to
17 retract the retraction and went back to their position
18 that they did not convey the copyrights.

19 And so that is why we are here, and that is why
20 we are seeking, as a matter of summary judgment on the
21 issue of copyright ownership, that the copyrights were
22 conveyed.

23 Now, as a general observation, if you look at
24 Novell's papers, particularly their reply papers and
25 their opposition papers to our motion, they seek to have

1 this Court interpret Amendment 2 in a vacuum. Amendment
2 2 does not exist in a vacuum. Amendment 2 amends the
3 APA, and it has to be interpreted together with the
4 instrument which it amends. The APA, Amendment 1,
5 Amendment 2, and ancillary documents like the bill of
6 sale are one agreement which must be interpreted
7 together. That's Black Letter law. We give an example
8 of it at tab 3.

9 On the other hand, interpretation of the APA,
10 as though Amendment 2 doesn't exist and you had the
11 language before the amendment is, we would submit, both
12 meaningless and irrelevant. And yet that is what the
13 bulk of Novell's argument amounts to.

14 Now, we submit the starting place for this
15 argument is really where we left off in the last
16 argument, that the APA was intended to transfer all
17 rights in ownership of UNIX and UnixWare to Santa Cruz.
18 And I won't go over these provisions again because I just
19 discussed it. It comes right from the plain language of
20 the agreement.

21 Now, that was effectuated here by the Schedule
22 of Assets that were conveyed, and I'd like to spend some
23 time talking about that Schedule because it makes plain
24 that the transfer of copyrights is included. This is
25 page 1 of a four-page Schedule of the assets being sold.

1 We have it. In addition, it appears behind tab 5 of the
2 binder. And the Schedule makes plain that all rights and
3 ownership of UNIX and UnixWare and that it includes
4 source code, all copies, without limitation, are being
5 transferred.

6 And then it provides specificity as to the
7 products, so there's no issue with respect to what
8 copyrights are being transferred. They are the
9 copyrights relating to UnixWare 2.0, as described in the
10 UnixWare 2.0 licensing Schedule, and the other products
11 listed specifically here on Schedule 1.1(a). In
12 addition, the Schedule went on to say that all of
13 seller's claims arising after the closing date against
14 any parties related to any right, property or asset
15 included in the business is being transferred.

16 We submit there has been no dispute about this.
17 You need the copyrights in order to enforce those rights
18 against infringers and third parties. All seller's
19 rights pertaining to UNIX and UnixWare under any software
20 development contracts. In short, we got the entire UNIX
21 and UnixWare business. And we submit, if this is all you
22 had, Schedule 1.1(a), there could not be any issue under
23 the case law or otherwise that this transfers the whole
24 business, copyrights included.

25 The issue which Novell has raised relates to

1 the Schedule of Excluded Assets, and I'd like to turn to
2 that as amended. The first page of excluded assets dealt
3 principally with NetWare, which is a system which the
4 parties agree was not being sold. And virtually every
5 category here deals with NetWare. And then you turn to
6 Section Roman Numeral V of the list of excluded assets.
7 And as amended by Amendment 2, that provides that what
8 Novell retains as excluded assets in the sale are all
9 copyrights and trademarks except the copyrights and
10 trademarks owned by Novell as of the date of the
11 agreement, which is the date of the APA, required for SCO
12 to exercise its rights with respect to the acquisition of
13 UNIX and UnixWare technologies.

14 Now, we submit that, as amended, this taking
15 out the language which was originally in there, which
16 just excluded copyrights, there no longer is any conflict
17 between the Schedule of sold assets, Schedule A, and the
18 Schedule of Excluded Assets, Schedule B. Schedule A
19 transfers all right, title and interest in these
20 programs, all rights of ownership in UNIX and UnixWare
21 which, under the law and really is not disputed, includes
22 copyrights, by definition.

23 This, while retaining copyrights by Novell,
24 does not retain copyrights required for SCO to exercise
25 its rights with respect to the acquisition of UNIX and

1 UnixWare technologies. There is no dispute, we submit,
2 other than an issue we will get to in a moment, as to
3 whether we just got a license, as opposed to acquisition
4 of the assets themselves, that SCO needed copyright
5 rights, needed copyrights to exercise its rights for UNIX
6 and UnixWare; to be able to run the business, to license
7 it to third parties, to enforce rights against
8 infringers.

9 On this basis we are entitled to summary
10 judgment. There is not an issue there. There is no
11 inconsistency that requires resolution at trial. This is
12 also consistent with another part of the APA, and that is
13 the technology licensing agreement because, under the
14 APA, the parties agreed that there would be a related
15 agreement called the Technology Licensing Agreement,
16 under which Novell would have the license to use the
17 intellectual property and technology which it had sold
18 subject to certain restrictions.

19 And those restrictions were part of the
20 argument which was before Your Honor last Thursday for
21 the breach of those promises not to use that technology
22 to compete with SCO with an operating system that
23 embraced the very technology that they had sold us.

24 But the point of this, as we indicate at tab 9
25 in our book and on the board -- but this transaction

1 makes no sense if SCO did not get the copyrights. If SCO
2 did not get the copyrights, you would have seen not a
3 license back to Novell, but a license from Novell to
4 Santa Cruz for the copyrights which were maintained,
5 which were essential for Santa Cruz to run a UNIX and
6 UnixWare business. Instead, this is Novell retaining a
7 license to the technology which it sold.

8 And the only thing which Novell has sought to
9 say about this is: Well, maybe there's other types of
10 intellectual property like trade secrets, or knowhow
11 other than copyrights, which this was referring to. Of
12 course that's not how the agreement is written with
13 respect to those specific forms of intellectual property.
14 It covers everything. And of course it is the copyrights
15 on UNIX and UnixWare which is the core intellectual
16 property for the business which was sold.

17 So that provides a strained and, I would
18 suggest, unacceptable interpretation of an agreement
19 which, as Mr. Frankenberg and other Novell witnesses have
20 admitted, only makes sense in the context of Novell
21 having sold those copyrights.

22 Now, we think the combination of the TLA, the
23 purpose of the agreement is transferring the business,
24 the embracing language of Schedule 1.1(a), and now
25 Schedule 1.1 B as amended by Amendment 2, not creating

1 any inconsistency, is a firm and solid plain language
2 basis on which the Court should grant summary judgment
3 that we received the copyrights.

4 I will discuss at the end of my argument the
5 Section 204 copyright transfer issue.

6 But if one turned to the extrinsic evidence,
7 again, the extrinsic evidence fully supports our
8 position. Now, it is well established that extrinsic
9 evidence is admissible to give effect to the intent of
10 the parties, and we submit that, as we have before, at
11 tab 10 in our book, what Novell has done in response is
12 raise a whole series of evidentiary objections, mainly
13 in a 60-page set of objections filed after their reply
14 brief on Tuesday of last week.

15 The short answer to those is, first of all,
16 it's silly to suggest that there would be separate
17 evidence of intent regarding, for example, the Bill of
18 Sale. You look at the transaction as a whole and what is
19 the intent of that deal. At tab 11 we cite California
20 Civil Code, which makes clear that particular clauses of
21 a contract are subordinate to its general intent. At tab
22 12, we briefly deal with the litany of objections which
23 are being raised to this and other of the extrinsic
24 evidence. The Court doesn't need to reach it if it
25 agrees with our plain language interpretation.

1 But clearly what the people who put the deal
2 together at the time believed they were transferring is
3 relevant evidence. As we will see, those witnesses had
4 personal knowledge of the transaction. It's not hearsay
5 when a Novell witness makes that statement about what was
6 said. And this doesn't turn on issues of expert opinion.
7 And, to the extent we use any depositions from the IBM
8 case, those certainly stand equal to declarations which
9 we can also use on summary judgment.

10 If we turn to tab 14, we have a list of the
11 individuals, and it gives a little bit about the
12 foundation on which they testified from personal
13 knowledge. And if we turn to tab 15, I'd like to go over
14 some of that in a little more detail, and, again,
15 starting with the Novell witnesses.

16 Your Honor, I've litigated a lot of cases over
17 the past 20 years, and I'm sure Your Honor has litigated
18 many cases. I can't think of a case where -- you have
19 cases where maybe you get one witness on the other side
20 who agrees with your position, and you're fortunate to
21 get that. I can't think of a case where virtually every
22 witness, with the exception of a couple of lawyers we
23 will talk about in a moment, but every businessman
24 involved in the transaction in structuring the deal, from
25 the Novell side, agrees with our position, starting with

1 the CEO, Mr. Frankenberg, who repeatedly, clearly
2 testified it was his understanding that the sale of all
3 rights and ownership included the copyrights associated
4 with UNIX and UnixWare.

5 Now, what do they do with testimony like this?
6 They try to create uncertainty where there is none. For
7 example, at tab 16, where we have longer excerpts from
8 each of these witnesses, you have, first of all,
9 Mr. Frankenberg's clear statements that that was the
10 intent at the time the APA was signed, when the deal
11 closed, and it was always his intent.

12 On the next page, behind tab 16, you have
13 Novell's quotation of Mr. Frankenberg where they point to
14 the fact that he recalled discussing with the negotiation
15 team the fact that retaining the copyrights might
16 facilitate Novell's exercise of rights. And then you
17 have the full testimony at that point in his deposition,
18 on the right-hand-side column, where, after he says: I
19 recall vaguely discussing that. He specifically says:
20 It would have been inconsistent with selling UNIX to SCO
21 that they wouldn't get the copyrights.

22 On the next page, you have Novell's quotation
23 of Frankenberg saying it's possible, supposedly, that the
24 negotiation team excluded copyrights from the transfer of
25 assets. And then, on the right-hand column, you look at

1 what that possibility was mentioned as.

2 He's asked at deposition: Is it possible the
3 negotiating team acted outside of its authority in
4 drafting the original exclusionary language -- you
5 remember the language that was then changed by amendment.

6 He says: It's possible. Maybe there was a
7 drafting error.

8 He's then asked: Are there any other
9 possibilities?

10 He says: Not that I can think of.

11 And then it's Novell's counsel that says:
12 Well, is it possible that they effectuated your
13 directions by obtaining the UNIX copyrights?

14 And he says: Well, I guess that's possible as
15 well.

16 That is the type of counter extrinsic evidence
17 that Novell is reduced to trying to rely upon in the face
18 of their own CEO at the time's clear testimony that he
19 intended the copyrights to be sold.

20 And it doesn't stop with the CEO. If we go
21 back to tab 15 on the chart here before the Court, you
22 have Duff Thompson, who formed the Novell team,
23 personally involved in face-to-face negotiations with
24 Santa Cruz officials, who specifically and unmistakably
25 says that it was the intent that the UNIX copyrights were

1 transferred to Santa Cruz.

2 Ty Mattingly, the personal liaison between the
3 CEO and the negotiating team, who was very heavily
4 involved in the negotiation. And he says that we sold
5 them the entire business, including the copyrights.

6 Ed Chatlos, the lead negotiator for Novell:
7 The copyrights were included. It was intended to sell
8 the entire business, including the copyrights.

9 Burt Levine, at the time a Novell attorney
10 involved in drafting parts of the APA. Mr. Broderick,
11 who was part of the Novell licensing group, and
12 Mr. Masley.

13 And then, if you turn to the next page, you see
14 that on the Santa Cruz side, the people involved in the
15 deal, beginning with the CEO and working your way down,
16 also all agree that the transaction involved the transfer
17 of the copyrights.

18 Now, what does IBM rely upon to try to deal
19 with this overwhelming testimony?

20 THE COURT: Novell?

21 MR. SINGER: Did I say "IBM?"

22 THE COURT: Yes.

23 MR. SINGER: I meant Novell. IBM has echoed
24 the same arguments.

25 THE COURT: But he said IBM once, too.

1 MR. SINGER: Okay. So we're even.

2 THE COURT: Let's try to keep all the parties
3 straight.

4 MR. SINGER: I will try to. In this case, it
5 is Novell that is relying on the Braham and Bradford
6 declarations, Braham being a lawyer and Bradford being an
7 in-house counsel. And at tab 17 we explain why those
8 declarations do not create a factual conflict. They
9 don't controvert the business deal for the sale of the
10 entire business, including the copyrights. Amendment --
11 they deal with the language which was changed by
12 Amendment 2.

13 They basically say that in the last ten days
14 before the agreement was signed, they amended the
15 language to try to exclude copyrights. There is no
16 testimony that this was ever discussed with or agreed to
17 by Santa Cruz. And to the extent they got away with
18 changing that language by putting into an asset -- a list
19 of excluded assets that language, that was changed by
20 Amendment 2.

21 And you can't create, we submit, a factual
22 conflict on a material issue of disputed fact by relying
23 on language which has been excised from the agreement by
24 amendment.

25 Now, the other points they rely on of extrinsic

1 evidence, the board minutes. The boards minutes recited
2 that Novell will transfer UNIX and UNIX technology
3 assets. You have press releases at the time that said
4 that the UnixWare business was sold, that Mr. Frankenberg
5 said it was a joint release.

6 The other testimony they rely on is
7 Mr. Amadia -- or Ms. Amadia and Mr. Tolonen's
8 declarations with Amendment 2, where they say Amendment 2
9 created only an implied license. At tab 19, I deal with
10 this argument. The argument doesn't make any sense. The
11 word "license" is not used in Amendment 2. Amendment 2
12 is an amendment to a schedule of assets excluded from the
13 sale of assets. It's not anything to do with a license.

14 Moreover, under the law, that cannot be a
15 tenable position. You can't have an implied exclusive
16 license. That's Black Letter law. If it's a
17 non-exclusive license, SCO would not be able to enforce
18 it's IP rights. That's also Black Letter law. Holders
19 of a non-exclusive license don't have standing to sue.
20 Novell admits that we have the rights to sue. Those are
21 one of the rights under Section 3 of Schedule 1, the
22 rights to bring claims.

23 So you cannot have an implied license as the
24 way by which SCO obtained the rights it needed to operate
25 this business. And, of course, that's not what the

1 agreement says. It deals with amending an asset
2 transfer.

3 Similarly, Amendment 2 didn't create a process
4 to ask Novell for permission. Now, there are other
5 post-contract actions that are consistent with this. If
6 you turn to tab 22, you see that Santa Cruz transferred
7 the copyrights to Caldera in 2001, and Mr. Keller, who is
8 an attorney there, says that that included the
9 understanding that Santa Cruz owned the UnixWare and UNIX
10 copyrights.

11 The actual copyright registrations, which were
12 in New Jersey in a building, Novell didn't say: Give us
13 those. We are retaining those in the deal. Those went
14 along with all the other assets. And that is, while not
15 dispositive evidence, it is evidence suggesting that they
16 didn't intend to retain the copyrights. That's also at
17 tab 22.

18 In addition, there were changes in the
19 copyright notices made by Novell after the APA, with
20 Novell's assistance, which, in one case, it specifically
21 said in the documents: SCO will replace Novell as the
22 copyright owner in UnixWare 2.1 online books. On other
23 copyrights Santa Cruz was added and Novell was left on
24 because they owned the copyright at earlier periods of
25 time.

1 The position we have briefed regarding
2 Microsoft; Santa Cruz referred to itself as the copyright
3 owner in a very public issue, and Novell never objected.

4 I'd like to deal with one final issue, Section
5 204 of the Copyright Act, sort of a Statute of Frauds and
6 evidentiary requirement they would have some right. As
7 we indicate in our brief and at tab 25, both -- all the
8 cases indicate there is no particular form of writing
9 required. No magic words are required. A one-line pro
10 forma statement will do. Here, of course, you have a
11 complete agreement with schedules, and we submit the
12 APA, with Amendment 2 and the Bill of Sale, constitute a
13 set of documents easily sufficient to convey title under
14 Section 204, and, in the alternative, could also satisfy
15 the requirement where you have an oral assignment that's
16 ratified or confirmed by a written memorandum of the
17 transfer.

18 So, clearly, Section 204 is not grounds on
19 which Novell can rest. We are entitled, Your Honor, to
20 summary judgment on this issue.

21 THE COURT: Thank you, Mr. Singer. Mr. Jacobs,
22 I suppose you have a different view.

23 MR. JACOBS: I do, Your Honor, and, ultimately,
24 I hope you will, too. Let me start with just a review of
25 the bidding on this issue.

1 THE COURT: A review of the what?

2 MR. JACOBS: Of the bidding because, of course,
3 we're back again on ownership, and you parsed the
4 agreements in your ruling on the motion to dismiss. In
5 that ruling, you noted that the Asset Purchase Agreement,
6 pre-Amendment 2, specifically excluded the UNIX and
7 UnixWare copyrights from the transfer, and as to
8 Amendment Number 2, you noted that it doesn't identify
9 which copyrights are required for SCO to exercise its
10 rights. You noted that it's not retroactive to the date
11 of the APA. You noted that it does not state that a
12 transfer of copyrights is to occur as of the date of the
13 amendment, and it suggested that perhaps a separate
14 writing was contemplated in order effectuate a transfer.

15 You noted that the use of the word "required"
16 was troublesome, given the number of copyrighted works
17 involved in the transaction. Amendment Number 2, the
18 Court's decision notes, doesn't state which works are
19 being transferred or what rights within each copyrighted
20 work are being transferred.

21 And then, citing the Apex Associate case, the
22 Court's ruling noted the policy behind Section 204(a) of
23 the Copyright Act, to force a negotiation to determine
24 precisely what rights are being transferred.

25 Well, as the Court anticipated in not ruling

1 definitively on the motion to dismiss, the parties have
2 now amended their pleadings so there are more causes of
3 action relating to ownership. They have taken discovery.
4 We have got lots of testimony in the form of transcripts
5 and declarations, and we have provided you with a
6 voluminous report. And the question is: Are there
7 genuine issues of material fact that defeat Novell's
8 motion for summary judgment that copyright ownership
9 didn't and shouldn't transfer?

10 Well, the APA still specifically excludes UNIX
11 and UnixWare copyrights from the transfer. Only two UNIX
12 trademarks are identified as included IP assets in
13 Section 5 of the included-assets list. We tend to not
14 focus so much on the included-assets list, but remember
15 there is a specific provision for intellectual property,
16 and all that it refers to is two trademarks.

17 No declaration or other extrinsic evidence can
18 be considered to vary the clear terms of the Asset
19 Purchase Agreement. None of the business people have
20 testified to knowing the details of the negotiations in
21 the last few weeks. Now, we don't think we need this
22 evidence in order to win on summary judgment, but if you
23 look at the Braham declaration or the Bradford
24 declaration, you're not just talking about people and
25 their memories. We are talking about a documented

1 negotiating history that specifically describes what went
2 back and forth between the lawyers who were negotiating
3 the final transaction.

4 In it there are detailed declarations supported
5 by contemporaneous documentary evidence. SCO has nothing
6 like that about the negotiations of the Asset Purchase
7 Agreement. They have business people who perhaps didn't
8 understand the legal technology involved in converting a
9 very simple deal to the complicated structure that
10 ultimately was executed in connection with the Asset
11 Purchase Agreement. The Bradford and Braham
12 declarations, they can be considered because they are
13 consistent with the plain language of the Asset Purchase
14 Agreement. They are not necessary, but they can be
15 considered.

16 All the declarations, all the depositions that
17 are contradictory to the plain language of the Asset
18 Purchase Agreement, they are out on the Parol Evidence
19 Rule.

20 Since the motion to dismiss, we have also spent
21 more time on Amendment Number 1, the TLA, the Operating
22 Agreement and the Bill of Sale. Amendment Number 1 shows
23 that the parties spent several months puzzling over the
24 Asset Purchase Agreement and scrubbing it and working it
25 through on a very fine grain basis. The parties

1 specifically included and considered Schedules 1.1(a) and
2 1.1(b), and they amended both of those schedules in
3 Amendment Number 1 without changing the copyright
4 exclusion.

5 The TLA we have talked about, it provides
6 Novell with a retained license, and it says that the
7 licensed technology is owned by SCO, but licensed
8 technology is unambiguously defined as the assets and
9 derivative of the assets, which excludes the copyrights
10 at issue.

11 The Bill of Sale transfers only the assets and,
12 by the way, harkening back to our argument on Thursday,
13 it says that if there is an inconsistency between the
14 Bill of Sale and the Asset Purchase Agreement, the Asset
15 Purchase Agreement controls.

16 The Operating Agreement, which we haven't spent
17 a lot of time on, describes in greater detail the
18 business Santa Cruz was supposed to operate after the
19 closing, and it grants it specific permissions with
20 respect to the UnixWare business.

21 And that brings us to Amendment Number 2. It
22 still suffers from the same flaws that were present at
23 the motion-to-dismiss stage. It does not effectuate a
24 transfer in the sense of a present A transfers to B. It
25 is not retroactive to the date of the Asset Purchase

1 Agreement's closing. There are a lot of ways that the
2 parties could have done that differently had they so
3 intended in the summer of 1996.

4 They could have said that it was effective as
5 of the earlier date. They could have had a provision
6 which says that the parties acknowledge and agree that
7 the transaction or conveyance occurred as of the earlier
8 date. They could have said that it shall be deemed to
9 have occurred. They could have said that Amendment
10 Number 2 was merely a clarification for the avoidance of
11 doubt. They could have said that the transferer has
12 transferred or licensed, and, to the extent not already
13 transferred or licensed, hereby transfers or licenses.

14 All of these are familiar drafting styles if
15 you want to make sure that a document is clear as to
16 whether a transfer is taking place or whether you are
17 trying to incorporate the document back into an earlier
18 document. And, critically, the Asset Purchase Agreement,
19 even as amended by Amendment Number 2 or Amendment Number
20 2 on its own still doesn't specify what versions of UNIX
21 or UnixWare or what rights within copyright are being
22 transferred.

23 Now on Amendment Number 2, once again, there is
24 only one set of probative evidence before Your Honor
25 about the negotiating history and what set the stage

1 for the copyright provision, and that's the Allison
2 Amadia declaration. Only two people apparently were
3 actually involved in the interactions between the two
4 companies. That's Amadia and Sabbath.

5 Sabbath testified in his deposition that he
6 didn't remember anything about Amendment Number 2. He
7 has submitted a -- completely contrary declarations about
8 his understanding of the deal. In the IBM case, he
9 earlier submitted a declaration that said that Santa Cruz
10 didn't own all the copyrights, and then, later on, Boies
11 Schiller, the SCO lawyers talk to him, and he submitted a
12 completely contradictory declaration. So I think
13 Sabbath's testimony is effectively dead for purposes of
14 this litigation.

15 As with the Braham declaration and with the
16 Bradford declaration, Ms. Amadia's declaration is backed
17 by documents, specifically a prior version, which I gave
18 to Your Honor, Santa Cruz's initial proposal, which is
19 very probative of their intent. They wanted the
20 copyrights acquired through Amendment Number 2. It
21 wasn't a clarification but a proposed change to the
22 original Asset Purchase Agreement which had not
23 transferred the copyrights.

24 This sequence of an earlier draft and the final
25 agreement reinforces the plain reading of the amendment.

1 There is no present transfer included by virtue of
2 Amendment Number 2. SCO needed to demonstrate that
3 something was required for it to operate the business,
4 and, ultimately, as the declaration of Ms. Amadia makes
5 clear, the purpose of that language was to reassure Santa
6 Cruz that the exercise of its rights to develop and
7 distribute UnixWare would not run afoul of Novell's
8 retained copyrights.

9 It was a confirmation of what had gone on in
10 the many months before already. Santa Cruz is off
11 running its UnixWare business. Novell isn't coming after
12 it, for what was obviously contemplated by the parties
13 and is specifically set forth in the Asset Purchase
14 Agreement and in the Operating Agreement.

15 So, as we come before the today, the only
16 significant issue is: What is or was required for Santa
17 Cruz or SCO to exercise its rights with respect to the
18 acquisition of UNIX or UnixWare technologies? The
19 natural reading of "required" is that it imposes a pretty
20 substantial burden on SCO to make a sufficient showing
21 that some right within copyright is essential -- not just
22 nice to have, not just desirable, but essential for SCO
23 to carry out the particular business activities that were
24 contemplated by the Asset Purchase Agreement and the
25 Operating Agreement. To exercise its rights with respect

1 to the acquisition, what SCO was supposed to do with
2 respect to the acquisition was set forth in the APA and
3 associated documents.

4 Now, here we come to a huge fundamental problem
5 with SCO's argument. It is a bolder in their road to
6 victory. The industry is replete with companies that are
7 in the UNIX business that didn't own the underlying UNIX
8 copyrights. The biggest example in front of Your Honor
9 is IBM. You know all about how IBM developed AIX, how it
10 added the UNIX codes with its AIX code and then
11 redistributed AIX to its customers.

12 AIX is a UNIX flavor. You've heard that term
13 often in this litigation. You know that AIX was based on
14 SVRX. We have discussed that in the previous argument.
15 IBM never owned the SVRX code. It owned its
16 enhancements, just as we have acknowledged SCO owns all
17 the enhancements it wrote as it carried out the
18 activities contemplated by the Asset Purchase Agreement.
19 But IBM did just fine in the AIX business for several
20 tens of years without ever owning the underlying
21 copyrights to System V.

22 And the Operating Agreement of the APA refers
23 to Hewlett-Packard's 64 bit UNIX product then under
24 development. HP never owned the underlying UNIX code.
25 We talked about, in the other motion, how SCO terminated

1 Sequent's SVRX license related to Sequent's flavor or
2 the Silicon Graphics's flavor that is at issue in the
3 litigation. All of these companies had UNIX businesses
4 but didn't own the underlying UNIX copyrights.

5 Even SCO itself, Santa Cruz, as is referenced
6 in the APA, they had a license before the Asset Purchase
7 Agreement, pursuant to which they modified UNIX and had
8 an Open Server product, and they provided it to
9 customers. It was a business that they had even before
10 the APA. They never owned the underlying UNIX
11 copyrights. None of these commercial strategies,
12 perfectly viable commercial strategies, are premised on
13 ownership of the underlying UNIX copyrights.

14 That ownership went from AT&T to Novell. There
15 is no intermediate grant of copyright ownership rights.

16 So, when SCO gets right down to it, they say it
17 actually pretty crisply. It's in their reply brief at
18 page 45. The issue between the parties as of late 1996,
19 concerned the legal rights and entitlements necessary for
20 Santa Cruz lawfully to copy, modify, distribute and
21 sublicense the copyrighted code and otherwise to take the
22 steps it had been taking -- the steps it had been taking
23 -- in operating the business it had acquired.

24 We submit that, as a matter of law, Your Honor,
25 the only rights that are required in that context are not

1 outright ownership of the copyrights, they are the --
2 they are the license rights to carry out those
3 activities, the permission to engage in those activities;
4 in other words, the non-exclusive right under copyright
5 to copy, modify, distribute and sublicense.

6 That is precisely how SCO got into the Open
7 Server business, how IBM got into the AIX business, etc.
8 They all had these non-exclusive rights under the license
9 agreements to carry out these activities. And the Asset
10 Purchase Agreement and the Operating Agreement give SCO
11 specific permissions.

12 For example, in the Operating Agreement, at
13 6(b)(iv), quote: SCO will begin offering Eiger binary
14 and source offerings when it becomes available. SCO will
15 also offer a binary and source offering of the merged
16 product sometime within the first half of 1997. SCO
17 shall have discretion to name and market this product as
18 SCO deems appropriate.

19 Or Section 6(b)(i): As of the closing date --
20 this is critical -- As of the closing date, SCO will
21 begin to distribute, offer, promote and market UnixWare
22 through existing UnixWare distributor and reseller
23 channels as well as through SCO's existing resellers --
24 reseller channels.

25 Section 4.16(b), our famous -- favorite provision

1 says SCO has the right to -- refers to SCO's right to
2 sell and license the assets or the merged product or
3 future versions thereof, of the merged product.

4 So, in the Asset Purchase Agreement are all the
5 permissions Santa Cruz and SCO need to carry out the
6 business that was contemplated by the Asset Purchase
7 Agreement. So we believe those rights were conferred in
8 the APA. It's not in a formal grant of license. And
9 you've seen how the agreement evolved from an outright
10 asset purchase into this kind of hybrid agreement, and
11 that explains why perhaps it isn't in the exact form that
12 SCO submits such an agreement should have.

13 It's also critical, in connection with the
14 heart of the copyright ownership dispute, which is the
15 copyright rights to System V Release SVRX. SCO's rights
16 with respect to SVRX under the Asset Purchase Agreement
17 were very narrow. They were not supposed to enter into
18 SVRX license except in the most narrow circumstances,
19 this incidental provision that you may recall from our
20 previous argument a few months ago.

21 They were supposed to remit 100 percent of the
22 royalties to Novell, and Novell paid over the 5 percent
23 administration fee. They have made no showing of why the
24 SVRX copyrights are required, when really Novell retained
25 the SVRX business and enormous rights over it. SCO

1 administered the license agreements, but under Article 4,
2 Novell retained plenipotentiary rights to tell SCO what
3 to do with those license agreements.

4 Now, that's all that's necessary, we submit,
5 for you to rule on our motion for summary judgement. The
6 APA didn't transfer copyright ownership before or after
7 Amendment Number 2 because SCO has not made the requisite
8 showing of necessity for such a transfer, and we submit
9 that that's an issue of law for the Court.

10 Now we've learned some more, however, about the
11 transaction which I think should make all of us a little
12 bit more comfortable with the answer that we think the
13 documents drive at. We know, from the Braham declaration
14 why the copyrights were retained. We know that Novell
15 was concerned. Its lawyers were concerned about
16 protecting Novell's interest with respect to the retained
17 revenue stream and that by owning the copyrights, Novell
18 would be much more than merely an unsecured creditor if
19 Santa Cruz went bankrupt. It would have the right to
20 assert the copyrights.

21 The documents that you've seen show how the
22 Asset Purchase Agreement evolved and that it did, indeed,
23 evolve, with full notice to the negotiators. There's a
24 document showing the revised exhibit going over to Jeff
25 Higgins, Jeff Higgins, the lawyer for Santa Cruz on the

1 deal, an empty chair before Your Honor. We have no
2 substantial evidence from anyone on the Santa Cruz side,
3 who was actually doing the last several weeks of
4 negotiations, to explain how it is that the copyrights
5 were excluded from the deal, from their standpoint.

6 But there's a fascinating document that came in
7 through one of SCO's other briefs. It's the James --
8 it's in the TLA opposition, and it's James Exhibit 70.
9 And what it does is it highlights the distinction that
10 the parties were drawing between physical ownership of
11 the UNIX source code, the asset -- the included asset in
12 the first section of the Included-Asset Schedule and the
13 underlying intangible intellectual property rights.

14 SCO undeniably got ownership of the physical
15 source code. How that code would be treated, though, for
16 tax purposes, was very closely scrutinized, and in
17 Amendment Number 1, part of the changes to Article 1 of
18 the APA, they specify exactly how the source code is
19 going to get delivered to Santa Cruz. So what this Peat
20 Marwick tax planning document does is show us how much
21 forethought went into all of this. There was major
22 distinction between how the physical embodiments were
23 going to be treated for tax purposes, and then the Peat
24 Marwick document itself says there is no intangible being
25 transferred here, so we don't need to worry about it.

1 We now know something that we didn't know at
2 the time of the motion to dismiss, that the copyright
3 ownership issues surfaced in 2001 during the Santa Cruz
4 to Caldera, now SCO, transaction.

5 Now, we have given you the documents. They
6 have a lawyer who says that what I will refer to as the
7 Novell exception in the 2001 asset transfer dealt only
8 with the location and transfer of copyright
9 registrations.

10 Now, we have objected on a variety of
11 admissibility grounds to Keller's declaration, but the
12 documents just show exactly what was going on. In the
13 Brakebill opposition declaration at Exhibit 5, there's
14 talk about a proposed form for a Novell IP assignment.
15 The penultimate draft of the 2001 intellectual property
16 assignment -- that's at Exhibit 6 of the Brakebill
17 declaration -- says: Except for the inability to obtain
18 third-party acknowledgements to establish a chain of
19 title.

20 Exhibit 7 says that Santa Cruz -- it's an
21 e-mail. It says: Santa Cruz will try to get Novell to
22 sign a global IP assignment. And the final, line of this
23 intellectual property assignment agreement says: Except
24 that Santa Cruz, in brackets, may not be able to
25 establish a chain of title from Novell, Inc., but shall

1 diligently endeavor to do so as soon as possible.

2 Now, interestingly, Keller says that the
3 Caldera team evaluated Amendment Number 2. He says that
4 right in his declaration. But still the issue of
5 establishing the chain of title remained. There is no
6 evidence in the record that Santa Cruz actually sought
7 the global assignment from Novell that's referenced in
8 the Novell exception in the IP assignment agreement. And
9 when we asked SCO's witnesses about it, they were
10 instructed not to answer.

11 But we do know that it wasn't until about a
12 year and a half after the Santa Cruz/Caldera transaction
13 closed, and hence after the control of the original Asset
14 Purchase Agreement asset changed hands from Caldera to
15 now SCO, that SCO embarked on an effort to obtain a
16 transfer of title from Novell to clear up this issue,
17 that Novell resisted SCO's efforts and that this lawsuit
18 followed.

19 What's most interesting to us is not the Novell
20 silence during that period that SCO talks about because
21 Novell wasn't seized with the copyright issue until 2003,
22 but what's most interesting is that, for a total of
23 nearly seven years, neither Santa Cruz nor SCO thought it
24 necessary to document a chain of title from Novell, and
25 yet both were fully able to operate the business that

1 Santa Cruz bought and to which SCO ultimately succeeded.

2 Again, I emphasize, for about a year and a half
3 SCO was perfectly fine operating the UNIX business
4 without clarifying this chain of title promise that they
5 were fully on notice about as a result of the Santa
6 Cruz/Caldera transaction.

7 The business strategy changed, and now it
8 depends on the assertion of SVRX copyrights in Linux, but
9 as we have seen, SVRX is the area where SCO has the
10 smallest role and the greatest restrictions on it. It's
11 even more difficult for SCO to establish that it was
12 entitled to a transfer of SVRX copyrights.

13 SCO's argument has shifted back and forth on
14 this and, on summary judgment, I don't know how much it
15 matters that they can't quite figure out exactly what
16 their argument is. Was it the Asset Purchase Agreement
17 that originally transferred it? Was it Amendment Number
18 2? Do you read them all as a whole? They are all over
19 the map on this. I think their fundamental problem is
20 that the Asset Purchase Agreement itself is clear. The
21 negotiating record of the Asset Purchase Agreement is
22 clear. Amendment Number 2 imposes a heavy burden on
23 them, a burden they have simply not met, and the
24 negotiating history of Amendment Number 2 reinforces that
25 heavy burden.

1 For those reasons, Your Honor, we think our
2 motion for summary judgment should be granted and SCO's
3 denied.

4 THE COURT: Thank you, Mr. Jacobs.
5 Mr. Singer.

6 MR. SINGER: I'd like to start with the
7 observation by Mr. Jacobs that: Why do we need the
8 copyrights? IBM and other licensees got along fine
9 without owning the copyrights. This was the UNIX
10 business was sold to Santa Cruz. We weren't a licensee
11 like IBM and Hewlett-Packard. Santa Cruz, and now SCO's
12 business was UNIX. It paid \$200 million, plus, for that
13 business. And it's suggested they were in the same
14 position as the license that any other licensee got? It
15 makes no sense whatsoever.

16 And even the Operating Agreement which
17 Mr. Jacobs points to, together with all the other
18 agreements, Section 7 of that agreement says: It is the
19 intent of the parties to transfer the agreements and
20 associated rights and obligations which relate to
21 Novell's UNIX System business to SCO.

22 All of these agreements talk about a sale of
23 the business. We weren't just to be a licensee, and if
24 we were to be licensee, we need an express license
25 because one argument that Mr. Jacobs -- I did not hear a

1 response to is the following: If one was going to imply,
2 as they argued, a license out of these various
3 transactions, even though the word "license" to SCO was
4 never mentioned. It talks about selling assets -- but if
5 one were to indulge the fiction that we were just a
6 licensee, by implication, we would not have the right to
7 bring suits because to bring suits to enforce your
8 intellectual property rights, you either have to be an
9 exclusive licensee or the owner of a copyright, which
10 both require an express transfer of either the license or
11 the ownership.

12 You, therefore, cannot reconcile the sections
13 of the transferred assets that say we have rights to
14 bring claims and the rights, with all rights and
15 ownership of UNIX, to sue IBM, to enforce our
16 intellectual property, to take whatever steps are prudent
17 to take as the owner of business with the idea that we're
18 operating under just some type of an implied license.

19 Now, the first part of Mr. Jacobs' argument is
20 simply what the reply brief does in seeking to separately
21 deal with the Amendment 2 issue from the APA and to try
22 to interpret the APA as though Amendment 2 never existed.
23 So when they're looking at sections of the APA,
24 everything has been excised. They took out the language
25 excluding copyrights. And to have interpretations of

1 that language from Braham and Bradford, whatever they
2 tried to do in the last ten days, they tried to change
3 the business deal.

4 Number 1, it was contrary to the intent of the
5 business people, and you haven't heard anything denying
6 all the business people on both sides of the transaction
7 intended there to be a sale of the UNIX and UnixWare
8 copyrights. So, first, it's contrary to the intent of
9 the deal.

10 But, second, their work, their language, which
11 created confusion in the Excluded-Asset Schedule was
12 changed, and you don't look, on the other hand, at
13 Amendment 2 just standing alone and is it specific
14 enough? Does it transfer title? Amendment 2 amends a
15 schedule which is part of a broader agreement, and when
16 you then look at that broader agreement with the
17 amendment, there is no inconsistency, and you have
18 specificity.

19 Section 1.1(a), that schedule on page 1,
20 specifically identifies the products to which everything,
21 the copies and all right, title and ownership are being
22 transferred for, UnixWare 2.0, as described in the
23 schedule, and all prior products, SVR 4.1 and on through
24 here. This is as specific a list as anyone could ever
25 require of a transfer of not only all the source code but

1 the copyrights as part of all right, title and interest.

2 And I note, does it make any sense that you
3 would have a transaction where Novell retained the
4 copyrights but every last copy of source code has been
5 given and transferred to Santa Cruz? The arguments
6 Novell is making before Your Honor are predicated upon
7 Amendment 2 either not existing, and it does exist, or on
8 one looking at Amendment 2 with blinders as though it
9 wasn't part, now, of a broader agreement and an
10 amendment, an amendment which clearly is retroactive in
11 the sense that it amendmends a schedule of assets that
12 closed at the time the APA closed with the Bill of Sale,
13 which clearly satisifies Section 204 as being a writing
14 or other memorandum which, because it is part of this
15 agreement, it didn't have to spell out these assets which
16 were transferred.

17 It's a schedule of excluded assets. It's the
18 copyrights related to these products that are now
19 transferred as part of all right, title and ownership,
20 without contradiction from Amendment 2.

21 And so the only argument that Mr. Jacobs has
22 left is that, well, Amendment 2 does not require these
23 copyrights. At tab 23 -- excuse me -- at tab 22 -- that
24 isn't quite right either. It's tab 21. We have the
25 factual evidence, and we think it is a factual issue as

1 to whether UNIX copyrights are required for a UNIX
2 business. And all the same witnesses who say that the
3 assets were sold, the copyrights were sold, say you need
4 the copyrights to run the business.

5 But even Novell doesn't contend we don't need
6 those rights. It just says we got them from a license,
7 and if you don't buy the idea that somehow Amendment 2,
8 which doesn't talk about a license, nevertheless gave us
9 a license rather than, together with the rest of the APA,
10 the actual ownership of the copyrights, you never get to
11 an issue of whether UNIX copyrights are required.

12 If there is an issue there, it's a factual
13 issue which would require a trial on that issue, but we
14 don't think there is any genuine dispute that UNIX and
15 UnixWare copyrights themselves, the ones specifically
16 related to the products being sold in Schedule 1, are
17 transferred to SCO in the transaction.

18 Now, the other arguments made are simply --
19 they are in tab 22. Mr. Keller deals with, in his
20 testimony, the fact that when Santa Cruz transferred
21 these copyrights to Caldera, that included ownership of
22 the copyrights, and the language about excepting the
23 chain of title was referring to physical possession of
24 all the copyrights, which they didn't have in their hand
25 at that time. And that's in his sworn and unrefuted

1 testimony.

2 With respect to our possession of the
3 copyrights, I didn't hear anything as to why, if Novell
4 retained them, they didn't take them with them when they
5 left the New Jersey offices. I didn't hear anything
6 about why, if Novell retained these copyrights, they went
7 ahead and changed the designation in copyright books and
8 other forms to show SCO to be -- Santa Cruz to be the
9 copyright owner.

10 I didn't hear anything about why, publicly,
11 Santa Cruz, in the Microsoft dispute, referred to itself
12 as the copyright owner of UNIX, and Novell never said a
13 word.

14 The only thing I heard Mr. Jacobs say is that
15 in 2003, we asked for a transfer of the copyrights.
16 That's inconsistent with the belief we already owned
17 them. But if you look at tab 23, you will see that
18 Novell's General Counsel, Mr. Jones, at his deposition,
19 admitted that what SCO's request was for was a document
20 that would clarify the issue; not a transfer, but to
21 clarify SCO's ownership and that this was simply a
22 clerical error in the Excluded Assets Schedule of the
23 APA, which is completely consistent with the position
24 which we have taken throughout this lawsuit.

25 And, lastly, as with the prior argument, you

1 have not heard any dispute that all of the Novell and
2 Santa Cruz witnesses who actually put the business deal
3 together intended for there to be a sale of these
4 copyrights. The plain language and the extrinsic
5 evidence and the parties' conduct all agree here that at
6 the sale of the UNIX and UnixWare business to Santa Cruz,
7 the copyrights went with it.

8 THE COURT: Thank you.

9 Mr. Jacobs.

10 MR. JACOBS: Your Honor, I think Mr. Singer
11 put his finger on the heart of the issue sort of in the
12 middle of what he was talking about when he asserted that
13 in SCO's view what is required for is a factual issue and
14 not a legal issue and, therefore, not susceptible of
15 decision on summary judgement. We disagree. We think
16 it's legal from start to finish. It's legal in terms of
17 interpreting the required-for language, whether on its
18 plain meaning or with the benefit of the consistent
19 extrinsic evidence provided by Ms. Amadia and only
20 Ms. Amadia.

21 We think it's a legal question as to what, in
22 fact, is necessary to carry out the business that was
23 contemplated by the Asset Purchase Agreement. I don't
24 want to get into whether Mr. Singer should have heard
25 something or should have read something in the briefs,

1 but as we have made clear, it is our view that the Asset
2 Purchase Agreement conferred express rights on SCO to
3 carry out the business as contemplated.

4 And what Ms. Amadia makes clear in her
5 declaration is that she was trying to get past a dispute
6 between the companies by offering SCO something -- Santa
7 Cruz something that would make them happy, and it was an
8 assurance, but it was not intended to be a transfer.

9 Now, I did miss one issue before that
10 Mr. Singer raised again, and that's the question of
11 whether the Asset Purchase Agreement contemplated that
12 Santa Cruz would sue for copyright infringement and,
13 therefore, Santa Cruz or SCO needs the copyrights in
14 order to sue. The language is very carefully worded.
15 It's all of seller's claims arising after the closing
16 date against any parties relating to any right, property
17 or asset included in the business.

18 But, of course, copyrights were specifically
19 excluded from the business and, therefore, could not have
20 been contemplated that Santa Cruz would bring copyright
21 infringement suits. Otherwise, as Mr. Singer asserted,
22 some basis would have been required to give them
23 standing, and that's not present in the Asset Purchase
24 Agreement. So we think this argument cuts in our favor,
25 not in favor of SCO.

1 And as we explored on Thursday, there are
2 actually a variety of causes of action available to a
3 licensor. And what the deal here was, was that Novell
4 would retain the copyrights. Novell would retain the
5 right to bring various forms of action, whether by
6 terminating an agreement or rescinding it and then suing
7 for infringement or bringing a contract claim, Santa Cruz
8 retained the right to bring contract claims subject to
9 Novell's exercise of its Section 4.16(b) right. When
10 they launched the IBM lawsuit, they didn't assert a
11 copyright infringement claim for breach of the SVRX
12 license against IBM, they asserted a breach of contract
13 claim, and that allowed them to plead a billion dollars
14 in damages.

15 So there's plenty of basis in contract law
16 itself to bring a claim, but Novell wanted additional
17 assurance. That's set forth in the Bradford declaration.
18 They really have no contrary testimony. They do have a
19 lot of business executives who were not a part of that
20 detailed structuring, and if we get to trial if you rule
21 against us, we will have to deal with that.

22 They will tell you, they will tell the jury
23 that they did not know what was going on with the
24 schedules. They did not study them. They did not
25 explore the detailed implementation of the plan to retain

1 the SVRX revenues. But we hope we don't need to get
2 there.

3 Thank you very much, Your Honor.

4 THE COURT: Thank you, Mr. Jacobs.

5 Thank you both.

6 I will take these motions under advisement. I
7 appreciate your efficient arguments and your brilliant
8 briefs. We will be in recess.

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25 (Whereupon the proceedings were concluded.)

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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I am a
Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of
the foregoing matter on June 4, 2007, and thereat
reported in Stenotype all of the testimony and
proceedings had, and caused said notes to be transcribed
into typewriting, and the foregoing pages numbered 1
through 85 constitute a full, true and correct record of
the proceedings transcribed.

That I am not of kin to any of the parties and
have no interets in the outcome of the matter;

And hereby set my hand and seal this 11th day
of June, 2007.

REBECCA JANKE, CSR, RPR, RMR

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