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

THE SCO GROUP, INC., a Delaware corporation,
Plaintiff,
vs.
NOVELL, INC., a Delaware corporation,
Defendant.
AND RELATED COUNTERCLAIMS.

Case No. 2:04-CV-139TS

BEFORE THE HONORABLE TED STEWART

March 26, 2010
Jury Trial

REPORTED BY: Patti Walker, CSR, RPR, CP
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SALT LAKE CITY, UTAH; FRIDAY, MARCH 26, 2010; 8:30 A.M.

PROCEEDINGS

THE COURT: Good morning.

Let me ask, first of all, whether or not you have any disputes over closing argument demonstratives or slides, or whatever else?

MR. BRENNAN: Your Honor, we had a chance to look at one another's. I think with some modifications that were just made, we should be in agreement, at least in terms of presentation of the material.

THE COURT: I'm not sure that I understand what you mean at least in regards to the presentation of materials.

MR. BRENNAN: We don't have an objection to the use of the demonstratives.

THE COURT: Do you have an objection to any of Mr. Brennan's?

MR. SINGER: No, Your Honor.

THE COURT: SCO today filed a motion regarding three issues about closing, and I would agree with their request. I am going to assume the first one is no longer relevant because the parties have agreed as to the demonstratives.

MR. SINGER: That's correct.

THE COURT: The second is SCO objects to any

attempt by Novell to argue to the jury that Novell's assertion to ownership applied only to UNIX and not to UnixWare copyrights. Do you wish to address that, Mr. Jacobs?

MR. JACOBS: We do not quarrel with that in the context of the closings, Your Honor, but we will be making clear the delineation between the pre-APA UnixWare and post-APA UnixWare.

THE COURT: I think the jury instruction now reflects that better than it did before as well.

The third has to do with an attempt, frankly, by either side to argue something contrary to law. My assumption is that neither of you will have done that in any event; is that correct?

MR. JACOBS: That is correct. Just to avoid confusion during the openings themselves, SCO's motion is drawn to section 204(a) of the Copyright Act, which was the subject of the Tenth Circuit ruling. The Tenth Circuit ruling was that there is no per say requirement under 204(a) of the Copyright Act for something that represents specifically or in substance a bill of sale. We're not arguing that issue under the Copyright Act. We will be arguing that the asset purchase agreement was a promise to a assign, not an assignment, that Amendment No. 2 is dated October 26th, I think, 1996, and that as a matter of

contract law, just as in the purchase and sale of a house, there was no subsequent evidence of an actual transfer. So we'll be arguing it as a matter of contract law, which the Tenth Circuit did not address.

MR. SINGER: Your Honor, this is exactly the type of argument that we filed this motion because we were concerned they might make. The Tenth Circuit specifically held they didn't see anything to this date issue. I think it's expressly in one of the footnotes on this section when this argument was made. There is no difference between making this argument in the context of the Copyright Act or making it in the contract section. The Court of Appeals specifically ruled that Amendment 2 would be sufficient to transfer title, that that was the intent of the parties.

So I think, with all due respect, Mr. Jacobs is in the teeth of that decision.

THE COURT: Mr. Jacobs.

MR. JACOBS: Your Honor, footnote 2 is the footnote I think Mr. Singer is referring to and it's a footnote in the context of the discussion of section 204(a), it is not a holding that the contract could not be interpreted in the way that we're proposing to interpret it. There was no such briefing or argument before the Tenth Circuit. The footnote itself is not definitive at all on the question that we propose to argue as a matter of

contract interpretation. I could hand it to Your Honor if it would be convenient, you could look yourself.

THE COURT: I probably need to look at it.

MR. SINGER: We would also submit that this would just be confusing to the jury because there's been no evidence here that they would be drawing any conclusions from that.

THE COURT: Mr. Singer, I think that is probably your best argument, that this ought to be handled by you in your reply. But I do want to look at the footnote.

MR. JACOBS: Sure. Just for the avoidance of doubt, Ms. Amadia did say had she intended to transfer, there would have been additional documents that would have been required.

May I, Your Honor?

THE COURT: Yes.

If you are not arguing a pure legal issue about the bill of sale or something akin to it but rather the intent of the parties, I believe that footnote would not preclude you from doing so.

MR. JACOBS: Thank you, Your Honor.

THE COURT: Counsel, let me again remind you, it would be my intent to dismiss juror 13 as the alternate.

MR. SINGER: We understand, Your Honor.

THE COURT: I am going to hold you to your one

hour and 15 minutes. My intent will be to instruct the jury and then to have your initial presentation and closing.

Will that be by you, Mr. Singer, or Mr. Hatch, or will you be splitting it?

MR. SINGER: We will be splitting it, but I plan to reserve 15 minutes for rebuttal.

THE COURT: Who will go first.

MR. SINGER: I will be going first, Mr. Hatch will be taking over at about the 45-minute mark.

THE COURT: All right.

Mr. Brennan, will you making the closing?

MR. BRENNAN: Yes, I will, Your Honor.

THE COURT: Again, after your initial hour, then we'll take a break and come back to Mr. Brennan, and then your rebuttal.

MR. SINGER: Would it be possible to have a few minutes break after the reading of the instructions just to set up?

THE COURT: Certainly.

MR. SINGER: One final question, given that the Court has granted SCO's 50(a) motion and dismissed Novell's counterclaim, and that's been raised in opening and otherwise, will the Court make some mention of that?

THE COURT: There is a specific jury instruction that will state, and I'll read it to you, if you've not seen

it, the claim of Novell that SCO slandered Novell's title is no longer before you and will not be decided by you. Do not concern yourselves with this development and do not speculate about it.

MR. SINGER: Thank you.

THE COURT: Counsel, let me remind you that the Court will expect proposed findings of facts and conclusions of law as to those issues reserved for the Court on the 16th of April, which is 20 days plus. Okay.

All right. Is there anything else before we bring the jury in?

MR. BRENNAN: Not from Novell, Your Honor.

MR. SINGER: Not from SCO.

THE COURT: Ms. Malley.

(Jury present)

THE COURT: Good morning, ladies and gentlemen.

Let me begin by reassuring you that a copy of the instructions that I'm about to read to you will go with you into the jury room, so I do not expect you to memorize this as I go through it. All right.

Members of the jury, now that you have heard the evidence, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the

rules of law to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence of the case.

You are to disregard any evidence offered at trial and rejected by the Court. You are not to consider questions of counsel as evidence. You are not to consider the opening statements and the arguments of counsel as evidence. Their purpose is merely to assist you in analyzing and considering the evidence presented at trial.

The Court did not by any words uttered during the trial or in these instructions give or intimate, or wish to be understood by you as giving or intimating, any opinions as to what has or has not been proven in the case or as to what are or are not the facts of the case.

The claim of Novell that SCO slandered Novell's

title is no longer before you and will not be decided by you. Do not concern yourselves with this development and do not speculate about it.

SCO has the burden of proving its claim by a preponderance of the evidence.

To prove by a preponderance of the evidence means to prove something is more likely so than not so. It does not mean the greater number of witnesses or exhibits. It means the evidence that has the more convincing force when taken on a whole compared to the evidence opposed to it. It means the evidence that leads you the jury to find that the existence of the disputed fact is more likely true than not true.

Any finding of fact you make must be based on probabilities, not possibilities. A finding of fact must not be based on speculation or conjecture.

When I say in these instructions that the party has the burden of proof on any proposition or use the expression if you find or if you determine, I mean that you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

In determining whether any disputed fact has been proven by a preponderance of the evidence you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all

exhibits.

If a party fails to meet this burden of proof, or if the evidence weighs so evenly that you are unable to say that there is a preponderance on either side, you must resolve the question against the party who has the burden of proof on that issue and in favor of the opposing party.

In this particular civil case, one of the elements of the claim made by SCO, the showing of constitutional malice, has a different burden of proof called clear and convincing evidence. That means that SCO has a higher burden than preponderance of the evidence, but it does not require proof beyond a reasonable doubt. Clear and convincing evidence is evidence that shows it is highly probable that what is claimed is true. It is evidence that produces in your mind a firm belief as to the fact at issue. For such evidence to be clear and convincing, it must at least have reached a point where there remains no substantial doubt as to the truth or correctness of the claim based upon the evidence.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of SCO, and the answer thereto of Novell. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both

the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law stated by the Court, and reach a just verdict, regardless of the consequences.

During the trial I have permitted you to take notes. Many courts do not permit note-taking by jurors. And as instructed at the beginning of trial, a word of caution is in order. There is always a tendency to attach undue importance to matters which one has written down. Some testimony which is considered unimportant at the time presented, and thus not written down, takes on greater importance later in the trial in light of all the evidence presented. Therefore, you are instructed that your notes are only a tool to aid your own individual memory and you should not compare your notes with other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Your notes are not evidence, and are by no means a complete outline of the proceeding or list of the highlights of the trial. Above all, your memory should be your greatest asset when it comes to deliberating and rendering a decision in this case.

Both SCO and Novell are corporations and, as such, can act only through their officers and employees, and others designated by them as their agents.

Any act or omission of any officer, employee or

agent of a corporation, in the performance of the duties or within the scope of the authority of the officer, employee or agent, is the act or omission of the corporation.

Unless you are otherwise instructed, the evidence in this case consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated; and all facts and events which may have been judicially noticed.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside of the courtroom is not evidence and must be entirely disregarded.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply

requires that the jury find the facts in accordance with the burden of proof in the case, both direct and circumstantial.

You, as jurors, are the sole judges of the credibility of witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witnesses, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such

testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it differently and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

Witnesses who, by education, study and experience, have become expert in some art, science, profession or calling, may state opinions as to any such matter in which that witness is qualified as an expert, so long as it is material and relevant to the case. You should consider such expert opinion and the reasons, if any, given for it. You are not bound by such an opinion. Give it the weight you think it deserves. If you should decide that the opinions of an expert witness are not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinions are not sound, or that such opinions are outweighed by other evidence, you may disregard the opinion entirely.

In resolving any conflict that may exist in the

testimony of experts, you may compare and weigh the opinion of one against that of another. In doing this, you may consider the qualifications and credibility of each, as well as the reasons for each opinion and the facts on which the opinions are based.

In determining the weight to be given to an opinion expressed by any witness who did not testify as an expert witness, you should consider his or her credibility, the extent of his other her opportunity to perceive the matters upon which his or her opinion is based and the reasons, if any, given for it. You are not required to accept such an opinion but should give it the weight to which you find it entitled.

During the trial of this case, certain testimony has been presented to you by way of a deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath or on a videotape. Such testimony is entitled the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present and had testified from the witness stand.

Certain charts, graphs and illustrations have been shown to you. Those charts, graphs and illustrations are used for convenience and to help explain the facts of the case. They are not themselves evidence or proof of any facts.

You have heard evidence that there were earlier rulings by this Court concerning the ownership of the UNIX and the UNIX copyrights existent as of the date of the asset purchase agreement. In making these rulings, the Court did not have the benefit of the evidence that you have now heard. These prior rulings have been reversed in a unanimous ruling by the Court of Appeals, which is why these issues are being presented to you in this trial. You must decide this case solely on the evidence presented to you in this trial. The earlier rulings should have no bearing on your determination of which party owns the copyrights at issue in this case. However, the existence of these prior rulings may be considered by you in your determination of special damages and punitive damages, if any.

You heard reference to a SCO Group bankruptcy. That is a reorganization proceeding which is pending in another court. SCO continues to operate its business in reorganization and the existence of that proceeding should have no bearing on your consideration of this case.

You have also heard reference to a trial involving

SCO and Novell in 2008. That trial concerned other issues that are not before you.

In this case, SCO has alleged that Novell has slandered its title regarding ownership of copyrights over the UNIX and UnixWare computer operating systems.

Slander of title requires you to find that: First, there was a publication of a statement disparaging SCO's title; second, the statement was false; third, the statement was made with constitutional malice; and, fourth, the statement caused special damages. I will now explain these four elements in more detail.

The first element requires SCO to prove that Novell published a statement that disparaged SCO's title or ownership of the UNIX or UnixWare copyrights existent as of the date of the asset purchase agreement. SCO alleges that Novell made several slanderous statements in 2003 and 2004. The allegedly slanderous statements do not include statements made in pleadings and filings made by Novell in connection with this litigation, which began in January 2004. Novell may not be held liable for making such statements made in pleadings and filings.

For the statement to have been published, it must have been communicated to someone other than SCO.

A statement is not slanderous if the context makes clear that the speaker is expressing a subjective view or an

interpretation or theory, rather than an objectively verifiable fact. You may determine, however, that the speaker intended to convey a statement of fact even if the speaker has couched its statements in the form of an opinion or belief.

In deciding whether a publication disparaged SCO's title, you should not view individual words or sentences in isolation. Rather, each statement must be considered in the context in which it was made, giving the words their most common and accepted meaning. You should also consider the surrounding circumstances of the statement and how the intended audience would have understood the statement in view of those circumstances.

The second element of a claim for slander of title is falsity of the statement that disparages title. False means that the statement is either directly untrue or that an untrue inference can be drawn from the statement. You are to determine the truth or falsity of the statement according to the facts as they existed at the time the statement was made.

The statement, to be true, need not be absolutely, totally, or literally true, but must be substantially true. A statement is considered to be true if it is substantially true or the gist of the statement is true.

In order to determine whether the statements at

issue were true or false, you must determine which party owned the UNIX and UnixWare copyrights, existent as of the date of the asset purchase agreement, at the time the statements were made.

To determine which party owned the UNIX and UnixWare copyrights, existent as of the date of the asset purchase agreement, you should consider the asset purchase agreement and the amendments thereto. I will now provide you instructions on how you should interpret these agreements.

Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together. The contracts need not have been executed on the same day to be parts of substantially one transaction.

Where contracts are made at different times, but where the later contract is not intended to entirely supersede the first, but only modify it in certain particulars, the two are to be construed as parts of one contract, the later superseding the earlier one where it is inconsistent with the earlier.

Here, the amendments, including Amendment No. 2, must be considered together with the asset purchase agreement as a single document. The language of the amendments, including Amendment No. 2, controls whenever its

language contradicts the asset purchase agreement.

In deciding what the terms of a contract mean, you must decide what the parties intended at the time the contract was created. You may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract.

With respect to your consideration of the agreements at issue here, where contract terms are clear, they should be given their plain and ordinary meanings.

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts makes sense when taken together.

You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

With respect to who owns the copyrights at issue, you may consider what is called the extrinsic evidence of the intent of the parties to the amended asset purchase agreement. Extrinsic evidence is the evidence of what parties to a contract intended apart from the language they used in the contract.

One type of extrinsic evidence is testimony or documents showing what the people who were negotiating the contract said or did or understood at the time of the transaction.

Another type of extrinsic evidence is called the parties course of performance. Course of performance is how the parties interpreted and applied the terms of the contract after the contract was created but before any disagreement between the parties arose.

In determining which party owns the property at issue, and your consideration of the amended asset purchase agreement, you may consider the nature of a copyright.

Copyright is the exclusive right to copy. The owner of a copyright has the exclusive right to do and to authorize the following: One, to reproduce the copyrighted work in copies; two, to prepare derivative works based upon the copyrighted work; three, to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending.

The term owner includes the author of the work, an assignee, or an exclusive licensee. In general, copyright law protects against production, adaptation, distribution, performance, or display of substantially similar copies of the owner's copyrighted work without the owner's permission.

A copyright owner may enforce these rights to

exclude others in an action for copyright infringement. Even though one may acquire a copy of a copyrighted work, the copyright owner retains rights and control of that copy, including uses that may result in additional copies or alterations of the work.

Possession of certificates of copyright registrations is immaterial to ownership of the copyrights, but may be considered for other purposes, such as the intent of the parties.

A copyright owner may transfer, sell, or convey to another person all or part of the copyright owner's property interest in the copyright. A property interest in a copyright includes the right to exclude others from reproducing, preparing a derivative work, distributing, performing, displaying, or using the copyrighted work.

To be valid, the transfer, sell, or conveyance must be in writing. The person to whom a right is transferred is called the assignee. The assignee may enforce this right to exclude others in an action for a copyright infringement.

The copyright owner may also transfer, sell, or convey to another person any of the exclusive rights included in the copyright. To be valid, the transfer, sell, or conveyance must be in writing. The person to whom this right is transferred is called an exclusive licensee. An

exclusive licensee has the right to exclude others from copying the work to the extent of the rights granted in the license and may bring an action for damages for copyright infringement.

Nonexclusive licenses, on the other hand, do not transfer copyright ownership and can be granted orally or implied from conduct. An implied license can only be nonexclusive. A nonexclusive licensee cannot bring suit to enforce a copyright.

An implied nonexclusive license may arise when, one, a person, the licensee, requests the creation of the work, two, the creator, the licensor, makes the particular work and delivers it to the licensee who requested it, and, three, the licensor intends that the licensee-requestor copy or distribute his work.

The third element of slander of title requires SCO to prove by clear and convincing evidence that Novell's statement disparaging the ownership of the UNIX and UnixWare copyrights, existent as of the date of the asset purchase agreement, was made with constitutional malice. That is, SCO must prove that the statement was published with: One, knowledge that it was false; or, two, reckless disregard of whether it was true or false, which means that Novell made the statement with a high degree of awareness of the probable falsity of the statement, or that, at the time the

statement was transmitted Novell had serious doubts that the statement was true. Clear and convincing evidence leaves no substantial doubt in your mind that the constitutional malice is highly probable, as previously explained in Instruction No. 13.

In determining whether Novell published the statement knowing the statement to be false or with reckless disregard for the truth, you should take into account all the facts and circumstances. You should consider whether the statement was fabricated or the product of the party's imagination. You may also consider whether the party knew about the source of the information and whether there were reasons for the party to doubt the informant's veracity, whether the information was inherently improbable, or if there were other reasons for the party to doubt the accuracy of the information.

In determining whether there was knowing falsehood or reckless disregard for the truth, however, it is not enough for you to find that the party acted negligently, carelessly, sloppily or did not exercise good judgment in researching, writing, editing, or publishing the statement. An extreme departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers does not, standing alone, constitute knowledge of falsity or reckless disregard for the truth. The reliance on one

source standing alone does not constitute knowing falsehood or reckless disregard for the truth, even if other sources would be readily available, and even if, in applying reasonable reporting of care, you believe those other sources should have been contacted.

Spite, ill will, hatred, bad faith, evil purpose or intent to harm does not alone support a finding of constitutional malice.

The mere fact that a mistake may occur is not evidence of knowing falsehood or reckless disregard for the truth. Reckless disregard for the truth or falsity requires a finding that the person making the statement had a high degree of awareness that the statement was probably false, but went ahead and published the statement anyway. The test is not whether the person acted as a responsible publisher under the circumstances. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a standard of conduct in this matter.

Unless you find by clear and convincing evidence, under all the circumstances, that Novell acted knowing the statement to be false or with a high degree of awareness of its probable falsity, there can be no liability.

The final element of a claim for slander of title requires a showing that the statement disparaging SCO's ownership of the UNIX of UnixWare copyrights, existent as of

the date of the asset purchase agreement, caused special damages to SCO.

This requires SCO to establish an economic loss that has been realized or liquidated, as in the case of lost sales. Special damages are ordinarily proved in a slander of title action by evidence of a lost sale or the loss of some other economic advantage. Absent a specific monetary loss flowing from a slander affecting the salability or use of the property, there is no damage. It is not sufficient to show that the property's value has dropped on the market, as this is not a realized or liquidated loss. The law does not presume special damages.

Special damages in the form of lost sales may be shown in two ways: A, proof of the conduct of specific persons or, b, proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify. There is a separate test you must apply for each.

First, when the loss of a specific sale is relied on to establish special damages, SCO must prove that the publication of the disparaging statement was a substantial factor influencing the specific, identified purchaser in his decision not to buy.

In order for the disparaging statement to be a substantial factor in determining the conduct of an intending or potential purchaser, it is not necessary that

the conduct should be determined exclusively or even predominantly by the publication of the statement. It is enough that the disparagement is a factor in determining his decision, even though he is influenced by other factors without which he would not decide to act as he does. Thus many considerations may combine to make an intending purchaser decide to break a contract or to withdraw or refrain from making an offer. If, however, the publication of the disparaging matter is one of the considerations that has substantial weight, the publication of the disparaging matter is a substantial factor in preventing the sale and thus bringing financial loss upon the owner of the thing in question.

The extent of the loss caused by the prevention of a sale is determined by the difference between the price that would have been realized by it and the salable value of the thing in question after there has been a sufficient time following the frustration of the sale to permit its marketing.

Second, in the case of a widely disseminated disparaging statement, SCO need not identify a specific purchaser and recovery is permitted for loss of the market. This may be proved by circumstantial evidence showing that the loss has in fact occurred and eliminating other causes.

A decline in stock price is not an appropriate

claim for special damages.

You are entitled to award punitive damages if you deem them to be appropriate.

Before any award of punitive damages can be considered, SCO must prove by clear and convincing evidence that Novell published a false statement knowing it was false or in reckless disregard whether it was true or false, and that Novell acted with hatred or ill will towards SCO, or with an intent to injure SCO, or acted willfully or maliciously towards SCO.

If you find that SCO has presented such proof, you may award, if you deem it proper to do so, such sum as in your judgment would be reasonable and proper as a punishment to Novell for such wrongs, and as a wholesome warning to others not to offend in a like manner. If such punitive damages are given, you should award them with caution and you should keep in mind they are only for the purpose just mentioned and are not the measure of actual damage.

The fact that I have instructed you on damages does not mean that I am indicating that you should award any. That is entirely for you, the jury, to decide.

Any damages you award must have a reasonable basis in the evidence. They need not be mathematically exact, but there must be enough evidence for you to make a reasonable estimate of damages without speculation or guess work.

The burden is upon the party seeking damages to prove the existence and amount of its damages and that its damages were caused by the acts of the opposing party. You are not permitted to award speculative damages.

You have heard evidence concerning specifics about the parties' rights and obligations under section 4.16 of the amended asset purchase agreement. You are instructed that those issues of specific rights and obligations under section 4.16 are for the Court to decide and you are not to concern yourself with them. You may consider section 4.16, as well as all other provisions, in interpreting the amended asset purchase agreement.

It is the duty of the attorney on each side of the case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against any attorney or his or her client because the attorney has made an objection.

Upon allowing testimony or other evidence to be introduced over the objection of any attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of any such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

When the Court has sustained an objection to a

question addressed to a witness, the jury must disregard the question entirely, and may draw no inference from the wording of it or speculate as to what the witness would have said if he or she had been permitted to answer any question.

During the course of the trial, I may have occasionally asked questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions may have related.

A copy of these instructions will also accompany you to the jury room. Do not write on the instructions.

You will notice during are deliberations that there may be gaps in the numbering of the instructions. The instruction numbers are for the convenience of the Court and the parties, and you are not to be concerned by them.

Upon retiring to the jury room, you must select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

The verdict must represent the collective judgment of the jury. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an

agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors for the mere purpose of returning a unanimous verdict.

Remember at all times, you are not partisans. You are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Your verdict must be based solely upon the evidence received in the case. Nothing you have seen or heard outside of court may be considered. Nothing that I have said or done during the course of this trial is intended in any way to somehow suggest to you what I think your verdict should be. Nothing said in these instructions and nothing in any form of verdict prepared for your convenience is to suggest or convey to you in any way or manner any intimation as to what verdict I think you should return. What the verdict shall be is the exclusive duty and responsibility of the jury. As I have told you many times, you are the sole judges of the facts.

The Court has prepared a verdict form for your convenience. You are instructed that your answers to the interrogatories on the verdict form must be consistent with the instructions I have given you and with each other.

When you have reached a unanimous agreement as to your verdict, your foreperson will fill in, date and sign the verdict form upon which you have unanimously agreed. When you have reached unanimous agreement as to your verdict, the foreperson shall inform the bailiff and you shall return to the courtroom.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. But bear in mind that you are not to reveal to the Court or to any person how the jury stands, numerically or otherwise, on the question before you, until after you have reached a unanimous verdict or agreement.

The attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance. It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of his or her opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his or her sense of pride may be aroused, and he or she may hesitate to recede from an announced position if shown that it is wrong.

During your deliberations, you are able as a group to set your own schedule for deliberations. You may deliberate as late as you wish or recess at an appropriate time set by yourselves. You may set your own schedule for lunch and dinner breaks.

However, I do ask that you notify the Court by a note when you plan to recess for the evening.

You have now been instructed on the law, ladies and gentlemen. Again, a copy of the instructions, what I just read to you, will accompany you to the jury room.

It is now time for closing statements, and we'll begin with SCO. And because SCO is the plaintiff in the case and, as I just instructed you, has certain burdens to carry by way of the weight of evidence and such, the plaintiffs have the opportunity to go both first and last in their closing statements, meaning that SCO will go ahead now with part of its closing. We'll then hear from Novell, and then SCO will be given the last word.

Mr. Singer, if you would like to proceed.

MR. SINGER: Thank you, Your Honor.

Ladies and gentlemen, it's been a long three weeks and we appreciate your close attention to this case. I know it's not been the most exciting case at times, but I assure you it's a very important case. It's very important to SCO, it very important to individuals like Bill Broderick, John

Maciaszek, and Andy Nagle, men who have been with the company for 20 years, going all the way back to AT&T, and they are still there at SCO turning out UnixWare, providing products for companies all over the country and the world, and trying in a difficult situation to have the company proceed.

These individuals and the customers, and some of these have been long time or current customers, McDonald's, NASDAQ, BMW, that business depends on the copyrights, depends on having ownership of intellectual property that is at the heart of their business.

You are going to be asked in this case two basic important questions. It will be your responsibility to decide, first, to declare that the UNIX, UnixWare copyrights that existed back at the time of this transaction went with the rest of the business, except for this royalty stream, and belonged to SCO. That is very important and critical on its own. And, second, you will be asked to determine, if you agree with us, that there's been a slander on SCO's title, to determine that and award a reasonable amount of damages to compensate SCO in connection with that slander.

Now as the Court has instructed you, you are the judges of the facts and, in doing so, you must determine credibility. And credibility is, in part, a question of the consistency of witnesses with one another. And I would like

to give you an example of one of the things you can look at.

You'll recall Mr. Stone when he was testifying here about whether or not when they waived rights of SCO that benefited IMB, whether that was done unilaterally or whether it was done at IBM's request. Mr. Stone answered no, it wasn't at IBM's request. We acted on our own. No input from IBM at all.

Then a few days later you heard from Mr. LaSala, the former general counsel of Novell who admitted on the stand that, in fact, Mr. Marriot, a lawyer for IBM, specifically asked Novell to assert those rights to waive SCO's claims; in fact, said it was urgent. You also learned that even internally, with Mr. LaSala's testimony, there was an inconsistency because when he was first asked about that in February 2007, he denied it. Only later in May, when we pursued the issue, he admitted it. That's credibility. That's an issue you can consider in determining who to believe in this case.

Another example, Mr. Stone again, on a basic point. This is not something people can be confused about. Were you asked to leave the company. Yes, I was. I asked Mr. Messman the same question, was Mr. Stone asked to leave Novell. Answer, no. Someone is not telling the truth.

Now the questions that you will need to answer in this case will be set out in the verdict form that you will

receive along with a copy of the instructions and the evidence, and the very first question will be did the amended asset purchase agreement transfer to UNIX and UnixWare copyrights from Novell to SCO. I would like to address that question at the outset.

Amendment No. 2, we submit, is the key to answering that question. Amendment No. 2 replaced the language that was inconsistent with what was the intent of the transaction, the intent of the parties who put this deal together that those copyrights would be transferred with the UNIX and the UnixWare business. Amendment 2 replaces the old language, which is gone, and that is the operative language.

Now Judge Stewart read you an important instruction that makes that clear, which is the instruction I have on the screen, and it makes clear that it is the language of the amendments, including Amendment No. 2, controls wherever its language contradicts the asset purchase agreement.

Of course you knew that from the face of it, that it says it replaces the old language. It took out this copyright exclusion and put in language that, we submit to you, is consistent with what the parties intended, that the copyrights required for the business were now part of what were the included assets.

Now you might remember about three weeks ago Novell's counsel telling you that it was important to listen for the rest of the story. I think he invoked Paul Harvey. I was thinking about that statement all during the first week of this trial, and I was doing that because it seemed that all during that week Novell was focused on this language in the schedule of excluded assets, excluding copyrights, when the rest of the story was that language didn't exist anymore. That language was replaced by Amendment No. 2. So the language that they have spent more hours in this trial on than anything else is simply not in the agreement and hasn't been in there since 1996. That's really the rest of the story on this because under the plain language of the asset purchase agreement with Amendment 2, it is very clear that the assets, the copyrights transferred.

You have a schedule of included assets, which you've seen many times and you will be able to look at when you deliberate, it says, all rights and ownership of UNIX and UnixWare on all these products, including the UnixWare products, and you haven't heard any evidence there are any products on there that -- products missing from that list. This includes what we're talking about, that all rights and ownership of UNIX and UnixWare are transferred.

And then you had the old language that excluded

copyrights and trademarks. Now you have the current language replaced by Amendment 2 which says that Novell gets to keep copyrights, except for the copyrights and trademarks owned by Novell as of the date of the agreement required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies. That really is the heart of this case. With Amendment No. 2, it is clear that those copyrights were transferred.

Now I would submit to you that Novell has admitted the fact that SCO, in light of Amendment No. 2, owns those copyrights, and they did that on two occasions. The first occasion that that was admitted goes back to June 6th of 2003 when Novell issued the press release, when they -- of course, you've heard about Amendment No. 2 when they said they didn't have it and it turns out they did have it. They didn't know it was signed. They claimed they had a signed copy in the files. But the important point here on copyright ownership is their recognition that it appears to support SCO's claim that ownership for certain copyrights of UNIX did transfer to SCO in 1996. So that's the first time.

The second time that that was admitted was in front of you a few days ago on March 23rd, and that was when Allison Amadia admitted -- and certainly she started out in her testimony being adverse to SCO and in favor of Novell. Then under Mr. Normand's cross-examination, listen to what

she said. She was asked, now you agree that under the plain language of Amendment 2 Novell has included in the transfer of assets the copyrights required for SCO to exercise its rights in UNIX and UnixWare. Her answer was, the way I wrote and intended Amendment No. 2 to be read is that this language was saying that whatever copyright rights Santa Cruz needed in order to exercise the rights it was given, then they would have those rights.

Then a little bit later near the end of her cross-examination she was asked, so if there are copyrights that are required for SCO to exercise its rights, like the UNIX and UnixWare trademarks, they were transferred, correct. Her answer was yes.

Now there is no real dispute, ladies and gentlemen, that the copyrights are required for the UNIX and UnixWare business. You have heard a lot of evidence on that. It has included Bob Frankenberg, the Novell president and CEO, who said it was ludicrous to think about selling software without selling the copyrights.

Doug Michels, the SCO founder and vice president, equated it to breathing oxygen, that it's so essential. There is no way this deal would have happened without getting the copyrights.

Jim Wilt, who was the lead negotiator for Santa Cruz, says that, you know, when you walk out the door, I

assume your head goes with you. That's how he equated it. And, of course, the copyrights have to go with the company.

Steve Sabbath was asked, if you didn't own the copyrights, how could you go after somebody that's pirating your software, how could you enforce your rights to the technology.

Bill Broderick said, if we couldn't protect our software, we'd be out of business. This is how you protect your software.

Now with Amendment No. 2, the APA makes sense. Without it, the agreement doesn't make sense. The software business without the copyrights, well, I would suggest to you that's like a car without an engine, or maybe a house without a roof, or maybe even suggest that it's an ice cream sundae where you only get the cherry and not the ice cream, as Mr. Braham suggested a couple days ago. It doesn't make any sense.

Now with Amendment No. 2 all of the things fit together and makes sense, beginning with the very recital at the beginning of the document that says that this is the sale of a business, the UNIX and UnixWare business, the support of those products, all of that is what it being sold. It is the intent that all of the business relating to that be transferred. So it's consistent with the overall intent of the deal.

There's been some discussion about the consideration received. I suggest to you that it makes sense because of the amount of money which Novell received. Back in the opening you might remember seeing this slide from Novell, the first one on the left-hand side, where it suggests the purchase price was just the stock. The stock itself was worth a lot of money, 40, $50 million. You wouldn't even receive that if you weren't transferring the copyrights. But if you look at the entirety of that section of the asset purchase agreement, you see that there was another part to the payments which included the royalty stream that would occur in the future, both from the existing UNIX products and the UnixWare products.

If you look at Mr. Bradford's memo to the board right before Novell approved this transaction, he identified those four royalty streams, which turn into a lot of money. The stock is worth about 40, $50 million, $50 million a year in the UNIX royalties, the estimated present value of $60 million or so in the UnixWare royalties. So this was a sale of a business. This wasn't simply serving as an agent, as Mr. Braham suggested, to collect for someone else.

For instance, you've got here all the title to the UNIX licenses. If you have a real estate agent handle your house, you don't give them title to sell it. I don't know of any real estate agents who would pay me something like

$100 million to handle a transaction. This agency was very limited to the collection of royalties that Novell was going to keep, and the rest of this was the sale of a business.

Now Amendment 2 also is needed to make sense of something you've heard me refer to and my colleagues refer to throughout the trial, the license back provision, and that's because -- and Novell has never been able to explain this, it makes no sense for Novell to have kept the copyrights and then the license back right to use them. If they kept them, they wouldn't need the license back. That is clear evidence that this was intended to be a sale of the copyrights.

The license back of assets appears right in the asset purchase agreement in section 1.6. Now Novell tries to say, well, it only applied to the new products, so that's why you had the license back. But the plain language of the license back says, all of the technology included in the assets, which means they are getting a license back to the assets being sold. They wouldn't need a license to use that if it wasn't for the fact they were selling the copyrights.

And, in fact, if you look at the technology license agreement, it says specifically, as between Novell and SCO, ownership of licensed technology shall reside in SCO. We think that makes it very clear, and you have heard a lot of witnesses say when I asked them or Mr. Normand

asked them that does it make any sense to have a license back if you retained the copyrights, and everyone agreed with that.

Now Amendment 2 -- with Amendment 2, the agreement also makes sense in light of -- let's see, there we are. With Amendment 2, the agreement also makes sense in light of the testimony of the witnesses that you've heard. Now I told you a few weeks ago in the opening, pointing to this chart, that you would hear from ten witnesses drawn from both the Santa Cruz and the Novell side of the transaction who would agree that it was intended that the copyrights were sold. All ten of those witnesses, either through video deposition or through live testimony here, have so testified.

I would like to start with the Santa Cruz side because there's been a lot of attention here paid to what Novell intended and what was going on at Novell's board meeting. That's really not the issue before you. The issue before you is what the two parties to a contract intended. So you have to look at both parties' intent and how they expressed that to each other. And there is no confusion at all on the Santa Cruz side there. All of these executives and negotiators testified consistently that this deal required the transfer of the copyrights.

You remember Doug Michels. I think that was

pretty memorable videotaped testimony, wasn't it? He was perplexed that anyone could even raise the issue. Copyrights are like breathing oxygen. I'm going to read you a little bit of his testimony. He says, I guarantee you, we put copyright notices in every document we wrote. How could we do that if we didn't own the copyrights? We put copyright notices in every module of source code we wrote. They all said we own the copyrights. We own the intellectual property, and every action we took represents that. I don't do a very good imitation of him.

THE COURT: Mr. Singer, remember, if you read too fast, the court reporter will have difficulty.

MR. SINGER: I will try to read slower as well.

Michels also said, we took over the business. We were in the business of selling intellectual property. We were in the business of supporting the intellectual property. We were in the business of providing marketing materials. We couldn't do any of that without owning the copyrights.

He was asked if any attorney from Santa Cruz ever told him that Novell was asking for -- that he had to go to Novell and ask them for the copyrights. He said, I think I would have laughed them out my office.

Now you recall that you also heard testimony from Steve Sabbath who said, when we bought the UNIX business

from Novell, all copyrights came with the product and Amendment No. 2 was meant to confirm that, and he testified to that.

In addition, you had Kimberlee Madsen. Ms. Madsen has no interest in this litigation. She works for Apple. She came here and testified clearly to you that the copyrights were going with the assets. She was asked, do you have a view, as you sit here, as to whether the parties intended that the copyrights would be retained by Novell. Answer, no. The intent was clearly to be that the copyrights for the UNIX and UnixWare were to be transferred to The Santa Cruz Operation.

And you heard Mr. Mohan, Mr. Wilt also. So there is no question on the Santa Cruz side of the equation that everyone agrees that the copyrights were part of the deal.

Now in a typical case you would expect to see the Santa Cruz executives and attorneys saying one thing and the Novell executives and lawyers saying something completely different. The incredible thing about this case is that you have numerous senior executives and lawyers who were with Novell at the time who agree with Santa Cruz, who agree that the copyrights were intended to be sold.

Now you have heard from Robert Frankenberg, the chief executive officer at the time, on the first day and again on the last day of testimony. I think he's probably

the most important witness in this trial. Ladies and gentlemen, in the future, when I think of a stand-up guy, I'm going to be thinking of Bob Frankenberg. He has no financial or other interest in this. A lot of CEOs would simply duck something like this and say they don't remember, it's a long time ago. He didn't do that. He has given you forthright testimony, both on the first day of trial and yesterday, that this was a deal to sell the copyrights along with the rest of the business.

He acknowledged that he missed that line item in one part -- one word in a board resolution that he thought was probably referring to the NetWare copyrights, but that it was clear, because he was the guy at the top, that this was a sale of the business, including the copyrights. That's why the error had to be fixed a year later with Amendment No. 2.

His testimony is consistent with the testimony of Duff Thompson, of Ty Mattingly and Ed Chatlos, the people most involved in the negotiation of the deal. They were the people out there in California for months negotiating this. These were the people who looked at Alok Mohan and the other Santa Cruz people across the table and said, you are getting the business lock, stock and barrel, except, of course, for those royalties which were going to help pay for it. These were the people who came here and testified that there had

never been any suggestion made in that process of Novell holding back the copyrights.

Now Novell suggests some of these witnesses, who, remember, are their own executives, should be discredited because some of them later went to the business and therefore had a financial interest in SCO. What I would submit to you, though, is their testimony is consistent with individuals who have no such interest, Mr. Levine, Mr. Frankenberg. I think they insulted Mr. Chatlos, their senior director, by suggesting because his wife had a little stock that somehow he isn't telling the truth when he said this was the deal he negotiated. And Mr. Thompson, who you can judge, was a forthright witness.

Basically, what Novell is telling you is that you would have to believe that all ten of these witnesses, all ten, half of whom are former senior executives, were either mistaken or lying in order to agree with what Novell would have you believe in this case.

Now how did this happen? How did the problem happen that required Amendment 2? I think we have gotten a little more insight into that over the last several days. I think you see what happens when you have a set of lawyers rushing to document a deal under a lot of time pressure. This is Tor Braham's forced march. Mr. Braham ignored months of negotiations between the parties that preceded the

last two weeks, which is when he got involved, as simply discussions about a potential transaction that he didn't really have to pay attention to.

He also ignored the term sheet which I asked him about, a term sheet which, if you look at it when you look at all the evidence, he had, which, before he got to work on 9-11-95, or within that period he got to work, said what the business people had negotiated, and it says, UnixWare and SVRX, the intent is to provide all rights to SCO including rights to modify, rights to sublicense binary copies, rights to distribute source code. And, ladies and gentlemen, if you compare that to the instruction that Judge Stewart read and you'll have with you, you'll see that lines up very closely to what the rights are that an owner of a copyright has.

Now going back to Mr. Braham's forced march, what are the other things that indicate how this problem happened? The excluded assets schedule, which has originally had this exclusion of copyrights, it wasn't even provided until the week before the signing. The fact that he testified to you that on a big issue like this there was no push back from Santa Cruz shows that this wasn't discussed, it was missed. Can you believe a situation where Novell pops up a few days before the closing and says, we're going to sell you the business, but we're going to hold the

copyrights, and Santa Cruz says, yeah, that's fine, it doesn't push back? It doesn't make any sense. This was just missed in a schedule.

Mr. Bradford's September 18th, 1995 board memo didn't mention that either, which explains why Mr. Frankenberg and other people on the board who aren't looking at the minutia of the resolution but are looking what their general counsel sent to them in advance of the meeting, it didn't mention anything about retaining the copyrights.

And then there was one more piece of evidence that was interesting. When Mr. Braham testified, I asked him about this copy he made notes on during the board conference call and, interestingly enough, as you'll see, because that's in evidence as Exhibit V-3, even that copy that their lawyer was making notes on during the call, supposedly supporting the exclusion of copyrights, had no copies of the schedules at all attached to them. So if that's the same copy people were looking at at the time, they wouldn't have even had the schedule that had this erroneous copyright exclusion on it.

Now you do have someone who says I remember exactly that at the board meeting they said the copyrights were excluded. You will have to determine the credibility of that, because that was Jack Messman, the chef executive

officer who approved the slanderous statements.

I put his testimony up here to draw attention to the fact that while he remembers that clearly when I asked him about that in his deposition, he didn't even know which decade this meeting occurred in. He says I think in the board presentation they made to us in, whenever it was, '81 or '83. But yet he has a distinct recollection of this one point, which, by the way, isn't reflected in the board minutes as having been discussed, and he recalls nothing else, the same Mr. Messman who you could judge his credibility for when he was here before you.

So I think this is how the error was made, and I think you can see that in the rush of those last few days, excluded asset schedule had a term that was inconsistent with the intent of the deal, either by mistake or perhaps even accepting you have some overzealous lawyers who acceded that, and then it was fixed with Amendment No. 2. And not only does that bring everything in the asset purchase agreement together and make sense, it also makes the deal sensible in light of what was told to the public.

Novell's version of the events can't be squared with the official press release it issued jointly with Santa Cruz. And while it says it's a SCO press release, Mr. Frankenberg said and was quoted in there that this was the approved joint release. They are the acquiring party. They

said, SCO will acquire the UnixWare business and UNIX intellectual property. That's the core intellectual property.

The Wall Street Journal, which said, the deal includes the purchase by Santa Cruz Operation of most trademarks and intellectual property associated with UNIX software. A lot of people read The Wall Street Journal at Novell. No one popped up, never heard anyone say The Wall Street Journal has this wrong. That didn't happen either.

Novell's version can't be squared with the report to the United States government in Novell's Hart-Scott-Rodino filing. True, they put the schedules in the APA attached to the back of the document, but they were summarizing the deal for the United States government in the text. When they summarized it, they said, the assets to be acquired by Santa Cruz were all rights and ownership of UNIX and UnixWare. This is a big thing, the copyrights. If that was excluded, don't you think they would have put in the text we keep the copyrights, except the copyrights. Mr. Braham had no explanation for that whatsoever.

Even IBM recognized that SCO had the copyrights, an irony there. The documents that you've seen in the last few days, including yesterday, are documents where IBM, in certain positions it was taking in this dispute that came up a year later, said, SCO is protected by copyrights. You can

show us the source code because you have copyright protection. So none of what the outside world was looking at would be consistent with what Novell would have you believe.

Now, ladies and gentlemen, you have also been instructed by the Court that you should consider the course of performance. How a party acts is sometimes more important than anything else. It's an indication of their intent. And the instructions said that the course of performance is something that you can look at to determine by their actions whether the copyrights were intended to stay with Novell or to go Santa Cruz.

And what have we heard about that? This has virtually been undisputed testimony from three different individuals, three individuals who have been with the UNIX business all the way back to the 1990s. Bill Broderick, Andy Nagle and John Maciaszek. You've heard Bill Broderick say, we sent letters out to all these customers. This is an example of the Prentice-Hall letter. Novell sent it out, a lot of different people signed them, and it said, as you may know, Novell transferred to SCO its existing ownership in the UNIX System-based offerings, that included all releases of UNIX and all the UnixWare releases at the time. It doesn't make sense if it wasn't true you tell the customers that.

You heard Mr. Nagle talk about how during the transition period they actually changed the code on the software, not just on the outside of the box but in the software itself, the code that reflects who owns those programs, and they did that for the UnixWare program that was being built at the time at Novell. They didn't have any new code after the sale in it. That only makes sense if you are transferring the ownership of that old code as of the time of the deal. There's no refutation of that.

Of course, you can also look for intent at what happened with the copyright registrations. You'd think that Novell would have kept them. That's sort of important. They were with Santa Cruz. They have been sitting on that desk during the trial. You saw them in the testimony through Mr. Maciaszek.

Now all of this testimony shows that the answer to question number one should be yes, that under the amended asset purchase agreement, the transfer of the UNIX and UnixWare copyrights from Novell to SCO occurred.

The next question you will need to answer -- and let me, before I move onto the next question, say that first question is very important because it will mean if you answer that yes, that SCO can go about rebuilding its business with the ownership of the copyrights it needs for that business.

The next question you'll need to answer is whether Novell slandered SCO's ownership of the UNIX and UnixWare copyrights. Now if you agree that SCO owned the copyrights, there is not much question here that a slander occurred. In fact, you have multiple slanders. You have what could be characterized as a campaign of slander.

It started on May 28th, 2003 with the statement that SCO is not the owner. There is the one moment of truth on June 6th, and then a resumption in letters in August of obtaining copyright registrations by filing with the United States Copyright Office they own the copyrights. Other statements in December and January. Mr. Stone's statement on March 16th publicly that we still own UNIX. There is no question those statements are false. They are definitive statements by Novell.

So the question, then, is whether or not these statements were made with what is called constitutional malice. You've been instructed on that. We submit that you will find that they were made with reckless disregard for the truth and, after June 6th, with actual knowledge of their falsity.

Now we call this constitutional malice because this is what takes into account the concerns of the First Amendment. There is a right to engage in free speech. But there is not a right to make statements that are false, that

are made recklessly or with knowledge that they are false. That's the difference. That is the balance of the free speech that we hold dear in our constitutional system with the protection against slander, defamation and falsehoods.

Now the instruction shows that we have to prove, and we believe we have, that the statement was made with knowledge that it was false or with reckless disregard of whether it was true, which means that there was a high degree of awareness of the probable falsity or that at the time the statement was made Novell had serious doubts that the statement was true.

And we think that fits to a T what happened with the May 28th slander, because let's think about the statement that went out in the press release. You heard testimony that they knew there was an unsigned Amendment 2 in their possession, but in a rush to get this out on May 28th, they didn't do their checking to see whether or not that Amendment No. 2 had, in fact, been signed. They went ahead. They could have easily determined that it was signed. Do you think they could have called Wilson Sonsini, the lawyers who negotiated the deal, to determine if it was signed? Do you think Mr. Messman could have called Bob Frankenberg, his predecessor? There are a lot of ways they could have determined that was signed. Could they have checked their files a little more clearly? We submit that

that constitutes recklessness, making the statement on May 28th, 2003.

However, the statements after May 28th, 2003 were not just reckless, and one more point about that. Mr. LaSala said he turned the company upside down for a signed version. I suggest that submits they knew this was a very important document. This would determine the issue.

So they get the document from SCO on June 5th, and all during this period they never ask SCO -- they're about to put out a statement, they are talking to them for months, did they ever say we have this unsigned copy of Amendment No. 2, do you happen to have a signed version? No word of it. They just go public on May 28th.

June 5th they receive from SCO a copy of the signed Amendment No. 2. Mr. McBride testified before you, and I think you will find it credible when he says Mr. Messman, when confronted with the signed version, admitted that SCO owned the copyrights. It's credible, we believe, because the very next day he said that publicly in this press release where, on June 6th, the amendment appears to support SCO's claim that ownership of the copyrights did transfer in 1996.

Now they want you to believe they didn't mean what they said on June 6th. Ladies and gentlemen, the June 6th statement was not just a casual statement. You heard it was

reviewed by Joe LaSala, general counsel. It was written by him. This is not a complicated amendment. It's about one paragraph long. They had the unsigned version for some time. It didn't take Novell months to figure out what it meant. It took Novell months to try to turn it around to figure out a way to suggest that it doesn't mean anything so they could go back to a campaign of slander, which was launched later in 2003. And this is then done, because of the June 6th, 2003 press release, with knowledge of falsity.

They were cautious at first with the internal letters on June 26th and August 4th. And then later, for reasons that you can conclude were coincidental or otherwise, they went public again on December 22nd. And, in fact, the claim that they made in March, we still own UNIX, an outrageous claim, not even limited to the copyrights, but we still own UNIX, was echoed by Mr. Messman on that witness stand. We still own UNIX, when the company had been sold, the business had been sold eight years earlier. So these statements were false, knowingly false, and we submit to you were made with constitutional malice.

Indeed, the falsity of the claim, which includes the copyrights that they registered with the United States Copyright Office saying they owned them and which includes Mr. Stone's statement on March 14th sarcastically saying, sorry, Darl, we still own UNIX, all of these are knowingly

false because we know what they thought. We know on June 6th they recognized the ownership of these copyrights were with SCO.

But the falsity of this is proven by another piece of evidence that I think is very important. There are Novell witnesses, people who work for Novell, who have stated that it is so absurd to claim to own the copyrights while having sold the business that it would be unethical to take that position.

Ed Chatlos in his testimony when he was asked did you ever get the lawyers' authority to hold back the copyrights, absolutely not, no. And he said, the deal I negotiated with SCO included the copyrights, so we modeled it to include the copyrights. From a personal standpoint, it would have been unethical to exclude them.

Burt Levine, an in-house counsel involved in drafting of the operative agreements, he said, well, I believe that being an ethical company, you couldn't resort to withholding something that the transferee in this case would be entitled to. If it is that clear that it causes internal Novell lawyers and negotiators to say it would be unethical to suggest that you're holding back the copyrights while selling the business, then these types of allegations made by Novell have to be concluded to be knowingly false.

Now if you find a false statement and you find

constitutional malice, we submit that you will have found, then, that Novell is liable for slander of title and you should then consider whether we have proven damages. And there are two types of damages that you need to be concerned with, special damages and punitive damages.

Special damages are the damages that are intended to compensate SCO. Here, the damage done to SCO is damage to SCO's SCOsource program. It was started by Darl McBride after he was told by Linux supporters within his own company that certain UNIX libraries were being used to run Linux and that some companies had call him and wanted to see if they could get a license to do that. As time progressed, SCO found more of its intellectual property in Linux.

They decided, rather than trying to stop people from using Linux, they would want to obtain a license, a fee in the marketplace, that they had the right to do, for their intellectual property. Now how much UNIX is in Linux will be decided in the courts. That is not an issue that you will need to decide in this case.

A lot of companies, as Professor Pisano told you, have expressed that they wanted protection against infringement, at least the risk of infringement. You'll recall Mr. Tibbitts told you that when they were selling the SCOsource program, that they had a code room that people could come to and see the code. And after looking at that,

a number of those individuals and companies decided to take a license.

We're not talking about unsophisticated companies here. You had licenses entered into with Microsoft and Sun and Computer Associates, actually demanded a license as part of another deal. If there was nothing to those claims, they wouldn't be out there doing that.

After looking at that proof -- and some of that SCO presented to customers. An example of what SCO presented to customers was shown early in the trial. These were comments from industry analysts who had visited the code room. One of them, Information Week, stated that, my impression is that SCO's claim is credible, says Laura DiDio, a Yankee Group analyst who was shown the evidence by SCO Group earlier this week. It appears to be the same code. According to EE Times in June 2003, if everything SCO showed me today is true, then the Linux community should be very concerned, said Bill Claybrook, research director for Linux and open-source software at Aberdeen Group in Boston. Computer Weekly, from what I've seen, I think people should be taking the SCO accusations seriously.

Now there is also evidence that Mr. Tibbitts testified to that he obtained from IBM's Web site which indicated that Linux was derived from UNIX, which is no surprise and just sort of the start of the issue, and he

sent letters in December of 2003 with examples of code. And some of that code you've heard, the Malloc code from Silicon Graphics, essentially admitted had been infringed.

So the important point here is this isn't an issue that's going to be decided in this trial. The marketplace can decide that issue of whether or not individual companies want to obtain a license from SCO or whether they want to wait further and see how that issue is resolved, or simply decide never to do that. You heard Mr. Pisano, based on the surveys, indicate what percentage of people fell into which buckets. That's the way a licensing program works.

Now you've also seen, however, that members of the open source community have viciously attacked SCO for trying to protect its intellectual property. I would submit to you that Novell has brought some of those attacks into this very court proceeding here. It remains that SCO has valuable business relationships with business partners, big companies like McDonald's, NASDAQ. It entered into, as I mentioned, agreements in 2003 with Microsoft, Sun, Computer Associates. And so while there are elements in the community that really hated SCO for saying that Linux, which they thought was free, incorporates intellectual property of UNIX, that would not have prevented the SCOsource program from making sales. Indeed, I would suggest to you, ladies and gentlemen, if there wasn't any real competitive threat to Novell's Linux

activities, this campaign of slander would never have been embarked upon.

There is a difference -- you heard Professor Pisano testify about this, there is an important difference between a slander that goes to ownership and simply expressing views that there is or is not infringement or how much infringement exists. One is opinion. The other is fact. If someone says that I sold you this business and you didn't get the copyrights, that is just as much a slander on title if the person who sold you your house says you didn't get title to the house when you bought it. That, when it comes from such a credible source, the former owner of the business, is deadly. That type of slander killed the SCOsource business.

Now Mr. Hatch will talk to you in a few minutes about the customers that were lost and the amount of damages that were inflicted, but I would like to say a few words first about punitive damages, because there's another type of malice called personal malice that's important for punitive damages, and that is the intent to injure. The intent here to injure SCO. Unfortunately, there is no shortage of evidence of that type of intent. Unfortunate for SCO in the sense this is what they were dealing with back in 2003.

The defendants, we submit, issued two of these

slanders on the same day as SCO's earnings reports. Now Novell and its witnesses suggest to you that this is a coincidence. They are entitled to argue that. And you're entitled to reject that and to say it is not a coincidence when there are only four days during the entire year that SCO announces its earnings and Novell makes two public announcements of its assertion that it owns the UNIX and UnixWare copyrights, and both of those public announcements occur on two of the four days when SCO was announcing its earnings. I would submit to you that that is not coincidence, that that is an intent to injure. That is malice.

That is before you even get to Maureen O'Gara's testimony that Chris Stone admitted to her that the press release was timed for May 28th to damage SCO's stock price. Sure, the PR people at SCO, they had one journalist who was willing to take on some of this community hate, said why don't you take a jab at PJ and things like that, but there is no reason to believe she invented this. It's consistent -- it's consistent with what actually happened on May 28th the same day as the earnings release, they issued this slander, and they did it to, quote, confound SCO's stock positions. And Chris Stone did it while he was chortling, I think was the word. That's malice, ladies and gentlemen.

There's also Jack Messman's admission that they tried to publicize this press release in May as widely as possible. That exhibited intent to harm SCO. It's not enough to say, well, we wanted to make money, we wanted to get our story out there. That's not a defense for spreading a falsehood as widely as possible. There is evidence that these acts were made to injure SCO because of SCO's taking on of IBM.

Novell's attempted waivers of SCO's legal rights, while they are an issue that the Court will deal with in terms of whether those were proper, you can consider the fact that they made those waivers as elements of intent, that those were made in the same year, at the same time that a $50 million investment in Novell's Linux purchase was made by IBM. You can consider the attempt by Mr. Stone and Mr. LaSala to cover up the fact that these were done at IBM's request by not telling the truth about it the first time around. And that is also evidence of malice and effort to hurt SCO in order to help a third party.

So thank you for your attention, ladies and gentlemen. I'll have the opportunity to address you for a little bit at the end of the closing arguments, but at this time I would like to turn the podium over to Mr. Hatch.

MR. HATCH: As Mr. Singer just talked about, the SCOsource licensing program began to have sales. There was

testimony of sales to Sun, Microsoft and other companies. These were real sales, tens of millions of dollars. SCOsource was off to a strong start. Now I would like to talk about what happened next.

Now you heard Mr. McBride testify about the Hewlett Packard deal. You were shown the contract, which is here on your screen, and this deal was near completion. Now you were shown a red line here, markings, because Mr. Byers of Hewlett Packard, he personally had typed in these changes, and this was his offer on behalf of Hewlett Packard to contract with SCO for $30 million. You will notice here it's six separate payments of $5 million each.

Now Novell showed you some e-mails that said that Hewlett Packard was weighing the pros and cons of doing this deal. They were looking at the risk factors that were out in the community. But the bottom line, even with all those risks, they were still considering this deal, and they made a $30 million offer. The negotiations continued, and then all of a sudden that changed.

Mr. McBride told you that Novell had inserted itself into this deal. Why? They told HP that they were going to reassert copyrights ownership, and with that this $30 million contract was gone.

Mr. McBride testified, we went deep into the discussions here, and ultimately Mr. Byers came back and

informed me that it was difficult for Hewlett Packard to complete the transaction as long as Novell was out there saying they still owned the UNIX copyrights.

Likewise, SCO had begun negotiations with Google. You heard that testimony. Google was the largest Linux user in the world with over 500,000 servers. That would have been a significant contract as well. Google pulled out of that deal referencing that Novell's slander was a substantial factor in not doing that deal.

Mr. McBride also testified that he personally met with Michael Dell. Michael Dell is the CEO of Dell Computers, another large company. After being excited about that partnership, the deal died shortly after Novell's December 22nd, 2003 reassertion of its ownership rights in these copyrights. Now that was the primary reason that that deal died.

You also heard testimony from three of Novell's -- excuse me, SCO's salesforce, Mr. Later Gasparro, Mr. Phil Langer, and Gregory Pettit. You may remember that was the day that Mr. Normand got to play two of those individuals for us. Mr. Gasparro, you will recall, he had testified that he had actually made earlier SCOsource sales. He actually had concrete sales of product. He talked about EBI Web hosting and others. He testified that he had somewhere between 50 and $60 million of licensing opportunities in the

first six months of the program, Ford Motor, Google, Cisco. But after Novell's claims of ownership, the salespeople started getting negative feedback, as he described it, and the results of the SCOsource program after Novell's claim of ownership was dramatically affected in a negative way.

Mr. Gasparro told you that he visited with a large number of corporate Linux users. He said that in calls, letters and e-mails, he would be told that Novell's claim of ownership was a major factor why customers didn't sign deals with SCO.

Mr. Phil Langer, he is another SCO salesman, he testified that he had over $3 million in the sales pipeline. After the Novell slander, there was a strong negative impact on sales and sales dried up. He specifically talked about one deal with Regal Entertainment who wanted to do a deal between 300 and $350,000, but then told SCO, we can't go forward, we can't buy your intellectual property because there is not clear title on it like we do when we buy movies that we have clear copyright title to.

The third salesman was a man named Gregory Pettit. He was a regional salesman. He said he had the exact same problems as all the other salesmen. You may recall that he was -- he said he was negotiating deals with other major companies like Raytheon and Cisco. He specifically testified as to Merrill Lynch, but that deal couldn't be

done while SCO was being faced with Novell's claim of ownership.

Now the judge has instructed you that evidence -- that specific customers didn't do deals with SCO is one of two ways that SCO can prove special damages in this case. Consistent with the Judge's instructions, we have shown through these three salesmen, Mr. McBride and others, that Novell's conduct was a substantial factor in these customers' decisions not to go forward with the deals.

Now Novell's conduct doesn't have to be the only reason, as the Judge has talked about. There can be other reasons. There are always lots of reasons a customer doesn't do things. Novell's conduct must simply be a substantial factor for the customer's decision not to do a deal with SCO. That was certainly true here.

Now the second way the Judge instructed you that you could find damages is by proving -- using the type of analysis that Dr. Pisano and Dr. Botosan used. I'm going to discuss their calculations in just a minute. But just for a moment, I want to talk to you about the things you heard from Mr. Musika. He recited pretty much every nasty remark -- Mr. Singer talked about that, almost every nasty remark that people were out making about SCO in an effort to say that sales were lost for some reason other than Novell.

Now we've acknowledged from day one that people

dislike SCO. It was a small Utah company that was standing up for itself with property rights. It was trying to protect its business from larger, more powerful competitors. That's it's right. But here's what you need to remember about the bad things other people claimed about SCO.

Dr. Pisano and Dr. Botosan both took all of those factors into consideration. They never said, ever, that 100 percent of the people who were potential customers would buy SCOsource products. That would be unreasonable. That wouldn't be conservative. You heard them testify that the numbers were somewhat less than that, taking all of these factors into consideration.

Now what Mr. Musika didn't want to admit, because it didn't clearly fit his zero damages model, is that despite some of these factors, some of the largest companies in technology, Sun, Microsystems, Microsoft and others, had actually done deals knowing all these things that Mr. Musika talked about. Of course, these companies understood the risks, that they took a license. That speaks volumes about what other companies would have done if Novell hadn't slandered the title.

Now that's exactly what Dr. Pisano found. You remember his chart. He's taking all things into consideration. He said there would be between 19 and 45 percent of the total potential market of likely buyers of

SCOsource products. That was him taking into account, as you can see here, not just one independent study, but three of them. You will notice that all of them came in this 19 to 45 percent range.

Now you heard Dr. Pisano's testimony. He was here. He listed in his discussion in a pretty dramatic fashion that he had taken into account every one of the risk factors that Mr. Musika claimed, and he showed clearly through hard scientific data that this 19 to 45 percent of potential customers were there. His number wasn't zero.

Now as Mr. Singer pointed out, you will be given this jury verdict form. In question number three you will be asked what is the amount of special damages, if any, that you award SCO as a result of Novell's slander of SCO's title to the UNIX and UnixWare copyrights. You'll be asked to put a number on that line. So what is the best and proper measure of those damages?

Dr. Botosan and Dr. Pisano came here to help you with that, to help distill some complex business economic concepts into real numbers. Now Dr. Pisano -- excuse me, Dr. Botosan did her calculations in front of you. I told you at the beginning I would have her come here and show you exactly how she made her calculations. She did that for you. She calculated two streams of revenue, vendor licenses -- and you'll recall, those were the larger

licenses that even independent analysts said there were probably a sale of at least 15 of those in the time period we're talking about, at $10 million each. That would have been $150 million, just that. But you recall that Dr. Botosan said, I want to be conservative and I'm going to -- consistent with the internal forecasts, I'm going to estimate somewhat less than that. And you'll recall that her number was just a little bit more than half of what the independent analysts are saying.

For right to use licenses, she used several internal, independent forecasts to reach her conclusions. And then she showed you that she double-checked her work with Dr. Pisano's numbers, remember, using one of the independent forecasts, and then she went back and she used Dr. Pisano's numbers of potential sales to double-check her work. She did the calculations in front of you, and her number was not zero, but her numbers were consistent when she double-checked it.

Now Dr. Botosan's estimates were conservative. Growth, remember she chose a flat growth number. She used a number of licenses that was much lower than even the independent analyst was going to use. You'll recall that on price, she could have used higher prices. We've heard testimony that there were sales as high as $1399 for some of these, $695. Deutsche Bank said going forward prices would

come down, they would be selling somewhere between 100 and $300. They said $200 per unit would be the most likely price. Dr. Botosan said I'm going to be very conservative. I'm not here to give some giant number. She picked the lower of those numbers.

So to the extent she cherry-picked, she cherry-picked conservative. That's why she said I'm building conservatism on top of conservatism. I'm starting with a low base and I'm not letting it grow. So there are two levels of conservatism buried in those numbers, and her numbers reflect that.

Well, when Novell's turn came to talk about damages, Mr. Musika did not do any calculations for you. Even though his task was the same as Dr. Botosan, to show if Novell had slandered what would the damages be to SCO, he just highlighted the risk factors that Dr. Pisano had already told you that he had taken fully into account.

Now you heard Musika admit that Dr. Botosan used the correct "but for" analysis. There was a lot of issue about that. But when he finally came to her, he admitted not only that it was correct, but he personally had used it in other cases, used the "but for" analysis. But then in this case he didn't use it. He didn't make a single calculation. He refused to admit that even $1 was lost. You will have to decide whether that was really likely,

whether that's reasonable or whether that's fair.

He rejected Dr. Pisano's analysis of the market completely and found zero lost licenses. Is that reasonable? Is that fair?

Now Dr. Botosan put her numbers up, and this is the same as on the board. She had a lower range, as you'll recall, just short of $114 million, and an upper range of $215 million.

If you will go to the next slide.

We ask you to award our client somewhere in that range, that would be fair, and that would be the number you would put here in number three on the verdict form.

Now you are going to have one more task. Mr. Singer, you heard him talk about malice, you heard him talk about the bad acts of Novell, and consistent with what the judge has instructed you, you are allowed to award punitive damages.

Now punitive damages are an additional and special type of damages that are intended to keep a party from doing bad acts again, to teach them a lesson. So let Novell, in this instance, know that it can't conduct business this way in the future.

You are going to see -- and these are pages from Novell's most recent filing with the United States government, their 10-K, and this exhibit has been admitted

during trial, you will have access to that, you can see Novell has a worth of about a billion dollars. And you are allowed to consider that when you make a decision to make an appropriate award.

Mr. Singer has discussed in detail the evidence that Novell recklessly and knowingly asserted its ownership on that May 28th day, the time that SCO was going to issue its earnings statement, and they announced it in that way to maximize the damages to SCO.

Now Novell later knew for a certainty, as Mr. Singer pointed out, that it didn't own the copyrights, that SCO did, and yet it reasserted to the world through a press release, with malice, its false claim of ownership on December 22nd, 2003. That was the second time. It was the second time designed to maximize the hurt to SCO, on the day of their annual earnings report.

You are able to send a message through an award of punitive damages, and the message and the amount are up to you.

Could you go back to the verdict form.

Number four is where you do that, it says, what is the amount of punitive damages, if any, that you award SCO as a result of Novell's slander of SCO's title to the UNIX and UnixWare copyrights. We leave you to take into account Novell's worth. We leave that number to you.

Thank you very much.

THE COURT: Ladies and gentlemen, we'll now take our recess and we'll return and have Mr. Brennan.

Ms. Malley.

(Jury excused)

THE COURT: Mr. Singer, you'll have 12 minutes in your rebuttal.

MR. SINGER: Thank you.

THE COURT: We'll take 15 minutes.

(Recess)