

1 THE COURT: Counsel, let me explain, on the
2 jury instructions and verdict form that you were just
3 given, I would like any response to it by 8:00 o'clock
4 Wednesday morning. And I will decide, thereafter,
5 whether or not we actually have to have a jury
6 instruction conference or whether or not -- whether, if
7 you disagree with some, we'll determine whether or not we
8 have a jury instruction conference or whether or not I
9 will rely upon your written objections as you create in
10 the record for the instructions, okay? Thank you.

11 If we're ready, Ms. Malley.

12 MR. ACKER: We're set.

13 THE COURT: How long do you think it will be
14 reasonable for the findings of fact and conclusions of
15 law?

16 MR. JACOBS: Two weeks, Your Honor, after the
17 jury verdict is entered.

18 THE COURT: Well, there's a thought here.
19 Number 1, I would like it as soon as possible, just
20 because I want my memory to be refreshed, but, on the
21 other hand, the more time you take, probably the
22 greater -- the better your product will be. So, give me
23 what you think would be reasonable to meet both of those.

24 MR. SINGER: We were thinking 20 days.

25 MR. JACOBS: That's fine.

1 THE COURT: Okay. Plan on 20 days, then,
2 counsel. Thank you.

3 MR. JACOBS: Just to be clear on the form of
4 this, then, the findings of fact and conclusions of law
5 will, in a sense, be a self-contained argument with
6 reference to supporting evidence, including, as we
7 discussed, the bench trial record?

8 THE COURT: Yes.

9 MR. JACOBS: Great.

10 MR. SINGER: To be exchanged simultaneously?

11 THE COURT: Exactly. And in not just written
12 form but also submitted electronically so that we can
13 manipulate it, please.

14 MS. MALLEY: All rise.

15 (Jury brought into the courtroom.)

16 THE COURT: Go ahead, Mr. Acker.

17 MR. ACKER: Thank you, Your Honor.

18 Q. BY MR. ACKER: Mr. LaSala, let me show you what
19 we have marked as G-21 and ask if you recognize that
20 letter?

21 A. Yes, I do.

22 Q. And is that a letter that you wrote to
23 Mr. Tibbitts on October 7, 2003?

24 A. Yes, it is.

25 MR. ACKER: I move for admission of G-21, Your

1 Honor.

2 MR. SINGER: No objection.

3 THE COURT: It will be admitted.

4 (Novell Exhibit G-21 received in evidence.)

5 Q. BY MR. ACKER: Can you -- before we take a look
6 at the specific provisions of the letter, could you tell
7 the ladies and gentlemen of the jury, in sum, what you
8 were doing in this letter to Mr. Tibbitts?

9 A. This letter to Mr. Tibbitts is very much in the
10 vein of a letter we spoke about just before the break
11 concerning IBM code that had been developed by IBM, and
12 this letter concerns SCO's threat to terminate the
13 license that a company called SGI has with respect to
14 SVRX by October 14, if SGI did not correct alleged
15 breaches of the license agreement that SCO claimed it
16 made.

17 Q. And, to your knowledge, is there any
18 relationship between SGI and IBM?

19 A. To my knowledge, there is no relationship.
20 They are two totally different companies.

21 Q. And how did you; that is, Novell, become aware
22 of SCO's actions toward SGI that caused this letter to be
23 drafted and sent to Mr. Tibbitts?

24 A. My recollection is I got a call from the
25 general counsel at Silicon Graphics, at SGI, advising me

1 that they had received this letter from Mr. McBride, that
2 we are talking about, and asking if we would take a look
3 at a claim that was being made and act appropriately.

4 Q. And what action did you ask SCO to take?

5 A. Well, in this letter, we, again, reminded SCO
6 of Novell's rights under Section 4.16(b), and we asked
7 SCO -- or we directed SCO to waive any claim that it
8 might have to terminate SGI's SVRX license.

9 Q. Did you believe it was in Novell's business
10 interest to do so?

11 A. Yes, I did.

12 Q. Why is that?

13 A. For the same reason that we took the action
14 with respect to IBM, because we believed that SCO was
15 making these claims, and, in this case, with respect to
16 SGI, in a way or under circumstances in which it did not
17 have the rights to do so. And, if it were allowed to do
18 this, were allowed to terminate this license, it could
19 have harmed Novell's business interest, again, by
20 disturbing, disrupting the Linux market, which is a
21 market we were -- we had, by this time, gotten very much
22 into.

23 Q. And when you say "by this time," by October of
24 2003, what steps had Novell made to enter into the Linux
25 market?

1 A. We had taken numerous actions, going back to
2 2002, to transition our company to take -- to participate
3 in the Linux business. Perhaps the two most significant
4 things that we did were, in August of 2003, we acquired a
5 Linux company called Zimion. That was in August, 2003.
6 And, by this time, October 7, 2003, we were in
7 negotiations to acquire the second leading distributor of
8 Linux code in the world, a company called SUSE Linux,
9 which was a German -- a German company.

10 Q. And did IBM subsequently make an investment in
11 Novell with respect to Novell's acquisition of SUSE
12 Linux?

13 A. It did, yes.

14 Q. And can you explain that for the jury,
15 please?

16 A. Sure. When Novell acquired this company called
17 SUSE Linux in Germany, we completed the acquisition in
18 November, and our CEO, Mr. Messman, was really looking
19 for a marketplace affirmation of the significance of that
20 transaction. And it's important to appreciate that our
21 acquisition of this company was quite a significant deal
22 in the industry and for Novell because it really put
23 our -- you know, our commitment to Linux on the table. I
24 think the acquisition was about \$210 million.

25 So, what we were looking for was an affirmation

1 by a leading market player. In this case, it was IBM.
2 And what our CEO requested that IBM do was to make an
3 investment in Novell and then to publicly announce that
4 they had made that investment. And we viewed that as
5 a -- if you will, a stamp of approval or an endorsement
6 by a leading technology company with respect to the
7 significance of Novell buying this Linux distribution
8 company.

9 Q. Was there any relationship between the actions
10 that Novell took with respect to SCO and IBM's decision
11 to purchase Novell stock?

12 A. No.

13 Q. Let me show you one final exhibit, X-22.

14 A. Twenty-three?

15 Q. I'm sorry. X-23. Do you recognize that?

16 A. Yes, I do.

17 Q. And what is it?

18 A. This is a press release that Novell issued on
19 December 22, 2003, wherein we assert publicly our belief
20 that we own the copyrights to UNIX, and we include
21 correspondence between Novell and SCO in a link so that
22 the reader can access that correspondence on -- between
23 SCO and Novell as it relates to the question of ownership
24 of copyrights.

25 MR. ACKER: All right. I'd move for admission

1 of X-23, Your Honor.

2 MR. SINGER: This is already in evidence as a
3 SCO exhibit.

4 THE COURT: It will be admitted.

5 (Novell Exhibit X-23 received in evidence.)

6 Q. BY MR. ACKER: Let's take a look at that.

7 A. Okay.

8 Q. On December 22, the press release reads:

9 "Novell believes it owns the copyrights in
10 UNIX."

11 Do you see that?

12 A. I do.

13 Q. And was that true as of December 22, 2003?

14 A. Yes.

15 Q. And you still have that belief today?

16 A. Yes.

17 Q. "And has applied for and received copyright
18 registrations pertaining to UNIX consistent with that
19 position."

20 Is that also true as of the December 22, 2002?

21 A. Yes.

22 Q. "Novell detailed the basis for its ownership
23 position in correspondence with SCO."

24 Do you see that?

25 A. I do.

1 Q. And is that a reference to your June 26 and
2 August 4 letters to Mr. McBride?

3 A. Yes.

4 Q. And were those letters attached to this link so
5 that readers could view it?

6 A. Yes.

7 Q. And then you wrote:

8 "Copies of our correspondence and SCO's reply
9 are available here."

10 Do you see that?

11 A. I do.

12 Q. Also, in addition to your letters to
13 Mr. McBride on August 4 and June 26, did you also attach
14 Mr. Tibbitts' reply to those letters?

15 A. We did.

16 Q. Why?

17 A. Well, we thought it was important to really
18 allow the public to see the communication on the
19 substance of a very important issue, the ownership of the
20 UNIX copyrights. And, for the first time, as I alluded
21 to prior to our break, we had Mr. McBride out there, over
22 the course of, you know, almost an entire year, making
23 public statements as to SCO's ownership of UNIX. And, as
24 we have gone through here, we were making -- we were
25 sending private letters back to Mr. McBride and other

1 A. Yes.

2 Q. You testified, however, that Mr. Marriott, who
3 is a lawyer for IBM, asked you to take that action to
4 waive those rights, correct?

5 A. Yes. He asked us to take -- to assert our
6 rights to waive all claims, yes, he did.

7 Q. Now, you were asked that question at your
8 deposition in February, 2007, whether IBM had asked
9 Novell to waive those rights. Do you recall that?

10 A. Not specifically.

11 Q. Let's look at your February, 2007, deposition.
12 And this is going to be page 158, line 1, to 158, line 7.

13 MR. ACKER: Just a second. I'm sorry. 158,
14 line 1?

15 MR. SINGER: Yes.

16 MR. ACKER: All right.

17 MR. SINGER: Mr. Calvin, will you play clip 10.

18 This will be on your screen.

19 (Video clip played as follows:)

20 Q. Did IBM ever ask you to direct SCO to take the
21 steps that Novell directed SCO to take?

22 A. No.

23 Q. Do you know if IBM asked anyone at Novell to
24 take the steps that Novell directed SCO to take?

25 A. No. I'm not aware that such a thing ever

1 occurred.

2 (End of video clip.)

3 Q. BY MR. SINGER: So, Mr. LaSala, under oath, in
4 February, 2007, you denied what you've testified here to
5 today, that IBM asked Novell to take these steps, right?

6 A. Well, the request that was made, at that time,
7 was a broader request. It was a request to waive all
8 claims, is my recollection, by Mr. Marriott, and we, as I
9 testified earlier, responded in such a way as to say that
10 we would take a look at that, and we took subsequent
11 actions related to a more narrowed set of issues than
12 what was being asked.

13 Q. Sir, wasn't the very question you were asked in
14 deposition about the action that Mr. Marriott asked you
15 to take in not allowing SCO to terminate a license with
16 respect to UNIX code?

17 MR. ACKER: Your Honor, that misstates the
18 video clip, and also there is -- well, I'll do it on
19 redirect.

20 THE COURT: Well, I think, in fairness, it was
21 not clear, from the video clip, what the question was.

22 MR. SINGER: I would ask clip 9 to be played,
23 which plays the prior question and answer.

24 THE COURT: All right.

25 (Video clip played as follows:)

1 Q. In what way did you think that the actions
2 Novell was taking in directing SCO to take certain steps
3 could be beneficial to IBM?

4 A. Well, one example is SCO's attempt to terminate
5 the IBM/AT&T license could benefit IBM, Novell's actions
6 in relation to that could benefit IBM by preventing that
7 termination from occurring, and, thereby, had it
8 occurred, IBM would have been prevented from continuing
9 to distribute certain code. So, that's one example.

10 Q. Did IBM ever ask you to direct SCO to take the
11 steps that Novell directed SCO to take?

12 A. No.

13 Q. Do you know if IBM asked anyone at Novell to
14 take the steps that Novell directed SCO to take?

15 A. No. I'm not aware that such a thing ever
16 occurred.

17 (End of video clip.)

18 Q. BY MR. SINGER: Mr. LaSala, you see that you
19 were asked in February, 2007, specifically whether IBM
20 had asked Novell to take the steps regarding SCO's
21 efforts to terminate the license that IBM had, right?

22 MR. ACKER: It misstates the prior testimony,
23 Your Honor. It wasn't a question.

24 MR. SINGER: The question has been read.

25 THE COURT: The jury has read the question.

1 The jury can decide what was asked.

2 Q. BY MR. SINGER: Mr. LaSala?

3 A. My understanding of the question that was asked
4 in February and the question that you asked me just now
5 are different. What was -- what was asked of me by you
6 is whether or not IBM had asked us to take the actions
7 that we directed SCO to take. And what we were asked by
8 IBM was whether or not we would waive the claims that SCO
9 could possibly make against IBM. And what we responded,
10 at that time, was that we would review the matter and
11 take actions as we deemed to be appropriate.

12 So, the subsequent action that we took was
13 narrower than SCO -- than what was asked -- what you've
14 asked me about, I believe.

15 Q. So, are you saying that it is -- that your
16 testimony in February was correct, that IBM did not ask
17 you to direct SCO to take the steps that Novell directed
18 SCO to take with respect to terminating -- to preventing
19 the termination of the license?

20 A. I think that's -- what you said I think is
21 right. And the reason I say that, again, is because my
22 recollection of the conversation that we had with IBM was
23 that they asked us to waive all of the potential claims
24 that SCO might assert against IBM, and we told IBM that
25 we would look at them on a claim-by-claim basis.

1 that this is unfair because the exact testimony he gave
2 today, he testified about in his deposition. They have a
3 copy of a -- the statement itself, about this
4 conversation, and Mr. LaSala testified during his
5 deposition as a 30(b)(6) witness.

6 So now they are trying to leave the impression
7 that that testimony was never given during the course of
8 the deposition. It's totally unfair, and that's exactly
9 what he's saying in this clip.

10 MR. SINGER: Well, but what happened first of
11 all, in February of '07, he denied, as the testimony we
12 just played, that IBM had a role in what Novell did. In
13 May, 2007, he admitted that. And now, in his testimony
14 on the stand, he's saying that, well, they didn't tell me
15 to waive the rights with code. The clip I'm about to
16 play specifically says they were to waive the rights with
17 code. The explanation doesn't make any sense. I'm
18 entitled to do that.

19 MR. ACKER: That's the exact point. When he
20 stood up there and accused Mr. LaSala -- and I disagree
21 about your characterization about any inconsistencies so
22 far -- but when he accused Mr. LaSala of not providing
23 that testimony during the deposition, this testimony, it
24 is exactly the conversation.

25 THE COURT: Well, I believe he's entitled to

1 use the depositions to impeach the witness. If you want
2 to draw the jury's attention to the inconsistencies, you
3 will be able to do that. If you want to rely on
4 additional parts of the deposition, you certainly may do
5 that. But I believe that, again, Mr. Singer is entitled
6 to use the depositions in this way.

7 MR. ACKER: As long as he's accurate about
8 characterizing them. He stands up and says, "you never
9 made --"

10 MR. SINGER. I can --

11 MR. ACKER: Let me just finish. "You never
12 made these. You never testified during your deposition
13 about this."

14 When you know he did. You know he did. It's
15 an improper question.

16 THE COURT: Mr. Acker, I believe he has the
17 right to use the depositions as I have said. I don't
18 believe it's correct to characterize the nature of the
19 testimony and draw -- and, in effect, be testifying as to
20 his inconsistencies. You may point them out, but I don't
21 think you should, in your questions, be testifying,
22 trying to draw undue attention to it. Fair enough?

23 MR. SINGER: Fair enough.

24 THE COURT: Okay.

25 (Proceedings continued in open court.)

1 MR. SINGER: Mr. Calvin, would you play clip
2 15, which is testimony from the May, 2007, deposition,
3 page 115, line 11 to line 22.

4 (Video clip played as follows:)

5 Q. You say in the second paragraph:

6 "Mr. Marriott explained that IBM had paid
7 Novell for a paid-up, irrevocable license through
8 Amendment X and that SCO was threatening to terminate
9 IBM's UNIX/AIX license. Mr. Marriott requested that
10 Novell exercise its rights under Section 4.16(b) of the
11 APA and waive SCO's claims against IBM. He noted that
12 the matter was urgent in view of of SCO's threatened
13 termination date." End quote.

14 Do you see that language?

15 A. I do.

16 (End of video clip.)

17 Q. Did you give that testimony?

18 A. Yes.

19 Q. Would you take a look at SCO Exhibit 530.

20 MR. ACKER: Could we get a copy?

21 Q. BY MR. SINGER: Mr. LaSala, is Exhibit 530 a
22 document which you created in connection with your
23 deposition in a corporate capacity in May, 2007?

24 A. Yes, it is.

25 Q. And does this document summarize testimony --

1 summarize conversations that you had with Mr. Marriott,
2 of IBM, and Mr. Rosenberg, of IBM, in June of 2003?

3 A. Yes, it does.

4 Q. And, am I correct that, in June, 2003, you had
5 a phone conversation where you participated on behalf of
6 Novell, together with Mr. Jacobs, correct?

7 A. Yes.

8 Q. Mr. Marriott, who is an outside lawyer for IBM,
9 participated, correct?

10 A. Yes.

11 Q. And, at the same time, a Mr. Rosenberg, who is
12 an in-house lawyer for IBM, participated, correct?

13 A. Yes.

14 Q. And, in that conversation, am I correct that
15 the IBM lawyers specifically requested that Novell take
16 action, under its agreement, to waive SCO's claims
17 against IBM?

18 A. Yes. SCO's claims against IBM.

19 Q. And, at that time, the particular -- and,
20 at that time, Mr. Marriott noted that the matter was
21 urgent in view of SCO's threatened termination date; is
22 that correct?

23 A. Yes, it is.

24 Q. The threatened termination date was the date
25 that SCO had given IBM that, if this issue wasn't

1 resolved, they were going to pull the UNIX license and
2 say that it had been terminated, correct?

3 A. That's my understanding.

4 Q. And you wrote a letter, then, on June 9, 2003,
5 specifically telling SCO not to do that, right?

6 A. Not to do what?

7 Q. Not to terminate IBM's AIX -- IBM's UNIX
8 license?

9 A. Yes. I wrote that letter, and not to put too
10 fine a point on it, that letter related to termination.
11 The request that we're talking about relates to a waiver
12 of SCO's claims. So, that was one of the claims. But
13 this letter is -- this note suggests there was a broader
14 request than the one that was ultimately granted.

15 Q. Well, in fact, what was requested by IBM was
16 that you waive SCO's ability to terminate that license,
17 which IBM, in SCO's view, had breached, correct?

18 A. I'm not trying to be difficult, but I really
19 understood the request to be broader than that, and I
20 think, if you read the notes regarding Mr. Jacob's
21 response, it --

22 Q. I'm not asking you about Mr. Jacob's responses,
23 Mr. LaSala.

24 A. Okay.

25 MR. ACKER: Your Honor, Mr. LaSala should be

1 allowed to answer Mr. Singer's question.

2 MR. SINGER: He will have redirect. He can
3 elicit other things he wants in response.

4 THE COURT: That's correct, Mr. LaSala. In
5 effect, what I'm saying is, please answer the questions
6 as directly as possible that Mr. Singer may ask you. If
7 there is additional information that you think is
8 relevant, Mr. Acker will be able to ask you questions on
9 redirect to bring those out.

10 THE WITNESS: Understood.

11 Q. BY MR. SINGER: Mr. LaSala, in fact, IBM asked
12 you both to waive all of SCO's claims, right?

13 A. I understood them to be asking us to waive all
14 of SCO's claims.

15 Q. And you did that, correct? You tried to waive
16 every claim that you had a right to waive or you thought
17 you had a right to waive?

18 A. I'm not sure that's the case.

19 Q. Well, you waived -- you wrote a letter
20 purporting to waive the claims under the contract
21 agreement between SCO -- between IBM and AT&T, which SCO
22 was seeking to exercise rights to, correct?

23 A. We did write a letter directing SCO to waive
24 the breach of contract claims in connection with SCO's
25 allegation that IBM breached the confidentiality

1 provision.

2 Q. And Mr. Marriott was also asking you to take
3 urgent action with respect to the termination that SCO
4 was seeking to take, the termination action with respect
5 to their license, correct?

6 A. He said the matter was urgent. He said the
7 matter was urgent.

8 Q. And the matter we're talking about is the
9 termination of the UNIX license that IBM had, right?

10 A. Yes.

11 Q. And, after Mr. Marriott made that request,
12 that's exactly what you did. You then directed SCO to
13 waive those rights to terminate that license, correct?

14 A. We directed SCO to waive the termination of the
15 IBM license. We did.

16 Q. Now let's talk about the issue of Novell's
17 interest that you talked about with respect to having a
18 \$10 million royalty interest. There was a buyout of all
19 the royalties that IBM had to pay Novell that was done in
20 1996, correct?

21 A. That's my understanding, yes.

22 Q. So there weren't any current royalties between
23 1996 and 2003 that were being paid by IBM on that
24 license?

25 A. They weren't being paid currently. All of

1 those royalty obligations were paid up in full. We were
2 making reference to the earlier statement.

3 Q. Now, you understood that SCO was pursuing a
4 court suit to determine that IBM had breached its rights
5 under its contract by disclosing code that shouldn't have
6 been disclosed, correct?

7 A. Yes.

8 Q. And you sought to shortcut that process so,
9 instead of the Court deciding who was right, IBM or SCO,
10 Novell was going to just move in and waive those rights
11 so there wouldn't need to be a court dispute on that,
12 right?

13 A. No.

14 Q. Well, what is the purpose of the waiver, other
15 than to stop SCO from asserting those rights in court?

16 A. I think you said we were seeking to shortcut
17 the court process, and that was not our intention. I
18 wasn't -- we weren't seeking to shortcut the court
19 process.

20 Q. Well, what term would you put on waiving a
21 party's rights to bring a legal claim in court, other
22 than shortcutting that process?

23 A. We were looking out for our interests. As I
24 said, we had \$10 million at stake, and we wanted to make
25 sure our interests in those were protected.

1 Q. Let's talk about the \$10 million. That's money
2 that was paid in 1996, correct?

3 A. I believe that's right, yes.

4 Q. Let's assume, if the SCO lawsuit had proceeded
5 on without any waiver and SCO was right, that IBM
6 breached the agreement, IBM wouldn't be able to demand
7 back its \$10 million from you, would they?

8 A. Well, I don't know whether they would have
9 succeeded in doing so, but we had a concern that they
10 might try to do so.

11 Q. Well, if they breached the agreement, they
12 wouldn't be able to successfully get that \$10 million
13 back because they would have been in the wrong. They
14 would have breached. Correct?

15 A. I don't know.

16 Q. You don't know that?

17 A. Not for certain, no.

18 Q. And, if it turns out in court that IBM was
19 right, and SCO was wrong, well then IBM wouldn't have any
20 right then, either, to ask for the \$10 million back from
21 Novell because they wouldn't have had any right under any
22 agreement to do so, correct?

23 A. Well, if IBM had prevailed in that litigation
24 that you're talking about, I imagine they would not have
25 come and asked us for the \$10 million. That's correct.

1 Q. And, in fact, at no point did IBM actually ask
2 you for \$10 million back, correct?

3 A. Not that I'm aware of.

4 Q. In fact, what happened in November of 2003 is
5 IBM paid Novell \$50 million to facilitate the purchase of
6 a Linux company, right?

7 A. No.

8 Q. No? The \$50 million wasn't invested in Novell
9 for the purchase of SUSE Linux?

10 A. I'm sorry. You said IBM paid Novell \$50
11 million I think is what you said. And my answer to that
12 was, no, Novell did not pay \$50 million.

13 Q. They transferred the money to Novell, \$50
14 million, as an investment in Novell for the purpose of
15 purchasing SUSE Linux, correct?

16 A. I'm trying to be precise here. It was not
17 for the purpose. It was not so Novell could purchase
18 SUSE Linux. And Novell -- excuse me -- IBM did make an
19 investment of \$50 million in Novell. That is true.

20 Q. With respect to the other waivers that Novell
21 directed SCO to make, you testified earlier about one
22 regarding SGI, Silicon Graphics. Do you recall that?

23 A. Yes.

24 Q. Are you aware, Mr. LaSala, that Silicon
25 Graphics issued a public statement that they made a

1 mistake and put UNIX code in Linux, and then they removed
2 that code. Are you aware of that?

3 A. Yes.

4 Q. Now, with respect to the IBM code, you agree
5 that you waived rights. You caused Novell to waive SCO's
6 rights with respect both to IBM and a company called
7 Sequent that IBM then owned, correct?

8 A. Yes. That second letter came a bit later.

9 Q. And you talked about this being irrevocable
10 rights. Are you familiar with an agreement called
11 Amendment X that was entered into between the Santa Cruz
12 Operation and IBM?

13 A. Yes.

14 Q. I'd like to show you Exhibit 165, which is in
15 evidence, I believe, already, as Novell Exhibit 08.

16 MR. ACKER: Do you have a copy?

17 MR. SINGER: I'm sure this was premarked. It's
18 your Exhibit 08, and it's SCO Exhibit 165.

19 Q. BY MR. SINGER: Do you see this in front of
20 you, Mr. LaSala?

21 A. Yes, I do.

22 Q. And I would move the admission of SCO Exhibit
23 165 so this copy is before the Court.

24 MR. ACKER: No objection, Your Honor.

25 THE COURT: It will be admitted.

1 (SCO Exhibit 165 received in evidence.)

2 Q. BY MR. SINGER: Do you recognize this to be

3 what we were referring as Amendment X, an amendment

4 entered into between IBM and Santa Cruz Operation; is

5 that correct?

6 A. Yes.

7 Q. And Novell was a party to that agreement,

8 correct?

9 A. Yes.

10 Q. This was part of resolving a dispute that came

11 up in 1996, right?

12 A. That's my understanding.

13 Q. And, if you turn to page 2 of the agreement,

14 -- in fact, why don't we start on page 1, with the "No

15 additional royalties."

16 Mr. Calvin, if you can blowup the Amendment

17 Number X, paragraph 1.

18 And here you see the reference that upon

19 payment to SCO of the consideration in the section

20 entitled Consideration, IBM will have the irrevocable,

21 fully paid-up, perpetual right to exercise all of its

22 rights under the related agreements, beginning January 1,

23 1996, with no additional royalty payment.

24 And it says:

25 "However, if IBM requests delivery of

1 additional copies of source code of the --" let's turn
2 now to the next page -- "of the software product, IBM
3 will pay certain fees listed on this schedule."

4 And I'd like to direct your attention to the
5 next statement:

6 "Notwithstanding the above, the irrevocable
7 nature of the above rights will in no way be construed to
8 limit Novell's or SCO's rights to enjoin or otherwise
9 prohibit IBM from violating any and all of Novell's or
10 SCO's rights under this Amendment X to related agreements
11 or under general patent, copyright or trademark law."

12 Do you see that?

13 A. I do.

14 Q. Were you aware of this when you sought to waive
15 SCO's rights to proceed against IBM under contract
16 claims?

17 A. Yes.

18 Q. I'd like to go back now to something you
19 testified to near the start of your direct examination,
20 your discussions with Mr. McBride regarding copyright
21 ownership.

22 Now, is it your testimony that Mr. McBride
23 specifically said, in your presence, that he wanted
24 Novell to transfer copyrights to SCO?

25 A. I don't recall that he used the word

1 "transfer."

2 Q. He was seeking a clarification, was he not,
3 that those rights already existed with SCO, correct?

4 A. That was not my understanding of what he was
5 asking.

6 Q. Well, in fact, it's true you don't recall the
7 phrasing that Mr. McBride used?

8 A. Not the precise phrasing.

9 Q. And you are -- you're not aware of Mr. McBride
10 having had a copy of Amendment Number 2 at the time of
11 those conversations, are you?

12 A. I don't know whether he did or he did not.

13 Q. But you are aware that there was a document
14 that was forwarded by SCO to Novell which sought to
15 clarify these issues. Were you aware of that?

16 A. I'm sorry. I'm not sure what you are referring
17 to.

18 Q. I'd like to show you the last page of SCO
19 Exhibit 615. Do you recognize this to be a draft
20 document provided by SCO to Novell?

21 A. I've not seen this document until now.

22 Q. You have never seen this document before?

23 A. I don't recall ever having seen this
24 document.

25 MR. SINGER: We would move the admission of the

1 last page of Exhibit 615.

2 MR. ACKER: I have no objection, Your Honor, as
3 long as it's just the last page.

4 MR. SINGER: The last page.

5 MR. ACKER: Not the declaration in front.

6 THE COURT: All right. The last page only?

7 MR. SINGER: Yes.

8 THE COURT: Of exhibit 615 will be admitted.
9 (The last page of SCO Exhibit 615 received in evidence.)

10 Q. BY MR. SINGER: This was a document sent
11 for the purpose of clarifying -- well, you have never
12 seen this; is that right?

13 A. That's my recollection is that I've not seen
14 this.

15 Q. Now, there were discussions in late 2002
16 between SCO and Novell, where SCO indicated its interest
17 in licensing UNIX technology for use in Linux; is that
18 correct?

19 A. That's my understanding.

20 Q. At any time between those conversations in late
21 2002 and June, 2003, did you, as general counsel, ever
22 directly tell SCO that it could not engage in SCOSource
23 licensing?

24 A. No. I don't believe I did.

25 Q. Did you ever direct others to tell SCO that it

1 couldn't engage in SCOSource licensing?

2 A. No.

3 Q. And, in fact, there were public announcements
4 in the early part of 2003 which announced that SCO
5 planned to do that, to engage in that licensing, correct?

6 A. Yes.

7 Q. But, instead of telling SCO that, in your view,
8 they didn't have the rights to do that, you went public
9 on May 28, 2003, with a press release, right?

10 A. I'm not sure it was instead of, but we did go
11 public with the press release on May 28.

12 Q. Now let's talk about that press release and the
13 events surrounding that. Now, you joined Novell in 2002
14 as general counsel, correct?

15 A. 2001.

16 Q. 2001. You weren't involved in the negotiation
17 of the transaction by which the UNIX business was sold to
18 Santa Cruz, correct?

19 A. That's correct.

20 Q. And you had no involvement in the Asset
21 Purchase Agreement and its negotiation, correct?

22 A. Correct.

23 Q. And you never spoke with any of the negotiators
24 of the deal about these issues, right?

25 A. Me, personally?

1 Q. Yes.

2 A. I did not.

3 Q. So, you were, however, an individual who
4 approved the May 28 press release before it was issued,
5 right?

6 A. Yes.

7 Q. You issued a press release which stated that
8 Novell, not SCO, owned the UNIX copyrights, correct?

9 A. Yes.

10 Q. And you testified that you were aware of
11 Amendment Number 2 in an unsigned fashion before you sent
12 that press release out, correct?

13 A. Yes.

14 Q. And, in fact, I think what you testified to --
15 and you tell me if I'm wrong -- is that you turned the
16 company upside down trying to find whether there was a
17 signed version of Amendment Number 2. Do you recall
18 that?

19 MR. ACKER: Objection. That misstates his
20 testimony.

21 Q. BY MR. SINGER: Isn't that what you said, sir,
22 you turned the company upside down trying to find it?

23 A. I asked Mr. Lundberg to do that.

24 Q. And the reason you asked Mr. Lundberg, who is
25 counsel for -- another lawyer for Novell to do that is

1 that you understood that Amendment Number 2 was very
2 important because it would clarify the issue as to who
3 owned the UNIX copyrights, right?

4 A. If amendment -- no. That's not correct.

5 Q. So you just asked Mr. Lundberg to turn the
6 company upside down for a document that didn't matter.
7 Is that your testimony?

8 A. No. That's not my testimony.

9 Q. Now, you had outside counsel involved in the
10 Asset Purchase Agreement, correct, the Wilson, Sonsini
11 firm? Are you familiar with --

12 A. I'm not familiar --

13 MR. ACKER: Your Honor, objection. There is no
14 foundation. It's going to call for speculation. He
15 wasn't around at the time of the Asset Purchase
16 Agreement.

17 MR. SINGER: I'll reframe the question.

18 Q. BY MR. SINGER: Were you aware, Mr. LaSala,
19 that there was outside counsel representing Novell at the
20 time of the Asset Purchase Agreement?

21 A. Yes.

22 Q. Did you ask that outside counsel whether they
23 had a copy of the signed version of Amendment 2 before
24 you went public with your May 28 press release?

25 A. Did I personally do that?

1 Q. Did either you or did you ask anyone else to do
2 that?

3 A. I did not do that.

4 Q. Did you ask --

5 A. And I really don't recall whether I asked
6 anyone who worked for me to reach out to Wilson, Sonsini
7 or anyone who worked on that agreement to see if a
8 copy of -- an executed copy of Amendment Number 2 was
9 available.

10 Q. Wouldn't that have been a very logical thing to
11 do if you were trying to find out whether or not
12 Amendment Number 2 had been signed before going public
13 with the press release?

14 A. Not illogical.

15 Q. Now, it turned out Amendment Number 2 was
16 present in Novell's files, correct?

17 A. That's what I was told, yes.

18 Q. And it wasn't off-site in some storage, was it?
19 It was in one of the executive's files, correct?

20 A. I didn't understand it to be in an executive's
21 files.

22 Q. Well, where do you understand the document was
23 found?

24 A. My recollection is that it was found in the tax
25 department.

1 Q. Now, the tax department is a department of
2 Novell. It's not like in some warehouse somewhere,
3 correct?

4 A. Yes. But -- and I don't know the answer to
5 this. It could have been in off-site, but it could have
6 been in the building. I just don't know.

7 Q. Now, you, never the less, went ahead with the
8 May 28 press release before having determined whether or
9 not Amendment Number 2 had been signed, correct?

10 A. Yes.

11 Q. And there wasn't any urgency that you had to
12 come out on May 28. You could have kept looking for that
13 signed version of Amendment Number 2, right?

14 A. Yes. We could have. Yes.

15 Q. But it's your view that it's just a coincidence
16 that May 28 was also the day that SCO announced its
17 earnings?

18 A. There was no connection between the release of
19 the letter on May 28 and SCO's earnings release date.

20 Q. Now let's look at the June 6 press release,
21 which is SCO Exhibit 97. And you recognize that, in this
22 press release, there is the statement that, to Novell's
23 knowledge, this amendment is not present in Novell's
24 files. It turned out it was, correct?

25 A. Yes.

1 Q. And you understand that an amendment to
2 language is very important, that it replaces language
3 that exists in the agreement before it, correct?

4 A. It has the potential to replace it, or it could
5 be additive to it.

6 Q. Well, in this case, you had seen an unsigned
7 copy of Amendment Number 2, correct?

8 A. I had seen an unsigned copy of Amendment Number
9 2.

10 Q. And did you understand that, if this had been
11 signed, then the language replaced the exclusion of
12 copyrights that you had been looking at in the Asset
13 Purchase Agreement?

14 A. I probably didn't give it that much attention,
15 to be honest were you, the unsigned copy.

16 Q. On June 6, the press release states that the
17 amendment appears to support SCO's claim that ownership
18 of certain copyrights for UNIX did transfer to SCO in
19 1996, right?

20 A. Yes.

21 Q. And your approval indicated that you believed
22 that this was a true and correct statement?

23 A. Yes.

24 Q. And, in fact, even now you recognize that SCO
25 can get certain copyrights under Amendment 2, that it

1 doesn't vest ownership of copyrights with Novell; is that
2 correct?

3 A. I would agree with -- I think I would agree
4 with the first part of your statement but not the second
5 part.

6 Q. And, is it also true that you have no view,
7 yourself, as to whether the UNIX copyrights are in fact
8 required for SCO to conduct its business with respect to
9 the UNIX and UnixWare technologies it purchased?

10 A. I am not aware that SCO has a need for the
11 copyrights to conduct the business that it purchased.

12 Q. Well, when you were asked that question at your
13 deposition -- and this is page 45 --

14 MR. ACKER: Which deposition? February 8,
15 2000 --

16 MR. SINGER: February 8, 2007, page 45, line 13
17 to line 17.

18 MR. ACKER: Let me have a sec, please. I'm
19 sorry. Okay.

20 Q. BY MR. SINGER: Do you recall giving the
21 following testimony?

22 Which is clip 3, Mr. Calvin.

23 (Video clip played as follows:)

24 Q. Do you have a view, as you sit here today, as
25 to whether SCO needed any copyrights to exercise its

1 rights with respect to the acquisition of UNIX and
2 UnixWare technologies?

3 A. I don't have a view.

4 (End of video clip.)

5 Q. BY MR. SINGER: That was your testimony in
6 February, 2007, correct?

7 A. Yes.

8 Q. Now, you were also familiar with the license
9 back provisions of the Asset Purchase Agreement, even
10 before you saw Amendment Number 2, right?

11 A. Yes.

12 Q. And, in fact, Novell wouldn't need a license
13 back of existing technology if it had kept the
14 copyrights, correct?

15 A. I don't believe that's correct.

16 Q. Do you believe that Novell would need a license
17 back to technology that it wasn't giving anyone?

18 A. Well, I didn't say that, but there were other
19 rights conveyed to SCO in the Asset Purchase Agreement,
20 and there were -- there was additional code to be
21 developed by SCO as a result of the Asset Purchase
22 Agreement, to which Novell was going to have a license.

23 Q. But, in addition to that future code, the
24 technology licensing agreement also provided a license
25 back to the existing technology and code that was being

1 sold at the time of the APA, right?

2 A. To the existing technology? Everything that
3 was being transferred to SCO, this is my understanding,
4 was the subject of a license back from SCO to Novell.

5 Q. And you agree that this technology licensing
6 agreement can be read as inconsistent with Novell
7 retaining the copyrights?

8 A. Well, that's a possible reading of it.

9 MR. SINGER: I'd like to play clip 8 at page 95
10 of his February 8, 2007 deposition, line 10 to 16

11 MR. ACKER: Wait, if I could just --

12 MR. SINGER: Certainly.

13 MR. ACKER: February?

14 MR. SINGER: Yes. This is page 95, line 10 to
15 16.

16 MR. ACKER: Your Honor, I'm just going to
17 object. It's not inconsistent. They can keep playing
18 clips, but they are not inconsistent.

19 MR. SINGER: That's for the jury --

20 THE COURT: That's for the jury to determine.
21 I will let the jury decide that, Mr. Acker.

22 MR. SINGER: Mr. Calvin, will you play clip 8.

23 (Video clip played as follows:)

24 Q. Do you think it would be reasonable for
25 somebody to read the technology licensing agreement as

1 inconsistent with the reading of the APA, that the UNIX
2 copyrights were retained by Novell?

3 A. Yes.

4 (End of video clip.)

5 Q. Now let's talk about your June 24 letter, which
6 is SCO Exhibit 103. I'm sorry. It's your June 26
7 letter.

8 Mr. Calvin, could you expand the second
9 paragraph.

10 Q. BY MR. SINGER: This is part of your letter to
11 Mr. McBride on June 26, 2003, correct?

12 A. Yes, it is.

13 Q. And what you stated in this paragraph was:

14 "We acknowledge, as noted in our June 6 public
15 statement, that Amendment Number 2 to the Asset Purchase
16 Agreement appears to support a claim that Santa Cruz
17 Operation had the right to acquire some copyrights from
18 Novell."

19 That's what you said in your June 26 letter,
20 correct?

21 A. Yes.

22 Q. Now, in fact, that's not what the June 6 public
23 statement says, is it?

24 A. I think it is.

25 Q. Well, let's take a look at it.

1 A. Okay.

2 Q. If we can go back to the June 6 press release,
3 which is Exhibit 97. In the public statement, isn't it
4 true you didn't say that Amendment Number 2 supports a
5 claim that Santa Cruz had the right to acquire some
6 copyrights from Novell, you stated that the amendment
7 appears to support SCO's claim that ownership of certain
8 copyrights for UNIX did transfer to SCO in 1996.

9 Correct?

10 A. That's correct.

11 Q. The June 6 statement talks about what had
12 transferred in 1996. You characterized that, in June 26,
13 2003, as being a statement about a claim to acquire some
14 copyrights from Novell, right?

15 A. To your point, the statements are different.

16 Q. Now, you also stated, in your June 26 letter,
17 that upon closer scrutiny, however, Amendment Number 2
18 raises as many questions about copyright transfers as it
19 answers.

20 You put that into the letter, correct?

21 A. Yes.

22 Q. And am I correct that, in writing that, you
23 didn't have anything specific in mind with respect to
24 what questions were raised; is that right?

25 A. No. I probably did have things specific in

1 mind when that was written.

2 MR. SINGER: Okay. Let's take a look at your
3 deposition on February 8, 2007, at page 53, line 24, to
4 54, 09; 55, 04 --

5 MR. ACKER: I'm sorry. Page 53?

6 MR. SINGER: Yes. 53, 24 to 54, 09. 55, 04 to
7 55, 05.

8 MR. ACKER: 53, line 24?

9 MR. SINGER: Yes, to 54, 09.

10 MR. ACKER: Yes.

11 MR. SINGER: Then 55, 04, to 55, 05.

12 MR. ACKER: Okay.

13 MR. SINGER: Mr. Calvin, would you play clip
14 4.

15 (Video clip played as follows:)

16 Q. What did you mean by saying that Amendment
17 Number 2 raises as many questions about copyright
18 transfers as it answers?

19 A. Well, it was made in the context of comments
20 that Mr. McBride made about the effect of Amendment
21 Number 2 on the question of copyright ownership. And it
22 was intended to point out to the reader that it wasn't as
23 clear as he was suggesting -- to the addressee, that it
24 wasn't as clear as he's suggesting.

25 Q. And do you have anything specific in mind?

1 A. No, I don't.

2 MR. ACKER: Whoa. Whoa. Your Honor, we need
3 to approach.

4 (Discussion among the Court and counsel out of the
5 hearing of the jury.)

6 MR. ACKER: He's cut out a whole clip. The
7 next section was.

8 "And were there questions that you had in
9 mind as of the time of this letter that
10 Amendment Number 2 raised but did not answer."

11 "Yes. I'm sure -- at the time, I'm sure I
12 had in mind questions that had been raised that
13 the amendment didn't answer."

14 He's cut that out.

15 MR. SINGER: I don't believe it requires --

16 MR. ACKER: It would have required, for
17 purposes of completeness, that it be included.

18 MR. SINGER: I raised this with you before --

19 MR. ACKER: You made it as one single clip.

20 That's a misrepresentation. And the next question and
21 answer made clear that, at the time of his deposition, he
22 had questions in mind. And you just left that out.

23 MR. SINGER: "Did you have anything specific in
24 mind? "

25 "No, I didn't."

1 "Were there questions you had in mind?"
2 "Yes. I'm sure -- at the time, I'm sure I had
3 in mind questions that had been raised but weren't
4 answered."
5 "As you sit here, do you know what those
6 questions are?"
7 "Yes. I'm having a difficult time doing that,
8 but it, I believe --"
9 MR. ACKER: But you --
10 MR. SINGER: Let me finish.
11 "I'm having a difficult time doing that."
12 I asked him:
13 "Do you have anything specific in mind?"
14 "No, I don't."
15 I think that's fair use of the examination.
16 MR. ACKER: But you cut out the middle where he
17 said he had questions in mind at the time. You can't do
18 that
19 MR. JACOBS: Your Honor --
20 THE COURT: Mr. Jacobs?
21 MR. ACKER: But you played it as a clip as
22 though it was one continuous question and answer. You
23 left out the middle where he was asked and said he had
24 questions in mind at the time. That's clearly improper.
25 You can't do that.

1 MR. SINGER: I don't think there is anything
2 improper in the use of this. I identified the specific
3 lines I was reading. He says that, about this press
4 release, my question to him before I used this
5 impeachment.

6 "Can you identify specifically what those
7 questions are?"

8 He said: "I'm sure I could."

9 And then I asked him: "Do you have anything
10 specific in mind?" And he wasn't identify anything
11 specifically at the time of his deposition.

12 THE COURT: All right. All right.

13 MR. ACKER: It's not --

14 THE COURT: Be quiet. If you want to right now
15 stand up and point out that you think there was something
16 that was left out of the clip, you may read it to the
17 witness, all right?

18 MR. ACKER: Yes.

19 (Proceedings continued in open court.)

20 MR. ACKER: Your Honor, if I might, I want to
21 read -- to have Mr. LaSala confirm that there were
22 portions of his testimony that was left out from the
23 clips that SKO's counsel played for him. And I'm going
24 to give him a copy of his deposition.

25 MR. SINGER: Your Honor, I think what you had

1 asked is that the section be read.

2 THE COURT: Well, I think we need to confirm
3 whether or not it did, in fact, happen, Mr. Singer. And
4 I'll let Mr. LaSala look at his own testimony.

5 MR. ACKER: Mr. LaSala, will you look at page
6 54, please.

7 THE WITNESS: Okay.

8 MR. ACKER: And starting at the bottom of page
9 53, do you have that, line 24?

10 THE WITNESS: Yes.

11 MR. ACKER: So you were asked the following
12 questions and gave the following answers in the
13 deposition:

14 "What did you mean in your statement that
15 SCO's press release raised as many questions as
16 it answered?"

17 "Well, it was made in the context of
18 comments that Mr. McBride made about the effect
19 of Amendment Number 2 and the question of
20 copyright ownership. And it was intended to
21 point out to the reader that it wasn't as clear
22 as he was suggesting -- to the addressee, that
23 it wasn't as clear as he was suggesting."

24 And then you were asked the following question
25 and gave the following answer that we haven't heard:

1 "And were there questions that you had in
2 mind at the time of this letter that Amendment
3 Number 2 raised but did not answer?"

4 "Yes. I'm sure -- at the time, I'm sure I
5 had in mind questions that had been raised that
6 weren't answered."

7 MR. ACKER: Did you give that testimony under
8 oath?

9 THE WITNESS: Yes.

10 MR. ACKER: That's all I have, Your Honor.

11 Q. BY MR. SINGER: And were you then asked:

12 "And, as you sit here, can you recall what
13 those questions might have been?"

14 A. That's what the transcript says.

15 Q. Yes. And you said:

16 "I'm having a difficult time doing that, but
17 I believe it relates to our interpretation of
18 Amendment Number 2, and the fact that there had
19 been previous statements made by us about
20 Amendment Number 2 and that there would be
21 subsequent statements made by us with respect to
22 its meaning, and, you know, things that hadn't
23 yet been articulated were being articulated or
24 were going to be articulated at some point in
25 the future."

1 And then you were asked:

2 "And do you have anything specific in mind?"

3 And your answer was:

4 "No, I don't."

5 That's your testimony. Correct?

6 A. That's correct.

7 Q. Now, turning back to the June 26 release, after
8 that you proceeded, on August 4, to write another letter
9 to SCO, this one the letter that's identified as SCO
10 Exhibit 105, correct?

11 A. Yes, sir.

12 Q. And, if we go down to the bottom of that
13 letter, it says:

14 "Unless and until SCO is able to establish that
15 some particular copyright right is required for SCO to
16 exercise its rights under the APA, SCO's claim to
17 ownership of any rights in UNIX technologies must be
18 rejected and ownership of such rights, instead, remains
19 with Novell."

20 You wrote that, correct?

21 A. Yes.

22 Q. So, did you contemplate some process where SCO
23 would have to go to Novell and say: "Novell, we actually
24 need this copyright."

25 And then Novell would decide whether or not SCO

1 could have it?

2 A. Essentially, yes.

3 Q. Now, if SCO doesn't own the copyrights, they'd
4 have to have a license in order to distribute UnixWare,
5 correct?

6 A. Yes.

7 Q. And they would have to have a license in order
8 to develop new code, correct?

9 A. Yes.

10 Q. And you agree, there is no explicit license in
11 the Asset Purchase Agreement to Santa Cruz to make use of
12 the UNIX copyrights, right?

13 A. I think that's correct.

14 Q. So, what you're talking about is an unwritten,
15 implied license. That's what, in your view, Santa Cruz
16 has and what SCO today has, an unwritten, implied
17 license, right?

18 A. Yes.

19 Q. So, the entire basis for SCO to run this
20 business would be an unwritten, implied license to use
21 UNIX and UnixWare copyrights, correct?

22 A. Yes. An implied license.

23 Q. Now, do you also know that, to bring lawsuits
24 to defend your intellectual property, to defend your
25 copyrights, you must either be a copyright owner or an

1 exclusive licensee, correct?

2 A. I wouldn't care to comment on that.

3 Q. Well, you're an attorney who worked for
4 technology companies, works for a technology -- well, a
5 communications company right now, so you're familiar with
6 copyright law, are you not?

7 A. Somewhat. Not well enough to speak with
8 authority on it.

9 Q. So, are you saying, in August of 2003, when you
10 wrote this letter, you didn't know whether or not, in
11 order to be able to protect your copyrights, in order to
12 bring a copyright suit against someone you thought was
13 infringing your copyrights, you had to either own the
14 copyrights or be an exclusive licensee? You didn't know
15 that?

16 A. You know, I'm not saying I didn't know it. I
17 suspect the position is correct. But those were not
18 thoughts that were going through my mind at the time.

19 Q. Because you weren't thinking about what rights
20 SCO might need to protect as part of rights, of why it
21 would need the copyrights? That wasn't a concern to you?

22 A. I wasn't really thinking about or contemplating
23 the rights that SCO might need. I was contemplating what
24 the agreement said.

25 Q. But don't the agreements speak to what

1 copyrights SCO requires in order to exercise its rights
2 under the agreement?

3 A. They do.

4 Q. And is one of the rights SCO has, the rights to
5 bring claims to protect its business?

6 A. SCO has the rights to bring claims to protect
7 its business, yes.

8 Q. And if it doesn't own the copyrights or have an
9 exclusive license, it can't bring a copyright
10 infringement claim, correct?

11 A. I don't know.

12 Q. You didn't know -- when you wrote this letter,
13 you didn't know, in August of 2003?

14 A. Right.

15 Q. Do you understand the difference between an
16 exclusive license, in that an exclusive license can't be
17 an implied license, it has to be something in writing?
18 Do you know that?

19 A. Yes. I know that. An exclusive license or an
20 express license?

21 Q. Well, you have to have -- in order for an
22 exclusive license, it has to be in writing, correct?

23 A. Yes.

24 Q. And we've already covered the fact that what
25 you thought Santa Cruz, SCO, has is not something in

1 writing, some implied license, right?

2 A. Yes.

3 Q. And so, you have no basis to say, then, if you
4 didn't know that you needed to either be a copyright
5 owner or an exclusive licensee, with a written exclusive
6 license, that SCO didn't need the copyrights to enforce
7 its rights back in August of 2003, when you wrote this
8 letter, did you?

9 A. Could you say that again. I apologize.

10 Q. You didn't have a basis to say that the
11 copyrights weren't required for SCO to exercise its
12 rights if you didn't know, back in August of 2003, that
13 SCO couldn't bring copyright infringement suits to
14 protect its rights without either being an owner or an
15 exclusive licensee, right?

16 A. What I knew in 2003 was that we -- at this
17 point in 2003, that we had an Amendment Number 2 that
18 arguably granted to SCO certain copyrights, those that it
19 would need to exercise the rights that it had acquired
20 under the Asset Purchase Agreement. That was the focus
21 of my thought at the time. And I also knew that SCO had
22 never demonstrated to us that they had that -- that --
23 the need for a copyright to exercise their rights under
24 the APA. That's what was going through my mind at the
25 time.

1 Q. Now, following this, in September and October,
2 you had Novell apply for copyrights; is that correct?

3 A. Yes.

4 Q. And, in fact, those were copyrights to the same
5 UNIX technology that AT&T had copyrighted and which Santa
6 Cruz had the copyright registrations for, correct?

7 A. I believe so, yes.

8 Q. And you told the copyright office that those
9 copyrights were owned by Novell, correct?

10 A. Yes.

11 Q. And, in October and September, you didn't go
12 public with the fact that you had acquired those
13 copyright registrations? At that time, you didn't go
14 public with that, correct?

15 A. Well, it's a public registration, so it's
16 public.

17 Q. But you didn't put out a press release to that
18 effect?

19 A. I don't believe we did.

20 Q. And you didn't put out your August 4 letter
21 in a press release at the time either, did you?

22 A. No.

23 Q. But, in December of 2003, December 22, 2003,
24 you did put out a press release that we've seen, correct?

25 A. Yes.

1 Q. And that press release was one in which you
2 revealed that you did have -- you had applied for
3 copyrights and registered the copyrights earlier that
4 year, correct?

5 A. That's my recollection of what it said. I
6 don't have it in front of me. Actually, I do have it in
7 front of me. I apologize. Yes. That's what it says.

8 Q. And you didn't go public with those copyright
9 registrations in August, September, October or November.
10 You went public with them on December 22, correct?

11 A. Yes.

12 Q. Were you aware that December 22, 2003, was the
13 date that SCO was announcing its earnings?

14 A. No, I was not.

15 Q. Just as you weren't aware that May 28, 2003,
16 was also a date that SCO was announcing its earnings?

17 A. That's correct.

18 Q. So, both of those were coincidences. The date
19 you went public in May, May 28, was a coincidence to be
20 SCO earnings release, and the date you went public in
21 December, that date was also a coincidence?

22 A. Yes.

23 MR. SINGER: Would you give me one moment. I
24 have nothing further.

25 REDIRECT EXAMINATION

1 BY MR. ACKER:

2 Q. Mr. LaSala, let me back up to the part where
3 Mr. Singer finished off on December 22. When did you
4 first learn that SCO had a press release on December 22,
5 2003?

6 A. An earnings release or a press release?

7 Q. When did you learn that SCO had an earnings
8 release on the 22nd of December, 2003?

9 A. Yesterday.

10 Q. Now, leading up to that December 22 release by
11 Novell, you testified on direct that part of the
12 motivation is that because Mr. McBride was in the
13 marketplace saying that SCO still owned the copyrights.
14 In addition to speaking on behalf of SCO, did you also
15 become aware of statements Mr. McBride made where he
16 seemed to be speaking on behalf of Novell?

17 A. Yes. It was one of the things that concerned
18 us was, in my recollection, in particular, is a comment
19 he made in an interview that had been published on the
20 web somewhere. I think it was in the July, mid-July time
21 frame, where he was not only asserting that SCO owned the
22 copyrights, but he was asserting that he was sure that,
23 if you asked Novell, they would say that they didn't.

24 And that caused us a great deal of concern, as
25 you might imagine.

1 Q. And is that part of the reason that the press
2 release was issued in December of 2003?

3 A. Yes, it was. It had gotten to the point where,
4 again, Mr. McBride was making public statements about
5 SCO's ownership claims, and he had made at least one, and
6 I think others who worked for SCO had made similar
7 claims, that Novell would say that we didn't own them.

8 And so we felt the need to put before the
9 public the arguments that we were making with respect to
10 ownership and the rebuttal that we received from SCO.
11 And that's why we did this on December 22.

12 Q. Is it fair to say that Novell didn't have in
13 your corporate offices a calendar with a big red circle
14 around when SCO's earnings announcements were?

15 A. Not that I'm aware of. No. We certainly would
16 not have had that.

17 Q. Let me show you what Mr. Singer showed you, a
18 SCO exhibit that lists a number of communications that
19 you had or others had at Novell with IBM during the
20 2002/2003, time frame. Do you see that?

21 A. Yes.

22 Q. And Mr. Singer seemed to imply in his
23 questioning of you that somehow you had, during the
24 discovery process in this case, kept from SCO these
25 conversations. Do you recall that series of questions

1 and playing clips from your deposition?

2 A. Yes.

3 Q. That document that actually lists the
4 conversations between folks at Novell and folks at IBM.
5 Was that provided to Mr. Singer during the course of
6 discovery?

7 A. Yes, it was.

8 Q. And was provided to Mr. Normand during the
9 course of discovery?

10 A. It was.

11 Q. So, those statements between IBM and Novell,
12 that was something that these guys have had for years.
13 Would that be fair?

14 A. Yes.

15 Q. Let me show you what we've marked as L-19.
16 And, on that last point, did you ever try and keep secret
17 from the lawyers for SCO, during the course of discovery,
18 these conversations that you have testified about between
19 yourself and representatives of IBM?

20 A. No. Of course not.

21 Q. And what is L-19, sir?

22 A. L-19 is an August 20, 2003, letter to
23 Mr. McBride from me.

24 Q. And, in the letter, are you requesting
25 something of SCO?

1 A. Yes. We're requesting that SCO provide us with
2 the source in binary code due to Novell under the asset
3 purchase agreement pursuant to the technology license
4 agreement that we -- that the parties had executed back
5 in 1995.

6 Q. Okay. And then, so the jury understands, can
7 you explain in simple terms what you understand the
8 technology licensing agreement to be?

9 A. The technology licensing agreement was an
10 agreement between Novell and SCO, at the time the Asset
11 Purchase Agreement was entered into, whereby Novell would
12 get a license to all of the assets that had been
13 transferred to SCO. We would have a license back to
14 those. And Novell would get a license to newly developed
15 code by SCO after it acquired this business.

16 Q. And were the assets to which Novell was
17 obtaining a license, were they limited to assets that
18 were actually transferred during -- in the Asset Purchase
19 Agreement?

20 A. No. They were -- they were -- they were to
21 code that SCO developed subsequent to the Asset Purchase
22 Agreement.

23 Q. But, in your letter, what is it you're
24 requesting?

25 A. We are requesting source and binary code under

1 the Asset -- due to Novell under the Asset Purchase
2 Agreement. And we're -- we make reference to the assets,
3 the definition of assets in the APA, and we make
4 reference to the excluded assets. And we say that the
5 included assets includes all versions of UNIX and
6 UnixWare, including UNIX source code products in UNIX
7 binary product releases.

8 MR. ACKER: Your Honor, I move for the
9 admission of L-19.

10 MR. SINGER: No objection.

11 THE COURT: It will be admitted.

12 (Novell Exhibit L-19 received in evidence.)

13 Q. BY MR. ACKER: And when you were asking for SCO
14 to get back to you the source code, were you asking
15 for the copyrights or simply the source code?

16 A. The source code.

17 Q. So, was it your understanding, in August of
18 2003, that the technology license agreement provided for
19 the license back of assets that had been transferred that
20 did not include the copyrights?

21 A. That is correct.

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

24 MR. SINGER: Your Honor, I have a couple
25 questions on recross.

1 THE COURT: Go ahead.

2 RE CROSS EXAMINATION

3 BY MR. SINGER:

4 Q. If you look at L-19, Mr. LaSala?

5 A. Yes, sir.

6 Q. It's on the screen. The second paragraph. It
7 says:

8 "It follows from the foregoing that Novell is
9 entitled to copies of the source and binary code for the
10 versions of UNIX and UnixWare under SCO's control."

11 That was under SCO's control because SCO had
12 ownership of it, correct?

13 A. No.

14 Q. Would you turn to Exhibit 162, the actual
15 technology licensing agreement that this letter refers
16 to.

17 A. I don't have it. I'm sorry.

18 Q. It's on the screen.

19 A. I beg your pardon.

20 Q. And if we turn to, I think it's the third page
21 that talks about ownership. Have you ever seen this
22 provision which says that, as between Novell and SCO, the
23 ownership of the licensed technology shall reside in SCO?

24 A. I see that.

25 Q. Have you ever seen that before?

1 A. I'm sure I have. I don't recall it at this
2 moment, but I'm sure I have, since I've read this
3 document.

4 Q. And if I recall correctly, your testimony was
5 that you could see how a reasonable person would look at
6 the technology licensing agreement and conclude that
7 Novell did not have ownership of the copyrights, correct?

8 A. I don't think that quite accurately
9 characterizes the testimony.

10 Q. Well, the jury heard your earlier testimony, so
11 we'll go with what they recall.

12 A. Okay.

13 Q. One further area of questioning. You were
14 asked about the consistency of your testimony in your
15 deposition about the contacts with IBM, asking Novell to
16 waive rights. Do you recall that?

17 A. Yes.

18 Q. Now, the document which set forth the
19 conversations you had with Mr. Marriott and Mr. Jacobs
20 and Mr. Rosenberg from IBM, you have that before you?

21 A. I do

22 MR. SINGER: In fact, I'd like to move into
23 evidence that exhibit.

24 MR. ACKER: You already did.

25 MR. SINGER: Okay. If it's in evidence.

1 THE COURT: Which number is it? Remind me.

2 MR. SINGER: It's 530.

3 Q. BY MR. SINGER: This was presented in a
4 deposition where you were a corporate representative in
5 May, 2007, correct?

6 A. That's my recollection.

7 Q. The testimony that I showed you at the
8 beginning of your cross examination --

9 THE COURT: One second. 530 is not in.

10 MR. SINGER: Okay.

11 MR. ACKER: I apologize, Your Honor. I'm
12 fairly sure that Mr. Singer asked for it to be admitted.
13 I didn't object.

14 MR. SINGER: I didn't think I had, but I will
15 now.

16 THE COURT: Okay. He's going asking now. Do
17 you object now?

18 MR. ACKER: No.

19 THE COURT: Okay. It will be admitted.

20 (SCO Exhibit 530 received in evidence.)

21 Q. BY MR. SINGER: The deposition that you
22 prepared this for as a corporate representative and we
23 questioned you about, it was in May of 2007. Do you
24 recall that?

25 A. Yes.

1 Q. However, you had given an earlier deposition in
2 February, 2007, in your individual capacity, correct?

3 A. I did.

4 Q. And the testimony that you were presented with
5 in my cross examination, where you said that there had
6 not been these requests for IBM to waive rights, that was
7 given in your February, 2007, deposition, correct?

8 A. I believe that's correct, subject to your
9 characterization of my testimony, which we have been
10 through already.

11 Q. And, at that time, in February, 2007, neither I
12 nor SCO had the document that's in front of you, SCO
13 Exhibit 530, did we?

14 A. No.

15 MR. SINGER: Okay. Thank you.

16 THE COURT: Counsel, may this witness be
17 excused?

18 MR. ACKER: Can I ask one more question? I
19 promise one.

20 THE COURT: Each attorney gets a third round
21 one time in the entire trial. If you want to take it
22 right now, you may.

23 MR. ACKER: I'll save it, Your Honor.

24 MR. SINGER: We do not perceive a need to
25 recall Mr. LaSala.

1 MR. ACKER: No.

2 THE COURT: He may be excused, then.

3 MR. ACKER: Thank you, Your Honor.

4 THE COURT: That means you can return to
5 Virginia, and you don't have need to worry about being
6 recalled, but, Mr. LaSala, I will instruct you not to
7 discuss your testimony with any other witnesses, in the
8 presence of any other witness, or indicate in any way
9 what your testimony was. Thank you.

10 THE WITNESS: Thank you, Your Honor.

11 THE CLERK: Mr. LaSala, you may want to go out
12 that door.

13 THE COURT: We'll go ahead and break for the
14 afternoon.

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

16 (Jury leaves the courtroom.)

17 THE COURT: Do you have anything, counsel?

18 MR. SINGER: We don't.

19 MR. ACKER: No, Your Honor.

20 THE COURT: Okay. We'll see you at 8:30 in the
21 morning. We do have hearings this afternoon, Counsel.

22 MR. SINGER: Thank you, Your Honor.

23

24 (Whereupon the proceedings were concluded for the day.)

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REPORTER'S CERTIFICATE

STATE OF UTAH)

) ss.

COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I am a Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of the foregoing matter on March 22, 2110, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages numbered 1936 through 1990 constitute a full, true and correct record of the proceedings transcribed.

That I am not of kin to any of the parties and have no interest in the outcome of the matter;

And hereby set my hand and seal this 22nd day of March, 2010.

REBECCA JANKE, CSR, RPR, RMR