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 1           IN THE UNITED STATES DISTRICT COURT

 2        FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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   THE SCO GROUP, INC., a Delaware )
 5 corporation,                    )
                                   )
 6                                 )
      Plaintiff and Counterclaim-  )
 7    Defendant,                    )
                                   )
 8                                 )
         vs.                       )Case No. 2:04-CV-139 dak
 9                                 )
   NOVELL, INC., a Delaware        )
10 corporation,                    )
                                   )
11    Defendant and Counterclaim-  )
      Plaintiff.                    )
12 _____)

13

14

15

16        BEFORE THE HONORABLE DALE A. KIMBALL

17             DATE:  MAY 2, 2008

18      REPORTER'S TRANSCRIPT OF PROCEEDINGS

19              TRIAL TRANSCRIPT

20               VOLUME IV

21

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25          Reporter:  REBECCA JANKE, CSR, RMR
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1 MAY 2, 2008                          SALT LAKE CITY, UTAH

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

3                         * * *

4          THE COURT:  Good morning.

5          ALL ATTORNEYS:  Good morning.

6          THE COURT:  You may call your next witness.

7          MR. NORMAND:  Yes, Your Honor.  James Nagle.

8 Before that, could I raise some evidentiary issues?

9          THE COURT:  Sure.

10         MR. NORMAND:  I have spoken with Ms. Jones and

11 with opposing counsel, Your Honor, about this.  You will

12 recall with Mr. Broderick, yesterday, I did some

13 handwritten markups on the pages of the Sun and Microsoft

14 agreements, and I wanted to admit the markups of those

15 pages as evidence.

16         MR. MELAUGH:  We have no objection, Your

17 Honor.

18         THE COURT:  All right.  They are admitted.

19 What numbers?

20         MR. NORMAND:  They are SCO Exhibit 185-A.

21         THE COURT:  185-A?

22         MR. NORMAND:  Yes, sir.

23         THE COURT:  So the originals stay, and then the

24 additional will be the markup, right?

25         MR. NORMAND:  Just one page from the original,

1 Your Honor, yes.

2          THE COURT:  All right.  185-A is received.

3       (SCO Exhibit 185-A received in evidence.)

4          And is that it?

5          MR. NORMAND:  And SCO, 237-A.

6          THE COURT:  Thank you.

7       (SCO Exhibit 237-A received in evidence.)

8          Thank you.

9          MR. NORMAND:  Thank you.

10          THE COURT:  Come forward and be sworn, please,

11 right here in front of the clerk.

12                    ANDREW NAGLE,

13          the witness hereinbefore named, being first

14 duly cautioned and sworn or affirmed to tell the truth,

15 the whole truth, and nothing but the truth, was examined

16 and testified as follows:

17                    DIRECT EXAMINATION

18 MR. NORMAND:

19      Q.   Good morning, Mr. Nagle.

20      A.   Good morning.

21          THE COURT:  Hang on a second.

22          THE CLERK:  Please indicate your name and spell

23 it for the record.

24          THE WITNESS:  Andrew Nagle.  Last name is

25 N-a-g-l-e.

```
 1          THE COURT:  Go ahead.

 2     Q.    What is your current employment, Mr. Naglel?

 3     A.    I am employed by the SCO Group.  I am the

 4 Senior Director of Product Development with the SCO

 5 Group.

 6     Q.    And what are your responsibilities in that

 7 capacity?

 8     A.    I manage the engineering staff that is

 9 responsible for maintaining the operating system and

10 mobility products that SCO has on the market.

11     Q.    And what kind of operating systems are those?

12     A.    Unixware and OpenServer.

13     Q.    And how much experience do you have working

14 with UNIX-based operating systems?

15     A.    I joined the organization that is now the UNIX

16 Development Organization in 1984.  I held a variety of

17 engineering and management and project management

18 positions between 1984 and 2002.  In 2002, I became a

19 product manager and took a more customer-focusing

20 position.  And then, in January of this year, I moved

21 back to engineering and became -- took over as senior

22 director of all the development at SCO.

23     Q.    What is your educational background?

24     A.    I have Bachelor's Degree in Electrical

25 Engineering and a Bachelor's in English from the
```

1 University of Delaware.  I have a Master's in Electrical

2 Engineering and a PhD in Electrical Engineering from

3 Carnegie Mellon University.

4     Q.   Mr. Nagle, what is the relationship between the

5 initial releases of UnixWare and the immediately prior

6 System V releases?

7     A.   The System V releases that pre-date UnixWare

8 for what would have been for UnixWare 1, would have been

9 System V Release 4.2.  4. -- the existing System V

10 Release 4.2, in order to create UnixWare, was largely

11 taken lock, stock and barrel to create UnixWare 1, which

12 was a product of a joint venture between Novell and USL

13 at the time.  There were some Novell Netware features

14 added and then some user interface and cosmetic changes

15 made, and that resulted in the UnixWare 1 product.  So it

16 was largely the same.

17     Q.   And that's probably on the monitor in front of

18 you, as well?

19     A.   I see it here.

20     Q.   Do you recognize this demonstrative?

21     A.   I do.

22     Q.   And You helped me create this, correct?

23     A.   I did.

24     Q.   And what does it represent?

25     A.   This depicts the relationship of the System V

1 Release 4 operating system as it evolved into UnixWare 2.

2 I previously spoke about UnixWare 1 and its relation to

3 System V Release 4.2.  This shows that UnixWare V Release

4 4 was further then developed by the engineering staff at

5 USL to be capable of multiprocessing.  This became the

6 System V Release 4.2 MP.  Release MP is short, of course,

7 for multiprocessing.  And then this 4.2 MP Release was

8 taken pretty much lock, stock and barrel as the 4.2

9 Release was for UnixWare 1.  4.2 became the foundation of

10 UnixWare 2.

11     Q.   Would UnixWare operate without the code from

12 the earlier releases of System V?

13     A.   No.

14     Q.   Could you describe, in general, what kind of

15 work Santa Cruz, and then SCO, did with UnixWare after it

16 acquired the UNIX business in 1995?

17     A.   We developed the UnixWare releases beyond the

18 capabilities that we brought in with UnixWare 2.1.  We

19 had a staff of over a hundred engineers for several years

20 working on the features of UnixWare 2 and beyond.  We

21 enhanced it with cooperation from industry partners to

22 harden the operating system and build in what we called

23 data center acceleration features.  With UnixWare 7, by

24 the time we were then owned by the Santa Cruz operation,

25 we combined it with features from OpenServer to provide a

1 better product that would meet the Santa Cruz Operations

2 market.

3           Generally speaking, we invested to improve it

4 to increase its value in the marketplace.

5     Q.   Mr. Nagle, do you recall what system calls are?

6     A.   I do.

7     Q.   Could you briefly describe for us what they

8 are.

9     A.   When one talks about an operating system, one

10 distinguishes between user level and kernel level.

11 Kernel level is what talks most closely to the processor,

12 and the operation at kernel level is generally

13 privileged.  The users are not permitted to execute

14 kernel level code directly.  When a user level program

15 needs to communicate with the hardware, it executes a

16 trap or a software interrupt in order to get attention

17 from the kernel to service its needs.

18           The system call is what is used to transfer

19 information back and forth between user and kernel level.

20     Q.   That sounds simple.  How do the SVR 4 system

21 calls compare to the system calls in UnixWare 1?

22     A.   I'm sorry.  Restate?

23     Q.   How do the SVR 4 system calls compare to the

24 system calls in UnixWare 1?

25     A.   They are one and the same.

```
 1      Q.   Have you heard of Streams?

 2      A.   I have.

 3      Q.   What is Streams?

 4      A.   Streams is a subsystem in System V Release 4

 5 that is used in processing information in the

 6 input-output area of the operating system to communicate

 7 with hardware devices and internet calls and other such

 8 things.

 9      Q.   Do you use Streams in SVR 4?

10      A.   Yes.

11      Q.   Do you use Streams in UnixWare 1?

12      A.   Yes.

13      Q.   Have you heard of ELF?

14      A.   I have.

15      Q.   What is ELF?

16      A.   ELF is a file format that was defined at the

17 time that we introduced dynamic linking to UnixWare --

18 I'm sorry -- to System V Release 4.  The ELF and dynamic

19 linking in System V Release 4 are closely related.  One

20 is -- we need both in order to function on System V

21 Release 4.  So, does that answer your question?

22      Q.   It does.

23      A.   Okay.

24      Q.   Is ELF in SVR 4?

25      A.   Yes.
```

```
 1      Q.    Is ELF in UnixWare 1?

 2      A.    Yes.

 3      Q.    Have you heard of memory allocation?

 4      A.    I have.

 5      Q.    What is memory allocation?

 6      A.    Memory allocation is the procedure that is used

 7 by a user level program to gain exclusive access to the

 8 memory in a -- so that it can function and record its

 9 data in memory and then, at some point or another, it

10 needs more or less memory.  It can call to the operating

11 system for more.  It can give back to the operating

12 system.  The memory allocation routines in an operating

13 system would handle all of those functions.

14      Q.    How does the memory allocation in SVR 4 compare

15 to the memory allocation in UnixWare 1?

16      A.    It's the same.

17      Q.    Have you heard of a file system?

18      A.    Yes.

19      Q.    What is the file system in an operating system?

20      A.    File systems in UNIX actually span a variety of

21 technologies because file systems are used as an

22 interface to many different subsystems.  The primary use

23 of a file system is to be able to read and write from a

24 hard drive.

25      Q.    How does the file system in SVR 4 compare to
```

1 the file system in UnixWare 1?

2     A.    The file system in System V Release 4.2 is the

3 same as the file system in UnixWare 1.

4     Q.    Mr. Nagle, do you have any idea how the Sun

5 Solaris operating system was developed?

6     A.    I know, at the time we developed System V

7 Release 4, Sun announced support for System V Release 4

8 and entered into an agreement whereby there was some

9 joint development between then AT&T and Sun.  There were

10 features that came into System V Release 4 from Sun.

11 I know that today Sun's operating system, called Solaris,

12 is based on System V Release 4, as a result of that early

13 cooperation with AT&T.

14     Q.    And how do you know that?

15     A.    I know that because the engineers that report

16 in to me tell me that the affinity between the SCO

17 operating system of UnixWare and Sun is actually quite

18 close, that the ELF technology is similar, that moving an

19 application between the two operating systems is fairly

20 straightforward.

21     Q.    Would it be fair to say that knowledge of how

22 Solaris was developed, general knowledge of how Solaris

23 was developed, has been part of your employment for the

24 last couple decades?

25     A.    In the sense that I track the developments in

1 the industry and was aware, certainly, of the early

2 cooperation between Sun and AT&T.  That early

3 cooperation, I should say, started what was then referred

4 to as the UNIX Wars because others took opposition

5 positions to the AT&T/Sun cooperative agreement with SVR

6 4.  So, it was widely known that Sun used SVR 4.

7      Q.   Do you recognize this demonstrative,

8 Mr. Nagle?

9      A.   I do.

10      Q.   And what this is demonstrative meant to

11 depict?

12      A.   This shows that the Solaris operating system

13 has a basis with System V Release 4 and that Sun also

14 took technology from the BSD UNIX and other non-UNIX

15 technology in order to create its Solaris operating

16 system.  No doubt they also brought forward technologies

17 from their previous release, which was known as Sun LS.

18      Q.   Now, are the SVR 4 system calls in Solaris --

19      A.   Yes.

20      Q.   -- to the best of your knowledge?

21      A.   Yes, to the best of my knowledge.

22      Q.   Is Streams from SVR 4 in Solaris?

23      A.   To the best of my knowledge, yes.

24      Q.   How about ELF?

25      A.   Yes.

1          MR. NORMAND:  No further questions, Your

2 Honor.

3          THE COURT:  Thank you, Mr. Normand.

4          Mr. Melaugh, you may cross examine the witness.

5          MR. MELAUGH:  Thank you, Your Honor.  May I

6 approach?

7          THE COURT:  You may.

8                    CROSS EXAMINATION

9 BY MR. MELAUGH:

10     Q.   Good morning, Mr. Nagle.

11     A.   Hello.

12     Q.   I'd like to discuss one of the graphics you

13 discussed during your direct testimony.  If you could

14 take a look at demonstrative number 1, please.  So I want

15 to walk through this with you to make sure I understand

16 this graphic.  First up, I want to understand this

17 graphic accurately represents your understanding; is that

18 correct?

19     A.   Yes.

20     Q.   And this is a square and two circles.  And the

21 square, is UnixWare 2.0?

22     A.   It's a rectangle.

23     Q.   A rectangle.  You're right.  And the two

24 circles are SVR 4.0 and SVR 4.2 MP, correct?

25     A.   Yes.

1      Q.    And part of the circles are in the square, and

2 part of the circles are outside the square?

3      A.    Yes.

4      Q.    And the part that's inside -- the part of the

5 circles that's inside this rectangle is meant to indicate

6 that that SVR 4 and 4.2 code is inside UnixWare 2.0,

7 correct?

8      A.    Yes.

9            And the part that's outside is meant to

10 indicate that that code is no longer in UnixWare 2.0?

11     A.    Yes.

12     Q.    And if I wanted to determine what, of UnixWare,

13 is unique to UnixWare 2.0, which is to say it's not in

14 SVR 4.0 or 4.2, what I'd look at is this area of the

15 rectangle that's outside these squares?

16     A.    Yes.

17     Q.    Now let's take a look at the second graphic.

18 Again, we've got roughly the same square on -- rectangle

19 and circles on the right side; is that right?

20     A.    Yes.

21     Q.    And it represents the same things as it did in

22 the last slide?

23     A.    Yes.

24     Q.    And this time there's an arrow from SVR 4.0 to

25 the circle; is that right?

```
 1      A.   Yes.

 2      Q.   And the circle is pointing to Solaris?

 3      A.   Yes.

 4      Q.   Which is meant to indicate that there's SVR 4.0

 5 code that's moved into Solaris?

 6      A.   Yes.

 7      Q.   And Solaris is Sun's operating system?

 8      A.   Yes.

 9      Q.   I notice there's not an arrow from the UnixWare

10 rectangle to Solaris; is that right?

11      A.   Yes.

12      Q.   So I take it, then, it's your understanding

13 that there is no code unique to UnixWare 2.0 that's in

14 Solaris?

15      A.   That's something I don't know.  I do know that

16 the SVR 4 code made its way into Solaris, according to

17 its heritage and the development relationship that I was

18 aware of.  I don't, frankly, know what Sun did or didn't

19 do with the UnixWare technology that they licensed from

20 us in 2003.

21      Q.   We can agree, though, that that's what this

22 graphic suggests, though?

23      A.   Yes.

24      Q.   Let's go back to the first slide.  Now, I

25 notice you don't have any numbers here aside from the
```

1 4.0, the 4.2 and the 2.0.  How many lines of code are in

2 this top part of the circle, and how many lines of code

3 are in this bottom part of the circle?

4     A.    I don't know.

5     Q.    You don't know because you haven't actually

6 gone through every line of code in here, in this bottom

7 slide, to make some sort of determination as to whether

8 it's commercially valuable or not, have you?

9     A.    I have not.

10     Q.    You are just assuming that, because the code

11 isn't in UnixWare anymore, this SVR 4.0 and 4.2 code

12 isn't valuable anymore?

13     A.    It's more than an assumption.  I'm aware of the

14 development and development practices and the

15 requirements process that was used to make decisions

16 about what to retain and what to leave out.

17     Q.    Again, though, this isn't something that you

18 can answer on a line-by-line basis?

19     A.    Correct.

20     Q.    How many lines of code, roughly, are there in

21 SVR 4.0?

22     A.    I don't know.

23     Q.    Is it more than a million?

24     A.    Almost certainly.

25     Q.    Is it more than 2 million?

```
 1     A.    Probably.

 2     Q.    More than 5 million?

 3     A.    I don't know.

 4     Q.    So, probably somewhere between 2 and 5 million,

 5 can we agree on that?

 6     A.    No.  We can't agree on that.  It could be more

 7 than five.

 8     Q.    Okay.  It could be more than five.  Now, I

 9 realize that you've just testified that you haven't gone

10 through every line of code, but let's just take this

11 graphic.  From my eye, it looks as though I would say 15

12 or 20 percent of the circle's volume is below the line

13 and outside of the UNIX 2.0?

14     A.    The size of the circles and the rectangle were

15 not meant to convey anything about the relative size of

16 the technology in those circles.  It was merely meant to

17 convey the overlap that we talked about already.

18     Q.    I see.  As far as you know, these circles could

19 be positioned farther down?

20     A.    They could be, but -- yes, I guess they could

21 be.

22     Q.    So --

23     A.    If it was meant to convey the actual

24 percentages of code left behind, then we'd have to

25 redesign the graphic, I suppose.
```

1     Q.   Well, I think that's what SCO may have intended

2 to convey here, that there's a lot of code from SVR 4.0

3 still in 2.0 and not as much outside of 2.0.  Is that

4 what you regard this graphic as intending to convey?

5     A.   I'll concede that we intended that this graphic

6 would convey that there was a small percentage that was

7 left out.

8     Q.   But you don't know, in fact, what percentage

9 was left out?

10     A.   I don't.

11     Q.   And it could be larger than this graphic

12 suggests?

13     A.   It could be.

14     Q.   Based on your experience, would you -- can we

15 estimate what percentage has been left out?  Is it more

16 than 10 percent that's in this bottom section?

17     A.   Based on what I know of the development

18 practices between System V Release 4 and then leading to

19 4.2 and leading to 4.2 MP, the general trend during that

20 period was to add features, not to leave things out, so

21 I'd be surprised if it was more than 5 percent,

22 frankly.

23     Q.   And another thing I don't understand about this

24 graphic, if code is changed, did you put it in this part

25 or did you put it in the part below?

1    A.   If code is changed and the feature enhanced,

2 then I would regard that as remaining with the operating

3 system.

4    Q.   So, let's take a specific example, ELF.

5    A.   Okay.

6    Q.   That's one of the examples you discussed?

7    A.   Yes.

8    Q.   And that's something that is in both 4.0 and

9 UnixWare 2.0?

10   A.   Yes.

11   Q.   And do you know whether there were any changes

12 at all made to the lines of code that make up ELF between

13 4.0 and UnixWare 2.0?

14   A.   I don't know for sure.  I can speculate

15 reasonably that adding features for multiprocessing could

16 have resulted in some additions to the ELF and dynamic

17 linking subsystem.

18   Q.   And the same is true with the differences

19 between 4.2 and 2.0.  You don't know, one way or the

20 other, whether every line of code that was in ELF in 4.2

21 is the same in UnixWare 2.0?

22   A.   Correct.

23   Q.   Is it fair to say, though, that given the total

24 volume of code we're talking about here, millions of

25 lines of code, that this lower portion here could be

1 hundreds of thousands of lines of code?

2     A.    It's possible.

3     Q.    Let's talk for a moment about OpenSolaris.  You

4 do know what OpenSolaris is, correct?

5     A.    Yes, I do.

6     Q.    It's a Sun operating system?

7     A.    Yes.

8     Q.    It's essentially an open-sourced version of

9 Solaris?

10     A.    Yes.

11     Q.    And given that Solaris is based on SVR 4.0 and

12 open source -- and OpenSolaris is based on Solaris, you

13 would expect there to be SVR 4.0 code in OpenSolaris,

14 correct?

15     A.    Yes.

16     Q.    In fact, isn't it fair to say that you would

17 expect there to be a significant volume of SVR 4.0 code

18 in OpenSolaris?

19     A.    Yes.  There could be.

20     Q.    So you have this notion of commercial value,

21 both in the title of this slide and in the bottom of the

22 slide.  I'd like to talk about that with you.  Doesn't

23 the very fact that code is in an operating system give it

24 commercial value?

25     A.    Not necessarily.  If there's code in an

1 operating system that doesn't help you to sell the

2 operating system, it's a feature that nobody uses, for

3 instance, then it's hard to assign that commercial value.

4 If it's a feature that somebody -- that the sales force

5 advertises particularly or is a deciding factor for

6 someone to purchase an operating system, that clearly has

7 commercial value.

8      Q.   When we are stumbling over the word "commercial

9 value," doesn't the fact that code is in the operating

10 system imply that it has some sort of monetary value?

11      A.   I would just refer to my previous answer.  It

12 has monetary value if customers will pay for it.

13      Q.   For example, let's say I have an operating

14 system and it's got a million lines of code in it and

15 there's 900,000 of them out there actively selling, as

16 you suggested.  Those are features that I'm actively

17 selling.  And there's another hundred thousand that's

18 like this bottom position of the circles, and someone

19 comes to me and says:  You know, listen.  I own those

20 hundred-thousand lines of code.  You've got to take them

21 out of the operating system.

22          At that point, this bottom part of the circle

23 starts to become pretty valuable, doesn't it?

24      A.   Not necessary.  If it's code that is not

25 critical to the operating -- operation of the operating

1 system, it might easily be removed and then no one would

2 be the wiser.  I can think of examples where we did that.

3     Q.   You've spent something on the order of 20 years

4 in computer programming and engineering; isn't that

5 right?

6     A.   I have.

7     Q.   And it's your testimony that it would be a

8 trivial matter to take hundreds of thousands of lines of

9 code out of an operating system?

10     A.   That's not what I said.  I said that there

11 could be features that have no particular commercial

12 value that are carried along in an operating system that

13 customers are not willing to pay for that, if we were

14 approached by a third party who happened to have a claim

15 on those lines, and we were told those lines can no

16 longer be distributed with your operating system, we

17 might be able to remove those and still sell the

18 operating system with the remainder.

19          It's not clear that every single line of code

20 without commercial value is vital to the function of the

21 operating system.

22     Q.   We can agree, though, that as a matter of

23 man-hours and engineering effort, it's not a trivial

24 undertaking to take hundreds of thousands of lines of

25 code out of an operating system; isn't that right?

1     A.    It depends on the subsystem.  There would be

2 some that would be easier than others, but there are

3 others that would be difficult.

4     Q.    Let's talk about OpenSolaris again.

5 OpenSolaris is released under a license that allows the

6 public to see the OpenSolaris code, isn't that right?

7     A.    Yes.

8     Q.    If I wanted to, I could go to Sun's web site,

9 download the OpenSolaris code and look at it myself?

10     A.    Yes.

11     Q.    And it's Sun's 2003 SCOsource license that gave

12 Sun the right to expose SVRX source code to the public;

13 isn't that right?

14     A.    It's my understanding that it gave Sun the

15 right to expose the UnixWare code as well.

16     Q.    But it gave -- the answer is:  Yes, it gave Sun

17 the right to expose to the public the SVR 4.0 code that

18 you have admitted is in OpenSolaris.

19         Isn't that right?

20     A.    That's correct.

21     Q.    And you and I can agree, can't we, that the

22 right to release code under an open source license, the

23 right to say to the public that you can come and download

24 this code as you will, that's something that has market

25 value, doesn't it?

1     A.    That's a debatable point, I would have to say.

2 There are those who would say that the ability to expose

3 code for people to download and review at-will does have

4 market value, that -- and certainly Sun hoped that it had

5 market value.  Sun hoped to garner a better position in

6 the marketplace by publishing their code.  There are

7 others that would say that it has no particular market

8 value, that, in fact, protected code has as much market

9 value or more than open source code.

10          So, I will concede that it might have market

11 value but, that it absolutely does, I would probably side

12 on the -- with those that would say that it has less

13 market value than others.

14     Q.    Do you recall giving a deposition in this

15 action, Mr. Nagle?

16     A.    I do.

17     Q.    In fact, it was just a couple weeks ago, with

18 me, wasn't it?

19     A.    It was.

20          MR. MELAUGH:  Your Honor, I would like to

21 publish an excerpt from Mr. Nagle's April 16, 2008

22 deposition.  It's page 26, lines 24 to 27.

23          THE COURT:  Yes.  Go ahead.

24     Q.    So the question asked to you:

25          "Okay, so to be clear, though, you think the

1      right to release source code that was conveyed

2      to Sun in the 2003 license is something that has

3      market value?

4           Answer:  Yes."

5     Q.   Is that your testimony, Mr. Nagle?

6     A.   Yes.

7     Q.   Were you being accurate and truthful at that

8 time?

9     A.   Yes.

10     Q.   So we can agree, can't we, that the right to

11 release source code that was conveyed to Sun in the 2003

12 license is something that has market value, can't we?

13     A.   Yes.

14          MR. MELAUGH:  Thank you.  I have no further

15 questions.

16          THE COURT:  Thank you, Mr. Melaugh.

17          Redirect, Mr. Normand?

18          MR. NORMAND:  Your Honor, I'd like to publish

19 another portion of Mr. Nagle's deposition transcript.

20 This is, in my my transcript at least, at page 24, line

21 15, to page 25, line 8

22          THE COURT:  Go ahead.

23

24

25

1                    REDIRECT EXAMINATION

 2  BY MR. NORMAN

 3          "Question:  Would you agree with me that the

 4          right we have just discussed, the right to

 5          release code into OpenSolaris, is a right that

 6          has commercial value?

 7          Objection:  Vague and ambiguous.  Calls for

 8          speculation.

 9          Answer:  That's a subject that gets a lot of

10          debate, whether providing open source has

11          commercial value, just the fact of posting open

12          source, so that it is available to be read

13          without payment.  So, in that sense, does it

14          have commercial value?  No.  You don't pay to be

15          able to read it if somebody exposes it.  Does it

16          have market value?  Well, possibly, because it

17          allows a company to position themselves as open,

18          and it allows them to position themselves as

19          willing to cooperate with the community."

20          Does that constitute commercial value?

21          That's a debatable point.  So, market value,

22          I'll grant.  Commercial value, direct commercial

23          value, where you actually pay for the right to

24          see some of that stuff?  I doubt it."

25           Mr. Nagle, is every line of code from SVR 4 in

1 UnixWare?

2     A.    Every line of code from SVR 4.0 in UnixWare?

3     Q.    Yes.

4     A.    Most likely not.

5     Q.    Is every line of code from SVR 4.2 MP in

6 UnixWare, every line of code?

7     A.    Highly probable, yes.

8     Q.    Is the vast majority of the code from SVR 4 in

9 UnixWare?

10     A.    Yes.

11     Q.    And the vast majority of the code from SVR 4.2

12 MP is in UnixWare?

13     A.    Absolutely.

14     Q.    Is this graphic meant to depict that?

15     A.    Sir, can you be specific?  Is the graphic meant

16 to depict?

17     Q.    What we just discussed?

18     A.    Yes.

19     MR. NORMAND:  Thank you, Your Honor.

20     THE COURT:  Thank you.

21     Any recross Mr. Melaugh?

22     MR. MELAUGH:  No, Your Honor.

23     THE COURT:  Thank you, Mr. Nagle.  You may step

24 down.

25     I assume this witness may be excused?

1           MR. NORMAND:  Yes, Your Honor.

2           MR. SINGER:  Your Honor, that concludes our

3 case.

4           THE COURT:  Thank you.

5           We'll proceed with closing arguments.  Now,

6 according to the --

7           MR. JACOBS:  Excuse me, Your Honor.  Would you

8 prefer to clean up on the exhibits that still need to be

9 admitted before or after closing?

10          THE COURT:  After.

11          MR. JACOBS:  Okay.  Mr. Acker will do the

12 closing argument for Novell.

13          THE COURT:  According to the schedule, you've

14 indicated SCO goes first?

15          MR. SINGER:  I think the schedule, at one

16 point, discussed SCO going first.  And, in finishing, we

17 are happy to proceed in either manner.

18          MR. ACKER:  I prefer to go first.  We have been

19 acting as plaintiffs, if that makes some sense.

20          MR. SINGER:  That's fine with us.

21          THE COURT:  Go ahead, Mr. Acker.

22          MR. ACKER:  Your Honor, I think it makes some

23 sense here to get back to basics, so I want to start with

24 the APA.  And what we're really talking about here is

25 Schedule 6, Exhibit 1.1 A to Exhibit 1 in this case.  And

1 what this is, is a listing in the APA of the code to

2 which SCO has to remit royalties to Novell.  No doubt

3 about that.

4           So there's three questions that the Court is

5 faced with.  One is:  How much of the Sun and Microsoft

6 agreements relate to this SVRX code which is in schedule

7 121-A-6 because the Court has determined, as a matter of

8 law, that SCO breached its fiduciary duties to Novell by

9 failing to account for and remit the appropriate royalty

10 payments to Novell for the SVRX portions of the 2003 Sun

11 and Microsoft agreements.  So, as to those two

12 agreements, the decision for the Court is simply:  How

13 much of the money that SCO got from those agreements is

14 Novell entitled to?

15          The second question for the Court is:  Are

16 there others of the other SCOsource licenses SVRX

17 licenses.  And, if so, what percentage of those royalties

18 is Novell entitled to under the APA?

19          And, finally, the third question the Court must

20 address is:  Was the licensing of SVRX code in any of the

21 licenses merely incidental to the license of UnixWare?

22 If not, then Novell is entitled to a declaration that SCO

23 improperly failed to seek Novell's permission before

24 entering into those agreements.

25          So, what are the facts?  Well, let's go back to

1 2002 when Darl McBride and Chris Sontag first came to

2 SCO.  The financial situation of SCO was horrible.  How

3 do we know that?  Darl McBride told us.  This is his

4 testimony at transcript 231, lines 3 through 232, 10:

5     "Q.  And at that time when you joined Caldera, it

6 was not in great financial shape, correct?

7     A.   That is correct.

8     Q.   In fact, the company was in somewhat of a

9 turnaround situation.  Would that be accurate?

10     A.   Yes.

11     Q.   The company had not been profitable for the

12 fiscal year ending October 31, 2002, right?

13     A.   Yes.

14     Q.   And, in fact, the company had suffered a net

15 loss of over $24 million for that year, right?

16     A.   I don't remember exactly, but it wasn't in good

17 shape.  I know that.

18     Q.   And when you first came to Caldera, you met

19 with the top dozen or so managers of the company and

20 asked them what they would do if they were running the

21 company?

22     A.   Yes.

23     Q.   And during those conversations, one of the

24 managers, John -- I believe his name is Terpstra?

25     A.   Terpstra.

1    Q.    Terpstra told you that he believed that the
2 UNIX intellectual property exists inside of Linux, right?
3    A.    Yes.  That's correct.
4    Q.    And one of your take aways or your findings
5 from your meetings with managers was although the prior
6 management or regime had been focusing on marketing
7 Linux.  Most of the company's revenue was coming from
8 UNIX, correct?
9    A.    Yes.  That's correct.
10    Q.    And you believed that the course of action had
11 to change in the company in order to become profitable,
12 had to turn its attention to protecting its UNIX assets,
13 right?
14    A.    That was clearly one of the key strategies that
15 a we identified, yes."
16        That's how Mr. McBride was going to solve the
17 problems with SCO in late 2002 and 2003.  He was going to
18 market the UNIX assets.  And how do we know that?  Again,
19 because he told us.  Here's testimony at page 236 in the
20 transcript, 4 through 15:
21    "Q.  Well, isn't it true that when you arrived in
22 Caldera in late 2002, you realized that the revenues from
23 the branches UnixWare and OpenServer were, in your words,
24 marching south and dying off, correct?
25    A.    They were under severe competition from

1 primarily Linux, but also from others.  But, yes, they

2 had been going south for a number of years.

3     Q.   And, because the revenues from the branches

4 UnixWare and OpenServer were marching south and dying

5 off, your strategy was to focus on maximizing the value

6 of the trunk, correct?

7     A.   In part, that's correct."

8          So, what is it Darl McBride decides to do?  He

9 decides to -- I'm losing my business in OpenServer and

10 UnixWare, so I have to turn back to the core technology,

11 to the trunk, and I have to mine that resource in some

12 fashion.  Mr. Sontag told us about what they hoped to

13 achieve with SCOsource.  And Mr. Sontag's testimony at

14 page 79, lines 14 to 24?

15     "Q.  And you and others hoped that the SCOsource

16 campaign would become an important revenue generator for

17 the company, correct?

18     A.   Of course.

19     Q.   In fact, you thought it would generate

20 billions, right?

21     A.   We viewed the UNIX asset held by SCO to be a

22 very valuable asset and had potential to generate

23 significant revenues.

24     Q.   That included billions, right?

25     A.   Potentially, yes".

1           So, 2002, the end of the fiscal year, in

2 October, financials are terrible.  Mr. McBride decides:

3 We better start SCOsource and save the company.  Again,

4 Chris Sontag talking about the trunk and what they were

5 hoping to do with SCOsource.  His testimony at page 91 in

6 the transcript, 18 through 23:

7      "Q.  But you wanted to mine this entire body of

8 intellectual property, right?  That was the plan?  ?

9      A.   That was my understanding of the intellectual

10 property body that we had rights to license.

11      Q.   Going back to 1969, right?

12      A.   Correct."

13           And what was that body of intellectual property

14 that they hoped to mine?  This is the tree that

15 Mr. McBride spoke about and Mr. Sontag spoke about it,

16 and it's the centerpiece of the SCOsource plan.  Instead

17 of focusing on the branches, which are the derivative

18 operating systems, OpenServer and UnixWare, they are

19 going to mine the trunk.  They are going to mine the core

20 UNIX IP, the trunk of the tree, and there has been much

21 testimony about what exists in that trunk.

22           But Mr. McBride, again, in his own words, told

23 us what that trunk consists of because that is the basis

24 of SCOsource.  Again his testimony, page 265, line 6 to

25 13:

1       "Q.   Let me understand your testimony.   So, when

2  you're talking about the UnixWare and the OpenServer

3  licensing revenue in the Q -- "

4             Again, this quarterly statement.

5             "-- you're talking about the branches of the

6  tree, correct?

7       A.   Yes.

8       Q.   But when you're talking about the Sun and

9  Microsoft and SCOsource licensing, you're talking about

10 the trunk, the core UNIX IP, correct?

11      A.   That's the way I would depict it."

12            Mr. McBride's own words what SCOsource was

13 about was licensing and mining the trunk of the tree.

14 So, Mr. Sontag is put in charge of the program and

15 Mr. Petersen is his deputy.  The next thing they need, of

16 course, is lawyers because we are not talking about a

17 regular sale of product here, Your Honor.  This is not a

18 regular Hunsaker-driven sale of UnixWare OpenServer to

19 folks who are going to use it.  This is a licensing

20 campaign, and we need litigators to support that.

21            And as Mr. Hunsaker put it, I think very

22 nicely, that you have to pay us so you can run Linux and

23 you can be clean with SCO.  And here was his testimony.

24 Mr. Hunsaker:

25      "Q.   Are you familiar with the SCOsource program?

1     A.    Yes.

2     Q.    And can you generally describe what the

3 SCOsource program was?

4     A.    This program was put in place to provide a

5 licensing mechanism for Linux customers that were perhaps

6 unknowingly using our intellectual property, our UNIX

7 technology, and it provided a way to make them whole or

8 clean, if you will."

9           Mr. Petersen, who was the deputy, second in

10 charge of SCOsource, echoed these comments.  Here's his

11 testimony about what SCOsource was:

12     "Q.    And after you were assigned to SCOsource, you

13 soon met with lawyers, including Darl McBride's brother,

14 Kevin McBride, to map out the strategy for the SCOsource

15 campaign, correct?

16     A.    Yes.  I was involved in that, yes.

17     Q.    So you come on in, in October, and immediately

18 you're meeting with lawyers, including Mr. McBride's

19 brother, in order to map out how SCOsource is going to

20 work, right?

21     A.    Yes.

22     Q.    And that included working out a litigation

23 strategy, right?

24     A.    There was some discussion of litigation at that

25 point, I think, yeah."

1          If these licenses and this program is about
2 selling operating systems to customers, why do you need
3 lawyers?  Why do you need litigators?  You need lawyers,
4 you need litigators because this is about not selling
5 product to customers to run that operating system, it's
6 about a licensing scheme, Your Honor, in which litigation
7 is going to be a focal point.
8          Mr. Hunsaker made this clear in his e-mail,
9 July 31, 2003.  This is immediately after a conference
10 call including Mr. Hunsaker, Mr. McBride and Mr. Sontag,
11 and they talked about this SCOsource program.  And what
12 Mr. Hunsaker says at the bottom could not be more
13 telling, despite his repeated efforts yesterday to try
14 and make the SCOsource program into a sale of UnixWare.
15 These are his own words, contemporaneously, at the time,
16 before litigation:
17          "There is no connection between UnixWare and
18 OpenServer and the SCO UNIX IPC license whatsoever."
19          There is no connection whatsoever.  His own
20 words.
21          "They are independent.  Simply put, the license
22 allows users of Linux to run legally."
23          It's not about selling products.  And then
24 finally, Mr. Hunsaker's own notes, which have been a
25 discussion amongst the executives at SCO, talking about

1 what really what SCOsource is.  This is in December of

2 2004, a year after the program has been in place, and it

3 makes painfully clear exactly what the program is:

4             "What is our business model for SCOsource

5          and SCOx?  SCOsource.  Take 15 thousand penguins

6          --"

7          When they are talking about penguins there,

8 Your Honor, they are talking about Linux users.

9             THE COURT:  I think it says 1500.

10           MR. ACKER:  1500.

11             "Take 1500 penguins --"

12          they are talking about Linux users.

13             "-- create a room in Lindon, line them up

14          and place the company brand on each one of them.

15          We then send out a letter within the next few

16          weeks which takes our code claims and

17          demonstrates to customers what we have found to

18          date.  We let the end user know that, quote, if

19          they want to be safe, they need to remove the

20          offending code from Linux in order to continue

21          to use it legally.  Once you have cleaned up

22          your systems, you will be clean."

23           And the only code they refer to is pre-APA

24 code.  This is not about a sale of UnixWare OpenServer.

25 It's a licensing campaign to get money from Linux users,

1 the 1500 penguins.  Again, the CEO's own words make this

2 clear in a letter that Mr. McBride wrote in May of 2003

3 to 1000 companies across the United States.  He tells, in

4 the first line:

5           ""SCO holds the rights to the UNIX operating

6           system software originally licensed by AT&T to

7           approximately 6,000 companies and institutions

8           worldwide, the UNIX licenses."

9            He doesn't say:  SCO holds the right to

10 UnixWare.  Would you like to buy an operating system?  He

11 says:  We have the core IP.

12           And then he tells -- in the fifth paragraph, he

13 talks about his beliefs that UNIX developers have taken

14 that IP in the past and put it into Linux.

15           "Many Linux contributors were originally

16           UNIX developers who had access to UNIX source

17           code distributed by AT&T and were subject to

18           confidentiality agreements, including

19           confidentiality of the methods and concepts

20           involved in software design.  We have evidence

21           that portions of UNIX System V software code

22           have been copied into Linux and that additional

23           other portions of UNIX System V software code

24           have been modified and copied into Linux."

25            He sends it out to a thousand companies across

1 the United States and says:  We think our core IP is in

2 your operating systems if you're running Linux.  And then

3 what does he say he's going to do?  He says he's going to

4 sue you.

5           "We believe that Linux infringes on our UNIX

6           intellectual property and other rights.  We

7           intend to agressively protect and enforce these

8           rights.  Consistent with this effort, on March

9           7, we initiated legal action against IBM."

10           So, what he's telling those folks is:  Get in

11 line, penguins.  Get your license or you're going to get

12 sued.  That is SCOsource.  Again, Mr. Petersen, the

13 second in command, yesterday told the Court clearly what

14 SCOsource is.  Here's what he said:

15      "Q.  But the focus of the SCOsource program was

16 to -- 1000 letters went out from Mr. McBride to Linux

17 users all over the country, correct?

18      A.   That was one of the aspects of that program.

19      Q.   And in that letter, Mr. McBride told those

20 users of Linux:  Hey, we think our IP is in Linux.

21 Correct?

22      A.   That's correct.

23      Q.   And he told them:  You better take a license

24 from us or you're going to get sued.  Correct?

25      A.   I don't remember exactly how he said that, but,

1 yes, that was the impression.

2     Q.    And that was the SCOsource program, right?

3     A.    Yes."

4          It's in this context that the Sun and Microsoft

5 deals were executed, Your Honor, and there's no question

6 that the Sun and Microsoft deals are SCOsource licenses.

7 So let's take a look at those licenses themselves.  The

8 Sun license was executed in February, 2003.  And it

9 really, I don't believe, given the evidence here, could

10 be disputed that it amended or restated the earlier 1994

11 Sun and Novell license.  And how do we know that?  Well,

12 the contract says so in the first two lines:

13          "Whereas Sun and UNIX system laboratories,

14          Inc., Novell, are parties to a software license

15          and distribution agreement dated January 1,

16          1994; whereas Sun and SCO desire to amend and

17          restate the original agreement by the execution

18          of this agreement."

19          It could not be more clear that what the Sun

20 agreement was doing in 2003 is restating the earlier

21 agreement, the SVRX agreement between Sun and Novell.  In

22 fact, Mr. Sontag, in negotiating this agreement, was

23 pretty up front about this.  When you compare the first

24 page of the second license, the 2003 license, it lists

25 the technology on the right with the earlier list of

1 technology that was licensed on the left in the earlier

2 agreement.  They are identical.  He had a hard time

3 admitting it on the stand, but when he was asked

4 follow-up questions, he gave this testimony about it,

5 these two versions of software:

6     "Q.  And you know what happened was, in the 2003

7 deal, for the first page of attachment 1, you simply took

8 the old attachment 1 from the earlier deal and made a

9 copy of it, right?

10     A.   I suspect that's the case."

11         It amended and restated the earlier agreement.

12 And, in addition to the -- the set of identical pages

13 there, there's a second page to the 2003 that lists a

14 total of seven new pieces of software.  For five of

15 those, Your Honor, the ones that are highlighted are

16 listed on the schedule in the APA to which Novell is

17 entitled to royalties.

18         And there's no question, Your Honor, that

19 Mr. McBride admitted the 2003 Sun license allowed Sun to

20 open source its Solaris product, OpenSolaris.  Here's the

21 evidence.  He was asked:

22     "Q.  And SCO does not have a problem with what Sun

23 did in open sourcing Solaris after the execution of the

24 2003 Sun licensing deal, right?

25     A.   Correct.

1      Q.   And you would agree, wouldn't you, that what
 2 Sun has done with its OpenSolaris products is, it has the
 3 right to package that Sun obtained -- it has the right to
 4 package what Sun obtained from SCO in its 2003 license?
 5      A.   That's what I said.
 6      Q.   And it's true, isn't it, that Sun's OpenSolaris
 7 is a derivative of UNIX System V?
 8      A.   Yes, it is."
 9           So, there's 30 pieces of software that's listed
10 on that first page that's identical to both contracts.
11 Under the first contract, they couldn't open source it.
12 They couldn't allow it to be open sourced, but after the
13 second deal, they could.   There's no doubt about that.
14 So then the question becomes, and the dispute has been:
15 Is there market value to that?
16           SCO would have you believe there's not.   The
17 problem with that is that their own employees, four
18 employees, tell you different.   This is John Maciaszek's
19 testimony yesterday -- or yesterday afternoon --
20 yesterday morning:
21      "Q.   It is true that Solaris was developed before
22 the 1995 Asset Purchase Agreement, correct?
23      A.   Yes.
24      Q.   And it would not surprise you if you found
25 substantial code predating the Asset Purchase Agreement

1 in Sun Solaris?

2    A.   No.  It wouldn't surprise me if there were code

3 in the prior release, no.

4    Q.   And at any particular point in time, an OEM

5 licensee could stop taking additional releases of UNIX or

6 UnixWare and develop it on its own path?

7    A.   That's correct.

8    Q.   And, in fact, some OEMs did that, correct?

9    A.   Yes.

10    Q.   For example, Sun Solaris, correct?

11    A.   Yes.

12    Q.   They -- insofar as their code refresh, if you

13 will, from any of the UNIX businesses was concerned, it

14 was frozen in time as of the last schedule attached to

15 their software agreement, correct?

16    A.   I would have assumed, yes.  I think it was 4.0,

17 but I'm not positive.

18    Q.   And that code as to Sun, the older code, that

19 is the UNIX code --"

20         Or the trunk of the tree, Your Honor.

21         "-- on which then, as of that date and going

22 forward, unless they were to sign a new license, they

23 were building their variance on, correct?

24    A.   Yes.

25    Q.   And, I would assume there would be code from

1 other sources as well.  But, yes."

2          So, what Sun has done is they have taken 4.0,

3 which is listed on the APA, they have made that the base

4 of their Solaris operating system and they have stopped

5 taking refreshers, or they have stopped taking new code.

6          And Mr. Maciaszek continued:

7    "Q.  You are right.  I didn't actually ask that

8 quite precisely enough.  In so far as the UNIX code is

9 concerned, once they're frozen in time as of their latest

10 schedule, that is the UNIX code on which they were

11 relying, correct?

12    A.   Correct.

13    Q.   And as to Sun in that case, that UNIX code has

14 substantial value, doesn't it?

15    A.   Well, you'd to have ask Sun that.  I mean, I

16 can't answer that question."

17          And here's the telling part, Your Honor.

18 Mr. Jacobs asks Mr. Maciaszek, who I submit was a very

19 credible witness:

20    "Q.  And if you went to them and say -- after the

21 Asset Purchase Agreement, went to them in 1996 and you

22 said; you know what, we want to strip out all of that

23 UNIX System V Release 4 code from Sun Solaris.  What do

24 you think their reaction would have been?"

25          And the answer, and he got a chuckle from the

1 gallery:

2      "A.  It wouldn't have been favorable."

3            Sun has built their operating system on that

4 code, Your Honor.  For them to go in and rip it all out,

5 it has huge commercial value to them, and Mr. Maciaszek

6 confirmed that:

7      "Q.  Because it would have been a substantial injury

8 to their business, would it not, sir?

9      A.   Yes."

10           In addition, Mr. Patterson(sic), when he

11 realized what it was that Sun was able to do with the new

12 license, when he saw this article in August of 2003, he

13 wrote an e-mail to his boss, Chris Sontag and said:

14           "Hey, Chris, it looks like Sun intends to

15           use its broader license to protect its Linux

16           customers.  That is fine, but I hope they don't

17           decide to go after the rest of the market.  I

18           doubt they would, but I think they could

19           actually sell an equivalent license to ours."

20            So, I asked Mr. Sontag about this -- or

21 Mr. Patterson about this:

22      "Q.  And then you wrote:  That's fine, but I hope

23 they don't decide to go after the rest of the market.  Do

24 you see that?

25      A.   Yes.

1    Q.   What did you mean when you wrote that?

2    A.   Well, I knew that Sun had broader rights and

3 that they could sublicense some of those rights.  And I

4 was wondering whether they were going to -- whether that

5 was their interpretation, what they were talking about

6 here was their Linux stuff, their Linux program.  And I

7 wondered whether they would try to take that and do

8 anything more than that.

9    Q.   You were worried that they were going to

10 provide indemnity to all of these Linux users out there,

11 right?

12    A.   I didn't know if they could or not, but I

13 wondered if whether that was an issue.

14    Q.   And that was a concern for you as a deputy at

15 SCOsource, correct?

16    A.   Yes."

17         And here's the key, Your Honor:

18    "Q.   And that would have been a commercial -- that

19 would have commercial value for Sun if they could provide

20 indemnity to customers that were using their OpenSolaris

21 product, right?

22    A.   It would.

23    Q.   It would be valuable, extremely valuable,

24 right?

25    A.   Yes.

1      Q.    And it would seriously undermine the SCOsource

2 program, correct?

3      A.    It could, yes."

4            No doubt that, in the 2003 agreement, Sun got

5 the ability -- it contained the ability to open source

6 their product.  Jay Petersen, the deputy of SCOsource,

7 tells this Court that that has substantial commercial

8 value to Sun because they can now indemnify their

9 customers.  There undoubtedly is commercial value in that

10 license, Your Honor.

11            And then there has been much testimony and

12 argument about -- of whether or not a grant to the latest

13 version of UnixWare is going to solve some problem.  And

14 that's really SCO's position.  Well, we're going to give

15 you the grant that we gave you in the Sun license, the

16 latest grant, and it's going to cover all of the problems

17 because all of the code that's in the latest grant is

18 also in the earlier releases.

19            Well, we just heard testimony here this morning

20 from Mr. Nagle that they don't know.  Nobody knows.  No

21 one sat down and compared the two.  There's no evidence

22 before this Court that there is unique code in the Sun

23 Solaris system.  If there's not unique code in the Sun

24 Solaris system that is not also in UnixWare, there is no

25 evidence before this Court that if you get a license to

1 UnixWare and you open source Sun Solaris, that you're

2 going to be protected, that you're not going to get sued,

3 that you're not going to be one of the penguins.

4          And I asked Mr. Sontag about this:

5     "Q.  Now it's true, isn't it, that not all of this

6 pre-APA SVRX software is in the current version of

7 UnixWare, correct?

8     A.   Probably not, but I would suspect, you know,

9 that anything that is valuable and important would still

10 be in the current version of UnixWare."

11          And we have heard that over and over from three

12 or four witnesses, that they think it would be, that they

13 suspect it would be.  Mr. Hunsaker told you that of

14 course, it would be.  But there's no evidence that it

15 is.

16     "Q.  But you have never done a line-by-line

17 comparison to determine what portions of this software,

18 the legacy SVRX software, is actually in the current

19 version of UnixWare, correct?

20     A.   I have not.

21     Q.   And you're not aware of anyone else having done

22 that analysis, correct?

23     A.   I'm not aware of that analysis.

24     Q.   And Sun didn't do that analysis as far as you

25 know, correct?

1      A.    Not that I know.

2      Q.    And you're not aware of any expert for SCO

3 doing that analysis?

4      A.    I'm not aware.

5      Q.    And you're not aware of any technician or

6 technical person or engineer of SCO doing this analysis,

7 correct?

8      A.    No, I'm not."

9            John Maciaszek was also asked about this.

10      "Q.    Now, you talked about the development practices

11 of the UNIX operating system.  You testified that

12 modifications were added over time with each successive

13 release.  Do you recall that testimony?

14      A.    Yes.

15      Q.    And isn't it a fact, sir, that modifications

16 also included deletions of code over time?

17      A.    That is correct.  Substitutions as well."

18            And what we're talking about is the development

19 of Sun Solaris, based on that pre-APA.

20      "Q.    And I think in answer to a question from

21 Mr. Singer that was driving at a somewhat similar point,

22 you said --"

23            And this is important, Your Honor.

24            "-- whatever is in UnixWare is in UnixWare.  Do

25 you recall that?

1      A.   Yes.

2      Q.   And in order to know whether any particular

3 code from a prior release has been carried forward all

4 the way to the present day, you would actually have to

5 look at the code and compare it, wouldn't you?

6      A.   To be definitive, yes.

7      Q.   And it's quite possible the code from, say,

8 UNIX 4.0, pick your release, has been deleted over time

9 and is not in the current version of UnixWare?"

10          Again, this is their witness, Your Honor.

11     "A.   That's correct.  It could have been deleted or

12 it could have been substituted or enhanced.

13     Q.   And the same is true, for, say, UNIX System IV,

14 pick your release, and, say, SCO UnixWare 2.1?

15     A.   That's correct."

16          So for SCO to argue there is no value in Sun

17 having the ability to open source Solaris in 2003, after

18 that agreement was signed, simply defies logic and

19 ignores the testimony of their own current and former

20 employees.

21          So, how does SCO respond?  What have we heard

22 the last three days?  What's the mantra?  It's just about

23 UnixWare.  This is the sale of the products that's just

24 about UnixWare, and every time we sell UnixWare, we give

25 you everything in the past.  That's what we've always

1 done.  That's the guts of their defense.  I'll give you

2 several reasons, Your Honor, why it's refuted by the

3 evidence.

4         One.  There is no question this is not a

5 routine software license, neither Sun nor Microsoft or

6 the others.  This is part of the SCOsource campaign.  So

7 you can't take that out of that context and apply to it a

8 sale of a regular operating system.  Mr. Hunsaker made

9 that clear in his e-mail, and he made that clear in his

10 testimony.  This is not a regular sale of an operating

11 system.

12         Two.  And this is critical here.  The practice

13 followed here is inconsistent with what Mr. Broderick

14 said was the current legacy software licensing practice

15 at SCO.  Do you remember Mr. Sontag went on and on about

16 we always license all the prior code whenever we license

17 something, and then we showed him a couple licenses.  And

18 two of them had just these two releases in them.  This is

19 Exhibit 69 and 70.  We showed him two sets of those.

20         And he said:  Well, you know, maybe I was wrong

21 and I didn't hear right, but as I understand it, that's

22 the current practice now.  We changed it.  We used to

23 license -- we used to just list everything as a matter of

24 course, but now we're just listing the last two UnixWare

25 releases.

1        And Mr. Maciaszek highlighted that and said:
2  Yeah, that's part of the sales technique.  We just want
3  the license to say UnixWare.
4        Mr. Sontag said that we wanted those contracts
5  to be shorter, but Mr. Maciaszek said it was what the
6  sales guys wanted, which is that we just want UnixWare on
7  the license.
8        Okay.  So that's the practice as of five years
9  ago.  Well, we've seen the lists.  They don't just list
10 UnixWare.  They list 30 other prior pieces of software.
11 Their own evidence and their own explanation is that
12 that's the practice now.  We just list the UnixWare.  But
13 that's not what happened in Sun, and that's not what
14 happened in Microsoft.
15        Reason 3.  The standard legacy SVRX license
16 program does not allow a licensee to open source the
17 legacy software.  In other words, you can look at it, but
18 you can't build on it.  You can't make a derivative work
19 of it, and you certainly can't open source the source
20 code.  And how do we know that?  Because their own
21 witness told us that.  William Broderick:
22     "Q.  Let me make sure I understand your testimony.
23 If I wanted to make a derivative work of UNIX System V
24 Release 3.2, that is not something I could do under
25 supplement 87?"

1          And, again, supplement 87 was a listing.  They

 2 had a list of prior SVRX software that included Release

 3 3.2.  And he said:

 4      "A.  That's correct.

 5      Q.  And so if I wanted to use --

 6      A.  Well, let me clarify that.  If you wanted to

 7 create a derivative work of UnixWare 2.1 --"

 8          Which is actually being licensed in that

 9 supplement.

10          "-- that included some of the prior product,

11 you could do that.  But if you just looked at the prior

12 products --"

13          In other words, you just looked at that list of

14 legacy software.

15          "-- It's not the same as having a full source

16 license for that product, so there is no right, by virtue

17 of the prior products, that you can distribute a

18 stand-alone UnixWare 3.2 derivative work."

19          So what they're telling this Court is:  As a

20 matter of course, we list everything, and because of

21 that, you can distribute it.  You can open source it.

22 But that's not what their own witnesses say, and that's

23 not what the practice is.  The evidence simply does not

24 hold up to it.

25          Reason 4.  Ms. Acheson, yesterday, the CFO of

1 SCO made it clear that when she receives revenues from

2 UnixWare, she books it as UnixWare.  This is what she

3 said:

4     "Q.  How did you book the revenues from Novell's

5 UnixWare licenses?

6     A.   As UnixWare and then what the release was.  In

7 this case, it would have been booked as UnixWare 1.1 or

8 UW 1.1."

9          So, if this really was a UnixWare license where

10 you're selling UnixWare -- that was what these licenses

11 were -- that money, the Sun and Microsoft money, would

12 have been booked as UnixWare revenue, but we know it

13 wasn't.  We know it wasn't because the filings of the SEC

14 expressly do not book it as UnixWare revenue.  They book

15 it as SCOsource licensing revenue.  No doubt about that.

16          And Mr. McBride said he would never make a

17 mistake in an SEC filing, so we asked him about it:

18     "Q.  The products revenue in your Q includes

19 UnixWare licensing revenue, correct?

20     A.   Which means it was a product.  It was a

21 branch."

22          The branch of the tree.

23     "Q.  And that did not include -- that line item from

24 products revenue did not include the Sun and Microsoft

25 revenue, correct?

1      A.   No, it did not."

2           If this was a sale of UnixWare product, a

3 traditional sale of UnixWare product, which is the legacy

4 software, it would have been booked as UnixWare revenue.

5           Reason 5.  Sun already had a license to all of

6 the legacy software.  There was no reason for that to be

7 included in the legacy list or for them to get an

8 additional list that included that software but for one

9 reason, because they wanted to expand the confidentiality

10 agreement, Your Honor.  That's what the Sun 2003 license

11 was about.

12          Reason number 6.  In this very action in this

13 Court, SCO has claimed that it suffered hundreds of

14 millions of dollars of damages due to Novell's challenge

15 to the ownership of the copyrights, the pre-APA

16 copyrights.  And yet, what they would have you believe

17 now is that it's worthless.  They come into Court and

18 they say:  You have challenged our title to those

19 copyrights.  We've been damaged hundreds of millions of

20 dollars.  You have stopped our SCOsource program.

21          That was the guts of this entire case, until

22 now, when they have to explain why they're licensing SVRX

23 revenue to Sun and Microsoft that all of a sudden -- and

24 then they say, oh, no, no, no.  No value, none.

25 Negligible.  Incidental.

1            And item 7, Your Honor, and perhaps most

2 important, is SCO's position now is inconsistent with the

3 position its general counsel took in 2003 in responding

4 to Novell's request to see the Sun and Microsoft

5 licenses.  Mr. LaSala's testimony:

6       "Q.  So, over the -- and then, at some point, the

7 Sun and Microsoft agreements are produced in discovery.

8 That happens.  I'll just set the chronology.  That

9 happens in the winter of 2006.  So, up until that point,

10 did SCO ever comply with your request under these letters

11 that it supply Novell with the Sun and Microsoft

12 agreements?

13      A.   No.

14      Q.   Did it ever comply with the request, pursuant

15 to the audit provisions of the Asset Purchase Agreement,

16 that Novell be allowed to audit SCO's compliance with the

17 Asset Purchase Agreement as it related to the Sun and

18 Microsoft agreements?

19      A.   No.

20      Q.   Did SCO ever tell you, in any communications

21 outside litigation pleadings, in the last year and a half

22 or so, that its theory was these agreements were not SVRX

23 licenses as to which it owed you a payment obligation

24 because the SVRX was only incidental?"

25            Back in 2003, when six different letters were

1 written from Novell to SCO and asked:  Do you want to see

2 the licenses?  No, no, no, no.  Did they ever say it was

3 incidental back then?  No.

4            Well, what did they say?  Well, I asked

5 Mr. McBride:  How are we supposed to understand what your

6 position was back in 2003?  And we asked him.

7      "Q.  So, if we wanted to understand what it was with

8 SCO's response to Novell's request to see the Sun and

9 Microsoft agreements, we have to look at what

10 Mr. Tibbitts said in his letters back to Novell, correct?

11      A.   Again, that would be the place I would go."

12            So, let's go there.  This is the letter of

13 November 21 from Mr. Bench to SCO, asking again for the

14 Sun and Microsoft licenses:

15            "We have completed significant portions of

16            the audit but are still lacking critical

17            information and documentation necessary to

18            finish the audit."

19            And, again, he asked specifically for the

20 Microsoft agreements.  He references Section 4.16(b) of

21 the APA, which has the language.  And he expressly

22 says -- uses the word "incidental," and asks about

23 amendment number 1 in November, 2003.

24            What does Mr. Tibbitts write back on February

25 5, 2004?  Does he say:  Well, the SVRX licenses were

1 incidental.  It was a negligible part of the contract.

2 It had no commercial value.

3          Did he say that in 2003, before the litigation

4 strategies were developed?  No.  Here's what he says:

5               "In your letter, you assert that SCO

6          unilaterally amended and modified SVRX licenses

7          with Sun Microsystems and Microsoft.  You claim

8          this characterization is based on public

9          statements by SCO but do not identify where SCO

10         made these alleged statements.  By your citation

11         to paragraph 4.16(b) of the APA and Section B of

12         amendment number 2, it appears you are concerned

13         about the proper flow of royalty revenues to

14         Novell under the APA.  This is curious to us as

15         we are well aware, as you are well aware, Sun

16         Microsystems bought out its license from Novell

17         in 1994."

18          And here's where he gives what the plan of

19 attack is in 2004:

20               "To the limited extent Novell may have some

21         rights under paragraph 4.16 of the APA to

22         protect its revenue streams from SVRX licenses

23         that were in existence at the time of the APA,

24         those rights do not extend to the new contract

25         with Sun.  The Microsoft agreement is a new

1          agreement, not covered by the APA."

 2           So, they don't say those licenses are only

 3 licensing SVRX incidentally, they say those are new

 4 agreements.  And this Court has already determined that

 5 that defense won't fly, so we see a new one.  And I asked

 6 Mr. McBride if that really was the company's position

 7 back in 2003.

 8      "Q.  So, was it SCO's position back in 2003 that the

 9 reason that Novell was not entitled to these licenses is

10 because these were licenses that were entered into after

11 the date of the APA, correct?

12      A.   Yes."

13          That was then.  New defense now.  So, if the

14 SVRX license grant here truly was incidental to the grant

15 of the most recent version in the Sun agreement, why

16 didn't SCO produce the license in 2003 and just explain

17 it.  Why didn't Mr. Tibbitts say so in his letter?  Why

18 didn't SCO declare its $10,000,000 payment from Sun as

19 UnixWare revenue?  Because the incidental argument is an

20 after-the-fact trial strategy, Your Honor.  It's nothing

21 more.

22          The Microsoft deal.  We are asking for the

23 royalty of Section 2 and Section 4 of the Microsoft deal.

24 Section 2 is a fully paid-up license.  Microsoft, as

25 Mr. Sontag told this Court, was concerned.  Its engineers

1 were concerned that some of the UNIX core IP had made its

2 way into Microsoft products and so he wanted this release

3 and license for all of SCO's IP and for all of

4 Microsoft's products.  And for that they paid a million

5 and a half dollars.

6          And the position now appears to be:  Well, they

7 were really just asking about a UnixWare Release.  They

8 really weren't that concerned about the old technology

9 SVRX, although there is no analysis about what exists in

10 the Microsoft products.  But, given the saber rattling of

11 Mr. McBride, who knows what the accusation would be?

12          And so we asked Mr. Sontag what it was that SCO

13 was concerned about.  And he's the one that talked to Sun

14 during the negotiations part, to Microsoft, what they

15 were concerned about.

16      "Q.  And so Microsoft was concerned that there might

17 be some of SCO's intellectual property in their products,

18 right?

19      A.   Yes, potentially.

20      Q.   And so, at Section 2, they wanted a release

21 that included releases for all of SCO's IP and all of

22 Microsoft's products, right?

23      A.   Yes.

24      Q.   And during negotiations, they expressed concern

25 that they may have inadvertently used SCO's IP in their

1 products, including SVRX code, right?

2    A.    Potentially, yes.

3    Q.    So, part of what Microsoft wanted in the

4 negotiation around Section 2 was the license that

5 protected them against potential claims relating both to

6 UnixWare and to older SVRX technology, right?

7    A.    That was the license that we provided to

8 them.

9    Q.    So the license that was provided to them

10 included both protection against violation of UnixWare

11 and also older UnixWare technology, right?

12    A.    Older UnixWare technology -- "

13          Again, Mr. Sontag, head of Scosource.

14          "-- yes.

15    Q.    And for this release in license, Microsoft paid

16 you $1 1/2 million, right?

17    A.    Yes.

18    Q.    And none of that money was provided to Novell,

19 correct?

20    A.    No, it was not."

21          That's their witness telling you that that

22 release and license in Section 2 relates to SVRX, Your

23 Honor.

24          Section 4.  And here we're talking about the $8

25 million payment in addition to the quarter-million dollar

1 payment up front in order to be able to exercise this

2 right.  And what is the software that was being provided

3 in Section 4 of the Microsoft license?  Here it is,

4 Exhibit C.  Remember in Section 3 of the license, they

5 got the UnixWare license?  Exhibit C expanded that

6 UnixWare license but also provided all of this prior SVRX

7 software.

8          Again, this is totally inconsistent with what

9 they now tell you is their practice to only include prior

10 UnixWare releases in their licenses.  And here it is.

11 And they would have this Court believe that this Section

12 4 grant has nothing to do with SVRX, that it's unrelated,

13 that it's incidental.  What Section C does is grants

14 expansive rights to A, B and C, including rights to

15 sublicense the software, rights that were never ever

16 granted in prior legacy grants in other licenses.

17          And this includes the vast majority of which is

18 listed in Exhibit C is older SVRX.  It's the trunk of the

19 tree.  It's what SCOsource is seeking to mine.  And,

20 again, SCO's defensive claim of incidental licensing is

21 the same one made here, and it should be rejected for the

22 same reasons.  This is not a standard product license.

23 The license in legacy software here is inconsistent with

24 what they tell you their practice has been.  Expansive

25 rights were granted here beyond what were granted before

1 in legacy software.

2        The revenue from this deal also was never

3 reported anywhere as UnixWare revenue in any SEC filing.

4 SCO's position is inconsistent with the position it took

5 in 2003 in the damages they wanted in this case, and it's

6 inconsistent with Mr. Tibbitts' letter.  And, again,

7 their claim that the granting of this software has no

8 commercial value is undermined again that -- by the fact

9 that when they came into this courtroom and they asked

10 for hundreds of millions of dollars, they said that this

11 is why, because we claim that we owned the copyrights to

12 this software.  And that damaged them hundreds of

13 millions of dollars.  Now, when there's a grant to it,

14 they say it's worthless.

15        The other SCOsource licenses.  So, what

16 SCOsource is, is the Sun, the Microsoft license and 23

17 other smaller licenses that we went through with

18 Mr. Sontag.  And these 23 other licenses were granted to

19 Linux users for the privilege of avoiding becoming one of

20 the penguins, for the privilege of avoiding being sued by

21 SCO.  And the total paid here is 1.156 million.

22        And here's an example.  Everyone's Internet

23 paid, I believe, a half a million dollars for this

24 license.  And virtually all the licenses were identical

25 to this.

1          And Mr. Sontag was pretty up front about what
2 they granted, the SCO IP.  What's that mean?  SCO IP
3 means SCO UNIX-based code.  It's at paragraph 1.10.  It's
4 UNIX System IV or UnixWare, UNIX System IV or UnixWare.
5 They are not granting UnixWare, Your Honor.  They are
6 mining the trunk of the tree.  There is no division
7 anywhere of this revenue between UnixWare and UNIX System
8 V.  Simply, as Mr. Hunsaker put it, it's a chance to run
9 Linux and be clean with SCO for all of its IP.  And this
10 is the plan of SCOsource to save the company.  This, too,
11 is revenue that should have been passed to Novell.
12          So, wrapping up, Your Honor, there's no dispute
13 that both the Sun and Microsoft deals, there is a
14 grant -- there are grants of UnixWare rights.  I mean,
15 the documents clearly show that.  And we have done our
16 best to provide to the Court what we believe to be a
17 reasonable breakdown based on the terms of the agreements
18 themselves and the evidence this Court has heard in the
19 last three days.
20          We have conceded the $7 million in Section 3 of
21 the Microsoft deal because that clearly is just a
22 UnixWare license.  But as Mr. James made clear, and the
23 fiduciary law side in our trial brief also establishes,
24 it's SCO's burden to provide an equitable division of the
25 SVRX and SCO UnixWare.  And it shouldn't be done here and

1 now.  It should have been done in 2003, when we sent them

2 six different letters asking for the licenses.  Not now,

3 after years of litigation.  Now, any jump balls go to

4 Novell.

5           But, even now, they don't provide any

6 apportionment.  It simply says we get nothing.  And I

7 think what's telling about that, and telling about that

8 attitude, is Mr. McBride's testimony in this courtroom

9 the other day, in the face of this Court's finding that

10 the Sun and Microsoft licenses are SVRX licenses, its

11 express finding, as a matter of law, that they are SVRX

12 licenses.

13           And this is what Mr. McBride said:

14      "A.  So, my view of those two licenses -- "

15           He's talking about the Sun and Microsoft

16 licenses.

17           "-- was that Novell had no more standing to ask

18 us to produce those licenses to them than the court

19 reporter here has the standing to ask for those.  So, it

20 didn't make any sense that we would send it to them."

21      "Q.  So, it's your position that the court reporter

22 here in this courtroom today has the same standing to ask

23 for those licenses as Novell did in 2003?

24      A.   For the UnixWare licenses with Sun and

25 Microsoft, absolutely correct."

1        Your Honor, Novell here seeks for the Sun

2 license, $9,143,809.  That was the amount that was paid

3 of the $10 million total.

4        For the Microsoft, we seek the revenues that

5 were paid in Section 2 and Section 4, $9,750,000.

6        And for the other license, we ask for all of

7 that money because there has been simply no breakdown

8 between UnixWare and SVRX licenses.  And that's

9 $1,156,110.

10        So, the total that we are asking for from this

11 Court is $19,979,561.

12        We believe that justice and equity would not be

13 served if SCO's litigation-driven characterization of

14 these licenses were allowed to carry the day.  We believe

15 the facts and the evidence and the law do not allow such

16 a result.  Thank you, Your Honor.

17        THE COURT:  Thank you, Mr. Acker.

18        Mr. Singer, you may proceed with your closing

19 argument.

20        MR. SINGER:  Your Honor, would it be possible

21 to have two minutes?

22        THE COURT:  Sure.

23              (Short break.)

24        THE COURT:  You may proceed, Mr. Singer.

25        MR. SINGER:  Thank you.  And, good morning,

1 Your Honor.

2          THE COURT:  Good morning.

3          MR. SINGER:  When Novell moved for summary

4 judgment that some parts of the Microsoft agreement

5 involved an SVRX license, they did so on the basis that

6 there was, listed in that agreement, certain prior

7 products which fell within the schedule of the APA.  They

8 made the same argument with respect to Sun, that certain

9 of the prior products listed in the Sun license were

10 among those listed in the APA.

11          They made no motion about SCOsource being

12 covered with respect to the language entitling Novell to

13 royalties.  And when this Court ruled on their motion for

14 summary judgment, it held that an SVRX license was

15 implicated by the Sun agreement and by the Microsoft

16 agreement because of the inclusion of those certain prior

17 products.

18          It made no ruling with respect to SCOsource Now

19 all we're hearing about is the SCOsource campaign, and we

20 submit that is because the weight of the testimony shows

21 that, with respect to the Sun and Microsoft agreement,

22 their substantial value was in licensing of UnixWare, a

23 license to the current products, a licensing of

24 OpenServer and things which SCO had every right to

25 license and keep, and that no valuation has been

1 established by Novell for those prior products.

2          Let's consider the weight of the testimony in

3 general.  We'll talk about it more specifically as we go

4 along.  During this week, SCO has presented testimony

5 from witnesses who have spent their professional careers

6 working with UNIX, witnesses like John Maciaszek, Bill

7 Broderick and Jean Acheson, with decades of experience in

8 licensing and accounting for the UNIX licenses at USL, at

9 Novell, itself, and then later at Santa Cruz and SCO.

10 Their testimony has been consistent about what the value

11 of those prior products was.

12          On the other side of the ledger, Novell has

13 called two in-house attorneys with no involvement in UNIX

14 licensing.  Only one of them even addresses the valuation

15 issue and simply concludes that, because he doesn't see

16 any apportionment, there should be -- and this is his

17 term -- a forfeiture of all the benefits of those

18 contracts.

19          Now, the undisputed testimony from the

20 witnesses that SCO has called, the witnesses who have

21 been there for decades and licensing these products, is

22 that, first, historically, the prior products were

23 licensed without any additional fee.

24          Second.  There were no substantial commercial

25 sales after new releases became available.  You remember

1 the chart which showed that.

2          Third.  There was no customer demand for those
3 older products, aside from being just included in the
4 latest release.  In fact, the last time a customer paid
5 for any SVRX release at all was in 1996.  And that makes
6 sense when you think about it.  When a company goes to
7 buy software, they want the most recent version, the
8 up-to-date version, and that was UnixWare.

9          Novell offered no contrary evidence whatsoever
10 establishing any value to the prior products.  Instead,
11 they have sought to confuse the issue of the value of
12 those prior products with the value of the older SVRX
13 copyrights.  And those are two separate things.

14          The value of the older SVRX copyrights, the
15 copyrights which we acknowledge the Court has held belong
16 to Novell and were not transferred to SCO, is not an
17 issue before this Court.  We are not valuing the
18 copyrights.  They don't have a royalty on the copyrights.
19 What they have is an entitlement to royalties on certain
20 SVRX products.  And that is what they have had to value,
21 contracts relating to those SVRX licenses as this Court
22 held, and that's what they have not purported to do.

23          Now, in Novell's closing, they talk a lot about
24 how SCOsource was promised to be the salvation of SCO
25 because it was losing millions of dollars.  And there's

1 no question about it.  SCO was losing a lot of money and

2 was not profitable in 2002, largely because of what was

3 happening with Linux in offering a free alternative,

4 using its technology in competition with SCO's UNIX

5 products.

6           What Novell ignores, though, is that SCO was

7 not able to effectively realize on its SCOsource program

8 of dealing with that Linux threat either by licensing

9 because Novell contended it owned the copyrights.  And,

10 at that point, there was very little interest in buying

11 SCOsource licenses, which is why we have only about a

12 million and a half dollars to argue about in that

13 category of true SCOsource licenses and because the Court

14 has found that we did not own the copyrights and, thus,

15 our claim relating to that was dismissed.

16           But that does not mean that, when SCO licensed

17 products to Sun and to Microsoft -- and those were

18 UnixWare and OpenServer licenses -- that those did not

19 have the value established by the testimony and did not

20 constitute the license that the plain language in those

21 agreements establish, which was a license to UnixWare, a

22 license to OpenServer and, to the extent claims were

23 surrendered, those were SCO's claims which SCO had the

24 right to surrender, and not Novell's.

25           Now, one of the issues that has been talked

about a lot throughout this case has been UNIX
technology.  But what the evidence makes clear is that
this core UNIX technology, what Novell likes to talk
about as the trunk of the tree, is in both the SVRX
legacy products and the newer UnixWare products.  That
continues through.  And you've heard, as recently as this
morning, that that technology, the value parts of it,
continue through into UnixWare.

The issue of royalties doesn't turn on whether
SVRX is involved.  The royalties are determined by a
factor of what products are being licensed.  And this
Court's order dealt with contracts relating to a specific
set of SVR products.  There is no order, there is no
right in the APA that any product that might contain any
System V technology means that money goes to Novell.
That type of position would include UnixWare, where it's
clearly established that revenue goes and stays with SCO.

It has been established and it's undisputed
that SCO has the right to distribute UnixWare source
code.  And that UnixWare source code includes the legacy
SVRX source code, without any royalty to Novell.

Now, there was a possibility of a royalty to
Novell.  There was a specific provision in the APA which
called for a royalty on UnixWare, but it's never been
a point of this litigation, Your Honor, because it is

1 recognized that the sales of UnixWare never reached the

2 threshold where a UnixWare royalty would be due to

3 Novell.  And, by its terms, that right ended in 2002, and

4 Novell has not contended that they are entitled to one

5 cent under the UnixWare royalty provision, which was part

6 of the APA.

7           Now, SCO's rights to distribute UnixWare

8 include UnixWare versions initially developed at Novell

9 and sold to Santa Cruz through the APA.  Novell does not

10 contest this.  At times, though, they ask questions to

11 suggest:  Well, was this new technology in UnixWare

12 developed at SCO after the APA?

13          That, we submit, is not a relevant question.

14 We got all the rights to distribute UnixWare.  Our

15 licensing rights with UnixWare were not limited to any

16 new technological advances developed at SCO after the APA

17 was signed.  There is nothing in the agreement that

18 suggests that.  Rather, what Novell retained was a right

19 to royalties pertaining to certain legacy products.

20          Now, there's one other issue, before turning to

21 the specific claims, I'd like to briefly address.  And

22 that is Novell's effort to shift the burden of proof.

23 And that should be rejected.  It should be rejected

24 legally because, in this type of situation, there is no

25 case that says, when you're arguing about what is

1 essentially a contract-based royalty, that one party

2 versus the other should have that burden.  In fact, it's

3 the party, generally, who's seeking that, which would

4 have the burden.

5          And a case that we cited in our papers, that we

6 think is most on point, is the Third Circuit's decision

7 in the Bohler-Uddeholm vs. Ellwood Group case, which is

8 at 247 F.3d 79, and where, in distinguishing between

9 situations where fiduciaries are disputing the fairness

10 of self dealing, where it is appropriate to shift the

11 burden, and where you're talking about interpreting a

12 contract that has implications, and where that contract

13 was entered into before the parties had a fiduciary

14 relationship to one another.

15          And the Court stated that, while it makes

16 perfect sense to place the burden on a fiduciary to

17 explain business actions which benefitted itself over its

18 beneficiary, the same logic does not hold for a breach of

19 contract when there are dueling interpretations of the

20 contract entered into at arm's length by sophisticated

21 corporations who are not in any kind of fiduciary

22 relationship at the time the contract is formed.

23          Now, beyond the law, we think that the whole

24 rationale for shifting the burden of proof went out by

25 omission of Novell because they have not been prejudiced

1 in trying to argue for an apportionment of a royalty

2 because the Sun and Microsoft agreements were not

3 provided in 2003.  They have had those in this

4 litigation.  They have had full rights of discovery.

5 They have had more rights for discovery than they would

6 have under the contract for an audit.

7         For example, if they wanted to, they could have

8 gone out and taken depositions from Microsoft and Sun

9 executives.  Curiously, that they did not do.  The only

10 testimony in this trial about those agreements, the only

11 firsthand testimony comes from SCO witnesses, Mr. Sontag

12 in particular.

13        Now, Mr. LaSala was very candid when I asked

14 him, in terms of calculating the amount of the royalty

15 received in 2003 by SCO, I asked him:  You're not

16 prejudiced in any way now in your ability to argue what

17 part of that belongs to Novell.

18        And he said:  I think that's probably correct.

19        And that's really also embraced in Your Honor's

20 ruling denying the accounting last year because the Court

21 said that, through discovery, the information Novell

22 needs could be obtained.

23        So this is not a case where Novell can prevail

24 on the basis of the burden of proof.  We think they have

25 it.  We think, even if we had it, we have been the party

1 that has discharged it by virtue of the evidence we have

2 presented.

3          Now, there are three are substantial issues

4 which I think both sides have agreed upon that require

5 the Court's resolution:  What is the value -- what

6 components of the Microsoft and Sun agreements are SVRX

7 licenses and what value to attribute to them.

8          Second.  Whether parts of the SCOsource

9 agreements are SVRX licenses and, if so, what value to

10 attribute to them.

11          And third.  Whether SCO had the authority to

12 enter into those agreements.

13          I'd like to discuss each of those topics.  Now,

14 with respect to the first, it's important to identify

15 that there are four separate revenue streams that are at

16 issue.  One of those is Section 2 of the Microsoft

17 agreement, which was the release.  And that's the million

18 and a half dollars.  The second is where a UnixWare

19 license was provided in Section 4, a broader UnixWare

20 license, and where the prior products are listed.  And

21 that is 8.25 million.  At one time Section 3 was on this

22 list, and Novell's -- I think the way Novell

23 characterized it in closing is very accurate.

24          There was clearly no basis to argue for that

25 because it was a UnixWare license, and it's not an

1 apportionment when they gave it to us.  It's not an

2 argument that should have been advanced in the first

3 place.

4          So, we have two sections of the Microsoft

5 agreement and then we have Section 4 of the Sun

6 agreement, which is the licensing provision there, and

7 the value there is 10 million.  And then the rest of the

8 licenses, the so-called SCOsource licenses to protect

9 Linux users against SCOsource intellectual property

10 claims, that's about $1.15 million.

11          And it's important to deal with these

12 agreements separately because they are not all the same.

13 Now, it's true SCO accounted for the money in the

14 SCOsource division, but that SCOsource division does not

15 mean that that revenue is an SVRX royalty that flows

16 through to Novell.  It simply meant these were not

17 licensed like other UnixWare products in the ordinary

18 course of that division.  You had a separate division

19 that cut these deals, and it was accounted for in a very

20 accurate manner.

21          What's important is to look at the licenses

22 because they are radically different.  The Sun and the

23 Microsoft agreements provide actual UnixWare licenses.

24 It's in the plain language of the agreements, and it's

25 never been contested.  And they did so at a time where

1 SCO had the right to license parties to make full use of

2 that UnixWare source code including any older SVRX code,

3 without any requirement of apportionment.

4          And then the SCOsource licenses with other

5 parties involved licenses of IP and releases that are not

6 tied to providing a UnixWare license, and we don't think

7 they get that revenue either, in the second category, but

8 when they are talking about SCOsource licenses and

9 penguins and all that, it's really just this second

10 category that's at issue.

11          I'd like to deal with each of these four

12 revenue streams, Your Honor.  The first is our position

13 that only a de minimus amount of the Section 4 Microsoft

14 fees should be allocated to the legacy SVRX products.

15          Now, Section 4 gave Microsoft something they

16 previously did not enjoy.  In fact, the whole agreement

17 gave Microsoft a UnixWare license they did not have.

18 Section 3 gave certain basic rights, limited to certain

19 products.  And it was Section 4 that expanded that to

20 allow Microsoft to use UnixWare technology, which means

21 all the earlier technology that's carried on and that's

22 in UnixWare in its prior -- in any of its products.

23          As Mr. Sontag testified, this was a significant

24 expansion of their rights for how they could utilize that

25 UnixWare source code.  It was now all of Microsoft's

1 products, in millions and millions of products, and that

2 was a substantial expansion in how they could use that

3 UnixWare technology.  There has been no contradictory

4 testimony on that point.

5           Microsoft also received a unique license to

6 OpenServer source code, which was a product that actually

7 accounted for two-thirds of SCO's revenue stream.  They

8 had never had the source code license before until this

9 Microsoft agreement.  And that has substantial value, and

10 there has been no contradiction on that point either.

11          Now, the one witness who dealt directly with

12 Microsoft and Sun who testified here was Mr. Sontag.  He

13 negotiated that transaction.  Mr. Sontag indicated, with

14 respect to the Microsoft deal, that what they wanted was

15 to develop UNIX compatibility with Microsoft Windows.

16 And he also said it allowed Microsoft to have the ability

17 to have compatibility with a broad range of OpenServer

18 applications.  This wasn't a Linux/SCOsource transaction.

19 This was a transaction where Microsoft wanted broader

20 compatibility with UNIX, and they obtained a license to

21 do so.

22          And I submit to you that, if Mr. Sontag's

23 testimony was not an accurate view of the purpose of this

24 transaction, that Novell would have pursued depositions

25 and brought in testimony from Microsoft and Sun to

1 dispute that, which they did not do.  Mr. Sontag also

2 testified that Microsoft had little interest in the prior

3 outdated versions of System V.  He was asked directly

4 about his view as to the relative value of the SVRX

5 component of the agreement, and he said it was

6 insignificant.

7          It was licensed as a matter of course, but he

8 didn't believe that Sun or Microsoft was valuing it at

9 all.  What they were valuing was the UnixWare source

10 code, the UnixWare binary distribution rights and broad

11 distribution rights and OpenServer source code

12 distribution rights.  And, in fact, Mr. Petersen

13 testified yesterday that, when there were certain older

14 products, they weren't even able to give them the code

15 because they couldn't find it, that wasn't even an issue

16 and no adjustment of price was made.

17          Now, this comports with the well-established

18 practice involving UNIX products where the prior products

19 were licensed along with the current release at no

20 additional charge.  And you've heard testimony from a

21 number of witnesses on that.  Mr. Sontag, Mr. Maciaszek,

22 who said that's the standard practice going back to AT&T

23 days, to grant the right to use prior products as part of

24 the new product.  And Mr. Maciaszek said -- he was asked

25 whether they were asked anything extra.  And his answer

1 was, quote, "absolutely not."

2          Mr. Broderick's testimony is consistent with
3 that, as is Ms. Acheson's.  There is no contradictory
4 testimony.

5          There is also documentary proof on that point.
6 We have seen comparisons of licenses on, from one hand,
7 UNIX and, one hand, ALPS, which, for some reason, didn't
8 want the prior products.  And the amount of UnixWare
9 license was exactly the same.  That was this
10 demonstrative which was used in opening and throughout
11 the trial

12          Now, what has Novell sought to do with this
13 testimony?  They certainly don't have any witnesses that
14 have contradicted it.  Instead, they have tried to
15 suggest that the practice was limited to prior products
16 purchased by the licensee.  That's what was said in the
17 opening.  Well, there is no support in the evidence for
18 that, that you only got the prior products if you had a
19 prior license to it.  In fact, Mr. Maciaszek and
20 Mr. Broderick denied that.  This is the chart that we
21 have looked at.

22          And the other point that they have raised is:
23 Well, you didn't get the same amount of rights.  And they
24 quote Mr. Broderick's testimony that, if you built a
25 derivative on that, you didn't get the full source code

1 rights.  And what Mr. Broderick is saying, and what he

2 made clear in his testimony is that if you used one of

3 the earlier versions in the license to base a product,

4 then you still had to, if you didn't have that earlier

5 license, pay the binary royalties for the current

6 release.  And quoting from the testimony yesterday where

7 he said:

8            "If somebody took a 2.0 license and they

9            accessed the prior products and they built a

10           derivative by accessing the prior products in

11           the UnixWare license, then they could distribute

12           the derivative, work, but they would pay off the

13           UnixWare license."

14           So, the practice was not limited to a few

15 situations where you had a long history of licensing

16 prior products for value.  As all witnesses testified, it

17 came automatically.  It provided for source code rights.

18           And what's the other thing that Novell has said

19 this morning?  They said:  Well, that practice changed

20 when UnixWare only listed a couple of UnixWare prior

21 products.  But that's not quite what the testimony said.

22 The testimony from Mr. Maciaszek and Mr. Broderick is

23 that we stopped listing those, but any customer who

24 wanted the earlier products that went beyond, back beyond

25 the UnixWare days, only had to ask for them.  But no one

1 bothered to ask because they weren't interested.  There

2 was no extra price for those.  There was simply no demand

3 for those.

4           So, in addition to that practice, you also have

5 undisputed testimony that Novell never sought an

6 allocation of royalties on those prior products.  They

7 didn't do it in their prior audits of Santa Cruz, and

8 they never sought an allocation for other UnixWare

9 agreements which did include those prior products.  So,

10 why should Sun and Microsoft be different?

11           Now, this is Mr. Maciaszek's testimony

12 indicating that the royalty was not allocated on whether

13 technology from prior products was included, it was

14 always based on the current product.

15           I'd like to address now the Section 2 fee with

16 respect to Microsoft.  This is the million and a half

17 dollars that relates to the release language.  And what,

18 exactly, does the contract say?  Section 2.1 is a release

19 by SCO to Microsoft of any and all claims.  It is SCO's

20 claims that are released.  This is an issue that Novell

21 has refused to deal with from the opening, until now,

22 throughout the trial and to the closing.

23           This is not a release by definition of Novell's

24 claims.  It's a release of SCO's claims, and thus SCO had

25 a right to do it.

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 1            Now, Section 2.2 grants a license to all

 2  intellectual property rights owned or licensable by SCO.

 3  So it is still limited to what SCO has a right to do.

 4  And this, of course, didn't even involve Linux issues.

 5  This was Microsoft's products and whether there was any

 6  intellectual property concerns that SCO might have with

 7  how UNIX technology was being used in its products.  SCO

 8  released and licensed its rights.  That $1.5 million does

 9  not require any allocation.

10            Now I'd like to turn to the Sun agreement.  And

11  I would maintain there, too, only a de minimus amount of

12  the Sun $10 million payment should be allocated to the

13  older SVRX products.  But it's important with respect to

14  Sun, we think, to put this in the perspective of history,

15  that the Sun agreement did not just come out of nowhere.

16  In 1994 Sun bought out the royalties with respect to

17  these legacy SVRX products.  They paid $82.5 million for

18  those and the substantial source code rights they

19  received in 1994.  And every dollar of that went to

20  Novell.

21            And, you know, when Mr. Acker is referring to

22  the fact that Novell -- or, rather, Sun could develop

23  products based on that source code, Novell was well paid

24  for that.  It was the $82.5 million for those legacy

25  products.
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1          We then come to 2003.  We had a period of time

2 of nine years, but Sun had not licensed UnixWare during

3 that time.  They wanted a UnixWare license because it

4 would be valuable.  Again, Mr. Sontag negotiated a deal.

5 And he testified.

6          "The most important thing they --" Sun "--

7          were asking for was the ability to quickly take

8          the Solaris product and make it available on an

9          Intel-compatible platform, which they would be

10         able to do with a UnixWare 7.1.3 source code

11         license and the software drivers for UnixWare."

12          Now, in addition to the source code in 2003,

13 Sun received UnixWare and OpenServer drivers.  None of

14 that is allocated.  Of course Novell puts not one dollar

15 of value on the OpenServer rights, the UnixWare rights or

16 the drivers.  They say all of this should be allocated to

17 them.  They point out that they received copies of the

18 same list of legacy products that were in the '94

19 agreement, but under Section 1.2, SCO was entitled to

20 sell Sun additional source code copies for those products

21 that were in the '94 list and retain the fees from that.

22          So, the only thing which Sun has a right to is

23 any value that is related uniquely to these older

24 products which were included, the seven prior products or

25 five prior products added by the 2003 license.  Did they

have any value?  Well, certainly Novell has not shown

any.  Mr. Nagle testified that UnixWare does encompass

all the valuable code from those few additional System V

products, including Solaris specifically.

Now, the one attempt during trial that Novell

made to try to include that was a list of open source

Solaris products that they downloaded.  I think Mr. Jones

testified about that.  And Mr. Petersen's trial testimony

was that every one of the 21 source files that Novell

introduced into evidence from OpenSolaris also appeared

in UnixWare.  There is no testimony that Sun wanted or

that it received anything in those five legacy products

that it didn't have in UnixWare.

The one further point that Novell seeks to make

is that, well, there was a relaxation of confidentiality

provisions in the 2003 agreement as to what you could do

with the source code.  And we submit that is not a basis

for allocating any substantial value to the SVRX

component there.  First of all because Sun already had

substantial rights in the 1994 agreement.  That agreement

allowed them to sublicense the source code and to have

those sublicensees sublicense it to their customers.

Mr. Sontag testified that that could have a

thousand, a million.  They could sublicense that source

code to their customers, and by sublicensing source code,

1 he means those customers get to look at the source code.

2 They get not just to look at it, but they can use it to

3 make derivative products.

4        So, what did the 2003 agreement add to that?

5 Not much.  Mr. Sontag testified that Sun believed that

6 they had almost all they needed or had all the rights

7 that they needed and that, to the extent that there was

8 an ability under the 2003 agreement to show that source

9 code to others, to open-source it, it was limited by a

10 provision that said that was for value.  So, Sun could

11 not take the source code and do what Linux is doing and

12 distribute it under the GPL and let people use that

13 without being distributed for value at a price.

14        One other point about the change in the

15 confidentiality provisions.  Those changes related to

16 UnixWare, and there is no showing that there is any

17 incremental value in the change in confidentiality as it

18 related to whatever technology -- none of which Novell

19 has been able to successfully identify -- that appeared

20 in the prior legacy products that was not carried forth

21 in the UnixWare.

22        So we submit there is no basis for that small

23 piece to receive anything but a de minimus valuation.

24        The fourth area are the other SCOsource

25 agreements.  And there, we submit, those are not SVRX

1 licenses within the meaning of the APA which, of course,

2 is an issue this Court has not previously determined.

3          What are those agreements?  They Release SCO

4 claims, not Novell claims, by their terms.  And we quote

5 one example, Novell Exhibit 300:

6          "SCO wishes to grant and licensee wishes to

7          obtain certain limited rights in licenses to use

8          the SCO IP."

9          And later it provides that SCO shall not bring

10 any legal action alleging infringement of any SCO IP by

11 the licensee.  That's a release of SCO's claims.  It

12 doesn't prejudice Novell.  If they want to take the

13 copyrights that the Court has found it has owned, and if

14 that is maintained, and they want to go out and pursue

15 the people who had a release here under the SCOsource

16 agreement, I don't think it goes very far to say:  Well,

17 SCO released its claims.

18          None of that value flows through to Novell.

19 It's not much because of the actions they have taken, but

20 that $1.15 million stays with SCO.  And, in fact, the

21 uncertainly of SCO's claims is recognized in the

22 agreement itself.  We cite three of them, which are in

23 evidence, where it indicates that the customer recognizes

24 that you're aware that these claims are in litigation,

25 aware that SCO has not made representations with respect

1 to the outcome of that litigation.  No representations or

2 guaranties with respect to that.  You're basically

3 getting an insurance policy from SCO.

4          And that's what the people were paying for.

5 And that is not an SVRX license within the meaning of the

6 APA.  And, in fact, to the extent the APA bears on this

7 issue, it is the language in the APA which assigned

8 Novell's claims to the buyer, that claims arising after

9 the closing date against any parties related to any

10 right, property or asset included in the business goes to

11 SCO.

12          So, even aside from the fact that by their

13 terms these agreements only release SCO claims, the APA

14 gave Novell's claims relating to the business to SCO.

15          And, finally, the SCOsource concerns, as the

16 Court is aware from the testimony in the case, are not

17 limited to the legacy System V technology.  Sure, that's

18 a major part of it, but it extends to UnixWare and

19 OpenServer libraries and rights there.  And that is true

20 from a variety of documents in evidence going back to the

21 initiation of the program which talked about UnixWare and

22 OpenServer.

23          Now, I'd like to address one more issue with

24 respect to apportionment.  It is our firm belief that the

25 correct apportionment is a de minimus amount on the

1 components in the Sun agreement and Section 4 in the

2 Microsoft agreement and not at all for Section 2 or the

3 SCOsource licenses because those are not SVRX agreements.

4         There's certainly no basis in the evidence for

5 Novell's apportionment, which is, except for one section

6 which had nothing do with SVRX that they dropped their

7 claims to, to say they want everything else.  That's not

8 an apportionment.  But we would submit that what they

9 have suggested in supporting that is simply counting the

10 number of software products up, and that is not any basis

11 for valuation, so a de minimus value is the appropriate

12 valuation.

13         But there is a ceiling valuation which is also

14 found in the evidence which goes beyond a de minimus

15 amount.  And that came out of Mr. Broderick's testimony

16 because he testified that, even if you go back to the

17 time when these prior products were being licensed for

18 value, when they were current -- remember, Mr. Normand

19 took him through each of those on the screen, on the

20 ELMO -- and he said how much each of those products would

21 be licensed for.

22         And those amounts came up to 700,000 for Sun

23 and 1.249 million for Microsoft, plus another 700,000 if

24 you included in the Microsoft column certain products

25 which they had a right to but never received the copies.

1  This was the handwriting on that exhibit, 700,000 in the

2  Sun column, 1.249 million in the Microsoft column.

3           But those, of course, are the dollar values

4  back at the date when those were currently being

5  licensed, when there was market demand for them during

6  these respective periods.  And when these new products

7  came out, there was no longer a demand in the market, a

8  market value to those products.  So, this has to be

9  considered, we submit, a ceiling on any valuation.

10          Now, what does Novell say about that?  They

11 say:  Well, we've got broader disclosure rights for these

12 legacy products in the Sun agreement than you would have

13 gotten back when you were paying this amount.

14          Well, that's true, but you had that broader

15 disclosure right for the UnixWare product, so there's no

16 incremental value shown to that disclosure right for

17 these prior products.  And this, which is the actual

18 amount that these products were sold for, should be

19 regarded as a ceiling on any valuation.

20          Now, there's one other source of evidence

21 that the Court might look at in terms of value.  And that

22 relates to what Novell did concede in Section 3, where

23 Section 3 of the Microsoft agreement was priced at $7

24 million, which was a UnixWare license.  And there was

25 undisputed testimony at trial from Mr. Sontag, and

1 Mr. Jones agreed with it, that the SunWare/UnixWare

2 rights are at least as valuable as those procured by

3 microsoft in Section 3 of its licenses for $7 million.

4          So, if you take that $7 million out of the $10

5 million that Sun paid, you have a total, a ceiling of $3

6 million in Sun licenses to allocate among the drivers and

7 any prior products.  So that's another place where a

8 ceiling on allocation can be derived from the evidence.

9          Now I'd like to turn to the last issue which

10 the Court must decide, which is the issue of authority.

11 Now, Mr. Normand argued, as the Court will remember, that

12 there is a fundamental contradiction, an inconsistency by

13 the pleadings, where Novell, on the one hand, has

14 rejected these agreements as being unauthorized, and yet,

15 on the other hand, wants the royalties from them as

16 though they were authorized.

17          But the Court doesn't even need to resolve that

18 issue if it accepts SCO's position, which is that these

19 were fully authorized; that with respect to the Microsoft

20 and Sun provisions insofar as they had a licensing

21 component that touched on SVRX, that was incidental to

22 the UnixWare license.

23          And we provided two definitions of "incidental"

24 that support that, which are dictionary definitions and

25 case law definitions, one of them being whether something

1 depends upon or appertains to something else as primary,

2 just as these prior products pertain to UnixWare as

3 primary; or a minor value, which would also be applicable

4 here.

5          But the best evidence that this was incidental

6 actually comes from, as we'll see in a moment,

7 Mr. Broderick's testimony that there was instruction

8 provided by Novell as to this being exactly what the term

9 "incremental" meant in the APA.  What does Novell say

10 about that?

11          The primary thing it said in closing, was that,

12 well, you didn't advance this argument, SCO, when we

13 wrote Mr. Tibbitts in 2003 and said:  Give us these

14 documents and tell us what your position is.

15          But what they ignored is that SCO's position,

16 as articulated by Mr. Tibbitts and defended in this

17 litigation, was principally -- our first line position

18 was these were not SVRX licenses at all because the

19 meaning of the APA on SVRX licenses meant only the old

20 licenses prior to the date of the APA and not new

21 agreements like these entered into in 2003.

22          When we got into litigation, we had a fall-back

23 position.  The Court, in its summary judgment order,

24 rejected our primary position.  That doesn't mean that

25 second position, that these, to the extent that they

1 implicate SVRX, are not incidentally licensed along with

2 UnixWare.  And that's a fully preserved position in the

3 pleadings and in all of the arguments.

4            Now, what did Mr. Broderick say?  He was asked

5 about the time when Novell sat down and they all talked

6 about the licensing of these products.  And he says:

7            "We could license SVRX incidentally.  And we

8            asked:  What's incidentally?  And they said:

9            Well, the major part of this, if you take a

10           look, if you license the source code, the

11           license fees when they first started being used

12           always included prior products of the legacy

13           products.  You will continue to use those same

14           types of licenses.  You'll continue to include

15           that legacy prior products.  And that's an

16           example of an incidental right."

17           There could not be stronger evidence -- and

18 this evidence is not disputed -- that operationally

19 defines a term in a contract by how the parties

20 understood it and discussed it when it became relevant to

21 do so.

22           As I mentioned, there was an undisputed

23 historical practice of licensing those prior products

24 incidental to the current release that no fewer than five

25 different witnesses testified.

1          Now, in its opening, Mr. Jacobs for Novell said

2 that we actually kind of agree with SCO that these

3 examples of incidental SVRX licenses through UNIX

4 licenses is what incidental licensing means.  But he

5 suggested at that time that those were different from Sun

6 and Microsoft because people like NCR had paid value for

7 each of those releases.

8          But the testimony this week has shown that the

9 practice of SCO and its predecessors consistently has

10 been to license the prior products, regardless of whether

11 or not that was a licensee who had 112 supplements or

12 just came in for the first time to license the product,

13 the current product, you would still get the legacy

14 products.  For example.  Mr. Maciaszek was asked.

15          "Did NCR's rights to make use of prior

16          software set forth in this license depend, in

17          any way, on the fact that there were 112

18          supplements?"

19          "His answer:  Absolutely not."

20          Mr. Broderick gave two examples, Super Computer

21 and LEXIS software, where they came in, didn't have prior

22 licenses for value, bought a UnixWare 2.0 license and

23 obtained the prior products with it.

24          And remember that, while these are not all

25 listed out, there is uncontradicted testimony now that if

1 anyone today, even, wanted to come in and for some reason

2 wanted a prior product that went back before UnixWare,

3 that would be provided.  There's just no demand for it.

4          Now, there's one additional argument that

5 Novell has made about the Sun agreement, and I'm not

6 going to belabor this because this was argued to the

7 Court on the summary judgment motion.  And that's the

8 suggestion that amendment number 2 prevented SCO from

9 acting without Novell's approval because it related to a

10 buyout.  And amendment number 2 specifically says that

11 Novell may not prevent SCO from exercising its rights

12 with respect to source code in accordance with the

13 agreement.

14          In addition, there's no effect on the '94

15 buyout of Sun's royalty obligation.  The '94 agreement

16 was referenced, but nothing changed regarding that, so it

17 should not be held to apply to amendment number 2.  In

18 fact, there is additional evidence that came in at trial

19 that's very important on these issues.  And that is that,

20 back at the time of the APA, Novell told both Sun and

21 Microsoft that they should deal with SCO as the assignee

22 of UNIX rights, which is consistent with our position.

23          As to the language that says you can't prevent

24 SCO from exercising its rights with respect to source

25 code, the only argument that Mr. Jacobs made the other

1 day was that, well, it's sort of circular, that Novell

2 would actually read that provision out of the agreement,

3 would give it no meaning at all.  So, either because the

4 2003 agreement didn't change the '94 buyout in any

5 substantial fashion or because of this exclusion, there

6 was no need for -- with respect to the Sun agreement, for

7 Novell's approval to be obtained.

8          With respect to the SCOsource agreements,

9 that's also the case because they only released SCO

10 claims and licensed SCO IP and, therefore, no Novell

11 authority is required.

12          In addition, with respect to the SCOsource

13 agreements, Novell, we maintain, should be estopped from

14 contending that their approval is required.  And this

15 goes back to what the testimony showed was the whole

16 dialogue that occurred in late 2002 and early 2003

17 between Mr. McBride and Mr. Jones and people at Novell.

18 And Mr. Jones tried to suggest they really didn't

19 understand what was being involved in SCOsource

20 licensing.

21          And we think think their e-mails show that's

22 not really the case.  The November 15, 2002 e-mail, SCO

23 Exhibit 398 indicates that the purpose for the IP

24 tracking is to help SCO understand its IP rights; that

25 this relates to a conversation with Darl a few weeks ago

1 in which he expressed his interest in pursuing Linux

2 users who may be using misappropriated UNIX code.

3          Also in 2002, you had Exhibits 399 and 400

4 which show that Novell knew SCOsource involved pursuit of

5 of UNIX claims.

6          And, in response to that, did Novell ever say:

7 SCO, we own those rights.  You can't do this.

8          Never happened.

9          Did it ever say:  If you go forward with the

10 SCOsource licenses, we get the revenue.

11          Never happened.

12          That is a sufficient basis in the evidence for

13 estoppel.

14          Now, Your Honor, in this case you have had the

15 opportunity to listen principally to witnesses who have

16 spent a large part of their professional career on the

17 development of UNIX technology, either from a technology

18 side or from a marketing side or from a licensing side.

19 Their testimony is consistent.  These are individuals

20 whose legacy has been the development of UNIX software.

21 To suggest, as Novell has, that UnixWare doesn't mean

22 anything; that these prior products, because of code, had

23 some value and the SCOsource claim is what this value

24 should be given is flatly contradicted by the testimony

25 of these witnesses.

1 And, on the other side of the ledger, you have

2 Novell's in-house counsel, a gentleman who had no

3 involvement in the events in question, who admits in

4 testimony that what he has done in claiming all of it is

5 not an objective assessment of value, does not reflect

6 any type of economic value or analysis or anything of

7 that nature, but is, in reality, a forfeiture.

8 We don't think a forfeiture is what this Court

9 is in the business of awarding.  Thank you, Your Honor.

10 THE COURT:  Thank you, Mr. Singer.

11 Did you want to say something, Mr. Jacobs?

12 MR. JACOBS:  At your pleasure, Your Honor.  I'm

13 all into getting those documents submitted.

14 THE COURT:  Thank you.  We'll take care of

15 these exhibit matters in a minute, and I'll try to get a

16 decision out without undue delay, reasonably, as quickly

17 as I can.  I know that there are many important reasons

18 for that.

19 Now, where are we on the exhibits?  We need

20 somebody on each side to compare with Kim's list on

21 what's in and what isn't and then clean up anything that

22 needs to come in that isn't

23 MR. JACOBS:  On the first point, I think our

24 legal assistants will be doing that, Your Honor.

25 THE COURT:  All right.  Well, let's have them.

1          You have got your list, Kim?

2          THE CLERK:  Yes.

3          MR. JACOBS:  Your Honor, we would like to move

4 the following exhibits into evidence, and we can flash

5 them on the screen or hand them out, whatever would be

6 most efficient.

7          MR. SINGER:  These documents are not previously

8 moved?

9          MR. JACOBS:  Correct.

10          THE COURT:  Are they on the list?

11          MR. JACOBS:  They are on the list, Your

12 Honor.

13          THE COURT:  But they weren't admitted by

14 stipulation?

15          MR. JACOBS:  That's correct.

16          THE COURT:  Let's see where we are on them.

17          MR. JACOBS:  Novell Exhibit 33.

18          THE COURT:  Thirty-three?

19          MR. JACOBS:  Yes.

20          MR. NORMAND:  Your Honor, shall we do these

21 one-by-one?  Do you want me to speak into the record?

22          THE COURT:  Well, I need to know if there is

23 any objection.

24          MR. NORMAND:  No objection to this exhibit,

25 Your Honor.

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 1            THE COURT:  Thirty-three?  Novell 33 is in.

 2         (Novell Exhibit 33 received in evidence.)

 3            MR. JACOBS:  Novell Exhibit 48.

 4            THE COURT:  Any objection?

 5            MR. NORMAND:  No objection.

 6            THE COURT:  Novell 48 is in.

 7         (Novell Exhibit 48 received in evidence.)

 8            MR. JACOBS:  Novell Exhibit 172.

 9            MR. NORMAND:  We object to the admission of

10 this document, Your Honor.

11            THE COURT:  Nobody testified about this, did

12 they?

13            MR. JACOBS:  That's correct, Your Honor.

14            THE COURT:  Okay.  I'm not admitting that one.

15 172 is not received.

16            MR. JACOBS:  And the same with proposed Novell

17 Exhibit 176, Your Honor.

18            THE COURT:  176?

19            MR. NORMAND:  Same objection, Your Honor.

20            THE COURT:  Let me see it so I don't have to go

21 blind looking at the screen.  This is 176?

22            MR. JACOBS:  Correct, Your Honor.

23            THE COURT:  Same ruling.  It's not admitted.

24            MR. JACOBS:  Novell Exhibit 186.

25            THE COURT:  186?
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1          MR. JACOBS:  Yes.  This is a press release from

2 Sun announcing the OpenSolaris program -- I'm sorry,

3 announcing the agreement with SCO.

4          MR. NORMAND:  We don't have an objection, Your

5 Honor.

6          THE COURT:  186 is received.

7          (Novell Exhibit 186 received in evidence.)

8          MR. JACOBS:  Novell Exhibit 327 is one that was

9 the subject of testimony, Your Honor.

10          THE COURT:  Which one is it?

11          MR. JACOBS:  327.  And I just forgot to move it

12 in at the time.

13          MR. NORMAND:  No objection, Your Honor.

14          THE COURT:  327 is received.

15          (Novell Exhibit 327 received in evidence.)

16          MR. JACOBS:  Your Honor, we'd like to move in a

17 series of expert reports from SCO's experts in this

18 litigation and the IBM litigation for the limited purpose

19 of showing that SCO attributed, through its experts,

20 substantial value to System V Release 4 copyright rights

21 and System V Release 4 code.  That would be Novell

22 Exhibits 350, 356, 380, 437 and 438.  All of those are

23 expert reports from SCO experts in this and the IBM

24 litigation.

25          MR. NORMAND:  Your Honor, no objection on the

1 basis of the representation regarding the limited

2 purpose.  And, I apologize, I don't think counsel has

3 discussed this.  These are all confidential.  And

4 although we were able to reach agreement as to the other

5 documents that have been admitted to date, these are

6 confidential.

7         MR. JACOBS:  We have no problem with submitting

8 them under seal, Your Honor, and making those

9 arrangements.

10         THE COURT:  All right.  Tell me what they are,

11 again.

12         MR. JACOBS:  These are all Novell.

13         THE COURT:  350?

14         MR. JACOBS:  356 -- excuse me.  Let me start

15 over.  350, 356, 380, 437 and 438.

16         THE COURT:  All right.  Those are admitted

17 under seal, for the limited purpose you described,

18 Mr. Jacobs.

19         (Novell Exhibits 350, 356, 380, 437 and 438

20         received in evidence.)

21         MR. JACOBS:  And that's it, Your Honor.

22         THE COURT:  Thank you.

23         MR. NORMAND:  We don't have anything, Your

24 Honor.

25         THE COURT:  All right.

1          MR. NORMAND:  I'm sorry.  I did mention, as I

2 mentioned this morning, the two A exhibits, but I think

3 that's been taken care of.

4          THE COURT:  Yes.  That has been taken care of.

5          MR. SINGER:  We have -- I didn't hand this out

6 before, but these are the slides shown in the closing.

7          THE COURT:  All right.  Thank you.

8          Now, do we have agreement on what's in and what

9 isn't?

10          MR. JACOBS:  We have no disagreement.  Let's

11 put it that way, Your Honor.

12          MR. NORMAND:  We understand we should go

13 through with Ms. Jones and check, and if anything comes

14 up --

15          THE COURT:  All right.  Check with her, then,

16 and we'll generally be in recess.

17          MR. JACOBS:  Thank you.

18          MR. NORMAND:  Thank you, Your Honor.

19                    (Short break.)

20          THE COURT:  Go ahead.

21          MR. MELAUGH:  Your Honor, we are going to move

22 into evidence two exhibits from Novell and one from SCO,

23 as I understand it.  Novell moves into evidence Novell

24 Exhibit 279 and Novell Exhibit 428.

25          THE COURT:  Any objection?

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1          MR. GONZALEZ:  No, Your Honor.

2          THE COURT:  They are admitted.

3    (Novell Exhibits 279 and 428 received in evidence.)

4          MR. GONZALEZ:  And SCO moves into evidence SCO

5 Exhibit 0050.

6          THE COURT:  Any objection?

7          MR. MELAUGH:  No, Your Honor.

8          THE COURT:  It's admitted.

9          (SCO Exhibit 0050 received in evidence.)

10         MR. GONZALEZ:  Thank you, Your Honor.

11         MR. MELAUGH:  Thank you, Your Honor.

12         THE COURT:  Thank you

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24      (Whereupon the proceedings were concluded.)

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