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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91122524
Party	Defendant Wayne R. Gray
Correspondence Address	DAVID L. PARTLOW DAVID L. PARTLOW P.A. P.O. BOX 82963 TAMPA, FL 33682-2963 UNITED STATES
Submission	Motion to Reopen
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Signature	/David L. Partlow/
Date	04/08/2011
Attachments	MOT TO RESUME Exhibit No. 21.pdf (6 pages)(1965673 bytes) MOT TO RESUME Exhibit No. 24.pdf (10 pages)(545586 bytes) MOT TO RESUME Exhibit No. 25.pdf (19 pages)(179666 bytes) MOT TO RESUME Exhibit No. 26.pdf (4 pages)(182623 bytes)

EXHIBIT No. 21

7123930

THE UNITED STATES OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL COME:

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office

May 04, 2008

THIS IS TO CERTIFY THAT ANNEXED IS A TRUE COPY FROM THE RECORDS OF THIS OFFICE OF THE TRADEMARK FILE WRAPPER AND CONTENTS OF:

TRADEMARK APPLICATION: *78/438,912*
FILING DATE: *June 21, 2004*

By Authority of the
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office

N. WILLIAMS
Certifying Officer

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, P. O. Box 1451 Alexandria, VA 22313-1451, on August 3, 2005.

Attorney for Applicant

TRADEMARK APPLICATION
Docket No.: 3412.3.1

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	The SCO Group, Inc.	)
Serial No.:	78/438,912	)
Filed:	June 21, 2004	) Trademark
Mark:	UNIX SYSTEM LABORATORIES	) Law Office) 105
International Class No.:	009	)
Trademark Attorney:	Anne Farrell	)

RESPONSE TO OFFICE ACTION

Commissioner for Trademarks
P. O. Box 1451
Alexandria, VA 22313-1451

Dear Sir:

The Applicant respectfully submits this paper in response to issues raised by the Examining Attorney in an Office Action mailed on February 3, 2005. In the Office Action, the Examining Attorney refused registration of the present application based upon a finding that Applicant's mark, "UNIX SYSTEM LABORATORIES" is likely to cause confusion with

Registration Nos. 1390593, 1392203, 1845474, and for the marks "UNIX" and "UNIXWARE" (herein "the cited registrations"). Additionally, the Examining Attorney also requested that the Applicant disclaim certain portions of the mark and amend the description of the goods. By this paper, Applicant respectfully responds to the issues raised in the Office Action. In light of this submission, Applicant's application should be passed on for publication.

I. DESCRIPTION OF THE GOODS

Applicant wishes to prosecute this application as multiple-class application. Please amend the above-referenced application to include the following identification of goods and services:

> Class 9
> "Computer software, namely, computer operating system software, computer language compilers, and translators; computer networking software; transaction processing software; graphical user interface software; computer graphics software; computer applications software; data management software; software development tools and environments; computers and computer hardware."
>
> Class 42
> "Providing web services, namely, providing web-based computer programs so that users or other web-based computer programs can dynamically interact with the web-based computer programs."

Applicant recognizes that the amended description of goods converts the present application into a "multi-class application." Accordingly, Applicants have enclosed a Credit Card Payment Form in the amount of three hundred seventy five dollars ($375.00) representing the additional filing fee. Of course, should there be any problems with the payment, the Commissioner is hereby authorized to charge any underpayment of the fees, or credit any overpayment, to Deposit Account Number 13-0763.

In light of these changes, Applicant submits that the description of goods/services is proper. Withdrawal of this objection is respectfully requested.

II. DISCLAIMER

Please amend the present application to include the present disclaimer:

> No claim is made to the exclusive right to use "SYSTEM LABORATORIES" apart from the mark as shown.

The above-recited disclaimer is submitted in response to the Examiner's request. Accordingly, withdrawal of this objection is respectfully requested.

III. LIKELIHOOD OF CONFUSION REJECTION

In the Office Action, the Examining Attorney refused registration of the present application based upon a finding that Applicant's mark, "UNIX SYSTEM LABORATORIES" for computer software is likely to cause confusion with Registration No. 1,390,593 for UNIX, Registration No. 1,392,203 for UNIX, Registration No. 1,845,474 for UNIXWARE and Registration No. 2,241,666 for UNIXWARE. Because an owner of these marks has now become part of Applicant, this trademark application should be passed on to publication.

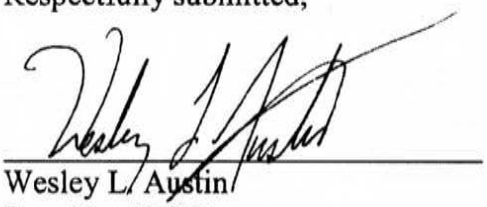
Registration No. 1,390,593 for UNIX had an owner of UNIX SYSTEM LABORATORIES. Registration No. 1,392,203 for UNIX had an owner of UNIX SYSTEM LABORATORIES. Registration No. 1,845,474 for UNIXWARE had an owner of UNIX SYSTEM LABORATORIES. Registration No. 2,241,666 for UNIXWARE had an owner of UNIX SYSTEM LABORATORIES. Because an owner of these marks (namely, UNIX SYSTEM LABORATORIES) has now become part of Applicant, this trademark application should be passed on to publication.

Because UNIX SYSTEM LABORATORIES is now part of the Applicant, this trademark should be sent on to publication. In 1992, Novell purchased UNIX SYSTEM LABORATORIES and all of the UNIX assets, including all trademarks owned by UNIX SYSTEM LABORATORIES. In 1995, The Santa Cruz Operation, Inc. purchased all of the UNIX assets from Novell. As part of the transaction, Novell assigned the UNIX and UNIXWARE trademarks to The Santa Cruz Operation. In 2001, The Santa Cruz Operation completed the sale of, inter alia, the UNIXWARE technologies to Caldera Systems, Inc. Caldera subsequently changed its name to The SCO Group. Because of this, the mark should be allowed to go on to publication.

IV. CONCLUSION

Based on the foregoing amendment and remarks, the Applicant respectfully asserts that Applicant's mark, "UNIX SYSTEM LABORATORIES", should be passed on for publication. If there remains any further impediment to registration that could be clarified in a telephone interview, the Examining Attorney is invited to initiate the same with the undersigned.

Respectfully submitted,



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Date: August 3, 2005

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EXHIBIT No. 24

Application for the initiation of proceedings pursuant to Article 3 of Regulation 17/62 to establish the existence of infringements of Articles 85 and 86 of the Treaty of Rome

filed by

The Santa Cruz Operation, Inc.

on

31st January, 1997

CONFIDENTIAL VERSION

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THE SANTA CRUZ OPERATION, INC.'S COMPLAINT AGAINST MICROSOFT CORPORATION

This is an application respectfully submitted by The Santa Cruz Operation Inc. ("SCO") under Article 3 of Council Regulation No. 17 of 1962 that the Commission should by decision find that the Agreement made between the Microsoft Corporation ("Microsoft") and AT&T in January 1987 contains restrictions on competition which infringe Articles 85 and 86 and thereupon order the parties thereto to bring such infringements to an end. A copy of this agreement is attached as Annex 1.

1. THE UNDERTAKINGS

1.1 SCO is a software company headquartered in Santa Cruz, California, which is located forty kilometres south of the Silicon Valley. SCO has subsidiaries located in France, Germany, Italy and the UK and employs well in excess of 400 people in the European Union In addition to sales offices located in France, Germany, Italy, the UK, Spain, Denmark, and Sweden, it maintains significant research and product development facilities in Watford, Cambridge and Leeds in the UK.

1.2 As described in more detail below, SCO's principal products consist of UNIX based operating system software designed to run on PCs which utilise Intel processors. SCO's yearly turnover for the financial year 1995 was approximately $200 million with approximately $93 million generated in the EU.

1.3 SCO also maintains significant customer relations within the EU selling to distributors, value added resellers and OEM.

1.4 Microsoft is well known to the Commission. It is the world's largest vendor of computer software and one of the most profitable undertakings in the computer industry. Its 1996 worldwide turnover was $ 8.7 billion which earned Microsoft a profit, after taxes of $ 2.2 billion.

1.5 In 1980 Microsoft licensed from another company a PC operating system which it modified and introduced in 1981 as the Microsoft Disk Operating System ("MS-DOS"). Since the mid-1980's, it has been the world's largest vendor of operating systems for PCs (and in particular Intel PCs, as defined below). More than 170 million PCs worldwide employ Microsoft operating systems.

1.6 Microsoft's PC operating system products currently consist of DOS, Windows 3.1x, Windows 95 and Window NT.

2. THE PRODUCTS

2.1 SCO's principal product is "SCO OpenServer" ("SCOOS"). SCOOS is a PC operating system based upon UNIX which is designed to operate on computers employing Intel processors. Intel processors and compatible processors which conform to the Intel instruction set (so-called Intel "clones" such as those offered by AMD and Cyrix) comprise the vast majority of the PC

market. Approximately 90% of all PCs utilise such Intel or Intel clone processors (we refer to both PCs using Intel processors and PCs using Intel clone processors as "Intel PCs").

2.2 UNIX is an operating system originally developed by AT&T thirty years ago for what were then known as minicomputers. From its inception, UNIX was promoted as a non-proprietary "open operating system" and was freely licensed by AT&T throughout the computer industry. Unlike proprietary operating systems which were unique to particular hardware vendors such as IBM's MVS or Digital Equipment's VMS, UNIX was offered by many different hardware vendors and afforded the customer a degree of freedom to migrate among these different hardware platforms, which used UNIX as the operating system thus permitting existing UNIX applications to be retained with only small changes. As it has evolved, UNIX has become an extremely advanced operating system providing true multitasking (that is, allowing the processor to work on more than one program at a time); multiple user capabilities (allowing multiple users to access a single processor), tight security (allowing different classes of users to a single computer different degrees of access), advanced networking and communication capabilities; and robustness (low rates of failure or system crashes). Indeed, UNIX was the program standard around which the Internet was originally developed.

2.3 SCOOS adapts UNIX, originally developed for large systems, and enables it to function as the operating system for an Intel PC.

2.4 SCO also offers a second UNIX based PC operating system known as "UnixWare". Like SCOOS, UnixWare brings UNIX to the Intel PC platform. SCO acquired the rights to UnixWare in a recent transaction with Novell, the original developer of the program. Because SCOOS and UnixWare have certain differences between them, SCO has plans to merge the two operating systems into one program known currently by the code name "Gemini".

2.5 Sun Microsystems has sub-licensed UNIX from Microsoft. Using its sub-licence it also offers a UNIX for Intel PC operating system known as "Solaris X86". Solaris X86 has differences when compared to SCOOS and UnixWare such that a user of Solaris X86 has no assurance that an application program developed for it will operate with SCOOS or UnixWare.

2.6 SCOOS and UnixWare thus compete with the other operating systems offered on the market for Intel PCs including Windows 95, Windows 3.1, Windows NT, Solaris X86 and Novell's NetWare.

3. THE MICROSOFT LICENSES

3.1 SCO's rights to create, distribute and sell UNIX software code at the time it developed SCOOS were acquired through a license chain from (i) AT&T to Microsoft (wherein AT&T as the new owner of UNIX granted a license for UNIX to Microsoft) and then (ii) Microsoft to SCO. Microsoft's original rights to UNIX were thus acquired through its non-exclusive sub-licensable license from AT&T. Pursuant to its license from AT&T, Microsoft had adapted UNIX to function on Intel PCs, naming the resulting program "XENIX". XENIX is thus a derivative work of UNIX. Later, in 1987 as a result of the agreement made that year between Microsoft and AT&T, which is described in Section 4 below, Microsoft developed another version of UNIX for Intel PCs using 386 processors based upon the then current release of UNIX, System V, and XENIX known as "System V/386 Rel. 3.2". System V/386 Rel. 3.2, also a derivative work of UNIX, depended upon AT&T's UNIX license to Microsoft.

3.2 In 1988, Microsoft granted SCO a license to use System V/386 Rel. 3.2. Under this license agreement (a copy of which is attached as Annex 2), SCO was permitted to copy System V/386 Rel. 3.2, which largely consisted, of course, of UNIX code, and to modify that code, without restriction, into new products. Under the terms of this 1988 Agreement, SCO has to pay Microsoft a royalty for products sold under the Agreement.

3.3 SCOOS now contains the many additions and improvements which have been made over the years to the System V software originally licensed to SCO by Microsoft. Among other things, SCO has undertaken the major task of adapting the System V code to function with modern Intel processors. XENIX and System V/386 Rel. 3.2 were 1987 vintage programs designed to permit UNIX to function with Intel 286 and 386 processors (both 16-bit processors). SCO has now written SCOOS to function with the Intel Pentium, a 32-bit processor, two generations more advanced than the processor for which System V/386 Rel. 3.2 was written. So fundamental are the changes made by SCO, that SCOOS dwarfs in size the System V/386 Rel 3.2 UNIX program licensed from Microsoft. Indeed, SCO's SCOOS contains nearly five times more code than the System V/386 Rel. 3.2. SCO has converted the program from a character based program to one employing a graphical user interface. In addition, SCO has added modern networking, Internet, and multiprotocol facilities, as well as security features and modern device drivers.

3.4 As a result of the chain of transactions described below, SCO has now acquired ownership of the UNIX program itself so that it no longer requires a license from anyone to produce UNIX products. In November 1989, AT&T, the original developer of the UNIX Operating System, had spun off the UNIX division as a separate company then known as UNIX System Laboratories, Inc. ("USL"). In June 1993, Novell, the vendor of the NetWare Operating System, acquired USL and hence became the owner of the UNIX program. In turn, in December 1995, Novell sold the ownership of UNIX to SCO. As a result, SCO now enjoys the right, as the owner of the UNIX program, to exploit that program without the necessity of a license from any other party. In particular, if SCO chooses to develop products based on UNIX, without any lines of Microsoft developed code, SCO will not have further need to license such products under the 1988 Agreement with Microsoft or pay royalties, thereunder, to Microsoft.

3.5 It is SCO's intention to develop a new highly advanced UNIX based operating system for the next generation of Intel processors. Currently, the most advanced Intel processor on the market is known as the "P6". This processor, now only at the start of its product life-cycle, is being sold in very small volumes at extremely high prices. Although they are not the most advanced processor chips currently offered for sale by Intel, various versions of the P5 processor, known as the "Pentium", account for overwhelming portions of current sales. Virtually all Intel PCs sold currently employ Pentium processors. Although SCO's new product, envisioned for the P7 processor, is technically speaking only one generation ahead of the P6, in reality it is two generations ahead of the main stream Intel PCs currently being sold. SCO's work to create the new UNIX for Intel's P7 based PCs will be a tremendous undertaking, which will involve thousands of man years of engineering time. The new product code, named "NGOS" (Next Generation Operating System), will be developed from the ground up, and will be based not upon XENIX or the SCO 1988 licensing agreement with Microsoft (System V/386 Rel. 3.2) but from UNIX itself which SCO now owns.

4. THE MICROSOFT/AT&T AGREEMENT

4.1 In 1987, Microsoft and AT&T entered into an agreement entitled "Development and License Agreement for Convergence of AT&T's UNIX® System V and Microsoft's XENIX® Operating System on Intel Microprocessors" (hereinafter the "1987 MS Agreement").

4.2 The overt objective of this agreement was to enable Microsoft to create a version of UNIX to run on the Intel 386 processor and to be compatible with 286 processors and programs written for the 286 PCs. However, the Intel 386 processor is now two generations behind the current main stream Pentium and is obsolete. It is in fact no longer sold. The 286 uses even older technology and has no commercial value at all. Few 286 PCs even remain in use. The resulting adaptation of UNIX to run on the Intel 386 was termed under the 1987 MS Agreement "Merged Product". The 1987 MS Agreement contemplated that both AT&T and Microsoft would sell the resulting Merged Product. In addition, it provided for the parties to develop future evolutions of the first Merged Product (the 386 version) for future releases of UNIX and for future generations of Intel processors. However, no such products were ever developed pursuant to the 1987 MS Agreement.

4.3 Notwithstanding the absence of evolution of the original Merged Product, the 1987 MS Agreement imposes significant restrictions on competition. It prohibits AT&T and its successors from selling any UNIX software for Intel processors, in either executable binary form or source code form which is not a Product under the 1987 MS Agreement for as long as the 1987 MS Microsoft Agreement remains in force.

4.4 The restriction on selling executable versions of UNIX for Intel PCs is found at paragraph 2(c) which reads:

> *(c) as to UNIX System Code, or a derivative work thereof, in Executable File form, after one year from acceptance of the Initial Merged Product. MS and AT&T shall, except as hereinafter provided, market and distribute only Binary Compatible Product for Intel Microprocessor Based General Business Computer Systems.*

"Binary Compatible Product" is defined in the Agreement as a "Product" which, in turn, is defined as the "Merged Product" or derivative works thereof which are governed by the 1987 MS Agreement. Binary Compatible Products are also required to run and support a listed group of application programs written for 286 Intel processor machines.

4.5 The restriction on source code distribution is similar and found at paragraph 2(d):

> *(d) After ninety (90) days from acceptance of the initial Merged Product, any source code license granted by AT&T for UNIX System Code for an Intel Microprocessor, or any source code license granted by MS for a derivative work of UNIX System Code for an Intel Microprocessor, shall be for Product only. Source code licenses granted by either party prior to the ninety first (91st) day after acceptance of the Initial Merged Product shall continue in full force and effect.*

Again, "Product" is a defined term in the Agreement which covers the "Merged Product" and derivative works thereof.

4.6 As a consequence of these restrictions, AT&T and its successors are prevented from offering any UNIX product for Intel PCs that is not based upon the original Microsoft "Merged Product" developed under the 1987 MS Agreement and that is not "Binary Compatible." That is to say, these restrictions compel AT&T and its successors to sell only Merged Product or derivative works based upon the 1987 Merged Product for so long as the contract remains in force and to ensure that it is Binary Compatible and capable of supporting old 286 application software.

4.7 The consequences of these restrictions on competition are enormous. First, they stifle innovation in the development of new forms of UNIX for Intel PCs free of the structures, facilities and code created for 16 bit processors and application programs no longer being sold and which are as many as five generations behind the 64 bit P7. Incorporating these facilities in a program is both unnecessary and costly. Indeed, some of the programs required to be supported have not been sold for nearly a decade. Second, they compel the payment of royalties to Microsoft where none is needed or deserved. Under the Agreement, Microsoft was to be paid a $15 per copy royalty for each copy of a program covered by the Agreement which was sold by AT&T or its downstream licensees. By restricting competition in the development and sale of an alternative UNIX based Intel PC program, Microsoft ensured that all such software would be subject to a royalty payable to it. In effect, the provision operates like the per processor license agreements which were the subject of the Commission's earlier proceedings against Microsoft. The 1987 MS Agreement forces use of obsolete and redundant Microsoft code in circumstances where it is neither needed nor desired and it provides Microsoft with a royalty for an unnecessary product. Of course, the technical means to develop a new independent UNIX for Intel PC programs have been available at all times; the restriction on pursuing that course ensures that all such software remains under Microsoft's control.

4.8 The anti-competitive effect of these restrictions is magnified by the term provisions of the Agreement which keep the Agreement in force, and thus the restrictions and royalty provisions in force, until such time as neither party (AT&T and its successors or Microsoft) has commercially released a new generation product for a new Intel processor or new release of UNIX for a period of two years. The 1987 MS Agreement in every practical respect is thus everlasting. It will continue with its restrictions in force under its express terms forever unless both parties have failed to offer products for new Intel processors or new variations of UNIX. Under the terms of this provision, if AT&T's successors wished to be released from the 1987 MS Agreement, they would be required to forego offering new products to meet the market for two years. Such a two year hiatus in the offer of new UNIX software products for new Intel processors or new releases of UNIX is in all commercial respects equivalent to termination of business. In the electronics business products must advance continually or they will be spurned by the market.

4.9 Microsoft's 1988 Agreement with SCO does not affect the issues concerning the anti-competitive restraints created by the 1987 MS Agreement. Because it has acquired ownership of the copyright to UNIX from AT&T, SCO should be free to develop new UNIX based works without the necessity of a license from anybody. The 1988 license between Microsoft and SCO is no longer commercially viable as a basis for SCO to develop new UNIX products since paying a royalty to Microsoft to obtain UNIX rights free of development restraints is, in effect, a double payment: SCO owns UNIX, has paid for such ownership and would be placed at a competitive disadvantage were it to nonetheless proceed under a royalty bearing license that it does not need.

The only effect of the continued enforcement of the restraints in the 1987 MS Agreement is to place Intel PC UNIX products at a competitive disadvantage when compared to Windows 95 and Windows NT. Whereas Microsoft is free to innovate and change its Windows product line as it sees fit and price them as it chooses, the copyright owner of UNIX is required to include unnecessary features for a common product that no longer exists and bear a royalty charge for the required inclusion of such features.

For these reasons the 1987 MS Agreement can be distinguished from the X/Open Group case[2] where the Commission's decision to exempt an agreement which sought to establish an open industry standard was based largely on the benefits which flowed to the consumer from the notified agreement. Unlike the 1987 Microsoft Agreement, the X/Open agreement merely allowed the competitive undertakings to develop a common, standard product. There were no restraints which prevented the parties from developing products outside the agreement.

(2) The forced royalty payment

The terms of the 1987 MS Agreement compel the payment of royalties to Microsoft for the use of Microsoft code which SCO does not desire to use. Under the Agreement, Microsoft was to be paid a $15 per copy royalty for each copy of a program covered by the Agreement which was sold by AT&T or its downstream licensees. By restricting competition in the development and sale of an alternative UNIX based Intel PC program, Microsoft ensured that all such software would be subject to a royalty to it. Of course, the technical means to develop a new independent UNIX for Intel PC program[s] have been available at all times but the restriction on pursuing that course ensures that all such software remains under Microsoft's control.

The principle that royalties should only relate to products which a licensee desires to use in order to gain some form of advantage was alluded to in the **Windsurfing International Decision**[3] where the Commission made the following statement:

> *"If the calculation of royalties, when payable on the basis of individual sales, is not linked to the products covered by the licensed invention, there is a danger of the licensee's production, as compared with that of competitors, having to bear costs for which the licensee is not compensated through the advantages conferred by exploitation of the product."*

Although this statement refers to the method used by Windsurfing International for calculating the royalties, the principle is clear that the royalties must relate to the advantages conferred by exploitation of the product so that a party is not hindered by unnecessary costs not faced by competitors. SCO believes that the 1987 MS Agreement breaches this principle in two ways. First, there are no current advantages to using the Microsoft code in UNIX products. Indeed, as explained at Paragraph 8.1.1(1) above, the forced inclusion of the Microsoft code in UNIX products is a technical liability, and secondly, the royalty of US$ 15/copy charged to publishers of UNIX products for a "product" which brings with it no advantage (i.e. Microsoft code), is not one borne by developers of products competing with the UNIX operating system. Indeed, there is one competitor to UNIX operating systems, Microsoft, which rather than being hindered by the forced royalty, is the beneficiary of its income.

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2 OJ 1987 L35/36 [1988] 4 CMLR 542

3 OJ 1983 L229/1 [1984] 1 CMLR 1

- A declaration that the existence of the 1987 MS Agreement strengthens Microsoft's dominance in Intel PC operating system market and is therefore abusive, which is further evidenced, as discussed above, by Microsoft's refusal/failure to waive the restrictive provisions of the 1987 MS Agreement on request; and that Microsoft should be enjoined from taking any action legal or otherwise to enforce the restrictive provisions of the 1987 MS Agreement.

SCO is at the disposal of the Commission to furnish any further information that it may require.

31st January, 1997
Brobeck Phleger & Harrison

31st January, 1997
Allen & Overy, Brussels

Santacru\nb08.doc

EXHIBIT No. 25

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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, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**SCO'S MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL** Civil No. 2:04 CV-00139 Judge Ted Stewart

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TABLE OF AUTHORITIES

Cases

Other Authorities

Plaintiff/Counterclaim-Defendant, The SCO Group, Inc. ("SCO"), respectfully submits this Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial.[1]

PRELIMINARY STATEMENT

The jury verdict in this case is the type for which Rule 50(b) and Rule 59 exist. The jury simply got it wrong: The verdict cannot be reconciled with the overwhelming evidence or the Court's clear instructions regarding the controlling law. The jury answered "no" to the single question: "Did the amended Asset Purchase Agreement transfer the UNIX and UnixWare copyrights from Novell to SCO?" We do not know whether the verdict resulted from misapprehension of the jury instructions, confusion about the meaning of prior judicial decisions that Novell read into the record for the ostensible purpose of challenging SCO's damages theory, Novell's persistent efforts to focus the jury on the old language of the Asset Purchase Agreement ("APA") which was replaced by a binding amendment, or other factors.

Whatever the explanation for the verdict, the evidence demonstrated that ownership of the UNIX and UnixWare copyrights is required for SCO to exercise the complete ownership rights in the UNIX and UnixWare technologies (including the source code) it acquired under the APA, and that the amended APA provides that such copyrights were transferred. That record compels judgment as a matter of law for SCO under Rule 50(b). At a minimum, the verdict is clearly against the substantial weight of the evidence, necessitating a new trial under Rule 59.

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[1] These motions and SCO's Proposed Findings on its claim for specific performance all relate to the ownership of the UNIX and UnixWare copyrights. SCO believes the appropriate order of consideration is for the Court first to decide the Rule 50(b) motion which, if granted, would set aside the jury determination on ownership of the copyrights as a matter of law; if that were not granted, to consider SCO's alternative motion for a new trial under Rule 59; and if neither of these post-trial motions were granted, to determine SCO's claim for specific performance to receive transfer of the UNIX and UnixWare copyrights at this time.

Amendment No. 2, together with the APA, means that SCO acquired the copyrights "required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies." The Tenth Circuit's opinion supports that reading, and at trial the chief negotiator and sole drafter of the Amendment for Novell admitted it. There is no reasonable interpretation of Amendment No. 2 to the contrary. For a variety of reasons, it stretches reason beyond the breaking point to characterize the Amendment as merely "affirming" that SCO had received some sort of "license" under the APA. In the hundreds of pages of agreements, press releases, SEC filings, letters, and other contemporaneous documentation, there is not one word of a license from Novell to SCO for use of the UNIX and UnixWare copyrights.

The evidence further demonstrated beyond any reasonable dispute that the UNIX and UnixWare copyrights were required for SCO to exercise its full ownership rights with respect to the UNIX and UnixWare technologies. The evidence in SCO's favor on this obvious point is overwhelming. The UNIX and early UnixWare technology lies at the heart of SCO's subsequent versions of UnixWare, including the current version of UnixWare. Without copyright ownership SCO cannot assert rights or bring suit to protect that technology against misuse by third parties, and without the ability to protect the technology, SCO cannot maintain its UNIX business or exercise the full ownership rights to exploit, develop, and defend the core UNIX source code. While SCO could physically continue to sell its UnixWare and OpenServer products without copyright ownership, SCO could not fully maintain its UnixWare business without the ability to enforce the copyrights in the core UNIX technology.

In addition, SCO indisputably acquired "[a]ll of Seller's claims arising after the Closing Date against any parties relating to any right, property or asset included in the Business." (APA Schedule 1.1(a), Item II.) SCO thus acquired, among other claims, all of the claims, which

Novell otherwise would have, relating to the use or misuse of the UNIX and UnixWare source code – including all copyright claims concerning that source code. The law requires that SCO own the UNIX and UnixWare copyrights to prosecute such claims.

At a minimum, the verdict is clearly against the weight of the evidence. While there was some evidence by Novell witnesses to the contrary, the significantly more substantial and more persuasive evidence was that in the sale of a software business and source code, the parties did not agree that the seller could withhold the copyrights reflecting ownership of that source code. The business negotiators agreed that the parties intended for SCO to acquire the copyrights, and the course of performance after the APA was signed confirms that intent. An exclusion of the copyrights in the original APA nevertheless resulted, from either a mistake (negotiators who understood the exclusion to refer solely to Novell's NetWare copyrights) or a last-minute, overzealous decision between Novell's general counsel and its outside counsel (who admitted that they never asked the business negotiators whether any such exclusion was part of the deal). Regardless, Amendment No. 2 replaced the exclusion, and it did not merely preserve a status quo in which SCO had acquired some sort of "license."

ARGUMENT

I. SCO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

Rule 50 requires that the verdict be set aside if there was not a "legally sufficient evidentiary basis" for a "reasonable jury" to have reached that verdict. Fed. R. Civ. P. 50(a)(1). Rule 50 is satisfied where the "evidence points but one way," Wagner v. Live Nat'l Motor Sports, Inc., 586 F.3d 1237, 1244 (10th Cir. 2009), or "the evidence so overwhelmingly favors the moving party as to permit no other rational conclusion," Shaw v. AAA Eng'g & Drafting, 213 F.3d 519, 529 (10th Cir. 2000); see, e.g., Vanmeveren v. Whirlpool Corp., 65 Fed. Appx. 698, 700-01 (10th Cir. 2003); J.I. Case Credit Corp. v. Crites, 851 F.2d 309, 311-16 (10th Cir.

1988). At the close of all the evidence, SCO moved for judgment on its claim to copyright ownership under Rule 50(a) on the grounds that ownership of the copyrights was required for SCO to exercise its rights in connection with its acquisition of the UNIX and UnixWare technologies, and now renews the motion under Rule 50(b) because the verdict cannot be squared with the overwhelming evidence and the law.[2]

A. SCO Acquired the Copyrights Required to Exercise SCO's Ownership Rights in the UNIX and UnixWare Technologies It Acquired.

The only reasonable interpretation of Amendment No. 2 – an interpretation that Novell's own negotiator of the Amendment adopted at trial – is that SCO acquired all copyrights "required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies."

SCO acquired the "Business" of developing, licensing, and supporting UNIX and UnixWare software products, including the sale of both source and binary code licenses. (Ex. 1 (APA), Recital A.) The APA effectuated that asset transfer by specifying a schedule of transferred assets, Schedule 1.1(a) (the Assets Schedule), and a schedule of excluded assets, Schedule 1.1(b) (the Excluded Assets Schedule). (Id. § 1.1(a).)

The Assets Schedule covers copyrights by providing for the transfer of "All rights of ownership" in, among other things, the source code for all then-extant versions of UNIX and UnixWare. While the language of the Excluded Asset Schedule originally excluded all

[2] On March 26, 2010, the day the jury received the case, the Court denied SCO's Rule 50(a) motion as "moot." While that would have been true of a motion directed to Novell's slander of title claim, SCO's Rule 50(a) motion was directed to SCO's claim relating to copyright ownership (the sole question on which the jury returned a verdict). The motion may now be renewed under Rule 50(b). If granted, the motion would then require a new trial limited to whether slander of title occurred and whether (and to what extent) SCO suffered damages.

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copyrights from the transferred assets, that language was replaced by Amendment No. 2. Item I of Schedule 1.1(a) identifies the full scope of the transferred assets as consisting of:

> All rights and ownership of UNIX and UnixWare, including but not limited to all versions of UNIX and UnixWare and all copies of UNIX and UnixWare (including revisions and updates in process), and all technical, design, development, installation, operation and maintenance information concerning UNIX and UnixWare, including source code, source documentation, source listings and annotations, appropriate engineering notebooks, test data and test results, as well as all reference manuals and support materials normally distributed by Seller to end-users and potential end-users in connection with the distribution of UNIX and UnixWare, such assets to include without limitation the following:

Item I then proceeds to identify by name or reference all UNIX and UnixWare source code products and binary products.

As the Tenth Circuit recognized in its decision remanding the case for trial, the specific, catch-all phrase "All rights and ownership of UNIX and UnixWare" includes the copyrights of UNIX and UnixWare – the core intellectual property on which the UNIX and UnixWare licensing business depends. The SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1213-14 (10th Cir. 2009). A transfer of "all right, title and interest to computer programs and software can only mean the transfer of the copyrights as well as the actual computer program or disks." Shugrue v. Cont'l Airlines, Inc., 977 F. Supp. 280, 286 (S.D.N.Y. 1997) (emphasis added); see also ITOFCA, Inc. v. Megatrans Logistics, Inc., 322 F.3d 928, 931 (7th Cir. 2003) (transfer of "all assets" to a business includes copyrights); Relational Design & Tech., Inc. v. Brock, No. 91-2452-EEO, 1993 WL 191323, at *6 (D. Kan. May 25, 1993) (transfer of "all rights" in a program includes copyrights). In addition, the "without limitation" language makes clear that the list of Items that follow in the Assets Schedule is non-exhaustive. Where copyrights are one of the "rights and ownership" of UNIX and UnixWare covered by Item I of Schedule 1.1(a), such copyrights need not have been expressly included under the intellectual property subheading in

Item V of the Schedule. When Novell and SCO agreed to remove the language excluding copyrights from the APA by executing Amendment No. 2, the effect was that copyrights were included under "rights and ownership" in the Assets Schedule, as the Tenth Circuit indicated. SCO, 578 F.3d at 1213-14 ("[A]ny change to the set of Excluded Assets in Schedule 1.1(b) necessarily implicated those copyrights actually transferred under Schedule 1.1(a).").

The inclusion of copyrights in the sale of the source code is logical. Indeed, it is difficult to comprehend that a party would or could transfer "all rights and ownership of" source code while retaining the copyrights. In a licensing arrangement, the licensor does not transfer all rights and ownership of the source code. Here, where Novell sold "all" ownership, it logically follows that the copyright ownership would be included in the sale. This common-sense proposition is reflected in the testimony of numerous witnesses, addressed below, who spoke to what they saw as the obvious inclusion of copyrights in the sale of the UNIX and UnixWare source code. Indeed, the only alternative interpretation that Novell offered at trial – that Amendment No. 2 "affirms" that SCO obtained a "license" to copyrighted material that SCO requires – finds no support in the plain language. As the Tenth Circuit observed: "Whatever the Amendment means, it refers to the ownership of copyrights, not to licenses." SCO, 578 F.3d at 1216 (emphasis added).

With respect to the extrinsic evidence, moreover, Novell's own chief witness for and negotiator of Amendment No. 2 ultimately acknowledged that copyrights that are required for SCO to exercise its rights in the UNIX and UnixWare technologies it had acquired were transferred, not licensed, to SCO. Alison Amadia confirmed on cross-examination that "if there are copyrights that are required for SCO to exercise its rights, like the UNIX and UnixWare

trademarks, they were transferred." (2177:15-18 (emphasis added).)[3] Ms. Amadia's testimony is consistent with Novell's official position, as expressed in a press released dated June 6, 2003, that the ownership of required copyrights "did transfer" to SCO under the amended APA. (Ex. 97 (emphasis added).)[4]

Meanwhile, SCO's negotiator and general counsel Steve Sabbath testified that "the intent was clearly to me that all the copyrights for the UNIX and UnixWare were to be transferred to Santa Cruz Operation" and that the Excluded Asset Schedule was intended to exclude the Netware copyrights. (900:23-901:9.) Mr. Sabbath further testified that SCO "bought the UNIX business from Novell, all copyrights pertaining to that business came with the product. Amendment Number 2 was meant to confirm that." (911:6-14.) Even Ms. Amadia acknowledged that Mr. Sabbath told her that the copyrights had been excluded as a result of a "typographical error in the original APA" that required correction. (2184:25-2185:1.)[5]

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[3] Indeed, to give Amendment No. 2 a contrary interpretation the jury would had to have ignored the evidence – as to which there is no contrary evidence – that the Amendment confirmed the transfer of the UNIX and UnixWare trademarks by referring to them as ones "required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies." (2176:5-24 (Amadia); 2177:25-218:18 (Amadia).) Where Amendment No. 2 changes the APA to make no distinction between trademarks and copyrights, and where Novell admitted that the trademarks referenced in Amendment No. 2 were not being licensed, but were in fact transferred, no reasonable juror could conclude that the same language used to describe the copyrights could mean something different.

[4] Novell subsequently tried to change its position and argued that Amendment No. 2 gave SCO the right to acquire copyrights if it could demonstrate that such copyrights were required. (Ex. 105.) That revised position is one basis for SCO's alternative claim for specific performance.

[5] Ms. Amadia's testimony about what Mr. Sabbath told her at the time is consistent with Mr. Sabbath's deposition testimony as opposed to the IBM declaration that Mr. Sabbath stated did not accurately reflect his testimony. (927:14-25 (Sabbath); 928:19-929:2 (Sabbath)), and that is not affirmative evidence in any event.

focuses on whether the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence." Black, 804 F. 2d at 362.

A district court therefore may weigh evidence and consider the credibility of witnesses when exercising its broad discretion to determine whether a new trial is warranted. Tanberg v. Sholtis, 401 F.3d 1151, 1160 (10th Cir. 2005); see, e.g., Caruolo v. John Crane, Inc., 226 F.3d 46, 54 (2d Cir. 2000) ("Unlike a motion for judgment as a matter of law, a motion for a new trial may be granted even if there is substantial evidence to support the jury's verdict."); Giles v. Rhodes, 171 F. Supp. 2d 220, 229 at n.5 (S.D.N.Y. 2001) (trial judge may consider "credibility and the weight of the evidence"). In addition, after a long and complicated trial such as this, a trial judge should be especially vigilant in examining the verdict. See, e.g., Siemens Med. Solutions USA, Inc. v. Saint-Gobain Ceramics & Plastics, Inc., 615 F. Supp. 2d 884, 899 (N.D. Iowa 2009).

A. SCO Acquired the UNIX and UnixWare Copyrights.

SCO's request for a new trial incorporates not only all of the points set forth in Section I above, but also the overwhelming weight of the evidence, summarized below, that a transfer of copyrights was intended.

1. The Intent of the Negotiators and Principals Regarding the APA.

A total of ten witnesses – including multiple witnesses from each of the SCO and Novell sides of the transaction – testified to their intent and understanding that Novell had sold and Santa Cruz had acquired the UNIX and UnixWare copyrights under the APA:

- Novell President and CEO Robert Frankenberg. Mr. Frankenberg testified that it was the intent at the beginning of the transaction, throughout the transaction, and when the transaction closed, to sell the copyrights in UNIX and UnixWare and to exclude the NetWare copyrights because Novell was retaining the Netware business. (176:9-177:3; 2558:17-2559:7.) He also testified that no other member of his board of directors had the authority to negotiate a deal apart from what the executives had

negotiated across the table from SCO. (178:4-11.) And he testified that Messrs. Tolonen, Bradford, and Braham had no authority to decide whether copyrights would be part of the deal, as the deal had already been negotiated with SCO before those individuals even began their involvement in the process of documenting the deal. (2541:18-2542:4.)

- Novell Senior Vice President Duff Thompson. Mr. Thompson testified that Novell told SCO that it was selling all of the UNIX and UnixWare business "lock, stock and barrel, the whole thing" including the copyrights. (230:15-231:13.) He further testified that he never asked the attorneys documenting the deal from Novell's end to change the deal so that the UNIX and UnixWare copyrights would be retained. (233:1-15.)

- Novell Senior Director and Chief Negotiator Ed Chatlos. Mr. Chatlos testified that he participated in the face-to-face negotiations with SCO, including weekly travel from New Jersey to California for three months. (351:2-7.) He testified that "the deal with SCO was to include the copyrights" for UNIX and UnixWare and to exclude the copyrights for the Netware business that Novell was not selling, and that he understood Schedule 1.1(b)'s original exclusion of copyrights to be referring to the NetWare copyrights. (352:5-17; 359:20-362:3.) He further testified that holding back the UNIX and UnixWare copyrights would have been inconsistent with the directives he was given by Mr. Thompson and the directives and authority given to the lawyers documenting the deal. (354:16-355:5.) Mr. Chatlos also testified that the deal he negotiated included the UNIX and UnixWare copyrights and that changing the deal to exclude the copyrights "would have been unethical." (354:16-355:5.)

- Novell Vice President of Strategic Relations Ty Mattingly. Mr. Mattingly testified that during the months of negotiations that he attended, no one from Novell ever suggested that Novell was retaining the UNIX and UnixWare copyrights and that the copyrights the parties intended to withhold were the Netware copyrights for the Netware business that Novell was retaining. (677:5-13; 690:18-22.)

- Novell In-House Counsel Burt Levine. Mr. Levine was involved in review of the very asset schedules that originally included language excluding copyrights. He testified that that language did not reflect Novell's intent and that, under the APA, SCO "obtained a full right, title and interest in ownership" in UNIX and UnixWare that "would automatically convey the copyright along with the rest of the business assets." (522:3-14.) Indeed, he characterized the idea that Novell would sell the business while withholding the copyrights as not being "ethical." (521:17-522:2.)

- Santa Cruz President and CEO Alok Mohan. Mr. Mohan testified that the deal "absolutely" included the UNIX copyrights as part of the business that SCO was acquiring. (461:19-462:9.) Like Novell's own witnesses, he testified that SCO's understanding was that it was acquiring the business "lock, stock, and barrel." (464:4-19.) He testified that no one from Novell ever said to him prior to the execution of the APA that Novell intended to retain any UNIX or UnixWare copyrights. (467:24-468:6.)

- Santa Cruz Vice President of Business Development Jim Wilt. Mr. Wilt testified that it was his "intent on behalf of SCO to acquire, through the APA, Novell's entire UNIX and UnixWare business, including the UNIX and UnixWare source code and all associated copyrights" and that he believed that Novell's intent was to sell those assets and rights as well. (445:21-446:5.) He testified that if Novell had ever said that it was retaining the UNIX and UnixWare copyrights that would have been "extremely remarkable and probably would have ended the negotiations." (443:7-19.)

- Santa Cruz Assistant Negotiator Kimberlee Madsen. Ms. Madsen testified that it was SCO's intent to acquire the UNIX and UnixWare copyrights as part of the business and that it was her understanding and belief after the transaction was completed that SCO had acquired those copyrights. (783:3-784:4; 788:24-789:5; 814:24;815:3.) She also testified that Mr. Seabrook's report to the SCO board of directors never suggested that Novell had retained any UNIX or UnixWare copyrights. (788:5-8;788:20-23.) She further testified that no one from Novell had ever said that Novell would retain any UNIX or UnixWare copyrights. (783:3-784:4.) She further testified that during the 1996 dispute with Novell concerning its conduct with respect to IBM, Novell never asserted that it had retained ownership of the UNIX and UnixWare copyrights. (802:3-7.)

- SCO General Counsel Steve Sabbath. Mr. Sabbath testified that "the intent was clearly to me that all the copyrights for UNIX and UnixWare were to be transferred to Santa Cruz Operation" and that the Excluded Assets Schedule was intended to exclude the Netware copyrights. (900:23-901:9.) He further testified that when SCO "bought the UNIX business from Novell, all copyrights pertaining to that business came with the product. Amendment Number 2 was meant to confirm that." (911:6-14.)

- Santa Cruz Founder and Vice President Doug Michels. Mr. Michels testified that "of course" SCO bought the UNIX and UnixWare copyrights and that, had any of his executives suggested otherwise, he would have "laughed them out of [his] office." (501:1-18.)

Novell continued to argue through trial that much of the foregoing testimony was irrelevant and inadmissible, but that is contrary to the Tenth Circuit's decision, SCO, 578 F.3d at 1210-18, and this Court's rulings on motions in limine. (Order on Defendant's Motions in Limine 12 to 19, Docket No. 717.)

To be sure, Novell presented pieces of evidence at trial to support its version of events, but that evidence cannot overcome the overwhelming evidence in SCO's favor.

in Novell's own products, subject to certain limitations. (Ex. 162 (TLA) § II.) If Novell had retained the UNIX and UnixWare copyrights, it would not have needed any license-back to use the UNIX and UnixWare source code in Novell's own products. (See 107:23-108:1 (Frankenberg); 847:4-7 (Madsen).) Indeed, the evidence showed that Novell itself thinks that it is reasonable to read the TLA as inconsistent with a reading of the APA under which the UNIX and UnixWare copyrights were retained. (1965:4-1966:4 (LaSala).) The TLA also identified SCO as the "owner" of the Licensed Technology. (Ex. 162 (TLA) § III.)

Novell has suggested that the license-back was necessary because it would permit Novell to use in its products the technology in the "Merged Product" that SCO was to develop after the execution of the APA. But the TLA gives Novell a license-back to much more than just the source code in the Merged Product; it gives Novell such a license for the existing UNIX and UnixWare source code itself. (Ex. 1 (APA) § 1.6, Schedule 1.1(a) Item I; Ex. 162 (TLA) § II.A.) Where the APA refers to the TLA and vice versa and the two agreements are obviously related agreements (Ex. 1 (APA) § 1.6; Ex. 162 (TLA) § I), it would be unreasonable to read the amended APA in a manner that renders it inconsistent with the unambiguous terms of the TLA.

3. The Parties' Course of Performance.

In addition to the foregoing, a wealth of extrinsic evidence of the parties' course of performance prior to any litigation further demonstrated that SCO had acquired the UNIX and UnixWare copyrights. That course of performance is further compelling grounds for concluding that the parties intended for SCO to acquire the UNIX and UnixWare copyrights. The undisputed evidence at trial reflected the following facts of the parties' (and even third parties') "practical construction" of the amended APA:

- At Novell's direction, Novell's own engineers placed SCO copyright notices on source code for the existing versions of UnixWare – versions on which SCO had done

no work at all. (1727:19-25 (Nagle); 1733:9-25 (Nagle); Ex. 655; 1704:18-1705:7 (Maciaszek); 1723:14-20 (Maciaszek).) Novell also replaced the "Novell" copyright notice on the CD for the current version of the UnixWare product with a "Santa Cruz" copyright notice. (1725:1-1728:21 (Nagle); 1723:9-1736:17 (Nagle); Ex. 35.) Because SCO had done no additional work on UnixWare at the time Novell added the SCO copyright notices, these actions can only be understood as consistent with a change in ownership of the then-existing copyrights to UnixWare.

- The participants in the transition of the UNIX and UnixWare business from Novell to SCO – individuals who had not participated in the negotiations – understood SCO to have acquired the UNIX and UnixWare copyrights, including because no one ever suggested otherwise. (547:11-16 (Broderick); 1671:22-1672:18 (Maciaszek); 1676:17-20 (Maciaszek).) Novell presented no evidence that any such participants believed that Novell continued to own any such copyrights.[16]

- In sorting through the materials in its former offices to determine what to keep and what not to keep, moreover, Novell turned over to SCO the copyright registration certificates for UNIX and instructed its transition team to retain only materials pertaining to the businesses it was retaining, Netware and Tuxedo. (610:5-612:4 (Broderick).)

- In early 1996, Novell sent thousands of letters explaining that it had transferred to SCO Novell's "existing ownership interest in UNIX System-based offerings and related products," specifically identifying such products as including "All Releases of UNIX System V and prior Releases of the UNIX System" and "All UnixWare Releases up to and including UnixWare Release 2 (encompassing updates and upgrades to these releases as well." (586:4-15 (Broderick); Ex. 580.) In one such letter, which was co-signed by Novell and SCO, Novell further explained that "Novell's right as licensor under such agreements have been assigned to the Santa Cruz Operation" and that "the ownership of the UNIX operating system has been transferred from Novell, Inc. to the Santa Cruz Operation." (Ex. 751; 1682:23-1684:10 (Maciaszek); 1684:24-1685:7 (Maciaszek).)[17]

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[16] In fact the only testimony regarding the transition meetings reflected that Novell representatives told SCO that Novell had sold UNIX and that the copyright notices had to be changed. (548:10-17 (Broderick); 1704:18-1705:7 (Maciaszek); 1723:14-1728:21 (Nagle); 1732:12-1737:13 (Nagle); 1775:15-1776:16 (Nagle).) There was no evidence that Novell ever told anyone in these meetings that Novell was retaining any UNIX or UnixWare copyrights.

[17] Novell argued at trial that these letters did not need to tell customers about Novell's claimed copyright exclusion, but the evidence showed otherwise. In addition to the plain fact that Novell's assertion of ownership transfer would have been inaccurate if Novell had retained the copyrights, such an exclusion would have been relevant to customers. Mr. Maciaszek testified, for example, that among the "things a customer does need to know" is "who can enforce the copyrights in the contracts" that SCO now owned. (1710:8-22.)

- In concert with these letters, Novell representatives visited OEM licensees, including in Europe, to reiterate the statements in those letters and personally inform the licensees that "SCO had acquired all ownership rights in the business," without "any limitation ever." (1678:4-16 (Maciaszek); 1680:22-1681:22 (Maciaszek); 1684:4-17 (Maciaszek).)

- Novell, SCO, and IBM engaged in a protracted dispute and negotiation throughout 1996 regarding the scope of Novell's rights under the APA. SCO's evidence showed that Novell never contended that it owned the copyrights during that dispute, and Novell presented no evidence to the contrary. (802:3-7 (Madsen).)

- During the dispute among the three corporations in 1996, even IBM took the position that SCO could protect itself through its ownership of the UNIX copyrights, asserting that "SCO is protected by copyright." (Ex. 123.). SCO's evidence showed that Novell never contended otherwise, and Novell presented no evidence to the contrary. (802:3-13 (Madsen).)

- Just months after Amendment No. 2 was signed, SCO, through the law firm that had represented SCO in connection with the Novell/SCO APA, took the position in formal litigation against Microsoft Corporation in the European Union that SCO had acquired the UNIX copyrights and was the UNIX copyright holder. (807:3-811:20 (Madsen); Ex. 127 §§ 3.4, 4.9.) Novell presented no evidence to call into question the nature of SCO's assertions in that filing.

- In resolving the foregoing dispute, SCO entered into a settlement agreement with Microsoft in which SCO again stated that it had acquired the UNIX copyrights and was the UNIX copyright holder. (811:21-813:24 (Madsen).) The document states: "SCO has acquired AT&T's ownership of the copyright in the UNIX System V Operating System Program." (Ex. 199 Recital B.) Novell again presented no evidence to call into question the nature of SCO's assertion in that settlement.

All of this evidence is particularly relevant here because the parties' course of performance is the "best evidence" of the parties' contractual intent. SCO, 578 F.3d at 1217.

B. The Copyrights Are Required for SCO to Exercise Its Ownership Rights in the UNIX and UnixWare Technologies It Acquired.

There was a surfeit of specific testimony, such as set forth above, concerning SCO's need of the copyrights to run its UnixWare business. Mr. Frankenberg called it "ludicrous to think about selling software without selling the copyrights. If you don't have the copyrights, you don't have the ability to freely use what you bought." (2543:21-2544:3.) Similarly, Mr. Thompson testified that "[i]t is hard for me to imagine any instance in which we are selling them the entire

business, to go forward with this business in the future, without giving them the underlying intellectual property rights that they needed to do so." (241:19-242:3.) In a case where witnesses from both sides of the deal, with involvement in various aspects of the UNIX business, specifically testified that SCO required the UNIX and UnixWare copyrights to run its business and protect the intellectual property at the heart of that business, a jury verdict to the contrary simply cannot stand.[18]

CONCLUSION

SCO respectfully submits, for the reasons stated above, that the Court should grant SCO's motion for judgment as a matter of law or, in the alternative, grant SCO a new trial.

DATED this 27th day of April, 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

Counsel for The SCO Group, Inc.

[18] See, e.g., Broderick (666:9-21; 667:16-668:6) (SCO "would be out of business" if it couldn't protect its software "through copyrights"); Michels (502:24-503:14) (copyrights "so essential" to a software business they are "like breathing oxygen"); Wilt (442:15-443:6) (copyrights "such a fundamental part of an asset purchase that if you didn't have copyrights and such go along with it, there was no asset purchase"); Madsen (780:23-24; 802:23-803:1; 865:16-21; 866:18-21; 875:7-14; 884:21-885:21) (SCO "required all" the UNIX and UnixWare copyrights; copyrights "essential" to "protect and enforce [SCO's] intellectual property rights" in UNIX); Sabbath (913:1-15; 914:17-915:5) ("you would need all the copyrights and binaries and source code"); McBride (997:11-23) (ownership of the UNIX copyrights "absolutely" "required for SCO's business"); Maciaszek (1687:16-24) ("the copyrights are required to operate SCO's business"); Tibbitts (1844:25-1845:18) ("copyrights are critical for us to run the business that was purchased from Novell in '95, both the SCOsource business and the right to protect that core UNIX intellectual property").

EXHIBIT No. 26

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WAYNE R. GRAY,

Plaintiff,

v. CASE NO.:8:06-CV-01950-JSM-TGW

NOVELL, INC., and
THE SCO GROUP, INC., and
X/OPEN COMPANY LIMITED,

Defendants.

_____/

SCO'S RESPONSES AND OBJECTIONS TO GRAY'S FIRST SET OF REQUESTS FOR ADMISSIONS TO SCO

Pursuant to Rule 36 of the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Middle District of Florida, Defendant, The SCO Group, Inc. ("SCO"), hereby responds and objects to Plaintiff, Wayne R. Gray's ("Gray's"), First Set of Requests For Admissions, as follows:

GENERAL OBJECTIONS

1. SCO objects to Gray's definitions, instructions and requests for admission to the extent that they purport to require searches of files and the production of documents in the possession, custody, or control of any individual or entity other than SCO.
2. SCO objects to Gray's definitions, instructions and requests for admission to the extent that they seek to impose a burden or obligation beyond the scope permitted or authorized by the Federal Rules of Civil Procedure.

Request for Admission No. 22
Admit that at least one party to the "Confirmation Agreement" in admission request No. 20 above executed said agreement after September 1996.

Response to Request No. 22
SCO specifically objects to this request to the extent it seeks to require SCO to authenticate documents produced by Plaintiff and objects to this request because the document referred to in the prior request is not a copy of the "1996 Confirmation Agreement." SCO further specifically objects to this request as calling for a legal opinion or conclusion or an opinion on a mixed question of law and fact. Subject to and without waiving the foregoing general and specific objections, SCO denies that GRAY 004673 is a copy of the Confirmation Agreement.

Request for Admission No. 23
Admit that X/Open was not the UNIX marks owner or registrant prior to the 1996 "Confirmation Agreement".

Response to Request No. 23
SCO specifically objects to this request as calling for a legal opinion or conclusion or an opinion on a mixed question of law and fact. SCO further specifically objects to this request to the extent it seeks to require SCO to authenticate documents produced by Plaintiff. Subject to and without waiving the foregoing general and specific objections, SCO denies this request other than to state that the APA, as amended, the May 14, 1994 Novell-X/Open Trademark Licensing Agreement, and 1996 Confirmation Agreement speak for themselves.

Request for Admission No. 24
Admit that prior to November 1998 SCO used UNIX mark acknowledgements substantially similar to one or more of the following:

> Motif, OSF/1 and UNIX are registered trademarks and the 'X' Device and The Open Group are trademarks of the Open Group;
>
> Motif, OSF/1, UNIX, and the "X" Device are registered trademarks, and IT DialTone and The Open group are trademarks of The Open Group in the U.S. and other countries; and
>
> UNIX is the registered trademark of The Open Group.

(GRAY 004002, GRAY 004250, GRAY 004626, GRAY 004636, GRAY 004642, GRAY 004644, GRAY 004652, GRAY 004662, GRAY 004665)

Response to Request No. 58

SCO specifically objects to this request as calling for a legal opinion or conclusion or an opinion on a mixed question of law and fact. Subject to and without waiving the foregoing general and specific objections, SCO denies this request other than to state that the May 10, 1994 Novell-X/Open UNIX Trademark Relicensing Agreement, the APA, as amended, and the 1996 Confirmation Agreement speak for themselves.

Dated: June 20, 2007

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of SCO's Responses and Objections to Gray's First Set of Requests for Admissions to SCO was served on the following party by U.S. Mail, postage prepaid on June 20, 2007.

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George R. Coe