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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

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THE SCO GROUP, INC., a Delaware  
corporation,

Plaintiff and Counterclaim-  
Defendant,

v.

NOVELL, INC., a Delaware corporation,

Defendant and Counterclaim-  
Plaintiff.

**MEMORANDUM IN SUPPORT OF  
NOVELL'S MOTION FOR SUMMARY  
JUDGMENT ON ITS FOURTH CLAIM  
FOR RELIEF**

*[REDACTED pursuant to the August 2,  
2006 Stipulated Protective Order]*

Case No. 2:04CV00139

Judge Dale A. Kimball

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## **I. INTRODUCTION**

With the Court's permission, Novell brings this additional Motion for Summary Judgment to further refine and narrow the issues for trial. This motion is based substantially on the Court's August 10, 2007 Order resolving the parties' motions for summary judgment. (Docket No. 377, "Order.") To decide this motion, the Court need only apply the plain prohibitions found in the APA to the equally plain text of SCO's SCOSource licenses.

The APA prohibits SCO from modifying existing SVRX Licenses and from entering into new SVRX Licenses. That prohibition is subject only to limited exceptions, and those exceptions do not apply here. SCO thus was without authority to enter into or amend those licenses.

In addition, Amendment 2 to the APA prohibits SCO from modifying or entering into "buyout" licenses of SVRX rights, without exception. Because, again, it is plain from the face of SCO's SCOSource license with Sun that it modifies a prior SVRX buyout, SCO was without authority to enter the Sun SCOSource license.

## **II. STATEMENT OF UNDISPUTED FACTS**

The Court is generally familiar with the facts of this matter, which are briefly repeated below. (*See* Order at 2-42.)

### **The APA and its Prohibitions**

1. The Asset Purchase Agreement prohibits SCO from modifying existing SVRX Licenses and from entering into new SVRX Licenses. (Declaration of David E. Melaugh in Support of Novell's Motion for Summary Judgment on its Fourth Claim for Relief, filed herewith ("Melaugh Decl."), Ex. 9 (APA) at § 4.16; Order at 92.)

2. SCO can amend existing SVRX Licenses only "as may be incidentally involved through its rights to sell and license [UnixWare software]" or "to allow a licensee under a particular SVRX License to use the source code of the relevant SVRX product(s) on additional

CPU's or to receive an additional distribution, from [SCO], of such source code." (*Id.*; *see also* Melaugh Decl., Ex. 10 (Amendment No. 1) ¶ 10 (amending APA § 4.16).)

3. SCO can enter into new SVRX Licenses only "as may be incidentally involved through its rights to sell and license [UnixWare software]." (*Id.*)

4. In addition, before entering into "any potential transaction with an SVRX licensee which concerns a buy-out of any such licensee's royalty obligations," SCO must obtain Novell's consent. (Melaugh Decl., Ex. 12 (Amendment No. 2) at § B.) This prohibition is subject to no exceptions.

#### **SCOSource**

5. SCO's "SCOSource" program was, fundamentally, a campaign to extract licensing revenue based on SCO's now-rejected claim to own the SVRX copyrights. (Order at 29 ("SCOSource . . . was an effort to obtain license fees from Linux users based on claims to Unix System V intellectual property.").)

6. SCO has never claimed SCOSource had anything to do with SCO's UnixWare derivative rights.

#### **Sun's SCOSource License**

7. In 1994, Sun Microsystems, Inc. ("Sun") entered into an SVRX License with UNIX Systems Laboratories. Sun's 1994 SVRX License was a "buy-out," as that term is used in Amendment No. 2. (Order at 94; Melaugh Decl., Ex. 12 (Amendment No. 2).)

8. In 2003, SCO entered into a "Software License Agreement" with Sun. (Melaugh Decl., Ex. 11 at SCO1287208; Order at 94.) That agreement is explicitly intended to "amend and restate" the 1994 license agreement.

9. SCO characterizes the 2003 Sun Software License Agreement as a "SCOSource" license. (Melaugh Decl., Ex. 14 (SCO interrogatory response listing SCOSource licenses) at NOVTR 4238, 4241.)

10. Both the 2003 Sun SCOsource license and the 1994 license are "SVRX Licenses" within the meaning of the APA. (Order at 41, 101.)

11. The principal effects of the Sun SCOsource license were to:

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**Microsoft's SCOsource License**

13. In 2003, SCO entered into a "Release, License and Option Agreement" with Microsoft. (Melaugh Decl., Ex. 13 (Microsoft SCOsource license).)

14. SCO characterizes the 2003 Microsoft Release, License and Option Agreement as a "SCOsource" license. (Melaugh Decl., Ex. 14 (SCO interrogatory response listing SCOsource licenses) at NOVTR 4238, 4241.)

15. The 2003 Microsoft SCOsource license is an SVRX License. (Order at 41, 101.)

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**Other SCOsource Licenses**

REDACTED

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18. These licenses were each entered into under standardized terms. "The central feature of [these] other SCOsource agreements is the covenant not to sue and the waiver of claims by SCO for the companies' internal Linux usage." (SCO's Memo. in Opp. to Novell's Motion *In Limine* No. 2 to Preclude SCO from Contesting Licenses Conveying SVRX Rights are "SVRX Licenses," Docket No. 421 ("SCO SVRX Opp."), at 3.)

19. The Everyone's Internet SCOsource license is representative of the rights these licenses conveyed. That license grants, with certain limitations, the "right and license to use . . . SCO IP." (Melaugh Decl., Ex. 15 (Everyone's Internet Agreement) at § 2.1.) The definition of "SCO IP" makes clear that the license conveys SVRX rights:

**"SCO IP" means the SCO UNIX®-based Code** alleged by SCO to be included, embodied, or otherwise utilized in the Operating System.

...

"UNIX-based Code" means any Code or Method that: (i) in its literal or non-literal expression, structure, format, use, functionality or adaptation (ii) is based on, developed in, derived from or is similar to (iii) any Code contained in or Method devised or developed in (iv) UNIX System V or UnixWare®, or (v) any

modification or derivative work based on or licensed under UNIX System V or UnixWare.

(*Id.* at §§ 1.7, 1.10 (emphasis added).)

### III. ARGUMENT

#### A. SCOSource Was a Campaign Purporting to License Novell's SVRX Copyrights.

As this Court has already observed, SCOSource was, fundamentally, a campaign to extract licensing revenue based on SCO's now-rejected claim to own the SVRX copyrights. (Undisputed Facts ¶ 5; Order at 29 ("SCOSource . . . was an effort to obtain license fees from Linux users based on claims to Unix System V intellectual property.")) Indeed, the name for the first iteration of the SCOSource program was "SCO System V for Linux." (Melaugh Decl. Exs. 1 at SCO1275739, 2 at SCO1270161, 3 at SCO1537795.)

One of the acts SCO undertook as part of SCOSource was to send a letter to every Fortune 1000 company. (*Id.*, Exs. 4-7.) In that letter, SCO asserted:

We have evidence that portions of UNIX System V software code have been copied into Linux and that additional other portions of UNIX System V software code have been modified and copied into Linux, seemingly for the purposes of obfuscating their original source.

(*Id.*, Ex. 6 (May 12, 2003 Letter) at SCON 24113.) SCO later followed up on that correspondence with another, more specific letter identifying particular SVRX files, claiming:

[A]ny distribution of Linux by a software vendor or a re-distribution of Linux by an end user that contains any of the identified System V code violates SCO's rights under the DMCA, insofar as the distributor knows of these violations.

(*Id.*, Ex. 8 (Marsh Decl.) at Ex. 1.)

From start to finish, SCO never claimed SCOSource had anything to do with SCO's UnixWare derivative rights, and any attempt by SCO to recast SCOSource now should fail. (Undisputed Facts ¶ 6.)

**B. SCO Had No Authority to License Novell's SVRX Copyrights.**

As this Court has also observed, SCO is generally barred from modifying existing SVRX Licenses and from entering into new SVRX Licenses. (Undisputed Facts ¶ 1; Order at 92.) These prohibitions are consistent with other aspects of the APA's transactional structure: SCO doesn't own the SVRX copyrights and it doesn't own the revenue from SVRX Licenses. (Order at 99-101.) The APA provides only limited exceptions to that general bar, none of which apply here.

**1. SCO Had No Authority to Amend Sun's SVRX License.**

Sun has entered into a variety of SVRX Licenses with Novell and its predecessors, the most recent of which Sun executed with Novell in 1994. (Undisputed Facts ¶ 7; Order at 94.) SCO's SCOsource license with Sun explicitly acknowledges it is intended to "amend and restate" Sun's 1994 SVRX License. (Undisputed Facts ¶ 8) This Court has confirmed that the Sun SCOsource license is an SVRX License. (Undisputed Facts ¶ 10) SCO was without authority to amend Sun's SVRX License for two independent reasons.

First, SCO has no authority to "amend, modify or waive any right under or assign any SVRX License." (Undisputed Facts ¶¶ 1-2; Melaugh Decl., Ex. 9 (APA) at § 4.16(b).) That general prohibition is subject to only two exceptions. SCO may amend licenses "as may be incidentally involved through its rights to sell and license [UnixWare software]" or "to allow a licensee under a particular SVRX License to use the source code of the relevant SVRX product(s) on additional CPU's or to receive an additional distribution, from [SCO], of such source code." (*Id.*; see also Melaugh Decl., Ex. 10 (Amendment No. 1) ¶ 10.) Neither exception applies here.

As reflected above in Section IIIA, there can be no debate that SCOsource is, fundamentally, a program to license Novell's SVRX rights. (Undisputed Facts ¶¶ 5-6) SVRX was not merely "incidental" to some UnixWare license — it was at the heart of the SCOsource licenses. That is true of the Sun SCOsource license. Its principal effects were to: REDACTED

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Second, before entering into “any potential transaction with an SVRX licensee which concerns a buy-out of any such licensee’s royalty obligations,” SCO must obtain Novell’s consent. (Undisputed Facts ¶ 4; Melaugh Decl., Ex. 12 (Amendment No. 2) at § B.) This prohibition is subject to no exception. There is no dispute that Sun’s 1994 agreement with Novell was a “buy-out,” as that term is used in Amendment No. 2. (Undisputed Facts ¶ 7.) Sun’s 2003 SCOsource license explicitly acknowledges that it is intended to “amend and restate” that 1994 license. (Undisputed Facts ¶ 8.) By definition, Sun’s 2003 SCOsource license therefore “concerns” a buy-out, and SCO was required to obtain Novell’s consent to the license. SCO did not, and was therefore without authority to amend Sun’s SVRX License.

**2. SCO Had No Authority to Enter Into the Microsoft SCOsource License.**

This Court has held the Microsoft SCOsource license is an SVRX License. (Undisputed Facts ¶ 15; Order at 41, 101.) The Microsoft SCOsource license does not, on its face, modify any existing Microsoft SVRX License and is therefore a “new” SVRX License. The APA prohibits SCO from entering into new SVRX Licenses. (Undisputed Facts ¶ 1) The APA allows only one exception, discussed above: “as may be incidentally involved through its rights to sell and license [UnixWare software].” (Undisputed Facts ¶ 2).

As with the Sun SCOsource license, there can be no dispute that SVRX played more than a merely “incidental” role in Microsoft’s SCOsource license. REDACTED



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As the sole exception does not apply, SCO was without authority to enter into the Microsoft SCOsource license.

**3. SCO Had No Authority to Enter Into the Other SCOsource Licenses.**

SCO also entered into  other SCOsource licenses. (Undisputed Facts ¶ 17.) These licenses were each entered into under standardized terms. (Undisputed Facts ¶ 18.) Taking the SCOsource license with Everyone's Internet as an example: the license grants, with certain limitations, the "right and license to use . . . SCO IP." (Undisputed Facts ¶ 19; Melaugh Decl., Ex. 15 (Everyone's Internet Agreement) at § 2.1.) The definition of "SCO IP" makes clear that the license conveys SVRX rights. (*Id.*) The remaining "other" SCOsource licenses convey similar rights to SVRX.

These licenses each convey SVRX rights and are therefore SVRX Licenses. Because no exception applies here, SCO is barred from entering into these new SVRX Licenses.

**a. The Other SCOsource Licenses are SVRX Licenses.**

For purposes of this motion, it is not necessary to examine the licenses individually. SCO has admitted that "[t]he central feature of the other SCOsource agreements is the covenant not to sue and the waiver of claims by SCO for the companies' internal Linux usage." (Undisputed Facts ¶ 18; SCO SVRX Opp. at 3.) The Court need therefore only decide that, as a matter of law, licenses that excuse a company's purported past and future infringement of SVRX copyrights are "SVRX Licenses" within the meaning of the APA.

This Court has held that "the only possible interpretation of the APA [is] that SVRX Licenses mean all contracts relating to the list of SVRX products provided in Item (VI) of Schedule 1.1(a)" and the Auxiliary Products listed in Amendment 1. (Order at 34, 77, 91.) It is

plain that a contract permitting a party to use code contained in the SVRX products listed in the APA is a contract “relating to” those products and is therefore an SVRX License.

SCO has, in the past, contended that because the emphasis of the other SCOsource licenses is “the avoidance of litigation with SCO,” these agreements are not SVRX Licenses. (SCO SVRX Opp. at 3-4.) There is no merit to such an argument. The Court has held that licenses granting SVRX rights are SVRX Licenses. (Order at 34, 77, 91.) Neither the plain language of the APA nor the Court’s orders interpreting that language support any argument that licenses granting SVRX rights are SVRX Licenses *unless they are primarily litigation-avoidance agreements*. Indeed, any license to intellectual property is ultimately a litigation-avoidance agreement — a license is an affirmative defense to a claim of infringement. *See, e.g., Evolution, Inc. v. Prime Rate Premium Fin. Corp.*, No. 03-2315-KHV, 2004 U.S. Dist. LEXIS 25017, at \*15 (D. Kan. Aug. 13, 2004) (“The existence of a license, exclusive or non-exclusive, creates an affirmative defense to a claim of copyright infringement.”) (attached as Exhibit 1). Under SCO’s logic, any license granting rights to copyrights could always be instead characterized as a “litigation-avoidance agreement.”

SCO has also contended that the other SCOsource licenses are not SVRX Licenses because SCO did not deliver any physical software along with the licenses. That also makes no difference. Intellectual property is intangible. A license to use a copyright conveys rights whether a copy of the work is appended to the contract or not, and, again, nowhere in the APA or the Court’s orders is there anything limiting SVRX Licenses to just those licenses that convey physical instantiations of the licensed rights.

**b. SVRX Plays More Than an “Incidental” Role in the Other SCOsource Licenses.**

Given that the SCOsource licenses are SVRX Licenses, SCO can only enter into such licenses if they are “incidentally involved through its rights to sell and license [UnixWare software].” (Undisputed Facts ¶¶ 1, 3; Melaugh Decl., Ex. 9 (APA) at § 4.16(b).) As SCO has

admitted, the purpose of these licenses was to excuse the licensee's purported infringement of SCO's intellectual property rights. (Undisputed Facts ¶ 18; SCO SVRX Opp. at 3.) SCO has never contended that Linux infringes its UnixWare derivative intellectual property. (Undisputed Facts ¶ 6.) SCO has only contended that SVRX is infringed. There can therefore be no contention that the "incidental" exception applies.

### CONCLUSION

For the reasons stated above, Novell is entitled to a declaration that SCO was without authority to enter into the SCOSource licenses.

DATED: December 21, 2007

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By:           /s/ Heather M. Sneddon          

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21st day of December, 2007, I caused a true and correct copy of the **MEMORANDUM IN SUPPORT OF NOVELL'S MOTION FOR SUMMARY JUDGMENT ON ITS FOURTH CLAIM FOR RELIEF** to be served to the following:

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