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Attachment No. 1 – Novell-Santa Cruz-X/Open September 1996 Confirmation Agreement (redacted).

Attachment No. 2 - November 13, 1998 Novell-X/Open UNIX Trademark Assignment Agreement.

Attachment No. 3 - The Wall Street Journal article titled "Novell Will Transfer Trademark Rights For Unix System to Industry" dated October, 12 1993, stating therein: "Because it no longer has the value of that [UNIX] trademark, Novell said it would take a $15 million write-off against earnings over three years."

Attachment No. 4 - InformationWeek article titled "UNIX Name Is Now Fair Game" dated October 18, 1993, stating therein: "In exchange for handing over the [UNIX] trademark, which Novell says is valued at $15 million,..."

Attachment No. 5 - Open Systems Today article titled "A Curious Loophole In The X/Open-Unix Deal" dated October, 25 1993, stating therein: "The [UNIX] trademark was valued on the books at $15 million," said Jeff Hansen, a spokesman for X/Open. "They had to get something for it. Of course, the shareholder status won't come close to that $15 million." Shareholder fees are about $550,000 per year,"

Attachment No. 6 - Brief of Appellant Wayne R. Gray, in the Case Styled *Gray v. Novell, et al.*, in the United States Court of Appeals for the Eleventh Circuit, Appeal No. 09-11374-C.

ATTACHMENT No. 1

CONFIDENTIAL
Attorney's Eyes Only

EXECUTION COPY

CONFIRMATION AGREEMENT

This Agreement is effective among The Santa Cruz Operation, Inc. ("SCO"), a California corporation; Novell, Inc. ("NOVELL"), a Delaware corporation; and X/Open Company, Limited ("X/OPEN"), a UK corporation. The effective date of this Agreement is the latest of the dates of execution by the respective parties.

WHEREAS, NOVELL and SCO entered into a September 19, 1995 Purchase Agreement, as amended ("APA"), pursuant to which NOVELL agreed to convey its entire right, title and interest in and to the UNIX trademark to SCO, subject to rights and obligations established in a May 14, 1994 NOVELL-X/OPEN Trademark Relicensing Agreement, as amended ("1994 Agreement") with the exception of non-assignable agreements and any compensation received by NOVELL from X/OPEN pursuant to the 1994 Agreement; and

WHEREAS, pursuant to the 1994 Agreement, X/OPEN is entitled to receive, subject to certain conditions not relevant here, full ownership of the UNIX trademark as of May 14, 1997; and

WHEREAS, X/OPEN and SCO desire to provide for the acceleration of the vesting of title in X/OPEN to the UNIX trademark, and the assignment to SCO of NOVELL's rights under the 1994 Agreement, under the following terms and conditions.

NOW, THEREFORE, for appropriate consideration, the adequacy and sufficiency of which are acknowledged, the parties agree as follows:

1. At the request of X/OPEN, NOVELL shall, as soon as possible after the date of execution of this Agreement, execute appropriate assignment document(s), to be prepared by X/OPEN, formally transferring to X/OPEN the legal title to the UNIX trademark. As among NOVELL, SCO and X/OPEN, and notwithstanding any prior understandings to the contrary, NOVELL shall for this purpose be considered the owner of legal title to the UNIX trademark and shall execute such assignment document(s) as assignor. SCO agrees that notwithstanding the fact that NOVELL will be executing such assignment document(s) after the Closing Date established by the APA, such assignment by NOVELL shall not be considered a breach of NOVELL's obligations under the APA. X/OPEN acknowledges and confirms that, as of the date of execution of such assignment document(s) ("Assignment Date"), it will be solely responsible for all expenses and fees incident to the protection and enforcement of the UNIX mark, including but not limited to expenses of seeking, obtaining and preserving registration of same, and the expenses of transferring existing registrations into the name of X/OPEN; provided, however, that

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with respect to any document that is required to be executed by SCO to perfect X/OPEN's title to such mark after such assignment, SCO shall execute such document without cost to X/OPEN.

5. This Agreement supersedes all prior agreements, arrangements and understandings among the parties and, together with any relevant portions of the 1994 Agreement that are not inconsistent with this Agreement, constitute the entire understanding among the parties relating to the subject matter of this Agreement. No addition to or modification

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of any provision of this Agreement shall be binding on the parties unless made by a written instrument signed by a duly authorized representative of each of the parties.

IN WITNESS WHEREOF, the parties have executed the Agreement through their duly authorized representatives on the respective dates indicated below.

THE SANTA CRUZ OPERATION, INC.

By: James P Wilt

Printed Name: James P. Wilt

Title: VP Business Development

Date: September 4, 1996

X/OPEN COMPANY, LIMITED

By: Steve Norris

Printed Name: STEVE NORRIS

Title: GENERAL COUNSEL

Date: SEPTEMBER 2, 1996

NOVELL, INC.

By: David R Bradford

Printed Name: David R. Bradford

Title: Sr. Vice President and General Counsel

Date: August 23, 1996

CONFIDENTIAL INFORMATION
Gray v. Novell, et al.
Civil Action No. 8:06-cv-01950-JSM-TGW

REDACTED

UNIX 000135

01127

ATTACHMENT No. 2

Document #: 322305.

DEED OF ASSIGNMENT

THIS AGREEMENT is made this 13th day of November one thousand nine hundred and ninety eight.

BETWEEN Novell, Inc, a corporation organised under the laws of Delaware, of 1555 North Technology Way, Orem, Utah 84097-2395, USA (hereinafter called "the Assignor") of the one part.

AND X/Open Company Limited, a British company of Apex Plaza, Forbury Road, Reading, Berkshire, RG1 1AX (hereinafter called "the Assignee") of the other part.

WHEREAS

1. The Assignor is the Proprietor of the trade marks referred to in the Schedule hereto (hereinafter referred to as "the said trade marks").

2. It has been agreed between the parties that the Assignor shall assign to the Assignee the said trade marks.

NOW IT IS HEREBY AGREED AS FOLLOWS

1. For good and valuable consideration and the sum of One Dollar ($1.00) now paid to the Assignor by the Assignee (the receipt whereof the Assignor hereby acknowledges) the Assignor hereby assigns unto the Assignee all property, right, title and interest in the said trade marks with the business and goodwill attached to the said trade marks TO HOLD the same unto the Assignee absolutely.

2. This assignment includes the right of the assignee to bring action and claim relief and damages in respect of any infringement of said trade marks which occurred prior to the date of this assignment.

SCHEDULE

COUNTRY	TRADE MARK	NUMBER
USA	UNIX	1392 203
USA	UNIX	1390 593
USA	UNIX SYSTEM LABORATORIES	1780 785

IN WITNESS WHEREOF the parties hereto have executed this agreement in accordance with their respective constitutions the day and year first above mentioned.

FOR AND ON BEHALF OF
Novell, Inc.

Richard C. Nite
Vice President &
Assistant Corporate Secretary

IN THE PRESENCE OF

FOR AND ON BEHALF OF
X/Open Company Limited

IN THE PRESENCE OF

S Thompson

ATTACHMENT No. 3

THE WALL STREET JOURNAL.

Technology

Novell Will Transfer Trademark Rights For Unix System to Industry Consortium

By Don Clark
Staff Reporter of The Wall Street Journal
559 words
12 October 1993
The Wall Street Journal
PAGE B6
English

Novell Inc. agreed to transfer trademark rights to the **Unix** operating system to a nonprofit industry consortium, the latest in a series of steps to end technical disputes over the widely used software.

The agreement, supported by most major computer and software companies, transfers rights to the **Unix** trademark to X/Open Co., a 14-company organization that helps set technical standards for the industry. The pact allows any company the right to use the **Unix** name, as long as its software complies with a new set of specifications designed to ensure that application programs work with different versions of **Unix**.

Novell retains ownership of the underlying **Unix** source code and will continue to license it to other companies. By yielding control over the **Unix** name and key specifications, Novell removes objections from competitors that hampered efforts to standardize **Unix** and make it compete more effectively with the new Windows NT operating system from Microsoft Corp., which is trying to move into markets long controlled by **Unix** system suppliers.

"We are acknowledging the fact that Novell is not the sole source of technology going forward," said Kanwal Rekhi, executive vice president in charge of Novell's **Unix** systems group. "The specifications would be set by X/Open."

Operating systems control the basic internal housekeeping functions of computers. **Unix**, invented by American Telephone & Telegraph Co., has been custom-tailored by most major computer makers to run personal computers, desktop workstations, minicomputers and mainframes. The subtle differences have made it impossible to write one application program that would work without modifications on all the **Unix** versions.

Novell, best-known for its NetWare operating system for computer networks, acquired title to **Unix** in July when it bought **Unix** Systems Laboratories from AT&T for $320 million in stock. Besides receiving royalties from products based on its **Unix** source code, Novell has been aggressively selling a complete version of the operating system called UnixWare along with its NetWare program. It has also been trying to build support for a so-called application programming interface, a set of specifications that would allow programmers to write one version of an application program and have it converted to multiple **Unix** versions through a process called recompilation.

Competing **Unix** suppliers, including Sun Microsystems Inc. and Santa Cruz Operation Inc., objected that Novell was trying to use its influence over software standards to unfairly benefit its UnixWare and NetWare products. Mr. Rekhi said the agreement announced yesterday should answer those objections and ensure that all **Unix** vendors can now compete on an equal footing.

The arrangement was endorsed by representatives of Sun, Santa Cruz Operation, International Business Machines Corp., Hewlett-Packard Co., Digital Equipment Corp. and others.

"Before Novell could say they were the real **Unix**," said Jim Wilt, Santa Cruz Operation's vice president, business development. "Now it's a level playing field."

Under the agreement, Novell becomes a member of X/Open with an equal say over future **Unix** specifications. X/Open will receive an undetermined royalty fee from companies that wish to license the **Unix** trademark. Because it no longer has the value of that trademark, Novell said it would take a $15 million write-off against earnings over three years.

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ATTACHMENT No. 4

TOP OF THE WEEK NOVELL PASSES TRADEMARK TO X/OPEN

UNIX NAME IS NOW FAIR GAME

Marianne Kolbasuk McGee
469 words
18 October 1993
InformationWeek
15
Issue: 447
English

Ending weeks of speculation, Novell Inc. last week signed over the **Unix trademark** to the X/Open standards group, thus paving the way for other software developers to use the Unix brand name with their products.

The move had been scheduled for nearly a month ago at a high-profile press conference in New York, but last-minute protests by other vendors over the terms of the agreement derailed the event.

The biggest bone of contention was Novell's intention to require licensees of the **Unix trademark** to be licensees of Novell's own Unix-based product, UnixWare. "No one had any intentions of licensing UnixWare just to be able to use the **Unix trademark**," says SunSoft VP Jim Billimaier, noting that Sun's version of Unix has about 1.4 million users, compared with about 15,000 users for UnixWare.

Over the past few weeks, Novell apparently reached the same conclusion. Rather than insist that other vendors incorporate UnixWare technology into their products in order to license the **Unix trademark**, Novell will instead require that the vendors' products conform to the set of 1,170 application program interfaces that most members of the Unix industry agreed on last month (IW, Sept. 6, p. 12).

Let Novell Be Novell?

"Novell is starting to understand that it cannot act like Microsoft if it wants Unix to compete against Windows NT," says Judith Hurwitz, president of Hurwitz Consulting in Newton, Mass.

In exchange for handing over the trademark, which Novell says is valued at $15 million, Novell will become X/Open's 15th shareholder and the vendor will be able to use the Unix name in its own products royalty-free for the next three years. An X/Open spokesman says the group has not set the licensing fees.

Although this is the first time the **Unix trademark** has been held by an independent body (AT&T owned it before Novell), other Unix developers are in no hurry to change the names of their products. "We plan to license the Unix name as soon as possible," explains Hewlett-Packard's Doug Johnson, a Unix marketing program manager. "But over the years we've built brand recognition with our users and HP/UX, and we're not planning to give that up."

Some users also express little interest in Unix uniformity. "It's good that the Unix providers are working to fix compatibility and identity problems, but diversity among their products is not necessarily a bad thing," points out Mike Prince, IS director at Burlington Coat Factory Inc. in Burlington, N.J. "I would have hated to have seen everyone's product become UnixWare, or any other Unix flavor for that matter.'

Document iwk0000020011031dpai00174

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ATTACHMENT No. 5

News

A Curious Loophole In The X/Open-Unix Deal

Mitch Wagner
637 words
25 October 1993
Open Systems Today
17
Issue: 135
English

An agreement with Novell to give control of the **Unix trademark** to X/Open will block NT, VMS and Unix workalikes such as BSD/386 and Linux from calling themselves Unix-for at least a year.

One provision of the agreement that had not been anticipated among the voluminous leaks and rumors preceding the actual announcement earlier this month is that the first phase of the X/Open Unix branding program will require that products calling themselves "Unix" be licensed Unix versions, as well as meet X/Open Portability Guide (XPG) and System V Interface Definition (SVID) specifications. A later phase, expected in about a year and based on a broader array of APIs, will not require a Unix license.

With the exception of the Unix license requirement, both NT and VMS could fit the other requisites for Unix in the near future. Software vendors have promised XPG and SVID compliance for both OSes-NT from third parties, VMS from Digital Equipment Corp. Moreover, Unix workalikes, such as BSD/386 from Berkeley Software Design and Linux, already promise Unix compatibility without branding and they could win the right to call themselves Unix, which they haven't been able to, under the second phase of the branding process.

The agreement also allows for Novell to become a shareholder in X/Open.

And while Novell will have to go through a validation branding process for standards compliance before it can use the **Unix trademark**, just like any other vendor, it won't have to pay X/Open for that branding for three years.

"The trademark was valued on the books at $15 million," said Jeff Hansen, a spokesman for X/Open. "They had to get something for it. Of course, the shareholder status won't come close to that $15 million." Shareholder fees are about $550,000 per year, and X/Open has 15 shareholders, including Novell, DEC, Hewlett-Packard, IBM, Sun Microsystems and major non-U.S. vendors such as Hitachi and Siemens Nixdorf.

Novell and X/Open announced earlier this month that X/Open will take on the role of ultimate arbiter of what is and isn't called "Unix." The trademark had been a jealously kept property of AT&T and, later, Unix System Laboratories (USL), when AT&T spun USL off as an independent subsidiary. The trademark came to Novell when Novell acquired USL in July.

Now, Novell said it wants to focus on providing its UnixWare shrink-wrapped Unix implementation. Also, giving up the **Unix trademark** is a tactic in Novell's plan to nurture an image in users' minds that Unix is a unified, standards-based OS.

To win the right to use the name "Unix" in the near term, vendors' products will need to conform to XPG3 or XPG4 and the System V Interface Definition (SVID) Version 2 or Version 3. The product also will need to be "derived from USL operating system technology." That somewhat enigmatic phrase from X/Open and Novell's joint statement means that the OS should be based on a source-code or binary-code version of Unix licensed from Novell or USL, said Kanwahl Rekhi, executive vice president of Novell's Unix Systems Group.

Also, the vendor must promise to make the operating system conform to the Spec 1170 API endorsed by about 75 vendors Sept. 1. Spec 1170 defines 1,170 interfaces that all Unix systems should comply with, according to the vendors that have been developing it.

X/Open said it expects to adopt a version of Spec 1170 in about a year.

Once X/Open rules on Spec 1170, that will become the litmus test for use of the **Unix trademark**, replacing the XPG, SVID and USL licensing requirements.

Document unx0000020011102dpap00193

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ATTACHMENT No. 6

Appeal No. 09-11374-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WAYNE R. GRAY,

Plaintiff-Appellant,

vs.

NOVELL, INC., THE SCO GROUP, INC., and X/OPEN COMPANY, LIMITED,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida
The Honorable Virginia M. Hernandez Covington, Judge Presiding
(Case No. 8:06-CV-01950-T-33TGW)

BRIEF OF APPELLANT WAYNE R. GRAY
ORAL ARGUMENT REQUESTED

STEELE + HALE, P.A.
Thomas T. Steele, Atty.
Florida Bar No. 158613
Email: tsteele@steelehale.com
201 East Kennedy Boulevard, Suite 425
Tampa, Florida 33602
Telephone (813) 223-2060
Facsimile (813) 223-2065
Counsel for Plaintiff-Appellant

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Plaintiff/Appellant, WAYNE R. GRAY, by and through his undersigned counsel and in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, hereby submits his "Certificate Of Interested Persons" for the above-styled and numbered appeal:

1. Mr. Gray hereby lists all persons, associated persons, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities financially interested in the outcome of the litigation, including publicly-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to a party in this case:

A. Covington, Virginia M. Hernandez, The Honorable (United States District Court Judge, M.D. Fla.)

B. Wayne R. Gray (Plaintiff)

C. Novell, Inc. (Defendant)

D. The SCO Group, Inc. (Defendant)

E. X/Open Company Limited (Defendant)

F. Thomas T. Steele (Plaintiff's counsel)

G. Mercedes G. Hale (Plaintiff's counsel)

H. Sarah M. Hammett (Plaintiff's counsel)

I. Steele + Hale, P.A. (Plaintiff's counsel's law firm)

J. Frederick H.L. McClure (Defendant Novell's counsel)

K. E. Colin Thompson (Defendant Novell's counsel)

L. DLA Piper US, LLP (Defendant Novell's counsel's law firm)

M. Heather M. Sneddon (Defendant Novell's counsel)

N. Thomas R. Karrenberg (Defendant Novell's counsel)

O. Anderson & Karrenberg (Defendant Novell's counsel's law firm)

P. Karen C. Dyer (Defendant SCO's counsel)

Q. George R. Coe (Defendant SCO's counsel)

R. Boies, Schiller & Flexner, LLP (Defendant SCO's counsel's law firm)

S. Evan A. Raynes (Defendant X/Open's counsel)

T. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP (Defendant X/Open's counsel's law firm)

U. William C. Guerrant, Jr. (Defendant X/Open's counsel)

V. Hill, Ward & Henderson, P.A. (Defendant X/Open's counsel's law firm)

W. iNUX, Inc. (Plaintiff's corporation).

None of the above-listed persons or legal entities, including publicly-traded companies, owns 10% or more of a party's stock.

2. The name of every other entity whose publicly-traded stock, equity, or debt may be substantially affected by the outcome of the proceedings:

A. None.

3. The name of every other entity likely to be an active participant in the proceedings, including the debtor and members of the creditors' committees (or twenty largest unsecured creditors) in bankruptcy cases:

A. None.

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"*Milestones in The History of The SCO Group 1979 through 1999*" at 1989 stating: "SCO … product licensed by AT&T to use the UNIX System trademark." at URL - www.sco.com/company/history_1979-1999.html 44

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TABLE OF ABBREVIATIONS AND SPECIAL TERMS

Term	Meaning
#####	Five-digit Bates numbers refer to Appendix and/or Attachments.
1996 Confirmation Agreement	Novell-SCO-X/Open Agreement purportedly executed September 4, 1996.
1998 Assignment Agreement	Novell-X/Open UNIX assignment agreement dated and purportedly executed November 13, 1998.
Amendment No. 1	Amendment No. 1 to the APA, executed at the Closing on December 6, 1995.
Amendment No. 2	Amendment No. 2 to the APA, dated October 16, 1996.
APA	Novell-Santa Cruz Asset Purchase Agreement, dated and executed September 19, 1995.
AT&T	American Telephone and Telegraph Company, original developer of the UNIX operating system software.
Bill of Sale	Document executed at the December 6, 1995 closing, transferring the UNIX business Assets pursuant to the APA and the Schedules thereto as amended.
Certification mark	A certification mark is "any word [or] name . . . used by a person other than its owner . . . to certify . . . origin . . . quality . . . or other characteristics of such person's goods or services." (15 U.S.C. § 1127)
Mr. Gray	Appellant Wayne R. Gray
May 10, 1994, ,Agreement	Novell-X/Open untitled UNIX trademark licensing agreement, dated May 10, 1994.
May 14, 1994, Agreement	A May 14, 1994 agreement titled "Novell-X/Open May 14, 1994, UNIX Trademark Relicensing Agreement."

Term	Meaning
Novell	Appellee Novell, Inc., a software products company.
Santa Cruz	The Santa Cruz Operation, Inc. (also known as "SCO"), predecessor-in-interest to Appellee SCO.
Schedule 1.1(a)	Schedule to the APA, titled "Assets," identifying transferring UNIX and UnixWare assets.
Schedule 1.1(b)	Schedule to the APA, titled "Excluded Assets," identifying assets excluded from transfer.
SCO	Appellee The SCO Group, Inc., a software products company.
SCO v. Novell	Civil action styled and numbered *SCO v. Novell*, Case No. 2:04cv00139, in the United States District Court for the District of Utah, filed January 20, 2004.
SCO v. Novell	SCO's appeal of the final judgment entered in *SCO v. Novell*, to the United States Court of Appeals for the Tenth Circuit, Appeal No. 08-4217.
SVVS	System V Verification Suite, the testing software owned by AT&T and its successors USL, Novell, Santa Cruz and now SCO that verifies that its UNIX trademark licensees' software in fact is derived from the UNIX operating system software originally developed by AT&T.
Trademark	A trademark is "any word, name, symbol, or device, or any combination thereof [used] to identify and distinguish [one's] goods . . . from those manufactured or sold by others and to indicate the source of the goods." (15 U.S.C. § 1127)
TTAB	Trademark Trial and Appeal Board of the USPTO
U.S. "UNIX" Trademarks	The two UNIX Trademarks registered by AT&T at the USPTO in 1986, Registration No. 1390593 for "computers" and Registration No. 1392203 for "computer programs."
UK	United Kingdom, or England.

Term	Meaning
UNIX	The UNIX operating system software owned by SCO.
UnixWare	A version of the UNIX operating system owned by SCO.
USL	UNIX System Laboratories, Inc., an AT&T subsidiary and successor to the UNIX operating system.
USPTO	United States Patent and Trademark Office.
X/Open	Appellee X/Open Company, Ltd., a foreign UK company whose business is software certification (also known as "The Open Group").
X/Open v. Gray	X/Open's Opposition No. 91122524, filed at the TTAB April 11, 2001, to Gray's USPTO application to register his iNUX mark.

TABLE OF RELATED CASES

X/Open Company, Ltd. v. Wayne R. Gray, Opposition No. 91122524, filed by X/Open Company, Ltd. before the Trademark Trial and Appeal Board of the USPTO ("TTAB") on April 11, 2001, and is suspended pending the outcome of *Gray v. Novell, et al.*, *infra*.

Wayne R. Gray v. X/Open Company, Ltd., Opposition No. 91176820, filed by Wayne R. Gray before the TTAB on April 9, 2007, and is suspended pending the outcome of *Gray v. Novell, et al*.

The SCO Group v. Novell, Inc., Case No. No. 2:04cv00139, filed by The SCO Group, Inc. on January 20, 2004 in the United States District Court for the District of Utah. Final Judgment was entered on December 20, 2008.

The SCO Group v. Novell, Inc., Case No. 08-4217, appeal by The SCO Group, Inc. on December 25, 2008, to the United States Court of Appeals for the Tenth Circuit, Oral Argument heard on May 6, 2009. As of the electronic filing of this Brief Of Appellant on Monday, July 13, 2009, no decision had been published by the Tenth Circuit.

JURISDICTIONAL STATEMENT

This is an appeal from a Final Judgment entered on February 23, 2009. The Plaintiff-Appellant Wayne R. Gray ("the Plaintiff-Appellant Mr. Gray" or "Mr. Gray") timely filed his notice of appeal on March 16, 2009. The Final Judgment incorporated the Order of United States District Judge Virginia M. Hernandez Covington, entered February 20, 2009, granting summary judgment for the Defendant-Appellee X/Open Company Limited ("the Defendant-Appellee X/Open" or "X/Open") on liability and damages, granting summary judgment for the Defendant-Appellee Novell, Inc. ("the Defendant-Appellee Novell" or "Novell") on Counts Three, Four, Five, Six, and Seven of the "Complaint," and denying Mr. Gray's motion for partial summary judgment as to liability. Jurisdiction in the district court was founded under 28 U.S.C. §§ 1331 and 1338(a). Appellate jurisdiction in this Court is founded upon U.S.C. § 1291.

STATEMENT OF THE CASE

After Mr. Gray had applied to register his "iNUX" Mark on the Principal Register of the USPTO, X/Open sent a UNIX mark enforcement letter to Mr. Gray, dated February 27, 2001, and filed an opposition to Mr. Gray's "iNUX" trademark application on April 11, 2001, styled *X/Open v. Gray*, Opposition No. 91122524,

representing in that application that it lawfully owned the registered U.S. "UNIX" Trademarks.[1]

Mr. Gray filed his amended answer, affirmative defenses, and counterclaims to add the counterclaim of fraud in January, 2004, in the *X/Open v. Gray* Oppositions after viewing X/Open's continuing misrepresentations that it had owned the registered U.S. "UNIX" Trademarks since 1994 and viewing portions of the 1995 APA.

Mr. Gray filed *Gray v. Novell, et al.*, on October 21, 2006, after his independent research revealed defendants' schemes to conceal the lawful owner of the U.S. UNIX Trademarks. X/Open and Novell filed motions for summary judgment, Mr. Gray filed a motion for partial summary judgment as to liability, and the district court granted the motions of X/Open and Novell and denied Mr. Gray's motion. The district court entered final judgment against Mr. Gray and in favor of X/Open and Novell, and this appeal ensued.

[1] (02173; 02177).

SUMMARY OF APPELLANT'S ARGUMENT

In this appeal, the key issue is: Who owned the registered U.S. "UNIX" Trademarks,[2] and the goodwill associated with them, in 1998? That issue in turn depends upon (i) a careful analysis of a dozen or so key documents and (ii) application of well-settled principles of California contract law and the United States trademark laws to those documents.

Mr. Gray contends that the key documents, read in the light of (a) established principles of California contract law (the substantive law selected by the signatories to those documents) and (b) established United States trademark law, inevitably required the district court to conclude that neither Novell nor X/Open lawfully owned the registered U.S. "UNIX" Trademarks in 2001 when it challenged Mr. Gray's application to register his trademark.

Specifically, Mr. Gray asserts that Novell transferred the U.S."UNIX" Trademarks to The Santa Cruz Operation, Inc. ("Santa Cruz"), in a 1995 transaction consisting of (i) an "Asset Purchase Agreement," dated September 19, 1995 ("APA"), in which Novell sold its entire UNIX business, including the registered U.S. "UNIX" Trademarks, to Santa Cruz, (ii) a "Bill of Sale," dated

[2] For the purpose of this appeal, the term "U.S. 'UNIX' Trademarks" shall refer, collectively, to United States Serial Nos. 73537419 and 73544900, Registration Nos. 1390593 and 1392203, respectively, for the "UNIX" trademarks registered by AT&T in 1986.

December 6, 1995, and (iii) two amendments, one dated December 6, 1995, and the other dated October 16, 1996.[3]

X/Open and Novell disagree, contending that the 1995 APA did not transfer the registered U.S. "UNIX" Trademarks to Santa Cruz. But the district court ignored their contention and instead concluded that a so-called 1996 "Confirmation Agreement," a document referring to the APA, coming between the two numbered amendments to the APA, but not purporting to amend or modify the APA, somehow undid the APA's transfer of Novell's registered U.S. "UNIX" Trademarks to Santa Cruz, somehow restored exclusive ownership of the registered U.S. "UNIX" Trademarks to Novell, and somehow made Novell's subsequent assignments of those marks to X/Open valid.

The district court never undertook the correct analysis, ignored key documents, misread or misinterpreted other key documents, and failed to apply the correct rules of California contract law and the appropriate rules of United States trademark law, granting final summary judgment against Mr. Gray.

In sum, Mr. Gray contends that the undisputed facts are:

1. In early 1994, Novell owned the registered U.S. "UNIX" Trademarks.

[3] For the purpose of this appeal, the term "1995 APA" shall refer, collectively, to (i) the "Asset Purchase Agreement" of September 19, 1995, (ii) the "Bill of Sale" of December 6, 1995, (iii) the first amendment of December 6, 1995, and (iv) the second amendment of October 16, 1996.

2. In May, 1994, and as part of a license agreement, Novell agreed to transfer a UNIX trademark to X/Open within three (3) years.

3. In September, 1995, Novell expressly agreed to sell its UNIX business, and to transfer its registered U.S. "UNIX" Trademarks, together with the goodwill associated with those Marks, to Santa Cruz, a predecessor of The SCO Group, Inc. ("SCO").[4]

4. On December 6, 1995, Novell executed a "Bill of Sale" that, in law and in fact, assigned those same registered U.S. "UNIX" Trademarks, together with the goodwill associated with those trademarks, to Santa Cruz.

5. On December 6, 1995, Novell and Santa Cruz executed "Amendment No. 1 to the 1995 APA. That amendment did not affect the transfer of the registered U.S. "UNIX" Trademarks to Santa Cruz.

6. On October 16, 1996, Novell and Santa Cruz executed "Amendment No. 2 to the 1995 APA. That amendment did not affect the transfer of the registered U.S. "UNIX" Trademarks to Santa Cruz.

7. Neither Santa Cruz nor any of its successors ever assigned any UNIX business, any goodwill associated with that business, or either of the registered U.S. "UNIX" Trademarks (or any UNIX mark, for that matter) back to Novell.

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[4] In connection with the 1995 APA, Novell and Santa Cruz executed a non-competition agreement prohibiting Novell from competing in the UNIX business. (00600(¶¶2-3)).

8. As a result, when Novell purported to assign the registered U.S. "UNIX" Trademarks to X/Open in November, 1998, those assignments were invalid because Novell had nothing to assign; Santa Cruz (or one of its successors) still owned the registered U.S. "UNIX" Trademarks and associated goodwill.

Accordingly, when X/Open challenged Mr. Gray's attempt to register his "iNUX" trademark and represented to the United States Patent and Trademark Office ("the USPTO") that it (X/Open) was the lawful owner of the registered U.S. "UNIX" Trademarks, it had no right to do so because it owned neither of the registered U.S. "UNIX" Trademarks. Its representation of ownership was false, and its effort to block Mr. Gray's trademark registration applications was "sham litigation."

STATEMENT OF FACTS

UNIX is an operating system software ("OS") product originally developed by American Telephone and Telegraph ("AT&T"). It registered two UNIX Trademarks at the United States Patent and Trademark Office ("USPTO") in 1986 as Registration No. 1390593 for "computers" and Registration No. 1392203 for "computer programs."[5]

[5] (Appendix at 02629-02630)

AT&T's primary UNIX business was licensing the UNIX OS source code to others who then developed and marketed their version or "flavor" of the UNIX OS. AT&T spun off its UNIX business, its UNIX trademark license agreements, and its registered U.S. "UNIX" Trademarks to its subsidiary, UNIX System Laboratories ("USL"), in about 1990 and USL merged into Novell in about June 1993.[6]

A. THE MAY, 1994, AGREEMENTS

Novell acquired the UNIX business to support its network software business market share, and, as owner of UNIX, attempted in 1993 to require its UNIX licensees to accept its UNIX OS software "flavor" known as "UnixWare" as the industry standard. Because Novell's UNIX licensees (such as IBM) also purchased significant amounts of Novell's other software products known as "Netware," those powerful licensees balked at abandoning their UNIX OS in favor of UnixWare. As a result, Novell abandoned its plan and notified the information technology industry that it was transferring its registered "UNIX" Trademarks and the UNIX specifications that define UNIX to a neutral industry organization.[7]

Novell selected X/Open, a foreign company located in the United Kingdom, whose business was (and is) software certification, as the neutral industry organization. In about December 1993, X/Open and Novell began representing to the industry that X/Open lawfully owned the registered U.S. "UNIX" Trademarks,

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[6] (02633-02637; 02639-02647)
[7] (00765(¶¶1-3); 00769(¶4); 00771(¶¶1-5); 00775(¶¶3-7); 00793(¶¶1-2,7)).

concealing Novell's continuing ownership of those Marks. Novell and X/Open subsequently entered into at least two agreements in 1994 related to a UNIX trademark, a May 10, 1994, Agreement and a May 14, 1994, Agreement.[8] In that May 10, 1994, Agreement,[9] Novell authorized X/Open to sub-license use of UNIX as an unregistered certification mark[10] in a new software certification business (i) unrelated to the business associated with the registered U.S. "UNIX" Trademarks[11] and (ii) owned and controlled by X/Open. That agreement was valid for three years, included termination terms, required X/Open to pay royalties, and restricted X/Open's limited rights to certain geographic territories identified in Schedule 1 to the Agreement.[12] Novell retained ownership, control, and enforcement of its registered U.S. "UNIX" Trademarks and its existing and continuing UNIX trademark licensing business pursuant to ¶II.3.b. and ¶II.3.d. at pages 9-10 of the

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[8] (00816(¶2);00819(¶1);00823(¶1);00825(¶6);00829(¶1);00831(¶1);00834).

[9] Mr. Gray first viewed the May 10, 1994, Agreement in March, 2008.

[10] A certification mark is "any word [or] name . . . used by a person other than its owner . . . to certify . . . origin . . . quality . . . or other characteristics of such person's goods or services." 15 U.S.C. § 1127. "A certification mark is a special creature created for a purpose uniquely different from that of an ordinary trademark or service mark." 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 19:91 (4th ed. 2006).

[11] A trademark is "any word, name, symbol, or device, or any combination thereof [used] to identify and distinguish [one's] goods . . . from those manufactured or sold by others and to indicate the source of the goods." *Gift of Learning Foundation, Inc. v. TGC, Inc.*, 329 F.3d 792, 797 (11th Cir. 2003) (per curiam) (quoting 15 U.S.C. §1127).

[12] (00855(No.2);00856 at "Initial Period"; 00860(No.II.1.(a)); 00159(¶1); 02603;02623(No.9); 02763(No.8-9)).

May 10, 1994 Agreement.[13] In that Agreement, Novell promised to transfer a UNIX trademark to X/Open in about three years, but subject to certain express restrictions. Interestingly, and quite significantly, that Agreement included no specific provision for X/Open to enforce proper use of any UNIX trademark before any court or tribunal.

The executed May 10, 1994, Agreement[14] was sent to certain of Novell's UNIX licensees for approval pursuant to an earlier October 1993 agreement between Novell and X/Open.[15]

Novell then confirmed its continuing ownership of all rights in and to its registered U.S. "UNIX" Trademarks in three separate oppositions before the Trademark Trial and Appeal Board of the USPTO ("TTAB"): Opposition No. 91095813, filed on or about August 29, 1994; Opposition No. 91095421, filed on or about September 19, 1994; and Opposition No. 91096202, filed on or about October 24, 1994.[16] Those oppositions, all filed after the May 10, 1994, Agreement, declared:

> 2. .... Novell and its predecessors in interest have owned valid and enforceable rights in UNIX and UNIX-related marks for computer

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[13] (00863(No.3.b.)-00864(No.3.d)).
[14] (00804(No.5).
[15] Mr. Gray has not viewed often-requested the May 1994 agreement, titled "May 14, 1994 Novell-X/Open Trademark Relicensing Agreement." The existence, and relevance of the May 14, 1994 Agreement to UNIX trademark ownership and fraud, is a question of fact for the jury.
[16] (00922-00923; 00927-00928; 00932-00933).

programs and computer-related goods and services.

3. In the United States, Novell owns the following federal registrations and applications for UNIX and UNIX-related marks:

a. UNIX - Registration No. 1,392,203, registered May 6, 1986 for "computer programs" in International Class 9;

b. UNIX - Registration No. 1,390,593, registered April 22, 1986 for "computers" in International Class 9;

(emphasis supplied). Accordingly, Novell believed (or at least wanted others to believe) that it lawfully owned and controlled the registered U.S. "UNIX" Trademarks. Meanwhile, X/Open represented to the industry in 1994 that its use of the UNIX trademark was only as a certification mark and not as a trademark, but it continued to represent to the relevant purchasing public that it lawfully owned the registered U.S. "UNIX" Trademarks.[17]

B. THE 1995 "APA" AND "BILL OF SALE"

The 1995 APA and the subsequent "Bill of Sale" make clear that Novell sold, and that Santa Cruz purchased, substantially all of Novell's UNIX business in 1995. And public comments of senior officials of Novell make equally clear that "all of Novell's UNIX business" included the registered U.S. "UNIX" Trademarks.

1. The Public Announcement by Novell's General Counsel

On September 18, 1995, Novell's General Counsel (David Bradford) confirmed to Novell's Board of Directors that Novell intended to sell all of its

[17] (00821(¶1); 00834(¶5); 00837(¶¶3-4); 00838(¶4); 00849(¶1)).

UNIX business to Santa Cruz and that the sale would include its registered U.S. "UNIX" Trademarks. The Minutes of that Board meeting stated: "RESOLVED ... Pursuant to the Asset Purchase Agreement ... Novell will retain all of its patents, copyrights and trademarks (except for the trademarks UNIX and UnixWare)."[18]

2. The APA and the "Bill of Sale"

a. Novell and Santa Cruz subsequently executed the UNIX Business APA on September 19, 1995; they agreed that the APA was an integrated agreement and that the transferred UNIX assets were not subject to any prior agreement.[19] In Article II, Section 2.11(b), of the APA, entitled "Title to Properties; Absence of Liens and Encumbrances," the Seller Novell warranted to the Purchaser Santa Cruz that the registered U.S. "UNIX" Trademarks being transferred to Santa Cruz were free of all encumbrances:[20]

> (b) Seller has good and valid title to... 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 ... .

(Emphasis added.) Item I of Schedule 1.1(a) to the APA, titled "Assets," and identifying the "Assets" being transferred to Santa Cruz, memorialized Novell's agreement to transfer its entire UNIX business "without limitation" to Santa Cruz, including its UNIX trademark licensing business predating

[18] (01010(¶5);01654(No.76) 01667(¶2);01700(¶1)).
[19] (01531(¶2)-01532(¶¶1-4);01536(FN8);01739(¶3)-01740(¶1);01773(¶3)).
[20] (00966;02060).

1994:[21]

> 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:

(Emphasis added).

b. Item III of Schedule 1.1(a) of the APA memorialized Novell's agreement to transfer all of its UNIX license agreements and contracts "without limitation" to Santa Cruz, including all of its UNIX trademark license agreements:[22]

> 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:

(Emphasis added). Interestingly, assuming (i) the validity of the May 10, 1994, Agreement between Novell and X/Open and (ii) that that Agreement constituted a license agreement to which Novell was a party, Item III of Schedule 1.1(a) of the APA transferred that Agreement to Santa Cruz.

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[21] (02100(No.I)).
[22] (02101(No.III)).

c. Item V of Schedule 1.1(a) of the APA memorialized Novell's agreement to transfer all of its registered U.S. "UNIX" Trademarks to Santa Cruz:[23]

> 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).

Significantly, the license compensation exclusion is consistent with Novell retaining all other UNIX license royalties even as it transferred ownership and enforcement of all of its UNIX licenses to Santa Cruz.[24]

d. Item V of Schedule 1.1(b) to the APA, titled "Excluded Assets," is consistent with Schedule 1.1(a), confirming that Novell excluded the registered U.S. "UNIX" Trademarks from the non-transferring assets. Schedule 1.1(b) specifically identified the registered U.S. "UNIX" Trademarks as assets not excluded from transfer: "A. All copyrights and trademarks, except the trademarks UNIX and UnixWare."[25] Attachment C to Novell's "Seller Disclosure Schedule" to the APA lists the UNIX trademarks owned by Novell being transferred to Santa Cruz, and the registered U.S. "UNIX" Trademarks are identified at page 9 of Attachment C.[26]

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[23] (02102(No.V); 02452(¶¶1-2)).
[24] (00598(¶3)).
[25] (02105(No.V);01661(No.IV,A(1));01662(¶1);01516-01517(No.3-No.4);01731(¶1)).
[26] (02121).

3. More Public Announcements by Novell's Senior Management

a. Novell's Worldwide Sales Director for UNIX (Larry Bufford), confirmed in his email dated October 18, 1995, that Novell was selling its entire UNIX business to Santa Cruz and that Novell thereafter would not be in any UNIX business:[27]

> ...give Sco all information, contracts, assets etc. pertaining to the UnixWare business and the old UNIX source code business. They have bought it lock, stock, and barrel. Once the transaction is closed (Nov.-Dec.) we will have no more involvement with this business.

(Emphasis supplied.)

b. Novell's Senior Product Manager (Skip Jonas) also confirmed Novell's complete exit from the UNIX business, explaining on December 4, 1995, to other Novell members of transition team:[28]

> As of the Closing Date (now set for 12/6), all UNIX & UW agreements transfer to SCO . . . . Novell is out of the UNIX/UW business after the Closing and does not have the right to sell UW. ("UW" represents UnixWare).

Amendment No. 1 to the 1995 APA specifically identified the versions of System V Verification Suite ("SVVS"), the testing software used by Novell and its predecessors (but not X/Open) in the trademark (but not certification mark) licensing business, to verify that its registered U.S. "UNIX" Trademark licensees'

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[27] (02138).
[28] (01464(¶3)).

software was in fact UNIX, as "Auxiliary Products" transferring to Santa Cruz.[29]

> Novell and Santa Cruz executed (i) the "Bill of Sale" to the APA and (ii) Amendment No. 1 to the APA on December 6, 1995, transferring to Santa Cruz (a) title to its entire UNIX business and (b) all UNIX assets identified in Schedule 1.1(a) to the APA.[30]

Amendment No. 1 to the APA does not modify Item III of Schedule 1.1(a) (which includes "UNIX" Trademark license agreements as transferring assets), nor does it modify Item V of Schedule 1.1(a) or of Schedule 1.1(b) as consistent in their inclusion of the registered U.S. "UNIX" Trademarks as transferring assets.[31]

C. THE PURPORTED "CONFIRMATION AGREEMENT"

On September 4, 1996, Novell, Santa Cruz, and X/Open executed a so-called "Confirmation Agreement," just one month before Amendment No. 2 to the APA. There, Novell confirmed that Santa Cruz was the lawful owner of the registered U.S. "UNIX" Trademarks pursuant to the 1995 APA. But the signatories agreed that, notwithstanding Santa Cruz's continuing ownership of the registered U.S. "UNIX" Trademarks and associated goodwill, Novell, not Santa Cruz, would assign UNIX trademarks to X/Open on some future date:[32]

> WHEREAS, NOVELL and SCO entered into a September 19, 1995 Purchase Agreement, as amended (APA"). pursuant to which

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[29] System V Verification Suite Release 2, System V Verification Suite Release 3 and System V Verification Suite Release 4. (00006(No.25); 00014-00015(No.48); 00706-00707(Nos.7-8); 01046(No.A); 01052(No.K.1(i)); 01059; 2148; 2159-2160).
[30] (01066; 02136¶2)).
[31] (01740(¶3); 02480(¶ 3)-04481(¶1); 02512(¶2); 02515(¶3)).
[32] (02163(¶¶2,4 and No.1)).

> NOVELL agreed to convey its entire right, title and interest in and to the UNIX trademark to SCO....
>
> * * *
>
> WHEREAS, X/OPEN and SCO desire to provide for the acceleration of vesting of title ... to the UNIX trademark,
>
> * * *
>
> ... notwithstanding any understanding to the contrary, NOVELL shall for this purpose be considered the owner of legal title to the UNIX trademark...
>
> * * *
>
> SCO agrees that notwithstanding the fact that NOVELL will be executing [UNIX trademark] assignment document(s) [to X/Open] after the Closing Date established by the APA, such assignment by NOVELL shall not be considered a breach of NOVELL's obligations [to Santa Cruz] under the APA. (emphasis added)

No accelerated transfer of a UNIX trademark to X/Open ever was executed by Novell before the agreed May 14, 1997, date.

Significantly, no provision in the so-called "Confirmation Agreement" stated that it retroactively modified or clarified the APA, any Schedule attached to the APA, or the related "Bill of Sale" with respect to Novell's lawful and complete transfer to Santa Cruz of its right, title, and interest in and to the registered U.S. "UNIX" Trademarks and associated goodwill to Santa Cruz on December 6, 1995. The "Confirmation Agreement" nowhere refers to a partial unwinding of the APA, to a modification of Schedules 1.1(a) or 1.1(b) to the APA, to transfers from Santa Cruz back to Novell of (i) any part of the UNIX business sold to Santa Cruz

through the APA, (ii) any goodwill of the UNIX business sold to Santa Cruz through the APA, (iii) any registered U.S. "UNIX" Trademark transferred to Santa Cruz through the APA, (iv) any "UNIX" trademark licenses sold to Santa Cruz through the APA, or (v) any other asset of the UNIX business sold by Novell to Santa Cruz through the APA. Neither Novell nor X/Open ever produced any document that operated to transfer any of those assets back to Novell in connection with, or at the time of, the execution and delivery of the "Confirmation Agreement": no conveyance document, no bill of sale, no nothing. The district court therefore had before it no basis for concluding that, although Novell had transferred the registered U.S. "UNIX" Trademarks and associated goodwill to Santa Cruz, Santa Cruz somehow managed to transfer those same assets back to Novell.

A careful review of the so-called "Confirmation Agreement" discloses only that it purports to supplement the APA as to obligating Santa Cruz to unknown terms in the May 14, 1994, Novell-X/Open "Trademark Relicensing Agreement":[33]

> .... [APA is] subject to rights and obligations established in a May 14, 1994 NOVELL-X/OPEN Trademark Relicensing Agreement, as amended ("1994 Agreement")...

(Emphasis added.) That bald statement – an unsupported declaration that "NOVELL shall ...be considered the owner of legal title to the UNIX trademark" –

[33] (02163(¶2)).

is insufficient to modify the APA; it is contrary to the express wording and operation of the APA; it is contrary to established United States trademark law; it is not designated or treated or numbered as an amendment to the APA; it is contrary to the California Parol Evidence Code; and, interestingly enough, it was executed over a month before Amendment No. 2 to the APA. And Amendment 2 makes no mention of it. Perhaps most significantly, the "Confirmation Agreement" (and the subsequent purported assignment of the registered U.S. "UNIX" Trademarks to X/Open) have not caused Santa Cruz or its successors to cease operating the UNIX business that Santa Cruz purchased from Novell or caused any of those companies to cease using the registered U.S. "UNIX" Trademarks transferred from Novell to Santa Cruz through the APA to identify all of its UNIX software products.

And, to put the final nail in this coffin, Amendment No. 2 to the APA was executed on October 16, 1996, nearly a year after the "Bill of Sale," but it failed to modify Item III of Schedule 1.1(a). Item III of Schedule 1.1(a) included the UNIX trademark license agreements. Nor did Amendment No. 2 modify (or recognize any modification of) Item V of Schedule 1.1(a); that Item included the registered U.S. "UNIX" Trademarks as assets that transferred to Santa Cruz.[34]

[34] (02480(¶3); 02481(¶1); 02512(¶3); 02515(¶¶2-3)).

D. ILLICIT POST-"CONFIRMATION AGREEMENT" CONDUCT

On December 23, 1996, X/Open applied for a UNIX trademark registration substantially the same as existing registrations purportedly transferring to it prior to May, 1997, although it was only a UNIX mark licensee and did not own any UNIX trademark registrations.[35]

In about January, 1997, Novell, Santa Cruz, and X/Open began to issue widespread parallel false representations that X/Open lawfully owned the registered U.S. "UNIX" Trademarks. Their false representations included statements in, among others, X/Open's books, web site business and legal pages, and UNIX certification mark certificates; Novell's 1996 and 1997 U.S. Security and Exchange Commission Form 10K reports and web site legal pages; and Santa Cruz's press releases.[36]

Yet, in its August 3, 2005, response titled "Response To Office Action" at 4 to a USPTO action, in its application for the "Unix System Laboratories" mark, SCO represented to the USPTO that, in 1995, pursuant to the APA, the UNIX trademarks and Unix business assets had transferred to its predecessor, Santa

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[35] (01138-01143).

[36] (01146-01148; 01150-01153; 01156,01161; 01164; 01168(¶3); 01170; 01172; 01174; 01176). Contrary to X/Open's representation of its and SCO's conduct after the 1996 "Confirmation Agreement" (01943(No.3), SCO and X/Open also repeatedly represented that X/Open owned the "UnixWare" marks (00030-00031(No.93); 00031(No.94)).

Cruz:[37]

> In 1995, The Santa Cruz Operation, Inc. purchased all of the UNIX assets fron Novell. As part of the transaction, Novell assigned the UNIX and UNIXWARE trademarks to The Santa Cruz Operation.

(Emphasis supplied).

X/Open continued its public representations in and after 2002 that Novell had transferred the registered U.S. "UNIX" Trademarks to it in 1994,[38] not 1998, and repeatedly declared and confirmed that its only use of the UNIX mark was as a certification mark, not as a trademark.[39]

E. NOVELL'S EMPTY TRADEMARK ASSIGNMENT TO X/OPEN

Although Novell was completely out of the UNIX business and did not own either of the registered U.S. "UNIX" Trademarks or associated goodwill,[40] it entered into a trademark assignment with X/Open. Novell purportedly assigned the registered U.S. "UNIX" Trademarks to X/Open on November 13, 1998 ("the 1998 Assignment"): "... Assignor hereby assigns unto Assignee all property, right, title and interest in the said [UNIX] trade marks with the business and goodwill attached to the said [UNIX] trade marks..."[41] The assignment documents offered

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[37] (02231(¶1)).
[38] (01300(¶3); 01318(¶1); 01320(¶¶1-2,16).
[39] (00916(¶¶3-6); 01299(¶¶2-3); 01791-01792; 01795-01796; 01798).
[40] (02265(No.32)-02266(No.33)).
[41] (01188(¶6); 02170(¶6)). The November 13, 1998, UNIX Assignment Agreement (#322305) is stamped with a document number significantly higher that the March 23, 1999, Novell-X/Open UNIX Assignment Agreement (#297523).

no explanation for how Novell had come to reacquire the UNIX business, the goodwill associated with that business, or the registered U.s. "UNIX" Trademarks. Moreover, the 1998 Assignment is dated more than two years after the signatories to the so-called "Confirmation Agreement" purportedly agreed to an accelerated UNIX trademark transfer. X/Open recorded the 1998 Assignment at the USPTO on June 22, 1999.[42]

F. X/OPEN'S CHALLENGE TO MR. GRAY

X/Open subsequently filed several UNIX trademark enforcement actions before the TTAB in and after 1999. Then, it sent a UNIX mark enforcement letter to Mr. Gray, dated February 27, 2001, and filed an opposition to Mr. Gray's "iNUX" trademark application on April 11, 2001, styled *X/Open v. Gray*, Opposition No. 91122524, representing in that opposition that it lawfully owned the registered U.S. "UNIX" Trademarks.[43]

After viewing (i) X/Open's continuing misrepresentations that it had owned the registered U.S. "UNIX" Trademarks since 1994 and (ii) portions of the 1995 APA, Mr. Gray filed his amended answer, affirmative defenses and counterclaims to add the counterclaim of fraud in January, 2004, in the *X/Open v. Gray* Oppositions.

Mr. Gray filed *Gray v. Novell, et al.*, in the United States District

[42] (02167-02171).
[43] (02173; 02177).

Court for the Middle District of Florida on October 21, 2006, after his independent research revealed the defendants' scheme to conceal the lawful owner of the registered U.S. "UNIX" Trademarks. He especially relied upon the Opinion and Order of United States District Judge Kimball in the related case pending in the Utah federal court, entered on August 10, 2007. On April 9, 2007, Mr. Gray filed an opposition to X/Open's "UNIXWARE" trademark application, before the TTAB, Opposition No. 91176820.[44]

G. THE RELATED UTAH DISTRICT COURT AND TENTH CIRCUIT LITIGATION

1. The District Court Proceedings

On January 20, 2004, SCO sued Novell in Utah state court over what UNIX assets, and, more specifically, what UNIX Intellectual Property, transferred to its predecessor Santa Cruz pursuant to the 1995 APA. That action was removed to the United States District Court for the District of Utah, styled and numbered, *The SCO Group, Inc. v. Novell, Inc.,* Case No. 2:04cv00139 ("*SCO v. Novell*").

In its summary judgment motion memorandum of April 20, 2007, in *SCO v. Novell,* Novell confirmed that it had transferred its entire UNIX business, including all UNIX trademark license agreements, to Santa Cruz in 1995. Novell submitted the declaration of SCO's Software Licensing Director William Broderick (a former

[44] (02199-02200(No.13); 00737(No.113); 00728-00739(No.118)).

Novell employee):[45]

> Broderick noted that his career "has followed the UNIX business as it has been transferred successively from AT&T/USL to Novell to Santa Cruz to Caldera (now SCO)." (*Id.*, ¶ 9.) He further asserted that the transfer from Santa Cruz to Caldera (as well as the preceding transfers) included all of the UNIX assets and business, stating as follows:
>
> - "In each instance (USL to Novell, Novell to Santa Cruz, and Santa Cruz to Caldera), the company selling the UNIX technology also transferred *control* of the commercial enterprise that developed, marketed and licensed that technology (the UNIX business). In each instance, the makeup and operation of the UNIX business continued as constituted through and after each transition." (*Id.*, ¶ 10.)
> - "In each instance, the transferred UNIX business included "without limitation" the UNIX source code, binary code, and intellectual property, licenses and other agreements; and the rights, liabilities, and claims related to that business."4 (*Id.*, ¶ 11.)
> - "In each instance, the transferred UNIX business also included all or many of the people who managed and operated the business, including senior-level managers, engineers, sales people, support staff, and other employees. It also included customer, supplier, and vendor relationships." (*Id.*, ¶ 12.)
> - "In each instance, the transferred UNIX business also included office space, leaseholds, furniture, and equipment." (*Id.*, ¶ 13.) "In short, through and after each transaction, my colleagues and I almost universally kept doing the same work, with the same people, from the same offices and buildings, developing and delivering the same UNIX products and services to the same customers. We also continued to develop the same technology, service the same contracts, and collect revenues under those contracts." (*Id.*, ¶ 14.)
> - "In each instance, after each transaction, neither the seller nor its employees remained involved in managing or operating the business. The buyer (mainly through its newly acquired employees) took over those responsibilities." (*Id.*, ¶ 15.) (emphasis

[45] (01484-01485(No.32)).

added).

Novell repeatedly admitted in that summary judgment memorandum that the intent of the 1995 APA was to, and did lawfully, transfer its registered U.S "UNIX" Trademarks to Santa Cruz. Novell flatly stated: "Thus, the only "Intellectual Property" identified in the list of assets to be transferred were the UNIX and UnixWare trademarks."; "It [Novell's outside counsel] revised Schedule 1.1(a) so that the UNIX and UnixWare trademarks were the *only* "Intellectual Property" included in the transaction"; and "The only "Intellectual Property" identified in the Schedule 1.1(a) list of assets to be transferred are the UNIX and UnixWare trademarks."[46]

Novell also confirmed in that same summary judgment memorandum that Schedule 1.1(a) and Schedule 1.1(b) of the 1995 APA were consistent in transferring its registered U.S. "UNIX" Trademarks to Santa Cruz:[47]

> Thus, the intellectual property listed as included assets under Schedule 1.1(a) was consistent with the intellectual property excluded by Schedule 1.1(b): only the UNIX and UnixWare trademarks were included, and all patents, copyrights, and trademarks were excluded except for the UNIX and UnixWare trademarks.

(Emphasis added).

Novell also acknowledged that the 1995 APA was governed by California

[46] (01516-01517(No.3); 01522(No.17); 01529(¶6)).
[47] (01517(No.4)).

law subject to federal intellectual property law:[48]

> The APA provides for application of California law. (Brakebill Decl., Ex. 2, Section 9.8.) Thus, interpretation of the APA is governed by California law, except that federal law controls to the extent that California law conflicts with federal copyright law or policy. *Foad Consulting Group, Inc. v. Musil Govan Azzalino*, 270 F.3d 821, 827-28 (9th Cir. 2001).

(Emphasis added.)

And, just to make the point crystal-clear, Novell conceded in its memorandum of May 14, 2007, in *SCO v. Novell* that, pursuant to the 1995 APA, it had transferred its registered U.S. "UNIX" Trademarks: "The APA did transfer UNIX and UnixWare trademarks to Santa Cruz (to the extent owned by Novell)".[49] (Emphasis added.)

Indeed, SCO squarely confirmed in its memorandum of May 18, 2007, in *SCO v. Novell* that, pursuant to the report of the auditor (Peat Marwick, LLP) of its predecessor Santa Cruz, dated November 16, 1995, the 1995 APA transferred Novell's registered U.S. "UNIX" Trademarks and associated goodwill to Santa Cruz.[50]

The Utah district court, in its August 10, 2007, Opinion, confirmed at least six times Novell's admission that, pursuant to the APA, it had transferred its

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[48] (01531(FN6)).
[49] 01683(¶2)).
[50] (01574(No.26);01602(¶4)).

registered U.S. "UNIX" Trademarks to Santa Cruz:[51]

> With respect to their "Intellectual Property" provisions, Schedule 1.1(a) and Schedule 1.1(b) are consistent. Schedule 1.1(b) excludes from transfer "[a]ll copyrights and trademarks, except for the trademarks UNIX and UnixWare" and "[a]ll Patents." *Id.* APA Sched. 1.1(b) § V.A, V.B. Schedule 1.1(a) transfers only "[t]rademarks UNIX and UnixWare ... (emphasis added)
>
> * * *
>
> Schedule 1.1(a) provides that the only intellectual property Santa Cruz was acquiring were the UNIX and UnixWare trademarks.
>
> * * *
>
> Schedule 1.1(b) clearly distinguished UNIX and UnixWare trademarks as assets being transferred. Schedule 1.1(a) also clearly transferred only UNIX and UnixWare trademarks.

(Emphasis supplied).

The Utah district court, in its August 10, 2007, Opinion, confirmed Novell's representations that (i) there were only two amendments to the APA, Amendment No. 1 and Amendment No. 2, and (ii) neither amendment modified Novell's transfer of its registered U.S. "UNIX" Trademarks and associated goodwill to Santa Cruz:[52]

> Although changes to Schedule 1.1(a) and 1.1(b) were made in Amendment No. 1, there were no changes made to the intellectual property provisions.
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> * * *

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[51] (01691(¶1);01700(¶1);01731(¶1);01735(¶2);01737(¶2);01738(¶2)-01739(¶1);01740(¶3)).

[52] (01743(¶3);01746(¶¶2-3)).

Furthermore, Amendment No. 2 also did not amend Schedule 1.1(a). It is undisputed that the Bill of Sale transferred the Assets contained on Schedule 1.1(a).

2. The Tenth Circuit Appeal

SCO appealed District Judge Kimball's order and judgment to the United States Court of Appeals for the Tenth Circuit. Under an order mandating expedited treatment of SCO's appeal, the Tenth Circuit heard oral argument on May 6, 2009, and, according to the Clerk of the Tenth Circuit, "an opinion is expected any day."

STATEMENT OF THE ISSUES

1. Did the district court err, as a matter of law, in considering only a redacted version of the May 10, 1994, Agreement, that it grants X/Open UNIX trademark exclusive licensee status in the U.S.?

2. Did the district court err in concluding, as a matter of law, that the May 14, 1994, Agreement does not exist?

3. Did the district court err in concluding, as a matter of law, that it need not consider the September 19, 1995, "Asset Purchase Agreement" as to the lawful ownership of the registered U.S. "UNIX" Trademarks and associated goodwill?

4. Did the district court err, as a matter of law, in considering only a redacted version of the September 4, 1996, "Confirmation Agreement" and then concluding that it confirmed Novell's lawful ownership of the registered U.S. "UNIX" Trademarks and associated goodwill?

5. Did the district court err in concluding, as a matter of law, that Novell, after selling its entire UNIX business in 1995, including the registered U.S. "UNIX" Trademarks, lawfully owned and transferred to X/Open in 1998, the same registered U.S. "UNIX" Trademarks and associated goodwill, and that the November 13, 1998, UNIX Trademark Assignment Agreement therefore is valid?

6. Did the district court err in concluding, as a matter of law, that its February 20, 2009, ruling does not conflict with the Utah district court's August 10, 2007, ruling that confirmed Novell's repeatesd admissions that Santa Cruz owned the entire UNIX business and the registered U.S. "UNIX" Trademarks after December 6, 1995?

STANDARD OF REVIEW

This appeal is from (i) the grant of final summary judgment to the Defendants-Appellees X/Open and Novell and (ii) the denial of the Plaintiff-Appellant Mr. Gray's motion for partial summary judgment as to liability. Accordingly, the standard of appellate review to be employed by this Court is "*de novo* review": "We review the district court's grant of summary judgment *de novo*, with all facts and reasonable inferences therefrom reviewed in the light most favorable to the nonmoving party." *Carnival Brand Seafood Co. v. Carnival Brands, Inc.*, 187 F.3d 1307 (11th Cir. 1989).

ARGUMENT

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING, AS A MATTER OF LAW, THAT THE MAY 10, 1994, AGREEMENT CONSTITUTED AN EXCLUSIVE LICENSE BY NOVELL TOX/OPEN OF THE U.S. "UNIX" TRADEMARKS

In its Order, the district court found (as a matter of fact) and ruled (as a matter of law) that the May 10, 1994, Agreement constituted the grant of an exclusive license by Novell to X/Open of the registered U.S. "UNIX" Trademarks. A casual reading of the redacted version of that document confirms that, whatever may be its operative terms and conditions, it is not an exclusive license of the registered U.S. "UNIX" Trademarks.

A. The Fundamental Rules Governing the Creation of Exclusive Trademark Licenses.

Preliminarily, this Court should note the basic rules governing the creation and maintenance of exclusive licenses. The law governing exclusive licenses for trademarks and service marks in the United States is derived from, and virtually identical to, the substantive law governing exclusive licenses for patents in the United States.[53] Several rules stand out for determining whether an agreement is an exclusive license or a non-exclusive license. First, even if an entity has been granted an "exclusive license," that designation or characterization is not

[53] *Hako-Med USA, Inc. v. Axiom Worldwide, Inc.*, Case No.: 8:06-cv-1790-T-27 EA-J, United States District Court, Middle District of Florida, Tampa Division, *citing Ultrapure Systems, Inc. v. Ham-Let Group*, 921 F. Supp 659, 665 (N.D. Cal. 1996).

controlling. It does not mean that the purported licensor conveyed "all substantial rights" to the purposed 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 licensor "all substantial rights" to the intellectual property in question.[54] And, in 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).[55] In that process, the court must examine whether the agreement in question grants "the right of exclusivity, the right to transfer and most importantly the right to sue infringers." *Biagro W. Sales, Inc. v. Helena Chem. Co.*, 160 F. Supp. 2d 1136, 1144 (E.D. Cal. 2001).

B. The May 10, 1994, Agreement Did Not License X/Open To Use The Registered U.S. "UNIX" Trademarks.

Nowhere in the May 10, 1994, Agreement did the signatories (Novell and X/Open) agree that the license in question covered or included the registered U.S. "UNIX" Trademarks. And that omission is consistent with the view that Novell was licensing X/Open to use UNIX as an unregistered mark in its new business,

[54] *Ultrapure Systems, Inc. v. Ham-Let Group, supra.*
[55] *Vaupel Textilmaschiner KG v. Meccanica Euro Italia S.P.A.*, 944 F.2d 870, 874 (Fed. Cir. 1991).

the UNIX certification business. Nowhere in that Agreement do the parties suggest that X/Open itself would be selling or licensing Novell's UNIX software to third parties to develop and sell operating system software under one of Novell's registered U.S. "UNIX" Trademarks.

C. In The May 10, 1994, Agreement, Novell Retained "UNIX" Trademark Enforcement Rights.

In Section II, Paragraph 3b., of the May 10, 1994, Agreement, X/Open expressly recognized that Novell had licensed other persons "to use the Trade Mark on Products." And in Section II, Paragraph 3c. of that same Agreement, X/Open agreed "to use all reasonable endeavors to protect the integrity of the Trade Mark in all other situations." (Emphasis supplied.) In plain English, then, Novell continued to have the obligation to "protect the integrity of the Trade Mark" *vis-à-vis* its UNIX trademark licensees.

D. In The May 10, 1994, Agreement, Novell Expressly Retained "UNIX" Trademark License Enforcement Rights.

Novell Prosecuted Three (3) Separate Trademark Registration Opposition Proceedings Before The USPTO After It Executed The May 10, 1994, Agreement.

After the execution and delivery of the May 10, 1994, Agreement, but before December 6, 1995, Novell prosecuted not one, not two, but three USPTO opposition proceedings in its own name. Plainly, unless those opposition proceedings were fraudulent, Novell did not transfer to X/Open (*i.e.*, it retained)

the right to sue to enforce its rights in the registered U.S. "UNIX" Trademarks. And Novell's exercise of that right during the period of the so-called "exclusive license" is entirely consistent with Mr. Gray's argument that the license granted by Novell to X/Open in the May 10, 1994, Agreement was a license for a new certification business to be operated by X/Open.

E. The License Granted By The May 10, 1994, Agreement Was Terminable By Novell.

Despite the statement in Section II, Paragraph 1, of the May 10, 1994, Agreement that the license was "irrevocable," the license in fact was viewed by Novell as terminable. In Section 2.10 (iv) of the 1995 APA, Novell listed:

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

In Attachment G to the 1995 APA, entitled "Seller Contracts Containing Business-Related Rights which are Terminable in the Event of Acquisition," Novell specifically identified:[56]

> May 10, 1994 Trademark Relicensing Agreement between Seller and X/Open Company, Ltd.

Accordingly, whatever rights Novell had granted to X/Open in the May 10, 1994, Agreement, those rights were declared "terminable" as of the APA, and no subsequent document amended Attachment G to the APA.

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[56] (02133).

F. The May 10, 1994, "Agreement" Did Not Transfer Any Unix Mark To X/Open.

The district court clearly erred in concluding that X/Open was the UNIX trademark "exclusive licensee." It viewed only a narrow part of the heavily-redacted May 10, 1994, Agreement that specifically included territorial and other restrictions, granting X/Open, a foreign company located in England, substantially no rights to the U.S. "UNIX" Trademarks.[57] The district court had no evidence before it that the May 10, 1994, Agreement granted X/Open any trademark rights in the "UNIX" Trademarks registered in the United States or any other country.[58]

Novell licensed X/Open only to use UNIX as an unregistered certification mark in its new UNIX certification business dealing with third-party conformance to specifications, and not as a trademark, thus creating two separate and distinct

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[57] (00711(No.22);00712(No.23);00863(No.3b);00864(No.3d)). 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).

[58] (00711(Nos.20-21);00713(No.28);00860(¶4);00860(No.1a)). The territoriality doctrine states that a trademark has a separate existence in each sovereign territory in which it is registered or legally recognized as a mark. Therefore, even if the May 10, 1994, Agreement granted X/Open exclusive licensee rights (which it did not), no evidence was before the district court to support a finding that X/Open's purported UNIX trademark rights extended to the United States. *See E. Remy Martin & Co., S.A. v. Shaw-Ross Int'l Imports, Inc.*, 756 F.2d 1525, 1531 (11th Cir. 1985) (holding that the district court commits error to the extent that it relies on use, goodwill, or the rights in a foreign country).

continuing UNIX mark licensing businesses.[59]

X/Open was not the exclusive UNIX trademark licensee pursuant to the redacted May 10, 1994, Agreement; that agreement was no more than a promise to transfer, so it was not a trademark assignment; that agreement confirmed that it was valid only for a term of three years;[60] and that agreement confirmed that Novell retained all rights in its existing UNIX trademark licensing business, including the licensee contracts that were an integral part of that business, including all enforcement rights.[61] In all likelihood, that agreement is a mere "naked assignment" because it was subject to termination by Novell if X/Open

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[59] Whether Novell's simultaneous licensing and use of UNIX as a registered trademark and as a certification mark constitutes trademark abandonment remains a question of fact for a jury. (00007(No.30); 00009(No.35); 00709(No.16); 00710(No.18); 00711(No.22); 00712(Nos.23,25); 00713(No.28); 00714(Nos.30-31); 00863(No.3.b); 00864(No.3.d)). USPTO "Trademark Manual of Examining Procedure - 5th Edition" ("TMEP"), Chapter 1300 at 1306.05(a), titled "Same Mark Not Registrable as Certification Mark and as Any Other Type of Mark," stating: "Trade or service marks and certification marks are different and distinct types of marks, which serve different purposes. A trademark or service mark is used by the owner of the mark on his or her goods or services, whereas a certification mark is used by persons other than the owner of the mark. A certification mark does not distinguish between producers, but represents a certification regarding some characteristic that is common to the goods or services of many persons. Using the same mark for two contradictory purposes would result in confusion and uncertainty about the meaning of the mark and would invalidate the mark for either purpose."

[60] (00711(No.20); 00712-00713(Nos.26-27); 00855(No.2); 00856(¶4); 00864(No.4); 01956(No.4); 01963(¶2)).

[61] (00014(No.47); 00714-00715(No.32); 01956(No.4)). *National Ins. Underwriters v. Maurice Carter*, 17 Cal. 3d 380, 386 (1976) ("[W]hen a general and particular provision are inconsistent, the latter is paramount to the former."). Novell and X/Open agreed in ¶ II. 3.b. and in ¶ II. 3.d. at 9-10 that the pre-existing Unix trademark licenses of Novell and its predecessors USL and AT&T, and enforcement of these Unix trademark licenses, would remain with Novell even should the purported promise to transfer an unidentified Unix trademark in about May 1997 occur.

defaulted on any of its obligations. X/Open's many obligations included royalties, and the agreement also included a provision that Novell or its licensor successor would not control or supervise quality after September 1996.[62]

Novell apparently entered into multiple UNIX trademark licensing agreements, purportedly running "into perpetuity," not just with X/Open, and several of these apparently are identified in the redacted Schedule No. 2 to the May 10, 1994, Agreement. X/Open did not in 1994, and according to its website admits that it does not now, exercise any control over these licensees' use of the UNIX trademark.[63]

Novell's three opposition actions at the TTAB concerning its purported registered U.S. "UNIX" Trademarks after May, 1994, confirm that it, not X/Open, owned and held the rights to the registered U.S. "UNIX" Trademarks. In each opposition, Novell confirmed its continuing ownership of all rights to the registered U.S. "UNIX" Trademarks.

Even the district court's own Report and Recommendation dated November 15, 2006 in *Hako-Med USA, Inc. v. Axiom Worldwide, Inc. et al*, No. 8:06-cv-01790 (2006), (adopted December 19, 2006) rejected the proposition that a

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[62] Whether Novell abandoned the registered U.S. "UNIX" Trademarks in 1994 as a result of naked licensing when it agreed in the May 10, 1994, Agreement to waive all supervision and control over licensee X/Open's UNIX trademark use in and after September, 1996, remains a question of fact for the jury. (00866(No.2c)).

[63] (00863(No.3.b.)-00864(No.3.d);01096(¶1);01300(¶10)).

trademark licensee with few (if any) rights to a registered trademark, such as X/Open here, qualifies as an exclusive licensee:[64]

The district court erred in not considering the entire May 10, 1994, Agreement and all trademark rights restrictions identified in that Agreement. But, even the details of the redacted May 10, 1994, Agreement clearly demonstrate that Novell licensed X/Open as a bare licensee to use UNIX as an unregistered certification mark and that Novell retained all rights to its registered U.S. "UNIX" Trademarks.

Accordingly, the district court's conclusion -- that X/Open was the registered U.S. "UNIX" Trademark exclusive licensee based on the limited terms

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[64] Even if an entity has been granted an "exclusive licensee," those words do not themselves mean that "all substantial rights" were conveyed in the instrument. *See Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal., Inc.*, 248 F.3d 1333, 1344 (Fed. Cir. 2001) (stating that the title of the agreement at issue, whether it is termed a "license" or an "assignment," is not determinative of the nature of rights transferred under an agreement). Rather, in considering whether a transferee has received "all substantial rights" from a licensing agreement, the court must ascertain the intention of the parties and examine the substance of what was granted by the [entire] agreement. *See Mentor H/S, Inc. v. Med. 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); Typically, where the license is an exclusive license and does not set forth any restrictions on the licensee's ability to enforce the trademark, the licensee has standing to sue for infringement. *Ultrapure Systems, Inc. v. Ham-Let Group*, 921 F.Supp. 659, 665-666 (N.D. Cal. 1996); 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.

disclosed in the redacted May 10, 1994, Agreement -- must be vacated.

G. The Tampa District Court Erred In Concluding That The May 14, 1994, Agreement Did Not Exist And Thus Was Not Relevant.

The district court erred in concluding that an agreement, titled "Novell-X/Open May 14, 1994 UNIX Trademark Relicensing Agreement," and specifically identified in the so-called "Confirmation Agreement," did not exist because it was dated four days after the untitled May 10, 1994, Agreement. No party has represented to the district court under oath that the May 14, 1994, agreement does not exist.

Mr. Gray reasonably believes, and he has argued consistently that, because Novell and X/Open promised to and did send copies of the May 10, 1994, Agreement to certain Novell licensees, they entered into the May 14, 1994, Agreement as the actual agreement that included their intended UNIX trademark obligations. By its very name, it is reasonable that Novell and X/Open intended the May 14, 1994, "Trademark Relicensing Agreement" to supplement, if not supersede, the May 10, 1994, Agreement.[65]

The district court erred in not examining un-redacted copies of both May 10, 1994, and May 14, 1994, Agreements. No party has denied the existence of the latter agreement, and the district court's conclusion -- that the May 14, 1994,

[65] Whether or not the terms of the May 14, 1994, Agreement supersede those of the May 10, 1994, Agreement remains a question of fact for the jury. (00719-00720(No.48); 00720(No.50); 01965-01966(No.3)).

Agreement does not exist and that the May 10, 1994, Agreement is the relevant agreement -- is sheer speculation.

THE 1995 "APA" AND THE SUBSEQUENT "BILL OF SALE" TRANSFERRED THE REGISTERED U.S. "UNIX" TRADEMARKS TO SANTA CRUZ

The district court erred in not considering the 1995 APA and other agreements in chronological order. The district court further erred in not considering Novell's admissions, the Utah district court's confirmations in *SCO v. Novell*, and other evidence before it, all confirming that Novell sold its entire UNIX business to Santa Cruz by way of the 1995 APA. It is beyond argument that, as of December 6, 1995, Santa Cruz owned the entire UNIX business, including UNIX trademark licensing, UNIX trademarks, and goodwill that formerly belonged to Novell.

The wording of the 1995 APA is clear that Novell and Santa Cruz agreed that there were no prior encumbrances to the registered U.S. "UNIX" Trademarks subject to transfer. (Article II, Section 2.11(b)). The wording of Schedules 1.1(a) and 1.1(b) were clear and consistent in transferring Novell's entire UNIX business (including UNIX trademark licensing) "without limitation" to Santa Cruz; were clear and consistent in transferring all UNIX trademark licenses (including all May 1994 X/Open licenses) "without limitation" to Santa Cruz; and were clear and consistent in transferring all of Novell's "UNIX" trademarks to Santa Cruz.

Attachment C at page 9 to the "Seller [Novell] Disclosure Schedule" clearly identifies the registered U.S. "UNIX" Trademarks as transferring trademarks, *i.e.*, as trademarks going with the UNIX business to Santa Cruz. Amendment No 1 to the 1995 APA clearly identifies the SVVS software versions, the software owned and controlled by Novell and its predecessors used in its UNIX trademark licensing business, as assets transferring to Santa Cruz, confirming that Novell was entirely out of its UNIX trademark licensing business.[66]

Both before and after the execution and delivery of the "Bill of Sale" of December 6, 1995, Novell confirmed in its communications and documents that the intent of the 1995 APA was to transfer, and did transfer, to Santa Cruz its ownership rights in the registered U.S. "UNIX" Trademarks that it owned.[67]

California Contract Law.

The district court erred in considering X/Open's interpretation of the 1995 APA that is the opposite of, and contradicted by, Novell's repeated admissions (and the Utah district court's repeated acknowledgments of those admissions) in *SCO v. Novell*. X/Open was not a signatory to the 1995 APA, so it has no standing

[66](00006(No.25);00014-00015(No.48);00706-00707(Nos.7-8);00741-00749 (Nos.127,131,132, 134); 01046(No.A); 01052(No.K.1(i)); 01059;01484-01485(No.32); 01517(No.4); 01691(¶¶1-2); 01731(¶1); 01748(¶1); 02148; 02159-02160; 02235(¶¶1-4); 02237(¶¶1-4); 02241(¶1); 02242(¶¶1-6); 02245(¶¶1-6)).

[67](00719(No.47);00741(¶¶125-126);00742(¶128);00743(¶130);00743-00746(¶131);0747-00748(¶133);01010(¶5);01125(¶2);01654(No.76);01667(¶2);01700(¶1);01964(¶1);01973 (No.4); 02138;02141(¶1); 02144(¶1);02151(¶2); 02153(¶1); 02154(¶3); (01516-01517(No.3);01517(No.4); 01522(No.17);01529(¶6);01683(¶2)).

(constitutional, statutory, or otherwise) to argue any interpretation of the 1995 APA. The district court's acceptance of X/Open's position -- that the wording in Schedule 1.1(a) of the APA somehow confirms that that Agreement was subject to an earlier May, 1994, agreement and that that agreement controlled or restricted any subsequent UNIX trademark transfers -- defies all unchallenged evidence before the district court and is completely without support.

Without question, such an interpretation is absurd. For example, it makes meaningless Article II, Section 2.11(b), of the APA. That section declares that no transferring UNIX assets are encumbered. It also conveniently ignores Novell's admissions, and the Utah district court's repeated acknowledgments in *SCO v. Novell,* that Schedules 1.1(a) and 1.1(b) of the APA are consistent in transferring the registered U.S. "UNIX" Trademarks; [68] makes meaningless Novell's admissions and the Utah district court's declaration in *SCO v. Novell* that, pursuant to Schedules 1.1(a) and 1.1(b) of the APA, Novell transferred to Santa Cruz the registered U.S. "UNIX" Trademarks that it owned. "A contract may not be interpreted in a manner which would render one of its terms meaningless." *Kavruck v. Blue Cross of Cal.*, 108 Cal. App. 4th 773, 783 (2003). Indeed, it is fundamental that a court may not interpret one provision to render another

[68] Schedule 1.1(b) to the 1995 APA plainly states that Novell will **not** exempt any UNIX trademark from transfer to Santa Cruz. A fundamental principle of contract interpretation is that there are no surplus words. If the words are there, they have meaning and effect.

provision "meaningless." *Ameripride Servs. v. Valley Indus. Serv.*, No. CIV. S-00-113 LKK/JFM, 2007 WL 656850, at *11 (E.D. Cal. Feb. 28, 2007).[69]

In their summary judgment motions and in their opposition to Mr. Gray's partial summary judgment motion, X/Open and Novell also argued that the 1995 APA did not transfer Novell's registered U.S. "UNIX" Trademarks to Santa Cruz because the wording of Item V in Schedule 1.1(a) to the APA somehow obligated Novell to transfer its registered U.S. "UNIX" Trademarks to X/Open and not Santa Cruz. That argument ignores established contract and trademark law. X/Open and Novell produced no evidence to support such an inconsistent, absurd, and meaningless interpretation.[70]

Federal Trademark Law

Without question, Novell was out of the UNIX business after December 6, 1995. Novell never has identified any UNIX business that did not transfer to Santa Cruz in December, 1995.

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[69] The plain language alone governs the meaning of a contract unless that language "involve[s] an absurdity." *See* Cal. Civ. Code §§ 1638, 1639. The California Supreme Court has held that "in the construction of a contract, the office of the court is simply to ascertain and declare what, in terms or in substance, is contained therein, and not to insert what has been omitted or omit what has been inserted." *Jensen v. Traders & Gen. Ins. Co.*, 52 Cal. 2d 786, 790 (1959) (citing Cal. Code Civ. Proc. § 1858). "[A]s a general matter, implied terms should never be read to vary express terms." *Carma Developers, Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 374 (1992).

[70] *Bionghi v. Metro. Water Dist.*, 70 Cal. App. 4th 1358, 1363-66 (1999) (affirming summary adjudication where contractual clause was not reasonably susceptible to more than one meaning, declaring that a party cannot "smuggle extrinsic evidence to add a term to an integrated contract").

Established trademark law confirms that, because Novell transferred its entire UNIX business and associated goodwill to Santa Cruz and left the UNIX business after December 6, 1995, stating no intent to re-enter, the registered U.S. "UNIX" Trademarks automatically transferred to Santa Cruz. *See Oklahoma Beverage Co. v. Dr. Pepper Love Bottling Co.*, 565 F.2d 629, 632 (10th Cir. 1977) (concluding that trademark transferred with sale of entire business even though it was not mentioned in the sale contract and stating that " [n]o particular words are necessary for the assignment when the business and the goodwill are transferred to another who continued the operation under the same trademark."); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18:37 (4th ed. 2005) ("When a business is sold as a going concern, the intent to transfer good will and trademarks to the buyer is presumed. Goodwill and trademarks are transferred even though not specifically mentioned in the contract of sale. That is, trademarks and the goodwill they symbolize are presumed to pass with the sale of a business.").[71]

Novell admitted, the Utah district court accepted, and all evidence before the district court here supported, that Schedules 1.1(a) and 1.1(b) to the APA are

[71] Where the entire business is purchased and the business continued under its original name, it must be presumed that the purchaser acquired the goodwill of the business together with the commercial symbols of that goodwill, the business' trademarks and trade names. *Dovenmuehle v. Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697, 700 (7th Cir. 1989) ("Absent contrary evidence, a business trade name is presumed to pass to its buyer.")

consistent in including the registered U.S. "UNIX" Trademarks owned by Novell, identified in Attachment C to Novell's "Seller Disclosure Schedule" to the 1995 APA, as UNIX assets that transferred to Santa Cruz pursuant to that transaction.[72]

Novell conceded, and the Utah district court unqualifiedly declared that, pursuant to the 1995 APA, Novell intended to transfer, and did transfer, to Santa Cruz, the registered U.S. "UNIX" Trademarks. There were only two amendments to the 1995 APA; neither Amendment No. 1 nor Amendment No. 2 modified the Schedule 1.1(a) inclusion of the registered U.S. "UNIX" Trademarks as UNIX Intellectual Property that transferred to Santa Cruz.[73]

All evidence presented by Novell and SCO in *SCO v. Novell*, and presented by Mr. Gray to the district court here, supported Novell's transfer to Santa Cruz of its entire UNIX business (including UNIX trademark licensing), its registered U.S. "UNIX" Trademarks and associated goodwill on December 6, 1995, and that Novell then had left the UNIX business, stating no intent to re-enter that business.

Based on the unchallenged evidence before the district court, Novell's admissions in the Utah district court, and the Utah district court's acceptance of those admissions, this Court should rule that the registered U.S. "UNIX" Trademarks and associated goodwill lawfully transferred from Novell to Santa

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[72] (01516-01517(No.3);01517(No.4);01522(No.17);01529(¶6);01683(¶2)).
[73] (01524(No.24); 01526(¶1); 01526(¶1); 01695(¶4)-01696(¶1); 01712(¶1); 01743(¶3); 01746(¶¶2-3)).

Cruz on December 6, 1995, pursuant to the 1995 APA and the "Bill of Sale," and that Novell then completely left the UNIX business. Clearly, Novell was not in the UNIX business as of the September 1996 "Confirmation Agreement."

THE SO-CALLED "CONFIRMATION AGREEMENT" NEITHER TRANSFERRED THE REGISTERED U.S. "UNIX" TRADEMARKS FROM SANTA CRUZ TO NOVELL NOR GAVE X/OPEN ANY RIGHTS IN THOSE TRADEMARKS.

A. The "Confirmation Agreement" Recognized The APA

The district court here erred in concluding that, under the September 1996 "Confirmation Agreement," Novell lawfully owned the registered U.S. "UNIX" Trademarks. But a review of the pertinent documents discloses that Santa Cruz lawfully owned all right and title to the entire UNIX business, including the registered U.S. "UNIX" Trademarks and associated goodwill, after December 6, 1995, and no evidence has been presented that Santa Cruz thereafter lawfully transferred its ownership of any UNIX trademark and associated goodwill to Novell or X/Open.[74]

No party argued to the district court that the September 1996 "Confirmation

[74] The district court Order refers to, and relies upon, an X/Open license issued to Santa Cruz in May 1995 (02887(¶2). That license can relate only to UNIX certification; Santa Cruz already held a "UNIX" trademark license from AT&T since about 1989 and needed no license from X/Open to use either registered U.S. "UNIX" Trademark (00706(No.7); Also see (newly discovered) SCO's website titled "Milestones in The History of The SCO Group 1979 through 1999" at **1989** stating: "SCO ... product licensed by AT&T to use the UNIX System trademark." at URL - www.sco.com/company/history_1979-1999.html . (02921)

Agreement" modified (retroactively or otherwise), supplemented, or clarified any wording in the 1995 APA or the "Bill of Sale" as to UNIX trademark ownership. Plainly, the district court erred in accepting X/Open executive Steve Nunn's declaration that the prior Agreement date of May 14, 1994, was a typo and should have been May 10th.[75]

The so-called "Confirmation Agreement" clearly confirmed Novell's intent to transfer its ownership and rights to the UNIX trademarks to Santa Cruz pursuant to the 1995 APA. But, where it went on to discuss transfers of those Marks to X/Open, it was not a lawful trademark transfer agreement. Although Santa Cruz remained the lawful owner of the registered U.S. "UNIX" Trademarks and associated goodwill, the agreement refers to a proposed future Novell-X/Open UNIX trademark transfer accelerated to occur prior to May 14, 1997, pursuant to the terms of a May 14, 1994, Agreement, not the May 10, 1994, Agreement produced by Novell and X/Open. The May 14, 1994, Agreement never has been produced in this lawsuit, and no accelerated trademark transfer ever happened. No party to this proceeding ever declared under oath to the district court that the May

[75] Whether or not the May 14, 1994 Agreement date is a typo error is a question of fact for a jury. Newly discovered SCO bankruptcy evidence reveals that X/Open, in its opposition to Mr. Gray's partial summary judgment motion, and Steve Nunn, in his support declaration, may have falsely represented to the district court that X/Open lawfully owns SCO's UnixWare trademarks. That transfer was never finalized, strongly questioning X/Open's and Mr. Nunn's truthfulness. See SCO bankruptcy, District of Delaware, Case No.07-11337-KG, Dkt. No.819 filed June 23, 2009 at SCO's Schedule 5.9(a) titled "Registered Intellectual Property" at pages 2-3. (02930-02931) (Also see 01854(No.83);02609(No.G);02626-02627(No.22)).

14, 1994, Agreement did not exist.

In conjunction with the 1995 APA, the parties executed a "Bill of Sale" that explicitly transferred title to "the Assets" as defined in the APA, and specifically in Attachment C to Novell's "Seller Disclosure Schedule" as to UNIX trademarks. However, no bill of sale or other written instrument of transfer was executed in connection with so-called "Confirmation Agreement." That agreement did not purport to retroactively modify the Bill of Sale as to the transferring assets. Rather, the effective date of its terms was nine months *after* the 1995 APA closed.

B. California Contract Law

The district court here took two contradictory positions in its Order: (i) The September 1996 "Confirmation Agreement" amended the 1995 APA; and (ii) it is a stand-alone agreement superseding the 1995 APA. These positions involve application of very different contract and trademark law, but the results are the same: the district court should have (a) considered the 1995 APA and (b) concluded that Santa Cruz, not Novell, lawfully owned the registered U.S. "UNIX" Trademarks and associated goodwill in and after December, 1995.[76]

If the September 1996 "Confirmation Agreement" is an amendment to, and modified, the 1995 APA (which it did not as to any UNIX trademarks), then its

[76] Neither Novell nor X/Open argued to the District court that the 1996 Confirmation Agreement modifies, nullifies, clarifies, supplements or supersedes the 1995 APA as to the lawful UNIX trademark owner in 1996.

terms and provisions must be taken together with, and must be consistent with, those of the 1995 APA.[77]

The odd wording of the so-called "Confirmation Agreement" -- that Novell "shall ... be considered the owner of .... the UNIX trademark" for the purpose of a future transfer to X/Open -- violated California contract law. That wording conflicted with the terms of Article II, Section 2.11(b), of the 1995 APA concerning no prior asset encumbrances, contradicted Schedules 1.1(a) and 1.1(b) to the APA, and directly modified (without actually saying so) the "Bill of Sale" for the 1995 APA. That "Confirmation Agreement" ignored, violated, or otherwise declined to comply with established federal trademark law because all UNIX business, including UNIX trademark licensing, UNIX license agreements, and UNIX trademarks and associated goodwill transferred "without limitation" to Santa Cruz pursuant to the 1995 APA and its "Bill of Sale." A casual reading of the so-called "Confirmation Agreement" discloses no provisions or words that can be interpreted as stating (or even suggesting) that its intent was to retroactively modify or supplement the specific and detailed language of the 1995 APA and its "Bill of Sale" that transferred Novell's registered U.S. "UNIX" Trademarks to

[77] 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).

Santa Cruz on December 6, 1995.[78]

Moreover, the so-called "Confirmation Agreement" does not identify the specific UNIX trademarks that Novell lawfully owned and was to transfer to X/Open. Where there are specific provisions of a document detailing the assets being transferred and the assets being excluded, the more specific provisions control. *National Ins. Underwriters v. Maurice Carter*, 17 Cal. 3d 380, 386 (1976) ("[W]hen a general and a particular provision are inconsistent, the latter is paramount to the former."). Schedule 1.1(a) of the 1995 APA is consistent with Schedule 1.1(b) of the 1995 APA in identifying the UNIX Intellectual Property that Novell was transferring to Santa Cruz and specifically included Novell's registered U.S. "UNIX" Trademarks, as identified in Attachment C to its Disclosure Schedule.[79]

The provision in the "Confirmation Agreement" -- that Novell "shall ...be considered the owner of ... the UNIX trademark" – plainly was for the purpose of a future transfer to X/Open; it does not establish that Novell was the lawful owner of any UNIX trademark because of any retroactive modification to the 1995 APA. The "Confirmation Agreement," after specifically confirming that the intent of the

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[78] A question of fact remains for the jury as to the parties' knowing and willful intent to violate established trademark law concerning Novell's future transfer of UNIX trademarks lawfully own by Santa Cruz to X/Open. (00720(No.50);00747-00748(No.133);01966-01967(No.5); 01975(No.4)).

[79] (01735(¶2)).

1995 APA was to (and did) transfer Novell's registered U.S. "UNIX" Trademarks to Santa Cruz, provides no explanation as to how or why Novell's purported ownership was lawful.

C. United States Federal Trademark Law

If the so-called "Confirmation Agreement" was a stand-alone agreement that superseded the 1995 APA (as the district court appears to have concluded), its terms and provisions relating to Novell's purported UNIX trademark ownership must be consistent with prevailing federal trademark law. As such, the "Confirmation Agreement" somehow must have lawfully transferred the registered U.S. "UNIX" Trademarks back to Novell, *sub silentio* (which it does not). And that purported transfer would have been effective only as of September 4, 1996, the date of the "Confirmation Agreement."

No evidence of a transfer of the registered U.S. "UNIX" Trademarks back to Novell was before the district court; even if there were, such a transfer would have been an invalid transfer "in gross." After selling its entire UNIX business, Novell left that business with no stated intent to re-enter, and the UNIX goodwill (which is not even mentioned in the "Confirmation Agreement" or by the district court), remained with Santa Cruz and now is with its successor in interest, SCO.[80]

[80] (00720-00721(Nos.52-54);00732(No.92);01958(No.10);01964-01965(No.1)). "[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

Ownership of a business necessarily includes the goodwill of the business, and it is well settled that a trademark merely symbolizes goodwill. "If there is no business and no goodwill, a trademark symbolizes nothing."; "Goodwill and its trademark symbol are as inseparable as Siamese Twins who cannot be separated without death to both." (McCarthy on Trademarks and Unfair Competition (4th ed., 1992), §18:2, at 18-5 to 18-7 (release No. 38, Sept., 2006) (McCarthy).)[81]

Goodwill is bound to the business with which it is associated, and it "can no more be separated from a business than reputation from a person." Id. at 18-7 (*citing Webster Investors, Inc. v. Comm'r*, 291 F.2d 192 (2d Cir. 1961)). To suggest that Novell's transfer of its entire UNIX business to Santa Cruz in 1995 did not include the goodwill -- and necessarily the registered U.S. "UNIX" Trademarks symbolizing that goodwill -- is contrary to both common sense and established trademark law.

Because a trademark symbolizes goodwill, and therefore has no independent significance apart from that goodwill, the law requires "that good-will always go

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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 mark 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.").

[81] The district court's February 20, 2009 ruling establishes a new trademark law precedent that goodwill is no longer bound to a trademark and can be separated, and that precedent cannot stand.

with the trademark . . . ." (2 McCarthy, *supra*, § 18:3.) Thus, "there are no rights in a trademark alone and . . . no rights can be transferred apart from the business with which the mark has been associated." *Mister Donut of America, Inc. v. Mr. Donut, Inc.* 418 F.2d 838, 842 (9th Cir. 1969); 2 McCarthy, *supra*, § 18:2. An attempt to assign or sell a trademark "divorced from its good-will" is characterized as an unenforceable "assignment in gross." 2 McCarthy, *supra*, § 18:3.

> A trademark cannot be sold 'in gross,' that is, separately from the essential assets used to make the product or service that the trademark identifies. (citations omitted) The discontinuity would be too great. The consumer would have no assurance that he was getting the same thing (more or less) in buying the product or service from its new maker.

Green River Bottling Co. v. Green River Corp., 997 F.2d 359, 362 (7th Cir. 1993).

A contract's purpose must be to accomplish some goal that is legal and not in violation of established laws. Under California law governing contracts, an essential element of a contract is that it have a "lawful object." (Cal.Civ.Code § 1550.) The object of a contract must have been lawful when its parties attempted to form it. Cal.Civ.Code § 1596. A contract is not lawful if it is contrary to an express provision of law, or contrary to the policy of express law. (Cal.Civ.Code § 1667.) An unlawful or illegal contract is void. *Kolani v. Gluska*, 64 Cal.App.4th 402, 406-407, 75 Cal.Rptr.2d 257, 260 (1998). All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether

willful or negligent, are against the policy of the law. (Cal.Civ.Code § 1668.)

The trademark transfer provision of the "Confirmation Agreement" does not have a lawful object under 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."). Thus the so-called "Confirmation Agreement" provision -- that Novell would at some future date transfer UNIX trademarks to X/Open that it does not own violates established trademark law, is unlawful, and has no legal force.[82]

Conduct Surrounding the 1996 Confirmation Agreement

That X/Open applied in December 1996 to register a UNIX trademark substantially similar to existing registrations suggests that at least it did not believe that the purpose and intent of the so-called Confirmation Agreement was to accelerate the transfer of UNIX trademarks to it. That Novell, X/Open and Santa Cruz began parallel false public representations in January 1997 in their Internet postings, publications, government filings and Certification Certificates that X/Open was the lawful owner of the U.S. "UNIX" Trademarks, when no such transfer had occurred or would occur for almost two years suggests that all

[82] The transfer provision is more consistent with the parties' unlawful intent to conceal the lawful December 6, 1995, Novell-Santa Cruz UNIX trademark transfer pursuant to the 1995 APA, relating to fraud and a question of fact for the jury.

signatories to the 1996 "Confirmation Agreement" knew that a transfer of the registered U.s. "UNIX" Trademarks to X/Open, accelerated or otherwise, was not its intent.[83]

X/Open has willfully admitted since 1993 that it use of UNIX is as a certification mark and that it does not now and has never used UNIX as a trademark as registered. "Use of the mark by the assignee in connection with a different goodwill and different product would result in a fraud on the purchasing public..." *Marshak v. Green*, 746 F.2d 927, 929 (2d Cir. 1984).[84] Yet, X/Open even now continues to represent that it has owned the registered U.S. "UNIX" Trademarks since 1994.[85]

Because the 1996 "Confirmation Agreement" does not modify any wording of the 1995 APA and does not supersede the 1995 APA as to UNIX trademark ownership, the inconsistent and unsupported provision in the "Confirmation Agreement" -- that Novell "shall ...be considered the owner of.... the UNIX trademark" -- is legally meaningless pursuant to Novell's admissions as confirmed

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[83] (01146-01148;01150-01153; 01156; 01161; 01164; 01168(¶3); 01170; 01172; 01174; 01176). The intent of the 1996 "Confirmation Agreement" as to UNIX trademark ownership and fraud is a question of fact for the jury, noting that "[T]he existence of an agreement in a conspiracy case is rarely proven by direct evidence that the conspirators formally entered or reached an agreement. . . . The more common method of proving an agreement is through circumstantial evidence." *United States v. Morales*, 868 F.2d 1562, 1274 (11th Cir. 1989) (citation omitted).

[84](00714(Nos.30-31);00753(No.143);00816-00817;00821(¶1);00838(¶4);00916(¶¶3-6); 01791-01792;01795-01796;01798).

[85] (01300(¶3);01318(¶1);01320(¶¶1-2,16)).

by the Utah district court in *SCO v. Novell* and established California contract and United States federal trademark law, and is therefore void and must be rejected.

The district court erred, as a matter of law, in its conclusions concerning the redacted "Confirmation Agreement" as to lawful U.S. UNIX trademark ownership. No wording in the redacted "Confirmation Agreement" implies or suggests, and no party argues, that it modified or supplemented the 1995 APA as to UNIX trademark transfer or ownership, retroactively or otherwise. No evidence was before the district court that Santa Cruz ever lawfully transferred the registered U.S. "UNIX" Trademarks and goodwill back to Novell. The district court's conclusion -- that Novell lawfully owned the registered U.S. "UNIX" Trademarks pursuant to the redacted so-called "Confirmation Agreement" -- was wrong and should be reversed.

MR. GRAY WAS WRONGFULLY INJURED WHEN X/OPEN CHALLENGED HIS APPLICATION TO REGISTER HIS MARK "INUX" ON THE PRINCIPAL REGISTER OF THE USPTO.

1. The Key Facts

Mr. Gray developed, adopted, and used the mark "INUX" in connection with his computer software business of the same name. In 1999, Mr. Gray applied to register his "iNUX" mark on the Principal Register of the USPTO. Subsequently, X/Open filed an opposition proceeding with the TTAB of the USPTO, alleging that (i) it owned the United States registrations for the "UNIX"

Trademarks and (ii) Mr. Gray's "iNUX" trademark should be denied registration because it was confusingly-similar to X/Open's registered "UNIX" Trademarks.

As a direct and proximate result of X/Open's wrongful conduct before the USPTO, Mr. Gray (i) has been deprived of the opportunity to register and use his mark, (ii) has suffered injury to his reputation in the computer industry, and (iii) has had to spend substantial sums of money in an effort to vindicate his rights and restore his reputation.

2. The Controlling Law Governing "Sham Litigation"

The institution of sham litigation against a competitor forms the basis for similar claims in antitrust and RICO cases, as well as claims arising from the institution of sham litigation based on a falsely-procured trademark registration. *Malley-Duff & Associates, Inc. v. Crown Life Ins. Co.*, 792 F.2d 341, 355 (3d Cir. 1986) (allegations of great expense, delays, and inconvenience in prosecution of lawsuit constituted sufficient injury to business or property for RICO purposes; *Academy Award Products, Inc. v. Bulova Watch co.*, 233 F.2d 449 (2d Cir. 1956) (fees incurred in defending action brought to harass that person with a trademark procured by means of a false registration constitute "damages sustained in consequence" of procurement of a registration by false means under section 38 of the Lanham Act, 15 U.S.C. 1120).

3. Mr. Gray's "Injury"

Assuming that Mr. Gray's argument is correct, *i.e.*, that (i) the May 10, 1994, Agreement did not transfer the registered U.S. "UNIX" Trademark rights to X/Open, (ii) that the May 10, 1994, Agreement cannot be declared, as a matter of law, to constitute an exclusive license of the registered U.S. "UNIX" Trademark rights to X/Open, (iii) that Novell transferred, either expressly under the 1995 APA or implicitly with Novell's transfer of its entire UNIX business to Santa Cruz, (iv) that the so-called 1996 "Confirmation Agreement" was ineffective and a nullity, and (v) that Novell's subsequent purported Assignment of the registered U.S. "UNIX" Trademark was an empty transaction, then X/Open wrongfully represented itself to the USPTO, to the industry, and, most importantly, to Mr. Gray, as the proper owner of the registered U.S. "UNIX" Trademarks. That conduct constitutes sham litigation because X/Open had no standing, constitutionally or statutorily, to object to the registration of Mr. Gray's mark.

Even if Novell owned the registered U.S. "UNIX" Trademarks in 1998 (which it did not), neither it nor X/Open produced any evidence, and the district court did not identify any UNIX business that Novell purportedly owned after 1995 and transferred in 1998 to X/Open. Neither X/Open nor Novell challenged the overwhelming evidence presented by the parties in the Utah district court in *SCO v. Novell,* the same evidence that was before the district court here, that

Novell completely exited the UNIX business in December 1995, stated no intent to re-enter that business, and therefore owned no UNIX business or goodwill after that transaction to transfer to X/Open in 1998.[86]

Most significantly, neither the district court nor Novell nor X/Open ever explained how Novell somehow lawfully acquired back from Santa Cruz (i) ownership of the registered U.S. "UNIX" Trademarks and associated goodwill and UNIX business. All of those rights had been transferred to Santa Cruz by the "Bill of Sale" on December 6, 1995.[87]

At least as to Novell's purported transfer of UNIX business and goodwill from it to X/Open, the November 13, 1998 UNIX "Trademark Assignment Agreement" is a false document because these representations in the assignment agreement are material statements that Novell and X/Open know or should have known are false.[88]

The district court erred in concluding that the November 13, 1998 UNIX "Trademark Assignment Agreement" is not a false document; that recordation of the assignment agreement was not a fraud upon the USPTO; and that X/Open

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[86] (00741-00751(Nos.125-136);01969(¶¶1-2);01970(¶¶1-3);01971(¶¶1-2);01973(¶6)).

[87] All three items are separate material facts as to the purported assignment, and a willful false representation of just one of these invalidates the entire agreement. *See Medinol Ltd. v. Neuro Vasx, Inc.*, 67 USPQ2d 1205, 1209 (TTAB 2003). (00023-00024(Nos.72-74);00724-00725(No.65);00741-00751(Nos.125-136);01964-01965(No.1);01973(No.3)).

[88] The district court erred in not considering Gray's unchallenged evidence that the November 13, 1998 UNIX Trademark Assignment Agreement is a falsely backdated document, a question of fact for a jury. (00725-00726(Nos.68-69);01188;01191).

lawfully owned the UNIX trademarks in 2001. The district court's conclusion should be reversed.[89]

[89] Under established trademark and contract law, and all evidence before the district court, Santa Cruz's successor SCO, not X/Open, was in 2001 and now may well be the lawful owner of the registered U.S. "UNIX" Trademarks. (00737(No.111); 00741-00751(Nos.125-136); 01954 (Nos.B-D); 01960(¶2); 01961(¶¶1-3); 01971(¶¶3-4); 01972(¶¶1-2)).

CONCLUSION

X/Open defrauded Mr. Gray, the USPTO, and the software industry when, in its challenge to Mr. Gray's application to register his "iNUX" trademark, it asserted that it owned the registered U.S. "UNIX" Trademarks. Novell had sold those rights, without reservation, to Santa Cruz in 1995. The "Bill Of Sale" actually transferred those rights to Santa Cruz. It was not an agreement to transfer; it was a transfer. And neither Santa Cruz nor any of its successors ever subsequently transferred either of the registered U.S. "UNIX" Trademarks back to Novell or on to X/Open. Moreover, neither Novell nor X/Open ever demonstrated that Santa Cruz (or any of its successors) ever transferred back to Novell either (i) the UNIX business or (ii) the goodwill associated with that business and with the registered U.S. "UNIX" Trademarks. In sum, neither Novell nor X/Open produced any document of any kind that legally transferred the rights in either registered U.S. "UNIX" Trademark from Santa Cruz (or from any of its successors) to Novell. And neither Novell nor X/Open has produced any document of any kind that legally transferred the rights in either "UNIX" Mark from Santa Cruz (or from any successor organization) to X/Open. In the so-called "Confirmation Agreement," Novell merely purports to agree to transfer rights from it to X/Open. But, by reason of the 1995 APA (as amended) and the subsequent "Bill Of Sale," Novell had no rights in the registered U.S. "UNIX" Trademarks to transfer to

X/Open. The purported "Confirmation Agreement" was (and is) legally meaningless, so the subsequent 1998 "Deed of Assignment" was (and is) legally meaningless. Accordingly, this Court should vacate the district court's summary judgment Order in its entirety, reverse the appealed-from final judgment, and remand the case to the district court for further proceedings consistent with the principles set forth in this brief.

DATED this 13th day of July, 2009.

STEELE + HALE, P.A.
Thomas T. Steele, Atty.
201 E. Kennedy Boulevard, Suite 425
Tampa, Florida 33602
Telephone: 813.223.2060
Facsimile: 813.223.2065
Email: tsteele@steelehale.com

/s/ Thomas T. Steele
Thomas T. Steele
Attorney for Appellant

ORAL ARGUMENT STATEMENT

The Plaintiff-appellant Mr. Gray requests oral argument of the issues presented by the appeal. The procedural and factual background of the claims in this litigation is complex, and this appeal presents novel issues of contract law and trademark law in the context of the pertinent transactions and documents. A number of issues presented by this appeal are involved in an appeal pending before the United States Court of Appeals for the Tenth Circuit, styled and numbered, *The SCO Group, Inc. v. Novell, Inc.*, Appeal No. 08-4217. And, perhaps most important, this Court should explore thoroughly, both in its review of the pertinent documents and at oral argument, how to reconcile the fact that Novell has taken diametrically-opposed positions in the Utah and Florida federal courts on perhaps the key issue in both cases.

CERTIFICATE OF COMPLIANCE

I, Thomas T. Steele, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), typeface requirement of Fed. R. App. P. 32(a)(5), and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief contains 13,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), and is prepared in a proportionally spaced typeface (14-point Times New Roman).

Dated: July 13, 2009

/s/ Thomas T. Steele
Thomas T. Steele
Steele + Hale, P.A.
201 East Kennedy Boulevard
Suite 425
Tampa, Florida 33602
Telephone: 813-223-2060
Facsimile: 813-223-2065
tsteele@steelehale.com

CERTIFICATE OF SERVICE

I, Thomas T. Steele, certify that on this 13th day of July, 2009, the BRIEF OF APPELLANT WAYNE R. GRAY was filed electronically with the Clerk of the United States Court of Appeals for the Eleventh Circuit; true and correct copy of the BRIEF OF APPELLANT WAYNE R. GRAY was delivered to the following recipients by United States Mail, Two-Day Delivery, on July 13, 2009:

Thomas R. Karrenberg
Heather M. Sneddon
ANDERSON & KARRENBERG
50 West Broadway, Ste. 700
Salt Lake City, Utah 84101
Counsel for Defendant-Appellee Novell, Inc.

David Bois
Robert Silver
Edward Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
Counsel for Plaintiff-Appellant The SCO Group, Inc.

Michael A. Jacobs
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Counsel for Defendant-Appellee Novell, Inc.

Stuart Singer
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Blvd., Suite 1200
Fort Lauderdale, Florida 33301
Counsel for Plaintiff-Appellant The SCO Group, Inc.

Brent O. Hatch
Mark F. James
HATCH, JAMES & DODGE, PC
10 West Broadway, Ste.400
Salt Lake City, Utah 84101
Counsel for Plaintiff-Appellant The SCO Group, Inc.

Devan V. Padmanabhan
DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402
Counsel for Plaintiff-Appellant The SCO Group, Inc.

William C. Guerrant, Jr.
Hill, Ward & Henderson, P.A.
101 E. Kennedy Blvd., Ste. 3700
(33602)
P. O. Box 2231 (33601)
Tampa, FL
Email: **wguerrant@hwhlaw.com**
Attorney for X/Open Company Limited

/s/ Thomas T. Steele
Attorney