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1 THE COURT: You may proceed, Mr. Singer.

2 MR. SINGER: Thank you, Your Honor.

3 CROSS EXAMINATION

4 BY MR. SINGER:

5 Q. Good morning, Mr. McBride.

6 A. Good morning.

7 Q. You were asked some questions about the public
8 filings of SCO in which there's references to license
9 agreements with two licensees, Sun and Microsoft, to
10 clean up IP issues. Do you remember that line of
11 examination?

12 A. Yes, I do.

13 Q. Was the manner in which those IP issues cleared
14 up with Sun and Microsoft through a license to UnixWare
15 technology?

16 A. Yes.

17 Q. And, with respect to Microsoft, was there also
18 a license to OpenServer technology?

19 A. Yes.

20 Q. And, with respect to Sun, was there also a
21 provision of drivers for UnixWare technology?

22 A. Yes.

23 Q. Now, anywhere in the SEC filings you are aware
24 of, has SCO sought any amount of money from those
25 licenses as actually being SVRX license money in the

1 meaning of the APA?

2 A. No.

3 Q. I'd like to direct your attention back to the
4 eWEEK article, which is Novell's Exhibit 326. Do you
5 remember being asked a few questions about your comments
6 in that article about what Sun obtained from SCO?

7 A. Yes.

8 Q. And you remember, at one point you wanted to
9 explain what those rights were, and it was suggested
10 would better be done during my examination rather than
11 Novell's counsel?

12 A. Yes.

13 Q. Well, that time has now come, and I would like
14 you to provide that explanation.

15 A. I remember the advice well.

16 Q. Can you explain what you understood Sun was
17 getting from the 2003 rights, as you were expressing them
18 with reregard to the E-Week article?

19 A. Yes. The key thing that they were looking for
20 was how to take their Solaris operating system and make
21 it more compliant with the Intel chip set, which is what
22 SCO has a deep history of doing. And the way you do
23 that, the way it's substantiated, is by taking the
24 drivers that attach to SCO's operating systems and allow
25 Sun to move that over to Solaris.

1 Q. With respect to open sourcing rights and the
2 ability to distribute source code, did Sun have
3 substantial rights from the 1994 agreement in that
4 regard?

5 A. Yes, they did.

6 Q. And you mentioned \$82.5 million being paid in
7 the 1994 agreement; is that right?

8 A. Yes.

9 Q. Was all of that paid to Novell?

10 A. Yes.

11 Q. At the very beginning of the direct
12 examination, you were asked about the tree analogy and
13 UnixWare technology in there. When SCO licenses
14 UnixWare, is it your understanding that it licenses all
15 the core intellectual property in the trunk of that tree?

16 A. Yes.

17 Q. Has anyone come in to you and said: We want to
18 simply go back and license that technology in the form of
19 the old SVRX licenses from the 1980's and early 1990's,
20 as opposed to licensing UnixWare.

21 A. No.

22 Q. Have you ever told shareholders that the way in
23 which you're going to commercially exploit that
24 intellectual property is from selling those old SVRX
25 licenses, as opposed to through UnixWare technology?

1 A. No.

2 Q. You were asked some questions about UnixWare
3 having started before the Asset Purchase Agreement was
4 executed in 2005. Do you remember those questions?

5 A. Yes.

6 Q. Is it your understanding that Santa Cruz, and
7 now SCO, bought the rights to UnixWare in the APA?

8 A. Yes.

9 Q. And that included the business as it was before
10 the APA was executed?

11 A. That's what they told us.

12 Q. And was a fair amount of consideration paid for
13 that business?

14 A. Yes. It was well over a hundred million
15 dollars.

16 Q. In addition, were there royalty rights in the
17 APA for the sale of UnixWare products that Novell would
18 get under certain conditions?

19 A. Yes.

20 Q. And were those conditions, first of all, a
21 floor that had to be exceeded in UnixWare sales?

22 A. Yes.

23 MR. ACKER: I'm just going to object to
24 leading. The last five questions have been leading.

25 THE COURT: Try not to lead.

1 Q. Was there a floor in the agreement?

2 A. Yes.

3 Q. And can you explain how the floor operated?

4 A. Yes. There had to be a certain threshold hit
5 before Novell would receive any of those royalties.

6 Q. Was there also a -- was there any time limit on
7 the time during which those royalties would accrue to
8 Novell?

9 A. Yes.

10 Q. And do you remember how many years that time
11 limit existed for?

12 A. I know that it expired December 31, 2002.

13 Q. Did Novell ever qualify for any royalties on
14 UnixWare sales, as provided in that provision of the
15 APA?

16 A. No.

17 Q. Has, to your knowledge, Novell, at any time,
18 ever suggested to you that you owed Novell any royalties
19 under that provision?

20 A. No.

21 Q. Outside of that provision, has Novell ever
22 suggested to you, in any way, that you owed UnixWare
23 licensing money to Novell on sales of UnixWare
24 products?

25 A. No.

1 Q. Even if some of those products were UnixWare
2 products that started at Novell prior to the sale?

3 A. No.

4 Q. There was a line of questioning about the
5 request for the Sun and Microsoft agreements. And I want
6 to ask you a couple of questions about that. Mr. Acker
7 asked that -- if SCO had ever refused before to provide a
8 contract when provided by Novell. I'd like to ask you,
9 had Novell ever requested any UnixWare licenses prior to
10 the Sun and Microsoft agreement?

11 A. Not that I'm aware of. We did a deal with IBM
12 in '98 over Project Monterey, and I never saw anything
13 where they came in and requested to see what was going on
14 with that.

15 Q. Now, in connection with the Sun and Microsoft
16 agreements, you were asked some questions about, first of
17 all, the June 24, 2003 letter to you from Mr. LaSala.
18 And that is Novell's Exhibit 215. That was in June of
19 2003?

20 A. Yes.

21 Q. Prior to that time, had there been
22 conversations that you had with Novell regarding the
23 SCOSource program?

24 A. Yes.

25 Q. Who did you have those conversations with at

1 Novell?

2 A. Greg Jones.

3 Q. Can you tell me when the first conversations
4 occurred?

5 A. Yes. It would have been in the fall of 2002,
6 probably early November.

7 Q. Who initiated the conversation?

8 A. I first called in to Greg Jones, who was an
9 attorney at Novell.

10 Q. Okay. And what did you tell him or ask him?

11 A. Well, I told him that I was the CEO of SCO, SCO
12 had acquired the UNIX properties, as we remembered from
13 the '95 time frame, and we were preparing to enforce our
14 intellectual property rights and, in the process of going
15 through the related agreements, I had come across a
16 head-scratcher, if you will, something in the agreements
17 that did not make sense to me.

18 There was competing language, where the
19 majority of the Asset Purchase Agreement seemed to appear
20 that all of the property went to the Santa Cruz
21 operation, and there was really just one word in one
22 small section that was conflicting that, and that was
23 relating to the copyrights in the excluded asset list.

24 And I explained that to Mr. Jones and, at the
25 same time, explained to him what we were trying to do

1 with our SCOSource program.

2 Q. Now, at the time you had this conversation,
3 were you aware of amendment number 2?

4 A. No, I was not.

5 Q. What did you ask Mr. Jones for Novell to do?

6 A. I asked him if he would help us find all of the
7 documents that related to the Asset Purchase Agreement in
8 1995, so we could try and get some clarity to what was
9 clearly an erroneous problem. Something was in error
10 because there was conflicting statements.

11 Q. What did Mr. Jones say to you?

12 A. He agreed with me and said he would do his best
13 to see how he could help.

14 Q. Okay. Was there a follow-up conversation with
15 Mr. Jones or anyone else from Novell?

16 A. Yes. Over the period of the next, I would say,
17 two to three months, there were a number of discussions I
18 had with Greg. And then, eventually, there was someone
19 else from Novell, a Dave Wright came in, and I had some
20 discussions with him, but primarily it was with
21 Mr. Jones.

22 Q. Can you relate the substance of that
23 conversation -- conversations?

24 A. The substance, if you put a thread through it,
25 was basically us asking them to clarify this language

1 that we felt was conflicting and that we had bought the
2 technology, SCO had bought it, Novell had sold it. I
3 went through that with Greg. Greg agreed with me and
4 said: Yeah. That doesn't make sense. Let's try and
5 figure out if there's a document out there somewhere.

6 So, the first part was going out to try and
7 find some documents that would help that. So if there
8 was a thread through it, it was Greg was very helpful
9 every step along the way to try and help us resolve the
10 issues.

11 Q. Well, did they express a willingness to go back
12 and search for documents?

13 A. Yes, they did. The first part of of it was
14 Mr. Jones telling me: Let me go see what I can find out.

15 I worked with Greg at Novell, and I knew him
16 well. A lot of people had left over the ten years since
17 I had worked there, so -- eight years, whatever it was.
18 So -- but I did know Greg, and Greg was very helpful to,
19 first of all, go try and find any documentation that
20 would explain what was going on at the time of the deal.

21 Q. Did there come a time when Novell said they
22 were not willing to provide any assistance in doing
23 that?

24 A. Yes.

25 Q. When did that occur?

1 A. The first come back from Greg was that they had
2 gone -- he had gone down the path of trying to find the
3 documents, and he came back and said to me that all the
4 documentation around the UNIX stuff was old and in
5 archives and wasn't even on property anymore and so it
6 was going to be extremely difficult for them to go out
7 and even find the documentation around the UNIX
8 technologies.

9 Q. At that time, did you ask them if they would
10 take any further steps to clarify the ownership of the
11 copyrights?

12 A. Yes. Well, we talked about it, and so the
13 first step that I took was to try and explain to them why
14 there would be an incentive for them to do it, and that
15 was that Novell's royalties from the preexisting
16 royalties from '95, they obviously had been coming down
17 over the years. And the way I described it to Greg was
18 that if we're able to support, in the industry, the
19 defense of the intellectual property for UNIX, vis-a-vis
20 Linux, then anybody who has anything to do with UNIX will
21 benefit from that, so their declining revenue stream
22 might slow down.

23 So I was trying to explain to them that it
24 wasn't just in our interest, but it was in fact in
25 Novell's interest to get involved with us to support us

1 in what we were doing with SCOSource.

2 Q. Did you explain the SCOSource program to
3 Mr. Jones?

4 A. Yes, I did.

5 Q. That it would involve licensing individuals who
6 are using Linux to make use of whatever UNIX intellectual
7 property existed in Linux?

8 MR. ACKER: Same objection. Leading, Your
9 Honor. He can ask, simply: What did you say?

10 Q. Did you describe the SCOSource program?

11 A. Yes, I did. I explained to Greg what we were
12 doing. I believe he understood it. At the point in time
13 we were talking, the tight focus that we had on the
14 intellectual property problems in Linux related to our
15 UNIX was around our library licensing, and I went through
16 and described generally what we were doing with SCOSource
17 and then also specifically what the first program would
18 be around.

19 Q. Did Novell, through Mr. Jones or anyone else,
20 respond to you with respect to their interest in helping
21 on the SCOSource program?

22 A. Well, again, Greg was extremely helpful along
23 the way to try and help us clarify what the problems were
24 in the Asset Purchase Agreement. And with respect to the
25 SCOSource program -- well, in order -- what came back was

1 Mr. Jones said that SCO -- Novell was not interested in
2 participating in anything to do with UNIX. That was
3 yesterday's story, that they had taken it all the way up
4 to the top of the company. And I can't remember if he
5 said executive committee or the CEO.

6 Somebody at a very high level had reviewed the
7 request for both things; to get involved in what we were
8 doing with our licensing program, but also to help us try
9 and get some clarity around what was clearly some
10 incorrect documents.

11 Q. Did Novell agree or refuse to provide any
12 clarification, through any subsequent documentation, on
13 the ownership of the copyrights?

14 A. Greg agreed, but higher-ups disagreed. So,
15 Greg, after basically saying that it's in the archives,
16 we can't find them, and after we kept pressing and saying
17 that we really want to get this cleared up, Greg had an
18 idea which I thought it was a good one, which was: Why
19 don't you guys just draft a statement -- maybe we can
20 include it as a side letter -- and clarify what is
21 clearly a problem in the documents, and I'll get somebody
22 to sign it, and we'll be done with it.

23 We went through that step per Mr. Jones'
24 request. We actually created a one-page, I believe. It
25 was a document that was a little side letter to attach

1 that said: Both parties agree that, at the time of the
2 transaction, it was the intent of the parties to -- that
3 the copyrights were part of this transaction.

4 Over the course of the last several years, it's
5 been proposed --

6 Q. I'm not asking about the last several years,
7 Mr. McBride, just those questions.

8 A. Okay.

9 Q. With respect, though, to that request for
10 clarification, did Novell ultimately agree or refuse to
11 provide it?

12 A. They ultimately refused.

13 Q. Did -- at any time in these conversations that
14 occurred in late 2002 and early 2003, did Novell ever say
15 that you, SCO, are not able to engage in a SCOSource
16 licensing program because we, Novell, own that
17 intellectual property?

18 A. No, they did not.

19 Q. Did Novell, at any time during those
20 discussions, ever say: You, SCO, if you go forward with
21 that program, have to give us, Novell, the revenue that
22 comes out of it?

23 A. Not at all. In fact, what they did say was:
24 UNIX is yesterday's story. We're going forward. We're
25 interested in Linux. We don't want to get involved in

1 UNIX.

2 Q. Now, moving forward to June 24, 2003 and Novell
3 Exhibit 215, Mr. McBride, you were asked about this
4 letter, which talked about receiving copies of the
5 agreements, the two license agreements.

6 A. Correct.

7 Q. At that time, did Novell ever say to you: We
8 think the SCOSource licenses that are publicly being made
9 available are licenses which violate our SVRX rights.

10 A. Say that again.

11 Q. Did Novell ever say to you, either in the June
12 24, 2003 letter, or at that time, that the SCOSource
13 licenses, which are publicly available, that you're
14 selling to the public, violate our SVRX rights in the
15 APA?

16 A. No.

17 Q. In fact, if you turn to Exhibit 272, which is
18 Mr. Tibbitts' letter that you were asked about,
19 Mr. Tibbitts' letter of February 5, 2004, to
20 Mr. LaSala --

21 A. I think it's 272. It appears -- oh, here it
22 is.

23 Q. It's Deposition Exhibit 272. It's Trial
24 Exhibit 294. It should be.

25 If you turn to the second page, you see even in

1 February, 2004, Mr. Tibbitts is saying to Mr. LaSala:

2 You also question SCO's introduction of
3 intellectual property license for Linux and whether that
4 was a USVRX license.

5 Do you see that?

6 A. Yes.

7 Q. Had Novell, even as late as February, 2004,
8 ever told you that the publicly available SCOSource
9 licenses, that SCO was marketing at that time, were
10 things that you were not authorized to offer to the
11 public because of their SVRX rights?

12 A. No.

13 Q. Did they ever tell you, at that time, that if
14 you marketed those, they would get the revenue?

15 A. No.

16 Q. Or they believed they were entitled to the
17 revenue?

18 A. No.

19 MR. SINGER: Thank you very much.

20 THE COURT: Thank you.

21 Anything else, Mr. Acker?

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

23 THE COURT: Is it Acker or Acker?

24 MR. ACKER: Spelled Acker, pronounced Acker.

25

1 REDIRECT EXAMINATION

2 BY MR. ACKER:

3 Q. Mr. McBride, if you still have Exhibit --

4 Could you bring up Exhibit 215, please.

5 And Exhibit 215 is the letter to you from
6 Mr. LaSala, dated June 24, 2003, that counsel just asked
7 you about. If we could take a look at the second page
8 under the "therefore" clause, it's true, isn't it, that
9 what Mr. LaSala wrote in June of 2003:

10 Immediately provide to Novell copies of the two
11 agreements in question -- the Sun and Microsoft
12 agreements -- and any other agreements in which SCO
13 purports to amend, modify or waive rights under any SVRX
14 license or to enter into any new SVRX license.

15 Do you see that?

16 A. Yes.

17 Q. So, it was the case in June of 2003 that Novell
18 asked you not only for the Sun and Microsoft license, but
19 for any other licenses, correct?

20 A. You're looking under A?

21 Q. Yes, sir.

22 A. Yes, uh-huh.

23 Q. And Counsel asked you about conversations that
24 you had with folks at Novell in late 2002, going into
25 2003. At that point, the SCOSource program was still in

1 its infancy, correct?

2 A. Yes.

3 Q. And, in fact, you were still playing with this
4 idea of licensing UNIX libraries, correct?

5 A. Right.

6 Q. And that plan, that licensing of UNIX
7 libraries, that never went forward, right?

8 A. That's not correct.

9 Q. Well, there was never any license issued under
10 that program, correct?

11 A. That's not correct.

12 Q. The licensing of the UNIX libraries in the
13 SCOTech program, it's your testimony there were licenses
14 entered into?

15 A. No. There were licenses made available. There
16 was no one that licensed it.

17 Q. So this early first version of SCOTech, there
18 were never any licenses actually executed, correct?

19 A. The licensees that were interested in it were
20 ultimately interested in getting more than just the
21 libraries. They wanted the license to all of the UNIX
22 intellectual property that was related to all of the
23 Linux.

24 Q. And so, when you had this conversation --
25 conversations with folks from Novell in late 2002 and

1 early 2003, the SCOSource program wasn't even really
2 formally in existence yet, correct?

3 A. No. That's not correct. It was in existence.
4 Before we went out with it, we went and visited with
5 various people, industry partners, and explained to them
6 what we were doing, but we eventually launched it in
7 January of 2003.

8 Q. And what was launched in January of 2003
9 changed in the summer of 2003?

10 A. It got bigger as we went along.

11 Q. And the -- when you had the conversations with
12 folks from Novell in late 2002, you didn't disclose to
13 them what ultimately became the SCOSource program in the
14 summer of 2003, right?

15 A. When I talked to Greg, on the very first call
16 we talked about how we were going to protect our
17 intellectual property rights. I explained the SCOSource
18 program. At that point in time, I think it was actually
19 called SCOTech, but I explained very clearly what the
20 program was. And it was clear what we were doing. And
21 what I explained to him in the fall and winter of 2002 is
22 eventually what SCOSource became.

23 Q. Well, did you disclose, in those conversations
24 with Mr. Jones, that you intended to enter into a license
25 agreement with Sun that would modify and restate Novell's

1 license agreement with Sun from 1994?

2 A. We didn't talk about Sun when I talked to Greg.

3 Q. When you talked to Mr. Jones, did you disclose
4 to Mr. Jones that you had plans to enter into a licensing
5 agreement with Microsoft?

6 A. I didn't talk about specific companies. I
7 didn't talk about Sun. I didn't talk about Microsoft. I
8 did talk, in general terms, about being able to protect
9 our rights, whether it was vis-a-vis users or large
10 companies.

11 Q. And, after you were asked, when Novell became
12 aware of the Sun and Microsoft agreements, as you
13 testified earlier this morning, you got letter after
14 letter of them demanding to see copies of those
15 agreements, right?

16 A. I got letter after letter as a result of Novell
17 doing a flip flop on the copyright language. That's
18 exactly when the letters started. And that's when they
19 got very intense in litigating.

20 Q. And they also sent you letters that we looked
21 at this morning, Mr. LaSala's letter, where he asked for
22 copies of the Sun and Microsoft and any other agreements,
23 correct?

24 A. The question was?

25 Q. You also got a letter from Mr. LaSala --

1 A. Yes.

2 Q. -- asking for those agreements?

3 A. Yes.

4 Q. And you refused to provide those agreements,
5 correct?

6 A. We refused to provide those and a number of
7 other things.

8 Q. Let me show you, if I could, Exhibit 267.

9 Mr. McBride, Exhibit 267 is a letter from Mike -- it's
10 Bready, I believe -- to Robert Bench, the Chief Financial
11 Officer of SCO, dated November 21, 2003. Do you see
12 that?

13 A. Yes.

14 Q. And if you take a look at the first paragraph,
15 Mr. Bench wrote to SCO's CFO, in November of 2003:

16 We have completed significant portions of the
17 audit, but we are still lacking critical information and
18 documentation necessary to finish the audit.

19 Do you see that?

20 A. Yes.

21 Q. And if we take a look at the second page,
22 paragraph 1.4, there's a specific reference to the Sun
23 and Microsoft agreements, correct?

24 A. Yes.

25 Q. And then, in paragraph 1.5, just below it,

1 again Novell renews its request for the Sun and Microsoft
2 agreements. Do you see that?

3 A. Yes.

4 Q. And then, if we could take a look at Section
5 2.1, there's a specific reference in this letter from
6 Mr. Bready to Mr. Bench regarding the incidental clause
7 in the APA.

8 Do you see that?

9 A. Yes.

10 Q. And it's true, isn't it, that despite these
11 letters and requests for agreements and references to the
12 incidental clause in the APA; at no point, in either 2003
13 or 2004, did SCO respond to Novell and say: You're not
14 entitled to any of these revenues because this was a
15 UnixWare license, the Sun and Microsoft license were, and
16 any other software we licensed was simply incidental.

17 That never happened, right?

18 A. I don't know how we responded to all these.
19 Again, I wasn't involved in the response.

20 Q. Are you aware of that response ever being made?

21 A. Yes. I talked to Mr. Tibbitts.

22 Q. I asked you: Are you aware of that response
23 ever being made?

24 A. I don't know what they -- how they responded to
25 it.

1 MR. ACKER: I don't have anything else, Your
2 Honor.

3 THE COURT: Thank you.

4 Anything else, Mr. Singer?

5 REXCROSS EXAMINATION

6 BY MR. SINGER:

7 Q. Based on your conversations with Novell in
8 early 2003 and late 2002, do you believe that Novell
9 clearly understood that you were intending to license
10 UNIX intellectual property for use in Linux?

11 A. Absolutely.

12 Q. And it was in the context of that discussion
13 that Novell refused to provide clarification that the
14 copyrights were in SCO's possession; is that correct?

15 A. That's correct.

16 Q. And did you, at any time, ask Novell to
17 transfer to SCO copyrights?

18 A. No. I have to tell you, it makes me very upset
19 every time I read that in some kind of paper or anywhere
20 that is stated. Novell's papers -- you have Mr. Jones'
21 own testimony that contradicts that. So, the answer is:
22 No. I never asked them to transfer it. I always took
23 the approach that the property had been sold and all we
24 were seeking was a clarification. That was it.

25 MR. SINGER: Thank you very much. Nothing

1 further.

2 THE COURT: Anytning else -- thank you,
3 Mr. Singer.

4 Anything else, Mr. Acker?

5 MR. ACKER: No, Your Honor. Thank you.

6 THE COURT: Thank you. You may step down,
7 Mr. McBride. I assume this witness may be excused.

8 MR. ACKER: Yes, on behalf of Novell, Your
9 Honor.

10 MR. SINGER: Yes, Your Honor.

11 THE COURT: You may call your next witness.

12 MR. MELAUGH: Your Honor, we call Greg Jones

13 GREG JONES,

14 the witness hereinbefore named, being first
15 duly cautioned and sworn or affirmed to tell the truth,
16 the whole truth, and nothing but the truth, was examined
17 and testified as follows:

18 THE COURT: Let's see, now. You're
19 Mr. Melaugh, right?

20 MR. MELAUGH: Yes, I am. Good morning, Your
21 Honor.

22 THE COURT: Good morning.

23 THE CLERK: Please state your name and spell it
24 for the record.

25 THE WITNESS: Greg Jones. G-r-e-g.

1 J-o-n-e-s.

2 THE CLERK: Thank you.

3 DIRECT EXAMINATION

4 BY MR. MELAUGH:

5 Q. Good good morning, Mr. Jones.

6 A. Good morning.

7 Q. Mr. Jones, could you please introduce yourself
8 to the Court?

9 A. Yes. I am Greg Jones. I am Vice President of
10 Technology Law at Novell.

11 Q. Mr. Jones, could you please describe your
12 educational background.

13 A. Yes. I have a Computer Science Degree from
14 Brigham Young University and also a Juris Doctorate
15 Degree from BYU.

16 Q. Could you please describe briefly your work
17 history following graduation from law school.

18 A. Following law school, I had a law clerk/baliff
19 position in Utah County, which included being law clerk
20 to a State District Judge. In March of '92, I joined
21 Novell. I have been at Novell since then, always in a
22 position of advising on intellectual property and
23 licensing matters, and I currently lead a team of
24 attorneys that supports Novell's R&D efforts.

25 Q. Mr. Jones, could I ask you to expand a bit on

1 your responsibilities during the timeframe at issue in
2 this case; say, from 2002 to the present?

3 A. Again, leading this team of attorneys and
4 paralegals in supporting the R&D efforts. So, that
5 includes inbound licensing of technology and other
6 intellectual property licensing. Also, if there are
7 disputes that arise or things of that nature that affect
8 the R&D organization, then we offer counsel and advice.

9 Q. Mr. Jones, you have been present in the
10 courtroom since we began; isn't that right?

11 A. Yes.

12 Q. And so you've heard the testimony of Mr. Sontag
13 yesterday, and Mr. McBride today?

14 A. Yes.

15 Q. I'd like to ask you about a segment of that
16 testimony. I believe the substance of it is that, both
17 from Mr. Sontag and from Mr. McBride, that SCO explained
18 the details of the SCOSource program to you; that you or
19 anyone else from Novell didn't say no to SCOSource; and
20 that, therefore, SCO felt it could proceed with the
21 SCOSource program.

22 How does that testimony comport with your
23 memory of these communications that are being talked
24 about?

25 A. Well, they both did speak of their belief that

1 UNIX intellectual property or code may be found in Linux.
2 I recall Mr. McBride talking about the libraries that he
3 alluded to. And I recall their desire to enforce their
4 rights. And, at one point, I do recall them saying that
5 the enforcement may be by means of a licensing program.
6 But I didn't have a full understanding exactly what
7 SCOsource would be or what it would entail. I had never
8 seen anything that explained the exact terms of what that
9 program might be or anything of that nature.

10 Q. Did they ever suggest to you, during these
11 communications, that SCO might sue Linux users for
12 infringement of SVRX copyrights?

13 A. They were not that specific.

14 Q. As part of these communications, did they ever
15 suggest to you that SCO was going to go out and license
16 SVRX?

17 A. Again, they were never that specific. In those
18 2002 conversations, where are they were introducing
19 themselves and what was happening, they never got that
20 specific with me.

21 Q. As well as the early 2003 communications; is
22 that right?

23 A. The only thing in 2003 was: There was this --
24 Mr. McBride alluded to a document they prepared and they
25 sent to Novell and, in looking at that document, which --

1 there is a reference to SVRX, but, again, it's not really
2 an explanation of what the SCOSource program is. It was,
3 instead, something they were proposing to do to define
4 the rights in a way that they wanted to see them
5 defined.

6 Q. And, and as a matter of fact, no one from
7 Novell signed that letter, no one from Novell agreed to
8 the letter that you're referencing?

9 A. That's correct.

10 Q. As part of these communications, did anyone
11 from SCO ever suggest to you or anyone else at Novell
12 that SCO was going to purport to authorize the open
13 sourcing of SVRX?

14 A. No.

15 Q. Did they ever suggest to you that they were
16 going to amend or -- and restate Sun's 1994 buyout
17 agreement?

18 A. No.

19 Q. Did they ever suggest to you, or anyone else at
20 Novell that you're aware of, that they were going to
21 enter into a license with Microsoft?

22 A. No.

23 Q. Mr. Jones, I'm going to show you an exhibit
24 that's not in the binder that you have. This has been
25 premarked as Exhibit 151 from Novell. I want to draw

1 your attention to the paragraph at the bottom of the
2 e-mail. This is from -- the paragraph right above that
3 that's from you.

4 THE COURT: This has not been admitted,
5 correct?

6 MR. MELAUGH: That's correct, Your Honor.

7 Q. Does this comport with your memory of the
8 communications that you have just described?

9 A. Yes.

10 Q. And I want to draw your attention to the top of
11 the e-mail. And this is a response from Chris Stone.
12 Does this comport with your memory of Novell's reaction
13 to SCO's proposal?

14 A. Yes.

15 MR. MELAUGH: Your Honor, I'd like to move
16 Exhibit 151 into evidence.

17 MR. NORMAND: No objection, Your Honor.

18 THE COURT: 151 is received.

19 (Novell's Exhibit 151 received in evidence.)

20 Q. Mr. Jones, if you could turn in your binder to
21 Exhibit 187. This is Novell Exhibit 187. It's been
22 pre-admitted. Mr. Jones, what is this?

23 A. This is a 2003 software license agreement
24 between Sun and SCO.

25 Q. Where did Novell obtain this document?

1 A. We obtained this document from SCO in discovery
2 in litigation.

3 Q. Did Novell have a copy of this document prior
4 to obtaining it in discovery in this litigation?

5 A. No.

6 Q. After receiving this agreement in discovery in
7 this litigation, what did you do?

8 A. Well, this agreement, you know, it relates back
9 to this 1994 agreement -- excuse me -- it relates back to
10 a 1994 agreement between Novell and Sun, and it says that
11 it meant to restate that agreement. So I went back and
12 looked at the 1994 agreement. Both of them identified
13 versions of SVRX as technologies that are being licensed,
14 so I also took a look at the Asset Purchase Agreement
15 between Novell and Santa Cruz, SCO.

16 Q. If you could turn for a moment to the next tab
17 in this Novell Exhibit 5, which has been pre-admitted,
18 what is this document, Mr. Jones?

19 A. This is a 1994 software license and
20 distribution agreement between Sun Microsystems and
21 Novell.

22 Q. Was this the 1994 agreement you were referring
23 to just a moment ago?

24 A. Yes.

25 Q. As a general matter, what is this agreement?

1 A. Well, this is an agreement under which Sun
2 bought out its royalty obligations for licenses to UNIX
3 technologies.

4 Q. After reviewing the Asset Purchase Agreement
5 and the 1994 agreement and the 2003 agreement, what was
6 your understanding of the relationship between these
7 three agreements?

8 A. Well, I guess, first of all, that indeed the
9 2003 agreement carries over many of the terms from the
10 1994 agreement, but it does, for all practical purposes,
11 remove the confidentiality obligations for the source
12 code that were part of the 1994 agreement.

13 I also note that the 2003 agreement, basically,
14 is a restatement of a buyout that was done. So this is
15 an agreement relating to a buyout of royalties that comes
16 under provisions of amendment number 2 to the Asset
17 Purchase Agreement, which requires that such agreements
18 not be entered without both parties' consent.

19 Also, the 2003 agreement relates to SVRX
20 technologies and substantial new rights being granted
21 with respect to them, independent of the UnixWare
22 technologies identified in the agreement. So, it is an
23 SVRX agreement.

24 The licensing of SVRXs is not merely incidental
25 to UnixWare. It's not minor. Expansive rights were

1 granted with respect to SVRX, that it could even be
2 released as open source. So, this is also an agreement
3 that, under the Asset Purchase Agreement, should not have
4 been entered without Novell's approval.

5 Q. So, let's walk through that again. You -- I
6 think, the first part of your answer referred to
7 confidentiality obligations that were in the 1994
8 agreement and in the 2003 agreement. Are you referring
9 to the -- at least, in part, to the sections that are on
10 the screen now?

11 A. Yes. This is from the 2003 agreement, right?

12 Q. Can you walk us through your understanding of
13 these sections?

14 A. Well, so -- well, so, first have all, 10.1 is
15 just a general -- I'm sorry 10.1 is --

16 Q. 10.1 is from 1994, to be clear, and the bottom
17 one is from 2003.

18 A. So 10.1 is from the 1994 agreement and imposes
19 confidentiality restrictions, of course. I'd add that
20 there are other provisions in the 1994 agreement that
21 also provide that any source code sublicensing has to be
22 done pursuant to terms at least as restrictive as those
23 that Sun uses for its most valuable proprietary source
24 code.

25 So, while there were significant sublicensing

1 rights in the 1994 agreement, they were very tightly
2 controlled. And, furthermore, Sun had an obligation to
3 police those licenses and to act on any violations of the
4 confidentiality.

5 And, by contrast, I look at Section 8, Roman 1,
6 towards the bottom, which basically says that if Sun
7 distributes these UNIX technologies under a license model
8 of Sun's choosing, then, at that point, those
9 technologies are no longer confidential, and there are no
10 longer any confidentiality requirements that apply to
11 that technology.

12 Q. I believe you said it was also your
13 understanding that SVRX plays a significant role in the
14 2003 SCOSource license. What led you to that conclusion?

15 A. Well, simply that the SVRX products are
16 identified on the schedules and that this dramatic
17 expansion of rights received by virtue of removing the
18 confidentiality applies across the board to all of the
19 technologies that are identified, whether it's UnixWare
20 or earlier versions of SVRX that predated the APA.

21 Q. Stepping back to this change in the
22 confidentiality obligations, what significance do you
23 attribute to this change?

24 A. What significance in terms of how it's
25 important?

1 Q. In the context of what you know about Sun's
2 business, the actions Sun took after entering into this
3 license?

4 A. So, Sun has an operating system known as
5 Solaris. It's a UNIX variant. It's competitive with
6 Linux. This 2003 agreement allows Sun, then, to release
7 Solaris as open source under an open source licensing
8 model, which they have done in a project called
9 OpenSolaris. So it poses a direct competitive challenge
10 to Linux and, certainly, to Novell, given that Linux is
11 an important part of Novell's business. We are a Linux
12 distributor.

13 Q. Do you know whether there is any SVRX code in
14 Sun's OpenSolaris product?

15 A. Yes.

16 Q. How do you know that?

17 A. Well, Novell has SVRX code in its possession,
18 and so I obtained source code files from Novell's
19 personnel, and then I downloaded source code from
20 OpenSolaris. I found those same files, and sometimes
21 with some degree of difference or change but, in the
22 majority's of instances, identical in the OpenSolaris
23 project. So I took those files, compared them
24 side-by-side, so I was able to find SVRX files in the
25 OpenSolaris project.

1 Q. You said you downloaded the OpenSolaris code.
2 Is that something anyone can do?

3 A. Yes. Anyone can do that.

4 Q. And do you have to pay any money to download
5 the OpenSolaris code?

6 A. No.

7 Q. Do you have to sign an agreement to download
8 the OpenSolaris code?

9 A. No. You don't have to do that.

10 Q. If you could turn to Exhibit 439 in your
11 binder. This is Novell Exhibit 439. It has not yet been
12 admitted. Mr. Jones, could you describe what 439 is.

13 A. Well, the right-hand side of this document
14 contains the -- just the contents of one of the SVRX
15 files that I looked at, this one called Auto Push.C, and
16 the left side of the document, the left column, is a
17 corresponding file that comes out of the OpenSolaris
18 project.

19 Q. And what's significant to you in the text of
20 the chart that we're looking at right now?

21 A. Well, one thing just of note is, of course, Sun
22 has included its open source license notice at the top of
23 the file, but then below that, on the left-hand side, we
24 see an AT&T copyright notice, with the latest year of
25 creation of code being 1989. And then we just jump

1 across the page to the SVRX side and see basically the
2 identical copyright notice.

3 And from there on, you can see what's striking
4 is that while there are places where there are some
5 additional text or a minor difference, there are just
6 extensive portions of the file where what you find is
7 that they are identical.

8 Q. And, moving to the second page of this chart,
9 is that what we're seeing here?

10 A. Yes.

11 MR. MELAUGH: Your Honor, I'd like to move
12 Exhibit 439 into evidence.

13 MR. NORMAND: No objection.

14 THE COURT: 439 is received.

15 (Novell's Exhibit 439 received in evidence.)

16 Q. Mr. Jones, if you could turn to Exhibit 440.
17 Could you tell us what this exhibit is?

18 A. Yes. Again, this is a document in which the
19 right column includes the contents of a source code file
20 from SVRX, Disk USG.C, and the left column is a -- the
21 corresponding file that I downloaded from the OpenSolaris
22 project. And, as with the previous exhibit, you look at
23 the copyright notices. You see the commonalities.

24 On this particular one, you see that Sun notes
25 that it made some modifications in 1999, so they are not

1 going to be identical in every respect, but you walk down
2 through the file and they are identical in many respects.
3 And it's evident that the OpenSolaris file is based on
4 the SVRX file.

5 Q. Mr. Jones -- I move Exhibit 440 into evidence,
6 Your Honor.

7 MR. NORMAND: No objection.

8 THE COURT: 440 is received.

9 (Novell's Exhibit 440 received in evidence.)

10 Q. Mr. Jones, if you could turn -- and we will
11 just address this briefly, to Exhibit 441. Is this
12 similar to what we've seen with the past two exhibits?

13 A. Yes. It's the same. Again, on the right-hand
14 side, the contents of a source code file from SVRX; on
15 the left-hand side, the contents of a source code file
16 from the OpenSolaris project. The file names are the
17 same, and it's quite clear, as you walk through, the
18 similarities show that the OpenSolaris file was based on
19 the SVRX file.

20 MR. MELAUGH: Your Honor, I move Novell Exhibit
21 441 into evidence.

22 MR. NORMAND: No objection.

23 THE COURT: 441 is received.

24 (Plaintiff's 441 Exhibit received in evidence.)

25 Q. Greg, if you could just page through the

1 exhibits that follow in this book. I'm going to list
2 them off for the record. They are Novell Exhibits 442,
3 443, 446, 447, 448, 449, 450, 451, 452, 453, 455, 456,
4 458 and 459.

5 Mr. Jones, are these exhibits similar to the
6 three that we have just taken a look at?

7 A. Yes.

8 MR. NORMAND: No, objection.

9 MR. MELAUGH: Your Honor, I move these exhibits
10 into evidence.

11 THE COURT: Same nature. Any objection?

12 MR. NOLRMAND: Your Honor, I said no objection.

13 THE COURT: I didn't hear you.

14 MR. NORMAND: I'm sorry.

15 THE COURT: 442, 443, 446, 447, 448, 449, 450,
16 451, 452, 453, 455, 456, 458 and 459 are received.

17 (Novel Exhibits 442, 443, 446, 447, 448,
18 449, 450, 451, 452, 453, 455, 456, 458
19 and 459 received in evidence.)

20 MR. MELAUGH: Thank you, Your Honor.

21 Q. Mr. Jones, do you know whether there is any SCO
22 UnixWare code in OpenSolaris?

23 A. I have not done a comprehensive search. I did
24 search on the OpenSolaris site for any reference to Santa
25 Cruze or SCO that would appear on a copyright notice. I

1 didn't find anything, but I didn't make a comprehensive
2 effort to identify UnixWare code in OpenSolaris.

3 Q. When you say "search on the OpenSolaris web
4 site," what do you mean?

5 A. There is a -- if you go to the OpenSolaris site
6 on the internet, there is a user interface there, and
7 there is a utility that allows you to do text searches
8 that searches through the text of the source code files
9 that are there on the OpenSolaris site.

10 Q. I'm sorry. What were the terms that you
11 searched for in that code?

12 A. Two of them, Santa Cruz and SCO. Yeah. I
13 also -- I also did Caldera. There was one Caldera
14 file.

15 Q. And by "file," are you referring to copyright
16 notices? What are you referring to when you say that?

17 A. Again, all I looked for is whether those terms
18 appeared in any copyright notices, and I could not see
19 them appearing in a copyright notice.

20 Q. Did SCO obtain Novell's permission to enter
21 into the 2003 Sun SCOSource license?

22 A. No.

23 Q. Would Novell have consented to the 2003 Sun
24 SCOSource license if SCO had asked?

25 A. No.

1 Q. Why not?

2 A. Well, it simply would not have been in Novell's
3 commercial interests. In the fall of 2002, Novell had
4 acquired Simeon a Linux desk top company. We were
5 exploring ways to get into the Linux market so enabling a
6 competitor to Linux simply would not have been in
7 Novell's interests. In the manner in which they entered
8 this agreement, when they did it, they kept all the
9 money. I assume that would have been their proposal but,
10 fundamentally, it simply would have been contrary to
11 Novell's business interests to enable something like
12 this.

13 Q. What amount does Novell seek from the Sun
14 SCOsource licensse?

15 A. Everything that was paid.

16 Q. Why does Novell believe it is entitled to that
17 amount?

18 A. Well, there were expansive rights granted with
19 respect to the versions of SVRX that pre-date --
20 post-date -- pre-date the Asset Purchase Agreement.
21 These were dramatically greater rights than were enjoyed
22 under the 1994 agreement, and there is nothing in the
23 agreement that assigns any value to anything other than
24 the SVRX technologies for which Novell is entitled to
25 receive royalties.

1 The customary 5 percent administrative fee that
2 SCO normally receives for collecting SVRX royalties just
3 doesn't seem to be germane in this particular instance.

4 Q. Based on your experience with software
5 licensing, would you describe the 2003 Sun SCOsource
6 license as a typical software license?

7 A. No. I mean, it's an extraordinary agreement.
8 When you enter an agreement where you take the step of
9 going from proprietary to open source, that is quite a
10 dramatic change. And so it's not something you would
11 custom -- certainly it would not be what you would
12 customarily see in an agreement. It's an extraordinary
13 agreement.

14 Q. 267, Novell's 267.

15 Did Novell ever ask SCO whether SCO considered
16 the Sun license an incidental license of SVRX?

17 A. Yes.

18 Q. Are you familiar with the letter -- we have had
19 testimony about this so far. Are you familiar with this
20 letter that's Exhibit 267?

21 A. Yes.

22 Q. This is a letter to Mr. Bench, dated November
23 21, 2003, correct?

24 A. Correct.

25 Q. If I could draw your attention to the second

1 page of the letter, paragraph 1.2. So, what's going on
2 in this paragraph, Mr. Jones?

3 A. Well, this simply -- it's an audit letter, of
4 course, so this is describing to SCO this particular
5 aspect of amendment 1 to the Asset Purchase Agreement
6 that does allow SCO to engage in certain SVRX licensing
7 activities if they are incidental -- well, just as it
8 says right there: As may be incidentally involved
9 through SCO's right to sell and license UnixWare
10 software.

11 So, this paragraph kind of says: Okay. Let's
12 talk about this topic here.

13 Q. Let's take a look at paragraph 1.6.

14 A. Okay.

15 Q. And so what's going on in Exhibit 1.6?

16 A. That is an invitation to SCO to say, you know,
17 if the activities -- any activities that you're
18 participating in that qualify for these exceptions, then,
19 you know, please make those known to us.

20 Q. And if we could take a look at paragraph 2.1.
21 And the same question here, Mr. Jones: What's going on
22 in this paragraph?

23 A. So, again, we're introducing the topic of:
24 We're aware that there is this exception in the context
25 of incidental licensing and so I think it's, again, going

1 to be an invitation for them to let us know if they
2 believe any of their activities would qualify for this
3 exception.

4 Q. So, after asking three times in this letter,
5 Mr. Jones, up and until this litigation, did SCO ever say
6 to Novell that the reason it was entitled to the Sun
7 SCOsource revenue was because that license was an
8 incidental SVRX license?

9 A. No.

10 Q. Mr. Jones, if you could turn to Exhibit 189 in
11 your binder. What is this exhibit, Mr. Jones?

12 A. This is a release, license and option agreement
13 between Microsoft and Caldera International d/b/a the SCO
14 group, now known as SCO.

15 Q. Where did Novell obtain this document?

16 A. We obtained this in discovery in this
17 litigation.

18 Q. Before obtaining this document in discovery in
19 this litigation, did Novell have a copy of this
20 document?

21 A. No.

22 Q. After receiving the 2003 Microsoft SCOsource
23 license, what did you do?

24 A. Well, this agreement -- again, you know, you go
25 through a license agreement to see what technology is

1 being licensed. And I observed there numerous versions
2 of SVRX identified as licensed technologies. So I then
3 took out the Asset Purchase Agreement between Novell and
4 SCO and looked at this agreement in light of the terms of
5 the Asset Purchase Agreement.

6 Q. After conducting that review, what was your
7 understanding of the 2003 Microsoft SCOSource license as
8 it concerns the Asset Purchase Agreement?

9 A. Well, it's certainly an SVRX agreement. I
10 think it's been found that an SVRX agreement is one that
11 relates to SVRX code. And this one certainly does. I
12 also look at it from the perspective of whether this
13 exception for licensing of SVRX incidental to UnixWare
14 might be germane.

15 In this instance, I look at the identification
16 of all of these SVRX technologies, and I look at the
17 broad intellectual property licenses that are granted
18 under the agreement. And I see that there is -- this is
19 not an amendment to an existing agreement. This is not
20 adding rights to rights already acquired. So, basically,
21 all of the rights to the SVRX technologies are new, and,
22 again, they are quite expansive as you march through the
23 options.

24 So I look at this as an SVRX agreement that
25 should not have been entered without Novell's approval.

1 There is a Section 3 that relates solely to UnixWare, but
2 the overall agreement is an SVRX agreement, and those
3 other parts are so substantial that I can't view them as
4 being really incidental to the UnixWare component of the
5 agreement.

6 Q. Did SCO obtain Novell's permission to enter
7 into the 2003 Microsoft SCOSource agreement?

8 A. No.

9 Q. Would Novell have consented to the 2003
10 Microsoft SCOSource agreement if SCO had asked?

11 A. No. I just can't see, again, any commercial
12 benefit to Novell from this particular agreement, and so,
13 no.

14 Q. What amount does Novell seek from the 2003
15 Microsoft agreement?

16 A. Well, I actually don't know the specific figure
17 myself. It's whatever amounts were paid under Section 2
18 and under Section 4 of the agreement, but not whatever
19 was paid under Section 3.

20 Q. So let's walk through those.

21 A. Okay.

22 Q. If we could put up Section 2, please. Why is
23 Novell entitled to the revenue from Section 2?

24 A. Well, here, you know, we have these licenses
25 that broadly relate to SCO's, you know, intellectual

1 property rights. And I think, at that point in time, I
2 simply -- I can't avoid looking at this in the context of
3 what was going on in the marketplace in terms of the
4 dramatic representation being made about SCO ownership of
5 UNIX technologies, historic UNIX and so forth.

6 And so, looking at that context, in combination
7 with Section 2, I say, basically, this is an invitation
8 for someone to use intellectual property when in the end
9 it has been found to be Novell's. There is no
10 apportionment, value-wise, in this agreement as to, you
11 know, how many dollars correspond to this or that. And I
12 think Novell is entitled to conclude that all of it
13 should come to Novell.

14 Q. What do you -- what conclusions have you come
15 to about the Section 3 revenue, Mr. Jones?

16 A. Well, as previously mentioned, you know, this
17 is something that Novell is not pursuing. It is -- it is
18 the case that the Section 4 rights that, again, relate to
19 SVRX, can't be obtained without these Section 3 UnixWare
20 optional rights being exercised or being purchased, but
21 we're not pursuing it.

22 Q. Are you at Section 4 now?

23 A. Yes.

24 Q. Mr. Jones, why is Novell entitled to the
25 revenue from Section 4?

1 A. Well, again, Section 4, the license grant
2 relates to all the technologies identified in the
3 agreement, including those in Exhibit C, which is a list
4 of SVRX, pre-APA SVRX technologies. And, again, these
5 are new rights. I don't see any evidence of -- that
6 these are merely restating rights previously obtained
7 under some separate agreement, that these are new rights
8 that are being received to SVRX technologies. I simply
9 cannot conclude that this is incidental to UnixWare.
10 They are substantial rights.

11 There is no -- there is nothing on the face of
12 the agreement, or otherwise, by which SCO has attempted
13 to assign value to the UnixWare-unique portion of this
14 section. So I think Novell is entitled to conclude that
15 Novell should receive all of this money.

16 Q. Mr. Jones, if you could turn to what's been
17 marked as Novell Exhibit 237, which has been
18 pre-admitted.

19 A. I think I -- I think I should add that, in
20 these instances, one thing that factors into my
21 conclusion in terms of Novell's being entitled to draw
22 these conclusions is that Novell was counting on SCO to
23 be our fiduciary, to look at these SVRX agreements, to
24 bring them to our attention if our rights were
25 implicated.

1 And, as demonstrated by our repeated requests
2 for these agreements, and those requests being rejected,
3 we had absolutely no visibility as to what was going on
4 with these transactions. And so, there was -- to me,
5 there is a heightened responsibility here, and it
6 lends -- and that lends to Novell's being entitled to
7 conclude that we should receive all these monies.

8 Q. And I asked you earlier -- we saw that letter
9 from Mr. Bready, and I asked you earlier whether SCO had
10 ever said that the Sun license was incidental up until
11 this litigation. Did SCO ever say that the Microsoft
12 license -- that it was entitled to the Microsoft money
13 because it was an incidental license of SVRX, up until
14 this litigation?

15 A. No.

16 Q. So now we're on Exhibit 237, Mr. Jones. What
17 is this document?

18 A. This is a SCO Group intellectual property
19 compliance license for SCO UNIX rights. The agreement is
20 between SCO, obviously, and Computer Associates.

21 Q. Where did Novell obtain this document?

22 A. In discovery in this litigation from SCO.

23 Q. And, prior to obtaining this document in
24 discovery in this litigation, did Novell have a copy of
25 this document?

1 A. No.

2 Q. After receiving this intellectual property
3 compliance license, what did you do?

4 A. Well, again, this is -- it's a license, so I
5 look for what technology is being licensed or what
6 intellectual property rights, and, you know, so I go
7 to -- and you'll see that, you know, a key term here is
8 that this is UNIX-based code.

9 Q. You're looking on the second page now?

10 A. Yeah, on the second page.

11 Q. And at 1.14, is that what you're looking at?

12 A. Right. And here, you know, there's a reference
13 to -- that the UNIX-based code is UNIX System V or
14 UnixWare. And so, these are, again, implicating versions
15 of pre-APA SVRX in a context in which there are no --
16 this is not enhancing a previous agreement. This is not
17 adding UnixWare rights on top of UNIX System V rights
18 that were previously obtained. It's just a brand new
19 grant. So I view this as an SVRX agreement.

20 Q. What's your understanding of the larger context
21 in which this SCOSource license and the SCOSource
22 licensing campaign is taking place?

23 A. Well, this was obviously a very public campaign
24 that SCO was undertaking, and in a very -- a public
25 campaign carried out in a very public way; a lot of

1 publicity and a lot of assertions of rights and a lot of
2 assertions that Linux included UNIX code. And so, it was
3 in that context that these types of agreements were being
4 offered to people.

5 Q. And do you have an understanding of what code
6 SCO claims is at issue in SCOsource, is at issue in
7 Linux?

8 A. Well, you know, clearly, Novell's assertion of
9 ownership to the SVRX -- the pre-APA SVRX copyrights
10 basically precipitated this litigation, and there were
11 claims that this was causing great damage to SCO as a
12 result of damaging the SCOsource program itself.

13 And so -- so, basically, it's quite evident
14 that the SVRX code was just critical to the SCOsource
15 project.

16 Q. Has Novell ever claimed to own copyrights to
17 SCO UnixWare?

18 A. No. If by "SCO UnixWare," you mean any
19 UnixWare code produced after the date of the Asset
20 Purchase Agreement, no.

21 Q. Did SCO obtain Novell's permission to enter
22 into the license that we're looking at right now?

23 A. No.

24 Q. Would Novell have consented if SCO had asked?

25 A. No.

1 Q. Why not?

2 A. Well, again, this is entered into in August of
3 2003, and, again, in the fall of 2002, Novell's going in
4 the direction of Linux, and this would simply be
5 completely contrary to Novell's business interests, among
6 other things. There's just no -- no benefit to Novell to
7 enter such an agreement, and a down side.

8 Q. What revenue from this agreement does Novell
9 seek?

10 A. All of it.

11 Q. Why is that?

12 A. Again, this is one where there are substantial
13 SVRX rights granted. There is no allocation or
14 identification of value uniquely associated with
15 UnixWare, and, again, all this is in the context of SCO
16 being Novell's fiduciary and entering SVRX-related
17 agreements and not disclosing them to us, and we are not
18 in a position to protect our rights

19 Q. If you could look briefly at the exhibits that
20 follow, Mr. Jones. For the record those are Novell
21 Exhibit 286, Novell Exhibit 300, Novell Exhibit 309,
22 Novell Exhibit 322, Novell Exhibit 349, Novell Exhibit
23 422 and Novell Exhibit 426, all of which have been
24 pre-admitted in this litigation.

25 As a general matter, what are these exhibits,

1 Mr. Jones?

2 A. These are all agreements of a like nature.
3 Their terms may vary in some, I think, immaterial
4 respects, for our purposes, but they are all -- well,
5 they are all agreements that purport to license the
6 licensee to use any UNIX code that is found in copies of
7 Linux that the licensee is using; and, again, whether
8 it's UNIX System V code or UnixWare code.

9 Q. Did SCO obtain Novell's permission to enter
10 into any of these licenses?

11 A. No.

12 Q. And would Novell have consented to these
13 licenses, if asked?

14 A. No.

15 Q. What revenue does Novell seek from these
16 licenses?

17 A. All of the revenue. There is no specification
18 in the agreements as to any specific amount that's
19 associated with UnixWare, and there are substantial SVRX
20 rights granted, and there's a fiduciary relationship
21 here. So I think we are entitled to all of them. Again,
22 the 5 percent administrative fee that Novell normally
23 allows SCO for collecting royalties doesn't seem germane
24 here.

25 MR. MELAUGH: Thank you, Mr. Jones.

1 THE COURT: Thank you, Mr. Melaugh.

2 Mr. Normand, you may cross examine.

3 MR. NORMAND: Thank you, Your Honor.

4 CROSS EXAMINATION

5 BY MR. NORMAND:

6 Q. Still good morning, Mr. Jones.

7 A. Good morning.

8 Q. You're a lawyer, right?

9 A. Yes.

10 Q. How long have you been a lawyer?

11 A. Since 1990.

12 Q. Did you ever work in selling any software
13 products since you have been at Novell?

14 A. No. I have been involved in the outbound
15 licensing of technologies for revenue. I've assisted --
16 I have assisted in a legal role in supporting sales
17 efforts, but it's not been, by any means, my primary
18 responsibility or my focus.

19 Q. Hve you been involved in pricing any software
20 products, while at Novell?

21 A. Very tangentially.

22 Q. Did you ever work in marketing any software
23 products at Novell?

24 A. Probably not even tangentially.

25 Q. Did you ever have occasion to negotiate the

1 terms of any software agreement regarding UNIX at your
2 time at Novell?

3 A. Yes.

4 Q. Can you please explain that?

5 A. It was -- there was a -- it was after the Asset
6 Purchase Agreement, there was a source code licensee that
7 had -- was involved in a buyout situation, and so I
8 participated to some extent in that. I was not the
9 primary person responsible for doing that.

10 Q. Do you remember the name of the licensee?

11 A. I think it was Silicone Graphics, Silicone
12 Graphics and Cray.

13 Q. And do you recall dealing with Santa Cruz on
14 that issue at all?

15 A. I believe Santa Cruz was involved, but I can't
16 recall whether I'm one of the people who spoke to them.

17 Q. How much familiarity with how computer
18 operating systems are developed do you have?

19 A. I have a general familiarity. I have been --
20 you know, I have a computer science degree. I have been
21 working in the industry. I have been legal counsel to a
22 company that develops and markets operating systems and
23 legal issues associated with the development process and
24 so forth. So, I don't know how to quantify my knowledge,
25 but I come from that background.

1 Q. Have you ever worked as a programmer,
2 professionally?

3 A. Yes.

4 Q. And when?

5 A. This was prior to law school, just working for
6 a small software company.

7 Q. What operating systems did you deal with?

8 A. There? Well, one was Solaris. And I can't
9 recall the other operating systems that we were using.

10 Q. Did you have an understanding, at that time, as
11 to the origins of Solaris?

12 A. At that point in time? No.

13 Q. Do you now?

14 A. To some extent, yes.

15 Q. What is that understanding?

16 A. Well, that Solaris is an SVRX-based operating
17 system.

18 Q. Which release?

19 A. Well, I generally understand SVRX 4. My
20 knowledge is no more specific than that, and that -- and
21 that, basically, Solaris is one of the many source code
22 licensees that takes a source code license and then will
23 create their own variant, and so Solaris is the Sun
24 variant of SVRX 4.

25 Q. Do you know how Solaris was developed?

1 A. I'm not sure what you mean.

2 Q. AT&T developed Solaris with Sun, correct?

3 A. You're saying -- if AT&T and Solaris worked
4 together, side-by-side, to develop Sun? I'm not aware of
5 that one way or another, so I don't know what you're
6 asking about.

7 Q. Let me ask it again because I think you flipped
8 Solaris and Sun in your answer. Do you know how the SVR
9 4 operating system was developed?

10 A. Well, I have a general understanding that AT&T
11 developed the base UNIX technologies and that, at a
12 certain point in time, there was a subsidiary, UNIX
13 System Laboratories, that was created. They would
14 advance the core UNIX technologies and then they would
15 license out that source code to the various UNIX OEMs.

16 Q. Now, when it came time for AT&T and USL to move
17 from Release 3 to Release 4, in developing Release 4,
18 they actually worked with Sun, didn't they?

19 A. I have no knowledge one way or another on
20 that.

21 Q. And when Sun developed Solaris, it did so
22 simultaneously with the development of Release 4,
23 correct?

24 A. I'm not sure exactly what you mean.

25 Q. Do you have a view as to whether Solaris

1 contains any significant amount of SVR 4 technology?

2 A. My understanding has been that it does.

3 Q. Do you know whether previous versions of UNIX
4 contained source code included in UnixWare?

5 A. Previous to what?

6 Q. Previous to the latest release of System V that
7 UnixWare represents?

8 A. My general understanding is that you would
9 find, in the latest release of UnixWare, code that had
10 been in earlier versions of UnixWare SVRX.

11 Q. And code that had been in earlier versions of
12 System V might not have made its way into UnixWare,
13 correct?

14 A. Yeah. I'd -- yeah. I don't know that for a
15 fact, but you say "might," and that sounds very possible
16 to me.

17 Q. Do you have a view as to whether, if code from
18 older versions of System V has not made its way into
19 UnixWare, do you have a view as to whether that older
20 code has any commercial value?

21 A. Well, yes.

22 Q. What's your view?

23 A. Well, in terms of -- to me, there are at least
24 two types of commercial value. One commercial value is
25 that there is actual technical merit that is still placed

1 on the marketplace, and I can't opine one way or the
2 other. The other is that there are intellectual property
3 rights associated with the technology but that,
4 independent of that current technical merit of that code
5 base, could have some relevance in the marketplace.

6 Q. Do you have a view as to whether UNIX System V,
7 Release 2, for example, has any commercial value?

8 A. I just -- well, in that respect that I just set
9 out, I would say, with respect to whether it has
10 technical merit, I'm not in a position to say. As to
11 whether the intellectual property rights associated with
12 it potentially have value, potentially.

13 Q. But you don't have a view one way or the other?

14 A. I think I would have a bias towards -- well,
15 which release is it?

16 Q. Release 2.

17 A. UNIX System V? So it's SVR 2?

18 Q. Two.

19 A. Let me see. Well, you know, copyright lasts
20 for a long time, and so if that code is still available,
21 potentially it could have commercial value in the sense
22 that I stated, for the intellectual property.

23 Q. As someone with programming experience, do you
24 have any view as to whether there is any existing
25 hardware that you could run SVR 2 on?

1 A. I don't know. I don't know.

2 Q. Now, in Novell's view, if there are trade
3 secrets in UNIX System V, SCO owns them, correct?

4 A. I believe that's been Novell's position.

5 Q. And was that your position at deposition?

6 A. I think so.

7 Q. And, in Novell's view, SCO owns the software
8 know-how and methods and concepts in UNIX System V and
9 UnixWare, correct?

10 A. You're talking post-APA UnixWare, these
11 rights -- independent of copyright?

12 Q. I'm asking you whether, in your view --

13 A. And I'll answer it this way. Post-APA versions
14 of UnixWare, to the extent not implicating Novell's
15 pre-APA copyrights in SVRX, and to the extent they are
16 developed by SCO, as opposed to some partner of SCO or
17 something, Novell would not be asserting rights to those,
18 certainly.

19 MR. NORMAND: Your Honor, could I publish a
20 portion of Mr. Jones' deposition in this case?

21 THE COURT: Sure.

22 (A portion of the deposition was played.)

23 MR. NORMAND: That's from Mr. Jones' May 10,
24 2007 deposition, Rule 30(b)(6); at page 36, line 24, to
25 page 38, line 1.

1 Q. Mr. Jones, in Novell's view, it would not be
2 accurate to say that Novell had transferred its existing
3 ownership interest in the UNIX System V products to Santa
4 Cruz in 1995, correct?

5 A. Could you say that again?

6 Q. In Novell's view, it would not be accurate to
7 say that Novell had transferred its existing ownership
8 interests in UNIX System V to Santa Cruz in 1995,
9 correct?

10 A. Right.

11 THE COURT: SCO 411?

12 MR. NORMAND: Yes, Your Honor.

13 Q. Mr. Jones, this is a document dated May 23,
14 1996. Do you recognize the document?

15 A. Yes. I've seen it before.

16 Q. And the second full paragraph says:

17 As you may have heard, Novell has transferred
18 to Santa Cruz, Santa Cruz Operation, Inc., Novell's
19 existing ownership interest in the UNIX System-based
20 offerings and related products, collectively transferred
21 products.

22 Do you see that line?

23 A. Yes.

24 Q. And you think that that's an inaccurate
25 statement, correct?

1 A. Yes.

2 Q. Do you have any explanation for why Mr. DeFazio
3 would sign a document containing such a statement?

4 A. No.

5 Q. Have you spoken with Mr. Defazio about that
6 issue?

7 A. No.

8 Q. Mr. Jones, do you have a view as to whether a
9 UnixWare license gives the licensee the right to use all
10 prior releases of UNIX System V?

11 A. I take it a UnixWare license to be a license to
12 a stand-alone version of UnixWare, and then I would say
13 that that license includes rights to any code contained
14 in it, and if it so happens that some of that code was in
15 prior releases of UNIX, then the licensee is receiving
16 licenses to that code.

17 Q. Do you have any view as to whether, when Novell
18 owned the UNIX business, it granted rights to the
19 previous releases of System V when it did a license of
20 the most recent releases of System V?

21 A. I've had some exposure to that in this
22 litigation and seeing what's come forward in discovery.
23 It seems -- what I have seen is that that happens when
24 consideration has been given for the prior products that
25 are in the agreement.

1 But, as I have told you before, and as you were
2 inquiring today, you know, my career focus has not been
3 doing sales agreements and things of that nature, so --

4 Q. Did you watch your counsel's opening argument?

5 A. Yes.

6 Q. Did you see reference made to the NCR
7 supplements?

8 A. Yes.

9 Q. Do you recall what the number of that
10 supplement was?

11 A. 112.

12 Q. And it's your position, as you understand it --
13 when I say "you," I mean Novell. It's Novell's position
14 that the only reason the System V prior products were
15 listed for NCR was because it had previously obtained a
16 stand-alone license to every previous release of System
17 V?

18 A. Well, what I heard was that, in fact, the
19 licenses had been obtained for previous releases. I
20 don't necessarily recall having heard that's the only
21 reason. I just can't recall.

22 Q. I may have misunderstood your answer. I
23 thought you said that your understanding was that the
24 only reason System V prior products would be listed would
25 be if the licensee had already obtained a stand-alone

1 license to all those releases.

2 A. Did I say "only?"

3 Q. That's what I understood you to say.

4 A. Okay. I -- and I thought I prefaced it with
5 generally. But, I mean, what I have -- my impression
6 that I have formed after seeing the documents that I have
7 been able to see in this litigation is that consideration
8 has been given for prior products. And I, again, tell
9 you that I have not surveyed all these agreements. That
10 has not been my purview. That's is not what I am
11 about.

12 Q. Can you recall coming across any agreements
13 where that could not have been true?

14 A. No.

15 Q. Are you familiar with the language in the APA
16 providing that Novell would receive royalties from SCO's
17 sales of UnixWare if certain conditions were met?

18 A. Yes.

19 Q. You were here for Mr. McBride's testimony,
20 right?

21 A. Yes.

22 Q. So you heard questions and answers regarding
23 floors and thresholds regarding UnixWare sales?

24 A. Actually I think my mind drifted off at that
25 point, but I have seen those parts of the agreement.

1 Q. Are you familiar with language in the APA
2 providing that, after December 31, 2002, Novell would not
3 receive any royalties from SCO's sales of UnixWare, even
4 if the conditions were met?

5 A. Yeah, something to that effect. I know that
6 there was a cut-off date and so forth.

7 Q. So, in Novell's view, after December 31, 2002,
8 SCO had the right to retain all royalties it received for
9 licensing UnixWare, correct?

10 A. Clearly, from the language, at least,
11 stand-alone versions of UnixWare.

12 Q. And, in Novell's view, in fact, the entire
13 intent of the APA was for the UnixWare business to be
14 transitioned to Santa Cruz, correct?

15 A. Could you say that again?

16 Q. In your view and in Novell's view, the entire
17 intent of the APA was for the UnixWare business to be
18 transitioned to SCO, correct?

19 A. Well, I don't -- I guess the only thing I would
20 say is: You know, in terms of entire intent, certainly
21 it was a driving factor behind the agreement, was to
22 transition that technology into another company and have
23 it advanced. But there were a variety of other purposes
24 to that agreement, including protecting Novell's
25 interests in making sure that there were provisions that

1 would enable Novell to receive a portion of an ongoing
2 revenue stream to be compensated for the business.

3 And so I'm with you in terms of, you know, the
4 business motive that triggered the transition was
5 certainly to advance the UnixWare technology, but I can't
6 go as far as saying that that was the entire purpose of
7 that document, the agreement. The agreement also has a
8 fundamental purpose to protect the interests and rights
9 of Novell.

10 Q. Let me rephrase the question. With respect to
11 UnixWare, Novell's entire intent was to transfer the
12 UnixWare business to Santa Cruz, correct?

13 A. Yeah, to the extent consistent with Novell's
14 other interests that would be implicated by the
15 agreement, which I think is -- you know, manifests itself
16 in various places in the document.

17 MR. NORMAND: Your Honor, I would like to play
18 a brief excerpt from Mr. Jones' deposition.

19 THE COURT: Go ahead.

20 (A portion of the deposition was played.)

21 MR. MELAUGH: If I could ask Mr. Normand to
22 state the part in the deposition before your start the
23 clip.

24 MR. NORMAND: All right. Sorry

25 MR. MELAUGH: I don't think you have indicated

1 it yet, the date and the page number you're referencing.

2 THE COURT: The page number and the line.

3 MR. NORMAND: Yes, Your Honor. I'm sorry.

4 That's Mr. Jones' May 10, 2007, 30(b)(6) deposition, and
5 at page 60 lines 14 to 23.

6 Q. SCO 61 is a two e-mail chain dated December 4,
7 1995, the top e-mail is from David Johnson to, among
8 others, Larry Bouffard. Do you recognize any of those
9 names, Mr. Jones?

10 A. Yes.

11 Q. And do you see the name of Skip Jonas about a
12 third of the way down?

13 A. Yes.

14 Q. Who is Skip Jonas?

15 A. He had a position relating to -- he had a sales
16 position, and I know that at least at one time his
17 responsibilities related to our UNIX business. That's
18 about the extent of my knowledge of Skip Jonas.

19 Q. Do you see this language, Mr. Jones, where
20 Mr. Jonas says, quote:

21 Novell is out of the UNIX/UnixWare business
22 after the closing and does not have the right to sell
23 UnixWare, so if Novell has any inventory of UnixWare
24 after the closing, I believe that Novell has only two
25 choices. Sell it to SCO or destroy it.

1 Do you see that language?

2 A. Yes.

3 Q. Is that language consistent with your
4 understanding of what happened with the sale of UnixWare
5 under the APA?

6 A. I'm not familiar with this particular issue of
7 the preexisting UnixWare inventory and what was done with
8 it and so forth. At this moment in time, I can't recall
9 that issue.

10 Q. But it is your understanding that Novell was
11 out of the UnixWare business after the APA, correct?

12 A. Yeah. I think, generally-speaking, I would
13 have to say yes. I would like to ask a clarifying
14 question on your earlier question.

15 Q. Of course.

16 A. What do you mean by "UnixWare business?"

17 Q. What's the ambiguity as to what UnixWare
18 business is?

19 A. Well, for example, there were pre-APA versions
20 of SVRX that were UnixWare, and so Novell continued to
21 have a revenue stream associated with those. So, that's
22 why I asked the question, in terms of just: What do you
23 mean by "in the business," because there's still
24 interests there. And so, hence, my question.

25 Q. Is that your only caveat to your view that the

1 entire UnixWare business had been transferred, as you sit
2 here today?

3 A. Now, that's a different question, the entire
4 UnixWare business having been transferred. Generally, of
5 course, Novell's focus was not going to be UnixWare, and
6 Novell was counting on SCO on moving forward with that.
7 And Novell had some -- it retained rights in terms of
8 copyrights, in terms of royalties that corresponded to
9 UnixWare, you know, and I haven't thought through to
10 delineate every little interest, ongoing interest Novell
11 may have, but I'm with you in terms of: No doubt, the
12 general direction was that UnixWare was moving forward
13 with SCO, and Novell has some ongoing interest in that
14 area, but it's certainly not Novell's focus.

15 Q. You're not suggesting, then, that Santa Cruz
16 was Novell's agent for purposes of UnixWare licenses, are
17 you?

18 A. Well, what do you mean by "UnixWare?" And,
19 again, I just mean, there are -- there were some pre-APA
20 releases of SVRX that were UnixWare, so, with respect to
21 those releases -- and those are identified on the
22 schedule of SVRX licenses. So, only with respect to
23 those versions of UnixWare, I would say that that
24 fiduciary relationship, that collection role applies to
25 those.

1 Q. But the right that Novell retained was to
2 continue to receive royalties for certain UnixWare
3 licenses that were in existence?

4 A. Anything that would be an SVRX license that
5 would pertain to the pre-APA release of UnixWare.

6 Q. Your position is that the APA identifies, as a
7 basis for SVRX licenses, certain UnixWare licenses?

8 A. I believe, if we were to take out the Asset
9 Purchase Agreement and look at the schedule that we would
10 see that the last one or two SVRX releases were, in fact,
11 UnixWare. And that's all I'm talking about.

12 Q. And, apart from that retained royalty interest,
13 do you have a view as to whether Novell retained any
14 interest in the UnixWare business after the APA?

15 A. Again, I think I've mentioned that, you know,
16 we would have copyrights associated with anything that
17 was pre-APA. And you said "apart from the royalties,"
18 and so we're not talking about that, you know, and I --
19 so, in my mind, those are the primary things. But as
20 I've told you, this is the last place in the world I
21 would want to sit and attempt to delineate every single
22 aspect of the APA and every possible ongoing interest.

23 And I'm with you in terms of the UnixWare
24 business, in general, is going to SCO, and that's SCO's
25 focus, and it's not Novell's from that point going

1 forward.

2 Q. It's not Novell's view that, when SCO was
3 licensing UnixWare with SVRX copyrights therein, it's not
4 Novell's view that SCO had to try to value those
5 copyrights and remit money to Novell, is it?

6 A. So, if you're talking about versions of
7 UnixWare created post-APA and what's being licensed is
8 that version of UnixWare, yes, that is not Novell's
9 position that SCO would have to attempt to, you know,
10 value all the SVRX component parts that make up a part of
11 that UnixWare release.

12 Q. Even though that UnixWare release, in your
13 view, does contain all manner of SVRX code, correct?

14 A. That's right.

15 Q. Now, you're familiar with this language in
16 amendment number 1 to the APA?

17 THE COURT: What is the exhibit?

18 MR. NORMAND: This is SCO 71, Your Honor. I'm
19 sorry.

20 Q. You have seen this language before?

21 A. Yes.

22 Q. Now, I may have misunderstood your testimony,
23 but SCO had the right to enter into new SVRX licenses if
24 it was doing so incidentally through its rights to sell
25 and license UnixWare software, correct?

1 A. Right.

2 Q. Now, when you were testifying earlier, I
3 thought you were saying that, in your review of the
4 Microsoft and Sun agreements, that an important fact to
5 you was that it was a new license. Did I mishear you?

6 A. Well, that was an important fact, but it was
7 taken in combination with my belief that the UnixWare
8 activity in the agreement was not -- excuse me -- that
9 the SVRX rights being granted were not merely incidental
10 to the UnixWare portion.

11 So I wasn't -- that was not the only factor. I
12 did highlight that.

13 Q. It doesn't really matter whether the SVRX
14 component of the Sun and Microsoft agreements is a new
15 component for purposes of determining this incidental
16 exception, does it?

17 A. I think it does.

18 Q. How so?

19 A. Well, so, for example, if you go to that
20 licensee and they already have a fully paid-up license
21 for a certain release of SVRX, and then that licensee
22 approaches SCO and licenses UnixWare, and from the
23 license -- that wouldn't be surprising -- licenses
24 UnixWare from SCO and enters an agreement in which
25 UnixWare is identified and then that version of SVRX, for

1 which the licensee had fully paid up its license, in that
2 scenario, the fact that -- and, to me, in that scenario,
3 the licensing of UnixWare very likely is incidental to
4 the -- excuse me -- the licensing of the SVRX showing
5 up on the schedule of the new UnixWare agreement, it's,
6 for all purposes, incidental because no new rights are
7 being granted. It's significance there is it's almost
8 meaningless.

9 However, if I took that same version of SVRX
10 and SCO approaches a customer, and SCO enters an
11 agreement with the customer and identifies that same
12 version of UnixWare on the product schedule and then
13 separately that version of SVRX, and that customer has
14 never paid for SVRX before and charges that customer the
15 very same amount for UnixWare, you know, then, to me, I
16 say: Well, now this customer has received substantial
17 additional rights that it did not previously have.

18 Q. It sounds like you've thought about the issue
19 of incidental licensing a bit?

20 A. I've thought about it.

21 Q. But you don't have any view as to whether this
22 language, this incidental language, encompasses a prior
23 practice of licensing older versions of System V with the
24 most recent release, do you?

25 A. Well, my view is, to the extent I have been

1 exposed to prior practices, that the theme that I see in
2 them is consistent with the rationale that I just set
3 out.

4 Q. You don't have a view as to whether, in
5 amendment number 1, the parties intended, through the use
6 of that language, to encompass the practice of licensing
7 the prior releases of System V with the most recent
8 release, do you?

9 A. I don't have any knowledge of the people who
10 drafted that language, having -- having spoken and saying
11 that this is why we are putting that language in the
12 agreement. I do not have that type of knowledge.

13 Q. Well, if you have no view on that issue, you
14 can't make a fully-informed assessment of whether
15 incidental licensing has occurred, can you?

16 A. To the contrary. This is an agreement. I
17 think there is an integration clause that says this
18 merges prior discussions and understandings. This
19 agreement, you know, I look at it, and I think that that
20 language has meaning independent of whatever prior
21 discussions took place.

22 Q. Would you acknowledge that it could also be
23 meant to encompass this prior practice, correct?

24 A. What prior practice?

25 Q. The prior practice of licensing older versions

1 of System V with the most recent release?

2 A. Well, the prior practice that I described is
3 one in which, for each of those prior releases,
4 consideration had been given. So I don't know if you're
5 talking about the same prior practice, but if that's the
6 prior practice you're alluding to, I could easily see
7 that this would support that type of practice.

8 Q. You don't have a view as to whether it
9 encompasses a practice of licensing releases even to
10 those people who had not previously acquired a
11 stand-alone license to the earlier releases?

12 A. I don't have any knowledge of it being applied
13 to such people.

14 Q. And if this provision was intended to encompass
15 this practice, it would change your analysis, wouldn't
16 it?

17 A. I don't know that it would.

18 Q. So you think the intent of the parties is
19 irrelevant?

20 A. No. But, again, there is -- this is an
21 agreement. I think there is an integration clause.
22 "Incidentally" is a word that appears in the dictionary.
23 It has a meaning.

24 Q. It's ambiguous, isn't it?

25 A. I don't know. I think it calls for application

1 to circumstances, but I have been asked about this
2 before, I know, and I said, you know, I'd look at the
3 dictionary, so --

4 THE COURT: Pick a good stopping point.

5 MR. NORMAND: This is fine, Your Honor.

6 THE COURT: Are you sure?

7 MR. NORMAND: Yes.

8 THE COURT: All right. We'll take our second
9 break and be in recess for 15 minutes.

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(Short recess.)

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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

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

That as such Reporter I attended the hearing of the foregoing matter on April 30, 2008, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages numbered 281 through 354 constitute a full, true and correct record of the proceedings transcribed.

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

And hereby set my hand and seal this 30th day of April, 2008.

REBECCA JANKE, CSR, RPR, RMR