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*Attorneys for Plaintiff, The SCO Group, Inc.*

**IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF UTAH**

<p>THE SCO GROUP, INC., by and through the          Chapter 11 Trustee in Bankruptcy, Edward N.          Cahn,</p> <p style="text-align: center;">Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p style="text-align: center;">Defendant/Counterclaim-Plaintiff.</p>	<p><b>SCO’S OPPOSITION TO “NOVELL’S          MOTION IN LIMINE NO. 7 TO          DETERMINE THAT COMMON LAW          PRIVILEGES APPLY TO ALLEGEDLY          DEFAMATORY PUBLICATIONS”</b></p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Novell asks the Court to rule that certain common-law privileges apply to Novell's claims of copyright ownership that are the subject of SCO's claim for slander of title.

1. Novell's motion should be denied without prejudice to request appropriate jury instructions. The subject of this motion would more appropriately be addressed in the context of jury instructions.<sup>1</sup> Novell does not discuss in its motion Judge Kimball's prior rulings with respect to the applicability of privileges. Novell sought to have the slander of title claim dismissed on the basis of privilege. The Court denied the motion in June 2005. (Docket No. 75.) With the exception of the "absolute privilege," Novell argued then for application of the same privileges it asks the Court to apply now. In denying the motion, the Court noted that SCO may establish that the asserted privileges do not apply or prove that Novell acted with an intent or through conduct that removes the privilege:

- Where "'the disparaging matter was published maliciously,'" the defendant has published the matter "'without privilege to do so.'" Id. at 11 (quoting Dowse v. Doris Trust Co., 208 P.2d 956, 958 (Utah 1949)).
- The qualified or conditional privileges that Novell invokes do not apply if "'the scope of the qualified privilege has been transcended or the defendant acted with malice.'" Id. (quoting Brehany v. Nordstrom, Inc., 812 P.2d 49, 57 (Utah 1991)).
- The plaintiff may prove 'that the wrong was done with an intent to injure, vex or annoy,' or 'because of hatred, spite or ill will.' Or, 'malice may be implied where a party knowingly and wrongfully records or publishes something untrue or spurious or which gives a false or misleading impression adverse to one's title under circumstances that it should reasonably foresee might result in damage to the owner of the property.'" Id. at 12 (quoting First Sec. Bank of Utah v. Banberry Crossing, 780 P.2d 1253, 1257 (Utah 1989)).

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<sup>1</sup> Insofar as part of Novell's motion seeks a ruling that certain of the slanderous statements are not actionable because of an absolute litigation privilege, that is a motion for partial summary judgment that was required to have been brought – like Novell's other summary judgment motions – by April 20, 2007, the deadline for dispositive motions.

- “Statements that are otherwise privileged lose their privilege if they are excessively published, that is, published to more persons than the scope of the privilege requires to effectuate its purpose.” Id. at 15 (quoting Krouse v. Bower, 20 P.3d 895, 900 (Utah 2001)). “The issue of whether there has been an excessive publication is a question of fact.” Id. (citing Brehany, 812 P.2d at 58).

SCO does not dispute that jury instructions may be appropriate with respect to certain applicable privileges, and their limitations. On the “legitimate interest” qualified privilege, for example, the defendant must be under “a legal duty” to the recipient to publish the statement. O’Connor v. Burningham, 165 P.3d 1214, 1224 (Utah 2007). Novell owed no “legal duty” to the public to make its statements.<sup>2</sup>

2. The issue of “excessive publication” is for the jury to determine. The Court’s prior rulings defeat Novell’s instant request for a legal ruling that SCO cannot show “excessive publication.” That is an issue for the jury. Indeed, where the very notion of a qualified privilege precludes “widespread or unrestricted communication,” Spencer v. Spencer, 479 N.W.2d 293, 297 (Iowa 1991), a “defense of qualified privilege does not extend to a publication to the general public.” Knudsen v. Kan. Gas and Elec. Co., 807 P.2d 71, 79 (Kan. 1991).

3. Novell is not entitled to any “in limine” relief. The question of excessive publication therefore is for the jury, and if Novell acted with malice, no qualified privilege applies. Even if SCO were to be required “actual malice,” as Novell seeks to require in Motions in Limine Nos. 2 and 3, evidence of common law malice will be admissible at trial. D. Elder, Defamation: A Lawyer’s Guide § 7:3 (2009).

4. Novell’s claim of “absolute privilege” fails under the relevant law. The absolute privilege for litigation generally applies to a “party to a private litigation.” Hansen v. Kohler, 550

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<sup>2</sup> Likewise, financially motivated public claims of copyright ownership do not fall within the alternate “decent conduct” standard.

P.2d 186, 189-90 (Utah 1976); see also O'Connor v. Burningham, 165 P.3d 1214, 122-23 (Utah 2007). The purpose of the privilege is to “promote candid and honest communication between the parties and their counsel in order to resolve disputes.” Krouse v. Bower, 20 P.3d 895 900 (Utah 2001). In certain limited situations, pre-litigation correspondence such as cease-and-desist letters may qualify for the privilege. It is an open factual question, however, whether Novell’s letters are consistent with any such purpose. In addition, those letters were later published to the world – which is clearly not consistent with the privilege. Contrary to Novell’s suggestion, moreover, excessive publication (such as publication to the public) is a defense to this privilege as well. Id. That question, again, is for the jury to resolve.

### **Conclusion**

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell’s “Motion in Limine No. 7,” without prejudice to Novell’s right to request appropriate jury instructions on privileges.

DATED this 19th day of February, 2010.

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**CERTIFICATE OF SERVICE**

I, Brent O. Hatch, hereby certify that on this 19th day of February, 2010, a true and correct copy of the foregoing **SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 7"** was filed with the court and served via electronic mail to the following recipients:

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