

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 26, 2010  
18   Jury Trial

19  
20  
21  
22  
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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

For Plaintiff:

Brent Hatch  
HATCH JAMES & DODGE  
10 West Broadway, #400  
Salt Lake City, Utah 84010

Stuart Singer  
BOIES SCHILLER & FLEXNER  
401 East Las Olas Blvd., #1200  
Fort Lauderdale, Florida 33301

Edward Normand  
BOIES SCHILLER & FLEXNER  
33 Main Street  
Armonk, New York 10504

For Defendant:

Sterling Brennan  
WORKMAN NYDEGGER  
60 East South Temple, #1000  
Salt Lake City, Utah 84111

Eric Acker  
Michael Jacobs  
MORRISON & FOERSTER  
425 Market Street  
San Francisco, California 94105

1 SALT LAKE CITY, UTAH; FRIDAY, MARCH 26, 2010; 8:30 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning.

4 Let me ask, first of all, whether or not you have  
5 any disputes over closing argument demonstratives or slides,  
6 or whatever else?

7 MR. BRENNAN: Your Honor, we had a chance to look  
8 at one another's. I think with some modifications that were  
9 just made, we should be in agreement, at least in terms of  
10 presentation of the material.

11 THE COURT: I'm not sure that I understand what  
12 you mean at least in regards to the presentation of  
13 materials.

14 MR. BRENNAN: We don't have an objection to the  
15 use of the demonstratives.

16 THE COURT: Do you have an objection to any of Mr.  
17 Brennan's?

18 MR. SINGER: No, Your Honor.

19 THE COURT: SCO today filed a motion regarding  
20 three issues about closing, and I would agree with their  
21 request. I am going to assume the first one is no longer  
22 relevant because the parties have agreed as to the  
23 demonstratives.

24 MR. SINGER: That's correct.

25 THE COURT: The second is SCO objects to any

1 attempt by Novell to argue to the jury that Novell's  
2 assertion to ownership applied only to UNIX and not to  
3 UnixWare copyrights. Do you wish to address that, Mr.  
4 Jacobs?

5 MR. JACOBS: We do not quarrel with that in the  
6 context of the closings, Your Honor, but we will be making  
7 clear the delineation between the pre-APA UnixWare and  
8 post-APA UnixWare.

9 THE COURT: I think the jury instruction now  
10 reflects that better than it did before as well.

11 The third has to do with an attempt, frankly, by  
12 either side to argue something contrary to law. My  
13 assumption is that neither of you will have done that in any  
14 event; is that correct?

15 MR. JACOBS: That is correct. Just to avoid  
16 confusion during the openings themselves, SCO's motion is  
17 drawn to section 204(a) of the Copyright Act, which was the  
18 subject of the Tenth Circuit ruling. The Tenth Circuit  
19 ruling was that there is no per se requirement under 204(a)  
20 of the Copyright Act for something that represents  
21 specifically or in substance a bill of sale. We're not  
22 arguing that issue under the Copyright Act. We will be  
23 arguing that the asset purchase agreement was a promise to a  
24 assign, not an assignment, that Amendment No. 2 is dated  
25 October 26th, I think, 1996, and that as a matter of

1 contract law, just as in the purchase and sale of a house,  
2 there was no subsequent evidence of an actual transfer. So  
3 we'll be arguing it as a matter of contract law, which the  
4 Tenth Circuit did not address.

5 MR. SINGER: Your Honor, this is exactly the type  
6 of argument that we filed this motion because we were  
7 concerned they might make. The Tenth Circuit specifically  
8 held they didn't see anything to this date issue. I think  
9 it's expressly in one of the footnotes on this section when  
10 this argument was made. There is no difference between  
11 making this argument in the context of the Copyright Act or  
12 making it in the contract section. The Court of Appeals  
13 specifically ruled that Amendment 2 would be sufficient to  
14 transfer title, that that was the intent of the parties.

15 So I think, with all due respect, Mr. Jacobs is in  
16 the teeth of that decision.

17 THE COURT: Mr. Jacobs.

18 MR. JACOBS: Your Honor, footnote 2 is the  
19 footnote I think Mr. Singer is referring to and it's a  
20 footnote in the context of the discussion of section 204(a),  
21 it is not a holding that the contract could not be  
22 interpreted in the way that we're proposing to interpret it.  
23 There was no such briefing or argument before the Tenth  
24 Circuit. The footnote itself is not definitive at all on  
25 the question that we propose to argue as a matter of

1 contract interpretation. I could hand it to Your Honor if  
2 it would be convenient, you could look yourself.

3 THE COURT: I probably need to look at it.

4 MR. SINGER: We would also submit that this would  
5 just be confusing to the jury because there's been no  
6 evidence here that they would be drawing any conclusions  
7 from that.

8 THE COURT: Mr. Singer, I think that is probably  
9 your best argument, that this ought to be handled by you in  
10 your reply. But I do want to look at the footnote.

11 MR. JACOBS: Sure. Just for the avoidance of  
12 doubt, Ms. Amadia did say had she intended to transfer,  
13 there would have been additional documents that would have  
14 been required.

15 May I, Your Honor?

16 THE COURT: Yes.

17 If you are not arguing a pure legal issue about  
18 the bill of sale or something akin to it but rather the  
19 intent of the parties, I believe that footnote would not  
20 preclude you from doing so.

21 MR. JACOBS: Thank you, Your Honor.

22 THE COURT: Counsel, let me again remind you, it  
23 would be my intent to dismiss juror 13 as the alternate.

24 MR. SINGER: We understand, Your Honor.

25 THE COURT: I am going to hold you to your one

1 hour and 15 minutes. My intent will be to instruct the jury  
2 and then to have your initial presentation and closing.

3 Will that be by you, Mr. Singer, or Mr. Hatch, or  
4 will you be splitting it?

5 MR. SINGER: We will be splitting it, but I plan  
6 to reserve 15 minutes for rebuttal.

7 THE COURT: Who will go first.

8 MR. SINGER: I will be going first, Mr. Hatch will  
9 be taking over at about the 45-minute mark.

10 THE COURT: All right.

11 Mr. Brennan, will you making the closing?

12 MR. BRENNAN: Yes, I will, Your Honor.

13 THE COURT: Again, after your initial hour, then  
14 we'll take a break and come back to Mr. Brennan, and then  
15 your rebuttal.

16 MR. SINGER: Would it be possible to have a few  
17 minutes break after the reading of the instructions just to  
18 set up?

19 THE COURT: Certainly.

20 MR. SINGER: One final question, given that the  
21 Court has granted SCO's 50(a) motion and dismissed Novell's  
22 counterclaim, and that's been raised in opening and  
23 otherwise, will the Court make some mention of that?

24 THE COURT: There is a specific jury instruction  
25 that will state, and I'll read it to you, if you've not seen

1 it, the claim of Novell that SCO slandered Novell's title is  
2 no longer before you and will not be decided by you. Do not  
3 concern yourselves with this development and do not  
4 speculate about it.

5 MR. SINGER: Thank you.

6 THE COURT: Counsel, let me remind you that the  
7 Court will expect proposed findings of facts and conclusions  
8 of law as to those issues reserved for the Court on the 16th  
9 of April, which is 20 days plus. Okay.

10 All right. Is there anything else before we bring  
11 the jury in?

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

13 MR. SINGER: Not from SCO.

14 THE COURT: Ms. Malley.

15 (Jury present)

16 THE COURT: Good morning, ladies and gentlemen.

17 Let me begin by reassuring you that a copy of the  
18 instructions that I'm about to read to you will go with you  
19 into the jury room, so I do not expect you to memorize this  
20 as I go through it. All right.

21 Members of the jury, now that you have heard the  
22 evidence, it becomes my duty to give you the instructions of  
23 the Court as to the law applicable to this case.

24 It is your duty as jurors to follow the law as  
25 stated in the instructions of the Court, and to apply the



1 rules of law to the facts as you find them from the evidence  
2 in the case.

3           You are not to single out one instruction alone as  
4 stating the law, but must consider the instructions as a  
5 whole.

6           Neither are you to be concerned with the wisdom of  
7 any rule of law stated by the Court. Regardless of any  
8 opinion you may have as to what the law ought to be, it  
9 would be a violation of your sworn duty to base a verdict  
10 upon any other view of the law than that given in the  
11 instructions of the Court; just as it would be a violation  
12 of your sworn duty, as judges of the facts, to base a  
13 verdict upon anything but the evidence of the case.

14           You are to disregard any evidence offered at trial  
15 and rejected by the Court. You are not to consider  
16 questions of counsel as evidence. You are not to consider  
17 the opening statements and the arguments of counsel as  
18 evidence. Their purpose is merely to assist you in  
19 analyzing and considering the evidence presented at trial.

20           The Court did not by any words uttered during the  
21 trial or in these instructions give or intimate, or wish to  
22 be understood by you as giving or intimating, any opinions  
23 as to what has or has not been proven in the case or as to  
24 what are or are not the facts of the case.

25           The claim of Novell that SCO slandered Novell's

1 title is no longer before you and will not be decided by  
2 you. Do not concern yourselves with this development and do  
3 not speculate about it.

4           SCO has the burden of proving its claim by a  
5 preponderance of the evidence.

6           To prove by a preponderance of the evidence means  
7 to prove something is more likely so than not so. It does  
8 not mean the greater number of witnesses or exhibits. It  
9 means the evidence that has the more convincing force when  
10 taken on a whole compared to the evidence opposed to it. It  
11 means the evidence that leads you the jury to find that the  
12 existence of the disputed fact is more likely true than not  
13 true.

14           Any finding of fact you make must be based on  
15 probabilities, not possibilities. A finding of fact must  
16 not be based on speculation or conjecture.

17           When I say in these instructions that the party  
18 has the burden of proof on any proposition or use the  
19 expression if you find or if you determine, I mean that you  
20 must be persuaded, considering all the evidence in the case,  
21 that the proposition is more probably true than not true.

22           In determining whether any disputed fact has been  
23 proven by a preponderance of the evidence you may, unless  
24 otherwise instructed, consider the testimony of all  
25 witnesses, regardless of who may have called them, and all

1 exhibits.

2           If a party fails to meet this burden of proof, or  
3 if the evidence weighs so evenly that you are unable to say  
4 that there is a preponderance on either side, you must  
5 resolve the question against the party who has the burden of  
6 proof on that issue and in favor of the opposing party.

7           In this particular civil case, one of the elements  
8 of the claim made by SCO, the showing of constitutional  
9 malice, has a different burden of proof called clear and  
10 convincing evidence. That means that SCO has a higher  
11 burden than preponderance of the evidence, but it does not  
12 require proof beyond a reasonable doubt. Clear and  
13 convincing evidence is evidence that shows it is highly  
14 probable that what is claimed is true. It is evidence that  
15 produces in your mind a firm belief as to the fact at issue.  
16 For such evidence to be clear and convincing, it must at  
17 least have reached a point where there remains no  
18 substantial doubt as to the truth or correctness of the  
19 claim based upon the evidence.

20           You have been chosen and sworn as jurors in this  
21 case to try the issues of fact presented by the allegations  
22 of the complaint of SCO, and the answer thereto of Novell.  
23 You are to perform this duty without bias or prejudice as to  
24 any party. Our system of law does not permit jurors to be  
25 governed by sympathy, prejudice, or public opinion. Both

1 the parties and the public expect that you will carefully  
2 and impartially consider all the evidence in the case,  
3 follow the law stated by the Court, and reach a just  
4 verdict, regardless of the consequences.

5           During the trial I have permitted you to take  
6 notes. Many courts do not permit note-taking by jurors.  
7 And as instructed at the beginning of trial, a word of  
8 caution is in order. There is always a tendency to attach  
9 undue importance to matters which one has written down.  
10 Some testimony which is considered unimportant at the time  
11 presented, and thus not written down, takes on greater  
12 importance later in the trial in light of all the evidence  
13 presented. Therefore, you are instructed that your notes  
14 are only a tool to aid your own individual memory and you  
15 should not compare your notes with other jurors in  
16 determining the content of any testimony or in evaluating  
17 the importance of any evidence. Your notes are not  
18 evidence, and are by no means a complete outline of the  
19 proceeding or list of the highlights of the trial. Above  
20 all, your memory should be your greatest asset when it comes  
21 to deliberating and rendering a decision in this case.

22           Both SCO and Novell are corporations and, as such,  
23 can act only through their officers and employees, and  
24 others designated by them as their agents.

25           Any act or omission of any officer, employee or

1 agent of a corporation, in the performance of the duties or  
2 within the scope of the authority of the officer, employee  
3 or agent, is the act or omission of the corporation.

4           Unless you are otherwise instructed, the evidence  
5 in this case consists of the sworn testimony of the  
6 witnesses, regardless of who may have called them; and all  
7 exhibits received in evidence, regardless of who may have  
8 produced them; and all facts which may have been admitted or  
9 stipulated; and all facts and events which may have been  
10 judicially noticed.

11           Any evidence as to which an objection was  
12 sustained by the Court, and any evidence ordered stricken by  
13 the Court, must be entirely disregarded.

14           Unless you are otherwise instructed, anything you  
15 may have seen or heard outside of the courtroom is not  
16 evidence and must be entirely disregarded.

17           There are, generally speaking, two types of  
18 evidence from which a jury may properly find the truth as to  
19 the facts of a case. One is direct evidence, such as the  
20 testimony of an eyewitness. The other is indirect or  
21 circumstantial evidence, the proof of a chain of  
22 circumstances pointing to the existence or nonexistence of  
23 certain facts.

24           As a general rule, the law makes no distinction  
25 between direct and circumstantial evidence, but simply

1 requires that the jury find the facts in accordance with the  
2 burden of proof in the case, both direct and circumstantial.

3           You, as jurors, are the sole judges of the  
4 credibility of witnesses and the weight their testimony  
5 deserves. You may be guided by the appearance and conduct  
6 of the witnesses, or by the manner in which the witness  
7 testifies, or by the character of the testimony given, or by  
8 evidence to the contrary of the testimony given.

9           You should carefully scrutinize all the testimony  
10 given, the circumstances under which each witness has  
11 testified, and every matter in evidence which tends to show  
12 whether a witness is worthy of belief. Consider each  
13 witness's intelligence, motive and state of mind, and  
14 demeanor and manner while on the stand. Consider the  
15 witness's ability to observe matters as to which he or she  
16 has testified, and whether he or she impresses you as having  
17 an accurate recollection of these matters. Consider also  
18 any relation each witness may bear to either side of the  
19 case; the manner in which each witness might be affected by  
20 the verdict; and the extent to which, if at all, each  
21 witness is either supported or contradicted by other  
22 evidence in the case.

23           Inconsistencies or discrepancies in the testimony  
24 of a witness, or between the testimony of different  
25 witnesses, may or may not cause you to discredit such

1 testimony. Two or more persons witnessing an incident or a  
2 transaction may simply see or hear it differently and  
3 innocent misrecollection, like failure of recollection, is  
4 not an uncommon experience. In weighing the effect of a  
5 discrepancy, always consider whether it pertains to a matter  
6 of importance or an unimportant detail, and whether the  
7 discrepancy results from innocent error or intentional  
8 falsehood.

9           After making your own judgment, you will give the  
10 testimony of each witness such weight, if any, as you may  
11 think it deserves.

12           Witnesses who, by education, study and experience,  
13 have become expert in some art, science, profession or  
14 calling, may state opinions as to any such matter in which  
15 that witness is qualified as an expert, so long as it is  
16 material and relevant to the case. You should consider such  
17 expert opinion and the reasons, if any, given for it. You  
18 are not bound by such an opinion. Give it the weight you  
19 think it deserves. If you should decide that the opinions  
20 of an expert witness are not based upon sufficient education  
21 and experience, or if you should conclude that the reasons  
22 given in support of the opinions are not sound, or that such  
23 opinions are outweighed by other evidence, you may disregard  
24 the opinion entirely.

25           In resolving any conflict that may exist in the

1 testimony of experts, you may compare and weigh the opinion  
2 of one against that of another. In doing this, you may  
3 consider the qualifications and credibility of each, as well  
4 as the reasons for each opinion and the facts on which the  
5 opinions are based.

6           In determining the weight to be given to an  
7 opinion expressed by any witness who did not testify as an  
8 expert witness, you should consider his or her credibility,  
9 the extent of his other her opportunity to perceive the  
10 matters upon which his or her opinion is based and the  
11 reasons, if any, given for it. You are not required to  
12 accept such an opinion but should give it the weight to  
13 which you find it entitled.

14           During the trial of this case, certain testimony  
15 has been presented to you by way of a deposition, consisting  
16 of sworn recorded answers to questions asked of the witness  
17 in advance of the trial by one or more of the attorneys for  
18 the parties to the case. The testimony of a witness who,  
19 for some reason, cannot be present to testify from the  
20 witness stand may be presented in writing under oath or on a  
21 videotape. Such testimony is entitled the same  
22 consideration, and is to be judged as to credibility, and  
23 weighed, and otherwise considered by the jury, insofar as  
24 possible, in the same way as if the witness had been present  
25 and had testified from the witness stand.



1           Certain charts, graphs and illustrations have been  
2 shown to you. Those charts, graphs and illustrations are  
3 used for convenience and to help explain the facts of the  
4 case. They are not themselves evidence or proof of any  
5 facts.

6           You have heard evidence that there were earlier  
7 rulings by this Court concerning the ownership of the UNIX  
8 and the UNIX copyrights existent as of the date of the asset  
9 purchase agreement. In making these rulings, the Court did  
10 not have the benefit of the evidence that you have now  
11 heard. These prior rulings have been reversed in a  
12 unanimous ruling by the Court of Appeals, which is why these  
13 issues are being presented to you in this trial. You must  
14 decide this case solely on the evidence presented to you in  
15 this trial. The earlier rulings should have no bearing on  
16 your determination of which party owns the copyrights at  
17 issue in this case. However, the existence of these prior  
18 rulings may be considered by you in your determination of  
19 special damages and punitive damages, if any.

20           You heard reference to a SCO Group bankruptcy.  
21 That is a reorganization proceeding which is pending in  
22 another court. SCO continues to operate its business in  
23 reorganization and the existence of that proceeding should  
24 have no bearing on your consideration of this case.

25           You have also heard reference to a trial involving

1 SCO and Novell in 2008. That trial concerned other issues  
2 that are not before you.

3 In this case, SCO has alleged that Novell has  
4 slandered its title regarding ownership of copyrights over  
5 the UNIX and UnixWare computer operating systems.

6 Slander of title requires you to find that:  
7 First, there was a publication of a statement disparaging  
8 SCO's title; second, the statement was false; third, the  
9 statement was made with constitutional malice; and, fourth,  
10 the statement caused special damages. I will now explain  
11 these four elements in more detail.

12 The first element requires SCO to prove that  
13 Novell published a statement that disparaged SCO's title or  
14 ownership of the UNIX or UnixWare copyrights existent as of  
15 the date of the asset purchase agreement. SCO alleges that  
16 Novell made several slanderous statements in 2003 and 2004.  
17 The allegedly slanderous statements do not include  
18 statements made in pleadings and filings made by Novell in  
19 connection with this litigation, which began in January  
20 2004. Novell may not be held liable for making such  
21 statements made in pleadings and filings.

22 For the statement to have been published, it must  
23 have been communicated to someone other than SCO.

24 A statement is not slanderous if the context makes  
25 clear that the speaker is expressing a subjective view or an

1 interpretation or theory, rather than an objectively  
2 verifiable fact. You may determine, however, that the  
3 speaker intended to convey a statement of fact even if the  
4 speaker has couched its statements in the form of an opinion  
5 or belief.

6           In deciding whether a publication disparaged SCO's  
7 title, you should not view individual words or sentences in  
8 isolation. Rather, each statement must be considered in the  
9 context in which it was made, giving the words their most  
10 common and accepted meaning. You should also consider the  
11 surrounding circumstances of the statement and how the  
12 intended audience would have understood the statement in  
13 view of those circumstances.

14           The second element of a claim for slander of title  
15 is falsity of the statement that disparages title. False  
16 means that the statement is either directly untrue or that  
17 an untrue inference can be drawn from the statement. You  
18 are to determine the truth or falsity of the statement  
19 according to the facts as they existed at the time the  
20 statement was made.

21           The statement, to be true, need not be absolutely,  
22 totally, or literally true, but must be substantially true.  
23 A statement is considered to be true if it is substantially  
24 true or the gist of the statement is true.

25           In order to determine whether the statements at

1 issue were true or false, you must determine which party  
2 owned the UNIX and UnixWare copyrights, existent as of the  
3 date of the asset purchase agreement, at the time the  
4 statements were made.

5           To determine which party owned the UNIX and  
6 UnixWare copyrights, existent as of the date of the asset  
7 purchase agreement, you should consider the asset purchase  
8 agreement and the amendments thereto. I will now provide  
9 you instructions on how you should interpret these  
10 agreements.

11           Several contracts relating to the same matters,  
12 between the same parties, and made as parts of substantially  
13 one transaction, are to be taken together. The contracts  
14 need not have been executed on the same day to be parts of  
15 substantially one transaction.

16           Where contracts are made at different times, but  
17 where the later contract is not intended to entirely  
18 supersede the first, but only modify it in certain  
19 particulars, the two are to be construed as parts of one  
20 contract, the later superseding the earlier one where it is  
21 inconsistent with the earlier.

22           Here, the amendments, including Amendment No. 2,  
23 must be considered together with the asset purchase  
24 agreement as a single document. The language of the  
25 amendments, including Amendment No. 2, controls whenever its

1 language contradicts the asset purchase agreement.

2           In deciding what the terms of a contract mean, you  
3 must decide what the parties intended at the time the  
4 contract was created. You may consider the usual and  
5 ordinary meaning of the language used in the contract as  
6 well as the circumstances surrounding the making of the  
7 contract.

8           With respect to your consideration of the  
9 agreements at issue here, where contract terms are clear,  
10 they should be given their plain and ordinary meanings.

11           In deciding what the words of a contract meant to  
12 the parties, you should consider the whole contract, not  
13 just isolated parts. You should use each part to help you  
14 interpret the others, so that all the parts makes sense when  
15 taken together.

16           You should assume that the parties intended the  
17 words in their contract to have their usual and ordinary  
18 meaning unless you decide that the parties intended the  
19 words to have a special meaning.

20           With respect to who owns the copyrights at issue,  
21 you may consider what is called the extrinsic evidence of  
22 the intent of the parties to the amended asset purchase  
23 agreement. Extrinsic evidence is the evidence of what  
24 parties to a contract intended apart from the language they  
25 used in the contract.

1           One type of extrinsic evidence is testimony or  
2 documents showing what the people who were negotiating the  
3 contract said or did or understood at the time of the  
4 transaction.

5           Another type of extrinsic evidence is called the  
6 parties course of performance. Course of performance is how  
7 the parties interpreted and applied the terms of the  
8 contract after the contract was created but before any  
9 disagreement between the parties arose.

10           In determining which party owns the property at  
11 issue, and your consideration of the amended asset purchase  
12 agreement, you may consider the nature of a copyright.

13           Copyright is the exclusive right to copy. The  
14 owner of a copyright has the exclusive right to do and to  
15 authorize the following: One, to reproduce the copyrighted  
16 work in copies; two, to prepare derivative works based upon  
17 the copyrighted work; three, to distribute copies of the  
18 copyrighted work to the public by sale or other transfer of  
19 ownership, or by rental, lease or lending.

20           The term owner includes the author of the work, an  
21 assignee, or an exclusive licensee. In general, copyright  
22 law protects against production, adaptation, distribution,  
23 performance, or display of substantially similar copies of  
24 the owner's copyrighted work without the owner's permission.

25           A copyright owner may enforce these rights to

1 exclude others in an action for copyright infringement.  
2 Even though one may acquire a copy of a copyrighted work,  
3 the copyright owner retains rights and control of that copy,  
4 including uses that may result in additional copies or  
5 alterations of the work.

6            Possession of certificates of copyright  
7 registrations is immaterial to ownership of the copyrights,  
8 but may be considered for other purposes, such as the intent  
9 of the parties.

10            A copyright owner may transfer, sell, or convey to  
11 another person all or part of the copyright owner's property  
12 interest in the copyright. A property interest in a  
13 copyright includes the right to exclude others from  
14 reproducing, preparing a derivative work, distributing,  
15 performing, displaying, or using the copyrighted work.

16            To be valid, the transfer, sell, or conveyance  
17 must be in writing. The person to whom a right is  
18 transferred is called the assignee. The assignee may  
19 enforce this right to exclude others in an action for a  
20 copyright infringement.

21            The copyright owner may also transfer, sell, or  
22 convey to another person any of the exclusive rights  
23 included in the copyright. To be valid, the transfer, sell,  
24 or conveyance must be in writing. The person to whom this  
25 right is transferred is called an exclusive licensee. An

1 exclusive licensee has the right to exclude others from  
2 copying the work to the extent of the rights granted in the  
3 license and may bring an action for damages for copyright  
4 infringement.

5           Nonexclusive licenses, on the other hand, do not  
6 transfer copyright ownership and can be granted orally or  
7 implied from conduct. An implied license can only be  
8 nonexclusive. A nonexclusive licensee cannot bring suit to  
9 enforce a copyright.

10           An implied nonexclusive license may arise when,  
11 one, a person, the licensee, requests the creation of the  
12 work, two, the creator, the licensor, makes the particular  
13 work and delivers it to the licensee who requested it, and,  
14 three, the licensor intends that the licensee-requestor copy  
15 or distribute his work.

16           The third element of slander of title requires SCO  
17 to prove by clear and convincing evidence that Novell's  
18 statement disparaging the ownership of the UNIX and UnixWare  
19 copyrights, existent as of the date of the asset purchase  
20 agreement, was made with constitutional malice. That is,  
21 SCO must prove that the statement was published with: One,  
22 knowledge that it was false; or, two, reckless disregard of  
23 whether it was true or false, which means that Novell made  
24 the statement with a high degree of awareness of the  
25 probable falsity of the statement, or that, at the time the



1 statement was transmitted Novell had serious doubts that the  
2 statement was true. Clear and convincing evidence leaves no  
3 substantial doubt in your mind that the constitutional  
4 malice is highly probable, as previously explained in  
5 Instruction No. 13.

6           In determining whether Novell published the  
7 statement knowing the statement to be false or with reckless  
8 disregard for the truth, you should take into account all  
9 the facts and circumstances. You should consider whether  
10 the statement was fabricated or the product of the party's  
11 imagination. You may also consider whether the party knew  
12 about the source of the information and whether there were  
13 reasons for the party to doubt the informant's veracity,  
14 whether the information was inherently improbable, or if  
15 there were other reasons for the party to doubt the accuracy  
16 of the information.

17           In determining whether there was knowing falsehood  
18 or reckless disregard for the truth, however, it is not  
19 enough for you to find that the party acted negligently,  
20 carelessly, sloppily or did not exercise good judgment in  
21 researching, writing, editing, or publishing the statement.  
22 An extreme departure from the standards of investigating and  
23 reporting ordinarily adhered to by responsible publishers  
24 does not, standing alone, constitute knowledge of falsity or  
25 reckless disregard for the truth. The reliance on one

1 source standing alone does not constitute knowing falsehood  
2 or reckless disregard for the truth, even if other sources  
3 would be readily available, and even if, in applying  
4 reasonable reporting of care, you believe those other  
5 sources should have been contacted.

6           Spite, ill will, hatred, bad faith, evil purpose  
7 or intent to harm does not alone support a finding of  
8 constitutional malice.

9           The mere fact that a mistake may occur is not  
10 evidence of knowing falsehood or reckless disregard for the  
11 truth. Reckless disregard for the truth or falsity requires  
12 a finding that the person making the statement had a high  
13 degree of awareness that the statement was probably false,  
14 but went ahead and published the statement anyway. The test  
15 is not whether the person acted as a responsible publisher  
16 under the circumstances. While exceptional caution and  
17 skill are to be admired and encouraged, the law does not  
18 demand them as a standard of conduct in this matter.

19           Unless you find by clear and convincing evidence,  
20 under all the circumstances, that Novell acted knowing the  
21 statement to be false or with a high degree of awareness of  
22 its probable falsity, there can be no liability.

23           The final element of a claim for slander of title  
24 requires a showing that the statement disparaging SCO's  
25 ownership of the UNIX of UnixWare copyrights, existent as of

1 the date of the asset purchase agreement, caused special  
2 damages to SCO.

3           This requires SCO to establish an economic loss  
4 that has been realized or liquidated, as in the case of lost  
5 sales. Special damages are ordinarily proved in a slander  
6 of title action by evidence of a lost sale or the loss of  
7 some other economic advantage. Absent a specific monetary  
8 loss flowing from a slander affecting the salability or use  
9 of the property, there is no damage. It is not sufficient  
10 to show that the property's value has dropped on the market,  
11 as this is not a realized or liquidated loss. The law does  
12 not presume special damages.

13           Special damages in the form of lost sales may be  
14 shown in two ways: A, proof of the conduct of specific  
15 persons or, b, proof that the loss has resulted from the  
16 conduct of a number of persons whom it is impossible to  
17 identify. There is a separate test you must apply for each.

18           First, when the loss of a specific sale is relied  
19 on to establish special damages, SCO must prove that the  
20 publication of the disparaging statement was a substantial  
21 factor influencing the specific, identified purchaser in his  
22 decision not to buy.

23           In order for the disparaging statement to be a  
24 substantial factor in determining the conduct of an  
25 intending or potential purchaser, it is not necessary that

1 the conduct should be determined exclusively or even  
2 predominantly by the publication of the statement. It is  
3 enough that the disparagement is a factor in determining his  
4 decision, even though he is influenced by other factors  
5 without which he would not decide to act as he does. Thus  
6 many considerations may combine to make an intending  
7 purchaser decide to break a contract or to withdraw or  
8 refrain from making an offer. If, however, the publication  
9 of the disparaging matter is one of the considerations that  
10 has substantial weight, the publication of the disparaging  
11 matter is a substantial factor in preventing the sale and  
12 thus bringing financial loss upon the owner of the thing in  
13 question.

14           The extent of the loss caused by the prevention of  
15 a sale is determined by the difference between the price  
16 that would have been realized by it and the salable value of  
17 the thing in question after there has been a sufficient time  
18 following the frustration of the sale to permit its  
19 marketing.

20           Second, in the case of a widely disseminated  
21 disparaging statement, SCO need not identify a specific  
22 purchaser and recovery is permitted for loss of the market.  
23 This may be proved by circumstantial evidence showing that  
24 the loss has in fact occurred and eliminating other causes.

25           A decline in stock price is not an appropriate

1 claim for special damages.

2           You are entitled to award punitive damages if you  
3 deem them to be appropriate.

4           Before any award of punitive damages can be  
5 considered, SCO must prove by clear and convincing evidence  
6 that Novell published a false statement knowing it was false  
7 or in reckless disregard whether it was true or false, and  
8 that Novell acted with hatred or ill will towards SCO, or  
9 with an intent to injure SCO, or acted willfully or  
10 maliciously towards SCO.

11           If you find that SCO has presented such proof, you  
12 may award, if you deem it proper to do so, such sum as in  
13 your judgment would be reasonable and proper as a punishment  
14 to Novell for such wrongs, and as a wholesome warning to  
15 others not to offend in a like manner. If such punitive  
16 damages are given, you should award them with caution and  
17 you should keep in mind they are only for the purpose just  
18 mentioned and are not the measure of actual damage.

19           The fact that I have instructed you on damages  
20 does not mean that I am indicating that you should award  
21 any. That is entirely for you, the jury, to decide.

22           Any damages you award must have a reasonable basis  
23 in the evidence. They need not be mathematically exact, but  
24 there must be enough evidence for you to make a reasonable  
25 estimate of damages without speculation or guess work.

1           The burden is upon the party seeking damages to  
2 prove the existence and amount of its damages and that its  
3 damages were caused by the acts of the opposing party. You  
4 are not permitted to award speculative damages.

5           You have heard evidence concerning specifics about  
6 the parties' rights and obligations under section 4.16 of  
7 the amended asset purchase agreement. You are instructed  
8 that those issues of specific rights and obligations under  
9 section 4.16 are for the Court to decide and you are not to  
10 concern yourself with them. You may consider section 4.16,  
11 as well as all other provisions, in interpreting the amended  
12 asset purchase agreement.

13           It is the duty of the attorney on each side of the  
14 case to object when the other side offers testimony or other  
15 evidence which the attorney believes is not properly  
16 admissible. You should not show prejudice against any  
17 attorney or his or her client because the attorney has made  
18 an objection.

19           Upon allowing testimony or other evidence to be  
20 introduced over the objection of any attorney, the Court  
21 does not, unless expressly stated, indicate any opinion as  
22 to the weight or effect of any such evidence. As stated  
23 before, the jurors are the sole judges of the credibility of  
24 all witnesses and the weight and effect of all evidence.

25           When the Court has sustained an objection to a

1 question addressed to a witness, the jury must disregard the  
2 question entirely, and may draw no inference from the  
3 wording of it or speculate as to what the witness would have  
4 said if he or she had been permitted to answer any question.

5           During the course of the trial, I may have  
6 occasionally asked questions of a witness, in order to bring  
7 out facts not then fully covered in the testimony. Do not  
8 assume that I hold any opinion on the matters to which my  
9 questions may have related.

10           A copy of these instructions will also accompany  
11 you to the jury room. Do not write on the instructions.

12           You will notice during are deliberations that  
13 there may be gaps in the numbering of the instructions. The  
14 instruction numbers are for the convenience of the Court and  
15 the parties, and you are not to be concerned by them.

16           Upon retiring to the jury room, you must select  
17 one of your members to act as your foreperson. The  
18 foreperson will preside over your deliberations and will be  
19 your spokesperson here in court.

20           The verdict must represent the collective judgment  
21 of the jury. In order to return a verdict, it is necessary  
22 that each juror agree to it. Your verdict must be  
23 unanimous.

24           It is your duty, as jurors, to consult with one  
25 another and to deliberate with a view to reaching an

1 agreement if you can do so without violence to individual  
2 judgment. Each of you must decide the case for yourself,  
3 but do so only after an impartial consideration of the  
4 evidence in the case with your fellow jurors. In the course  
5 of your deliberations, do not hesitate to reexamine your own  
6 views and change your opinion if convinced it is erroneous.  
7 But do not surrender your honest conviction as to the weight  
8 or effect of evidence solely because of the opinion of your  
9 fellow jurors for the mere purpose of returning a unanimous  
10 verdict.

11 Remember at all times, you are not partisans. You  
12 are judges, judges of the facts. Your sole interest is to  
13 seek the truth from the evidence in the case.

14 Your verdict must be based solely upon the  
15 evidence received in the case. Nothing you have seen or  
16 heard outside of court may be considered. Nothing that I  
17 have said or done during the course of this trial is  
18 intended in any way to somehow suggest to you what I think  
19 your verdict should be. Nothing said in these instructions  
20 and nothing in any form of verdict prepared for your  
21 convenience is to suggest or convey to you in any way or  
22 manner any intimation as to what verdict I think you should  
23 return. What the verdict shall be is the exclusive duty and  
24 responsibility of the jury. As I have told you many times,  
25 you are the sole judges of the facts.



1           The Court has prepared a verdict form for your  
2 convenience. You are instructed that your answers to the  
3 interrogatories on the verdict form must be consistent with  
4 the instructions I have given you and with each other.

5           When you have reached a unanimous agreement as to  
6 your verdict, your foreperson will fill in, date and sign  
7 the verdict form upon which you have unanimously agreed.  
8 When you have reached unanimous agreement as to your  
9 verdict, the foreperson shall inform the bailiff and you  
10 shall return to the courtroom.

11           If it becomes necessary during your deliberations  
12 to communicate with the Court, you may send a note by the  
13 bailiff. But bear in mind that you are not to reveal to the  
14 Court or to any person how the jury stands, numerically or  
15 otherwise, on the question before you, until after you have  
16 reached a unanimous verdict or agreement.

17           The attitude and conduct of jurors at the outset  
18 of their deliberations are matters of considerable  
19 importance. It is rarely productive or good for a juror,  
20 upon entering the jury room, to make an emphatic expression  
21 of his or her opinion on the case or to announce a  
22 determination to stand for a certain verdict. When one does  
23 that at the outset, his or her sense of pride may be  
24 aroused, and he or she may hesitate to recede from an  
25 announced position if shown that it is wrong.

1           During your deliberations, you are able as a group  
2 to set your own schedule for deliberations. You may  
3 deliberate as late as you wish or recess at an appropriate  
4 time set by yourselves. You may set your own schedule for  
5 lunch and dinner breaks.

6           However, I do ask that you notify the Court by a  
7 note when you plan to recess for the evening.

8           You have now been instructed on the law, ladies  
9 and gentlemen. Again, a copy of the instructions, what I  
10 just read to you, will accompany you to the jury room.

11           It is now time for closing statements, and we'll  
12 begin with SCO. And because SCO is the plaintiff in the  
13 case and, as I just instructed you, has certain burdens to  
14 carry by way of the weight of evidence and such, the  
15 plaintiffs have the opportunity to go both first and last in  
16 their closing statements, meaning that SCO will go ahead now  
17 with part of its closing. We'll then hear from Novell, and  
18 then SCO will be given the last word.

19           Mr. Singer, if you would like to proceed.

20           MR. SINGER: Thank you, Your Honor.

21           Ladies and gentlemen, it's been a long three weeks  
22 and we appreciate your close attention to this case. I know  
23 it's not been the most exciting case at times, but I assure  
24 you it's a very important case. It's very important to SCO,  
25 it very important to individuals like Bill Broderick, John

1 Maciaszek, and Andy Nagle, men who have been with the  
2 company for 20 years, going all the way back to AT&T, and  
3 they are still there at SCO turning out UnixWare, providing  
4 products for companies all over the country and the world,  
5 and trying in a difficult situation to have the company  
6 proceed.

7           These individuals and the customers, and some of  
8 these have been long time or current customers, McDonald's,  
9 NASDAQ, BMW, that business depends on the copyrights,  
10 depends on having ownership of intellectual property that is  
11 at the heart of their business.

12           You are going to be asked in this case two basic  
13 important questions. It will be your responsibility to  
14 decide, first, to declare that the UNIX, UnixWare copyrights  
15 that existed back at the time of this transaction went with  
16 the rest of the business, except for this royalty stream,  
17 and belonged to SCO. That is very important and critical on  
18 its own. And, second, you will be asked to determine, if  
19 you agree with us, that there's been a slander on SCO's  
20 title, to determine that and award a reasonable amount of  
21 damages to compensate SCO in connection with that slander.

22           Now as the Court has instructed you, you are the  
23 judges of the facts and, in doing so, you must determine  
24 credibility. And credibility is, in part, a question of the  
25 consistency of witnesses with one another. And I would like

1 to give you an example of one of the things you can look at.

2           You'll recall Mr. Stone when he was testifying  
3 here about whether or not when they waived rights of SCO  
4 that benefited IMB, whether that was done unilaterally or  
5 whether it was done at IBM's request. Mr. Stone answered  
6 no, it wasn't at IBM's request. We acted on our own. No  
7 input from IBM at all.

8           Then a few days later you heard from Mr. LaSala,  
9 the former general counsel of Novell who admitted on the  
10 stand that, in fact, Mr. Marriot, a lawyer for IBM,  
11 specifically asked Novell to assert those rights to waive  
12 SCO's claims; in fact, said it was urgent. You also learned  
13 that even internally, with Mr. LaSala's testimony, there was  
14 an inconsistency because when he was first asked about that  
15 in February 2007, he denied it. Only later in May, when we  
16 pursued the issue, he admitted it. That's credibility.  
17 That's an issue you can consider in determining who to  
18 believe in this case.

19           Another example, Mr. Stone again, on a basic  
20 point. This is not something people can be confused about.  
21 Were you asked to leave the company. Yes, I was. I asked  
22 Mr. Messman the same question, was Mr. Stone asked to leave  
23 Novell. Answer, no. Someone is not telling the truth.

24           Now the questions that you will need to answer in  
25 this case will be set out in the verdict form that you will

1 receive along with a copy of the instructions and the  
2 evidence, and the very first question will be did the  
3 amended asset purchase agreement transfer to UNIX and  
4 UnixWare copyrights from Novell to SCO. I would like to  
5 address that question at the outset.

6 Amendment No. 2, we submit, is the key to  
7 answering that question. Amendment No. 2 replaced the  
8 language that was inconsistent with what was the intent of  
9 the transaction, the intent of the parties who put this deal  
10 together that those copyrights would be transferred with the  
11 UNIX and the UnixWare business. Amendment 2 replaces the  
12 old language, which is gone, and that is the operative  
13 language.

14 Now Judge Stewart read you an important  
15 instruction that makes that clear, which is the instruction  
16 I have on the screen, and it makes clear that it is the  
17 language of the amendments, including Amendment No. 2,  
18 controls wherever its language contradicts the asset  
19 purchase agreement.

20 Of course you knew that from the face of it, that  
21 it says it replaces the old language. It took out this  
22 copyright exclusion and put in language that, we submit to  
23 you, is consistent with what the parties intended, that the  
24 copyrights required for the business were now part of what  
25 were the included assets.

1           Now you might remember about three weeks ago  
2 Novell's counsel telling you that it was important to listen  
3 for the rest of the story. I think he invoked Paul Harvey.  
4 I was thinking about that statement all during the first  
5 week of this trial, and I was doing that because it seemed  
6 that all during that week Novell was focused on this  
7 language in the schedule of excluded assets, excluding  
8 copyrights, when the rest of the story was that language  
9 didn't exist anymore. That language was replaced by  
10 Amendment No. 2. So the language that they have spent more  
11 hours in this trial on than anything else is simply not in  
12 the agreement and hasn't been in there since 1996. That's  
13 really the rest of the story on this because under the plain  
14 language of the asset purchase agreement with Amendment 2,  
15 it is very clear that the assets, the copyrights  
16 transferred.

17           You have a schedule of included assets, which  
18 you've seen many times and you will be able to look at when  
19 you deliberate, it says, all rights and ownership of UNIX  
20 and UnixWare on all these products, including the UnixWare  
21 products, and you haven't heard any evidence there are any  
22 products on there that -- products missing from that list.  
23 This includes what we're talking about, that all rights and  
24 ownership of UNIX and UnixWare are transferred.

25           And then you had the old language that excluded

1 copyrights and trademarks. Now you have the current  
2 language replaced by Amendment 2 which says that Novell gets  
3 to keep copyrights, except for the copyrights and trademarks  
4 owned by Novell as of the date of the agreement required for  
5 SCO to exercise its rights with respect to the acquisition  
6 of UNIX and UnixWare technologies. That really is the heart  
7 of this case. With Amendment No. 2, it is clear that those  
8 copyrights were transferred.

9           Now I would submit to you that Novell has admitted  
10 the fact that SCO, in light of Amendment No. 2, owns those  
11 copyrights, and they did that on two occasions. The first  
12 occasion that that was admitted goes back to June 6th of  
13 2003 when Novell issued the press release, when they -- of  
14 course, you've heard about Amendment No. 2 when they said  
15 they didn't have it and it turns out they did have it. They  
16 didn't know it was signed. They claimed they had a signed  
17 copy in the files. But the important point here on  
18 copyright ownership is their recognition that it appears to  
19 support SCO's claim that ownership for certain copyrights of  
20 UNIX did transfer to SCO in 1996. So that's the first time.

21           The second time that that was admitted was in  
22 front of you a few days ago on March 23rd, and that was when  
23 Allison Amadia admitted -- and certainly she started out in  
24 her testimony being adverse to SCO and in favor of Novell.  
25 Then under Mr. Normand's cross-examination, listen to what

1 she said. She was asked, now you agree that under the plain  
2 language of Amendment 2 Novell has included in the transfer  
3 of assets the copyrights required for SCO to exercise its  
4 rights in UNIX and UnixWare. Her answer was, the way I  
5 wrote and intended Amendment No. 2 to be read is that this  
6 language was saying that whatever copyright rights Santa  
7 Cruz needed in order to exercise the rights it was given,  
8 then they would have those rights.

9           Then a little bit later near the end of her  
10 cross-examination she was asked, so if there are copyrights  
11 that are required for SCO to exercise its rights, like the  
12 UNIX and UnixWare trademarks, they were transferred,  
13 correct. Her answer was yes.

14           Now there is no real dispute, ladies and  
15 gentlemen, that the copyrights are required for the UNIX and  
16 UnixWare business. You have heard a lot of evidence on  
17 that. It has included Bob Frankenberg, the Novell president  
18 and CEO, who said it was ludicrous to think about selling  
19 software without selling the copyrights.

20           Doug Michels, the SCO founder and vice president,  
21 equated it to breathing oxygen, that it's so essential.  
22 There is no way this deal would have happened without  
23 getting the copyrights.

24           Jim Wilt, who was the lead negotiator for Santa  
25 Cruz, says that, you know, when you walk out the door, I



1     assume your head goes with you. That's how he equated it.  
2     And, of course, the copyrights have to go with the company.

3             Steve Sabbath was asked, if you didn't own the  
4     copyrights, how could you go after somebody that's pirating  
5     your software, how could you enforce your rights to the  
6     technology.

7             Bill Broderick said, if we couldn't protect our  
8     software, we'd be out of business. This is how you protect  
9     your software.

10            Now with Amendment No. 2, the APA makes sense.  
11     Without it, the agreement doesn't make sense. The software  
12     business without the copyrights, well, I would suggest to  
13     you that's like a car without an engine, or maybe a house  
14     without a roof, or maybe even suggest that it's an ice cream  
15     sundae where you only get the cherry and not the ice cream,  
16     as Mr. Braham suggested a couple days ago. It doesn't make  
17     any sense.

18            Now with Amendment No. 2 all of the things fit  
19     together and makes sense, beginning with the very recital at  
20     the beginning of the document that says that this is the  
21     sale of a business, the UNIX and UnixWare business, the  
22     support of those products, all of that is what it being  
23     sold. It is the intent that all of the business relating to  
24     that be transferred. So it's consistent with the overall  
25     intent of the deal.

1           There's been some discussion about the  
2   consideration received. I suggest to you that it makes  
3   sense because of the amount of money which Novell received.  
4   Back in the opening you might remember seeing this slide  
5   from Novell, the first one on the left-hand side, where it  
6   suggests the purchase price was just the stock. The stock  
7   itself was worth a lot of money, 40, \$50 million. You  
8   wouldn't even receive that if you weren't transferring the  
9   copyrights. But if you look at the entirety of that section  
10  of the asset purchase agreement, you see that there was  
11  another part to the payments which included the royalty  
12  stream that would occur in the future, both from the  
13  existing UNIX products and the UnixWare products.

14           If you look at Mr. Bradford's memo to the board  
15  right before Novell approved this transaction, he identified  
16  those four royalty streams, which turn into a lot of money.  
17  The stock is worth about 40, \$50 million, \$50 million a year  
18  in the UNIX royalties, the estimated present value of  
19  \$60 million or so in the UnixWare royalties. So this was a  
20  sale of a business. This wasn't simply serving as an agent,  
21  as Mr. Braham suggested, to collect for someone else.

22           For instance, you've got here all the title to the  
23  UNIX licenses. If you have a real estate agent handle your  
24  house, you don't give them title to sell it. I don't know  
25  of any real estate agents who would pay me something like

1 \$100 million to handle a transaction. This agency was very  
2 limited to the collection of royalties that Novell was going  
3 to keep, and the rest of this was the sale of a business.

4 Now Amendment 2 also is needed to make sense of  
5 something you've heard me refer to and my colleagues refer  
6 to throughout the trial, the license back provision, and  
7 that's because -- and Novell has never been able to explain  
8 this, it makes no sense for Novell to have kept the  
9 copyrights and then the license back right to use them. If  
10 they kept them, they wouldn't need the license back. That  
11 is clear evidence that this was intended to be a sale of the  
12 copyrights.

13 The license back of assets appears right in the  
14 asset purchase agreement in section 1.6. Now Novell tries  
15 to say, well, it only applied to the new products, so that's  
16 why you had the license back. But the plain language of the  
17 license back says, all of the technology included in the  
18 assets, which means they are getting a license back to the  
19 assets being sold. They wouldn't need a license to use that  
20 if it wasn't for the fact they were selling the copyrights.

21 And, in fact, if you look at the technology  
22 license agreement, it says specifically, as between Novell  
23 and SCO, ownership of licensed technology shall reside in  
24 SCO. We think that makes it very clear, and you have heard  
25 a lot of witnesses say when I asked them or Mr. Normand

1 asked them that does it make any sense to have a license  
2 back if you retained the copyrights, and everyone agreed  
3 with that.

4           Now Amendment 2 -- with Amendment 2, the agreement  
5 also makes sense in light of -- let's see, there we are.  
6 With Amendment 2, the agreement also makes sense in light of  
7 the testimony of the witnesses that you've heard. Now I  
8 told you a few weeks ago in the opening, pointing to this  
9 chart, that you would hear from ten witnesses drawn from  
10 both the Santa Cruz and the Novell side of the transaction  
11 who would agree that it was intended that the copyrights  
12 were sold. All ten of those witnesses, either through video  
13 deposition or through live testimony here, have so  
14 testified.

15           I would like to start with the Santa Cruz side  
16 because there's been a lot of attention here paid to what  
17 Novell intended and what was going on at Novell's board  
18 meeting. That's really not the issue before you. The issue  
19 before you is what the two parties to a contract intended.  
20 So you have to look at both parties' intent and how they  
21 expressed that to each other. And there is no confusion at  
22 all on the Santa Cruz side there. All of these executives  
23 and negotiators testified consistently that this deal  
24 required the transfer of the copyrights.

25           You remember Doug Michels. I think that was

1 pretty memorable videotaped testimony, wasn't it? He was  
2 perplexed that anyone could even raise the issue.  
3 Copyrights are like breathing oxygen. I'm going to read you  
4 a little bit of his testimony. He says, I guarantee you, we  
5 put copyright notices in every document we wrote. How could  
6 we do that if we didn't own the copyrights? We put  
7 copyright notices in every module of source code we wrote.  
8 They all said we own the copyrights. We own the  
9 intellectual property, and every action we took represents  
10 that. I don't do a very good imitation of him.

11 THE COURT: Mr. Singer, remember, if you read too  
12 fast, the court reporter will have difficulty.

13 MR. SINGER: I will try to read slower as well.

14 Michels also said, we took over the business. We  
15 were in the business of selling intellectual property. We  
16 were in the business of supporting the intellectual  
17 property. We were in the business of providing marketing  
18 materials. We couldn't do any of that without owning the  
19 copyrights.

20 He was asked if any attorney from Santa Cruz ever  
21 told him that Novell was asking for -- that he had to go to  
22 Novell and ask them for the copyrights. He said, I think I  
23 would have laughed them out my office.

24 Now you recall that you also heard testimony from  
25 Steve Sabbath who said, when we bought the UNIX business

1 from Novell, all copyrights came with the product and  
2 Amendment No. 2 was meant to confirm that, and he testified  
3 to that.

4 In addition, you had Kimberlee Madsen. Ms. Madsen  
5 has no interest in this litigation. She works for Apple.  
6 She came here and testified clearly to you that the  
7 copyrights were going with the assets. She was asked, do  
8 you have a view, as you sit here, as to whether the parties  
9 intended that the copyrights would be retained by Novell.  
10 Answer, no. The intent was clearly to be that the  
11 copyrights for the UNIX and UnixWare were to be transferred  
12 to The Santa Cruz Operation.

13 And you heard Mr. Mohan, Mr. Wilt also. So there  
14 is no question on the Santa Cruz side of the equation that  
15 everyone agrees that the copyrights were part of the deal.

16 Now in a typical case you would expect to see the  
17 Santa Cruz executives and attorneys saying one thing and the  
18 Novell executives and lawyers saying something completely  
19 different. The incredible thing about this case is that you  
20 have numerous senior executives and lawyers who were with  
21 Novell at the time who agree with Santa Cruz, who agree that  
22 the copyrights were intended to be sold.

23 Now you have heard from Robert Frankenberg, the  
24 chief executive officer at the time, on the first day and  
25 again on the last day of testimony. I think he's probably

1 the most important witness in this trial. Ladies and  
2 gentlemen, in the future, when I think of a stand-up guy,  
3 I'm going to be thinking of Bob Frankenberg. He has no  
4 financial or other interest in this. A lot of CEOs would  
5 simply duck something like this and say they don't remember,  
6 it's a long time ago. He didn't do that. He has given you  
7 forthright testimony, both on the first day of trial and  
8 yesterday, that this was a deal to sell the copyrights along  
9 with the rest of the business.

10 He acknowledged that he missed that line item in  
11 one part -- one word in a board resolution that he thought  
12 was probably referring to the NetWare copyrights, but that  
13 it was clear, because he was the guy at the top, that this  
14 was a sale of the business, including the copyrights.  
15 That's why the error had to be fixed a year later with  
16 Amendment No. 2.

17 His testimony is consistent with the testimony of  
18 Duff Thompson, of Ty Mattingly and Ed Chatlos, the people  
19 most involved in the negotiation of the deal. They were the  
20 people out there in California for months negotiating this.  
21 These were the people who looked at Alok Mohan and the other  
22 Santa Cruz people across the table and said, you are getting  
23 the business lock, stock and barrel, except, of course, for  
24 those royalties which were going to help pay for it. These  
25 were the people who came here and testified that there had

1 never been any suggestion made in that process of Novell  
2 holding back the copyrights.

3           Now Novell suggests some of these witnesses, who,  
4 remember, are their own executives, should be discredited  
5 because some of them later went to the business and  
6 therefore had a financial interest in SCO. What I would  
7 submit to you, though, is their testimony is consistent with  
8 individuals who have no such interest, Mr. Levine,  
9 Mr. Frankenberg. I think they insulted Mr. Chatlos, their  
10 senior director, by suggesting because his wife had a little  
11 stock that somehow he isn't telling the truth when he said  
12 this was the deal he negotiated. And Mr. Thompson, who you  
13 can judge, was a forthright witness.

14           Basically, what Novell is telling you is that you  
15 would have to believe that all ten of these witnesses, all  
16 ten, half of whom are former senior executives, were either  
17 mistaken or lying in order to agree with what Novell would  
18 have you believe in this case.

19           Now how did this happen? How did the problem  
20 happen that required Amendment 2? I think we have gotten a  
21 little more insight into that over the last several days. I  
22 think you see what happens when you have a set of lawyers  
23 rushing to document a deal under a lot of time pressure.  
24 This is Tor Braham's forced march. Mr. Braham ignored  
25 months of negotiations between the parties that preceded the



1 last two weeks, which is when he got involved, as simply  
2 discussions about a potential transaction that he didn't  
3 really have to pay attention to.

4           He also ignored the term sheet which I asked him  
5 about, a term sheet which, if you look at it when you look  
6 at all the evidence, he had, which, before he got to work on  
7 9-11-95, or within that period he got to work, said what the  
8 business people had negotiated, and it says, UnixWare and  
9 SVRX, the intent is to provide all rights to SCO including  
10 rights to modify, rights to sublicense binary copies, rights  
11 to distribute source code. And, ladies and gentlemen, if  
12 you compare that to the instruction that Judge Stewart read  
13 and you'll have with you, you'll see that lines up very  
14 closely to what the rights are that an owner of a copyright  
15 has.

16           Now going back to Mr. Braham's forced march, what  
17 are the other things that indicate how this problem  
18 happened? The excluded assets schedule, which has  
19 originally had this exclusion of copyrights, it wasn't even  
20 provided until the week before the signing. The fact that  
21 he testified to you that on a big issue like this there was  
22 no push back from Santa Cruz shows that this wasn't  
23 discussed, it was missed. Can you believe a situation where  
24 Novell pops up a few days before the closing and says, we're  
25 going to sell you the business, but we're going to hold the

1 copyrights, and Santa Cruz says, yeah, that's fine, it  
2 doesn't push back? It doesn't make any sense. This was  
3 just missed in a schedule.

4           Mr. Bradford's September 18th, 1995 board memo  
5 didn't mention that either, which explains why  
6 Mr. Frankenberg and other people on the board who aren't  
7 looking at the minutia of the resolution but are looking  
8 what their general counsel sent to them in advance of the  
9 meeting, it didn't mention anything about retaining the  
10 copyrights.

11           And then there was one more piece of evidence that  
12 was interesting. When Mr. Braham testified, I asked him  
13 about this copy he made notes on during the board conference  
14 call and, interestingly enough, as you'll see, because  
15 that's in evidence as Exhibit V-3, even that copy that their  
16 lawyer was making notes on during the call, supposedly  
17 supporting the exclusion of copyrights, had no copies of the  
18 schedules at all attached to them. So if that's the same  
19 copy people were looking at at the time, they wouldn't have  
20 even had the schedule that had this erroneous copyright  
21 exclusion on it.

22           Now you do have someone who says I remember  
23 exactly that at the board meeting they said the copyrights  
24 were excluded. You will have to determine the credibility  
25 of that, because that was Jack Messman, the chef executive

1 officer who approved the slanderous statements.

2 I put his testimony up here to draw attention to  
3 the fact that while he remembers that clearly when I asked  
4 him about that in his deposition, he didn't even know which  
5 decade this meeting occurred in. He says I think in the  
6 board presentation they made to us in, whenever it was, '81  
7 or '83. But yet he has a distinct recollection of this one  
8 point, which, by the way, isn't reflected in the board  
9 minutes as having been discussed, and he recalls nothing  
10 else, the same Mr. Messman who you could judge his  
11 credibility for when he was here before you.

12 So I think this is how the error was made, and I  
13 think you can see that in the rush of those last few days,  
14 excluded asset schedule had a term that was inconsistent  
15 with the intent of the deal, either by mistake or perhaps  
16 even accepting you have some overzealous lawyers who acceded  
17 that, and then it was fixed with Amendment No. 2. And not  
18 only does that bring everything in the asset purchase  
19 agreement together and make sense, it also makes the deal  
20 sensible in light of what was told to the public.

21 Novell's version of the events can't be squared  
22 with the official press release it issued jointly with Santa  
23 Cruz. And while it says it's a SCO press release, Mr.  
24 Frankenberg said and was quoted in there that this was the  
25 approved joint release. They are the acquiring party. They

1 said, SCO will acquire the UnixWare business and UNIX  
2 intellectual property. That's the core intellectual  
3 property.

4 The Wall Street Journal, which said, the deal  
5 includes the purchase by Santa Cruz Operation of most  
6 trademarks and intellectual property associated with UNIX  
7 software. A lot of people read The Wall Street Journal at  
8 Novell. No one popped up, never heard anyone say The Wall  
9 Street Journal has this wrong. That didn't happen either.

10 Novell's version can't be squared with the report  
11 to the United States government in Novell's  
12 Hart-Scott-Rodino filing. True, they put the schedules in  
13 the APA attached to the back of the document, but they were  
14 summarizing the deal for the United States government in the  
15 text. When they summarized it, they said, the assets to be  
16 acquired by Santa Cruz were all rights and ownership of UNIX  
17 and UnixWare. This is a big thing, the copyrights. If that  
18 was excluded, don't you think they would have put in the  
19 text we keep the copyrights, except the copyrights. Mr.  
20 Braham had no explanation for that whatsoever.

21 Even IBM recognized that SCO had the copyrights,  
22 an irony there. The documents that you've seen in the last  
23 few days, including yesterday, are documents where IBM, in  
24 certain positions it was taking in this dispute that came up  
25 a year later, said, SCO is protected by copyrights. You can

1 show us the source code because you have copyright  
2 protection. So none of what the outside world was looking  
3 at would be consistent with what Novell would have you  
4 believe.

5 Now, ladies and gentlemen, you have also been  
6 instructed by the Court that you should consider the course  
7 of performance. How a party acts is sometimes more  
8 important than anything else. It's an indication of their  
9 intent. And the instructions said that the course of  
10 performance is something that you can look at to determine  
11 by their actions whether the copyrights were intended to  
12 stay with Novell or to go Santa Cruz.

13 And what have we heard about that? This has  
14 virtually been undisputed testimony from three different  
15 individuals, three individuals who have been with the UNIX  
16 business all the way back to the 1990s. Bill Broderick,  
17 Andy Nagle and John Maciaszek. You've heard Bill Broderick  
18 say, we sent letters out to all these customers. This is an  
19 example of the Prentice-Hall letter. Novell sent it out, a  
20 lot of different people signed them, and it said, as you may  
21 know, Novell transferred to SCO its existing ownership in  
22 the UNIX System-based offerings, that included all releases  
23 of UNIX and all the UnixWare releases at the time. It  
24 doesn't make sense if it wasn't true you tell the customers  
25 that.

1           You heard Mr. Nagle talk about how during the  
2 transition period they actually changed the code on the  
3 software, not just on the outside of the box but in the  
4 software itself, the code that reflects who owns those  
5 programs, and they did that for the UnixWare program that  
6 was being built at the time at Novell. They didn't have any  
7 new code after the sale in it. That only makes sense if you  
8 are transferring the ownership of that old code as of the  
9 time of the deal. There's no refutation of that.

10           Of course, you can also look for intent at what  
11 happened with the copyright registrations. You'd think that  
12 Novell would have kept them. That's sort of important.  
13 They were with Santa Cruz. They have been sitting on that  
14 desk during the trial. You saw them in the testimony  
15 through Mr. Maciaszek.

16           Now all of this testimony shows that the answer to  
17 question number one should be yes, that under the amended  
18 asset purchase agreement, the transfer of the UNIX and  
19 UnixWare copyrights from Novell to SCO occurred.

20           The next question you will need to answer -- and  
21 let me, before I move onto the next question, say that first  
22 question is very important because it will mean if you  
23 answer that yes, that SCO can go about rebuilding its  
24 business with the ownership of the copyrights it needs for  
25 that business.

1           The next question you'll need to answer is whether  
2   Novell slandered SCO's ownership of the UNIX and UnixWare  
3   copyrights. Now if you agree that SCO owned the copyrights,  
4   there is not much question here that a slander occurred. In  
5   fact, you have multiple slanders. You have what could be  
6   characterized as a campaign of slander.

7           It started on May 28th, 2003 with the statement  
8   that SCO is not the owner. There is the one moment of truth  
9   on June 6th, and then a resumption in letters in August of  
10  obtaining copyright registrations by filing with the United  
11  States Copyright Office they own the copyrights. Other  
12  statements in December and January. Mr. Stone's statement  
13  on March 16th publicly that we still own UNIX. There is no  
14  question those statements are false. They are definitive  
15  statements by Novell.

16           So the question, then, is whether or not these  
17  statements were made with what is called constitutional  
18  malice. You've been instructed on that. We submit that you  
19  will find that they were made with reckless disregard for  
20  the truth and, after June 6th, with actual knowledge of  
21  their falsity.

22           Now we call this constitutional malice because  
23  this is what takes into account the concerns of the First  
24  Amendment. There is a right to engage in free speech. But  
25  there is not a right to make statements that are false, that

1 are made recklessly or with knowledge that they are false.  
2 That's the difference. That is the balance of the free  
3 speech that we hold dear in our constitutional system with  
4 the protection against slander, defamation and falsehoods.

5 Now the instruction shows that we have to prove,  
6 and we believe we have, that the statement was made with  
7 knowledge that it was false or with reckless disregard of  
8 whether it was true, which means that there was a high  
9 degree of awareness of the probable falsity or that at the  
10 time the statement was made Novell had serious doubts that  
11 the statement was true.

12 And we think that fits to a T what happened with  
13 the May 28th slander, because let's think about the  
14 statement that went out in the press release. You heard  
15 testimony that they knew there was an unsigned Amendment 2  
16 in their possession, but in a rush to get this out on May  
17 28th, they didn't do their checking to see whether or not  
18 that Amendment No. 2 had, in fact, been signed. They went  
19 ahead. They could have easily determined that it was  
20 signed. Do you think they could have called Wilson Sonsini,  
21 the lawyers who negotiated the deal, to determine if it was  
22 signed? Do you think Mr. Messman could have called Bob  
23 Frankenberg, his predecessor? There are a lot of ways they  
24 could have determined that was signed. Could they have  
25 checked their files a little more clearly? We submit that



1 that constitutes recklessness, making the statement on May  
2 28th, 2003.

3           However, the statements after May 28th, 2003 were  
4 not just reckless, and one more point about that. Mr.  
5 LaSala said he turned the company upside down for a signed  
6 version. I suggest that submits they knew this was a very  
7 important document. This would determine the issue.

8           So they get the document from SCO on June 5th, and  
9 all during this period they never ask SCO -- they're about  
10 to put out a statement, they are talking to them for months,  
11 did they ever say we have this unsigned copy of Amendment  
12 No. 2, do you happen to have a signed version? No word of  
13 it. They just go public on May 28th.

14           June 5th they receive from SCO a copy of the  
15 signed Amendment No. 2. Mr. McBride testified before you,  
16 and I think you will find it credible when he says  
17 Mr. Messman, when confronted with the signed version,  
18 admitted that SCO owned the copyrights. It's credible, we  
19 believe, because the very next day he said that publicly in  
20 this press release where, on June 6th, the amendment appears  
21 to support SCO's claim that ownership of the copyrights did  
22 transfer in 1996.

23           Now they want you to believe they didn't mean what  
24 they said on June 6th. Ladies and gentlemen, the June 6th  
25 statement was not just a casual statement. You heard it was

1 reviewed by Joe LaSala, general counsel. It was written by  
2 him. This is not a complicated amendment. It's about one  
3 paragraph long. They had the unsigned version for some  
4 time. It didn't take Novell months to figure out what it  
5 meant. It took Novell months to try to turn it around to  
6 figure out a way to suggest that it doesn't mean anything so  
7 they could go back to a campaign of slander, which was  
8 launched later in 2003. And this is then done, because of  
9 the June 6th, 2003 press release, with knowledge of falsity.

10           They were cautious at first with the internal  
11 letters on June 26th and August 4th. And then later, for  
12 reasons that you can conclude were coincidental or  
13 otherwise, they went public again on December 22nd. And, in  
14 fact, the claim that they made in March, we still own UNIX,  
15 an outrageous claim, not even limited to the copyrights, but  
16 we still own UNIX, was echoed by Mr. Messman on that witness  
17 stand. We still own UNIX, when the company had been sold,  
18 the business had been sold eight years earlier. So these  
19 statements were false, knowingly false, and we submit to you  
20 were made with constitutional malice.

21           Indeed, the falsity of the claim, which includes  
22 the copyrights that they registered with the United States  
23 Copyright Office saying they owned them and which includes  
24 Mr. Stone's statement on March 14th sarcastically saying,  
25 sorry, Darl, we still own UNIX, all of these are knowingly

1 false because we know what they thought. We know on June  
2 6th they recognized the ownership of these copyrights were  
3 with SCO.

4 But the falsity of this is proven by another piece  
5 of evidence that I think is very important. There are  
6 Novell witnesses, people who work for Novell, who have  
7 stated that it is so absurd to claim to own the copyrights  
8 while having sold the business that it would be unethical to  
9 take that position.

10 Ed Chatlos in his testimony when he was asked did  
11 you ever get the lawyers' authority to hold back the  
12 copyrights, absolutely not, no. And he said, the deal I  
13 negotiated with SCO included the copyrights, so we modeled  
14 it to include the copyrights. From a personal standpoint,  
15 it would have been unethical to exclude them.

16 Burt Levine, an in-house counsel involved in  
17 drafting of the operative agreements, he said, well, I  
18 believe that being an ethical company, you couldn't resort  
19 to withholding something that the transferee in this case  
20 would be entitled to. If it is that clear that it causes  
21 internal Novell lawyers and negotiators to say it would be  
22 unethical to suggest that you're holding back the copyrights  
23 while selling the business, then these types of allegations  
24 made by Novell have to be concluded to be knowingly false.

25 Now if you find a false statement and you find

1 constitutional malice, we submit that you will have found,  
2 then, that Novell is liable for slander of title and you  
3 should then consider whether we have proven damages. And  
4 there are two types of damages that you need to be concerned  
5 with, special damages and punitive damages.

6           Special damages are the damages that are intended  
7 to compensate SCO. Here, the damage done to SCO is damage  
8 to SCO's SCOSource program. It was started by Darl McBride  
9 after he was told by Linux supporters within his own company  
10 that certain UNIX libraries were being used to run Linux and  
11 that some companies had call him and wanted to see if they  
12 could get a license to do that. As time progressed, SCO  
13 found more of its intellectual property in Linux.

14           They decided, rather than trying to stop people  
15 from using Linux, they would want to obtain a license, a fee  
16 in the marketplace, that they had the right to do, for their  
17 intellectual property. Now how much UNIX is in Linux will  
18 be decided in the courts. That is not an issue that you  
19 will need to decide in this case.

20           A lot of companies, as Professor Pisano told you,  
21 have expressed that they wanted protection against  
22 infringement, at least the risk of infringement. You'll  
23 recall Mr. Tibbitts told you that when they were selling the  
24 SCOSource program, that they had a code room that people  
25 could come to and see the code. And after looking at that,

1 a number of those individuals and companies decided to take  
2 a license.

3           We're not talking about unsophisticated companies  
4 here. You had licenses entered into with Microsoft and Sun  
5 and Computer Associates, actually demanded a license as part  
6 of another deal. If there was nothing to those claims, they  
7 wouldn't be out there doing that.

8           After looking at that proof -- and some of that  
9 SCO presented to customers. An example of what SCO  
10 presented to customers was shown early in the trial. These  
11 were comments from industry analysts who had visited the  
12 code room. One of them, Information Week, stated that, my  
13 impression is that SCO's claim is credible, says Laura  
14 DiDio, a Yankee Group analyst who was shown the evidence by  
15 SCO Group earlier this week. It appears to be the same  
16 code. According to EE Times in June 2003, if everything SCO  
17 showed me today is true, then the Linux community should be  
18 very concerned, said Bill Claybrook, research director for  
19 Linux and open-source software at Aberdeen Group in Boston.  
20 Computer Weekly, from what I've seen, I think people should  
21 be taking the SCO accusations seriously.

22           Now there is also evidence that Mr. Tibbitts  
23 testified to that he obtained from IBM's Web site which  
24 indicated that Linux was derived from UNIX, which is no  
25 surprise and just sort of the start of the issue, and he

1 sent letters in December of 2003 with examples of code. And  
2 some of that code you've heard, the Malloc code from Silicon  
3 Graphics, essentially admitted had been infringed.

4           So the important point here is this isn't an issue  
5 that's going to be decided in this trial. The marketplace  
6 can decide that issue of whether or not individual companies  
7 want to obtain a license from SCO or whether they want to  
8 wait further and see how that issue is resolved, or simply  
9 decide never to do that. You heard Mr. Pisano, based on the  
10 surveys, indicate what percentage of people fell into which  
11 buckets. That's the way a licensing program works.

12           Now you've also seen, however, that members of the  
13 open source community have viciously attacked SCO for trying  
14 to protect its intellectual property. I would submit to you  
15 that Novell has brought some of those attacks into this very  
16 court proceeding here. It remains that SCO has valuable  
17 business relationships with business partners, big companies  
18 like McDonald's, NASDAQ. It entered into, as I mentioned,  
19 agreements in 2003 with Microsoft, Sun, Computer Associates.  
20 And so while there are elements in the community that really  
21 hated SCO for saying that Linux, which they thought was  
22 free, incorporates intellectual property of UNIX, that would  
23 not have prevented the SCOSource program from making sales.  
24 Indeed, I would suggest to you, ladies and gentlemen, if  
25 there wasn't any real competitive threat to Novell's Linux

1 activities, this campaign of slander would never have been  
2 embarked upon.

3           There is a difference -- you heard Professor  
4 Pisano testify about this, there is an important difference  
5 between a slander that goes to ownership and simply  
6 expressing views that there is or is not infringement or how  
7 much infringement exists. One is opinion. The other is  
8 fact. If someone says that I sold you this business and you  
9 didn't get the copyrights, that is just as much a slander on  
10 title if the person who sold you your house says you didn't  
11 get title to the house when you bought it. That, when it  
12 comes from such a credible source, the former owner of the  
13 business, is deadly. That type of slander killed the  
14 SCOSource business.

15           Now Mr. Hatch will talk to you in a few minutes  
16 about the customers that were lost and the amount of damages  
17 that were inflicted, but I would like to say a few words  
18 first about punitive damages, because there's another type  
19 of malice called personal malice that's important for  
20 punitive damages, and that is the intent to injure. The  
21 intent here to injure SCO. Unfortunately, there is no  
22 shortage of evidence of that type of intent. Unfortunate  
23 for SCO in the sense this is what they were dealing with  
24 back in 2003.

25           The defendants, we submit, issued two of these

1 slanders on the same day as SCO's earnings reports. Now  
2 Novell and its witnesses suggest to you that this is a  
3 coincidence. They are entitled to argue that. And you're  
4 entitled to reject that and to say it is not a coincidence  
5 when there are only four days during the entire year that  
6 SCO announces its earnings and Novell makes two public  
7 announcements of its assertion that it owns the UNIX and  
8 UnixWare copyrights, and both of those public announcements  
9 occur on two of the four days when SCO was announcing its  
10 earnings. I would submit to you that that is not  
11 coincidence, that that is an intent to injure. That is  
12 malice.

13           That is before you even get to Maureen O'Gara's  
14 testimony that Chris Stone admitted to her that the press  
15 release was timed for May 28th to damage SCO's stock price.  
16 Sure, the PR people at SCO, they had one journalist who was  
17 willing to take on some of this community hate, said why  
18 don't you take a jab at PJ and things like that, but there  
19 is no reason to believe she invented this. It's  
20 consistent -- it's consistent with what actually happened on  
21 May 28th the same day as the earnings release, they issued  
22 this slander, and they did it to, quote, confound SCO's  
23 stock positions. And Chris Stone did it while he was  
24 chortling, I think was the word. That's malice, ladies and  
25 gentlemen.



1           There's also Jack Messman's admission that they  
2     tried to publicize this press release in May as widely as  
3     possible. That exhibited intent to harm SCO. It's not  
4     enough to say, well, we wanted to make money, we wanted to  
5     get our story out there. That's not a defense for spreading  
6     a falsehood as widely as possible. There is evidence that  
7     these acts were made to injure SCO because of SCO's taking  
8     on of IBM.

9           Novell's attempted waivers of SCO's legal rights,  
10    while they are an issue that the Court will deal with in  
11    terms of whether those were proper, you can consider the  
12    fact that they made those waivers as elements of intent,  
13    that those were made in the same year, at the same time that  
14    a \$50 million investment in Novell's Linux purchase was made  
15    by IBM. You can consider the attempt by Mr. Stone and  
16    Mr. LaSala to cover up the fact that these were done at  
17    IBM's request by not telling the truth about it the first  
18    time around. And that is also evidence of malice and effort  
19    to hurt SCO in order to help a third party.

20           So thank you for your attention, ladies and  
21    gentlemen. I'll have the opportunity to address you for a  
22    little bit at the end of the closing arguments, but at this  
23    time I would like to turn the podium over to Mr. Hatch.

24           MR. HATCH: As Mr. Singer just talked about, the  
25    SCOsource licensing program began to have sales. There was

1 testimony of sales to Sun, Microsoft and other companies.  
2 These were real sales, tens of millions of dollars.  
3 SCOSource was off to a strong start. Now I would like to  
4 talk about what happened next.

5           Now you heard Mr. McBride testify about the  
6 Hewlett Packard deal. You were shown the contract, which is  
7 here on your screen, and this deal was near completion. Now  
8 you were shown a red line here, markings, because Mr. Byers  
9 of Hewlett Packard, he personally had typed in these  
10 changes, and this was his offer on behalf of Hewlett Packard  
11 to contract with SCO for \$30 million. You will notice here  
12 it's six separate payments of \$5 million each.

13           Now Novell showed you some e-mails that said that  
14 Hewlett Packard was weighing the pros and cons of doing this  
15 deal. They were looking at the risk factors that were out  
16 in the community. But the bottom line, even with all those  
17 risks, they were still considering this deal, and they made  
18 a \$30 million offer. The negotiations continued, and then  
19 all of a sudden that changed.

20           Mr. McBride told you that Novell had inserted  
21 itself into this deal. Why? They told HP that they were  
22 going to reassert copyrights ownership, and with that this  
23 \$30 million contract was gone.

24           Mr. McBride testified, we went deep into the  
25 discussions here, and ultimately Mr. Byers came back and

1 informed me that it was difficult for Hewlett Packard to  
2 complete the transaction as long as Novell was out there  
3 saying they still owned the UNIX copyrights.

4           Likewise, SCO had begun negotiations with Google.  
5 You heard that testimony. Google was the largest Linux user  
6 in the world with over 500,000 servers. That would have  
7 been a significant contract as well. Google pulled out of  
8 that deal referencing that Novell's slander was a  
9 substantial factor in not doing that deal.

10           Mr. McBride also testified that he personally met  
11 with Michael Dell. Michael Dell is the CEO of Dell  
12 Computers, another large company. After being excited about  
13 that partnership, the deal died shortly after Novell's  
14 December 22nd, 2003 reassertion of its ownership rights in  
15 these copyrights. Now that was the primary reason that that  
16 deal died.

17           You also heard testimony from three of Novell's --  
18 excuse me, SCO's salesforce, Mr. Later Gasparro, Mr. Phil  
19 Langer, and Gregory Pettit. You may remember that was the  
20 day that Mr. Normand got to play two of those individuals  
21 for us. Mr. Gasparro, you will recall, he had testified  
22 that he had actually made earlier SCOsource sales. He  
23 actually had concrete sales of product. He talked about EBI  
24 Web hosting and others. He testified that he had somewhere  
25 between 50 and \$60 million of licensing opportunities in the

1 first six months of the program, Ford Motor, Google, Cisco.  
2 But after Novell's claims of ownership, the salespeople  
3 started getting negative feedback, as he described it, and  
4 the results of the SCOSource program after Novell's claim of  
5 ownership was dramatically affected in a negative way.

6           Mr. Gasparro told you that he visited with a large  
7 number of corporate Linux users. He said that in calls,  
8 letters and e-mails, he would be told that Novell's claim of  
9 ownership was a major factor why customers didn't sign deals  
10 with SCO.

11           Mr. Phil Langer, he is another SCO salesman, he  
12 testified that he had over \$3 million in the sales pipeline.  
13 After the Novell slander, there was a strong negative impact  
14 on sales and sales dried up. He specifically talked about  
15 one deal with Regal Entertainment who wanted to do a deal  
16 between 300 and \$350,000, but then told SCO, we can't go  
17 forward, we can't buy your intellectual property because  
18 there is not clear title on it like we do when we buy movies  
19 that we have clear copyright title to.

20           The third salesman was a man named Gregory Pettit.  
21 He was a regional salesman. He said he had the exact same  
22 problems as all the other salesmen. You may recall that he  
23 was -- he said he was negotiating deals with other major  
24 companies like Raytheon and Cisco. He specifically  
25 testified as to Merrill Lynch, but that deal couldn't be

1 done while SCO was being faced with Novell's claim of  
2 ownership.

3 Now the judge has instructed you that evidence --  
4 that specific customers didn't do deals with SCO is one of  
5 two ways that SCO can prove special damages in this case.  
6 Consistent with the Judge's instructions, we have shown  
7 through these three salesmen, Mr. McBride and others, that  
8 Novell's conduct was a substantial factor in these  
9 customers' decisions not to go forward with the deals.

10 Now Novell's conduct doesn't have to be the only  
11 reason, as the Judge has talked about. There can be other  
12 reasons. There are always lots of reasons a customer  
13 doesn't do things. Novell's conduct must simply be a  
14 substantial factor for the customer's decision not to do a  
15 deal with SCO. That was certainly true here.

16 Now the second way the Judge instructed you that  
17 you could find damages is by proving -- using the type of  
18 analysis that Dr. Pisano and Dr. Botosan used. I'm going to  
19 discuss their calculations in just a minute. But just for a  
20 moment, I want to talk to you about the things you heard  
21 from Mr. Musika. He recited pretty much every nasty  
22 remark -- Mr. Singer talked about that, almost every nasty  
23 remark that people were out making about SCO in an effort to  
24 say that sales were lost for some reason other than Novell.

25 Now we've acknowledged from day one that people

1 dislike SCO. It was a small Utah company that was standing  
2 up for itself with property rights. It was trying to  
3 protect its business from larger, more powerful competitors.  
4 That's it's right. But here's what you need to remember  
5 about the bad things other people claimed about SCO.

6 Dr. Pisano and Dr. Botosan both took all of those  
7 factors into consideration. They never said, ever, that  
8 100 percent of the people who were potential customers would  
9 buy SCOsource products. That would be unreasonable. That  
10 wouldn't be conservative. You heard them testify that the  
11 numbers were somewhat less than that, taking all of these  
12 factors into consideration.

13 Now what Mr. Musika didn't want to admit, because  
14 it didn't clearly fit his zero damages model, is that  
15 despite some of these factors, some of the largest companies  
16 in technology, Sun, Microsystems, Microsoft and others, had  
17 actually done deals knowing all these things that Mr. Musika  
18 talked about. Of course, these companies understood the  
19 risks, that they took a license. That speaks volumes about  
20 what other companies would have done if Novell hadn't  
21 slandered the title.

22 Now that's exactly what Dr. Pisano found. You  
23 remember his chart. He's taking all things into  
24 consideration. He said there would be between 19 and  
25 45 percent of the total potential market of likely buyers of

1 SCOSource products. That was him taking into account, as  
2 you can see here, not just one independent study, but three  
3 of them. You will notice that all of them came in this 19  
4 to 45 percent range.

5 Now you heard Dr. Pisano's testimony. He was  
6 here. He listed in his discussion in a pretty dramatic  
7 fashion that he had taken into account every one of the risk  
8 factors that Mr. Musika claimed, and he showed clearly  
9 through hard scientific data that this 19 to 45 percent of  
10 potential customers were there. His number wasn't zero.

11 Now as Mr. Singer pointed out, you will be given  
12 this jury verdict form. In question number three you will  
13 be asked what is the amount of special damages, if any, that  
14 you award SCO as a result of Novell's slander of SCO's title  
15 to the UNIX and UnixWare copyrights. You'll be asked to put  
16 a number on that line. So what is the best and proper  
17 measure of those damages?

18 Dr. Botosan and Dr. Pisano came here to help you  
19 with that, to help distill some complex business economic  
20 concepts into real numbers. Now Dr. Pisano -- excuse me,  
21 Dr. Botosan did her calculations in front of you. I told  
22 you at the beginning I would have her come here and show you  
23 exactly how she made her calculations. She did that for  
24 you. She calculated two streams of revenue, vendor  
25 licenses -- and you'll recall, those were the larger

1 licenses that even independent analysts said there were  
2 probably a sale of at least 15 of those in the time period  
3 we're talking about, at \$10 million each. That would have  
4 been \$150 million, just that. But you recall that  
5 Dr. Botosan said, I want to be conservative and I'm going  
6 to -- consistent with the internal forecasts, I'm going to  
7 estimate somewhat less than that. And you'll recall that  
8 her number was just a little bit more than half of what the  
9 independent analysts are saying.

10           For right to use licenses, she used several  
11 internal, independent forecasts to reach her conclusions.  
12 And then she showed you that she double-checked her work  
13 with Dr. Pisano's numbers, remember, using one of the  
14 independent forecasts, and then she went back and she used  
15 Dr. Pisano's numbers of potential sales to double-check her  
16 work. She did the calculations in front of you, and her  
17 number was not zero, but her numbers were consistent when  
18 she double-checked it.

19           Now Dr. Botosan's estimates were conservative.  
20 Growth, remember she chose a flat growth number. She used a  
21 number of licenses that was much lower than even the  
22 independent analyst was going to use. You'll recall that on  
23 price, she could have used higher prices. We've heard  
24 testimony that there were sales as high as \$1399 for some of  
25 these, \$695. Deutsche Bank said going forward prices would



1 come down, they would be selling somewhere between 100 and  
2 \$300. They said \$200 per unit would be the most likely  
3 price. Dr. Botosan said I'm going to be very conservative.  
4 I'm not here to give some giant number. She picked the  
5 lower of those numbers.

6 So to the extent she cherry-picked, she  
7 cherry-picked conservative. That's why she said I'm  
8 building conservatism on top of conservatism. I'm starting  
9 with a low base and I'm not letting it grow. So there are  
10 two levels of conservatism buried in those numbers, and her  
11 numbers reflect that.

12 Well, when Novell's turn came to talk about  
13 damages, Mr. Musika did not do any calculations for you.  
14 Even though his task was the same as Dr. Botosan, to show if  
15 Novell had slandered what would the damages be to SCO, he  
16 just highlighted the risk factors that Dr. Pisano had  
17 already told you that he had taken fully into account.

18 Now you heard Musika admit that Dr. Botosan used  
19 the correct "but for" analysis. There was a lot of issue  
20 about that. But when he finally came to her, he admitted  
21 not only that it was correct, but he personally had used it  
22 in other cases, used the "but for" analysis. But then in  
23 this case he didn't use it. He didn't make a single  
24 calculation. He refused to admit that even \$1 was lost.  
25 You will have to decide whether that was really likely,

1 whether that's reasonable or whether that's fair.

2 He rejected Dr. Pisano's analysis of the market  
3 completely and found zero lost licenses. Is that  
4 reasonable? Is that fair?

5 Now Dr. Botosan put her numbers up, and this is  
6 the same as on the board. She had a lower range, as you'll  
7 recall, just short of \$114 million, and an upper range of  
8 \$215 million.

9 If you will go to the next slide.

10 We ask you to award our client somewhere in that  
11 range, that would be fair, and that would be the number you  
12 would put here in number three on the verdict form.

13 Now you are going to have one more task. Mr.  
14 Singer, you heard him talk about malice, you heard him talk  
15 about the bad acts of Novell, and consistent with what the  
16 judge has instructed you, you are allowed to award punitive  
17 damages.

18 Now punitive damages are an additional and special  
19 type of damages that are intended to keep a party from doing  
20 bad acts again, to teach them a lesson. So let Novell, in  
21 this instance, know that it can't conduct business this way  
22 in the future.

23 You are going to see -- and these are pages from  
24 Novell's most recent filing with the United States  
25 government, their 10-K, and this exhibit has been admitted

1 during trial, you will have access to that, you can see  
2 Novell has a worth of about a billion dollars. And you are  
3 allowed to consider that when you make a decision to make an  
4 appropriate award.

5 Mr. Singer has discussed in detail the evidence  
6 that Novell recklessly and knowingly asserted its ownership  
7 on that May 28th day, the time that SCO was going to issue  
8 its earnings statement, and they announced it in that way to  
9 maximize the damages to SCO.

10 Now Novell later knew for a certainty, as Mr.  
11 Singer pointed out, that it didn't own the copyrights, that  
12 SCO did, and yet it reasserted to the world through a press  
13 release, with malice, its false claim of ownership on  
14 December 22nd, 2003. That was the second time. It was the  
15 second time designed to maximize the hurt to SCO, on the day  
16 of their annual earnings report.

17 You are able to send a message through an award of  
18 punitive damages, and the message and the amount are up to  
19 you.

20 Could you go back to the verdict form.

21 Number four is where you do that, it says, what is  
22 the amount of punitive damages, if any, that you award SCO  
23 as a result of Novell's slander of SCO's title to the UNIX  
24 and UnixWare copyrights. We leave you to take into account  
25 Novell's worth. We leave that number to you.

1 Thank you very much.

2 THE COURT: Ladies and gentlemen, we'll now take  
3 our recess and we'll return and have Mr. Brennan.

4 Ms. Malley.

5 (Jury excused)

6 THE COURT: Mr. Singer, you'll have 12 minutes in  
7 your rebuttal.

8 MR. SINGER: Thank you.

9 THE COURT: We'll take 15 minutes.

10 (Recess)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25