

# **EXHIBIT 1**

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*Attorneys for The SCO Group, Inc.*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH**

**THE SCO GROUP, INC.,**

Plaintiff/Counterclaim Defendant,

v.

**NOVELL, INC.,**

Defendant/Counterclaim-Plaintiff.

**DECLARATION OF WILLIAM M.  
BRODERICK**

Case No. 2:04CV00139

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

I, William M. Broderick, declare as follows:

1. I submit this declaration in connection with The SCO Group v. Novell, Inc., Civil Action No. 2:04CV00139 DAK (D. Utah 2004).
2. I am Director of Software Licensing for The SCO Group, Inc. ('SCO'). My office is located in Murray Hill, New Jersey.
3. Unless otherwise noted or evident from context, this Declaration is based on my personal knowledge.
4. Since December 1991, I have been continuously employed with the successive companies that have owned the UNIX technology and business.
5. From December 1991 to June 1993, I was the Manager of Sales Operation for UNIX System Laboratories ('USL'), a company that owned and operated the UNIX business that AT&T originally created.
6. When AT&T sold USL to Novell, Inc. ('Novell') in June 1993, I remained with the UNIX business as a Novell employee performing substantially the same work as at USL. During most of my time at Novell, my title was Contract Manager.
7. When Novell sold the UNIX business to The Santa Cruz Operation ('Santa Cruz') in 1995, I remained with the UNIX business as a Santa Cruz employee performing substantially the same work as at Novell. During my employment at Santa Cruz, my title was Manager, Law and Corporate Affairs.
8. When Santa Cruz sold the UNIX business to Caldera International, Inc. ('Caldera') in 2001, I remained with the UNIX business as a Caldera employee performing essentially the same work as at Santa Cruz. For a short period after the sale to Caldera, my official

title remained the same, but it later changed to my current title, Director of Software Licensing. In 2003, Caldera changed its name to SCO.

9. In sum, my career has followed the UNIX business as it has been transferred successively from AT&T/USL to Novell to Santa Cruz to Caldera (now SCO). I personally witnessed and experienced the transition of the business from one owner to the next.
10. As part of my duties as Contract Manager for Novell and as Manager, Law and Corporate Affairs, for Santa Cruz, I was responsible for implementing the APA, and was thus required to understand the meaning and intent of the APA. In the performance of my duties for Novell and Santa Cruz, I also attended several meetings, including Novell company-wide meetings, during which the purpose and intent of the APA explained. I also participated in the transition team, composed of representatives of both companies, that was responsible for the transitioning of the business to Santa Cruz.
11. During the transition period that preceded and followed the closing of the transaction, and the seven-plus years that followed the execution of the APA, I had numerous communications and interactions with numerous people on both sides of the transaction, including people who were directly involved in negotiating and implementing the APA. Without exception, those people always manifested a common understanding that Novell intended to and did transfer the entire UNIX and UnixWare business to Santa Cruz under the APA, including all rights, title and interest in the assets and properties related to that business, with the exception of interest in certain binary royalties. During that time, no one ever communicated or otherwise indicated to me a contrary understanding.

12. In addition to transferring the business to Santa Cruz, the APA helped forge a strategic relationship between the parties. Santa Cruz planned to merge its own UNIX-derivative product, Open Server 5.1, with UnixWare Release 2.1, to create a standard high-volume UnixWare operating system that also integrated Novell's Netware networking services. In addition, as described below, as part of the payment for the transferred business, Novell took an equity position in Santa Cruz and obtained a contingent interest in the performance of UnixWare, including the merged product.

#### **The SVRX Licenses**

13. The agreements Novell transferred to Santa Cruz under the APA included all software agreements, sublicensing agreements, and product supplements and related contracts. The software agreements delineated the general rights and conditions for a licensee's internal use of any UNIX or UnixWare product the licensee chose to license under a product supplement. The sublicensing agreement outlined the rights and conditions for a licensee's distribution of such a product in binary form. The supplements were the licenses for individual UNIX or UnixWare products. Thus, for example, all licensees who licensed UNIX System V, Release 3.2 signed the standard supplement licensing that product. The contracts related to the supplements included amendments to the standard product supplements, including letter-agreements adjusting binary royalties due under the supplements.
14. Like its predecessors and successors, Novell licensed UNIX and UnixWare through this set of agreements. While the software and sublicensing agreements described general rights and obligations that would apply if a licensee licensed a product, they did not

themselves license any product. They did not identify any product, specify the CPUs on which use of the product was authorized, require the payment of any consideration, or list any fees or royalties to be paid by the licensee. Rather, that information was contained in the supplement for each product.

15. Each time a licensee sought to license a UNIX or UnixWare product, the licensee executed a supplement for that specific product. If the licensee later sought to license the same source code on additional CPUs, the licensee executed a supplement licensing those additional CPUs. If a licensee sought an additional distribution (that is, another copy) of the source code, the licensee entered into a supplement for that additional distribution. If a licensee sought to license a different UNIX or UnixWare product, such as a later version or release, the parties executed the supplement for that specific product. In the licensing groups at Novell and its predecessors and successors, we understood an SVRX license to be a SVRX product supplement.
16. Each product supplement included a product schedule that listed the specific technologies licensed as part of the product. The schedule also listed the fees corresponding to the product, including the one-time 'right-to-use fee' for use of the source code internally on a designated CPU, right-to-use fees for each additional CPU, the one-time 'sublicensing fee' for the right to distribute binary copies of a product based on the licensed product, and the 'per-copy fees' to be paid by the licensee for each such copy distributed by the licensee. In the licensing group at Novell and its predecessors and successors, we often used the terms 'supplement' and 'schedule' interchangeably.

17. The software agreement itself bears out the relationship between the foregoing agreements. The software agreement granted the right to create derivative works based on the licensed product, for example, provided that the licensee treated any such modifications and derivatives the same as the licensed product and kept any such modifications and derivative work confidential. A licensee, however, was permitted to disclose a derivative work to an equivalent-scope licensee, that is, a licensee who had executed a supplement, or license, for the same or a later version of UNIX or UnixWare.

#### **The Configuration of Santa Cruz's Payment for the Business**

18. As I stated previously, my understanding was that Novell intended to transfer, and Santa Cruz to acquire, the entire UNIX and UnixWare business under the APA. However, because Santa Cruz could not afford the price that Novell asked for the business, the parties agreed that Novell would retain interests in certain royalties.
19. Based on what Novell told those of us in the Novell licensing group when the APA was announced and explained, my understanding is that Novell and Santa Cruz agreed that Novell would retain an interest in the continuing binary royalties paid under the SVRX licenses to which Novell was a party and that were transferred to Santa Cruz under the APA. That is, the parties agreed that Novell would retain an interest in the per-copy fees that the then-current SVRX licensees would continue to pay under their existing SVRX product supplements for their distribution of binary products based on the licensed SVRX product.
20. The parties also agreed that Santa Cruz would pay royalties for the shipment or distribution of certain UnixWare-related products if those shipments and distributions

reached certain annual benchmarks through 2002. Novell never received those royalties because the required benchmarks were never reached.

21. My understanding is that Novell's financial interest in the SVRX binary royalties and its contingent interest in the UnixWare-related royalties were not intended to grant Novell any other interest of any kind in the UNIX and UnixWare business. Novell and Santa Cruz simply intended for those royalties to bridge the gap between the price that Santa Cruz could pay for the business and the value that Novell deemed appropriate.

**Novell's Limited Rights Under Sections 1.2(b) and 4.16(b) of the APA**

22. Under Section 1.2(b), the parties agreed that the SVRX binary royalties would continue to be recognized as royalties by Novell on an ongoing basis and Santa Cruz was obligated to collect and pass through to Novell 100% of these SVRX binary royalties, subject to a 5% administrative fee that Novell paid back to Santa Cruz. Section 1.2(b) also granted Novell the right to receive periodic reports and conduct audits of those royalties and the contingent UnixWare-related royalties.
23. Amendment No. 1 was intended to clarify that Novell's interest in the SVRX product licenses transferred to Santa Cruz was limited to the binary royalties listed in the corresponding product schedules. Accordingly, Amendment No. 1 expressly provided that, notwithstanding Novell's interest in the binary royalties due under those licenses, Santa Cruz would retain every other category of fees that a licensee could pay under such a product license, namely, source code fees for additional copies of the SVRX product or for its use on additional CPUs. (The one-time right-to-use and sublicensing fees would



have already been paid to Novell upon the execution of the licenses because the licenses transferred to Santa Cruz were licenses to which Novell was a party.)

24. Under Section 4.16(b) of the APA, the parties granted Novell certain rights and imposed on Santa Cruz certain obligations with respect to the SVRX licenses. Novell and Santa Cruz intended for those rights and obligations to protect Novell's interest in the binary royalties due under the transferred SVRX licenses. The parties did not intend for Section 4.16(b) to apply to any other assets or properties transferred to Santa Cruz under the APA.
25. Again based on the training I received from Novell and my experience licensing UNIX products at Novell and its successors, my understanding is that Amendment No. 1 was intended to clarify that Section 4.16(b) applied only to Novell's interest in the SVRX binary royalties I have described above. Accordingly, Amendment No. 1 provided that, notwithstanding Novell's interest in those royalties, Santa Cruz obtained the right to license the SVRX source code without any restrictions except when such action by Santa Cruz would adversely affect Novell's rights to royalties in the current SVRX licenses. Specifically, Amendment No. 1 provided that Santa Cruz could amend the SVRX licenses to license additional distributions of the licensed product, additional designated CPUs, or the SVRX source code incidental to the licensing of UnixWare products.
26. UnixWare products, like SVRX products, are built on prior versions of the same technology. Accordingly, each time Novell licensed a UnixWare product, Novell also granted the right to use prior UnixWare and SVRX products by listing them in the schedule for the licensed product. Because Santa Cruz could not have licensed

UnixWare products going forward without the ability to also license the legacy SVRX products on which UnixWare was built, Amendment No. 1 provided that Santa Cruz could amend or enter into new SVRX license as an incidental part of its UnixWare licenses.

27. Amendment No. 1 otherwise prohibited Santa Cruz from entering into new SVRX licenses without Novell's prior approval. Like the other provisions in Sections 1.2(b) and 4.6(b), this provision was intended solely to protect Novell's limited financial interest in the SVRX royalties and contingent UnixWare royalties. As the SVRX was the legacy product and both parties had an interest in the growth of UnixWare products, the parties did not anticipate that Santa Cruz would enter into new SVRX product licenses but rather would offer UnixWare to new licensees or licensees seeking to upgrade their product. The prior-approval provision, therefore, was specifically intended to preclude Santa Cruz from entering into SVRX licenses that cut out Novell from its royalty interests.
28. In other words, the provision was intended to apply to instances where Santa Cruz might have sold an SVRX licensee a new version of the product, extinguishing the SVRX binary royalties due to Novell without converting the existing SVRX license to a UnixWare license in which Novell would have a contingent interest. As the sole purpose and intent of Sections 1.2(b) and 4.1(b) were to secure and protect Novell's royalty interests, the prior-approval provision did not apply to any agreement that Santa Cruz or its successors might enter into that did not disturb those interests.

**SCO's 2003 Agreements with Sun and Microsoft**

29. I understand that Novell claims that the payments SCO received for its 2003 agreements with Sun and Microsoft are SVRX royalties owed to Novell under Section 1.2(b) of the APA. That claim is inconsistent with the intent and meaning of the APA as they were explained to me by Novell. In 1994, Novell granted Sun a buyout of its obligations to pay any SVRX fees under its SVRX license. Similarly, Microsoft was under no obligation to pay any SVRX binary royalties under its SVRX license. Section 1.2(b) was not intended to apply, and in my view does not apply, to any payments that SCO received from licensing its technology to Sun and Microsoft in 2003.
30. Novell did not negotiate for or obtain any right under the APA to receive any fees or royalties that Santa Cruz might collect in licensing its fully acquired UNIX and UnixWare code without disturbing Novell's royalty interest described above. Sections 1.2 and 4.16 of the APA do not apply to the 2003 Sun and Microsoft agreements.
31. Insofar as those agreements are licenses to technology, moreover, they are licenses for UnixWare. Consistent with the licensing practices of Novell and its predecessors and successors and consistent with the reality of licensing products that are built on prior technology, the license for the prior SVRX products contained in those agreements is incidental to the license for UnixWare. Amendment No. 1 to the APA thus expressly permits both agreements. The interest that Novell had in such UnixWare licenses expired in 2002. Novell cannot claim any interest in the 2003 Sun and Microsoft agreements.
32. I also understand that Novell has claimed that the rights it retained under Section 4.16(b) of the APA extend to any agreements related to SVRX, including those that Santa Cruz and its successors entered into following the APA. That claim also is inconsistent with

the intent and meaning of the APA, as I understand them. The only interest that Novell retained in the UNIX business was the right to continue receiving SVRX binary royalties under the product supplements, or licenses, transferred under the APA. Novell and Santa Cruz did not intend for Novell's rights under Section 4.16(b) to extend either to new SVRX agreements that did not disturb Novell's limited royalty interests, or to any software and sublicensing agreements whether then existing or not.

**Amendment No. 2**

33. In April 1996, Novell attempted to grant IBM a buyout of its binary royalty obligations under its System V, Release 3.2 product license. Santa Cruz objected for several reasons. First, the purported buyout also extended IBM's rights to distribute the source code. Second, although Santa Cruz understood that Novell had a 95% interest in the binary royalties that IBM would pay for the distribution of that product, Santa Cruz explained that the buyout violated the APA because it denied Santa Cruz the opportunity to convert IBM's SVRX license to UnixWare, as intended by the parties under the APA. Although Novell was willing to forego the royalties it might receive from the licensing of UnixWare in favor of an up-front payment of the SVRX binary royalties, Santa Cruz understood that buyouts hurt its UnixWare business going forward. In addition, Santa Cruz pointed out that Novell, in a bid to recognize revenue for that quarter, had underestimated the royalties that IBM would pay absent a buyout, so that the buyout diminished Santa Cruz's 5% percent interest in the royalties.
34. After months of negotiations, the parties agreed that Novell could not enter into any new royalty buyouts without Santa Cruz's participation and approval. Section B of

Amendment No. 2 was intended to prevent the reoccurrence of a unilateral buyout by Novell. Amendment No. 2 was a protection that Santa Cruz insisted upon before agreeing to the buyout that the parties jointly granted IBM. Thus, I understood Amendment No. 2 to be an acknowledgement by Novell that even its interest in the SVRX binary royalties was subject to Santa Cruz's rights under the APA.

35. I understand that Novell now argues that SCO has violated Amendment No. 2 by entering into the 2003 Sun and Microsoft agreements without Novell's involvement. That position is simply wrong. The buyout provisions of Amendment No. 2 apply only to the buyouts, and specifically to buyouts of SVRX binary royalties due under the SVRX licenses transferred to Santa Cruz under the APA. The Sun and Microsoft agreements are UnixWare licenses that only incidentally licensed prior SVRX products. They did not grant Sun and Microsoft any buyouts because, prior to the APA, those parties had either previously bought out their obligations to pay SVRX binary royalties or did not have an obligation to pay SVRX binary royalties under their SVRX licenses. Microsoft terminated its software agreement and SVRX licenses in 1998.
36. I understand that Novell also takes the position that the interests it was granted in the APA and amendments thereto to protect the royalty stream it retained gave Novell protection from competition with respect to competitors such as Sun and Microsoft. The APA and its amendments were never intended to afford Novell any such prospective protections. There was never any discussion or agreement of any kind regarding any such protections. In fact, the only non-compete provision in the APA imposed restrictions on Novell to the benefit of Santa Cruz.

37. In 1999, SVRX licensee Hewlett-Packard (HP) sent the Santa Cruz legal department a check for several million dollars purporting to exercise a so-called favored pricing clause in its UNIX agreement. In compliance with Amendment No. 2 to the APA, Santa Cruz contacted Novell to determine if the parties were willing to grant HP the proposed buyout.
38. Under an agreement dated January 28, 2000, Novell and Santa Cruz bilaterally granted HP a buyout for twenty-two million dollars, several times the amount of the check received by Santa Cruz.
39. In 1994, Novell gave Texas Instruments (TI) a three-year binary-royalty buyout for specified distributions of its SVRX product with renewal rights after the period expired. The price of the buyout was \$500,000. In 1997, after Santa Cruz had acquired the UNIX and UnixWare business, TI contacted the Santa Cruz legal department seeking to renew the buyout for an additional three-year period at the same price.
40. In an effort to comply with Amendment No. 2, over the subsequent several months, I made every effort to contact the persons at Novell with the authority to review the proposed renewal, including the persons in Novell finance who received Santa Cruz's quarterly royalty reports. After receiving no response from Novell, and to comply with Santa Cruz's contractual obligations to TI, Santa Cruz unilaterally granted TI the renewal and sent Novell its 95% share of the \$500,000 payment. In 2000 and 2003, Santa Cruz and SCO again granted TI a renewal and again sent Novell its 95% share of the \$500,000 payment. It was not until the 2006 renewal, after Novell filed this lawsuit, that Novell took an active participation in the renewal negotiations.

41. Prior to its sale of the UNIX and UnixWare business to Santa Cruz, Novell granted Silicon Graphics, Inc. (SGI) a buyout of its SVRX binary-royalty obligations. On April 2, 1996, Cray Research, Inc. ('Cray'), a distinct SVRX licensee, became a subsidiary of SGI. Later that year, Cray wrote me stating that it intended to operate under the terms of the SGI buyout agreement. Although Santa Cruz had only a 5% interest in the Cray's royalty stream, I negotiated with Cray for nearly seven months. On May 6, 1997, after Santa Cruz had expended resources far above the 5% administrative fee that it would get, I turned the dispute over to Novell.
42. In doing so, I advised Novell that it had no right under the APA to negotiate source code rights or fees, and Novell agreed. In fact, before negotiating with Cray, Novell asked Santa Cruz to execute a letter agreement to "enable Novell to negotiate directly with Cray on the issue of Cray's intention to operate under the SGI Agreements for all SVRX royalty-generating binary shipment without requiring direct involvement from SCO."
43. I declare under penalty of perjury that the foregoing is true and correct.

Executed: December 11, 2006

  
William M. Broderick