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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation,

Plaintiff,

vs.

NOVELL, INC., a Delaware corporation,

Defendant.

AND RELATED COUNTERCLAIMS.

Case No. 2:04CV00139

**NOVELL'S MOTION IN LIMINE
NO. 7 TO DETERMINE THAT
COMMON LAW PRIVILEGES
APPLY TO ALLEGEDLY
DEFAMATORY PUBLICATIONS**

Judge Ted Stewart

SCO alleges that Novell slandered SCO's title to certain copyrights by asserting that Novell, and not SCO, owns those copyrights. (Dkt. 96 at ¶ 91.) According to SCO, Novell published that allegedly defamatory matter in: (1) a public letter dated May 28, 2003; (2) private correspondence sent to SCO in June and August 2003; (3) copyright applications submitted to the United States Copyright Office in September and October 2003; and (4) various other public announcements, including a December 22, 2003 press release that republished hitherto private correspondence with SCO. (*Id.* at ¶ 37.) By this motion, Novell seeks rulings in limine that (a) its private correspondence to SCO is not actionable because it is protected by the common law litigation privilege; and (b) its broader publications are not actionable unless SCO can prove that Novell acted *solely* out of malice or bad faith because they are subject to the recipient's and rival claimant's privileges.¹

I. ARGUMENT

All of Novell's allegedly defamatory publications were made *after* SCO sent demand letters to Novell and to 1,500 other companies, in which SCO published its own claim that it owned the copyrights at issue in this case and demanded that the recipients pay for licenses.² (Dkt. 121 at ¶ 52.) Under these circumstances, a rule imposing liability on Novell for disputing SCO's ownership would be unfair both to Novell *and* to the third parties from whom SCO wants to extract licensing fees, and it is not the law. Slander of title requires a false statement made "without privilege," *Dowse v. Doris Trust Co.*, 116 Utah 106, 110-11, 208 P.2d 956 (1949), and Novell's publications were privileged.

Novell's publication of its ownership claim in private pre-litigation correspondence to SCO, responding to SCO's demand letter, is protected by the litigation privilege, which is

¹ A companion motion in limine (no. 8) addresses the *Noerr-Pennington* privilege applicable to Novell's copyright applications.

² SCO was also the first to go public, as more fully explained in Novell's motion in limine no. 3.

absolute. *See Price v. Armour*, 949 P.2d 1251, 1256 (Utah 1997) (quoting Restatement (Second) of Torts [“Rest.”] § 587) (“A party to a private litigation ... is absolutely privileged to publish defamatory matter ... in communications preliminary to a proposed judicial proceeding ... if the matter has some relation to the proceeding”).³

Novell’s broader publications, in turn, are protected by two other, conditional privileges. First, “[t]he law has long recognized that a publication is conditionally privileged if made to protect a legitimate interest of the ... recipient.” *Brehany v. Nordstrom*, 812 P.2d 49, 59 (Utah 1991) (citing, *inter alia*, Rest. § 595); *see also* Rest. § 646A (privilege applies to slander of title).⁴ Second, a further privilege applies specifically to a rival’s publication of its claim to property (including intangible property). Rest. § 647; *see also id.* cmt. b (privilege is “applicable to ... injurious falsehood”); *Jack B. Companies v. Nield*, 751 P.2d 1131, 1134 (Utah 1988) (“slander of title ... is ... injurious falsehood”). Novell seeks in limine rulings that its public disclosures are covered by both privileges. *See O’Connor v. Burningham*, 165 P.3d 1214, 1224 (Utah 2007) (“Whether a statement is entitled to the protection of a conditional privilege presents a question of law; whether the holder of the privilege lost it due to abuse presents a question of fact”). Taking them in order, the other recipients of Novell’s publications—to whom SCO also sent demand letters—have a legitimate interest in ascertaining the true ownership of the copyrights SCO is threatening to sue them on, so the recipient’s privilege also applies. *See* Rest.

³ For convenient reference, Restatement sections cited herein are reproduced in Exhibits 7A-7F hereto. As SCO itself has elsewhere observed: “Thus, for example, the sending of a demand letter, settlement letter, or a cease and desist letter is absolutely privileged.” SCO’s Mem. Supp. Mot. Summ. J. at 5, *SCO Group, Inc. v. IBM*, No. 2:03CV294 (D. Utah Sep. 25, 2006). Arguably, this privilege also protects Novell’s publications to the broader Linux community. *See Krouse v. Bower*, 20 P.3d 895, 900 (Utah. 2001) (“The excessive publication rule, in the context of judicial proceeding privilege cases, is to prevent abuse of the privilege by publication of defamatory statements to persons who have no connection to the judicial proceeding”).

⁴ Property interests are a “legitimate interest” within the ambit of the recipient’s interest privilege. *See* Rest. § 595 cmt. d.

§ 595. And the rival claimant's privilege applies, by definition, to any assertion by Novell that it owns the copyrights claimed by SCO.

SCO bears the burden of overcoming the conditional privileges "by proof of malice or excessive publication." *Brehany*, 812 P.2d at 59. Novell also requests that the Court rule in limine that SCO cannot show excessive publication because it is suing Novell for publishing to precisely those third parties that have interest in the true ownership of the copyrights, and any publication to disinterested parties is irrelevant to SCO's supposed damages. *See* Rest. § 599 cmt. b ("If the harm done by the abuse is severable, and can be distinguished from the harm done by a part of the publisher's conduct that would properly be privileged, he is subject to liability only for the excess of harm resulting from his abuse"); *see generally O'Connor*, 165 P.3d at 1224 (the Restatement's teachings on privilege "enjoy close ties to common sense and thus appear worthy of our confidence"). The only remaining issue that would leave for the jury to decide is whether Novell made those publications in bad faith, *solely* out of ill-will, and with *no* intent to protect the legitimate interests of the recipients. *See* Rest. § 603 cmt. a. ("if the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not constitute an abuse of the privilege"); *id.* at § 647 cmt. b (rival claimant's privilege "permits the publisher to assert a claim ... provided that the assertion is honest and in good faith, even though his belief is neither correct nor reasonable").

II. CONCLUSION

This Court should rule, in limine, that (1) Novell's publication of its ownership claim to SCO is subject to the absolute litigation privilege; and (2) any broader publication of that claim is conditionally protected by the recipient's interest and rival claimant's privileges.

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Respectfully submitted,

By: /s/ Sterling A. Brennan
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