

1 (12:10 p.m.)

2 THE COURT: I understand that there are some of you
3 who are protesting my time keeping. Ms. Malley did not
4 indicate to me any specific names, but I try to keep us
5 going. Do you have anything, counsel, before we bring the
6 jury in?

7 MR. JACOBS: Not from us, Your Honor.

8 THE COURT: Ms. Malley, if you would, please. I'm
9 curious, Mr. Normand, Mr. Singer, why you don't have the
10 words below the deposition? Is there some conscious effort?

11 MR. NORMAND: There was no conscious decision, Your
12 Honor. It was my understanding was it was something that
13 was very difficult to accomplish.

14 MR. SINGER: Part of it was we had edited out
15 objections that weren't being made, and that couldn't have
16 been apparently done from running transcript.

17 MR. JACOBS: Just on that point, Your Honor, we're
18 going to try to make sure that the objections are edited out
19 going forward. You have been kind not to call us on it
20 but --

21 THE COURT: It is really quite distracting. It is
22 even more so than, well, I do -- I don't know which is
23 better in terms of whether you should have the banner below
24 or not, but it is kind of like going to a basketball game
25 and spending the whole time looking at the screen, the

1 floor, because you become distracted by those words moving
2 below it. I will not stop either of you from doing it or
3 not doing it, I was just curious why the decision was made
4 for one to do it and the other not.

5 Mr. Singer, did you have something?

6 MR. SINGER: There is. What we're trying to clarify
7 is one of the witnesses that we plan to call tomorrow there
8 has been a concern that somehow he is not properly listed.
9 And we are trying to get to the bottom of it. He is on the
10 pretrial order signed by the court. There has been a
11 suggestion that he was not on a more recent order and
12 Mr. Jacobs and I have been trying to work through that
13 issue. But right now there is nothing we need to take up
14 with Your Honor.

15 THE COURT: All right. Was his name read the first
16 day?

17 MR. HATCH: I will start bringing that every day. I
18 can look again, but I am pretty sure he was.

19 THE COURT: Is his name on my witness list?

20 MR. HATCH: That is the problem, Your Honor, Troy
21 Keller is the name.

22 MR. SINGER: He was on the pretrial order signed by
23 the court. We would need to check to see whether he was on
24 the list that was read.

25 MR. JACOBS: He is not on the list.

1 MR. HATCH: He is not on the list, I agree with that.

2 MR. JACOBS: There may be a set of privilege issues.
3 He is a lawyer. So we'll try and work this out and get it
4 up to you.

5 THE COURT: All right.

6 THE CLERK: All rise for the jury.

7 (Whereupon, the jury returned to the courtroom.)

8 THE COURT: Go ahead, Mr. Jacobs, if you would,
9 please.

10 (Whereupon, the deposition continued.)

11 Q. Did you draft any of the language of the Asset
12 Purchase Agreement?

13 A. No.

14 Q. Did you review drafts of the Asset Purchase
15 Agreement?

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

25 Q. Do you recall any of the debates that they came

1 to you about on the translation process?

2 A. Not in detail, no.

3 Q. Even -- even vaguely?

4 A. Not really.

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

8 A. I -- same answer. I was involved in the
9 negotiations of all of the agreements, and I don't have any
10 recollection specific to any particular agreement.

11 Q. Is the same true of Amendment Number 2? Were you
12 -- do you have any recollections of being involved --
13 specific recollections of being involved in the negotiations
14 of Amendment Number 2?

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

16 Q. Fair enough. Let's talk a bit about the
17 declaration you gave in this action. I'm going to hand you
18 a copy of it. Let's mark this as exhibit -- I think
19 we're -- the first one is Exhibit 241. Do you recognize
20 this document?

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

23 Q. That is correct, as far as I understand. Now,
24 I'm -- the last page, that's your signature above the line,
25 "Doug Michels"?

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

2 Q. Did you draft the language of this declaration?

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

4 Q. Who drafted the language of this declaration?

5 A. The -- the SCO attorneys.

6 Q. So let's talk again a bit more about the basis

7 for your conclusion that copyrights transferred as part of

8 the Asset Purchase Agreement. I take it that's based on

9 your general understanding of the deal? It's -- you don't

10 recall anything specifically told to you about this? Is it

11 based on -- are there provisions of the Asset Purchase

12 Agreement that you can recall that support this opinion?

13 A. I -- I didn't read it then, and I haven't read it

14 recently. I've never read it through. I'm not a lawyer,

15 and I have no comment about the Asset Purchase Agreement.

16 Q. And did you read the Asset Purchase Agreement

17 agreement in preparation for your December, I think --

18 November 2006 declaration?

19 A. No.

20 Q. When was the last time you read the Asset

21 Purchase Agreement?

22 A. I have never read the Asset Purchase Agreement.

23 I've glanced at it, I've skimmed through little bits of it,

24 but I have never read it.

25 Q. Is the same true of -- of the other agreements we

1 discussed earlier?

2 A. Yes.

3 Q. The Technology Licensing Agreement, The Operating
4 Agreement?

5 A. Yes.

6 Q. And the two amendments?

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

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

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

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

14 A. No.

15 Q. So if I asked you, as a businessman, where would
16 I go to learn the answer to this question, what would your
17 answer be?

18 A. My answer would be I would call my counsel and
19 ask them, you know, what's the answer to this question?

20 Q. What was your involvement in those agreements?
21 Did you, for example, draft any of the language of those
22 agreements?

23 A. Oh, sure, of course. I love to write legal
24 contacts.

25 Q. I take it the answer is no, you didn't -- you did

1 not write any of the language in those agreements?

2 A. No, I did not write any of the language of those
3 agreements. I was involved --

4 Q. Now, is it fair to say that for all of those
5 topics -- term sheets, communications with Novell,
6 communications with the Board of Directors, press releases,
7 communications with counsel and paralegals -- you have no
8 specific recollection, sitting here today, that's informing
9 your testimony?

10 A. No. I mean, I can't give you a specific -- I
11 mean, I know in order to -- to do a deal in this magnitude
12 we had to do a major presentation to the Board, you know,
13 before you can make a deal involving nearly 20 percent of
14 the equity of the company. I mean, the Board -- the Board
15 had a duty to scrutinize it in great detail. And we -- we
16 prepared a detailed analysis of the deal, and the rights,
17 and, you know, all that.

18 So there was -- there was a lot of discussion
19 internally, and -- and even formalization of that. But, you
20 know, from ten years ago, can I remember the exact details
21 of that? No.

22 Q. I take it it is your testimony then, that you
23 don't have any specific memory of conversations with people
24 from Novell in which they said they're transferring the UNIX
25 copyrights as part of the Asset Purchase Agreement?

1 Q. I take it it's your testimony that you haven't
2 had conversations, one way or the other with Novell, about
3 UNIX copyright ownership between 1995 and 2001?

4 A. I might have. I don't know. I don't recall.

5 Q. You don't recall any conversation, one way or the
6 other?

7 A. I certainly recall with certainty that Novell
8 never claimed that they had the copyright.

9 Q. Did SCO -- did anyone from Novell ever say that
10 SCO owned the UNIX copyrights?

11 A. I don't know.

12 MR. JACOBS: That concludes this witnesses testimony,
13 Your Honor.

14 THE COURT: Thank you, Mr. Jacobs.

15 Mr. Normand, your next deposition?

16 MR. NORMAND: The next deposition designation will be
17 of Burt Levine who was deposed on March 23rd, 2007.

18 (Whereupon, the following is deposition excerpts of
19 Mr. Burt Levine's deposition.)

20 Q. Okay. You were a lawyer for AT&T back in the
21 1980's; is that correct?

22 A. That's correct.

23 Q. How many lawyers were there in the legal
24 department at AT&T in the eighties? Roughly.

25 A. I guess between 75 and a hundred.

1 Q. At some point in time when you were a lawyer in
2 AT&T's Legal Department, were you involved in working on
3 AT&T's UNIX business?
4 A. Yes.
5 Q. What portion of the 75 to a hundred lawyers in
6 AT&T's Legal Department were involved in working on AT&T's
7 UNIX business, to the best of your recollection?
8 A. I guess, um, 15 to 20.
9 Q. When AT&T spun off its UNIX business in the form
10 of UNIX Systems Labs in 1991, did you go to USL?
11 A. Yes.
12 Q. Now do you recall that I believe in 1993 USL and
13 its UNIX assets were purchased by Novell?
14 A. Yes.
15 Q. Do you recall what the purchase price was?
16 A. I don't.
17 Q. When Novell purchased USL and its UNIX assets in
18 1993, did you move to Novell?
19 A. Yes.
20 Q. And when I say "moved to Novell," I meant you
21 went to work for Novell in 1993; is that right?
22 A. That's correct.
23 Q. Is it fair to say that you and Mr. Weitz and
24 Mr. Tannenbaum in New Jersey were continuing to head up the
25 legal efforts relating to UNIX after Novell's purchase of

1 the USL in 1993?

2 A. That was my understanding.

3 Q. Do you have an understanding that on September
4 19th, 1995 Novell sold certain UNIX assets to a company
5 called Santa Cruz?

6 A. Yes.

7 Q. Immediately after that purchase on
8 September 19th, 1995 did you continue to work with Novell
9 back in New Jersey?

10 A. As I recall, I did. In the same facility --

11 Q. Right.

12 A. -- I remember I did.

13 Q. Were you still in Summit, New Jersey, at that
14 point in time?

15 A. I believe we were, yeah.

16 Q. A few months or so after the purchase by Santa
17 Cruz of certain UNIX assets from Novell did you then move to
18 Santa Cruz, meaning you began to work for Santa Cruz?

19 A. Yes.

20 Q. Do you remember approximately when that happened?

21 A. It was a transition time and by February 1st of
22 2006 I know that the three of us in the Legal Department
23 were considered SCO employees, whether there was anything
24 that was formalized on company records before that, I don't
25 know.

1 Q. Is this document, Schedule 1.1(b), unclear to
2 you?

3 A. Yes.

4 Q. How is it unclear to you?

5 A. The asset that purports to be transferred from
6 Novell to SCO in the intent of the parties ex -- will
7 include, to my reading or to my knowledge, even though I
8 don't remember the specific terms of this agreement, the
9 intention was to convey all of these ownership and auxiliary
10 ownership rights to the asset including copyright. And the
11 fact that there is this kind of an exclusion there tells me
12 that there is an ambiguity in this agreement or a mutual
13 mistake which wipes out any kind of an integration clause.
14 I don't agree that that's what the agreement means.

15 Q. Can you tell me in your view what is ambiguous
16 about the exclusion on Schedule 1.1(b) of, quote, all
17 copyrights and trademarks except for the trademarks UNIX and
18 UnixWare?

19 A. I don't think you can exclude a copyright in this
20 kind of an asset transfer. I think you can exclude a
21 copyright if you're transferring the physical manifestation
22 of the asset, but when you purport to transfer the whole
23 asset and all the business and everything else I think
24 inherent in that is going to be the copyright and it's a
25 contradiction in terms for the copyright to be excluded like

1 this.

2 Q. What language can you point me to where there is
3 that restriction in Section 4.16(b)?

4 A. I think you would have to look at the intent of
5 the parties. The intent of the parties was to give as one
6 category of compensation a royalty stream.

7 Q. Aside from the intent of the parties, can you
8 point me to any specific language in Section 4.1(b) that
9 supports your limitation on Novell's dictation right?

10 A. No, I can't point to anything specifically in
11 those sections but it's inconceivable to me that if you take
12 the language of (b) literally, this derogates 100 percent
13 from the grant that's being given from Novell to SCO. The
14 grant is illusory if Novell wanted to actually enforce
15 something like this to the extent it says in subsection (b).
16 There may as well not be an agreement.

17 Q. Now you've talked about the intent of the
18 parties, Mr. Levine, as being the basis for your view that
19 the dictation right in 4.16(b) is limited to a royalty
20 stream. What specifically can you point me to in support of
21 your view of the intent of the parties on 4.16(b). You can
22 answer?

23 A. I can't point you to anything in the agreement.

24 Q. What are you referring to when you talk about the
25 intent of the parties? What are you basing that on?

1 A. One of the few things that I can recollect about
2 these things is the discussions that I've had with the
3 negotiating people.

4 Q. Which people?

5 A. With Novell.

6 Q. Which people in the negotiating team did you
7 discuss concerning any limitation on Novell's dictation
8 right under Section 4.16(b)?

9 A. Definitely Chatlos and probably Maciaszek.

10 Q. Do you remember any specific conversations with
11 Ed Chatlos concerning your view that Section 4.16(b) in
12 Novell's dictation right thereunder is somehow limited to a
13 royalty stream?

14 A. No. No, nothing specific.

15 Q. Do you recall how long you stayed with Santa
16 Cruz?

17 A. Yes.

18 Q. How long did you stay with Santa Cruz?

19 A. Till September of 2000.

20 Q. Was it your understanding at the time of the
21 drafting or negotiations of the APA that Mr. Bradford was
22 personally involved at all?

23 A. Yes.

24 Q. Did Mr. Bradford ever tell you that Novell was
25 retaining any UNIX or UnixWare copyrights with respect to

1 the APA?

2 A. No.

3 Q. Did Mr. Bradford ever tell you that he had
4 informed Wilson Sonsini lawyers to draft the APA so as to
5 have Novell retain any Unix or UnixWare copyrights?

6 A. No.

7 Q. Mr. Levine, from the time of the APA in 1995
8 until you left Santa Cruz in 2000, did you ever hear anyone
9 whether inside or outside of Santa Cruz or inside or outside
10 of Novell say that Novell had retained the UNIX or UnixWare
11 copyrights?

12 A. No.

13 Q. If you had heard anyone make such a statement,
14 would that have been a surprise to you?

15 A. Very much so, yeah.

16 Q. And why do you say "very much so"?

17 A. My personal experience with the couple of years
18 that I spent at Novell was that it was a very ethical
19 company and I, I was very impressed with that.

20 Q. And how has that fact bear on your answer, the
21 fact that you had the view that Novell was an ethical
22 company?

23 A. Was ethical and I believe that being an ethical
24 company in its dealings with its partners or transferees or
25 whatever it is that they would not resort to withholding

1 information or trying to withhold something that the
2 transferee in this case would be entitled to.

3 Q. As I ask you now, what words would you use to
4 describe your view that the copyrights had been transferred?

5 A. Right. That the transfer of the business,
6 including both the physical assets and the intellectual
7 property assets, would automatically convey the copyright
8 along with the rest of the business assets.

9 Q. Is it your view that under the Asset Purchase
10 Agreement between Novell and Santa Cruz that Santa Cruz
11 merely acquired a license from Novell to use the UNIX and
12 UnixWare source code?

13 A. No, they obtained a full right, title and
14 interest in ownership of that asset.

15 Q. If a prospective licensee had signed a software
16 agreement and no other documentation with AT&T, what rights
17 with respect to source code did it have?

18 A. It would have no rights under the agreement
19 because there was no product identified.

20 Q. And how would that licensee gain rights to use
21 source code from AT&T?

22 A. It would have to obtain a supplement and schedule
23 for that product to define what it was it was licensing and
24 pay the fees.

25 Q. If a licensee had entered into a software

1 agreement and sublicensing agreement and no other agreement
2 with AT&T, what rights would it have, if any, with respect
3 to binary products or sublicensed products?

4 A. If you mean a form sublicensing agreement without
5 any identification of the product, then they would have no
6 rights.

7 Q. Do you recall reviewing the language of Section
8 4.16(b) with Mr. Brakebill earlier?

9 A. Yes.

10 Q. And I believe that you testified in response to
11 Mr. Brakebill's questions that part of the source of your
12 understanding of Section 4.16(b) is discussions with
13 Mr. Chatlos and Mr. Maciaszek following the execution of the
14 APA; is that fair to say?

15 A. Yes.

16 Q. And I believe you said with respect to Section
17 4.16(b) that to read it literally would make the transfer of
18 the assets and the licenses under the APA illusory, do you
19 recall using that word?

20 A. Words to that effect, yes.

21 Q. Could you just review for me in your words how it
22 is that you used that word and what you meant by using that
23 word illusory?

24 A. Yes. That given the scope of the grant of the
25 agreement, the fact that the intention of the parties, as I

1 read the agreement, was very broad and commensurate with
2 that, that to give this under -- to give this paragraph any
3 interpretation other than the limitation that I testified to
4 would render this broad grant illusory, certainly weaken it
5 substantially if the things that Novell could do or require
6 SCO to do were part of this agreement and in the limit it
7 could nullify it completely. So I think reading the
8 agreement as a whole as to what was intended and what is
9 here that this is the only proper interpretation of 4.16(b).

10 Q. Was it ever your view while at Novell or Santa
11 Cruz to the best of your recollection that Novell under the
12 APA retained the right to direct SCO to modify or change its
13 source code rights under the agreements that had been
14 transferred under the APA?

15 A. No.

16 MR. NORMAND: Your Honor, that completes SCO's
17 designations of Mr. Levine.

18 THE COURT: Mr. Jacobs?

19 MR. JACOBS: We have some additional testimony of
20 Mr. Levine.

21 THE COURT: If you would like to go ahead.

22 Q. Do you have an understanding that there was an
23 Asset Purchase Agreement that was signed by Novell and Santa
24 Cruz on September 19th, 1995?

25 A. Yes.

1 Q. Just so you have it, I'm going to hand you what's
2 been marked as Exhibit 1 in this case.

3 A. Thank you.

4 Q. Do you recognize this document, Mr. Levine?

5 A. Yes, I've seen it.

6 Q. Okay. And this is a document entitled Asset
7 Purchase Agreement By and Between The Santa Cruz Operation,
8 Inc. and Novell, Inc., dated as of September 19th, 1995; do
9 you see that?

10 A. I see it.

11 Q. As you sit here today, do you recall what
12 involvement, if any, you had in drafting or contributing any
13 portion of this particular agreement dated September 19th,
14 1995?

15 A. I know that I worked on drafting some of the
16 provisions, I don't know which ones in particular.

17 Q. And how is it that you recall that you were
18 involved in drafting some provisions?

19 A. I was asked to do it by the negotiators for
20 Novell.

21 Q. And as you sit here today are you sure that any
22 drafting that you did relating to the Novell-Santa Cruz deal
23 was in connection with this particular September 19th, 1995
24 contract as opposed to an amendment to this contract?

25 A. No, I can't recall specifically, you know, what

1 work I did on one versus the other.

2 Q. Do you remember any particular provisions in this
3 contract as you sit here today?

4 A. No.

5 Q. Memories can fade over time?

6 A. Yes.

7 Q. You would agree with me that a contract is
8 written to govern the rights and obligations of the party;
9 isn't that right?

10 A. I believe that's usually the purpose of it.

11 Q. Do you recall as you sit here today that there
12 were any provisions in this September 19, 1995 contract
13 relating to intellectual property as assets?

14 A. No, I don't recall.

15 Q. Let me turn your attention to Exhibit 1 which is
16 the September 1995 contract between Novell and Santa Cruz?

17 A. (Complies.)

18 Q. And ask you to turn to the page in the lower
19 right-hand corner ending in 950?

20 A. (Complies.)

21 Q. Are you there?

22 A. Yeah.

23 Q. Okay. And you'll see this is a part of the
24 contract entitled Schedule 1.1(a) entitled Assets?

25 A. Yes.

1 Q. Okay. And if you turn to -- you see there are a
2 series of Roman numerals on the left-hand side, do you see
3 that?
4 A. Yes.
5 Q. I'd ask you if you could turn to Roman numeral V
6 which is on the third page of Schedule 1.1(a)?
7 A. (Complies.)
8 Q. Do you see that?
9 A. I do.
10 Q. Okay. And do you see that Roman numeral V is
11 entitled Intellectual Property?
12 A. Yes.
13 Q. And do you see that it lists one particular type
14 of intellectual property as an asset?
15 A. Yes.
16 Q. And it's listed as "trademarks UNIX and UnixWare
17 as and to the extent held by Seller, parenthetical,
18 excluding any compensation Seller receives with respect to
19 the license granted to X/Open regarding the UNIX trademark"?
20 A. I see it, yeah.
21 Q. And that's the only type of intellectual property
22 listed as an asset; is that right?
23 A. Yes.
24 Q. Aside from listing trademarks UNIX and UnixWare,
25 it doesn't list any other type of intellectual property as

1 an asset, does it?

2 A. No.

3 Q. Do you recall that there was a schedule of
4 excluded assets in the September 19th, 1995 contract between
5 Novell and Santa Cruz?

6 A. I guess to the extent I remember anything about
7 this document, I would have remembered this, but -- as a
8 title of something in here, I think so, yeah.

9 Q. And I'll ask -- well, as an experienced lawyer in
10 transactions what does excluded assets mean to you?

11 A. Just off the top of my head what you're asking.

12 Q. Yes.

13 A. If you have a definition in the agreement of a
14 particular term, an asset means so and so and so and so and
15 so and so, usually you would put the exclusion right in that
16 same paragraph, which is my practice. I'm assuming, because
17 I don't know different, that this has got the same effect
18 that whatever an asset is, it does not include this.

19 Q. Do you see the last sentence, Mr. Levine, of this
20 Section 1.1(a) of the contract that says, quote,
21 Notwithstanding the foregoing the capital assets to be so
22 purchased shall not include those assets, parenthesis (the,
23 quote, excluded assets, quote) parenthesis, set forth on
24 Schedule 1.1(b)?

25 A. I see it.

1 Q. Now turning back to the Excluded Asset Schedule
2 in Schedule 1.1(b) that we were just looking at which is on
3 Page 954 of this document in front of you, as an experienced
4 lawyer do you understand that what's listed in this Excluded
5 Asset Schedule is specifically an asset or assets that are
6 not included in the purchase?

7 A. As a matter of form that's true, I agree with
8 you.

9 Q. Then referring you to Page 955 in the lower
10 right-hand corner which is the second page of the Excluded
11 Asset Schedule?

12 A. (Complies.)

13 Q. By the way, there are eight items that are listed
14 on the Excluded Asset Schedule; is that right?

15 A. Eight Roman numerals, yes.

16 Q. Right. And those are assets of substance; isn't
17 that right?

18 A. Intellectual property, yes, definitely.

19 Q. And if you look at Roman V it is entitled
20 Intellectual Property, correct?

21 A. Right.

22 Q. And it lists as two types of excluded
23 intellectual property, one, all copyrights and trademarks
24 except for the trademarks UNIX and UnixWare, and two, all
25 patents; do you see that?

1 A. I see that.

2 Q. Okay. What is listed is (a) and (b) of Roman V
3 are specifically excluded assets under this contract, would
4 you agree with me?

5 A. Specifically listed assets, yes.

6 Q. Specifically listed as excluded --

7 A. Right.

8 Q. -- assets, correct? In reading this, do you
9 understand that Novell is excluding all patents from this
10 asset transfer?

11 A. I understand what the agreement says, I
12 understand what the exclusions are in the document.

13 Q. Okay. And based on reading this exclusion in the
14 contract do you understand that all copyrights and
15 trademarks except for the trademarks UNIX and UnixWare are
16 excluded from this asset transfer?

17 A. No, I don't.

18 Q. You disagree with the language in this schedule;
19 is that right?

20 A. No, I don't disagree that these are listed here,
21 I disagree that in the context of this agreement that this
22 is, that this is the whole story.

23 Q. Based on what you're saying today, would you have
24 stricken this from the Excluded Asset Schedule?

25 A. You're asking me to say what I would have done,

1 certainly that would have been something that went through
2 my mind, I don't know what I would have done.

3 Q. Well, you seem to think there's an ambiguity as
4 you sit here today in this copyright --

5 A. Well, ambiguity or mistake, yeah.

6 Q. Okay. As you sit here today you think there's
7 some kind of ambiguity or mistake in this Excluded Assets
8 Schedule excluding all copyrights and trademarks except for
9 the trademarks UNIX and UnixWare; is that right?

10 A. Yes.

11 Q. So I take it today 12 years after the fact, you
12 would strike this reference to all copyrights and trademarks
13 except for the trademarks UNIX and UnixWare; is that right?

14 A. Or would have tried to have the agreement
15 reformed or amended, yeah.

16 Q. You wouldn't have left it in, correct?

17 A. No, I wouldn't have left it in.

18 Q. In fact, Mr. Levine, you did review schedule
19 1.1(b) prior to the execution of this Asset Purchase
20 Agreement on September 19th, 1995, didn't you?

21 A. I don't recall.

22 Q. I'm going to hand you what's been marked as
23 Exhibit 202?

24 A. Thank you.

25 Q. For the record this is a fax from you,

1 Mr. Levine, to an attorney named Aaron Alter at the Wilson
2 Sonsini firm that was representing Novell?

3 A. Okay.

4 Q. Do you see that?

5 A. I see.

6 Q. Okay. And this fax cover from you is dated
7 September 18th, 1995, do you see that?

8 A. Correct.

9 Q. In fact, there's a fax transmission line up at
10 the top, it says September 18, 5:20 a.m. USL Legal
11 Department, do you see that?

12 A. I see it.

13 Q. Okay. This is a fax that you sent, isn't that
14 correct?

15 A. I'll accept that I did, I have no reason to think
16 I didn't, but I don't recall it.

17 MR. JACOBS: Your Honor, I would like to move into
18 evidence Novell's Exhibit X3, the fax from Mr. Levine to
19 Aaron Alter at Wilson Sonsini just referred to in the
20 deposition.

21 MR. SINGER: No objection.

22 THE COURT: Exhibit X3 will be admitted.

23 (Whereupon, Defendant's Exhibit X3 was
24 admitted into evidence.)

25 MR. JACOBS: Your Honor, what I propose to do, the

1 witness is going to walk through various pages. So we'll go
2 through his walk through and alternate between the
3 deposition and showing the jury the various pages that he is
4 referring to, okay?

5 THE COURT: All right.

6 Q. Turning to Page 2 you write a note to Aaron Alter
7 and it says, "Aaron: Attached are copies of the following:
8 A suggested markups of certain pages in Schedules 1.1(a) and
9 1.1(b)." Do you see that?

10 A. Yes.

11 Q. Okay. And then turning you to Page 3 of this
12 document there's a draft of Schedule 1.1(a), do you see
13 that?

14 A. Yes.

15 Q. Okay. Do you recognize this as the schedule, a
16 draft of the Schedule 1.1(a) that you were just looking at?

17 A. Yes.

18 Q. And do you see some handwriting about halfway
19 down the page and then on a few of the subsequent pages of
20 Schedule 1.1(a), that's your handwriting; isn't that right?

21 A. Yes.

22 Q. Okay. You reviewed Schedule 1.1(a) prior to the
23 execution of this September 19th, 1995 contract; isn't that
24 right?

25 A. It seems that way, yeah.

1 Q. And you provided some comments on this Schedule
2 1.1(a) draft?
3 A. Yes.
4 Q. And if you turn to Roman V of this Schedule
5 1.1(a), do you see that page?
6 A. Yes.
7 Q. And up in the left you've written in your
8 handwriting "from Schedule 1.1(a)"?
9 A. Yes.
10 Q. And then do you see you've made some comments on
11 Roman V relating to intellectual property?
12 A. Yes.
13 Q. Okay. And you made one change adding the phrase
14 "and to the extent" in between the phrase "trademarks UNIX
15 and UnixWare as," and the phrase, quote, held by seller, do
16 you see that?
17 A. I see it.
18 Q. You left in place "trademarks UNIX and UnixWare"
19 as a type of intellectual property to be an included asset;
20 is that right?
21 A. Yes.
22 Q. Okay. And you did not add any other types of
23 intellectual property to this list of included assets, did
24 you?
25 A. No.

1 Q. You didn't add copyrights?
2 A. Not as a specific item, no.
3 Q. Okay. You did not add UNIX copyrights?
4 A. No.
5 Q. You did not add UnixWare copyrights?
6 A. No.
7 Q. You did not add patents?
8 A. No.
9 Q. Now your cover memo to Mr. Alter of Wilson
10 Sonsini says that you also were attaching suggested markups
11 of certain pages in Schedule 1.1(b), correct? And this is
12 Page 2 of the fax.
13 A. (Reviews.) 1.1(a) and 1.1(b), yes.
14 Q. And turning your attention to the excluded asset
15 draft which is on the page ending 613 of this fax number in
16 the lower right-hand corner, are you there?
17 A. Okay, yeah.
18 Q. Do you see that up in the left-hand corner you've
19 handwritten "from Schedule 1.1(b)"?
20 A. Yes.
21 Q. And do you see that this is your markup of a
22 portion of Schedule 1.1(b) of the excluded assets?
23 A. That's what it appears to be, yeah.
24 Q. And you actually reviewed the Intellectual
25 Property section of the Excluded Assets Provision of

1 Schedule 1.1(b) before the Asset Purchase Agreement was
2 executed on September 19th, 1995; isn't that correct?

3 A. Yeah. Yes.

4 Q. And specifically looking at and commenting on
5 intellectual property you deleted a reference to patent
6 licenses, do you see that?

7 A. Yes.

8 Q. Okay. And do you see that in reviewing a draft
9 Schedule 1.1(b) prior to the execution of the agreement you
10 specifically looked at and commented on the exclusion of all
11 copyrights and trademarks except for the trademarks UNIX and
12 UnixWare?

13 A. Yes.

14 Q. Okay. And do you see that you made only one
15 comment on that line item?

16 A. Yes.

17 Q. Okay. And the comment that you added was at the
18 very end a phrase, quote, as and to the degree held by
19 Seller, quote; is that right?

20 A. That's true.

21 Q. Okay. When you looked at the Excluded Asset
22 Provision prior to the exclusion of the Asset Purchase
23 Agreement, you left in tact the exclusion of all copyrights
24 and trademarks except for the trademarks UNIX and UnixWare;
25 isn't that correct?

1 A. Yes.

2 Q. And you also left in the exclusion of all patents
3 as being a transferred asset; isn't that right?

4 A. Yes.

5 Q. And again you passed your comments on to the
6 outside lawyers of Wilson Sonsini who were representing
7 Novell in the negotiation and drafting of this contract
8 between Novell and Santa Cruz, correct?

9 A. That's correct.

10 Q. And your inclusion of "all copyrights and
11 trademarks except for the trademarks UNIX and UnixWare" in
12 the Excluded Assets provision of Schedule 1.1(b) was also
13 transmitted to Santa Cruz during the negotiations, correct?

14 A. Okay. My -- inclusion it wasn't modified "all of
15 the copyrights and trademarks," yeah.

16 Q. You did not modify the line item "all copyrights
17 and trademarks except for the trademarks UNIX and UnixWare,"
18 correct?

19 A. No.

20 Q. And so when your comments on Schedule 1.1(b) were
21 transmitted to Santa Cruz the line item "all copyrights and
22 trademarks" was included as an excluded asset, correct?

23 A. It was included.

24 Q. And do you recall that one of the types of
25 intellectual property that was excluded was all patents?

1 A. Yes.

2 Q. As you sit here today, do you have any
3 understanding as to whether SCO as part of the Asset
4 Purchase Agreement in 1995 got a license to practice the
5 UNIX patents or any other IP that Novell retained?

6 A. Yes, I do.

7 Q. And what is your understanding today?

8 A. My understanding is similarly to my stand on
9 copyrights that the grant of the whole business carries with
10 it at least licenses under the patents needed to carry on
11 the business to the extent that Novell had them.

12 Q. Do you remember any specific conversations with
13 Ed Chatlos concerning your view that Section 4.16(b) in
14 Novell's dictation right thereunder is somehow limited to a
15 royalty stream?

16 A. No. No, nothing specific.

17 Q. So you just recall in general having a
18 conversation with Ed Chatlos --

19 A. Yes.

20 Q. -- at some point in time?

21 A. Yes.

22 Q. Okay. And 12 years ago you wrote some documents
23 concerning 4.16(b), didn't you?

24 A. Very possibly.

25 Q. And we looked at -- do you have Exhibit 206

1 before you?

2 A. Yes.

3 Q And if you look at Paragraph 2 at the bottom this
4 is an e-mail that you sent Mr. Chatlos on November 16th,
5 1995, do you recall that

6 A. I don't recall that, I see that that's what
7 happened.

8 Q. This is an e-mail that you sent to Mr. Chatlos on
9 November 16, 1995?

10 A. Okay.

11 MR. JACOBS: Your Honor, at this point we move into
12 evidence Exhibit I5 which is the memo or e-mail that is
13 being referred to in this portion of the deposition.

14 THE COURT: Any objection?

15 MR. SINGER: No objection.

16 THE COURT: I5 will be admitted.

17 (Whereupon, Defendant's Exhibit I5 was
18 received into evidence.)

19 MR. JACOBS: Your Honor, in this case I think it would
20 be helpful to read it out loud.

21 THE COURT: You may do so.

22 MR. JACOBS: My reading of the Asset Purchase
23 Agreement is that while we would have the right to direct
24 SCO to offer HP licenses on any terms we choose with respect
25 to any SVRX products that HP needs to carry on the Rhine

1 River work, it is not clear whether we can restrict SCO in
2 the terms they can offer HP for UnixWare licenses for this
3 purpose. Do you think we should try to cover by amendment
4 that at least with regard to HP, we should have the right to
5 specify the terms for UnixWare licenses as well?

6 Q. And in this e-mail to Mr. Chatlos you expressed
7 your viewpoint concerning Novell's rights to direct SCO to
8 offer licenses, quote, on any terms we choose with respect
9 to any SVRX products, isn't that what you said?

10 A. Yes, it is.

11 Q. You did not say in this memorandum dated November
12 16th, 1995 that Novell would have the right to direct SCO to
13 offer HP licenses on any terms we choose with respect to any
14 binary SVRX agreements, did you?

15 A. No, I didn't.

16 Q. You don't say in April of 1996 that Novell's
17 dictation right under 4.16(b) only extended to binary SVRX
18 agreements, isn't that the case?

19 A. That's true.

20 MR. JACOBS: That ends the testimony of Mr. Levine,
21 Your Honor.

22 THE COURT: Thank you, Mr. Jacobs.

23 Mr. Singer?

24 MR. SINGER: Our next witness is Bill Broderick.

25 THE COURT: All right.

1 THE CLERK: Mr. Broderick, if you would come forward.
2 If you would raise your right hand.

3 WILLIAM BRODERICK,
4 called as a witness at the request of the Plaintiff,
5 having been first duly sworn, was examined
6 and testified as follows:

7 THE WITNESS: Yes.

8 THE CLERK: Thank you. Please be seated. If you
9 would please state and spell your name for the court.

10 THE WITNESS: William Broderick, B-R-O-D-E-R-I-C-K.

11 THE CLERK: Thank you.

12 DIRECT EXAMINATION

13 BY MR. NORMAND:

14 Q. Good afternoon, Mr. Broderick.

15 A. Good afternoon.

16 Q. Are you currently employed?

17 A. Yes, I am.

18 Q. Where?

19 A. I am director of software licensing for the SCO
20 Group.

21 Q. Could you briefly summarize your responsibilities
22 in that capacity?

23 A. I am responsible for all software licensing and
24 contracts that go through the company.

25 Q. And what kind of software licensing or contracts

1 are you talking about?

2 A. Um, it is -- we have business in certain areas.
3 We have source code licensing, binary licensing, we have
4 support contracts, third-party software agreements where we
5 license products with third parties.

6 Q. Okay. I'm sure we will get into more of that
7 later. Could you briefly describe your educational
8 background?

9 A. Well, I graduated high school in 1966. I went my
10 freshman year out to Missouri. I have completed my freshman
11 year and I enlisted in the Army. I spent two and a half
12 years in the Army, a year and a half with 101st Airborne
13 Division in Vietnam. Came home, graduated in 1973 from
14 William Patterson College with a degree in business. And in
15 1975, I graduated from Santa Clara University of California
16 with an MBA.

17 Q. What did you do after that?

18 A. I went to work for Trans World Airlines. I spent
19 five years with them in various accounting positions in New
20 York, London and Paris.

21 Q. Did there come a time when you became involved in
22 the UNIX business?

23 A. I did. That was in 19 -- late 1991.

24 Q. And in what capacity did you become involved with
25 the business at that time?

1 A. I was working for a computer manufacturer in New
2 Jersey and I had an opportunity to join UNIX System
3 Laboratories, it was AT&T's UNIX Group. And in I believe it
4 was December of 1991, I joined USL as manager of sales
5 operations.

6 Q. USL is UNIX System Labs?

7 A. Yes.

8 Q. And what did you do there?

9 A. Um, I managed the sales operations. I had some
10 people that worked with me. I was responsible for the sales
11 compensation plan, of coordinating revenue forecasts and
12 expense forecasts with the finance people, and chasing down
13 any problems the vice-president of sales told me to chase
14 down.

15 Q. What did the UNIX group at USL do at that time?

16 A. At that time they -- they licensed source code
17 for the UNIX operating system. Source code is the code
18 where it's -- it is a code that you actually go in and
19 manipulate and you work with. So what we had was a lot of
20 computer manufacturers, also government agencies, that
21 licensed the source code because they wanted to go in and be
22 able to work with it. And you have got a computer, you take
23 the source code which is a generic operating system, you
24 know how to manipulate that source code so it would work on
25 your computer. So what you did was you created your flavor

1 of UNIX. And so we licensed the source code for companies
2 to do that. These are companies like Hewlett Packard, IBM,
3 Stratus, large -- every large computer manufacturer in the
4 world licensed to UNIX. And we licensed them the source
5 codes so that they could do that.

6 Q. And how long were you at USL?

7 A. I was at USL until 1993 when Novell purchased the
8 business. I think it was officially called a merger with
9 USL but it was a purchase of the business from AT&T.

10 Q. And did you transition over to Novell at that
11 point?

12 A. Yes, I did.

13 Q. And in what capacity?

14 A. I first went as -- I continued in sales
15 operations but just a short time, just a few weeks, and then
16 I was put into doing contracts and licensing.

17 Q. And what does that mean "doing contracts and
18 licensing"?

19 A. I became a person at Novell who worked with the
20 sales people, product management, development people and the
21 customers. We actually licensed the source code I talked
22 about earlier.

23 Q. And did there come a time when you became aware
24 of a sale of the UNIX business to Santa Cruz?

25 A. Yes, there was.

1 Q. When did you become aware of that?

2 A. That was the fall of 1995. We were all -- all of
3 the employees were called down to a cafeteria in the
4 building where we were at. And the executives from the --
5 from Novell's UNIX group were there. Mike DeFazio was the
6 lead executive and he chaired it and he made the
7 announcement that Novell was going to refocus their
8 attention back to their net ware product, which was their
9 flagship product, and as a result of that refocussing, they
10 were going to be selling the UNIX business and the
11 technology to a company called Santa Cruz Operation.

12 Q. And did you have any particular reaction to that
13 announcement?

14 A. God I hope I go to Santa Cruz Operation.

15 Q. Did that end up happening?

16 A. Yes, it did.

17 Q. And in what capacity did you end up going to
18 Santa Cruz?

19 A. Pretty much the same the job I had. We had three
20 license -- three people that did licensing and contracts at
21 Novell and we moved to the Santa Cruz Operation. And we
22 primarily handled the source code licensing, but Santa Cruz
23 was also in the business of licensing a binary product.
24 They weren't a computer manufacturer, but they had developed
25 a UNIX for what they -- it is sort of an Intel platform. I

1 don't want to get too complicated, but it was kind of like
2 Microsoft windows, but it was a UNIX operated system. And
3 they sold binary. You can go into a store and you can buy a
4 copy of Microsoft windows and load it onto your computer.

5 Santa Cruz had a product where you could go to a
6 distributor, go to a store, and actually buy a UNIX product,
7 same type, a binary, and load it onto your computer. So
8 Santa Cruz was in that business and now by purchasing the
9 UNIX Technology they were in the source licensing business.
10 So we did a combination of all of that.

11 Q. Did you participate in any transition process
12 upon the announcement of the sale from Novell to Santa Cruz?

13 A. Yes. Starting in the -- starting after the
14 announcement in September of '95 that they had -- Novell was
15 selling the business, um, they put together a lot of
16 employees in the transition teams. And these handled all of
17 the different areas of the company from the development,
18 product management, IT, contracts, finance, and they had to
19 work together to see how best to transition the business
20 from Novell to Santa Cruz. And we met over the next few
21 months.

22 Q. And in the course of those transition team
23 meetings, do you recall any discussion about the notion that
24 copyrights had been retained by Novell?

25 MR. ACKER: Objection, hearsay, Your Honor.

1 MR. NORMAND: The question is whether he recalls any
2 such statement being made.

3 THE COURT: I believe I can have this answer given but
4 not beyond that if it is going to be specific.

5 MR. NORMAND: Thank you, Your Honor.

6 Q. (By Mr. Normand) Mr. Broderick, do you recall the
7 question?

8 A. Yes. So I can give a simple yes or no?

9 THE COURT: You may.

10 THE WITNESS: Give the question again.

11 Q. (By Mr. Normand) Do you recall any discussions
12 in these transition meetings about whether Novell was
13 retaining any UNIX or UnixWare copyrights as part of the
14 transaction?

15 A. Retaining ownership, no, I did not hear any
16 comments.

17 Q. Did the transition team discuss the issue of
18 whether copyright notices in the source code had to be
19 changed?

20 MR. ACKER: Same objection, he is asking for hearsay.
21 Objection, Your Honor.

22 MR. NORMAND: Same response, Your Honor. It doesn't
23 go to the truth, it goes to what Mr. Broderick remembers and
24 how it bears on what he did during the transition work.

25 THE COURT: Well beyond that, isn't this a party

1 opponent?

2 MR. ACKER: Well, I don't know who he said he heard
3 things from.

4 THE COURT: Well, until we get more specific, I'm
5 going to have to allow the questions to be asked.

6 MR. ACKER: All right.

7 Q. (By Mr. Normand) I take it you don't recall the
8 question?

9 A. Give it again.

10 Q. Do you recall during the transition work as to
11 whether the issue of needing to change copyright notices
12 came up?

13 A. Yes.

14 Q. And in what sense did that issue come up?

15 A. The Novell software engineers announced that they
16 were completing the changing of the Novell copyrights in
17 UNIX to Santa Cruz.

18 Q. And do have any firsthand knowledge as to how
19 that work was undertaken?

20 A. No.

21 Q. In the course of explaining what copyright
22 notices would be changed, do you recall there being any
23 discussion about some copyright notices not being changed?

24 MR. ACKER: Your Honor, again I'm going to object.
25 That is really very vague as to who these comments were

1 allegedly coming from. I don't think he has clearly
2 established if it is going to come from a party to be
3 qualified as a party admission.

4 THE COURT: I would agree with Mr. Acker. You have
5 got to ask more specific questions before you elicit this
6 type of testimony.

7 MR. NORMAND: Thank you, Your Honor.

8 Q. (By Mr. Normand) In the course of this transition
9 work, did you undertake to send out any letters to UNIX
10 customers to inform them of the transition that was
11 happening?

12 A. Yes. As part of the transition meetings it was
13 Burt Levine who was the attorney at the Novell UNIX Group
14 who was tasked with putting together a notice letter. We
15 had some discussion on who the notification should go to the
16 licensees from, Santa Cruz or Novell, and it was decided
17 that Novell ought to send the license because, you know, if
18 you received a letter from somebody saying make your
19 mortgage payments to me now, you probably wouldn't comply
20 with it and have your bank to do it.

21 So Burt Levine drafted up a letter that would go to
22 all of the general licensees, all of the ones that had the
23 standard license agreements. And he drafted it up and
24 passed it around to some of us to look at. And that letter
25 was sent down to all licensees. Then what we did was we had

1 to go through because there was some contracts, mostly third
2 party suppliers, or we had some special agreements with some
3 other companies that required their approval of an
4 assignment of the contracts. So we had to go through, dig
5 through the files, and find those companies and they were
6 given a slightly different letter where it was, you know,
7 Novell is doing this, Santa Cruz is doing this, please sign
8 below your acceptance of the assignment.

9 Q. In your work with respect to the drafting of
10 these letters, did you ever speak with Mr. Levine about the
11 issue of any retention of copyright?

12 A. No.

13 MR. NORMAND: Your Honor, I would propose to put into
14 evidence SCO Exhibit 580.

15 THE COURT: Which number again?

16 MR. NORMAND: 580, Your Honor.

17 THE COURT: 580. Any objections to this?

18 MR. ACKER: No, Your Honor.

19 THE COURT: 580 will be admitted.

20 MR. NORMAND: Thank you, Your Honor.

21 (Whereupon, Plaintiff's Exhibit 580 was received
22 into evidence.)

23 Q. (By Mr. Normand) Do you see the document on your
24 screen?

25 A. Yes.

1 Q. I'm going to blow up the language so you and the
2 jury can see it better. Is this letter in the form of the
3 letters you just described?

4 A. Yes, it is. This is in the form of the letter of
5 one of the customers who would have to approve the
6 assignment of the agreement.

7 Q. And, again, what was your understanding as to the
8 purpose of this letter and letters of this sort?

9 A. Well, it was to advise any licensees or people we
10 had contracts with that Santa Cruz owned the business and
11 the technology.

12 Q. Would you pull up the first two paragraphs?
13 Actually, the one above that as well. The opening paragraph
14 of the letter, Mr. Broderick, as can you see, quote, "as you
15 may know, Novell transferred to The Santa Cruz Operation,
16 Inc., SCO, its existing ownership interest in UNIX
17 System-based offerings and related products as listed in
18 Attachment A of this letter "collectively Transferred
19 Products."

20 Could we go to Attachment A. Attachment A begins,
21 "Novell Software Products, all releases of UNIX System V and
22 prior Releases of the UNIX System. All UnixWare releases up
23 to and including UnixWare Release 2 (encompassing updates
24 and upgrades to these releases as well.)

25 Do you see that language, Mr. Broderick?

1 A. Yes, I do.

2 Q. How does this language comport with your
3 understanding of what ownership interest Novell had
4 transferred?

5 MR. ACKER: Objection, Your Honor, based on hearsay,
6 based on the testimony so far of what his understanding is
7 of what ownership rights --

8 MR. NORMAND: It is not all based on hearsay, Your
9 Honor. It is his personal experience and his work and his
10 work drafting the letter and the transition team meetings
11 and his employment.

12 MR. ACKER: He has testified that he had no
13 involvement in the APA, any of the contracts. That anything
14 that he heard was heard from others and he has already
15 established that is hearsay. This is going to be based on
16 hearsay.

17 MR. NORMAND: We have established, Your Honor, that
18 what he heard, at least some of what he has heard, he has
19 heard from Novell employees.

20 THE COURT: I will overrule the objection.

21 Q. (By Mr. Normand) The question, Mr. Broderick,
22 was how does this description of the ownership interest that
23 Novell had transferred comport with your understanding of
24 what you believe Novell had transferred during the course of
25 your employment?

1 A. It is -- it is exactly consistent with what I
2 know of the sale from Novell to Santa Cruz. In fact, during
3 the transition teams, we were given portions of the Asset
4 Purchase Agreement where Novell sold all right, title and
5 interest in the assets. This letter seems to state that
6 they sold all their interests.

7 Q. Go back to Page 1. Thank you. Mr. Broderick,
8 the second paragraph begins, "it makes immeasurably more
9 business sense for SCO, as the owner of the Transferred
10 Products, to handle directly with Prentice-Hall any matters
11 that may become relevant under the subject agreement." Do
12 you see that language?

13 A. Yes.

14 Q. How does that language comport with your
15 understanding of what Novell was intending to achieve by
16 sending these letters out?

17 A. It was telling people don't call us any more,
18 call SCO.

19 Q. Why?

20 A. Because SCO owned divisions from that point on.

21 Q. Do you recall who Prentice-Hall was, the
22 addressee in this letter?

23 A. They were a publisher, book publisher, they
24 published some books on UNIX.

25 Q. Do you see at the bottom of this paragraph,

1 Mr. Broderick, it states, "accordingly, Novell would
2 appreciate Prentice-Hall's formal concurrence under Section
3 28 of the subject agreement, to Novell's assignment of its
4 rights and delegation of any remaining obligations under the
5 subject agreement insofar as such rights and obligations
6 relate to the Transferred Products to SCO. Novell
7 represents that SCO has undertaken in writing to assume such
8 obligations." Do you see that language?

9 A. Yes.

10 Q. Is it your understanding that SCO had undertaken
11 to assume the obligations of the UNIX business?

12 A. Absolutely.

13 Q. Now, let me take a step back, Mr. Broderick. You
14 started to speak to this issue already. You did go over to
15 Santa Cruz as part of the transition; is that right?

16 A. Yes, I did.

17 Q. And what was your job responsibilities the next
18 several years?

19 A. It was as a licensing and contracts manager.

20 Q. What did you do from day-to-day?

21 A. I wrote contracts, issued contracts. I dealt
22 with sales people and customers, negotiated terms of the
23 contracts. We answered questions from current contract, you
24 know, companies that had contracts as far as what their
25 rights were under the contract. If you wanted to license

1 software from Santa Cruz Operation, you went through the
2 sales people to the contracts people, and I was one of the
3 contracts people.

4 Q. Did you approach your contracts work at Santa
5 Cruz in any way different from how you approached it when
6 you were at Novell?

7 A. With the exception that we added that extra
8 binary business to some of our responsibilities. As far as
9 the source code goes, they were exactly the same. In fact,
10 in the transition meetings, we were directed by Novell on
11 the source code licenses not to make any changes to the
12 licenses except to replace the name Novell with Santa Cruz.

13 Q. Is that what you did?

14 A. Yes.

15 Q. What were the agreements that Novell and Santa
16 Cruz actually used in licensing source code products to
17 licensees?

18 A. The source code products it is -- it started with
19 an umbrella agreement called the software agreement. And
20 that software agreement --

21 Q. What do you mean by umbrella agreement?

22 A. It is -- overall, it was the general terms and
23 conditions that you would agree to when you licensed the
24 source code product. So when I talk about -- we always
25 refer to it as an umbrella agreement because it covered the

1 general terms and conditions. We will license you source
2 code, you can do this with the source code, you can't do
3 this with the source code, you have to protect the source
4 code, you can't tell anybody or show anybody the source code
5 because the source code is the company's family jewels. If
6 you lose control of the source code, you're out of business.

7 Now, what we did was with the software agreement, it
8 was that umbrella agreement that had the general terms and
9 conditions for being able to license a source code product.

10 MR. NORMAND: Okay. Your Honor, I would move into
11 evidence SCO Exhibit 4?

12 MR. ACKER: No objection, Your Honor.

13 THE COURT: Exhibit 4 will be admitted.

14 (Whereupon, Plaintiff's Exhibit 4 was received
15 into evidence.)

16 Q. (By Mr. Normand) Do you see the document on the
17 screen, Mr. Broderick?

18 A. Yes.

19 Q. Do you recognize this document?

20 A. Yes, this is a software agreement.

21 Q. That is the document you just described?

22 A. Yes.

23 Q. And with whom is this software agreement or who
24 is it between?

25 A. This is between AT&T and IBM.

1 Q. And in the course of your work at Santa Cruz, did
2 you have occasion to read and review and grapple with
3 documents of this sort?

4 A. Yes, I did.

5 THE COURT: Mr. Normand, would you be looking for an
6 appropriate time for us to recess for the afternoon?

7 MR. NORMAND: I think in a minute or two we'll be
8 there, Your Honor. I apologize for the delay.

9 THE COURT: All right.

10 Q. (By Mr. Normand) Mr. Broderick, we're having
11 brought out Section 7.03 of the software agreement which
12 states, "AT&T warrants that it is empowered to grant the
13 rights granted hereunder." Do you see that paragraph?

14 A. Yes, I do.

15 Q. It continues a couple of lines down, "AT&T makes
16 no representations or warranties of merchantability or
17 fitness for any particular purpose, or that the use of any
18 Software Product will not infringe any patent, copyright or
19 trademark." Do you see that language?

20 A. Yes, I do.

21 Q. In the course of your work, did you develop an
22 understanding or view as to what the point of this kind of
23 language and software agreement was for?

24 A. Yes, I did.

25 Q. In summary, what was the view that you developed?

1 A. Well, what they were doing was they were
2 licensing the software. You are licensing the software
3 product. Here is our software product, um, go ahead and
4 license it and go ahead and use it. Don't come back to us
5 and tell us it won't run your Ferris Wheel.

6 Q. Now we're going to stop in a few minutes. Did
7 the software agreement actually license any product as such?

8 A. No, it didn't. It was the umbrella agreement
9 that had general terms and conditions. If you look through
10 this software agreement, you get -- you get the right at
11 some point in time to license a software product. This does
12 -- this agreement does not give you a software product.
13 There are no fees associated or royalties associated with
14 this software agreement.

15 MR. NORMAND: Your Honor, on that cliff-hanger, we
16 will end.

17 THE COURT: All right. Thank you. Um, we will
18 recess. You get to come back tomorrow, Mr. Broderick. We
19 will recess for the afternoon.

20 Ladies and gentlemen of the jury, I do not want to,
21 again, be too specific other than to remind you about the
22 importance of you avoiding any exposure about this case on
23 the television, radio, newspaper, internet. Again, do not
24 do any research on your own. Do not do anything that would
25 violate those instructions you have been given. More

1 specifically, do not discuss the case with anyone or allow
2 anyone to discuss it with you. If anyone attempts to, again
3 I will remind you to bring it to my attention.

4 Finally, as I have told you today, you have heard a
5 lot of evidence so far. You have yet to hear a lot more.
6 So it would be inappropriate for any of you to be making up
7 your minds about this case in any respect. And we'll start
8 at 8:30 in the morning and we will be in recess until then.

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

10 (Whereupon, the jury left the courtroom.)

11 THE COURT: Mr. Broderick, we will have you back here
12 I believe at 8:30 in the morning. You intend to continue
13 with this witness, don't you, Mr. Normand?

14 MR. NORMAND: Yes, Your Honor.

15 THE COURT: Please do not discuss your testimony with
16 any other witness or in the presence of any other witness.
17 Do not discuss this matter with anyone other than perhaps
18 attorneys. All right.

19 THE WITNESS: Certainly.

20 THE COURT: Thank you. Counsel, the issue about the
21 witness that suddenly appeared out of nowhere, is it a
22 significant issue that we need to meet earlier in the
23 morning to deal with it?

24 MR. SINGER: I don't believe so because what I think
25 we may be prepared to do, I mean this witness, Mr. Keller,

1 was listed in initial 26(a)(3) disclosures and was in the
2 joint pretrial order as issued by the court. He was not on
3 the forms which were submitted to the court for witnesses.
4 And we understand that therefore there may be some surprise
5 to Mr. Jacobs and to Novell's team. So instead of us trying
6 to call him tomorrow, what we would propose to do is call
7 him out of turn. He is going to be out of the country next
8 week on business, he works for Huntsman Corporation, and he
9 would then appear out of turn during the third week with the
10 court's permission.

11 And hopefully during the time, between now and then,
12 Novell's counsel and myself would be able to work out any
13 issues regarding his privilege point which has been raised.
14 That is how we would propose to handle the issue.

15 THE COURT: Mr. Jacobs?

16 MR. JACOBS: Your Honor, if we could meet and confer
17 this afternoon and I'll alert your office if we need to come
18 in early tomorrow morning on this topic, all right?

19 THE COURT: All right. And unless I hear from you,
20 then we will presume we'll start at 8:30 then. All right.
21 But we are agreeable to start earlier, if necessary. I
22 would rather we deal with it before 8:30 instead of keeping
23 the jury in the jury room too long in the morning.

24 Anything else before we recess?

25 MR. SINGER: I was going to mention the order of

1 witnesses or the other witnesses for tomorrow.

2 THE COURT: If you will, please.

3 MR. SINGER: We will finish with Mr. Broderick. Then
4 we are going to call Mr. Mattingly and then Mr. Maciaszek.
5 We may -- I'm not certain of the order of those, one order
6 or the other, it will be Maciaszek and Mattingly or
7 Mattingly and Maciaszek. And then we will go to the
8 videotape deposition of Ms. O'Gara. We think that would be
9 the final -- that will take us through the end of the day.
10 If not, we will play another deposition.

11 THE COURT: All right.

12 MR. JACOBS: Two things.

13 THE COURT: Yes, sir.

14 MR. JACOBS: We talked earlier about the relationship
15 between the evidence coming in on the breach of the covenant
16 of good faith and fair dealing relating to Section 4.16(b)
17 and the slander of title claim. And I think where we left
18 it is that you were considering -- as it is turning out,
19 evidence is coming in on both claims during the course of
20 the trial.

21 I think where we left it is that you were going to
22 consider instructing the jury that they're going to hear
23 evidence in the interest the efficiency, something like
24 that, but it is reserved for the court. So we would, now
25 that it has happened, it has crystalized in the proceeding,

1 we thought it might be a good time to renew that request.

2 THE COURT: Mr. Jacobs, my desire would be not to tell
3 the jury now because my fear is that they would begin to
4 speculate what they have to pay attention to and what they
5 don't. I think it would be best to just simply make a
6 strong -- give them strong instruction at the end that you
7 ought not to worry yourself about the fact that there will
8 be some issues you may have heard evidence to that you are
9 not asked in the verdict form to decide. But can you see my
10 concern? If I do it now, I think it would be fairly natural
11 for them to begin wondering okay what is and what isn't for
12 us to decide.

13 MR. JACOBS: I understand, Your Honor. The second
14 topic. We think that there was a quite significant door
15 opening event yesterday and in opening statements. And I
16 just want to pull up my notes on this. The topic is the
17 admissibility or instructions to the jury of what happened
18 during the course of this litigation over the past several
19 years.

20 The court's prior ruling and strong indication was
21 that the court was reluctant to have the jury hear about
22 that. And we understand the court's reasoning in that
23 regard. The door opening event is that in examining
24 Mr. Duff Thompson yesterday, Mr. Singer asked him what we're
25 going to colloquially refer to as the "to this day"

1 question. He asked Mr. Thompson, isn't it true that to this
2 day Novell is publishing the allegedly slanderous statements
3 on its website? That was not inadvertent because three
4 times in SCO's opening statement the "to this day" comment
5 was made as well. SCO argued to the jury "to this day
6 Novell is publishing these statements." Well that places
7 into question Novell's continuing basis for making the
8 statements for not taking down, I suppose, the statements
9 from the website. And, of course, Novell's continuing
10 intent is heavily informed by the rulings that have been
11 received over the course of the past several years.

12 What we propose to do is crystalize this in writing.
13 We would -- we realize it is something that the court has
14 given this whole question, that the court has given a lot of
15 thought to this, so we would like to submit something
16 tomorrow. Maybe give SCO until the first thing Monday or
17 something like that. It is -- it is not urgent that the
18 jury be informed of this, but I think both sides should know
19 where this issue would fall out going forward.

20 THE COURT: Okay. Your point is well taken and I
21 would request that you put it in the form of writing with a
22 specific request for SCO to respond.

23 MR. JACOBS: Perfect. Thank you, Your Honor.

24 THE COURT: All right. Anything else?

25 MR. SINGER: Um, Your Honor, there are some disputes

1 regarding Ms. O'Gara's deposition. Would you like to
2 undertake those now or bring us in early in the morning
3 or --

4 THE COURT: I would rather you get me something in
5 writing as I have requested. It always easier for me to
6 read it in advance before I hear argument on it.

7 MR. SINGER: We will submit something this afternoon.

8 THE COURT: Thank you. We do not have any hearings
9 this afternoon, so you don't need to move anything more than
10 you feel you need to. We'll be in recess. Thank you.

11 (Whereupon, the hearing adjourned for day
12 at 1:36 p.m. The jury trial will continue at
13 8:30 a.m. on Friday, March 12, 2010.)

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