

1 THE COURT: Are we ready, counsel?

2 MR. JACOBS: Your Honor, I have had a chance to
3 review the transcript, and I believe that my characterization
4 of the record was far more correct than Mr. Normand's.

5 In the deposition that we're discussing, this is
6 the deposition of April 27th, 2007, it's a 30(b)6 deposition,
7 and Aaron Alter is the witness for the firm, for Wilson
8 Sonsini. Aaron Alter was Mr. Braham's subordinate on the 1995
9 asset purchase agreement. There are only a handful, less than
10 five, less than four privileged instructions in this whole
11 deposition in which Mr. Alter is examined at length about all
12 relevant aspects of the asset purchase agreement. In
13 particular, there is this -- there are these two relevant
14 exchanges:

15 Question. What did Wilson Sonsini and Novell
16 discuss in 1995 regarding the prospects of
17 retaining intellectual property in UNIX and
18 UnixWare?

19 Mr. Perens -- he's the internal general
20 counsel for Wilson Sonsini -- well, I'll have to
21 instruct not to answer based on privilege. I
22 don't know if you -- if there's any waiver issue
23 that you wanted to instruct us on.

24 Mr. Brakebill, counsel for Novell. I
25 would ask him whether he knows, first of all, a

1 foundational question, and see whether there's any
2 issue of instruction.

3 Answer, the witness. I don't personally
4 recall. And while I am the Wilson designee here,
5 I would suggest in having read Tor's
6 declaration -- bracket Tor Braham's declaration --
7 closed bracket, that he was the primary
8 negotiator, and I believe he answers that question
9 quite specifically in his deposition.

10 So that's the testimony on the 1995 transaction.

11 Then as to Amendment Number 2, Your Honor, there is
12 no instruction whatsoever around Amendment Number 2.

13 Mr. Alter is asked:

14 Question. Amendment Number 2, Mr. Alter.
15 Handing you a copy of previously marked as
16 Exhibit 1009. Do you recognize this document?

17 Answer. I do not.

18 Question. Is the question of the
19 negotiation and drafting of Amendment Number 2 a
20 topic you're prepared to address today?

21 Lacks foundation, counsel. Why don't you
22 ask him what role our firm had, if any, in this.

23 The witness. Okay. So, Mark, I don't --
24 I don't recall. I don't recall. I'm reading the
25 trailer, and I'm trying to see if it was even a

1 Wilson document or whether Novell did it.

2 Question by Mr. Normand. I take it you
3 didn't have any involvement with respect to
4 Amendment --

5 Answer. If I did I don't recall.

6 Question. And do you know whether the
7 firm had any involvement with respect to Amendment
8 Number 2?

9 Answer. I also don't know that off the
10 top of my head.

11 Question. And I take it you don't know
12 whether Mr. Braham did.

13 Answer. I did not -- I do not. I'm sorry.

14 In other words, no instruction around Amendment
15 Number 2, no opposition to Mr. Normand inquiring of the law
16 firm. Again, Mr. Braham has left. They have Mr. Braham's
17 declaration already. They've chosen not to take Mr. Braham's
18 deposition. And that's the state of the record. There is no
19 privilege assertion of relevance here, Your Honor.

20 THE COURT: Mr. Normand?

21 MR. NORMAND: Three things, Your Honor. First,
22 Mr. Jacobs hasn't spoken to the 100 documents over which
23 Novell has claimed a privilege concerning negotiation of the
24 APA in the fall of 1995. Whether the assertion that privilege
25 is appropriate or not, the question is whether it would be

1 congruous to allow this witness to speak to Mr. Braham's
2 intent when we haven't gotten discovery on all of the
3 communications between Wilson Sonsini and Novell.

4 Two, Mr. Jacobs quoted on Page 45 of the
5 transcript. If you go to Page 48, there is a specific
6 question and a specific answer.

7 Question. Did Wilson Sonsini ever tell other
8 than Mr. Bradford anyone from Novell that the
9 copyrights in UNIX and UnixWare would not
10 transfer?

11 Mr. Perens. I'll instruct not to answer
12 on the grounds of attorney-client privilege.

13 And three, Your Honor, we never disputed that there
14 has been a selected waiver with respect to these
15 communications about Amendment Number 2. Ms. Amadia put in a
16 declaration on it, and Mr. Braham put in a declaration on it.
17 The issue is the witness reaching back in time saying, I spoke
18 with Mr. Braham. He can't speak to, quote-unquote, Novell's
19 intent when we haven't got full discovery on Novell's intent.

20 THE COURT: I understand the line of questioning
21 that Mr. Brennan would have liked to have pursued with
22 Ms. Amadia was, as represented by Mr. Normand, what
23 Mr. Braham, tell me, when I called him and asked him about the
24 intention of the APA. It seems to me based upon what was
25 represented in the side bar as well as what has now been read

1 to me that that line of questioning was not permitted during
2 the deposition.

3 MR. JACOBS: I'm sorry, Your Honor. He's leading
4 you into error. There is a whole transcript about the intent
5 underlying the APA.

6 THE COURT: We're not talking about the APA. We're
7 talking about Amendment 2, and it could be, more specifically,
8 conversations between Mr. Braham and Ms. Amadia about
9 Amendment Number 2. That is what no line of questioning was
10 allowed because of privilege.

11 Isn't that a fact, Mr. Jacobs?

12 MR. JACOBS: No, I don't think so, Your Honor. I
13 think the question on Amendment Number 2 and the role of
14 Wilson Sonsini on Amendment Number 2 was specifically allowed
15 and was referred to, and the witness Mr. Alter didn't know
16 Mr. Braham's involvement in it. So there was no blockage of
17 examination on Amendment Number 2. And Mr. Normand just
18 didn't make his record.

19 MR. NORMAN: I agree with what Mr. Jacobs just
20 said, and I explained to him on the break and I'll explain
21 again, I want to be very clear about our position. There has
22 been a selective waiver. Ms. Amadia and Mr. Braham have both
23 spoken to their discussions regarding Amendment Number 2.
24 Novell wants to put in Ms. Amadia's testimony of her
25 discussion with Mr. Braham on the proposition that Mr. Braham

1 can speak to Novell's intent. We have not gotten full
2 discovery on Novell's intent in 1995.

3 THE COURT: Okay. That is a separate issue. That
4 is not what was represented at the side bar.

5 MR. NORMAND: That is what I've been trying to say
6 for 20 minutes, Your Honor. I'm sorry if I was unclear.

7 THE COURT: That was not what was represented at
8 side bar. What was represented at the side bar was that a
9 question was posed to the witness in the law firm about
10 Braham's conversation with Ms. Amadia, and there was a
11 privilege exercised, and you were therefore not allowed to ask
12 of the witness representing the law firm about that
13 conversation. That was what was represented at the side bar.

14 MR. NORMAND: That's not what I meant to say.

15 THE COURT: Is that what happened in the
16 deposition?

17 MR. NORMAND: No. What happened in the deposition
18 was we were not permitted to speak to Wilson Sonsini's, all of
19 Wilson Sonsini's communications with Novell in 1995.

20 THE COURT: Okay. That's a different issue.

21 All right. I will permit Mr. Brennan to reopen,
22 and he may ask this witness about conversations with
23 Mr. Tor Braham.

24 MR. NORMAND: Do you want to do that now, Your
25 Honor?

1 THE COURT: Yeah. We'll let him finish before you
2 go to your cross.

3 MR. BRENNAN: Your Honor, if I could have
4 permission just to tell Ms. Amadia that I'm going to ask that
5 question.

6 THE COURT: Do that now while Ms. Malley is
7 bringing in the jury.

8 MR. BRENNAN: Thank you.

9 (Whereupon, the jury returned to the court
10 proceedings.)

11 THE COURT: Ladies and gentlemen, Mr. Brennan has
12 been given permission to ask some questions. And so though he
13 had said that he only had three more to go, this is
14 specifically at the Court's permission and not a request. And
15 don't hold it against him if he's going to ask a few more
16 questions to this witness.

17 MR. BRENNAN: Thank you. You just made my day,
18 Your Honor.

19 Q. BY MR. BRENNAN: What I'd like to have you do,
20 Ms. Amadia, is focus back in time when Mr. Steve Sabbath,
21 general counsel of Santa Cruz Operation, had approached you
22 making a request that the asset purchase agreement be amended,
23 and then what you undertook to do relative to deciding how to
24 respond. And I believe you indicated that you spoke with
25 Tor Braham, who was the lawyer at Wilson Sonsini. Do you

1 recall that?

2 A. I do, and I did. I spoke with Tor Braham, because
3 after reviewing the asset purchase agreement I -- it seemed
4 very clear that copyright ownership was not intended to be
5 transferred, and I wanted to understand from the drafter and
6 the lead negotiator himself whether that was some kind of
7 clerical error as it had been presented to me by Mr. Sabbath
8 or whether that was intentional. He indicated very clearly
9 that that was intentional. There were good reasons for that.
10 And he directed me not to modify it.

11 Q. And when you say he directed you not to modify it,
12 what did you understand him to mean in that regard?

13 A. He said, don't change the schedule of excluded
14 assets such that the copyright ownership would transfer to
15 Santa Cruz.

16 MR. BRENNAN: Thank you, Your Honor. I appreciate
17 your indulgence.

18 THE COURT: Mr. Normand?

19 CROSS-EXAMINATION

20 BY MR. NORMAND:

21 Q. Good afternoon, Ms. Amadia.

22 A. I'm sorry. I didn't hear you.

23 Q. Good afternoon.

24 A. Oh, good afternoon.

25 Q. Now, you've testified that you perceived your job

1 in 1996 as to follow the business decision; is that correct?

2 A. Correct.

3 Q. And when you were determining what the intent was
4 under the asset purchase agreement, you didn't call any of the
5 business negotiators of the asset purchase agreement; correct?

6 A. No, I did not.

7 Q. Now, you perceived your job as an attorney in 1996
8 to follow the intent of business negotiators; correct?

9 A. Well, I didn't negotiate the original asset
10 purchase agreement, so I perceived my job as to follow the
11 business intent of the business people in making any changes
12 to that with respect to Amendment Number 2.

13 Q. You said you called Tor Braham; correct?

14 A. Yes. And I spoke with Jim Tolonen, as well, who,
15 as I said in my earlier testimony, is the lead business person
16 involved in the transaction of Amendment X and Amendment
17 Number 2.

18 Q. And with respect to your discussion with
19 Mr. Braham, if Mr. Braham was wrong about what the business
20 negotiators had intended under the APA, then what he told you
21 about that intent was wrong; correct?

22 A. Yeah, I suppose so; although I also received
23 direction from Jim Tolonen and from inhouse Novell counsel
24 that was consistent with what Tor told me. So I didn't have
25 one source for that understanding.

1 Q. And if what Mr. Tolonen had told you about what he
2 regarded as the intent under the APA did not reflect the
3 intent of the business negotiators in 1995, then you had a
4 misunderstanding of the business intent; correct?

5 A. I -- yeah. My -- when I testified as to following
6 the direction of the business intent, it was as to changes or
7 amendments to Amendment Number 2.

8 Q. Your understanding --

9 A. Okay. So I was going to follow the direction of
10 the business intent with respect to the modification to the
11 asset purchase agreement.

12 Q. Let me make sure I understand. I heard you say you
13 had three bases in which you concluded that you thought you
14 understood in 1996 was the intent of the APA on the issue of
15 copyright transfer; correct?

16 A. Uh-huh (affirmative).

17 Q. One, your discussion with Mr. Tolonen; two, your
18 discussion with Mr. Braham; and, three, your review of the
19 asset purchase agreement; is that fair to say?

20 A. Yes.

21 Q. Now, you recognize that there was an issue with the
22 copyright exclusion language in the asset purchase agreement;
23 correct?

24 A. Can you say that again? I recognize that --

25 Q. That there was some issue with the language of the

1 copyright exclusion in the asset purchase agreement; correct?

2 A. I was told by Steve Sabbath that there was an issue
3 with the copyright exclusion.

4 Q. But you recognized that there was an issue with the
5 clarity of the language; correct? Otherwise you wouldn't have
6 agreed to enter into any amendment at all.

7 A. No, I didn't think there was any issue at all with
8 the copyright exclusion. I thought it was very clear in the
9 asset purchase agreement in Schedule 1.1(a) and
10 Schedule 1.1(b) that copyright actually was excluded.

11 Q. So your testimony is that this paragraph in
12 Amendment Number 2 serves no purpose?

13 A. Oh, no. It serves a purpose.

14 Q. What purpose did it serve?

15 A. Well, understanding the context, we are trying to
16 negotiate Amendment Number X with Santa Cruz and IBM.
17 Santa Cruz has threatened litigation. They're telling us we
18 need to agree to their terms on the buyout provision with IBM
19 and future buyouts in order to avoid litigation. And then
20 they throw in this alleged clerical error.

21 And so in that context, trying again to settle this
22 dispute and be able to move forward and let us run our
23 perspective businesses, I saw the purpose of Amendment
24 Number 2 with regard to altering the copyright section as
25 appeasing them to make them understanding that we have no

1 intention of suing them for copyright infringement for their
2 rights to develop this code and run their business that they
3 acquired. So again, I modified that section to affirm the
4 licenses that were already in the APA.

5 Q. So your view was, your testimony is there was no
6 lack of clarity in the original APA, but you signed Amendment
7 Number 2, anyway?

8 MR. BRENNAN: Objection; mischaracterizes her
9 statement.

10 MR. NORMAND: Your Honor, she can answer these
11 questions.

12 THE COURT: Well, number one, she did not sign.

13 MR. BRENNAN: That was my objection.

14 THE WITNESS: I did not think there was any lack of
15 clarity in the original APA.

16 Q. BY MR. NORMAND: But you did recommend to
17 Mr. Tolonen that he sign the language in Amendment Number 2
18 that changed the original asset purchase agreement; correct?

19 A. I didn't view it as a change. I viewed it as
20 language to clarify it.

21 Q. But it did change it; correct?

22 A. I still don't believe it changed it.

23 Q. You don't think it's a new language?

24 A. It can have new language to shed additional light
25 without changing the underlying meaning, and that was what I

1 was intending to do.

2 Q. And do you think Mr. Sabbath agrees with you?

3 A. I think he should agree with me. I don't know
4 whether he does agree with me.

5 Q. You just said in your testimony that you, and I'll
6 use your word, felt that Mr. Sabbath had agreed with your view
7 on the issue of copyright ownership; is that right?

8 A. Yeah.

9 Q. But you're not sure if he agrees; right?

10 A. Like I said, he didn't dispute it when I presented
11 the rationale of the changed language and the changed
12 language, and he signed the document.

13 Q. But it's possible that Mr. Sabbath believed that
14 the language you two had agreed to did confirm that copyrights
15 had transferred; correct?

16 A. I don't know how he could believe that.

17 Q. But you don't know what he believes; correct?

18 A. Well, if we were going to amend the schedule --

19 Q. Yes or no? You don't know what he believes on this
20 issue; correct?

21 THE COURT: Will you answer the question? If
22 there's something else that needs to be brought out, it will
23 be brought out on redirect.

24 THE WITNESS: Okay. I apologize.

25 What was question?

1 Q. BY MR. NORMAND: You don't know what Mr. Sabbath
2 believes with respect to the language you two ended up
3 settling on with respect to Amendment Number 2; right?

4 A. I can't speak to what is in his mind, no.

5 Q. And you agree that the jury should consider the
6 actual words of Amendment Number 2 in deciding the parties'
7 intent; right?

8 A. I do.

9 Q. Let me show you what's previously been marked as
10 SCO's Exhibit 137. This is Santa Cruz' 1996 annual report.

11 And, Mr. Calvin, can we go to the page.

12 I'm showing you language, Ms. Amadia, stating that
13 Santa Cruz stated in this 1996 annual report in December 1995,
14 the company, Santa Cruz, acquired certain assets related to
15 the UNIX business including the core intellectual property
16 from Novell.

17 Do you see that language?

18 A. Yes.

19 Q. Do you agree with that language?

20 A. I don't -- I don't necessarily agree or disagree.
21 I think it's got some ambiguity in it.

22 Q. You agree that copyrights are among the core
23 intellectual property of the UNIX; right?

24 A. I don't know that.

25 Q. I thought you said it was important to Novell that

1 they keep the UNIX copyrights. Why would they have done that
2 if it wasn't core?

3 A. It was important to secure the royalty stream from
4 the pre-asset purchase agreement code.

5 Q. You've said you're a software licensing attorney;
6 correct?

7 A. (Witness indicates by nodding head up and down.)

8 Q. And your testimony is that copyrights are not core
9 intellectual property concerning software?

10 A. Well, again the use of the words intellectual
11 property is ambiguous here. I don't know what they mean by
12 intellectual property in this statement.

13 Q. I'm asking you as a general legal matter, would you
14 agree that the copyrights are among the core intellectual
15 property in any given piece of software?

16 A. In software? Yes, typically.

17 Q. You were asked about your review of the asset
18 purchase agreement. Do you recall those questions?

19 A. Yes.

20 Q. You recall reviewing Schedule 1.1(a) of the asset
21 purchase agreement sometime in 1996?

22 A. Yes.

23 Q. Mr. Calvin, could you bring that up. And if you
24 could bring up that Roman Numeral I with the top language, as
25 well.

1 Do you recognize this, Ms. Amadia, as
2 Schedule 1.1(a) of the asset purchase agreement?

3 A. I do.

4 Q. And Roman Numeral I identifies assets that were
5 being transferred to Santa Cruz; correct?

6 A. Correct.

7 Q. And those assets include, all rights and
8 ownership of UNIX and UnixWare including but not
9 limited to all versions of UNIX and UnixWare and
10 all copies of the UNIX and UnixWare including
11 revisions and updates in process, and all
12 technical, design, development, installation,
13 operation and maintenance information concerning
14 UNIX and UnixWare, including source code, source
15 documentation, source listings and annotations,
16 appropriate engineering notebooks, test data, test
17 results as well as all reference manuals and support
18 materials normally distributed by seller to end users
19 and potential end users in connection with the
20 distribution of UNIX and UnixWare, such assets to
21 include without limitation the following:

22 Do you see that language?

23 A. Yes.

24 Q. Now, if there were no excluded assets scheduled to
25 the APA, this language would include the copyrights of UNIX

1 and UnixWare; correct?

2 A. I don't believe so, no.

3 Q. Why not?

4 A. Well, if you scroll down there is a section in the
5 included asset schedule on intellectual property.

6 Q. But I asked you about this language in Roman I.

7 A. So you're saying if this is the only language in
8 the asset schedule?

9 Q. Correct.

10 A. No, I still don't believe it would. When I read
11 this then and as I read it now, it refers in my mind to the
12 tangible media of UNIX and UnixWare and not speaking to the
13 intellectual property or copyright.

14 Q. So your testimony is that copyrights as a general
15 matter are not among the rights and ownership of UNIX and
16 UnixWare; is that right?

17 A. Yeah.

18 Q. Let's look at --

19 A. I mean, whenever you have a property right or you
20 have a right and a tangible thing, you know, you often will
21 transfer all rights, title and interest. That's what I think
22 that title and ownership language is.

23 Q. Although it doesn't say, all rights, title and
24 interest; correct?

25 A. No, it doesn't.

1 Q. It says, all rights and ownership; correct?

2 A. It does.

3 Q. But you still say that copyrights are not among all
4 rights and ownership of a given --

5 A. Let's just put it this way. As a technology
6 licensing practitioner, I would not rely on that language to
7 imply that I had copyright ownership.

8 Q. Now, you refer to Roman Numeral V, I believe it
9 was.

10 Mr. Calvin, if you could bring up that language.
11 That is the intellectual property language.

12 Roman V is the language you're referring to?

13 A. Yes.

14 Q. And then that says:

15 Intellectual property. Trademarks UNIX and
16 UnixWare as and to the extent held by seller
17 excluding any compensation seller receives with
18 respect to the license granted to X/Open regarding
19 the UNIX trademark.

20 Correct?

21 A. Yes.

22 Q. Is it your testimony that this is the only
23 intellectual property that you believe was included in
24 Schedule 1.1(a) of the APA?

25 A. Yes.

1 Q. Now --

2 A. Potentially -- well, yeah, because this is the
3 intellectual property section, so, yeah.

4 Q. And you're a software licensing attorney. You said
5 that; correct?

6 A. (Witness indicates by nodding head up and down.)

7 Q. You've heard of trade secrets in software; correct?

8 A. Yes.

9 Q. So is it your testimony that trade secrets were not
10 included in the assets that Santa Cruz had acquired?

11 A. Well, if you go back to Section Roman Numeral I --

12 Q. Well, yes or no? Is it your testimony that trade
13 secrets were among the assets that Santa Cruz acquired?

14 A. I don't think it's clear.

15 Q. You don't know?

16 A. I don't think it's clear from the language.

17 Q. Do you have a view?

18 A. Well, I can tell you that Amendment Number 2
19 attempted to clarify that and make it clear that whatever
20 copyright rights, whatever specific rights under copyright law
21 that Santa Cruz needed in order to exercise their rights to do
22 this business that they did obtain them under the original
23 APA. So if they needed trade secret rights in order to run
24 their business then they acquired them.

25 Q. I'm not asking you about copyright, though. I'm

1 asking you about trade secrets. That's a discrete subject
2 matter. It's a discrete form of intellectual property; right?

3 A. Yes.

4 Q. And there are no trade secrets identified in the
5 excluded assets schedule in the APA; correct?

6 A. Correct.

7 Q. So it falls that they must be included if they
8 exist in UNIX and UnixWare; correct?

9 A. No. The excluded asset schedule is more, for lack
10 of a better term, what we call belts and suspenders. So
11 really what is included or what are included in
12 Schedule 1.1(a), there really isn't an actual need to have a
13 list of excluded assets except to indicate without, you know,
14 any doubt that these things are not included. So the fact
15 that trade secrets aren't excluded doesn't mean they were
16 included.

17 Q. So your testimony is after the APA signed no one
18 owned the trade secrets in UNIX and UnixWare; is that right?

19 A. No. After the APA was signed Novell owned the
20 trade secrets in UNIX and UnixWare.

21 Q. But they're not in the excluded assets schedule. I
22 thought that's where you said the intellectual property was
23 excluded.

24 A. It doesn't have to be in there.

25 Q. Why not?

1 A. The excluded asset schedule typically is a list of
2 items that the parties think of and agree are not included,
3 but it's not exhaustive. What's exhaustive is the schedule of
4 included assets.

5 Q. Why would one be exhausted and one not be
6 exhausted?

7 A. Because it's very clear in the section that refers
8 to the schedule that what is being sold is what is in
9 Schedule 1.1(a).

10 Q. So that long language I read at the beginning of
11 the Schedule 1.1(a) and bored the jury with, you don't regard
12 that language which ends with the phrase, without limitation
13 as being exhaustive; is that your testimony?

14 A. No. I didn't say 1.1(a) wasn't exhaustive. It is.
15 It's limited to what is in that schedule. 1.1(b) is
16 exhaustive.

17 Q. So your testimony is that Novell may have excluded
18 other assets that it did not identify in the excluded asset
19 schedule?

20 A. Yes.

21 Q. And your testimony would be the same with respect
22 to know-how?

23 A. I was just going to say, know-how is another way.
24 Know-how isn't mentioned in either included or excluded.

25 Q. And so you presume that it is excluded if it's not

1 mentioned at all?

2 A. Yes.

3 Q. Let's look at the language of Amendment Number 2.

4 And, Mr. Calvin, if you could bring up that

5 Paragraph A.

6 Now, I've heard you say that this paragraph was

7 intended to confirm that Novell had retained the UNIX and

8 UnixWare copyrights. Is that a fair description of your

9 testimony?

10 A. Yes.

11 Q. Now, this language doesn't use those words;

12 correct?

13 A. Correct.

14 Q. Your testimony is that you intended for Amendment

15 Number 2 to affirm, that was your word, that SCO has what you

16 called a license, that was your word, under the asset purchase

17 agreement; correct?

18 A. Correct.

19 Q. So you use the word "affirm." And the way you

20 would affirm a license is would be actually by saying in the

21 document the word "license."

22 A. Typically.

23 Q. But not here?

24 A. Not here.

25 Q. The asset purchase agreement does not use the word

1 "license" in describing Santa Cruz' rights; correct?

2 A. Well, that goes to the fundamental question of what
3 is a license. When you grant someone the right to do
4 something with technology that you own, that's a license. It
5 doesn't have to use the word "license" for it to be a license.

6 Q. So your view is the asset purchase agreement sets
7 out an implied license; is that right?

8 A. No. It sets out a license. It just didn't use the
9 word "license," which isn't required for it to be a license.

10 Q. So other than by implication, how would you know
11 when you read the APA that there is a license if it doesn't
12 use the word "license"?

13 A. Because you specifically read the provisions that
14 show you what you're allowed to do. So it says, you have a
15 right to take this code. You have a right to develop
16 derivative works to this code. You have a right to market it.
17 You have a right to distribute it, et cetera.

18 Q. Now, you work in software licensing; correct?

19 A. (Witness indicates by nodding head up and down.)

20 Q. You know that the phrase implied license is a term
21 of art; correct?

22 A. Uh-huh (affirmative).

23 Q. It's the words used to describe a license when the
24 word "license" is not used in a document; correct?

25 A. I've heard it described that way, yeah.

1 Q. So you would agree with me that if the asset
2 purchase agreement does not use the word "license," then any
3 standard of proof license would have to be an implied license;
4 correct?

5 A. Well, I still think that it can be a license
6 without using the word "license." So an implied license is
7 often something that is, something that you glean from it that
8 you say, well, if I can do X, then I must be able to do Y,
9 because I can't get to X without doing Y.

10 That's not what I'm saying. I'm saying that the
11 APA explicitly said that Santa Cruz could do certain things,
12 and that was an explicit license agreement, even though it
13 didn't use the word "license."

14 Q. Let me make this a easier. The APA is titled, The
15 Asset Purchase Agreement; correct?

16 A. Uh -- huh (affirmative).

17 Q. The word "license" is not in the title; correct?

18 A. Correct.

19 Q. And as far as you know, the word "license" is
20 nowhere used in the APA describing any rights that Santa Cruz
21 has; correct?

22 A. Yes.

23 Q. Now, it comes time to Amendment 2, and you
24 testified that you wanted to be clear that Santa Cruz had
25 acquired a license, but you do not use the word "license" in

1 Amendment 2 either; correct? In fact, it says, the jury can
2 see, that Santa Cruz acquired the UNIX and UnixWare copyrights
3 required for SCO to exercise its rights with respect to the
4 acquisition of the UNIX and UnixWare technology.

5 Do you see that language?

6 A. Yes.

7 Q. That's the plain language; correct?

8 A. Uh-huh (affirmative).

9 Q. And you don't clarify that someone has obtained a
10 license by amending an asset transfer provision; correct?

11 A. We did. Do you want to know why?

12 Q. Your counsel can ask you why, and I've heard you
13 speak to why.

14 A. Okay.

15 Q. But you didn't use the word "license"; correct?

16 A. No.

17 Q. You could have signed something that said
18 Santa Cruz has a license, and you didn't sign something that
19 says that; correct?

20 A. Correct.

21 Q. So your testimony that Paragraph A of
22 Amendment 2 which does not use the word "license" affirms that
23 Santa Cruz had a license under the asset purchase agreement,
24 which also does not use the word "license"; is that right?

25 A. Several licenses under the APA, yeah.

1 Q. So let me make sure I understood that. Amendment
2 Number 2 Paragraph A clarifies that Santa Cruz had several
3 licenses?

4 A. Uh-huh (affirmative).

5 Q. But it also doesn't use the phrase, several
6 licenses; correct?

7 A. Correct.

8 Q. And you know that Santa Cruz agreed to give Novell
9 over \$100 million in payments under the asset purchase
10 agreement; correct?

11 A. I believe so.

12 Q. So your testimony is that Santa Cruz agreed to give
13 Novell over \$100 million in payments for an unwritten and
14 implied license to use the copyrights; is that right?

15 A. No, that's not right.

16 Q. Your testimony is that they paid over \$100 million
17 in payments, and part of the rights that they received was an
18 implied, unwritten license to use the copyrights; correct?

19 A. No.

20 Q. What's incorrect?

21 A. It's not an implied license. It was expressed. It
22 was very clear what they were getting the rights to do in my
23 mind.

24 Q. So it was an expressed license, but it doesn't use
25 the word "license." How is that possible?

1 A. It was an expressed right to do something --

2 Q. Okay.

3 A. -- which had a value.

4 Q. So expressed right is different from an expressed
5 license; correct?

6 A. Not really. I mean, I look at copyrights as a
7 bundle of rights, okay? So if you have -- you have certain
8 rights under copyright law, and Santa Cruz was definitely
9 given a number of those rights.

10 Q. But they weren't given them in the form of a
11 description license; correct?

12 A. No, they were not.

13 Q. Now, as an attorney --

14 A. But I don't think that has any difference in terms
15 of their ability to do those things. I'm not aware that it
16 would impact their ability to do it whether they used the word
17 "license" or didn't. They still would have that right free
18 from, you know, any infringement claim from Novell that
19 they're somehow infringing on their copyrights.

20 Q. Let's look at the language in Paragraph A because
21 I'm not sure I'm following what you're saying. This says:

22 The copyrights and trademarks owned by Novell
23 as of the date of agreement required SCO to
24 exercise its rights with respect to the
25 acquisition of UNIX and UnixWare technology.

1 You're not here to testify what copyrights are
2 required for SCO to exercise its rights, are you?

3 A. No.

4 Q. You understand that if SCO has only an implied
5 license to use the UNIX copyrights, then SCO cannot bring a
6 lawsuit to enforce those copyrights, aren't you?

7 A. Can you repeat the question?

8 Q. You understand that if SCO has only an implied
9 license to use the UNIX copyrights that it cannot enforce
10 those copyrights in court? You understand that from your
11 background; right?

12 A. Yes.

13 Q. And enforcing the copyrights in a company software
14 is part of running a software business; correct?

15 A. Potentially. It depends upon what your -- I mean,
16 in this case there are license rights. That wasn't the
17 business that they really acquired.

18 Q. Well, if a company can enforce the copyrights and
19 the source code, then it cannot prevent third parties from
20 misusing the source code; right?

21 A. They could enforce a copyright after the derivative
22 work. They had ownership as to the derivative work.

23 Q. But you agree they did not enforce under your view
24 of their rights the copyrights in UNIX that existed as of
25 1995; correct?

1 A. Yeah. I didn't believe and I still don't believe
2 from reading the APA that they had the right to license the
3 underlying code. So I would believe the right to enforce the
4 copyright is part of that business.

5 Q. Your understanding of the APA was that Santa Cruz
6 could not license the UNIX and UnixWare source code to third
7 parties; is that right?

8 A. In its form as of the signing of the APA? Only
9 under certain limited circumstances.

10 Q. Your understanding was that after the APA
11 Santa Cruz could not license the versions of UnixWare that
12 existed as of the time of the APA to third parties; is that
13 right?

14 A. Yes.

15 Q. You agree that Amendment Number 2 revises the
16 excluded asset schedule of the asset purchase agreement;
17 correct?

18 A. Can you say that again?

19 Q. You agree that Amendment Number 2 revises the
20 excluded asset schedule of the asset purchase agreement;
21 correct?

22 A. Yes.

23 Q. Mr. Calvin, can we pull up that demonstrative?

24 Ms. Amadia, is that in front of you on the screen?

25 A. Yes.

1 Q. This is meant to depict the language in Amendment
2 Number 2 that we've been talking about replaces the language
3 of the excluded assets schedule of the APA. Do you think this
4 is a fair representation of that?

5 A. I can't read the original schedule on my screen. I
6 can only read the bubble language. But let me get closer.

7 Yeah.

8 MR. NORMAND: Your Honor, can I show this to the
9 jury? We gave this to Novell this morning.

10 MR. BRENNAN: Not precisely in this form. I don't
11 have an objection to this page. There was another one, I
12 don't know whether they intend to use it, to which I have an
13 objection, but I don't what's now before the Court.

14 THE COURT: All right. The jury may see this page.

15 Q. BY MR. NORMAND: Ms. Amadia, you recognize the
16 language on the left side of this demonstrative to be the
17 language from the original excluded assets provision of the
18 APA; correct?

19 A. Correct.

20 Q. And you would agree with me that the language on
21 the right is the language from Amendment Number 2 that
22 replaces the old language; correct?

23 A. Correct.

24 Q. Now, you agree that under the plain language of
25 Amendment Number 2 Novell has included in the transfer of

1 assets the copyrights required for SCO to exercise its rights
2 in UNIX and UnixWare; correct?

3 A. Well, the way that I wrote and intended Amendment
4 Number 2 to be read is that this language was saying that
5 whatever copyright rights Santa Cruz needed in order to
6 exercise the rights it was given under the asset purchase
7 agreement, then that would be -- they would have those rights.

8 Q. Would you agree with me that it's a fair
9 interpretation of this language that Novell has included in
10 the transferred assets the copyrights required for SCO to
11 exercise its rights in UNIX and UnixWare? Correct?

12 A. Well, so that -- yeah. I suppose it's a reasonable
13 interpretation to say that if they required those rights under
14 the original APA that they were transferred in this revised
15 schedule. But the original language of this Amendment
16 Number 2 in this section was presented by Steve Sabbath. And
17 what we were attempting to do is work with the language that
18 he had proposed and modify it in a way that was acceptable to
19 us. We weren't -- so had I started from whole cloth in
20 drafting an amendment that was affirming SCO's license rights,
21 I wouldn't have necessarily modified Schedule 1.1(b). And if
22 I was intending to modify them in order to transfer
23 copyrights, I would have definitely amended Schedule 1.1(a),
24 which listed the included assets, and we didn't do that.

25 Q. But in the terms of the question that I asked,

1 would you agree with me that it's reasonable to interpret this
2 language as saying that among the copyrights included in the
3 transfer are those that SCO needs to exercise its rights with
4 respect to the acquisition of UNIX and UnixWare technologies?
5 Correct?

6 A. Yes.

7 Q. Now, let's pull up SCO 97.

8 Ms. Amadia, have you seen Novell's press release
9 dated June 6, 2003, on the issue of copyright transfer?

10 A. No, I haven't.

11 Q. Novell's attorneys haven't showed you this
12 language?

13 A. No.

14 Q. Let me highlight the language for you towards the
15 bottom of the first paragraph. And because you haven't seen
16 this, let me read into the record a little bit of background.

17 In a May 28th letter to SCO Novell
18 challenged SCO's claims to UNIX patent and
19 copyright ownership and demanded that SCO
20 substantiate its allegations that Linux infringes
21 SCO's intellectual property rights.

22 And then at Number 2. 1995 SCO Novell
23 asset purchase agreement was sent to Novell last
24 night by SCO. To Novell's knowledge, this amendment
25 is not present in Novell's files. The amendment

1 appears to support SCO's claim that owners have
2 certain copyrights for UNIX be transferred to SCO in
3 1996.

4 Do you see that language?

5 A. I do.

6 Q. Do you agree with that last sentence that I read
7 into the record?

8 A. No, I don't. I don't agree with the last sentence.

9 Q. But you agree that that's a reasonable
10 interpretation of the language that is actually used in
11 Amendment 2; correct?

12 A. Without having the background knowledge of the
13 intent of the draftsman and the business people in that
14 transaction, I suppose it is a reasonable interpretation. But
15 I have that background knowledge, so for me it wouldn't be
16 reasonable for me to interpret it that way.

17 Q. And you said that the intent of the business people
18 is relevant in determining the party's intent of the
19 agreement; correct?

20 A. Well, it certainly is as far as my job as an
21 attorney and what I was going to draft or agree to in a
22 substantive agreement, yeah.

23 Q. And with respect to this language that we've been
24 looking at, if Novell's general counsel approved the language
25 of this press release you think his interpretation was

1 unreasonable?

2 A. As I said, without having the background knowledge
3 of the intent of the draftsman in Amendment Number 2 and
4 the business intent in drafting that Amendment Number 2, I
5 don't think that would be unreasonable. But I have that
6 knowledge, so to me it would be unreasonable.

7 Q. In 2002 or 2003, did anyone from Novell ever ask
8 you about Amendment Number 2? Did they ever ask you to send
9 them a copy of Amendment 2?

10 A. Not that I recall, no.

11 Q. Now, you've previously said -- and let's go back,
12 Mr. Calvin, to Paragraph A of Number 2 and pull out that
13 language.

14 You previously said that you intended Paragraph A
15 in Amendment Number 2 to set out what you called a process;
16 correct?

17 A. I'm sorry. Paragraph A?

18 Q. Yes.

19 A. No. I was actually referring to Paragraph B when I
20 said that.

21 Q. You previously said in your declaration that this
22 paragraph maybe sets out a process; correct?

23 A. No. I don't -- I believe it was the buyout process
24 that I was referring to, which is Section B.

25 Q. So it's not your view that Santa Cruz was under

1 some obligation if it wanted copyrights to go back to Novell
2 and ask Novell to send it copyrights; is that right?

3 A. Well, to the extent that they believe what was
4 required in order for them to exercise their rights under the
5 APA was full copyright ownership, then they would need to do
6 something beyond this. But I guess that's what you mean by
7 process.

8 Q. Yeah.

9 A. Yeah.

10 Q. It would be fair to describe that is a form of
11 process; right?

12 A. I don't think that anyone -- well, I can't speak
13 for Steve Sabbath, but I did not believe that the original APA
14 required for Santa Cruz to have full copyright ownership with
15 all of the rights that are incident to full copyright
16 ownership. So I didn't view this as something that was going
17 to trigger a process, because what I viewed it as is an
18 affirmation of their licenses in the original APA. So I
19 didn't expect anything to come out of it in terms of a process
20 of someone making any claim that they required copyright
21 ownership.

22 Q. But your view was that there was a process that had
23 to unfold before Santa Cruz could obtain copyright ownership;
24 is that right?

25 A. Like I said, my reading of the APA, my discussions

1 with Tor Braham and Jim Tolonen indicated to me that
2 Santa Cruz had certain rights with respect to the technology
3 and that the underlying copyright ownership was retained by
4 Novell for good reason. And I did not anticipate that Santa
5 Cruz needed any more than those license rights, an affirmation
6 of those rights in order to do their business.

7 So, no, I think in my mind this cleared up any
8 doubt as to whether or not they had the right to go and run
9 the business, and that was all they needed was those license
10 rights.

11 Q. So I think I understand.

12 Your testimony is if Santa Cruz did need them, if
13 they were required, then they got them?

14 A. No, not exactly.

15 Q. So there's no process. And you say they didn't get
16 them at the time.

17 A. I don't believe that they needed them, and I don't
18 believe that they got them. If, in fact, they thought they
19 needed them, I would imagine they would need to come back and
20 have some form of amendment actually granting them with
21 retroactive rights and amended bill of sale and everything
22 tantamount to a transfer. This was never a transfer in my
23 mind. So, you know, I feel like I'm saying the same thing.

24 Q. Now, this language in Paragraph A doesn't say
25 anything about Santa Cruz' obligations to come back to Novell;

1 correct?

2 A. No.

3 Q. It doesn't have any language that refers to any
4 process; correct?

5 A. Not that I can see.

6 Q. And we've gone through the fact that Paragraph A of
7 Amendment 2 revises the excluded assets schedule of the asset
8 purchase agreement; correct?

9 A. Yes.

10 Q. And there's no other provision of the excluded
11 assets schedule that sets out any process; correct?

12 A. Not that I'm aware of.

13 Q. Let me ask you it a different way, Ms. Amadia.
14 Before Amendment 2 when Santa Cruz actually thought it did not
15 own the copyrights, it already had the right to ask Novell to
16 transfer them; correct?

17 A. I don't believe so. No.

18 Q. No. Let's look at Section 4.12 of the APA. And
19 let's pull out that language at the top, Mr. Calvin.

20 So, Ms. Amadia, this is from the APA Section 4.12,
21 states:

22 Each party hereto, at the request of another
23 party hereto, shall execute and deliver such other
24 instruments and do and perform such other acts and
25 things as may be necessary or desirable for

1 effecting completely the consummation of this
2 agreement and the transactions contemplated
3 hereby.

4 Do you see that language?

5 A. Yes.

6 Q. Do you see the language in the second line that
7 says, at the request of another party?

8 A. Yes.

9 Q. So under this provision Santa Cruz could have made
10 a request to Novell for the copyrights if they believed they
11 did not own them; correct?

12 A. No, I don't believe so.

13 Q. You think that Santa Cruz literally could not ask
14 Novell in the form of a request, would you, please, transfer
15 copyrights to us?

16 A. I think they could ask, and I think they did ask.
17 I don't think Novell was obligated by this provision to grant
18 them.

19 Q. Well, I'm --

20 A. I don't believe the original APA granted them, and
21 this provision addresses following acts in order to consummate
22 the agreement and the transactions contemplated hereby. I'm
23 reading the actual language. And the agreement was an asset
24 purchase agreement of certain assets which did not include --

25 Q. Well, I appreciate all of that, I do, and maybe my

1 question wasn't clear enough.

2 A. Okay.

3 Q. I'll try to ask a clear question, and see if we can
4 get a yes or no. And if you can't let me know.

5 A. Okay.

6 Q. But my question was, didn't Santa Cruz have a right
7 to make a request to Novell? Whatever Novell did in response,
8 Santa Cruz could have made a request?

9 A. Do I have to say yes or no, or can I --

10 Q. If you can't say yes or no you can explain why.

11 A. Absolutely. Whether or not this language was in
12 the agreement there's no law that prohibits Santa Cruz from
13 making that request.

14 Q. And Novell could have said no in response to the
15 question; right?

16 A. Correct.

17 Q. And none of that in your view changed after
18 Paragraph A of Amendment Number 2 was put in place; correct?

19 A. Correct.

20 Q. So Paragraph A of Amendment Number 2 never had
21 anything in Section 4.12; correct?

22 A. Well, again, to the extent there's any document or
23 further assurance that they requested in relation to the
24 licensees that they received under the original APA, then I
25 think this section would require Novell to respond and perform

1 in good faith with respect to those licenses. I believe they
2 still had that obligation under the original APA. So I guess
3 the answer is yes, there is no additional, there's no
4 additional obligations that came about as a result of the
5 Amendment Number 2.

6 Q. Now, you don't think that Steve Sabbath after he
7 executed Amendment Number 2 thought he got nothing out of that
8 paragraph amendment?

9 A. No, I don't. I don't think he got nothing. I
10 think he thought he got what he needed, which would clear
11 license rights to go forward, to use the code, to develop it,
12 to, you know, own modifications to it, to do all of the things
13 they intended to do to acquire the assets.

14 Q. You think he thought he had clear license rights in
15 the form of the agreements that don't use the word "license"?

16 A. Yeah.

17 Q. Now, let's look at the draft language that we
18 talked about that Mr. Sabbath sent to you. And I think that's
19 in, what was put in at T34. Let's pull up that Paragraph A.

20 I think you said Mr. Sabbath told you initially in
21 the beginning of the discussions that the purpose of the
22 Amendment was to clarify that the UNIX and UnixWare copyrights
23 had transferred; correct? I'm not saying you agreed with it,
24 but I'm saying that was your understanding of what he was
25 proposing; right?

1 A. Yes.

2 Q. Let's look at this language. The language that
3 you're saying he sent to you said:

4 All copyrights and trademarks, except for the
5 copyrights and trademarks owned by Novell as of
6 the date of this Amendment Number 2, which pertain
7 to the UNIX and UnixWare technologies and which
8 SCO has acquired hereunder.

9 Do you see that language?

10 A. Yes.

11 Q. You spent a little time with that language with
12 counsel, and unfortunately for the jury I'm going to ask you
13 about grammar a little bit.

14 The first part of this language says, all
15 copyrights and trademarks; correct?

16 A. Correct.

17 Q. So if the language stopped there, then what you
18 would have is a situation where all copyrights and trademarks
19 had been excluded; is that fair to say?

20 A. That's fair to say.

21 Q. The language goes on, and it begins with the word
22 "except," so that's an exception; correct?

23 A. Correct.

24 Q. All copyrights and trademarks except for the
25 copyrights and trademarks owned by Novell as of the date of

1 this Amendment Number 2.

2 Now, that would have said that Santa Cruz acquired

3 all of Novell's copyrights and trademarks; correct?

4 A. Yes. If it had stopped there?

5 Q. Yes.

6 A. Yes.

7 Q. Now, that's not what either you or Mr. Sabbath

8 intended; correct?

9 A. It's not what he signed and what Novell signed,
10 either, yeah.

11 Q. But Mr. Sabbath didn't intend to have anything
12 clarify that Santa Cruz had acquired Novell's NetWare
13 copyrights; correct?

14 A. Correct.

15 Q. So this was, first two parts of this sentence,
16 they're simply inaccurate?

17 A. They're what?

18 Q. Inaccurate.

19 A. Well, it wasn't ever intended to be read alone. So
20 as a draftsman I take offense to it being called
21 inaccurate, even though I didn't draft it. Steve drafted it.
22 But it was never intended to be read --

23 Q. I was hoping you wouldn't be offended. I mean,
24 Mr. Sabbath --

25 A. It was intended to be read in context and

1 particularly in the context of a complete sentence, which it
2 was written, but, yeah.

3 Q. So we agree -- you know, I'm going to get to that
4 third part, and I'm not trying to exclude it. But do we
5 agree, if you read the first two parts what that language
6 literally says is Santa Cruz had acquired all of Novell's
7 copyrights and trademarks. And you didn't understand that's
8 what Mr. Sabbath intended; correct?

9 A. No. Yeah.

10 Q. And then the last part explains the second part.
11 The last part says, which pertain to the UNIX and UnixWare
12 technologies and which SCO has acquired hereunder.

13 Now, all of Novell's copyrights and trademarks did
14 not contain the UNIX and UnixWare technologies; correct?

15 A. Correct.

16 Q. There were Novell copyrights and trademarks that
17 pertained to NetWare; correct?

18 A. Yes.

19 Q. So this language that Mr. Sabbath sent you actually
20 didn't even reflect his intent, did it?

21 A. Well, if it didn't reflect his intent, I don't know
22 why he presented it.

23 Q. But what I'm getting at --

24 A. I think he did. He was saying that he was
25 intending to transfer copyright ownership with respect to all

1 copyrights which pertained to UNIX and UnixWare that they
2 claim to have acquired under the original APA.

3 Q. Well, I guess I'm focussing on the comma, and
4 here's the grammar, the comma in the second line of the
5 sentence, and, comma identifies, does it not, it identifies
6 the copyrights and trademarks owned by Novell as of the date
7 of the amendment as pertaining to the UNIX and UnixWare
8 technologies? And that was not accurate, was it?

9 A. Comma error, but yeah. It probably should have
10 been that pertain, not which pertain.

11 Q. Now, you agreed that if Novell had signed the
12 language that Mr. Sabbath sent to you, that would have
13 provided that all of the UNIX and UnixWare copyrights were
14 transferred; correct? And again, I'm not saying you did sign
15 it, but --

16 A. Again, if I were Steve Sabbath, I would not have
17 presented this language in and of itself and expected to
18 retain copyright ownership from this language.

19 Q. Let me ask it differently. The reason you didn't
20 sign this language, I thought I heard you testify earlier,
21 because your view was if you had signed it, it would have made
22 very clear that Santa Cruz had acquired all the UNIX and
23 UnixWare copyrights.

24 A. I don't know that I said that.

25 MR. BRENNAN: I want to state an objection. That

1 mischaracterizes the witness' prior testimony.

2 Q. BY MR. NORMAND: Well, if it does, explain that.

3 A. No. I think what I said, or I can at least say now
4 what I meant to say is it would have created an ambiguity that
5 there was an intent to transfer copyright ownership.

6 Q. And you think that the language that you ultimately
7 settled on with Mr. Sabbath contained no ambiguity?

8 A. I think it did contain some ambiguity. And if
9 you're a transactional attorney and you understand the way
10 these transactions work in the context of settling a
11 threatened litigation, sometimes you're willing to live with a
12 little bit of ambiguity in order to get a deal done. And I
13 don't think that the ambiguity was such that at the end of the
14 day it wasn't clear.

15 I mean, like I said, in a perfect world I never
16 would have accepted Steve Sabbath's original language and even
17 modify the excluded asset schedule. I would have started with
18 basically some statement affirming the license grant. But
19 knowing Steve Sabbath and who he was and what his reaction was
20 going to be to a whole modification of his proposed language,
21 that was not going to bring the deal forward and get the
22 parties on to do their businesses, which is where we all
23 wanted to be. So I tried to work within the confines of his
24 initial drafts.

25 Q. Let me ask you a different question in that vein.

1 And if we could go back, Mr. Calvin, to the
2 excluded assets. Now pull up that language on Roman V.

3 So you agree, Ms. Amadia, that under the APA
4 Santa Cruz did acquire trademarks of UNIX and UnixWare;
5 correct?

6 A. Yes.

7 Q. Okay. And you said that Amendment Number 2
8 clarified the asset schedule of the APA; correct?

9 A. Yes. Well, yes.

10 Q. So Amendment Number 2 confirmed that Santa Cruz had
11 acquired UNIX and UnixWare trademarks; correct?

12 A. Can I actually see the language on Amendment
13 Number 2 at the same time, or can somebody present me with
14 that document?

15 Q. Sure. I think we can stack it up there.

16 A. Because I don't want to misspeak. Section A of
17 Amendment Number 2. That would be great.

18 Q. So as you look at it, I thought I heard you say
19 earlier that Amendment Number 2 was designed to clarify the
20 excluded assets schedule. And it was meant to confirm what
21 assets Santa Cruz had and had not acquired; correct?

22 A. Uh-huh (affirmative).

23 Q. So Amendment Number 2 was not designed to say that
24 Santa Cruz had not acquired the UNIX and UnixWare trademarks;
25 correct?

1 A. Yes. At the time that this section was being
2 modified, trademarks wasn't really top of line for either
3 party. And -- but I don't think -- it certainly didn't intend
4 to take them away.

5 Q. So the language now in Paragraph A, I hope I'm not
6 testing the jury's patience, but the language says that what
7 was transferred to Santa Cruz were the copyrights and
8 trademarks owned by Novell as of the date of the agreement
9 required for SCO to exercise its right with respect to the
10 acquisition of UNIX and UnixWare technologies.

11 Do you see that language?

12 A. Yes.

13 Q. And you agree with me that that language identifies
14 the UNIX and UnixWare trademarks as having been transferred;
15 correct?

16 A. It doesn't expressly identify them. But to the
17 extent that the UNIX and UnixWare trademarks were required for
18 SCO to exercise its rights under the APA, they were
19 transferred through Amendment -- well, their transfer was
20 clarified in Amendment 2. They actually were transferred in
21 the APA.

22 Q. And you said in response to my question earlier
23 that Paragraph A did not change that; correct?

24 A. Yes.

25 Q. So the way Paragraph A identifies UNIX and UnixWare

1 trademarks is by identifying them as required for SCO to
2 exercise its rights with respect to the acquisition of UNIX
3 and UnixWare technologies; correct?

4 A. Yes. Well, the UNIX and UnixWare trademarks were
5 also listed in the schedule of included assets.

6 Q. Now, but this language pertains to the excluded
7 assets schedule; right?

8 A. Right.

9 Q. And we've agreed, haven't we, that there are at
10 least some intellectual property rights that are not
11 specifically identified in the included assets schedule in the
12 APA?

13 A. Yeah. Again, I view intellectual property rights
14 as you can dissect them into individual rights and licenses.
15 So certainly we're saying under trademark law and under
16 copyright law there were certain rights that SCO got licenses
17 to or I guess acquired with respect to trademarks.

18 Q. Well, when you say, I guess acquired, I want to be
19 clear.

20 A. Yeah.

21 Q. This paragraph --

22 A. Again, it all ties -- the whole purpose of
23 Amendment Number 2 in this language was to tie it back to the
24 original assets purchase agreement.

25 Q. So Santa Cruz got the UNIX and UnixWare trademarks

1 because they were acquired for its business; correct?

2 A. If they were required for its business, then they
3 got them.

4 Q. Well, that's not what I heard you say. I want to
5 make sure we're being clear. You said that they did get them
6 under the original APA; correct?

7 A. Yes.

8 Q. And you said that this Paragraph A does not change
9 that; correct?

10 A. Yes.

11 Q. Okay. Now, this Paragraph A on its face does not
12 draw any distinction between trademarks and copyrights;
13 correct?

14 A. Correct.

15 Q. So if there are copyrights that are required for
16 SCO to exercise its rights, like the UNIX and UnixWare
17 trademarks, they were transferred; correct?

18 A. Yeah.

19 Q. Ms. Amadia, you testified very briefly to the
20 negotiations that were among Novell and IBM and Santa Cruz in
21 the first half of 1996; at least that's how I heard it; is
22 that a fair description?

23 A. Uh-huh (affirmative).

24 Q. And that arose in a situation where Novell was
25 claiming to act on behalf of Santa Cruz; correct?

1 A. Correct.

2 Q. Novell had entered into an agreement with IBM and
3 said in the agreement, we're acting on behalf of Santa Cruz;
4 correct?

5 A. Yes.

6 Q. And after Santa Cruz found out about that
7 agreement, Santa Cruz was upset; correct?

8 A. Correct. Well, Santa Cruz was collecting the
9 royalty stream under all SVRX licenses including that
10 agreement. So the way they found out about it was Novell's
11 agreement, it prevents them from being ready to receive the
12 check.

13 Q. But Santa Cruz did object to the agreement that
14 Novell had negotiated with IBM on behalf of Santa Cruz;
15 correct?

16 A. They did. They ultimately agreed to an amendment
17 that revised that, and that was Amendment Number X.

18 Q. And there was really a dispute among Novell and
19 Santa Cruz throughout a lot of 1996; correct?

20 A. I'm only aware of the dispute regarding
21 Amendment X.

22 Q. That's what I meant. It lasted several months;
23 correct?

24 A. It did last several months. I don't know about the
25 year language. But it did last several months.

1 Q. And to your knowledge, throughout that whole
2 dispute with Santa Cruz, Novell never claimed to own the UNIX
3 and UnixWare copyrights, did it?

4 A. The issue never came up. Nobody made any claims as
5 to ownership.

6 Q. And there came a time when IBM who had entered into
7 that agreement with Novell earlier became involved; in other
8 words, there came a time when all three companies were
9 involved in the discussion; correct?

10 A. Yeah. The ultimate amendment was signed by all
11 three companies.

12 Q. And do you recall whether during that process among
13 the three companies IBM insisted that Santa Cruz should agree
14 to lift restrictions on IBM's software agreement because SCO
15 could protect itself through its copyrights?

16 A. No.

17 Q. You don't recall any discussion on that?

18 A. I don't recall that.

19 Q. Let me show you to see if we can refresh your
20 recollection. SCO 123.

21 And, Ms. Amadia, I wanted to -- let's identify it
22 at the top. I can't really speak to the internal substance of
23 the document because it's not in. But do you see the title of
24 the document?

25 MR. BRENNAN: Do you have a copy that I may see?

1 MR. NORMAND: Yeah. Sorry.

2 Q. BY MR. NORMAND: Do you see the language at the
3 very bottom that I think Mr. Calvin will pull up?

4 A. Can I ask, who's the author of the document?

5 Q. I can't tell you.

6 A. Okay.

7 Q. All I'm trying to do is refresh your recollection,
8 if you've seen this document.

9 A. Oh, okay.

10 Q. So take a second and look at it and let me know if
11 you recognize it.

12 A. I don't recall seeing this document.

13 Q. It doesn't refresh your recollection at all?

14 A. Huh-uh (negative).

15 Q. And you don't recall any discussion in which IBM
16 said that Santa Cruz could protect itself through its
17 copyright ownership?

18 A. I don't recall.

19 Q. In 1996, Ms. Amadia, you had occasion to review the
20 asset purchase agreement; correct?

21 A. Correct.

22 Q. And you were at Novell in 1995 when the asset
23 purchase agreement was signed; is that right?

24 A. I don't know.

25 Q. Would you recall when --

1 A. I was there in 1995, and it was signed in 1995. I
2 don't recall the exact month I started and the exact month it
3 was signed. But I was not involved in it at all.

4 Q. Do you recall reviewing either in 1995 or 1996 a
5 technology license agreement that was executed in connection
6 with the asset purchase agreement?

7 A. I don't recall if I reviewed that.

8 Q. Do you recall reviewing a strategic development
9 agreement between Novell and Santa Cruz that was also executed
10 in 1995?

11 A. No.

12 Q. Do you know whether the technology license
13 agreement uses the word "license"?

14 A. I think it does, yeah. I've reviewed it now since.
15 But not at that time do I recall if I reviewed it.

16 Q. And what is your current job, Ms. Amadia?

17 A. I'm an independent legal consultant. I have my own
18 practice. And I represent companies in myriads of corporate
19 transactions including licensing transactions.

20 Q. Did you have an infertility law firm?

21 A. I also have an infertility law practice, yes.

22 Q. So how much licensing software work do you do at
23 this point?

24 A. About 95 percent of my practice is licensing and
25 general corporate counsel work, and about 10 percent of my

1 practice is fertility, which is contract based, as well, but
2 obviously deals with a different body of law.

3 Q. Thank you, Ms. Amadia.

4 THE COURT: Mr. Brennan?

5 MR. BRENNAN: Yes, thank you, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. BRENNAN:

8 Q. Ms. Amadia, you may recall that Mr. Normand asked
9 you a whole series of questions regarding the thought process
10 and intent of Steve Sabbath. Do you recall those various
11 questions?

12 A. Yes.

13 Q. I'd like to have placed before the witness
14 Exhibit Y23. It's not in evidence, Your Honor. I'll
15 represent that this is the declaration of Steven M. Sabbath
16 that was signed in the SCO --

17 THE COURT: Mr. Normand?

18 MR. NORMAND: This is going to raise some issues,
19 unless Mr. Brennan is speaking careful, I guess.

20 MR. BRENNAN: Your Honor, clearly some of us were
21 speaking uncareful and opened the door wide open.

22 THE COURT: No, he didn't, Mr. Brennan. The Court
23 is not going to allow you to use this in the way you hoped to.

24 MR. BRENNAN: Just so I can be clear. Do we have
25 to do it in front of the jury or at side bar, Your Honor? I

1 do have a problem --

2 THE COURT: I will inform you that your intent to
3 use this for a substantive purpose is not permitted under the
4 rules. You can use it for impeachment, but this witness is
5 not being impeached by this document.

6 MR. BRENNAN: Well, will the Court allow me to ask
7 any questions regarding the statements by Mr. Sabbath that he
8 made under oath regarding the subject matter of the
9 questioning that Mr. Normand directed?

10 THE COURT: No.

11 MR. BRENNAN: Thank you, Your Honor.

12 THE COURT: For the reason I just stated, which
13 ought to be clear to you, Mr. Brennan.

14 MR. BRENNAN: Thank you.

15 Q. BY MR. BRENNAN: Now, you were asked by Mr. Normand
16 questions regarding the use of the word "license." You'll
17 recall that Mr. Normand at that time declined to allow you to
18 explain why the word "license" was or was not used in
19 Amendment Number 2?

20 A. Uh-huh (affirmative).

21 Q. I'm going to give you that chance now. Will you
22 explain why the word "license" was not used in the Amendment
23 Number 2?

24 A. Again, I have had conversations with Tor Braham.
25 When I was told by Steve Sabbath that there was a

1 typographical error in the original APA, and it did not
2 include transfer of copyright ownership. And what Tor
3 explained to me was that, no, it was not a typographical
4 error, and there was no intent to transfer copyright ownership
5 and that Novell had strong reasons to retain copyright
6 ownership. So -- I may have missed part of your question. Do
7 you mind?

8 Q. Yes. I apologize. I was hoping that you could --

9 A. I haven't eaten yet, so I'm getting kind of hungry.

10 Q. I think we're near the break. I was hoping you
11 could explain why the word "license" is not used in
12 Amendment 2.

13 A. Oh, yes. So what Tor explained to me was that the
14 original transaction was structured as an asset purchase
15 agreement and that it morphed a little bit based upon the
16 business dealings and consideration that basically what
17 Santa Cruz could afford to pay. And so my understanding from
18 that is that that to me as a licensing attorney gives me some
19 reason to believe why there wasn't the word "license" and
20 there wasn't, you know, provisions and titles related to
21 licenses in the original asset purchase agreement because it
22 was originally intended to be a full and complete asset
23 purchase agreement including copyright transfer.

24 Q. And as it turned out, it was not a full asset
25 transfer; correct?

1 A. No. I mean, it's very clear in the provisions in
2 the APA that Novell retained the royalty stream for the
3 existing licenses and other rights and needed, at least the
4 way Tor explained it, needed the copyright ownership in order
5 to protect those rights.

6 Q. Thank you.

7 I have no further questions, Your Honor.

8 THE COURT: Thank you, Mr. Brennan.

9 Mr. Normand, do you have any anything?

10 MR. NORMAND: No, your Honor.

11 THE COURT: May this witness be excused?

12 MR. BRENNAN: Yes, Your Honor.

13 THE COURT: Mr. Normand?

14 MR. NORMAND: Yes.

15 THE COURT: That means that you will not be
16 recalled. I will instruct you to not discuss your testimony
17 with any other witness in this case or potential witness or in
18 the presence of any other witness, nor should you communicate
19 the content of your testimony with anyone that may be a
20 witness in this case.

21 Thank you. You better go get something to eat.

22 We'll recess for the afternoon, ladies and
23 gentlemen.

24 (Whereupon, the jury left the court proceedings.)

25 THE COURT: Counsel, please remember that you need

1 to get me any objections to the jury instructions before
2 8 o'clock in the morning.

3 Okay. Is there anything else before we recess?

4 MR. BRENNAN: No. Thank you.

5 THE COURT: Are we going to finish by 1:30 by
6 Thursday?

7 MR. BRENNAN: We certainly feel bound by that. The
8 only thing I suggest is that we do clock management. I
9 believe at this juncture most likely SCO has consumed more
10 time than we have. And so both sides are going to have to do
11 a mathematical calculation, and I would imagine if they
12 exceed -- just a quick hypothetical. If we had, for example,
13 one day left and they had exceeded more than their allotted
14 share, they would have no time to do anything else with. I
15 know that's a simplistic way of stating the problem, but I
16 hope --

17 THE COURT: I think they have been warned.

18 MR. BRENNAN: Thank you.

19 THE COURT: All right. We'll be in recess until
20 8:30.

21 MR. BRENNAN: I appreciate that.

22 THE COURT: I don't know whether it makes any
23 difference if we have any hearings or not. It seems like you
24 clear out regardless.

25 (Whereupon, the court proceedings were concluded.)

1 STATE OF UTAH)

2) ss.

3 COUNTY OF SALT LAKE)

4 I, KELLY BROWN HICKEN, do hereby certify that I am
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of
7 the foregoing matter on March 23, 2010, and thereat reported
8 in Stenotype all of the testimony and proceedings had, and
9 caused said notes to be transcribed into typewriting; and the
10 foregoing pages number from 2130 through 2187 constitute a
11 full, true and correct report of the same.

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

14 And hereby set my hand and seal, this ____ day of
15 _____ 2010.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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