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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH**

<p>THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn,</p> <p style="text-align: center;">Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p style="text-align: center;">Defendant/Counterclaim-Plaintiff.</p>	<p><b>MEMORANDUM IN SUPPORT OF SCO'S OBJECTIONS TO NOVELL'S PROPOSED JURY INSTRUCTIONS AND VERDICT FORM</b></p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Plaintiff/counterclaim-defendant, The SCO Group, Inc. (“SCO”), by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, respectfully submits these Objections to Novell’s Proposed Jury Instructions and Verdict Form.

**NOVELL’S PROPOSED INSTRUCTION NO. 1: SLANDEROUS STATEMENT**

The first element requires the party claiming slander of title (also called the “claimant”) to prove that defendant’s statement was (a) made publicly and (b) disparaged claimant’s title or ownership of the UNIX copyrights.

For the statement to be “public,” defendant must have communicated the statement to someone other than claimant.

For the statement to be “slanderous,” it must disparage the claimant’s title or ownership of the UNIX copyrights. In deciding whether a public statement by defendant disparaged the claimant’s title, you should not view individual words or sentences in isolation. Rather, each statement must be carefully examined in the context in which it was made, giving the words their most common and accepted meaning. You should also consider the surrounding circumstances of the statement, and how the intended audience would have understood the statement in view of those circumstances.

~~For the statement to be “slanderous,” it must also be an objective assertion of fact about copyright ownership that is capable of being proven to be true or false. A subjective opinion or inference that is based on true facts is not slanderous. A statement is not slanderous if the context makes clear that the speaker is expressing a subjective view or an interpretation or theory, rather than an objectively verifiable fact.~~

SCO objects to this proposed instruction on the following grounds:

1. The Propriety of SCO’s Competing Instruction. SCO submits that its Proposed Instruction No. 1 captures what the Court should convey to the jury on this element. SCO’s instruction states in appropriately general terms that there are several statements at issue whose falsity the jury should consider, including copyright registrations (consistent with the Court’s denial of Novell’s Motion in Limine No. 8); and explains that a defendant may claim ownership of the “property at issue” even through statements of opinion.

2. Inaccurate Description of the Evidence. The instruction’s third paragraph improperly seeks to frame the evidence by telling the jury that the statement at issue “must disparage the

claimant's title or ownership of the UNIX copyrights." This wrongly suggests that Novell's own claim to own the UNIX and UnixWare copyrights is not slanderous.

3. Inaccurate Description of the Law. The instruction's final paragraph is not an accurate description of the law or the law of the case. Instead, although other portions of Novell's proposed instruction closely track the Court's description of the law in its Orders denying Novell's Motions in Limine Nos. 5 and 6, Novell parts ways with the Court's language with respect to this last paragraph. The Court specifically stated: "A statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion.'" (Order on Novell's Motion in Limine No. 5 at 6.) SCO submits that the Court should include such language in its instruction on this element, and explains below why the final paragraph of Novell's proposed instruction is improper.

SCO'S PROPOSED INSTRUCTION NO. 1:  
The Element of a False Statement

The first element of a claim for slander of title is that the defendant has made a false statement claiming to own the property at issue. There are several statements at issue that the plaintiff contends are false statements.

Among the conduct that you are entitled to regard as "statements" are the parties' filing of copyright registrations. The filing of such registrations does not mean that the filing party actually owns the copyrights identified in the registrations.

You may determine that the plaintiff intended to convey that message even if the defendant has couched its statements in the form of an opinion, such as by conveying its "opinion" or "belief." That is because an expression of opinion or belief may often imply an assertion of objective fact.

You must also determine whether the defendant's statements were false.

"False" means that the statement is either directly untrue or that an untrue inference can be drawn from the statement. You are to determine the truth or falsity of the statement according to the facts as they existed at the time defendant made the statements.

The statement, to be true, must be substantially true. A statement is considered to be true if it is substantially true or the gist of the statement is true.

**NOVELL'S PROPOSED INSTRUCTION NO. 2:**  
**FALSE STATEMENT/COPYRIGHT OWNERSHIP**

The second element ~~requires the party claiming slander of title to prove that defendant's statement disparaging the ownership of the UNIX copyrights was false because the claimant actually owned the UNIX copyrights at the time the statement was made. If a statement is true, it cannot be the subject of a claim for slander of title. You must decide whether the accused statement was true or false. Thus, you must decide which company owned the copyrights at the time the statement was made. If you determine that defendant owned the UNIX copyrights, you cannot find that defendant is liable for slander of title.~~

~~As the party claiming slander of title, the claimant bears the burden of proving by a preponderance of the evidence that defendant's statement was false—in other words, that the claimant is the owner of the UNIX copyrights.~~

SCO objects to this proposed instruction on the following grounds:

1. Redundancy, Lack of Necessity, Undue Prejudice. The instruction in effect says four times that the plaintiff must show that the statement at issue is false. Once is enough. The instruction twice says that the plaintiff bears the burden of proof, which the Court will have already told the jury. That reference is enough; no redundant reference here is necessary.
2. Incomplete Description of the Law. Novell's proposed instruction fails to inform the jury of an important aspect of the law of false statements – namely, what it means for a statement to be “false.” (Novell's Proposed Instruction No. 1 also does not address this issue, at least not at all directly.)
3. The Propriety of SCO's Competing Instruction. SCO's Proposed Instruction No. 1 suffers from the none of the foregoing deficiencies. The instruction identifies falsity as an element, without repeating the burden of proof; properly frames the element as one concerning “the property at issue” (as in SCO's Proposed Instructions Nos. 2, 3, 5 & 6); and explains what it means for a statement to be “false” in accordance with the Model Utah Jury Instructions.

SCO'S PROPOSED INSTRUCTION NO. 1:  
The Element of a False Statement

The first element of a claim for slander of title is that the defendant has made a false statement claiming to own the property at issue. There are several statements at issue that the plaintiff contends are false statements.

Among the conduct that you are entitled to regard as "statements" are the parties' filing of copyright registrations. The filing of such registrations does not mean that the filing party actually owns the copyrights identified in the registrations.

You must determine whether, in the various statements at issue in this case, and taken in context, the defendant intended to convey the message that it owns the UNIX and UnixWare copyrights.

You may determine that the plaintiff intended to convey that message even if the defendant has couched its statements in the form of an opinion, such as by conveying its "opinion" or "belief." That is because an expression of opinion or belief may often imply an assertion of objective fact.

You must also determine whether the defendant's statements were false.

"False" means that the statement is either directly untrue or that an untrue inference can be drawn from the statement. You are to determine the truth or falsity of the statement according to the facts as they existed at the time defendant made the statements.

The statement, to be true, must be substantially true. A statement is considered to be true if it is substantially true or the gist of the statement is true.

### NOVELL'S PROPOSED INSTRUCTION NO. 3: CONSTITUTIONAL MALICE

The third element requires the party claiming slander of title to prove that defendant's statement disparaging the ownership of the UNIX copyrights was made with "constitutional malice."

To show constitutional malice, the claimant must prove by clear and convincing evidence that defendant either knew the statement was false or acted with reckless disregard for the truth when it made the statement.

To find that defendant acted with reckless disregard for the truth or falsity of the statement, there must be sufficient evidence for you to conclude that defendant published the statements with a high degree of awareness of probable falsity.

~~You must not confuse "constitutional malice," as I have defined it here, with more common definitions of malice, such as ill will or hatred. Hostility, disapproval or other forms of ill will do not as such establish constitutional malice; a person making a public statement may despise someone but nevertheless state only what he believes to be the truth.~~

~~The claimant must prove constitutional malice by clear and convincing evidence. Clear and convincing evidence is a more exacting standard than proof by a preponderance of the evidence, which only requires you to believe that a party's claim is more likely true than not true. Clear and convincing evidence, on the other hand, leaves no substantial doubt in your mind that the constitutional malice is *highly* probable.~~

SCO objects to this proposed instruction on the following grounds:

1. Redundancy, Lack of Necessity, Undue Prejudice. Novell's proposed instruction contains at least four main errors in this regard:

First, the instruction first repeats, unnecessarily, that the plaintiff must prove the element at issue, then twice says that the claimant must prove by "clear and convincing evidence." Once is enough.

Second, in defining what it means for the defendant to act with "reckless disregard" in the third paragraph, Novell omits the language explaining the phrase to mean that at the time the defendant made its statements, it had "serious doubts that the statement was true." Model Utah Jury Instructions – Civil § 10.7 (1993).

Third, the instruction's fourth paragraph is unnecessary and unduly prejudicial. The jury will have been instructed on common law malice, which is clearly different from constitutional malice.

Fourth, the instruction's final paragraph contains unnecessary and unduly prejudicial language. There is no need to (a) repeat the burden of proof, (b) say that clear and convincing evidence is more exacting than the preponderance of the evidence standard, or (c) use italics to emphasize the standard for what clear and convincing evidence requires. Those aspects of the fourth paragraph, like the third paragraph, serve only to underscore the claimant's particular burden of proof under this standard.

2. The Propriety of SCO's Competing Instruction. SCO's Proposed Instruction No. 7.1 proposes a simpler, accurate instruction that does not repeat or unduly emphasize the claimant's burden of proof and that more fully and accurately defines what "reckless disregard" means.

SCO'S REVISED PROPOSED INSTRUCTION NO. 7.1:

First Amendment

I will also ask you to determine whether the plaintiff has shown by clear and convincing evidence that the defendant has acted with what is called "actual malice." Clear and convincing evidence means that you must be left with no substantial doubt that the defendant acted with actual malice.

A defendant has acted with actual malice when it published its statement either knowing that the statement was false or else was acting in reckless disregard of whether its statement was false, which means that the defendant acted with a high degree of awareness of the probable falsity of the statement, or that, at the time the statement was made, the defendant had serious doubts that the statement was true.

#### **NOVELL'S PROPOSED INSTRUCTION NO. 4: SPECIAL DAMAGES**

~~The fourth element requires the party claiming slander of title to prove that defendant's statement disparaging claimant's ownership of the UNIX copyrights caused special damages to claimant. The claimant cannot prevail on its slander of title claim unless it proves it suffered actual economic damage as a direct and immediate result of the slanderous false statement. The law does not assume that economic damage always occurs as a result of an act slandering one's title to property. For this reason, it is necessary for the party claiming slander to prove that the false statement caused it economic injury, called "special" damages.~~

~~The burden is on the party claiming slander of title to establish that the harm complained of resulted from the false statement and not from other factors. In other words, the party claiming slander must show that if not for the false statement, it would not have suffered any harm.~~

~~Unless the party claiming slander can prove a specific monetary loss flowing from the slander, then you must find that there is no damage. These "special" damages must be shown and their amount must be proven and not merely estimated. A decline in stock price is not an appropriate claim for special damages.~~

SCO objects to this proposed instruction on the following grounds:

1. Inaccurate Description of the Law. The proposed instruction contains two main errors in this regard:

First, the instruction's second paragraph improperly describes the law. SCO need not show that the harm complained of did not result from other factors. So long as Novell's statements were a substantial factor, SCO has demonstrated damages even if there were also other factors in causing the harm. See Restatement (Second) of Torts § 632; see also Docket No. 307 (May 18, 2007) at 29-34 (citing and discussing authority). Accordingly, SCO also need not show that if Novell had not made its statements, SCO would have suffered no harm. That language improperly seeks to eviscerate the "substantial factor" law that applies here.

Second, the instruction's third paragraph is redundant of the first paragraph, and also improperly describes the law. Novell's instruction improperly seeks to preclude SCO from relying on experts who have worked to provide estimates of SCO's damages, which the Court already has determined to be relevant and admissible on the issue of special damages. As to the

last sentence, since SCO will not be claiming that a decline in stock price constitutes special damages, it is unnecessary and confusing to tell the jury that such a decline cannot constitute special damages.

2. Redundancy, Lack of Necessity, Undue Prejudice. Novell's proposed instruction contains at least three main errors in this regard:

First, the instruction begins by redundantly referring to the plaintiff's burden to prove the element at issue. It is not necessary to start every instruction by reference to what must be proved, and it is unduly prejudicial to SCO.

Second, the first paragraph continues by explaining, unnecessarily, that the plaintiff cannot prevail unless it proves this element. That is, of course, the definition of an element, as the Court will have already explained. It is also unduly prejudicial to SCO.

Third, the instruction's first paragraph goes on to purport to explain why it is that the element must be proved and then repeats, yet again, the plaintiff's burden of proof. This is all unnecessary, and it is again unduly prejudicial to SCO.

3. The Propriety of SCO's Competing Instruction. SCO's Proposed Instruction No. 10 suffers from the none of the foregoing deficiencies. The instruction identifies special damages as an element, explains what special damages are without repeating itself or the burden at issue; acknowledges that in the absence of special damages "there is no damage"; properly acknowledges the commentary in the Restatement (Second) of Torts that the plaintiff's pecuniary loss may be established by proof that the loss has resulted from the conduct of a number of persons whom it is impossible specifically to identify; and proposes to tell the jury only that they must conclude that Novell's statements were a "substantial factor" in causing the special damages. SCO submits that "substantial factor" needs no definition or elaboration, because

those are straightforward terms that the jury will have heard before, and because the legal definition of a substantial factor does not differ from the common meaning of that term.

SCO'S PROPOSED INSTRUCTION NO. 10:  
The Element of Damages on Slander of Title

The final element of a claim for slander of title is that the defendant's statements have caused the plaintiff to suffer "special damages."

A defendant's conduct has "caused" the plaintiff's damages where the defendant's conduct was a substantial factor in causing such damages.

The special damage rule requires the plaintiff to establish pecuniary loss that has been realized or liquidated, as in the case of specific lost sales. Damages are ordinarily proved in a slander of title action by evidence of a lost sale or the loss of some other pecuniary advantage. Absent a specific monetary loss flowing from a slander affecting the saleability or use of the property, there is no damage.

Plaintiff's pecuniary loss may be established by proof that the loss has resulted from the conduct of a number of persons whom it is impossible specifically to identify.

## NOVELL'S PROPOSED INSTRUCTION NO. 5: PRIVILEGE

~~If you decide that SCO owns the UNIX copyrights, that Novell published statements slandering SCO's title with constitutional malice, and that SCO suffered special damages as a result, then you must decide if Novell was privileged to make those statements. If a privilege applies to a statement, and the publisher of the statement has not abused the privilege, then the publisher cannot be held liable for making the statement.~~

Novell claims several different privileges. You must decide whether those privileges apply; and, if so, whether Novell abused those privileges. ~~SCO bears the burden of proving that each of Novell's statements either was not privileged, or that Novell abused any applicable privilege.~~

~~First, Novell claims that statements it made in its applications for copyright registration were protected by Novell's right to petition the government. Novell's applications were protected by this privilege unless Novell's applications were baseless and Novell filed those applications without regard to whether it was entitled to registration.~~

Second, Novell claims that other statements were protected by the litigation privilege, the recipient's interest privilege, and the rival property claimant's privilege.

Taking those in order, a party to litigation is privileged to publish slanderous statements during a lawsuit and even before a proposed lawsuit, ~~so long as the statements have some relation to the lawsuit. Statements published by Novell before or during this lawsuit, that had some relation to this lawsuit, are protected by the litigation privilege unless Novell abused that privilege.~~ The litigation privilege is abused if the statement is published to persons who have no connection to the judicial proceeding because they do not have an adequate legal interest in the outcome of the proposed litigation.

Next, a party is privileged to publish slanderous statements that affect a legitimate interest of the recipient or audience. A legitimate interest may be, for example, a business interest, a financial interest, or a property interest. ~~Statements published by Novell that affected a legitimate interest of the recipients of the publication were protected by the recipient's interest privilege unless Novell abused that privilege.~~ The recipient's interest privilege is abused if the statement was made with constitutional malice, if the statement was made ~~solely~~ out of spite or ill will, or if the statement was published to persons that did not have a legitimate interest in the statement.

Finally, a party is privileged to publish slanderous statements asserting that it owns property, ~~such as copyrights. Novell was privileged to assert ownership of the copyrights unless it abused that privilege. The rival claimant's privilege is abused if the person claiming ownership does not believe that it owns the property.~~

SCO objects to this proposed instruction on the following grounds:

1. Inaccurate Description of the Law and the Law of the Case. Novell's proposed instruction contains five main errors:

First, as to the second paragraph, it is not accurate to say that the plaintiff has the burden of proving that the defendant's statements are not privileged. In this trial, where the Court has determined that the jury must determine whether the privileges apply, the defendant has the burden of proving that the privilege applies. See Ferguson v. Williams & Hunt, Inc., 221 P.3d 205, 212 (Utah 2009).

Second, as to the third paragraph, the proposed instruction ignores this Court's denial of Novell's Motion in Limine No. 8. The statements that Novell made in its applications for copyright registration were not protected by Novell's right to "petition the government." The Court has already held that no such privilege applies.

Third, as to the fifth paragraph, the purpose of the litigation privilege is to promote candid and honest communication between the parties and their counsel in order to resolve disputes. Krouse v. Bower, 20 P.3d 985, 900 (Utah 2001). Accordingly, a statement made before a lawsuit must do more than have "some relation to the lawsuit"; it must be a legitimate, directed effort or purpose to resolve a dispute before litigation arises; and if a party makes statements that are not designed to try to resolve the ongoing dispute, they should not be privileged. Id. Contrary to the suggestion in Novell's proposed instruction, the question with respect to the litigation privilege is not whether a party has published the statements to individuals who "do not have an adequate legal interest in the outcome of the proposed litigation," but rather whether the communications are intended to resolve disputes. Id. That is why the privilege generally applies to a "party to a private litigation." Hansen v. Kohler, 550 P.2d 186, 189-90 (Utah 1976).

Fourth, as to the sixth paragraph, the legitimate interest privilege applies only if the defendant is under a “legal duty” to the recipient to publish the statement or whether the defendant’s publication is consistent with generally accepted standards of “decent conduct.” O’Connor v. Burningham, 165 P.3d 1214, 1224 (Utah 2007). In addition, the plaintiff need not show that the statements at issue were made “solely” out of spite or ill will in order to show that the privilege has been abused. Utah law provides that the privilege is abused if the defendant has acted with “malice.” SCO therefore submits that the jury should be told of that standard. At a minimum, even taking the law from other jurisdictions, the general standard is the following: “It must be shown that the improper motive was predominant.” Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 9.3.1 (2004); accord Novecon Ltd. v. Bulgarian-American Enter. Fund, 190 F.3d 556, 567 (D.C. Cir. 1999) (speaking to “primary motive”). The jury should not be instructed otherwise.

Fifth, as to the seventh paragraph, the rival claimant’s privilege applies at all only if the defendant has made a statement that would be of service in the lawful protection of an important interest of the defendant’s own. In addition, under Utah law and this Court’s prior orders (Docket No. 75 at 11), in addition to abuse if the defendant did not honestly believe he owned the claimed property, the privilege is abused if the defendant has acted with malice. See, e.g., Simonis v. Simonis, 205 B.R. 939, 943 (Bankr. S.D. Cal. 1997) (explaining with respect to the rival claimant privilege that where malice is an element of the claim itself, “actual bad faith will support a slander of title actions regardless of the filer’s privilege”).

2. Redundancy, Undue Prejudice. The instruction in general is phrased incorrectly and prejudicially, because SCO has asserted its own affirmative defenses of “absolute and conditional privileges” in response to Novell’s counterclaims. The instruction should be phrased

by reference to the plaintiff and the defendant (which is how at least many of Novell's other proposed instructions are phrased).

3. The Propriety of SCO's Competing Instructions. SCO's Proposed Instruction Nos. 7, 8, and 9 avoid the errors in Novell's Proposed Instruction No. 5. The instruction is phrased with respect to plaintiff and defendant; properly identifies the burden of proof; accurately describes the scope of the three privileges at issue; and fully identifies the grounds on which a privilege may be abused. In addition, SCO would agree to have its Proposed Instruction No. 9 say that the plaintiff has the burden of proving that the defendant has abused any privilege that applies.

#### SCO'S PROPOSED INSTRUCTION NO. 7:

##### The Element of Malice

The third element of a claim for slander of title is that the defendant must have made its false statements with malice.

A defendant has acted with malice when it published its statement with an intent to injure, vex, or annoy the plaintiff.

A defendant has acted with malice when it published its statement because of hatred, spite, or ill will toward the plaintiff.

You may infer that a defendant has acted with malice when the defendant knowingly and wrongfully records or publishes something untrue or spurious or which gives a false or misleading impression adverse to the plaintiff's title under circumstances that it should reasonably foresee might result in damage to the plaintiff.

#### SCO'S PROPOSED INSTRUCTION NO. 8:

##### The Defense of Privileges

A defendant to a claim for slander of title may assert what are called "privileges" to have made the statements at issue. The defendant has the burden of proving that a privilege applies.

That is, a publisher of statements may have what is called a "conditional" or "qualified" privilege to make those statements. There are several privileges which may be applicable.

The first privilege is the absolute privilege for litigation.

The purpose of this privilege is to promote candid and honest communication between the parties and their counsel in order to resolve disputes. Accordingly, the privilege generally applies to a party to a private litigation. In order to find that this privilege applies, you must conclude that a party made its statements as part of candid and honest communication in order to resolve a potential or pending lawsuit between the parties.

The second privilege is the “legitimate interest” privilege.

The purpose of this privilege is to permit a party to publish a statement where the recipient of the statement is one to whom the publisher is under a legal duty to publish the matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct. In order to find that this privilege applies, you must conclude that a party was under a legal duty to publish its statements to the public or conclude that its publications of its statement to the public was within the generally accepted standards of decent conduct.

The third privilege is the “rival claim” privilege.

The purpose of that privilege is to permit a rival claimant to disparage another’s property by asserting an inconsistent legally protected interest in itself. The statement must be made honestly and in good faith.

#### SCO’S REVISED PROPOSED INSTRUCTION NO. 9:

##### Abuse of Privileges

Although you may find that the foregoing privileges exist, where the disparaging statement was published maliciously or in bad faith, the defendant has published the matter without privilege to do so. The plaintiff has the burden of showing abuse of privilege.

That is, no privilege applies if a party acted with malice or otherwise transcended the scope of the privilege.

A defendant transcends the scope of the privilege if it excessively publishes the statement at issue or acts inconsistent with the purpose of the privilege. A statement is excessively published if it is published to more persons than the scope of the privilege requires to effectuate its purpose.

## **NOVELL'S PROPOSED INSTRUCTION NO. 6: AWARD OF TORT DAMAGES**

I will now instruct you about awarding damages. This instruction is given as a guide for calculating what damages should be if you find that SCO or Novell is entitled to them.

~~However, if you decide that neither party is entitled to recover damages, then you must disregard this instruction.~~

If you decide that one party slandered the other party's title to the UNIX copyrights, you must decide how much money will fairly and adequately compensate the slandered party for that harm.

Both SCO and Novell claim damages in the form of legal costs incurred to defend their alleged ownership of the UNIX copyrights in the face of slanderous statements allegedly made by the other party.

~~In addition, SCO (but not Novell) claims damages in the form of lost profits. To recover damages for lost profits, SCO must prove it is reasonably certain it would have earned profits but for Novell's conduct.~~

~~If you find that Novell did not publish a slanderous statement with constitutional malice or solely out of spite or ill will but did publish a slanderous statement to persons that did not have a legitimate interest in the statement, then Novell is responsible only for the portion of lost profits that results from publishing the statements to persons that did not have a legitimate interest in the statements.~~

~~To decide the amount of damages for lost profits, you must determine the gross amount SCO would have received but for Novell's conduct and then subtract from that amount the expenses SCO would have had if Novell's conduct had not occurred. In addition, the amount of damages must be reduced by the value of any licenses SCO will still be able to sell once its title to the copyrights is clear. If the current licensing value of the copyrights is greater than or equal to the value of the copyrights before any slander by Novell then SCO has no recoverable damages.~~

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

SCO objects to this proposed instruction on the following grounds:

1. Inaccurate Description of the Law. The instruction's fifth paragraph improperly states the law. No Utah precedent holds that a plaintiff must show that the defendant acted "solely" out of spite or ill will or that a plaintiff must demonstrate that the portion of the defendant's statements that were published to those with no legitimate interest in the statement was the

substantial factor in causing the plaintiff's special damages. Under Utah law, the defendant must have acted with "malice." SCO therefore submits that the jury should be told of that standard. At a minimum, even taking the law from other jurisdictions, the general standard is the following: "It must be shown that the improper motive was predominant." Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 9.3.1 (2004); accord Novecon Ltd. v. Bulgarian-American Enter. Fund, 190 F.3d 556, 567 (D.C. Cir. 1999) (speaking to "primary motive"). The jury should not be instructed otherwise.

2. Improper Phrasing, Redundancy, Undue Prejudice. The proposed instruction is improperly phrased, redundant and unduly prejudicial in the following respects:

First, the instruction's second paragraph improperly, cumulatively, and prejudicially repeats prior elements. In addition, the phrasing of the instruction regarding the money necessary to "fairly and adequately compensate SCO for that harm" is unnecessary. The proximate issue of which the jury should be instructed is whether the defendant's statements were a substantial factor in causing the plaintiff special damages.

Fourth, the instruction's fourth paragraph is improper and unduly prejudicial legal argument. The jury will understand from the attorneys' arguments that SCO is seeking lost profits and that Novell is not. There is no need for the Court to tell that jury that, and thereby permit the jury to infer that SCO somehow is more "aggressive" than Novell.

Fifth, the instruction's fifth paragraph improperly, cumulatively, and prejudicially repeats prior elements and SCO's obligation to meet them.

Sixth, the instruction's sixth paragraph is improper legal argument. In addition to the fact that the word "profits" has a common and ordinary meaning that the jury will understand, the question of what constitutes "lost profits" is an issue on which both sides will offer expert

testimony, and the jury can determine the issue. The instruction's final paragraph properly captures the legal standard that should govern the jury's deliberations.

3. The Propriety of SCO's Competing Instruction. SCO's Proposed Instruction No. 10 is sufficient to instruct the jury on the damages they must apply, and it suffers from none of the foregoing deficiencies. If the Court thought it would be appropriate to instruct the jury on the issue of "lost profits" in particular, SCO would accept the addition of language stating that (a) a plaintiff must prove it is reasonably certain that it would have earned profits but for the defendant's conduct, and (b) the amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

#### SCO'S REVISED PROPOSED INSTRUCTION NO. 10:

##### The Element of Damages on Slander of Title

The final element of a claim for slander of title is that the defendant's statements have caused the plaintiff to suffer "special damages."

A defendant's conduct has "caused" the plaintiff's damages where the defendant's conduct was a substantial factor in causing such damages.

The special damage rule requires the plaintiff to establish pecuniary loss that has been realized or liquidated, as in the case of specific lost sales. Damages are ordinarily proved in a slander of title action by evidence of a lost sale or the loss of some other pecuniary advantage. Absent a specific monetary loss flowing from a slander affecting the saleability or use of the property, there is no damage.

Plaintiff's pecuniary loss may be established by proof that the loss has resulted from the conduct of a number of persons whom it is impossible specifically to identify.

A plaintiff must prove it is reasonably certain that it would have earned profits but for the defendant's conduct, and the amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

**NOVELL'S PROPOSED INSTRUCTION NO. 7:  
INTERPRETATION OF CONTRACTUAL TERMS**

In deciding what the terms of a contract mean, you must decide what the parties intended at the time the contract was created.

~~The starting point for your interpretation must be the actual words used in the contract, which are given their usual and ordinary meaning. Any type of evidence other than the words themselves is "extrinsic evidence."~~

SCO objects to this proposed instruction on the following grounds:

1. Inaccurate Description of the Law and of the Law of the Case. The Tenth Circuit has remanded on the basis that the amended APA is ambiguous and therefore the extrinsic evidence must be considered in its interpretation. The SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1209-19 (10th Cir. 2009). "As trier of fact, it is the jury's responsibility to resolve any conflict in the extrinsic evidence properly admitted to interpret the language of a contract." Morey v. Vannuci, 64 Cal. App. 4th 904, 913 (1998).

Accordingly, in asking the Court to tell the jury generally and without distinction that the "starting point for your interpretation must be the actual words used in the contract, which are given their usual and ordinary meaning," Novell thus proposes an instruction that is inconsistent with the law and the law of the case. Where such law bears directly on the terms of the contract at issue, a jury instruction reflecting the law of the case is appropriate. Joyce v. Simi Valley Unified Sch. Dist., 110 Cal. App. 4th 292, 304 (2003). In addition, with respect to issues of contract interpretation, it is inappropriate to give an instruction on an issue that is "for the jury to determine after weighing all of the evidence." Risner v. Freid and Goldsman, No. B188211, 2007 WL 2949298, at \*11 (Cal. Ct. App. Oct. 11, 2007). Where it has been determined that the courts cannot discern the parties' intent solely from the language of the contract, the court cannot give an instruction suggesting that the jury must try to do so. Cf. Deland v. Old Republic Life

Ins. Co., 758 F.2d 1331, 1335-36 (9th Cir. 1985) (where the court should have interpreted the language of the contract as a matter of law, it should not have instructed the jury on the issue). The instructions should not tell the jury that their interpretation of the parties' intent may begin and end with the language used in the amended APA.

2. The Propriety of SCO's Competing Instructions. SCO's Proposed Instruction No. 2 tells the jury that the amended APA is ambiguous. This should not be a problematic instruction, because under the Tenth Circuit's decision the parties should not be permitted to argue that the amended APA is unambiguous. SCO's Proposed Instruction Nos. 2 and 5 then explain the significance of extrinsic evidence and make clear that the jury should consider such evidence in assessing the parties' intent. SCO's Proposed Instruction No. 4 properly acknowledges that the jury may undertake to interpret contractual language in this case, but does so without suggesting that the amended APA is unambiguous, and without suggesting that the jury need not consider extrinsic evidence at all in assessing the parties' intent on the issue of copyright ownership.

#### SCO'S PROPOSED INSTRUCTION NO. 2:

##### The Element of Ownership: Amended Asset Purchase Agreement

The element of a false statement concerns who owns the property at issue. On that issue, you should consider the Asset Purchase Agreement, as amended.

The parties to the amended Asset Purchase Agreement were Santa Cruz and Novell, but SCO now stands in the shoes of Santa Cruz. That is because several years ago SCO acquired from Santa Cruz all of the UNIX and UnixWare assets that Santa Cruz had acquired from Novell.

You should be guided by the following legal principles in interpreting the amended Asset Purchase Agreement.

Amendment No. 2 must be considered together with the Asset Purchase Agreement as a single document.

The language of Amendment No. 2 controls wherever its language contradicts the Asset Purchase Agreement.

The contractual language of Amendment No. 2 is ambiguous. Accordingly, what is called the “extrinsic evidence” of the parties’ intent is relevant to interpreting the combined APA and Amendment No. 2.

I will explain to you in a few minutes the kind of evidence that constitutes relevant “extrinsic evidence.”

#### SCO’S PROPOSED INSTRUCTION NO. 4:

##### The Element of Ownership: Interpretation of Contractual Terms

With respect to your consideration of the amended Asset Purchase Agreement, and other agreements at issue here, where contract terms are clear, they should be given their plain and ordinary meanings.

You should interpret a contract to give meaning to all of its provisions, instead of leaving a portion of the writing useless or inexplicable. You should not interpret a contract to render one of its terms meaningless.

You should interpret a contract as a whole, with each clause helping to interpret the other.

#### SCO’S PROPOSED INSTRUCTION NO. 5:

##### The Element of Ownership: Extrinsic Evidence

With respect to who owns the property at issue, you should consider what is called the “extrinsic evidence” of the intent of the parties to the amended Asset Purchase Agreement. The “extrinsic evidence” is the evidence of what parties to a contract intended apart from the language they used in the contract.

Extrinsic evidence can aid you in determining the circumstances under which the parties negotiated a contract.

The evidence of the business negotiators’ intent concerning the Asset Purchase Agreement and Amendment No. 2 is relevant. Such evidence may take the form of witness testimony or documentary evidence of what they said or did or understood at the time of the transaction.

Another type of extrinsic evidence is called the parties’ “course of performance.” Course of performance is how, as a practical matter, the parties’ interpreted and applied the terms of the contract in the years after the contract was signed.

Indeed, the practical construction the parties placed upon the combined Asset Purchase Agreement and Amendment No. 2 is the best evidence of their intention. That is because parties are far less likely to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to

law, and when one of them then seeks a construction at variance with the practical construction they have placed upon it.

Another type of relevant extrinsic evidence is the customs or practices within a particular field or industry. You may consider the testimony of either laypersons or experts in assessing any such customs or practices.

## **NOVELL'S PROPOSED INSTRUCTION NO. 8: EXTRINSIC EVIDENCE**

~~Extrinsic evidence may only be considered to interpret ambiguous language. Language that is not ambiguous must be given its usual and ordinary meaning, without regard to any extrinsic evidence.~~

~~Even when extrinsic evidence is used to interpret ambiguous language, the interpretation must be consistent with the language used in the contract. Even ambiguous language cannot be given an interpretation that is inconsistent with the words used.~~

~~One type of extrinsic evidence is testimony or documents showing what the people who were negotiating the contract said or did or understood at the time of the transaction. However, evidence that one party thought the language had a certain meaning is not relevant unless that understanding was somehow communicated to the other side.~~

~~Another type of extrinsic evidence you may consider to interpret ambiguous language is the parties' "course of performance," which is how the parties interpreted and applied the terms of the contract after it was created but before any disagreement between the parties arose. However, you may not consider the parties' course of performance, by itself, conclusive as to the meaning of the contract.~~

SCO objects to this proposed instruction on the following grounds:

1. Inaccurate Description of the Law and of the Law of the Case. Novell's proposed

instruction contains four main errors:

First, as to the opening paragraph, it is not accurate to say that extrinsic evidence is relevant only if the language of the contract is unambiguous. Novell lost that argument on appeal, not only with respect to the interpretation of the amended APA, but also more generally as a matter of California law. Extrinsic evidence is admissible to expose ambiguities in contractual language that might otherwise appear clear.

Second, as to the second paragraph, there are no such limitations on the utility and relevance of extrinsic evidence under California law. It makes no sense to tell the jury that the extrinsic evidence must be "consistent with the language used in the contract," where it is for the jury to decide the extent to which, if at all, the parties' actual intent was adequately reflected in the language used.

Third, as to the third paragraph, Novell’s proposed instruction will confuse the jury. Novell concedes (as reflected in the proposed instruction) that what the negotiators “understood” to be the parties’ intent under the contract is relevant and admissible evidence. Under California law, extrinsic evidence is admissible to help the factfinder understand the context and circumstances under which the contract was negotiated. Under that standard, the evidence of what a negotiator understood the parties have agreed to by using particular contractual language is relevant and admissible, and it is for the jury to decide what weight to afford such testimony.

Fourth, as to the fourth paragraph, Novell’s proposed instruction does not reflect the law. Course of performance is not evidence the jury merely “may” consider; it must consider it. In addition, the jury is entitled to conclude the parties’ course of performance is conclusive, and should not be told otherwise. Indeed, the Tenth Circuit confirmed the California law that course of performance is the “best evidence” of the parties’ intent.

2. The Propriety of SCO’s Competing Instruction. SCO’s Proposed Instruction No. 5 avoids the errors in Novell’s Proposed Instruction No. 8. SCO’s Proposed Instruction explains that extrinsic evidence is relevant in this trial, that the jury should consider it (without any instruction on whether it somehow has to be “consistent” with the ambiguous contractual language), that the jury should consider the evidence of the business negotiators’ intent (without any instruction on what and to what extent testimony is indicative of that intent), and that the parties’ course of performance is the best evidence of their intent, and why.

SCO'S PROPOSED INSTRUCTION NO. 5:  
The Element of Ownership: Extrinsic Evidence

With respect to who owns the property at issue, you should consider what is called the “extrinsic evidence” of the intent of the parties to the amended Asset Purchase Agreement. The “extrinsic evidence” is the evidence of what parties to a contract intended apart from the language they used in the contract.

Extrinsic evidence can aid you in determining the circumstances under which the parties negotiated a contract.

The evidence of the business negotiators' intent concerning the Asset Purchase Agreement and Amendment No. 2 is relevant. Such evidence may take the form of witness testimony or documentary evidence of what they said or did or understood at the time of the transaction.

Another type of extrinsic evidence is called the parties' “course of performance.” Course of performance is how, as a practical matter, the parties' interpreted and applied the terms of the contract in the years after the contract was signed.

Indeed, the practical construction the parties placed upon the combined Asset Purchase Agreement and Amendment No. 2 is the best evidence of their intention. That is because parties are far less likely to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and when one of them then seeks a construction at variance with the practical construction they have placed upon it.

Another type of relevant extrinsic evidence is the customs or practices within a particular field or industry. You may consider the testimony of either laypersons or experts in assessing any such customs or practices.

## **NOVELL'S PROPOSED INSTRUCTION NO. 9: UNCLEAN HANDS**

~~Novell claims that SCO has unclean hands. The phrase “unclean hands” captures the idea that bad actors should not be aided by the courts. A party who has unclean hands is denied relief, regardless of whether it has otherwise proven its claims.~~

~~While there is no precise rule applied to determine whether a party's hands are clean, in general terms the unclean hands defense has two parts: first, the party said to have unclean hands must have acted unconscientiously, or in bad faith, or unfairly; and second, the bad conduct must be connected with the subject matter of the lawsuit.~~

~~Novell claims that SCO has unclean hands because even if it owns the copyrights, it misused them by trying to collect royalties from companies that might not infringe the copyrights, and by refusing to give those companies the information they needed to either decide if they infringe the copyrights or change their code so they would not infringe. A copyright is misused if the owner of the copyright tries to use it to prevent others from either using unprotected elements of the copyrighted work or designing around the protected elements of the work, for example, by writing noninfringing code that performs the same function.~~

~~It is SCO's burden to prove that its hands are clean. That is, SCO must prove that the conduct said by Novell to make SCO's hands unclean either is not unconscientious, or in bad faith, or unfair; or that the conduct is not connected with the subject matter of this lawsuit.~~

SCO objects to this proposed instruction on the following grounds:

1. The Proposed Instruction Is Improper. SCO brings its claim for slander of title under Utah common law and Utah statutory law. Under that law, “unclean hands” is an affirmative defense to a plaintiff's request for equitable relief; it does not pertain to SCO's claim for slander of title. Pelt v. State of Utah, 611 F. Supp. 2d 1267, 1286 (D. Utah 2009); Hill v. Estate of Allred, 216 P.3d 929, 935 (Utah 2009). Novell asserts that it brings the defense to SCO's claim for breach of the implied covenant of good faith and fair dealing, but the general rule is that defense is for the Court alone to consider. Utah Labor Comm'n v. Paradise Town, 660 F. Supp. 2d 1256, 1263 (D. Utah 2009); Pelt, 611 F. Supp. 2d at 1286; Parduhn v. Bennett, 112 P.3d 495, 506 (Utah 2005). Novell further contends that under California law the defense has been asserted against a legal claim, but that requires a finding that the “gist” of the plaintiff's claim is not legal, but equitable. Unilogic, Inc. v. Burroughs Corp., 10 Cal. App. 4th 612, 622 (Cal. Ct.

App. 1993). SCO's claim for slander of title is not "equitable." It is a legal claim for special damages. In contrast, the alternative claim to this claim, for specific performance, is one based in equity.

SCO further submits that this affirmative defense does not apply at all here. The defense is an equitable one that it is for the Court alone to consider and apply. Accordingly, the Court may determine as a matter of law not to apply the defense at all. The issue arises now because it is only through its recent proposed jury instruction that Novell has described the supposed factual bases for the defense, and in consideration of how Novell frames the defense, it cannot apply.

The sole basis on which Novell contends that the defense applies is "copyright misuse." Copyright misuse is a defense to a claim for copyright infringement in a court of equity, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, 454 F. Supp. 2d 966, 994-95 (C.D. Cal. 2007) (citing authority); Home Design Servs., Inc. v. B&B Custom Homes, LLC, Civil Action No. 06-cv-00249-WYD-GJR, 2008 WL 2302662, at \*2 (D. Colo. May 30, 2008); In re ISOs Antitrust Litig., 989 F. Supp. 1131, 1134 & n.1 (D. Kan. 1997), or else arguably a type of antitrust violation, Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 64-65 (1993). The leading commentator identifies no other context in which the defense applies. See Nimmer on Copyright § 13.09 (2009).

There is no antitrust claim here, and SCO is not bringing a claim for copyright infringement at this trial; that claim has been fully stayed. It does not make sense for Novell to be able to present a defense to copyright infringement that is not being tried.

Novell's invocation of the defense fails as a matter of law for lack of any support in the case law. The defense "is recognized only rarely," where the copyright owner has engaged in some transgression that "is of serious proportions and relates directly to the subject matter of the

infringement action.” Nimmer, supra, § 13.09[B]. The defense applies only if a copyright owner has leveraged his copyright to undermine the Constitution’s goal of promoting invention and creative expression. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 995 (citing authority). The conduct Novell cites does not undermine that goal. Most fundamentally, there has never been any requirement that a copyright owner publicly identify the infringing portions of an infringing work, whether litigation has commenced or not. It is undisputed, moreover, that there are copyright notices in UNIX. Indeed, where a manufacturer’s refusal to license software to third parties does not constitute “copyright misuse,” Trial Sys. Corp. v. Southeastern Exp. Co., 64 F.3d 1330, 1337 (9th Cir. 1995), it cannot be that SCO’s alleged misconduct should qualify. Novell’s grounds in support of “copyright misuse” thus fail as a matter of law.<sup>1</sup>

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<sup>1</sup> It bears emphasis, moreover, that the “alleged wrongdoing of the plaintiff does not bar relief unless the defendant can show that he has personally been injured by the plaintiff’s conduct.” Id. Novell has already failed to meet any of these requirements as a matter of law. Whether Novell falsely and recklessly claimed to own UNIX and the copyrights is entirely “extraneous” from whether, in Novell’s mind, SCO had adequately addressed in public the detailed and complex respects in which Linux is a derivative work of UNIX.

Further, the instruction Novell proposes is incorrect in any event. In particular, the defendant, not the plaintiff, has the burden of proving that the plaintiff acted with unclean hands, including in intellectual property cases. Trace Minerals Research, L.C. v. Mineral Resources Int’l, Inc., 505 F. Supp. 2d 1233, 1244 (D. Utah 2007); see also Logiclink, Inc. v. Keylink Serv. Solutions, Inc., No. SA CV07-1056-DOC(MLGx), 2009 WL 764526, at \*11 (C.D. Cal. Mar. 19, 2009); Abbot Diabetes Care Inc. v. Roche Diagnostics Corp., No. C05-03117 MJJ, 2007 WL 1241928, at \*11 (N.D. Cal. Apr. 27, 2007); Pfizer, Inc. v. Int’l Rectifier Corp., 545 F. Supp. 486, 537 (C.D. Cal. 1980).

## NOVELL'S PROPOSED INSTRUCTION NO. 10: DEFINITION OF COPYRIGHT

Copyright is the exclusive right to copy. Upon obtaining a copyright, an author automatically acquires certain rights that are inherent in the very nature of a copyright. Specifically, the copyright owner obtains the following six exclusive rights of copyright:

- (1) the right to make additional copies, or otherwise reproduce the copyrighted work;
- (2) the right to recast, transform, adapt the work, or otherwise prepare derivative works based upon the copyrighted work;
- (3) the right to distribute copies of the copyrighted work to the public by sale or other transfer of ownership;
- (4) the right to perform publicly a copyrighted work;
- (5) the right to display publicly a copyrighted work; and
- (6) the right to perform a sound recording by means of digital audio transmission.

It is the owner of a copyright who may exercise these exclusive rights to copy. The term “owner” may include the author of the work, an assignee, or a licensee. In general, copyright law protects against production, adaptation, distribution, performance, and display of substantially similar copies of the owner’s copyrighted work without the owner’s permission. An owner may enforce these rights to exclude others in an action for copyright infringement. Even though one may acquire a copy of the copyrighted work, the copyright owner retains rights and control of that copy, including uses that may result in additional copies or alterations of the work.

SCO objects to this proposed instruction on the following grounds:

1. Inaccurate Description of the Law. The right to bring suit to enforce the copyrights is among the exclusive rights of copyright ownership. See Davis v. Blige, 505 F.3d 90, 98 (2d Cir. 2007) (among the “bundle of discrete rights” of copyright ownership is that the “owner may sue for infringement those who exploit the creative work without permission or assignment”); accord 1 Copyright Throughout the World § 19:29 (2009); Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity, 3 J. High Tech. L. 1 (2003); see also Chirco v. Gateway Oaks, LLC, No. 02-CV-73188, 2005 WL 2284218, at \*6 (E.D. Mich. Aug. 26, 2005) (explaining that if an exclusive licensee lacked standing to bring claims for copyright

infringement, “it would be tantamount to holding that copyright law gives such licensees rights without the necessary remedy for a violation of those rights”); 3 Patry on Copyright § 7:2 (2010) (explaining that “copyright is not just a bundle of rights; it is also the ability to enforce those rights”). Accordingly, in failing to identify that right as among the exclusive rights (the instruction says only that the owner “may enforce” its rights), the proposed instruction is inaccurate. In addition, only an exclusive licensee possesses all of the exclusive rights of copyright ownership. Gillespie v. AST Sportswear, Inc., No. 97 Civ. 1911 (PKL), 2001 WL 180147, at \*7 (S.D.N.Y. Feb. 22, 2001); SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 316 (S.D.N.Y. 2000); see also 1 Copyright Throughout the World § 19:29 (2009) (“Only an exclusive licensee therefore has the right to sue for infringement of copyright.”); 1 Copyright Law in Business and Practice § 9:1 (2009) (“When infringement exists, the copyright owner or beneficial owner, or exclusive licensee, is entitled to bring suit to enforce his rights.”). Accordingly, in stating that “an owner” for copyright purposes includes “a licensee,” and that a licensee “may enforce” its copyrights through a claim for copyright infringement, the proposed instruction is inaccurate.

2. The Propriety of SCO’s Competing Instruction. SCO’s Proposed Instruction No. 6 accurately states that the owner of a copyright has the exclusive right to bring suit to enforce the copyrights; that such an exclusive right can be conveyed only through an exclusive license; and that there are different types of “licenses” and that they do not afford the different types of licensees the same rights. The Proposed Instruction also provides a more cogent summary of the rights of copyright ownership.

SCO'S REVISED PROPOSED INSTRUCTION NO. 6:  
The Element of Ownership: Relevance of Copyright Ownership

With respect to who owns the property at issue, and your consideration of the amended Asset Purchase Agreement, you should consider the nature of a copyright.

Copyright is the exclusive right to copy. The owner of a copyright has the exclusive right to make and distribute copies of the copyrighted work, to display publicly the copyrighted work, and to license the right to use the copyrighted work to other people. The owner of a copyright also has the exclusive right to bring claims in court to enforce the copyright against people who are infringing on the copyright. The owner can also license that right to someone else, but only through an express, exclusive license.

You therefore should also consider the issue of a "license" to use copyrighted material. There are different types of licenses. One distinction is between "express" and "implied" licenses.

An "express" license is found in a contract that clearly states that one party to the contract has a "license."

An "implied" license is found in a contract that does not use the word "license," but from whose terms you can conclude that one party has the right to use the copyrighted material.

Implied licenses usually are found where one party has created a work at the other's request and handed it over, intending that the other copy and distribute it.

Another distinction, which is related to the difference between an "express" and an "implied" license, is the difference between an "exclusive" and a "non-exclusive" license to use copyrighted material.

An exclusive license means that only the exclusive licensee can use the copyrighted material, whereas an implied license means that several licensees can use the copyrighted material.

The distinction between an "exclusive" and a "non-exclusive" license to use copyrighted material is relevant for two main reasons.

First, an implied license can only be non-exclusive.

Second, an implied licensee, because he is a non-exclusive licensee, cannot bring lawsuits to enforce the copyrights against people who may be violating them.

When the copyright owner has transferred to a transferee only the right to bring any claims for infringement of the owner's copyrights, and has not transferred the copyrights themselves or given the transferee an exclusive license to use the copyrighted material, the transferee actually is not legally entitled to bring any of the claims for copyright infringement.

**NOVELL'S PROPOSED INSTRUCTION NO. 11:**  
**DIVISIBILITY OF COPYRIGHT OWNERSHIP**

~~The various rights included in a copyright are divisible and any of the exclusive rights comprised in a copyright may be transferred or licensed (on an exclusive or non-exclusive basis) to other parties.~~

SCO objects to this proposed instruction on the following grounds:

1. Inaccurate Description of the Law. A non-exclusive licensee, as shown above, may not exercise at least one of the exclusive rights of copyright ownership – namely, the right to bring suit to enforce the copyrights. Accordingly, in conveying that a non-exclusive licensee is authorized to exercise any of the exclusive rights of copyright ownership, the proposed instruction is inaccurate.

2. The Propriety of SCO's Competing Instruction. SCO's Proposed Instruction No. 6 accurately states that an implied license can only be non-exclusive, and therefore an implied licensee cannot bring suits to enforce the copyrights. In addition, considering the necessity of such an instruction to clarify the relevant copyright law, SCO would propose this additional instruction: "When the copyright owner has transferred to a transferee only the right to bring any claims for infringement of the owner's copyrights, and has not transferred the copyrights themselves or given the transferee an exclusive license to use the copyrighted material, the transferee actually is not legally entitled to bring any of the claims for copyright infringement." Silvers v. Sony Pictures Ent't, 402 F.3d 881, 885 (9th Cir. 2005).

SCO'S REVISED PROPOSED INSTRUCTION NO. 6:  
The Element of Ownership: Relevance of Copyright Ownership

With respect to who owns the property at issue, and your consideration of the amended Asset Purchase Agreement, you should consider the nature of a copyright.

Copyright is the exclusive right to copy. The owner of a copyright has the exclusive right to make and distribute copies of the copyrighted work, to display publicly the copyrighted work, and to license the right to use the copyrighted work to other people. The owner of a copyright also has the exclusive right to bring claims in court to enforce the copyright against people who are infringing on the copyright. The owner can also license that right to someone else, but only through an express, exclusive license.

You therefore should also consider the issue of a "license" to use copyrighted material. There are different types of licenses. One distinction is between "express" and "implied" licenses.

An "express" license is found in a contract that clearly states that one party to the contract has a "license."

An "implied" license is found in a contract that does not use the word "license," but from whose terms you can conclude that one party has the right to use the copyrighted material.

Implied licenses usually are found where one party has created a work at the other's request and handed it over, intending that the other copy and distribute it.

Another distinction, which is related to the difference between an "express" and an "implied" license, is the difference between an "exclusive" and a "non-exclusive" license to use copyrighted material.

An exclusive license means that only the exclusive licensee can use the copyrighted material, whereas an implied license means that several licensees can use the copyrighted material.

The distinction between an "exclusive" and a "non-exclusive" license to use copyrighted material is relevant for two main reasons.

First, an implied license can only be non-exclusive.

Second, an implied licensee, because he is a non-exclusive licensee, cannot bring lawsuits to enforce the copyrights against people who may be violating them.

When the copyright owner has transferred to a transferee only the right to bring any claims for infringement of the owner's copyrights, and has not transferred the copyrights themselves or given the transferee an exclusive license to use the copyrighted material, the transferee actually is not legally entitled to bring any of the claims for copyright infringement.

## **NOVELL'S PROPOSED INSTRUCTION NO. 12: TRANSFER IN WRITING**

~~If the owner of a copyright seeks to transfer or sell ownership of that copyright, that transfer of copyright ownership must be in writing and signed by the party from whom the copyright is transferred. The purpose of this requirement is to protect copyright holders from people or companies who mistakenly or fraudulently claim transfers of copyright.~~

SCO objects to this proposed instruction on the following ground:

1. The Proposed Instruction Is Precluded by Tenth Circuit Ruling. The instruction improperly suggests that the jury may conclude that the parties did not execute a writing sufficient to transfer copyrights. The Tenth Circuit already held otherwise. The SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1211-14 (10th Cir. 2009).

**NOVELL'S PROPOSED INSTRUCTION NO. 13:**  
**FINDINGS BY THE COURT AND TENTH CIRCUIT**

In this case, the Court and the Tenth Circuit Court of Appeals have already made certain findings. As you consider your verdicts on the issues presented in these jury instructions, you must consider the following as undisputed and true:

- ~~“[A]greements that postdate the APA may constitute SVRX Licenses.”~~
- ~~“Although Novell may have initially intended to sell the complete UNIX business, both parties agree that Santa Cruz was either unwilling or unable to commit sufficient financial resources to purchase the entire UNIX business outright.”~~
- ~~“If [one] were to interpret the contract based initially only on the APA itself—without regard to Amendment No. 2 . . . its language unambiguously excludes the transfer of copyrights.”~~
- ~~“[T]here is no evidence that Novell’s public statements [regarding copyright ownership] were based on anything but its good faith interpretation of the contracts.”~~
- ~~“[T]here is no evidence to demonstrate that Novell’s position [regarding copyright ownership] was contrary to its own understanding of the contractual language or objectively unreasonable given the history of the dispute between the parties.”~~
- ~~“SCO breached its fiduciary duties to Novell by failing to account for and remit the appropriate SVRX Royalty payments to Novell for the SVRX portions of the 2003 Sun . . . Agreement[.]”~~
- ~~“SCO was not authorized under the APA to amend, in the 2003 Sun Agreement, Sun’s 1994 SVRX buyout agreement with Novell, and SCO needed to obtain Novell’s approval before entering into the amendment.”~~

SCO objects to this proposed instruction on the following grounds:

1. The Proposed Instruction Is Improper. The Court has denied Novell’s motion for the Court to take judicial notice of such items, and SCO submits that on that same basis the Court should not accept this proposed instruction.

In addition, jury instructions serve to explain to the jury the law they must apply to the facts. Jury instructions are not to embody or favor either side’s legal arguments. They are not a vehicle for suggesting to the jury that matters that the jury must resolve have somehow already been resolved against one party or the other. The findings that Novell cites, like the many findings

against Novell that SCO has previously cited and could cite, bear on the arguments the parties can and cannot make at trial. They do not constitute any law that the jury must apply to the facts. Instead, they improperly reflect Novell’s arguments about prior findings that it believes will induce the jury to find in its favor. In addition, SCO offers the following comment and objection:

- “[A]greements that postdate the APA may constitute SVRX Licenses.” The Court has determined that this language does not relate to any issue in this trial. (Memorandum Decision and Order Denying Defendant’s Request for Judicial Notice of Prior Factual Findings (Mar. 5, 2010), at 2.)
- “Although Novell may have initially intended to sell the complete UNIX business, both parties agree that Santa Cruz was either unwilling or unable to commit sufficient financial resources to purchase the entire UNIX business outright.” This is the Tenth Circuit’s description of the factual record, not a matter of law.
- “If [one] were to interpret the contract based initially only on the APA itself – without regard to Amendment No. 2 – . . . its language unambiguously excludes the transfer of copyrights.” As reflected in the Court’s Memorandum Decision and Order Denying Defendant’s Request for Judicial Notice of Prior Factual Findings (Mar. 5, 2010), no instruction should suggest that the jury can revisit the exact legal issue the Tenth Circuit has already resolved – namely, that the APA and Amendment No. 2 must be read together.
- “[T]here is no evidence that Novell’s public statements [regarding copyright ownership] were based on anything but its good faith interpretation of the

contracts.”; and “[T]here is no evidence to demonstrate that Novell’s position [regarding copyright ownership] was contrary to its own understanding of the contractual language or objectively unreasonable given the history of the dispute between the parties.” The Court has held that “these ‘factual findings’ are not relevant to the issues before the Court or the jury and would be misleading and confusing if read to the jury.” (Memorandum Decision and Order Denying Defendant’s Request for Judicial Notice of Prior Factual Findings (Mar. 5, 2010), at 2.)

- “SCO breached its fiduciary duties to Novell by failing to account for and remit the appropriate SVRX Royalty payments to Novell for the SVRX portions of the 2003 Sun . . . Agreement[.]”; and “SCO was not authorized under the APA to amend, in the 2003 Sun Agreement, Sun’s 1994 SVRX buyout agreement with Novell, and SCO needed to obtain Novell’s approval before entering into the amendment.” These statements are not relevant to the trial, and therefore would be misleading and confusing in the form of jury instructions. They relate only to Novell’s prior argument for “substantial performance,” which the Court rejected in denying Novell’s Motion in Limine No. 11, stating that “the evidence of Defendant’s monetary judgment is irrelevant to the issues before the jury.”

## **OBJECTIONS TO NOVELL'S PROPOSED VERDICT FORM**

A special verdict form must “clearly state the relevant issues, and ambiguous, biased, misleading, or confusing questions” should be omitted. Chlopek v. Fed. Ins. Co., 499 F.3d 692, 701 (7th Cir. 2007); accord Fidelity & Guar. Ins. Underwrites, Inc. v. Jasam Realty Corp., 540 F.3d 133, 139-41 (2d Cir. 2008). Accordingly, a special verdict form should not be “too complicated,” Santos v. Posadas de Puerto Rico Assocs., 452 F.3d 59, 65 (1st Cir. 2006); Chedd-Angier Production Co. v. Omni Publications Int’l, Inc., No. Civ. A. 81-1188-MA, 1984 WL 478431, at \*8 n.5 (D. Mass. Jan. 5, 1984); nor “confusing, and confusing long,” Grove Holding Corp. v. First Wis. Nat’l Bank of Sheboygan, 12 F. Supp. 2d 885, 899 (E.D. Wis. 1998); nor one that is “long, complicated, and serve[s] only to confuse the jury,” Farmers Coop. v. Senske & Son Transfer Co., Civil No. 2:06-cv-32, 2008 WL 2705098, at \*2 (D.N.D. July 9, 2008).

Novell’s proposed verdict form badly fails this test. It is unnecessarily long and complicated, and no reasonable set of jurors could be expected to follow it and fill it out without running the risk that the way they fill out the form does not accurately reflect the verdict they intend to reach. SCO submits that its proposed verdict form is by far the clearer one, and that it accurately reflects the law and appropriately directs the jury to answer all of the ultimate issues in this case. The only modification that SCO would suggest is to change the instructions to Question No. 5 to reflect this Court’s recent Order concerning the First Amendment; the question plainly should be framed as one the jury must answer. Accordingly, SCO rejects Novell’s proposed verdict form on a wholesale basis, and would propose the following, slightly revised verdict form:

**SLANDER OF TITLE**

1. Did SCO acquire ownership of some or all of the UNIX and UnixWare copyrights through the amended APA?                      Yes \_\_\_\_      No \_\_\_\_

If Yes, answer the next question. If No, do not answer any other questions; sign and return this form.

2. Has Novell made one or more false statements with respect to SCO's ownership of UNIX and UnixWare copyrights?                      Yes \_\_\_\_      No \_\_\_\_

If Yes, answer the next question. If No, do not answer any other questions; sign and return this form.

3. Did Novell make any of its false statements without any privilege, or in a manner that abused or exceeded any privilege?                      Yes \_\_\_\_      No \_\_\_\_

If Yes, answer the next question. If No, do not answer any other questions; sign and return this form.

4. Did SCO show by clear and convincing evidence that Novell made one or more of its false statements with knowledge that the statements were false or with reckless disregard for the truth of the statements?                      Yes \_\_\_\_      No \_\_\_\_

If Yes, answer the next question. If No, do not answer any other questions; sign and return this form.

5. Did Novell cause SCO damages in making any of its false statements?

Yes \_\_\_\_\_ No \_\_\_\_\_

If Yes, answer the next question. If No, do not answer any other questions; sign and return this form.

6. What is the amount of damages that SCO has suffered? Please state the amount:

\$ \_\_\_\_\_

If you have awarded SCO damages, please proceed to the following question regarding punitive damages.

**PUNITIVE DAMAGES**

1. Do you award punitive damages against Novell?

Yes \_\_\_\_\_ No \_\_\_\_\_

2. What is the amount of punitive damages that you award against Novell?

\$ \_\_\_\_\_

Dated this \_\_\_\_ day of March, 2010

\_\_\_\_\_  
Foreperson

DATED this 5th day of March, 2010.

By: /s/ Brent O. Hatch  
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**CERTIFICATE OF SERVICE**

I, Brent O. Hatch, hereby certify that on this 5th day of March, 2010, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF SCO'S OBJECTIONS TO NOVELL'S PROPOSED JURY INSTRUCTIONS AND VERDICT FORM** was filed with the court and served via electronic mail to the following recipients:

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