

1                   IN THE UNITED STATES DISTRICT COURT  
2                   DISTRICT OF UTAH, CENTRAL DIVISION  
3  
4 THE SCO GROUP, INC., a Delaware )  
5 corporation,                            )  
6                   Plaintiff,                            )  
7            vs.    ) Case No. 2:04-CV-139TS  
8 NOVELL, INC., a Delaware            )  
9 corporation,                            )  
10                   Defendant.                            )  
11 \_\_\_\_\_ )  
12 AND RELATED COUNTERCLAIMS.        )  
13 \_\_\_\_\_ )

14  
15   BEFORE THE HONORABLE TED STEWART  
16   -----  
17   March 22, 2010  
18   Jury Trial

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24 REPORTED BY: Patti Walker, CSR, RPR, CP  
25 350 South Main Street, #146, Salt Lake City, Utah 84101

A P P E A R A N C E S

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1 SALT LAKE CITY, UTAH; MONDAY, MARCH 22, 2010; 8:30 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning. I'm going to give you  
4 some rulings on some of the motions that were filed over the  
5 weekend. First, as to the SCO motion to preclude the  
6 testimony of DeFazio regarding the intention of the APA, the  
7 Court will deny the motion. In reviewing the deposition  
8 testimony, the Court believes that this is more like that  
9 testimony that was permitted to be elicited from  
10 Mr. Frankenberg and other witnesses who were asked questions  
11 about the intent of the APA, and the Court permitted them.

12 Mr. DeFazio was clearly involved in the  
13 negotiations, he had personal knowledge, and the questions  
14 that were posed to him had to do with whether or not there  
15 was a specific discussion about copyrights. As with the  
16 other witnesses presented by the plaintiffs, apparently  
17 there were no such discussions, and that was the type of  
18 testimony the Court believes ought to be elicited, again,  
19 primarily because of his personal involvement in the  
20 negotiations of the APA.

21 Second, Novell's motion for leave to examine other  
22 witnesses about prior court rulings, the Court will deny it.  
23 The Court will find, first of all, that the relevance of the  
24 testimony, its probative value is very slight, if there is  
25 any, for the time frame in question. It's apparent that the

1 time frame that matters is the year 2003 and early 2004  
2 prior to the first ruling by Judge Kimball in June 2004.  
3 Further, the prejudicial value is still extremely high.

4           The Court would note, however, that the question  
5 of these Court rulings might be relevant to the issue of  
6 punitive damages, specifically there ought to be a means  
7 whereby the defendants can respond to the assertions that  
8 were made in the opening statement that the so-called --  
9 well, the claim to title to the copyrights exists on the  
10 Novell Web sites to this day. Therefore, the Court will  
11 allow a witness to be asked the question why do they remain  
12 on the Web site. And if that witness can truthfully testify  
13 that they are there because of the prior court rulings, the  
14 Court will allow general reference to the court rulings, but  
15 the Court will not allow any reading of the rulings or  
16 anything more specific than that.

17           Regarding Troy Keller, there is no response from  
18 SCO. Do you wish to say something here this morning?

19           MR. SINGER: Yes. This was filed late last night.

20           Your Honor, Mr. Keller is to be called as a  
21 witness on the points in his declaration which reflect  
22 communications with Wilson Sonsini when Wilson Sonsini was  
23 representing Santa Cruz in the 2001 sale of these assets to  
24 Caldera and to why the language, which is questioned by  
25 Novell, states what it does and not something else.

1           This was presented originally in May of 2007 in  
2   opposition to a motion for summary judgment. While this is  
3   a number of years ago, it's our best recollection this is  
4   the first time the issues surfaced, but in that motion for  
5   summary judgment and before that time there was no reason to  
6   believe Mr. Keller's testimony on that point relating to a  
7   2001 transaction would be probative. The various  
8   disclosures were subsequently amended. There was no effort  
9   by Novell from the May 18, 2007 filing through the summary  
10  judgment in August of 2007 to raise this issue.

11           Novell notes that we did not list Mr. Keller in an  
12  August 22, 2007 pretrial disclosure. We, in fact, dropped  
13  him off the list, and that is quite correct, because by that  
14  time Judge Kimball had ruled on summary judgment against us  
15  on ownership issues, which this testimony related to, and  
16  the trial we were looking at in September would not have  
17  involved these issues. That's why he was, at that time,  
18  removed.

19           The case goes on appeal. It comes back to Your  
20  Honor in 2009. And in the first disclosures here we've  
21  included him as someone who we intended to call. There has  
22  been no effort from that point, which I think was in early  
23  February, until now to suggest that they needed the  
24  deposition of Mr. Keller.

25           Notwithstanding that, when this issue came up a

1 week or so ago, we indicated that --

2 THE COURT: The one point they make is that you  
3 did not disclose him as a witness in this trial until  
4 subsequent to the commencement of trial, correct?

5 MR. SINGER: That's not quite correct, Your Honor.  
6 We listed him in the pretrial disclosure. It is in the  
7 order signed of witnesses.

8 THE COURT: But then the witness list that you  
9 submitted to the Court did not contain --

10 MR. SINGER: The witness list, inadvertently, did  
11 not contain it. That's why we said when we were going to  
12 call him in our case back over a week ago, that we wouldn't  
13 call him then. We would even agree to provide a deposition  
14 of him, which we're prepared to provide for a couple of  
15 hours this afternoon. We thought we were going to be able  
16 to work out these issues. The stumbling block has been,  
17 they said, well, we don't have all these Brobeck Phleger  
18 documents regarding due diligence, which of course they  
19 could have sought years ago if they wanted to pursue that.  
20 Brobeck isn't around.

21 This is important testimony regarding things that  
22 are not privileged with respect to his conversations with  
23 Wilson Sonsini in 2001 and why he drafted this document.  
24 We're prepared for him to be fully deposed on that even  
25 though they didn't take advantage of opportunities to ask



1 for such a deposition in an earlier point in time. But he  
2 was disclosed prior to this trial in the joint pretrial  
3 order and in the supplemental disclosures preceding that  
4 pretrial order.

5 THE COURT: Remind me again, at what point did you  
6 disclose that you did intend to call him as a witness in  
7 this trial?

8 MR. SINGER: I know he was in a joint pretrial  
9 order that was --

10 THE COURT: No, during the trial.

11 MR. SINGER: During the trial, we disclosed on  
12 Thursday, I believe, that he was going to be called the  
13 following day as a witness.

14 THE COURT: Thursday of last week or the week  
15 prior?

16 MR. SINGER: The week prior.

17 THE COURT: So they have known for ten days in  
18 this trial that he was going to be called?

19 MR. SINGER: Yes.

20 THE COURT: All right. The Court is going to  
21 permit the testimony of Mr. Keller. If the deposition is  
22 necessary, the Court will order that he be admitted --  
23 access be made available for him this afternoon so that that  
24 deposition may be taken.

25 MR. SINGER: Thank you.

1           THE COURT: There is another motion filed by the  
2 plaintiff in this case limiting Novell's trial testimony  
3 based on privilege objections. Counsel, do you want to  
4 respond to that in writing or do you want to deal with it  
5 here orally this morning?

6           Mr. Jacobs.

7           MR. JACOBS: Your Honor, in discussing how to  
8 handle this witness with Mr. Singer before court began, Mr.  
9 Singer made it a little clearer that this was kind of a  
10 heads-up, here are the issues that might arise during  
11 testimony with which we understand. I would like to make a  
12 couple of global comments about privilege and about the  
13 material that they have submitted so that when a particular  
14 question is asked at least you have this background.

15           Number one, I believe the record is clear from the  
16 beginning that on the questions of copyright ownership and  
17 the negotiations of the asset purchase agreement, Novell did  
18 not assert or you could say waive subject matter privilege.  
19 So in that -- so when you are looking at a record where  
20 someone is saying we're asserting privilege over the APA,  
21 that may be true as a general matter -- or as they related  
22 to negotiations, that may be true as a general matter, but  
23 the specific subjects at issue in this lawsuit, the  
24 documents were produced, the witnesses testified, there were  
25 declarations that were submitted. And so on those subjects,

1 there should not be any disagreement. You may have to  
2 penetrate a little bit the materials that have been provided  
3 to understand that. From the beginning, that has been our  
4 plan.

5 THE COURT: So let me make sure I understand. You  
6 are asserting that even though during the course of the  
7 depositions there were some general privilege objections  
8 made, when it came to specific questions regarding the  
9 issues in this case, the privilege was waived and the  
10 witnesses were allowed to answer those questions in the  
11 deposition?

12 MR. JACOBS: That's correct, Your Honor, as to the  
13 asset purchase agreement negotiations, the focus of my  
14 comments.

15 THE COURT: Okay.

16 MR. JACOBS: Now one of the places where there is  
17 some conflicting evidence submitted by SCO is in the  
18 deposition of Wilson Sonsini. This was a somewhat peculiar  
19 deposition. It was a deposition of Wilson Sonsini as an  
20 entity. I think at the time SCO was trying to pursue this  
21 idea that because there is Wilson Sonsini as a firm during  
22 the '95 negotiations and then Wilson Sonsini as a firm in  
23 the 2001 transaction with Caldera, there is some kind of an  
24 institutional position on the question of whether copyrights  
25 transferred.

1           Mr. Parnes is Wilson Sonsini's lawyer representing  
2 Wilson Sonsini in that deposition. And the transcript --  
3 frankly, Your Honor, because of the way that theory was  
4 being pursued, the transcript is a bit of a mess. As we  
5 discussed before, the team that represented Santa Cruz in  
6 2001, 2002 was subject to an ethical wall from the team that  
7 represented Novell in 1995. So part of what Mr. Parnes as  
8 Wilson Sonsini's lawyer is trying to fend off in that  
9 deposition is this very idea that the firm as an institution  
10 has a position on the question of copyright ownership.

11           When he was making assertions, he was not doing so  
12 on behalf of Novell. That was a third-party deposition of  
13 Wilson Sonsini, the institution. So that's one additional  
14 piece of background because some of the materials they have  
15 submitted relate to that topic.

16           The third general point relates to the 2002, 2003  
17 period. This is relevant to an upcoming -- to our first  
18 witness, Mr. LaSala, the general counsel. The Court has  
19 seen e-mails -- internal e-mails at Novell recounting the  
20 contents of communications with, for example, Mr. McBride  
21 when Mr. McBride was telephoning the Novell personnel and  
22 raising the topic of copyright ownership. Those are  
23 redacted because the contents of the communications we did  
24 not assert a point of privilege over, but the advice or what  
25 should we do in light of this call we regarded as internal

1 legal advice. So that's what the redactions are. We've  
2 cued to that faithfully, we believe, and it's a little late  
3 now to be arguing over whether the redactions were  
4 appropriate or not.

5           Mr. LaSala will likely testify to what he  
6 understood the contents of the communications with Mr.  
7 McBride were. But, again, we did not assert a claim of  
8 privilege over those facts while we did assert a claim of  
9 privilege over internal legal advice.

10           Last point, because I think that the real danger  
11 here is not in the questions we're going to ask the  
12 witnesses that we're going to be presenting in our case in  
13 chief because we've had this plan in mind, if you will, for  
14 how we were going to deal with privilege issues, I think the  
15 bigger question comes up on cross-examination because it  
16 could be quite easier for the witness to hear a question on  
17 cross and think, oh, SCO is now opening the door, and to  
18 answer this question truthfully I have to discuss what  
19 happened internally at Novell. So it's really up to SCO, I  
20 believe, to frame its questions carefully so that the  
21 witness is not put in the awkward spot of understanding from  
22 the plan how we were going to deal with privilege issues but  
23 being asked a question that to answer truthfully requires  
24 inquiry into privilege matters.

25           With that, I don't need to say anything more

1 because, again, we think we know where we assert the  
2 privilege and we've planned our direct examination  
3 accordingly.

4 THE COURT: Thank you, Mr. Jacobs.

5 Let me state that the Court has now been informed  
6 and SCO has been warned, and I will again restate generally  
7 what the Court ruled last week in regards to the requests  
8 made by Novell, that the Court is not going to permit  
9 testimony to be presented to the jury that was not explored  
10 in the deposition because of the claim of the privilege,  
11 across the board, both sides. That's what we're going to  
12 do.

13 I don't know enough about the specifics to go  
14 beyond that in regards to the motion by SCO at this point,  
15 but I hope we all have a little bit of a framework that we  
16 can operate on without too much trouble during the course of  
17 the next four days.

18 Mr. Brennan, do you have something?

19 MR. BRENNAN: Yes. Thank you. I appreciate that,  
20 Your Honor.

21 I just wanted to follow up with respect to the  
22 Court's ruling regarding prior rulings by Judge Kimball. I  
23 don't intend to reargue it, I just wanted to raise a point  
24 of a practicality, as I understand it.

25 Mr. Tibbitts, I believe, is the last witness that

1 will be proffered today by the plaintiff before SCO begins  
2 its case, and one of the issues, at least as we understand  
3 it that has given rise to the request we made to the Court,  
4 is that Mr. Tibbitts had communications with potential  
5 licensees after the commencement of this case against  
6 Novell, after Novell had filed its motion to dismiss which  
7 led to the June 2004 ruling. And in those communications  
8 the issue of the Novell litigation and the status of the  
9 ruling on the motion to dismiss was a subject matter of  
10 discussion between Mr. Tibbitts and these potential  
11 licensees.

12           So my request, Your Honor, is in light of the  
13 Court's ruling, in particular the framing of the operative  
14 time period being, as I understood it, essentially prior to  
15 the commencement of the Novell case --

16           THE COURT: No, it was prior to the ruling by  
17 Judge Kimball in June of 2004.

18           MR. BRENNAN: Thank you, Your Honor.

19           With that in mind, it would seem unfair and  
20 inappropriate to allow Mr. Tibbitts to testify to the  
21 contact that he had with potential licensees after that  
22 ruling.

23           THE COURT: After June 2004?

24           MR. BRENNAN: Yes.

25           THE COURT: The only one I'm aware of is the

1 Department of Defense, and SCO said that they were not going  
2 to explore that with Mr. Tibbitts.

3 MR. BRENNAN: I think there may be others. So  
4 with that guideline --

5 THE COURT: I would agree, that anything after  
6 June 2004 --

7 MR. NORMAND: There are no others. There are none  
8 that fall into that category.

9 MR. BRENNAN: That makes it easier.

10 Thank you, Your Honor.

11 THE COURT: Anything else?

12 MR. SINGER: Your Honor, before we turn over to  
13 Novell after Mr. Tibbitts, we would like to read in certain  
14 paragraphs of the answer that we believe constitute  
15 admissions. The objection that Novell raised last week was  
16 rejected by the Court. May we be permitted to do that after  
17 Mr. Tibbitts' testimony?

18 THE COURT: Mr. Jacobs, you wanted to reply?

19 MR. JACOBS: Two things, Your Honor. I believe  
20 what the Court said was we would see how things unfolded  
21 this week to see if anything needed to be revisited in that  
22 connection.

23 THE COURT: That is what the Court said.

24 Mr. Singer, the point the Court was trying to make  
25 is that though apparently in defendant's mind there is now



1 some way to distinguish between UNIX and UnixWare, I don't  
2 believe that is yet before the jury. What I was  
3 anticipating is that during the course of their case, that  
4 they may try to make that distinction. If they do, then I'm  
5 going to allow you to read what you want. But you have your  
6 case, two more witnesses, so you will have an opportunity to  
7 do it. I would rather we do it only if it's justified. I  
8 don't want to confuse the jury any more than is necessary by  
9 having you out of the blue stand up and read that because I  
10 don't think they would understand the significance of that.

11 MR. SINGER: We understand, Your Honor.

12 MR. JACOBS: The only second point is that, as Mr.  
13 Singer acknowledged the other day, one important point of  
14 clarification would be, as Mr. Singer proposed, to say UNIX  
15 and UnixWare copyrights existing up to the date of the asset  
16 purchase agreement. There has never been a claim by Novell  
17 that we own copyrights to material created after the asset  
18 purchase agreement by Santa Cruz or SCO.

19 MR. SINGER: That's not a point of dispute.

20 THE COURT: All right. Ms. Malley, will you  
21 please bring the jury in.

22 (Jury present)

23 THE COURT: Good morning, ladies and gentlemen.  
24 We hope you had a nice weekend. We have another week ahead  
25 of us. As I said to you last week, we do appreciate the

1 fact that you have paid attention as you have, that you have  
2 remained alert during the course of the trial. We hope that  
3 you will make an effort to do so during this next very  
4 important week.

5 I believe, Mr. Singer, I need to ask you, or is it  
6 Mr. Normand?

7 Mr. Normand.

8 MR. NORMAND: It's me, your Honor.

9 We call Ryan Tibbitts.

10 THE COURT: All right, Mr. Tibbitts.

11 RYAN TIBBITTS,

12 Having been duly sworn, was examined

13 and testified as follows:

14 THE CLERK: If you would please state and spell  
15 your name for the Court.

16 THE WITNESS: Ryan Tibbitts. R-y-a-n,  
17 T-i-b-b-i-t-t-s.

18 DIRECT EXAMINATION

19 BY MR. NORMAND:

20 Q Good morning, Mr. Tibbitts.

21 A Good morning.

22 Q Are you currently employed?

23 A I am.

24 Q Where?

25 A At The SCO Group, Inc.

1 Q When did you start at SCO?

2 A The last week of May 2003.

3 Q Could you briefly describe your educational background?

4 A After I graduated from high school, over the course of  
5 the few years I attended a junior college in Idaho, Ricks  
6 College. Graduated from there. Then I attended Brigham  
7 Young University in Provo, received a business degree from  
8 there, and then also a law degree from BYU.

9 Q What did you do after law school?

10 A The first year out of law school I clerked for a  
11 judge -- that's just working for a state judge on various  
12 matters before that court -- for a year. Then I joined a  
13 large Salt Lake City law firm.

14 Q How long were you at the law firm?

15 A Just short of 16 years.

16 Q Did you serve in any management positions at the law  
17 firm?

18 A I did. I think the last eight or nine years I was  
19 there, I was on the board of directors. And then the last  
20 six years I was there, I was the president of the firm.

21 Q What did you do after you left the firm?

22 A I left the firm to join a technology company called  
23 Lineo, as general counsel. Was there for about a year.  
24 Then I joined a second technology company named Center 7, as  
25 general counsel. And then I joined The SCO Group. So I'm

1 on to my third technology company.

2 Q Were you with SCO when Novell asserted in May 2003 that  
3 SCO does not own the copyrights at issue here?

4 A Yes. I had been there just a few days when that  
5 happened.

6 Q Do you generally recall the reaction from the  
7 community?

8 A Yeah. I think I was so new to the game at that point  
9 in the company, the significance was maybe lost on me a  
10 little bit. But I can say within the company, you know, a  
11 cross between absolute astonishment and total crisis mode  
12 for what it was doing to the company.

13 Q Now on the issue of copyrights, what happened next?

14 A Well, the next thing I recall was a few days later a  
15 secretary there at the company found the file with what  
16 we've referred to as Amendment No. 2 in the file. Our CEO,  
17 Darl McBride, faxed that off to Novell's CEO, Jack Messman.  
18 There were some phone conversations and letters that went  
19 back and forth. And then on June 6th, Novell issued a press  
20 release retracting what they had previously said about  
21 copyright ownership.

22 MR. NORMAND: Mr. Calvin, would you pull up  
23 Exhibit 97.

24 BY MR. NORMAND:

25 Q Mr. Tibbitts, is this the press release you were

1 referring to?

2 A Yes, it is.

3 Q Was there particular language you were referring to in  
4 the answer you just gave?

5 A Yes. I think it's the last sentence of the first  
6 paragraph where it says, the amendment appears to support  
7 SCO's claim that ownership of certain copyrights for UNIX  
8 did transfer to SCO in 1996.

9 Q Did you rely on this press release in deciding that SCO  
10 owns the copyrights at issue here?

11 A Yes. I think we clearly looked at the press release,  
12 that Novell is a public company that's issued worldwide, and  
13 then the events that led up to that, including the  
14 conversations that Mr. McBride had with Mr. Messman and the  
15 letters that had gone back and forth up to that point.

16 Q Did SCO and Novell exchange correspondence about  
17 copyrights over the next many months?

18 A Yes, we did.

19 Q Did that correspondence change your mind about whether  
20 SCO had acquired the copyrights at issue in this case?

21 A No, it did not.

22 MR. NORMAND: Mr. Calvin, would you pull up  
23 Exhibit 109.

24 BY MR. NORMAND:

25 Q Do you recognize this document, Mr. Tibbitts?

1 A Yes. This is a letter from September of '03 that I  
2 sent on behalf of SCO to Joseph LaSala, who was Novell's  
3 general counsel at the time.

4 MR. NORMAND: Your Honor, I would move the  
5 document into evidence.

6 MR. BRENNAN: No objection, Your Honor.

7 THE COURT: It will be admitted.

8 (Plaintiff's Exhibit 109 was received into  
9 evidence.)

10 THE COURT: This is 109, correct?

11 MR. NORMAND: That's right, Your Honor.

12 BY MR. NORMAND:

13 Q So now that the jury can see the document, Mr.  
14 Tibbitts, what is the date again?

15 A Pardon me?

16 Q What is the date of the document?

17 A September 10th, 2003.

18 MR. NORMAND: Mr. Calvin, would you pull up the  
19 middle paragraph beginning we have reviewed.

20 BY MR. NORMAND:

21 Q Can you see that language, Mr. Tibbitts?

22 A I do.

23 Q Did this language reflect your views at the time?

24 A Yes. We were responding to a couple of letters as  
25 referenced in the first paragraph that they had sent us, so

1 this was in response to several letters. We just conclude,  
2 we respectfully suggest that you carefully review all of the  
3 agreements in their entirety, and particularly Amendment No.  
4 2.

5 Q Why did you call out Amendment No. 2?

6 A Well, because we believed, just as Novell had stated in  
7 their press release, that Amendment 2 cleared up the issue  
8 and confirmed that the copyrights had transferred many years  
9 before. We thought that was the end of the issue.

10 Q When you refer in the sentence to all the agreements,  
11 were there other documents that SCO relied on in forming the  
12 view reflected in this letter?

13 A Yes.

14 Q Do you recall reviewing the technology license  
15 agreement in 2003?

16 A We did.

17 Q Did you rely on that agreement?

18 A Yes, we did.

19 Q Do you recall relying on any other documents for the  
20 views reflected in this letter?

21 A Yes. All during this period of time, we were gathering  
22 the documents on this issue because Novell had sent a couple  
23 of additional letters. So, of course, we looked at the  
24 asset purchase agreement itself, both of the amendments,  
25 including Amendment No. 2. We looked at the technology

1 license agreement. And then in various time frames other  
2 documents came to light, including the joint press release  
3 that Novell and SCO had issued at the time alerting the  
4 world that the intellectual property had transferred to  
5 Santa Cruz as part of this transaction.

6 There were letters that came to light somewhere in this  
7 time frame that Novell had sent to their customers around  
8 the world.

9 Q When did Novell send those letters?

10 A Within a couple months after the closing date. All  
11 went out at different times.

12 There was an SEC filing by Santa Cruz from -- I believe  
13 late '95, shortly after the deal closed, where they  
14 indicated that they had acquired the core intellectual  
15 property to the UNIX operating system, which anyone who  
16 understands source code and software, the core intellectual  
17 property would be the copyrights. Then there was, you know,  
18 other types of evidence that was coming in or statements  
19 about SCO being the copyright owner, including statements  
20 relating to SuSE, the company Novell announced it was going  
21 to acquire, and those sorts of documents.

22 MR. NORMAND: Mr. Calvin, could you pull up C-14.  
23 If you could pull up that paragraph beginning so far.

24 BY MR. NORMAND:

25 Q Is this the SuSE document that you were just referring



1 to, Mr. Tibbitts?

2 A Yes.

3 Q Was there particular language in this paragraph that  
4 you had in mind?

5 A Yes. Third line up it says, SCO, which owns the  
6 copyright to UNIX. This was part of a story on InfoWorld  
7 that had come out relating to SuSE Linux, which was one of  
8 the largest Linux companies in the world. At this time I  
9 believe IBM was a majority owner of SuSE. Many IBM  
10 executives were involved with SuSE. And SuSE, during this  
11 time frame when they were talking about this UnitedLinux  
12 organization, had requested that SCO donate the UNIX  
13 technology and copyrights to SuSE and to the UnitedLinux  
14 organization. And, you know, that was further evidence on  
15 what the world understood and what people that were very  
16 heavily involved in this space understood about who owned  
17 the copyrights in the business.

18 Q Now you mentioned IBM. When you joined SCO, was SCO in  
19 litigation against IBM?

20 A Yes, we were.

21 Q What were the principal claims SCO had brought against  
22 IBM, if you recall?

23 A Well, the principal claim was essentially a breach of  
24 contract claim that related to SCO's allegations. SCO was  
25 the owner of all of those UNIX licenses under which other

1 companies had developed their own flavor of UNIX, IBM being  
2 one of those. Their UNIX derived flavor was known as AIX.  
3 IBM had announced publicly to the world that they were going  
4 to donate all of AIX, if the Linux community wanted it, to  
5 Linux. We believed that was a very clear breach of their  
6 license agreement and would be devastating to our UNIX  
7 business, which is in the same market space as Linux. And  
8 so we sued them for breach of that license agreement.

9 Q Did Novell direct SCO to waive its contract claims  
10 against IBM?

11 A Yes.

12 Q Were you involved in the correspondence on that issue?

13 A Some of it. There were some letters earlier on, I  
14 believe, between Novell and our CEO, Mr. McBride. And then,  
15 as I say, I kind of moved into SCO in mid 2003. And so when  
16 they made some demands later on about asking us to waive  
17 certain claims against IBM, then I got involved at that  
18 juncture.

19 MR. NORMAND: Mr. Calvin, could you pull up SCO  
20 243.

21 BY MR. NORMAND:

22 Q Do you recognize this document, Mr. Tibbitts?

23 A Yes, I do.

24 Q What is the document?

25 A This is a letter to me from Mr. LaSala of Novell.

1 There is not a date on the front page, but I believe if we  
2 look at the headers on the second pages, it's October of  
3 2003.

4 MR. NORMAND: Your Honor, I move SCO 243 into  
5 evidence.

6 THE COURT: It's already been admitted.

7 MR. NORMAND: Can we go to the last page, Mr.  
8 Calvin, and bring out those two paragraphs, if you would.

9 BY MR. NORMAND:

10 Q Mr. Tibbitts, what did you understand Mr. LaSala to be  
11 saying in this portion of the letter in particular?

12 MR. BRENNAN: Objection, Your Honor. In that  
13 regard it speaks for itself.

14 THE COURT: I'll sustain the objection.

15 BY MR. NORMAND:

16 Q Mr. Tibbitts, let me direct you to the last paragraph.

17 MR. NORMAND: If we could highlight that, Mr.  
18 Calvin.

19 BY MR. NORMAND:

20 Q Mr. Tibbitts, would you mind reading that into the  
21 record.

22 A Accordingly, pursuant to section 1.16(b) of the asset  
23 purchase agreement, Novell hereby --

24 THE COURT: You said 1.16. Do you want to look at  
25 that again?

1           THE WITNESS: That's what it looks like on my  
2 screen.

3           MR. BRENNAN: It appears to be 4.16.

4           THE WITNESS: Excuse me. Sorry about that.

5           4.16(b) of the asset purchase agreement, Novell  
6 hereby directs SCO to waive any purported rights SCO may  
7 claim to require IBM to treat IBM code itself as subject to  
8 the confidentiality obligations or use restrictions of the  
9 agreements. Novell directs SCO to take this action by noon,  
10 MST, on October the 10th, 2003, and to notify Novell that it  
11 has done so by that time.

12 BY MR. NORMAND:

13 Q    Do you recall whether SCO complied with this directive?

14 A    No, we did not.

15 Q    Do you see at the bottom the cc?

16           MR. NORMAND: If you could bring that out, Mr.  
17 Calvin.

18 BY MR. NORMAND:

19 Q    Do you know who Mr. Ron Lauderdale was at that time?

20 A    Yeah, by this time I knew who he was. He was an  
21 assistant general counsel in IBM's legal department.

22 Q    Did it concern you that IBM was copied on this letter  
23 to you from Novell?

24 A    Yes. They had copied them on some prior correspondence  
25 as well, and obviously that caused us some concern. You

1 know, if companies like IBM and Novell are lined up against  
2 you, that's a serious matter. And, you know, our choice was  
3 do we -- do we stand up for our rights and fight for our  
4 customers and our shareholders or do we just, you know, let  
5 them run over us. We decided we had to stand up to them.

6 Q Mr. Tibbitts, let me show you SCO Exhibit 110. Do you  
7 recognize this document?

8 A Yes. This is a letter that I sent to Mr. LaSala on  
9 October the 9th, 2003. So I think this is responding to the  
10 letter that we just looked at.

11 MR. NORMAND: Your Honor, I don't believe SCO 110  
12 is in evidence. I would move it in.

13 MR. BRENNAN: Your Honor, this letter was the  
14 subject of discussion in court on Friday regarding certain  
15 redactions. I don't see those redactions appearing in the  
16 letter, contrary to your agreement.

17 MR. NORMAND: I have a hard copy of the  
18 redactions.

19 This is the redacted version now on the screen, so  
20 the jury hasn't seen it.

21 THE COURT: Let Mr. Brennan see the redacted  
22 version and make certain he's comfortable with what has been  
23 redacted.

24 MR. BRENNAN: May I just inquire of counsel to see  
25 the unredacted version so I can make the comparison?

1 THE COURT: Yes, certainly.

2 MR. BRENNAN: Thank you, Your Honor. I appreciate  
3 that.

4 THE COURT: So as redacted --

5 MR. BRENNAN: No objection, Your Honor.

6 THE COURT: Thank you.

7 (Plaintiff's Exhibit 110 was received into  
8 evidence.)

9 BY MR. NORMAND:

10 Q So, Mr. Tibbitts, I believe you were saying this was  
11 your letter in response to Mr. LaSala, the letter from Mr.  
12 LaSala that we've just reviewed; is that right?

13 A Yes.

14 Q Now let's pull out the second paragraph. Could you  
15 read the second to last and the last sentences of this  
16 paragraph?

17 A Starting with you claim?

18 Q Yes.

19 A You claim that any result other than your selective  
20 interpretation of the agreements would defy logic. We  
21 submit that your position that SCO received basically  
22 nothing for the many millions it paid Novell or that Novell  
23 has the unfettered right to simply declare that all SCO  
24 license rights have been waived defies logic.

25 Q And why did you use the phrase defies logic?

1 A Well, that was their term. They said our position  
2 defied logic. And just by looking at the evidence that we  
3 had and our understanding, we thought, you know, their claim  
4 that they had literally the right to destroy our business  
5 and waive all our license protections against everybody  
6 defied logic.

7 Q Mr. Tibbitts, let's show you SCO Exhibit 691. Do you  
8 recognize this document?

9 A Yes. This is a letter from October 10th, 2003  
10 addressed to me and Ron Lauderdale from Mr. LaSala at  
11 Novell.

12 MR. NORMAND: Your Honor, I move SCO 691 into  
13 evidence.

14 MR. BRENNAN: No objection.

15 THE COURT: It will be admitted.

16 (Plaintiff's Exhibit 691 was received into  
17 evidence.)

18 BY MR. NORMAND:

19 Q Now again, Mr. Tibbitts, IBM is copied on this letter.  
20 So you recall reacting to that issue?

21 A Well, they weren't just copied on it. It was sent to  
22 them as well. And along the lines that I've said before, it  
23 was of great concern to us that two companies like IBM and  
24 Novell locking arms to try and waive all your rights of your  
25 business, and, you know, we viewed it as essentially an

1 effort to shut us down. So this was their follow-up letter.  
2 Because we didn't comply with their order to waive our  
3 claims against IBM, they were purporting to waive those  
4 rights on our behalf.

5 MR. NORMAND: Mr. Calvin, let's go to the second  
6 page of this document and bring out those two paragraphs.

7 BY MR. NORMAND:

8 Q Is this the language you were referring to, Mr.  
9 Tibbitts?

10 A Yes.

11 Q So by this point you had not complied with their  
12 directive from a few days earlier?

13 A No, we had not.

14 Q Have you ever complied with that directive?

15 A No.

16 MR. NORMAND: Let's look at SCO 108, Mr. Calvin.

17 BY MR. NORMAND:

18 Q Do you recognize this document, Mr. Tibbitts?

19 A Yes. This is another letter from a few months later to  
20 me from Mr. LaSala at Novell.

21 MR. NORMAND: Your Honor, I move SCO 108 into  
22 evidence.

23 MR. BRENNAN: No objection, Your Honor.

24 THE COURT: It will be admitted.

25 (Plaintiff's Exhibit 108 was received into



1 evidence.)

2 MR. NORMAND: The jury can now see the front page  
3 of the document.

4 BY MR. NORMAND:

5 Q The subject line says, Sequent Computer Systems. Could  
6 you briefly describe what that refers to?

7 A Yes. This is a little tricky, so I hope I can explain  
8 it well. Sequent Computer Systems was another one of these  
9 UNIX licensees that had taken a license to make their own  
10 flavor or version of UNIX. So they had a UNIX derived  
11 version.

12 Sequent was purchased by IBM in the late '90s. So at  
13 this time Sequent was actually part of IBM, but it was a  
14 different license agreement than the IBM license agreement.  
15 And IBM had started donating technology from Sequent's  
16 version of UNIX, their UNIX flavor, and they were donating  
17 portions of that operating system into Linux which would  
18 allow Linux to run enterprise servers. So it was directly  
19 competing with us at that point. So we had also terminated  
20 Sequent's license and said that they were in breach and no  
21 longer authorized to use that code, even though it was at  
22 that point owned by IBM.

23 So it was a little complicated, but we felt the need  
24 that we had to terminate that license too because IBM was  
25 doing the same thing with Sequent Computer System as they

1 were doing with their own UNIX flavor.

2 MR. NORMAND: Mr. Calvin, let's go to the second  
3 page of the document and bring out the last two paragraphs.

4 BY MR. NORMAND:

5 Q Mr. Tibbitts, could you just read that first paragraph  
6 into the record.

7 A Accordingly, pursuant to section 4.16(b) of the asset  
8 purchase agreement, Novell hereby directs SCO to waive any  
9 purported right SCO may claim to require Sequent, or IBM as  
10 its successor, to treat Sequent code as subject to the  
11 confidentiality obligations or use restrictions of Sequent's  
12 SVRX license. Novell directs SCO to take these actions by  
13 noon, MDT, February 11th, 2004, and to notify Novell that it  
14 has done so by that time.

15 Q Did SCO comply with this directive?

16 A No, we did not. It was another three days that they  
17 had given us to comply with this directive, and we did not.

18 Q Let's look at the last document in this series, Mr.  
19 Tibbitts, SCO Exhibit 500. Do you recognize this document,  
20 Mr. Tibbitts?

21 A Yes. This is another letter to me from Mr. LaSala --  
22 actually the letter is to me and to Mr. Lauderdale of IBM.  
23 This is following up their other letter where they said  
24 because we didn't comply with their order, that they were  
25 going to just do it on their own.

1           MR. BRENNAN: Objection, Your Honor, I move to  
2 strike that. The letter speaks for itself. The witness is  
3 characterizing it. The document itself is in evidence.

4           THE COURT: I will sustain the objection and  
5 strike the answer that Mr. Tibbitts just gave.

6           If you want to show the document, you may do so.

7           MR. NORMAND: I'm moving the document into  
8 evidence now, Your Honor. I move SCO 500 into evidence.

9           MR. BRENNAN: No objection, Your Honor.

10          THE COURT: It will be admitted.

11          (Plaintiff's Exhibit 500 was received into  
12 evidence.)

13 BY MR. NORMAND:

14 Q    Mr. Tibbitts, how does this letter relate to the letter  
15 we just looked at?

16 A    As I said, this is a follow-up letter regarding Sequent  
17 Computer Systems. Because we did not comply with their  
18 previous order, they were taking that action on their own.

19 Q    Let's look at the second page of the document.

20          MR. NORMAND: Mr. Calvin, if you would bring out  
21 the last two paragraphs.

22 BY MR. NORMAND:

23 Q    Could you read that language into the record, Mr.  
24 Tibbitts?

25 A    SCO has failed to take the actions directed by Novell.

1 Accordingly, pursuant to section 4.16(b) of the asset  
2 purchase agreement, Novell, on behalf of The SCO Group,  
3 hereby waives any purported right SCO may claim to require  
4 Sequent, or IBM as its successor, to treat Sequent code as  
5 subject to the confidentiality obligations or use  
6 restrictions of Sequent's SVRX license.

7 Q So in this letter Novell was actually claiming to be  
8 acting on behalf of The SCO Group; is that right?

9 MR. BRENNAN: Objection, Your Honor, leading the  
10 witness.

11 THE COURT: Sustained.

12 MR. NORMAND: Summarizing his testimony.

13 MR. BRENNAN: I object to that. He ought to offer  
14 his own testimony.

15 BY MR. NORMAND:

16 Q When you received this letter, Mr. Tibbitts, what did  
17 you understand this language on behalf of The SCO Group to  
18 signify?

19 A That Novell was purporting to waive our rights under  
20 the license agreements that we owned relative to Sequent  
21 slash IBM.

22 Q Let's move to a different topic, Mr. Tibbitts, the  
23 SCOSource program. Did you have any involvement with the  
24 SCOSource program?

25 A Yes. When I joined the company, the IBM litigation was

1 under the broad umbrella of the SCOSource division of SCO,  
2 so I got involved over time with that lawsuit. And then I  
3 also got involved in a few efforts to meet with customers  
4 and sell the SCOSource licenses it had developed.

5 Q What was your first direct involvement in the SCOSource  
6 program?

7 A My first involvement was the first part of August 2003  
8 where we had -- where we obtained a license from one of the  
9 largest computer technology companies in the world, Computer  
10 Associates.

11 Q Could you explain how that works.

12 A I hope so. It's another bit of a story. But my prior  
13 employer, before I joined SCO, had been involved in a  
14 dispute with Computer Associates over an unrelated contract.  
15 There came a time when those parties decided they wanted to  
16 resolve that dispute. So we negotiated a settlement of  
17 that.

18 At the last minute, after we thought we had everything  
19 put to bed, the person who was mediating that dispute for us  
20 came in and said, Computer Associates wants one other thing.  
21 We said, what's that. They said, well, they understand,  
22 Ryan, that you are now working for The SCO Group and they  
23 want some kind of a license from SCO to make sure they are  
24 okay with SCO's IP as it relates to Linux. This obviously  
25 surprised all of us because we were dealing with totally

1 different issues. I said, well, I just started to work for  
2 SCO, that's true, but I don't have a position to grant you  
3 some kind of a license. I will certainly get you in touch  
4 with people at SCO who can talk to you about that. And so  
5 we proceeded in that fashion.

6 A few days later Computer Associates gave us a list of  
7 the things they wanted. We negotiated back and forth. And  
8 ultimately, in early August, Computer Associates signed what  
9 I think was our first license that became -- I don't know if  
10 it was known at that point as the RTU, or right to use  
11 license that we've talked about, but that was the first  
12 license that went into that category, I believe.

13 Q And, in summary, why was that discussion significant to  
14 you?

15 A Well, because I knew CA was one of the -- I think it  
16 was a Fortune 500 company, one of the largest technology  
17 companies in the world, and they came to us and demanded  
18 that SCO provide some kind of a license to them. And they  
19 were willing to hang up this other deal they had been  
20 working on for years to get resolve over this point. So it  
21 told me it was a serious matter and that big companies out  
22 there were interested in this.

23 Q What did you say happened with respect to Computer  
24 Associates on this issue of a potential license?

25 A They signed a license agreement.

1 Q Now with respect to the SCOSource program, what did you  
2 understand SCO's target market to be?

3 A Corporate users. They wanted businesses that were  
4 using Linux in their enterprise server environment as  
5 opposed to individuals or people that were using Linux as a  
6 hobby tool on their personal computers. That was not the  
7 target at all.

8 Q In connection with this SCOSource program, was the  
9 company collecting evidence that Linux was infringing on  
10 SCO's rights?

11 A Yes.

12 Q If you can recall it this way, what materials do you  
13 recall having organized by mid 2003 say?

14 A Well, there were several different categories I  
15 believe. This all started with a person within our company  
16 who was basically in charge of our Linux marketing, when he  
17 informed management that he understood that people in the  
18 marketplace were using our SCO UNIX libraries to migrate  
19 their systems to Linux. He viewed that as --

20 MR. BRENNAN: Your Honor, I think we're  
21 communicating hearsay. We're now hearing reports of some  
22 individual at SCO, unidentified. It's hearsay.

23 MR. NORMAND: We were speaking to the issue of Mr.  
24 Tibbitts' understanding of what materials had been collected  
25 by SCO.

1           MR. BRENNAN: But that's not what the answer had  
2 been. We haven't heard what materials have been collected.  
3 We've been hearing what someone else at SCO identified.

4           THE COURT: Mr. Tibbitts, you know what hearsay  
5 is. Would you please try to testify avoiding hearsay.

6           Let's start over.

7           THE WITNESS: We gathered information about SCO's  
8 UNIX libraries that people were using to migrate their  
9 systems over to Linux away from UNIX. That was the first  
10 thing that we came up with.

11           There were -- I think the next thing was an e-mail  
12 from a gentleman who had a Linux company. I'm afraid I'll  
13 probably butcher his name, but it's Miguel de Icaza I  
14 believe. He had a company called Ximian that was working in  
15 the Linux space. Sometime in early 2003, he had sent an  
16 e-mail to the company asking SCO if it would consider  
17 donating technology that is called ELF -- or some components  
18 of ELF into the Linux open source community.

19           ELF is a very critical technology, which I'm not  
20 qualified to explain, about the reasons that Linux moved  
21 from being an operating system that individuals could mess  
22 around with to an enterprise grade server operating system  
23 that people like IBM would use. So here's this gentleman  
24 who was --

25           MR. BRENNAN: Your Honor, I'm sorry. The question



1 that was asked is what materials were gathered. We've  
2 strayed beyond that.

3 MR. NORMAND: This is exposition as to how these  
4 materials were gathered and the basis for gathering. We can  
5 ask a series of six questions rather than one to get there.

6 MR. BRENNAN: The question was what materials were  
7 gathered.

8 THE COURT: Because this is direct, I want you to  
9 be more specific in your questions, Mr. Normand.

10 THE WITNESS: On that point, the information we  
11 gathered was an e-mail from this gentleman, who was well  
12 aware of Linux and the open source movement, asking us to  
13 donate portions of ELF technology into that movement.

14 BY MR. NORMAND:

15 Q Have you heard the phrase code room?

16 A I have.

17 Q Does SCO have a code room?

18 A Yes. By late summer of 2003, SCO set up a room there  
19 at our headquarters that had agreements and some television  
20 screens where people could come in and view some code  
21 comparisons that showed, you know, various files of UNIX  
22 code that had been copied almost verbatim into Linux.

23 Q Can you provide any examples of code, as you recall,  
24 that were copied verbatim?

25 A I think the first example that someone found in

1 April or May of 2003 was some code called the Malloc code.  
2 And, again, I don't understand the technology enough to  
3 explain it, but it was UNIX code that was donated by a  
4 company called Silicon Graphics into a version of Linux.  
5 And I'm not sure who discovered it or how, but you could put  
6 those two different code comparisons up on the screen and  
7 highlight in red many, many lines of that code was directly  
8 copied into Linux. So that was one example that people  
9 could see when they visited our code room.

10 Q Now were SCO's salespeople allowed to show potential  
11 customers this kind of proof that you've been describing  
12 when you met with them?

13 A Not down to that level, no.

14 Q Why not?

15 A We didn't want salespeople out there running around  
16 disclosing code to people that we have no control over them  
17 or who they were. The salespeople did have bullet points  
18 that they would show identifying the categories, but we did  
19 not give them all of the specifics of the various claims  
20 that were in the IBM case or were involved with Linux in  
21 general.

22 Q Did people from outside the company come to visit the  
23 code room?

24 A Yes. There were a number of people that came in and  
25 viewed that code, and I attended some of those meetings.

1 Q Did you have occasion to see how people reacted?

2 A Yeah, they were impressed with it. It's pretty glaring  
3 when you take a look at that.

4 Q Do you recall attending SCO Forum in the summer of  
5 2003?

6 A I did not attend SCO Forum.

7 Q During this time, 2003, 2004, did SCO have other  
8 support for its claim that Linux was infringing SCO's  
9 copyrights? Did they present this support in presentation  
10 materials?

11 A Yes, we did. I do know at SCO Forum in 2003, some  
12 people in our company did show those examples to the people  
13 attending the forum. And we continued to gather more  
14 evidence. There were people saying, you know, show us how  
15 we're in violation.

16 MR. BRENNAN: Objection, Your Honor. We're at  
17 hearsay again. The witness said he wasn't at the show, and  
18 he told hearsay answers.

19 THE COURT: I'll sustain the objection.

20 BY MR. NORMAND:

21 Q Let me show you, Mr. Tibbitts, a slide from what's been  
22 marked as SCO Exhibit 748.

23 MR. NORMAND: Mr. Calvin, I'm looking at the slide  
24 that ends in the Bates number 69.

25 //

1 BY MR. NORMAND:

2 Q Do you recognize this slide, Mr. Tibbitts?

3 A Yes. This was one of the slides that was in various  
4 presentations that we showed to people who were interested  
5 in finding out what we were talking about.

6 MR. NORMAND: Your Honor, I move to admit this  
7 slide within SCO Exhibit 748. I don't move to admit the  
8 whole exhibit.

9 THE COURT: SCO 748 has already been admitted.

10 MR. NORMAND: Thank you, Your Honor. I thought  
11 there was only one slide from 748.

12 MR. BRENNAN: I think that's right, Your Honor,  
13 there is only a portion, and we do object to this as  
14 hearsay.

15 THE COURT: Let me see what page you are looking  
16 at. What page was it again?

17 MR. BRENNAN: What page number is this?

18 Your Honor, we believe, if I can read the fine  
19 print, what was permitted was Bates number 72. It's  
20 entitled comments from the industry analyst. As I recall,  
21 the reason this was permitted was these were comments from  
22 outsiders, not SCO, and that's different than what is before  
23 the Court that's been proffered. Page 69 is pure hearsay.

24 MR. NORMAND: It's not being submitted for the  
25 truth of the matter, Your Honor. It's being submitted to

1 show what materials Mr. Tibbitts would show to potential  
2 customers and others in the marketplace at the time.

3 MR. BRENNAN: Object to relevance. It's still  
4 hearsay.

5 MR. NORMAND: It's an issue that Novell has raised  
6 throughout the trial, Your Honor.

7 THE COURT: Counsel, the Court is going to sustain  
8 the objection for the same reason I believe that this was  
9 denied when it was offered previously, except for that one  
10 page. It is hearsay.

11 MR. NORMAND: Okay. I thought it was because  
12 there was a foundation problem with Mr. McBride because he  
13 had not -- he acknowledged that he hadn't presented this  
14 material to anybody.

15 MR. BRENNAN: Your Honor, it was hearsay. That  
16 was the reason, quite clearly.

17 MR. NORMAND: If we could have a stipulation that  
18 Novell was not raising in the trial the question what  
19 materials were presented to potential customers, then I  
20 would be happy with that.

21 MR. BRENNAN: Well, Your Honor, I think the issue  
22 remains to be seen what we might use for impeachment  
23 purposes, but we're not there yet. We're on this document  
24 given the proffered reason at this juncture.

25 MR. NORMAND: There is a Novell claim in this case

1 raising the issue of state of mind.

2 But I will move on, Your Honor.

3 THE COURT: There is no reason why you cannot ask  
4 questions about the information without the document being  
5 admitted.

6 MR. NORMAND: Agreed.

7 THE COURT: Assuming that a proper foundation is  
8 laid.

9 MR. NORMAND: Thank you, Your Honor.

10 BY MR. NORMAND:

11 Q Mr. Tibbitts, do you recall addressing the issue of SMP  
12 in the marketplace?

13 A Yes.

14 Q Could you briefly describe what you understand SMP to  
15 be and what its significance is?

16 A Well, I don't have a very deep understanding, but SMP  
17 is symmetrical multiprocessing, which is one of the  
18 technologies that was donated into Linux from people who had  
19 license restrictions on that, and that was one of the  
20 technologies we discussed with people who wanted to hear  
21 more about what we were claiming.

22 Q Let me show you, Mr. Tibbitts, what has been marked as  
23 R-23. Do you recognize this document?

24 A I do.

25 MR. NORMAND: If you would go to the last page,

1 Mr. Calvin.

2 BY MR. NORMAND:

3 Q Is that your signature line, Mr. Tibbitts?

4 A Yes.

5 Q Do you recall sending this letter out to Linux users?

6 A Well, it wasn't just Linux users, I don't think. I  
7 mean, as a group it was sent out to corporate -- potential  
8 corporate users, many of them -- I think maybe as many as a  
9 thousand companies, again, just showing some of the things  
10 that we were finding along the way that we alleged was a  
11 problem for Linux. And so this is a letter outlining ABI  
12 code, which is application binary interface, that links the  
13 operating system with applications, critical technologies  
14 that we believed prove that Linux was using our stuff  
15 without our permission.

16 MR. NORMAND: Your Honor, we move Novell Exhibit  
17 R-23 into evidence.

18 MR. BRENNAN: Your Honor, we do object for several  
19 reasons. First of all, this is hearsay. Second of all,  
20 it's not an executed copy of a letter. There is no evidence  
21 on the face of it that it was sent to any particular person  
22 or company, and there has not been a demonstration that that  
23 particular communication was sent to any particular company.

24 Given all those reasons, it should not be  
25 admitted.

1 THE COURT: The Court will admit the document.

2 (Defendant's Exhibit R-23 was received into  
3 evidence.)

4 BY MR. NORMAND:

5 Q Mr. Tibbitts, the jury, I think, can now see this  
6 document.

7 MR. NORMAND: Mr. Calvin, if you highlight the  
8 bottom part of this letter.

9 BY MR. NORMAND:

10 Q Again, Mr. Tibbitts, to your understanding, what is it  
11 that is being addressed in this part of the letter and the  
12 remainder of the letter regarding what I will refer to here  
13 as Linux files?

14 A Well, I think the best I can do is just read what it  
15 says. It says, any part of any Linux file that includes the  
16 copyrighted binary interface code must be removed. Files in  
17 Linux version 2.4.21 and other versions that incorporate the  
18 copyrighted binary interfaces include, and the list goes on  
19 for a couple of pages, if I recall. And, again, this is  
20 just code that our consultants looked at and reviewed and  
21 determined this was a problem. People were asking for  
22 information, so we shared this with many companies.

23 Q Mr. Tibbitts, let me show you a slide from what has  
24 been marked as SCO Exhibit 575.

25 MR. NORMAND: Mr. Calvin, I'm thinking of a slide



1 that says what makes Linux different.

2 BY MR. NORMAND:

3 Q Do you recognize this slide, Mr. Tibbitts?

4 A I do.

5 Q On what basis do you recognize it?

6 A Well, this was a slide presentation that came in  
7 several forms, one of which we just simply pulled off the  
8 Internet somewhere in the 2003, 2004 time frame. It's a  
9 slide presentation by Dan Frye, who is an IBM executive that  
10 runs their whole Linux technology center. It's a marketing  
11 piece --

12 Q Let me stop you there because we may run into this same  
13 issue from a few minutes ago.

14 What was the relevance of the slide to you?

15 A Well, this is one thing that we also showed people when  
16 they wanted to know what kind of things we were talking  
17 about, and this is a document that I personally showed to  
18 many people over the course of time.

19 MR. NORMAND: Your Honor, at least as a proffer, I  
20 would move this slide into evidence.

21 MR. BRENNAN: Objection, Your Honor, it suffers  
22 from the same problem before. First of all, there's not  
23 been a proper foundation laid as to its source of origin.  
24 This witness has not indicated that he himself did the pull  
25 off the Internet. He hasn't laid the foundation for that.

1 It is hearsay on two levels.

2 MR. NORMAND: Your Honor, again, it falls into  
3 this category of materials that Mr. Tibbitts was showing in  
4 the marketplace, and for the reasons that I have stated  
5 before, I think it's relevant.

6 THE COURT: There is no proper foundation for it,  
7 but I think it could be -- it could avoid hearsay because I  
8 don't believe you're offering it for the truth, but I don't  
9 believe there's been a proper foundation.

10 BY MR. NORMAND:

11 Q Mr. Tibbitts, do you recall how it was that you came to  
12 have possession of this document -- this slide?

13 A Yes. A person who worked for SCO one day told me, look  
14 what I found on the Internet.

15 MR. BRENNAN: Objection, Your Honor, that's  
16 hearsay.

17 MR. NORMAND: It's not going in for the truth of  
18 the matter, Your Honor.

19 THE COURT: Overruled.

20 THE WITNESS: So he went to a link on the Web site  
21 where this IBM document was, and we flipped through it. I  
22 said, yes, this is very interesting, I would like a copy of  
23 that. And it remained on the Internet. You could get it  
24 until not long ago. We put some of these slides up on our  
25 Web site, and shortly thereafter it disappeared.

1 BY MR. NORMAND:

2 Q Did you have occasion to see the color version of this  
3 slide on the Internet within the last several days?

4 A Yes.

5 MR. NORMAND: Your Honor, I submit that's proper  
6 foundation.

7 MR. BRENNAN: That is not an adequate foundation,  
8 Your Honor, for a document pulled off the Internet.

9 THE COURT: I'll overrule the objection.

10 BY MR. NORMAND:

11 Q So the jury can now see this document, Mr. Tibbitts.  
12 What is the particular language of the document that you  
13 regard as significant in the course of your presenting it to  
14 the marketplace?

15 A Several things. I would start with the logo down in  
16 the bottom right that says IBM, for International Business  
17 Machines, with a penguin next to it, which is the Linux  
18 logo, or mascot, if you will. Then at the top the heading  
19 is what makes Linux different. There are several things  
20 identified there. In the center it says Linux attributes.  
21 And then immediately to the left there it says derived from  
22 UNIX.

23 Q Why did you think that phrasing was relevant?

24 A Well, that's significant because it's an admission that  
25 that is exactly where Linux came from. It started with UNIX

1 and was derived from UNIX. And, you know, I'm not saying  
2 this is the beginning -- or the end of the issue, but it's a  
3 good starting place when IBM admits that Linux is derived  
4 from UNIX.

5 Q Let me show you the next slide, Mr. Tibbitts.

6 THE COURT: The whole document has not been  
7 admitted. Only one slide at a time.

8 MR. NORMAND: That's right, Your Honor. I don't  
9 think the jury can see the next slide.

10 BY MR. NORMAND:

11 Q Do you recognize this slide, Mr. Tibbitts?

12 A I do.

13 Q Does this fall into the same category as the slide we  
14 just looked at in terms of the use you made of it and the  
15 significance you attributed to it?

16 A Yes, it's part of these presentations that we pulled  
17 off the Internet from IBM.

18 Q Is this a slide that you've seen the color version in  
19 the last few days on the Internet?

20 A It's also a slide that we've shown to potential  
21 customers and others who were interested in the issue.

22 MR. NORMAND: Your Honor, I move this slide into  
23 evidence.

24 MR. BRENNAN: Your Honor, the same objection. In  
25 fact, what we saw was a suggestion in connection with the

1 previous one that it wasn't being offered for the truth of  
2 the matter asserted. May I suggest it was somehow an  
3 admission. Your Honor, so the first one was misused and now  
4 I suggest the same may be tried with this one. We still  
5 haven't met the evidentiary requirements for its admission.

6 THE COURT: I will overrule the objection. Let's  
7 make certain the Bates numbers of these are made available  
8 so Ms. Malley and I will know exactly which portion of 575  
9 has been admitted.

10 MR. NORMAND: Yes, Your Honor. It's Bates number  
11 ending 200.

12 (Plaintiff's Exhibit 575, slide 200, was received  
13 into evidence.)

14 BY MR. NORMAND:

15 Q Was there any particular language in this slide, Mr.  
16 Tibbitts, that you found significant at the time you were  
17 making use of it?

18 A Yes. Again, it's an IBM presentation, IBM's logo and  
19 penguin, the question why does Linux work. And then the  
20 first bullet I guess is somebody's attempt to be humorous,  
21 maybe, I don't know, it says, UNIX was a pre-write of Linux.

22 MR. BRENNAN: Objection, Your Honor, calls for  
23 speculation. Move to strike.

24 BY MR. NORMAND:

25 Q How was this language significant to you at the time,

1 Mr. Tibbitts?

2 A Again, I think this is a different way of saying that  
3 Linux is derived from UNIX, but they say UNIX was a  
4 pre-write, like UNIX was written just so Linux could be  
5 derived from it or something. But, anyway, it's clearly  
6 making the same point.

7 MR. BRENNAN: Objection, move to strike.

8 THE COURT: I'm going to grant the motion to  
9 strike because I think he's speculating about as to what it  
10 says and what it means. So the Court will instruct the jury  
11 to disregard the answers given by Mr. Tibbitts.

12 BY MR. NORMAND:

13 Q Do you recall having any discussions with anyone who  
14 was reviewing the slide with you about what that language  
15 meant?

16 A Sure.

17 Q Could you summarize what the discussions were?

18 MR. BRENNAN: Objection, Your Honor, lacks  
19 foundation and it's hearsay.

20 MR. NORMAND: I have no idea how that could lack  
21 foundation.

22 MR. BRENNAN: Because we don't know who he's  
23 speaking with. That's the problem.

24 THE COURT: I would agree.

25 //

1 BY MR. NORMAND:

2 Q Who did you discuss --

3 A Well, it says what it says.

4 Q Do you recall discussing this language with anyone in  
5 particular apart from your attorneys?

6 A Yes. I think I discussed this with a gentleman who  
7 pointed it out to me on the Internet. His name is Dean  
8 Zimmerman.

9 Q What do you recall discussing with Mr. Zimmerman about  
10 the language?

11 MR. BRENNAN: Objection, that's hearsay, Your  
12 Honor.

13 MR. NORMAND: It's going to Mr. Tibbitts' state of  
14 mind not to the truth of what Mr. Zimmerman stated.

15 MR. BRENNAN: I'm not sure what relevance that  
16 has, but it's still hearsay.

17 THE COURT: I will overrule the objection.

18 THE WITNESS: Well, the discussion was that this  
19 was, in our view, another way of saying that Linux is  
20 derived from UNIX. But it was, again, a different way of  
21 saying that by indicating that UNIX was written for Linux.

22 MR. BRENNAN: Your Honor, I move to strike.  
23 Again, that's speculation. Now we have Mr. Tibbitts  
24 engaging in speculation with somebody else.

25 MR. NORMAND: Your Honor, it was a description of

1 his discussion with Mr. Zimmerman.

2 MR. BRENNAN: But the description is what they  
3 were speculating over, Your Honor.

4 THE COURT: I will strike the answer and ask the  
5 question be asked again. If you will simply, without  
6 speculating as to what the individual thought, just tell us  
7 what he said.

8 Go ahead, Mr. Tibbitts.

9 THE WITNESS: Okay. Well, what he said is it  
10 looked like it was another way of saying the same thing that  
11 was on the other slide, that Linux was derived from UNIX.

12 BY MR. NORMAND:

13 Q Now, Mr. Tibbitts, in connection with the SCOSource  
14 program, did you meet with a company called Questar?

15 A I did.

16 Q Do you recall when you met with them?

17 A Late 2003.

18 Q What was the tone of the meeting?

19 A It was a cordial business meeting.

20 Q Do you recall whether Questar entered into a license  
21 with SCO?

22 A Yes, they did. A few weeks after our meeting -- within  
23 a few weeks after our meeting, they entered into a SCOSource  
24 license.

25 Q Mr. Tibbitts, do you have a view as to whether



1 ownership of the UNIX and UnixWare copyrights is required  
2 for SCO to run its UNIX related business?

3 A I do.

4 Q What is your view?

5 A The copyrights are critical for us to run the business  
6 that was purchased from Novell in '95, both the SCOSource  
7 business and the right to protect that core UNIX  
8 intellectual property, and then the products businesses that  
9 emanate off of that, to continue to develop and maximize  
10 that business opportunity.

11 Q Couldn't SCO run its UNIX business by just owning the  
12 UnixWare copyrights?

13 A Not our current business, no.

14 Q Why not?

15 A Because we own the core UNIX intellectual property and  
16 a very critical component of that at this point in time is  
17 to protect that IP, and we have got to have that IP to keep  
18 other people from encroaching into our marketplace.

19 Q Mr. Tibbitts, what kind of business would SCO have been  
20 left with without these copyrights?

21 A Well, as I said, we could not fully develop that core  
22 intellectual property. We could not protect it. And this  
23 venerable UNIX business that has been around for many years  
24 that many customers around the world are using would simply  
25 die off, and we have got to have that intellectual property

1 to protect those crown jewels.

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

3 THE COURT: Mr. Brennan.

4 MR. BRENNAN: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. BRENNAN:

7 Q Good morning, Mr. Tibbitts. How are you today?

8 A I'm doing fine. How are you?

9 Q Good.

10 I think you told us that you joined SCO in May of 2003,  
11 correct?

12 A Yes.

13 Q And since you have joined SCO, you have been awarded  
14 either shares in the company or options to acquire shares,  
15 correct?

16 A Well, when you say awarded, I've been awarded options I  
17 guess. I am not sure -- I don't remember being awarded  
18 shares, but maybe you will prove me wrong.

19 Q Well, do you currently own shares of stock in SCO?

20 A Yes.

21 Q How many do you own?

22 A I don't know.

23 Q Any idea?

24 A Ownership I would think is in the few thousand shares  
25 that I purchased through the employee stock purchase plan, I

1 believe.

2 Q If you were to combine the shares that you actually own  
3 and those that you have options to acquire, those would  
4 aggregate to over 420,000 shares, correct?

5 A Yes, I believe that's correct.

6 Q So as you sit here today, you understand that if SCO  
7 were to prevail in this litigation, that you would stand  
8 personally to gain, correct?

9 A Correct.

10 Q You have a financial stake in the outcome of this  
11 litigation, right?

12 A I believe so, yes.

13 Q Now you said that you joined SCO after the SCOSource  
14 business had been launched, right?

15 A Yes.

16 Q And as a result of that, given that you joined SCO in  
17 2003, you had no involvement whatsoever in the drafting of  
18 the underlying asset purchase agreement between Novell and  
19 Santa Cruz Operation entered into in 1995, right?

20 A That's correct.

21 Q You had no involvement whatsoever in the drafting or  
22 negotiations over either Amendment No. 1 or Amendment No. 2,  
23 right?

24 A True.

25 Q Now in terms of the SCOSource program itself, that

1 licensing program was directed, I think you told us, to  
2 Linux users, right?

3 A Corporate Linux users I believe.

4 Q And the basic premise of the SCOSource program was the  
5 suggestion that Linux contained elements of the UNIX  
6 software code, right?

7 A I would agree with your general description, yes.

8 Q And the thrust of the SCOSource program was that Linux  
9 thereby infringed UNIX, right?

10 A Yes.

11 Q And the code that was claimed to be protected, that is  
12 the protected UNIX code that SCO alleged was in Linux, was  
13 UNIX System V code, right?

14 A I believe so, yes.

15 Q So it's correct, then, that SCO's claim has been and  
16 the SCOSource program was premised upon the notion that  
17 Linux infringes UNIX System V software code, right?

18 A I believe that's correct, yes.

19 Q It's not premised upon the notion that Linux or other  
20 operating system software infringes UnixWare, right?

21 A I would disagree with that. UnixWare is System V,  
22 based on System V, and just the latest version, as I  
23 understand it.

24 Q So is it SCO's contention that the SCOSource program is  
25 premised on the notion that Linux users are infringing

1 UnixWare?

2 A In part, I believe that's correct.

3 Q Now in connection with -- I think they called it Malloc

4 code. Did I get that correct?

5 A Yes.

6 Q You indicated that someone at SCO had determined that

7 there was some portion of this Malloc code in UNIX, right?

8 A Yes.

9 Q And the UNIX code that you make reference to contains

10 how many lines of code?

11 A When I referenced -- which UNIX code are we talking

12 about?

13 Q The UNIX code that is the subject of the SCOSource

14 program.

15 A The whole UNIX operating code base?

16 Q I assume that's what the subject is --

17 A I think it's millions of lines of code.

18 Q More than 14 million lines?

19 A I don't know, but that would be in the ballpark.

20 Q So you would agree that the UNIX code that the

21 SCOSource program is seeking to enforce against Linux users

22 would be roughly 14 million lines of code, right?

23 A I think that's probably correct.

24 Q And the Malloc code that you had referenced contains no

25 more than 70 lines of code, right?

1 A I haven't counted them, but that sounds like it's in  
2 the ballpark.

3 Q So 70 of 14 million lines of code is what you were  
4 suggesting was the basis for the infringement?

5 A No, that's not what I was suggesting at all.

6 Q When you brought these potential licensees into the  
7 code room and pointed out the Malloc code, I think you told  
8 us we're talking about 70 lines of code?

9 A That was one example that we showed them. That was  
10 certainly not the entire presentation.

11 Q Now you also indicated that you believe that SCO could  
12 not conduct its business without the UNIX copyrights; is  
13 that correct?

14 A Its total business, that's true.

15 Q Now it is true that SCO has offered to sell its  
16 business without the UNIX copyrights, correct?

17 A At this point in time the copyrights were potentially  
18 going to go with that business when the issues get cleared  
19 up, yes.

20 Q You're aware of a proposed transaction just in the last  
21 year whereby SCO would have sold its business and retained  
22 solely the UNIX copyrights, correct?

23 A Correct.

24 Q So you then were -- that is SCO was undertaking to sell  
25 its business but believed that someone could buy and operate

- 1 that business and not receive the UNIX copyrights, correct?
- 2 A Well, that's a portion of our business, as I said.
- 3 Q Again, just so we're all clear, SCO itself has proposed
- 4 transactions and preliminarily entered into one transaction
- 5 to sell its entire business but retain the UNIX copyrights?
- 6 A No, not our entire business, absolutely not.
- 7 Q The business that was related to UNIX, right?
- 8 A The product business, not the intellectual property
- 9 business.
- 10 Q Just so we're clear -- thank you for that correction --
- 11 what SCO has proposed to do is sell the UNIX business --
- 12 product business, but retain the UNIX copyrights?
- 13 A Yes, and the rights to enforce those copyrights.
- 14 Q That is not a product, is it?
- 15 A Well, the licensing could be a product.
- 16 Q It's not a physical product, is it? It's not even a
- 17 CD?
- 18 A No, it's not.
- 19 Q Now you were asked about letters that you exchanged
- 20 with Mr. LaSala, who at the time that you were engaged in
- 21 this letter exchange was general counsel of Novell, right?
- 22 A Correct.
- 23 Q And Mr. Normand didn't show you all the letters that
- 24 went back and forth, did he?
- 25 A No, he did not.

1 Q He made a selection of some letters, but didn't show  
2 all, correct?

3 A Correct. There was quite a barrage of letters that  
4 went back and forth.

5 Q So, for example, he didn't show you the letters that  
6 Mr. LaSala had written to SCO, right?

7 A No. He showed me a few of those.

8 Q But not all of them. For example, he didn't show you  
9 the August 4th or August 20th of 2003 letters, did he?

10 A I don't believe so.

11 Q And in terms of the suggestion that Novell had issued a  
12 directive relative to IBM or Sequent, you remember those  
13 questions that Mr. Normand asked you about?

14 A Yes, I do.

15 Q You understood by virtue of going back and looking at  
16 section 4.16(b) of the asset purchase agreement and reading  
17 the letters from Mr. LaSala and others, that what Novell was  
18 doing was asking SCO to act in accordance with the express  
19 contractual provisions of Section 4.16(b), right?

20 A No, that's not right.

21 Q You thought that Novell was acting under some other  
22 provision?

23 A No. They were relying on that provision, but it was an  
24 inaccurate reading and interpretation of that.

25 Q So you disagreed with Novell's reading of the rights



1 permitted under section 4.16(b), correct?

2 A Very much so.

3 Q If we could look at Exhibit 1 in evidence. I would  
4 like to take a quick look at section 4.16(b).

5 Now as you look at what's on the screen, do you  
6 understand this to be the operative language of 4.16(b)?

7 A Yes, as you highlighted 4.16(b), but 4.16(a) is also  
8 part of the equation.

9 Q But, as you understood it, the claims that Novell was  
10 making relative to the transaction with IBM and Sequent were  
11 pursuant to section 4.16(b), right?

12 A Well, they were attempting to do that, yes.

13 Q So let's take a look at that. It says buyer -- that  
14 would have been Santa Cruz Operation, right?

15 A Yes.

16 Q -- shall not, and shall not have the authority to,  
17 amend, modify or waive any right under or assign any SVRX  
18 license without the prior written consent of seller, right?

19 A Yes, that is what this sentence says.

20 Q The seller would be Novell, correct?

21 A Correct.

22 Q It says, in addition, at seller's sole discretion and  
23 direction -- that would be Novell's sole discretion and  
24 direction, correct?

25 A Correct.

1 Q -- buyer shall amend, supplement, modify or waive any  
2 rights under, or shall assign any rights to, any SVRX  
3 license to the extent so directed in any manner or respect  
4 by seller, correct?

5 A Yes, but you have to go up to the prior provision to  
6 see what this means.

7 Q If you look at that language that we've just read,  
8 there is not a qualifier there, is there?

9 A What do you mean?

10 Q The sentence does not have a qualifier or a limitation,  
11 does it?

12 A Yes, it does.

13 Q Well, let's read the words again. In addition, at  
14 seller's sole discretion and direction, buyer shall amend,  
15 supplement, modify or waive any rights under, or shall  
16 assign any rights to, any SVRX license to the extent so  
17 directed in any manner or respect by seller. You see that,  
18 right?

19 A I do.

20 Q Then it continues, in the event that buyer shall fail  
21 to take any action concerning the SVRX licenses as required  
22 herein, seller shall be authorized and hereby is granted,  
23 the rights to take any action on buyer's own behalf. Do you  
24 see that?

25 A I see that language.

1 Q So you understood when you engaged in this exchange  
2 with Mr. LaSala that Novell was taking the position that  
3 under section 4.16(b) they had the right to direct the  
4 successor of Santa Cruz Operation, that is SCO, to amend,  
5 supplement, modify or waive any rights with respect to an  
6 SVRX license, right?

7 A I think I understood what Novell was claiming. I just  
8 disagreed with it.

9 Q Well, in answer to my question, you understood that  
10 Novell was giving direction to SCO pursuant to this  
11 contractual provision, right?

12 A Yes, this whole section I would say.

13 Q You also understood that the contractual language  
14 agreed to and to which Santa Cruz had agreed to and SCO was  
15 bound provided that in the event that the buyer, which  
16 became SCO under the language of this agreement, if it were  
17 to fail to take the action that Novell directed, that Novell  
18 was authorized and granted the right to take action on SCO's  
19 behalf, right?

20 A If it was legitimate, yes.

21 Q So the contention by SCO is somehow it was illegitimate  
22 what Novell asked SCO to do?

23 A It was not authorized by this agreement.

24 Q You are not aware of any court order having been issued  
25 that affirmed that IBM has infringed any copyright interest

1 held by SCO, are you?

2 A Say it again.

3 Q You are not aware of any court decision that has  
4 affirmed or confirmed a claim by SCO that Linux infringes  
5 any copyrights, have you?

6 A No. That case is still alive.

7 Q So any potential licensee who had any question in their  
8 mind about whether or not SCO would prevail with those  
9 claims still would have those questions in their mind,  
10 right?

11 A Maybe, maybe not.

12 Q Well, you are not aware of any ruling by any court that  
13 has adjudicated that, are you?

14 A Correct, but that's not the only analysis people would  
15 go into.

16 Q Now when you had communications with potential  
17 licensees and the issue of IBM came up or Novell came up,  
18 you suggested to those potential licensees that what they  
19 ought to do in order to resolve in their own minds any issue  
20 is to go to the publicly available documents that discussed  
21 the dispute, right?

22 A I don't recall necessarily saying that. That certainly  
23 could have been something we told them, among other things.

24 Q Do you recall, for example, in a telephone call with  
25 Google that you stated that, quote, that's an issue out

1 there and all the documents are out publicly, so you should  
2 take a look and decide for yourself?

3 A Yeah, but that doesn't just mean court documents.  
4 There are a lot of documents available out there.

5 Q Just so we're clear, whenever you met with potential  
6 licensees or had communications with them and there was an  
7 issue that was raised as to either the dispute with IBM or  
8 any dispute with Novell, you suggested to these potential  
9 licensees that they ought to go to sources that identified  
10 publicly the background of the dispute and the legal  
11 documents that pertain to it, right?

12 A In general terms, yes.

13 Q And the source of that information was Novell, right?

14 A Not necessarily. They were one source.

15 Q So what you expected potential licensees to do is if  
16 they had a question as to whether they should take a  
17 SCOsource license is to go to look at sources like Novell  
18 who had made public the relevant documents and  
19 communications between the parties and make their own  
20 decision, right?

21 A Yes.

22 Q That was because you believed that those potential  
23 licensees could make their own determination as to who was  
24 right and who was wrong?

25 A To some degree, yes.

1 Q That's because you felt that reasonable minds, even  
2 though they might differ, would be able to discern who had  
3 the better argument, correct?

4 A In some situations that would be true.

5 MR. BRENNAN: One second, Your Honor.

6 BY MR. BRENNAN:

7 Q Just a question or two more, Mr. Tibbitts.

8 When we talked about the claim by SCO that perhaps  
9 either UNIX or UnixWare might infringe Linux, what  
10 particular versions of UNIX or UnixWare do you have  
11 reference to?

12 A I believe you said that UNIX or UnixWare infringed  
13 Linux.

14 Q I'm sorry. I got it backwards. Let me restate the  
15 question. Thank you.

16 So when you were discussing with us the issue as to  
17 whether Linux was infringing either UNIX or UnixWare, what  
18 versions?

19 A Of Linux?

20 Q No. What versions of UNIX or UnixWare.

21 A That I don't have the answer to. I know it's the  
22 System V versions, but we've had people much more technical  
23 than me weigh in on that. Sorry, I don't know the answer  
24 for you today.

25 Q Just so we're clear, when you had communications with

1 potential licensees and talked with them or communicated  
2 with them about Linux potentially infringing either UNIX or  
3 UnixWare, you didn't have in mind what versions of UNIX or  
4 UnixWare were being infringed?

5 A I didn't specifically, but I always went to those  
6 meetings with people who are more technical than me, and I  
7 believe they had that information at their disposal.

8 Q Now when SCOSource was launched, that was launched  
9 essentially as a new business, right?

10 A Well, a new business -- or a new licensing line within  
11 all the other licensing lines we had, so --

12 Q SCOSource was deemed to be a new organization within  
13 SCO, right?

14 A A new division within SCO.

15 Q And SCOSource was something that was created in about  
16 August of 2003, right?

17 A The division was not created then. The division was  
18 formed earlier in the year. In August, what I was  
19 testifying to is I think that's when we came up with the  
20 right to use license as requested by Computer Associates.

21 MR. BRENNAN: I have no further questions. Thank  
22 you.

23 THE COURT: Thank you, Mr. Brennan.

24 Mr. Normand.

25 //

1 REDIRECT EXAMINATION

2 BY MR. NORMAND:

3 Q Mr. Tibbitts, do you recall being asked by Mr. Brennan

4 about section 4.16(b)?

5 A I do.

6 MR. NORMAND: Mr. Calvin, could you pull that up.

7 BY MR. NORMAND:

8 Q I thought I heard you refer to 4.16(a) in connection

9 with the answers you gave. Do you recall that?

10 A Yes.

11 Q Why did you mention 4.16(a)?

12 A Because you can't get anything out of 4.16(b) unless

13 you read and understand 4.16(a).

14 Q Why do you think that is?

15 A Well, I recall Mr. Brennan asking me about a sentence

16 in (b) and whether there were any qualifications. I said

17 there clearly were, and the qualification is with the term

18 SVRX license, which takes you up to 4.16(a) where it talks

19 about royalties due under SVRX licenses. Then there is a

20 parenthetical as listed in detail under item VI of schedule

21 1.1(a) hereof and referred to as SVRX royalties. So then

22 you have to go to the schedules and try and figure out what

23 we're talking about here.

24 Q So why do you think the schedules are relevant to this

25 issue of Novell's waiver rights?



1 A Well, because that at least begins the discussion on  
2 how broad that waiver right is.

3 Q How so?

4 A Well, because it tells you what the licenses are that  
5 they would have some right to deal with.

6 Q And what have you understood those licenses to be that  
7 Novell had waiver rights over?

8 A Well, product licenses underneath the various master  
9 agreements for which binary royalties were being paid back  
10 to Novell when this transaction came together.

11 Q Were those the kind of agreements at issue in the  
12 breach of contract claims against IBM?

13 A No, not down to that level. The master agreement is  
14 involved, but that is in a different section of the  
15 schedule.

16 MR. NORMAND: Mr. Calvin, could you pull up  
17 Amendment 2. Pull up all of paragraph B, including the  
18 subsections, please.

19 BY MR. NORMAND:

20 Q Mr. Tibbitts, do you have a view as to whether  
21 Amendment No. 2 clarified the scope of Novell's waiver  
22 rights?

23 A Yes, it did.

24 Q How so?

25 A Well, one of the provisions is right at the bottom

1 where it says, Novell may not prevent SCO from exercising  
2 its rights with respect to SVRX source code in accordance  
3 with the agreement. That's one of the places that jumps to  
4 mind.

5 MR. NORMAND: Now, Mr. Calvin, bring us back to  
6 4.16.

7 BY MR. NORMAND:

8 Q And I wanted to show you, Mr. Tibbitts, what you  
9 referred to as the first three lines of (a), the reference  
10 to the SVRX licenses, and then you referred to item VI of  
11 schedule 1.1(a). Do you recall that?

12 A Yes.

13 Q Let's go to item VI of schedule 1.1(a), if we can.

14 MR. NORMAND: That's at the bottom, Mr. Calvin.

15 BY MR. NORMAND:

16 Q Mr. Tibbitts, how did you understand this item VI to  
17 relate to the answer you just gave about section 4.16(a)?

18 A Well, this is where it takes you on the notion of what  
19 are SVRX licenses and then SVRX royalties. As you see, it  
20 says, all contracts relating to the SVRX licenses listed  
21 below. So SVRX licenses, as I think we've heard, these are  
22 not technically licenses, so this is one place the agreement  
23 is confusing. These are products. And then you have the  
24 product schedules that list the royalty payments that go  
25 with that. So that is my understanding of what this is

1 pointing us to here, and it's a subset of all contracts that  
2 relate to this.

3 Q Now let's go back to Amendment 2.

4 MR. NORMAND: Let's pull out that paragraph 5  
5 again, Mr. Calvin at the bottom.

6 BY MR. NORMAND:

7 Q Could you just read this language into the record, Mr.  
8 Tibbitts?

9 A Paragraph 5?

10 Q Yes.

11 A This amendment does not give Novell the right to  
12 increase any SVRX licensee's rights to SVRX source code nor  
13 does it give Novell the right to grant new SVRX source code  
14 licenses. In addition, Novell may not prevent SCO from  
15 exercising its rights with respect to SVRX source code in  
16 accordance with the agreement.

17 Q Now, in summary, when you see the reference to SVRX  
18 source code on the bottom of that paragraph, what do you  
19 understand that to refer to?

20 A Well, that is the crown jewels of the core UNIX  
21 intellectual property. That's the UNIX source code. And  
22 that is what Novell was trying to direct us to waive our  
23 rights over. They didn't have that right.

24 Q Let me ask you a couple more questions, Mr. Tibbitts.  
25 You were asked by Mr. Brennan about whether there are any

1 court orders on whether Linux infringes Linux copyrights.

2 Do you recall that?

3 A Yes.

4 Q Do you recall saying there is a pending litigation  
5 concerning that issue?

6 A Correct.

7 Q Has SCO hired experts to address the issue of whether  
8 Linux infringes --

9 MR. BRENNAN: Objection, Your Honor, we're varying  
10 into territory.

11 MR. NORMAND: They opened this door, Your Honor.

12 THE COURT: You did, Mr. Brennan.

13 MR. BRENNAN: Well, we're going to have hearsay  
14 here is the problem.

15 MR. NORMAND: No. We're going to have a  
16 discussion of what the status of the pending litigation is.

17 THE COURT: Let's see what the questions are.

18 MR. BRENNAN: Your Honor, there were specific  
19 agreements. What I asked about was limited to suggestions  
20 made earlier. This would be a violation of an express  
21 agreement. Perhaps we should have a side-bar to make sure  
22 we're clear on this issue.

23 THE COURT: Let's go ahead and take a recess.

24 (Jury dismissed)

25 MR. NORMAND: We were so close to being done, Your

1 Honor.

2 THE COURT: I know. I could tell you were just  
3 anxious.

4 MR. NORMAND: If it helps, the questions were not  
5 going to go to the merits. The questions were going to go  
6 whether there's pending litigation, whether experts have  
7 been hired, whether there's evidence for the Court to  
8 consider, and whether Mr. Tibbitts understands it will be  
9 resolved in the future.

10 THE COURT: Mr. Brennan.

11 MR. BRENNAN: If it's limited to that.

12 MR. NORMAND: I thought there was a suggestion  
13 that there will never be a resolution in SCO's favor. I was  
14 trying to put that suggestion to bed.

15 MR. BRENNAN: Otherwise, we're going to get into  
16 this duel because there are experts on the other side, there  
17 is a summary judgment motion --

18 THE COURT: We don't want to do that.

19 MR. NORMAND: We don't want a mini trial.

20 THE COURT: We don't. As long as the questions  
21 are as narrow as just defined, I think we're okay.

22 MR. BRENNAN: If Mr. Normand does ask those  
23 questions, then there would have to be the response there  
24 are experts on the other side.

25 THE COURT: Well, you would get another shot, Mr.

1 Brennan. You may ask those questions.

2 MR. BRENNAN: Thank you.

3 THE COURT: All right. We'll take 15 minutes.

4 (Recess)

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