

1 (Recess)

2 THE COURT: Who will be your first witness?

3 MR. SINGER: Mr. Robert Frankenberg, Your HONor.

4 THE COURT: You'll be handling that?

5 MR. SINGER: I will be handling that.

6 THE COURT: Thank you.

7 Anything, counsel, before we bring the jury in?

8 MR. SINGER: No, Your Honor.

9 MR. BRENNAN: No Your Honor.

10 THE COURT: Ms. Malley.

11 (WHEREUPON, the jury enters the proceedings.)

12 THE COURT: Mr. Singer, would you like to call
13 your fist witness, please.

14 MR. SINGER: Thank you.

15 We would call Mr. Robert Frankenberg.

16 THE COURT: Mr. Frankenberg, do you want to come
17 forward and I'll swear you in.

18 ROBERT J. FRANKENBERG

19 Having been duly sworn, was examined

20 and testified as follows:

21 THE WITNESS: Robert J. Frankenberg,

22 F-r-a-n-k-e-n-b-e-r-g.

23 DIRECT EXAMINATION

24 BY MR. SINGER

25 Q. Good morning, Mr. Frankenberg.

1 Would you please describe your educational background.

2 A. I have a degree in computer engineering from San Jose
3 State University, and I am a S.E.P. graduate of the Stanford
4 Graduate School of Business.

5 Q. Would you briefly summarize your employment background
6 before joining Novell.

7 A. I spent four years in the U.S. Air Force as a radar
8 computer technician, and then was at Hewlett Packard from
9 1969 to 1994. I started there as a manufacturing technician
10 and left as the person responsible for Hewlett Packard's
11 computer and networking business.

12 I left Hewlett Packard in late March of 1994 to become
13 the C.E.O. of Novell, and later became chairman of Novell.

14 Q. The position that you took at Novell when you joined
15 was that of chief executive officer, and then later you also
16 became chairman of the board?

17 A. That is correct.

18 Q. Can you briefly describe the major lines of Novell's
19 business at the point when you joined the company?

20 A. Novell's major business was NetWare, which is a network
21 operating system that allows people and still does to
22 connect personal computers together and share storage, share
23 disk storage and printing. At the time those were very
24 expensive and it became a very popular product to be able to
25 share those amongst many users.

1 The second largest part of Novell's business was
2 training people to support those systems. There were
3 several smaller businesses that included UNIX and UnixWare.

4 And almost at the same time that I joined Novell they
5 completed negotiations to buy Word Perfect corporation,
6 which included word processing and a spreadsheet called
7 QuatroPro from Borland, with the intent to create an office
8 suite that would very much compete with Microsoft Office.

9 Q. Did there come a time when you decided as chief
10 executive officer that it would be in the best interests of
11 Novell to sell one or more of those businesses?

12 A. Yes, we did come to that conclusion. We did a very
13 careful study, beginning shortly after I arrived, looking at
14 all of the businesses that Novell was involved in. I
15 mentioned the chief ones in answer to your question, but
16 there were actually quite a few more, about 15 or 16
17 different businesses.

18 We came to the conclusion that we were trying to do too
19 much, and that we were not properly funding the products
20 that we felt we could be successful with, and so we came to
21 the conclusion that we should sell several of those
22 businesses, find good homes for them and find jobs for as
23 many of the people involved with them as possible, and then
24 focus on our networking product area.

25 Q. So what businesses did you decide to sell?

1 A. We decided to sell Word Perfect, the Word Perfect
2 product, not the company. It had already been integrated
3 into Novell, and a suite that we called Perfect Office,
4 which combined it with the other elements that I mentioned
5 that had just been purchased before I got there.

6 We decided to sell UNIX and UnixWare. UNIX was and
7 still is a very popular operating system. UnixWare was that
8 same operating system but with networking capabilities built
9 in consistent with NetWare, Novell's product.

10 We also decided to sell Tuxedo, which was another
11 product that we had purchased at the same time. That had
12 been purchased, I should say, and I was not there, but at
13 the same time that UNIX was purchased from AT&T.

14 Q. When did you come to the view that these businesses
15 should be sold?

16 A. That would have been late in '94 or early '95. I
17 remember having made the decision and driving through a
18 blinding snow storm to get home, so it was mid winter.

19 Q. Did you have a time frame in which you hoped to
20 accomplish these sales?

21 A. Well, when you make a decision like that it is best to
22 execute a sale properly and well but quickly, because
23 customers find out that you're not going forward with it,
24 and employees are disheartened because they are working on
25 something that may not continue with the company, so we

1 wanted to do it in as short order as possible.

2 Q. With respect to the UNIX business, Mr. Frankenberg, was
3 it your intent to sell that business in its entirety?

4 A. Yes.

5 Q. Did selling UNIX include selling the UnixWare product
6 line?

7 A. Yes.

8 Q. Did selling UNIX include selling the UNIX copyrights?

9 A. Yes.

10 Q. Was UnixWare the current UNIX product that Novell was
11 licensing at that time?

12 A. Yes.

13 Q. Did there come a time when you directed certain of the
14 people that worked for you at Novell to take steps to have
15 that sale occur?

16 A. Yes.

17 Q. Was there a man named Duff Thompson who worked at
18 Novell?

19 A. Yes.

20 Q. What position did he have in 1995?

21 A. He was the senior vice president of business
22 development.

23 Q. Did you ask Mr. Thompson to take any steps to
24 accomplish the sale of the UNIX business?

25 A. Yes, I did.

1 Q. What direction did you give Mr. Thompson and others at
2 Novell?

3 A. I told them that we wanted to first of all sell UNIX
4 and UnixWare at a price that would be acceptable, that it
5 would go to a company that would be able to carry it forward
6 and that would have the means to do that and the ability to
7 do that. We wanted to affect a common UNIX operating system
8 across the entire spectrum of the Intel processor product
9 line, so that it would be compatible from the bottom of the
10 line to the top of the line, and thus create a competitor to
11 Microsoft's N.T. and other future operating systems.

12 Q. Did that mean you wanted to pick a seller who you
13 thought could do that?

14 MR. BRENNAN: Objection, leading the witness and
15 move to strike.

16 THE COURT: Overruled.

17 BY MR. SINGER

18 Q. Was there a gentleman by the name of Ed Chatlos that
19 also worked at Novell?

20 A. Yes.

21 Q. What role did he have in the transaction?

22 A. Ed was the primary day-to-day negotiator.

23 Q. Do you recall who he reported to?

24 A. I believe he reported to Duff.

25 Q. Did Mr. Thompson report to you?

1 A. Yes.

2 Q. Who was David Bradford?

3 A. David Bradford was the general counsel of Novell.

4 Q. What was Mr. Bradford's role in the transaction as
5 compared to that of Mr. Chatlos and Mr. Thompson?

6 A. Mr. Bradford would have overseen the effort. It was
7 his responsibility as general counsel, and he had many other
8 things on his plate, but he would have overseen especially
9 the legal aspects of it.

10 Q. In terms of negotiating the deal, who would have been
11 the responsible people for that?

12 A. The primary people negotiating the deal were Duff
13 Thompson and Ed Chatlos.

14 Q. Do you recall who became to buyer of the business, the
15 UNIX business?

16 A. Yes, Santa Cruz Operation, often referred to as SCO,
17 S-C-O.

18 Q. Did you have any conversations with any of the
19 principles of SCO?

20 A. I did, yes. I talked with Doug Michaels who was an
21 executive at SCO. I am pretty sure that it was at one of
22 the industry conferences that he and I both attended. We
23 talked about how attractive it would be to have a compatible
24 UNIX running on Intel from the bottom to the top of their
25 product line. He believed and he felt that SCO would be a

1 good company to do that.

2 Q. Did you also have any communications with Mr. Mohan?

3 A. Yes, I did.

4 Q. Who was he?

5 A. I believe he was relatively new, but he was the C.E.O.,
6 the relatively new C.E.O. of SCO.

7 Q. Were these the two top officials of SCO?

8 A. I am sure there were other people, but those were the
9 two people that I talked to.

10 Q. What was your belief as to whether Santa Cruz was the
11 appropriate company to sell the UNIX business to?

12 A. They had quite a successful business at the time
13 selling UNIX on Intel processors. They had customers like
14 McDonald's who ran a good part of their business on their
15 systems. They were viewed as a company that created very
16 highly reliable UNIX business systems. From that standpoint
17 it seemed a good choice.

18 From another standpoint they were not very large, and
19 they did not have a significant amount of cash behind them.

20 Q. Do you recall, roughly speaking, the time frame when
21 you first discussed the possibility of selling the UNIX
22 business to Santa Cruz Operation?

23 A. First discussed it with whom?

24 Q. Mr. Mohan or Mr. Michael.

25 A. I believe that would have been in the spring, late

1 spring of 1995.

2 Q. Did you ever express to them that it was Novell's
3 intent to sell the UNIX and UnixWare business?

4 A. Yes.

5 Q. Did you ever express to anyone from Santa Cruz that it
6 was your intent to hold back the copyrights to UNIX in the
7 course of selling that business?

8 A. No.

9 Q. Did any of the Novell executives working on the deal
10 ever tell you that the UNIX copyrights were being held back
11 from Santa Cruz?

12 A. No.

13 Q. Did you ever hear from anyone that the copyrights had
14 been held back in the transaction from Santa Cruz?

15 A. At what point in time?

16 Q. Well, let's talk about the time when the deal was being
17 negotiated.

18 A. No.

19 Q. Now, I would like you to look at the A.P.A.

20 If I might, I will give you a set of exhibits that
21 we'll be using on direct examination.

22 MR. SINGER: Your Honor, we have a set for you as
23 well.

24 THE COURT: Is this already on the D.V.D.?

25 MR. SINGER: It is on the D.V.D.

1 THE COURT: I will just refer to my D.V.D. then.

2 Thank you.

3 BY MR. SINGER

4 Q. Could you turn to what is marked as SCO Exhibit 1 in
5 the book, Mr. Frankenberg. If you would turn to page 49, do
6 you see your signature on this asset purchase agreement on
7 behalf of Novell?

8 I might note that the pages will also be shown on the
9 screen in front of you.

10 A. Okay.

11 Q. Whichever is more convenient.

12 A. Yes. I do see my signature.

13 Q. Is that your signature approving the sale of assets
14 pursuant to this agreement?

15 A. Yes.

16 MR. SINGER: I would like to move SCO Exhibit
17 Number 1 into evidence at this time.

18 MR. BRENNAN: No objection, Your Honor.

19 THE COURT: It will be admitted.

20 (Plaintiff's Exhibit 1 was
21 received into evidence.)

22 BY MR. SINGER

23 Q. I would like to turn to the recital. It is the first
24 page of the asset purchase agreement.

25 A. Yes, I see it on the screen.

1 Q. If you would look at A, it says the seller is engaged
2 in the business of developing a line of software products
3 currently known as UNIX and UnixWare, the sale of binary and
4 source code licenses to various versions of UNIX and
5 UnixWare and the support of such products and the sale of
6 other products which are directly related to UNIX and
7 UnixWare, collectively, the business.

8 Now, is that in your view an accurate description of
9 the business?

10 A. Yes.

11 Q. Now, in B it says the board of directors of each of the
12 seller and buyer believe that it is in the best interest of
13 each company and the respective stockholders that buyers
14 acquire certain of the assets of and assume certain of the
15 liability of seller comprising the business.

16 Did you understand that to mean the UNIX and UnixWare
17 business?

18 A. Yes.

19 Q. Would there be other assets for other businesses that
20 were not being sold?

21 A. Yes, there would be.

22 Q. Now, if we turn to Section 1.1, which says purchase of
23 assets, do you see under Section 1.1A it says on the terms
24 and subject to the conditions set forth in this agreement,
25 the seller will sell, convey, transfer and assign and

1 deliver to the buyer, and the buyer will purchase and
2 acquire from the seller at the closing date, as defined in
3 Section 1.7, all of the seller's right, title and interest
4 in and to the assets and properties of seller relating to
5 the business, collectively, the assets identified on
6 Schedule 1.1A hereto.

7 Then notwithstanding the foregoing, the assets to be
8 so purchased shall not include those assets, the excluded
9 assets set forth in Schedule 1.1B.

10 Is that correct in your understanding that this was the
11 sale of assets, with the assets to be sold on Schedule 1.1A,
12 and the assets to be excluded on Schedule 1.1B?

13 A. Yes, it was.

14 Q. Can we now turn to Schedule 1.1A, which will be on the
15 screen, but also appears in the book after the signature
16 page.

17 Now, on Schedule 1.1A it says all rights and ownership
18 of UNIX and UnixWare including but not limited to all
19 versions of UNIX and UnixWare and all copies of UNIX and
20 UnixWare, including revisions and updates in process, and
21 all technical design, development, installation, operation
22 and maintenance information concerning UNIX and UnixWare,
23 including source code, source documentation, source listings
24 and annotations, appropriate engineering notebooks, test
25 data and test results, as well as all reference manuals and

1 support materials normally distributed by the seller to end
2 users and to potential end users in connection with the
3 distribution of UNIX and UnixWare, such assets to include
4 without limitation the following.

5 Did that comport with your understanding of what Novell
6 was selling?

7 A. Yes, it does.

8 Q. Was this inclusive of both UNIX and UnixWare
9 technology?

10 A. Yes.

11 Q. In fact, under UNIX source code products, do you see
12 listed both UNIX and UnixWare? It appears right below that
13 section under UNIX source code products.

14 A. Yes. I was looking at it on the page, not the screen.

15 Q. It says UnixWare 2.0 as described in the UnixWare 2.0
16 licensing schedule and those products listed as prior
17 products, and then you have the UNIX system five release
18 four, and those products listed as prior products, and then
19 several pages more of other technology; is that correct?

20 A. Yes.

21 Q. Did you understand that both UNIX and UnixWare source
22 code then was being sold --

23 A. Yes.

24 Q. -- to Santa Cruz?

25 Did you understand that this list of assets would

1 include the copyrights associated with UNIX and UnixWare?

2 A. Yes.

3 Q. Now, there is a separate section that deals with
4 intellectual property. If you would turn to page 3 of 4 of
5 the asset schedule.

6 Are you there?

7 A. I am, yes.

8 Q. Now, this listed trademarks; is that correct?

9 A. Yes.

10 Q. Would that be additional intellectual property to the
11 assets listed on the source code products in Section 1?

12 A. Yes.

13 Q. Now, did you ever give any directions to the team
14 handling the documentation of this deal, that they should
15 transfer all right, title and interest to UNIX and UnixWare,
16 but they should retain the copyrights for UNIX and UnixWare
17 from being sold?

18 A. No.

19 Q. Did you ever authorize anyone at Novell to remove the
20 UNIX and UnixWare copyrights from the assets being sold?

21 A. No.

22 Q. Did you ever tell anyone from Santa Cruz that
23 copyrights for UNIX and UnixWare were not part of the
24 technology being sold?

25 A. No.

1 Q. Now, let's turn to the list of excluded assets that
2 appear behind the list of assets being sold, Schedule 1.1B.

3 Do you see that on the first page of the listed
4 excluded assets there is a number of NetWare assets listed?

5 A. Yes.

6 Q. Did you want to be clear that NetWare assets were not
7 being transferred as a part of the sale?

8 MR. BRENNAN: Objection, Your Honor, and move to
9 strike.

10 I'm sorry. The question is leading.

11 THE COURT: Overruled.

12 THE WITNESS: Repeat the question, please.

13 BY MR. SINGER

14 Q. Yes. Did you want to be clear that NetWare was not
15 being transferred as part of the transaction?

16 A. It was very important that no aspects of NetWare be
17 transferred as part of the transaction.

18 Q. So in the list of excluded assets, Roman numeral one
19 pertains to NetWare; is that correct? Does item one pertain
20 to assets not listed on Schedule 1, including without
21 limitation any asset that pertains to NetWare?

22 A. I'm sorry. I'm lost.

23 Q. Okay. This is under the schedule --

24 A. I'm sorry. Yes. I was looking at item two which says
25 NetWare operating system. Yes.

1 Q. Item two was the NetWare operating system; is that
2 correct?

3 A. Yes.

4 Q. Item three was Tuxedo transaction processing.

5 A. Yes.

6 Q. Was that a separate business?

7 A. That was a separate product. It was part of the UNIX
8 and UnixWare purchase from AT&T.

9 Q. Was that being sold to Santa Cruz?

10 A. No.

11 Q. Then you had under license technology that wasn't being
12 sold, under 4-A, NetWare and other Novell code contained in
13 UnixWare 2.01 and Eiger.

14 Do you see that?

15 A. Yes.

16 Q. What was Eiger?

17 A. I don't recall.

18 Q. Was it a new product?

19 A. I believe it was, but I don't recall exactly.

20 Q. This was Novell code that was being withheld?

21 MR. BRENNAN: Objection, leading the witness.

22 THE COURT: Sustained.

23 MR. SINGER: Okay.

24 BY MR. SINGER

25 Q. Item B, does that say NetWare code contained in Eiger

1 only?

2 A. No.

3 B. I'm sorry. Yes.

4 Q. Item C is NetWare 4.1 for UnixWare; is that correct?

5 A. Yes.

6 Q. Could you turn to the next page of the excluded asset
7 schedule.

8 Here under intellectual property it says under A all
9 copyrights and trademarks except for trademarks UNIX and
10 UnixWare.

11 Do you see that line?

12 A. Yes.

13 Q. Was that consistent with the understanding that you had
14 of the deal?

15 A. No.

16 Q. Now, do you recall whether or not you ever reviewed
17 this schedule in connection with the transaction?

18 A. I am sure that I did, yes.

19 Q. Do you have any understanding of why this wouldn't have
20 been caught at the time in 1995 when the transaction was
21 being signed?

22 MR. BRENNAN: Objection, that assumes facts not in
23 evidence and lacks foundation.

24 THE COURT: Overruled.

25 THE WITNESS: As I mentioned in response to an

1 earlier question, we were very concerned that NetWare, which
2 was our largest product, remain fully protected including
3 all the copyrights and trademarks and code and so forth.
4 What I think happened when I read this, if I actually
5 noticed this, was I said, oh, that is the protection of the
6 NetWare copyrights and obviously misread it.

7 BY MR. SINGER

8 Q. Now, do you recall that there were also board minutes
9 which were done at the time that Novell approved the
10 transaction in September of 1995?

11 A. Yes.

12 Q. Were those minutes also prepared by the same lawyers
13 who documented the transaction?

14 A. I believe those minutes were prepared by the secretary,
15 who was David Bradford, and who was also general counsel.

16 Q. If those minutes reflected Novell was keeping UNIX and
17 UnixWare copyrights, would they be an accurate reflection of
18 your understanding of the deal?

19 A. No, they would not.

20 Q. Are you aware, Mr. Frankenberg, of the language that we
21 are looking at on this schedule of excluded asserts, whether
22 or not that was changed a year later by an amendment?

23 MR. BRENNAN: Your Honor, I believe this is
24 covered by a ruling.

25 THE COURT: Overruled.

1 MR. BRENNAN: We had a motion in limine order,
2 Your Honor, and I believe it is covered by this, about the
3 scope this witness would be permitted to testify to.

4 THE COURT: Can you remind me which numbered
5 motion that would be?

6 MR. BRENNAN: Yes. One moment, Your Honor, and I
7 will get that for you.

8 I have reference to the Court's ruling and
9 memorandum decision and order on defendant's motion in
10 limine numbers 12 to 19 with respect to Mr. Frankenberg's
11 testimony. That is recited in the Court's order on page 6
12 going on to page 7.

13 THE COURT: Thank you.

14 I will sustain the objection.

15 MR. SINGER: May I be heard on that point, Your
16 Honor?

17 THE COURT: You may.

18 MR. SINGER: I am not intending to ask Mr.
19 Frankenberg to interpret it, I am asking simply about
20 whether he knows this language was replaced by a subsequent
21 amendment.

22 MR. BRENNAN: That would fly directly in the face
23 of the Court's ruling.

24 THE COURT: I will continue to sustain the
25 objection.

1 BY MR. SINGER

2 Q. Please look at Section 1.3 of the asset purchase
3 agreement on page 3, transfer of customers.

4 Under 1.3A, little I, it says it is the intent of the
5 parties hereto that all of the business and all of seller's
6 backlog, if any, relating to the business be transferred to
7 buyer. Accordingly, all parties agree to facilitate the
8 transfer of customers of the business from seller to buyer
9 following the closing.

10 Would you have transferred the UNIX customers to the
11 buyer if you were not selling the entire UNIX business?

12 A. No.

13 Q. Did all of the UNIX employees go over to Santa Cruz?

14 A. Most of them did. I believe some were laid off.

15 Q. Would you have done that if you were keeping the UNIX
16 business?

17 A. No.

18 Q. Would you look, please, at Section 1.6 of the asset
19 purchase agreement on page 5. This is called a license back
20 of assets.

21 Do you see that?

22 A. I do, yes.

23 Q. What is your understanding of a license back of assets?

24 A. The license back gave Novell the right to use the
25 intellectual property that had been sold to S-C-0 in their

1 products, and was protection for us versus someone later
2 claiming that we did not have the right to make use of that
3 technology.

4 Q. Were there certain restrictions listed in there which
5 you had agreed to?

6 A. I am reading it. I don't see any restrictions.

7 Q. Did this contemplate that there would be a separate
8 license agreement that would be entered into at the same
9 time as the closing?

10 A. Yes.

11 Q. I would like you to turn, if you would, to Exhibit 162.
12 It is in your book. This is the technology licensing
13 agreement.

14 Was this an agreement that was referred to from your
15 understanding in Section 1.6 of the asset purchase
16 agreement?

17 A. Yes.

18 Q. If you would turn to the last page of this, do you see
19 that this was entered into by Novell on December 6, 1995?

20 A. Mr. Singer, the screen has gone blank.

21 THE CLERK: Are you going to admit this?

22 MR. SINGER: Yes.

23 I would move to have Exhibit 162 admitted.

24 THE COURT: Any objection?

25 MR. BRENNAN: No objection, Your Honor. Thank

1 you.

2 THE COURT: It will be admitted.

3 (Plaintiff's Exhibit 162 was
4 received into evidence.)

5 THE COURT: Mr. Singer, just so that you
6 understand, Ms. Malley cannot show the exhibit to the jury
7 until after it has been admitted and that is why the screen
8 was blank.

9 MR. SINGER: I understand.

10 BY MR. SINGER

11 Q. Do you recognize this to be Mr. Thompson who signed on
12 behalf of Novell?

13 A. Yes.

14 Q. And were there restrictions in the technology licensing
15 agreement with respect to the use of the technology that was
16 being licensed back by Santa Cruz?

17 A. Yes, there were.

18 Q. I think I misspoke. I said licensed back by Santa
19 Cruz, but it is licensed back by Novell from Santa Cruz?

20 A. Yes.

21 Q. Is that correct?

22 A. Yes, there were restrictions.

23 Q. If Novell was keeping the UNIX and UnixWare copyrights,
24 would Novell have needed to license back the right to use
25 those assets in its business?

1 A. I don't think so, no.

2 Q. I would like to discuss the payment terms.

3 Was Santa Cruz in a position to pay cash for the
4 business?

5 A. No, they were not.

6 Q. Did the parties agree on a different source of
7 compensation for the business?

8 A. Yes.

9 Q. I would like you to look back at the asset purchase
10 agreement, Exhibit 1, Section 1.2 of the A.P.A.

11 Does this set forth the payment terms?

12 A. Yes, it does.

13 Q. Now, was paragraph one the receipt of stock in Santa
14 Cruz?

15 A. Yes, it was.

16 Q. Was paragraph two that dealt with certain royalties
17 also part of the payment for the business?

18 A. Yes, it was.

19 Q. Did that paragraph provide for a royalty stream in
20 certain existing UNIX licenses as part of the payment terms?

21 A. Yes, it did.

22 Q. Now, is it your understanding that Novell could obtain
23 that royalty interest and retain that while still selling
24 the copyrights to Santa Cruz?

25 A. Yes.

1 Q. Was there a third piece of compensation that Novell was
2 receiving that related to the sale of UnixWare products in
3 the future?

4 A. Yes.

5 Q. Explain what your understanding of that was.

6 A. There was a royalty on the UnixWare, on future UnixWare
7 sales.

8 Q. Was it your understanding that those three revenue
9 streams together constituted the payment for UNIX and the
10 UnixWare businesses?

11 A. Yes.

12 Q. I would like to show you, if I might, an exhibit which
13 is slide 15 from what was shown by the defendants during the
14 opening statement a little bit earlier today.

15 Do you see that that is a picture of only paragraph
16 1.2A as consideration of the assets, stock?

17 Do you see that?

18 A. Yes.

19 Q. It does not have Section 1.2B royalties.

20 Do you see that?

21 A. Yes.

22 Q. But if you look at the agreement, 1.2B royalties from
23 the UNIX and UnixWare system, was that part of the payment
24 stream that Novell was receiving for the sale of the
25 business?

1 A. Yes, it was.

2 Q. I would like you to look at Section 4.16 of the asset
3 purchase agreement on page 24.

4 Do you understand under Section 4.16B that there were
5 certain rights that Novell was retaining, to force the buyer
6 to take or not take certain steps relating to SVRX licenses?

7 A. Yes.

8 Q. What was your understanding of the purpose of that
9 provision?

10 A. The purpose of this was to make sure that we would be
11 able to effect buyouts by customers of their SVRX licenses.
12 A buyout is to monetize, or to in one sale grant the right
13 of a customer to sell copies of the product and not have to
14 do an ongoing royalty check each quarter. This would allow
15 us to receive a substantial payment from a number of SVRX
16 licensees.

17 Q. Was this waiver provision in 4.16B ever intended to
18 allow Novell to force a buyer to abandon enforcing its
19 intellectual property rights if they wanted to pursue such
20 an action?

21 A. No.

22 Q. Now, pursuant to the terms of the asset purchase
23 agreement, do you recall whether Novell and Santa Cruz were
24 supposed to get together and agree on the terms of a press
25 release?

1 A. Yes.

2 Q. I would like you to look at Exhibit 526.

3 Was this the jointly approved press release pertaining
4 to the transaction?

5 A. Yes, it was.

6 MR. SINGER: I move the admission of Exhibit 526.

7 THE COURT: Any objection?

8 MR. BRENNAN: Objection, Your Honor. I don't
9 think we have laid a proper foundation for this and it calls
10 for the witness's speculation.

11 THE COURT: Can you ask more questions to see if
12 you can establish a proper foundation?

13 BY MR. SINGER

14 Q. You had personal knowledge at the time of the
15 transaction in approving the press release?

16 A. Yes, I did.

17 Q. As CEO you had to approve the press release?

18 A. Yes.

19 Q. The press release, since it was a joint release, would
20 it be an official statement from Novell as well as SCO?

21 A. Yes.

22 Q. Is this the press release that you approved?

23 A. Yes, it is.

24 THE COURT: Foundation has been laid and the Court
25 will admit Exhibit 526.

1 MR. SINGER: Thank you.

2 (Plaintiff's Exhibit 526 was
3 received into evidence.)

4 BY MR. SINGER

5 Q. If we look at the press release that was issued, it
6 says according to the terms of the agreement -- Mr. Calvin,
7 if you could blow up that part -- according to the terms of
8 the agreement SCO will acquire Novell's UnixWare business
9 and UNIX intellectual property.

10 Is that a correct statement?

11 A. Yes.

12 Q. Did you understand that to include the copyrights?

13 A. Yes.

14 Q. Is the asset purchase agreement which we have been
15 looking at similar to licenses that Novell might have issued
16 to third companies like Hewlett Packard or others that might
17 come in to seek a license to make use of the property?

18 A. Yes.

19 Q. And the license agreements, would they be a sale of
20 assets or would they be called a license agreement?

21 A. They would be called license agreements.

22 Q. An asset purchase agreement, is that something else?

23 A. Yes.

24 Q. Did this transaction close in December of 2005?

25 A. Yes, it did.

1 Q. At that time was it your understanding that the
2 copyrights were being sold to Santa Cruz with the rest of
3 the UNIX business?

4 A. Yes.

5 Q. Did your understanding ever change while you were the
6 chief executive officer of Novell?

7 A. No.

8 MR. SINGER: I have nothing further.

9 THE COURT: How long were you the chief executive
10 officer?

11 THE WITNESS: From late March, early April of
12 1994, until late August of 1996.

13 THE COURT: Thank you.

14 Go ahead, Mr. Brennan.

15 MR. BRENNAN: Thank, you Your Honor.

16 CROSS-EXAMINATION

17 BY MR. BRENNAN

18 Q. Good morning, Mr. Frankenberg.

19 Let me introduce myself. My name is Sterling Brennan
20 and I represent Novell. I don't think we have had the
21 privilege of meeting, have we?

22 A. We have not. Very nice to meet you.

23 Q. Likewise.

24 My first question, in essence, is the one that Your
25 Honor has just asked you. You were with Novell for less

1 than two and a half years, right?

2 A. Correct.

3 Q. As you have indicated, you joined the company in April
4 of 2004, correct?

5 A. Late March, early April, right at the border there.

6 Q. And you had left by August of 1996, correct?

7 A. Correct.

8 Q. During the time that you were with Novell, for that
9 period of March and April of 1994, until August of 1996, you
10 were the chief executive officer of Novell, right?

11 A. Correct.

12 Q. And chairman of its board of directors, correct?

13 A. Shortly after I joined I became chairman. I was not
14 chairman when I joined.

15 Q. How long after you joined was it that you became the
16 chairman of the board of directors?

17 A. That would have been a couple months, I believe. I
18 don't remember precisely.

19 Q. When you did become the chairman of the board of
20 directors, what was the purpose or function of Novell's
21 board of directors?

22 A. To oversee the operations of the company and govern its
23 proper conduct.

24 Q. So was the board of directors in essence superior to
25 you or were you superior to the board?

1 A. I worked at the pleasure of the board of directors.

2 Q. So the ultimate decisions and policy for the company
3 were set by the board of directors, correct?

4 A. A number of decisions were delegated to me as C.E.O.,
5 but the ultimate decision was whether I remained the C.E.O.
6 so that, of course, would be the case.

7 Q. With respect to the asset purchase agreement that
8 Mr. Singer has talked to you about, the ultimate decision as
9 to whether or not Novell should enter into that agreement
10 was a decision of the Novell board of directors, correct?

11 A. That is correct. It was the sale of significant assets
12 of the company and, therefore, required board approval.

13 Q. I would like you to focus for a moment on the period of
14 September of 1995.

15 Do you have that time period in mind?

16 A. Yes, sir.

17 Q. If you will look back to what has been marked as
18 Exhibit 1, that is the asset purchase agreement.

19 Do you see that?

20 A. Yes.

21 Q. That is dated as of September 19, 1995.

22 Do you see that?

23 A. Yes.

24 Q. As of the day before, September 18th, 1995, who were
25 the members of the board of directors of Novell as of that

1 date?

2 A. Let's see if I can remember. That was a few years ago
3 now. Jack Messman, Alan Ashton, Kanwal Rekhi.

4 THE COURT: Do you have anything that can help
5 refresh his memory?

6 MR. BRENNAN: I do.

7 I will ask one question, and then I will do just
8 that, Your Honor.

9 BY MR. BRENNAN

10 Q. Do you remember any others than the three you have
11 mentioned?

12 A. There are others whose names won't come to mind, but I
13 do remember their faces. John Young was a member.

14 Q. John Young was another?

15 A. Yes.

16 Q. How many members of the board were there at the time?

17 A. I believe there were eight or nine.

18 Q. Mr. Singer asked you about minutes of board of director
19 meetings.

20 Do you recall that?

21 A. Yes.

22 Q. Do you know whether or not there was a board of
23 director meeting held by Novell before the asset purchase
24 agreement was approved?

25 A. Yes.

1 Q. Were you present at that meeting?

2 A. Yes, I was.

3 Q. Do you know whether minutes were prepared of that
4 meeting?

5 A. Yes, they were.

6 Q. Did you review the minutes to make sure that they were
7 accurate?

8 A. I did, yes.

9 Q. You have indicated that David Bradford was the one who
10 prepared those minutes.

11 Correct?

12 A. Yes.

13 Q. Do you expect that those minutes would identify who the
14 persons were that were present at the board of directors
15 meeting on September 18, 1995?

16 A. Yes.

17 MR. BRENNAN: May I approach, Your Honor?

18 THE COURT: You may, and you don't have to ask.

19 MR. BRENNAN: Thank you.

20 BY MR. BRENNAN

21 Q. You have before you what has been marked as Exhibit
22 Z-3.

23 Do you recognize that?

24 A. Yes.

25 Q. Are those the minutes of the board of directors meeting

1 of Novell, Inc. held on Monday, September 18, 1995?

2 A. Yes, they are.

3 Q. It indicates at the top who the members of the board of
4 directors were that were present, correct?

5 A. Yes.

6 MR. BRENNAN: Your Honor, I move into admission
7 the minutes of the board of directors of Monday, September
8 18th, 1995 as an exhibit, Z-3.

9 MR. SINGER: No objection.

10 THE COURT: Exhibit Z-3 will be admitted.

11 (Defendant's Exhibit Z-3 was
12 received into evidence.)

13 BY MR. BRENNAN

14 Q. If we look at the minutes of the board of directors
15 meeting it indicates in the first paragraph, quote, a
16 meeting of the Novell, Inc. board of directors was held on
17 Monday, September 18th, 1995, commencing at noon Mountain
18 Time. The meeting was held pursuant to a telephone
19 conference call. Seven of the eight directors were present
20 for the meeting. Bob Frankenberg. That would be you,
21 correct?

22 A. Yes.

23 Q. Jack Messman. You recognize Mr. Messman, right?

24 A. I do, yes.

25 Q. He subsequently became the chief executive officer and

1 chairman of the board of Novell, correct?

2 A. I knew he became the chief executive, but I didn't know
3 he was chairman, but I wouldn't be surprised.

4 Q. Then there is reference to Elaine Bond.

5 Who was that?

6 A. Elaine Bond was a board member who was on the board
7 when I joined. She had an I.T. background and was there
8 largely to represent the customer's point of view.

9 Q. Do you now recognize that Elaine Bond was present at
10 the September 18th, 1995 board meeting?

11 A. Yes, she is listed as present.

12 Q. Then there is reference to a Larry Sonsini.

13 Do you recognize that?

14 A. Yes, I do.

15 Q. Who is Larry Sonsini?

16 A. Larry Sonsini is the one of partners of Wilson Sonsini
17 Goodrich and Rosati, and he was a board member and often
18 provided legal advice.

19 Q. So your understanding was Mr. Sonsini in addition to
20 being a member of the board of directors was an attorney who
21 would give legal advice to the company, correct?

22 A. Yes.

23 Q. Did you rely on Mr. Sonsini and his advice?

24 A. Yes.

25 Q. Did he ever advise you during the period of time that

1 you served as the chief executive officer of Novell?

2 A. Yes, many times.

3 Q. Did you find his advice to be sound and worth listening
4 to?

5 A. Yes.

6 Q. Then there is a reference to Alan Ashton. You
7 mentioned him earlier, right?

8 A. Yes.

9 Q. Mr. Ashton had been one of the founders of the Word
10 Perfect Corporation, correct?

11 A. Correct.

12 Q. At the time of this meeting he was a member of the
13 board of directors and present at the meeting, correct?

14 A. Yes.

15 Q. Then there is a reference to Ian Wilson.

16 Do you recognize that name?

17 A. I do.

18 Q. Who is Ian Wilson?

19 A. Ian was a South African businessman who had involvement
20 in a number of technology ventures and was also on the board
21 when I joined Novell.

22 Q. Then John young. Who was Mr. Young?

23 A. John Young was the former C.E.O. of Hewlett Packard,
24 and my boss's boss before I left Hewlett Packard.

25 Q. Did you trust Mr. Young's advice?

1 A. I did, yes.

2 Q. Were there any members of the board that were present
3 at the September 18, 1995 meeting whose advice you did not
4 trust?

5 A. No, sir.

6 Q. Now, apparently there were eight directors of Novell at
7 the time, right?

8 A. Yes.

9 Q. Only seven are identified as being present at the
10 meeting, correct?

11 A. Yes.

12 Q. Do you know who the director was who was not present at
13 the meeting?

14 A. I think it may have been Kanwal Rekhi. Cornwall was the
15 C.E.O. of a company that Novell had purchased before I got
16 there. It doesn't say who wasn't present, but that is a
17 good possibility of who was not there.

18 Q. In your role as the chief executive officer and
19 chairman of the board as well as a member of the board, did
20 you ever undertake to mislead or misrepresent management or
21 the board?

22 A. No.

23 Q. In fact, it was your desire always to be forthright and
24 complete in your transmission of information to the board,
25 right?

1 A. Very much so, yes.

2 Q. If you were ever present at a board meeting, including
3 the September 18th, 1995 board meeting, where there was any
4 incomplete or inaccurate information presented, you would
5 have done everything you could to correct that, right?

6 A. That is correct.

7 Q. Now, looking still at the first paragraph, it continues
8 also present by invitation were David Bradford, Ty Mattingly
9 and Jeff Turner of Novell.

10 Do you remember each of those individuals being present
11 at the board meeting?

12 A. Yes, I do.

13 Q. Now, you indicated before that David Bradford was the
14 general counsel of Novell, right?

15 A. Correct.

16 Q. What was his role as general counsel?

17 A. He was the chief legal officer of the company. He
18 represented the company in all legal matters. He also had a
19 role in looking forward to potential legal issues that might
20 face the company.

21 Q. So if there were an important business transaction
22 involving Novell, and it also implicated legal issues, as
23 the chairman of the board who would you look to for
24 guidance?

25 A. I would look to David Bradford and also, as you said

1 earlier, Larry Sonsini.

2 Q. At the board meeting you had present at least two
3 individuals who were trained lawyers, right?

4 A. Correct.

5 Q. Now, Mr. Sonsini's law firm also performed legal
6 services for Novell, correct?

7 A. Yes, they did.

8 Q. And Mr. Sonsini's law firm, Wilson Sonsini, was outside
9 counsel representing and advising Novell in connection with
10 the asset purchase agreement between Novell and Santa Cruz
11 Operation, correct?

12 A. That is correct.

13 Q. As the chief executive officer and chairman of the
14 board of directors, did you look to rely upon the legal
15 advice that Wilson Sonsini provided Novell?

16 A. I did, yes.

17 Q. Did you trust the legal advice that Wilson Sonsini
18 provided Novell?

19 A. Yes, I did.

20 Q. Did you understand that there were attorneys
21 negotiating on Novell's behalf with Santa Cruz Operation
22 with respect to the terms and conditions of the asset
23 purchase agreement?

24 A. Yes.

25 Q. Did you understand that one of those attorneys was a

1 partner at Wilson Sonsini by the name of Tor Braham?

2 A. Yes.

3 Q. Did you understand that Mr. Graham was working at
4 Mr. Bradford's direction to make sure that the asset
5 purchase agreement best represented Novell's interests?

6 A. He, together with other people on the team, yes.

7 Q. Let's talk about others who may be on the team.

8 You are familiar with Jim Tolonen?

9 A. I am.

10 Q. Who was Mr. Tolonen as of 1995?

11 A. He was the chief financial officer of Novell.

12 Q. Did Mr. Tolonen have any involvement in the asset
13 purchase agreement?

14 A. Yes, he did.

15 Q. Did you rely upon Mr. Tolman's recommendation an
16 advice?

17 A. I did, yes.

18 Q. You were aware that he was familiar with the terms and
19 conditions of the asset purchase agreement, correct?

20 A. Correct.

21 Q. So you would expect that if Mr. Tolonen were to provide
22 testimony regarding what the meaning and intent were of the
23 asset purchase agreement, that you would expect him because
24 of his involvement to be able to accurately state what the
25 position of Novell was, correct?

1 A. I would expect him to accurately state what he saw that
2 as, yes.

3 Q. Thank you.

4 Now, let's look to the first section that describes
5 what was discussed at the September 18, 1995 board meeting.
6 You'll see that the first major heading is proposed sale of
7 UnixWare business and equity investment in SCO.

8 I'm going to ask that the first three paragraphs be
9 highlighted. We'll take them in turn, however.

10 The first paragraph begins Mr. Bradford and Mr.
11 Frankenberg -- let me go back one. Right at the outset it
12 states Mr. Bradford and Mr. Frankenberg first confirmed that
13 the directors present on the call had received the materials
14 regarding several proposed transactions.

15 Do you see that?

16 A. I do, yes.

17 Q. Was it in fact the case that before the board meeting
18 each of the board members, yourself included, received a
19 packet of information regarding transactions including the
20 asset purchase agreement?

21 A. Yes.

22 Q. Then the next paragraph, if we could highlight that,
23 continues as follow. It says Mr. Frankenberg then provided
24 an overview of several business transactions that the
25 company was negotiating with Santa Cruz Operation, Inc.,

1 S-C-O, and Hewlett Packard for the purpose of strengthening
2 UNIX on the Intel platform. He described one of the key
3 steps in this process was the sale of a portion of Novell's
4 UnixWare business to SCO.

5 Do you see that?

6 A. Yes.

7 Q. Does that accurately reflect what you stated and did at
8 the board meeting?

9 Right?

10 A. Yes.

11 Q. In fact, what you described to the board of directors
12 was a contemplated sale of a portion of Novell's UnixWare
13 assets, right?

14 A. Yes.

15 Q. In fact, what was being considered was not a sale of
16 all of the UnixWare assets but only a portion, right?

17 A. The UnixWare business is different than the UnixWare
18 product.

19 Q. So is it correct then --

20 A. This is a portion of the UnixWare business being sold.
21 That excluded Tuxedo, which was part of the UnixWare
22 business.

23 Q. Is it correct that what you informed the board about
24 was the sale of a portion, as you put it, of the UnixWare
25 business?

1 A. Correct.

2 Q. Not all of it, right?

3 A. Correct.

4 Q. Then it continues that he then described a proposed
5 structure in which Hewlett Packard would take a leadership
6 position in the development of 64-bit UNIX technology, under
7 which Hewlett Packard would license Novell networking
8 services as a core component of future 64-bit UNIX.

9 Do you see that?

10 A. Yes.

11 Q. Is it correct that at the very time that Novell was
12 considering a sale of a portion of Novell's UnixWare
13 business to SCO, it was also considering a separate
14 transaction involving a license with Hewlett Packard
15 relating to UNIX?

16 A. Hewlett Packard was already a licensee of UNIX from
17 Novell. This would be an extension of that license.

18 Q. Well, the license that was being considered was one
19 that would be granted by Novell to Hewlett Packard, correct?

20 A. Yes, of networking services. Novell already had a UNIX
21 license. It didn't need a UNIX license.

22 Q. Well, in fact, Novell did not intend to transfer every
23 bit of its UnixWare business to SCO because it wanted to
24 preserve the right to do other UNIX related business, right?

25 A. That is not accurate. No.

1 Q. Okay. Well, let's see if we can test that just for a
2 minute. Are you aware, based on what you were shown earlier
3 today, that the asset purchase agreement includes certain
4 exceptions?

5 A. Yes.

6 Q. There were certain assets that were excluded, correct?

7 A. Yes.

8 Q. And the assets that were excluded were all copyrights
9 and trademarks except UNIX and UnixWare, right?

10 A. That is what it --

11 Q. That is what the document states, right?

12 A. Yes.

13 Q. As you look at the agreement even today, you realize
14 that the wording of the agreement is that all copyrights and
15 trademarks except the trademarks UNIX and UnixWare were
16 excluded, correct?

17 THE COURT: One second.

18 Ms. Singer?

19 MR. SINGER: I object. That misleads the content
20 of the document today.

21 THE COURT: I'm sorry. Could you restate the
22 objection?

23 MR. SINGER: It is misleading in that the document
24 today and the question related to what the document says
25 today does not say that. It lacks foundation.

1 THE COURT: I will sustain the objection.

2 BY MR. BRENNAN

3 Q. You do have in front of you the asset purchase
4 agreement that has been admitted into evidence as Exhibit 1,
5 correct?

6 A. Yes.

7 Q. Mr. Singer asked you earlier to look at Section 1.1B
8 and the schedule thereunder, right?

9 A. Yes.

10 Q. Let's look again at the schedule, Section 1.1B, if we
11 might, of the asset purchase agreement.

12 Do you have that before you?

13 A. It is on the screen, yes.

14 Q. So of the excluded assets, if we were to look at the
15 second page under the heading Roman numeral five, it is
16 intellectual property, right?

17 A. Yes.

18 Q. As you read those words as you sit here today, you're
19 capable of reading it and they say that excluded is all
20 copyrights and trademarks except for the trademarks UNIX and
21 UnixWare, correct?

22 A. Correct.

23 Q. And also excluded are all patents, right?

24 A. Correct.

25 Q. Let me have you focus for just a minute on patents.

1 Did Novell hold any patents that related to UNIX as of
2 1995?

3 A. Yes.

4 Q. Were any transferred to Santa Cruz Operation?

5 A. No.

6 Q. So this exclusion accurately states that the patents
7 that Novell held relative to UNIX did not transfer to SCO,
8 correct?

9 A. Correct.

10 Q. The agreement also says that excluded are all
11 copyrights, correct?

12 A. Correct.

13 Q. So as you sit here today and look at this agreement,
14 you would agree with me that the stated words in the
15 agreement exclude all copyrights, correct?

16 MR. SINGER: Objection. I think this goes to our
17 motion in limine regarding the reading of the documents
18 together.

19 THE COURT: Well, I think that you questioned him
20 on this document by itself, and I think I need to allow
21 cross-examination on this document by itself.

22 Go ahead. Overruled.

23 THE WITNESS: Would you repeat the question? Some
24 time has passed since we --

25 BY MR. BRENNAN

1 Q. I will try it again. I will try it again and I hope I
2 get it the same.

3 As you look at the words used in the asset purchase
4 agreement, section five, the excluded assets, you would
5 agree that those words state that all copyrights and
6 trademarks except for the trademarks UNIX and UnixWare are
7 excluded, correct?

8 A. That is what the document says, yes.

9 Q. As you sit here today would you agree that anyone else
10 who were to pick up the asset purchase agreement and look at
11 the excluded assets schedule, section five, intellectual
12 property, would you expect them to come to the same
13 conclusion that you did today, that in looking at the words
14 it would exclude all copyrights, right?

15 MR. SINGER: Objection, foundation.

16 May we approach, Your Honor?

17 THE COURT: We'll just go ahead and take a recess
18 at this point. 15 minutes.

19 MR. BRENNAN: Your Honor, just so we are clear,
20 are we going to get an answer to --

21 THE COURT: We will deal with the answer after I
22 have dealt with the objection.

23 MR. BRENNAN: Very well, Your Honor.

24 THE COURT: Ms. Malley.

25 THE CLERK: All rise for the jury, please.

1 (WHEREUPON, the jury leaves the proceedings.)

2 THE COURT: Go ahead, Mr. Singer.

3 MR. SINGER: Your Honor, this I think reflects the
4 concern that we have raised in the motion in limine that
5 Novell should not be allowed to create the impression with
6 the jury that the language as it is today in the A.P.A. has
7 this excluded copyright and trademark language. That was
8 replaced by an amendment and it no longer exists in the
9 agreement. Between my not being able to even have Mr.
10 Frankenberg acknowledge it, I think it is misleading to the
11 jury to suggest in questions that deal with the agreement as
12 it reads today, that this language appears here because it
13 does not. This is exactly the concern with misleading the
14 jury that led us to file that motion.

15 If I recall, the Court said, well, correctly, that
16 it is necessary to get into the history of the transaction,
17 so we need to take this up and see where we go at trial with
18 objections and that the plaintiffs would be able to object
19 at trial if this concern reappeared. Well, it has
20 reappeared. I think that the combination of Mr. Frankenberg
21 not being able to address amendment two, together with this
22 line of questioning, is creating a misimpression on the jury
23 that as it reads today this language appears in the
24 agreement and it does not.

25 THE COURT: Well, I believe the questions had to

1 do with what it read the day that the board approved the
2 minutes. That is all Mr. Brennan has asked, and because of
3 the questioning that you undertook of Mr. Frankenberg, the
4 Court will allow a continuation of this type of questioning.

5 MR. BRENNAN: Thank you, Your Honor.

6 THE COURT: We'll take 15 minutes.

7 MR. SINGER: Would I be allowed, Your Honor, to
8 ask that today it wouldn't be there, just reading from the
9 exhibit that is in evidence?

10 THE COURT: I'm sorry? Will I allow you to do
11 what?

12 MR. SINGER: To address on redirect with Mr.
13 Frankenberg, reading from evidence that is in the record,
14 that that language would not appear today in the A.P.A. as
15 amended?

16 THE COURT: Well, again, Mr. Frankenberg left the
17 company before the amendment was made and that was the
18 reason why the Court ruled as it did on the motion in limine
19 dealing with that. You will have to simply deal with that
20 with another witness, Mr. Singer.

21 MR. SINGER: Thank you, Your Honor.

22 (Recess)

23

24

25