

1 (12:30 p.m.)

2 MR. SINGER: Your Honor?

3 THE COURT: Yes, Mr. Singer.

4 MR. SINGER: Um, I just wanted to note, if I might,

5 one additional point. We do not have any objection to

6 making clear, in reading this, that the reference to UNIX

7 and UnixWare copyrights is at the time of the APA. So that

8 would eliminate any confusion that we are suggesting that

9 these assertions were to the SCO UnixWare copyrights that

10 are generated after the APA. The point is as of the time of

11 the APA because we think that that is what we're talking

12 about. But to the extent there was an issue raised about

13 the confusion, I think that could easily take care of that.

14 THE COURT: Well, counsel, based on what I know about

15 this case so far, I would say that Mr. Jacobs' position is

16 completely without merit. If something develops during this

17 next week that persuades me otherwise, then perhaps I will

18 have a different view of it. If this is pursued to any

19 degree, then I have no choice but to allow you to read the

20 admissions into the record.

21 MR. SINGER: Thank you, Your Honor.

22 THE COURT: Let's bring the jury in.

23 MR. BRENNAN: Just one quick thought, Your Honor,

24 unrelated to what the court just mentioned.

25 THE COURT: Go ahead, Mr. Brennan.

1 MR. BRENNAN: As you know, we have been working with
2 respect to the scope of Mr. Tibbitts testimony given the
3 work product and privilege objections that have been raised.
4 There is quite a number of them. My thought is rather than
5 interrupt or hold the jury further, perhaps we ought to
6 finish with Mr. Nagle, see what the day looks like, but I
7 think it will probably take five or 10 minutes to go through
8 it, maybe less, maybe I'm overstating it, but to go through
9 the number of objections that were asserted in his
10 deposition. So I just wanted to alert you.

11 THE COURT: So you have not yet reached an agreement
12 that will allow Mr. Tibbitts to be brought to the --

13 MR. BRENNAN: We have not reached an agreement on the
14 scope of what his examination will be.

15 THE COURT: Mr. Normand?

16 MR. NORMAND: In my view, Your Honor, we're talking
17 about the margins of Mr. Tibbitts testimony. But with
18 respect to the margins, there is room -- there is
19 disagreement between Novell and SCO.

20 THE COURT: Well, if you're suggesting that when we
21 finish with Mr. Nagle that we recess for the afternoon, is
22 that what you're saying, or do you want me to take another
23 recess and bring the jury back?

24 MR. BRENNAN: I'm sure that perhaps would be of
25 concern to the court. I am willing to do it either way.

1 I'm willing to do it now. I just didn't want to have a
2 lengthy or lengthier break than the court would want and I
3 didn't want to interrupt the cross-examination. I am happy
4 to do it either way that the court would prefer, Your Honor.

5 MR. NORMAND: Your Honor, we would prefer to have
6 Mr. Tibbitts come on this afternoon, and I take it that if
7 you're concerned about bringing the jury in and out, maybe
8 we ought to try to do it now.

9 THE COURT: Well, let's do it now then.

10 MR. BRENNAN: Okay. Your Honor, perhaps I can do
11 this. The deposition transcript that is at issue is the
12 deposition of Ryan Tibbitts taken in this case on
13 April 24th, 2007. I believe, Your Honor, we have tendered a
14 copy of that transcript, and I would like to highlight, at
15 least in my mind, what appear to be three species of lines
16 of examination to which objections on the ground of either
17 attorney/client privilege or work product were raised and
18 for which the witness, Mr. Tibbitts, was instructed not to
19 answer.

20 The first of those is found on page 16 of the April
21 24th, 2007 transcript and it appears at lines 10 through 18.
22 And perhaps I can very briefly give some context that I
23 think will help the court explore these areas. Mr. Tibbitts
24 was asked about a number of contacts that he had with either
25 SCO licenses or potential licensees and, for example, in the

1 reference that I just gave you the question that was asked
2 of him, this has to do with Questar, again page 16 line 10,
3 "With respect to the Questar license, does SCO contend that
4 Novell interfered with that in any way; that it would have
5 been a larger license, had Novell not done what it's done
6 and said what it's said?"

7 And then the objection, and then what follows is the
8 assertion by the witness, who is an attorney, "That's work
9 product." And thus, as the court can read, there was no
10 disclosure of -- well, let me back up. The witness was not
11 allowed to answer the question as to whether SCO even
12 contended whether Novell had interfered and Novell was not
13 at that deposition in April to find out the basis for that
14 contention.

15 THE COURT: Mr. Normand?

16 MR. NORMAND: I was going to wait for Mr. Brennan to
17 finish because I'm taking an entirely different approach but
18 let me try it this way. On that question, Mr. Tibbitts is
19 not testifying at this trial. He is not testifying as a
20 damages expert. He will testify to his discussions with
21 potential SCO source licensees, and he testified at length
22 to all of those discussions from pages 9 to 40 in his
23 deposition.

24 We are not putting him up as an expert on the issue of
25 how much damages SCO suffered, or even whether SCO suffered

1 some quantifiable amount of damages related to these
2 discussions with potential customers.

3 MR. BRENNAN: The problem is, this is repeated time
4 and again, is the witness is asked whether there is even a
5 contention being made with respect to this customer. And
6 the answer is, as you can see --

7 THE COURT: The contention being that this would be
8 considered part of the damages?

9 MR. BRENNAN: Well, twofold. Yes, absolutely, and
10 second of all, at the deposition it was confirmed that any
11 examination of Mr. Tibbitts would be work product on that
12 subject.

13 MR. NORMAND: So if I were asking --

14 THE COURT: The work product on the issue of damages.

15 MR. BRENNAN: Twofold. Yes on damages, and in
16 particular with respect to Questar. Because as we will see
17 in a minute, in the deposition Mr. Normand stated on the
18 record that Mr. Tibbitts would not be a witness offered at
19 trial at all on the subject of damages. So there is a very
20 broad assertion on the issue of damages, and then there is
21 the more narrow ones, for example, I think it would be
22 inappropriate for Mr. Tibbitts to be offered whatsoever on
23 the issue of damages. I'll show the court in a minute the
24 reference, and also to be asked about Questar in particular
25 given this instruction here.

1 MR. NORMAND: And Mr. Tibbitts will not be testifying
2 on the issue of damages. That was yesterday's testimony and
3 the day before. He will be testifying to the nature of the
4 discussions with customers. I won't ask him what
5 conclusions he drew from those discussions, whether he
6 concluded from those discussions that SCO had suffered some
7 particular amount of damages. This is a standard work
8 product objection, Your Honor. He was not an expert on
9 damages. So the questions that went to that issue were not
10 ones that were appropriate for him.

11 THE COURT: Mr. Brennan, if you are asserting that he
12 ought not to be allowed to answer any questions about
13 customers that were affected by the Novell statements, um, I
14 think that is overly broad.

15 MR. BRENNAN: Well, perhaps -- I appreciate that and
16 that is not the purpose of what I wanted.

17 THE COURT: Then what are we disputing here?

18 MR. BRENNAN: That he shouldn't be able to ask him,
19 first of all, about Questar. Because the question put to
20 the witness is does SCO contend that Novell did something
21 relative to Questar. And he was instructed not to answer
22 that on work product. That is as far as I have gone is
23 just --

24 THE COURT: Let's leave Questar out. No questions
25 about --

1 MR. NORMAND: Your Honor, that was not an accurate
2 characterization of either his testimony or the instruction
3 given to him. I would ask Mr. Tibbitts two principal things
4 about Questar. What did you show them, if you can recall,
5 and what was said, if you can recall. That is it. That is
6 nothing to do with the instruction I gave at the deposition.

7 MR. BRENNAN: Your Honor, here is the unfair part
8 about it. It is not relevant if Mr. Tibbitts was asked as
9 the question says, "is SCO contending that Novell did
10 anything to interfere with Questar." And that basic
11 question can't be answered because, you see, "that's all
12 part of the ongoing damage analysis, and I would believe
13 that's work product."

14 THE COURT: Mr. Normand, if you ask the questions you
15 just told me you are going to ask him, does that not then
16 imply that there was an interference with Questar by Novell,
17 a question of which he was not allowed to answer at the
18 deposition?

19 MR. NORMAND: No. But Novell has been entitled to ask
20 any of our damages experts the conclusions they drew from
21 any work they may have done.

22 THE COURT: That is not my point, Mr. Normand. If I
23 -- if I am not understanding this, then I want you to tell
24 me where I don't understand it. If you are allowed to ask
25 Mr. Tibbitts questions about Questar, does that not by

1 itself imply to the jury that you are asserting, even though
2 you don't directly say okay what was the extent of the
3 damage, what was the nature of the contract lost, et cetera,
4 does that not imply to the jury that is part of the damage
5 claim in this case? Just simply asking.

6 MR. NORMAND: I don't think it does and I don't think
7 I am --

8 THE COURT: Then why would you ask the question then?

9 MR. NORMAND: Because I was going to say, Your Honor,
10 I don't think I'm cutting it too thin. One of the issues,
11 one of the arguments Novell has made is that SCO was not
12 presenting evidence to any potential customers. So part of
13 what Mr. Tibbitts would speak to, I did speak with these
14 customers, I did present to them support for our position.

15 THE COURT: Okay. Now you're speaking in the
16 abstract. I'm speaking about Questar. I have been focused
17 on some deposition testimony where the question was asked of
18 him at the deposition about Questar, you objected and
19 apparently no more questions were asked.

20 MR. NORMAND: No, that is not correct at all. He
21 testified at length from pages 9 to 16 about everything that
22 he could remember about his discussion with Questar.

23 MR. BRENNAN: Your Honor, the point there is that we
24 were told that there was going to be no contention. Your
25 Honor, we have, for example, this point is put --

1 THE COURT: What do you mean no contention?

2 MR. BRENNAN: The question again was asked is with
3 respect to the Questar license, does SCO contend that Novell
4 interfered with that in any way, that it would have been a
5 larger license had Novell not done what it has done and said
6 what it said. Objection to the form. Answer, well I think
7 that's all part of the ongoing damages analysis, and I
8 believe that is work product.

9 THE COURT: I have that whole deposition here,
10 Mr. Normand. Did you just give me something that I don't
11 have?

12 MR. NORMAND: I may have not if you already have it.
13 It is pages 9 to 16 on the issue of Questar in particular,
14 Your Honor.

15 MR. BRENNAN: Your Honor, I think -- I think this
16 precisely same issue comes into sharp focus on page 20 of
17 the deposition of -- where now SCO moves to the Department
18 of Defense. So the question of Novell's counsel at line
19 four on page 20, "I take it that the Department of Defense
20 did not take any license -- take a license of any kind?
21 Answer, they did not. Question, does SCO contend that they
22 would have taken a license if not for Novell's actions?
23 Mr. Normand, I'm going to object on the grounds of work
24 product. There's an objection to the form to the extent
25 you're asking what a complaint might say or what a pleading

1 might say. But to the extent it goes beyond that, I think
2 we are in the area of work product. Answer, I think that's
3 work that we are doing with our experts and the attorneys
4 are involved and so am I, and so I think it's work product."
5 So that is precisely the same issue with another client.

6 THE COURT: Mr. Normand?

7 MR. NORMAND: It is an entirely different issue. The
8 question is whether as to what Mr. Tibbitts will be
9 testifying to whether Novell has already been given the
10 opportunity to cross-examine him on that subject and they
11 have at length. If I were to finish my questions by asking
12 Mr. Tibbitts what conclusions have you drawn with respect to
13 the damages that you think SCO suffered, Novell would have
14 an argument. I am not asking him that question.

15 THE COURT: Well, I see here that you, Mr. Brennan or
16 whoever is taking the deposition, was allowed to continue to
17 ask questions about the Department of Defense.

18 MR. BRENNAN: That is correct, Your Honor. However,
19 when they withdraw -- when they won't allow the witness even
20 to answer the questions as to whether there is an intention
21 that Novell did something wrong, they are removing the
22 Department of Defense, they're removing Questar from their
23 pallet of claimed customers who they allege constitute the
24 basis of their damages assertion. We have -- those are two
25 specific instances where they wouldn't let the witness even

1 answer whether there was a contention. And then as I
2 mentioned, there is the broader problem, this is found on
3 Page 51 of the deposition, and the context the court
4 certainly could look back at Page 50 where Novell's
5 attorney, at that time it was Mr. Melaugh of the Morrison
6 and Foerster firm, on Page 50 referenced the fact that he
7 was trying to get answers. They took a break. Mr. Normand
8 at Page 51 Line 1. "We just took a break to talk about how
9 to approach the questions that Mr. Melaugh flagged. What we
10 will say is Mr. Tibbitts is not going to be a witness on the
11 issue of damages."

12 MR. NORMAND: Which is a true statement.

13 THE COURT: By that, Mr. Normand, you mean that he is
14 not going to be a witness who will be asked to quantify the
15 amount of damages, correct?

16 MR. NORMAND: That is correct, Your Honor. And I'm
17 not even trying to pull a fast one. I'm not going to ask
18 him did they suffer some damages that you just don't know
19 how to quantify. He is not here to testify to the issue
20 that SCO has suffered damages.

21 THE COURT: But you are going to ask him questions
22 about specific customers that he has knowledge of who he
23 thought would have undertaken a SCO source contract but did
24 not because of the Novell actions.

25 MR. NORMAND: That is correct. He is going to testify

1 as a percipient witness. The objection was to the extent he
2 was being asked questions beyond that.

3 THE COURT: So the question is whether or not that
4 constitutes testifying about damages?

5 MR. NORMAND: Well, it is testifying to facts from
6 which juries can draw inferences. He is not an expert on
7 the issue of damages. That was the objection made. He is
8 the general counsel of the company. He is being deposed.
9 And now he is being asked well, what do you know about what
10 experts might be doing or what work might be done? So the
11 objection is he is not testifying about that. He does know
12 something about it because he has got experts on his team
13 and he speaks with attorneys about it. But he is not going
14 to testify to that. That is not what he is here for and
15 that is not what he is here for at trial here today.

16 MR. BRENNAN: The objection was not that it was
17 subject to expert testimony, the objection was work product.

18 THE COURT: It appears, however, that as to both
19 Questar and the Department of Defense, despite the
20 objection, you did ask him questions about those two
21 specific customers. So anything he may be testifying to
22 here today will not be a surprise to you.

23 MR. BRENNAN: It will be a surprise to the extent that
24 we were told that there was no contention relative to those
25 customers. It will be a surprise to the extent that we were

1 told that Mr. Tibbitts would not be testifying as a witness
2 regarding damages.

3 THE COURT: Apparently the two of you had a
4 misunderstanding about what was meant when Mr. Normand
5 represented that he would not be called as a witness
6 regarding damages. The court will allow questions to be
7 asked about specific customers. He will not be asked --
8 allowed to ask or be asked or answer questions about the two
9 specific customers, Questar and Department of Defense beyond
10 those questions that were allowed at the deposition.

11 MR. BRENNAN: Thank you, Your Honor. One other
12 species and then I think I can dispense with the third
13 species quickly as well. On page number -- well it runs 47
14 through 49 of the transcript. I would like to start with
15 Page 47 Line 11. And the question is, "One of the things
16 SCO has said in Interrogatory response about damages was
17 that SCO's existing UNIX customers expressed their concerns
18 over Novell's claims and SCO suffered further losses in that
19 business. Do you have any personal knowledge of concerns
20 expressed by UNIX customers about Novell's claims?
21 Objection to form. Answer, yes, I do. What is that?
22 Mr. Normand, I'm going to object to that on the grounds of
23 work product."

24 MR. NORMAND: Mr. Tibbitts is not testifying today to
25 any complaints from existing UNIX customers.

1 MR. BRENNAN: Okay.

2 THE COURT: All right.

3 MR. BRENNAN: And then the last species, Your Honor,
4 it frankly runs a span of pages 54 through 72. I don't
5 expect the court at my invitation at least to read all of
6 that. I can highlight --

7 THE COURT: Can you summarize it?

8 MR. BRENNAN: Yes, I will. Over that span,
9 interspersed between pages 55 through 72 of the deposition,
10 the questioning attorney for Novell, Mr. Melaugh, and that
11 is spelled M-E-L-A-U-G-H, for the benefit of the reporter,
12 asked about item of correspondence that Mr. Tibbitts had
13 sent to Novell. And I think if I show one, that will
14 illustrate the problem with all of them, Your Honor.

15 THE COURT: Okay.

16 MR. BRENNAN: So perhaps if I could, as an
17 illustrative exhibit, direct the court's attention to
18 Page 67 at Line 13. And the question is, "This is
19 Exhibit 271. It's been Bates labeled NOV 43173. It's dated
20 October 9. It's from Mr. Tibbitts to Mr. LaSala. Like the
21 last letter, it also has some faxed headers at the top which
22 bear different dates."

23 Your Honor, rather than read all of this into the
24 record if I can just jump forward to the stated objection
25 where the question is on Page 68 Line 1. And the second

1 paragraph in the first line you see, "We remind you, Novell,
2 that Novell sold the UNIX business, source code and
3 copyrights to SCO for approximately \$150,000,000. How do
4 you arrive at that figure?" Mr. Normand, well, I think
5 that's the subject of the same work product objection in
6 that however Mr. Tibbitts arrived at that figure, whether it
7 was the result of discussions with outside counsel, whether
8 it was a result of his review of, for example, the APA,
9 whether it was the result of his discussions with others
10 regarding the APA, with respect to any of those sources the
11 number reflects his mental impressions, his analysis, his
12 organization of information. And I think therefore his
13 basis for that number is his -- reflects his work product.
14 Mr. Melaugh, I take it you are directing him not to answer?
15 Mr. Normand, correct. Mr. Melaugh, are you taking that --
16 answer, I think it is privileged, also. I wasn't involved
17 in the transaction."

18 Now that has to do with the letter that Mr. Tibbitts
19 sent to Mr. LaSala of Novell. We have that same very sort
20 of request and instruction on work product grounds that in
21 fact not only that letter, but a subsequent letter sent by
22 Mr. Tibbitts to Mr. LaSala on October 9th, 2003. That is
23 covered in pages 67 through 68. And we have almost
24 identically the same exchange with respect to a letter that
25 Mr. Tibbitts sent to Mr. LaSala on February 5th, 2004 and

1 that colloquy spans pages 69 through 72. The problem here,
2 Your Honor --

3 THE COURT: Mr. Brennan, may I interrupt? So are you
4 then requesting that Mr. Normand not be permitted to
5 introduce those as exhibits through Mr. Tibbitts?

6 MR. BRENNAN: Um --

7 THE COURT: Or that they be -- that those portions --

8 MR. NORMAND: Your Honor, I'm sorry to jump in but I
9 think I can shortcut this. The only letter that Mr. Brennan
10 that has referred to that I would use is marked as SCO
11 Exhibit 110. That is the October 9th letter. My
12 instruction was clear and therefore I should not be entitled
13 to show the jury or ask Mr. Tibbitts about the sentence of
14 this letter that refers to the \$150,000,000 figure. I would
15 propose --

16 THE COURT: But the other two letters you do not
17 intend to use?

18 MR. NORMAND: I would use the letter, not that line.

19 THE COURT: I'm sorry, the other two letters?

20 MR. NORMAND: The other two letters I'm not using.

21 THE COURT: You're not going to use. As to this
22 letter if that part is redacted, and there is no question
23 about that figure, are you all right? You're all right?

24 MR. BRENNAN: Yes, but I think there is also a
25 provision on the second page where --

1 MR. NORMAND: Mr. Brennan is correct and this is not
2 one that I would have Mr. Tibbitts read. It is a paragraph
3 -- would you like me to read it to Your Honor?
4 THE COURT: Is it something that you can have
5 redacted?
6 MR. NORMAND: It is, yeah.
7 THE COURT: Then let's just have it redacted.
8 MR. BRENNAN: That solves our problems, Your Honor.
9 Thank you.
10 THE COURT: All right.
11 MR. BRENNAN: I appreciate your indulgence with the
12 discussion.
13 THE COURT: It is important. I understand. Anything
14 else before we bring the jury in?
15 MR. SINGER: No, Your Honor.
16 MR. NORMAND: No, Your Honor.
17 THE COURT: Ms. Malley. Mr. Nagle, I hope this makes
18 you happy that you are an engineer and not an attorney.
19 THE WITNESS: Yes, Your Honor. I assure you we have
20 equally Archean discussions in our field.
21 THE COURT: I'm sure.
22 THE CLERK: All rise for the jury.
23 (Whereupon, the jury returned to the courtroom.)
24 THE COURT: Go ahead, Mr. Jacobs.
25 //

CROSS-EXAMINATION

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BY MR. JACOBS:

Q. Good afternoon, Mr. Nagle. I'm Michael Jacobs one of the counsel for Novell.

You discussed with Mr. Normand your employment history and the various roles that you had in the course of your tenure with various companies you worked with. I would like to ask you about one of the roles that you have played with SCO, which is your role in the UnitedLinux partnership.

MR. NORMAND: Your Honor, this is both beyond the scope of my direct and pertains to an issue that is stayed with respect to this case. I am hesitant to say more without asking for a side bar.

MR. JACOBS: I will not venture into stayed territory, Your Honor, and he was asked about whether his jobs had remained the same through his various times in the UNIX business. And this is a distinct role he played.

MR. NORMAND: Your Honor, I won't belabor the point but it has nothing to do with the subject matter of my direct.

THE COURT: Well, maybe we better have a side bar, counsel.

(Whereupon, a side bar conference was held.)

MR. NORMAND: We didn't make it far, did we.

THE COURT: We did not get very far.

1 MR. JACOBS: This witness was the representative on
2 UnitedLinux. I would like to ask if SCO was a partner in
3 UnitedLinux. He was the representative that SCO actually
4 released SCO Linux 4 powered by UnitedLinux in one of the
5 issues that arose in the community around SCO source that
6 relate. I won't ask the ultimate question of this witness,
7 but one of the issues that relates to SCO source is that in
8 connection with SuSE, UnitedLinux was cited on the e-mail to
9 him as one of the reasons people didn't take SCO source
10 licenses. That is where I would like to go.

11 MR. NORMAND: Putting aside for the moment the
12 question of any relevance, perhaps they could get that in in
13 their case but that has nothing to do with what I asked
14 Mr. Nagle about. That is my point.

15 THE COURT: He asked him about his various roles.

16 MR. JACOBS: Your Honor, he just confined him to his
17 time in 1995.

18 THE COURT: Mr. Jacobs, it is really a stretch to say
19 that they saw him asking a very general question about his
20 background to say that he opened this door. And I just
21 don't think in good conscious I can allow you to go there
22 with this witness.

23 MR. JACOBS: Thank you, Your Honor.

24 MR. NORMAND: Thank you, Your Honor.

25 THE COURT: We're not done.

1 MR. JACOBS: The only thing then that I need to do, I
2 don't want to make him subject to recall, is to get him to
3 authenticate this or have Mr. Normand stipulate that I can
4 bring it in without his authentication. Sorry.

5 MR. NORMAND: But you're not going to ask him about
6 it? You want to get it in through him?

7 MR. JACOBS: Or stipulate it is admissible without him
8 being here to authenticate it. SCO received -- this is an
9 e-mail that SCO received.

10 MR. NORMAND: That is fine. We'll stipulate to that.

11 THE COURT: Let me ask you this.

12 MR. JACOBS: C-14.

13 THE COURT: Are you going to recall him?

14 MR. JACOBS: I don't want to.

15 THE COURT: Well, I don't either. And so, you know, I
16 would revisit this ruling if you are going to tell me that
17 you're going to recall him to get this testimony in any way.

18 MR. JACOBS: I would recall him to get in about ten
19 minutes of testimony on UnitedLinux in our case in chief.

20 MR. NORMAND: I took it from my comments that they had
21 some other way to speak to this issue of UnitedLinux in
22 their case. We wanted to reserve our rights honestly
23 whether it is relevant at all. If we have to pull him back,
24 obviously, that is a terrible result but this is springing
25 up at the last second. They have never indicated they

1 wanted to use him as a witness in their case.

2 THE COURT: I would have to -- I mean the argument
3 would be that they're bringing him back as a rebuttal
4 witness. Ultimately, they will recall him and I would have
5 to allow him to be recalled.

6 MR. NORMAND: As a rebuttal witness?

7 MR. JACOBS: One, this will take five minutes, Your
8 Honor.

9 THE COURT: There are much trickier things that have
10 occurred in this trial than that.

11 MR. NORMAND: That is the standard we're using?

12 THE COURT: Yes.

13 MR. NORMAND: He can ask his questions.

14 THE COURT: You raised the bar. If you want to accept
15 that I think it would be more efficient.

16 MR. NORMAND: Okay, very good.

17 THE COURT: All right.

18 (Whereupon, the side bar conference concluded.)

19 THE COURT: I will hold you to the five minutes,
20 however.

21 Q. (By Mr. Jacobs) Mr. Nagle, you were SCO's
22 representative to the UnitedLinux consortium; correct?

23 A. I was.

24 Q. And can you describe briefly what UnitedLinux was
25 all about?

1 A. There were four companies around the world who
2 consolidated their resources to create a distribution of
3 Linux that they would make available in the market.
4 Q. And SCO was one of the partners in that
5 consortium; correct?
6 A. It was. When it was first started it was Caldera
7 that was the partner.
8 Q. Same company, different name?
9 A. Correct.
10 THE COURT: What time frame are we looking at?
11 Q. (By Mr. Jacobs) What time frame are we looking
12 at?
13 A. 2001, 2002, I believe.
14 Q. And, in fact, in November of 2002, SCO released
15 SCO Linux 4 powered by UnitedLinux, correct, Mr. Nagle?
16 A. Yes.
17 Q. Let me show you an exhibit marked as I11. Um,
18 I11 is a press release from SCO, correct, Mr. Nagle?
19 A. Yes.
20 MR. JACOBS: I offer I11 into evidence, Your Honor.
21 MR. NORMAND: No objection, Your Honor.
22 THE COURT: It will be admitted.
23 (Whereupon, Defendant's Exhibit I11 was
24 received into evidence.)
25 Q. (By Mr. Jacobs) So at this point in time,

1 November 19, 2002, Mr. Nagle, SCO is part of the UnitedLinux
2 consortium and releasing a version of Linux; correct?

3 A. Yes.

4 Q. And one of the goals of the UnitedLinux
5 consortium was in fact to create an enterprise suitable
6 version of the Linux Operating System; correct?

7 A. Yes.

8 Q. For example, and SCO says, for example, in the
9 press release, um, that it is -- that this version of the
10 Linux Operating System in the second line, Mr. Lee, "is a
11 high-quality Linux Operating System designed for
12 mission-critical business applications, with guaranteed
13 stability, security and worldwide support from SCO." Do you
14 see that?

15 THE COURT: Mr. Normand?

16 MR. NORMAND: Your Honor, can I just have a standing
17 objection to relevance for this question and then the next
18 three and a half minutes?

19 THE COURT: Yes.

20 THE WITNESS: Yes, I see that.

21 Q. (By Mr. Jacobs) So at this point in time, SCO is
22 offering an enterprise ready version of Linux that it has
23 been created with the assistance of the partners and with
24 the assistance of the UnitedLinux consortium?

25 A. Yes.

1 Q. Now, SuSE was one of the members of the
2 UnitedLinux consortium; correct?

3 A. Yes.

4 Q. And just to get us all on the same chronology,
5 ultimately SuSE will be purchased at the end of 2003 by
6 Novell, correct?

7 A. Yes.

8 Q. So about a year after this release, Novell will
9 purchase the SuSE company, correct?

10 A. Yes.

11 Q. And then Novell will have a distribution of Linux
12 from SuSE, correct?

13 A. Yes.

14 Q. Okay. So I want to now go back in time just a
15 little bit and show you one more document here. C14, Your
16 Honor.

17 MR. NORMAND: Same objection as to relevance, Your
18 Honor, but pursuant to the discussion.

19 THE COURT: All right. The objection is noted,
20 Mr. Normand. Thank you.

21 Q. (By Mr. Jacobs) Mr. Nagle, C14 is an e-mail from
22 you dated May 8th, 2003?

23 A. I see that.

24 MR. JACOBS: I offer C14 into evidence, Your Honor.

25 THE COURT: It has been accepted.

1 Q. (By Mr. Jacobs) Mr. Nagle, you were forwarding a
2 statement. Why don't you go down to the second paragraph.
3 You were forwarding to others a statement that had been
4 issued by SuSE, correct?
5 A. So it appears.
6 Q. And in that statement, SuSE was reacting to the
7 SCO source campaign, correct? If you look at the first
8 paragraph.
9 A. It appears so.
10 Q. In --
11 A. The context seems to suggest that it was.
12 Q. In the first paragraph it says, "So far, SuSE
13 Linux isn't losing any sleep over a legal battle brewing
14 between IBM and the SCO Group." Do you see that?
15 A. I do.
16 Q. So now back to the second paragraph. SuSE is, in
17 this statement, it is reassuring its Linux customers that
18 quote, "they have nothing to worry about because the company
19 has a contractual agreement with SCO within the framework of
20 the UnitedLinux initiative." Do you see that?
21 A. I do.
22 Q. And then the statement of assurance goes on to
23 say, "we can say today with assurance that neither SuSE nor
24 its customers need to be concerned about facing any demands
25 from SCO." Do you see that?

1 A. I do.

2 Q. And isn't it true, Mr. Nagle, that one of the
3 issues in the marketplace for SCO source licenses was the
4 question arising out of the UnitedLinux agreement and
5 whether the UnitedLinux agreement meant that, for example,
6 SuSE and its customers were immune from any claim from SCO?

7 A. I am not sure I can cite firsthand knowledge of
8 that issue in the marketplace but --

9 Q. You are aware that the statement was made by
10 SuSE?

11 A. I'm aware, yes.

12 Q. And it got wide publicity, correct, Infoworld?

13 A. I can't confirm that.

14 Q. Do you see that it is from Infoworld?

15 A. I do.

16 Q. Infoworld is a very widely circulated journal?

17 A. I accept that.

18 THE COURT: Time is up, Mr. Jacobs.

19 MR. JACOBS: And I'm done, Your Honor.

20 Q. (By Mr. Jacobs) Let me now bring you back to
21 1995 and 1996 and your work on the transition plan. I would
22 like to show you SCO Exhibit 38. SCO Exhibit 38 is a
23 transition plan related document from the time of the APA?

24 A. Yes.

25 Q. And that is your signature, handwriting in the

1 upper right hand, corner?

2 A. Yes.

3 Q. I will represent to you, sir, that the boxing is
4 -- that is, the boxes around the various portions of this
5 document were placed on the document by SCO and are not part
6 of the original exhibit.

7 So this document is describing some of the activities
8 that are underway through transition of business that is
9 going to Santa Cruz to Santa Cruz, correct?

10 A. I'm sorry. Say that again.

11 Q. It wasn't very well done. This is a document
12 that is describing some of the activities that were underway
13 to effectuate the transition of business to Santa Cruz,
14 correct?

15 A. From Novell, yes.

16 Q. And in particular, a lot of the activity had to
17 do with, as I think you discussed with Mr. Normand,
18 transitioning source code, correct?

19 A. Correct.

20 Q. I would like to ask you to look at, it is the
21 second to the last page, it has got a stamp in the lower
22 right hand corner of 2833.

23 THE COURT: Are you going to offer this document?

24 MR. JACOBS: I'm sorry, Your Honor, absolutely. SCO
25 Exhibit 38 offered into evidence.

1 MR. NORMAND: No objection, Your Honor.

2 THE COURT: It will be admitted.

3 (Whereupon, Plaintiff's Exhibit 38 was
4 received into evidence.)

5 Q. (By Mr. Jacobs) Did you see in the box around
6 the lower third of the -- I'm sorry, the end of the top
7 third of the page there is a box, a box added by SCO as part
8 of the document process around it, "Appendix: Intellectual
9 property transfer plan."

10 A. I see that.

11 Q. Could you explain what is going on in the plan
12 underneath that box?

13 A. Yes. This describes the activities that were
14 going to go on to transfer certain intellectual property
15 from the Novell source code archives to the Santa Cruz
16 source code archives.

17 Q. So in your answer, sir, you embrace the real
18 focus of my question. What does the word intellectual
19 property refer to there?

20 A. It refers to the source code, it appears.

21 Q. And isn't it true, sir, that sometimes when
22 people use this phrase, intellectual property, they're using
23 it to refer in some loose sense to technology or the
24 intellectual assets of the company and not necessarily to
25 patents, copyrights or trademarks?

1 A. Are you asking for a layman's interpretation of
2 that phrase?

3 Q. Precisely.

4 A. It can be used in lots of different ways. That
5 is why there are intellectual property attorneys.

6 Q. This document evidences a lay person's use of
7 intellectual property when it refers to source code,
8 correct?

9 A. Yes.

10 Q. Let's talk about copyright notices, sir. Isn't
11 it true that practices with respect to copyright notices in
12 the UNIX world were well-established prior to the asset
13 purchase agreement?

14 A. I really can't speak to that. I can tell you
15 that the copyright notice practices within the companies
16 that I worked for were fairly well-established. Around the
17 rest of the UNIX world, um, not my purview.

18 Q. Isn't it true, sir, that the copyright notice
19 practices were governed by the AT&T forum dating back to the
20 old UNIX days of the license agreement, to be specific, the
21 sublicensing agreement?

22 A. I am not aware of any language in the
23 sublicensing agreement that specified specifically the form
24 of copyright notices that needed to be in the source code.

25 Q. So, um, I didn't mean that as a trick question,

1 sir. I have the agreement in front of me. So let's take a
2 look at E1, please. I believe it is in evidence already.
3 And in particular let's look at the top --
4 THE COURT: Which document is this?
5 MR. JACOBS: E1 is the AT&T Technologies sublicensing
6 agreement with, in this case, IBM.
7 THE COURT: E1 is not yet admitted.
8 MR. JACOBS: I offer E1 into evidence.
9 MR. NORMAND: No objection.
10 THE COURT: Mr. Normand, I didn't hear you.
11 MR. NORMAND: No objection. I thought this exhibit
12 was actually already in.
13 THE COURT: E1 is not, but it is now. It will be
14 admitted.
15 (Whereupon, Defendant's Exhibit E1 was
16 received into evidence.)
17 MR. NORMAND: It is in evidence as a different number,
18 I guess. So no objection.
19 THE COURT: It could be in as a Plaintiff's Exhibit
20 then?
21 MR. NORMAND: It is, Your Honor.
22 THE COURT: All right.
23 MR. JACOBS: I apologize, Your Honor.
24 Q. (By Mr. Jacobs) So, sir, I will focus you on the
25 top of Page 5 of this agreement. And subparagraph B turns

1 out to be in Section 2.08 which is on the previous page.
2 Why don't I give you my copy so you will have the actual
3 document. It will make it easier. Highlight subparagraph
4 B, Mr. Lee.

5 The license agreement says, "Each portion of a
6 sublicensed product shall include an appropriate copyright
7 notice. Such copyright notice may be the copyright notice
8 or notices appearing in or on the corresponding portions of
9 the Software Product on which such sublicensed product is
10 based or, if copyrightable changes are made in developing
11 such sublicensed product, a copyright notice identifying the
12 owner of such changes." Do you see that?

13 A. I do.

14 Q. It is a little -- the language is a little hard
15 to parse. So let me see if I can simplify it and see if
16 this is consistent with your recollection of the actual
17 practices in the companies in which you worked.

18 Wasn't it the case that when -- in the companies in
19 which you worked, if a change was made or an addition was
20 made in the source code, the copyright notice in that
21 portion of the source code would be updated to reflect that
22 the company making that change was the copyright holder?

23 A. If it was the case that we made changes in our
24 source code, in our source code database, based on newly
25 received code from a third-party in which that third-party

1 owned copyright, it is true that we would have put a
2 copyright notice into the source code to reflect that
3 ownership. That was a common practice with hardware drivers
4 and other such software.

5 Q. And with respect to the code that say Santa Cruz,
6 Santa Cruz -- actually let me back up a second. It has been
7 15 years now since Santa Cruz and then SCO have been the
8 companies that have evolved UnixWare, correct?

9 A. Yes.

10 Q. What is your estimate of the amount of code that
11 Santa Cruz and SCO have contributed to the UnixWare product?

12 A. I really don't have an estimate.

13 Q. Would it surprise you if it is in the millions of
14 lines of code?

15 A. Certainly not.

16 Q. It would not surprise you?

17 A. Certainly not.

18 Q. Would it surprise you if around 1995 there were
19 roughly seven million lines of code in UnixWare and now
20 there are 14 million lines of code?

21 A. It wouldn't surprise me.

22 Q. So I want you to assume with me that in all of
23 those millions of lines of code that Santa Cruz has written
24 or SCO has written in UnixWare, there is no dispute about
25 copyright ownership because that post dates the asset

1 purchase agreement? Can you assume that with me for a
2 minute?

3 A. Okay.

4 Q. Isn't it the case that in those lines of code,
5 one would expect to see a Santa Cruz or a SCO copyright
6 notice?

7 A. No, sir. Um, the copyrights that we had -- that
8 we added to our source code products were added only at the
9 time that we published the source code products. So that,
10 um, when we created a source code product that was
11 associated with, for example, UnixWare 2.1, the act of
12 creating that source code product inserted copyright notices
13 into all of the code because we owned the copyrights in all
14 of the code. We did not as a matter of engineering and
15 development practice on a daily basis add new copyrights
16 when we the owner of the copyrights added code to the
17 databases.

18 Um, what I said in my earlier testimony is that when
19 we received code from a third-party, and the third-party
20 owned the copyright, we felt obliged to record that
21 copyright ownership. But since we owned all of the
22 copyrights in the source in the database, except where it
23 was already noted that a third-party owned the copyright,
24 there was no need to add the copyright notice on a daily
25 basis, only when we published it and that is when we did it.

1 Q. So what is the latest version that you published,
2 quote published, unquote?
3 A. UnixWare 714.
4 Q. So there is a 714 version of the source code for
5 UnixWare?
6 A. Well, there certainly is, yes.
7 Q. That you have gone in and you have added SCO
8 copyright notices to the portions that you have modified,
9 correct?
10 A. Well, I don't -- I don't recall that we actually
11 issued a source code product for UnixWare 714. If we issued
12 a source code product for 714, then we added a copyright
13 notice on every file since we own the source to all of the
14 source to the source to UnixWare.
15 Q. Let's go back to 1995 and 1996. In your
16 testimony on direct with Mr. Normand, you explained that the
17 copyright notice was changed in UnixWare 2.1; correct?
18 A. Yes.
19 Q. And that was the then current version that Santa
20 Cruz was going to release after the asset purchase
21 agreement?
22 A. Yes.
23 Q. You did not go back and change the copyright
24 notices at that point in time as to UnixWare 2.0, UnixWare
25 1.0, SVRX -- no, sorry, System V Release 4.2MP; correct?

1 A. No, we didn't. These products were already done
2 and dusted. They were on the manufacturing shelf, masters
3 were available to be duplicated. It was our understanding
4 that we could continue to ship those products with copyright
5 notices as they existed in those products at the time that
6 these were mastered. It was our understanding that the
7 actual establishment of the ownership of the copyright in
8 those codes was established by the legal agreements, not the
9 notices, notices that existed in those old products.

10 Q. All right. So it just didn't seem that important
11 at the time to adjust the copyright notices in the older
12 versions of UNIX or UnixWare because the agreement was
13 controlling, correct?

14 A. That was our understanding at the time.

15 Q. And that --

16 A. Continues to be my understanding.

17 Q. Okay, perfect. So let me ask you -- ask you
18 about the tree and the trunk of the tree and let's see if we
19 can help the jury understand how this works.

20 I am not a very good drawer -- artist, Mr. Nagle, but
21 I hope this serves the purpose. So I think you were
22 explaining that UnixWare System V and, in particular, this
23 last System V release, 4.2MP, was the guts of UnixWare,
24 correct?

25 A. And 4.2MP was the basis for UnixWare 2 and

1 UnixWare 2.1. For UnixWare 1, it was System V release 4.2.

2 Q. And in UnixWare, there is some other --
3 importantly there is some other components that are NetWare
4 components, correct?

5 A. There are NetWare components in UnixWare 2, there
6 were fewer. In UnixWare 2.1, there were more that were
7 introduced.

8 Q. And then ultimately, just to avoid any confusion,
9 there was an agreement between Santa Cruz and Novell some
10 years later that meant that NetWare didn't need to be
11 included any longer, correct?

12 A. I was not party to that, but I did hear about it.

13 Q. But in the relevant time period that we're
14 focusing on here around the time of the asset purchase
15 agreement, UnixWare consists of UNIX System V code,
16 specifically UnixWare 2.1 consists of System V code, some
17 NetWare code, some additional code for the UnixWare release
18 that has been written or is being written as of the time of
19 the asset purchase agreement, correct?

20 A. Yes. If it -- yes, it includes at least that.
21 There were other -- there was other third-party code that
22 was a part of SVR 4.2MP. NetWare is not the only
23 third-party that had code in the UnixWare base.

24 Q. And can the jury see my wonderful art work?

25 Great. In particular, what we were focusing on was UnixWare

1 2.1 in your direct testimony, correct?

2 A. Yes.

3 Q. And that got a copyright Santa Cruz notice,
4 correct?

5 A. Yes.

6 Q. Now, UnixWare was a flavor of UNIX, correct?

7 A. Yes.

8 Q. And there were other flavors of UNIX such as IBM
9 AIX, HP UX, correct?

10 A. Yes.

11 Q. There are -- I think I heard somewhere that there
12 are thousands of flavors; is that correct?

13 A. I can't confirm or deny. I wouldn't be
14 surprised, I guess.

15 Q. There are many?

16 A. There are many.

17 Q. So on the would you be surprised line of
18 questioning, would it surprise you if IBM had registered
19 copyrights to its AIX flavor of UNIX?

20 A. No.

21 Q. Would it surprise you if IBM were to distribute
22 say a CD, if they were in that business with AIX? It used
23 to be out so I could hold it up.

24 MR. NORMAND: The witness has it.

25 Q. (By Mr. Jacobs) If they were to distribute a CD

1 and put an IBM copyright notice on their CD of the AIX?

2 A. My understanding of the purpose of a copyright
3 notice on the front of a product box is that it says to the
4 customer that purchases that product if you have any
5 questions about the copyrights on this -- in this product,
6 you come to me to see -- to get your answers. Um, it makes
7 no claim, as far as I know, to assert that the copyright
8 notice on the front of the box overrides the legal
9 agreements that establish copyright ownership.

10 Q. So if there was a copyright IBM or copyright
11 registration by IBM on AIX, it wouldn't answer the question
12 who owns UNIX System V, correct?

13 A. It would not.

14 Q. In fact, you would not understand it -- you would
15 not understand IBM to be making a claim of ownership of UNIX
16 System V merely by putting a copyright notice on the box of
17 AIX?

18 A. Um, I would not. I would assume that they would
19 respect the legal ownership of the underlying copyrights as
20 established by the appropriate agreements.

21 MR. JACOBS: I have no further questions, sir.

22 THE COURT: Mr. Normand?

23 REDIRECT EXAMINATION

24 BY MR. NORMAND:

25 Q. Mr. Calvin, could you pull up C14 and then could

1 you pull up the middle paragraph for the witness and the
2 jury.

3 Mr. Nagle, do you recall being asked about
4 UnitedLinux?

5 A. I do.

6 Q. Do you see the line five or six lines down that
7 says, "SCO, which owns the copyright to UNIX"?

8 A. I do.

9 Q. Is that statement consistent with your
10 understanding of SCO's ownership rights and Linux copyright?

11 A. Yes, it is.

12 Q. Did members of UnitedLinux ask SCO to contribute
13 UNIX intellectual property to the undertaking?

14 A. They did. They did during the negotiation of the
15 agreements, and the CEO of Caldera, Ransom Love at time,
16 declined. There was a very short specific list of
17 technology that each of the companies contributed to the
18 consortium. We did contribute some, but none of it was the
19 core technology that was driving the revenues for our
20 company at the time.

21 Q. Was Novell a member of UnitedLinux?

22 A. Only after they purchased SuSE.

23 Q. And before that time, did anyone ask Novell to
24 contribute any UNIX intellectual property to the
25 undertaking?

1 A. No.

2 Q. Do you recall being asked some questions about
3 changes that were made to copyright notices in 1995?

4 A. Yes.

5 Q. Did Novell change the copyright notices on their
6 existing version of UnixWare even before SCO had made any
7 changes to it?

8 A. No. Because the changes in copyrights were
9 always done in the last month prior to ship.

10 Q. And is it your understanding today, that Novell
11 engineers in 1995 changed copyright notices on UNIX code
12 that Novell is now claiming to own copyrights to?

13 A. Yes, that is my understanding.

14 Q. And you directed that undertaking, that the
15 engineers would make those changes, you were part of that?

16 A. I was part of the team that directed that
17 undertaking. I was -- at the time I was a Novell employee.

18 Q. Now you were shown the trunk of a tree and asked
19 about thousands of UNIX flavors. Do you recall that?

20 A. I do.

21 Q. Let me compete with Mr. Jacobs on terrible
22 drawings. It is all right, Mr. Jacobs. You will recall
23 questions I asked you about the relationship between
24 UnixWare, your earlier versions, and the previous version of
25 UNIX which I think you said was 4.2MP; is that right?

1 A. UnixWare 2 is derived from 4.2MP, that is
2 correct.

3 Q. Now, I know you probably can't quantify it, but
4 how close are those two products in terms of overlapping
5 source code?

6 A. Very, very close. Over 90, 95 percent.

7 Q. And you saw that Mr. Jacobs had put up a trunk
8 and then a branch. Do you recall that?

9 A. Yes.

10 Q. And the trunk was System V?

11 A. Yes.

12 Q. And the branch over here was UnixWare?

13 A. Yes.

14 Q. Do you recall that?

15 A. Yes.

16 Q. Do you think that is a fair description of the
17 relationship between System V and UnixWare?

18 A. No. I think you would have to recognize that
19 System V reached into all of the branches of that tree that
20 he drew and into many others.

21 Q. Now, we have confirmed that is a terrible
22 drawing. However, do you see the reference in the middle
23 circle the SVR5 and UNIX System V 4.2MP?

24 A. I do.

25 Q. And you see that I have attempted to draw a

1 circle around that and I have labeled that UnixWare?

2 A. If you would label that 2.0, we're slightly more
3 precise.

4 Q. Okay. And do you think that this would be an
5 accurate depiction of the relationship between UnixWare and
6 the prior version of the UNIX System V 4.2MP?

7 A. To a first approximation I would say yes, close.

8 Q. When you say to a first approximation, just
9 explain to the jury why you think to a first approximation
10 this is accurate? What does this represent?

11 A. Um, System V release 4.2MP was a release of UNIX
12 that was under development prior to the acquisition of the
13 UNIX business by Novell. We were, at the time, we were UNIX
14 System Labs, we went through a lot of company name changes,
15 um, and we had developed a version of UNIX that we labeled
16 System V release 4.2 and we were intending to go to market
17 with that as a binary product and at the time we saw our
18 chief competitor to be The Santa Cruz Operation. That was
19 then seized on by Novell as they took control of the company
20 assets and they said well we want to go to market with this
21 under a different brand. We want to go to market with this
22 as UnixWare 1.

23 Q. Now Mr. Nagle --

24 A. Yeah.

25 Q. -- in terms of this relationship between these

1 products, let me just ask you this. If Novell owned the
2 copyrights to the System V, and they could do whatever they
3 wanted with all of these copyrights to System V, the old
4 version of UNIX, what would be left of UnixWare?

5 A. Well, very little.

6 Q. Would it work?

7 A. It wouldn't work.

8 Q. Why wouldn't it work?

9 A. It would be -- it would be the equivalent of
10 having purchased a car from someone and then years later
11 they come to your front door and say give me the engine for
12 my car. The engine to UNIX is the kernel, it is the core of
13 the operating system that actually talks to the hardware.
14 That it tells how to reach into memory, how to -- how to
15 read or write from the disk. All of that technology, the
16 basis for that technology, reaches back to the development
17 of 4.2MP that was done at UNIX System Laboratories. It was
18 brought forward into UnixWare 2, it was brought forward into
19 UnixWare 2.1 and it is still there.

20 Q. Is it true that if you took the old UNIX pre-1995
21 UNIX out of UnixWare 7?

22 A. It wouldn't work.

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

24 //

25 //

1 RE-CROSS-EXAMINATION

2 BY MR. JACOBS:

3 Q. Mr. Nagle, Mr. Normand asked you about copyright
4 ownership and then switched to taking the code out of
5 UnixWare, taking the System V code out of UnixWare?

6 A. Yes.

7 Q. Did you understand that copyright ownership means
8 take the code out?

9 A. Copyright ownership confers the right to do with
10 the code whatever the copyright owner chooses to do with
11 code. And therefore they would have the right to direct
12 somebody that is using the code to do whatever they want
13 with it.

14 Q. SCO claims to own the UNIX System V copyrights.
15 Does that mean SCO has the right to tell HP take out the
16 System V code from your product?

17 A. SCO has a license agreement with HP that sets the
18 terms under which HP can use that code. And so long as HP
19 is in conformance with this license, then the rights that
20 SCO has to direct HP to do anything are quite limited.

21 Q. You're aware that SCO issued a press release in
22 2007 in which it said, even if we don't own the copyrights,
23 we're fine with our existing products and they can go -- we
24 can continue to support them, made a securities filing to
25 that effect?

1 A. Um --

2 MR. NORMAND: Your Honor, this is beyond the scope.

3 THE WITNESS: I don't remember -- well --

4 Q. (By Mr. Jacobs) You're not familiar with that?

5 A. I'm not familiar with it.

6 Q. And you do know that the asset purchase agreement

7 has a lot -- has a number of provisions governing what Santa

8 Cruz was to do with the code such as the development of the

9 AIX product, the development of UnixWare 2.1, correct?

10 A. Yes.

11 MR. JACOBS: Okay. Thank you, sir.

12 THE COURT: May this witness be excused?

13 MR. NORMAND: Yes, he may.

14 THE COURT: Mr. Jacobs?

15 MR. JACOBS: I'm sorry. Yes, Your Honor.

16 THE COURT: All right. Mr. Nagle, that means you do

17 not need to worry about being recalled, but I would instruct

18 you not to discuss your testimony with any other witnesses

19 in this case or in the presence of any other witness nor

20 communicate your testimony in any way to anyone else. All

21 right?

22 THE WITNESS: Thank you.

23 THE COURT: Thank you very much. Ladies and

24 gentlemen, we will recess for the weekend. Because of its

25 importance, I'm going to again read to you the instruction

1 that was given to you at the very beginning of this case.

2 First, I instruct you that during the trial you are
3 not to discuss the case with anyone, including fellow
4 jurors, or permit anyone to discuss it with you. Until you
5 retire to the jury room at the end of the case to deliberate
6 on your verdict, you simply are not to talk about this case.
7 Not talking about this case means not talking about it in
8 anyway including by internet, e-mail, text message and
9 instant communication devices or services such as cell
10 phones, blackberries, I-phones or social networking websites
11 including Facebook, Twitter, et cetera.

12 Second, you are not to read or listen to anything
13 touching on this case in any way. Do not watch or listen to
14 any news reports concerning this trial on television or on
15 the radio. Do not read any news accounts of this trial in
16 the newspaper or on the internet or on any instant
17 communication device including, again, Facebook, Twitter and
18 so on. If anyone should try to talk to you about it, bring
19 it to my attention immediately.

20 Third, do not do any research or make any
21 investigation about the case on your own. Specifically
22 yesterday you were instructed to that and that means that
23 are you not to be doing Googleing or anything of that sort,
24 any type of research on your own regarding this case.

25 And finally, though you have now heard two weeks of

1 evidence, the bulk of the plaintiff's case has now been
2 presented. It would be inappropriate, unwise and wrong for
3 any of you to be making up your mind. You have yet to hear
4 the remainder of the plaintiff's case, you have yet to hear
5 the defendant's case. And most importantly, you have yet to
6 be instructed on the law that you are required to apply to
7 the facts that you have been hearing over the last two
8 weeks.

9 So endure another week. When have heard everything,
10 when you have been instructed and you have heard the closing
11 arguments, you begin your deliberations, and then and only
12 then should you be making up your mind about this case.

13 I sincerely hope you have a nice weekend. And we'll
14 see you here Monday morning at 8:30. Ms. Malley.

15 THE CLERK: All rise for the jury, please.

16 (Whereupon, the jury left the courtroom.)

17 THE COURT: Do you have anything before we recess?

18 MR. BRENNAN: Not from Novell, Your Honor.

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

20 THE COURT: I hope all of you have a nice weekend
21 also. We do have hearings this afternoon, so if you would
22 please clear the desks.

23 MR. SINGER: We will.

24 (Whereupon, court adjourned for the day. The trial
25 will resume on Monday, March 22, 2010 at 8:30 a.m.)