

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 24, 2010  
18   Jury Trial

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23  
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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3		Mr. Normand (Cross)	2234
4		Mr. Acker (Redirect)	2248
5		Mr. Normand (Recross)	2250
6		Mr. Acker (Further Redirect)	2251
7	Jack Messman	Mr. Singer (Direct)	2252
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1 EXHIBITS RECEIVED INTO EVIDENCE:

2 Plaintiff's:

3 756 2230

4 755 2244

5 552 2272

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12 Defendant's:

13 V-12 2219

14 U-45 2229

15 H-2 2330

16 U-3 2348

17 V-3 2354

18 D-4 2360

19 Y-3 2362

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1 SALT LAKE CITY, UTAH; WEDNESDAY, MARCH 24, 2010; 8:30 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning.

4 Overnight Novell filed a motion to strike  
5 testimony of damages after June 9th, 2004. The Court will  
6 deny the motion based upon the prior rulings of the Court  
7 and the conclusion of the Court that the defendants are, in  
8 fact, confusing intent and damages. Therefore, it will be  
9 denied.

10 When will Tor Braham be testifying?

11 MR. JACOBS: He will be at the end of the day  
12 today, Your Honor, or first thing tomorrow.

13 THE COURT: Would a solution to this dispute be to  
14 make him available for a deposition today?

15 MR. JACOBS: I think you're asking me if it's  
16 feasible for us to produce him for a deposition today, and  
17 the answer is yes.

18 THE COURT: Mr. Singer.

19 MR. SINGER: I think that under the circumstances  
20 that would probably be the most equitable way to deal with  
21 these issues.

22 THE COURT: Mr. Jacobs, I think that's what we  
23 better do. It is a confusing issue, but I think there is  
24 merit to your argument that a decision by plaintiff not to  
25 depose him was a part of their strategy and they ought not

1 to be rewarded for it. But, on the other hand, I am  
2 conscious of the rather limited privilege exercised by the  
3 Wilson Sonsini law firm representative, and if we can solve  
4 the problem by making him available for a brief deposition,  
5 then I would like to request that that take place.

6 MR. JACOBS: Your Honor, given everything that's  
7 going on, let me urge the briefer side of brief.

8 THE COURT: It would have to be brief. We're  
9 talking really about, in my judgment, one issue, and that  
10 was the question that was posed to Mr. Alter about whether  
11 or not any communication had gone to anyone at Novell other  
12 than Mr. Bradford as to the retaining of the UNIX  
13 copyrights. That was the question that was posed at the  
14 deposition that a privilege was then exercised.

15 I'm not saying that the deposition has to be  
16 confined to that alone, but it seems to me that that is the  
17 focal point of the dispute and that's where the deposition  
18 ought to be begin and ought not to extend much beyond.

19 MR. JACOBS: Let me suggest an hour, Your Honor.  
20 I think that would be plenty to cover the topics.

21 MR. SINGER: Your Honor, may I note that, in  
22 connection with this issue, last night Novell served -- I  
23 don't know the exact amount, these were served in the middle  
24 of the night -- probably somewhere around 30 documents that  
25 previously were withheld on the grounds of privilege. We

1 haven't even had time to properly review those, but we  
2 believe that, of course, is also a proper subject to this  
3 deposition. And we think that it wouldn't certainly take  
4 more than 60 or 90 minutes at the outmost, given that's the  
5 ruling.

6 THE COURT: Novell has asserted from the beginning  
7 and I think they run the risk now of being shown to be not  
8 playing fair, it's not the fact that those documents that  
9 were withheld -- and I was told there were a hundred, at  
10 least the filings would indicate there were a hundred -- are  
11 not relevant. And, you know, if -- well, I would say a  
12 one-hour deposition. All right, counsel?

13 MR. JACOBS: Thank you, Your Honor.

14 MR. SINGER: I understand, Your Honor.

15 MR. JACOBS: Your Honor, just for the record, I'm  
16 holding up the file. It's one red well of documents.

17 THE COURT: That would not appear to be much if it  
18 weren't for the fact that we're only two days, technically,  
19 away from the end of this trial. So they look big in light  
20 of that.

21 Counsel, you both met the deadline, but just  
22 barely. I was hoping you would be 30 seconds late and I  
23 then would have disregarded it, but it didn't happen. The  
24 Court will try to get a revised package to you by tomorrow  
25 morning, and then we'll have a jury instruction conference

1 tomorrow afternoon at three o'clock where you can make your  
2 record if you have opposition to any of the instructions  
3 after we've looked at what you have filed here today. All  
4 right. It may be that -- well, we'll just deal with that at  
5 three o'clock tomorrow.

6 Any problem?

7 MR. JACOBS: No, Your Honor.

8 THE COURT: Is there anything else we need to deal  
9 with then?

10 MR. JACOBS: Briefly, Your Honor. Just to make  
11 sure we're all on the same page on time, we've reached  
12 agreement with SCO that there is four hours and seven  
13 minutes remaining for Novell's presentation of its case and  
14 three hours and 13 minutes for SCO time at the podium.

15 THE COURT: All right. You say those are  
16 stipulated times?

17 MR. NORMAND: We're splitting the difference  
18 between the parties' inexplicable differences of time.

19 THE COURT: What were the extent of the  
20 inexplicable differences?

21 MR. NORMAND: We had us at 35 minutes where Novell  
22 had us at one hour and 15 minutes. To be fair, I think  
23 there may be confusion as to how side-bars were being  
24 counted and whatnot, so we agreed to split the difference.

25 THE COURT: All right. Thank you.



1           Mr. Acker.

2           MR. ACKER: Good morning, Your Honor.

3           With respect to Mr. Messman, the Court will  
4 recall -- and this has to do with time. The Court will  
5 recall that the jury has heard lengthy deposition clips from  
6 Mr. Messman, and we had agreement we would bring him live.  
7 Given the time restraints and the way the evidence has come  
8 in, Novell is not seeking to put Mr. Messman on, simply  
9 producing him because SCO has indicated they want him.

10           However, I do have a transcript of the depo clips  
11 that were played. SCO put on almost 50 minutes of his  
12 testimony, and we countered with 19 minutes. It's our  
13 position that when Mr. Messman testifies today, the areas  
14 that they have inquired in during the deposition should not  
15 be reseeded during the examination of Mr. Messman today.

16           Those areas included his background, time on the  
17 board of Novell, the APA, discussions regarding anyone who  
18 negotiated the APA, Amendment No. 2, Novell's efforts to  
19 locate a signed copy of Amendment No. 2, the May 28th press  
20 release, the reasons for the May 28th press release, the  
21 June 6th, 2003 press release, whether or not Mr. Messman has  
22 spoken with anyone who had participated in the APA, the  
23 August 4th letter after the June 6th press release, the Wall  
24 Street Journal article, as well as Mr. Sontag's request for  
25 clarification of the APA. Those were all issues that were

1 covered in depth in his examination. And when they made the  
2 pitch to the Court early on said in a sense what we're doing  
3 is we're continuing Mr. Messman's direct examination.

4 So given the shortness of time, the amount we need  
5 to cover in the next day and a half, we don't think it's  
6 fair for them to be able to, in our case, continue to put on  
7 evidence that the jury has already heard.

8 THE COURT: Even if it counts on their time?

9 MR. ACKER: Even if it counts on their time, yes,  
10 Your Honor. It's a classic asked and answered, particularly  
11 given the tightness of time.

12 THE COURT: Let me hear from Mr. Singer.

13 MR. SINGER: First of all, we think we are well  
14 incentivized by the time limits, given that this counts on  
15 our time, to be efficient and not unnecessarily cover ground  
16 that's properly treated in the deposition. But this issue  
17 rises because Mr. Messman was not available to be called the  
18 first week of trial when we asked for him. So in light of  
19 that, and I don't propose that we revisit all the arguments  
20 relating to that issue, the decision was that we could play  
21 his deposition at that time. It obviously would have been  
22 unfair to the plaintiffs to have to wait until now before  
23 they heard anything about Mr. Messman.

24 The subjects listed by Mr. Acker cover virtually  
25 every issue in this case and certainly every issue relating

1 to Mr. Messman. I'm entitled to relay issues I'm going to  
2 go to, even if that goes across some of the points that were  
3 raised before. I don't think we should be interrupted by  
4 objections and such saying, well, this question is a  
5 duplicate of a question asked that the jury may have heard  
6 two to three weeks ago. I should be entitled to present a  
7 cohesive direct examination of Mr. Messman as though he was  
8 present here when we asked for him during the first week of  
9 trial.

10 MR. ACKER: That's really the point, Your Honor.  
11 We gave them the option. We said we'll leave your case open  
12 and you can have Mr. Messman, the full examination in our  
13 case. They chose not to do that. They wanted to put on his  
14 direct testimony, at least portions of it in their case.  
15 They made that decision. So I don't think it's fair for  
16 them now to be able to go back and redo what they have  
17 already decided they wanted to do via video when they knew  
18 he was going to be here, particularly given where we are in  
19 the trial.

20 THE COURT: Mr. Acker, I think you accurately  
21 reflected what happened. It's true that they wanted him  
22 earlier. You couldn't produce him. They were given the  
23 option of either waiting and taking all of his testimony  
24 live. They chose to put it on by way of deposition. I  
25 think it would be unfair for me to preclude areas of

1 questioning.

2 I think what I will do is, number one, I agree  
3 with Mr. Singer, that they are going to have great incentive  
4 to be very efficient because of the amount of time they have  
5 left, but I will instruct them that they ought not to simply  
6 ask the same questions that were asked at the deposition.  
7 If it becomes clear that that's what is happening to the  
8 best of our recollection, the Court's recollection, I will  
9 sustain objections that it's been asked and answered. But I  
10 can't say you can't discuss anything about all these areas  
11 that you just listed because, as pointed out, that would  
12 preclude the necessity of testimony. And I think that  
13 Mr. Singer ought to be allowed to explore further those  
14 areas without asking the same questions over again.

15 MR. ACKER: For the Court's convenience, I'm going  
16 to proffer the Court a copy of the deposition clips that  
17 were played by defendants.

18 THE COURT: That would be very helpful, Mr. Acker.  
19 Thank you.

20 MR. SINGER: Your Honor, I just note, it's not my  
21 intent to go into questions that were substantively covered  
22 before. However, inevitably, just so the jury knows where I  
23 am, for example, I'm going to show them the May 28th press  
24 release as I did in the deposition. I would like to think  
25 that wouldn't elicit an objection because the fact that was

1 asked and answered, otherwise the jury wouldn't --

2 THE COURT: Again, I am not going to preclude  
3 areas. If you can ask additional questions about the press  
4 release that were not already covered, you will be permitted  
5 to do so.

6 MR. ACKER: Thank you, Your Honor.

7 THE COURT: Counsel, do any of you have anything  
8 else?

9 MR. BRENNAN: Just so we can complete the lineup,  
10 Your Honor. I think this will be relatively brief.

11 Last night we were informed by plaintiff's counsel  
12 that they wished to introduce two exhibits that have not  
13 previously been denominated as trial exhibits. They have  
14 been identified as SCO 757 and 758. Your Honor, both of  
15 these are documents the produced in discovery I think in  
16 excess of three years ago. They have been in the possession  
17 of SCO's lawyers for a substantial amount of time. These  
18 are not surprise documents, not newly produced documents.  
19 We're mindful of the fact that a couple of days ago the  
20 Court would not permit Novell to produce AK filings by SCO  
21 on the ground that --

22 THE COURT: Well, it's more than AK. I mean,  
23 there were other things.

24 MR. BRENNAN: Right. The point was --

25 THE COURT: Your point is well taken, Mr. Brennan.

1 The Court is not going to permit at this late date exhibits  
2 that have not been previously disclosed to the other side.

3 MR. BRENNAN: Thank you, Your Honor.

4 MR. NORMAND: Can I make one point on one exhibit,  
5 Your Honor?

6 THE COURT: You may.

7 MR. NORMAND: One of the exhibits was an exhibit  
8 to a Novell motion for summary judgment and it's an exhibit  
9 that Mr. Jones was asked about at deposition.

10 THE COURT: That's not the point, Mr. Normand.  
11 The AK and the other things were probably known to you and  
12 by the other side as well. The point is at this late date  
13 to be coming in with entirely new exhibits I just think is  
14 prejudicial and I cannot allow you to do something that I  
15 precluded Novell from doing just a few days ago.

16 MR. NORMAND: Very good, Your Honor.

17 There one last issue, Your Honor.

18 THE COURT: Before you go, Mr. Brennan, tell me  
19 your order of witnesses today, please.

20 MR. BRENNAN: Yes, Your Honor. We intend to call  
21 Greg Jones, who is Novell in-house counsel. And as the  
22 Court heard, Mr. Jack Messman, the former Novell CEO, will  
23 be called.

24 THE COURT: He will be your last witness; is that  
25 correct?

1 MR. SINGER: That's correct.

2 MR. BRENNAN: Then we will have the deposition of  
3 Mike DeFazio, the former general manager of the UNIX group.  
4 I think the clip length is about 45 minutes. And then  
5 assuming we're able to get to him, we intend to start with  
6 Mr. Braham. And the Court has indicated this afternoon his  
7 deposition would be conducted. So that's the lineup for  
8 today, Your Honor.

9 THE COURT: Okay.

10 Mr. Normand.

11 MR. NORMAND: Thank you, Your Honor.

12 The issue that Mr. Singer raised a few days ago  
13 was in what context would it be appropriate for SCO to put  
14 in Novell shareholder value and market capitalization. I  
15 propose to do that with Mr. Jones with Your Honor's  
16 permission.

17 THE COURT: Any objection?

18 MR. ACKER: No, Your Honor. I assume if he knows  
19 the answer, but, all right, they can ask.

20 MR. NORMAND: Your Honor, I propose to do it -- we  
21 could do it in the redacted form, but I propose to do it  
22 with a trial exhibit we have, which is a Novell 10-K.

23 THE COURT: Why don't we wait and see what the  
24 foundation is.

25 MR. ACKER: Let's do it the old fashioned way and

1 see what he has to say.

2 THE COURT: That's all we can do.

3 MR. NORMAND: I guess the point we're making, Your  
4 Honor, is we thought we were going to be given the  
5 opportunity to get this in. It seems as if we should be  
6 able to do it with a Novell witness, otherwise we would  
7 simply propose to read it to the Court and to the jury.

8 THE COURT: Well, let's play it by ear. Okay.

9 MR. NORMAND: Thank you, Your Honor.

10 THE COURT: Counsel, we have to talk about juror  
11 number ten. During the voir dire -- I have talked about  
12 this already -- she indicated she had a vacation that was  
13 planned to begin Friday. She and her family are planning to  
14 go to Las Vegas for the weekend. Yesterday she was very  
15 upset because she senses there is no way that the jury is  
16 going to be able to finish its deliberations by Friday.  
17 Therefore, she was asking Ms. Malley what to do.

18 In the course of that, the jury, among themselves  
19 I guess, said what if we were to, if we can't finish Friday  
20 night, come back Tuesday and allow her then to take her  
21 vacation through at least part of the day Monday. The  
22 alternative would be to have her be the designated alternate  
23 juror and simply dismiss her when we finish the case.

24 So what is your thought?

25 MR. SINGER: I think we would like to have a



1 little bit of time to discuss the implications of that. Can  
2 we respond to the Court at the first break?

3 THE COURT: Yes.

4 I think -- and, Sandy, tell me if I'm wrong. I  
5 think if we were able to communicate to her that it would be  
6 all right for her to be gone Monday, the deliberations can  
7 continue Tuesday, that if we can tell her that, that will  
8 solve her emotional dilemma. She apparently is quite upset.

9 MR. SINGER: My inclination is to say that would  
10 be an acceptable course to not be here for Monday. I would  
11 like to have a chance -- if we could have a few minutes?

12 THE COURT: I was just going to say, if we can  
13 communicate to her something by the end of today, even if  
14 it's as general as we are aware of your concern and we'll  
15 take care of it, that then leaves us the option of having  
16 her be the alternate. So, please, both sides think about  
17 it. Before today is up, let me know what you think and I  
18 will try to communicate something to her so her mind can be  
19 put to rest.

20 MR. BRENNAN: Your Honor, I appreciate the Court's  
21 sensitivity. I have one proposal on Novell's behalf. A  
22 happy juror is a better juror. We're of the mind to allow  
23 that decision to be made now so she doesn't spend the day  
24 fretting.

25 THE COURT: That's a good point, Mr. Brennan.

1           Those guys want to talk, so let's let them visit  
2 for a second.

3           MR. SINGER: May we have a couple minutes to  
4 discuss this issue?

5           THE COURT: Go ahead.

6           MR. SINGER: Your Honor, SCO is in agreement with  
7 the Court informing this morning juror number ten that this  
8 issue will be worked out in one of the ways that the Court  
9 has enumerated. We're prepared, if she is on the jury and  
10 the decision isn't back Friday, for Monday to be a day that  
11 the jury does not deliberate, we pick up on Tuesday. We're  
12 prepared, alternatively, to discuss the possibility that she  
13 would serve as an alternate.

14          THE COURT: All right. If I inform her when she  
15 comes in that if the jury is not able to reach a verdict on  
16 Friday, that they can then be dismissed or excused, recess  
17 over the weekend, including Monday, come back Tuesday, will  
18 that be an acceptable alternative?

19          MR. BRENNAN: That's agreeable, Your Honor. Thank  
20 you.

21          MR. SINGER: We would suggest, if it meets with  
22 the Court's approval, she be told privately rather than --

23          THE COURT: The only problem with that, Mr.  
24 Singer, is it affects the whole jury. You know, they are  
25 the ones who are going to have to come back Tuesday as well,

1 so I think it's probably best. I think it will be  
2 communicated to them through her, in any event, because  
3 apparently yesterday it was a subject of some discussion,  
4 because they were wondering why she was crying.

5 MR. SINGER: We certainly are in agreement with  
6 her mind being put at ease on that issue as soon as  
7 possible.

8 THE COURT: That's what I'll do as soon as they  
9 come in.

10 Mr. BRENNAN: Yes. Thank you, Your Honor.

11 THE COURT: If there is nothing else, counsel,  
12 we'll have Ms. Malley bring the jury in.

13 Could you be getting Mr. Jones in, please.

14 MR. ACKER: I am, Your Honor.

15 (Jury present)

16 THE COURT: Good morning, ladies and gentlemen.

17 Ms. Thomas, we understand that we are causing you  
18 some consternation about your vacation. As I recall, during  
19 voir dire, you indicated to us that you had it planned and  
20 so it was not withheld. I just wanted you to know that if  
21 it became necessary because the jury was not able to reach a  
22 unanimous verdict on Friday, that if the jury decided they  
23 wanted to wait until Tuesday to reconvene to complete the  
24 deliberations, that is something that you can do.

25 In fairness, let me ask you this, will that solve

1 your dilemma so your mind is now at rest?

2 JUROR NO. 10: Yeah, it would.

3 THE COURT: Let me ask the other jurors, is that  
4 going to create a serious problem for any of you if that is  
5 the outcome? Is there anyone who would have a problem with  
6 that?

7 Okay. So everyone should put those things aside  
8 and focus entirely on the testimony that you will be hearing  
9 today.

10 Mr. Acker.

11 MR. ACKER: Thank you, Your Honor.

12 Novell will call Mr. Greg Jones.

13 GREG JONES,

14 Having been duly sworn, was examined

15 and testified as follows:

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

18 THE WITNESS: Greg Jones. G-r-e-g, J-o-n-e-s.

19 DIRECT EXAMINATION

20 BY MR. ACKER:

21 Q Mr. Jones, if you would adjust that mike up, it might  
22 make it a little easier for you and the court reporter.

23 Mr. Jones, what do you do for a living?

24 A I'm in-house counsel at Novell.

25 Q How long have you been in-house counsel for Novell?

1 A I think since March of 1992.

2 Q Can you tell the ladies and gentlemen of the jury what  
3 your responsibilities are as a lawyer inside of Novell?

4 A So I lead a team of lawyers and paralegals that provide  
5 legal support to our engineering, research and development  
6 teams, product development teams.

7 Q Where do you live and work?

8 A In Provo, Utah.

9 Q At some point in time during 1995 and 1996, or earlier,  
10 did you have occasion to meet someone by the name of Darl  
11 McBride?

12 A Yes, I did.

13 Q How did that happen?

14 A Darl and I both were working at Novell. Darl had  
15 business responsibilities with Novell Japan. I had legal  
16 responsibilities for Novell Japan. I think it's in that  
17 context of when he and I first met.

18 Q So you worked together for a short period of time?

19 A Yes.

20 Q Let me fast forward now to 2002. Were you contacted by  
21 Mr. McBride?

22 A Yes, I was.

23 Q Approximately when did that occur?

24 A It was in the fall. I think the first contact was  
25 October 10th, was the first contact.

1 Q When you say contact, was that an in-person  
2 conversation or telephone call?

3 A It was a telephone call.

4 Q Who called whom?

5 A Darl McBride called me.

6 Q Do you recall before October of 2002 when was the last  
7 time you had spoken with Mr. McBride?

8 A The last time I had spoken to Darl was probably when he  
9 left Novell, sometime in the mid 1990s.

10 Q What did Mr. McBride say to you?

11 A So when he called me, he kind of updated me on his  
12 career. He told me that he had just joined Caldera, the  
13 company that later would be called The SCO Group. He had  
14 joined them about three months earlier as their CEO. He  
15 described to me that SCO was collecting UNIX royalties for  
16 Novell as they were required to by the agreement and how  
17 they were paid five percent of those royalties and said, you  
18 know, that's not really cost efficient for us. It costs us  
19 more to collect the royalties than we're getting paid, kind  
20 of mentioned that. Then he said they were looking into  
21 whether users of Linux might be violating UNIX intellectual  
22 property rights in some way.

23 Then, in that call -- or it could have been in a later  
24 call in November, he mentioned that in the agreement between  
25 Novell and SCO called the asset purchase agreement whereby

1 Novell had transferred certain parts of the UNIX business to  
2 SCO, that that agreement excluded copyrights, and so those  
3 copyrights stayed with Novell and had not transferred to  
4 SCO. And he said he thought that must be some type of  
5 clerical error or something in the agreement.

6 Q Did he ask for anything in that first call?

7 A I can't recall him actually asking for something in  
8 that first call.

9 Q Did you respond at all to his statement regarding the  
10 copyrights being excluded?

11 A Yes. Yeah, he had pointed out to me in the agreement  
12 where they were excluded, so I agreed with him the agreement  
13 did exclude the copyrights.

14 Q Did you agree with him his statement that this was some  
15 sort of a mistake or some sort of clerical error?

16 A No. I told him I understood what he was saying, why he  
17 might have a question, but I didn't agree with him that it  
18 was a clerical error that led to those copyrights being  
19 excluded.

20 Q After the first conversation in October of 2002, did  
21 you have subsequent calls or conversations with Mr. McBride  
22 or other folks at SCO?

23 A Yes. The first one was from Joanie Bingham, who I  
24 understood to be an assistant to Darl McBride of The SCO  
25 Group. She left some messages for us.

1 Q Did you actually call Ms. Bingham back?

2 A Yes. Yes, I did.

3 Q After that conversation, did you document your call  
4 with her in an e-mail?

5 A Yes, I did.

6 Q Let me show you, Mr. Jones, what we've marked as  
7 Exhibit G-11, and ask you to take a look at that. Do you  
8 recognize it?

9 A Yes, I do.

10 Q What is it?

11 A This is an e-mail I wrote about the conversation that I  
12 had with Joanie Bingham, an e-mail I wrote about that  
13 conversation.

14 Q Either from your memory or reading from the e-mail  
15 itself, can you tell the ladies and gentlemen of the jury  
16 what Ms. Bingham said to you and what you said to her on or  
17 about the 15th of November in 2002?

18 MR. NORMAND: Your Honor, I am not sure we have  
19 laid a foundation for the use of the document if Mr. Jones  
20 is going to read from the document.

21 THE COURT: I will not allow him to read from it  
22 until you've asked him whether or not he needs his memory  
23 refreshed. Let's just lay the foundation properly, Mr.  
24 Acker.

25 //



1 BY MR. ACKER:

2 Q Do you have a recollection of the call from Ms.  
3 Bingham?

4 A Yes, I do.

5 Q Can you tell the ladies and gentlemen of the jury what  
6 you said to her and what she said to you?

7 A Yeah. Basically she left me these messages, and in her  
8 messages she had wanted access to our files -- some of our  
9 files at Novell. So I asked her, you know, what she needed,  
10 why she wanted access to these files. She said she had an  
11 assignment from Darl McBride, her boss, to help him with  
12 some type of IP tracking. He wanted to know something  
13 about -- I believe it was the agreement between Novell and  
14 UNIX System Laboratories when Novell had purchased the UNIX  
15 business from AT&T, and at that time AT&T had a company  
16 called UNIX System Laboratories. I think she was saying  
17 that Darl would like her to get access to those, look into  
18 them. And I told her, you know, I need to understand this  
19 better, so I'm going to be calling Darl.

20 Q So you left her that you were going to call Darl  
21 McBride directly?

22 A Yes.

23 Q Did you do that or was there a subsequent telephone  
24 conversation with Mr. McBride?

25 A Yes, there was.

1 Q Do you recall approximately when that was?

2 A Within several days of this e-mail. I can't remember  
3 the specific date.

4 Q Did you actually speak with Mr. McBride?

5 A Yes, I did.

6 Q Did you draft an e-mail after speaking with him, after  
7 this call with Ms. Bingham?

8 A Yes, I did.

9 Q Let me show you what we've marked as Exhibit K-11. Do  
10 you recognize what that is?

11 A Yes, I do.

12 Q What is it?

13 A This was an e-mail that I wrote on November 20th  
14 reporting a phone call that Dave Wright -- Dave Wright is  
15 someone at Novell who works in our corporate development  
16 team. So in this an e-mail I talk about a conversation that  
17 Dave Wright and I had with Darl McBride on that day,  
18 November 20th.

19 Q Did you document in this e-mail the substance of the  
20 conversation with Mr. McBride after it happened?

21 A Yes, I did.

22 Q Can you tell the ladies and gentlemen of the jury what  
23 it was that Mr. McBride said to you and to Mr. Wright and  
24 what, if anything, you said in return?

25 MR. NORMAND: Again, Your Honor, as long as

1 Mr. Jones is not reading off the document.

2 BY MR. ACKER:

3 Q Do you have a memory of what was said?

4 A Yeah. So basically we wanted to get back in touch with  
5 Darl to find out why he wanted access to these materials.  
6 He said he wanted to research the IP rights that SCO might  
7 have in UNIX, what rights they have, and this was for the  
8 purpose of looking at pursuing end users of Linux if they  
9 were violating UNIX intellectual property rights.

10 He also suggested -- he brought up again the fact that  
11 SCO was collecting these SVRX royalties of Novell's that  
12 were being sent to us and suggested that, you know -- I  
13 think what he was saying is that people might be moving from  
14 SVRX to Linux, so if we, SCO, are taking IP enforcement  
15 actions against these Linux users, maybe your SVRX revenues  
16 will be supported in some way so you will get more revenues.  
17 So, Novell, this might be in your interest to help us out  
18 this way, to give us access to the information because it's  
19 going to help with those revenues.

20 I basically told Darl, you know, that's sensitive, you  
21 may be getting into litigation with third parties. That's  
22 very sensitive for us to be sharing information with you in  
23 that context. Also some of the materials you're asking for  
24 may be confidential. Then said I would get back to him.

25 Q Is that how you left the conversation with Mr. McBride

1 on November 20th?

2 A Yes.

3 Q What did you do internally after that telephone call  
4 with Mr. McBride and Mr. Wright on November 20th?

5 A So, for example, I wrote this e-mail. I wanted to  
6 inform my boss and people in the legal department that this  
7 contact had happened, so I wrote this e-mail.

8 I also brought this to the attention of Carl Ledbetter  
9 and Chris Stone, they were the executives responsible for  
10 Novell's research and development and product development  
11 efforts at Novell at the time, to find out what their  
12 reaction was, if they would have any interest in supporting  
13 SCO in these types of activities Darl was describing to me.

14 Q Did you get a response from either Mr. Stone or  
15 Mr. Ledbetter, or both?

16 A I got a response, yeah, from both of them. They said  
17 no, they were not interested in supporting these efforts.

18 Q Did you have a subsequent telephone conversation with  
19 Mr. McBride in the fall or winter of 2002?

20 A Yes, I did.

21 Q Did you document that in an e-mail as well?

22 A Yes, I did.

23 Q Let me show you what we've marked as R-11. Do you  
24 recognize that?

25 A Yes, I do.

1 Q What is it?

2 A This was an e-mail I wrote on December 4th, 2002  
3 reporting on a conversation that Dave Wright and I again had  
4 with Darl McBride on that day, December 4th.

5 Q Could you tell the ladies and gentlemen of the jury the  
6 substance of that conversation on December 4th?

7 A Yes. So basically we got back to Darl, followed up  
8 with him, let him know that Novell was not going to be  
9 supporting him, this research effort that he was undertaking  
10 to find these documents and so forth.

11 And, you know, Darl can be very persistent, so he -- so  
12 he tried to advocate, I still think this is in your interest  
13 to help us out. This would still be something that would be  
14 beneficial to you. And so we just let him know, well, there  
15 are several reasons why Novell had made this decision not to  
16 support SCO's efforts in this regard.

17 Q What were the reasons?

18 A Well, one was, you know, he had said we have these SVRX  
19 revenues, those might be supported in some way by his  
20 activities. And we said, we don't know if that's going to  
21 happen, that may not necessarily happen. Also it's really,  
22 again, sensitive that this may involve litigation with third  
23 parties. And also, you know, to go access these materials  
24 and do the research and do this type of due diligence  
25 effort, that takes time and resource and it's just not

1 something we're going to spend our time on.

2           Lastly, you know, that we have customers and partners  
3 that distribute Linux and they use Linux, so, you know, we  
4 value those relationships more than we would any other type  
5 of benefit, such as those SVRX revenues being a benefit in  
6 some way.

7 Q    At any point during your first conversation in October,  
8 your conversation on November 20th or this conversation on  
9 December 4th, did you ever agree with, in any way, Mr.  
10 McBride's position or statement that somehow the exclusion  
11 of copyrights in the asset purchase agreement was somehow a  
12 clerical error or mistake?

13 A    No, I didn't.

14 Q    How did Mr. McBride react when you told him you weren't  
15 going to be -- Novell was not going to be participating or  
16 assisting in his efforts?

17 A    Well, so Darl, you know, very, very persistent, saying,  
18 well, you know, who's making these decisions, who's calling  
19 the shots, I would like to explore this further. So I let  
20 him know that basically, you know, these individuals had  
21 been identified to you before, Carl Ledbetter and Chris  
22 Stone. They are on the executive management -- they were at  
23 the time on the executive management team at Novell, the  
24 worldwide management team, the highest level. So I told  
25 Darl our highest executive level had made that decision.

1 That's who was calling the shots. And then he indicated  
2 that he would, you know, be revisiting the topic.

3 Q After the holidays into 2003, did you have subsequent  
4 contact with someone from SCO on the issue of the  
5 copyrights?

6 A Yes, I did.

7 Q What happened?

8 A Well, I was contacted by Chris Sontag. Chris Sontag  
9 worked with Darl at SCO and he had responsibility for this  
10 licensing program that Darl had mentioned to me earlier, so  
11 he had responsibility for that and was contacting me in that  
12 context.

13 Q Do you recall approximately when that call was with  
14 Mr. Sontag?

15 A This was sometime in February, I think mid February,  
16 maybe around -- one of them was around the 20th of February.

17 Q Did you subsequently get an e-mail from Mr. Sontag  
18 after the call?

19 A Yes, I did.

20 Q Let me show you what we've marked as Exhibit V-12. Do  
21 you recognize V-12?

22 A Yes, I do.

23 Q There appears to be two e-mails here; is that right?

24 A Yes.

25 Q One from Mr. Sontag and from you on the bottom; is that

1 right?

2 A That's right.

3 Q What is the date of that e-mail to you?

4 A The one to me is February 20th.

5 Q And you responded back to him on the following day?

6 A Yes, I did.

7 MR. ACKER: Your Honor, I move for admission of  
8 Exhibit V-12.

9 MR. NORMAND: No objection, Your Honor.

10 THE COURT: V-12 will be admitted.

11 (Defendant's Exhibit V-12 was received into  
12 evidence.)

13 MR. ACKER: Highlight the first e-mail at the  
14 bottom from Mr. Sontag, Mr. Lee.

15 BY MR. ACKER:

16 Q So, on the 20th, Mr. Sontag wrote to you and said,  
17 attached is a first cut at a side letter to clarify the  
18 issues that we discussed yesterday. I will give you a call  
19 later, or feel free to call me on my cell. Regards, Chris  
20 Sontag. Does that help you place the date of the telephone  
21 call with Mr. Sontag?

22 A Yes.

23 Q When was it?

24 A Pardon?

25 Q When was the call?



1 A February 20th -- well, so this is -- let me see.

2 So it's February 19th.

3 Q Do you recall what was discussed with Mr. Sontag in the  
4 call on February 19th?

5 A So what had happened is obviously we had -- Novell had  
6 rejected SCO's request that we provide them with research  
7 assistance and access to documents and so forth. But then  
8 Chris came back because they were still concerned the asset  
9 purchase agreement was left with saying the copyrights were  
10 excluded from the transferred assets, so they are staying  
11 with Novell, SCO wants them to be with SCO. So they are  
12 wanting to change this in some way.

13 So I basically told Chris, look, we've told you we're  
14 not going to do this research and so forth for you.  
15 Whatever -- if you want to send a written document, some  
16 terms that we just evaluate one time and get back to you,  
17 then I could look at that.

18 Q Is that what Mr. Sontag attached to his e-mail on the  
19 20th, what he refers to as a side letter?

20 A Yes.

21 Q If we go up to your response to him on the 21st, you  
22 wrote, Chris, as I mentioned on the phone, I need to work in  
23 conjunction with a business person here at Novell, and I am  
24 still trying to get a business person assigned to this. I  
25 will keep you posted. What did you mean by that?

1 A Well, that, you know, I'm in-house counsel at Novell  
2 and so I'm their lawyer, but decisions like this need to be  
3 made by the appropriate -- people in appropriate authority,  
4 the business people, the management team. So I told that to  
5 Chris. So he had sent me this document. So basically I'm  
6 telling him I'll take a look at it and I will take it to the  
7 appropriate executive or people in management at Novell.

8 Q Let me hand you what has already been admitted, the  
9 final page of Exhibit I-31. Take a look at that.

10 MR. ACKER: If we could bring that up, Mr. Lee.

11 BY MR. ACKER:

12 Q Is this the side letter that Mr. Sontag sent to you on  
13 the 20th of February of 2003?

14 A Yes.

15 Q If we take a look at the first sentence --

16 MR. ACKER: Actually, just highlight the entire  
17 body of it for the jury.

18 THE COURT: Excuse me. You say I-31?

19 MR. ACKER: Yeah, the final page of I-31, Your  
20 Honor.

21 MR. NORMAND: Your Honor, the final page of I-31 I  
22 think has been admitted as the redacted portion of SCO 615.

23 THE COURT: That's why I was confused.

24 MR. ACKER: Thank you for that clarification.

25 THE COURT: Go ahead.

1 BY MR. ACKER:

2 Q If you go down to the signature page. So this was a  
3 proposal that SCO was making to Novell. Do I have that  
4 right?

5 A Correct.

6 Q And if we can go up to the top of the body of it, we  
7 can see the first sentence, what Mr. Sontag was proposing  
8 was a letter that says this letter clarifies the intent of  
9 the parties with respect to the above-captioned transaction,  
10 correct?

11 A Correct.

12 Q Then if we move down to the sentence that begins we  
13 wish to clarify the following?

14 A Yes.

15 Q Below that bullet point one says, all right, title and  
16 interest in and to copyrights associated with the AT&T SVRX  
17 agreements held by Novell at the time of the asset purchase  
18 agreement were intended to be in part of the included assets  
19 identified in schedule 1.1(a). Do you see that?

20 A Yes, I see that.

21 Q Did you have an understanding when Mr. Sontag sent this  
22 to you in February 2003 why he wanted that language changed  
23 in the APA?

24 A Only that he was involved in their licensing program,  
25 he had responsibilities there, and so this was in that

1 context.

2 Q Did you understand in the APA that, in fact, the  
3 copyrights to the UNIX code were not included in the  
4 transferred assets?

5 A Yes.

6 MR. NORMAND: Objection, Your Honor.

7 THE COURT: Excuse me.

8 MR. NORMAND: Objection, Your Honor, calls for a  
9 legal conclusion, among other things.

10 THE COURT: I'll overrule the objection.

11 BY MR. ACKER:

12 Q If we go down to bullet point number two, Mr. Sontag  
13 was also asking that no right, title or interest in and  
14 copyrights associated with the AT&T SVRX agreements  
15 otherwise held by Novell at the time of the asset purchase  
16 agreement were intended to be part of excluded assets  
17 identified in schedule 1.1(b). Do you see that?

18 A Yes.

19 Q So what were you understanding that Mr. Sontag was  
20 asking Novell to do with respect to the excluded asset  
21 portion of the asset purchase agreement?

22 A Well, this language is directly in conflict with the  
23 actual language of the asset purchase agreement, so I  
24 understood him to be saying, you know, the asset purchase  
25 agreement says the copyrights are here. I want to have some

1 document that says that they should be here with SCO.

2 Q When you say at first that the copyrights were here,  
3 referring to --

4 A To Novell. So basically under the asset purchase  
5 agreement copyrights are with Novell and he's saying I want  
6 something that says that they were intended to be with SCO  
7 and they should be with SCO.

8 Q Again, this request is being made to you in February --  
9 around February 20th, 2003?

10 A That's right.

11 Q What did you do with this request from Mr. Sontag?

12 A So I reported this to Chris Stone, the executive I  
13 mentioned earlier, and asked -- and basically he rejected  
14 this and said no, Novell would not do this.

15 Q Would not do what?

16 A Would not accept this proposal, sign this document.

17 MR. NORMAND: Your Honor, I move to strike because  
18 there was an objection at his deposition to subsequent  
19 conversations with any business person.

20 MR. ACKER: Mr. Stone has already provided that  
21 testimony in this courtroom, Your Honor.

22 MR. NORMAND: That doesn't mean it comes in  
23 through, Mr. Jones, Your Honor.

24 THE COURT: Mr. Acker, are you disputing that a  
25 privilege was exerted?

1           MR. ACKER: Off the top of my head, I don't know,  
2 Your Honor.

3           THE COURT: I'm going to have to rely upon Mr.  
4 Normand's representation, and I would agree that anything  
5 privileged ought not to come in through this witness. So  
6 the Court will instruct the jury to disregard the answer to  
7 the question just given regarding this conversation with Mr.  
8 Stone.

9 BY MR. ACKER:

10 Q Did you respond back to Mr. Sontag?

11 A We responded back to him. I can't remember  
12 specifically if I called him or how we got back to him, but  
13 we got back to him and let him know what the response was.

14 Q What was the response?

15 A The response was no, that their proposal was rejected.

16 Q At some point in early 2003, sometime before May 28th,  
17 2003, did you see a copy of -- an unexecuted copy of what is  
18 Amendment No. 2 to the asset purchase agreement?

19 A Yes, I did.

20 Q Can you explain to the jurors how that happened?

21 A Well, so we had had these contacts from SCO asking  
22 about the asset purchase agreement, you know, dealing with  
23 the copyright ownership issue. We started to review some of  
24 our documents internally at Novell. In the course of doing  
25 that, we came upon this unsigned Amendment No. 2 to the

1 asset purchase agreement.

2 Q Do you recall where that was found?

3 A No.

4 Q Did you make any efforts to find an executed copy of  
5 Amendment No. 2?

6 A A member of our legal department was given the  
7 assignment to see if there was a signed Amendment 2 in the  
8 files of Novell.

9 Q Did that occur before May 28th, 2003?

10 A Yes, it did.

11 Q Was that person able to locate a signed copy of  
12 Amendment 2?

13 A No, he was not.

14 Q Where, typically, at Novell are legal documents --  
15 these contractual documents maintained?

16 A In the legal department itself, in our law department,  
17 in our file room, or in our archives that the legal  
18 department has sent off-site.

19 Q Is that where the person on your team that was assigned  
20 to look looked for the executed copy of Amendment 2?

21 A I'm sure the places he looked included those locations.

22 Q At some point in time in 2003, did you see a signed  
23 copy of Amendment 2?

24 A Yes, I did.

25 Q When was that?

1 A June 6th, 2003.

2 Q Do you know how it was that you came to see that?

3 A Yes. SCO had located a signed Amendment 2 and they  
4 faxed that to Novell, and that's when I saw the signed  
5 Amendment 2.

6 Q Was that the first time you saw a signed copy of it?

7 A In 2003, that was the first time I saw a signed copy.

8 Q Subsequently was the signed copy of Amendment No. 2  
9 located in Novell's files?

10 A Yes, it was.

11 Q Do you know where it was found?

12 A It was found in the tax department.

13 Q Was that a relatively unusual place for a contract to  
14 be found?

15 A Well, it was not where we store our documents. It's  
16 not -- they may have occasion to review our documents, but  
17 it's not where we store them. It's not our file room, you  
18 know.

19 Q At some point in time in the fall of 2003, did Novell  
20 register copyrights with the U.S. Copyright Office for the  
21 UNIX code?

22 A Yes, we did.

23 Q Let me show you what is marked as U-45. Let me show  
24 that to you, Mr. Jones. Do you recognize what that  
25 compilation document is?



1 A These are the certificates of registration that were  
2 given to Novell after Novell applied for copyright  
3 registrations on versions of UNIX.

4 Q What was the latest version of UNIX or UnixWare that  
5 Novell filed a copyright registration for?

6 A I believe it was UNIX SVRX 4.2MP.

7 Q Is UNIX SVRX 4.2MP the version of UNIX that was in  
8 existence prior to the closing of the APA in 1995?

9 A Yes.

10 Q Is that the most recent version that was in existence  
11 prior to the closing of the APA in 1995?

12 A To my knowledge, yes.

13 Q Did Novell have to pay money in order to get those  
14 registrations on file?

15 A Yes.

16 Q How much?

17 A The fees we paid the copyright office totaled \$9,540.

18 THE COURT: Mr. Acker, are you going to offer  
19 U-45?

20 MR. ACKER: Yes. I'm moving to admit Exhibit  
21 U-45, Your Honor. I believe there is a stipulation on its  
22 admissibility.

23 MR. NORMAND: There is, Your Honor. The other  
24 half of the stipulation is our similar compilation will come  
25 in. I propose to do that with Mr. Jones as well.

1 THE COURT: All right. U-45 will be admitted.

2 (Defendant's Exhibit U-45 was received into  
3 evidence.)

4 BY MR. ACKER:

5 Q Let me show you two documents, Mr. Jones, X-23 and SCO  
6 Exhibit 756. X-23 is a document. Can you refresh the  
7 ladies and gentlemen of the jury's memory about what that  
8 is?

9 A So after Novell obtained these registrations, we were  
10 concerned that SCO had been saying that they were the owners  
11 of these copyrights. So we felt it was important that we  
12 make it known we had obtained these registrations. So one  
13 of the things that we did was on December 22nd, 2003 post on  
14 Novell's Web site correspondence we had with SCO on this  
15 topic and a statement that we had obtained these copyright  
16 registrations, and letting people know if they wanted to see  
17 these registrations, they were available on the copyright  
18 office Web site.

19 Q Do you know what documents were posted on December  
20 22nd, 2003 in connection with this press release?

21 A I know it was correspondence between Novell and SCO on  
22 this topic.

23 Q On the topic of?

24 A The topic of copyright ownership and Novell's belief  
25 that Novell is the owner of these copyrights under the asset

1 purchase agreement.

2 Q If you can look at SCO Exhibit 756. Do you recognize  
3 what that is?

4 A Yes.

5 Q What is that?

6 A This is a press release from Novell on January 13th,  
7 2004. It's announcing that Novell -- by this time Novell  
8 has just acquired SuSE Linux. So now Novell is in the Linux  
9 business directly and we are going to be distributing Linux.  
10 This is telling our customers at this point that we have an  
11 indemnification program. So basically if anyone were to  
12 tell you that your use of Linux violates their rights, then  
13 we will back you up, we've got your back, we'll support you,  
14 and also saying that we actually believe that we are the  
15 rightful owner of the UNIX copyrights. So that's basically  
16 what this is announcing.

17 MR. ACKER: Your Honor, I move for admission of  
18 SCO Exhibit 756.

19 MR. NORMAND: No objection, Your Honor.

20 THE COURT: It will be admitted.

21 (Plaintiff's Exhibit 756 was received into  
22 evidence.)

23 BY MR. ACKER:

24 Q Unfortunately Mr. Lee doesn't have it in the system  
25 yet, so I'm going to have to ask you some questions about

1 it, Mr. Jones.

2 Turn to the second page of the document. Do you see  
3 there's a section there that says copies of relevant  
4 correspondence between Novell and SCO are available and it  
5 gives the Novell Web site address? Do you see that?

6 A Yes.

7 Q Do you know what correspondence -- what body of  
8 correspondence went up on the Novell Web site as of January  
9 10th, 2004?

10 A Well, in general it was correspondence back and forth  
11 between Novell and SCO on the topic of ownership of these  
12 copyrights, then also some other contractual issues that the  
13 two companies had with each other.

14 Q Why was it that Novell decided to put all the  
15 correspondence between itself and SCO up on its public Web  
16 site?

17 A Well, this had become a matter of great public concern.  
18 The things that SCO was doing were very visible, very  
19 public, so we felt there was a need to put people on notice  
20 of Novell's position in what we believe the true situation  
21 was, and so just to be transparent and put those materials  
22 out there so that people have the opportunity to go view  
23 them.

24 Q Did you also put up what SCO had asserted its position  
25 was in the correspondence it had sent to Novell?

1 A Correct. It was correspondence, it was the back and  
2 forth. It was the Novell letter to SCO, here's the letter  
3 back to Novell from SCO, and the back and forth that was  
4 going on.

5 Q That correspondence remained up on Novell's Web site  
6 over the next five, six years?

7 A Yes.

8 Q Were you aware and did you review a ruling by a  
9 district court in this case on a motion for remand and a  
10 motion to dismiss on June 9th, 2004?

11 THE COURT: One second.

12 MR. NORMAND: Objection, Your Honor. I don't know  
13 that a side-bar is appropriate, but this has been an ongoing  
14 issue.

15 MR. ACKER: I believe the Court's ruling the other  
16 day is we could go into this issue with respect to punitive  
17 damages.

18 MR. NORMAND: We have an issue with respect to  
19 which he came to it, Your Honor.

20 MR. ACKER: If the Court will let me lead.

21 THE COURT: You go ahead and lead.

22 MR. ACKER: Yes, Your Honor.

23 BY MR. ACKER:

24 Q Did you review that ruling on June 9th, 2004,  
25 Mr. Jones?

1 A Yes.

2 Q Was there anything in that decision of the district  
3 court of June 9th, 2004 that you believe was inconsistent  
4 with Novell's continuing assertion that it owned the UNIX  
5 copyrights?

6 A No.

7 Q Did you also review an order granting summary judgment  
8 of August 10th, 2007 by the district court in this case?

9 A Yes, I did.

10 Q Was there anything in that order granting summary  
11 judgment that was inconsistent in any way with Novell's  
12 continued assertion of ownership of the UNIX copyrights?

13 A No.

14 Q Did you also review the Tenth Circuit Court of Appeals  
15 decision on August 24th -- dated August 24th, 2009 in this  
16 case?

17 A Yes, I did.

18 Q Was there anything in that opinion that was  
19 inconsistent with Novell continuing to maintain its position  
20 into 2009 that it was the owner of the UNIX copyrights?

21 A No.

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

23 THE COURT: Mr. Normand.

24 MR. NORMAND: Just a moment, Your Honor.

25 //

1 CROSS-EXAMINATION

2 BY MR. NORMAND:

3 Q Good morning, Mr. Jones.

4 A Good morning.

5 Q You just mentioned the Tenth Circuit opinion. Do you  
6 recall that?

7 A Yes.

8 Q You've read that opinion?

9 A Yes.

10 Q You understand that that opinion is why we're having a  
11 trial here, correct?

12 A Yes.

13 Q You understand that this trial could result in a  
14 situation in which Novell does not own the UNIX and UnixWare  
15 copyrights, correct?

16 A Yes.

17 Q You understand that SCO is bringing a claim for slander  
18 of title at this trial, correct?

19 A Yes.

20 Q That prospect has no bearing on your testimony on  
21 whether you wanted to keep that information up on Novell's  
22 Web site, right?

23 A That's correct.

24 Q Now you were asked, Mr. Jones -- let's look at SCO  
25 Exhibit 756. This is a Novell press release in which it

1 announces that it's offering SuSE Linux enterprise server  
2 customers a new indemnification program, correct?

3 A That's right.

4 Q And Novell made this announcement shortly after IBM had  
5 invested \$50 million in Novell, correct?

6 A I know that was part of the transaction. I don't know  
7 the date that the investment took place.

8 Q Mr. Jones, Novell has a joint defense agreement with  
9 IBM, correct?

10 A Yes.

11 Q That agreement exists because Novell and IBM share  
12 common interests opposing SCO's claims in litigation,  
13 correct?

14 A I know there was a joint defense agreement, and there  
15 is a commonality of interest. If it fits exactly your  
16 description, I wouldn't be surprised. I know there is a  
17 joint defense agreement.

18 Q That joint defense agreement existed prior to  
19 January 2004, correct?

20 A I don't know what date the joint defense agreement was  
21 put in place.

22 Q If I were to represent to you there's been testimony it  
23 began in May 2003, would that refresh your recollection?

24 MR. ACKER: Your Honor, there has been no such  
25 testimony. If he has a question, he should ask him. He



1 shouldn't be testifying.

2 THE COURT: I will sustain the objection and ask  
3 you to rephrase the question.

4 BY MR. NORMAND:

5 Q The relationship began in May 2003, is that right,  
6 Mr. Jones?

7 A I don't know when the joint defense agreement was put  
8 in place. I don't know.

9 Q You know that counsel for IBM spoke with counsel for  
10 Novell in the spring of 2003, correct?

11 A Yes.

12 Q You know there have been discussions about those  
13 communications in discovery in this case, correct?

14 A Yes.

15 Q Now you spoke about your communications with SCO in the  
16 fall of 2002. Do you recall that testimony?

17 A Yes.

18 Q Those conversations included discussions about  
19 copyrights; is that right?

20 A That's right.

21 Q You don't recall all of the exact language that SCO  
22 used in those discussions, correct?

23 A Yeah, the exact words, the exact language that they  
24 used, I wouldn't remember that.

25 Q I think you did say that you recall the gist of the

1 conversations was that Mr. McBride thought the original  
2 language of the asset purchase agreement on the issue of  
3 copyrights contained a clerical error; is that right?

4 A Yeah, that was part of what he said was that he thought  
5 there was a clerical error.

6 Q You understood him to mean that the original language  
7 of the asset purchase agreement on the issue of copyrights  
8 can't reflect what the parties intended, correct?

9 A That seemed to be what he was expressing.

10 Q Now you understand that Mr. McBride wanted to correct  
11 what he regarded as a clerical error, correct?

12 A Yes.

13 Q Now the internal e-mails Mr. Acker asked you to look  
14 at, in none of those e-mails did you assert that Novell  
15 owned the copyrights, did you?

16 A There was no need to. It was understood, Mr. McBride  
17 had brought to my attention the asset purchase agreement  
18 excluded the copyrights.

19 Q In those e-mails you weren't speaking to Mr. McBride,  
20 correct?

21 A I was not. Those e-mails don't -- those e-mails report  
22 discussions that I had with Mr. McBride.

23 Q So you never said to Mr. McBride in the discussions  
24 Novell owns those copyrights, correct?

25 A In effect, I did because he told me the asset purchase

1 agreement excluded the copyrights and I agreed with him.

2 Q So that is something you are saying you told Mr.  
3 McBride but you did not report in your e-mails; is that  
4 right?

5 A Correct.

6 Q Why is that?

7 A Again, I think Novell's ownership of the copyrights was  
8 well understood by us.

9 Q It's your testimony that before you heard from  
10 Mr. McBride in the fall of 2002 you believed that Novell  
11 owned the UNIX and UnixWare copyrights?

12 A Before that happened -- well, in 2002, I would have  
13 had -- when he called me, it had been a long time since I'd  
14 even looked at the issue.

15 Q You didn't know whether Novell owned the UNIX or  
16 UnixWare copyrights before you spoke with Mr. McBride?

17 A At the moment he called, I didn't have an  
18 understanding, didn't have a recollection.

19 Q Let's look, Mr. Jones, at what we've shown to you,  
20 Exhibit R-11.

21 MR. NORMAND: If we could blow up the full text of  
22 that language.

23 BY MR. NORMAND:

24 Q This is an internal e-mail, Mr. Jones, from December  
25 4th, 2002 to your colleagues at Novell from yourself; is

1 that right?

2 A That's correct.

3 Q You say at the bottom of the second to last paragraph  
4 that you did not mention in any way Novell's own interest in  
5 becoming more active in the Linux area in a more direct  
6 manner. You say that, correct?

7 A That's right.

8 Q So in this internal e-mail you were acknowledging you  
9 were not straight with Mr. McBride in your discussion with  
10 him, right?

11 A I don't think that's a fair --

12 Q But you didn't tell him in this, correct?

13 A No, I'm answering your question, which was that I was  
14 not straight with him. I think that's a very unfair  
15 characterization. I'm a lawyer and -- I'm answering your  
16 question.

17 Q Very good, Mr. Jones.

18 A I'm a lawyer for Novell. I'm apprized of confidential  
19 business plans that they are developing and considering, and  
20 so I'm not at liberty to share with others who are calling  
21 me the various things that we may intend to do in the  
22 future. It would be inappropriate for me to share  
23 information that's given to me in my capacity as a lawyer  
24 for Novell.

25 Q There was information that you thought was relevant to

1 your discussion with Mr. McBride that you opted not to tell  
2 him, correct?

3 A Yeah. I believe I had very appropriate reasons.

4 Q Now in your discussions with Mr. McBride, he was  
5 explaining to you ways in which Novell could make more  
6 money, correct?

7 A Yeah, that's right. His idea was either more money or  
8 at least SVRX royalties would not decline as rapidly. One  
9 way or another, he was suggesting there might be some  
10 benefit to you, Novell.

11 Q Now you spoke to this issue of a side letter that you  
12 received from Mr. Sontag in February 2003. Do you recall  
13 that?

14 A Yes.

15 MR. NORMAND: Can we look at Exhibit I-31. If we  
16 could blow up the text of that letter for the jury.

17 THE COURT: This one has been admitted, so do you  
18 want it shown to the jury?

19 MR. NORMAND: Yes, Your Honor.

20 THE COURT: This is the one that has been -- this  
21 one has been admitted?

22 MR. NORMAND: I believe it was admitted.

23 MR. ACKER: Yes, the last page of I-31.

24 THE COURT: That's all you were referring to?

25 MR. NORMAND: Yes, Your Honor.

1 BY MR. NORMAND:

2 Q This is a letter, Mr. Jones, in which Mr. Sontag sought  
3 to clarify the original language of the asset purchase  
4 agreement; is that right?

5 A The words of the document are clarified.

6 Q And your understanding is that Mr. Sontag sent you this  
7 letter before he had seen Amendment No. 2, correct?

8 A You know, I don't know when he saw Amendment 2. I know  
9 that later he said he had not seen it prior to June of 2003.

10 Q Now by this time you had seen an unsigned copy of  
11 Amendment No. 2, correct?

12 A You know, I may have. I'm just not certain the date  
13 when I first saw the unsigned copy of Amendment 2. I'm just  
14 really not certain when I first saw it.

15 Q I thought I heard you tell Mr. Acker that by this point  
16 you had seen an unsigned copy?

17 A I'm sorry. I thought he was asking me sometime in the  
18 spring of 2003. I hadn't recalled him asking me if prior to  
19 this conversation with Mr. Sontag I had seen it. I don't  
20 believe that's what he asked me.

21 Q Maybe I misheard. At some point in the next couple of  
22 months, however, you saw an unsigned copy of Amendment No.  
23 2, correct?

24 A That's true.

25 Q You thought the language of Amendment No. 2 was

1 potentially significant, correct?

2 A Yeah, I would say potentially significant is correct.

3 Q You thought it was a potentially important document,  
4 correct?

5 A It was a relevant document, so we would want to  
6 actually see if it was signed or not.

7 Q You didn't make any personal effort to find the signed  
8 copy; is that right?

9 A I did in the sense that I was involved in assigning  
10 someone else who had experience finding documents that we  
11 might have difficulty tracking down to go see if he could  
12 find it.

13 Q You don't know exactly what that person did to try and  
14 find it, do you?

15 A I don't know all his efforts. I do know his efforts  
16 included looking at our file rooms and pulling boxes out of  
17 the archives.

18 Q Do you know whether this person made any effort to  
19 contact anyone that had negotiated the asset purchase  
20 agreement?

21 A I don't know.

22 Q You made no such effort, correct?

23 A I did not.

24 Q Novell's tax department is part of Novell's files,  
25 correct?

1 A It is. Our legal department files, yeah. The Novell  
2 general files is part of our company. They have files.

3 Q You were asked about the issue of copyright  
4 registrations. Do you recall that?

5 A Yes.

6 Q I believe that Exhibit U-45 was a compilation of Novell  
7 copyright registrations?

8 A Yes.

9 Q Novell filed those copyright registrations after SCO  
10 had filed its own set of registrations?

11 A That's correct.

12 MR. NORMAND: And could we pull up SCO 755.

13 THE WITNESS: Do I have that one?

14 MR. NORMAND: I think it's in front of you on the  
15 screen, Mr. Jones.

16 Your Honor, I move SCO 755 pursuant to the  
17 stipulation with counsel.

18 MR. ACKER: I have no objection. I just need to  
19 check to make sure it is what was stipulated to. I don't  
20 doubt counsel's representation.

21 MR. NORMAND: We'll give Mr. Acker an opportunity  
22 to review it.

23 THE COURT: You don't have a copy for him to look  
24 at?

25 MR. NORMAND: I think we do. I know I have one



1 handy.

2 MR. ACKER: I don't have an objection subject to  
3 being able to look at this and compare it --

4 THE COURT: All right. Let's go ahead. I will  
5 admit it, then, subject to Mr. Acker's subsequent review.

6 (Plaintiff's Exhibit 755 was received into  
7 evidence.)

8 BY MR. NORMAND:

9 Q Do you recognize the front page of that document,  
10 Mr. Jones?

11 A Can it be blown up a bit?

12 Q I think we can. You recognize it to be a certificate  
13 of registration?

14 A I recognize that's what it is, yes.

15 Q You have seen SCO's -- or at least some of SCO's own  
16 copyright registrations before, correct?

17 A As you know, there are many documents in this case. I  
18 may have.

19 Q Novell was aware that SCO had filed its copyright  
20 registrations before Novell filed its own, correct?

21 A Absolutely, we knew.

22 Q As an attorney, you understand that by filing a  
23 copyright registration it doesn't mean you own the  
24 copyrights, correct?

25 A Yes. The fact that SCO obtained this didn't mean they

1 actually were the owners of the copyrights. It's not  
2 indicative of that.

3 Q Now, Mr. Jones, you understand that one of the issues  
4 in this trial is whether Novell has falsely claimed to own  
5 UNIX and UnixWare copyrights, correct?

6 A Yes.

7 Q Your view is that Novell has publicly claimed to own  
8 UNIX copyrights, correct?

9 A Yes, it is. It's a fact.

10 Q Your view is also that Novell has publicly claimed to  
11 own UnixWare copyrights, correct?

12 A That I'm not following you on.

13 Q Mr. Jones, while counsel looks at this, I wanted to  
14 show you, and read to yourself lines 16 through 20. That is  
15 from the 2008 trial testimony.

16 A Yes.

17 Q Having looked at that, do you acknowledge your view  
18 that Novell has claimed to own UnixWare copyrights?

19 A I'm sorry. You're saying based on that testimony that  
20 was given at trial? Is that the question?

21 Q The question is whether your testimony at trial was  
22 that you acknowledge that Novell has claimed --

23 A No. What happened at trial --

24 Q Let me finish the question, Mr. Jones. The question is  
25 whether you said at trial that you acknowledge that Novell

1 has claimed to own UnixWare copyrights?

2 A I'm going to answer that no. I was -- during the  
3 course of the testimony that I was giving, it wasn't clear  
4 to me in the asset purchase agreement at what point in time  
5 certain products had been excluded. And during the back and  
6 forth that I had had with Mr. Normand at the trial, we  
7 worked through the actual agreement and identified at which  
8 version that stopped, and that it wasn't UnixWare. So I  
9 thought that was resolved. When I was stating that at  
10 trial, I was stating it as a question that I thought we had  
11 worked through live during trial.

12 MR. NORMAND: Your Honor, may I read this question  
13 and answer into the record?

14 THE COURT: Yes, you may.

15 BY MR. NORMAND:

16 Q The question, has Novell ever claimed to own copyrights  
17 to SCO UnixWare. Answer: No. If by SCO UnixWare you mean  
18 any UnixWare code produced after the date of the asset  
19 purchase agreement, no.

20 So your position, if I understand it, is Novell has not  
21 claimed to own any UnixWare code produced after the date of  
22 the asset purchase agreement; is that correct?

23 A Again, there is a broader testimony. That is not --  
24 that is a statement that I made as I was working through an  
25 issue with you and ultimately that was not my conclusion.

1 So I would not regard that as being some sort of a statement  
2 on behalf of Novell, even a statement that I would have made  
3 by the end of the trial, that I would make today.

4 Q Mr. Jones, you are aware, generally, that in its answer  
5 Novell has acknowledged this claimed ownership of UNIX and  
6 UnixWare copyrights, correct?

7 A UNIX and UnixWare copyrights?

8 Q Correct.

9 A I am not aware of that.

10 Q Let me ask you if you agree with this statement from  
11 Novell's answer, quote, Novell admits that it has registered  
12 its claim to the UNIX and UnixWare copyrights enumerated in  
13 paragraph 14-G of this answer. Do you agree with that  
14 statement?

15 A I guess I would say I'm not -- I am not familiar with  
16 the statement, I am not familiar with the exhibits that are  
17 attached, and so it's just hard for me to agree with because  
18 I just don't have -- I'm not sitting here with the agreement  
19 reading it and seeing the exhibits. I'm not sure in that  
20 context how the term UnixWare is being used.

21 In this questioning, I would just say that what the  
22 asset purchase agreement says in terms of copyright  
23 ownership is what -- we have attempted to be faithful to  
24 that. If there are versions of UnixWare that correspond to  
25 those things that were excluded from the asset purchase

1 agreement as transferred assets, then that's all I've ever  
2 intended to identify. I think that's all Novell has ever  
3 intended to identify.

4 If there is some confusion about product naming or  
5 versioning or something about that, I don't know. But I can  
6 tell you all Novell has ever intended to do was to assert  
7 ownership for those things that were excluded from the asset  
8 purchase agreement.

9 Q You don't have any reason to disbelieve that Novell  
10 made an accurate statement in its answer in this case,  
11 correct?

12 A No.

13 Q Wouldn't you agree, Mr. Jones, Novell has publicly  
14 claimed to own copyrights at issue in this trial, correct?

15 A Yes.

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

17 MR. ACKER: Just a few questions, Your Honor.

18 REDIRECT EXAMINATION

19 BY MR. ACKER:

20 Q In your conversations in the fall of 2002 with Mr.  
21 McBride, he said to you he thought Novell could make more  
22 money if Novell participated with SCO in this licensing  
23 campaign?

24 A Generally.

25 Q Can you explain as best you can to the jurors what it

1 was that Mr. McBride was conveying to you?

2 A All I understood -- all I understood Darl to be saying  
3 was that, you know, if Novell is entitled to royalties on  
4 these SVRX products, SCO is collecting those and sending  
5 those to Novell, and I think the -- I think basically what  
6 he was saying is that some of these SVRX customers might be  
7 moving to Linux. And so if SCO does something that stops  
8 them from moving from SVRX to Linux, then these revenues  
9 will stay up and thereby Novell would get more money.  
10 That's basically what I understood Darl to be saying.

11 Q So implicit in that statement that Novell could stand  
12 to make more money was that SCO's licensing campaign would  
13 prevent a migration from UNIX to Linux?

14 A That seemed to be the underlying assumption of what  
15 Darl was telling me.

16 Q Going back to your first conversation with Mr. McBride  
17 or the first several conversations, what is it that gave you  
18 the impression that Mr. McBride understood that the asset  
19 purchase agreement excluded the UNIX copyrights?

20 A He directly told me it did. I mean, he pointed me to  
21 the section of the agreement that excluded the copyrights.

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

23 MR. NORMAND: Just a few questions.

24 THE COURT: Go ahead.

25 //

1

## REXCROSS-EXAMINATION

2 BY MR. NORMAND:

3 Q Mr. Jones, you understand that the language of the  
4 original asset purchase agreement that you and Mr. McBride  
5 were discussing in 2002 has been amended, correct?

6 A Correct. There's been at least two amendments to the  
7 agreement.

8 Q You understand in particular the issue of copyright  
9 addressed in the original APA, that language has been  
10 amended and is not the operative language anymore, correct?

11 A Yeah. Amendment 2 amended it, and that would be the  
12 operative language, as you put it.

13 Q Now on this issue of your discussions with Mr. McBride  
14 and Mr. Sontag, when you found an unsigned copy of Amendment  
15 No. 2, you didn't call SCO to tell them you had found an  
16 unsigned copy, did you?

17 A We did not.

18 Q You knew it was relevant to the issue you had been  
19 talking about with Mr. McBride and Mr. Sontag, correct?

20 A Yep.

21 Q You knew it went to the issue that Chris had sought to  
22 clarify in that side letter, correct?

23 A It related to it.

24 Q You didn't tell them about it, correct?

25 A That's correct.

1 FURTHER REDIRECT EXAMINATION

2 BY MR. ACKER:

3 Q Mr. Jones, are you in the habit of sending unsigned  
4 documents to presidents of other companies?

5 A Definitely not.

6 MR. ACKER: Nothing else, Your Honor.

7 THE COURT: You realize you just took your --

8 MR. ACKER: I used it up, you're right. Thank  
9 you, Your Honor.

10 THE COURT: I have to mark you down.

11 May this witness be excused, counsel?

12 MR. NORMAND: Yes.

13 MR. ACKER: Yes, Your Honor.

14 THE COURT: Mr. Jones, that means you do not need  
15 to worry about being re-called. You may go about your  
16 business. But I do need to caution you to please not  
17 discuss your testimony with any other witness in this case  
18 or in the presence of any other witness or in any way  
19 communicate what the content of your testimony was. Thank  
20 you.

21 Mr. Acker.

22 MR. ACKER: I believe it's Mr. Singer's witness.

23 THE COURT: Mr. Singer.

24 MR. SINGER: Your Honor, at this time we call Jack  
25 Messman as an adverse witness.



1           THE COURT: Ladies and gentlemen -- Mr. Acker, I  
2 want you to hear this to make certain I don't misrepresent  
3 anything. Mr. Messman, you may recall you heard previously  
4 a portion of his deposition testimony. Plaintiffs had hoped  
5 to have called him originally, but he was not available at  
6 the time that the plaintiffs originally wished to call him,  
7 and he therefore is appearing today as the final witness for  
8 the plaintiffs in their case in chief.

9           Go ahead, please, Mr. Acker.

10                         JACK L. MESSMAN,  
11           Having been duly sworn, was examined  
12                         and testified as follows:

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

15           THE WITNESS: My name is Jack L. Messman.  
16 M-e-s-s-m-a-n.

17           THE COURT: Mr. Singer, I will remind you that we  
18 have about ten minutes until the normal break time, if you  
19 could try to keep that in mind, please.

20           MR. SINGER: I will look for an appropriate time.

21           THE COURT: Thank you.

22                         DIRECT EXAMINATION

23 BY MR. SINGER:

24 Q     Good morning, Mr. Messman. My name is Stuart Singer.  
25 I am one of the attorneys for The SCO Group. I think you'll

1 recall that we met at your deposition taken several years  
2 ago in this case.

3 A Yes. Good to see you again.

4 Q Now the jury has had an opportunity to hear excerpts of  
5 that deposition earlier in the trial. We're going to  
6 discuss some areas the jury has not yet heard precise  
7 questions on.

8 I would like to go back to the time of 5-28, the May  
9 28th press release, SCO Exhibit 525. These documents will  
10 appear on the screen before you.

11 I believe you are familiar with this press release?

12 A Yes.

13 Q Which you approved Novell issuing on May 28th, 2003,  
14 correct?

15 A Yes.

16 Q And at that time you understood that press release  
17 stated that Novell, not SCO, owned copyrights to the UNIX  
18 and UnixWare operating system, correct?

19 A Yes.

20 Q Why was your press release issued on May 28th, that  
21 specific day?

22 A We didn't pick any particular day. That was the day  
23 that we got the work done necessary to release it.

24 Q Are you aware Mr. McBride sent a letter to Novell that  
25 was dated May 12th?

1 A Yes.

2 Q Did you believe it was important to respond to that  
3 letter?

4 A Yes.

5 Q Why did you wait 16 days from May 12th to May 28th?

6 A Well, we didn't want to react without thinking it  
7 through and understanding the implications of his letter to  
8 us.

9 Q Well, in terms of thinking it through, had you  
10 thoroughly read the asset purchase agreement before issuing  
11 this press release?

12 A I had glanced at it in this case, and I had been a part  
13 of the board in 1995 that approved the asset purchase  
14 agreement.

15 Q You had only glanced at it?

16 A Because I had read it after that board meeting.

17 Q Had you been informed prior to issuing the press  
18 release by Mr. LaSala that he had been turning the company  
19 upside down to find a signed copy of what we've referred to  
20 as Amendment No. 2?

21 A He told me that he had an unsigned copy called  
22 Amendment 2. I said until we found Amendment 2 signed, it  
23 didn't exist legally.

24 Q So at the time you approved the issuance of this press  
25 release on May 28th, you knew there was an unsigned copy and

1 Novell hadn't found out whether or not that it had been  
2 executed, correct?

3 A That's correct.

4 Q Yet you believed you were ready on May 28th to send out  
5 the press release?

6 A Yes.

7 Q Now you were aware, since you were on the board in  
8 1995, that the Wilson Sonsini firm represented Novell in  
9 that transaction, correct?

10 A Yes.

11 Q Did you or anyone at your direction make efforts to  
12 contact Wilson Sonsini to see if they had a signed copy of  
13 Amendment No. 2 before you issued this press release?

14 A I did not, but the people who reported to me were  
15 responsible for doing those sorts of things.

16 Q Did you direct them to do that?

17 A No.

18 Q Did you know if they did that?

19 A I don't know if they did that.

20 Q You weren't informed before May 28th when you sent out  
21 this press release that there was such a signed version of  
22 Amendment No. 2?

23 A That's correct.

24 Q Similarly, you never asked SCO about whether they had a  
25 signed copy of the second amendment? You never sent them

1 your unsigned copy and said before we come out with a press  
2 release saying we own the UNIX copyrights, can you tell us  
3 if you happen to have a signed version of this? That didn't  
4 happen.

5 A That did not happen. I did not do that.

6 Q You didn't direct anyone else to do that?

7 A That's correct.

8 Q You could have sent this letter privately to SCO before  
9 you put it out as a press release, correct?

10 A I could have.

11 Q You didn't do that either?

12 A I did not.

13 Q Now you knew the press release would hurt SCO in saying  
14 that they didn't own these UNIX copyrights, right?

15 A I didn't know it would hurt them. I was putting out  
16 our side of the story.

17 Q You didn't think that putting out a press release  
18 saying that the core intellectual property, the copyrights  
19 to the UNIX operating system weren't owned by the company  
20 that is running that business would hurt them?

21 A I didn't know. I wasn't following the stock market. I  
22 only knew we owned the copyrights and the patents, and I was  
23 letting the outside world know that we owned the copyrights  
24 and the patents.

25 Q My question is simple, did you believe it would hurt

1 them? Yes or no.

2 A I didn't know.

3 Q You didn't know.

4 Now you wanted to get the press release as broadly as  
5 possible; is that correct?

6 A Yes.

7 Q And in a statement about copyright ownership -- let me  
8 be more precise. Did you believe that asserting that you  
9 owned these copyrights would hurt SCO's SCOSource licensing  
10 program?

11 A I didn't know because it was a new licensing program.

12 Q You didn't have the view that the reason you were  
13 putting this out was to basically convince people to not get  
14 a SCOSource license?

15 A I didn't know what SCOSource licensing was all about at  
16 that point. It was new.

17 Q It was announced in January of 2003; was it not?

18 A Yes, it was.

19 Q And wasn't that one of the reasons that you went public  
20 with this press release in May of 2003 is the SCOSource  
21 licensing program?

22 A It was not the reason.

23 Q That was not reason?

24 A No.

25 Q It had nothing to do with it?

1 A It wasn't the reason why we did it.

2 Q Now in your May 28th letter you asserted that SCO had  
3 not proven to your satisfaction its case for a copyright  
4 infringement, correct?

5 A They hadn't proved anything to us. We believed there  
6 was no UNIX in Linux.

7 Q Now you could have made that point without also saying  
8 that we own the UNIX copyrights, correct?

9 A I could have.

10 Q Now you understood a claim of ownership to UNIX  
11 copyrights coming from the company, Novell, that had then  
12 sold the business to Santa Cruz would have special force in  
13 the outside world, correct?

14 A We owned the copyrights and we sold the rights to those  
15 copyrights to Santa Cruz Operation.

16 Q Mr. Messman, my question must have been unclear because  
17 that's not what I asked. I asked did you understand that a  
18 statement coming from the seller of the business, Novell,  
19 saying we still own the copyrights would have special force  
20 and effect in the outside world?

21 A I didn't know what the effect would be. I was trying  
22 to make sure the customers knew what the facts were.

23 Q So you didn't think that it would have more effect on  
24 listeners who heard Novell, the former owner of the  
25 business, saying we still own the copyrights than some other

1 third party making that claim?

2 A Well, we were the only ones that could make that  
3 statement because we knew we owned the copyrights and the  
4 patents.

5 Q Now you understand the difference between getting out  
6 your side of the story and making a false statement?

7 A Sure.

8 Q Now what would have been your reaction if AT&T, after  
9 you had bought the UNIX business from them, had said we  
10 still own the UNIX copyrights?

11 A That's a hypothetical.

12 Q Yes, it is.

13 A I don't think I would have reacted to it.

14 Q You don't think it would have mattered to you?

15 A No. We had our documents and I would have probably had  
16 Joe LaSala, our general counsel, contact them.

17 Q Do you think, sir, that it would have been okay if AT&T  
18 said we still own the copyrights but we'll put in your side  
19 of the story, Mr. LaSala's statement perhaps out on a Web  
20 site at the same time so people can decide what they think?  
21 That would have been perfectly okay with you?

22 A I don't know what they would have done.

23 Q My question is would that have been okay with you?

24 A Well, it wasn't the facts. We owned the copyrights and  
25 the patents. We bought them from them in 19 -- whenever it



1 was we bought USL, UNIX System Laboratories, so they would  
2 not have had the right to say that.

3 Q They wouldn't have had the right to say it because it  
4 wouldn't have been true, correct?

5 A It wouldn't have been true.

6 Q Do you think that your interest in supporting Linux  
7 would justify Novell telling a 2003 and 2004 falsehood?

8 A I don't think we did tell a falsehood.

9 Q That wasn't my question.

10 A I'm sorry. Would you repeat it?

11 Q Yes, sir.

12 Do you think your interest in supporting Linux  
13 justifies Novell telling a falsehood in 2003 or 2004?

14 A No, I don't.

15 Q Now after the May 28th press release, there was a June  
16 6th press release. That's SCO Exhibit 97. Would you take a  
17 look at that, please.

18 Do you recognize this as a press release which you  
19 approved, eight days later?

20 A Yes.

21 Q And do you recognize that you stated in this press  
22 release that Amendment No. 2 appears to supports SCO's claim  
23 that ownership of certain copyrights for UNIX did transfer  
24 to SCO in 1996, correct?

25 A I see that, yes, sir.

1 Q Now your general counsel, Mr. LaSala, worked with you  
2 on this press release, correct?

3 A It was his press release. I worked with him on it.

4 Q Fair enough.

5 You would expect your general counsel not to approve a  
6 press release involving the interpretation of a legal  
7 document unless he was comfortable that he had it right,  
8 correct?

9 A I think he's saying that he hadn't done all the work  
10 yet and therefore on the surface it appeared --

11 Q Would you answer my question, sir?

12 A Sure. Would you repeat it?

13 Q Yes.

14 My question was would you expect your general counsel  
15 to write a press release interpreting a legal document and  
16 to do so in a way that was correct?

17 A Yes, I would.

18 Q Now were you aware that Mr. LaSala had been looking at  
19 an unsigned version of Amendment No. 2 for several weeks  
20 before this press release came out and even before the May  
21 28th press release came out?

22 A I was aware he had an unsigned copy.

23 Q So there was plenty opportunity over a period of weeks  
24 to try to interpret the document and decide what it meant,  
25 correct?

1 A I don't know whether he had -- how much time he had. I  
2 can't remember the amount of time it was in his possession.  
3 And as far as I was concerned, when he brought it up with  
4 me, it wasn't part of the document until I saw a signed  
5 copy.

6 Q Now the statement that Novell says the amendment  
7 appears to support SCO's claims that ownership of certain  
8 copyrights to UNIX did transfer to SCO in 1996, you approved  
9 that at the time this was issued, correct?

10 A Yes.

11 Q And would you agree that after June 6th Novell engaged  
12 in the process of trying to back away from that statement?

13 A I don't think we were trying to back away from it. We  
14 were clarifying what appears in it.

15 Q Well, are you aware that on August 4th, 2003 there was  
16 a letter from Mr. LaSala to SCO that was different than what  
17 this said?

18 A I recall that there was a letter that said that we had  
19 done our investigation work and we now believe there is no  
20 merit to your claims that the copyrights and the patents  
21 transferred.

22 Q Isn't it true that between the time of June 6th when  
23 this was issued and August 4th when that letter was sent  
24 nothing had changed, there had been no new information that  
25 had come to light?

1 A I don't know what had come to light during that period  
2 of time.

3 Q Do you recall being asked about that in your  
4 deposition?

5 A Being asked about what, sir?

6 Q Whether anything different had come to light between  
7 June 6th, 2003 and the August 4, 2003 letter?

8 A I don't recall what I said at that point in time.

9 Q Are you aware of anything that occurred differently  
10 between June the 6th and August the 4th?

11 A No, I can't recall. There might have been something  
12 that occurred, but I don't recall it.

13 Q Now did you authorize Novell to go public with the  
14 August 4th letter if they had wanted to do so?

15 A Could you refresh my memory of what the August 4th  
16 letter is?

17 Q The August 4th letter, Mr. LaSala's letter to Mr.  
18 McBride or Mr. Tibbitts which said that we believe ownership  
19 of the UNIX copyrights still rests with Novell. That was  
20 not published, correct?

21 A Correct.

22 MR. SINGER: I think this might be a good time for  
23 us to have a break, Your Honor. We will move on to other  
24 subjects.

25 THE COURT: All right. We'll take a 15-minute

1 break.

2 (Jury excused)

3 THE COURT: Mr. Brennan, what is your intent as  
4 far as a Rule 50 motion?

5 MR. BRENNAN: We intend to file one.

6 In terms of timing, Your Honor?

7 THE COURT: Timing.

8 MR. BRENNAN: If I could confer with Mr. Jacobs, I  
9 can give you a prompt answer.

10 Your Honor, rather than me be a mouthpiece, I  
11 think Mr. Jacobs --

12 THE COURT: Mr. Jacobs, that's a good idea.

13 MR. JACOBS: Thank you, Your Honor.

14 We obviously intend to file a Rule 50 motion  
15 before the case goes to the jury and, if necessary, after  
16 the case goes to the jury. In terms of the close of  
17 plaintiff's case a Rule 50 motion, we're aiming for this  
18 evening, Your Honor.

19 THE COURT: All right.

20 MR. SINGER: Well, we can only imagine what they  
21 plan to file.

22 THE COURT: Yes, you probably can.

23 MR. BRENNAN: I can confirm it will be  
24 interesting.

25 THE COURT: All right. That helps the Court a

1 little bit. Normally, at the end of the plaintiff's last  
2 witness, I will ask do you now rest, and that then will  
3 trigger you saying, Your Honor we want to reserve the right,  
4 et cetera, et cetera. I'm going to assume that has now been  
5 done so we don't have to interrupt as soon as we're through  
6 with Mr. Messman. Is that agreeable, counsel?

7 MR. SINGER: That's fine with us.

8 MR. JACOBS: Thank you, Your Honor.

9 THE COURT: Thank you.

10 (Recess)

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