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**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 RESPONSE TO  
COURT'S JURY INSTRUCTIONS**

Judge Ted Stewart

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**AND RELATED COUNTERCLAIMS.**

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On March 22, 2010, the Court distributed to the parties a final set of jury instructions and requested that the parties respond with any comments, additions, or objections by 8:00 a.m. on March 24, 2010. Novell respectfully submits these comments.

## **I. GLOBAL COMMENT ON INSTRUCTIONS**

The Court's Instructions 25, 27, 29, 35, and 36 reference both the UNIX and UnixWare copyrights as the copyrights in dispute. SCO has agreed that the dispute applies only to those copyrights as they existed at the time of the APA. Neither party claims ownership of copyrights to any software developed by the other party after the APA. Accordingly, any references to UNIX and UnixWare copyrights should be clarified to state "UNIX and UnixWare copyrights (existent as of the date of the APA)."

## **II. COMMENTS ON SPECIFIC INSTRUCTIONS**

### **A. Instruction No. 16 Regarding Corporate Acts**

The following language in the Court's Instruction No. 16 is not consistent with the law regarding corporate scienter: "Any act or omission of any officer, employee or agent of a corporation . . . is the act or omission of the corporation." As discussed in Instruction No. 35 below, corporate state of mind in the context of slander of title can only be shown with respect to those individuals with responsibility for the publication. The Supreme Court held in *New York Times v. Sullivan* that whether a corporation acted with constitutional malice depends on "the state of mind" of the persons responsible for the publication at issue. *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964). The plaintiff argued that the New York Times "knew" the publication was false because news stories in its own files showed that certain points were inaccurate. The Supreme Court rejected this argument, holding that:

The mere presence of the stories in the files does not, of course, establish that the Times “knew” the advertisement was false, since *the state of mind required for actual malice would have to be brought home to the persons* in the Times’ organization *having responsibility for the publication* of the advertisement.

*Id.* (emphasis added).

Thus, to establish corporate liability for a tort requiring a culpable state of mind, it is necessary to show that the person acting in the corporation’s behalf to publish the statement had the culpable state of mind. *Woodmont, Inc. v. Daniels*, 274 F.2d 132, 137 (10th Cir. 1959) (“while in some cases, a corporation may be held constructively responsible for the composite knowledge of all of its agents, whether acting in unison or not, we are unwilling to apply the rule to fix liability where, as here, intent is an essential ingredient of tort liability.”) (*See also* Joint Proposed Jury Instr. at 35-36 (citing cases), Dkt. No. 812.)

**B. Instruction No. 25 Regarding Earlier Rulings**

Instruction No. 25 instructs the jury that earlier rulings by this Court should have no bearing on the jury’s determination of which party owns the copyrights at issue in this case. However, evidence of prior rulings is relevant for other purposes: (1) to demonstrate an additional cause for SCO’s alleged lost sales (the rulings were public information available to the market during the relevant time period); and (2) to establish the level of knowledge and state of mind of the officers at Novell at the time that it made the allegedly slanderous statements.

**1. Prior Rulings Bear on SCO’s Damages Calculation.**

The prior rulings are relevant to the jury’s damages calculations. Dr. Pisano offered testimony about a “but for” world that continues to the end of 2007, well after the time period when Novell first made the allegedly slanderous statements, and well into the period in which Novell had obtained favorable Court rulings. And although SCO decided, at the last minute, to instruct Dr. Botosan not to offer testimony on her “event study,” she nonetheless calculated damages amounting to tens of millions of dollars for the same periods. The Court previously

allowed the prior rulings to be used during the cross-examination of Dr. Botosan regarding her damages calculations based on a hypothetical “but for” world.

Dr. Pisano’s surveys were taken before Novell had received its first favorable district court ruling in mid-2004, but his “market penetration” calculations extended well past that date, stopping not in mid-2004 or even the end of 2004, but rather toward the end of 2007. In other words, Dr. Pisano projected a market penetration well past the initial period following Novell’s statements, well past the date of the surveys he relied on, and even past the date of a district court ruling that strongly favored Novell on the question of copyright ownership. Yet he did not factor those decisions into his analysis. Nor did he factor in Novell’s favorable August 2007 summary judgment ruling into his calculation of market penetration in 2007.

Dr. Botosan made the same “but for” assumptions. She relied on projections of SCOsource’s likely success that were made by SCO and third parties in 2003, as compared with SCO’s actual SCOsource revenues. She too testified for the period 2003 through the end of 2007, and her testimony quantified damages through the end of 2007. Certain of Dr. Botosan’s damages calculations, moreover, explicitly relied on Dr. Pisano’s market penetration analysis. She testified that she did not take into account the impact of the district court rulings on the projected success of the SCOsource campaign.

The jury thus has now heard evidence of between \$100M and \$250M in damages that SCO allegedly suffered from Novell’s statements. But that evidence is premised on a demonstrable falsity: that Novell obtained no favorable district court rulings during the claimed damages period that also could have contributed to customer reluctance to take SCOsource licenses.

The jurors have heard testimony that the Linux community learned in mid-2004 that there was a strong likelihood that Novell was right on the merits of its UNIX copyright ownership contentions and it learned in 2007 that Novell had in fact prevailed on that issue. Instruction 25

should specify that the jurors may consider the prior rulings in the context of judging whether SCO's damages calculations are reliable.

## **2. Prior Rulings Bear on Novell's State of Mind.**

The prior rulings are also relevant to defeating the constitutional malice element of SCO's slander of title claim, which requires knowledge that the allegedly slanderous statements were false or made with reckless disregard for their truth. First, the rulings are directly probative of scienter, to the extent that Novell's representatives acted with knowledge of them. Second, the rulings are circumstantial evidence of scienter because the fact that they were made proves, or at least strongly supports, the objective reasonableness of Novell's assertion of ownership. *See, e.g., Abbott Labs. v. Sandoz, Inc.*, 532 F. Supp. 2d 996, 999 (N.D. Ill. 2007) (dismissing claim for *willful* patent infringement because the Federal Circuit had ruled that a substantial question as to the validity of the patent was raised in another case). Objective reasonableness is, in turn, probative of whether the allegedly slanderous statements were published with constitutional malice. *See, e.g., St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S. Ct. 1323 (1968) (recognizing inherent probability as a factor relevant to constitutional malice). The Court previously denied Novell's motion to use the prior rulings with Novell's witnesses to show the impact on their state of mind. Novell requests reconsideration of that issue in connection with this jury instruction.

As currently worded, it will likely not be evident to the jury that they are allowed to consider the prior rulings for either of the two purposes discussed above. Novell proposes that the following sentence be added to end of the instruction:

The existence of these earlier rulings, however, may bear on other issues in this case, such as the state of mind of the parties at the time the public statements were made and the cause of their damages.

Language to this effect will ensure that the jury is properly informed that this evidence may be relevant and that they are not obligated to disregard it.

**C. Instruction No. 26 Regarding Elements of Slander of Title**

Novell objects to the Court's Instruction No. 26 on the grounds that the first element of slander of title omits the word "unprivileged." The claimant has the affirmative burden to prove that the party publishing the slanderous statement was not privileged to do so. In addition to the arguments Novell has already made on this point (*see* Joint Proposed Jury Instr. at 4, 6-7, Dkt. No. 812; Novell Supp. Submission at 2-3, Dkt. No. 787), Novell points the Court's attention to Restatement (Second) of Torts § 632, which both SCO and the Court have cited to in support of the special damages instruction. In § 632, the Restatement lists lack of privilege as the second element of the claim for injurious falsehood, as follows:

The publication of an injurious falsehood is a legal cause of pecuniary loss if

- (a) it is a substantial factor in bringing about the loss, and
- (b) there is no rule of law relieving the publisher from liability because of the manner in which the publication has resulted in the loss.

Restatement (Second) Torts § 632 (2009). *See also West v. Thomson Newspapers*, 872 P.2d 999, 1007-08 (Utah 1994) (“To state a claim for defamation, he must show . . . that the statements were . . . not subject to any privilege”); *Dowse v. Doris Trust Co.*, 208 p.2d 956, 958-59 (Utah 1949) (publication “without privilege” is an element of the claim).

**D. Instruction No. 27 Regarding Slanderous Statements**

On March 19, 2010, the Court requested that the parties submit a joint instruction clarifying that litigation-related submissions and statements by SCO and Novell are not actionable. Accordingly, Novell proposes adding the following language to the end of the first paragraph of the Court's Instruction No. 27:



The allegedly slanderous statements do not include submissions and statements made by SCO and Novell in connection with this litigation, which began in January 2004. Neither party may be held liable for making such litigation-related submissions and statements.

It is Novell's understanding from representations made by SCO that SCO does not disagree with this approach.

**E. Instruction No. 30 Regarding Amendments to the Asset Purchase Agreement**

Novell repeats its request to include a jury instruction on the proper interpretation of unambiguous provisions of the amended Asset Purchase Agreement. (*See* Joint Proposed Jury Instructions at 11-12, 19-24, Dkt. No. 812.) It is the court's responsibility to interpret unambiguous contractual terms. *Schmidt v. Macco Const. Co.*, 119 Cal. App. 2d 717, 734 (Cal. App. 1953) ("only the interpretation of the ambiguous clauses is one of fact, and . . . the jury should be so instructed"); Cal. Civ. Jury Instr., BAJI No. 10.75 (*citing Schmidt*, 119 Cal. App. 2d at 733) ("Where there are ambiguous and unambiguous clauses to the contract, the jury should be instructed which clauses are clear, which are ambiguous, and that only the latter should be interpreted by them."). The Court should therefore interpret unambiguous terms of the APA and related agreements as a matter of law, and highlight these terms for the jury. The Tenth Circuit laid out the "basic facts" underlying "Novell's transfer of certain UNIX-related assets to Santa Cruz. *The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1210 (10th Cir. 2009). Judge Kimball also outlined the basic facts relating to the APA and contemporaneous agreements. (Order at 3-9, Dkt. No. 377.)

Novell's proposed instruction explains these unambiguous terms to the jury. Novell submits the following amended proposal for the Court's consideration:

## **THE AMENDED ASSET PURCHASE AGREEMENT AND RELATED AGREEMENTS**

You should be guided by the following principles in interpreting the amended Asset Purchase Agreement and related agreements:

- Under the amended Asset Purchase Agreement (“APA”), Santa Cruz purchased certain assets from Novell, listed in Schedule 1.1(a) and called “Assets.” Those Assets do not include the “Excluded Assets” that are listed in Schedule 1.1(b), which were retained by Novell.
- Under Section 4.16(a) of the APA, Santa Cruz was obligated to administer the collection of royalties from all UNIX SVRX licenses and transmit 100% of those royalties to Novell, minus a 5% administrative fee for Santa Cruz.
- Under Section 4.16(b) of the APA, Santa Cruz did not have the authority to amend, modify, waive any right under, or assign any UNIX SVRX license without Novell’s consent.
- Under Section 4.16(b) of the APA, Santa Cruz did not have the authority to enter into new UNIX SVRX licenses without Novell’s permission, unless it was doing so incidentally to a UnixWare license.
- Under Section 6(b) of the Operating Agreement (related to the APA), Santa Cruz was obligated to distribute, offer, promote and market UnixWare.
- Under Schedule 1.2(b) of the APA, Santa Cruz was entitled to keep all royalties from sales of UnixWare, unless certain sales thresholds were met.
- Under Section 4.18 of the APA and under the related Operating Agreement, Santa Cruz was obligated to develop a merged product based on specifications from Santa Cruz and Novell.
- Under Section 6(b) of the Operating Agreement, Santa Cruz was obligated to offer the Eiger software product.
- Under Section 1.6 of the APA and under the related Technology License Agreement, Novell obtained a license from Santa Cruz of the technology included in the Assets (as defined above) and any derivatives of that technology created by Santa Cruz. These provisions do not grant Novell a license to any of the Excluded Assets (as defined above), which Novell had kept under the APA.

### **F. Instruction No. 31 Regarding Contractual Interpretation**

Novell repeats its request that language from the California Model Jury Instructions on contract interpretation be added to the Court’s Instruction No. 31. (Novell Objections at 11, Dkt.

No. 774; Novell Reply at 13, Dkt. No.786; Novell Supp. Submission at 22, Dkt. No. 787; Joint Proposed Jury Instr. at 16, Dkt. No. 812.) CACI 315 instructs the jury that:

You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

California Model Jury Instr. CACI 315. Indeed, the California Court of Appeal has held that:

Ordinarily it is presumed that the parties read and understood the import of their contract and that they had the intention which its terms manifest.

*Heidlebaugh v. Miller*, 271 P.2d 557, 559 (Cal. App. 1954) (cited in SCO's Proposed Jury Instr. at 7, Dkt No. 743). An instruction on the parties' understanding of the contract is particularly relevant given the facts of the case. Novell requests that either of these correct statements of the law be added to the end of the Court's Instruction No. 31.

**G. Instruction No. 34 Regarding Copyright Licenses**

**1. Writing Requirement**

Novell renews its request to include the following language at the end of the first paragraph of Instruction No. 34: "To be valid, the transfer must be in writing." As noted by Novell in the Joint Proposed Jury Instructions (Dkt. 812 at 27-28), this language is drawn from Section 204(a) of the Copyright Act, which states that the transfer of copyright ownership must be in writing and signed by the party from whom the copyright is transferred. 17 U.S.C. § 204(a) (1994) (copyright transfer is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.); *The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1211-12 (10th Cir. 2009) (citing 17 U.S.C. § 204(a) (1994)).

Although the Tenth Circuit has ruled that the amended APA satisfies the § 204(a) writing requirement,<sup>1</sup> the jury should still be advised of the existence of the writing requirement, lest they think that such transfers can occur orally or through some other non-written agreement. The need for such an instruction is highlighted by the substantial amount of testimony of the business negotiators' intent and understanding. It is possible that without an instruction on the writing requirement, the jury may believe that copyright transfers do not need to be in writing.

The Court has already adopted this approach elsewhere in the Court's Instruction No. 34, stating in the second paragraph that "[a]n exclusive license must be in writing." This instruction should not be limited to licenses, however.

## **2. Law on Implied License is Irrelevant**

Novell requests that the law in Instruction No. 34 regarding implied licenses (last three sentences of paragraph 3 and the entirety of paragraph 4) be stricken from the instruction, since it is not relevant to the issues of this case. SCO's position is that it obtained ownership of the UNIX copyrights under the amended APA, not an implied license. Novell submits that SCO did not obtain ownership of the UNIX copyrights, but did obtain certain express rights under the APA to develop UnixWare. SCO's former CEO, Darl McBride, admitted in his testimony that if SCO did not own the UNIX copyrights, it would still possess a license under the amended APA to operate its software business. (Trial Tr. at 1225:2-1226:10.) Because the concept of an implied license is not relevant to the issues of this case, the law on this subject is unnecessary and may cause confusion for the jurors.

Additionally, in SCO's Reply in Support of Proposed Jury Instructions, SCO agreed to the removal of the language regarding implied licenses now in paragraph 4 of Instruction No. 34, stating that "SCO will accept an instruction that omits reference to the well-established law that

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<sup>1</sup> Novell has petitioned the U.S. Supreme Court for a writ of certiorari on the 10<sup>th</sup> Circuit's ruling regarding the application of the § 204(a) writing requirement in this case.

implied licenses usually are found where one party has created a work at the other's request and handed it over, intending that the other copy and distribute it." (SCO's Reply at 17 ¶ C, Dkt. No. 784.)

### **3. Physical Possession of Copyright Registration is Irrelevant to Ownership**

The jury has heard evidence regarding the physical location of the copyright registrations. It is undisputed that the physical location or possession of copyright registrations are irrelevant to the issue of copyright ownership. The jury should be so instructed in order to avoid jury confusion.

The physical possession of a copyright certificate is legally irrelevant. "[T]he possessor of a copyright certificate is not ipso facto the copyright owner. The valuable federal right is not transferred by mere physical delivery, or other acquisition, of the certificate. The owner may, of course, assign the copyright. But this is to be done 'by an instrument in writing signed by the proprietor of the copyright.'" *Kingsrow Enters., Inc. v. Metromedia, Inc.*, 397 F. Supp. 879, 881 (S.D.N.Y. 1975) (possession of the actual papers is "immaterial" to the question of copyright ownership); *see also La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1203 & n.7 (10th Cir. 2005) (holding that physical possession of a "registration is separate from the issuance of a certificate of registration" and that a rule placing emphasis on physical possession of registration papers is "hard to imagine considering the fact that a certificate could easily be lost").

Accordingly, Novell proposes that the following language be added to the end of the Court's Instruction No. 34: "Physical possession of copyright certificates does not prove ownership of the copyrights."

#### **4. SCO Owns the Software Code That It Writes**

Given the evidence that the jury has heard regarding SCO's creation of new versions of the UnixWare software, the jury should be instructed that copyright ownership in software code written by SCO vests in SCO whether or not SCO owns the copyrights in the preexisting material.

The Copyright Act states that the subject matter of copyright includes derivative works. 17 U.S.C. 103(a). It goes on to state that “[c]opyright in a work protected under this title vests initially in the author or authors of the work.” 17 U.S.C. 201(a). Such protection does not require or imply that the creator of the derivative work owns the copyrights in the underlying material on which the derivative work was based. *See* 17 U.S.C. 103(b)(“copyright in . . . derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of . . . any copyright protection in the preexisting material.”)

Accordingly, Novell proposes that the following language be added to the end of the Court's Instruction No. 33:

SCO owns the copyrights for software code that it writes. SCO does not require copyright ownership in preexisting code on which its own code is based in order to own the copyrights in subsequent code that it authors, nor does owning the copyrights in the code SCO authors imply that SCO owns the copyrights in preexisting code.

#### **5. Copyright Notices Do Not Affect Ownership In Underlying Work**

Copyright notices do not establish or even evidence ownership. Section 401(d) of the Copyright Act, entitled “Evidentiary weight of notice,” states that the existence of a copyright notice may defeat an “innocent infringement defense.” It does not indicate that the effect of the notice is to prove or evidence ownership.

As a result, if there is a dispute over copyright ownership, a copyright notice cannot resolve that dispute. The reverse would be absurd - a party could unilaterally place a self-serving copyright notice on an item for which it does not own the copyrights, and then use that same copyright notice as evidence that it owns those copyrights. Courts have consistently rejected such attempts. *See, e.g., Arthur Retlaw & Associates, Inc. v. Travenol Laboratories, Inc.*, 582 F. Supp. 1010, 1014 (N.D. Ill. 1984) (party's unilateral act of placing its own name in copyright notice did not affect copyright ownership); *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (unilateral act of placing copyright notice ineffective to modify contract stating employer owned copyright) (superseded by statute on other grounds). Similarly, a copyright notice on a derivative work does not necessarily address ownership of the underlying work (*United States v. Taxe*, 540 F.2d 961 (9th Cir. 1976)), and a copyright notice on a collection does not necessarily indicate ownership rights between the individual authors and the collector (*Bagdadi v. Nazar*, 84 F.3d 1194 (9th Cir. 1996) (analyzing *Quinto v. Legal Times of Wash., Inc.*, 506 F. Supp. 554 (D.D.C. 1981))).

Accordingly, Novell proposes that the following language be added to the end of the Court's Instruction No. 33: "Copyright notices do not affect copyright ownership. A party cannot establish that it owns a copyright by placing its name in a copyright notice."

#### **H. Instruction No. 35 Regarding Constitutional Malice**

##### **1. The Jury Should Be Instructed on How to Assess Corporate State of Mind**

Novell repeats its request that the jury be instructed on how the claimant can establish the culpable state of mind of a corporation, or corporate scienter. (*See* Novell's Supp. Submission at 8-12, Dkt. No. 787; Joint Proposed Jury Instr. at 30, 35-36, Dkt. No. 812 (citing cases).) The Supreme Court held in *New York Times v. Sullivan* that whether a corporation acted with constitutional malice depends on "the state of mind" of the persons responsible for the

publication at issue. 376 U.S. 254, 287 (1964). The plaintiff argued that the New York Times “knew” the publication was false because news stories in its own files showed that certain points were inaccurate. The Supreme Court rejected this argument, holding that:

The mere presence of the stories in the files does not, of course, establish that the Times “knew” the advertisement was false, since *the state of mind required for actual malice would have to be brought home to the persons* in the Times’ organization *having responsibility for the publication* of the advertisement.

*Id.* (emphasis added).

Thus, to establish corporate liability for a tort requiring a culpable state of mind, it is necessary to show that one person acting in the corporation’s behalf had the culpable state of mind. *Woodmont, Inc. v. Daniels*, 274 F.2d 132, 137 (10th Cir. 1959) (“while in some cases, a corporation may be held constructively responsible for the composite knowledge of all of its agents, whether acting in unison or not, we are unwilling to apply the rule to fix liability where, as here, intent is an essential ingredient of tort liability.”) (*See also* Joint Proposed Jury Instr. at 35-36 (citing cases), Dkt. No. 812.)

## **2. Objective Reasonableness Negates Constitutional Malice**

Novell objects to the Court’s exclusion of the objective reasonableness instruction from the broader constitutional malice instruction. The Tenth Circuit has held that where there is a “reasonable basis” for an allegedly tortious statement, it “is incompatible with a finding of recklessness or gross negligence as to the truth.” *Ball Corp. v. Xidex Corp.*, 967 F.2d 1440, 1445 (10th Cir. 1992); (Joint Proposed Jury Instr., at 34-35 (citing cases), Dkt. No. 812; Novell’s Supp. Submission at 11-12, Dkt. No. 787). Thus, a finding that a belief is objectively reasonable precludes a finding of reckless disregard or constitutional malice.



**3. Spite, Ill Will, Hatred, Bad Faith, or Evil Purpose Are Not Sufficient to Find Constitutional Malice**

Recognizing that the language of the Court’s Instruction No. 35 is taken from the MUJI, Novell nevertheless objects that the fourth paragraph does not accurately reflect the law. It leaves the incorrect impression with the jury that spite, ill will, hatred, bad faith, or evil purpose – while “not required” per se – may nonetheless constitute one basis for finding constitutional malice. The U.S. Supreme Court has explained that

Instructions that permit a jury to impose liability on the basis of the defendant’s hatred, spite, ill will, or desire to injure are “clearly impermissible.” *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82, 88 S.Ct. 197, 198, 19 L.Ed.2d 248 (1967). “(I)ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard.” *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n. 18, 91 S.Ct. 1811, 1824, 29 L.Ed.2d 296 (1971) (opinion of Brennan, J.).

*Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974) (other citations omitted). *See also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510-11 (1991) (“Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will .... In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.”) (citations omitted); *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 665-668, n.7 (1989) (“The phrase ‘actual malice’ is unfortunately confusing in that it has nothing to do with bad motive or ill will. By instructing the jury ‘in plain English’ at appropriate times during the course of the trial concerning the not-so-plain meaning of this phrase, the trial judge can help ensure that the *New York Times* standard is properly applied.”). Other courts agree. *See, e.g., Westmoreland v. CBS Inc.*, 596 F. Supp. 1170, 1172-1173, n.1 (S.D.N.Y.1984) (suggesting that jury confusion can be minimized if a less confusing phrase, such as ‘state-of-mind,’ ‘deliberate

or reckless falsity,’ or ‘constitutional limitation’ is used in the jury’s presence) (citations omitted).

In addition, paragraph four may also confuse the jury because it contradicts the distinction made between constitutional malice and personal malice in the Court’s Instruction No. 37: “Malice in this sense means the statements were made from spite, ill will, or hatred, and is distinct from the constitutional malice standard discussed previously.”

Novell requests that the fourth paragraph be removed in order to avoid confusing or misleading the jury. In the alternative, Novell proposes adding the following sentence to the fourth paragraph:

“Spite, ill will, hatred, bad faith, evil purpose or intent to harm does not alone support a finding of constitutional malice.”

#### **4. Reference to Definition of Clear and Convincing Evidence**

Since this element of the claim requires a higher burden of proof than that required for the other elements, and since this instruction does not include that definition, it would be helpful to point out to the jury that the definition of clear and convincing evidence is in Instruction No. 4. Novell proposes the following language be added to the last sentence of the first paragraph:

Clear and convincing evidence leaves no substantial doubt in your mind that the constitutional malice is highly probable, as explained in Instruction No. 4.

### **I. Instruction No. 36 Regarding Special Damages**

#### **1. Limiting Instruction on SCO’s Damages Period**

The jury must be instructed that the relevant time period for which it may calculate damages in favor of SCO begins no earlier than May 28, 2003 (the date of the first of Novell’s allegedly slanderous statements) and ends no later than June 9, 2004 (the date of the first of the prior rulings in this case). As the Court has ruled, any damages allegedly suffered by SCO after

June 9, 2004 are not at issue in this case. The jury should also be provided with an explanation that since testimony from SCO's damages experts are based on projections that extend into 2007, they should disregard damages from years 2005, 2006, 2007, and the second half of 2004.

On March 22, 2010, the Court denied Novell's "Motion for Leave to Examine Other Witnesses on Prior Rulings" (Dkt. No. 815). In denying Novell's motion, the Court ruled that "the time frame that matters is the year 2003 and early 2004 prior to the first ruling by Judge Kimball in June 2004." (Tr. at 1793:25-1794:2). Notably, the Court held that testimony regarding post-June 2004 contact with potential licensees would be unfair and inappropriate. (*See* Tr. at 1803:19-1804:6). As explained by Novell in its Motion to Strike Testimony of Damages after June 9, 2004 (Dkt. No. 823), and consistent with the Court's ruling of March 22, 2010 establishing the relevant time period, the jury should be instructed that the relevant time period for which it may calculate damages begins in 2003 and ends on June 9, 2004. The jury should also be instructed to disregard any expert or other testimony regarding damages allegedly suffered after June 9, 2004. The jury should also be instructed that testimony regarding damages incurred both before and after June 9, 2004, which does not segregate damages incurred before that date from damages incurred after that date, should be disregarded.

Given the Court's ruling of the relevant time frame at issue, it is clear that Dr. Botosan's testimony exceeds this time frame and calculates alleged lost profits after the end of the June 9, 2004 deadline. In fact, Dr. Botosan has testified that \$156 million of SCO's lost revenues comes from 2005, 2006, and 2007. (*See* Tr. at 1357:15-23; 1360:19-1370:7; 1362:5-17.) This analysis is directly contrary to the Court's recent order and is thereby irrelevant to the issues at trial. Thus, Novell has moved to strike evidence offered by SCO through Dr. Botosan regarding damage calculations outside the relevant time frame. Specifically, SCO cannot put on evidence of lost sales after June 9, 2004, because such evidence is inadmissible as irrelevant. (*See* Tr. at 1803:16-1804:6.)

The Court's preclusion of any evidence of SCO's lost sales after June 9, 2004, necessarily precludes an award of damages based on Dr. Botosan's calculation of lost profits for alleged lost sales occurring from June 10, 2004 through the end of her calculated damages period, October 31, 2007. Without an instruction explaining these guidelines, the jury will not be aware of this limit on the relevant time period and will not know how to apply this limit to its damages calculation.

The jury should be provided with a limiting instruction that informs them of the relevant time frame for SCO's special damages. In addition, the instructions should explain to the jury how they are to interpret Dr. Botosan and Dr. Pisano's calculations, given that they are based on projections that extend to 2007. Novell proposes the following language be added after the second paragraph of Instruction No. 36:

The time period to calculate SCO's special damages starts no earlier than May 28, 2003, and ends no later than June 9, 2004. This means if you award special damages to SCO, it may not include damages, if any, that incurred prior to May 28, 2003, or after June 9, 2004.

**2. The Instruction Applies Two Tests for Damages, and Should Clearly Explain So In Order to Avoid Jury Confusion<sup>2</sup>**

The Court's Instruction No. 36 effectively applies two separate tests for damages – a substantial factor test for specific lost sales from identified, known purchasers and a but-for test for lost sales from unidentified purchasers. Paragraph 6 of this instruction informs jurors that SCO may recover damages for unidentified lost sales if it can “eliminate other causes.” However, in paragraphs 3 and 4, the jury is informed of the substantial factor test, as it applies to the particular decision-making process of a specific, identified potential purchaser. These two tests are substantively different and apply to two different fact patterns. To the extent the Court

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<sup>2</sup> Novell maintains that it is improper to instruct the jury on the substantial factor test of causation. Utah courts have not adopted the substantial factor test of causation or § 632 of the Restatement. Instead, the but-for test applies. (See Novell's Objections to SCO's Proposed Jury Instr. at 29-30, Dkt. No. 774; Novell's Reply in Support of Its Proposed Jury Instr., at 4-7, Dkt. No. 786; Joint Proposed Jury Instr. at , Dkt. No. 53-57.)

will instruct the jury on the substantial factor test for specific lost sales, this dichotomy should be clearly highlighted and spelled out for the jury. Without such clarification, the jury is likely to be confused by the separate test explained in the sixth paragraph (“eliminating other causes” test), or worse, ignore it altogether as a result of the disproportionate attention given to the substantial factor test much earlier in the instruction.

Restatement § 633, which discusses pecuniary loss resulting from injurious falsehoods and on which paragraphs 3 and 6 of this instruction are based, clearly explains the distinction between these two theories of lost sales:

This pecuniary loss may be established by

- (a) proof of the conduct of specific persons, or
- (b) proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify.

*Restatement (Second) Torts* § 633 (2009). Accordingly, Novell proposes that the similar language be inserted into the Court’s Instruction No. 36, before the third paragraph, in order to highlight this difference to the jury (as shown in redline):

Special damages in the form of lost sales may be shown in two ways: (a) proof of the conduct of specific persons, or (b) proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify. There is a separate test you must apply for each.

First, when the loss of a specific sale is relied on . . . [*insert remainder of third paragraph*].

Likewise, the paragraph discussing lost sales by unidentified purchasers (currently, paragraph 6) should follow the third paragraph and should be preceded with similar language (as shown in redline):

A second way to establish special damages in the form of lost sales is in the case of a widely disseminated disparaging statement, in which the claimant cannot need not identify a specific lost sale. The claimant may recover for the loss of the market if the claimant can prove that the loss has in fact occurred and can eliminate other causes.

### **3. Paragraph 4 Gives Undue Weight to the Substantial Factor Test of Causation**

Paragraph 4 disproportionately emphasizes the substantial factor test for damages in the case of specific lost sales to identified potential customers. SCO has not presented testimony from a single identified potential SCOsource licensee. On the contrary, SCO's damages theory – as evidenced in SCO's damages experts' testimonies – relies on the loss of sales to unidentified potential SCOsource licensees. As discussed above, the relevant test to prove special damages under such a theory is “if the claimant can prove that the loss has in fact occurred and can eliminate other causes.” (Mar. 22, 2010 Jury Instructions, at Instr. No. 36 ¶6.) Thus, the substantial factor test does not apply to SCO's specific theory of lost sales.

Paragraph 4 of the Court's Instruction No. 36 is adopted from the “substantial factor” language in Comment c of Section 632 of the Restatement (Second) of Torts. Among the cases cited by SCO in the Joint Jury Instructions filing, none of them specifically cite to § 632, much less comment c of § 632.

The Restatement § 632 substantial factor test relied on by SCO and the Court only applies to lost sales by *specific*, known intending purchasers. Comments b and c and Illustrations 1 and 2 of Restatement § 632 discuss the potential purchaser's firsthand knowledge of the statements and their decision-making process. *See Restatement (Second) Torts § 632 cmts. b, c and illustrs.* On this point, §633 of the Restatement explains that “The most usual manner in which a third person's reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser.” *Restatement (Second) Torts §633 cmt. c* (going on to discuss broken agreements and terminated negotiations). Comment g explains:

Even when the plaintiff claims that the publication has prevented him from finding any purchaser at all for his land or other things, he does not ordinarily make out his case by proving that after the publication he was unable to sell. The possibility remains that he would not have been able to sell even without the publication. Normally,<sup>3</sup> therefore, *he must establish his case by evidence that some specific person* was substantially influenced by the publication in refusing to make a purchase that he otherwise would have made.

*Restatement (Second) Torts* § 633 cmt. g (2009).

**a. Paragraph 4 Should Be Removed in Order To Balance The Two Theories of Damages and Eliminate Undue Attention to Damages Theory SCO For Which SCO Has Not Presented Evidence**

In paragraph 4, this instruction goes on at length to explain the substantial factor test as it applies to a damages theory that SCO is not claiming. Novell contends that the fourth paragraph is particularly excessive, given that SCO's main theory of special damages is based on lost sales from unidentified customers. At most, the instruction should give equal weight (not more) to the theory of lost sales to specific potential customers. Compounding this disproportionality is the fact that the theory of lost sales to unidentified potential customers is buried in the last sentence of the sixth paragraph of the instruction. Novell believes that both theories should be placed adjacent to each other and that they should be given equal attention.

**J. Instruction No. 37 Regarding Privileges**

Novell objects to Instruction No. 37, relating to privileges, on five grounds.

First, Novell objects to the jury being instructed that the party asserting privilege bears the burden of proving it applies. *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991) (“If a qualified privilege exists, the burden is on the plaintiff to prove that the privilege was abused.”). As addressed in multiple prior submissions, whether a conditional privilege applies should be

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<sup>3</sup> This qualification that claimant must “normally” make out his case by proof of lost sales to specific persons is explained in Comment H, which explains the only other alternative – lost sales to unidentified potential persons and eliminating other causes.

decided as a matter of law, by the Court. *O'Connor v. Burningham*, 165 P.3d 1214, 1224 (Utah 2007) (“Whether a statement is entitled to the protection of a conditional privilege presents a question of law”).

Here, instead of instructing the jury that the applicability of the privileges asserted must be proven by the party asserting them, the Court should instead instruct the jury that the privileges apply.

Second, Novell objects to the jargon-laden characterization of the rival claimant's privilege, which might frustrate the jury's attempt to carry out the Court's role of deciding whether the privilege applies. *See* Model Utah Jury Instructions 2d, Introduction (2d ed. 2010) (“accuracy is meaningless if the statement is not understood – or is misunderstood – by jurors”). Instead of saying the privilege “permits a rival claimant to disparage another's property by asserting an inconsistent legally protected interest in itself,” the Court should instruct the jury that the privilege “permits a corporation to assert that it owns property claimed by another.”

Third, Novell objects to the conflation of the standards for abuse of the rival claimant's and recipient's interest privileges, and the resulting mischaracterization of both. The rival claimant's privilege is abused only if the publisher does not believe it owns the property; malice and excessive publication do not constitute abuse of the rival claimant's privilege. *Restatement (Second) of Torts* § 647 cmt. b (2009) (“[A] rival claimant is privileged to assert the inconsistent interest unless a trier of fact is persuaded that he did not believe in the possible validity of his claim. It is not necessary that the person asserting the claim should believe in its certain or even probable validity. It is enough if he believes in good faith that there is a substantial chance of its being sustained.”). Conversely, the recipient's interest privilege is abused if the publication is made solely out of malice, without regard to whether the statement is believed or doubted.



Fourth, Novell objects to the statement that the privileges are abused if “the party making the statement acted with malice.” That the publisher may have been motivated in part by malice is insufficient to constitute abuse. The privileges are abused only by a publication made solely from malice. Restatement (Second) of Torts § 603 cmt. a. (“[A] publication of defamatory matter upon an occasion giving rise to a privilege, if made solely from spite or ill will, is an abuse and not a use of the privilege. However, if the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not constitute an abuse of the privilege.”); *O’Connor*, 2007 UT 58, ¶ 37, 165 P.3d at 1224 (“Although we have not yet had occasion to formally adopt all the potential means to abuse the privilege cited in the Restatement, they all enjoy close ties to common sense and thus appear worthy of our confidence.”).

Fifth, Novell objects to the characterization of excessive publication and to the inclusion of any excessive publication instruction at all. Taking those points in order: first, telling the jury that the privileges are abused if “the publication extended beyond those who had a legally justified reason for receiving it” is incorrect and unhelpful. As noted above, excessive publication is not abuse of the rival claimant's privilege at all, and whether the recipient's interest privilege has been abused through excessive publication depends on whether it has been published to recipients who do not share the interest fostered by the publication. Telling the jury excessive publication occurs when the publication “extend[s] beyond those who had a legally justified reason for receiving it” is meaningless because the jury has not been told what constitutes “a legally justified reason for receiving it.”

Moreover, the jury should not be instructed on excessive publication because SCO cannot have been harmed by any excessive publication. Those whose conduct SCO complains has been influenced by Novell's publications are precisely those who have the interest Novell's

publications furthered. Thus, this instruction (on excessive publication) should not be given at all.

**K. Instruction No. 38 Regarding Punitive Damages**

Novell repeats its objection to instructing the jury on punitive damages. (Joint Proposed Jury Instr. at 61, Dkt. No. 812; Novell's Objections at 32-35, Dkt. No. 774; Novell Supp. Submission at 31, Dkt. No. 787.) The facts in evidence are insufficient to support a finding of punitive damages, which requires both constitutional malice and personal malice. The Court's Instruction No. 38 is based on the MUJI 10.12 and requires a finding of two forms of malice – (1) knowledge of falsity or reckless disregard of falsity, and (2) hatred, ill will, intent to injure, or personal malice.

The district court previously held that “there is no evidence that Novell's public statements [regarding copyright ownership] were based on anything but its good faith interpretation of the contracts.” (Summ. Jgmt. Order at 64, Dkt. No. 377.) This ruling was not appealed. Furthermore, the former CEO of SCO testified to the jury that a reasonable person could read the APA and believe that Novell owned the copyrights:

Q. But you'd agree with me that somebody – differing minds could differ on this. One person could read the asset purchase agreement and say, “Well, this doesn't seem to make sense with the rest of the agreement” and come to the conclusion there's something wrong. But a reasonable person of a differing mind could also read this and see the express language excluding the copyrights and come to a reasonable conclusion that, in fact, the UNIX copyrights were excluded, right?

A. You could come to that conclusion, yes.

Q. And that would not be unreasonable to do that?

A. Correct.

(Tr. at 1075:2-13 (McBride Testimony, Mar. 16, 2010).)

Thus, the facts in this case do not support an instruction on punitive damages.

**L. Instruction No. 40 Regarding Section 4.16 of the APA**

The Court's Instruction No. 40 says that the "parties' rights and obligations under Section 4.16 of the Asset Purchase Agreement" are "for the Court to decide and you are not to concern yourself with them." Novell objects to this language on the grounds that it may mislead jurors into thinking that they should ignore Section 4.16 all together. Section 4.16 is relevant to understanding the assets and rights that were not transferred to Santa Cruz, and thus, the jurors should take it into account as they are instructed to do in Instruction No. 31 ("you should use each part to help you interpret the others, so that all the parts make sense when taken together").

**III. OBJECTIONS TO SPECIAL VERDICT FORM**

Novell objects to the format of the verdict form. On the one hand, it is basically a general verdict form with regard to liability for slander of title, as it asks only if there was a slander of title without breaking this down into specific elements. On the other hand, the first question asks whether the copyrights transferred, even though this is not an element of slander of title and there is no claim for ownership that the jury must decide. The only cause of action that the jury must decide is slander of title. Copyright ownership is an issue only to the extent that it relates to whether the statements were false, which is one of the elements of slander of title.

The verdict form is problematic for several reasons. First, it incorrectly suggests that "preponderance of the evidence" is the applicable burden of proof for all elements of slander of title by stating that the jury finds "from a preponderance of the evidence as follows," and then asking a single question about slander of title. In fact, constitutional malice must be proven by clear and convincing evidence, not a simple preponderance.

Second, because the verdict form is limited to a single question about whether there was a slander of title, it does not provide guidance to the jury as to the specific issues that must be decided, nor does it allow judicial review as to whether specific findings were correct or inconsistent.

Third, as noted above, the verdict form includes a separate question about copyright ownership, even though this is not an element of slander of title and copyright ownership is not an issue that jury must decide except to the extent that it relates to whether the statements were false.

Fourth, the verdict form precludes the jury from deciding all of the elements of slander of title if there is a hung jury on the issue of copyright ownership. As currently drafted, if the jury is undecided as to the first question regarding copyright ownership, the jury will be precluded from deciding any of the elements of slander of title. This is a problem because even if the jury cannot reach a decision as to copyright ownership, it may still be able to return a verdict as to whether there was slander of title by finding that one of the other required elements of this claim was not proven (e.g., no disparagement, no constitutional malice, no falsity, no specific damages, or statements were privileged). The verdict form as currently drafted does not allow for this possibility.

To remedy these problems, the verdict form should ask separate questions about each of the elements that must be proven to establish slander of title, referring to the applicable burden of proof. These elements should include disparagement, falsity, constitutional malice, and special damages. In addition, there should be a question for lack of privilege, since the party claiming slander of title has the affirmative burden to prove that the party accused of slander was not privileged to make the slanderous statements.

The verdict form should also instruct the jury that they should find that there was no slander of title if they answer “no” to any of these questions. Upon further consideration, Novell believes that there is no need for a separate question about copyright ownership, because this is relevant to this case only as to the element of falsity, which is part of the verdict form. This will ensure that the even if the jury is hung on the issue of copyright ownership, they will still be able to render a verdict on slander of title.

For the reasons articulated in Novell's objection to the Court's Instruction No. 38 regarding punitive damages, Novell objects to the inclusion of a punitive damages award in the special verdict form.

Novell proposes the following special verdict form.

**SCO's Claim for Slander of title**

1. Did SCO prove by a preponderance of the evidence that Novell published a statement disparaging SCO's title to the UNIX copyrights?  Yes  No
  
2. Did SCO prove by a preponderance of the evidence that Novell's statements were false?  Yes  No
  
3. Did SCO prove by clear and convincing evidence that Novell made the statements with constitutional malice?  Yes  No
  
4. Did SCO prove by a preponderance of the evidence that Novell's publication caused SCO special damages?  Yes  No
  
5. Did SCO prove by a preponderance of the evidence that Novell was not privileged to publish the slanderous statements?  Yes  No

If you answered "Yes" to all of Questions 1 through 5, then you must determine that Novell slandered SCO's title to the UNIX copyrights. You must answer "Yes" to Question 6 below.

If you answered “No” to any of Questions 1, 2, 3, 4, or 5, then you must determine that Novell did not slander SCO’s title to the UNIX copyrights. You must answer “No” to Question 6 below.

6. Did Novell slander SCO’s title to the UNIX copyrights?    \_\_\_Yes    \_\_\_No

If you answered “Yes” to Question 6, go on to Question 7.

7. What is the amount of special damages, if any, that you award to SCO as a result of Novell’s slander of SCO’s title to the UNIX copyrights?

\$ \_\_\_\_\_

**Novell’s Claim for Slander of title**

8. Did Novell prove by a preponderance of the evidence that SCO published a statement disparaging Novell’s title to the UNIX copyrights?    \_\_\_Yes    \_\_\_No

9. Did Novell prove by a preponderance of the evidence that SCO’s statements were false?    \_\_\_Yes    \_\_\_No

10. Did Novell prove by clear and convincing evidence that SCO made the statements with constitutional malice?    \_\_\_Yes    \_\_\_No

11. Did Novell prove by a preponderance of the evidence that SCO’s publication caused Novell special damages?    \_\_\_Yes    \_\_\_No

**12.** Did Novell prove by a preponderance of the evidence that SCO was not privileged to publish the slanderous statements?    \_\_\_ Yes    \_\_\_ No

If you answered “Yes” to all of Questions 8-12, then you must determine that SCO slandered Novell’s title to the UNIX copyrights. You must answer “Yes” to Question 13 below.

If you answered “No” to any of Questions 8, 9, 10, 11, or 12, then you must determine that SCO did not slander Novell’s title to the UNIX copyrights. You must answer “No” to Question 13 below.

**13.** Did SCO slander Novell’s title to the UNIX copyrights?    \_\_\_ Yes    \_\_\_ No

If you answered “yes” to Question 13, go on to Question 14.

**14.** What is the amount of special damages, if any, that you award to Novell as a result of SCO’s slander of Novell’s title to the UNIX copyrights? \$ \_\_\_\_\_

DATED this \_\_\_\_ day of March, 2010

\_\_\_\_\_  
Foreperson

DATED: March 24, 2010

Respectfully submitted,

By: /s/ Sterling Brennan  
WORKMAN NYDEGGER

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