

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 LLPMichael 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, INC.'S OPPOSITION TO
SCO'S MOTION IN LIMINE NO. 4
TO EXCLUDE REFERENCE TO
LITIGATION COMMENTARY**

Judge Ted Stewart

AND RELATED COUNTERCLAIMS.

SCO's request for an order precluding all references to "commentary on this case or related litigation," including the Groklaw website, should be denied. Novell agrees that it would be improper for the jury to consult Groklaw or any other external sources during the trial. But SCO's motion seeks to conceal from the jury a broad and largely undefined category of litigation commentary, much of which is directly relevant to Novell's defense to SCO's slander of title claim. Any prejudice SCO identifies can be prevented by instructing the jury not to investigate any external sources during the trial.

I. ARGUMENT

SCO's assertion that litigation commentary, including the Groklaw website, is not relevant is simple wrong. SCO alleges that Novell has slandered its title to the UNIX copyrights, and that SCO has incurred damages as a result. (Second Am. Compl. ¶¶ 91-93, Dkt. No. 96.) The commentary relating to SCO's dispute on Groklaw and other sources is relevant to Novell's defense to SCO's slander of title claim, including rebutting SCO's damages theory.

In order to prove the special damages element of its slander of title claim, SCO must show that harm "resulted from" Novell's statements, "not from other factors." *Macia v. Microsoft Corp.*, 152 F. Supp. 2d 535, 541 (D. Vt. 2001) (internal quotations omitted). Novell's evidence against SCO's causation theory includes information that was published on Groklaw and references to Groklaw. Indeed, SCO's CEO, Darl McBride, cited Groklaw itself as a cause for the poor performance of the SCOSource initiative. (Ex. 4A (Novell Trial Ex. C30) at 3 [Mr. McBride is quoted as saying that Groklaw is "having a dampening effect" on SCOSource].) In addition, when Mr. McBride wrote an open letter to Linux users claiming license fees were owed, the open source community used Groklaw to respond that it would "not accept your attempt to charge us a second time for a product that we have already bought and paid for," suggesting that Novell's statements were not the sole cause of SCOSource's failure. (Ex. 4B

(Novell Trial Ex. Q20) at 3.) It will, therefore, be necessary for Novell to reference Groklaw in defending against SCO's damages claim.

Other litigation commentary, including publicity surrounding SCO's suit against IBM, is also necessary for the same reason. The SCOsource licensing program, launched in January 2003, generated a great deal of negative publicity that was in part responsible for the poor performance of SCOsource. (*See generally* Mem. ISO Novell's Motion for Summary Judgment on SCO's First Claim for Slander of Title Based on Failure to Establish Special Damages ¶¶ 14-19, Dkt. No. 288 (under seal).) Some of this publicity involved commentary on the IBM litigation, including recommendations that Linux users not purchase a SCOsource license. (*See, e.g.* Ex. 4C (Novell Trial Ex. T44) at 1 ("There is real doubt as to whether end users should purchase a license from SCO."); Ex. 4D (Novell Trial Ex. D30) at 4 (advising Linux users not to contract or negotiate with SCO during the litigation process with IBM).) This evidence shows that other factors contributed to the poor performance of SCOsource; such evidence is directly relevant to disproving SCO's causation theory.

SCO's motion seeks to preclude all testimony about, and reference to, litigation commentary. The motion refers to "a number of websites and publications which have followed this litigation and related litigation" (Mot. at 1), but SCO presents no argument why this broad and largely undefined category of evidence should be precluded. The prejudice SCO identifies relates only to SCO's narrower request that the Court should "not allow Novell or its counsel or witnesses to make any statements that might lead jurors to investigate" sources such as Groklaw. (Mot. at 1.) Novell agrees that it would be improper for either party to direct jurors to public sources of commentary on this litigation. However, because SCO's request to preclude all references to litigation commentary would risk the exclusion of highly relevant evidence, SCO's concern is properly addressed by instructing the jury not to investigate external sources of information.

II. CONCLUSION

SCO's request to preclude all testimony about, and reference to, litigation commentary should therefore be denied.

DATED: February 19, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan
WORKMAN NYDEGGER

MORRISON & FOERSTER LLP

Attorneys for Defendant and
Counterclaim-Plaintiff Novell, Inc.