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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91122524
Party	Defendant Wayne R. Gray
Correspondence Address	DAVID L. PARTLOW DAVID L. PARTLOW P.A. P.O. BOX 82963 TAMPA, FL 33682-2963 UNITED STATES
Submission	Motion to Reopen
Filer's Name	David L. Partlow
Filer's e-mail	DLPPA@MINDSPRING.COM
Signature	/David L. Partlow/
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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

X/OPEN COMPANY LIMITED,

Opposer,

Opposition No.: 91122524

vs.

Application Serial No.: 75/680,034

WAYNE R. GRAY,

Mark: INUX

Applicant.

**APPLICANT'S COMBINED MOTION AND BRIEF TO RESUME
THE OPPOSITION PROCEEDING AND RESET THE SCHEDULE**

Applicant Wayne R. Gray (herein "Mr. Gray"), by and through his undersigned counsel, hereby moves to re-set the schedule in this opposition, and extend the time for discovery an additional five (5) months to enable Mr. Gray's introduction of dispositive new material evidence into this opposition.¹ Grounds for this motion are given below. This opposition was suspended on July 17, 2007 pending final determination of a certain civil action before the United States District Court, Middle District of Florida, Tampa Division (herein "District Court") between the parties hereto, which case was styled *Wayne R. Gray v. Novell, Inc., The SCO Group, Inc. and The X/Open Company Limited*² (herein *Gray v. Novell et al.*), and the suspension was extended for the related appeal before The United States Court of Appeals for the Eleventh Circuit (herein "Eleventh Circuit"). Those actions are now final, and Mr. Gray did not prevail.

Basically, Mr. Gray has discovered dispositive new material evidence that was introduced in the case styled *The SCO Group, Inc. v. Novell*, Case No. 2:04cv00139, Utah Dist.. (herein "*SCO*

¹ Mr. Gray informed the TTAB and X/Open in January, 2004 that the issues in the related case *SCO v. Novell* include UNIX trademark ownership in his "Amended Motion and Combined Brief to Present Second Amended Answer, Affirmative Defenses, and Counterclaim," in ¶2 at page 3, ¶4 at page 5, and ¶1 at page 6, herein as Dkt. No. 32.

v. Novell"). Because this new evidence was not available to the District Court or Eleventh Circuit Appeals Court, and because the District Court did not consider or rule on lawful UNIX goodwill ownership, Mr. Gray requests that this opposition proceeding be resumed and the discovery period reset to provide sufficient time to introduce the dispositive new material³.

BACKGROUND:

On October 20, 2006 Mr. Gray filed an action styled *Gray v. Novell, et al.*, Case No. 06-01950, before the United States District Court, Middle District of Florida, claiming, *inter alia*, the following:

1. Novell, Inc. (herein "Novell") sold its entire UNIX business, UNIX trademark at issue here and associated goodwill to Santa Cruz Operation, Inc. (herein "Santa Cruz") in a September 19, 1995 Novell-SCO UNIX Business Asset Purchase Agreement ("APA");⁴
2. Novell and X/Open Company, Limited (herein "X/Open") knew that Novell did not lawfully own the UNIX business, UNIX trademarks or goodwill in November, 1998 when it (Novell) purportedly assigned the UNIX business, UNIX trademarks and associated goodwill to X/Open; and
3. The June, 1999 recordation of the false Novell-X/Open November, 1998 UNIX trademarks Assignment Agreement (herein "November, 1998 Assignment") was willful fraud upon the USPTO, and the UNIX trademarks should therefore be canceled.

In essence, Mr. Gray's claim was that X/Open did not and does not legally own the UNIX trademark. On July 17, 2007 this Opposition was stayed (herein as Dkt. 74) pending the disposition of *Gray v. Novell, et al.*

On February 20, 2009, the District Court in Florida ruled that X/Open lawfully owned the UNIX trademarks in 2001 when it filed its opposition to Mr. Gray's iNUNIX trademark registration, because: (1) X/Open was the exclusive UNIX Trademark licensee pursuant to the terms revealed in a heavily redacted and untitled May 10, 1994 Novell-X/Open Agreement (herein "May 10, 1994

² Novell, Inc., The SCO Group, Inc., and The X/Open Company Limited are herein referred to as Novell, SCO, and X/Open respectively.

³ In addition, another opposition exists between the parties herein, No. 91176820, regarding the related mark UNIXWARE, and Mr. Gray is considering filing a motion to consolidate these two oppositions since the core issues are so closely related.

Agreement"); (2) that Novell and not Santa Cruz, pursuant to a heavily redacted September 1996 Novell-Santa Cruz-X/Open Confirmation Agreement (herein "September 1996 CA"), lawfully owned the UNIX Trademarks at issue here in and after 1996; and (3) that Novell lawfully transferred the UNIX trademarks to X/Open in November 1998.⁵

The Florida District Court did not consider or rule on who lawfully owned the UNIX business or goodwill associated with the UNIX trademarks in and after 1996.

On January 7, 2011, the Eleventh Circuit, in Appeal No. 06-11374, issued its Ruling affirming the Florida District Court's ruling, and Final Judgment was entered on February 10, 2011.⁶

On August 24, 2009, the Tenth Circuit Appeals Court, in *The SCO Group, Inc. v. Novell*, (herein "*SCO v. Novell* Appeal") Appeal No. 08-4217, issued its ruling, stating that the basis of the case *SCO v. Novell* (in Utah), is the broad issue of **what intellectual property transferred** from Novell to Santa Cruz pursuant to the 1995 APA as amended, stating as follows:⁷

This case primarily involves a dispute between SCO and Novell regarding the scope of intellectual property in certain UNIX and UnixWare technology and other rights retained by Novell following the sale of part of its UNIX business to Santa Cruz, a predecessor corporate entity to SCO, in the mid-1990s. (emphasis added)

On August 3, 2010, Mr. Gray filed a Rule 59 and 60 Motion for Reconsideration and Relief of the District Court's February 20, 2009 Order (therein as Doc. 161) and June 28, 2010 Attorneys' Fees Order (therein as Doc. 218). Therein Mr. Gray offered substantial dispositive new material evidence to the District Court that was unavailable to Mr. Gray earlier in the proceeding, and thus unavailable to the District Court prior to its February 20, 2009 ruling. This new evidence

⁴ The term "UNIX trademarks" shall refer, collectively, to Serial No. 73537419 (Reg. No. 1390593) and Serial No. 73544900 (Reg. No. 1392203), respectively, for the "UNIX" trademarks registered by AT&T in 1986.

⁵ District Court's February 20, 2009 Ruling, Dkt. No. 161 in *Gray v. Novell, et al.* The Florida District Court had before it only the heavily redacted versions of the untitled May 10, 1994 Agreement and the September 1996 CA.

⁶ Eleventh Circuit Court's January 7, 2011 Ruling, in the *Gray v. Novell, et al.* appeal.

⁷ Tenth Circuit Appeals Court Ruling, in Appeal No. 08-4217, dated August 24, 2009, in ¶ 1 at 2, and in ¶ 3 at 3, hereto in relevant part as Exhibit No. 1.

includes Novell's and The SCO Group, Inc.'s (herein "SCO") sworn trial testimony in the March, 2010 *SCO v. Novell* jury trial.⁸

The March 2010 *SCO v. Novell* jury trial testimony includes admissions, evidence, and sworn statements by Novell and Santa Cruz (as SCO's predecessor in interest) executives, in-house counsel and outside counsel with first-hand knowledge of Santa Cruz's lawful UNIX trademarks ownership pursuant to the 1995 APA as amended, and SCO's continuing ownership at least to 2005. In their sworn testimony the witnesses unanimously agree and state that Novell and SCO have known since 1996 that Novell transferred its entire UNIX business, UNIX trademarks and associated goodwill to Santa Cruz in December, 1995 pursuant to the 1995 APA, and that Novell by non-compete contract terms was prohibited from remaining in or re-entering the UNIX business thereafter. They also testified that Santa Cruz/SCO's continuing UNIX trademark rights ownership was required for it to operate its UNIX business. Thus, Novell and SCO, under oath, confirmed that all of X/Open's UNIX trademark and licensing representations and arguments in the Florida District Court and Eleventh Circuit Court, and here before the USPTO, are completely and flagrantly false. Mr. Gray's motion was denied on February 15, 2011, and thus this dispositive new material evidence of SCO's lawful UNIX trademark ownership in 2001 and X/Open's knowing and willful fraud upon the USPTO was not available to or considered by the federal courts.

This opposition, and the case *Gray v. Novell, et al* that was before the Florida District Court and Eleventh Circuit Appeals Court, mostly rely on the answer to two simple questions:

1. Did Novell lawfully own and transfer the UNIX trademarks, associated goodwill and its UNIX business to X/Open in November, 1998, as Novell and X/Open represented to the USPTO in the Novell-X/Open June, 1999 UNIX trademarks Assignment recordation?
2. If not (as the evidence now irrefutably confirms), was that false representation fraud upon the USPTO, and thus grounds for UNIX trademark cancellation?

The Florida District Court, and the Eleventh Circuit affirmed, that the answer is yes to the trademark ownership part of question #1 without considering lawful UNIX goodwill and business

⁸ In about 2001 SCO purchased the entire UNIX business and intellectual property assets of Santa Cruz that

ownership, and with no availability to the Novell's and SCO's March 2010 sworn trial testimony, trial evidence and related documents. That testimony and documents make it irrefutably clear that both Novell and SCO never disputed, and stipulated to, in *SCO v. Novell*, the following: 1) Santa Cruz/SCO (not X/Open) lawfully owned Novell's entire UNIX business, and UNIX trademarks and associated goodwill after 1995 pursuant to the 1995 APA as amended; 2) Novell was specifically prohibited from remaining in or re-entering the UNIX business after 1995, and 3) Novell never lawfully owned and never intended to own the UNIX trademarks and/or associated UNIX goodwill after 1995.

DISCUSSION:

Mr. Gray has identified certain documents that have relatively recently become available and that were not available to the Florida District and Eleventh Circuit Courts, and these documents along with the March 2010 *SCO v. Novell* jury trial testimony, undisputedly identify and define with absolute clarity the UNIX Trademarks and goodwill chain-of-title, and are dispositive that: 1) Novell never owned the UNIX Trademarks, goodwill or any UNIX business after 1995; 2) Novell was prohibited by non-compete contract terms from remaining in or re-entering the UNIX business; 3) the November, 1998 Assignment Agreement is a knowingly false document; 4) Novell and X/Open knew then and know now that the June, 1999 recordation of the false November, 1998 Assignment Agreement was knowing and willful fraud upon the USPTO; 5) X/Open does not now, and has never, lawfully owned the UNIX trademarks or goodwill; and 6) X/Open was in 1994, and is now, a bare UNIX trademark licensee. These documents, among others, include the following:

- May 10, 1994 untitled Novell-X/Open Agreement (unredacted version).
- May 14, 1994 Novell-X/Open Agreement identified and titled as the "May 14, 1994 NOVELL-X/OPEN Trademark Relicensing Agreement (herein "May 14, 1994 Agreement").
- September 18, 1995 Novell Board of Directors Meeting Minutes.
- September 19, 1995 Novell-Santa Cruz UNIX Business Asset Purchase Agreement ("APA").
- October 18, 1995 Novell Worldwide Sales Director of UNIX Products Larry Bouffard email.

it owned pursuant to the 1995 APA.

- November 16, 1995 Peat Marwick LLC, APA opinion Letter.
- December 6, 1995 Santa Cruz-Novell Technology License Agreement (herein "TLA").
- February, 1996 X/Open-Open Software Foundation (herein "OSF") merger agreement.
- September, 1996 Novell-Santa Cruz-X/Open Confirmation Agreement (herein "September, 1996 CA") (unredacted version).
- October 16, 1996 Amendment No. 2 to the APA.
- January 31, 1997 Santa Cruz antitrust complaint against Microsoft Corporation.
- November 13, 1998 Novell-X/Open UNIX Trademark Assignment Agreement.
- June 22, 1999 USPTO Recordation of the false 1998 UNIX Trademark Assignment.
- August 3, 2005 SCO Declaration letter to the USPTO.
- March, 2010 Jury Trial Testimony in *SCO v. Novell*, Case No. 2:04cv00139, Utah Dist.

The material facts revealed in these documents and trial testimony support Mr. Gray's UNIX trademark fraud claims, and most were not available to or before the Florida District Court or Eleventh Circuit. For example:

The May 10, 1994 untitled Novell-X/Open Agreement, in Section IX at pages 18-19 (identified by X/Open as UNIX 000046-UNIX 000047), clearly identifies severe restrictions to X/Open's rights to assign that licensing agreement, and confirms X/Open's status as merely a bare licensee. These restrictive licensee terms were not in the heavily redacted version of this document and therefore were not available to, and thus not before the Florida District Court or Eleventh Circuit Court.⁹

SCO confirmed in *Gray v. Novell et al*, and SCO's former CEO Mr. Darl McBride on September 17, 2009 confirmed to Mr. Gray, the existence of the May 14, 1994 Agreement, which

⁹ The heavily redacted May 10, 1994 Agreement, as available to the Florida District Court and Eleventh Circuit Court, is included herewith in relevant part as Exhibit No. 2. The **unredacted** May 10, 1994 Agreement (identified as X/Open evidence document Bates stamped UNIX000029-UNIX000051) is considered confidential by Opposer, and Mr. Gray will file it under seal when a protective order is entered. That document identified certain rights restrictions that are fatal to any "exclusive" trademark licensee claims. The right to dispose of an asset is an important incident of ownership, and substantial restrictions on that right is a strong indicator that the agreement does not grant ... all substantial rights. *Sicom Sys. Ltd. v. Agilent Techs., Inc.*, 427 F.3d 971, 976, 979 (Fed. Cir. 2005); *Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal., Inc.*, 248 F.3d 1333, 1345 (Fed. Cir. 2001); *Abbott Labs. v. Diamedix Corp.*, 47 F.3d 1128, 1130, 1132 (Fed. Cir. 1995). In fact, the court in *Sicom Systems* referred to the restraint on transferability of the rights under the agreement as "fatal" to the argument that the agreement transferred all substantial rights in the patent. 427 F.3d at 979.

Even if an entity has been granted an "exclusive license," that designation or characterization is not controlling. It does not mean that the purported licensor conveyed "all substantial rights" to the purported licensee in that document. See *Intellectual Property Dev., Inc. v. TCI Television of Cal., Inc.*, 248 F.3d 1333, 1334 (Fed. Cir.2001). To be considered an exclusive licensee, the licensee must have received from the

by its title suggests it supersedes the untitled May 10, 1994 Agreement, but that document was never available to the courts.

As SCO and Novell testified in the March, 2010 *SCO v. Novell* jury trial, the 1995 APA confirms Novell transferred its entire UNIX business, UNIX trademarks and associated goodwill to Santa Cruz in fact and by operation of federal trademark law on December 6, 1995, because the APA includes the following terms and provisions:¹⁰

1. the 1995 APA in Article I, Section 1.1(a), at pages 1-2, confirms that “Seller [Novell] will sell, convey, transfer, assign and deliver to Buyer [Santa Cruz] and Buyer will purchase and acquire from Seller on the Closing Date (as defined in Section 1.7), all of Seller's right, title and interest in and to the assets and properties of Seller relating to the [UNIX and UnixWare] Business”; (emphasis supplied)
2. the 1995 APA in Article II, Section 2.11(b), at pages 11-12, entitled “Title to Properties; Absence of Liens and Encumbrances,” states Novell’s UNIX assets are free and clear of any encumbrances or pledges;
3. the 1995 APA in Section 1.6, at page 5, includes a non-compete provision prohibiting Novell from remaining in or re-entering the UNIX business after December 6, 1995;
4. Item I. of Schedule 1.1(a) to the APA, at page 1, states Novell's entire UNIX business transferred to SCO's predecessor Santa Cruz "without limitation";
5. Item III. of Schedule 1.1(a) to the APA, at page 2, states all of Novell's UNIX trademark licenses transferred to Santa Cruz "without limitation";
6. Item V. of Schedule 1.1(a) to the APA, at page 3, specifically identifies the UNIX trademarks as transferring assets; and Item V. of Schedule 1.1(b) to the APA, at page 2, is consistent as it specifically identifies the UNIX trademarks as assets that are NOT excluded from transfer to Santa Cruz;¹¹
7. Attachment C to the APA Seller [Novell] Disclosure Schedule, at page 9, specifically identifies the UNIX trademarks at issue here as transferring assets, and

licensor “all substantial rights” to the intellectual property in question. *Ultrapure Systems, Inc. v. Ham-Let Group, supra*.

¹⁰ 1995 APA hereto in relevant part as Exhibit No. 3. Novell, X/Open and SCO have never produced any evidence to any court as to how the UNIX trademarks and associated goodwill lawfully transferred back to Novell after 1995; and, considering Novell’s non-compete agreements in 1995 to never re-enter the UNIX business, have never produced any evidence as to what UNIX business Novell was in that it purportedly transferred to X/Open in 1998.

¹¹ Schedule 1.1(a) to the APA titled “Assets” identified the UNIX trademarks as assets transferring to Santa Cruz in Section V. titled “Intellectual Property” at page 3, hereto in relevant part as Exhibit No. 4. Schedule 1.1(b) to the APA titled “Excluded Assets” identified the UNIX trademarks as assets NOT excluded from transfer to Santa Cruz in Section V. titled “Intellectual Property” at page 3, hereto in relevant part as Exhibit No. 5.

Attachment G thereto specifically identifies the May 10, 1994 Agreement as a transferring asset, and terminable in the event of X/Open's acquisition;¹²

8. The APA December 6, 1995 Bill of Sale execution transferred Novell's entire UNIX business, UNIX trademarks and associated goodwill to Santa Cruz; and¹³
9. The October 16, 1996 Amendment No. 2 to the APA confirmed Santa Cruz's UNIX trademark and goodwill ownership was required for its UNIX business.¹⁴

The 1995 APA and its related Santa Cruz-Novell December 6, 1995 Technology Licensing Agreement (herein "TLA") both include UNIX business non-compete terms that prohibit Novell from remaining in or re-entering the UNIX business, providing in part the following:¹⁵

(Section 1.6 of the APA): Seller agrees that it shall use the Licensed Technology only (i) for internal purposes without restriction or (ii) for resale in bundled or integrated products sold by Seller which are not directly competitive with the core products of Buyer and in which the Licensed Technology does not constitute a primary portion of the value of the total bundled or integrated product.¹⁶

(Section II.A.(2) of the TLA): This license was subject to the following limitation: "provided, however, that (i) such technology and modifications may be sublicensed and/or distributed by NOVELL solely as part of a bundled or integrated offering ("Composite Offering"); (ii) such Composite Offering shall not be directly competitive with core application server offerings of SCO, (emphasis added)¹⁷

¹² The Seller [Novell] Disclosure Schedule to the 1995 APA identifies the UNIX trademarks at page 9 in Attachment C thereto, and identifies in Attachment G the terminable, non-exclusive Novell-X/Open May 10, 1994 UNIX trademark license as assets transferring to Santa Cruz, *see* Exhibit No. 6 hereto.

¹³ Novell and Santa Cruz executed the APA Bill of Sale on December 6, 1995, hereto as Exhibit No. 7.

¹⁴ October 16, 1996 Amendment No. 2 to the APA, hereto as Exhibit No. 8

¹⁵ Novell was prohibited from remaining in or re-entering in the UNIX business after December 6, 1995 and therefore could NEVER lawfully own UNIX goodwill and thus NEVER lawfully own the U.S. UNIX trademarks after that sale; 15 U.S.C. § 1060(a): "A registered mark or a mark for which application to register has been filed shall be assignable with the goodwill of the business in which the mark is used, or with that part of the goodwill of the business connected with the use of and symbolized by the mark."; "[I]t is well-settled law that 'the transfer of a trademark or trade name without the attendant good-will of the business which it represents is, in general, an invalid, 'in gross' transfer of rights.'" *Int'l Cosmetics Exchange, Inc. v. Gapardis Health & Beauty, Inc.*, 303 F.3d 1242, 1246 (11th Cir. 2002) (quoting *Berni v. Int'l Gourmet Rest. of Am.*, 838 F.2d 642, 646 (2d Cir. 1988)). Without the appurtenant goodwill, Novell could not legally hold the U.S. UNIX trademarks for later transfer to X/Open. *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97, 39 S.Ct. 48, 50, 63 L.Ed. 141 (1918) ("There is no such thing as property in a trademark except as a right appurtenant to an established business or trade in connection with which the mark is employed.").

¹⁶ SCO, in *SCO v. Novell*, identified the non-compete provisions and defined its core business as: "The 'core products' and 'core application server offerings' referenced in the APA and TLA, respectively, refer to the UNIX and UnixWare operating systems owned by Santa Cruz upon the [December 6, 1995] closing date." SCO brief titled "Memorandum in Opposition to Novell's Motion for Partial Summary Judgment on SCO's Noncompete Claim in its Second Claim for Breach of Contract and Fifth Claim for Unfair Competition" in Section Nos. 7-10 at pages 3-4, *SCO v. Novell* Dkt. No. 301, hereto in relevant part as Exhibit No. 9.

¹⁷ December 6, 1995 Technology License Agreement ("TLA") in Section II.A.(2) at page 2. Exhibit No. 162 in the *SCO v. Novell* jury trial, entered into evidence on March 9, 2010, hereto as Exhibit No. 10. Also as Exhibit 4 to Dkt. No. 260 in *SCO v. Novell*.

The 1996 Confirmation Agreement apparently deals with X/Open's bare UNIX trademark licensee status, as identified and defined by the *Sicom* Court, wherein Santa Cruz acknowledges severe restrictions to X/Open's licensee assignment rights.¹⁸ See redacted version, Exhibit 11 hereto.

Well after 1995, Santa Cruz in its January 31, 1997 antitrust complaint against Microsoft Corporation confirms that it (Santa Cruz) is the sole owner of UNIX, that it needs no UNIX license from anyone, and that would include X/Open.

In March 2010 the *SCO v. Novell* jury trial was held concerning what UNIX intellectual property transferred from Novell to Santa Cruz/SCO pursuant to the 1995 APA as amended. In that trial, Novell and SCO executives and counsel directly involved in the drafting and wording and terms of the 1995 APA and Amendments testified under oath that the 1995 APA as amended transferred Novell's entire UNIX business, and the UNIX and UnixWare trademarks with the associated goodwill to Santa Cruz. Even as X/Open and Novell made knowingly false UNIX trademark exclusive licensee and ownership representations to the Florida District Court, counsel for Novell and SCO continue to testify under oath that Novell never owned the UNIX trademarks, associated goodwill or UNIX business after 1995, and was prohibited from remaining in or re-entering the UNIX business.¹⁹ For example:

Mr. Sterling Brennan, counsel for Novell, in trial opening statements on March 9, 2010 in

¹⁸ The heavily redacted September, 1996 Confirmation Agreement, as available to the Florida District and Eleventh Circuit Courts, is hereto as Exhibit No. 11. The unredacted 1996 Confirmation Agreement Mr. Gray will file under seal when a protective order is entered. The unredacted 1996 Confirmation Agreement was also filed by X/Open as a confidential document in this proceeding on February 24, 2005 as Exhibit "A" to its pending emergency protective order motion, and also identified as X/Open evidence document Bates stamped UNIX000132-UNIX000135.

The unredacted 1996 Confirmation Agreement is material evidence as to the following: 1) the parties intent to commit fraud upon the USPTO; 2) X/Open's severely restricted UNIX trademark rights and thus status as a bare licensee only; 3) Santa Cruz/SCO's intentional UNIX trademarks ownership abandonment in or prior to September, 1996, because of its willful intent not to use, or enforce use of, its trademarks; and 4) Santa Cruz/SCO's intentional UNIX trademark abandonment by knowing and willful naked trademark licensing, because it deliberately did not supervised X/Open's UNIX trademark license since in or prior to September 1996.

¹⁹ Counsel for Novell and SCO in *SCO v. Novell* are the same counsel as in *Gray v. Novell, et al.*

open court admits the amended APA wording and terms transferred Novell's UNIX and UnixWare trademarks to Santa Cruz in 1995, stating as follows:²⁰

Well, let's look at schedule 1.1(a) to see what assets were and weren't sold. ... Under intellectual property, and intellectual property comprises things like copyrights, patents, trademarks, this is the description of what Novell sold in terms of copyrights or other intellectual property interests to Santa Cruz. It says this, trademarks -- not copyrights, trademarks -- which are completely different than copyrights -- the trademarks UNIX and UnixWare as to the extent held by seller for Novell. So the complete description of the intellectual property, whether copyrights, patents or trademarks, were just two things, the UNIX trademark and the UnixWare trademark. That is the entire description of the intellectual property.

Well, let's look at the asset purchase agreement. This now is schedule 1.1(b) entitled excluded assets.

And it continues, and all trademarks are excluded except for two. What trademarks were not excluded? Well, we looked at it before, UNIX and UnixWare trademarks. That lines up completely with the list of included assets. There is a perfect symmetry. The agreement says here's what is being sold, the intellectual property, only two things, trademarks for UNIX and UnixWare. We've looked at the next schedule, what is excluded, everything, all copyrights are excluded, and all trademarks are excluded except for two, UNIX and UnixWare. It lines up perfectly. (emphasis supplied)

Mr. Robert J. Frankenberg, Novell CEO in 1995, testified on March 9, 2010 that the APA wording and terms transferred Novell's entire UNIX business and UNIX trademarks to Santa Cruz in 1995. In response to questions concerning the amended APA, Mr. Frankenberg stated it was his intent to, and all business decisions in and after 1995 were consistent with, transferring Novell's entire UNIX and UnixWare businesses, along with its UNIX trademarks to Santa Cruz, testifying as

²⁰ March 9, 2010 **certified trial transcript**, see Mr. Brennan's statements at pages 68-70, Dkt No. 855-2 in *SCO v. Novell*, Case No. 2:04cv00139, Utah Dist., hereto in relevant part as Exhibit No. 12; Novell confirmed in *SCO v. Novell* that the UNIX trademarks that transferred to Santa Cruz in 1995 were the UNIX trademarks it owned as identified in Attachment C to its APA Seller Disclosure Schedule, stating the following: "Novell will retain all of its patents, copyrights and trademarks (except for the trademarks UNIX and UnixWare)" in its September 18, 1995 (Novell's) Board of Director Meeting minutes. "Declaration of [Novell General Counsel] David Bradford" in Section Nos. 13-14 at pages 3-4, Dkt. No. 279 in *SCO v. Novell*, hereto in relevant part as Exhibit No. 13. September 18, 1995 Novell Board of Director Meeting Minutes in ¶5 at page 2, as Exhibit A to "Declaration of Kellie Carlton in Support of Novell, Inc.'s Motion to Dismiss," *SCO v. Novell* Dkt. No. 57 (Exhibit A)), also as Exhibit No. Z3 in the *SCO v. Novell* March, 2010 jury trial, entered into evidence on March 9, 2010), hereto in relevant part as Exhibit No. 14; and Novell stating: "The APA did transfer UNIX and UnixWare trademarks to Santa Cruz (to the extent owned by Novell)," (emphasis added). Novell brief titled "Memorandum in Support of Novell's Opposition to SCO's Motion for Partial Summary Judgment on SCO's First, Second, and Fifth Causes of Action and for Summary Judgment on Novell's First Counterclaim" in ¶2 at page 56, *SCO v. Novell* Dkt. No. 292, filed May 14, 2007, hereto in relevant part as Exhibit No. 15. The material and dispositive nature of this evidence that was not

follows:²¹

Q. With respect to the UNIX business, Mr. Frankenberg, was it your intent to sell that business in its entirety?

A. Yes.

Q. ...Would you have transferred the UNIX customers to the buyer if you were not selling the entire UNIX business?

A. No.

Q. Did all of the UNIX employees go over to Santa Cruz?

A. Most of them did. I believe some were laid off.

Q. Would you have done that if you were keeping the UNIX business?

A. No.

Q. Let's look again at the schedule, Section 1.1B, if we might, of the asset purchase agreement. Do you have that before you?

A. It is on the screen, yes.

Q. So of the excluded assets, if we were to look at the second page under the heading Roman numeral five, it is intellectual property, right?

A. Yes.

Q. As you read those words as you sit here today, you're capable of reading it and they say that excluded is all copyrights and trademarks except for the trademarks UNIX and UnixWare, correct?

A. Correct.

Q. Now let's consider on the other side of that coin, if you will, that's the excluded assets. We looked earlier at Schedule 1.1(b), which was the list of assets that were excluded. Do you recall that?

A. Yes.

Q. And in the September 1995 asset purchase agreement that you signed that we looked at and is consistent with the board meeting, Novell excluded and Santa Cruz agreed to exclude all copyrights and trademarks except for UNIX and UnixWare; right?

A. Right.

Mr. Robert Duff Thompson, Novell senior Vice President of corporate development and strategic relations and APA negotiator in 1995, stated on March 10, 2010 that the APA wording and terms did transfer Novell's entire UNIX business, UNIX trademark licenses and UNIX trademarks to Santa Cruz in 1995, testifying as follows:²²

considered by the courts is now re-enforced by the new evidence.

²¹ March 9, 2010 **certified trial transcript**, see Mr. Frankenberg's testimony at pages 90 (lines 2-4), 92 (lines 10-13), 105 (lines 2-17), 129 (lines 10-22), 131 (lines 1-8), 146-147 (lines 24-25, 1-25), 148-149 (lines 25, 1-14), 153-154 (lines 23-25, 1-8) and 190-191 (lines 1-25, 1-10), Dkt. Nos. 856 and 856-1 in *SCO v. Novell*, hereto in relevant part as Exhibit No. 12.

²² March 10, 2010 **certified trial transcript**, see Mr. Thompson's testimony at pages 230 (lines 15-23), 237 (lines 5-25), 239 (lines 11-24), 241-242 (lines 24-25, 1-15), 250 (lines 1-16), 285-286 (lines 23-25, 1-15), 291

Q. ... When you decided on this payment mechanism, did that change the fact that you were going to sell the entire UNIX business to Santa Cruz?

A. When we decided on the payment system?

Q. Yes.

A. No. The transaction never changed. Sell the business was the order of the day. That was our instruction, sell the business.

Q. Well, we'll turn to the schedule separately of the excluded assets, but did you understand that this schedule of 1.1A were the assets that were being sold?

A. Yes. These are all the included assets, yes.

Q. Did you understand this to represent the entire UNIX and UnixWare business?

A. I did.

Q But the initial plan was to sell the entire business outright for cash; correct?

A Well, the plan was to sell the whole business period. The instruction was to go sell this lock, stock and barrel. Sell the business. It was not to go get cash for this business. It was to go sell this.

Q In the paragraph in the included assets it says intellectual property, all that's listed is trademarks Unix and UnixWare; right?

A I see that, yes.

Q In the intellectual property section of what was excluded, 1.1(b), in (a), what's listed there is all copyrights and trademarks, except for the trademarks Unix and UnixWare; correct?

A Yes.

Mr. Edward Chatlos, Novell executive and APA principal negotiator in 1995, stated on March 10, 2010 that the APA wording and terms did transfer Novell's entire UNIX business and UNIX trademarks to Santa Cruz in 1995, testifying as follows.²³

Q What did Mr. Thompson tell you about his intent regarding the sale of these assets?

A He said he wanted to sell the entire UNIX business to a buyer. I am not sure if he said SCO at that time.

Q How much of the UNIX business was to be sold in this transaction, as you recall it, during your negotiations?

(lines 5-12), 296 (lines 10-19), 297 (lines 17-19), 299 (lines 6-10), 301 (lines 1-6), and 343-344 (lines 6-25, 1-6), Dkt. Nos. 857, 857-1 and 857-2 in *SCO v. Novell*, Case No. 2:04cv00139, Utah Dist., hereto in relevant part as Exhibit No. 16.

²³ March 10, 2010 **certified trial transcript**, see Mr. Chatlos's testimony at pages 348-349 (lines 18-25, 1-7), 351 (lines 20-24), 362-363 (lines 19-25, 1-10), and 377-378 (lines 14-25, 1-13), Dkt No. 857-2 in *SCO v. Novell*, Case No. 2:04cv00139, Utah Dist., hereto in relevant part as Exhibit No. 16. Mr. Chatlos's trial testimony corroborates Novell Worldwide Sales Director of UNIX Products Mr. Larry Bouffard's October 18, 1995 email to Novell employees stating the following: "They [Santa Cruz] have bought it [UNIX business] lock, stock and barrel. Once the transaction is closed (Nov.-Dec.) we will have no more involvement with this business." Available at SCO's official web site (last viewed March 24, 2011) as URL - <http://www.sco.com/company/legal/update/Bouffard.pdf>, hereto as Exhibit No. 17.

A Well, the entire business.

Q Was it the sale of just UnixWare?

A No. It was definitely UNIX and UnixWare.

Q Can you briefly describe what the point of the license back was?

A Since Novell was transferring the entire business to SCO, there were groups within Novell that were using some of the UNIX and UnixWare technology, ...

Q Did you have a view, during the course of your negotiations, as to why it would be necessary for Novell to have a license back?

A Well, we were instructed to transfer the entire business to SCO, so Novell would have no rights to it, so this section covered giving back rights to Novell.

Q And that paragraph reads, the intellectual property paragraph of what was not transferred, in A, all copyrights and trademarks, except for the trademarks UNIX and UnixWare, correct?

A Yes,...

Mr. James Wilt,²⁴ Santa Cruz Vice President of Corporate Development in 1995 and a lead APA negotiator, and Mr. Alok Mohan,²⁵ Santa Cruz President, CEO and Board member in 1995, both testified March 11, 2010 that the APA wording and terms did transfer Novell's entire UNIX business and UNIX trademarks to Santa Cruz in 1995.

Mr. Doug Michels, Santa Cruz Executive Vice-President and CTO in 1995, stated in his March 11, 2010 sworn testimony that the APA wording and terms did transfer Novell's entire UNIX business and UNIX trademarks and associated goodwill to Santa Cruz in 1995, and Novell by non-compete agreement terms was prohibited from remaining in or re-entering the UNIX business, testifying as follows:²⁶

Q What is your understanding of the purpose of the Asset Purchase Agreement?

²⁴ March 11, 2010 **certified trial transcript**, see Mr. Wilt's testimony at pages 445-446 (lines 12-25, 1-5), Dkt No. 858 in *SCO v. Novell*, Case No. 2:04cv00139, Utah., hereto in relevant part as Exhibit No. 18.

²⁵ March 11, 2010 **certified trial transcript**, see Mr. Mohan's testimony at pages 463-464 (lines 8-25, 1-19), 465 (lines 10-19), and 485 (lines 3-9), Dkt No. 858-2 in *SCO v. Novell*, hereto in relevant part as Exhibit No. 18.

²⁶ March 11, 2010 **certified trial transcript** at pages 491 (lines 15-24), 497 (lines 5-10), 500-501 (lines 13-25, 1-4), 505 (lines 8-16), 506 (lines 21-25), Dkt No. 858-2 in *SCO v. Novell*, hereto in relevant part as Exhibit No. 18. Mr. Michels testimony is confirmed by SCO in *SCO v. Novell*, wherein SCO stating the following: "The broad transfer of "[a]ll rights and ownership of UNIX and UnixWare" included the goodwill Novell had developed in its UNIX and UnixWare business" as corroborated by Santa Cruz's auditor Peat Marwick LLP APA in its November 16, 1995 APA opinion letter wherein Peat Marwick states the following: "The [UNIX business] sale includes goodwill, trade names, and other intangibles." SCO brief titled "Memorandum in Opposition to Novell's Motion for Partial Summary Judgment on SCO's Noncompete Claim in its Second Claim for Breach of Contract and Fifth Claim for Unfair Competition" in Section Nos. 25-26 at pages 10-11 and ¶3 at page 39, *SCO v. Novell* Dkt. No. 301, hereto in relevant part as Exhibit No. 9.

A We were buying the original A.T.& T./Unix business from Novell, who had bought it from A.T.& T.

Q And what's the basis for that statement? What leads you to say that?

A That was the deal.

A Yes. Our -- our agreement with Novell was that we were buying the entire business.

Q Do you recall -- independent of how it was embodied in a particular agreement, do you recall the issue of a license back to Novell in --

A Yes. We wanted to make sure that that license didn't give them any rights to go back into the Unix business...

Q Was it your view that Santa Cruz owned rights in the Unix technology as of the date of the license back to Novell?

A Of course. We bought the business. And as a result of buying the business, we owned all the intellectual property.

Q Well, Mr. Normand asked you I think a fairly specific question, whether SCO held itself out to be the owner of the Unix copyrights --

A Yes.

Q -- between 1995 and 2001?

A We thought ourselves to be the owner of everything. We owned Unix. We owned the product. We spent a lot of money. We gave away 20 percent of our company to buy Unix. Of course we held ourselves out to be the owner of Unix.

A There's no -- there's no break in this pattern. We owned Unix. We owned the copyrights. We owned the trademarks. We owned the intellectual property, and every action we took represents that.

Mr. Burt Levine,²⁷ Novell house counsel in 1995, testified March 11, 2010, and Mr. Ty Mattingly,²⁸ Novell executive and principal APA negotiator in 1995, testified on March 12, 2010, that the APA transferred Novell's UNIX and UnixWare trademarks to Santa Cruz in 1995.

Ms. Allison Amadia, Novell in-house counsel from 1995 to 1997 and "lead negotiator and drafts person on behalf of Novell with respect to [APA] amendment number two," stated on March 23, 2010 that the 1995 APA transferred Novell's UNIX and UnixWare trademarks to Santa Cruz in 1995; the APA October 16, 1996 Amendment No. 2, executed over a month AFTER the September, 1996 Confirmation Agreement, "clarified" Santa Cruz owned the UNIX trademarks

²⁷ March 11, 2010 **certified trial transcript** at pages 534 (lines 1-25, 1) and 537 (lines 5-19), Dkt Nos. 858, 858-1 in *SCO v. Novell*, Case No. 2:04cv00139, Utah Dist., hereto in relevant part as Exhibit No. 18.

²⁸ March 12, 2010 **certified trial transcript** at pages 740-741 (lines 23-25, 1), 742 (lines 1-23) and 753-754 (lines 21-25, 1-13), Dkt Nos. 859, 859-1 in *SCO v. Novell*, hereto in relevant part as Exhibit No. 19.

pursuant to the APA December, 1995 transfer; Santa Cruz required UNIX trademark ownership to exercise its business rights; and Novell had no intent of owning the UNIX trademarks thereafter, testifying as follows:²⁹

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

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

A. Yes.

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

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

Q. And you agree with me that that [Amendment No.2] language identifies the UNIX and UnixWare trademarks as having been transferred; correct?

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

Q. And you said in response to my question earlier that [Amendment Number 2] Paragraph A did not change that; correct?

A. Yes.

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

Q. So Santa Cruz got the UNIX and UnixWare trademarks because they were acquired for its business; correct?

A. If they were acquired for its business, then they got them.

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

A. Yes.

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

A. Yes.

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

A. Correct.

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

²⁹ March 23, 2010 **certified trial transcript** at pages 2105, 2124, 2174-2178, Dkt Nos. 866, 866-1 and 866-2 in *SCO v. Novell*, Case No. 2:04cv00139, Utah Dist., hereto in relevant part as Exhibit No. 20. Ms. Amadia's trial testimony corroborates SCO's August 3, 2005 declaration letter to the USPTO. Therein SCO confirms that the 1995 APA transferred Novell's entire UNIX business and UNIX trademarks to SCO's predecessor Santa Cruz, and that Santa Cruz/SCO (not X/Open) owned the trademarks from December, 1995 to at least till August 2005. SCO August 3, 2005 letter (**USPTO certified document**) in Section III, specifically ¶1 at page 4, hereto as Exhibit No. 21.

A. Yeah. (emphasis supplied)

Mr. Tor Braham,³⁰ Wilson Sonsini attorney, Novell outside counsel and primary 1995 APA text and terms drafter, and Mr. David Bradford,³¹ Novell Senior Vice-President, General Counsel and Corporate Secretary from 1987 to 2000, both testified on March 25, 2010 the APA transferred Novell's UNIX and UnixWare trademarks to Santa Cruz in 1995.

Mr. Stuart Singer,³² counsel for SCO, and Mr. Sterling Brennan,³³ counsel for Novell, in both their closing statements on March 26, 2010, confirm the APA as amended in October, 1996 transferred Novell's UNIX and UnixWare trademarks to Santa Cruz.

SCO introduced new trial evidence on March 15, 2010 that explains Santa Cruz's position in January 1997 concerning X/Open's UNIX trademark ownership and UNIX trademark exclusive licensee claims, four (4) months after the purportedly dispositive September, 1996 Confirmation Agreement. That evidence, Santa Cruz's January 31, 1997 antitrust complaint against Microsoft Corporation, is *SCO v. Novell* Trial Exhibit No. 127. Therein Santa Cruz admits X/Open was not the exclusive UNIX trademark licensee because Santa Cruz owned all UNIX rights after December 1995 pursuant to the 1995 APA as amended, and thus Santa Cruz did not need any X/Open UNIX trademark license to call its UNIX products "UNIX", stating the following:³⁴

3.4 As a result of the chain of transactions described below, SCO has now acquired ownership of the UNIX program itself so that it no longer requires a license from anyone to produce UNIX products. In November 1989, AT&T, the original

³⁰ March 25, 2010 **certified trial transcript** at pages 2419-2420 (lines 25, 1-12), Dkt No. 868 in *SCO v. Novell*, Case No. 2:04cv00139, Utah Dist., hereto in relevant part as Exhibit No. 22.

³¹ March 25, 2010 **certified trial transcript** at page 2442 (lines 5-19), Dkt No. 868 in *SCO v. Novell*, Case No. 2:04cv00139, Utah Dist., hereto in relevant part as Exhibit No. 22.

³² March 26, 2010 **certified trial transcript** at pages 2634-2635 (lines 21-25, 1-13), Dkt No. 869 in *SCO v. Novell*, Case No. 2:04cv00139, Utah Dist., hereto in relevant part as Exhibit No. 23.

³³ March 26, 2010 **certified trial transcript** at pages 2679 (lines 6-9) and 2703-2704 (lines 25, 1-5), Dkt No. 869-1 in *SCO v. Novell*, hereto in relevant part as Exhibit No. 23.

³⁴ Santa Cruz's January 31, 1997 antitrust complaint at pages 3 (Section 3.4) and 12 (Section 8.1.1), *Santa Cruz v. Microsoft*, Exhibit No. 127 in the *SCO v. Novell* Jury Trial, entered into evidence on March 15, 2010, hereto in relevant part as Exhibit No. 24. Also available at SCO's official web site (last viewed March 24, 2011) at URL - <http://www.sco.com/company/legal/update/Microsoft%20Complaint.pdf>.

developer of the UNIX Operating System, had spun off the UNIX division as a separate company then known as UNIX System Laboratories, Inc. ("USL"). In June 1993, Novell, the vendor of the NetWare Operating System, acquired USL and hence became the owner of the UNIX program. In turn, in December 1995, Novell sold the ownership of UNIX to SCO. As a result, SCO now enjoys the right, as the owner of the UNIX program, to exploit that program without the necessity of a license from any other party.

Santa Cruz also explains therein that X/Open's UNIX certification license does not violate antitrust laws because it is optional, and thus Santa Cruz and its UNIX licensees were not required to have any X/Open license.

Unlike the 1987 Microsoft Agreement, the X/Open agreement merely allowed competitive undertakings to develop a common, standard product. There were no restraints which prevented the parties from developing [UNIX] products outside the agreement. (emphasis supplied)

SCO, in its "Memorandum in Support of Its Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial" in *SCO v. Novell* expressly states that the purpose of the October 16, 1996 "APA" Amendment No. 2 was, among others, to confirm Santa Cruz's continuing UNIX trademark ownership and, consistent with Santa Cruz's January, 1997 antitrust complaint (Trial Exhibit No. 127), confirms Santa Cruz as the exclusive UNIX trademark licensor, stating the following:³⁵

Indeed, to give Amendment No. 2 a contrary interpretation the jury would had to have ignored the evidence – as to which there is no contrary evidence – that the Amendment confirmed the transfer of the UNIX and UnixWare trademarks by referring to them as ones “required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.” (2176:5-24 (Amadia); 2177:25-218:18 (Amadia).) Where Amendment No. 2 changes the APA to make no distinction between trademarks and copyrights, and where Novell admitted that the trademarks referenced in Amendment No. 2 were not being licensed, but were in fact transferred, no reasonable juror could conclude that the same language used to describe the copyrights could mean something different. (emphasis supplied)

On September 17, 2009, Mr. Gray met with Mr. Darl McBride, then CEO of SCO, for the purpose of negotiating SCO's complete exit from this *Gray v. Novell et al.* litigation and the related Eleventh Circuit Appeal. Mr. Gray informed Mr. McBride that any release would require SCO to

produce certain documents, and most specifically the May 14, 1994 Agreement as identified in the September, 1996 Confirmation Agreement. Mr. McBride represented to Mr. Gray in that meeting that the elusive May 14, 1994 Agreement does in fact exist.³⁶

ARGUMENT:

The Florida District Court's February 20, 2009 ruling was mostly based on its access to a severely redacted May 10, 1994 Agreement and severely redacted September 1996 Confirmation Agreement. Had the District Court had available to it the unredacted versions of these two documents, it would have recognized and ruled that X/Open has always been, and is at most now, a bare UNIX trademark licensee because it had no right to transfer its trademark licensee agreement without the UNIX trademark licensor's authorization, and pursuant to the *Sicom* Court, that restriction is fatal to any exclusive trademark licensee claims.

Counsel for Novell, in his March, 2010 *SCO v. Novell* jury trial opening statements, made it very clear to the jury that Novell's official position is now and always has been since 1996 that the only UNIX IP transferred by the APA as amended in October 1996:

"were just two things, the UNIX trademark and the UnixWare trademark. That is the entire description of the intellectual property."

Mr. Frankenberg, Novell CEO in 1995, testified under oath in the March, 2010 *SCO v. Novell* jury trial that it was his "intent to sell that [UNIX] business in its entirety" and the APA transferred Novell's UNIX and UnixWare trademarks to Santa Cruz.

Mr. Michels, Santa Cruz VP and CTO in 1995, testified under oath in the March, 2010 *SCO v. Novell* jury trial that:

³⁵ "SCO's Memorandum in Support of Its Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial" dated April 27, 2010, at page 7 in FN3, as Doc. 872 in *SCO v. Novell*, and hereto in relevant part as Exhibit No. 25.

³⁶ Mr. McBride's is the 2nd SCO representation to Mr. Gray the May 14, 1994 Agreement exist. In that same meeting Mr. McBride also stated that SCO outside counsel also believes that SCO continues to lawfully own the UNIX trademarks. SCO's first admission to Mr. Gray of the existence of the May 14, 1994 Agreement was June 20, 2007 in response to Mr. Gray's First Request for Admissions, Request No. 23 at page 13, hereto in relevant part as Exhibit No. 26. Neither Novell, nor X/Open nor SCO have ever represented to any court that the mysterious May 14, 1994 Agreement does not exist.

"our agreement with Novell was that we were buying the entire [UNIX] business" and that "there's no break in this pattern [from 1995 to 2001]. We owned Unix. We owned the copyrights. We owned the trademarks. We owned the intellectual property, and every action we took represents that."

Ms. Amadia, Novell in-house counsel from 1995 to 1997, testified under oath in the March, 2010 *SCO v. Novell* jury trial that as "lead negotiator and drafts person on behalf of Novell with respect to" APA Amendment No.2, its intent was clarify the APA UNIX and UnixWare trademarks transfer because:

"the UNIX and UnixWare trademarks [are] listed in the [APA] schedule of included assets," that "the UNIX and UnixWare trademarks were required for SCO to exercise its rights under the APA," and that Novell "certainly didn't intend to take [the UNIX and UnixWare trademarks] away" from Santa Cruz.

SCO counsel, in closing arguments in the March, 2010 *SCO v. Novell* jury trial, reminded the jury that Ms. Amadia, in cross-examination:³⁷

"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."

SCO counsel introduced as evidence in the March, 2010 *SCO v. Novell* jury trial a January 1997 SCO legal document that clearly set out SCO's position in 1997 that it:

"no longer requires a [UNIX] license from anyone to produce UNIX products," and that "the X/Open agreement merely allowed competitive undertakings to develop a common, standard product. There were no restraints which prevented the parties from developing [UNIX] products outside the agreement."

SCO again admitted in its Memorandum dated April 27, 2010 in *SCO v. Novell* that its position is now and always has been that the APA as amended in October 1996 confirms:

Amendment No. 2 ... confirmed the transfer of the UNIX and UnixWare trademarks by referring to them as ones "required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies." (2176:5-24 (Amadia); 2177:25-218:18 (Amadia).) ...Novell admitted that the trademarks referenced in Amendment No. 2 were not being licensed, but were in fact transferred,...

None of this evidence was available to or before the Florida District Court and thus was not considered by the Eleventh Circuit. Had this new evidence been before the District Court, it would

not, and could not, have ruled in favor of X/Open on UNIX trademark ownership and exclusive licensee status, and the court would have recognized the September, 1996 Confirmation Agreement (full version) for what it actually is, an agreement to commit fraud on the USPTO by all parties thereto, agreeing that Novell would falsely represent itself to the USPTO and others as the lawful owner of the UNIX business, UNIX trademark and associated goodwill for the purpose of fraudulently assigning the UNIX trademarks to X/Open, a scheme that is apparently detailed in the mysterious May 14, 1994 Agreement.

Mr. Gray respectfully submits that the TTAB must consider and rely on the sworn trial testimony and evidence as new evidence and information of Novell's and Santa Cruz/SCO's executives and legal counsel in the March, 2010 *SCO v. Novell* jury trial because they, not Opposer X/Open, actually negotiated, drafted and executed the APA; and the TTAB, pursuant to established precedent and law, must consider and rely on the wording and terms expressed in the entire May 10, 1994 Agreement and entire September, 1996 Confirmation Agreement, none of which were available to or before the Florida District or Eleventh Circuit Courts.³⁸

The evidence, sworn testimony in *SCO v. Novell*, relevant contracts and federal trademark law are dispositive of SCO's lawful UNIX Trademarks ownership at least till August 2005, long after X/Open's 2001 fraudulent UNIX trademark enforcement letter and sham opposition against Mr. Gray's iNUNIX mark. Therefore, the TTAB should resume this proceeding and re-set the schedule, permitting Mr. Gray to continue discovery for an additional five (5) months to enter these documents into evidence in this opposition.

³⁷ March 26, 2010 **certified trial transcript** at page 2635 (lines 9-13), Dkt No. 869 in *SCO v. Novell*, hereto in relevant part as Exhibit No. 23.

³⁸in determining whether the licensee received "all substantial rights" under a licensing agreement, the district court must ascertain the intent of the parties and examine the substance of what was granted by the entire agreement. *Mentor H/S, Inc. v. Medical Device Alliance, Inc.*, 240 F.3d 1016, 1017 (Fed. Cir. 2001). *Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A.*, 944 F.2d 870, 874 (Fed. Cir. 1991).

Noting that the APA is governed by California law (APA in Section 9.8 at page 47, Exhibit 3 hereto). Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."). "A written instrument must be construed as a whole, and multiple writings must be considered together when part of the same contract." *Nish Noroian Farms v. Agric. Labor Relations Bd.*, 35 Cal. 3d 726, 735 (1984).

The undersigned counsel has contacted counsel for Opposer, but it appears that no motion is acceptable to Opposer at this time, on procedural grounds.

CONCLUSION:

Because this dispositive new material evidence confirming Santa Cruz/SCO's continuing lawful UNIX business and trademark ownership and X/Open's limited UNIX trademark licensee rights was not available to or before the Florida District Court and thus was not considered by it or the Eleventh Circuit, and because the District Court did not consider or rule on lawful UNIX goodwill or UNIX business ownership, Mr. Gray respectively submits that the TTAB should resume this opposition proceeding, and re-set and extend the schedule, permitting additional discovery for at least five (5) months, to allow Mr. Gray the opportunity to enter these documents into evidence in this opposition.

Dated: April 8, 2011

Respectfully submitted,

/David L. Partlow/
David L. Partlow, P.A.
P.O. Box 82963
Tampa, FL 33682-2963
(813) 287-8337; FAX (813) 287-8234
DLPPA@MINDSPRING.COM
Counsel for Applicant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by email and regular U.S. mail to Mark Sommers, Esquire, at Finnegan, Henderson, Farabow, Garrett, & Dunner, L.L.P., 901 New York Ave., N.W., Washington, D.C. 20001-4413, this 8th day of April, 2011.

/David L. Partlow/

EXHIBIT No. 1

August 24, 2009

PUBLISH

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

THE SCO GROUP, INC.,

Plaintiff-Appellant,

v.

No. 08-4217

NOVELL, INC.,

Defendant-Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. NO. 2:04-CV-00139-DAK)**

Stuart Singer, Boies, Schiller & Flexner LLP, Fort Lauderdale, Florida (David Boies, Robert Silver, and Edward Normand, Boies Schiller & Flexner LLP, Armonk, New York; Brent O. Hatch, Mark F. James, Hatch, James & Dodge, PC, Salt Lake City, Utah; Devan V. Padmanabhan, Dorsey & Whitney LLP, Minneapolis, Minnesota with him on the briefs) for Plaintiff-Appellant.

Michael Jacobs, Morrison & Foerster LLP, San Francisco, California (George C. Harris, Grant L. Kim, David E. Melaugh, Morrison & Foerster LLP, San Francisco, California; Thomas R. Karrenberg, Heather M. Sneddon, Anderson & Karrenberg, Salt Lake City, Utah with him on the briefs) for Defendant-Appellee.

Before **LUCERO, BALDOCK** and **McCONNELL**, Circuit Judges.

McCONNELL, Circuit Judge.

This case primarily involves a dispute between SCO and Novell regarding the scope of intellectual property in certain UNIX and UnixWare technology and other rights retained by Novell following the sale of part of its UNIX business to Santa Cruz, a predecessor corporate entity to SCO, in the mid-1990s. Following competing motions for summary judgment, the district court issued a detailed opinion granting summary judgment to Novell on many of the key issues. We affirm the judgment of the district court in part, reverse in part, and remand for trial on the remaining issues.

I. Background

We begin by laying out some of the basic facts underlying Novell's transfer of certain UNIX-related assets to Santa Cruz, as well as the background to the instant litigation. Other facts will be discussed as the issues require.¹

A. The UNIX Business and the Sale to Santa Cruz

UNIX is a computer operating system originally developed in the late 1960s at AT&T. By the 1980s, AT&T had developed UNIX System V ("SVRX"); it built a substantial business by licensing UNIX source code to a number of major computer manufacturers, including IBM, Sun, and Hewlett-Packard. These manufacturers, in turn, would use the SVRX source code to develop their own individualized UNIX-derived "flavors" for use on their computer systems.

¹ The motion of Wayne R. Gray, for leave to file a brief as amicus curiae, is denied.

Licensees could modify the source code and create derivative products mostly for internal use, but agreed to keep the UNIX source code confidential.

In 1993, Novell paid over \$300 million to purchase UNIX System Laboratories, the AT&T spin-off that owned the UNIX copyrights and licenses. Only two years later, however, Novell decided to sell its UNIX business. Although Novell may have initially intended “to sell the complete UNIX business,” both parties agree that Santa Cruz was either unwilling or unable to commit sufficient financial resources to purchase the entire UNIX business outright. App’x 8610; Aplt. Br. 8; Aple. Br. 5. The deal was therefore structured so that Novell would retain a 95% interest in SVRX license royalties, which had totaled \$50 million in 1995.

The transfer of Unix-related rights occurred pursuant to three documents: an asset purchase agreement (“APA”) executed on September 19, 1995; “Amendment No. 1” signed by the parties at the actual closing on December 6, 1995; and “Amendment No. 2” on October 16, 1996. The APA provided that:

“Buyer will purchase and acquire from Seller on the Closing Date . . . all of Seller’s right, title, and interest in and to the assets and properties of Seller relating to the Business (collectively the “Assets”) identified on Schedule 1.1(a). Notwithstanding the foregoing, the Assets to be so purchased shall not include those assets (the “Excluded Assets”) set forth on Schedule 1.1(b).

Schedule 1.1(a) included within the list of “Assets” transferred, “[a]ll rights and ownership of UNIX and UnixWare.” App’x 313. Section V of the Asset

Schedule, entitled “Intellectual property” provided that Santa Cruz would obtain “[t]rademarks UNIX and UnixWare as and to the extent held by Seller” but did not explicitly mention copyrights. App’x 315. In contrast, Schedule 1.1(b), the list of assets excluded from the deal, did expressly speak to copyrights. Section V—“Intellectual Property”—explained that “*All copyrights* and trademarks, except for the trademarks UNIX and UnixWare,” as well as “[a]ll [p]atents,” were excluded from the deal. App’x 318 (emphasis added).

Less than a year after the deal closed, the parties agreed to Amendment No. 2, which amended the APA’s treatment of copyrights. Amendment No. 2 provided that:

With respect to Schedule 1.1(b) of the Agreement, titled ‘Excluded Assets’, Section V, Subsection A shall be revised to read:

All copyrights and trademarks, 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. However, in no event shall Novell be liable to SCO for any claim brought by any third party pertaining to said copyrights and trademarks.

App’x 374.

The APA separately purported to give Novell certain residual control over “SVRX Licenses.” Section 4.16(b) of the agreement provided that:

Buyer shall not, and shall not have the authority to, amend, modify or waive any right under or assign any SVRX License without the prior written consent of Seller. In addition, at Seller’s sole discretion and direction, Buyer shall amend, supplement, modify or waive any

with the APA itself, we remind it that when “two contracts are made at different times, [but where] the later is not intended to entirely supersede the first, but only modif[y] it in certain particulars[,] [t]he two are to be construed as parts of one contract, the later superseding the earlier one wherever it is inconsistent therewith.” *Hawes v. Lux*, 294 P. 1080, 1081 (Cal. Dist. Ct. App. 1931). What is sauce for the goose is sauce for the gander. Since SCO’s challenge to the district court’s ruling was premised only on its argument that “SVRX License” is a term temporally limited to assets existing at the time of the APA,⁸ *see* Apl’t. Br. 66, we are compelled to reject it.

For all these reasons, we affirm the district court’s ruling with respect to SCO’s liability from its 2003 agreement with Sun.

VI. Conclusion

For the foregoing reasons, we **AFFIRM** the district court’s judgment with regards to the royalties due Novell under the 2003 Sun-SCO Agreement, but **REVERSE** the district court’s entry of summary judgment on (1) the ownership of the UNIX and UnixWare copyrights; (2) SCO’s claim seeking specific performance; (3) the scope of Novell’s rights under Section 4.16 of the APA; (4)

⁸SCO notes in its reply brief that the provision referring to “new SVRX licenses” provides that SCO retains the source code right-to-use fees thereunder. But the district court found that SCO was unjustly enriched not with regard to right-to-use fees, but by SCO’s willingness to provide Sun with relief from the confidentiality restrictions imposed by the 1994 agreement.

the application of the covenant of good faith and fair dealing to Novell's rights under Section 4.16 of the APA. On these issues, we **REMAND** for trial.

EXHIBIT No. 2

D1028.SDN.06.05.94

THIS AGREEMENT is made the 10th day of May 1994

PARTIES:

- A. UNIX SYSTEM LABORATORIES, INC., a Delaware Corporation having a principal office at 190 River Road, Summit, New Jersey 07901, USA ("Novell") and
- B. X/OPEN COMPANY LIMITED, an United Kingdom Company having its principal office at Apex Plaza, Forbury Road, Reading, England RG1 1 AX ("X/Open")

WHEREAS:

1. The parties share the vision of the operating system originally developed by AT&T Bell Laboratories' engineers and licensed under the Trade Mark "UNIX" being characterised by a single specification, enabling multiple compatible implementations.
2. The parties agree that this vision is best accomplished by X/Open applying the UNIX Trade Mark to operating systems which meet a single specification developed by it, and to this end Novell agrees to license the UNIX Trade Mark to X/Open for a term of years and thereafter to assign the Trade Mark to X/Open subject to and upon the terms and conditions hereinafter contained.

NOW IT IS HEREBY AGREED AS FOLLOWS:

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For the avoidance of doubt, Novell agrees that it will only use the Trade Mark upon new Products that meet the Quality Criteria except, as described in sub-clause (i) above, for UnixWare and its subsequent releases.

3.
 - a. X/Open has no obligation to protect the integrity of the Trade Mark with respect to infringement or other misuse of the Trade Mark prior to the Commencement Date.
 - b.
 - i. Schedule 2 hereto lists Novell's Product licensees (other than its corporate affiliate UNIVEL) that have been licensed by Novell to use the Trade Mark on Products. Novell confirms that such list is comprehensive. Novell also confirms that it has licensed the Trade Mark to corporate affiliates and third parties for use as a corporate or trade name and other non-Product use. Novell agrees that it will use reasonable efforts to provide to X/Open, by May 31, 1994, a comprehensive list of such last-mentioned corporate affiliates and third parties. Novell further agrees that it will notify all such existing licensees of the appointment of X/Open as exclusive licensee for the Trade Mark.
 - ii. Novell also agrees to supply to X/Open with copies of all the existing licenses described in Schedule 2 and to use reasonable endeavors to persuade such existing licensees to submit their Products to the Interim Branding Programme and, thereafter, to the SPEC1170 Branding Programme.
 - c. X/Open, as exclusive licensee, hereby agrees to use all reasonable endeavors to protect the integrity of the Trade Mark in all other situations.

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- d. After the assignment of the Trade Mark pursuant to sub-clause (4) X/Open agrees that the licenses specified in sub-clause (3)(b) shall continue as stated, and that Novell's rights to enforce such licenses in the event of misuse shall also continue.
4. At the end of the Initial Period (or at any time either earlier or later if Novell and X/Open agree) Novell will assign the Trade Mark to X/Open provided that:
- a. there are no material adverse tax consequences or other material incremental costs to Novell which would not otherwise occur except as a result of structuring the transaction as a transfer of ownership rather than an exclusive license;
 - b. In the event that there are material adverse tax consequences or other material incremental costs as specified above, then X/Open in its absolute discretion shall either:
 - i. indemnify Novell as to such adverse tax consequences or other material incremental costs, in which event Novell shall assign the Trade Mark to X/Open, or
 - ii. not so indemnify Novell and no such assignment shall take place and the licenses set out in this Agreement shall continue.
5. If at any time (whether during or after the Initial Period) Novell elects not to maintain the existing registration of the Trade Mark in any of the Territories, then Novell hereby agrees to assign to X/Open (at no charge to X/Open) all of its rights in the Trade Mark in the relevant part of the Territories, and to execute without delay and at no cost to X/Open any document required to be signed in order to perfect X/Open's title to the Trade Mark in that part of the Territories.

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VIII. ENTIRE AGREEMENT

This Agreement supersedes all prior agreements, arrangements and understandings between the parties and constitutes the entire agreement between the parties relating to the subject matter hereof. No addition to or modification of any provision of this Agreement shall be binding upon the parties unless made by a written instrument signed by a duly authorized representative of each of the parties.

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REDACTED

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REDACTED

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X/OPEN COMPANY, LTD.

By: Jeff Morris

Name (Print): JE MORRIS

Title: President & CEO

Date: May 10 1994

UNIX SYSTEM LABORATORIES, INC.

By: DE McGovern

Name (Print): Donald E. McGovern

Title: Vice President UNIX Systems Group

Date: 5-8-94

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REDACTED

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EXHIBIT No. 3

ASSET PURCHASE AGREEMENT
BY AND BETWEEN
THE SANTA CRUZ OPERATION, INC.
AND
NOVELL, INC.

Dated as of September 19, 1995

BPHPA1\RB\0147981.06
09/19/95

NOV-32-0000038

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<u>Exhibit</u>	<u>Description</u>
Exhibit 5.1.(c)	Form of Proposed Operating Agreement, including <u>Exhibit A</u> and <u>Exhibit B</u> thereto and Eiger Development.

INDEX OF SCHEDULES

Schedule 1.1(a)	Assets
Schedule 1.1(b)	Excluded Assets
Schedule 1.1(c)	Assumed Liabilities
Schedule 1.2(b)	Royalties relating to UnixWare product
Schedule 6.3(a)	Change of Control Parties

ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT (the "Agreement") is made and entered into as of September 19, 1995 by and between The Santa Cruz Operation, Inc., a California corporation ("Buyer") and Novell, Inc., a Delaware corporation ("Seller").

RECITALS

A. Seller is engaged in the business of developing a line of software products currently known as Unix and UnixWare, the sale of binary and source code licenses to various versions of Unix and UnixWare, the support of such products and the sale of other products which are directly related to Unix and UnixWare (collectively, the "Business").

B. The Boards of Directors of each of Seller and Buyer believe it is in the best interests of each company and their respective stockholders that Buyer acquire certain of the assets of, and assume certain of the liabilities of Seller comprising the Business (the "Acquisition").

C. In connection with the Acquisition Buyer will issue to Seller 6,127,500 shares of Common Stock of Buyer (the "Shares").

D. In connection with the acquisition by Seller of the Shares, Buyer and Seller desire to set forth certain agreements with respect to the governance of Buyer following the closing of the Acquisition.

NOW, THEREFORE, in consideration of the covenants, promises and representations set forth herein, and for other good and valuable consideration, the parties agree as follows:

ARTICLE I

THE ACQUISITION

1.1 Purchase of Assets.

(a) Purchase and Sale of Assets. On the terms and subject to the conditions set forth in this Agreement, Seller will sell, convey, transfer, assign and deliver to Buyer and Buyer will purchase and acquire from Seller on the Closing Date (as defined in Section 1.7), all of Seller's right, title and interest in and to the assets and properties of Seller relating to the Business (collectively the "Assets") identified on

Schedule 1.1 (a) hereto. Notwithstanding the foregoing, the Assets to be so purchased shall not include those assets (the "Excluded Assets") set forth on Schedule 1.1 (b):

(b) Assumption of Liabilities. At the Closing, Buyer shall assume those obligations and liabilities of Seller set forth on Schedule 1.1(c) hereto (collectively, the "Assumed Liabilities").

(c) Liabilities Not Assumed. Other than the Assumed Liabilities, Buyer shall not assume, nor shall Buyer or any affiliate of Buyer be deemed to have assumed or guaranteed, any other liability or obligation of any nature of Seller, or claims of such liability or obligation, whether accrued, matured or unmatured, liquidated or unliquidated, fixed or contingent, known or unknown arising out of (i) acts or occurrences related to any of the Assets, prior to the Closing Date, or (ii) any other liability or obligation of Seller which is not an Assumed Liability (collectively, the "Unassumed Liabilities"). Seller will remain responsible for all Unassumed Liabilities.

1.2 Payments.

(a) Consideration for Assets: Stock. On the terms and subject to the conditions set forth in this Agreement, as full payment for the transfer of the Assets by Seller to Buyer, at the Closing Buyer shall assume the Assumed Liabilities and issue to Seller 6,127,500 shares of fully paid and nonassessable shares of Common Stock of Buyer (the "Shares" or the "Purchase Price").

(b) Royalties. Buyer agrees to collect and pass through to Seller one hundred percent (100%) of the SVRX Royalties as defined and described in Section 4.16 hereof. Seller agrees to pay Buyer an administrative fee of five percent (5%) of the SVRX Royalties. Seller and Buyer further acknowledge and agree that Seller is retaining all rights to the SVRX Royalties notwithstanding the transfer of the SVRX Licenses to Buyer pursuant hereto, and that Buyer only has legal title and not an equitable interest in such royalties within the meaning of Section 541(d) of the Bankruptcy Code. For purposes of administering the collection of SVRX Royalties, the parties acknowledge that the royalties shall continue to be recognized as royalties by Seller on an ongoing basis and the parties shall take such commercially reasonable steps as may be necessary to effectuate the foregoing for financial accounting and tax purposes. In addition, Buyer agrees to make payment to Seller of additional royalties retained by Seller in respect of the transfer of UnixWare and on account of Buyer's future sale of UnixWare products. The amounts and timing of additional royalties to be paid in connection with Buyer's sale of the UnixWare products are identified in detail on Schedule 1.2(b) hereto. Seller shall be entitled to conduct periodic audits of Buyer concerning all royalties and payments due to Seller hereunder or under the SVRX Licenses, provided that Seller shall conduct such audits after reasonable notice to Buyer and during normal business hours and shall not be entitled to more than two (2) such audits per year. The cost of

any such audit shall be borne by Seller, unless such audit reveals a payment shortfall in excess of 5% of amounts due hereunder in which case the cost of such audit shall be borne by Buyer.

(c) Allocation of Purchase Price. Within 45 days following the Closing Buyer shall prepare and deliver to Seller, subject to Seller's approval, an allocation of the Purchase Price plus any other consideration properly allocable among the Assets (the "Allocation"). The parties agree that all tax returns and reports (including Internal Revenue Service ("IRS") Form 8594) and all financial statements shall be prepared in a manner consistent with (and the parties shall not otherwise take a position inconsistent with) the Allocation unless required by the IRS or state taxing authority. The Allocation shall be prepared in a manner consistent with Section 1060 of the Internal Revenue Code of 1986, as amended (the "Code"), and the income tax regulations promulgated thereunder.

(d) Transfer Taxes. Buyer shall pay and promptly discharge when due the entire amount of any and all sales and use tax ("Sales Taxes") imposed or levied by reason of the sale of the Assets to Buyer. The parties shall cooperate with each other to the extent reasonably requested and legally permitted to minimize any such Sales Taxes.

1.3 Transfer of Customers.

(a) Transfer of Customers.

(i) Intent. It is the intent of parties hereto that all of the Business and all of Seller's backlog, if any, relating to the Business be transferred to Buyer. Accordingly, all parties agree to facilitate the transfer of customers of the Business from Seller to Buyer following the Closing.

(ii) Purchase Order Data. Seller shall make available to Buyer, upon request (A) a list of all outstanding written customer orders, purchase orders and other customer commitments from the current customers of the Business (the "Current Customers"), (B) the names of all current Customers, and (C) data regarding Seller's standard cost of sales for the items covered by such orders, and shall provide upon request such other information as is (AA) relevant to profitability on such items, (BB) available to Seller without incurring undue effort or expense and (CC) requested by Buyer.

(iii) Transfer of Orders: Assignments. Prior to the Closing, Seller and Buyer agree to cooperate with each other in conducting joint contacts with the Current Customers (as appropriate) for the purpose of attempting to obtain such customers' consent to transfer orders from Seller to Buyer (or to issue new orders to

Buyer for the same or similar items) and to assign Seller's rights and benefits under the contracts included in the Assets to Buyer as of the Closing.

(iv) Assumption of Obligation. To the extent that an order is transferred or assigned to Buyer or that Buyer accepts a new purchase order from a Current Customer, Buyer agrees to assume and perform all obligations thereunder.

1.4 Non-Assignment of Certain Items. Notwithstanding anything to the contrary in this Agreement, to the extent that the assignment or license hereunder of any of the Assets shall require the consent of any other party (or in the event that any of the Assets shall be nonassignable), neither this Agreement nor any action taken pursuant to its provisions shall constitute an assignment or license or an agreement to assign or license such Assets if the requisite consents are not obtained and such assignment or license or attempted assignment or license would constitute a material breach or result in the loss or diminution thereof; provided, however, that Seller shall, at its own expense, use reasonable commercial efforts to obtain all third party consents necessary to assign or license the Assets to Buyer, and Seller hereby consents to Buyer using such efforts as it deems necessary or appropriate to effect the same. In the event that notwithstanding the efforts of Seller and Buyer all assignments or licenses needed to assign or license the Assets to Buyer cannot be provided to Buyer, Seller shall negotiate an alternative assignment or license as to such Assets so as to afford Buyer, to the extent practicable, the same or similar benefits and rights as if such assignment or license had occurred.

1.5 Transitional Contracts. The parties acknowledge that it may not be practical or advisable to assign or terminate certain contracts (such as Seller's Master License Agreements ("MLAs")) pursuant to which Seller has granted third parties rights to sell, distribute, obtain support and/or maintain Seller's UnixWare products (such contracts to be referred to hereinafter collectively as the "Transitional Contracts"). In such cases, Seller and Buyer will use diligent efforts to transition such business (concerning the Business only) and the customer relationship relating to such business to Buyer such that any new agreements concerning the Business will be entered into by, and support and maintenance will be provided by, Buyer, except where Buyer is unable to do so. In any event, Buyer shall be entitled to the revenue and benefits received by Seller reasonably attributable to support or maintenance of the products pursuant to the Transitional Contracts (even if prepaid before Closing) net of Seller's identifiable direct expenses of support and maintenance related specifically thereto and documented to Buyer. Seller may retain such units of inventory of products as it deems reasonably necessary solely to satisfy customers under Transitional Contracts in accordance with this paragraph if Buyer is unable to do so. Following the Closing, Seller shall not enter into any new Transitional Contracts nor extend the term of any existing contract. Except for revenue from MLAs, Buyer and Seller shall negotiate a mutually acceptable arrangement to afford Buyer the benefits of ongoing licenses which are intended to be assigned

hereunder as part of the Assets but which cannot be assigned due to third party objections.

1.6 License Back of Assets. Concurrent with the Closing, Buyer shall execute a license agreement under which it shall grant to Seller a royalty-free, perpetual, worldwide license to (i) all of the technology included in the Assets and (ii) all derivatives of the technology included in the Assets, including the "Eiger" product release (such licensed back technology to be referred to collectively as "Licensed Technology"). Seller agrees that it shall use the Licensed Technology only (i) for internal purposes without restriction or (ii) for resale in bundled or integrated products sold by Seller which are not directly competitive with the core products of Buyer and in which the Licensed Technology does not constitute a primary portion of the value of the total bundled or integrated product. The license agreement shall include reasonable provisions concerning Buyer's obligation to provide documentation and support for the Licensed Technology. The license agreement shall also provide Seller with an unlimited royalty-free, perpetual, worldwide license to the Licensed Technology upon the occurrence of a Change of Control of Buyer described in Section 6.3(c) hereof. In the event of a Change of Control of Seller (as defined in Section 6.6 hereof), the license granted pursuant to the license agreement shall be limited to Seller's products either developed or substantially developed as of the time of the Change of Control.

1.7 Closing.

(a) Closing. Unless this Agreement is earlier terminated pursuant to Article VII, the closing of the transactions contemplated by this Agreement (the "Closing") shall be held at the offices of Wilson, Sonsini, Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304, at 10:00 a.m. on the date which is two business days following satisfaction or waiver of the last of the conditions to Closing as set forth in the Article IV hereof, or on such other time and/or date as the parties agree (the actual date on which the Closing occurs is referred to herein as the "Closing Date").

(b) Delivery. At the Closing:

(i) Buyer shall deliver to Seller an instrument of assumption of liabilities by which Buyer shall assume the Assumed Liabilities as of the Closing;

(ii) Buyer shall deliver to Seller a certificate or certificates representing the Shares;

(iii) Seller shall deliver to Buyer all bills of sale, endorsements, assignments, consents to assignments to the extent obtained and other instruments and documents as Buyer may reasonably request to sell, convey, assign, transfer and deliver to Buyer Seller's title to all the Assets; and

(iv) Seller and Buyer shall deliver or cause to be delivered to one another such other instruments and documents necessary or appropriate to evidence the due execution, delivery and performance of this Agreement.

(c) Taking of Necessary Action; Further Action. If, at any time after the Closing Date, any further action is necessary or desirable to carry out the purposes of this Agreement the parties agree to take, and will take, all such lawful and necessary and/or desirable action.

ARTICLE II

REPRESENTATIONS AND WARRANTIES OF SELLER

Except as described with reasonable particularity in the Seller Disclosure Schedule (which shall cross-reference to the particular section below to which such description applies) delivered by Seller to Buyer simultaneously with the execution of this Agreement, as such Seller Disclosure Schedule may be updated and/or amended pursuant to Section 4.11 hereof (the "Seller Disclosure Schedule"), Seller represents and warrants to Buyer that:

2.1 Organization, Standing and Power. Seller is a corporation duly organized, validly existing and in good standing under the laws of its state of incorporation, and has all requisite corporate power and authority to own, operate and lease its properties and to carry on its business as now being conducted. Seller is duly qualified as a foreign corporation and is in good standing in each jurisdiction in which the failure to so qualify reasonably would be expected to have a material adverse effect on the Business Condition of the Business. (As used in this Agreement, "Business Condition" with respect to any corporate entity, group of corporate entities or the Business shall mean the business, financial condition, results of operations and assets of such corporate entity, group of corporate entities or the Business, as the case may be.) Seller has made available to Buyer complete and correct copies of the Certificate of Incorporation and Bylaws of Seller, as amended to the date hereof.

2.2 Authority. Seller has all requisite corporate power and authority to enter into this Agreement and, to consummate the transactions contemplated hereby. The execution and delivery of this Agreement, the performance by Seller of its obligations hereunder and the consummation of the transactions contemplated hereby have been duly and validly authorized by all necessary corporate action on the part of Seller, and have been approved by the Board of Directors of Seller. No other corporate proceeding on the part of either Seller is necessary to authorize the execution and delivery of this Agreement by Seller or the performance of Seller's obligations hereunder or the consummation of the transactions contemplated hereby. This Agreement has been duly executed and delivered by Seller and constitutes a legal, valid and binding

obligation of Seller enforceable against Seller in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency, or other similar laws affecting the enforcement of creditors' rights generally and except that the availability of equitable remedies is subject to the discretion of the court before which any proceeding therefor may be brought. Subject to satisfaction or waiver of the conditions set forth in Article V the execution and delivery of this Agreement does not, and the consummation of the transactions contemplated hereby will not, conflict with or result in any violation of any statute, law, rule, regulation, judgment, order, decree, or ordinance applicable to Seller, or its properties or assets that, individually or in the aggregate, reasonably would be expected to have a material adverse effect on the Business Condition of the Business, or conflict with any provision of the Certificate of Incorporation or Bylaws of Seller or result in any breach or default (with or without notice or lapse of time, or both) under, or give rise to a right of termination, cancellation or acceleration of any obligation or to loss of a material benefit under, or result in the creation of a lien or encumbrance on any of the properties or assets of Seller pursuant to any agreement, contract, note, mortgage, indenture, lease, instrument, permit, concession, franchise or license to which Seller is a party or by which Seller or its properties or assets may be bound that would reasonably be expected, either individually or in the aggregate, to have a material adverse effect on the Business Condition of the Business). No consent, approval, order or authorization of, or registration, declaration or filing with, any court, administrative agency, commission, regulatory authority or other governmental authority or instrumentality, domestic or foreign (a "Governmental Entity"), is required by or with respect to Seller in connection with the execution and delivery of this Agreement or the consummation by Seller of the transactions contemplated hereby, except for (i) the filing of a pre-merger notification report under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"); (ii) those required to be made or obtained by Buyer or any of its affiliates, (iii) such consents, approvals, orders, authorizations, registrations, declarations and filings as would not have a material adverse effect on the ability of Seller to transfer the Assets to Buyer at the Closing.

2.3 Financial Statements. Seller has furnished Buyer with unaudited financial information concerning the Business as of July 31, 1995 (the foregoing financial information is referred to collectively as the "Business Financial Information"). The Business Financial Information has been prepared in accordance with generally accepted accounting principles consistently applied (except as may be indicated in the notes thereto) and fairly present, in all material respects, the financial position of the Business as at the dates thereof and the results of operations for the periods then ended. There has been no material change in Seller's accounting policies during such periods relating to the Business.

2.4 Compliance with Law. Seller has conducted the Business so as to comply in all material respects with all laws, rules and regulations, judgments, decrees or orders of any Governmental Entity applicable to its operations except where the failure so to comply reasonably would not be expected to have a material adverse effect on the

Business Condition of the Business. As of the date hereof, there are no judgments or orders, injunctions, decrees, stipulations or awards (whether rendered by a court or administrative agency or by arbitration) against Seller with any continuing effect that reasonably would be expected to have a material adverse effect on the Business Condition of the Business. To the knowledge of Seller, there is no investigation by any Governmental Entity with respect to Seller pending against Seller which is reasonably likely to have a material adverse effect on the Business Condition of the Business.

2.5 No Defaults. To the knowledge of Seller, Seller is not, nor has it received written notice that it would be with the passage of time, (i) in violation of any provision of its Certificate of Incorporation or Bylaws or (ii) in default or violation of any term, condition or provision of (A) any judgment, decree, order, injunction or stipulation applicable to the Business or (B) any agreement, note, mortgage, indenture, contract, lease or instrument, permit, concession, franchise or license to which Seller is a party (with respect to the Business) or by which the Business may be bound, in any such case in a manner that reasonably would be expected to have a material adverse effect on the Business Condition of the Business.

2.6 Litigation. There is no action, suit, proceeding, claim or governmental investigation pending or, to the knowledge of Seller, threatened, against Seller that reasonably would be expected to have a material adverse effect on the Business Condition of the Business. There is no action, suit, proceeding, claim or governmental investigation pending against Seller as of the date hereof that in any manner challenges or seeks to prevent, enjoin, alter or materially delay any of the transactions contemplated hereby.

2.7 Absence of Certain Changes. Since July 31, 1995, Seller has conducted the Business in the ordinary course and, except for the execution, delivery and performance of this Agreement or as required hereby, there has not occurred: (a) any material adverse change in the Business Condition of the Business; (b) any entry into any material commitment or transaction by Seller relating to the Business, other than in the ordinary course of business; (c) any damage, destruction or loss, whether covered by insurance or not, materially and adversely affecting the Business Condition of the Business; (d) any acquisition or disposition of a material amount of property or assets of Seller relating to the Business outside of the ordinary course of business; (e) any transfer or grant by Seller of a right under any Seller Intellectual Property Rights (as defined in Section 2.10 hereof), other than those transferred or granted in the ordinary course of business.

2.8 Agreements. With respect to the Business, Seller is not a party to, and the Business is not subject to:

(a) Any union contract or any employment contract or arrangement providing for future compensation, written or oral, with any officer,

consultant, director or employee which is not cancelable by Seller on 30 days' notice or less without penalty or obligation to make payments related to such termination, other than (A) (in the case of employees other than executive officers of Seller) such agreements as are not materially different from standard arrangements offered to employees generally in the ordinary course of business consistent with Seller's past practices and (B) such agreements as may be imposed or implied by law;

(b) Any plan, contract or arrangement, the obligations under which exceed \$100,000, written or oral, providing for bonuses, pensions, deferred compensation, severance pay or benefits, retirement payments, profit-sharing, or the like;

(c) As of the date hereof, any existing OEM agreement, distribution agreement, volume purchase agreement, or other similar agreement in which the annual amount paid or received by Seller during the twelve-month period ended July 31, 1995 exceeded \$1,500,000 or pursuant to which Seller has granted most favored nation pricing provisions or exclusive marketing rights related to any product, group of products or territory to any person;

(d) Any lease or month-to-month tenancy for real or personal property in which the amount of payments which Seller is required to make on an annual basis exceeds \$100,000;

(e) Any contract containing covenants purporting to limit Seller's freedom to compete in any line of business in any geographic area; or

(f) Any license to a third party involving Seller Intellectual Property Rights (as such term is defined in Section 2.10 hereof) source or binary code which includes a right to sublicense such source or binary code without additional payment.

Each agreement, contract, mortgage, indenture, plan, lease, instrument, permit, concession, franchise, arrangement, license and commitment listed in the Seller Disclosure Schedule pursuant to this Section is valid and binding on Seller, and is in full force and effect, and Seller has not breached any provision of, nor is it in default under the terms of, any such agreement, contract, mortgage, indenture, plan, lease, instrument, permit, concession, franchise, arrangement, license or commitment except for such failures to be valid and binding or in full force and effect and such breaches or defaults as reasonably would not be expected to have a material adverse effect on the Business Condition of the Business.

2.9 Tax Returns and Reports.

(a) Definition of Taxes. For the purposes of this Agreement, "Tax" or "Taxes" refers to any and all federal, state, local and foreign taxes, assessments

and other governmental charges, duties, impositions and liabilities relating to taxes, including taxes based upon or measured by gross receipts, income, profits, sales, use and occupation, and value added, ad valorem, transfer, franchise, withholding, payroll, recapture, employment, excise and property taxes, together with all interest, penalties and additions imposed with respect to such amounts and any obligations under any agreements or arrangements with any other person with respect to such amounts and including any liability for taxes of a predecessor entity.

(b) Tax Returns and Audits. Except as reasonably would not be expected to have a material adverse effect on the Business Condition of the Business:

(i) Seller has timely filed all federal, state, local and foreign returns, estimates, information statements and reports ("Returns") relating to Taxes required to be filed by it, except such Returns which are not material to the Business, and has paid all Taxes shown to be due on such Returns or is contesting them in good faith.

(ii) Seller has withheld with respect to its employees all federal and state income taxes, FICA, FUTA and other Taxes required to be withheld.

(iii) Seller has not been delinquent in the payment of any Tax nor is there any Tax deficiency outstanding, proposed or assessed against Seller, nor has Seller executed any waiver of any statute of limitations on or extending the period for the assessment or collection of any Tax.

(iv) No audit or other examination of any Return of Seller is presently in progress, nor has Seller been notified of any request for such an audit or other examination.

(v) None of the Assets are treated as "tax-exempt use property" within the meaning of Section 168(h) of the Code.

(vi) Seller is not, and has not been at any time, a "United States real property holding corporation" within the meaning of Section 897(c)(2) of the Code.

2.10 Technology. To the knowledge of Seller, as of the date hereof, Seller owns, co-owns or is licensed or otherwise entitled to use rights to all patents, trademarks, trade names, service marks, copyrights, mask work rights, trade secret rights, and other intellectual property rights and any applications therefor, and all maskworks, net lists, schematics, technology, source code, know-how, computer software programs and all other tangible information or material, that are used in the Business as currently conducted (the "Seller Intellectual Property Rights").

The Seller Disclosure Schedule lists, as of the date hereof, (i) all patents, registered copyrights, trademarks, service marks, mask work rights, and any applications therefor, included in the Seller Intellectual Property Rights; (ii) the jurisdictions in which each such Seller Intellectual Property Right has been issued or registered or in which an application for such issuance and registration has been filed, including the respective registration or application numbers; and (iii) which, if any, of such products have been registered for copyright protection with the United States Copyright Office and any foreign offices. The Seller Disclosure Schedule also sets forth a list of license agreements which, to Seller's knowledge, constitutes all license agreements under which Seller licenses as licensee the intellectual property rights of third parties relating to technology or software which is incorporated in existing products of the Business for which products Seller has received revenues in excess of \$2,000,000 in the twelve-month period ended July 31, 1995. To Seller's knowledge, Seller is not in material violation of any such license agreement.

With respect to the Business, Seller is not a party to nor is the Business subject to (i) any joint venture contract or arrangement or any other agreement that involves a sharing of profits with other persons other than the payment or receipt of royalties by Seller; (ii) any agreement pursuant to which Seller was obligated to make payment of royalties in the twelve-month period ended July 31, 1995 of \$1,000,000 or more; or (iii) any agreement pursuant to which Seller utilizes the intellectual property rights of others in any products currently marketed by Seller and which is either non-perpetual or terminable by the licensor thereunder in the event of the Acquisition and which, if terminated, reasonably would be expected to have a material adverse effect on the Business Condition of the Business.

No claims with respect to the Seller Intellectual Property Rights have been communicated in writing to Seller (i) to the effect that the manufacture, sale or use of any product of the Business as now used or offered by Seller infringes on any copyright, patent, trade secret or other intellectual property right of a third party or (ii) challenging the ownership or validity of any of the Seller Intellectual Property Rights; any or all of which claims reasonably would be expected to have a material adverse effect on the Business Condition of the Business. To the knowledge of Seller, as of the date hereof, all patents and registered trademarks, service marks and registered copyrights held by Seller in connection with the Business are valid and subsisting except for failures to be valid and subsisting that reasonably would not be expected to have a material adverse effect on the Business Condition of the Business. Seller does not know of any unauthorized use, infringement or misappropriation of any of the Seller Intellectual Property Rights by any third party that reasonably would be expected to have a material adverse effect on the Business Condition of the Business.

2.11 Title to Properties; Absence of Liens and Encumbrances.

(a) The Seller Disclosure Schedule sets forth a list of all real property owned or, as of the date hereof, leased by Seller for use in connection with the Business and the aggregate annual rental or mortgage payment or other fees payable under any such lease or loan.

(b) Seller has good and valid title to, or, in the case of leased properties and assets, valid leasehold interests in, all of the tangible properties and assets, real, personal and mixed, which are material to the conduct of the Business, free and clear of any liens, charges, pledges, security interests or other encumbrances, except for such of the foregoing as (A) are reflected in the Seller Financial Statements, or (B) arise out of taxes or general or special assessments not in default and payable without penalty or interest or the validity of which is being contested in good faith by appropriate proceedings, or (C) such imperfections of title and encumbrances, if any, which are not substantial in character, amount or extent, and which do not materially detract from the value, or interfere with the present use, of the property subject thereto or affected thereby.

2.12 Governmental Authorizations and Licenses. Seller is the holder of all licenses, authorizations, permits, concessions, certificates and other franchises of any Governmental Entity required to operate the Business, the failure to hold which reasonably would be expected to have a material adverse effect on the Business Condition of the Business (collectively, the "Licenses"). The Licenses are in full force and effect. There is not now pending, or to the knowledge of Seller is there threatened, any action, suit, investigation or proceeding against Seller before any Governmental Entity with respect to the Licenses, nor is there any issued or outstanding notice, order or complaint with respect to the violation by Seller of the terms of any License or any rule or regulation applicable thereto, except in any such case as reasonably would not be expected to have a material adverse effect on the Business Condition of the Business.

2.13 Environmental Matters. To Seller's knowledge, Seller has at all relevant times with respect to the Business been in material compliance with all environmental laws, and has received no potentially responsible party ("PRP") notices or functionally equivalent notices from any governmental agencies or private parties concerning releases or threatened releases of any "hazardous substance" as that term is defined under 42 U.S.C. 9601(14).

2.14 Customers. The Seller Disclosure Schedule sets forth each customer of the Business that paid Seller royalties and licensee fees in an aggregate amount in excess of \$1,000,000 during the twelve-month period ended July 31, 1995.

2.15 Proprietary Information and Inventions and Confidentiality Agreements. To the knowledge of Seller, each employee, consultant, and officer of Seller (exclusively with respect to the Business) has executed a proprietary information and inventions and confidentiality agreement, copies of which have been made available

9.3 Interpretation. When a reference is made in this Agreement to Schedules or Exhibits, such reference shall be to a Schedule or Exhibit to this Agreement unless otherwise indicated. The words "include," "includes" and "including" when used herein shall be deemed in each case to be followed by the words "without limitation." The table of contents and headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

9.4 Counterparts. This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other party, it being understood that all parties need not sign the same counterpart.

9.5 Entire Agreement. This Agreement, and the Schedules and Exhibits hereto: (a) constitute the entire agreement among the parties with respect to the subject matter hereof and supersede all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof; (b) are not intended to confer upon any other person any rights or remedies hereunder, unless expressly provided otherwise; and (c) shall not be assigned by operation of law or otherwise except as otherwise specifically provided.

9.6 Severability. In the event that any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, void or unenforceable, the remainder of this Agreement will continue in full force and effect and the application of such provision to other persons or circumstances will be interpreted so as reasonably to effect the intent of the parties hereto. The parties further agree to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that will achieve, to the extent possible, the economic, business and other purposes of such void or unenforceable provision.

9.7 Other Remedies. Except as otherwise provided herein, any and all remedies herein expressly conferred upon a party will be deemed cumulative with and not exclusive of any other remedy conferred hereby, or by law or equity upon such party, and the exercise by a party of any one remedy will not preclude the exercise of any other remedy.

9.8 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California regardless of the laws that might otherwise govern under applicable principles of conflicts of laws thereof.

9.9 Rules of Construction. The parties hereto agree that they have been represented by counsel during the negotiation and execution of this Agreement and, therefore, waive the application of any law, regulation, holding or rule of

construction providing that ambiguities in an agreement or other document will be construed against the party drafting such agreement or document.

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7.2

IN WITNESS WHEREOF, Buyer and Seller have caused this Agreement to be signed by their duly authorized respective officers, all as of the date first written above.

THE SANTA CRUZ OPERATION, INC.

By:

Name: Alak Mohan

Title: Chief Executive Officer

NOVELL, RICHARD

By:

Name: Robert J. Frankenberg

Title: Chairman of the Board.

President and Chief
Executive Officer

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EXHIBIT No. 4

Schedule 1.1(a)

Assets

(Page 1 of 4)

- I. All rights and ownership of UNIX and UnixWare, including but not limited to all versions of UNIX and UnixWare and all copies of UNIX and UnixWare (including revisions and updates in process), and all technical, design, development, installation, operation and maintenance information concerning UNIX and UnixWare, including source code, source documentation, source listings and annotations, appropriate engineering notebooks, test data and test results, as well as all reference manuals and support materials normally distributed by Seller to end-users and potential end-users in connection with the distribution of UNIX and UnixWare, such assets to include without limitation the following:

UNIX Source Code Products

- A. UnixWare 2.0 as described in the UnixWare 2.0 Licensing Schedule and those products listed as "prior" products on such schedule (includes source code updates where appropriate - i.e. UnixWare product family).
- B. UNIX SVR4.1 ES as described in the UNIX SVR4.1 ES Licensing Schedule and those products listed as "prior" products on such schedule
- C. UNIX SVR4.0MP as described in the UNIX SVR4.0 MP Licensing Schedule and those products listed as "prior" products on such schedule.
- D. Ancillary SVRx Products (a final list of which shall be developed by the parties prior to the Closing)

Binary Product Releases

- A. UnixWare 2.01 Product Family as described by the Novell UnixWare 2.01 Part/Price List
- B. UnixWare 2.0.x update releases
- C. UnixWare 1.1 Product Family as described by the Novell UnixWare 1.1 Part/Price List
- D. UnixWare 1.1.x - update releases

Products Under Development

- A. UnixWare 2.1 (Eiger) - contains NetWare UNIX Client and Server capabilities
- B. UnixWare 2.1 Oracle Parallel Server (OPS)
- C. UnixWare 2.03 - maintenance update under development
- D. UnixWare 2.0.x/2.1 Enhanced Mode Merge
- E. UnixWare 2 Internet Server

Schedule 1.1(a)

Assets

(Page 2 of 4)

Other Technology

- A. UnixWare system/HBA/etc. Test/Certification Suites Used by Novell Labs
 - B. UnixWare "OS Branding" Test Suites
 - C. UnixWare "OS Compatible" Requirements
 - D. Gaede Performance Test suite
 - E. ARTUS, Bart, Buster Internal UNIX Test suites and test harnesses
 - F. UnixWare Training/Education Courseware
 - G. Requirements, Design, and Test Specifications for UnixWare 2
 - H. Technical Support Update Manager
 - I. Marketing collateral/information in electronic form
 - J. ODI Transmogrification software
- II. All of Seller's claims arising after the Closing Date against any parties relating to any right, property or asset included in the Business.
- III. All of Seller's rights pertaining to UNIX and UnixWare under any software development contracts, licenses and any other contracts to which Seller is a party or by which it is bound and which pertain to the Business (to the extent that such contracts are assignable), including without limitation:
- A. Joint Development with third parties:
 - 1. In-Process development agreements
 - 2. Past development agreements with on-going pricing discounts
 - 3. Past development agreements without ongoing pricing discounts
 - 4. Joint development agreements in which Seller didn't get full rights to the code developed.
 - B. Third party software license agreements - Those agreements in which Seller pays per copy fees for technology/products which are shipped with or to be used with UNIX System and/or UnixWare.
 - C. Joint marketing agreements - Marketing programs with customers.
 - D. End user MLA agreements - Agreements to allow end users to copy binary products for internal use only. Associated with these agreements are support requirements.
 - E. UNIX-only VAR agreements - UNIX Masters VARs

Schedule 1.1(a)

Assets

(Page 3 of 4)

- F. Support agreements - End user support agreements (i.e., TMAC, NALCOMIS)
 - G. Microsoft agreement (Xenix Agreement) - Xenix compatibility and per copy fee agreement. Seller will agree to discuss with SCO Seller's interpretation of this agreement.
 - H. Microsoft Agreement (Extra-Ordinary Discount) - Microsoft's additional discount beyond 80%.
 - I. Strategic Relationship Agreements (i.e. MTA, ECPA, MBA, etc.)
 - J. Out-sourced development (i.e., India) - Development agreements with third parties (Wipro and HCL) and India Development Center. IDC is a Seller subsidiary.
 - K. Out-sourced Support Agreements
 - L. Software and Sublicensing Agreements - This includes the source code and sublicensing agreements that Seller has with its OEM, End User and Educational customers. The total number of these agreements is approximately 30,000.
 - M. OEM Binary Licensing Agreements - OEM distribution of UnixWare with Seller's agreement to include some OEM added value into future releases of UnixWare.
- IV. All copies of UNIX and UnixWare, wherever located, owned by Seller.
- V. Intellectual property - Trademarks UNIX and UnixWare as and to the extent held by Seller (excluding any compensation Seller receives with respect of the license granted to X/Open regarding the UNIX trademark).
- VI. All contracts relating to the SVRX Licenses listed below:
- UNIX System V Release 4.2 MP, Intel386 Implementation
 - #UNIX System V Release 4.2 MP International Edition, Intel386 Implementation
 - UNIX System V Release 4.2, Intel386 Implementation
 - #UNIX System V Release 4.2 International Edition, Intel386 Implementation
 - UNIX System V Release 4.1 ES, Intel386 Implementation
 - #UNIX System V Release 4.1 ES International Edition, Intel386 Implementation

Schedule 1.1(a)

Assets

(Page 4 of 4).

- UNIX System V Release 4.0 MP, Intel386 Implementation
- #UNIX System V Release 4.0 MP International Edition, Intel386 Implementation
- UNIX System V Release 4.0 MP, Intel386 Version 4 Implementation
- #UNIX System V Release 4.0 International Edition, Intel386 Version 4 Implementation
- UNIX System V Release 4.0, Intel386 Version 3 Implementation
- #UNIX System V Release 4.0 International Edition, Intel386 Version 3 Implementation
- UNIX System V Release 4.0, Intel386 Version 2 Implementation
- #UNIX System V Release 4.0 International Edition, Intel386 Version 2 Implementation
- UNIX System V Release 4.0, Intel386 Version 1 Implementation
- #UNIX System V Release 4.0 International Edition, Intel386 Version 1 Implementation
- UNIX System V/386 Release 3.2 and #UNIX System V/386 Release 3.2 International Edition
- UNIX System V Release 3.2 and #UNIX System V Release 3.2 International Edition
- UNIX System V Release 3.1 and #UNIX System V Release 3.1 International Edition
- UNIX System V Release 3.0 and #UNIX System V Release 3.0 International Edition
- All prior releases and versions of UNIX System V Release 2.1
- #All prior releases and versions of UNIX System V Release 2.1 International Editions
- All prior releases and versions of UNIX System V Release 2.0
- #All prior releases and versions of UNIX System V Release 2.0 International Editions
- All prior UNIX System releases and versions preceding UNIX System V Release 2.0
- #All prior UNIX System releases and versions preceding UNIX System V Release 2.0 International Editions

VII. Such office furniture and personal computers or work stations as may be currently used by the employees of Seller hired by Buyer pursuant to Section 4.13 hereof.

EXHIBIT No. 5

Schedule 1.1(b)
Excluded Assets
(Page 1 of 2)

- I. Any asset not listed on Schedule 1.1(a), including without limitation any asset which pertains to NetWare which is not listed on Schedule 1.1(a)
- II. NetWare Operating System and Services
- III. TUXEDO Transaction Processing
- IV. Licensed technology, including:
 - A. NetWare and other Novell code contained in UnixWare 2.01 and Eiger:
 - 1. ODI Software contained in NetWare and UnixWare LAN Drive Test Kit
 - 2. Nprinter (for printing from NetWare to UnixWare Server)
 - 3. NUC (NetWare UNIX Client - for print, etc. from UnixWare to NetWare Server)
 - 4. TNVT, Host Presenter (Terminal Emulation to Log into UnixWare Server from NetWare Client)
 - 5. MHS Gateway (Mail Gateway)
 - 6. IPX/SPX (Re-Write of Native 4.1)
 - 7. ODI (Networking driver protocol; version 3.3 of assembly Spec and 1.0 of C Spec)
 - 8. Xconsole (Log-in to NetWare console)
 - 9. UnixWare TSA (SMS is back-up and restore, TSA is the 'agent' needed to do this)
 - 10. Some NetWare Client APIs
 - 11. DR-DOS
 - 12. Host Presenter (*Binary only*)
 - 13. TNVT (*Binary only*)
 - 14. criptor (*Binary only*)
 - 15. NetWare NLM (*Binary only*)
 - B. NetWare code contained in Eiger Only:
 - 1. NDS APIs
 - 2. NWS (Incl. NetWare File, Print and Directory Services)
 - C. NetWare 4.1 for UnixWare

Schedule 1.1(b)
Excluded Assets
(Page 2 of 2)

- V. Intellectual Property:
 - A. All copyrights and trademarks, except for the trademarks UNIX and UnixWare.
 - B. All Patents
- VI. Existing Master License Agreements with end users which include, in addition to other products of Seller, integrated delivery of UnixWare.
- VII. All accounts receivable or rights to payment concerning the Assets arising prior to the Closing Date.
- VIII. All right, title and interest to the SVRx Royalties, less the 5% fee for administering the collection thereof pursuant to Section 4.16 hereof.

EXHIBIT No. 6

SELLER DISCLOSURE SCHEDULE

For convenience, section numbers refer to the Asset Purchase Agreement dated as of September 19, 1995 between Seller and The Santa Cruz Operation, Inc. However, the disclosure herein of any information which is relevant in connection with more than one section of such agreement shall be deemed adequate in all respects notwithstanding the fact that such information is disclosed herein only with reference to one section.

Section 2.6

Claims and threatened litigation:

Seller has been put on notice of a possible infringement of Unisys patent 4,558,302, covering the so-called LZW data-compression algorithm.

Section 2.8(c)

(i) Contracts under which Seller paid \$1,500,000 or more in Business related royalties, additional license fees and revenue sharing during the period 8/1/94 - 7/31/95:

(1) February 7, 1987 Development and License Agreement now in effect between Seller and Microsoft Corporation

(2) March 8, 1993 International OEM Distribution Agreement now in effect between Seller and Locus Computing Corporation

(ii) Customers from whom Seller received \$1,500,000 or more in Business related royalties, additional license fees and revenue sharing during the period 8/1/94 - 7/31/95:*

See Attachment A

(iii) Contracts now in existence in which Seller granted most favored nation pricing or exclusive marketing rights related to any Business related product, group of products, or territory:

See Attachment B

**Pursuant to various Software Agreements and Sublicensing Agreements administered by Seller's Licensing Organization.*

Section 2.8(f)

(f) Contracts containing rights for a customer to sublicense Business related source or binary code without additional payments to Seller:

(1) January 1, 1994 Software License and Distribution Agreement now in effect between Seller and Sun Microsystems, Inc.

(2) June 9, 1986 Sublicensing Agreement now in effect between Seller and Silicon Graphics, Inc.

Section 2.10

(i) Intellectual Property:

Attachment C to this Schedule contains the most current listing of pending and issued applications for trademarks covering products of the Business.

Attachment D to this Schedule contains a listing of pending and issued applications for patents covering products of the Business.

Attachment E to this Schedule contains a listing of Seller's copyright registrations covering product(s) relating to the Business.

(ii) Contracts under which Seller received Business-related revenues in excess of \$2,000,000 in the twelve month period ending 7/31/95:

See Attachment A

(iii) Contracts pursuant to which Seller was obligated to pay Business-related royalties of \$1,000,000 or more over the period 8/1/94-7/31/95:

See Attachment F

(iv) Contracts containing Business-related rights which are non-perpetual or which are terminable in the event of acquisition:

See Attachment G

(v) Claims of infringement:

See entry for Section 2.6 above

Section 2.11(a)

Real property and leases:

The Business (excluding outside sales and support activities conducted in the ordinary course) is primarily concentrated in a facility leased from Exxon Corporation in Florham Park, New Jersey. A copy of the current lease covering such facility is appended hereto as Attachment H. Other facilities in which relatively minor portions of the Business are conducted are located in San Jose, California, Orem, Utah and Provo, Utah.

Section 2.14

See Attachment A

NOVELL-SCO-Proprietary (Restricted)
Not for disclosure to third parties

Section 2.16

Estimated level of UnixWare software inventory as of October 11, 1995:

U.S. / Canada	\$1,516,860
International	750,700
<hr/>	
Total	\$2,267,560

ATTACHMENT A

Largest Volume OEM Customers of Seller

Sales Over \$2 Million

Microsoft
AT&T
Hewlett-Packard
Fujitsu
NEC
Siemens-Nixdorf
ICL
Digital Equipment
IBM
Silicon Graphics

Sales Over \$1.5 Million

Microsoft
AT&T
Hewlett-Packard
Fujitsu
NEC
Siemens-Nixdorf
ICL
Digital Equipment
IBM
Silicon Graphics

Hitachi
Motorola

Sales Over \$1 Million

Microsoft
AT&T
Hewlett-Packard
Fujitsu
NEC
Siemens-Nixdorf
ICL
Digital Equipment
IBM
Silicon Graphics

Hitachi
Motorola

Cray
Stratus
Tandem
Mitsubishi

Attachment B

Agreements* with Most Favored Customer Pricing or Exclusive

Marketing Rights for Business Products or Territories

- February 21, 1986 Territorial Software Distribution Agreement between AT&T Information Systems, Inc. and AT&T UNIX Pacific Co., Ltd.
- Joint Venture Contract between Shenzhen Comtec Software, Ltd., China National Computer Software & Technology Service Corporation, China Great Wall Computer Group Co., Langchao Electronic Information Industrial Group Corporation, Changjiang Computer Union Corporation (Group), Beijing Modern Information Development Center, Dascom (Holdings) Ltd., and UNIX System Technologies China Company, Ltd. for the Establishment of UNIX System Technologies Company, Ltd.
- Sales Agency Agreement between AUDILOG (France) and UNIX System Laboratories, Inc.
- Publication Agreement between UNIX System Laboratories, Inc. and Addison-Wesley Publishing Company, Inc.
- January 1, 1994 Software License and Distribution Agreement between Seller and Sun Microsystems, Inc.
- May 10, 1994 Trademark Relicensing Agreement between Seller and X/Open Company, Ltd.
- Publication Agreement dated December 17, 1986 between AT&T Information Systems Inc. and Prentice-Hall, Inc.

** Agreements originally entered into by one of Seller's predecessors in title are so identified.*

NOVELL-SCO-Proprietary (Restricted)
Not for disclosure to third parties

ATTACHMENT C
Page 1 of 9

TRADEMARK STATUS REPORT

TRADEMARK	COUNTRY	STATUS	CLASS	FILING DATE	REG. DATE	LOCATOR NO.
UNIX	Argentina	Registered	38	01/31/86	06/02/89	09062-TM5156
UNIX	Argentina	Registered	42	06/05/86	07/04/89	09062-TM5157
UNIX	Argentina	Registered	9	01/31/86	01/31/91	09062-TM5155
UNIX	Australia	Registered	42	01/05/83	01/05/83	09062-TM5161
UNIX	Australia	Registered	38	01/05/83	01/05/83	09062-TM5160
UNIX	Australia	Registered	16	01/05/83	01/05/83	09062-TM5159
UNIX	Australia	Registered	9	01/05/83	01/05/83	09062-TM5150
UNIX	Australia	Registered	9, 38	06/13/84	01/17/85	09062-TM5163
UNIX	Austria	Registered	9, 16, 37, 41, 42	01/19/87	08/05/83	09062-TM5162
UNIX	Benelux	Registered	38, 42	02/01/83	01/19/87	09062-TM5165
UNIX	Benelux	Registered	9, 16	03/06/86	02/01/83	09062-TM5164
UNIX	Bermuda	Registered	9	02/17/89	03/06/86	09062-TM5166
UNIX	Bolivia	Registered	38	02/17/86	11/04/86	09062-TM5168
UNIX	Bolivia	Registered	9	02/17/86	11/04/86	09062-TM5167
UNIX	Brazil	Registered	38	01/29/86	08/25/87	09062-TM5171
UNIX	Brazil	Registered	9	05/19/83	07/31/84	09062-TM5170
UNIX	Brazil	Registered	9	01/29/86	08/25/87	09062-TM5169
UNIX	Canada	Registered	9	01/19/83	04/24/87	09062-TM5172
UNIX	Chile	Registered	9, 38	03/19/86	10/16/92	09062-TM5173
UNIX	China	Registered	16	11/11/85	11/30/86	09062-TM5174
UNIX	Colombia	Registered	38	02/26/86	04/12/89	09062-TM5176
UNIX	Colombia	Registered	9	02/26/86	12/09/88	09062-TM5175
UNIX	Costa Rica	Registered	9	10/27/86	06/22/88	09062-TM5177
UNIX	Costa Rica	Registered	16	01/19/87	11/27/90	09062-TM5178
UNIX	Croatia	Filed	9	09/27/92		09062-TM5179
UNIX	Cyprus	Registered	9	08/02/90	09/23/92	09062-TM5180
UNIX	Denmark	Registered	9, 38	05/29/84	03/11/88	09062-TM5181
UNIX	Dominican Repub	Registered	20	05/07/86	08/15/86	09062-TM5182
UNIX	Dominican Repub	Registered	22	05/07/86	08/15/86	09062-TM5183
UNIX	Ecuador	Registered	9	03/05/86	09/02/86	09062-TM5184
UNIX	Ecuador	Registered	38	03/05/86	09/19/86	09062-TM5185
UNIX	Egypt	Registered	9	10/03/85	02/23/94	09062-TM5186
UNIX	Egypt	Registered	42	01/09/85	11/12/86	09062-TM5187
UNIX	El Salvador	Registered	9	08/22/86	07/12/89	09062-TM5188
UNIX	Finland	Registered	9, 38	11/12/85	03/20/89	09062-TM5189

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TRADEMARK	COUNTRY	STATUS	CLASS	FILING DATE	REG. DATE	LOCATOR NO.
UNIX	France	Registered	9, 38	10/26/84	10/26/84	09062-TM5190
UNIX	France	Registered	3, 16, 17, 21, 28, 30, 33	03/29/82	03/29/92	09062-TM5191
UNIX	Germany	Registered	9, 16, 37, 38, 42	11/27/90	07/30/91	09062-TM5192
UNIX	Germany	Registered	9, 16, 37, 38, 42	07/02/90	08/14/90	09062-TM5193
UNIX	Germany	Registered	9, 16, 42	03/21/83	11/17/83	09062-TM5194
UNIX	Greece	Registered	9	04/18/88	10/17/91	09062-TM5195
UNIX	Greece	Filed	38	11/17/92		09062-TM5196
UNIX	Guatemala	Registered	9	09/10/86	09/09/88	09062-TM5197
UNIX	Honduras	Registered	38	04/16/86	12/05/88	09062-TM5199
UNIX	Honduras	Registered	9	04/16/86	12/05/88	09062-TM5198
UNIX	Hong Kong	Registered	9	05/11/84	05/11/84	09062-TM5200
UNIX	Hong Kong	Registered	16	05/11/84	05/11/84	09062-TM5201
UNIX	Hungary	Registered	9	03/06/91	12/22/92	09062-TM5202
UNIX	Iceland	Registered	9	07/13/90	12/05/90	09062-TM5203
UNIX	India	Registered	9	08/08/85	08/08/85	09062-TM5205
UNIX	India	Registered	9	01/01/85	01/01/85	09062-TM5204
UNIX	Indonesia	Reflected	9	08/05/85		09062-TM5206
UNIX	Ireland	Registered	9	07/24/85	07/24/85	09062-TM5208
UNIX	Ireland	Registered	9	05/17/84	05/17/84	09062-TM5207
UNIX	Israel	Registered	42	11/26/86	10/22/87	09062-TM5212
UNIX	Israel	Registered	38	01/27/83	08/06/87	09062-TM5211
UNIX	Israel	Registered	16	01/27/83	06/25/87	09062-TM5210
UNIX	Israel	Registered	9	01/27/83	06/25/87	09062-TM5209
UNIX	Italy	Registered	9, 38	03/22/84	05/23/86	09062-TM5213
UNIX	Jamaica	Registered	9	02/13/86	06/08/92	09062-TM5214
UNIX	Japan	Filed	42	09/01/92		09062-TM5217
UNIX	Japan	Registered	11	12/26/89	01/31/95	09062-TM5482
UNIX	Japan	Registered	41		02/28/95	09062-TM5216
UNIX	Japan	Registered	26	05/18/84	01/29/93	09062-TM5215
UNIX	Jordan	Proposed				09062-TM5218
UNIX	Kenya	Filed	9	09/13/94		09062-TM5476
UNIX	Korea, South	Registered	39	03/19/83	11/09/83	09062-TM5219
UNIX	Liberia	Registered	N/A	03/10/86	03/10/86	09062-TM5220
UNIX	Liechtenstein	Registered	9, 38	01/13/86	10/31/91	09062-TM5221
UNIX	Macau	Registered	9, 38	12/22/87	12/13/91	09062-TM5222

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TRADEMARK	COUNTRY	STATUS	CLASS	FILING DATE	REG. DATE	LOCATOR NO.
UNIX	Macau	Registered	9	12/22/87	12/13/91	09062-TM5222
UNIX	Macau	Published	16	06/17/86		09062-TM5223
UNIX	Malaysia	Registered	9	01/02/86		09062-TM5225
UNIX	Malta	Registered	9	07/31/85	07/31/85	09062-TM5226
UNIX	Mexico	Registered	35	07/15/85	06/12/87	09062-TM5229
UNIX	Mexico	Registered	9	07/15/85	06/24/87	09062-TM5227
UNIX	Mexico	Registered	9	07/23/85	10/28/85	09062-TM5228
UNIX	Monaco	Registered	9, 38	03/20/86	03/20/86	09062-TM5230
UNIX	Morocco	Registered	9, 16, 38	01/20/86	01/20/86	09062-TM5231
UNIX	New Zealand	Registered	16	10/09/84	10/09/84	09062-TM5234
UNIX	New Zealand	Registered	9	06/28/82	06/28/82	09062-TM5232
UNIX	New Zealand	Registered	9	06/17/85	06/17/85	09062-TM5233
UNIX	Nicaragua	Registered	9	08/06/86	06/03/87	09062-TM5235
UNIX	Nigeria	Filed	9	03/21/86		09062-TM5236
UNIX	Norway	Registered	9, 38	05/11/84	12/22/87	09062-TM5237
UNIX	Pakistan	Filed	16	04/01/86		09062-TM5239
UNIX	Pakistan	Registered	9	04/01/86	04/01/86	09062-TM5238
UNIX	Panama	Registered	9	09/28/87	07/29/88	09062-TM5241
UNIX	Panama	Registered	9	04/28/86	02/27/87	09062-TM5240
UNIX	Papua New Guinea	Registered	38	05/08/87	05/08/87	09062-TM5243
UNIX	Papua New Guinea	Registered	9	04/05/86	04/05/86	09062-TM5242
UNIX	Paraguay	Registered	9	12/16/85	07/25/86	09062-TM5244
UNIX	Paraguay	Registered	16	11/17/86	10/07/87	09062-TM5245
UNIX	Paraguay	Registered	38	12/16/85	07/25/86	09062-TM5246
UNIX	Peru	Registered	9	12/23/85	04/24/86	09062-TM5247
UNIX	Peru	Abandoned	38	12/23/85	04/24/86	09062-TM5248
UNIX	Philippines	Registered	9	04/17/86	05/29/89	09062-TM5249
UNIX	Poland	Registered	9	05/17/91	09/14/93	09062-TM5250
UNIX	Portugal	Registered	9	01/29/86	07/22/91	09062-TM5251
UNIX	Portugal	Filed	16	06/17/85		09062-TM5252
UNIX	Portugal	Registered	38	01/29/85	07/22/91	09062-TM5253
UNIX	Ras-al-Khaimah	Registered	9	08/21/86	03/15/87	09062-TM5254
UNIX	Russia	Registered	9, 38	01/02/86	07/11/88	09062-TM5282
UNIX	Singapore	Registered	9	06/25/85	06/27/85	09062-TM5255
UNIX	Slovenia	Proposed				09062-TM5256

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TRADEMARK	COUNTRY	STATUS	CLASS	FILING DATE	REG. DATE	LOCATOR NO.
UNIX	South Africa	Filed	16	02/07/86		09062-TM5257
UNIX	Spain	Filed	9	05/07/84		09062-TM5258
UNIX	Spain	Registered	38	05/07/84	05/06/85	09062-TM5259
UNIX	Sri Lanka	Registered	9	01/29/86	12/28/91	09062-TM5260
UNIX	Sudan	Filed	9	01/05/88		09062-TM5261
UNIX	Surinam	Registered	9	03/17/86	03/17/86	09062-TM5262
UNIX	Surinam	Registered	16	03/17/86	03/17/86	09062-TM5263
UNIX	Sweden	Registered	9, 16	10/24/83	12/11/87	09062-TM5264
UNIX	Sweden	Registered	9, 38	03/16/84	02/03/89	09062-TM5265
UNIX	Switzerland	Registered	9	03/15/84	05/31/85	09062-TM5266
UNIX	Syrian Arab	Registered	9, 38	09/02/86	09/19/91	09062-TM5267
UNIX	Taiwan	Registered	8	04/26/83	02/01/84	09062-TM5268
UNIX	Taiwan	Abandoned	8	04/26/83	12/01/83	09062-TM5269
UNIX	Taiwan	Registered	56	04/26/83	11/01/83	09062-TM5270
UNIX	Taiwan	Registered	80	04/26/83	07/16/84	09062-TM5271
UNIX	Taiwan	Registered	94	11/28/83	07/01/84	09062-TM5272
UNIX	Tanganyika	Registered	9	09/13/86	11/13/86	09062-TM5273
UNIX	Thailand	Registered	8	07/16/85	05/12/86	09062-TM5274
UNIX	Thailand	Registered	8	01/09/86	08/21/86	09062-TM5275
UNIX	Tunisia	Registered	9	01/17/86	01/17/86	09062-TM5276
UNIX	Turkey	Registered		03/24/86	03/24/86	09062-TM5277
UNIX	United Arab Emi	Filed	9	03/19/95		09062-TM5278
UNIX	United Kingdom	Registered	9	05/24/83	06/24/83	09062-TM5279
UNIX	United Kingdom	Registered	16	06/24/83	06/24/83	09062-TM5280
UNIX	Uruguay	Registered	9, 16, 38	01/08/86	01/16/92	09062-TM5281
UNIX	Venezuela	Filed	26	09/26/85		09062-TM5283
UNIX	Vietnam	Registered	9, 38, 42	05/12/86	06/17/87	09062-TM5284
UNIX	Yugoslavia	Registered	9	08/02/90	04/08/92	09062-TM5285
UNIX	Zaire	Registered	9, 35, 38	02/10/86	02/10/86	09062-TM5286
UNIX	Zimbabwe	Registered	9	02/05/86	02/05/86	09062-TM5287
UNIX & DESIGN (NESTED CHEVRONS)	Australia	Filed	42			09062-TM5383
UNIX & DESIGN (NESTED CHEVRONS)	Australia	Filed	9	05/20/91		09062-TM5382
UNIX & DESIGN (NESTED CHEVRONS)	France	Registered	9, 16, 35, 42	06/24/91	06/24/91	09062-TM5383
UNIX & DESIGN (NESTED CHEVRONS)	India	Proposed				09062-TM5384

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TRADEMARK	COUNTRY	STATUS	CLASS	FILING DATE	REG. DATE	LOCATOR NO.
UNIX & DESIGN (NESTED CHEVRONS)	Italy	Filed	9, 35, 38, 42	10/24/91		09062-TM5386
UNIX & DESIGN (NESTED CHEVRONS)	Spain	Filed	42	09/03/91		09062-TM5390
UNIX & DESIGN (NESTED CHEVRONS)	United Kingdom	Rejected	42	06/06/91		09062-TM5393
UNIX & DESIGN (NESTED CHEVRONS)	United Kingdom	Registered	16	06/06/91	06/06/91	09062-TM5392
UNIX & DESIGN (NESTED CHEVRONS)	United Kingdom	Registered	9	06/06/91	06/06/91	09062-TM5391
UNIX (KATAKANA VERSION)	Japan	Registered	41		03/31/95	09062-TM5417
UNIX (KATAKANA VERSION)	Japan	Filed	42	09/01/92		09062-TM5418
UNIX AND DESIGN (CRESTED WAVE)	Argentina	Filed	9	05/10/93		09062-TM5288
UNIX AND DESIGN (CRESTED WAVE)	Australia	Filed	9	04/02/93		09062-TM5289
UNIX AND DESIGN (CRESTED WAVE)	Austria	Abandoned	9, 42	04/19/93		09062-TM5290
UNIX AND DESIGN (CRESTED WAVE)	Azerbaijan	Proposed				09062-TM5291
UNIX AND DESIGN (CRESTED WAVE)	Belarus	Filed	9			09062-TM5292
UNIX AND DESIGN (CRESTED WAVE)	Benelux	Registered	9	02/03/93	02/03/93	09062-TM5293
UNIX AND DESIGN (CRESTED WAVE)	Bermuda	Proposed	9			09062-TM5294
UNIX AND DESIGN (CRESTED WAVE)	Bolivia	Filed	9	02/02/93		09062-TM5295
UNIX AND DESIGN (CRESTED WAVE)	Brazil	Published	9	04/05/93		09062-TM5296
UNIX AND DESIGN (CRESTED WAVE)	Canada	Abandoned	9	03/09/93		09062-TM5297
UNIX AND DESIGN (CRESTED WAVE)	Chile	Registered	9	02/02/93	07/29/93	09062-TM5298
UNIX AND DESIGN (CRESTED WAVE)	China	Filed	9	04/29/93		09062-TM5299
UNIX AND DESIGN (CRESTED WAVE)	Colombia	Registered	9	03/02/93	02/23/94	09062-TM5300
UNIX AND DESIGN (CRESTED WAVE)	Costa Rica	Proposed	9			09062-TM5301
UNIX AND DESIGN (CRESTED WAVE)	Croatia	Filed	9	03/18/93		09062-TM5302
UNIX AND DESIGN (CRESTED WAVE)	Denmark	Filed	9	02/12/93		09062-TM5470
UNIX AND DESIGN (CRESTED WAVE)	Dominican Repub	Registered	66	03/04/93	05/15/93	09062-TM5303
UNIX AND DESIGN (CRESTED WAVE)	Ecuador	Filed	9	02/17/93		09062-TM5304
UNIX AND DESIGN (CRESTED WAVE)	Egypt	Filed	9	03/29/93		09062-TM5305
UNIX AND DESIGN (CRESTED WAVE)	El Salvador	Proposed	9			09062-TM5306
UNIX AND DESIGN (CRESTED WAVE)	Estonia	Published	9	04/07/93		09062-TM5307
UNIX AND DESIGN (CRESTED WAVE)	Finland	Filed	9	03/18/93		09062-TM5308
UNIX AND DESIGN (CRESTED WAVE)	France	Proposed				09062-TM5309
UNIX AND DESIGN (CRESTED WAVE)	Georgia	Filed	9	04/29/93		09062-TM5310
UNIX AND DESIGN (CRESTED WAVE)	Germany	Registered	9, 16, 42	02/10/93		09062-TM5311
UNIX AND DESIGN (CRESTED WAVE)	Greece	Abandoned	9	07/12/93	11/22/93	09062-TM5312

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TRADEMARK	COUNTRY	STATUS	CLASS	FILING DATE	REG. DATE	LOCATOR NO.
UNIX AND DESIGN (CRESTED WAVE)	Guatemala	Filed	42	09/17/93		09062-TM5314
UNIX AND DESIGN (CRESTED WAVE)	Guatemala	Filed	9	09/17/93		09062-TM5313
UNIX AND DESIGN (CRESTED WAVE)	Honduras	Proposed	9			09062-TM5315
UNIX AND DESIGN (CRESTED WAVE)	Hong Kong	Abandoned	9	05/12/93		09062-TM5316
UNIX AND DESIGN (CRESTED WAVE)	Hungary	Registered	9, 16, 42	09/20/93		09062-TM5317
UNIX AND DESIGN (CRESTED WAVE)	Iceland	Registered	9	02/17/93	05/27/93	09062-TM5318
UNIX AND DESIGN (CRESTED WAVE)	India	Filed	9	02/05/93		09062-TM5319
UNIX AND DESIGN (CRESTED WAVE)	Indonesia	Proposed		02/11/93		09062-TM5320
UNIX AND DESIGN (CRESTED WAVE)	Ireland	Filed	9	02/09/93		09062-TM5321
UNIX AND DESIGN (CRESTED WAVE)	Israel	Filed	9	02/08/93		09062-TM5322
UNIX AND DESIGN (CRESTED WAVE)	Italy	Filed	9, 42	03/29/93		09062-TM5323
UNIX AND DESIGN (CRESTED WAVE)	Jamaica	Proposed	9			09062-TM5324
UNIX AND DESIGN (CRESTED WAVE)	Japan	Filed	42	05/13/93		09062-TM5327
UNIX AND DESIGN (CRESTED WAVE)	Japan	Filed	9	04/26/93		09062-TM5325
UNIX AND DESIGN (CRESTED WAVE)	Japan	Filed	41	05/13/93		09062-TM5326
UNIX AND DESIGN (CRESTED WAVE)	Kazakhstan	Proposed				09062-TM5328
UNIX AND DESIGN (CRESTED WAVE)	Korea, South	Filed	39	02/23/93		09062-TM5329
UNIX AND DESIGN (CRESTED WAVE)	Latvia	Filed	9	03/09/93		09062-TM5330
UNIX AND DESIGN (CRESTED WAVE)	Liberia	Filed		02/23/93		09062-TM5331
UNIX AND DESIGN (CRESTED WAVE)	Liechtenstein	Registered	9	09/13/93		09062-TM5332
UNIX AND DESIGN (CRESTED WAVE)	Lithuania	Filed	9	01/19/93		09062-TM5333
UNIX AND DESIGN (CRESTED WAVE)	Macau	Published	9	03/11/93		09062-TM5334
UNIX AND DESIGN (CRESTED WAVE)	Malaysia	Filed	9	07/31/93		09062-TM5335
UNIX AND DESIGN (CRESTED WAVE)	Malta	Registered	9	02/03/93	01/06/94	09062-TM5336
UNIX AND DESIGN (CRESTED WAVE)	Mexico	Proposed	9			09062-TM5337
UNIX AND DESIGN (CRESTED WAVE)	Moldova	Abandoned	9	02/12/93		09062-TM5338
UNIX AND DESIGN (CRESTED WAVE)	Monaco	Registered	9	03/22/93		09062-TM5339
UNIX AND DESIGN (CRESTED WAVE)	Morocco	Registered	9	02/19/93		09062-TM5340
UNIX AND DESIGN (CRESTED WAVE)	New Zealand	Filed	9			09062-TM5341
UNIX AND DESIGN (CRESTED WAVE)	Nicaragua	Proposed	9			09062-TM5342
UNIX AND DESIGN (CRESTED WAVE)	Nigeria	Registered	9	05/24/93	06/07/93	09062-TM5343
UNIX AND DESIGN (CRESTED WAVE)	Norway	Published	9, 42	03/19/93		09062-TM5344
UNIX AND DESIGN (CRESTED WAVE)	Pakistan	Filed	9	03/30/93		09062-TM5345
UNIX AND DESIGN (CRESTED WAVE)	Panama	Proposed	0			09062-TM5346
UNIX AND DESIGN (CRESTED WAVE)	Paraguay	Filed		02/10/93		09062-TM5347

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TRADEMARK	COUNTRY	STATUS	CLASS	FILING DATE	REG. DATE	LOCATOR NO.
UNIX AND DESIGN (CRESTED WAVE)	Peru	Abandoned	9	02/25/93		09062-TM5348
UNIX AND DESIGN (CRESTED WAVE)	Poland	Abandoned	9	02/05/93		09062-TM5349
UNIX AND DESIGN (CRESTED WAVE)	Portugal	Filed	9	03/13/93		09062-TM5350
UNIX AND DESIGN (CRESTED WAVE)	Singapore	Filed	9	03/30/93		09062-TM5351
UNIX AND DESIGN (CRESTED WAVE)	Slovenia	Filed	9	04/22/93		09062-TM5352
UNIX AND DESIGN (CRESTED WAVE)	South Africa	Withdrawn	9	04/01/93		09062-TM5353
UNIX AND DESIGN (CRESTED WAVE)	Spain	suspended	9	02/23/93		09062-TM5354
UNIX AND DESIGN (CRESTED WAVE)	Spain	Published	16	03/16/93		09062-TM5355
UNIX AND DESIGN (CRESTED WAVE)	Spain	Published	35	03/16/93		09062-TM5356
UNIX AND DESIGN (CRESTED WAVE)	Spain	Published	39	03/16/93		09062-TM5357
UNIX AND DESIGN (CRESTED WAVE)	Spain	Published	42	03/16/93		09062-TM5358
UNIX AND DESIGN (CRESTED WAVE)	sti Lanka	Filed	9	05/28/93		09062-TM5359
UNIX AND DESIGN (CRESTED WAVE)	Sudan	Filed	9	10/25/93		09062-TM5360
UNIX AND DESIGN (CRESTED WAVE)	sucinam	Proposed	9		11/26/93	09062-TM5361
UNIX AND DESIGN (CRESTED WAVE)	Sweden	Registered	9	03/08/93		09062-TM5362
UNIX AND DESIGN (CRESTED WAVE)	Switzerland	Registered	9	03/31/93		09062-TM5363
UNIX AND DESIGN (CRESTED WAVE)	Syrian Arab	Filed	9	02/24/93		09062-TM5364
UNIX AND DESIGN (CRESTED WAVE)	Taiwan	Proposed	9			09062-TM5365
UNIX AND DESIGN (CRESTED WAVE)	Tanganyika	Filed	9	03/31/93		09062-TM5366
UNIX AND DESIGN (CRESTED WAVE)	Thailand	Proposed	9			09062-TM5367
UNIX AND DESIGN (CRESTED WAVE)	Tunisia	Abandoned	9		06/17/93	09062-TM5368
UNIX AND DESIGN (CRESTED WAVE)	Turkey	Filed	9	03/19/93		09062-TM5369
UNIX AND DESIGN (CRESTED WAVE)	Ukraine	Filed	9	06/17/93		09062-TM5370
UNIX AND DESIGN (CRESTED WAVE)	United Arab Emi	Withdrawn	9	03/19/95		09062-TM5371
UNIX AND DESIGN (CRESTED WAVE)	United Kingdom	Filed	9			09062-TM5372
UNIX AND DESIGN (CRESTED WAVE)	Uruguay	Filed	9	02/17/93		09062-TM5373
UNIX AND DESIGN (CRESTED WAVE)	Uzbekistan	Abandoned	9	06/30/93		09062-TM5374
UNIX AND DESIGN (CRESTED WAVE)	Venezuela	Proposed	9, 38, 42		11/22/93	09062-TM5375
UNIX AND DESIGN (CRESTED WAVE)	Vietnam	Registered	9	03/19/93		09062-TM5376
UNIX AND DESIGN (CRESTED WAVE)	Yugoslavia	Filed	9	02/24/93		09062-TM5377
UNIX AND DESIGN (CRESTED WAVE)	Zaire	Filed	9, 16, 42	04/21/93		09062-TM5378
UNIX AND DESIGN (CRESTED WAVE)	Zimbabwe	Cancelled	9	02/17/93		09062-TM5379
UNIX AND DESIGN (CRESTED WAVE)	Zimbabwe	Cancelled	41	03/05/93	08/30/93	09062-TM5380
UNIX AND DESIGN (CRESTED WAVE)	Zimbabwe	Cancelled	41	03/05/93	08/30/93	09062-TM5381

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TRADEMARK	COUNTRY	STATUS	CLASS	FILING DATE	REG. DATE	LOCATOR NO.
UNIX AND DESIGN (PERSON)	Austria	Registered	3, 16, 17, 21, 28, 30, 33	12/24/60	12/24/60	09062-TM5397
UNIX AND DESIGN (PERSON)	Austria	Registered	3, 16, 17, 21, 28, 30, 33	05/29/61	05/29/61	09062-TM5407
UNIX AND DESIGN (PERSON)	Benelux	Registered	3, 16, 17, 21, 28, 30, 33	12/24/60	12/24/60	09062-TM5398
UNIX AND DESIGN (PERSON)	Benelux	Registered	3, 16, 17, 21, 28, 30, 33	05/29/61	05/29/61	09062-TM5408
UNIX AND DESIGN (PERSON)	Egypt	Registered	3, 16, 17, 21, 28, 30, 33	12/24/60	12/24/60	09062-TM5399
UNIX AND DESIGN (PERSON)	Egypt	Registered	3, 16, 17, 21, 28, 30, 33	05/29/61	05/29/61	09062-TM5409
UNIX AND DESIGN (PERSON)	France	Registered	1, 2, 4-15, 18, 20, 22-27 29, 31, 32, 34	04/10/86	04/10/86	09062-TM5395
UNIX AND DESIGN (PERSON)	France	Registered	3, 16, 17, 21, 28, 30, 33	06/21/85	06/21/85	09062-TM5394
UNIX AND DESIGN (PERSON)	International	Registered	3, 16, 17, 21, 28, 30, 33	12/24/60	12/24/60	09062-TM5396
UNIX AND DESIGN (PERSON)	International	Registered	3, 16, 17, 21, 28, 30, 33	05/29/61	05/29/61	09062-TM5406
UNIX AND DESIGN (PERSON)	Italy	Registered	3, 16, 17, 21, 28, 30, 33	05/29/61	05/29/61	09062-TM5410
UNIX AND DESIGN (PERSON)	Italy	Registered	3, 16, 17, 21, 28, 30, 33	12/24/60	12/24/60	09062-TM5400
UNIX AND DESIGN (PERSON)	Monaco	Registered	3, 16, 17, 21, 28, 30, 33	05/29/61	05/29/61	09062-TM5412
UNIX AND DESIGN (PERSON)	Monaco	Registered	3, 16, 17, 21, 28, 30, 33	12/24/60	12/24/60	09062-TM5402
UNIX AND DESIGN (PERSON)	Morocco	Registered	3, 16, 17, 21, 28, 30, 33	05/29/61	05/29/61	09062-TM5411
UNIX AND DESIGN (PERSON)	Morocco	Registered	3, 16, 17, 21, 28, 30, 33	12/24/60	12/24/60	09062-TM5401
UNIX AND DESIGN (PERSON)	Portugal	Registered	3, 16, 17, 21, 28, 30, 33	05/29/61	05/29/61	09062-TM5413
UNIX AND DESIGN (PERSON)	Spain	Registered	3, 16, 17, 21, 28, 30, 33	12/24/60	12/24/60	09062-TM5403
UNIX AND DESIGN (PERSON)	Spain	Registered	3, 16, 17, 21, 28, 30, 33	05/29/61	05/29/61	09062-TM5414
UNIX AND DESIGN (PERSON)	Switzerland	Registered	3, 16, 17, 21, 28, 30, 33	12/24/60	12/24/60	09062-TM5404
UNIX AND DESIGN (PERSON)	Switzerland	Registered	3, 16, 17, 21, 28, 30, 33	05/29/61	05/29/61	09062-TM5415
UNIX AND DESIGN (PERSON)	Tunisia	Registered	3, 16, 17, 21, 28, 30, 33	12/24/60	12/24/60	09062-TM5405
UNIX AND DESIGN (PERSON)	Tunisia	Registered	3, 16, 17, 21, 28, 30, 33	05/29/61	05/29/61	09062-TM5416
UNIX SYSTEM TECHNOLOGIES	France	Registered	9, 16, 38	10/05/92	10/05/92	09062-TM5434
UNIX NAME	Germany	Registered	9, 16, 37, 38, 42	02/05/93	05/12/93	09062-TM5446
UNIX NAME (STACKED)	Germany	Registered	9, 16, 37, 38, 42	04/01/93	06/17/93	09062-TM5447
UNIXMASTER	Germany	Registered	9, 16, 37, 38, 42	03/31/93	09/30/93	09062-TM5435
UNIXWARE	Australia	Filed		07/01/94		09062-TM547
UNIXWARE	Bangladesh	Filed		09/17/94		09062-TM547

ATTACHMENT C

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TRADEMARK STATUS REPORT

TRADEMARK	COUNTRY	STATUS	CLASS	FILING DATE	REG. DATE	LOCATOR NO.
UNIXWARE	Bangladesh	Filed	16	09/17/94		09062-TM5475
UNIXWARE	China	Filed	9	09/15/94		09062-TM5473
UNIXWARE	Denmark	Registered	9	09/28/93	06/24/94	09062-TM5436
UNIXWARE	France	Proposed				09062-TM5437
UNIXWARE	Germany	Registered	9, 16, 37, 39, 42	02/05/93	04/29/93	09062-TM5438
UNIXWARE	Indonesia	Filed	9	08/28/95		09062-TM5481
UNIXWARE	Italy	Filed	9	12/02/93		09062-TM5439
UNIXWARE	Japan	Filed	9	03/13/95		09062-TM5419
UNIXWARE	Mexico	Filed	9	12/10/93		09062-TM5440
UNIXWARE	New Zealand	Filed	9	08/02/94		09062-TM5472
UNIXWARE	Norway	Published	9	09/13/93		09062-TM5441
UNIXWARE	Spain	Published	42	12/28/92		09062-TM5443
UNIXWARE	Spain	Suspended	9	12/28/92		09062-TM5442
UNIXWARE	Sweden	Registered	9	09/10/93	04/29/94	09062-TM5444
UNIXWARE	United Kingdom	Registered	9	09/22/93	09/22/93	09062-TM5445
UNIX	United States	Registered	9	05/13/85	04/22/86	09062-TM4023
UNIX	United States	Registered	9	06/24/85	05/06/86	09062-TM4024
UNIX DESKTOP	United States	Abandoned	9	07/09/91		09062-TM4025
UNIX EASY	United States	Abandoned	9	07/09/91		09062-TM4026
UNIX LABS	United States	Abandoned	9	06/01/90		09062-TM4027
UNIX LABS	United States	Abandoned	42	06/01/90		09062-TM4028
UNIX LIFE	United States	Abandoned	9	07/09/91		09062-TM4029
UNIX PRESS	United States	Registered	16	05/14/90	12/03/91	09062-TM4030
UNIX SVR4.2 AND DESIGN	United States	Allowed	9	08/23/92		09062-TM4031
UNIX UNIVERGITY	United States	Abandoned	41	04/07/92		09062-TM4035
UNIX WINDOWS	United States	Abandoned	9	06/04/93		09062-TM4036
UNIXWARE	United States	Abandoned	9	11/20/91		09062-TM4037
UNIXWARE	United States	Suspended	9	09/03/93		09062-TM4038
UNIXWARE	United States	Registered	9	09/03/93	07/19/94	09062-TM4039

Attachment G

Seller Contracts Containing Business-Related Rights

which are Terminable in the Event of Acquisition

- October 16, 1992 Master Purchase and License Agreement between Seller and Electronic Book Technologies, Inc.
- June 1, 1995 CDE/MOTIF PST Joint Development Agreement among Seller and Digital Equipment Corporation; Hitachi, Ltd.; International Business Machines Corporation; Fujitsu Limited; Open Software Foundation, Inc.; X Consortium, Inc. and Sun Microsystems, Inc.
- May 10, 1994 Trademark Relicensing Agreement between Seller and X/Open Company, Ltd.
- February 28, 1995 Software License Agreement between Seller and Atria Software, Inc.
- February 7, 1987 Development and License Agreement now in effect between Seller and Microsoft Corporation.

EXHIBIT No. 7

BILL OF SALE

Reference hereby is made to that certain Asset Purchase Agreement by and between The Santa Cruz Operation, Inc. and Novell, Inc. dated as of September 19, 1995, as amended by Amendment No. 1 to Asset Purchase Agreement dated as of December 6, 1995 (together, the "Agreement"). Capitalized terms used in this Bill of Sale and not otherwise defined shall have the meanings ascribed to such terms in the Agreement.

In accordance with Article 1.1(a) of the Agreement, Seller, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, does hereby transfer, convey, sell, assign and deliver to Buyer, without recourse, representation or warranty except as otherwise expressly provided in the Agreement, all of the Assets. Excepted from the transfer of Assets pursuant to the preceding sentence are the rights reserved by Seller pursuant to that certain Technology License Agreement between Seller and Buyer dated as of December 6, 1995.

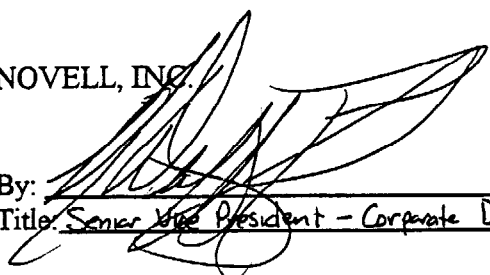
Seller does not sell to Buyer and Buyer does not purchase from Seller any interest in any of Seller's assets other than the Assets.

This Bill of Sale shall be binding upon the successors and assigns of Seller and shall inure to the benefit of the successors and assigns of Buyer as permitted under the Agreement.

It is acknowledged and agreed that this Bill of Sale is intended only to document the sale and assignment of the Assets to Buyer, and that the Agreement is the exclusive source of the agreement and understanding between Seller and Buyer respecting the Assets. Nothing in this Bill of Sale shall limit, expand or otherwise affect any of the representations, warranties, agreements or covenants contained in the Agreement. If any provision of this Bill of Sale is construed to conflict with any provision of the Agreement, the provision of the Agreement shall control.

IN WITNESS WHEREOF, Seller has cause this Bill of Sale to be duly executed as of the 6th day of December, 1995.

NOVELL, INC.

By: 
 Title: Senior Vice President - Corporate Development

Acknowledged this 6th day of December, 1995:

THE SANTA CRUZ OPERATION, INC.

By: 
 Title: Chief Executive Officer

EXHIBIT No. 8

AMENDMENT No. 2
TO THE ASSET PURCHASE AGREEMENT

As of the 16th day of October, 1996, the September 19, 1995 Asset Purchase Agreement (the "Agreement") between Novell, Inc. ("Novell") and The Santa Cruz Operation, Inc. ("SCO") is amended in the following respects.

- A. With respect to Schedule 1.1(b) of the Agreement, titled "Excluded Assets", Section V, Subsection A shall be revised to read:

All copyrights and trademarks, 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. However, in no event shall Novell be liable to SCO for any claim brought by any third party pertaining to said copyrights and trademarks.

- B. Except as provided in Section C below, and notwithstanding the provisions of Article 4.16, Sections (b) and (c) of the Agreement, any potential transaction with an SVRX licensee which concerns a buy-out of any such licensee's royalty obligations shall be managed as follows:

1. Should either party become aware of any such potential transaction, it will immediately notify the other in writing.
2. Any meetings and/or negotiations with the licensee will be attended by both parties, unless agreed otherwise. Novell's participation will be by personnel who are engaged in corporate business development.
3. Any written proposal to be presented to the licensee, including drafts and final versions of any proposed amendments to the SVRX licenses, will be consented to by both parties prior to its delivery to the licensee, unless agreed otherwise.
4. Prior to either parties' unilateral determination as to the suitability of any potential buy-out transaction, the parties will meet face to face and analyze the potential merits and disadvantages of the transaction. No such transaction will be concluded unless the execution copy of the amendment is consented to in writing by both parties, and either party will have the unilateral right to withhold its consent should it judge, for any reason whatsoever, the transaction to be contrary to its economic interests and/or its business plans and strategy.
5. This Amendment does not give Novell the right to increase any SVRX licensee's rights to SVRX source code, nor does it give Novell the right to grant new SVRX source code licenses. In addition, Novell may not prevent SCO from exercising its rights with respect to SVRX source code in accordance with the Agreement.

6. The parties agree that no member of Novell's sales force will receive a bonus, commission, quota attainment credit, or other type of sales incentive as a result of the buy-out of an SVRX license.
- C. Novell may execute a buy-out with a licensee without any approval or involvement of SCO, and will no longer be bound by any of the requirements stated in Section B. above, if: (i) SCO ceases to actively and aggressively market SCO's UNIX platforms; or (ii) upon a change of control of SCO as stated in schedule 6.3(g) of the Agreement.
- D. Novell and SCO agree to indemnify and hold harmless the other from and against any and all losses, liabilities, judgments, and costs incurred ("Liability") if either causes the other to incur Liability under Section 10 of Amendment No. X to Software Agreement SOFT-00015 as amended, Sublicensing Agreement SUB-00015A as amended, Software Agreement SOFT-00015 Supplement No. 170 as amended, and Substitution Agreement XFER-00015B ("Amendment No. X").

In witness whereof, the parties have executed this Amendment No. 2 to be signed by their duly authorized representatives as of the date first written above.

THE SANTA CRUZ OPERATION, INC.

NOVELL, INC.

By: Steven M. Sabbath

By: _____

Name: Steven M. Sabbath

Name: _____

Title: Vice President Law &

Title: _____

Corporate Affairs

6. The parties agree that no member of Novell's sales force will receive a bonus, commission, quota attainment credit, or other type of sales incentive as a result of the buy-out of an SVRX license.
- C. Novell may execute a buy-out with a licensee without any approval or involvement of SCO, and will no longer be bound by any of the requirements stated in Section B. above, if: (i) SCO ceases to actively and aggressively market SCO's UNIX platforms; or (ii) upon a change of control of SCO as stated in schedule 6.3(g) of the Agreement.
- D. Novell and SCO agree to indemnify and hold harmless the other from and against any and all losses, liabilities, judgments, and costs incurred ("Liability") if either causes the other to incur Liability under Section 10 of Amendment No. X to Software Agreement SOFT-00015 as amended, Sublicensing Agreement SUB-00015A as amended, Software Agreement SOFT-00015 Supplement No. 170 as amended, and Substitution Agreement XFER-00015B ("Amendment No. X").

In witness whereof, the parties have executed this Amendment No. 2 to be signed by their duly authorized representatives as of the date first written above.

THE SANTA CRUZ OPERATION, INC.

NOVELL, INC.

By: _____

By: James R. Tolonen

Name: _____

Name: James R. Tolonen

Title: _____

Title: EVP & CFO