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

X/OPEN COMPANY LIMITED,

Opposer,

vs.

WAYNE R. GRAY,

Applicant.
_____/

Opposition No.: 91122524

Application Serial No.: 75/680,034

Mark: INUX

APPLICANT'S REPLY IN SUPPORT OF HIS COMBINED MOTION AND BRIEF TO RESUME OPPOSITION PROCEEDING AND RESET AND EXTEND THE SCHEDULE

For the reasons set forth below, Applicant Wayne Gray's ("Applicant" or "Mr. Gray") "Combined Motion and Brief to Resume the Opposition Proceeding and Reset the Schedule" filed with the Board on April 8, 2011 should be granted in its entirety.

X/Open Company Limited's ("X/Open") opposition to Mr. Gray's motion misrepresents the facts in the *Gray v. Novell et al* proceedings in the United States District Court for the Florida Middle District ("Florida Court") and United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"), misrepresents the new evidence in the case styled *The SCO Group, Inc. v. Novell, Inc.*, ("*SCO v. Novell*") Case No. 2:04cv00139, United States District Court for the Utah District ("Utah Court"), and includes patently false statements. X/Open was warned by the Florida Court of "sharp practice," but it apparently does not heed that warning in its opposition.[1]

ARGUMENT

A. X/Open argues that the Board should not resume this opposition proceeding until Attorneys' Fees award amount is determined.

That position is without merit because the *Gray v. Novell et al.* substantive proceedings in both the Florida Court and Eleventh Circuit are final, and the cases are closed. There is nothing currently in court preventing resumption and consideration of the new dispositive material evidence of X/Open's

[1] The Florida Court, in its December 13, 2009 oral hearing, warned X/Open, stating **"it really looks like sharp**

fraud upon the USPTO as to the UNIX and UnixWare trademark registrations, and as to Mr. Gray's counterclaims here, none of which was considered by these federal courts.

B. X/Open argues that discovery has closed in this proceeding.

X/Open's argument that discovery closed in these proceedings in 2005 is completely false. On February 24, 2005, prior to the close of discovery, the Board suspended this opposition proceeding, (Doc. 67 herein) pending disposition of Mr. Gray's motions to compel discovery from X/Open. That stay in this proceeding was never lifted.

C. X/Open, throughout this opposition, and in the federal actions, repeatedly mischaracterizes the September, 1996 "Confirmation Agreement."

Novell, Inc. ("Novell") and The SCO Group, Inc. ("SCO"), in their recent declarations and sworn jury trial testimony in *SCO v. Novell*, demonstrate that the September, 1996 "Confirmation Agreement" amounts to an agreement to commit fraud upon the USPTO.[2]

No matter how many times X/Open attempts to portray the Confirmation Agreement as confirming its trademark ownership, it does not. X/Open cannot change Novell's and SCO's sworn positions in *SCO v. Novell* that SCO and its successors (not Novell nor X/Open) have lawfully owned the UNIX trademarks since 1995 pursuant to a September 19, 1995 Novell-Santa Cruz Operation, Inc. ("SCO") UNIX Asset Purchase Agreement as amended by Amendment No. 2 on October 16, 1996 ("APA"). X/Open presents no evidence in this proceeding or to any court that the Confirmation Agreement, or any other document, modified that APA UNIX trademarks transfer. X/Open was not a party to the APA or the *SCO v. Novell* litigation, and it presents no evidence to challenge Novell's and SCO's consistent interpretation of the amended APA in their case documents and trial testimony. X/Open's attempts to insert its interpretation of the APA are conjecture and hearsay.[3]

UnXis, Inc. ("UnXis"), SCO's successor, now states it, not X/Open, lawfully owns the UNIX and UnixWare trademarks. SCO just completed the bankruptcy sale of its UNIX and UnixWare businesses to

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practice to me," hearing transcript at p.61, hereto in relevant part as Exhibit No. 27.

[2] The Confirmation Agreement also confirms SCO's UNIX trademark naked licensing to X/Open (SCO's abandonment of its licensor supervision) and SCO's willful UNIX trademark abandonment.

UnXis. In its April 11, 2011 official press release UnXis confirms it purchased the UNIX and UnixWare trademarks from SCO, stating the following:[4]

> Under the sale terms, UnXis retains all customer contracts, the rights to the UNIX and UNIXWARE trademarks and installed base of over 32,000 customer contracts….

The Florida Court, in its February, 2009 Order, mostly relied on the 1996 CA, and in ruling for X/Open characterized *Gray v. Novell et al* as a simple contract case. The Florida Court did not rule on any of Mr. Gray's trademark-related counterclaims that are before the Board and based on U.S. trademark law, did not consider the APA, and did not have before it and thus did not consider new material evidence that includes, among others, the March, 2010 trial testimony in *SCO v. Novell*.

The Florida Court never stated that Mr. Gray's fraudulent conspiracy claims as to UNIX trademark ownership were "baseless," and in fact stated the opposite in a February, 2010 Report and Recommendation. The Florida Court recognized the Utah Court's statements of APA UNIX trademark transfer supported Mr. Gray's claims as not groundless, that Mr. Gray presented a "Colorable" argument, and that his claims are in good faith. The Florida Court went further, stating there remains the question that 'if the APA did transfer the UNIX trademarks to SCO, how did Novell re-gain ownership after the 1995 APA transfer,' stating the following:[5]

> the basis of the plaintiffs Lanham Act claims - that X/Open was not the lawful owner of the UNIX trademark - has not been shown to be groundless. Thus, albeit a losing argument, the plaintiff asserted a colorable contention that the 1998 Deed of Assignment, which purportedly transferred the UNIX trademark from Novell to X/Open, was ineffectual because Novell had previously sold its rights in that mark to SCO in 1995, and the 1996 Confirmation Agreement did not legally transfer the rights back to Novell. (at pages 11-12, and emphasis added)
>
> ****
>
> X/Open does not refute the plaintiff's contention that, if the trademark passed to SCO

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[3] Herein "SCO" is used to identify Santa Cruz Operation, Inc. and its successor in interest The SCO Group, Inc.

[4] UnXis press release titled "UnXis Completes Purchase of SCO UNIX Assets" dated April 11, 2011, posted and available on its official website at - http://www.unxisco.com/2011/04/11/unxis-completes-purchase-of-sco-unix-assets/ (last viewed May 16, 2011), hereto as Exhibit No. 28.SCO identified the UnixWare trademarks as Intellectual Property it still owned in 2009 in Schedule 5.9(a) at pgs.2-3 titled "Registered Intellectual Property" to Doc.819 in its Delaware Dist. bankruptcy proceeding No. 07-11337, hereto in relevant part as Exhibit No. 29.

[5] "Court's Report and Recommendation" (Doc. 196 in *Gray v. Novell et al*, and adopted June 28, 2010), the Honorable Magistrate Judge Thomas G. Wilson, entered February 22, 2010, at pages 11 and 20-23, hereto as Exhibit No. 30.

> under the APA, the Confirmation Agreement did not satisfy Lanham Act requirements to transfer the UNIX trademark back to Novell (see Doc. 164). This is fatal to X/Open's argument that the plaintiff frivolously alleged that X/Open is not the owner of the UNIX trademark. Thus, because the plaintiff made a colorable argument that the UNIX trademark transferred from Novell to SCO pursuant to the APA, X/Open also had to establish as meritless the contention that the trademark was not legally transferred back to Novell. (emphasis added)
>
> ****
>
> There is no evidence that the plaintiff did not have a good faith belief in his Lanham Act claims. As discussed, the plaintiff identified with particularity the legal basis for his belief that the UNIX trademark chain of title was faulty and, although he did not prevail, X/Open has not shown that this contention was baseless. Furthermore, the Utah district court's statements that the trademark transferred to SCO under the APA, and acceptance of his case by two intellectual property attorneys, further gave the plaintiff reason to believe that his Lanham Act claims were not groundless.

D. X/Open argues that the March, 2010 *SCO v. Novell* jury trial testimony is out-of-context.

Fatal to X/Open's "jury trial testimony out-of-context" argument is that it is merely conclusory; it omits even one example. X/Open was not a party to the APA and, and yet it challenges Novell's and SCO's jury trial testimony positions that the amended APA transferred Novell's entire UNIX business, and the UNIX and UnixWare trademarks and associated goodwill to SCO; and that Novell was prohibited from remaining in or re-entering the UNIX business. More importantly, as Mr. Gray argues in his motion, there is no need for anyone to put the testimony of any trial witness into any context or interpret their positions, because the testimony transcripts speak for themselves. Pursuant to the amended APA, SCO, not Novell nor X/Open, lawfully owned the UNIX trademarks after 1995.

Novell and SCO never disputed and in fact repeatedly agreed to one overriding issue throughout the *SCO v. Novell* litigation and during the jury trial - the amended APA clearly transferred Novell's UNIX trademarks and UnixWare trademarks to SCO. Where they disagree is as to what other UNIX Intellectual Property did or did not transfer. For example, Novell corroborates the trial testimony that it transferred to SCO in 1995, pursuant to the APA, all rights to the UNIX trademarks by its identification of, among others, the two UNIX trademarks at issue here in Novell's APA Seller Disclosure Schedule in Attachment "C".[6]

[6] Novell identified the UNIX trademarks it owned in its APA Seller Disclosure Schedule in "Attachment C" titled

As Mr. Gray pointed out in his motion to resume (Doc. 87 herein at 9-10), there is nothing out-of-context or ambiguous about Novell's counsel Mr. Sterling Brennan's opening statement that Schedule 1.1(a) and Schedule 1.1(b) of the amended APA are consistent in transferring Novell's UNIX trademarks to SCO, presenting the following:

> So the complete description of the intellectual property, whether copyrights, patents or trademarks, were just two things, the UNIX trademark and the UnixWare trademark. That is the entire description of the intellectual property.
> ***
> There is a perfect symmetry. The [APA] agreement says [in Schedule 1.1(a)] here's what is being sold, the intellectual property, only two things, trademarks for UNIX and UnixWare. We've looked at the next schedule [1.1(b)], what is excluded, everything, all copyrights are excluded, and all trademarks are excluded except for two, UNIX and UnixWare. It lines up perfectly.

As Mr. Gray pointed out in his pending motion to resume (Doc. 87 herein at 15-16), there is nothing out-of-context or ambiguous for, among others, former Novell house counsel Ms. Allison Amadia, author and lead negotiator of APA Amendment No. 2, to testify under oath that the APA transferred Novell's UNIX trademarks to SCO, and that Novell never intended to own the trademarks thereafter, testifying as follows:

> Q. Let me ask you a different question in that vein. ...
> So you agree, Ms. Amadia, that under the APA Santa Cruz did acquire trademarks of UNIX and UnixWare; correct?
> A. Yes.
> ***
> Q. So Amendment Number 2 was not designed to say that Santa Cruz had not acquired the UNIX and UnixWare trademarks; correct?
> A. Yes. …. it [Novell] certainly didn't intend to take them away.
> ***
> Q. And you agree with me that that [Amendment No.2] language identifies the UNIX and UnixWare trademarks as having been transferred; correct?
> A. It doesn't expressly identify them. But…. their transfer was clarified in Amendment 2. They actually were transferred in the APA.
> ***
> Q. So Santa Cruz got the UNIX and UnixWare trademarks because they were acquired for its business; correct?
> A. If they were acquired for its business, then they got them.
> Q. Well, that's not what I heard you say. I want to make sure we're being clear. You said

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"Trademark Status Report", and included, among others, at page 9 are the two UNIX trademarks at issue here. See Exhibit No. 3 to "Applicant's Brief in Support of Motion to Test Sufficiency of Opposer's Response to Admission Requests," herein as Doc. No. 59; and See Exhibit No. 6 to "Applicant's Combined Motion and Brief to Resume the Opposition Proceeding and Reset and Extend the Schedule," herein as Doc. No. 87.

that they did get them under the original APA; correct?
A. Yes. (emphasis added)

As Mr. Gray pointed out in his pending motion to resume (Doc. 87 herein at 17), there is nothing out-of-context or ambiguous for SCO to argue the APA transferred Novell's UNIX trademarks to SCO when it stated:

> 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." …, 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. (emphasis added)

It is this March, 2010 *SCO v. Novell* jury trial testimony that specifically reinforces and confirms the UNIX trademarks and associated goodwill did in fact transfer to SCO pursuant to the APA; the transfer was never modified by the Confirmation Agreement or any other document; and because (under trademark law, as opposed to contract law) Novell never owned the UNIX trademarks or goodwill after 1995.

E. X/Open argues the jury trial evidence is identical in substance (in declaration form as opposed to trial testimony) as to was already before the district court on summary judgment.

X/Open's representation that the jury trial evidence is identical in substance (in declaration form as opposed to trial testimony) as to was already before the Florida Court on summary judgment, is patently false. Fatal to that false argument is that X/Open neither identifies any declarations nor provides any documentary evidence to support its claims that any Novell or SCO pre-trial declarations were before the Florida Court, or part of the record, prior to its February, 2009 Order in *Gray v. Novell et al*. In fact, as Mr. Gray points out in his motion to resume, although he repeatedly requested the pre-trial declarations in discovery, none were produced by Novell or SCO.

The Florida Court, in its February, 2009 Order, did reject repeated citations from *SCO v. Novell* that the UNIX and UnixWare trademark transferred from Novell to SCO in 1995 pursuant to the APA. However, the court was referring to Mr. Gray's citations of the Utah Court's statements in its August,

2007 Order that the amended APA did transfer Novell's UNIX trademarks to SCO, characterizing to those statements as mere dicta, and stating the following:[7]

> Although the [Utah] court discussed the APA at length and at one point noted that "it is undisputed that trademarks did transfer" under the APA, that statement was not necessary to the decision in that case and therefore is non-binding dicta.

The Florida Court at least did recognize that the Utah Court's position in the *SCO v. Novell* litigation after it reviewed the APA and related documents was that the UNIX trademarks did transfer to SCO. Counsel for Novell also put the APA transaction into clear context in *SCO v. Novell*, stating:[8]

> The APA did transfer UNIX and UnixWare trademarks to Santa Cruz (**to the extent owned by Novell**), but explicitly excluded "all patents" and "all copyrights."" (emphasis added)

The Eleventh Circuit only considered the evidence before the Florida Court prior to its February, 2009, and thus could not consider the March, 2010 *SCO v. Novell* jury trial testimony.[9]

F. X/Open quotes the Florida Court as stating that the *SCO v. Novell* litigation is not relevant to *Gray v. Novell et al,* because it concerned only UNIX copyrights.

X/Open quotes the Eleventh Circuit (Doc. 94 at 5) as stating the following:

> Gray repeatedly insists that this Court must consider the Utah District Court's decision in SCO Group v. Novell, Inc.…… the District Court in this case recognized, the issue before the Utah court was the ownership of the UNIX and UNIXWARE copyrights—not the trademarks. (emphasis added)

There, the Eleventh Circuit reference to the "Utah District Court's decision in SCO Group v. Novell, Inc…." is clearly to the August, 2007 decision (Doc. 377 therein) Mr. Gray filed before the Florida Court and Eleventh Circuit that was referred to as dicta, and not to any Novell or SCO executive's or counsel's declarations, and certainly not to the March, 2010 jury trial testimony.

The Tenth Circuit clearly disagrees with the Florida Court's and Eleventh Circuit's view that the

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[7] Florida Court February, 2009 Order at pages 29-30, Exhibit No. 1 to Doc. 94 herein. The August, 2007 Order (Doc. 377) in *SCO v. Novell* , states that the amended APA transferred Novell's UNIX trademarks to SCO at least seven (7) times, at pages 3-4, 13, 44, 47-48, 50, 51-52, and 53, hereto in relevant part as Exhibit No. 31.

[8] Novell's motion dated May 14, 2007 at 56, Dkt. No. 292 in *SCO v. Novell*, Utah Court. See Exhibit No. 15 (herein as Doc. No. 90) to "Applicant's Combined Motion and Brief to Resume the Opposition Proceeding and Reset and Extend the Schedule," herein as Doc. No. 87.

[9] The Eleventh Circuit's January, 2011 ruling does not discuss or consider the March, 2010 *SCO v. Novell* trial testimony; nor did it rule on Mr. Gray's motion to take judicial notice of that and other new evidence.

issue in *SCO v. Novell* is limited to copyright ownership. The Tenth Circuit specifically identifies the core issue in *SCO v. Novell* as the larger issue of what intellectual property passed from Novell to SCO pursuant to the APA, in a 2009 Order and also a very recent 2011 Order, stating the following:

> This [*SCO v. Novell*] case primarily involves a dispute between SCO and Novell regarding the scope of intellectual property in certain UNIX and UnixWare technology and other rights retained by Novell following the sale of part of its UNIX business to Santa Cruz, a predecessor corporate entity to SCO, in the mid-1990s.[10]

and

> In its [*SCO v. Novell*] complaints, SCO alleged that it had acquired from Novell all right, title, and interest in and to the UNIX and UnixWare (collectively, "Unix") business, operating system, source code, and all copyrights on September 19, 1995, pursuant to an Asset Purchase Agreement ("Agreement"),[11]

And as clearly identified herein, the parties' arguments concerning the APA in *SCO v. Novell* included, among others, UNIX trademarks, UNIX copyrights and UNIX patents.

G. X/Open argues that the unredacted copies of the May 10, 1994 license agreement and/or May 14, 1994 Agreement was a part of the Florida Court record.[12]

The record in *Gray v. Novell, et al* is clear--only the heavily redacted versions of the May 10, 1994 Novell-X/Open UNIX trademark license agreement and 1996 Confirmation Agreement were before the Florida Court, and thus the Eleventh Circuit. It is unfortunate that these Courts did not examine all relevant documents.[13] Even now, Mr. Gray is still seeking in discovery in this opposition a copy of the mysterious May 14, 1994 agreement, which has never been produced in any proceeding.

H. X/Open argues that the issue of Attorneys' Fees before the Florida Court and Eleventh Circuit may have an impact on how X/Open litigates the remainder of this proceeding.

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[10] Tenth Circuit Order dated August, 24, 2009, at page 2 in *SCO v. Novell*, No. 08-4217. See Exhibit No. 1 to "Applicant's Combined Motion and Brief to Resume the Opposition Proceeding and Reset and Extend the Schedule," herein as Doc. No. 87.

[11] Tenth Circuit Order dated April 29, 2011, at page 2 in *Novell, Inc. v. Vigilant Insurance Company*, No. 10-4102, Tenth Circuit, hereto in relevant part as Exhibit No. 32.

[12] X/Open conveniently relies on the Florida Court's February, 2009 Order wherein it characterizes the existence of the May, 14, 1994 Agreement as "merely speculative." But that characterization is now known to be incorrect, as SCO's former CEO represented to Mr. Gray in September, 2009 that the May, 14, 1994 Agreement does in fact exist (Mr. Gray's motion, herein as Doc. 87 at pages 6-7 and 17-18). Neither X/Open nor Novell have ever represented to any court that the May 14, 1994 agreement does not exist.

[13] ....in determining whether the licensee received "all substantial rights" under a licensing agreement, the district court must ascertain the intent of the parties and examine the substance of what was granted by the entire agreement. *Mentor H/S, Inc. v. Medical Device Alliance, Inc.*, 240 F.3d 1016, 1017 (Fed. Cir. 2001). *Vaupel Textilmaschiner KG v. Meccanica Euro Italia S.P.A.*, 944 F.2d 870, 874 (Fed. Cir. 1991). (emphasis added)

While the pending issue of attorney's fees may relate to how X/Open proceeds in this opposition, the fact remains that neither federal court ruled on Mr. Gray's trademark law related counterclaims involving goodwill, ownership, trademark use, abandonment, and naked licensing.

I. X/Open argues the evidence Gray seeks to introduce has already been considered by the Florida Court and the Eleventh Circuit, and was determined to be irrelevant.

This cannot be true. As is clearly demonstrated in the pending motion, the dispositive March, 2010 jury trial testimony and other documents Mr. Gray discovered after the Florida Court's February, 2009 Order were never considered by the Florida Court or the Eleventh Circuit, and must be considered by the Board because, among others, this material evidence directly bears upon the UNIX trademark registrations, and X/Open's UnixWare trademarks application and (canceled) registrations.

Fatal to X/Open's argument is that it does not identify any Novell or SCO document, declaration or trial testimony evidence that was considered and rejected by the Florida Court or the Eleventh Circuit as irrelevant. Only the Utah Court's earlier August, 2007 Order was rejected.

J. *Res judicta* in this Opposition.

X/Open confuses issue preclusion with claim preclusion, either of which may be meant by the term "*res judicata.*"[14]

Mr. Gray's counterclaims before the Board involve, *inter alia*, UNIX trademark use, associated goodwill, and naked licensing, and were never considered or ruled upon by the Florida Court or Eleventh Circuit in *Gray v. Novell, et al*. These courts' rulings only considered contract law. Mr. Gray's counterclaims here are mostly based on trademark law, and include the following:[15]

> 10. Novell completely exited the UNIX business in 1995, and was prohibited from re-entering that business, and thus it could not have owned the UNIX trademarks or the associated goodwill after 1995.
>
> 11. SCO owned the entire UNIX business after 1995, and thus the UNIX trademarks and associated goodwill pursuant to the automatic transfer doctrine.

[14] *Bernice Brown et al. v. R.J. Reynolds et al.*, 611 F.3d 1324 (11th Cir. 2010).
[15] Applicant's Second Amended Answer, Affirmative Defense and Counterclaim, in No. 10 - No. 14 at pages 7-11, herein as Doc. 32. Mr. Gray's counterclaims are based on, among others, questions of who lawfully owned the goodwill associated UNIX trademarks after 1995, UNIX trademark use abandonment and naked licensing.

12. X/Open took a bare assignment of the UNIX trademarks in November, 1998 because its use of the trademarks was in a new and different business unrelated to the business for which registration had been originally been granted.

13. The purported November, 1998 Novell-X/Open UNIX Trademark Assignment Agreement is a false agreement because Novell did not own any UNIX business, the UNIX trademarks or associated goodwill, and thus could not have assigned said property to X/Open as represented therein.

14. Because SCO never exercised any UNIX trademark licensor supervision over X/Open's UNIX trademark license after 1995, that naked licensing resulted in abandonment of the UNIX trademarks.

CONCLUSION

Because the *Gray v. Novell, et al.* litigation is complete and final, because discovery never closed in this proceeding, and because Mr. Gray's counterclaims before the Board (based upon trademark law) have not been litigated to conclusion, the Board must resume this opposition and permit discovery to continue, permitting Mr. Gray to enter, among other things, the new evidence.

For the foregoing reasons, Mr. Gray respectfully requests that the Board grant his motion in its entirety, resume this opposition at discovery, and reset and extend the schedule.

Dated: May 16, 2011.

Respectfully submitted,

/David L. Partlow/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by regular U. S. mail to Mark Sommers, Esquire, at Finnegan, Henderson, Farabow, Garrett, & Dunner, L.L.P., 901 New York Ave., N.W., Washington, D.C. 20001-4413, this 16th day of May, 2011.

/David L. Partlow/