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4 IN THE UNITED STATES DISTRICT COURT  
5 FOR THE DISTRICT OF UTAH, CENTRAL DIVISION  
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10 THE SCO GROUP, )  
11 )  
12 )

11 Plaintiff, )  
12 )

13 vs. )

Case 2:04-CV-139

14 NOVELL, INC., )  
15 )  
16 )

15 Defendant. )  
16 )  
17 )

18 BEFORE THE HONORABLE DALE A. KIMBALL

19 MAY 11, 2004

20 REPORTER'S TRANSCRIPT OF PROCEEDINGS

21 MOTION HEARING  
22  
23  
24

25 Reported by: KELLY BROWN, HICKEN CSR, RPR, RMR

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1 SALT LAKE CITY, UTAH, TUESDAY, MAY 11, 2004

2 \* \* \* \* \*

3 THE COURT: We're here this afternoon in the matter of  
4 the SCO Group, Inc., vs. Novell, Inc., 2:04-CV-139. For  
5 plaintiff, Mr. Brent Hatch, Mr. Mark Clements, Mr. Ryan  
6 Tibbits. For defendant, Mr. Michael Jacobs.

7 MR. JACOBS: Good afternoon, Your Honor.

8 THE COURT: Good afternoon. And Mr. John Mullen.

9 MR. MULLEN: Good afternoon, Your Honor.

10 THE COURT: Good afternoon.

11 We have two motions, plaintiff's motion to remand  
12 and defendant's motion to dismiss. Let's hear the motion to  
13 remand first. Who's going to argue it?

14 MR. HATCH: I am, Your Honor.

15 THE COURT: Mr. Hatch.

16 Who's going to argue for the defendant on remand?

17 MR. JACOBS: I am.

18 THE COURT: That would be Mr. Jacobs; right?

19 MR. JACOBS: Right.

20 THE COURT: Go ahead, Mr. Hatch, on the motion to  
21 remand.

22 MR. HATCH: Thank you, Your Honor.

23 Your Honor, as you know, Novell, being a party who  
24 removed this action from the state court, carries the burden,  
25 and any ambiguities should be resolved against removal in this

1 case. What this really comes down to is, Your Honor, we  
2 brought a state court action seeking state court remedies in  
3 state court.

4 THE COURT: Slander of title.

5 MR. HATCH: Slander of title. And the complaint, unlike  
6 many of the cases cited by Novell, does not allege federal  
7 question, does not allege or seek a federal remedy. SCO as --

8 THE COURT: Can you get to your title claim without  
9 somehow deciding something about 204(a)?

10 MR. HATCH: I think so, Your Honor. I think what's  
11 happened here is Novell to a large part has put form over  
12 substance here. Section 204(a), as Your Honor is well aware  
13 now having read the briefs, that requires a writing. And  
14 that's it. There isn't a lot more there. There isn't a set  
15 of standards for a court to apply, like Novell seems to imply  
16 that there's something more there. They call it, there needs  
17 to be a contract of conveyance or what have not.

18 We clearly allege that there is an agreement by  
19 which these copyrights were transferred. It is a writing, and  
20 prima facie meets the requirements of 204(a). The kind of  
21 argument that they're making here is that there needs to be  
22 something more has been really routinely objected by the  
23 courts. And I think if we just get to the nub of the matter,  
24 essentially what they are relying on here is some -- a ruling  
25 in Jasper. The reality here is the type of argument they're

1 making that somehow if you have to get to the underlying  
2 argument about what the contract means and what it is, which  
3 are frankly all state law questions, it will turn every single  
4 contract case that even tangentially mentions a copyright or  
5 trademark into a federal question.

6 And that's been pretty routinely rejected by all  
7 the courts. As a matter of fact, Judge Friendly, a fine judge  
8 out of the Second Circuit that we read over and over and over  
9 again in law school made that very clear in the TB Harms  
10 decision. He said we can't put form over substance. If we do  
11 the kind of things that Novell is asking to do here, we're  
12 going to always have a federal question.

13 And the reality is 204(a) doesn't apply standards.  
14 It makes it very clear that you have to have it in writing.  
15 Particularly what they're worried about, and this comes out in  
16 the cases, is that somebody loses a copyright because of  
17 someone coming later and saying, we have had some type of oral  
18 agreement. It really creates a distinction between oral and  
19 written agreements, so there is something concrete to go on.  
20 It doesn't go to the underlying, what does the written  
21 agreement say.

22 And that's, frankly, where Novell makes its  
23 mistake, in my view, on the law because the cases it cites,  
24 virtually every one of them, are -- where they're saying  
25 there's a 204, a real 204 issue, they were oral agreements.

1                   Now, really, what it gets us down to, as I say  
2 again, is the Jasper case.

3           THE COURT:   The Second Circuit case Jasper?

4           MR. HATCH:   Correct, Your Honor.   2002.

5           THE COURT:   2002.

6           MR. HATCH:   And I think the decision, because they rely  
7 on it so heavily, if you look at TB Harms, you look at  
8 virtually every other decision, and it's really clear that all  
9 we're looking for is a written agreement, and we have that  
10 here.  And at this stage of the game it shouldn't be going any  
11 further than that.

12                   What it really comes down to is if the Court is  
13 going to rely on Jasper.  Does Jasper give the Court anything  
14 to chew on?  And Jasper really does an interesting thing, Your  
15 Honor.  It goes through the law.  And I think it states it  
16 pretty well.  They say -- and they go right to Judge Friendly,  
17 as I did.  And they say:

18                           Judge Friendly pointed out the fact that a  
19 case concerns a copyright does not necessarily  
20 mean that it is within the jurisdiction of the  
21 Federal District Court.

22                   Well, that's good law.  I think that's still in  
23 place, and I think almost every court follows that.  And just  
24 right below that in the decision, he says:

25                           Specifically, if the case concerns a dispute as to

1 ownership of copyright --

2 Which is exactly what we have here. And the  
3 issue -- which I point out is raised by defense. It's not  
4 raised in the initial pleadings.

5 Specifically, if the case concerns a dispute as to  
6 ownership of a copyright, then the issue of  
7 ownership turns on the interpretation of a contract,  
8 the case presents only a state law issue. And  
9 unless the complaint asserts a remedy expressly  
10 granted by the Copyright Act, federal jurisdiction  
11 is lacking in the absence of diversity  
12 jurisdiction.

13 And then he makes the point that I just made just a  
14 few --

15 THE COURT: There's no claim that there's any diversity  
16 here, is there?

17 MR. HATCH: No. Both companies are Delaware  
18 corporations, so it could not be removed on a diversity basis.

19 So they're relying --

20 THE COURT: So it's federal jurisdiction or no  
21 jurisdiction.

22 MR. HATCH: That's exactly right, Your Honor.

23 And Judge Friendly found and so did Judge Newman  
24 here in the Jasper case and says:

25 The difficulty that is almost every case involving

1 contract interpretation, appropriate for state court  
2 determination, could be recharacterized as a case  
3 appropriate for a federal court simply by framing the  
4 issue to be whether the disputed contract qualified as a  
5 writing within the meaning of Section 204(a). In most  
6 cases, there will be no doubt that the contract is a  
7 Section 204(a) writing, and the only substantial issue  
8 can be contract interpretation.

9 THE COURT: Except Jasper was not one of those cases.

10 MR. HATCH: It was not.

11 THE COURT: How is your case different than Jasper?

12 MR. HATCH: Well, I would urge the Court to look very  
13 close to Jasper because the Court there made it very clear  
14 that it is the rare exception to the rule. And I would report  
15 to the Court that Jasper -- and in their briefs Novell says it  
16 is a leading case in its area. I would agree it's a leading  
17 case in the area, but on a very different point than they do.  
18 I think it's a leading case in the area of the following.

19 In Jasper, the plaintiff himself brought his case  
20 in federal court, unlike us. He claimed that his case was one  
21 that fell under the federal copyright laws, the plaintiff  
22 himself. Again, unlike our case. The defense in that case  
23 never raised an issue as to whether or not subject matter  
24 jurisdiction properly was laid in the federal court.

25 THE COURT: The ultimate question, though, is still the



1 same, isn't it? Is there appropriate federal jurisdiction?

2 MR. HATCH: Exactly. Eventually what happened here, the  
3 case went to a bench trial, and the plaintiff lost. In other  
4 words, it was found that he didn't have a case. And this  
5 matter for the first time on jurisdiction was raised on  
6 appeal. And it really doesn't take a lot to read why the  
7 Court found this is a rare exception.

8 Now, in our brief we point out one of the reasons  
9 here is because there were third parties involved and there  
10 had to be some clarification as to the copyright. But the  
11 reality is they cite the law, which would apply directly here,  
12 and say this is the rare case because it's pretty clear the  
13 Court said, you had your day in court. You wasted all of our  
14 time. This is a rare case.

15 And what goes to show that even more --

16 THE COURT: You're saying that more normally the  
17 jurisdiction question would have been raised and decided much  
18 earlier.

19 MR. HATCH: Oh, sure.

20 THE COURT: Theoretically, it shouldn't make any  
21 difference, I guess.

22 MR. HATCH: Correct. And if you notice, Judge Friendly  
23 does the same kind of thing. If you look at the TB Harms  
24 decision, it's kind of interesting. He pointed out there were  
25 other cases that were like that where people miss it. And

1 frankly, I guess in some people's minds, they don't look at  
2 those issues. And Your Honor is absolutely right. Subject  
3 matter jurisdiction can be raised at any time.

4 And Judge Friendly was called to deal with the  
5 Rossiter case and also the Venus Music cases, that somehow  
6 they went forward even though there wasn't -- in his mind it  
7 was pretty clear you can read between the lines there wasn't  
8 subject matter jurisdiction. And he said kind of the same  
9 thing I said here. It was kind of bad facts making bad law.  
10 He said:

11 But the jurisdictional problem, that was obscured  
12 by the insistence of both parties that this action was a  
13 copyright infringement.

14 In other words, the district court missed it  
15 because nobody raised it, and the district court didn't catch  
16 it himself.

17 Here, we don't have that instance. It's not one of  
18 those rare instances. This is one of those cases where it's  
19 pretty clear there was a writing, and this is an argument that  
20 is just being made purely for the purposes of shopping for  
21 federal court jurisdiction.

22 I think one of the things it points out most  
23 clearly is the Jasper court laid out kind of parameters, and  
24 the parameters were if it's contract interpretation, that's  
25 all it is. If there is an actual writing and all you're doing

1 is interpreting it, that's a state law question. And that's  
2 exactly our case here.

3 What Jasper doesn't do, and if it's really a  
4 leading case on exceptions, where's the standard, Your Honor?  
5 You know, if you're trying to put this in a case book for law  
6 students to study or better yet, be in the case law so you and  
7 I can understand, what's the rare exception? How do we apply  
8 it? There's no standards really enunciated here. And I think  
9 it's really a rare exception in the sense that this Court  
10 wasn't about to let the plaintiffs in that case after having  
11 gone clear to trial and getting a judgment, then being the one  
12 to take advantage and say, never mind. Gee, we want to take a  
13 second bite in state court. And since they had brought their  
14 case under federal law, I think the Court allowed it to be --  
15 die its intermediate death under federal law.

16 Simply put, the 204(a) is the same. It doesn't  
17 apply any standards at all. Just like Jasper, its only  
18 requirement is there be a writing. And I don't think there  
19 can be really honest dispute that there is a writing here.

20 Now, Novell is trying to make what we believe are  
21 very convoluted arguments that there may be some issue as to  
22 what the writing meant. But isn't that really the gravamen of  
23 any contract claim that is decided in state court where  
24 there's a dispute between the parties? And I don't think that  
25 in and of itself makes it a federal claim.

1                   So, Your Honor, as much as we'd like to be here --

2           THE COURT: I can tell.

3           MR. HATCH: And in reality, I think we would. But the  
4 difference is I think we have to raise this because we don't  
5 want to be put in a position where one or the other parties  
6 having received a bad ruling at the end of the matter then  
7 says, wait a minute --

8           THE COURT: No jurisdiction.

9           MR. HATCH: -- no jurisdiction, for the exact reason  
10 Your Honor raised, and that's the kind of thought process we  
11 went through. We'd rather be here. But the bottom line is it  
12 can't be waived, and so -- and it can be raised at any time.  
13 And we don't want to have to go through the time and expense  
14 of getting really quite far down the road when we want to be  
15 able to see this through as quickly as possible and have  
16 somebody who doesn't think the litigation is going  
17 particularly well say, oh, wait a minute, we just discovered  
18 there isn't subject matter jurisdiction here. Because, gosh,  
19 that is a writing. And since it's a writing and we are  
20 interpreting the contract, we really ought to be in state  
21 court.

22                   That ought to happen now, not later.

23                   Thank you, Your Honor.

24           THE COURT: Thank you, Mr. Hatch.

25                   Mr. Jacobs? You have a somewhat different view in

1       this matter.

2               MR. JACOBS:  Indeed, Your Honor.  Good afternoon.

3               Your Honor, I think that SCO's argument understates  
4       the significance of Section 204(a) and understates the  
5       significance to this dispute.  And what I'd like to do is walk  
6       you through the structure of the relevant provisions of the  
7       Copyright Act so you can see how 204(a) sits in context.  
8       Where I'm going is this.

9               THE COURT:  You would agree, before you go wherever  
10      you're going, you would agree that it's your burden to  
11      establish -- you're the removing defendant.  It's your burden  
12      to establish federal jurisdiction because you removed and  
13      claimed it.

14              MR. JACOBS:  That's correct, your Honor.

15              THE COURT:  And the standard is preponderance.

16              MR. JACOBS:  Well, I don't know that there is a  
17      preponderance standard.  I think the standard is --

18              THE COURT:  What do you think it is if it isn't  
19      preponderance?

20              MR. JACOBS:  I think the question -- the standard is  
21      whether applying Jasper -- whether there's a substantial  
22      204(a) issue raised by the complaint.  And I'll come to the  
23      issue of boundaries so that we see that isn't infinitely  
24      elastic.

25              THE COURT:  Okay.

1           MR. JACOBS: 204 is in the Copyright Act around some  
2 other sections that make clear that the Copyright Act is going  
3 to supplant state law when it comes to the question of  
4 transfers of copyright interests. Section 201, for example,  
5 says that ownership can be transferred by a conveyance. So  
6 there's no question. I'm a copyright owner. I can transfer.  
7 And what it goes on to say is, this will be relevant to sort  
8 of a tertiary issue about what the amendment Number 2 means,  
9 201 says that:

10                   Any of the exclusive rights and any  
11                   subdivision of the exclusive rights can be transferred  
12                   by conveyance.

13                   So we have a lot of flexibility under the  
14 Copyright Act. We can transfer. If you ever thought that  
15 there was some issue about authors transferring, the 1976  
16 Copyright Act says, no. It's broadly transferable.

17                   Section 202 says, if I give you a physical object,  
18 that doesn't necessarily mean I gave you any copyright rights  
19 in that physical object. The two are distinct. So we're  
20 going to deal with any ambiguity that might have been lurking  
21 in the law about whether, if I give you a physical object you  
22 own the copyright rights to that object.

23                   Section 204 says, however, you have all these  
24 rights to transfer, you can transfer in a very open-ended sort  
25 of way, but you have to have a written instrument of

1 conveyance in order to do so. And what case after case says  
2 is if you don't have a written instrument of conveyance, then  
3 there is no transfer. And federal law, not state law, is the  
4 law that says that that is so.

5 And our contention here is that there is no written  
6 instrument of conveyance. There's a writing. There's a  
7 contract. We agree that's undisputed. But SCO's argument  
8 reads out of the statute the words of conveyance. And our  
9 point here, our position is that 204(a) says a written  
10 instrument of conveyance, in order to transfer the copyrights,  
11 I need to see a piece of paper that looks more or less like a  
12 deed.

13 THE COURT: You agree with Mr. Hatch that there's a  
14 writing, but you don't think there's a written instrument of  
15 conveyance.

16 MR. JACOBS: Precisely. There's a contract, but it  
17 didn't convey ownership.

18 THE COURT: And because there's not a written instrument  
19 of conveyance, then we have to get to the 204(a) question.

20 MR. JACOBS: Well, 204(a) tells us that we need to look  
21 to whether there is a written instrument of conveyance before  
22 they get to the very first paragraph of their complaint, which  
23 is that SCO, acquired new SCO -- pause, definitional moment,  
24 I'm going to use SCO interchangeably referred to SCO that  
25 contracted with Novell and the SCO that we're dealing with

1 today so I don't have to repeatedly say old SCO and new SCO.

2 So in the very first paragraph of SCO's complaint,  
3 they allege that they obtained ownership under the asset  
4 purchase agreement. We say, how? Where's the instrument of  
5 conveyance? Where's the transfer? We see a promise. We see  
6 an asset purchase agreement that says something will occur,  
7 and then I'll walk you through the asset purchase agreement,  
8 perhaps, if we get to the merits. But we say there is no  
9 written instrument of conveyance.

10 So our point is if you look at the very first  
11 paragraph of their complaint, you see the federal issue. They  
12 did not say, under Section 204(a) we obtained ownership. But  
13 the cases teach us that they can't plead around that problem.

14 Contrary to SCO's view on this, there are lots of  
15 ownership cases as to which federal jurisdiction under 1331  
16 and 1338 has been held to lie. Those ownership issues are  
17 ones in which there's a substantial federal question relating  
18 to ownership. What is a widow? What is a work for hire?  
19 What is a joint author? And we submit, and Jasper  
20 demonstrates, has the 204 bridge been crossed?

21 Paragraph 1 of their complaint again doesn't say,  
22 we crossed the 204(a) bridge, in hac verba. But we submit the  
23 question is there and can't be avoided. You can't hand wave  
24 and say, no, there's a writing so there's no 204(a) issue.

25 SCO says that 204(a) cases are really about the



1 distinction between a written agreement and an oral agreement.  
2 And that's not right. The best example of that is the  
3 Radio Television Espanola case --

4 THE COURT: You say the distinction here is between one  
5 kind of written agreement and perhaps another kind.

6 MR. JACOBS: Precisely. And it's a sharp distinction in  
7 the law. The Arachnid case is probably the best one to look  
8 at if you really want to see plain as day a context of the  
9 patent, a case where the court is saying, well, no. For this  
10 period, we didn't have an assignment. For this period, we had  
11 a promise.

12 So that's right. Of course, if there was an oral  
13 issue, we'd have a 204(a) versus an oral promise. But 204(a)  
14 says you have to have a written instrument of conveyance.

15 Now, SCO says, there is no real law around this,  
16 and that's just not right. 204(a) sets up federal standards  
17 for an instrument of conveyance. The Radio Television  
18 Espanola case says that, and a very good case to look at is  
19 the Pamfiloff case at 794 F Sup 933.

20 What Pamfiloff says, it's very interesting. What  
21 Pamfiloff says is that 204(a) is so powerful that it displaces  
22 all other bases on which you could argue ownership. Equitable  
23 estoppel, for example. 204(a) displaces equitable estoppel.  
24 So to say there is no law here for a requirement of writing,  
25 that's simply incorrect. 204(a) sets up what might be thought

1 of as a federal common law for the transfer of copyright  
2 ownership.

3 Is Jasper infinitely elastic? I think that's a  
4 tough question here. Jasper says, is there a substantial  
5 204(a) issue? If so, federal jurisdiction lies. I think we  
6 are still looking at --

7 THE COURT: What did Jasper mean when it says this is  
8 rare?

9 MR. JACOBS: There are -- I don't know what it really  
10 means when it says that it is rare because there are a fair  
11 number of ownership cases that turn on federal law and,  
12 therefore, make their way into federal court. What Jasper  
13 literally says is this is the rare contract case in which  
14 there's a 204(a) issue. There the 204(a) issue was trivial  
15 compared to the one here. There the 204(a) issue is  
16 whether -- if some of the co-owners signed the documents after  
17 the purported transfer took place, what does that mean? Does  
18 that mean effective conveyance? And the Court said yes. It  
19 didn't spend a lot of time on the issue. But if you look at  
20 the history of the 204(a) law, it is an issue whether you can  
21 have an after-signed, a later-signed document somehow affects  
22 the transfer of copyright. So it was an issue, and the Court  
23 looked at it and passed on it.

24 They don't argue that Jasper was incorrectly  
25 decided. And if Jasper wasn't incorrectly decided, then I

1 don't see how they can credibly argue here there is no federal  
2 jurisdiction.

3 THE COURT: Well, there was -- I guess Mr. Hatch will  
4 get to reply since this is his motion. But maybe he does  
5 think it was incorrectly decided because he thought the  
6 circuit let it go because it had already been to trial and  
7 they didn't want to disturb it and so on.

8 MR. JACOBS: Those are the facts of the case. But let's  
9 be clear on whether we are arguing to you that you should not  
10 follow Jasper or not, because that's an important -- that's  
11 really a strong argument to make to you, that you should not  
12 follow Jasper. We say Jasper was correctly decided. But even  
13 if Jasper was kind of out here given the fact that the Court  
14 had to construct its own 204(a) issue to maintain  
15 jurisdiction, we're well inside of Jasper because we're not  
16 asking you to construct the 204(a) issue. We're saying it's  
17 as plain as day, right on the face of the complaint, even  
18 though they don't utter the words 204(a).

19 So what are the boundaries? We still have a  
20 well-pleaded complaint rule. We contend, however, that the  
21 well-pleaded complaint doesn't allow them to recharacterize  
22 what is an ownership dispute as a slander of title claim, not  
23 mention 204(a) and avoid as plain as day copyright ownership  
24 204(a) issues. That they can't do because the Supreme Court  
25 told us even in the Christensen case that the well-pleaded

1 complaint doesn't mean that the plaintiff is entirely the  
2 master of his claim. Got a lot of mastery over the claim and  
3 a lot of mastery where the case ends up, but not entirely.  
4 You penetrate into the complaint, and you look at whether  
5 there is a substantial 204(a) issue.

6 Since copyright law governs ownership transfers and  
7 since this case pleads an ownership transfer, right on its  
8 face, right in the opening paragraph, this complaint  
9 necessarily goes through a proper bridge and through a gate, a  
10 bridge and a gate defined by 204(a). This is not a side  
11 issue. This is not an issue within an issue. This is a  
12 threshold question they don't get anywhere close to making out  
13 their slander additional element if they haven't shown that  
14 ownership occurred. And that's why there's federal  
15 jurisdiction here.

16 THE COURT: Thank you, Mr. Jacobs.

17 You get to reply, Mr. Hatch.

18 MR. HATCH: Thank you.

19 THE COURT: Slander action does presuppose ownership,  
20 doesn't it?

21 MR. HATCH: Yes, it does, Your Honor. And I assume  
22 that's why they've raised that as one of their remaining  
23 defenses.

24 What's interesting here is what they're essentially  
25 saying is that this is not an instrument of conveyance, the

1 APA and the Amendment 2. And a lot of this gets into the  
2 argument that they're also making on the motion to dismiss.  
3 To a large degree, they're putting the cart before the horse,  
4 because they're asking you, and I will argue in that motion,  
5 as well, given an opportunity, that they're asking you to look  
6 at things in a vacuum. I mean, they're really putting  
7 substance ahead of form because it really defies logic to say  
8 this isn't a 204(a) writing. It's a contract --

9 THE COURT: You meant form ahead of substance.

10 MR. HATCH: What did I say?

11 THE COURT: Substance ahead of form.

12 MR. HATCH: Sorry.

13 THE COURT: Isn't that what you meant?

14 MR. HATCH: Yes.

15 THE COURT: Okay. I just wanted to make sure I  
16 understood you.

17 MR. HATCH: I'll hear about that back at the office, but  
18 I appreciate that.

19 No, they truly are, because it really defies one to  
20 be able to say this is not a standard, in a sense a standard  
21 contract that is purporting to transfer copyrights to have a  
22 party pay millions of dollars for it. By asking you to look  
23 at it in a vacuum, they're basically saying, you know, gee,  
24 this isn't it. But we alleged, one, ownership. We alleged,  
25 two, the contract. We alleged it's closed and its pact. And

1 for eight years the parties have acted as though it is.

2 One of the exhibits that we attached to the motion  
3 is very interesting because they're saying, well, this isn't  
4 an instrument of conveyance. Well, this is a press release  
5 put out by them. And what did they say about it? Because  
6 you'll recall -- well, one of the things you may not be aware  
7 of is when this deal closed in 1996, most of the executives in  
8 that period of time moved on to other endeavors. The  
9 management caused what we are calling the problems today are  
10 all new management with presumably different agendas. And  
11 when they first started making these types of slanderous  
12 comments about the copyright ownership, they pointed only  
13 initially to the APA. The APA has what we consider to be a  
14 error, and it did not reflect the intent of the parties, which  
15 was fixed by Amendment 2, which made it very clear that the  
16 copyrights were transferred.

17 The CEO of Novell, apparently because he hadn't  
18 been there and he wasn't aware of the transaction and  
19 apparently didn't do his homework before he started making the  
20 comments he was making to the public, basically went out and  
21 said, well, look, we've got the APA, and it doesn't transfer  
22 copyrights. The words aren't in there.

23 So my client sent him a copy of Amendment 2. And  
24 immediately what he told the public upon receiving that is he  
25 had to make a public statement because he saw that he was

1 wrong. And he says in a May 28th letter to SCO:

2 Novell challenged SCO's claims to UNIX patent and  
3 copyright ownership and demanded that SCO substantiate  
4 its allegations that Linux infringed SCO's property  
5 rights. Amendment 2 to the 1995 SCO-Novell asset  
6 purchase agreement was sent to Novell last night by SCO.  
7 To Novell's knowledge, this plan is not present in  
8 Novell's payment. The amount of energy support SCO's  
9 claim that ownership to certain copyrights bringing did  
10 transfer to SCO in 1992.

11 So he's even acknowledged that the way they view  
12 that contract is it was -- that it was transferred at the  
13 time, the APA was a transferred document.

14 Now, the cases that Mr. Jacobs cited to you  
15 claiming that there's lot of law, and I'll point -- put to you  
16 that none of them cite Jasper, nobody cites Jasper. There's  
17 only one case that I'm aware of that cites Jasper, and it  
18 sites Jasper for our position, for the good law that it does  
19 quote like when it's quoting Judge Friendly. But most of the  
20 other cases he's talked about are totally different kinds of  
21 cases. They are cases where there wasn't an adequate right.  
22 The writing that was alleged in those cases didn't make a  
23 transfer. That's true. The Radio case, the Arachnid case.  
24 He's saying that Arachnid, it does not rise to the level of  
25 present assignment and existing invention. It doesn't vest

1 legal title.

2 Now, we've alleged the exact opposite. We've  
3 alleged that this is the operative agreement and that the deal  
4 closed. And as a matter of fact, he's saying it didn't -- in  
5 the motion to dismiss, he makes a lot of arguments that  
6 somehow puts again this agreement out as in a vacuum as though  
7 we can't look at anything else.

8 I mean, I posed the question to one of the lawyers  
9 in the firm today, you know, what would they go on if we  
10 hadn't even -- if we'd never attached the agreement, we just  
11 made the allegations? I don't think we'd be here. I mean,  
12 every piece of evidence isn't attached to a complaint or put  
13 in a complaint. We're in another pleading state.

14 I went back just today, pulled off a Novell cite.  
15 How did Novell look at this deal? And this is their press  
16 release, and it's still on their sight as of today. You can  
17 get it yourself. Dated November 6, 1995. And it's saying:

18 Novell states it completed the sale of UnixWare  
19 business to SCO finalizing the agreement first  
20 announced in September of 1995.

21 That's the APA.

22 And so it really kind of -- it really does stretch  
23 the imagination to be able to try and take what was a  
24 transaction that was treated as a transfer of copyright for  
25 the last eight years and then all of a sudden there was a



1     dispute between the new management of Novell and SCO, and all  
2     of a sudden, this becomes a federal issue because 204(a)  
3     requires a writing, and they don't think this is enough of a  
4     writing, but didn't have any problem over the last eight  
5     years? I mean, this is the same company that upon the closing  
6     of the agreement, the evidence is going to show, immediately  
7     wrote letters to virtually every one of their clients saying,  
8     we don't own it anymore. Here's contact to SCO. They're who  
9     you have to deal with now.

10           So I would urge the Court not to look at it in a  
11     vacuum that apparently Novell wants you to to be able to not  
12     look at the reality out there and take it for what it is.  
13     This couldn't be more clear as an instrument of conveyance  
14     even if you want to put it that way.

15           Thank you, Your Honor.

16           THE COURT: Thank you.

17           I'll take the motion under advisement. And since I  
18     don't yet know how I'm going to rule on the motion to remand,  
19     I don't want to bring you all back, I'll now hear arguments on  
20     the motion to dismiss.

21           Mr. Jacobs? Obviously if I end up remanding, I  
22     wouldn't worry about the motion to dismiss. But if I do  
23     don't, I will.

24           MR. JACOBS: All right.

25           Just to set the context, Your Honor, I'm sure

1       you're aware you have SCO v. IBM.

2               THE COURT: I am the lucky judge who has that.

3               MR. JACOBS: You have two of the many SCO cases that are  
4 now filed around the country.

5               THE COURT: So I've read.

6               MR. JACOBS: And they're alleging copyright infringement  
7 in SCO v. IBM. So just I want you to have in mind that what  
8 you're doing here may have some bearing on your other case.

9               I think it would be useful to walk you through the  
10 asset purchase agreement because --

11              THE COURT: I can solve them both by some ruling here?

12              MR. JACOBS: Yes. Or at least a lot of both.

13              I think it would be helpful to walk you through the  
14 asset purchase agreement. I have found that every time I read  
15 it, I get a new insight into the language of the parties. Do  
16 you have a copy of the complaint there with you, the APA?  
17 Because I'm going to --

18              THE COURT: I think I do someplace here.

19              Here it is. September 1995?

20              MR. JACOBS: Indeed. And I will try to make sure that I  
21 can help guide you to the right pages. Not all of them are  
22 enumerated, so there may be a little flipping back and forth.  
23 If you'd like, I did take a copy with some clips that divide  
24 up Amendment Number 2 and a couple portions. Would you like  
25 to use the one you have?

1 THE COURT: I'd be happy with any help.

2 MR. JACOBS: May I approach?

3 THE COURT: Sure.

4 MR. JACOBS: So I guess I should start out by saying we  
5 wouldn't be here if there was a document that SCO had adduced  
6 or told you they would adduce that says, "Novell, hereby,  
7 transfers the UNIX copyright to SCO." "Seller, hereby,  
8 transfers the UNIX copyright to buyer." They have not adduced  
9 such a writing.

10 One of the questions that comes up in this case is,  
11 what did SCO get? Or as Mr. Hatch put it, how is it possible  
12 that for the last eight years parties have been surviving  
13 without a copyright dispute arising? SCO attribute it to a  
14 change in management of Novell; we attribute it to a change of  
15 business strategy at SCO, one not contemplated by the original  
16 agreement.

17 Asset purchase agreement, let's start with the  
18 recitals. This will be important because the term business is  
19 defined there.

20 Seller is engaged in a business of developing a  
21 line of software products currently known as UNIX and  
22 UnixWare.

23 Now let me stop a minute because this gets a little  
24 tricky. UNIX and particularly UNIX System V Release X or  
25 SVRX. UNIX System V Release X was the unit that Novell itself

1     acquired from AT&T Unit System Laboratories, or USL, just a  
2     few years before the APA. UnixWare is a derivative of that, a  
3     software program that Novell wrote to try and make UNIX  
4     inter-operate well with NetWare, Novell's flagship product.

5             When we talked about UNIX, we're talking about  
6     legacy, a legacy program and legacy licenses and a business  
7     that by the time the asset purchase agreement, as I'll show  
8     you, is from the standpoint of Novell and the acquirer here  
9     essentially static.

10            In B, the recitals go on to say that certain assets  
11     related to the business are going to be acquired. So they're  
12     not going to acquire, quote, the business, unquote; they're  
13     going to acquire certain assets.

14            And then we get to 1.1(A) down at the bottom of the  
15     first page, and that is the provision of the promise to convey  
16     or the promise to assign, harking back to our distinction  
17     between an actual conveyance or promise to convey, this is a  
18     promise to convey.

19            At closing date, the seller will convey, et cetera,  
20     the included assets -- and if you read across to the next page  
21     stating rather the obvious, they're not going to transfer the  
22     excluded assets. We're going to transfer the included assets.  
23     We're not going to transfer the excluded assets.

24            Now, we noted in our opening paper, and SCO did not  
25     respond to this point, that there is a document -- there is a

1 closing that takes place, and there's documents in any big  
2 transaction like this at a closing.

3 THE COURT: When you say the opening papers, you mean on  
4 the motion to dismiss.

5 MR. JACOBS: Correct. One of the earlier footnotes.

6 So something happens at the closing, and what  
7 happens at the closing is the included assets get transferred,  
8 the excluded assets don't.

9 So now flip ahead to, I believe, it is the black  
10 clip.

11 THE COURT: Schedule 1.1(A)?

12 MR. JACOBS: Exactly. And this is -- the  
13 Schedule 1.1(A) and 1.1(B) are the schedules referred to in  
14 that provision right there I just pointed you to. And the  
15 first line is the line that SCO points to:

16 All rights and ownership of UNIX and UnixWare.

17 And that sounds pretty broad. All rights in UNIX  
18 and UnixWare. And they like that language.

19 Now, if you go to the next page, the page marked  
20 Page 34, we're still in the included assets. We're still in  
21 Schedule 1.1(A). And if you go down to Roman V, there's a  
22 heading there for intellectual properties. So we're still in  
23 the included assets. What intellectual property is being  
24 conveyed to SCO in this agreement? And the answer is a couple  
25 trademarks. No copyrights are shown. No patents are shown.

1 Just a couple trademarks.

2 Now, if you flip ahead to the excluded assets list,  
3 Schedule 1.1(B), you'll see a Roman V there, kind of a  
4 parallel provision, right? Intellectual excluded assets.

5 All copyrights and trademarks except for the  
6 trademark UNIX and UnixWare.

7 So we have a mirror image provisions here, the  
8 excluded assets, included only -- when it comes to IT, it  
9 included UNIX and UnixWare. The excluded assets include  
10 everything. You see all patents there, of course, except for  
11 the trademark UNIX and UnixWare. So as of the closing, we're  
12 plainly not transferring copyrights, and I don't think there's  
13 any serious dispute about that.

14 What, then, does SCO get out of this? If they  
15 don't get the copyrights, what do they get? And I want to  
16 turn you now to Article 4 of the agreement, because this is  
17 where a lot of the interesting provisions of this agreement  
18 come in, and particularly Section 4.16.

19 So this is the heading SVRX licenses. And as I  
20 mentioned, SVRX refers to the legacy business, UNIX System V,  
21 SV, Release X, X standing for any numeral. And it's  
22 important, first of all, in 4.16(A) to see what SCO doesn't  
23 get with respect to UNIX System V Release X, because in  
24 4.16(A), what SCO has with respect to those rights is the  
25 rights to administer those legacy licenses remitting

1       95 percent to Novell and keeping 5 percent for it.

2               So right away you start to wonder, well, why would  
3       SCO need the copyright rights, any of the copyright rights in  
4       UNIX System V Release X. And maybe most fundamentally, why  
5       would they need any ownership of UNIX System V Release X in  
6       order to carry on that business of administering the licenses  
7       remitting 95 percent to Novell? The answer is, they don't.  
8       They don't need the copyrights to do that. They're just  
9       administering licenses.

10              Now, as I mentioned, by this time, the SVRX  
11       business is largely static. And if you look down at 4.16(C),  
12       it says that seller, that's Novell, is not going to promote  
13       the SVRX business. And then if you look up a sentence at the  
14       bottom of 4.16(B), it says that buyer is not going to make  
15       additional sales of SVRX without Novell's permission. That  
16       gets amended slightly by amendment Number 1, not at issue  
17       here. They get the right to make some additional licenses to  
18       additional computers for already existing licenses.

19              So when we look at what the agreement does with  
20       respect to UNIX System V Release X, which is the UNIX that is  
21       at issue in the slander title claim, what we see is SCO has no  
22       reason to have a copyright.

23              What did they get? Well, what they get, if you go  
24       ahead to 4.18, is a provision that says development of a  
25       merged product. And it says in the second sentence:

1           Buyer is going to commercial use with commercially  
2           reasonable efforts to complete the merged product.

3           The merged product was basically what this deal was  
4           about from Novell's standpoint. What SCO was going to do was  
5           enhance some additional kinds of UNIX, some additional UNIX  
6           flavors for special kinds of processors or non-special  
7           processors, but evolve the UNIX business, evolve UnixWare in  
8           particular, and that's the reference there to the merged  
9           product.

10           And if you look even further ahead of the  
11           agreement, I won't ask you to jump there now, but it shows  
12           that far from remitting 95 percent of the SVRX royalties to  
13           Novell. As to this merged product, where it calls for other  
14           products that are named in there, there's Eiger and White Box  
15           and computeristic terms, as to those products, there's a step  
16           down in royalties.

17           Here's the interesting question. We alluded to it  
18           in our reply brief. What ownership of copyrights falls out of  
19           this arrangement?

20           Because SCO is developing enhancements, is writing  
21           its own code, SCO does as a matter of copyright law own the  
22           copyright rights and the rights to enforce the copyright  
23           rights in the code that it developed. There is no so-called  
24           grant back provision in this agreement itself. There is  
25           another agreement that's referred to here which does have a



1 license back to Novell. It's not at issue today. But the  
2 point is, in terms of the copyright ownership, it's not  
3 correct to say that they didn't get any copyright ownership.  
4 As a matter of copyright law and how copyright law treats  
5 derivative works, they own the code that they wrote. The code  
6 that they are merely taking from Novell and incorporating that  
7 product they don't own, and they have no need to own.

8 And that's why even if you look at the required for  
9 language in Amendment Number 2, you come up against a very --  
10 you come up against a stonewall when you start talking about  
11 UNIX System V Release X. There is no reason under the  
12 structure and logic of the asset purchase agreement for SCO to  
13 have acquired ownership rights of anything in System V  
14 Release X, because that wasn't what they were supposed to be  
15 out focusing on in any way.

16 So Amendment Number 2 gets executed, and that is  
17 the green clip. And Amendment Number 2 adjusts the definition  
18 of excluded assets. Now, this is the kind of quirky way to  
19 begin with to try to effect a change in the structure and  
20 logic of the agreement to only modify the excluded assets, do  
21 away with the included assets.

22 But in any case, having sat down and thought about  
23 it a little bit, what did the parties do? Did they purport to  
24 write an amendment that transferred all intellectual property  
25 rights in UNIX to SCO? Did they purport to transfer all of

1 the intellectual property rights that are listed in a later  
2 exhibit in the agreement to SCO? They didn't do that. Did  
3 they say, all intellectual property rights relate to the  
4 business, which would have been kind of interesting because  
5 they talked about -- they defined the business. There's even,  
6 just to underline the point, there is even a definition of  
7 seller intellectual property rights in the asset purchase  
8 agreement at Section 2.10. Did they say, we are going to  
9 transfer seller intellectual property rights from seller to  
10 buyer? They didn't do that.

11 They said something very narrow and very limited.  
12 All copyrights and trademarks -- so actually to start out  
13 with, a very interesting point. We retain the exclusion for  
14 all copyrights and trademarks. We don't wipe it away. We  
15 say, all copyrights and trademarks except for the copyrights  
16 and trademarks owned by Novell as of the date of the agreement  
17 required for SCO to exercise its rights with respect to the  
18 acquisition of UNIX and UnixWare technology.

19 None of us were present in that negotiation.  
20 Section 204(A) says it doesn't matter. You look to the plain  
21 language of the document, and you have to cross over that  
22 204(a) bridge, and you have to see a conveyance. You have to  
23 see an assignment. You have to see something that says  
24 something along the lines of, seller hereby conveys to buyer.

25 But even if you start penetrating this language,

1 you see why SCO's claim just cannot survive a motion to  
2 dismiss, because under 204(a), we should know what copyright  
3 rights went to SCO. And as I mentioned when I discussed the  
4 structure and logic of the Copyright Act, it's not just what  
5 rights and what programs or what rights and what manuals, but  
6 Section 201 makes it clear that you can transfer any one or  
7 more of the exclusive rights volume within copyright. The  
8 right to reproduce, the right to distribute, the right to  
9 publicly perform. And then even in that you can convey  
10 sub-divisible rights.

11 So we should know -- from the face of the document,  
12 we should have a guidepost that say the cases, what programs,  
13 what exclusive rights, can't assume that it's all exclusive  
14 rights, here especially since it says required for. And  
15 that's why this is -- this Amendment Number 2, amendment to  
16 the APA fails two tests under the law of 204(A). One, is it  
17 an instrument of conveyance? Meaning that it had the effect  
18 of conveying a present interest in an item of property; and,  
19 two, is it close enough so that we're not left completely  
20 guessing as to what copyright rights might have -- might, in  
21 fact, have transferred to Novell -- from Novell to SCO,  
22 assuming that this was such an instrument of conveyance?

23 But their slander of title claim depends on their  
24 ability to show that a transfer of ownership occurred because,  
25 as Mr. Hatch noted, they have attached these documents to

1 their complaint. These are the documents. They haven't told  
2 you how they might amend. They haven't told you what they  
3 might show by way of additional written instruments of  
4 conveyance.

5 We submit that you should dismiss this complaint.  
6 And if they want to try and change your mind later with some  
7 additional evidence, they will have to file a relevant motion.

8 I just want to note two -- one housekeeping item.  
9 The cases that we cite on 204(a) and on jurisdiction refer to  
10 1338, and the issue of jurisdiction should be considered as a  
11 1338 issue. And, secondly, on the -- you've dealt with this  
12 issue of special damages. I think you're the expert of  
13 special damages under Utah law. And your decision on that was  
14 affirmed.

15 They have to plead special damages with serious  
16 particularity, and they have to prove -- they can't just plead  
17 attorney's fees in this action as a basis for their special  
18 damages. You decided that in the Computerized Thermal Imaging  
19 case. It was affirmed by the 10th Circuit. So on the issue  
20 of special damages, I think that is a really fairly clear  
21 question of law.

22 THE COURT: Thank you, Mr. Jacobs.

23 Mr. Hatch?

24 MR. HATCH: You know, Your Honor, I think, and I hope I  
25 get it right this time, I think he's putting the cart before

1 the horse. How's that?

2 As I sat and listened to Mr. Jacobs, I think this  
3 would all -- it would be all good and well if he were making  
4 those types of arguments, you know, several months from now,  
5 particularly as he's trying to go through the contract and  
6 tell you what he thinks it means, after we've had the  
7 discovery and we've talked to the people who are involved, we  
8 have all the documents out there.

9 We have to remember, this is a motion to dismiss.  
10 We're talking about the pleading, not all the documents out  
11 there. And to be honest with you, as you can probably well  
12 guess, I have rather divergent views of the documents as to  
13 what they say and what Mr. Jacobs says.

14 One of the things he does tell you, I think he  
15 started his argument by saying this, and I think it says  
16 volumes, he said every time I read the APA, I get something  
17 new and different. And, you know, we ought not to be sitting  
18 here on a motion to dismiss when the only thing before this  
19 Court is a complaint and having Mr. Jacobs, who apparently  
20 gets different readings every time he reads it, telling us  
21 what this contract means.

22 The reality is all we're here to decide today is  
23 whether or not we sufficiently pled in the pleading the  
24 statute of slander of title claims and whether we can go  
25 forward. And he is trying to put his defense that somehow he

1 thinks the contract, he may be able to show that it means  
2 something different than we say it is, he wants to do that  
3 now. He wants you to decide that issue now without the  
4 benefit of all the documents, all the correspondence, the  
5 witnesses that are involved in this, and frankly without a  
6 real knowledge of the contract. You know, he's gone up and  
7 made representations that were really quite amazing, because  
8 the contract itself, as he tried to show it to you, he asked a  
9 very interesting question. He pointed out that part of this  
10 was -- the duty was SCO was to administer current licenses and  
11 remit a percentage back to Novell. And that doesn't -- why  
12 would that require having any copyright?

13 Well, okay. That's really wonderful and probably  
14 true. But, you know, a lot of money was paid for this, and  
15 not enough money that could be justified from just that part  
16 of the contract. He leaves out the entire rest of the  
17 contract including from that list of assets where the source  
18 code is being transferred to SCO. And it's with the source  
19 code that we have the ability to use that source code, to  
20 develop new products under the source code, new licenses and  
21 to be able to take the business forward. That is worth  
22 something. In the source code without a copyright isn't worth  
23 anything. And if we don't decide it's a vacuum today on a  
24 motion to dismiss and go forward, I think Mr. Jacobs knows  
25 very well just as he really -- well, he knows that we're going

1 to find several things. We're going to find that Novell  
2 transferred copyrights to us at the time of closing. Well,  
3 why did they do that if his reading is correct?

4 One of the documents -- and this is a motion to  
5 dismiss, but I think it's only fair for the Court to see the  
6 kind of things that we're going to need to be looking at as we  
7 go forward. One of the documents that is dated  
8 December 6, 1995, now that's the date of closing. That's a  
9 date where they're claiming no transfer was made. It is a  
10 technology licensing agreement between Novell and SCO. And  
11 essentially what it does is it gives Novell a license back of  
12 the copyrights and all the rights and everything that it just  
13 sold to SCO for its own use.

14 Well, if this were a summary judgment motion, we'd  
15 be asking serious of questions of, if you're saying copyrights  
16 weren't transferred, why did you feel like you needed to get a  
17 license back so that you could use these in your own business?  
18 Because if you owned them, guess what, this document doesn't  
19 exist. And that's kind of why he wants you to decide this on  
20 a motion to dismiss and impact, you know, impact the other  
21 case you have and impact this case without any information,  
22 because, well, that would be a really great victory.

23 But it really goes contrary to the law of the  
24 motion to dismiss. We're here. Our only concern here is  
25 whether or not it was pled sufficiently and, therefore, put on

1 notice of their claims so we can go forward and resolve the  
2 dispute, which is a state law claim on whether or not they've  
3 slandered our title, which we allege they have; and, two,  
4 whether their defense, which seems to be created not back in  
5 1995 when this thing was closed or even '96 when the  
6 clarification of the Amendment 2 was put into place, but just  
7 a few, not more than a few months ago when new management  
8 started to take positions that, you know, we frankly believe  
9 were taken to affect the IBM litigation.

10 THE COURT: What is your response to Mr. Jacobs'  
11 argument that you haven't sufficiently pled special damages  
12 and that you have not met the brilliant test for them outlined  
13 in Thermal Energy?

14 MR. HATCH: I would say to that, Your Honor, if we  
15 haven't met it as well as you would expect, my most profound  
16 apologies, because I wouldn't challenge that ruling at all.  
17 What I would say, again, we're in the notice of pleading  
18 stage, and it's very -- we have alleged, and I'm always -- I'm  
19 always willing to say we could have alleged better. I think  
20 anybody who takes a second grasp of something can always write  
21 something better. But I think it is sufficient.

22 They are on knowledge that based on what they did  
23 that they know that people -- they know the intent of the  
24 people -- there are people out there and businesses who will  
25 not take licenses with us now because they have raised an



1 issue whether we own the copyright or not. That's a damage,  
2 and that's a type of damage that you talk about in that  
3 position -- I mean, that opinion in its typed form, not the  
4 exact. They know that people won't invest with the company  
5 because there's a question mark out there that they caused.  
6 And, frankly, we're having, you know, we're having impact  
7 that's not monetary, as well, because people were citing to  
8 this case and other cases saying, we ought to state them,  
9 ought to go forward where we can protect their rights because  
10 they want to see if they can actually make their case that we  
11 don't own the copyright.

12 So those are all pled generally. Could we be more  
13 specific? Always. Could we be more specific in six months  
14 when we have more discovery? Probably. But I don't think the  
15 Notice Pleading Statute requires that. If there was no  
16 possibility that we had any type of special damages under the  
17 claim, then I would say there's a problem. But I would say  
18 it's pretty obvious, and they know it, that there are claims  
19 for damages out there, and having us put another paragraph in  
20 the complaint would really -- it could be done, but it's  
21 really kind of a waste of time and manpower. The case ought  
22 to move forward. And, frankly, even if there had only been a  
23 monetary damage, the fact that we had to expend attorney's  
24 fees to protect our rights is a legitimate damage under the  
25 case law, as well.

1           The only other point I would make, and it goes  
2 really to the same point that I was making about, you know,  
3 really what Novell was trying to argue here is a motion to  
4 dismiss is their interpretation of the contract. I heard  
5 Mr. Jacobs talk about, you know, you have main parts and  
6 subparts and got into a rather quite complexity that he claims  
7 the law of Section 204(A) requires. I would put to you and I  
8 have yet to see the case that requires all of that.

9           Judge Kazinski was very clear in his decision in  
10 the Ninth Circuit, a juris that I personally have respect for,  
11 bright man. He stated the same thing that Judge Friendly  
12 stated and Judge Newman before stated, virtually every judge  
13 that addressed it, it needs to be a writing. And he says, it  
14 does not need to be the Magna Charta. And the reality is  
15 here, there isn't a lot of detail in the contract.

16           But one of the things that they're trying to attach  
17 their interpretation to this is, is we will show at trial if  
18 they bring summary judgment, at summary judgment, that what  
19 was being transferred here was everything that was UNIX and  
20 UnixWare. And the only -- and it doesn't take a lot of  
21 language to say, everything is being transferred.

22           And Novell knew that. And we believe that not only  
23 will the SCO side of that contract testify that we were buying  
24 everything in UNIX and UnixWare, which doesn't take a  
25 delineation, but that the Novell people are going to testify

1 to that, too, because that's what the deal was. And so we  
2 have every belief that they will be consistent with that  
3 testimony.

4 Now, one of the things that he doesn't point out,  
5 it's hard to define this. But you'll notice in the excluded  
6 assets, the reason it even makes any limitation at all is  
7 because Novell at the time was concerned that one thing didn't  
8 get transferred over, and that was their NetWare product. And  
9 so that's why it's worded. It goes all the way down the list.  
10 You don't get NetWare. You don't get NetWare this, and you  
11 don't get NetWare that. And when it talks about you don't get  
12 copyrights in 1.1(A), it's talking about we're not getting the  
13 NetWare copyrights.

14 Now, all of this is going to be made clear  
15 throughout the course of this litigation, and it would be  
16 truly unfortunate if in a motion to dismiss based on a  
17 lawyer's argument he gets a different reading every time he  
18 reads it, we throw the entire case out. That doesn't make  
19 sense.

20 And I think they understand the pleadings under the  
21 Notice of Pleading standard. And I really wouldn't -- could  
22 the pleading be made better? Maybe. But it wouldn't -- would  
23 their knowledge of what they're defending be any better  
24 because of it being written slightly better? I don't think  
25 so, and I think we ought to move on.

1                   Thank you, your Honor.

2           THE COURT:   Thank you, Mr. Hatch.

3                   Mr. Jacobs?

4           MR. JACOBS:   Briefly, Your Honor.

5                   We read Section 204(a) as saying that SCO doesn't  
6   get to get to the jury.   The policy behind the 204(a) is there  
7   should be clarity in instrument of assignment so that both  
8   parties and the world can trace title.   We don't have a deed  
9   system, although you can record assignments in the copyright  
10   office.   We don't have the kind of elaborate system of land  
11   title that we have in this country to make sure -- to ensure  
12   certainty.   And, of course, there are disputes that arise out  
13   of the real property deeds.   But you have to start out with a  
14   deed.   You have to start out with an instrument of conveyance.

15                  I'm studying the assets purchase agreement to  
16   answer the question, what did SCO get?   I started out by  
17   saying we wouldn't be here if SCO could point to an instrument  
18   of conveyance.

19                  They haven't pointed to an instrument of  
20   conveyance.   They haven't pointed to a document in which  
21   Novell conveyed ownership, in which buyer conveyed ownership  
22   of copyrights to seller -- when seller conveyed ownership of  
23   copyrights to buyer, when Novell to SCO.   If they had that  
24   piece of paper in front of you, could there be interpretive  
25   issues?   Perhaps.   If they did it right?   No.   But could there

1 be interpretive issues? Perhaps. But at least we would know  
2 that there was some actual conveyance of something to  
3 something, and they haven't even gone that far.

4 So by suggesting to you that what they really need  
5 to do is take discovery and get to the jury, we propose to you  
6 that they're making our argument. They're making our 204(a)  
7 policy argument. They're making our 204(a) case law argument.

8 The instrument of conveyance is supposed to serve  
9 as the guidepost. It's supposed to be sufficiently clear that  
10 the world and the parties know that the buyer is actually  
11 negotiated. One of the cases says the purpose of 204(a) is to  
12 ensure buyers negotiate specifically with sellers over what  
13 copyrights are being transferred. And if you stretch that law  
14 very far and you allow people to say, let me get to the jury  
15 and let me introduce evidence of a former executive that now  
16 works for us, then you undermine that policy behind 204(a).  
17 You undermine the entire federal scheme. That's why you  
18 should dismiss their complaint.

19 THE COURT: Thank you.

20 Thank you all. I'll take this motion under  
21 advisement and reach it if I don't remand the case.

22 Court will be in recess.

23 (Whereupon, the court proceedings were concluded.)

24 \* \* \* \* \*

1 STATE OF UTAH )  
2 ) ss.  
3 COUNTY OF SALT LAKE )

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

6 That as such reporter, I attended the hearing of  
7 the foregoing matter on May 11, 2004, and thereat reported in  
8 Stenotype all of the testimony and proceedings had, and caused  
9 said notes to be transcribed into typewriting; and the  
10 foregoing pages number from 3 through 45 constitute a full,  
11 true and correct report of the same.

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

14 And hereby set my hand and seal, this 24<sup>th</sup> day of

15 Jme 2004.

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17  
18  
19  
20 Kelly Brown Hicken  
21 KELLY BROWN HICKEN, CSR, RPR, RMR