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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware)
corporation,)
Plaintiff,)

vs.

) Case No. 2:04-CV-139TS

NOVELL, INC., a Delaware)
corporation,)
Defendant.)

_____)
AND RELATED COUNTERCLAIMS.)
_____)

BEFORE THE HONORABLE TED STEWART

March 9, 2010

Jury Trial

REPORTED BY: Patti Walker, CSR, RPR, CP
350 South Main Street, #146, Salt Lake City, Utah 84101

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SALT LAKE CITY, UTAH; TUESDAY, MARCH 9, 2010; 8:30 A.M.

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PROCEEDINGS

THE COURT: Good morning.

I understand that a question has been raised about juror number nine, Thomas Hunsaker.

MR. ACKER: Yes, Your Honor. Just out of an abundance of caution, after the close of the jury selection yesterday, we obviously recognized the similar name between Mr. Hunsaker and a senior executive at SCO currently. When we went back, and just on our memory, we couldn't recall whether or not Jeff Hunsaker's, the executive of SCO, name was mentioned during the course of voir dire. We just wanted to be sure there is no relation at all. I wouldn't think so given the dialogue that occurred in the juror room. If that is the case, we would want to raise it now so it doesn't become an issue.

THE COURT: Let me ask, Mr. Hatch, did you mention Mr. Hunsaker's name?

MR. HATCH: Your Honor, I didn't bring the notes that I read from. My recollection was that I did, but I can't -- I would have to check those notes.

THE COURT: Will his name come up again during the course of trial?

MR. HATCH: He's on our may call list, so he may be called. We don't have any problem if you, Judge, want to make an inquiry.

1 THE COURT: I don't want to do that, unless it's
2 necessary. So what I'm going to do is ask you to ask
3 Mr. Hunsaker whether or not he's related to Mr. Thomas
4 Hunsaker.

5 MR. HATCH: Let me have Mr. Tibbitts step out and
6 do that.

7 THE COURT: Would you do that?

8 MR. HATCH: Sure.

9 THE COURT: If necessary, if he indicates there is
10 any relationship, then we'll deal with that. I don't want
11 to raise it with Mr. Hunsaker, the juror, and bring focus of
12 his attention on the fact if it's not a reality.

13 MR. ACKER: I understand, Your Honor. I think it
14 probably is not given the dialogue, but I just wanted to be
15 sure.

16 THE COURT: You are absolutely right to bring it
17 up, Mr. Acker. I appreciate it.

18 Another related matter, last night or early this
19 morning defendants filed an alternative jury instruction
20 packet. And I don't know if you have had a chance to look
21 at it, Mr. Hatch, Mr. Singer?

22 MR. SINGER: I have not.

23 MR. HATCH: No, Your Honor.

24 THE COURT: What I would request is that you do
25 look at it and respond to it by Wednesday at five o'clock.

1 I haven't looked at it, but Mr. Copeland looked at it
2 quickly and he saw some real benefit to it. But we think it
3 ought to be dealt with in a timely fashion. So Wednesday by
4 five.

5 MR. NORMAND: Your Honor, we also put in some
6 proposed alternative instructions in the form of our reply.
7 We were contemplating putting in our full set this
8 afternoon. In that event, I think Novell would have the
9 same opportunity to respond.

10 THE COURT: They would. If you do that by today.
11 By Thursday, if you would respond to theirs.

12 MR. ACKER: We will, Your Honor.

13 THE COURT: Okay.

14 Counsel, do you have anything else before we bring
15 the jury in?

16 MR. HATCH: No, Your Honor.

17 MR. BRENNAN: No, Your Honor. Thank you.

18 THE COURT: Thank you.

19 Ms. Malley, if you would, please.

20 Counsel, let me remind you that I intend to read
21 the statement of uncontroverted facts before you begin your
22 openings.

23 MR. BRENNAN: Your Honor, may I make just a brief
24 inquiry while we're waiting? Did you have in mind a very
25 short break so we could set up or would you prefer just to

1 go?

2 THE COURT: I'm hoping that we don't need to. I
3 will have the jury stand and we'll take a break within the
4 courtroom, but I don't want to take a separate break.

5 MR. BRENNAN: That's fine. We just need a few
6 minutes to transition.

7 THE COURT: Certainly. I'll give you what time
8 you need to do that.

9 MR. BRENNAN: Thank you, Your Honor.

10 (Jury present)

11 THE COURT: Good morning, ladies and gentlemen.
12 Yesterday before we recessed, you were given very specific
13 instructions as to how you were to conduct yourselves. In
14 particular, you were told that you were not to discuss the
15 case with anyone and I detailed what that entails. I have
16 to ask you, did any of you violate that instruction in any
17 respect?

18 You all look innocent.

19 Another thing, ladies and gentlemen, one of you is
20 an alternate juror. Who that alternate juror is not for you
21 to know. So every one of you must assume that you will be
22 deliberating on the case and you are all to pay attention
23 and to assume that at the end you will have that
24 opportunity, and we'll reveal to you who the alternate juror
25 is right before those deliberations begin. But that's not

1 for several weeks.

2 I do want to now read to you a statement of
3 controverted facts, which means these are facts that the
4 parties have stipulated to and you therefore are to accept
5 them as facts in this case.

6 The SCO Group, Inc. is a Delaware corporation with
7 its principal place of business Lindon, Utah. It has been
8 in the business of developing and selling software products.

9 Novell, Inc. is a Delaware corporation with its
10 executive offices in Waltham, Massachusetts, and its
11 principal product development facility in Provo, Utah.
12 Novell is also involved in the development and sale of
13 software products.

14 UNIX is the name of a computer operating system
15 originally developed in the late 1960s by engineers at
16 AT&T's Bell Laboratories. Different versions of UNIX are in
17 widespread use around the world.

18 In September 1995, Novell, Inc. and the Santa Cruz
19 Operation, Inc. entered into an asset purchase agreement, or
20 APA. That APA was signed on September 19th, 1995, and was
21 amended in December 1995 and October of 1996.

22 The parties to the asset purchase agreement were
23 Santa Cruz and Novell, but SCO is now a party to the
24 agreement in lieu of Santa Cruz. That is because several
25 years ago SCO acquired from Sants Cruz all the UNIX and

1 UnixWare assets that Santa Cruz had acquired from Novell.

2 In March 2003, SCO filed a lawsuit against
3 International Business Machines Corporation, IBM, alleging
4 that, among other things, IBM had breached contracts that
5 SCO has the right to enforce. SCO subsequently terminated
6 those contracts for the alleged breach.

7 Linux is the name of a computer operating system
8 that was published as open-source software in the early
9 1990s.

10 As I indicated to you yesterday, the first thing
11 we'll deal with today now will be the opening statements.
12 The plaintiffs will go first and the defendants will then
13 respond thereafter.

14 Mr. Hatch, will you be going first or you, Mr.
15 Singer?

16 MR. SINGER: I will be.

17 THE COURT: Mr. Singer.

18 MR. SINGER: Good morning, ladies and gentlemen.
19 My name is Stuart Singer and I'm one of the attorneys for
20 the SCO Group in this case. I would like to begin by
21 thanking you for your service and taking time from your
22 lives to resolve this important dispute. There is no other
23 country except America which has a jury system to decide
24 civil cases. It wouldn't work without citizens like you.
25 So on behalf of my colleagues, on behalf of SCO Group, I

1 think on this issue I can speak for our opponents as well,
2 we thank you for your attention to this case.

3 I will be presenting the first part of our opening
4 statement and then Mr. Hatch will be presenting the second
5 part.

6 SCO Group is a computer software company based
7 here in Lindon, Utah. This is the building that SCO
8 occupied until December of 2009. SCO and its predecessor
9 companies have been in the software business for
10 approximately 30 years. And SCO's business is UNIX, which
11 is a computer operating system, like Windows, but for
12 business computers. There are millions of SCO UNIX products
13 in circulation and use around the world.

14 Now this is a case involving slander of title.
15 What does that mean, slander of title? Slander of title is
16 when one party, in this case Novell, falsely claims that
17 another party's, in this case my client, SCO Group, property
18 is, in fact, its own.

19 Now, for example, let's say you own a house and
20 someone comes along and says that's not your house, that's
21 my house, and that creates a cloud on your title and, as a
22 result of that, you can't sell your house. That's a slander
23 of title.

24 The same thing is true for companies. And here
25 the property which is being slandered is a copyright -- a

1 set of copyrights. Copyrights are what authors get to
2 protect books, musicians get to protect music, and computer
3 companies get to protect their programs. It's one of the
4 most valuable things that a computer company can have.

5 Now in this case, Novell falsely claimed that SCO
6 Group did not own the copyrights to the UNIX system. So
7 this slander went to the very heart of SCO's business. And
8 it came, ladies and gentlemen, from the very company that
9 sold the business to Santa Cruz in 1995, a company which
10 obviously knows or should know what it sold.

11 Now the slander involved here was made at the very
12 top of Novell. It came from the CEO initially, a man named
13 Jack Messman. That occurred on May 28th, 2003 when Novell
14 put out this press release that was circulated all over the
15 country and internationally saying SCO is not the owner of
16 the UNIX copyrights. They are saying that a check at the
17 copyright office would reveal that, that a review of the
18 asset transfer agreement between Novell and SCO confirms it.
19 And they are saying that the 1995 agreement did not convey
20 to SCO the associated copyrights and that SCO can't
21 demonstrate it has any ownership interest whatsoever in
22 those copyrights. This, I might note, came out on the very
23 day that SCO is reporting record earnings from licensing
24 products directly related to the ownership of these
25 copyrights.

1 THE COURT: Mr. Singer, excuse me one second.

2 Ladies and gentlemen, can you see what is on that
3 board, on those screens in front of you? Is there anyone
4 who cannot?

5 If at any time during the course of this trial you
6 think that you ought to be able to see something on the
7 screens and you can't, please let the Court know, because
8 there is some uncertainty. Okay.

9 Sorry, Mr. Singer.

10 MR. SINGER: Thank you, Your Honor.

11 Ladies and gentlemen, you will hear evidence that
12 Mr. Messman didn't bother to have anyone thoroughly check
13 Novell's own files and he did not know on May 28th, 2003
14 that there had been an amendment made to this asset purchase
15 agreement, the contract by which the UNIX assets were sold,
16 that makes clear that the copyrights did go over to the
17 purchaser along with the rest of the business.

18 So SCO sent them this amendment. And eight days
19 later, on June 6th, 2003, Novell admitted that they were
20 wrong. In another press release, this one issued on
21 June 6th, Novell says, Amendment No. 2 to the 1995
22 SCO-Novell asset purchase agreement was sent to Novell last
23 night by SCO. To Novell's knowledge, this amendment is not
24 present in Novell's files. By the way, we'll learn that it
25 was present in their files. They say the amendment appears

1 to support SCO's claim that ownership of certain copyrights
2 for UNIX did transfer to SCO in 1996.

3 Now if that was the end of the story, it would be
4 bad enough, a slander made and published to the entire world
5 on the very day that SCO was announcing record earnings.
6 But this is far worse, because not long after the June 6th
7 retraction, Novell decided to retract the retraction and
8 resume a campaign of slander.

9 So, on May 28th, we had the initial statement. On
10 June 6th, there was a retraction. There were some letters
11 back and forth between the parties. August 4th, Novell says
12 that SCO's claimed ownership in the UNIX technologies must
13 be rejected and they go back to saying they own the
14 copyrights.

15 In October they go in to obtain copyright
16 registrations themselves on UNIX, and they told the
17 copyright office they retain all or substantially all of the
18 ownership of the copyrights in UNIX, including the U.S.
19 copyright registration referenced above.

20 Then in December of 2003, December 22nd, another
21 important date, as you'll learn, Novell goes public again,
22 says they have the copyrights, and starts a Web page where
23 it continues to assert ownership of the UNIX copyrights to
24 this very day.

25 In January of 2004, they launched their own

1 program for licensing UNIX users to protect them against
2 infringement that competes with SCO's program.

3 In March 2004, a Novell executive goes so far as
4 to stand up at a convention and flat out say, we still own
5 UNIX, even though that was a product that was sold to our
6 client's predecessor and now belongs to SCO.

7 So this is a campaign of slander, broadcast and
8 repeated to the world that continues to this very day.
9 Mr. Hatch will talk later about the effect that this had on
10 SCO's business. It depended on those UNIX copyrights.

11 Now how do we know it's a slander? You will hear
12 tremendous amount of evidence about that in this trial.
13 What is remarkable, though, is that this is a case where the
14 executives at the time of the sale, on both Novell's side
15 and Santa Cruz's side, agreed that the copyrights were sold.

16 Ladies and gentlemen, you're going to hear
17 testimony in this trial from ten witnesses on both the
18 Novell and the Santa Cruz side of the transaction which
19 indicate that the copyrights were sold by Novell to Santa
20 Cruz.

21 Our first witness, which you'll hear later today,
22 is Robert Frankenberg. He was the president and chief
23 executive officer of Novell. The number one guy at the
24 time. He will testify that it was the intent of Novell to
25 sell the entire business, including the copyrights, that

1 that was the intent at the start of the transaction, it was
2 the intent throughout the transaction, at the end of the
3 transaction, that the copyrights were part of the business
4 being sold. He's the number one guy.

5 He charged a man named Duff Thompson, who was a
6 senior vice president, with finding a buyer and leading that
7 process. He will be our number two witness that you'll hear
8 either today or tomorrow morning. Mr. Thompson says the
9 same thing as Mr. Frankenberg, that this was the sale of the
10 entire business, including the copyrights.

11 Who was the lead negotiator working with
12 Mr. Thompson? That was a gentleman named Ed Chatlos.
13 You'll hear his testimony. He will be our third witness.
14 He says the same thing, the copyrights were sold. These are
15 the witnesses on Novell's side at the time of the
16 transaction. And other witnesses, like Mr. Levine and
17 Mr. Mattingly who were involved, will say the same thing.

18 Now, of course, on the buyer's side, Santa Cruz
19 Corporation, which at the time was in California and then it
20 was sold to a Utah company, which is why it's here now, they
21 say, of course we got the copyrights. We wouldn't have
22 bought the business if we didn't get the copyrights. It
23 would be ridiculous to buy a software business without the
24 copyrights.

25 Now since they are in California, we took their

1 depositions, which is testimony under oath, just as if the
2 witness was sitting in that witness stand, where the other
3 side's attorneys have a right to cross-examine, and you will
4 hear testimony -- and I'll just give you a couple of
5 snippets of it, but you will hear it at greater length
6 during the trial.

7 Doug Michels. Mr. Michels, you can see, was the
8 founder and vice president of Santa Cruz. He said, and I
9 quote, the only way that I know of and anyone on my team
10 knew to buy a software business is to buy the copyrights.
11 There is no way we would have ever done a deal to buy a
12 software business where we didn't get the copyrights and all
13 the other intellectual property.

14 Mr. Mohan, who is the CEO, is UNIX copyrights part
15 of the UNIX business? Absolutely. Did Santa Cruz get the
16 UNIX copyrights? Santa Cruz got the whole business.
17 Copyrights were part of it.

18 You will hear testimony as well from Mr. Wilt, Mr.
19 Sabbath, Ms. Madsen to the very same point.

20 Now it's unusual in a case that you have one
21 witness from the other side who agrees with your position.
22 Here, it's extraordinary that you have a set of five
23 witnesses from Novell, including the three top people,
24 involved in a transaction who agree.

25 Now we will also show you that this was a

1 particularly malicious slander because Novell knew better
2 than anyone else that they sold the copyrights. After all,
3 they were the seller of the business. It went to the most
4 important property that SCO had, its ownership of UNIX.

5 Now I would like to take a step back with you and
6 talk about UNIX, talk about the business and how this became
7 so important.

8 Now UNIX, like Windows, runs computers, except
9 it's significantly designed for business computers. SCO
10 UNIX runs businesses worldwide. If you go into a McDonald's
11 to order a hamburger, that's on a SCO UNIX system. If you
12 decide to purchase a share of stock on NASDAQ, that
13 transaction will be processed on a SCO UNIX system. If you
14 have a BMW and you take it in for servicing, SCO's software
15 helps runs BMW service centers. In fact, internationally,
16 the same is true, SCO UNIX products help run the German
17 train system, the China post office, and one of Russia's
18 largest banks. So while SCO is not a large company, its
19 products are in use and depended on by companies all over
20 the world.

21 Now SCO UNIX is the very heart of a lot of
22 products that other companies also market because SCO owns
23 the core intellectual property to UNIX. And over the years
24 that has been licensed by different people who own UNIX and
25 own those copyrights to a variety of companies, including

1 IBM, Siemens, Data General, Sequent, and at the heart of
2 that is the UNIX intellectual property that SCO holds by
3 license agreements and copyrights the right to control.

4 Now how did this company turn out to be SCO's
5 business? If we look at when UNIX was invented, that was in
6 1969 at the Bell Labs, which is owned by AT&T. And in 1993,
7 Novell acquired that business from AT&T for \$300 million.

8 Then in 1995, Santa Cruz Operation bought the
9 business. And you will hear that Novell received
10 compensation in excess of \$200 million for that.

11 And then in 2001, a company called Caldera, which
12 was based here in Utah, acquired UNIX business from Santa
13 Cruz and changed the name to the SCO Group, which is the
14 plaintiff in this suit.

15 Now Novell, as I mentioned, got handsomely paid
16 for this business, receiving over \$200 million in value.
17 And that consisted of 17 percent of Santa Cruz's common
18 stock, which was worth 50 to \$60 million, and a royalty
19 stream on what is called the SVRX licenses, that means
20 system V, some release of UNIX, which were licenses that
21 were already in place. Because Santa Cruz didn't have the
22 cash to pay all cash for the business and Novell didn't want
23 to take more than 17-percent stock, they decided the
24 difference would be bridged by this royalty stream, which
25 has resulted in over \$200 million over the years going to

1 Novell.

2 So why did Novell, having sold the business to
3 Santa Cruz, falsely claim that they still own the
4 copyrights? That brings us to Linux. Novell decided, along
5 with its business partner, IBM, to make a big commitment to
6 Linux.

7 Now what is Linux? It started as a hobbyist tool.
8 It was invented by a man in Finland, a student named Linus
9 Torvalds. In fact, the very name Linux is a combination of
10 Linus and UNIX.

11 Now Linux is open-source software, which means
12 that thousands of people around the world make
13 co-contributions to it, and the problem is no one can be
14 completely sure where that code is coming from. And Linux
15 was distributed for free. It started as a hobbyist tool.
16 But IBM decided that this would be a great platform around
17 which it could build other businesses and sell products.
18 And so they decided to enhance Linux, make in stronger for a
19 business tool by putting in UNIX technology. The only
20 problem is that UNIX technology belonged to SCO. It was
21 protected by contracts.

22 And IBM began doing this in early 2000 and 2001.
23 It had a tremendous effect on SCO's business. In 2003, SCO
24 decided they had to do something about it. They decided to
25 bring a lawsuit against IBM, and to ask users of Linux to

1 buy a license, to say, all right, if you want to use Linux,
2 pay us a license so that we're being compensated for the use
3 of what is our intellectual property. This is called
4 SCOSource licensing. You'll hear more about it during this
5 trial. SCO entered into a number of licenses with different
6 businesses for that.

7 And that was -- it was in discussions with many
8 more, when Novell pops up in May of 2003 and says, wait a
9 minute, SCO doesn't own the copyrights, you shouldn't buy a
10 license from them. And Novell went even further. When SCO
11 brought its dispute against IBM, Novell comes in and says,
12 we have the rights, even though we sold you the business, to
13 stop that lawsuit. And so they tried to stop the lawsuit
14 from even going forward on its merits.

15 Now we suggest it's not coincidence that soon
16 thereafter IBM invested \$50 million with Novell. What was
17 that for? So Novell could buy a Linux business too, which
18 they did at the same, in the fall of 2003.

19 Now what will Novell tell you about this
20 situation? Novell will tell you, despite what you have seen
21 and you will hear from these witnesses, that they kept the
22 copyrights after all. They owned the UNIX and UnixWare
23 copyrights. And I would like to talk about the evidence
24 that you will hear from which you can decide whether or not
25 that is true.

1 The first bucket of evidence that you can look at
2 is the testimony of the people who did the deal, these
3 executives. They looked each other in the eye, they shook
4 hands, and they said you've got the business. The evidence
5 is unmistakable that the intent was to sell copyrights.

6 But, ladies and gentlemen, there will also be
7 documentary proof. We're not just relying on this. This
8 was a transaction for business. And it was the APA, which
9 was a document which existed and was negotiated to
10 effectuate -- to put into effect the intent of those
11 executives in selling the business.

12 Now let's look at what the APA says. First of
13 all, it talks about what is the business being sold. It
14 says the seller, which is Novell, is engaged in a business
15 of developing a line of software products currently known as
16 UNIX and UnixWare, the sale of binary and source code
17 licenses -- binary is like you would buy if you buy a
18 product out in the market, source code is what is used to
19 develop new products because you can actually read it -- to
20 various versions of UNIX and UnixWare, that's the business.

21 What is the intent of the transaction? The
22 parties said in writing, it is the intent of the parties
23 that all of the business and all the backlog relating to the
24 business be transferred to the buyer.

25 So then what do you have in the manner in which

1 that was to be accomplished? You will see that there was a
2 list of assets which were being sold, a schedule. And that
3 schedule -- I know this is small. You will have a chance to
4 look at the document and we'll blow it up. This says, all
5 rights and ownership of UNIX and UnixWare, -- these are the
6 assets to be sold -- including but not limited to all
7 versions of UNIX and UnixWare and all copies of UNIX and
8 UnixWare, including all technical, design, development,
9 installation, et cetera, including source code, source
10 documentation and so forth, what we sold pertaining to the
11 following products, and it lists UnixWare and UNIX.

12 By the way, to the extent Novell is now going to
13 tell you, well, we just sold Santa Cruz UnixWare, we didn't
14 sell them SCO, the black and white language on this schedule
15 shows that isn't true. It shows that UNIX as well as
16 UnixWare software was sold.

17 Now the way this deal was put together, there was
18 a list of assets that were being sold, which is this
19 schedule, and there was a list of assets which were being
20 retained, because there were some businesses that Novell
21 wasn't selling, like a business called NetWare. And this is
22 where the problem that is behind this lawsuit occurred.
23 Because what happened is that the lawyers, you will hear,
24 ten days before the agreements were signed, put into this
25 schedule, even though it was against the intent of the

1 people who did the deal, they listed on those excluded
2 assets, which mainly dealt with this NetWare product, in the
3 middle of this document a line that said all copyrights and
4 trademarks as being excluded from the sale, inconsistent
5 with what you will hear all the business people intended.

6 And that wasn't caught at that time, but it was
7 caught a year later. And that language was amended. It was
8 changed. And that language went out of the agreement and in
9 its place is language which makes clear that the copyrights
10 that Novell is to keep do not include the copyrights
11 required for SCO to exercise its rights with respect to the
12 acquisition of the UNIX and UnixWare technologies. It fixed
13 the problem.

14 Now I might note, why is it that people didn't
15 catch this in 1995? Why is it that the minutes didn't
16 identify this correctly? The reason, we suggest, is because
17 the business executives took it for granted that the
18 copyrights were being sold. It was fundamental to the deal.
19 No one of the lawyers who put this language in ever raised
20 it with Santa Cruz. They never went to Santa Cruz and said,
21 we want to change the deal, we want to keep the copyrights.
22 They just put that in the schedule and it wasn't caught
23 until a year later.

24 Now you have here a transaction which closed in
25 December 2005. You will hear that Novell and Santa Cruz

1 went forward from that point, and all of their actions
2 reflected their understanding that the copyrights were sold.
3 The registrations were transferred, customers were
4 transferred, the products were re-marked, letters were sent.

5 The only thing which was inconsistent with that
6 were these minutes which were done by lawyers. But, in
7 fact, even the press release indicates that the entire
8 business, the intellectual property was sold. So if you
9 look at the official press release that was agreed to by
10 both Novell and Santa Cruz at the time of this sale, it
11 said, according to the terms of the agreement, SCO will
12 acquire Novell's UnixWare business and UNIX intellectual
13 property.

14 So a year later a dispute arises when Novell on
15 its own tries to restructure one of these license deals
16 with, guess who, IBM. Santa Cruz says, wait a second, we
17 own the business, you can't just do this unilaterally. And
18 Novell backs down. That is when this Amendment No. 2, which
19 is now part of the APA, was negotiated and took out the
20 language which Mr. Messman relied on May 28, 2003, not
21 knowing that he claims this amendment had been signed.

22 The new language makes clear that the copyrights
23 belong to SCO. Because, as we see, you have a section about
24 the sold assets, which were all rights and ownership of UNIX
25 and UnixWare, that includes the copyrights. Then you have

1 what was originally in the APA before the amendment, which
2 excluded the copyrights. Then that was fixed with Amendment
3 No. 2 which said, except for the copyrights required for SCO
4 to exercise its rights with respect to the acquisition of
5 UNIX and UnixWare technologies, which put the copyrights at
6 issue here back within the column of the sold assets, which
7 is why Novell, on June 6th, 2003, agreed.

8 Remember the chart where they said this amendment
9 appears to support SCO's claims that ownership of certain
10 copyrights of UNIX did transfer in 1996? So this was the
11 amendment that led Novell to admit, not in this court
12 proceeding but rather to the world, Amendment No. 2
13 supporting SCO's position.

14 Now it's also important to consider what is not
15 anywhere in this written amendment because SCO, Novell
16 concedes, had to run a software business. They were buying
17 a business. How were they going to run it without the
18 copyrights? Novell is going to tell you that all that SCO
19 got was an unwritten implied license, an unwritten license,
20 when you have a document like this. Now that doesn't make a
21 lot of sense.

22 You will hear testimony from Gervaise Davis, an
23 attorney and professor who has done hundreds of licensing
24 transactions in the computer business, and he will tell you
25 that he's never seen a sale of a software business where the

1 copyrights were not sold and you got something like an
2 implied license. For one reason, an implied licensee
3 couldn't bring any lawsuits to defend themselves against
4 someone taking their property. So it just doesn't make a
5 lot of sense.

6 In fact, the only license that did appear in this
7 asset purchase agreement was a license back. There was a
8 license from Santa Cruz back to Novell to use the
9 intellectual property which was being sold. So it wouldn't
10 make any sense for Novell to get a license back if they
11 hadn't sold the intellectual property to begin with.

12 Now you will also hear sworn testimony from Steve
13 Sabbath, who was general counsel, and Kimberlee Madsen, who
14 was an assistant negotiator at Santa Cruz, that indicates
15 that Amendment No. 2 clarified that these copyrights were
16 sold and that was the purpose of it. Ms. Madsen will come
17 here to testify. She has no interest in this dispute. She
18 works for Apple now. She will indicate that Amendment No. 2
19 was intended to confirm the sale of the copyrights.

20 Now you will hear testimony from a lawyer at
21 Novell on the other side, Ms. Amadia, that says, no, that
22 wasn't the intent. The intent was just this implied
23 license. You will have to judge whether that's credible.
24 You'll need to ask yourselves whether any amendment at all
25 was needed. If all SCO was getting was what they had in the

1 1995 agreement without the copyrights, why did they make
2 Amendment No. 2 at all?

3 So you'll have the testimony of all the
4 executives. You will have the documentary evidence. But,
5 ladies and gentlemen, there is a third type of evidence that
6 is very important for you to consider in this case as well,
7 this is because actions often speak louder than words. How
8 did the parties act after this deal was done in 1995? You
9 will see a lot of evidence on that.

10 You will hear from three witnesses who have been
11 there since AT&T days in the licensing and engineering area,
12 Mr. Broderick, Mr. Maciaszek and Mr. Nagle. They were there
13 at the time when this business transitioned in 1995 from
14 Novell to Santa Cruz. What will you hear from them? The
15 first thing you'll hear is that the copyrights went to Santa
16 Cruz. These are the original AT&T copyrights on UNIX that
17 go back to when these different systems were developed. And
18 then as more modifications occurred, more code was written,
19 additional copyrights were obtained. If Novell intended to
20 keep the copyrights, if they had a right to keep the
21 copyrights, why are the copyright registrations actually
22 with Santa Cruz? That doesn't make any sense whatsoever.

23 This in itself shows that Novell well recognized
24 Santa Cruz got the copyrights along with the rest of the
25 business. When they told the copyright office later in

1 2003, let us register the copyrights, that was false. We
2 already had those copyrights.

3 In addition, Novell, you will hear, worked with
4 Santa Cruz who actually re-marked the products showing SCO
5 as owner of the copyrights. Here's an example. This is a
6 product of SCO UnixWare product in 1996 right after the
7 sale, and it was re-marked with Santa Cruz Operation as the
8 copyright owner. And Novell worked with SCO's engineers to
9 do that. It doesn't make any sense if the copyrights
10 weren't being sold.

11 Customers were told that SCO now owned the entire
12 business. Here's a letter from Novell to one of those
13 customers, Prentice-Hall, and there are many letters similar
14 to this. What does it say? They told the customers, as you
15 may know, Novell transferred to the Santa Cruz Operation its
16 existing ownership interest in UNIX system-based offerings
17 listed in attachment A. What does attachment A say? All
18 releases of UNIX system V. Not just UnixWare. You'll hear
19 Novell telling you that. All releases of UNIX system V and
20 all UnixWare releases.

21 And what do they say after that? It makes
22 immeasurably more business sense for SCO, as the owner of
23 the transferred products, to handle directly with
24 Prentice-Hall any matters that may become relevant under
25 this subject agreement. SCO, as the owner of the

1 transferred products. How do you own a product? You own
2 the copyrights.

3 Now Novell will tell you that even if they were
4 wrong, you should find that they acted in good faith when
5 they made these slanders on Santa Cruz's title. And I
6 submit to you to ask yourself if that's good faith when you
7 are the seller. It's one thing if a stranger came along and
8 said I own this car and the stranger doesn't know better and
9 maybe the stranger was confused and made that statement in
10 honest error. But Novell owns this business. Novell knew
11 about all the things that I'm telling you. Therefore, when
12 you are the seller, there is no excuse for being wrong about
13 what you were sold.

14 Let's talk about what happened in May 2003.
15 Consider the position again of Jack Messman, Novell's chief
16 executive officer. He is considering putting out a press
17 release that he knows will be devastating to SCO. He's
18 going to tell the world that SCO doesn't own the copyrights
19 that protect its crown jewels, the UNIX business, and he's
20 going to say that Novell owns them. And Messman is the
21 chief executive officer of a major company. He has a lot of
22 people working for him. Does he make sure that he has the
23 correct document, one with all the amendments, including
24 Amendment No. 2, before going public? No, he doesn't do
25 that.

1 It turns out that that document was in the chief
2 financial officer's files, probably down the hall from him
3 in Waltham, Massachusetts. Does he pick up the phone and
4 call Bob Frankenberg, who was the CEO before him, on the
5 board at Novell, and say, were the copyrights sold? No, he
6 doesn't do that. Does he talk to Mr. Thompson or Mr.
7 Chatlos? No. He simply goes public and he wrongly states
8 that the copyrights don't belong to Santa Cruz. And he
9 admits this in deposition testimony that was taken from him.

10 I asked him under oath, so is it fair to say that
11 Novell, through your action as CEO, intentionally
12 communicated to the public on May 28th, 2003 that SCO did
13 not own the UNIX copyrights? Is that correct? Answer, yes.
14 Did you approve this letter before it was sent? Answer,
15 yes. But you had not been aware of the Amendment No. 2?
16 That's right.

17 So then SCO sends them Amendment No. 2 and says,
18 here it is. And Novell recognized they were wrong. The
19 very next day, Darl McBride, who you will hear testify,
20 SCO's chief executive officer, said, what are you doing, Mr.
21 Messman, Amendment No. 2 makes clear that the copyrights are
22 owned by SCO, and he sent them a copy of that.

23 Mr. Messman now admits that the copy of Amendment
24 No. 2 was in their files. I asked him under oath, so at the
25 time Novell said this, it was not aware that the signed copy

1 was in Novell's files? It later turned out to be in
2 Novell's files; is that correct? Answer, yes. So there was
3 no excuse for him making that slander.

4 But Novell was so intent on discrediting SCO, and
5 because of Novell's ties to IBM, Novell decided, as we've
6 seen, to retract the retraction and to continue with this
7 campaign of slander throughout 2003. In September 2003,
8 they sought their own copyright registrations falsely
9 telling the U.S. Copyright Office that they owned these
10 copyrights.

11 Now copyrights are not like patents. There is not
12 a process by which the government approves them and decides
13 whether or not it's a proper patent. You apply for a
14 registration. The government assumes you are making a true
15 and correct statement and issues it. That's how they got
16 registrations and were able to tell the world in December of
17 2003 we're the copyright owner.

18 In November 2003, they buy Suse Linux, a Linux
19 company, so they can go into the Linux business themselves.
20 They get \$50 million from IBM to invest to help them buy
21 that company.

22 Then we get to spring 2004 when Chris Stone, who
23 becomes Novell's vice chairman, Novell's number two man,
24 stands up at a computer software business and he repeats the
25 slander.

1 I think we're going to need to rerun that.

2 (Video clip played)

3 MR. SINGER: So here you have him publicly saying
4 flat out, we still own UNIX, we still own UNIX, even though
5 they have sold the company, they've told customers they've
6 sold the company, we have copyright registrations, and they
7 are continuing to slander in public.

8 Compare, if you will, what Mr. Stone said, we
9 still own UNIX, to what Novell told its customers in 1995
10 when the deal was done. In 1995, they say Novell
11 transferred to the Santa Cruz Operation its existing
12 ownership interest in UNIX system-based offerings, which are
13 defined as all releases of UNIX. And in 2003, their vice
14 chairman stands up and says, quote, we still own UNIX. That
15 was false, that was slander we believe you will find. And
16 to this day Novell, on their Web site, continues to
17 republish that slander. So there will be plenty of evidence
18 where you will be able to conclude that Novell acted
19 recklessly, intentionally and maliciously.

20 But there is something more. All of this was
21 timed to harm SCO to the max. Chris Stone, the man who
22 stood up at the 2004 conference and said we still own UNIX,
23 is also the Novell executive who talked to the press on May
24 28th, 2003, and said, here's the press release we're going
25 to put out. And you will hear sworn testimony from one of

1 the reporters he talked with, a lady named Maureen O'Gara,
2 where Mr. Stone admitted that they picked May 28th, 2003
3 because that was the very day that SCO was going to announce
4 its record earnings for the first quarter, for the period
5 where they were selling their SCOSource product, the very
6 day. And you will have to consider whether Mr. Stone says,
7 oh, that was just a coincidence, whether that's believable.
8 But Ms. O'Gara says, under oath, that that press release was
9 timed on May 28th, 2003 to do maximum damage to, quote, up
10 end the stock, to, quote, throw a monkey wrench into SCO.
11 That's what Mr. Stone told Ms. O'Gara. And Ms. O'Gara
12 testified that Mr. Stone said it laughing.

13 Then they did it again in December. December
14 22nd, 2003 is when Novell decides to come out with a press
15 release which says, again, they own the copyrights in UNIX.
16 And it claimed they had the copyright registrations. And
17 don't you know it, December 22nd, 2003 is the day that SCO
18 reports its record earnings for the year. Another
19 coincidence? These things were intended to harm SCO to the
20 max.

21 Now we anticipate that Novell's final defense will
22 be to attack SCO in this very courtroom. They filed a
23 counterclaim asking you to find that we've slandered their
24 title, which you'll see is entirely without support. They
25 will say that SCO is a disliked company and there was no

1 proof of infringement.

2 Now it's not surprising that some people didn't
3 like the fact that SCO, to protect itself, filed a lawsuit
4 against IBM and was trying to obtain licenses from people
5 who were using Linux. People didn't like the fact that a
6 free product, they may have to pay a license for, and that
7 SCO's enforcement of its rights was unpopular in some
8 courts. Taking on companies like IBM and Novell has
9 repercussions in the technology business.

10 Then, to be sure, there were differences in
11 opinion about whether Linux infringes UNIX. There is a lot
12 of evidence to be presented. You are not going to need to
13 decide that issue. The courts will ultimately determine
14 that.

15 You'll hear testimony that 19 to 45 percent of the
16 people who used Linux in a corporate setting believed there
17 was enough to the infringement issue that they wanted to buy
18 a protection, a license. But what held it up, you're not
19 going to buy it from someone if you don't believe they have
20 the copyrights, that they have a right to sell it to you.
21 You will see before the slander occurred, some companies did
22 buy that, including Microsoft and Sun, entered into license
23 agreements with Santa Cruz.

24 So it's one thing if Novell said we don't think
25 Linux infringes UNIX. They said that. They had a right to

1 say that. That would be fair. It's a matter of opinion.
2 But copyright ownership, we think you will conclude, is not
3 a matter of opinion. It's a matter of fact. And when they
4 said we still own the copyrights, we still own UNIX, that
5 was false, it was intentional and it was maliciously false.
6 For SCO, whose business depended on those copyrights, it was
7 the most damaging slander imaginable.

8 Now I'm going to turn the podium over to
9 Mr. Hatch, who will talk about the effect of the slander and
10 the damages that SCO has suffered.

11 Thank you very much.

12 THE COURT: Mr. Hatch, 15.

13 MR. HATCH: Thank you, Your Honor.

14 Ladies and gentlemen, actions cause effects. The
15 evidence you are going to hear going to trial will show that
16 Novell's false claims of ownership, these copyrights,
17 seriously harmed SCO's business, particularly SCOSource
18 business, and they did this to benefit their ongoing
19 businesses. They had a reason. They had intent.

20 You recall Mr. Singer told you the SCOSource was a
21 licensing program whereby SCO based its ownership on UNIX --
22 based on its ownership of UNIX was able to sell its property
23 to Linux users and make money off of that.

24 Now Mr. Singer just told you about Mr. Stone, and
25 it's true that the evidence is going to show that they timed

1 their slander to inflict maximum damage on SCO. Novell
2 understood that it was making its slanderous statements
3 about the ownership timed exactly to overshadow SCO's
4 positive financial results, and that was going to affect
5 their stock price. He laughed, as Mr. Singer said, he
6 laughed when he told this to the press. He picked that
7 time.

8 Now, through these actions, Novell was being
9 malicious. They were making every effort to hurt SCO.
10 We'll show you that that is exactly what happened here.
11 Novell, through its actions, planned the effect of maximum
12 damages, and they succeeded.

13 Now during this trial we're going to introduce
14 evidence that many of the largest companies in America
15 considered and decided not to do business with SCO because
16 of the copyright ownership issue being up in the air, as
17 Novell had raised it. We'll prove that Novell's malicious
18 slander of SCO was a substantial factor in these companies
19 choosing not to do business with SCO. How do we know this?
20 There will be evidence presented that many of them said so.
21 They told us.

22 Now to understand that Novell's malicious acts
23 caused the market to devalue SCO's business and caused
24 customers to decide not to license SCO's SCOsource products,
25 we'll show you what happened to the market for SCO's stock

1 the day of Novell's damaging, slanderous statement on May
2 28th, 2003, that Mr. Singer talked about earlier.

3 Let me put that up. This is the instance where
4 they claim to the world that they owned the copyrights, and
5 not SCO.

6 On that day, based on publicly available
7 information, it shows that the sales -- and this chart shows
8 various sales throughout the day of SCO's stock and the
9 price at which they were sold. You can see it began in the
10 \$10 range with very sporadic trading, and basically held
11 fairly level throughout the day.

12 You will notice at about one o'clock -- you will
13 see it's a military clock -- eastern standard time, just
14 after 1:12 p.m eastern time, Novell had made its slanderous
15 statements, the ones contained here. What happened almost
16 immediately is the bottom fell out of SCO's stock. And Dr.
17 Botosan is going to come here and show you that nothing else
18 happened this day that could have caused that. Almost
19 immediately after SCO made its slanderous statements -- I
20 mean Novell made its slanderous statements, SCO's stock
21 tanked. Now that shows the initial effect of the slander.

22 The interesting thing about that day is that May
23 28th was the same day that SCO was going to announce to the
24 world its earnings. Its quarterly report was going to show
25 that they had made over \$21 million in revenues and more

1 than \$4 million in profits. That was record quarterly
2 revenue. Those results would normally have resulted in a
3 stock going through the roof.

4 Novell decided to chose this day to go public.
5 You will hear testimony from Novell executives, and you've
6 heard Mr. Stone talking about it and laughing about it, they
7 are claiming now, when we brought that up and called them on
8 it, that it was just coincidence.

9 Well, one week later after doing that and trying
10 to cause damage to Novell, Mr. Singer pointed out to you,
11 one week later when they finally read Amendment 2, claim
12 they didn't have it, they turn around and they say, oh,
13 well, it appears SCO does own the copyrights.

14 Now we've been litigating this case for years,
15 you're going to spend three weeks at trial, and they are
16 going to bring a lot of people in here to say, well, we
17 really didn't do that. But the interesting thing about this
18 statement one week later is when they first saw Amendment 2,
19 first saw it, what was their initial reaction? This is
20 before they hired hoards of lawyers. Some of them are going
21 to come into court and tell you, oh, no, through legalities
22 and other stuff, we didn't really sell to you what everybody
23 on both sides -- every business executive on both sides of
24 the sale said we sold. Their first reaction, we sold it.

25 So they tell the public that, and you are going to

1 hear Novell say, well, we see that the stock went down. But
2 you know what, later it went back up. And you will see
3 charts that show that after this particular statement, the
4 stock recovered almost the same amount as having gone down.
5 What does that tell you? It tells you that people in the
6 marketplace, when they knew SCO owned the copyrights and
7 Novell had admitted to it, they are listening. They
8 understand these SCOsource licenses and the copyrights mean
9 everything to SCO's business.

10 You will see that over the course of the next
11 couple of years, while the stock price starts to go back up,
12 and, you know, there are days when it goes down -- let me do
13 it this way. I knew that high tech wouldn't work very well.
14 I should have started here. It goes down, May 28th.
15 Recovers. And then over the course of the next six months
16 or so, it has blimps up and down, up and down, but the stock
17 goes up in price.

18 Then what happens December 22nd, about six months
19 later, after meeting with the lawyers, after ignoring what
20 they saw, they said the first time they see the amendment,
21 their initial reaction, they start to say, because they want
22 to do this December 22nd, that we don't own the copyrights
23 again. They republish the slander.

24 Now Novell is going to say, well, you gained all
25 this back. But then they do it again. You're going to see

1 over the course of two years the stock starts to turn down
2 again. What that shows you is the market understood. They
3 understood what was important to SCO and what was important
4 to their business being able to succeed.

5 Now during this time, during the time where there
6 were not a lot of public statements here, this is when it
7 became public, when it's going up, you are going to see that
8 during that time, the evidence from Ms. Botosan and others,
9 that there were independent market analysts who were
10 forecasting that SCO would make significant profits through
11 its SCOSource program, because at the time the market didn't
12 realize that Novell was soon going to flip flop and again
13 reassert its slanderous claims.

14 Now, regrettably, because of this change in heart
15 in Novell, I want you to think about -- remember the first
16 slander, the day they picked, what do you think December
17 22nd was? The evidence is going to show that that was the
18 same day as SCO's fourth quarter and year-end earnings was
19 going to be announced, an announcement that SCO was going to
20 announce over \$79 million of revenues for the year, over \$5
21 million in profits, and about \$25 million of the revenues
22 came from this SCOSource program that was just beginning.

23 Now a public company like SCO makes those earnings
24 announcements four times a year, once each quarter. Those
25 days are known in advance. Of the 365 days in a year that

1 Novell could have chosen to make its claims, Novell zeroed
2 in precisely on the days that would have the most damaging
3 effect on SCO, the days of their positive quarterly and
4 annual earnings reports. They are going to call that a
5 coincidence, and it wasn't. That's malicious, that's
6 knowing, that's intent.

7 Now Novell continued to slander SCO by repeatedly
8 claiming that it owned UNIX during the next two years, and
9 this ongoing campaign of slander was causing SCO's customers
10 to turn down deal after deal. You will hear from the
11 executives who were negotiating at SCO, who were negotiating
12 SCOsource licenses out in the marketplace, and they will
13 tell you that Novell's campaign of this information to some
14 of the largest business in America was, in fact, harmful to
15 SCO's business.

16 I put just a few of them up here, contracts that
17 couldn't be reached. Morgan Stanley, for instance, said
18 they refused to meet with SCO until SCO provided, among
19 other things, documents or information that disproved press
20 reports that questioned SCO's claim of ownership of the
21 relevant UNIX code. Cause, effect. Action, cause, effect.
22 Ford, same thing. Sherwin Williams, same thing. Merrill
23 Lynch, Hewlett Packard, Google, even the United States
24 Department of Defense. Novell's statements were a
25 substantial factor why these companies and others did not go

1 with buying SCOsource licenses from SCO.

2 Novell will try to convince you that SCO never
3 made a profit. You just heard that's not true. In any
4 event, that's not an excuse for what Novell did to SCO.
5 Under Novell's theory, if you can destroy a smaller
6 competitor quickly --

7 MR. BRENNAN: Objection, Your Honor, this is
8 argument, not an opening statement.

9 THE COURT: Sustained.

10 MR. HATCH: The evidence is going to show that
11 if -- Novell will argue that SCO was never a particularly
12 successful company. The evidence is going to show you,
13 though, that the SCOsource program would not have been any
14 different -- it will show you that SCO would have been
15 successful. Novell is going to tell you that SCO's UNIX
16 business, the part of the business we're talking about here
17 in this trial, this SCOsource business had millions of
18 dollars -- UNIX part of this business had millions of
19 dollars of revenue and it really was the most profitable of
20 SCO's businesses.

21 Those profits were being plowed, the evidence will
22 show, into other parts of the business to upgrade SCO's
23 products, to hire more employees, including here in Utah
24 County. So, technically speaking, SCO did have some
25 unprofitable years while they built up their business. I

1 want to be real up front about that.

2 But what Novell doesn't want you to know --

3 MR. BRENNAN: Objection, this is argument. It's
4 not evidence.

5 THE COURT: Sustained.

6 MR. HATCH: I will rephrase that, then, Your
7 Honor.

8 The evidence is going to show in the very quarter
9 that Novell first attacked in the May 28th slander, that
10 over \$20 million in revenues were reported by SCO and
11 \$4 million in profits. Those weren't losses. Those were
12 profits. And those profits were attributable, and the
13 evidence will show, in large part, to the success of the
14 SCOsource program.

15 The evidence is going to show that before Novell
16 began to make its slanderous statements, SCO had already
17 signed large deals that were related to its SCOsource
18 program and bringing in millions of dollars. The evidence
19 is going to show that before Novell's slander, the SCOsource
20 program had generated a substantial amount of interest in
21 the Linux marketplace and that SCO had many other SCOsource
22 deals in the pipeline.

23 Now one potential customer that we're going to
24 highlight is Hewlett Packard. HP is one of the largest
25 companies in the world. We have all possibly owned their

1 computers and their printers. SCO was in the middle of
2 negotiating with them a deal in the tens of millions of
3 dollars. The evidence will show that when negotiations
4 broke down, it broke down because of Novell's slander,
5 because Novell was claiming the ownership of the copyrights.
6 Needless to say, Hewlett Packard wasn't going to spend
7 millions of dollars on licenses from SCO if those copyright
8 issues were still being disputed. That's just one deal.

9 THE COURT: Mr. Hatch, you have three minutes
10 left.

11 MR. HATCH: SCO will ask you to make an award that
12 will just make them whole, and that's fair. To assist you
13 in understanding and quantifying the damages to SCO, we'll
14 present evidence through experts that these damages were
15 conservatively calculated. You are going to hear from Dr.
16 Gary Pisano, who is a professor at the Harvard Business
17 School. Dr. Pisano, he is going to show in the total
18 marketplace -- and you heard Mr. Singer talk about this,
19 that the total possible marketplace, based on his research
20 and looking at other independent researchers and using
21 conservative estimates, that if you add the very likely and
22 somewhat likely, almost 45 percent of the marketplace would
23 have been likely purchasers of SCOsource products. Now he's
24 going to say that even though that Novell may argue that SCO
25 was not liked, was hated, that there were other reasons. He

1 said he took all of those things into account and they still
2 would have had success in the marketplace.

3 You are also going to hear from Dr. Christine
4 Botosan, a professor of accounting at the University of
5 Utah. Dr. Botosan, who has a Ph.D, conducted her own
6 analysis and was able to calculate damages to SCO. She will
7 be here to show you exactly how the damages were calculated
8 and how much they are. Importantly, Dr. Botosan was able to
9 compare her work with that of Dr. Pisano, and their
10 calculations led to similar results.

11 Dr. Botosan is an accounting professor and she
12 teaches her students, when dealing with financial statements
13 and financial matters, that you should be conservative. You
14 shouldn't exaggerate. That's exactly what she did here. In
15 every instance, Dr. Botosan used numbers, forecasts and
16 assumptions that were conservative and reasonable. And that
17 even though the damages asked for here will be large, they
18 will be fair. And the evidence will show that in doing so,
19 SCO was affording Novell what Novell did not afford SCO.

20 Thank you.

21 THE COURT: Thank you, Mr. Singer, Mr. Hatch.

22 Ladies and gentlemen, we're going to take a brief
23 recess here in the courtroom while defendants get the
24 opportunity to set up. If you would like to stand up and
25 stretch your legs, please feel free to do so.

1 If we could please have the courtroom come back to
2 order.

3 Mr. Brennan, go ahead, please. Thank you.

4 MR. BRENNAN: Thank you, Your Honor.

5 May it please the Court, and ladies and gentlemen
6 of the jury, let me reintroduce myself. My name is Sterling
7 Brennan. I practice law here in Salt Lake City. Yesterday
8 I introduced my colleagues, Michael Jacobs and Eric Acker of
9 the law firm of Morrison and Foerster. Mr. Jacobs and Mr.
10 Acker and I have been able to practice law together for many
11 years, and we're grateful that we have the opportunity to
12 represent Novell during the course of this trial. Also
13 yesterday I introduced Mr. Dana Russell, who is Novell's
14 senior vice president and its chief financial officer.

15 I do join Mr. Singer in expressing our
16 appreciation for your willingness to serve. We're mindful
17 of the sacrifice that you make. On Novell's behalf, we'll
18 do our very best to be efficient and clear in presenting the
19 evidence. And we believe, and as we intend to show, the
20 evidence will establish that Novell has not slandered, as
21 you've heard today, the claim of ownership to the UNIX
22 copyrights. In fact, Novell intends to show that no slander
23 could have occurred for a number of reasons.

24 First of all, Novell believes that to this day it
25 owns the UNIX copyrights. In addition, Novell is entitled,

1 as an exercise of its free speech, to comment on matters
2 that have been put into the public forum by SCO, and that
3 Novell was well within its rights to claim its ownership and
4 to challenge SCO to demonstrate that, in fact, it owned the
5 copyrights.

6 In addition, Novell's public statements that have
7 been identified for you today were in response to public
8 statements and threats that, in fact, SCO shared with
9 others. And the evidence will show that what, in fact, SCO
10 did was sent letters -- some 1500 letters out to the world
11 to those who were using this Linux software and open source,
12 free source of software, and what SCO was attempting to do
13 was to leverage on the users of the Linux open-source
14 software royalty payments, or license payments. And that by
15 putting that claim into the public domain, Novell then
16 reserved the right, as an exercise of its free speech, to
17 clarify and to state its position regarding ownership.

18 Now I want to share with you just a little bit of
19 information about Novell. Some of you may be familiar with
20 the entity. As the Court shared with you at the outset in
21 terms of noncontested established facts, Novell is a company
22 that has been in existence since about 1979. It was
23 incorporated and formed here in Utah -- at least the
24 business was operated in Utah since 1983. And Novell
25 maintains to this day a large campus operation in Provo.

1 If we were to focus on the time period of 1995,
2 which is the period when Novell entered into the subject
3 agreement with Santa Cruz Operation, Novell had a number of
4 major projects and products that it offered. One was a
5 product called NetWare. It also offered a product called
6 WordPerfect. It also was the owner and offered UNIX. There
7 also was a flavor of UNIX called UnixWare, which was a joint
8 development between Novell and AT&T Labs.

9 Now you've heard a little bit about SCO. That is
10 shorthand version for what is sometimes an acronym. SCO
11 takes it's name from a company that was formed in 1979 in
12 California called the Santa Cruz Operation, Inc. The Santa
13 Cruz Operation, Inc. was a software company that, in
14 essence, also was dealing in UNIX based system softwares.
15 And then it was in May of 2001 that a company called Caldera
16 acquired whatever rights, and we'll talk about what those
17 rights were relating to UnixWare from Santa Cruz Operation.
18 Caldera changed its name to the SCO Group in August of 2002.
19 So the plaintiff in this case is this entity that we, in
20 shorthand reference, call SCO, but its full title is SCO
21 Group, Inc.

22 There have been a number of terms that have been
23 bandied about already in the trial. Since you're,
24 hopefully, going to be patient enough to be with us
25 throughout the three weeks likely that we'll be together,

1 there will be a number of terms that are used. Mr. Singer
2 made reference to some of them today.

3 At the end of the evidence, as the Court has
4 already informed you, you will receive legal instructions,
5 the law that you are to apply. What I have to say here
6 today, no more than that which my learned colleagues
7 representing SCO suggested, is not evidence. Instead, it's
8 our role to suggest what the evidence will be, and then
9 we'll present the evidence and you will be the judges of the
10 facts.

11 There are a couple of terms, however, that I think
12 might be helpful for this discussion today. One is
13 copyrights. Copyright, in simple terms, is a property right
14 this is given to the creator or author of an original
15 creative work. And so, as indicated, it could be a book.
16 It could be a play. In this case it can be a creation --
17 the original creation of computer software.

18 There is also a reference that you've heard to
19 operating systems. Some of you will be familiar with
20 prominent operating systems. Microsoft Corporation offers
21 one called Windows. And many, particularly consumer
22 computers, run off Microsoft Windows. Apple Corporation
23 also has an operating system, their variance. One is the
24 Mac system.

25 One of the very first operating systems that was

1 developed is this operating system called UNIX, developed by
2 AT&T, and that development began as early as 1969. UNIX
3 itself was a forerunner to what really led to the
4 development of the Internet in many ways.

5 The operating system, in shorthand, is the
6 interface between the user, typically the operator of the
7 computer, and the hardware, and it allows instruction to be
8 given, allocates computer resources. So virtually every
9 computer operates off of an operating system.

10 Now UNIX itself developed a variant of UNIX called
11 SVRX. You will hear that term. You'll see that term when
12 you look at the actual documents in the case. Let me help
13 you understand what SVRX refers to.

14 In the UNIX terminology, the s refers to system.
15 The V is the Roman numeral V standing for five. The R is
16 the release. And then the X is the variant for the version
17 of that release. Sometimes your software 1.1, 1.2. It's
18 that same sort of concept. So SVRX is a shorthand reference
19 to UNIX's system V release and then whatever the number
20 release is.

21 You are also going to hear about the term license
22 and royalties. Well, here's the simple concept behind a
23 license and a royalty. A license, essentially, is the right
24 that the owner of copyrighted software would grant to
25 someone else to make some sort of use of it. The license

1 itself would typically describe the scope of the use. It
2 also would likely, depending on what sort of arrangement
3 there is, would define the payment, if there is a payment
4 required, for the user to use that copyrighted software.

5 Novell enters into many license agreements, as do
6 other software companies. The license would set forth what
7 are the payment terms and, again, what the use terms are,
8 and would typically specify what version is included.

9 Now you will also hear the term NetWare. Netware
10 is a proprietary operating system that was developed by
11 Novell. It's a little different than some of the operating
12 systems that we've already made reference to in that NetWare
13 was and is intended to help networks of computers join
14 together to operate. Rather than perhaps a stand-alone
15 computer, networks are created joining devices. The NetWare
16 is a Novell product that helps those systems operate.

17 Now you've also heard the term and will throughout
18 the course of this trial something called UnixWare.

19 UnixWare is a joint development, initially between AT&T and
20 Novell, to develop a variant, what we call a flavor of UNIX,
21 that was intended to help network systems operate as well.

22 UnixWare itself was, as we'll see, transferred
23 later to Santa Cruz Operation and then was transferred to
24 the SCO Group. But not all of UnixWare, as we're going to
25 see, it was not a complete transfer of everything that

1 pertains to UNIX or UnixWare, but just parts.

2 Now when companies decide to sell all or part of
3 their assets to another, there are a variety of mechanisms
4 that could be used. Sometimes companies will whole merger
5 where one company becomes in its entirety part of the other.
6 There are other situations where companies, just as
7 individuals do, would intend to sell a part or a portion of
8 their assets. And the typical vehicle for that is an asset
9 purchase agreement. Rather than sell the entirety of the
10 business, one would sell a part. Sometimes those
11 agreements, depending on what is written in them, also
12 describe what liabilities might go with the assets. And the
13 document that defines what the rights and obligations and
14 duties of the parties are is typically the asset purchase
15 agreement.

16 Now you've also heard reference to something
17 called SCOsource. That is a program that SCO Group, Inc.,
18 the plaintiff in this case, undertook in 2003. And, as the
19 evidence will show you, in a complete 180-degree turnaround
20 from the business practices of the SCO Group before, which
21 had been involved in helping Linux users, the SCO Group, in
22 2003, made this complete about-face and, as the evidence
23 will demonstrate, turned on Linux users and went out to them
24 and said, this Linux that you've been using and, in fact,
25 products that we've been developing and help you use, we now

1 have determined infringe UNIX copyrights. So instead of
2 helping you, our customers, we're now going to come to you
3 and demand that you pay us or else we'll sue you for
4 copyright infringement.

5 That is the large motivator for the lawsuit.
6 Contrary to what you've heard suggested to you today, the
7 real change in the world was SCO Group, in 2003, completely
8 changing its business model and going after, as has not yet
9 been established that they even had the right to do, going
10 after Linux users and trying to make a profit off of them.

11 Now there will be a number of things that will be
12 the themes of this case. I want to suggest them to you, but
13 first I need to make this suggestion to you. Of necessity,
14 because the way the rules work, Novell goes second. The SCO
15 Group is the plaintiff, bearing the burden of proof, as the
16 Court has outlined, needs to go first. It will put on the
17 evidence it feels will demonstrate its case. Novell, on the
18 other hand, must stand back patiently and wait for its turn.
19 I may have to bite my tongue hard for the first half of this
20 trial. But then we'll have a chance to put on our evidence,
21 to tell our story, to demonstrate why Novell believes it has
22 not slandered SCO's title. We're going to have to ask you
23 to be patient and not to make any judgments until you've
24 heard all the evidence and the story.

25 This reminds me of a radio program that I used to

1 enjoy. I wish it were still on the air. As I would drive
2 to work up I-15, there was a radio commentator, Paul Harvey.
3 He had a famous daily program called the Rest of the Story.
4 The premise was something like this. Mr. Harvey, in a
5 unique voice -- I would embarrass myself if I tried to mimic
6 it, but in a unique way Mr. Harvey would tell the first
7 after half of a real life account, someone famous in history
8 or an event. One would get the picture, listening to the
9 first half, that the outcome was going to be something in
10 particular. Then he would take a commercial break and come
11 back and tell the rest of the story. The outcome was
12 unanticipated and different than one thought.

13 Well, with that analogy in mind, I need to ask you
14 to wait until we can give you the rest of the story because
15 it will be, in our estimation, far different than you hear
16 perhaps in the first part.

17 Now the themes, again, in this case are three-fold
18 at least. One, as I've indicated, Novell has a free speech
19 right. It has a constitutional right when there has been an
20 issue that's been injected in the public forum to speak its
21 mind and to state its position. Novell has done that, and
22 it can't be liable, we believe the evidence will show, for
23 speaking its mind.

24 Secondly, words really matter. I'm going to show
25 you in greater detail than you had a chance to see this

1 morning parts of this. This is the asset purchase agreement
2 between Novell and the Santa Cruz Operation that was entered
3 into in 1995. And there are some very important words in
4 here. The suggestion was made, oh, these were just lawyers
5 who wrote it. Lawyers did write it, on purpose. And both
6 sides were represented by very capable, experienced lawyers.
7 And, in fact, most people, large companies, who do they turn
8 to when the words matter? They do turn to their lawyers to
9 make sure that the words are written in a precise way. So
10 rather than just kind of gloss over the words, it's going to
11 be important today that we look at them and understand what
12 really is happening.

13 Now there has been another entity -- or product
14 that's been referenced to, and that's Linux. Again, Linux
15 is a little different than some other computer programs
16 because Linux is developed through what's called the
17 open-source community. Rather than being private
18 individuals who are developing software for profit, there
19 are other software contributors who, in this collaborative
20 group sense, develop and take this software and improve it.

21 A common example sometimes that you would have
22 seen perhaps is Wikipedia. Wikipedia is an online,
23 essentially, encyclopedia, and people are free to make their
24 contributions and add to it. Linux is very similar to that.
25 So Linux is going to be an important focus of what we talk

1 about here today and through the course of this trial.

2 Here's a quick overview. We mentioned that Novell
3 acquired all of the rights -- it's important that I
4 underscore that term all of the rights to UNIX from AT&T in
5 1993. As we'll show you, when Novell acquired all the
6 rights to UNIX, it was not in an asset purchase agreement
7 where some of the assets were acquired. Instead, it was,
8 essentially, through a merger where all of the assets were
9 placed inside Novell. That's in contrast to what you will
10 see with the agreement that is at issue in this case between
11 Novell and Santa Cruz Operation, entered into in 1995.

12 The 1995 deal between Novell and Santa Cruz was a
13 selected asset purchase where only part of the assets were
14 acquired. The asset purchase agreement was drafted, signed
15 in September of 1995. The deal did not close, on purpose,
16 for several months. We'll see there was a reason for that.
17 Both sides, after signing the agreement, were given nearly
18 three months to carefully review it before there was
19 actually a transfer.

20 It's not a perfect analogy, but those of you who
21 have been involved in the sale of a home, you sign an
22 agreement to buy a house, but there's an escrow period where
23 people get a chance to check it out to make sure there was
24 no mistake, that what they did agree to buy is what they end
25 up buying.

1 The parties here, Novell and Santa Cruz Operation,
2 took nearly three months to carefully scrutinize this word
3 for word to make sure that the words were right, that they
4 mattered, and they did. So the deal closed in December of
5 1995, and there was an amendment entered into on December
6 6th, 1995 to correct any errors. As we'll show you, nothing
7 was changed regarding the assets that were excluded from
8 this transaction, including the UNIX assets.

9 Well, then for nearly six years things go along
10 without significant challenge or difficulty. In May of
11 2001, as we've indicated, Caldera acquires whatever UNIX
12 rights Santa Cruz Operation had. And then where things
13 became tumultuous was in the second half of 2002 and the
14 first half of 2003. The evidence will show these
15 developments.

16 SCO hired a new chief executive officer, an
17 individual by the name of Darl McBride. Mr. McBride came
18 in, realized that Caldera, now renamed SCO -- or to be
19 renamed SCO was not doing well. Mr. Hatch did indicate that
20 they did not have profits. They were a struggling business.

21 Mr. McBride, as you will hear, recognized that he
22 had to try something radically different, and that is to
23 turn on his previous customers. Instead of helping the
24 Linux users and developing products that would help the
25 open-source community, he decided we'll go out and extract

1 license fees from these very people we've been trying to
2 help.

3 So it was in the early part of 2003, January of
4 2003, that Mr. McBride and SCO launched this SCOSource
5 license program where they sent all these threatening demand
6 letters to Linux users, you've been using Linux, we now
7 claim we own UNIX, and we think, although they've never had
8 proof, that Linux infringes UNIX, and so pay us an
9 extravagant license fee. And those letters went out in May
10 of 2003.

11 Now I want to step back so we can clearly
12 understand what this asset purchase agreement means, what it
13 says and what it doesn't say. I told you that, in fact,
14 AT&T had developed UNIX. I don't think there is any
15 challenge here. I don't think there is any contrary
16 evidence that AT&T was the original developer of UNIX.

17 To help and assist in that, Novell was, in some
18 ventures, a co-developer, but the UNIX software business
19 essentially had four components to it. They are
20 demonstrated on the screen in front of you. One was the
21 copyrights to UNIX itself, the code that had been started
22 and prepared as early as 1969.

23 There also was revenue that flowed from code that
24 was developed. I told you about SVRX code. And what AT&T
25 did is it was able to license two companies and users of its

1 UNIX code, and there were revenue streams that came to AT&T
2 as a result.

3 There also were other things that the UNIX
4 business, under AT&T's umbrella, had, and those were future
5 development rights. AT&T continued to write new software,
6 develop new products. One of those, as we mentioned, is
7 UnixWare that was initially a co-venture between AT&T and
8 Novell, that then became a Novell product, and there were
9 revenue rights that flowed from that.

10 Well, then what happened is Novell, in 1993,
11 acquired all of those UNIX rights from AT&T. And it wasn't
12 just a partial deal, but everything, all those rights were
13 sold to Novell for a hefty price, \$300 million. Novell did
14 not buy part of the business. It bought all of it, lock,
15 stock and barrel, all of it.

16 Well, that was followed, then, by this graphic
17 that I think will help you understand that transaction.
18 AT&T sells all of the UNIX related business to Novell.
19 There are no exclusions. There is not a schedule of assets
20 that aren't included. There is not an effort to parse what
21 went and what didn't. Everything went. And that was the
22 price in exchange for the \$300 million.

23 Now what happens? Two years later there is a
24 different deal that's entered into, the asset purchase
25 agreement. Novell had owned the entire UNIX business for

1 about two years. Novell determined that in order to pursue
2 some of its core products, NetWare being one of them, that
3 it would undertake to see if it could sell, just as it had
4 purchased the entire UNIX business. So it went out in the
5 marketplace to see if there would be a potential buyer for
6 all of UNIX business. Novell paid \$300 million for it. It
7 hoped to accomplish at least an equal sale price.

8 One of the buyers that expressed an interest was
9 the Santa Cruz Operation, but there was a problem.
10 Initially the thought was that Novell would sell all of the
11 business to Santa Cruz, but Santa Cruz didn't have enough
12 money. It did not have \$300 million. It was not as large,
13 as financially successful as Novell and others. It couldn't
14 afford to buy the whole business. So the deal had to
15 change.

16 What initially was hoped for would be an entire
17 sale had to move to something that Santa Cruz could afford,
18 and that was a partial sale. So there were certain assets
19 that were required.

20 This is a portion from the asset purchase
21 agreement. Right at the very beginning, the asset purchase
22 agreement makes this statement, the boards of directors of
23 each seller -- the seller in this instance is Novell -- and
24 buyer -- it's Santa Cruz Operation -- believe it's in the
25 best interest of each company and their respective

1 stockholders that buyer acquire -- and here's important
2 language, what is it that the buyer, Santa Cruz, acquired?
3 It doesn't say all of the assets. It doesn't say all of the
4 business. It says certain of the assets and assumes certain
5 of the liabilities of the seller comprising the business.

6 So what happened in this transaction was rather
7 than sell all of the business, there were certain things
8 that were sold, certain things that were retained. What
9 Novell did sell to Santa Cruz Operation were the future
10 development rights that related to UNIX and UnixWare and the
11 revenues that would come from that, but Novell retained or
12 held back the UNIX copyright interest as well as the revenue
13 that came from that.

14 What SCO gave for the piece of the business that
15 it got was stock. How much was the stock worth? Well, you
16 heard a little bit of a confusing message from SCO's
17 lawyers, something about \$200 million. Well, no. What
18 Novell received was stock worth between about 39 million and
19 \$73 million, depending on the day that you measure it.

20 For example, if we were to look at the date that
21 the agreement was signed, September 19th, 1995, SCO stock
22 was trading at that point for about 11 and a half dollars.
23 If you were to multiply that share price times the number of
24 shares, is roughly 17 percent of the shares, you would get
25 to a number of about \$73 million. But the deal didn't close

1 for 90 days, until December of 1995. You go to SCO's stock
2 price, it had dropped, precipitously, between September 1995
3 and December 1995. The Santa Cruz Operation stock at that
4 date was trading at about six and a half dollars. If you do
5 the math there, it's about \$39 million worth of stock.

6 Why then would SCO suggest to you that there was
7 something like \$200 million in revenues? Because what SCO
8 wants to suggest to you is that somehow it paid Novell for
9 an asset that Novell retained. Novell did not sell the UNIX
10 copyrights and it retained the right to the royalties or
11 license agreements. That was something that we simply
12 didn't sell. So that was not consideration that was paid.

13 That is made clear in the agreement itself. This
14 is from the asset purchase agreement. You will have a
15 chance to see it. The agreement describes what is the
16 payment that Santa Cruz is going to make. It says,
17 interestingly, on the terms and subject to the conditions
18 set forth in this agreement, as full payment for the
19 transfer of the assets, and then it continues, SCO would
20 transfer 6,127,500 shares. That is the purchase price.
21 That is the entire purchase price. Not \$200 million.
22 Whatever the value is of those six million shares is what
23 SCO paid Novell for the limited assets that it acquired.

24 Here's how the deal was intended to work and this
25 is how the deal does work when one reads the agreement.

1 There are UNIX users out there and they pay license fees,
2 and they pay two sorts of fees. One for the SVRX license.
3 That was the early UNIX that was developed by AT&T, bought
4 by Novell. Then there was in this new UnixWare that was
5 developed.

6 Under the agreement, Santa Cruz Operation would
7 have entitlement to the license fees for new UnixWare
8 development. Novell would retain the license fees for the
9 old, or the SVRX licenses. What Santa Cruz would do under
10 the agreement is, in essence, act as the collection entity.

11 So what Santa Cruz, then later SCO, got was a
12 five-percent administrative fee for SVRX licenses. If we do
13 a simply mathematical example, if Novell was entitled to a
14 \$100 a year license fee for SVRX licenses, under the
15 agreement, as I'll show you the language in a minute, it was
16 entitled to all of that \$100. But SCO did the job to go out
17 and collect it. For doing that, it got \$5, or five percent.

18 Now one of the things that you are going to hear
19 about through the course of this trial is who was doing
20 what. There was a suggestion that lawyers were just running
21 around. Well, as I mentioned, lawyers were very involved in
22 this transaction. There were lawyers for both sides. On
23 the Novell side, there were in-house lawyers. One was an
24 individual by the name of David Bradford, who was Novell's
25 general counsel at the time, and he was given the task,

1 along with other senior business executives, to make sure
2 that Novell's interests were protected.

3 Novell hired an outside law firm, a very reputable
4 law firm based in the San Francisco Bay area by the name of
5 Wilson Sonsini. That is the short version. The name goes
6 on longer. One of the partners at the Wilson Sonsini firm
7 was a partner by the name of Tor Braham. You are going to
8 have a chance to be meet Mr. Braham. He will come into
9 court. He was the primary draftsman and negotiator of this
10 agreement. He wrote it. He knows what its terms say. He
11 knows what he was asked to do by Novell. He knows what
12 words were put in the agreement.

13 In addition, you are going to hear testimony,
14 probably this afternoon, from some former Novell executives,
15 high level executives. The realty is, however, they were so
16 high level they did not become entrenched in the very
17 details of the agreement. Keep in mind that what Novell
18 initially wanted was to sell the entire business. It didn't
19 find a buyer in Santa Cruz that could pay for it all, so the
20 deal changed. Now we have to sell some of the assets. If
21 we're not going to sell all of them, we're not going to get
22 full price, let's make sure we don't give everything away.
23 Let's reserve what we need to. Mr. Braham will explain to
24 you that he was tasked with protecting Novell's interest in
25 a more complicated transaction because it wasn't the entire

1 sale of this. It was only a part of it.

2 Mr. Braham will also indicate that to protect
3 Novell's interest, there were specific provisions put into
4 the agreement to exclude certain assets from transferring.
5 What was excluded? Among other things, the UNIX copyrights
6 that is the very subject of this litigation. Also, it was
7 made clear in the agreement that the royalties that were
8 attached to these SVRX licenses remained Novell product and
9 that it had control over it.

10 So let's look at the asset purchase agreement
11 itself, in part, if we might. If you were to have this book
12 in you hands -- you will have a chance to look at all of
13 this -- and you were to open it up, you would find right at
14 the front what is called an index of schedules. It's a
15 little bit like a table of contents. It tells the reader
16 what the parts are. What is this agreement comprised of?

17 Well, there are five schedules. One is the
18 assets. This is the part of the document that lists what is
19 it that Novell is selling. There was another part, the
20 excluded assets. What is it that Novell is not selling. So
21 if anyone, including the jury, wanted to look and find out
22 what is it that Novell sold and what is it that it didn't,
23 one would quickly turn to schedule 1.1, the list of assets.
24 If one wanted to find out what was not being sold, one would
25 turn to schedule 1.1(b), the excluded assets.

1 So of necessity, to resolve the issues in this
2 case, one would need to look at the actual language of the
3 agreement. That was brushed over a little quickly for you.
4 I'm not going to make that same mistake. I told you what
5 the agreement itself says. Let's take a bit of a more
6 detailed look.

7 In the recitals, that's the very first substantive
8 page of the agreement, it describes what is this deal all
9 about. We're going to recite what the foundation is for
10 this agreement. It says, seller -- that's Novell -- is
11 engaged in the business of developing a line of software
12 products currently known as UNIX and UnixWare. Now that's
13 not everything that Novell did. Keep in mind, in 1995
14 Novell has a whole sweep of products, WordPerfect, NetWare,
15 GroupWise, a whole other sort and collection of products.
16 But in terms of UNIX and UnixWare, there is reference to the
17 sale of binary and source code licenses to various versions
18 of UNIX, which was the AT&T developed product, UnixWare,
19 which is the follow on or the new flavor that was developed
20 between Novell and AT&T, both of which Novell acquired
21 outright from AT&T, and the support for those products.
22 That's the business that's referenced.

23 Now the question is did Santa Cruz Operation, and
24 now SCO Group, did it buy all of this described business,
25 because that's the claim. The claim that SCO Group is

1 making is it bought all of the described business. The
2 agreement answered the question for us. In fact, part B,
3 the boards of directors of each seller and buyer. That's
4 important. Who approved this deal.

5 I think the first witness that's going to be
6 called today is Mr. Frankenberg, who was the former chief
7 executive officer of Novell and the chairman of the board of
8 directors. The board of the directors is the one that made
9 the decision. And I invite you, during the course of this
10 trial, to listen very carefully to and look at what the
11 boards of directors of Novell and Santa Cruz thought this
12 deal was about because they are the ones who made the
13 decision to do the deal. And it says right here that the
14 board of directors for both companies, and the language
15 continues, believe it's in the best interest of each company
16 and their respective shareholders -- excuse me,
17 stockholders -- I showed you this before -- that buyer
18 acquire certain assets.

19 The exchange is in part C, what is going to be the
20 deal point in terms of compensation? Well, Novell gets
21 these shares.

22 The agreement continues because it tells us what
23 is being bought and what is not. Section (a), what are the
24 assets? Now, again, on the terms and subject to the
25 conditions set forth in this agreement. This is why this is

1 so important.

2 What you are going to likely hear are statements
3 being made by people who say this is what we thought the
4 deal was going to be. Executives who thought, well, this is
5 what we wanted to do, but that wasn't the deal. The deal
6 said on the terms and subject to the conditions set forth in
7 the agreement.

8 We need to look at what the words were. Seller
9 will sell, convey, transfer, assign and deliver to the
10 buyer -- Santa Cruz -- and the buyer will purchase and
11 acquire from the seller on the closing date -- keep in mind
12 I told you this deal is dated September 1995, it doesn't
13 close for three months. Then it says, all of the seller's
14 right, title and interest in and to the assets and
15 properties of seller relating to the business. Now that's
16 assets. Which assets? Identified on schedule 1.1(a).

17 So, again, if you want to find out what Novell
18 sold, we're going to have to look at schedule 1.1(a). To be
19 very clear about the point, Novell and Santa Cruz then
20 agreed, notwithstanding the foregoing -- that is as an
21 exception to what is being sold -- the assets to be so
22 purchased shall not -- let me underscore that, shall not
23 include those assets, called the excluded assets, set forth
24 on schedule 1.1(b).

25 Well, let's look at schedule 1.1(a) to see what

1 assets were and weren't sold. So if you were to -- and you
2 will have a chance in the jury room after the close of
3 evidence and you have a chance to deliberate, you will have
4 a chance to look at Schedule 1.1(a) and see what was sold.
5 Under intellectual property, and intellectual property
6 comprises things like copyrights, patents, trademarks, this
7 is the description of what Novell sold in terms of
8 copyrights or other intellectual property interests to Santa
9 Cruz. It says this, trademarks -- not copyrights,
10 trademarks -- which are completely different than
11 copyrights -- the trademarks UNIX and UnixWare as to the
12 extent held by seller for Novell. So the complete
13 description of the intellectual property, whether
14 copyrights, patents or trademarks, were just two things, the
15 UNIX trademark and the UnixWare trademark. That is the
16 entire description of the intellectual property.

17 There is no suggestion that copyrights are
18 transferred. If there be any doubt about that, one then
19 would look at the excluded assets to see what was not sold.

20 Well, let's look at the asset purchase agreement.
21 This now is schedule 1.1(b) entitled excluded assets. Now
22 I've superimposed on you part of that pie that I showed you.
23 Keep in mind that you will be able to verify this as you
24 look at the agreement. Novell did sell rights to develop
25 UnixWare and also permitted SCO to get revenues from the

1 sell of UnixWare. That is only half the pie. What Novell
2 retained was UNIX and the rights to revenues from UNIX.

3 So we look at what was not sold, what was
4 explicitly, expressly held back, it says this -- and I just
5 want to compare. Let me go back. This is what was
6 included. Notice Roman numeral V under the list of included
7 assets. Now we're going to flip the page and we're going to
8 look at excluded assets. Now, again, we're at intellectual
9 property. This is what was not sold, all copyrights. All
10 copyrights were not sold. There is no equivocation.
11 There's not, well, maybe some copyrights were, some weren't.
12 This agreement, black and white, says all copyrights are
13 excluded from the asset transfer.

14 And it continues, and all trademarks are excluded
15 except for two. What trademarks were not excluded? Well,
16 we looked at it before, UNIX and UnixWare trademarks. That
17 lines up completely with the list of included assets. There
18 is a perfect symmetry. The agreement says here's what is
19 being sold, the intellectual property, only two things,
20 trademarks for UNIX and UnixWare. We've looked at the next
21 schedule, what is excluded, everything, all copyrights are
22 excluded, and all trademarks are excluded except for two,
23 UNIX and UnixWare. It lines up perfectly. Then, in
24 addition, also to be clear, it says all patents are
25 excluded. This agreement could not be more clear.

1 Now I told you the agreement also reserved to
2 Novell all of its royalty rights. Here's the language,
3 you'll see it in the agreement, the role or the function of
4 Santa Cruz Operation was to collect royalties for Novell for
5 SVRX and its licenses. It says it right on the face of the
6 agreement. Buyer agrees to collect and pass through to
7 seller 100 percent -- 100 percent of SVRX royalties as
8 defined and described in Section 4.16. Seller -- Novell --
9 agrees to pay buyer -- Santa Cruz -- an administrative fee
10 of five percent of the SVRX royalties.

11 So the suggestion somehow that Novell was paid
12 this royalty stream for SVRX in exchange for all the
13 copyrights, that's belied by the agreement itself. The
14 agreement says, no, Novell retains all of the royalty
15 stream. If Novell didn't hold the copyrights, why does it
16 get the royalties stream? It did retain the copyrights.

17 Now there is also another suggestion that somehow
18 Novell went out and did something wrong or bad with IBM.
19 Well, what you weren't shown is the language of the
20 agreement. Here's another provision in the agreement
21 itself. Section 4.16 says, at seller's sole discretion and
22 direction -- that means Novell gets sole right, sole
23 discretion -- buyer -- that is Santa Cruz -- shall amend,
24 supplement, modify or waive any rights hereunder, and it
25 talks about with respect to what, any SVRX license, to the

1 extent so directed in any manner or respect by seller.
2 That's some dense language. You will have a chance to look
3 at it. You will see that Novell reserved to itself and
4 Santa Cruz granted contractual -- the words matter, Novell's
5 sole discretion to tell Santa Cruz, if you're trying to do
6 something with the license, you've got to respect our
7 request, and Novell acted in accordance with the contractual
8 right it reserved.

9 Now just a couple of other points here. The
10 suggestion has been, and I think you are going to hear this
11 today and through the course of this trial, there were
12 executives out there thinking the deal was this. But what
13 really matters? Again, I keep saying this, you have got to
14 look at the words. Words matter.

15 So the agreement itself makes this very clear, to
16 avoid a problem which brings us here today in this court,
17 the reason we're here today is because SCO is trying to
18 suggest that the words really don't matter, that we need to
19 look outside the agreement and see what was in peoples'
20 minds and reject or not take into account the words. You
21 can imagine what chaos would ensue. Someone enters into an
22 agreement, five, ten, 15 years later -- here we are 15 years
23 later -- they say, no, we didn't really mean that, that was
24 a mistake or we thought something else. How on earth would
25 anyone determine what the agreement was? You have to look

1 at the words.

2 So here's what the agreement says about this, this
3 agreement, and the schedules and the exhibits hereto,
4 constitute the entire agreement among the parties with
5 respect to the subject matter hereof and supersede all prior
6 agreements and understandings. So what the parties
7 expressly put in their agreement is whatever we may have had
8 in our mind. Whatever we may have been thinking before we
9 finally negotiated and signed our name, that is all out the
10 door because we want to be governed by the written
11 agreement. Makes sense that's what the parties agreed to.

12 Now also, again, the suggestion that the lawyers
13 were running around doing this. Well, the parties
14 themselves asked the lawyers to get involved and they
15 acknowledge in Section 9, the parties hereto agree that they
16 have been represented by counsel during negotiation. That's
17 why the lawyers are so important.

18 Well, here's why Novell retained the copyrights.
19 I've showed you the black and white letter of the agreement.
20 First of all, Santa Cruz couldn't afford to buy everything.
21 Second of all, there were concerns, quite candidly, about
22 Santa Cruz's financial viability. It was a smaller company.
23 It didn't have resources. Novell was concerned, as you will
24 hear its negotiating lawyers say who wrote this agreement,
25 that if there were a situation where Santa Cruz got into

1 financial trouble and went into bankruptcy, what does Novell
2 do to protect its retained interests in these license fees.
3 If it gives them the copyrights, it has to run into a
4 bankruptcy court to try to pull them out. Whereas if it
5 retains them, it doesn't have to go through that problem.
6 That's why the agreement was structured the way it is, to
7 protect those royalty rights.

8 I mentioned the board of directors. This will be
9 critical. I think you'll hear this this afternoon with
10 Mr. Frankenberg. What did Novell really think it was doing
11 when it entered into in this agreement. These are the
12 minutes of the board of directors of a meeting for Novell
13 held the day before the agreement was signed. This
14 agreement was signed on September 19th, 1995, the day before
15 Novell holds a board of directors meeting. Who was there?
16 Mr. Frankenberg chaired the meeting. David Bradford,
17 in-house counsel, was the corporate secretary. What was the
18 resolution, what was the decision of Novell? It says right
19 here, resolved, that the board of directors of this
20 corporation, Novell, hereby determines that it is in its
21 best interests -- in the best interests of this corporation
22 to enter into the asset purchase agreement. What else?
23 This is no mystery. This is no surprise. Novell will
24 retain all of its patents, copyrights and trademarks, except
25 for the trademarks UNIX and UnixWare.

1 Now who else was at this meeting? Here's the
2 evidence you are going to hear. Not only was
3 Mr. Frankenberg there as the chair, but Jack Messman was
4 there. You're going to hear his testimony. There was some
5 suggestion that Mr. Messman must not have had any idea what
6 was going on, he didn't understand, there were these
7 retractions made. Mr. Messman was a member of the board of
8 directors, was present when the asset purchase agreement was
9 there, and he heard and received the report that Novell will
10 retain all of its patents, copyrights and trademarks. Of
11 course he believed Novell retained the patents, copyrights
12 and trademarks, because that's what the agreement says and
13 that's what the board of directors decided.

14 Well, I told you that after the agreement was
15 entered into, that there had to be some adjustments made.
16 What were the adjustments? Let's step back. The agreement
17 is signed September 19th, 1995. Deal doesn't close for
18 nearly 90 days. What are the parties doing? As I
19 mentioned, they are going through the agreement. Did we
20 miss anything. Did we make any mistake. Did we misstate
21 anything. Did the contract that we signed say something
22 wrong. Did it not say something we wish it had. Was there
23 anything wrong with the agreement. Lawyers are involved,
24 business executives for both sides.

25 So what happens is the day that the deal closes,

1 the parties do sign an amendment. Now one would naturally
2 ask the question, during that 60 to 90 days, Santa Cruz
3 Operation must be pouring over the agreement. It must have
4 come to the conclusion, arguably, that, whoa, we did not
5 acquire the copyrights. The language that we signed says we
6 don't get them. We've got to fix that. You would expect
7 that.

8 When you have a chance to look at Amendment No. 1,
9 there was no change to the language I showed you about
10 excluding of copyrights. No change made. So Amendment No.
11 1 goes on for 18 pages listing other changes, but no change
12 made either to the inclusion of copyrights, no change made
13 to exclusion of copyrights.

14 What else happens? Well, the asset purchase
15 agreement itself doesn't transfer anything. It describes
16 what will be transferred. The legal document that transfers
17 the assets is called a bill of sale. If I were to go down
18 the street and buy a new car from one of our fine auto
19 dealers and I entered into a purchase agreement, that
20 wouldn't give me title. I've got to get a bill of sale.
21 That is the document that is memorializing the transfer.
22 The bill of sale doesn't say anything about copyrights,
23 trademarks. It says, instead, look to the agreement, look
24 to the asset purchase agreement to describe. I have shown
25 you the language, all copyrights were excluded.

1 So here's an excerpt from the bill of sale that
2 says, in accordance with Article 1.1(a) of the agreement,
3 then describes what the payment was, what the transfer would
4 be, and the description of the assets would be those
5 described in the agreement. It's so important that people
6 look at what they wrote. There was no wool pulled over
7 anybody's eyes.

8 Novell had very fine lawyers, but so did the Santa
9 Cruz Operation. They had very fine lawyers. Very fine
10 lawyers. Large law firm, Brobeck, Phleger & Harrison, at
11 the time. One of the largest firms in the United States
12 represented Santa Cruz Operation. You're not going to hear
13 a lawyer, I don't expect, show up from that firm to suggest
14 anything different than what I've told you here today. You
15 will hear lawyers from Wilson Sonsini and you will hear
16 in-house lawyers from Novell that drafted this agreement.

17 Now what happened after that? I told you that the
18 asset purchase agreement was signed in September of 1995,
19 and then was amended the day that it closed. And then about
20 nine months after the close, Santa Cruz Operation said we
21 wish we had gotten those copyrights. And so they came to
22 Novell and said we would like the copyrights. And Ms.
23 Alison Amadia, who you will meet in court, she will be here,
24 she's going to come and testify, she was given the
25 responsibility to work with Santa Cruz when it made this

1 request for copyrights.

2 What is the first thing she does? She contacts --
3 as you'll hear her say, she says, I didn't write this
4 agreement. I'm going to go back to those who wrote it. She
5 contacts Tor Braham and said SCO is now asking for
6 copyrights. I've read the agreement, she'll say, I've read
7 the exclusions, they weren't transferred, is that right Mr.
8 Braham. You will hear both of them say that's right. It
9 was written in a very particular way to protect Novell. You
10 will hear both Ms. Amadia and Mr. Braham indicate to be very
11 careful not to transfer copyrights. That wasn't the deal.

12 She is the one, however, who negotiated and
13 drafted Amendment No. 2. You'll hear her in court. She
14 will describe what process she went through, what was at
15 issue, and the language that was drafted. She will tell you
16 that when SCO came out 14 months after signing the
17 agreement, that SCO asked for the copyright transfer and
18 Novell said no. We didn't do it in the initial deal, we
19 didn't do it in Amendment No. 1, we're not going to do it
20 now. Hence, the lawsuit. So Amendment No. 2 did not
21 copyright transfer ownership.

22 Who else are you going to hear from? You're going
23 for hear from Novell's chief financial officer at the time,
24 the predecessor to Mr. Russell, who's name is Jim Tolonen.
25 He will be here in court. He was involved in both the

1 original asset purchase agreement and Amendment No. 2. He
2 signed Amendment No. 2. You will have a chance to see that.
3 He was the signatory for Novell. He will confirm to you
4 that neither in the asset purchase agreement nor Amendment
5 No. 2 was there any intent to transfer the UNIX copyrights.

6 Now to prove what I told you, what you will see is
7 what SCO had asked for. It came to Novell 14 months after
8 the deal was signed and said, you know, now we wish we had
9 the copyrights and we would like to enter into an amendment
10 that makes reference to copyrights that SCO has acquired.
11 Novell rejected that proposal.

12 Instead, what was agreed to was something much
13 different that does not transfer copyrights. In the final
14 language of Amendment No. 2, there is no reference to
15 copyrights being transferred. Instead, Amendment No. 2 says
16 this, what will be excepted from the transfer is all
17 copyrights and trademarks, except for the copyrights and
18 trademarks owned by Novell as of the date of the
19 agreement -- that is the asset purchase agreement. And for
20 what? Required for SCO to exercise its rights with respect
21 to the acquisition of the UNIX and UnixWare technologies.

22 THE COURT: Mr. Brennan, you have ten minutes.

23 MR. BRENNAN: Thank you, Your Honor.

24 So let's take a look at this. The suggestion that
25 you've heard this morning is somehow that Novell had not

1 transferred copyrights, and that was a mistake. The
2 agreement you'll see throughout does not support that.

3 The other argument being made is somehow SCO
4 needed ownership of the copyrights in order to operate its
5 business. What was the business that was initially
6 transferred? Was the UnixWare new development and rights
7 that SCO would have to revenues for that. It did not need
8 ownership of copyrights to run that business. In fact, it
9 ran it perfectly well from 1995 until 2003, when Mr. McBride
10 switched strategies. It never had or needed the copyrights.

11 There are many examples of this. Novell has
12 provided license agreements to IBM, to Sun Microsystems,
13 Hewlett Packard, many other companies that allow those
14 companies to develop their flavor of UNIX. Just as UnixWare
15 is a flavor of UNIX, all these other companies are doing all
16 the things that SCO was able to do as well without ownership
17 of the copyrights.

18 Now here's one last clue. There are others, but
19 for time, I told you and you heard that Santa Cruz Operation
20 sold whatever rights it had to Caldera, which was renamed
21 the SCO Group, Inc. So one might be interested to go back
22 and look at the agreement when SCO itself buys from Santa
23 Cruz, what does it get? Here's the description of what
24 intellectual property was transferred by Santa Cruz
25 Operation to the plaintiff, in this case SCO Group. Subpart

1 (v), right here, assigner -- that is the Santa Cruz
2 Operation -- has no knowledge of any fact that would prevent
3 assignees registration of any rights -- see this exception
4 highlighted -- except that assignor may not be able to
5 establish a chain of title from Novell. The company from
6 which SCO bought these purported UNIX assets itself said we
7 can't even demonstrate that we own those assets. We can't
8 even prove we own the copyrights.

9 Now here's some witnesses you're going to hear
10 about as we get into this critical 2002, 2003 time frame.
11 Chris Stone, he will say that he was contacted by Darl
12 McBride. Mr. McBride wanted right to copyrights.
13 Mr. McBride knew they didn't have them. Mr. Stone rejected
14 it.

15 You will hear from Joe LaSala, general counsel at
16 the time that these statements were made, he will say they
17 were contacted and that Novell did not agree.

18 You will hear from Greg Jones, also in-house
19 lawyer at Novell, said he was contacted by Mr. McBride and
20 he too rejected the request.

21 Now there was letters sent out. This May 12th
22 letter, 2003, this is the Darl McBride letter sent to the
23 world claiming that Linux infringes UNIX and requesting that
24 people pay them money. That caused uproar. These letters
25 were sent to 1500 companies throughout the country. Novell

1 was one of them. Office Max. It created a huge uproar.
2 This is an example of one of many we expect you'll see
3 during this trial where people indicated that what now SCO
4 was trying to do, switching its business model, created a
5 huge backlash against SCO, not created by Novell.

6 What Novell did is responded and said, you have
7 made these assertions, but we're telling you we still own
8 the copyrights. Be very careful, SCO, about what you claim.
9 You will see that.

10 Now why did SCO suffer the way it claims to have
11 suffered? Was it because of Novell and what it did? No.
12 First, there is no indication that UNIX is actually
13 infringed by Linux. Let me say it the other way. They have
14 yet to establish that Linux, this open-source code, is a
15 copy of Linux. People are smart enough out in the community
16 to understand that. It was a holdup, a stickup.

17 Second of all, there are these indemnification
18 agreements, meaning that people could alternatively get
19 protection so they wouldn't have to fight with SCO. There
20 is something you'll hear about called the GPL, the general
21 public license. There is a license out there for all users
22 of open-source software that enables them and entitles them
23 to use Linux. People can design around it. They can create
24 their own method of software. SCO was asking for exorbitant
25 rates. People just rejected it, said we're not going to pay

1 you for that. Finally, there was this huge public backlash
2 against SCO.

3 Here's what you were shown. I'm almost done.
4 Mr. Hatch put up this graph. This is a copy of his, saying,
5 my goodness, on May 28th, Novell made this public statement
6 and that caused this enormous problem for SCO.

7 Well, let's take a quick look at this. On that
8 single date and time, that single point in history, which
9 claimed that Novell released its statement at about what,
10 one in the afternoon, the stock opened that morning above
11 \$10 a share. Before Novell made one statement, the stock
12 had already dropped by almost two and a half dollars. You
13 received no explanation for that. How could possibly Novell
14 be blamed for the stock price dropping that day?

15 Then they say, there was a statement made, the
16 stock continued to drop. No more than the stock had already
17 dropped before Novell made a statement. Mr. Hatch tried to
18 do a fingerpainting. Here's the actual diagram. If you
19 wanted to track, these are from public sources regarding
20 SCO's stock price. If you look at May 28th, 2003, the date
21 that the statement was made claiming these horrific results
22 for SCO, look what happens then over the next six months. A
23 tremendous rise in SCO's price.

24 I told you that you hadn't heard the rest of the
25 story. You are given a one-day shot at stock price. You're

1 not told what happened after that. During the trial, we'll
2 tell you what happened after that.

3 Now in conclusion, SCO's slander claim must fail
4 for a number of reasons. Number one, because Novell
5 contractually -- contractually retained the rights to the
6 UNIX copyrights. So anyone who wanted to go back and look
7 and see who owned what, they look to the agreement. I've
8 shown you the language. You will see it repeatedly during
9 the course of this trial.

10 Second of all, even if we were to engage in a very
11 generous assumption that somehow there was a mistake here,
12 Novell at least had a good faith belief it owned the
13 copyrights by opening up and looking at the language. It
14 can't be liable for slander of title when it has a good
15 faith belief and it has a constitutional right when this
16 subject was thrown into the public forum, when SCO went out
17 to the public and made these claims, when it upset the Linux
18 open-source community, when it upset Novell's customers,
19 Novell had a right to stand up and say no, we own this. Now
20 for all those reasons, the slander of title claim asserted
21 by SCO fails.

22 We greatly appreciate your patience with us. As I
23 said at the outset, we'll have to sit back and wait until
24 it's our turn. But we have every confidence that as you
25 listen to and weigh all of the evidence, you will find that

1 SCO cannot recover for slander of title. And that if any
2 slander was committed, it was by SCO's false claim that it
3 owned the copyrights, which were expressly excluded by the
4 terms of this written agreement. Thank you for your
5 attention.

6 Thank you, Your Honor.

7 THE COURT: Thank you, Mr. Brennan.

8 Ladies and gentlemen, we have gone longer than we
9 normally would, so I don't want you to worry. This is the
10 longest stretch you will normally have to endure. We'll
11 take a 15-minute recess.

12 Ms. Malley.

13 THE COURT: Fifteen minutes, counsel.

14 (Recess)

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