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,<br><br>Plaintiff,<br><br>vs.<br><br>NOVELL, INC., a Delaware corporation,<br><br>Defendant. | Case No. 2:04CV00139<br><br>**NOVELL'S MOTION IN LIMINE NO. 6 TO PRECLUDE RELIANCE ON STATEMENTS IN DECEMBER 2003 AND MARCH 2004 THAT DO NOT CONSTITUTE FACTUAL ASSERTIONS OF COPYRIGHT OWNERSHIP**<br><br>Judge Ted Stewart |
| AND RELATED COUNTERCLAIMS. | |

SCO's slander of title claim points to various statements that allegedly assert that "Novell, and not SCO, owns the UNIX and UnixWare copyrights." (Dkt. No. 96, ¶¶ 91, 37.) Novell demonstrated in its Motion In Limine No. 5 that SCO should be barred from relying on Novell's June and August 2003 statements because they cannot reasonably be read as asserting copyright ownership as an objective fact. Novell hereby moves to bar SCO from relying on Novell's later statements in December 2003 and March 2004 because they merely reiterate Novell's subjective opinion that Novell owns the copyrights, and are thus not actionable as a matter of law.

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

Slander of title requires 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 an issue 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."[1] *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). Thus, the Utah Supreme Court held that an implied charge that a politician lied to get elected was not actionable as a matter of law because it was an inference based on the undisputed fact that he had changed his position on a key issue after being elected. *West*, 872 P.2d at 1018-20; *see also Mast v. Overson*, 971 P.2d 928, 934 (Utah Ct. App. 1998) (statements not defamatory when replied to "assertions of wrongdoing" in "spirited public

[1] *West* held that a charge of "manipulat[ing]" the press was not defamatory in the context of a "heated political battle" and in view of its "casual, albeit critical" tone, which most readers would view as "exaggerated commentary." *Id.* at 1009-10. The Utah Supreme Court recently emphasized that *West* requires "a context-driven assessment" of whether a statement is reasonably susceptible to a defamatory meaning, which requires the court to "weigh competing definitions and make sense of context," and thus "leaves no room for indulging inferences in favor of the nonmoving party." *O'Connor v. Burningham*, 165 P.3d 1214, 1221-22 (Utah 2007).

debate"); *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs.*, 175 F.3d 848, 855-57 (10th Cir. 1999) ("negative outlook" rating too subjective to state injurious falsehood claim); *Partington v. Bugliosi*, 56 F.3d 1147, 1153-54 (9th Cir. 1995) (account of controversial criminal trials not actionable because rational interpretation and opinion about ambiguous subject).

## II. NOVELL'S DECEMBER 2003 STATEMENT IS A SUBJECTIVE OPINION ON A LEGITIMATE DISPUTE BASED ON ITS PRIOR STATEMENTS

SCO's complaint relies on Novell's press release dated December 22, 2003.[2] (Dkt. No. 96, ¶ 37(i).) The full text of that press release is as follows (Ex. 6A (emphasis added)):

> Novell *believes* it owns the copyrights in UNIX, and has applied for and received copyright registrations pertaining to UNIX consistent with that position. *Novell detailed the basis for its ownership position in correspondence with SCO. Copies of our correspondence, and SCO's reply, are available* here. Contrary to SCO's public statements, as demonstrated by this correspondence, SCO has been well aware that Novell *continues to assert* ownership of the UNIX copyrights.

The clear import of this statement is that Novell "believes" it owns the copyrights for the reasons "detailed" in its prior correspondence with SCO, copies of which are available on Novell's website, with SCO's reply.[3] This is Novell's subjective view on a disputed legal issue that the Tenth Circuit found "could legitimately be resolved in favor of either party." *See The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1215 (10th Cir. 2009) (further noting that the "language of Amendment No. 2 concerning the transfer of copyrights is ambiguous").

Novell's statement that it "continues to assert" ownership confirms the subjective nature of Novell's belief. This is the language of argument, not objective fact. This argumentative tone

---

[2] SCO's complaint also alleges that Novell stated in a January 13, 2004 press release that Novell "retained ownership of [UNIX] copyrights." (Dkt. No. 96, ¶ 37(j).) SCO has not designated any press release with this statement as a trial exhibit, and thus cannot rely on any such statement.

[3] Novell's December 22, 2003 press release and the related correspondence is available at http://www.novell.com/news/press/archive/2003/12/pr03080.html. Clicking the "here" hyperlink in the press release brings up copies of Novell's letters to SCO of June 26 and August 4, 2003, and SCO's reply of September 10, 2003. (*See* Ex. 6B.)

is reinforced by Novell's concurrent publication of SCO's reply of September 10, 2003, asserting that SCO "disagree[s] with [Novell's] analysis and conclusions," and that Novell's interpretation "ignores certain provisions of the relevant documents and does not consider the agreements between Novell and SCO as a whole." (Ex. 6B.) Novell's publication of its June 26 and August 4, 2003 letters also did not constitute a statement of copyright ownership because Novell's June letter did not claim ownership and its August letter merely expressed the qualified opinion that SCO did not own the copyrights *"unless and until"* SCO could show that a particular copyright was "required" to exercise APA rights. (*Id.*; *see* Novell's Motion In Limine No. 5, at 3.)

## III. NOVELL'S MARCH 2004 TRADE SHOW REMARKS MERELY REPEAT NOVELL'S PRIOR OPINION

SCO's complaint alleges: "At the March 2004 Open Source Business Conference in San Francisco, Novell's Vice Chairman Chris Stone proclaimed during his keynote address that Novell 'still own[s] UNIX.'" (Dkt. No. 96, ¶ 37(k).) SCO has relied on a transcript it prepared of a CNET broadcast, which states (Ex. 6C at 5):

> "Sorry Darl, again. Al Gore didn't invent the Internet and you didn't invent Linux or intellectual property law. We still own Unix. And we believe, that Unix is not in Linux, and that Linux is a free, and is an open distribution, and should be. And always will be."

Here, the context is dispositive. SCO had filed this suit against Novell two months earlier. (Dkt. No. 1. 1/20/2004 Complaint.) This was an "Open Source" conference for the Linux community that was the target of SCO's threats and was thus already aware of the Novell/SCO dispute and massive related media coverage. (*See* Novell's Motion In Limine No. 3 and Exs. 3B to 3S.) Thus, the context "informed the reader/listener that the statements were merely another installment in the continuing heated debate." *See Mast*, 971 P.2d at 933. The only reasonable interpretation is that Mr. Stone was repeating Novell's subjective view that it owned the copyrights for the reasons in its letters, which is not actionable as a matter of law.

DATED: February 8, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan
WORKMAN NYDEGGER

MORRISON & FOERSTER LLP

Attorneys for Defendant and
Counterclaim-Plaintiff Novell, Inc.