IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, Plaintiff, vs. NOVELL, INC., Defendant.	Case 2:04-CV-139

BEFORE THE HONORABLE DALE A. KIMBALL

MAY 11, 2004

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

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SALT LAKE CITY, UTAH, TUESDAY, MAY 11, 2004

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THE COURT: We're here this afternoon in the matter of the SCO Group, Inc., vs. Novell, Inc., 2:04-CV-139. For plaintiff, Mr. Brent Hatch, Mr. Mark Clements, Mr. Ryan Tibbits. For defendant, Mr. Michael Jacobs.

MR. JACOBS: Good afternoon, Your Honor.

THE COURT: Good afternoon. And Mr. John Mullen.

MR. MULLEN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

We have two motions, plaintiff's motion to remand and defendant's motion to dismiss. Let's hear the motion to remand first. Who's going to argue it?

MR. HATCH: I am, Your Honor.

THE COURT: Mr. Hatch.

Who's going to argue for the defendant on remand?

MR. JACOBS: I am.

THE COURT: That would be Mr. Jacobs; right?

MR. JACOBS: Right.

THE COURT: Go ahead, Mr. Hatch, on the motion to remand.

MR. HATCH: Thank you, Your Honor.

Your Honor, as you know, Novell, being a party who removed this action from the state court, carries the burden, and any ambiguities should be resolved against removal in this

case. What this really comes down to is, Your Honor, we brought a state court action seeking state court remedies in state court.

THE COURT: Slander of title.

MR. HATCH: Slander of title. And the complaint, unlike many of the cases cited by Novell, does not allege federal question, does not allege or seek a federal remedy. SCO as --

THE COURT: Can you get to your title claim without somehow deciding something about 204(a)?

MR. HATCH: I think so, Your Honor. I think what's happened here is Novell to a large part has put form over substance here. Section 204(a), as Your Honor is well aware now having read the briefs, that requires a writing. And that's it. There isn't a lot more there. There isn't a set of standards for a court to apply, like Novell seems to imply that there's something more there. They call it, there needs to be a contract of conveyance or what have not.

We clearly allege that there is an agreement by which these copyrights were transferred. It is a writing, and prima facie meets the requirements of 204(a). The kind of argument that they're making here is that there needs to be something more has been really routinely objected by the courts. And I think if we just get to the nub of the matter, essentially what they are relying on here is some -- a ruling in Jasper. The reality here is the type of argument they're

making that somehow if you have to get to the underlying argument about what the contract means and what it is, which are frankly all state law questions, it will turn every single contract case that even tangentially mentions a copyright or trademark into a federal question.

And that's been pretty routinely rejected by all the courts. As a matter of fact, Judge Friendly, a fine judge out of the Second Circuit that we read over and over and over again in law school made that very clear in the TB Harms decision. He said we can't put form over substance. If we do the kind of things that Novell is asking to do here, we're going to always have a federal question.

And the reality is 204(a) doesn't apply standards. It makes it very clear that you have to have it in writing. Particularly what they're worried about, and this comes out in the cases, is that somebody loses a copyright because of someone coming later and saying, we have had some type of oral agreement. It really creates a distinction between oral and written agreements, so there is something concrete to go on. It doesn't go to the underlying, what does the written agreement say.

And that's, frankly, where Novell makes its mistake, in my view, on the law because the cases it cites, virtually every one of them, are -- where they're saying there's a 204, a real 204 issue, they were oral agreements.

Now, really, what it gets us down to, as I say again, is the Jasper case.

THE COURT: The Second Circuit case Jasper?

MR. HATCH: Correct, Your Honor. 2002.

THE COURT: 2002.

MR. HATCH: And I think the decision, because they rely on it so heavily, if you look at TB Harms, you look at virtually every other decision, and it's really clear that all we're looking for is a written agreement, and we have that here. And at this stage of the game it shouldn't be going any further than that.

What it really comes down to is if the Court is going to rely on Jasper. Does Jasper give the Court anything to chew on? And Jasper really does an interesting thing, Your Honor. It goes through the law. And I think it states it pretty well. They say -- and they go right to Judge Friendly, as I did. And they say:

> Judge Friendly pointed out the fact that a case concerns a copyright does not necessarily mean that it is within the jurisdiction of the Federal District Court.

Well, that's good law. I think that's still in place, and I think almost every court follows that. And just right below that in the decision, he says:

> Specifically, if the case concerns a dispute as to

ownership of copyright --

Which is exactly what we have here. And the issue -- which I point out is raised by defense. It's not raised in the initial pleadings.

Specifically, if the case concerns a dispute as to ownership of a copyright, then the issue of ownership turns on the interpretation of a contract, the case presents only a state law issue. And unless the complaint asserts a remedy expressedly granted by the Copyright Act, federal jurisdiction is lacking in the absence of diversity jurisdiction.

And then he makes the point that I just made just a few --

THE COURT: There's no claim that there's any diversity here, is there?

MR. HATCH: No. Both companies are Delaware corporations, so it could not be removed on a diversity basis.

So they're relying --

THE COURT: So it's federal jurisdiction or no jurisdiction.

MR. HATCH: That's exactly right, Your Honor.

And Judge Friendly found and so did Judge Newman here in the Jasper case and says:

The difficulty that is almost every case involving

contract interpretation, appropriate for state court determination, could be recharacterized as a case appropriate for a federal court simply by framing the issue to be whether the disputed contract qualified as a writing within the meaning of Section 204(a). In most cases, there will be no doubt that the contract is a Section 204(a) writing, and the only substantial issue can be contract interpretation.

THE COURT: Except Jasper was not one of those cases.

MR. HATCH: It was not.

THE COURT: How is your case different than Jasper?

MR. HATCH: Well, I would urge the Court to look very close to Jasper because the Court there made it very clear that it is the rare exception to the rule. And I would report to the Court that Jasper -- and in their briefs Novell says it is a leading case in its area. I would agree it's a leading case in the area, but on a very different point than they do. I think it's a leading case in the area of the following.

In Jasper, the plaintiff himself brought his case in federal court, unlike us. He claimed that his case was one that fell under the federal copyright laws, the plaintiff himself. Again, unlike our case. The defense in that case never raised an issue as to whether or not subject matter jurisdiction properly was laid in the federal court.

THE COURT: The ultimate question, though, is still the

same, isn't it? Is there appropriate federal jurisdiction?

MR. HATCH: Exactly. Eventually what happened here, the case went to a bench trial, and the plaintiff lost. In other words, it was found that he didn't have a case. And this matter for the first time on jurisdiction was raised on appeal. And it really doesn't take a lot to read why the Court found this is a rare exception.

Now, in our brief we point out one of the reasons here is because there were third parties involved and there had to be some clarification as to the copyright. But the reality is they cite the law, which would apply directly here, and say this is the rare case because it's pretty clear the Court said, you had your day in court. You wasted all of our time. This is a rare case.

And what goes to show that even more --

THE COURT: You're saying that more normally the jurisdiction question would have been raised and decided much earlier.

MR. HATCH: Oh, sure.

THE COURT: Theoretically, it shouldn't make any difference, I guess.

MR. HATCH: Correct. And if you notice, Judge Friendly does the same kind of thing. If you look at the TB Harms decision, it's kind of interesting. He pointed out there were other cases that were like that where people miss it. And

frankly, I guess in some people's minds, they don't look at those issues. And Your Honor is absolutely right. Subject matter jurisdiction can be raised at any time.

And Judge Friendly was called to deal with the Rossiter case and also the Venus Music cases, that somehow they went forward even though there wasn't -- in his mind it was pretty clear you can read between the lines there wasn't subject matter jurisdiction. And he said kind of the same thing I said here. It was kind of bad facts making bad law. He said:

> But the jurisdictional problem, that was obscured by the insistence of both parties that this action was a copyright infringement.

In other words, the district court missed it because nobody raised it, and the district court didn't catch it himself.

Here, we don't have that instance. It's not one of those rare instances. This is one of those cases where it's pretty clear there was a writing, and this is an argument that is just being made purely for the purposes of shopping for federal court jurisdiction.

I think one of the things it points out most clearly is the Jasper court laid out kind of parameters, and the parameters were if it's contract interpretation, that's all it is. If there is an actual writing and all you're doing

is interpreting it, that's a state law question. And that's exactly our case here.

What Jasper doesn't do, and if it's really a leading case on exceptions, where's the standard, Your Honor? You know, if you're trying to put this in a case book for law students to study or better yet, be in the case law so you and I can understand, what's the rare exception? How do we apply it? There's no standards really enunciated here. And I think it's really a rare exception in the sense that this Court wasn't about to let the plaintiffs in that case after having gone clear to trial and getting a judgment, then being the one to take advantage and say, never mind. Gee, we want to take a second bite in state court. And since they had brought their case under federal law, I think the Court allowed it to be -- die its intermediate death under federal law.

Simply put, the 204(a) is the same. It doesn't apply any standards at all. Just like Jasper, its only requirement is there be a writing. And I don't think there can be really honest dispute that there is a writing here.

Now, Novell is trying to make what we believe are very convoluted arguments that there may be some issue as to what the writing meant. But isn't that really the gravamen of any contract claim that is decided in state court where there's a dispute between the parties? And I don't think that in and of itself makes it a federal claim.

So, Your Honor, as much as we'd like to be here --

THE COURT: I can tell.

MR. HATCH: And in reality, I think we would. But the difference is I think we have to raise this because we don't want to be put in a position where one or the other parties having received a bad ruling at the end of the matter then says, wait a minute --

THE COURT: No jurisdiction.

MR. HATCH: -- no jurisdiction, for the exact reason Your Honor raised, and that's the kind of thought process we went through. We'd rather be here. But the bottom line is it can't be waived, and so -- and it can be raised at any time. And we don't want to have to go through the time and expense of getting really quite far down the road when we want to be able to see this through as quickly as possible and have somebody who doesn't think the litigation is going particularly well say, oh, wait a minute, we just discovered there isn't subject matter jurisdiction here. Because, gosh, that is a writing. And since it's a writing and we are interpreting the contract, we really ought to be in state court.

That ought to happen now, not later.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Hatch.

Mr. Jacobs? You have a somewhat different view in

this matter.

MR. JACOBS: Indeed, Your Honor. Good afternoon.

Your Honor, I think that SCO's argument understates the significance of Section 204(a) and understates the significance to this dispute. And what I'd like to do is walk you through the structure of the relevant provisions of the Copyright Act so you can see how 204(a) sits in context. Where I'm going is this.

THE COURT: You would agree, before you go wherever you're going, you would agree that it's your burden to establish -- you're the removing defendant. It's your burden to establish federal jurisdiction because you removed and claimed it.

MR. JACOBS: That's correct, your Honor.

THE COURT: And the standard is preponderance.

MR. JACOBS: Well, I don't know that there is a preponderance standard. I think the standard is --

THE COURT: What do you think it is if it isn't preponderance?

MR. JACOBS: I think the question -- the standard is whether applying Jasper -- whether there's a substantial 204(a) issue raised by the complaint. And I'll come to the issue of boundaries so that we see that isn't infinitely elastic.

THE COURT: Okay.

MR. JACOBS: 204 is in the Copyright Act around some other sections that make clear that the Copyright Act is going to supplant state law when it comes to the question of transfers of copyright interests. Section 201, for example, says that ownership can be transferred by a conveyance. So there's no question. I'm a copyright owner. I can transfer. And what it goes on to say is, this will be relevant to sort of a tertiary issue about what the amendment Number 2 means, 201 says that:

> Any of the exclusive rights and any subdivision of the exclusive rights can be transferred by conveyance.

So we have a lot of flexibility under the Copyright Act. We can transfer. If you ever thought that there was some issue about authors transferring, the 1976 Copyright Act says, no. It's broadly transferable.

Section 202 says, if I give you a physical object, that doesn't necessarily mean I gave you any copyright rights in that physical object. The two are distinct. So we're going to deal with any ambiguity that might have been lurking in the law about whether, if I give you a physical object you own the copyright rights to that object.

Section 204 says, however, you have all these rights to transfer, you can transfer in a very open-ended sort of way, but you have to have a written instrument of

conveyance in order to do so. And what case after case says is if you don't have a written instrument of conveyance, then there is no transfer. And federal law, not state law, is the law that says that that is so.

And our contention here is that there is no written instrument of conveyance. There's a writing. There's a contract. We agree that's undisputed. But SCO's argument reads out of the statute the words of conveyance. And our point here, our position is that 204(a) says a written instrument of conveyance, in order to transfer the copyrights, I need to see a piece of paper that looks more or less like a deed.

THE COURT: You agree with Mr. Hatch that there's a writing, but you don't think there's a written instrument of conveyance.

MR. JACOBS: Precisely. There's a contract, but it didn't convey ownership.

THE COURT: And because there's not a written instrument of conveyance, then we have to get to the 204(a) question.

MR. JACOBS: Well, 204(a) tells us that we need to look to whether there is a written instrument of conveyance before they get to the very first paragraph of their complaint, which is that SCO, acquired new SCO -- pause, definitional moment, I'm going to use SCO interchangeably referred to SCO that contracted with Novell and the SCO that we're dealing with

today so I don't have to repeatedly say old SCO and new SCO.

So in the very first paragraph of SCO's complaint, they allege that they obtained ownership under the asset purchase agreement. We say, how? Where's the instrument of conveyance? Where's the transfer? We see a promise. We see an asset purchase agreement that says something will occur, and then I'll walk you through the asset purchase agreement, perhaps, if we get to the merits. But we say there is no written instrument of conveyance.

So our point is if you look at the very first paragraph of their complaint, you see the federal issue. They did not say, under Section 204(a) we obtained ownership. But the cases teach us that they can't plead around that problem.

Contrary to SCO's view on this, there are lots of ownership cases as to which federal jurisdiction under 1331 and 1338 has been held to lie. Those ownership issues are ones in which there's a substantial federal question relating to ownership. What is a widow? What is a work for hire? What is a joint author? And we submit, and Jasper demonstrates, has the 204 bridge been crossed?

Paragraph 1 of their complaint again doesn't say, we crossed the 204(a) bridge, in hac verba. But we submit the question is there and can't be avoided. You can't hand wave and say, no, there's a writing so there's no 204(a) issue.

SCO says that 204(a) cases are really about the

distinction between a written agreement and an oral agreement. And that's not right. The best example of that is the Radio Television Espanola case --

THE COURT: You say the distinction here is between one kind of written agreement and perhaps another kind.

MR. JACOBS: Precisely. And it's a sharp distinction in the law. The Arachnid case is probably the best one to look at if you really want to see plain as day a context of the patent, a case where the court is saying, well, no. For this period, we didn't have an assignment. For this period, we had a promise.

So that's right. Of course, if there was an oral issue, we'd have a 204(a) versus an oral promise. But 204(a) says you have to have a written instrument of conveyance.

Now, SCO says, there is no real law around this, and that's just not right. 204(a) sets up federal standards for an instrument of conveyance. The Radio Television Espanola case says that, and a very good case to look at is the Pamfiloff case at 794 F Sup 933.

What Pamfiloff says, it's very interesting. What Pamfiloff says is that 204(a) is so powerful that it displaces all other bases on which you could argue ownership. Equitable estoppel, for example. 204(a) displaces equitable estoppel. So to say there is no law here for a requirement of writing, that's simply incorrect. 204(a) sets up what might be thought

of as a federal common law for the transfer of copyright ownership.

Is Jasper infinitely elastic? I think that's a tough question here. Jasper says, is there a substantial 204(a) issue? If so, federal jurisdiction lies. I think we are still looking at --

THE COURT: What did Jasper mean when it says this is rare?

MR. JACOBS: There are -- I don't know what it really means when it says that it is rare because there are a fair number of ownership cases that turn on federal law and, therefore, make their way into federal court. What Jasper literally says is this is the rare contract case in which there's a 204(a) issue. There the 204(a) issue was trivial compared to the one here. There the 204(a) issue is whether -- if some of the co-owners signed the documents after the purported transfer took place, what does that mean? Does that mean effective conveyance? And the Court said yes. It didn't spend a lot of time on the issue. But if you look at the history of the 204(a) law, it is an issue whether you can have an after-signed, a later-signed document somehow affects the transfer of copyright. So it was an issue, and the Court looked at it and passed on it.

They don't argue that Jasper was incorrectly decided. And if Jasper wasn't incorrectly decided, then I

don't see how they can credibly argue here there is no federal jurisdiction.

THE COURT: Well, there was -- I guess Mr. Hatch will get to reply since this is his motion. But maybe he does think it was incorrectly decided because he thought the circuit let it go because it had already been to trial and they didn't want to disturb it and so on.

MR. JACOBS: Those are the facts of the case. But let's be clear on whether we are arguing to you that you should not follow Jasper or not, because that's an important -- that's really a strong argument to make to you, that you should not follow Jasper. We say Jasper was correctly decided. But even if Jasper was kind of out here given the fact that the Court had to construct its own 204(a) issue to maintain jurisdiction, we're well inside of Jasper because we're not asking you to construct the 204(a) issue. We're saying it's as plain as day, right on the face of the complaint, even though they don't utter the words 204(a).

So what are the boundaries? We still have a well-pleaded complaint rule. We contend, however, that the well-pleaded complaint doesn't allow them to recharacterize what is an ownership dispute as a slander of title claim, not mention 204(a) and avoid as plain as day copyright ownership 204(a) issues. That they can't do because the Supreme Court told us even in the Christensen case that the well-pleaded

complaint doesn't mean that the plaintiff is entirely the master of his claim. Got a lot of mastery over the claim and a lot of mastery where the case ends up, but not entirely. You penetrate into the complaint, and you look at whether there is a substantial 204(a) issue.

Since copyright law governs ownership transfers and since this case pleads an ownership transfer, right on its face, right in the opening paragraph, this complaint necessarily goes through a proper bridge and through a gate, a bridge and a gate defined by 204(a). This is not a side issue. This is not an issue within an issue. This is a threshold question they don't get anywhere close to making out their slander additional element if they haven't shown that ownership occurred. And that's why there's federal jurisdiction here.

THE COURT: Thank you, Mr. Jacobs.

You get to reply, Mr. Hatch.

MR. HATCH: Thank you.

THE COURT: Slander action does presuppose ownership, doesn't it?

MR. HATCH: Yes, it does, Your Honor. And I assume that's why they've raised that as one of their remaining defenses.

What's interesting here is what they're essentially saying is that this is not an instrument of conveyance, the

APA and the Amendment 2. And a lot of this gets into the argument that they're also making on the motion to dismiss. To a large degree, they're putting the cart before the horse, because they're asking you, and I will argue in that motion, as well, given an opportunity, that they're asking you to look at things in a vacuum. I mean, they're really putting substance ahead of form because it really defies logic to say this isn't a 204(a) writing. It's a contract --

THE COURT: You meant form ahead of substance.

MR. HATCH: What did I say?

THE COURT: Substance ahead of form.

MR. HATCH: Sorry.

THE COURT: Isn't that what you meant?

MR. HATCH: Yes.

THE COURT: Okay. I just wanted to make sure I understood you.

MR. HATCH: I'll hear about that back at the office, but I appreciate that.

No, they truly are, because it really defies one to be able to say this is not a standard, in a sense a standard contract that is purporting to transfer copyrights to have a party pay millions of dollars for it. By asking you to look at it in a vacuum, they're basically saying, you know, gee, this isn't it. But we alleged, one, ownership. We alleged, two, the contract. We alleged it's closed and its pact. And

for eight years the parties have acted as though it is.

One of the exhibits that we attached to the motion is very interesting because they're saying, well, this isn't an instrument of conveyance. Well, this is a press release put out by them. And what did they say about it? Because you'll recall -- well, one of the things you may not be aware of is when this deal closed in 1996, most of the executives in that period of time moved on to other endeavors. The management caused what we are calling the problems today are all new management with presumably different agendas. And when they first started making these types of slanderous comments about the copyright ownership, they pointed only initially to the APA. The APA has what we consider to be a error, and it did not reflect the intent of the parties, which was fixed by Amendment 2, which made it very clear that the copyrights were transferred.

The CEO of Novell, apparently because he hadn't been there and he wasn't aware of the transaction and apparently didn't do his homework before he started making the comments he was making to the public, basically went out and said, well, look, we've got the APA, and it doesn't transfer copyrights. The words aren't in there.

So my client sent him a copy of Amendment 2. And immediately what he told the public upon receiving that is he had to make a public statement because he saw that he was

wrong. And he says in a May 28th letter to SCO:

> Novell challenged SCO's claims to UNIX patent and copyright ownership and demanded that SCO substantiate its allegations that Linux infringed SCO's property rights. Amendment 2 to the 1995 SCO-Novell asset purchase agreement was sent to Novell last night by SCO. To Novell's knowledge, this plan is not present in Novell's payment. The amount of energy support SCO's claim that ownership to certain copyrights bringing did transfer to SCO in 1992.

So he's even acknowledged that the way they view that contract is it was -- that it was transferred at the time, the APA was a transferred document.

Now, the cases that Mr. Jacobs cited to you claiming that there's lot of law, and I'll point -- put to you that none of them cite Jasper, nobody cites Jasper. There's only one case that I'm aware of that cites Jasper, and it sites Jasper for our position, for the good law that it does quote like when it's quoting Judge Friendly. But most of the other cases he's talked about are totally different kinds of cases. They are cases where there wasn't an adequate right. The writing that was alleged in those cases didn't make a transfer. That's true. The Radio case, the Arachnid case. He's saying that Arachnid, it does not rise to the level of present assignment and existing invention. It doesn't vest

legal title.

Now, we've alleged the exact opposite. We've alleged that this is the operative agreement and that the deal closed. And as a matter of fact, he's saying it didn't -- in the motion to dismiss, he makes a lot of arguments that somehow puts again this agreement out as in a vacuum as though we can't look at anything else.

I mean, I posed the question to one of the lawyers in the firm today, you know, what would they go on if we hadn't even -- if we'd never attached the agreement, we just made the allegations? I don't think we'd be here. I mean, every piece of evidence isn't attached to a complaint or put in a complaint. We're in another pleading state.

I went back just today, pulled off a Novell cite. How did Novell look at this deal? And this is their press release, and it's still on their sight as of today. You can get it yourself. Dated November 6, 1995. And it's saying:

> Novell states it completed the sale of UnixWare business to SCO finalizing the agreement first announced in September of 1995.

That's the APA.

And so it really kind of -- it really does stretch the imagination to be able to try and take what was a transaction that was treated as a transfer of copyright for the last eight years and then all of a sudden there was a

dispute between the new management of Novell and SCO, and all of a sudden, this becomes a federal issue because 204(a) requires a writing, and they don't think this is enough of a writing, but didn't have any problem over the last eight years? I mean, this is the same company that upon the closing of the agreement, the evidence is going to show, immediately wrote letters to virtually every one of their clients saying, we don't own it anymore. Here's contact to SCO. They're who you have to deal with now.

So I would urge the Court not to look at it in a vacuum that apparently Novell wants you to to be able to not look at the reality out there and take it for what it is. This couldn't be more clear as an instrument of conveyance even if you want to put it that way.

Thank you, Your Honor.

THE COURT: Thank you.

I'll take the motion under advisement. And since I don't yet know how I'm going to rule on the motion to remand, I don't want to bring you all back, I'll now hear arguments on the motion to dismiss.

Mr. Jacobs? Obviously if I end up remanding, I wouldn't worry about the motion to dismiss. But if I do don't, I will.

MR. JACOBS: All right.

Just to set the context, Your Honor, I'm sure

you're aware you have SCO v. IBM.

THE COURT: I am the lucky judge who has that.

MR. JACOBS: You have two of the many SCO cases that are now filed around the country.

THE COURT: So I've read.

MR. JACOBS: And they're alleging copyright infringement in SCO v. IBM. So just I want you to have in mind that what you're doing here may have some bearing on your other case.

I think it would be useful to walk you through the asset purchase agreement because --

THE COURT: I can solve them both by some ruling here?

MR. JACOBS: Yes. Or at least a lot of both.

I think it would be helpful to walk you through the asset purchase agreement. I have found that every time I read it, I get a new insight into the language of the parties. Do you have a copy of the complaint there with you, the APA? Because I'm going to --

THE COURT: I think I do someplace here.

Here it is. September 1995?

MR. JACOBS: Indeed. And I will try to make sure that I can help guide you to the right pages. Not all of them are enumerated, so there may be a little flipping back and forth. If you'd like, I did take a copy with some clips that divide up Amendment Number 2 and a couple portions. Would you like to use the one you have?

THE COURT: I'd be happy with any help.

MR. JACOBS: May I approach?

THE COURT: Sure.

MR. JACOBS: So I guess I should start out by saying we wouldn't be here if there was a document that SCO had adduced or told you they would adduce that says, "Novell, hereby, transfers the UNIX copyright to SCO." "Seller, hereby, transfers the UNIX copyright to buyer." They have not adduced such a writing.

One of the questions that comes up in this case is, what did SCO get? Or as Mr. Hatch put it, how is it possible that for the last eight years parties have been surviving without a copyright dispute arising? SCO attribute it to a change in management of Novell; we attribute it to a change of business strategy at SCO, one not contemplated by the original agreement.

Asset purchase agreement, let's start with the recitals. This will be important because the term business is defined there.

Seller is engaged in a business of developing a line of software products currently known as UNIX and UnixWare.

Now let me stop a minute because this gets a little tricky. UNIX and particularly UNIX System V Release X or SVRX. UNIX System V Release X was the unit that Novell itself

acquired from AT&T Unit System Laboratories, or USL, just a few years before the APA. UnixWare is a derivative of that, a software program that Novell wrote to try and make UNIX inter-operate well with NetWare, Novell's flagship product.

When we talked about UNIX, we're talking about legacy, a legacy program and legacy licenses and a business that by the time the asset purchase agreement, as I'll show you, is from the standpoint of Novell and the acquirer here essentially static.

In B, the recitals go on to say that certain assets related to the business are going to be acquired. So they're not going to acquire, quote, the business, unquote; they're going to acquire certain assets.

And then we get to 1.1(A) down at the bottom of the first page, and that is the provision of the promise to convey or the promise to assign, harking back to our distinction between an actual conveyance or promise to convey, this is a promise to convey.

At closing date, the seller will convey, et cetera, the included assets -- and if you read across to the next page stating rather the obvious, they're not going to transfer the excluded assets. We're going to transfer the included assets. We're not going to transfer the excluded assets.

Now, we noted in our opening paper, and SCO did not respond to this point, that there is a document -- there is a

closing that takes place, and there's documents in any big transaction like this at a closing.

THE COURT: When you say the opening papers, you mean on the motion to dismiss.

MR. JACOBS: Correct. One of the earlier footnotes.

So something happens at the closing, and what happens at the closing is the included assets get transferred, the excluded assets don't.

So now flip ahead to, I believe, it is the black clip.

THE COURT: Schedule 1.1(A)?

MR. JACOBS: Exactly. And this is -- the Schedule 1.1(A) and 1.1(B) are the schedules referred to in that provision right there I just pointed you to. And the first line is the line that SCO points to:

All rights and ownership of UNIX and UnixWare.

And that sounds pretty broad. All rights in UNIX and UnixWare. And they like that language.

Now, if you go to the next page, the page marked Page 34, we're still in the included assets. We're still in Schedule 1.1(A). And if you go down to Roman V, there's a heading there for intellectual properties. So we're still in the included assets. What intellectual property is being conveyed to SCO in this agreement? And the answer is a couple trademarks. No copyrights are shown. No patents are shown.

Just a couple trademarks.

Now, if you flip ahead to the excluded assets list, Schedule 1.1(B), you'll see a Roman V there, kind of a parallel provision, right? Intellectual excluded assets.

All copyrights and trademarks except for the trademark UNIX and UnixWare.

So we have a mirror image provisions here, the excluded assets, included only -- when it comes to IT, it included UNIX and UnixWare. The excluded assets include everything. You see all patents there, of course, except for the trademark UNIX and UnixWare. So as of the closing, we're plainly not transferring copyrights, and I don't think there's any serious dispute about that.

What, then, does SCO get out of this? If they don't get the copyrights, what do they get? And I want to turn you now to Article 4 of the agreement, because this is where a lot of the interesting provisions of this agreement come in, and particularly Section 4.16.

So this is the heading SVRX licenses. And as I mentioned, SVRX refers to the legacy business, UNIX System V, SV, Release X, X standing for any numeral. And it's important, first of all, in 4.16(A) to see what SCO doesn't get with respect to UNIX System V Release X, because in 4.16(A), what SCO has with respect to those rights is the rights to administer those legacy licenses remitting

95 percent to Novell and keeping 5 percent for it.

So right away you start to wonder, well, why would SCO need the copyright rights, any of the copyright rights in UNIX System V Release X. And maybe most fundamentally, why would they need any ownership of UNIX System V Release X in order to carry on that business of administering the licenses remitting 95 percent to Novell? The answer is, they don't. They don't need the copyrights to do that. They're just administering licenses.

Now, as I mentioned, by this time, the SVRX business is largely static. And if you look down at 4.16(C), it says that seller, that's Novell, is not going to promote the SVRX business. And then if you look up a sentence at the bottom of 4.16(B), it says that buyer is not going to make additional sales of SVRX without Novell's permission. That gets amended slightly by amendment Number 1, not at issue here. They get the right to make some additional licenses to additional computers for already existing licenses.

So when we look at what the agreement does with respect to UNIX System V Release X, which is the UNIX that is at issue in the slander title claim, what we see is SCO has no reason to have a copyright.

What did they get? Well, what they get, if you go ahead to 4.18, is a provision that says development of a merged product. And it says in the second sentence:

Buyer is going to commercial use with commercially reasonable efforts to complete the merged product.

The merged product was basically what this deal was about from Novell's standpoint. What SCO was going to do was enhance some additional kinds of UNIX, some additional UNIX flavors for special kinds of processors or non-special processors, but evolve the UNIX business, evolve UnixWare in particular, and that's the reference there to the merged product.

And if you look even further ahead of the agreement, I won't ask you to jump there now, but it shows that far from remitting 95 percent of the SVRX royalties to Novell. As to this merged product, where it calls for other products that are named in there, there's Eiger and White Box and computeristic terms, as to those products, there's a step down in royalties.

Here's the interesting question. We alluded to it in our reply brief. What ownership of copyrights falls out of this arrangement?

Because SCO is developing enhancements, is writing its own code, SCO does as a matter of copyright law own the copyright rights and the rights to enforce the copyright rights in the code that it developed. There is no so-called grant back provision in this agreement itself. There is another agreement that's referred to here which does have a

license back to Novell. It's not at issue today. But the point is, in terms of the copyright ownership, it's not correct to say that they didn't get any copyright ownership. As a matter of copyright law and how copyright law treats derivative works, they own the code that they wrote. The code that they are merely taking from Novell and incorporating that product they don't own, and they have no need to own.

And that's why even if you look at the required for language in Amendment Number 2, you come up against a very -- you come up against a stonewall when you start talking about UNIX System V Release X. There is no reason under the structure and logic of the asset purchase agreement for SCO to have acquired ownership rights of anything in System V Release X, because that wasn't what they were supposed to be out focusing on in any way.

So Amendment Number 2 gets executed, and that is the green clip. And Amendment Number 2 adjusts the definition of excluded assets. Now, this is the kind of quirky way to begin with to try to effect a change in the structure and logic of the agreement to only modify the excluded assets, do away with the included assets.

But in any case, having sat down and thought about it a little bit, what did the parties do? Did they purport to write an amendment that transferred all intellectual property rights in UNIX to SCO? Did they purport to transfer all of

the intellectual property rights that are listed in a later exhibit in the agreement to SCO? They didn't do that. Did they say, all intellectual property rights relate to the business, which would have been kind of interesting because they talked about -- they defined the business. There's even, just to underline the point, there is even a definition of seller intellectual property rights in the asset purchase agreement at Section 2.10. Did they say, we are going to transfer seller intellectual property rights from seller to buyer? They didn't do that.

They said something very narrow and very limited. All copyrights and trademarks -- so actually to start out with, a very interesting point. We retain the exclusion for all copyrights and trademarks. We don't wipe it away. We say, all copyrights and trademarks except for the 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 technology.

None of us were present in that negotiation. Section 204(A) says it doesn't matter. You look to the plain language of the document, and you have to cross over that 204(a) bridge, and you have to see a conveyance. You have to see an assignment. You have to see something that says something along the lines of, seller hereby conveys to buyer.

But even if you start penetrating this language,

you see why SCO's claim just cannot survive a motion to dismiss, because under 204(a), we should know what copyright rights went to SCO. And as I mentioned when I discussed the structure and logic of the Copyright Act, it's not just what rights and what programs or what rights and what manuals, but Section 201 makes it clear that you can transfer any one or more of the exclusive rights volume within copyright. The right to reproduce, the right to distribute, the right to publicly perform. And then even in that you can convey sub-divisible rights.

So we should know -- from the face of the document, we should have a guidepost that say the cases, what programs, what exclusive rights, can't assume that it's all exclusive rights, here especially since it says required for. And that's why this is -- this Amendment Number 2, amendment to the APA fails two tests under the law of 204(A). One, is it an instrument of conveyance? Meaning that it had the effect of conveying a present interest in an item of property; and, two, is it close enough so that we're not left completely guessing as to what copyright rights might have -- might, in fact, have transferred to Novell -- from Novell to SCO, assuming that this was such an instrument of conveyance?

But their slander of title claim depends on their ability to show that a transfer of ownership occurred because, as Mr. Hatch noted, they have attached these documents to

their complaint. These are the documents. They haven't told you how they might amend. They haven't told you what they might show by way of additional written instruments of conveyance.

We submit that you should dismiss this complaint. And if they want to try and change your mind later with some additional evidence, they will have to file a relevant motion.

I just want to note two -- one housekeeping item. The cases that we cite on 204(a) and on jurisdiction refer to 1338, and the issue of jurisdiction should be considered as a 1338 issue. And, secondly, on the -- you've dealt with this issue of special damages. I think you're the expert of special damages under Utah law. And your decision on that was affirmed.

They have to plead special damages with serious particularity, and they have to prove -- they can't just plead attorney's fees in this action as a basis for their special damages. You decided that in the Computerized Thermal Imaging case. It was affirmed by the 10th Circuit. So on the issue of special damages, I think that is a really fairly clear question of law.

THE COURT: Thank you, Mr. Jacobs.

Mr. Hatch?

MR. HATCH: You know, Your Honor, I think, and I hope I get it right this time, I think he's putting the cart before

the horse. How's that?

As I sat and listened to Mr. Jacobs, I think this would all -- it would be all good and well if he were making those types of arguments, you know, several months from now, particularly as he's trying to go through the contract and tell you what he thinks it means, after we've had the discovery and we've talked to the people who are involved, we have all the documents out there.

We have to remember, this is a motion to dismiss. We're talking about the pleading, not all the documents out there. And to be honest with you, as you can probably well guess, I have rather divergent views of the documents as to what they say and what Mr. Jacobs says.

One of the things he does tell you, I think he started his argument by saying this, and I think it says volumes, he said every time I read the APA, I get something new and different. And, you know, we ought not to be sitting here on a motion to dismiss when the only thing before this Court is a complaint and having Mr. Jacobs, who apparently gets different readings every time he reads it, telling us what this contract means.

The reality is all we're here to decide today is whether or not we sufficiently pled in the pleading the statute of slander of title claims and whether we can go forward. And he is trying to put his defense that somehow he

thinks the contract, he may be able to show that it means something different than we say it is, he wants to do that now. He wants you to decide that issue now without the benefit of all the documents, all the correspondence, the witnesses that are involved in this, and frankly without a real knowledge of the contract. You know, he's gone up and made representations that were really quite amazing, because the contract itself, as he tried to show it to you, he asked a very interesting question. He pointed out that part of this was -- the duty was SCO was to administer current licenses and remit a percentage back to Novell. And that doesn't -- why would that require having any copyright?

Well, okay. That's really wonderful and probably true. But, you know, a lot of money was paid for this, and not enough money that could be justified from just that part of the contract. He leaves out the entire rest of the contract including from that list of assets where the source code is being transferred to SCO. And it's with the source code that we have the ability to use that source code, to develop new products under the source code, new licenses and to be able to take the business forward. That is worth something. In the source code without a copyright isn't worth anything. And if we don't decide it's a vacuum today on a motion to dismiss and go forward, I think Mr. Jacobs knows very well just as he really -- well, he knows that we're going

to find several things. We're going to find that Novell transferred copyrights to us at the time of closing. Well, why did they do that if his reading is correct?

One of the documents -- and this is a motion to dismiss, but I think it's only fair for the Court to see the kind of things that we're going to need to be looking at as we go forward. One of the documents that is dated December 6, 1995, now that's the date of closing. That's a date where they're claiming no transfer was made. It is a technology licensing agreement between Novell and SCO. And essentially what it does is it gives Novell a license back of the copyrights and all the rights and everything that it just sold to SCO for its own use.

Well, if this were a summary judgment motion, we'd be asking serious of questions of, if you're saying copyrights weren't transferred, why did you feel like you needed to get a license back so that you could use these in your own business? Because if you owned them, guess what, this document doesn't exist. And that's kind of why he wants you to decide this on a motion to dismiss and impact, you know, impact the other case you have and impact this case without any information, because, well, that would be a really great victory.

But it really goes contrary to the law of the motion to dismiss. We're here. Our only concern here is whether or not it was pled sufficiently and, therefore, put on

notice of their claims so we can go forward and resolve the dispute, which is a state law claim on whether or not they've slandered our title, which we allege they have; and, two, whether their defense, which seems to be created not back in 1995 when this thing was closed or even '96 when the clarification of the Amendment 2 was put into place, but just a few, not more than a few months ago when new management started to take positions that, you know, we frankly believe were taken to affect the IBM litigation.

THE COURT: What is your response to Mr. Jacobs' argument that you haven't sufficiently pled special damages and that you have not met the brilliant test for them outlined in Thermal Energy?

MR. HATCH: I would say to that, Your Honor, if we haven't met it as well as you would expect, my most profound apologies, because I wouldn't challenge that ruling at all. What I would say, again, we're in the notice of pleading stage, and it's very -- we have alleged, and I'm always -- I'm always willing to say we could have alleged better. I think anybody who takes a second grasp of something can always write something better. But I think it is sufficient.

They are on knowledge that based on what they did that they know that people -- they know the intent of the people -- there are people out there and businesses who will not take licenses with us now because they have raised an

issue whether we own the copyright or not. That's a damage, and that's a type of damage that you talk about in that position -- I mean, that opinion in its typed form, not the exact. They know that people won't invest with the company because there's a question mark out there that they caused. And, frankly, we're having, you know, we're having impact that's not monetary, as well, because people were citing to this case and other cases saying, we ought to state them, ought to go forward where we can protect their rights because they want to see if they can actually make their case that we don't own the copyright.

So those are all pled generally. Could we be more specific? Always. Could we be more specific in six months when we have more discovery? Probably. But I don't think the Notice Pleading Statute requires that. If there was no possibility that we had any type of special damages under the claim, then I would say there's a problem. But I would say it's pretty obvious, and they know it, that there are claims for damages out there, and having us put another paragraph in the complaint would really -- it could be done, but it's really kind of a waste of time and manpower. The case ought to move forward. And, frankly, even if there had only been a monetary damage, the fact that we had to expend attorney's fees to protect our rights is a legitimate damage under the case law, as well.

The only other point I would make, and it goes really to the same point that I was making about, you know, really what Novell was trying to argue here is a motion to dismiss is their interpretation of the contract. I heard Mr. Jacobs talk about, you know, you have main parts and subparts and got into a rather quite complexity that he claims the law of Section 204(A) requires. I would put to you and I have yet to see the case that requires all of that.

Judge Kazinski was very clear in his decision in the Ninth Circuit, a juris that I personally have respect for, bright man. He stated the same thing that Judge Friendly stated and Judge Newman before stated, virtually every judge that addressed it, it needs to be a writing. And he says, it does not need to be the Magna Charta. And the reality is here, there isn't a lot of detail in the contract.

But one of the things that they're trying to attach their interpretation to this is, is we will show at trial if they bring summary judgment, at summary judgment, that what was being transferred here was everything that was UNIX and UnixWare. And the only -- and it doesn't take a lot of language to say, everything is being transferred.

And Novell knew that. And we believe that not only will the SCO side of that contract testify that we were buying everything in UNIX and UnixWare, which doesn't take a delineation, but that the Novell people are going to testify

to that, too, because that's what the deal was. And so we have every belief that they will be consistent with that testimony.

Now, one of the things that he doesn't point out, it's hard to define this. But you'll notice in the excluded assets, the reason it even makes any limitation at all is because Novell at the time was concerned that one thing didn't get transferred over, and that was their NetWare product. And so that's why it's worded. It goes all the way down the list. You don't get NetWare. You don't get NetWare this, and you don't get NetWare that. And when it talks about you don't get copyrights in 1.1(A), it's talking about we're not getting the NetWare copyrights.

Now, all of this is going to be made clear throughout the course of this litigation, and it would be truly unfortunate if in a motion to dismiss based on a lawyer's argument he gets a different reading every time he reads it, we throw the entire case out. That doesn't make sense.

And I think they understand the pleadings under the Notice of Pleading standard. And I really wouldn't -- could the pleading be made better? Maybe. But it wouldn't -- would their knowledge of what they're defending be any better because of it being written slightly better? I don't think so, and I think we ought to move on.

Thank you, your Honor.

THE COURT: Thank you, Mr. Hatch.

Mr. Jacobs?

MR. JACOBS: Briefly, Your Honor.

We read Section 204(a) as saying that SCO doesn't get to get to the jury. The policy behind the 204(a) is there should be clarity in instrument of assignment so that both parties and the world can trace title. We don't have a deed system, although you can record assignments in the copyright office. We don't have the kind of elaborate system of land title that we have in this country to make sure -- to ensure certainty. And, of course, there are disputes that arise out of the real property deeds. But you have to start out with a deed. You have to start out with an instrument of conveyance.

I'm studying the assets purchase agreement to answer the question, what did SCO get? I started out by saying we wouldn't be here if SCO could point to an instrument of conveyance.

They haven't pointed to an instrument of conveyance. They haven't pointed to a document in which Novell conveyed ownership, in which buyer conveyed ownership of copyrights to seller -- when seller conveyed ownership of copyrights to buyer, when Novell to SCO. If they had that piece of paper in front of you, could there be interpretive issues? Perhaps. If they did it right? No. But could there

be interpretive issues? Perhaps. But at least we would know that there was some actual conveyance of something to something, and they haven't even gone that far.

So by suggesting to you that what they really need to do is take discovery and get to the jury, we propose to you that they're making our argument. They're making our 204(a) policy argument. They're making our 204(a) case law argument.

The instrument of conveyance is supposed to serve as the guidepost. It's supposed to be sufficiently clear that the world and the parties know that the buyer is actually negotiated. One of the cases says the purpose of 204(a) is to ensure buyers negotiate specifically with sellers over what copyrights are being transferred. And if you stretch that law very far and you allow people to say, let me get to the jury and let me introduce evidence of a former executive that now works for us, then you undermine that policy behind 204(a). You undermine the entire federal scheme. That's why you should dismiss their complaint.

THE COURT: Thank you.

Thank you all. I'll take this motion under advisement and reach it if I don't remand the case.

Court will be in recess.

(Whereupon, the court proceedings were concluded.)

* * * * *

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, KELLY BROWN HICKEN, do hereby certify that I am a certified court reporter for the State of Utah;

That as such reporter, I attended the hearing of the foregoing matter on May 11, 2004, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages number from 3 through 45 constitute a full, true and correct report of the same.

That I am not of kin to any of the parties and have no interest in the outcome of the matter;

And hereby set my hand and seal, this ____ day of _____ 2004.

_____
KELLY BROWN HICKEN, CSR, RPR, RMR