

1 (10:15 a.m.)

2 THE COURT: Are you ready, counsel?

3 MR. ACKER: Yes, Your Honor.

4 THE COURT: If you would, please, Mr. Broderick.

5 (jury present)

6 THE COURT: Go ahead, Mr. Acker.

7 MR. ACKER: Thank you, Your Honor.

8 Q (BY MR. ACKER) Before we broke -- or actually Mr. Normand

9 was sort of asking you questions about a couple of schedules

10 that were attached to the APA, and I want to ask you about

11 those as well.

12 So why don't we start with section 2.0 of the Seller

13 Disclosure Schedule in the APA. Highlight that, please. Now,

14 this section 2.10 of the Seller Disclosure Schedule describes

15 those -- that list of copyrights that you were talking to

16 Mr. Normand about; correct?

17 A I assume so.

18 Q Let's take a look at it. The heading first is

19 Intellectual Property. Do you see that?

20 A Yes.

21 Q So this is a disclosure in the APA by the seller, Novell,

22 of its intellectual property; correct?

23 A Yes.

24 Q And then Attachment C to the schedule contains the most

25 current listing of pending and issued applications for

1 trademarks covering products of the business. Do you see
2 that?

3 A Yes.

4 Q And then Attachment D to the schedule contains a listing
5 of pending and issued applications for patents covering
6 products of the business. Do you see that?

7 A Yes.

8 Q And then, finally, the attachment that Mr. Normand asked
9 you about was Attachment E, and it says attachment E of this
10 schedule contained a listing of seller's copyright
11 registrations covering products relating to the business. Do
12 you see that?

13 A Yes.

14 Q So this is -- in the APA this is Novell's description of
15 intellectual property; correct?

16 A Yes.

17 Q And you've done asset purchase agreements, and you know
18 in an asset purchase agreement there will be a section of the
19 agreement that says what gets transferred and what does not
20 get transferred; correct?

21 A Yes.

22 Q Why don't we go to Schedule -- or Section 1.1(b) of the
23 Asset Purchase Agreement. And Schedule 1.1(b) of the Asset
24 Purchase Agreement, sir, you understand is the section of the
25 Asset Purchase Agreement that says what assets were excluded;

1 correct?

2 A Correct.

3 Q So, in other words, if we take a look at Roman Numeral V
4 of the excluded asset section, it says what intellectual
5 property is excluded from a deal that is not transferred;
6 right?

7 A Correct.

8 Q And so what this is is this is a subset of what is
9 disclosed later on in those disclosures we looked at, and this
10 is saying what is not going in the transaction; right?

11 A Correct.

12 Q And what the deal was was intellectual property,
13 including all copyrights and trademarks, except for trademarks
14 Unix and UnixWare were not being transferred; right?

15 A It makes no sense to use this language because it's been
16 replaced. This language does not exist in the APA.

17 Q Well, this was the language that was approved by the
18 Board of Directors; correct?

19 A But it does not exist in the APA. It was -- it was
20 replaced with wording in Amendment 2.

21 Q My question was was this wording, "All copyrights and
22 trademarks, except for the trademarks Unix and UnixWare," as
23 intellectual property excluded from the Asset Purchase
24 Agreement, was that approved by the Novell Board of
25 directors?

1 A I would assume so.

2 Q And you also see there's all patents are excluded;
3 correct?

4 A Yes, but I don't believe -- AT&T didn't transfer any Unix
5 patents to Novell, so I don't think Novell had any patents to
6 transfer.

7 Q So these lists that we see, the disclosure lists that we
8 see at the end of the agreement that list patents and patent
9 applications and that list a bunch of copyrights, that's
10 simply a list of what exists, but you have to look to the
11 excluded assets section to see -- and the included assets
12 section to see what actually went and what actually did not go
13 in the transaction; right?

14 A That would be true.

15 Q So now if we could take a look at -- well, let me --
16 first of all, you mentioned Mr. Burt Levine.

17 If we could bring up his photograph, please.

18 Is that the Burt Levine that you were referring to as the
19 one that gave you these letters that went to customers?

20 A Yes.

21 Q And were you aware that Mr. Levine was an in-house lawyer
22 at Novell during 1995?

23 A Yes.

24 Q And were you aware that Mr. Levine actually reviewed and
25 edited the included and excluded asset schedules of the APA?

1 Were you aware of that?

2 A I didn't know that.

3 Q And were you aware that Mr. Levine approved and agreed
4 with those included and excluded asset sections, including the
5 section that excluded copyrights? Are you aware of that?

6 A No.

7 Q Let's go back to Schedule E if we could. Schedule E,
8 yes -- Attachment E. Now, this is a list that goes on for
9 one, two, three, four, five, six, seven, eight pages; is that
10 right?

11 A Okay. I'm only looking at the section of one page --

12 (voices overlapping)

13 THE COURT: Just a second. Just a second. Don't
14 talk over each other.

15 Mr. Acker, if you'd ask your question again.

16 MR. ACKER: Yeah, I'll ask him another question.

17 Q (BY MR. ACKER) You see in Attachment E it says page 1 of 8?

18 A Yes.

19 Q And you've looked at the APA, and you and Mr. Normand
20 have spent time looking at this together; correct?

21 A Correct.

22 Q And when you walk through these eight pages of these
23 copyrights, the first seven-and-a-half pages are all manuals,
24 instruction guides; right?

25 A Okay.

1 Q It's not code; right?

2 A Okay.

3 Q Do you agree with that? You want to look at it?

4 A I would agree with that.

5 Q So the only code listed, again on this disclosure, is in
6 the last four items; right? If we go to page --

7 I'm sorry, Thomas. Go to page eight, please. Highlight
8 those last four.

9 And do you know what year that code was written?

10 A I'd say the late 70's.

11 Q And there was many, many improved or added on or new
12 versions of Unix after the 70's before the Asset Purchase
13 Agreement in 1995; correct?

14 A Absolutely.

15 Q And none of those are listed in this schedule; right?

16 A No, they're not.

17 Q And in fact these copyright registrations -- if I can
18 hand those back to you, sir --

19 487, if you could bring up 487, please.

20 And the first page you see there's a section there in --
21 three in the front page?

22 A Yes.

23 Q The code is written in 1978; right?

24 A Yes.

25 Q And the named owner of the registration or the copyright

1 in this document that was being testified about was AT&T;
2 right?
3 A Yes.
4 Q And SCO or Santa Cruz or Caldera never made any effort to
5 change this; right?
6 A I don't know.
7 Q And all of that code that was improved on, the new Unix
8 code that was written between 1978 and 1995, that's not
9 anywhere in this attachment to the APA; correct?
10 A Correct.
11 Q And similarly, if you go to -- and I'm sorry. It's 488,
12 the next copyright registration. You see the date that that
13 code was written?
14 A Yes.
15 Q 1978?
16 A Yes.
17 Q And you see also that the name of the registrant is AT&T?
18 A Yes.
19 Q Now, when there was a switch, when the Asset Purchase
20 Agreement was finalized in the end of '95 and you moved from
21 Novell to Santa Cruz, you actually stayed in the same physical
22 building in New Jersey; right?
23 A Correct.
24 Q So, in other words, it wasn't as though the moving trucks
25 came and all of the folks, former Novell people who are now

1 becoming Santa Cruz people, got moved to another location.

2 You actually stayed in the same building; right?

3 A For a period of time, yes.

4 Q And if you take a look actually -- if we could bring up
5 SCO exhibit 580. So this letter was the letter that you
6 talked about that Mr. Levine gave to you. And this was a form
7 letter, wasn't it? In other words --

8 A Pretty much so, yes.

9 Q So you talked about thousands of these letters going out,
10 but this same paragraph was in every single letter; right?

11 A Well, this letter was a little different because it was
12 addressing a specific agreement that needed approval, but,
13 yes, there was a form letter that went to standard licensees.

14 Q And if you take a look at -- this is March 25th of '96,
15 so about four months after the -- or three months after the
16 close of the deal, the address for -- well, I'm sorry, wrong
17 letter. Give me a minute.

18 Bring up SCO -- or rather Novell H6, please.

19 Now, H6 is a letter that was sent in March of 1996 from
20 SCO to Novell. Do you see that?

21 A Yes.

22 Q And do you see the address at the top for SCO and the
23 address at the top for Novell, same address; right?

24 A Yes.

25 Q And so how was it that you -- did you simply move

1 those -- the Santa Cruz people over to cubicles on the right
2 and the Novell people to cubicles on the left, or did you all
3 just keep sitting in the same seats?

4 A I think for the most part we just kept staying in the
5 same offices. They did firewalls on I.P. computer systems,
6 but if I remember, we pretty much stayed in the same
7 offices.

8 THE COURT: Are you going to offer this exhibit?

9 MR. ACKER: I'm going to ask him about it. Yeah,
10 let me back up and I'll come back to this one.

11 THE COURT: All right.

12 MR. ACKER: Take that down.

13 Q (By MR. ACKER) Now, you -- there was some testimony you
14 gave to Mr. Normand about HP, Sun and IBM being able to
15 develop their own flavors of Unix. Do you recall that
16 testimony?

17 A Yes.

18 Q And what you said was that if and because HP, Sun and IBM
19 had a license, they had the ability to take Unix code and
20 build on top of it and develop their own flavor of Unix;
21 right?

22 A Yes.

23 Q And they did that, but they did not have ownership of the
24 copyrights; right?

25 A Well, yes.

1 Q And so it's true, isn't it, that you certainly can have
2 the rights to develop your own version of Unix on top of old
3 Unix and not own the copyrights; correct?

4 A That's true.

5 Q There's nothing surprising about that; correct?

6 A No.

7 Q Now, you also mentioned that Novell engineers changed
8 some of the language on the copyrights after the APA; is that
9 right?

10 A In the status meeting at one of the transition meetings
11 it was reported that the Novell engineers were changing --
12 were changing the copyrights from Novell to Santa Cruz.

13 Q Did you ever actually look at the code and see what those
14 changes were?

15 A No.

16 Q Let me show you what has been marked as SCO 641.

17 THE COURT: 641?

18 MR. ACKER: Yes, Your Honor.

19 Q (BY MR. ACKER) I'm going to ask you about the third page in
20 in the document. Now, if you take a look at Roman -- or
21 number six of what we've -- on the third page of what has been
22 marked as SCO 641, you see there's -- what is listed there is
23 changes that were made to the Unix code after the APA;
24 correct?

25 MR. NORMAND: Your Honor, the document is not in

1 evidence. We shouldn't be speaking to the substance of it.

2 MR. ACKER: I'm just trying to lay a foundation if
3 he even knows what actually got changed or what didn't get
4 changed.

5 THE COURT: Could you perhaps have him look at it.
6 And try to avoid referencing the content of the document,
7 Mr. Acker.

8 Q (BY MR. ACKER) Well, you're saying that you didn't actually
9 see what changes were made; correct?

10 A That's correct.

11 Q And so you don't know that in fact what happened is that
12 the engineers left on for Novell the ownership from 1984 to
13 1995. You don't know that; right?

14 A I have no idea what was changed.

15 Q And you don't know that the only time Santa Cruz is
16 mentioned as the owner of any copyrights is for UnixWare with
17 a registration after the APA of 1996? You just don't know
18 that; right?

19 A No, I don't.

20 Q And as far as you know, that's exactly what happened is
21 that the engineers left the Novell registration for the period
22 before the APA, and they only changed it for UnixWare after
23 the APA. You simply don't know that; right?

24 A No. The only thing I know about it is when they said
25 they were changing the copyrights, I asked if they were going

1 back into old, old versions of Unix, and they said no, they
2 only do what is on a current software product. So that's all
3 I know about it.

4 Q But in terms of what dates were put on there for who
5 owned -- who owned the old Unix code from 1984 to 1995, you
6 don't know that the engineers left Novell on, do you?

7 A I have no idea.

8 Q Now, between the period of the end of December of 1995
9 and October of 1996, that ten month period, you were at Santa
10 Cruz; correct?

11 A Yes.

12 Q And Santa Cruz was issuing licenses during that period,
13 during that ten month period; correct?

14 A Correct.

15 Q Let me show you L7. Have you had a chance to look at
16 what we've marked as Novell Exhibit L7?

17 A Yes.

18 Q And the first agreement is a Supplement and Licensing
19 Order Form that was executed by SCO in March of 1996;
20 correct?

21 A Yes.

22 Q And this is a license agreement in which Unix is being
23 licensed in March of 1996; correct?

24 A Correct.

25 Q And then if you go back into the document, do you see

1 there's a second licensing agreement in May of 1996?

2 A I've got -- where do you want me to look? Up on the
3 screen I've got a June 25, '96.

4 Q Let me show it to you.

5 THE COURT: Mr. Acker, you need to know that the L7
6 identified in the list you gave us is not the same as the one
7 you're referring to. We can correct that easily.

8 MR. ACKER: We'll fix that.

9 THE COURT: That's based on the assumption you
10 ultimately will be asking for submission, which you have not
11 been doing, so I'm not going to worry about it until you do.

12 Q (BY MR. ACKER) Do you see that, sir, May 10th Software
13 License Agreement, SCO for Unix System V, release 4.0?

14 A Yes.

15 Q These were license agreements that were executed by SCO
16 in March and May of 1996; correct?

17 A Yes.

18 MR. ACKER: I move for admission of L7, Your
19 Honor.

20 MR. ACKER: No objection, Your Honor.

21 THE COURT: L7 will be admitted.

22 MR. ACKER: And we may need to amend that.

23 THE COURT: But just so that I -- for our records,
24 these are license agreements. You said that they were
25 dated.

1 MR. ACKER: There's two of them, Your Honor. One is
2 dated March of 1996 and one is dated May of 1996, executed by
3 SCO licensing Unix software.

4 THE COURT: My dilemma is that the one -- the first
5 sheet of mine is the May 1996.

6 MR. ACKER: Right.

7 THE COURT: There's a subsequent one in here
8 somewhere?

9 MR. ACKER: No, I'm sorry, you're right. They're
10 both May.

11 The Court: Okay. That was why I was confused. So
12 license agreements from May of 1996 is how we can identify
13 them; correct?

14 MR. ACKER: Yes, Your Honor.

15 THE COURT: All right. And they're not objected to,
16 so they will be admitted.

17 (Defendant's Exhibit L7 received in evidence)

18 Q (BY MR. ACKER) So it was true that after you -- the APA was
19 executed and you went to work for Santa Cruz, you and your
20 team were issuing license agreements during the period of time
21 from December of '95 until October of '95; correct?

22 A Yes.

23 Q And did anybody during that period of time from Novell
24 say, "Hey, you can't do that. You don't have the rights to
25 issue license agreements"?

1 A No.

2 Q Did anyone during that period of time from December of
3 '95 until October of '95 say, "You don't have the rights --
4 you, Santa Cruz, don't have the rights to build a new version
5 of UnixWare on top of the old Unix code"?

6 A Well, Novell knew we were doing this because this is a
7 reference license. This is a read only right to look at the
8 source code. We did them at Novell. We continued to do them
9 at Santa Cruz. This was ordinary course of business. So I
10 don't see why I should have had to have asked Novell for
11 permission to do this.

12 Q And exactly right. That's my point. Novell knew you
13 were doing this, issuing licenses between December of '95 and
14 October of '96, and no one said, "Hey, you can't do that,
15 Mr. Broderick," correct?

16 A Correct.

17 Q Because that was your rights under the APA; correct?

18 A Correct. We owned the technology. We could do with it
19 what we wanted.

20 Q Why don't we take a look at Section 4.16(a) of the APA.
21 Now, this is -- Section 4.16(a) is the section regarding the
22 royalties that you were to collect, you being Santa Cruz, were
23 to collect and funnel 95 percent back to Novell; correct?

24 A Yes.

25 Q And it's your -- as I heard your testimony, was that your

1 belief was that the only royalties that had to go back to
2 Novell were royalties for the binary licenses; is that
3 right?

4 A That's -- that's correct.

5 Q Now, can you show me where in 4.16(a) it says that the
6 obligation to pay back to Novell 95 percent of the SVRX
7 revenue is limited to binary licenses?

8 A That's covered in Amendment No. 1 where they clarify --
9 they realized when they did this that they had forgotten about
10 the source code and support fees. So Amendment 1 was executed
11 at the time of closing, and in Amendment 1 they carve out
12 source code right to use fees, support fees, and they carve
13 out everything, leaving only binary royalties.

14 Q But the deal that was approved by the Novell Board of
15 Directors, you'll agree with me that 4.16(a) doesn't say
16 anything about limiting it to binary code or binary licenses;
17 right?

18 A You have to know the contract's value. When I look at a
19 contract, I look at the whole contract, including amendments.
20 So when I look at the APA, in my mind I have to consider all
21 the amendments.

22 Q Ane we'll take a look at that. But you actually wrote
23 letters to people describing this -- these obligations;
24 correct? Letters were written by SCO describing what their
25 Obligations were under 4.16(a); correct?

1 A I -- we had some dealings. I think there was an issue
2 with Unisys and probably with Cray and SGI where I sent a
3 letter to Novell saying under the APA we need to talk about
4 this.

5 Q And I apologize. I don't think you wrote it, but someone
6 I think at SCO did. If you'd take a look at H6.

7 A Okay.

8 Q Now, this is a letter written on March 12, 1996 by
9 Mr. James -- is it Machi?

10 A Jim Machi?

11 Q Jim Machi? What was his job in '96 at Santa Cruz?

12 A He was a Product Manager.

13 MR. ACKER: Your Honor, I move for admission of H6.

14 MR. NORMAND: No objection, Your Honor.

15 THE COURT: It will be admitted.

16 (Defendant's Exhibit H6 received in evidence)

17 Q (BY MR. ACKER) And if you take a look again at the top, you
18 see we have the same addresses, that Novell is residing in the
19 same location as Santa Cruz; correct?

20 A Yes.

21 Q And if you take a look, if we could highlight the first
22 paragraph down to the end of the parenthetical, you see
23 that -- is it Machi, Mr. Machi?

24 A Machi.

25 Q That Mr. Machi wrote, just three months after the APA was

1 executed, he wrote, "Under the December 6, 1995 Asset Purchase
2 Agreement, APA, between SCO and Novell, SCO has an obligation
3 to collect and pass through to Novell certain SVRX royalties
4 that are due under SVRX licenses listed in item six of
5 schedule 1.1(a) and assigned to SCO under the APA. Such
6 royalties are payments of the type that prior to December 6,
7 1995 accrued to Novell under standard customer licensing
8 agreements" -- and then he gives two examples of those sorts
9 of agreements. And he writes, "For example, source code and
10 sublicensing agreements". Do you see that?

11 A Yes.

12 Q And so at least Mr. Machi believed as of March of 1996
13 that what Santa Cruz was obligated to pass through to Novell
14 was fees from both binary licenses and source code licenses;
15 correct?

16 A Up to December 6, 1995 I think -- it was up to the
17 closing date. Novell got all the fees associated with the
18 business up to the closing date. After the business closed,
19 they only got the binary royalties.

20 Q No. But what he says is that under the Asset Purchase
21 Agreement, those royalties were source code royalties and
22 binary royalties that used to go -- that used to be -- go
23 to -- that Novell collected before the APA, now Santa Cruz
24 collects and gives 95 percent back to Novell?

25 A Not source code.

1 Q Well, he says source code, doesn't he?

2 A Well, he's talking about such source code royalties are
3 payments of the type prior to December 6, 1995 accrued to
4 Novell under standard licenses, source code and sublicensing.
5 If you're trying to say that he's saying he's getting --
6 they're getting the source code fees, he's wrong, and we never
7 gave Novell source code fees and they never asked for them.

8 Q So three months after the APA was signed in December of
9 1995 and it went into effect, Mr. Machi believed that 4.16(a)
10 required Santa Cruz to pass through the source code royalties;
11 correct?

12 A I don't know if he believed that, but he was a product
13 manager, and --

14 Q That's what he wrote; right?

15 A That's what he wrote.

16 Q Take a look at the APA again, 4.16(b). Now, you said it
17 in direct, and I think it's accurate, that you, SCO, could do
18 nothing that would jeopardize the revenue stream for these
19 SVRX licenses; is that correct? Do I have that testimony
20 right?

21 A That's correct.

22 Q And you also said it was essentially money in the bank
23 for Novell; correct?

24 A That's correct.

25 Q So after December of '95, after the APA went into effect,

1 Santa Cruz, and subsequently SCO, the plaintiff in this case,
2 could take no action that jeopardized that SVRX royalty stream
3 back to Novell; correct?

4 A Yeah. What we were told is as -- as of the closing, if a
5 licensee was paying royalties that were going to Novell, we
6 had to continue to collect those royalties and Novell got
7 them. We couldn't do anything. That's the example I gave
8 about going to a licensee and saying, "You're paying a hundred
9 dollars a copy for a royalty. Sign a license with us and
10 we'll only charge you 50." We couldn't do something like
11 that.

12 Q But you'll agree with me that what your testimony was is
13 that first Santa Cruz and then SCO couldn't take any actions
14 that would impact or affect that money in the bank for Novell
15 from those SVRX licenses; correct?

16 A Yeah. For the binary royalties they were receiving, we
17 couldn't screw that up.

18 Q Well, I understand we have a difference of opinion
19 regarding binary and source code, but it's true, isn't it,
20 that you couldn't take any actions, you SCO, Santa Cruz,
21 couldn't take any actions that affected that royalty stream
22 for SVRX licenses; right?

23 A True.

24 Q And if you take a look at 4.16(b), the language of the
25 contract regarding this waiver provision, there's no language

1 in there that limits this waiver provision simply to binary
2 royalties; right?

3 A Yeah, but you only have to consider the amendments.

4 Q But in the contract approved by Novell Board of
5 Directors, it doesn't say anything about binary royalties;
6 right?

7 A No, it doesn't. That's why it was amended.

8 MR. ACKER: I don't have anything else.

9 REDIRECT EXAMINATION

10 BY MR. NORMAND:

11 Q Mr. Broderick, you testified you're a contracts guy?

12 A I'm a contracts guy.

13 Q And what does that mean exactly?

14 A I work contracts and licensing for the SCO group. I've
15 been doing it since Novell purchased us from U.S.L. If a
16 customer wants to license a source code product, get rights to
17 distribute a product that we have, or if we want to license a
18 third-party product, some company may have developed something
19 that we'd like to use in our product, I work with them.

20 Q Have you spent a lot of time thinking about how contracts
21 operate in the course of your work?

22 A Close to 20 years.

23 Q Now, as a contracts guy, is it your view that perfect
24 clarity in a contract is always the goal?

25 A That is the goal.

1 Q Is perfect clarity in a contract always achieved?

2 A No, it is not.

3 Q In your experience are contracts ever ambiguous?

4 A Yes, they are.

5 Q In your experience are contracts ever amended?

6 A All the time.

7 Q In your experience, when a contract is amended, is the
8 amended language of the contract, the old language, relevant
9 to you anymore?

10 A The old language does not exist anymore. When we amend
11 something, the old language is gone and the new language goes
12 in. In fact what I do in a lot of cases, if we have a
13 contract that we amend, I will -- we have all the contracts in
14 word processing. What I'll do is I'll take that contract in
15 word processing. If we amend it, I will go in and put the
16 amended language in it so I'm sure to make sure I'm always
17 looking at the current state of the contract, the original
18 contract with the amended language.

19 MR. NORMAND: Mr. Calvin, could you bring up Roman
20 Numeral V.

21 Q (BY MR. NORMAND) Do you see this language, Mr. Broderick,
22 that Mr. Acker spent several minutes asking you about?

23 A Yes, I do.

24 Q Do you know whether this language has been amended?

25 A That language was replaced.

1 Q And in your experience as a contracts manager in
2 reviewing the APA, would this language be relevant to you
3 anymore?

4 A Not at all. It's been replaced.

5 Q What language would you look to in your experience?

6 A The amended language in the -- the language that's
7 included in the amendment.

8 Q Which amendment is that?

9 A This was replaced in Amendment No. 2.

10 Q Now, in your experience in working with contracts, has
11 there ever arisen an occasion where if you interpret a
12 contract very literally, you can create an absurd outcome?

13 A Oh, I can come up with some really absurd outcomes.

14 Q Now, in your experience, if you read a contract
15 literally, and it would create an absurd outcome from reading
16 it literally, do you take the language literally?

17 MR. ACKER: Objection. That calls for a legal
18 opinion, Your Honor.

19 MR. NORMAND: Your Honor, this goes to the first ten
20 minutes of Mr. Acker's examination of Mr. Broderick as a
21 contracts guy.

22 THE COURT: I'll overrule the objection.

23 Q (BY MR. NORMAND) Are there times, Mr. Broderick, when
24 interpreting a contract literally would create an absurd
25 result?

1 A Yes.

2 Q And when that happens in your experience, how would you
3 go about determining the intent of the parties under the
4 contract?

5 A I would talk to the parties -- both parties of the
6 contract, find out what they really intended the contract to
7 be, and then we would do an official amendment to the contract
8 to make it clear to everybody.

9 Q In your experience, when a contract is ambiguous, would
10 you look to the way the parties had performed under the
11 contract as relevant?

12 A Absolutely.

13 MR. NORMAND: Mr. Calvin, can you bring up 4.16(b).

14 Q (BY MR. NORMAND) Mr. Broderick, do you remember being asked
15 about this literal language in 4.16(b) of the APA?

16 A Yes.

17 Q Do you have an understanding as to whether this language
18 was subsequently amended?

19 A Yes, I believe it was.

20 Q And if it were amended, would this language be relevant
21 to you anymore in your work as a contracts guy?

22 A No. I'd look at the amended language.

23 Q Now, Mr. Acker asked you about the types of agreements
24 that you've overseen in the course of your work. I think they
25 included the software agreement, sublicensing agreement, and

1 what you described as the product license schedules. Do you
2 recall that --

3 A Yes.

4 Q -- series of questions and answers? In your experience
5 in your time at Santa Cruz and SCO, what is an SVRX license?

6 A It's --

7 Q How would you use that term?

8 A A product license. Anytime -- anybody, whether we were
9 at USL, Novell, Santa Cruz Operation or SCO, if a salesperson
10 was dealing with a customer and the customer wanted to go to a
11 latest release, he would call us up and say they need a
12 license for "X" product. If a -- if the finance people wanted
13 to check the royalties that a customer was supposed to pay,
14 they would call us up and say, "Can I get a copy of this
15 company's license for "X" product?" And that would be the
16 product schedule because that's what the royalties are.

17 MR. NORMAND: Mr. Calvin, could you bring up
18 schedule 1.1(a). Go to the next page, and the next page.
19 Now, could you bring up, Mr. Calvin, the top half.

20 Q (BY MR. NORMAND) Mr. Broderick, do you recall what purpose
21 Schedule 1.1(a) of the APA served?

22 A It was a listing of all the assets that were going to
23 Santa Cruz.

24 Q Now, do you see item L in this description of the list of
25 assets that are being transferred?

1 A Yes.

2 Q And it says, "Software and sublicensing agreements. This
3 includes the source code and sublicensing agreements that
4 seller has with its OEM, end user and educational customers.
5 The total number of these agreements is approximately 30,000."
6 Do you see that language?

7 A Yes.

8 MR. NORMAND: And now, Mr. Calvin, can you bring out
9 item six. I think it's at the bottom. And could you put on
10 top of that the paragraph we just read?

11 Q (BY MR. NORMAND) Now, Mr. Broderick, in this asset schedule
12 the APA separately identifies in item six SVRX licenses; is
13 that right?

14 A That's correct.

15 Q Now, as a contracts guy, in your experience, would there
16 be any reason to make these two provisions redundant? Would
17 there be any reason to think that SVRX licenses refers to
18 something that has already been identified in the asset
19 schedule?

20 A Well, they're different. Up in L, software and
21 sublicense agreement, that's why I talked about the umbrella
22 agreements that really cover the general terms and protections
23 of the company for our software. And item six here, the SVRX
24 licenses, those are the actual products that we will grant
25 licenses for.

1 Q Now, Mr. Broderick, we're going to put on the screen --
2 Mr. Calvin, let's go to Exhibit 168.
3 Is this document, Mr. Broderick, among the ones that made
4 their way into your files and under your purview?
5 A Yes, I'm aware of this.
6 Q And you've seen this document before, of course?
7 A Yes.
8 MR. NORMAND: Your Honor, I move SCO Exhibit 168
9 into evidence.
10 MR. ACKER: No objection.
11 THE COURT: It will be admitted.
12 (Plaintiff's Exhibit 168 received in evidence)
13 MR. NORMAND: And, Mr. Calvin, can we pull out the
14 paragraph two in the middle of the page.
15 Q (By MR. NORMAND) Now, Mr. Broderick, what is this
16 document?
17 A This document relates to a binary royalty buyout by
18 Hewlett Packard.
19 Q And this language states in paragraph two quote,
20 "Purpose: Novell retained or has acquired all rights to
21 outstanding and future HP binary code royalty and licensee fee
22 payments, but not source code royalties." Do you see that
23 language?
24 A Yes.
25 Q Now, was it your understanding over the course of your

1 work at Santa Cruz and SCO that those companies had any
2 obligations to pay source code royalties to Novell?

3 A No, they didn't. And Novell had a number of audits that
4 they performed to the royalty payments at Santa Cruz and the
5 SCO group. The people doing the audits were aware of our
6 business. They knew we were doing source code licensing, and
7 not once did they say, "But what about the source code?" All
8 they did was review the binary royalty reports.

9 Q Now, Mr. Acker asked you some questions about the Sun and
10 Microsoft agreements that he showed you. Do you recall
11 that?

12 A Yes.

13 Q Do you know whether those were part of the SCOSource
14 program?

15 A Yes, they were.

16 Q And did you negotiate those contracts?

17 A No. I had -- I didn't really have anything to do with
18 the Sun agreement. The Microsoft agreement, I participated in
19 some reviews of the documents as they were negotiating them.

20 Q Do you have any view or understanding as to the
21 individual value of the individual components of those
22 agreements?

23 A No, I don't, except for the fact that some of the values
24 are highlighted in the agreement. The values that anybody
25 placed on them, I'm not aware of.

1 Q Now, as a matter of practice in 2003 and 2004, around the
2 time these contracts were executed, did SCO license all of the
3 old Unix source code with the most current version of
4 UnixWare?

5 A The most current -- UnixWare was licensed with prior
6 products.

7 Q What are prior products?

8 A Prior products are the prior -- it's the -- sort of the
9 family tree or hierarchy of all of the development of the
10 products through time. The example I used, I gave a house two
11 bedrooms and a bathroom, and you add a room and add a
12 bathroom, and you end up down the road with UnixWare.

13 They listed prior products. But when we came to UnixWare
14 7, I believe they took a lot of the older prior products out
15 and only included UnixWare because the product people at the
16 time made the decision that they wanted the customers to focus
17 on UnixWare and not look at the prior stuff.

18 Q Now, in 2003 and 2004, when SCO licensed any prior
19 products with any UnixWare product, did they charge the
20 customer anything extra for those prior products?

21 A No.

22 Q You were asked some questions about the copyright
23 registration certificates that we discussed. Do you recall
24 that? Do you know whether all of the copyrights in the Unix
25 computer programs are registered, whether certificates exist

1 for all of the copyrights in those programs?

2 A What I've been told is they're not all registered.

3 Q And so in your view do certificates exist for all of the
4 computer programs that are identified in the APA?

5 MR. ACKER: Your Honor, That calls for speculation
6 given his prior answer.

7 MR. NORMAND: Well, he testified to his
8 understanding, and this is an issue that's come up --

9 THE COURT: I'll sustain the objection.

10 MR. ACKER: Speculation.

11 Q (BY MR. NORMAND) And who told you that copyright
12 registration certificates do not exist for all of the computer
13 programs for Unix and UnixWare?

14 A I believe it was Ryan Tibbitts.

15 Q Now, as to the older computer programs that have been
16 registered, who holds the copyright certificates? Who has
17 physical possession of them?

18 A The SCO group.

19 Q You were asked about HP, Sun and IBM, and you were asked
20 the question whether Santa Cruz and SCO have been able to
21 operate their Unix businesses in the years after the APA. Do
22 you recall those questions?

23 A Yes.

24 Q And you were asked whether they quote, "Needed the
25 copyrights to have done that." Do you recall that?

1 A Yes.

2 Q Now, I want to ask you about your understanding of how
3 this would work. When you're involved in your work at Santa
4 Cruz and negotiating contracts, does a copyright registration
5 number play any particular role in any of the work you do?

6 A No.

7 Q Do you look to see if there are copyright registration
8 numbers and contracts that they're executing?

9 A No.

10 Q To your understanding, do programmers, when they're
11 making copy of source code, do they have to enter a copyright
12 registration number or some sort of password?

13 A Not my knowledge.

14 Q To your knowledge, can a programmer copy the source code
15 without knowing what the corresponding copyright registration
16 number is?

17 A I would assume so.

18 Q So is it your testimony that in the 10 or 15 years after
19 the APA, programmers have been physically able to copy the
20 source code, and you have been physically able to sign
21 contracts that license the source code?

22 MR. ACKER: Objection, leading, Your Honor.

23 THE COURT: Overruled.

24 MR. NORMAND: It's an open-ended question.

25 THE COURT: Overruled.

1 MR. NORMAND: With a lot built in.

2 THE COURT: Why don't you try it again.

3 The Witness: Thank you.

4 Q (BY MR. NORMAND) Have you been physically able to sign
5 contracts with third parties since the execution of the APA?

6 A Yes.

7 Q Has anything stopped you from doing that?

8 A No.

9 Q When you do that, in the last 15 years has it been your
10 belief and understanding that Santa Cruz and SCO owns the Unix
11 copyrights?

12 A Well, yes. In our agreements we provide an
13 indemnification for infringement of a third-party product.
14 Somebody licensing our software, we would -- we would give
15 them an indemnification. So if somebody else came along and
16 said, "The product you're using infringes this, and I'm suing
17 you for \$1,000,000," we indemnify them and say, "Since we've
18 licensed you the software, we'll protect you from that." We
19 wouldn't protect them from that unless we owned the software.
20 And the copyright -- in software a copyright is how you own
21 the software.

22 Q Let me ask you another question, Mr. Broderick. I think
23 we spoke earlier about the fact that IBM has a Unix license
24 with what is now SCO; is that right?

25 A Correct.

1 Q And in your view as a contracts guy, if IBM were to give
2 away the Unix code that it licensed from SCO and it gave it
3 away to a third party, as a contracts guy do you think you'd
4 have an ability to sue that third party for breach of
5 contract?

6 A I'd have to sue IBM.

7 Q What could you do as against that third party in your
8 experience as a contracts guy?

9 A I think the only thing you could do is get an injunction
10 against them using the software.

11 Q And how would you do that if you didn't have a contract
12 with them?

13 A If somebody is using something that belongs to you and
14 they're not authorized to use it. The only recourse we have
15 would be against a person with a contract.

16 Q And do you have a view as to whether if you own the
17 copyrights you would have any recourse against that third
18 party?

19 A We have ownership of the product, therefore, we could
20 press the issue. Copyrights is how you own a -- how you show
21 your ownership and protect your software is by copyright.

22 Q Now, in your view is the ability to enforce prescriptions
23 against third parties integral to the operation of SCO's
24 business?

25 A Oh, absolutely. If we couldn't protect our software,

1 we'd be out of business. You know, if we couldn't protect our
2 software, the first person that we licensed the software could
3 go into business for themselves and we'd be out of business.
4 We have to be able to protect our software, and you do that
5 through copyrights. That's how all of the companies have done
6 it.

7 MR. NORMAND: Your Honor, I had mentioned that I
8 wanted to move into evidence all of the copyright registration
9 certificates that we had identified. I can do that now. It's
10 a fairly long list, or we can do it however Your Honor
11 pleases.

12 THE COURT: Have you discussed this with --

13 MR. ACKER: We're going to have to take a look at
14 each of those, so maybe we can do it over a break.

15 MR. NORMAND: We'll do it that way, Your Honor.

16 THE COURT: All right.

17 MR. NORMAND: I have no further questions.

18 RE-CROSS-EXAMINATION

19 BY MR. ACKER:

20 Q Mr. Broderick, in response to Mr. Normand's questions you
21 said that sometimes, and in your -- your opinion is that the
22 language of the APA was ambiguous. Did I hear that right?

23 A There's language in the APA that's confusing.

24 Q And when language is confusing, it's the case, isn't it,
25 that two reasonably minded people can take a look at the

1 language and come to different opinions about what it means;

2 correct?

3 A Yes, they could.

4 Q And so two people might look at language that's

5 ambiguous, and one person might say copyright's transferred,

6 and another person might look at that language and say the

7 copyrights do not transfer; correct?

8 A They could, but that wasn't the case. They looked at the

9 copyrights transferring and executed Amendment 2, which

10 transferred the copyrights.

11 Q And my question was if the language is ambiguous, two

12 reasonably minded people can look at the same language and

13 come to different conclusions; correct?

14 A If they take all the facts into consideration, that's a

15 possibility.

16 MR. ACKER: That's all I have, Your Honor.

17 THE COURT: May this witness be excused, counsel?

18 MR. NORMAND: Yes, Your Honor.

19 MR. ACKER: Yes, Your Honor.

20 THE COURT: Mr. Broderick, that means you do not

21 need to worry about being recalled as a witness. You may go

22 about your business. But I do have to instruct you to please

23 not discuss your testimony with any other witness in this case

24 or in the presence of any other witness or in any other way

25 communicate the nature of your testimony broadly. All right?

1 MR. NORMAND: Your Honor, I hope to reach agreement
2 with Novell on the issue, but I suppose I should mention that
3 if we need to have Mr. Broderick technically on the stand to
4 get in the remaining registration certificates, maybe we
5 shouldn't let him go.

6 THE COURT: That means you may come back after all.
7 Forget everything I just said. No, that's not true.

8 THE WITNESS: Does that mean I get to sit out there
9 or I have to go back in the box?

10 THE COURT: I think you ought to stick around until
11 at least the end of the next break, all right, which will be
12 approximately an hour from now.

13 MR. NORMAND: I think his question, Your Honor --

14 THE COURT: Whether he can stay in the courtroom?

15 THE WITNESS: Can I watch or do I go in the closet?

16 THE COURT: Counsel, do you oppose if he stays in
17 the courtroom, Mr. Acker?

18 MR. ACKER: No, Your Honor.

19 THE COURT: You may stay here if you would like.
20 But, again, the instructions about discussing your testimony
21 with any other witness or in the presence of any other
22 witness --

23 THE WITNESS: No problem. Thank you very much.

24 THE COURT: -- Survives, whatever you may do in the
25 next hour, okay?

1 THE WITNESS: Thank you.

2 THE COURT: Go ahead, Mr. Singer.

3 MR. SINGER: Your Honor, our next witness is Ty
4 Mattingly.

5 The Clerk: Mr. Mattingly, do you want to come
6 forward and I'll swear you in.

7 THE WITNESS: Sure.

8 (Ty Mattingly, Plaintiff's witness, sworn)

9 The Clerk: Thank you. Please be seated.

10 And if you would please state and spell your name for the
11 court.

12 THE WITNESS: Ty D. Mattingly. It's T-Y, D.,
13 M-A-T-T-I-N-G-L-Y.

14 THE COURT: Thank you.

15 DIRECT EXAMINATION

16 BY MR. SINGER:

17 Q Good morning, Mr. Mattingly. I'm Stuart Singer, one of
18 the attorneys for the SCO group. Would you briefly describe
19 your educational background.

20 A Sure. Graduated, and came up to Brigham young university
21 in 1980, and graduated from B.Y.U. in '87 with a degree out of
22 the college of Engineering in the design engineering world.
23 And then took a job with IBM after that, and spent 14 months
24 going through IBM's advanced education program, where
25 basically spent 14 months learning about computers and

1 information technology, etcetera.

2 Q And after that?

3 A Educationally?

4 Q In business?

5 A You know, on and off would go to postgraduate types of
6 courses, education.

7 Q Could you briefly summarize where you went to work after
8 school, after college.

9 A Sure. I worked for IBM for just under five years, and
10 then left and joined Novell in 1992, about February of '92,
11 and then worked with Novell until 1987.

12 Q 1987 or '97?

13 A '97.

14 Q Can you describe what you worked at after you left Novell
15 in 1997?

16 A Sure. I started some companies up that were in the
17 consulting world, and built some internet types of businesses
18 there that we later sold. And then I've just been an investor
19 since about 19 -- excuse me -- since about 2004.

20 Q Has your investments focused on the technology business?

21 A Correct.

22 Q Was one of the companies that you invested in sold to SCO
23 group?

24 A It was.

25 Q Do you recall when that was?

1 A I don't recall exactly what the time frame was, but it
2 was a company by the name of Voltis, and it was a real small
3 company, very small transaction.

4 Q As a result did you receive certain stock in the SCO
5 group?

6 A I did.

7 Q Do you know approximately how much?

8 A It was a little more than 9,000 shares.

9 Q And do you still have it?

10 A I do.

11 Q Are you good friends with certain members of the SCO
12 group?

13 A I am.

14 Q Such as Mr. Tibbitts? How do you know Mr. Tibbitts?

15 A Ryan and I met in 1980. We were teammates at B.Y.U. I
16 attended B.Y.U. on a football scholarship. And Ryan was an
17 upperclassman and one of my teammates, so I have known him for
18 30 years.

19 Q In fact were you an All-American at B.Y.U.?

20 A Well, I was an Academic All-American, so it's a little
21 bit of a combination of the school room as well as the playing
22 field.

23 Q Do you also have good friends at Novell?

24 A Sure.

25 Q And does that include David Bradford, General Counsel?

1 A Yeah. David Bradford is the person that I approached
2 when I wanted to leave Novell -- excuse me -- IBM and go to
3 Novell, and he actually set up my interviews with Jim Bills
4 back in those days and really helped me get into Novell and
5 mentored me a lot through Novell.

6 Q Let's go back to the time when you joined Novell.

7 A I also know Dana Russell over there, who is their C.F.O.

8 Q You're friends with Mr. Russell as well?

9 A Yes.

10 Q Going back to the time when you joined Novell, can you
11 describe your responsibilities?

12 A Sure. When I first joined Novell, I was a product
13 manager working in the marketing group.

14 Q Did your responsibilities change at some point?

15 A Yeah. After about a year Ray Norda, who was the Chairman
16 and CEO, grabbed me and asked me to start working for him. So
17 I spent the next couple of years working in the Chairman's
18 Office on various projects.

19 Q When Robert Frankenberg became CEO, did you continue in
20 that role working closely with the Chairman?

21 A Yes, I had. I had the same role and stayed working with
22 Bob Frankenberg for probably a year-and-a-half.

23 Q Was that your position at Novell in 1995?

24 A No. I'd left working for the Chairman's Office and took
25 a role as Vice-President of Corporate Development Strategic

1 Relationships.

2 Q Who did you report to at that time?

3 A Duff Thompson.

4 Q Were you involved in the sale of the Unix business to
5 Santa Cruz in 1995?

6 A Yes.

7 Q Do you recall who the principal negotiators were in that
8 transaction?

9 A Sure. The principal negotiators on the ground and living
10 in California for, you know, two months were myself and Ed
11 Chatlos, with me having the relationship and kind of the high
12 level strategy aspects of it, and Ed Chatlos, who was very
13 detailed oriented, assigned from the business unit, to work
14 out all of the details.

15 Q Did you attend negotiation sessions during those two
16 months that you were living in California?

17 A Sure, daily.

18 Q Was that the reason you were in California?

19 A Correct.

20 Q How personally involved was Mr. Bradford, the General
21 Counsel, in the negotiations?

22 A Well, Dave was the General Counsel of Novell at the time,
23 but he was not involved on the daily basis and was not on the
24 ground in California.

25 Q Are you familiar with a gentleman named Tor Braham, who

1 is an attorney from the Wilson Sonsini firm?

2 A Sure. Tor did a lot of work for us, very good guy.

3 Q How involved was Mr. Braham in the negotiations?

4 A You know, I don't recall that Tor was that involved on
5 the ground with the negotiations. When we finished coming to
6 a meeting of the minds, then docs were turned over, and that's
7 when the legal team took over for the last period of time, and
8 Tor would have been a key component in that.

9 Q When the lawyers came in to document the transaction, had
10 the principal business terms of the deal been agreed upon?

11 A Yes.

12 Q What was your Understanding from the negotiations as to
13 how much of the Unix business was being sold?

14 A Well, it was the majority of it. I mean we sold the
15 business. We acquired it from USL, and we were selling the
16 business to accomplish some very high level strategic
17 objectives for Novell and hopefully for the greater
18 industry.

19 Q What was not being sold?

20 A Oh, certain functions, like SCO was acting as Novell's
21 agent to collect some of the existing SVRX binary royalties,
22 and so that was retained, and SCO acted as the agent to
23 collect it, and I think the distribution was 95/5 towards
24 Novell.

25 Q Other than that, was the remainder of the business, the

1 Unix and UnixWare business, sold --

2 A Absolutely.

3 Q -- To Santa Cruz?

4 A Absolutely.

5 Q During the months of negotiations that you attended, did
6 anyone from Novell ever say that we are selling the Unix
7 business but we are retaining the copyrights?

8 A No.

9 Q Would that have been consistent with your understanding
10 of the deal which you negotiated, holding back the
11 copyrights?

12 A Holding back the copyrights would not have been
13 consistent.

14 Q Let's advance to the time of the Board of Directors
15 Meeting to approve the sale in September of 1995. What
16 responsibility, Mr. Mattingly, did you have in connection with
17 Board of Directors meetings at Novell?

18 A Well, prior to that time I had attended all of the
19 meetings when I worked for Ray Norda and Bob Frankenberg. At
20 this time where I worked for Duff Thompson I did not go to all
21 of the Board meetings, but I did present at a number of them
22 when they involved transactions that I was involved with.

23 Q Who was responsible for preparing Board materials for the
24 Board of Directors to review prior to the meeting?

25 A Dave Bradford as the General Counsel and Corporate

1 Secretary usually prepared and presented all of that
2 information.

3 Q Like to show you exhibit 570. It's on the screen. I'm
4 going to show you a hard copy. Can you identify exhibit 570,
5 Mr. Mattingly, as a memorandum sent to the Novell Board of
6 Directors from Mr. Bradford on September 15, 1995?

7 A Yes.

8 Q And was this in connection with the Santa Cruz
9 transaction that we've been discussing?

10 A Yes.

11 Q Did you receive a copy of this yourself?

12 A I did.

13 MR. SINGER: I move the admission of exhibit 570.

14 MR. BRENNAN: No objection, Your Honor.

15 THE COURT: It will be admitted.

16 (Plaintiff's Exhibit 570 received in evidence)

17 MR. BRENNAN: Your Honor, just one point. There are
18 some highlights that have been apparently -- excuse me --
19 apparently placed on the document, and we don't have the
20 source of that. Perhaps I should withhold the acknowledgment
21 of admission until we have an establishment as to the source
22 of that.

23 THE COURT: I think these traditionally, as I've
24 observed, these are the things that will be highlighted now,
25 but the document that will go to the jury will not include

1 these highlights; is that correct?

2 MR. SINGER: That's correct. These can be removed
3 and will be removed.

4 THE COURT: All right.

5 MR. BRENNAN: Your honor, just so we're clear, the
6 submission of the exhibit has the highlights, so --

7 THE COURT: Again, the one I have on my computer
8 also has those highlights, as have others.

9 Again, I will say to you, Mr. Singer, that none of the
10 exhibits that will actually go to the jury should contain the
11 highlights.

12 MR. SINGER: We understand that, your honor.

13 The Court: Okay. Are you all right then,
14 Mr. Brennan?

15 MR. BRENNAN: Subject to that clarification, Your
16 Honor, thank you.

17 The Court: Exhibit 570 again will be admitted.

18 Q (BY MR. SINGER) Now, was this provided to the Board on
19 Friday, September 15th?

20 A Yes. It's very typical to provide information ahead of
21 Board meetings.

22 Q And was this for the Board Meeting at which the Santa
23 Cruz deal was up for approval?

24 A Yes.

25 Q Do you recall how soon after this September 15th meeting

1 the Board was to have its meeting to consider the
2 transaction?

3 A Well, you know, I can recall by looking at it that it
4 was -- I think the transaction took place around the 19th, and
5 so we had the Board Meeting on the -- I think the 18th.

6 Q And that would make -- do you recall if you were --
7 looking at the last sentence on the second page where it talks
8 about weekend review, do you know whether September 15th, 1995
9 was a Friday?

10 A I don't know that, but I assume that it was a Friday.
11 We'd have it for Saturday, Sunday and then a Board Meeting
12 Monday, and then close the transaction sometime after the
13 Board Meeting.

14 Q And do you see the reference on the first page to a term
15 sheet for the proposed transaction?

16 A Yes.

17 Q I'd Like to show you exhibit 83. Mr. Mattingly, can you
18 identify exhibit 83?

19 THE COURT: Excuse me. 83 should not be shown to
20 the jury. It's not there, is it?

21 The Clerk: It's not.

22 Q (BY MR. SINGER) Can you identify exhibit 83?

23 A Yes. It's the Novell/SCO term sheet that's referenced as
24 letter "E" under the memo from Dave Bradford.

25 Q So this was part of the memorandum that we've just been

1 looking at from Mr. Bradford dated September 15th, 1995?

2 A Yes.

3 MR. SINGER: I move the admission of exhibit 83.

4 MR. BRENNAN: Your Honor, subject to the
5 qualifications that were given previously, we have no
6 objection. But, again, we're going to have to clean up the
7 highlighted portions.

8 THE COURT: All right. Exhibit 83 will be admitted,
9 understanding again that it will be cleaned by the time it
10 goes to the jury.

11 MR. SINGER: Yes, Your Honor.

12 (Plaintiff's Exhibit 83 received in evidence)

13 Q (BY MR. SINGER) Was this the term sheet that -- did you
14 receive this term sheet along with the memorandum to the Board
15 that's marked as exhibit 570?

16 A I did.

17 Q These documents were together at that time?

18 A Correct.

19 Q Can you review what is stated in item one, "Novell
20 transfers to SCO."

21 A You want me to just read it?

22 Q Well, can you give us your understanding of what is meant
23 by transfers to SCO the Unix technology assets and UnixWare
24 technology assets?

25 A Well, the Unix technology assets is the Unix business.

1 UnixWare technology assets was the binary version of that that
2 Novell shipped that had some integrations with Novell's
3 network product offering.

4 Q Now, under the second item, item number two, does that
5 indicate what Novell was going to retain --

6 A Yes.

7 Q -- after the transaction closed with Santa Cruz
8 Operation?

9 A Yes.

10 Q And do you see that patents are listed as being retained
11 by Novell?

12 A Yes.

13 Q Do you see that there's a license back to Unix and
14 UnixWare for internal use and resale in bundled products?

15 A Yes.

16 Q Do you have an understanding of what that was?

17 A Well, sure. I mean Novell had some other product
18 offerings that were bundled with UnixWare, you know, such as
19 Groupwise or some of our network management products, various
20 other products. So Novell was retaining a license back from
21 SCO so that they could actually use those products bundled
22 with Novell's products internally and for resale as bundles.

23 Q Do you have an understanding of what Tuxedo was?

24 A It was a transaction processing monitor.

25 Q And that wasn't being sold?

1 A It was not.

2 Q Do you see any mention under item two of Novell retaining
3 the Unix and UnixWare copyrights?

4 A No.

5 Q So if Mr. Frankenberg -- well, let me ask this. If
6 Novell was retaining the copyrights, would you expect to have
7 found that listed here under item two?

8 A Yes.

9 Q So if a member of the Novell Board of Directors was
10 looking at the package that went to them the Friday before the
11 Board Meeting, with the term sheet pertaining to the deal,
12 would they have seen anything that would indicate that Novell
13 was retaining copyrights in this term sheet?

14 A That's a pretty material omission, so it would have to be
15 listed here on Novell's retained assets.

16 Q So if Mr. Frankenberg, for example, was reviewing this
17 term sheet provided by Mr. Bradford, the General Counsel, the
18 weekend before the Board Meeting, would it have alerted him in
19 any way to Novell retaining copyrights?

20 MR. BRENNAN: Objection, Your Honor. This calls for
21 speculation as to the mind of Mr. Frankenberg.

22 THE COURT: I'm going to overrule the objection.

23 MR. SINGER: Yes.

24 THE WITNESS: Yes. And I think it would have also
25 alerted any of us that were on the business team. You know,

1 you'd have to put this in perspective. At that point you're
2 in the 11th hour and 59 minutes into this process, and to have
3 something as material as the copyrights excluded from this
4 Asset Purchase Agreement, it would have alerted everyone in
5 the room.

6 Q (BY MR. SINGER) Would it have -- were you at the Board
7 Meeting on September 18, 1995?

8 A Yes.

9 Q Would it have alerted you that there's a problem here
10 that someone thinks that the copyrights are being retained?

11 A Yes.

12 Q And that didn't happen, did it?

13 A Did not.

14 Q Does the term sheet indicate what Novell expected to
15 receive from Santa Cruz Operation in exchange for the
16 business?

17 A Yes.

18 Q And does that include a number of different forms of
19 compensation?

20 A Yes.

21 Q Was the first of that the stock equal to 16.6 percent of
22 Santa Cruz Operation's stock?

23 A Yes.

24 Q Was the second 95 percent of all royalties received by
25 SCO on the existing Unix business?

1 A Yes.

2 Q Now, for fiscal year 1995 alone, was that estimated to be
3 47.65 million dollars?

4 A Yes.

5 Q And would you continue then to get those royalties in
6 future years from Santa Cruz?

7 A Yes.

8 Q And that would be part of the compensation that Santa
9 Cruz would be paying Novell for the business?

10 A Yes.

11 Q In addition, was there also a possibility of Novell
12 receiving additional royalties based on the UnixWare shipments
13 by SCO in the future?

14 A Yes.

15 Q And is that covered in item C --

16 A Yes, it is.

17 Q -- of what Novell would receive? And it says, "If SCO
18 hits our business forecast, which is admittedly aggressive,
19 royalties on future UnixWare shipments by SCO through the year
20 2002, those royalties could have a net present value of 50 to
21 \$60,000,000," correct?

22 A Yes.

23 Q And then also if there was NetWare technology included in
24 UnixWare products, you would have rights to royalties on those
25 as well?

1 A Correct.

2 MR. BRENNAN: Objection, Your Honor. We're leading
3 the witness.

4 THE COURT: Sustained.

5 Q (BY MR. SINGER) Would you have contained -- would you have
6 received any royalties on NetWare technology included in the
7 UnixWare products that Santa Cruz would sell?

8 A Sure, since its says continuing royalties on NetWare
9 technology.

10 Q Now, I'd like to turn to the minutes for the Board
11 Meeting that was held on September 18th, 1995, which has
12 already been admitted into evidence as Novell's exhibit Z3.
13 If we look at these, you recognize these as the Board minutes
14 for that meeting?

15 A Yes.

16 Q And if you go to the top page, do you see that in
17 addition to the members of the Board itself, also present by
18 invitation were Dave Bradford, yourself, and Jeff Turner of
19 Novell?

20 A Yes.

21 Q And you attended this meeting; is that correct?

22 A Yes.

23 Q If we turn to -- you understand the first part -- do you
24 have an understanding as to whether the first part of the
25 Board minutes seek to summarize what was actually discussed at

1 the meeting before the Board of Directors?

2 A Yes.

3 Q Do you see any reference in that part, which runs from
4 the beginning of the minutes all the way down to the
5 resolutions, of any discussion at the Board over the
6 copyrights of the Unix and UnixWare systems specifically?

7 A No.

8 Q Do you on your own recollection recall any discussion at
9 the Board Meeting of the copyrights?

10 A No.

11 Q You then get the resolution which -- by which the Board
12 of Directors approved the sale. Do you know whether there was
13 any time that's typically spent at that point in the Board
14 Meeting reviewing in detail documents which are being approved
15 by the resolution?

16 A No, I don't think that would be typical with the Board of
17 Directors to get into the details of a asset purchase
18 agreement.

19 Q And if we compare for a moment what was listed on the
20 term sheet that was circulated on Friday before the Board of
21 Directors Meeting, and then this resolution of what was
22 summarized in the Board minutes, if we go back to the term
23 sheet, exhibit 83 --

24 And I don't know, Mr. Calvin, if it's possible to split
25 the screen and put one up on one half and one on the other.

1 If so, that would be helpful.

2 So on the right-hand side of the screen we have the term
3 sheet that we have been looking at, and if on the left-hand
4 side we can have page two of exhibit Z3, the minutes.

5 The Court: Ladies and gentlemen, can you read that?

6 A JUROR: Not really.

7 MR. SINGER: We're going to need to highlight.

8 Q (BY MR. SINGER) We'll go back and forth then between the
9 two. If we can go to the term sheet for a moment. Do you see
10 under Novell term sheet, Novell SCO term sheet item one the
11 reference to Unix technology assets, UnixWare technology
12 assets being transferred to SCO?

13 A Yes.

14 Q We turn now to page two of the minutes, which I think
15 Mr. Calvin has now successfully put on the right-hand side of
16 the screen. And if you can highlight the resolution. Do you
17 see a reference here in the resolution that pursuant to the
18 Asset Purchase Agreement, Novell will transfer to SCO its Unix
19 and UnixWare technology assets?

20 A Yes.

21 Q And if you keep reading it says, "A portion of the
22 employee base in New Jersey and equipment used in the UnixWare
23 business." Do you see that?

24 A Yes.

25 Q And if we turn back for a moment to exhibit 83, do you

1 also see under item one the reference to Novell transferring
2 to SCO the portion of the employee base in New Jersey and the
3 equipment used in the UnixWare business?

4 A Yes.

5 Q And that's under the category of Novell's transfers to
6 SCO; correct?

7 A Correct.

8 Q Can we now look at what Novell was retained. If we turn
9 back to exhibit 83, do you see on the term sheet that was in
10 the Board package the reference to patents, the license back
11 to Unix, UnixWare and Tuxedo and other miscellaneous
12 technology?

13 A Yes.

14 Q Can we now look at the Board minutes, and where it
15 says -- do you see where it says here that, "Novell will
16 retain all of its patents, copyrights and trademarks, except
17 for the trademarks Unix and UnixWare, a royalty-free,
18 perpetual, worldwide license back to Unix and UnixWare for
19 internal use and resale in bundled products, Tuxedo and other
20 miscellaneous, unrelated technology"?

21 A Yes.

22 Q Now, is that -- the term copyrights that's in the
23 minutes, that's not in the term sheet, is it?

24 A It's not.

25 Q Do you have an understanding of why it -- well, let me

1 ask you this. Are you able to reconcile the reference in the
2 minutes to Novell retaining its copyrights with no mention of
3 Unix copyrights being included on the term sheet?

4 A Sure. I mean Novell bundled its products with Unix and
5 UnixWare, and so the copyrights being referred to as well as
6 the trademarks are the Novell copyrights pertaining to the
7 Novell products that they retained, not those that they sold
8 to SCO.

9 Q So would you understand the reference to copyrights here,
10 where Novell will retain all of its copyrights, as pertaining
11 to the Unix copyrights being sold to Santa Cruz?

12 A Yes.

13 Q I'm sorry. Let me read back that question. Do you
14 understand --

15 MR. BRENNAN: Your Honor, I think the answer was
16 clearly heard.

17 THE WITNESS: Well, no. Say it again.

18 Q (BY MR. SINGER) My question is does the reference here of
19 Novell retaining its copyrights mean the Unix copyrights or
20 does it mean copyrights other than Unix copyrights?

21 A It's the Novell copyrights not the Unix copyrights.
22 Those were sold with the business to SCO.

23 Q You see the reference to the worldwide license back to
24 Unix and UnixWare?

25 A Yes.

1 Q Would that have made any sense if Novell was retaining
2 the copyrights to Unix and UnixWare?
3 A No, because they would have already had those copyrights.
4 Q I'd like to show you what is marked as Defendant's
5 Exhibit G4. Is this a memorandum on September 19th, '95 from
6 Ed Chatlos -- excuse me -- from David Bradford to Ed Chatlos,
7 copied to you?
8 A Yes.
9 Q And is this a document which transmitted the final Asset
10 Purchase Agreement between Novell and SCO?
11 A It looks like it is.
12 MR. SINGER: I move the admission of G4.
13 MR. BRENNAN: No objection, Your Honor.
14 THE COURT: It will be admitted.
15 (Plaintiff's Exhibit G4 received in evidence)
16 Q (BY MR. SINGER) So if we look at the -- and I'm going to
17 ask Mr. Calvin to highlight the text of the memorandum that
18 says, "Dear Ed." Now, the Ed here, is this Ed Chatlos, the
19 person you mentioned was out in California with you for two
20 months negotiating the deal?
21 A Yes.
22 Q And since this is not the clearest, can you read out loud
23 the language which Mr. Bradford put into this memorandum?
24 A From the beginning?
25 Q Please.

1 A Sure. "Dear Ed, I am now in receipt of the final Asset
2 Purchase Agreement between Novell and SCO. Simultaneous to my
3 receipt of this contract, you have been faxed an identical
4 copy. The purpose of this memorandum is to let you know that
5 I have reviewed the final document and find the same to be an
6 accurate reflection of the business and legal terms and
7 conditions negotiated between the parties. I therefore
8 approve this asset purchase agreement for final signature by
9 Bob Frankenberg. You have indicated that you will let him
10 know of my approval. Let me also congratulate you for the
11 effort you have expended in putting this deal together. Your
12 attention to detail and long hours were invaluable to Novell
13 throughout this process. Regards, David R. Bradford."

14 Q Was Mr. Bradford telling Mr. Chatlos that the final
15 agreement was an accurate reflection of the business and legal
16 terms negotiated between the parties?

17 MR. BRENNAN: Objection, Your Honor. In that regard
18 the document speaks for itself.

19 THE COURT: I'll sustain the objection.

20 Q (BY MR. SINGER) Is the General Counsel, Mr. Mattingly,
21 supposed to make sure that the legal documentation faithfully
22 implements the business terms negotiated between the
23 parties?

24 A Yes.

25 Q Do you and the other business executives rely on the

1 General Counsel to document the deal accurately?

2 A Yes.

3 Q And did anyone to your knowledge at Novell ever authorize
4 the lawyers to seek in the documentation to hold back the
5 copyrights for Unix and UnixWare in this transaction?

6 A No.

7 MR. SINGER: I have nothing further. Thank you.

8 THE COURT: Mr. Brennan, would it be a disadvantage
9 to you if we were to take a break before you do your cross?

10 MR. BRENNAN: Certainly not, Your Honor.

11 The Court: We'll go ahead and take a 20 minute
12 recess.

13 The Clerk: All rise for the jury, please.

14 (Jury excused)

15 THE COURT: Do you have anything, counsel, before we
16 recess?

17 MR. SINGER: Not from us, Your Honor.

18 MR. ACKER: No, Your Honor.

19 THE COURT: We'll take 20 minutes.

20 (recess at 11:39 a.m.)

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