SCO Grp v. Novell Inc Doc. 688

Brent O. Hatch (5715)
bhatch@hjdlaw.com
Mark F. James (5295)
mjames@hjdlaw.com
HATCH, JAMES & DODGE, PC
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666

Stuart Singer (admitted pro hac vice)
ssinger@bsfllp.com
Sashi Bach Boruchow (admitted pro hac vice)
sboruchow@bsfllp.com
BOIES SCHILLER & FLEXNER LLP
401 East Las Olas Blvd.
Suite 1200
Fort Lauderdale, Florida 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

David Boies (admitted pro hac vice)
dboies@bsfllp.com
Robert Silver (admitted pro hac vice)
rsilver@bsfllp.com
Edward Normand (admitted pro hac vice)
enormand@bsfllp.com
BOIES SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

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

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

| | |
|---|---|
| THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn,<br><br>Plaintiff/Counterclaim-Defendant,<br><br>vs.<br><br>NOVELL, INC., a Delaware corporation,<br><br>Defendant/Counterclaim-Plaintiff. | **SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 8 TO PRECLUDE SCO FROM RELYING ON NOVELL'S APPLICATIONS FOR COPYRIGHT REGISTRATION"**<br><br>Civil No. 2:04 CV-00139<br><br>Judge Ted Stewart |

Dockets.Justia.com

Novell's "Motion in Limine No. 8" is an untimely motion for partial summary judgment seeking to exclude Novell's copyright registrations as evidence of its slander on SCO's title. Novell's motion also fails for the reasons that follow.

1. SCO's allegations about Novell's copyright registrations include Novell's public announcements concerning those registrations. In addition to filing copyright applications in September and October 2003, Novell issued a press release on December 22, 2003, stating that Novell "owns the copyrights in UNIX, and has applied for and received copyright registrations pertaining to UNIX consistent with that position." Novell's website continues to publish that press release, and also lists and publishes the registrations themselves.[1] Novell does not even attempt to articulate grounds for excluding these public statements.

2. It is beyond argument that recordation filings give rise to claims for slander of title. Indeed, the courts routinely cite such filings as an independent basis for slander of title claims. See, e.g., First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253, 1257 (Utah 1989) (claim lies where defendant "wrongfully records or publishes" statement); Howarth v. Ostergaard, 30 Utah 2d 183, 185 (1973) (same); RJW Media, Inc. v. CIT Group/Consumer Fin., Inc., 202 P.3d 291, 296 (Utah Ct. App. 2008) (same). In addition, the courts have repeatedly found defendants liable for slander of title based on the recording of instruments claiming a property interest. See e.g., Olsen v. Kidman, 120 Utah 443, 451 (1951) (defendant liable for wrongful recording of instrument); Dowse v. Doris Trust Co., 116 Utah 106 (1949) (same). Novell fails to confront, or even acknowledge, this long-established precedent.

3. The Noerr-Pennington doctrine does not apply in this situation. Novell cites no case that expands the doctrine beyond its use as a defense in antitrust cases to a slander of title case, let alone to shield a defendant from liability for slanderous statements made in applications recording

---

[1] http://www.novell.com/news/press/novell_statement_on_unix_copyright_registrations; http://www.novell.com/licensing/ntap/legal.html.

alleged ownership of copyrights or any property. As explained, the case law consistently makes clear that such statements are an independently sufficient basis for such liability.

4. Novell's registration applications are not entitled to Noerr-Pennington protection because they are not petitions for government action. Even in the antitrust context, the Noerr-Pennington doctrine protects only persuasive requests for discretionary action by the government. See, e.g., E. Railroad Presidents' Conference v. Noerr Motor Fright, Inc., 365 U.S. 127, 138 (1988) (equating protected petitioning with "an effort to persuade an independent government decision-maker through the presentation of facts and arguments"). Ministerial filings, such as the Novell applications at issue, are not entitled to protection because they are not persuasive in nature and are not requests for government action. See, e.g., Litton Sys. v. Am. Telephone & Telegraph Co., 700 F.2d 785 (2d Cir. 1983) (tariff filing did not merit protection); In re Buspirone Patent Litig./In re Buspirone Antitrust Litig., 185 F. Supp. 2d 363, 371 (S.D.N.Y. 2002) (patent listing accepted and reviewed by the FDA did not merit protection); see also Organon, Inc. v. Mylan Pharms., Inc., 293 F. Supp. 2d 453, 458-59 (D.N.J. 2003) (filing a patent for listing by FDA was not "petitioning activity" because the FDA's action was "purely ministerial").

5. Novell's arguments regarding the strength of its litigation position are irrelevant to the analysis. Novell did not file the applications at issue in connection with any "petition" it brought before this Court. In fact, Novell filed its copyright applications and certifications in September and October 2003, and announced and published the registrations in December 2003. SCO filed this lawsuit in January 2004, and Novell did not bring any counterclaims until it filed its Answer to SCO's Amended Complaint on July 29, 2005. Novell thus did not bring any "petition" before this Court for nearly two years after filing its copyright applications. Novell does not cite any support for the proposition that a "petition" can retroactively cure liability.

The alleged strength of Novell's subsequent legal claims is inconsequential. The Noerr-Pennington doctrine protects against liability for antitrust activity flowing from government action – the "intended consequence" of petitioning activity – but not against liability for harms resulting from the petitioning activity itself. See, e.g., Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424-25 (1990) (concluding that defendants' lobbying efforts were themselves restraints on trade); City of Columbus v. Omni Advertising, Inc., 499 U.S. 365, 381 (1991) (no protection where anticompetitive activity "is sought to be achieved only by the lobbying process itself, and not by the government action that the lobbying seeks"). Apart from the question of Novell's bad faith, the applications thus are not entitled to any immunity.

## CONCLUSION

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's "Motion in Limine No. 8."

DATED this 19th day of February, 2010.

By: /s/ Brent O. Hatch
HATCH, JAMES & DODGE, P.C.
Brent O. Hatch
Mark F. James

BOIES, SCHILLER & FLEXNER LLP
David Boies
Robert Silver
Stuart H. Singer
Edward Normand
Sashi Bach Boruchow

*Counsel for The SCO Group, Inc.*

## CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 19,th day of February, 2010, a true and correct copy of the foregoing **SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 8"** was filed with the Court and served via electronic mail to the following recipients:

Sterling A. Brennan
David R. Wright
Kirk R. Harris
Cara J. Baldwin
WORKMAN | NYDEGGER
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111

Thomas R. Karrenberg
Heather M. Sneddon
ANDERSON & KARRENBERG
700 Bank One Tower
50 West Broadway
Salt Lake City, UT 84101

Michael A. Jacobs
Eric M. Aker
Grant L. Kim
MORRISON & FOERSTER
425 Market Street
San Francisco, CA 94105-2482

*Counsel for Defendant and Counterclaim-Plaintiff Novell, Inc.*

By: /s/ Brent O. Hatch
HATCH, JAMES & DODGE, P.C.
Brent O. Hatch