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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,

Opposition Nos.: 91122524 and 91176820

vs.

WAYNE R. GRAY,

Marks: INUX, UNIX, and UNIXWARE

Applicant.

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**MOTION TO CONSOLIDATE OPPOSITION PROCEEDINGS**

Pursuant to Fed. R. Civ. P. 42(a) and T.B.M.P. Section 511, Applicant, Wayne R. Gray ("Mr. Gray"), through counsel, hereby moves to consolidate Opposition Number 91122524 and Number 91176820 presently before the Board. The current opposition proceedings before the Board involve common questions of law and fact, the same or similar marks and the same parties.

Applicant's application to register his "iNUX" mark serial No. 75680034 is opposed in Opposition No. 91122524 (the "parent" opposition) by Opposer, X/Open Company, Limited ("X/Open"), based upon its claim of ownership of "UNIX" trademark registrations No. 1390593 and No. 1392203. Applicant has counterclaimed therein that X/Open obtained the UNIX trademark registrations from Novell, Inc. ("Novell") through a knowingly false November, 1998 assignment agreement, although X/Open knows or should have known since prior to 1998 that the UNIX trademarks' lawful ownership chain of title is as follows: Novell-Santa Cruz Operation, Inc. ("Santa Cruz" and lawful successor to Novell) to The SCO Group, Inc. ("SCO") to UnXis, Inc.

Novell's and SCO's sworn positions are that they have known since 1996 that SCO (not Novell or X/Open) lawfully owned the UNIX trademarks in and after 1996, and it is thus now undisputable that X/Open, in June, 1999, willfully and fraudulently recorded the false November, 1998 Novell-X/Open

UNIX trademark assignment at the USPTO.<sup>1</sup>

Applicant X/Open's application to register the "UNIXWARE" mark serial No. 78833448 is being opposed in Opposition No. 91176820 by Opposer, Mr. Gray, because of, among others, the following:<sup>2</sup>

1. X/Open is therein basing its registration standing on its purported lawful ownership of the same UNIX trademark registrations set forth above pursuant to the June, 1999 fraudulent assignment recordation; and
2. X/Open, in June, 2006, fraudulently recorded an undated assignment agreement for UNIXWARE trademark registrations No. 1845474 and No. 2241666 that it knows or should have known was never finalized by the trademarks lawful owner SCO at least prior to 2009. SCO is successor in interest to Santa Cruz-Novell, and SCO's successor in interest is UnXis, Inc. ("UnXis").<sup>3</sup>

UnXis, as recently as April 11, 2011, represented that it, not X/Open, lawfully owns the UNIX trademarks and UnixWare trademarks at issue in these two Oppositions, stating the following:<sup>4</sup>

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<sup>1</sup> Novell and SCO executives, and in-house and outside counsel, testified under oath in the March, 2010 jury trial, in the case styled *SCO v. Novell*, Case No. 2:04cv00139, Utah Dist., that Novell transferred its entire UNIX business and UNIX trademarks to SCO in a September 19, 1995 UNIX Asset Purchase Agreement as amended ("APA"); and that it (Novell) never owned the UNIX trademarks, associated goodwill or UNIX business after 1995, and was prohibited from remaining in or re-entering the UNIX business. See Defendant, Mr. Gray's Motion to resume Opposition No. 91122524 and reset the schedule, as Doc. 87 in that opposition, at pages 7-17.

<sup>2</sup> Mr. Gray's claims before the Board in Opposition No. 91176820 and counterclaims before the Board in Opposition No. 91122524 are substantially the same and involve, *inter alia*, X/Open's UNIX trademark non-use as registered, lawful UNIX trademark associated goodwill chain-of-title ownership by Novell to SCO to UnXis (not X/Open), and UNIX trademark naked licensing to X/Open; and these 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 claims and counterclaims here are mostly based on trademark law.

See Mr. Gray's Second Amended Answer, Affirmative Defense and Counterclaim Board in Opposition No. 91122524, in No. 10 - No. 14 at pages 7-11, therein 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.

<sup>3</sup> SCO represented to the Delaware Bankruptcy Court in June, 2009 that it (not X/Open) lawfully owned UNIXWARE trademark registrations No. 1845474 and No. 2241666, and its other UNIXWARE trademarks as Debtor assets. SCO document titled "Exhibits to Purchase and Sale Agreement Regarding Debtors' Motion for Authority to Sell Property Outside the Ordinary Course of Business Free and Clear of Interests and ..." at Exhibit H in Schedule 5.9(a) titled "Registered Intellectual Property" at pages 2 and 3, as Dkt. No. 819 in *The SCO GROUP, INC., et al.*, at The United States Bankruptcy Court For The District Of Delaware, Case No. 07-11337 (KG). Also see Schedule 5.9(a) as Exhibit No. 29 (Doc. No. 96 in Opposition No. 91122524) to Mr. Gray's Reply brief (Doc. No. 95 in Opposition No. 91122524).

<sup>4</sup> UnXis press release titled "UnXis Completes Purchase of SCO UNIX Assets" dated April 11, 2011, at page 2 in ¶2, posted and available on its official website (last viewed July 7, 2011) at URL - <http://www.unxisco.com/2011/04/11/unxis-completes-purchase-of-sco-unix-assets/>; and as Exhibit No. 28 (Doc. No. 96 in Opposition No. 91122524) to Mr. Gray's Reply brief (Doc. No. 95 in Opposition No. 91122524).

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 goods and services offered by the parties are at least somewhat related in both oppositions, and X/Open has asserted that the businesses of the parties are related.

The claims and Mr. Gray's Answers and counterclaims in the parent Opposition Number 91122524 and the claims and X/Open's Answers in Opposition Number 91176820 raise similar issues and defenses. There are no other parties involved besides Mr. Gray and X/Open.

Consolidation will save the Board and the parties time, effort and expense that would be required in two separate opposition proceedings. This motion is sought for purposes of judicial economy and not for reasons of delay.

Answers have been filed in each opposition, and discovery has not yet commenced in Opposition Number 91176820. Applicant Mr. Gray respectfully requests the Board grant this motion and consolidate Oppositions Number 91122524 and Number 91176820.

Dated: July 8, 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 8th day of July, 2011.

/David L. Partlow/