

1 THE COURT: Are we ready, counsel?

2 MR. ACKER: Yes, Your Honor.

3 MR. SINGER: Yes. Well --

4 THE COURT: Does that mean no?

5 MR. SINGER: I was thinking whether it made sense
6 to raise one evidentiary issue that's going to come up in
7 redirect, in light of the cross, now before the jury is
8 here --

9 THE COURT: Go ahead.

10 MR. SINGER: -- so we can openly discuss that.
11 I had moved Exhibit 748, which was the July
12 presentation, into evidence and the Court at that time had
13 not accepted it. Now we have had all these other articles
14 which were presented as statements to Mr. McBride, were you
15 aware of this, were you aware of that. And I would like to
16 put in, through Exhibit 748, the response which they
17 provided, which Mr. McBride was aware of, as well as what
18 they used to respond to those criticisms by the Linux
19 community. So I intend to try to get back into this on
20 redirect. And I think now I certainly have a basis to do so
21 given the issues that have been raised in cross-examination.

22 MR. ACKER: I wouldn't object as to that one page.
23 It's just the whole PowerPoint, Your Honor.

24 THE COURT: I would tell you that I will not
25 permit the whole Power Point to come in, Mr. Singer, because

1 there is no foundation.

2 MR. SINGER: There are two pages that I would like
3 to have come in that relate to --

4 THE COURT: Show Mr. Acker, and if he's willing to
5 agree.

6 MR. SINGER: One is this page from articles, and
7 the other is this page which talks about the Linux
8 development.

9 MR. ACKER: I wouldn't have a problem with the
10 articles. The other is their theory on infringement, and I
11 would object to that.

12 MR. SINGER: I will just go with the articles,
13 then.

14 THE COURT: Your 748 will consist of one page,
15 which is the articles, all right?

16 MR. SINGER: That's correct, Your Honor.

17 THE COURT: All right. Good.

18 Ms. Malley, would you please bring the jury in.

19 If, in fact, we have another hour on cross, I am
20 presuming that we probably will only finish with this
21 witness today. Is that likely?

22 MR. SINGER: If we have an hour and only an hour,
23 I think my redirect might be completed within the half hour
24 that we would have, roughly speaking.

25 THE COURT: So the answer to my question is this

1 is probably the only witness we'll finish today?

2 MR. SINGER: I think that's quite certain, Your
3 Honor.

4 THE COURT: What does that, then, do to our
5 schedule?

6 MR. SINGER: I think we're looking at putting Mr.
7 Pisano on now instead of Ms. Botosan because Mr. Pisano, he
8 is the professor from the Harvard business school, he has to
9 leave at the end of the day tomorrow. So we can't risk not
10 completing his testimony. So instead of going --

11 (Jury present)

12 THE COURT: Go ahead, Mr. Acker.

13 MR. ACKER: Thank you, Your Honor.

14 BY MR. ACKER:

15 Q Mr. McBride, I've handed you what have been marked and
16 admitted I believe as N-13 and T-13, the Microsoft and Sun
17 agreements. Do see those, sir?

18 A Yes, I do.

19 Q You are familiar with these license agreements,
20 correct?

21 A Yes, I am.

22 MR. ACKER: Your Honor, I would move for admission
23 of N-13 and T-13, if they have not already been admitted.

24 MR. SINGER: I don't think they have been, but I
25 have no objection.

1 THE COURT: N-13 and T-13 will be admitted.

2 (Defendant's Exhibit N-13 and T-13 were received
3 into evidence.)

4 BY MR. ACKER:

5 Q In talking to the jury this morning about license
6 agreements that SCO was able to obtain in the first part of
7 2003, these are the two agreements you are talking about,
8 this Sun agreement and the Microsoft agreement?

9 A That's right, Mr. Acker.

10 Q And those are the only agreements under the SCOsouce
11 division that were obtained between the announcement of the
12 SCOsouce program in January of 2003 and May 28th of 2003,
13 right?

14 A Yes, that's correct.

15 Q And those two licenses, the Sun license and the
16 Microsoft licenses, those are UnixWare licenses, correct?

17 A Those are UnixWare IP licenses in the SCOsouce
18 division.

19 Q But you agree with me they are UnixWare licenses?

20 A They are based on UnixWare.

21 Q Now let me turn to this conversation that you testified
22 you had with Mr. Messman on June 5th. You said that at some
23 point, either on the 4th or the 5th, your assistant found
24 Amendment No. 2, correct?

25 A Yes.

1 Q And she let you know that, and you were in New York,
2 right?

3 A Yes.

4 Q And did you come back to Utah to call Mr. Messman or
5 did you stay in New York?

6 A No, I was actually flying home from New York. I
7 believe when I landed there was a voice mail from my
8 assistant -- I had just landed in New York. And then I went
9 down to the office in Lindon after receiving -- well, I
10 called her, but I received her voice mail. I called her and
11 then I went to Lindon.

12 Q Then you called Mr. Messman; is that right?

13 A Not initially. When I found out about it, it was in
14 the afternoon time frame. From three o'clock until around
15 four or five o'clock, I don't remember exactly, we spent a
16 couple of hours going through and figuring out what we
17 wanted to do. One of the first things, once we found it,
18 was to call him. So, yes, I placed a call in to him, I
19 recall, in the late afternoon on June 5th of 2003.

20 Q Then after the first call, you faxed him a copy of
21 Amendment No. 2, correct?

22 A That's correct.

23 Q It was during the second call that you claim -- and I
24 wrote it down yesterday, you claim he said, okay, Darl, you
25 got the copyrights. Do I have that right?

1 A Yes.

2 Q That was a big deal, wasn't it?

3 A Yeah.

4 Q I mean, that was a huge admission, the CEO of Novell,
5 according to you, told you on the phone, okay, Darl, you
6 have the copyrights, right?

7 A Yes.

8 Q So you've won this dispute, right?

9 A I felt like we had.

10 Q Did you take any notes of that call?

11 A No.

12 Q Did you send an e-mail to anybody to document that
13 call?

14 A No -- well, I had somebody there in the room with me
15 that overheard the call, so I didn't feel like I needed to.

16 Q Did Mr. Sontag take any notes?

17 A I don't know.

18 Q Did Mr. Sontag send any e-mails?

19 A I don't know.

20 Q So this happens in the evening -- late afternoon,
21 evening on June 5th, right?

22 A Yes.

23 Q And then the very next morning you send a letter to
24 Mr. Messman, right?

25 A Yes.

1 MR. ACKER: Can we bring up SCO 95, please.

2 BY MR. ACKER:

3 Q This is your letter to Mr. Messman on June 6th, 2003,
4 maybe within 12 hours of this phone call in which you
5 claimed that Mr. Messman essentially confessed to you,
6 right?

7 A Yes, that's right.

8 Q And in this letter that you wrote within 12 hours of
9 this conversation, you referenced the conversation, correct?

10 A Yes, that's correct.

11 Q Why don't we take a look at that portion of the letter.
12 In the second sentence of this paragraph, you wrote, I am
13 also concerned that IBM may have possibly been involved in
14 your decision to issue this groundless press release based
15 upon statements you made in our telephone conversation on
16 June 5th, right?

17 A Yes.

18 Q And what you said yesterday about what Mr. Messman said
19 about IBM is he wouldn't answer your questions, right?

20 A He was evasive, that's what I said.

21 Q So within 12 hours of the CEO of Novell confessing to
22 you that you own the copyrights, you write him a letter, you
23 reference the phone call, you don't say anything about that
24 alleged statement. Do I have that right?

25 A About which alleged statement?

1 Q Do I have it right that within 12 hours you wrote a
2 letter to Mr. Messman that you referenced a telephone
3 conversation and said nothing about this alleged confession?
4 Do I have that correct?

5 A Well, I think we've got to read the rest of this
6 letter.

7 Q Take your time.

8 A How do I pull it up?

9 Q I'll give you a hard copy.

10 A Great.

11 Right. So if you go to the latter part of the letter,
12 there's a good three points in there that talk about the
13 concerns that I have about the intercommunications between
14 IBM and Novell.

15 Q Nowhere in that letter do you say, Mr. Messman, you
16 confessed to me last night on the phone, or words to that
17 effect?

18 A Well I said, regarding our call last night, based on
19 the conversations we had. I didn't say a lot of other
20 things that he said either.

21 Q But wasn't the most important part of that call that
22 Mr. Messman allegedly told you you owned the copyrights?
23 Wasn't that the real essence of it?

24 A There were a lot of things that were important. The
25 fact that he had admitted, okay, you've got the copyrights,

1 that was very important. His hesitance and unwillingness
2 and evasiveness around whether they were, in fact,
3 coordinating with IBM was an important part. And then the
4 fact that, you know, he didn't want to talk about damages
5 either. There were a lot of things that were important
6 about the call.

7 Q But nowhere in the letter that you wrote to him within
8 12 hours did you say, by the way, you admitted last night
9 that we own the copyrights, right?

10 A The letter is what it is.

11 Q So the answer to my question is yes, correct?

12 A What was the question again?

13 Q You never said in the letter that you confessed to me
14 last night --

15 A I didn't say confessed because he knew -- he
16 confessed -- here's the issue, Mr. Acker. He confessed --

17 THE WITNESS: Can I talk about this or am I going
18 too far? I don't want to get in trouble with.

19 THE COURT: He's your witness. What do you want
20 to do?

21 MR. ACKER: I would like an answer to the
22 question.

23 THE WITNESS: Try again. I can talk to Mr.
24 Singer. Try again.

25 //

1 BY MR. ACKER:

2 Q Within 12 hours of having this conversation with
3 Mr. Messman where he allegedly told you you own the
4 copyrights, you wrote him a letter, you referenced the phone
5 call, you didn't say anything about this statement, right?

6 A About which statement?

7 Q To him saying, allegedly, to you that you, SCO, owns
8 the copyrights?

9 A Right, because he had already made that statement. He
10 hadn't admitted to the IBM statements.

11 Q You wrote another letter to him five days later on
12 June 16th, correct? Let me show J-16.

13 I'm sorry, June 11th.

14 A Okay.

15 Q J-16 is a letter that you wrote to Mr. Messman on
16 June 11th, 2005, correct?

17 A Yes, that's right.

18 MR. ACKER: I move for admission of J-16, Your
19 Honor.

20 MR. SINGER: No objection.

21 THE COURT: It will be admitted.

22 (Defendant's Exhibit J-16 was received into
23 evidence.)

24 BY MR. ACKER:

25 Q If you would take a look at the fourth page, 4 of 5 of

1 the letter, paragraph 4, you again wrote to Mr. Messman and
2 you again referenced your June 5th call with him, right?

3 A Yes.

4 Q You wrote, the fact that Mr. Lauderdale was directly
5 involved in your decision to issue the June 9, 2003 letter
6 further confirms your reluctant admission to me on June 5th,
7 2003 that IBM may have been involved in your press release
8 of May 28th, 2003, with the resulting adverse impact on SCO
9 and its shareholders, correct?

10 A Yes, that's right.

11 Q So six days -- in your second letter to him six days
12 later about the same telephone conversation, you
13 characterized his statements about IBM as being a reluctant
14 admission, right?

15 A Yes.

16 Q Nowhere in this letter do you say anything about
17 Mr. Messman allegedly saying to you, Darl, you own the
18 copyrights, correct?

19 A He had already admitted that.

20 Q Nowhere in this letter do you say that, correct?

21 A No, I haven't.

22 Q Nowhere do you reference this, correct?

23 A No, he'd already given us --

24 Q You have no notes --

25 THE COURT: Just a second. Let the witness finish

1 the answer before you ask the next question.

2 THE WITNESS: No. He had already given us a
3 retraction letter stating that the copyrights were with SCO.
4 There was no reason to pursue it.

5 BY MR. ACKER:

6 Q You have no notes of that conversation, correct?

7 A I didn't need notes of the retraction letter. It was a
8 public press release.

9 Q Let's go back to the first page of this letter, J-16.
10 If we could highlight the first paragraph. You wrote, this
11 letter is in response to yours of June 9th, 2003. In your
12 June 9 letter, you attempt to assert claims on behalf of IBM
13 with respect to its SVRX license with SCO. Do you see that?

14 A Yes.

15 Q That statement is true, right?

16 A Yes.

17 Q So you believed as of June 11th, 2003, that IBM's
18 license with SCO was an SVRX license, correct?

19 A Yes.

20 Q No doubt about that, right?

21 A No doubt about which part?

22 Q That IBM's license was an SVRX license.

23 A Let me read this again. This sounds like a trick one.
24 Let me just see here.

25 So IBM had an -- IBM has an SVRX license with SCO and

1 Novell was asserting claims on behalf of IBM. I agree with
2 that statement.

3 Q You agree that the license was an SVRX license?

4 A It was a license with respect to their AIX license.

5 Q Which is an SVRX license, according to you?

6 A Yes.

7 Q So it was your testimony yesterday, and you've just
8 referred to it a minute ago, that Mr. Messman's letter -- or
9 Mr. LaSala's letter to you and the Novell press release on
10 June 6th was some sort of admission that SCO owned the
11 copyrights; is that your testimony?

12 A The June 6th -- say that again. The June 6th letter
13 was an admission?

14 Q The June 6th press release, you believe -- you
15 testified a number of times that you believed it was
16 essentially --

17 A Yes, it was a retraction letter --

18 THE COURT: Mr. McBride, please, while Mr. Acker
19 is speaking, do not speak over him.

20 THE WITNESS: Sorry, Your Honor.

21 BY MR. ACKER:

22 Q That, in your mind, Novell is telling the world on June
23 6th that, in fact, SCO owns the copyrights, that is your
24 interpretation of that press release, correct?

25 A Yes.

1 Q And so for this period of time between June 6th and
2 until Novell makes another public statement, December 22nd,
3 2003, in your mind, SCO has told the world we don't own the
4 copyrights -- excuse me, Novell has told the world we don't
5 own the copyrights, SCO does, correct?

6 A Incorrect.

7 Q Well, there was no other press release between that
8 period of time, between June 6th, 2003 and December 22nd,
9 2003, correct?

10 A That's correct.

11 Q Novell didn't say in any public press release during
12 that period of time anything about the copyrights, right?

13 A Not that I'm aware of in a press release.

14 Q Now did you have conversations with the investing
15 public during that period of time?

16 A Yes, I did.

17 Q And it's true, isn't it, that during that period of
18 time you told the investing public, that is between June 6th
19 of 2003 and December 22nd of 2003, you told the investing
20 public Novell has given up, they say we own the copyrights,
21 correct?

22 A That's not correct. Not exactly the way you said it.

23 Q But that was the gist of what you told the investing
24 public?

25 A Initially. It changed in the fall time frame.

1 Q Why don't we take a look at Exhibit L-17. I hand you
2 what you we've marked as Exhibit L-17.

3 Mr. McBride, this is a transcript of an interview that
4 you gave on July 21st, 2005, correct?

5 A Yes, that's right, Mr. Acker.

6 Q If you turn to page 3 of the document --

7 MR. ACKER: I move for admission of L-17, Your
8 Honor.

9 MR. SINGER: First of all, this is July 2003, not
10 2005.

11 MR. ACKER: 2003. I move for admission of L-17.

12 MR. SINGER: I have no objection.

13 THE COURT: Admitted.

14 (Defendant's Exhibit L-17 was received into
15 evidence.)

16 BY MR. ACKER:

17 Q So on the third page do you see the interviewer asks
18 you a question and you give an answer that begins at the
19 top, it begins with the word well? Do you see that?

20 A Yes, I see that.

21 Q The questioner asks you, well, Novell would say you
22 actually don't own those copyrights fully. You responded
23 yeah, well, the Novell thing, they came out and made a claim
24 that held up for about four days and then we put that one to
25 bed. If you go talk to Novell today, I will guarantee you

1 that they will say -- what they will say, which is they
2 don't have a claim on those copyrights, correct?

3 A Yes, that's right.

4 Q That's what you said in a press interview on or about
5 July 21st, 2003, right?

6 A Yes, that's correct.

7 Q Let me show you J-19.

8 Mr. McBride, J-19 is an e-mail to you and a number of
9 others at SCO dated August 18th, 2003, correct?

10 A Yes.

11 Q It's attaching a number of articles quoting yourself
12 and others, correct?

13 A Yes.

14 MR. ACKER: We would move for admission of Exhibit
15 J-19, Your Honor.

16 MR. SINGER: This is a composite of about eight
17 different articles. If there is a particular one that
18 relates to Mr. McBride's testimony, perhaps Mr. Acker could
19 point to that.

20 MR. ACKER: Certainly. Page 6 of 18, article date
21 is August 19th, 2003. Also on page 16 of 18, an article
22 dated August 18th, 2003.

23 MR. SINGER: What part on page 6?

24 We have no objection to the two passages which
25 have been mentioned by Mr. Acker being admitted as part of a

1 redacted document.

2 MR. ACKER: That's fine, Your Honor. I'll just
3 show him those passages.

4 THE COURT: More importantly, I don't see the need
5 for a long document like this going to the jury as an
6 exhibit. If you can somehow clean it up, Mr. Acker, before
7 it goes to the jury, I would appreciate it.

8 MR. ACKER: Absolutely, Your Honor.

9 THE COURT: It will be admitted, presuming there
10 will be an appropriate redaction of unnecessary material
11 between now and the time it goes to the jury.

12 MR. ACKER: Absolutely.

13 (Defendant's Exhibit J-19 was received into
14 evidence.)

15 BY MR. ACKER:

16 Q So, Mr. McBride, take a look at the -- can you see the
17 page numbers at the top -- 15 of 18 of that document?

18 A Yes.

19 Q Go down to the bottom, you see there is an article
20 there dated August 18th, 2003? Do you see that?

21 A Yes.

22 THE COURT: Which item is it, again?

23 MR. ACKER: I'm sorry, Your Honor?

24 THE COURT: Which item is it?

25 MR. ACKER: It's number 12.

1 BY MR. ACKER:

2 Q If you go to the next page, you see there is a quote in
3 the middle the page attributed to you from an address you
4 gave, correct?

5 A Yes, that's right.

6 Q The paragraph that begins with in regard?

7 A I see it.

8 Q As of August 18th of 2003, you were still telling
9 people in the public, in regard to Novell's recent claim
10 that it still owns the copyright to UNIX, McBride said it
11 took SCO just four days to press the eject button on that
12 claim, right?

13 A Yes, that's right.

14 Q That's a statement you made on or around August 18th,
15 2003, right?

16 A That's correct.

17 BY MR. ACKER:

18 Q Let me show you one more, Exhibit P-45.

19 THE COURT: This is one of your new exhibits
20 today?

21 MR. ACKER: It is, Your Honor. And subject to the
22 discussion we had, I only offer a limited portion of this
23 document subject to the discussion we had earlier today.

24 MR. SINGER: Perhaps Mr. Acker could point me to
25 the portion that he is using.

1 I have no objection to that portion.

2 THE COURT: It will be admitted.

3 (Defendant's Exhibit P-45 was received into
4 evidence.)

5 BY MR. ACKER:

6 Q Mr. McBride, just so the jury has some context, P-45 is
7 a transcript of a conference call that you and other
8 executives at SCO provided in November of 2003 to the
9 investing public, right?

10 A Yes, that's correct.

11 Q And what this document is is a transcript of what was
12 actually said by yourself and other Novell executives during
13 the course of that conference call?

14 A Yes, that's right.

15 THE COURT: Mr. Singer.

16 MR. SINGER: I thought Mr. Acker was focusing on a
17 particular passage in the document.

18 MR. ACKER: I'm going to get to that right now.

19 THE COURT: What page will it be found on?

20 BY MR. ACKER:

21 Q And I misspoke a minute ago. It wasn't Novell
22 executives, it was SCO executives in this conference call,
23 correct?

24 A I misspoke on, I guess, my answer. It was SCO
25 executives on a conference call.

1 Q You were all speaking so that one another could hear
2 one another, correct?

3 A Yes.

4 Q And so you heard what Mr. Bench -- was he your CFO at
5 the time?

6 A Yes, that's right.

7 Q You heard what Mr. Bench said to the investing public
8 in November of 2003, correct?

9 A Yes, that's right.

10 Q He said the following, along the way over the last
11 several months, once we had the copyright issue resolved
12 where fully we had clarity around the copyright ownership on
13 UNIX and System V source code, we've gone in and done a deep
14 dive into Linux. Do you see that?

15 A Yes.

16 Q That's what Mr. Bench said to the investing public,
17 while you could hear, in November of 2003, right?

18 A That's correct.

19 Q When he's referring to the copyright issue resolved,
20 he's talking about who owns the copyrights, right?

21 A That's right.

22 Q Wasn't it the case, though, actually, despite the fact
23 that in July and August in 2003 SCO was telling the
24 investing public that Novell has given up and has denied
25 ownership of the copyright, you were actually receiving

1 correspondence -- non-public correspondence from Novell
2 saying just the opposite?

3 A I wouldn't characterize it the way you said it.

4 Q Well, didn't you receive a letter from Mr. LaSala on
5 August 4th, 2003 saying in no uncertain terms that Novell
6 owns the copyrights?

7 A That was the portion we talked about yesterday where
8 they had come back and flip-flopped, so yes.

9 Q So as of August 4th, 2003, it's your testimony that
10 Novell has told you in a private letter from Mr. LaSala that
11 your interpretation of the contract is wrong and Novell
12 still owns the copyrights, correct?

13 A That's not the way I would say it.

14 MR. ACKER: Why don't we bring up SCO Exhibit 105.

15 BY MR. ACKER:

16 Q This is a letter to you from Mr. LaSala dated August
17 4th, 2003, correct?

18 A Yes.

19 MR. ACKER: And highlight the third paragraph,
20 please.

21 BY MR. ACKER:

22 Q Mr. LaSala said -- this in a private letter to you on
23 August 4th, 2003, in other words, under the asset purchase
24 agreement and Amendment No. 2, copyrights were not
25 transferred to Santa Cruz, correct?

1 A That's what it says.

2 Q And you also characterized an earlier letter of Mr.
3 LaSala?

4 MR. ACKER: If we could go to SCO Exhibit 678, and
5 if we could take a look at the middle paragraph, please.

6 BY MR. ACKER:

7 Q Mr. LaSala, on June 26th, said this to you, SCO's
8 statements are simply wrong. We acknowledge, as noted in
9 our June 6th public statement, that Amendment No. 2 to the
10 asset purchase agreement appears to support a claim that the
11 Santa Cruz Operation had the right to acquire some
12 copyrights from Novell. Then he continued, upon closer
13 scrutiny, however, Amendment No. 2 raises as many questions
14 about copyrights transferred as it answers. Indeed, what is
15 most certainly not the case is that any question of the UNIX
16 copyrights -- of whether UNIX copyrights were transferred to
17 SCO as part of the asset purchase agreement was clarified in
18 Amendment No. 2.

19 This is what you characterized in your testimony
20 yesterday as a flip-flop, right?

21 A Part of the flip-flopping. This is a few of the
22 letters that were flip-flopping.

23 Q So what you've told this jury is that on June 6th you
24 believed Novell agreed with your position, but then on
25 June 26th they had flip-flopped, right?

1 A I viewed that this was a flip-flop. I viewed that
2 other parts of Novell, Jack Messman specifically had told me
3 you got the copyrights.

4 Q Then on August 4th Mr. LaSala wrote you another letter
5 and told you in no uncertain terms Novell's position was it
6 still owned the copyrights, right?

7 A Which was a different position than this letter.

8 Q But you and your executives at SCO are still out in the
9 marketplace until November of 2003 saying that Novell has
10 agreed with your position and that Novell has agreed that
11 SCO owns the copyrights, correct?

12 A That's not how we characterized it.

13 Q So Novell, in private, was telling you you are wrong
14 about your interpretation of the APA, correct?

15 A The Novell attorney was, not Jack Messman.

16 Q But you, in public, are telling the world Novell has
17 given up, right?

18 A I was relying on Messman's comments.

19 Q Then what happens on November 22nd is that Novell on
20 its Web site puts all the correspondence up, correct?

21 A That's correct.

22 Q So they tell the world, that has a keen interest in
23 this, here's Novell's position and here is SCO's position,
24 and here is the asset purchase agreement, and here's
25 Amendment 1 and here's Amendment 2. All that went up on the

1 Web site, right?

2 A There were a number of things. That sounds roughly as
3 I remember it.

4 Q And Novell left it to the public to decide who was
5 right, correct?

6 A I don't know what Novell left it to.

7 Q Did you have a conversation with Chris Sontag in the
8 last three months?

9 A I've talked to Chris a few times since I left SCO. I
10 don't know exactly what point in time. I probably talked to
11 him in that period of time, yes.

12 Q It's true, isn't it, within this year actually, in
13 2010, that you called Mr. Stone, who is a venture
14 capitalist, and asked him to invest in one of your new
15 ventures related to a protective covering for a cell phone?
16 Isn't that right?

17 A That was the call that was made, yes.

18 Q And you asked him to invest money in your company
19 because you trust Mr. Stone, correct?

20 A I don't recall saying that.

21 Q You called him and asked him for money, right?

22 A We were rounding up capital. We called and talked to
23 him regarding his firm to see if they would be interested in
24 investing. It was at the request of one of the other people
25 of the cell phone company that asked that I place a call

1 into Stone.

2 Q Isn't it also true that during that conversation that
3 you said to Mr. Stone, Chris, don't worry about these
4 Maureen O'Gara allegations, those won't be part of the
5 trial? Didn't you say that to him?

6 A No, I didn't say that.

7 Q Just a few more questions, Mr. McBride.

8 Now you told the jury yesterday and today that the
9 reason that you believe that the SCOsouce initiative failed
10 after December 22nd, 2003 and going into 2004 was because of
11 Novell's actions, right?

12 A Say that again. What failed, the SCOsouce?

13 Q Yes.

14 A Yes. They were the major problem for the SCOsouce
15 program failing.

16 Q Let me show you what we've marked as Exhibit Q-22.

17 Mr. McBride, Exhibit Q-22 is a form 10-K filing that
18 SCO made with the SEC for the fiscal year ending
19 October 31st, 2003, correct?

20 A Yes.

21 Q So this document would have been filed sometime in
22 early 2004, correct?

23 A Yes, that's right.

24 Q Again, as with your other SEC filings, if you go to the
25 second to the last page of the document, you'll see your

1 electronic signature there.

2 A Okay.

3 MR. ACKER: I move for admission of Exhibit Q-22,
4 Your Honor.

5 THE COURT: It's already been admitted.

6 MR. ACKER: Thank you, Your Honor.

7 BY MR. ACKER:

8 Q Do you see that, sir?

9 A Yes, I do.

10 Q You signed it on or about or your electronic signature
11 was affixed with your permission on January 28th, 2004?

12 A Yes.

13 Q You would have reviewed the statements in Q-22 before
14 agreeing to have that happen?

15 A Yes, that's right.

16 MR. ACKER: If we go to page 36 of 87, please. If
17 we could highlight the paragraph that begins with our future
18 SCOSource licensing revenue.

19 BY MR. ACKER:

20 Q What SCO, with your permission, told the SEC and the
21 investing public was this in January of 2004: We initiated
22 the SCOSource licensing effort in January of 2003 to review
23 the status of UNIX licensing and sublicensing agreements.
24 This effort resulted in the execution of two significant
25 vendor license agreements during fiscal year 2003 and

1 generated \$25,846,000 in revenue. Do you see that?

2 A Yes.

3 Q That's a reference to the Sun and Microsoft deals plus
4 several other smaller licenses, correct?

5 A Yes, that's right.

6 Q Due to a lack of historical experience and the
7 uncertainties related to SCOSource licensing revenue, we are
8 unable to estimate the amount and timing of future SCOSource
9 licensing revenue, if any. That statement was also true,
10 right?

11 A Yes.

12 Q If we do receive revenue from this source, it may be
13 sporadic and fluctuate from quarter to quarter, correct?

14 A Yes.

15 Q True statement?

16 A Yes.

17 Q Our SCOSource initiatives are unlikely to produce a
18 stable or predictable revenue stream for the foreseeable
19 future. Also true, correct?

20 A That's right.

21 Q Then you told the government, additionally, the success
22 of this initiative may depend on the strength of our
23 intellectual property rights and contractual claims
24 regarding UNIX. Then you finished, including, the strength
25 of our claim that unauthorized UNIX source code and

1 derivative works are prevalent in Linux, correct?

2 A Yes, that's correct.

3 Q So the success of SCOSource, in your mind, in January
4 of 2004 would depend, in part, on the strength of your claim
5 that there actually was unauthorized UNIX source code and
6 derivative works prevalent in Linux, right?

7 A That was one of the risk factors we mentioned, that's
8 correct.

9 Q Mr. McBride, you were hired as CEO of SCO on June 27th,
10 2002, correct?

11 A Yes, that's correct.

12 Q This was a significant development in your professional
13 career as your first job as a CEO of a publicly traded
14 company, right?

15 A Yes.

16 Q Over time you acquired a significant number of stock
17 options to purchase SCO stock, correct?

18 A Yes, that's correct.

19 Q Today you have over a million such options, correct?

20 A That's correct.

21 Q In fact, of that million, 600,000 of those options are
22 fully vested, right?

23 A I don't know exactly how many are vested. I think it
24 would be more than that, but yes.

25 Q Of those 600,000 that you initially received upon

1 becoming CEO in 2002, your strike price is 76 cents, isn't
2 it?

3 A That's correct.

4 Q So what that means is that if SCO is successful in this
5 lawsuit and the SCO stock goes to \$1.76, you stand to make
6 \$600,000, right?

7 A I think the way you did the math, that's correct.

8 Q If the SCO stock price goes to \$2.76, you stand to make
9 \$1.2 million, correct?

10 A Correct.

11 Q If the SCO stock price goes to \$5.76, you stand to make
12 \$3 million, correct?

13 A Correct.

14 Q It's a lot of money, isn't it, Mr. McBride?

15 A Yes, it is.

16 Q That is not considering additional stock options you
17 have and stock ownership, correct?

18 A That's correct.

19 Q So you have a significant financial stake in the
20 outcome of this case, don't you, sir?

21 A I have a material -- what should I say -- interest in
22 the outcome of this case here, there is no doubt about that.

23 Q Not only do you have a financial interest, you have a
24 reputation interest in the outcome of this case, don't you,
25 sir?

1 A I would say that's accurate as well.

2 Q You were fired as CEO last year, correct?

3 A That's correct.

4 Q You believe that Novell has harmed your reputation,
5 correct?

6 A I believe that is accurate, yes.

7 Q You want to be vindicated, don't you, sir?

8 A I believe that's correct as well.

9 MR. ACKER: I don't have anything else, Your
10 Honor.

11 THE COURT: Mr. Singer.

12 MR. SINGER: I have some questions, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. SINGER:

15 Q Mr. McBride, are you out of a job right now?

16 A Yes, I am.

17 Q And were you terminated in October 2009 as part of a
18 series of cost cutting lay-offs --

19 A Yes, I was.

20 Q -- that were pursued?

21 A Yes, I was.

22 Q And let me go back to your employment with Novell. How
23 many years were you employed with Novell?

24 A I was there eight years.

25 Q Were you able to obtain positions of responsibility

1 while you were at Novell?

2 A Yes, I was.

3 Q What was the highest position that you reached in
4 Novell?

5 A I was vice president, general manager of the extended
6 networks division.

7 Q Was that an important division to the company?

8 A It was a startup group, had new emerging exciting
9 technology. So, yes, I guess you would say it was
10 important.

11 Q When you left Novell, did you leave voluntarily?

12 A Yes, I did.

13 Q That was after, you said, eight years?

14 A Yes.

15 Q Now let's turn back to some of the points that were
16 raised in cross-examination. There was some questioning
17 earlier today about the fact there was initially made -- I
18 think the first press release is a statement about patents
19 and copyrights. Do you remember that line of
20 cross-examination?

21 A Yes, I do.

22 Q Did the company, that is SCO, determine after that that
23 there were no patents which were owned?

24 A Yes, we did.

25 Q Did the company ever bring a patent infringement claim

1 against anyone?

2 A No, we did not.

3 Q Did the company ever seek to sell a SCOsource license
4 at that point based on patents as opposed to copyrights?

5 A No, we did not.

6 Q In subsequent press releases, did you refer to
7 copyrights?

8 A No -- yes, we referred to copyrights. We didn't refer
9 to patents after those January press releases were issued.

10 Q Now you were asked about whether you could reach
11 certain reasonable conclusions in looking at the asset
12 purchase agreement. Do you recall that line of questioning?

13 A Yes.

14 MR. SINGER: Mr. Calvin, can you put up on the
15 screen Exhibit SCO 1 again. Can you go to the excluded
16 asset schedule in the original agreement. Turn to the
17 second page, please.

18 BY MR. SINGER:

19 Q When you were talking about being able to reach
20 reasonable conclusions, you were being asked about the
21 language which appears in the original APA that had this
22 reference to all copyrights; is that correct?

23 A Yes, that's correct.

24 Q Was that language removed by an amendment?

25 A Yes, it was.

1 MR. SINGER: Can you turn, Mr. Calvin, to the
2 Amendment No. 2. Can you highlight paragraph A.
3 BY MR. SINGER:
4 Q Is this the language that replaced the language that we
5 just were looking at?
6 A Yes, it is.
7 Q Did you believe anyone could have a reasonable
8 conclusion in light of this language as to whether or not
9 SCO owned the copyrights?
10 Let me rephrase the question.
11 Could you believe anyone in light of this language
12 could have any reasonable conclusion that Novell had
13 retained the copyrights?
14 A No.
15 Q Now with respect to reasonable conclusions, do you have
16 a belief as to whether the seller, Novell, if it had
17 possession of Amendment No. 2, would be in a position to
18 know what it had sold to Santa Cruz?
19 MR. ACKER: Calls for speculation, Your Honor.
20 MR. SINGER: It think it just follows his line of
21 examination about reasonable conclusions.
22 THE COURT: I'll overrule the objection.
23 THE WITNESS: I believe that if Amendment 2 had
24 been there from day one, we wouldn't be sitting here today.
25 I think reasonable minds on both sides of the table would

1 look at it and conclude that Amendment 2 fully squared the
2 problem of the excluded assets. I would have never made the
3 first call in to Greg Jones and there wouldn't have been the
4 issues that went from there.

5 BY MR. SINGER:

6 Q After June 6th, did Novell, even at the level of the
7 CEO, have Amendment 2 right in front of him?

8 A Yes, he did.

9 Q Now let's talk about SVRX royalties. There were some
10 questions about the agency relationship. I wanted to ask
11 you, during the time that you are CEO, how significant was
12 the revenue stream that was being generated by these old
13 legacy SVRX royalties that had been in place in 1995?

14 A It was something that had been going down. It was
15 some -- are you talking about revenue stream to SCO or to
16 Novell?

17 Q Well, total revenue stream.

18 A Total revenue stream was roughly eight million, as I
19 recall it, for the year, and we were collecting only about
20 five percent of that.

21 Q Now you were asked some questions about the memorandum
22 that Mike Anderer had sent to you?

23 A Yes, right.

24 MR. SINGER: That is Exhibit C-12. Mr. Calvin,
25 can you put that on the screen.

1 BY MR. SINGER:

2 Q This was in January 4th of 2003, correct?

3 A Yes, that's right.

4 Q Had SCO at this time identified Amendment No. 2?

5 A No, we had not.

6 Q Was Mr. Anderer given Amendment No. 2?

7 A Eventually. Not at this time, but eventually he was.

8 Q So is his statement here, with respect to his view of
9 the agreement, based on the APA without the benefit of
10 Amendment No. 2?

11 A That's correct.

12 Q And can you read what he said in the last statement --
13 next to last statement?

14 Go ahead.

15 A I need to read this 20 more times to get it straight.
16 So understand this is just a first read.

17 Q Did there come to be a later time when Mr. Anderer was
18 presented with Amendment No. 2?

19 A Yes.

20 Q Did that affect his opinion as to whether or not there
21 was clarity on the issue?

22 A Yes.

23 Q And in what way did it clarify the situation?

24 A Well, I remember him sending me e-mails saying, this is
25 awesome news.

1 Q What was your understanding of what was meant by that?

2 A It was awesome news that Amendment 2 had been found
3 which cleared up the copyright concerned he raised earlier.

4 Q Now you have been shown a lot of press articles that
5 were presented and reflected criticism of SCO engaging in
6 its SCOsouce licensing program; is that correct?

7 A That's correct.

8 Q Now did SCO seek to respond to those critics by -- or
9 at least to its corporate clients or potential clients by
10 showing code that was allegedly infringing?

11 A Yes, we did.

12 Q Was that what was in the code room that you testified
13 about earlier today?

14 A Yes, that's right.

15 Q In addition, were there articles which were presented,
16 after looking at that code, that supported SCO's position?

17 A Yes.

18 MR. SINGER: I would like to go to Exhibit 748.

19 BY MR. SINGER:

20 Q This is one page of Exhibit 748. Do you recognize that
21 this is part of what you used in dealing with customers who
22 had raised concerns?

23 A Yes, it is.

24 MR. SINGER: I move the admission of 748.

25 MR. ACKER: Subject to just this page, that's no

1 problem.

2 THE COURT: 748 is just this one page and it will
3 be admitted.

4 (Plaintiff's Exhibit 748 was received into
5 evidence.)

6 BY MR. SINGER:

7 Q Can you tell us about each of these statements and,
8 first of all, whether they were used with potential
9 customers for SCOsouce licenses?

10 A Yes, they were.

11 Q And how did you present these to SCOsouce customers?

12 A Well, we had a PowerPoint presentation that we put
13 together that outlined where we were with our SCOsouce
14 program, where we were with our different programs and
15 products that we had inside of there, and then we laid out
16 our claims that we had, our licensing programs. And then on
17 top of that, we had some comments that third parties had
18 made regarding our program. So this was an example of that.

19 Q One of those was Information Week which said that, my
20 impression is that SCO's claim is credible, says Laura
21 DiDio, a Yankee Group analyst who was shown the evidence by
22 SCO Group earlier this week. It appears to be the same
23 code?

24 A Yes, that's right.

25 Q There is another one. What is EE Times?

1 A Electronic Engineering Times, I believe.

2 Q And Mr. Claybrook is a research director for Linux and
3 open-source software at Aberdeen Group in Boston. Is it
4 your understanding that he stated that, if everything SCO
5 showed me today is true, then the Linux community should be
6 very concerned?

7 A Yes, he did.

8 Q Computer Weekly quoted a George Weiss, vice president
9 of the Gartner Group. What is Gartner?

10 A Gartner is a research analyst group.

11 Q And did he state, from what I have seen, I think people
12 should be taking the SCO accusations seriously?

13 A Yes, he did.

14 Q Did you believe that there was a division, then, in the
15 technology community with respect to how strong a case of
16 infringement there was with respect to the amount of UNIX
17 that was in Linux?

18 A Yes, there were varying opinions.

19 Q And was this the state of affairs when Novell came
20 forward in May of 2003 with its initial claim that you
21 didn't own UNIX, UNIX copyrights?

22 A Yes.

23 Q Now let's look at another one of Novell's exhibits,
24 A-15, Mr. Gasparro's e-mail.

25 A Okay.

1 Q I think you were shown part of this e-mail, but I would
2 like to look at another part.

3 A Okay.

4 Q Let's focus on -- and Mr. Gasparro was a person who
5 worked at SCO; is that right?

6 A Yes, that's correct.

7 MR. SINGER: Mr. Calvin, can you blow up the
8 second paragraph and the third paragraph.

9 BY MR. SINGER:

10 Q Did Mr. Gasparro tell you that, it appears that the
11 Linux end-user community had suspected issues over IP for
12 quite some time? Do you see that?

13 A Yes, I see that.

14 Q Did you view that as consistent or inconsistent with
15 their being issues of copyright infringement based on Linux?

16 A Say that again.

17 Q Did you view that the fact that the Linux end-user
18 community had suspected issues over IP -- does IP to you
19 mean intellectual property?

20 A Yes.

21 Q -- for quite some time, did that reflect that there
22 was -- in your view, was that consistent with the articles
23 we just looked at or was it inconsistent?

24 A That was consistent with those articles.

25 Q In the second paragraph there is a statement -- or a

1 question that asked, should we consider publishing the
2 results of three independent auditors without divulging
3 actual code. Do you know what that refers to?

4 A That refers to the fact that we had independent
5 technology teams that had come in and had given us, as a
6 management team, advice and opinions that, in fact, Linux
7 was infringing on our copyrights.

8 Q Now there was a reference -- or a question by Mr. Acker
9 about the fact that the company decided not to contest a
10 certain action brought in Germany; is that correct?

11 A Yes.

12 Q Why did your company not contest that action?

13 A Because it didn't want to try its claims in Germany.

14 Q Did you prefer to try those in a United States
15 courtroom?

16 A Yes, that's correct.

17 Q There was an article which you were asked about --
18 before we turn to those articles, in your view, was there a
19 difference between people who questioned whether Linux
20 infringed UNIX and Novell's challenge to copyright
21 ownership? Were those two different things or the same type
22 of thing to you?

23 A They were two different things.

24 Q Can you explain that?

25 A Right. There were really two issues here. Where the

1 discussion typically started was is there infringement in
2 Linux. Then before you could move to getting it licensed,
3 it came down to, well, if you don't even own the copyrights,
4 even if there is infringement, how can we go there. So
5 there were two different issues, sometimes dealt with by the
6 same customer. Sometimes they would bring up one or not the
7 other. Those were the two big issues that we faced.

8 Q And did you view them to be the same or did one, in
9 your view, create a more serious difficulty to overcome than
10 the other?

11 A The copyright ownership problem was by far the biggest
12 because -- that's the answer to that.

13 Q And the reason is?

14 A The reason is because if you don't have the ownership,
15 then it doesn't matter if there is ten lines of infringement
16 or hundreds of thousands of lines or millions of lines, it
17 doesn't matter if you don't own the copyrights and you can't
18 enforce it.

19 Q Now I would like to turn to the forecast of earnings
20 that you were asked about by Mr. Acker in M-14. Perhaps we
21 can look at that document.

22 A Okay.

23 Q Now, first of all, in this press release, did SCO
24 publicly announce that there would be a formal earnings
25 release on May 28th, 2003?

1 A Yes, we did.

2 Q Is that in the fourth paragraph?

3 A Yes, it is.

4 MR. SINGER: Mr. Calvin, can you highlight that.

5 BY MR. SINGER:

6 Q So would this mean that everyone, including Novell,
7 would know that's when you are releasing your actual
8 results?

9 MR. ACKER: Objection, leading, Your Honor, and
10 speculation too.

11 THE COURT: Overruled.

12 THE WITNESS: Yes.

13 BY MR. SINGER:

14 Q Now on May 14th, 2003, do you recall Mr. Acker pointing
15 out to you that the stock price had closed at \$3.55?

16 A Yes, I recall.

17 MR. SINGER: And can we put up this slide. I
18 think we have some other slide that deals with the price
19 movement on May 28th, 2003, Mr. Calvin.

20 BY MR. SINGER:

21 Q While he's looking for that, is there a difference
22 between projected results and having actual results
23 announced?

24 A Yes.

25 Q After your projected results were announced on May

1 14th, when the stock was \$3 and something, had the stock
2 increased to about \$10?

3 A Yes. Over the next week or two, it continually trended
4 up until it got up to that nine, \$10 mark.

5 Q And Mr. Acker made a point that early in the morning
6 before Novell's press release there appeared to be some
7 downward trending in the stock. Do you see that?

8 A Yes.

9 Q Do you know whether, in fact, Novell had put out word
10 earlier that day in advance of their press release that
11 would have indicated that they were going to make a
12 statement that asserted ownership to the copyrights?

13 MR. ACKER: Calls for speculation, Your Honor.

14 THE COURT: Sustained.

15 MR. SINGER: Can we look at Plaintiff's 172.

16 BY MR. SINGER:

17 Q And this is a news flash article on May 28th, 2003, and
18 I am going to ask the witness if you have a basis, in
19 looking at this, to say whether or not there was early
20 morning announcements regarding this stock?

21 Let me reframe that.

22 Do you know, as you sit here today without looking at
23 this document, exactly when the first public word came out
24 about Novell's May 28th press statement?

25 A No, I don't know exactly.

1 Q I would like you to look at this document for a moment
2 and see if that refreshes your recollection, this article,
3 that there was a news flash on May 28th, 2003.

4 MR. ACKER: Well, Your Honor, I'm just going to
5 object. If he has any refreshing recollection, it's based
6 on hearsay. As to what his knowledge was at the time, that
7 would be based on hearsay.

8 MR. SINGER: I think these are matters of public
9 record as to the timing. It doesn't go to the truth of
10 anything. It's the timing of certain announcements.

11 MR. ACKER: Exactly, and what --

12 THE WITNESS: I thought he meant what time of the
13 day.

14 MR. ACKER: I think he did too.

15 THE COURT: Why don't we start over again.

16 Mr. Singer, why don't you ask the question.

17 BY MR. SINGER:

18 Q Looking at the May 28th, 2003 news flash, is your
19 memory refreshed as to what time of the day there was any
20 news about Novell's announcement?

21 A My recollection of their announcement -- we're talking
22 about May 28th?

23 Q Yes.

24 A -- is that it came later in the day.

25 Q Does this refresh your recollection as to whether there

1 was some advance word put out into the market about what
2 Novell was going to do?

3 A Yes.

4 MR. ACKER: Your Honor, he's going to testify
5 based on hearsay. He's testified twice he didn't have a
6 memory other than it was later in the day. Now he's shown
7 hearsay to try to change the answer.

8 MR. SINGER: This is the purpose of a document, to
9 refresh recollection as to something which one would
10 ordinarily not remember so precisely.

11 MR. ACKER: There is a difference between
12 refreshing recollection and parrotting hearsay. We're in the
13 later category.

14 THE COURT: I think this has some kinship to the
15 document that you wanted the witness to testify to and then
16 asked questions about the stock price. I think I have got
17 to let it proceed to this point, but no further, okay.

18 MR. SINGER: Yes.

19 Let's take down the document. So whatever
20 refreshing it has or has not provided you have.

21 BY MR. SINGER:

22 Q Do you know, based on your recollection, having been
23 refreshed, whether there was some advance knowledge into the
24 market that Novell was going to come out later in the day
25 and say on May 28th SCO doesn't own the copyrights?

1 A Yes.

2 Q What is your understanding?

3 A Well, my understanding was that Maureen O'Gara had
4 understood the night before --

5 MR. ACKER: Your Honor, this is just hearsay.

6 BY MR. SINGER:

7 Q I'm not asking you to talk about what someone else
8 said. It's simply -- and I will move on from this point if
9 you don't have a recollection, Mr. McBride, but do you --

10 THE COURT: Do you have an independent
11 recollection of this?

12 THE WITNESS: Of this being what is the exact
13 recollection?

14 BY MR. SINGER:

15 Q This being what time in the day, whether there was any
16 advance knowledge that Novell was going to put out a press
17 release on May 28th, 2003?

18 A Yes, I did.

19 Q Was that early in the day, late in the day that word
20 began to circulate about the press release that was going to
21 be forthcoming?

22 A Early in the day.

23 Q If you then go back to the stock chart that we were
24 looking at, the movement -- the initial movement down, then,
25 that Mr. Acker was talking about occurred early in the day

1 on May 28th, 2003?

2 A That's correct.

3 Q Then when the actual press release came out is when you
4 see the decline that indicated it is going down from \$8 and
5 some cents down to \$6 and some cents?

6 MR. ACKER: Objection, leading, Your Honor, the
7 last three questions.

8 THE COURT: Sustained.

9 BY MR. SINGER:

10 Q Can you tell the jury what the nature of the decline
11 was from the point in the day when Novell published its
12 ownership claim down to the end of the day?

13 A Yes. It drops from eight something -- it looks like
14 about 8.30 or so per share, down to six something. So eight
15 something down to six something. I don't see the exact
16 pennies.

17 Q I would like to turn to another subject, which was the
18 June 11th letter. This is J-16.

19 Actually, before we go to that, let's go to your June
20 6th letter, which shall SCO 95.

21 Do you recall some questions, Mr. McBride, about the
22 fact that you didn't put in the letter the fact that
23 Mr. Messman had said to you, okay, Darl, you have got the
24 copyrights. Do you recall that line of questions?

25 A Yes, I do.

1 Q Would you read the first sentence of the second
2 paragraph in the June 6th letter?

3 A Importantly, and contrary to SCO's assertions, SCO is
4 not the owner of the UNIX copyrights.

5 Q I was referring to the second paragraph, the one after
6 you talk about the press release.

7 A As you know, your accusation that SCO does not own the
8 UNIX copyrights was false and was without a good faith basis
9 or belief.

10 Q And did you make -- seem to make any case in the June
11 6th, 2003 letter to persuade them of the ownership of the
12 copyrights or were you talking about consequences?

13 MR. ACKER: Objection, leading, Your Honor.

14 MR. SINGER: I'll reframe that question.

15 THE COURT: Please.

16 BY MR. SINGER:

17 Q Let's go down later in the letter to the part where you
18 ask him what you want him to do. Do you see the three
19 items?

20 A Yes.

21 Q Do you see, number one, is you wanted Novell to affirm
22 publicly that Novell has not retained any rights in and to
23 the UNIX copyrights?

24 A Correct.

25 Q And Mr. Messman as of this time affirmed privately in

1 his conversation to you that he didn't believe that Novell
2 had an ownership interest in the copyrights?

3 A That's when he said, okay, Darl, you've got the
4 copyrights, yes.

5 Q And then later this day did you receive Exhibit 96?

6 Can we look at the -- this is Mr. LaSala's letter?

7 A Okay.

8 Q Can we turn to the second page. This is one day after
9 your call on June 5th with Mr. Messman?

10 A Yes, that's right.

11 Q Do you see the language which says, Amendment No. 2 to
12 the 1995 SCO-Novell asset purchase agreement was sent to
13 Novell last night by SCO. To Novell's knowledge, this
14 amendment is not present in Novell's files. The amendment
15 appears to support SCO's claim that ownership of certain
16 copyrights for UNIX did transfer to SCO in 1996.

17 After Novell publicly stated this, did you feel there
18 was any need to put into your letters with Mr. Messman the
19 fact that the amendment supports SCO's claim that ownership
20 of the UNIX copyrights transferred?

21 A No, not at all.

22 Q So when we turn to the letter that you were asked about
23 by Mr. Acker, the June 11th letter, J-16, did you feel any
24 need to put into the June 11th letter, five days after this
25 press release by Novell, by the way, Jack, this confirms

1 what you told me on the phone, that Novell isn't claiming
2 the copyrights any longer?

3 A No.

4 Q Now you were asked some questions about this letter
5 with respect to SVRX licenses. Do you recall that?

6 A Yes.

7 Q And what I would like to do is ask you to take a look
8 at the asset purchase agreement?

9 A Okay.

10 Q By the way, before we go there, if you look at the
11 June 11th letter, had Mr. Messman put into his letter the
12 term SVRX licenses? Do you see that, which quotes part of
13 his letter --

14 A Yes.

15 Q -- in the first paragraph there?

16 A Yes.

17 Q Now can we turn to Exhibit 1 again, the asset purchase
18 agreement?

19 A Okay.

20 Q Let's look at section 4.16(a).

21 Now, Mr. McBride, were you involved in drafting this
22 agreement?

23 A No.

24 Q Or negotiating this agreement?

25 A No, I was not.

1 Q But if we look at SVRX licenses as used for purposes of
2 this section, does it have a particular defined meaning?

3 A Yes, it does.

4 Q And does that require you to look at item VI of
5 schedule 1.1(a) ?

6 A Yes, it does.

7 Q Let's look at that.

8 A Okay.

9 Q Is this the schedule?

10 A Yes, it is.

11 Q Let's turn to item VI. Do you see where it says, all
12 contracts relating to the SVRX licenses listed below?

13 A Yes.

14 Q And in the SVRX licenses listed below, do you see IBM's
15 software development agreement? And we can put the second
16 page on right after this.

17 A I don't see it on this page.

18 Q Can we turn to item three of the APA -- item III of
19 this schedule.

20 Now item III, can you read what falls within item III
21 out loud, please, just the heading part.

22 A All of seller's rights pertaining to UNIX and UnixWare
23 under any software development contracts, licenses and any
24 other contract to which seller is a party or by which it is
25 bound and which pertain to the business, to the extent that

1 such contracts are assignable, including without limitation.

2 Q Now can we go down to -- I think it's on the next page.

3 It's item L under this provision. Can you read what it says
4 there under III L?

5 A Software and sublicensing agreements, this includes the
6 source code and sublicensing agreements that seller has with
7 its OEM, end user and educational customers. The total
8 number of these agreements is approximately 30,000.

9 Q Is the IBM software development agreement one of the
10 agreements that SCO had under section III of the APA?

11 A Yes.

12 Q Now did Mr. Acker show you this particular schedule
13 which defines what an SVRX license is when he was asking you
14 those questions?

15 A No.

16 Q Should he have held up his hand when he was asking you
17 that question?

18 Let's go on to another topic.

19 A Okay.

20 Q In your cross-examination you were asked about vendor
21 licenses such as Microsoft and Sun. Do you recall that?

22 A That's right.

23 Q And at that time -- I think the question was were these
24 SCOSource licenses. At that time had you announced a right
25 to use -- license to the public in the first quarter or

1 second quarter of 2003?

2 A No, we had not.

3 Q So in April 2003, was that yet on the market?

4 A No, it was not.

5 Q And with respect to Microsoft and Sun, would you have
6 considered those vendor agreements or would you have
7 considered those right to use agreements?

8 A Clearly vendor agreements.

9 Q You were shown a number of articles about the fact that
10 in the summer of 2003 you thought the issue over copyright
11 ownership was over. Do you recall that questioning?

12 A Yes, I do.

13 Q Did you think that Novell, after publicly making its
14 statement on June 6th, was going to do an about-face later
15 in August and in subsequent months?

16 A No.

17 Q In fact, if we turn to one of those articles that you
18 were asked about in August 19th, J-19 -- can we go to
19 page -- I think it's page 16 of 18 that you were being asked
20 about.

21 MR. SINGER: Page 16, I believe. One more page,
22 please. It's the next page.

23 BY MR. SINGER:

24 Q In regard -- I'm just going to read you the language.
25 Why don't we -- here we go. In regard to Novell's recent

1 claim that it owns the copyright to UNIX, McBride said it
2 took SCO just four days to press the eject button on that
3 claim. What were you referring to?
4 A I was referring to the -- first of all, Messman's
5 letter to me and the press release. Then the finding of
6 Amendment 2. And then the calling of Jack and informing him
7 that we found Amendment 2. And then finally him saying,
8 okay, Darl, you have the copyrights.

9 Q If we go to the next paragraph, can you read that to
10 yourself?

11 A Sure.

12 Q The after attacking us.

13 A After attacking us, Novell's CEO, Jack Messman, was
14 then irate that we had not told them there was an amendment
15 to the contract between us that clarified our copyright
16 ownership of UNIX. He seemed to believe -- he seemed to
17 believe that we knew about it but weren't telling them so
18 they could attack us and look foolish. Go figure.

19 Q Mr. McBride, is this consistent with your recollection
20 of that conversation with Mr. Messman on June 5th?

21 A Yes, it is.

22 THE COURT: Mr. Singer, how much more do you have?

23 MR. SINGER: Just a couple more minutes.

24 THE COURT: Mr. Acker, how much recross will you
25 have?

1 MR. ACKER: Not a great deal, Your Honor.

2 THE COURT: Can you be more specific?

3 MR. ACKER: Five, ten minutes.

4 THE COURT: Okay. Counsel, I'm inclined to go
5 ahead and break now and let you finish with your redirect
6 tomorrow, then recross. I don't think we ought to try to
7 finish this witness today. So we are going to recess now,
8 all right.

9 MR. SINGER: Thank you, Your Honor.

10 THE COURT: Ladies and gentlemen, let me, first of
11 all, thank you for the way you have been conducting
12 yourselves. This has been a long week, plus, and you have
13 heard a lot of testimony, but you have been paying
14 attention. You have remained alert and have tried to be
15 attentive throughout. That is very important. And I hope
16 you will continue to do so.

17 Again, I will remind you that though you have
18 heard a lot of testimony, you still have a lot to hear, and
19 it would not be appropriate for any of you to be making up
20 your mind in regards to any of the issues in this case
21 because you really don't know what those issues are until
22 you've been instructed on the law and until you've heard
23 closing arguments, which you've heard before.

24 I would just gently remind you again about the
25 importance of you not discussing this with anyone or

1 allowing anyone to discuss it with you, that you not do any
2 research on your own, you not listen to anything or watch
3 anything or do anything on the Internet, on any of those
4 social network sites that have been read to you several
5 times already. It's very, very important that you be
6 confining yourselves to this case, only what you hear in
7 this courtroom and absolutely nothing else.

8 We'll be in recess until 8:30 tomorrow morning.

9 (Jury excused)

10 THE COURT: Mr. Singer, I asked you a question
11 before the jury came in which was really just a short -- and
12 hoping for a short answer, and that was are we on schedule
13 or have we fallen behind?

14 MR. SINGER: We are behind schedule. We are
15 seeking to address that by trimming some of what we plan to
16 put in. Obviously we don't have control over the
17 cross-examination length of witnesses. Our plan is, after
18 Mr. McBride finishes his testimony, to have Mr. Pisano
19 testify. There is a possibility that, before the two of
20 them, we would present a deposition of Ms. O'Gara. We're
21 either going to use that then or later in the day, or
22 possibly the beginning of Thursday. The lineup is generally
23 finishing Mr. McBride, then we would go to Professor Pisano
24 and Professor Botosan. We think that's going to take the
25 balance of the day.

1 We're hopeful, if we finish all of that, then we
2 have Mr. Stone, we've asked to be called adverse, on
3 Thursday to appear. And I'm hopeful we can finish our case
4 on Thursday with the balance of some very short witnesses,
5 Mr. Maciaszek, Mr. Nagle, and Mr. Tibbitts, on Thursday.
6 That's our game plan.

7 THE COURT: If they finish by, roughly, noon on
8 Thursday, Mr. Brennan, how does that play out as far as you
9 and meeting the three-week schedule?

10 MR. BRENNAN: May I confer with my colleagues?

11 THE COURT: Yes, please.

12 MR. SINGER: Again, we're assuming the
13 cross-examination?

14 THE COURT: Yes. I'm not holding you to that
15 commitment.

16 MR. JACOBS: Your Honor, I will field this. I
17 think we are -- I think we can get the case done on the
18 original schedule. We're keeping time. We're trading time
19 with SCO. So far we seem to be very closely in sync in
20 terms of the clock.

21 What would make that more assured is if we could
22 work out some mechanism so we don't have to spend a lengthy
23 amount of time on the covenant of good faith and fair
24 dealing issue, but would rather have the opportunity to
25 augment the record for the Court's determination of that

1 issue. I have not ventilated this with SCO's counsel yet,
2 so we haven't worked out what that might look like.

3 But it would be something like, if there is
4 something we didn't get in now, we would get it in through
5 deposition testimony that's been taken on that topic and
6 through exhibits and argument to the Court. That would
7 constrain what we really have to do in this courtroom to the
8 ownership and slander related topic, and I think we would
9 feel a little more comfortable with trimming our case, if
10 that were true.

11 THE COURT: Would that also include the unclean
12 hands issue?

13 MR. JACOBS: I would have to consider that, Your
14 Honor. Let me think about that and get back to you.

15 THE COURT: Okay. If you would think about it,
16 discuss it with Mr. Singer, then try to make a united
17 presentation to the Court as to what you would like to do.
18 The Court certainly has no objection to dealing with that
19 issue and perhaps even unclean hands by way of non-live
20 testimony.

21 MR. SINGER: We're happy to discuss it with
22 Mr. Jacobs and see where we go with that.

23 I just wanted to be complete in setting forth the
24 schedule, and Novell already is aware of this. There are
25 two witnesses, essentially, in our case that would be

1 presented next week. One is Mr. Keller, he's a short
2 witness. The other, of course, is Mr. Messman, who's
3 supposed to appear on the 24th.

4 THE COURT: All right, counsel.

5 We do have hearings this afternoon. If you would
6 please clear the desks.

7 We'll be in recess until 8:30 in the morning.

8 (Whereupon, the trial was continued to Wednesday,
9 March 17, 2010 at 8:30 a.m.)

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