

1 THE COURT: Do we have a witness? You can resume
2 the stand.

3 And you may proceed with redirect, Mr. Normand.

4 MR. NORMAND: Thank you, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. NORMAND:

7 Q. Mr. Broderick, you've been asked by both counsel
8 and myself about the Unisys ClearPath situation. Do you
9 recall those questions?

10 A. Yes, sir.

11 Q. If the ClearPath computer contained only the CPUs
12 that worked with UnixWare on the one hand and with the Unisys
13 proprietary product on the other hand, would you have remitted
14 any money to Novell?

15 A. No. I wouldn't have told them about it.

16 Q. Why not?

17 A. Because UnixWare was owned by SCO, and the APA was
18 very clear that UnixWare money went to SCO.

19 THE COURT: Put the mike up and speak right into
20 it.

21 THE WITNESS: I'm sorry.

22 Q. BY MR. NORMAND: You looked at the Supplement
23 Number for the NCR license, I think it was 112. Do you recall
24 that?

25 A. Yes.

1 Q. I take it that every licensee at some point had to
2 execute a Supplement 1; is that fair to say?

3 A. Correct.

4 Q. Now in those instances of UnixWare licensees who
5 executed a Supplement 1, was there a list of prior products in
6 that supplement?

7 A. Absolutely.

8 Q. And what were the two examples that we spoke about
9 earlier of that, that you can recall?

10 A. I had two examples. One was Super Computer
11 International, and one was Lexis Software Corporation. They
12 license UnixWare 2.0 licenses with Novell. And the UnixWare
13 license was Supplement Number 1. They had not licensed
14 anything previously.

15 Q. Mr. Broderick, this is the Unisys UnixWare 2.0
16 license represented on the right. Do you recall going through
17 this?

18 A. Yes.

19 Q. Now, to your understanding, was any of this
20 System V material included in the UnixWare source code at the
21 time of this license?

22 A. At the time we developed the UnixWare 2.0 source
23 code product?

24 Q. At the time the Unisys UnixWare 2.0 license was
25 executed, did you have an understanding as to whether this

1 UnixWare source code included source code from these prior
2 releases?

3 A. Source code from the prior releases, if it had any
4 commercial usability or value would have continued forward
5 into UnixWare. Each release is built on a previous release.
6 And what they do is, say you're at 4.2 MP, you add new
7 functionality to it. You may make some modifications, but
8 you're adding new functionality to support market needs. That
9 new functionality that was put in the 4.2 MP became
10 UnixWare 2.0. And 4.2 MP has functionality from 4.0
11 conceivably to 3.0. If there is any commercial usability to
12 it, it's carried forward.

13 Q. Now, at this point, the time of this license, did
14 Unisys have an existing UNIX license?

15 A. Yes.

16 Q. And do you know whether they had an existing
17 operating system that was derived from their previous UNIX
18 licenses?

19 A. If they had -- well, Unisys had a derivative work
20 that was based on UNIX System V Release 4 MP.

21 Q. Was that your understanding?

22 A. That's a fact.

23 Q. As to that operating system under this
24 UnixWare 2.0 license, was Unisys entitled to use any part of
25 these prior products in building that derivative work?

1 A. For --

2 THE COURT REPORTER: I'm sorry?

3 THE WITNESS: I'm clearing up the question.

4 Q. MR. NORMAND: For Unisys' existing UNIX derivative
5 operating system --

6 A. Yes.

7 Q. -- once Unisys acquired this UnixWare license, were
8 they entitled to use any material they wanted from this System
9 V releases in that existing operating system?

10 A. Yes. They just had to treat it as UnixWare 2.0 and
11 pay the royalties based on the 2.0 license.

12 Q. Was there any scenario in a case of a UnixWare
13 licensee like Unisys in which they would be paying royalties
14 based on the System V products?

15 A. Not solely based on the fact that they're listed as
16 a prior product and they have access to them. They would pay
17 royalties if they had executed a separate supplement for that
18 specific release of UNIX.

19 Q. If you had a licensee who had never before been a
20 UNIX licensee, brand-new, UnixWare licensee of the sort that
21 we discussed earlier, for simplicity, let's pick a name, Super
22 Computer, was that a UnixWare 2.0 licensee?

23 A. Yes.

24 Q. Is there any scenario in which Super Computer would
25 be paying System V royalties based on the list of System V

1 products with its UnixWare license?

2 A. Absolutely not. It's very clear in the prior
3 products section that says you can access these prior products
4 pending any code you might use has to be treated as though
5 it's UnixWare. So no. If you access prior products under
6 UNIX -- for 2.0 schedule, it's 2.0.

7 Q. In the case of Super Computer, first-time UnixWare
8 licensee --

9 A. Uh-huh (affirmative).

10 Q. -- to your understanding, was there System V
11 material in its UnixWare source code that it had a license?

12 A. Well, yes. UnixWare is a System V product. It's
13 just a brand naming. So -- and it's built on prior releases
14 of UNIX System V. So UnixWare clearly has System V coding.

15 Q. And under its license, it can use System V
16 technology consistent with its rights to use UnixWare; is that
17 fair to say?

18 A. Absolutely.

19 MR. NORMAND: Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Normand.

21 Any re-cross, Mr. Malaugh?

22 MR. MALAUGH: Yes, Your Honor.

23 RE-CROSS-EXAMINATION

24 BY MR. MALAUGH:

25 Q. When you and I were looking at that NCR supplement

1 and I asked you whether that supplemental loan, it was a 2.1
2 supplement, gave NCR the right to make derivative works from
3 the prior products listed, I think your answer was no; isn't
4 that right?

5 A. As a standalone derivative work, my answer is no.

6 Q. Is that answer also true -- and isn't that answer
7 also true if it had been Supplement 1?

8 A. That's correct. They can access the code, but it
9 has to be treated as though it would be a UnixWare 2.0
10 product.

11 Q. And they don't have the right to make derivative
12 works and distribute derivative works as standalone products
13 for products listed in the prior products list of that
14 Supplement 1?

15 A. Well, it's kind of hypothetical. If somebody took
16 a 2.0 license and they accessed the prior products, and they
17 built a derivative by accessing the prior products on a
18 UnixWare license, then they could distribute derivative work,
19 but they would pay off a UnixWare -- they would pay off of the
20 UnixWare license.

21 Q. I thought you had said that the prior products
22 license did not convey the right to make a derivative work of
23 those products.

24 A. That's true. But it's -- it doesn't grant rights
25 to create a derivative work, like UNIX -- you have UNIX

1 System V 3.2 listed as prior products.

2 Q. Uh-huh (affirmative).

3 A. You can't access that from a -- say you get from a
4 licensee that has a SCO license created derivative work on
5 that 3.2 and distribute that derivative work as a
6 3.2 license.

7 Q. And that's true regardless of whether it's
8 Supplement 112 or Supplement 1.

9 A. That's correct.

10 Q. You've answered my question. Thank you very much.

11 THE COURT: Thank you.

12 Anything else, Mr. Normand?

13 MR. NORMAND: No, Your Honor.

14 THE COURT: Thank you. You may stand down,
15 Mr. Broderick.

16 I assume this witness may be excused.

17 MR. NORMAND: Yes, sir.

18 THE COURT: And you may call your next witness.

19 MR. GONZALES: Your Honor, SCO calls Jean Acheson.

20 THE COURT: You are Mr. Cyrulnik; is that correct?

21 MR. GONZALES: No. I wish I were. I'm

22 Mr. Gonzalez. Mr. Cyrulnik is a few years younger than I am.

23 THE COURT: All right. Thank you.

24 MR. GONZALEZ: May I approach, Your Honor?

25 THE COURT: Yes. Thank you.

1 Come forward and be sworn, please, right here in
2 front of the clerk of court.

3 Do we need these posters up still?

4 MR. GONZALEZ: No. I'll take them down.

5 THE CLERK: Please raise your right hand.

6 JEAN ACHESON,

7 called as a witness at the request of SCO Group,

8 having been first duly sworn, was examined

9 and testified as follows:

10 THE WITNESS: I do.

11 THE CLERK: Thank you. Please take the witness
12 stand over there.

13 THE WITNESS: Thank you.

14 THE CLERK: Please state your name and spell it for
15 the record.

16 THE WITNESS: My name is Jean Acheson. That's
17 spelled J-E-A-N A-C-H-E-S-O-N.

18 THE CLERK: Thank you.

19 DIRECT EXAMINATION

20 BY MR. GONZALEZ:

21 Q. Good morning, Ms. Acheson.

22 A. Hello.

23 Q. What is your current occupation?

24 A. I'm the controller at SCO.

25 Q. And when did you began?

1 THE COURT: Excuse me. Pull the mike down a little
2 and speak right into it. Thank you.

3 THE WITNESS: Okay.

4 Q. BY MR. Gonzalez: When did your tenure as
5 controller begin?

6 A. Last September.

7 Q. And in that role, do you have responsibilities that
8 are related to UNIX revenues?

9 A. Well, all of the financial functions report into me
10 including the recording of the UNIX revenues.

11 Q. And have you had prior experience related to
12 UNIX -- the UNIX licensing business and its revenues?

13 A. Yes. I started back with AT&T UNIX Systems
14 Laboratories '90, '91. Basically at that point I started in
15 the accounts payable and moved over into the revenue as a
16 contract administrator working for Carolyn Kachinsky in UNIX
17 Systems Laboratories. And there I processed the OEM and other
18 company quarterly reports for the SVR binary royalties.

19 Q. And did you then leave USL?

20 A. Well, not really, because Novell purchased USL, and
21 I continued in the same function with Novell. And then later
22 when Santa Cruz Operations was purchasing the product line
23 from Novell, my boss at that time Carolyn Kachinsky moved into
24 another position at Novell, and I took over management for the
25 binary royalties. And then with Santa Cruz Operation, I

1 continued as the manager of the binary royalties taking on all
2 the binary royalties for the company, whether it was the SVRX,
3 UnixWare, OpenServer or other products. And later making the
4 worldwide revenue manager for Santa Cruz and then moved into
5 that that same position when Caldera later known as SCO
6 purchased the UNIX product line, as well.

7 Q. Thank you. Is it fair to say, therefore, that
8 since 1991 when you started at USL you have been continually
9 involved with tracking and reporting of UNIX revenue?

10 A. Yes.

11 Q. And within those functions, did you come to be
12 involved with the reporting and tracking of what are known as
13 SVRX royalties under the agreement between Novell and Santa
14 Cruz in '95?

15 A. Yes.

16 Q. And what function did you play with respect to
17 those royalties?

18 A. Well, either myself directly or my direct report
19 would review the quarterly royalty reports that were sent in
20 by the OEMs and the other customers. We would review them for
21 correctness under the various product schedules to make sure
22 they were calculating correctly, you know, just adding and
23 subtracting correctly. We would record these revenues, well,
24 not as revenue, to SCO or to Santa Cruz or to SCO, but we
25 would record the transactions. We would segregate the cash,

1 and then on a monthly basis prepare a report that we would
2 give to Novell for the cash from the preceding month.

3 Q. And did you continue performing those functions
4 once you moved over to Caldera SCO?

5 A. Yes.

6 Q. So again, it's fair to say that with respect to
7 SVRX royalties, you had been on the front line of tracking and
8 reporting and remitting those royalties?

9 A. Yes.

10 Q. And what exactly -- what is your understanding of
11 what these SVRX royalties are?

12 A. Basically as identified in the APA, you know, as
13 SVRX royalties it's various products where the revenue stream
14 was, you know, maintained administratively by Santa Cruz for
15 Novell.

16 Q. And that administration has continued with SCO?

17 A. Yes.

18 Q. And are you aware of any interest under the APA
19 that Novell had with respect to UnixWare royalties?

20 A. Novell didn't have any interest in UnixWare under
21 the APA.

22 Q. Was there a section of the APA that provided for
23 any interest that Novell would have in UnixWare royalties if
24 certain benchmarks were reached?

25 A. Yes, that's correct. The APA provided that if

1 Santa Cruz reached in their total UnixWare sales more than
2 40 percent of projections that were laid out in the APA, then
3 Santa Cruz would have had to have paid an additional fee,
4 royalty fee to Novell for the UnixWare product line. These
5 benchmarks were never reached, and that calculation ended in
6 2002.

7 Q. By that, do you mean that Novell's interest expired
8 in 2002?

9 A. Yes.

10 Q. And in your work with -- in your work in the UNIX
11 business that you were describing, did you become familiar
12 with the licenses that generated the UNIX revenues that you
13 tracked?

14 A. Yes. We had to review them from the financial
15 viewpoint.

16 Q. And please describe the licenses under which
17 licensees paid these SVRX royalties that you've been talking
18 about.

19 A. Well, basically it was a product schedule that
20 described, you know, from the technical view point it
21 described a lot about the product and the licensee's rights
22 for the product. And then it also -- the section I was more
23 interested and concerned with was how to calculate the
24 royalties and when royalties were due.

25 Q. Going back to your earlier testimony about the

1 interest that Novell had with respect to UnixWare royalties
2 that expired in 2002, did you have a shorthand name for that
3 interest?

4 A. Yeah. We called it the 40-percent calculation.

5 Q. So going back to the line of questioning on which
6 we were, were the licenses that you were describing that are
7 identified under the APA that generated SVRX royalties, were
8 those for a particular release of a System V product?

9 A. Well, each product schedule was for a release. So
10 you would have -- you know, a customer would purchase
11 licensing rights for SVRX or System V Release 3.2 or System V
12 Release 4.0, et cetera.

13 Q. Are you familiar -- having seen and worked with
14 these UNIX licenses, are you familiar with the concept of
15 prior products under these licenses?

16 A. Yes. I've seen that.

17 Q. And can you describe for us your understanding of
18 what prior products are?

19 A. Usually when licensee would sign up for the next --
20 for a release of a product, it would include, there was
21 usually a section in it, a schedule that would list all of the
22 prior releases or most of the prior releases of the
23 predecessor products. So if they were taking System V
24 Release 4.0, it would give them rights to 3.2, 3.0, 2, et
25 cetera.

1 Q. Now, you've just testified that you work for SCO's
2 predecessors. In the UNIX licensing business; correct?

3 A. Yes.

4 Q. Which of the companies that you worked for in the
5 UNIX business before SCO include prior products in their UNIX
6 licenses?

7 A. UNIX -- well, AT&T because we inherited the
8 agreements from them, UNIX System Laboratories, Novell and
9 Santa Cruz.

10 Q. Did any of those companies charge a separate
11 additional fee for the prior products?

12 A. No.

13 Q. So the licensee only paid royalties on the current
14 Release V license?

15 A. Yes.

16 Q. Do you know of any instance in which a licensee
17 paid a separate fee for the prior products?

18 A. No, not under the schedule.

19 Q. And that would be true for any of the companies
20 that you have worked for before SCO?

21 A. That is correct.

22 Q. Ms. Acheson, did you play any role in the
23 transition of the UNIX business from Novell to Santa Cruz?

24 A. Yes.

25 Q. And what role did you play?

1 A. Well, basically I was on various committees with
2 Novell and Santa Cruz personnel to, you know, discuss the
3 various clauses of the APA and, you know, how to execute the
4 transition smoothly between the two companies. My major
5 focus, especially later on in the transition, was on how to
6 report and how to administer the SVRX administration
7 arrangement under the APA with Novell.

8 Q. And during this period of transition of business,
9 how often did you have an opportunity to meet with Novell on
10 the issues that you are describing?

11 A. Well, first, of course, the meetings were almost
12 daily, and later on, especially around the reporting, it was
13 probably more on a monthly basis with the reports. And then,
14 of course, telephone conversations in-between if we had
15 questions on other things for the transition.

16 Q. I'd like to now show you what has been admitted as
17 SCO Exhibit 331. And can you tell us what that document is?

18 A. Well, it's the cover sheet of a report that we
19 would have sent to Novell for the January -- for the cash
20 collected during January of 1997.

21 Q. And can you briefly walk us through some of the
22 major items there on that chart?

23 A. Well, basically we're stating that there was --
24 that adjusted revenue was approximately -- sorry. It's pretty
25 blurry. I think it's 5.6 million. And that after the

1 administrative fees and other royalties are deducted, that the
2 total payment due to Novell for the period is 4.5 or
3 6 million.

4 Q. And if you turn the pages, what do the underlying
5 documents reflect?

6 A. Well, you know, sometimes our licensees aren't the
7 quickest on remembering who to pay what. And so consequently,
8 we sometimes -- the licensees would direct the cash to the
9 wrong company. So that next page was just returning cash to
10 Novell that belonged to Novell directly.

11 Q. And the next two pages, what do they reflect, the
12 spreadsheet?

13 A. That page is simply just the detail of the fees
14 that we administered under the agreement for the month of
15 January.

16 Q. How was the form at of this report developed?

17 A. During the transition, Cindy Lamont, who had worked
18 for me in Novell as a contract administrator, and -- or I'm
19 sorry. Cindy Lamont was a contract manager and Barbara
20 Cavalla, who was the contract administrator, they remained
21 with Novell. And what happened is for the first time that we
22 needed to do a report for them, I sat down and figured out a
23 format that looked right. And then we reviewed it in light of
24 the clauses within the APA.

25 Q. Do you have a view as to how familiar Ms. Lamont

1 and Ms. Cavalla were with the UNIX business?

2 A. Well, quite familiar, because Cindy Lamont was a
3 contract manager. She had worked on developing many of the
4 schedules and the agreements and had worked with the
5 negotiations with the OEMs and other customers on these. And
6 Barbara Cavalla had worked directly for me as a contract
7 administrator actually reviewing many of the quarterly
8 reports.

9 Q. So if I understand correctly, these representatives
10 of Novell that you were meeting with were the colleagues who
11 just a few days before you had worked with intimately within
12 the Novell business?

13 A. That is correct.

14 Q. So the meetings with Novell developed the report
15 that we are looking at. Did Novell at any time say that you
16 would be reporting UnixWare royalties?

17 A. In this report? No.

18 Q. Or in any report?

19 A. No. None.

20 Q. Did Novell say to you that would you be reporting
21 royalties for any prior products listed in a UNIX license?

22 A. No.

23 Q. Did the reports that you, in fact, sent Novell
24 every month after that point in time ever contain any
25 information about royalties paid under UnixWare licenses?

1 A. No.

2 Q. After the transition period ended, did you have
3 further interactions with Novell representatives?

4 A. Yes. Each month as we sent this report in, you
5 know, they would call to discuss it. If they had questions
6 about certain of the revenues because, as I stated, Barb and
7 Cindy were pretty familiar with the OEMs and knew how to ask
8 the various questions in regards to it.

9 Q. I'd like to now show you what has been admitted as
10 SCO Exhibit 98. And this is a letter that you wrote to
11 Cindy Lamont of Novell whom you've testified about.

12 A. Uh-huh (affirmative).

13 Q. And as you can see, it's dated April 26, 1996.

14 A. Uh-huh (affirmative).

15 Q. And can you tell us who the people copied on this
16 e-mail?

17 A. Basically those were my co-workers at SCO. So T.
18 Dulin was my boss, Terry Dulin, Kathy Sensor was one of my
19 contract administrators. Burt Lavine was an attorney who had
20 come from AT&T and through Novell and out to Santa Cruz
21 Operations.

22 Q. And if you look at the very last paragraph where it
23 says:

24 We have given the pertinent Cray letter
25 agreements to Burt.

1 Who is Burt?

2 A. That was the Burt Lavine.

3 Q. So that was the same person that is copied on this
4 e-mail?

5 A. That is correct.

6 Q. And if you can focus on the subject matter, you see
7 that it says "Cray source"; right?

8 A. That's correct.

9 Q. Can you briefly describe what the issue that you
10 were discussing with Ms. Lamont on this issue of Cray source?

11 A. Yeah. Cray had been given a special right to
12 actually distribute source code. And during the review of one
13 of the monthly reports, I believe it was Barbara Cavalla
14 brought up because she was -- you know, knew the details of
15 the Cray reporting, that Cray had reported source code. And
16 since it was a reporting, she thought that possibly those
17 revenues would belong to Novell. I disagreed, and this was
18 why I disagreed. This was my argument for it.

19 Q. So is it fair to say that you are setting forth the
20 issue of the question in the first couple lines where you say:

21 Dear Cindy, we have looked in the ownership of
22 the revenues generated by Cray Research, Inc.'s
23 right to distribute source code products.

24 A. Yes.

25 Q. And then later on I believe you're expressing a

1 position that Santa Cruz came to with respect to those source
2 code sublicenses fees where you state:

3 SCO has a right to retain 100 percent of
4 the revenue.

5 A. That's correct.

6 Q. And there's a last paragraph where it says:

7 We have been given the pertinent Cray letter
8 agreement to Burt -- I'm sorry -- we have given
9 the pertinent Cray letter agreements to Burt, and
10 it is his opinion that these source revenues do
11 belong in full to SCO.

12 Do you see that?

13 A. Yes.

14 MR. MALAUGH: Objection, Your Honor. I think this
15 is a leading line of questioning.

16 MR. GONZALEZ: I'm asking about the document. I
17 can ask her what it says. It makes it more efficient.

18 THE COURT: Overruled. Go ahead.

19 Q. BY MR. Gonzalez: So you do see that language;
20 right?

21 A. Yes.

22 Q. And do you understand that to mean that you had
23 consulted with Mr. Lavine on this issue, and you were copying
24 him so that he would be aware of your communications with
25 Novell on the issue?

1 A. Yes.

2 Q. And what was Novell's response to the position that
3 Santa Cruz had taken with respect to Cray's source of
4 licensing fees?

5 A. After their review, they agreed.

6 Q. And I'd like to now show you what has been marked
7 as Exhibit 126.

8 THE COURT: SCO 126; right?

9 MR. GONZALEZ: Pardon me?

10 THE COURT: SCO 126.

11 MR. GONZALEZ: I'm sorry. SCO Exhibit 126.

12 Q. BY MR. Gonzalez: Is this an e-mail in which Novell
13 communicated to you its position?

14 A. Yes. They actually sent it to my boss,
15 Terry Dulin.

16 Q. And this is dated a few months later in August of
17 1996; correct?

18 A. Yes.

19 Q. So this is actually an e-mail that Terry Dulin,
20 your boss, sent to you?

21 A. Right. Forwarded it to me from Cindy Lamont.

22 Q. What was she forwarding to you?

23 A. Basically stating that Cindy stated that Novell
24 agreed that the source code fee paid by Cray did belong to
25 Santa Cruz.

1 Q. And would that language be reflected where it says:

2 This is to let you know -- Terry, this is to
3 let you know that Novell agrees that the fees that
4 Cray pays pertaining to their source sublicensing
5 provisions -- and we can skip down a little bit --
6 can be retained by SCO as a source code right to
7 use fee under Amendment Number 1 of the APA.

8 A. That's correct.

9 Q. Is that the position that Novell took, as you
10 understood it?

11 A. Yes.

12 Q. And we can go back to the prior exhibit, I believe
13 it was SCO Exhibit 98. In the second paragraph, do you see a
14 reference there to the Novell SCO agreement, section E?

15 A. Yes.

16 Q. Do you see that? Is that a reference to
17 Amendment Number 1?

18 A. I believe it is.

19 Q. And that's why Ms. Cindy Lamont communicated and
20 relied on the same position in her response?

21 A. Yes.

22 Q. Thank you.

23 Did Cray pay these sublicensing source fees to
24 Novell before the APA?

25 A. Oh, yes.

1 Q. Why do you say "oh, yes"?

2 A. Because it's been a relationship that's been
3 going -- went way back into the AT&T premie.

4 Q. Were the fees substantial?

5 A. It was a few 100,000 a year, at least afterwards.
6 I think it had been more substantial back in the AT&T days.

7 Q. Did Cray continue to pay these source sublicensing
8 fees to Santa Cruz?

9 A. Yes.

10 Q. And for how long did that occur?

11 A. I believe for several years thereafter. They would
12 still be obligated to pay today if they had the situation
13 arise.

14 Q. We can briefly go back to Exhibit, SCO Exhibit 126.
15 I meant to highlight for you in Ms. Lamont's e-mail to your
16 boss Terry Dulin, a Michael Gennaro was copied in that e-mail;
17 correct?

18 A. Yes.

19 Q. Who was Michael Gennaro?

20 A. He was the controller of Novell at that time.

21 Q. So Ms. Lamont was conveying Novell's position and
22 making Mr. Gennaro aware of the position they had taken;
23 right?

24 A. Yes.

25 Q. So going back to the history of Cray paying the

1 source sublicensing fees, you said he continued to pay Santa
2 Cruz a few years after the APA; correct?

3 A. Correct.

4 Q. Did I understand that correctly?

5 A. Yes.

6 Q. Did Novell ever ask later on for those fees?

7 A. No.

8 Q. Did Novell ever deviate from the position it took
9 in its 1996 e-mail that I've just shown you?

10 A. No.

11 Q. Did SCO or Santa Cruz, in fact, remit such
12 sublicensing fees to Novell at any time?

13 A. No.

14 Q. Do you recall we were talking about prior products
15 a little bit earlier?

16 A. Yes.

17 Q. What versions of UNIX did Novell license when it
18 was the owner of the UNIX product line?

19 A. Well, there was what we classified as the SVRX
20 products, which went up through, I think like Release 4.2 MP.
21 And then there was in what was classified as UnixWare,
22 UnixWare 1.1 and 2.0.

23 Q. Did Novell's UnixWare licenses include the list of
24 prior products?

25 A. Yes.

1 Q. Did those prior products include SVRX products that
2 are identified under the APA?

3 A. Yes.

4 Q. Let me show you now what has been marked as SCO
5 Exhibit 27. And as you can see, this is a license between
6 AT&T GIS and Novell executed July 1995. Do you recognize the
7 signature of the person who signed this at the bottom for
8 Novell?

9 A. Russ Holt.

10 Q. Are we looking at the same thing?

11 A. For Novell. I'm sorry. Bill Broderick. For AT&T
12 is Russ Holt.

13 Q. And what do you understand this document to be?

14 A. This was a licensing form that when both parties
15 had signed gave AT&T the right to use the UnixWare
16 Release 1.1.

17 Q. And if you turn to the next page, I take it this is
18 a table of contents for what the schedule includes?

19 A. Correct.

20 Q. And where do we find the prior products?

21 A. It's in Exhibit J, prior products, Page 27.

22 Q. And again, this was a license granted by Novell in
23 1995 for UnixWare 1.1; correct?

24 A. Yes.

25 Q. So we look at Exhibit J on Page 27. Is that the

1 list of prior products that you've been testifying about?

2 A. Yes, it is.

3 Q. Did Novell charge an separate fee for the prior
4 products?

5 A. No, they did not.

6 Q. How did you book the revenues from Novell's
7 UnixWare licenses?

8 A. As UnixWare and then whatever the release was. So
9 in this case, it would have been booked as UnixWare 1.1 or
10 UW 1.1.

11 Q. Did you book any part of the revenue from UnixWare
12 licenses at Novell as SVRX revenue to account for the prior
13 products?

14 A. No.

15 Q. To your knowledge, did anyone at Novell do that?

16 A. No.

17 Q. Did Santa Cruz later release its own versions of
18 UnixWare?

19 A. Yes.

20 Q. And do you recall what those versions were?

21 A. I believe it was the UnixWare 2.1 and then all of
22 the UnixWare 7 family.

23 Q. So let me show you what has been marked as SCO
24 Exhibit 371. And you see about three quarters of the way down
25 where it says, UnixWare 2.1 technology?

1 A. Yes.

2 Q. So what is this document?

3 A. It's also a licensing order form executed giving
4 Unisys the right to UnixWare 2.1 technology.

5 Q. Who are the parties of this license?

6 A. Unisys as the customer and Santa Cruz Operation.

7 Q. And do you see on the next page that there's also a
8 list of prior products?

9 A. Yes.

10 Q. At least an item for that identifying --

11 A. Yes.

12 Q. -- a page where the prior products are listed?

13 A. Yes. Exhibit I, Page 24.

14 Q. Turn to that, Exhibit I. Do you see the list of
15 prior products that you've been testifying about?

16 A. Yes.

17 Q. And did you book royalties under licenses for
18 UnixWare that Santa Cruz granted as UnixWare revenues?

19 A. Yes.

20 Q. Did you ever seek to break out those revenues as
21 UnixWare and prior products in any way?

22 A. No.

23 Q. Did Novell transfer its UnixWare licenses to
24 Santa Cruz?

25 A. Yes.

1 Q. Did Santa Cruz continue receiving royalties paid
2 under those licenses?

3 A. Yes.

4 Q. Did Santa Cruz remit any of those royalties to
5 Novell?

6 A. No.

7 Q. Did Santa Cruz remit to Novell any royalties for
8 prior products?

9 A. No.

10 Q. Did Santa Cruz remit any royalties paid under its
11 own UnixWare licenses to Novell?

12 A. No.

13 Q. Did Santa Cruz ever remit to Novell royalties for
14 the prior products in its UnixWare licenses?

15 A. No.

16 Q. Did Santa Cruz transfer its own and Novell's
17 UnixWare licenses to SCO in 2001?

18 A. Yes.

19 Q. Did SCO continue receiving royalties under those
20 UnixWare licenses?

21 A. Yes.

22 Q. Did SCO remit those royalties to Novell?

23 A. No.

24 Q. Ms. Acheson, have you had experience with audits?

25 A. Yes.

1 Q. How deep is your experience with audits?

2 A. Well, as a finance person in public companies, of
3 course, we have quarterly audits and the annual, you know,
4 major audit. Additionally, in a revenue group where we deal
5 with binary royalties, we had an audit group that audited many
6 of our customers or we worked through independent CPA firms to
7 audit customers. Additionally, we have been audited by
8 companies who have granted us licensing rates, such as
9 Microsoft and Mrs. Novell audited us twice.

10 Q. Did Novel audit the administration of the SVRX
11 royalties?

12 A. Yes.

13 Q. When did that take place?

14 A. One time in 1998 and then again in 2003.

15 Q. Who was audited in 1998?

16 A. It would have been Santa Cruz Operation in '98.

17 Q. What role did you play in the 1998 audit?

18 A. Well, my boss Terry Dulin at that time did the
19 majority of the negotiation of the auditors for timing and
20 scope. I worked with them as far as supplying the information
21 and data to them that they required.

22 Q. And based on your experience with auditing, how
23 thorough and detailed do you think Novell's auditors were in
24 that 1998 audit?

25 A. They were extremely detailed.

1 Q. Did Novell's auditors ask Santa Cruz for any
2 information or documents regarding SVRX licenses or royalties?

3 A. No; except for the 40-percent calculation which
4 they reviewed with my boss Terry Dulin.

5 Q. With that exception aside, did they ask for any
6 information about anything regarding royalties or licenses?

7 A. No, they did not.

8 Q. Did Novell at that audit request Santa Cruz to pay
9 UNIX for royalties?

10 A. No.

11 Q. Under UnixWare licenses?

12 A. No, they did not.

13 Q. Did Novell request any share of those royalties for
14 the prior products that were listed in the UnixWare licenses?

15 A. No, they did not.

16 Q. What role did you play in the 2003 audit of SCO --
17 I'm sorry. Was SCO audited later, you said?

18 A. Yes, it was SCO.

19 Q. In 2003; right?

20 A. Correct.

21 Q. What role did you play in that audit?

22 A. By that time, I had the direct negotiations with
23 the auditors, and, you know, working with -- my contract
24 administrator supplied them with the details that they
25 required under the audit.

1 Q. Did Novell's auditors ask SCO for any information
2 about Novell's or Santa Cruz' UnixWare licenses?

3 A. No, not from those.

4 Q. The licenses of those companies have executed?

5 A. No.

6 Q. As part of the audit did Novell request payment for
7 royalties from those licenses?

8 A. No, they did not.

9 Q. Did Novell request any share of those royalties for
10 the prior products listed in the UnixWare licenses?

11 A. No.

12 Q. To the best of your knowledge, Ms. Acheson, did
13 Novell ever ask to assign any value to the prior products in
14 UnixWare licenses and pay Novell for the licensing of those
15 products?

16 A. No, they didn't.

17 Q. To the best of your knowledge, did Novell ask the
18 same thing of SCO? I meant to say Santa Cruz before. But I
19 guess your answer applies to both Santa Cruz and SCO?

20 A. Well, with one exception.

21 Q. What --

22 A. No. They only asked auditing for the Sun and
23 Microsoft agreement.

24 Q. And no new information about UnixWare licenses
25 granted by Novell or Santa Cruz?

1 A. No.

2 Q. Do you recall a licensee called Unisys?

3 A. Yes.

4 Q. And so let me show you what has been marked as SCO
5 Exhibit 370.

6 And it's been admitted, Your Honor.

7 If you look at the second page, correct me if I'm
8 wrong, but I think I understand this to be a Unisys 2.0
9 license executed in 1995 between Unisys and Novell. Do you
10 read that document to be that?

11 A. Yes.

12 Q. And if you look at Paragraph -- Page 26 we find a
13 list of prior products; is that correct? On Page 26?

14 A. Yes.

15 Q. Was this license transferred to Santa Cruz for the
16 sale of the UNIX assets?

17 A. Yes, it was.

18 Q. Did Santa Cruz receive royalties from Unisys under
19 this particular license?

20 A. Yes, we did.

21 Q. Let me show you, then, what has been marked
22 Exhibit 387, SCO Exhibit 387. And this document was produced
23 by Novell in this litigation. Can you, please, briefly
24 describe or explain what this report reflects.

25 A. Basically it's one of the pages of the quarterly

1 reports submitted by Unisys to document the payment of their
2 various royalties under their various products schedules.
3 What they're doing on this report is they are summarizing for
4 about nine quarters the gross amounts due for both
5 UnixWare 2.0 and the SVRX 4 product. The net amount due after
6 discount is taken on the third matrix down basically shows the
7 geographic breakout of the UnixWare sales activity, and the
8 fourth segment of the report shows how they calculated their
9 discount.

10 Q. And how often did Santa Cruz receive this report?

11 A. Quarterly.

12 Q. Did Novell receive this report?

13 A. Yes.

14 Q. When it was the owner of the UNIX business?

15 A. Well, yes. When it was the owner, yes.

16 Q. And if I wanted to focus on the royalties that
17 Unisys was paying on their 2.0 license from Novell that we
18 just saw, where would I look within these tables?

19 A. The third table down would probably be the easiest.
20 It's basically breaking out the UnixWare 2.0 binary royalty
21 fees by geographic region, and the second column is the total.
22 The other columns are just the regions within Unisys.

23 Q. So if I look, for example, at the very last item,
24 it says first Q '99, how much did Unisys report and pay to
25 Santa Cruz under the 2.0 license?

1 A. \$152,966.

2 Q. Do you know how Novell came into possession of this
3 document?

4 A. More than likely through their audits of us.

5 Q. Did Novell at any time ask for the royalties that
6 Santa Cruz was collecting under the 2.0 license between Unisys
7 and Novell?

8 A. No.

9 Q. Did Novell ever ask for a share of those royalties
10 corresponding to the prior products?

11 A. No.

12 Q. Did Novell ask for any royalties under this license
13 even in its 2003 audit?

14 A. No, they did not.

15 Q. Just a couple of discrete questions, and we're
16 done.

17 Ms. Acheson, are you familiar with OpenServer?

18 A. Yes.

19 Q. What is OpenServer?

20 A. OpenServer is, well, Santa Cruz Operation's flavor
21 of UNIX.

22 Q. And is that a SCO product?

23 A. Now it is, yes.

24 Q. And how do SCO's UnixWare royalties currently
25 compare with SCO's OpenServer -- I'm sorry. How does SCO's

1 UnixWare revenues currently compare with SCO's OpenServer
2 revenues?

3 A. I believe in 2007, it was about 70-percent
4 OpenServer and 30-percent UnixWare.

5 Q. And how did those revenues compare in 2002?

6 A. At that point it was about two-thirds OpenServer
7 and one-third UnixWare.

8 MR. GONZALEZ: Nothing further. Thank you.

9 THE COURT: Thank you, Mr. Gonzalez.

10 Mr. Malaugh, you may cross-examine.

11 MR. MALAUGH: Thank you, Your Honor.

12 If I may approach?

13 THE COURT: Yes.

14 MR. MALAUGH: It's the list of exhibits that we may
15 be using during cross-examination.

16 CROSS-EXAMINATION

17 BY MR. MALAUGH:

18 Q. Good morning, Ms. Acheson.

19 A. Hello.

20 MR. MALAUGH: If I may approach the witness, Your
21 Honor.

22 THE COURT: You may.

23 Q. BY MR. MALAUGH: Ms. Acheson, I'm showing you
24 what's been pre-marked as Novell Exhibit 187. It's been
25 admitted. Do you recognize this document? This is the

1 agreement --

2 A. Yes.

3 Q. -- with Sun SCO entered into in 2003; is that
4 correct?

5 A. Yes.

6 Q. If I can ask you to turn to Attachment 1 of that
7 document. And the second page. This is SCO 1287219.

8 You see there's a list of SVRX versions here and
9 then OpenUNIX 8 release. Do you see where I'm pointing to?

10 A. Yes.

11 Q. And my first question is about the first version
12 listed here System V 4.1 ES/3B2. In the ordinary practice of
13 royalty remission, was this one of the SVRX versions that SCO
14 was under an obligation to remit royalties as to?

15 A. When it was separately licensed by the licensee,
16 yes.

17 Q. And the same is true of the next version listed
18 here, 4.1 C2/3B2?

19 A. Yes.

20 Q. And same is true of the next three lines, in fact,
21 4.1 ES, 4.2 and 4.2 MP?

22 A. Well, as long as it was the standalone version,
23 not -- not that which was included in UnixWare.

24 MR. MALAUGH: If I may approach.

25 Q. BY MR. MALAUGH: I'm showing you what's been marked

1 as SCO Exhibit 141. I think you may have actually seen this
2 during your direct testimony. This is a license supplement
3 with NCR. I'm sorry. SCO Exhibit 141. This is a license
4 supplement with NCR; is that right?

5 A. Yes.

6 Q. And it's listed as Supplement 112?

7 A. That is correct.

8 Q. And it's signed by Mr. Bill Broderick of the Santa
9 Cruz Operation?

10 A. That is correct.

11 Q. Let's turn to the prior products listing that we've
12 heard some testimony on today. I believe it is Exhibit I in
13 this document. It's on SCO 9776.

14 Now, I take it, it's your testimony and it's SCO's
15 position that once NCR had entered into this UnixWare 2.1
16 supplement with Santa Cruz, Santa Cruz was non-obligated to
17 pass along royalties on account of these prior products listed
18 in Exhibit I?

19 A. That's correct. NCR was purchasing UnixWare 2.1.

20 Q. So if we were to look at the royalty reports that
21 Santa Cruz was issuing and you've testified about --

22 A. Uh-huh (affirmative).

23 Q. -- we shouldn't see any royalties for the versions
24 listed here being remitted from Santa Cruz to Novell?

25 A. As long as it was -- as long as they were reporting

1 under the UnixWare schedule we would not have.

2 Q. I'm not sure what you mean by that. So if NCR is
3 out there using its System V Release 3.2 rights, is it SCO --
4 and paying money for using those rights, is it SCO's position
5 that because of this supplement SCO doesn't have to pay any
6 money to Novell?

7 A. Okay. No, that's not correct. Basically the
8 customers paid under the product schedule of which their
9 software release was. So if NCR had an older, it's just like
10 if you have Windows, you know, one of the older releases of
11 Windows versus a later or Vista, it's two separate products.
12 So, too, would NCR. They would have an older release. And if
13 that was under the standalone schedule for 3.2, then they
14 would pay royalties under that schedule. However, if they
15 upgraded their product to the UnixWare 2.0, then their new
16 releases they would pay under the UnixWare of 2.30.

17 However, customers still use the old products.
18 They want upgrades. They want new installation, so they would
19 continue paying under the 3.2. If that case happened, you
20 know, we would record the 3.2 as SVRX 3.2 and the UnixWare 2.0
21 as UnixWare 2.0.

22 Q. So let me see if I understand your testimony, thank
23 you. If NCR is out there, it's got derivative work. It's
24 made some changes to the source code, and the source code is a
25 derivative of it is 3.2 that we've been discussing. And it's

1 distributing that derivative work, the money for all of that
2 is still Novell's despite the fact that there's this new
3 supplement for 2.1.

4 A. Right. As long as they were distributing under
5 that original product supplement for 3.2.

6 Q. And that's the case despite the fact that they've
7 got this list of prior products rights in Supplement 112?

8 A. Yes.

9 Q. In fact, if we look at SCO Exhibit 387, which was
10 one of the last exhibits you testified about.

11 A. Uh-huh (affirmative).

12 Q. This was the Unisys reporting history. We see a
13 significant amount of money that's coming in for SVR4.
14 There's some entries at the top, and there's some entries down
15 at the bottom. Those all fees that SCO is continuing to remit
16 to Novell; is that right?

17 A. Yes.

18 MR. MALAUGH: I have no further questions of this
19 witness.

20 THE COURT: Thank you, Mr. Malaugh.

21 Mr. Gonzalez, any redirect?

22 MR. GONZALEZ: Yes. I have brief redirect, Your
23 Honor.

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REDIRECT EXAMINATION

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BY MR. GONZALEZ:

Q. Ms. Acheson, Mr. Malaugh just asked you about a scenario in which a licensee took out, for example, a UnixWare license, and at the same time had a derivative product based on an earlier license, for example, for System V Release 3.2. Do you recall that discussion with Mr. Malaugh?

A. Yes.

Q. And when you said the licensee would report under the newer license for that product and then you pointed out it would report royalties for the earlier license, the 3.2 license, are you referring to source code fees or binary fees?

A. Binary fees.

Q. And so when the licensee who took out the later license pay any source code fees for the prior products listed in that license?

A. Well, they were buying the UnixWare what -- they're buying whatever the latest and greatest version is in that product schedule.

Q. And they would pay the source code fees for what?

A. For whatever that product was. So if the product schedule is UnixWare 2.30, then they would be purchasing UnixWare 2.30.

Q. And they would pay the fees just for that later release?

1 and testified as follows:

2 THE WITNESS: I do.

3 THE CLERK: Thank you. Please take the witness
4 stand over there.

5 MR. CYRULNIK: Good morning, Mr. Hunsaker.

6 THE COURT: Hang on just a minute.

7 THE CLERK: Please state your name and spell it for
8 the record.

9 THE WITNESS: Jeff Hunsaker. J-E-F-F
10 H-U-N-S-A-K-E-R.

11 THE COURT: You may proceed.

12 MR. CYRULNIK: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. CYRULNIK:

15 Q. Mr. Hunsaker, are you currently employed?

16 A. Yes.

17 Q. And what is your current employment?

18 A. I work for the SCO Group. My title is president
19 and chief operating officer of SCO Operations.

20 Q. And what is the relationship between SCO Operations
21 and the SCO Group?

22 A. It's a wholly-owned subsidiary of the SCO Group.

23 Q. How long have you been president and chief
24 operating officer of SCO Operations?

25 A. Since December of '07.

1 Q. And when did you first start working for SCO?

2 A. I started in January of 2000 with Caldera SCO.

3 Q. And can you briefly describe your prior positions
4 at SCO starting in January 2000?

5 A. Yes. I started as director of sales, and over
6 subsequent years I was over sales for the Americas division.
7 I was vice-president of worldwide marketing, vice-president of
8 worldwide sales, general manager of our UNIX division and also
9 general manager of our mobile business until recently
10 president, chief operating officer.

11 THE COURT: Until recently what? Excuse me. I
12 didn't hear you.

13 THE WITNESS: Until recently president and chief
14 operating officer of SCO Operations.

15 THE COURT: Thank you.

16 Q. BY MR. CYRULNIK: Mr. Hunsaker, did your
17 responsibilities generally remain the same during the course
18 of your time with SCO?

19 A. Yes. Primarily focussed on sales, marketing,
20 business development activities.

21 Q. Can you briefly describe your employment prior to
22 joining SCO in 2000?

23 A. In 1989, I started with a company called
24 WordPerfect Corporation in sales and marketing capacity. And
25 for the next seven, eight years until I believe it was 1998, I

1 was with the same company, but we were acquired by Novell and
2 Corel Corporation. And then in 1998, I worked for a company
3 called Baan, B-A-A-N, enterprise resource planning company in
4 a sales capacity until 2000 when I joined SCO Caldera.

5 Q. And what was the nature of your work at WordPerfect
6 and Baan?

7 A. I was a product marketing, regional sales manager,
8 so fairly consistent always focussed on sales marketing,
9 business development.

10 Q. So would it be fair to say you've had almost
11 20 years of experience in the sales or marketing aspects of
12 the computer industry?

13 A. Yes.

14 Q. Can you briefly summarize your educational
15 background for the Court?

16 A. Bachelor of Arts degree in business from Utah State
17 University.

18 Q. And when was that?

19 A. In 1989.

20 Q. Mr. Hunsaker, I'd like to go back to the 2002-2003
21 time period for the moment. And can you describe generally
22 your role during those particular years?

23 A. Yeah. During that time frame, I was vice-president
24 of worldwide marketing, also during that time vice-president
25 of sales.

1 Q. And what were your responsibilities as
2 vice-president of sales and marketing?

3 A. Generally in terms of marketing and sales, you're
4 focussed on the customers, products, making sure that your
5 product are messaged properly, they're priced properly, that
6 there's a way to distribute those products, that your sales
7 teams are out selling and talking to customers, the
8 administrative side, you know, of quotas and so forth. So
9 it's just generally driving those activities.

10 Q. What products was SCO primarily selling or
11 marketing during the 2000-2003 period?

12 A. We were selling UnixWare and OpenServer is our
13 primary flagship products.

14 Q. What was UnixWare?

15 A. UnixWare is an operating system that runs on
16 hardware that serves up applications, business applications,
17 that allow companies to function. And UnixWare comes, you
18 know, from the early days of AT&T, USL, Novell and through
19 SCO. And so that was that product.

20 Q. And what was OpenServer? That was the second
21 product you mentioned.

22 A. OpenServer is also an operating system, same
23 scenario. Runs on hardware required, and also serves up
24 applications for various customers. And we started in the
25 early days with SCO back in I think late '80s.

1 Q. Mr. Hunsaker, I believe you testified that UnixWare
2 and OpenServer, I think you used the term --

3 THE COURT REPORTER: I'm sorry?

4 MR. CYRULNIK: Sorry.

5 Q. BY MR. CYRULNIK: I believe you used the term they
6 were SCO's flagship products during that period?

7 A. That is correct.

8 Q. What percent of SCO's annual revenue do UnixWare
9 and OpenServer account for approximately?

10 A. At that time and still today, almost 100 percent of
11 our revenue. I mean, 95-plus, 98 percent of our revenue comes
12 from those two products as it relates to products.

13 Q. And are you familiar with the term installed base
14 as it's used with respect to an operating system?

15 A. Sure.

16 Q. Can you generally describe the size of OpenServer's
17 install base?

18 A. Well, we've stated for many years over the history
19 of this company we've sold approximately 2 million servers
20 that have been deployed with, you know, various installations.
21 And OpenServer has accounted for approximately two-thirds of
22 the overall installed base and revenue for our company.

23 Q. In your various sales and managerial positions, did
24 you have occasion to use the term UNIX?

25 A. Yes.

1 Q. Did you have occasion to use the term System V?

2 A. Yes.

3 Q. And how often did you use those terms?

4 A. You know, fairly frequently with customers, with
5 employees discussing our UNIX and System V technologies.

6 Q. Mr. Hunsaker, when you use those terms, what did
7 you mean to convey?

8 A. UnixWare and OpenServer. We're talking about our
9 products. And so when I use the term UNIX or System V, I'm
10 referring to the brand of UnixWare and/or OpenServer.

11 Q. Were you referring to a particular release when you
12 would use those terms?

13 A. Well, yeah. Release version of UnixWare or version
14 of OpenServer, yes.

15 Q. If you heard the term UNIX or System V being used
16 by a customer in the year 2000, for example, what product, if
17 any, would you have in mind that that customer was referring
18 to?

19 A. I don't recall exactly which version, but it would
20 be UnixWare Version 7, 7.1, perhaps.

21 Q. And that was the current release?

22 A. It was the current version at that time, yes.

23 Q. Mr. Hunsaker, was the latest release of UnixWare,
24 UnixWare 7, referred to by any other names?

25 A. Yeah. We referred to it as System V Release 5,

1 SVR5. It's synonymous with UnixWare 7.

2 Q. And is that same SVR 5 used internally?

3 A. Yes.

4 Q. Is it used externally?

5 A. Yes.

6 Q. Do you have any technical training or expertise?

7 A. No.

8 Q. Your expertise is in sales and marketing?

9 A. Correct.

10 Q. From a sales and marketing perspective,
11 Mr. Hunsaker, did you have an understanding as to the
12 relationship between the latest release of UnixWare, say
13 UnixWare 7, and the prior release UnixWare, say UnixWare 2?

14 A. Well, the relationship is -- we have always
15 understood from the sales and marketing perspective we're
16 selling the latest release of our products, UnixWare 7.13 or
17 whatever the version was at that point in time, which
18 incorporated the prior release technology and brought forward
19 any of the technology that was commercially valuable that
20 obviously was important to bring forth into the next version
21 of our products to sell to our customers.

22 Q. How about the relationship between that prior
23 release of UnixWare, say, UnixWare 2, and the proceeding
24 release System V, say SVR4.2?

25 A. Same scenario. Once again, it's all based on

1 whenever the time was we would be selling the latest version
2 of our product where it included the System V technology, and
3 we would bring forth and forward earlier technologies that
4 were relevant, that were commercially valuable, that were
5 needed by customers based on their requests and their input
6 and deliver this into a new product.

7 Q. Mr. Hunsaker, when you say that you understood the
8 latest release of UnixWare to include the commercially
9 valuable technology from the prior release, would you explain
10 to the Court what you mean by commercially valuable?

11 A. Well, I'm referring to, first of all, technology
12 that is current, that it runs and is supported by the latest
13 hardware, latest drivers, that is based on features and
14 functions that our customers need to run their products and
15 their application within their environment. And so it
16 obviously needs to incorporate relevant current technology
17 that we bring forth and then add to that technology for new
18 versions of our product.

19 Q. And how would SCO go about determining what
20 technology fit that description, what technology was
21 commercially valuable?

22 A. Well, from a sales perspective --

23 MR. ACKER: Your Honor, I object to this line of
24 questioning. The witness has testified he does not have
25 technical expertise. He has no involvement in the development

1 process, and we're really just asking the witness to speculate
2 now how the development process works.

3 THE COURT: Mr. Cyrulnik?

4 MR. CYRULNIK: Your Honor, I'm specifically asking
5 the witness about his sales perspective, and I believe the
6 witness has now testified his sales team was intricately
7 involved in determining the commercially valuable technology
8 being included in the next release.

9 THE COURT: I'll let you ask. Overruled. You can
10 go ahead.

11 THE WITNESS: Yes. Once again, from a sales
12 marketing perspective, which has always been my world, we meet
13 with our customers. We talk to them face to face, and we
14 have, whether it's user conferences or annual forum events, we
15 have webinars, just obviously, you know, need to need
16 discussions with customers to understand from them what's
17 relevant and what's important, what they need in terms of
18 their solutions for an operating system.

19 And we take this information, and we move it
20 forward. We talk to our engineers. And we convey to them,
21 you know, this technology is not needed or required. They're
22 looking for new technologies, new functions. And we have
23 what's called product meetings. The product managers and the
24 system engineers and our sales teams communicate updates from
25 the customers upon a weekly basis.

1 Q. BY MR. CYRULNIK: So the process of determining the
2 commercially valuable technology was a process that involved
3 the sales side of SCO and the engineering side together?

4 A. Yes; because the sales teams' responsibility was to
5 focus on the customer and understand their needs and then
6 convey that to the engineers who would then develop the
7 products and the applications.

8 Q. And with whom did you interact on the development
9 side, on the engineering side to convey the information
10 feedback that you were getting from the marketplace as to what
11 was commercially valuable?

12 A. Well, during that time frame, we spent time talking
13 to our product managers and engineering leads, Andy Nagle,
14 John Maciaszek, Wolf Bauer, Sandy Gupta and others in terms of
15 these meetings.

16 Q. And did you have an understanding as to what they
17 would do with the information you would to provide them?

18 A. Well, they would -- they're smart individuals, and
19 they understand the importance of customer feedback. And so
20 they would take the latest technology, and they -- functions
21 and technology that is relevant and current and move that
22 forward and then add new features and functions that the
23 product needed at that time to deliver that solution to a
24 customer so we could sell it.

25 Q. Were you involved in that process at all, the

1 engineering process?

2 A. Not the engineering process, but I was involved in
3 the sales communication process to the engineering teams.
4 That was my focus and my team's focus.

5 Q. Mr. Hunsaker, in addition to the various releases
6 of UnixWare and OpenServer that you said you were marketing
7 and selling during your tenure, were there other, any other
8 UNIX products that you were marketing or selling during that
9 time?

10 A. Yeah, there were other products. But once again,
11 almost exclusively and primarily our revenues were made up of
12 OpenServer and UnixWare. We had products such as SCOofficer
13 Server, as I recall, and Merge and a few others that don't
14 come to mind.

15 Q. That's fine.

16 During your tenure, did you or your sales team ever
17 market or sale older pre-UnixWare releases of UNIX? And I'll
18 call those SVRX for short.

19 A. No.

20 Q. Why didn't you ever market or sale to customers
21 pre-UnixWare releases of System V?

22 A. It doesn't really make sense to me. Our customers
23 weren't asking for old technology. They want the latest and
24 greatest technology. And so from the sales perspective, we're
25 focusing on selling our most current technology. You know,

1 the System V Release 5 technology at the time with UnixWare 7,
2 which once again incorporates all of the technology that's
3 commercially valuable over many years of work. And so that's
4 what they ask for, and, of course, that's what we're focusing
5 on selling.

6 Q. Mr. Hunsaker, did you have direct contact with
7 SCO's customers?

8 A. Yes.

9 Q. In the context of that contact, do you recall any
10 instance in which a customer or sales rep requested a license,
11 either source or binary, to a pre-UnixWare release of UNIX
12 System V?

13 A. No.

14 Q. Never?

15 A. Never.

16 Q. Do you recall any instance in which you personally
17 tried to sell or market or in which you told members of your
18 team to sell or market a pre-UnixWare version of UNIX
19 System V?

20 A. No. I wouldn't even know how.

21 Q. Mr. Hunsaker, you testified earlier that you were
22 working at SCO in the 2002-2003 time period in particular?

23 A. Yes.

24 Q. Are you familiar with the SCOSource program?

25 A. Yes.

1 Q. And can you generally describe what the SCOSource
2 program was?

3 A. This program was put in place to provide a
4 licensing mechanism for Linux customers that were perhaps
5 unknowingly using our intellectual property, our UNIX
6 technology. And it provided a way to make them whole or
7 clean, if you will.

8 Q. Were you involved in the administration of the
9 SCOSource program?

10 A. I was involved in the overall program based on my
11 responsibilities and sales in marketing, but I didn't run the
12 program.

13 Q. Who did run the program?

14 A. That was -- the general manager of that division
15 was Chris Sontag.

16 Q. And do you have a recollection as to how the
17 SCOSource program unfolded, how it came to be?

18 A. I do. I remember being in a sales call in the 2002
19 time frame, late 2002, as I recall, in Tennessee with a
20 customer, and they were, we found out, moving from our UNIX
21 platform to a Linux platform. And they -- in the course of
22 these discussions and so forth, we realized that they were
23 unbundling our libraries from our SCO UNIX technologies and
24 using those within Linux to allow for their Linux application
25 to run easily on Linux.

1 And, you know, a big flag went up and said, well,
2 you can't do that. Our licensing agreement, our ULA, UNIX
3 licensing agreement, does not allow customers to unbundle
4 technology to be put in Linux.

5 And so that's kind of the genesis for these
6 discussions. And we then developed a licensing program to
7 allow those customers that wanted to use those libraries, we
8 allowed them through this licensing program which they would
9 pay for.

10 Q. I'd like to show you what's been marked as Novell
11 Exhibit 387.

12 And, Your Honor, can I approach?

13 THE COURT: Yes.

14 MR. CYRULNIK: A book that contain all of the
15 exhibits that I intend to use.

16 THE COURT: All right.

17 THE WITNESS: Yes.

18 Q. BY MR. CYRULNIK: Mr. Hunsaker, do you recognize
19 Novell Exhibit 387 generally?

20 A. It looks like a presentation, a PowerPoint
21 presentation.

22 Q. And were you involved in creating PowerPoint
23 presentations of this sort?

24 A. Yeah. I was involved and reviewed and had, you
25 know, some say clearly in presentations that were communicated

1 out to our employees and customers.

2 THE COURT: This is Novell 387?

3 MR. CYRULNIK: Novell 387, yes.

4 THE COURT: Thank you. Excuse me. Go ahead.

5 Q. BY MR. CYRULNIK: Mr. Hunsaker, if you could turn
6 to Page, I believe it's 4 or 5. It's marked as 4267 in the
7 bottom right-hand corner as a Bate stamp. Once again it's
8 Novell 387. You can also access it on your screen. It's
9 easier.

10 A. I'll just look at it on the screen.

11 Q. Okay. And do you recognize this part of the
12 SCOSource presentation?

13 A. Yes. It looks like it's talking about what I just
14 described, the System V for Linux license.

15 Q. Do you recall being involved in creating this
16 presentation about SCOSource?

17 A. I recall being -- and reviewing these
18 presentations. I didn't author all of those documents.

19 Q. And the text of this slide reads:

20 SCO shared UNIX libraries from OpenServer and
21 UnixWare for use of Linux.

22 Is that correct?

23 A. Correct.

24 Q. Was SCO licensing libraries in any prior versions
25 of UNIX to its customers?

1 A. No. Once again, we're focusing on our latest
2 technologies of UNIX and OpenServer, which included all of the
3 commercially valuable technology from prior releases.

4 Q. Does SCO continue with SCOsource after those
5 initial concerns about the libraries, OpenServer and UnixWare?

6 A. Yes. We realized after a period of time that it
7 was more than just the libraries that were being used within
8 Linux and recognized there was additional code. And so we
9 furthered this program and instituted what is called, I
10 believe, the SCO IP license program, which included more of
11 our UnixWare code and technology that was found in Linux.

12 Q. Mr. Hunsaker, what was the nature of the agreements
13 that were used to license this technology?

14 A. To license the SCOsource technology?

15 Q. The SCOsource agreements.

16 A. Well, these agreements were based off of our
17 UnixWare technology. And it was simply a license that a
18 customer would use and to register, and then they would be
19 made clean, meaning we would not come out after them and sue
20 them, if you will, for using our code inappropriately. It was
21 obviously different from a UnixWare license because once
22 again, with the UnixWare license itself, you could not
23 unbundle, the ULA, the UNIX License Agreement didn't allow you
24 to unbundle the technology. So it was a new license, a new
25 product, if you will.

1 Q. So with respect to, say, the libraries just as an
2 example, the traditional type of UnixWare license would allow
3 you to use those libraries in what context?

4 A. Well, you would use those libraries on a Linux
5 deployment for those customers that were trying to migrate
6 UNIX applications to Linux. So they would purchase a license
7 in order to run those Linux -- those applications, UNIX
8 applications on Linux.

9 Q. And just to clarify that, what was allowed under
10 the SCO source license?

11 A. Correct.

12 Q. And under a pre-SCOsource license, UnixWare
13 license, would that be allowed?

14 A. No. No. Once again, you couldn't unbundle the
15 technology. And so that's why we developed the SCOsource IP
16 license.

17 Q. I believe you characterized these agreements in
18 your answer, a couple of answers ago, as types of UnixWare
19 licenses. Was that always your understanding of the SCOsource
20 agreements?

21 A. Yes.

22 Q. I'd like to show you what's been marked as
23 SCO Exhibit 236. And again, it's in your binder and will be
24 on the screen in a moment.

25 Do you recognize SCO Exhibit 236?

1 A. Yes. A press release that we issued in July
2 regarding UNIX and our copyrights and so forth. Yes.

3 Q. And again, were you involved in issuing these press
4 releases or creating or reviewing these press leases?

5 A. Primarily reviewing the press releases for content.
6 Did not author every word of the documents, no.

7 Q. I'd like to zoom in on the bottom third of the
8 press release that begins:

9 Following the distribution of our letter.

10 A. Uh-huh (affirmative).

11 Q. And press release quotes Mr. McBride saying:

12 Today we're delivering a very clear message to
13 customers regarding what they should do.

14 Intellectual property is valuable and needs to be
15 respected and paid for by corporations who use it
16 for their own commercial benefits. The new
17 UnixWare license accomplishes that objective in a
18 fair and balanced way.

19 Is that an accurate reading?

20 A. Yes.

21 Q. And does the language of that press release, is
22 that consistent with your recollection that you had always
23 termed this UnixWare license?

24 A. Yes, absolutely. The SCOSource program was all
25 built on our UnixWare licenses built around a UnixWare

1 license.

2 Q. Now, Mr. Hunsaker, you had testified -- well, I
3 think you said it was UnixWare license. It was different from
4 the traditional UnixWare license. Can you elaborate on the
5 specific difference between the UnixWare license, traditional
6 UnixWare license and the SCOSource UnixWare license?

7 A. Well, one is the target audience, I mean, for the
8 traditional UnixWare license, it was sold to SCO customers and
9 other SCO customers and new SCO customers that we wanted to
10 run our UnixWare technology on, our OpenServer technology on
11 their hardware. And it included a packaged product. It
12 included a manual. It included CDs. It included
13 registration, cards. It included a license agreement. And so
14 it was physically a packaged product that was delivered and
15 installed and it was ready to use.

16 On the other hand, a SCOSource IP license, while
17 it's based on the same technology of UnixWare, it was focussed
18 for Linux customers that just wanted to be made clean and one
19 against ensured them that we were not going to sue them. And
20 it didn't have anything to install. There was nothing
21 physical to it. It was simply a license that allowed them to
22 run this in that instance. There was no manual or other
23 things that I've talked about.

24 Q. Let me direct you to Novell, what we've marked as
25 Novell Exhibit 227. And if you'll briefly review that.

1 Do you recognize this document?

2 A. Yes.

3 Q. And the document appears to be a series of e-mail
4 exchanges that involved either you sending or receiving
5 e-mails?

6 A. Correct.

7 Q. Could you turn to Page 2, please, of the document,
8 Novell 227. And I'd like to focus in on the e-mail that you
9 sent on July 31st of '03. Do you see that second half of the
10 page?

11 A. Yes.

12 Q. And if you can specifically look at the line that
13 begins, Item 1.

14 A. Okay.

15 Q. You were the author of this e-mail?

16 A. Yes. It says my name. Yes.

17 Q. And, Mr. Hunsaker, you wrote on July 31st of '03:

18 The official name of this program will be the
19 SCO UNIX IP compliance license program. This is
20 not a UnixWare 7.1.3 SKU.

21 A. Yes.

22 Q. Mr. Hunsaker what's an SKU?

23 A. SKU or SKU is defined as a stock keeping unit.
24 It's more of a manufacturing operational term designed to
25 categorize or name a particular product. It's a unique

1 identifier for products that we deliver.

2 Q. And what did you mean when you were writing that,
3 this is not a UnixWare 7.1.3 SKU?

4 A. Well, it's not. It's different. And once again,
5 my mindset is always from a sales marketing perspective. I
6 mean, that's my focus. But from a -- so from a product
7 perspective, this was a different SKU than the SCO IP license.
8 It had a different part number. It had -- you know, like I
9 described earlier, it had a manual and CDs and disks and
10 license agreement that were unique to that.

11 Whereas, the SCO IP license was based on the same
12 technology. So if you look at the technology perspective,
13 it's the same. But from a pure product perspective, it
14 requires a unique identifier and different package.

15 So it's -- if I could -- perhaps let me just give a
16 quick analogy here. The way I view this is if you were
17 looking at an automobile, for example, a Chevrolet or a GMC
18 truck, they're very different in terms of products and
19 customers that they focus on, in terms of the brand. And
20 so -- but the underlying technology is pretty much the same.
21 I mean, it's based on the same engine, the same chassis. But
22 if you look at the product managers that are responsible for
23 the GM Division versus the Chevrolet Division, they're very
24 different.

25 As a customer, I'm a GMC guy. That's the truck I

1 prefer. And others like Chevy. So they're different from a
2 product perspective, but the technology is essentially the
3 same.

4 Q. And you were talking about from a technology
5 perspective or a product perspective?

6 A. I'm talking about it from a product perspective,
7 they were unique. From a technology perspective, they're
8 pretty much the same.

9 Q. Continue on in the e-mail. Pick up where we left
10 off:

11 The license is called the SCOUNIX IPC license
12 for Linux. The only rights that this license
13 provides is for Linux binary run-time copies.
14 When we are ready to issue a similar license for
15 AIX, it will be called the SCOUNIX IPC license for
16 AIX. There is no connection between
17 UnixWare/OpenServer and the SCOUNIX IPC license
18 whatsoever. They are independent.

19 Did I read that accurately?

20 A. Yes. I mean, that's what I wrote at the time.

21 Q. Mr. Hunsaker, can you explain once again what you
22 meant when you wrote this language?

23 A. Well, once again, you've got to remember the
24 perspective that I authored this from. I'm thinking of things
25 more in terms of binaries, in terms of a product. And this is

1 different. The SCO -- the IP license is different in terms of
2 a product, if you will, than it is from a SCO UnixWare
3 license. And so in that respect, they're very much different.
4 But in terms of the technology, it's the same technology.

5 Q. And were you involved from the technology
6 perspective at all, the licenses? Were you involved in
7 defining the technology?

8 A. Just providing feedback from what our customers
9 requested.

10 Q. Mr. Hunsaker, if you could turn to Page 1 of that
11 exhibit. I'm if following the chain of e-mail correctly, it's
12 a response to you're e-mail from someone named Kim Jenkins at
13 the bottom of the page?

14 A. Yes.

15 Q. Who was Kim Jenkins?

16 A. I believe Kim was a consultant for the company.

17 Q. And if you look at the response he gives, he
18 writes:

19 Item 1, name is fine by me. Separation from
20 UW 7.13 is also fine with me. I like the
21 simplicity but defer final decision to Chris.

22 Do you have any understanding as to what
23 Mr. Jenkins meant when he said he likes the simplicity of
24 separation of 7.13?

25 A. I don't know exactly what his intent was, but I

1 think it's similar to what I described previously.

2 Q. Mr. Jenkins continues:

3 Also as a clarification to your last sentence
4 Item 1, this license does not allow users to run
5 Linux legally. The license allows Linux end users
6 to be clean with SCO.

7 Did I read that correctly?

8 A. Yes.

9 Q. Mr. Hunsaker, do you have any understanding as to
10 what Mr. Jenkins meant when he said that?

11 A. I think as I previously testified, the license
12 allowed the infringing Linux customers to be clean with SCO.
13 We were not going to sue them because they had a license that
14 covered the technology that we owned. And they were clean
15 with SCO.

16 Q. And is Mr. Jenkins' understanding consistent with
17 your understanding?

18 A. Yes.

19 Q. And, Mr. Hunsaker, was it your understanding at the
20 time that you were offering SCOsource licenses that Linux
21 users were free from claims from any other company aside from
22 SCO if they bought the IP license from SCO?

23 A. Yeah. This related to our technology, and they're
24 clean with SCO. Others could make other claims if need be.
25 But once again, this is focused on our technology, our

1 UnixWare systems allowing them to be clean by licensing this
2 from us and from SCO. Others could do whatever they chose.

3 Q. Mr. Hunsaker, you just described a number of
4 differences between this license and the last, this UnixWare
5 license and the other UnixWare license. Do the differences
6 that you just described have any impact on how the SCOsource
7 program was administered or managed?

8 A. Well, yes; in that we created a new division. And
9 we had a general manager, Chris Sontag, that ran that
10 business. They focused on a different set of customers, a
11 different target market and its own products and revenue. And
12 so that's the difference from setting up a new division.

13 Q. So SCO had a new division to run this particular
14 type of license?

15 A. Correct.

16 Q. I'd like to show you what had been marked as
17 Novell's Exhibit 159. Do you recognize Exhibit Novell's 159?

18 A. Yes.

19 Q. And can you generally describe what Novell 159 is?

20 A. Well, it states:

21 SCO establishes SCOsource; New Division Created
22 to Insure and Protect Intellectual Property in Linux
23 Environments.

24 So it's announcing the creation of this business
25 division.

1 Q. And do you recall the creation of that new
2 division?

3 A. I do.

4 Q. And can you explain to the Court why a new division
5 was necessary to run this particular license?

6 A. Well, as I've described previously, the product was
7 being focused on the Linux customers, the Linux installed
8 customers. And so there was a new sales organization that was
9 focused on selling these licenses to that audience. And we
10 had a general manager running that business with the unique,
11 you know, SKUs and parts numbers for those products in the SCO
12 UNIX division. Once again, while the technology is consistent
13 across both, we were focused on selling to our installed base
14 and to new UNIX customers that wanted to employ our UnixWare
15 and OpenServer technology.

16 Q. Mr. Hunsaker, did you charge customers for a
17 SCOsourc license?

18 A. Yes.

19 Q. Do you recall what you charged?

20 A. Yeah. We charged the same price as we charge for a
21 UnixWare 7.13 license. It was 1399.

22 Q. I'd like to show you what's been marked as Novell's
23 Exhibit 245.

24 THE COURT: Pick a good break point, Mr. Cyrulnik.

25 MR. CYRULNIK: Sure. I only have a couple

1 questions left, if Your Honor would like me to finish up with
2 this witness.

3 THE COURT: Go ahead.

4 Q. BY MR. CYRULNIK: Do you recognize Novell 245 as an
5 e-mail from John Maciaszek to a bunch of recipients that
6 attaches the document that begins on the second page of that
7 document?

8 A. Yes.

9 Q. What's that document that is attached?

10 A. It is the SCO IP compliance program for Linux.

11 Q. And I believe it's labeled, Internal Product
12 Announcement?

13 A. That's correct.

14 Q. And did you participate in drafting internal
15 product announcements?

16 A. I did not draft the announcements, but I reviewed
17 the announcements.

18 Q. If you would turn to the next page for a moment,
19 third paragraph. The internal product announcement writes:

20 Pricing of the Linux IP licenses is based on
21 standard pricing for the UnixWare 7.1.3 using the
22 business edition, which is 1-CPU as the starting
23 point.

24 Did I read that correctly?

25 A. That is correct.

1 Q. So you priced the SCO IP license, the SCOsource
2 agreement, the same based on the pricing of the
3 UnixWare 7.1.3?

4 A. Yes.

5 Q. And it's exactly the same price?

6 A. Yes.

7 MR. CYRULNIK: Nothing further. Thank you.

8 THE COURT: Thank you. We'll take a 15-minute
9 break.

10 (Recess.)

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