

Brent O. Hatch (5715)  
[bhatch@hjdllaw.com](mailto:bhatch@hjdllaw.com)  
Mark F. James (5295)  
[mjames@hjdllaw.com](mailto:mjames@hjdllaw.com)  
HATCH, JAMES & DODGE, PC  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101  
Telephone: (801) 363-6363  
Facsimile: (801) 363-6666

Stuart Singer (admitted pro hac vice)  
[ssinger@bsfllp.com](mailto:ssinger@bsfllp.com)  
Sashi Bach Boruchow (admitted pro hac vice)  
[sboruchow@bsfllp.com](mailto:sboruchow@bsfllp.com)  
BOIES SCHILLER & FLEXNER LLP  
401 East Las Olas Blvd.  
Suite 1200  
Fort Lauderdale, Florida 33301  
Telephone: (954) 356-0011  
Facsimile: (954) 356-0022

David Boies (admitted pro hac vice)  
[dboies@bsfllp.com](mailto:dboies@bsfllp.com)  
Robert Silver (admitted pro hac vice)  
[rsilver@bsfllp.com](mailto:rsilver@bsfllp.com)  
Edward Normand (admitted pro hac vice)  
[enormand@bsfllp.com](mailto:enormand@bsfllp.com)  
BOIES SCHILLER & FLEXNER LLP  
333 Main Street  
Armonk, New York 10504  
Telephone: (914) 749-8200  
Facsimile: (914) 749-8300

*Attorneys for Plaintiff, The SCO Group, Inc.*

**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>Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p>Defendant/Counterclaim-Plaintiff.</p>	<p><b>SCO'S RESPONSE TO JURY INSTRUCTIONS</b></p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Plaintiff, The SCO Group, Inc. (“SCO”), respectfully submits the following response to the Court’s proposed jury instructions.

SCO does not propose any revisions to the Court’s Special Verdict Form, which accurately reflects the law and properly identifies the issues that the jury must decide in a simple, straightforward manner. SCO proposes the following limited revisions to the Court’s Jury Instructions.

### **Instruction No. 32**

#### **Proposed Revision**

With respect to who owns the copyrights at issue, you ~~may~~ **[INSERT: should]** consider what is called the “extrinsic evidence” of the intent of the parties to the amended Asset Purchase Agreement. Extrinsic evidence is the evidence of what parties to a contract intended apart from the language they used in the contract.

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.

Another type of extrinsic evidence is called the parties’ “course of performance.” Course of performance is how the parties interpreted and applied the terms of the contract after the contract was created by before any disagreement between the parties arose.

#### **Argument**

The jury should consider the extrinsic evidence presented at trial. Novell lost the contrary argument on appeal, not only with respect to the interpretation of the amended APA, but also more generally as a matter of California law. The Tenth Circuit concluded that “extrinsic evidence regarding the parties’ intent is relevant to our interpretation of the combined instrument.” The SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1211 (10th Cir. 2009) (emphasis added). The Court also held that, under California law, extrinsic evidence is admissible to expose ambiguities in contractual language even if that language otherwise appears clear. Id. at 1209-10 (citing Dore v. Arnold Worldwide, Inc., 139 P.3d 56, 60 (Cal. 2006)). “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). In fact, the Tenth Circuit confirmed the California law that extrinsic evidence of course of performance is the best evidence of the parties’ intent. SCO Group, 578 F.3d at 1217 (citing Universal Sales Corp. v. Cal. Press Mfg. Co., 20 Cal.2d 751, (1942)). SCO therefore proposes that the Court instruct the jury that it “should” consider the extrinsic evidence.

### Instruction No. 33

#### Proposed Revision

Copyright is the exclusive right to copy. The owner of a copyright has the exclusive right to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies ~~or phonorecords~~;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies ~~or phonorecords~~ of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- (4) **[INSERT: to bring suit to enforce the copyrights.]**
- (5) ~~in the case of a literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;~~
- (6) ~~in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and~~
- (7) ~~in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.~~

It is the owner of a copyright who may exercise these exclusive rights ~~to copy~~. The term “owner” includes the author of the work, an assignee, or an exclusive licensee. In general, copyright law protects against production, adaptation, distribution, performance, or display of substantially similar copies of the owner’s copyrighted work without the owner’s permission. ~~A~~ **[INSERT: copyright]** 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.

#### Argument

SCO proposes two main revisions to this instruction. First, the foregoing revision removes those portions of the model instruction that pertain to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works” and that (as SCO believes both parties agree) do not pertain to the facts of this case. Second, the revision accurately fills out the instruction concerning a copyright owner’s exclusive rights “to reproduce

the copyrighted work,” “to prepare derivative works based upon the copyrighted work,” and “to distribute copies of the copyrighted work” by including another such right (#4) that is particularly relevant to this case – the right “to bring suit to enforce the copyrights.” 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 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”).

## Instruction No. 34

### Proposed Revision

A copyright owner may ~~transfer~~ **[grant]** to another person any of the of the rights comprise in the copyright. The person to whom this right is ~~transferred~~ **[granted]** is called a licensee.

Licenses may be either exclusive or nonexclusive. **[An exclusive license is one way of transferring copyright ownership.]** An exclusive license must be in writing. An exclusive licensee has the right to exclude others from copying the work to the extent of the rights granted in the license. An exclusive licensee is also entitled to bring an action for damages for copyright infringement of the right licensed.

Nonexclusive licenses, on the other hand, do not transfer copyright ownership and can be granted orally or implied from conduct. An implied license can only be nonexclusive. ~~An implied nonexclusive licensee has a right to exclude others who do not have a right to copy the work. However,~~ a **[A]** nonexclusive licensee cannot bring suit to enforce a copyright.

An implied nonexclusive license may arise when (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes the particular work and delivers it to the licensee who request it, and (3) the licensor intends that the licensee-requestor copy and distribute his work.

### Argument

SCO proposes three important revisions to conform the instruction to the law.

First, SCO proposes to change the language in the beginning of the instruction from “transfer” to “grant” because it is undisputed that nonexclusive licenses grant rights (and, unlike exclusive licenses, do not transfer copyright ownership). John G. Danielson, Inc. v. Winchester-Conant Properties, Inc., 322 F.3d 26, 40 (1st Cir. 2003) (“A copyright owner may grant a nonexclusive license”); Netbula, LLC v. Chordiant Software, Inc., 2009 WL 2044693, at \*6 (N.D. Cal. 2009) (same).

Second, SCO proposes to add a sentence to the explanation of an exclusive license that mirrors the Court’s instruction regarding a nonexclusive license, and Instruction No. 33. The law provides that a transfer of copyright ownership is an assignment, mortgage, exclusive license, or any other conveyance of a copyright or any of the exclusive rights comprised in a

copyright, but not including a nonexclusive license. 17 U.S.C.A. § 101; see, e.g., Traicoff v. Digital Media, Inc., 439 F. Supp. 2d 872, 877-79 (S.D. Ind. 2006) (surveying the relevant precedent); accord 1 The Law of Copyright § 4:44 (2009) (explaining that “the obvious conclusion is that an exclusive license is a transfer of copyright ownership under the statute”). Thus, just as the Court tells the jury that “[n]onexclusive licenses, on the other hand, do not transfer copyright ownership,” they should be told that exclusive licenses do transfer ownership.

Third, SCO proposes that the Court delete the sentence identified in the third paragraph of the instruction because an implied nonexclusive licensee cannot exclude others who do not have a right to copy the work. (SCO thought that Novell had previously agreed to the inaccuracy of this proposed instruction.)

As the Court’s instruction already properly indicates, “an implied license can only be non-exclusive.”<sup>1</sup> It is similarly clear that only an exclusive licensee possesses all of the exclusive rights of copyright ownership, including the right to sue for infringement. 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.”); 2 Patry on Copyright § 5:1118 (2010) (“Because Section 501(a) permits only owners of exclusive rights to sue for infringement,

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<sup>1</sup> See Robinson v. Buy-Rite Costume Jewelry, Inc., No. 03 Civ. 3619 (DC), 2004 WL 1878781, at \*4 (S.D.N.Y. Aug. 24, 2004); 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); 2 Patry, supra, § 5:1118 (“Oral and implied licenses can only be nonexclusive.”); Copyright Litigation Handbook § 13:12 (2d ed. 2009) (explaining that “an oral license and an implied license can only be non-exclusive”).

nonexclusive licensees have no standing.”). Thus, the law is that an implied licensee cannot exclude others who do not have a right to copy the work.

## Instruction No. 35

### Proposed Revision

The third element requires the party claiming slander of title to prove by clear and convincing evidence that the statement disparaging the ownership of the UNIX and UnixWare copyrights was made with “constitutional malice.” That is, the party claiming slander of title must prove that the statement was published with: (1) knowledge that it was false; or (2) reckless disregard of whether it was true or false, which means that the party making the statement acted with a high degree of awareness of the probable falsity of the statement, or that, at the time the statement was transmitted, the party making the statement had serious doubts that the statement was true. Clear and convincing evidence leaves no substantial doubt in your mind that the constitutional malice is highly probable.

In determining whether the party published the statement knowing the statement to be false or with reckless disregard for the truth, you should take into account all the facts and circumstances. You should consider whether the statement was fabricated or the product of the party’s imagination. You may also consider what the party knew about the source of the information and whether there were reasons for the party to doubt the informant’s veracity, whether the information was inherently improbable, or if there were other reasons for the party to doubt the accuracy of the information.

~~In determining whether there was knowing falsehood or reckless disregard for the truth, however, it is not enough for you to find that the party acted negligently, carelessly, sloppily or did not exercise good judgment in researching, writing, editing, or publishing the statement. An extreme departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers does not, standing alone, constitute knowledge of falsity or reckless disregard for the truth. The reliance on one source standing alone does not constitute knowing falsehood or reckless disregard for the truth, even if other sources would be readily available, and even if, in applying reasonable reporting care, you believe those other sources should have been contacted.~~

Knowing falsehood or reckless disregard as to the truth or falsity does not require a finding of spite, ill will, hatred, bad faith, evil purpose or intent to harm,

The mere fact that a mistake may occur does not evidence knowing falsehood or reckless disregard for the truth. Reckless disregard for the truth or falsity requires a finding that the person making the statement had a high degree of awareness that the statement was probably false, but went ahead and published the statement anyway. The test is not whether the person acted as a responsible publisher would have acted under the circumstances. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a standard of conduct in this matter.

Unless you find by clear and convincing evidence, under all the circumstances, that the party making the statement acted knowing the statement to be false or with a high degree of awareness of its probable falsity, there can be no liability.

## **Argument**

SCO submits that the Court's lengthy instruction on constitutional malice more than fairly identifies the standard that the plaintiff must meet. The third paragraph of the instruction consists of language taken from bracketed portions of the model Defamation Instruction (MUJI § 10.7) that concern the application of the constitutional malice standard to a claim involving "investigating and reporting." Such language does not pertain to the slander of title claim at issue in this case. Moreover, even in the context of a defamation claim, the language is bracketed. The Court's instruction already includes several other bracketed portions of the model instruction. SCO submits that the omission of the foregoing paragraph is appropriate.

## Instruction No. 39

### Proposed Revision

The final element of a claim for slander of title requires a showing that the statement disparaging claimant's ownership of the UNIX and UnixWare copyrights caused special damages.

This requires the claimant to establish an economic loss that has been realized or liquidated, as in the case of specific lost sales. Special damages are ordinarily proved in a slander of title action by evidence of a lost sale or the loss of some other economic advantage. Absent a specific monetary loss flowing from a slander affecting the saleability or use of the property, there is no damage. It is not sufficient to show that the property's value has dropped on the market, as this is not a realized or liquidated loss. The law does not presume special damages.

When the loss of a specific sale is relied on to establish special damages, the claimant must prove that the publication of the disparaging statement was a substantial factor influencing the specific, identified purchaser in his decision not to buy.

In order for the disparaging statement to be a substantial factor in determining the conduct of an intending or potential purchaser, it is not necessary that the conduct should be determined exclusively or even predominantly by the publication of the statement. It is enough that the disparagement is a factor in determining his decision, even though he is influenced by other factors without which he would not decide to act as he does. Thus many considerations may combine to make an intending purchaser decide to break a contract to withdraw or refrain from making an offer. If, however, the publication of the disparaging matter is one of the considerations that has substantial weight, the publication of the disparaging matter is a substantial factor in preventing the sale and thus bringing financial loss upon the owner of the thing in question.

The extent of the loss caused by the prevention of a sale is determined by the difference between the price that would have been realized by it and the salable value of the thing in question after there has been a sufficient time following the frustration of the sale to permit its marketing.

In the case of a widely disseminated disparaging statement, the claimant need not identify a specific lost sale. The claimant may recover for the loss of the market if the claimant can prove that the loss has in fact occurred ~~and can eliminate other causes.~~

A decline in stock price is not an appropriate claim for special damages.

### Argument

Novell had proposed the inclusion of the language "and can eliminate other causes," in the paragraph identified above. SCO objected, noting that the proposed language does not

remotely reflect the controlling standard. The Court’s instruction properly identifies that controlling standard, which is that a plaintiff on a slander of title claim must show that the slanderous statement was a “substantial factor” in causing damages. The plaintiff is not required to “eliminate other causes.”

The language that Novell had proposed was taken out of context from one example in the Comments to Section 633 of the Restatement, and does not purport to be the exclusive way a plaintiff can show damages. Such an instruction would be flatly inconsistent with the substantial factor test that Utah law (and this Court) has adopted.

If the Court does wish to include examples from the Restatement, including this one, SCO submits that such language should track the precise language from the Restatement, which clearly reflects the Court providing the jury with an example – “this may be proved by circumstantial evidence showing that the loss has in fact occurred, and eliminating other causes.” Restatement (Second) of Torts § 633 cmt. h (2009).

**Instruction No. 39**

**Proposed Revision**

The fact that I have instructed you on damages does not mean that I am indicating that you should award any – that is entirely for you, the jury, to decide.

Any damages you award must have a reasonable basis in the evidence. They need not be mathematically exact, but there must be enough evidence for you to make a reasonable estimate of damages without speculation or guesswork.

The burden is upon the party seeking damages to prove the existence and amount of his damages ~~and that his damages were caused by the acts of the opposing party~~. You are not permitted to award speculative damages.

**Argument**

In Instruction No. 36, the Court already specifically and properly instructs the jury regarding the element of causation in a slander of title claim. The phrase identified above in Stock Instruction No. 39 is thus redundant and potentially confusing.

DATED this 24th day of March, 2010.

By: /s/ Brent O. Hatch  
HATCH, JAMES & DODGE, P.C.  
Brent O. Hatch  
Mark F. James

BOIES, SCHILLER & FLEXNER LLP  
David Boies  
Robert Silver  
Stuart H. Singer  
Edward Normand  
Sashi Bach Boruchow

*Counsel for The SCO Group, Inc.*

**CERTIFICATE OF SERVICE**

I, Brent O. Hatch, hereby certify that on this 24th day of March, 2010, a true and correct copy of the foregoing Response to Jury Instructions was filed with the Court and served via electronic mail to the following recipients:

Sterling A. Brennan  
David R. Wright  
Kirk R. Harris  
Cara J. Baldwin  
WORKMAN | NYDEGGER  
1000 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, UT 84111

Thomas R. Karrenberg  
Heather M. Sneddon  
ANDERSON & KARRENBERG  
700 Bank One Tower  
50 West Broadway  
Salt Lake City, UT 84101

Michael A. Jacobs  
Eric M. Aker  
Grant L. Kim  
MORRISON & FOERSTER  
425 Market Street  
San Francisco, CA 94105-2482

*Counsel for Defendant and Counterclaim-Plaintiff Novell, Inc.*

By: /s/ Brent O. Hatch  
Brent O. Hatch  
HATCH, JAMES & DODGE, P.C.  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101  
Telephone: (801) 363-6363  
Facsimile: (801) 363-6666