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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

THE SCO GROUP, INC., a)
Delaware corporation,)
Plaintiff,)
vs.)
NOVELL, INC., a Delaware)
corporation,)
Defendant.)
_____)
AND RELATED COUNTERCLAIMS.)
_____)

CASE NO. 2:04-CV-139TS

BEFORE THE HONORABLE TED STEWART

March 16, 2010

Jury Trial
Volume VII

A P P E A R A N C E S

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1 March 16, 2010

8:30 a.m.

2 P R O C E E D I N G S

3

4 THE COURT: Good morning.

5 MR. BRENNAN: Good morning.

6 THE COURT: Mr. Brennan, you have something?

7 MR. BRENNAN: I do. Thank you, Your Honor.

8 In the interest of avoiding surprise, and to make
9 sure that we have fully apprised the Court of developments
10 as we see them and raise issues, we have been informed by
11 counsel for plaintiff that they intend likely today to call
12 as one of their witnesses one of their designated experts,
13 Dr. Christine Botosan. This is the issue. Dr. Botosan in
14 her analysis forms two general opinions. One is a causation
15 opinion and the other is a damage opinion premised on the
16 lost profits analysis. The period for which she calculates
17 damages runs through the end of 2007. There is significance
18 to that for several reasons, but let me first back up and
19 explain how this is connected to her analysis regarding
20 causation.

21 As the Court may recall from the Daubert motions,
22 Dr. Botosan conducted what is known as an events study,
23 pegged certain events and marked those as against variations
24 in SCO's stock price performance relative to the NASDAQ
25 composite index, and if there was a variation that she

1 believed was not explained by the market, then looked to see
2 whether there was an event that occurred that could be
3 explained or a predictor for the variation.

4 Of the events that she seized on, some of them are
5 litigation activities. For example, the filing of the
6 lawsuit by SCO against IBM. She identifies that as a
7 significant predictor of a variation in SCO's stock
8 performance. There are events that she does not include.
9 For example, the filing of this lawsuit against Novell in
10 early 2004. There are other events, litigation related,
11 that she does not include in her analysis that we believe
12 would be subject to cross-examination, and by virtue of
13 offering her opinions would open the door to various
14 litigation events that occurred during the period of her
15 damages analysis.

16 In 2004 there is significant litigation activity
17 in this case when Judge Kimball made his initial ruling that
18 it did not appear that the asset purchase agreement
19 constituted a transfer of copyright assets, and that in any
20 event it was unlikely that that agreement met the written
21 description or written requirement for transfer of the
22 copyright ownership. That was in the public domain. That
23 was information that the market could react to. That was
24 information that potential licensees could react to. Dr.
25 Botosan's opinion is premised entirely on the

1 prognostication or prediction of what both the marketplace
2 would do in reaction to certain events and, more
3 importantly, what potential licensees might do.

4 So if, in fact, the opinion that is going to be
5 offered through direct examination is what is the mind-set,
6 the state of mind of the market for potential licensees in
7 either 2004, 2005, 2006 or 2007, which is her damages
8 period, then in all fairness Novell ought to be able, since
9 they would open the door, to examine the witness regarding
10 other events. In fact, these are not even predicted events,
11 these are actual events that would have a significant impact
12 on the reaction both in the market and to potential
13 licensees.

14 I have pointed out Judge Kimball's initial ruling
15 in 2004 which is within the damages period and because,
16 according to Dr. Botosan's report, and the deposition
17 testimony that was taken, she also includes damages, a very
18 significant amount of damages for 2007, and that is the very
19 year where Judge Kimball, of course, issued his ruling
20 finding in favor of Novell.

21 So, Your Honor, I wanted to alert the Court that
22 if they are going to proceed with this line of testimony,
23 they would be clearly opening the door and Novell in every
24 respect ought to be able to examine Dr. Botosan regarding
25 these events. This is not simply an analysis of what was

1 Novell's state of mind, because the expert testimony now
2 goes to what is the state of mind of third parties.

3 Similarly, Dr. Pisano, we are told they may also
4 call, and is the one that conducted the analysis based on
5 surveys, again, prognostications. Here we have actual real
6 world events that play a significant role, and we ought to
7 be able to cross-examine both Dr. Botosan and Dr. Pisano
8 regarding these developments should they seek to recover
9 damages at any point beyond 2003.

10 THE COURT: Thank you.

11 Mr. Hatch.

12 MR. HATCH: Your Honor, of course, this is the
13 first time we have heard of this listening to it today, but
14 Dr. Botosan's regression analysis only involves events in
15 2003. We don't intend, given the prior discussions with the
16 Court, we don't intend to specifically identify court
17 hearings or talk about court hearings, and those were part
18 of her report, and, as I understand it, that does not come
19 in as evidence, but we'll be discussing her event study
20 analysis and oral opinions and as we did when we had the
21 Daubert hearing.

22 THE COURT: Mr. Brennan is saying, if I understand
23 him, that regardless of whether you plan to discuss them
24 that her report would have to reflect those events.

25 MR. HATCH: Well, he is kind of mixing two things,

1 because he is talking about causation again and then
2 damages. On the event study, which talks about causation,
3 those are events in 2003. The particular event that he is
4 most concerned about apparently is Judge Kimball's summary
5 judgment ruling which came down in August of 2004. Excuse
6 me, 2007. The damages study, and that is where he moves to
7 damages, the damages study went through October of that
8 year, because that was the month leading up to the trial, so
9 we are only going to talk about a couple of months there.

10 So I think in large part what Novell is trying to
11 do is essentially they are trying to bootstrap in
12 information that is not relevant. It is not relevant to the
13 causation study, which is only the 2003 time period, and it
14 really does not have an effect on damages.

15 THE COURT: Mr. Brennan.

16 MR. BRENNAN: Well, clearly we have the right to
17 cross-examine the witness regarding the efficacy of the
18 events study. If the witness, that is Dr. Botosan, cherry
19 picked, in other words said I am going to pick a regression
20 period that does not include other events, and I am going to
21 cut it off before there are signal events that could have an
22 impact, we should be entitled on cross-examination to ask
23 about that.

24 Here is a perfect example. Her event study runs
25 through the end of 2003. Why stop there? What is

1 significant about the end of 2003? Why not go another 20
2 days into early 2004? January 20th is when this litigation
3 was filed. We will be able to show through stock analysis,
4 the very premise that Dr. Botosan's testimony is based on,
5 that a precipitous change in SCO's stock price was the day
6 that this lawsuit was filed.

7 In addition, the causation is not necessarily cut
8 off at a particular date, particularly when they are seeking
9 damages all the way through 2007. So, yes, there are two
10 lines of analysis. The first is her causation analysis.
11 There is nothing in the law that says that we can't go
12 beyond the arbitrary period that she picked and say, well,
13 let's look at events that happened right after 2003. Let's
14 look at early 2004. Let's look at what happened to SCO's
15 stock price in 2005, 2006, 2007, because that is their
16 damages period.

17 Now, moving to the other side, the lost profits
18 analysis, they are seeking multi-millions of dollars of
19 damages, more than \$50 million of damages in 2007 alone. In
20 that year Judge Kimball issued his summary judgment ruling.
21 We don't need to wait until 2007. In 2004 Judge Kimball
22 ruled on a motion to dismiss that the asset purchase
23 agreement did not transfer copyrights, and that it was
24 highly unlikely that amendment number two met the writing
25 requirement for transfer of ownership of a copyright.

1 Now, whether or not that ultimately proved to be
2 correct or not, that was in the marketplace. Dr. Botosan is
3 going to present to this jury events in the marketplace and
4 make prognostications. So as long as they are going to put
5 on expert witnesses who are going to testify as to what
6 happened in 2004, 2005, 2006 and 2007, and seek
7 multi-millions of dollars of damages on the premise of how
8 the market would have reacted, what was the state of mind of
9 people in the market for causation, and what was the state
10 of mind of potential licensees, Novell has every right then
11 to look at all of the events, other events that would have
12 occurred in those same periods. They will open the door if
13 they present this testimony, Your Honor.

14 THE COURT: Counsel, the Court will try to give
15 you some more precise parameters, but the Court is inclined
16 to allow the cross-examination request by Mr. Brennan. I
17 will say to you that if the issue of Judge Kimball's motion
18 for summary judgment comes up, then this Court is ultimately
19 going to have to reveal to the jury that that decision was
20 reversed. We'll just have to play that by ear. If I think
21 I can give you more guidance, I will give you something
22 before she testifies, but I do believe that it is within the
23 realm of your cross-examination --

24 MR. BRENNAN: Thank you.

25 THE COURT: -- that you be allowed to do that.

1 The Court received a letter from the plaintiffs
2 regarding the deposition testimony of three former SCO
3 employees whose depositions were taken in the IBM case.

4 First of all, counsel, it is much preferable that
5 you bring this to the Court's attention by way of motions
6 not by way of letters, okay, if you can remember that in the
7 future.

8 MR. SINGER: Yes, Your Honor.

9 THE COURT: Mr. Brennan, I am going to assume that
10 you want to respond to that.

11 MR. BRENNAN: We do. Our intention was to put
12 something together today and we can get it to Your Honor.

13 THE COURT: You do not intend to use the
14 depositions today, do you, Mr. Singer?

15 MR. SINGER: No, we do not, Your Honor.

16 THE COURT: Get us something as early this
17 afternoon as possible, Mr. Brennan. That would be very
18 helpful.

19 MR. BRENNAN: We'll do that, Your Honor.

20 THE COURT: Mr. Singer.

21 MR. SINGER: Your Honor, there is an additional
22 issue. We received last night notice from Novell that they
23 intended to add two exhibits to their exhibit list. One of
24 them involves an H.P. transaction, and we don't have a
25 problem with the late notice on that. We are not saying it

1 is admissible, but we will deal with it like any other
2 exhibit.

3 The other one, however, is a different matter. It
4 is an exhibit that essentially involves the financial terms
5 of the retention of our law firm in 2003, and does not seem
6 to have any particular relevance beyond that. It has, of
7 course, been disclosed now at the eleventh hour with Mr.
8 McBride already on the stand. We strongly object to the use
9 of that document.

10 MR. ACKER: Your Honor, it is Exhibit P-45, and
11 what it is is a transcript of a conference call that Mr.
12 McBride and others had in November of 2003. I am fully
13 willing to redact any reference to the Boies Schiller law
14 firm or how much they were paid. I simply want to use it
15 for statements that Mr. McBride and others made to the
16 investing public in November of 2003.

17 THE COURT: If the portions pertaining to your law
18 firm and the amounts paid, and what ever else it may be, if
19 those are redacted do you have a continued opposition to it?

20 MR. SINGER: We would like to see from Mr. Acker
21 what parts he plans to show the jury, because the retention
22 of the law firm is -- in fact, my partner, David Boies, is
23 involved in this conference and starts at the headline and
24 goes throughout the article, so we would like to see how it
25 is planned to be redacted to see if we have an objection.

1 MR. ACKER: I will represent to the Court and to
2 Mr. Singer that I won't show any portion of that part of the
3 conference call to the jury or ask it be admitted.

4 THE COURT: Mr. Acker, I am going to trust you on
5 this and just presume that you'll be very prudent and not
6 allow anything inappropriate pursuant to Mr. Singer's
7 opposition.

8 MR. ACKER: I will do that, Your Honor.

9 THE COURT: All right.

10 MR. SINGER: We don't have anything further, Your
11 Honor.

12 THE COURT: Mr. McBride?

13 Would someone get him?

14 Ms. Malley, if you would please bring the jury in.

15 Mr. McBride, if I could get you to please re-take
16 the witness chair.

17 Thank you.

18 (WHEREUPON, the jury enters the proceedings.)

19 THE COURT: Good morning, ladies and gentlemen of
20 the jury. In case you're wondering why the blinds are shut,
21 it is because we didn't want you to see that the sun is
22 shining outside and have any desire to be out there. All
23 right.

24 Mr. Singer, were you through your examination with
25 Mr. McBride?

1 MR. SINGER: No, Your Honor, I have more.

2 THE COURT: Go ahead, please.

3 MR. SINGER: Thank you.

4 DIRECT EXAMINATION (Cont.)

5 BY MR. SINGER

6 Q. Good morning, Mr. McBride.

7 I would like to start by bringing up SCO Exhibit 1 and
8 amendment two which is part of SCO Exhibit 1.

9 Do you recognize this as amendment number two?

10 A. Yes, I do.

11 Q. Yesterday in your testimony you were saying that you
12 had obtained some comfort from finding the language in
13 amendment number two with respect to the transfer of
14 copyrights.

15 Can you explain that?

16 A. Yes. My initial concern was when I read the asset
17 purchase agreement, and the excluded assets section said the
18 copyrights were excluded. That was why I was trying to get
19 some comfort around that. When this amendment number two
20 came in it gave me exactly the comfort that I was looking
21 for, because this effectively replaced the language that was
22 in the A.P.A. with this new language which said we had the
23 copyrights for UNIX and UnixWare necessary to run our
24 business.

25 Q. You also testified yesterday with respect to certain

1 letters on June 9th and June 12th from Jack Messman
2 pertaining to the waiver of SCO's claims against IBM.

3 Do you remember that testimony?

4 A. Yes, I do.

5 Q. I want to ask you this morning whether or not you know
6 if Novell had any continuing interest in a royalty stream
7 from IBM at the time of these letters in June of 2003?

8 A. No, they did not.

9 Q. At one time was there such an interest?

10 A. Yes, there was. At the time of the asset purchase
11 agreement in September of 1995 there was an interest.
12 However, one year later that was replaced or that was taken
13 out in a buyout. IBM effectively bought out their interest
14 of ongoing royalties, so there was not anything ongoing at
15 the point in time when they were sending me these letters.

16 Q. I would also like to ask you, Mr. McBride, if you're
17 still the C.E.O. of SCO Group?

18 A. No, I am not currently.

19 Q. When did you lose your job?

20 A. That was in October of last year.

21 Q. Do you have any stock holdings in SCO Group?

22 A. Yes, I do.

23 Q. Approximately how much?

24 A. As far as the shares that I own it is a little over
25 26,000 shares.

1 Q. Do you hold a substantial number of options?

2 A. Yes, I do have a material number of options that I hold
3 as well.

4 Q. What I would like to do now, is go back to 2002 and
5 when you became C.E.O.

6 What was SCO's business at the time?

7 A. The core business of S-C-O was selling operating
8 systems.

9 Q. Which particular products were being sold?

10 A. There were two main products being sold, the UNIX
11 operating system and then they had started to dabble in
12 trying to sell the Linux operating system.

13 Q. Which UNIX based products were being sold?

14 A. Which were UNIX based?

15 Q. Yes.

16 A. We had two main products. One was called UnixWare and
17 the other one was OpenServer.

18 Q. Explain what OpenServer was.

19 A. OpenServer was a product that a lot of store owners and
20 a lot of companies, large companies and small companies
21 would use to run their business. It was very popular in
22 retail environments and with companies like McDonald's, Good
23 Year Tire, BMW, let's see, C.V.S. Pharmacy, Walgreens.
24 There were a number of large organizations that would use
25 these in their branch offices.

1 Q. How about your server base, how large was that at the
2 time?

3 A. Between both products, both of the UNIX products we had
4 over two million servers worldwide.

5 Q. What are some examples of SCO's UNIX customers?

6 A. Well, besides the ones I mentioned, and, again, when
7 you have two million servers obviously that touches a lot of
8 customers. A lot of retailers had them. Many governments
9 around the world had them. For example, the United States
10 government uses SCO UnixWare. Even today before you can
11 launch an F-16 fighter jet off from a deck, it has to get an
12 okay from a SCO UnixWare system. Until it has this
13 encrypted key that says launch, it does not go.

14 The German train system, basically our SCO UNIX runs
15 the entire network of trains in Germany. The postal service
16 in China runs on SCO UNIX. Large banks in Russia and India
17 and other parts of the world run on SCO UNIX. There are a
18 number of small organizations that run it too, but I'm kind
19 of giving you the flavor of the big brands or the big ones
20 that you would recognize.

21 Q. You mentioned McDonald's, I believe?

22 A. Yes, McDonald's is another one.

23 Q. How does McDonald's make use of SCO UNIX?

24 A. Well, every time you pull through to order a Happy Meal
25 or a Big Mac, there is a server back there that is

1 processing these orders. The attendant will take your order
2 and enter it into a computer, and the SCO UNIX is the think
3 that is processing that transaction. So there are over
4 10,000 McDonald's, I think all of them here in the United
5 States that run on SCO UNIX. When you go into McDonald's
6 and you see the green screen computer behind the clerk
7 there, you see these orders rolling through, behind that is
8 OpenServer, SCO UNIX.

9 Q. Mr. McBride, what was the financial condition of the
10 company in July of 2002?

11 A. It was in pretty rough shape when I joined the company.

12 Q. Can you elaborate on that?

13 A. Yes, I can.

14 The company had gone through a serious decline when I
15 joined. In fact, I had been brought in for a turn around,
16 to try and get those revenues to go back up again. The
17 company was once a high flying seller of this UNIX operating
18 system, had over \$200 million per year in revenue, that was
19 in the late nineties, and then by the time that you get to
20 2002 you see that revenue coming all the way down to 50, \$60
21 million. It was heading south rapidly. It was not in good
22 shape when I joined the company.

23 Q. How much money on research and development was being
24 spent during that time period?

25 A. There was millions, tens of millions of dollars being

1 spent on research and development for new products.

2 Q. I would like you to turn to Exhibit Y-10 that appears
3 in your binder of exhibits.

4 A. Okay.

5 Q. Is Y-10 a memorandum or letter that you sent to
6 shareholders of Caldera on August 12, 2002?

7 A. Yes, it is.

8 Q. Is Caldera the company whose name was changed to SCO
9 Group, Inc.?

10 A. That is correct. It was changed just right after this
11 letter went out.

12 MR. SINGER: I move the admission of Y-10.

13 MR. ACKER: No objection.

14 THE COURT: It will be admitted.

15 (Defendant's Exhibit Y-10 was
16 received into evidence.)

17 BY MR. SINGER

18 Q. Mr. McBride, explain the purpose of your letter to
19 shareholders on August 12, 2002.

20 A. It was to inform them of my findings having been on
21 board now for not quite two months, as to what the state of
22 the company was, what the assets were that I had found
23 inside of the company. Generally it was a road map as to
24 where I hoped to take the company going forward and how to
25 capitalize on the assets that the company did have.

1 Q. Can you look at the first paragraph and explain what
2 you were doing during the first month that you became
3 C.E.O.?

4 A. Do you want me to read that?

5 Q. You can read it to yourself. The question is to
6 explain what you were doing when you joined the company.

7 A. Right. It was, again, going through this diligence
8 process, focussing on the assets that we had and trying to
9 understand how we can take those assets into the marketplace
10 and try to come up with some new ideas, instead of the
11 revenue going south, trying to figure out how to get it to
12 go up again.

13 Q. You state here that your findings were encouraging.

14 A. Yes.

15 Q. Explain why. Feel free to point to any of the bullet
16 points or discuss any of the bullet points in the course of
17 that.

18 A. Sure. If you look at the bullet points -- I can't see
19 them right now. If you could blow up that section there
20 just a bit. Thank you.

21 I would almost take these in order of importance as to
22 how I wrote them out here in the letter. The first thing
23 that I found that was incredibly valuable was the ownership
24 rights to the UNIX operating system. If you look at the
25 world of operating systems, worldwide you would essentially

1 see two very big systems. You would see one that was UNIX
2 and you would see one called Windows.

3 As we all know, Windows has become pervasive in our
4 daily use and lives, but as big as windows is, UNIX is much
5 bigger in the business environment. Through my
6 understanding and research and really coming down to what
7 our assets were, we had this asset purchase agreement and we
8 had this document that says in it, in part, SCO owns all
9 right and interest in the UNIX operating system, in UNIX and
10 UnixWare. SCO owns all versions of UNIX and UnixWare.

11 Q. Let me interrupt you three, if I might, for a moment,
12 Mr. McBride, and ask is ownership of the UNIX copyrights
13 required for SCO's business?

14 A. Yes, absolutely.

15 Q. Can you explain why ownership of the UNIX copyrights is
16 required?

17 A. Well, you can't make copies of things if you don't have
18 the copyright protection. You can't go out and do deals
19 with people. You can't enforce your rights if somebody
20 tries to take advantage of your property. There are a
21 number of reasons. It would be like the Beatles trying to
22 protect their music catalog without having the underlying
23 copyrights. You have to have the copyrights to protect it.

24 Q. Can you continue with your explanation of the points
25 that you were making in memorandum Y-10.

1 A. Sure. Again, UNIX was the first big thing we saw. We
2 mentioned the customers, and that was a big deal. When you
3 have seven of the top ten retailers in the country that run
4 on your servers, that is a good thing.

5 NASDAQ is another example. Every stock trade that goes
6 through NASDAQ runs through a SCO UNIX server. So the
7 customer base was something that we felt like we could go
8 back to and offer them new products and new offerings.

9 Q. Can you describe the importance of the distribution
10 channel?

11 A. Sure. As we mentioned earlier, we have these big
12 companies that we're talking about, but you also have a lot
13 of small companies, thousands and thousands of small
14 companies that run their business on SCO UNIX. If you were
15 to go over here to Wasatch Marine in Salt Lake City, a
16 little company like that, they have built their operating
17 business on a SCO UNIX server.

18 The problem is when you go to a small company like
19 Wasatch Marine, we don't have the capacity with the 300
20 people in the company to reach out and service thousands of
21 those kinds of customers. So what you see in bullet number
22 three, was we had over 16,000 resellers worldwide that had
23 signed up to support and be an extension, if your will, of
24 SCO's sales force but also of SCO's service and support
25 team.

1 We were selling into 82 countries and we had 12 offices
2 around the world, so we had a very broad reach through that
3 distribution channel.

4 Q. Can you explain item four?

5 A. Yes. We felt like we had this very good business and
6 we had a market capitalization at the time of \$10 million,
7 but we were competing against other companies doing similar
8 things that had a market value of, in the case of Red Hat,
9 our number one competitor, who had \$800 million. We
10 believed that from a shareholder standpoint that we were
11 undervalued, and that it was an opportunity that we could
12 have for our investors to make more money in the stock as we
13 went forward.

14 Q. Can you explain item number five?

15 A. Yes. I mentioned that we had been dabbling with Linux
16 and we have been trying to get in there. We actually had
17 formed a group or joined in a group called United Linux.
18 The idea was that we have our UNIX system over here, and if
19 people want to try this Linux system, even though it is a
20 smaller part of our company, we have an offering there. It
21 was back to this idea of what are some new things that we
22 can go to our customers with.

23 Q. Finally, can you talk about item number six?

24 A. Yes. The company did not have any debt. Although the
25 revenues were coming down and we were in a loss position on

1 a quarter-by-quarter basis, we felt like if we could get the
2 loss situation turned around, and we didn't have debt, we
3 were undervalued as a company, we felt like we had an upside
4 for investors.

5 Q. Were you aware in 2002 of what SCO's market share had
6 been in the late 1990s?

7 A. Yes. When we talk about SCO, the SCO UNIX product
8 line, which at the time was owned by the Santa Cruz
9 Operation, it had revenues that exceeded \$230 million, and
10 market capitalization that was multiples more than that.

11 Q. In terms of the share of the market, though, of
12 servers, of UNIX servers --

13 A. At that point in time when the company was selling a
14 couple hundred million dollars a year, the market share for
15 UNIX, the UNIX operating system that the company held was 43
16 percent.

17 Additionally, if you take just the UNIX on Intel, which
18 is really where the company specialized, which was the P.C.
19 Intel type chips, the company had an 85 percent market
20 share.

21 Q. What had been happening to the sales of UNIX over the
22 time frame of the late the 1990s to when you joined the
23 company in 2002?

24 A. They had been falling precipitously.

25 Q. Did you develop an understanding why the company's

1 sales were falling precipitously?

2 A. Yes. It was mainly due to the competition from this
3 Linux operating system.

4 Q. Can you explain how Linux became a competing operating
5 system?

6 A. Yes. Linux, as we talked a little bit about yesterday,
7 in the initial phases was somewhat of a hobbyist tool, a
8 hobbyist operating system. It was like a garage band
9 operating system with college students and free programmers
10 and people getting together and coming up with this fun
11 little operating system.

12 Somewhere along the way, though, there was a transition
13 where it went from being a fun little garage band toy to
14 being a major operating system that big companies used.
15 What happened along the way is we had a joint venture
16 partnership with the IBM Corporation that went sour, and
17 later we found that important materials of ours had found
18 their way via IBM into Linux, which made it a very viable
19 operating system for businesses to buy.

20 Q. Now, why would IBM want to spend money on something
21 like Linux that was being distributed for free?

22 MR. ACKER: Objection, calls for speculation, Your
23 Honor.

24 THE COURT: Overruled.

25 THE WITNESS: IBM's main business was selling

1 hardware systems and selling service to support those
2 systems. The fact that Linux was there as a free operating
3 system played right into their strategic hands. They liked
4 the fact that they could go out and sell a system and get
5 people to buy an entire package from them, and they could
6 sell the value saying, look, you got your software for free.
7 That was a big strategic opportunity for them.

8 BY MR. SINGER

9 Q. Did there come a time, Mr. McBride, when you became
10 concerned that Linux contained within it propriety UNIX
11 technology?

12 A. Yes, I did.

13 Q. Can you explain how that came to your attention?

14 A. Sure. I joined the company in June of 2002. The
15 company is in a free fall in terms of revenue. Up to that
16 point in my life I had done a lot of start-ups. I had done
17 companies that were at zero going up, and now I'm looking at
18 you take a company that is coming done and turn it around.
19 My first thought was, well, this can't be that hard. They
20 have a lot a revenue. It ends up that it is a difficult
21 proposition.

22 What I did first when I came in is I brought together
23 the top 12 managers of the company and asked each of them
24 what is going on with the company? What can we do to turn
25 this around? How can we get our revenues returned? In the

1 course of discussing opportunities with those 12 managers,
2 one of them, who was the Linux evangelist, who had come to
3 me in my one-on-one interview with him, said to me that
4 there were UNIX materials that were being misused with
5 Linux, and that it was a problem for the company, but it
6 could also be an opportunity if we played it right. That
7 was really the first introduction that I had that there was
8 misuse going on inside of Linux.

9 Q. Did you have people investigate that further?

10 A. Yes, I did.

11 Q. Did you determine what part of UNIX you were initially
12 concerned with that had been put into Linux?

13 A. Yes. The individual we're talking about, his name is
14 John Terpstra, and he is a very bright individual and has
15 been around the Linux environment for many years. He
16 informed me that the main area he was concerned with was
17 something called shared libraries. Attached to the shared
18 libraries was this thing called a dynamic linker.

19 That was the main thing that he had introduced to me
20 that he felt like was problematic.

21 Q. Did you develop a program to license those libraries
22 for use with Linux?

23 A. Yes, we did.

24 As I talked through this with Mr. Terpstra, the idea
25 that he had, and I supported it, was this concept of saying,

1 well, instead of going to all these people who are running
2 Linux and saying, you know, you can't use that, take it out,
3 the idea was to go to them and say, okay, you're using this.
4 We have a license here, and those are our materials, but we
5 will sell you a license and then it would be a win win.
6 They would be able to continue to use those libraries and we
7 would be able to get some royalty or some revenue from it.

8 Q. Could you look at Exhibit Y-11.

9 A. Okay.

10 Q. Was this a press release that you planned to issue on
11 December 11, 2002?

12 A. Yes. That is correct.

13 MR. SINGER: I move the admission of Y-11.

14 MR. ACKER: No objection.

15 THE COURT: It will be admitted.

16 (Defendant's Exhibit Y-11 was
17 received into evidence.)

18 BY MR. SINGER

19 Q. What was this press release about?

20 A. This was a press release that was going to announce our
21 introduction of this licensing program for those shared
22 libraries that we just talked about.

23 Q. What was the date that was set for this press release?

24 A. That was December 11 in 2002.

25 Q. Was this press release issued at that time?

1 A. No, it was not.

2 Q. Did you delay the announcement?

3 A. Yes, we did.

4 Q. Why is that?

5 A. Two days before the announcement IBM approached us and
6 was understanding that we were going to make this
7 announcement and was not happy about it, and asked us to
8 hold off on the announcement so that we could have time to
9 talk about it.

10 Q. What was your understanding of why IBM didn't want you
11 to make this announcement at this time?

12 MR. ACKER: Objection, calls for speculation.

13 THE COURT: Sustained.

14 BY MR. SINGER

15 Q. Did you subsequently issue a press release announcing
16 the program?

17 A. Yes, we did.

18 Q. I would like you to turn to Exhibit 174 for SCO.

19 Is this a press release that, in fact, was issued on
20 January 22, 2003?

21 A. Yes. That is correct.

22 MR. SINGER: I move the admission of Exhibit 174.

23 MR. ACKER: No objection.

24 THE COURT: It will be admitted.

25 (Plaintiff's Exhibit 174 was

1 received into evidence.)

2 BY MR. SINGER

3 Q. Mr. McBride, can you take the jury through the points
4 which are being made here in terms of the announcement of a
5 SCOSource division? What was that?

6 A. We had gone through this now and we had been working on
7 this for several months, and the decision was -- we have had
8 this really rough run with our products getting beat up by
9 this free operating system called Linux, and now we're going
10 to come back out and put together a licensing program. We
11 are going to announce this library licensing deal that we
12 have been talking about, but we had to put them inside of a
13 group. We formed a new group which was different from our
14 products group. Our products group continued to sell to
15 McDonald's and other people.

16 The SCOSource division, on the other hand, had a
17 charter to take SCO's valuable intellectual property and go
18 out and license them in different ways to different people.
19 SCOSource then is the division, and later had product names
20 that were branded SCOSource, but it starts off SCOSource is
21 the division for licensing these properties.

22 Q. Can you move to page 2 of the release.

23 MR. SINGER: Mr. Calvin, if you would highlight
24 the first paragraph.

25 BY MR. SINGER

1 Q. Read the quote that is attributed to you.

2 A. Sure. SCO was the developer and owner of SCO UnixWare
3 and SCO OpenServer, both based on UNIX System Five
4 technology. SCO owns much of the core UNIX intellectual
5 property and has full rights to license this technology and
6 enforce its associated patents and copyrights. SCO is
7 frequently approached by software and hardware vendors and
8 customers who want to gain access to pieces of key UNIX
9 technology. SCOSource will expand our licensing activities,
10 offering partners and customers new ways to take advantage
11 of these technologies.

12 Q. Turn to the third paragraph.

13 MR. SINGER: Mr. Calvin, highlight that paragraph.

14 BY MR. SINGER

15 Q. Who was Mr. Sontag?

16 A. Chris Sontag was the vice president over the SCOSource
17 division.

18 Q. Can you read to the jury the statement in the press
19 release that Mr. Sontag made.

20 A. Sure.

21 The most substantial intellectual property in UNIX
22 comes from S-C-O. While Linux is an open source product it
23 shares velocity and architecture and A.P.I.'s with UNIX.
24 Starting today, SCO's libraries will be available to third
25 party application developers, O.S. vendors, hardware

1 providers, service vendors and end users. SCO will help
2 customer legitimately combine Linux and UNIX technology to
3 run thousands of UNIX applications. SCOSource plans to
4 create other new licensing programs to make our rich
5 inventory of UNIX system technology available to the market.

6 Q. Now, were you seeking to sell the SCOSource products to
7 your existing customers who were using UnixWare on
8 OpenServer?

9 A. No. This was primarily going out to a new set of
10 customers.

11 Q. If there were customers who had bought a Linux product
12 for SCO, would they have to buy this product?

13 A. No.

14 Q. Now, at the time of the actual launch of this product,
15 which this is January 22, 2003; is that correct?

16 A. That is correct.

17 Q. Did anything occur at that time to cause you to be
18 concerned about copyrights?

19 A. Yes.

20 Q. Can you explain that.

21 A. Let me back up just a little bit. In December IBM had
22 come to us and was very concerned about our announcement of
23 this SCOSource licensing division and the subsequent
24 products that came from it. We negotiated back and forth
25 with them a couple times and they did not want us to go

1 launch this product.

2 Ultimately we came to a disagreement and said we are
3 going to. On the day that we launched it I was at a trade
4 show in New York called Linux World. I received a call from
5 a senior executive from IBM by the name of Karen Smith, who
6 was very upset and wanted to sit down and have a meeting to
7 talk about what happened with this announcement.

8 We had a breakfast meeting the next day. She again was
9 very upset. She was very upset that the announcement went
10 out. We talked for a couple of hours and there were other
11 discussions about their UNIX license that was becoming an
12 issue at the time as well. In the context of those
13 discussions, Karen Smith said to me, well, we are not
14 worried about you being able to sue us or others, because
15 you never got the copyrights from Novell in that transaction
16 in 1995.

17 Q. Did she say what her source of information was?

18 A. She implied that there were discussions going on with
19 Novell.

20 Q. Had you previously taken any steps to assure yourself
21 that SCO, in fact, owned the UNIX copyrights?

22 A. Ask that again.

23 Q. Had you previously taken any steps to assure yourself
24 that SCO did own the UNIX copyrights?

25 A. Yes, I had.

1 Q. Can you explain what you did?

2 A. In the fall time frame of 2002 when we started putting
3 together this licensing program and this licensing division,
4 the first thing that I did was to do a lot of research and
5 due diligence to get an understanding of all of the
6 agreements and all of the intellectual property that we
7 owned.

8 I had a number of attorneys that we engaged at that
9 time. The first person that I called was my older brother,
10 Kevin, who is an attorney, one of the smartest people I
11 know, and he came in and did an initial analysis. He is not
12 an intellectual property attorney, but he connected me with
13 some that were. We had an intellectual property attorney
14 come in and start looking at the agreements. As we went
15 through those agreements, the word that was coming back to
16 us was --

17 MR. ACKER: I object. I think we need a sidebar
18 on this.

19 THE COURT: Okay.

20 (WHEREUPON a sidebar discussion was begun.)

21 MR. ACKER: I suspect we're going to get into some
22 sort of advice of counsel that he in fact was told they did
23 own the copyrights, and this was the subject or discussion
24 in Mr. McBride's deposition and the privilege was asserted
25 when we started to inquire into this area. So they can't on

1 the one hand not let us get at this during the course of
2 discovery, and now try and present it to the jury.

3 MR. SINGER: It is not my intent to get into such
4 a statement. My point is simply getting Mr. McBride to say
5 why he approached Novell for clarification on this issue. I
6 will try and focus the questions to make that clear, and I
7 am not planning to get into anything Mr. -- advice of
8 counsel or otherwise.

9 MR. ACKER: The problem is is that clearly the
10 implication of this line of questioning is just that, and he
11 in fact just said that it was what my brother told me that
12 everything was okay, and there is no other reason to ask
13 that other than to --

14 MR. SINGER: That is not in fact what --

15 THE COURT: Do not ask anymore questions about
16 specific legal advice based upon the representations that
17 you raised the privilege on in the course of deposition. I
18 can't allow you to do that.

19 MR. SINGER: I understand.

20 THE COURT: All right.

21 (WHEREUPON, the bench conference was concluded.)

22 BY MR. SINGER

23 Q. Mr. McBride, in this fall 2002 period, did you look at
24 the A.P.A.?

25 A. Yes, I did.

1 Q. Did you see the language which is pertaining to an
2 exclusion of copyrights?

3 A. Yes, I did.

4 Q. At that time were you aware of amendment number two?

5 A. No, I was not.

6 Q. Did you contact Novell in the fall of 2002?

7 A. Yes, I did.

8 Q. Who did you speak with?

9 A. I spoke with a handful of attorneys, but the one that I
10 spent most the time talking to was a person by the name of
11 Greg Jones.

12 Q. Tell us about your conversation with Mr. Jones.

13 A. I talked to Greg and I called him on the phone. He was
14 somebody I had known when I was working at Novell years
15 earlier. I talked to him about how I was now the C.E.O. of
16 SCO and that we had our UNIX business that we had bought
17 from Novell back in the nineties.

18 We were putting together this licensing division and we
19 were going to go out and license and enforce and protect our
20 intellectual property, but in the process of doing that my
21 research and diligence had shown that there was an oddity,
22 if you will, in the asset purchase agreement that didn't
23 make any sense to me, which was this excluded asset saying
24 that copyrights were excluded from the asset purchase
25 agreement.

1 Q. If you had been aware of amendment number two, would
2 you have called Mr. Jones?

3 A. No, I would not have.

4 Q. What did Mr. Jones say to you?

5 A. Mr. Jones was as stumped as I well. He said, well,
6 that does not make any sense. We talked about it and he
7 ultimately agreed to go try and find some documentation that
8 would clear up the problem.

9 Q. Did that happen?

10 A. I don't know what he did on his side exactly. He
11 represented to me that he was going to go off and look and
12 then report back to me.

13 Q. Did he report back?

14 A. Yes, he did.

15 Q. What did he say?

16 A. We talked a number of times, several times over the
17 coming months. The first thing that he came back with was
18 that they had looked around the office and they didn't see
19 anything, and realized that their UNIX files were in
20 archives off site and they didn't have access to them, and
21 that they didn't want to take the time or energy to go look
22 in their archives.

23 Q. Did you discuss any alternative to doing that?

24 A. Yes. Then at Mr. Jones' request, his idea was why
25 don't you guys put together a clarification letter, and we

1 all know what happened here, and rather than us going and
2 chasing down this language, why don't we just -- if you
3 could just draft a clarification letter and send it over and
4 I'll try and get somebody to sign it indicating that the
5 copyrights did in fact transfer in 1995.

6 Q. Did that happen?

7 A. The first part of it happened in that we did send him
8 over the proposed or requested clarification letter.

9 Q. Was it ever signed and returned?

10 A. The second part did not happen. They did not sign
11 that.

12 Q. Did Mr. Jones ever state that SCO did not own the UNIX
13 copyrights?

14 A. No, not at all.

15 Q. Did Mr. Jones ever state that Novell continued to own
16 the UNIX copyrights?

17 A. No.

18 Q. Did you at any time ask Novell to transfer the
19 copyrights?

20 A. No, not at all.

21 Q. To your knowledge did anyone else at SCO do so?

22 A. No.

23 Q. Now, going back to the issue of Linux and UNIX, did
24 there come a time when your concern expanded from the
25 libraries that were used with Linux to other parts of the

1 UNIX system?

2 A. Yes.

3 Q. Explain that.

4 A. Well, over time we engaged a team of technology experts
5 to come in and evaluate what was going on inside of the
6 Linux code base and the UNIX code base. As those
7 evaluations progressed, there were additional concerns
8 coming back that there was more infringement going on than
9 just the libraries.

10 Q. What did you discover concerning that issue?

11 A. What did I discover?

12 Q. Yes.

13 A. What we discovered ultimately is that UNIX and its
14 technology was showing up in material ways inside of Linux.

15 Q. Did SCO bring a lawsuit against IBM in March of 2003?

16 A. Yes, we did.

17 Q. Why did you do so?

18 A. We brought that for breach of contract.

19 Q. Why did you do so?

20 A. IBM had taken material amounts of technology that was
21 under license to our UNIX group and our UNIX System Five
22 technology, and had donated and had moved it over to Linux
23 and had given it to Linux to help it grow up to be this more
24 mature operating system. That was against the contract
25 rights that they had with us.

1 Q. Did you put IBM on notice that you would terminate
2 their license?

3 A. Yes, we did.

4 Q. Did that begin a period of discussions with IBM about
5 the resolution of those issues?

6 A. Yes. That is correct.

7 Q. Is that the notice that we talked about yesterday
8 afternoon that Novell acted to waive SCO's rights to on June
9 12, 2003?

10 A. Correct.

11 Q. Did there come a time, Mr. McBride, when SCO decided to
12 expand the SCOSource licensing program?

13 A. Yes.

14 Q. Was there more than one type of SCOSource license that
15 you developed?

16 A. Yes.

17 Q. Can you explain what the vendor license was?

18 A. Yes. The vendor license was the idea of taking our
19 valuable UNIX technology, UNIX the UnixWare, and going to
20 other large companies and selling them a source code license
21 where they could take UNIX and they could go develop and do
22 things like we had been doing with it.

23 Q. Was there another type of license called a right to use
24 license?

25 A. Yes. That is correct.

1 Q. Can you explain what that is?

2 A. The right to use license was a little different than
3 the vendor license. The vendor license was where you would
4 go to a large company and say here is all of our technology,
5 develop your own products around that.

6 The right to use license, on the other hand, was taking
7 the same technology but putting it in the form of an end
8 user agreement, and allowing end users of Linux to run Linux
9 to their heart's content, and any of the intellectual
10 property there that mapped over to UNIX would be covered
11 with this right to use license.

12 Q. Did you send out a lot of letters to major
13 corporations?

14 A. Yes, we did.

15 Q. I would like you to look at SCO Exhibit 241.

16 Is this a letter which you sent on May 12, 2003?

17 A. Yes.

18 MR. SINGER: I move the admission of Exhibit 241.

19 MR. ACKER: No objection.

20 THE COURT: It will be admitted.

21 (Plaintiff's Exhibit 241 was
22 received into evidence.)

23 BY MR. SINGER

24 Q. Mr. McBride, is this a letter which SCO sent on May 12,
25 2003 or about that date to a lot of different companies?

1 A. Yes. That is correct.

2 Q. What was the purpose? Well, let's walk through the
3 letter first.

4 A. Okay.

5 Q. Well, let's talk about the first paragraph.

6 MR. SINGER: If we could blow that up, Mr. Calvin.

7 BY MR. SINGER

8 Q. Why were you telling these companies about your rights
9 in the UNIX operating system?

10 A. We wanted to establish a foundation that we were the
11 owner of this operating system before we started talking
12 about the licensing plan. At this point we were not talking
13 licensing, we were putting them on notice that we had
14 concerns about the misuse of our intellectual property
15 inside of Linux.

16 Q. Was it important to you to put them on notice?

17 A. Yes.

18 Q. Can you go to the next paragraph of the letter, or the
19 next couple of paragraphs actually.

20 MR. SINGER: Mr. Calvin, can you put the balance
21 of those up?

22 BY MR. SINGER

23 Q. Can you explain what you meant by the statement that
24 the development process for Linux is different substantially
25 from the development process for other enterprise operating

1 systems?

2 A. Yes. The Linux development environment was one where
3 anybody around the world could go and take things and
4 contribute them into this pool of code, if you will. When
5 people contributed into this pool of code there was not a
6 process to guarantee that the code going in was protected
7 and free of copyright material.

8 MR. SINGER: Mr. Calvin, can you blow up the last
9 two paragraphs of this page so that the jury can see those.

10 BY MR. SINGER

11 Q. Can you explain what you were seeking to tell people
12 about in the last couple paragraphs on page 1?

13 A. What we're talking about here is with this Linux
14 system, which was really trying to replicate what UNIX did,
15 it was trying to copy SCO, and there were cases we were
16 finding where our code was showing up inside of Linux. In
17 some of these cases people who were contributing this code
18 worked for companies that had licenses to SCO UNIX
19 technology.

20 There was a big concern about someone having access to
21 our code, and then going out and donating it to Linux, and
22 the authoring process here not being supervised and not
23 having the legal integrity whether that code was clear or
24 not was something that was going to create a liability for
25 the end user of Linux when it was all said and done.

1 Q. Is that different than the way most software was
2 distributed?

3 A. Yes.

4 Q. Can you explain?

5 A. Most software or proprietary software is usually
6 developed inside of a company, and it is basically one
7 company that is putting it together and then they go to
8 market with it, and then they stand behind it and they
9 warrant that this is our material.

10 Q. Was that true of Linux?

11 A. No, it was actually the opposite. There was an end
12 user license agreement that goes with Linux that says
13 because you got this operating system for free, if there are
14 any problems with it, then it is your problem, is basically
15 what the license says, to paraphrase.

16 Q. What was the reaction to this letter from companies
17 that received it?

18 A. It was mixed.

19 Q. What was the different type of reaction that formed
20 that mix?

21 A. Of the people who received this, hundreds of people
22 called in and wanted to talk about the situation. Some were
23 interested in getting a license, which at the time we didn't
24 even have a license. We were just putting them on notice as
25 to the issue. Some people were interested in a license.

1 Some people called and said why did you send this letter?

2 We don't even do Linux.

3 Then others, you know, were not excited about the
4 prospect of having to have a license or having to face the
5 prospect of going into a battle over this.

6 Q. Did any corporations ask for a way to become compliant
7 with your intellectual property?

8 A. Yes, they did.

9 Q. Now, was there an adverse reaction from other parts of
10 the technology community?

11 A. There was an extremely adverse reaction from the Linux
12 part of the community. Not all of them. There were some
13 that were saying, yes, I understand what you're saying, but
14 the hard core loyalists, if you will, had a severe negative
15 reaction to what we were doing.

16 Q. Did you enter -- let me rephrase that.

17 Was the quarter that ended April 30th a good quarter
18 for SCO?

19 A. Yes, it was.

20 Q. We're talking about April 30, 2003?

21 A. Correct.

22 Q. Turn to Exhibit 254.

23 That is a press release May 28, 2003. Is that what
24 this document is, a press release on May 28, 2003?

25 A. Yes.

1 MR. SINGER: I move the admission of Exhibit 254.

2 THE COURT: It is already admitted.

3 BY MR. SINGER

4 Q. Mr. McBride, can you take a look at Exhibit 254, and
5 tell us whether that accurately reflects your understanding
6 of the financial performance of SCO during the quarter that
7 ended on April 30, 2003?

8 A. Yes, it does.

9 MR. SINGER: Again, can you blow up that first
10 paragraph?

11 BY MR. SINGER

12 Q. Now, Mr. McBride, we talked yesterday about what
13 happened in May and June with respect to you and your
14 conversations with Mr. Messman. I would like to ask you
15 about the financial performance at the end of June of 2003
16 and ask you to take a look at Exhibit 229.

17 Is this a presentation to the board of directors of SCO
18 on June 26, 2003?

19 A. Yes, it is.

20 Q. Was this a financial presentation?

21 A. Yes. That is correct.

22 Q. Do you know whether the financial information contained
23 here were taken from the books and records of SCO?

24 A. Yes.

25 Q. Does that include both the historical and forecasted

1 financial information?

2 A. Yes.

3 Q. Was it a regular part of SCO's business to create such
4 documents and maintain such records?

5 A. Yes.

6 Q. Are you knowledgeable about these issues and able to
7 address them?

8 A. Yes, I am.

9 MR. SINGER: I move the admission of SCO Exhibit
10 229.

11 MR. ACKER: I object on a couple of grounds, Your
12 Honor. One, it appears that there are two documents stapled
13 together. The second document at the back is a review draft
14 and it appears to be unrelated to the power point. I don't
15 think this power point is a proper business record. It is
16 not a financial record of the company, it is simply a power
17 point and it is hearsay on those grounds. It does appear to
18 be two documents, and the back document appears to be a
19 draft of something.

20 MR. SINGER: I have no problem with removing the
21 back document. The first part of the document constitutes a
22 series of financial charts, and I can go through them one by
23 one, if necessary, to show that those come from the
24 financial records prepared in the ordinary course of SCO's
25 business.

1 THE COURT: The Court will overrule the objection
2 and allow you to proceed, but I do want the back part taken
3 out.

4 MR. SINGER: Yes.

5 BY MR. SINGER

6 Q. Can we turn to the first page of the document?

7 Actually, if we look at the first document, the first page,
8 is that a breakdown of the revenue by product line?

9 A. Yes.

10 Q. Where it says E next to a particular bar on the graph,
11 does that mean estimated?

12 A. Yes.

13 Q. And in June of 2003?

14 A. That is correct.

15 Q. Can we turn to page -- look at the Bates stamp
16 number -- it is page 921.

17 Can you explain what this page is?

18 A. Yes. This is a breakdown of our revenue by business
19 line and product.

20 Q. And certain periods are listed as actual and others are
21 forecasted?

22 A. Yes.

23 Q. Can you explain and tell the jury what the numbers are
24 on the line which says SCOSource on the left-hand side?

25 A. Sure. SCOSource, again, relates to -- as you can see,

1 up until January 31 there was no revenue coming from that.
2 When I joined the company and we had this revenue problem
3 and we came up with the SCOSource division, but the first
4 quarter of having any revenue in the SCOSource division
5 shows up in our second fiscal quarter of 2003 ending April
6 30th. The first quarter then you see with revenue is the
7 actual revenue, and that is the revenue that we reported in
8 our earnings report that quarter that we mentioned just a
9 moment ago.

10 Q. Are these figures in millions?

11 A. These figures are in millions as it mentions up above.

12 Q. What was the forecast for 2003, for the year?

13 A. The forecast for the year was 27.25 million.

14 Q. Did you also have a forecasted number for the SCOSource
15 division for 2004?

16 A. Yes, we did.

17 Q. What number was that?

18 A. 40 million.

19 Q. Did this represent your best estimates at the time of
20 this report?

21 A. Yes, it did.

22 Q. Did you proceed with SCOSource licensing in the summer
23 of 2003?

24 A. Yes, we did.

25 Q. I would like you to take a look at SCO Exhibit 748.

1 This has your name on the front page.

2 A. Yes, it does.

3 Q. Can you explain what this document is without talking
4 about the contents of it?

5 A. I need to see the second page to see what the --

6 Q. It is also in your book.

7 A. This is an overview. This was a power point
8 presentation overview of the company at the time.

9 Q. Take a look in your book at Exhibit 748.

10 A. Okay.

11 Q. Was this presentation used with companies that were
12 interested in SCOSource products?

13 A. Yes, it was.

14 MR. SINGER: I move the admission of 748.

15 MR. ACKER: Objection. It is hearsay, Your Honor.

16 MR. SINGER: I am not seeking to admit it for the
17 truth of the matter, but rather as part of the presentation
18 that was made to customers showing the operation of the
19 program.

20 MR. ACKER: I don't know how it is relevant. He
21 wants the truth of the matter asserted in here, Your Honor.
22 There are allegations and assertions in here that he can't
23 prove and he wants to do it with this document and it is
24 hearsay.

25 THE COURT: I am going to sustain the objection.

1 I think it is clearly being offered for what it says.

2 BY MR. SINGER

3 Q. Did you provide customers with information in the
4 summer of 2003 regarding the SCOSource program?

5 A. Yes, we did.

6 Q. Did you create a code room at SCO in the summer of
7 2003?

8 A. Yes, I believe it was June of 2003.

9 Q. Can you explain what the code room was?

10 A. The code room had a couple of things in it. As was
11 mentioned in one of our earlier documents, we had thousands
12 and thousands of agreements with various companies, so we
13 had all of these UNIX agreements in different binders.
14 Those were in the code room. They indicated who all of our
15 licensees were.

16 The second thing we had in the code room was sample
17 code of the infringement that we had found to that point
18 between UNIX and Linux. The code room was set up because
19 there was a lot of demand. Once these letters went out a
20 lot of companies responded and said we want to see some
21 code. We don't need to see the whole thing, we just need to
22 see a sample so that we understand what you're saying has
23 some legitimacy to it. The code room was set up to let
24 people come in and see the examples of here is the Linux
25 code and here is the UNIX code and here is how we are

1 showing that they are infringing.

2 Q. Did you register copyrights in July of 2003?

3 A. Yes, we did.

4 Q. Did these include copyrights that you had obtained from
5 Novell?

6 A. Yes.

7 Q. Can you explain why it was important to you to register
8 copyrights at that point in 2003?

9 A. In order to enforce your copyrights, you actually have
10 to have them registered with the copyright office.

11 Q. Can you identify Exhibit 532? Is this a press release
12 that you issued on July 21, 2003?

13 A. Yes. That is right.

14 MR. SINGER: I move the admission of Exhibit 532.

15 MR. BRENNAN: No objection.

16 THE COURT: It will be admitted.

17 (Plaintiff's Exhibit 532 was
18 received into evidence.)

19 BY MR. SINGER

20 Q. Tell us what the purpose of this press release was, Mr.
21 McBride.

22 A. It was to let the world know that we had actually
23 registered our copyrights with UNIX and UnixWare.

24 Q. Can you turn to the fourth paragraph? Well, let's turn
25 first to the first paragraph.

1 Can you read this paragraph out loud for the jury,
2 please.

3 A. Sure.

4 The SCO Group today announced that it has received U.S.
5 copyright registrations for the UNIX System Five source
6 code, a jurisdictional prerequisite to enforcement of its
7 UNIX copyrights. The company also announced that it will
8 offer UnixWare licenses tailored to support run time binary
9 use of Linux for all commercial users of Linux based on
10 kernel version 2.4X and later. S-C-O will hold harmless
11 commercial Linux customers that purchase a UnixWare license
12 against any past copyright violations, and for any future
13 use of Linux in a run only binary format.

14 Q. If we go down to the fourth paragraph, can you read
15 that paragraph, please.

16 A. Yes.

17 Hundreds of files of misappropriated UNIX source code
18 and derivative UNIX code have been contributed to Linux in a
19 variety of areas, including multi processing capabilities.
20 The Linux 2.2X kernel was able to scale to two to four
21 processors. With Linux 2.4X and the 2.5X development
22 kernel, Linux now scales to 32 and 64 processors through the
23 addition of advanced symmetrical multi processing
24 capabilities taken from UNIX System Five and derivative
25 works in violation of S-C-O's contract agreements and

1 copyrights.

2 Q. Did you publicly announce a SCOSource I.P license for
3 users in Linux?

4 A. Yes.

5 Q. Would you turn to SCO Exhibit 533.

6 Is this a press release dated August 5, 2003 by SCO?

7 A. Yes. That is correct.

8 MR. SINGER: I move the admission of 533.

9 MR. ACKER: No objection.

10 THE COURT: It will be admitted.

11 (Plaintiff's Exhibit 533 was
12 received into evidence.)

13 BY MR. SINGER

14 Q. What was the purpose of this press release on August 5,
15 2003?

16 A. It was to announce that we had now formally put
17 together the SCOSource licensing program, and to let them
18 know that there was this binary license to run SCO's
19 intellectual property in Linux.

20 MR. SINGER: Can you expand the first paragraph of
21 the press release, please.

22 BY MR. SINGER

23 Q. Now, earlier you had said that there were two different
24 types of licenses, a vendor license and a right to use
25 license.

1 A. Right.

2 Q. Which one was being referred to here?

3 A. This was the right to use license.

4 Q. Did you also have deals with vendors for vendor
5 licenses going on during this time period?

6 A. Yes, we did.

7 Q. I would like to ask you whether or not Hewlett-Packard
8 was one of those companies?

9 A. Yes, they were.

10 Q. Take a look at Exhibit H-18.

11 Is this a letter which you wrote to Ms. Fiorina, the
12 chief executive officer of Hewlett-Packard on August 4th of
13 2003?

14 A. Yes.

15 MR. SINGER: I move the admission of H-18?

16 MR. ACKER: No objection.

17 THE COURT: It will be admitted.

18 (Defendant's Exhibit H-18 was
19 received into evidence.)

20 BY MR. SINGER

21 Q. Can you explain at this point in time what the status
22 was of the discussions with H.P. regarding a SCSource
23 vendor license?

24 A. Yes. We were in discussions with them about a vendor
25 license, and while those discussion were going on H.P had

1 asked us to give them an okay letter for the marketplace, to
2 indicate that their use of UNIX, which was a different
3 product that we had had with them for a long time, and they
4 had a UNIX license like IBM did, and they wanted a comfort
5 letter to go to their customers to show that they were not
6 suffering from the same kind of infringement -- not
7 infringement, but rather breach of contract problems that
8 IBM was. They asked us for a comfort letter to indicate
9 that. That is what this letter was.

10 Q. Did you provide that comfort letter?

11 A. Yes.

12 Q. Can you turn to the last paragraph of the letter.

13 Can you read that?

14 A. Yes.

15 We wish to clarify that in our code review of the
16 referenced Linux kernels today, SCO has not identified any
17 infringing Linux code attributed to Hewlett-Packard. It
18 appears from our review, that Hewlett-Packard has made
19 admirable efforts to abide by its obligations under the H.P.
20 agreements, including those involving Compac, Dec and
21 Tandem. It is our position that H.P. is in full compliance
22 with its obligations under the H.P. agreements. We
23 appreciate your diligence in these matters.

24 Q. Did SCO enter into a release agreement that formally
25 indicated that?

1 A. Yes, we did.

2 Q. Is that attached to the letter?

3 A. Yes, it is.

4 Q. At the same time was there a discussion about
5 Hewlett-Packard purchasing a Linux vendor license?

6 A. Yes.

7 Q. Explain that.

8 A. Separate from this discussion then was the idea that
9 H.P. would come in and take a vendor license for Linux. We
10 went into negotiations from I think early August into the
11 September time frame.

12 Q. Were you personally involved in those discussions?

13 A. Yes, I was.

14 Q. Who did you have those discussions with?

15 A. With the vice president of intellectual property at
16 Hewlett-Packard, a gentleman by the name of Joel Byers.

17 Q. Can you tell us how far those negotiations went?

18 A. They went very deep, near conclusion.

19 Q. I would like you to take a look at Exhibit T-19.
20 I don't think this is good, the correct exhibit.
21 Can you tell us what T-19 is without going into the
22 contents at this point?

23 A. Yes. T-19 is a draft agreement that was put together
24 by Hewlett-Packard for the two of us to come together on one
25 of these vendor licenses.

1 MR. SINGER: I move the admission of T-19.

2 MR. ACKER: No objection.

3 THE COURT: It will be admitted.

4 (Defendant's Exhibit T-19 was
5 received into evidence.)

6 BY MR. SINGER

7 Q. Did Exhibit T-19 come from Hewlett-Packard? Let me
8 rephrase that.

9 Was this the product negotiations with Hewlett-Packard?

10 A. Yes.

11 Q. If we turn to page 2, at the bottom, Section 2.1 --

12 A. Yes.

13 Q. It starts on the bottom of this page and continues to
14 the next.

15 MR. SINGER: Perhaps Mr. Calvin can clip the next
16 page, and we can put both parts up on the screen for you.

17 BY MR. SINGER

18 Q. Can you explain what the covenant not to sue on other
19 non-contaminated Linux refers to?

20 A. That we would not be going after Linux users for
21 basically the misuse of Linux.

22 Q. And in return for this was Hewlett-Packard going to
23 make payments to SCO?

24 A. Yes, they were.

25 Q. Those payments, are they identified on page 900 of the

1 agreement, the draft agreement?

2 A. Yes, they are.

3 MR. SINGER: Can we expand, Mr. Calvin, section
4 three that says payments?

5 THE COURT: When you say page 900, maybe you want
6 to tell them you are referring to the Bates number.

7 MR. SINGER: There is a number in the lower
8 right-hand corner of the pages and we call it a Bates
9 stamped number. It is an identification number. When I am
10 referring to 900, it is the last three digits of that number
11 which Mr. Calvin uses to retrieve these documents.

12 BY MR. SINGER

13 Q. Are these the payment terms that Hewlett-Packard and
14 SCO had been negotiating?

15 A. Yes, they were.

16 Q. Was this the H.P. proposal or the SCO proposal for a \$5
17 million initial payment and subsequent payments of \$5
18 million for every three months for a 15-month period?

19 A. This was H.P.'s proposal.

20 Q. What would the total of those payments led to in
21 reference to SCO?

22 A. \$30 million.

23 Q. Was this transaction finalized and put into affect?

24 A. No, it was not.

25 Q. What is your understanding as to why that did not

1 occur?

2 A. We went deep into the discussions here, and ultimately
3 Mr. Byers came back and informed me that it was difficult
4 for H.P. to complete the transaction as long as Novell was
5 out there saying that they still owned the UNIX copyrights.

6 Q. Did the transaction ever become consummated with SCO?

7 A. No, it did not.

8 Q. I would like you to turn, if you would, to Exhibit
9 T-42.

10 Is T-42 a company overview which you prepared in or
11 about September of 2003?

12 A. That is correct.

13 MR. SINGER: I move the admission of T-42.

14 MR. ACKER: Same objection, Your Honor. This is a
15 power point loaded with hearsay.

16 MR. SINGER: It is Novell's exhibit to which they
17 have listed --

18 MR. ACKER: That does not mean it is admissible.

19 THE COURT: Can you elicit any more foundation?

20 MR. SINGER: I will seek to.

21 BY MR. SINGER

22 Q. Can you explain the purpose for which T-42 was used,
23 again, without going into the content of the document?

24 A. T-42 was used to describe the company and what was
25 going on at the company.

1 Q. I direct your attention to pages 63 and 64.

2 Were these pages used with customers in connection with
3 the marketing of SCOSource licenses?

4 A. That is correct.

5 Q. Were these used by you personally?

6 A. Yes.

7 Q. Do you know if they were used by other members of the
8 sales force?

9 A. Yes, I believe they were.

10 Q. Did this document come up in the course of discussions
11 with potential customers of SCOSource licenses?

12 A. Yes.

13 MR. SINGER: Your Honor, I believe this can be
14 admitted for purposes of showing part of what otherwise
15 would be admitted on 8033 of the intent of the customers in
16 doing these deals. This shows what they were being shown
17 that led the customers to respond and to be interested in a
18 SCOSource license.

19 MR. ACKER: Mr. McBride certainly can testify as
20 to what he personally said to customers, but this is a
21 document that is a classic hearsay document, if they are
22 going to use it to say what it was that was communicated,
23 and the document itself is speaking and that is hearsay.

24 MR. SINGER: I think the difference is we are not
25 using this to prove that the matters put forth on these

1 pages are true, we are using it to put forth that this is
2 what was told to customers which led to their interest in
3 acquiring the vendor license.

4 MR. ACKER: It is still hearsay, Your Honor.

5 THE COURT: Was this record prepared as a part of
6 the regularly conducted business activity of SCO?

7 THE WITNESS: Yes, it was.

8 MR. ACKER: I don't know how to define hearsay,
9 other than the document is speaking and saying facts.

10 MR. SINGER: It is an admission under the business
11 records --

12 MR. ACKER: Well, it is not a business record.
13 This is a power point. It is not a business record of
14 regularly conducted activity.

15 THE COURT: The Court is out of an abundance of
16 caution going to not admit the document, based on the
17 foundation I have heard so far.

18 MR. SINGER: Yes.

19 Your Honor, we may come back to it.

20 BY MR. SINGER

21 Q. Let me ask, did you continue in the September of 2003
22 time frame making presentations to customers?

23 A. Yes, we did.

24 Q. Did you seek to answer questions that customers might
25 have as to the basis for the claims that SCO had regarding

1 the potential infringement of its copyrights?

2 A. Yes. That is correct.

3 Q. Now, did there come a time when Novell went public with
4 a press release regarding its UNIX ownership claims?

5 A. Yes.

6 Q. I would like you to turn to SCO Exhibit 517. I believe
7 this already exhibit is in evidence. We looked at this
8 yesterday.

9 Is this a press release that you were familiar with in
10 December of 2003?

11 A. Yes, it is.

12 Q. Was December 22nd, 2003, again, the date of a SCO
13 earnings release?

14 A. Yes. That is correct.

15 Q. Did you understand that the December 22, 2003 press
16 release from Novell could be an assertion of its ownership
17 of the UNIX copyrights?

18 A. Yes. That is correct.

19 Q. Now, would you turn to Exhibit A-24.

20 A. Okay.

21 MR. SINGER: Can I ask if A-24 has been moved into
22 evidence?

23 THE COURT: A-24 is in.

24 BY MR. SINGER

25 Q. Mr. McBride, is A-24 an earnings release for SCO that

1 was announced December 22, 2003?

2 A. Yes. That is correct.

3 MR. SINGER: Can we blow up the first paragraph of
4 that.

5 BY MR. SINGER

6 Q. Can you read for the jury the first paragraph of the
7 press release.

8 A. The SCO Group, Inc., the owner of the UNIX operating
9 system and the leading provider of UNIX based solutions
10 today reported revenues --

11 THE COURT: Mr. McBride, would you slow down when
12 you are reading. If you go too fast the court reporter --

13 THE WITNESS: I have been reading a little bit
14 fast. I was afraid of boring people if I went slow, but I
15 will read slowly, Your Honor.

16 The SCO Group, Inc., the owner of the UNIX
17 operating system and the leading provider of UNIX based
18 solutions, today reported revenue of 24.3 million for the
19 fourth quarter of its fiscal year ended October 31, 2003, a
20 57 percent increase over revenue of 15.5 million for the
21 comparable quarter a year ago.

22 BY MR. SINGER

23 Q. Can you read the second paragraph.

24 A. Sure.

25 Fourth quarter revenue from UNIX products and services

1 was 14 million. In addition, revenue generated from the
2 company's SCOSource licensing initiative was 10.3 million,
3 which was derived from licensing agreements reached with
4 MicroSoft Corporation and Sun Microsystems, Inc. earlier in
5 fiscal 2003.

6 Q. As you moved forward into December of 2003 and into
7 2004, did Novell's December announcement have an affect on
8 your SCOSource business?

9 MR. ACKER: Objection. That calls for
10 speculation, Your Honor.

11 THE COURT: I'll sustain the objection.

12 BY MR. SINGER

13 Q. Were there business opportunities that you continued to
14 engage in in December and January?

15 A. Yes.

16 Q. Was one of them Google?

17 A. Yes.

18 Q. Was Google an attractive business opportunity for SCO?

19 A. Yes, they were.

20 Q. Can you explain what the nature of that business
21 opportunity was?

22 A. Google had hundreds of thousands of servers that were
23 running on Linux, and at the time it was believed to be one
24 of the largest customers of Linux worldwide. If they would
25 take a license to our SCOSource material, obviously it would

1 be very valuable to the company.

2 Q. Did you personally have phone conversations with
3 Google?

4 A. Yes, I did.

5 Q. Was Google interested in a SCOSource license?

6 A. Yes.

7 MR. ACKER: Objection, calls for speculation and
8 asks for hearsay.

9 MR. SINGER: With respect to the hearsay
10 objection, I would say under 8033 the statements of a
11 customer with respect to the reasons why it would or would
12 not do business are admissible. If the Court would like, we
13 have authorities on that point.

14 With respect to the form of the question, I would
15 be happy to rephrase it.

16 THE COURT: Rephrase the question, please.

17 BY MR. SINGER

18 Q. Did you have phone conversations with Google in which
19 the subject was Google's interest in a SCOSource license?

20 A. Yes.

21 Q. In those conversations, did Google indicate that they
22 were interested in negotiating for a SCOSource license?

23 A. Yes.

24 THE COURT: Mr. McBride, if you see Mr. Acker
25 start to respond, would you just wait before you answer?

1 THE WITNESS: Yes, Your Honor.

2 MR. ACKER: Your Honor, I am just going to make a
3 blanket objection that he is trying to elicit statements,
4 out of court statements to prove the truth of the matter
5 when we don't have the witness here. That is exactly what
6 we are doing. He is talking about phone calls with people
7 that are not going to testify at this trial.

8 MR. SINGER: Your Honor, may I approach with
9 certain case authorities on this point?

10 THE COURT: Why don't we take a break and we can
11 discuss it during the break.

12 Ms. Malley.

13 THE CLERK: All rise for the jury.

14 (WHEREUPON, the jury leaves the proceedings.)

15 THE COURT: Mr. McBride, you don't need to sit
16 there, if you don't want to. If you want to take advantage
17 of the break, please feel free to.

18 THE WITNESS: I will take you up on that offer,
19 Your Honor.

20 THE COURT: Do you want some time to do this,
21 Mr. Singer? We can come back from the break and --

22 MR. SINGER: I am sorry. I missed what the Court
23 said.

24 THE COURT: Would you prefer me leaving and let
25 you put together that you want to, and then we can address

1 it when we come back?

2 MR. SINGER: That would be preferable to us, Your
3 Honor.

4 THE COURT: Let's do that. We will take ten
5 minutes and then come back and deal with this.

6 MR. SINGER: Thank you, Your Honor.

7 (Recess)

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