

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:)	
)	
THE SCO GROUP, INC., a)	
Delaware corporation,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 2:04-CV-00139TS
)	
NOVELL, INC., a Delaware)	
corporation,)	
)	
Defendant.)	
)	
_____)	

BEFORE THE HONORABLE TED STEWART
March 17, 2010
Jury Trial

REPORTED BY:

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Salt Lake City, Utah 84101-2180

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I N D E X

Witness	Examination	Page
Darl McBride	Redirect	1200
	Mr. Singer	
	Recross	1208
	Mr. Acker	
	Further Direct	1226
Gary Pisano	Mr. Singer	
	Direct	1233
	Cross	1271
	Mr. Acker	
	Redirect	1340
Christine Botosan	Mr. Singer	
	Direct	1346
	Mr. Hatch	

EXHIBITS RECEIVED INTO EVIDENCE

Defendant's Q45	1211
Defendant's D20	1222
Defendant's R45	1224
Plaintiff's 750	1235
Defendant's M18	1292
Defendant's D16	1302
Defendant's V15	1306
Defendant's Z18	1309
Defendant's X22	1312
Defendant's W24	1314
Defendant's T25	1315
Defendant's F26	1317
Defendant's F27	1319
Plaintiff's 188	1343
Plaintiff's 187 and 227	1343
Plaintiff's 749	1347
Defendant's M27	1328

1 a single judge supports this finding. In that filing,
2 defendant stated quoting, the heart of both case is SCO's
3 claim that IBM and Novell have infringed SCO's alleged right
4 related to the Linux Computer Operating System, end of
5 quote. Defendant further stated that the claims and
6 defenses in the two cases overlap in numerous respects.
7 Defendant went on to detail those areas where the claims and
8 defenses are similar including SCO's contention that it
9 acquired ownership of the UNIX copyrights through the APA,
10 and Novell and IBM's contentions that SCO does not own UNIX
11 copyrights.

12 Defendant further stated that, quoting, because this
13 case presents so many of the same issues as SCO versus IBM,
14 judicial economy and efficiency would be best served by
15 ensuring the same judges decide both cases, end of quote.

16 In essence, the court will find that based on the
17 cited Minyen case that there is the similarity of issues,
18 and that the interest and motives of cross-examination were
19 similar enough that the depositions will be permitted. It
20 will be up to the plaintiffs and defendants, however, to
21 agree to the designation of the testimony from those
22 depositions.

23 This morning SCO filed a -- well, I don't know when it
24 was filed, the court received it this morning, a request
25 that the court re-examine its ruling not allowing

1 Mr. McBride to testify as to the intent of those entities
2 that had originally discussed going to SCO source and
3 ultimately decided not to and the court precluded testimony
4 as to what was stated to Mr. McBride as to why they made
5 that decision. It was my understanding yesterday that both
6 sides had agreed to allow that testimony. It was the
7 court's ruling that precluded it.

8 Mr. Acker, are you still willing to agree to allowing
9 that testimony?

10 MR. ACKER: I'll allow that testimony as long as
11 Mr. McBride is subject to cross-examination on 15 or 16
12 customer letters in which there is no mention of Novell. So
13 it will take about 45 minutes to an hour to go through that,
14 I would imagine.

15 MR. SINGER: We accept that position. If it is good
16 for the goose, it is good for the gander. We believe that
17 the evidence ruling should apply both ways.

18 THE COURT: The court will do so not just because you
19 have agreed to it, but I believe that this finding this
20 morning and reference to cases indicated that the court's
21 narrow ruling yesterday based on the criminal case was not
22 appropriate. So the court will permit that. Again, I do
23 have to say, and I think that this is obvious to you, that
24 the court will allow what would otherwise be hearsay
25 testimony as to the intent of those parties who decided not

1 to go with SCO source but it cannot be used in any way to
2 try to establish the proof of Novell's claims to the
3 copyrights or SCO's claims of the copyrights.

4 MR. SINGER: We understand that, Your Honor.

5 THE COURT: All right. As to Mr. Pisano's expert
6 testimony, is Mr. Pisano going to be called, first of all?

7 MR. SINGER: Yes. I don't know why -- perhaps the
8 reason there was confusion is we initially were going to
9 call Ms. Botosan before Professor Pisano, but given that
10 Mr. Pisano needs to leave town today, we switched the order.
11 But it was always our intent and we do intend to call him.

12 THE COURT: The court will note that the defense had
13 argued this in a motion in limine, the court had denied it.
14 And what the defendant has now done is come up with a case
15 which the court has reviewed. The court is going to allow
16 Mr. or Dr. Pisano to testify, but the court will state that
17 if his ignorance of the underlying studies is established by
18 cross-examination, that the court will entertain a motion to
19 strike the testimony of Dr. Pisano.

20 MR. BRENNAN: Thank you, Your Honor.

21 THE COURT: And finally --

22 MR. BRENNAN: Your Honor, can I just make one point of
23 inquiry on that?

24 THE COURT: You may.

25 MR. BRENNAN: Would the court permit voir dire of the

1 expert at the outset before he goes into the substance of
2 his opinions so that determination can be made at the
3 outset?

4 MR. SINGER: Your Honor, we would object to that. The
5 issue of voir dire goes to qualifications of the expert. We
6 think that was raised, properly disposed of on Daubert
7 motions, and it would not be appropriate to have a separate
8 voir dire on the predicate for particular opinions. Because
9 if that was true, every cross-examination -- every
10 examination of expert witness would be broken up into a
11 series of direct and crosses on that.

12 THE COURT: Mr. Brennan, I think it is going to be
13 better to let this be played out in a normal fashion so that
14 I would not permit a voir dire in that narrow way. You will
15 have to deal with it on cross-examination.

16 MR. BRENNAN: I understand. Just so I'm clear, Your
17 Honor, understanding the court's preference and ruling, if
18 in fact through cross-examination it is demonstrated that
19 Dr. Pisano does not have the requisite information, if you
20 will, regarding the survey, then his testimony will be
21 subject of being stricken.

22 THE COURT: That is what I just said, I thought.

23 MR. BRENNAN: That is what I understood, Your Honor.
24 Thank you.

25 THE COURT: All right. Three issues were raised about

1 the Botosan testimony. First of all, the argument is that
2 she cannot rely on -- rely on Dr. Pisano's testimony. I
3 believe for the underlying reason that the court just
4 addressed that the court will have to deal with that after
5 Dr. Pisano has testified.

6 Secondly, it is asserted that she ought not to be
7 allowed to testify beyond the dates of her report because
8 there has been no supplement. And third, the defendants
9 have argued that she ought not to be permitted to testify
10 regarding prejudgment interest.

11 The court has looked at the prejudgment interest and
12 is convinced that that is a correct statement and she should
13 not be allowed to provide testimony as to an amount of
14 prejudgment interest.

15 As to the second issue, how do you wish to respond to
16 that, Mr. Hatch?

17 MR. HATCH: First, on the interest, we agree with Your
18 Honor that she was not going to testify as to that. I think
19 that to the extent interest is available, that would be a
20 legal question for Your Honor at a later time.

21 As to the issues regarding the event study, we have
22 contemplated your ruling of yesterday overnight and this
23 morning and have decided that we will not elicit testimony
24 on the event study today. So that issue is moot.

25 THE COURT: All right. Thank you. Counsel, is there

1 anything else before we -- Mr. Singer?

2 MR. SINGER: Yes. Your Honor, early this morning we
3 received notice that Novell is adding or seeking to add an
4 additional exhibit to their list to use with Mr. McBride.
5 That is a statement in a SCO filing pertaining to the effect
6 of the summary judgment ruling in 2007 that since has been
7 reversed.

8 This is yet another attempt to introduce, through one
9 way or another, what the court has already recognized
10 repeatedly would be irrelevant, prejudicial, confusing to
11 this jury, would be a decision reversed by the court of
12 appeals. And we don't think that should be allowed. Aside
13 from that, it is being raised at the last moment and wasn't
14 something I covered in redirect and so it wouldn't be proper
15 on re-cross in any event. But our basic -- our principal
16 objection is that this is right in the face of the court's
17 prior rulings.

18 MR. ACKER: Your Honor, the evidence that we're
19 talking about is a form 8-K that Mr. McBride filed -- SCO
20 filed with the SEC following Judge Kimball's ruling on the
21 summary judgment motion. In the 8-K statement, Mr. McBride
22 said explicitly that SCO did not need to own the copyright
23 in order to run its software business which is directly
24 contrary to the sworn testimony that he has given in this
25 court. And we think that given that, clearly this is

1 something that impeaches his testimony. It is extremely
2 probative. And if the court is still concerned given the
3 court's ruling with respect to damages experts on whether
4 they truly have opened the door to this issue, we would be
5 willing to redact those portions of the 8-K and my
6 questioning would not directly refer to Judge Kimball's
7 ruling but would ask Mr. McBride if, in fact, he submitted a
8 statement to the federal government saying that he could run
9 his business without the copyrights.

10 THE COURT: Okay. Go ahead, Mr. Singer.

11 MR. SINGER: Well, I was just going to note that the
12 exact statement pertaining to the UnixWare and the
13 OpenServer Business and there is no contention that those
14 businesses couldn't be run in light of the summary judgment
15 ruling. The issue is, of course, the SCO source and the
16 effect of copyright enforcement.

17 MR. ACKER: The issue is that Mr. McBride said the
18 exact opposite thing on the stand yesterday.

19 THE COURT: Well, I am aware of this document and I
20 will allow you to use it. But I will have to tell you,
21 Mr. Acker, that if either advertently or inadvertently that
22 it comes out that Judge Kimball's summary judgment ruling,
23 then as I have stated before, the court will be required to
24 inform the jury that as to the issues before it that was
25 reversed by the Tenth Circuit which I frankly think is

1 something you ought to be very cautious about. And so I
2 will allow it, as I do believe it is important for your
3 purposes on impeachment, but I would caution you to try to
4 avoid violating the court's prior ruling on not permitting
5 reference to prior court rulings coming before this jury.

6 MR. ACKER: Very well, Your Honor. I understand.

7 MR. SINGER: Your Honor, in connection with that
8 issue, might I note first that I don't think there was
9 anything in redirect that would raise that issue and we're
10 now on re-cross.

11 THE COURT: Well, the dilemma is that redirect is
12 going to be opened up substantially by the court's ruling
13 allowing you to get in with Mr. McBride the issue about the
14 customs. And I think it is purely for impeachment purposes,
15 Mr. Singer, so I have got to allow it.

16 MR. SINGER: Your Honor, in light of the court's
17 ruling on that, may we speak to Mr. McBride so he doesn't
18 inadvertently refer to the 2007 ruling or the court of
19 appeals ruling because when he sees this he might assume
20 that somehow that has changed.

21 MR. ACKER: I was actually going to suggest that that
22 be done.

23 THE COURT: Yes. I would request that you do so.
24 Okay. Is there anything else?

25 MR. BRENNAN: Yes, Your Honor. Thank you. I do

1 appreciate the determination announced in court this morning
2 by SCO that it will not be proffering the event study. And
3 I am also mindful of the court's comments regarding the
4 possible impacts of raising these court decisions. Just so
5 that at least we're clear from our side of the courtroom,
6 there are aspects of Dr. Pisano's testimony and
7 Dr. Botosan's testimony unrelated to the event study that
8 still could implicate, in essence, the opening of the door
9 on these court decisions.

10 In particular, both experts, even in the portions of
11 their testimony that is expected that do not result to an
12 event study, are focusing their opinions on reactions of the
13 marketplace and potential licensees through the period of
14 2007. Dr. Botosan, in particular, through October 31st,
15 2007. The significance of that, of course, is that there is
16 an analysis done of certain so-called risk factors. What is
17 it that the -- either the marketplace or in particular
18 potential licensees may or may not have reacted to in making
19 decisions regarding the taking of licenses. So we will be
20 mindful of the court's comments, but I also wanted to
21 indicate that the mere removal of the event study does not
22 avoid this opening of the door issue. So that is more just
23 to inform the court.

24 THE COURT: Mr. Singer?

25 MR. SINGER: Your Honor, I will address this with

1 respect to Mr. -- to Dr. Pisano and Mr. Hatch will address
2 Dr. Botosan.

3 With respect to Dr. Pisano, his is examining the "but
4 for world" and what would have happened to this business
5 line if there had been no slander of title, if copyright
6 ownership is assumed, and if slander of title had not
7 occurred. But that type of testimony there is no reason in
8 the world that any court decision that occurred in a real
9 world and was reversed in the real world needs to come in.
10 And I haven't heard anything that would suggest otherwise.

11 MR. HATCH: The same thing would apply to Dr. Botosan.
12 And largely what she will be doing is the event study won't
13 be spoken about, just doing a calculation of damages in the
14 same manner that Mr. Singer just talked about.

15 THE COURT: All right. Everyone has had their say,
16 including the court. All right. And I just want you to
17 remember that the court feels very strongly about this
18 because of its prior ruling, number one.

19 But number two, again I believe that any reference to
20 prior court rulings by Judge Kimball must result in the
21 Tenth Circuit reversal being made known to the jury. And I
22 have got to believe that if a jury hears that, it is
23 probably going to consider that a more rigor matter than the
24 preliminary summary judgment rulings.

25 So anything else, counsel?

1 MR. SINGER: No, Your Honor. May we have a minute to
2 discuss this issue with Mr. McBride?

3 THE COURT: Yes, go ahead.

4 MR. BRENNAN: Your Honor, in light of the comments
5 perhaps we could have just a minute ourselves to caucus
6 relative to the court's suggestions this morning.

7 THE COURT: Yes. Yes, go ahead.

8 MR. BRENNAN: Your Honor, we're just going to step
9 outside for a moment.

10 THE COURT: Sure.

11 (Whereupon, there was a brief pause
12 in the proceedings.)

13 MR. HATCH: Your Honor, when Dr. Botosan gets up, I
14 need to set some easels and things.

15 THE COURT: I will try to remember that.

16 MR. HATCH: I don't know whether we will be near the
17 break at that point. Maybe that will be a good point to
18 break, if we can.

19 THE COURT: Okay.

20 MR. HATCH: Your Honor, we will put up two boards. Do
21 you have any preference where they go?

22 THE COURT: No. As long as the jury can see them
23 and --

24 MR. HATCH: I'm not sure where I can put them where
25 you can see them, too.

1 THE COURT: Probably right over here is probably the
2 safest for all purposes.

3 MR. HATCH: I'm going to ask her to get up and to do
4 some teaching.

5 THE COURT: That is fine. It either has to be right
6 there (indicating) or back there (indicating) or the people
7 in the courtroom can't see it.

8 MR. SINGER: Your Honor, before the jury comes in, I
9 think there is one point that we wish to clarify lest there
10 be any confusion among either side. It is our understanding
11 that the court's ruling is that the reference to prior
12 decisions of Judge Kimball should not come in. It is not
13 that Novell has an option that if they want that to come in
14 there is a --

15 THE COURT: That is correct. The court has ruled on
16 the motion in limine that they're not to come in. If,
17 however, it does come in inadvertently, then the court will
18 be compelled to make reference to the Tenth Circuit in jury
19 instructions or some other special instruction.

20 MR. SINGER: We just wanted to make clear that this
21 was not an option that the defendant could exercise one way
22 or the other.

23 THE COURT: Counsel, let me ask you about jury
24 instructions. Mr. Normand?

25 MR. NORMAND: Yes, Your Honor.

1 THE COURT: Where are we?

2 MR. NORMAND: We are going to submit to the court by
3 the end of the day today a joint filing reflecting agreement
4 on, I would say, half of the instructions, and another half
5 on which we would, for Your Honor's and clerk's convenience,
6 set forth the party's respective arguments in favor of their
7 version of the instruction after having identified the
8 disagreements in the instructions. So we met again last
9 night, spoke on the phone for a couple of hours, and got
10 even closer, and that is the filing that is going to happen.

11 MR. JACOBS: That is correct, Your Honor. It will be
12 as -- the filings will clearly show what the point of
13 disagreement is, and then have both sides arguments about
14 that point of disagreement so that the court can call it and
15 then what the resulting instruction should follow from the
16 legal determination of the court.

17 THE COURT: All right.

18 MR. NORMAND: We did all of that work, Your Honor,
19 with the assumption, I think as Your Honor had said, that
20 you would then send to us in a few days time your proposed
21 instructions and we would offer our comments, for what
22 they're worth, on those.

23 THE COURT: Yes. And hopefully we'll get those to you
24 no later than Monday morning so you will have next week to
25 prepare your responses as well as your final arguments.

1 MR. NORMAND: Thank you.

2 THE COURT: Are we ready now, counsel?

3 MR. SINGER: Yes, Your Honor.

4 MR. BRENNAN: Your Honor, I just had one last inquiry,
5 I make my apologies as I cross the courtroom. Back to
6 Dr. Botosan, as I understand, by eliminating inquiry
7 regarding the event study, I assume that means that
8 Dr. Botosan will not be offering an opinion regarding
9 causation?

10 MR. HATCH: Yeah, that is correct.

11 THE COURT: Okay. All right.

12 MR. BRENNAN: Thank you.

13 THE COURT: Let's bring the jury in. Please be sure
14 and tell them that we have been working. We didn't have a
15 mass sleep in this morning.

16 THE CLERK: All rise for the jury.

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

18 THE COURT: Good morning, ladies and gentlemen. We
19 will continue with the redirect examination by Mr. Singer of
20 Mr. McBride.

21 Mr. Singer?

22 MR. SINGER: Thank you, Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. SINGER:

25 Q. Good morning, Mr. McBride.

1 A. Good morning, Mr. Singer.

2 Q. Do you recall there was some testimony or some
3 questions yesterday regarding your stock options; is that
4 correct?

5 A. Yes, that is correct.

6 Q. Is it typical, to your knowledge, for the chief
7 executive officers of public companies for a significant
8 part of their compensation to be in the form of stock
9 options?

10 A. Yes, that is very typical.

11 Q. Now, if you had wanted to do so, could you have
12 exercised those stock options you held and at certain points
13 sold the stock and made a substantial profit?

14 A. Yes, for sure.

15 Q. Did you do that?

16 A. No, I did not.

17 Q. Did you sell any of your SCO stock?

18 A. Since I have joined the company, I have only
19 bought stock. I have yet to sell any, whether as options or
20 as stock.

21 Q. Did you believe in this company?

22 A. Yes, I did.

23 Q. I would like to ask you about a couple of
24 business opportunities that we alluded to yesterday. One of
25 those was with Google?

1 A. Yes.

2 Q. Just to set the foundation for that, can you tell
3 us what the time frame was that you had discussions with
4 Google regarding a potential SCO source type business
5 arrangement?

6 A. Yes. It was initiated in late 2003 and it ended
7 in early 2004.

8 Q. Was Google an important business opportunity for
9 SCO?

10 A. Yes, for sure.

11 Q. Can you explain why?

12 A. Because they were apparently the largest Linux
13 customer in the world. They reportedly, in their own words,
14 had over 500,000 servers running Linux.

15 Q. Were you personally involved in the discussions
16 with Google?

17 A. Yes, I was.

18 Q. And can you discuss how far the discussions went
19 with respect to potential pricing of a SCO source license
20 with Google?

21 A. Yes. We entered into discussions, we had a
22 number of discussions with them, and we got to a point where
23 they wanted a severe volume discount. We agreed to discount
24 the -- on a volume basis from our 699 per server price down
25 to \$100 per server, but that was where it stopped.

1 Q. At \$100 per server, if there were 500,000 servers
2 running Linux, how much in revenue would that have meant for
3 SCO Group?

4 A. Um, I don't have my calculator. I think that
5 comes up to about 50,000,000.

6 Q. And can you tell us whether or not the issue of
7 Novell's assertions to own the copyrights to UNIX came up in
8 the course of your discussions with Google?

9 A. Yes, it came up in the end. When we were trying
10 to get them to the \$100 per number of servers, that was the
11 point in time that they came up, they brought it up as an
12 issue, and that is when the discussions broke down.

13 Q. Do you have an understanding as to whether in
14 your judgment a deal would have been able to have been
15 reached if it had not been for the assertions of copyright
16 ownership by Novell?

17 MR. ACKER: Objection, calls no speculation, Your
18 Honor.

19 MR. SINGER: It goes based on his conversations, he is
20 in negotiations, he is able to express that view.

21 MR. ACKER: He is asking for Mr. McBride to divine the
22 thinking of Novell or Google executives, Your Honor.

23 THE COURT: I think if you would like to elicit more
24 foundation for the conclusion the court will allow that.

25 MR. SINGER: Yes, Your Honor.

1 Q. (By Mr. Singer) Were the discussions that you
2 had with Novell, excuse me, with Google over a number of
3 months?

4 A. Yes, they were.

5 Q. Did it involve senior people at Google?

6 A. Yes, it did.

7 Q. Were there face-to-face meetings?

8 A. I wasn't involved in the face-to-face, I was
9 involved in some phone calls, but yes, it is my
10 understanding that there were face-to-face calls.

11 Q. For the meetings that you weren't present, did
12 you receive reports from people who were?

13 A. Yes, I did.

14 Q. With respect to the opportunity, did this occur
15 during the -- during the time frame of the Google
16 discussions, did Novell come forward with its December 22,
17 2003 public announcement that they were asserting a claim to
18 ownership?

19 A. Yes. Yes, it was in that same time frame.

20 Q. Before that occurred, was the last public
21 statement that Novell had made the retraction on June 6,
22 2003?

23 A. Yes, that is correct.

24 Q. Did Google, after Novell's December 22, 2003
25 statement, make specific reference to Novell having asserted

1 copyright ownership?

2 A. Yes, they did.

3 Q. And on the basis of that, were you able to move
4 the discussions forward?

5 A. No, we were not. Basically the discussions died
6 off at that point.

7 Q. Given that course of dealing, in your view, was
8 the assertion of a claim to copyright ownership a
9 substantial factor in Google's decision not to go forward
10 and take a SCO source license?

11 MR. ACKER: Same objection. Calls for speculation,
12 Your Honor.

13 MR. SINGER: I think there is sufficient foundation
14 for this witness.

15 THE COURT: I will overrule the objection.

16 THE WITNESS: Yes, there was.

17 Q. (By Mr. Singer) Okay. Mr. McBride, I would like
18 to talk a little bit about Dell. Can you again set the time
19 frame as to when you were in discussions with Dell?

20 A. Yes. It was roughly the same time frame as the
21 Google discussions. And, again, the late 2003 first couple
22 of months of 2004 is when we were talking to Dell.

23 Q. Did you have personal conversations with
24 representatives of Dell?

25 A. Yes. The first conversation was a phone call

1 between myself and Michael Dell who is the CEO of Dell.

2 Q. Did you also have conversations with anyone else
3 at Dell?

4 A. Yes, I did.

5 Q. Who was that?

6 A. There was -- Michael handed it over to their
7 general counsel, a gentleman by the name of Tom Green. He
8 is general counsel and also over their licensing group.
9 Talked to him. Mr. Green had some other people on the calls
10 that we had. I don't recall their names offhand. And then
11 there were some other people inside of Dell as well.

12 Q. What was the nature of the business opportunity
13 involving SCO source licensing that you were discussing with
14 Dell?

15 A. Um, Dell's idea was they wanted to be able to go
16 to market with a SCO source license to be able to provide
17 indemnification for Linux users. And specifically, they
18 wanted something that would allow them to position
19 themselves stronger than what HP's program was.

20 Q. Would Dell have been reselling SCO source
21 licenses?

22 A. Yes, that is correct.

23 Q. Can you explain whether or not the issue of
24 Novell's claims or ownership of the UNIX copyrights came out
25 in the course of your discussions with Dell?

1 A. Yes, they did.

2 Q. How was it raised?

3 A. It was raised by their general counsel.

4 Q. And was this a positive or a negative issue from
5 the perspective of being able to do business with Dell?

6 A. It was definitely a negative.

7 Q. Um, was this raised in the aftermath of the
8 December 22, 2003 assertion of ownership that Novell made?

9 A. Yes.

10 Q. And were you able to conclude a transaction with
11 Dell after that assertion of ownership was made?

12 A. No.

13 Q. And in your view, based on the course of dealing
14 you had with Dell, was there a -- what role did the Novell
15 assertion of ownership have in that transaction not
16 occurring?

17 MR. ACKER: Calls for speculation, Your Honor.

18 MR. SINGER: It is the same issue.

19 THE COURT: I will overrule the objection.

20 THE WITNESS: I viewed it as the primary role in the
21 Dell deal not going through.

22 Q. (By Mr. Singer) Now, there were a number of
23 business opportunities and many businesses out there which
24 use Linux; is that correct?

25 A. Yes, that is correct.

1 Q. Now, would you agree, in your view are there
2 certain businesses that might have decided not to take a SCO
3 source license for a variety of different reasons?

4 A. Yes, that is correct.

5 Q. Based on what was happening to SCO's business,
6 after the December 22, 2003 assertion of copyright ownership
7 and reactions in the market to that, were you able to
8 continue successfully with the SCO source licensing
9 business?

10 A. No, we were not.

11 MR. SINGER: I have nothing further, Your Honor.

12 MR. ACKER: One second, Your Honor.

13 RE-CROSS-EXAMINATION

14 BY MR. ACKER:

15 Q. Good morning, Mr. McBride.

16 A. Good morning, Mr. Acker.

17 Q. Happy Saint Patrick's Day.

18 A. Thank you. Same to you. Where is your green?

19 Q. I left it at home. Let me ask you about these --
20 the Dell and the Google negotiations. True is it, and let's
21 start with Google?

22 A. Okay.

23 Q. You were not involved in any face-to-face
24 negotiations with anyone from Google; correct?

25 A. I never flew out to their campus, no.

1 Q. And the negotiations began sometime before Novell
2 put up on its website both its position and SCO's position
3 regarding this dispute over the ownership of the UNIX
4 copyrights; correct?

5 A. That is my recollection.

6 Q. And even after those materials went up on
7 Novell's website on December 22nd, 2003, the negotiations
8 with Google continued for several months beyond that;
9 correct?

10 A. I think they went into the January, February time
11 frame.

12 Q. And so on December 22nd, Novell puts up on its
13 website its position regarding a copyright ownership, it
14 puts up on its website your position regarding copyright
15 ownership, it puts up on its website the APA, it puts up on
16 the website Amendment 1, it puts up on its website Amendment
17 Number 2 so anybody can see it, everybody's position on all
18 of the documents, and then Google continues to talk with you
19 for another two months; correct?

20 A. Yes, that is correct.

21 Q. With respect to Dell, similarly negotiations with
22 Dell began before December 22, correct?

23 A. Yes.

24 Q. And on December 22nd, everything went up on
25 Novell's website, correct?

1 A. Yes.

2 Q. Including your position, right?

3 A. It was whatever they put up.

4 Q. Your letters regarding your position regarding
5 copyright ownership went up on the website, correct?

6 A. That is not totally correct. If you go look at
7 the letters that Novell put up on their website, they
8 conveniently omitted some of the letters that were very
9 strongly in our position and that was an oddity to us. If
10 you're going to put up the whole story, put it up. But they
11 put up some of our position, but they didn't put up all of
12 it. I remember that for certain.

13 Q. They put up the contract, the APA; correct?

14 A. Yes.

15 Q. They put up Amendment Number 1, correct?

16 A. Yes.

17 Q. They put up Amendment Number 2; correct?

18 A. Yes.

19 Q. The whole world could see that, correct?

20 A. Yes. But they didn't put up some of the other
21 ones.

22 Q. The executives of Dell could see that, correct,
23 right?

24 A. I don't know when the executives at Dell looked
25 at it. I know that three days before Christmas a lot of

1 people were not looking at Novell's website. Um, I don't
2 know that. I do know that over time these statements that
3 Novell put up on it's website was a little bit like dropping
4 Napalm gas. It didn't kill people immediately, but over
5 time, it did.

6 Q. And over time, you continued to negotiate with
7 Dell for weeks, even months after December 22nd, correct?

8 A. Yes.

9 Q. Let me show you what we have marked as Exhibit
10 Q45. Now, the gentleman that you said that you spoke with
11 on the phone from Hewlett Packard was a man by the name of
12 Joe Beyers; correct?

13 A. Yes, that is correct.

14 Q. And what you have in front of you, Exhibit Q45,
15 is an e-mail from Joe Beyers discussing whether or not he
16 will enter into -- HP will enter into a licensing agreement
17 with SCO in the August 2003 time frame; correct?

18 A. Yes.

19 MR. ACKER: Move for admission of Exhibit Q45, Your
20 Honor.

21 MR. SINGER: No objection.

22 THE COURT: It will be admitted.

23 (Whereupon, Defendant's Exhibit Q45 was received
24 into evidence.)

25 Q. (By Mr. Acker) Why don't we take a look at what

1 Mr. Beyers said on August 15th, 2003. Mr. Lee, if we could
2 bring up the first paragraph beginning with the word today.

3 Mr. Beyers wrote to his colleagues at HP, "Today I
4 threatened SCO that HP would not attend the SCO forum next
5 week if they did not sign the HP UNIX release today." Do
6 you see that?

7 A. Yes.

8 Q. "They responded by signing the release and they
9 also provided a letter that we can show our UNIX customers."
10 Do you see that?

11 A. Yes, I see that.

12 Q. So wasn't it the case that after the SCO source
13 program was announced, um, you were in negotiations with HP
14 and HP was going to participate in your SCO source forum in
15 Las Vegas; correct?

16 A. Yes, that is correct.

17 Q. And a week before the forum, SCO is demanding, I
18 believe, a certain number of millions of dollars from HP;
19 correct?

20 A. We were in negotiations over something that they
21 were -- had initiated. We were talking about millions of
22 dollars, yes.

23 Q. And what HP said to you, we're not going to pay
24 you millions of dollars, and if you don't give us a release
25 for free, we're not going to come to your SCO forum; right?

1 A. That is part of what they said.

2 Q. Why don't we highlight the number of points
3 below, if we could. And this is the release that HP wanted.
4 "SCO releases/forgives any past actions by HP (and its
5 future direct consequences) which may have been in violation
6 of its UNIX licenses."

7 A. Right.

8 Q. Two, "The HP UNIX license now becomes
9 "unconditionally irrevocable", even for future "bad" acts."
10 Three, "HP has no restrictions on what it does or says about
11 the IBM case or the Linux case." Do you see that?

12 A. Yes.

13 Q. And four, "Publicity: SCO has provided us a
14 letter to Carly," who is the CEO, Ms. Fiorina, CEO of HP at
15 the time, "that we can show to our customers that states
16 that SCO believes that HP is in compliance with its UNIX
17 license." That is what they wanted, correct?

18 A. Yes.

19 Q. And then the financial terms are also there at
20 number four, right?

21 A. Yes.

22 Q. And the financial terms are zero, right?

23 A. For that release.

24 Q. And you originally wanted \$100,000,000, right?

25 A. In the original instance of this, we had

1 \$100,000,000 tied to the release and to the other SCO source
2 agreement. What they ended up doing was separating the two.
3 So as you recall yesterday, we had two deals going with HP.
4 One was the release that their CEO Carly had asked for, and
5 then the other one was this SCO source licensing deal. We
6 had put those two together for a \$100,000,000 deal. They
7 wanted to bifurcate them and so we did. So the release
8 ended up being for zero. The other one was the \$30,000,000
9 that HP proposed back.

10 Q. All right. And we'll talk about that in a
11 second. So as I understand it, you want -- you originally
12 go to HP and you ask Ms. Fiorina pay me 100 million bucks,
13 right, for both for the release and the other part of the
14 license, right?

15 A. No.

16 Q. And then they come back to you and say, we're not
17 going to go to your forum in Las Vegas unless you give us
18 this release for free, right?

19 A. That part, yes.

20 Q. And you guys gave them the release for free,
21 right?

22 A. We gave them the release for free, correct.

23 Q. This happened in August of 2003, right?

24 A. Yes, that is correct.

25 Q. And so that was a couple of months after you

1 believe that Novell had retracted its claim to ownership on
2 June 6, 2003, right?

3 A. That is correct.

4 Q. And so in your mind, there is no taint out there
5 by Novell's position in this period of time; correct?

6 A. I didn't believe that -- well, yeah, I believe
7 that we had resolved that at that point, at this point.

8 Q. So you buckled to HP and give them a license, a
9 release, for no money?

10 A. For the UNIX business.

11 Q. Despite the fact that according to you, there is
12 no suggestion by Novell in the marketplace in this period of
13 time that they own the UNIX copyrights, right?

14 A. Let me -- no, that is not correct. Let me
15 explain to you the difference. What you just said -- you
16 said two things there. I think you crossed metaphors. I
17 think that might have been a trick question. If you look at
18 the copyright issue, that was one that was tied to the
19 \$30,000,000 that we were discussing still with HP.

20 If you look at the UNIX business issue, now if you
21 remember we read through it yesterday, we stated in there,
22 and I think I read it out loud before the court, we hereby
23 certify that Hewlett Packard has done nothing wrong with
24 their UNIX business, like IBM had done, and that is what we
25 were giving them a release on. So that release, excuse me,

1 that release for their UNIX business was fundamentally and
2 totally independent from the copyright issue that related to
3 the \$30,000,000 deal that HP was proposing back to us.
4 Q. You gave them the release for free, correct?
5 A. For the UNIX business.
6 Q. And you did that in August of 2003; correct?
7 A. That is correct.
8 Q. And that was a period of time, according to you,
9 when Novell was taking the position that you owned the
10 copyrights, right?
11 A. Yes.
12 Q. Now, the negotiations between HP and you, you
13 testified yesterday, they broke down in August and they were
14 over by September of 2003, correct?
15 A. I don't recall testifying to that.
16 Q. Well, the jury knows what you said or what you
17 didn't say?
18 A. I recall testifying that they broke down in
19 September.
20 Q. All right. September of 2003?
21 A. Right.
22 Q. Done with HP, right?
23 A. Yes.
24 Q. But Novell didn't, according to you, say that
25 they owned their -- owned the copyrights until December 22nd

1 after the June 6th, what you believed to be, the
2 recantation; correct?

3 A. Incorrect.

4 Q. So it is during this period of time between
5 June 6th, 2003 when you claim that Novell has said you own
6 the copyrights, and before December 22nd, 2003 when you say
7 they slander you again because they put everything up on the
8 website that negotiations with HP broke down?

9 A. So the big issue then was the reason that they
10 broke down. And the reason that they broke down was they
11 were pointing to the copyright problem. And when they
12 brought it up, I said whoa, Joe, we put that to bed months
13 ago. That -- I was -- I wasn't thinking when he first said
14 Novell copyright issue that they hadn't even been following
15 what happened after Messman had announced they owned it and
16 that we had come back and put that to bed. So I went
17 through that story with him and he said no, no, no, no, we
18 got all of that. What you don't understand, Darl, is that
19 Novell is gearing up for another run and you will eventually
20 see them come out public again and they will say that they
21 own the copyrights. That was the first time that I had
22 heard that, in fact, Novell was going to take this public
23 position and it was from Hewlett Packard in the context of
24 not doing this deal.

25 Q. So you knew that information in September of 2003

1 that Novell was going to claim ownership of the UNIX
2 copyrights?

3 A. That was the first time I had heard about it.

4 Q. But you had that in your mind as the CEO of SCO
5 in September of 2003 that Novell was going to reassert its
6 ownership of the UNIX copyrights?

7 A. Based on that we started watching.

8 Q. And despite having that knowledge in September of
9 2003, you and your CFO continued to tell the market that
10 that issue was put to bed, right?

11 A. The things that you pointed to yesterday were
12 predating that.

13 Q. There was a -- you had a conference call in
14 November of 2003 where Mr. Bench your CFO said this issue is
15 put to bed, and you were sitting right next to him. And now
16 you have told the jury that you had that knowledge in your
17 head in September of 2003 that Novell was going to reassert
18 its ownership to the UNIX copyrights?

19 A. We had a lot of things in our heads. And every
20 time we would turn around from May, June, July, August we
21 were hearing something different. And what happens with
22 these SEC filings is you have to state things based on
23 material changes. And until they went public, we did not
24 view that as a material change. The fact that they were
25 behind the scenes saying this or saying that, is not a

1 materiality threshold by which you would adjust your 10-K
2 filings for the investing public.

3 Q. Let me ask you this. Do you believe that when
4 the general counsel of Novell sent you a letter on
5 August 4th, 2003 and said Novell still owns the copyrights,
6 do you believe that was a material fact that you were
7 obligated to take to the market?

8 A. First of all, he didn't say we still own the
9 copyrights. Secondly, I didn't believe that his statement
10 trumped what Mr. Messman had told me.

11 Q. So it is your testimony that when the general
12 counsel of Novell said that Amendment Number 2 did not
13 transfer the copyrights to SCO, when he said that to you in
14 no uncertain terms on August 4th, 2003, that was not
15 material to you?

16 A. I didn't believe that it trumped Messman's
17 statement.

18 Q. My question was, was it or was it not a material
19 fact?

20 A. At that point in time.

21 Q. Let me finish my question. Was it or was it not
22 a material fact that you were obligated to take to the
23 market?

24 A. At that point in time, no. And because their
25 letters kept changing. If you read the June 6th letter, it

1 says one thing. If you read the June 26th letter, it says
2 another thing. If you read the August 4th letter it says
3 another thing. We can't go to the investing public every
4 time that Novell changes, and every time they sneeze we
5 can't go out and say Novell sneezed. Once they came out
6 publically, then we did address it.

7 Q. So let me get it clear. It is your testimony
8 that when the general counsel of Novell wrote you a letter
9 on August 4th, 2003 and said Amendment Number 2 did not
10 transfer the copyrights, you as the CEO of SCO did not
11 believe that was a material event that needed to be reported
12 to the marketplace?

13 A. I believe I have answered that question,
14 Mr. Acker.

15 Q. You haven't answered that question, Mr. McBride.

16 THE COURT: Answer the question if you please,
17 Mr. McBride.

18 THE WITNESS: I did not believe that to be material at
19 that point in time.

20 Q. (By Mr. Acker) So as the CEO of SCO, the fact
21 that Novell was claiming ownership of the UNIX copyrights
22 was not a material fact to you?

23 A. Not at that point in time.

24 MR. ACKER: Show you D20.

25 THE COURT: D20?

1 MR. ACKER: D20, D as in dog, yes, Your Honor.

2 Q. (By Mr. Acker) Do you see, Mr. McBride, on
3 Exhibit D20 is the internal e-mail at Hewlett Packard in
4 which Hewlett Packard employees are discussing the reasons
5 to move ahead with the SCO source deal and also reasons not
6 to do the deal and it is dated September 3rd, 2003. Do you
7 see that?

8 A. Yes.

9 MR. ACKER: I move for admission of Exhibit D20, Your
10 Honor.

11 MR. SINGER: No objection.

12 THE COURT: It will be admitted.

13 (Whereupon, Defendant's Exhibit D20 was
14 received into evidence.)

15 Q. (By Mr. Acker) Why don't we highlight, if we
16 could, Mr. Lee, the first paragraph.

17 "There have been a bunch of messages floating about --
18 floating around regarding SCO. I thought it would be useful
19 to summarize the situation, and present both sides of the
20 argument. As you know, I oppose moving forward, although I
21 will do my best to support the larger HP position if we
22 decide to move forward. I would like to emphasize that
23 there are not -- that there are open source nuances here
24 that are not typical of normal software licensing deals.
25 For this reason, this is "not" a licensing deal, but rather

1 an non-asset deal, paren, (SCO -- non-assert -- non-assert
2 deal, paren, (SCO agree to not assert rights against our
3 customers.)"

4 Now Mr. Lee, if we could go down to the bottom of the
5 e-mail which says Reasons Not to Do the Deal. "Reasons not
6 to do the deal. One, RedHat has counter-sued SCO and will
7 view HP as partnering with SCO and will potentially refuse
8 to deal with HP, paren, (HP Linux biz rapidly moves to
9 zero). B, we have strong indications that the Open Source
10 community will revolt against HP and will block any future
11 HP enhancements to open source projects. C, while SCO has
12 shown Joe some code, there is still no clear evidence that
13 IBM, paren, (or anyone else) end paren, has actually done
14 anything wrong. D, all legal experts in the field believe
15 SCO's case is fundamentally flawed and have published white
16 papers to support their position and (attached). E, while
17 we may have a quote, "most favored nation" end quote clause
18 in the deal, our competitive advantage could evaporate in a
19 day. The deal is not exclusive."

20 And then the e-mail continues onto the next page. "F,
21 this is, in effect, support of terrorism. Rewarding SCO for
22 this behavior opens us up to other claims. We can't predict
23 from who/where. G, doing a deal with SCO does not provide
24 customers with full indemnification. Customers want full
25 indemnification, so a deal with SCO is likely not enough.

1 H, SCO has shown a pattern of unpredictable and "bad"
2 behavior. We can't predict future behavior from SCO which
3 could negatively impact HP. I, amusingly enough, doing the
4 deal would negatively impact our relationship with
5 Microsoft. J, SCO is perceived very negatively in the
6 industry at large. HP will suffer a negative image as a
7 result."

8 And then he concludes, "there is obviously no easy
9 answer here. I believe that the risks associated with
10 points "a" and "b" are large enough that we should not do
11 the deal."

12 Did you understand that that was why HP didn't do a
13 licensing deal with SCO in September of 19 -- 2003,
14 Mr. McBride?

15 A. No, I did not.

16 Q. Mr. McBride, yesterday you told this court and
17 jury that you believed that you needed the UNIX copyrights
18 in order to run your business, correct?

19 A. That is correct.

20 Q. Let me show you what we have marked as R45.
21 Mr. McBride, R45 is a form 8-K that SCO Group filed on
22 behalf of -- that SCO Group filed on August 14th, 2007;
23 correct?

24 A. Yes, that is correct.

25 Q. And a form 8-K is a form where SCO is advising

1 the SEC and the market at large of material facts that
2 affect its business, right?

3 A. Pardon me, I didn't get the last question. I was
4 looking here.

5 Q. Form 8-K is a form by which a company advises the
6 Security and Exchange Commission and the market at large
7 regarding material?

8 A. Yes, that is right.

9 Q. And you reviewed this document before it was
10 filed with the SEC; correct?

11 A. Yes, I did.

12 Q. And you wouldn't have filed it with the SEC if
13 you didn't think it was accurate, correct?

14 A. Correct.

15 Q. Now, I want you to listen carefully to my
16 question, if you could, sir. It is true, isn't it, that if
17 you turn to the last page of the document, in the one, two,
18 three, four, fifth paragraph --

19 THE COURT: Why don't you offer it before we go any
20 further, please.

21 MR. ACKER: I would move for admission of R45 with
22 redactions, Your Honor.

23 MR. SINGER: No objection.

24 THE COURT: It will be admitted.

25 (Whereupon, Defendant's Exhibit R45 was

1 received into evidence.)

2 Q. (By Mr. Acker) If we could go to the last page
3 in the one, two, three, four, fifth paragraph. Mr. McBride,
4 isn't it true that although we have redacted portions of
5 this document that what you told the SEC and the investing
6 public, contrary to what you have told this court, is that
7 even without ownership of the UNIX copyrights, that SCO's
8 "ability to continue to develop and support all versions of
9 UnixWare and OpenServer as well as the recently announced
10 OpenServer 6M and UnixWare 7M as well as our new mobility
11 products will not be impacted." Didn't you tell the market
12 that?

13 A. This is part of what I told them. There is more
14 nuances in other parts of this document that, um, come into
15 play on this.

16 Q. Didn't you tell them that you could run that part
17 of your business without ownership of the UNIX copyrights?

18 A. I told them that we could run this part which
19 relates to the products. That as we talked yesterday, there
20 is the -- it is like a tree analogy of the source code
21 coming up through the tree that was the IP licensing part.
22 We had a licensing group and we had a products group. Yes,
23 we believed that the branches off this tree, UnixWare and
24 OpenServer, we could run our business with -- without the
25 copyrights, just like HP, IBM, all of the other licensees of

1 UNIX can run their businesses as well. The part that we
2 differ on here is we were unable to run our business for the
3 licensing side without the copyrights. And the licensing
4 side was really the future of the company.

5 Q. So let me get it straight so the jury
6 understands. You could operate as a software company
7 without the UNIX copyrights, but you couldn't run your SCO
8 source campaign without the UNIX copyrights. Do I have that
9 correct?

10 A. Mostly.

11 MR. ACKER: That is all I have, Your Honor.

12 THE COURT: Mr. Singer, I normally would not give you
13 a third time around, but I think in light of this I will.
14 But don't either of you think that this somehow opens the
15 door to a third course, all right?

16 MR. SINGER: Thank you, Your Honor.

17 FURTHER DIRECT EXAMINATION

18 BY MR. SINGER:

19 Q. I just have a few questions. First of all, with
20 respect to the press, well, the first area of examination by
21 Mr. Acker was about Novell putting up both sides of the
22 picture on its website. Do you recall those questions?

23 A. Yes, I do.

24 Q. I would like you to look at the press release
25 that was issued December 22, 2003, Exhibit 517. Would you

1 put that on the screen, please. Can you read this out loud?

2 A. Sure. Novell Statement on UNIX Copyright
3 Registrations.

4 THE COURT: Not too fast.

5 THE WITNESS: Sorry, Your Honor. "Novell believes it
6 owns the copyrights in UNIX, and has applied for and
7 received copyright registrations pertaining to UNIX
8 consistent with that position. Novell detailed the basis
9 for its ownership position in correspondence with SCO.
10 Copies of our correspondence, and SCO's reply, are available
11 here. Contrary to SCO's public statements, as demonstrated
12 by this correspondence, SCO has been well aware that Novell
13 continues to assert ownership of the UNIX copyrights."

14 Q. (By Mr. Singer) Mr. McBride, did you understand
15 this press release as simply telling people go look at our
16 website and make up your mind?

17 A. No.

18 Q. Now, with respect to the continuation to
19 negotiate with parties such as Google and Dell, did you try
20 your best to dissuade them from listening to Novell's
21 assertion of ownership?

22 A. Yes.

23 Q. Were you able to do that?

24 A. No, we were unsuccessful.

25 Q. With respect to Q45, could we put that on the

1 screen, that is one of the defendant's documents relating to
2 HP?

3 A. Yes.

4 Q. Who is Joe Beyers?

5 A. Joe Beyers was the vice president of Intellectual
6 Property and Licensing at Hewlett Packard.

7 Q. Did you understand that he would be the
8 decision-maker here?

9 A. Yes.

10 Q. Was Mr. Fink the decision-maker?

11 A. No. Mr. Fink was a Linux general manager who was
12 -- had a very strong interest in Linux being the show within
13 inside of HP.

14 Q. Was Mr. Fink, who wrote the D20 document that we
15 looked at a few minutes ago, a vocal advocate of Linux?

16 A. Yes, very much so.

17 Q. You were negotiating with Mr. Beyers; is that
18 correct?

19 A. Yes. We never had one discussion with Mr. Fink.

20 Q. Now, if you look at item number two where it
21 says, um, excuse me, item number three, I don't believe this
22 part was highlighted in the recent examination, which says,
23 "HP has no restrictions on what it does or says about the
24 IBM case or the Linux case." And the footnote says, and
25 this is what wasn't highlighted, any restrictions of this

1 type will only be in a Linux release, if executed. What is
2 the Linux release pertaining to?

3 A. That pertains to the deal that we were working on
4 that did not go through.

5 Q. And did that get to a point where a contract
6 which we saw yesterday was presented to you from HP that
7 could have been signed by SCO?

8 A. Yes.

9 Q. And what was the amount of the payments on that
10 contract if you had signed it?

11 A. \$30,000,000.

12 Q. Now after the -- did you have understandings as
13 to whether or not that could have been done after Novell's
14 statements were made to Mr. Beyers?

15 A. I'm sorry?

16 Q. You had referred that they had heard from Novell
17 that they were going to go public with another round of
18 comments?

19 A. Yes, okay. Once those statements were there, it
20 really did kill the deal.

21 Q. Now, you were asked about the August 4, 2003
22 letter and whether or not that was viewed as an outright
23 assertion of copyright ownership. Can we put that up on the
24 screen. This is Exhibit 105?

25 A. Okay.

1 Q. Can we -- this is Mr. LaSala's letter of
2 August 4, 2003. Do you understand this is what Mr. Acker
3 was asking you about in the cross-examination?

4 A. Yes.

5 Q. If we come down to the last paragraph, can you
6 read that out loud?

7 A. "Unless and until SCO is able to establish that
8 some particular copyright right is "required" for SCO to
9 exercise its rights under the APA, SCO's claim to ownership
10 of any copyrights in UNIX technologies must be rejected, and
11 ownership of such rights instead remains with Novell."

12 Q. Did you believe that copyright ownership was
13 required for SCO to exercise its rights under the APA to
14 enforce its intellectual property?

15 A. Yes, absolutely.

16 Q. So at this point was this letter publically
17 announced by Novell?

18 A. No, it was not.

19 Q. Did you view this as the same as when they made
20 public announcements in May and then later in December 2003
21 to the effect of we own the copyrights?

22 A. No.

23 Q. Is that why this was not reported in your public
24 securities filings until they publically made such an
25 assertion again?

1 A. That is correct.

2 Q. And when you saw that public assertion which you
3 were just asked about, where you said that you would be able
4 to operate the UNIX and UnixWare business?

5 A. Yes.

6 Q. Would you have been able to do licensing deals
7 such as you did with Microsoft and Sun?

8 A. No.

9 Q. If you didn't own the copyrights?

10 A. No, not at all.

11 Q. Would you have been able to take any action to
12 enforce your intellectual property if you didn't own the
13 copyrights?

14 A. No. The copyrights were a prerequisite to
15 enforcing the intellectual property.

16 Q. What you would have -- so were you referring to
17 just the ability to sell product, the UNIX and UnixWare
18 products?

19 A. Yes.

20 MR. SINGER: Thank you very much.

21 THE WITNESS: Thank you.

22 THE COURT: Mr. Acker?

23 MR. ACKER: I don't have anything else, Your Honor.

24 THE COURT: May this witness be excused?

25 MR. SINGER: Your Honor, it is possible he will need

1 to be recalled.

2 THE COURT: All right. Mr. McBride, that means that
3 you need to keep yourself available in that event. But I
4 would again inform you please do not discuss your testimony
5 with any other witness or in the presence of any other
6 witness in the case or communicate in any way to them what
7 the nature of your testimony is.

8 THE WITNESS: I understand, Your Honor.

9 THE COURT: Thank you, Mr. McBride.

10 THE WITNESS: Thank you.

11 THE COURT: Mr. Singer, your next witness.

12 MR. SINGER: Our next witness is Gary Pisano.

13 THE CLERK: Please raise your right hand.

14 GARY PISANO,

15 called as a witness at the request of the Plaintiff,

16 having been first duly sworn, was examined

17 and testified as follows:

18 THE WITNESS: I do.

19 THE CLERK: Thank you. Please be seated. And if you
20 would please state and spell your name for the court.

21 THE WITNESS: My name is Gary Pisano, G-A-R-Y
22 P-I-S-A-N-O.

23 THE CLERK: Thank you.

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DIRECT EXAMINATION

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BY MR. SINGER:

Q. Do you need some water?

A. Yes.

THE COURT: There should be some in there.

MR. SINGER: Why don't we provide you some of ours.

THE WITNESS: It is empty.

Q. (By Mr. Singer) Good morning. Professor Pisano,
how are you employed?

A. I am a professor at Harvard Business School.

Q. And do you hold a particular position at the
Harvard Business School?

A. Yes. I am the Harry E. Figgie, Junior Professor
of Business Administration.

Q. What does it mean to be a chaired professor?

A. That is the highest rank you can have in
academia.

Q. How long have you been a professor at Harvard?

A. I have been on the faculty for 22 years.

Q. Can you briefly summarize your educational
background?

A. Yes. I have a PhD in Business Administration
from the University of California Berkeley, and a BA in
economics with distinction from Yale.

Q. What is your area of specialty?

1 A. I specialize in economics and management of
2 technological innovations.

3 THE COURT: Dr. Pisano, would you please speak into
4 the microphone and please do not speak so quickly that the
5 court reporter cannot get what you have to say or that
6 others cannot understand what you are saying, all right?

7 THE WITNESS: Thank you sir, yes. I should repeat my
8 last answer.

9 Q. (By Mr. Singer) Yes. Can you explain what you
10 mean by economics of management innovation?

11 A. Economics of management innovation I study a
12 range of topics concerning how firms develop innovations,
13 the strategies and approaches they use, and how they try to
14 commercialize those through various mechanisms including
15 licensing strategies.

16 Q. I would like you to look at Exhibit 750 on the
17 screen. Is this a true and correct copy of your CV setting
18 forth your expert qualifications?

19 A. Yes, it is.

20 Q. And does this set forth your various honors and
21 awards and your publications?

22 A. Yes, it does.

23 MR. SINGER: I move the admission of Exhibit 750.

24 MR. ACKER: No objection, Your Honor.

25 THE COURT: It will be admitted.

1 (Whereupon, Plaintiff's Exhibit 750 was
2 received into evidence.)

3 Q. (By Mr. Singer) I would like to talk just a
4 little bit about some of that, and recognizing that when
5 you're qualifying an expert witness, it is not a time for
6 modesty so I'm going to ask you to disclose the full extent
7 of your honors and recognition in the field.

8 Has any of your work been published?

9 A. Yes, it has.

10 Q. And approximately how many articles have you
11 published?

12 A. I have published 30 articles.

13 Q. And presentations?

14 A. Presentations, case studies, other materials, we
15 do develop a lot of course material at Harvard, another 50
16 or 60 on top of that.

17 Q. Have you written books?

18 A. Yes, I have. I'm the author of six books.

19 Q. Are you on the editorial board of any journals?

20 A. Yes. I am an editor of a journal called
21 Industrial and Corporate Change and I was, until a couple of
22 years ago, the main editor, one of the main editors for the
23 top journal in the innovation field called Research Policy.

24 Q. Has your work won any awards?

25 A. Yes, it has.

1 Q. Can you explain?

2 A. Yes. The most recent award was a paper for an
3 article published in the Harvard Business Review this past
4 year in 2009 and it won an award called the McKenzie Award
5 which is an award given to the best publication in the
6 journal that year.

7 Q. Has your work been cited widely by other
8 academics?

9 A. Yes. It has been widely cited and one of my
10 papers, in particular, called Dynamic Capabilities in
11 Strategic Management was among the most cited papers in the
12 entire fields of business finance and economics from 2000 to
13 2005.

14 Q. Have you done any case studies in the information
15 technology field?

16 A. Yes, I have done a number. I have written a case
17 study on Amazon web services as well as case studies on
18 Intel and IBM.

19 Q. And can you explain to the jury what a case study
20 is?

21 A. Sure. Case studies are something that we write
22 and describe an actual business situation that we then use
23 in our classroom and they're used in other business schools
24 around the world to help students come to an understanding
25 of how to analyze certain kinds of business situations.

1 Q. And other than your position at Harvard, what
2 else do you do professionally?

3 A. I do consulting.

4 Q. And what type of consulting do you?

5 A. Um, I advise companies of a range of sizes and in
6 a range of industries on strategies for innovation, how to
7 develop innovation, how to introduce new products to the
8 market, licensing strategy, development of business models,
9 those sort of issues.

10 Q. Now, are you limited to a certain number of days
11 of consulting?

12 A. Yes. By Harvard rules I can do up to 52 days per
13 year of consulting.

14 Q. Does your work here count against that?

15 A. It does.

16 Q. Now, do you act often as an expert witness in
17 litigation?

18 A. No, I don't.

19 Q. In fact, is this the first time you have
20 testified in court?

21 A. This is the first time I have testified at a
22 trial, yes.

23 Q. And have you been deposed as an expert before?

24 A. Yes. I was deposed in this case and in one other
25 case which was the SCO/IBM case. I was deposed in that

1 case.

2 Q. And is there any other litigation or arbitration
3 that you have ever been involved in as an expert witness?

4 A. I did one small arbitration case back in 1996,
5 1997, around that time frame.

6 Q. Professor Pisano, are you being compensated for
7 your work on this case?

8 A. Yes, I am.

9 Q. And do you bill by the hour?

10 A. Yes, I do.

11 Q. What is your hourly rate in this case?

12 A. \$600 per hour.

13 Q. Now, what do you -- what are you able to charge
14 for the companies that you consult with?

15 A. For my corporate clients, um, I can charge up to
16 \$1,250 per hour.

17 Q. And do you have a lot of customers at that rate?

18 A. Yes, I do.

19 Q. Now, what were you asked to do for this case?
20 What was the scope of your engagement?

21 A. I was asked to conduct research on the question
22 of how many right to use licenses SCO would have been able
23 to sell had the slander not occurred.

24 Q. And why are you qualified -- do you believe
25 you're qualified to offer an opinion on that issue?

1 A. Yes, I do.

2 Q. Why is that?

3 A. For the past 22 years, you know, my research, my
4 consulting, my teaching, has focused on exactly these kind
5 of issues of a company with a -- with a new product and
6 trying to think about the ways it can be commercialized.
7 And in particular, I have spent quite a bit of my time
8 thinking about licensing, which this is a license, a
9 licensed product, and how markets for licenses work.

10 Q. How does that relate to this case?

11 A. Well, this is a -- this is a product, the right
12 to use license, it is a license, um, and it is exactly the
13 kind of, you know, selling it into that market it is a
14 market for licensing as opposed to a market for a physical
15 product.

16 Q. What assumptions have you made about this case
17 for the purpose of your opinion work?

18 A. I have made just two assumptions. The first
19 assumption is I assume that SCO does indeed own the
20 copyrights at issue. The second assumption I make is that
21 there had not been any slander. So no statements by Novell,
22 nothing like that. So that is the second assumption.

23 Q. Now, is there something in your field of work
24 called "the but for world"?

25 A. Yes, yeah. Yes, I mean we don't describe it

1 exactly that way, I think that is more legal terminology,
2 but it is a form of analysis and --

3 Q. Can you explain what that form of analysis is?

4 A. In essence what you're doing in a "but for world"
5 you're trying to describe what would have happened "but for"
6 or in the case something else didn't happen. So in this
7 case, but for Novell's slanders, we assume that slander
8 never occurred.

9 THE COURT: Dr. Pisano, will you please slow down.

10 THE WITNESS: Sorry, yeah.

11 THE COURT: I realize this is your first trial.

12 THE WITNESS: Yes. I think I --

13 THE COURT: If you're not familiar with it, when the
14 judge suggests something, it is probably a good idea to do
15 it.

16 THE WITNESS: Okay. It is advice I have gotten many
17 times before, sir. I really work hard at it. Um, so, in
18 this case, a but for analysis you assume there hadn't been
19 slander. And then you ask but for that slander had not
20 occurred, um, what would the market for RTU's have looked
21 like? How many right to use licenses could SCO have sold?

22 Q. (By Mr. Singer) Now, are you aware that in 1995
23 Santa Cruz purchased the UNIX business from Novell?

24 A. Yes.

25 Q. Did Santa Cruz have a UNIX product?

1 A. Yes.

2 Q. What was that called?

3 A. UnixWare.

4 Q. What was the significance of UnixWare?

5 A. UnixWare was an important product because

6 UnixWare was an operating system for servers that could run

7 on types of a computer servers that were called Intel

8 architecture. That is, they had Intel chips in them. And

9 that was a very fast growing part of the computer server

10 market. And until that time, there was no -- there had been

11 no other UNIX products that could run on an Intel based

12 machine.

13 Q. How did Santa Cruz UNIX on Intel products do in

14 the marketplace?

15 A. They did very well. By 1999, they had 80 percent

16 of the market for UNIX that ran on Intel architectures.

17 Q. Did the evolution of Linux have an impact on that

18 business?

19 A. Yes, it did. It had a significant impact.

20 Q. Can you explain?

21 A. Yes. Um, Linux is very similar to UNIX. It has

22 a lot of the same functionality and, in fact, over time,

23 Linux began to develop a lot of the same enterprise

24 capabilities. That is, you could use it for computers that

25 businesses were using for critical functions.

1 As Linux got better, it was doing essentially the same
2 things UNIX could do, but it was free, or at a much lower
3 cost. So it just ate right into the market share of the
4 UNIX on Intel products.

5 Q. If it was free, why would companies like IBM or
6 Novell be interested in it?

7 A. There is still a way to make money on it. If
8 you, for example, some companies like Novell take it and
9 they can -- not everyone gets it for free. Some want a
10 packaged version that comes with support, comes with
11 instructions.

12 Q. Dr. Pisano, a little slower, please.

13 A. Gosh, I'm really sorry. Some companies want the
14 version -- want a lot of support. They want instructions on
15 how to use it. And companies like Novell can provide that.
16 And, of course, you have to pay for that. If you just got
17 the downloaded version, you don't get that. For companies
18 like IBM, they can use it to enhance their hardware
19 business.

20 Q. Was Linux always able to compete with UNIX?

21 A. No.

22 Q. Can you explain?

23 A. Yes. Initially, Linux was actually developed by
24 a graduate student in Finland, Linus Torvalds, and initially
25 it was really a bit of a hobbyist's toy. A few computer

1 aficionados played with it and made contributions. Over
2 time, however, it began to get used in businesses.
3 Initially, just for very simple business applications. So
4 in -- for a computer server, web serving, just serving up
5 web pages, it is a very simple function. But over time, as
6 it got more capability, it could -- it could take on more
7 difficult tasks and more complex tasks for the businesses
8 such as transaction processing.

9 Q. Is there something called enterprise hardening?

10 A. Yes.

11 Q. Can you explain what that is?

12 A. Yes. That again refers to building in capability
13 and functionality into the operating system to make it
14 reliable, more available, and more scalable. That is you
15 can use it at -- for lots of -- lots of users and use many
16 of them.

17 Q. Did there come a time when Linux became
18 enterprise hardened?

19 A. The first point at which that really happens is
20 with the introduction of Linux version 2.4 which is
21 introduced to the market in January of 2001 or February
22 of 2000 -- announced in January 2001, available in February
23 of 2001. That really began to include some elements that
24 made it enterprise hardened.

25 Q. And how did that affect Santa Cruz?

1 A. This had a very significant impact on them
2 because, again, as I explained before, you have this
3 operating system, Linux, which could do a lot of the same
4 things that UNIX could do and it just ate right into the
5 market share.

6 Q. Do you have an understanding of how Santa Cruz
7 responded to this competitive challenge from Linux?

8 A. Yes. At a point in time Santa Cruz discovered
9 that their intellectual property associated with System Five
10 of the -- of their UNIX product had been incorporated into
11 Linux without their permission. And they decided to launch
12 a licensing program and the one that I study for the
13 purposes here today is the right to use license as a way to
14 capture some of the value of their intellectual property
15 which had gotten out into the market.

16 Q. What was a SCO source right to use license,
17 Professor?

18 A. A SCO source -- SCO source right to use license
19 is essentially an agreement, a contract, between SCO and a
20 user of Linux that gives them permission to use it and says
21 if you buy this license, we're not going to sue you. You
22 have got our permission to use the product.

23 Q. Now, can you explain whether a right to use
24 license is comparable to insurance?

25 A. It is in many ways, yes. Because a computer user

1 might not know if there really was infringement. That is,
2 they don't really know there was a dispute and debate as to
3 whether SCO's intellectual property really was in Linux.
4 And so you would buy the license as insurance in case -- you
5 bought it in case there was infringement you were fine, you
6 weren't going to be sued.

7 Q. Is that like homeowner's insurance?

8 A. Yeah. A great analogy would be homeowner's
9 insurance. We buy homeowner's insurance against the
10 possibility that something bad might happen to our homes.
11 We hope it doesn't, right, and there is a probability
12 something bad will happen like a fire or a flood and we hope
13 it doesn't, but in case it does happen, we have insurance
14 and that insurance protects us. So the right to use is very
15 similar to a form of insurance for the user.

16 Q. Is there a difference between Linux and
17 proprietary operating systems in the type of indemnification
18 that they offer to people who would use their products?

19 A. Yes. A very big difference. So when we go out
20 and buy say Microsoft Windows, or Microsoft Office, or
21 another computer program from a company like that, they have
22 controlled the development of the code. So they offer
23 indemnification. They say to us, we buy that and you can
24 actually read that, there is a little -- a little tab often
25 inside of the package which will explain it to you, or

1 sometimes it is right on the screen, that indemnifies you.
2 It says look, if there is some intellectual property of
3 someone else inside this system or your program, and we get
4 sued for it, you can't get sued for it. We will protect
5 you. Even though you're using something that you shouldn't
6 be using, we'll kind of take care of it for you. We will
7 protect you legally.

8 Linux didn't have that. Linux never had
9 indemnification because it was being developed by users
10 around the world, anonymous using contributing code. So no
11 one was in a position to essentially guarantee the origins
12 of that code. No one could say gosh, you know, we have
13 checked and we have made really sure that there is no
14 infringing code in here. So there was no indemnification
15 for Linux.

16 Q. Now, I would like to turn to Novell's statements.
17 Are you familiar with Novell's statements claiming copyright
18 ownership?

19 A. Yes, I am.

20 Q. In completing your assignment, what was the first
21 thing that you did?

22 A. The first thing that I did was I looked at those
23 statements to see if there is any economically plausible way
24 those statements could have an effect.

25 Q. An effect on what?

1 A. On SCO's sales of right to use licenses.

2 Q. What did you conclude?

3 A. I concluded they would have an effect. And I
4 looked at three things in that, um, or I looked at a few
5 things.

6 First, one has to look at who is making the
7 statements. Um, Novell. Novell was a credible player in
8 the market. They were the first party to the transaction
9 that sold the rights to SCO. So for them to challenge it,
10 it would have to be taken seriously. It is not like some
11 third party somebody came out of the, you know, from left
12 field and said hey, by the way, I don't think SCO owns the
13 rights. This was the first party.

14 Um, second they were -- they were public statements.
15 Um, they made them publically so the market and potential
16 computer users and companies who were using Linux could hear
17 -- would hear them. And so I think those two things
18 together convinced me that there would be an effect. And if
19 you just go back to, again, basic economic logic, it is very
20 hard to sell an asset that you can't claim you own.

21 When you go to sell your home, one of the first things
22 that happens is a title search. If you can't prove you own
23 the home, you're not going to be able to sell the home. And
24 you wouldn't want to buy a home where the person selling it
25 to you can't guarantee they actually own the home.

1 Q. Now, I would like to ask you about -- did you
2 take any steps to determine the size of the potential market
3 for Linux?

4 A. Yes, I did.

5 Q. What did you try to do?

6 A. So the first step was to try to understand what
7 is the magnitude in trying to do -- in doing one of these
8 analysis what you do is you start out with what is the
9 target market. What is the population of potential
10 customers. And so I started out by looking at the total
11 market for servers that were running Linux 2.4 and 2.6.
12 Linux version 2.4 was the first version of Linux that SCO
13 says its intellectual property was in. That was launched,
14 as I mentioned before, in February 2001. So my first step
15 was to say how many of these versions of Linux that were
16 either sold or downloaded for free were out in the market
17 between 2001 and 2007.

18 Q. Did you look at particular Linux versions?

19 A. Yes. Linux 2.4 and then there was another
20 version that came out in 2003 called 2.6 and that also --
21 SCO also claims its code was in 2.6.

22 Q. What was the geographical scope of the market
23 that you looked at?

24 A. I restricted my analysis to just the North
25 American market. That is a conservative approach because

1 Linux is used around the world. And as far as I understand
2 legally, SCO would have had a right to press its copyright
3 claims against anyone around the world.

4 However, there is higher costs of doing that. It is
5 more difficult. It is easier to do it in your own market,
6 the North American market. And, um, while IDC, the source
7 of data I used IDC which is an extremely reliable source of
8 data, they track it worldwide, I felt that their data would
9 be more complete for the North American market. So I
10 restricted my analysis to just the North American market.

11 Q. Did you look at all computers using Linux or just
12 a certain type of computer?

13 A. So Linux can be used on both a desktop like we
14 might have at work or at home, or it can be used on a server
15 which is a computer that supports multiple users. And, in
16 fact, Linux is used on both. However, SCO was targeting the
17 right to use license to business users. And for the vast
18 majority of business users, the relevant market is going to
19 be the server market. And so I restricted my analysis just
20 to looking at servers that were running Linux.

21 Q. How did you quantify the size of that market?

22 A. So I used the source of data from an organization
23 that tracks trends in the computer and IT industries. It is
24 called IDC and they -- they report for each year from 2001
25 to 2007 every year the number of both the paid shipments, so

1 for instance versions of Linux that a company bought from
2 RedHat or Novell, and the unpaid ones, that is ones that
3 those companies downloaded for free. Many companies will
4 buy a copy, download a few copies for free. So we really
5 need to look at both.

6 Q. Are there different types of Linux shipments?

7 A. Yes, those are the two types. The two types are
8 the paid and the -- what are called the non paid. Those are
9 the ones that are downloaded for free.

10 Q. What years did you focus on again?

11 A. Again 2001 to 2007.

12 Q. So based on the IDC data for that time frame,
13 what did you conclude the size of the market was?

14 A. There were 7.4 million Linux -- versions of Linux
15 out there, cumulatively, between 2001 and 2007.

16 Q. Is that just looking at the servers in the North
17 American --

18 A. Yes, just in the North American market.

19 Q. Did you view that to be a -- how did that relate
20 to what the universe of potential buyers were for these
21 right to use licenses?

22 A. So that starts -- that is kind of, if you will,
23 that is the outer bounds, right. That is if you could sell
24 100 percent, you could penetrate 100 percent of the market,
25 you would get all 7.4. But there are lots of reasons to

1 believe they couldn't sell to 100 percent of the market
2 because in many situations you don't. So then the next step
3 for me was to try to assess what percentage of that total
4 7.4 million could they have sold to.

5 Q. Before we turn to that step, let me ask you,
6 Dr. Pisano, do companies typically have multiple servers?

7 A. Yes, they do.

8 Q. What would be a range that might be useful to
9 know?

10 A. It is a dramatic range. I mean a small company
11 might have a dozen or, you know, a handful. The largest
12 companies could have tens of thousands, hundreds of
13 thousands. There are some reports that Google has over a
14 million servers. So that really -- really ranges.

15 Q. What was the next step in your analysis?

16 A. So the next step was to try to assess what is the
17 likely market penetration of the SCO right to use license in
18 this universe of 7.4 million users.

19 Q. How did you go about that?

20 A. Well, the first step was to kind of conceptualize
21 the problem this way. Imagine in that universe of users
22 there is a spectrum of users. And at one extreme we have
23 computer users or businesses that they don't think there is
24 infringement, they don't think SCO has got any chance to
25 prove infringement. Maybe they have looked at the data

1 themselves, or they have listened to others, or they don't
2 think they'll be caught, all right. They think they'll
3 never find us. Or, regardless of that, they think you know
4 what, we'll just take the risk. Some organizations are
5 willing to take that kind of risk. That is one extreme.
6 They're never going to buy a SCO right to use license, ever.

7 Imagine at the other end of the extreme we have
8 computer users, businesses, with a very different set of
9 preferences. They're concerned about infringement. They
10 think there could be infringement. They're afraid they'll
11 get caught. Well, regardless of how they view that, they
12 just don't want to take the risk. They are conservative.
13 They don't want to take the risk. So we have a continuum.
14 This end of the spectrum (indicating) are the ideal
15 customers for SCO RTU, the conservative side. This group
16 out here, (indicating), they're not going to buy. So we
17 want to try to then assess and think about where is the
18 market on this continuum.

19 Q. How do you go about determining that then?

20 A. So a useful technique to try to do this in a
21 market to estimate how much of a product might sell is to
22 use a proxy, right. A proxy is another product that looks
23 very similar or is almost a substitute for the product
24 you're trying to analyze. So let me give a simple example.
25 If you are a book publisher and you are trying to estimate

1 how many -- you have got a young author who writes about
2 courtroom dramas, right, a novelist, and you're trying to
3 say how do they even sell a particular market, you know, say
4 Salt Lake. How many are they going to sell here? How many
5 of those books should we send to this market? They might
6 use as a proxy how many sells of other books that looked
7 very similar. They might pick John Grisham novels. They
8 might say how many John Grisham novels sell. Because that
9 is close to what this product, this author's book, is doing.
10 This is very common for companies to do is to look at
11 similar products and use that as a benchmark to decide how
12 many might our products sell.

13 Q. Did you find such a proxy with respect to the SCO
14 source right to use license?

15 A. The best proxy you can use here are businesses,
16 preferences, or demands for indemnification. As I mentioned
17 before, indemnification is something that protects you in
18 the event of a lawsuit. So the SCO right to use license is
19 very similar to indemnification. So if we can assess the
20 percentage of the market that wants indemnification, that
21 should give us a very good idea of the percentage of the
22 market that would have bought the SCO right to use licenses.

23 Q. Did you find such surveys?

24 A. There were three such surveys. Excuse me, may I
25 get some more water? I'm really dry.

1 THE COURT: Certainly.

2 THE WITNESS: Dryer mountain air, I guess. Thank you.
3 Thank you for that. Let me answer your question.

4 Q. (By Mr. Singer) Yes.

5 A. I found three surveys. One was a survey
6 conducted by a business intelligence and analyst firm called
7 Forrester Group. They have been around for a couple of
8 decades and they conducted a survey. This particular survey
9 had 36 large -- 36 large North American companies with sells
10 greater than one billion dollars. And they asked them two
11 questions. They asked them if they were concerned about the
12 intellectual property issues as concerning Linux, and they
13 specifically made reference in their question to SCO/IBM.
14 36 percent yes they were concerned. Um, they then asked
15 about their interest in buying into an indemnification plan
16 and 22 percent said they would be interested in buying into
17 a plan.

18 Q. In your view was the Forrester Group a reputable
19 source?

20 A. Yes. And when I look at the sources of data,
21 when I use surveys, what I did in this research here is
22 exactly what I do in my own academic research. It is the
23 same standard I use when I judge other people's work in
24 academia. There is a few things you look at.

25 So first you have to look at the organization. Who is

1 doing the survey. And the first question is do they have
2 any reason to be biased? That is, for example, if they have
3 a political agenda and is there a certain issue that you
4 would expect them to be biased on. Thank you. Or do they
5 have an incentive to be unbiased. An organization like
6 Forrester, their reputation hinges on doing unbiased
7 surveys. CIO's, chief information officers, executives,
8 other analysts use their reports, buy their work, they want
9 unbiased information.

10 The second is, um, is this organization experienced at
11 doing this. To put it in simple terms, are they amateurs or
12 are they professionals at it. Is this the first time
13 they're doing a survey, or is this something that they do as
14 a matter of course. And for, um, Forrester, as I mentioned,
15 they have been around a couple of decades. They're one of
16 the oldest firms to do this kind of work. They do these as
17 a matter of course. They do -- they do dozens of these
18 things a year. So they are -- they definitely meet that
19 criteria. And the third criteria is to look at the basic
20 parameters of the survey design to see is there any reason
21 to believe the result would be biased in one direction or
22 the other.

23 And here they had 36 companies, larger companies. It
24 is not a very large sample, but it is large enough, by the
25 way, to get reliable findings. You don't need samples of

1 thousands to get a reliable, you know, indicator. And there
2 was nothing in the design that would suggest to me a strong
3 bias in either direction.

4 Q. And tell us again what were the results of this
5 first study?

6 A. It was 36 percent said they were -- had concerns
7 over the intellectual property issues in Linux, and 22
8 percent planned or were interested in buying
9 indemnification.

10 Q. Can you tell the jury about the second study that
11 you looked at?

12 A. The second study was conducted by an organization
13 called Yankee Group. Yankee is actually -- so Forrester was
14 one of the oldest. Yankee is actually the oldest company to
15 do business intelligence analysis for the IT sector.

16 And they did a survey of 1,000 organizations, and they
17 asked about -- they asked companies about their concerns,
18 whether indemnification was a concern, a top priority, high
19 concern, somewhat concerned, unconcerned were the
20 categories. And what they found is that 19 percent of their
21 respondents said that it was either a top priority or they
22 were very concerned about indemnification. And then another
23 26 percent said somewhat concerned. And that is a harder
24 one to interpret.

25 So again, my view was at a minimum 19 percent, and

1 then sort of think on that continuum of the 26 percent we
2 don't know which of those are concerned enough to be buying,
3 but a maximum it would be 45 percent. We add the 26 to the
4 19, there is 45 percent.

5 Q. And in connection with this survey, did you look
6 at and have cited in your report Exhibit K28 which is the
7 2004 Windows, UNIX and Linux Comparison Survey by the Yankee
8 Group?

9 A. Yes.

10 Q. And did this provide the methodological
11 information regarding how this survey was conducted?

12 A. Yes.

13 Q. Did this provide you with information about how
14 many people were surveyed?

15 A. Yes.

16 Q. The exact questions used?

17 A. Yes.

18 Q. Did it include the demographics of the different
19 people?

20 A. Of the different kinds of organizations, the
21 sectors they were, yes.

22 THE COURT: Mr. Singer, would you keep in mind we need
23 to break in the next couple of minutes so when it is a good
24 time for you.

25 MR. SINGER: I think after one more question.

1 Q. (By Mr. Singer) In your judgment was this second
2 survey a reliable survey for you to consider?

3 A. Yes. And it meets all of the same three criteria
4 I laid out before for the first survey.

5 MR. SINGER: I think this would be a good time, Your
6 Honor.

7 THE COURT: We'll take a 15 minute recess.
8 Ms. Malley.

9 THE CLERK: All rise for the jury.

10 (Whereupon, the jury left the courtroom.)

11 THE COURT: Let's take 15 minutes, counsel.

12 (Recess.)

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