

Brent O. Hatch (5715)
bhatch@hjdllaw.com
Mark F. James (5295)
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
Sashi Bach Boruchow (admitted pro hac vice)
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
Robert Silver (admitted pro hac vice)
rsilver@bsfllp.com
Edward Normand (admitted pro hac vice)
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>SCO'S MEMORANDUM IN SUPPORT OF ITS RULE 50(a) MOTION AT THE CLOSE OF ALL EVIDENCE</p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p> |
|--|---|

TABLE OF CONTENTS

| | |
|--|----|
| INTRODUCTION | 1 |
| LEGAL STANDARD..... | 1 |
| ARGUMENT | 2 |
| I. THE AMENDED APA TRANSFERS TO SCO THE COPYRIGHTS THAT SCO REQUIRES TO EXERCISE ITS RIGHTS WITH RESPECT TO ITS ACQUISITION OF UNIX AND UNIXWARE..... | 2 |
| II. NOVELL HAS NOT OFFERED ANY EVIDENCE THAT SCO DOES NOT REQUIRE THE UNIX AND UNIXWARE COPYRIGHTS TO RUN THE UNIX BUSINESS..... | 3 |
| CONCLUSION..... | 10 |

Plaintiff, The SCO Group, Inc. (“SCO”), respectfully submits this Memorandum in Support of Its Rule 50(a) Motion for Judgment as a Matter of Law.

INTRODUCTION

Plaintiff hereby moves at the close of all the evidence under Rule 50(a) for judgment as a matter of law. Under the plain language of the amended Asset Purchase Agreement (“APA”), SCO acquired all “copyrights and trademarks owned by Novell as of the date of the Agreement required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.” (SCO-EX-1.) The parties to Amendment No. 2 agree that the amended APA transferred to SCO all copyrights and trademarks that SCO needed to exercise its rights with respect to the UNIX business it purchased from Novell. The evidence in the record cannot support a reasonable jury finding that SCO does not require the UNIX and UnixWare copyrights to exercise its rights with respect to the UNIX business. Ten witnesses from both sides of the asset purchase deal have testified that SCO does requires the UNIX and UnixWare copyrights to run its business, including because that business depends on SCO’s ability to protect the valuable source code at the heart of its licensing business. After three weeks of testimony, there is no evidence in the record to support the contrary conclusion. Accordingly, the Court should grant SCO’s motion for judgment as a matter of law and find that SCO owns the UNIX and UnixWare copyrights.

LEGAL STANDARD

Under Rule 50 of the Federal Rules of Civil Procedure, a court should render judgment as a matter of law when “a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” Fed. R. Civ. P. 50(a); BC Technical, Inc. v. Ensil Intern. Corp., No. 2:02-CV-700 TS, 2009 WL 81386, at *1 (D. Utah

January 9, 2009). Motions under Rule 50 must “specify the judgment sought and the law and facts that entitle the movant to the judgment.” Fed. R. Civ. P. 50(a)(2).

ARGUMENT

I. THE AMENDED APA TRANSFERS TO SCO THE COPYRIGHTS THAT SCO REQUIRES TO EXERCISE ITS RIGHTS WITH RESPECT TO ITS ACQUISITION OF UNIX AND UNIXWARE.

The record is clear that Amendment No. 2 was drafted by Steven Sabbath, on behalf of SCO, and Allison Amadia, on behalf of Novell. Both witnesses agree that the Amendment transfers to SCO the copyrights it requires to exercise its rights in connection with its acquisition of the UNIX and UnixWare technologies. Mr. Sabbath testified that SCO acquired all of the UNIX and UnixWare copyrights under the amended APA. (3/15/10 Trial Tr. at 913:17-914:5.) At trial, Ms. Amadia acknowledged that SCO acquired all of the copyrights it needed to exercise its rights with respect to the UNIX business. On cross examination, Ms. Amadia testified:

Q. So if there are copyrights that are required for SCO to exercise its rights, like the UNIX and UnixWare trademarks, they were transferred; correct?

A. Yeah.

(3/23/10 Trial Tr. at 2177:15-18.) Ms. Amadia further admitted that under the amended APA, “whatever copyright rights Santa Cruz needed in order to exercise the rights it was given under the asset purchase agreement, then that would be – they would have those rights.” (*Id.* at 2160:5-7.) Ms. Amadia’s testimony comports with Novell’s own admission on June 6, 2003, when it publicly admitted that “Amendment No. 2 appears to support SCO’s claim that ownership of certain copyrights for UNIX did transfer to SCO in 1996” – the copyrights SCO requires to run its business as identified in the plain language of Amendment No. 2. (SCO-EX-97.) There is no

legally sufficient evidentiary basis for a reasonable jury to find that SCO did not acquire the copyrights that SCO requires to run the UNIX business it acquired under the amended APA.

II. **NOVELL HAS NOT OFFERED ANY EVIDENCE THAT SCO DOES NOT REQUIRE THE UNIX AND UNIXWARE COPYRIGHTS TO RUN THE UNIX BUSINESS.**

With respect to the question of whether SCO needs the UNIX and UnixWare copyrights to run its business, ten witnesses from both sides of the asset purchase deal, with involvement in various aspects of the UNIX business, testified that SCO does require the UNIX and UnixWare copyrights to run its business.

- **Novell President and CEO Robert Frankenberg**

Q. Well, if someone had said to you that, well, we're trying to sell the software business but we're going to retain the copyrights, would that have been something you think would have gotten your attention?

A. That definitely would have gotten my attention, because it's ludicrous to think about selling software without selling the copyrights. If you don't have the copyrights, you don't have the ability to freely use what you bought.

(3/25/10 Trial Tr. at 2543:21-2544:3.)

- **Novell Senior Vice President Duff Thompson**

Q. Without the UNIX copyrights would Santa Cruz be able to operate the software business that they were buying?

MR. ACKER: Objection, calls for a legal conclusion, Your Honor.

THE COURT: I'll overrule the objection.

THE WITNESS: It is hard for me to imagine any instance in which we are selling them the entire business, to go forward with this business in the future, without giving them the underlying intellectual property rights that they needed to do so.

(3/10/10 Trial Tr. at 241:19-242:3.)

- **UNIX Contract Manager Bill Broderick**

Q. When you do that, in the last 15 years has it been your belief and understanding that Santa Cruz and SCO owns the Unix copyrights?

A. Well, yes. In our agreements we provide an indemnification for infringement of a third-party product. Somebody licensing our software, we would -- we would give them an indemnification. So if somebody else came along and said, "The product you're using infringes this, and I'm suing you for \$1,000,000," we indemnify them and say, "Since we've licensed you the software, we'll protect you from that." We wouldn't protect them from that unless we owned the software. And the copyright -- in software a copyright is how you own the software.

(3/12/10 Trial Tr. at 666:9-21.)

Q. And do you have a view as to whether if you own the copyrights you would have any recourse against that third party?

A. We have ownership of the product, therefore, we could press the issue. Copyrights is how you own a -- how you show your ownership and protect your software is by copyright.

Q. Now, in your view is the ability to enforce prescriptions against third parties integral to the operation of SCO's business?

A. Oh, absolutely. If we couldn't protect our software, we'd be out of business. You know, if we couldn't protect our software, the first person that we licensed the software could go into business for themselves and we'd be out of business. We have to be able to protect our software, and you do that through copyrights. That's how all of the companies have done it.

(3/12/10 Trial Tr. at 667:16-668:6.)

- **SCO Founder and Vice President Doug Michels**

Q. What is your opinion as to the scope of that phrase, namely, copyrights required for SCO to exercise its rights, and so on? What copyrights does that include?

A. I mean I believe the scope of the term here is all copyrights relating to the Unix business: Source code, documentation, screens, you know, training materials, you know, brochures,

marketing literature. I mean, you know, there's millions of copyright things in a business.

Q. Why are all those copyrights required for SCO to exercise its rights with respect to the acquisition?

A. We took over the business. We were in the business of selling intellectual property. We were in the business of supporting the intellectual property. We were in the business of providing training. We were in the business of providing marketing materials. We couldn't do any of that without owning the copyrights.

A. I meant that the only way I know of and anyone on my team knew of to buy a software business is to buy the copyrights. And there's no way we would have ever done a deal to buy a software business where we didn't get the copyrights and all the other intellectual property. That's what you're buying. And especially in the case of Unix with its convoluted intellectual property history and whatnot, to not -- to not get that stuff would be to not do the deal. And so it was implicit in everything we did, everything we thought. Every single person on my team understood that. The lawyers understood it. The business development people understood it. I mean it's just -- it's so essential it's, you know, like breathing oxygen. I mean there's no way that deal could have happened without getting the copyrights.

(3/11/10 Trial Tr. at 502:24-503:14.)

- **SCO Vice President of Business Development and Lead Negotiator of the APA Jim Wilt**

Q. Certainly. With this text in mind and recalling your meetings with Novell leading up to the asset purchase agreement, do you recall anyone from Novell ever communicating to you affirmatively, specifically, that Novell was selling SCO the UNIX or UnixWare copyrights?

A. I do not have specific recollection of somebody communicating they were transferring that explicitly in terms of saying copyrights because it was such a fundamental part of an asset purchase that if you didn't have copyrights and such go along with it, there was no asset purchase. It's called a license. We did not discuss a license. We discussed a purchase. So there are a lot of things that we didn't explicitly cull out as part of the purchase because they were

just assumed. I mean, when you walk out the door, I assume your head goes with you, and the same thing is true when you buy the assets. Copyrights and things like that have got to go with it.

(3/11/10 Trial Tr. at 442:15-443:6.)

- **SCO Assistant Negotiator Kimberlee Madsen**

Q. Did you have a view, as of 1996, as to what copyrights were required for Santa Cruz to operate its UNIX and UnixWare business?

A. We would have acquired all the copyrights.

(3/15/10 Trial Tr. at 802:23-803:1.)

MR. BRENNAN:

Q. So let me ask his question again. Over the course of your tenure at Santa Cruz, did you understand that Santa Cruz required the UNIX copyrights to exercise its rights with respect to the acquisition of the UNIX and UnixWare technologies?

A. Yes.

(Id. at 864:16-21.)

MR BRENNAN:

Q. And you're sitting there and you're thinking, we require the UNIX copyrights in order for this UNIX, UnixWare business to be successful.

A. Yes.

(Id. at 865:18-21.)

A. No, that was not my understanding at all. SCO wanted to unify UNIX. It wanted to be the UNIX company. It wanted all rights to the UNIX, and it wanted to be able to enforce and protect its intellectual property rights. The copyrights would have been essential to that. And we wanted to be able to take action such as

we did with the European union with respect to Microsoft, and we needed the copyrights to do that, as well.

(Id. at 874:7-14.)

- **SCO General Counsel Steven Sabbath**

Q. And up until the time that you left Santa Cruz/Tarantella, what copyright rights in UNIX did Santa Cruz need in order to carry on the business contemplated by the asset purchase agreement?

A. Well, once we sold the business to Caldera now the SCO Group and became Tarantella, we didn't need those rights. Up till then you would need all rights to run your business. You don't know what you're going to be doing day to day, what kind of situations you'll find yourself in with the potential partners, with the potential customers. So you want all rights to do anything that you deem fit with the technology.

(Id. at 911:21-912:6.)

A. But we did need to protect the technology. We didn't want somebody to be able to go off and pirate, for example. So we needed the copyright in order to defend the property.

(Id. at 912:12-15.)

Question. In your view as of the execution of the APA, what copyrights were required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies?

Answer. Well, you would need all of the copyrights.

Question. And why do you say that?

Answer. To do the future development, you would need the copyrights. To license the technology the way you saw fit you would need the copyrights. My gosh, if you didn't own the copyrights, how could you even go after somebody that is pirating your software? How could you enforce your right to the

technology? So you would need all the copyrights and binaries and source code.

(Id. at 913:17-914:5.)

- **SCO CEO Darl McBride**

Q. Let me interrupt you three, if I might, for a moment, Mr. McBride, and ask is ownership of the UNIX copyrights required for SCO's business?

A. Yes, absolutely.

Q. Can you explain why ownership of the UNIX copyrights is required?

A. Well, you can't make copies of things if you don't have the copyright protection. You can't go out and do deals with people. You can't enforce your rights if somebody tries to take advantage of your property. There are a number of reasons. It would be like the Beatles trying to protect their music catalog without having the underlying copyrights. You have to have the copyrights to protect it.

(3/16/10 Trial Tr. at 997:11-23.)

- **UNIX Product Manager & OEM Relations Manager John Maciaszek**

Q. And do you have an understanding of what you need to be able to have the ability to give a license to a client?

A. Well, you need to own -- you need to own the code, and you need to have the copyrights associated with it. That's certainly the way I understand it.

Q. So your understanding is the copyrights are required to operate SCO's business?

A. Yes.

(3/19/10 Trial Tr. at 1687:16-24.)

Novell's witnesses did not contest the foregoing evidence that SCO requires the UNIX and UnixWare copyrights to run its UNIX and UnixWare business.

- **Novell Attorney Allison Amadia**

Q. But in the terms of the question that I asked, would you agree with me that it's reasonable to interpret this language as saying that among the copyrights included in the transfer are those that SCO needs to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies? Correct?

A. Yes.

(3/23/10 Trial Tr. at 2160:25-2161:6.)

- **Novell General Counsel Joseph LaSala**

(Video clip played as follows:)

Q. Do you have a view, as you sit here today, as to whether SCO needed any copyrights to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies?

A. I don't have a view.

(End of video clip.)

Q. BY MR. SINGER: That was your testimony in February, 2007, correct?

A. Yes.

(3/22/10 Trial Tr. at 1963:24-1964:7.)

In light of the foregoing evidence and Novell's failure to proffer any contrary evidence, there is no reasonable dispute regarding SCO's ownership of the UNIX and UnixWare copyrights, and SCO is entitled to judgment as a matter of law that it owns the UNIX and UnixWare copyrights. SCO submits that the remaining elements of SCO's claim for slander of title should be decided by the jury.

CONCLUSION

For the reasons stated above, SCO respectfully submits that the Court should grant SCO's motion for judgment as a matter of law and find that SCO owns the UNIX and UnixWare copyrights.

DATED this 26th 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 26th day of March, 2010, a true and correct copy of the foregoing SCO's MEMORANDUM IN SUPPORT OF ITS RULE 50(a) MOTION AT THE CLOSE OF ALL EVIDENCE 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