

**WORKMAN | NYDEGGER** A PROFESSIONAL CORPORATION

Sterling A. Brennan (Utah State Bar No. 10060; E-mail: sbrennan@wnlaw.com)

David R. Wright (Utah State Bar No. 5164; E-mail: dwright@wnlaw.com)

Kirk R. Harris (Utah State Bar No. 10221; E-mail: kharris@wnlaw.com)

Cara J. Baldwin (Utah State Bar No. 11863; E-mail: cbaldwin@wnlaw.com)

1000 Eagle Gate Tower

60 E. South Temple

Salt Lake City, Utah 84111

Telephone: (801) 533-9800

Facsimile: (801) 328-1707

**MORRISON & FOERSTER LLP**Michael A. Jacobs (Admitted *Pro Hac Vice*; E-mail: mjacobs@mofo.com)Eric M. Acker (Admitted *Pro Hac Vice*; E-mail: eacker@mofo.com)Grant L. Kim (Admitted *Pro Hac Vice*; E-Mail: gkim@mofo.com)

425 Market Street

San Francisco, California 94105-2482

Telephone: (415) 268-7000

Facsimile: (415) 268-7522

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

**IN THE UNITED STATES DISTRICT COURT****DISTRICT OF UTAH, CENTRAL DIVISION**THE SCO GROUP, INC., a Delaware  
corporation,

Plaintiff,

vs.

NOVELL, INC., a Delaware corporation,

Defendant.

Case No. 2:04CV00139

**NOVELL'S MOTION IN LIMINE  
NO. 5 TO PRECLUDE SCO FROM  
RELYING ON NOVELL'S JUNE  
AND AUGUST 2003 STATEMENTS  
AS FACTUAL ASSERTIONS OF  
COPYRIGHT OWNERSHIP**

Judge Ted Stewart

**AND RELATED COUNTERCLAIMS.**

SCO claims that Novell slandered its title by asserting that “Novell, and not SCO, owns the UNIX and UnixWare copyrights.” (Dkt. No. 96, ¶ 91.) SCO’s complaint points to statements allegedly made by Novell from May 2003 to March 2004. (*Id.*, ¶ 37.) However, SCO has distorted the substance of these statements. In particular, Novell’s June and August 2003 statements cannot reasonably be read as asserting copyright ownership as an objective fact. Thus, SCO should be barred from relying on these statements at trial to support its slander of title claim.<sup>1</sup>

**I. SCO MUST PROVE THAT NOVELL’S STATEMENTS CAN REASONABLY BE INTERPRETED AS FACTUAL ASSERTIONS OF COPYRIGHT OWNERSHIP**

Slander of title requires publication of a false statement “disparaging claimant’s title.” *First Sec. Bank of Utah v. Banberry Crossing*, 780 P.2d 1253, 1256-67 (Utah 1989). Whether a statement is reasonably capable of a wrongful meaning is a question of law for the Court. *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994). A court “must carefully examine the context in which the statement was made,” and cannot make this determination by “viewing individual words in isolation.” *Id.* at 1009. A statement is not actionable if the context makes clear that “the speaker is expressing a subjective view” or “interpretation,” rather than “claiming to be in possession of objectively verifiable facts.” *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993); *see West*, 872 P.2d at 1018-20 (view that politician misrepresented position to get elected was non-actionable opinion based on inference from true facts).<sup>2</sup>

---

<sup>1</sup> Novell’s Motions In Limine Nos. 6 to 8 concern Novell’s statements in December 2003 and early 2004; application of common law privileges to Novell’s statements; and Novell’s statements in copyright applications. As noted in Motions In Limine Nos. 6 and 7, Novell’s June and August 2003 statements were in private letters to SCO and thus cannot be potentially actionable until Novell later published them on its website, with copies of the parties’ other related correspondence.

<sup>2</sup> *See also Mast v. Overson*, 971 P.2d 928, 932-33 (Utah Ct. App. 1998) (statements not defamatory as a matter of law when made in “ongoing heated debate” in reply to plaintiff’s public “assertions of wrongdoing”); *Jefferson County Sch. Dist. No. R-1 v. Moody’s Investor’s Servs.*, 175 F.3d 848, 855-57 (10th Cir. 1999) (“negative outlook” bond rating too subjective to state claim for injurious falsehood).

## **II. NOVELL'S JUNE 6, 2003 LETTER AND PRESS RELEASE DID NOT ASSERT THAT NOVELL OWNS THE UNIX COPYRIGHTS**

SCO's complaint alleges that Novell's June 6, 2003, letter "call[ed] SCO's claims of *copyright ownership* 'absurd' and 'unsubstantiated.'" (Dkt. No. 96, ¶ 37(d)(emphasis added).) This is incorrect. Novell did not refer to "SCO's claims of copyright ownership." Rather, Novell stated: "*Your letter* contains absurd and unfounded accusations against Novell and others." (Ex. 5A.) The cited SCO letter accused Novell of (1) "maliciously...intend[ing] to harm SCO's share value"; (2) timing a press release "to coincide with [SCO's] earnings announcement"; and (3) "deceptive" conduct to "depress SCO's stock price in violation of the Federal securities law." (Ex. 5B.) Calling these accusations "absurd" is *not* a denial of SCO's ownership claim, especially since Novell's attached press release stated that Amendment #2 "appears to support" SCO's claim. (Ex. 5A.) Novell's letter cannot reasonably be read as asserting that SCO did not own the copyrights, and cannot be relied on to prove slander of title.<sup>3</sup>

## **III. NOVELL'S JUNE 26, 2003 LETTER DID NOT ASSERT THAT NOVELL OWNS THE UNIX COPYRIGHTS**

SCO asserts that Novell's June 26, 2003, letter to SCO "called SCO's claims of ownership of UNIX and UnixWare 'simply wrong.'" (Dkt. No. 96, ¶ 37(e).) This is another distortion. Novell said that "*SCO's statements*" are wrong, referring to SCO's assertion that it owns "*all* of the intellectual property rights associated with UNIX and UnixWare," including "the patents" and other rights. (Ex. 5C (emphasis added).) Novell explained that there was no evidence that "SCO owns all of the patents associated with UNIX and UnixWare." (*Id.*) Novell was correct. SCO does not own the UNIX patents, as SCO's witnesses have admitted.<sup>4</sup> Thus,

---

<sup>3</sup> Oddly, SCO's complaint cites Novell's statement that Amendment #2 "appears to support" SCO's ownership claim as a "wrongful assertion" by Novell of ownership rights in UNIX." (Dkt. No. 96, ¶ 37(c).) This makes no sense. The plain meaning is to the contrary.

<sup>4</sup> See Novell's 4/20/2007 Sum. Jgt. Mot., Dkt. No. 276 at 23 & n. 7 (citing evidence that two SCO witnesses admitted that the APA's exclusion of "all patents" meant that SCO did not own UNIX patents). SCO did not dispute this point in its opposition. (See Dkt. No. 325.)

SCO cannot own “all” UNIX intellectual property, including patents. Novell’s further comment that Amendment No. 2 “raises as many questions as it answers” (*id.*), is a true statement that the amendment is unclear. *See The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1215 (10th Cir. 2009) (the “language of Amendment No. 2 concerning the transfer of copyrights is ambiguous”).

**IV. NOVELL’S AUGUST 4, 2003 LETTER DID NOT ASSERT THAT NOVELL OWNS THE UNIX COPYRIGHTS**

SCO cites the statement in Novell’s August 4, 2003, letter that Novell “disputes SCO’s claim to ownership of these copyrights.” (Dkt. No. 96, ¶ 37(f).) But the only “fact” asserted is that Novell “disputes SCO’s claim,” which is correct. And SCO ignores the rest of the letter, which explains that (1) the APA excluded copyrights from the transfer; (2) the Amendment No. 2 exception is limited to copyrights “required” for Santa Cruz Operation to exercise APA rights; and (3) “[u]nless and until SCO is able to establish that some particular copyright is ‘required’ for SCO to exercise its rights under the APA, SCO’s claim to ownership of any copyrights in UNIX technology must be rejected.” (Ex. 5D.)

All of these points are correct. The Tenth Circuit held that the APA, by itself, “unambiguously excludes the transfer of copyrights.” *The SCO Group*, 578 F.3d at 1210. It also found that whether the copyrights transferred because they were “required” to exercise APA rights presents a triable issue that “could legitimately be resolved in favor of either party.” *Id.* at 1215-19. Novell’s statement of its subjective view on a legitimate dispute is not actionable.

DATED: February 8, 2010

Respectfully submitted,

By:           /s/ Sterling A. Brennan            
WORKMAN NYDEGGER

MORRISON & FOERSTER LLP

Attorneys for Defendant and  
Counterclaim-Plaintiff Novell, Inc.