

1 THE COURT: Counsel, I want to ask Dr. Pisano a
2 couple of questions before the jury comes back.

3 MR. SINGER: Yes.

4 THE COURT: Dr. Pisano, did you look at the
5 methodology of the underlying Yankee Group study in order
6 to determine whether or not it was reliable?

7 THE WITNESS: Yes.

8 THE COURT: Is the Yankee Group study the type
9 of study that is reasonably relied upon by other experts
10 in your field in forming similar opinions?

11 THE WITNESS: Yes.

12 THE COURT: All right. Thank you.

13 Anything before we bring in the jury?

14 MR. SINGER: No, Your Honor.

15 MR. ACKER: No, Your Honor.

16 THE COURT: Dr. Pisano, I have to warn you that
17 we have a court reporter here who is more inclined than
18 some to get after you if you start staking too fast.

19 THE WITNESS: I apologize.

20 THE COURT: I just want you to be aware.

21 THE WITNESS: I apologize. It's a bad habit.
22 I mentioned to her, being the youngest in a large family,
23 speaking fast --

24 THE COURT: You were doing well after the third
25 or fourth suggestions. I'm just trying to warn you.

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1 THE WITNESS: Thank you. I appreciate it,
2 sir.

3 MR. SINGER: Dr. Pisano would have been a very
4 good college debater.

5 MS. MALLEY: All rise for the jury, please.

6 (Jury brought into the courtroom.)

7 Q. BY MR. SINGER: Dr. Pisano, a few more
8 questions regarding the second Yankee -- well, the second
9 of the studies, the Yankee study which you were talking
10 about.

11 First of all, I'd move the admission of K-28.

12 MR. ACKER: I object, Your Honor. He can rely
13 on it, but it doesn't come into evidence.

14 THE COURT: I'll sustain the objection.

15 Q. BY MR. SINGER: Are you aware of the number of
16 respondents to the overall survey?

17 A. The overall survey was 1,000.

18 Q. Was the question regarding indemnification
19 directed at a particular type of respondent?

20 A. Yes. It was directed at respondents. They
21 asked: If your company is mid-size or greater than 5,000
22 employees, what is your -- what is your attitude toward
23 or concern over indemnification?

24 Q. So a small company wouldn't necessarily have
25 responded to that?

1 A. No.

2 Q. Are you comfortable with the methodology, even
3 though you don't know how many small companies might not
4 have responded to that question?

5 A. Yes. I'm very comfortable.

6 Q. And, can you explain?

7 A. Yes. Again, this is a survey with a -- the
8 biggest survey is a thousand. Now, there's a subset in
9 there. We don't know the exact number, okay, but, again,
10 let's go back to who this organization is and what they
11 are about. They don't have an incentive to publish a
12 study with, you know, an absurdly low response rate that
13 would, in any way, bias the results.

14 And if we also just think demographically about
15 businesses, it leaves out small businesses, and there's
16 quite a few small businesses, but mid-to-large companies
17 is also likely to be a very big chunk of their total
18 survey. So if we are starting with a thousand, they
19 might have a few hundred responses in there, and that
20 certainly is sufficient to get a reliable response.

21 Q. I'd like to ask you about the third survey that
22 you relied upon.

23 A. Yes.

24 Q. Can you tell us about that study?

25 A. Yes. That was also done by Yankee Group. That

1 was 550 North American companies of all sizes, similar,
2 similar methodology, similar -- directed at similar kind
3 of decision-makers, chief information officers or systems
4 administrators in these organizations and across a broad
5 range of industries; banking, government, academia,
6 manufacturing, professional services, etc.

7 Q. Can we put A-30 up on the screen for you to
8 see? Is this the study that you're referring to is the
9 2005 Yankee Study?

10 A. Yes.

11 Q. And did you review the methodology of this
12 study?

13 A. Yes, I did.

14 Q. Did you believe it was an appropriate
15 methodology?

16 A. Yes.

17 Q. Was it a methodology of the type that people in
18 your field would rely on for your work?

19 A. Yes. Absolutely.

20 Q. Is that true of all three of the studies?

21 A. Absolutely. Yes.

22 Q. And how many respondents did you say this
23 particular study had?

24 A. This study had 550 respondents.

25 Q. And what did this study indicate?

1 A. This study indicated that 20 percent of
2 organizations that use Linux or are planning to use Linux
3 were planning on buying indemnification.

4 Q. So, what conclusions did you reach about the
5 reliability of these three surveys as a whole?

6 A. So, in one of the principles that I use, when I
7 do my academic research, is, if you have multiple sources
8 of data, is triangulation. Do they all point in the same
9 direction? And there is a high degree of overlap between
10 these. At minimum, it seems to be 19 percent
11 penetration; at maximum, 45 percent.

12 But, again what I think about here with the
13 three studies in evaluating together, is, do they
14 triangulate? Do they point in the same direction? And,
15 in this case, they did

16 MR. SINGER: Can we put up a demonstrative,
17 which is -- Mr. Calvin.

18 I'd like the jury to be able to see -- this is
19 a demonstrative exhibit, Your Honor.

20 THE COURT: Any objection?

21 MR. ACKER: No, Your Honor, none.

22 THE COURT: Go ahead.

23 Q. BY MR. SINGER: With this demonstrative
24 exhibit, can you explain how the 19, 26 and 55 percent
25 numbers relate to one another?

1 A. Sure. So we can think about that pie as the
2 total size of the market. That's all the Linux 2.4, 2.6.
3 That had 7.4 million users. The 19 percent is the lower
4 bound, the minimum estimate of what I would think the
5 market penetration for the the SCO right-to-use license
6 would have been. There is this other 26 that was
7 potential. And, depending on how we would interpret the
8 somewhat concern, we get a maximum of 45 percent. So no
9 more than 45 percent, no less than 19 percent. It's just
10 the range that I calculate.

11 Q. Were all three studies showing interest at 19
12 percent or higher?

13 A. Yes. One was showing -- yes, all three, 19
14 percent of higher. The minimum was 19, and the other two
15 were -- their minimums were 20 and 22 percent.

16 Q. So, what was your -- did you draw a conclusion
17 from these three surveys with respect to the purchasers
18 for SCOsource licenses and what you've described is this
19 but-for world if the slander of title had not occurred?

20 A. So, if we take the lower bound estimate of 19
21 percent and we apply that to the 7.4 million total
22 potential market, we get 1.4 million SCOsource
23 right-to-use licenses. If we go to the other extreme,
24 the 45 percent, we get 3.3 million. So we think it's
25 between that range, 1.4 and 3.3.

1 Q. Did you view these as buyers that were likely
2 to purchase SCO right-to-use licenses?

3 A. Yes.

4 Q. Can you explain?

5 A. Yes because, again, if we go back to the proxy,
6 and the demand for indemnification, these users appear to
7 be asking for a product that does exactly what the SCO
8 right-to-use license does. It relieves them of the risk,
9 of the legal risks of infringement and also the
10 operational risks; the need to shut down your systems if
11 you have to change things, down time, which can be
12 extremely costly. So, again, this segment, it seems to
13 me, really almost perfectly aligned with what the SCO
14 right-to-use license was offering.

15 Q. Did you reach any conclusion about why, in the
16 real world, not the hypothetical world, those 19 to 45
17 percent did not buy a SCOSource license?

18 A. In my opinion, it's the lack of clear ownership
19 over the copyrights. The SCO right-to-use license,
20 without clear ownership, is a worthless product, so it
21 doesn't solve their problem. You know, had the ownership
22 been clear, it solves their problem. Without that
23 ownership being clear, it's not solving their problem.
24 They are not going to be interested in it.

25 Q. Did you consider other possible reasons that

1 users of Linux would not purchase a SCOSource license?

2 A. Yes. Absolutely. And that's the beauty of
3 this methodology. So, for example, if there are users
4 who say: I'm not going to buy a license. I'm not
5 concerned about the ownership issue, but I don't think
6 SCO has an infringement claim. They are never going to
7 win infringement.

8 Well, in the survey, they are not going to show
9 up in that 19 to 45 percent. You know, why would you be
10 worried about indemnification if you think there is no --
11 there is no legal risk there? So, yeah, the infringement
12 issue, different companies, different users have
13 different views on the infringement. And that's okay.
14 That's reality, and that's reflected in the answers.

15 Q. Did you consider whether the 19 to 45 percent
16 of the respondents were concerned about an infringement
17 risk other than SCO?

18 A. That's a great question because there was the
19 potential for other infringement risk, other companies.
20 Now, at the time, as we looked through the record, the
21 historical record of what's happening, SCO is, by far --
22 is the most visible one. In fact, at that time, they are
23 the only ones pressing claims for their intellectual
24 property. There were some things out there in the press
25 and in the literature saying that, gosh, there are 283

1 patents out there and a bunch of them belong to IBM, and
2 what happens if IBM decides to start suing people.

3 My view is the probability of that was very low
4 since IBM had a very huge stake in the success of Linux.
5 Another thought was, gosh, Microsoft might start to exert
6 their intellectual property rights. They hadn't been
7 doing that either. But, you know, let's just assume that
8 that was also on people's mind.

9 If you were concerned -- if you were a user and
10 you were, say, concerned with, say, IBM and the remote
11 possibility that IBM or some third party which hadn't
12 even expressed any issue around intellectual property was
13 going to come after you, if you weren't concerned enough
14 to say you wanted indemnification, you know, compared to
15 SCO, you had to have been concerned about SCO because SCO
16 was out there saying: We intend to press, you know, our
17 rights for -- to claim, to make our claims, to sue people
18 for infringement. So SCO was a real credible threat.

19 So, my view is if this 19 -- this certainly
20 doesn't exclude the possibility that, in this 19 to 45
21 percent, there are users who are also concerned with
22 other, unspecified intellectual property risks. That's
23 fine.

24 Q. Did you consider the issue of pricing?

25 A. Yes. The surveys don't speak directly to

1 price. But, let's, again, remember what's going on out
2 here. First of all, SCO had already announced a price
3 for their product. It was initially 695, and they had
4 made various deals at lower prices, and, in fact,
5 Deutsche Bank was forecasting that their price would be
6 \$200. So, the users certainly knew the price from SCO.
7 They also knew the price of other indemnification out
8 there. There were other plans out there, and they had
9 various prices. And these are companies who are used to
10 paying a premium for indemnification.

11 And in fact, in the third Yankee Group survey,
12 they asked users.

13 How much are you intending to spend extra on
14 indemnification?

15 And there's, again, as you would expect, a
16 range of responses, but the median was about 150 to 200,
17 the bracket, 150 -- I'm sorry -- 100,000 to \$250 thousand
18 per year extra on indemnification. So these users have a
19 range of prices in their mind at which indemnification
20 makes sense, and that's affecting their responses.

21 Q. Were there competitors who were also offering a
22 similar type product?

23 A. Yes.

24 Q. How did you consider that?

25 A. After -- after Novell's statements, a number of

1 companies, including Novell, decided to enter this market
2 to offer indemnification, to tell users: No need to
3 worry. We can offer you indemnification.

4 So there are potential substitutes. I looked
5 at them very carefully. But if you look at the different
6 programs that were being offered, they were very poor
7 substitutes, very poor substitutes. So, for example,
8 Novell's program -- Novell had a program. It capped the
9 legal liability at \$1.5 million. It required you to buy
10 \$50 thousand worth of services in the year before. It
11 was restrictive. It didn't compensate you for down time.
12 And several others had very significant flaws,
13 restrictions that would make them very imperfect
14 substitutes for a SCO RTU, right-to-use license.

15 Q. Did you also consider whether, if SCO's UNIX
16 copyright ownership was decided now, in its favor, would
17 SCO be able to go into the market and recoup those sales
18 by going back into a SCOSource business?

19 A. Absolutely not. And I thought about that
20 question as if I had never been asked to be involved in
21 this case, but the case was over, SCO won the case, and
22 they called me as a consultant and said: You know, Gary,
23 can you help us figure out our strategy for the SCO
24 right-to-use licenses? We want to go back and try to
25 recoup those sales. What's your opinion? What's your

1 advice?

2 And there's no way. I mean, there's just no
3 way they could do it. The market has moved on. Time has
4 moved on. You'd have to go back and find those people,
5 find the number of servers. Some have changed servers.
6 Some have outsourced their servers. Any of the possible
7 momentum they could have had in the market -- momentum
8 matters a lot in markets. If you can get something
9 going, you build -- you build momentum. That's dead.
10 The momentum is gone.

11 And then we also have to look at the resources
12 available to the company today. They had a sales force
13 in place then who could sell these. They had contacts in
14 the market. They had relationships with people. Both
15 some of the buyers, some of those people move on, and, as
16 I understand it, the sales force is not here anymore, so
17 they are just not in a position now to go back and recoup
18 those sales.

19 Q. So, finally, Professor Pisano, what is your
20 opinion regarding how many SCOSource licenses SCO could
21 have sold 2003 to 2007 if the ownership of its copyrights
22 had not been called into question by Novell?

23 A. In my opinion, it would range between 1.4
24 million and 3.3 million.

25 Q. And does that refer to the 19 to 26 percent --

1 A. Yes.

2 Q. -- 19 to 45 percent range?

3 A. Yes, sir.

4 MR. SINGER: Thank you.

5 THE COURT: Mr. Acker.

6 MR. ACKER: Thank you, Your Honor.

7 CROSS EXAMINATION

8 BY MR. ACKER

9 Q. Good morning, Dr. Pisano.

10 A. Good morning.

11 Q. Glad to see see you're a Cal Bear.

12 THE COURT REPORTER: Glad to see what?

13 MR. ACKER: A Cal Bear. We both attended the
14 University of California, Berkeley.

15 Q. BY MR. ACKER: Let me ask you, first, how many
16 hours have you spent working on this matter?

17 A. Oh, that's a great -- going back to the
18 beginning? Oh, I believe hundreds. Just in the last,
19 you know, weeks or two, 60 hours or so just in the last
20 few weeks, just kind of refamiliarizing myself with
21 things and the original report. I don't have that number
22 off the top of my head, but a lot. I go back to the
23 original, you know, creation of the report, to the
24 original expert report written in 2000 -- 2007.

25 Q. And you were paid \$600 for each one of those

1 hours?

2 A. Yes.

3 Q. And so, would you say that it's more than a
4 hundred hours?

5 A. Well, I mean, I'd really have to go back and
6 look. Going back to 2007 -- I have the total figure off
7 the top of my head of what I was paid. I believe it was
8 \$120 thousand total. So I'd just have to do the math,
9 the 600, and divide it in to get that but I. --

10 Q. \$120 thousand before -- as of when were you
11 paid that much money?

12 A. As of 2007.

13 Q. And, since that time, have you spent another
14 hundred hours or more on this?

15 A. Approximately.

16 Q. So, is it fair to say you have been paid over
17 \$200,000 thousand for your opinion?

18 A. Again, I'd want to go back and look at it, but
19 I think it would be below 200 thousand. I'd have to go
20 back, but it's a number like that.

21 Q. It's a lot of money, isn't it?

22 A. Yes, sir, it is.

23 Q. And so you have been paid a lot of money to
24 give the opinion that you have given today, right?

25 A. No. I would say I have been paid a lot of

1 money to do the research that I have done. The opinion
2 was up to me to draw. I don't think I was paid for my
3 opinion, at least I never viewed it that way.

4 Q. Now, you mentioned you prepared some reports.
5 Did you actually write those reports, or did the lawyers
6 write those reports for you?

7 A. I wrote those reports.

8 Q. So you were careful in writing those reports,
9 correct?

10 A. Yes, I was.

11 Q. And you, a smart guy, and you spent a lot of
12 time, and you made sure they were accurate, right?

13 A. That's true.

14 Q. Let me hand you, Dr. Pisano, your first expert
15 report in this matter. Take a look, Doctor, and make
16 sure I've given you the right report.

17 A. You have.

18 Q. And this is your -- the expert report and
19 declaration of Gary Pisano, correct?

20 A. That is correct.

21 Q. And you signed it at the back, right?

22 A. That is correct.

23 Q. And I see your signature dated May 25, 2007.
24 It looks like you signed it in Boston or in Cambridge,
25 correct?

1 A. That is correct.

2 Q. And you also said that -- there's a line at 97
3 above your signature you say: I declare, under penalty
4 of perjury, that the foregoing is true and correct.

5 Right?

6 A. That is correct.

7 Q. And that's essentially the same oath that you
8 took when you walked into this courtroom today?

9 A. Yes.

10 Q. And you read it, I assume, before you put your
11 signature under that declaration under penalty of
12 perjury, right?

13 A. Yes.

14 Q. If you could take a look at page 3 of your
15 report, if you would, Doctor.

16 A. Yes, sir.

17 Q. And you see the second -- or fourth sentence
18 down that begins with "in my professional" on the right
19 side?

20 A. "In my professional opinion," yeah.

21 Q. You wrote: In my professional opinion, the
22 relevant damage period extends from the date of first
23 slander, May 28, 2003, to the end of of trial in
24 approximately 2007.

25 Do you see that?

1 A. Yes, I do.

2 Q. So that's your damages period, 2003 to 2007,
3 right?

4 A. That's correct.

5 Q. And then if you could turn to page 5. You see
6 paragraph 12C?

7 A. Yes, sir.

8 Q. And you wrote: Based on my knowledge of the
9 industry, in my research and analysis in this case, I am
10 not aware of any causes for SCO's loss of those SCOsource
11 license sales other than Novell's conduct during the
12 relevant time period.

13 Do you see that?

14 A. That's correct.

15 Q. That's a true statement?

16 A. Yes.

17 Q. And so your opinion is based on your opinion
18 that the only thing that caused SCO to lose a license
19 between 2003 and 2007 was statements by Novell; is that
20 right?

21 A. Again, taking into account that the relevant
22 market for them and the fact that the market they could
23 have had was 19 to 45 percent. As I mentioned before, in
24 my direct testimony, there were other factors that led
25 people to not be interested, the folks on this end of the

1 spectrum.

2 Q. But your opinion in your report is based on
3 your knowledge of the industry and your research and
4 analysis, which includes your analysis of these reports
5 you have identified, correct?

6 A. Yes.

7 Q. And your conclusion was that, after doing that
8 analysis, you were not aware of any causes for SCO's loss
9 of the SCOSource license sales other than Novell's
10 conduct. That's your opinion?

11 A. Yes.

12 Q. And your numbers that you gave this jury at the
13 end is based on that opinion, that the only thing that
14 caused SCO to lose a SCOSource license was statements by
15 Novell?

16 A. You're framing it in a way that I'm not quite
17 comfortable with. I just want to be clear and go back to
18 the analysis which says, there were actually a bunch of
19 players in the market who were not going to buy that had
20 nothing to do with Novell.

21 They could have been players who said: I don't
22 think there is infringement, they are out of it.

23 But, among the players who would have bought
24 it -- that's the subset of the market, the 19 to 45
25 percent -- that's my opinion, that the statements of

1 Novell take away the sales from that segment, the 19 to
2 45 percent.

3 Q. Okay. So what you actually said in your report
4 is not exactly accurate. What you say in your report is
5 you are not aware of them losing any sales, SCOSource
6 losing any sales other than Novell's statement. That's
7 what you say here.

8 A. I don't agree with the way you're
9 characterizing it. Again, the lost sales were the ones
10 they could have had. There's a whole bunch of ones they
11 couldn't have, and so I wasn't saying they were -- Novell
12 was taking away those sales.

13 Q. Well, let me just ask this. Is this statement
14 true or false: Based on my knowledge of the industry and
15 my research and analysis in this case, I am not aware of
16 any causes for SCO's loss of those SCOSource license
17 sales other than Novell's conduct during the relevant
18 time period.

19 Is that statement accurate?

20 A. Yeah. That's an accurate statement, and it's
21 completely consistent with my analysis.

22 Q. And so it's accurate, and your opinion is based
23 on the fact that you believe the only thing that caused
24 SCO to lose a loss of a SCOSource license was Novell's
25 statements?

1 A. Yes. Of the segment identified.

2 Q. Okay.

3 A. I think we are violently agreeing.

4 Q. I don't think we are, Doctor. And, again, if
5 you take a look at page 21 of your report. Do you see
6 that?

7 A. Yes, sir.

8 Q. And that is where you come up with your 7. -- a
9 little over 7 million total sales of Linux between 2001
10 and 2007, right?

11 A. Sir, the table 1. That's actually -- that's
12 the -- that's the 14.99 million, the world market. Is
13 that the one you're referring to?

14 Q. Table 1 on page 21.

15 A. Okay. But that's not the 7.4.

16 Q. Well, my question is, that's the time period,
17 2001 to 2007?

18 A. Absolutely.

19 Q. Right? And so, in order for this jury to
20 understand whether your analysis is accurate or not, they
21 are going to have to understand exactly what all the
22 factors were that may have influenced the potential
23 licensee's decision to buy a SCOSource license between
24 2001 and 2007?

25 A. No. You'd be buying the license. Remember,

1 the license is not available until August of 2003.

2 Q. All right. So I can change my question. So,
3 in order for this jury to determine whether or not your
4 analysis is correct or not, they are going to have to
5 know all the potential factors that would influence a
6 potential licensee between the periods 2003 to 2007?

7 A. Yes.

8 Q. And they would have to be aware of all the
9 things that occurred in the marketplace during 2003 and
10 2007 to understand whether or not your analysis holds
11 water, right?

12 A. They would have to be aware? I think that
13 would be very helpful, to be aware of what's happening in
14 the market.

15 Q. And the reason it would be helpful to be aware
16 of what's happening in the market during that period is
17 to know what factors were influencing potential SCOSource
18 licensing and their decision whether to take a license,
19 right?

20 A. Yes.

21 Q. Now, this Yankee survey that you relied on,
22 true, is it that part of the reason that you believed
23 that -- well, let me back up. You relied on three
24 surveys. There's one Yankee survey. The third one is an
25 IDC survey. The first one, your 19 to 49 (sic) percent,

1 that really comes from the first Yankee survey, right?

2 A. I'm really confused. I did not use the IDC
3 surveys to calculate the percentage. They were used for
4 a different purpose.

5 Q. Okay.

6 A. I just want to make sure I am clear with your
7 question.

8 Q. You're right. So, you've got two Yankee
9 surveys, and you've got a Forester survey, right?

10 A. Yes, sir.

11 Q. And the one Yankee survey that you really
12 focused on, that gave you the percentages that you relied
13 on in the table that Mr. Singer just showed to you, that
14 was the first Yankee survey that you talked about,
15 correct?

16 A. That's correct, sir.

17 Q. And part of the reason that you relied on that
18 survey was because you think Yankee is a reputable outfit
19 that does surveys all the time, correct?

20 A. Yes. That's one of the factors I took into
21 account.

22 Q. And, again, it would be true, isn't it, that a
23 company like Yankee, that does this kind of stuff all the
24 time would really -- you know, it would be like Toyota
25 makes cars, Yankee does surveys, correct?

1 A. Absolutely. I think I said that in my
2 deposition.

3 Q. So you're relying on the Yankee survey because
4 of its reputation, and you do an analogy of that to
5 Toyota's reputation building cars; is that right?

6 A. Correct. I was using it as an analogy that,
7 if a company is in a certain business, when we go to buy
8 a car, we don't look at everything of how it was -- as a
9 car owner, there are certain -- as a buyer, there are
10 certain things you expect the company is doing right.
11 And I used the analogy of Yankee is like Toyota. It was
12 a metaphor for the fact that they -- this is a company
13 that's in the business of collecting this kind of
14 information. This is what they do. This is their bread
15 and butter. If they don't do it well, they go out of
16 business.

17 Q. Well, as we know, simply because somebody is in
18 the business doesn't mean they always do it right,
19 correct?

20 A. Absolutely.

21 Q. And, for instance, Toyota makes cars, and they
22 don't always do it right, correct?

23 A. Absolutely.

24 Q. And you weren't involved directly in any of
25 these surveys, correct?

1 A. No.

2 Q. And you weren't -- you don't even have any
3 connection with the Yankee -- you don't know what exact
4 questions were asked of the respondents, correct?

5 A. That's not true. I do know the questions that
6 were asked.

7 Q. And do you know the exact words that were used
8 to every respondent that was called in that survey?

9 A. Yeah. They listed them in the -- in the
10 report. They said these are the questions, and they had
11 a series of charts. Here's the questions and here's the
12 answers.

13 Q. And you know the exact words that each person
14 communicated to the respondent during every phone
15 conversations?

16 A. Well, they were web-based. So there is a
17 standard one they were getting. I don't think they were
18 relying on people calling. As a matter of course, they
19 will do some followup by phone, but these were web-based.
20 You are getting it on there. There's a standard
21 question, and that's the question that the users are
22 getting.

23 Q. Do you know how many phone conversations
24 actually took place?

25 A. No. But I don't think I need to.

1 Q. Do you know exactly what companies were part of
2 the survey?

3 A. No. We don't know the names of the specific
4 companies. We don't know whether it's, you know, Company
5 X, the Hilton Hotel. We don't know the names of the
6 companies.

7 Q. Do you know what exact businesses any of the
8 companies were in?

9 A. Yes. There's a demographic, a report across
10 the sectors. I don't have the numbers off the top of my
11 head. It was like 14 percent retail, 27 percent
12 professional services.

13 THE COURT REPORTER: Whoa. Please slow down.
14 "I don't know have the numbers --"

15 THE WITNESS: I don't know the exact
16 percentages here now off the top of my head, but it was
17 something like 14 percent were retail, 27 percent were
18 professional service, 10 percent were, I think,
19 manufacturing. Anyway, the demographic was laid out, so
20 we know that the distribution.

21 Q. BY MR. ACKER: But you don't know exactly what
22 companies were involved or what specific industries each
23 one of those companies was in, correct?

24 A. Yeah. We never know in surveys the identities.
25 Identities are always kept secret of either individuals

1 or companies in surveys. That's standard survey
2 practice.

3 Q. And you also don't know exactly what the
4 infrastructure or computer needs were of these
5 respondents, correct?

6 A. No. That's not true. I mean, it describes --
7 the surveys describe what their infrastructures were like
8 and what systems they were using, so I had a pretty good
9 idea of that, too.

10 Q. Did you look, in your analysis, at all the
11 other factors that were involved or all the other
12 influences that were involved in influencing whether or
13 not a potential licensee would take a SCOSource license
14 between 2003 and 2007?

15 A. I looked at as many factors as I could think
16 of.

17 Q. And, after looking at all those factors, it's
18 your opinion that none of those factors had any bearing
19 other than the statements of Novell?

20 A. Again, just to be clear, on the 19 to 45
21 percent, right. That's the target group.

22 Q. Okay. Let me ask you about some of those
23 factors. By the way, you didn't have any direct
24 conversations with any potential licensees to determine
25 whether or not -- or what reasons they used or what

1 reasons they justified for not taking a license from SCO,
2 correct?

3 A. No.

4 Q. And, in the surveys that you relied on, the
5 name of SCO, there wasn't any question that asked: Would
6 you take a SCOSource license, and, if not, what the
7 reasons were why you wouldn't take that SCOSource
8 license?

9 That wasn't asked?

10 A. No. The SCOSource license was, in some sense,
11 by that time in the market, dead.

12 Q. Well when you say in the market dead, what was
13 the time frame of these surveys?

14 A. Well, it was not going anywhere. I mean, it
15 wasn't going to go anywhere. It didn't have -- it wasn't
16 making sales. But there was one survey, by the way, that
17 did ask: Are you concerned with the intellectual
18 property issues?

19 And they put in parentheses in the question,
20 such as IBM/SCO.

21 Q. And my question was, what were the dates of the
22 surveys, sir?

23 A. April 2000 -- I'm sorry -- May, 2004. The
24 Yankee survey is done in April, 2004 and published in
25 November, 2004, and then March, 2005.

1 Q. And, again, in none of those surveys, were the
2 respondents asked about any statements by Novell,
3 correct?

4 A. That's correct, sir.

5 Q. And, in none of those surveys, were any of the
6 respondents asked: Would you not take a SCOSource
7 license because of something Novell may have said, or are
8 you not taking a SCOSource license because of some other
9 factor?

10 A. Right. They are not asked that question.

11 Q. And so none of this survey information can help
12 this jury understand why it is a potential licensee may
13 or may have not purchased a SCOSource license, correct?

14 A. That I disagree with completely.

15 Q. Well, those questions weren't asked of any of
16 the respondents, correct?

17 A. But you don't need to. That's the beauty of
18 the methodology. You have got a wonderful proxy here for
19 something that would have been a great substitute for the
20 SCO RTU.

21 Q. And that proxy, according to you, is
22 indemnification, correct?

23 A. Yes.

24 Q. So, let me show you what we have marked as
25 G-29.

1 A. So this is what is just appearing on the
2 screen?

3 Q. Yeah. It's going to come up on the screen.

4 A. Yeah.

5 Q. And you see Exhibit G-29 is an article, and I
6 want you to focus your attention on Roman Numeral X, the
7 article, SCO CEO. No Need To Sue More Customers.

8 A. Sure.

9 Q. Do you see that?

10 A. Yes.

11 Q. And if you take a look at the next page, you
12 see the reference to IG -- IDG news --

13 THE COURT: Mr. Acker, before you start reading
14 from it --

15 MR. ACKER: Yes.

16 THE COURT: I would like to you ask for its
17 admission.

18 MR. ACKER: I just want to get him to a point
19 and ask him a question, but I won't disclose the
20 substance of it.

21 THE COURT: Try not to disclose the substance
22 in the course of it.

23 Q. BY MR. ACKER: Well, let me hand you this.

24 Were you aware, Professor, that Darl McBride, the CEO of
25 SCO actually told in an interview that the SCO --

1 MR. SINGER: I object, Your Honor. This is a
2 hearsay statement that isn't in evidence.

3 MR. ACKER: I'm able to probe his knowledge or
4 lack of knowledge underlying his opinion.

5 THE COURT: Well, by disclosing the contents of
6 the document in the course of doing so, without the
7 document being admitted, it's problematic.

8 MR. ACKER: Well, let me lay a foundation, Your
9 Honor.

10 THE COURT: Go ahead.

11 Q. BY MR. ACKER: It's your opinion that these
12 other indemnification programs out there, Doctor, didn't
13 have any impact on the SCOSource licensing program
14 because they were bad substitutes for it, right?

15 A. In a but-for world, okay, they would not have
16 been good substitutes. But, remember, the SCO RTU is not
17 out there at that point. It's not doing well on the
18 market. These things emerge, and they are -- some people
19 are definitely buying them. They are better than
20 nothing. If --

21 Q. Well --

22 A. -- you don't have a SCO RTU --

23 Q. But so the jury understands --

24 THE COURT REPORTER: One at a time, please.

25 Q. BY MR. ACKER: So the jury understands, it's

1 your opinion that indemnification programs offered by Red
2 Hat, offered by HP, offered by Novell, that those were
3 poor substitutes for the SCOSource program. That's your
4 opinion?

5 A. Absolutely. They came with very significant
6 restrictions. For example, if you changed on any of
7 those programs, if you changed any of the source code --
8 and one of the real values of Linux is it's open source.
9 You can do stuff with the source code. You do that, and,
10 boom, your indemnification is done. You are not
11 covered. That's a huge --

12 Q. And would your --

13 A. -- restriction.

14 THE COURT: Just a second, counsel. Let him
15 finish.

16 THE WITNESS: That's a huge restriction.

17 Q. BY MR. ACKER: And would that opinion change if
18 you knew that Darl McBride indicated that, in fact --

19 MR. SINGER: I object, Your Honor, if he's
20 going to read from a document --

21 MR. ACKER: I'm not reading from a document.

22 MR. SINGER: -- or proffer testimony that is
23 not in the record.

24 THE COURT: You may ask the question.

25 Q. BY MR. ACKER: Would that opinion, that the

1 indemnification programs were poor substitutes for
2 SCOSource change, Doctor, if you knew that Darl McBride
3 indicated that, in fact, the SCOSource program was being
4 harmed by other indemnification programs?

5 A. But, again, we have to keep in mind the
6 analysis. This is in the real world, with the SCOSource
7 product severely impaired, competing against real
8 indemnification programs. You can understand it. But
9 in a but-for world, the SCO RTU -- sorry -- the SCO
10 right-to-use license is not impaired, so the balance
11 shifts dramatically.

12 Q. And my question was really pretty simple. Were
13 you aware that Mr. McBride believed that other
14 indemnification programs were harming the SCOSource
15 licensing program? Were you aware of that fact?

16 A. I was not aware of that.

17 Q. And now, if you assume that fact, that, in
18 fact, Mr. McBride himself thinks that the SCOSource
19 licensing program was harmed by other indemnification
20 programs, does that change your opinion at all?

21 A. No. Not one bit. Not one bit.

22 Q. But it is your opinion that your proxy, and
23 that is, the basis for your opinion, is that there is an
24 analogy between an indemnification program and the
25 SCOSource licensing program. Do I have that right?

1 A. Absolutely. You know, they were potential --
2 you know, potential substitutes. I actually interpret
3 his statement there, as I'm looking at it --

4 THE COURT: Dr. Pisano, there is no question.

5 THE WITNESS: Okay. I'm sorry.

6 THE COURT: Thank you.

7 Q. BY MR. ACKER: Let me hand you another
8 document, M-18. You see, Dr. Pisano, M-18, it is an
9 internal e-mail inside of SCO dated August 8 -- August 6,
10 2003, talking about ability of the SCOSource program to
11 provide indemnification.

12 A. I'll have to look at it. There's a string of
13 messages here. I'm having a little trouble in
14 interpreting that. It's the classic kind of e-mail with
15 the little one-line blurbs. It's actually hard for me to
16 really figure out what they are talking about here. They
17 are snippets, so I don't quite know how to interpret
18 this.

19 Q. Well, let's take a look at the e-mail beginning
20 down at the bottom dated 6/6/03 from Janet Sullivan. Do
21 you see that?

22 A. To Blake -- I'm sorry. Is that the one that
23 says: Folks, what would you say to this argument?

24 Q. Yes.

25 A. Okay: Folks, what would you say to this

1 argument?

2 Yes. I mean, I've read it.

3 Q. And you see on the next page, on the back page,
4 Janet writes to Blake at SCO, and he actually talks
5 expressly about the inability of the SCOSource licensing
6 program to indemnify. Do you see that?

7 A. Sorry. Could you repeat your question. I
8 didn't get the last part of it.

9 Q. There is a direct reference to the SCOSource
10 licensing program being unable to provide full
11 indemnification. Do you see that?

12 A. Right. Yeah. So there --

13 Q. Let me just stop you there.

14 MR. ACKER: Your Honor, I'd move for admission
15 of M-16 -- or M-18.

16 MR. SINGER: No objection to this document.

17 THE COURT: M-18 will be admitted.

18 (Novell Exhibit M-18 received in evidence.)

19 Q. BY MR. ACKER: And so let's start the the back,
20 Doctor, and work our way forward. You see Joe Barr
21 writes to Blake Stowell inside of SCO and says:

22 Blake, your new Linux license apparently
23 expressly disclaims any indemnification for third-party
24 intellectual property rights.

25 Do you see that?

1 A. Yes. Now, again, just to make sure I'm
2 following this. The "your new Linux license," are they
3 referring to the right-to-use license?

4 Q. I don't know. Is this a document you have ever
5 seen before, Doctor?

6 A. I have not seen this document.

7 Q. So this is news to you, this document,
8 correct?

9 A. Yeah. I have not seen the document before.

10 Q. And you see that Blake writes -- someone writes
11 from inside into SCO:

12 Your new Linux license apparently expressly
13 disclaims any indemnification for third-party
14 intellectual property rights. Is that an oversight or is
15 this the sort of thing -- something you feel Red Hat
16 should do but not you?

17 Do you see that?

18 A. Yes. I see that.

19 Q. And did you understand that that was the case,
20 that Red Hat was able to provide indemnification that was
21 broader than the indemnification that SCOSource was
22 willing to provide?

23 A. Again, I don't agree with that. There were
24 significant restrictions on the Red Hat program, very
25 significant. It wouldn't cover you for down time. There

1 were limits. In fact, initially, they didn't cover even
2 legal costs. They promised to remove the code. So you
3 get sued, and they will say: But, okay, if we can't fix
4 it, we will remove it.

5 Well, that may not be an easy thing to do.
6 Then you've got down time. You're shut down. So, again,
7 I don't think this implies what you're saying. The Red
8 Hat program was very restrictive. Early on, it didn't
9 even cover you for legal -- if you got sued, and had
10 legal damages, you had to pay for them.

11 Q. So why don't we move on the next response at
12 the bottom of the first page. And Blake Stowell, public
13 relations at SCO says: Folks, what would you say to this
14 argument?

15 And you see there's the response above from
16 Janet Sullivan: That's the whole problem with Linux.
17 Because of the GPL, no one can indemnify. We know
18 that SCO IP found its way into Linux, but we have no way
19 of knowing if there is other code in there that belongs
20 to someone else. Therefore we can't indemnify.

21 Do you see that?

22 A. We can't indemnify against the others.

23 Of course, SCO could not indemnify if there was
24 another party that had put something in. SCO couldn't
25 protect them from these other parties. They could

1 clearly indem -- SCO could indemnify them, again, from
2 SCO. It wouldn't be indemnification. They would just
3 give them a license.

4 THE COURT: Dr. Pisano, slow down.

5 THE WITNESS: Okay.

6 Q. BY MR. ACKER: And so, SCO would only be able to
7 indemnify if there actually was any SCO-owned UNIX in
8 Linux, right? That's the only protection they could
9 provide?

10 A. The SCO right-to-use license, yes.

11 Q. Now, in your survey, were the respondents
12 asked: Would you be willing to take a license if the
13 only protection that you got was indemnification against
14 SCO-owned UNIX?

15 A. No.

16 Q. Let me show you another document. Let me show
17 you what has previously been admitted as Exhibit D-20.
18 Can you take a minute, Doctor, and I'm going to ask
19 you -- this is an internal e-mail inside of
20 Hewlett-Packard regarding their decision not to take a
21 SCOSource license. Have you ever seen this document
22 before?

23 A. I don't recall seeing it, but I'm --

24 Q. So this wasn't something that the lawyers for
25 SCO provided to you; is that right?

1 A. No.

2 Q. And you see, in this document, a Martin Fink
3 lists a number of reasons why -- in the top, why he might
4 move ahead with a SCOSource license. And then, below,
5 those are the numbers, 1, 2, 3, 4, 5, 6, but in the
6 letters below, he provides reasons not to move forward.
7 Do you see that?

8 A. Yes, I see that.

9 Q. And if we turn to those --
10 If we could highlight, Mr. Lee, those items, A,
11 B, C, D and E.

12 And you see the first one says: Red Hat has
13 counter-sued SCO and will view HP as partnering with SCO
14 potentially refuse to deal with HP.

15 Were any of the respondents in your survey
16 asked about whether they had a problem with alienating
17 Red Hat?

18 A. No. But, again, they could take these licenses
19 in confidential -- in confidential ways. I don't think
20 that --

21 Q. You also see in B: We have strong indications
22 that the Open Source community will revolt against HP and
23 block any future HP enhancements to Open Source SCO
24 products.

25 Were any of your respondents in your survey

1 said: How do you feel about the potential that the Open
2 Source community will revolt against your enterprise
3 organization if you take a SCOSource license?

4 Was that question asked?

5 A. No.

6 Q. And then you see in C, below:

7 While SCO has shown Joe some code, there is
8 still no clear evidence that IBM or anyone else has
9 actually done anything wrong.

10 Were the respondents in your survey asked about
11 their understanding of whether or not SCO could actually
12 prove there was any protected UNIX code in Linux?

13 A. No. No.

14 Q. And then you see under D, below, Mr. Fink
15 wrote: All legal experts in the field believe SCO's case
16 is extremely fundamentally flawed and have published
17 white papers to support their positions attached.

18 Were there any questions of any respondents in
19 the survey about the fact that SCO's case was believed to
20 be, by legal experts in the field, fundamentally flawed?

21 A. It's actually picked up in the surveys. I
22 mean, it is. I mean, this is all taken into account in
23 the surveys. It affects the attitudes.

24 Q. Let's go to the next page. If we could look at
25 item F, it says:

1 This is, in effect, support of terrorism.
2 Rewarding SCO for this behavior opens us up to other
3 claims. We can't predict from who or where.

4 Were any of the respondents in your surveys
5 asked about whether or not they were afraid that, if they
6 took a SCOSource license, they would be essentially
7 supporting terrorism?

8 A. No. I don't think they were asked the question
9 that way.

10 Q. Look under G. It says: Doing a deal with SCO
11 does not provide customers with full indemnification.
12 Customers want full indemnification, so a deal with SCO
13 is likely not enough.

14 Do you see that?

15 A. I see that.

16 Q. And you've also already told us that no one was
17 told in this survey: How would you feel if you only
18 received partial indemnification, as opposed to full
19 indemnification?

20 Correct?

21 A. That's correct.

22 Q. H. One of the concerns of Mr. Fink is: SCO
23 has shown a pattern of unpredictable and bad behavior.
24 We can't predict future behavior from SCO which could
25 negatively impact HP.

1 Were the respondents asked about their concerns
2 about the unpredictable and bad behavior of SCO?

3 A. Nope.

4 Q. First time you've seen this document, right,
5 Doctor?

6 A. That's my recollection.

7 Q. In your work in rendering your opinion did
8 you -- were you provided with any letters from customers
9 of SCOSource, that those of any of the thousand company's
10 that received one of these 15 hundred letters Mr. McBride
11 sent out on May 12, were you given access to any of those
12 to see how they responded and what reasons they gave for
13 not taking a SCOSource license?

14 A. In my rebuttal report, I outlined those
15 responses, and 8 out of 32 mentioned Novell lack of
16 ownership for a reason for not taking the license, which
17 is within my --

18 Q. And so --

19 A. Which is 25 percent, which fell within my
20 boundary.

21 Q. And so, you were only given access to 32
22 letters; is that right?

23 A. Those were the 32 letters I had, right.

24 Q. And of those 32 letters, only eight gave any
25 mention of Novell, correct?

1 A. That's correct.

2 Q. And how many of those eight that made mention
3 of Novell also made mention of other reasons why they
4 weren't willing to take a SCOSource license?

5 A. I don't recall off the top of my head.

6 Q. And you can't tell this jury that, in those
7 eight letters of the 32, that, in fact, those eight that
8 did mention Novell said Novell was the only reason that
9 they wouldn't take a license from the SCOSource program,
10 correct?

11 A. Just a sec. Can you repeat the question?

12 Q. Sure. The eight that mentioned Novell, all you
13 can recall is it simply mentioned Novell, right?

14 A. Yes.

15 Q. And you can't tell this jury that, in fact,
16 those eight that did mention Novell actually said Novell
17 was the reason why they weren't taking a license,
18 correct?

19 A. Sure. Now, again, as I mentioned in my report,
20 you know, that's right. These are just pieces of data,
21 the letters, what they write, what companies write back.
22 The same with their internal documentation. And if they
23 are writing a letter to a company like SCO, they have to
24 be very careful in how they -- in how they couch it,
25 particularly if there is a legal issue at stake. So you

1 can imagine they could couch that letter very carefully.
2 So it's very hard to interpret those customer -- those
3 customer letters.

4 Q. So, are you trying to tell the jury that you
5 believe that when companies wrote letters back to SCO,
6 they didn't provide the real reason why it was that they
7 weren't taking a SCOSource license?

8 A. No. I used those letters -- actually, it was
9 in response to your expert's opinion and brought them
10 into the analysis and the discussion, and then I looked
11 at the letters, and I made that point in my rebuttal
12 report, if I recall, and then I also pointed out that,
13 oh, by the way, they do mention -- eight out of the 32 --
14 and I did say that you have to be a little careful, as we
15 always to have to be, in interpreting these kinds of
16 letters. It's just good standard practice to be
17 careful.

18 Q. So, being careful and being cautious about
19 interpreting the letters, you would also have to be
20 careful and cautious as to whether Novell is simply
21 mentioned is what the letters -- is actually the reason
22 why they are not taking a SCOSource license, correct?

23 A. Correct. And I drew no conclusions from the
24 letters.

25 Q. Let me show you one of those.

1 THE COURT: Which is?

2 MR. ACKER: D-16, Your Honor.

3 Q. BY MR. ACKER: Have you had a chance, Doctor,
4 to look at D-16?

5 A. Yes, I have.

6 Q. You see it's a letter to Mr. McBride, dated
7 June 6, 2003, from General Electric regarding the
8 SCOSource program, correct?

9 A. Yes.

10 MR. ACKER: I'd move for admission of D-16,
11 Your Honor.

12 MR. SINGER: No objection.

13 THE COURT: It will be admitted.

14 (Novell Exhibit D-16 received in evidence.)

15 Q. BY MR. ACKER: General Electric is a
16 sophisticated and large company, correct?

17 A. That's correct.

18 Q. And in this letter on June 6, 2000 -- first of
19 all, have you ever seen this letter before?

20 A. I don't recall. I don't believe so.

21 Q. So, of the 32 letters that counsel provided to
22 you, this was not one of those?

23 A. Again, I want to be careful that counsel
24 provided me letters. In this research, I was free to ask
25 for whatever I wanted to get in terms of documents and

1 letters, so it wasn't like they were just providing it.
2 And I can't recall the specifics around the 32 when they
3 came out. I think those were the ones cited in your
4 expert's report and therefore I looked at the analysis
5 around those.

6 Q. Did you ask for all the letters that customers
7 wrote indicating why it is they weren't taking a
8 SCOSource license?

9 A. I did not.

10 Q. You didn't think that was something that you
11 should have?

12 A. No. I had plenty of other data and plenty of
13 other information. And, again, those would be
14 reflected -- the customers -- think of it. You have
15 these customer responses. You know, in the survey
16 methodology, we pick up all these issues that we are
17 talking about. If they didn't think there was
18 infringement, they are showing up in the survey as not
19 being interested. They are in that other group.

20 So the customer letters gave us a very small
21 and potentially biased sample. For example, if SCO sent
22 those letters to the ones they thought were most likely
23 to be concerned, there could have been a very high
24 response rate. That would have biased my level upward,
25 and I didn't want to do that. I wanted to give the

1 fairest view. The survey, I thought, gives the fairest
2 view of this. And these kinds of issues that are being
3 raised in these letters, concerns like in the HP
4 document, those are -- those are concerns lots of
5 companies had. That wasn't unique to HP. That wasn't
6 unique to GE.

7 And that's why I don't estimate the market at a
8 hundred percent. Nineteen to 45 percent is a small
9 percentage, small percentage. A lot of people had these
10 concerns.

11 Q. Doctor, so -- so the jury understands, you were
12 relying more on a survey of anonymous companies, you
13 don't know who they are, as opposed to actual letters
14 from companies telling you the reasons they are not
15 taking a SCOSource license. Do I have that right?

16 A. I think that's a more objective way to do it,
17 absolutely. That's exactly the way I would do it in my
18 academic research.

19 Q. So, in your academic research, you would rely
20 on an anonymous survey, as opposed to what happened in
21 the real world?

22 A. I wouldn't make that as a generalization, but
23 for this kind of problem, for understanding this kind of
24 issue, that's what I would do, absolutely.

25 Q. Anonymous survey, as opposed to what happened

1 in the real world?

2 A. Not as opposed to, but for this particular one,
3 I did look at what's happening in the real world.
4 There's lots of data that I looked at that was happening
5 in the real world, real action, what was going on,
6 historical events. There's a lot of historical analysis
7 in my -- in my report.

8 Q. So let's take a look at what GE said on June 6,
9 2003, in writing to Mr. McBride:

10 Dear Mr. McBride, I am responding to your May
11 12, 2003 -- letter of May 12, 2003, to Jeffrey Immelt.
12 In that letter, you accused Linux of infringing UNIX
13 intellectual property rights that belong to SCO. Your
14 letter also states that legal liability may arise from
15 the Linux development process and may also rest with the
16 end user. We assume this statement and your purpose in
17 sending Mr. Immelt this letter is to notify GE of your
18 belief that GE has infringed your IP rights.

19 We take such an assertion very seriously
20 because GE respects the intellectual property rights of
21 others.

22 If you take a look at the next paragraph, GE
23 wrote to Mr. McBride:

24 However, we cannot begin to review the claims
25 you make until you provide us with more information. We

1 request that you tell us what IP rights you are alleging
2 have been infringed, if they involve patents or copyright
3 registrations. Please provide the specifics. In
4 addition, please provide us the particular GE goods or
5 services that you believe infringe your rights. Without
6 these details, it is not possible for us to evaluate your
7 claims.

8 Do you see that?

9 A. Yes, I do.

10 Q. Do you know if Mr. McBride ever responded to
11 General Electric and told them exactly what products or
12 what software General Electric had that Mr. McBride felt
13 infringed any SCO protected intellectual property?

14 A. No, I don't.

15 Q. Let me show you another letter we have marked
16 as V, as in victor, 15. Have you seen this letter
17 before, Doctor?

18 A. No.

19 Q. And in this letter, this is a response of the
20 Sprint Corporation to Mr. McBride dated June 4, 2003,
21 regarding the SCOSource program, correct?

22 A. That's true.

23 MR. ACKER: And I'd move for admission of V-15,
24 Your Honor.

25 MR. SINGER: No objection.

1 THE COURT: It will be admitted.

2 (Novell Exhibit V-15 received in evidence.)

3 Q. BY MR. ACKER: And you see in this letter,
4 Sprint responds to Mr. McBride's May 12 letter and
5 writes:

6 Your letter does not identify a specific
7 purpose for the letter. It does not make any request of
8 Sprint. I understand that SCO is currently involved in a
9 dispute with IBM. SCO's public statements are that,
10 quote, this case is not about the Linux community or us
11 going against them. Your letter provides no specific
12 allegations of infringement or any information that can
13 provide the basis of any investigation.

14 I understand, from other SCO public statements,
15 that your dispute with IBM is generally a contractual
16 matter. I take comfort that SCO has been a Linux
17 distributor, with the associated GNU license rights the
18 public has come to rely on. Sprint will continue to
19 depend on SCO's public statements and past actions.

20 Do you see that?

21 A. Yes.

22 Q. In the survey, were any of the respondents
23 asked about if their responses would be different if they
24 knew that GNU license rights were at issue?

25 A. No. They weren't asked that.

1 Q. Let me show you what we have marked as Z-18.
2 Do you see, Doctor, Z-18 is a letter to Mr. McBride,
3 Mr. Sontag, Kevin McBride, from Blake Stowell inside SCO
4 on August 12, 2003, regarding Gardner's recommendation
5 regarding whether to take a SCOSource license or not.

6 Do you see that?

7 A. Yes.

8 MR. ACKER: I move for admission of Exhibit
9 Z-18, Your Honor.

10 MR. SINGER: Objection, Your Honor. Could we
11 approach on this one?

12 THE COURT: You may.

13 (Discussion between counsel and the Court outside the
14 hearing of the jury.)

15 MR. SINGER: Your Honor, in addition to this
16 being hearsay, which is an article by someone that's
17 being presented here, by some other source, it is also
18 entirely prejudicial under 403 because it talks about
19 claims in the IBM lawsuit by IBM, which is, I think, a
20 subject of one of the motions in limine is not to go into
21 other lawsuits. It talks about SCO's false -- these are
22 IBM's claims SCO falsely gave Sequence the uniform memory
23 access -- SCO deliberately concealed the specific code
24 alleged to have been appropriated and other allegations
25 related to the IBM litigation.

1 In addition to hearsay, there is a strong
2 litigation value that doesn't belong in this case.

3 MR. ACKER: It was their opening the door on
4 hearsay why people weren't taking licenses. This is a
5 respected industry group saying don't take a license and
6 here's the reasons why. They wanted to get the evidence
7 in. They opened the door with Mr. McBride, and I am
8 perfectly entitled to ask this witness about these
9 letters.

10 MR. SINGER: This doesn't mean that everything
11 comes in.

12 THE COURT: Excuse me. Can the information,
13 specific information about the IBM lawsuit, be redacted?

14 MR. ACKER: Yes.

15 THE COURT: Let's redact that. And then, if
16 that's the case, I see nothing different about this and
17 many other articles that have been permitted in this
18 case, so I'm going to have to allow it to come in.

19 (Proceedings continued in open court.)

20 MR. ACKER: So, with the discussion at side
21 bar, I would move for admission of Z-18, Your Honor.

22 THE COURT: There was an objection to it, but
23 the Court will admit it over the objection.

24 (Novell Exhibit Z-18 received in evidence.)

25 Q. Do you see in this -- you know what the Gardner

1 Group is, correct?

2 A. Yes.

3 Q. What is the Gardner Group?

4 A. They are a research business intelligence firm.

5 Q. And what is a research business intelligence
6 firm?

7 A. They collect data. They track industry trends.
8 They provide advisory services. They do consulting.

9 Q. And they make recommendations, correct?

10 A. Yes.

11 Q. And you see in this e-mail, Z-18, that they are
12 making the recommendation that potential SCOSource
13 licensees should not take a SCOSource license, correct?

14 A. Sure. Yep. I think others made the same
15 recommendation.

16 Q. I'm sorry?

17 A. Yeah. They made it. I think there were others
18 out there saying the same thing. There were lots of
19 other players out there saying these things.

20 Q. And, if you take a look at the second page. Go
21 down to the bottom. Hang on just a sec.

22 I gave Mr. Lee a complex task, Your Honor.

23 THE COURT: Okay.

24 MR. ACKER: Would you bring up just that
25 portion, please.

1 Q. BY MR. ACKER: And you see that what the
2 Gardner Group is saying in their recommendation in August
3 of 2003 --

4 A. Sorry. This is not very visible on this
5 screen. Is there a part on here you could direct me? Is
6 there a part I can read on the paper?

7 THE COURT: I can see why it is hard to read on
8 the screen.

9 Q. BY MR. ACKER: Sure, I can do that.

10 A. If you just want to highlight it for me or mark
11 it.

12 Q. I can trade you.

13 A. Yeah. You've got it marked here.

14 Q. You see what the Gardner Group is saying is:
15 Customers with large Linux commitments should
16 avoid paying SCO server license fees, since they appear
17 arbitrarily high, representing concession to SCO's claims
18 and will expose them to ever larger fees. Moreover,
19 SCO's claims challenge the foundation of GPL.

20 Do you see that?

21 A. Yes.

22 Q. And that was what the Gardner Group was saying
23 about the SCOSource licensing campaign in August of 2003,
24 correct?

25 A. That's correct.

1 Q. Let me show you another document we have marked
2 as X-22. Do you see X-22 is an e-mail from Larry
3 Gasparro inside of SCO, to Reg Broughton inside of SCO,
4 on November 13, 2003, and the subject line being RTU
5 followup. Do you see that?

6 A. Yes.

7 MR. ACKER: I'd move for the admission of X-22,
8 Your Honor.

9 MR. SINGER: May I have a moment, Your Honor?

10 THE COURT: You may.

11 MR. SINGER: No objection, Your Honor.

12 THE COURT: X-22 will be admitted.

13 (Novell Exhibit X-22 received in evidence.)

14 MR. ACKER: And if we could highlight the
15 second paragraph, please, Mr. Lee.

16 Q. BY MR. ACKER: And, Doctor, you see, beginning
17 in the middle of that paragraph the word "I proceeded."

18 A. Yes.

19 Q. And what Larry Gasparro is saying to
20 Mr. Broughton regarding his presentation of SCOSource --

21 Well, actually, let's start the the top of the
22 paragraph. I'm sorry:

23 I traveled to Knoxville, Tennessee for a
24 meeting with the Regal Entertainment Group. The Regal
25 Group is one of the America's largest movie theaters,

1 with over 5,000 screens in the U.S. I met with the CIO,
2 director of IT, and senior counsel at Regal. I, again,
3 had the impression that the CIO was putting the Linux
4 decisionmaker, director of IT, in front of SCO to learn
5 of the potential consequences of his decision. This is
6 not a fact but an impression.

7 I proceeded to give the one-hour presentation
8 and many questions came up. SCO sold/distributed Linux.
9 Isn't this all about SCO and IBM, etc.? Very common
10 questions. As I presented the example of literal
11 copying, the director of IT noted that the example was
12 prehistoric and ultimately SCO, suggesting that we are
13 attempting to claim copyright -- you would have a hard
14 time proving ownership. He claimed that the example is
15 suggesting that we are attempting to claim copyright
16 infringement for the words, quote, "and" or "the."

17 I hinted that SCO is obviously not presenting
18 evidence to the general public that we are preparing for
19 our \$3 billion lawsuit.

20 Do you see that?

21 A. Yes.

22 Q. Have you ever seen that e-mail before today,
23 Doctor?

24 A. I don't recall, no. I don't think so.

25 Q. Let me show you another e-mail that we marked

1 as W-24, another letter. Do you see this is a letter
2 from a MASCO Corporation to Mr. Philip Langer at SCO on
3 January 15, 2004, regarding the RTU license or the
4 SCOSource program? Correct?

5 A. That's correct.

6 MR. ACKER: I'd move for admission of W-24,
7 Your Honor.

8 MR. SINGER: No objection, Your Honor.

9 THE COURT: W-24 will be admitted.

10 (Novell Exhibit W-24 received in evidence.)

11 MR. ACKER: Why don't we highlight the second
12 paragraph, if we could, Mr. Lee.

13 Q. BY MR. ACKER: In response to SCO's letter,
14 MASCO wrote:

15 Given that we have only had a short period of
16 time to investigate your latest assertions, your letter
17 of January 13, 2004, is premature. Each of SCO's letters
18 have been a generalized statement of its alleged rights
19 in the Linux operating system with no specific
20 information concerning MASCO'S use of the operating
21 system. If you have specific knowledge of our use of
22 Linux, we suggest that you provide such information. If
23 not, we suggest that you allow us to continue with our
24 investigation without repeated inquiries. We
25 respect our -- we will report our findings once we have

1 concluded our investigation related to SCO's December 19,
2 2003, letter.

3 Now, Doctor, were you -- do you know whether or
4 not SCO ever provided any specific information regarding
5 alleged infringement by MASCO?

6 A. No. I don't know.

7 Q. Let me show you another letter, Exhibit T-25.
8 Do you see Exhibit T-25 is a letter from Verizon to SCO
9 regarding the SCOSource licensing program, dated January
10 30, 2004? Do you see that?

11 A. Yes.

12 MR. ACKER: I'd move for admission of T-25,
13 Your Honor.

14 MR. SINGER: No objection.

15 THE COURT: It will be admitted.

16 (Novell Exhibit T-25 received in evidence.)

17 MR. ACKER: And if we could highlight the
18 entire letter, Mr. Lee.

19 Q. BY MR. ACKER: In the second paragraph, Verizon
20 wrote:

21 While Verizon respects the intellectual
22 property rights of third parties, including those of its
23 suppliers, we do not believe that we are violating any
24 SCO intellectual property rights with respect to Linux,
25 UNIX or any other intellectual property. We are

1 following closely SCO's efforts to document and sustain
2 its intellectual property claim with respect to Linux.
3 In this event, we believe that is necessary -- it is
4 necessary -- or -- in this event, we believe that it is
5 necessary and appropriate for us to discuss this matter
6 further. We will arrange for such a meeting.

7 Are you aware if Verizon ever had any meeting
8 with SCO?

9 A. No.

10 Q. Are you aware if Verizon ever felt it was
11 necessary to have a meeting with SCO?

12 A. No. I'm not aware.

13 Q. Are you aware of the reasons why Verizon
14 decided that it was not necessary to have a meeting with
15 SCO?

16 A. No. I'm not aware.

17 Q. Exhibit F-26. Do you see Exhibit F-26 is a
18 letter from the Oracle Corporation to Ryan Tibbitts,
19 general counsel of SCO, dated February 6, 2004?

20 A. Uh-huh.

21 Q. Do you see that?

22 A. Yes.

23 Q. Do you see it's written in response to a letter
24 that SCO wrote to its chairman, Oracle's chairman,
25 Mr. Larry Ellison? Do you see that?

1 A. That's correct. Yep.

2 MR. ACKER: I'd move for admission of F-26,
3 Your Honor.

4 MR. SINGER: No objection.

5 THE COURT: It will be admitted.

6 (Novell Exhibit F-26 received in evidence.)

7 Q. BY MR. ACKER: Oracle is a pretty sophisticated
8 company in the software and computer industry, isn't it?

9 A. Yes.

10 Q. And it's chairman, Mr. Ellison, is a pretty
11 sophisticated guy, isn't he?

12 A. I would say so.

13 Q. And this was his response to SCOsource's demand
14 for a license: Dear Mr. Tibbitts, I write in response to
15 your letter dated December 19, 2003, to Larry Ellison.
16 It is difficult to respond substantively to your letter,
17 given the lack of any specific information for Oracle to
18 analyze. Oracle certainly respects the intellectual
19 property rights of others. However, based on the
20 information provided in your letter, it is impossible for
21 Oracle to determine whether any code in the 71 identified
22 files may be infringing. Although it would appear in
23 your letter that the -- that SCO alleges that portions of
24 the 71 identified files infringe SCO's copyrights, there
25 is no identification of any specific code with any --

1 within any one of the 71 files.

2 Oracle can hardly analyze SCO's claims without
3 such information. Moreover, Oracle would not be able to
4 complete any such analysis, given that SCO's own
5 investigation is ongoing. Oracle would be happy to
6 analyze any claims SCO may have had, once SCO's
7 investigation is complete and all of the specific code
8 alleged to have infringed has been identified.

9 Do you see that?

10 A. Uh-huh.

11 Q. Doctor, do you know whether or not anyone at
12 SCO ever identified any specific code that it believed
13 Oracle had in its Linux operating system that was
14 infringing any SCO UNIX copyrights?

15 A. I know that SCO has done its own investigations
16 as to which code is infringing.

17 Q. Do you know if there -- if any specific
18 information was ever provided to Oracle?

19 A. I don't know, no.

20 Q. Is it fair to say that the fact that no
21 specific information regarding whether or not a potential
22 licensee's products infringe might be a reason why
23 someone would decide not to take a SCOSource license?

24 A. Absolutely. Again, I would agree with that
25 completely. That's why my method is what it is. It

1 picks it up, as is true for the other comments from the
2 other letters. It's all picked up in the method.

3 MR. ACKER: Let me show you what we have marked
4 as F-27. Do you see that F-27 is a letter dated March
5 19, 2004, from the Google Corporation to SCO, regarding
6 SCO's SCOSource licensing program?

7 A. I see that.

8 Q. I'm sorry?

9 A. I do see that, yes.

10 MR. ACKER: Your Honor, I'd move for admission
11 of F-27.

12 MR. SINGER: No objection.

13 THE COURT: It will be admitted.

14 (Novell Exhibit F-27 received in evidence.)

15 MR. ACKER: And if we could highlight the
16 second, third and fourth paragraphs, Mr. Lee.

17 Q. BY MR. ACKER: Were you aware, Doctor, that on
18 March 19, 2004 -- well, first of all, you know what
19 Google is, correct?

20 A. Absolutely.

21 Q. It's a pretty sophisticated company, correct?

22 A. Yes.

23 Q. In fact, would you disagree with the statement
24 that Google may have more servers than many other
25 companies in the United States?

1 A. Absolutely.

2 Q. So, this would be a potentially large customer
3 for the SCOSource licensing program, correct?

4 A. Absolutely.

5 Q. And sophisticated about software. You would
6 agree with that, correct?

7 A. I would agree.

8 Q. And you see what Google wrote back to SCO on
9 March 10, 2004. And, again, March 10, 2004, do you
10 believe, by that point in time, Novell had made some sort
11 of slanderous statements in the marketplace?

12 A. Yes.

13 Q. And what is your understanding of when it is
14 that Novell made any slanderous statements in the
15 marketplace?

16 A. So, the first statements are made in May, 2003,
17 and then again in December of 2003, and then again in
18 January and February of 2004.

19 Q. Well, let's start with March -- or May of 2003.
20 Do you know what date the statement was allegedly made?

21 A. May 28, 2003.

22 Q. And are you aware of any statement by Novell on
23 June 6, 2003?

24 A. Yes.

25 Q. And what's your understanding of that

1 statement?

2 A. That was the statement that retracted their
3 ownership claim.

4 Q. That's your understanding of what that
5 statement was?

6 A. That's my understanding what the public
7 statement was, yes.

8 Q. Okay. And then, the next public statement by
9 Novell was not until December 22, 2003?

10 A. That's correct.

11 Q. So there's this gap between June 6, 2003, when
12 it's your understanding that Novell retracted its claim
13 to ownership of the UNIX copyrights, and December 22,
14 2003, correct?

15 A. That's correct.

16 Q. Did your study factor that gap in, in any way?

17 A. Sure. I mean, the -- first let's keep in mind
18 the SCO RTU, as a product, wasn't even available until
19 August. In fact, even some of these letters are previous
20 to that time. So that's clearly an issue that has to be
21 considered. The RTU is available in August officially.
22 And, yes, there is a gap, but once the statement is made,
23 there is doubt. Doubt. Then it clearly corrects the
24 doubt to some degree. But then, in December, again, it
25 all kind of comes out.

1 So, whatever doubt might have been removed by
2 December, it's -- that doubt is there big time. And
3 there's no way you're going to be able to sell RTU's at
4 that point.

5 Q. So, is your analysis and your -- in your
6 numbers based only on when the RTU license was first
7 available?

8 A. No. The RTU license becomes available. But,
9 remember, it would apply to servers going back to 2001.
10 Any server with 2.4, Linux 2.4, would have SCO's code in
11 it.

12 Q. And do you know how many of those servers that
13 were first sold in 2001 were still operating in 2003?

14 A. The IDC data would -- no. You wouldn't know if
15 somebody had pulled a server off. So, if they had a
16 server and they took it off line, you wouldn't know
17 that.

18 Q. But you're counting servers back to 2001, even
19 though you don't know how many of those servers that went
20 online in 2001 were no longer online in 2003?

21 A. Because they'd still be liable.

22 Q. Even though the licensing program didn't even
23 come into place until 2003?

24 A. Yeah.

25 Q. Isn't it true that the best evidence of how

1 successful the SCOSource licensing program may or may not
2 be is what happens in the real world?

3 A. No. No. Because that's affected by factors
4 like the slander, and, you know, we have to look at --
5 that's why we have to do these kind of analyses, to see
6 what's a good -- what's a good proxy.

7 Q. And so, wouldn't the best information about how
8 successful the SCOSource licensing program would be,
9 would be what happened in the real world before you
10 believe there was any slanderous statement on May 28,
11 2003?

12 A. Again, you know, as you say, "what happened in
13 the real world." And there's lots of data, lots of
14 historical records. And we have letters here from
15 lawyers. Now, again, I think when -- you know, when
16 lawyers write to lawyers, they couch things. They write
17 in a certain way. I'm not sure how I would even, you
18 know, weigh these. They are certainly a factor, but
19 clearly, in the context of potential litigation, letters
20 are going to be couched, I sense, in very careful ways
21 and may not disclose all the reasons.

22 Q. But isn't it true that the best evidence of how
23 successful the SCOSource program would be is what
24 happened between SCOSource being announced, in January of
25 2003, and this alleged statement May 28, 2003?

1 A. Let's remember. The SCOSource right-to-use
2 license, which is the product I analyzed, was not
3 introduced until August of 2003, not January.

4 Q. So, does your analysis not depend on any
5 program that was announced prior to August of 2003?

6 A. Yeah. I don't look at any -- yes. I'm looking
7 at a product that was launched in August of 2003.

8 Q. And so your analysis in no way factors in what
9 happened between January of 2003 and May 28 of 2003?

10 A. I think it considers it as part of the
11 historical context. I think I cover a pretty broad patch
12 of the industry.

13 Q. And my question was: Does your numerical
14 numbers -- in coming up with those numbers, did you
15 consider what actually happened in the real world between
16 January of 2003 and May 28 of 2003?

17 A. Sure. Absolutely.

18 Q. And you know what happened in the real world is
19 there was an announcement of the SCOSource program in
20 January of 2003, correct?

21 A. There was an announcement that SCO was forming
22 a division to pursue its intellectual property claims,
23 and there's different licenses. And the right-to-use
24 license was not announced until August of 2003, August
25 6.

1 Q. And the only licenses that were signed between
2 January of 2003 and May, 2003, were one license to SUN,
3 correct?

4 A. Yes.

5 Q. And one license to Microsoft?

6 A. Right.

7 Q. Correct?

8 A. And those were not right-to-use licenses.

9 Q. And those licenses were UnixWare licenses,
10 correct?

11 A. That's correct.

12 Q. And that's what happened in the real world,
13 right?

14 A. Yes.

15 Q. Let's go back to the Google letter and see how
16 Google responded to this SCOSource licensing program:

17 In our January 28 letter, we noted that your
18 prior letters appear to have been form letters, and it
19 was, therefore, difficult to assess your position as it
20 relates to our particular business. We asked that you
21 provide us with further information, including the
22 precise portions of the files at issue, what you believe
23 were copied from copyrighted UNIX code, what versions of
24 the kernel you believe contain proprietary code and so
25 on.

1 Instead of addressing the issues we raised, it
2 appears that you have chosen to simply to send us another
3 form letter. Indeed, the closing paragraph of your
4 letter begins, quote, "please contact me by (one week
5 from date of letter-specific date) -- and there's a
6 (sic) -- so that we may schedule a meeting."

7 Presumably, you intended to replace the
8 parenthetical with a specific date but inadvertently
9 failed to do so. We do not believe it will be productive
10 to engage in further discussions until you have addressed
11 the issues raised in our January 28, 2004, letter, a copy
12 of which is enclosed for your convenience. Once we have
13 received a response for the issues noted in the letter,
14 we reiterate that we will be happy to investigate the
15 matter further and get back to you.

16 Do you see that?

17 A. I see that. Yeah.

18 Q. Did you -- in the survey that you relied on,
19 were any of the respondents asked how willing they would
20 be to accept indemnification from a company that sends
21 them repeated form letters and forgets to fill in the
22 dates?

23 A. No.

24 THE COURT: Mr. Acker, would this be a good
25 time for a break?

1 MR. ACKER: Yes, Your Honor.
2 THE COURT: Ms. Malley.
3 MS. MALLEY: All rise for the jury, please.
4 (Jury leaves the courtroom.)
5 THE COURT: How much more do you have,
6 Mr. Acker?
7 MR. ACKER: Not that much, Your Honor, ten to
8 15 minutes.
9 THE COURT: We'll take a 20-minute recess.
10 MR. ACKER: Thank you.
11 (Short break.)
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