

1 THE COURT: Are you ready, counsel?

2 MR. JACOBS: Yes, Your Honor.

3 (Whereupon, the jury returned to the court  
4 proceedings.)

5 THE COURT: Where did our witness go?

6 Go ahead, Mr. Jacobs.

7 Q. BY MR. JACOBS: Ms. Madsen, over the course of your  
8 time at Santa Cruz, various internal issues would arise in  
9 which people were needing advice about how to apply the asset  
10 purchase agreement day to day; correct?

11 A. Yes.

12 Q. And you were involved in the rendering of that  
13 advice to the individuals who asked questions; correct?

14 A. From time to time.

15 Q. So you had occasion during your time at Santa Cruz  
16 to actually sit down with the asset purchase agreement, sort  
17 through the provisions, many of which we're discussing today,  
18 and figure out how they actually apply to the day-to-day  
19 business of Santa Cruz; correct?

20 A. From time to time, yes.

21 Q. Let me ask you about, I mentioned this before the  
22 break, the operating agreement, Exhibit X5. If you turn to  
23 the signature page, Ms. Madsen, you'll see that the agreement  
24 was executed by the CEO of Santa Cruz. Do you see that?

25 A. I do.

1                   MR. JACOBS: Your Honor, we would move X5 into  
2 evidence.

3                   MR. NORMAND: No objection.

4                   THE COURT: X5 will be admitted.

5                   (Whereupon, Defendant's Exhibit X5 was received.)

6                   Q. BY MR. JACOBS: So as I mentioned, Ms. Madsen, I  
7 don't think the jury has seen this piece of the package of APA  
8 related agreements. But you had seen this around the time of  
9 the asset purchase agreement; correct?

10                  A. Yes. I have a general recollection of seeing this.

11                  Q. And the operating agreement is referred to in the  
12 asset purchase agreement as one of the other pieces of the  
13 transactional arrangement; correct?

14                  A. I believe so.

15                  Q. And in particular, Ms. Madsen, take a look with  
16 me -- well, let's go to just the introductory paragraph. Do  
17 you see, this operating agreement is made by and between Santa  
18 Cruz Operation and Novell?

19                  A. Yes.

20                  Q. And the effective date is the closing date, do you  
21 see that?

22                  A. Yes.

23                  Q. And the closing date is the defined term in the  
24 asset purchase agreement, but it was actually, I'll represent  
25 to you, December 6th, 1995; correct, Ms. Madsen?

1           A.    That sounds right.

2           Q.    So now let's look at, product and channel strategy,  
3           on Page 5 of X5.  And we're talking in the operating agreement  
4           about, in this section in particular, about UnixWare.  Do you  
5           see that?

6           A.    In which section?  I'm sorry?

7           Q.    Product and channel strategy, B(i), as the closing  
8           date.

9           A.    Yes.

10          Q.    It says:  SCO will begin to distribute, offer,  
11          promote and market UnixWare through the channel, the  
12          distributorship channel that's there.

13                    Do you see that?

14          A.    Yes.

15          Q.    And it says:

16                    Novell will cease distributing UnixWare  
17          product through its indirect channel and cease  
18          signing the distribution agreement.

19                    Do you see that?

20          A.    I do.

21          Q.    So the contract is pretty clear as of the closing  
22          date and it is consistent with your understanding that as of  
23          the closing date Santa Cruz would be the UnixWare business in  
24          terms of actually selling UnixWare products; right?

25          A.    Yes.

1 Q. And Novell would, through the mechanisms set forth  
2 in the asset purchase agreement and the operating agreement  
3 transfer that sales relationship, those customer  
4 relationships, to Santa Cruz; correct?

5 A. Yes.

6 MR. JACOBS: May I, Mr. Hatch, borrow this for a  
7 second?

8 MR. HATCH: Sure.

9 Q. BY MR. JACOBS: And when we're talking about  
10 UnixWare we are talking about something like this; right,  
11 Mrs. Madsen?

12 A. Wow. I haven't seen this in a long time. Yes.

13 Q. It's a disk; right?

14 A. Yep, it is.

15 Q. So when we talk about distributing UnixWare, we're  
16 not talking about anything much more than distributing these  
17 packages; right? These disks?

18 A. I'm sorry. I lost the question.

19 Q. This is how UnixWare was distributed in 1995-1996,  
20 on a disk; right?

21 A. Umm, you know what, I don't know that that was the  
22 only way that it was distributed. We may have -- we may have  
23 distributed it electronically. I'm not sure.

24 Q. Okay. So let's go on and see if this refreshes  
25 your recollection about how all of this was going to occur.

1                   This specifies, first of all, as we began that  
2 Santa Cruz is, in fact, going to distribute and market  
3 UnixWare; correct?  
4           A.    Yes.  
5           Q.    And that was your understanding at the time?  
6           A.    That was my understanding at the time.  
7           Q.    And it is clear in the contract, isn't it, that  
8 that's one of the rights and obligations of Santa Cruz, to  
9 distribute the UnixWare software?  
10          A.    Yes.  
11          Q.    And so there's no -- you don't see any -- you  
12 didn't have any at the time, there was never any issue,  
13 Santa Cruz had permission from Novell to distribute UnixWare?  
14          A.    That's right. That was one of the fundamental  
15 pieces of the asset purchase agreement. We were acquiring all  
16 right, title and interest in UnixWare.  
17          Q.    Now, if you look at little (b) little iv, Roman iv.  
18          A.    Yes.  
19          Q.    It says:  
20                   SCO will continue to offer OpenServer  
21                   Release V in conjunction with the UnixWare 2x  
22                   after the closing date.  
23                   Do you see that?  
24          A.    I do.  
25          Q.    So that was the legacy, the older Santa Cruz

1 product, and now it's going to be -- and this is making clear  
2 and this is your understanding that both products would be in  
3 distribution after the closing date?

4 A. Yes.

5 Q. You know what, Ms. Madsen. I don't believe in  
6 trick questions. So if I'm going to ask you a trick question,  
7 I'll raise my hand and warn you in advance, okay? So for the  
8 moment I just want to walk you through your understanding of  
9 the asset purchase agreement at the time and how the contract  
10 worked, okay?

11 A. Okay.

12 Q. So in the next sentence:

13 Additionally SCO will begin offering Eiger  
14 binary and source offerings.

15 Do you see that?

16 A. Yes.

17 Q. So there is explicit grant or permission for SCO to  
18 offer the Eiger release. Do you see that?

19 A. You know, I'm uncomfortable with the word  
20 permission. But it does reflect the intent that SCO would be  
21 offering Eiger binary. I don't know that we needed  
22 permission.

23 Q. But it certainly could be understood as both a  
24 right and obligation under the contract to do that; right? To  
25 agree to offer Eiger binary and source offerings?

1           A.    It was SCO's intent to offer Eiger binary and  
2 source offerings, yes.

3           Q.    And then in the next sentence we're talking about  
4 the merge product.  Do you see that?

5                   SCO will also offer a binary and source  
6 offering of the merged products.

7           A.    Right.

8           Q.    So at the time in the first half of 1997?

9           A.    Yes.

10          Q.    So that's an explicit permission about SCO's  
11 offering of the merged product; right?

12          A.    Again, I don't -- I'm not comfortable with the word  
13 permission.  I don't see where this is permission.  It's  
14 stating what SCO intends to do.  It will offer binary and  
15 source offerings of the merged product.

16          Q.    And Novell is agreeing that that's what Santa Cruz  
17 will do.

18          A.    Yes.

19          Q.    Now, if you turn to Page 6 of the operating  
20 agreement, product packaging.

21          A.    Uh-huh (affirmative).

22          Q.    This is back to our disk package.

23          A.    Uh-huh (affirmative).

24          Q.    Commencing after the closing date, SCO  
25 plans to sell the UnixWare 1.1 and the

1           UnixWare 2.x product and may use existing  
2           Novell inventory with the SCO sticker on it.  
3           Do you see that?  
4           A.    I do.  
5           Q.    So that's how the distribution will occur right  
6           after the closing date; right?  
7           A.    I see that, yes.  Again, I really don't have any  
8           specific knowledge about our distribution processes.  
9           Q.    You recall the operating agreement?  
10          A.    I recall the operating agreement.  
11          Q.    You recall picking up the operating agreement from  
12          time to time to understand the party's rights and obligations  
13          under the asset purchase agreement?  
14          A.    I do.  
15          Q.    Next sentence, Ms. Madsen.  
16          A.    Yes.  
17          Q.    Once this stock is exhausted, SCO will  
18          be responsible for manufacturing all products  
19          in the UnixWare 1.1 and UnixWare 2.x product family.  
20          Do you see that?  
21          A.    Yes.  Yes.  
22          Q.    And so once again, the operating agreement is quite  
23          clear at this moment in time, that is, once the stock is  
24          exhausted, SCO is going to manufacture; right?  
25          A.    Yes.



1           Q.   SCO is going to take these, re-using this  
2   distribution mechanism, SCO is going to cut the disks; right?  
3           A.   Yes.  
4           Q.   The contract is clear that SCO has both the right  
5   and obligation to do that, isn't it?  
6           A.   Yes.  
7           Q.   No issue ever came up between the parties with  
8   respect to this question of whether SCO would actually have a  
9   right to make disks of UnixWare, did it?  
10          A.   Not that I'm aware of, no.  
11          Q.   Mr. Normand asked you about Amendment X. Do you  
12   recall this question on that subject?  
13                  MR. NORMAND: Your Honor, that's not true.  
14                  THE WITNESS: No. I don't recall any discussion of  
15   Amendment X.  
16          Q.   BY MR. JACOBS: Do you recall Amendment X?  
17          A.   I do.  
18          Q.   That was the amendment between Santa Cruz, Novell  
19   and -- Santa Cruz and Novell that resolved the dispute about  
20   the IBM buyout; correct?  
21          A.   Yes.  
22          Q.   And you were involved in that dispute?  
23          A.   Yes.  
24          Q.   And you were involved in some way in Amendment X;  
25   correct?

1           A.    Yes.

2           Q.    And Mr. Normand is correct.  I'm refreshed, my  
3           recollection is refreshed.  We didn't talk specifically about  
4           Amendment X.  You didn't talk with Mr. Normand about that, but  
5           you did talk about the IBM dispute; correct?  The buyout  
6           dispute?

7           A.    I do remember that giving rise to Amendment 2.

8           Q.    Do you recall it giving rise to Amendment X, also?

9           A.    I do, yes.

10          Q.    So let me hand you this.  This is O8.  
11                And if you'll turn to the signature page for  
12           Santa Cruz you'll see that Steve Sabbath signed this  
13           agreement.  Do you see that?

14          A.    Yes.

15                MR. JACOBS:  Your Honor, we offer O8 into evidence.

16                MR. NORMAND:  No objection, Your Honor.

17                THE COURT:  It will be admitted.

18                (Whereupon, Defendant's Exhibit O8 was received.)

19          Q.    BY MR. JACOBS:  Now, Ms. Madsen, if you look at the  
20           top of this document, you'll see it's, International Business  
21           Machines Corporation, The Santa Cruz Operation, Novell.  Do  
22           you see that?

23          A.    I do.

24          Q.    And then if you look at the next several lines, it  
25           says:

1 Amendment Number X to software agreement

2 SOFT-00015.

3 Do you see that?

4 A. I do.

5 Q. You became familiar with the structure of the old  
6 AT&T UNIX licensing system that applied to companies like IBM  
7 that were in the business of creating their own flavor of  
8 UNIX; correct?

9 A. Marginally familiar. I relied on other people who  
10 had greater familiarity to inform me about those agreements.

11 Q. Were you familiar with what a software agreement  
12 SOFT-00015 would contain? Let me help you.

13 A. At that time, yes, I would have. But as I sit here  
14 today, I have no specific knowledge of the contents of that  
15 agreement.

16 Q. Do you recall that the software agreement  
17 SOFT-00015 is kind of a master agreement in that the  
18 sublicensing agreement and the supplements are part of a  
19 package with the software agreement?

20 A. I remember that there was a master, and then there  
21 was a supplement, but I don't remember which was which.

22 Q. So you don't recall which agreement was the  
23 software agreement, the sublicensing agreement and the  
24 agreement, do you?

25 A. No. Not as I sit here today, no.

1           Q.    So in conjunction with the asset purchase  
2 agreement, if we go back to 4.16(b) or 4.16(a), when it refers  
3 to SVRX licenses in the asset purchase agreement, you don't  
4 have an opinion one way or another whether it's referring to  
5 the entire package of agreement, the software agreement, the  
6 supplement and the schedule or pieces of those agreements, do  
7 you?

8           A.    It was my understanding that it related to a  
9 subsection of the agreement relating to the distribution of  
10 binary royalties.

11          Q.    And that was your understanding as you worked at  
12 Santa Cruz?

13          A.    That's correct.

14          Q.    In the legal department of Santa Cruz?

15          A.    Correct.

16          Q.    Under Steve Sabbath?

17          A.    Yes.

18          Q.    The lawyer at Santa Cruz?

19          A.    Yes.

20          Q.    Who signed the agreement?

21          A.    Yes.

22          Q.    Hand up. Take a look at Recitals on 08.

23          A.    Yes.

24          Q.    Do you see there the Recitals, the first sentence  
25 of the recitals?

1 A. Uh-huh (affirmative).

2 Q. AT&T and IBM entered into various software  
3 license agreements concerning the software product  
4 UNIX System V Release 3.2.  
5 Do you see that?

6 A. I see that language.

7 Q. Which are software agreement, SOFT-00015 as  
8 amended.

9 A. Uh-huh (affirmative).

10 Q. That's the software agreement; right?

11 A. Yes.

12 Q. Sublicensing agreement SOFT-00015 as amended. Do  
13 you see that?

14 A. Yes.

15 Q. And then software agreement SOFT-00015  
16 Supplement Number 170 as amended.  
17 Do you see that?

18 A. Yes.

19 Q. Or any other supplements that pertain to --  
20 THE COURT: Mr. Jacobs, will you slow down when you  
21 start reading?

22 MR. JACOBS: Sure.

23 Q. BY MR. JACOBS: Or any other supplements that  
24 pertain to prior versions or releases of the software  
25 product.

1 Do you see that?

2 A. Yes.

3 Q. And substitution agreement XFER-00015B.

4 A. Yes.

5 Q. And then that's all the defined terms in related  
6 agreement.

7 Do you see that?

8 A. I do.

9 Q. And then it says: Novell acquired AT&T rights  
10 under the related agreement.

11 Do you see that?

12 A. Yes.

13 Q. And then it says:

14 In an agreement between Novell and SCO dated  
15 September 19, 1995, the asset purchase agreement,  
16 SCO purchased and Novell retained certain rights  
17 with respect to the related agreements.

18 Do you see that?

19 A. I do.

20 Q. That makes clear, does it not, that Novell retained  
21 rights with respect to the supplements, the sublicensing  
22 agreement and the software agreement? Doesn't it, Ms. Madsen?

23 A. No, I don't believe so; because the first sentence  
24 is talking about the agreements that were entered into between  
25 IBM and AT&T, and the second sentence is saying that Novell

1 retained certain rights with respect to the agreements, but it  
2 doesn't say which ones.

3 Q. Okay. So you're reading that and your  
4 understanding at the time is that it retained certain rights  
5 with respect only to some of the related agreements?

6 A. I don't know -- I mean, without looking at these  
7 agreements it's really hard for me to talk about the specifics  
8 of the sublicensing agreements and the software agreements and  
9 the supplements.

10 Q. All right. Fair enough, Ms. Madsen.

11 Let's go back, then, to SCO Exhibit 1.

12 You testified in your direct examination as to your  
13 role in the original asset purchase agreement. Do you recall  
14 that back and forth with Mr. Normand?

15 A. Yes.

16 Q. And by the original asset purchase agreement  
17 meaning the version that was signed on September 19th, 1995.

18 A. Yes.

19 Q. Do you recall that back and forth?

20 A. Yes.

21 Q. There is a section in this agreement, Section 1 in  
22 Article One that defines what's going to Santa Cruz and what's  
23 being kept by Novell; right?

24 A. Yes.

25 Q. It's the purchase of asset section; right?

1 A. Yes.

2 Q. And you understood that at the time?

3 A. Yes.

4 Q. So my hand is up again. You have a specific  
5 recollection as you sit here today of understanding that  
6 1.1(a) was the purchase and sale of assets provision that  
7 governed the -- what Novell would sell to Santa Cruz and what  
8 Novell would retain?

9 A. Well, I think the entire agreement talks about what  
10 is being conveyed. So, I mean, I hesitate to just pluck out  
11 one sentence and say that captures in its entirety what assets  
12 are being transferred.

13 Q. My question was a little different. I'm trying to  
14 figure out what exactly you remember about 1995, 15 years ago,  
15 versus what looking at the agreements, trying to understand  
16 the general context, you're trying to think what must have  
17 happened --

18 A. Yes.

19 Q. -- back in 1995?

20 A. Yes.

21 Q. That's the thrust of my question.

22 A. Yes.

23 Q. So is it more the former or more the latter? What  
24 you specifically remember or what you're able to reconstruct  
25 and say must have happened based on the documents and the few



1 things that you do actually remember?

2 A. It's both. And it would be hard for me, you know,  
3 to draw a bright line between the two. But it's both.

4 Q. All right. Then let's go through this a little  
5 bit. You understood that Section 1.1(a) says that Novell  
6 is going -- in a nutshell it says that Novell is going to sell  
7 to Santa Cruz the assets identified on Schedule 1.1(a), but  
8 there's a Schedule 1.1(b). And Schedule 1.1(b) is controlling  
9 as to what is excluded; correct, Miss Madsen? You understood  
10 that?

11 A. Well, I understood that the two worked together.

12 Q. Well, that you understood that the language, not  
13 withstanding the foregoing, means that the excluded asset  
14 sentence, if you will, is more powerful than the included  
15 asset sentence; right?

16 A. No, I would disagree with that characterization.  
17 The excluded assets might modify, but more powerful? No, I  
18 wouldn't agree with that characterization.

19 Q. In your understanding and belief, sometimes lawyers  
20 talk about one provision trumping another provision? Isn't it  
21 true that the excluded asset schedule trumps the included  
22 asset schedule if there's a disagreement between the two?

23 A. I don't know.

24 Q. You don't know what, not withstanding the  
25 foregoing, meant or means?

1           A.    I understand what that means, yes.

2           Q.    Notwithstanding the foregoing, because now you do a  
3           lot of contracts, so now you know when somebody writes,  
4           notwithstanding the foregoing, the mean --

5           A.    However.

6           Q.    However, or, forget what came before because if  
7           this next sentence says something different, it's this next  
8           sentence that applies; right?

9           A.    That is my understanding of the clause, not  
10          withstanding the foregoing. It's making an exception to what  
11          was previously stated. But I wouldn't use that statement to  
12          say something blatantly contradictory.

13          Q.    You don't think, notwithstanding the foregoing,  
14          means, I mean -- let's go back to 1995. What did you  
15          understand, then, when your eyes passed over this provision  
16          about the words, not withstanding the foregoing?

17          A.    That the excluded assets is modifying the  
18          including. So there's a however. You get this, however,  
19          there might be, you know, an exception.

20          Q.    And you don't get what's in the exception?

21          A.    Right.

22          Q.    Okay. So now let's look at the excluded assets  
23          schedule as the agreement was signed on September 19th, 1995.

24          A.    Okay.

25          Q.    You testified that you were present at meetings

1 between Santa Cruz representatives and Novell representatives?

2 A. Yes.

3 Q. You were present at business level meetings  
4 involving people like Ed Chatlos and Mr. Wilt and other  
5 business level negotiators. You were actually at those  
6 meetings?

7 A. I was. I can't say that I was at all of them, but  
8 I was present at some of them.

9 Q. And you were also present when the legal teams met  
10 to negotiate the final change of the asset purchase agreement;  
11 correct?

12 A. Correct.

13 Q. And in those meetings, it was really legal team to  
14 legal team, wasn't it, Ms. Madsen?

15 A. No, not exclusively. The business team was also  
16 present during many of those meetings.

17 Q. Let's talk about the week leading up to the signing  
18 of the asset purchase agreement. Do you recall those  
19 meetings?

20 A. Yes.

21 Q. Those were at the Brobeck, Phleger & Harrison  
22 office in Palo Alto?

23 A. Yes.

24 Q. And the legal teams met face to face; correct?

25 A. They did.

1 Q. And drafts were exchanged back and forth.

2 A. Yes, they were.

3 Q. Including drafts of the excluded assets schedule?

4 A. I don't remember specifically the excluded asset  
5 schedule, but, yes, I'm sure that it was.

6 Q. And that's a classic example of, you don't have a  
7 specific recollection, but surely they must have been  
8 exchanged back and forth; right?

9 A. Well, I remember, you know, the agreement being  
10 exchanged back and forth. I don't remember when a specific  
11 schedule was exchanged. But I remember the contract packet  
12 being exchanged.

13 Q. Do you have a specific recollection of your eyes  
14 passing over the excluded asset schedule before the agreement  
15 was signed?

16 A. I have a general recollection, but not a specific  
17 recollection.

18 Q. So general recollection that you're present in the  
19 room, the drafts are flying back and forth, people are working  
20 hard because there's deadline, isn't there --

21 A. Yes.

22 Q. -- to sign it?

23 By the way, where did the deadline come from?

24 A. I believe that we needed to get the transaction  
25 finalized prior to a scheduled board meeting --

1 Q. Of --  
2 A. -- that Novell had.  
3 Q. That's your recollection?  
4 A. That's my recollection.  
5 Q. It didn't come from the Santa Cruz side as you  
6 recall? The time pressure?  
7 A. I know that the Santa Cruz operation was anxious to  
8 get the deal done, but I don't remember them setting the  
9 specific timeline.  
10 Q. So the Santa Cruz side wants to get the deal done  
11 and is anxious to do so?  
12 A. Absolutely.  
13 Q. The excluded asset schedule goes back and forth  
14 between the parties, yes?  
15 A. I believe so.  
16 Q. But you don't have a recollection as you sit here  
17 today of looking at the excluded asset schedule and in  
18 particular the intellectual property section that so much of  
19 this case revolves around; correct?  
20 A. No.  
21 Q. So you don't recall as you sit here today that you  
22 read and thought, oh, this must be related to NetWare?  
23 A. I don't have that specific recollection, no.  
24 Q. Do you have a general -- I'm not sure -- we'll have  
25 to figure out what we mean by specific versus general. But do

1       you have a general recollection of that? And I should put my  
2       hand up again.

3             A.    I have a general recollection of reading this asset  
4       schedule, but I cannot recall what I thought about it in 1995.

5             Q.    You had occasion to look at this excluded asset  
6       schedule again well before this dispute arose; correct? The  
7       dispute between -- this dispute in this courtroom.

8             A.    Yes.

9             Q.    Did you look at it in connection with the  
10       negotiations around Amendment Number 2?

11            A.    Yes.

12            Q.    Did you look at it and did you conclude that when  
13       it was referring to intellectual property and all copyrights  
14       and trademarks it must be referring -- it was referring --  
15       I'll withdraw the must be and ask was -- it was referring to  
16       network copyrights?

17            A.    I'm sorry. I'm not sure I understand your  
18       question.

19            Q.    It wasn't a very good one. Let me start over.

20                    When you looked at the excluded asset schedule in  
21       the period following the exclusion of the asset purchase  
22       agreement for whatever purpose in your business role --

23            A.    Uh-huh (affirmative).

24            Q.    -- at Santa Cruz and you came across Roman V,  
25       intellectual property, all copyrights and trademarks except

1 for the trademarks UNIX and UnixWare, did you conclude, did  
2 your mind go, oh, that's excluding the NetWare copyrights?

3 A. I don't know. I know that we modified this, but I  
4 don't recall saying, oh -- I don't know.

5 Q. No recollection as you sit here today in this  
6 courtroom of reading this provision and thinking, this is  
7 referring to NetWare?

8 A. SCO understood that the copyrights were being  
9 transferred, so I wasn't looking at this provision in that  
10 context. I mean, I just don't have any specific recollection  
11 of thinking, oh, you know, this is NetWare. It's the  
12 copyrights for UNIX and UnixWare were being transferred as  
13 part of the asset purchase agreement.

14 Q. Well, sort of actually, your last fragment there is  
15 relevant to the next question I was going to ask, which is,  
16 you see it says, except for the trademarks in UNIX and  
17 UnixWare; right? Do you see that?

18 A. Uh-huh (affirmative).

19 Q. Now the trademarks in UNIX, that doesn't have  
20 anything to do with NetWare, does it?

21 A. No. I have no reason to think so. No.

22 Q. So when we're talking about excluding all  
23 copyrights and trademarks except for the UNIX and UnixWare, we  
24 must be talking about UNIX -- we must be talking at least in  
25 part about intellectual property relating to UNIX; correct?

1           A.    I'm sorry.

2           Q.    When it says except for the trademarks UNIX --

3           A.    Yes.

4           Q.    -- that's referring to UNIX intellectual property;

5 right?

6           A.    It's referring to the trademark UNIX.

7           Q.    And that's UNIX intellectual property, not NetWare

8 intellectual property; correct?

9           A.    Yes.

10          Q.    So this section must be dealing with, at least in

11 part UNIX intellectual property; correct?

12          A.    At least in part, yes.

13          Q.    So when it says, all copyrights and trademarks, it

14 just doesn't make any sense to have understood it as your eyes

15 were passing over it in 1995 or 1996 as referring to NetWare,

16 does it?

17          A.    This provision doesn't make any sense, is the

18 problem.

19          Q.    Can you answer my question? It doesn't make any

20 sense that when your eyes passed over this in 1995 or 1996,

21 you would have understood it as NetWare copyrights and

22 trademarks?

23          A.    I didn't say that it did.

24          Q.    And it wouldn't have made any sense to you, would

25 it?



1           A.    I don't know.  I mean, I just -- I don't know how I  
2 was thinking about NetWare at that time.

3           Q.    Let me approach the topic this way.  At the end of  
4 your direct examination, Mr. Normand asked you whether over  
5 the course of your tenure at Santa Cruz you understood that  
6 the UNIX copyrights were required for Santa Cruz to exercise  
7 its rights with respect to the acquisition of UNIX and  
8 UnixWare technologies?

9           A.    Yes.

10          Q.    I may have reformulated a little bit from the way  
11 he asked it.

12          A.    Yes.

13          Q.    And I believe I heard that you said in response, we  
14 acquired the UNIX copyrights.  Do you recall that answer?

15          A.    That sounds right.

16          Q.    So let me ask his question again.  Over the course  
17 of your tenure at Santa Cruz, did you understand that  
18 Santa Cruz required the UNIX copyrights to exercise its rights  
19 with respect to the acquisition of the UNIX and UnixWare  
20 technologies?

21          A.    Yes.

22          Q.    Did you understand that requirement to exist when  
23 you were sitting there at the negotiating table in connection  
24 with the asset purchase agreement as originally signed on  
25 September 19th, 1995?

1           A.    Yes.

2           Q.    So let's see if we can set the stage.  You're there  
3           at the negotiating table.  There are lawyers from both sides,  
4           Wilson Sonsini lawyers; right?

5           A.    Yes.

6           Q.    Brobeck, Phleger & Harrison lawyers; right?

7           A.    Yes.

8           Q.    The Brobeck lawyers representing Santa Cruz; right?

9           A.    Yes.

10          Q.    The Wilson lawyers representing Novell?

11          A.    Correct.

12          Q.    You never had any doubt about the legal team in  
13          that transaction?

14          A.    No.

15          Q.    Brobeck lawyers were well recognized as outstanding  
16          lawyers in the mid '90s in Silicon Valley; right?

17          A.    I believe so.

18          Q.    And you're sitting there and you're thinking, we  
19          require the UNIX copyrights in order for this UNIX, UnixWare  
20          business to be successful.

21          A.    Yes.

22          Q.    And a schedule comes across the table, and the  
23          schedule says it excluded assets, intellectual property, all  
24          copyrights, and no one catches it.  You don't catch it, the  
25          Brobeck lawyers don't catch it, Steve Sabbath doesn't catch

1 it, nobody catches it. You're sitting there thinking it's  
2 required --

3 A. Yes.

4 Q. -- but you don't catch it; right?

5 A. Yes; because the entire asset purchase agreement is  
6 contrary to this one statement. So we were looking at this in  
7 its entirety, and we just didn't notice that this statement  
8 really didn't make sense. It's an asset purchase agreement,  
9 not a license agreement.

10 Q. It's a complicated transaction; right, Ms. Madsen?

11 A. It is a complicated transaction, yes.

12 Q. And what's included in the included asset schedule  
13 is superceded if there's a disagreement by what's excluded by  
14 the excluded asset schedule.

15 A. Well, we just talked about this a little bit. It  
16 modifies it. You wouldn't put, I'm giving you this and then  
17 I'm taking the exact same thing away, in two different  
18 schedules. It would be, I'm giving you this. However, you  
19 know, there's an exception to this.

20 Q. So let's see what we were giving on the included  
21 assets, Roman V, on the included asset. Schedule 1.1(a),  
22 Roman V.

23 So here's a specific provision in the included  
24 asset governing intellectual property; right, Ms. Madsen?

25 A. Yes.

1 Q. And copyrights aren't listed there?

2 A. Correct.

3 Q. Trademarks UNIX and UnixWare are listed.

4 A. Yes.

5 Q. Now, if we put the included assets sort of back to  
6 back against the excluded assets, they mesh quite well, don't  
7 they, Ms. Madsen? That is, copyrights aren't listed under  
8 intellectual property in V, and copyrights are excluded on the  
9 excluded asset schedule. The trademarks UNIX and UnixWare are  
10 entirely consistent between the two provisions; right?

11 A. Yes.

12 Q. So let me ask you the same question again. It's  
13 1995. You have in your head that copyrights are required,  
14 essential, not optional, not nice to have, not a good thing to  
15 keep around in case you have to go file a lawsuit, required to  
16 exercise your rights. And you look at the included assets  
17 under intellectual property, and no one on the Santa Cruz  
18 legal team notices copyrights aren't on the included assets,  
19 either?

20 A. Yes. Copyrights -- because copyrights were always  
21 understood to be transferred. And I have a specific  
22 recollection that the reason why this statement was inserted  
23 was because of the transaction between Novell and X/Open  
24 regarding the trademark UNIX. So they wanted to clarify that.

25 Q. Let me offer you --

1           A.    There was no need to clarify that the copyrights  
2           were transferring because everybody understood they were  
3           transferring.

4           Q.    Let me offer an alternative explanation.  We've  
5           talked a little bit about memory, Ms. Madsen, and how you can  
6           be in the courtroom and you're trying to think what happened  
7           back 15 years ago, and it's a mix of specific recollections  
8           and general recollection and what must have happened.

9           A.    Right.

10          Q.    So let me offer you an alternative explanation.  
11          You've been in the business of UNIX, the company Santa Cruz,  
12          for I think 12 years without owning the underlying UNIX  
13          copyrights but successfully selling OpenServer; right?

14          A.    Yes.

15          Q.    And you're now going to get, an important part of  
16          what you're going to get is another flavor of UNIX, UnixWare;  
17          right?  According to Mr. Mohan in his summary, we're going to  
18          own UnixWare product line.

19          A.    Yes.

20          Q.    So UnixWare is another flavor of UNIX; right?

21          A.    Yes.

22          Q.    And so we're going to be in the flavor business  
23          again.  We don't need ownership of the UNIX copyrights in  
24          order to be in the flavor business.

25                    Isn't that a more plausible explanation,

1 Ms. Madsen, of how legal teams on both sides could have left  
2 the asset purchase agreement the way it was?

3 A. No.

4 Q. Well, you know, Mr. Sabbath disagrees with you in a  
5 sworn declaration; right?

6 MR. NORMAND: Your Honor, obvious hearsay.

7 THE COURT: Sustained.

8 Q. BY MR. JACOBS: Ms. Madsen, are you aware of a  
9 declaration that Mr. Sabbath, your superior, signed under oath  
10 under penalties of perjury --

11 MR. NORMAND: Same objection, Your Honor.

12 Q. BY MR. JACOBS: -- in December of 2003?

13 THE COURT: The Court will sustain the objection.

14 Q. BY MR. JACOBS: Ms. Madsen, who was Mr. Sabbath  
15 again?

16 A. Mr. Sabbath was the senior vice-president law in  
17 corporate affairs and my boss.

18 Q. And so he's the actual lawyer, the in-house lawyer  
19 on the deal; right?

20 A. He is.

21 Q. And he has many years at that time of software and  
22 software licensing and copyright experience; right?

23 A. Yes.

24 Q. And he's an experienced lawyer in dealing with  
25 UNIX-related issues because SCO has had this OpenServer

1 business for a while.

2 A. Yes.

3 Q. And Mr. Sabbath did not speak up during the asset  
4 purchase agreement negotiations and say, wait a minute, why is  
5 Novell retaining all copyrights under the excluded asset  
6 schedule? You have no memory of that; right?

7 A. I have no memory of that.

8 Q. By the way, the same is true for the next three  
9 months, isn't it, Ms. Madsen, after the asset purchase  
10 agreement is signed?

11 A. Because we believed that the copyrights were  
12 transferring, there would have been no need to speak up.

13 Q. So, Ms. Madsen, there's now a team of lawyers again  
14 on both sides. They have all the time in the world compared  
15 to the closing of the asset purchase agreement -- I'm sorry --  
16 the signing of the asset purchase agreement; right? They have  
17 three months to look at this document?

18 A. No. That's an unfair characterization because  
19 during that three months, we were conducting all of the  
20 transition activities as well as that closing check list that  
21 Mr. Normand showed. So, I mean, there was still a lot of  
22 activity and not a lot of leisure to reflect on missed  
23 language in an agreement.

24 Q. If you go to Amendment Number 1 as part of SCO's  
25 Exhibit Number 1, and you've seen this before, Miss Madsen, I

1 believe, you know that, in fact, the excluded asset schedule  
2 was modified?

3 A. Yes.

4 Q. And the included asset schedule was modified?

5 A. Yes.

6 Q. And so attention was paid to the included asset  
7 schedule during the follow three months.

8 A. It was.

9 Q. And there were adjustments made to make it; right?

10 A. Yes.

11 Q. And this specific exclusion, all copyrights and  
12 trademarks, was not adjusted; correct?

13 A. Correct.

14 Q. So surely you would agree with me that there was  
15 more time that one could spend on the asset purchase agreement  
16 and, if I will, its details over the months after the asset  
17 purchase agreement than during the week just before signing.

18 A. Yes. I agree that there was more time.

19 Q. And yet --

20 A. That's the question.

21 Q. -- in that period of time Mr. Sabbath didn't raise  
22 his hand and say, there's a bug here. We meant to get the  
23 copyrights, but it excludes all copyrights.

24 A. No, he didn't.

25 Q. He didn't do that?



1 A. No, he didn't.

2 Q. And you agree with me there is a bug.

3 A. I agree that that language is unclear.

4 Q. And so I'll ask you my question again. Here's an  
5 experienced software lawyer. He's been in the business for  
6 years and years. He's been in the UNIX business, and there  
7 are two possibilities. He along with everybody else blew it  
8 or their eyes passed over it. They understood it, and they  
9 said, we're going to be in the UNIX flavor business. We don't  
10 need to own the UNIX copyrights. And your testimony is that  
11 the former is the better explanation.

12 A. I lost the question in that.

13 Q. And I loved it. So I'm sorry. I'll have to try it  
14 again.

15 We have Mr. Sabbath looking at the asset purchase  
16 agreement in Amendment Number 1 and not catching the bug in  
17 the period leading up to Amendment Number 1; right?

18 A. Correct.

19 Q. And in that period the lawyers and Mr. Sabbath and  
20 yourself all have additional time to focus on the excluded  
21 asset schedule.

22 A. We had a lot of things that we were working on.  
23 But, yes, we did have some time to create Amendment 1.

24 Q. And there's two possibilities, at least in my view.  
25 One possibility is that you and your colleagues on the Santa

1 Cruz side, leave aside the Novell people who were going to go  
2 with the business like Mr. Levine, the people on the Santa  
3 Cruz side didn't catch what you regard as a mistake in the  
4 drafting during that period.

5 A. Yes. I mean, mistake, the drafting, yes. It  
6 certainly could have been more clear. And we did not correct  
7 that, no. We didn't catch it.

8 Q. And your explanation is, everybody on the Santa  
9 Cruz side, people you had trust and confidence in, including  
10 your boss Mr. Sabbath, blew it.

11 A. Blew it. I don't want to say my former boss blew  
12 it. I would say that, yes, that was overlooked. But everyone  
13 understood that the copyrights were transferred. The Novell  
14 people that came over to the Santa Cruz Operation understood  
15 that the copyrights were transferred. It just wasn't in our  
16 mind to clarify the agreement.

17 Q. It wasn't in your mind to read the excluded assets  
18 closely?

19 A. Not with respect to copyrights, no.

20 Q. So that's your explanation, and you reject the  
21 explanation, again, trying to put all these pieces of the  
22 puzzle together and figuring out actually the relevant  
23 question in this lawsuit, what copyrights are required, you  
24 reject that explanation, that explanation being that Santa  
25 Cruz had been in the UNIX flavor business. It had not owned

1       copyrights to the UNIX operating system. In order to be in  
2       the flavor business, now they were going to be in a second  
3       flavor, UnixWare, and the negotiators thought to themselves,  
4       we can live with this. We don't need ownership of the  
5       copyrights because we have all the permissions we need in the  
6       asset purchase agreement to carry on the business of UnixWare.

7           A.    No, that was not my understanding at all. SCO  
8       wanted to unify UNIX. It wanted to be the UNIX company. It  
9       wanted all rights to the UNIX, and it wanted to be able to  
10      enforce and protect its intellectual property rights. The  
11      copyrights would have been essential to that. And we wanted  
12      to be able to take action such as we did with the European  
13      union with respect to Microsoft, and we needed the copyrights  
14      to do that, as well.

15          Q.    And it was just -- to sum all of this up, then,  
16      your testimony is that as of the exclusion of the asset  
17      purchase agreement on September 19th, 1995, the execution of  
18      the closing documents including the bill of sale on  
19      December 6th, 1995, as of that period, Santa Cruz and yourself  
20      thought that the copyrights in UNIX were essential, were  
21      required for SCO to carry out, to exercise its rights with  
22      respect to the acquisition of UNIX and UnixWare technologies,  
23      and nobody on the SCO side caught the fact that the excluded  
24      assets schedule includes all copyrights.

25          A.    Yes.

1 Q. And your testimony to that effect is not in any way  
2 called into question in your mind by what you understand  
3 Mr. Sabbath believes to have been as stated in a sworn  
4 declaration.

5 MR. NORMAND: Same objection, Your Honor.

6 MR. JACOBS: Your Honor, I believe I can impeach  
7 with an out-of-court statement. And I can show the witness  
8 the declaration, and I can ask her whether it affects her  
9 understanding.

10 MR. NORMAND: I don't think that's right, Your  
11 Honor.

12 MR. JACOBS: And it will be referred to in  
13 Mr. Sabbath's videotaped deposition. SCO isn't calling him  
14 live, but it will be in the videotape.

15 MR. NORMAND: Same objection, Your Honor.

16 THE COURT: I will sustain the objection.

17 Q. BY MR. JACOBS: Ms. Madsen, just to clarify a few  
18 things about the exhibits Mr. Normand asked you about. So he  
19 asked you about SCO Exhibit 30, and in particular he asked you  
20 about a paragraph that the SCO side had put a bracket around  
21 on Mr. Mohan's letter. Do you recall that?

22 A. Yes.

23 Q. 1456, Mr. Lee.

24 It refers to the acquisition of UNIX technologies.

25 A. Yes.

1 Q. Now, you understood that, in fact, Santa Cruz was  
2 acquiring UNIX source code from Novell; correct?

3 A. Yes.

4 Q. And you know enough about this dispute that's  
5 arisen to know that there's never been any question that Santa  
6 Cruz rightfully acquired the actual physical source code;  
7 correct?

8 A. I haven't heard that there's been any dispute with  
9 respect to source code, no.

10 Q. So when it refers to acquisition of the UNIX  
11 technologies, that could simply be referring to the  
12 acquisition of UNIX source code, couldn't it?

13 A. It could. That wasn't my understanding of the  
14 transaction, but it's not rendered inaccurate by that.

15 Q. So now let's look back at the asset purchase  
16 agreement just for a minute, and let's look at the provision  
17 governing the technology license agreement, which is in 1.6.  
18 And this is a license back of assets. Do you see that?

19 A. Yes.

20 Q. Concurrent with the closing, buyer shall  
21 execute a license agreement under which it shall  
22 grant to seller a royalty free perpetual worldwide  
23 license to all of the technology including the assets.

24 Do you see that?

25 A. Yes.

1 Q. Now there was technology included in the assets;  
2 right? There was source code included in the assets.

3 A. Yes.

4 Q. And this license, then, would license Novell to  
5 have access to and use the source code; right, Ms. Madsen?

6 A. Correct. However, if it retained the copyrights,  
7 it wouldn't have needed such a license.

8 Q. Well, are you aware, Ms. Madsen, that Novell has  
9 actually written to SCO and said under the technology  
10 licensing agreement, we have a right to access the source code  
11 because we have a license back, we retained a license to the  
12 technology included in the assets, and that Novell actually  
13 asked to get a copy of the source code under that provision?  
14 Are you aware of that?

15 MR. NORMAND: Your Honor, I think that's both  
16 hearsay and best evidence problem.

17 MR. JACOBS: I'm asking her if she's aware, Your  
18 Honor.

19 THE COURT: I'll overrule the objection.

20 THE WITNESS: To which letter are you referring and  
21 what's the time frame and --

22 Q. BY MR. JACOBS: You're not aware of it, are you,  
23 Ms. Madsen?

24 A. Well, you haven't given me enough detail about the  
25 letter to say one way or another.

1 Q. Fair enough.

2 It again then goes on, let's stay on with this for  
3 a minute:

4 All derivatives of this technology included in  
5 the assets including the Eiger product release.

6 Do you see that?

7 A. Yes.

8 Q. And such licensed back technology to be  
9 referred to collectively as licensed technology.

10 Do you see that?

11 A. Yes.

12 Q. Now for the terms of the Eiger product release,  
13 that was one of the evolving products that Santa Cruz was  
14 supposed to pursue; correct?

15 A. Yes.

16 Q. And Santa Cruz would, as you understand the way the  
17 mechanics of ownership works in the software business, you  
18 understood that at the very least Santa Cruz would own the  
19 copyright in the code that Santa Cruz wrote; correct?

20 A. It would own a copyright in the new product that it  
21 created, yes.

22 Q. And so this provision makes sense as you sit here  
23 today or as you looked at it in 1995, this provision makes  
24 sense even if Novell owns the underlying UNIX copyrights  
25 because the derivatives Santa Cruz would own, and Novell would

1 get a license of the derivatives.

2 A. But that's not what this provision states.

3 Q. It says, all derivatives of the technology included  
4 in the assets, doesn't it?

5 A. It does. But it also says, all technology included  
6 in the assets.

7 Q. And if we want to know what technology was included  
8 in the assets as of the asset purchase agreement of September  
9 1995 --

10 A. Right.

11 Q. -- we should go look at the included assets and  
12 throw out what's in the excluded assets; correct?

13 A. No.

14 Q. We shouldn't do that? Isn't that how assets is  
15 defined in this agreement, Ms. Madsen?

16 A. I'm sorry. I'm really trying to understand your  
17 question here. I'm not trying to be obtuse. But I'm not sure  
18 what you're asking me.

19 Q. I'm asking you for your understanding because  
20 you've testified that you have to look at this as a whole.

21 A. Yes.

22 Q. You have to make it all work.

23 A. Yes.

24 Q. And I'm just asking you, can you make it all work  
25 under my alternative explanation?



1           A.    No, I can't.

2           Q.    Because you reject the idea that Novell would want  
3 a license to all of the technology included in the assets when  
4 the technology includes the source code, Ms. Madsen?

5           A.    Yes.

6           Q.    And you reject the idea that Novell would want a  
7 license to all derivatives of the technology included in the  
8 assets --

9           A.    No.  It's not that I reject that.  It's just that  
10 this gives them broader rights than what they would have  
11 needed if they retained the copyrights.  So it would make  
12 sense if they said, we want, you know, future versions, we  
13 want the derivatives.  But here they're talking about they  
14 want a license back of all technology.  But if they retained  
15 the copyrights, they wouldn't need that.

16          Q.    And that's because as a legal matter, Ms. Madsen,  
17 your understanding is that the word technology equals the word  
18 copyrights?

19          A.    Well, it's a portion of that.

20          Q.    So if we go to the included assets and we go to the  
21 excluded assets to see under the plain language of the asset  
22 purchase agreement of September 1995, isn't it true,  
23 Ms. Madsen, that all of the technology included in the assets  
24 included the source code to UNIX?

25          A.    Well, if I could look at that provision again.

1 But, yes, I believe that's correct.

2 Q. So at the very least, Novell got a license back to  
3 the source code in UNIX; right, Ms. Madsen?

4 A. I believe so.

5 Q. Now, a couple of other exhibits that Mr. Normand  
6 asked you about.

7 The settlement agreement between Santa Cruz  
8 Operation and Microsoft, SCO Exhibit 199.

9 A. Yes.

10 Q. Novell had no role in that; correct?

11 A. I don't know. I have a general recollection that  
12 SCO may have apprised Novell of this. Certainly Duff Thompson  
13 who was Novell's representative on SCO's board, would have  
14 known about this.

15 Q. By the 29th of May, 1998, Duff Thompson was no  
16 longer a Novell representative; correct, Ms. Madsen?

17 A. I don't know when Duff departed the board. But  
18 discussions regarding this were prior to that, so I'm not sure  
19 when he left.

20 Q. Let me sharpen up my question. No one at Novell  
21 legal reviewed Recital B, SCO has acquired AT&T ownership of  
22 the copyright.

23 A. Not that I'm aware of, no.

24 Q. And same question with respect to SCO Exhibit 127,  
25 the filing with the European union, which Mr. Normand asked

1 you about. No one in Novell legal reviewed that document;  
2 correct?

3 A. No, not to my knowledge.

4 MR. JACOBS: No further questions, Ms. Madsen.

5 THE COURT: Mr. Normand?

6 REDIRECT EXAMINATION

7 BY MR. NORMAND:

8 Q. Thank you for your patience, Mrs. Madsen.

9 Mr. Jacobs finished or nearly finished by asking  
10 about the technology license agreement. Do you recall that?

11 A. Yes.

12 Q. And he showed you repeatedly the word license in  
13 that document.

14 A. Yes.

15 Q. Do you recall there being the word license in the  
16 asset purchase agreement with respect to Santa Cruz' rights?

17 A. No.

18 Q. Mr. Jacobs asked you about a bug, as he called it,  
19 in the excluded assets provision in the APA. Do you recall  
20 that question and answer?

21 A. Yes.

22 Q. To your understanding, was the bug subsequently  
23 fixed?

24 A. Yes.

25 Q. In what form?

1           A.    Amendment Number 2.

2           Q.    Did Mr. Sabbath ever express to you any  
3           dissatisfaction with the way the bug had been fixed?

4           A.    No.

5           Q.    Did Santa Cruz shortly after Amendment Number 2  
6           represent that it owned the UNIX copyright?

7           A.    It did in the Microsoft filing -- or the filing  
8           with the European union.

9           Q.    And was that representation consistent with your  
10          understanding of what assets Santa Cruz had acquired?

11          A.    Yes.

12          Q.    Now, do you recall questions about this box and  
13          this disk?

14          A.    Yes.

15          Q.    Is there intellectual property in here to your  
16          understanding?

17          A.    Yes.

18          Q.    And do you recall being asked a hypothetical about  
19          contract interpretation?

20          A.    Yes.

21          Q.    Do you recall being asked about whether copyrights  
22          are required?

23          A.    Yes.

24          Q.    Let me give you a hypothetical.  Let's say you're  
25          Santa Cruz in the hypothetical, and I'm a licensee.  In that

1 hypothetical do I have to have a contract with you?

2 A. Yes.

3 Q. In order to acquire this I need to execute a  
4 contract?

5 A. Correct.

6 Q. Let's say I give this to Mr. Hatch. He's not a  
7 licensee. Just a good citizen of Utah.

8 A. Yes.

9 Q. Can you sue me for breach of contract?

10 A. Yes, I can.

11 Q. Can you sue him for breach of contract? Do you  
12 have a contract with him?

13 A. No, I don't.

14 Q. On what basis could you enforce rights against him?  
15 Would you need intellectual property to do that?

16 A. I would. I would need to look to copyright law.

17 Q. Is that what's happening in connection with the  
18 Microsoft dispute? You were exercising intellectual property  
19 rights that were required in your view to operate the  
20 business?

21 A. Yes.

22 Q. Now, do you recall being asked about the operating  
23 agreement that was signed in 1995?

24 A. I do.

25 Q. Mr. Calvin, can we pull that up?

1 THE COURT: Which exhibit is it again?

2 MR. NORMAND: It's X5, Your Honor.

3 THE COURT: Thank you.

4 Q. BY MR. NORMAND: And let's go to Paragraph 7,  
5 Mr. Calvin, and let's bring up the paragraph at the bottom.  
6 You see, Ms. Madsen, in the operating agreement it  
7 states, quote:  
8 It is the intent of the parties to transfer  
9 the agreements and associated rights and obligations  
10 which relate to Novell's UNIX system business to SCO.  
11 A. I do.  
12 Q. Did Mr. Jacobs show you that language?  
13 A. No. I don't remember him showing me that language.  
14 Q. Should he have raised his hand?  
15 A. Shame on you, Mr. Jacobs.  
16 Q. Let's look at SCO's Exhibit 163.  
17 You recall questions and answers about this e-mail,  
18 Ms. Madsen, when it comes up? This is the Alok Mohan e-mail.  
19 A. I do.  
20 Q. And let's look at the top box, Mr. Calvin, if you  
21 could pull up that paragraph.  
22 Do you see here, Ms. Madsen, that Mr. Mohan says:  
23 We announce the purchase of the UNIX business  
24 from Novell?  
25 A. Yes.

1 Q. Did you understand the UNIX business to include the  
2 UNIX copyrights?

3 A. Yes.

4 Q. Did you understand it to include the UnixWare  
5 copyrights?

6 A. Yes.

7 Q. And could you compare that, Mr. Calvin, to the  
8 language at the very bottom of the e-mail, very bottom.

9 And here Mr. Mohan explains that, quote:

10 SCO is now the primary supplier of the UNIX  
11 technology.

12 Do you see that language?

13 A. I do.

14 Q. To your understanding, was UNIX technology part of  
15 the UNIX business?

16 A. Yes.

17 Q. To your understanding, was the copyrights for UNIX  
18 and UnixWare part of the UNIX technology?

19 A. Yes.

20 Q. Now, Mr. Jacobs asked you a series of questions  
21 about the license that Santa Cruz had before the asset  
22 purchase agreement was signed. Do you recall that?

23 A. Yes.

24 Q. Now, looking at the top paragraph, before the asset  
25 purchase agreement, was Santa Cruz the principal provider of

1 UNIX products and technology to the entire computer industry?

2 A. No.

3 Q. And before the asset purchase agreement was signed,  
4 was SCO the, looking at the bottom paragraph, primary supplier  
5 of UNIX technology to most OEMs?

6 A. No.

7 Q. Now, this exhibit also contains a press release.

8 And, Mr. Calvin, if you could bring up the first  
9 page of the press release.

10 At the bottom, Ms. Madsen, we'll bring that up for  
11 you and the jury. This is a press release with the title, SCO  
12 Acquires Unix Business From Novell and Licenses of NetWare  
13 Technology.

14 Do you see that?

15 A. Yes.

16 Q. Does the title say that SCO licenses UNIX business  
17 from Novell?

18 A. No.

19 Q. Now let's go to the next page of that press  
20 release.

21 And let's bring up, Mr. Calvin, the paragraph  
22 beginning, according.

23 This press release states:

24 According to the terms of the agreement, SCO  
25 will acquire Novell's UnixWare business and UNIX



1 intellectual property.

2 Do you see that statement?

3 A. I do.

4 Q. Is that statement consistent with your  
5 understanding of the assets that Santa Cruz acquired?

6 A. Yes.

7 Q. Mr. Jacobs showed you Exhibit D11.  
8 And, Mr. Calvin, can we pull that up?  
9 And you were shown Page 42 of this Caldera  
10 document. And I think its the restricted cash and royalty  
11 payable to Novell paragraph, Mr. Calvin.

12 THE COURT: What page is that on?

13 MR. NORMAND: Page 42, Your Honor.

14 THE COURT: Thank you.

15 Q. BY MR. NORMAND: And these were the series of  
16 questions and answers about agency. Do you recall that,  
17 Miss Madsen?

18 A. Yes.

19 Q. Now, does this document speak to the fact that  
20 Santa Cruz had acquired all copies of the UNIX source code  
21 under the asset purchase agreement?

22 A. Yes.

23 Q. Show me where it says that.  
24 In other words, does it speak to anything other  
25 than agency?

1           A.   Well, I'm not comfortable with the word agency.

2           Q.   I'm asking you to just look at the words on the  
3 page. Do you see anything other than agency discussed in this  
4 paragraph of this document?

5           A.   Well, what I see is a royalty stream where we're  
6 going to collect the royalties, and we're going to remit a  
7 portion of those royalties to Novell.

8           Q.   Do you read this paragraph to be a complete  
9 description of the assets Santa Cruz had acquired?

10          A.   No.

11          Q.   Now, Mr. Jacobs showed you Section 4.16(b) of the  
12 original APA.

13                 Can you pull that up, Mr. Calvin? And why don't  
14 you bring up Paragraph B for now.

15                 And Mr. Jacobs asked you about whether the  
16 reference to SVRX license in this paragraph refers only to  
17 royalties. Do you recall all of those questions and answers?

18          A.   Yes.

19          Q.   Mr. Calvin, could you bring up Paragraph A of  
20 4.16(b)?

21                 And I'm looking at the language, Ms. Madsen, in the  
22 first sentence, which says:

23                         Following the closing, buyer, Santa Cruz,  
24 shall administer the collection of all royalties,  
25 fees and other amounts due under all SVRX

1 licenses.

2 A. Right.

3 Q. As listed in detail under Item 6 of  
4 Schedule 1.1(a) hereof and referred to herein as  
5 SVRX royalties.

6 A. Yes.

7 Q. Do you see that?

8 How does that language compare as to your  
9 understanding of what payment Santa Cruz will be making to  
10 Novell after the APA?

11 A. Well, I'm not sure I understand the question.

12 Q. What was your understanding of what payments Santa  
13 Cruz would be making to Novell after the APA?

14 A. Well, there were three components that I recall.  
15 There were the stock, which we talked about earlier; there was  
16 the royalty stream; and then I remember that there were  
17 certain thresholds, revenue thresholds, that if we met those,  
18 there would be additional monies transferred to Novell.

19 Q. And when Mr. Jacobs was asking you about  
20 Subsection B in his questions about royalties, did he show you  
21 the reference to royalties in Subsection A?

22 A. No, I don't recall that.

23 Q. Now, Mr. Jacobs asked you a series of questions  
24 based on your experience as a contracts person. Do you  
25 remember those questions?

1 A. Yes.

2 Q. Are contracts sometimes ambiguous?

3 A. Yes. Unfortunately, you know, they are not perfect  
4 documents. And in mind sight we wish we could perfect them.

5 Q. Do provisions of contracts sometimes contradict  
6 each other?

7 A. Unfortunately sometimes they do.

8 Q. Are contracts sometimes amended?

9 A. Yes.

10 Q. And when they're amended, is the only language in  
11 the contract in your view relevant anymore?

12 A. No.

13 Q. Now, Mr. Jacobs asked you about Section 4.16(b).  
14 That's still on the screen. And he asked about the second  
15 sentence. Let's read it again.

16 As sellers, Novell's, sole discretion, buyer,  
17 Santa Cruz, shall amend, supplement, modify or  
18 waive any rights under or shall assign any rights  
19 to any SVRX license to the extent so directed in  
20 any manner with respect to seller.

21 Do you recall questions and answers about that  
22 provision?

23 A. Yes.

24 Q. And then Mr. Jacobs referred to what he called the  
25 master agreement, which he called the software agreement. Do

1       you remember that?

2             A.    Yes.

3             Q.    Do you have a view as a contracts person as to the  
4       consequences if Novell could waive all of Santa Cruz' rights  
5       under all of the master agreements it had just acquired under  
6       the APA?

7             A.    Well, that would have rendered this asset purchase  
8       agreement meaningless.

9             Q.    How so?

10            A.    Well, they could -- they could give away, they  
11       could waive confidentiality requirements. They could, you  
12       know, essentially resell the Brooklyn Bridge.

13            Q.    Ms. Madsen, have you seen anything today that is  
14       inconsistent with your view that Santa Cruz acquired UNIX and  
15       UnixWare copyrights under the asset purchase agreement?

16            A.    No.

17            MR. NORMAND:  No further questions, Your Honor.

18            THE COURT:  Mr. Jacobs?

19            MR. JACOBS:  Your Honor, could we have a brief side  
20       bar or maybe use this as a break to talk about possibly  
21       recalling Ms. Madsen?

22            THE COURT:  Let's do it with a side bar.

23            (Whereupon, the following proceedings were  
24       held outside the hearing of the jury:)

25            MR. JACOBS:  Mr. Sabbath executed a declaration

1 that directly contradicts her testimony today. It is a  
2 statement like many of the statements that Mr. Normand showed  
3 Ms. Madsen that is completely inconsistent with her testimony.  
4 It will be introduced by way of deposition testimony in the  
5 next segment of the trial. Mr. Normand asked Mr. Sabbath  
6 about that declaration as did I. We will offer it into  
7 evidence in conjunction with that deposition. We would then  
8 like to -- we would like to be able to recall Ms. Madsen and  
9 ask her about how her understanding is affected by  
10 Mr. Sabbath's declaration.

11 MR. NORMAND: Your Honor, we object to the use of  
12 the declaration in the way that Mr. Jacobs proposes. And I  
13 suppose if it rises to this level of gravity we should address  
14 the issue in writing to Your Honor.

15 THE COURT: The Court is not going to allow the use  
16 of the declaration with no foundation. And if she has to be  
17 recalled, then she'll have to be recalled. So --

18 MR. NORMAND: Okay.

19 THE COURT: The dilemma I have is that in effect  
20 what she would be asked to do would then to comment on the  
21 testimony of another witness, which is prohibited.

22 MR. NORMAND: For what it's worth, Your Honor,  
23 Mrs. Madsen was asked about that declaration in her  
24 deposition, and her answer was, this is not my understanding  
25 of Mr. Sabbath's understanding of the transaction. So she

1 offered no explanation one way or the other. I think it's of  
2 a tiny probative value in terms of the substance of her  
3 testimony, and its massively prejudicial hearsay with respect  
4 to the remainder of the trial.

5 THE COURT: Again, the Court is not going to allow  
6 her to be questioned at this time. I'm going to have to see  
7 how the declaration is treated in the video deposition of  
8 Mr. Sabbath, and then we'll have to revisit it at that time.

9 MR. NORMAND: But in the interim you'd like us to  
10 not close testimony with Ms. Madsen?

11 THE COURT: Yes.

12 MR. NORMAND: Thank you.

13 (Whereupon, the following proceedings were  
14 held in open court:)

15 THE COURT: Mr. Jacobs, do you have anything else  
16 at this time?

17 MR. JACOBS: No, Your Honor. Thank you very much.

18 THE COURT: All right.

19 Ms. Madsen, I've been informed that you may be  
20 recalled. So if you would be available to return, if  
21 necessary, at some subsequent point. Is that going to be a  
22 great inconvenience to you?

23 THE WITNESS: It would be a great inconvenience to  
24 me. I have two children back in Santa Cruz, California, that  
25 I don't have child care arrangements for. They are missing

1 school today. And I have an infant child outside waiting for  
2 me. Plus my employer would be most aggrieved if I were to  
3 miss additional work.

4 THE COURT: The decision as to whether to recall  
5 you will be made very carefully by the Court, but I still  
6 think it's possible that it could happen. So you just need to  
7 be aware of that.

8 THE WITNESS: Okay.

9 THE COURT: But it will not be till many days have  
10 passed by, so you certainly should be able to return to  
11 California now.

12 THE WITNESS: Okay. Thank you.

13 MR. NORMAND: Your Honor, I'm sorry. Could we have  
14 one brief side bar on this issue, having heard what Ms. Madsen  
15 just said?

16 THE COURT: Yes.

17 (Whereupon, the following proceedings were held  
18 outside the hearing of the jury:)

19 MR. NORMAND: And I apologize, Your Honor. I  
20 started to speak to that issue, and I should have completed  
21 the thought. At a maximum her deposition testimony when she  
22 was asked about what Mr. Sabbath said would come in. Of  
23 course, we object to it coming in, but we don't need her back  
24 live. She was asked at deposition, and she gave an answer.  
25 And I know Mr. Jacobs would like to do a more extensive cross,



1 but under the circumstances we object whole-heartedly. But if  
2 anything could come in perhaps that portion of the deposition  
3 where she's asked about that prior deposition.

4 MR. JACOBS: I have an alternative proposal. Let's  
5 see what happens with Sabbath. And if we need to recall her,  
6 we will discuss it after Sabbath, and we'll do it today.

7 MR. BRENNAN: Sabbath is the next witness through  
8 designations. And it would be a sufficient time to hear what  
9 Mr. Sabbath has to say before the Court concludes testimony  
10 for the day. And if the decision is then made at that time,  
11 then we would reexamine her. That could all happen today.

12 MR. NORMAND: I do believe she has a 3 o'clock  
13 flight today. I just feel we're treading on her.

14 THE COURT: My inclination is not to allow her to  
15 be directly examined on the testimony of Mr. Sabbath. I would  
16 agree that the Court will consider, ought to consider whether  
17 the deposition testimony should be permitted, but I want to  
18 see the deposition testimony. So if any of you could get that  
19 for me so I could look at it during the next break.

20 Well, try to make -- let's just proceed. But it's  
21 highly unlikely I'm going to make her stay if that's all we're  
22 going to do.

23 MR. NORMAND: So we should keep her?

24 THE COURT: Keep her in the witness room until --

25 MR. NORMAND: Okay.

1 THE COURT: If she had a 3 o'clock flight, she'll  
2 have plenty of time once we finish and it is done.

3 (Whereupon, the following proceedings were  
4 continued in open court:)

5 THE COURT: You have a 3 o'clock flight today?

6 THE WITNESS: I do.

7 THE COURT: We will try to deal with anything we  
8 need to with you before you leave today. So just make  
9 yourself, keep yourself available throughout the remainder of  
10 this trial time today, which should be 1:30.

11 THE WITNESS: Okay. Thank you.

12 THE COURT: Thank you, Ms. Madsen.

13 Mr. Singer, Mr. Norman, call your next witness.

14 MR. SINGER: Thank you, Your Honor. We call Steve  
15 Sabbath by his deposition.

16 (Whereupon, the following excerpts were  
17 played by video deposition of Steven Sabbath:)

18 Q. And how long were you at Santa Cruz?

19 A. Well, I was there almost 13 years. I believe  
20 12 1/2, 13 years.

21 Q. And you were the general counsel throughout that  
22 time?

23 A. That's correct.

24 Q. Did you understand in 1995 that there were  
25 negotiations between Novell and Santa Cruz regarding this

1 potential acquisition?

2 A. Sure.

3 Q. And who did you understand on the Santa Cruz side  
4 was leading those negotiations?

5 A. Well, we had two corporate development  
6 vice-presidents or senior vice-presidents, I can't recall.  
7 Jim Wilt or James Wilt and Geoff Seabrook.

8 Q. And did those individuals have occasion to speak  
9 with you regarding progress of the negotiations?

10 A. Yes. I mean, once we engaged with Novell, I worked  
11 with those two individuals constantly.

12 Q. Did you develop an understanding during these  
13 negotiations as to whether Santa Cruz would be acquiring UNIX  
14 intellectual property?

15 A. Sure. I mean, sure. We were buying the entire  
16 business including the intellectual property.

17 Q. And what was your basis for that understanding?

18 A. I'm not sure I understand the question.

19 Q. How did you develop that understanding?

20 A. Well, I mean, that is what the corporate  
21 development guys told me. As we started meeting with the  
22 Novell people and their attorneys, that was the discussion.  
23 We were buying the entire business. Novell didn't want to  
24 keep any part of it so that they could go off and do other  
25 things, mainly focus on NetWare.

1           Q. Did you have occasion during the negotiations  
2 regarding this potential transaction to deal with folks on the  
3 Novell side?

4           A. Oh, sure. Sure.

5           Q. And who did you personally deal with, if you can  
6 recall?

7           A. Well, their chief negotiator, their counterpart to  
8 our Geoff and Jim, was a fellow named Ed Chatlos who was  
9 stationed in New Jersey, worked for Novell out of New Jersey.  
10 He was their project manager.

11                   There were a few others from Utah that I met from  
12 time to time. I can't recall their names or their titles. To  
13 some extent David Bradford, their general counsel, was  
14 involved. He did appear in California at least once that I  
15 can recall and worked on the deal with us. And then, of  
16 course, there was Wilson Sonsini, outside counsel.

17           Q. Can you recall any of the attorneys from Wilson  
18 Sonsini that you dealt with?

19           A. Well, Tor Braham was their lead. He was Ed  
20 Leonard's counterpart. Tor Braham, and I think his Number 2  
21 might have been Aaron Alter, who would have been Scott  
22 Lester's counterpart on the Wilson side.

23           Q. Was it ever your understanding during the  
24 negotiations leading up to the APA or thereafter that  
25 copyrights in the UNIX business were being excluded from the

1 assets transfer?

2 A. No. Copyrights were going with the assets.

3 Q. Do you have a view as you sit here as to whether  
4 the parties to the APA intended that UNIX or UnixWare  
5 copyrights would be retained by Novell?

6 A. Well, no. The intent was clearly to me that the  
7 copyrights for the UNIX and UnixWare were to be transferred to  
8 Santa Cruz Operation. This Schedule 1.1(b) looks to me like  
9 it pertains to NetWare.

10 Q. Did you have a view at the time the APA was  
11 executed as to whether in order to improve upon and give  
12 better performance to UNIX technology Santa Cruz would have to  
13 copy and distribute the UNIX source code?

14 A. Well, certainly. It would have to do that.

15 Q. Did you have a view at the time of the execution of  
16 the APA of what the source of Santa Cruz' rights to copy and  
17 reproduce the UNIX source code would be?

18 A. It would be limitless. Santa Cruz Operation, you  
19 know, would -- you know, owned the source code, owned the  
20 technology, owned everything, and it could do as it saw fit.

21 Q. Since the execution of the APA, has it come to your  
22 attention that Novell was claiming to own the UNIX and  
23 UnixWare copyrights?

24 A. I'm sorry. Can you say that again?

25 Q. Has it come to your attention that Novell is now

1 claiming to own the UNIX and UnixWare copyrights?

2 A. Yes, it has come to my attention.

3 Q. And how did that come to your attention?

4 A. Umm, I believe somebody from your law firm  
5 explained that to me.

6 Q. Do you have a view as to the merit of that claim?

7 A. Well, I just -- I can't see where Novell is coming  
8 from, to be honest with you. I mean, no offense to Novell,  
9 but I just don't see what they base that position on.

10 Q. Do you recall whether at sometime in 1996 the issue  
11 of UNIX and UnixWare copyrights with respect to the APA arose  
12 between the parties?

13 A. Copyright issue? No, I don't ever recall any  
14 discussion between Novell and Santa Cruz Operation regarding  
15 copyrights.

16 Q. In your view as of the execution of the APA, what  
17 copyrights were required for SCO to exercise its rights with  
18 respect to the acquisition of UNIX and UnixWare technologies?

19 A. (No answer.)

20 Q. At any time after the execution of Amendment  
21 Number 2, did Santa Cruz ever have occasion to ask Novell to  
22 transfer any UNIX or UnixWare copyrights to Santa Cruz?

23 A. Not that I recall.

24 Q. Did you ever have an understanding during your  
25 tenure at Santa Cruz that Santa Cruz was obligated to ask

1 Novell to transfer particular UNIX and UnixWare copyrights?

2 A. No.

3 Q. No one from Santa Cruz ever told you that that was  
4 a process in place that needed to be pursued with Novell?

5 A. I don't recall that.

6 Q. Do you know whether after the execution of the APA,  
7 Santa Cruz had occasion to enter into source code licenses  
8 with any third parties in which Santa Cruz licensed UNIX or  
9 UnixWare source code to those third parties?

10 A. Well, I mean, we routinely licensed source code to  
11 customers who needed it for development purposes, for  
12 supporting their own customer base, what have you.

13 Q. And at the time did you have a view as to what gave  
14 Santa Cruz the right to enter into such licenses?

15 A. We owned the technology, lock, stock and barrel.

16 Q. During the negotiations of the APA that we  
17 discussed earlier, did anyone from Santa Cruz ever say to you  
18 that -- I'm sorry -- did anyone from Novell ever say to you  
19 that Novell intended to retain any UNIX or UnixWare  
20 copyrights?

21 A. No.

22 Q. After the execution of Amendment Number 2 that we  
23 referred to earlier, did anyone from Novell ever say to you  
24 that Novell believed SCO would have to come back to Novell and  
25 ask for the transfer of any particular UNIX or UnixWare

1 copyrights in this case?

2 A. No.

3 Q. Did Santa Cruz have occasion to sell its UNIX and  
4 UnixWare business at any time in your tenure at Santa Cruz?

5 A. Yes. The business that we had bought from Novell  
6 was subsequently sold to Caldera based out of Utah, which now  
7 goes by the name of SCO Group.

8 Q. Do you recall when that transaction occurred?

9 A. I don't.

10 Q. What role, if any, did you play with respect to  
11 that transaction?

12 A. Very similar to the role I played when we acquired  
13 the technology. It was just the flip side, and again, I  
14 worked with the corporate development people and outside  
15 counsel, et cetera.

16 Q. With respect to the UNIX and UnixWare business,  
17 what did Santa Cruz intend to transfer to Caldera?

18 A. The entire UNIX business, exactly what we had  
19 purchased from Novell.

20 Q. In your view at the time of the Santa Cruz/Caldera  
21 transaction, did that UNIX business include UNIX and UnixWare  
22 copyrights?

23 A. Yes, of course.

24 Q. The language in Paragraph D5 of Amendment Number 2  
25 says, quote:



1           This amendment does not give Novell the right  
2           to increase any SVRX licensee's rights to SVRX  
3           source code nor does it give Novell the right to  
4           grant new SVRX source code licenses. In addition,  
5           Novell may not prevent SCO from exercising its  
6           rights with respect to SVRX source code in  
7           accordance with the agreement.

8           How does that language comport with your  
9           understanding of what a parties had -- how the  
10          parties had resolved the issue that you referred  
11          to earlier?

12          A. Well, it clarifies the fact that Santa Cruz  
13          Operation owned the source code, all UNIX source code  
14          including SVRX, that Novell could not give any future SVRX  
15          source code licenses to anybody, and that Novell couldn't  
16          prevent us from exercising from whatever -- from taking  
17          whatever actions we wanted with regard to that source code.

18          Q. You say in Paragraph 4, based on my involvement  
19          with the APA, I understand what the parties' intent and  
20          purpose in executing the APA was to transfer to Santa Cruz  
21          Novell's entire UNIX-related business, including all rights to  
22          UNIX and UnixWare and UNIX copyrights. But the parties agreed  
23          to permit Novell to retain an interest in the future System 5  
24          binary royalties to enable SCO to afford the asset purchase  
25          and that the parties never intended to give Novell any right

1 with respect to any Santa Cruz' future source code interests  
2 in UNIX and UnixWare including the SVRX licenses, end quote.

3 Do you see that language?

4 A. Yes, I do.

5 Q. Are those statements accurate?

6 A. Yes, they are.

7 Q. You say in Paragraph 5:

8 I understand that IBM has argued that Section  
9 4.136(b) of the APA gave Novell the right to  
10 acquire Santa Cruz to waive any breach of the  
11 intellectual property protections provided in the  
12 SVRX licenses. That argument is contrary to the  
13 intent of Paragraph 4.16(b) as I understood it.  
14 Indeed, Santa Cruz would never have agreed to give  
15 Novell the right under the APA to waive such  
16 protections under the SVRX licences because such a  
17 right could have eviscerated the entire purpose of  
18 the APA and the value of the assets transferred to  
19 Santa Cruz under the APA, end quote.

20 Do you see that language?

21 A. I do.

22 Q. Are those statements accurate?

23 A. Yes. I believe them to be true.

24 Q. When you say that such a rate could have  
25 eviscerated the entire purpose of the APA and the value of the

1 assets transferred to Santa Cruz under the APA, would you  
2 elaborate on that?

3 A. Yes. I think I explained before, if IBM or any  
4 other hardware OEM were to get expanded rights, it would have  
5 been far less likely that Santa Cruz would have been able to  
6 convert them to future versions of UNIX, and that was the  
7 purpose of purchasing the UNIX business from Novell and then  
8 spending a lot of money in trying to come up with future  
9 enhanced versions of UNIX in an attempt to unify UNIX.

10 Q. Mr. Sabbath, during your tenure at Santa Cruz, did  
11 you have occasion to work with Kim Madsen?

12 A. Yes, I did. She reported to me.

13 Q. And do you recall approximately what Ms. Madsen's  
14 tenure was at Santa Cruz?

15 A. I got to Santa Cruz in January of '91, and she was  
16 already there. So she had arrived at least some time in 1990.  
17 And when I departed the company the end of '03, she was still  
18 there.

19 Q. And I think you said that she reported to you. Do  
20 you recall what the scope of her responsibilities were in  
21 reporting to you?

22 A. She was more or less the department's chief  
23 paralegal, the most senior paralegal we had. And, I mean,  
24 over the years, we're talking 12, 13 years, she had various  
25 duties. But when it came to M and A work, for example, she

1 was always on the M and A team typically working with the  
2 documents such as the APA and the related documents. As a  
3 matter of fact, I mean, she was pretty senior and pretty darn  
4 sharp. So any major project she normally got sucked into and  
5 asked to play a major role, sometimes lead role.

6 Q. Do you recall what role, if any, she played in the  
7 connection with the negotiation of the APA?

8 A. Yeah. She was really my Number 2 in doing the APA  
9 and the related documents.

10 Q. And when you say, she was my Number 2, what do you  
11 mean?

12 A. Well, she sat in in many, if not all, of the  
13 meetings. She would review the documents, whether I reviewed  
14 them or not. Sometimes she reviewed them. I didn't even need  
15 to review them. Really played a -- you know, just like  
16 Jim Wilt and Geoff Seabrook were partnered up in the corporate  
17 development side, Kim Madsen and I were partnered up in the  
18 in-house legal side.

19 Q. Do you recall what role, if any, Ms. Madsen played  
20 in connection with the events that culminated in Amendment X  
21 and Amendment Number 2 that we reviewed earlier?

22 A. Again, she played a very important role as the  
23 Number 2 or in some cases taking the lead on pieces of these  
24 documents.

25 Q. Do you know whether Ms. Madsen's title changed

1 during her tenure at Santa Cruz?

2 A. Well, I'm sure she got promoted and got bumped up  
3 in pay and the like, but I can't remember what her titles  
4 were.

5 Q. Did her responsibilities change during the course  
6 of her work --

7 A. Oh --

8 Q. -- of reporting to you?

9 A. Yes. Her responsibilities broadened considerably  
10 as well as the number of the people that reported to her from  
11 time to time.

12 Q. And how did they change considerably?

13 A. Well, as she gained experience and, you know, it  
14 became obvious to myself and the other executives in the  
15 company that she was exceptionally good at what she did, she  
16 got more and more responsibility, taking on more important  
17 projects, working more independently, managing the work of  
18 others.

19 Q. IBM didn't compensate you for your work on that  
20 declaration, did they?

21 A. Absolutely not.

22 Q. What compensation are you receiving from SCO in  
23 connection with your ongoing work on the litigation?

24 A. They bought them lunch today.

25 Q. Are you being paid an hourly fee?

1           A.    I'm not being paid a nickel.

2           Q.    You were not retained as a consultant to SCO at

3           all?

4           A.    I wish.

5           Q.    So you've not been paid any compensation by SCO or

6           its law firm in connection with litigation?

7           A.    No.  Haven't been paid a nickel by anybody.

8           Q.    Do you have any ongoing financial interest in SCO?

9           A.    I do not.

10          Q.    No stock?

11          A.    No stock.

12          Q.    Any relatives work at SCO?

13          A.    Not that I'm aware of.

14          Q.    Any close friends?

15          A.    No.

16          Q.    So in your 19th November 2004 declaration, you say

17           Amendment Number 2 was intended to confirm, among other

18           things, the parties' intent that SCO would obtain ownership of

19           the UNIX copyrights under the APA.

20                    Do you see that?

21          A.    Let's see.

22          Q.    Right in the middle of the Paragraph 6.

23          A.    Was intended to confirm among other things, the

24           parties' intent.  Yeah, correct.

25          Q.    And did you review and approve that sentence?

1           A.    I suspect so.

2           Q.    You understood in saying the UNIX copyrights that  
3 you were talking about the entirety of the copyright rights in  
4 UNIX System V?

5           A.    I'm sorry.  Ask that question again.

6           Q.    When you were referring to the UNIX copyrights  
7 there, what did you mean?

8           A.    I meant that when we bought the UNIX business from  
9 Novell, all copyrights pertaining to that business came with  
10 the product, and Amendment Number 2 was meant to confirm that.

11          Q.    And when you said -- so when you were using the  
12 expression, the UNIX copyrights, you meant all UNIX  
13 copyrights?

14          A.    Yes.

15          Q.    And, the UNIX copyrights, or, all UNIX copyrights,  
16 is a simple way of saying all the copyrights relating to UNIX  
17 that Novell had at the time; correct?

18          A.    That's correct.

19          Q.    It's not hard to say "all" or "the" --

20                MR. NORMAND:  Objection to form.

21          Q.    -- to mean that, to get -- to convey that intent;  
22 right?

23          A.    I suppose so.

24          Q.    And if you look at Amendment Number 2 it doesn't  
25 say that, does it?

1           A.   Well, if you're saying the word "all" isn't there,  
2 you're absolutely right.

3           Q.   And a simple expression like, the UNIX copyrights,  
4 isn't there, either.

5           A.   No.   The UNIX copyrights.

6           Q.   I'm sorry.  I'm looking at Amendment Number 2, sir.

7           A.   Oh.  With respect to -- well, it says, all  
8 copyrights and trademarks.

9           Q.   That's the exclusionary part.

10          A.   Let me read it.  Oh, except for the copyrights and  
11 trademarks covered by Novell.  Yeah.  It doesn't say, except  
12 for all the copyrights and trademarks, true.

13          Q.   And when it says, the copyrights necessarily to  
14 carry on the business, do want to read that expression again?

15          A.   Umm, okay.  Except for the copyrights and  
16 trademarks owned by Novell as of the date of the agreement  
17 required for SCO to exercise its rights with respect to the  
18 acquisition of UNIX and UnixWare technology.

19          Q.   So it referred to the exercise of rights; correct?

20          A.   Yes.

21          Q.   And up until the time that you left Santa  
22 Cruz/Tarantella, what copyright rights in UNIX did Santa Cruz  
23 need in order to carry on the business contemplated by the  
24 asset purchase agreement?

25          A.   Well, once we sold the business to Caldera now the



1       SCO Group and became Tarantella, we didn't need those rights.  
2       Up till then you would need all rights to run your business.  
3       You don't know what you're going to be doing day to day, what  
4       kind of situations you'll find yourself in with the potential  
5       partners, with the potential customers. So you want all  
6       rights to do anything that you deem fit with the technology.

7           Q.   SCO wasn't going to enter into new SVRX licenses;  
8       correct?

9           A.   Right. We didn't want to do that, anyway.

10          Q.   So you didn't need the copyright necessary to enter  
11       into new SVRX licenses?

12          A.   But we did need to protect the technology. We  
13       didn't want somebody to be able to go off and pirate, for  
14       example. So we needed the copyright in order to defend the  
15       property.

16                THE COURT: Mr. Singer, Mr. Normand, if you would  
17       stop it there, we are going to go ahead and take a break.

18                MR. NORMAND: Your Honor, could I ask if I could  
19       read two of the designations that did not make their way into  
20       the video but that the parties did agree to be played? I  
21       propose to read those to the jury now with Your Honor's  
22       permission.

23                MR. BRENNAN: No objection, Your Honor.

24                THE COURT: All right. Go ahead.

25                MR. NORMAND: Question. If anyone on either side

1 of this transaction had proposed that Novell would retain the  
2 UNIX and UnixWare copyrights, do you think that's something  
3 you would have heard about in the course of negotiations?

4 MR. BRENNAN: Excuse me. Excuse me. Mr. Normand,  
5 where are you?

6 MR. NORMAND: Page 31.

7 Answer. Yes, of course, I would have heard about  
8 it. I doubt the deal would have been consummated. I don't  
9 know how you could sell a software business and not pass  
10 copyrights. It just didn't make sense.

11 Question. Why in your view doesn't that make  
12 sense?

13 Answer. Well, then the buyer's not really buying  
14 the business. So I'm not sure what the buyer would get. What  
15 could he do? What would be his purpose to buy the business  
16 without the copyrights?

17 Question. In your view as of the execution of the  
18 APA, what copyrights were required for SCO to exercise its  
19 rights with respect to the acquisition of UNIX and UnixWare  
20 technologies?

21 Answer. Well, you would need all of the  
22 copyrights.

23 Question. And why do you say that?

24 Answer. To do the future development, you would  
25 need the copyrights. To license the technology the way you

1 saw fit you would need the copyrights. My gosh, if you didn't  
2 own the copyrights, how could you even go after somebody that  
3 is pirating your software? How could you enforce your right  
4 to the technology? So you would need all the copyrights and  
5 binaries and source code.

6 Thank you, Your Honor.

7 THE COURT: All right. We will go ahead and take  
8 our recess at this time.

9 Miss Malley?

10 (Whereupon, the jury left the court proceedings.)

11 THE COURT: I was looking for -- I have a copy of  
12 Mr. Sabbath's deposition here, and I was looking for what you  
13 might be giving me. I couldn't find it, so I hope you have  
14 been able to. And I would also appreciate a copy of the  
15 declaration that you would be questioning him about during the  
16 course of the deposition. If you could get those and get them  
17 to me. And we'll take 20 minutes.

18 (Recess.)

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1 STATE OF UTAH )  
2 ) ss.  
3 COUNTY OF SALT LAKE )

4 I, KELLY BROWN HICKEN, do hereby certify that I am  
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of  
7 the foregoing matter on March 15, 2010, and thereat reported  
8 in Stenotype all of the testimony and proceedings had, and  
9 caused said notes to be transcribed into typewriting; and the  
10 foregoing pages number from 841 through 915 constitute a full,  
11 true and correct report of the same.

12 That I am not of kin to any of the parties and have  
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this \_\_\_\_ day of  
15 \_\_\_\_\_ 2010.

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KELLY BROWN HICKEN, CSR, RPR, RMR