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International Business Machines, Corporation.*

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

THE SCO GROUP, INC.

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendant/Counterclaim-Plaintiff.

**DECLARATION OF
A. ALLISON AMADIA ON
BEHALF OF NOVELL, INC.**

Civil No. 2-03CV0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

I, A. Allison Amadia, declare as follows:

1. I am an attorney duly licensed to practice law in the state of California.
2. I was employed by Novell, Inc. ("Novell") as corporate counsel from 1995 through 1997. During this time, I was primarily involved in technology licensing on behalf of Novell.
3. This declaration is submitted in connection with the lawsuit filed by the SCO Group, Inc. ("SCO"), against International Business Machines, Corporation ("IBM"), Caldera Systems, Inc. v. International Business Machines, Corporation, Civil Action No. 2:03CV-0294 DAK (D. Utah 2003).
4. I am authorized to submit this Declaration on behalf of Novell to state its position as to the matters discussed herein. This Declaration also reflects my personal knowledge and understanding as Novell's chief legal negotiator for various 1996 agreements involving Novell, IBM and/or The Santa Cruz Operation ("Santa Cruz") (discussed herein).

I. NOVELL'S ROLE IN AMENDMENT X

5. In early 1996, IBM and Novell negotiated changes to the following agreements between IBM and AT&T Technologies, Inc., whose rights had been acquired by Novell in 1995, relating to UNIX software:

- the Software Agreement (Agreement Number SOFT-00015) dated February 1, 1985 ;
- the Sublicensing Agreement (Agreement Number SUB-00015A) dated February 1, 1985 ;
- the Substitution Agreement (Agreement Number XFER-00015B) dated February 1, 1985;
- the Side Letter Agreement dated February 1, 1985; and
- Software Agreement Supplement 170, as amended by a letter agreement dated on or about January 25, 1989.

(collectively, the "IBM SVRX Agreements").

6. IBM sought to amend the IBM SVRX Agreements to, among other things, effect a royalty buy-out and to make IBM's rights under those agreements irrevocable, fully paid-up, and perpetual. IBM was prepared to pay Novell a lump sum payment in the amount of \$10,125,000, for that purpose.

7. During the negotiations between Novell and IBM, IBM stated its position that its rights under the IBM SVRX Agreements would not be revocable under any circumstances. On behalf of Novell, I understood IBM's proposal to mean that neither Novell nor Santa Cruz (as its partial successor) could terminate IBM's rights under the IBM SVRX Agreements.

8. Novell agreed to accept IBM's condition concerning irrevocability (i.e., that IBM's rights under the IBM SVRX Agreements could never be terminated under any circumstances). On April 26, 1996, IBM and Novell, acting on its own behalf and on the behalf of Santa Cruz, executed an amendment to the IBM SVRX Agreements (the "April 1996 Amendment") giving IBM irrevocable rights. It was my belief, based on my negotiations and discussions, that the parties understood "irrevocable" to mean non-terminable.

9. After the April 1996 Amendment was executed, Santa Cruz objected to that amendment on a variety of grounds. Among other things, Santa Cruz proposed language to trim back the irrevocability provision. On May 21, 1996, Santa Cruz proposed to revise the language of the irrevocability provision by making it "subject to the provisions of this Amendment" and adding the phrase "to distribute Sublicensed Products specified in Section 6 below." Novell told IBM about this proposal. IBM refused; it did not waver during the negotiations on its position that its rights be non-terminable. At no point after this did Novell state that IBM should take a license that would be terminable under any circumstances.

10. Novell generally negotiated separately with IBM and with Santa Cruz. IBM presented its views to Novell; Santa Cruz presented its views to Novell; and Novell sought to broker an agreement between the parties.

11. Based on IBM's willingness to accept some of Santa Cruz's proposed changes and Santa Cruz's willingness, among other things, to let stand the irrevocability provision that IBM wanted, the three parties (with Novell acting as intermediary) reached an agreement. On October 17, 1996, Novell, Santa Cruz and IBM executed an amendment ("Amendment No. X"), which was substantially similar to but replaced the April 1996 Amendment.

12. Amendment No. X provides, among other things, that IBM's rights under the IBM SVRX Agreements are irrevocable, fully paid-up and perpetual. The relevant language from Paragraph 1 of Amendment No. X states:

Upon payment to SCO of the consideration in the section entitled "Consideration", IBM will have the irrevocable, fully paid-up, perpetual right to exercise all of its rights under the Related Agreements beginning January 1, 1996 at no additional royalty fee . . . Notwithstanding the above, the irrevocable nature of the above rights will in no way be construed to limit Novell's or SCO's rights to enjoin or otherwise prohibit IBM from violating any and all of Novell's or SCO's rights under this Amendment No. X, the Related Agreements, or under general patent, copyright, or trademark law.

13. Through its agreement with Amendment X, Santa Cruz gave up any right to terminate the IBM SVRX Agreements if there was a breach by IBM and, instead, acceded to the irrevocable proposal sought by IBM. I, on behalf of Novell, and I believe all of the parties to the negotiation understood the irrevocability language of Paragraph 1 of Amendment X to mean that Novell and Santa Cruz no longer had any termination right with respect to IBM's rights under the IBM SVRX Agreements, though Novell and Santa Cruz retained the right to seek to enjoin or otherwise prohibit conduct that violated the provisions of Amendment No. X, IBM SVRX Agreements, or Novell's or Santa Cruz's rights under general patent, copyright or trademark laws, provided that they could satisfy the standards for obtaining such relief.

14. So, for example, if IBM were to publicly disclose UNIX software under circumstances constituting a breach of the IBM SVRX Agreements, Novell and Santa Cruz had

contracted away the right to terminate IBM's rights to copy and furnish, including market, license and distribute, sublicensed products based on SVR3.2 and previous releases, but retained the right to enjoin IBM from such disclosure, provided that Novell or Santa Cruz could satisfy the standards for obtaining such relief.

15. As Novell intended Amendment No. X, IBM has the irrevocable, fully paid-up, perpetual right to use the licensed code and products in accordance with the IBM SVRX Agreements, precluding Novell or Santa Cruz (or their respective successors or assigns) from terminating IBM's right to copy and furnish, including market, license and distribute, sublicensed products.

II. AMENDMENT NO. 2

16. Around the time of the execution of Amendment X, Novell and Santa Cruz executed Amendment No. 2 to the APA. I was Novell's chief legal negotiator on Amendment No. 2.

17. Amendment No. 2 modifies Section V.A. of Schedule 1.1(b) to provide that Excluded Assets include:

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.

Amendment No. 2 was not intended to, nor did it actually, transfer ownership of UNIX or UnixWare copyrights owned by Novell at the time of the APA and its Amendments.

Amendment No. 2 was not intended to alter the APA's copyright exclusion.

18. Amendment No. 2 was not intended to be, nor does it qualify as, "an instrument of conveyance or a note or memorandum of the transfer" under 17 U.S.C. § 204(a) for at least the following reasons:

- a. Amendment No. 2 merely amends the schedule of excluded assets and therefore does not, itself, constitute a transfer of any asset.

- b. Amendment No. 2 does not identify “the copyrights and trademarks owned by [Novell] as of the date of the Agreement required for Santa Cruz to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.”
- c. Amendment No. 2 does not contain any language suggesting a contemporaneous transfer of any copyright.
- d. Amendment No. 2 does not provide a date for any purported transfer of copyrights.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on this 23 day of September, 2006 in Santa Cruz, California.



A. Allison Amadia