

# EXHIBIT 18A

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC.,  
Plaintiff and  
Counterclaim Defendant,

COPY

vs.

C.A. No. 2:04CV00139

NOVELL, INC.,  
Defendant and  
Counterclaim Plaintiff.

Deposition of  
DOUGLAS MICHELS  
March 28, 2007

Reported by  
Katherine E. Lauster  
CSR 1894

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1 BE IT REMEMBERED that, pursuant to the laws  
2 governing the taking and use of depositions, and on  
3 March 28, 2007, commencing at 10:16 a.m. thereof, at the  
4 Scotts Valley Hilton Hotel, Board Room I, 6001 La  
5 Madrona Drive, Santa Cruz, California, before me,  
6 KATHERINE E. LAUSTER, a Certified Shorthand Reporter in  
7 the State of California personally appeared

8 DOUGLAS MICHELS,  
9 called as a witness by the defendant and counter- claim  
10 plaintiff, who, being by me first duly sworn, was  
11 examined and testified as is hereinafter set forth.

12 BOIES, SCHILLER & FLEXNER, LLP, 333 Main  
13 Street, Armonk, New York 10504, represented by EDWARD J.  
14 NORMAND, Attorney at Law, and RYAN E. TIBBITTS, 355  
15 South 520 West, Suite 100, Lindon, Utah 84042, Attorney  
16 at Law, appeared as counsel on behalf of plaintiff and  
17 counterclaim defendant, SCO Group, Inc.

18 MORRISON & FOERSTER, LLP, 425 Market Street,  
19 San Francisco, California 94105-2482, represented by  
20 DAVID E. MELAUGH, Attorney at Law, appeared as counsel  
21 on behalf of defendant and counterclaim plaintiff,  
22 Novell, Inc.

23 ALSO PRESENT: Thomas Strong, Paralegal,  
24 Boies, Schiller & Flexner, LLP; and  
25 Joseph A. Mourgos, Videographer.

1 answers. This reporter here will take down everything,  
2 and as you know, you're being videotaped.

3 It's important that we try not to talk over  
4 each other, so that the reporter can take down what each  
5 of us says. It's also important that we keep our  
6 conversation verbal, as opposed to nods of the head or  
7 shrugs of the shoulder, so that she can take down  
8 everything. Do you understand?

9 A. Yes, I do.

10 Q. Now, my purpose here today isn't to try to  
11 trick you or trip you up. So if there's ever anything I  
12 say that you don't understand, please just let me know,  
13 and I'll try and rephrase the question or clarify my  
14 question. Do you understand?

15 A. Sure.

16 Q. The next thing, I'm going to use the term  
17 "SCO" today to refer both to the entity that's the  
18 plaintiff in this action, and to the corporate entities  
19 that it claims as its predecessors. If there's ever a  
20 point where you feel that you need to clarify that an  
21 answer applies only to one particular entity, or that my  
22 question doesn't make sense in light of the different  
23 corporate entities, just let me know.

24 A. Okay.

25 Q. Now, from time to time, I expect Mr. Normand

1 will make objections to my questions. Unless he  
2 specifically instructs you not to answer, you can go  
3 ahead and answer my question.

4 If you find his objection or any conversation  
5 that he and I have had distracting, let me know, and I  
6 can have the question repeated to you or I can restate  
7 it myself. Do you understand that?

8 A. I do.

9 Q. All right. At the end of all this you will be  
10 given a written transcript to review. You'll have the  
11 opportunity to make corrections to the transcript, but  
12 I'll know you made those corrections and I'll be able to  
13 comment on them, so it's important that you give as  
14 accurate and complete testimony as you can today. Do  
15 you understand?

16 A. I do.

17 Q. Are you taking any medica- -- medication that  
18 might impair your ability to give truthful, accurate  
19 testimony today?

20 A. No.

21 Q. Do you have any medical condition that might  
22 impair your ability to give truthful and accurate  
23 testimony today?

24 A. Nope.

25 Q. What was your position at the time of the

1 execution of the Asset Purchase Agreement in September  
2 of '95 at SCO?

3 A. You know, dates aren't my favorite thing, but  
4 as best that I can determine, I was probably CTO at that  
5 point, Executive Vice-President and then CTO.

6 Q. Are there other possibilities, or are you  
7 sure --

8 A. I was there for 20 years, and I had half a  
9 dozen titles, and it never really changed my job much,  
10 so I never really worried about what my title was.

11 So --

12 Q. I saw in your declaration that by April '98  
13 you were SCO's President and CEO. Did you have  
14 different positions between being CTO in September '95  
15 and those positions in April of 1998?

16 MR. NORMAND: Objection. Form.

17 THE WITNESS: I don't think so. I mean, I was  
18 generally -- well, in that period I was generally  
19 Executive Vice-President and CTO, or CEO, but -- I mean,  
20 I was part of the -- part of the, you know, executive  
21 team running the company. Exact titles didn't -- didn't  
22 make much difference, other than CEO. That's a little  
23 different.

24 BY MR. MELAUGH:

25 Q. Now, in terms of the negotiations that led to

1 the Asset Purchase Agreement in September '95, is it  
2 fair to say that you participated in those negotiations  
3 only at sort of high level, as an executive?

4 MR. NORMAND: Objection. Form.

5 THE WITNESS: I don't know what that would  
6 mean.

7 BY MR. MELAUGH:

8 Q. Well, how would you characterize your  
9 participation in the Asset Purchase Agreement  
10 negotiations?

11 A. Well, I was very involved in the initiation of  
12 it, and I was very involved in the strategy behind it,  
13 and I was very involved in the high level structure of  
14 the agreement, and I was involved in supervising pretty  
15 directly the people who were negotiating the details of  
16 the agreement.

17 Q. When you say you were involved in the  
18 initiation of the agreement, can you tell me what you  
19 mean by that?

20 A. Well, unfortunately this is a very long time  
21 ago, and -- and I'm really bad at dates, and I know  
22 that. You know, trying to -- trying to get, you know,  
23 remote facts in exactly the right order.

24 But, you know, the discussion of essentially  
25 acquiring UNIX had been going on for ten years. Before

1 strategic in nature, and that I was involved with.

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

4 A. Primarily Jim and Geoff and some of the legal  
5 people, but the real business development team was --  
6 was Jim Wilt and Geoff Seabrook.

7 And again, I don't recall whether they were --  
8 whether they were directly reporting to me at that point  
9 or not, or one of them was and one of them wasn't. I  
10 mean, again, over the years they often reported to me,  
11 and I worked very closely with -- whether they were  
12 reporting to me or someone else, we worked very closely  
13 as a team.

14 And business development was one of the -- one  
15 of my main roles. So I met with them regularly, and  
16 whenever issues came up that they had trouble resolving,  
17 they would -- they would come to me. So --

18 Q. Apart from your initial meetings with  
19 Mr. DeFazio, did you have other meetings face-to-face  
20 with Novell's personnel as part of the APA's  
21 negotiations?

22 A. Yes.

23 Q. With whom?

24 A. I don't remember.

25 Q. How -- how many meetings, would you say?



1 A. Two or three.

2 Q. And do you recall the time period of those?  
3 Was it close to the execution? Earlier?

4 A. No.

5 Q. Okay. Do you recall anyone who was at --  
6 present at those meetings, either from your side or from  
7 Novell?

8 A. Well, certainly Jim Wilt and Geoff Seabrook  
9 and Ed Chatlas, some of the legal -- some of the legal  
10 people.

11 Q. Do you recall any of the legal people?

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

14 Q. Did you draft any of the language of the Asset  
15 Purchase Agreement?

16 A. No.

17 Q. Did you review drafts of the Asset Purchase  
18 Agreement?

19 A. No, not really. I think there was, you know,  
20 a -- a -- prior to the Asset Purchase Agreement there  
21 was some kind of letter of intent or -- or high level  
22 deal, and I'm sure I reviewed that carefully, but once  
23 we -- the trans- -- translation from the sort of two- or  
24 three-page deal to the Asset Purchase Agreement -- you  
25 know, had a great team to do that, and they didn't --

1 they only came to me if there was a debate about the  
2 translation process. So --

3 Q. Do you recall any of the debates that they  
4 came to you about on the translation process?

5 A. Not in detail, no.

6 Q. Even -- even vaguely?

7 A. Not really.

8 Q. Do you have an understanding as to what the  
9 purpose of the Asset Purchase Agreement was?

10 A. Sure.

11 Q. What is your understanding of the purpose of  
12 the Asset Purchase Agreement?

13 A. We were buying the -- the original AT&T/UNIX  
14 business from Novell, who had bought it from AT&T.

15 Q. And what's the basis for that statement? What  
16 leads you to say that?

17 A. That was the deal.

18 Q. Um --

19 A. It's what Mike and I talked about in Dallas,  
20 and it's what the deal was. It's -- Novell didn't want  
21 it anymore. We'd always wanted it. He said, do you  
22 want to buy it? I said yeah. We bought it.

23 Q. Aside from your conversations with  
24 Mr. DeFazio, what else leads you to say that that's the  
25 purpose of the Asset Purchase Agreement?

1           A.    I don't understand.  The deal was to buy the  
2    UNIX business.  That was the deal.  I mean, what do  
3    you -- what do you want me to tell you?

4           Q.    In your meeting with Mr. DeFazio, did you talk  
5    about whether SCO could afford to buy the whole UNIX  
6    business?

7           A.    Sure.

8           Q.    And what was the result of that conversation?

9           A.    Well, I mean, we said, effectively, you know,  
10   we needed to do a deal that was, you know, based more on  
11   stock than cash, because we didn't have a lot of cash.  
12   And that we were concerned because a big part of the  
13   value was the -- the future value of a bunch of royalty  
14   streams that were kind of, you know, not even involved  
15   in the -- they were people who had licensed product  
16   years ago, and hadn't taken any new releases, and -- and  
17   were continuing to ship and pay binary royalties.

18                   And when you kind of get into that present  
19   value of that, it came out to be a pretty big number.  
20   And we said, you know, that's just like us pre-paying  
21   you for a present value of a royalty stream with cash  
22   that we don't have, and we -- and we can argue about how  
23   big -- you know, are they going to decline?  Are they  
24   going to increase?

25                   And so we came to the conclusion that it made

1 Operating Agreement?

2 MR. NORMAND: Objection as to form.

3 THE WITNESS: I was specifically involved in  
4 the negotiation of all the agreements, but I don't know  
5 what agreements were -- resulted from what  
6 conversations.

7 BY MR. MELAUGH:

8 Q. Do you have --

9 A. I was involved in the entire process, I had  
10 daily discussions with people doing the negotiation, and  
11 they would come to me with issues and concerns and  
12 discussions about how should something work.

13 I never asked them, well, does that go in the  
14 Operating Agreement or does that go in the Technology  
15 License Agreement? I didn't care. It's just a --  
16 doesn't matter to me.

17 Q. I understand you were involved in the deal  
18 generally, and understand the testimony you've given so  
19 far. What I'm trying to do now is compartmentalize that  
20 a bit, and see if you have any memories specific to  
21 particular agreements.

22 A. I have no memory of any specific agreement.

23 Q. Did you have any involvement in the  
24 negotiation of Amendment Number 1 of the Asset Purchase  
25 Agreement, again, a few months later?

1 A. Same answer.

2 Q. No memory specific to the --

3 A. I was involved in the discussions leading up  
4 to every agreement. I was not focused on what pieces of  
5 paper came out of those discussions.

6 Q. Do you recall seeing drafts of the -- of the  
7 Number 1 -- reports as to drafts --

8 A. I don't recall.

9 Q. Do you recall having any involvement in the  
10 writing of the actual language of the Amendment Number  
11 1?

12 A. Not that I recall. But there were lots of  
13 details went back and forth: What do you think of X?  
14 So whether some of that was language that eventually got  
15 into agreements, I don't know.

16 Q. But sitting here today, you don't have any  
17 recollection of being involved in the negotiation of  
18 Amendment Number 1?

19 MR. NORMAND: Objection to form.

20 THE WITNESS: I -- same answer. I was  
21 involved in the negotiation of all the agreements, and I  
22 don't have any recollection specific to any particular  
23 agreement.

24 BY MR. MELAUGH:

25 Q. Is the same true of Amendment Number 2? Were

1 you -- do you have any recollections of being  
2 involved -- specific recollections of being involved in  
3 the negotiations of Amendment Number 2?

4 A. I don't even know what Amendment Number 2 is.

5 Q. Fair enough.

6 Let's talk a bit about the declaration you  
7 gave in this action. I'm going to hand you a copy of  
8 it. Let's mark this as Exhibit -- I think we're -- the  
9 first one is Exhibit 241.

10 (Deposition Exhibit Number 241 was  
11 marked for identification.)

12 BY MR. MELAUGH:

13 Q. Do you recognize this document?

14 A. This is a declaration I gave in regard to the  
15 case with IBM, not the case with Novell; correct?

16 Q. That is correct, as far as I understand.

17 Now, I'm -- the last page, that's your  
18 signature above the line, "Doug Michels"?

19 A. I would say that looks like my signature.

20 Q. Did you draft the language of this  
21 declaration?

22 A. Not -- I edited it, but I didn't draft it.

23 Q. Who drafted the language of this declaration?

24 A. The -- the SCO attorneys.

25 Q. Are you referring to Boies Schiller or

1 Mr. Tibbitts?

2 A. I don't know.

3 Q. From whom did you receive the first draft of  
4 this declaration?

5 A. From Mr. Tibbitts.

6 Q. How many -- aside from this version, how many  
7 drafts of this declaration have you seen?

8 A. Oh, we went back and forth half a dozen times.  
9 I mean, I wrote -- I mean, initially we discussed it.  
10 He wrote up essentially what I said. I corrected it.  
11 He made changes. You know, we went around a few times  
12 until we got it so it was correct.

13 Q. And you said that was roughly a half dozen  
14 times?

15 A. Probably.

16 Q. Do you recall specifically any of the changes  
17 that were made during the course of these edits?

18 A. No. Probably didn't spell my name right.

19 Q. Aside from Mr. Tibbitts, with whom have you  
20 discussed this declaration?

21 A. In detail? No one.

22 Q. I mean, as part of the drafting process were  
23 you only interacting with Mr. Tibbitts, or were you  
24 interacting -- interacting also with attorneys from  
25 Boies Schiller?

1 BY MR. MELAUGH:

2 Q. And --

3 A. I don't know.

4 Q. Fair enough.

5 And the place to look for the answer would  
6 be --

7 A. In the all the documentation.

8 Q. The Asset Purchase Agreement and the related  
9 contracts?

10 A. If you say so.

11 Q. I'm asking you that question.

12 A. I don't know. In all the documents that  
13 govern the relationship. It -- I mean, it's in the  
14 documents that govern the relationship, but, you know,  
15 what the names are and which ones, I'm not going to tell  
16 you that. You're asking me a legal question that I'm --  
17 I'm not going to answer, because I don't know.

18 Q. Let's move on a bit to another section of  
19 paragraph 9.

20 A. All right.

21 Q. Do you need to take a break?

22 A. I'm fine.

23 Q. Okay. So this sentence that I read the  
24 beginning of continues:

25 -- even though the entire UNIX business,



1 source code and related assets,  
2 including copyrights, were transferred  
3 to Santa Cruz.

4 What's the basis for your statement here that copyrights  
5 were transferred from Novell to Santa Cruz?

6 MR. NORMAND: Objection to form.

7 THE WITNESS: We bought the whole business. I  
8 mean, as far as I'm concerned, Mike DeFazio said, would  
9 you like to buy the whole business? I said, we'd like  
10 to buy the whole business. We bought the business.  
11 And, you know, there were some complexity because of  
12 the -- the way we paid for it, but the intention of the  
13 parties was they were selling the business and we were  
14 buying the business.

15 You buy a software business, you get the  
16 intellectual property and you get the copyrights.  
17 That's why I thought we were buying the intellectual  
18 property and the copyrights.

19 BY MR. MELAUGH:

20 Q. Were you ever told by anyone at Novell or SCO,  
21 prior to the Asset Purchase Agreement, specifically that  
22 UNIX property rights were part of the transfer?

23 A. We bought the whole business.

24 Q. That wasn't my question. Were you told by  
25 anyone at Novell or SCO, prior to the Asset Purchase

1 Agreement, specifically that copyrights were part of the  
2 transfer of assets between Novell and SCO?

3 MR. NORMAND: Objection to form.

4 THE WITNESS: You know, I -- I -- I just  
5 don't under- -- told by who? What? I mean, we  
6 negotiated to buy a business, all the assets of the  
7 business. There was never any question we were buying  
8 all the assets of the business.

9 BY MR. MELAUGH:

10 Q. Were you told by anyone specifically, from  
11 Novell or SCO, prior to the Asset Purchase Agreement,  
12 that copyrights were among the assets transferred as  
13 part of the agreement?

14 A. I -- you know, I have no -- no recollection --  
15 I mean, the -- if -- if somebody told me that, it --  
16 then of course. I mean, it wouldn't -- it wouldn't even  
17 leave an impression. It's so obvious it isn't even --  
18 it isn't even a question to discuss.

19 Q. I take it your answer then, is no, you do not  
20 have a specific recollection of anyone telling you that  
21 UNIX copyrights were being transferred as part of the  
22 Asset Purchase Agreement?

23 MR. NORMAND: Objection to form.

24 THE WITNESS: I certainly don't have a  
25 specific recollection that, ten years ago, somebody

1 stating something that obvious. I don't recall anybody  
2 stating the sky is blue, or it was raining today. I  
3 mean, you buy a software business, you buy the  
4 intellectual property. I'm not -- it's not something  
5 you discuss.

6 BY MR. MELAUGH:

7 Q. Well, did you, for example, obtain patents  
8 that related to UNIX as part of the Asset Purchase  
9 Agreement?

10 MR. NORMAND: Objection to form, and objection  
11 to the extent it calls for a legal conclusion.

12 THE WITNESS: I think there were patents  
13 that -- that Novell never obtained from AT&T because  
14 they covered -- they were used for things UNIX and --  
15 they were used for UNIX and other -- other things that  
16 AT&T retained -- retained the actual patents and  
17 provided licenses so -- to use those patents.

18 So we either got licenses to use patents or  
19 patents. I don't know. We had -- we had all rights to  
20 the patents that were necessary to buy the business.

21 BY MR. MELAUGH:

22 Q. But as far as you were aware, the title to any  
23 Novell-owned pattern was not transferred as part of the  
24 Asset Purchase Agreement?

25 MR. NORMAND: Objection to form.

1 THE WITNESS: I don't know.

2 BY MR. MELAUGH:

3 Q. If I wanted to know whether patents held by  
4 Novell transferred to SCO as part of the Asset Purchase  
5 Agreement, where would I look?

6 MR. NORMAND: Objection to form.

7 THE WITNESS: I'll -- you look in all of the  
8 documentation and all of the agreements between the  
9 parties. I mean --

10 BY MR. MELAUGH:

11 Q. And likewise, if I wanted to know whether  
12 copyrights transferred as part of the Asset Purchase  
13 Agreement, wouldn't I look to the language of the Asset  
14 Purchase Agreement and the related agreements?

15 MR. NORMAND: Objection to form. Objection to  
16 the extent it calls for a legal conclusion.

17 THE WITNESS: You know, you're asking some  
18 kind of legal question about documents that I don't  
19 know, I haven't read, don't -- don't have any comment  
20 about. I'm telling you what I can comment on is the  
21 deal we made and what the expectations of the parties  
22 were.

23 And patents are materially different than  
24 copyrights. When you're buying a software product, the  
25 copyrights are the product. I mean, there's no --

1 there's no question you're buying those. Patents often  
2 apply to multiple products. They're often developed,  
3 you know, in the lab, independent of a specific product.

4           UNIX came out of a Bell Labs research  
5 environment, and they -- they filed for patents, you  
6 know, day and night about all sorts of things, some of  
7 which may or may not have touched UNIX, and may have  
8 touched every other product they had. I don't know.  
9 Same thing with Novell. They had a large R and D  
10 department and they developed a lot of patents.

11           All that matters to the acquisition of the  
12 UNIX business with patents was that we had rights to use  
13 all the patents that we might -- that we might have --  
14 that might have been involved in that code. And as long  
15 as we had unlimited rights, it didn't matter.

16           As far as the copyrights go, that's what we  
17 were buying. When you -- we're buying a software  
18 product. You have to be buying the copyrights.

19 BY MR. MELAUGH:

20           Q. So let's talk again a bit more about the basis  
21 for your conclusion that copyrights transferred as part  
22 of the Asset Purchase Agreement.

23           I take it that's based on your general  
24 understanding of the deal? It's -- you don't recall  
25 anything specifically told to you about this? Is it

1 based on -- are there provisions of the Asset Purchase  
2 Agreement that you can recall that support this opinion?

3 MR. NORMAND: Objection to form.

4 THE WITNESS: I -- I didn't read it then, and  
5 I haven't read it recently. I've never it through. I'm  
6 not a lawyer, and I have no comment about the Asset  
7 Purchase Agreement.

8 BY MR. MELAUGH:

9 Q. And did you read the Asset Purchase Agreement  
10 in preparation for your December, I think --  
11 November 2006 declaration?

12 A. No.

13 Q. When was the last time you read the Asset  
14 Purchase Agreement?

15 A. I have never read the Asset Purchase  
16 Agreement. I've glanced at it, I've skimmed through  
17 little bits of it, but I've never read it.

18 Q. Is the same true of -- of the other agreements  
19 we discussed earlier?

20 A. Yes.

21 Q. The Technology Licensing Agreement, the  
22 Operating Agreement?

23 A. Yes.

24 Q. And the two amendments?

25 A. I have never read any of them cover to cover.

1 MR. NORMAND: Let me know, David, when you're  
2 at a natural stopping point.

3 MR. MELAUGH: We can have a natural stopping  
4 point now, actually. I could use the restroom.

5 THE WITNESS: Okay.

6 THE VIDEOGRAPHER: We're going off the record.  
7 The time is 11:16 a.m.

8 (Short break.)

9 THE VIDEOGRAPHER: We are back on the record.  
10 The time is 11:29 a.m.

11 BY MR. MELAUGH:

12 Q. So to begin back where we left off, to be  
13 clear, you did not review the Asset Purchase Agreement  
14 in preparation for the execution of your declaration?

15 A. I don't -- did not, no.

16 Q. And -- and you have not read the Asset  
17 Purchase Agreement cover to cover?

18 A. No.

19 Q. Do you have any specific recollection of the  
20 Schedule of Excluded Assets?

21 A. (Laughs.) Sure.

22 Q. The Schedule of Excluded Assets that's  
23 attached to the Asset Purchase Agreement?

24 A. There is one.

25 Q. I take it, the answer is no, you do not have a

1 wrong.

2 BY MR. MELAUGH:

3 Q. Which employees are we talking about? You  
4 said they admitted that they had done something wrong.

5 A. I don't know.

6 Q. So you don't have any specific recollection of  
7 a Novell employee saying something like that?

8 MR. NORMAND: Objection to form.

9 THE WITNESS: No.

10 BY MR. MELAUGH:

11 Q. Taking a step back a bit, I take it this  
12 declaration is about -- is based on your view of the  
13 intent of the deal, not on your view as to the meaning  
14 of the words in the Asset Purchase Agreement?

15 A. I could agree with that.

16 Q. Let's turn to the last -- or look in Schedule  
17 1.1(b), "Excluded Assets." This is -- I don't know --  
18 three-quarters of the way through this stack. This is  
19 the Asset Purchase Agreement. I need you to turn to the  
20 page that's marked -955, Bates label at the bottom.

21 A. Which page?

22 Q. Sorry. It's --

23 MR. NORMAND: -955.

24 BY MR. MELAUGH:

25 Q. -955. You need to go maybe 50 pages forward

75



1 in it, or 30 pages forward.

2 A. Okay.

3 Q. So maybe, actually, you should turn one page  
4 over. I misspoke. -54. So we're looking now at  
5 something that's labeled "Schedule 1.1(b), Excluded  
6 Assets." It's two pages. On the second page, the one I  
7 directed to you originally, -55 -- turn the page.

8 A. Uh-huh.

9 Q. Item V(A) states:  
10 All copyrights and trademarks, except  
11 for the trademarks UNIX and UnixWare.

12 I take it, again, this Schedule of Excluded Assets is  
13 not something with which you're familiar?

14 A. No.

15 Q. Do you recall ever having seen this before?

16 A. I've seen it.

17 Q. When did you last review it?

18 A. This morning.

19 Q. And before that, when was the last time you  
20 had seen it?

21 A. I don't recall.

22 Q. But it was not something you reviewed in  
23 preparation for your declaration?

24 A. No.

25 Q. Did you have any opinion on the meaning of the

1 exclusion here -- this is V(A) again, "All copyrights"

2 --

3 A. I mean, it clearly makes no sense in the  
4 context of the agreement. I assume it was an error.

5 Q. Why do you assume it was an error?

6 A. Because we bought the copyrights.

7 Q. Why do you assume that?

8 A. Because --

9 MR. NORMAND: Objection to form.

10 THE WITNESS: I -- you know, you are just  
11 asking me the same questions over and over and over  
12 again. I told you we bought the entire business. That  
13 included the copyrights. We did press releases  
14 announcing we bought the entire business --

15 THE REPORTER: I'm sorry. I couldn't  
16 understand. "We bought the entire business. That  
17 included the copyrights" --

18 THE WITNESS: And we did press releases  
19 announcing that we bought the entire business, which  
20 were approved by Novell. And I understand that, you  
21 know, this was corrected in a later amendment of some  
22 sort, but -- so it probably was an error. I mean, it  
23 would be my guess.

24 BY MR. MELAUGH:

25 Q. Did the press releases you're talking about

77

1 mention copyrights?

2 A. They mentioned intellectual property. I --  
3 but I don't recall if they mentioned copyrights or not.  
4 But they said we bought the entire business. I mean --

5 Q. And -- and V(B) here says "All patents." I  
6 take it that is -- that is consistent with your memory,  
7 that all patents were excluded from --

8 A. No, I don't recall.

9 Q. You don't recall, one way or the other?

10 A. I recall we had all the patent rights we  
11 needed. Whether -- I don't recall how we got the patent  
12 rights we needed. I just recall we had all the patent  
13 rights we needed.

14 Q. So it's possible that patent rights were  
15 transferred, but not the actual patents.

16 A. As I said before, patents often go beyond a  
17 single product. Most of the patents were Bell Labs  
18 patents that even Novell never got, other than rights.  
19 And that's the nature of -- you know, AT&T has a very  
20 strong patent portfolio, and they consider patents to be  
21 something, and so they granted rights that -- you know,  
22 I don't know.

23 I just know that patents weren't ever an  
24 issue, and we didn't care. We weren't -- we weren't in  
25 the business of a patent portfolio, and didn't make

1 anywhere difference to us, as long as we had the rights.

2 Q. I take it then, the answer to my question is  
3 yes, it's possible that patent rights transferred, but  
4 not patent title transferred?

5 A. It's certainly possible.

6 Q. Isn't it also possible that -- that rights to  
7 copyrights transferred, but not title to copyrights  
8 transferred?

9 MR. NORMAND: Objection to form. Objection to  
10 the extent it calls for a legal conclusion.

11 THE WITNESS: You're -- you're asking me a  
12 legal question. Far as I'm concerned, we bought the  
13 entire business. We bought rights to all the  
14 intellectual property. We bought exclusive rights to  
15 all the intellectual property, and that certainly  
16 includes all the copyrights. How they were transferred  
17 is a legal issue, and I don't care.

18 BY MR. MELAUGH:

19 Q. So it's possible though, that something less  
20 than the title to the copyrights transferred?

21 A. I -- I don't know.

22 MR. NORMAND: Objection to form. Same  
23 objections.

24 THE WITNESS: I don't know. I -- I -- my  
25 hunch is that the lawyers would not have been happy with

1 that, no. But only -- that's only a hunch from  
2 recollections of discussions that -- that the lawyers  
3 would have insisted on the actual copyrights. But why,  
4 and what was actually implemented exactly, I don't know.

5 MR. MELAUGH: Let's mark this Exhibit 242.

6 (Deposition Exhibit Number 242 was  
7 marked for identification.)

8 BY MR. MELAUGH:

9 Q. This is an e-mail, the first e-mail -- the top  
10 e-mail in which is dated April 1, 1996. The first Bates  
11 page of this is SCO 1640426. It goes through -0428.

12 So this relates to the -- the IBM dispute that  
13 you and I had a bit of conversation about earlier. As  
14 an introductory point, some of these e-mails are from a  
15 fellow named Biff Traber.

16 A. (Nods head.)

17 Q. Who is Biff Traber at the time?

18 A. He was one of the USL employees that we got as  
19 a result of this purchase.

20 Q. Do you remember roughly what his  
21 responsibilities were in -- around this time?

22 A. I think he was something in Product  
23 Management, but I'm not sure I can -- what his exact  
24 job --

25 Q. And the -- in the "To:" field of this first

1 the products are, you know, effectively, source code and  
2 documentation and screens, all of which are governed by  
3 copyrights. That's what -- that's what you own. That's  
4 the intellectual property of a source code product. It  
5 would be meaningless to own it if you didn't own the  
6 copyrights. I mean, that's -- that's what you would  
7 have to have.

8           And there's no reason -- if you own it,  
9 there's no reason for anybody else to have it, other  
10 than, you know, this sort of residual thing we've talked  
11 about.

12 BY MR. NORMAND:

13           Q. Was it part of Santa Cruz's exercise of its  
14 rights with respect to the UNIX and UnixWare  
15 technologies to make copies of the UNIX and UnixWare  
16 source code?

17           A. What do you mean?

18           Q. Do you know, from your experience at Santa  
19 Cruz, whether, after the APA, Santa Cruz had occasion to  
20 make copies and distribute versions of the UNIX and  
21 UnixWare source code?

22           A. Of course we did. What business were we in?

23           Q. Do you have a view, from your experience at  
24 Santa Cruz, as to whether, after the APA, Santa Cruz had  
25 occasion to license the rights to use UNIX and UnixWare

1 to other companies?

2 A. Of course.

3 Q. Do you recall any discussion or negotiation  
4 surrounding the language in paragraph A of Amendment  
5 Number 2 at the time Amendment Number 2 was executed?

6 A. No. I mean, looking at these two documents  
7 here and now, I mean, it's pretty clear this is  
8 correcting an error in the previous document.

9 I mean, there -- there was no money that  
10 changed hands for this. And if the previous document  
11 was correct, then this would be a huge concession. You  
12 would expect there would have been, you know, payment or  
13 consideration of some form.

14 So you see something this massive being  
15 granted in the cleanup amendment, you know, I can only  
16 assume there must have been an error in the first  
17 document. That's -- it doesn't make any sense.

18 Q. Was it ever your understanding when you were  
19 at Santa Cruz that in order to acquire any UNIX or  
20 UnixWare copyrights, Santa Cruz was obligated to go back  
21 to Novell and make a case as to why Santa Cruz needed  
22 the copyright?

23 A. Of course -- of course not.

24 Q. Did any attorney --

25 A. We owned the business.

1 Q. Did any attorney from Santa Cruz ever tell you  
2 any such thing?

3 A. No.

4 Q. Did any executive or any employee of Santa  
5 Cruz ever tell you any such thing?

6 A. Not that I can recall. I think I would have  
7 laughed them out of my office.

8 THE REPORTER: Um --

9 MR. TIBBITTS: Did you get that?

10 THE REPORTER: No. "I would have asked him  
11 out of my office"?

12 THE WITNESS: Laughed them out of my office.  
13 If I was in a good mood.

14 BY MR. NORMAND:

15 Q. Now, I had directed your attention earlier to  
16 Exhibit 241, which was your declaration. Did you have  
17 a -- ever have occasion to speak with counsel for IBM  
18 about the prospect of a declaration?

19 A. I did not speak to them specifically about a  
20 declaration. I did -- they asked me if I would come in  
21 and -- and answer a few questions, and I -- and I did.  
22 In fact, in this very -- in, I think, the room across  
23 the hall, actually, but --

24 Q. Can you recall whom you spoke with?

25 A. I -- no.



1 STATE OF CALIFORNIA )  
2 ) ss.  
3 COUNTY OF MONTEREY )

4 The witness in the foregoing deposition  
5 appeared before me, KATHERINE E. LAUSTER, Certified  
6 Shorthand Reporter for the State of California.

7 Said witness was then and there at the time  
8 and place previously stated, by me placed under  
9 oath to tell the truth, the whole truth and nothing  
10 but the truth in the testimony given on said day.

11 The testimony of the witness and all questions  
12 and remarks requested by counsel were taken by me  
13 in shorthand at the time and place therein named,  
14 and thereafter transcribed into longhand.

15 I further certify that I am not of counsel or  
16 attorney for either or any of the parties to said  
17 deposition, nor in any way interested in the  
18 outcome of the cause named in said caption, and  
19 that I am not related to any party thereto.

20 IN WITNESS WHEREOF, I have hereunto set my  
21 hand this 29th day of March, 2007.

22  
23  
24  
25

  
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FOR THE STATE OF CALIFORNIA